

*Legal
Counsel*

SPECIAL PAMPHLET

Retain with your Iowa Code Annotated

1963 IOWA PROBATE CODE

Acts 1963 (60 G.A.) S.F. No. 165

Effective January 1, 1964

***Including*
Comments of Special Committee
on Probate Law
of the
Iowa State Bar Association**

**ST. PAUL, MINN.
WEST PUBLISHING CO.**

1963
IOWA PROBATE CODE

Acts 1963 (60 G. A.) S.F. No. 165

Effective January 1, 1964

ST. PAUL, MINN.
WEST PUBLISHING CO.

1963

Copyright © 1963
by
WEST PUBLISHING CO.

PREFACE

The Iowa Probate Code as enacted in 1963 revises and rearranges the statutory probate law of Iowa.

The text of the Code is set out in this Pamphlet according to the system of section numbering and with the section headings appearing in the Code as enacted by the General Assembly.

A number of supplementary features are provided to facilitate the study and use of the Code. Of particular interest are the Comments prepared by the Special Committee on Probate Law of the Iowa State Bar Association. These Comments cover the source, history, and purpose of the new probate provisions.

A Table of Corresponding Sections, also prepared initially by the Committee, enables the user to trace the specific subject matter of pertinent sections from the Iowa Code of 1962 and Iowa Code Annotated into the new Probate Code of 1963.

A detailed Index, editorially supplied, gives ready access to the text of the law.

The text of the Code, with indispensable ancillary aids, is thus provided in compact and convenient form for ready reference.

The Code, fully annotated, will be published later as a unit of Iowa Code Annotated, under the official section numbering assigned thereto by the Code Editor.

THE PUBLISHER

TABLE OF CONTENTS

	Page
Preface	III
Comments of Special Committee on Probate Law of the Iowa State Bar Association	IX
Disposition Table—Corresponding Sections	XV

IOWA PROBATE CODE

	Page
Division	
I. Introduction and Definitions	17
Part	
1. Introduction	17
2. Definitions and Use of Terms	18
II. Probate Court, Clerk of Probate Court and Procedure in Probate	21
Part	
1. Probate Court	21
2. Clerk of Probate Court	25
3. Procedure in Probate	28
III. General Provisions Relating to Fiduciaries	35
Part	
1. Qualification, Appointment, Substitution and Removal of Fiduciaries	35
2. Powers Applicable to All Fiduciaries	37
3. Special Provisions Relating to Property	42
4. Provisions Relating to Administration by all Fiduciaries	44
5. Powers of Foreign Fiduciaries	55
6. Liability of Fiduciaries	57
7. Oath and Bond of Fiduciaries	59
8. Compensation of Fiduciaries and Attorneys	65
IV. Intestate Succession	67
Part	
1. Rules of Inheritance	67
2. Procedure for Opening Administration of Intestate Estates	74

TABLE OF CONTENTS

Division	Page
V. Rights of Surviving Spouse -----	76
Part	
1. Right to Take Against the Will -----	76
2. Procedure for Setting off Share -----	80
VI. Wills -----	83
Part	
1. General Provisions Relating to Wills -----	83
2. Execution and Revocation -----	88
3. Custody -----	90
4. Procedure for Probate of Wills -----	92
5. Actions to Set Aside or Contest of Wills -----	99
VII. Administration of Estates of Decedents -----	103
Part	
1. General Provisions -----	103
2. Temporary Administration -----	105
3. Title and Possession of Decedent's Property -----	106
4. Inventory -----	109
5. Allowance for Surviving Spouse and Minor Children -----	112
6. Sale of Property -----	113
7. Claims Against Decedent's Estate -----	121
8. Accounting, Distribution, Final Report and Discharge -----	135
9. Reopening -----	140
VIII. Foreign Wills and Ancillary Administration -----	141
Part	
1. Foreign Wills -----	141
2. Ancillary Administration -----	143
IX. Estates of Absentees -----	145
X. Uniform Simultaneous Death Act -----	148
XI. Felonious Death -----	149
XII. Proceedings for Escheat -----	150
XIII. Opening Guardianships and Conservatorships -----	151
Part	
1. Opening Guardianships -----	151
2. Opening Conservatorships -----	155
3. Conservatorships for Absentees -----	158
4. Standby Conservatorships -----	160
5. Foreign Conservators -----	161
6. Conservatorships Involving Veterans Administration -----	163
7. Combining Petition for Guardian and Conservator ..	166

TABLE OF CONTENTS

Division	Page
XIV. Administration of Guardianships and Conservators	166
Part	
1. Appointment and Qualification of Guardians and Conservators	166
2. Rights and Title of Ward	167
3. Duties and Powers of Conservator	168
4. Transferring, Encumbering and Leasing Property by Conservator	172
5. Claims	172
6. Gifts	175
7. Guardian's Report	176
8. Conservator's Report	176
9. Costs and Accounts	177
10. Termination of Guardianships and Conservatorships	178
XV. Trusts	180

INDEX

Page 187

*

COMMENTS OF SPECIAL COMMITTEE ON PROBATE LAW

of the IOWA STATE BAR ASSOCIATION

INTRODUCTION

Iowa's present statutory probate law has been enacted piecemeal in the course of the one and a quarter centuries since she became an organized territory of the United States. Although it constitutes a basically good probate system, it is poorly arranged, has many gaps in its coverage, and in several areas it provides for procedure that is unnecessarily cumbersome, expensive, and time-consuming. Developments in the economic and social conditions of Iowa indicate the need for certain substantive changes.

During its period of existence, Iowa has emerged from a thinly populated, frontier, agricultural region where oxen supplied a substantial part of the motive power, where many of its people lived in log cabins and sod houses, and the telephone, electric light, radio and television had not been invented, into a highly industrialized commonwealth in which manufacturing and commercial trade vie in importance with a totally mechanized agriculture that employs, in part, self-propelled, four-row corn harvesting machines that, all in one operation, pick and husk the corn, shell it, load it into wagons, and grind up the cobs.

While this change has been going on, the people of Iowa and of the other states in the Union have changed a number of their social concepts relating to the probating of wills, certain details relating to what is necessary, desirable, or prudent in the administration of the estates of persons deceased or under guardianship, the taxation of the right to inherit property, the taxation of income and of sales of property, and as to the proper share of a widow in the estate of her husband.

BAR COMMITTEE

Prior to the appointment of the Special Probate Committee of Iowa State Bar Association in June, 1958, with instructions to review the entire body of Iowa Probate Law and make recommendations for its improvement, none of the twenty-two members of the Committee had had occasion to study that law from just that point of view,—although all of them were experienced students, users, and in some instances, teachers of it. At the first meeting of the Committee, held on September 5, 1958, no one thought that we should enter upon so extensive a revision of the Probate Law as is embodied in the bill containing the PROPOSED IOWA PROBATE CODE that Iowa State Bar Association is now recommending for adoption.

Divided into five subcommittees, the Committee worked for two and one-half years only on the improvement of the law relating to the estates of deceased persons. Then, regrouping into three subcommittees,—one for drafting, and one each for the law of guardianship and of testamentary trusts,—the final hammering out of the finished product has continued another two years. Throughout these years, the whole Committee met many times each year to consider the numerous successive written reports of the subcommittees and to make all decisions as to changes, what was to be left unchanged, matters of policy, and so forth.

Entering first upon an intensive study of details with respect to which the Iowa Probate Law ought to be improved, the Committee members necessarily extended their study and research into what has been done in other states to improve their probate laws. This led soon to a concentrated study of a monumental Model Probate Code that was completed in 1945 by the University of Michigan Law School in cooperation with a group of practicing lawyers, specialists in Probate Law, for the Probate Division of the Section of Real Property, Probate and Trust Law of the American Bar Association.

Very gradually the entire Committee became persuaded that, whereas the basic plan and scheme of our Probate Law and Probate Court (as a division of the District Court) should remain unchanged, there is a great need for so many important changes that a complete overhauling and revision is needed. Therefore, it was decided to prepare a complete revision in the hope that the people of the state, acting through their General Assembly, will adopt it.

Early in 1962, the Committee submitted the third "Tentative Final Draft" of its revision to a Committee of the Iowa District Judges Association. The Judges studied it, corresponded with each other about it, and then spent a day with our Drafting Subcommittee discussing, debating and approving it after agreement upon certain very valuable suggestions made by the Judges.

INTRODUCTORY COMMENTS

Then West Publishing Company of St. Paul, Minnesota, printed the Fourth Tentative Final Draft in a 169 page 6 $\frac{1}{4}$ x 9 $\frac{1}{4}$ inch booklet for distribution to, and study by, all of the Judges and lawyers of Iowa, and for their criticisms. Gathering in Des Moines on the afternoon and evening of Sunday, April 23, 1962, the entire Committee devoted the week to a statewide bus tour in which all-day area meetings of Judges, lawyers and Clerks of Court were held, in succession, at Des Moines, Davenport, Waterloo, Cherokee and Atlantic. In each such meeting all members of the Committee participated in presenting the entire Proposed Iowa Probate Code to those present, and a wealth of good criticism and constructive suggestions as well as of commendation, were received. Those were very fruitful meetings. They resulted in securing for this Proposed Iowa Probate Code the thoughtful study and endorsement of more than one thousand of those citizens of Iowa who are best qualified to understand and evaluate the work and the need for it.

Interestingly enough, in spite of the statewide distribution of the members of the Committee that has prepared the Proposed Iowa Probate Code, we have not heard of a single lawyer or Judge who says no revision of our Probate Law is needed. We have submitted the completed work to two of the leading American students, teachers and writers on Probate Law, Professors Lewis M. Simes and Paul E. Basye, for their study and criticism. Each of those distinguished scholars made some valuable suggestions and praised the work as a whole. Acting through its Board of Governors, The Iowa State Bar Association has approved the Proposed Iowa Probate Code in its entirety and recommended it to the Sixtieth Iowa General Assembly for adoption.

ARRANGEMENT OF CODE

In preparing the Probate Code, the committee was conscious of the fact that the present statutory law governing probate matters was not arranged in a logical manner. In arranging the proposed Code, we included the Definitions and Use of Terms immediately following the short introduction.

The next Division of the Code contains the provisions relating to the Probate Court, the Clerk of Probate Court and followed by the part on Procedure in Probate. This entire Division is general in nature and defines the jurisdiction and general powers of the probate court, the general duties of the clerk of the probate court, and the general powers and duties applicable to all fiduciaries as set out in the part on Procedure in Probate.

There are a great number of matters which are common to all representatives of decedents estate, guardians, conservators, and trus-

BAR COMMITTEE

tees. Among these matters are qualification, bonds, substitution and removal, releases of liens, settlement and compromise of claims, security transfers, and liability. For the purpose of clarity and to avoid repetitious Code sections under the title of the various fiduciaries, the committee attempted to collect these general powers relating to all fiduciaries in one division of the Probate Code. These provisions appear in sections 64 through 205 under Division III of the Code.

Division IV consists of two parts; the first setting forth the rules of inheritance in intestate estates, and the second part defining the procedure for opening administration of intestate estates.

The rights of the surviving spouse are dealt with in Division V. In the first part, the rights of the spouse to take against the will are set forth, and the second part contains the procedure for setting off the share of the surviving spouse.

All the provisions of the Code relating to wills are included under Division VI; the general provisions relating to wills being contained in the first part; the second part dealing with execution and revocation; and the first part, custody. The entire procedure for probating wills is codified in Part 4 under this heading and the sections relating to contest or setting aside wills is contained in the last part (Part 5).

In Division VII, we have attempted to collect all the Code provisions dealing with administration of decedents' estates. In this Division, we have not included the general matters which would relate to all fiduciaries.

Division VIII contains all the provisions relating to foreign wills and ancillary administration. The sections which are not so frequently used, such as Estates of Absentees, Uniform Simultaneous Death Act, Felonious Death, and Escheat, are dealt with in Divisions IX, X, XI and XII respectively.

The arrangement of the provisions relating to guardianships and conservatorships follow the same pattern as those relating to estates of decedents. The provisions covering the matter of opening of guardianships and conservatorships are contained in Division XIII. Division XIV sets forth the provisions relating to the administration of guardianships and conservatorships, including the rights and title of the ward and the powers and duties of the guardian or conservator.

Division XV covers reports and accounting, and Division XVI contains the provisions for termination of the guardianship or conservatorship.

INTRODUCTORY COMMENTS

The provisions relating especially to trusts are contained in Division XVII.

EXPLANATION OF REFERENCES

References to the 1962 Code of Iowa are so indicated, e. g., 633.32 (1962 Code). The Code sections not otherwise indicated refer to sections of the Iowa Probate Code.

References to Model Probate Code are to a MODEL PROBATE CODE prepared for the Probate Law Division of the Section of Real Property Probate and Trust Law of the American Bar Association by its Model Probate Code Committee in cooperation with the Research Staff of the University of Michigan Law School and Monographs by Lewis M. Simes, Professor of Law, The University of Michigan, and Paul E. Basye of the San Francisco Bar, formerly Research Associate, The University of Michigan, and published by Callaghan & Company, 1946.

References to Codes of other states are so stated.

COMMITTEE MEMBERS

SHIRLEY A. WEBSTER, Winterset, *Chairman*
O. E. ANDERSON, Creston
WILLARD L. BOYD, Iowa City
WILLIAM CARR, Charles City
GERALD CHINN, Des Moines
CARLTON M. CORBETT, Sioux City
C. REAM DAUGHRITY, Des Moines
EARL FISHER, Rock Rapids
D. J. GOODE, Des Moines
E. C. HALBACH, Clinton
DONALD HARRIS, Bloomfield
MATTHEW J. HEARTNEY, JR., Des Moines
ROY HENDERSON, Belmond
RUSSELL HESS, Cedar Rapids
DWIGHT McCARTY, Emmetsburg
JACK W. PETERS, Council Bluffs
ROBERT C. REIMER, Denison
ALBERT C. ROBERTS, Des Moines
H. COSGROVE WALSH, Burlington
ARLEY J. WILSON, Marshalltown
EUGENE D. WRIGHT, Dubuque
ARTHUR A. ZIMMERMAN, Waterloo

*

DISPOSITION TABLE

Corresponding Sections

Showing where and how the sections of the Iowa Code of 1962, constituting the statutory probate law of Iowa, have been incorporated in the Probate Code of 1963.

Code 1962	Changes	1963 Probate Code Section	Code 1962	Changes	1963 Probate Code Section
532.21	Adapted	127, 128	633.1	Revised	264
533A.1-533A.5	Same	126-129	633.2	Adapted	268
604.3	Reenacted	12	633.3	Adapted	266
604.4	Adapted	12	633.4	Substituted	269
614.1(3)	Revised	308	633.5	Repealed	—
614.2	Replaced	412	633.6	Omitted	—
631.1	Same	15	633.7	Revised	279
631.2	Similar	38	633.8	Reworded	282
631.3	Same	39	633.9	Reworded	281
631.4	Adapted	40	633.10	Added to	284
631.5	Adapted	17	633.11	Substituted	286
631.6	Same	14	633.12	Substituted	300
631.7	Adapted	13	633.13	Adapted	267, 436
631.8	Reworded	48	633.14	Adapted	436
631.9	Same	19	633.15	Adapted	3
631.10	Replaced	169-177	633.16	Adapted	273
631.11	Same	49	633.17	Substituted	285
631.12	Same	50	633.18	Substituted	297
631.13	Same	51	633.19	Rewritten	310
632.1	Adapted	22	633.20	Substituted	293
632.2	Changed	309	633.21	Similar	297
632.3	Adapted	23	633.22	Adapted	298
632.4	Same	24	633.23	Same	301
632.5	Same	25	633.24	Adapted	302
632.6	Adapted	26	633.25	Same	305
632.7	Replaced	169-177	633.26	Same	306
632.8	Omitted	—	633.27	Adapted	64
632.9	Omitted	—	633.28	Adapted	64
632.10	Adapted	27	633.29	Reworded	66
632.11	Adapted	29	633.30	Substituted	66
632.12	Substituted	30	633.31	Adapted	69
632.13	Substituted	31	633.32	Replaced	169-177
632.14	Substituted	32	633.33	Similar	496
632.15	Adapted	41	633.34	Same	498
			633.35	Omitted	see 383 et seq.
			633.36	Omitted	see 383 et seq.

DISPOSITION TABLE

		1963				1963	
Code 1962		Probate Code		Code 1962		Probate Code	
Section	Changes	Section		Section	Changes	Section	
633.37	Omitted	see 383		635.19	Adapted	349	
		et seq.		635.20	Omitted	---	
633.38	Omitted	see 383		635.21	Adapted	387	
		et seq.		635.22	Adapted	386	
633.39	Adapted	227		635.23	Adapted	386, 388, 389	
633.40	Rewritten	228		635.24	Adapted	389	
633.41	Reworded	342		635.25	Adapted	389	
633.42	Adapted	343		635.26	Replaced	396	
633.43	Replaced	168-177		635.27	Adapted and Replaced	392, 396, 397, 398	
633.44	Adapted	184		635.28	Replaced	396	
633.45	Rewritten	178		635.29	Replaced	396	
633.46	Substituted	303		635.30	Replaced	394	
633.47	Rewritten	331 and 413		635.31	Replaced	394	
633.48	Omitted	(See R.C.P. #270)		635.32	Replaced	394	
633.49	Adapted	283		635.33	Substituted	399	
633.50	Rewritten	500		635.34	Substituted	399	
633.51	Substituted	502		635.35	Adapted	401	
633.52	Reworded	504		635.36	Adapted	401	
633.53	Adapted	144		635.37	Adapted	402	
633.54	Adapted	98 and 145		635.38	Adapted	403	
633.55	Adapted	146		635.39	Adapted	404	
633.56	Adapted	147		635.40	Adapted	413	
				635.41	Simplified	99	
634.1	Revised	510		635.42	Included	386	
634.2	Adapted	511		635.43	Adapted	100	
634.3	Revised	512		635.44	Included	388	
634.4	Adapted	513		635.45	Included	389	
634.5	Adapted	514		635.46	Substituted	399	
634.6	Substituted	515		635.47	Substituted	399	
634.7	Substituted	515		635.48	Substituted	351	
634.8	Substituted	515		635.49	Substituted	351	
634.9	Substituted	515		635.50	Substituted	352	
634.10	Substituted	515		635.51	Adapted	265	
634.11	Adapted	516		635.52	Enlarged	351	
634.12	Same	517		635.53	Adapted	418, 419, 655	
				635.54	Adapted	418, 655	
635.1	Revised	361		635.55	Substituted	443	
635.2	Adapted	363		635.56	Adapted	420, 656	
635.3	In lieu of	364		635.57	Adapted	428, 438	
635.4	Adapted	362		635.58	Substituted	446	
635.5	Substituted	365		635.59	Substituted	447	
635.6	Substituted	365		635.60	Substituted	421-422	
635.7	Adapted	211, 238, 332		635.61	Substituted	424	
635.8	Adapted	333		635.62	Substituted	447	
635.9	Adapted	336		635.63	Replaced	430	
635.10	Same	334		635.64	Adapted	431, 661	
635.11	Same	335		635.65	Adapted	425, 433, 434	
635.12	Adapted	374		635.66	Adapted	425	
635.13	Revised	374		635.67	Adapted	425	
635.14	Adapted	112		635.68	Adapted	410, 412, 415	
635.15	Adapted	113		635.69	Adapted	425, 433, 434	
635.16	Similar	368		635.70	Substituted	421, 422	
635.17	Enlarged	114, 115					
635.18	Substituted	95					

DISPOSITION TABLE

		1963				1963	
Code 1962 Section	Changes	Probate Code Section		Code 1962 Section	Changes	Probate Code Section	
635.71	Adapted	425, 426, 433, 434		636.44	Replaced	224, 225, 226	
635.72	Adapted	117		636.45	Adapted	221	
635.73	Adapted	352, 355		636.46	Adapted	222	
635.74	Adapted	355		636.47	Same	535	
635.75	Adapted	471, 355		636.48	Same	536	
635.76	Adapted	471, 472		636.49	Adapted	537	
635.77	Adapted	471, 472		636.50	Included	219	
635.78	Adapted	471		636.51	Adapted	543	
635.79	Adapted	186		636.52	Adapted	544	
635.80	Adapted	186		636.53	Adapted	545	
				636.54	Same	546	
				636.55	Omitted	—	
636.1	Adapted	210, 211, 238		637.1	Same	523	
636.2	Omitted	—		637.2	Same	524	
636.3	Adapted	472		637.3	Same	525	
636.4	Adapted	473		637.4	Same	526	
636.5	Adapted	211, 238		637.5	Omitted	—	
636.6	Adapted	211, 238		637.6	Adapted	527	
636.7	Reworded	239		637.7	Adapted	528	
636.8	Omitted	—		637.8	Omitted	—	
636.9	Adapted	247					
636.10	Adapted	248		638.1	Revised	20	
636.11	Adapted	249		638.2	Restated	469	
636.12	Adapted	250		638.3	Restated	469	
636.13	Same	251		638.4	Adapted	473	
636.14	Adapted	252		638.5	Adapted	162	
636.15	Same	253		638.6	Omitted	—	
636.16	Reworded	254		638.7	Omitted	—	
636.17	Adapted	255		638.8	Adapted	155, 157	
636.18	Adapted	256		638.9	Substituted	52	
636.19	Same	257		638.10	Reworded	122	
636.20	Adapted	258		638.11	Revised	488	
636.21	Adapted	236, 264		638.12	Adapted	479	
636.22	Adapted	237		638.13	Adapted	159	
636.23	Adapted	245		638.14	Substituted	77	
636.24	Omitted	—		638.15	Adapted	45	
636.25	Rewritten	236, 237		638.16	Adapted	45	
636.26	Adapted	244		638.17	Adapted	160	
636.27	Adapted	240		638.18	Adapted	80	
636.28	Adapted	241		638.19	Adapted	112	
636.29	Similar	244		638.20	Adapted	476	
636.30	Similar	247		638.21	Adapted	96, 97	
636.31	Adapted	219		638.22	Reworded	79	
636.32	Adapted	212, 219		638.23	Reworded	197	
636.33	Adapted	213		638.24	Reworded	198	
636.34	Adapted	214		638.25	Addition	199	
636.35	Adapted	215		638.26	Reworded	200	
636.36	Adapted	216		638.27	Reworded	202	
636.37	Adapted	217		638.28	Adapted	203	
636.38	Adapted	218		638.29	Substituted	65	
636.39	Adapted	219		638.30	Substituted	65	
636.40	Adapted	219(3)		638.31	Substituted	65	
636.41	Adapted	219		638.32	Same	70	
636.42	Adapted	219		638.33	Substituted	469	
636.43	Repealed	219					

DISPOSITION TABLE

Code 1962		1963		Code 1962		1963	
Section	Changes	Probate Code	Section	Section	Changes	Probate Code	Section
638.34	Adapted		477	638.38	Same		119
638.35	Adapted		35	638.39	Same		120
638.36	Adapted	478, 487		638.40	Same		121
638.37	Adapted		118	638.41	Adapted		108

GUARDIANSHIPS AND CONSERVATORSHIPS

Code 1962		1963		Code 1962		1963	
Section	Changes	Probate Code	Section	Section	Changes	Probate Code	Section
668.1	Adapted		559	670.9	Adapted	555, 569	
668.2	Adapted		559	670.10	Adapted		638
668.3	Adapted		574	670.11	Replaced	615, 679	
668.4	Adapted		557, 559, 572	670.12	Omitted		
668.5	Replaced	168, 175, 634		670.13	Omitted		
668.6	Replaced	170, 634		670.14	Replaced		673
668.7	Replaced	168, 174, 634		670.15	Adapted		670
668.8	Replaced		642	670.16	Replaced		652
668.9	Replaced		641	670.17	Adapted		647
668.10	Adapted		81	670.18	Replaced		667
668.11	Adapted		640	670.19	Omitted		
668.12	Adapted		640	671.1	Replaced		580
668.13	Replaced		650	671.2	Replaced		581
668.14-668.23	Replaced		652	671.3	Replaced		582
668.24	Replaced	670, 671		671.4	Replaced		583
668.25	Replaced	670, 671		671.5	Adapted		584
668.26	Adapted		200	671.6	Adapted		584
668.27	Adapted		65	671.7	Omitted		
668.28	Adapted		70	671.8	Adapted		584
668.29	Replaced		70	671.9	Adapted	634, 641, 646, 647	
668.30	Replaced		186	671.10	Adapted		675
668.31	Replaced	65, 180		671.11	Adapted		673
668.32	Adapted		566	671.12	Replaced		65
668.33	Included		676, 678, 681	671.13	Adapted		682
669.1	Adapted		603	672.1	Omitted		
669.2	Adapted		604	672.2	Adapted		614
669.3	Adapted		606	672.3	Adapted		566
669.4	Adapted		605	672.4	Adapted	553, 567, 615	
669.5	Adapted		606	672.5	Adapted	558, 573	
669.6	Adapted		607	672.6	Adapted	555, 569	
669.7	Adapted		608	672.7	Adapted		616
670.1	Omitted			672.8	Adapted		570
670.2	Replaced		556, 570	672.9	Adapted	174, 180, 634	
670.3	Omitted			672.10	Adapted		617
670.4	Replaced		552	672.11	Adapted	670, 671	
670.5	Adapted	557, 572		672.12	Replaced		65
670.6	Included		572	672.13	Adapted		618
670.7	Adapted		566	672.14	Replaced		123
670.8	Adapted	558, 573		672.15	Adapted		619
				672.16	Adapted		621
				672.17-672.19	Omitted		
				672.20	Adapted		620
				672.21	Omitted		

DISPOSITION TABLE

		1963				1963	
Code 1962 Section	Changes	Probate Code Section	Section	Code 1962 Section	Changes	Probate Code Section	Section
673.1-673.5	Replaced	100, 652		682.24	Supplemented	123, 127	
682.1	Replaced	169-177		682.25	Supplemented	123, 127	
682.2	Replaced	181		682.26	Replaced	95	
682.3	No change			682.27	No change		
682.4	Reenacted	182		682.28	Adapted	469, 670, 671, 700	
682.5	Replaced	182		682.29	No change		
682.6	Replaced	180		682.30	No change		
682.7	No change			682.31	Amended		
682.8	No change			682.32	Amended		
682.9	No change			682.33	Amended		
682.10	No change			682.34	Amended		
682.11	No change			682.35	Adapted	474, 475	
682.12	No change			682.36	Adapted	475	
682.13	No change			682.37	No change		
682.14	No change			682.38	No change		
682.15	No change			682.39	No change		
682.16	No change			682.40	No change		
682.17	No change			682.41	No change		
682.18	No change			682.42	No change		
682.19	No change			682.43	No change		
682.20	Replaced	186		682.44	No change		
682.21	Replaced	186		682.45	No change		
682.22	No change			682.46	No change		
682.23	Supplemented	123, 127		682.47	No change		

IOWA PROBATE CODE

Acts 1963 (60 G.A.) S.F.No.165

†

IOWA PROBATE CODE

TITLE OF ACT

AN ACT to amend, revise and codify the law relating to probate, including descent and distribution, wills, administration and distribution of estates of decedents, trusts, administration of estates of persons under conservatorship, custody of persons under guardianship and to establish a probate code.

SENATE FILE 165

1963 GENERAL ASSEMBLY, REGULAR SESSION

Analysis.

DIVISION I. INTRODUCTION AND DEFINITIONS

PART 1. INTRODUCTION

Section

1. Short title.
2. How code to take effect.
 1. Effective date.
 2. Rights not affected.
 3. Severability.

PART 2. DEFINITIONS AND USE OF TERMS

3. Definitions and use of terms.
 1. Administrator.
 2. Bequeath.
 3. Bequest.
 4. Charges.
 5. Child.
 6. Clerk.
 7. Conservator.
 8. Costs of administration.
 9. Court.
 10. Debts.
 11. Devise (when used as a noun).
 12. Devise (when used as a verb).
 13. Devisee.
 14. Distributee.
 15. Estate.

IOWA PROBATE CODE

Section

3. Definitions and use of terms—Continued
 16. Executor.
 17. Fiduciary.
 18. Full age.
 19. Guardian.
 20. Guardian of the property.
 21. Heir.
 22. Incompetent.
 23. Issue.
 24. Legacy.
 25. Legatee.
 26. Letters.
 27. Minor.
 28. Person.
 29. Personal representative.
 30. Property.
 31. Surviving spouse.
 32. Temporary administrator.
 33. Trustee.
 34. Trusts.
 35. Will.
4. Gender and number.

DIVISION II. PROBATE COURT, CLERK OF PROBATE COURT AND PROCEDURE IN PROBATE

PART 1. PROBATE COURT

10. Jurisdiction.
 1. Estates of decedents and absentees.
 2. Construction of wills and trust instruments.
 3. Conservatorships and guardianships.
 4. Trusts and trustees.
11. Declaratory judgments—determination of heirship—distribution.
12. County of jurisdiction.
13. Extent of jurisdiction.
14. Concurrent jurisdiction.
15. Probate court always open.
16. Control of probate records.
17. Judge disqualified—procedure.
18. Uniform rules in probate.
19. Process revoked.
20. Referee—examination of accounts—fees.
21. Appraisers' fees and referees' fees fixed by rule.

PART 2. CLERK OF PROBATE COURT

22. Probate powers of clerk.
23. Clerk's actions reviewed.

IOWA PROBATE CODE

Section

24. Docketing and hearing.
25. Validity of clerk's orders.
26. Clerk not to prepare reports.
27. Probate docket.
28. Docketing trust proceedings.
29. Probate record.
30. Bonds given by fiduciaries.
31. Calendar.
32. Delinquent inventories and reports.

PART 3. PROCEDURE IN PROBATE

33. Nature of proceedings in probate.
34. Applicability of rules of civil procedure.
35. Reports and applications for orders.
36. Orders in probate.
37. Orders without notice.
38. Time and place of hearing.
39. Place of hearing—noncontest or agreement.
40. Notice.
41. Consular representatives—notice.
42. Requests for notice.
43. Notice and appearance.
44. Waiver of service of notice.
45. Notice of order served on fiduciary and attorney.
46. Proof of publication.
47. Proof of service and taxation of costs.
48. Certified copies affecting foreign real estate.
49. Transfer to another county.
50. Certified copy filed.
51. Certified copy recorded.
52. Mistakes corrected.
53. Submission and retention of vouchers and receipts.

DIVISION III. GENERAL PROVISIONS RELATING TO FIDUCIARIES

PART 1. QUALIFICATION, APPOINTMENT, SUBSTITUTION AND REMOVAL OF FIDUCIARIES

64. Qualification of fiduciaries.
65. Removal of fiduciary.
66. Appointment of successor fiduciary.
67. Powers of surviving cofiduciary.
68. Powers of successor fiduciary.
69. Substitution—effect.
70. Property delivered—penalty.

IOWA PROBATE CODE

PART 2. POWERS APPLICABLE TO ALL FIDUCIARIES

Section

76. Two or more fiduciaries—exercise of powers.
77. Receipts by one fiduciary.
78. Third parties protected.
79. Fiduciaries considered as one.
80. Fiduciary of a fiduciary.
81. Suit by and against fiduciary.
82. Designation of attorney.
83. Continuation of business.
84. Delegation of authority.
85. Liability of fiduciary employing agents.
86. Reduction of fees when agents are employed.
87. Deposit of money in banks.
88. Law governing administration of estates of nonresidents.

PART 3. SPECIAL PROVISIONS RELATING TO PROPERTY

94. Platting.
95. Release of liens and mortgages.
96. Specific performance voluntary.
97. Specific performance involuntary.
98. Certificate of appointment and authority.
99. Federal stock authority to purchase.
100. Waiver of exemption.
101. Appraisal.
102. Costs and expenses.

PART 4. PROVISIONS RELATING TO ADMINISTRATION BY ALL FIDUCIARIES

GENERAL PROVISIONS

108. Small legacies to minors—payment.
109. Inability to distribute estate funds.
110. Receipts taken.
111. Final discharge period.
112. Discovery of property.
113. Commitment.
114. Compromise of claims held by an estate.
115. Compromise of claims against an estate.
116. Abandonment of property.
117. Encumbered assets.
118. Attorney appointed for persons not represented.
119. Order and authority thereunder.
120. Compensation.
121. Substitution—division of fees.
122. Settlement contested.

IOWA PROBATE CODE

Section

INVESTMENTS BY FIDUCIARIES

123. Investments by fiduciaries.

APPOINTMENT OF A NOMINEE BY BANKING INSTITUTIONS ACTING IN A FIDUCIARY CAPACITY

124. Investment may be held in name of nominee of bank or trust company.

125. Records of bank or trust company to show ownership.

COMMON TRUST FUNDS

126. Definitions.

127. Establishment of common trust funds.

128. Court accountings.

129. Uniformity of interpretation.

SIMPLIFICATION OF FIDUCIARY SECURITY TRANSFERS

130. Registration in the name of a fiduciary.

131. Assignment by a fiduciary.

132. Evidence of appointment or incumbency.

133. Adverse claims.

134. Nonliability of corporation and transfer agent.

135. Nonliability of third persons.

136. Territorial application.

137. Tax obligations.

138. Uniformity of interpretation.

PART 5. POWERS OF FOREIGN FIDUCIARIES

144. Mortgages and judgments.

145. Certificate of appointment and authority.

146. Filing of certificate.

147. Record.

148. Maintaining actions.

149. Filing of bond.

PART 6. LIABILITY OF FIDUCIARIES

155. Self-dealing by fiduciary prohibited.

156. Deposits by corporate fiduciaries.

157. Liability for property of estate.

158. Liability for property not a part of estate.

159. Judgment—execution.

160. Breach of duty.

161. Examination of fiduciaries.

162. Penalty.

IOWA PROBATE CODE

PART 7. OATH AND BOND OF FIDUCIARIES

Section

168. Oath.
169. Bond.
170. Amount of bond.
171. Approval by clerk.
172. Will—waiver of bond.
173. Waiver of bond by distributees.
174. Guardians—bond.
175. Waiver of bond by court.
176. Reduction of bond by deposit.
177. Deposit in lieu of bond.
178. Letters.
179. Review by clerk when inventory is filed.
180. Bond changed.
181. Obligees of bond; joint and several liability.
182. Qualifications for sureties.
183. Authority for fiduciary and surety to enter into agreement for deposit of property or joint control.
184. Release of sureties before estate fully administered.
 1. Release for cause.
 2. Extent of liability of original and new sureties.
185. Insolvency of fiduciary.
186. Suit on bond.
 1. Execution of bond deemed as appearance.
 2. Summary enforcement in proceedings for administration.
 3. Enforcement by separate suit.
 4. Bond not void upon first recovery.
 5. Denial of liability by surety; intervention.
187. Limitation of action on bond.

PART 8. COMPENSATION OF FIDUCIARIES AND ATTORNEYS

197. Compensation.
198. Attorney fee.
199. Expenses and extraordinary services.
200. Compensation of other fiduciaries and their attorneys.
201. Court officers as fiduciaries.
202. Affidavit relative to compensation.
203. Affidavit for corporate fiduciary.
204. Fees of deceased fiduciary.

DIVISION IV. INTESTATE SUCCESSION

PART 1. RULES OF INHERITANCE

210. Rules of descent.
211. Share of surviving spouse if decedent left descendants.

IOWA PROBATE CODE

Section

212. Share of surviving spouse where decedent left no descendants.
213. Appraisal.
214. Procedure determined by court.
215. Notice.
216. Objections.
217. Trial.
218. Right of spouse to select property.
219. Shares of others than surviving spouse.
220. Afterborn heirs; time of determining relationship.
221. Illegitimate child—inheritor from mother.
222. Illegitimate child—inheritor from father.
223. Effect of adoption.
224. Advancements—in general.
225. Valuation of advancements.
226. Death of advancee before intestate.

PART 2. PROCEDURE FOR OPENING ADMINISTRATION OF INTESTATE ESTATE

227. Administration granted.
228. Time allowed.
229. Petition for administration of an intestate estate.
230. Notice in intestate estates.

DIVISION V. RIGHTS OF SURVIVING SPOUSE

PART 1. RIGHT TO TAKE AGAINST THE WILL

236. Right of surviving spouse to elect to take against will.
237. Presumption that surviving spouse elects to take under will.
238. Share of surviving spouse who elects to take against will.
239. Share to embrace homestead.
240. Election to occupy homestead.
241. Time for election to occupy homestead.
242. Rights of election personal to surviving spouse.
243. Filing elections.
244. Incompetent spouse—election by court.
245. Record of election.
246. Election not subject to change.

PART 2. PROCEDURE FOR SETTING OFF SHARE

247. Setting off share of surviving spouse when electing to take against the will—time limit.
248. Referee—notice.
249. Mode of setting off share in real estate.
250. Report—delinquency.
251. Confirmation—new reference.
252. Confirmation conclusive—possession.

IOWA PROBATE CODE

Section

- 253. Right contested.
- 254. Sale—division of proceeds.
- 255. Purchase of new homestead.
- 256. Security to avoid sale.
- 257. Security by surviving spouse.
- 258. Sale prohibited.

DIVISION VI. WILLS

PART 1. GENERAL PROVISIONS RELATING TO WILLS

- 264. Disposal of property by will.
- 265. Procedure prescribed by will.
- 266. Limitation on disposal by will.
- 267. Children born or adopted after execution of will.
- 268. Presumption attending devise to spouse.
- 269. After acquired property.
- 270. Contractual or mutual wills.
- 271. Effect of divorce.
- 272. Partial intestacy.
- 273. Antilapse statute.
- 274. Exception to antilapse statute.
- 275. Testamentary additions to trusts.
- 276. Effect on prior wills.
- 277. Uniformity of interpretation.
- 278. Devise of encumbered property.

PART 2. EXECUTION AND REVOCATION

- 279. Formal execution.
- 280. Competency of witnesses.
- 281. Interest of witnesses.
- 282. Defect cured by codicil.
- 283. Will executed in foreign state or country.
- 284. Revocation—cancellation—revival.

PART 3. CUSTODY

- 285. Custodian—filing—penalty.
- 286. Deposit of will with clerk.
- 287. Manner of deposit.
- 288. Delivery by clerk during lifetime of testator.
- 289. Delivery by clerk after death of testator.

PART 4. PROCEDURE FOR PROBATE OF WILLS

- 290. Petition for probate of will.
- 291. Contents of petition.
- 292. Petition for appointment of executor.

IOWA PROBATE CODE

Section

- 293. Hearing on petition.
- 294. Order of preference for appointment of executor.
- 295. Nonresident executors of resident decedents.
- 296. Testimony of witnesses.
- 297. Deposition.
- 298. Witnesses unavailable.
- 299. Order admitting or disallowing will.
- 300. Order appointing executor.
- 301. Certificate of probate.
- 302. Record—copy for executor.
- 303. Notice of appointment.
- 304. Notice where no administration.
- 305. Record in foreign county.
- 306. Costs of transcript.

PART 5. ACTIONS TO SET ASIDE OR CONTEST OF WILLS

- 307. Setting aside probate of will.
- 308. Time within which contest must be filed.
- 309. Objections prior to admission of will to probate.
- 310. Contest or objection shall be tried as a law action.
- 311. Joinder of parties.
- 312. Election of defendants to join with contestants.
- 313. Taxation of costs.
- 314. Allowance for defending will.
- 315. Notice to devisees in other wills.
- 316. Where will is filed after letters of administration have been granted.
- 317. Where will is filed after letters testamentary have been granted.
- 318. Proof of execution.
- 319. Declaratory judgment to determine last will.

DIVISION VII. ADMINISTRATION OF ESTATES OF DECEDENTS

PART 1. GENERAL PROVISIONS

LIMITATION

- 330. Character of proceedings.
- 331. Limitation of administration.

EXEMPT PROPERTY AND INSURANCE

- 332. Exempt personal property.
- 333. Proceeds of insurance.
- 334. Surviving spouse included as "heir".
- 335. Share of survivor.

WRONGFUL DEATH

- 336. Damages for wrongful death.

IOWA PROBATE CODE

PART 2. TEMPORARY ADMINISTRATION

Section

- 342. Temporary administration.
- 343. Inventory—preservation of property.

PART 3. TITLE AND POSSESSION OF DECEDENT'S PROPERTY

- 349. Security to sustain devise or bequest.
- 350. Title to decedent's estate; when property passes; possession and control thereof; liability for administration expenses, debts and family allowance.
- 351. Possession of real and personal property.
- 352. Collection of rents and payment of taxes and charges.
- 353. Surrender of possession upon application by personal representative.
- 354. Surrender of possession by any interested person.
- 355. Delivery of specific devise after nine months.

PART 4. INVENTORY

- 361. Inventory and report.
- 362. Filing mandatory.
- 363. Reporting failure to court.
- 364. Supplementary inventory.
- 365. Appraisement.
- 366. Debts of executor.
- 367. Inventory and appraisement as evidence.
- 368. Property for payment of creditor's claims.

PART 5. ALLOWANCE FOR SURVIVING SPOUSE

- 374. Allowance to surviving spouse.
- 375. Review of allowance to surviving spouse.
- 376. Allowance to minor children who do not reside with surviving spouse.
- 377. Review of allowance to minor children.

PART 6. SALE OF PROPERTY

- 383. When power given in will.
- 384. Equitable conversion and power of sale.
- 385. Conversion.
 - 1. When realty treated as personalty.
 - 2. When personalty treated as realty.
- 386. Sale, mortgage, pledge, lease or exchange of property; purposes.
- 387. Sale of personal property.
- 388. Petition to sell, mortgage, exchange, pledge or lease property.

IOWA PROBATE CODE

Section

- 389. Notice and hearing on sale, mortgage, exchange, pledge or lease of property.
- 390. Leasing for term of not to exceed one year.
- 391. Quieting adverse claims.
- 392. Terms of sale.
- 393. Purchase by holder of lien.
- 394. Order to sell, mortgage, pledge, exchange or lease to be refused if bond given.
- 395. Validity of proceedings.
- 396. Order for sale, mortgage, pledge, exchange or lease of real property.
- 397. Sale at public auction.
- 398. Adjournment of sale at public auction.
- 399. Report and confirmation.
- 400. Execution of conveyance or other instrument.
- 401. Endorsement of confirmation.
- 402. Effect of conveyance—presumption.
- 403. Record in foreign county.
- 404. Transcript of court conveyance—record—effect.

PART 7. CLAIMS AGAINST DECEDENT'S ESTATE

TIME AND MANNER OF FILING CLAIMS

- 410. Limitation on filing claims against decedent's estate.
- 411. Pleading statute of limitations.
- 412. When claim not affected by statutes of limitation.
- 413. Claims barred when no administration commenced.
- 414. Liens not affected by failure to file claim.
- 415. Commencement or continuance of separate action.
- 416. Compulsory counterclaims—Rules of Civil Procedure.
- 417. Separate action in lieu of proceedings on claims.
- 418. Form and verification of claims—general requirements.
- 419. Requirements when claim founded on written instrument.
- 420. How claim entitled.
- 421. Unsecured claims not yet due.
- 422. Secured claims not yet due.
- 423. Procedure for secured claims.
- 424. Contingent claims.

CLASSIFICATION, ALLOWANCE AND PAYMENT OF DEBTS AND CHARGES

- 425. Classification of debts and charges.
- 426. Order of payment of debts and charges.
- 427. Payment of contingent claims by distributee; contribution.
- 428. Allowance by personal representative.
- 429. Compelling payment of claims.
- 430. Execution and levies prohibited.

IOWA PROBATE CODE

Section

- 431. Claims of personal representative.
- 432. Allowance or disallowance of claim of personal representative.
- 433. Payment of debts and charges before expiration of six months period.
- 434. Payment of debts and charges after expiration of six months period.
- 435. Debts and charges not filed.
- 436. General order for abatement.
- 437. Contrary provision as to abatement.

DENIAL AND CONTEST OF CLAIMS

- 438. General denial of claims.
- 439. Disallowance by personal representative.
- 440. Contents of notice of disallowance.
- 441. Proof of service.
- 442. Claims barred after twenty days.
- 443. Request for hearing by claimant.
- 444. Applicability of rules of civil procedure.
- 445. Offsets and counterclaims.
- 446. Burden of proof.
- 447. Trial and hearing.
- 448. Allowance and judgment.

PART 8. ACCOUNTING, DISTRIBUTION, FINAL REPORT AND DISCHARGE

- 469. Interlocutory report.
- 470. Waiver of accounting.
- 471. Right of retainer.
- 472. Proceeds distributed in kind.
- 473. Final settlement—time limit.
- 474. Certificate as to payment of personal taxes.
- 475. Compromise of personal taxes.
- 476. Action against distributees—costs—tender.
- 477. Final report.
- 478. Notice of application for discharge.
- 479. Discharge.
- 480. Change of title certificate with administration.
- 481. Change of title certificate without administration.

PART 9. REOPENING

- 487. Limitation on rights.
- 488. Reopening settlement.
- 489. Reopening administration.

IOWA PROBATE CODE

DIVISION VIII. FOREIGN WILLS AND ANCILLARY ADMINISTRATION

PART 1. FOREIGN WILLS

Section

- 495. Admission of wills of nonresidents.
- 496. Foreign probated wills.
- 497. Foreign wills as a muniment of title.
- 498. Foreign wills—procedure.
- 499. Appointment where no foreign probate.

PART 2. ANCILLARY ADMINISTRATION

- 500. Appointment of foreign administrator.
- 501. Application for appointment of foreign administrator.
- 502. Appointment of foreign fiduciary.
- 503. Application for appointment of foreign executor or trustee.
- 504. Removal of property—payment of claims.

DIVISION IX. ESTATES OF ABSENTEES

- 510. Administration authorized—petition.
- 511. Notice.
- 512. Service.
- 513. Proof of service—filing.
- 514. Hearing—continuance—orders.
- 515. Administration.
- 516. Rights of absentee barred—sale by spouse.
- 517. Missing soldiers or sailors—presumption of death.

DIVISION X. UNIFORM SIMULTANEOUS DEATH ACT

- 523. No sufficient evidence of survivorship.
- 524. Beneficiaries of another person's disposition of property.
- 525. Joint tenants.
- 526. Insurance policies.
- 527. Limitation of application.
- 528. Uniformity of interpretation.

DIVISION XI. FELONIOUS DEATH

- 535. Feloniously causing death.
- 536. Insurance beneficiary feloniously causing death.
- 537. Distribution to other heirs or insured.

DIVISION XII. PROCEEDINGS FOR ESCHEAT

- 543. Proceedings for escheat.
- 544. Notice to persons interested.
- 545. Sale—proceeds.
- 546. Payment to person entitled.

IOWA PROBATE CODE

DIVISION XIII. OPENING GUARDIANSHIPS AND CONSERVATORSHIPS

PART 1. OPENING GUARDIANSHIPS

Section

- 552. Petition for appointment of guardian.
- 553. No notice required—minor.
- 554. Notice governed by Rules of Civil Procedure.
- 555. Pleadings and trial—Rules of Civil Procedure.
- 556. Appointment of guardian.
- 557. Appointment of guardian on voluntary petition.
- 558. Appointment of temporary guardian.
- 559. Preference as to appointment.
- 560. Appointment of guardian on a standby basis.

PART 2. OPENING CONSERVATORSHIPS—RESIDENTS

- 566. Petition for appointment of conservator.
- 567. No notice—minor.
- 568. Notice governed by Rules of Civil Procedure.
- 569. Pleadings and trial—Rules of Civil Procedure.
- 570. Appointment of conservator.
- 571. Preference as to appointment of conservator.
- 572. Appointment of conservator on voluntary petition.
- 573. Appointment of temporary conservator.
- 574. Procedure in lieu of conservatorship.

PART 3. CONSERVATORSHIPS FOR ABSENTEES

- 580. Petition for appointment of conservator for absentee.
- 581. Original notice governed by Rules of Civil Procedure.
- 582. Notice on county attorney.
- 583. Pleadings and trial—Rules of Civil Procedure.
- 584. Appointment of conservator.
- 585. Appointment of temporary conservator.

PART 4. STANDBY CONSERVATORSHIPS

- 591. Voluntary petition for appointment of conservator—standby basis.
- 592. Petition may nominate conservator.
- 593. Deposit of petition.
- 594. Revocation of petition.
- 595. Filing petition upon occurrence of condition.
- 596. Time of appointment of conservator.
- 597. Conservator shall have same powers and duties.

PART 5. FOREIGN CONSERVATORS

- 603. Appointment of foreign conservators.
- 604. Application.
- 605. Personal property.

IOWA PROBATE CODE

Section

- 606. Copy of bond.
- 607. Order for delivery.
- 608. Recording of bond—notice to court.

PART 6. CONSERVATORSHIPS INVOLVING VETERANS ADMINISTRATION

- 614. Application of other provisions to veterans' conservatorships.
- 615. Administrator of veterans affairs—party in interest.
- 616. Ward rated incompetent by Veterans Administration.
- 617. Limitation on conservator acting for more than ten wards.
- 618. Compensation in conservatorships involving Veterans Administration.
- 619. Order for support and maintenance of ward.
- 620. Dual conservatorship proceedings not required.
- 621. Liberal construction.
- 622. In administering moneys paid by the Veterans Administration the conservator shall have the following powers and be subject to the following restrictions.

PART 7. COMBINING PETITION FOR GUARDIAN AND CONSERVATOR

- 627. Combining petitions.
- 628. Same person as guardian and conservator.

DIVISION XIV. ADMINISTRATION OF GUARDIANSHIPS AND CONSERVATORSHIPS

PART 1. APPOINTMENT AND QUALIFICATION OF GUARDIANS AND CONSERVATORS

- 634. Provisions applicable to all fiduciaries shall govern.
- 635. Combination of voluntary and standby petitions with involuntary petition for hearing.

PART 2. RIGHTS AND TITLE OF WARD

- 636. Effect of appointment of guardian or conservator.
- 637. Powers of ward.
- 638. Presumption of fraud.
- 639. Title to ward's property.
- 640. Conservator's right to possession.

PART 3. DUTIES AND POWERS OF CONSERVATOR

- 641. General duties of conservator.
- 642. Inventory of ward's property.
- 643. Disposal of will by conservator.
- 644. Court order to preserve testamentary intent of ward.

IOWA PROBATE CODE

Section

- 645. Court to deliver will to clerk.
- 646. Powers of the conservator without order of court.
- 647. Powers of conservator subject to the approval of the court.
- 648. Appointment of attorney in compromise of personal injury settlements.
- 649. Powers of conservators—same as all fiduciaries.
- 650. Breach of contracts.
- 651. Tort liability of conservator.

PART 4. TRANSFERRING, ENCUMBERING AND LEASING PROPERTY BY CONSERVATOR

- 652. Procedure applicable to personal representatives shall govern.

PART 5. CLAIMS

- 653. Claims against the ward, the conservatorship or the conservator in that capacity.
- 654. Form and verification of claims—general requirements.
- 655. Requirements when claim founded on written instrument.
- 656. How claim entitled.
- 657. Filing of claim required.
- 658. Compelling payment of claims.
- 659. Allowance by conservator.
- 660. Execution and levy prohibited.
- 661. Claims of conservators.
- 662. Claims not filed.
- 663. Waiver of statute of limitations by conservator.
- 664. Liens not affected by failure to file claim.
- 665. Separate actions and claims.
- 666. Denial and contest of claims.
- 667. Payment of claims in insolvent conservatorships.

PART 6. GIFTS

- 668. Conservator may make gifts.

PART 7. GUARDIAN'S REPORT

- 669. Guardian's report.

PART 8. CONSERVATOR'S REPORT

- 670. Conservator shall report and account.
- 671. Requirements of report and accounting.

PART 9. COSTS AND ACCOUNTS

- 672. Payment of court costs in conservatorship.
- 673. Court costs in guardianship.
- 674. Settlement of accounts.

PART 10. TERMINATION OF GUARDIANSHIPS
AND CONSERVATORSHIPS

Section

- 675. Cause for termination.
- 676. Assets exhausted.
- 677. Accounting to ward—notice of hearing.
- 678. Delivery of assets.
- 679. Petition to terminate.
- 680. Limit on application to terminate.
- 681. Assets of minor ward exhausted.
- 682. Discharge of conservator and release of bond.

DIVISION XV. TRUSTS

- 699. Powers of trustees.
- 700. Intermediate report of trustees.
- 701. Final report of trustees.
- 702. Notice of application for discharge.
- 703. Discharge.

DIVISION I—INTRODUCTION AND DEFINITIONS

PART 1. INTRODUCTION

§ 1. Short title

This Act shall be known and may be cited as the "Iowa Probate Code".

Bar Committee Comment

The use of the title, "Iowa Probate Code" is suggested as being both proper and convenient, just as the body of statute law pertaining to crimes and their punishment is frequently spoken of as the Iowa Criminal Code.

§ 2. How Code to take effect

1. **Effective date.** This Code shall take effect and be in force on and after January 1, 1964. The procedure herein prescribed shall govern all proceedings in probate brought after the effective date of this Code. It shall also govern further procedure in proceedings in probate then pending, except to the extent that, in the opinion of the court, its application in particular proceedings or parts thereof would not be feasible or would work injustice, in which event the former procedure shall apply.

2. **Rights not affected.** No act done in any proceeding commenced before this Code takes effect and no accrued or vested right shall be impaired by its provisions. When a right has been acquired, extinguished, or barred upon the expiration of a prescribed period of time governed by the provision of any statute in force before this Code takes effect, such provision shall remain in force and be deemed a part of this Code with respect to such right.

3. **Severability.** If any provision of this Code or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this Code which can be given effect without the invalid provision or application, and to this end the provisions of this Code are declared to be severable.

Bar Committee Comment

In making the transition from one set of statutory provisions to another covering the same subject, there is always the problem of how such transition affects rights. Of necessity the provisions of the new law must be effective as of a certain date, and the provisions of the old law must terminate as of the same date. There can be no overlapping. Rights cannot be construed or determined under two sets of laws. There is no real problem presented in connection with the rights that have already vested in the strict sense of real property or the strict sense of vested rights. However, there is an area where real injustice may be done if the rights were determined solely on the basis of whether or not they were "vested", in the strict sense. It was with this thought that the word "accrued" was inserted in this section, and the construction of this word must, of necessity, be left to the courts to construe the word liberally so as to prevent injustices in making the transition from the old provisions to the new Code.

PART 2. DEFINITIONS AND USE OF TERMS

§ 3. Definitions and use of terms

When used in this Code, unless otherwise required by the context, the following words and phrases shall be construed as follows:

1. **Administrator**—any person appointed by the court to administer an intestate estate.
2. **Bequeath**—includes the word "devise" when used as a verb.
3. **Bequest**—includes the word "devise" when used as a noun.
4. **Charges**—includes costs of administration, funeral expenses, cost of monument, and federal and state estate taxes.
5. **Child**—includes an adopted child but does not include a grandchild or other more remote descendants, nor, except as provided in

sections two hundred twenty-one (221) and two hundred twenty-two (222), an illegitimate child.

6. Clerk—"Clerk of the District Court" in the county in which the matter is pending and includes the term "Clerk of the Probate Court".

7. Conservator—a person appointed by the court to have the custody and control of the property of a ward under the provisions of this Code.

8. Costs of administration—includes court costs, fiduciary's fees, attorney fees, all appraisers' fees, premiums on corporate surety bonds, statutory allowance for support of surviving spouse and children, cost of continuation of abstracts of title, recording fees, transfer fees, transfer taxes, agents' fees allowed by order of court, and all other fees and expenses allowed by order of court in connection with the administration of the estate.

9. Court—the district court sitting in probate, and includes any judge of the judicial district in which the estate administration is pending.

10. Debts—includes liabilities of the decedent which survive, whether arising in contract, tort or otherwise.

11. Devise—when used as a noun, includes testamentary disposition of property, both real and personal.

12. Devise—when used as a verb, to dispose of property, both real and personal, by a will.

13. Devisee—includes legatee.

14. Distributee—a person entitled to any property of the decedent under his will or under the statutes of intestate succession.

15. Estate—the real and personal property of a decedent, a ward, or a trust, as from time to time changed in form by sale, reinvestment or otherwise, and augmented by any accretions or additions thereto and substitutions therefor, or diminished by any decreases and distributions therefrom.

16. Executor—means any person appointed by the court to administer the estate of a testate decedent.

17. Fiduciary—includes personal representative, executor, administrator, guardian, conservator and trustee to whom letters have been issued.

18. Full age—the state of legal majority attained through arriving at the age of twenty-one years or through having married, even though such marriage is terminated by divorce.

19. **Guardian**—the person appointed by the court to have the custody of the person of the ward under the provisions of this Code.

20. **Guardian of the property**—at the election of the person appointed by the court to have the custody and care of the property of a ward, the term “guardian of the property” may be used, which term shall be synonymous with the term “conservator”.

21. **Heir**—any person, except the surviving spouse, who is entitled to property of a decedent under the statutes of intestate succession.

22. **Incompetent**—includes any person who has been adjudicated by a court to be incapable of managing his property, or caring for his own person, or both.

23. **Issue**—for the purposes of intestate succession, includes all lawful lineal descendants of a person, whether natural or adopted, except those who are the lineal descendants of his living descendants.

24. **Legacy**—a testamentary disposition of personal property.

25. **Legatee**—a person entitled to personal property under a will.

26. **Letters**—includes letters testamentary, letters of administration, letters of guardianship, letters of conservatorship, and letters of trusteeship.

27. **Minor**—a person who is not of full age.

28. **Person**—includes natural persons and corporations.

29. **Personal representative**—includes executor and administrator.

30. **Property**—includes both real and personal property.

31. **Surviving spouse**—the surviving wife or husband, as the case may be.

32. **Temporary administrator**—any person appointed by the court to care for an estate pending the probating of a proposed will, or to handle any special matter designated by the court.

33. **Trustee**—the person or persons appointed as trustee by the instrument creating the trust, or the person or persons appointed by the court to administer the trust.

34. **Trusts**—include only: testamentary trusts; express trusts where jurisdiction is specifically conferred on the court by the trust instrument; express trusts where the jurisdiction of the court is invoked by the trustee, beneficiary or any interested party for a limited purpose, or otherwise; and trusts which are established by a judgment or a decree of court which results in administration of the trust by the court, and the court entering the judgment or decree es-

tablishing such trust orders the administration of the trust transferred to the probate court.

35. **Will**—includes codicil; it also includes a testamentary instrument that merely appoints an executor, and a testamentary instrument that merely revokes or revives another will.

Bar Committee Comment

The use of statutory definitions in legislative acts promotes clearness in the meaning of the text of laws dealing with technical matters. The practice of inserting definitions is becoming quite common, and has been employed many times by the General Assembly of Iowa.

§ 4. Gender and number

When used in this Code, unless otherwise required by the context, the masculine gender includes the feminine and the neuter; the singular number includes the plural and the plural number includes the singular.

Bar Committee Comment

This provision promotes brevity and clarity in the drafting of the Probate Code.

§§ 5 to 9, inclusive, reserved for future use

**DIVISION II—PROBATE COURT, CLERK OF
PROBATE COURT AND PROCEDURE
IN PROBATE**

PART 1. PROBATE COURT

§ 10. Jurisdiction

The district court sitting in probate shall have jurisdiction of:

1. Estates of decedents and absentees.

The probate and contest of wills; the appointment of personal representatives; the granting of letters testamentary and of administration; the administration, settlement and distribution of estates of decedents and absentees, whether such estates consist of real or personal property or both.

2. Construction of wills and trust instruments.

The construction of wills and trust instruments during the administration of the estate or trust, whether said construction be incident to such administration, or as a separate proceeding.

3. Conservatorships and guardianships.

The appointment of conservators and guardians; the granting of letters of conservatorship and guardianship; the administration, settlement and closing of conservatorships and guardianships.

4. Trusts and trustees.

The appointment of trustees; the granting of letters of trusteeship; the administration of testamentary trusts; the administration of express trusts where jurisdiction is specifically conferred on the court by the trust instrument; the administration of express trusts where the administration of the court is invoked by the trustee, beneficiary or any interested party; the administration of trusts which are established by a decree of court and result in the administration thereof by the court; and the settlement and closing of all such trusts

Bar Committee Comment

New. This is patterned after section 6 of the Model Probate Code and section 604.3 and 604.4 (1962 Code). The probate court is simply a division of the district court, and this section is designed to clarify the jurisdiction of the district court sitting in probate and to provide without any question that the district court sitting in probate shall have full jurisdiction of all matters pertaining to estates of decedents and absentees, guardianships, conservatorships, and trusts during the period of the administration of an estate, and to clarify the jurisdiction of the district court sitting in probate to interpret express trust agreements.

§ 11. Declaratory judgments—determination of heirship—distribution

During the administration of an estate, the district court sitting in probate shall have full, legal and equitable powers to make declaratory judgments in all matters involved in the administration of the estate, including those pertaining to the title of real estate, the determination of heirship, and the distribution of the estate. It shall have full, legal and equitable powers to enter final orders and decrees in all probate matters to effectuate its jurisdiction and to carry out its orders, judgments and decrees.

Bar Committee Comment

New. Patterned after Rules of Civil Procedure 261, 262 and 264. Since the district court sitting in probate is a "court of record" as provided in RCP 261, this section is simply a restatement of existing law and clearly establishes the power of the probate court to make declaratory judgments in all probate matters.

§ 12. County of jurisdiction

The court of each county shall have original and exclusive jurisdiction to administer the estates of all persons who are residents of the county, or who were residents at the time of their death, and all non-residents of the state who have property, or who die leaving property in the county subject to administration, or whose property is afterwards brought into the county; to appoint conservators for nonresidents having property in the county; and to appoint conservators and guardians of residents of the county.

Bar Committee Comment

Adapted from 604.3 and 604.4 (1962 Code).

§ 13. Extent of jurisdiction

The court of the county in which a will is probated, or in which administration, conservatorship or guardianship is granted, shall have jurisdiction coextensive with the state in the settlement of the estate, and in the sale and distribution thereof.

Bar Committee Comment

Adapted from 631.7 (1962 Code).

§ 14. Concurrent jurisdiction

When a case is originally within the jurisdiction of the courts of two or more counties, the one which first takes cognizance thereof by the commencement of the proceedings shall retain the same throughout.

Bar Committee Comment

Same as 631.6 (1962 Code).

§ 15. Probate court always open

The court sitting in probate shall always be open for the transaction of probate business.

Bar Committee Comment

Same as 631.1 (1962 Code).

§ 16. Control of probate records

The court shall have jurisdiction and supervision of the probate records of the clerk, and may direct the destruction of records it deems to be old, obsolete or unnecessary, except that the probate record pro-

vided for in section twenty-nine (29) and the will record provided for in section three hundred two (302), or a copy thereof, shall be preserved at all times.

Bar Committee Comment

New. Simply codifies the inherent power of the court to supervise its clerk in the general performance of his record-keeping duties.

§ 17. Judge disqualified—procedure

Where the judge is a party, or is connected by blood or affinity with a person interested nearer than the fourth degree, or is personally interested in any probate matter, the same shall be heard before another judge of the same district, or be transferred to the court of another district, or a judge of another district shall be procured to hold court for the hearing of such matter.

Bar Committee Comment

Adapted from 631.5 (1962 Code).

§ 18. Uniform rules in probate

The supreme court shall have power to adopt rules of procedure in probate not inconsistent with the provisions of this Code. The judges of the district court sitting en banc may adopt rules of procedure in probate matters within their respective districts not inconsistent with the rules adopted by the supreme court and the provisions of this Code.

Bar Committee Comment

New. There are substantial variations in probate practices not only from one district to another, but also differences between counties within the same district. This section is designed to codify the inherent power of the court to adopt its own rules of procedure not inconsistent with the law.

§ 19. Process revoked

Any process or authority emanating from the court in probate matters may for good cause be revoked and a new one issued.

Bar Committee Comment

Same as 631.9 (1962 Code).

§ 20. Referee—examination of accounts—fees

For the auditing of the accounts of fiduciaries and for the performance of such other ministerial duties as the court may direct, the court

may appoint a referee in probate whenever in the opinion of the court it seems fit and proper to do so. The referee may be the clerk. No person shall be appointed as referee in any matter where he is acting as a fiduciary or as the attorney. All fees received by any county officer serving in the capacity of referee in probate shall become a part of the fees of his office and shall be accounted for as such.

Bar Committee Comment

Adapted from 638.1 (1962 Code), except it is made explicit that no one shall be appointed a referee where he is acting as a fiduciary or an attorney

§ 21. Appraisers' fees and referees' fees fixed by rule

The district court sitting en banc shall by rule fix the fees of probate referees. It shall also by rule provide, insofar as practicable, a uniform schedule of compensation for other appraisers, brokers, and agents employed at estate expense.

Bar Committee Comment

New. This is to provide for uniformity of practice and reasonableness of fees.

PART 2. CLERK OF PROBATE COURT

§ 22. Probate powers of clerk

The clerk shall have and may exercise within his county all the powers and jurisdiction of the court and of the judge thereof, in the following matters:

1. The appointment of personal representatives who are residents of the state, guardians and conservators for minors, the fixing and determining of the amount of the bond, or waiving the same when permitted by law or by will, and the approval of any and all bonds given by fiduciaries in the discharge of their duties.
2. The examination and approval of all intermediate and interlocutory accounts and reports of fiduciaries.
3. The admission of wills of decedents to probate, when not contested, and the making of necessary orders in relation thereto, including orders for the issuance of commissions to take depositions. Proof may be made before the clerk in the same manner as is made in open court.

4. The making of all necessary orders in relation to the personal effects of a deceased person, where no objection is filed, and perform all other acts within his jurisdiction, as provided in this Code.

Bar Committee Comment

Adapted from 632.1 (1962 Code).

§ 23. Clerk's actions reviewed

Any person aggrieved by any order made or entered by the clerk under the powers conferred in section twenty-two (22) may have the same reviewed in court upon motion filed within six months or before the hearing on the final report of the fiduciary, whichever is the earlier, and upon such notice as the court may prescribe.

Bar Committee Comment

Adapted from 632.3 (1962 Code), except that review limitation is changed from one year to six months.

§ 24. Docketing and hearing

Upon the filing of such a motion, the clerk shall place the cause or proceeding on the docket without additional docket fee, and the matter shall stand for hearing or trial de novo in open court.

Bar Committee Comment

Same as 632.4 (1962 Code).

§ 25. Validity of clerk's orders

The records, orders, and judgments made and entered by the clerk, as hereinbefore provided, and not reversed, set aside, or modified by the court, shall stand, and shall be of the same force, validity, and effect, and be entitled to the same faith and credit, as if they had been made by the court.

Bar Committee Comment

Adapted from 632.5 (1962 Code), no essential change.

§ 26. Clerk not to prepare reports

No clerk, deputy, or employee of the clerk shall act as attorney for a fiduciary, or make or assist in making, drafting, or filling out any report of any fiduciary or any other report to be filed in his office.

Bar Committee Comment

Adapted from 632.6 (1962 Code), no essential change.

§ 27. Probate docket

The clerk shall keep a book to be known as the Probate Docket, which shall show :

1. The name of every deceased person whose estate is administered or whose will is admitted to probate, and the date of his death.
2. The name of each person as to whom application for conservatorship or guardianship is made.
3. The names of all the heirs in intestate estates and the surviving spouse of such deceased intestate, and their ages and places of residence, so far as they can be ascertained.
4. The title of each trust where letters of trusteeship are issued.
5. A note of every sale of real estate made under the order of the court, with a reference to the volume and page of the record where a complete record thereof may be found.

Bar Committee Comment

Adapted from 632.10 (1962 Code), no essential change.

§ 28. Docketing trust proceedings

When a trust is created by a will, the administration thereof shall be treated as a separate proceeding, with a separate docket number, from the date of the order of appointment or confirmation of the original trustee, unless otherwise ordered by the court.

Bar Committee Comment

New. The purpose of this section is to improve upon the present record-keeping practices and to help distinguish trust proceedings from estate proceedings since trusts are usually of much longer duration.

§ 29. Probate record

The clerk shall also keep a book to be known as the Probate Record that shall contain full and complete journal entries of all orders made in relation to the business of each estate. When real estate is sold or mortgaged by a fiduciary under an order of court therefor, a complete record of the same shall be made in the probate record, including the petition, the notice, the returns of service, and all other papers filed, with the orders made relating thereto.

Bar Committee Comment

Adapted from 632.11 (1962 Code), no essential change.

§ 30. Bonds given by fiduciaries

The clerk shall also keep a book known as Record of Bonds, in which he shall record all bonds given by fiduciaries.

Bar Committee Comment

Adapted from 632.12 (1962 Code).

§ 31. Calendar

The clerk shall keep a court calendar, and enter thereon such matters as the court may prescribe.

Bar Committee Comment

Substitute for 632.13 (1962 Code). Permits the court to control its own calendar.

§ 32. Delinquent inventories and reports

On May 1 and November 1 of each year, the clerk shall notify the fiduciary and his attorney of any delinquent inventories or reports due by law in any pending estate, trust, guardianship, or conservatorship, and that unless such delinquent inventory or report is filed within sixty days thereafter, the matter shall be reported to the presiding judge. If the delinquent inventory is not filed within the time so specified, the fiduciary will be subject to removal under the provisions of section sixty-five (65) of this Code.

On July 1 and January 1 of each year, the clerk shall report to the presiding judge all delinquent inventories or reports in estates, trusts, guardianships or conservatorships on which such notice has been given and no report or inventory has been filed in response to the notice.

Bar Committee Comment

Substitute for 632.14 (1962 Code). This section is designed to expedite the administration and closings of estates by providing a means of reminding the fiduciaries of delinquencies and informing the court of any continuing delinquencies. The court under section 65 may remove dilatory fiduciaries.

PART 3. PROCEDURE IN PROBATE

§ 33. Nature of proceedings in probate

Actions to set aside or contest wills, for the involuntary appointment of guardians and conservators, and for the establishment of contested claims shall be triable in probate as law actions, and all

other matters triable in probate shall be tried by the probate court as a proceeding in equity.

Bar Committee Comment

New. This section specifies the three types of proceedings which are triable as law actions, with the parties being entitled to a jury trial on the issues presented. All other matters arising in probate will be tried by the court as equitable proceedings. This section does not divide the probate court into a court of law and a court of equity, but simply prescribes the procedure applicable to the matters before it.

§ 34. Applicability of Rules of Civil Procedure

All actions triable in probate shall be governed by the Rules of Civil Procedure, except as provided otherwise in this Code.

Bar Committee Comment

New. There is no essential difference between a trial in probate and the trial of any other cause.

§ 35. Reports and applications for orders

All reports and applications for orders in probate must be in writing, verified and self-explanatory, so that the clerk or court from a perusal thereof may understand the relief sought without explanations.

Bar Committee Comment

Adapted from 638.35 (1962 Code).

§ 36. Orders in probate

All orders and decrees of the court sitting in probate are final decrees as to the parties having notice and those who have appeared without notice.

Bar Committee Comment

New. This section provides a method whereby a final determination of a particular matter can be made by giving notice to affected parties and prevents the necessity of waiting until the hearing on the final report. All parties who appear at the hearing are bound by the proceedings whether served with notice or not. Such orders are final orders and are appealable.

§ 37. Orders without notice

All orders entered without notice or appearance are reviewable by the court at any time prior to the entry of the order approving the final report.

Bar Committee Comment

New. This section eliminates any question as to whether or not an order is binding when it is merely *ex parte*.

§ 38. Time and place of hearing

The hearing of any matter requiring notice shall be had at such time and place as the court may fix.

Bar Committee Comment

Adapted from 631.2 (1962 Code). Eliminates reference to term time.

§ 39. Place of hearing—noncontest or agreement

In cases where no objection, resistance or appearance has been filed, or by agreement, such hearing may be had at any place within the judicial district.

Bar Committee Comment

Adapted from 631.3 (1962 Code).

§ 40. Notice

When the court fixes a time and place of hearing, it may direct what notice shall be given, and no hearing shall be had until proof of the giving or of the waiver of such notice has been made. When the manner of service of notice is not prescribed by the court or by this Code, such notice shall be served in the same manner that is provided by the Rules of Civil Procedure for the commencement of actions. In the case of proceedings against unknown persons, notice may be given by publication in accordance with the Rules of Civil Procedure. In no event shall notice be given by publication, except under order of court, nor shall notice be given at any time by posting.

Bar Committee Comment

Adapted from 631.4 (1962 Code) and Rule 369 of the Rules of Civil Procedure. This section is designed to establish uniformity in the manner of probate notices. In order to avoid any question, it is specifically provided that notice by publication be given to unknown persons as required by the Rules of Civil Procedure. Since the expense of notice should not be incurred unnecessarily, no notice by publication shall be given without specific order of court. Posted

notices are eliminated since in contemporary life posted notices constitute no actual notice whatsoever and are not calculated to inform as required in *Mullane v. Central Hanover Bank & Trust Company*, 94 Lawyers Ed. 865, 70 Supreme Court Reporter 652 (1950).

§ 41. Consular representatives—notice

Whenever in the course of the administration of any estate, it shall appear that any subject, citizen, or national of a foreign country is interested as an heir, devisee, legatee, or otherwise, and the address of such person is unknown to the personal representative, the personal representative shall give notice by mail to the consular representative of such country for Iowa of the pendency of such proceedings and of the particular interest of such foreign subject. If such consular representative shall not have filed his designation and address with the clerk, then such notice shall be mailed to the chief diplomatic representative of such foreign country at Washington, D. C. Failure to give such notice shall in no event and in no manner affect title to property.

Bar Committee Comment

Adapted from 632.15 (1962 Code). A statement of the exact manner of giving notice is desirable for the protection of the fiduciary who has to give the notice as well as the alien who is entitled to receive notice. See 47 Iowa Law Review, p. 29-103.

§ 42. Requests for notice

At any time after the issuance of letters testamentary or of administration upon a decedent's estate, any person interested in the estate may file with the clerk a written request, in duplicate, for notice of the time and place of all hearings in such estate for which notice is required by law, by rule of court, or by an order in such estate. Such request for notice shall state the name and post-office address of such person and the name and post-office address of the attorney for the party requesting the notice. The clerk shall docket such request, and transmit the duplicate to the personal representative of the estate of the decedent. Thereafter, the personal representative shall, unless otherwise ordered by the court, serve, by ordinary mail, upon such person, or his said attorney, a notice of each such hearing.

Bar Committee Comment

New. This follows the practice in other states and provides an orderly manner for an interested person to be sure he is receiving notice on matters which will affect him. See Rule 290 of the Rules of Civil Procedure pertaining to request for notice in partition actions.

§ 43. Notice and appearance

In any matter pending in the probate court, the attorney general may request notice of all hearings therein as provided by section forty-two (42), and may, with the approval of the court, intervene in behalf of the public interest. The court, on its own motion, in any such matter involving the public interest, may direct the fiduciary to give notice of the hearing to the attorney general.

Bar Committee Comment

New. This section will enable the attorney general to have notice and appear where the interests of the general public should be protected. Originally, it was the recommendation of the committee, with the advice of the attorney general, that 682.48 through 632.59, inclusive, (1962 Code) (special provisions dealing with charitable trusts) be repealed and that the following section be substituted in lieu of said section:

Charitable Trusts—Copies of Wills to Attorney General. When a will creating a charitable trust has been admitted to probate, or when any instrument establishing a charitable trust has been filed with the clerk, the clerk shall forthwith mail a copy of such will or instrument to the attorney general. At any time, the attorney general may investigate for the purpose of determining and ascertaining whether or not such estate or trust is being administered in accordance with law and with the terms and purposes thereof, and may, at any time, make application to the court for such orders therein as may appear to be reasonable and proper to carry out the purposes of the trust. The words "charitable trust" as used in this section shall mean any fiduciary relationship with respect to property arising as a result of manifestation of an intention to create it and subjecting the person by whom the property is held to equitable duties to deal with the property for charitable, educational or religious purposes.

However, the legislature chose to retain such sections rather than adopt the proposed section.

§ 44. Waiver of service of notice

Any notice required under this Code, or by order of court, may be waived in writing by the person, or the fiduciary, entitled to receive such notice.

Bar Committee Comment

New. The purpose of this section is to provide for waiver of service of notice. Heretofore the right of a fiduciary to waive notice has been questioned.

§ 45. Notice of order served on fiduciary and attorney

When the court makes an order affecting a fiduciary, it shall be served upon him and his attorney of record in such manner as the court may prescribe.

Bar Committee Comment

New, and is in lieu of 638.15 and 638.16 (1962 Code). It will be necessary to serve notice on both the attorney and the fiduciary. Where it is not possible to serve the notice personally, it will be necessary for the court to prescribe the mode for service.

Cross reference: See section 82.

§ 46. Proof of publication

Proof of the publication of all notices that are by this Code or by order of court required to be published shall be made by an affidavit of the publisher or of any employee having knowledge of the facts.

Bar Committee Comment

Adapted from 622.94 (1962 Code).

§ 47. Proof of service and taxation of costs

Proof of service of any notice, required by this Code or by order of court, including those by publication, shall be filed with the clerk. The costs of serving any notice given by the fiduciary shall be taxed by the clerk as part of the costs of administration in said estate.

Bar Committee Comment

New, and is intended to make explicit the place where the proof of service is to be filed and against whom costs of service shall be taxed.

§ 48. Certified copies affecting foreign real estate

A certified copy of any proceedings, order, judgment, or deed, affecting real estate in any county other than that in which administration or conservatorship is originally granted, shall be furnished to the clerk of the court of the county where such real estate is situated, and shall by him be entered in the Probate Record.

Bar Committee Comment

Adapted from 631.8 (1962 Code).

§ 49. Transfer to another county

In any proceeding in probate, the court may, upon written showing, supported by affidavit, and on such notice to interested parties as the court may prescribe, transfer such proceeding to any other county,

when it is made to appear that such transfer will be in furtherance of justice. Thereupon, the matter shall be pending in such other county.

Bar Committee Comment

Same as 631.11 (1962 Code).

§ 50. Certified copy filed

The clerk of the court which orders such a transfer shall retain the original files and papers, but shall make a certified copy thereof and of all record entries pertaining to the proceedings. He shall at once file the same in the office of the clerk of the court to which the transfer has been made.

Bar Committee Comment

Same as 631.12 (1962 Code).

§ 51. Certified copy recorded

The clerk of the court to which the proceedings are transferred shall record at length, in the probate record of his county, the certified copy of the record entries referred to in section forty-nine (49).

Bar Committee Comment

Same as 631.13 (1962 Code).

§ 52. Mistakes corrected

Mistakes in settlements may be corrected at any time before the final discharge of any fiduciary on such notice, if any, as the court may direct.

Bar Committee Comment

See 638.9 (1962 Code). Simply defines the inherent power of the court to correct mistakes during administration. Notice is not required to correct clerical errors or other minor matters. If a correction is necessary involving a substantive right, the court may set the matter down on hearing and notice.

§ 53. Submission and retention of vouchers and receipts

In all accountings filed by fiduciaries, vouchers or receipts for all disbursements shall be filed or submitted by the fiduciary upon written request of any interested party, or upon order of court. After an order, or decree, has been entered approving such accounting, any vouchers or receipts which have been filed may be withdrawn under order of the court. Vouchers or receipts not filed, or which have been with-

drawn, shall be preserved by the fiduciary until the accounting of such fiduciary becomes final.

Bar Committee Comment

New. The intent of this section is to force the fiduciary to make vouchers or receipts available if the need arises without cluttering up the court files if there is no real necessity.

§§ 54 to 63, inclusive, reserved for future use

DIVISION III—GENERAL PROVISIONS RELATING TO FIDUCIARIES

PART 1. QUALIFICATION, APPOINTMENT, SUBSTITUTION AND REMOVAL OF FIDUCIARIES

§ 64. Qualification of fiduciary

Any person of full age and any corporation authorized to act in a fiduciary capacity is qualified to serve as a fiduciary in this state except the following:

1. One who is a mental retardate, mentally ill, a chronic alcoholic, or a spendthrift.
2. Any other person whom the court determines to be unsuitable.

Bar Committee Comment

This provision is a comprehensive statement of the necessary qualifications of a fiduciary. Adapted from 633.27 and 633.28 (1962 Code).

§ 65. Removal of fiduciary

When any fiduciary is, or becomes, disqualified under section sixty-four (64), has mismanaged the estate, failed to perform any duty imposed by law, or by any lawful order of court, or ceases to be a resident of the state, then the court may remove him. The court may upon its own motion, and shall upon the filing of a verified petition by any person interested in the estate, including a surety on the fiduciary's bond, order the fiduciary to appear and show cause why he should not be removed. Any such petition shall specify the grounds of complaint. The removal of a fiduciary after letters are duly issued to him shall not invalidate his official acts performed prior to removal.

Bar Committee Comment

Adapted from Model Probate Code Section 98. This section provides a concise statement of the basis and procedure for removing fiduciaries and replaces 638.29, 638.30 and 638.31 (1962 Code).

§ 66. Appointment of successor fiduciary

When any fiduciary fails to qualify, dies, is removed by the court, or resigns, and such resignation is accepted by the court, the court may, and if he were the sole or last surviving fiduciary, and the administration has not been completed, the court shall appoint another fiduciary in his place.

Bar Committee Comment

Adapted from Model Probate Code Section 99. To replace 633.12 633.29 and 633.31 (1962 Code).

§ 67. Powers of surviving cofiduciary

When the instrument creating the estate or trust requires two or more fiduciaries, and a vacancy occurs on account of the death, resignation, or removal of one of the fiduciaries, during the period of the vacancy thus created, the remaining fiduciary or fiduciaries shall have all the rights, titles and powers, whether discretionary or otherwise, of all the fiduciaries.

Bar Committee Comment

Adapted from Section 101 of the Model Probate Code.

§ 68. Powers of successor fiduciary

When a successor fiduciary is appointed, he shall have all the rights, powers, titles and duties of his predecessor, except that he shall not exercise powers given in the instrument creating the powers that by its express terms are personal to the fiduciary therein designated.

Bar Committee Comment

Adapted from Section 100 of the Model Probate Code. This section is a codification and amplification of the Iowa case law under which a successor fiduciary had all of the nondiscretionary powers granted by will to the person nominated as fiduciary in the will. *Ellyson v. Lord*, 124 Iowa 125, 99 N.W. 582 (1904); *In re Estate of Jackson*, 217 Iowa 1046, 252 N.W. 775 (1934). This section extends the case law principles so that the successor shall have all of the powers granted to the fiduciary named in the instrument creating the estate except those expressly made personal to the nominee by the said instrument.

§ 69. Substitution—effect

The substitution of a fiduciary shall occasion no delay in the administration of an estate. The periods herein specified within which acts are to be performed after the appointment of a fiduciary shall,

unless otherwise ordered by the court, be computed from the issuing of the letters to the first fiduciary.

Bar Committee Comment

Adapted from 633.31 (1962 Code).

§ 70. Property delivered—penalty

Upon the removal of any fiduciary, he shall be required by order of the court to deliver to the person who may be entitled thereto all the property in his hands or under his control belonging to the estate, and if he fails or refuses to comply with any proper order of the court, he may be committed to the jail of the county until he does.

Bar Committee Comment

Adapted from 638.32 (1962 Code).

§§ 71 to 75, inclusive, reserved for future use

PART 2. POWERS APPLICABLE TO ALL FIDUCIARIES

§ 76. Two or more fiduciaries—exercise of powers

Where there are two or more fiduciaries, they shall all concur in the exercise of the powers conferred upon them, unless the instrument creating the estate provides to the contrary. In the event that the fiduciaries cannot concur upon the exercise of any power, any one of the fiduciaries may apply to the court for directions, and the court shall make such orders as it may deem to be the best interests of the estate.

Bar Committee Comment

New. Previously in Iowa in the absence of a court order requiring unanimous consent of cofiduciaries to act, a majority of the corepresentatives could act notwithstanding the objection of the minority cofiduciaries. In re Estate of Doolittle, 169 Iowa 639, 145 N.W. 873 (1915). The committee drafted this section to require unanimous consent by all cofiduciaries unless otherwise provided by the instrument creating the estate. In the event the cofiduciaries fail to agree, any one of them is expressly authorized to apply to the court for instructions.

§ 77. Receipts by one fiduciary

One of the several fiduciaries may receive and receipt for any money, which receipt shall be given by him in his own name only, and he must individually account for all the money thus received and receipted for

by himself, and this shall not charge his cofiduciary, except insofar as it can be shown to have come into his hands.

Bar Committee Comment

Adapted from 638.14 (1962 Code).

§ 78. Third parties protected

A person who in good faith pays or transfers to a fiduciary any money or other property which the fiduciary as such is authorized to receive, is not responsible for the proper application thereof by the fiduciary; and any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary.

Bar Committee Comment

Taken from Section 2 of the Uniform Fiduciaries Act and applies only when the fiduciary is "authorized to receive" the money or other property transferred. In advocating this provision the National Conference of Commissioners on Uniform State Laws has stated: "In the absence of a statute it has been held that one who makes payment to a trustee is bound to see to the application of the money. This rule is subject to various limitations, but it is uncertain how far these limitations go".

§ 79. Fiduciaries considered as one

In an action against several fiduciaries, in their fiduciary capacity, they shall be considered one person, and judgment may be taken against all as such, although not all were served with notice.

Bar Committee Comment

Adapted from 638.22 (1962 Code).

§ 80. Fiduciary of a fiduciary

A fiduciary has no authority to act in a matter wherein his decedent or ward was merely a fiduciary, except that he shall file a report and accounting on behalf of his decedent or ward in said matter.

Bar Committee Comment

Adapted from 638.18 (1962 Code).

§ 81. Suit by and against fiduciary

Any fiduciary may sue, be sued and defend in such capacity.

Bar Committee Comment

New Codification of existing Iowa Practice. Adapted from Rule 2 of the Rules of Civil Procedure.

§ 82. Designation of attorney

The designation of the attorney or attorneys employed by the fiduciary to assist him in the administration of the estate shall be filed in said estate proceedings. Such designation shall state the attorney's name and post-office address.

Bar Committee Comment

New. In other provisions of the Code, notices may be served upon the attorney for the fiduciary in certain circumstances. This section is necessary in order to facilitate the use of such provisions.

§ 83. Continuation of business

Upon a showing of advantage to the estate, the court may authorize the fiduciary to continue any business of the estate for the benefit thereof. The order may be without notice, or after such notice as the court may prescribe. The court may on its own motion, and upon the application of any interested party shall, review such authorization, and upon such review, may revoke or modify the same. The order may provide:

1. For the conduct of the business solely by the fiduciary, or jointly with one or more other persons; for the formation of a partnership for the conduct of such business; or for the formation of, or for the fiduciary to join in the formation of a corporation for the conduct of such business;

2. For the extent of the liability of the estate, or any part thereof, or of the fiduciary, for obligations incurred in the continuation of the business;

3. As to whether liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate set aside for use in the business, or to the estate as a whole;

4. As to the period of time for which the business may be conducted; and

5. Such other conditions, restrictions, regulations and requirements as the court may order.

Bar Committee Comment

Adapted from Section 131 of the Model Probate Code in lieu of 635.52 (1962 Code) which did not clearly authorize the court to direct the continuation of an estate business for any purpose other than for winding up. Under present Iowa law, a court order authorizing the continuation of a business may be ex parte, although subsequently creditors may attack the order. In re Estate of Harsh, 207 Iowa 84, 218 N.W. 537 (1928). It has also been held that where there was no court order to continue the business, the estate was not liable for ob-

ligations subsequently incurred in the operation of the business. *Williams v. Schee*, 214 Iowa 1181, 243 N.W. 529 (1923). The best interests of many modern-day estates require that the business be carried on if full value is to be protected as far as the widow, children, other heirs and creditors are concerned. Otherwise, much of the estate may be unduly sacrificed in an unwise immediate liquidation. This section is in accord with the modern trend to give the fiduciary greater power in this respect in those estates where the court finds that continuation of the business is prudent and desirable. Under this section, the court can determine whether the estate alone, or what part thereof, or the estate representative is liable for obligations incurred as a result of carrying on the business. Thus, the court can limit the personal liability of the fiduciary and can also provide for the business creditors having claims against the estate assets other than those used in the business. It is intended that the court shall have fairly broad discretion to find an independent solution to the particular problems of individual estates.

§ 84. Delegation of authority

Under order of court, with or without notice, a fiduciary may engage, at estate expense, outside specialists, and he may delegate to them, or consult with them for advice regarding the performance of aspects of the estate management which require professional skills or facilities which he does not possess, or does not possess in sufficient degree, and he may employ, at estate expense, subordinates and agents to perform ministerial acts and carry on or complete details of estate business under the policies and terms established by him.

Bar Committee Comment

New. Sections 84-86 were drafted to reflect the current state of common law. Initially, the courts took the position that the duties of a fiduciary could not be delegated. Gradually, however, the courts have recognized exceptions to this rule so that delegation has in fact been sustained in numerous cases. See *Delegation of Fiduciary Duties*, 46 Iowa L.Rev. 127 (1960). This section recognizes that the administration of modern estates often requires the services of specialists and assistants and provides statutory authorization for obtaining them.

§ 85. Liability of fiduciary employing agents

The fiduciary shall not be personally liable for the acts or omissions of any such specialist, subordinate or agent, unless it can be shown that said acts or omissions would have been a breach of duty by the fiduciary had he done it himself, and that,

1. The fiduciary directed or permitted the breach; or
2. He did not select or retain the said specialist, subordinate or agent with reasonable care; or
3. The fiduciary did not properly supervise the specialist, subordinate or agent; or

4. The fiduciary approved, acquiesced or co-operated in the neglect, omission, misconduct or default by the specialist, subordinate or agent.

Bar Committee Comment

Establishes standards to determine the fiduciary's liability for acts or omissions of agents employed by the fiduciary.

§ 86. Reduction of fees when agents are employed

The court shall, in fixing the fees of any fiduciary, consider the compensation allowed to any person employed by the fiduciary under the provisions of section eighty-four (84). If the court determines that the services rendered by such person were services that would normally have been performed by the fiduciary, the compensation of the fiduciary may, in the court's discretion, be reduced by all or any part of the compensation allowed to any such person.

Bar Committee Comment

New. Gives the court discretion to reduce the fiduciary's compensation where he has engaged delegates to perform services normally done by fiduciaries themselves.

§ 87. Deposit of money in banks

A fiduciary may deposit moneys and other assets belonging to the estate in any banking institution authorized to do business in the state of Iowa.

Bar Committee Comment

Codifies existing practice in Iowa.

§ 88. Law governing administration of estates of nonresidents

Except as otherwise provided in this Code, all provisions of the law relating to the administration of domestic estates and to the fiduciaries appointed therein, shall apply to the administration of the estate of a nonresident, the appointment of the fiduciary therein, and the granting of letters.

Bar Committee Comment

New. Designed to make all provisions of law which are applicable in the administration of the estates of residents apply to the estates of nonresidents, unless there is specific statutory provision to the contrary.

§§ 89 to 93, inclusive, reserved for future use

PART 3. SPECIAL PROVISIONS RELATING TO PROPERTY

§ 94. Platting

When it is for the best interests of the estate in order to dispose of real property, the court may, upon application by the fiduciary, or any other interested person, after notice and upon good cause shown, authorize the fiduciary, either alone or together with other owners, to plat any land belonging to the estate in accordance with the statutes in regard to platting. The court may authorize the fiduciary to execute any instruments which may be required of the titleholder or proprietor in connection with the platting of such land.

Cross reference: Ch. 409 of the Code of Iowa.

Bar Committee Comment

Adapted from Section 170 Model Probate Code. Last sentence was added to make explicit the authority of the fiduciary to execute all instruments required in connection with platting of real estate property in which an estate has an interest, e. g., security to complete improvements or utilities required by a city council or planning and zoning commission.

Cross reference: See Chapter 409 of the Code of Iowa.

§ 95. Release of liens and mortgages

Any fiduciary qualified under the laws of this state may, without prior order of court, release, assign or discharge, in whole or in part any mortgage, judgment or other lien held by the estate.

Bar Committee Comment

New. Derived in part from 633.53 (1962 Code) relating to powers of foreign fiduciaries. Authorizes the fiduciary to act where the transaction is largely ministerial.

§ 96. Specific performance voluntary

When an estate is under such an obligation to convey property as might be enforced by suit for specific performance, the fiduciary may without prior order of court execute such conveyance.

Bar Committee Comment

Adapted from 638.21 (1962 Code). Permits fiduciary to make such conveyance voluntarily and omits that part of 638.21 (1962 Code) which infers that an action is required by which the court would require such performance on the part of the fiduciary.

§ 97. Specific performance involuntary

When an estate is under obligation to convey property, the court may, upon application of any interested person, with or without notice as the court may direct, require the fiduciary to execute such a conveyance.

Bar Committee Comment

Adapted from 638.21 (1962 Code). Gives any interested party the right to apply to the court for an order requiring the performance of such conveyance, if the fiduciary refuses to act voluntarily as provided in the preceding section.

§ 98. Certificate of appointment and authority

When any instrument executed in accordance with the preceding three sections is to be recorded in a county other than the county in which the estate is pending, there shall also be recorded a certificate executed by the clerk of the court making the appointment, with seal affixed, showing the name of the court making the appointment, the date of the same, and that such fiduciary had not been discharged at the time of the execution of such instrument.

Bar Committee Comment

Adapted from 633.54 (1962 Code). Scope is broadened to apply to domestic as well as foreign fiduciaries and to conveyances contemplated under sections 96 and 97, as well as releases, etc.

§ 99. Federal stock authority to purchase

When the court shall enter an order authorizing the fiduciary to execute a mortgage to encumber any property of the estate to secure a loan obtained from any association or corporation created, or which may be created, by authority of the United States and as an instrumentality of the United States, the court may authorize the fiduciary to purchase stock in an association or corporation, when such a purchase of stock is necessary or required as an incident to, or condition of, obtaining the loan, and to mortgage the estate property for such purpose, as well as to make payment for the stock so purchased from the proceeds of the loan so obtained.

Bar Committee Comment

Adapted from 635.41 (1962 Code).

§ 100. Waiver of exemption

Any deed or mortgage executed by a fiduciary under order of court shall have the effect of waiving any exemption as to homestead or

otherwise of any person owning an interest in said real estate as fully as such owner could do if he were sui juris.

Bar Committee Comment

Adapted from 635.43 (1962 Code).

§ 101. Appraisal

At any time that the court may determine it to be to the best interests of the estate, it may order an appraisal of any or all of the property of an estate.

Bar Committee Comment

New. This section is applicable to all fiduciaries. The court is given broad powers. The method of appraisal and the number of appraisers is purposely left to the discretion of the court in each instance.

§ 102. Costs and expenses

In connection with the sale, mortgage, lease, pledge or exchange of property, the court may authorize the fiduciary to pay, out of the proceeds realized therefrom or out of other funds of the estate, the customary and reasonable auctioneers' and brokers' fees and any necessary expenses for abstracting, survey, revenue stamps, and other necessary costs and expenses in connection therewith.

Bar Committee Comment

Adapted from Section 169 of the Model Probate Code and codifies the practice almost uniformly followed.

§§ 103 to 107, inclusive, reserved for future use**PART 4. PROVISIONS RELATING TO ADMINISTRATION
BY ALL FIDUCIARIES****GENERAL PROVISIONS****§ 108. Small legacies to minors—payment**

Whenever a minor shall become entitled under the terms of a will to a bequest or legacy, to a share of the estate of an intestate, or to a beneficial interest in a trust fund upon the distribution thereof, and the value of such bequest, legacy, share, or interest shall not exceed the sum of one thousand dollars, and no conservator for such minor has theretofore been appointed, the court having jurisdiction of the

distribution of such funds may, in its discretion, upon the application of the fiduciary, enter an order authorizing such fiduciary to pay such bequest, legacy, share or interest to the parents of such minor, or to the person with whom such minor resides, for the use of such minor, and the receipt of such person or persons therefor, when presented to the court or filed with the report of distribution of any such fiduciary, shall have the same force and effect as though such payment had been made to a duly appointed and qualified conservator for such minor.

Bar Committee Comment

Adapted from 638.41 (1962 Code). Increases the amount of the small legacy from \$500 to \$1,000 and restricts the application thereof to minors.

§ 109. Inability to distribute estate funds

Any fiduciary having in his possession or under his control any funds, moneys or securities due or to become due to any other person to whom payment or delivery cannot be made as shown by the report of the fiduciary on file, may, upon order of court, deposit such property with the clerk and take the receipt of the clerk for the same. Such receipt shall specifically state from whom said property was derived, the description thereof, and the name of the person entitled to the same. Thereafter, such funds shall be held and disposed of by the clerk in accordance with the provisions of chapter six hundred eighty-two (682) of the Code of Iowa.

Bar Committee Comment

This section and the two following sections are adapted from 682.31-682.34 inclusively (1962 Code), except the requirements as to the notice are eliminated since notice requirements are adequately covered by this Code.

§ 110. Receipts taken

If such fiduciary shall otherwise discharge all the duties imposed upon him by such appointment, he may take the receipts of the clerk for such funds, moneys, or securities so deposited, which receipts shall specifically set forth from whom said funds, moneys, or securities were derived, the amount thereof, and the name of the person to whom due or to become due, if known.

Bar Committee Comment

Adapted from 682.32 (1962 Code). See comment under 109.

§ 111. Final discharge period

Such fiduciary may file such receipts with his final report, and if it shall be made to appear to the satisfaction of the court that he has in all other respects complied with the law governing his appointment and duties, the court may approve such final report and enter his discharge.

Bar Committee Comment

Adapted from 682.33 (1962 Code). See comment under 109.

§ 112. Discovery of property

The court may require any person suspected of having possession of any property, including records and documents, of the decedent, ward, or the estate, or of having had such property under his control, to appear and submit to an examination under oath touching such matters, and if on such examination it appears that he has the wrongful possession of any such property, the court may order the delivery thereof to the fiduciary. Such a person shall be liable to the estate for all damages caused by his acts.

Bar Committee Comment

Adapted from 635.14 and 638.19 (1962 Code). Broadened to cover all property including records.

§ 113. Commitment

If, upon being served with an order of the court requiring him to appear for interrogation, as provided in the preceding sections hereof, any person fails to appear in accordance therewith, or if, having appeared, he refuses to answer any question which the court thinks proper to be put to him in the course of such examination, or if he fails to comply with the order of the court requiring him to deliver the property to the fiduciary, he may be committed to the jail of the county until he does.

Bar Committee Comment

Adapted from 635.15 (1962 Code).

§ 114. Compromise of claims held by an estate

When it appears for the best interest of the estate, the fiduciary may, subject to approval of the court, effect a compromise with any debtor or other obligor, or extend, renew, or in any other manner, modify the terms of any obligation owing to the estate. If the fidu-

ciary holds a mortgage, pledge, or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of such encumbered assets from the owner thereof in satisfaction of the indebtedness secured by such lien, if it appears for the best interests of the estate, and if the court shall so order.

Bar Committee Comment

Based on Section 126 of the Model Probate Code, and is in lieu of 635.17 (1962 Code). Substantially broadens the power of the fiduciary to compromise claims held by an estate and includes the compromise of any pending suit which the estate is prosecuting, such as a wrongful death action. It is to be noted that court approval is necessary.

§ 115. Compromise of claims against an estate

When a claim against an estate has been filed, or suit thereon is pending, the creditor and the fiduciary may, if it appears for the best interests of the estate, subject to approval of the court, compromise the claim, whether it is due or not due, absolute or contingent, liquidated or unliquidated.

Bar Committee Comment

Adapted from Section 147 of the Model Probate Code. It is to be noted that court approval is necessary.

§ 116. Abandonment of property

When any property is valueless, or is so encumbered, or in such condition, that it is of no benefit to the estate, the court may order the fiduciary to abandon it, or make such other disposition of it as may be suitable in the premises.

Bar Committee Comment

Adapted from Section 128 of the Model Probate Code. Facilitates the administration of estates by allowing the fiduciaries to eliminate doubtful or worthless property from his reports for accounting purposes. This section does not interfere with passage of title to such property under the provisions of this Code. See Minnesota statute (1941) Section 525.401.

§ 117. Encumbered assets

When any assets of the estate are encumbered by mortgage, pledge or other lien, the fiduciary 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, or he may purchase lands claimed or

contracted for by the decedent, if it appears to be for the best interests of the estate and if the court shall so order. The making of such payment shall not increase the share of the distributee entitled to such encumbered assets.

Cross reference: See section 423.

Bar Committee Comment

Based on Section 149 of the Model Probate Code and adapted from 635.72 (1962 Code). See section 278 for devise of encumbered property and section 423 for procedure for payment of secured claims in estates of decedents.

§ 118. Attorney appointed for persons not represented

At or before the hearing in any proceedings under this Code, where all the parties interested in the estate are required to be notified thereof, the court, in its discretion, may appoint some competent attorney to represent any interested person who has been served with notice and who is otherwise unrepresented

Bar Committee Comment

Adapted from 638.37 (1962 Code) but substantially reduced in length by omitting the specific designations of proceedings and parties.

§ 119. Order and authority thereunder

The order making the appointment of such attorney must specify the names of the parties, so far as known, for whom he is appointed, and he will be authorized to represent such parties in all such proceedings subsequent to his appointment.

Bar Committee Comment

Adapted from 638.38 (1962 Code).

§ 120. Compensation

Any attorney so appointed under the authority of section one hundred eighteen (118) shall be paid for his services out of the estate, as a part of the costs of administration, a fee to be fixed by the court, and upon distribution of the estate, the fee may be charged to the party represented by him.

Bar Committee Comment

Adapted from 638.39 (1962 Code).

§ 121. Substitution—division of fee

The court may substitute another attorney for the one first appointed under the authority of section one hundred eighteen (118),

in which case the fees must be divided in proportion to the services rendered.

Bar Committee Comment

Adapted from 638.40 (1962 Code).

§ 122. Settlement contested

The acts of the fiduciary without prior approval of court after notice, may be contested by any interested person at or before the entry of the order discharging the fiduciary.

Bar Committee Comment

Adapted from 638.10 (1962 Code). See also sections 36 and 37 of this Code. (45 Iowa Law Review, 198, *Finality of Intermediate Orders.*)

INVESTMENTS BY FIDUCIARIES

§ 123. Existing investments

Any fiduciary may, by and with the consent of the court having jurisdiction over such fiduciary or under permission of the will or other instrument creating the estate, continue to hold any investment originally received by him, and, also, any increase thereof. The fiduciary may also make investments which he may deem necessary to protect and safeguard investments already made.

Bar Committee Comment

The committee recommended to the legislature the enactment of the Model Prudent Man Investment Act. Thirty-nine jurisdictions recognize the prudent man rule as the proper philosophical concept underlying the making of trust investments. Twenty of these have enacted the model Act with or without minor variations, and six have the rule by judicial decisions. Four more allow full investment discretion to fiduciaries, but in language somewhat different from that of the model Act. The Iowa Supreme Court, *In re Wiley's Guardianship*, 239 Iowa 1225, 34 N.W. 593 (1948), held that a guardian may, with authority of the court, invest in investments found to be safe and advantageous although not included among those listed in 682.23 (1962 Code). It was originally intended by the committee that these sections would supersede 682.23 (1962 Code) insofar as the estates governed by this Code are concerned. The legislature decided not to enact the Prudent Man Investment Act. It is thereby noted that as a result of such decision the amendment to subsection 15 of section 682.23 (1962 Code) is ineffective at least until such time as the Model Prudent Man Investment rule, or such provisions on investments, are enacted.

Section 123 is adapted from 682.25 (1962 Code).

APPOINTMENT OF A NOMINEE BY BANKING INSTITUTIONS
ACTING IN A FIDUCIARY CAPACITY

§ 124. Investment may be held in name of nominee of bank or trust company

If court approval is first obtained, any state or national bank or trust company, when acting with the consent of its cofiduciary, if any, may cause any investment held in any such capacity to be registered and held in the name of a nominee or nominees of such bank or trust company. Such cofiduciary is hereby empowered to give such consent unless it is specifically forbidden in the instrument creating the fiduciary relationship. Such bank or trust company shall be liable for the acts of any such nominee with respect to any investment so registered.

Bar Committee Comment

Adapted from 532.21 (1962 Code). It is to be noted that this section, as did 532.21 (1962 Code) requires court accounting which is not required in the model Act. (The committee recommended that the requirement of court approval in these sections be deleted in order that the sections might conform with the uniform act, but the legislature decided to retain such requirement.)

§ 125. Records of bank or trust company to show ownership

The records of said bank or trust company shall at all times show the ownership of any such investment, which investment shall be in the possession and control of such bank or trust company and be kept separate and apart from the assets of such bank or trust company.

Bar Committee Comment

Comment. See Comment under section 124.

COMMON TRUST FUNDS

Bar Committee Comment

These sections are the Uniform Common Trust Fund Act now a part of the Iowa law, Chapter 533A (1962 Code) and are enacted as part of this Probate Code.

§ 126. Definitions

1. "Common trust fund" means a fund maintained by a bank or trust company exclusively for the collective investment and reinvest-

ment of moneys contributed thereto by the bank or trust company in its capacity as a fiduciary or cofiduciary.

2. "Fiduciary", for the purposes of sections one hundred twenty-six (126) to one hundred twenty-nine (129), inclusive, of this Code, means acting in any of the following capacities, namely: testamentary trustee appointed by any court, trustee under any written agreement, declaration or instrument of trust, executor, administrator, guardian, or conservator.

§ 127. Establishment of common trust funds

Any bank or trust company qualified to act as fiduciary in this state may establish common trust funds for the purpose of furnishing investments to itself as fiduciary, or to itself and others, as cofiduciaries; and may, as such fiduciary or cofiduciary, invest funds which it lawfully holds for investment in interests in such common trust funds, if such investment is not prohibited by the instrument, judgment, decree, or order creating such fiduciary relationship, and if, in the case of cofiduciaries, the bank or trust company procures the consent of its cofiduciaries to such investment. If the instrument creating the fiduciary relationship gives to the bank or trust company the exclusive right to select investments, the consent of the cofiduciary shall not be required.

§ 128. Court accountings

Unless ordered by a court of competent jurisdiction, the bank or trust company operating such common trust funds is not required to render a court accounting with regard to such funds; but it may, by application to the court, secure approval of such an accounting on such conditions as the court may establish.

When an accounting of a common trust fund is presented to a court for approval, the court shall assign a time and place for hearing, and order notice thereof by: (1) publication once each week for three consecutive weeks in a newspaper of general circulation, published in the county in which the bank or trust company operating the common trust fund is located, the first publication to be not less than twenty days prior to the date of hearing, and (2) sending by ordinary mail not less than fourteen days prior to the date of hearing, a copy of the notice prescribed to all beneficiaries of the trust participating in the common trust fund whose names are known to the bank or trust company from the records kept by it in the regular course of business in the administration of said trusts, directed to them at the addresses shown by such records, and (3) such further notice, if any, as the court may order.

§ 129. Uniformity of interpretation

Sections one hundred twenty-six (126), one hundred twenty-seven (127) and one hundred twenty-eight (128) shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact the common trust funds.

SIMPLIFICATION OF FIDUCIARY SECURITY TRANSFERS**Bar Committee Comment**

These sections are adapted from the Uniform Act for Simplification of Fiduciary Security Transfers. Definitions contained in the Uniform Act are deleted as they are considered unnecessary in view of the general definitions set forth in section 3 of this Code and the established general usage of the terms.

§ 130. Registration in the name of a fiduciary

A corporation or transfer agent registering a security in the name of a person who is a fiduciary or who is described as a fiduciary is not bound to inquire into the existence, extent, or correct description of the fiduciary relationship, and thereafter the corporation and its transfer agent may assume without inquiry that the newly registered owner continues to be the fiduciary until the corporation or transfer agent receives written notice that the fiduciary is no longer acting as such with respect to the particular security.

§ 131. Assignment by a fiduciary

Except as otherwise provided in this Code, a corporation or transfer agent making a transfer of a security pursuant to an assignment by a fiduciary:

1. May assume without inquiry that the assignment, even though to the fiduciary himself or to his nominee, is within his authority and capacity, and is not in breach of his fiduciary duties;
2. May assume without inquiry that the fiduciary has complied with any controlling instrument and with this Code, including any law requiring the fiduciary to obtain court approval of the transfer; and
3. Is not charged with notice of, and is not bound to obtain or examine, any court record, or any recorded or unrecorded document, relating to the fiduciary relationship or the assignment, even though the record or document is in its possession.

§ 132. Evidence of appointment or incumbency

A corporation or transfer agent making a transfer pursuant to an assignment by a fiduciary who is not the registered owner shall obtain the following evidence of appointment or incumbency:

1. In the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of that court or an officer thereof, and dated within sixty days before the transfer; or

2. In any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by the corporation or transfer agent to be responsible, or, in the absence of such a document or certificate, other evidence reasonably deemed by the corporation or transfer agent to be appropriate. Corporations and transfer agents may adopt standards with respect to evidence of appointment or incumbency under this subsection two (2), provided such standards are not manifestly unreasonable. Neither the corporation nor transfer agent is charged with notice of the contents of any document obtained pursuant to this subsection two (2), except to the extent that the contents relate directly to the appointment or incumbency.

§ 133. Adverse claims

1. A person asserting a claim of beneficial interest adverse to the transfer of a security pursuant to an assignment by a fiduciary may give the corporation or transfer agent written notice of the claim. The corporation or transfer agent is not put on notice unless the written notice identifies the claimant, the registered owner and the issue of which the security is a part, provides an address for communications directed to the claimant and is received before the transfer. Nothing in this Act relieves the corporation or transfer agent of any liability for making or refusing to make the transfer after it is put on notice, unless it proceeds in the manner authorized in subsection two (2).

2. As soon as practicable after the presentation of a security for transfer pursuant to an assignment by a fiduciary, a corporation or transfer agent which has received notice of a claim of beneficial interest adverse to the transfer may send notice of the presentation by certified or registered mail to the claimant at the address given by him. If the corporation or transfer agent so mails such a notice, it shall withhold the transfer for thirty days after the mailing, and shall then make the transfer unless restrained by a court order.

§ 134. Nonliability of corporation and transfer agent

A corporation or transfer agent incurs no liability to any person by making a transfer or otherwise acting in a manner authorized by sections one hundred thirty (130) through one hundred thirty-three (133).

§ 135. Nonliability of third persons

1. No person who participates in the acquisition, disposition, assignment or transfer of a security by or to a fiduciary, including a person who guarantees the signature of the fiduciary, is liable for participation in any breach of fiduciary duty by reason of failure to inquire whether the transaction involves such a breach unless it is shown that he acted with actual knowledge that the proceeds of the transaction were being, or were to be, used wrongfully for the individual benefit of the fiduciary, or that the transaction was otherwise in breach of duty.

2. If a corporation or transfer agent makes a transfer pursuant to an assignment by a fiduciary, a person who guaranteed the signature of the fiduciary is not liable on the guarantee to any person to whom the corporation or transfer agent by reason of sections one hundred thirty (130) through one hundred thirty-three (133) incurs no liability.

3. This section does not impose any liability upon the corporation or its transfer agent.

§ 136. Territorial application

1. The rights and duties of a corporation and its transfer agents in registering a security in the name of a fiduciary, or in making a transfer of a security pursuant to an assignment by a fiduciary, are governed by the law of the jurisdiction under whose laws the corporation is organized.

2. Sections one hundred thirty (130) through one hundred thirty-five (135) apply to the rights and duties of a person other than the corporation and its transfer agents with regard to acts and omissions in this state in connection with the acquisition, disposition, assignment or transfer of a security by or to a fiduciary, and of a person who guarantees in this state the signature of a fiduciary in connection with such a transaction.

§ 137. Tax obligations

Sections one hundred thirty (130) through one hundred thirty-six (136) do not affect any obligation of a corporation or transfer agent

with respect to estate, inheritance, succession, or other taxes imposed by the laws of this state.

§ 138. Uniformity of interpretation

Sections one hundred thirty (130) through one hundred thirty-seven (137) shall be so construed as to effectuate their general purpose to make uniform the transfers of securities by fiduciaries.

§§ 139 to 143, inclusive, reserved for future use

PART 5. POWERS OF FOREIGN FIDUCIARIES

§ 144. Mortgages and judgments

Judgments rendered by any court in the state of Iowa and mortgages belonging to an estate, trust, or to a person under conservatorship may, without prior order of court, be released, discharged or assigned, in whole or in part as to any particular property, and deeds may be executed in performance of real estate contracts entered into before the creation of the estate, trust, or conservatorship, by any foreign fiduciary, receiver, referee, assignee or commissioner, or by any other person acting in a fiduciary capacity appointed by a court of record of any foreign state or country, where a statement is filed by said fiduciary that no fiduciary, receiver, referee, assignee, or commissioner has been appointed and qualified in this state. Such release, satisfaction, discharge, assignment or deed may be made without any order of court in any manner or by any instrument which would be valid and effective if made by a like officer qualified under the law of this state.

Bar Committee Comment

Adapted from 633.53 (1962 Code). Enlarged to include performance of real estate contracts.

§ 145. Certificate of appointment and authority

Before any instrument executed by such foreign fiduciary or officer as authorized by section one hundred forty-four (144) shall be effective, a certificate executed by the court or clerk making the appointment, with seal attached, if such officer has a seal, shall be recorded. Such certificates shall state the name of the court making such appointment, the date of the appointment, and that such fiduciary or officer has not been discharged at the time of the execution of said instrument.

Bar Committee Comment

Adapted from 633.54 (1962 Code) to conform with section 148.

§ 146. Filing of certificate

The certificate aforesaid shall be filed for record:

1. In the case of judgments, in the office of the clerk in which the judgment is of record or in which it has been filed, and
2. In the case of mortgages and deeds executed in performance of real estate contracts, in the office of the appropriate county recorder.

Bar Committee Comment

Adapted from 633.55 (1962 Code) to conform with section 148.

§ 147. Record

Such certificate shall be recorded by the proper officer in the judgment records of the court in which the same appears of record, or in the appropriate chattel or real estate records, as the case may be.

Bar Committee Comment

Adapted from 633.56 (1962 Code).

§ 148. Maintaining actions

When there is no administration of an estate nor a petition therefor pending, in this state, a foreign fiduciary may maintain actions and proceedings in this state subject to the requirements and conditions imposed upon nonresident suitors generally.

Bar Committee Comment

New. Adapted from section 257 of the Model Probate Code.

§ 149. Filing of bond

At the time of commencing any action or proceeding in any court of this state, the foreign fiduciary shall file with the court an authenticated copy of his appointment, and of his official bond, if he has given a bond. If the court believes that the security furnished by him in the domiciliary administration is insufficient to cover the proceeds of the action or the proceeding, or for any other reason or cause, it may at any time order the action or proceeding stayed until sufficient security is furnished in the action or proceeding.

Bar Committee Comment

New. Adapted from section 258 of the Model Probate Code.

§§ 150 to 154, inclusive, reserved for future use

PART 6. LIABILITY OF FIDUCIARIES

§ 155. Self-dealing by fiduciary prohibited

No fiduciary shall in any manner deal with himself, except on order of court after notice to all interested persons, and shall derive no profit other than his distributive share in the estate from the sale or liquidation of any property belonging to the estate.

Bar Committee Comment

Codification of present case law governing fiduciaries, except that self-dealing is permitted under order of court after notice to all interested persons.

§ 156. Deposits by corporate fiduciaries

Section one hundred fifty-five (155) shall not be construed to prohibit a corporate fiduciary from making a deposit of estate funds in its own banking department.

Bar Committee Comment

New. Gives statutory approval to a practice normally followed by fiduciaries as a matter of routine.

§ 157. Liability for property of estate

Every fiduciary shall be liable for, and chargeable in his accounts with, all of the estate that comes into his possession at any time, including all the income therefrom; but he shall not be accountable for any debts due to the estate or other assets of the estate that remain uncollected without his fault. He shall not be entitled to profit from the increase in value of any asset of the estate, nor shall he be chargeable with loss resulting, without his fault, from the decrease in value or the destruction of any part of the estate, excepting, only to the extent of his pro rata share in such gain or loss as one of the distributees of the estate.

Bar Committee Comment

New. Adapted from section 172(a) of the Model Probate Code in lieu of 638.6 and 638.7 (1962 Code).

§ 158. Liability for property not a part of estate

Every fiduciary shall be chargeable in his accounts with property not a part of the estate that comes into his hands at any time, and shall be liable to the persons entitled thereto, if:

1. The property was received under a duty imposed upon him by law in the capacity of fiduciary; or
2. He has commingled such property with the assets of the estate.

Bar Committee Comment

New. Adapted from section 172(b) of the Model Probate Code.

§ 159. Judgment—execution

If judgment is rendered against a fiduciary for costs in any action prosecuted or defended by him in that capacity, execution shall be awarded against him as for his own debt, if it appears to the court that such action was prosecuted or defended without reasonable cause.

Bar Committee Comment

Adapted from 638.13 (1962 Code).

§ 160. Breach of duty

Every fiduciary shall be liable and chargeable in his accounts for neglect or unreasonable delay in collecting the credits or other assets of the estate or in selling, mortgaging or leasing the property of the estate; for neglect in paying over money or delivering property of the estate he shall have in his hands; for failure to account for or to close the estate within the time provided by this Code; for any loss to the estate arising from his embezzlement or commingling of the assets of the estate with other property; for loss to the estate through self-dealing; for any loss to the estate arising from wrongful acts or omissions of his cofiduciaries which he could have prevented by the exercise of ordinary care; and for any other negligent or willful act or nonfeasance in his administration of the estate by which loss to the estate arises.

Bar Committee Comment

Adapted from section 173(c) of the Model Probate Code.

§ 161. Examination of fiduciaries

The fiduciary may be examined under oath by the court upon any matter relating to his accounts.

Bar Committee Comment

Adapted from 638.5 (1962 Code).

§ 162. Penalty

In fixing the fees of any fiduciary, the court shall take into consideration any violation of this Code by the fiduciary, and may diminish the fee of such fiduciary to the extent the court may determine to be proper.

Bar Committee Comment

Adapted from 638.17 (1962 Code). See also section 86 "Reduction of Fees when Agents are employed" which points out to the court matters to be considered in fixing fees of a fiduciary.

§§ 163 to 167, inclusive, reserved for future use**PART 7. OATH AND BOND OF FIDUCIARIES****Bar Committee Comment**

General Comment: It is not possible to determine fairly in all cases the amount of the bond under rigid fixed rules. Sections 169 through 177 give the court discretion with respect to the amount of the bond. The determination of the amount of the bond should not be capricious, however. For the purpose of promoting a proper, uniform and consistent exercise of this discretion by the court, it is anticipated that the Supreme Court, or the district court in the exercise of its rule-making power, will promulgate rules particularizing the special circumstances to be considered in fixing the amount of each bond. These special circumstances, among others, might concern the character of the assets to be handled, the duration of the fiduciary's control of the assets, the fact that the fiduciary is the principal distributee, the fact that there are no debts, the fact that the assets might soon be exhausted, the fact that the assets might be converted into more liquid property, the fact that additional assets may soon be received or the value of existing assets increased by appreciation, growth or development.

Sections 168-171 replace 631.10, 632.7, 633.32, 633.43, 668.5, 668.6, 668.7 and 672.9 (1962 Code). 64.2 and 64.4 (1962 Code) will, however, continue to fix the particular conditions of the bond. 682.11 through 682.22 (1962 Code) will continue applicable to corporate sureties. 682.4 through 682.9 (1962 Code) will continue applicable to the manner of qualification of the sureties except as modified by Section 182 of this Code.

§ 168. Oath

Every fiduciary, before entering upon the duties of his office and within such time as the court or clerk directs, shall subscribe an oath that he will faithfully discharge the duties imposed upon him by law, according to the best of his ability.

§ 169. Bond

Except as herein otherwise provided, every fiduciary shall execute and file with the clerk a bond with sufficient surety or sureties, as

hereinafter provided. It shall be conditioned upon the faithful discharge of all the duties of his office according to law, including his duty to account. It shall be procured at the expense of the estate, if an approved surety company bond is furnished.

§ 170. Amount of bond

Except as herein otherwise provided, the court or the clerk shall fix the penalty of the bond in an amount equal to the value of the personal property of the estate, plus the estimated gross annual income of the estate during the period of administration.

§ 171. Approval by clerk

The bond shall not be deemed sufficient until it has been examined and approved by the clerk who shall endorse such approval thereon. In the event that the bond is not approved, the fiduciary shall, within such time as the court or the clerk directs, secure and file a bond with satisfactory surety or sureties.

§ 172. Will—waiver of bond

When, by the terms of the will, the testator has directed or expressed the desire that no bond shall be required, such direction or expression shall be construed to be a waiver of the posting of a bond by the fiduciary for all purposes, and no bond shall be required unless the court for good cause finds it proper to require one; if no bond is initially required, the court may nevertheless, for good cause, at any subsequent time require that a bond be given.

Bar Committee Comment

Adapted from 107(a) of the Model Probate Code; also perpetuates similar privilege for exempting executor from necessity for giving bond contained in 635.51 (1962 Code).

§ 173. Waiver of bond by distributees

If the distributees, in writing waive the statutory requirement that a bond shall be filed by the fiduciary with the clerk, and the court finds that the interests of the creditors will not thereby be prejudiced, no bond shall be required.

Bar Committee Comment

New.

§ 174. Guardians—bond

When the guardian appointed for a person is not the conservator of the property of that person, no bond shall be required of the guard-

ian, unless the court for good cause finds it proper to require one. If no bond is initially required, the court may, nevertheless, for good cause, at any subsequent time, require that a bond be given.

Bar Committee Comment

New.

§ 175. Waiver of bond by court

The court may, for good cause shown, exempt any fiduciary from giving bond, provided the court finds that the interests of creditors and distributees will not thereby be prejudiced.

Bar Committee Comment

See comment preceding section 168.

§ 176. Reduction of bond by deposit

Personal property of the estate may be deposited with a bank or trust company located in the state of Iowa upon such terms as may be prescribed by order of the court. The amount of the bond of the fiduciary may be then reduced as the court may determine.

Bar Committee Comment

Adapted from 107(c) of the Model Probate Code to replace 532.3 (1962 Code).

§ 177. Deposit in lieu of bond

The court may permit the fiduciary to deposit cash or other prescribed securities of his own in lieu of bond.

Bar Committee Comment

Adapted from 682.1 (1962 Code).

§ 178. Letters

Upon the filing of an oath of office and a bond, if any is required, the clerk shall issue letters under the seal of the court, giving the fiduciary the powers authorized by law.

Bar Committee Comment

633.45 (1962 Code) rewritten to provide for the issuance of letters upon the filing of the oath or of the oath and bond, if bond is required.

§ 179. Review by clerk when inventory is filed

At the time the inventory of the estate is filed, the clerk shall review the amount of bond, and report to the court as to any apparent insufficiency thereof.

Bar Committee Comment

New.

§ 180. Bond changed

The court may at any time require a new bond, or increase or decrease the amount of the penalty of the bond of any fiduciary, when good cause therefor appears.

Bar Committee Comment

Adapted from 633.44 (1962 Code) and section 115 of the Model Probate Code.

§ 181. Obligees of bond—joint and several liability

The bond of the fiduciary shall run to the use of all persons interested in the estate, and shall be for the security and benefit of such persons. The sureties shall be jointly and severally liable with the fiduciary, and with each other.

Bar Committee Comment

Adapted from section 109 of the Model Probate Code.

§ 182. Qualifications for sureties

Qualifications for sureties on probate bonds shall be the same as those provided by section six hundred eighty-two point four (682.4) or section six hundred eighty-two point fourteen (682.14) of the Code of Iowa, provided, however, that no attorney shall act as surety on any such bond.

Bar Committee Comment

New. Limitation on 682.4 (1962 Code).

§ 183. Authority for fiduciary and surety to enter into agreement for deposit of property or joint control

It shall be lawful for the fiduciary to agree with his surety for the deposit of any or all moneys and other property of the estate with a bank, safe deposit or trust company, authorized by law to do business

as such, or other depository approved by the court, if such deposit is otherwise proper, in such manner as to prevent the withdrawal of such moneys or other property without the written consent of the surety, or on order of the court made on such notice to the surety as the court may direct.

Bar Committee Comment

Adapted from section 108 of the Model Probate Code in lieu of 682.47 (1962 Code).

§ 184. Release of sureties before estate fully administered

1. **Release for cause.** For good cause, the court may, before the estate is fully administered, order the release of the sureties of the fiduciary and require the fiduciary to furnish a new bond.

2. **Extent of liability of original and new sureties.** The original sureties shall be liable for all breaches of the obligation of the bond up to the time of filing of the new bond and the approval thereof by the clerk, but not for acts and omissions of the fiduciary thereafter. The new bond shall bind the sureties thereon with respect to acts and omissions of the fiduciary from the time when the sureties on the original bond are no longer liable therefor.

Bar Committee Comment

Adapted from section 116(a) and (c) of the Model Probate Code.

§ 185. Insolvency of fiduciary

If, at any time, a fiduciary becomes insolvent after qualifying as such fiduciary, and after the maturity of a debt owing by such fiduciary to the estate, then the fiduciary and the sureties on his bond shall be liable to the estate for the indebtedness owing by the fiduciary to the estate. If the fiduciary is not solvent at any time after his qualification and after the maturity of the debt, the sureties on his bond shall not be liable to the estate for the indebtedness.

Bar Committee Comment

Codification of present Iowa case law. See McCarty 122 and Ladd & Boyd 59.

§ 186. Suit on bond

1. **Execution of bond deemed as appearance.** The execution and filing of the bond by a fiduciary, any other provisions of law notwithstanding, shall be deemed an appearance by the surety in the proceeding for the administration of the estate including all hearings with respect to the bond.

2. **Summary enforcement in proceedings for administration.** Subject to the provisions of subsection three (3) hereof, the court may, upon the breach of the obligation of the bond of a fiduciary, after notice to the obligors on the bond and to such other persons as the court directs, summarily determine the damages as a part of the proceeding for the administration of the estate, and by appropriate process enforce the collection thereof from those liable on the bond. Such determination and enforcement may be made by the court upon its own motion or upon application of a successor fiduciary, or of any other interested person. The court may hear the application at the time of settling the accounts of the defaulting fiduciary or at such other time as the court may direct. Damages shall be assessed on behalf of all interested persons and may be paid over to the successor or other non-defaulting fiduciary and distributed as other assets held by the fiduciary in his official capacity.

3. **Enforcement by separate suit.** If the estate is already distributed, or if, for any reason, the procedure to recover on the bond provided in subsection two (2) hereof, is inadequate, any interested person may bring a separate suit in a court of competent jurisdiction on his own behalf for damages suffered by him by reason of the default of the fiduciary.

4. **Bond not void upon first recovery.** The bond of the fiduciary shall not be void upon the first recovery, but may be proceeded upon from time to time until the whole penalty is exhausted.

5. **Denial of liability by surety—intervention.** If the court has already determined the liability of the fiduciary, the sureties shall not be permitted thereafter to deny such liability in any action or hearing to determine their liability; but the surety may intervene in any hearing to determine the liability of the fiduciary.

Bar Committee Comment

Adapted from section 118 of the Model Probate Code in lieu of 635.79 and 635.80 (1962 Code).

§ 187. Limitation of action on bond

No proceedings upon the bond of a fiduciary shall be brought subsequent to two years after the discharge of the fiduciary or six months after the discovery of fraud, whichever is later.

Bar Committee Comment

Adapted from section 119 of the Model Probate Code.

§§ 188 to 196, inclusive, reserved for future use

PART 8. COMPENSATION OF FIDUCIARIES
AND ATTORNEYS

§ 197. Compensation

Personal representatives shall be allowed such reasonable fees as may be determined by the court for services rendered, but not in excess of the following commissions upon the gross assets of the estate listed in the probate inventory for Iowa inheritance tax purposes, which shall be received as full compensation for all ordinary services:

For the first one thousand dollars, six percent;

For the overplus between one and five thousand dollars, four percent;

For all sums over five thousand dollars, two percent.

Cross reference: See sections 86 and 162.

Bar Committee Comment

Same as 638.23 (1962 Code) except for substitution of the words "personal representatives". See provisions in sections 86 and 166 qualifying the application of this section.

§ 198. Attorney fee

There shall also be allowed and taxed as part of the costs of administration of estates as an attorney's fee for the personal representative's attorney, such reasonable fee as may be determined by the court, for services rendered, but not in excess of the schedule of fees herein provided for personal representatives.

Bar Committee Comment

Same as 638.24 (1962 Code) except for substitution of the words "personal representative".

§ 199. Expenses and extraordinary services

Such further allowances as are just and reasonable may be made by the court to personal representatives and their attorneys for actual necessary and extraordinary expenses or services. Necessary and extraordinary services shall be construed to also include services in connection with real estate, tax matters, and litigated matters.

Bar Committee Comment

Same as 638.25 (1962 Code) except for addition of the words "litigated matters" which merely codify present law as announced

by Supreme Court decisions *In re Robinsons Estate*, 233 Iowa 613, 10 N.W.2d 43 (1943) and *In re Myers Estate*, 238 Iowa 113, 29 N.W.2d 426 (1947).

§ 200. Compensation of other fiduciaries and their attorneys

The court shall allow and fix from time to time the compensation for fiduciaries, other than personal representatives, and their attorneys for such services as they shall render as shown by an itemized claim or report made and filed setting forth what such services consist of during the period of time they continue to act in such capacities.

Bar Committee Comment

Same as 638.26 (1962 Code) except for addition of the words "fiduciaries other than personal representatives" in lieu of "guardians, trustees, and receivers".

§ 201. Court officers as fiduciaries

Judges, clerks and deputy clerks serving as fiduciaries shall not be allowed any compensation for services as such fiduciaries.

Bar Committee Comment

New.

§ 202. Affidavit relative to compensation

In no case shall the compensation of fiduciaries and their attorneys be allowed or paid until there shall have been filed with the clerk of the district court in which administration of the estate is pending an affidavit of the fiduciary, or attorney, as the case may be, stating that there is no contract, agreement, or arrangement, either oral or written, express or implied, contemplating any division of compensation for such services, or participation therein, directly or indirectly, by any other person, firm, or corporation with such fiduciary or attorney, unless it be with a regular and bona fide law partner, or with one jointly serving with them in the same capacity in relation to the estate in which such compensation is allowed, in which event the affidavit shall show such fact.

Bar Committee Comment

Same as 638.27 (1962 Code) except for substitution of the word "fiduciary" for "executors, administrators, guardians, trustees and receivers".

§ 203. Affidavit for corporate fiduciary

In any case where a corporation is acting as a fiduciary under and by virtue of the provisions of chapter five hundred thirty-two (532)

of the Code of Iowa, the affidavit required by section two hundred two (202) shall be executed and made by an officer of such corporation.

Bar Committee Comment

Adapted from 638.28 (1962 Code).

§ 204. Fees of deceased fiduciary

When a fiduciary dies, all fees to which his personal representative and his attorney are entitled shall be a charge against the estate assets until paid.

Bar Committee Comment

New.

§§ 205 to 209, inclusive, reserved for future use

DIVISION IV—INTESTATE SUCCESSION

PART 1. RULES OF INHERITANCE

§ 210. Rules of descent

The estate of a person dying intestate shall descend as provided in sections two hundred eleven (211) through two hundred twenty-six (226).

Bar Committee Comment

New.

§ 211. Share of surviving spouse if decedent left issue

If the decedent dies intestate leaving a surviving spouse and leaving issue, the surviving spouse shall receive the following share:

1. One-third in value of all the legal or equitable estates in real property possessed by the decedent at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the surviving spouse has made no relinquishment of his right.
2. All personal property that, at the time of death, was, in the hands of the decedent as the head of a family, exempt from execution.
3. One-third of all other personal property of the decedent which is not necessary for the payment of debts and charges.

4. If the property received by the surviving spouse under subsections one (1), two (2) and three (3) of this section is not equal in value to the sum of fifteen thousand dollars, then so much additional of the remaining real and personal property of the decedent that is subject to payment of debts and charges against the decedent's estate, after payment of such debts and charges, even to the extent of the whole of the net estate, as may be necessary to make the amount of fifteen thousand dollars.

Bar Committee Comment

Adapted from Sections 636.5, 636.1 and 635.7 (1962 Code). Paragraph 2 codifies existing case law. In re Jones Estate, 239 Iowa 1364, 35 N.W.2d 36 (1948). Paragraph 4 is new and provides that the surviving spouse shall take all of the estate up to the amount of fifteen thousand dollars even where there is issue. This provision is designed to give additional protection to the surviving spouse in small estates where there is no Will.

§ 212. Share of surviving spouse where decedent left no issue

If the decedent dies intestate leaving a surviving spouse and leaving no issue, the surviving spouse shall receive the following share:

1. One-third in value of all the legal or equitable estates in real property possessed by the decedent at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the surviving spouse has made no relinquishment of his right.
2. All personal property that, at the time of death, was in the hands of the decedent as the head of a family, exempt from execution.
3. One-third of all other personal property of the decedent which is not necessary for the payment of debts and charges.
4. If the property received by the surviving spouse under subsections one (1) and three (3) of this section is not equal in value to the sum of fifteen thousand dollars, then so much additional of the non-exempt real and personal property of the decedent remaining after payment of the debts and charges against the estate, as may be necessary (even to the extent of the entire net estate) to make the amount of fifteen thousand dollars.
5. So much additional of the remaining real and personal property belonging to the decedent as is necessary to make the entire share of the surviving spouse, including the property received under subsections one (1), three (3) and four (4) of this section, equal in value to the aforesaid sum of fifteen thousand dollars plus one-half of the

net value of the estate over and above the said sum of fifteen thousand dollars and the value of the exempt personal property.

Bar Committee Comment

Adapted from Section 636.32 (1962 Code) with no substantial change and also codifies existing case law. In re Jones Estate, 239 Iowa 1364, 35 N.W.2d 36 (1948). For disposition of other one-half under paragraph 5, see Section 219.

§ 213. Appraisal

Prior to the settlement of every intestate estate in which there is a surviving spouse, and in which appraisal has not been waived by the surviving spouse and all the heirs of the decedent, it shall be the duty of the court, upon application of the personal representative, the surviving spouse, or any of the heirs of the decedent, to appoint three competent disinterested appraisers to appraise such estate and to make their report to the court, at such time as the court may direct by order, unless the court, after notice, finds further appraisal unnecessary. In such appraisal, the homestead, if any, shall be appraised separately.

Bar Committee Comment

Adapted from Section 636.33 (1962 Code).

§ 214. Procedure determined by court

At the time it appoints the appraisers provided for by section two hundred thirteen (213), the court shall prescribe the kind of notice and the method of service thereof, whether by publication or otherwise.

Bar Committee Comment

Adapted from Section 636.34 (1962 Code).

§ 215. Notice

Such notice shall designate the names of the appraisers, the time and place of the appraisal, and the date on which the appraisers shall file with the clerk the report of their appraisal, directed to all persons interested in such appraisal.

Bar Committee Comment

Adapted from Section 636.35 (1962 Code).

§ 216. Objections

All persons interested in such report and having objections to it and the appraisal, shall file their objections within ten days after the date fixed in said notice for the filing of the report of such appraisal.

Bar Committee Comment

Adapted from Section 636.36 (1962 Code), except that the time for filing the objections is changed from the second day after the date fixed for filing the report to ten days after said date.

§ 217. Trial

Such objections, if any, shall be tried to the court as in equity, and the court shall enter a final order in the matter.

Bar Committee Comment

Adapted from Section 636.37 (1962 Code).

§ 218. Right of spouse to select property

After such proceedings, and after payment of debts and charges, the surviving spouse shall have the right to select from the property so appraised, at its appraised value thus fixed, property equal in value to the amount to which she is entitled under section two hundred eleven (211) or two hundred twelve (212) which selection shall be in writing filed with the clerk of court.

Bar Committee Comment

Adapted from Section 636.38 (1962 Code).

§ 219. Share of others than surviving spouse

The portion of the estate remaining after the payment of the debts and charges, and not distributed to the surviving spouse, as provided in this Code, or if there is no surviving spouse, then the remaining estate after payment of the debts and charges, shall descend and be distributed as follows:

1. In equal shares to the decedent's children, unless one or more of them is dead, in which case the issue of such deceased child shall inherit his or her share in accordance with the rules herein prescribed, in the same manner as though said child had outlived his parents.

2. If there is no person to take under subsection one (1) of this section, then to the surviving parents in equal shares; and if either

parent is dead, the portion that would have gone to such deceased parent, shall go to the survivor.

3. If there is no person to take under either subsection one (1) or two (2) of this section, the portion uninherited shall go to such persons as would have been entitled to take if the parents of the decedent had outlived the intestate and had died in possession and ownership of the portion thus falling to their share, and so on, through their ascending ancestors and their heirs.

4. If heirs are not thus found under subsection one(1), two (2) or three (3) of this section, the portion uninherited shall go to the spouse of the intestate; and if the spouse is dead, then to the heirs of the spouse, according to like rules. If such intestate has had more than one spouse who either died or survived in lawful wedlock, it shall be equally divided between the one who is living and the heirs of those who are dead, or between the heirs of all such heirs, taking per stirpes and not per capita.

5. If there is no person who qualifies under either subsection one (1), two (2), three (3) or four (4) of this section, the intestate property shall escheat to the state of Iowa.

Bar Committee Comment

Paragraph 1 adapted from Section 636.31 (1962 Code). Paragraph 2 adapted from Sections 636.32, 636.39 and 636.42 (1962 Code). Paragraph 4 adapted from Section 636.41 (1962 Code). It is the present policy of the law to completely divorce an adopted child from its natural parents. In line with this policy, Section 636.43 (1962 Code), should no longer be part of the law.

§ 220. Afterborn heirs—time of determining relationship

Descendants and other heirs of an intestate, begotten before his death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived him. With this exception, the intestate succession shall be determined by the relationships existing at the time of the death of the intestate.

Bar Committee Comment

Adapted from Section 25 of the Model Probate Code in part. This also codifies Iowa case law. *Rowland v. Rowland*, 4 G. Greene 183 (1853).

§ 221. Illegitimate child—inheritor from mother

Unless he has been adopted, an illegitimate child shall inherit from his natural mother, and she from the child.

Bar Committee Comment

Adapted from Section 636.45 (1962 Code), except that it does not apply to adopted children or the mother of an adopted child in accordance with modern trends with reference to adoption.

§ 222. Illegitimate child—inheritor from father

Unless he has been adopted, an illegitimate child shall inherit from his natural father when the paternity is proven during the father's lifetime, or when the child has been recognized by the father as his child; but such recognition must have been general and notorious, or else in writing. Under such circumstances, if the recognition has been mutual, and the child has not been adopted, the father may inherit from his illegitimate child.

Bar Committee Comment

Adapted from Section 636.46 (1962 Code), except it does not apply to adopted children or to the father of adopted children in accordance with modern trends with reference to adoption.

§ 223. Effect of adoption

A lawfully adopted person and his heirs shall inherit from and through the adoptive parents the same as a natural born child. The adoptive parents and their heirs shall inherit from and through the adopted person the same as though he were a natural born child.

Bar Committee Comment

Adapted from Section 600.6 (1962 Code).

§ 224. Advancements—in general

When the owner of property transfers it as an advancement to a person who would be an heir of such transferor were the latter to die at that time, and the transferor dies intestate, then the property thus advanced shall be counted toward the share of the transferee in the estate, (which for this purpose only shall be increased by the value of the advancement at the time the advancement was made). The transferee shall have no liability to the estate for such part, if any, of the advancement as may be in excess of his share in the estate as thus determined. Every gratuitous inter vivos transfer is presumed to be

an absolute gift, and not an advancement. Such presumption is rebuttable.

Bar Committee Comment

Adapted from Section 29(a) of the Model Probate Code in lieu of Section 636.44 (1962 Code). This section reverses the presumption established by Iowa case law that a voluntary conveyance from parent to child is presumed to be an advancement and the burden is on the person who claims it to be a gift to prove a gift. *Finch v. Garrett*, 102 Iowa 381, 71 N.W. 429 (1897); *Ellis v. Newell*, 120 Iowa 71, 94 N.W. 463 (1903).

§ 225. Valuation of advancements

An advancement under section two hundred twenty-four (224) shall be valued as of the time when the advancee came into possession or enjoyment or as of the date of the death of the intestate, whichever first occurs.

Bar Committee Comment

Adapted from Section 29(b) of the Model Probate Code in lieu of Section 636.44 (1962 Code) and changes present Iowa Law under which valuation of advancement is the value at the time of the intestate's death of the property advanced, viewed and judged on the assumption that the said property was, at the time of the intestate's death, in the same condition as when received as an advancement. *Calhoun v. Taylor*, 178 Iowa 56, 159 N.W. 600 (1916). C. f. *Eastwood v. Crane*, 125 Iowa 707, 101 N.W. 481 (1904); *Finch v. Garrett*, 102 Iowa 381, 71 N.W. 429 (1897).

§ 226. Death of advancee before intestate

If an advancee under section two hundred twenty-four (224) dies before the intestate, leaving an heir who takes from the intestate, the advancement shall be taken into account in the same manner as if it had been made directly to such heir. If such heir is entitled to a lesser share in the estate than the advancee would have been entitled to, had he survived the intestate, then the heir shall be charged with only such proportion of the advancement as the amount he would have inherited, had there been no advancement, bears to the amount which the advancee would have inherited, had there been no advancement.

Bar Committee Comment

Adapted from Section 29(c) of the Model Probate Code in lieu of Section 636.44 (1962 Code).

PART 2. PROCEDURE FOR OPENING ADMINISTRATION
OF INTESTATE ESTATES

§ 227. Administration granted

Where there is no will, administration shall be granted to any qualified person on the petition of:

1. The surviving spouse;
2. The heirs of the decedent;
3. Creditors of the decedent;
4. Other persons showing good grounds therefor.

Bar Committee Comment

Adapted from 633.39 (1962 Code).

§ 228. Time allowed

To file such petition, there shall be allowed, commencing with the death of the decedent:

1. To the surviving spouse, a period of twenty days;
2. To each other class in succession, a period of ten days.

The period allowed each class shall be advanced to the period allowed the preceding class if there is no member of such preceding class. Any member of any class may file such petition after the expiration of the period allowed to him if letters have not been issued prior thereto.

Bar Committee Comment

Adapted from 633.40 (1962 Code). Provides for shorter period of priority for persons other than surviving spouse and provides explicitly for acceleration if there are no members of the preceding class or classes.

§ 229. Petition for administration of an intestate estate

The petition for administration of an intestate estate shall contain the following:

1. The name, domicile and date of death of the decedent.
2. If the decedent was domiciled outside the state at the time of his death, a statement that he had property within the county in which the petition is filed, or any other basis for jurisdiction in such county.
3. The name and address of the surviving spouse, if any, and the name and address of each heir so far as known to the petitioner.

4. The estimated value of the property belonging to the decedent that might be readily convertible into money.

Bar Committee Comment

New. Data needed to establish jurisdiction, information as to who are the beneficiaries, and a basis for determination of the amount of bond, if any, which should be required

§ 230. Notice in intestate estates

In intestate matters, the administrator shall, as soon as letters are issued, cause to be published once each week for two consecutive weeks in a daily or weekly newspaper of general circulation published in the county in which the estate is pending, a notice of his appointment which shall be in substantially the following form:

Notice of Appointment of Administrator

In the District Court of Iowa
 in and for _____ County.
 In the Estate of _____ Probate No. _____
 Deceased.

You are hereby notified that all persons indebted to said estate are requested to make immediate payment to the undersigned, and creditors having claims against said estate shall file them with the clerk of the above named district court, as provided by law, duly authenticated, for allowance, and unless so filed within six months from the second publication of this notice (unless otherwise allowed or paid) such claim shall thereafter be forever barred.

Dated this _____ day of _____, 19_____.

 Administrator of said estate

 Address

 Attorney for said administrator

 Address

Date of second publication
 _____ day of _____, 19_____.

(Date to be inserted by publisher)

Bar Committee Comment

Adapted in part from 633.46 (1962 Code). Under new procedure, this notice establishes the key time in intestate estates for filing claims and all other matters requiring a starting point to measure the time during which things must be done. See section 303 for notice in testate estate and section 304 for notice where no administration is had in testate estates.

§§ 231 to 235, inclusive, reserved for future use

DIVISION V—RIGHTS OF SURVIVING SPOUSE**PART 1. RIGHT TO TAKE AGAINST THE WILL****§ 236. Right of surviving spouse to elect to take against will**

When a married person dies testate as to any part of his estate, the surviving spouse shall have the right to elect to take against the will under the provisions of sections two hundred thirty-seven (237) through two hundred forty-six (246).

Bar Committee Comment

Explicit recognition of the right of the surviving spouse to take against the will.

§ 237. Presumption that surviving spouse elects to take under will

Where a voluntary election to take or refuse to take under a will has not been filed by a surviving spouse within sixty days from the date the will of the decedent has been admitted to probate, and the surviving spouse is not the executor of such will, it shall be the duty of the executor to cause to be served a written notice upon the surviving spouse in the manner required for service of an original notice, advising the surviving spouse that the will of such decedent has been admitted to probate, stating the name of the court where the will was admitted and the date when the will was admitted to probate, and notifying such spouse that unless within four months after the completed service of such notice, he files an election in writing with the clerk of such court refusing to take under the provisions of such will, such surviving spouse shall take under the provisions of the will, provided, however, that if within such period of six months an affidavit is filed setting forth that such surviving spouse is incapable to make

such election, the court shall determine whether there shall be an election to take against the will in accordance with section two hundred thirty-eight (238); provided further, that the court on application may, prior to the expiration of such period of six months, for cause shown, enter an order extending the time for making such election. If such surviving spouse shall be the executor of the will and fails, within six months after the will is admitted to probate, to file with the clerk of the court an election to refuse to take under the provisions of the will of the deceased, it shall be conclusively presumed that such survivor consents to the provisions of the will and elects to take thereunder.

Bar Committee Comment

Adapted from 636.25 (1962 Code). Provides procedure to be followed to compel the surviving spouse to elect to take under the will where the surviving spouse is not the executor. Provision is made to safeguard those rare instances when the spouse is incapable of making the election or other good reason exists for extending the time for making the election. For those occasional instances where the surviving spouse dies before making the election, see section 242 and comment thereunder.

§ 238. Share of surviving spouse who elects to take against will

If the surviving spouse elects to take against the will, the share of such surviving spouse will be:

1. One-third in value of all the legal or equitable estates in real property possessed by the decedent at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the surviving spouse has made no relinquishment of his right.
2. All personal property that, at the time of death, was in the hands of the decedent as the head of a family, exempt from execution.
3. One-third of all other personal property of the decedent that is not necessary for the payment of debts and charges.

Bar Committee Comment

Adapted from 635.7, 636.1 and 636.5 (1962 Code), and defines the share of the surviving spouse who elects to take against the will. The designation "surviving spouse" is used in all instances and recognizes that the wife may be "head of a family".

§ 239. Share to embrace homestead

The share of the surviving spouse in such real estate shall be set off in such manner as to include the ordinary dwelling house given by law to the homestead, or so much thereof as will be equal to the share allotted to him by section two hundred thirty-eight (238) unless he

prefers a different arrangement; but no such different arrangement shall be permitted unless there be sufficient property remaining to pay the claims and charges against the decedent's estate.

Bar Committee Comment

Adapted from 636.7 (1962 Code).

§ 240. Election to occupy homestead

In intestate estates, or where the surviving spouse elects to take against the will, the surviving spouse may, in lieu of his share in the real property possessed by the decedent at any time during their marriage which has not been sold on execution or other judicial sale, and to which the surviving spouse has made no relinquishment of his right, elect to occupy the homestead. Such election shall be made and entered of record as provided in section two hundred forty-five (245). In making such election, the surviving spouse shall have all the rights as to personal property provided in subsections two (2) and three (3) of section two hundred thirty-eight (238). In case of failure to make such election, the right to occupy the homestead shall be waived.

Bar Committee Comment

Adapted from 636.27 and 636.28 (1962 Code).

§ 241. Time for election to occupy homestead

In case the surviving spouse does not make an election to occupy the homestead and file it with the clerk within six months from the date of the second publication of the notice to creditors, it shall be conclusively presumed that such surviving spouse waives the right to make such election. The court on application may, prior to the expiration of such period of six months, for cause shown, enter an order extending the time for making such election.

Bar Committee Comment

New. Notice required by 636.27 (1962 Code) is eliminated since failure to affirmatively elect right of homestead is a waiver of such right.

§ 242. Rights of election personal to surviving spouse

The right of the surviving spouse to elect to take against the will and the right of the surviving spouse to occupy the homestead are personal. They are not transferable, and cannot be exercised for him subsequent to his death. If the surviving spouse dies prior to filing

an election to take against the will, it shall be conclusively presumed that the surviving spouse takes under the provisions of the will.

Bar Committee Comment

New. Adapted from section 37 of the Model Probate Code. Since these rights are for the special protection of the surviving spouse, no need is served if the surviving spouse dies before exercising such rights.

§ 243. Filing elections

The election to take against the will and the election to occupy the homestead shall be filed in the office of the clerk.

Bar Committee Comment

New.

§ 244. Incompetent spouse—election by court

In case an affidavit is filed that the surviving spouse is incapable of making an election to take against the will, or to elect to occupy the homestead, the court shall fix a time and place of hearing on the matter, and cause a notice thereof to be served upon said surviving spouse in such manner and for such time as the court may direct. At the hearing, a guardian ad litem shall be appointed to represent such spouse, and the court shall enter such orders as it may deem to be for the best interests of such person.

Bar Committee Comment

Adapted from 636.29 (1962 Code) to protect incompetent surviving spouse.

§ 245. Record of election

The elections of the surviving spouse under section two hundred thirty-six (236), two hundred forty (240) or two hundred forty-four (244) shall be entered on the proper records of the court.

Bar Committee Comment

Adapted from 636.23 (1962 Code).

§ 246. Election not subject to change

An election by or on behalf of a surviving spouse to take the share provided in either section two hundred thirty-six (236) or two hundred forty (240) or two hundred forty-four (244) hereof once made shall

be binding and shall not be subject to change except for such causes as would justify an equitable decree for the rescission of a deed.

Bar Committee Comment

Adapted from section 38 of the Model Probate Code.

PART 2. PROCEDURE FOR SETTING OFF SHARE

§ 247. Setting off share of surviving spouse when electing to take against the will—time limit

The share of the surviving spouse under section two hundred thirty-six (236) may be set off by the mutual consent of all parties in interest, or by referees appointed by the court. An application to have it set off by referees shall be made in writing within six months after the second publication of notice of the probate of the will, or within one month after the election to take against the will is filed with the clerk, whichever is the longer. The application must describe the land in which the share is claimed, and pray for the appointment of referees to set it off.

Bar Committee Comment

Adapted from 636.9 (1962 Code).

§ 248. Referee—notice

In the absence of mutual consent to the appointment of referees, the court shall fix a time and place for hearing upon such application and of the fact that referees will be appointed if such application is granted, and shall prescribe the time and manner of the service of notice of the hearing.

Bar Committee Comment

Adapted from 636.10 (1962 Code).

§ 249. Mode of setting off share in real estate

The referees may employ a surveyor, and may cause the shares in real estate to be set off by legally sufficient land descriptions. They shall make a report of their proceedings to the court as early as reasonably possible.

Bar Committee Comment

Adapted from 636.11 (1962 Code).

§ 250. Report—delinquency

The court may require a report by such a time as it deems reasonable. If the referees fail to obey this or any other of its orders, the court may discharge them and appoint others in their stead, and impose upon the first referees the payment of all costs previously made, unless they show good cause against it.

Bar Committee Comment

Adapted from 636.12 (1962 Code).

§ 251. Confirmation—new reference

The court may set the report for hearing and prescribe the notice to be given to interested parties. The court may confirm the report, or may set it aside and refer the matter to the same or other referees, at its discretion.

Bar Committee Comment

Adapted from 636.13 (1962 Code).

§ 252. Confirmation conclusive—possession

An order confirming a report of the referees shall be binding and conclusive unless appealed from within thirty days, and the surviving spouse may bring an action to obtain possession of the land set apart to him.

Bar Committee Comment

Adapted from 636.14 (1962 Code).

§ 253. Right contested

Nothing in sections two hundred forty-seven (247) through two hundred fifty-two (252) shall prevent any person interested from controverting the right of the surviving spouse to the share thus set apart before confirmation of the report of the referees.

Bar Committee Comment

Adapted from 636.15 (1962 Code).

§ 254. Sale—division of proceeds

If it appears to the court, upon application of the personal representative, the surviving spouse, or the report of the referee, that the property, or any part of it, cannot be advantageously divided, the

court may order the whole, or any part of such property, sold, and the share of the surviving spouse in the proceeds paid over to him.

Bar Committee Comment

This is an enlargement of section 636.16 (1962 Code) providing for setting off the share of the surviving spouse and in effect authorizes an alternative procedure for setting off the share without the necessity of appointment of referee.

§ 255. Purchase of new homestead

In case the homestead is sold, the surviving spouse may use any or all of her share to procure a homestead which shall be exempt from liability for all debts from which the former homestead would have been exempt.

Bar Committee Comment

Adapted from 636.17 (1962 Code).

§ 256. Security to avoid sale

No sale shall be made under section two hundred fifty-four (254) if anyone interested gives security to the satisfaction of the court, conditioned to pay the surviving spouse the appraised value of the share with seven percent interest on the same, within such reasonable time as the court may fix, not exceeding one year.

Bar Committee Comment

Adapted from 636.18 (1962 Code). Interest changed from "eight percent" to "seven percent".

§ 257. Security by surviving spouse

If no such arrangement is made, the surviving spouse may keep the property by giving like security to pay the claims of all others interested upon like terms.

Bar Committee Comment

Same as 636.19 (1962 Code).

§ 258. Sale prohibited

Such sale under section two hundred fifty-four (254) shall not be ordered so long as those in interest shall express a contrary desire and agree upon some mode of sharing and dividing the rents, profits, or

use thereof, or shall consent that the court shall order the division of such rents, profits or use.

Bar Committee Comment

Adapted from 636.20 (1962 Code).

§§ 259 to 263, inclusive, reserved for future use

DIVISION VI—WILLS

PART 1. GENERAL PROVISIONS RELATING TO WILLS

§ 264. Disposal of property by will

Subject to the rights of the surviving spouse to elect to take against the will as provided by section two hundred thirty-six (236), any person of full age and sound mind may dispose by will of all his property, except sufficient to pay the debts and charges against his estate.

Bar Committee Comment

Revision of 633.1 (1962 Code)

§ 265. Procedure prescribed by will

When the interests of creditors will not thereby be prejudiced, a testator may prescribe the entire manner in which his estate shall be administered, and, also, the manner in which his affairs shall be conducted until his estate is finally settled.

Cross reference: Section 172.

Bar Committee Comment

Adapted from 635.51 (1962 Code).

§ 266. Limitation on disposal by will

If the total of the devises in the decedent's will to corporations organized under the chapter relating to corporations not for profit, to foreign corporations of a similar character, to unincorporated associations of a similar character, or to a trustee for the use and benefit of any such organization is in excess of one-fourth of the testator's estate valued as of the date of death after the payment of debts and

charges, then the surviving spouse, any child, child of a deceased child or parent of the decedent shall have the right to make an election as follows:

1. The amount by which such devise described in this section exceeds such one-fourth of the testator's estate shall be first determined.

2. Each of such persons shall have the right to elect to receive the portion of such excess to which he would have been entitled had such excess been intestate property, provided, that in no event shall he receive in the aggregate under the will and as the result of such election, an amount greater than he would have received had the decedent died intestate.

3. Such election shall be made in writing by said person and filed with the clerk within six months after the second publication of the notice of appointment of the personal representative, unless the time is extended by order of court, or unless an affidavit is filed under the provisions of subsection four (4) hereof.

4. In case an affidavit is filed within six months after the second publication of the notice of appointment of the personal representative that the said surviving spouse, child, child of a deceased child or parent is under legal disability or is otherwise incapable of making the election provided for in this section, the court shall fix a time and place of hearing on the matter and cause a notice thereof to be served upon said person in such manner and for such time as the court may determine. At the hearing, a guardian ad litem shall be appointed to represent such person, and the court shall enter such orders as it may deem to be for the best interests of such person.

5. Any portion of the excess determined under the provisions of this section which is not distributed under an election provided in this section, shall be distributed under the will of the decedent the same as if no election had been made under subsection two (2) by anyone.

6. The right of election as provided for in this section is personal, is not transferable, and cannot be exercised for him subsequent to his death.

7. All elections hereunder shall be entered upon the records of the court, shall be binding, and shall not be subject to change except for such cause as would justify an equitable decree for the rescission of a deed.

8. In the event that there is more than one devise affected by the election provided for in this section, any reduction shall be made ratably in the absence of express testamentary intent to the contrary.

Bar Committee Comment

Revision of 633.3 (1962 Code). Limitation on charitable bequests effective only when imposed by persons adversely affected and only for the benefit of those persons imposing the limitation. Provides for ratable reduction of charitable bequests where limitation is imposed.

§ 267. Children born or adopted after execution of will

When a testator fails to provide in his will for any of his children born to or adopted by him after the making of his last will, such child, whether born before or after the testator's death, shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will that such omission was intentional.

Bar Committee Comment

Adapted from section 41a Model Probate Code in lieu of 633.13 (1962 Code).

§ 268. Presumption attending devise to spouse

Where the testator's spouse is named as a devisee in a will, it shall be presumed, unless the intent is clear and explicit to the contrary, and except as provided in section two hundred seventy-two (272), that such devise is in lieu of the intestate share and homestead rights of the surviving spouse.

Bar Committee Comment

Adapted from 633.2 (1962 Code).

§ 269. After acquired property

Any property acquired by the testator after the making of his will shall pass thereby, and in like manner as if title thereto were vested in him at the time of making the will, unless the intent is clear and explicit to the contrary.

Bar Committee Comment

Adapted from section 56 of the Model Probate Code, in lieu of 633.4 (1962 Code).

§ 270. Contractual or mutual wills

No will shall be construed to be contractual or mutual, unless in such will the testator shall expressly state his intent that such will shall be so construed.

Bar Committee Comment

New. Codification of recent Iowa case law to avoid inadvertent mutual wills. The mere fact that a husband and wife make wills at the same time with essentially the same provisions does not usually indicate an intention to make a binding contract so that the survivor may not ever change his will. Those who desire mutual wills are required to say so since theirs is the unusual rather than the usual intent.

§ 271. Effect of divorce

If after making a will the testator is divorced, all provisions in the will in favor of the testator's spouse so divorced are thereby revoked.

Bar Committee Comment

New. Adapted from section 53 of the Model Probate Code and expresses usual intent under such circumstances.

§ 272. Partial intestacy

If part but not all of the estate of a decedent is validly disposed of by will, the part not disposed of by will shall be distributed as provided herein for intestate estates. If the testator left a surviving spouse, and the spouse does not elect to take against the will, such spouse shall receive, in addition to the property given to him by the will, one-third of the intestate property, and that one-third shall be subject to the payment of its proportionate share of debts and charges against the estate.

Bar Committee Comment

New. Adapted from section 23 of the Model Probate Code. Codification of Iowa case law.

§ 273. Antilapse statute

If a devisee die before the testator, his heirs shall inherit the property devised to him, unless from the terms of the will, the intent is clear and explicit to the contrary.

Bar Committee Comment

Adapted from 633.16 (1962 Code).

§ 274. Exception to antilapse statute

The devise to a spouse of the testator, where the spouse does not survive the testator, shall lapse notwithstanding the provisions of section

two hundred seventy-three (273), unless from the terms of the will, the intent is clear and explicit to the contrary.

Bar Committee Comment

New. Testators ordinarily do not intend property to pass to heirs of predeceased spouses, unless such heirs are the same as those of the testators. Those who so intend may do so by an express provision in their wills.

§ 275. Testamentary additions to trusts

A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee of a trust established, or to be established, by the testator, or by the testator and some other person or persons, or by some other person or persons, (including a funded or unfunded life insurance trust, although the trustor has reserved some or all rights of ownership of the insurance contracts) if the trust is identified in the testator's will, and if its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will, or in the valid last will of a person who has predeceased the testator (regardless of the existence, size, or character of the corpus of the trust). The devise or bequest shall not be invalid because the trust is amendable or revocable, or both, or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised or bequeathed: (1) shall not be deemed to be held under a testamentary trust of the testator, but shall become a part of the trust to which it is given; and, (2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator (regardless of whether any such amendment was made before or after the execution of the testator's will), and, if the testator's will so provides, including any amendments to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse.

Bar Committee Comment

New. Adapted from the "Uniform Testamentary Additions to Trust Act."

§ 276. Effect on prior wills

Section two hundred seventy-five (275) shall not invalidate any devise or bequest made by a will executed prior to the effective date of this Code.

Bar Committee Comment

New. Adapted from the "Uniform Testamentary Additions to Trust Act".

§ 277. Uniformity of interpretation

Section two hundred seventy-five (275) shall be so construed as to effectuate its general purpose to make uniform the law of those states which have adopted a similar provision.

Bar Committee Comment

New. Adapted from the "Uniform Testamentary Additions to Trust Act". Provides for uniformity of construction.

§ 278. Devise of encumbered property

When any property subject to a mortgage or other lien is specifically devised, the devisee shall take such property so devised subject to such mortgage or other lien, unless the will provides expressly or by necessary implication that such mortgage or other lien be otherwise paid. If there is a testamentary direction to discharge such mortgage or other lien, the rules of abatement specified in section four hundred thirty-six (436) of this Code shall be applied. The term "mortgage or other lien" as used in this section shall not include a pledge of personal property.

Bar Committee Comment

New. Adapted from section 189 of the Model Probate Code reverses present Iowa law. If a testator intends that other assets be used to remove mortgages or other liens from property specifically devised, he should be required to say so.

PART 2. EXECUTION AND REVOCATION

§ 279. Formal execution

All wills and codicils, except as provided in section two hundred eighty-three (283), to be valid, must be in writing, signed by the testator, or by some person in his presence and by his express direction writing his name thereto, and declared by the testator to be his will, and witnessed, at his request, by two competent persons who signed as wit-

nesses in the presence of the testator and in the presence of each other; provided, however, that the validity of the execution of any will or instrument which was executed prior to the effective date of this Code shall be determined by the law in effect immediately prior to the effective date of this Code.

Bar Committee Comment

An expansion of the present requirements of 633.7 (1962 Code) by adding the requirement "declared by the testator to be his will" and the requirement of witnesses signing "who signed as witnesses in the presence of the testator and in the presence of each other". The extension of the statute conforms more nearly to the general practice in Iowa and changes the rule as set forth in the case of *In re Estate of Bybee*, 179 Iowa 1089, 160 N.W. 900, and the case of *In re Estate of Hagemeyer*, 244 Iowa 703, 58 N.W.2d 593.

§ 280. Competency of witnesses

Any person who is sixteen years of age, or older, and who is competent to be a witness generally in this state, may act as an attesting witness to a will.

Bar Committee Comment

New. Adapted from section 46(a) of the Model Probate Code which provides that any person competent to be a witness generally in this state may be an attesting witness to a will. The additional limitation of sixteen years of age was added to fix a minimal age heretofore lacking.

§ 281. Interest of witnesses

No will is invalidated because attested by an interested witness; but any interested witness shall, unless the will is also attested by two competent and disinterested witnesses, forfeit so much of the provisions therein made for him as in the aggregate exceeds in value, as of the date of the decedent's death, that which he would have received had the testator died intestate. No attesting witness is interested unless he is devised or bequeathed some portion of the testator's estate.

Bar Committee Comment

This is a preservation of the intent of 633.9 (1962 Code). The language used is an adaption of section 46(b) and (c) of the Model Probate Code. This adaption is for the purpose of clarity.

§ 282. Defect cured by codicil

If a codicil to a defectively executed will is duly executed, and such will is clearly identified in said codicil, the will and the codicil shall be

considered as one instrument and the execution of both shall be deemed sufficient.

Bar Committee Comment

Adapted from 633.8 (1962 Code).

§ 283. Will executed in foreign state or country

A will executed outside this state, in the mode prescribed by the law, either of the place where executed or of the testator's domicile, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state, provided said will is in writing and subscribed by the testator.

Bar Committee Comment

Adapted from 633.49 (1962 Code).

§ 284. Revocation—cancellation—revival

A will can be revoked in whole or in part only by being canceled or destroyed by the act or direction of the testator, with the intention of revoking it, or by the execution of a subsequent will. When done by cancellation, the revocation must be witnessed in the same manner as the making of a new will. No will, nor any part thereof, which shall be in any manner revoked, or which shall be or become invalid, can be revived otherwise than by a re-execution thereof, or by the execution of another will or codicil in which the revoked or invalid will, or part thereof, is incorporated by reference.

Bar Committee Comment

This is a preservation of the intent of 633.10 (1962 Code) except that the last sentence is taken directly from section 55 of the Model Probate Code to prevent the inadvertent revival of a will which the testator did not actually desire.

PART 3. CUSTODY

§ 285. Custodian—filing—penalty

After being informed of the death of the testator, the person having custody of his will shall deliver it to the court having jurisdiction of his estate. Every person who willfully refuses or fails to deliver a will after being ordered by the court to do so shall be guilty of contempt of court. He shall also be liable to any person aggrieved for the damages which may be sustained by such refusal or failure.

Bar Committee Comment

A substitution for 633.17 (1962 Code) and an adaption from section 63 of the Model Probate Code. The material change being in elimination of the criminal penalties provided in 633.17 (1962 Code). The custodian who refuses to deliver the will may be adjudged to be in contempt, and the court has great latitude in providing for the punishment for contempt.

§ 286. Deposit of will with clerk

The clerk shall maintain a file for the safekeeping of wills. There shall be placed therein wills deposited with the clerk by living testators or by persons on their behalf, and wills of deceased testators not accompanied by petitions for the probate thereof, when deposited with the clerk by persons having custody thereof as provided in section two hundred eighty-five (285) of this Code.

Bar Committee Comment

This section, together with sections 287, 288 and 289 of this Code, replace 633.11 (1962 Code) and expands 633.11 (1962 Code) to provide more particularity in the handling of wills and to achieve greater uniformity in the will files of clerks throughout the state.

Cross reference: Sections 643 through 646 relating to disposal of wills by conservators.

§ 287. Manner of deposit

Every such will shall be enclosed in a sealed wrapper. The clerk shall endorse thereon the name of the testator, the name of the depositor, the date of deposit, and, if provided, the name of the person to be notified of the deposit of such will upon the death of the testator. The clerk shall hold such will until disposed of as provided in section two hundred eighty-eight (288) or two hundred eighty-nine (289).

Bar Committee Comment

Adapted from section 58(b) of the Model Probate Code. See comment on section 286.

§ 288. Delivery by clerk during lifetime of testator

During the lifetime of the testator, such will shall be delivered only to him, or to some person authorized by him by an order in writing duly acknowledged.

Bar Committee Comment

This is an adaption of section 58(c) of the Model Probate Code.

§ 289. **Delivery by clerk after death of testator**

After being informed of the death of a testator, the clerk shall notify the person, if any, named in the endorsement on the wrapper of said will. If no petition for the probate thereof has been filed within thirty days after the death of the testator, it shall be publicly opened, and the court shall make such orders as it deems appropriate for the disposition of said will. The clerk shall notify the executor named therein and such other persons as the court shall designate of such action. If the proper venue is in another court, the clerk, upon request, shall transmit such will to such court, but before such transmission, he shall make a true copy thereof and retain the same in his files.

Bar Committee Comment

Adapted from section 59(d) of the Model Probate Code.

PART 4. PROCEDURE FOR PROBATE OF WILLS

Bar Committee Comment

General Comment: The committee recommended that wills be admitted to probate without notice. This is the procedure in England and numerous states in this country. Such procedure speeds up administration of estates. At the same time, there is adequate protection for persons desiring to contest the will. However, the legislature did not accept this approach. The procedure adopted in the statute as enacted provides a uniform state-wide system for probate of wills. It definitely requires notice by publication instead of posting.

Sections 290-295 are all new.

§ 290. **Petition for probate of will**

At the time the will of a decedent is filed with the clerk, or thereafter, any interested person may file a verified petition in the district court of the proper county:

1. To have the will admitted to probate;
2. For the appointment of the executor.

A petition for probate may be combined with a petition for appointment of the executor, and any person interested in either the probate of a will or in the appointment of the executor, may petition for both.

§ 291. **Contents of petition**

A petition for probate of a will shall state:

1. The name, domicile, and date of death of the decedent.

2. If the decedent was not domiciled in the state at the time of his death, then, that he had property within the county in which the petition is filed, or any other basis for jurisdiction in such county.

§ 292. Petition for appointment of executor

A petition for the appointment of an executor shall state the name and address of the person nominated or proposed as executor, and that such person is qualified to act as executor. If the person proposed in said petition is not the person nominated in the will, the petition shall state the reason why the person nominated is not proposed as executor. Unless bond is waived in the will, the petition shall state the estimated value of the property belonging to the decedent which might be readily convertible into money.

§ 293. Hearing upon petition

Upon the filing of a petition for probate of a will, the date for proving it shall be fixed by the court or the clerk, and the clerk shall give notice addressed TO ALL WHOM IT MAY CONCERN, signed by him, of such time fixed, by one publication in a daily or weekly newspaper published in the county where the will is filed, the publication to be at least seven days prior to the time fixed for such hearing.

§ 294. Order of preference for appointment of executor

Letters testamentary may be granted to one or more persons found to be qualified. Preference for appointment shall be in the following order:

1. The person designated in the will;
2. Any beneficiary named in the will, or a person nominated by the beneficiaries;
3. Any creditor of the deceased, or a person nominated by such creditor;
4. Such other person as the court may find to be qualified.

§ 295. Nonresident executors of resident decedents

A nonresident of this state, named as executor in the will of a resident of this state, may, upon application, be appointed executor after said will has been admitted to probate in this state, provided a resident executor be appointed to serve with the nonresident executor named in said will, except that the court for good cause shown may appoint the

nonresident executor to serve alone without the appointment of a resident executor.

§ 296. Testimony of witnesses

The proof may be made by the oral or written testimony of one or more of the subscribing witnesses to the will. If such testimony is in writing, it shall be substantially in the following form executed and sworn to after the death of the decedent:

In the District Court of Iowa

In and for _____ County

In the Matter of the Estate of

Probate No. _____

_____ Deceased

Testimony of Subscribing

State of _____ }
 _____ County } ss

Witness on Probate of Will.

I, _____, being first duly sworn, state:

I reside in the County of _____, State of _____; I knew the testator on the ____ day of _____, 19____, the date of the instrument, the original or exact reproduction of which is attached hereto, now shown to me, and purporting to be the last will and testament of the said _____, deceased; I am one of the subscribing witnesses to said instrument; at the said date of said instrument, I knew _____, the other subscribing witness; that said instrument was exhibited to me and to the other subscribing witness by the testator, who declared the same to be his last will and testament, and was signed by the testator at _____, in the County of _____, State of _____, on the date shown in said instrument, in the presence of myself and the other subscribing witness; and the other subscribing witness and I then and there, at the request of the testator, in the presence of said testator and in the presence of each other, subscribed our names thereto as witnesses.

 Name of witness

 Address

Subscribed and sworn to before me this ____ day of _____, 19____.

 Notary Public in and for the

County of _____

State of _____.

(SEAL)

Bar Committee Comment

Permits the use of testimony of witnesses in affidavit form on admission to wills. This form is adapted from that used in California. The right to use depositions is preserved under section 297. Use of this affidavit is prohibited in actions to set aside wills, see section 318.

§ 297. Deposition

If it is desired to prove the execution of the will by deposition, rather than by use of the affidavit form provided in section two hundred ninety-six (296), upon application, the clerk shall issue a commission to some officer authorized by the law of this state to take depositions, with the will annexed, and the officer taking the deposition shall exhibit it to the witness for identification, and, when identified by him, shall mark it as "Exhibit _____" and cause the witness to connect his identification with it as such exhibit. Before sending out the commission, the clerk shall make and retain in his office a true copy of such will.

Bar Committee Comment

Adapted from 633.21 (1962 Code) and preserves the right to use depositions as an alternative means of proof of wills.

§ 298. Witnesses unavailable

If all of such witnesses are deceased or otherwise not available, then it shall be permissible to prove said will by the sworn testimony of two credible disinterested witnesses that the signature to the will is in the handwriting of the person whose will it purports to be, and that the signatures of the witnesses are in the handwriting of such witnesses, or it may be proved by other sufficient evidence of the execution of such will.

Bar Committee Comment

Adapted from 633.22 (1962 Code).

§ 299. Order admitting or disallowing probate of will

The court or the clerk shall enter an order either admitting said will to probate, or disallowing probate because of insufficient proof thereof.

Bar Committee Comment

New.

§ 300. Order appointing executor

If a petition for appointment of an executor has been filed, the order admitting the will to probate shall include appointment of an executor thereof, unless the court or clerk shall determine that no appointment should be made at such time.

Bar Committee Comment

New.

§ 301. Certificate of probate

When a will has been admitted to probate the clerk shall have a certificate of such fact, endorsed thereon or annexed thereto, signed by the clerk and attested by the seal of the court; and, when so certified, it, or the record thereof, or the transcript of such record properly authenticated, may be read in evidence in all courts without further proof.

Bar Committee Comment

Same as 633.23 (1962 Code).

§ 302. Record—copy for executor

When a will has been admitted to probate, it, together with the certificate herein required, shall be recorded in a book kept for that purpose, and the clerk shall cause an authenticated copy thereof to be placed in the hands of the executor to whom letters are issued. The clerk shall retain the will in a separate file provided for that purpose until the time for contest has expired, and promptly thereafter shall place it with the files of said estate.

Bar Committee Comment

Same as 633.24 (1962 Code).

§ 303. Notice of appointment

On admission of a will to probate, the executor shall, as soon as letters are issued, cause to be published once each week for two consecutive weeks in a daily or weekly newspaper of general circulation published in the county in which the estate is pending, a notice of admission of the will to probate and of the appointment of the executor. There shall be included therein a notice to debtors to make payment, and to creditors having claims against said estate to file them with the clerk within six months from the second publication of said notice, or thereafter be forever barred.

Such notice shall be substantially in the following form:

Notice of Probate of Will, of Appointment of Executor,
and Notice to Creditors

In the District Court of Iowa
in and for _____ County.

In the Estate of _____
Deceased

Probate No. _____

To all persons interested in the estate of _____ deceased:

You are hereby notified that on the ____ day of _____, 19____, the last will and testament of _____, deceased, bearing date the ____ day of _____, 19____, was admitted to probate in the above named court and that _____ was appointed executor of said estate.

Notice is given that all persons indebted to said estate are requested to make immediate payment to the undersigned, and creditors having claims against said estate shall file them with the clerk of the above named district court, as provided by law, duly authenticated, for allowance; and unless so filed within six months from the second publication of this notice (unless otherwise allowed or paid) such claim shall thereafter be forever barred.

Dated this ____ day of _____, 19____.

Executor of said estate

Address

Attorney for said executor

Address

Date of second publication

____ day of _____, 19____.

(date to be inserted by publisher)

Bar Committee Comment

Substitute for 633.46 (1962 Code). Combines notice to creditors with notice of admission of will and appointment of executor.

§ 304. Notice where no administration

On admission of a will to probate without administration of the estate, the clerk shall cause to be published, in the manner prescribed in the preceding section, a notice of the admission of the will to probate.

Such notice shall be substantially in the following form:

Notice of Proof of Will without Administration

In the District Court of Iowa
in and for _____ County.

In the Estate of _____
Deceased

Probate No. _____

To all persons interested in the estate of _____ deceased:

You are hereby notified that on the _____ day of _____, 19____, the last will of _____, deceased, bearing date the _____ day of _____, 19____, was admitted to probate in the above named court and there will be no present administration of the estate.

Dated this _____ day of _____, 19____.

Clerk of the district court

Attorney for said estate.

Date of second publication

_____ day of _____, 19____.

(Above date to be inserted by publisher)

Bar Committee Comment

New.

§ 305. Record in foreign county

Whenever it shall appear that the testator died seized of real estate located in a county of this state other than that in which probate is granted, a complete transcript, properly authenticated, of the record entry of the order of court admitting the will to probate, and, if a copy of such will is not contained therein, a certified copy of such will shall be attached thereto, and the same shall be filed by the clerk in the office of the clerk of the district court in such other county, who shall cause the same to be entered in the probate docket, and said transcript shall be recorded in full in the book kept for the recording of wills in such county. When so recorded, such record may be read in evidence in all courts without further proof.

Cross reference: Sections 403 and 404.

Bar Committee Comment

Same as 633.25 (1962 Code).

§ 306. Costs of transcript

The cost of such transcript and of the recording thereof shall be taxed against the estate of the decedent unless administration thereof is closed, in which event it shall be paid by the owner of the real estate involved.

Bar Committee Comment

Same as 633.26 (1962 Code).

PART 5. ACTIONS TO SET ASIDE OR CONTEST OF WILLS**§ 307. Setting aside probate of will**

Any interested person may petition to set aside the probate of a will by filing a written petition in the probate proceedings. The petition for such purpose shall state the grounds therefor.

Bar Committee Comment

New. Adapted from section 72 of the Model Probate Code with additions to emphasize the nature of the proceeding and the manner in which it shall be brought.

§ 308. Time within which petition must be filed

A petition to contest or set aside the probate of a will must be filed in the court in which the will was admitted to probate within one year from the date of second publication of notice of admission of such will to probate and not thereafter.

Bar Committee Comment

New. Adapted from 614.1(3) (1962 Code). This section shortens the period of limitation on setting aside wills and follows one of the most readily discernible modern trends in will contests legislation. Seventy-five years ago, this trend was pointed up by Mr. Justice Bradley of the United States Supreme Court (Broderick's Will, 21 Wall. (88 U.S.) 503 at 519 (1874)), "The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject." The shortening of the period of limitations on setting aside wills is to provide for more certainty in the distribution of assets, the making of tax returns, and the payment of inheritance and estate taxes, the titles to real estate, and will expedite the closing of administration of estates. This requires a deletion by way of repeal of a portion of Iowa Code section 614.1(3) (1962 Code) which reads, "and those brought to set aside a will, within two years from the time the same is filed in the clerk's office for probate and notice thereof is given; provided that after a will is probated the executor may cause personal service of an original notice to be made on any person interested, which shall

contain the name of the decedent, the date of his death, the court in which the will is filed, and the date on which the will was probated, together with a copy of said will; said notice shall be served in the same manner as original notices and no action shall be instituted by any person so served after one year from date of service."

§ 309. Objections prior to admission of will to probate

Nothing herein contained shall prevent any interested person from filing objections to probate of a proposed will prior to probate thereof. If such objections are filed prior to the admission of the will to probate, the will shall not be admitted to probate pending trial and determination as to whether or not said instrument is the last will of the decedent.

Bar Committee Comment

New. This section permits an interested party to file objections to a known will prior to its admission to probate and is designed to protect the same rights that a party now has under the present Iowa law to file objections prior to admission of a will to probate.

§ 310. Contest or objection shall be tried as a law action

An action objecting to the probate of a proffered will, or to set aside a will, is triable in the probate court as an action at law, and the Rules of Civil Procedure governing law actions, including demand for jury trial, shall be applicable thereto.

Bar Committee Comment

New. Codification of present Iowa law. See *In re Hermence's Estate*, 235 Iowa 745, 15 N.W.2d 905.

§ 311. Joinder of parties

In all actions to contest or set aside a will, all known interested parties who have not joined with the contestants as plaintiffs in the action, shall be joined with proponents as defendants. When additional interested parties become known, the court shall order them brought in as party defendants. All such defendants shall be brought in by serving them with notice pursuant to the Rules of Civil Procedure.

Bar Committee Comment

New. At present it is not clear as to whether a judgment in a will contest is *res adjudicata* as to parties who did not appear or take part in the contest. A will contest is essentially no different than any other cause of action and all known interested parties should be brought into court so that the matter can be finally determined. R.C.P. 34 is applicable to this section.

§ 312. Election of defendants to join with contestants

Any person named as a defendant in an action to contest or set aside a will may, at time of appearance, or by leave of court at any time thereafter, elect to join with the contestants.

Bar Committee Comment

New.

§ 313. Taxation of costs

The court shall tax the costs in an action to contest or set aside a will. No costs shall be taxed against a losing party who has been joined in the action but who does not appear.

Bar Committee Comment

New. This section is designed to protect a losing party who was required to be joined merely because of interest and who did not appear.

§ 314. Allowance for defending will

When any person is designated as executor in a will, or has been appointed as executor, and defends or prosecutes any proceedings in good faith and with just cause, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney fees in such proceedings.

Bar Committee Comment

New. Adapted from section 104 of the Model Probate Code. This section is intended to clarify the matter of costs incurred by a designated executor in good faith defense of an action to contest the will.

§ 315. Notice to devisees in other wills

If the ground of objection is that another will of the decedent has been discovered, each devisee named in such other will shall be joined in the action.

Bar Committee Comment

New. Defines parties in interest in such cases and will avoid multiplicity of actions.

§ 316. Where will is filed after letters of administration have been granted

If, after letters of administration have been granted, a will of the decedent is admitted to probate, such letters of administration are there-

by revoked, and the person to whom such letters were issued shall promptly file a final report and make an accounting to the court.

Bar Committee Comment

New. A prescribed method of procedure to eliminate unnecessary litigation.

§ 317. Where will is filed after letters testamentary have been granted

If, after a will has been admitted to probate, another instrument purporting to be the will of the decedent, which has not been previously presented for probate, is filed, the court shall determine whether or not the former grant of letters should be revoked pending determination of which instrument constitutes the will of the decedent.

Bar Committee Comment

New. Adapted from section 75(b) of the Model Probate Code. A clarification of the procedural remedy.

§ 318. Proof of execution

If the lack of the due execution of a will constitutes a ground for objection, proof of such execution shall not be made by affidavit as provided in section two hundred ninety-six (296).

Bar Committee Comment

New.

§ 319. Declaratory judgment to determine last will

The executor or any person named as a beneficiary in a will may bring an action for a declaratory judgment to have such will declared to be the last will of the decedent. In such action, all known interested persons, including heirs of the decedent and persons named as beneficiaries in said instrument and other known instruments purporting to be wills of the decedent, shall be joined as parties.

Bar Committee Comment

New. Specifically authorizes declaratory judgments to determine last will.

§§ 320 to 329, inclusive, reserved for future use

DIVISION VII—ADMINISTRATION OF ESTATES OF DECEDENTS

PART 1. GENERAL PROVISIONS

LIMITATION

§ 330. Character of proceedings

The administration of the estate of a decedent from the filing of the petition for probate and admission or for administration until the order approving the final report and discharge of the last personal representative shall be considered as one proceeding for purposes of jurisdiction. Such entire proceeding is a proceeding in rem.

Bar Committee Comment

This section was adopted to clearly spell out the generally well recognized rule that proceedings to administer the estate of a decedent are strictly in rem. The res is the estate of the decedent within the state. The proceedings determine all of the owners of the property in which the decedent had an interest. It may be that controversies between persons claiming to be the owners of such property take on aspects of personam proceedings but the over-all administration of the estate is a proceedings in rem. In many instances in administration of estates, it is material to know whether the proceedings is in rem or personam. See Model Probate Code pp. 489-526 for monograph by Lewis M. Simes "The Administration of a Decedent's Estate as a Proceeding in Rem".

§ 331. Limitation of administration

Probate of a will, original administration of an intestate estate, or ancillary administration of an estate, shall not be granted after five years from the death of the decedent, whether he die within or without this state, unless a petition therefor is filed prior to the expiration of the five-year period. Provided, however, that the limitation herein provided shall not apply to the probate of a will of a decedent who died prior to January 1, 1964.

Bar Committee Comment

Adapted from 633.47 (1962 Code). The present statute bars original administration of an estate after five years. This section in effect extends this statute to cover foreign wills and to clarify its application to domestic wills. Section 497 provides for the establishment of foreign wills as a muniment of title after the five-year period. This section is designed to provide for more certainty in connection with ownership of property. It is to be noted that it is specifically provided that the limitations of this section do not apply to the probate of a will of a person who dies prior to January 1, 1964.

EXEMPT PROPERTY AND INSURANCE

§ 332. Exempt personal property

When the decedent left a surviving spouse all personal property, which in the hands of the decedent as head of a family would be exempt from execution, after being inventoried and appraised, shall be set aside to the surviving spouse, and be exempt in the hands of such surviving spouse as in the hands of the decedent.

Bar Committee Comment

Adapted from 635.7 (1962 Code). The exemption formerly granted to the widow alone is expanded to include the surviving spouse and simplifies the procedure for setting off the exempt property.

§ 333. Proceeds of insurance

The avails of any life or accident insurance, or other sum of money made payable to the decedent's estate by any mutual aid or benevolent society upon the death or disability of a member thereof, are not subject to the debts of the decedent, except by contract or by express provision in the will, and shall be disposed of like other property left by the decedent.

Bar Committee Comment

Adapted from 635.8 (1962 Code). The section is changed only to allow insurance proceeds to be subject to debts of the decedent when expressly so provided in the will of the decedent, which would be in addition to any contract entered into by the decedent as formerly set forth in 635.8 (1962 Code).

§ 334. Surviving spouse included as "heir"

The words "heirs" and "legal heirs", and other equivalent words used to designate the beneficiaries in any life insurance policy or certificate of membership in any mutual aid or benevolent association, where no contrary intention is expressed in such instrument, shall be construed to include the surviving husband or wife of the insured.

Bar Committee Comment

Same as 635.10 (1962 Code).

§ 335. Share of survivor

The share of such survivor in the proceeds of such policy or certificate made payable as aforesaid shall be the same as that provided by law for the distribution of the personal property of intestates.

charges, then the surviving spouse, any child, child of a deceased child or parent of the decedent shall have the right to make an election as follows:

1. The amount by which such devises described in this section exceeds such one-fourth of the testator's estate shall be first determined.

2. Each of such persons shall have the right to elect to receive the portion of such excess to which he would have been entitled had such excess been intestate property, provided, that in no event shall he receive in the aggregate under the will and as the result of such election, an amount greater than he would have received had the decedent died intestate.

3. Such election shall be made in writing by said person and filed with the clerk within six months after the second publication of the notice of appointment of the personal representative, unless the time is extended by order of court, or unless an affidavit is filed under the provisions of subsection four (4) hereof.

4. In case an affidavit is filed within six months after the second publication of the notice of appointment of the personal representative that the said surviving spouse, child, child of a deceased child or parent is under legal disability or is otherwise incapable of making the election provided for in this section, the court shall fix a time and place of hearing on the matter and cause a notice thereof to be served upon said person in such manner and for such time as the court may determine. At the hearing, a guardian ad litem shall be appointed to represent such person, and the court shall enter such orders as it may deem to be for the best interests of such person.

5. Any portion of the excess determined under the provisions of this section which is not distributed under an election provided in this section, shall be distributed under the will of the decedent the same as if no election had been made under subsection two (2) by anyone.

6. The right of election as provided for in this section is personal, is not transferable, and cannot be exercised for him subsequent to his death.

7. All elections hereunder shall be entered upon the records of the court, shall be binding, and shall not be subject to change except for such cause as would justify an equitable decree for the rescission of a deed.

8. In the event that there is more than one devise affected by the election provided for in this section, any reduction shall be made ratably in the absence of express testamentary intent to the contrary.

§ 300. Order appointing executor

If a petition for appointment of an executor has been filed, the order admitting the will to probate shall include appointment of an executor thereof, unless the court or clerk shall determine that no appointment should be made at such time.

Bar Committee Comment

New.

§ 301. Certificate of probate

When a will has been admitted to probate the clerk shall have a certificate of such fact, endorsed thereon or annexed thereto, signed by the clerk and attested by the seal of the court; and, when so certified, it, or the record thereof, or the transcript of such record properly authenticated, may be read in evidence in all courts without further proof.

Bar Committee Comment

Same as 633.23 (1962 Code).

§ 302. Record—copy for executor

When a will has been admitted to probate, it, together with the certificate herein required, shall be recorded in a book kept for that purpose, and the clerk shall cause an authenticated copy thereof to be placed in the hands of the executor to whom letters are issued. The clerk shall retain the will in a separate file provided for that purpose until the time for contest has expired, and promptly thereafter shall place it with the files of said estate.

Bar Committee Comment

Same as 633.24 (1962 Code).

§ 303. Notice of appointment

On admission of a will to probate, the executor shall, as soon as letters are issued, cause to be published once each week for two consecutive weeks in a daily or weekly newspaper of general circulation published in the county in which the estate is pending, a notice of admission of the will to probate and of the appointment of the executor. There shall be included therein a notice to debtors to make payment, and to creditors having claims against said estate to file them with the clerk within six months from the second publication of said notice, or thereafter be forever barred.

Such notice shall be substantially in the following form:

Notice of Probate of Will, of Appointment of Executor,
and Notice to Creditors

In the District Court of Iowa

in and for _____ County.

In the Estate of _____

Probate No. _____

Deceased

To all persons interested in the estate of _____ deceased:

You are hereby notified that on the ____ day of _____, 19____, the last will and testament of _____, deceased, bearing date the ____ day of _____, 19____, was admitted to probate in the above named court and that _____ was appointed executor of said estate.

Notice is given that all persons indebted to said estate are requested to make immediate payment to the undersigned, and creditors having claims against said estate shall file them with the clerk of the above named district court, as provided by law, duly authenticated, for allowance; and unless so filed within six months from the second publication of this notice (unless otherwise allowed or paid) such claim shall thereafter be forever barred.

Dated this ____ day of _____, 19____.

Executor of said estate

Address

Attorney for said executor

Address

Date of second publication

____ day of _____, 19____.

(date to be inserted by publisher)

Bar Committee Comment

Substitute for 633.46 (1962 Code). Combines notice to creditors with notice of admission of will and appointment of executor.

§ 304. Notice where no administration

On admission of a will to probate without administration of the estate, the clerk shall cause to be published, in the manner prescribed in the preceding section, a notice of the admission of the will to probate.

Such notice shall be substantially in the following form:

Notice of Proof of Will without Administration

In the District Court of Iowa
in and for _____ County.

In the Estate of _____

Probate No. _____

Deceased

To all persons interested in the estate of _____ deceased:

You are hereby notified that on the ____ day of _____, 19____, the last will of _____, deceased, bearing date the ____ day of _____, 19____, was admitted to probate in the above named court and there will be no present administration of the estate.

Dated this ____ day of _____, 19____.

Clerk of the district court

Attorney for said estate.

Date of second publication

____ day of _____, 19____.

(Above date to be inserted by publisher)

Bar Committee Comment

New.

§ 305. Record in foreign county

Whenever it shall appear that the testator died seized of real estate located in a county of this state other than that in which probate is granted, a complete transcript, properly authenticated, of the record entry of the order of court admitting the will to probate, and, if a copy of such will is not contained therein, a certified copy of such will shall be attached thereto, and the same shall be filed by the clerk in the office of the clerk of the district court in such other county, who shall cause the same to be entered in the probate docket, and said transcript shall be recorded in full in the book kept for the recording of wills in such county. When so recorded, such record may be read in evidence in all courts without further proof.

Cross reference: Sections 403 and 404.

Bar Committee Comment

Same as 633.25 (1962 Code).

§ 306. Costs of transcript

The cost of such transcript and of the recording thereof shall be taxed against the estate of the decedent unless administration thereof is closed, in which event it shall be paid by the owner of the real estate involved.

Bar Committee Comment

Same as 633.26 (1962 Code).

PART 5. ACTIONS TO SET ASIDE OR CONTEST OF WILLS**§ 307. Setting aside probate of will**

Any interested person may petition to set aside the probate of a will by filing a written petition in the probate proceedings. The petition for such purpose shall state the grounds therefor.

Bar Committee Comment

New. Adapted from section 72 of the Model Probate Code with additions to emphasize the nature of the proceeding and the manner in which it shall be brought.

§ 308. Time within which petition must be filed

A petition to contest or set aside the probate of a will must be filed in the court in which the will was admitted to probate within one year from the date of second publication of notice of admission of such will to probate and not thereafter.

Bar Committee Comment

New. Adapted from 614.1(3) (1962 Code). This section shortens the period of limitation on setting aside wills and follows one of the most readily discernible modern trends in will contests legislation. Seventy-five years ago, this trend was pointed up by Mr. Justice Bradley of the United States Supreme Court (Broderick's Will, 21 Wall. (88 U.S.) 503 at 519 (1874)), "The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject." The shortening of the period of limitations on setting aside wills is to provide for more certainty in the distribution of assets, the making of tax returns, and the payment of inheritance and estate taxes, the titles to real estate, and will expedite the closing of administration of estates. This requires a deletion by way of repeal of a portion of Iowa Code section 614.1(3) (1962 Code) which reads, "and those brought to set aside a will, within two years from the time the same is filed in the clerk's office for probate and notice thereof is given; provided that after a will is probated the executor may cause personal service of an original notice to be made on any person interested, which shall

contain the name of the decedent, the date of his death, the court in which the will is filed, and the date on which the will was probated, together with a copy of said will; said notice shall be served in the same manner as original notices and no action shall be instituted by any person so served after one year from date of service."

§ 309. Objections prior to admission of will to probate

Nothing herein contained shall prevent any interested person from filing objections to probate of a proposed will prior to probate thereof. If such objections are filed prior to the admission of the will to probate, the will shall not be admitted to probate pending trial and determination as to whether or not said instrument is the last will of the decedent.

Bar Committee Comment

New. This section permits an interested party to file objections to a known will prior to its admission to probate and is designed to protect the same rights that a party now has under the present Iowa law to file objections prior to admission of a will to probate.

§ 310. Contest or objection shall be tried as a law action

An action objecting to the probate of a proffered will, or to set aside a will, is triable in the probate court as an action at law, and the Rules of Civil Procedure governing law actions, including demand for jury trial, shall be applicable thereto.

Bar Committee Comment

New. Codification of present Iowa law. See *In re Hermence's Estate*, 235 Iowa 745, 15 N.W.2d 905.

§ 311. Joinder of parties

In all actions to contest or set aside a will, all known interested parties who have not joined with the contestants as plaintiffs in the action, shall be joined with proponents as defendants. When additional interested parties become known, the court shall order them brought in as party defendants. All such defendants shall be brought in by serving them with notice pursuant to the Rules of Civil Procedure.

Bar Committee Comment

New. At present it is not clear as to whether a judgment in a will contest is *res adjudicata* as to parties who did not appear or take part in the contest. A will contest is essentially no different than any other cause of action and all known interested parties should be brought into court so that the matter can be finally determined. R.C.P. 34 is applicable to this section.

§ 312. Election of defendants to join with contestants

Any person named as a defendant in an action to contest or set aside a will may, at time of appearance, or by leave of court at any time thereafter, elect to join with the contestants.

Bar Committee Comment

New.

§ 313. Taxation of costs

The court shall tax the costs in an action to contest or set aside a will. No costs shall be taxed against a losing party who has been joined in the action but who does not appear.

Bar Committee Comment

New. This section is designed to protect a losing party who was required to be joined merely because of interest and who did not appear.

§ 314. Allowance for defending will

When any person is designated as executor in a will, or has been appointed as executor, and defends or prosecutes any proceedings in good faith and with just cause, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney fees in such proceedings.

Bar Committee Comment

New. Adapted from section 104 of the Model Probate Code. This section is intended to clarify the matter of costs incurred by a designated executor in good faith defense of an action to contest the will.

§ 315. Notice to devisees in other wills

If the ground of objection is that another will of the decedent has been discovered, each devisee named in such other will shall be joined in the action.

Bar Committee Comment

New. Defines parties in interest in such cases and will avoid multiplicity of actions.

§ 316. Where will is filed after letters of administration have been granted

If, after letters of administration have been granted, a will of the decedent is admitted to probate, such letters of administration are there-

by revoked, and the person to whom such letters were issued shall promptly file a final report and make an accounting to the court.

Bar Committee Comment

New. A prescribed method of procedure to eliminate unnecessary litigation.

§ 317. Where will is filed after letters testamentary have been granted

If, after a will has been admitted to probate, another instrument purporting to be the will of the decedent, which has not been previously presented for probate, is filed, the court shall determine whether or not the former grant of letters should be revoked pending determination of which instrument constitutes the will of the decedent.

Bar Committee Comment

New. Adapted from section 75(b) of the Model Probate Code. A clarification of the procedural remedy.

§ 318. Proof of execution

If the lack of the due execution of a will constitutes a ground for objection, proof of such execution shall not be made by affidavit as provided in section two hundred ninety-six (296).

Bar Committee Comment

New.

§ 319. Declaratory judgment to determine last will

The executor or any person named as a beneficiary in a will may bring an action for a declaratory judgment to have such will declared to be the last will of the decedent. In such action, all known interested persons, including heirs of the decedent and persons named as beneficiaries in said instrument and other known instruments purporting to be wills of the decedent, shall be joined as parties.

Bar Committee Comment

New. Specifically authorizes declaratory judgments to determine last will.

§§ 320 to 329, inclusive, reserved for future use

DIVISION VII—ADMINISTRATION OF ESTATES OF DECEDENTS

PART 1. GENERAL PROVISIONS

LIMITATION

§ 330. Character of proceedings

The administration of the estate of a decedent from the filing of the petition for probate and admission or for administration until the order approving the final report and discharge of the last personal representative shall be considered as one proceeding for purposes of jurisdiction. Such entire proceeding is a proceeding in rem.

Bar Committee Comment

This section was adopted to clearly spell out the generally well recognized rule that proceedings to administer the estate of a decedent are strictly in rem. The res is the estate of the decedent within the state. The proceedings determine all of the owners of the property in which the decedent had an interest. It may be that controversies between persons claiming to be the owners of such property take on aspects of personam proceedings but the over-all administration of the estate is a proceedings in rem. In many instances in administration of estates, it is material to know whether the proceedings is in rem or personam. See Model Probate Code pp. 489-526 for monograph by Lewis M. Simes "The Administration of a Decedent's Estate as a Proceeding in Rem".

§ 331. Limitation of administration

Probate of a will, original administration of an intestate estate, or ancillary administration of an estate, shall not be granted after five years from the death of the decedent, whether he die within or without this state, unless a petition therefor is filed prior to the expiration of the five-year period. Provided, however, that the limitation herein provided shall not apply to the probate of a will of a decedent who died prior to January 1, 1964.

Bar Committee Comment

Adapted from 633.47 (1962 Code). The present statute bars original administration of an estate after five years. This section in effect extends this statute to cover foreign wills and to clarify its application to domestic wills. Section 497 provides for the establishment of foreign wills as a muniment of title after the five-year period. This section is designed to provide for more certainty in connection with ownership of property. It is to be noted that it is specifically provided that the limitations of this section do not apply to the probate of a will of a person who dies prior to January 1, 1964.

EXEMPT PROPERTY AND INSURANCE

§ 332. Exempt personal property

When the decedent left a surviving spouse all personal property, which in the hands of the decedent as head of a family would be exempt from execution, after being inventoried and appraised, shall be set aside to the surviving spouse, and be exempt in the hands of such surviving spouse as in the hands of the decedent.

Bar Committee Comment

Adapted from 635.7 (1962 Code). The exemption formerly granted to the widow alone is expanded to include the surviving spouse and simplifies the procedure for setting off the exempt property.

§ 333. Proceeds of insurance

The avails of any life or accident insurance, or other sum of money made payable to the decedent's estate by any mutual aid or benevolent society upon the death or disability of a member thereof, are not subject to the debts of the decedent, except by contract or by express provision in the will, and shall be disposed of like other property left by the decedent.

Bar Committee Comment

Adapted from 635.8 (1962 Code). The section is changed only to allow insurance proceeds to be subject to debts of the decedent when expressly so provided in the will of the decedent, which would be in addition to any contract entered into by the decedent as formerly set forth in 635.8 (1962 Code).

§ 334. Surviving spouse included as "heir"

The words "heirs" and "legal heirs", and other equivalent words used to designate the beneficiaries in any life insurance policy or certificate of membership in any mutual aid or benevolent association, where no contrary intention is expressed in such instrument, shall be construed to include the surviving husband or wife of the insured.

Bar Committee Comment

Same as 635.10 (1962 Code).

§ 335. Share of survivor

The share of such survivor in the proceeds of such policy or certificate made payable as aforesaid shall be the same as that provided by law for the distribution of the personal property of intestates.

Bar Committee Comment

Same as 635.11 (1962 Code).

WRONGFUL DEATH**§ 336. Damages for wrongful death**

When a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased, but if the deceased leaves a spouse, child, or parent, it shall not be liable for the payment of debts of the estate.

Bar Committee Comment

Adapted from 635.9 (1962 Code). The committee recommended that the statute be made explicit that such damages were available for the payment of court costs and other costs of administration, funeral expenses and expenses of last illness, but the legislature concluded not to adopt such explicit statement.

§§ 337 to 341, inclusive, reserved for future use

PART 2. TEMPORARY ADMINISTRATION**§ 342. Temporary administration**

When, from any cause, probate of a will or administration cannot be immediately granted, a temporary administrator may be appointed to collect, manage, preserve and dispose of the property of the deceased, as the court may prescribe, and no appeal from such appointment shall prevent his proceeding in the discharge of his duties.

Bar Committee Comment

Adapted from 633.41 (1962 Code). This section, subject to order of the court, broadens the powers of the temporary administrator in the management of the estate. The power of the temporary administrator to dispose of property to prevent losses to the estate is desirable when protracted litigation develops.

§ 343. Inventory—preservation of property

Such temporary administrator shall make and file an inventory of the property of the deceased in the same manner as is required of personal representatives, and shall preserve such property from injury, and may do all needful acts under the direction of the court, including the sale of property and the payment of claims as directed by the court. Upon the granting of administration, the powers of the temporary administra-

tor shall cease, and the administration of the estate shall be transferred to the personal representative to whom letters are granted.

Bar Committee Comment

Adapted from 633.42 (1962 Code). Broadens the powers of the temporary administrator to act under the direction of the court.

§§ 344 to 348, inclusive, reserved for future use

**PART 3. TITLE AND POSSESSION OF
DECEDENT'S PROPERTY**

§ 349. Security to sustain devise or bequest

When a person by his will makes such a disposition of his property as to prejudice the rights of creditors, the will may be sustained, by giving security to the satisfaction of the court for the payment of the debts and charges to the extent of the value of the property devised.

Bar Committee Comment

Adapted from section 635.19 (1962 Code).

§ 350. Title to decedent's estate—when property passes—possession and control thereof—liability for administration expenses, debts and family allowance

Except as otherwise provided in this Code, when a person dies, the title to his property, real and personal, passes to the person to whom it is devised by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as provided in this Code, but all of his property shall be subject to the possession of the personal representative as provided in section three hundred fifty-one (351) and to the control of the court for the purposes of administration, sale, or other disposition under the provisions of law, and such property, except homestead and other exempt property, shall be chargeable with the payment of debts and charges against his estate. There shall be no priority as between real and personal property, except as provided in this Code or by the will of the decedent.

Bar Committee Comment

New. Adapted from section 300 of the California Probate Code, this section codifies the Iowa rule with respect to the passage of title upon death in the case of real estate and adopts the same rule with respect to personalty. The Iowa case law has not been clear on whether title to personal property vests instantan in the beneficiaries

or in the personal representative. Iowa Code section 636.1 (1962); In Re Smith's Estate, 240 Iowa 499, 36 N.W.2d 815 (1949). The Probate Code generally equates personalty with realty for purposes of administration and gives the personal representative the right to possession of both realty and personalty during probate. The income from property which is part of the estate for purposes of administration is taxable to the estate even though title thereto may be in an heir or devisee. 8 Tax Court 784 and Revenue Ruling 57-133.

§ 351. Possession of real and personal property

If there is no distributee of the real estate present and competent to take possession, or if there is a lease of such real estate outstanding, or if the distributees present and competent consent thereto, the personal representative shall take possession of such real estate, except the homestead and other property exempt to the surviving spouse. Every personal representative shall take possession of all the personal property of the decedent, except the property exempt to the surviving spouse. The personal representative may maintain an action for the possession of such real and personal property or to determine the title to any property of the decedent.

Bar Committee Comment

New. This section as enacted by the legislature permits the personal representative to take possession of all property of the decedent under circumstances set forth therein. The committee recommended to the legislature that such right or duty in the personal representative apply in all cases and was in line with the comment on pages 133 and 134 of the Model Probate Code: "It seems preferable that the personal representative should have not only the right but also the duty of possession of the entire estate until distributed or delivered over to the heir or devisee upon a showing that it is not needed for the purposes of administration." However, the legislature did not concur in the recommendation of the committee.

§ 352. Collection of rents and payment of taxes and charges

Unless otherwise provided by the will, the personal representative shall collect the income from such property, pay the taxes and fixed charges thereon and apply the balance of such income to general estate obligations. Unless otherwise provided, any unexpended portion of such income shall become a part of the general assets of such estate.

Bar Committee Comment

New. Changes present law. Under the present Iowa law, the personal representative is not ordinarily entitled to the rents accruing during probate, and any rents he collects normally belongs to the heirs or devisees. See Iowa Code section 635.49 (1962). After equating realty with personalty, the income from both real and personal property should be available to pay general estate obliga-

tions in the absence of testamentary direction. This provision will help to provide a larger fund out of which general estate obligations can be paid, without the necessity of resorting to the sale of estate assets.

§ 353. Surrender of possession upon application by personal representative

Upon application by the personal representative, and after such notice, if any, as the court may prescribe, for good cause shown, the court may enter an order authorizing said personal representative to surrender any of such property to the person or persons who, under the will or under the rules of intestate succession, will ultimately be entitled to such property.

Bar Committee Comment

New. Since the personal representative must take possession of all real and personal property, this flexible means is provided to take care of a case where there is a specific thing that should be delivered to an heir or devisee at an early date.

§ 354. Surrender of possession upon application by any interested person

Upon application of any interested person and after such notice to the personal representative and to such other persons, if any, as the court may prescribe, and for good cause shown, the court may enter an order authorizing said personal representative to surrender any of such property to the person or persons who, under the will or under the rules of intestate succession, will ultimately be entitled to such property. The court may require a bond or other security conditioned as it may determine in connection with the delivery of such property.

Bar Committee Comment

New. See comment under section 353.

§ 355. Delivery of specific devise after nine months

Unless the court, for cause shown, determines that the possession of the personal representative shall continue for a longer period, the personal representative shall deliver all specifically devised property to the devisees entitled thereto after the expiration of nine months from the date of appointment of the personal representative. This section shall not preclude the court from directing that such delivery

be made before such period has expired, nor shall the personal representative be prevented from sooner settling the estate and delivering such property.

Bar Committee Comment

New. Provides for a final distribution of the specifically devised property after nine months, unless the estate is sooner settled or use is made of section 353 or 354. Supports one of the important objectives of the Probate Code, i. e.: to speed up the settlement of estates of decedents.

§§ 356 to 360, inclusive, reserved for future use

PART 4. INVENTORY

§ 361. Inventory and report

Within sixty days after his qualification, unless a longer time shall be granted by the court, the personal representative shall file with the clerk, in duplicate, a verified, full and detailed report and inventory of the property of the deceased, so far as the same has come to his knowledge, as follows:

1. Name, age and last residence of decedent.
2. Date of death.
3. Whether decedent died testate or intestate.
4. Name and post-office address of personal representative.
5. Name, age and post-office address of surviving spouse, if any.
6. If testate, name, age, relationship and post-office address of each beneficiary under will.
7. If testate, the name, age and address of each child, if any, born to or adopted by decedent after execution of the will.
8. If intestate, name, age, relationship and post-office address of each heir.
9. Inventory of all the real estate of the decedent in the state of Iowa, giving value and accurate description of each tract.
10. Any real property located outside of the state of Iowa not otherwise reported.
11. Personal property regarded as exempt from execution.
12. All other personal property.
13. All property whether subject to probate or not, not otherwise listed which is subject to the Iowa inheritance tax as provided in chapter four hundred fifty (450) of the Code of Iowa.

14. A statement as to whether or not there is any property not therein inventoried which must be reported for federal estate tax purposes.

Bar Committee Comment

Adapted from section 635.1 (1962 Code).

§ 362. Filing mandatory

Such inventory must be filed in all cases, notwithstanding the provisions of any will or the action of any heirs or devisees waiving the filing thereof, and no administration shall be closed until the same has been filed.

Bar Committee Comment

Adapted from section 635.4 (1962 Code).

§ 363. Reporting failure to court

The failure of the personal representative promptly to make said inventory and report shall be forthwith reported by the clerk to the court for such order as may be necessary to enforce the making and filing of the same.

Bar Committee Comment

Adapted from section 635.2 (1962 Code).

§ 364. Supplementary inventory

Whenever any additional information or property not mentioned in the inventory comes to the knowledge of a personal representative, he shall make a supplementary inventory thereof, such supplementary inventory to be filed within thirty days after such discovery.

Bar Committee Comment

Adapted from section 121 of the Model Probate Code in lieu of section 635.3 (1962 Code).

§ 365. Appraisal

Property belonging to the estate need not be appraised unless required for inheritance tax purposes under the provisions of this Code, or by order of court.

Bar Committee Comment

Substitute for 635.5 and 635.6 (1962 Code) which were repetitious of the provisions for inheritance tax appraisal in Chapter 450 of the Code. Codifies prior practice of generally waiving appraisal under 635.5 and 635.6 (1962 Code).

§ 366. Debts of executor

The naming of any person as executor in a will shall not operate as a discharge or bequest of any right of action owned by the testator against such persons, if it is a right that otherwise survives against such person. Every such right of action shall be included among the assets of the decedent in the inventory.

Bar Committee Comment

New. Codification of Iowa case law. *Kaster v. Pierson*, 27 Iowa 90; see *James v. James*, 252 Iowa 326, 105 N.W.2d 498 (1960) and authorities therein cited.

§ 367. Inventory and appraisal as evidence

Inventories and appraisements may be given in evidence in all proceedings, but shall not be conclusive, and other evidence may be introduced to vary the effect thereof.

Bar Committee Comment

New. Section 123 of the Model Probate Code. Several states have a similar provision.

§ 368. Property for payment of creditor's claims

The property liable for the payment of debts and charges against a decedent's estate shall include all property transferred by him with intent to defraud his creditors or any of them, or transferred by any other means which is in law void or voidable as against his creditors or any of them; and the right to recover such property, so far as necessary for the payment of the debts and charges against the estate of the decedent, shall be exclusively in the personal representative, who shall take such steps as may be necessary to recover the same. Such property shall constitute general assets for the payment of all creditors.

Bar Committee Comment

New. Adapted from Section 125 of the Model Probate Code. The only comparable provision prior to the Probate Code was contained in section 635.16 (1962 Code) and it relates to recovery of real estate fraudulently conveyed by decedent where there is insufficient personal property to pay estate debts. Under 635.16 (1962 Code), if it appeared that a deed of realty made by decedent was in fraud of creditors, the probate court could authorize the personal representative to bring an action in equity to set aside the deed. Under prior case law, the personal representative could also follow personalty transferred in fraud of creditors. *Cooley v. Brown*, 30 Iowa 470 (1870).

§§ 369 to 373, inclusive, reserved for future use

PART 5. ALLOWANCE FOR SURVIVING SPOUSE AND
MINOR CHILDREN**§ 374. Allowance to surviving spouse**

The court shall, upon application, set off and order paid to the surviving spouse, as part of the costs of administration, sufficient of the decedent's property as it deems reasonable for the proper support of the surviving spouse for the period of twelve months following the death of the decedent. When said application is not made by the personal representative, notice of hearing upon the application shall be given to the personal representative. The court shall take into consideration the station in life of the surviving spouse and the assets and condition of the estate. The allowance shall also include such additional amount as the court deems reasonable for the proper support, during such period, of dependents of the decedent who reside with the surviving spouse. Such allowance to the surviving spouse shall not abate upon the death or remarriage of such spouse.

Bar Committee Comment

Adapted from 635.12 (1962 Code), but changed to qualify the allowance for the "marital deduction" for federal estate tax. See Revenue Ruling 83, 1953-1 CB395, U. S. v. Shaffer (CA-8) 61-2 USTC Par. 12037, and L. L. Molner v. U. S., 175 Fed.Supp. 271.

§ 375. Review of allowance to surviving spouse

The court may, upon the petition of the spouse, or other person interested, and after hearing pursuant to notice to all interested parties, review such allowance and increase the same.

Bar Committee Comment

New. Provides allowance may be increased where circumstances make it necessary. The right to decrease the allowance is eliminated in order to avoid the terminable-interest rule which has been held to disqualify the widow's allowance as part of the marital deduction.

§ 376. Allowance to minor children who do not reside with surviving spouse

The court may also make an allowance to the minor children of the decedent, who do not reside with the surviving spouse, of such an amount as it deems reasonable in the light of the assets and condition of the estate, to provide for their proper support during such period of twelve months.

Bar Committee Comment

New. Section 374 applies to dependents residing with the spouse and this section permits allowance for minor children residing elsewhere.

§ 377. Review of allowance to minor children

The court may, upon the petition of any interested person, review the allowance made to the minor children who do not reside with the surviving spouse and may increase or decrease the same and make such other orders as it may deem proper.

Bar Committee Comment

New. Provides for review of allowance to minor children not living with surviving spouse, and for the increase or decrease of the allowance as circumstances warrant.

§§ 378 to 382, inclusive, reserved for future use

PART 6. SALE OF PROPERTY

§ 383. When power given in will

When power to sell, mortgage, lease, pledge or exchange property of the estate has been given to any personal representative under the terms of any will, the statutory requirements with reference to procedure for such purposes shall not apply.

Bar Committee Comment

New. Adapted from section 151 of the Model Probate Code Accords with present Iowa law. Estate of Wicks, 207 Iowa 264, 222 N.W. 843 (1929); Feaster v. Fagan, 135 Iowa 633, 113 N.W. 479 (1907). See also Iowa Title Standard 9.1 which takes the position that when an executor is given the unrestricted power to sell realty, statutory sale procedure need not be followed.

§ 384. Equitable conversion and power of sale

A testamentary direction to sell real property, and the exercise of a testamentary power of sale of real property, shall constitute an equitable conversion of real estate into personal property, but shall not affect distribution of the estate under the provisions of the will.

Bar Committee Comment

New. Gives the same effect to the exercise of testamentary power to sell as to a testamentary direction to sell. See Beaver v. Ross,

140 Iowa 154, 18 N.W. 287 (1908), which holds that where there is a testamentary direction to sell, equitable conversion occurs at the instant of death of the testator and the interest of the devisee passes as personalty.

§ 385. Conversion

1. **When realty treated as personalty.** Real property acquired by the personal representative by the completion of foreclosure proceedings, or by the forfeiture of real estate contracts, after the death of the decedent shall be deemed to be personal property for the purpose of administration and distribution of the estate.

2. **When personalty treated as realty.** In all cases of sale of real property by a personal representative under order of court, the surplus of the proceeds of such sale remaining after the payment of debts and charges shall be deemed to be real property and disposed of in the same proportions as the real property would have been if it had not been sold.

Bar Committee Comment

New. Adapted from section 127 of the Model Probate Code. This section is desirable in cases where a will which distinguishes between real and personal property must be construed in connection with the administration of an estate. Otherwise, it may be of little use, since the Probate Code generally treats real and personal property alike.

§ 386. Sale, mortgage, pledge, lease or exchange of property—purposes

Any real or personal property belonging to the decedent, except exempt personal property and the homestead, if set off, may be sold, mortgaged, pledged, leased or exchanged for any of the following purposes:

1. The payment of debts and charges against the estate;
2. The distribution of the estate or any part thereof;
3. Any other purpose in the best interests of the estate.

Bar Committee Comment

Permits the personal representative, when it appear to be in the best interest of the estate, to sell any property, including real estate. It is designated to provide flexibility to meet the problems arising in connection with settlement of modern estates. Real property is no longer given preference by provision that it shall be sold last. This accords with the trend of the law and this Code to treat real and personal property alike. The present Iowa law on this subject is found in Iowa Code 635.21 and 635.23 (1962 Code).

§ 387. Sale of personal property

Personal property belonging to the estate may be sold and transferred as follows:

1. Personal property of a perishable nature and personal property for which there is a regularly established market may be sold by the personal representative without order of court.
2. Any personal property belonging to the decedent may be sold mortgaged, exchanged, pledged or leased under order of court by the personal representative with or without notice as the court may determine.

Bar Committee Comment

Adapted from 635.21 (1962 Code). Gives desirable authority to personal representative to sell perishable property and property for which there is a regularly established market.

§ 388. Petition to sell, mortgage, exchange, pledge or lease property

A petition to sell, mortgage, exchange, pledge or lease any real or personal property shall set forth the reasons for the application and describe the property involved. It may apply for different authority as to separate parts of the property; or it may apply in the alternative for authority to sell, mortgage, exchange, pledge or lease. Whenever it is for the best interests of the estate, real and personal property of the estate may be sold, mortgaged, exchanged, pledged or leased as a unit.

Bar Committee Comment

New. Adapted from sections 160 and 161 of the Model Probate Code. No distinction is made between real and personal property.

§ 389. Notice and hearing on sale, mortgage, exchange, pledge or lease of property

Upon the filing of the petition, the court shall fix the time and place for the hearing thereof, provided, however, that as to personal property the court may, in its discretion, hear the petition without notice. In those instances where notice is required, the notice shall state briefly the nature of the application and shall be such notice as the court may prescribe. At the hearing and upon satisfactory proof, the court may order the sale, mortgage, exchange, pledge or lease of the property described, or any part thereof, at such price and upon such terms and conditions as the court may authorize. In any transaction

involving only personal property, no report or confirmation shall be necessary except as required by the court. When a claim secured by a mortgage on real property is, under the provisions of this Code, payable at the time of distribution of the estate or prior thereto, the court may with the consent of the mortgagee, order the sale of the real property subject to the mortgage, but such consent shall release the estate should a deficiency later appear.

Bar Committee Comment

New. Adapted from section 161 of the Model Probate Code. Discretion is given to the court, especially in the case of petitions for the sale of personal property. When notice is required or when finality is desired, counsel for the petitioner should request such notice as will insure finality as to all interested parties. See section 36 of this Code on finality of orders in probate.

§ 390. Leasing for term of not to exceed one year

The personal representative may under order of court lease any property not specifically devised for a period of not to exceed one year.

Bar Committee Comment

New.

§ 391. Quieting adverse claims

Upon any petition to sell or mortgage real property, the court shall have power to investigate and determine all questions of conflicting and controverted title, remove clouds from any title or interest involved, and invest purchasers or mortgagees with a marketable title to the property sold or mortgaged. When the petition to sell or mortgage seeks such relief, notice shall be given as provided by the Rules of Civil Procedure, and subsequent proceedings shall be in the manner of an equitable action, and shall be governed by such rules.

Bar Committee Comment

New. Adapted from section 162 of the Model Probate Code. The present Iowa case law is that ordinarily the probate court cannot determine a question of title to property, unless such question arises collaterally as a necessary incident to determination of other matters within the probate court's jurisdiction. In *re Anders' Estate*, 238 Iowa 344, 26 N.W.2d 67 (1947). There will be no change in procedure, however, as the probate court will try the question of title in the manner of an equitable action.

§ 392. Terms of sale

In all sales of property, the court may authorize credit to be given by the personal representative on such terms as the court may prescribe. Credit for more than twelve months shall be extended only after hearing pursuant to notice to interested parties.

Bar Committee Comment

Adapted from 635.27 (1962 Code). Removes mandatory twelve month credit limit in order to provide better market for sale of property.

§ 393. Purchase by holder of lien

At any sale of real or personal property upon which there is a mortgage, pledge or other lien, the holder of such lien may become the purchaser, and may apply the amount of his lien on the purchase price in the following manner. If no claim thereon has been filed or allowed, the court, at the hearing on the report of sale and for confirmation of the sale, may examine into the validity and enforceability of the lien or charge and the amount due thereunder and secured thereby, and may authorize the personal representative to accept the receipt of such purchaser for the amount due thereunder and secured thereby as payment pro tanto. If such mortgage, pledge or other lien is a valid claim against the estate and has been allowed, the receipt of the purchaser for the amount due him from the proceeds of the sale is a payment pro tanto. If the amount for which the property is purchased, whether or not a claim for it has been filed or allowed, is insufficient to defray the expenses and discharge his mortgage, pledge or other lien, the purchaser must pay an amount sufficient to pay the balance of such expenses. Nothing permitted under the terms of this section shall be deemed to be an allowance of a claim based upon such mortgage, pledge or other lien.

Bar Committee Comment

New. Adapted from section 156 of the Model Probate Code. It includes liens on property owned by the estate for the payment of which the estate was not liable, as where the decedent purchased property subject to a mortgage but did not assume its payment, or where a mortgagee could have filed a claim but did not do so.

§ 394. Order to sell, mortgage, pledge, exchange or lease to be refused if bond given

An order authorizing a personal representative to sell, mortgage, pledge, exchange or lease real or personal property for the payment of obligations of the estate shall not be granted if any of the persons

interested in the estate shall execute and file in the court a bond in such sum and with such sureties as the court may approve, conditioned to pay all obligations of the estate to the extent that the other property of the estate is insufficient therefor, within such time as the court shall direct. An action may be maintained on such bond by the personal representative on behalf of any person interested in the estate who is prejudiced by breach of any obligation of the bond.

Bar Committee Comment

New. Based on section 153 of the Model Probate Code in lieu of 635.30, 635.31 and 635.32 (1962 Code). Unlike 635.31 (1962 Code), this section limits the remedy to an action on the bond.

§ 395. Validity of proceedings .

No proceedings for sale, mortgage, pledge, lease, exchange or conveyance by a personal representative of property belonging to the estate shall be subject to collateral attack on account of any irregularity in the proceedings which is not such as to deprive the court of jurisdiction.

Bar Committee Comment

New. Codification of Iowa case law. *Whiteley v. Mills*, 239 Iowa 80, 29 N.W.2d 541 (1947).

§ 396. Order for sale, mortgage, pledge, exchange or lease of real property

The order shall describe the property to be sold, mortgaged, pledged, exchanged or leased, and may designate the sequence in which the several parcels shall be sold, mortgaged, pledged, exchanged or leased. An order for sale may direct whether the property shall be sold at private sale or public auction, and, if the latter, the place or places of sale. The order of sale may prescribe the terms, conditions and manner of sale. The court may, in its discretion, provide for appraisal for its guidance as to value of the property, and determine whether or not additional bond shall be deposited by the personal representative. If real property is to be mortgaged, it may fix the maximum amount of principal, the earliest and latest dates of maturity, and the purposes for which the proceeds shall be used. An order for sale, mortgage, pledge, exchange or lease shall remain in force until terminated by the court.

Bar Committee Comment

Adapted from section 163 of the Model Probate Code. Replaces 635.26, 635.27, 635.28, and 635.29 (1962 Code). Provides more flexibility, appraisal not mandatory, advantageous terms, conditions and manner of sale can be prescribed by the court.

§ 397. Sale at public auction

In all sales of property at public auction, the personal representative shall give such notice, in such form and manner, and to such persons or parties, as the court may prescribe. If no provision for notice is made by the court, the notice shall be published once each week for two consecutive weeks in some newspaper of general circulation in the county where sale is to be held, the last publication to be not less than one day nor more than seven days before the day of sale. If the property to be sold is located in more than one county, the sale may be held and notice given in any one or more of said counties. Unless otherwise provided by order of the court, the notice shall state the time and place of the sale and describe the property to be sold. Proof of service of the notice required shall be filed before confirmation of the sale.

Bar Committee Comment

Adapted from 635.27 (1962 Code) and based in part on section 165 of the Model Probate Code. No longer necessary to give same notice as is necessary for sale of like property on execution as provided in 635.27 (1962 Code).

§ 398. Adjournment of sale at public auction

The personal representative may adjourn any sale from time to time when, in his discretion, it is deemed for the best interests of the estate to do so, but no adjournment shall be to a time more than three months from the date first fixed for the sale. Every adjournment shall be announced publicly at the time and place at which adjournment is made.

Bar Committee Comment

Adapted from section 165 of the Model Probate Code.

§ 399. Report and confirmation

Within thirty days after making any sale, mortgage, exchange, or lease of real property, the personal representative shall make a verified report of his proceedings to the court. The court shall examine said report, and if satisfied that the sale, mortgage, exchange, or lease has been at the price and terms advantageous to the estate, and, in all respects, made in conformity with law, and that it ought to be confirmed, shall confirm the same and order the personal representative to execute a deed, mortgage, lease or other proper instruments to the persons entitled thereto; provided, however, that in the event said real property has been sold at private sale without an ap-

praisal made for the purpose of such sale, or if it has been appraised and has been sold at private sale for less than the appraised value thereof, then, upon the filing of such report, the court shall enter an order fixing a time and place for hearing thereon, and shall prescribe a notice of such hearing to be served upon all interested persons, any one of whom, prior to the time fixed for such hearing, may file written objections to the entry of an order approving said sale. If not satisfied that the sale, mortgage, exchange, or lease has been made in conformity with law and that it is to the best interests of the estate, the court may reject the sale, mortgage, exchange, or lease, and require a re-execution of the order upon such terms and conditions as it may direct.

Bar Committee Comment

Adapted from section 166 of the Model Probate Code.

§ 400. Execution of conveyance or other instrument

Upon the confirmation of any sale, mortgage, exchange or lease in accordance with the preceding section hereof, the personal representative shall execute the deed, mortgage, lease or other instrument according to the order of confirmation.

Bar Committee Comment

New. Adapted from sections 166 and 167 of the Model Probate Code. Eliminates second auctions in the courtroom and eliminates the necessity of obtaining a separate order approving the execution of the instrument.

§ 401. Endorsement of confirmation

The clerk shall, without further order of court, endorse such confirmation upon such instrument, and cause such instrument to be recorded in the records of his office.

Bar Committee Comment

Adapted from 635.35 and 635.36 (1962 Code).

§ 402. Effect of conveyance—presumption

When so endorsed, said instrument shall be presumptive evidence of the validity thereof and of the regularity of all the proceedings connected therewith.

Bar Committee Comment

Adapted from 635.37 (1962 Code).

§ 403. Record in foreign county

When real property so conveyed or encumbered is located in a county other than that in which such proceedings are had, a complete transcript of the record of all proceedings relating thereto shall be filed by the personal representative in the office of the clerk in such county.

Bar Committee Comment

Adapted from 635.38 (1962 Code).

§ 404. Transcript of court conveyance—record—effect

Any person interested therein may procure from the clerk a transcript of any such conveyance or other instrument which has been so recorded in the office of the clerk for more than five years, and such transcript, when certified by the clerk under the seal of his office, may be filed in the office of the recorder of the county in which said property is located, and shall have the same effect, when so recorded, as the original conveyance.

Bar Committee Comment

Adapted from 635.39 (1962 Code). Shortens the time from ten years to five years.

§§ 405 to 409, inclusive, reserved for future use**PART 7. CLAIMS AGAINST DECEDENT'S ESTATE****TIME AND MANNER OF FILING CLAIMS****§ 410. Limitation on filing claims against decedent's estate**

All claims against a decedent's estate, other than costs of administration, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, and the distributees of the estate, unless filed with the clerk within six months after the date of the second publication of the notice to creditors; provided, however, that the personal representative may waive such limitation on filing; and this provision shall not bar claimants entitled to equitable relief due to peculiar circumstances.

Bar Committee Comment

Adapted from 635.68 (1962 Code). Separate state and federal laws govern the necessity of filing federal and state claims (e. g. support of insane, 230.30 (1962 Code); old age assistance claims, 249.19,

249.21 (1962 Code). Late filing in the event of peculiar circumstances is permitted and retained from 635.68 (1962 Code). For peculiar circumstances, see *Mundt's Estate*, 247 Iowa 1124, 77 N.W.2d 643 (1956). All contingent claims are barred if not filed. For filing and procedure on contingent claims, see section 424 of this Code.

§ 411. Pleading statute of limitations

It shall be within the discretion of the personal representative to determine whether or not the applicable statute of limitations shall be pleaded to bar a claim which he believes to be just, provided, however, that this section shall not apply where the personal representative was appointed upon the application of a creditor.

Bar Committee Comment

Partial codification of Iowa case law. Our Supreme Court has held that a personal representative is not required to invoke the bar of the statute of limitations as to payment of claims against the estate which are payable from the proceeds of personal property belonging to the estate. See *In re Estate of Smith*, 240 Iowa 499, 36 N.W.2d 815 (1949).

§ 412. When claim not affected by statute of limitation

No claim shall be barred by the statutes of limitation which was not barred at the time of the decedent's death, if the claim shall have been filed against the decedent's estate within six months from the date of the decedent's death.

Bar Committee Comment

Adapted from 614.2 (1962 Code). See *Malone v. Averill*, 166 Iowa 78, 147 N.W. 145 (1914).

§ 413. Claims barred when no administration commenced

All claims barrable under the provisions of section four hundred ten (410) shall, in any event, be barred if administration of the estate, whether testate or intestate, original or ancillary is not commenced within five years after the death of the decedent.

Bar Committee Comment

Adapted from 633.47 (1962 Code). Some question existed under 633.47 (1962 Code) as to whether "administration" meant testate as well as intestate administration. Also, if administration was first commenced in another jurisdiction, the five-year limit did not apply to second proceedings commenced in Iowa, at least where decedent was an Iowa nonresident. This section clearly bars a claim in the testate or intestate estate, either of a resident or nonresident regardless of whether original or ancillary, if probate is not commenced within five years after the death of the decedent.

§ 414. Liens not affected by failure to file claim

Nothing in sections four hundred ten (410), four hundred twelve (412) and four hundred thirteen (413) shall affect or prevent any action or proceeding to enforce any mortgage, pledge or other lien upon property of the estate.

Bar Committee Comment

Statement of the present Iowa law. See also sections 422 and 423 of this Code relating to procedure for secured claims.

§ 415. Commencement or continuance of separate action

Any action pending against the decedent at the time of his death that survives, shall also be considered a claim filed against the estate if notice of substitution is served on the personal representative as defendant, and a duplicate of the proof of service of notice of such proceeding is filed in the probate proceedings within the time provided for filing claims in section four hundred ten (410).

A separate action based on a debt or other liability of the decedent may be commenced against the personal representative of the decedent in lieu of filing a claim in the estate. Such an action shall be commenced by serving an original notice on the personal representative and filing a duplicate of the proof of service of notice of such proceeding in the probate proceedings within the time provided for filing claims in section four hundred ten (410), and such action shall also be considered a claim filed against the estate. Such action may be commenced only in a county wherein the venue would have been proper had the decedent survived and the action been commenced against him.

A judgment or decree in favor of the plaintiff in any such action shall constitute an adjudication against the estate.

In all cases where by the death of the party to be charged, the bringing of the action against his estate shall have been delayed beyond the period provided by the statute of limitations, the action may be brought if the original notice is served on the personal representative as defendant, and proof of service of notice of such proceeding is filed in the probate proceedings within the time provided for filing claims in section four hundred ten (410).

Bar Committee Comment

New. Adapted from 635.68 (1962 Code) with codification of present Iowa law relating to continuing or commencing an action in lieu of filing a claim. Place of venue of such action is specified with the provision for filing duplicate of proof of service of notice in the probate proceedings. This provision as to filing duplicate of proof of service in the probate proceedings is intended to apprise all persons

interested in the estate of the fact that a separate action on a claim is pending. At present, there is no such provision in the Iowa law and an action may be pending against the personal representative, and persons interested in the estate, other than the personal representative, would have no knowledge of such action.

§ 416. Compulsory counterclaims—Rules of Civil Procedure

In an action commenced by or against the fiduciary under the provisions of section four hundred fifteen (415), or in any action pending by or against the decedent that survives under the provisions of section four hundred fifteen (415), the Rules of Civil Procedure as to compulsory counterclaims shall apply in such action.

Bar Committee Comment

New. Makes explicit R.C.P. 29 and 30 relating to compulsory counterclaims.

§ 417. Separate action in lieu of proceeding on claims

The provisions of sections four hundred thirty-eight (438) through four hundred forty-eight (448), inclusive, are not applicable to actions continued or commenced under section four hundred fifteen (415) of this Code.

Bar Committee Comment

New. Sections 438 through 448, inclusive, relate to denial and contest of claims filed against the estate and do not apply to separate actions brought under section 415.

§ 418. Form and verification of claims—general requirements

No claim shall be allowed against an estate on application of the claimant unless it shall be in writing, filed in duplicate with the clerk, stating the claimant's name and address, describing the nature and the amount thereof, if ascertainable, and accompanied by the affidavit of 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. If the claim is contingent, the nature of the contingency shall also be stated. The duplicate of said claim shall be mailed by the clerk to the personal representative or his attorney of record.

Bar Committee Comment

Adapted from 635.53 and 635.54 (1962 Code).

§ 419. Requirements when claim founded on written instrument

If a claim is founded on a written instrument, the original or a copy thereof with all endorsements must be attached to the claim. The original instrument must be exhibited to the personal representative or court, upon demand, unless it is lost or destroyed, in which case its loss or destruction must be stated in the claim.

Bar Committee Comment

Adapted from 635.53 (1962 Code).

§ 420. How claim entitled

All claims filed against the estate shall be entitled in the name of the claimant against the personal representative as such, naming the estate, and in all further proceedings thereon that title shall be preserved.

Bar Committee Comment

Adapted from 635.56 (1962 Code).

§ 421. Unsecured claims not yet due

Upon proof of an unsecured claim which will become due at some future time, the same may be paid if the claimant will consent to such discount as the court thinks reasonable; otherwise, the court shall direct the investment of an amount which will provide for the payment of the claim when it becomes due.

Bar Committee Comment

Adapted from 635.70 (1962 Code).

§ 422. Secured claims not yet due

When a creditor holds any security for a claim not yet due, he may file his claim as a claim not yet due with the right of withdrawing the claim if the compromise offer is not satisfactory, and, after such withdrawal, rely entirely on his security, or he may elect to rely entirely on his security without the necessity of filing a claim.

Bar Committee Comment

New. This provision provides for compromise on the basis of the present value of the secured claim or requires the claimant to rely entirely on his security.

§ 423. Procedure for secured claims

When a creditor holds any security for his claim, the security shall be described in the claim. If the claim is secured by a mortgage,

pledge or other lien which has been recorded, it shall be sufficient to describe the lien by date, and refer to the volume, page and place of recording. The claim shall be allowed in the amount remaining unpaid at the time of its allowance, and the judgment allowing it shall describe the security. Payment of the claim shall be upon the basis of the full amount thereof if the creditor shall surrender his security; otherwise payment shall be upon the basis of one of the following:

1. If the creditor shall exhaust his security before receiving payment, then upon the full amount of the claim allowed, less the amount realized upon exhausting the security; or

2. If the creditor shall not have exhausted, or shall not have the right to exhaust his security, then upon the full amount of the claim allowed, less the value of the security determined by agreement, or as the court may direct.

Bar Committee Comment

Adapted from section 139 of the Model Probate Code. Codification of the present Iowa law that the holder of the secured claim has the choice of proceeding against the security or the estate. If he proceeds against the security and a deficiency remains, he can file a claim against the estate for the amount of the deficiency. In the event that the probate estate is insolvent, the claimant receives a pro rata distribution on the basis of the amount of the deficiency rather than of the original claim; this represents an adoption of the bankruptcy (modern) rule and a rejection of the old chancery rule. It remains in the discretion of the equity court as to whether or not a secured creditor of an insolvent estate must proceed against the security first. See *Kramer v. Chambers*, 92 Iowa 681, 61 N.W. 373 (1894); *In re Estate of Butterfield*, 196 Iowa 633, 195 N.W. 188 (1923).

§ 424. Contingent claims

Contingent claims which cannot be allowed as absolute debts shall, nevertheless, be filed in the court and proved. If allowed as a contingent claim, the order of allowance shall state the nature of the contingency. If such claim shall become 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, or

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 two years after distribution of the remainder of the estate; 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, and such distributees shall be liable to the creditor to the extent of the estate received by them, 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, or

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 of the estate received by them, if the contingent claim thereafter becomes absolute; and the court may require such distributees to give bond for the performance of their liability to the contingent creditor, or

4. Such other method as the court may order.

Bar Committee Comment

New. Adapted from section 140 of the Model Probate Code with subsection 4 added. This section gives the utmost flexibility to the handling of contingent claims. Provision is made for compromise and immediate payment based on the present net worth of the contingent claim in addition to the provision for retention pending the claim becoming absolute or distribution subject to the contingency. In addition, subsection 4 is intended to give the court power to deal with unusual situations by proper order.

CLASSIFICATION, ALLOWANCE AND PAYMENT OF DEBTS AND CHARGES

§ 425. Classification of debts and charges

In any estate in which the assets are, or appear to be, insufficient to pay in full all debts and charges of the estate, the personal representative shall classify such debts and charges as follows:

1. Court costs.
2. Other costs of administration.
3. Reasonable funeral and burial expenses.
4. All debts and taxes having preference under the laws of the United States.
5. Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him at his last illness.

6. All taxes having preferences under the laws of this state.
7. All debts owing to employees for labor performed during the ninety days next preceding the death of the decedent.
8. All other claims allowed.

Bar Committee Comment

Adapted from section 142 of the Model Probate Code. General approach is the same as in 635.65 through 635.69, and 635.71 (1962 Code). The following differences: Under the Supreme Court decisions, the court has allowed only reasonable funeral expenses although statute did not say "reasonable", thus provision reflects the Iowa case law. In re Estate of Ewing, 234 Iowa 950, 14 N.W.2d 633; Foley v. Brocksmitt, 119 Iowa 457, 93 N.W. 344, 60 LRA 571, 97 Am.St.Rept. 324. As to medical expenses, they also, according to the provision, must be reasonable and necessary, which reflects common law. Note that medical expenses are now subordinated from former second class position to fifth class. This is due to the federal statute which provides that claims of the United States shall be subordinate only to costs of administration, burial and widow's allowance. 31 U.S.C.A. # 191, R.S. # 3466; See 31 USCA # 192 for liability of fiduciaries and IRC Sec. 6324 for special liens for Estate and Gift Taxes. Preference for labor claims is retained. Section 635.67 (1962 Code). For special limitations on amount which may be allowed for funeral expenses in the case of those to whom a certificate of old age assistance has been issued, see Section 249.18, 249.19 (1962 Code) and In re O'Donnell's Estate, 253 Iowa 607, 113 N.W.2d 246.

§ 426. Order of payment of debts and charges

Payment of debts and charges of the estate shall be made in the order provided in the preceding section, without preference of any claim over another of the same class. If the assets of the estate are insufficient to pay in full all of the claims of a class, then such claims shall be paid on a pro rata basis, without preference between claims then due and those of the same class not due.

Bar Committee Comment

Adapted from 635.69 (1962 Code).

§ 427. Payment of contingent claims by distributees—contribution

If a contingent claim shall have been filed and allowed against an estate and all the assets of the estate shall have been distributed, and the claim shall thereafter become absolute, the creditor shall have the right to recover thereon against those distributees 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, provided an action therefor shall be commenced within six

months after the claim becomes absolute. Such distributees shall be jointly and severally liable, but no distributee shall be liable for an amount exceeding the amount of the estate or fund so distributed to him. If more than one distributee is liable to the creditor, the creditor shall make parties to the action all such distributees who can be reached by process. By its judgment, the court shall determine the amount of the liability of each of the distributees as between themselves, but if any be insolvent or unable to pay his proportion, or beyond the reach of process, the others, to the extent of their respective liabilities, shall nevertheless be liable to the creditor for the whole amount of his debt. If any person liable for the debt fails to pay his just proportion to the creditors, he shall be liable to indemnify all who, by reason of such failure on his part, have paid more than their just proportion of the debt, the indemnity to be recovered in the same action or in separate actions.

Bar Committee Comment

New. Adapted from section 141 of the Model Probate Code.

§ 428. Allowance by personal representative

Where a claim has been filed and is admitted in writing by the personal representative, it shall stand allowed in the absence of fraud or collusion.

Bar Committee Comment

Adapted from 635.57 (1962 Code).

§ 429. Compelling payment of claims

No claimant shall be entitled to compel payment unless his claim has been duly filed and allowed.

Bar Committee Comment

New.

§ 430. Execution and levies prohibited

No execution shall issue upon, nor shall any levy be made against, any property of the estate under any judgment against a decedent or a personal representative, but the provisions of this section shall not be construed to prevent the enforcement of mortgages.

Bar Committee Comment

New. Adapted from section 145 of the Model Probate Code. Reflects present Iowa case law and replaces 635.63 (1962 Code).

§ 431. Claims of personal representative

If the personal representative is a creditor of the decedent, he shall file his claim as other creditors, and the court shall appoint some competent person as temporary administrator to represent the estate in the matter of allowing or disallowing such claim. The same procedure shall be followed in the case of corepresentatives where all such representatives are creditors of the estate; but if one of the corepresentatives is not a creditor of the estate, such disinterested representative shall represent the estate in the matter of allowing or disallowing such claim against the estate by a corepresentative.

Bar Committee Comment

Adapted from 635.64 (1962 Code).

§ 432. Allowance or disallowance of claim of personal representative

The temporary administrator shall, after investigation, file a report with the court recommending the allowance or disallowance of such claim. Unless the court allows the claim, it shall then be disposed of as a contested claim in accordance with the provisions of sections four hundred thirty-nine (439) through four hundred forty-eight (448).

Bar Committee Comment

New.

§ 433. Payment of debts and charges before expiration of six months period

As soon as the personal representative is possessed of sufficient means over and above the other costs of administration, he shall pay any allowance made by the court for the surviving spouse and children of the decedent, and may pay the expenses of funeral, and burial and last illness. Prior to the expiration of six months after the date of the second publication of notice to creditors, the personal representative shall pay such other debts and charges against the estate as the court shall order, and the court may require bond or other security to be given by the creditor to refund such part of such payment as may be necessary to make payment in accordance with the provisions of this code. All payments made by the personal representative without order of court shall be at his own peril.

Bar Committee Comment

Adapted from 635.65, 635.69 and 635.71 (1962 Code) and section 148 of the Model Probate Code.

§ 434. Payment of debts and charges after expiration of six months period

Upon the expiration of six months after the date of the second publication of notice to creditors, the personal representative shall proceed to pay the debts and charges against the estate in accordance with the provisions of this code. If it appears at any time that the estate is or may be insolvent, that there are insufficient funds on hand, or that there is other good and sufficient cause, the personal representative may report that fact to the court and apply for any order that he deems necessary in connection therewith.

Bar Committee Comment

Adapted from 635.65, 635.69 and 635.71 (1962 Code).

§ 435. Debts and charges not filed

The personal representative may pay any valid debts and charges against the estate even though no claim for such debts and charges has been filed, but all such payments made by the personal representative shall be at his own peril.

Bar Committee Comment

New. Statement of Iowa case law.

§ 436. General order for abatement

Except as provided in section two hundred eleven (211) hereof, shares of the distributees shall abate, for the payment of debts and charges, federal and state estate taxes, legacies, the shares of children born or adopted after the making of a will, or the share of the surviving spouse who elects to take against the will, without any preference or priority as between real and personal property, in the following order:

1. Property not disposed of by the will;
 2. Property devised to the residuary devisee, except property devised to a surviving spouse who takes under the will;
 3. Property disposed of by the will, but not specifically devised and not devised to the residuary devisee, except property devised to a surviving spouse who takes under the will;
 4. Property specifically devised, except property devised to a surviving spouse who takes under the will;
 5. Property devised to a surviving spouse who takes under the will.
- A general devise charged on any specific property or fund shall, for purposes of abatement, be deemed property specifically devised to the

extent of the value of the property on which it is charged. Upon the failure or insufficiency of the property on which it is charged, it shall be deemed property not specifically devised to the extent of such failure or insufficiency.

Bar Committee Comment

Adapted from section 184 of the Model Probate Code with codification of Iowa law that share of surviving spouse abates last in the absence of contrary testamentary intent. This section adopts the modern rule of abatement and makes explicit the order in which the share shall abate in the absence of contrary testamentary intent. Real estate is not given priority over personalty. For statutory provisions under the 1962 Code see 633.13, 633.14 and 633.15.

§ 437. Contrary provision as to abatement

If the provisions of the will, the testamentary plan, or the express or the implied purpose of the devise would be defeated by the order of abatement stated in section four hundred thirty-six (436) hereof, the shares of distributees shall abate in such other manner as may be found necessary to give effect to the intention of the testator.

Bar Committee Comment

New. A statement of Iowa law.

DENIAL AND CONTEST OF CLAIMS

§ 438. General denial of claims

Where a claim has been filed, but not admitted in writing by the personal representative before a request for hearing has been given as hereinafter provided, the claim shall be considered as denied without any pleading on behalf of the personal representative.

Bar Committee Comment

Adapted from 635.57 (1962 Code).

§ 439. Disallowance by personal representative

At any time after the filing of a claim against an estate, the personal representative shall give the claimant written notice of disallowance of claim. Such a notice shall be given by certified mail addressed to the claimant at the address stated in the claim.

Bar Committee Comment

New.

§ 440. Contents of notice of disallowance

Such a notice of disallowance shall advise the claimant that the claim has been disallowed and will be forever barred unless the claimant shall within twenty days after the date of mailing the notice, file a request for hearing on the claim with the clerk, and mail a copy of such request for hearing to the personal representative by certified mail.

Bar Committee Comment

New.

§ 441. Proof of service

Proof of service of the notice of disallowance shall be made by affidavit, shall show the date and place of mailing, and shall be filed with the clerk.

Bar Committee Comment

New.

§ 442. Claims barred after twenty days

Unless the claimant shall within twenty days after the date of mailing said notice of disallowance, file a request for hearing with the clerk, and mail a copy thereof to the personal representative, the claim shall be deemed disallowed, and shall be forever barred.

Bar Committee Comment

New. The twenty-day period is the same time allowed for appearance under R.C.P. 53 for all civil actions.

§ 443. Request for hearing by claimant

At the time of the filing of a claim against an estate, or at any time thereafter prior to the time that the claim may be barred by the provisions of section four hundred forty-two (442), or the approval of the final report of the personal representative after notice to the claimant, the claimant may file a written request, in duplicate, for hearing on his claim with the clerk who shall mail the duplicate to the personal representative, or to his attorney of record.

Bar Committee Comment

New.

§ 444. Applicability of Rules of Civil Procedure

Within twenty days from the filing of the request for hearing on a claim, the personal representative shall move or plead to said claim

in the same manner as though the claim were a petition filed in an ordinary action, and thereafter, all provisions of law and Rules of Civil Procedure applicable to motions, pleadings and the trial of ordinary actions shall apply as otherwise provided herein.

Bar Committee Comment

New. The trial of contested claims against estate is in essence a law suit and should be governed by the same rules of procedure.

§ 445. Offsets and counterclaims

At the time of the filing of an answer to a claim, the personal representative shall plead all offsets against the claim, and shall plead all counterclaims against the claimant of which he has knowledge. An offset or counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding the amount, or different in kind, from that sought in the claim.

Bar Committee Comment

New. The court may, of course, extend the time for pleading or filing offsets or counterclaims in accordance with the Iowa Rules of Civil Procedure.

§ 446. Burden of proof

The burden of proving that a claim is unpaid shall not be placed upon the party filing a claim against the estate; but the personal representative may on the trial of the cause, subject the claimant to an examination on the question of payment or consideration, and the estate shall not be concluded or bound thereby.

Bar Committee Comment

Adapted from 635.58 (1962 Code).

§ 447. Trial and hearing

The trial of a claim and the offsets or counterclaims, if any, shall be to the court without a jury; provided, however, that the court may, in its discretion, either on its own motion or upon the motion of any party, submit the same to a jury; and provided further, that in the event that the amount of the claim or a counterclaim exceeds the sum of three hundred dollars, either party shall be entitled to a jury trial, if written demand therefor is made as provided in the Rules of Civil Procedure in relation to the trial of ordinary actions.

Bar Committee Comment

New.

§ 448. Allowance and judgment

Upon the trial of a claim, offsets and counterclaims, the amount owing by or to the estate, if any, shall be determined. A claim against the estate shall be allowed for the net amount. Judgment shall be rendered for any amount found to be due the estate. If a judgment is rendered against a claimant for any net amount, execution may issue in the same manner as on judgments in civil cases.

Bar Committee Comment

New.

§ 449. Payment of federal estate taxes

All federal and state estate taxes (as distinguished from state inheritance taxes) ~~owing by the estate~~ of a decedent shall be paid from the property of the estate, and, in testate matters, from the residue of the estate, unless the will of the decedent, or other trust instrument, provides expressly to the contrary.

Bar Committee Comment

New. See *Kintzinger v. Millin*, 117 N.W.2d 68.

§§ 450 to 468, inclusive, reserved for future use

PART 8. ACCOUNTING, DISTRIBUTION, FINAL
REPORT AND DISCHARGE

§ 469. Interlocutory report

The personal representative may at any time file an interlocutory accounting to the court showing the condition of the estate, its debts and property, the amount of money received, and the disposition made of any of the assets of the estate.

The court may on application of any interested party, or on its own motion, order such an accounting at any time. Such an accounting shall embrace all matters directed by the court. The court may order such further accountings from time to time as it may determine to be to the best interests of the estate.

Bar Committee Comment

Adapted from 638.2, 638.3 and 638.22. Mandatory first report is eliminated since it is not usually followed in the practice.

§ 470. **Waiver of accounting**

The distributee, if under no legal disability, may waive the accounting.

Bar Committee Comment

New. To facilitate settlement of estate and to codify existing practice.

§ 471. **Right of retainer**

When a distributee of an estate is indebted to the estate, or if a distributee takes as an heir of a deceased devisee indebted to the estate, the amount of such indebtedness, if due, or the present worth of the indebtedness, if not due, shall be treated as an offset and retained by the personal representative out of any testate or intestate property, real or personal, of the estate to which such distributee is entitled. The right of setoff and retainer shall be prior and superior to the rights of judgment creditors, heirs or assigns of such distributee and shall not be barred by the statute of limitations, nor by a discharge in bankruptcy.

Bar Committee Comment

New. Adapted from section 187 of the Model Probate Code. There is no such statutory provision under the present Iowa law. It enlarges the provisions of the Model Probate Code to include distributees. It specifically makes the right of retainer superior to rights of creditors, heirs or assigns of the distributee and does not permit the right to be barred by lapse of time or discharge in bankruptcy. In effect it codifies the Iowa Law. See *In re Ferris Estate*, 234 Iowa 960, 14 N.W.2d 889 (1944).

§ 472. **Proceeds distributed in kind**

Property not otherwise disposed of by the personal representative may be distributed in kind.

Bar Committee Comment

Adapted from 636.3 (1962 Code).

§ 473. **Final settlement—time limit**

Final settlement shall be made within three years, after the second publication of the notice to creditors, unless otherwise ordered by the court after notice to all interested parties.

Bar Committee Comment

Adapted from 638.4 (1962 Code).

§ 474. Certificate as to payment of personal taxes

Prior to or at the time of filing the final report, there shall be filed in the estate proceedings, the certificate of the treasurer of the county in which the administration of the estate is pending, that all personal taxes due and to become due the county in such estate matter have been paid in full. When no assets remain in the hands of the personal representative after the payment of debts and charges having priority under the provisions of section four hundred twenty-five (425), such certificate need not be filed. No charge shall be made by the county treasurer for the issuance of such certificate.

Bar Committee Comment

Adapted from 682.35 and 682.36 (1962 Code). These sections should be in the Probate Code rather than in the taxation sections because the tax is already imposed under the taxation statutes.

§ 475. Compromise of personal taxes

For the purpose of facilitating the speedy settlement and distribution of estates, the county treasurer of such county, by and with the consent of the board of supervisors may compromise and agree upon the amount of personal taxes at any time due or to become due the county from an estate, and payment in accordance with such compromise or agreement shall be for the satisfaction of all taxes in such estate matter. No compensation shall be allowed any person because of such compromise or agreement.

Bar Committee Comment

See comment under 474.

§ 476. Action against distributees—costs—tender

In an action against the distributees, where the judgment is to be against them in proportion to the respective amounts received by them from the estate, costs awarded against them shall be in like proportion, and anyone may tender the amount due from him to the plaintiff, which shall have the same effect, as far as he is concerned, as though he were the sole defendant.

Bar Committee Comment

Adapted from 638.20 (1962 Code).

§ 477. Final report

Each personal representative shall, in his final report, set forth:

1. An accurate description of all the real estate of which the decedent died seized, stating the nature and extent of his interest therein, which has not been sold and conveyed by the personal representative.
2. Whether the deceased died testate or intestate.
3. The name and place of residence of the surviving spouse, or that none survived the deceased.
4. In intestate estates, the name and place of residence of each of the heirs and their relationship to the deceased.
5. In testate estates, the name and place of residence of each of the devisees and their relationship to the deceased, and the name and residence of after-born children, if any, as defined in section two hundred sixty-seven (267).
6. Whether any legacy or devise remains a charge on the real estate, and, if so, the nature and amount thereof.
7. Whether any distributee is under any legal disability.
8. The name of the conservator or trustee for any distributee, and the court from which his letters were issued.
9. An accounting of all the moneys and personal property coming into the hands of the personal representative. The accounting may be omitted if waived by all interested parties.
10. A statement as to whether or not all statutory requirements pertaining to taxes have been complied with.

Bar Committee Comment

Adapted from 638.34. Paragraph 4 has been confined to intestate estates; paragraph 5 is confined to testate estates; paragraphs 7, 9 and 10 are new; and a requirement has been added to include the name and residence of after-born children.

§ 478. Notice of application for discharge

Unless notice be waived in writing, no personal representative shall be discharged from further duty or responsibility upon final settlement until notice of hearing on his final report or of an application for discharge shall have been served upon all persons interested as required for the commencement of a civil action, unless a different service be ordered by the court. Such an order may be made before or after the filing of the final report.

Bar Committee Comment

Adapted from 638.36 (1962 Code).

§ 479. Discharge

Upon final settlement of an estate, an order shall be entered discharging the personal representative from further duties and responsibilities. The order approving the final report shall constitute a waiver of the omission from the final report of any of the recitals required in section four hundred seventy-seven (477).

Bar Committee Comment

Adapted from 638.12 (1962 Code).

§ 480. Change of title certificate with administration

After the entry of the order approving the final report, the clerk shall issue a certificate under the provisions of chapter five hundred fifty-eight (558) of the Code of Iowa relative to each parcel of real estate described in the final report of the personal representative which has not been sold by the personal representative, and deliver such certificate to the county auditor of the county in which such real estate is situated.

Bar Committee Comment

New. Codifies procedure used in most counties in connection with change of title authorized under 558.66 and 606.14 (1962 Code). This section spells out the duty of the clerk and avoids using certificate of change of title when real estate has been sold by the personal representative. The procedure followed in most counties is not too clear and often results in confusion when setting up the auditors' plat books.

§ 481. Change of title certificate without administration

Whenever an order is entered under the provisions of section four hundred fifty point forty (450.40) of the Code of Iowa, without administration of the estate of a decedent, the clerk shall issue and deliver to the county auditor of the county in which such real estate is situated a like certificate pertaining to each parcel of real estate described in the application for such order.

Bar Committee Comment

New. Provides for procedure for change of title of real estate when there is no administration of the estate and there is only clearance of inheritance taxes under Chapter 450 (1962 Code).

§§ 482 to 486, inclusive, reserved for future use

PART 9. REOPENING

§ 487. Limitation on rights

No person, having been served with notice of the hearing upon the final report and accounting of a personal representative or having waived such notice, shall, after the entry of the final order approving the same and discharging the said personal representative, have any right to contest, in any proceeding, other than by appeal, the correctness or the legality of the inventory, the accounting, distribution, or other acts of the personal representative, or the list of heirs set forth in the final report of the personal representative, provided, however, that nothing contained in this section shall prohibit any action against the personal representative and his bondsman under the provisions of section one hundred ninety (190) on account of any fraud committed by the personal representative.

Bar Committee Comment

New. Enlarges upon 638.36 (1962 Code). Explicitly establishes order approving final report as having the effect of a final judgment or decree as to all parties having notice, but preserves right against personal representative for fraud.

§ 488. Reopening settlement

Whenever a final report has been approved and a final accounting has been settled in the absence of any person adversely affected and without notice to him, the hearing on such report and accounting may be reopened at any time within five years from the entry of the order approving the same, upon the application of such person, and, upon a hearing, after such notice as the court may prescribe to be served upon the personal representative and the distributees, the court may require a new accounting, or a redistribution from the distributees. In no event, however, shall any distributee be liable to account for more than the property distributed to him. If any property of the estate shall have passed into the hands of good faith purchasers for value, the rights of such purchasers shall not, in any way, be affected.

Bar Committee Comment

Designed to protect persons adversely affected by a final report or final accounting who did not receive notice, but at the same time protecting rights of good faith purchasers for value.

§ 489. Reopening administration

Upon the petition of any interested person, the court may, with such notice as it may prescribe, order an estate reopened if other property be

discovered, if any necessary act remains unperformed, or for any other proper cause appearing to the court. It may reappoint the personal representative, or appoint another personal representative, to administer any additional property or to perform other such acts as may be deemed necessary. The provisions of law as to original administration shall apply, insofar as applicable, to accomplish the purpose for which the estate is reopened, but a claim which is already barred can, in no event, be asserted in the reopened administration.

Bar Committee Comment

Adapted from section 194 of the Model Probate Code in lieu of 638.9 (1962 Code) to permit reopening for administration of newly discovered property or performance of required but omitted acts of personal representatives.

§§ 490 to 494, inclusive, reserved for future use

**DIVISION VIII—FOREIGN WILLS AND ANCILLARY
ADMINISTRATION**

PART 1. FOREIGN WILLS

§ 495. Admission of wills of nonresidents

A will of a nonresident of this state, not probated in any other state or county, may be admitted to probate in any county of this state where either real or personal property of the deceased nonresident is located.

Bar Committee Comment

Entirely new concept in Iowa probate law. It makes possible an original probate in Iowa regardless of the last residence of the testator.

§ 496. Foreign probated wills

A will probated in any other state or country shall be admitted to probate in this state upon the production of a copy thereof and of the original record of probate, authenticated by the attestation of the clerk of the court in which such probate was made, or, if there be no clerk, then by the attestation of the judge of such court, and by the seal of office of such officer if he or his office has a seal.

Bar Committee Comment

Same as 633.33 (1962 Code), except that it omits the phrase "without the notice required in the case of domestic wills", which phrase is superfluous.

§ 497. Foreign wills as a muniment of title

After the expiration of the five-year period provided in section three hundred thirty-one (331), an exemplified copy of a will which has not been denied probate in Iowa, and of the order admitting it to probate in a foreign state or country, may be recorded in the office of the county recorder of any county where real estate owned by the testator is located. The record of such a will and of the order admitting the will to probate shall operate to dispose of said property as though said will had been admitted to probate in this state. Nothing contained in this section shall operate to defeat the rights, acquired prior to such record, of purchasers for value whose rights are shown of record.

Bar Committee Comment

New. By the introduction of this section, three ways are provided in the law for making title to Iowa real estate owned at his death by a testate nonresident:

1. By original probate under section 495;
2. By probate in Iowa of a foreign probated will under section 496;
3. By use of a foreign will as a muniment of title under this section even after time for probate has passed.

§ 498. Foreign wills—procedure

All provisions of law relating to the carrying of domestic wills into effect after their probate shall apply, so far as applicable, to foreign wills admitted to probate in this state.

Bar Committee Comment

Same as 633.34 (1962 Code). There is no conflict or ambiguity as between this section and section 497 since this section applies to wills admitted to probate under sections 495 and 496.

§ 499. Appointment where no foreign probate

The fiduciary named in the will of a nonresident that has not been probated in any other state, may, upon application, after such will has been admitted to probate in this state, be appointed fiduciary in this state; provided that a resident fiduciary be appointed to serve with the nonresident fiduciary; provided, further, that, for good cause shown, the court may appoint the nonresident fiduciary to act alone without the appointment of a resident fiduciary.

Bar Committee Comment

New. This section provides that in any case where the will of a nonresident is admitted to probate in Iowa without its prior probate in another state, the Iowa Court may appoint a nonresident as execu-

tor or as trustee. It is contemplated that a resident fiduciary will ordinarily be appointed to serve with the nonresident. However, in particular instances, for good cause shown, the court may appoint the nonresident as the sole fiduciary.

PART 2. ANCILLARY ADMINISTRATION

§ 500. Appointment of foreign administrator

If administration of the estate of a deceased intestate nonresident has been granted in accordance with the law of the state where he resided, the duly qualified administrator of the estate of the nonresident may upon application be appointed administrator in this state, unless another has already been appointed and provided that a resident administrator be appointed to serve with the nonresident administrator; provided further, however, that for good cause shown, the court may appoint the nonresident administrator to act alone without the appointment of a resident administrator.

Bar Committee Comment

Adapted from 633.50 (1962 Code). This revision gives the Iowa court control of the administration by providing that generally a resident administrator shall serve jointly with the nonresident; however, in particular instances, for good cause shown, the court may waive the appointment of a resident fiduciary.

§ 501. Application for appointment of foreign administrator

The application for any such appointment under section five hundred (500) shall contain the name and address of the foreign administrator and of the resident administrator, if any, to be appointed, and shall be accompanied by a certificate of the clerk of the court of original jurisdiction certifying that such estate is under administration, and a certification of the original letters or other authority authorizing the nonresident administrator to act in that estate.

Bar Committee Comment

New.

§ 502. Appointment of foreign fiduciary

The duly qualified fiduciary under a will admitted to probate in another state, may upon application be appointed fiduciary in this state, after said will has been admitted to probate in this state, provided that a resident fiduciary be appointed to serve with the nonresident fiduciary; provided further, however, that, for good cause shown, the court

may appoint the nonresident fiduciary to act alone without the appointment of a resident fiduciary.

Bar Committee Comment

New. This section replaces the very limited 633.35 (1962 Code), and, in practical effect, does for the Iowa administration of a foreign testate estate what section 500 does for a foreign intestate estate.

§ 503. Application for appointment of foreign executor or trustee

The application for appointment of a nonresident executor or trustee shall include the name and address of the nonresident executor or trustee, and the name and address of the resident executor or trustee, if any, to be appointed. It shall be accompanied by a certificate of the clerk of the foreign court granting the original letters or other authority conferring the power upon the nonresident executor or trustee to act as such. The application shall also state the cause for the appointment of the nonresident executor or trustee to act as the sole executor or trustee, if such appointment is desired. When the will has not been admitted to probate in any other state, the application shall include the name and address of the executor or trustee, if any, named in the will of the nonresident, and of the resident executor or trustee to be appointed.

Bar Committee Comment

New. This section establishes the procedure to be followed to secure the right which is given under section 502, just as section 501 provides a similar procedure for intestate estates.

§ 504. Removal of property—payment of claims

In all estates of nonresidents, being administered in this state, the court may require payment of all claims filed and allowed belonging to residents of this state, and all legacies or distributive shares payable to residents of this state, before allowing any of the property in the estate to be removed from the state.

Bar Committee Comment

Same as 633.52 (1962 Code).

§§ 505 to 509, inclusive, reserved for future use

DIVISION IX—ESTATES OF ABSENTEES**§ 510. Administration authorized—petition**

Administration may be had upon the estate of an absentee. A petition therefor must be filed in the office of the clerk and must allege:

1. Whether the absentee was a resident or a nonresident of this state, and his address at his last known domicile; that he has, without known cause, absented himself from his usual place of residence, and concealed his whereabouts from his family, for a period of five years.

2. That the said absentee has property in this state (describing it with reasonable certainty), all or part of which is situated in the county in which the petition is filed.

3. The names of the persons, so far as known to the petitioner, who would be entitled to share in the estate of the absentee if he were dead.

4. In the case of a nonresident, whether administration upon the estate has been granted in the state of last known domicile.

5. Facts showing that the petitioner is a party who would be entitled to administer the estate of the said absentee in case the absentee were known to be dead.

Bar Committee Comment

Adapted from 634.1 (1962 Code). This section revised to include the estates of nonresident absentees, and the period of absence is reduced in all instances from seven years to five years.

§ 511. Notice

Upon filing of such petition, the court shall, by a proper order, prescribe the notice and the return day therein, which shall be addressed to and served upon such absentee and the alleged distributees of his estate.

Bar Committee Comment

Adapted from 634.2 (1962 Code).

§ 512. Service

Said notice shall in all cases be served:

1. By publication in the county in which the petition is filed, once each week for three consecutive weeks, in a newspaper designated by the court; and

2. Upon all the alleged distributees of the estate of said absentee by ordinary mail addressed to them at their last known address.

Bar Committee Comment

Adapted from 634.3 (1962 Code). Paragraph 1 is the same as paragraph 1 of the old section except that the publication requirement is reduced from eight weeks to three weeks. Paragraph 2 provides for notice to "alleged distributees" rather than "known and alleged beneficiaries", and also spells out the requirement of giving notice by ordinary mail in addition to publication in order to comply with the requirements of the Mullane case. See *Mullane v. Central Hanover Bank & Trust Company*, 94 Lawyers Ed. 865, 70 Supreme Court Reporter 652 (1950).

§ 513. Proof of service—filing

Proof of the publication and service of such notice shall be filed with the clerk aforesaid on or before the day set for hearing.

Bar Committee Comment

Same as 634.4 (1962 Code).

§ 514. Hearing—continuance—orders

If, on the day set for hearing, the absentee fails to appear, the court shall appoint some disinterested person as guardian ad litem to appear for the absentee and all distributees not appearing, and said cause shall thereupon stand continued for twenty days. The court shall have authority to make further continuance upon proper showing. The guardian ad litem shall investigate the matter and things alleged in the petition. Upon the further hearing, the court shall hear the proofs, and, if satisfied of the truth of the allegations of the petition, shall enter an order establishing the death of the absentee as a matter of law.

Bar Committee Comment

Adapted from 634.5 (1962 Code), with the additional provision that the order establishes the death of the absentee as a matter of law. This addition is desirable to establish the rights of the survivors where property is held in joint tenancy. It would also establish the death of the absentee for purposes of social security benefits and claims under life insurance policies.

§ 515. Administration

Upon the entry of such further order under section five hundred fourteen (514), administration of the estate of such absentee, whether testate or intestate, shall proceed as provided herein for the admin-

istration of the estates of other decedents, notwithstanding the provisions of section three hundred thirty (330).

Bar Committee Comment

Substitute for 634.6, 634.7, 634.8, 634.9 and 639.10 (1962 Code). Provides for the administration of the estate of an absentee in the same manner as any other decedent's estate, making it unnecessary to spell out the various powers and duties set forth in the substituted sections.

§ 516. Rights of absentee barred—sale by spouse

Such an order establishing the death of an absentee shall forever bar the rights of homestead and distributive share of the absentee, and his interest in and to any real estate owned or held by the spouse of such absentee, and in which said spouse may have a legal or equitable interest. Conveyance of any such real estate by such spouse, after six months or more from date of publication of second notice of appointment of a personal representative, shall be free and clear of any claim or right of homestead or distributive share on the part of such absentee.

Bar Committee Comment

Same as 634.11 (1962 Code), except that the period after which a spouse may convey has been changed from one year to six months.

§ 517. Missing soldiers or sailors—presumption of death

1. A written finding of presumed death, made by the secretary of defense, or other officer or employee of the United States authorized to make such finding, pursuant to the federal Missing Persons Act (56 Stat. 143, 1092, and P.L. 408, Ch. 371, 2d Session 78th Congress; 50 U.S.C.App.Supp. 1001-17), as now or hereafter amended, or a duly certified copy of such a finding, shall be received in any court, office or other place in this state, as evidence of the death of the person therein found to be dead, and of the date, circumstances, and place of his disappearance.

2. An official written report or record, or a duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged, or captured by an enemy, or is dead, or is alive, made by any officer or employee of the United States authorized by the act referred to in subsection one (1) of this section, or by any other law of the United States, to make such a report or record, shall be received in any court, office or other place in this state as evidence that such person is missing, missing in action, in-

terned in a neutral country, or beleaguered, besieged, or captured by an enemy, or is dead, or is alive, as the case may be.

3. For the purposes of subsections one (1) and two (2) of this section, any finding, report, or record, or duly certified copy thereof, purporting to have been signed by such an officer or employee of the United States as is described in said subsections, shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing the same shall prima facie be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a person authorized by law to certify the same, such certified copy shall be prima facie evidence of his authority so to certify.

Bar Committee Comment

Same as 634.12 (1962 Code).

§§ 518 to 522, inclusive, reserved for future use

**DIVISION X—UNIFORM SIMULTANEOUS
DEATH ACT**

Bar Committee Comment

These sections are re-enacted into the Probate Code from sections 637.1 through 637.7 (1962 Code), with the deletion of "tenants by entirety" in 637.3 (1962 Code) which has not been recognized in Iowa.

§ 523. No sufficient evidence of survivorship

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 sections five hundred twenty-four (524) to five hundred twenty-seven (527) inclusive.

§ 524. Beneficiaries of another person's disposition of property

Where two or more beneficiaries are designated to take successively, by reason of survivorship, under another person's disposition of property, and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously, the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries, and these portions shall be distributed respectively to

those who would have taken in the event that each designated beneficiary had survived.

§ 525. Joint tenants

Where there is no sufficient evidence that two joint tenants 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 two 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.

§ 526. Insurance policies

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.

§ 527. Limitation of application

Sections five hundred twenty-three (523) and five hundred twenty-four (524) shall not apply in the case of wills, living trusts, deeds, or contracts of insurance wherein provision has been made for distribution of property different from the provisions of said sections.

§ 528. Uniformity of interpretation

Sections five hundred twenty-three (523) through five hundred twenty-seven (527) shall be so construed and interpreted as to effectuate their general purpose to make uniform the law relating to simultaneous death.

§§ 529 to 534, inclusive, reserved for future use

DIVISION XI—FELONIOUS DEATH

Bar Committee Comment

These sections are in substance a re-enactment of sections 636.47, 636.48 and 636.49 (1962 Code).

§ 535. Feloniously causing death

No person who feloniously takes or causes or procures another to take the life of another shall inherit from such person, or receive any

interest in the estate of the decedent as surviving spouse, or take by devise or legacy from him, any portion of his estate.

§ 536. Insurance beneficiary feloniously causing death

No beneficiary of any policy of insurance or certificate of membership issued by any benevolent association or organization, payable upon the death or disability of any person, who feloniously takes or causes or procures to be taken the life upon which such policy or certificate is issued, or who feloniously causes or procures a disability of such person, shall take the proceeds of such policy or certificate.

§ 537. Distribution to other heirs or insured

In every instance mentioned in sections five hundred thirty-five (535) and five hundred thirty-six (536), all benefits that would accrue to any such person upon the death or disability of the person whose life is thus taken or who is thus disabled shall be distributed to the other persons who would take under the will of the decedent or according to the rules of intestate succession, as the case may be.

§§ 538 to 542, inclusive, reserved for future use

DIVISION XII—PROCEEDINGS FOR ESCHEAT

Bar Committee Comment

Re-enactment of 636.51 through 636.54 (1962 Code). Section 543 changes the provision for notice to the attorney general to the comptroller.

§ 543. Proceedings for escheat

When the court has reason to believe that any property of the estate of a decedent within the county should by law escheat, he must forthwith inform the attorney general of the state of Iowa thereof, and appoint some suitable person as personal representative to take charge of such property, unless a personal representative has already been appointed.

§ 544. Notice to persons interested

The personal representative must give such notice of the death of the deceased, and of the amount and kind of property left by him within the state, as, in the opinion of the court appointing him shall be best calculated to notify those interested, or supposed to be interested, in the property.

§ 545. Sale—proceeds

If within six months from the giving of such notice, no claimant thereof appears, such property may be sold and the proceeds paid over by the personal representative to the state comptroller for the benefit of the school fund.

§ 546. Payment to person entitled

The money or any portion of it shall be paid at any time within ten years after the sale of the property or the appropriation of the money, but not afterwards, to anyone showing himself entitled thereto.

§§ 547 to 551, inclusive, reserved for future use

**DIVISION XIII—OPENING GUARDIANSHIPS AND
CONSERVATORSHIPS**

PART 1. OPENING GUARDIANSHIPS

Bar Committee Comment

GENERAL COMMENT:

A number of the problems dealing with guardianships are discussed in the Symposium on Guardianships which appears in the IOWA LAW REVIEW Vol. 45, pp 209 - 440 (Winter 1960). There are five chapters in the 1962 Code dealing with guardianships (Chapters 558 Minors, 668 Foreign, 670 Alcoholics, etc., 671 Absentees, and 672 Veterans). The provisions for appointment differ and the provisions for administration are often confusing.

In 1961, the state of Oregon enacted a complete revision of its law relating to guardianships and conservatorships which were recommended by the Legislative Counsel Committee. The Legislative Counsel Committee relied to a great extent upon the IOWA LAW REVIEW article above mentioned, as well as the sections in the MODEL PROBATE CODE pertaining to guardianships and conservatorships.

The term "conservatorship" is a new term in Iowa. There appears to be considerable resistance on the part of aged and uninformed people to have any person appointed to assist them in the management of their property and affairs. The word "guardian" in the minds of many people has a bad connotation and is associated with lunatics and insane persons. This is probably due to the wording of the 1963 Code provisions. The term "conservator" simply is a substitute term for what we have always known as "guardian of the property" and is designed to remove the prejudice of many aged persons to voluntarily consenting to the court appointment of a person to manage their property.

The provisions for a standby guardianship are entirely new. These provisions make it possible for a person who is presently compe-

tent but who realizes the possibility of incompetency with the declining years, to nominate a person to be later appointed by the court to manage his affairs. His right is very similar to the right of the person to name an executor in his will. These provisions should prove to be very beneficial in many instances.

In addition to the provisions in the Probate Code dealing with the special matters relating to guardianships and conservatorships, the sections relating to all fiduciaries (sections 64 through 205) are also applicable to guardians and conservators.

§ 552. Petition for appointment of guardian

Any person may file with the clerk a verified petition for the appointment of a guardian. The petition shall state the following information so far as known to the petitioner.

1. The name, age and post-office address of the proposed ward.
2. That the proposed ward is: a minor, a mental retardate, mentally ill, senile, a chronic alcoholic, or a spendthrift.
3. The name and post-office address of the proposed guardian, and that such person is qualified to serve in that capacity.
4. That the proposed ward is a resident of the state of Iowa or is present in the state, and that his best interests require the appointment of a guardian in this state.
5. The name and address of the person or institution, if any, having the care, custody or control of the proposed ward.

Bar Committee Comment

New. Adapted from the new Oregon Act on Guardianships. The intention is to specify the contents of the petition for appointment of a guardian to enable uniformity of procedure.

§ 553. No notice required—minor

No notice of the filing of such petition need be given when the proposed ward is a minor and such petition is filed by the person having custody of the proposed ward.

Bar Committee Comment

New. This section codifies present case law but limits its application to the situation in which the applicant already has custody of the minor for whom a guardianship is requested.

§ 554. Notice governed by Rules of Civil Procedure

In all other cases, notice of the filing of such petition shall be served upon the proposed ward in the manner of an original notice

and the Rules of Civil Procedure governing original notices shall also govern such notice as to content.

Bar Committee Comment

New. The requirements of proper notice to the proposed ward are clarified by exact reference to the body of rules which govern ordinary civil actions.

§ 555. Pleadings and trial—Rules of Civil Procedure

All other pleadings and the trial of the cause shall be governed by the Rules of Civil Procedure. The cause shall be tried as a law action, and either party shall be entitled to a jury trial if demand is made therefor as provided by the Rules of Civil Procedure.

Bar Committee Comment

New. The right to trial by jury as provided by former section 670.9 (1962 Code) has been retained. Former section 670.7 (1962 Code) has been clarified and expanded.

§ 556. Appointment of guardian

If the allegations of the petition as to the status of the proposed ward and the necessity for the appointment of a guardian are proved, the court may appoint a guardian.

Bar Committee Comment

Adapted from part of former section 670.2 (1962 Code).

§ 557. Appointment of guardian on voluntary petition

A guardian may also be appointed by the court upon the verified petition of the proposed ward, if he is other than a mental retardate, a mentally ill person, or a minor under the age of fourteen years, provided that the court determine that such an appointment inures to the best interest of the applicant.

Cross reference: See sections 572 and 635.

Bar Committee Comment

Adapted from former sections 668.4 and 670.5 (1962 Code).

§ 558. Appointment of temporary guardian

A temporary guardian may be appointed, but only after a hearing on such notice, and subject to such conditions, as the court shall prescribe.

Bar Committee Comment

Adapted from former section 670.8 (1962 Code). This section is intended to give the court authority to carefully restrict both the use and powers of a temporary guardian.

§ 559. Preference as to appointment

The parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as guardian. Preference shall then be given to any person, if qualified and suitable, nominated as guardian for a minor child by a will executed by the parent having custody of a minor child, and any qualified and suitable person requested by a minor fourteen years of age or older. Subject to these preferences, the court shall appoint as guardian a qualified and suitable person who is willing to serve in that capacity.

Bar Committee Comment

Adapted from 668.1, 668.2 and 668.4 (1962 Code). The preference for a parental guardian is retained, but the needless and imprecise language concerning "natural guardians" is discarded. The second category in the preferential scale creates a testamentary guardianship, which existed in Iowa until 1873, but which has been non-existent since that date. In re Guardianship of Johnson, 87 Iowa 130, 54 N.W. 69 (1893). See Jenkins vs. Clark, 71 Iowa 552, 32 N.W. 504 (1887); In re Estate of Meyer, 240 Iowa 1226, 1227, 37 N.W.2d 265, 266 (1949); Turner vs. Ryan, 223 Iowa 191, 196, 272 N.W. 60, 62 (1937); In re Guardianship of Waite, 190 Iowa 182, 186, 180 N.W. 159, 161 (1920). For the early provision for a testamentary guardianship see Iowa Code section 1492 (1851); Iowa Code section 2544 (Revision 1860). The third category of preference, which is intended to be equal to the second, retains the power of a minor over the age of fourteen years to select his own guardian, subject to the approval of the court.

§ 560. Appointment of guardian on a standby basis

A petition for the appointment of a guardian on a standby basis may be filed by any person under the same procedure and requirements as provided in sections five hundred ninety-one (591) through five hundred ninety-seven (597), both inclusive, for appointment of standby conservator, insofar as applicable.

Bar Committee Comment

New. Reference is made to the comments under section 591 through 597, inclusive. It is intended that the standby guardian upon appointment and qualification have the same powers and duties as any other guardian.

§§ 561 to 565, inclusive, reserved for future use

PART 2. OPENING CONSERVATORSHIPS

§ 566. Petition for appointment of conservator

Any person may file with the clerk a verified petition for the appointment of a conservator. The petition shall state the following information, so far as known to the petitioner:

1. The name, age and post-office address of the proposed ward.
2. That the proposed ward is: a minor, a mental retardate, mentally ill, senile, a chronic alcoholic, or a spendthrift.
3. The name and post-office address of the proposed conservator, and that such person is qualified to serve in that capacity.
4. A general description of the property of the proposed ward within this state and of the right to receive property, together with the probable present value of such property and rights. If any money is payable, or to become payable, to the proposed ward by the United States through the Veterans Administration, the petition shall so state.
5. The name and address of the person or institution, if any, having the care, custody or control of the proposed ward.
6. That the proposed ward resides in the state of Iowa, is a non-resident, or that his residence is unknown, and that his best interests require the appointment of a conservator in the state of Iowa.

Bar Committee Comment

Adapted from the new Oregon Act on Guardianships. The intention is to specify the contents of the petition for appointment of a conservator to enable uniformity of procedure. This section provides what no section in former Chapter 668 (1962 Code) covered and replaces former section 670.2 (1962 Code).

§ 567. No notice required—minor

No notice of the filing of such petition need be given when the proposed ward is a minor and such petition is filed by the person having custody of the proposed ward.

Bar Committee Comment

New. This section retains the "in rem" approach to conservatorships of minors only where the application is filed by the person having custody of the proposed ward.

§ 568. Notice governed by Rules of Civil Procedure

In all other cases, notice of the filing of such petition shall be served upon the proposed ward in the manner of an original notice and the Rules of Civil Procedure governing original notice shall also govern such notice as to content.

Bar Committee Comment

New. The requirements of proper notice are clarified by exact reference to the body of rules which govern ordinary civil actions.

§ 569. Pleadings and trial—Rules of Civil Procedure

All other pleadings and the trial of the cause shall be governed by the Rules of Civil Procedure. The cause shall be tried as a law action, and either party shall be entitled to a jury trial if demand is made therefor as provided by the Rules of Civil Procedure.

Bar Committee Comment

New. The right to trial by jury as provided by 670.9 (1962 Code) has been retained. Former section 670.7 (1962 Code) has been clarified and expanded.

§ 570. Appointment of conservator

If the allegations of the petition as to the status of the proposed ward and the necessity for the appointment of a conservator are proved, the court may appoint a conservator.

Bar Committee Comment

Adapted from part of 670.2 (1962 Code).

§ 571. Preference as to appointment of conservator

The parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as conservator. Preference shall then be given to any person, if qualified and suitable, nominated as conservator for a minor child by a will executed by the parent having custody of a minor child, and any qualified and suitable person requested by a minor fourteen years of age or older. Subject to these preferences, the court shall appoint as conservator a qualified and suitable person who is willing to serve in that capacity.

Bar Committee Comment

New. See the comment under section 589.

§ 572. Appointment of conservator on voluntary petition

A conservator may also be appointed by the court upon the verified petition of the proposed ward, if he is other than a mental retardate, or a mentally ill person, or a minor under the age of fourteen years, provided that the court determines that such an appointment inures to the best interest of the applicant. Such petition shall state whether a notice of involuntary petition for the appointment of a conservator has been served on the proposed ward.

Cross reference: See sections 557 and 635.

Bar Committee Comment

Adapted from 668.4 and 670.5 (1962 Code). The court may combine proceedings seeking voluntary and involuntary appointment of a conservator. See section 635.

§ 573. Appointment of temporary conservator

A temporary conservator may be appointed but only after a hearing on such notice, and subject to such conditions, as the court shall prescribe.

Bar Committee Comment

Adapted from 670.8 (1962 Code). This section is intended to give the court authority to carefully restrict both the use and powers of a temporary conservator.

§ 574. Procedure in lieu of conservatorship

If no conservator has been appointed, money due a minor or other property to which a minor is entitled, not exceeding in the aggregate the sum of one thousand dollars in value, may be paid or delivered to a parent of the minor who is entitled to the custody of such minor, upon written statement verified by the oath of such parent, that all money or property of such minor does not exceed in the aggregate the sum of one thousand dollars; and the written receipt of such parent shall constitute an acquittance of the person making such payment of money or delivery of such property.

Cross reference: See chapter 565A of the 1962 Code of Iowa.

Bar Committee Comment

Adapted from 668.3 (1962 Code). The amount of property which can be handled in this fashion has been increased from \$500.00 to \$1000.00.

Cross reference: See Chapter 565A (1962 Code).

§§ 575 to 579, inclusive, reserved for future use

PART 3. CONSERVATORSHIPS FOR ABSENTEES

§ 580. Petition for appointment of conservator for absentee

When a person owns property located in the state of Iowa, his whereabouts are unknown, and no provision for the care, control and supervision of such property has been made, with the result that such property is likely to be lost or damaged, or that the dependents of such owner are likely to be deprived of means of support because of such absence, it shall be proper for any person to file with the clerk a petition for the appointment of a conservator of such property of the absentee. The petition shall state the following information, so far as known to the petitioner:

1. The name, age and last known post-office address of the proposed ward.
2. The facts concerning the disappearance of the absentee.
3. The name and post-office address of the proposed conservator, and that he is qualified to serve in that capacity.
4. A general description of the property of the absentee within this state and of his right to receive property; also, the probable present value of such property and right. If any money is payable, or to become payable to the absentee by the United States through the Veterans Administration, the petition shall so state.
5. That the property of the absentee is likely to be lost or damaged, or that his dependents are likely to be deprived of means of support, because of his absence, and that no proper provision has been made for the care, control and supervision over such property.

Bar Committee Comment

New. This section replaces 671.1 (1962 Code) and modifies both substance and procedure. The former three-month waiting period is eliminated in order to permit immediate arrangements for the support of dependents of the absentee.

§ 581. Original notice governed by Rules of Civil Procedure

Notice of the filing of such a petition and of the hearing thereon shall be served upon the absentee by publication in the manner of an original notice and the Rules of Civil Procedure governing original notices by publication shall also govern such a notice as to content.

Bar Committee Comment

New. Replaces 671.2 (1962 Code). The notice provision is conformed to the practice under the Rules of Civil Procedure.

§ 582. Notice on county attorney

Such notice shall also be served on the county attorney of the county in which the petition is filed and on the spouse and children of the absentee as provided by the Rules of Civil Procedure. If there are no spouse or children, such notice shall be served on such persons and in such manner as the court may prescribe.

Bar Committee Comment

New. Replaces 671.3 (1962 Code). The intention is to provide for notice directed to those most likely to have an interest in the whereabouts of the absentees.

§ 583. Pleadings and trial—Rules of Civil Procedure

All other pleadings and the trial of the cause shall be governed by the Rules of Civil Procedure.

Bar Committee Comment

New.

§ 584. Appointment of conservator

In the event that the absentee does not appear at said hearing, the court shall hear the petition and the proof offered. All evidence shall be made a part of a transcript to be filed in such proceedings. If the allegations of the petition are proved, the court may appoint a conservator.

Bar Committee Comment

Adapted from 671.5, 671.6 and 671.8 (1962 Code) without substantial change except that the requirement that the county attorney be present at the hearing has been eliminated.

§ 585. Appointment of temporary conservator

A temporary conservator may be appointed, but only after a hearing on such notice, and subject to such conditions as the court shall prescribe.

Bar Committee Comment

New. The court can appoint a temporary conservator for limited purposes and with only such authority as the court shall prescribe.

§§ 586 to 590, inclusive, reserved for future use

PART 4. STANDBY CONSERVATORSHIPS

Bar Committee Comment

Sections 591–597 are all new. There appears to be no provision in the statutes of any other state for standby guardianships or conservatorships. These sections permit a person of sound mind to plan for the infirmities of advanced age without giving up present control of his property, even to a trustee. In section 597, the court, under the provisions of section 635, may combine the hearing on this petition with those made under sections 557 and 572. Section 597 was included to clearly provide that the standby provisions refer only to the procedure for appointment and qualification of a conservator and do not vary the powers and duties of that conservator.

§ 591. Voluntary petition for appointment of conservator—standby basis

Any person of full age and sound mind may execute a verified petition for the voluntary appointment of a conservator of his property upon the express condition that such petition shall be acted upon by the court only upon the occurrence of an event specified or the existence of a described condition of the mental or physical health of the petitioner, the occurrence of which event, or the existence of which condition, shall be established in the manner directed in said petition.

Cross reference: See section 635.

§ 592. Petition may nominate conservator

Such petition may nominate a person for appointment to serve as such conservator, and may request that the appointment be made without bond, or with bond of a certain stated sum. The court in appointing the conservator shall give due regard to such nomination and other requests and recommendations contained in the petition.

§ 593. Deposit of petition

Such petition may be deposited with the clerk of the county in which the party resides, or with any person, firm, bank or trust company selected by the petitioner.

§ 594. Revocation of petition

Such petition may be revoked by the petitioner at any time before appointment of a conservator by the court, provided that the petitioner is of sound mind. Revocation shall be accomplished by the destruction of the petition by the petitioner, or by the execution of an acknowledged instrument of revocation. If the petition has been

deposited with the clerk, the revocation may likewise be deposited there.

§ 595. Filing petition upon occurrence of condition

At any time after the deposit of the petition with the clerk, and before its revocation, it may be brought on for hearing by the filing of a verified statement to the effect that the occurrence of the event or the condition provided for in the petition has come to pass. If the petition has not been deposited with the clerk under the provisions of section five hundred ninety-three (593), then it may be brought on for hearing at any time by the filing of it and such a verified statement with the clerk of the county in which the person who executed the petition then resides.

§ 596. Time of appointment of conservator

At the time such petition is filed, the court, without any notice, may appoint the conservator nominated in such petition or may set the petition for hearing on such notice as the court may prescribe.

§ 597. Conservator shall have same powers and duties

The powers and duties of such a conservator shall be the same as those of a conservator appointed in response to any of the other petitions authorized in this Code.

§§ 598 to 602, inclusive, reserved for future use

PART 5. FOREIGN CONSERVATORS

§ 603. Appointment of foreign conservators

When there is no conservatorship, nor any application therefor pending, in this state, the duly qualified foreign conservator or guardian of a nonresident ward may, upon application, be appointed conservator of the property of such person in this state; provided that a resident conservator is appointed to serve with the foreign conservator; and provided further, that, for good cause shown, the court may appoint the foreign conservator to act alone without the appointment of a resident conservator.

Bar Committee Comment

New. Replaces former 669.1 (1962 Code). A foreign conservator or guardian may be appointed as conservator in this state. Unless good cause is shown why such should not be done, a resident co-conservator must be appointed for the protection of creditors and others dealing with the conservatorship.

§ 604. Application

The application for appointment of a foreign conservator or guardian as conservator in this state shall include the name and address of the nonresident ward, and of the nonresident conservator or guardian, and the name and address of the resident conservator to be appointed. It shall be accompanied by an exemplified copy of the original letters or other authority conferring the power upon the foreign conservator or guardian to act as such. The application shall also state the cause for the appointment of the foreign conservator to act as sole conservator, if such be the case.

Bar Committee Comment

New. Replaces 669.2 and 669.3 (1962 Code). The foreign conservator no longer receives different treatment from the resident conservator with respect to the requirements respecting his bond. However, it is not intended that greater burdens be created. The bond provisions for all fiduciaries provide amply for the protection of the conservatorship and its exemption from costly bond premiums under proper circumstances.

§ 605. Personal property

A foreign conservator or guardian of a nonresident may be authorized by the court of the county wherein such ward has personal property to receive the same upon compliance with the provisions of sections six hundred six (606), six hundred seven (607) and six hundred eight (608).

Bar Committee Comment

Adapted from 669.4 (1962 Code).

§ 606. Copy of bond

Such foreign conservator or guardian shall file in the office of the clerk in the county where the property is situated, a certified copy of his official bond, duly authenticated by the court granting his letters, and shall also execute a receipt for the property received by him.

Bar Committee Comment

Adapted from 669.5 (1962 Code).

§ 607. Order for delivery

Upon the filing of the bond as above provided, and the court being satisfied with the amount thereof, it shall order the personal property of the ward delivered to such conservator or guardian.

Bar Committee Comment

Adapted from 669.6 (1962 Code).

§ 608. Recording of bond—notice to court

The clerk shall record the bonds and the receipt, and notify by mail the court which granted the letters of conservatorship or guardianship of the amount of property delivered to the fiduciary and the date of delivery thereof.

Bar Committee Comment

Adapted from 669.7 (1962 Code).

§§ 609 to 613, inclusive, reserved for future use**PART 6. CONSERVATORSHIPS INVOLVING
VETERANS ADMINISTRATION****Bar Committee Comment**

Sections 614–621 are in substance a re-enactment and re-arrangement of Chapter 672 (1962 Code). Repetitious cross-references and incorporations by reference are eliminated. Sections 672.17, 672.18 and 672.19 (1962 Code) are eliminated as unnecessary, and section 672.21 (1962 Code) is covered by sections 676 through 683 of this Code.

§ 614. Application of other provisions to veterans' conservatorships

Whenever moneys are paid or are payable pursuant to any law of the United States through the Veterans Administration to a conservator or a guardian, the provisions of sections six hundred fifteen (615) through six hundred twenty-one (621) shall apply to the administration of said moneys. However, such provisions shall be construed to be supplementary to the other provisions for conservators, and shall not be exclusive of such provisions.

§ 615. Administrator of veterans affairs—party in interest

The administrator of veterans affairs of the United States, his successor, or the designee of either, shall be a party in interest in any proceeding for the appointment or removal of a conservator, or for the termination of the conservatorship, and in any suit or other proceeding, including reports and accountings, affecting in any manner the administration of those assets that were derived in whole or in part from benefits paid by the Veterans Administration. Not less than fifteen days prior to the time set for a hearing in any such matters, notice, in writing, of the time and place thereof shall be given by

mail to the office of the Veterans Administration having jurisdiction over the area in which such matter is pending.

§ 616. Ward rated incompetent by Veterans Administration

Upon the trial of an issue arising upon a prayer for the appointment of either a temporary or a permanent conservator, a certificate of the administrator of Veterans Administration, or his representative, setting forth the fact that the defendant ward has been rated incompetent by the Veterans Administration upon examination in accordance with the laws and regulations governing the Veterans Administration; and that the appointment of a conservator is a condition precedent to the payment of any moneys due such person by the Veterans Administration, shall be prima facie evidence of the necessity for such appointment, and the court may appoint a conservator for the property of such person.

§ 617. Limitation on conservator acting for more than ten wards

Except as hereinafter provided, it shall be unlawful for any person to accept appointment as conservator for any ward if such proposed conservator shall at that time be acting as conservator for as many as ten wards. In any case, upon presentation of a petition by an attorney of the Veterans Administration under this section alleging that a conservator is acting in a fiduciary capacity for more than ten wards, and requesting his discharge for that reason, the court, upon proof substantiating the petition, shall require a final accounting forthwith from such conservator, and shall discharge such conservator in the particular case. The limitations of this section shall not apply where the conservator is a bank or a trust company. A person may be conservator of more than ten wards if they are all members of the same family.

§ 618. Compensation in conservatorships involving Veterans Administration

In conservatorships involving the Veterans Administration, compensation payable to conservators for ordinary services shall not exceed five percent of the income of the ward during any accounting year, provided, however, that the court may grant compensation to such conservator in a sum not to exceed twenty-five dollars where five percent of the income of the ward during the accounting year will not adequately compensate the conservator for services performed. In the event of extraordinary services, however, the court may, upon petition and after hearing thereon, allow the conservator

additional compensation. Such petition shall set out the extraordinary services rendered by the conservator. Compensation as conservator and a fee as attorney shall not be allowed to the same person. No compensation shall be allowed on the corpus of an estate received from a predecessor conservator.

§ 619. Order for support and maintenance of ward

A conservator shall not apply any portion of the estate of his ward for the support and maintenance of any person other than his ward, except upon order of the court after a hearing.

§ 620. Dual conservatorship proceedings not required

Sections six hundred fourteen (614) through six hundred nineteen (619) shall not be construed as requiring dual conservatorship proceedings of the property of the same person, but when a conservator is such, both as to moneys paid by the United States through the Veterans Administration and to other property of the ward, the accounts of the money received through the Veterans Administration shall be kept separate and apart from the accounts of other property.

§ 621. Liberal construction

Sections six hundred fourteen (614) through six hundred twenty (620) shall be construed liberally to secure the beneficial intent and purpose thereof, and shall apply only to beneficiaries of the Veterans Administration.

§ 622. In administering moneys paid by the Veterans Administration the conservator shall have the following powers and be subject to the following restrictions

1. A bond executed by a recognized surety company equal to said assets and the annual income therefrom, plus the expected annual Veterans Administration benefit payments, shall be required to protect said funds.

2. Excess funds paid to the conservator may be invested in interest-bearing federally insured accounts, or in United States savings bonds, without approval of the court.

3. Moneys paid may be applied to the care, maintenance and support of the veteran and his legal dependents without prior approval of the court.

4. Moneys paid shall not be applied to the payment of obligations outlawed by the statute of limitations of any jurisdiction.

5. No money paid as a gratuity to a ward may be made the subject of a gift to third parties, except that the court may, on petition, authorize the application of said moneys to the assistance of a close relative after a finding that the veteran, if competent, would assist the relative to the extent of the order.

Bar Committee Comment

New. Included at the request of the Veterans Administration.

§§ 623 to 626, inclusive, reserved for future use

PART 7. COMBINING PETITION FOR GUARDIAN AND CONSERVATOR

§ 627. Combining petitions

The petitions for the appointment of a guardian and a conservator may be combined and the cause tried in the same manner as a petition for the appointment of a conservator.

Bar Committee Comment

New. Only one petition need be used to request appointment of a guardian and conservator, if such is desired.

§ 628. Same person as guardian and conservator

The same person may be appointed to serve as both guardian and conservator.

Bar Committee Comment

New. Codifies present Iowa law.

§§ 629 to 633, inclusive, reserved for future use

DIVISION XIV—ADMINISTRATION OF GUARDIANSHIPS AND CONSERVATORSHIPS

PART 1. APPOINTMENT AND QUALIFICATION OF GUARDIANS AND CONSERVATORS

§ 634. Provisions applicable to all fiduciaries shall govern

The provisions of this Code applicable to all fiduciaries shall govern the appointment, qualification, oath and bond of guardians and conservators, except that a guardian shall not be required to give

bond unless the court, for good cause, finds that the best interests of the ward require a bond. The court shall then fix the terms and conditions of such bond.

Bar Committee Comment

New. See sections 1 through 204 of this Code for provisions applicable to all fiduciaries. Since guardians will not ordinarily have property, there is usually no need for bond.

§ 635. Combination of voluntary and standby petitions with involuntary petition for hearing

If prior to the time of hearing on a petition for the appointment of a guardian or a conservator, a petition is filed under the provisions of sections five hundred fifty-seven (557), five hundred seventy-two (572) or five hundred ninety-one (591), the court may combine the hearing on such petitions and determine who shall be appointed guardian or conservator.

Bar Committee Comment

New. Eliminates any priorities with respect to voluntary and involuntary petitions, and also eliminates any priorities with respect to the order of filing the same, as it was felt neither a voluntary nor involuntary petition should have preference over the other, irrespective of the order of filing. See *Neidermyer v. Neidermyer*, 237 Iowa 685, 22 N.W.2d 346.

PART 2. RIGHTS AND TITLE OF WARD

§ 636. Effect of appointment of guardian or conservator

The appointment of a guardian or conservator shall not constitute an adjudication that the ward is of unsound mind.

Bar Committee Comment

New. Codifies case law that the appointment of a guardian or conservator, alone, does not prevent ward from making a will thereafter, if ward possesses qualifications enumerated in Sec. 264.

§ 637. Powers of ward

A ward for whom a conservator has been appointed shall not have the power to convey, encumber or dispose of property in any manner, other than by will if he possesses the requisite testamentary capacity.

Bar Committee Comment

New. Imposes absolute disqualification on ward to deal with his property with only exception that he can make a will if he possesses qualifications enumerated in Sec. 264.

§ 638. Presumption of fraud

If a conservator be appointed, all contracts, transfers and gifts made by the ward after the filing of the petition shall be presumed to be a fraud against the rights and interest of the ward.

Bar Committee Comment

Adapted from 670.10 (1962 Code). Not applicable to appointment of guardian.

§ 639. Title to ward's property

The title to all property of the ward is in the ward and not the conservator subject, however, to the possession of the conservator and to the control of the court for the purposes of administration, sale or other disposition, under the provisions of the law.

Bar Committee Comment

New. It is advisable that title to the ward's property should remain in the ward, and present case law to this effect is codified.

§ 640. Conservator's right to possession

Every conservator shall have a right to, and shall take, possession of all of the real and personal property of the ward. He shall pay the taxes and collect the income therefrom until the conservatorship is terminated. He may maintain an action for the possession of the property, and to determine the title to the same.

Bar Committee Comment

Enlargement of the provisions of 668.9 (1962 Code). Also, see section 79 of this Code.

PART 3. DUTIES AND POWERS OF CONSERVATOR

§ 641. General duties of conservator

It is the duty of the conservator of the estate to protect and preserve it, to invest it prudently, to account for it as herein provided, and to perform all other duties required of him by law, and at the termination of the conservatorship, to deliver the assets of the ward to the person entitled thereto.

Bar Committee Comment

New. Adapted from section 219(b) of the Model Probate Code in lieu of 668.9 and 671.9 (1962 Code).

§ 642. Inventory of ward's property

Within sixty days after the date of his appointment, or, within such further time as the court may allow, a conservator shall file in the conservatorship a verified inventory of all of the property of the ward that has come into his possession or of which he has knowledge. Whenever any property of the ward not mentioned in the inventory comes into the possession, or to the knowledge, of the conservator, he shall file in the conservatorship a verified supplemental inventory within thirty days after the property comes into his possession, or becomes known to him; or he may include the property in his next accounting.

Bar Committee Comment

Adapted from 668.8 (1962 Code). Extends time for filing inventory and provides for reporting of property coming to attention of conservator which was omitted from original inventory. Eliminates requirement of appraisal.

§ 643. Disposal of will by conservator

When an instrument purporting to be the will of the ward comes into the hands of a conservator, the conservator shall immediately deliver it to the court.

Bar Committee Comment

Sections 643–645 provide a procedure whereby the administration of a conservatorship can be guided by orders of the court to preserve the testamentary intent of the ward as expressed in a will coming into the hands of the conservator.

§ 644. Court order to preserve testamentary intent of ward

Upon receiving an instrument purporting to be the will of a living ward under the provisions of section six hundred forty-three (643), the court may open said will and read it. The court with or without notice, as it may determine, may enter such orders in the conservatorship as it deems advisable for the proper administration of the conservatorship in light of the expressed testamentary intent of the ward.

§ 645. Court to deliver will to clerk

An instrument purporting to be the will of a ward coming into the hands of the court under the provisions of either section six hundred forty-three (643), shall thereafter be resealed by the court and be deposited with the clerk to be held by said clerk as provided in sections two hundred eighty-six (286) through two hundred eighty-nine (289).

§ 646. Powers of the conservator without order of court

The conservator shall have the full power, without prior order of court, with relation to the estate of his ward to:

1. Collect, receive, receipt for any principal or income, and to enforce, defend against, prosecute, compromise or settle any claim by or against the ward or the conservator; to adjust, arbitrate, compromise, sue on and defend claims in favor of, or against, the ward or the conservator.
2. Sell and transfer personal property of a perishable nature and personal property for which there is a regularly established market.
3. To vote at corporate meetings in person or by proxy.
4. To receive additional property from any source.

Bar Committee Comment

New. They distinguish between those powers of a conservator which he may exercise without court approval and those which require court approval. Paragraph 5 of section 442 is intended to vest the court with broad powers to make orders in the conservatorship.

§ 647. Powers of conservator subject to the approval of the court

Conservators shall have the following powers subject to the approval of the court after hearing on such notice, if any, as the court may prescribe:

1. To invest the funds belonging to the ward.
2. To execute leases.
3. To make payments to, or for the benefit of, his ward in any of the following ways:
 - a. Directly to the ward;
 - b. Directly for the maintenance, welfare and education of the ward;
 - c. To the legal guardian of the person of the ward; or
 - d. To anyone who at the time shall have the custody and care of the person of the ward.
4. To apply any portion of the income or of the estate of the ward for the support of any person for whose support the ward is legally liable.
5. To do any other thing that the court determines to be to the best interests of the ward and his estate.

§ 648. Appointment of attorney in compromise of personal injury settlements

Notwithstanding the provisions of section six hundred forty-six (646) of this Code, prior to authorizing a compromise of a claim for damages on account of personal injuries to the ward, the court may order an independent investigation by an attorney other than by the attorney for the conservator. The cost of such investigation, including a reasonable attorney fee, shall be taxed as part of the cost of the conservatorship.

Bar Committee Comment

New. Gives the court discretionary power to order independent investigation of personal injury damage claims of ward prior to settlement thereof, to eliminate possible conflicts of interest where conservatorship is initiated on behalf of the person paying the settlement award.

§ 649. Powers of conservators—same as all fiduciaries

Except as expressly modified herein, conservators shall have the powers relating to all fiduciaries as set out in sections sixty-four (64) through one hundred sixty-two (162).

Bar Committee Comment

New.

§ 650. Breach of contracts

Under order of court, for good cause shown, after such notice as the court may prescribe, a conservator shall have the power to breach contracts of the ward entered into by the ward prior to the appointment of the conservator, thereby incurring such liability of the ward's estate for such breach as the ward would have incurred for such breach if he had been competent.

Cross reference: See section 638.

Bar Committee Comment

Specifically provides that conservator has power to breach valid contracts of ward entered into prior to conservatorship if court, for good cause, so orders.

§ 651. Tort liability of conservator

The fact that a person is a conservator or a guardian shall not in itself make him personally liable for damages for the acts of his ward.

Bar Committee Comment

New.

PART 4. TRANSFERRING, ENCUMBERING AND LEASING
PROPERTY BY CONSERVATOR

§ 652. Procedure applicable to personal representatives shall govern

Conservators shall have the power to sell, mortgage, exchange, pledge and lease real and personal property belonging to the ward, including the homestead and exempt personal property, when it appears to be to the best interests of the ward, in the same manner and by the same procedure that is provided in this Code for sale, mortgage, exchange, pledge and lease by personal representatives in administration of estates of decedents.

Bar Committee Comment

Amplification of section 648 to expressly provide the conservator with the same powers pertaining to property as provided for the personal representative in estates of decedents. See sections 383 through 404 of this Code.

PART 5. CLAIMS

Bar Committee Comment

Sections 653–667 impose the duty upon the conservator to pay valid claims against the estate of the ward and establish a procedure for determining and clarifying such claims. Right of levy of execution is prohibited, and provision is made for handling claims when the conservatorship becomes insolvent.

§ 653. Claims against the ward, the conservatorship or the conservator in that capacity

Claims accruing before or after the appointment of the conservator, and whether arising in contract or tort or otherwise, after being allowed or established as provided in sections six hundred fifty-four (654) through six hundred fifty-six (656), shall be paid by the conservator from the assets of the conservatorship.

§ 654. Form and verification of claims—general requirements

No claim shall be allowed against the estate of a ward upon application of the claimant unless it shall be in writing, filed in duplicate with the clerk, stating the claimant's name and address, and describing the nature and the amount thereof, if ascertainable. It shall be accompanied by the affidavit of the claimant, or of someone for him, that

the amount is justly due, or if not 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 duplicate of said claim shall be mailed by the clerk to the conservator or his attorney of record; however, valid contract claims arising in the ordinary course of the conduct of the business or affairs of the ward by the conservator may be paid by the conservator without requiring affidavit or filing.

§ 655. Requirements when claim founded on written instrument

If a claim is founded upon a written instrument, the original of such instrument, or a copy thereof, with all endorsements, must be attached to the claim. The original instrument must be exhibited to the conservator or to the court, upon demand, unless it has been lost or destroyed, in which case, its loss or destruction must be stated in the claim.

§ 656. How claim entitled

All claims filed against the estate of the ward shall be entitled in the name of the claimant against the conservator as such, naming the conservator, and in all further proceedings thereon, this title shall be preserved.

§ 657. Filing of claim required

The filing of a claim in the conservatorship tolls the statute of limitations applicable to such claim.

§ 658. Compelling payment of claims

No claimant shall be entitled to compel payment until his claim has been duly filed and allowed.

§ 659. Allowance by conservator

When a claim has been filed and has been admitted in writing by the conservator, it shall stand allowed, in the absence of fraud or collusion.

§ 660. Execution and levy prohibited

No execution shall issue upon, nor shall any levy be made against, any property of the estate of a ward under any judgment against the ward or a conservator, but the provisions of this section shall not be

so construed as to prevent the enforcement of a mortgage, pledge or other lien upon property in an appropriate proceeding.

§ 661. Claims of conservators

If the conservator is a creditor of the ward, he shall file his claim as other creditors, and the court shall appoint some competent person as temporary conservator to represent the ward at the hearing on the conservator's claim. The same procedure shall be followed in the case of coconservators where all such conservators are creditors of the ward; but if one of the coconservators is not a creditor of the ward, such disinterested conservator shall represent the ward at the hearing on any claim against the ward by a coconservator.

§ 662. Claims not filed

The conservator may pay any valid claim against the estate of the ward even though such claim has not been filed, but all such payments made by the conservator shall be at his own peril.

§ 663. Waiver of statute of limitations by conservator

It shall be within the discretion of the conservator to determine whether or not the applicable statute of limitation shall be invoked to bar a claim which he believes to be just, and his decision as to the invoking of such statute shall be final.

§ 664. Liens not affected by failure to file claim

Nothing in sections six hundred fifty-four (654) and six hundred fifty-eight (658) shall affect or prevent an action or proceeding to enforce any mortgage, pledge or other lien upon the property of the ward.

§ 665. Separate actions and claims

Any action pending against the ward at the time the conservator is appointed shall also be considered a claim filed in the conservatorship if notice of substitution is served on the conservator as defendant, and a duplicate of the proof of service of notice of such proceeding is filed in the conservatorship proceeding.

A separate action based on a debt or other liability of the ward may be commenced against the conservator as such in lieu of filing a claim in the conservatorship. Such an action shall be commenced by serving an original notice on the conservator and filing a duplicate of the proof

of service of notice of such proceeding in the conservatorship proceeding. Such an action shall also be considered a claim filed in the conservatorship. Such an action may be commenced only in a county where the venue would have been proper if there were no conservatorship and the action had been commenced against the ward.

§ 666. Denial and contest of claims

The provisions of sections four hundred thirty-eight (438) through four hundred forty-eight (448) shall be applicable to the denial and contest of claims against conservatorships, but shall not be applicable to actions continued or commenced under section six hundred sixty-five (665) of this Code.

§ 667. Payment of claims in insolvent conservatorships

When it appears that the assets in a conservatorship are insufficient to pay in full all the claims against such conservatorship, the conservator shall report such matter to the court, and the court shall, upon hearing, with notice to all persons who have filed claims in the conservatorship, make an order for the pro rata payment of claims giving claimants the same priority, if any, as they would have if the ward were not under conservatorship.

PART 6. GIFTS

§ 668. Conservator may make gifts

For good cause shown and under order of court, a conservator may make gifts on behalf of the ward out of the assets under a conservatorship to persons or religious, educational, scientific, charitable, or other nonprofit organizations to whom or to which such gifts were regularly made prior to the commencement of the conservatorship. The making of gifts out of such assets must not foreseeably impair the ability to provide adequately for the best interests of the ward.

Bar Committee Comment

New. Specifically provides conservator with limited power to continue gift policies of ward prior to conservatorship if court for good cause so orders. This section is a limitation on section 442.5 in that good cause must be shown; the recipients of the gifts must be of the class enumerated; and there must be a finding that (1) the ward was regularly making gifts to said recipient prior to the commencement of the conservatorship, and (2) the making of the gift will not foreseeably leave the ward destitute. See *In Re Guardianship of Brice*, 233 Iowa 183, 8 N.W.2d 576 (1943).

PART 7. GUARDIAN'S REPORT

§ 669. Guardian's report

Immediately after the appointment of the guardian, he shall make a report to the court advising the court as to the physical condition and whereabouts of the ward. At such times thereafter as the court may order, a guardian shall present to the court and file in the guardianship proceedings a written report of the condition of the ward and of the guardian's exercise of authority and performance of his duties.

Bar Committee Comment

New. Adapted from 672.11 (1962 Code). Leaves frequency of guardian's reports to discretion of the court.

PART 8. CONSERVATOR'S REPORT

Bar Committee Comment

Sections 670 and 671 are new and are in lieu of 668.24 and 672.11 (1962 Code).

§ 670. Conservator shall report and account

A conservator shall present to the court and file in the conservatorship proceedings a written verified report and accounting of his administration:

1. Annually within sixty days following the anniversary date of his appointment, unless the court otherwise orders on good cause shown.
2. Upon filing his resignation and before his resignation is accepted by the court.
3. Within thirty days following the date of his removal.
4. Within sixty days following the date of the termination of the conservatorship under the provisions of section six hundred seventy-five (675), unless that time is extended by the court.
5. At such other times as the court may order.

§ 671. Requirements of report and accounting

The report and accounting required by section six hundred seventy (670) shall account for all of the period since the close of the account-

ing contained in the next previous report, and shall include the following information as far as applicable:

1. The balance of funds on hand at the close of the last previous accounting, and all amounts received from whatever source during the period covered by the accounting.
2. All disbursements made during the period covered by the accounting.
3. Any changes in the inventory of property of the ward in the conservatorship.
4. The amount of the bond and the name of the surety on it.
5. The residence or physical location of the ward.
6. The general physical and mental condition of the ward.
7. Such other information as shall be necessary to show the condition of the affairs of the conservatorship.

PART 9. COSTS AND ACCOUNTS

Bar Committee Comment

Sections 672–674 are new.

§ 672. Payment of court costs in conservatorships

No order shall be entered approving an annual report of a conservator until the court costs which have been docketed have been paid or provided for.

§ 673. Court costs in guardianships

The ward or his estate shall be charged with the court costs of a ward's guardianship, including the guardian's fees and the fees of the attorney for the guardian.

§ 674. Settlement of accounts

The court shall settle each account filed by a conservator by allowing or disallowing it, either in whole or in part, or by surcharging the account against the conservator.

PART 10. TERMINATION OF GUARDIANSHIPS
AND CONSERVATORSHIPS

§ 675. Cause for termination

A guardianship shall cease, and a conservatorship shall terminate, upon the occurrence of any of the following circumstances:

1. If the ward is a minor, when he reaches full age.
2. The death of the ward.
3. A determination by the court that the ward is competent and capable of managing his property and affairs, and that the continuance of the guardianship or conservatorship would not be in his best interests.
4. Upon determination by the court that the conservatorship or guardianship is no longer necessary for any other reason.

Bar Committee Comment

New. Adapted from 671.10 (1962 Code). Specifically enumerates certain grounds which cause a guardianship or conservatorship to be ended. Subsection 4 gives broad discretion to court to order termination for other reasons. See also sections 668 and 677.

§ 676. Assets exhausted

At any time that the assets of the ward's estate do not exceed the amount of the charges and claims against it, the court may direct the conservator to proceed to terminate the conservatorship.

Bar Committee Comment

Adapted from 668.33 and 670.18 (1962 Code). Specifically calls attention of court to its authority to terminate conservatorship if insolvency is approaching.

§ 677. Accounting to ward—notice of hearing

Upon the termination of a conservatorship, the conservator shall pay the costs of administration, and render a full and complete accounting to the ward or his personal representative and the court. Notice of hearing on the final report of a conservator shall be served on the ward or his personal representative in accordance with the Rules of Civil Procedure, unless such notice is waived. The court may direct notice of hearing on the final report to be given to such other persons, at such time and in such manner as the court may prescribe.

Bar Committee Comment

New. Provides for payment of costs of administration by conservator whether the conservatorship is terminated by death or otherwise. Requires notice of hearing on final report unless notice is waived.

§ 678. Delivery of assets

Upon the termination of a conservatorship, all assets of the conservatorship shall be delivered, under direction of the court, to the person or persons entitled to them.

Bar Committee Comment

New.

§ 679. Petition to terminate

At any time, not less than six months after the appointment of a guardian or conservator, the person under guardianship or conservatorship may apply to the court by petition, alleging that he is no longer a proper subject thereof, and asking that the guardianship or conservatorship be terminated.

Bar Committee Comment

Adapted from 670.11 (1962 Code).

§ 680. Limit on application to terminate

If any petition for terminating such guardianship or conservatorship shall be denied, no other petition shall be filed therefor until at least six months shall have elapsed since the denial of the former one.

Bar Committee Comment

Adapted from 670.15 (1962 Code).

§ 681. Assets of minor ward exhausted

Whenever the assets of a minor ward's conservatorship are exhausted or consist of personal property only of an aggregate value not in excess of one thousand dollars, the court, upon application or upon its own motion, may terminate the conservatorship and direct the conservator to deliver such property to the parent or other person having the custody of the minor ward, for the use of such ward, after payment of allowed claims and expenses of administration. Such deliv-

ery shall have the same force and effect as if delivery had been made to the ward after he attains his majority.

Bar Committee Comment

Adapted from 668.33 (1962 Code). See 108 of this Code.

§ 682. Discharge of conservator and release of bond

Upon settlement of the final accounting of a conservator, and upon determining that the property of the ward has been delivered to the person or persons lawfully entitled thereto, the court shall discharge the conservator and exonerate the surety on his bond.

Bar Committee Comment

New. See 479 of this Code.

§§ 683 to 698, inclusive, reserved for future use

DIVISION XV—TRUSTS

§ 699. Powers of trustees

Unless it is otherwise provided by the will creating a testamentary trust, the instrument creating an express trust, or by an order or decree duly entered by a court of competent jurisdiction, a trustee shall have all the general powers of a fiduciary, including, but not limited to, the following powers:

1. To collect, receive and receipt for any principal or income, belonging to the trust estate, and to enforce, sue upon, defend against, prosecute, abandon, adjust, compromise, arbitrate or settle, any claim by or against the trust.
2. To acquire, manage, invest, reinvest, exchange and retain any or all property, real or personal, at any time, forming a part of the trust estate, as the court may direct; to grant options on, contract to sell, to sell, convey and transfer or lease any or all property, real or personal, at any time forming a part of the trust estate in the same manner and by the same procedure that is provided in this Code for sale, mortgage, exchange, pledge, and lease by personal representatives in administration of estates of decedents.
3. To vote in person, or to execute proxies to vote, corporate shares belonging to the trust at all regular and special meetings of shareholders.

4. To borrow money for the benefit of the trust estate, and to secure loans by pledge or mortgage of trust property, upon good cause shown and subject to the approval and direction of the court.

5. To execute leases for a customary period for the type of real estate involved, not to extend beyond the termination date of the trust without the specific approval and direction of the court, provided that in any event, leases may be made for as long as one year.

6. To make payments to, or for the benefit of, any beneficiary in any of the following ways:

- a. Directly to the beneficiary;
- b. Directly for the maintenance, welfare, and education of the beneficiary;
- c. To the guardian or conservator of the beneficiary; or
- d. To anyone who at the time shall have the custody and care of the person of the beneficiary.

A trustee shall not be obliged to see to the application of the funds so paid, but the receipt of the person to whom the funds were paid shall constitute a full acquittance of the trustee.

7. To make any required division or distribution in whole or in part in money, securities, or other property, and in undivided interests therein, and to continue to hold any remaining undivided interest in trust.

8. To receive additional property from any source.

Bar Committee Comment

New. Codification of usual powers of trustee included in most trust instruments. The enumerated powers may be enlarged or diminished in the trust instrument. However, paragraph 2 requires court approval. If the testator desires that such powers shall be exercised without court approval, it will be necessary to include such authorization specifically in the trust instrument.

§ 700. Intermediate report of trustees

Unless specifically relieved from so doing, by the instrument creating the trust, or by order of the court, the trustee shall make a written report, under oath, to the court, once each year, and oftener, if required by the court. Such report shall state:

1. The period covered by the report.
2. All changes in beneficiaries since the last previous report.
3. All changes in investments since the last previous report, and a list of all assets on hand.

4. A detailed accounting for all cash receipts and disbursements, and for all property of the trust, unless such accounting shall be waived in writing by all beneficiaries.

Bar Committee Comment

Enlargement of 682.28 (1962 Code), specifying more in detail the matters to be covered by the reports of trustees.

§ 701. Final report of trustees

Upon the partial or total termination of a trust, or upon the transfer of the trusteeship due to resignation, removal, dissolution, or other disqualification of the trustee of any trust pending in court, the trustee shall make a final report, under oath, to the court, showing for the period since the filing of the last report the facts required for an intermediate report, and, in addition thereto, the following:

1. The name and last known address of each beneficiary.
2. A statement as to those beneficiaries who are known to be minors or under any other legal disability.
3. The amount distributed or to be distributed to each beneficiary.

Bar Committee Comment

New. Sets out certain basic matters to be covered in the final reports of trustees.

§ 702. Notice of application for discharge

Unless notice is waived in writing, no final report of a trustee of a trust pending in court shall be approved, and no such trustee shall be discharged from further duty or responsibility upon final settlement, until notice of his application for discharge shall have been served upon all persons interested as required for the commencement of a civil action, unless a different service be ordered by the court by an order made either before or after the filing of the final report of the trustee.

Bar Committee Comment

New.

§ 703. Discharge

Upon final settlement of a trust, an order shall be entered discharging the trustee from further duties and responsibilities. The order approving the final report shall constitute a waiver of the omission

from the final report of any of the recitals required in section seven hundred one (701).

Bar Committee Comment

New. This is essentially section 479 adapted to final reports of trustees.

§ 704.

The following chapters of the 1962 Code of Iowa are hereby repealed:

Chapter five hundred thirty-three A (533A);

Chapter six hundred thirty-one (631);

Chapter six hundred thirty-two (632);

Chapter six hundred thirty-three (633);

Chapter six hundred thirty-four (634);

Chapter six hundred thirty-five (635);

Chapter six hundred thirty-six (636);

Chapter six hundred thirty-seven (637);

Chapter six hundred thirty-eight (638);

Chapter six hundred sixty-eight (668);

Chapter six hundred sixty-nine (669);

Chapter six hundred seventy (670);

Chapter six hundred seventy-one (671);

Chapter six hundred seventy-two (672); and

Chapter six hundred seventy-three (673).

§ 705.

The following sections of the 1962 Code of Iowa are hereby repealed:

Section five hundred thirty-two point twenty-one (532.21);

Section six hundred four point four (604.4);

Section six hundred eighty-two point thirty-five (682.35);

Section six hundred eighty-two point thirty-six (682.36).

§ 706.

Section six hundred four point three (604.3), Code 1962, is hereby repealed and the following enacted in lieu thereof:

“The district court of each county shall have general, original and exclusive jurisdiction of all probate matters as provided in the probate code.”

§ 707.

Section six hundred fourteen point one (614.1), Code 1962, is hereby amended by striking from subsection three (3) all following the words "two years" in line four (4).

§ 708.

Section six hundred eighty-two point four (682.4), Code 1962, is hereby repealed and the following enacted in lieu thereof:

"Qualifications of sureties. Each personal surety shall execute and file with the clerk an affidavit that he owns real estate subject to execution, other than real estate held in joint tenancy, equal to double the amount of the bond, and shall include in such affidavit the total amount of his obligations as surety on other official or statutory bonds. Where there are two or more sureties in the same bond, they must in the aggregate have the qualification prescribed in this section."

§ 709.

Section six hundred eighty-two point twenty-three (682.23), Code 1962, is amended by inserting in line two (2) of subsection fifteen (15) after the word "shall" the words "be construed as modifying the probate code nor".

Bar Committee Comment

This section is ineffective in view of the deletion by the legislature of the provisions of the Prudent Man Investment Act. See Comment following section 123.

§ 710.

Section six hundred eighty-two point twenty-five (682.25), Code 1962, is amended by inserting in line two (2) after the word "fiduciary" the words "not governed by the probate code".

Said section is further amended by striking from line four (4) the words "the will or other".

§ 711.

Section six hundred eighty-two point thirty-one (682.31), Code 1962, is amended by striking from lines one (1) and two (2) the words "Whenever any administrator, guardian, trustee, or referee" and inserting in lieu thereof the words "Whenever any fiduciary not governed by the probate code".

Said section is further amended by striking from line eight (8) the words "administrator, guardian, trustee, or referee" and inserting in lieu thereof the word "fiduciary".

§ 712.

Section six hundred eighty-two point thirty-two (682.32), Code 1962, is amended by striking from lines one (1) and two (2) the words "administrator, guardian, trustee, or referee" and inserting in lieu thereof the word "fiduciary".

§ 713.

Section six hundred eighty-two point thirty-three (682.33), Code 1962, is amended by striking from lines one (1) and two (2) the words "administrator, guardian, trustee, or referee" and inserting in lieu thereof the word "fiduciary".

§ 714.

Section six hundred eighty-two point thirty-four (682.34), Code 1962, is amended by striking from line five (5) the word "administrators" and inserting in lieu thereof the words "personal representatives under the probate code".

§ 715.

Chapter six hundred eighty-two (682), Code 1962, is amended by adding thereto a new section as follows:

"Powers and duties of trustees not subject to court administration. Trustees of express trusts not being administered in the probate court, shall have all the powers and shall be subject to all the duties and liabilities as provided in the probate code, except the duty of reporting to or obtaining approval of the court."

§ 716.

Section two hundred forty-one A point eleven (241A.11), Code 1962, is amended by striking from subsection two (2) all after the word "dollars" in line three (3).

§ 717.

Section two hundred forty-nine point eighteen (249.18), Code 1962, is amended by striking from subsection two (2) all after the word "dollars" in line five (5).

Approved May 16, 1963.

INDEX TO

IOWA PROBATE CODE

ABANDONMENT

Estate property, § 116.
Trustees, claims, § 699.

ABATEMENT

Allowance to surviving spouse, § 374.
Shares of distributees, §§ 436, 437.

ABATEMENT AND REVIVAL

Claims against estate, §§ 415, 436.
Counterclaims, § 416.

ABSENCE AND ABSENTEES

Administration of estates, § 510 et seq.
 Application of law, § 515.
 Armed forces members, presumption of death, § 517.
 Hearing on petition, § 514.
 Petition, §§ 510, 512, 514.
 Notice, § 511.
 Rights barred, § 516.
 Service of notice, § 512.
 Proof of service, § 513.
Conservators, §§ 580 to 585.
Death, order establishing, § 514.
 Rights barred, § 516.
Jurisdiction, district court sitting in probate, § 10 et seq.
Notice,
 Petition for administration, § 511.
 Proof of service, § 513.
 Petition for conservatorship, § 582.

ABSTRACTS

Fiduciaries, expenses, § 102.

ACCIDENT INSURANCE

Exemption, decedent's estate, § 333.

ACCOUNTS AND ACCOUNTING

Appeals, estates of decedents, § 487.
Common trust funds, § 128.
Conservators, this index.
Examination, probate accounts, § 20.
Executors and administrators, §§ 20, 21, 469 et seq.
Fiduciaries, this index.
Interlocutory accounting, § 469.
 Clerks of court, § 22.
Reopening, estates of decedents, § 488.
Trust company, common trust funds, § 128.
Trustees, § 700.
Veterans' conservators, § 620.
Waiver, estates of decedents, § 470.

INDEX

ACKNOWLEDGMENTS

Conservator, standby basis, revocation of petition, § 594.

ACTIONS AND OTHER PROCEEDINGS

Generally, § 33.

Abatement and revival, claims and counterclaims against estates, §§ 415, 416, 436.

Assets of estate, § 366.

Bond of fiduciary, action on, §§ 186, 187.

Bond stopping sale of real or personal property, decedents' estates, § 394.

Claims Against Estate, generally, this index.

Conservators, §§ 33, 646.

Pending actions, § 665.

Possession of property, § 640.

Contesting wills, §§ 10, 33, 307 to 319.

Contingent claims against estate, payment by distributees, § 427.

Continuance, § 415.

Costs, distributees, § 476.

Escheat proceedings, §§ 219, 543 to 546.

Executors and administrators, § 199.

Fraud, §§ 368, 487.

Possession of property, § 351.

Fiduciaries, this index.

In rem proceedings, decedents' estates, § 330.

Limitation of Actions, generally, this index.

Personal representatives, expenses for services, § 199.

Revival of actions, claims and counterclaims against estates, §§ 415, 416, 436.

Title to property, § 351.

Transfer, judge disqualified, § 17.

Trial, generally, this index.

Trustees, claims, § 699.

Wills, this index.

ADMINISTRATOR OF VETERANS AFFAIRS

Conservatorship affairs, party in interest, § 615.

ADMINISTRATORS

Defined, § 3.

Executors and Administrators, generally, this index.

ADOPTION OF CHILDREN

Intestate succession, § 223.

Illegitimate children, §§ 221, 222.

Wills, adoption after execution of will, share of estate, §§ 267, 436.

ADVANCEMENTS

Generally, § 224.

Death of advancee, § 226.

Valuation, § 225.

ADVERSE CLAIMS

Claims, generally, this index.

ADVERSE OR PECUNIARY INTEREST

Fiduciaries, § 155.

Probate judge, transfer of cause, § 17.

AFFIDAVITS

Conservators, claim against estate, § 654.

Corporate fiduciary, compensation, § 203.

Estates of decedent, claims against, § 418.

Fiduciaries, compensation, § 202.

Corporate fiduciary, § 203.

AFFIDAVITS—Continued

Probate matters, notices, proof of publication, § 46.
Transfer of proceedings to another county, § 49 et seq.
Ward's estate, claims against, § 654.

Wills,

Election of spouse, child or parent, excessive gift to nonprofit corporation, § 266.
Proving execution, § 296.

AFFIRMATIONS

Oaths and Affirmations, generally, this index.

AFTER ACQUIRED PROPERTY

Devise by will, § 269.

AFTER BORN CHILDREN

Intestate succession, § 220.
Share in decedent's estate, § 267.

AGE

Fiduciaries, § 64.
Full age, defined, § 3.

Wills,

Disposal of property by person of full age, § 264.
Witnesses, § 280.

AGENTS

Fees, decedents' estates, § 21.
Fiduciaries, liability, § 85.
Probate proceedings, compensation, § 21.

ALCOHOLICS

Guardianship, § 552 et seq.

ALIENS

Probate matters, consular representatives, notice, § 41.

ALLOWANCES

Estates of decedents, § 374 et seq.
Payment, § 433.

AMBASSADORS AND DIPLOMATS

Probate matters involving aliens, notice, § 41.

ANCILLARY ADMINISTRATION

Generally, §§ 331, 500 to 504.
Claims against estate, limitation of actions, § 413.

ANTILAPSE STATUTE

Wills, § 273.
Exception, § 274.

APPEAL AND REVIEW

Accounting, decedents' estates, § 487.
Children, allowance from estate, § 377.
Clerk's actions, probate proceedings, § 23.
Final reports, decedents' estates, § 487.
Heirs, § 487.
Surviving spouse, allowance from estate, § 375.
Temporary administration, § 342.

APPEARANCE

Attorney general, probate matters, § 43.
Fiduciary, execution of bond as appearance, § 186.

INDEX

APPRAISALS AND APPRAISERS

Generally, §§ 101, 213.

Appointment of appraisers, § 213.

Evidence, § 367.

Fees, § 21.

Final order, § 217.

Homestead, § 213.

Inventory, § 365.

Notice, §§ 214, 215.

Objections, § 216.

Trial, § 217.

Personal property, exemption, § 332.

Report of appraisers, objection, § 216.

Sale of property, § 396.

Selection of property, § 218.

Service of notice, § 214.

ARBITRATION

Conservators, claims, § 646.

Contingent claims, § 424.

Trustees, claims, § 699.

ARMED FORCES

Missing members, presumption of death, § 517.

Veterans, conservatorships, §§ 614 to 622.

ASSETS

Conservators, this index.

Decedents' estates,

Actions, § 366.

Delinquent inventories and reports, § 32.

Distributees, set-off and retainer, priorities, § 471.

ASSIGNMENTS

Debts of distributees, retainer and set-off, priorities, § 471.

Fiduciaries, § 95.

Security transfers, §§ 130 to 138.

Foreign fiduciaries, powers, § 144.

ASSOCIATIONS AND SOCIETIES

Gifts, conservators, § 668.

ATTESTATION

Foreign probated wills, admission to probate, § 496.

ATTORNEY GENERAL

Escheat, notice, § 543.

Probate matters, notice and appearance, § 43.

ATTORNEYS

Appointment for persons not represented at hearings, §§ 118, 119.

Compensation, §§ 120, 121.

Bond, acting as surety on, § 182.

Conservators,

Investigation of personal injury settlement, § 648.

Veterans' conservatorships, compensation in addition to fee as an attorney,
§ 618.

Fees,

Appointment for persons not represented at hearing, §§ 120, 121.

Fiduciary, fees after death, § 204.

Guardianships, costs, § 673.

INDEX

ATTORNEYS—Continued

Fees—Continued

Personal representatives, § 198.

Probate proceedings, allowance for defending will, § 314.

Fiduciaries, this index.

Substitution, attorney appointed for persons not represented at hearing, § 121.

AUCTIONS AND AUCTIONEERS

Estates of decedents, §§ 396, 397.

Adjournment of sale, § 398.

Order, § 396.

Fiduciaries, fees, sale of property, etc., § 102.

AUDITS AND AUDITORS

Fiduciaries' accounts, § 20.

Probate accounts, § 20.

Referees' accounts, §§ 20, 21.

BANKRUPTCY

See, also, Insolvency, generally, this index.

Set-off and retainer, priorities, § 471.

BANKS AND BANKING

Common trust funds, §§ 126 to 129.

Conservator, standby basis, deposit of petition, § 593.

Fiduciary capacity,

Deposits, §§ 87, 156, 183.

Investments, §§ 124, 125.

Trust Companies, generally, this index.

BASTARDS

Intestate succession, §§ 221, 222.

BENEVOLENT ASSOCIATIONS OR ORGANIZATIONS

Feloniously causing death or disability of insured person, beneficiary taking proceeds, §§ 536, 537.

BEQUEATH

Defined, § 3.

BEQUEST

Defined, § 3.

BONA FIDE PURCHASERS

Reopening settlement of estate, § 488.

BONDS

Conservators, this index.

Estates of decedents,

Contingent claims, § 424.

Credits, payment of claims, § 433.

Sale of property to pay obligations, § 394.

Surrender of property, § 354.

Executors and administrators, § 22.

Record by clerk, § 30.

Fiduciaries, this index.

Foreign conservators,

Filing copy, § 606.

Recording, § 608.

Guardians, this index.

Probate bonds, qualifications for sureties, § 182.

Veterans' conservators, § 622.

INDEX

BROKERS

Fiduciaries, fees, sale of property, etc., § 102.
Probate proceedings, compensation, § 21.

BURDEN OF PROOF

Claims against estates, § 446.

BURIALS

Payment of expenses, § 433.
Priority, § 425.

BUSINESS

Fiduciaries, continuing business of estate, § 83.

CANCELLATION

Wills, § 284.

CERTIFICATES

Fiduciary security transfers, § 132.
Foreign fiduciaries, appointment and authority, §§ 145, 147.
Personal taxes, estates of decedents, § 474.
Probate of wills, § 301.
Title to property, change, § 481.
Unsold land, estates of decedents, § 480.

CERTIFIED COPIES

Foreign real estate, § 48.
Probate matters transferred to another county, §§ 50, 51.
Wills, record in foreign county, § 305.

CHARGES

Defined, § 3.

CHARITABLE INSTITUTIONS AND SOCIETIES

Gifts, conservators, § 668.

CHATTEL MORTGAGES

Bond presenting execution of mortgage, § 394.
Collateral attack, § 395.
Confirmation, endorsement, § 401.
Devise of property subject to, § 278.
Execution of instrument, § 400.
Order, § 396.
Personal representative, perishable property, § 387.
Petition, § 388.
Powers, estate of decedent, § 383.
Purchase of property by holder, § 393.
Purpose, estates of decedents, § 386.
Transcript of record, § 404.
Wills, devise of property subject to, § 278.

CHILDREN AND MINORS

Adoption of Children, generally, this index.
Allowance, estate of decedent, §§ 376, 377.
 Payment, § 433.
Conservator of absentee, notice to minor children, filing of petition, § 582.
Conservators, §§ 566 to 574.
 Appointment, § 570.
 Notice, petition for appointment, §§ 567, 568.
 Petition for appointment, § 566.
 Pleadings and trial, appointment, § 569.
 Preference as to appointment, § 571.

INDEX

CHILDREN AND MINORS—Continued

Conservators—Continued

Procedure in lieu of conservatorship, § 574.

Temporary conservator, appointment, § 573.

Voluntary petition for appointment, § 572.

Defined, § 3.

Fiduciaries, payment of small legacies, § 108.

Guardians, this index.

Increase, allowance from estate, § 377.

Money or property due a minor, payment to parent, § 574.

Shares of children born after making will, abatement of shares, § 436.

Small shares, estate of decedent, payment, § 108.

Wills, small legacies, payment, § 108.

Wrongful death damages, exemption, estates of decedent, § 336.

CLAIMS

Conservators, this index.

Escheated property, persons entitled to, § 546.

Fiduciary security transfers, § 133.

Trustees, enforcement, § 699.

CLAIMS AGAINST ESTATE

Generally, § 410 et seq.

Abatement and revival, §§ 415, 436.

Affidavits, § 418.

Allowance, §§ 428, 432, 448.

Surviving spouse, review, § 375.

Compelling payment, § 429.

Contingent claims, §§ 418, 424.

Payment by distributees, § 427.

Counterclaims, §§ 416, 445.

Disallowance, § 438 et seq.

Limitation of actions, § 442.

Notice, § 440.

Proof of service, § 441.

Personal representative, § 439.

Request for hearing, § 443.

Rules of civil procedure, applicability, § 444.

Execution, § 430.

Form and verification, § 418.

Judgment, § 448.

Limitation of actions, § 410 et seq.

Monteague sale of real estate, § 389.

Offset, § 445.

Trial, § 447.

Payment, § 426.

Burden of proof, § 446.

Compelling payment, § 429.

Temporary administrator, § 343.

Preferences, § 426.

Priorities, § 425.

Quieting title, § 391.

Reopening administration, § 489.

Secured claims, procedure, § 423.

Secured claims not due, § 422.

Separate actions, §§ 415, 417.

Survival of actions, § 415.

Temporary administrator,

Allowance, § 432.

Payment, § 343.

INDEX

CLAIMS AGAINST ESTATE—Continued

- Title, § 420.
- Trial, § 447.
- Unsecured claims not yet due, § 421.
- Venue, § 415.
- Wage claims, priorities, § 425.
- Written instruments, § 419.

CLERK

- Defined, § 3.

CLERK OF THE DISTRICT COURT

- Accounts of fiduciaries, probate powers, § 22.
- Admission, will to probate, § 22 et seq.
- Appeals, actions in probate proceedings, § 23.
- Bonds,
 - Fiduciaries, probate powers, § 22.
 - Recording, § 30.
- Calendars, probate matters, § 31.
- Commission to take depositions, probate proceedings, § 22.
- Conservators, probate powers of clerk, § 22 et seq.
- Decedents' names, probate docket, § 27.
- Delinquent reports and inventories, fiduciaries, § 32.
- Depositions, issuing commission, proof of will, § 22.
- Deputies, fiduciaries, compensation, § 201.
- Dockets,
 - Probate docket, §§ 24, 27, 28.
 - Trust proceedings, § 28.
- Fiduciaries,
 - Bonds given by, recording, § 30.
 - Compensation, § 201.
 - Probate powers of clerk, § 22.
- Foreign probated wills, admission to probate, authentication, § 496.
- Guardians, probate powers of clerk, § 22 et seq.
- Hearings, probate proceedings, § 24.
- Intestate estates, docketing names, addresses, etc., § 27.
- Inventories, fiduciaries, reporting delinquencies, § 32.
- Judgment entered, probate proceedings, § 25.
- Mortgages on real estate, probate record, § 29.
- Motion, review of clerk's actions, probate matters, § 23.
- Names of decedents, docketing, probate docket, § 27.
- Orders, probate proceedings, § 22 et seq.
- Probate,
 - Clerk defined, probate code, § 3.
 - Docket, §§ 27, 28.
 - Powers and duties, § 22 et seq.
 - Proceedings transferred to another county, records, §§ 50, 51.
 - Records, duty to keep, § 29.
- Real estate, probate proceedings, docketing sales records, § 27.
- Records,
 - Bonds, fiduciaries, § 30.
 - Probate proceedings, §§ 25, 29.
- Reports,
 - Delinquent estates, § 32.
 - Fiduciaries,
 - Probate powers, § 22.
 - Reporting delinquencies, § 32.
 - Probate matters, clerk assisting, § 26.
- Sale, realty, probate proceedings, docketing, § 27.

INDEX

CLERK OF THE DISTRICT COURT—Continued

Titles, trusts, docketing, § 27.

Trust proceedings, docketing, § 28.

Wills,

Admission to probate, § 22 et seq.

Delivery after death of testator, § 289.

Delivery to testator, § 288.

Deposited for safekeeping, § 286.

Manner of deposit, § 287.

CLOUD ON TITLE

Sale of decedent's real estate, removal, § 391.

CODICILS

Wills, this index.

COFIDUCIARIES

Powers, § 76.

Surviving cofiduciary, § 67.

COLLATERAL ATTACK

Sale or exchange, decedents property, § 395.

COMMINGLING PROPERTY

Fiduciaries, liability, §§ 158, 160.

COMMITMENT

Discovery procedure, property belonging to estate, § 113.

Fiduciaries, removal, failure to deliver property, § 70.

COMMON TRUST FUNDS

Generally, §§ 126 to 129.

Accounting, § 128.

Definitions, § 126.

Establishment, § 127.

Fiduciary, defined, § 126.

Uniformity of interpretation of law, § 129.

COMPENSATION AND SALARIES

Agents, probate proceedings, § 21.

Appraisers, probate proceedings, § 21.

Attorneys, this index.

Brokers, probate proceeding, § 21.

Claims for wages, priorities, § 425.

Conservators, veterans, § 618.

Fiduciaries, this index.

COMPETENCY

Witnesses, wills, § 280.

COMPROMISE AND SETTLEMENT

Claims held by estate, § 114.

Conservators, §§ 10, 646.

Investigation by attorney, § 648.

Contingent claims, § 424.

Correction before final discharge of fiduciary, § 52.

Fiduciaries, this index.

Guardianships, § 10.

Jurisdiction, § 10 et seq.

Reopening settlement of estate, § 488.

Time for settlement of estate, § 355.

Taxes, § 475.

Trustees, claims, § 699.

INDEX

CONFLICT OF INTEREST

- Fiduciaries, § 155.
- Probate judge, transfer of cause, § 17.

CONFLICT OF LAWS

- Fiduciary security transfers, § 136.

CONSERVATORS

See, also, Fiduciaries, generally, this index.

- Generally, §§ 552 to 628.
- Absentees, §§ 580 to 585.
 - Appointment, § 584.
 - County attorney, notice of petition, § 582.
 - Notice, filing of petition, §§ 581, 582.
 - Petition for appointment, § 580.
 - Pleadings, § 583.
 - Temporary conservators, appointment, § 585.
 - Trial, § 583.
- Accounting, §§ 641, 670, 671.
 - Settlement, § 674.
 - Final account, § 682.
 - Termination of conservatorship, § 677.
 - Veterans, § 620.
- Actions,
 - Claims, § 646.
 - Involuntary appointment, law action, § 33.
 - Pending actions, § 665.
 - Possession of property, § 640.
- Additional property, receiving, § 646.
- Adjudication, ward of unsound mind, § 636.
- Adjustment of claims, § 646.
- Administration, control with property, § 639.
- Affidavit to accompany claim, § 654.
- Allowance,
 - Accounts, § 674.
 - Claim, § 659.
- Appointment, § 570.
 - Adjudication of unsound mind, § 636.
 - County of jurisdiction, § 12.
 - Effect of appointment, § 636.
 - Governing law, § 634.
 - Hearing on petition, § 635.
 - Petition, post.
 - Temporary conservator, § 661.
 - Voluntary petition, § 572.
- Arbitration, claims, § 646.
- Assets,
 - Delivery upon termination, § 678.
 - Duties, § 641.
 - Exhausted, termination, § 676.
 - Minor ward, § 681.
- Attorney appointed, investigation of personal injury claim, § 648.
- Balance of funds, accounting, § 671.
- Bonds,
 - Foreign conservators, filing copy, § 606.
 - Recording, § 608.
 - Governing law, § 634.
 - Recording, § 30.
 - Release, termination, § 682.

INDEX

CONSERVATORS—Continued

Bonds—Continued

- Report, § 671.
- Standby basis, § 592.
- Veterans, § 622.

Breach of contracts, § 650.

Charitable organizations, gifts, § 668.

Children and Minors, this index.

Claims, § 653 et seq.

- Affidavits, § 654.
- Allowance, § 659.
- Compelling payment, § 658.
- Conservator as creditor, § 661.
- Contest, § 666.
- Denial, § 666.
- Execution against estate, § 660.
- Filing,
 - Conservator as creditor, § 661.
 - Tolling statute of limitations, § 657.
- Form, § 654.
- Insolvency, payment, § 667.
- Limitation of actions, § 663.
- Payment, post.
- Pending actions, § 665.
- Powers without court order, § 646.
- Title, § 656.
- Verification, § 654.
- Written instruments, § 655.

Clerk of probate court, powers and duties, § 22 et seq.

Collections, §§ 640, 646.

Commencement of separate action, § 665.

Compelling payment of claims, § 658.

Competency of ward, termination, § 675.

Compromise and settlement, § 646.

Investigation by attorney, § 648.

Condition of ward, report, § 671.

Contest of claims, § 666.

Contracts,

- Appointment, contract of ward, § 638.
- Breach, order of court, § 650.
- Claims, payment, § 654.
- Ward, presumption of fraud, § 638.

Conveyances, powers of ward, § 637.

Copy of written instrument, claims, § 655.

Costs of administration, payment, § 677.

Court costs, payment, § 672.

Court orders,

- Breach of contract, § 650.
- Testamentary intent of ward, § 644.

Death of ward, termination, § 675.

Defined, § 3.

Delinquent inventories and reports, § 32.

Delivery of assets, termination, § 678.

Termination of conservatorship, § 641.

Denial of claims, § 666.

Deposit of will with court clerk, § 645.

Disallowance of accounts, § 674.

Disbursements, accounting, § 671.

Discharge, § 682.

INDEX

CONSERVATORS—Continued

- Disposal of property by ward, § 637.
- Duties and powers, § 641 et seq.
- Education of ward, § 647.
- Educational organizations, gifts, § 668.
- Encumbrances, powers of ward, § 637.
- Exchange of property, § 652.
- Execution against estate, § 660.
- Exempt personal property, disposal, § 652.
- Fiduciary, defined, probate code, § 3.
- Filing claims,
 - Conservator as creditor, § 661.
 - Tolling statute of limitations, § 657.
- Filing inventory, § 642.
- Foreign conservators, §§ 603 to 608.
 - Application for appointment, § 604.
 - Appointment, § 603.
 - Bond,
 - Filing copy, § 606.
 - Recording, § 608.
 - Notice to court, property received, § 608.
 - Order for delivery of property to, § 607.
 - Personal property, § 605.
 - Powers, § 144.
- Forms,
 - Absentees, appointment, § 580.
 - Claims, § 654.
 - Foreign conservators, application for appointment, § 604.
 - Petition for appointment, § 566.
- Fraud presumed, actions of ward, § 638.
- Gifts, § 668.
 - Presumption of fraud, § 638.
- Guardian,
 - Combining petitions, § 627.
 - Same person serving as guardian and conservator, § 628.
- Hearings,
 - Appointment, §§ 584, 585.
 - Petition, § 635.
 - Approval of court, § 647.
 - Final report, notice, § 677.
 - Petition for appointment, § 635.
 - Standby basis, filing petition, § 595.
- Homestead, disposition, § 652.
- Insolvency, payment of claims, § 667.
- Intoxication, this index.
- Inventory,
 - Filing, § 642.
 - Report of changes, § 671.
- Investments, § 647.
 - Powers and duties, § 641.
 - Veterans' conservators, § 622.
- Judgments, § 144.
 - Execution, § 660.
- Jurisdiction, district court sitting in probate, § 10.
- Leases, §§ 647, 652.
- Letters, defined, probate code, § 3.
- Liens, enforcement, §§ 660, 664.
 - Claims, § 663.
 - Filing claim, § 657.

INDEX

CONSERVATORS—Continued

- Mailing, duplicate of claim, § 654.
- Maintenance of ward, payments, § 647.
- Majority of minor, termination, § 675.
- Mentally deficient and mentally ill persons, standby conservatorships, §§ 591 to 597.
- Modification of powers, § 649.
- Mortgages, §§ 144, 652.
 - Enforcement, §§ 660, 664.
- Nonprofit organizations, gifts, § 668.
- Nonresidents' property, appointment, county of jurisdiction. § 12.
- Notice,
 - Absentees, filing of petition, § 582.
 - Foreign conservators, court, property received, § 608.
- Hearing,
 - Approval of court, § 647.
 - Final report, § 677.
- Petition,
 - Absentees, § 581.
 - Appointment, §§ 567, 568.
- Standby basis, appointment, § 596.
 - Veterans' administration, matters involving veterans' conservatorships, § 615.
- Oaths governing law, § 634.
- Opening and reading will by court, § 644.
- Orders of court,
 - Breach of contract, § 650.
 - Delivery of property to foreign conservator, § 607.
 - Foreign conservators, delivery of property to, § 607.
 - Gifts, § 668.
 - Pro rata payment of claims, § 667.
 - Veterans' conservators, support and maintenance of ward, § 619.
- Payments, § 647.
 - Claims, § 653.
 - Compelling payment, § 658.
 - Contract claims, § 654.
 - Insolvency, § 667.
 - Unfiled claims, § 662.
 - Court costs, § 672.
- Pending actions, § 665.
- Personal injury settlements, investigation by attorney, § 648.
- Personal liability,
 - Acts of ward, § 651.
 - Payment of unfiled claims, § 662.
- Personal property,
 - Foreign conservators, § 605.
 - Income, collection by conservators, § 640.
 - Possession by conservator, § 640.
 - Sale or transfer, § 646.
- Petition,
 - Appointment, § 566.
 - Absentees, § 580.
 - Combining petition for guardian and conservator, § 627.
 - Foreign conservators, § 604.
 - Hearing, § 635.
 - Voluntary petition, § 572.
 - Standby basis, §§ 592 to 595.
 - Voluntary petitions for appointment, § 591.
 - Termination, § 679.
 - Denial, § 680.

INDEX

CONSERVATORS—Continued

Pleadings, appointment, § 569.

Pledges, § 652.

Enforcement, §§ 660, 664.

Possession of property, §§ 639, 640.

Powers and duties, § 641 et seq.

Fiduciaries, § 649.

Ward, § 637.

Without order of court, § 646.

Preference as to appointment, § 571.

Presumption of fraud, actions of ward, § 638.

Pro rata payment of claims, § 667.

Procedure in lieu of conservatorship, § 574.

Proof of service, pending actions, § 665.

Protection of estate, § 641.

Proxy voting, § 646.

Qualifications, governing law, § 634.

Receipts, principal or income, § 646.

Receiving principal or income, § 646.

Religious organizations, gifts, § 668.

Removal, report and accounting, § 670.

Reports, §§ 670, 671.

Approval subject to payment of court costs, § 672.

Final report, notice of hearing, § 677.

Residence of ward, report, § 671.

Resignation, report and accounting, § 670.

Sale of personal property, § 646.

Sales, § 652.

Scientific organizations, gifts, § 668.

Separate action on debt, § 665.

Settlement of accounts, § 674.

Standby conservatorships, §§ 591 to 597.

Bond of conservator, § 592.

Deposit of petition, § 593.

Filing petition upon occurrence of condition, § 595.

Nomination of conservator in petition, § 592.

Powers and duties of conservator, § 597.

Revocation of petition, § 594.

Time of appointment of conservator, § 596.

Voluntary petition for appointment, § 591.

Substitution, pending action for claim, § 665.

Supplemental inventory, § 642.

Surcharging account, § 674.

Taxes, payment, § 640.

Temporary conservator, § 661.

Appointment, § 573.

Termination of conservatorship, § 675 et seq.

Accounting, § 677.

Assets exhausted, § 676.

Assets of minor ward exhausted, § 681.

Costs of administration, § 677.

Delivery of assets, § 678.

Discharge, § 682.

Petition, § 679.

Denial, § 680.

Release of bond, § 682.

Report and accounting, § 670.

Testamentary intent of ward, duties of court, § 644.

CONSERVATORS—Continued

- Title of claim, § 656.
- Title to property, § 639.
- Tort liability, acts of ward, § 651.
- Transfers,
 - Personal property, § 646.
 - Ward, presumption of fraud, § 638.
- Trial, appointment, § 569.
- Unfiled claims, payment, § 662.
- Venue, separate action on debt, § 665.
- Verification of claims, § 654.
- Verified inventory, § 642.
- Verified report and accounting, § 670.
- Veterans, §§ 614 to 622.
 - Accounts, § 620.
 - Acting as conservator for more than one veteran, § 617.
 - Administrator of veterans affairs, party in interest, § 615.
 - Application of law, § 614.
 - Appointment of conservator, § 616.
 - Compensation, § 618.
 - Dual conservatorship proceedings not required, § 620.
 - Liberal construction of law, § 621.
 - Order for support and maintenance, § 619.
 - Payments, § 622.
 - Powers and duties, § 622.
- Voluntary petition for appointment, § 572.
- Vote at corporate meetings, § 646.
- Waiver, notice of hearing on final report, § 677.
- Welfare of ward, payments, § 647.
- Wills,
 - Delivery to court, § 643.
 - Deposit with court clerk, § 645.
 - Disposal of property by ward, §§ 637, 643.
 - Duties of court, § 644.
 - Preference as to appointment, § 571.
- Written instruments, claims, § 655.

CONSTRUCTION OF INSTRUMENTS

- Wills and trust instruments, district court sitting in probate, § 10.

CONSTRUCTION OF LAW

- Common trust funds, § 129.
- Fiduciary security transfers, § 133.
- Veterans' conservatorships, § 621.

CONSULAR REPRESENTATIVES

- Probate matters involving aliens, notice, § 41.

CONTEMPT

- Wills, willful failure to deliver to court, § 285.

CONTEST OF WILLS

- Wills, this index.

CONTINGENT CLAIMS

- Claims against estate, §§ 418, 424.
- Filing, § 418.
- Payment by distributees, § 427.

CONTINUANCE

- Absentee's estate, hearing on petition for administration, § 514.
- Claims against estate, § 415.

INDEX

CONTRACTS

- Breach, conservators, § 650.
- Conservators, this index.
- Real estate,
 - Forfeiture, conversion into personalty, § 385.
 - Trustees, powers, § 699.
- Ward, appointment of conservator, § 638.

CONTRACTUAL OR MUTUAL WILLS

- Construction as, § 270.

CONTRIBUTIONS

- Gifts, generally, this index.

CONVERSION

- Sale of decedents' real property, equitable conversion, § 384.

CONVEYANCES

- Deeds and Conveyances, generally, this index.

COPIES

- Certified Copies, generally, this index.
- Claims against estate of ward, § 655.
- Foreign probated wills, admission to probate, § 496.

CORPORATIONS

- Affidavit for compensation, fiduciary, § 203.
- Conservators, voting at meetings, § 646.
- Fiduciary,
 - Affidavit for compensation, § 203.
 - Continuation of business of estate, § 83.
- Fiduciary capacity, acting in, § 64.
- Fiduciary security transfers, §§ 130 to 138.
- Foreign nonprofit corporations, wills, limitation on devises to, § 266.
- Proxy voting, trustees, § 699.
- Stock and stockholders, meetings, conservators, voting, § 646.

COSTS

- Claims, estates of decedents, § 425.
- Conservators, payment, § 672.
- Contesting or setting aside will, § 313.
- Distributees, § 476.
- Fiduciaries, § 159.
 - Notices, serving, § 47.
- Guardianship, § 673.
- Priority, estates of decedents, § 425.
- Transcript of probate record, § 306.
- Wills, probate, transcript of record in foreign county, § 306.

COSTS OF ADMINISTRATION

- Attorney fees, § 198.
- Defined, § 3.

COUNTERCLAIMS

- Set-off and Counterclaims, generally, this index.

COUNTY ATTORNEY

- Conservator for absentee, filing of petition, notice, § 582.

COUNTY CLERK

- Conservator, standby basis, deposit of petition, § 593.

INDEX

COUNTY OF JURISDICTION

District court sitting in probate, § 12.

COUNTY RECORDER

Foreign wills, muniment of title, recording, § 497.

COURTS

Defined, § 3.

District Court, generally, this index.

Foreign courts, notice, delivery of property to conservator, § 608.

Probate Court, generally, this index.

CREDIT

Sale of decedent's property, § 392.

CREDITORS

Bond, payment of claims, § 433.

Executors, preference for appointment, § 294.

Fraudulent transfers, decedent's estate, recovery of property, § 368.

Secured claims, §§ 422, 423.

Set-off and retainer, priorities, estates of decedents, § 471.

Wills,

Preference for appointment of executor, § 294.

Prejudicing rights of, § 265.

Security, § 349.

CUSTODY

Wills, §§ 285 to 289.

DAMAGES

Fiduciary, breach of obligation, bond, § 186.

Possession of property belonging to estate, § 112.

Wills, failure to produce, § 285.

Wrongful death, exemption, § 336.

DATE

Time, generally, this index.

DEATH

Absentee, order establishing death of, § 514.

Rights barred, § 516.

Advancee for intestate, § 226.

Armed forces members, presumption of death, § 517.

Conservatorship, termination, § 675.

Felonious death, inheriting from, §§ 535 to 537.

Fiduciary,

Appointment of successor, § 66.

Fees of personal representative and attorney, § 204.

Powers of surviving cofiduciary, § 67.

Guardianship, termination, § 675.

Intestate succession, death of advancee, § 226.

Simultaneous death, Uniform Act, §§ 523 to 528.

Uniform Simultaneous Death Act, §§ 523 to 528.

Wrongful death, damages, exemption, § 336.

DEBTORS AND CREDITORS

Notice to pay or make claim, § 303.

DEBTS

Abatement of shares, § 436.

Charges, payment of unfiled charges, § 435.

Classification of debts and charges, § 425.

DEBTS—Continued

- Defined, § 3.
- Disposal of property by will subject to, § 264.
- Distributees, retainer, § 471.
- Exemption, wrongful death damages, § 336.
- Fiduciaries, compromise of claims against estate, § 115.
- Fraudulent transfers, recovery, § 368.
- Interlocutory accounting, § 469.
- Payment, §§ 350, 433 to 435.
 - Debts not filed, § 435.
 - Debts of estate, § 434.
 - Order, § 426.
- Priorities, § 425.
- Sale of property, § 386.
- Wills, disposal of property subject to, § 264.
- Wrongful death damages, exemption, § 336.

DECLARATORY JUDGMENTS

- District court sitting in probate, § 11.
- Heirs, determination of heirship, § 11.
- Wills, determine last will, § 319.

DECREES

- Judgments and Decrees, generally, this index.

DEEDS AND CONVEYANCES

- Absentee, rights barred, sale by spouse, § 516.
- Certificate of appointment and authority, recording, § 98.
- Collateral attack, § 395.
- Conservator appointed for ward, § 637.
- Endorsement, evidence, § 402.
- Execution of instrument, § 400.
- Fiduciaries,
 - Certificate of appointment and authority, recording, § 98.
 - Foreign fiduciaries, § 144.
 - Specific performance,
 - Involuntary, § 97.
 - Voluntary, § 96.
 - Waiver, homestead or other exemption, § 100.
- Foreign fiduciaries, § 144.
- Transcript of record, § 404.
- Ward, appointment of conservator, § 637.

DEFECTS

- Wills, cured by codicil, § 282.

DEFENSE, SECRETARY OF

- Armed forces member, finding of death, evidence, § 517.

DEFICIENCY JUDGMENT

- Mortgages, sale of property subject to mortgage, § 389.

DEFINITIONS

- See Words and Phrases, generally, this index.

DELEGATION OF AUTHORITY

- Fiduciaries, § 84.

DELIVERY

- Property, § 354.
- Wills, this index.

INDEX

DEPENDENTS

Allowance, § 374.

DEPOSITIONS

Generally, § 22.

Wills, proof by deposition, § 297.

DEPOSITS

Conservator, standby basis, petition, § 593.

Fiduciaries, this index.

Will, depositing with clerk of court, §§ 286, 287.

DESCENT AND DISTRIBUTION

Generally, § 469 et seq.

Accounting, waiver, § 470.

Actions, costs, § 476.

Appeals, § 487.

Contingent claims, bond, § 424.

Declaratory judgments, district court sitting in probate, § 11.

Distributee, defined, § 3.

District court sitting in probate, jurisdiction, § 10.

Excessive devise to nonprofit corporation, § 266.

Inability to distribute estate funds, § 109.

Indebtedness, retainer, § 471.

Intestate succession, § 219.

Issue, defined, § 3.

Jurisdiction, district court sitting in probate, § 10.

Minors, small payments, § 108.

Redistribution, § 488.

Sale of property, § 386.

Will, devise to spouse in lieu of intestate share, § 268.

DESTRUCTION

Conservatorship petition, standby basis, revocation, § 594.

Records, § 16.

Wills, intention of revoking, § 284.

Written instrument, claim against estate of ward, § 655.

DEVISE

Defined, § 3.

DEVISEE

Defined, § 3.

DISABILITY

Insurance beneficiary feloniously causing disability, insurance proceeds, §§ 536, 537.

DISBURSEMENTS

Fiduciaries, vouchers or receipts, § 53.

DISCHARGE

Conservators, termination, § 682.

Executors and administrators, § 469 et seq.

Fiduciaries, § 111.

Trustees, § 703.

DISCOVERY

Property belonging to estate, § 112.

DISSOLUTION

Trust, final report, § 701.

INDEX

DISTRIBUTE

Defined, § 3.

DISTRIBUTION

Descent and Distribution, generally, this index.

DISTRICT COURT

Clerk of the District Court, generally, this index.

Defined, § 3.

Probate court, acting as, § 10 et seq.

Records, probate control, § 16.

DIVORCE

Wills, effect of divorce, § 271.

DOCKETS

Generally, §§ 24, 27, 28.

DOCUMENTS

Discovery, property belonging to estate, § 112.

DOMICILE AND RESIDENCE

Decedent, county of jurisdiction, § 12.

Nonresidents, § 12.

Ward, report of conservator, § 671.

DRUGS AND DRUGGISTS

Claims against estate, § 425.

DRUNKARDS AND DRUNKENNESS

Intoxication, generally, this index.

EDUCATION

Beneficiary, payment by trustee, § 699.

Conservators, payments, § 647.

EDUCATIONAL INSTITUTIONS

Gifts, conservators, § 668.

ELECTION OF RIGHTS

Homesteads, this index.

Wills, this index.

EMBEZZLEMENT

Fiduciaries, § 160.

EMPLOYMENT

Labor and Employment, generally, this index.

ENCUMBRANCES

See Liens and Encumbrances, generally, this index.

ENDORSEMENT

Confirmation of sale of property, § 401.

Sale of property, instruments, § 402.

Wills, clerk of court, § 287.

EQUITABLE CONVERSION

Sale of real property, § 384.

EQUITABLE INTEREST

Absentee, rights barred, order establishing death, § 516.

EQUITY

Generally, § 33.

Jurisdiction, district court sitting in probate, § 11.

INDEX

ESCHEAT

- Generally, §§ 543 to 546.
- Intestate succession, § 219.
- Notice to persons interested, § 544.
- Payment to person entitled to property, § 546.
- Proceedings for escheat, § 543.
- Sale of property, § 545.
- State comptroller, payment of sale proceeds, § 545.

ESTATE

- Defined, § 3.

ESTATE TAX

- Abatement of shares, § 436.
- State, payment, § 449.
- United States, payment, § 449.

EVIDENCE

- Armed forces members, death, § 517.
- Fiduciaries, appointment or incumbency, security transfers, § 132.
- Inventory and appraisal, § 367.
- Presumptions, generally, this index.
- Sale of property, § 402.
- Simultaneous death, §§ 523 to 528.
- Veterans' conservatorship proceedings, certificate of incompetency, § 616.

EXAMINATION

- Accounts, § 20.
- Fiduciaries,
 - Accounts, § 20.
 - Court, § 161.
- Property belonging to estate, § 112.

EXCEPTIONS

- Objections and Exceptions, generally, this index.

EXCHANGE OF PROPERTY

- Generally, §§ 386, 387.
- Bond presenting exchange, § 394.
- Collateral attack, § 395.
- Confirmation, § 399.
- Conservators, § 652.
- Execution of instrument, § 400.
- Fiduciaries, expenses, § 102.
- Hearings, § 389.
- Order, § 396.
- Personal property, § 387.
- Petition, § 388.
- Powers, § 383.

EXECUTION OF INSTRUMENTS

- Wills, this index.

EXECUTIONS

- Claims, § 430.
- Conservators, estate of ward, § 660.
- Exemption, § 332.

INDEX

EXECUTORS AND ADMINISTRATORS

See, also, Fiduciaries, generally, this index.

Accounts and accounting, § 469 et seq.

Audit and examination of accounts, referee, §§ 20, 21.

Interlocutory accounting, § 469.

Waiver, § 470.

Actions, expenses for services, §§ 199, 351, 368, 487.

Allowance for defending will, § 314.

Ancillary administration, §§ 500 to 504.

Appointments,

Clerk's powers, § 22.

Foreign administrator, §§ 499 to 502.

Jurisdiction of district court sitting in probate, § 10.

Nonresident executors, § 295.

Notice, § 303.

Petition, § 290.

Contents, § 292.

Powers of clerk of probate, § 22.

Publication of notice, § 230.

Attorneys,

Expenses, § 199.

Fees, § 198.

Bonds, sale of property, § 396.

Claims against Estate, generally, this index.

Copy of will for executor, § 302.

Creditors, fraudulent transfers, recovery, § 368.

Declaratory judgment to determine last will, § 319.

Defined, § 3.

Delinquent inventories and reports, § 32.

Discharge, § 469 et seq.

Escheat proceedings, §§ 543 to 545.

Expenses, § 199.

Fees, § 197.

After death, § 204.

Attorneys, § 198.

Final reports. Reports, post.

Foreign executor or administrators,

Application for appointment, §§ 501, 503.

Appointment, §§ 499, 500, 502.

Foreign wills, not probated, appointment, § 499.

Form, notice of appointment, § 230.

Fraud, actions, § 487.

Fraudulent conveyances, recovery, § 368.

Income, collection, § 352.

Indebtedness, assets of estate, § 366.

Interlocutory accounting, § 469.

Inventory, § 361.

Jurisdiction, district court sitting in probate, § 10.

Leases, term, § 390.

Letters, defined, § 3.

Letters testamentary and of administration, jurisdiction, district court sitting in probate, § 10.

Nonresidents, § 295.

Appointment, § 499.

Notice,

Allowance to surviving spouse, § 374.

INDEX

EXECUTORS AND ADMINISTRATORS—Continued

Notice—Continued

Appointment, § 303.

Publication, § 230.

Discharge, § 479.

Official bond, § 22.

Order appointing executor, § 300.

Order of preference, appointment of executor, § 294.

Petition, appointment, § 290.

Contents, § 292.

Possession of property, § 351.

Surrender, § 353, 354.

Power of sale, application of law, § 383.

Publication, notice of appointment, § 230.

Real estate, expenses for services, § 199.

Removal, delinquent inventories and reports, § 32.

Reopening administration, § 489.

Reports, § 361.

Delinquent reports, § 32.

Final reports, §§ 473, 477.

Appeals, § 487.

Certificate for unsold land, § 480.

Notice, § 479.

Reopening, § 488.

Mandatory filing, § 362.

Sale of property, execution of instrument, § 400.

Settlement of estate, time, § 355.

Specific devises, delivery, § 355.

Taxation,

Expenses for services, § 199.

Payment, § 352.

Temporary Administrator, generally, this index.

Waiver, official bond, probate powers of clerk, § 22.

EXEMPTIONS

Generally, § 332 et seq.

Conservators, disposal of property, § 652.

Executions, § 332.

Fiduciaries, deeds or mortgages, waiver, § 100.

Homestead, § 350.

Insurance, this index.

Possession of property, § 351.

Wrongful death, damages, § 336.

EXPENSES

Fiduciaries,

Bond, § 169.

Sale of property, etc., § 102.

Funeral expenses, §§ 425, 433.

FEDERAL ASSOCIATIONS OR CORPORATIONS

Fiduciaries, purchasing stock in, mortgages, § 99.

FEDERAL GOVERNMENT

United States, generally, this index.

FEES

Attorneys, this index.

Executors and Administrators, this index.

INDEX

FEES—Continued

Fiduciaries,

- Determination, breach of duty, § 162.
- Reduction, employment of agents, § 86.

Guardians, costs, § 673.

Personal representatives, § 197.

Referees, probate matters, §§ 20, 21.

FELONIOUS DEATH

Generally, §§ 535 to 537.

FIDUCIARIES

See also,

- Conservators.
- Executors and Administrators.
- Guardians.
- Trusts and Trustees.

Abandonment of property, § 116.

Accounts and accounting,

- Acting as fiduciary of a fiduciary, § 80.
- Defaulting fiduciary, § 186.
- Probate powers, district court clerk, § 22.
- Property of estate, § 157.
- Receipts, § 53.
- One of several fiduciaries, § 77.

Vouchers or receipts, § 53.

Acting as fiduciary of a fiduciary, § 80.

Actions,

- Bond, § 186.
- Limitation of action, § 187.
- By and against, § 81.
- Foreign fiduciaries, § 148.
- Filing bond, § 149.
- Several fiduciaries, § 79.

Acts of fiduciary without court approval, contesting, § 122.

Affidavit,

Compensation, § 202.

Agents, liability of fiduciary, § 85.

Appearance, execution of bond as appearance by surety, § 186.

Assignments, § 95.

Securities, § 131.

Attorneys,

- Compensation, § 200.
- Affidavit, § 202.
- Designation, § 82.
- Fees, death of fiduciary, § 204.
- Service, notice of order, § 45.

Audit of accounts, § 20.

Bank deposits,

- Corporate fiduciaries, § 156.
- Funds of estate, § 87.

Banking institutions, investments in name of nominee, § 124.

Bonds, § 169.

- Agreement with surety for deposit of property, § 183.
- Amount, § 170.
- Approval by clerk, § 171.
- Deposit in lieu of bond, § 177.
- District court clerk, probate powers, § 22.
- Execution of bond as appearance by surety, § 186.

INDEX

FIDUCIARIES—Continued

Bonds—Continued

- Increase or decrease in amount, § 180.
- Insolvency of fiduciary, liability of sureties, § 185.
- Limitation of action, § 187.
- New bond, §§ 180, 184.
- Obligees, liability, § 181.
- Record, clerk keeping, § 30.
- Reduction by deposit of estate personal property, § 176.
- Release of sureties before estate fully administered, § 184.
- Review when inventory filed, § 179.
- Suit on bond, § 186.
 - Limitation, § 187.
- Waiver,
 - Court, § 175.
 - Distributees, § 173.
 - Terms of will, § 172.

Breach of duty,

- Liability, § 160.
- Removal from office, § 65.

Certificate of appointment and authority, recording conveyances of property, § 98.

Clerks of court, compensation, § 201.

Cofiduciaries,

- Powers, § 76.
- Surviving, powers, § 67.

Commingling property, liability, §§ 158, 160.

Common trust funds, §§ 126 to 129.

Compensation, § 197 et seq.

Affidavit, § 202.

Corporate fiduciary, § 203.

- Corporate fiduciary, affidavit, § 203.
- Determination, breach of duty, § 162.
- Itemized claim or report, § 200.
- Judges, clerks and deputy clerks, § 201.
- Reduction, employment of agents, § 86.

Compromise and settlement,

- Claims against estate, § 115.
- Claims held by estate, § 114.
- Contesting settlement without court approval, § 122.

Conflict of laws, security transfers, § 136.

Continuation of business of estate, § 83.

Conveyances. Deeds and conveyances, generally, post.

Corporate fiduciary, affidavit, § 203.

Costs, § 159.

Court officers, compensation, § 201.

Damages, defaulting, § 186.

Death,

- Appointment of successor, § 66.
- Fees of personal representative and attorney, § 204.
- Powers of surviving cofiduciary, § 67.

Deeds and conveyances,

- Certificate of appointment and authority, recording, § 98.
- Foreign fiduciaries, § 144.
- Specific performance,
 - Involuntary, § 97.
 - Voluntary, § 96.

Waiver, homestead or other exemption, § 100.

INDEX

FIDUCIARIES—Continued

- Defined, § 3.
 - Common trust funds, § 126.
- Delegation of authority, § 84.
- Delinquent inventories or reports, § 32.
- Delivery of property, removal, § 70.
- Deposits,
 - Agreement with surety for deposit of property, § 183.
 - Bank deposits, § 156.
 - Money in banks, § 87.
 - Cash or other deposit in lieu of bond, § 177.
 - Corporate fiduciaries, § 156.
 - Court, deposits in court, inability to distribute estate funds, § 109.
- Deputy clerks of courts, compensation, § 201.
- Discharge, § 111.
- Distribution of estate, inability to distribute, § 109.
- Division of compensation, affidavit, § 202.
- Employment of individuals to manage estate, § 84.
 - Liability of fiduciary, § 85.
- Encumbered assets, payments, etc., § 117.
- Evidence of appointment or incumbency, security transfers, § 132.
- Examination,
 - Accounts, § 20.
 - Court, § 161.
- Exchange of property, expenses, § 102.
- Expenses,
 - Bond, § 169.
 - Sale of property, etc., § 102.
- Federally sponsored associations or corporations, purchasing stock, mortgages, § 99.
- Fees,
 - Determination, breach of duty, § 162.
 - Reduction, employment of agents, § 86.
- Final report and discharge, § 111.
- Fines and penalties,
 - Breach of duty, § 162.
 - Removal, failure to deliver property, § 70.
- Foreign Fiduciaries, generally, this index.
- Governing law, § 634.
- Inability to distribute estate funds, § 109.
- Income, accounting for, § 157.
- Insolvency of fiduciary, liability of bond sureties, § 185.
- Interlocutory accounts and reports, probate powers, district court clerk, § 22.
- Inventories,
 - Delinquent inventories, § 32.
 - Filing, review of bond, § 179.
- Investments, § 123.
 - Common trust funds, §§ 126 to 129.
 - Name of nominee, § 124.
 - Records, § 125.
 - Security transfers, simplification, §§ 130 to 138.
 - Simplification of fiduciary security transfers, §§ 130 to 138.
- Judges, compensation, § 201.
- Judgments and Decrees, this index.
- Leases, expenses, § 102.
- Letters, issuance, § 178.
- Liability,
 - Property not a part of estate, § 158.

INDEX

FIDUCIARIES—Continued

Liability—Continued

Property of estate, § 157.

Self-dealing, § 155.

Liens,

Payment, § 117.

Release, assignment, etc., § 95.

Transfer of assets to estate, § 114.

Minors, payment of small legacies, § 108.

Mismanagement of estate, liability, § 160.

Mistakes and settlements, correction, § 52.

Money,

Depositing in banks, § 87.

One of several fiduciaries receiving, § 77.

Third parties protected, payments, § 78.

Mortgages,

Expenses, § 102.

Foreign fiduciaries, § 144.

Payment, § 117.

Purchasing stock in lending association or corporation, § 99.

Release, assignment, etc., § 95.

Transfer of encumbered assets to estate, § 114.

Waiver, homestead or other exemption, § 100.

Negligence, employees or agents, liability, § 85.

Nonresident's estate, application of law, § 88.

Notice,

Acts of, approval of court, contesting settlement, § 122.

Breach of bond obligation, sureties, § 186.

Continuation of business of estate, § 83.

Self-dealing, § 155.

Service, § 45.

Notice of order, § 45.

Security transfers, authority of fiduciary, §§ 130 to 138.

Waiver of service, § 44.

Oath, § 168.

Orders of court, continuation of business of estate, § 83.

Payments, encumbered assets, § 117.

Payments or transfers to, protection of third parties, § 78.

Personal representative, fees, § 204.

Petitions,

Cofiduciaries, exercise of powers, § 76.

Plotting land, § 94.

Pledges,

Expenses, § 102.

Payment, § 117.

Transfer of encumbered assets to estate, § 114.

Powers, § 76 et seq.

Successor fiduciary, § 68.

Surviving cofiduciary, § 67.

Profits from self-dealing, § 155.

Qualification, § 64.

Real property,

Certificate of appointment and authority, recording, conveyances, § 93.

Platting, § 94.

Sales, exchanges, etc.,

Expenses, § 102.

Probate record, § 29.

INDEX

FIDUCIARIES—Continued

Real property—Continued

- Specific performance,
 - Involuntary, § 97.
 - Voluntary, § 96.

Waiver of exemptions, deeds or mortgages, § 100.

Receipts,

- Accounting, § 53.
- Inability to distribute estate funds, depositing with clerk of court, §§ 109, 110.
- One of several fiduciaries, § 77.

Records, investments, § 125.

Registration of securities in fiduciary's name, § 130.

Release of liens and mortgages, § 95.

Removal from office, §§ 65, 66.

- Delinquent inventories or reports, § 32.
- Delivery of property, § 70.
- Powers of cofiduciary, § 67.

Reports,

- Acting as fiduciary of a fiduciary, § 80.
- Delinquent reports, § 32.
- District court clerk, § 22.
- Final reports, § 111.
- Probate clerk assisting, § 26.

Resignation,

- Appointment of successor, § 66.
- Powers of surviving cofiduciary, § 67.

Security transfers, simplification, §§ 130 to 138.

Settlement. Compromise and settlement, generally, ante.

Simplification of fiduciary security transfers, §§ 130 to 138.

Specific performance, real property, § 97.

- Involuntary, § 97.
- Voluntary, § 96.

Splitting fees, affidavit, § 202.

Stock and stockholders,

- Purchasing stock in lending association or corporation, mortgages, § 99.

Substitution, § 69.

Successor fiduciary,

- Appointment, § 66.
- Powers, § 68.

Third parties protected, payments or transfers to a fiduciary, § 78.

Vacancy in office,

- Powers of surviving cofiduciary, § 67.

Waiver,

- Bonds, ante.
- Exemptions, deeds or mortgages, § 100.

FILING

Conservatorship petition, standby basis, § 595.

Wills,

- Election of spouses, child or parent, excessive gift to nonprofit corporation, § 266.
- Petition for probate, § 290.

FINES AND PENALTIES

Fiduciaries,

- Breach of duty, § 162.
- Removal, failure to deliver property, § 70.

FORECLOSURE

Real estate, conversion into personalty, § 385.

FOREIGN CONSERVATORS

Conservators and Conservatorships, this index.

FOREIGN COUNTRIES

Will executed in, § 283.

FOREIGN COUNTY

Probate of wills, record, § 305.

FOREIGN EXECUTORS AND ADMINISTRATORS

Appointment, §§ 499, 500.

Application for, §§ 501, 503.

FOREIGN FIDUCIARIES

Actions, § 148.

Filing bond, § 149.

Appointment, § 502.

Bond, filing, commencing action or proceeding, § 149.

Certificate of appointment and authority, § 145.

Filing, § 146.

Deeds and conveyances, § 144.

Judgments, § 144.

Mortgages, § 144.

Records, certificate of appointment and authority, § 147.

FOREIGN REAL ESTATE

Certified copies, § 48.

FOREIGN STATES

Wills executed in, § 283.

FOREIGN TRUSTEE

Application for appointment, § 503.

FOREIGN WILLS

Generally, §§ 495 to 499.

Admission to probate, §§ 495, 496.

Applicability of laws, § 498.

Applicability of law, § 498.

Execution requirements, § 283.

Muniment of title, § 497.

Probated in foreign state or country, admission to probate within state, § 496.

FORFEITURES

Real property, conversion to personalty, § 385.

Wills, interested witnesses, bequest to, § 281.

FORMAL EXECUTION

Wills and codicils, § 279.

FORMS

Absentee's estate, petition for administration, § 510.

Administrators, notice of appointment, § 230.

Attorney, appointment for persons not represented, order, § 119.

Conservators, this index.

Guardians, petition for appointment, § 552.

Wills, this index.

FRAUD

Contracts,

Ward, appointment of conservator, § 638.

Creditors, decedent's estate, recovery of property, § 368.

Executors and administrators, actions, § 487.

FRAUD—Continued

- Fiduciary, action on bond, limitation, § 187.
- Transfers and fraud of creditors, recovery of property, § 368.
- Ward, conservator appointed, § 638.

FRAUDULENT CONVEYANCES

- Generally, § 368.

FULL AGE

- Defined, § 3.

FUNDS

- Common Trust Funds, generally, this index.

FUNERAL EXPENSES

- Claims, § 425.
- Payment, § 433.
- Priorities, § 425.

GENDER

- Construction, § 4.

GIFTS

- Conservators, § 668.
 - Appointed for ward, § 638.
- Contingent claims, payment by distributees, § 427.
- Intestate succession, inter vivos transfer, § 224.
- Veterans, payment from conservator for conservatorship funds, § 622.
- Ward, appointment of conservator, § 638.

GOOD FAITH

- Fiduciaries, payments or transfers to, third parties protected, § 78.

GOVERNING LAW

- Fiduciary security transfers, § 136.

GUARDIAN AD LITEM

- Absentee's estate, hearing on petition for administration, § 514.
- Wills, appointment, excessive gift to nonprofit corporation, § 266.

GUARDIAN OF THE PROPERTY

- Defined, § 3.

GUARDIANS

- See, also, Fiduciaries, generally, this index.
- Action for involuntary appointment, law action, § 33.
- Adjudication, ward of unsound mind, § 636.
- Appointment,
 - Adjudication of unsound mind, § 636.
 - Combining conservator's petition, § 627.
 - Effect of appointment, § 636.
 - Governing law, § 634.
 - Hearing on petition, § 635.
 - Temporary guardian, § 558.
 - Petition, § 552.
- Attorney fees, costs, § 673.
- Bond, § 174.
 - Governing law, § 634.
- Recording, § 30.
- Clerk of probate court, powers and duties, § 22 et seq.
- Competency of ward, termination, § 675.
- Condition of ward, report, § 669.

INDEX

GUARDIANS—Continued

- Conservators,
 - Combining petitions, § 627.
 - Person serving as guardian and conservator, § 628.
- Costs, § 673.
- Death of ward, termination, § 675.
- Defined, § 3.
- Delinquent inventories and reports, § 32.
- Denial of petition for termination, § 680.
- District court sitting in probate, jurisdiction, § 10.
- Fees,
 - Costs, § 673.
- Fiduciary, defined, § 3.
- Forms, petition for appointment, § 552.
- Hearing, petition for appointment, § 635.
- Incompetent, defined, § 3.
- Intoxication, alcoholics, § 552 et seq.
- Jurisdiction, district court sitting in probate, § 10.
 - Appointment of guardians, § 12.
- Letters, defined, § 3.
- Letters of guardianship, granting, district court sitting in probate, § 10.
- Minors, §§ 552 to 560.
 - Appointment, §§ 22, 556.
 - Clerk of probate court, powers and duties, § 22 et seq.
 - Defined, § 3.
 - Majority, termination of guardianship, § 675.
 - Notice,
 - Filing petition for appointment, service, § 554.
 - Petition for appointment, § 553.
 - Petition for appointment, § 552.
 - Pleadings and trial, appointment, § 555.
 - Standby basis, § 560.
 - Temporary guardian, appointment, § 558.
- Notice, petition for appointment, §§ 553, 554.
- Oaths,
 - Governing law, § 634.
- Personal liability, acts of ward, § 651.
- Petition,
 - Appointment of guardian, § 552.
 - Combining petition for guardian and conservator, § 627.
 - Hearing, § 635.
 - Termination, § 679.
 - Denial, § 680.
- Qualifications,
 - Governing law, § 634.
- Report,
 - Condition and whereabouts of ward, § 669.
 - Temporary guardian, appointment, § 558.
- Termination of guardianship, § 675 et seq.
 - Petition, § 679.
 - Denial, § 680.
- Tort liability, acts of ward, § 651.
- Whereabouts of ward, report, § 669.

HANDICAPPED PERSONS

- Insurance beneficiary feloniously causing disability, policy proceeds, §§ 536, 537.

HANDWRITING

- Wills, testator and witnesses, proving, witness unavailable, § 298.

INDEX

HEALTH

Conservatorship, standby basis, §§ 591 to 597.

HEALTH INSURANCE

Exemption, § 333.

HOMESTEADS

Absentee, rights barred, sale by spouse, § 516.

Appraisal, intestate succession, § 213.

Conservators, disposal, § 652.

Devise in lieu of homestead presumed, § 268.

Election to take against will,

Change of election, § 246.

Filing, § 243.

Occupying homestead, § 240.

Incompetent spouse, § 244.

Time, § 241.

Personal right, § 242.

Record of election, § 245.

Share, § 239.

Exemption, § 350.

Fiduciaries, deeds or mortgages, waiver, § 100.

Possession, § 351.

Wills,

Devise in lieu of homestead rights, presumption, § 268.

Election to take against will, generally, ante.

HOMICIDE

Inheritance from deceased's estate by murderer, §§ 535 to 537.

HOSPITALS

Claims against estate, § 425.

HUSBAND AND WIFE

Absentees,

Petition for conservatorship, notice, § 582.

Rights barred, order establishing death, § 516.

Devise to spouse, presumption, § 268.

Feloniously causing death of spouse, inheritance, § 535.

Partial intestacy, § 272.

Spouse dying before testator, lapse of devise, § 274.

Surviving Spouse, generally, this index.

Wills, presumption attending devise to spouse, § 268.

ILLEGITIMATE CHILDREN

Intestate succession, §§ 221, 222.

IN REM PROCEEDINGS

Generally, § 330.

INCOME

Collection, § 352.

Conservators, § 640.

Fiduciaries, accounting, § 157.

INCOMPETENTS

Defined, § 3.

INDEBTEDNESS

Debts, generally, this index.

INDEMNITY

Contingent claims, payment by distributees, § 427.

INDEX

INFANTS

Children and Minors, generally, this index.

INSANE PERSONS

Mentally Deficient and Mentally Ill Persons, generally, this index.

INSOLVENCY

Conservatorship, payment of claims, § 667.

Contingent claims, payment by distributees, § 427.

Debts, payment, § 434.

Fiduciary, liability of bond sureties, § 185.

Set-off and retainer, priorities, § 471.

INSURANCE

Exemption, § 333.

Accident insurance, § 333.

Health insurance, § 333.

Life insurance, § 333.

Mutual aid insurance, § 333.

Feloniously causing insured's death, beneficiary, § 536.

Life Insurance, generally, this index.

Share of survivor, § 335.

Simultaneous death of insured and beneficiary, § 526.

INTEREST

Probate judge, transfer of cause, § 17.

INTERLOCUTORY ACCOUNTING

Generally, § 469.

Clerks of court, § 22.

INTERVENTION

Attorney general, § 43.

Fiduciary's bond, sureties, § 186.

INTESTATE SUCCESSION

Generally, § 210 et seq.

INTOXICATION

Conservators, appointment, §§ 566 to 574.

Petition, § 566.

Notice, §§ 567, 568.

Pleadings and trial, § 569.

Preference, § 571.

Temporary conservator, § 573.

Voluntary petition, § 572.

Fiduciary, § 64.

Guardians, appointment, §§ 552 to 560.

Petition, § 552.

Notice, filing petition, service, § 554.

Pleadings and trial, § 555.

Standby basis, § 560.

Temporary guardian, § 558.

Voluntary petition, § 557.

INVENTORY

Generally, §§ 32, 361 et seq.

Actions,

Assets of estate, § 366.

Chose in action, § 366.

Appeals, § 487.

Appraisal, § 365.

INDEX

INVENTORY—Continued

- Conservators,
 - Filing, § 642.
 - Report and accounting, § 671.
- Delinquent inventory reported, § 32.
- Evidence, § 367.
- Fiduciaries, filing, review of bond, § 179.
- Filing, § 363.
 - Mandatory filing, § 362.
- Personal property, exemption, § 332.
- Settlement of estates, delinquent inventory, § 32.
- Supplementary inventory, § 364.
- Temporary administrator, § 343.

INVESTIGATIONS

- Absentee's estate, guardian ad litem, § 514.
- Conservator's settlement of personal injury claim, § 648.
- Title to property, § 391.

INVESTMENTS

- Conservators, § 647.
 - Powers and duties, § 691.
- Fiduciaries, this index.
- Trusts and trustees, §§ 126 to 129, 699.
 - Reports, § 700.

ISSUE

- Defined, § 3.

JOINDER OF PARTIES

- Action to contest or set aside will, § 311.
 - Devises and other wills, § 315.
- Declaratory judgment to determine last will, § 319.
- Election of defendants to join with contestants, § 312.

JOINT AND SEVERAL LIABILITY

- Fiduciary's bond, obligees, § 181.

JOINT LIABILITY

- Contingent claims, payment by distributees, § 427.

JOINT TENANCY

- Simultaneous death, § 525.

JUDGES

- Probate Court, this index.

JUDGMENTS AND DECREES

- Generally, §§ 11, 36.
- Claims, § 448.
- Conservators, § 144.
- Declaratory judgments, §§ 11, 319.
- Distributees, costs, § 476.
- Fiduciaries,
 - Foreign fiduciaries, § 144.
 - Release, assignment, § 95.
 - Several fiduciaries, § 79.

JURISDICTION

- Generally, §§ 10 et seq., 330.
- Declaratory judgments, § 11.

INDEX

JURY

- Claims against estate, § 447.
- Conservators, appointment, § 569.
- Guardianship, appointment, § 555.
- Wills, contests, § 310.

LABOR AND EMPLOYMENT

- Agents, §§ 21, 85.
- Fiduciaries, employing individuals to manage estate, § 84.
 - Liability of fiduciary, § 85.
- Wage claims, priorities, § 425.

LANDLORD AND TENANT

- Leases, generally, this index.

LEASES

- Generally, § 386.
- Bond preventing lease of property, § 394.
- Collateral attack, § 395.
- Confirmation, § 399.
 - Endorsement, § 401.
- Conservators, §§ 647, 652.
- Execution of instruments, § 400.
- Fiduciaries, expenses, § 102.
- Hearings, § 389.
- Order, § 396.
- Personal property, § 387.
- Petition, § 388.
- Powers, § 383.
- Term, § 390.
- Transcript of record, § 404.
- Trustees, § 699.
- Wills, specific devises, § 390.

LEGACY

- Defined, § 3.

LEGATEE

- Defined, § 3.

LETTERS OF ADMINISTRATION

- Generally, § 294.
- Defined, § 3.
- Fiduciaries, issuance, § 178.
- Jurisdiction, § 10.
- Will filed after granting, § 316.

LIENS AND ENCUMBRANCES

- Claims, § 423.
- Conservators,
 - Appointment, § 637.
 - Enforcement, §§ 660, 664.
- Devise of encumbered property, § 278.
- Fiduciaries, this index.
- Limitation of actions, § 414.
- Purchase of property by holder, § 393.

LIFE INSURANCE

- Exemption, § 333.
- Feloniously causing insured's death, beneficiary, § 536.
- Simultaneous death of insured and beneficiary, § 526.

INDEX

LIMITATION OF ACTIONS

- Generally, § 331.
- Accounting, reopening, § 488.
- Claims against estate, § 410 et seq., 663.
 - Disallowance, § 442.
 - Filing claim, § 657.
- Escheated property, payments, § 546.
- Fiduciary's bond, § 187.
- Liens, § 414.
- Retainer and set-off, § 471.
- Separate actions, § 415.
- Wills, § 331.
 - Foreign wills, muniment of title, § 497.

LIQUIDATED CLAIM

- Compromise, § 115.

LODGES AND UNINCORPORATED ORGANIZATIONS

- Wills, limitation on devises, § 266.

LOST INSTRUMENTS

- Claim against estate, § 655.

MAIL AND MAILING

- Absentee's estate, petition for administration, notice, § 512.
- Conservators, duplicate of claim, § 654.

MAINTENANCE

- Support and Maintenance, generally, this index.

MAPS AND PLATS

- Fiduciaries, platting land, § 94.

MARRIAGE

- Surviving spouse, allowance, § 374.

MEDICAL AND SURGICAL TREATMENT

- Claims against estate, § 425.

MENTALLY DEFICIENT AND MENTALLY ILL PERSONS

- Conservators, §§ 566 to 574.
 - Standby conservatorships, §§ 591 to 597.
- Fiduciary, § 64.
- Guardians, §§ 552 to 560.
- Wills, mental capacity, § 264.

MILITARY SERVICE

- Missing soldiers or sailors, presumption of death, § 517.
- Veterans, conservatorships, §§ 614 to 622.

MINORS

- Children and Minors, generally, this index.

MISSING PERSONS

- Armed forces members, presumption of death, § 517.

MONEY

- Fiduciaries, this index.
- Minors, payment to parents, § 574.

MORTGAGES

- Chattel Mortgages, generally, this index.
- Claims, § 423.

MORTGAGES—Continued

- Collateral attack, § 395.
- Confirmation, § 399.
- Conservators, §§ 144, 652.
 - Enforcement, §§ 660, 664.
- Deficiency judgment, sale of property subject to mortgage, § 389.
- Defined, devise of encumbered property, § 278.
- Devise of property, § 278.
- Execution of instrument, § 400.
- Fiduciaries, this index.
- Limitation of actions, § 414.
- Order, § 396.
- Petition, § 388.
 - Hearing, § 389.
- Powers, § 383.
- Purchase of property by holder, § 393.
- Purposes, § 386.
- Quieting title, § 391.
- Recording, § 401.
 - Clerk keeping, § 29.
- Sale of property subject to mortgage, § 389.
- Transcript of record, § 404.
- Trustees, § 699.
- Wills, devise of property subject to mortgage, § 278.

MOTIONS

- Fiduciaries, removal from office, § 65.

MUNIMENT OF TITLE

- Foreign wills, § 497.

MURDER

- Inheritance from deceased's estate by murderer, §§ 535 to 537.

MUTUAL AID INSURANCE

- Exemptions, § 333.

MUTUAL OR CONTRACTUAL WILLS

- Construction, § 270.

NATIONAL BANKS

- Fiduciary capacity, investments, nominee's name, § 124.

NEGLIGENCE

- Conservators, liability, § 651.
- Fiduciaries, liability, § 160.
 - Agents or employees, § 85.

NOMINATION

- Banking institutions acting in fiduciary capacity, investments in name of, § 124.
- Conservator, standby basis, petition, § 592.

NONPROFIT CORPORATIONS

- Gifts, conservators, § 668.

NONRESIDENTS

- Absentees, administration of estates, petition, § 510.
- Ancillary administration, §§ 500 to 504.
- Application of law, § 88.
- County of jurisdiction, § 12.
- Executors and administrators, § 295,
 - Appointment, § 499.

INDEX

NONRESIDENTS—Continued

Fiduciary,

Application of law, § 88.

Removal from office, § 65.

Removal of property and payment of claims, § 504.

Wills, admission to probate, § 495.

Foreign probated wills, § 496.

NOTICE

Absentees,

Petition for administration, §§ 511, 512.

Petition for conservatorship, § 582.

Accounting,

Common trust funds, § 128.

Reopening, § 488.

Administration, reopening, § 489.

Allowance to surviving spouse, § 374.

Review, § 375.

Appraisal, intestate succession, §§ 214, 215.

Attorney general, § 43.

Auction sale, § 396.

Service, § 397.

Claims against estate, disallowance, § 440.

Proof of service, § 441.

Conservators, this index.

Consular representatives, probate matters involving aliens, § 41.

Escheat proceedings, § 544.

Executors and Administrators, this index.

Fiduciaries, this index.

Final settlement, § 473.

Guardians, filing petition for appointment, § 553.

Hearings, § 40.

Requests for notice, § 42.

Intestate succession, appraisal, §§ 214, 215.

Orders, §§ 36, 37.

Possession, surrender, §§ 353, 354.

Publication, this index.

Quieting title, § 391.

Sales of Property, this index.

Service, § 40.

Appraisal, intestate succession, § 214.

Auction sale, § 397.

Guardians, petition for appointment, § 554.

Proof of service, § 47.

Trustees, application for discharge, § 702.

Waiver, § 44.

Transfer to another county, § 49 et seq.

Trustees, application for discharge, § 702.

Wills, this index.

NUMBERS

Singular and plural, construction, § 4.

OATHS AND AFFIRMATIONS

Conservators, governing law, § 634.

Fiduciaries, § 168.

Guardians, governing law, § 634.

Trustees, reports, § 700.

Final report, § 701.

INDEX

OBJECTIONS AND EXCEPTIONS

Appraisal, intestate succession, § 216.

Trial, § 217.

Probate of will, prior to admission of will, § 309.

OFFICERS AND EMPLOYEES

Labor and Employment, generally, this index.

OFFSETS

Set-Off and Counterclaims, generally, this index.

OMITTED PROPERTY

Reopening administration, § 489.

OPTIONS

Trustees, powers, § 699.

ORDERS OF COURT

Generally, §§ 22 et seq., 36.

Applications, § 35.

Conservators, this index.

Fiduciaries,

Cofiduciaries, exercise of powers, § 76.

Continuation of business of estate, § 83.

Intestate succession, appraisal, § 217.

Notice, orders without notice, probate, § 37.

Trustees, discharge, § 703.

Wills, this index.

PARTIAL INTESTACY

Generally, § 272.

PARTIES

Joinder of Parties, generally, this index.

PARTNERSHIPS

Fiduciaries, continuation of business of estate, § 83.

PARTY IN INTEREST

Veterans' conservatorships, administrator of veterans affairs, § 615.

PAYMENT

Claims against Estate, this index.

Conservators, this index.

Debts, this index.

Escheat, payments to persons entitled to property, § 546.

Estate taxes, United States, § 449.

Fiduciaries, third parties protected, § 78.

Funeral expenses, § 433.

Minors, small legacies or interests, § 108.

PECUNIARY INTEREST

Judge, transfer of cause, § 17.

PENDING ACTIONS

Conservator, claim against estate. § 665.

Ward, claim against estate, § 665.

PERISHABLE PROPERTY

Sales, § 387.

PERSON

Defined, § 3.

INDEX

PERSONAL INJURIES

Conservator's settlement, investigation by attorney, § 648.

PERSONAL LIABILITY

Conservator or guardian,

Acts of ward, § 651.

Payment of unfilled claims, § 662.

PERSONAL PROPERTY

Abandonment, § 116.

Appraisal, § 101.

Conservators, this index.

Defined, § 3.

Executors and administrators, possession, § 351.

Exemption, § 332.

Fiduciary's bond, reduction, deposit, § 176.

Intestate succession, §§ 211, 212.

Jurisdiction, § 10.

Liens, purchase by holder, § 393.

Nonresidents, wills, probate, § 495.

Sale of Property, generally, this index.

Title, § 350.

Treatment as realty, § 385.

Trustees, powers, § 699.

PERSONAL REPRESENTATIVES

Defined, § 3.

Executors and Administrators, generally, this index.

Fiduciaries, generally, this index.

PETITION

Absentee's estate, administration, § 510.

Conservators, this index.

Fiduciaries,

Cofiduciaries, exercise of powers, § 76.

Removal from office, § 65.

Guardians, this index.

Intestate succession, administration, §§ 227, 229.

Time, § 228.

Wills, this index.

PHYSICIANS AND SURGEONS

Claims against estates, § 425.

PLACE

Hearings, §§ 38, 39.

PLEADING

Claims against estate,

Limitation of actions, § 411.

Offsets and counterclaims, § 445.

Conservators,

Absentees, appointment, § 583.

Appointment, § 569.

Counterclaims, § 445.

Compulsory counterclaims, § 416.

Guardian, appointment, § 555.

Wills, this index.

PLEDGES

Generally, §§ 386, 387.

INDEX

PLEDGES—Continued

Bond presenting pledge, § 394.
Claims, § 423.
Collateral attack, § 395.
Confirmation, endorsement, § 401.
Conservators, §§ 652, 660, 664.
Fiduciaries, this index.
Hearings, § 389.
Limitation of actions, § 414.
Order, § 396.
Petition, § 388.
Powers, § 383.
Purposes, § 386.
Transcript of record, § 404.
Trustees, § 699.

POPULAR NAME LAWS

Antilapse statute, §§ 273, 274.
Simplification of fiduciary security transfers, § 130 et seq.
Simultaneous death, § 523 et seq.

POSSESSION

Generally, § 349 et seq.
Conservator, § 640.
Executors and administrators, surrender, §§ 353, 354.
Ward, conservator appointed, § 639.

POSTHUMOUS CHILDREN

Intestate succession, § 220.
Share in estate, § 267.

POSTING

Notice, § 40.

POWER OF SALE

Fiduciaries, this index.
Wills, § 383.
Real estate, equitable conversion, § 384.

PREFERENCES

Priorities and Preferences, generally, this index.

PREJUDICE

Wills, creditors, security, § 349.

PRESUMPTIONS

Armed forces members, death, § 517.
Fraud of ward after appointment of conservator, § 638.
Gratuitous inter vivos transfer as gift, § 224.
Sale of property, § 402.
Wills,
 Devise to spouse, § 268.
 Election to take under will, § 237.

PRIMA FACIE EVIDENCE

Armed forces members, death, § 517.
Veterans administration, certificate of incompetency, conservatorship proceedings,
 § 616.

PRIORITIES AND PREFERENCES

Generally, § 426.
Abatement of shares, § 436.

INDEX

PRIORITIES AND PREFERENCES—Continued

- Claims, § 425.
- Executors, appointment, § 294.
- Guardians, appointment, § 559.
- Real and personal property, § 350.
- Set-off and retainer, § 471.

PRO RATA

- Claims against estate, payment, § 426.

PROBATE COURT

- Generally, § 10 et seq.
- Always open, § 15.
- Audit of accounts, §§ 20, 21.
- Calendar, § 31.
- Declaratory judgments, jurisdiction, § 11.
- Definitions, § 3.
- Docket, §§ 27, 28.
 - Trust proceedings, § 28.
- Equitable proceedings, § 33.
- Fiduciaries' accounts, audit, § 20.
- Hours of business, § 15.
- Judges,
 - Disqualification, procedure, § 17.
 - Fiduciaries, compensation, § 201.
 - Uniform rules, adoption, § 18.
- Judgments and decrees, § 11.
- Jurisdiction, § 10.
 - Concurrent jurisdiction, § 14.
 - County of jurisdiction, § 12.
 - Declaratory judgments, § 11.
 - Extent of jurisdiction, § 13.
- Law actions, § 33.
- Orders, jurisdiction, § 11.
- Procedure, § 33 et seq.
- Process, revocation for cause, § 19.
- Records, §§ 16, 29.
 - Election, excessive gift to nonprofit corporation, § 266.
- Referees,
 - Appointment, duties and compensation, §§ 20, 21.
 - Clerk as referee, § 20.
- Revocation of process, § 19.
- Rules, uniform rules, § 18.
- Transfer of causes, disqualification of judge, § 17.
- Uniform rules, § 18.

PROCESS

- Notice, generally, this index.
- Probate court, revocation for cause, § 19.

PROFESSIONAL SKILL

- Fiduciaries, employing individuals to manage estate, § 84.

PROFITS

- Fiduciaries, self-dealing, § 155.

PROPERTY

- Defined, § 3.
- Discovery, property belonging to estate, § 112.
- Exchange of Property, generally, this index.
- Minors, payment to parents, § 574.

INDEX

PROPERTY—Continued

- Personal Property, generally, this index.
- Real Property, generally, this index.
- Title to Property, generally, this index.

PROXIES

- Conservators, corporate meetings, § 646.

PUBLICATION

- Absentee's estate, petition for administration,
 - Notice, § 512.
 - Proof of publication, § 513.
- Administrators, notice of appointment, § 230.
- Common trust funds, notice of hearing, accounting, § 128.
- Conservators, absentees, notice of petition, § 581.
- Notices, §§ 40, 46.
 - Absentee's estate, petition for administration, § 512.
 - Proof of publication, § 513.
 - Appointment of administrators, § 230.
 - Common trust fund, hearing, § 128.
 - Conservators, petition, § 581.
 - Proof, §§ 46, 47.
 - Wills, hearing on petition, § 293.
- Wills, notice of hearing on petition for probate, § 293.

QUIETING TITLE

- Sale of real estate, § 391.

REAL PROPERTY

- Abandonment, § 116.
- Absentee, rights barred, § 516.
- Actions, conservators, § 640.
- Appraisal, estate property, § 101.
- Certificate, change of title, § 481.
- Collection of income, conservators, § 640.
- Conservator, possession, § 640.
- Contracts,
 - Foreign fiduciaries, powers, § 144.
 - Forfeiture, conversion to personalty, § 385.
- Declaratory judgments, district court sitting in probate, § 11.
- Deeds and Conveyances, generally, this index.
- Defined, § 3.
- Executors and administrators, possession, § 351.
- Fiduciaries, this index.
- Income, collection by conservators, § 640.
- Intestate succession, §§ 211, 212.
- Jurisdiction, district court sitting in probate, § 10.
- Liens, purchase by holder, § 393.
- Nonresidents, wills, probate, § 495.
- Personal representatives. expenses for services, § 199.
- Possession, conservator, § 640.
- Recovery, conservators, § 640.
- Sale of Property, generally, this index.
- Title, § 350.
- Treatment as personalty, § 385.
- Trustees, powers, § 699.
- Unsold property, certificate, § 480.

RECEIPTS

- Fiduciaries, this index.

INDEX

RECEIPTS—Continued

- Foreign conservators, § 606.
- Delivery of property to, § 608.
- Minors, small legacies or interests, payments, § 108.

RECORDS

- Generally, § 302.
- Armed forces members, death, § 517.
- Clerk keeping, § 29.
- Destruction, § 16.
- Discovery, property belonging to estate, § 112.
- Election to take against will or occupy homestead, § 245.
- Fiduciaries,
 - Bank or trust company, ownership of investments, § 125.
 - Certificate of appointment and authority, conveyances of property, § 98.
- Foreign conservators,
 - Application for appointment, § 604.
 - Bonds, § 608.
- Foreign fiduciaries, certificate of appointment and authority, §§ 145 to 147.
- Foreign probated wills, admission to probate within state, § 496.
- Foreign real estate, certified copies, § 48.
- Foreign wills, muniment of title, § 497.
- Jurisdiction and supervision, § 16.
- Mortgages, leases and conveyances, § 401.
- Proceedings, § 25.
 - Transferred to another county, § 50.
- Sale of real estate, foreign county, § 403.
- Wills, this index.

REFEREES

- Appointment, duties and compensation, §§ 20, 21.
- Election to take against will, setting off share, § 247 et seq.

RELEASES

- Fiduciaries, powers, § 95.
- Foreign fiduciaries, powers, § 144.
- Mortgage of real estate, sale of property subject to mortgage, § 389.

RELIGION

- Conservators, gifts, § 668.

REMOVAL FROM OFFICE

- Conservators, reports and accounting, § 670.
- Fiduciaries, this index.
- Trustee, final report, § 701.

REOPENING ESTATES

- Procedure, § 489.

REPORTS

- Generally, § 35.
- Appeals, final reports, § 487.
- Appraisers, intestate succession, § 213.
- Armed forces members, death, § 517.
- Clerk of the District Court, this index.
- Conservators, this index.
- Estates of decedents, § 361.
 - Enforcement, § 363.
 - Final reports, § 469 et seq.
 - Inventory, mandatory filing, § 362.
 - Sale of personal property, § 389.

INDEX

REPORTS—Continued

- Executors and Administrators, this index.
- Fiduciaries, this index.
- Final report, § 469 et seq.
- Intestate succession, objection to appraisal, § 216.
- Proceedings, clerk assisting, § 26.
- Sale of property, § 399.
 - Personal property, § 389.
- Trusts and Trustees, this index.

RESIDENCE

- Domicile and Residence, generally, this index.

RESIGNATIONS

- Fiduciaries,
 - Appointment of successor, § 66.
 - Powers of cofiduciary, § 67.
- Trustees, final report, § 701.

RETAINER

- Indebtedness of distributees, priorities, § 471.

REVENUE STAMPS

- Fiduciaries, expenses, § 102.

REVIEW

- Appeal and Review, generally, this index.

REVIVAL

- Wills, § 284.

REVIVAL OF ACTIONS

- Claims and counterclaims against estates, §§ 415, 416, 436.

REVOCAION

- Conservator, standby basis, petition, § 594.
- Letters of administration, will filed after letters granted, § 316.
- Process, § 19.
- Wills, this index.

RULES OF CIVIL PROCEDURE

- Applicability, § 34.
- Contest of will, § 310.
 - Joinder of parties, § 311.

RULES OF COURT

- Probate procedure, uniform rules, § 18.

RULES OF DESCENT

- Generally, § 210.

SAFE DEPOSIT COMPANIES

- Fiduciaries, agreement with sureties, deposit of property, § 183.

SALARIES

- Compensation and Salaries, generally, this index.

SALE OF PROPERTY

- Generally, § 383 et seq.
- Auction sale, § 397.
 - Adjournment, § 398.
- Bond, preventing sale, § 394.
- Collateral attack, § 395.

INDEX

SALE OF PROPERTY—Continued

- Confirmation, § 399.
- Endorsement, § 401.
- Conservators, § 652.
- Equitable conversion, § 384.
- Escheated property, disposition of proceeds, § 545.
- Evidence, § 402.
- Execution of instrument, § 400.
- Fiduciaries, expenses, § 102.
- Foreign counties, records, § 403.
- Lienholder, § 393.
- Mortgage, bond, § 394.
- Notice, § 387.
 - Less than appraised value, § 399.
 - Petition, § 388.
- Order, § 396.
- Perishable property, §§ 387, 646.
- Petition, § 388.
 - Hearing, § 389.
- Power of sale, application of law, § 383.
- Purposes, § 386.
- Quieting title, § 391.
- Surplus, conversion as realty, § 385.
- Temporary administrator, § 343.
- Terms, § 392.
- Wills, power of sale, application of law, § 383.

SCIENTIFIC SOCIETIES

- Gifts, conservators, § 668.

SECRETARY OF DEFENSE

- Armed forces member, finding of presumed death, evidence, § 517.

SECURED CLAIMS

- Generally, §§ 422, 423.

SECURITIES

- Fiduciaries,
 - Deposit in lieu of bond, § 177.
 - Transfers, simplification, §§ 130 to 138.
- Possession of property, surrender, § 354.

SELF-DEALING

- Fiduciaries, liability, § 155.

SERVICE

- Notice, this index.

SET-OFF AND COUNTERCLAIMS

- Allowance to surviving spouse, § 374.
- Claims against estate, § 445.
 - Trial, § 447.
- Compulsory counterclaim, § 416.
- Heirs, priorities, § 471.
- Indebtedness of distributees, § 471.
- Judgment, § 448.
- Trial, § 447.

SETTING ASIDE

- Wills, this index.

SETTLEMENT

Compromise and Settlement, generally, this index.

SEVERAL LIABILITY

Contingent claims, payment by distributees, § 427.

SHOW CAUSE ORDER

Fiduciary, removal from office, § 65.

SIGNATURES

Wills, testator and witnesses, § 279.

SIMPLIFICATION OF FIDUCIARY SECURITY TRANSFERS

Generally, §§ 130 to 138.

SIMULTANEOUS DEATH

Uniform act, §§ 523 to 528.

SMALL LEGACIES

Minors, payment, § 108.

SOCIETIES

Gifts, conservators, § 668.

SOLDIERS AND SAILORS

Missing, presumption of death, § 517.

Veterans, conservatorships, §§ 614 to 622.

SPECIALISTS

Fiduciaries, employment, management of estate, § 84.

SPECIFIC DEVICES

Wills, this index.

SPECIFIC PERFORMANCE

Fiduciaries,

 Involuntary performance, real property, § 97.

 Voluntary performance, real property, § 96.

SPENDTHRIFTS

Conservators, § 566 et seq.

 Appointment, § 570.

 Notice, petition for appointment, §§ 567, 568.

 Petition for appointment, § 566.

 Pleadings and trial, appointment, § 569.

 Preference as to appointment, § 571.

 Temporary conservators, appointment, § 573.

 Voluntary petition for appointment, § 572.

Fiduciary, acting as, § 64.

Guardians, §§ 552 to 560.

 Appointment, § 556.

 Notice, petition for appointment, service, § 554.

 Petition for appointment, § 552.

 Pleadings and trial, appointment, § 555.

 Standby basis, appointment, § 560.

 Temporary guardians, appointment, § 558.

 Voluntary petition for appointment, § 557.

STANDBY CONSERVATORSHIPS

Conservators, this index.

STATE

Escheat, §§ 543 to 546.

Estate taxes, payment, § 449.

INDEX

STATE COMPTROLLER

Escheated property, payment of proceeds to, § 545.

STATUTE OF LIMITATIONS

Limitation of Actions, generally, this index.

STOCK AND STOCKHOLDERS

Fiduciaries,

Purchasing stock in lending association or corporation, mortgages, § 99.

Security transfers, §§ 130 to 138.

SUBSEQUENT WILL

Revocation of prior will, § 284.

SUBSTITUTION

Attorneys, appointment for persons not represented at hearing, § 121.

Fiduciaries, § 69.

SUCCESSORS

Fiduciaries, appointment and powers, §§ 66, 68.

SUITS

Actions and other Proceedings, generally, this index.

SUMMARY PROCEEDINGS

Fiduciary, breach of bond obligation, § 186.

SUPPORT AND MAINTENANCE

Children of decedent, allowance, §§ 376, 377.

Conservators,

Payments, § 647.

Veterans, orders, § 619.

Surviving spouse, allowance, §§ 374, 375.

Trustee, beneficiary, payment, § 699.

SUPREME COURT

Rules of procedure, adoption, § 18.

SURETY COMPANY

Fiduciary's bond, furnishing, § 169.

SURVEYS AND SURVEYORS

Election to take against will, setting off share, § 249.

Fiduciaries, expenses, § 102.

Wills, setting off share, § 249.

SURVIVAL OF ACTIONS

Claims and counterclaims against estates, §§ 415, 416, 436.

SURVIVING SPOUSE

Abatement of estate shares, § 436.

Allowance, §§ 374, 375.

Appeals, § 375.

Payment, § 433.

Defined, §§ 3, 334.

Election to take against will, § 236 et seq.

Abatement of shares, § 436.

Feloniously causing death, surviving spouse inheriting, § 535.

Insurance, § 335.

Intestate succession, § 211.

Selection of property, § 218.

Personal property, exemption, § 332.

Wrongful death damages, exemption, § 336.

SURVIVORSHIP

Uniform Simultaneous Death Act, §§ 523 to 528.

TAXATION

Certificate of payment, § 474.
Claims against estate, § 425.
Compromise and settlement, § 475.
Conservators, payment, § 640.
Costs, fiduciaries, notices, § 47.
Estate tax, §§ 436, 449.
Fiduciary security transfers, application of law, § 137.
Inheritance tax, payment, § 352.
Personal representatives, expenses for services, § 199.
Priorities, § 425.

TEMPORARY ADMINISTRATOR

Appointment, §§ 342, 343.
Claims, allowance, § 432.
Defined, § 3.

TEMPORARY CONSERVATOR

Appointment, § 573.

TEMPORARY GUARDIAN

Appointment, § 538.

TESTAMENTARY TRUST

Administration, district court sitting in probate, § 10.

THIRD PARTIES

Fiduciaries, protection, payments or transfers, § 78.

TIME

Code becomes effective, § 2.
Conservator, standby basis, appointment, § 596.
Court open for business, § 15.
Hearing on probate matters, § 38.
Intestate succession, petition for administration, § 228.

TITLE TO PROPERTY

Generally, § 349 et seq.
Abstracts, fiduciaries, expenses, § 102.
Change, certificate, § 481.
Conservators, actions, § 640.
Declaratory judgments, § 11.
Quieting title, § 391.

TORTS

Conservators, liability, § 651.
Fiduciaries, liability, §§ 85, 160.

TRANSCRIPTS

Conservators, absentees, appointment, § 584.
Probate proceedings records transcribed to foreign counties, §§ 305, 306.

TRANSFER AGENTS

Fiduciary security transfers, §§ 130 to 138.

TRANSFER OF CAUSE

Another county, § 49 et seq.
Judge disqualified, § 17.

TRANSFERS

- Fiduciaries,
 - Security transfers, simplification, §§ 130 to 138.
 - Transfers to, third parties protected, § 78.
- Ward, appointment of conservator, § 638.

TRIAL

- Appraisal of intestate succession, objections, § 217.
- Conservators, appointment, § 569.
 - Absentees, § 583.
- Claims against estate, § 447.
- Guardian, appointment, § 555.
- Intestate succession, objection to appraisal, § 217.
- Will contest, § 310.

TRUST COMPANIES

- Common trust funds, §§ 126 to 129.
- Conservator, standby basis, deposit of petition, § 593.
- Deposits, fiduciary capacity, § 156.
- Fiduciaries, agreement with surety, deposit of property, § 183.
- Fiduciary capacity,
 - Common trust funds, §§ 126 to 129.
 - Investments,
 - Nominee's name, § 124.
 - Records, § 125.
- Investments,
 - Fiduciary capacity, records of ownership, § 125.
 - Nominee's name, fiduciary capacity, § 124.
- Records, investments, fiduciary capacity, § 125.

TRUSTS AND TRUSTEES

- See, also, Fiduciaries, generally, this index.
- Generally, § 699 et seq.
- Abandonment of claims, § 699.
- Accounting, § 700.
- Actions, claims, § 699.
- Additional property, receiving, § 699.
- Adjustment of claims, § 699.
- Application for discharge, notice, § 702.
- Appointment of trustees, jurisdiction, district court sitting in probate, § 10.
- Arbitration, claims, § 699.
- Borrowing, § 699.
- Changes in beneficiaries, reports, § 700.
- Claims, enforcement, § 699.
- Collections, powers, § 699.
- Common Trust Funds, generally, this index.
- Compromise and settlement, claims, § 699.
- Construction, trust instruments, district court sitting in probate, § 10.
- Contract to sell property, § 699.
- Conveyances of real estate, § 699.
- Corporate shares, voting, § 699.
- Defined, § 3.
- Delinquent inventories and reports, § 32.
- Discharge, § 703.
 - Notice of application, § 702.
- Dissolution of trust, final report, § 701.
- Distributions, reports, § 701.
- District court sitting in probate, jurisdiction, § 10.
- Dockets, trust proceedings, § 28.

TRUSTS AND TRUSTEES—Continued

- Education of beneficiary, payment, § 699.
- Foreign fiduciaries, § 144.
- Foreign trustee, application for appointment, § 503.
- Investments, § 699.
 - Reports, § 700.
- Judgments, foreign fiduciaries, § 144.
- Jurisdiction, district court sitting in probate, § 10.
- Leases, § 699.
- Letters,
 - Defined, § 3.
 - Granting, district court jurisdiction, § 10.
- Maintenance of beneficiary, payment, § 699.
- Minors, small beneficial interest, payments, § 103.
- Mortgages, §§ 144, 699.
- Notice, application for discharge, § 702.
- Oath, report, § 700.
 - Final report, § 701.
- Options, § 699.
- Order of discharge, § 703.
- Payment for beneficiary, § 699.
- Personal property, disposal, § 699.
- Pledges, § 699.
- Powers, § 699.
- Proxies, voting corporate shares, § 699.
- Real property, disposal, § 699.
- Receipt of principal or income, § 699.
- Removal, final report, § 701.
- Reports, § 700.
 - Final report, § 701.
 - Resignation, § 701.
- Service, notice of application for discharge, § 702.
- Simultaneous death, uniform act, §§ 523 to 528.
- Stock, voting, § 699.
- Termination of trust, final report, § 701.
- Testamentary additions, § 275.
 - Prior wills, effect on, § 276.
 - Uniformity of interpretation, § 277.
- Transfer of property, § 699.
- Undivided interest, holding, § 699.
- Uniform Simultaneous Death Act, §§ 523 to 528.
- Waiver, notice of application for discharge, § 702.

UNIFORM SIMULTANEOUS DEATH ACT

- Generally, §§ 523 to 528.

UNITED STATES

- Estate taxes,
 - Abatement of shares, § 436.
 - Payment, § 449.
- Fiduciaries, purchasing stock in federally sponsored association or corporation, mortgages, § 99.
- Priorities, § 425.

UNITED STATES SAVINGS BONDS

- Veterans' conservators, investments, § 622.

UNKNOWN PERSONS

- Notice of probate matters, § 40.

UNLIQUIDATED CLAIM

Fiduciaries, compromise, § 115.

VALUE

Advancements, intestate succession, § 225.

VENUE

Claims against estate, § 415.

Conservators, separate action on debt, § 665.

Wills, transmittal to court with proper venue, § 289.

VERIFICATION

Claims against estate, § 418.

Ward's, § 654.

Conservator, standby basis, petition for appointment, § 591.

Guardian, petition for appointment, § 552.

Inventory, conservators, § 642.

VETERANS

Conservatorships, §§ 614 to 622.

VETERANS ADMINISTRATION

Certificate of incompetency, evidence, conservatorship proceedings, § 616.

Conservatorships involving veterans, §§ 614 to 622.

VETERANS AFFAIRS, ADMINISTRATOR OF

Veterans' conservatorships, party in interest, § 615.

VOTING

Trustees, corporate stock, § 699.

VOUCHERS

Fiduciaries, accounting, § 53.

WAGES

Compensation and Salaries, generally, this index.

WAIVER

Accounting, § 470.

Claims against estate, limitation of actions, § 410.

Conservators, notice of hearing, § 677.

Executors and administrators,

Discharge, notice, § 479.

Final report, notice, § 487.

Fiduciaries, this index.

Personal representative's final reports, notice, § 487.

Service of notice, § 44.

Trustees, notice of application for discharge, § 702.

WIDOWS AND WIDOWERS

Surviving Spouse, generally, this index.

WIFE

Husband and Wife, generally, this index.

WILLS

Generally, §§ 290 to 319.

Abatement of shares, change of plan, § 437.

Accounts, examination and audit, § 20.

Actions to set aside or contest, §§ 307 to 319.

Allowance for defending will, § 314.

Attorney fees, executor defending will, § 314.

Declaratory judgment, § 319.

INDEX

WILLS—Continued

Actions to set aside or contest—Continued

- Election of defendants to join with contestants, § 312.
- Joinder of parties, §§ 311, 315, 319.
- Jurisdiction, § 10.
- Law action, § 33.
- Letters of administration, will filed after granting, § 316.
- Letters testamentary, will filed after letters granted, § 317.
- Notice, § 315.
- Options prior to admission of will, § 309.
- Petition, § 307.
- Proof of execution, § 318.
- Taxation of costs, § 313.
- Time, filing petition, § 308.
- Trial as law action, § 310.

Administration of estate,

- Costs of administration, defined, § 3.
- Prescribing by will, § 265.

Admission to probate, § 22.

- After letters of administration granted, § 316.

Adopted children,

- Abatement of shares, § 436.
- Adoption after execution, share, § 267.

Affidavit,

- Election of spouse, child or parent, excessive gift to nonprofit corporation, § 266.
- Proving execution of will, § 296.

After acquired property, § 269.

After born children, shares, § 267.

Age, disposal of property by person of full age, § 264.

Allowance for defending will, § 314.

Ancillary administration, claims against estate, limitation of actions, § 413.

Antilapse statute, § 273.

- Exception, § 274.

Attorney fees, allowance to executor defending will, § 314.

Beneficiaries, preference for appointment of executor, § 294.

Bequeath, defined, § 3.

Bequest, defined, § 3.

Bond of fiduciary, waiver, § 172.

Calendars, probate, § 31.

Cancellation, § 284.

Certificate of probate, § 301.

Certified copy, record of probate in foreign county, § 305.

Charitable corporation, limitation on gifts, § 266.

Claims against estate, limitation of actions, § 413.

Clerk of the District Court, this index.

Codicils,

- Defect cured by, § 282.
- Formal execution, § 279.
- Revival of revoked or invalid will, § 284.

Competency of witnesses, § 280.

Conservators, this index.

Construction, § 10.

- Statute, testamentary additions to trusts, § 277.

Contempt of court, willful failure to deliver will to court, § 285.

Contesting. Action to set aside or contest, generally, ante.

Contractual or mutual wills, § 270.

Conversion, equitable conversion, sale of real estate, § 384.

Copy for executor, § 302.

INDEX

WILLS—Continued

Corporations, limitation on devises, § 266.

Costs, transcript, record in foreign county, § 306.

Creditors,

Preference, appointment of executor, § 294.

Prejudice, §§ 265, 349.

Custody of wills, §§ 285 to 288.

Damages, willful failure to deliver will to court, § 285.

Death of devisee before testator, §§ 273, 274.

Debts, disposal of property subject to, § 264.

Declaratory judgment, last will, § 319.

Defectively executed, curing by codicil, § 282.

Definitions, § 3.

Delivery,

After death of testator, § 289.

Court, § 285.

Specific devises, § 355.

To testator, § 288.

Deposit with clerk of court, §§ 286, 287.

Depositions, § 22.

Proving execution of will, § 297.

Destruction of probate records, § 16.

Destruction with intention of revoking, § 284.

Devise, defined, § 3

Devisee, defined, § 3.

Disposal of property by will, § 264.

Disqualification of judge, transfer of cause, § 17.

Distributee, defined, § 3.

District court sitting in probate, sole jurisdiction, § 10 et seq.

Divorce, effect, § 271.

Dockets, § 24 et seq.

Election,

Defendants to join with contestants, § 312.

Excessive devise to nonprofit corporation, § 266.

Setting off share, § 247 et seq.

Taking against will, § 236 et seq.

Homesteads, this index.

Encumbered property, § 278.

Endorsement, clerk of court, deposit with, § 287.

Equitable conversion, sale of real estate, § 384.

Estate, defined, § 3.

Estate taxes, payment, § 449.

Examination of accounts, § 20.

Exception, antilapse statute, § 274.

Execution, §§ 279 to 283.

Competency of witnesses, § 280.

Foreign state or country, § 283.

Formal execution, § 279.

Interest of witnesses, § 281.

Proof, action to set aside or contest, § 318.

Subsequent will revoking prior will, § 284.

Feloniously causing testator's death, inheriting from, § 535.

Filing,

After letters of administration granted, § 316.

Election of spouse, child or parent, excessive gift to nonprofit corporation,
§ 266.

Petition for probate, § 290.

Petition to set aside probate, time, § 308.

INDEX

WILLS—Continued

- Foreign corporation, bequest limit, § 266.
- Foreign state or country, execution in, § 283.
- Foreign Wills, generally, this index.
- Forfeiture, interested witness, § 281.
- Formal execution, § 279.
- Forms,
 - Notice,
 - Probate of will, appointment of executor and notice to creditors, § 303.
 - Proof of will without administration, § 304.
 - Testimony of witnesses, § 396.
- Guardians ad litem, appointment, excessive gift to nonprofit corporation, § 266.
- Guardians, preference as to appointment, § 559.
- Handwriting of testator and witnesses, proving, witness unavailable, § 298.
- Hearing, petition for probate, § 293.
- Homesteads, this index.
- Intention of testator, abatement of shares, § 437.
- Interest of witnesses, § 281.
- Joinder of parties,
 - Action to set aside or contest probate, §§ 311, 312, 315.
 - Declaratory judgment to determine last will, § 319.
- Jurisdiction, district court sitting in probate, § 10 et seq.
- Jury trial, contest of probate, § 310.
- Leases, specific devises, § 390.
- Legacy, defined, § 3.
- Legatee, defined, § 3.
- Letters testamentary, § 294.
 - Will filed after letters granted, § 317.
- Liens, property subject to, § 278.
- Limitation,
 - Charitable corporation gifts, § 266.
 - Disposal by will, § 266.
- Limitation of actions,
 - Claims against estate, § 413.
 - Probate of wills, § 331.
- Mental capacity, requirement, § 264.
- Minors, small legacies, payment, § 108.
- Mortgage,
 - Defined, § 278.
 - Devise of property subject to, § 278.
- Mutual or contractual wills, § 270.
- Nonprofit corporations and associations, limitation on gifts, § 266.
- Nonresidents, § 495.
 - Executors of resident decedents, § 295.
- Notice,
 - Action to set aside or contest will, § 315.
 - Admission to probate and appointment of executor, § 303.
 - Debtors and creditors, pay or make claim, § 303.
 - Delivery after death of testator, § 289.
 - Hearing on petition for probate, § 293.
 - Proof of will without administration, § 304.
- Objections prior to admission of will to probate, § 309.
- Orders,
 - Admitting or disallowing probate, § 299.
 - Appointing executor, § 300.
 - Preference, appointment of executor, § 294.
 - Probate powers, district court clerk, § 22.
 - Ward, duties, § 644.
- Partial intestacy, § 272.

INDEX

WILLS—Continued

Payment of estate taxes, § 449.

Petition,

Appointment of executor, contents, § 292.

Hearing on probate, § 293.

Probate of wills, §§ 290, 291, 293.

Set aside probate, §§ 307, 308.

Pleading. Petition, generally, ante.

Power of sale,

Application of law, § 383.

Real estate, equitable conversion, § 384.

Preference for appointment of executor, § 294.

Presumption,

Devise to spouse, § 268.

Election to take under will, § 237.

Procedure prescribed by will, § 265.

Process, revocation for cause, § 19.

Property not disposed of by will, abatement of shares, § 436.

Publication of notice, probate, § 303.

Hearing on petition, § 293.

Real estate, sales, equitable conversion, § 384.

Records, § 302.

Clerk keeping, § 29.

Foreign county, admission of will to probate, § 305.

Probate, jurisdiction and supervision, § 16.

Re-execution of will, revival of revoked or invalid will, § 284.

Referees, appointment, duties and compensation, §§ 20, 21.

Residuary estate,

Abatement of shares, § 436.

Estate taxes, payment, § 449.

Review, actions by clerk, § 23.

Revival, § 284.

Revocation, § 284.

Divorce, § 271.

Letters of administration, will filed after letters granted, § 316.

Letters testamentary, will filed after letters granted, § 317.

Rules of civil procedure, action to set aside or contest, § 310.

Notice, joinder of parties, § 311.

Sale of real estate, equitable conversion, § 384.

Security, disposition of property, rights of creditors, § 349.

Setting aside. Action to set aside or contest, generally, ante.

Signature, testator and witnesses, § 279.

Simultaneous death, uniform act, §§ 523 to 528.

Small legacies to minors, payment, § 108.

Specific devises,

Abatement of shares, § 436.

Delivery, § 355.

Leases, § 390.

State, estate taxes, payment, § 449.

Subsequent will revoking prior will, § 284.

Surviving spouse,

Death of spouse before testator, lapse, § 274.

Election to take against will, § 264.

Partial intestacy, § 272.

Taxation of costs, § 313.

Temporary administration, §§ 342, 343.

Testimony of witnesses, § 296.

Time, petition to set aside probate, filing, § 309.

Title to property, § 350.

INDEX

WILLS—Continued

- Transcript, record in foreign county, §§ 305, 306.
- Transfer of causes, judge disqualified, § 17.
- Transmittal to court with proper venue, § 289.
- Trial, contests or objections to probate, § 310.
- Trusts,
 - Testamentary additions, §§ 275 to 277.
 - Testamentary trusts, jurisdiction, § 10.
- Uniform rules in probate, § 18.
- Uniform Simultaneous Death Act, §§ 523 to 528.
- Unincorporated associations, limitation on devises, § 266.
- United States, estate taxes, payment, § 449.
- Venue, transmittal to court with proper venue, § 289.
- Witnesses, § 281.
 - Cancellation of will, § 284.
 - Competency, § 280.
 - Interest of witnesses, § 281.
 - Signature, § 279.
 - Testimony, § 296.
 - Unavailable witnesses, § 298.

WITNESSES

- Wills, this index.

WORDS AND PHRASES

- Administrator, § 3.
- Bequeath, § 3.
- Bequest, § 3.
- Charges, § 3.
- Child, § 3.
- Clerk, § 3.
- Common trust fund, § 126.
- Conservator, § 3.
- Costs of administration, § 3.
- Court, § 3.
- Debts, § 3.
- Devise, § 3.
- Devisee, § 3.
- Distributee, § 3.
- Estate, § 3.
- Executor, § 3.
- Fiduciary, § 3.
 - Common trust funds, § 126.
- Full age, § 3.
- Guardian, § 3.
- Guardian of the property, § 3.
- Heir, § 3.
 - Surviving spouse, § 334.
- Incompetent, § 3.
- Issue, § 3.
- Legacy, § 3.
- Legatee, § 3.
- Letters, § 3.
- Minor, § 3.
- Mortgage or other lien, devise of encumbered property, § 278.
- Person, § 3.
- Personal representative, § 3.
- Property, § 3.

INDEX

WORDS AND PHRASES—Continued

Surviving spouse, §§ 3, 334.

Temporary administrator, § 3.

Trustee, § 3.

Trusts, § 3.

Will, § 3.

WRONGFUL DEATH

Damages, exemption, § 336.

†

SENATE BILL NO. 6

State of Washington
39th Regular Session

By Senators Petrich,
Neill and Gissberg

Read first time January 12, 1965.

1 AN ACT Establishing a code of probate law and procedure, including the
2 making and probating of wills, administration of estates of de-
3 ceased persons and appointment of guardians of the persons and
4 estates of minors, insane and mentally incompetent persons and
5 administration of their estates; enacting a title of the Re-
6 vised Code of Washington to be known as Title 11--Probate Law
7 and Procedure; providing penalties; repealing certain acts and
8 parts of acts; and declaring an effective date.

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

10 TITLE 11

11 PROBATE LAW AND PROCEDURE

12 Chapter 11.02

13 GENERAL PROVISIONS

14 Section 11.02.005 DEFINITIONS AND USE OF TERMS. When used in
15 this title, unless otherwise required from the context:

16 (1) "Personal representative" includes executor, administrator,
17 special administrator, and guardian.

18 (2) "Net estate" refers to the real and personal property of a
19 decedent exclusive of homestead rights, exempt property, the family
20 allowance and enforceable claims against, and debts of, the estate.

21 (3) "Representation" refers to a method of determining distri-
22 bution in which the takers are in unequal degrees of kinship with re-
23 spect to the intestate, and is accomplished as follows: After first
24 determining who, of those entitled to share in the estate, are in the
25 nearest degree of kinship, the estate is divided into equal shares, the
26 number of shares being the sum of the number of persons who survive
27 the intestate who are in the nearest degree of kinship and the number

1 of persons in the same degree of kinship who died before the intestate,
2 but who left issue surviving the intestate; each share of a deceased
3 person in the nearest degree shall be divided among those of his is-
4 sue who survive the intestate and have no ancestor then living who is
5 in the line of relationship between them and the intestate, those more
6 remote in degree taking together the share which their ancestor would
7 have taken had he survived the intestate. Posthumous children are
8 considered as living at the death of their parent.

9 (4) "Issue" includes all the lawful lineal descendants of the
10 ancestor, all lawfully adopted children, and illegitimates as speci-
11 fied in RCW 11.04.081.

12 (5) "Degree of kinship" shall mean the degree of kinship as
13 computed according to the rules of the civil law; that is, by counting
14 upward from the intestate to the nearest common ancestor and then
15 downward to the relative, the degree of kinship being the sum of these
16 two counts.

17 (6) "Heirs" denotes those persons, including the surviving
18 spouse, who are entitled under the statutes of intestate succession to
19 the real and personal property of a decedent on his death intestate.

20 (7) "Real estate" includes, except as otherwise specifically
21 provided herein, all lands, tenements, and hereditaments, and all
22 rights thereto, and all interest therein possessed and claimed in fee
23 simple, or for the life of a third person

24 (8) "Wills" includes all codicils.

25 (9) "Codicil" shall mean an instrument executed in the manner
26 provided by this title for wills, which refers to an existing will for
27 the purpose of altering or changing the same, and which need not be at-
28 tached thereto.

29 (10) "Guardian" means a personal representative of the estate
30 of an incompetent person as defined in RCW 11.88.010 and the term may
31 be used in lieu of "personal representative" wherever required by con-
32 text.

33 (11) "Administrator" means a personal representative of the

1 estate of a decedent and the term may be used in lieu of "personal
2 representative" wherever required by context.

3 (12) "Executor" means a personal representative of the estate
4 of a decedent appointed by will and the term may be used in lieu of
5 "personal representative" wherever required by context.

6 (13) "Special administrator" means a personal representative
7 of the estate of a decedent appointed for limited purposes and the
8 term may be used in lieu of "personal representative" wherever re-
9 quired by context.

10 (14) Words that import the singular number only, may also be
11 applied to the plural of persons and things.

12 (15) Words importing the masculine gender only may be extended
13 to females also.

14 Sec. 11.02.010 JURISDICTION IN PROBATE MATTERS--POWERS OF
15 COURTS. The superior courts in the exercise of their jurisdiction
16 of matters of probate shall have power to probate or refuse to pro-
17 bate wills, appoint personal representatives of deceased or incompe-
18 tent persons and administer and settle all such estates, award pro-
19 cesses and cause to come before them all persons whom they may deem
20 it necessary to examine, and order and cause to be issued all such
21 writs as may be proper or necessary, and do all things proper or in-
22 cident to the exercise of such jurisdiction.

23 Sec. 11.02.020 POWERS OF COURTS WHEN LAW INAPPLICABLE, INSUF-
24 FICIENT, OR DOUBTFUL. It is the intention of this title that the
25 courts mentioned shall have full and ample power and authority to ad-
26 minister and settle all estates of decedents and incompetent persons
27 in this title mentioned. If the provisions of this title with ref-
28 erence to the administration and settlement of such estates should in
29 any cases and under any circumstances be inapplicable or insufficient
30 or doubtful, the court shall nevertheless have full power and author-
31 ity to proceed with such administration and settlement in any manner
32 and way which to the court seems right and proper, all to the end
33 that such estates may be by the court administered upon and settled.

1 Sec. 11.02.030 EXERCISE OF POWERS--ORDERS, WRITS, PROCESS, ETC.
2 In exercising any of the jurisdiction or powers by this title given or
3 intended to be given, the court is authorized to make, issue and cause
4 to be filed or served, any and all manner and kinds of orders, judg-
5 ments, citations, notices, summons, and other writs and processes not
6 inconsistent with the provisions of this title, which may be consid-
7 ered proper or necessary in the exercise of such jurisdiction.

8 Sec. 11.02.060 POWER OF CLERK TO FIX DATES OF HEARINGS. The
9 clerk of each of the superior courts is authorized to fix the time of
10 hearing of all applications, petitions and reports in probate and guard-
11 ianship proceedings, except the time for hearings upon show cause
12 orders and citations. The authority herein granted is in addition to
13 the authority vested in the superior courts and superior court com-
14 missioners.

15 Chapter 11.04

16 DESCENT AND DISTRIBUTION

17 Sec. 11.04.015 DESCENT AND DISTRIBUTION OF REAL AND PERSONAL
18 ESTATE. The net estate of a person dying intestate shall descend sub-
19 ject to the provisions of RCW 11.04.250 and be distributed as follows:

20 (1) Share of surviving spouse. The surviving spouse shall re-
21 ceive the following share:

22 (a) All of the net community estate; and

23 (b) One-half of the net separate estate if the intestate is
24 survived by issue; or

25 (c) Three-quarters of the net separate estate if there is no
26 surviving issue, but the intestate is survived by one or more of his
27 parents, or by one or more of the issue of one or more of his parents;
28 or

29 (d) All of the net separate estate, if there is no surviving
30 issue nor parent nor issue of parent.

31 (2) Shares of others than surviving spouse. The share of the
32 net estate not distributable to the surviving spouse, or the entire
33 net estate if there is no surviving spouse, shall descend and be

Senate Committee Amendment to Senate Bill No. 6
By Judiciary Committee

On page 5, section 11.04.015, following subsection (d), add a new subsection as follows:

"(e) If the intestate not be survived by issue nor by either parent, nor by any issue of the parent or parents who survive the intestate, nor by any grandparent or grandparents who survive the intestate, then to the issue of any grandparent or grandparents who survive the intestate, the issue of any maternal grandparent or grandparents sharing equally with the issue of the paternal grandparent or grandparents."

Adopted March 5, 1965

House Amendment to Engrossed Senate Bill No. 6
By Representative Clark

On page 4, section 11.04.015, line 22 of the engrossed and printed bills, after "(a)" strike "All of the" and insert "If the intestate is survived by issue or by either parent, three-fourths of the"

Adopted 3/9/65

11.04.015 Descent and distribution of real and personal estate. The net estate of a person dying intestate shall descend subject to the provisions of RCW 11.04.250 and be distributed as follows:

(1) Share of surviving spouse. The surviving spouse shall receive the following share:

(a) All of the net community estate unless there be surviving issue or parents, in which event, the surviving spouse shall take three-fourths of the net community estate; and

(b) One-half of the net separate estate if the intestate is survived by issue; or

(c) Three-quarters of the net separate estate if there is no surviving issue, but the intestate is survived by one or more of his parents, or by one or more of the issue of one or more of his parents; or

(d) All of the net separate estate, if there is no surviving issue nor parent nor issue of parent.

(2) Shares of others than surviving spouse. The share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, shall descend and be distributed as follows:

(a) To the issue of the intestate; if they are all in the same degree of kinship to the intestate, they shall take equally, or if of unequal degree, then those of more remote degrees shall take by representation.

(b) If the intestate not be survived by issue, then to the parent or parents who survive the intestate.

(c) If the intestate not be survived by issue nor by either parent, then to those issue of the parent or parents who survive the intestate; if they are all in the same degree of kinship to the intestate, they shall take equally, or, if of unequal degree, then those of more remote degree shall take by representation.

(d) If the intestate not be survived by issue nor by either parent, nor by any issue of the parent or parents who survive the intestate, then to the grandparent or grandparents who survive the intestate, the maternal grandparent or grandparents sharing equally with the paternal grandparent or grandparents.

(e) If the intestate not be survived by issue nor by either parent, nor by any issue of the parent or parents who survive the intestate, nor by any grandparent or grandparents who survive the intestate, then to the issue of any grandparent or grandparents who survive the intestate, the issue of any maternal grandparent or grandparents sharing equally with the issue of the paternal grandparent or grandparents. [1965 1st ex.s. c 55 § 1; 1965 c 145 § 11.04.015. Former RCW sections: RCW 11.04.020, 11.04.030, 11.04.050.]

1 distributed as follows:

2 (a) To the issue of the intestate; if they are all in the same
3 degree of kinship to the intestate, they shall take equally, or if of
4 unequal degree, then those of more remote degrees shall take by rep-
5 resentation.

6 (b) If the intestate not be survived by issue, then to the
7 parent or parents who survive the intestate.

8 (c) If the intestate not be survived by issue nor by either
9 parent, then to those issue of the parent or parents who survive the
10 intestate; if they are all in the same degree of kinship to the intes-
11 tate, they shall take equally, or, if of unequal degree, then those of
12 more remote degree shall take by representation.

13 (d) If the intestate not be survived by issue nor by either
14 parent, nor by any issue of the parent or parents who survive the in-
15 testate, then to the grandparent or grandparents who survive the in-
16 testate, the maternal grandparent or grandparents sharing equally with
17 the paternal grandparent or grandparents.

18 Sec. 11.04.035 KINDRED OF THE HALF BLOOD. Kindred of the half
19 blood shall inherit the same share which they would have inherited if
20 they had been of the whole blood.

21 Sec. 11.04.041 ADVANCEMENTS. If a person dies intestate as to
22 all his estate, property which he gave in his lifetime as an advance-
23 ment to any person who, if the intestate had died at the time of mak-
24 ing the advancement, would be entitled to inherit a part of his es-
25 tate, shall be counted toward the advancee's intestate share, and to
26 the extent that it does not exceed such intestate share shall be taken
27 into account in computing the estate to be distributed. Every gratu-
28 itous inter vivos transfer is deemed to be an absolute gift and not an
29 advancement unless shown to be an advancement. The advancement shall
30 be considered as of its value at the time when the advancee came into
31 possession or enjoyment or at the time of the death of the intestate,
32 whichever first occurs. If the advancee dies before the intestate,
33 leaving a lineal heir who takes from the intestate, the advancement

1 shall be taken into account in the same manner as if it had been made
2 directly to such heir. If such heir is entitled to a lesser share in
3 the estate than the advancee would have been entitled had he survived
4 the intestate, then the heir shall only be charged with such propor-
5 tion of the advancement as the amount he would have inherited, had
6 there been no advancement, bears to the amount which the advancee
7 would have inherited, had there been no advancement.

8 Sec. 11.04.060 TENANCY IN DOWER AND BY CURTESY ABOLISHED.
9 The provisions of RCW 11.04.015, as to the inheritance of the husband
10 and wife from each other take the place of tenancy in dower and ten-
11 ancy by curtesy, which are hereby abolished.

12 Sec. 11.04.071 SURVIVORSHIP AS INCIDENT OF TENANCY BY THE
13 ENTIRETIES ABOLISHED. The right of survivorship as an incident of
14 tenancy by the entirety is abolished.

15 Sec. 11.04.081 INHERITANCE BY AND FROM ILLEGITIMATE CHILD.
16 For the purpose of inheritance to, through and from an illegitimate
17 child, such child shall be treated the same as if he were the legiti-
18 mate child of his mother, so that he and his issue shall inherit from
19 his mother and from his maternal kindred, in all degrees, and they may
20 inherit from him. Such child shall also be treated the same as if he
21 were a legitimate child of his mother for the purpose of determining
22 homestead rights, the distribution of exempt property and the making
23 of family allowances. When the parents of an illegitimate child shall
24 marry subsequent to his birth, or the father shall acknowledge said
25 child in writing, such child shall be deemed to have been made the
26 legitimate child of both of the parents for purposes of intestate suc-
27 cession.

28 Sec. 11.04.085 INHERITANCE BY ADOPTED CHILD. A lawfully
29 adopted child shall not be considered an "heir" of his natural parents
30 for purposes of this title.

31 Sec. 11.04.095 INHERITANCE FROM STEPPARENT AVOIDS ESCHEAT. If
32 a person die leaving a surviving spouse and issue by a former spouse
33 and leaving a will whereby all or substantially all of the deceased's

1 property passes to the surviving spouse or having before death con-
2 veyed all or substantially all his or her property to the surviving
3 spouse, and afterwards the latter dies without heirs and without dis-
4 posing of his or her property by will so that except for this section
5 the same would all escheat, the issue of the spouse first deceased who
6 survive the spouse last deceased shall take and inherit from the spouse
7 last deceased the property so acquired by will or conveyance or the
8 equivalent thereof in money or other property; if such issue are all
9 in the same degree of kinship to the spouse first deceased they shall
10 take equally, or, if of unequal degree, then those of more remote de-
11 gree shall take by representation with respect to such spouse first
12 deceased.

13 Sec. 11.04.230 U. S. SAVINGS BOND--EFFECT OF DEATH OF CO-OWNER.
14 If either co-owner of United States savings bonds registered in two
15 names as co-owners (in the alternative) dies without having presented
16 and surrendered the bond for payment to a federal reserve bank or the
17 treasury department, the surviving co-owner will be the sole and ab-
18 solute owner of the bond.

19 Sec. 11.04.240 U. S. SAVINGS BOND--EFFECT OF BENEFICIARY'S
20 SURVIVAL OF REGISTERED OWNER. If the registered owner of United States
21 savings bonds registered in the name of one person payable on death to
22 another dies without having presented and surrendered the bond for
23 payment or authorized reissue to a federal reserve bank or the treas-
24 ury department, and is survived by the beneficiary, the beneficiary
25 will be the sole and absolute owner of the bond.

26 Sec. 11.04.250 WHEN REAL ESTATE VESTS--RIGHTS OF HEIRS. When
27 a person dies seized of lands, tenements or hereditaments, or any
28 right thereto or entitled to any interest therein in fee or for the
29 life of another, his title shall vest immediately in his heirs or de-
30 visees, subject to his debts, family allowance, expenses of administra-
31 tion and any other charges for which such real estate is liable under
32 existing laws. No administration of the estate of such decedent, and
33 no decree of distribution or other finding or order of any court shall

1 be necessary in any case to vest such title in the heirs or devisees,
2 but the same shall vest in the heirs or devisees instantly upon the
3 death of such decedent: PROVIDED, That no person shall be deemed a
4 devisee until the will has been probated. The title and right to pos-
5 session of such lands, tenements, or hereditaments so vested in such
6 heirs or devisees, together with the rents, issues and profits thereof
7 shall be good and valid against all persons claiming adversely to the
8 claims of any such heirs, or devisees, excepting only the personal rep-
9 resentative when appointed, and persons lawfully claiming under such
10 personal representative; and any one or more of such heirs or devisees,
11 or their grantees, jointly or severally, may sue for and recover their
12 respective shares or interests in any such lands, tenements, or here-
13 ditaments and the rents, issues and profits thereof, whether letters
14 testamentary or of administration be granted or not, from any person
15 except the personal representative and those lawfully claiming under
16 such personal representative.

17 Sec. 11.04.270. LIMITATION OF LIABILITY FOR DEBTS. The estate
18 of a deceased person shall not be liable for his debts unless letters
19 testamentary or of administration be granted within six years from the
20 date of the death of such decedent: PROVIDED, HOWEVER, That this sec-
21 tion shall not affect liens upon specific property, existing at the
22 date of the death of such decedent.

23 Sec. 11.04.290 VESTING OF TITLE. RCW 11.04.250 through 11.04-
24 .290 shall apply to community real property and also to separate es-
25 tate; and upon the death of either husband or wife, title of all com-
26 munity real property shall vest immediately in the person or persons
27 to whom the same shall go, pass, descend or be devised, as provided in
28 RCW 11.04.015, subject to all the charges mentioned in RCW 11.04.250.

29 Chapter 11.05

30 UNIFORM SIMULTANEOUS DEATH ACT

31 Sec. 11.05.010 DEVOLUTION OF PROPERTY IN CASE OF SIMULTANEOUS
32 DEATH OF OWNERS. Where the title to property or the devolution there-
33 of depends upon priority of death and there is no sufficient evidence

1 that the persons have died otherwise than simultaneously, the property
2 of each person shall be disposed of as if he had survived, except as
3 provided otherwise in this chapter.

4 Sec. 11.05.020 PROCEDURE WHEN BENEFICIARIES DIE SIMULTANEOUS-
5 LY. Where two or more beneficiaries are designated to take successive-
6 ly or alternately by reason of survivorship under another person's
7 disposition of property and there is no sufficient evidence that these
8 beneficiaries have died otherwise than simultaneously the property
9 thus disposed of shall be divided into as many equal portions as there
10 are successive or alternate beneficiaries and the portion allocated to
11 each beneficiary shall be distributed as if he had survived all the
12 other beneficiaries.

13 Sec. 11.05.030 JOINT TENANTS--SIMULTANEOUS DEATH. Where there
14 is no sufficient evidence that two joint tenants have died otherwise
15 than simultaneously, the property so held shall be distributed one-
16 half as if one had survived, and one-half as if the other had sur-
17 vived. If there are more than two joint tenants and all of them have
18 so died, the property thus distributed shall be in the proportion that
19 one bears to the whole number of joint tenants.

20 Sec. 11.05.040 DISTRIBUTION OF INSURANCE POLICY WHEN INSURED
21 AND BENEFICIARY DIE SIMULTANEOUSLY. Where the insured and the benefi-
22 ciary in a policy of life or accident insurance have died and there is
23 no sufficient evidence that they have died otherwise than simultaneou-
24 sly the proceeds of the policy shall be distributed as if the insured
25 had survived the beneficiary.

26 Sec. 11.05.050 SCOPE OF CHAPTER LIMITED. This chapter shall
27 not apply in the case of wills, living trusts, deeds, or contracts of
28 insurance wherein provision has been made for distribution of property
29 different from the provisions of this chapter.

30 Sec. 11.05.900 APPLICATION OF CHAPTER TO PRIOR DEATHS. This
31 chapter shall not apply to the distribution of the property of a per-
32 son who has died before it takes effect.

33 Sec. 11.05.910 CONSTRUCTION OF CHAPTER. This chapter shall be

1 so construed and interpreted as to effectuate its general purpose to
2 make uniform the law in those states which enact it.

3 Chapter 11.08

4 ESCHEATS

5 PROPERTY OF DECEASED INMATES OF STATE INSTITUTIONS

6 Sec. 11.08.101 PROPERTY OF DECEASED INMATES OF STATE INSTITU-
7 TIONS--DISPOSITION AFTER TWO YEARS. Where, upon the expiration of two
8 years after the death of any inmate of any state institution, there re-
9 mains in the custody of the superintendent of such institution, money
10 or property belonging to said deceased inmate, the superintendent shall
11 forward such money to the state treasurer for deposit in the general
12 fund of the state, and shall reportsuch transfer and any remaining
13 property to the department of institutions, which department shall
14 cause the sale of such property and proceeds thereof shall be forward-
15 ed to the state treasurer for deposit in the general fund.

16 Sec. 11.08.111 -----DISPOSITION WITHIN TWO YEARS. Prior to
17 the expiration of the above two-year period, the superintendent may
18 transfer such money or property in his possession, upon request and
19 satisfactory proof submitted to him, to the following designated per-
20 sons:

21 (1) To the personal representative of the estate of such de-
22 ceased inmate; or

23 (2) To the next of kin of the decedent, where such money and
24 property does not exceed the value of five hundred dollars, and the
25 person or persons requesting same shall have furnished an affidavit as
26 to his or her being next of kin; or

27 (3) In the case of money, to the person who may have deposited
28 such money with the superintendent for the use of the decedent, where
29 the sum involved does not exceed five hundred dollars; or

30 (4) To the department of institutions, when there are moneys
31 due and owing from such deceased person's estate for the cost of his
32 care and maintenance at such institution: PROVIDED, That transfer of
33 such money or property may be made to the person first qualifying

1 under this section and such transfer shall exonerate the superintend-
2 ent from further responsibility relative to such money or property:
3 AND PROVIDED FURTHER, That upon satisfactory showing the funeral ex-
4 penses of such decedent are unpaid, the superintendent may pay up to
5 three hundred dollars from said deceased inmate's funds on said obli-
6 gation.

7 Sec. 11.08.120 -----SALE--DISPOSITION OF PROCEEDS. The prop-
8 erty, other than money, of such deceased inmate remaining in the cus-
9 tody of a superintendent of a state institution after the expiration of
10 the above two-year period may be forwarded to the department of insti-
11 tutions at its request and may be appraised and sold at public auction
12 to the highest bidder in the manner and form as provided for public
13 sales of personal property, and all moneys realized upon such sale,
14 after deducting the expenses thereof, shall be paid into the general
15 fund of the state treasury.

16 Sec. 11.08.140 ESCHEAT FOR WANT OF HEIRS. Whenever any
17 person dies, whether a resident of this state or not, leaving property
18 subject to the jurisdiction of this state and without being survived
19 by any person entitled to the same under the laws of this state, such
20 property shall be designated escheat property and shall be subject to
21 the provisions of RCW 11.08.140 through 11.08.280.

22 Sec. 11.08.150 TITLE TO PROPERTY VESTS IN STATE AT DEATH OF
23 OWNER. Title to escheat property, which shall include any intangible
24 personalty, shall vest in the state at the death of the owner thereof.

25 Sec. 11.08.160 JURISDICTION, DUTIES, OF TAX COMMISSION. The
26 tax commission of this state shall have supervision of and jurisdic-
27 tion over escheat property and may institute and prosecute any proceed-
28 ings deemed necessary or proper in the handling of such property, and
29 it shall be the duty of the tax commission to protect and conserve
30 escheat property for the benefit of the permanent common school fund
31 of the state until such property or the proceeds thereof have been for-
32 warded to the state treasurer or the state land commissioner as here-
33 inafter provided.

1 Sec. 11.08.170 PROBATE OF ESCHEAT PROPERTY--NOTICE TO TAX COM-
2 MISSION. Escheat property may be probated under the provisions of the
3 probate laws of this state. Whenever such probate proceedings are in-
4 stituted, whether by special administration or otherwise, the peti-
5 tioner shall promptly notify the tax commission in writing thereof on
6 forms furnished by the tax commission to the county clerks. There-
7 after, the tax commission shall be served with written notice at least
8 twenty days prior to any hearing on proceedings involving the valua-
9 tion or sale of property, on any petition for the allowance of fees,
10 and on all interim reports, final accounts or petitions for the deter-
11 mination of heirship. Like notice shall be given of the presentation
12 of any claims to the court for allowance. Failure to furnish such no-
13 tice shall be deemed jurisdictional and any order of the court entered
14 without such notice shall be void: PROVIDED, That the tax commission
15 may waive the provisions of this section in its discretion.

16 Sec. 11.08.180 TAX COMMISSION TO BE FURNISHED COPIES OF DOCU-
17 MENTS AND PLEADINGS. The tax commission may demand copies of any
18 papers, documents or pleadings involving the escheat property or the
19 probate thereof deemed by it to be necessary for the enforcement of
20 RCW 11.08.140 through 11.08.280 and it shall be the duty of the admin-
21 istrator or his attorney to furnish such copies to the commission.

22 Sec. 11.08.200 LIABILITY FOR USE OF ESCHEATED PROPERTY. If
23 any person shall take possession of escheat property without proper
24 authorization to do so, and shall have the use thereof for a period
25 exceeding sixty days, he shall be liable to the state for the reason-
26 able value of such use, payment of which may be enforced by the tax
27 commission or by the administrator of the estate.

28 Sec. 11.08.210 ALLOWANCE OF CLAIMS, ETC.--SALE OF PROPERTY--
29 DECREE OF DISTRIBUTION. If at the expiration of four months from the
30 date of the first publication of notice to creditors no heirs have ap-
31 peared and established their claim to the estate, the court may enter
32 an interim order allowing claims, expenses and partial fees. If at
33 the expiration of sixteen months from the date of issuance of letters

1 testamentary or of administration no heirs have appeared and established
2 their claim to the estate, all personal property not in the form of
3 cash shall be sold under order of the court. Personal property found
4 by the court to be worthless shall be ordered abandoned. Real proper-
5 ty shall not be sold for the satisfaction of liens thereon, or for the
6 payment of the debts of decedent or expenses of administration until
7 the proceeds of the personal property are first exhausted. The court
8 shall then enter a decree allowing any additional fees and charges
9 deemed proper and distributing the balance of the cash on hand, togeth-
10 er with any real property, to the state. Remittance of cash on hand
11 shall be made to the tax commission which shall make proper records
12 thereof and forthwith forward such funds to the state treasurer for
13 deposit in the permanent common school fund of the state.

14 Sec. 11.08.220 CERTIFIED COPIES OF DECREE--DUTIES OF COMMIS-
15 SIONER OF PUBLIC LANDS. The tax commission shall be furnished two
16 certified copies of the decree of the court distributing any real prop-
17 erty to the state, one of which shall be forwarded to the state land
18 commissioner who shall thereupon assume supervision of and jurisdic-
19 tion over such real property and thereafter handle it the same as
20 state common school lands. The administrator shall also file a certi-
21 fied copy of the decree with the auditor of any county in which the
22 escheated real property is situated.

23 Sec. 11.08.230 APPEARANCE AND CLAIM OF HEIRS--NOTICES TO TAX
24 COMMISSION. Upon the appearance of heirs and the establishment of
25 their claim to the satisfaction of the court prior to entry of the
26 decree of distribution to the estate, the provisions of RCW 11.08.140
27 through 11.08.280 shall not further apply, except for purposes of ap-
28 peal: PROVIDED, That the tax commission shall be promptly given writ-
29 ten notice of such appearance by the claimants and furnished copies of
30 all papers or documents on which such claim of heirship is based. Any
31 documents in a foreign language shall be accompanied by translations
32 made by a properly qualified translator, certified by him to be true
33 and correct translations of the original documents. The administrator

1 or his attorney shall also furnish the tax commission with any other
2 available information bearing on the validity of the claim.

3 Sec. 11.08.240 LIMITATION ON FILING CLAIM. Any claimant to
4 escheated funds or real property shall have seven years from the date
5 of issuance of letters testamentary or of administration within which
6 to file his claim. Such claim shall be filed with the court having
7 original jurisdiction of the estate, and a copy thereof served upon
8 the tax commission, together with twenty days notice of the hearing
9 thereon.

10 Sec. 11.08.250 ORDER OF COURT ON ESTABLISHMENT OF CLAIM. Upon
11 establishment of the claim to the satisfaction of the court, it shall
12 order payment to the claimant of any escheated funds and delivery of
13 any escheated land, or the proceeds thereof, if sold.

14 Sec. 11.08.260 PAYMENT OF ESCHEATED FUNDS TO CLAIMANT. In the
15 event the order of the court requires the payment of escheated funds or
16 the proceeds of the sale of escheated real property, a certified copy
17 of such order shall be served upon the tax commission which shall
18 thereupon take any steps necessary to effect payment to the claimant
19 out of the general fund of the state.

20 Sec. 11.08.270 CONVEYANCE OF ESCHEATED PROPERTY TO CLAIMANT.
21 In the event the order of the court requires the delivery of real prop-
22 erty to the claimant, a certified copy of such order shall be served
23 upon the state land commissioner who shall thereupon make proper cert-
24 ification to the office of the governor for issuance of a quit claim
25 deed for the property to the claimant.

26 Sec. 11.08.280 LIMITATION WHEN CLAIMANT IS MINOR OR INCOMPE-
27 TENT NOT UNDER GUARDIANSHIP. The claims of any persons to escheated
28 funds or real property which are not filed within seven years as spec-
29 ified above are forever barred, excepting as to those persons who are
30 minors or who are legally incompetent and not under guardianship, in
31 which event the claim may be filed within seven years after their
32 disability is removed.

33

Chapter 11.12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33

WILLS

Sec. 11.12.010 WHO MAY MAKE A WILL. The following persons of sound mind may, by last will, devise all his or her estate, both real and personal:

- (1) Any person who has attained the age of majority.
- (2) Any person who has legally married, and has attained the age of eighteen years.
- (3) Any person who has attained the age of eighteen years and is actively engaged with the armed forces of the United States or employed on a vessel of the United States merchant marine.

All wills executed subsequent to September 16, 1940, and which meet the requirements of this section are hereby validated and shall have all the force and effect of wills executed subsequent to the taking effect of this section.

Sec. 11.12.020 REQUISITES OF WILLS. FOREIGN WILLS. Every will shall be in writing signed by the testator or by some other person under his direction in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator by his direction or request: PROVIDED, That a last will and testament, executed without the state, in the mode prescribed by law, either of the place where executed or of the testator's domicile shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state.

Sec. 11.12.025 -----NUNCUPATIVE WILLS. Nothing contained in this chapter shall prevent any member of the armed forces of the United States or person employed on a vessel of the United States merchant marine from disposing of his wages or personal property, or prevent any person competent to make a will from disposing of his or her personal property of the value of not to exceed one thousand dollars, by nuncupative will if the same be proved by two witnesses who were present at the making thereof, and it be proven that the testator, at the time of pronouncing the same, did bid some person present to bear witness

1 that such was his will, or to that effect, and that such nuncupative
2 will was made at the time of the last sickness of the testator, but no
3 proof of any nuncupative will shall be received unless it be offered
4 within six months after the speaking of the testamentary words, nor
5 unless the words or the substance thereof be first committed to writ-
6 ing, and in all cases a citation be issued to the widow and/or heirs
7 at law of the deceased that they may contest the will, and no real es-
8 tate shall be devised by a nuncupative will.

9 Sec. 11.12.030 SIGNATURE OF TESTATOR AT HIS DIRECTION--SIGNA-
10 TURE BY MARK. Every person who shall sign the testator's or testa-
11 trix's name to any will by his or her direction shall subscribe his
12 own name to such will and state that he subscribed the testator's
13 name at his request: PROVIDED, That such signing and statement shall
14 not be required if the testator shall evidence the approval of the sig-
15 nature so made at his request by making his mark on the will.

16 Sec. 11.12.040 REVOCATION OF WILL, HOW EFFECTED. A will, or
17 any part thereof, can be revoked

18 (1) By a written will; or

19 (2) By being burnt, torn, canceled, obliterated or destroyed,
20 with the intent and for the purpose of revoking the same, by the test-
21 ator himself or by another person in his presence and by his direction.
22 If such act is done by any person other than the testator, the direc-
23 tion of the testator and the facts of such injury or destruction must
24 be proved by two witnesses.

25 Sec. 11.12.050 SUBSEQUENT MARRIAGE OF TESTATOR--DIVORCE. If,
26 after making any will, the testator shall marry and the spouse shall
27 be living at the time of the death of the testator, such will shall be
28 deemed revoked as to such spouse, unless provision shall have been made
29 for such survivor by marriage settlement, or unless such survivor be
30 provided for in the will or in such way mentioned therein as to show
31 an intention not to make such provision, and no other evidence to re-
32 but the presumption of revocation shall be received. A divorce, sub-
33 sequent to the making of a will, shall revoke the will as to the

House Amendment to Engrossed Senate Bill No. 6
By Representatives Smith and Uhlman

On page 17, section 11.12.090, beginning on line 27 of the printed and engrossed bills strike all of Sec. 11.12.090 through line 9, page 18, and insert:

"11.12.090 INTESACY AS TO PRETERMITTED CHILDREN. If any person make his last will and die leaving a child or children or descendants of such child or children not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, as to such child or children not named or provided for, shall be deemed to die intestate, and such child or children or their descendants shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part."

Adopted 3/10/65

1 divorced spouse.

2 Sec. 11.12.060 AGREEMENT TO CONVEY DOES NOT REVOKE. A bond,
3 covenant, or agreement made for a valuable consideration by a testator
4 to convey any property, devised or bequeathed in any last will previ-
5 ously made, shall not be deemed a revocation of such previous devise
6 or bequest, but such property shall pass by the devise or bequest, sub-
7 ject to the same remedies on such bond, covenant, or agreement, for
8 specific performance or otherwise, against devisees or legatees, as
9 might be had by law against the heirs of the testator or his next of
10 kin, if the same had descended to him.

11 Sec. 11.12.070 DEVISE OR BEQUEATHAL OF PROPERTY SUBJECT TO EN-
12 CUMBRANCE. When any real or personal property subject to a mortgage
13 is specifically devised, the devisee shall take such property so de-
14 vised subject to such mortgage unless the will provides that such mort-
15 gage be otherwise paid. The term "mortgage" as used in this section
16 shall not include a pledge of personal property.

17 A charge or encumbrance upon any real or personal estate for
18 the purpose of securing the payment of money, or the performance of
19 any covenant or agreement, shall not be deemed a revocation of any will
20 relating to the same estate, previously executed. The devises and leg-
21 acies therein contained shall pass and take effect, subject to such
22 charge or encumbrance.

23 Sec. 11.12.080 NO REVIVAL OF WILL BY REVOCATION OF LATER ONE.
24 If, after making any will, the testator shall duly make and execute a
25 second will, the destruction, cancellation, or revocation of such sec-
26 ond will shall not revive the first will.

27 Sec. 11.12.090 INTESTACY AS TO PRETERMITTED CHILDREN. If any
28 person make his last will and die leaving a child or children or de-
29 scendants of such child or children not named or provided for in such
30 will, although born after the making of such will or the death of the
31 testator, every such testator, as to such child or children not named
32 or provided for, shall be deemed to die intestate, and such child or
33 children or their descendants shall receive a share in the estate of

1 the testator equal in value to that which he would have received if the
2 testator had died intestate, unless it appears from the will that such
3 omission was intentional, or unless when the will was executed the
4 testator had one or more children known to him to be living and de-
5 vised substantially all his estate to his surviving spouse; or unless
6 it appears from the will that the intention of the testator was to de-
7 vise to his children equally, in which latter case any child not named
8 in the will shall receive a share in the estate equal in value to that
9 of the other children.

10 Sec. 11.12.110 DEATH OF DEVISEE OR LEGATEE BEFORE TESTATOR.

11 When any estate shall be devised or bequeathed to any child, grand-
12 child, or other relative of the testator, and such devisee or legatee
13 shall die before the testator, having lineal descendants who survive
14 the testator, such descendants shall take the estate, real and person-
15 al, as such devisee or legatee would have done in the case he had sur-
16 vived the testator; if such descendants are all in the same degree of
17 kinship to the predeceased devisee or legatee they shall take equally,
18 or, if of unequal degree, then those of more remote degree shall take
19 by representation with respect to such predeceased devisee or legatee.
20 A spouse is not a relative under the provisions of this section.

21 Sec. 11.12.120 LAPSED LEGACY OR DEVISE--PROCEDURE AND PROOF.

22 Whenever any person having died leaving a will which has been admitted
23 to probate, shall by said will have given, devised or bequeathed unto
24 any person, a legacy or a devise upon the condition that said person
25 survive him, and not otherwise, such legacy or devise shall lapse and
26 fall into the residue of said estate to be distributed according to
27 the residuary clause, if there be one, of said will, and if there be
28 none then according to the laws of descent, unless said legatee or de-
29 visee, as the case may be, or his heirs, personal representative, or
30 someone in behalf of such legatee or devisee, shall appear before the
31 court which is administering said estate within six years from and
32 after the date the said will was admitted to probate, and prove to the
33 satisfaction of the court that the said legatee or devisee, as the

1 case may be, did in fact survive the testator.

2 Sec. 11.12.130 PROCEDURE WHERE LEGATEE OR DEVISEE IS AN ABSEN-
3 TEE. If it shall be made to appear to the satisfaction of said court
4 within the time fixed by RCW 11.12.120 that such legatee or devisee,
5 as the case may be, did in fact survive the testator, but that such
6 legatee, or devisee, is an absentee within the meaning of chapter 11-
7 .80, then and in that event the court shall by appropriate order direct
8 the said legacy or devise to be distributed to a trustee appointed and
9 qualified as provided for in said chapter 11.80.

10 Sec. 11.12.140 ORDER OF COURT DECLARING LAPSE. The personal
11 representative, residuary legatee, or any heir at law of any such es-
12 tate, may by sworn petition call the attention of the court to the
13 fact that the periods of time set forth in RCW 11.12.120 have elapsed,
14 and that such legatee or devisee, his heirs, personal representative,
15 or anyone in his behalf, has not appeared and proved to the satisfac-
16 tion of the court that such legatee or devisee survived the testator,
17 and if it appear from the records of the proceedings in said estate
18 that the allegations of the petition are true, it shall be the duty of
19 the court to enter an appropriate order declaring such legacy or de-
20 vise to have lapsed, and directing its disposition as provided for in
21 RCW 11.12.120.

22 Sec. 11.12.150 PETITION AND NOTICE WHERE LEGATEE OR DEVISEE
23 UNKNOWN. Every personal representative of such an estate shall, with-
24 in two years after the said will has been admitted to probate, file in
25 said probate proceedings a sworn petition which shall set out in de-
26 tail the name and last known address of any such legatee or devisee,
27 the circumstances of his departure from that address, if known; his
28 occupation or business, if known; the fact that the personal represent-
29 ative has been unable to locate him or to ascertain whether or not he
30 survived the testator; and all other facts within the knowledge of the
31 personal representative, which may aid the court in determining the
32 best and most advantageous method to employ in attempting to locate
33 said legatee or devisee. Upon such a petition being filed it shall be

1 the duty of the court, and the court shall have the power, to call be-
2 fore it the personal representative and such witnesses as may be nec-
3 essary, and examine them under oath as to the truth of the allegations
4 in said petition. After the hearing the court may direct such notice
5 to be given as it shall think will most likely come to the attention of
6 said legatee or devisee, or persons who might know him. Such notice
7 shall be given for such a length of time and in such places as the
8 court may order, and shall set forth the fact that a legacy or de-
9 vise, as the case may be, awaits the person therein named, and shall
10 call upon all persons having any knowledge concerning the said person
11 or his whereabouts to notify the court of all the facts within their
12 knowledge concerning said person, within a time therein stated.

13 Sec. 11.12.160 WITNESS AS DEVISEE OR LEGATEE--EFFECT OF, ON
14 WILL. All beneficial devises, legacies, and gifts whatever, made or
15 given in any will to a subscribing witness thereto, shall be void un-
16 less there are two other competent witnesses to the same; but a mere
17 charge on the estate of the testator for the payment of debts shall
18 not prevent his creditors from being competent witnesses to his will.
19 If such witness, to whom any beneficial devise, legacy or gift may
20 have been made or given, would have been entitled to any share in the
21 testator's estate in case the will is not established, then so much of
22 the estate as would have descended or would have been distributed to
23 such witness shall be saved to him as will not exceed the value of the
24 devise or bequest made to him in the will; and he may recover the same
25 from the devisees or legatees named in the will in proportion to and
26 out of the parts devised and bequeathed to him.

27 Sec. 11.12.170 DEVISE OF LAND, WHAT PASSES. Every devise of
28 land in any will shall be construed to convey all the estate of the
29 devisor therein which he could lawfully devise, unless it shall clear-
30 ly appear by the will that he intended to convey a less estate.

31 Sec. 11.12.180 ESTATES FOR LIFE--REMAINDERS. If any person,
32 by last will, devise any real estate to any person for the term of
33 such person's life, such devise vests in the devisee an estate for

1 life, and unless the remainder is specially devised, it shall revert
2 to the heirs at law of the testator.

3 Sec. 11.12.190 WILL TO OPERATE ON AFTER-ACQUIRED PROPERTY.
4 Any estate, right or interest in property acquired by the testator
5 after the making of his will may pass thereby and in like manner as if
6 title thereto was vested in him at the time of making the will, unless
7 the contrary manifestly appears by the will to have been the intention
8 of the testator.

9 Sec. 11.12.200 CONTRIBUTION AMONG DEVISEES AND LEGATEES. When
10 any testator in his last will shall give any chattel or real estate to
11 any person, and the same shall be taken in execution for the payment
12 of the testator's debts, then all the other legatees, devisees and
13 heirs shall refund their proportional part of such loss to such per-
14 son from whom the bequest shall be taken.

15 Sec. 11.12.210 ENFORCEMENT OF CONTRIBUTION. When any devisees,
16 legatees or heirs shall be required to refund any part of the estate
17 received by them, for the purpose of making up the share, devise or
18 legacy of any other devisee, legatee or heir, the court, upon the
19 petition of the person entitled to contribution or distribution of
20 such estate, may order the same to be made and enforce such order.

21 Sec. 11.12.220 NO INTEREST ON DEVISE UNLESS WILL SO PROVIDES.
22 No interest shall be allowed or calculated on any devise contained in
23 any will unless such will expressly provides for such interest.

24 Sec. 11. 12.230 INTENT OF TESTATOR CONTROLLING. All courts
25 and others concerned in the execution of last wills shall have due re-
26 gard to the direction of the will, and the true intent and meaning of
27 the testator, in all matters brought before them.

28 Sec. 11.12.250 DEVISES OR BEQUESTS TO TRUSTS. A devise or be-
29 quest may be made by a will to a trustee or trustees of a trust crea-
30 ted by the testator and/or some other person or persons (including a
31 funded or unfunded life insurance trust, although the trustor has re-
32 served any or all rights of ownership of the insurance contracts) es-
33 tablishe^d by written instrument executed before or concurrently with

1 the execution of such will. Such devise or bequest shall not be in-
2 valid because the trust is amendable or revocable, or both, or be-
3 cause the trust was amended after the execution of the will. Unless
4 the will provides otherwise, the property so devised or bequeathed
5 shall not be deemed to be held under a testamentary trust of the tes-
6 tator but shall become a part of the trust to which it is given to be
7 administered and disposed of in accordance with the provisions of the
8 instrument establishing such trust, including any amendments thereto,
9 made prior to the death of the testator, regardless of whether made be-
10 fore or after the execution of the will. An entire revocation of the
11 trust prior to the testator's death shall invalidate the devise or be-
12 quest.

13 Chapter 11.16

14 JURISDICTION--VENUE--NOTICES

15 Sec. 11.16.050 VENUE. Wills shall be proved and letters tes-
16 tamentary or of administration shall be granted:

17 (1) In the county of which deceased was a resident or had his
18 place of abode at the time of his death.

19 (2) In the county in which he may have died, or in which any
20 part of his estate may be, he not being a resident of the state.

21 (3) In the county in which any part of his estate may be, he
22 having died out of the state, and not having been a resident thereof
23 at the time of his death.

24 Sec. 11.16.060 PROPERTY OF NONRESIDENT IN MORE THAN ONE COUN-
25 TY--JURISDICTION. When the estate of the deceased is in more than one
26 county, he not having been a resident of the state at the time of his
27 death, the superior court of that county in which the application is
28 first made for letters testamentary or of administration shall have
29 exclusive jurisdiction of the settlement of the estate.

30 Sec. 11.16.070 PROCEEDINGS HAD IN COUNTY WHERE LETTERS GRANTED.
31 All orders, settlements, trials and other proceedings, under this ti-
32 tle shall be had or made in the county in which letters testamentary
33 or of administration were granted.

House Amendment to Engrossed Senate Bill No. 6
By Representative Smith

On page 23, section 11.16.081, line 11 of the
printed and engrossed bills after "(c)" strike
"By ordinary mail, or by" and insert "By"
Adopted 3/10/65

1 Sec. 11.16.081 NOTICE. (1) When notice to be given. No no-
2 tice to interested persons need be given except as specifically pro-
3 vided for in this title or as ordered by the court in a particular
4 case.

5 (2) Kinds of notice required. Unless waived and except as
6 otherwise provided by law, all notices required by this title to be
7 served upon any person shall be served either

8 (a) By delivering a copy of the same at least ten days before
9 the hearing to such person personally; or

10 (b) By such publication as the court may direct; or

11 (c) By ordinary mail, or by registered or certified mail re-
12 questing a return receipt signed by addressee only, addressed to such
13 person located in the United States at his address stated in the peti-
14 tion for the hearing, to be posted by depositing in any United States
15 post office in this state at least fourteen days prior to the date set
16 for hearing in said notice; or

17 (d) By any combination of two or more of the above.

18 (3) Service on attorney. If an attorney shall have entered
19 his appearance in writing for any party in any probate proceeding or
20 matter pending in the court, all notices required to be served on the
21 party in such proceeding or matter shall be served on the attorney and
22 such shall be in lieu of service upon the party for whom the attorney
23 appears.

24 Sec. 11.16.082. PROOF OF SERVICE. Proof of service in all
25 cases requiring notice, whether by publication, mailing or otherwise,
26 shall be filed in the cause.

27 Sec. 11.16.083 WAIVER OF NOTICE. Any person legally competent
28 who is interested in any hearing in a probate proceeding may in person
29 or by attorney waive in writing notice of such hearing. A guardian of
30 the estate or a guardian ad litem may make such a waiver on behalf of
31 his incompetent, and a trustee may make such a waiver on behalf of the
32 beneficiary of his trust. A consul or other representative of a for-
33 eign government, whose appearance has been entered as provided by law

1 on behalf of any person residing in a foreign country, may make such
2 waiver of notice on behalf of such person. Any person who submits to
3 the jurisdiction of the court in any hearing shall be deemed to have
4 waived notice thereof.

5 Chapter 11.20

6 CUSTODY, PROOF AND PROBATE OF WILLS

7 Sec. 11.20.010 DUTY OF CUSTODIAN OF WILL--LIABILITY. Any per-
8 son having the custody or control of any will shall, within thirty
9 days after he shall have received knowledge of the death of the tes-
10 tator, deliver said will to the court having jurisdiction or to the
11 person named in the will as executor, and any executor having in his
12 custody or control any will shall within forty days after he received
13 knowledge of the death of the testator deliver the same to the court
14 having jurisdiction. Any person who shall wilfully violate any of the
15 provisions of this section shall be liable to any party aggrieved for
16 the damages which may be sustained by such violation.

17 Sec. 11.20.020 APPLICATION FOR PROBATE--HEARING--ORDER--TESTI-
18 MONY OF WITNESSES REDUCED TO WRITING. Applications for the probate of
19 a will and for letters testamentary, or either, may be made to the
20 judge of the court having jurisdiction and the court may immediately
21 hear the proofs and either probate or reject such will as the testi-
22 mony may justify. Upon such hearing the court shall make and cause to
23 be entered a formal order, either establishing and probating such will
24 or refusing to establish and probate the same, and such order shall be
25 conclusive except in the event of a contest of such will as hereinaf-
26 ter provided. All testimony in support of the will shall be reduced
27 to writing, signed by the witnesses, and certified by the judge of the
28 court.

29 Sec. 11.20.030 COMMISSION TO TAKE TESTIMONY OF WITNESS. If
30 any witness be prevented by sickness from attending at the time any
31 will is produced for probate, or reside out of the state or more than
32 thirty miles from the place where the will is to be proven, such court
33 may issue a commission annexed to such will, and directed to any judge

1 justice of the peace, notary public, or other person authorized to ad-
2 minister an oath, empowering him to take and certify the attestation
3 of such witness.

4 Sec. 11.20.040 PROOF WHERE ONE OR MORE WITNESSES ARE UNABLE OR
5 INCOMPETENT TO TESTIFY. The subsequent incompetency from whatever
6 cause of one or more of the subscribing witnesses or their inability
7 to testify in open court or pursuant to commission, shall not prevent
8 the probate of the will. In such cases the court shall admit the will
9 to probate upon satisfactory testimony that the handwriting of the tes-
10 tator and of an incompetent or absent subscribing witness is genuine
11 or the court may consider such other facts and circumstances, if any,
12 as would tend to prove such will.

13 Sec. 11.20.050 FILING AND RECORDING OF WILLS. All wills shall
14 be recorded in the book kept for that purpose, within thirty days af-
15 ter probate, and the original wills shall be carefully filed with the
16 clerk, but may be withdrawn on the order of the court.

17 Sec. 11.20.060 RECORD OF WILL AS EVIDENCE. The record of any
18 will made, probated and recorded as herein provided, and the exemplifi-
19 cation of such record by the clerk in whose custody the same may be,
20 shall be received as evidence, and shall be as effectual in all cases
21 as the original would be if produced and proven.

22 Sec. 11.20.070 PROOF OF LOST OR DESTROYED WILL. Whenever any
23 will is lost or destroyed, the court may take proof of the execution
24 and validity of such will and establish it, notice to all persons in-
25 terested having been first given. Such proof shall be reduced to writ-
26 ing and signed by the witnesses and filed with the clerk of the court.

27 No will shall be allowed to be proved as a lost or destroyed
28 will unless it is proved to have been in existence at the time of the
29 death of the testator, or is shown to have been destroyed, canceled or
30 mutilated in whole or in part as a result of actual or constructive
31 fraud or in the course of an attempt to change the will in whole or in
32 part, which attempt has failed, or as the result of a mistake of fact,
33 nor unless its provisions are clearly and distinctly proved by at

1 least two witnesses, and when any such will is so established, the pro-
2 visions thereof shall be distinctly stated in the judgment establish-
3 ing it, and such judgment shall be recorded as wills are required to
4 be recorded. Executors of such will or administrators with the will
5 annexed may be appointed by the court in the same manner as is herein
6 provided with reference to original wills presented to the court for
7 probate.

8 Sec. 11.20.080 RESTRAINT OF PERSONAL REPRESENTATIVE DURING
9 PENDENCY OF APPLICATION TO PROVE LOST OR DESTROYED WILL. If, before
10 or during the pendency of an application to prove a lost or destroyed
11 will, letters of administration shall have been granted on the estate
12 of the testator, or letters testamentary of any previous will of the
13 testator shall have been granted, the court shall have authority to
14 restrain the personal representatives so appointed, from any acts or
15 proceedings which would be injurious to the legatees or devisees claim-
16 ing under the lost or destroyed will.

17 Sec. 11.20.090 ADMISSION TO PROBATE OF FOREIGN WILL. Wills
18 probated in any other state or territory of the United States, or in
19 any foreign country or state, shall be admitted to probate in this
20 state on the production of a copy of such will and of the original
21 record of probate thereof, authenticated by the attestation of the
22 clerk of the court in which such probate was made; or if there be no
23 clerk, by the attestation of the judge thereof, and by the seal of such
24 officers, if they have a seal.

25 Sec. 11.20.100 LAWS APPLICABLE TO FOREIGN WILLS. All provi-
26 sions of law relating to the carrying into effect of domestic wills
27 after probate thereof shall, so far as applicable, apply to foreign
28 wills admitted to probate in this state.

29 Chapter 11.24

30 WILL CONTESTS

31 Sec. 11.24.010 CONTEST OF ADMISSION OR REJECTION--LIMITATION
32 OF ACTION--ISSUES. If any person interested in any will shall appear
33 within six months immediately following the probate or rejection

1 thereof, and by petition to the court having jurisdiction contest the
2 validity of said will, or appear to have the will proven which has
3 been rejected, he shall file a petition containing his objections and
4 exceptions to said will, or to the rejection thereof. Issue shall be
5 made up, tried and determined in said court respecting the competency
6 of the deceased to make a last will and testament, or respecting the
7 execution by a deceased of such last will and testament under restraint
8 or undue influence or fraudulent representations, or for any other
9 cause affecting the validity of such will.

10 If no person shall appear within the time aforesaid, the pro-
11 bate or rejection of such will shall be binding and final.

12 Sec. 11.24.020 CITATIONS ON CONTEST. Upon the filing of the
13 petition referred to in RCW 11.24.010, a citation shall be issued to
14 the executors who have taken upon themselves the execution of the will
15 or to the administrators with the will annexed, and to all legatees
16 named in the will residing in the state, or to their guardians if any
17 of them are minors, or their personal representatives if any of them
18 are dead, requiring them to appear before the court, on a day therein
19 specified, to show cause why the petition should not be granted.

20 Sec. 11.24.030 BURDEN OF PROOF. In any such contest proceed-
21 ings the previous order of the court probating, or refusing to pro-
22 bate, such will shall be prima facie evidence of the legality of such
23 will, if probated, or its illegality, if rejected, and the burden of
24 proving the illegality of such will, if probated, or the legality of
25 such will, if rejected by the court, shall rest upon the person con-
26 testing such probation or rejection of the will.

27 Sec. 11.24.040 REVOCATION OF PROBATE. If, upon the trial of
28 said issue, it shall be decided that the will is for any reason invalid,
29 or that it is not sufficiently proved to have been the last will of
30 the testator, the will and probate thereof shall be annulled and re-
31 voked, and thereupon and thereafter the powers of the executor or
32 administrator with the will annexed shall cease, but such executor or
33 administrator shall not be liable for any act done in good faith

1 previous to such annulling or revoking.

2 Sec. 11.24.050 COSTS. If the probate be revoked or the will
3 annulled, assessment of costs shall be in the discretion of the court.
4 If the will be sustained, the court may assess the costs against the
5 contestant, including, unless it appears that the contestant acted
6 with probable cause and in good faith, such reasonable attorney's
7 fees as the court may deem proper.

8 Chapter 11.28

9 LETTERS TESTAMENTARY AND OF ADMINISTRATION

10 Sec. 11.28.010 LETTERS TO EXECUTORS--REFUSAL TO SERVE--DIS-
11 QUALIFICATION. After probate of any will, letters testamentary shall
12 be granted to the persons therein appointed executors. If a part of
13 the persons thus appointed refuse to act, or be disqualified, the let-
14 ters shall be granted to the other persons appointed therein. If all
15 such persons refuse to act, letters of administration with the will
16 annexed shall be granted to the person to whom administration would
17 have been granted if there had been no will.

18 Sec. 11.28.020 OBJECTIONS TO APPOINTMENT. Any person inter-
19 ested in a will may file objections in writing to the granting of let-
20 ters testamentary to the persons named as executors, or any of them,
21 and the objection shall be heard and determined by the court.

22 Sec. 11.28.030 COMMUNITY PROPERTY--WHO ENTITLED TO LETTERS--
23 WAIVER. A surviving spouse shall be entitled to administer upon the
24 community property, notwithstanding any provisions of the will to the
25 contrary, if the court find such spouse to be otherwise qualified; but
26 if such surviving spouse do not make application for such appointment
27 within forty days immediately following the death of the deceased
28 spouse, he or she shall be considered as having waived his or her right
29 to administer upon such community property. If any person, other than
30 the surviving spouse, make application for letters testamentary on such
31 property, prior to the expiration of such forty days, then the court,
32 before making any such appointment, shall require notice of such ap-
33 plication to be given the said surviving spouse, for such time and in

1 such manner as the court may determine, unless such applicant show to
2 the satisfaction of the court that there is no surviving spouse or
3 that he or she has in writing waived the right to administer upon such
4 community property.

5 Sec. 11.28.040 PROCEDURE DURING MINORITY OR ABSENCE OF EXECU-
6 TOR. If the executor be a minor or absent from the state, letters of
7 administration with the will annexed shall be granted, during the time
8 of such minority or absence, to some other person unless there be an-
9 other executor who shall accept the trust, in which case the estate
10 shall be administered by such other executor until the disqualifica-
11 tion shall be removed, when such minor, having arrived at full age, or
12 such absentee, having returned, shall be admitted as joint executor
13 with the former, provided a nonresident of this state may qualify as
14 provided in RCW 11.36.010.

15 Sec. 11. 28.050 POWERS OF REMAINING EXECUTORS ON REMOVAL OF
16 ASSOCIATE. When any of the executors named shall not qualify or hav-
17 ing qualified shall become disqualified or be removed, the remaining
18 executor or executors shall have the authority to perform every act
19 and discharge every trust required by the will, and their acts shall
20 be effectual for every purpose.

21 Sec. 11.28.060 ADMINISTRATION WITH WILL ANNEXED ON DEATH OF
22 EXECUTOR. No executor of an executor shall, as such, be authorized to
23 administer upon the estate of the first testator, but on the death of
24 the sole or surviving executor of any last will, letters of administra-
25 tion with the will annexed, on the estate of the first testator left
26 unadministered, shall be issued.

27 Sec. 11. 28.070 AUTHORITY OF ADMINISTRATOR WITH WILL ANNEXED.
28 Administrators with the will annexed shall have the same authority as
29 the executor named in the will would have had, and their acts shall be
30 as effectual for every purpose: PROVIDED, That they shall not lease,
31 mortgage, pledge, exchange, sell or convey any real or personal prop-
32 erty of the estate except under order of the court and pursuant to
33 procedure under existing laws pertaining to the administration of

1 estates in cases of intestacy, unless the powers expressed in the will
2 are directory and not discretionary.

3 Sec. 11.28.090 EXECUTION AND FORM OF LETTERS TESTAMENTARY.

4 Letters testamentary to be issued to executors under the provisions of
5 this chapter shall be signed by the clerk, and issued under the seal
6 of the court, and may be in the following form:

7 State of Washington, county of

8 In the superior court of the county of

9 Whereas, the last will of A B, deceased, was, on the
10 day of, A. D.,, duly exhibited, proven,
11 and recorded in our said superior court; and whereas, it appears in
12 and by said will that C D is appointed executor thereon, and, whereas,
13 said C D has duly qualified, now, therefore, know all men by these
14 presents, that we do hereby authorize the said C D to execute said
15 will according to law.

16 Witness my hand and the seal of said court this
17 day of, A.D. 19.....

18 Sec. 11.28.100 FORM OF LETTERS WITH WILL ANNEXED. Letters of
19 administration with the will annexed shall be in substantially the
20 same form as provided for letters testamentary.

21 Sec. 11.28.110 APPLICATION FOR LETTERS OF ADMINISTRATION. Ap-
22 plication for letters of administration shall be made by petition in
23 writing, signed and verified by the applicant or his attorney, and
24 filed with the court, which petition shall set forth the facts essen-
25 tial to giving the court jurisdiction of the case, and state, if known,
26 the names, ages and residences of the heirs of the deceased and that
27 the deceased died without a will.

28 Sec. 11.28.120 PERSONS ENTITLED TO LETTERS. Administration of
29 the estate of the person dying intestate shall be granted to some one
30 or more of the persons hereinafter mentioned, and they shall be respec-
31 tively entitled in the following order:

32 (1) The surviving husband or wife, or such person as he or she
33 may request to have appointed.

1 (2) The next of kin in the following order: (a) child or child-
2 ren; (b) father or mother; (c) brothers or sisters; (d) grandchildren;
3 (e) nephews or nieces.

4 (3) One or more of the principal creditors.

5 (4) If the persons so entitled shall fail for more than forty
6 days after the death of the intestate to present a petition for let-
7 ters of administration, or if it appear to the satisfaction of the
8 court that there are no relatives or next of kin, as above specified
9 eligible to appointment, or they waive their right, and there are no
10 principal creditor or creditors, or such creditor or creditors waive
11 their right, then the court may appoint any suitable person to adminis-
12 ter such estate.

13 Sec. 11.28.130 HEARING ON PETITION. When a petition for gen-
14 eral letters of administration or for letters of administration with
15 the will annexed shall be filed, the matter shall not be heard for at
16 least ten days thereafter and the clerk shall have authority to fix
17 the time of hearing: PROVIDED, That if the petition be presented by or
18 on behalf of the surviving spouse, the court may at once hear the mat-
19 ter, make appointment, and cause letters of administration to be is-
20 sued: PROVIDED FURTHER, That if there be a surviving spouse, and the
21 petition be presented by anyone other than the surviving spouse prior
22 to forty days after the death of the decedent, notice to the surviving
23 spouse shall be given of the time and place of such hearing at least
24 ten days before the hearing. The surviving spouse may waive notice of
25 hearing in a writing filed in the cause.

26 Sec. 11.28.140 FORM OF LETTERS OF ADMINISTRATION. Letters of
27 administration shall be signed by the clerk, and be under the seal of
28 the court, and may be substantially in the following form:

29 State of Washington, County of
30 Whereas, A.B., late ofon or about the
31 day ofA.D.,died intestate, leaving at the
32 time of his death, property in this state subject to administration:
33 Now, therefore, know all men by these presents, that we do hereby

1 appoint.....administrator upon said estate
2 and whereas said administrator has duly qualified, hereby authorize
3 him to administer the same according to law.

4 Witness my hand and the seal of said court thisday
5 ofA.D., 19.....

6 Sec. 11.28.150 REVOCATION OF LETTERS BY DISCOVERY OF WILL. If
7 after letters of administration are granted a will of the deceased be
8 found and probate thereof be granted, the letters shall be revoked and
9 letters testamentary or of administration with the will annexed, shall
10 be granted.

11 Sec. 11.28.160 CANCELLATION OF LETTERS OF ADMINISTRATION. The
12 court appointing any personal representative shall have authority for
13 any cause deemed sufficient, to cancel and annul such letters and ap-
14 point other personal representatives in the place of those removed.

15 Sec. 11.28.170 OATH OF PERSONAL REPRESENTATIVE. Before let-
16 ters testamentary or of administration are issued, each personal rep-
17 resentative or an officer of a bank or trust company qualified to act
18 as a personal representative, must take and subscribe an oath, before
19 some person authorized to administer oaths, that the duties of the
20 trust as personal representative will be performed according to law,
21 which oath must be filed in the cause and recorded.

22 Sec. 11.28.180 BOND OF PERSONAL REPRESENTATIVE--EXCEPTIONS.
23 Every person to whom letters testamentary or of administration are
24 directed to issue must, before receiving them, execute a bond to the
25 state of Washington, except as hereinafter provided, with such surety,
26 or sureties, as the court may judge sufficient, which bond shall be in
27 a sum to be fixed by the court, and which bond must be conditioned
28 that the personal representative shall faithfully execute the duties
29 of the trust according to law, and such bond shall be approved by the
30 court. The court may at any time and for any reason require the per-
31 sonal representative to give additional bonds, the same to be condi-
32 tioned and to be approved as above provided; or, the court may allow
33 a reduction of the bond upon proper showing. When the petition for

1 letters testamentary or of administration is made by or upon the writ-
2 ten request of the surviving spouse and the court is satisfied from
3 the petition and the evidence introduced at the hearing thereon that
4 the value of the estate does not exceed the exemptions allowed by law
5 to the surviving spouse, the court in its discretion may order that
6 letters testamentary or of administration be issued without bond; and
7 in all other estates where it appears from the petition for letters
8 testamentary or of administration and from the evidence submitted at
9 the hearing thereon that the value of the estate does not exceed five
10 hundred dollars and that the rights of heirs and creditors will not be
11 jeopardized thereby, the court may order that letters testamentary or
12 of administration be issued without bond; and in all cases where a
13 bank or trust company authorized to act as personal representative is
14 appointed as personal representative or acts as personal representative
15 under an appointment as such heretofore made, no bond shall be re-
16 quired.

17 Sec. 11. 28.190 EXAMINATION OF SURETIES--ADDITIONAL SECURITY--
18 COSTS. Before the judge approves any bond required under this chap-
19 ter, and after its approval, he may, of his own motion, or upon the
20 motion of any person interested in the estate, supported by affidavit
21 that the sureties, or some one or more of them, are not worth as much
22 as they have justified to, order a citation to issue, requiring such
23 sureties to appear before him at a designated time and place, to be
24 examined touching their property and its value; and the judge must, at
25 the same time, cause notice to be issued to the personal representa-
26 tive, requiring his appearance on the return of the citation, and on
27 its return he may examine the sureties and such witnesses as may be
28 produced touching the property of the sureties and its value; and if
29 upon such examination he is satisfied that the bond is insufficient he
30 must require sufficient additional security. If the bond and sure-
31 ties are found by the court to be sufficient, the costs incident to
32 such hearing shall be taxed against the party instituting such hear-
33 ing. As a part of such costs the sureties appearing shall be allowed

1 such fees and mileage as witnesses are allowed in civil proceedings:
2 PROVIDED, That when the citation herein referred to is issued on the
3 motion of the court, no costs shall be imposed.

4 Sec. 11.28.200 WAIVER OF BOND BY WILL. When it is expressly
5 provided in the will that no bonds shall be required of the executor,
6 letters testamentary may issue and sale of real estate be made and
7 confirmed without any bond, unless the court for good cause requires
8 one to be executed; but the executor may at any time afterwards, if
9 it appear from any cause necessary or proper, be required to file a
10 bond, as in other cases.

11 Sec. 11.28.210 NEW OR ADDITIONAL BOND. Any person interested
12 may at any time by verified petition to the court, or otherwise, com-
13 plain of the sufficiency of any bond or sureties thereon, and the
14 court may upon such petition, or upon its own motion, and with or with-
15 out hearing upon the matter, require the personal representative to
16 give a new, or additional bond, or bonds, and in all such matters the
17 court may act in its discretion and make such orders and citations as
18 to it may seem right and proper in the premises.

19 Sec. 11. 28.220 PERSONS DISQUALIFIED AS SURETIES. No judge of
20 the superior court, no sheriff, clerk of a court, or deputy of either,
21 and no attorney at law shall be taken as surety on any bond required
22 to be taken in any proceeding in probate.

23 Sec. 11. 28.230 BOND NOT VOID FOR WANT OF FORM--SUCCESSIVE RE-
24 COVERIES. No bond required under the provisions of this chapter, and
25 intended as such bond, shall be void for want of form, recital or con-
26 dition; nor shall the principal or surety on such account be discharged,
27 but all the parties thereto shall be held and bound to the full extent
28 contemplated by the law requiring the same, to the amount specified in
29 such bond. In all actions on such defective bond the plaintiff may
30 state its legal effect in the same manner as though it were a perfect
31 bond. The bond shall not be void upon the first recovery, but may be
32 sued and recovered upon, from time to time, by any person aggrieved in
33 his own name, until the whole penalty is exhausted.

1 Sec. 11.28.235 LIMITATION OF ACTION AGAINST SURETIES. All ac-
2 tions against sureties shall be commenced within six years after the
3 revocation or surrender of letters of administration or death of the
4 principal.

5 Sec. 11.28.237 NOTICE OF APPOINTMENT AS PERSONAL REPRESENTA-
6 TIVE. Within twenty days after his appointment, the personal repre-
7 sentative of the estate of a decedent shall cause written notice of
8 his said appointment, and of the pendency of said probate proceedings,
9 to be mailed to each heir, distributee, and, in addition, in the case
10 of a will, to each person named therein whose names and addresses are
11 known to him, and proof of such mailing shall be made by affidavit and
12 filed in the cause.

13 Sec. 11.28.240 REQUEST FOR SPECIAL NOTICE OF PROCEEDINGS IN
14 PROBATE. At any time after the issuance of letters testamentary or
15 of administration upon the estate of any decedent, any person inter-
16 ested in said estate as heir, devisee, distributee, legatee or credi-
17 tor whose claim has been duly served and filed, or attorney for such
18 heir, devisee, distributee, legatee, or creditor may serve upon the
19 personal representative (or upon the attorney for such personal rep-
20 resentative) and file with the clerk of the court wherein the adminis-
21 tration of such estate is pending, a written request stating that he
22 desires special notice of any or all of the following named matters,
23 steps or proceedings in the administration of said estate, to wit:

- 24 (1) Filing of petitions for sales, leases, exchanges or mort-
25 gages of any property of the estate.
26 (2) Petitions for any order of solvency.
27 (3) Filing of accounts.
28 (4) Filing of petitions for distribution.
29 (5) Petitions by the personal representative for family allow-
30 ances and homesteads.
31 (6) The filing of a declaration of completion.
32 (7) The filing of the inventory.
33 (8) Notice of presentation of personal representative's claim

1 against the estate.

2 (9) Petition to continue a going business.

3 (10) Petition to borrow upon the general credit of the estate.

4 Such requests shall state the post office address of such heir,
5 devisee, distributee, legatee or creditor, or his attorney, and there-
6 after a brief notice of the filing of any of such petitions, accounts,
7 declaration, inventory or claim, except petitions for sale of perish-
8 able property, or other personal property which will incur expense or
9 loss by keeping, shall be addressed to such heir, devisee, distributee,
10 legatee or creditor, or his attorney, at his stated post office address
11 and deposited in the United States post office, with the postage there-
12 on prepaid, at least ten days before the hearing of such petition, ac-
13 count or claim; or personal service of such notices may be made on
14 such heir, devisee, distributee, legatee, or creditor, or attorney, not
15 less than five days before such hearing, and such personal service
16 shall be equivalent to such deposit in the post office, and proof of
17 mailing or of personal service must be filed with the clerk before the
18 hearing of such petition, account or claim. If upon the hearing it
19 shall appear to the satisfaction of the court that the said notice has
20 been regularly given, the court shall so find in its order or judgment,
21 and such judgment shall be final and conclusive.

22 Sec. 11. 28.250 REVOCATION OF LETTERS--CAUSES. Whenever the
23 court has reason to believe that any personal representative has
24 wasted, embezzled, or mismanaged, or is about to waste, or embezzle the
25 property of the estate committed to his charge, or has committed, or
26 is about to commit a fraud upon the estate, or is incompetent to act,
27 or is permanently removed from the state, or has wrongfully neglected
28 the estate, or has neglected to perform any acts as such personal rep-
29 resentative, or for any other cause or reason which to the court ap-
30 pears necessary, it shall have power and authority, after notice and
31 hearing to revoke such letters. The manner of the notice and of the
32 service of the same and of the time of hearing shall be wholly in the
33 discretion of the court, and if the court for any such reasons revokes

1 such letters the powers of such personal representative shall at once
2 cease, and it shall be the duty of the court to immediately appoint
3 some other personal representative, as in this title provided.

4 Sec. 11.28.260 -----PROCEEDINGS IN COURT OR CHAMBERS. The
5 applications and acts authorized by RCW 11.28.250 may be heard and de-
6 termined in court or at chambers. All orders made therein must be en-
7 tered upon the minutes of the court.

8 Sec. 11.28.270 POWERS OF REMAINING PERSONAL REPRESENTATIVES IF
9 LETTERS TO ASSOCIATES REVOKED. If there be more than one personal rep-
10 resentative of an estate, and the letters to part of them be revoked or
11 surrendered, or a part die or in any way become disqualified, those
12 who remain shall perform all the duties required by law.

13 Sec. 11.28.280 ADMINISTRATOR DE BONIS NON. If the personal
14 representative of an estate dies, resigns, or the letters are revoked
15 before the settlement of the estate, letters of administration of the
16 estate remaining unadministered shall be granted to those to whom ad-
17 ministration would have been granted if the original letters had not
18 been obtained, or the person obtaining them had renounced administra-
19 tion, and the administrator de bonis non shall perform like duties and
20 incur like liabilities as the former personal representative, and shall
21 serve as administrator with will annexed de bonis non in the event a
22 will has been admitted to probate.

23 Sec. 11. 28.290 ACCOUNTING ON DEATH, RESIGNATION, OR REVOCATION
24 TION OF LETTERS. If any personal representative resign, or his let-
25 ters be revoked, or he die, he or his representatives shall account
26 for, pay, and deliver to his successor or to the surviving or remain-
27 ing personal representatives, all money and property of every kind,
28 and all rights, credits, deeds, evidences of debt, and papers of every
29 kind, of the deceased, at such time and in such manner as the court
30 shall order on final settlement with such personal representative or
31 his legal representatives.

32 Sec. 11. 28.300 PROCEEDINGS AGAINST DELINQUENT PERSONAL REPRE-
33 SENTATIVE. The succeeding administrator, or remaining personal

1 representative may proceed by law against any delinquent former per-
2 sonal representative, or his personal representatives, or the sureties
3 of either, or against any other person possessed of any part of the
4 estate.

5 Chapter 11.32

6 SPECIAL ADMINISTRATORS

7 Sec. 11.32.010 APPOINTMENT OF. When, by reason of an action
8 concerning the proof of a will, or from any other cause, there shall be
9 a delay in granting letters testamentary or of administration, the
10 judge may, in his discretion, appoint a special administrator (other
11 than one of the parties) to collect and preserve the effects of the
12 deceased; and in case of an appeal from the decree appointing such
13 special administrator, he shall, nevertheless, proceed in the execu-
14 tion of his trust until he shall be otherwise ordered by the appellate
15 court.

16 Sec. 11.32.020 BOND. Every such administrator shall, before
17 entering on the duties of his trust, give bond, with sufficient surety
18 or sureties, in such sum as the judge shall order, payable to the state
19 of Washington, with conditions as required of an executor or in other
20 cases of administration: PROVIDED, That in all cases where a bank or
21 trust company authorized to act as administrator is appointed special
22 administrator or acts as special administrator under an appointment as
23 such heretofore made, no bond shall be required.

24 Sec. 11.32.030 POWERS AND DUTIES. Such special administrator
25 shall collect all the goods, chattels, money, effects, and debts of
26 the deceased, and preserve the same for the personal representative
27 who shall thereafter be appointed; and for that purpose may commence
28 and maintain suits as an administrator, and may also sell such perish-
29 able and other goods as the court shall order sold, and make family
30 allowances under the order of the court. The appointment may be for
31 a specified time, to perform duties respecting specific property, or
32 to perform particular acts, as stated in the order of appointment.
33 Such special administrator shall be allowed such compensation for his

1 services as the said court shall deem reasonable, together with rea-
2 sonable fees for his attorney.

3 Sec. 11.32.040 SUCCESSION BY PERSONAL REPRESENTATIVE. Upon
4 granting letters testamentary or of administration the power of the
5 special administrator shall cease, and he shall forthwith deliver to
6 the personal representative all the goods, chattels, money, effects,
7 and debts of the deceased in his hands, and the personal representa-
8 tive may be admitted to prosecute any suit commenced by the special
9 administrator, in like manner as an administrator de bonis non is
10 authorized to prosecute a suit commenced by a former personal repre-
11 sentative. The estate shall be liable for obligations incurred by the
12 special administrator pursuant to the order of appointment or approved
13 by the court.

14 Sec. 11.32.050 NOT LIABLE TO CREDITORS. Such special adminis-
15 trator shall not be liable to an action by any creditor of the de-
16 ceased, and the time for limitation of all suits against the estate
17 shall begin to run from the time of granting letters testamentary or
18 of administration in the usual form, in like manner as if such special
19 administration had not been granted.

20 Sec. 11.32.060 TO RENDER ACCOUNT. The special administrator
21 shall also render an account, under oath, of his proceedings, in like
22 manner as other administrators are required to do.

23 Chapter 11.36

24 QUALIFICATIONS OF PERSONAL REPRESENTATIVES

25 Sec. 11.36.010 PARTIES DISQUALIFIED--RESULT OF DISQUALIFICA-
26 TION AFTER APPOINTMENT. The following persons are not qualified to
27 act as personal representatives: Corporations, minors, persons of un-
28 sound mind, or who have been convicted of any felony or of a misdemean-
29 or involving moral turpitude: PROVIDED, That trust companies regularly
30 organized under the laws of this state and national banks when auth-
31 orized so to do may act as the personal representative of decedents'
32 or incompetents' estates upon petition of any person having a right to
33 such appointment and may act as executors or guardians when so

1 appointed by will. But no trust company or national bank shall be en-
2 titled to qualify as such executor or guardian under any will hereafter
3 drawn by it, or its agents or employees, and no salaried attorney of
4 any such company shall be allowed any attorney fee for probating any
5 such will, or in relation to the administration or settlement of any
6 such estate, and no part of any attorney fee shall inure, directly or
7 indirectly, to the benefit of any trust company or national bank. And
8 when any person to whom letters testamentary or of administration have
9 been issued becomes disqualified to act because of becoming of unsound
10 mind, or being convicted of any crime or misdemeanor involving moral
11 turpitude, the court having jurisdiction shall revoke his or her let-
12 ters. A nonresident may be appointed to act as personal representa-
13 tive if he shall appoint an agent, who is a resident of the county
14 where such estate is being probated, or, who is an attorney of record
15 of the estate, upon whom service of all papers may be made; such ap-
16 pointment to be made in writing and filed by the clerk with other pa-
17 pers of such estate; and, unless bond has been waived as provided by
18 RCW 11.28.200, such nonresident personal representative shall file a
19 bond to be approved by the court.

20 Chapter 11.40

21 CLAIMS AGAINST ESTATE

22 Sec. 11.40.010 NOTICE TO CREDITORS--LIMITATION ON FILING

23 CLAIMS. Every personal representative shall, immediately after his
24 appointment, cause to be published in a legal newspaper published in
25 the county in which the estate is being administered, a notice that he
26 has been appointed and has qualified as such personal representative,
27 and therewith a notice to the creditors of the deceased, requiring all
28 persons having claims against the deceased to serve the same on the
29 personal representative or his attorney of record, and file with the
30 clerk of the court, together with proof of such service, within four
31 months after the date of the first publication of such notice. Such
32 notice shall be published once in each week for three successive weeks.
33 If a claim be not filed within the time aforesaid, it shall be barred.

1 Proof by affidavit of the publication of such notice shall be filed
2 with the court: PROVIDED, HOWEVER, In cases where all the property
3 is awarded to the widow, husband or children as in this title provid-
4 ed, the notice to creditors herein provided for may be omitted.

5 Sec. 11.40.020 AFFIDAVIT OF CLAIMANT. Every claim served
6 and filed as above provided shall be supported by the affidavit of
7 the claimant that the amount is justly due, that no payments have
8 been made thereon, and that there are no offsets to the same to the
9 knowledge of the claimant.

10 Sec. 11.40.030 ALLOWANCE OR REJECTION OF CLAIMS--FAILURE TO
11 ACT. When a claim, accompanied by the affidavit required in RCW
12 11.40.020 has been served and filed, it shall be the duty of the per-
13 sonal representative to indorse thereon his allowance or rejection,
14 with the day and date thereof. If he allow the claim, it shall be
15 presented to the judge of the court, who shall in the same manner
16 indorse on it his allowance or rejection, or he may by order allow
17 or reject the claim. If the personal representative reject the claim
18 in whole or in part, he shall notify the claimant forthwith of said
19 rejection and file in the office of the clerk an affidavit showing
20 such notification and the date thereof. Such notification shall be
21 by personal service or registered or certified mail and shall state
22 that the holder of the rejected claim must bring suit in the proper
23 court against the personal representative within thirty days after
24 notification of the rejection, otherwise the claim shall be forever
25 barred.

26 If the personal representative shall neglect for the period of
27 sixty days after service upon him or his attorney to act upon any such
28 claim, the claimant may take the matter up before the court and the
29 court may require the personal representative to act on such claim and
30 in its discretion may impose costs and attorney's fees.

31 Sec. 11.40.040 EFFECT OF ALLOWANCE. Every claim which has
32 been allowed by the personal representative and the said judge, shall
33 be ranked among the acknowledged debts of the estate to be paid in the

1 course of administration.

2 Sec. 11.40.050 JUDGE AS CREDITOR OF ESTATE. Any judge of a court
3 may present a claim against the estate of any decedent for allowance;
4 and if the personal representative allows such claim, he shall, in writ-
5 ing, designate some other judge of the superior court, who shall have the
6 same power to allow or reject it as he would have, had letters issued in
7 his court; and the claimant shall have, in the event of his claim being
8 rejected, all the rights incident to any other creditor against the estate.

9 Sec. 11.40.060 SUIT ON REJECTED CLAIM. When a claim is reject-
10 ed by either the personal representative or the court, the holder must
11 bring suit in the proper court against the personal representative
12 within thirty days after notification of the rejection, otherwise the
13 claim shall be forever barred.

14 Sec. 11.40.070 OUTLAWED CLAIMS. No claim shall be allowed by
15 the personal representative or court which is barred by the statute of
16 limitations.

17 Sec. 11.40.080 CLAIMS MUST BE PRESENTED. No holder of any
18 claim against a decedent shall maintain an action thereon, unless the
19 claim shall have been first presented as herein provided.

20 Sec. 11.40.090 LIMITATION TOLLED BY VACANCY. The time during
21 which there shall be a vacancy in the administration shall not be in-
22 cluded in any limitations herein prescribed.

23 Sec. 11.40.100 ACTION PENDING AT DEATH OF TESTATOR--SUBSTITU-
24 TION. If any action be pending against the testator or intestate at
25 the time of his death, the plaintiff shall within ninety days after
26 first publication of notice to creditors, serve on the personal rep-
27 resentative a motion to have such personal representative, as such,
28 substituted as defendant in such action, and, upon the hearing of such
29 motion, such personal representative shall be so substituted, unless,
30 at or prior to such hearing, the claim of plaintiff, together with
31 costs, be allowed by the personal representative and court. After the
32 substitution of such personal representative, the court shall proceed
33 to hear and determine the action as in other civil cases.

1 Sec. 11.40.110 PARTIAL ALLOWANCE OF CLAIM. Whenever any claim
2 shall have been filed and presented to a personal representative and
3 the court, and a part thereof shall be allowed, the amount of such al-
4 lowance shall be stated in the indorsement. If the creditor shall re-
5 fuse to accept the amount so allowed in satisfaction of his claim, he
6 shall recover no costs in any action he may bring against the personal
7 representative unless he shall recover a greater amount than that of-
8 fered to be allowed, exclusive of interest and costs.

9 Sec. 11.40.120 EFFECT OF JUDGMENT AGAINST PERSONAL REPRESENTA-
10 TIVE. The effect of any judgment rendered against any personal repre-
11 sentative shall be only to establish the amount of the judgment as an
12 allowed claim.

13 Sec. 11.40.130 JUDGMENT AGAINST DECEDENT--PAYMENT. When any
14 judgment has been rendered against the testator or intestate in his
15 lifetime, no execution shall issue thereon after his death, but it
16 shall be presented to the personal representative, as any other claim,
17 but need not be supported by the affidavit of the claimant, and if
18 justly due and unsatisfied, shall be paid in due course of administra-
19 tion: PROVIDED, HOWEVER, That if it be a lien on any property of the
20 deceased, the same may be sold for the satisfaction thereof, and the
21 officer making the sale shall account to the personal representative
22 for any surplus in his hands.

23 Sec. 11.40.140 CLAIM OF PERSONAL REPRESENTATIVE. If the per-
24 sonal representative is himself a creditor of the testator or intes-
25 tate, his claim, duly authenticated by affidavit, shall be filed and
26 presented for allowance or rejection to the judge of the court, and
27 its allowance by the judge shall be sufficient evidence of its correct-
28 ness. This section shall apply to nonintervention and all other wills.

29 Sec. 11.40.150 NOTICE TO CREDITORS WHEN PERSONAL REPRESENTA-
30 TIVE RESIGNS, DIES, OR IS REMOVED. In case of resignation, death or
31 removal for any cause of any personal representative, and the appoint-
32 ment of another or others, after notice has been given by publication
33 as required by RCW 11.40.010, by such personal representative first

1 appointed, to persons to file their claims against the decedent, it
2 shall be the duty of the successor or personal representative to cause
3 notice of such resignation, death or removal and such new appointment
4 to be published two successive weeks in a legal newspaper published in
5 the county in which the estate is being administered, but the time be-
6 tween the resignation, death or removal and such publication shall be
7 added to the time within which claims shall be filed as fixed by the
8 published notice to creditors unless such time shall have expired be-
9 fore such resignation or removal or death: PROVIDED, HOWEVER, That no
10 such notice shall be required if the period for filing claims was ful-
11 ly expired during the time that the former personal representative was
12 qualified.

13 Chapter 11.44

14 INVENTORY AND APPRAISEMENT

15 Sec. 11.44.015 INVENTORY. Within three months after his ap-
16 pointment, unless a longer time shall be granted by the court, every
17 personal representative shall make and return upon oath into the court
18 a true inventory of all of the property of the estate which shall have
19 come to his possession or knowledge, including a statement of all en-
20 cumbrances, liens or other secured charges against any item. Such
21 property shall be classified as follows:

- 22 (1) Real property, by legal description and assessed valuation
23 of land and improvements thereon;
24 (2) Corporation stock;
25 (3) Mortgages, bonds, notes and other written evidences of
26 debt;
27 (4) Bank accounts and money;
28 (5) Furniture and household goods;
29 (6) All other personal property accurately identified, in-
30 cluding the decedent's proportionate share in any partnership, but no
31 inventory of the partnership property shall be required of the person-
32 al representative.

33 Sec. 11.44.025 ADDITIONAL INVENTORY. Whenever any property

Engrossed Senate Bill No. 6
By Free Conference Committee

In the House amendment to Engrossed Senate Bill No. 6 by Representative Brachtenbach to page 45 of the printed and engrossed bills, after "by him" on line 6 of Sec. 11.44.070, strike all of the material down to and including "fees" on line 2, page 2 of the amendment.

Adopted March 11, 1965

House Amendment to Engrossed Senate Bill No. 6
By Representative Brachtenbach

Beginning on page 45, line 19 of the printed and engrossed bills strike all of Sections 11.44.055, 11.44.065, 11.44.070 and 11.44.080 and insert the following:

"Sec. 11.44.055. APPOINTMENT OF APPRAISER. The personal representative shall apply to the court for the appointment of a suitable disinterested person to appraise the property inventoried and the court shall appoint such appraiser.

If any part of the estate shall be in a county other than that in which the letters are issued, an appraiser residing in that county may be appointed or the same appraiser may act.

Sec. 11.44.060. The value of the estate and effects of deceased persons determined under the probate law shall be the value for appraisement and inheritance tax purposes, except where the same estate is valued for federal estate tax purposes, and the valuation is adjusted according to federal appraisement in accordance with RCW 83.40-.040.

Sec. 11.44.065. DUTIES OF APPRAISER. The appraiser shall determine and state in figures opposite each item contained in the inventory the fair net value thereof, as of the date of decedent's death, after deducting the encumbrances, liens and other secured charges thereon, and shall deliver such inventory and appraisement, certified by him under oath to the personal representative within thirty days following his appointment, unless a longer time shall be granted by the court.

Sec. 11.44.070. COMPENSATION OF APPRAISER. The appraiser shall receive as compensation for his service an amount as to the court shall seem just and reasonable, but not less than ten dollars nor more than one-tenth of one percent of the assets of the estate actually appraised by him: PROVIDED, That the valuation of moneys, bank and savings and loan association accounts, checks, bonds, and other

ESB No. 6 (cont.)

securities of fixed or readily determinable value shall not be used in computing any appraisal fees.

Sec. 11.44.080. DISPENSING WITH APPRAISEMENT. Where it is shown by the filing of the inventory, or other proof to the satisfaction of the court, that the whole estate consists of personal property of less value than one thousand dollars, exclusive of moneys, drafts, bank and savings and loan association accounts, checks, and of bonds or securities listed with a recognized securities market or exchange, an appraisement may be dispensed with, in the discretion of the court, and the court may accept the verified appraisal of the personal representative in lieu of an appraisal by an appraiser; and in such case the court need not appoint an appraiser or may revoke his appointment if already made."

Adopted 3/9/65

1 not mentioned in the inventory comes to the knowledge of a personal
2 representative, he shall cause the same to be inventoried and appraised
3 within thirty days after the discovery thereof, unless a longer time
4 shall be granted by the court.

5 Sec. 11.44.035 INVENTORY OR APPRAISEMENT MAY BE CONTRADICTED.
6 In an action against the personal representative where his administra-
7 tion of the estate, or any part thereof, is put in issue and the in-
8 ventory of the estate returned by him, or the appraisal thereof is
9 given in evidence, the same may be contradicted or avoided by evidence
10 Any party in interest in the estate may challenge the inventory or ap-
11 praisement at any stage of the probate proceedings.

12 Sec. 11.44.050 FAILURE TO RETURN INVENTORY--REVOCATION OF LET-
13 TERS. If any personal representative shall neglect or refuse to re-
14 turn the inventory within the period prescribed, or within such further
15 time as the court may allow, the court may revoke the letters tes-
16 tamentary or of administration; and the personal representative shall
17 be liable on his bond to any party interested for the injury sustained
18 by the estate through his neglect.

19 Sec. 11.44.055 APPOINTMENT OF APPRAISERS. The personal rep-
20 resentative shall apply to the court for the appointment of three suit-
21 able disinterested persons to appraise the property inventoried, one
22 of whom shall be the nominee of the supervisor of the inheritance tax
23 division of the tax commission of the state of Washington, unless said
24 supervisor waives his right to nominate an appraiser, and the court
25 shall appoint such appraisers.

26 If any part of the estate shall be in a county other than that
27 in which the letters are issued, appraisers residing in that county
28 may be appointed, or the same appraisers may act.

29 Sec. 11.44.065 DUTIES OF APPRAISERS. The appraisers shall de-
30 termine and state in figures opposite each item contained in the in-
31 ventory the fair net value thereof, as of the date of decedent's
32 death, after deducting the encumbrances, liens and other secured
33 charges thereon, and shall deliver such inventory and appraisalment,

1 certified by them under oath to the personal representative within
2 thirty days following their appointment, unless a longer time shall be
3 granted by the court.

4 Sec. 11.44.070 COMPENSATION OF APPRAISERS. The appraisers
5 shall be allowed such reasonable fees, necessary disbursements and ex-
6 penses as may be fixed by the court, which shall be paid by the per-
7 sonal representative as expenses of administration: PROVIDED, HOWEVER,
8 That in all estates appraised at over five thousand dollars, the ap-
9 praiser nominated by the supervisor of the inheritance tax division of
10 the tax commission of the state of Washington shall receive a fee of
11 one-tenth of one percent of the appraised value of the estate and no
12 more: AND PROVIDED FURTHER, That the valuation of moneys, drafts, bank
13 and savings and loan association accounts, checks, and of bonds or
14 securities listed with a recognized securities market or exchange
15 shall not be used in computing any appraisers fee.

16 Sec. 11.44.080 DISPENSING WITH APPRAISEMENT. Where it is
17 shown by the filing of the inventory, or other proof to the satisfac-
18 tion of the court, that the whole estate consists of personal proper-
19 ty of less value than one thousand dollars, exclusive of moneys, drafts
20 bank and savings and loan association accounts, checks, and of bonds
21 or securities listed with a recognized securities market or exchange,
22 an appraisal may be dispensed with in the discretion of the court
23 and the court may accept the verified appraisal of the personal repre-
24 sentative in lieu of an appraisal by appraisers; and in such case the
25 court need not appoint appraisers or may revoke their appointment if
26 already made.

27 Sec. 11.44.085 CLAIMS AGAINST PERSONAL REPRESENTATIVE TO BE
28 INCLUDED. The naming or the appointment of any person as personal
29 representative shall not operate as a discharge from any just claim
30 which the testator or intestate had against the personal representa-
31 tive, but the claim shall be included in the inventory and the person-
32 al representative shall be liable to the same extent as he would have
33 been had he not been appointed personal representative.

Senate Committee Amendment to Senate Bill No. 6
By Judiciary Committee

On page 46, Section 11.44.070, line 12, after
"more" strike all of the material down to and
including "fee" on line 15.

Adopted March 5, 1965

1 Sec. 11.44.090 DISCHARGE OF DEBT TO BE CONSTRUED AS SPECIFIC
2 BEQUEST AND INCLUDED. The discharge or bequest in a will of any debt
3 or demand of the testator against any executor named in his will or a-
4 gainst any person shall not be valid against the creditors of the de-
5 ceased, but shall be construed as a specific bequest of such debt or
6 demand, and the amount thereof shall be included in the inventory, and
7 shall, if necessary, be applied in payment of his debts; if not neces-
8 sary for that purpose, it shall be paid in the same manner and propor-
9 tions as other specific legacies.

10 Chapter 11.48

11 PERSONAL REPRESENTATIVES--GENERAL PROVISIONS--ACTIONS BY AND AGAINST

12 Sec. 11.48.010 GENERAL POWERS AND DUTIES. It shall be the
13 duty of every personal representative to settle the estate in his hands
14 as rapidly and as quickly as possible, without sacrifice to the es-
15 tate. He shall collect all debts due the deceased and pay all debts
16 as hereinafter provided. He shall be authorized in his own name to
17 maintain and prosecute such actions as pertain to the management and
18 settlement of the estate, and may institute suit to collect any debts
19 due the estate or to recover any property, real or personal, or for
20 trespass of any kind or character.

21 Sec. 11.48.020 RIGHT TO POSSESSION AND MANAGEMENT OF ESTATE.
22 Every personal representative shall, after having qualified, by giv-
23 ing bond as hereinbefore provided, have a right to the immediate pos-
24 session of all the real as well as personal estate of the deceased,
25 and may receive the rents and profits of the real estate until the
26 estate shall be settled or delivered over, by order of the court, to
27 the heirs or devisees, and shall keep in tenantable repair all houses,
28 buildings and fixtures thereon, which are under his control.

29 Sec. 11.48.025 CONTINUATION OF DECEDENT'S BUSINESS. Upon a
30 showing of advantage to the estate the court may authorize a personal
31 representative to continue any business of the decedent, other than
32 the business of a partnership of which the decedent was a member:
33 PROVIDED, That if decedent left a nonintervention will or a will

1 specifically authorizing a personal representative to continue any
2 business of decedent, and his estate is solvent, or a will providing
3 that the personal representative liquidate any business of decedent,
4 this section shall not apply.

5 The order shall specify:

6 (1) The extent of the authority of the personal representative
7 to incur liabilities;

8 (2) The period of time during which he may operate the busi-
9 ness;

10 (3) Any additional provisions or restrictions which the court
11 may, at its discretion, include.

12 Any interested person may for good cause require the personal
13 representative to show cause why the authority granted him should not
14 be limited or terminated. The order to show cause shall set forth the
15 manner of service thereof and the time and place of hearing thereon.

16 Sec. 11.48.030 CHARGEABLE WITH WHOLE ESTATE. Every personal
17 representative shall be chargeable in his accounts with the whole es-
18 tate of the deceased which may come into his possession. He shall not
19 be responsible for loss or decrease or destruction of any of the prop-
20 erty or effects of the estate, without his fault.

21 Sec. 11.48.040 NOT CHARGEABLE ON SPECIAL PROMISE TO PAY DECE-
22 DENT'S DEBTS UNLESS IN WRITING. No personal representative shall be
23 chargeable upon any special promise to answer damages, or to pay the
24 debts of the testator or intestate out of his own estate, unless the
25 agreement for that purpose, or some memorandum or note thereof, is in
26 writing and signed by such personal representative, or by some other
27 person by him thereunto specially authorized.

28 Sec. 11.48.050 ALLOWANCE OF NECESSARY EXPENSES. He shall be
29 allowed all necessary expenses in the care, management and settlement
30 of the estate.

31 Sec. 11.48.060 MAY RECOVER FOR EMBEZZLED OR ALIENATED PROPERTY
32 OF DECEDENT. If any person, before the granting of letters testamen-
33 tary or of administration, shall embezzle or alienate any of the

1 moneys, goods, chattels, or effects of any deceased person, he shall
2 stand chargeable, and be liable to the personal representative of the
3 estate, in the value of the property so embezzled or alienated, togeth-
4 er with any damage occasioned thereby, to be recovered for the benefit
5 of the estate.

6 Sec. 11.48.070 CONCEALED OR EMBEZZLED PROPERTY--PROCEEDINGS
7 FOR DISCOVERY. The court shall have authority to bring before it any
8 person or persons suspected of having in his possession or having con-
9 cealed, embezzled, conveyed or disposed of any of the property of the
10 estate of decedents or incompetents subject to administration under
11 this title, or who has in his possession or within his knowledge any
12 conveyances, bonds, contracts, or other writings which contain evi-
13 dence of or may tend to establish the right, title, interest or claim
14 of the deceased in and to any property. If such person be not in the
15 county in which the letters were granted, he may be cited and examined
16 either before the court of the county where found or before the court
17 issuing the order of citation, and if he be found innocent of the
18 charges he shall be entitled to recover costs of the estate, which
19 costs shall be fees and mileage of witnesses, statutory attorney's
20 fees, and such per diem and mileage for the person so charged as al-
21 lowed to witnesses in civil proceedings. Such party may be brought
22 before the court by means of citation such as the court may choose to
23 issue, and if he refuse to answer such interrogatories as may be put
24 to him touching such matters, the court may commithim to the county
25 jail, there to remain until he shall be willing to make such answers.

26 Sec. 11.48.080 UNCOLLECTIBLE DEBTS, LIABILITY FOR--PURCHASE OF
27 CLAIMS BY PERSONAL REPRESENTATIVE. No personal representative shall
28 be accountable for any debts due the estate, if it shall appear that
29 they remain uncollected without his fault. No personal representative
30 shall purchase any claim against the estate he represents, but the
31 personal representative may make application to the court for permis-
32 sion to purchase certain claims, and if it appears to the court to be
33 for the benefit of the estate that such purchase shall be made, the

1 court may make an order allowing such claims and directing that the
2 same may be purchased by the personal representative under such terms
3 as the court shall order, and such claims shall thereafter be paid as
4 are other claims, but the personal representative shall not profit
5 thereby.

6 Sec. 11.48.090 ACTIONS FOR RECOVERY OF PROPERTY AND ON CON-
7 TRACT. Actions for the recovery of any property or for the possession
8 thereof, and all actions founded upon contracts, may be maintained by
9 and against personal representatives in all cases in which the same
10 might have been maintained by and against their respective testators
11 or intestates.

12 Sec. 11.48.120 ACTION ON BOND OF PREVIOUS PERSONAL REPRESENTA-
13 TIVE. Any personal representative may in his own name, for the bene-
14 fit of all parties interested in the estate, maintain actions on the
15 bond of a former personal representative of the same estate.

16 Sec. 11.48.130 COMPROMISE OF CLAIMS. The court shall have
17 power to authorize the personal representative to compromise and com-
18 pound any claim owing the estate.

19 Sec. 11.48.140 RECOVERY OF DECEDENT'S FRAUDULENT CONVEYANCES.
20 When there shall be a deficiency of assets in the hands of a personal
21 representative, and when the deceased shall in his lifetime have con-
22 veyed any real estate, or any rights, or interest therein, with in-
23 tent to defraud his creditors or to avoid any right, duty or debt of
24 any person, or shall have so conveyed such estate, which deeds or con-
25 veyances by law are void as against creditors, the personal represent-
26 ative may, and it shall be his duty to, commence and prosecute to
27 final judgment any proper action for the recovery of the same, and
28 may recover for the benefit of the creditors all such real estate so
29 fraudulently conveyed, and may also, for the benefit of the creditors,
30 sue and recover all goods, chattels, rights and credits which may have
31 been so fraudulently conveyed by the deceased in his lifetime, what-
32 ever may have been the manner of such fraudulent conveyance.

33 Sec. 11.48.150 SEVERAL PERSONAL REPRESENTATIVES CONSIDERED AS

1 ONE. In an action against several personal representatives, they shall
2 all be considered as one person representing their testator or intes-
3 tate, and judgment may be given and execution issued against all of
4 them who are defendants in the action.

5 Sec. 11.48.160 DEFAULT JUDGMENT NOT EVIDENCE OF ASSETS--EXCEP-
6 TION. When a judgment is given against a personal representative for
7 want of answer, such judgment is not to be deemed evidence of assets
8 in his hands, unless it appear that the complaint alleged assets and
9 that the notice was served upon him.

10 Sec. 11.48.180 LIABILITY OF EXECUTOR DE SON TORT. No person
11 is liable to an action as executor of his own wrong for having taken,
12 received or interfered with the property of a deceased person, but is
13 responsible to the personal representatives of such deceased person for
14 the value of all property so taken or received, and for all injury
15 caused by his interference with the estate of the deceased.

16 Sec. 11.48.190 EXECUTOR OF EXECUTOR MAY NOT SUE FOR ESTATE OF
17 FIRST TESTATOR. An executor of an executor has no authority as such
18 to commence or maintain an action or proceeding relating to the estate
19 of the testator of the first executor, or to take any charge or con-
20 trol thereof.

21 Sec. 11.48.200 ARREST AND ATTACHMENT, WHEN, AUTHORIZED. In an
22 action against a personal representative as such, the remedies of ar-
23 rest and attachment shall not be allowed on account of the acts of his
24 testator or intestate, but for his own acts as such personal represent-
25 ative, such remedies shall be allowed for the same causes in the man-
26 ner and with like effect as in actions at law generally.

27 Sec. 11.48.210 COMPENSATION--ATTORNEY'S FEE. If testator by
28 will makes provision for the compensation of his personal representa-
29 tive, that shall be taken as his full compensation unless he files in
30 the court a written instrument renouncing all claim for the compensa-
31 tion provided by the will before qualifying as personal representative.
32 The personal representative, when no compensation is provided in the
33 will, or when he renounces all claim to the compensation provided in

1 the will, shall be allowed such compensation for his services as the
2 court shall deem just and reasonable. Additional compensation may be
3 allowed for his services as attorney and for other services not re-
4 quired of a personal representative. An attorney performing services
5 for the estate at the instance of the personal representative shall
6 have such compensation therefor out of the estate as the court shall
7 deem just and reasonable. Such compensation may be allowed at the
8 final account; but at any time during administration a personal repre-
9 sentative or his attorney may apply to the court for an allowance upon
10 the compensation of the personal representative and upon attorney's
11 fees. If the court finds that the personal representative has failed
12 to discharge his duties as such in any respect, it may deny him any
13 compensation whatsoever or may reduce the compensation which would
14 otherwise be allowed.

15 Chapter 11.52

16 PROVISIONS FOR FAMILY SUPPORT

17 Sec. 11.52.010 AWARD IN LIEU OF HOMESTEAD--AMOUNT--TIME FOR
18 FILING PETITION. If it is made to appear to the satisfaction of the
19 court that no homestead has been claimed in the manner provided by law,
20 either prior or subsequent to the death of the person whose estate is
21 being administered, then the court, after hearing and upon being satis-
22 fied that the funeral expenses, expenses of last sickness and of ad-
23 ministration have been paid or provided for, and upon petition for
24 that purpose, shall award and set off to the surviving spouse, if any,
25 property of the estate, either community or separate, not exceeding
26 the value of ten thousand dollars at the time of death, exclusive of
27 general taxes and special assessments which were liens at the time of
28 the death of the deceased spouse, and exclusive of any mortgage or
29 mechanic's, laborer's or materialmen's or vendor's liens upon the
30 property so set off, and exclusive of funeral expenses, expenses of
31 last sickness and administration, which expenses may be deducted from
32 the gross value in determining the value to be set off to the surviv-
33 ing spouse; provided that the court shall have no jurisdiction to make

1 such award unless the petition therefor is filed with the clerk within
2 six years from the date of the death of the person whose estate is be-
3 ing administered.

4 Sec. 11.52.012 AWARD--EFFECT--CONDITIONS UNDER WHICH AWARD MAY
5 BE DENIED OR REDUCED. Such award shall be made by an order or judg-
6 ment of the court and shall vest the absolute title, and thereafter
7 there shall be no further administration upon such portion of the es-
8 tate so set off, but the remainder of the estate shall be settled as
9 other estates: PROVIDED, That no property of the estate shall be award-
10 ed or set off, as in RCW 11.52.010 through 11.52.024 provided, to a
11 surviving spouse who has feloniously killed the deceased spouse: PRO-
12 VIDED FURTHER, That if it shall appear to the court, either (1) that
13 there are minor or incompetent children of the deceased by a former
14 marriage or by adoption prior to decedent's marriage to petitioner, or
15 (2) that the petitioning surviving spouse has abandoned his or her mi-
16 nor children or wilfully and wrongfully failed to provide for them, or
17 (3) if such surviving spouse or minor children are entitled to receive
18 property including insurance by reason of the death of the deceased
19 spouse in the sum of ten thousand dollars, or more, then the award in
20 lieu of homestead and exemptions shall lie in the discretion of the
21 court, and that whether there shall be an award and the amount thereof
22 shall be determined by the court, who shall enter such decree as shall
23 be just and equitable but not in excess of the award provided herein.

24 Sec. 11.52.014 AWARD--NOTICE OF HEARING--APPOINTMENT OF GUARD-
25 IAN AD LITEM FOR INCOMPETENTS. Notice of such hearing shall be given
26 in the manner prescribed in RCW 11.76.040. If there be any incompe-
27 tent heir of the decedent, the court shall appoint a guardian ad litem
28 for such incompetent heir, who shall appear at the hearing and repre-
29 sent the interest of such incompetent heir.

30 Sec. 11.52.016 AWARD--FINALITY--IS IN LIEU--EXEMPT FROM DEBTS
31 --WHICH LAW APPLIES. The order of judgment of the court making the
32 award or awards provided for in RCW 11.52.010 through 11.52.024 shall
33 be conclusive and final, except on appeal and except for fraud. The

1 awards in RCW 11.52.010 through 11.52.024 provided shall be in lieu of
2 all homestead provisions of the law and of exemptions. The said prop-
3 erty, when set aside as herein provided, shall be exempt from all
4 claims for the payment of any debt of the deceased or of the surviving
5 spouse existing at the time of death, whether such debt be individual
6 or community. Under RCW 11.52.010 through 11.52.024, the court shall
7 not award more property than could be awarded under the law in effect
8 at the time of the death of the deceased spouse.

9 Sec. 11.52.020 HOMESTEAD MAY BE AWARDED TO SURVIVOR--APPOINT-
10 MENT OF GUARDIAN AD LITEM. In event a homestead has been, or shall be
11 selected in the manner provided by law, whether the selection of such
12 homestead results in vesting the complete or partial title in the sur-
13 vivor, it shall be the duty of the court, upon petition of any person
14 interested, and upon being satisfied that the value thereof does not
15 exceed ten thousand dollars at the time of the death, exclusive of
16 general taxes and special assessments which were liens at the time of
17 the death of the deceased and exclusive of mortgages, mechanic's, la-
18 borer's, materialmen's or vendor's liens thereon, and exclusive of
19 funeral expenses, expenses of last sickness and of administration,
20 which expenses may be deducted from the gross value in determining the
21 value to be set off to the surviving spouse, to enter a decree, upon
22 notice as provided in RCW 11.52.014 or upon longer notice if the court
23 so orders, setting off and awarding such homestead to the survivor,
24 thereby vesting the title thereto in fee simple in the survivor: PRO-
25 VIDED, That if there be any incompetent heirs of the decedent, the
26 court shall appoint a guardian ad litem for such incompetent heir who
27 shall appear at the hearing and represent the interest of such incom-
28 petent heir.

29 Sec. 11.52.022 AWARD IN ADDITION TO HOMESTEAD--CONDITIONS UN-
30 DER WHICH SUCH AWARD MAY BE DENIED OR REDUCED. If the value of the
31 homestead, exclusive of all such liens, be less than ten thousand dol-
32 lars, the court, upon being satisfied that the funeral expenses, ex-
33 penses of last sickness and of administration, have been paid or

1 provided for, shall set off and award additional property, either sep-
2 arate or community, in lieu of such deficiency, so that the value of
3 the homestead, exclusive of all such liens and expenses when added to
4 the value of the other property awarded, exclusive of all such liens
5 and expenses shall equal ten thousand dollars: PROVIDED, That if it
6 shall appear to the court, either (1) there are incompetent children
7 of the deceased by a former marriage or by adoption prior to decedent's
8 marriage to petitioner, or (2) that the petitioning surviving spouse
9 has abandoned his or her minor children or wilfully and wrongfully
10 failed to provide for them, or (3) if such surviving spouse or incom-
11 petent children are entitled to receive property including insurance
12 by reason of the death of the deceased spouse in the sum of ten thou-
13 sand dollars, or more, then the award of property in addition to the
14 homestead, where the homestead is of less than ten thousand dollars
15 in value, shall lie in the discretion of the court, and that whether
16 there shall be an award in addition to the homestead and the amount
17 thereof shall be determined by the court, who shall enter such decree
18 as shall be just and equitable, but not in excess of the award provid-
19 ed herein.

20 Sec. 11.52.024 HOMESTEAD AND ADDITIONAL AWARD--FINALITY--IS IN
21 LIEU--EXEMPT FROM DEBTS--WHICH LAW APPLIES. Said decree shall parti-
22 cularly describe the said homestead and other property so awarded, and
23 such homestead and other property so awarded shall not be subject to
24 further administration, and such decree shall be conclusive and final,
25 except on appeal, and except for fraud, and such awards shall be in
26 lieu of all further homestead rights and of all exemptions. The prop-
27 erty in addition to the homestead, when set aside as herein provided,
28 shall be exempt from all claims for the payment of any debt of de-
29 ceased or of the surviving spouse existing at the time of death, wheth-
30 er such debt be individual or community. Under RCW 11.52.010 through
31 11.52.024, the court shall not award more property than could be a-
32 warded under the law in effect at the time of the death of the de-
33 ceased spouse.

1 Sec. 11.52.030 SUPPORT OF MINOR CHILDREN. If there be no sur-
2 viving spouse, the court shall award and set aside to the minor child
3 or children, if any, and in such proportions as he considers proper,
4 property of the estate as the court may consider necessary for the
5 care and support of said minor or minors until they become of legal
6 age, not exceeding in value the amount which the court is now or here-
7 after empowered to award to a surviving spouse.

8 Sec. 11.52.040 FURTHER ALLOWANCE FOR FAMILY MAINTENANCE. In
9 addition to the awards herein provided for, the court may make such
10 further reasonable allowance of cash out of the estate as may be nec-
11 essary for the maintenance of the family according to their circum-
12 stances, during the progress of the settlement of the estate, and any
13 such allowance shall be paid by the personal representative in pre-
14 ference to all other charges, except funeral charges, expenses of last
15 sickness and expenses of administration.

16 Sec. 11.52.050 CLOSURE OF ESTATE--DISCHARGE OF PERSONAL REPRESENTATIVE. If the net estate is set off under the provisions of RCW
17 11.52.010 through 11.52.030 to the surviving spouse or for incompetent
18 heirs, the court shall, at the time of making such award and without
19 any additional notice, close said estate and discharge the personal
20 representative.
21

22 Chapter 11.56
23 SALES, EXCHANGES, LEASES, MORTGAGES AND BORROWING
24 Sec. 11.56.005 AUTHORITY TO EXCHANGE. Whenever it shall ap-
25 pear upon the petition of the personal representative or of any per-
26 son interested in the estate to be to the best interests of the es-
27 tate to exchange any real or personal property of the estate for other
28 property, the court may authorize the exchange upon such terms and
29 conditions as it may prescribe, which include the payment or receipt
30 of part cash by the personal representative. If personal property of
31 the estate is to be exchanged, the procedure required by this chapter
32 for the sale of such property shall apply so far as may be; if real
33 property of the estate is to be exchanged, the procedure required by

Senate Committee Amendment to Senate Bill No. 6
By Judiciary Committee

On page 56, section 11.52.050, line 17, after "SENTATIVE." strike all of the material down to and including "representative." on line 21 and insert "If it is made to appear to the court that the amount of funeral expenses, expenses of last illness, expenses of administration, general taxes and special assessments which were liens at the time of the death of the deceased spouse together with the unpaid balance of any mortgage or mechanic's, laborer's or materialmen's, or vendor's liens upon the property to be set off under the provisions of RCW 11.52.010 through 11.52.024 together with the amount of the award to be made by the court under the provisions of RCW 11.52.010 through 11.52.040 shall be equal to the gross value of the decedent's estate subject to probate, then the court at the time of making such award shall enter its judgment setting aside all of the property of the estate, subject to the aforementioned charges, to the petitioner, shall order the estate closed, discharge the executor or administrator and exonerate the executor's or administrator's bond."

Adopted March 5, 1965

1 this chapter for the sale of such property shall apply so far as may
2 be.

3 Sec. 11.56.010 AUTHORITY TO SELL, LEASE OR MORTGAGE. The
4 court may order real or personal property sold, leased or mortgaged
5 for the purposes hereinafter mentioned but no sale, lease or mortgage
6 of any property of an estate shall be made except under an order of
7 the court, unless otherwise provided by law.

8 Sec. 11.56.015 PRIORITY. In determining what property of the
9 estate shall be sold, mortgaged or leased for any purpose provided by
10 RCW 11.56.020 and 11.56.030, there shall be no priority as between real
11 and personal property, except as provided by will, if any.

12 Sec. 11.56.020 SALE, LEASE OR MORTGAGE OF PERSONAL PROPERTY.
13 The court may at any time order any personal property, including for
14 purposes of this section a vendor's interest in a contract for the
15 sale of real estate, of the estate sold for the preservation of such
16 property or for the payment of the debts of the estate or the expenses
17 of administration or for the purpose of discharging any obligation of
18 the estate or for any other reason which may to the court seem right
19 and proper, and such order may be made either upon or without petition
20 therefor, and such sales may be either at public or private sale or by
21 negotiation and with or without notice of such sale, as the court may
22 determine, and upon such terms and conditions as the court may decide
23 upon. No notice of petition for sale of any personal property need be
24 given, except as provided in RCW 11.28.240, unless the court expressly
25 orders such notice.

26 Where personal property is sold prior to appraisement, the sale
27 price shall be deemed the value for appraisal. Personal property may
28 be mortgaged, pledged or leased for the same reasons and purposes, and
29 in the same manner as is hereinafter provided for real property.

30 Sec. 11.56.030 SALE, LEASE OR MORTGAGE OF REAL ESTATE--PETI-
31 TION--NOTICE--HEARING. Whenever it shall appear to the satisfaction
32 of the court that any portion or all of the real property should be
33 sold, mortgaged or leased for the purpose of raising money to pay the

1 debts and obligations of the estate, and the expenses of administra-
2 tion, inheritance and federal death tax or for the support of the fam-
3 ily, to make distribution, or for such other purposes as the court may
4 deem right and proper, the court may order the sale, lease or mortgage
5 of such portion of the property as appears to the court necessary for
6 the purpose aforesaid. It shall be the duty of the personal represent-
7 ative to present a petition to the court giving a description of all
8 the property of the estate and its character, the amount of the debts,
9 expenses and obligations of the estate and such other things as will
10 tend to assist the court in determining the necessity for the sale,
11 lease or mortgage and the amount thereof. Unless the court shall by
12 order expressly so provide, no notice of the hearing of such petition
13 for sale, lease or mortgage need be given, except as provided in RCW
14 11.28.240 hereof; if, however, the court should order notice of such
15 hearing, it shall determine upon the kind, character and time thereof.
16 At the hearing of such petition the court may have brought before it
17 such testimony or information as it may see fit to receive, for the
18 purpose of determining whether it should order any of the property of
19 the estate sold, leased or mortgaged. The absence of any allegation
20 in the petition shall not deprive the court of jurisdiction to order
21 said sale, lease or mortgage, and the court may, if it see fit, order
22 such sale, lease or mortgage without any petition having been previous-
23 ly presented.

24 Sec. 11.56.040 ORDER DIRECTING MORTGAGE. If the court should
25 determine that it is necessary or proper, for any of the said purposes
26 to mortgage any or all of said property, it may make an order direct-
27 ing the personal representative to mortgage such thereof as it may de-
28 termine upon, and such order shall contain the terms and conditions of
29 such transaction and authorize the personal representative to execute
30 and deliver his note or notes and secure the same by mortgage, and
31 thereafter it shall be the duty of such personal representative to com-
32 ply with such order. The personal representative shall not deliver
33 any such note, mortgage or other evidence of indebtedness until he has

1 first presented same to the court and obtained its approval of the
2 form. Every mortgage so made and approved shall be effectual to mort-
3 gage and encumber all the right, title and interest of the said es-
4 tate in the property described therein at the time of the death of the
5 said decedent, or acquired by his estate, and no irregularity in the
6 proceedings shall impair or invalidate any mortgage given under such
7 order of the court and approved by it.

8 Sec. 11.56.045 ORDER DIRECTING LEASE. If the court should de-
9 termine that it is necessary or proper, for any of the said purposes
10 to lease any or all of said property, it may make an order directing
11 the personal representative to lease such thereof as it may determine
12 upon, and such order shall contain the terms and conditions of such
13 transaction and authorize the personal representative to execute the
14 lease and thereafter it shall be the duty of the personal represent-
15 ative to comply with such order. The personal representative shall
16 not execute such lease until he has first presented the same to the
17 court and obtained its approval of the form.

18 Sec. 11.56.050 ORDER DIRECTING SALE. If the court should de-
19 termine that it is necessary to sell any or all of the real estate for
20 the purposes mentioned in this title, then it may make and cause to be
21 entered an order directing the personal representative to sell so much
22 of the real estate as the court may determine necessary for the pur-
23 poses aforesaid. Such order shall give a particular description of
24 the property to be sold and the terms of such sale and shall provide
25 whether such property shall be sold at public or private sale, or by
26 negotiation. The court shall order sold that part of the real estate
27 which is generally devised, rather than any part which may have been
28 specifically devised, but the court may, if it appears necessary, sell
29 any or all of the real estate so devised. After the giving of such
30 order it shall be the duty of the personal representative to sell such
31 real estate in accordance with the order of the court and as in this
32 title provided with reference to the public or private sales of real
33 estate.

1 Sec. 11.56.060 PUBLIC SALES--NOTICE. When real property is
2 directed to be sold by public sale, notice of the time and place of
3 such sale shall be published in a legal newspaper of the county in
4 which the estate is being administered, once each week for three suc-
5 cessive weeks before such sale, in which notices the property ordered
6 sold shall be described with proper certainty: PROVIDED, That where
7 real property is located in a county other than the county in which
8 the estate is being administered, publication shall also be made in
9 a legal newspaper of that county. At the time and place named in such
10 notices for the said sale, the personal representative shall proceed
11 to sell the property upon the terms and conditions ordered by the
12 court, and to the highest and best bidder. All sales of real estate
13 at public sale shall be made at the front door of the court house of
14 the county in which the lands are, unless the court shall by order
15 otherwise direct.

16 Sec. 11.56.070 POSTPONEMENT, ADJOURNMENT OF SALE--NOTICE. The
17 personal representative, should he deem it for the best interests of
18 all concerned, may postpone such sale to a time fixed but not to ex-
19 ceed twenty days, and such postponement shall be made by proclamation
20 of the personal representative at the time and place first appointed
21 for the sale; if there be an adjournment of such sale for more than
22 three days, then it shall be the duty of the personal representative
23 to cause a notice of such adjournment to be published in a legal news-
24 paper in the county in which notice was published as provided in RCW
25 11.56.060, in addition to making such proclamation.

26 Sec. 11.56.080 PRIVATE SALES OF REALTY--NOTICE--BIDS. When a
27 sale of real property is ordered to be made at private sale, notice of
28 the same must be published in a legal newspaper of the county in which
29 the estate is being administered, once a week for at least two succes-
30 sive weeks before the day on or after which the sale is to be made, in
31 which the lands and tenements to be sold must be described with com-
32 mon certainty: PROVIDED, That where real property is located in a
33 county other than the county in which the estate is being administered;

1 publication shall also be made in a legal newspaper of that county.
2 The notice must state the day on or after which the sale will be made
3 and the place where offers or bids will be received. The day last re-
4 ferred to must be at least fifteen days from the first publication of
5 notice and the sale must not be made before that day, but if made,
6 must be made within twelve months thereafter. The bids or offers must
7 be in writing, and may be left at the place designated in the notice
8 or delivered to the personal representative personally, or may be
9 filed in the office of the clerk of the court to which the return of
10 sale must be made, at any time after the first publication of the no-
11 tice and before the making of the sale. If it be shown that it will
12 be for the best interest of the estate the court or judge may, by an
13 order, shorten the time of notice, which shall not, however, be less
14 than one week, and may provide that the sale may be made on or after
15 a day less than fifteen, but not less than eight days from the first
16 publication of the notice of sale, and the sale may be made to corre-
17 spond with such order.

18 Sec. 11.56.090 MINIMUM PRICE--PRIVATE SALE--SALE BY NEGOTIATION
19 --REAPPRAISEMENT. No sale of real estate at private sale or sale by
20 negotiation shall be confirmed by the court unless the gross sum of-
21 ferred is at least ninety percent of the appraised value thereof, nor
22 unless such real estate shall have been appraised within one year im-
23 mediately prior to such sale. If it has not been so appraised, or if
24 the court is satisfied that the appraisement is too high or too low,
25 appraisers may be appointed, and they must make an appraisement there-
26 of in the same manner as in the case of the original appraisement of
27 the estate, and which appraisement may be made at any time before the
28 sale or the confirmation thereof.

29 Sec. 11.56.100 CONFIRMATION OF SALE--APPROVAL--RESALE. The
30 personal representative making any sale of real estate, either at pub-
31 lic or private sale, or sale by negotiation shall within ten days af-
32 ter making such sale file with the clerk of the court his return of
33 such sale, the same being duly verified. In the case of a sale by

1 negotiation the personal representative shall publish a notice in one
2 issue of a legal newspaper of the county in which the estate is being
3 administered; such notice shall include the legal description of the
4 property sold, the selling price and the date after which the sale can
5 be confirmed: PROVIDED, That such confirmation date shall be at least
6 ten days after such notice is published. At any time after the expir-
7 ation of ten days from the publication of such notice, in the case of
8 sale by negotiation, and at any time after the expiration of ten days
9 from the filing of such return, in the case of public or private sale
10 the court may approve and confirm such sale and direct proper instru-
11 ments of transfer to be executed and delivered. But if the court shall
12 be of the opinion that the proceedings were unfair, or that the sum
13 obtained was disproportionate to the value of the property sold, or
14 if made at private sale or sale by negotiation that it did not sell
15 for at least ninety percent of the appraised value as in RCW 11.56.090
16 provided, and that a sum exceeding said bid by at least ten percent
17 exclusive of the expense of a new sale, may be obtained, the court may
18 refuse to approve or confirm such sale and may order a resale. On a
19 resale, notice shall be given and the sale shall be conducted in all
20 respects as though no previous sale had been made.

21 Sec. 11.56.110 OFFER OF INCREASED BID--DUTY OF COURT. If, at
22 any time before confirmation of any such sale, any person shall file
23 with the clerk of the court a bid on such property in an amount not
24 less than ten percent higher than the bid the acceptance of which was
25 reported by the return of sale and shall deposit with the clerk not
26 less than twenty percent of his bid, to be forfeited to the estate un-
27 less such bidder complies with his bid, the bidder whose bid was ac-
28 cepted shall be informed of such increased bid by registered or certi-
29 fied mail addressed to such bidder at any address which may have been
30 given by him at the time of making such bid. Such bidder then shall
31 have a period of five days, not including holidays, in which to make
32 and file a bid better than that of the subsequent bidder. After the
33 expiration of such five-day period the court may refuse to confirm the

1 sale reported in the return of sale and direct a sale to the person
2 making the best bid then on file, indicating which is the best bid,
3 and a sale made pursuant to such direction shall need no further con-
4 firmation. Instead of such a direction, the court, upon application
5 of the personal representative, may direct the reception of sealed
6 bids. Thereupon the personal representative shall mail notice by reg-
7 istered or certified mail to all those who have made bids on such prop-
8 erty informing them that sealed bids will be received by the clerk of
9 the court within ten days. At the expiration of such period the per-
10 sonal representative, in the presence of the clerk of the court, shall
11 open such bids as shall have been submitted to the clerk within the
12 time stated in the notice (whether by previous bidders or not) and
13 shall file a recommendation of the acceptance of the bid which he deems
14 best in view of the requirements of the particular estate. The court
15 may thereupon direct a sale to the bidder whose bid is deemed best by
16 the court and a sale made pursuant to such direction shall need no
17 confirmation: PROVIDED, HOWEVER, That the court shall consider the
18 net realization to the estate in determining the best bid.

19 Sec. 11.56.115 EFFECT OF CONFIRMATION. No petition or allega-
20 tion thereof for the sale of real estate shall be considered jurisdic-
21 tional, and confirmation by the court of any sale shall be absolutely
22 conclusive as to the regularity of all proceedings leading up to and in-
23 cluding such sale, and no instrument of conveyance of real estate made
24 after confirmation of sale by the court shall be open to attack upon
25 any grounds whatsoever except for fraud, and the confirmation by the
26 court of any such sale shall be conclusive proof that all statutory
27 provisions and all orders of the court with reference to such sale
28 have been complied with.

29 Sec. 11.56.120 CONVEYANCE AFTER CONFIRMATION OF SALE. Upon
30 the confirmation of any such sale the court shall direct the personal
31 representative to make, execute and deliver instruments conveying the
32 title to the person to whom such property may be sold, and such instru-
33 ments of conveyance shall be deemed to convey all the estate, rights

1 and interests of the testator or intestate at the death of the deceased
2 and any interest acquired by the estate.

3 Sec. 11.56.140 SALE, LEASE OR MORTGAGE OF REALTY TO PAY LEGACY.

4 When a testator shall have given any legacy by will that is effectual
5 to charge real estate, and his goods, chattels, rights and credits
6 shall be insufficient to pay such legacy, together with the debts and
7 charges of administration, the personal representative, with the will
8 annexed, may obtain an order to sell, mortgage or lease his real es-
9 tate for that purpose in the same manner and upon the same terms and
10 conditions as prescribed in this chapter in case of a sale, mortgage
11 or lease for the payments of the debts.

12 Sec. 11.56.150 APPROPRIATION TO PAY DEBTS AND EXPENSES. If
13 the provision made by the will or the estate appropriated be not suf-
14 ficient to pay the debts and expenses of administration and family ex-
15 penses, such part of the estate as shall not have been disposed of by
16 the will, if any, shall be appropriated for that purpose, according
17 to the provisions of this chapter.

18 Sec. 11.56.160 LIABILITY OF DEVISEES AND LEGATEES FOR DEBTS
19 AND EXPENSES. The estate, real and personal, given by the will to any
20 legatees or devisees, shall be held liable for the payment of the
21 debts, the expenses of administration and allowances to the family, in
22 proportion to the value or amount of the several devises or legacies,
23 if there shall not be other sufficient estate, except that specific
24 devises or legacies may be exempted, if it appear to the court neces-
25 sary to carry into effect the intention of the testator.

26 Sec. 11.56.170 CONTRIBUTION AMONG DEVISEES AND LEGATEES. When
27 the estate given by any will has been sold for the payment of debts
28 and expenses, all the devisees and legatees shall be liable to contri-
29 bute, according to their respective interests, to any devisee or lega-
30 tee from whom the estate devised to him may be taken for the payments
31 of the debts or expenses; and the court, when distribution is made,
32 shall by decree for that purpose, settle the amount of the several
33 liabilities and decree how much each person shall contribute.

1 Sec. 11.56.180 SALE OF DECEDENT'S CONTRACT INTEREST IN LAND.

2 If the deceased person at the time of his death was possessed of a
3 contract for the purchase of lands, his interest in such lands under
4 such contract may be sold on the application of his personal represent-
5 ative in the same manner as if he died seized of such lands; and the
6 same proceedings may be had for that purpose as are prescribed in this
7 title in respect to lands of which he died seized, except as herein-
8 after provided.

9 Sec. 11.56.210 ASSIGNMENT OF DECEDENT'S CONTRACT. Upon the
10 confirmation of such sale, the personal representative shall execute
11 to the purchaser an assignment of the contract and deed, which shall
12 vest in the purchaser, his heirs and assigns, all the right, title and
13 interest of the persons entitled to the interest of the deceased in
14 the land sold at the time of the sale, and such purchaser shall have
15 the same rights and remedies against the vendor of such lands as the
16 deceased would have had if living.

17 Sec. 11.56.220 REDEMPTION OF DECEDENT'S MORTGAGED ESTATE. If
18 any person die having mortgaged any real or personal estate, and shall
19 not have devised the same, or provided for any redemption thereof by
20 will, the court, upon the application of any person interested, may
21 order the personal representative to redeem the estate out of the as-
22 sets, if it should appear to the satisfaction of the court that such
23 redemption would be beneficial to the estate and not injurious to
24 creditors.

25 Sec. 11.56.230 SALE OR MORTGAGE TO EFFECT REDEMPTION. If it
26 shall be made to appear to the satisfaction of the court that it will
27 be to the interest of the estate of any deceased person to sell or
28 mortgage other personal estate or to sell or mortgage other real es-
29 tate of the decedent than that mortgaged by him to redeem the property
30 so mortgaged, the court may order the sale or mortgaging of any per-
31 sonal estate, or the sale or mortgaging of any real estate of the de-
32 cedent which it may deem expedient to be sold or mortgaged for such
33 purpose, which sale or mortgaging shall be conducted in all respects

1 as other sales or mortgages of like property ordered by the court.

2 Sec. 11.56.240 SALE OF MORTGAGED PROPERTY IF REDEMPTION INEX-
3 PEDIENT. If such redemption be not deemed expedient, the court shall
4 order such property to be sold at public or private sale, which sale
5 shall be with the same notice and conducted in the same manner as re-
6 quired in other cases of real estate or personal property provided for
7 in this title, and shall be sold subject to such mortgage, and the per-
8 sonal representative shall thereupon execute a conveyance thereof to
9 the purchaser, which conveyance shall be effectual to convey to the
10 purchaser all the right, title, and interest which the deceased had in
11 the property, and the purchase money, after paying the expenses of the
12 sale, shall be applied to the residue in due course of administration.

13 Sec. 11.56.250 SALES DIRECTED BY WILL. When property is di-
14 rected by will to be sold, or authority is given in the will to sell
15 property, the executor may sell any property of the estate without the
16 order of the court, and without any notice, and it shall not be nec-
17 essary under such circumstances to make any application to the court
18 with reference to such sales or have the same confirmed by the court.

19 Sec. 11.56.265 BROKERS FEE AND CLOSING EXPENSES--SALE, MORT-
20 GAGE OR LEASE. In connection with the sale, mortgage or lease of prop-
21 erty, the court may authorize the personal representative to pay, out
22 of the proceeds realized therefrom or out of the estate, the customary
23 and reasonable auctioneer's and broker's fees and any necessary expen-
24 ses for abstracting, title insurance, survey, revenue stamps and other
25 necessary costs and expenses in connection therewith.

26 Sec. 11.56.280 BORROWING ON GENERAL CREDIT OF ESTATE--PETITION
27 --NOTICE--HEARING. Whenever it shall appear to the satisfaction of
28 the court that money is needed to pay debts of the estate, expenses of
29 administration, inheritance tax, or estate tax, the court may by order
30 authorize the personal representative to borrow such money, on the
31 general credit of the estate, as appears to the court necessary for
32 the purposes aforesaid. The time for repayment, rate of interest and
33 form of note authorized shall be as specified by the court in its

1 order. The money borrowed pursuant thereto shall be an obligation of
2 the estate repayable with the same priority as unsecured claims filed
3 against the estate. It shall be the duty of the personal representa-
4 tive to present a petition to the court giving a description of all
5 the property of the estate and its character, the amount of the debts,
6 expenses and tax obligations and such other things as will tend to as-
7 sist the court in determining the necessity for the borrowing and the
8 amount thereof. Unless the court shall by order expressly so provide,
9 no notice of the hearing of such petition need be given, except to
10 persons who have requested notice under the provisions of RCW 11.28-
11 .240; if, however, the court should order notice of such hearing, it
12 shall determine upon the kind, character and time thereof. At the
13 hearing of such petition the court may have brought before it such
14 testimony or information as it may see fit to receive, for the fore-
15 going purpose. The absence of any allegation in the petition shall
16 not deprive the court of jurisdiction to authorize such borrowing.

17 Chapter 11.60

18 PERFORMANCE OF DECEDENT'S CONTRACTS

19 Sec. 11.60.010 ORDER FOR PERFORMANCE ON APPLICATION OF PERSON-
20 AL REPRESENTATIVE. If any person, who is bound by contract, in writ-
21 ing, shall die before performing said contract, the superior court of
22 the county in which the estate is being administered, may upon appli-
23 cation of the personal representative, without notice, make an order
24 authorizing and directing the personal representative to perform such
25 contract.

26 Sec. 11.60.020 PETITION, NOTICE AND HEARING WHEN PERSONAL REP-
27 RESENTATIVE FAILS TO MAKE APPLICATION. If the personal representative
28 fails to make such application, then any person claiming to be entitled
29 to such performance under such contract, may present a petition set-
30 ting forth the facts upon which such claim is predicated. Notice of
31 hearing shall be in accordance with the provisions of RCW 11.16.081.

32 Sec. 11.60.030 HEARING. At the time appointed for such hear-
33 ing, or at such other time as the same may be adjourned to, upon proof

1 of service of the notice as provided in RCW 11.16.081, the court shall
2 proceed to a hearing and determine the matter.

3 Sec. 11.60.040 CONVEYANCE OF REAL PROPERTY--EFFECT. In the
4 case of real property, a conveyance executed under the provisions of
5 this title shall so refer to the order authorizing the conveyance that
6 the same may be readily found, but need not recite the record in the
7 case generally, and the conveyance made in pursuance of such order
8 shall pass to the grantee all the estate, right, title and interest
9 contracted to be conveyed by the deceased, as fully as if the contract-
10 ing party himself were still living and executed the conveyance in pur-
11 suance of such contract.

12 Sec. 11.60.060 PROCEDURE ON DEATH OF PERSON ENTITLED TO PER-
13 FORMANCE. If the person entitled to performance shall die before the
14 commencement of the proceedings according to the provisions of this
15 title or before the completion of performance, any person who would
16 have been entitled to the performance under him, as heir, devisee, or
17 otherwise, in case the performance had been made according to the
18 terms of the contract, or the personal representative of such deceased
19 person, for the benefit of persons entitled, may commence such proceed-
20 ings, or prosecute the same if already commenced; and the performance
21 shall inure to the persons who would have been entitled to it, or to
22 the personal representative for their benefit.

23 Chapter 11.64

24 PARTNERSHIP PROPERTY

25 Sec. 11.64.002 INVENTORY AND APPRAISEMENT ON DEATH OF PARTNER
26 --FILING. Within thirty days after the death of a partner the surviv-
27 ing partner or partners shall file a verified inventory of the assets
28 of the partnership in the superior court in which letters testamentary
29 or of administration are issued on the estate of the decedent, or, if
30 no letters are issued, in the court of the county of which the dece-
31 dent was resident at the time of his death. The inventory shall state
32 the value of the assets as shown by the books of the partnership and a
33 list of the liabilities of the partnership. If letters testamentary

1 or of administration have been issued on the estate of the decedent,
2 the surviving partner or partners shall cause the assets of the part-
3 nership to be appraised in like manner as the individual property of a
4 deceased person, which appraisal shall include the value of the assets
5 of the partnership and a list of the liabilities. The appraisers ap-
6 pointed by the court under RCW 11.44 055 to appraise the property of
7 the deceased partner may appraise the partnership property, and the sur-
8 viving partner or partners shall file the inventory and appraisal with
9 the court in which the estate of the deceased partner is being adminis-
10 tered: PROVIDED, That if the surviving partner or partners cannot pre-
11 pare an inventory within thirty days after the death of the decedent,
12 the court may, on application made within said thirty day period and
13 for good cause shown, grant an extension of time not to exceed an ad-
14 ditional three months, within which time such inventory may be filed.

15 Sec. 11.64.008 SURVIVING PARTNER MAY CONTINUE IN POSSESSION--
16 ACCOUNTING. The surviving partner or partners may continue in posses-
17 sion of the partnership estate, pay its debts, and settle its business,
18 and shall account to the personal representative of the decedent and
19 shall pay over such balances as may, from time to time, be payable to
20 him. Upon the verified petition of the personal representative, or on
21 its own motion, the court, whenever it appears necessary, may order
22 the surviving partner or partners to account to said court.

23 Sec. 11.64.016 SECURITY MAY BE REQUIRED. If the surviving
24 partner or partners commit waste, or if it appears to the court that it
25 is for the best interest of the estate of the decedent, such court may
26 order the surviving partner or partners to give security for the faith-
27 ful settlement of the partnership affairs and the payment to the per-
28 sonal representative of any amount due the estate.

29 Sec. 11.64.022 FAILURE TO FILE INVENTORY, APPRAISAL, ETC.--
30 SHOW CAUSE--RECEIVER. If the surviving partner or partners fail or
31 refuse to file the inventory, list of liabilities or appraisal, or if
32 it appears proper to order the surviving partner or partners to ac-
33 count to the court or to file a bond, said court shall order a citation

1 to issue requiring the surviving partner or partners to appear and
2 show cause why they have not filed an inventory, list of liabilities
3 or appraisal or why they should not account to the court or file a
4 bond. The citation shall be served not less than ten days before the
5 return day designated therein. If the surviving partner or partners
6 neglect or refuse to file an inventory, list of liabilities or apprais-
7 al, or fail to account to the court or to file a bond, after they have
8 been directed to do so, they may be punished for a contempt or the
9 court may commit them to jail until they comply with the order of the
10 court. Where the surviving partner or partners fail to file a bond
11 after being ordered to do so by the court, the court may also appoint
12 a receiver of the partnership estate with like powers and duties of
13 receivers in equity, and order the costs and expenses of the proceed-
14 ings to be paid out of the partnership estate or out of the estate of
15 the decedent, or by the surviving partner or partners personally, or
16 partly by each of the parties.

17 Sec. 11.64.030 SURVIVOR MAY PURCHASE DECEASED'S INTEREST--PRO-
18 TECTION AGAINST PARTNERSHIP LIABILITIES. The surviving partner or the
19 surviving partners jointly, shall have the right at any time to peti-
20 tion the court to purchase the interests of a deceased partner in the
21 partnership. Upon such petition being presented the court shall, in
22 such manner as it sees fit, learn and by order fix the value of the
23 interest of the deceased over and above all partnership debts and obli-
24 gations, and the terms and conditions upon which the surviving partner
25 or partners may purchase, and thereafter the surviving partner or part-
26 ners shall have the preference right for such length of time as the
27 court may fix, to purchase the interest of the deceased partner at the
28 price and upon the terms and conditions fixed by the court. If any
29 such surviving partner be also the personal representative of the es-
30 tate of the deceased partner, such fact shall not affect his right to
31 purchase, or to join with the other surviving partners to purchase
32 such interest in the manner hereinbefore provided.

33 The court shall make such orders in connection with such sale

1 as it deems proper or necessary to protect the estate of the deceased
2 against any liability for partnership debts or obligations.

3 Sec. 11.64.040 SURVIVING PARTNER MAY OPERATE UNDER AGREEMENT
4 WITH ESTATE--TERMINATION. The court may, in instances where it is
5 deemed advisable, authorize and direct the personal representative of
6 the estate of a deceased partner to enter into an agreement with the
7 surviving partner or partners under which the surviving partner or
8 partners may continue to operate any going business of the former
9 partnership until the further order of the court. The court may, in
10 its discretion, revoke such authority and direction and thereby termi-
11 nate such agreement at any time by further order, entered upon the ap-
12 plication of the personal representative or the surviving partner or
13 partners or any interested person or on its own motion.

14 Chapter 11.68

15 SETTLEMENT OF ESTATES WITHOUT ADMINISTRATION

16 Sec. 11.68.010 SETTLEMENT WITHOUT COURT INTERVENTION--SOLVENCY
17 --CLOSING OF ESTATE. In all cases where it is provided in the last
18 will and testament of the deceased that the estate shall be settled in
19 a manner provided in such last will and testament, and that such es-
20 tate shall be settled without the intervention of any court or courts,
21 and where it duly appears to the court, by the inventory filed, and
22 other proof, that the estate is fully solvent, which fact may be es-
23 tablished by an order of the court on the filing of the inventory, it
24 shall not be necessary to take out letters testamentary or of adminis-
25 tration, except to admit the will to probate and to file a true inven-
26 tory of all the property of such estate and give notice to creditors
27 and to the body having charge of the collection of inheritance tax,
28 in the manner required by law.

29 After the probate of any such will and the filing of the inven-
30 tory all such estates may be managed and settled without the interven-
31 tion of the court, if the last will and testament so provides. How-
32 ever, when the estate is ready to be closed the court, upon applica-
33 tion, shall have authority and it shall be its duty, to make and cause

1 to be entered a decree finding and adjudging that all debts have been
2 paid, finding and adjudging also the heirs and those entitled to take
3 under the will and distributing the property to the persons entitled
4 thereto. Such decree shall be made after notice given as provided for
5 like decrees in the estates of persons dying intestate. If no appli-
6 cation for a final decree is filed, the executor shall, when the ad-
7 ministration of the estate has been completed, file a written declara-
8 tion to that effect, and thereupon his powers shall cease.

9 The obtaining of any interim order by the executor of a nonin-
10 tervention will shall not be deemed to be a waiver of the noninterven-
11 tion powers of such executor.

12 Sec. 11.68.020 EXECUTOR OF NONINTERVENTION WILL MAY DECLINE.
13 In all cases, if the party named in such will as executor declines to
14 execute the trust or dies or is otherwise disabled for any cause from
15 acting as such executor, letters testamentary or of administration
16 shall issue and the estate be settled as in other cases.

17 Sec. 11.68.030 PROCEDURE WHEN EXECUTOR RECREANT TO TRUST. If
18 the person named in the will fails to execute the trust faithfully and
19 to take care and promote the interest of all parties, then, upon peti-
20 tion of a creditor of the estate, or of any of the heirs, or of any
21 person on behalf of any minor heir, the court shall cite such person
22 to appear before it, and if, upon hearing of the petition it appears
23 that the trust in such will is not faithfully discharged, and that the
24 parties interested, or any of them, have been or are about to be dam-
25 aged by the doings of the executor, then, in the discretion of the
26 court, administration may be had and required as is required in the
27 administration of estates, and in all such cases the costs of the ci-
28 tation and hearing shall be charged against the party failing and neg-
29 lecting to execute the trust as required in the will.

30 Sec. 11.68.040 POWERS OF EXECUTOR UNDER NONINTERVENTION WILL--
31 PRESUMPTION OF NECESSITY. Executors acting under nonintervention wills
32 may, if the estate has been adjudged solvent, mortgage, lease, sell,
33 exchange, and convey the real and personal property of the testator,

1 and borrow money on the general credit of the estate, without an or-
2 der of the court for that purpose and without notice, approval, or
3 confirmation, and in all other respects administer and settle the es-
4 tate without the intervention of the court. The other party to any
5 such transaction and his successors in interest shall be entitled to
6 have it conclusively presumed that such transaction is necessary for
7 the administration of the estate.

8 Chapter 11.72

9 DISTRIBUTION BEFORE SETTLEMENT

10 Sec. 11.72.002 DELIVERY OF SPECIFIC PROPERTY TO DISTRIBUTEE
11 BEFORE FINAL DECREE. Upon application of the personal representative,
12 with or without notice as the court may direct, the court may order
13 the personal representative to deliver to any distributee who consents
14 to it, possession of any specific real or personal property to which
15 he is entitled under the terms of the will or by intestacy, provided
16 that other distributees and claimants are not prejudiced thereby. The
17 court may at any time prior to the decree of final distribution order
18 him to return such property to the personal representative, if it is
19 for the best interests of the estate. The court may require the dis-
20 tributee to give security for such return.

21 Sec. 11.72.006 PARTIAL DISTRIBUTION--DISTRIBUTION OF PART OF
22 ESTATE. After the expiration of the time limited for the filing of
23 claims and before final settlement of the accounts of the personal
24 representative, a partial distribution may be decreed, with notice to
25 interested persons, as the court may direct. Such distribution shall
26 be as conclusive as a decree of final distribution with respect to the
27 estate distributed except to the extent that other distributees and
28 claimants are deprived of the fair share or amount which they would
29 otherwise receive on final distribution. Before a partial distribution
30 is so decreed, the court may require that security be given for the
31 return of the property so distributed to the extent necessary to satis-
32 fy any distributees and claimants who may be prejudiced as aforesaid
33 by the distribution. In the event of a request for a partial

1 distribution asked by a person other than the personal representative
2 of the estate, the costs of such proceedings and a reasonable allow-
3 ance for attorneys fees shall be assessed against the applicant or ap-
4 plicants for the benefit of the estate.

5 Chapter 11.76

6 SETTLEMENT OF ESTATES

7 Sec. 11.76.010 REPORT OF PERSONAL REPRESENTATIVE--CONTENTS--
8 INTERIM REPORTS. Not less frequently than annually from the date of
9 qualification, unless a final report has theretofore been rendered, the
10 personal representative shall make, verify by his oath, and file with
11 the clerk of the court a report of the affairs of the estate. Such
12 report shall contain a statement of the claims filed and allowed and
13 all those rejected, and if it be necessary to sell, mortgage, lease or
14 exchange any property for the purpose of paying debts or settling any
15 obligations against the estate or expenses of administration or allow-
16 ance to the family, he may in such report set out the facts showing
17 such necessity and ask for such sale, mortgage, lease or exchange; such
18 report shall likewise state the amount of property, real and personal,
19 which has come into his hands, and give a detailed statement of all
20 sums collected by him, and of all sums paid out, and it shall state
21 such other things and matters as may be proper or necessary to give
22 the court full information regarding any transactions by him done or
23 which should be done. Such personal representative may at any time,
24 however, make, verify, and file any reports which in his judgment
25 would be proper or which the court may order to be made.

26 Sec. 11.76.020 NOTICE OF HEARING--SETTLEMENT OF REPORT. It
27 shall not be necessary for the personal representative to give any no-
28 tice of the hearing of any report prior to the final report, except as
29 in RCW 11.28.240 provided, but the court may require notice of the
30 hearing of any such report.

31 Sec. 11.76.030 FINAL REPORT AND PETITION FOR DISTRIBUTION--
32 CONTENTS. When the estate shall be ready to be closed, such personal
33 representative shall make, verify and file with the court his final

1 report and petition for distribution. Such final report and petition
2 shall, among other things, show that the estate is ready to be settled
3 and shall show any moneys collected since the previous report, and any
4 property which may have come into the hands of the personal represent-
5 ative since his previous report, and debts paid, and generally the con-
6 dition of the estate at that time. It shall likewise set out the names
7 and addresses, as nearly as may be, of all the legatees and devisees
8 in the event there shall have been a will, and the names and addresses
9 as nearly as may be, of all the heirs who may be entitled to share in
10 such estate, and shall give a particular description of all the prop-
11 erty of the estate remaining undisposed of, and shall set out such
12 other matters as may tend to inform the court of the condition of the
13 estate, and it may ask the court for a settlement of the estate and
14 distribution of property and the discharge of the personal representa-
15 tive. If the personal representative has been discharged without hav-
16 ing legally closed the estate, without having legally obtained an ad-
17 judication as to the heirs, or without having legally procured a de-
18 cree of distribution or final settlement the court may in its discre-
19 tion upon petition of any person interested, cause all such steps to be
20 taken in such estate as were omitted or defective.

21 Sec. 11.76.040 TIME AND PLACE OF HEARING--NOTICES. When such
22 final report and petition for distribution, or either, has been filed,
23 the court, or the clerk of the court, shall fix a day for hearing it
24 which must be at least twenty days subsequent to the day of the pub-
25 lication as hereinafter provided. Notice of the time and place fixed
26 for the hearing shall be given by the personal representative by pub-
27 lishing a notice thereof in a legal newspaper published in the county
28 for one publication at least twenty days preceding the time fixed for
29 the hearing. It shall state in substance that a final report and
30 petition for distribution have, or either thereof has, been filed with
31 the clerk of the court, and that the court is asked to settle such re-
32 port, distribute the property to the heirs or persons entitled thereto,
33 and discharge the personal representative, and it shall give the time

1 and place fixed for the hearing of such final report and petition and
2 shall be signed by the personal representative or the clerk of the
3 court.

4 Whenever a final report and petition for distribution, or
5 either, shall have been filed in the estate of a decedent and a day
6 fixed for the hearing of the same, the personal representative of such
7 estate shall, not less than twenty days before the hearing, cause to
8 be mailed a copy of the notice of the time and place fixed for hearing
9 to each heir, distributee, and, in addition, in the case of a will, to
10 each person named therein, whose names and addresses are known to him,
11 and proof of such mailing shall be made by affidavit and filed at or
12 before the hearing.

13 Sec. 11.76.050 HEARING ON FINAL REPORT--DECREE OF DISTRIBUTION.

14 Upon the date fixed for the hearing of such final report and petition
15 for distribution, or either thereof, or any day to which such hearing
16 may have been adjourned by the court, if the court be satisfied that
17 the notice of the time and place of hearing has been given as provided
18 herein, it may proceed to the hearing aforesaid. Any person interested
19 may file objections to the said report and petition for distribution,
20 or may appear at the time and place fixed for the hearing thereof and
21 present his objections thereto. The court may take such testimony as
22 to it appears proper or necessary to determine whether the estate is
23 ready to be settled, and whether the transactions of the personal rep-
24 resentative should be approved, and to determine who are the legatees
25 or heirs or persons entitled to have the property distributed to them,
26 and the court shall, if it approves such report, and finds the estate
27 ready to be closed, cause to be entered a decree approving such report
28 find and adjudge the persons entitled to the remainder of the estate,
29 and that all debts have been paid, and by such decree shall distribute
30 the real and personal property to those entitled to the same. Upon the
31 production of receipts from the beneficiaries or distributees for their
32 portions of the estate, the court shall, if satisfied with the correct-
33 ness thereof, adjudge the estate closed and discharge the personal

1 representative.

2 The court may, upon such final hearing, partition among the
3 persons entitled thereto, the estate held in common and undivided, and
4 designate and distribute their respective shares; or assign the whole
5 or any part of said estate to one or more of the persons entitled to
6 share therein. The person or persons to whom said estate is assigned
7 shall pay or secure to the other parties interested in said estate
8 their just proportion of the value thereof as determined by the court
9 from the appraisal, or from any other evidence which the court may
10 require.

11 If it shall appear to the court at or prior to any final hear-
12 ing that the estate cannot be fairly divided, then the whole or any
13 part of said estate may be sold or mortgaged in the manner provided by
14 law for the sale or mortgaging of property by personal representatives
15 and the proceeds thereof distributed to the persons entitled thereto
16 as provided in the final decree.

17 The court shall have the authority to make partition, distribu-
18 tion and settlement of all estates in any manner which to the court
19 seems right and proper, to the end that such estates may be adminis-
20 tered and distributed to the persons entitled thereto. No estate shall
21 be partitioned, nor sale thereof made where partition is impracticable
22 except upon a hearing before the court and the court shall fix the
23 values of the several pieces or parcels to be partitioned at the time
24 of making such order of partition or sale; and may order the property
25 sold and the proceeds distributed, or may order partition and distri-
26 bute the several pieces or parcels, subject to such charges or burdens
27 as shall be proper and equitable.

28 The provisions of this section shall be concurrent with and not
29 in derogation of other statutes as to partition of property or sale.

30 Sec. 11.76.060 CONTINUANCE TO CITE IN SURETIES ON BOND WHEN
31 ACCOUNT INCORRECT. If, at any hearing upon any report of any personal
32 representative, it shall appear to the court before which said pro-
33 ceeding is pending that said personal representative has not fully

1 accounted to the beneficiaries of his trust and that said report
2 should not be approved as rendered, the court may continue said hear-
3 ing to a day certain and may cite the surety upon the bond of said
4 personal representative to appear upon the date fixed in said citation
5 and show cause why the account should not be disapproved and judgment
6 entered for any deficiency against said personal representative and
7 the surety upon his bond. Said citation shall be personally served
8 upon said surety in the manner provided by law for the service of sum-
9 mons in civil actions and shall be served not less than twenty days
10 previous to said hearing. At said hearing any interested party, in-
11 cluding the surety so cited, shall have the right to introduce any
12 evidence which shall be material to the matter before the court. If,
13 at said hearing, the report of said personal representative shall not
14 be approved and the court shall find that said personal representative
15 is indebted to the beneficiary of his trust in any amount, the court
16 may thereupon enter final judgment against said personal representative
17 and the surety upon his bond, which judgment shall be enforceable in
18 the same manner and to the same extent as judgments in ordinary civil
19 actions.

20 Sec. 11.76.070 ATTORNEY'S FEE TO CONTESTANT OF ERRONEOUS AC-
21 COUNT OR REPORT. If, in any probate or guardianship proceeding, any
22 personal representative shall fail or neglect to report to the court
23 concerning his trust and any beneficiary or other interested party
24 shall be reasonably required to employ legal counsel to institute le-
25 gal proceedings to compel an accounting, or if an erroneous account or
26 report shall be rendered by any personal representative and any bene-
27 ficiary of said trust or other interested party shall be reasonably
28 required to employ legal counsel to resist said account or report as
29 rendered, and upon a hearing an accounting shall be ordered, or the
30 account as rendered shall not be approved, and the said personal rep-
31 resentative shall be charged with further liability, the court before
32 which said proceeding is pending may, in its discretion, in addition
33 to statutory costs, enter judgment for reasonable attorney's fees in

1 favor of the person or persons instituting said proceedings and against
2 said personal representative, and in the event that the surety or
3 sureties upon the bond of said personal representative be made a party
4 to said proceeding, then jointly against said surety and said person-
5 al representative, which judgment shall be enforced in the same manner
6 and to the same extent as judgments in ordinary civil actions.

7 Sec. 11.76.080 REPRESENTATION OF INCOMPETENT BY GUARDIAN AD
8 LITEM. If there be any incompetent or person under disability inter-
9 ested in the estate who has no legally appointed guardian, the court
10 shall appoint some disinterested person, as guardian ad litem, to
11 represent such incompetent or person under disability, with reference
12 to any petition or proceeding in which the incompetent or person under
13 disability may have an interest, who, on behalf of the incompetent or
14 person under disability, may contest the same as any other person
15 interested might contest it, and who shall be allowed by the court
16 reasonable compensation for his services.

17 Sec. 11.76.090 DISTRIBUTION OF FIVE HUNDRED DOLLARS OR LESS TO
18 MINOR. When a decree of distribution is made by the court in adminis-
19 tration upon a decedent's estate and distribution is ordered to a per-
20 son under the age of twenty-one years, of a sum of five hundred dol-
21 lars or less, the court, in such order of distribution, shall order
22 the same paid to the clerk of the court wherein administration of such
23 estate is pending, and the same shall be paid by the clerk, for the
24 use and as the property of said minor, to the person named in said
25 order of distribution to receive the same, without requiring bond or
26 appointment of any guardian.

27 Sec. 11.76.095 DISTRIBUTION OF ESTATES TO MINORS. When a
28 decree of distribution is made by the court in administration upon a
29 decedent's estate or when distribution is made by an executor under a
30 nonintervention will and distribution is ordered under such decree or
31 authorized under such nonintervention will to a person under the age
32 of twenty-one years, and the value of such property or money is five
33 thousand dollars or less and there is no general guardian of the

1 incompetent, the court may require that

2 (1) the money be deposited in a bank or trust company or be
3 invested in an account in an insured savings and loan association for
4 the benefit of the incompetent subject to withdrawal only upon the
5 order of the court in the original probate proceeding, or

6 (2) in all other cases a general guardian shall be appointed
7 and qualify and the money or other property be paid or delivered to
8 such guardian prior to the discharge of the personal representative in
9 the original probate proceeding.

10 This section shall not bar distribution under RCW 11.76.090.

11 Sec. 11.76.100 RECEIPTS FOR EXPENSES TO BE PRODUCED BY PERSON-
12 AL REPRESENTATIVE. In rendering his accounts or reports the personal
13 representative shall produce receipts or canceled checks for the ex-
14 penses and charges which he shall have paid, which receipts shall be
15 filed and remain in court; however, he may be allowed any item of ex-
16 penditure, not exceeding twenty dollars, for which no receipt is pro-
17 duced, if such item be supported by his own oath, but such allowances
18 without receipts shall not exceed the sum of three hundred dollars in
19 any one estate.

20 Sec. 11.76.110 ORDER OF PAYMENT OF DEBTS. After payment of
21 costs of administration the debts of the estate shall be paid in the
22 following order:

23 (1) Funeral expenses in such amount as the court shall order.

24 (2) Expenses of the last sickness, in such amount as the court
25 shall order.

26 (3) Wages due for labor performed within sixty days immediately
27 preceding the death of decedent.

28 (4) Debts having preference by the laws of the United States.

29 (5) Taxes, or any debts or dues owing to the state.

30 (6) Judgments rendered against the deceased in his lifetime
31 which are liens upon real estate on which executions might have been
32 issued at the time of his death, and debts secured by mortgages in
33 the order of their priority.

1 (7) All other demands against the estate.

2 Sec. 11.76.120 LIMITATION ON PREFERENCE TO MORTGAGE OR JUDG-
3 MENT. The preference given in RCW 11.76.110 to a mortgage or judgment
4 shall only extend to the proceeds of the property subject to the lien
5 of such mortgage or judgment.

6 Sec. 11.76.130 EXPENSE OF MONUMENT. Personal representatives
7 of the estate of any deceased person are hereby authorized to expend a
8 reasonable amount out of the estate of the decedent to erect a monu-
9 ment or tombstone suitable to mark the grave or crypt of the said de-
10 cedent, and the expense thereof shall be paid as the funeral expenses
11 are paid.

12 Sec. 11.76.140 ALLOWANCE OF CLAIMS MUST PRECEDE PAYMENT. No
13 claim against the estate shall be paid until the same shall first have
14 been allowed by both the personal representative and the court.

15 Sec. 11.76.150 PAYMENT OF CLAIMS WHERE ESTATE INSUFFICIENT.
16 If the estate shall be insufficient to pay the debts of any class, each
17 creditor shall be paid in proportion to his claim, and no other credi-
18 tor of any lower class shall receive any payment until all those of
19 the preceding class shall have been fully paid.

20 Sec. 11.76.160 LIABILITY OF PERSONAL REPRESENTATIVE. Whenever
21 a decree shall have been made by the court for the payment of credi-
22 tors, the personal representative shall be personally liable to each
23 creditor for his claim or the dividend thereon, except when his inabil-
24 ity to make the payment thereof from the property of the estate shall
25 result without fault upon his part. The personal representative shall
26 likewise be liable on his bond to each creditor.

27 Sec. 11.76.170 ACTION ON CLAIM NOT ACTED ON--CONTRIBUTION. If,
28 after the accounts of the personal representative have been settled
29 and the property distributed, it shall appear that there is a creditor
30 or creditors whose claim or claims have been duly filed and not paid
31 or disallowed, the said claim or claims shall not be a lien upon any of
32 the property distributed, but the said creditor or creditors shall
33 have a cause of action against the personal representative and his

1 bond, for such an amount as such creditor or creditors would have been
2 entitled to receive had the said claim been duly allowed and paid, and
3 shall also have a cause of action against the distributees and credi-
4 tors for a contribution from them in proportion to the amount which
5 they have received. If the personal representative or his sureties
6 be required to make any payment in this section provided for, he or
7 they shall have a right of action against said distributees and credi-
8 tors to compel them to contribute their just share.

9 Sec. 11.76.180 ORDER MATURING CLAIM NOT DUE. If there be any
10 claim not due the court may in its discretion, after hearing upon such
11 notice as may be determined by it, mature such claim and direct that
12 the same be paid in the due course of the administration.

13 Sec. 11.76.190 PROCEDURE ON CONTINGENT AND DISPUTED CLAIMS.
14 If there be any contingent or disputed claim against the estate, the
15 amount thereof, or such part thereof as the holder would be entitled
16 to, if the claim were established or absolute, shall be paid into the
17 court, where it shall remain to be paid over to the party when he shall
18 become entitled thereto; or if he fail to establish his claim, to be
19 paid over or distributed as the circumstances of the case may require.

20 Sec. 11.76.200 AGENT FOR NONRESIDENT DISTRIBUTE. When any es-
21 tate has been or is about to be distributed by decree of the court as
22 provided in this chapter, to any person who has not been located, the
23 court shall appoint an agent for the purpose of representing the in-
24 terests of such person and of taking possession and charge of said
25 estate for the benefit of such absentee person: PROVIDED, That no
26 public official may be appointed as agent under this section.

27 Sec. 11.76.210 AGENT'S BOND. Such agent shall make, subscribe
28 and file an oath for the faithful performance of his duties, and shall
29 give a bond to the state, to be approved by the court, conditioned
30 faithfully to manage and account for such estate, before he shall be
31 authorized to receive any property of said estate.

32 Sec. 11.76.220 SALE OF UNCLAIMED ESTATE--REMITTANCE OF PRO-
33 CEEDS TO TAX COMMISSION. If the estate remains in the hands of the

1 agent unclaimed for three years, any property not in the form of cash
2 shall be sold under order of the court, and all funds, after deducting
3 a reasonable sum for expenses and services of the agent, to be fixed
4 by the court, shall be paid into the county treasury. The county
5 treasurer shall issue triplicate receipts therefor, one of which shall
6 be filed with the county auditor, one with the court, and one with the
7 tax commission. If the funds remain in the county treasury unclaimed
8 for a period of four years and ninety days, the county treasurer shall
9 forthwith remit them to the tax commission for deposit in the state
10 treasury in the fund in which escheats and forfeitures are by law re-
11 quired to be deposited.

12 Sec. 11.76.230 LIABILITY OF AGENT. The agent shall be liable
13 on his bond for the care and preservation of the estate while in his
14 hands, and for the payment of the funds to the county treasury, and
15 may be sued thereon by any person interested including the state.

16 Sec. 11.76.240 CLAIMANT TO PROCEEDS OF SALE. During the time
17 the estate is held by the agent, or within four years after it is de-
18 livered to the county treasury, claim may be made thereto only by the
19 absentee person or his legal representative, excepting that if it
20 clearly appears that such person died prior to the decedent in whose
21 estate distribution was made to him, but leaving lineal descendants
22 surviving, such lineal descendants may claim. If any claim to the es-
23 tate is made during the period specified above, the claimant shall
24 forthwith notify the tax commission in writing of such claim. The
25 court, being first satisfied as to the right of such person to the es-
26 tate, and after the filing of a clearance from the tax commission, shall
27 order the agent, or the county treasurer, as the case may be, to
28 forthwith deliver the estate, or the proceeds thereof, if sold, to
29 such person.

30 Sec. 11.76.243 HEIRS MAY INSTITUTE PROBATE PROCEEDINGS IF NO
31 CLAIMANT APPEARS. If no person appears to claim the estate within
32 four years after it is delivered to the county treasury, as provided
33 by RCW 11.76.240, any heirs of the absentee person may institute

1 probate proceedings on the estate of such absentee within ninety days
2 thereafter. The fact that no claim has been made to the estate by the
3 absentee person during the specified time shall be deemed prima facie
4 proof of the death of such person for the purpose of issuing letters
5 of administration in his estate. In the event letters of administra-
6 tion are issued within the period provided above, the county treasurer
7 shall make payment of the funds held by him to the administrator upon
8 being furnished a certified copy of the letters of administration.

9 Sec. 11.76.245 PROCEDURE WHEN CLAIM MADE AFTER TIME LIMITA-
10 TION. After any time limitation prescribed in RCW 11.76.220, 11.76-
11 .240 or 11.76.243, the absentee claimant may, at any time, if the as-
12 sets of the estate have not been claimed under the provisions of RCW
13 11.76.240 and 11.76.243, notify the tax commission of his claim to the
14 estate, and file in the court which had jurisdiction of the original
15 probate a petition claiming the assets of the estate. The tax commis-
16 sion may appear in answer to such petition. Upon proof being made to
17 the probate court that the claimant is entitled to the estate assets,
18 the court shall render its judgment to that effect and the assets
19 shall be paid to the claimant without interest, upon appropriation made
20 by the legislature.

21 Sec. 11.76.247 WHEN COURT RETAINS JURISDICTION AFTER ENTRY OF
22 DECREE OF DISTRIBUTION. After the entry of the decree of distribution
23 in the probate proceedings the court shall retain jurisdiction for the
24 purpose of carrying out the provisions of RCW 11.76.200, 11.76.210,
25 11.76.220, 11.76.230, 11.76.240, 11.76.243 and 11.76.245.

26 Sec. 11.76.250 LETTERS AFTER FINAL SETTLEMENT. A final settle-
27 ment of the estate shall not prevent a subsequent issuance of letters
28 of administration, should other property of the estate be discovered,
29 or if it should become necessary and proper from any cause that let-
30 ters should be again issued.

31 Chapter 11.80

32 ESTATES OF ABSENTEES

33 Sec. 11.80.010 PETITION--NOTICE--HEARING--APPOINTMENT OF

1 TRUSTEE. Whenever it shall be made to appear by petition to any judge
2 of the superior court of any county that there is property in such
3 county, either real or personal, that requires care and attention, or
4 is in such a condition that it is a menace to the public health, safe-
5 ty or welfare, or that the custodian of such property appointed by the
6 owner thereof is either unable or unwilling to continue longer in the
7 care and custody thereof, and that the owner of such property has ab-
8 sented himself from the county and that his whereabouts is unknown and
9 cannot with reasonable diligence be ascertained, which petition shall
10 state the name of the absent owner, his approximate age, his last
11 known place of residence, the circumstances under which he left and
12 the place to which he was going, if known, his business or occupation
13 and his physical appearance and habits so far as known, the judge to
14 whom such petition is presented shall set a time for hearing such pe-
15 tition not less than six weeks from the date of filing, and shall by
16 order direct that a notice of such hearing be published for three suc-
17 cessive weeks in a legal newspaper published in the county where such
18 petition is filed and in such other counties and states as will in the
19 judgment of the court be most likely to come to the attention of the
20 absentee or of persons who may know his whereabouts, which notice shall
21 state the object of the petition and the date of hearing, and set
22 forth such facts and circumstances as in the judgment of the court
23 will aid in identifying the absentee, and shall contain a request that
24 all persons having knowledge concerning the absentee shall advise the
25 court of the facts: PROVIDED, HOWEVER, That the court may, upon the
26 filing of said petition, appoint a temporary trustee, who shall have
27 the powers, duties and qualifications of a special administrator.

28 If it shall appear at such hearing that the whereabouts of the
29 absentee is unknown, but there is reason to believe that upon further
30 investigation and inquiry he may be found, the judge may continue the
31 hearing and order such inquiry and advertisement as will in his dis-
32 cretion be liable to disclose the whereabouts of the absentee, but
33 when it shall appear to the judge at such hearing or any adjournment

1 thereof that the whereabouts of the absentee cannot be ascertained, he
2 shall appoint a suitable person resident of the county as trustee of
3 such property, taking into consideration the character of the property
4 and the fitness of such trustee to care for the same, preferring in
5 such appointment the husband or wife of the absentee to his presumptive
6 heirs, the presumptive heirs to kin more remote, the kin to strangers,
7 and creditors to those who are not otherwise interested, provided they
8 are fit persons to have the care and custody of the particular proper-
9 ty in question and will accept the appointment and qualify as herein-
10 after provided.

11 Sec. 11.80.020 INVENTORY AND APPRAISEMENT--BOND OF TRUSTEE.

12 The trustee so appointed shall make, subscribe and file in the office
13 of the clerk of the court an oath for the faithful performance of his
14 duties, and shall, within such time as may be fixed by the judge, pre-
15 pare and file an inventory of such property, and the judge shall there-
16 upon appoint three disinterested and qualified persons to appraise
17 such property, and report their appraisal to the court within such
18 time as the court may fix. Upon the coming in of the inventory and
19 appraisal, the judge shall fix the amount of the bond to be given
20 by the trustee, which bond shall in no case be less than the appraised
21 value of the personal property and the annual rents and profits of the
22 real property, and the trustee shall thereupon file with the clerk of
23 the court a good and sufficient bond in the amount fixed and with sure-
24 ty to be approved by the court, conditioned for the faithful perform-
25 ance of his duties as trustee, and for accounting for such property,
26 its rents, issues, profits and increase.

27 Sec. 11.80.030 REPORTS OF TRUSTEE. The trustee shall, at the
28 expiration of one year from the date of his appointment and annually
29 thereafter and at such times as the court may direct, make and file a
30 report and account of his trusteeship, setting forth specifically the
31 amounts received and expended and the conditions of the property.

32 Sec. 11.80.040 SALE OF PROPERTY--APPLICATION OF PROCEEDS AND
33 INCOME. If necessary to pay debts against the absentee which have

1 been duly approved and allowed in the same form and manner as provided
2 for the approving and allowing of claims against the estate of a de-
3 ceased person or for such other purpose as the court may deem proper
4 for the preservation of the estate, the trustee may sell, lease or
5 mortgage real or personal property of the estate under order of the
6 court so to do, which order shall specify the particular property af-
7 fected and the method, whether by public sale, private sale or by ne-
8 gotiation, and the terms thereof, and the trustee shall hold the pro-
9 ceeds of such sale, after deducting the necessary expenses thereof,
10 subject to the order of the court. The trustee is authorized and em-
11 powered to, by order of the court, expend the proceeds received from
12 the sale of such property, and also the rents, issues and profits ac-
13 cruing therefrom in the care, maintenance and upkeep of the property,
14 so long as the trusteeship shall continue, and the trustee shall re-
15 ceive out of such property such compensation for his services and
16 those of his attorney as may be fixed by the court. The notices and
17 procedures in conducting sales, leases and mortgages hereunder shall
18 be as provided in chapter 11.56 RCW .

19 Sec. 11.80.050 ALLOWANCE FOR SUPPORT OF DEPENDENTS--SALE OF
20 PROPERTY. Whenever a petition is filed in said estate from which it
21 appears to the satisfaction of the court that the owner of such prop-
22 erty left a husband or wife, child or children, dependent upon such
23 absentee for support or upon the property in the estate of such ab-
24 sentee, either in whole or in part, the court shall hold a hearing on
25 said petition, after such notice as the court may direct, and upon
26 such hearing shall enter such order as it deems advisable and may or-
27 der an allowance to be paid out of any of the property of such estate,
28 either community or separate, as the court shall deem reasonable and
29 necessary for the support and maintenance of such dependent or depen-
30 dents, pending the return of the absentee, or until such time as the
31 property of said estate may be provisionally distributed to the pre-
32 sumptive heirs or to the devisees and legatees. Such allowance shall
33 be paid by the trustee to such persons and in such manner and at such

1 periods of time as the court may direct. For the purpose of carrying
2 out the provisions of this section the court may direct the sale of any
3 of the property of the estate, either real or personal, in accordance
4 with the provisions of RCW 11.80.040.

5 Sec. 11.80.055 CONTINUATION OF ABSENTEE'S BUSINESS--PERFORMANCE
6 OF ABSENTEE'S CONTRACTS. Upon a showing of advantage to the estate of
7 the absentee, the court may authorize the trustee to continue any busi-
8 ness of the absentee in accordance with the provisions of RCW 11.48-
9 .025. The trustee may also obtain an order allowing the performance
10 of the absentee's contracts in accordance with the provisions of chap-
11 ter 11.60 RCW.

12 Sec. 11.80.060 REMOVAL OR RESIGNATION OF TRUSTEE--FINAL AC-
13 COUNT. The court shall have the power to remove or to accept the res-
14 ignation of such trustee and appoint another in his stead. At the
15 termination of his trust, as hereinafter provided or in case of his
16 resignation or removal, the trustee shall file a final account, which
17 account shall be settled in the manner provided by law for settling
18 the final accounts of personal representatives.

19 Sec. 11.80.070 PERIOD OF TRUSTEESHIP. Such trusteeship shall
20 continue until such time as the owner of such property shall return or
21 shall appoint a duly authorized agent or attorney in fact to care for
22 such property, or until such time as the property shall be provision-
23 ally distributed to the presumptive heirs, or to the devisees and leg-
24 atees of the absentee as hereinafter provided, or until such time as
25 the property shall escheat to the state as hereinafter provided.

26 Sec. 11.80.080 PROVISIONAL DISTRIBUTION--NOTICE OF HEARING--
27 WILL. Whenever the owner of such property shall have been absent
28 from the county for the space of five years and his whereabouts are
29 unknown and cannot with reasonable diligence be ascertained, his pre-
30 sumptive heirs at law may apply to the court for an order of provi-
31 sional distribution of such property, and to be let into provisional
32 possession thereof: PROVIDED, That such provisional distribution may
33 be made at any time prior to the expiration of five years, when it

1 shall be made to appear to the satisfaction of the court that there
2 are strong presumptions that the absentee is dead; and in determining
3 the question of presumptive death, the court shall take into consider-
4 ation the habits of the absentee, the motives of and the circumstan-
5 ces surrounding the absence, and the reasons which may have prevented
6 the absentee from being heard of.

7 Notice of hearing upon application for provisional distribution
8 shall be published in like manner as notices for the appointment of
9 trustees are published.

10 If the absentee left a will in the possession of any person
11 such person shall present such will at the time of hearing of the ap-
12 plication for provisional distribution and if it shall be made to ap-
13 pear to the court that the absentee has left a will and the person in
14 possession thereof shall fail to present it, a citation shall issue
15 requiring him so to do, and such will shall be opened, read, proven,
16 filed and recorded in the case, as are the wills of decedents.

17 Sec. 11.80.090 HEARING--DISTRIBUTION--BOND OF DISTRIBUTEES. If
18 it shall appear to the satisfaction of the court upon the hearing of
19 the application for provisional distribution that the absentee has
20 been absent and his whereabouts unknown for the space of five years,
21 or there are strong presumptions that he is dead, the court shall en-
22 ter an order directing that the property in the hands of the trustee
23 shall be provisionally distributed to the presumptive heirs, or to the
24 devisees and legatees under the will, as the case may be, upon condi-
25 tion that such heirs, devisees and legatees respectively give and file
26 in the court bonds with good and sufficient surety to be approved by
27 the court, conditioned for the return of or accounting for the proper-
28 ty provisionally distributed in case the absentee shall return and de-
29 mand the same, which bonds shall be respectively in twice the amount
30 of the value of the personal property distributed, and in ten times
31 the amount of estimated annual rents, issues and profits of any real
32 property so provisionally distributed.

33 Sec. 11.80.100 FINAL DISTRIBUTION--NOTICE OF HEARING--DECREE.

1 Whenever the owner of such property shall have been absent from the
2 county for a space of seven years and his whereabouts are unknown and
3 cannot with reasonable diligence be ascertained, his presumptive heirs
4 at law or the legatees and devisees under the will, as the case may
5 be, to whom the property has been provisionally distributed, may ap-
6 ply to the court for a decree of final distribution of such property
7 and satisfaction, discharge and exoneration of the bonds given upon
8 provisional distribution. Notice of hearing of such application shall
9 be given in the same manner as notice of hearing of application for
10 the appointment of trustee and for provisional distribution and if at
11 the final hearing it shall appear to the satisfaction of the court that
12 the owner of the property has been absent and unheard of for the space
13 of seven years and his whereabouts are unknown, the court shall ex-
14 erate the bonds given on provisional distribution and enter a decree of
15 final distribution, distributing the property to the presumptive heirs
16 at law of the absentee or to his devisees and legatees, as the case
17 may be.

18 Sec. 11.80.110 ESCHEAT FOR WANT OF PRESUMPTIVE HEIRS. When-
19 ever the owner of such property for which a trustee has been appointed
20 under the provisions of this chapter shall have been absent and un-
21 heard of for a period of seven years and no presumptive heirs at law
22 have appeared and applied for the provisional distribution of such
23 property and no will of the absentee has been presented and proven,
24 the trustee appointed under the provisions of the chapter shall apply
25 to the court for a final settlement of his account and upon the settle-
26 ment of such final account the property of the absentee shall be es-
27 cheated in the manner provided by law for escheating property of per-
28 sons who die intestate leaving no heirs.

29 Chapter 11.84

30 INHERITANCE RIGHTS OF SLAYERS

31 Sec. 11.84.010 DEFINITIONS. As used in this chapter:

32 (1) "Slayer" shall mean any person who participates, either as
33 a principal or as an accessory before the fact, in the wilful and

1 unlawful killing of any other person.

2 (2) "Decedent" shall mean any person whose life is so taken.

3 (3) "Property" shall include any real and personal property
4 and any right or interest therein.

5 Sec. 11.84.020 SLAYER NOT TO BENEFIT FROM DEATH. No slayer
6 shall in any way acquire any property or receive any benefit as the
7 result of the death of the decedent, but such property shall pass as
8 provided in the sections following.

9 Sec. 11.84.030 SLAYER DEEMED TO PREDECEASE DECEDENT. The slayer
10 shall be deemed to have predeceased the decedent as to property
11 which would have passed from the decedent or his estate to the slayer
12 under the statutes of descent and distribution or have been acquired
13 by statutory right as surviving spouse or under any agreement made with
14 the decedent under the provisions of RCW 26.16.120 as it now exists or
15 is hereafter amended.

16 Sec. 11.84.040 DISTRIBUTION OF DECEDENT'S PROPERTY. Property
17 which would have passed to or for the benefit of the slayer by devise
18 or legacy from the decedent shall be distributed as if he had prede-
19 ceased the decedent.

20 Sec. 11.84.050 DISTRIBUTION OF PROPERTY HELD JOINTLY WITH
21 SLAYER. (1) One-half of any property held by the slayer and the de-
22 cedent as joint tenants, joint owners or joint obligees shall pass
23 upon the death of the decedent to his estate, and the other half shall
24 pass to his estate upon the death of the slayer, unless the slayer
25 obtains a separation or severance of the property or a decree granting
26 partition.

27 (2) As to property held jointly by three or more persons, in-
28 cluding the slayer and the decedent, any enrichment which would have
29 accrued to the slayer as a result of the death of the decedent shall
30 pass to the estate of the decedent. If the slayer becomes the final
31 survivor, one-half of the property shall immediately pass to the es-
32 tate of the decedent and the other half shall pass to his estate upon
33 the death of the slayer, unless the slayer obtains a separation or

1 severance of the property or a decree granting partition.

2 (3) The provisions of this section shall not affect any en-
3 forceable agreement between the parties or any trust arising because
4 a greater proportion of the property has been contributed by one party
5 than by the other.

6 Sec. 11.84.060 REVERSIONS AND VESTED REMAINDERS. Property in
7 which the slayer holds a reversion or vested remainder and would have
8 obtained the right of present possession upon the death of the dece-
9 dent shall pass to the estate of the decedent during the period of the
10 life expectancy of decedent; if he held the particular estate or if
11 the particular estate is held by a third person it shall remain in his
12 hands for such period.

13 Sec. 11.84.070 PROPERTY SUBJECT TO DIVESTMENT, ETC. Any inter-
14 est in property whether vested or not, held by the slayer, subject to
15 be divested, diminished in any way or extinguished, if the decedent
16 survives him or lives to a certain age, shall be held by the slayer
17 during his lifetime or until the decedent would have reached such age,
18 but shall then pass as if the decedent had died immediately thereaf-
19 ter.

20 Sec. 11.84.080 CONTINGENT REMAINDERS AND FUTURE INTERESTS. As
21 to any contingent remainder or executory or other future interest held
22 by the slayer, subject to become vested in him or increased in any way
23 for him upon the condition of the death of the decedent:

24 (1) If the interest would not have become vested or increased
25 if he had predeceased the decedent, he shall be deemed to have so pre-
26 deceased the decedent;

27 (2) In any case the interest shall not be vested or increased
28 during the period of the life expectancy of the decedent.

29 Sec. 11.84.090 PROPERTY APPOINTED--POWERS OF REVOCATION OR
30 APPOINTMENT. (1) Property appointed by the will of the decedent to
31 or for the benefit of the slayer shall be distributed as if the slayer
32 had predeceased the decedent.

33 (2) Property held either presently or in remainder by the

1 slayer, subject to be divested by the exercise by the decedent of a
2 power of revocation or a general power of appointment shall pass to
3 the estate of the decedent, and property so held by the slayer, sub-
4 ject to be divested by the exercise by the decedent of a power of ap-
5 pointment to a particular person or persons or to a class of persons,
6 shall pass to such person or persons, or in equal shares to the mem-
7 bers of such class of persons, exclusive of the slayer.

8 Sec. 11.84.100 INSURANCE PROCEEDS. (1) Insurance proceeds
9 payable to the slayer as the beneficiary or assignee of any policy or
10 certificate of insurance on the life of the decedent, or as the sur-
11 vivor of a joint life policy, shall be paid instead to the estate of
12 the decedent, unless the policy or certificate designate some person
13 other than the slayer or his estate as secondary beneficiary to him
14 and in which case such proceeds shall be paid to such secondary bene-
15 ficiary in accordance with the applicable terms of the policy.

16 (2) If the decedent is beneficiary or assignee of any policy
17 or certificate of insurance on the life of the slayer, the proceeds
18 shall be paid to the estate of the decedent upon the death of the slay-
19 er, unless the policy names some person other than the slayer or his
20 estate as secondary beneficiary, or unless the slayer by naming a new
21 beneficiary or assigning the policy performs an act which would have
22 deprived the decedent of his interest in the policy if he had been
23 living.

24 Sec. 11.84.110 PAYMENT BY INSURANCE COMPANY, BANK, ETC.--NO
25 ADDITIONAL LIABILITY. Any insurance company making payment according
26 to the terms of its policy or any bank or other person performing an
27 obligation for the slayer as one of several joint obligees shall not
28 be subjected to additional liability by the terms of this chapter if
29 such payment or performance is made without written notice, at its
30 home office or at an individual's home or business address, of the
31 killing by a slayer.

32 Sec. 11.84.120 RIGHTS OF PERSONS WITHOUT NOTICE DEALING WITH
33 SLAYER. The provisions of this chapter shall not affect the rights of

1 any person who, before the interests of the slayer have been adjudi-
2 cated, purchases or has agreed to purchase, from the slayer for value
3 and without notice property which the slayer would have acquired ex-
4 cept for the terms of this chapter, but all proceeds received by the
5 slayer from such sale shall be held by him in trust for the persons
6 entitled to the property under the provisions of this chapter, and
7 the slayer shall also be liable both for any portion of such proceeds
8 which he may have dissipated and for any difference between the actual
9 value of the property and the amount of such proceeds.

10 Sec. 11.84.130 RECORD OF CONVICTION AS EVIDENCE AGAINST CLAIM-
11 ANT OF PROPERTY. The record of his conviction of having participated
12 in the wilful and unlawful killing of the decedent shall be admissible
13 in evidence against a claimant of property in any civil action arising
14 under this chapter.

15 Sec. 11.84.900 CHAPTER NOT TO BE CONSTRUED AS PENAL. This
16 chapter shall not be considered penal in nature, but shall be construed
17 broadly in order to effect the policy of this state that no person
18 shall be allowed to profit by his own wrong, wherever committed.

19 Chapter 11.88

20 GUARDIANSHIP--APPOINTMENT, QUALIFICATION,

21 REMOVAL OF GUARDIANS

22 Sec. 11.88.010 AUTHORITY TO APPOINT. The superior court of
23 each county shall have power to appoint guardians for the persons and
24 estates, or either thereof, of incompetent persons resident of the
25 county, and guardians for the estates of all such persons who are non-
26 residents of the state but who have property in such county needing
27 care and attention.

28 An "incompetent" is any person who is either

- 29 (1) Under the age of majority, as defined in RCW 11.92.010, or
30 (2) Incapable by reason of insanity; mental illness, imbecil-
31 ity, idiocy, senility, habitual drunkenness, excessive use of drugs,
32 or other mental incapacity, of either managing his property or caring
33 for himself or both.

1 Sec. 11.88.020 QUALIFICATIONS. Any suitable person over the
2 age of twenty-one years, or any parent under the age of twenty-one
3 years may, if not otherwise disqualified, be appointed guardian of
4 the person and/or the estate of an incompetent; any trust company
5 regularly organized under the laws of this state and national banks
6 when authorized so to do may act as guardian of the estate of an in-
7 competent. No person is qualified to serve as a domiciliary guardian
8 who is

9 (1) under twenty-one years of age except as otherwise provided
10 herein;

11 (2) of unsound mind;

12 (3) convicted of a felony or of a misdemeanor involving moral
13 turpitude;

14 (4) a nonresident of this state who has not appointed a resi-
15 dent agent to accept service of process in all actions or proceedings
16 with respect to the estate and caused such appointment to be filed
17 with the court;

18 (5) a corporation not authorized to act as a fiduciary in the
19 state;

20 (6) a person whom the court finds unsuitable.

21 Sec. 11.88.030 PETITION--CONTENTS. Any interested person may
22 file a petition for the appointment of himself or some other qualified
23 person as guardian of an incompetent. Such petition shall state:

24 (1) The name, age, residence and post office address of the
25 incompetent;

26 (2) The nature of his incapacity in accordance with RCW 11.88-
27 .010;

28 (3) The approximate value and description of his property, in-
29 cluding any compensation, pension, insurance or allowance to which he
30 may be entitled;

31 (4) Whether there is, in any state, a guardian for the person
32 or estate of the incompetent;

33 (5) The residence and post office address of the person whom

1 petitioner asks to be appointed guardian;

2 (6) The names and addresses, so far as known or can be reason-
3 ably ascertained, of the persons most closely related by blood or mar-
4 riage to the incompetent;

5 (7) The name and address of the person or institution having
6 the care and custody of the incompetent;

7 (8) The reason why the appointment of a guardian is sought and
8 the interest of the petitioner in the appointment, and whether the
9 appointment is sought as guardian of the person, the estate, or both.

10 Sec. 11.88.040 NOTICE AND HEARING, WHEN REQUIRED--SERVICE.

11 Before appointing a guardian, notice of a hearing, to be held not less
12 than ten days after service thereof, shall be given by registered or
13 certified mail requesting a return receipt signed by the addressee
14 only, or by personal service in the manner provided for services of
15 summons, to the following:

16 (1) The incompetent or minor, if over fourteen years of age;

17 (2) A parent, if the incompetent is a minor, and the spouse
18 of the incompetent, if any;

19 (3) Any other person who has been appointed as guardian, or
20 the person having the care and custody of the incompetent, if any.

21 No notice need be given to those persons named in subsections (2) and

22 (3) of this section if they have signed the petition for the appoint-
23 ment of the guardian or have waived notice of the hearing. If the pe-

24 tition is by a parent asking for his appointment as guardian of a
25 minor child under the age of fourteen years, or if the petition be ac-

26 companied by the written consent of a minor of the age of fourteen
27 years or upward, consenting to the appointment of the guardian asked

28 for, or if the petition be by a nonresident guardian of any minor,
29 then the court may appoint the guardian without notice of the hearing.

30 The court for good cause may reduce the number of days of notice, but
31 in every case, at least three days notice shall be given. It shall

32 not be necessary that the person for whom guardianship is sought shall
33 be represented by a guardian ad litem in the proceedings.

1 Sec. 11.88.080 TESTAMENTARY GUARDIANS. When either parent is
2 deceased, the surviving parent of any minor child may, by his last will
3 in writing appoint a guardian or guardians of the person, or of the
4 estate or both, of his minor child, whether born at the time of making
5 such will or afterwards, to continue during the minority of such child
6 or for any less time, and every such testamentary guardian of the es-
7 tate of such child shall give bond in like manner and with like condi-
8 tions as required by RCW 11.88.100 and RCW 11.88.110, and he shall
9 have the same powers and perform the same duties with regard to the
10 person and estate of the minor as a guardian appointed as aforesaid.

11 Sec. 11.88.090 GUARDIAN AD LITEM. Nothing contained in RCW
12 11.88.080 through 11.88.120, 11.92.010 through 11.92.040, 11.92.060
13 through 11.92.120, 11.92.170 and 11.92.180 shall affect or impair the
14 power of any court to appoint a guardian to defend the interests of
15 any incompetent person interested in any suit or matter pending there-
16 in, or to commence and prosecute any suit in his behalf.

17 Sec. 11.88.100 OATH AND BOND OF GUARDIAN. Before letters of
18 guardianship are issued, each guardian shall take and subscribe an
19 oath and, unless dispensed with by order of the court as provided in
20 RCW 11.88.105, file a bond, with sureties to be approved by the court,
21 payable to the state, in such sum as the court may fix, taking into
22 account the character of the assets on hand or anticipated and the in-
23 come to be received and disbursements to be made, and such bond shall
24 be conditioned substantially as follows:

25 The condition of this obligation is such, that if the above
26 bound A.B., who has been appointed guardian for C.D., shall faithfully
27 discharge the office and trust of such guardian according to law and
28 shall render a fair and just account of his guardianship to the supe-
29 rior court of the county of , from time to
30 time as he shall thereto be required by such court, and comply with
31 all orders of the court, lawfully made, relative to the goods, chat-
32 tels, moneys, care, management, and education of such incompetent per-
33 son, or his or her property, and render and pay to such incompetent

1 person all moneys, goods, chattels, title papers, and effects which
2 may come into the hands or possession of such guardian, at such time
3 and in such manner as the court may order or adjudge, then this obli-
4 gation shall be void, otherwise to be and remain in full force and ef-
5 fect.

6 The bond shall be for the use of the incompetent person, and
7 shall not become void upon the first recovery, but may be put in suit
8 from time to time against all or any one of the obligors, in the name
9 and for the use and benefit of any person entitled by the breach there-
10 of, until the whole penalty is recovered thereon. The court may re-
11 quire an additional bond whenever for any reason it appears to the
12 court that an additional bond should be given.

13 Sec. 11.88.105 REDUCTION IN AMOUNT OF BOND. In cases where
14 all or a portion of the estate consisting of cash or securities or
15 both, has been placed in possession of savings and loan associations
16 or banks, trust companies, escrow corporations, or other corporations
17 approved by the court and a receipt is filed by the guardian in court
18 therefor stating that such corporations hold the same subject to order
19 of court then in such case the court may in its discretion dispense
20 with the giving of a bond or reduce the same by the amount of such de-
21 posits of cash or securities, and may order that no further reports by
22 said guardian be required until such time as the guardian desires to
23 withdraw such funds or change the investment thereof.

24 Sec. 11.88.107 WHEN BOND MAY BE DISPENSED WITH. In all cases
25 where a bank or trust company, authorized to act as guardian, is ap-
26 pointed as guardian, or acts as guardian under an appointment as such
27 heretofore made, no bond shall be required.

28 Sec. 11.88.110 LAW ON EXECUTORS' AND ADMINISTRATORS' BONDS
29 APPLICABLE. All the provisions of this title relative to bonds given
30 by executors and administrators shall apply to bonds given by guard-
31 ians.

32 Sec. 11.88.120 PROCEDURE ON REMOVAL OR DEATH OF GUARDIAN+-DE-
33 LIVERY OF ESTATE TO SUCCESSOR. The court in all cases shall have

House Amendment to Engrossed Senate Bill No. 6
By Representative Brachtenbach

On page 99, section 11.88.140, line 30 of the printed and engrossed bills, strike lines 30 and 31 and insert

"(a) Upon the attainment of full and legal age, as defined in RCW 11.92.010, of any person defined as an incompetent pursuant to RCW 11.88.010 solely by reason of youth, RCW 26.28.020 to the contrary notwithstanding."

Adopted 3/9/65

1 power to remove guardians for good and sufficient reasons, which shall
2 be entered of record, and to appoint others in their place or in the
3 place of those who may die, who shall give bond and security for the
4 faithful discharge of their duties as prescribed in RCW 11.88.100; and
5 when any guardian shall be removed or die, and a successor be appoint-
6 ed, the court shall have power to compel such guardian removed to de-
7 liver up to such successor all goods, chattels, moneys, title papers,
8 or other effects belonging to such incompetent person, which may be in
9 the possession of such guardian so removed, or of the personal repre-
10 sentatives of a deceased guardian, or in the possession of any other
11 person or persons, and upon failure, to commit the party offending to
12 prison, until he complies with the order of the court.

13 Sec. 11.88.130 TRANSFER OF JURISDICTION AND VENUE. The court
14 of any county having jurisdiction of any guardianship proceeding is
15 authorized to transfer jurisdiction and venue of the guardianship pro-
16 ceeding to the court of any other county of the state upon application
17 of the guardian and such notice to an incompetent or other interested
18 party as the court may require. Such transfers of guardianship pro-
19 ceedings shall be made to the court of a county wherein either the
20 guardian or incompetent resides, as the court may deem appropriate, at
21 the time of making application for such transfer. The original order
22 providing for any such transfer shall be retained as a permanent re-
23 cord by the clerk of the court in which such order is entered, and a
24 certified copy thereof together with the original file in such guard-
25 ianship proceeding and a certified transcript of all record entries up
26 to and including the order for such change shall be transmitted to the
27 clerk of the court to which such proceeding is transferred.

28 Sec. 11.88.140 TERMINATION OF GUARDIANSHIP. (1) Termination
29 without court order. A guardianship is terminated

30 (a) By the incompetent's becoming of full and legal age as de-
31 fined in RCW 11.92.010, RCW 26.28.020 to the contrary notwithstanding.

32 (b) By an adjudication of competency.

33 (c) By the death of the incompetent .

1 (2) Termination on court order. A guardianship may be termi-
2 nated by court order after such notice as the court may require

3 (a) If the guardianship is of the estate and the estate is
4 exhausted;

5 (b) If the guardianship is no longer necessary for any other
6 reason.

7 (3) Effect of termination. When a guardianship terminates
8 otherwise than by the death of the incompetent, the powers of the
9 guardian cease, except that a guardian of the estate may make disburse-
10 ments for claims that are or may be allowed by the court, for liabili-
11 ties already properly incurred for the estate or for the incompetent,
12 and for expenses of administration. When a guardianship terminates by
13 death of the incompetent, the guardian of the estate may proceed under
14 RCW 11.88.150, but the rights of all creditors against the incompe-
15 tent's estate shall be determined by the law of decedents' estates.

16 Sec. 11.88.150 ADMINISTRATION OF DECEASED INCOMPETENT'S
17 ESTATE. Upon the death of an incompetent intestate the guardian of
18 his estate has power under the letters issued to him and subject to
19 the direction of the court to administer the estate as the estate of
20 the deceased incompetent without further letters unless within forty
21 days after death of the incompetent a petition is filed for letters of
22 administration or for letters testamentary and the petition is granted.
23 If the guardian elects to administer the estate under his letters of
24 guardianship, he shall petition the court for an order transferring
25 the guardianship proceeding to a probate proceeding, and upon court
26 approval, a new file shall be opened, captioned in the deceased in-
27 competent's name, containing a copy of said order of transfer. The
28 guardian shall then be authorized to continue administration of the
29 estate without the necessity for any further petition or hearing. No-
30 tice to creditors and other persons interested in the estate shall be
31 published and may be combined with the notice of the guardian's final
32 account. This notice shall be published in the manner provided in
33 RCW 11.40.010, once each week for three successive weeks, with proof

Senate Committee Amendment to Senate Bill No. 6
By Judiciary Committee

On page 100, section 11.88.150, line 26, after "approval," strike all of the material down to and including "transfer" on line 27 and insert "the clerk of the court shall re-index the cause as a decedent's estate, using the same file number which is assigned to the guardianship proceeding"

Adopted Mar. 5, 1965

1 by affidavit of the publication of such notice to be filed with the
2 court. All claims which are not filed within four months after first
3 publication shall be barred against the estate. Upon the hearing, the
4 account may be allowed and the balance distributed to the persons en-
5 titled thereto, after the payment of such claims as may be allowed.
6 Liability on the guardian's bond shall continue until exonerated on
7 settlement of his account, and may apply to the complete administra-
8 tion of the estate of the deceased incompetent with the consent of the
9 surety. If letters of administration or letters testamentary are
10 granted upon petition filed within forty days after the death of the
11 incompetent, the personal representative shall supersede the guardian
12 in the administration of the estate and the estate shall be adminis-
13 tered as a decedent's estate as provided in this title, including the
14 publication of notice to creditors and other interested persons and
15 the barring of creditors claims.

16 Chapter 11.92

17 GUARDIANSHIP--POWERS AND DUTIES OF GUARDIAN

18 Sec. 11.92.010 GUARDIANS UNDER COURT CONTROL. LEGAL AGE.

19 Guardians herein provided for shall at all times be under the general
20 direction and control of the court making the appointment. For the
21 purposes of chapters 11.88 and 11.92 RCW, all persons shall be of full
22 and legal age when they shall be twenty-one years old.

23 Sec. 11.92.035 CLAIMS. (1) Duty of guardian to pay. A

24 guardian of the estate is under a duty to pay from the estate all just
25 claims against the estate of his incompetent, whether they constitute
26 liabilities of the incompetent which arose prior to the guardianship
27 or liabilities properly incurred by the guardian for the benefit of
28 the incompetent or his estate and whether arising in contract or in
29 tort or otherwise, upon allowance of the claim by the court or upon
30 approval of the court in a settlement of the guardian's accounts. The
31 duty of the guardian to pay from the estate shall not preclude his
32 personal liability for his own contracts and acts made and performed
33 on behalf of the estate as it exists according to the common law. If

1 it appears that the estate is likely to be exhausted before all exist-
2 ing claims are paid, preference shall be given to prior claims for the
3 care, maintenance and education of the incompetent and of his depen-
4 dents and existing claims for expenses of administration over other
5 claims.

6 (2) Claims may be presented. Any person having a claim against
7 the estate of an incompetent, or against the guardian of his estate as
8 such, may file a written claim with the court for determination at any
9 time before it is barred by the statute of limitations, and, upon
10 proof thereof, procure an order for its allowance and payment from the
11 estate. Any action against the guardian of the estate as such shall
12 be deemed a claim duly filed.

13 Sec. 11.92.040 DUTIES OF GUARDIAN IN GENERAL. It shall be the
14 duty of the guardian

15 (1) To make out and file within three months after his appoint-
16 ment a verified inventory of all the property of the incompetent which
17 shall come to his possession or knowledge, including a statement of
18 all encumbrances, liens, and other secured charges on any item.

19 (2) Unless otherwise directed by the court, to file with the
20 court annually within thirty days after the anniversary date of his
21 appointment, and also within thirty days after termination of his ap-
22 pointment, a written verified account of his administration.

23 (3) If he is a guardian of the person, to care for and main-
24 tain the incompetent, and if the incompetent is a minor, to see that
25 the incompetent is properly trained and educated and that the incompe-
26 tent has the opportunity to learn a trade, occupation or profession.
27 The guardian of the person may be required to report the condition of
28 his incompetent to the court, at regular intervals or otherwise as the
29 court may direct.

30 (4) If he is a guardian of the estate, to protect and preserve
31 it, to apply it as provided in this chapter, to account for it faith-
32 fully, to perform all of the duties required of him by law, and at the
33 termination of the guardianship, to deliver the assets of the incompetent

1 to the persons entitled thereto. Except as provided to the contrary
2 herein, the court may authorize a guardian to do anything that a trust-
3 tee can do under the provisions of RCW 30.99.070 for periods not ex-
4 ceeding one year from the date of the order.

5 (5) To invest and reinvest the property of the incompetent in
6 accordance with the rules applicable to investment of trust estates by
7 trustees as provided in chapter 30.24 RCW, except that:

8 (a) No investments shall be made without prior order of the
9 court in any property other than unconditional interest bearing obli-
10 gations of this state or of the United States and in obligations the
11 interest and principal of which are unconditionally guaranteed by the
12 United States, and in share accounts or deposits which are insured by
13 an agency of the United States government. Such prior order of the
14 court may authorize specific investments, or, in the discretion of the
15 court, may authorize the guardian during a period of not exceeding one
16 year following the date of the order to invest and reinvest as provid-
17 ed in chapter 30.24 RCW without further order of the court.

18 (b) If it is for the best interests of the incompetent that a
19 specific property be used by the incompetent rather than sold and the
20 proceeds invested, the court may so order.

21 (6) To apply to the court for an order authorizing any dis-
22 bursement on behalf of the incompetent; provided, however, that the
23 guardian of the estate, or the person, department, bureau, agency or
24 charitable organization having the care and custody of an incompetent,
25 may apply to the court for an order directing the guardian of the es-
26 tate to pay to the person, department, bureau, agency or charitable
27 organization having the care and custody of an incompetent, or if the
28 guardian of the estate has the care and custody of the incompetent,
29 directing the guardian of the estate to apply an amount weekly, month-
30 ly, quarterly, semi-annually or annually, as the court may direct, to
31 be expended in the care, maintenance and education of the incompetent
32 and of his dependents. In proper cases, the court may order payment of
33 amounts directly to the incompetent for his maintenance or incidental

1 expenses. The amounts authorized under this section may be decreased
2 or increased from time to time by direction of the court. If payments
3 are made to another under such order of the court, the guardian of the
4 estate is not bound to see to the application thereof.

5 Sec. 11.92.050 INTERMEDIATE ACCOUNTS--HEARING--ORDER. Upon
6 the filing of any intermediate guardianship account required by stat-
7 ute, or of any intermediate account required by court rule or order,
8 the guardian may petition the court for an order settling his account
9 with regard to any and all receipts, expenditures and investments made
10 and acts done by the guardian to the date of said interim report. Up-
11 on such petition being filed, the court may in its discretion, where
12 the size or condition of the estate warrants it, set a date for the
13 hearing of such petition and require the service of the petition and
14 a notice of such hearing as provided in RCW 11.88.040; and, in the
15 event such a hearing be ordered, the court shall also appoint a guard-
16 ian ad litem, whose duty it shall be to investigate the report of the
17 guardian of the estate and to advise the court thereon at said hearing,
18 in writing. At such hearing on said report of the guardian, if the
19 court be satisfied that the actions of the guardian have been proper,
20 and that the guardian has in all respects discharged his trust with re-
21 lation to such receipts, expenditures, investments, and acts, then, in
22 such event, the court shall enter an order approving such account, and
23 such order shall be final and binding upon the incompetent, subject
24 only to the right of appeal as upon a final order; provided that at
25 the time of final account of said guardian or within one year after
26 said incompetent attains his majority any such interim account may be
27 challenged by said incompetent on the ground of fraud.

28 Sec. 11.92.053 SETTLEMENT OF ESTATE UPON TERMINATION OTHER
29 THAN BY DEATH INTESTATE. Within ninety days after the termination of
30 a guardianship for any reason other than the death of the incompetent
31 intestate, the guardian of the estate shall petition the court for an
32 order settling his account as filed in accordance with RCW 11.92.040
33 (2) with regard to any and all receipts, expenditures and investments

1 made and acts done by the guardian to the date of said termination.
2 Upon such petition being filed, the court shall set a date for the
3 hearing of such petition after notice has been given in accordance
4 with RCW 11.88.040. Any person interested may file objections to
5 such petition or may appear at the time and place fixed for the hear-
6 ing thereof and present his objections thereto. The court may take
7 such testimony as it deems proper or necessary to determine whether an
8 order settling the account should be issued and the transactions of
9 the guardian be approved.

10 At such hearing on said petition of the guardian, if the court
11 be satisfied that the actions of the guardian have been proper, and
12 that the guardian has in all respects discharged his trust with rela-
13 tion to such receipts, expenditures, investments, and acts, then, in
14 such event, the court shall enter an order approving such account, and
15 such order shall be final and binding upon the incompetent, subject
16 only to the right of appeal as upon a final order: PROVIDED, That with-
17 in one year after said incompetent attains his majority any such ac-
18 count may be challenged by said incompetent on the ground of fraud.

19 Sec. 11.92.056 CITATION OF SURETY ON BOND. If, at any hearing
20 upon a petition to settle the account of any guardian, it shall appear
21 to the court that said guardian has not fully accounted or that said
22 account should not be settled, the court may continue said hearing to
23 a day certain and may cite the surety or sureties upon the bond of
24 said guardian to appear upon the date fixed in said citation and show
25 cause why the account should not be disapproved and judgment entered
26 for any deficiency against said guardian and the surety or sureties
27 upon his or her bond. Said citation shall be personally served upon
28 said surety or sureties in the manner provided by law for the service
29 of summons in civil actions and shall be served not less than twenty
30 days previous to said hearing. At said hearing any interested party,
31 including the surety so cited, shall have the right to introduce any
32 evidence which shall be material to the matter before the court. If,
33 at said hearing, the final account of said guardian shall not be

1 approved and the court shall find that said guardian is indebted to
2 the incompetent in any amount, said court may thereupon enter final
3 judgment against said guardian and the surety or sureties upon his or
4 her bond, which judgment shall be enforceable in the same manner and
5 to the same extent as judgments in ordinary civil actions.

6 Sec. 11.92.060 GUARDIAN TO REPRESENT INCOMPETENT--COMPROMISE
7 OF CLAIMS. (1) Guardian may sue and be sued. When there is a guard-
8 ian of the estate, all actions between the incompetent or the guardian
9 and third persons in which it is sought to charge or benefit the es-
10 tate of the incompetent shall be prosecuted by or against the guardian
11 of the estate as such. He shall represent the interests of the in-
12 competent in the action and all process shall be served on him.

13 (2) Joinder, amendment and substitution. When the guardian of
14 the estate is under personal liability for his own contracts and acts
15 made and performed on behalf of the estate he may be sued both as
16 guardian and in his personal capacity in the same action. Misnomer or
17 the bringing of the action by or against the incompetent shall not be
18 grounds for dismissal of the action and leave to amend or substitute
19 shall be freely granted. If an action was commenced by or against the
20 incompetent before the appointment of a guardian of his estate, such
21 guardian when appointed may be substituted as a party for the incompe-
22 tent. If the appointment of the guardian of the estate is terminated,
23 his successor may be substituted; if the incompetent dies, his person-
24 al representative may be substituted; if the incompetent becomes com-
25 petent, he may be substituted.

26 (3) Garnishment, attachment and execution. When there is a
27 guardian of the estate, the property and rights of action of the in-
28 competent shall not be subject to garnishment or attachment, except
29 for the foreclosure of a mortgage or other lien, and execution shall
30 not issue to obtain satisfaction of any judgment against the incompe-
31 tent or the guardian of his estate as such.

32 (4) Compromise by guardian. Whenever it is proposed to com-
33 promise or settle any claim by or against the incompetent or the

1 guardian as such, whether arising as a result of personal injury or
2 otherwise, and whether arising before or after appointment of a guard-
3 ian, the court on petition of the guardian of the estate, if satisfied
4 that such compromise or settlement will be for the best interests of
5 the incompetent, may enter an order authorizing the settlement or com-
6 promise to be made.

7 Sec. 11.92.090 SALE, EXCHANGE, LEASE, OR MORTGAGE OF PROPERTY.
8 Whenever it shall appear to the satisfaction of a court by the peti-
9 tion of any guardian, that it is necessary or proper to sell, exchange,
10 lease, mortgage, or grant an easement, license or similar interest in
11 any of the real or personal property of the estate of such incompetent
12 for the purpose of paying debts or for the care, support and education
13 of such incompetent, or to redeem any property of such incompetent's
14 estate covered by mortgage or other lien, or for the purpose of making
15 any investments, or for any other purpose which to the court may seem
16 right and proper, the court may make an order directing such sale, ex-
17 change, lease, mortgage, or grant of easement, license or similar in-
18 terest of such part or parts of the real or personal property as shall
19 to the court seem proper.

20 Sec. 11.92.100 PETITION--CONTENTS. Such application shall be
21 by petition, verified by the oath of the guardian, and shall substan-
22 tially set forth:

23 (1) The value and character of all personal estate belonging
24 to such incompetent that has come to the knowledge or possession of
25 such guardian.

26 (2) The disposition of such personal estate.

27 (3) The amount and condition of the incompetent's personal es-
28 tate, if any, dependent upon the settlement of any estate, or the ex-
29 ecution of any trust.

30 (4) The annual income of the real estate of the incompetent.

31 (5) The amount of rent received and the application thereof.

32 (6) The proposed manner of reinvesting the proceeds of the
33 sale, if asked for that purpose.

1 (7) Each item of indebtedness, or the amount and character of
2 the lien, if the sale is prayed for the liquidation thereof.

3 (8) The age of the incompetent, where and with whom residing.

4 (9) All other facts connected with the estate and condition of
5 the incompetent necessary to enable the court to fully understand the
6 same. If there is no personal estate belonging to such incompetent in
7 possession or expectancy, and none has come into the hands of such
8 guardian, and no rents have been received, the fact shall be stated in
9 the application.

10 Sec. 11.92.110 LAW GOVERNING SALES OF REAL ESTATE. The order
11 directing the sale of any of the real property of the estate of such
12 incompetent shall specify the particular property affected and the
13 method, whether by public or private sale or by negotiation, and terms
14 thereof, and with regard to the procedure and notices to be employed
15 in conducting such sale, the provisions of RCW 11.56.060, 11.56.070,
16 11.56.080, and 11.56.110 shall be followed unless the court otherwise
17 directs.

18 Sec. 11.92.115 RETURN AND CONFIRMATION OF SALE. The guardian
19 making any sale of real estate, either at public or private sale or
20 sale by negotiation, shall within ten days after making such sale file
21 with the clerk of the court his return of such sale, the same being duly
22 verified. At any time after the expiration of ten days from the fil-
23 ing of such return, the court may, without notice, approve and confirm
24 such sale and direct proper instruments of transfer to be executed and
25 delivered. Upon the confirmation of any such sale, the court shall
26 direct the guardian to make, execute and deliver instruments conveying
27 the title to the person to whom such property may be sold and such
28 instruments of conveyance shall be deemed to convey all the estate,
29 rights and interest of the incompetent and of his estate. In the case
30 of a sale by negotiation the guardian shall publish a notice in one
31 issue of a legal newspaper published in the county in which the estate
32 is being administered; the substance of such notice shall include the
33 legal description of the property sold, the selling price and the date

1 after which the sale may be confirmed: PROVIDED, That such confirma-
2 tion date shall be at least ten days after such notice is published.

3 Sec. 11.92.120 CONFIRMATION CONCLUSIVE. No sale by any guard-
4 ian of real or personal property shall be void or be set aside or be
5 attacked because of any irregularities whatsoever, and none of the
6 steps leading up to such sale or the confirmation thereof shall be
7 jurisdictional, and the confirmation by the court of any such sale shall
8 be conclusive as to the regularity and legality of such sale or sales,
9 and the passing of title after confirmation by the court shall vest an
10 absolute title in the purchaser, and such instrument of transfer may
11 not be attacked for any purpose or any reason, except for fraud.

12 Sec. 11.92.125 BROKER'S FEE AND CLOSING EXPENSES--SALE, EX-
13 CHANGE, MORTGAGE OR LEASE OF REAL ESTATE. In connection with the sale,
14 exchange, mortgage, lease or grant of easement or license in any prop-
15 erty, the court may authorize the personal representative to pay, out
16 of the proceeds realized therefrom or out of the estate, the customary
17 and reasonable auctioneer's and broker's fees and any necessary expen-
18 ses for abstracting title insurance, survey, revenue stamps and other
19 necessary costs and expenses in connection therewith.

20 Sec. 11.92.130 PERFORMANCE OF CONTRACTS. If any person who is
21 bound by contract in writing to perform shall become incompetent be-
22 fore making the performance, the court having jurisdiction of the
23 guardianship of such property may, upon application of the guardian of
24 such incompetent person, or upon application of the person claiming to
25 be entitled to the performance, make an order authorizing and direct-
26 ing the guardian to perform such contract. The application and the
27 proceedings, shall, as nearly as may be, be the same as provided in
28 chapter 11.60 RCW.

29 Sec. 11.92.150 REQUEST FOR SPECIAL NOTICE OF PROCEEDINGS.
30 At any time after the issuance of letters of guardianship in the
31 estate of any incompetent person, any person interested in
32 said estate, or in such incompetent person, or any relative of
33 such incompetent person, or any authorized representative of any

1 agency, bureau, or department of the United States government
2 from or through which any compensation, insurance, pension or
3 other benefit is being paid, or is payable, may serve upon such
4 guardian, or upon the attorney for such guardian, and file with
5 the clerk of the court wherein the administration of such guardian-
6 ship estate is pending, a written request stating that special written
7 notice is desired of any or all of the following matters, steps or
8 proceedings in the administration of such estate:

9 (1) Filing of petition for sales, exchanges, leases, mort-
10 gages, or grants of easements, licenses or similar interests in any
11 property of the estate.

12 (2) Filing of all intermediate or final accountings or account-
13 ings of any nature whatsoever.

14 (3) Petitions by the guardian for family allowances or allow-
15 ances for the incompetent or any other allowance of every nature from
16 the funds of the estate.

17 (4) Petitions for the investment of the funds of the estate.

18 Such request for special written notice shall designate the
19 name, address and post office address of the person upon whom such no-
20 tice is to be served and no service shall be required under this sec-
21 tion and RCW 11.92.160 other than in accordance with such designation
22 unless and until a new designation shall have been made.

23 When any account, petition, or proceeding is filed in such
24 estate of which special written notice is requested as herein provided
25 the court shall fix a time for hearing thereon which shall allow at
26 least ten days for service of such notice before such hearing; and no-
27 tice of such hearing shall be served upon the person designated in
28 such written request at least ten days before the date fixed for such
29 hearing. The service may be made by leaving a copy with the person
30 designated, or his authorized representative, or by mailing through
31 the United States mail, with postage prepaid to the person and place
32 designated.

33 Sec. 11.92.160 CITATION FOR FAILURE TO FILE ACCOUNT OR REPORT.

1 Whenever any request for special written notice is served as provided
2 in this section and RCW 11.92.150, the person making such request may,
3 upon failure of any guardian for any incompetent person, to file any
4 account or report required by law, petition the court administering
5 such estate for a citation requiring such guardian to file such report
6 or account, or to show cause for failure to do so, and thereupon the
7 court shall issue such citation and hold a hearing thereon and enter
8 such order as is required by the law and the facts.

9 Sec. 11.92.170 REMOVAL OF PROPERTY OF NONRESIDENT INCOMPETENT.
10 Whenever it is made to appear that it would be in the best interests of
11 the incompetent, the court may order the transfer of property in this
12 state to a guardian of the estate of the incompetent appointed in an-
13 other jurisdiction.

14 Sec. 11.92.180 COMPENSATION AND EXPENSES OF GUARDIAN--ATTOR-
15 NEY'S FEE. A guardian shall be allowed such compensation for his
16 services as guardian as the court shall deem just and reasonable. Ad-
17 ditional compensation may be allowed for his necessary services as at-
18 torney and for other necessary services not required of a guardian.
19 He may also be allowed compensation for necessary expenses in the ad-
20 ministration of his trust, including reasonable attorney's fees if the
21 employment of an attorney for the particular purpose is necessary. In
22 all cases, compensation of the guardian and his expenses including
23 attorney's fees shall be fixed by the court and may be allowed at any
24 annual or final accounting; but at any time during the administration
25 of the estate, the guardian or his attorney may apply to the court for
26 an allowance upon the compensation or necessary expenses of the guard-
27 ian and for attorney's fees for services already performed. If the
28 court finds that the guardian has failed to discharge his duties as
29 such in any respect, it may deny him any compensation whatsoever or
30 may reduce the compensation which would otherwise be allowed.

31 Sec. 11.92.185 CONCEALED OR EMBEZZLED PROPERTY--PROCEEDINGS
32 FOR DISCOVERY. The court shall have authority to bring before it, in
33 the manner prescribed by RCW 11.48.070, any person or persons suspected

1 of having in his possession or having concealed, embezzled, conveyed
2 or disposed of any of the property of the estate of incompetents sub-
3 ject to administration under this title.

4 Chapter 11.96

5 APPEALS

6 Sec. 11.96.010 APPEALS TO SUPREME COURT. Any interested party
7 may appeal to the supreme court from any final order, judgment or de-
8 cree of the court, and such appeals shall be in the manner and way
9 provided by law for appeals in civil actions.

10 Chapter 11.98

11 TRUSTS

12 Sec. 11.98.010 VIOLATION OF RULE AGAINST PERPETUITIES BY IN-
13 STRUMENT--PERIODS DURING WHICH TRUST NOT INVALID. If any provision
14 of an instrument creating a trust shall violate the rule against per-
15 petuities, neither such provision nor any other provisions of the
16 trust shall thereby be rendered invalid during any of the following
17 periods:

18 (1) The twenty-one years following the effective date of the
19 instrument.

20 (2) The period measured by any life or lives in being or con-
21 ceived at the effective date of the instrument if by the terms of the
22 instrument the trust is to continue for such life or lives.

23 (3) The period measured by any portion of any life or lives
24 in being or conceived at the effective date of the instrument if by
25 the terms of the instrument the trust is to continue for such portion
26 of such life or lives; and

27 (4) The twenty-one years following the expiration of the pe-
28 riods specified in (2) and (3) above.

29 Sec. 11.98.020 DISTRIBUTION OF ASSETS AND VESTING OF INTEREST
30 DURING PERIOD TRUST NOT INVALID. If, during any period in which an
31 instrument creating a trust or any provision thereof is not to be
32 rendered invalid by the rule against perpetuities, any of the trust
33 assets should by the terms of the instrument become distributable or

House Amendments to Engrossed Senate Bill No. 6
By Representative Brachtenbach

On page 113, Section 11.99.010, line 25 of the printed bill being line 23 of the engrossed bill after the amended date "July, 1967" and before the period insert: "; except that sections 11.44.055, 11.44.065, 11.44.070 and 11.44.080 shall take effect on July 1, 1965, and the repeal of the following acts or parts of acts as listed in section 11.99.015 shall also take effect on July 1, 1965, to wit: In subsection (10), section 1444, Code of 1881; in subsection (47), section 95, chapter 156, Laws of 1917; in subsection (48), section 1, chapter 23, Laws of 1919; in subsection (64), section 1, chapter 112, Laws of 1929, in subsection (66), section 123, chapter 180, Laws of 1935; in subsection (71), section 8, chapter 202, Laws of 1939; and in subsection (111), section 83.16.040, chapter 15, Laws of 1961"

Adopted 3/9/65

On page 113, section 11.99.010, line 26 of the printed bill before "procedures" strike "The" and insert "Except as above provided the" being line 23 of the engrossed bill before "pro-"

Adopted 3/9/65

Senate Committee Amendment to Senate Bill No. 6
By Judiciary Committee

On page 113, section 11.99.010, line 25, after "day of" strike "January, 1966" and insert "July, 1967"

1 any beneficial interest therein should by the terms of the instrument
2 become vested, such assets shall be distributed and such beneficial
3 interest shall validly vest in accordance with the instrument.

4 Sec. 11.98.030 DISTRIBUTION OF ASSETS AT EXPIRATION OF PERIOD.

5 If, at the expiration of any period in which an instrument creating a
6 trust or any provision thereof is not to be rendered invalid by the
7 rule against perpetuities, any of the trust assets have not by the
8 terms of the trust instrument become distributable or vested, then
9 such assets shall be then distributed as the superior court having
10 jurisdiction shall direct, giving effect to the general intent of the
11 creator of the trust.

12 Sec. 11.98.040 EFFECTIVE DATE OF CREATION OF TRUST. For the
13 purposes of this chapter the effective date of an instrument purport-
14 ing to create an irrevocable inter vivos trust shall be its date of
15 delivery, and the effective date of an instrument purporting to create
16 either a revocable inter vivos trust or a testamentary trust shall be
17 the date of the trustor's or testator's death.

18 Sec. 11.98.050 APPLICATION OF CHAPTER. The provisions here-
19 of shall be applicable to any instrument purporting to create a trust
20 which has an effective date subsequent to the effective date of this
21 chapter.

22 Chapter 11.99

23 CONSTRUCTION

24 Sec. 11.99.010 EFFECTIVE DATE OF TITLE. This title shall take
25 effect and be in force on and after the first day of January, 1966.
26 The procedures herein prescribed shall govern all proceedings in pro-
27 bate brought after the effective date of the title and, also, all
28 further procedure and proceedings in probate then pending, except to
29 the extent that in the opinion of the court their application in par-
30 ticular proceedings or part thereof would not be feasible or would
31 work injustice, in which event the former procedure shall apply.

32 Sec. 11.99.013 TITLE, CHAPTER, SECTION HEADINGS NOT PART OF
33 LAW. Title headings, chapter headings, and section or subsection

1 headings, as used in this title do not constitute any part of the law.

2 Sec. 11.99.015 REPEAL. The following acts or parts of acts
3 are repealed:

4 (1) Sections 1 and 2 page 53, Laws of 1875 entitled AN ACT In
5 relation to the duties of probate judges.

6 (2) Sections 1 through 18, pages 53 through 59, Laws of 1875.

7 (3) Section 1, page 127, Laws of 1875.

8 (4) Sections 626 through 637, chapter 49, page 130, Laws of
9 1877.

10 (5) Sections 721 through 729, chapter LVIII, page 145, Laws of
11 1877.

12 (6) Sections 1 and 2, page 284, Laws of 1877.

13 (7) Sections 12 and 13, pages 78 and 79, Laws of 1879.

14 (8) Sections 623 through 634, chapter LII, Code of 1881.

15 (9) Sections 717 through 724, chapter LXI, Code of 1881.

16 (10) Sections 1297 through 1666, chapter XCV through CXI, Code
17 of 1881.

18 (11) Sections 1667 through 1670, chapter CXII, Code of 1881.

19 (12) Sections 1678 through 1680, chapter CXIV, Code of 1881.

20 (13) Sections 1681 through 1686, chapter CXV, Laws of 1881.

21 (14) Section 2138, chapter CLV, Code of 1881.

22 (15) Sections 2411, 2412 and 2414, chapter CLXXXIII, Laws of
23 1881.

24 (16) Sections 3302 through 3315, chapter CCLIII, Laws of 1881.

25 (17) Sections 3316 and 3317, chapter CCLIV, Code of 1881.

26 (18) Section 1, page 29, Laws of 1883.

27 (19) Sections 1 through 4, page 57, Laws of 1883.

28 (20) Sections 1 through 3, page 165, Laws of 1885 entitled
29 AN ACT To abolish the right of survivorship in estates held in joint
30 tenancy.

31 (21) Sections 1 through 3, pages 170 and 177, Laws of 1885.

32 (22) Chapter 99, page 185, Laws of 1887.

33 (23) Chapter 100, page 186, Laws of 1887.

- 1 (24) Chapter 101, p 187, Laws of 1887.
- 2 (25) Sections 2 and 3, page 82, Laws of 1889.
- 3 (26) Sections 14 and 15, chapter 54, Laws of 1891.
- 4 (27) Chapter 86, Laws of 1891.
- 5 (28) Sections 1 through 49, chapter 155, Laws of 1891.
- 6 (29) Chapter 32, Laws of 1893.
- 7 (30) Chapter 54, Laws of 1893.
- 8 (31) Sections 1 through 9, chapter 120, Laws of 1893.
- 9 (32) Chapter 42, Laws of 1895.
- 10 (33) Chapter 105, Laws of 1895.
- 11 (34) Chapter 157, Laws of 1895.
- 12 (35) Chapter 22, Laws of 1897.
- 13 (36) Chapter 25, Laws of 1897.
- 14 (37) Chapter 75, Laws of 1897.
- 15 (38) Chapter 98, Laws of 1897.
- 16 (39) Chapter 100, Laws of 1903.
- 17 (40) Chapter 130, Laws of 1903.
- 18 (41) Chapter 17, Laws of 1905.
- 19 (42) Chapter 50, Laws of 1907.
- 20 (43) Chapter 133, Laws of 1907.
- 21 (44) Chapter 118, Laws of 1909.
- 22 (45) Chapter 8, Laws of 1911.
- 23 (46) Chapter 39, Laws of 1915.
- 24 (47) Sections 1, 3 through 56, 58 through 71, and 73 through
25 221, chapter 156, Laws of 1917.
- 26 (48) Chapter 23, Laws of 1919.
- 27 (49) Chapter 31, Laws of 1919.
- 28 (50) Chapter 197, Laws of 1919.
- 29 (51) Chapter 93, Laws of 1921.
- 30 (52) Section 1, chapter 72, Laws of 1923.
- 31 (53) Chapter 113, Laws of 1923.
- 32 (54) Chapter 142, Laws of 1923.
- 33 (55) Chapter 80, Laws of 1925 extraordinary session.

- 1 (56) Chapter 104, Laws of 1925 extraordinary session.
- 2 (57) Chapter 76, Laws of 1927.
- 3 (58) Chapter 91, Laws of 1927.
- 4 (59) Chapter 104, Laws of 1927.
- 5 (60) Chapter 160, Laws of 1927.
- 6 (61) Sections 1 through 3, chapter 170, Laws of 1927.
- 7 (62) Section 1, chapter 185, Laws of 1927.
- 8 (63) Section 1, chapter 21, Laws of 1929.
- 9 (64) Chapter 112, Laws of 1929.
- 10 (65) Chapter 218, Laws of 1929.
- 11 (66) Section 123, chapter 180, Laws of 1935.
- 12 (67) Chapter 28, Laws of 1937.
- 13 (68) Chapter 151, Laws of 1937.
- 14 (69) Chapter 26, Laws of 1939.
- 15 (70) Chapter 132, Laws of 1939.
- 16 (71) Section 8, chapter 202, Laws of 1939.
- 17 (72) Sections 1 and 2, chapter 206, Laws of 1941.
- 18 (73) Chapter 83, Laws of 1941.
- 19 (74) Chapter 14, Laws of 1943.
- 20 (75) Chapter 29, Laws of 1943.
- 21 (76) Chapter 113, Laws of 1943.
- 22 (77) Chapter 193, Laws of 1943.
- 23 (78) Chapter 219, Laws of 1943.
- 24 (79) Chapter 39, Laws of 1945.
- 25 (80) Chapter 41, Laws of 1945.
- 26 (81) Chapter 72, Laws of 1945.
- 27 (82) Chapter 197, Laws of 1945.
- 28 (83) Chapter 198, Laws of 1945.
- 29 (84) Chapter 44, Laws of 1947.
- 30 (85) Chapter 54, Laws of 1947.
- 31 (86) Chapter 145, Laws of 1947.
- 32 (87) Chapter 11, Laws of 1949.
- 33 (88) Chapter 102, Laws of 1949.

House Amendment to Engrossed Senate Bill No. 6
By Representative Brachtenbach

On page 117, section 11.99.015, line 22 of the
printed and engrossed bills, following subsection
"(110)" add a new subsection as follows:
"(111) Section 83.16.040, Chapter 15, Laws of
1961"

Adopted 3/10/65

- 1 (89) Sections 1 through 3, chapter 138, Laws of 1951.
- 2 (90) Sections 1 through 6, chapter 197, Laws of 1951.
- 3 (91) Chapter 242, Laws of 1951.
- 4 (92) Chapter 264, Laws of 1951.
- 5 (93) Section 2, chapter 270, Laws of 1953.
- 6 (94) Chapter 45, Laws of 1955.
- 7 (95) Chapter 98, Laws of 1955.
- 8 (96) Chapter 141, Laws of 1955.
- 9 (97) Chapter 154, Laws of 1955.
- 10 (98) Chapter 205, Laws of 1955.
- 11 (99) Chapter 254, Laws of 1955.
- 12 (100) Chapter 7, Laws of 1955 extraordinary session.
- 13 (101) Chapter 64, Laws of 1957.
- 14 (102) Chapter 125, Laws of 1957.
- 15 (103) Chapter 43, Laws of 1959.
- 16 (104) Chapter 116, Laws of 1959.
- 17 (105) Chapter 146, Laws of 1959.
- 18 (106) Chapter 240, Laws of 1959.
- 19 (107) Chapter 155, Laws of 1961.
- 20 (108) Chapter 43, Laws of 1963.
- 21 (109) Chapter 46, Laws of 1963.
- 22 (110) Chapter 185, Laws of 1963.

23 Sec. 11.99.020 SAVINGS CLAUSE--RIGHTS NOT AFFECTED. No act
24 done in any proceeding commenced before this title takes effect and no
25 accrued right shall be impaired by its provisions. When a right is
26 acquired, extinguished or barred upon the expiration of a prescribed
27 period of time which has commenced to run by the provisions of any
28 statute in force before this title takes effect, such provisions shall
29 remain in force and be deemed a part of this code with respect to such
30 right.

31 Sec. 11.99.030 SEVERABILITY. If any provisions of this title
32 or the application thereof to any person or circumstances is held in-
33 valid, such invalidity shall not affect other provisions or applications

1 of the title which can be given effect without the invalid provision
2 or application, and, to this end, provisions of this title are de-
3 clared to be severable.

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33

LEGISLATIVE COUNSEL

**PROPOSED
WISCONSIN
PROBATE CODE**

STUDY DRAFT

Distributed as a Public Service
to the Wisconsin Bench and Bar

by
WEST PUBLISHING CO.
St. Paul, Minn.

COMMITTEE FOREWORD

The following proposed draft of the Wisconsin Probate Code has been produced as part of a larger project undertaken by the State Bar of Wisconsin to study revision of the basic property statutes of the state. It has been drafted by two committees appointed by the Directors of the Real Property, Probate and Trust Law Section, each of which worked with a research reporter.

Chapters 852, 853, 861 and portions of 851 were prepared by the following committee:

Joseph W. Wilkus, *County Judge*, Sheboygan (chairman)
Catherine B. Cleary, *Trust Officer*, Milwaukee
Warren M. Dana, *Practicing Attorney*, Racine
Leon Feingold, *Practicing Attorney and Public Administrator*,
Janesville
John C. Geilfuss, *Trust Officer*, Milwaukee
George Kroncke, Jr., *Trust Officer*, Madison
Donald J. McIntyre, *Practicing Attorney*, Janesville
Gordon P. Ralph, *Insurance Counsel*, Milwaukee
Sverre Roang, *County Judge*, Janesville
Ralph von Briesen, *Practicing Attorney*, Milwaukee
Richard W. Effland, *Professor, University of Wisconsin Law
School*, Madison (research reporter)

Chapters 856, 857, 858, 859, 860, 862, 863, 867, 868, 878, 879 and portions of 851 were prepared by the following committee:

William R. Curran, *County Judge*, Mauston (co-chairman)
A. R. Jones, *Trust Officer*, Madison (co-chairman)
Eugene M. Haertle, *Register in Probate*, Milwaukee
Jack H. Kalman, *Practicing Attorney*, Sheboygan
George G. Russell, *Practicing Attorney*, Merrill
Warren H. Stolper, *Practicing Attorney*, Madison
James B. MacDonald, *Professor, University of Wisconsin Law
School*, Madison (research reporter)

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

COMMITTEE FOREWORD

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 three 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.

These proposed statutes are being distributed to the members of the State Bar for comment. Your suggestions and criticisms are welcomed and should be addressed to the State Bar of Wisconsin, 402 West Wilson Street, Madison, Wisconsin 53703. It is expected that these proposed statutes will be restudied and redrafted in light of such suggestions before submission to the Directors of the Section and to the Board of Governors. The proposed statutes will then be introduced at the beginning of the 1967 session of the Wisconsin Legislature.

All members of the State Bar are urged to study these proposed statutes and to submit comments prior to November 15, 1966.

At the annual meeting of the State Board of County Judges held July 7-8, 1966, the Board adopted a resolution approving the revision in principle, subject to the right of individual judges to object to particular sections after further study.

COMMITTEE FOREWORD

It is planned that the effective date for these chapters will be July 1, 1968, if the legislation is introduced at the beginning of the 1967 session and passed promptly. The delay in effective date will afford time to acquaint the Bench and Bar with the new statutes, to inform the public, and to make any necessary legislative corrections.

A separate study is being made of joint tenancy, with particular attention to joint bank accounts. It is expected that separate legislation will be introduced relative to revision of the law relating to joint tenancy as a result of that study. Such legislation is therefore not included within this proposed Code at the present time.

•

PROPOSED WISCONSIN PROBATE CODE Conversion Table

Sections of existing Wisconsin Statutes to sections of proposed Probate Code.

Existing Statutes	Proposed Prob.Code	Existing Statutes	Proposed Prob.Code
233.01	861.03	238.136	852.01(3)
	852.01(1)	238.14	853.11
233.02	861.03	238.15	853.09
	852.01(1)	238.16	None
233.03 to 233.08	None	238.17	None
233.09 to 233.12	861.07(1)	238.18	856.13
233.13	861.05(2)	238.19	853.13
233.14	861.05	238.20	856.19
	861.11(1), (3)	310.01	856.03
233.15 (1)	861.11(2), (4)	310.02	856.05(1)
	861.11(3)	310.03	856.05(4)
233.16	861.15	310.031	856.05(3)
233.17 to 233.22	None	310.04	856.11(1)
233.23	861.03	310.045(1)	879.01
	852.01(1)	310.045(2)	856.11(2)
237.01	852.01	310.05(1)	879.09
237.02	852.01	310.05(2)	856.11(4)
	852.09	310.06(1)	856.15(1)
237.025	861.41	310.06(2)	856.15(2), (3)
237.03	852.03(2), (3)	310.06(3)	856.15(4)
237.04	851.51	310.06(4)	856.15(3)
237.05	852.05(1)	310.06(5)	856.15(5)
237.06	852.05(2)	310.07	868.01
237.07	852.03(1), (4)	310.075	868.05
237.08	None	310.09	None
237.09	867.05	310.10	856.17
237.10	851.55	310.11	863.21
237.11	851.61	310.12	856.21
238.01	853.01	310.14	857.03
238.02 (1)	853.31	310.15	856.25
238.02 (2)	853.15	310.16	856.23
238.03	853.29		857.13
238.04	861.41	310.17	856.23
238.05	853.01	310.18	856.25
238.06	853.03		857.23
	853.07	310.19	857.13
238.07	853.05		857.23
238.08	853.07	310.20(1)	856.25
238.09	853.07		857.13
238.10	853.25(1)		857.15
238.11	853.25(2)		857.21
238.12	853.25(4)	310.20(2)	862.01
238.13	853.27		862.03
238.135	853.21	310.21	879.67

EXISTING STATUTES TO PROPOSED PROBATE CODE

Existing Statutes	Proposed Prob.Code	Existing Statutes	Proposed Prob.Code
310.25 -----	856.31	313.05(1) -----	859.13
310.27 -----	857.27		859.29
311.01 -----	856.01	313.05(2) -----	859.15
	856.07		859.33
311.02 -----	856.07	313.05(3) -----	859.33
	856.21	313.05(4) -----	859.29
	856.23		859.35
311.03 -----	856.11(1)	313.06 -----	859.37
311.04 -----	856.25		879.43
311.05 -----	867.01	313.07 -----	859.17
311.06 -----	867.07	313.08 -----	859.01
311.07 -----	867.11	313.09 -----	860.01
311.075 -----	867.15	313.093 -----	860.13
311.08 -----	867.13	313.095 -----	860.01
311.09(1) to (6) -----	867.17	313.10 -----	859.01
311.09(7) -----	867.19		859.03
311.10 -----	867.21	313.12 -----	None
311.11 -----	857.23	313.13 -----	863.33
311.12 -----	857.19	313.14 -----	859.39
311.13 -----	857.23		863.33
311.14 -----	857.19		863.35
311.16(1) -----	879.57	313.15(1) -----	861.33
311.16(2) -----	879.57	313.15(2) -----	861.31
311.16(3) -----	879.21	313.15(3) -----	861.35
312.01(1) -----	858.01	313.15(4) -----	None
	858.07	313.16 -----	859.25
312.01(2) -----	858.13	313.17 -----	859.37
312.01(3) -----	858.15		859.39
312.01(4) -----	None	313.18 -----	859.39
312.02 -----	858.11	313.19 -----	859.39
312.03(1) -----	858.09	313.20 -----	859.39
312.03(2) -----	858.05	313.21 -----	859.39
312.04 -----	857.03	313.22 -----	859.21
312.05 -----	None	313.23 -----	859.21
312.06 -----	879.61	313.25 -----	859.23
312.07 -----	879.61	313.26 -----	863.11
312.08 -----	879.61	313.27 -----	863.11
312.09 -----	None	313.28 -----	863.11
312.10 -----	None	313.29 -----	None
312.11 -----	857.09	313.30 -----	None
	857.15	313.31 -----	None
	862.01	313.32 -----	None
312.13 -----	860.01	314.05 -----	None
312.15 -----	None	314.06 -----	879.65
312.16 -----	859.40	314.07 -----	None
312.17 -----	859.40	315.02 -----	867.05
313.01 -----	859.01	315.03 -----	867.05
313.03(1) -----	859.05	315.04 -----	867.05
313.03(2) -----	None	315.05 -----	867.05
313.03(3) -----	859.07	315.06 -----	867.05
313.03(5) -----	859.29	316.01 -----	None
	859.35	316.02 -----	None
313.03(6) -----	859.09	316.03 -----	None
	859.11	316.07 -----	None
313.03(7) -----	859.51	316.09 -----	None
313.04 -----	859.07	316.10 -----	857.29

EXISTING STATUTES TO PROPOSED PROBATE CODE

Existing Statutes	Proposed Prob.Code	Existing Statutes	Proposed Prob.Code
316.105	None	317.14	862.03
316.11	None	317.15	862.13
316.12	None	318.01(1)	852.01(1)
316.13	None	318.01(3)	863.09(2)
316.14	None	318.01(4)	863.09(1)
316.15	None	318.02	856.11(2) (e)
316.16	None	318.03	863.39
316.17	None	318.04	None
316.18	None	318.06(1)	863.25
316.19	None	318.06(2)	863.25
316.20	None		863.27
316.21	None	318.06(3)	863.31
316.22	None	318.06(4)	863.27
316.23	None		863.29
316.235	860.05	318.06(5)	863.47
316.24	860.05	318.06(7)	863.23
316.25	None	318.06(8)	863.37
316.26	None	318.06(9)	863.17
316.27	None	318.06(10)	863.07
316.28	None	318.065	863.29(2)
316.29	None	318.07	863.43
316.30	None	318.075	863.45
316.31	None	318.08	None
316.32	None	318.10	None
316.33	None	318.12	None
316.39	None	318.15	863.19
316.40	None	318.24	852.11
316.41	860.13	318.25	852.11
316.43	None	318.26	852.11
316.45	None	318.27	852.11
316.46	None	318.28	852.11
316.47	859.43	318.29	852.11
316.48	None	318.30	None
316.49	None	318.31	879.59
316.50	None	321.01	878.01
316.51	None	321.015	878.05
316.52	860.09	321.02	878.07
316.53	860.09	321.03	878.09
316.54	860.09	321.04	None
316.55	860.09	321.05	None
317.01(1)	862.05	321.06	878.11
317.01(2)	862.07	321.07	None
	862.09	321.08	878.13
317.02	862.07	324.001	851.23
317.03	None	324.01	879.27
317.04	857.03	324.04	879.29
	857.25	324.05	879.31
317.05	862.01	324.11	879.33
	862.15	324.12	879.35
317.06	Renumber	324.13(1)	879.37
317.07	None	324.13(2)	879.23
317.08	857.05	324.14	879.39
317.09	857.07	324.15	879.43
317.10	859.47	324.16	879.27
317.105	857.03	324.17	879.45
317.11	862.09	324.18(1) (a)	879.03
317.13	862.03		879.05

EXISTING STATUTES TO PROPOSED PROBATE CODE

Existing Statutes	Proposed Prob.Code	Existing Statutes	Proposed Prob.Code
324.18(1) (b) -----	856.11(2) (e)	324.26 -----	None
324.18(2) -----	879.09	324.27 -----	879.41
324.18(3) -----	879.11	324.29(1) -----	879.15
324.18(4) -----	879.05(3)	324.29(2) -----	879.23
324.18(5) (a) -----	879.07(2)	324.29(3) -----	879.17
324.18(5) (b) -----	879.07(2)		879.23
324.18(5) (c) -----	879.07(3)	324.29(4) -----	879.25
324.18(5) (d) -----	879.07(1)	324.30 -----	879.47
324.19 -----	879.03		879.49
324.20(1) -----	879.05(4)	324.31 -----	868.03
324.20(2) -----	None	324.35 -----	857.15
324.21 -----	879.55	324.351 -----	862.17
324.22 -----	879.55	324.355 -----	857.09
324.23 -----	879.55		863.35
324.24 -----	879.53	324.356 -----	None
324.25 -----	None	324.36 -----	879.13

PROPOSED WISCONSIN PROBATE CODE Conversion Table

Sections of proposed Probate Code from sections of existing Wisconsin Statutes.

Proposed Prob.Code	Existing Statutes	Proposed Prob.Code	Existing Statutes
851.01 to 851.29	New	853.35	New
851.51	237.04	856.01	311.01
851.55	237.10	856.03	310.01
851.61	237.11	856.05(1)	310.02(1), (2)
852.01(1)	237.01(1) to 237.02 233.01 233.02 233.23 318.01(1)	856.05(2)	New
		856.05(3)	310.031
		856.05(4)	310.03
		856.07	311.01 311.02
852.01(2)	New	856.09	New
852.01(3)	237.01(7) 238.136	856.11(1)	310.04 311.03
852.01(4)	New	856.11(2) (a)	310.045(2)
852.03(1)	237.07	856.11(2) (b)	New
(2)	237.03	856.11(2) (c)	New
(3)	237.03	856.11(2) (d)	New
(4)	237.07	856.11(2) (e)	318.02 324.18(1) (b)
852.05	237.05 237.06	856.11(3)	New
		856.11(4)	310.05(2)
852.07	New	856.13	238.18
852.09	237.02	856.15(1)	310.06(1)
852.11	318.24 to 318.29	856.15(2)	310.06(2)
		856.15(3)	310.06(2), (4)
852.13	237.01(8)	856.15(4)	310.06(3)
853.01	238.01 238.05	856.15(5)	310.06(5)
		856.17	310.10
853.03	238.06	856.19	238.20
853.05	238.07	856.21	310.12 311.02
853.07	238.06 238.08 238.09	856.23	310.16 310.17 311.02
			324.35
853.09	238.15	856.25	310.15 310.18 310.20(1)
853.11	238.14		311.04
853.13	238.19	856.27	New
853.15	238.02(2)	856.29	New
853.17	New	856.31	310.25
853.19	New	857.01	New
853.21	238.135	857.03	310.14 312.04 317.04 317.105
853.23	New		
853.25	238.10 to 238.12		
853.27	238.13		
853.29	238.03		
853.31	238.02(1)		
853.33	New		

PROPOSED PROBATE CODE FROM EXISTING STATUTES

Proposed Prob.Code	Existing Statutes	Proposed Prob.Code	Existing Statutes
857.05 -----	317.08	859.39 -----	313.14
857.07 -----	317.09		313.17 to
857.09 -----	312.11		313.21
	324.355	859.40 -----	312.16
857.11 -----	New		312.17
857.13 -----	310.16	859.41 -----	287.43
	310.19		287.44
	310.20(1)	859.43 -----	New
857.15 -----	310.20(1)	859.45 -----	New
	312.11	859.47 -----	317.10
	324.35	859.49 -----	New
857.17 -----	New	859.51 -----	313.03(7)
857.19 -----	311.12 to	860.01 -----	312.13
	311.14		313.09
857.21 -----	310.20(1)		313.095
857.23 -----	310.18	860.03 -----	New
	310.19	860.05 -----	316.235
	311.11		316.24
	311.13	860.07 -----	New
857.25 -----	317.04	860.09 -----	316.52 to
857.27 -----	310.27		316.55
857.29 -----	316.10	860.11 -----	New
858.01 -----	312.01(1)	860.13 -----	313.093
858.03 -----	New		316.41
858.05 -----	312.03(2)	861.01 -----	New
858.07 -----	312.01(1)	861.03 -----	233.01
858.09 -----	312.03(1)		233.02
858.11 -----	312.02		233.23
858.13 -----	312.01(2)	861.05 -----	233.13
858.15 -----	312.01(3)		233.14
858.17 -----	New	861.07(1) -----	233.09 to
859.01 -----	313.08		233.12
	313.10	(2) -----	New
859.03 -----	313.10	861.09 -----	New
859.05 -----	313.03(1)	861.11(1) -----	233.14
859.07 -----	313.03(3)	(2) -----	233.15(1)
	313.04	(3) -----	233.14
859.09 -----	313.03(6)	(4) -----	233.15(2)
859.11 -----	313.03(6)		233.15(1)
859.13 -----	313.05(1)	861.13 -----	New
859.15 -----	313.05(2)	861.15 -----	233.16
859.17 -----	313.07	861.17 -----	New
859.19 -----	New	861.31 -----	313.15(2)
859.21 -----	313.22	861.33 -----	313.15(1)
	313.23	861.35 -----	313.15(3)
859.23 -----	313.25	861.41 -----	237.025
859.25 -----	313.16		238.04
859.27 -----	New	862.01 -----	310.20(2)
859.29 -----	313.03(5)		312.11
	313.05(1), (4)		317.05
859.31 -----	New	862.03 -----	310.20(2)
859.33 -----	313.05(2), (3)		317.13
859.35 -----	313.03(5)		317.14
	313.05(4)	862.05 -----	317.01(1)
859.37 -----	313.06	862.07 -----	317.01(2)
	313.17		317.02

PROPOSED PROBATE CODE FROM EXISTING STATUTES

Proposed Prob.Code	Existing Statutes	Proposed Prob.Code	Existing Statutes
862.09 -----	317.01(2) 317.11	868.03 -----	324.31
862.11 -----	New	868.05 -----	310.075
862.13 -----	317.15	878.01 -----	321.01
862.15 -----	317.05	878.03 -----	New
862.17 -----	324.351 234.35	878.05 -----	321.015
863.01 -----	New	878.07 -----	321.02
863.03 -----	New	878.09 -----	321.03
863.05 -----	New	878.11 -----	321.06
863.07 -----	318.06(10)	878.13 -----	321.08
863.09(1) -----	318.01(4)	879.01 -----	310.045(1)
863.09(2) -----	318.01(3)	879.03 -----	324.18(1) (a)
863.11 -----	313.26 313.28		324.19
863.13 -----	New	879.05(1) -----	324.18(1) (a)
863.15 -----	New	879.05(2) -----	324.18(1) (a)
863.17 -----	318.06(9)	879.05(3) -----	324.18(1) (a), (4)
863.19 -----	318.15	879.05(4) -----	324.18(1) (a)
863.21 -----	310.11		324.20
863.23 -----	318.06(7)	879.07(1) -----	324.18(5) (d)
863.25 -----	318.06(1), (2)	879.07(2) -----	324.18(5) (a), (b)
863.27 -----	230.47(3) 318.06	879.07(3) -----	324.18(5) (c)
863.29(1) -----	318.06(4)	879.09 -----	310.05(1)
863.29(2) -----	318.06(4) 318.065		324.18(2)
863.31(1) -----	318.06(3)	879.11 -----	324.18(3)
863.31(2) -----	New	879.13 -----	324.36
863.33 -----	313.13 313.14	879.15 -----	324.29(1)
863.35 -----	313.14 324.355	879.17 -----	324.29(3)
863.37 -----	318.06(8)	879.19 -----	New
863.39 -----	318.03	879.21 -----	311.16(3)
863.41 -----	New	879.23 -----	324.13(2)
863.43 -----	318.07 (25 Wis.3d lx)		324.29(2), (3)
863.45 -----	318.075 (25 Wis.2d lx)	879.25 -----	324.29(4)
863.47 -----	318.06(5)	879.27 -----	324.01 324.16
863.49 -----	New		324.04
867.01 -----	311.05	879.29 -----	324.05
867.03 -----	230.47 230.48	879.31 -----	324.11
867.05 -----	237.09, ch. 315	879.33 -----	324.12
867.07 -----	311.06	879.35 -----	324.13(1)
867.09 -----	New	879.37 -----	324.14
867.11 -----	311.07	879.39 -----	324.27
867.13 -----	311.08	879.41 -----	324.27
867.15 -----	311.075	879.43 -----	313.06 324.15
867.17 -----	311.09(1) to (6)		324.17
867.19 -----	311.09(7)	879.45 -----	324.30
867.21 -----	311.10	879.47 -----	324.30
868.01 -----	310.07	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

PROPOSED WISCONSIN PROBATE CODE

Chap.

- 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

- 851.01 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.

851.01 **PROPOSED PROBATE CODE**

- 851.55 Uniform simultaneous death act.
- 851.61 Decedent devolution of United States obligations in beneficiary form.

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 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.

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. 4 and illegitimate persons and their lineal descendants to the extent provided by s. 5.

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, 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

“Person interested” as used in title XLII includes any heir or beneficiary of a decedent’s estate and any beneficiary or trustee of a trust which is entitled to property under a will. Person interested does not include an assignee of a person interested. Creditors are persons interested in insolvent estates after the will, if any, is proved and after a personal representative or special administrator is appointed. 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.

851.23 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 of the county court or the county court exercising its probate jurisdiction under s. 253.10.

851.27

PROPOSED PROBATE CODE

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 children for purposes of inheritance, wills and class gifts

(1) Inheritance rights between adopted child and adoptive relatives. A legally adopted child is treated as a natural child of his adoptive parents for purposes of intestate succession by, through and from the adopted child 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 child and natural relatives. A legally adopted child 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 children. 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 raised by the adoptive parent as a child and adopted after reaching majority.

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.

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 (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

851.51

PROPOSED PROBATE CODE

Wis. 642, 49 N.W.2d 914 (1951)
(anti-lapse statute).

Subsection (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 two 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 subsection (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 would be accompanied by an amendment to 48.92 eliminating the last sentence of subsection (1) and providing for cross-reference to the inheritance section. This might take the form of subsection (3) to 48.92 reading:

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

Subsection (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 por-

tions 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 two 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 two 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 shall die 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.
- 852.07 Denial or reduction of share of surviving spouse when living apart from decedent.
- 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 and is also limited to those

related in the fourth degree; these limitations serve 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 20 days 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—
 - (i) if there are no surviving issue of the decedent, the entire estate;
 - (ii) 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;
 - (iii) 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

852.01

PROPOSED PROBATE CODE

the nearest degree of kinship to the decedent equally and without representation.

(2) **Limitation on inheritance by remote relatives.** No person shall be entitled to take, directly or by representation, under sub. (1) (d), (e) or (g) unless such person is related to the decedent in the fourth degree of kinship or less.

(3) **Escheat.** If the decedent is survived by none of the heirs under sub. (1), the net estate escheats to the state to be added to the capital of the school fund.

(4) **Requirement that heir survive decedent for 20 days.** If any person who would otherwise be an heir under sub. (1) dies within 20 days of the date 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. For this purpose, a person dies within 20 days of the date of death of the decedent if he dies within the period from midnight of the date of death of decedent to midnight of the 20th day following, using the date and local standard time at the place of death of the decedent. In any case where the date of death of the decedent or of the person who would otherwise be an heir, or the dates 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 20 days, it is presumed that such person died within such 20 day period.

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 eliminat-

ing 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 20 days 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).

Subsection (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 313.-

852.01

PROPOSED PROBATE CODE

15 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 ("receives . . . out of the net estate") presupposes that the property will be allocated at its value at time of distribution, in

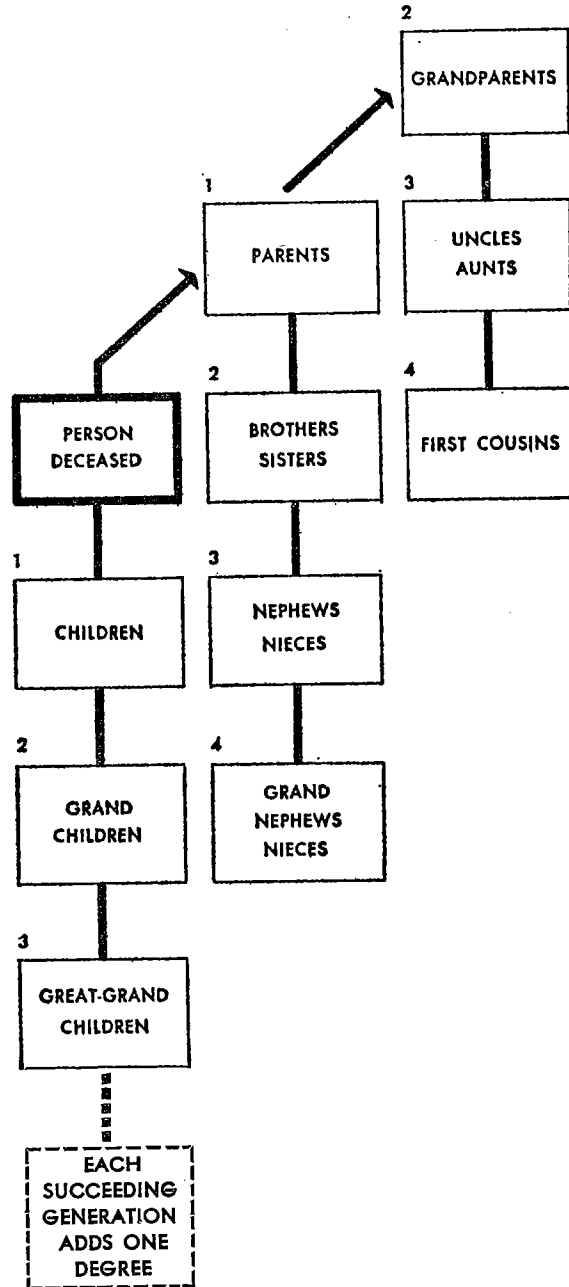
order to satisfy the share. This approach protects the surviving spouse particularly against deflation in values, and the spouse at the same time benefits in case of inflation by the fractional share. It should be noted that this same problem is inherent in 318.01(1) (b) and does not create difficulty.

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 subsection, 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.

852.03 Related rules

(1) **Meaning of representation.** When representation is called for by s. 852.01(4) (a), (c) or (d), 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:



852.03

PROPOSED PROBATE CODE

(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. Persons conceived before the death of the decedent but born thereafter take the same share as if they had been living at the death of the decedent.

COMMENT

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

Subsection (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 two 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, three 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, § 22(c) and prevents such an anomalous result. Since the point has never been decided in Wisconsin, this section would also eliminate litigation.

Subsection (2) is the same as the first sentence of 237.03 but a chart

of relationship has been added for convenience. Since inheritance by collaterals is limited under the preceding section, the chart shows relationship only through the fourth degree, except for direct descendants.

Subsection (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 second 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 second wife rather than the husband. Our court very early rejected the applica-

tion 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).

Subsection (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.

Subsection (1) (a) (iii) 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.

Subsection (1) (b) is the same as 237.01(1), and subsection (1) (c) is the same as 237.01(2). Likewise subsection (1) (d) is the same as 237.01(3). However, subsection (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. Subsection (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). Subsection (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.

Subsection (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.

Subsection (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.

A further limitation is found in subsection (2) which limits inher-

itance by collateral heirs to those related to the decedent in the fourth degree or nearer. This allows grandnieces and grandnephews to inherit, but not great grandnieces or great grandnephews; it allows first cousins to inherit but not second cousins or first cousins once removed. Note that there is *no* limitation on inheritance by decedent's own issue, although it is presently unlikely that a person would live to have more than four generations of descendants. The limitation in subsection (2) is found in a number of states.

These limitations on inheritance were proposed for the following reasons:

(1) In modern times, with increased mobility and loss of close contact due to urbanization, the "family" is more restricted in size. Persons lose track of all except close relatives. Family reunions are less frequent. Very few people can even name their second cousins. A decedent does not normally want his property to pass to these remote relatives; if he does, he can easily make a will picking out those whom he wishes to favor.

(2) Conversely the remote relative has no "claim" on a decedent's property. He is not likely to be dependent or to have rendered any of the services which might lead to an expectation of inheritance. He often learns of his relationship to decedent only after the latter's death. For this reason he has been sometimes referred to as "the laughing heir". The inheritance is a mere windfall.

(3) With mobility of persons it is increasingly difficult to trace remote relatives. This increases the cost of settling estates, including those in which decedent left a will and made

no provision for his relatives for the very reason that they were remote. Even with a will, these remote heirs must be notified as a matter of due process. In Wisconsin, remote relatives often are foreign citizens, complicating the problems of notifying them and transferring property to them.

(4) Remote relatives having a standing to contest wills may promote litigation for its nuisance value in the hopes of getting a settlement, even though they have no possible moral claim to a share in the estate. A statute limiting inheritance by remote relatives thus in some measure will cut down on will contests.

It is true that subsection (2) increases in some small amount the property passing to the state by escheat, and that the legislature of this state as well as those of other states has not favored escheat. But a person's obligations to the community in which he lives may be far stronger than those to remote relatives of whom he has long ago lost track. It must always be remembered that the decedent can prevent escheat by making a will leaving the property as he pleases, to remote relatives, to friends or to charity.

This section contains no provision comparable to subsections (5) and (6) of 237.01. 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. They originated in § 39 of the act on tenure of the 1839 Wisconsin Territorial Laws and were at that time the only provisions relating to inheritance by the half blood. See *Perkins v. Simonds*, 28 Wis. 90 (1871). The following situation will

illustrate the operation of these provisions. Suppose a father F dies, survived by widow M, and children A, B and C. Child A inherits a share in the father's estate. M remarries and has a child D. A now dies, under age and never having married. Under the statute property inherited by A from F would pass to B and C; it would not be inherited by the mother M (the normal rule if she survived, as sole parent under 237.01(2)) nor, if the mother predeceased A, could D share because he is not a child "of the same parent". In the latter respect the subsections are related to 237.03 on inheritance by the half blood line. See *Shuman v. Shuman*, 80 Wis. 479, 50 N.W. 670 (1891). Originally the Supreme Court seemed to interpret these provisions as amounting to a redistribution of the deceased parent's (F's) estate and treated the other children as inheriting "from the ancestor and not from the deceased child". *Perkins v. Simonds*, cited above; *Wiesner v. Zaun*, 39 Wis. 188 (1875). Literally this would mean reopening the parent's estate. But in *Bowker v. Shields*, 140 Wis. 330, 122 N.W. 809 (1909) the Court took the view, which is undoubtedly correct, that the other children take from the deceased child. See also 8 Op. Atty. Gen. 426 (1919). The court has refused to extend the statute beyond its literal terms to a situation where a minor inherited from a great-grandfather through his deceased mother; on the death of the minor, his estate passed to his father (out of the ancestral line) and not to his surviving brother and sister.

The precise purpose of subsections (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.

Subsection (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.

Subsection (4) is new. It is an extension of the purposes behind the Uniform Simultaneous Death Act.

852.03

PROPOSED PROBATE CODE

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 dece-

dent'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 days. All or a substantial interest in the husband's estate would normally pass to the wife by intestacy. Without subsection (4), 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. Subsection (4) 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.).

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 the provisions of 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 in the presence of a competent witness.

(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 the provisions of 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 pre-

sumed 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 subsection (1). The language in subsection (1) dealing with methods of proof of paternity is based on 237.06. 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. See *Richmond v. Tyler*, 151 Wis. 633, 139 N.W. 435 (1913) (letter written on behalf of father by a third person and signed merely "your father" held sufficient written acknowledgement) *Estate of Schalla*, 2 Wis.2d 38, 86 N.W.2d 5 (1957) (witness need not be produced at trial on heirship).

Subsection (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

852.05

PROPOSED PROBATE CODE

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 subsection (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.

Subsection (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 of 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.

852.07 Denial or reduction of share of surviving spouse when living apart from decedent

If 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, and if the decedent is survived by issue, the court in its discretion may deny the surviving spouse any intestate share, or may reduce the share to such amount as the court deems reasonable and proper, or may grant the full share provided by this chapter. 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. It will not often be applied. However, it empowers the court to deny or reduce the share given the surviving spouse if the decedent is survived by a child or other issue and the couple are living apart. For example, a father deserts his wife and two children; the

wife inherits property from her parents and dies intestate. Without this section the husband would take the first \$25,000 and a share of any excess. Under this section the court could deny the father any share. Under less extreme circumstances the court might merely reduce the share;

for example, if a wife and her husband separate, the court might in its discretion refuse to give the wife the first \$25,000 and confine her to a fractional share with the children taking the balance. The court is given standards to consider in making its decision. The power in the court is not unlike that exercised in divorce cases in determining a property settlement. It is intended that the relief will be molded to fit the individual case. A similar provision is found in the chapter on family rights dealing with election by the surviving spouse.

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 at the appraised value, with all liens deducted. If such value exceeds the value of the share of the surviving spouse under s. 852.01, the court may, in its discretion, 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 appraised value 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 subsection (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.

Subsection (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.

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(4), 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. Subsection (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.

Subsection (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,

852.11

PROPOSED PROBATE CODE

grandchildren do not take by representation).

Subsection (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 in-

tended 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 subsection (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 extend the time for cause shown. 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, the spouse of a beneficiary is permitted to act as a witness; and 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, con-

853.01

PROPOSED PROBATE CODE

demned 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 eighteen 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 § 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 by pass 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 two 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, 77 N.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 Johnston*, 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 subsection (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 subsection (1) (b) that such a signature be made or acknowledged in the presence of the witnesses may be the existing 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 not be one of the two witnesses. The requirement of subsection (1) (b) is patterned after Penn. Stat. title 20, § 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 subsection (1) (a) and not a proxy signature within subsection (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 per-

sonal 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 nonresidents within this state

A will is validly executed if executed according to the preceding section 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 force and effect as if executed in this state in compliance with the provisions of the preceding section.

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 out-

853.05

PROPOSED PROBATE CODE

side 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.

Section 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 two disinterested witnesses, any beneficial provisions of the will to a witness are invalid to the extent that such provisions in the aggregate exceed in value what the witness 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 some personal and beneficial interest. The following are not interests which are personal and beneficial to an attesting witness:

- (a) a provision for the spouse of the witness;
- (b) a provision for employment of the witness 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;

- (c) a provision which would have conferred no benefit on the witness if the testator had died immediately following execution of the will.

COMMENT

Subsection (1) makes no change in existing Wisconsin law. It merely states the obvious rules regarding competency. Subsection (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 § 46 (§ 3 of the Model Execution of Wills Act). The normal result of subsection (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 testator died intestate". The Committee 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. Section 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.

Subsection (3) is new. It makes some change in the existing law. Section 238.08 does not allow the spouse of a beneficiary to act as a witness; subsection (3) (a) does. This is in the interest of facilitating execution, it being difficult in some situations to obtain witnesses outside the family. Moreover, our existing statute permits use of a child or parent of a beneficiary as a witness while barring the spouse, on the basis of the old common-law identity of husband and wife. It is true that use of a spouse as a witness is not recommended, but it must be remembered that the will can be challenged on grounds of undue influence in any case of abuse, and that use of the spouse of a beneficiary as a witness would be a strong factor implying undue influence if the beneficiary receives a larger than normal share of the estate.

Subsection (3) (b) 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,

853.07

PROPOSED PROBATE CODE

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.

Subsection (3) (c) is 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 the next subsection or opened in accordance with s. 856.03 after death of the testator, shall be kept on file for a period of twenty-five 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. 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 shall be transferred to the register in probate and become subject to the provisions of 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 two witnesses other than the person authorized.

Cross References: See s. 856.03 for provisions governing opening of will on death of testator.

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 s. 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
- (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.

853.11

PROPOSED PROBATE CODE

(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.

Subsection (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 subsection (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.

Subsections (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.

Subsection (2) changes the Wisconsin rule to provide that marriage alone operates to revoke a will. While such a change may occasionally work hardship in case of second marriages, 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; marriage contracts are also common in that situation, and can under the terms of subsection (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. Subsection (2) attempts to embody the best features from those statutes. Subsection (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 subsection (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. Subsection 1 would be inapplicable because the will makes a provision for the spouse (and also indicates that it was drafted in contemplation of the marriage). Section 853.25 on Pretermitted Children is inapplicable for similar reasons.

Subsection (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 subsections (2) and (3) the doctrine of revocation by operation of law is abandoned. This is the result of subsection (4).

Subsection (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.

Subsection (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 revokes 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 de-

pendent 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.

Subsection (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

PROPOSED PROBATE CODE

853.13 When will is contractual

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.

This section applies to a joint will as well as to any other will; there is no presumption that the testators to 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).

Section 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 fed-

eral 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

853.15

PROPOSED PROBATE CODE

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 probate proceedings 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.

Subsection (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 re-

quire an election only if it "clearly" attempts to dispose of the property.

Subsection (2) changes existing law on the second issue. Section 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. Subsection (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 by-laws, is ineffective to change the contract beneficiary unless the contract or the company's by-laws 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 by-laws; 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 con-

853.19

PROPOSED PROBATE CODE

temporaneous 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 advance-

ments in the intestate estate (where written proof is required). To bring the testate situation into line with the intestate, this section parallels 862.11.

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 unless the will expressly provides otherwise any part of such property, by filing a signed declaration of such renunciation with the county court and serving a copy on the

personal representative within 180 days from admission of the will to probate; but the court may extend the time for cause shown. 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 county 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 renunciation 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 man-

853.23

PROPOSED PROBATE CODE

ner 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 in the manner 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, subsection (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.

Subsection (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) six 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 subsection (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 devisees or legatees 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 devise or bequest or other provision in the will would thereby be defeated, in which case the court in its discretion may adopt a different apportionment and may exempt a specific devise or bequest or other provision.

(5) **Discretionary power of court to assign different share.** If in any case under subsections (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.

Subsection (1) provides for the afterborn child. The share provided by this subsection is subject to adjustment under subsection (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 his estate to his wife, a child born of such marriage (or adopted) would take no share; the wife is obligated to 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, subsection (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 subsection (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 posthumous-

ly 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 subsection (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.

Subsection (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.

Subsection (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 six 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, as in the case of creditors' claims under 318.03.

Where the estate is settled and a final decree entered earlier than six 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 six months period as a precautionary measure.

Subsection (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. Section 238.12 and subsection (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).

853.25

PROPOSED PROBATE CODE

Subsection (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 is made for any of the following beneficiaries under the will and such beneficiary dies before the testator and leaves issue who survive the testator, then such issue as represent the deceased beneficiary are substituted for him under the will and take the same interest as he would have taken had he survived the testator:

(a) a person related to the testator in the fourth degree or less as computed in s. 852.03(2),

(b) the spouse of any such relative.

(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 in-

tent 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, if 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." Section 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 within the fourth degree (those who take under the proposed statute on intestate succession in the absence of a will) and to the spouse of any such relative. These are deemed to be the "close" relatives whom the statute should protect against lapse. This changes existing law, both as to the limitation in degree and as to inclusion of spouses (238.13 applying to all blood relatives but excluding relatives by affinity—*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 stood in the fourth (or nearer) degree of relation by virtue of the

adoption, by the provision of 851.51; 238.13 has been similarly interpreted.

Subsection (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 § 23.47 and Restatement, Property (1940) § 350. Subsection (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

853.27

PROPOSED PROBATE CODE

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 § 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.) §§ 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.

Section 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 make 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

853.31

PROPOSED PROBATE CODE

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 Non-ademption 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 or damaged, 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 two 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 third 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

853.35

PROPOSED PROBATE CODE

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) of this section.

(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 the preceding subsection 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 two years of testator's death is a sale by the testator within the meaning of sub. (3) of this section.

(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 Sec. 14A.

(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 anti-ademption 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 Venue.
- 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.
- 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 Venue

(1) Generally. The venue of a proceeding for the probate of a will and for administration is:

(a) In the county in this state where the decedent had his domicile at the time of his death.

(b) If the decedent had no domicile in this state, then in any county wherein he left any property or into which any property belonging to his estate may have come.

(2) Stay. If proceedings are commenced in more than one county, they shall be stayed in all counties except the county where first commenced until the proper venue is finally determined in the county where first commenced. If the proper venue is finally determined to be in another county, the court, after making and retaining a true copy of the entire file, shall transmit the original to the proper county. The proceeding is deemed commenced by the filing of a

petition; and the proceeding first legally commenced extends to all of the property of the estate in this state.

(3) Transfer. If it appears to the court at any time before the final judgment in any proceeding that the proceeding was commenced in the wrong county the court shall order the proceeding with all papers, files and a certified copy of all orders therein transferred to another probate court which other court shall thereupon proceed to complete the administration proceeding as if originally commenced therein.

Cross Reference: Section 859.11 requires new publication for creditors when administration is transferred to another county.

COMMENT

This section together with amended 253.10(1) gives all probate courts jurisdiction to administer any Wisconsin estate, but places venue in the county where the decedent was domiciled or where the non-domiciliary decedent has property. This is the approach used in guardianship under 319.02 and 319.05.

Amended section 253.10(1) reads as follows:

“253.10 Probate jurisdiction

“(1) The jurisdiction of the county court shall extend to the probate of wills and granting letters testamentary and of administration of the estates of all persons deceased who were at the time of their decease domiciled in this state and of all who shall die not domiciled in this state having any estate within this state to be administered or probated, and to any other cases authorized by law;”

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 or venue 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 thirty 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

856.05

PROPOSED PROBATE CODE

thirty 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 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 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) intended to enable a person in this giving one who has information concerning an unfiled will a duty to give this information to the court. It is 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) have petitioned within 30 days after the death of the decedent, petition for administration may be made by the public administrator, 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.

856.09 Petition for administration, contents

The petition for administration shall comply with the provisions of s. 879.05 and in addition shall state:

- (1) The name, age, domicile, post office address and date of death of the decedent;
- (2) 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

(1) **Generally.** When a petition for administration is filed the court shall appoint a time and place for hearing for proving the will, if any, for proving heirship and for the appointment of a personal representative. Notice of hearing shall be given as provided in s. 879.05, and a copy of the will which is being presented for proof, shall accompany each notice that is mailed or served in accordance with such section.

856.11

PROPOSED PROBATE CODE

(2) Who entitled to notice. The following persons are entitled to notice:

(a) Any person interested. In petition for administration the beneficiaries and heirs are persons interested. Creditors are not persons interested within the meaning of this section.

(b) Any general guardian, guardian ad litem and attorney for person in the military service for any person interested.

(c) Any executor named in the will.

(d) Any trustee named in the will.

(e) The attorney general where a public charitable trust is involved, and in all cases mentioned in secs. 237.01(7) and 238.136.

(3) No Notice to Petitioner. Notice need not be given to a petitioner.

(4) Foreign Domiciliary. 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 application or of such subsequent proceeding as 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 previous to the day appointed for 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. The notice required by this subsection is not jurisdictional.

Cross References:

Section 879.25 requires appointment of an attorney for persons in the military service.

Section 863.23 requires published notice before determination of heirs. For orders signed by register in probate, see § 253.33.

856.13 Will must be proved

No will shall pass any property unless it has been proved and admitted.

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.** No will shall be removed for the taking of a deposition or other proof until the time fixed for proving the will. If a will filed for probate is removed from the court in which the estate is pending, 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.

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

PROPOSED PROBATE CODE

856.21 Persons entitled to domiciliary letters

(1) **Generally.** Letters shall be granted to one or more of the persons hereinafter mentioned, who are not disqualified, in the following order:

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

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

(c) 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 non-resident 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. Non-residency is a sufficient cause for non-appointment 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 in its discretion 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 the provisions of ss. 220.9 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) The provisions of s. 895.345 shall 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, 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. Upon letters being issued 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. This section gives the testamentary trustee standing to be heard in such matters.

856.31**PROPOSED PROBATE CODE****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 incompetents, 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.
- 857.11 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 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

857.03

PROPOSED PROBATE CODE

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.

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 value of the gross estate (gross estate defined as the full 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 per cent; for all above the sum of \$50,000 at the rate of 2 per cent; 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.

COMMENT

This provision increases the per- first step and eliminates the per-centage rate of compensation on the diem charge.

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.

857.11 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 shall be charged to the personal representative personally and may be deducted from the fees which he may receive for his services as personal representative.

857.11

PROPOSED PROBATE CODE

COMMENT

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

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 appointments are 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 non-resident 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 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 as 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.

857.25**PROPOSED PROBATE CODE**

(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 representatives or trustees of the estate of a decedent or one or more of such personal representatives or trustees may organize a corporation for any of the purposes authorized by ch. 180 or 181 and may 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 make, acknowledge and record a plat of real estate in the manner and form prescribed in ch. 236, either alone or together with other owners of such real estate.

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, 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 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 860.03 requires a personal representative to file an inventory before he sells, mortgages or leases any property.

Section 72.01 describes property subject to inheritance tax.

858.03 Persons interested to be informed of inventory

Within 5 days after filing any inventory with the court, the personal representative shall mail or deliver to every person interested a statement indicating that such inventory has been filed together with 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, guardian ad litem or attorney for person in military service, a copy

858.03

PROPOSED PROBATE CODE

of the statement in regard to filing together with the inventory or statement of inventory value shall be mailed or delivered to the guardian, guardian ad litem or attorney for person 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, but is prima facie evidence of neglect of duty on the part of the personal representative.

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 representative 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 is 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. The value of improvements on real estate shall be shown separately from the value of the land.

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 partnership property and liabilities. If, without reasonable cause shown, he refuses or neglects to comply with such order for 20 days after the service of said order upon him, he shall be 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 may require. 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.
- 859.11 Transfer of claims when administration transferred.
- 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 Allowance of claims; objections to be filed within 60 days; information to persons interested.
- 859.31 Compromise of claims.
- 859.33 Contest of claims; procedure.
- 859.35 Prompt judgment; mandatory 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 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

Except as provided in section 859.03 and in the last sentence in this section, all claims against a decedent's estate including claims of the state and any sub-division 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 decedent unless filed with the court within the time limited by the court for filing claims. This section does not

apply to claims based on tort, claims based on Wisconsin income, 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.

859.03 Continuation 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 section 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 subse-

859.09

PROPOSED PROBATE CODE

quent administration proceeding. If the subsequent proceeding is in a different county, such claims shall be transmitted to and filed in the proper court.

859.11 Transfer of claims when administration transferred

If administration of an estate is transferred to another county all claims filed in the court where the administration was commenced which were not heard in that court shall be heard by the court to which the administration is transferred. In addition the court to which the administration is transferred shall set a new period within which claims may be filed, set a new date for hearing on claims and cause notice of the new period for filing and date for hearing to be published in accordance with s. 859.07.

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.

(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 endorsements must be attached to the claim.

Cross Reference: See § 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 six 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 amount realized on 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 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 distri-

859.21

PROPOSED PROBATE CODE

bution 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 two 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 an action therefor is commenced within six 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 claim based on 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.

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. 11-14 of family rights.
- (d) All debts and taxes having preference under the laws of the United States.
- (e) Reasonable and necessary medical expenses of the last sickness of the decedent, including compensation of persons attending him.
- (f) All taxes having preference under the laws of this state.
- (g) Wages due to employes which have been earned within three months before the date of the death of the decedent, not to exceed \$300 in value to each employe.
- (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 against a decedent or a personal representative, but the provisions of 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 Allowance of claims; objections to be filed within 60 days; information to persons interested

(1) **Claims allowed unless objection filed within 60 days.** Any claim against an estate which has been properly filed and which is not barred by any statute of limitations shall be allowed by the court unless it is objected to by the personal representative or by a person in-

859.29

PROPOSED PROBATE CODE

terested within 60 days after the last day for filing claims against the estate.

(2) **Personal representative to inform persons interested.** Within 30 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, indicating the last day on which objection to the claims can be made 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 person in military service, a copy of the statement shall be mailed or delivered to the guardian, guardian ad litem or attorney for person in military service as well as to the person interested. Failure of the personal representative or special administrator to comply with the provisions of this section does not affect the jurisdiction of the court as to persons interested but is prima facie evidence of neglect of duty on the part of the personal representative or special administrator.

COMMENT

This section is new. Subsection (1) adopts the rule from civil litigation that one against whom an action is brought must defend within a limited period of time or a default judgment will be rendered against him. Subsection (2) 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 counter-

claim only if he mails a copy of the objection, offset or counterclaim to the claimant and files the same with the court within 60 days after the last day for filing claims against the estate. 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; mandatory 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 counterclaim, 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

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

PROPOSED PROBATE CODE

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.

Cross Reference: Section 287.43 gives a similar power to the personal representative.

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

Subsection (2) is new and is consistent with the new power to lease and mortgage property which is given to the personal representative in chapter 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 the provisions of Sec. 859.01 or 859.21 or a separate action is continued thereon in accordance with the provisions of Sec. 859.03 the claimant will receive the same protection 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 estate has been distributed, a claimant whose claim has been made absolute through court approved settlement or through adjudication may proceed against the distributees.

Cross Reference: Chapter 287 deals with actions against distributees.

859.45**PROPOSED PROBATE CODE****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. 879.05. 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 expense of deceased wife

The expense of her last illness may be allowed as a claim against the estate of a deceased wife even though her surviving husband might 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 necessities 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.
- 860.03 Inventory to be filed.
- 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 are in effect 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

860.01

PROPOSED PROBATE CODE

of Scheibe, 30 Wis.2d 116, 140 N.W. 2d 196 (1966).

In conjunction with this section 72.05(1) is amended and 72.05(4) is created as follows:

"72.05 Lien

"(1) Personal liability. All taxes imposed by ss. 72.01 to 72.24 shall be due and payable at the time of the decedent's death, except as hereinafter provided; and except as provided in subsection (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. . . . (4) 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 when any property is sold from an estate by a personal representative, and the person to whom the property is transferred has no liability for such tax."

860.03 Inventory to be filed

Before any sale, mortgage or lease of property, except where the sale mortgage or lease is one which would have been in the ordinary course of business if made by the decedent prior to his death, the personal representative shall file with the court his inventory showing the value of all such property. Failure of the personal representative to comply with this requirement shall in no way affect the rights or title of the purchaser, mortgagee or lessee, but is prima facie evidence of breach of duty on the part of the personal representative.

Cross Reference: See Section 858.03 as to informing persons interested.

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 allowances 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

860.11

PROPOSED PROBATE CODE

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 subs. (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. 879.05 to all persons interested and all creditors of the estate.

COMMENT

Subsection (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. 879.05 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

- 861.01 Special definitions.
- 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

PROPOSED PROBATE CODE

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" person-

alty 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). Section 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).

Note on alternative proposal:

The Study Committee gave considerable thought to a proposal to abandon entirely the concept of dower and adopt in its place a marital share whereby the surviving spouse would be entitled to an elective share of one-third of the survivor's and the decedent's total property interests excluding non-commingled and clearly traceable property received by either party. "Total property interests" would include all property subject to an inheritance tax (the probate estate, life insurance, jointly owned property, trusts, etc.). The surviving spouse would normally own and receive more than one-third of total property interests anyway, and this election right would be used only in rare cases. To make the election, the survivor must list the total property

and the property actually received and bring an action for the difference between the amount received and $\frac{1}{3}$ of the total. The survivor would join all probate and non-probate donees as parties, except donees of specific tangible personal property, and such parties would each yield a proportionate fraction large enough to satisfy the survivor's shortage, unless the court adjusted the contributions differently to avoid damage to overall or particular estate plans. Donees of non-probate property transferred before death in fraud of the survivor's rights might also be joined as parties. Right to elect would cease six months after decedent's death.

This proposal had certain definite advantages: it relates the surviving spouse's share to the property accumulated during marriage (rather than "needs" or the form in which property is owned at death); it avoids the inconsistencies of an elective share based on the property in the probate estate alone; it would be simple to explain to lay people as requiring that a minimum of one-third

of the couple's total property interests be shared with the survivor; it allows for property already transferred from the decedent to the survivor or acquired in the survivor's name during the marriage; it assures the surviving spouse of about the same share of accumulated wealth as would be accorded in a separation by divorce during lifetime. On the other hand, the proposal had the disadvantages that it is novel and hence unfamiliar to the Bar and the public generally, that the surviving spouse would have to make an accounting of his or her own wealth in order to recover, that problems of tracing inherited property or gifts from third persons would complicate administration of such a law, and that the issues would be more numerous and more involved than under the dower approach adopted by the Committee. The Committee therefore favored the dower approach, but felt there was sufficient merit in the "marital share" concept outlined in the preceding paragraph to justify setting it forth here for reaction from interested members of the Bar.

SUBCHAPTER I. DOWER-ELECTIVE SHARE

861.01 Special definitions

As used in this chapter:

- (1) "Probate estate" means all property passing under the will and under the law of intestate succession.
- (2) "Net probate estate" means the probate estate after deducting allowances, expenses of administration, and debts and claims but before payment of taxes.
- (3) "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 two or more persons

861.01

PROPOSED PROBATE CODE

payable to the survivor, United States 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

These definitions are confined to usage in this chapter. The phrase "probate estate" is used in contrast to assets of a decedent which pass outside of the probate process, such as joint tenancy assets, life insurance payable to a named beneficiary, and the like. The term "net probate estate" is different from "net estate" as defined in 851.17; as used in this chapter 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). Because of the increasing variety of arrangements by which a person can place stock, bank accounts, savings and loan shares, credit union shares, real and personal property in his name and the name of another with a survivorship right, the phrase "property in joint names" is used in the broadest possible sense; it is intended to encompass any new kinds of similar arrangements whether they fit into presently accepted notions.

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 con-

cern 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 unprotected, 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 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) of this section.

(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)

861.05

PROPOSED PROBATE CODE

and the testator has not provided otherwise, but forfeits any other power of appointment. A power to pay more than the income or annuity, 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. It must be read in conjunction with the special definition of "net probate estate" in 861.01(2) and with 861.13 providing for the method of satisfying the elective share.

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, how-

ever, 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. Subsection (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 in-

tended 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.

Subsection (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 and need not be based upon consideration. 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 reduced by the amount of the federal estate tax: the net probate 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 two 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, death benefits under any pension or retirement plan by reason of decedent's employment, 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 installments of the entire principal and interest for any period equal to or less than normal life expectancy of the spouse.

861.07

PROPOSED PROBATE CODE

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. Subsection (1) provides for barring the surviving spouse by simple written agreement. It eliminates any need for finding consideration but otherwise 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 judi-

cial policy of favorable treatment of agreements settling property rights between husband and wife, particularly in cases involving second marriages.

Subsection (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.

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.

(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 non-probate 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 six (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 six 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 six 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 mail a copy or a notice as provided by s. 858.03 to the surviving spouse within five (5) months of the filing of the petition for probate, or other special circumstances justifying the delay in filing an election.

861.11

PROPOSED PROBATE CODE

(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.

Subsection (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 non-residuary 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).

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 dif-

ferent. 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), subsection (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

861.15

PROPOSED PROBATE CODE

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 non-probate 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) 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 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).

(3) 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.

(4) Every such suit must be brought within three (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 contemplation 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 subsection (1) has been criticized as difficult of proof, it has the advantage of being familiar.

It is not necessary that the surviving spouse have 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.

861.17

PROPOSED PROBATE CODE

It is the intent of subsection (3) 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.

Subsection (4) 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 by order, without notice or on such notice as the court may direct, provide 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) In its discretion 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. Subsection (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.

Subsection (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 subsection (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 the provisions of 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 appraised 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) In the event 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 appraised value until such time as claims are paid in full or the court otherwise orders.

(3) The surviving spouse may select items 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

861.33

PROPOSED PROBATE CODE

personal representative the excess of appraised 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 subsection (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 subsection (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 in its discretion 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 its

discretion, 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. Subsection (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 in category (h) of s. 859.25 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.

861.41

PROPOSED PROBATE CODE

(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 of this chapter, 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 appraised 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 in-

surance 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 rea-

FAMILY RIGHTS

861.41

son 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 subsection (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 show its inventory value or if acquired by the personal representative during administration, its acquisition value; it shall also contain a proposed distribution schedule showing as to each distributee the property being distributed to him and showing its inventory value, or if acquired by the personal representative during administration, its

862.07 **PROPOSED PROBATE CODE**

acquisition value, and in addition showing its estimated value as of the date of the final account. It shall also show as to each distributee the estimated inheritance tax payable out of his distribution.

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 matter shall be set for hearing and notice thereof shall be given in accordance with s. 879.05. Unless notice is waived, the account must be filed not less than 3 weeks before the date of the hearing. An account so filed may be brought up to date on the day of the hearing.

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 person in military service a copy of the account shall be mailed or delivered to the guardian, guardian ad litem or attorney for person 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, but is prima facie evidence of neglect of duty on the part of the personal representative.

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.

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. The personal representative shall be present at the hearing and may be examined on oath upon any matter relating to his account and the settlement of the estate.

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 before final judgment.
- 863.03 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.
- 863.17 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 closing.

SUMMARY OF CHAPTER

This chapter replaces chapter 318.

863.01 Distribution of specific property to distributee before final judgment

Upon petition of the personal representative or of any distributee, with or without notice as the court may direct, the court may order the personal representative to deliver to any distributee who consents to it, possession of any specific property to which he is entitled under the terms of the will or any statute, provided that other distributees and claimants are not prejudiced thereby. The court may require

the distributee to give security for the return of such property and may at any time prior to final judgment order the distributee to return such property to the personal representative if it is for the best interest of the estate.

863.03 Partial distribution before final judgment

After the expiration of the time limited for the filing of claims and before final settlement of the accounts of the personal representative, a partial distribution may be ordered, after hearing on notice in accordance with s. 879.05. Such distribution shall be as conclusive as an order of final distribution with respect to the estate distributed except to the extent that other distributees and claimants are deprived of the fair share or amount which they would otherwise receive on final distribution. Before a partial distribution is so ordered, the court may require that security be given for the return of the property so distributed to the extent necessary to satisfy any distributees and claimants who may be prejudiced as aforesaid by the distribution. The order described in this section is not an appealable order.

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 § 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 the provisions of ss. 863.01 and 863.03, 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

863.07

PROPOSED PROBATE CODE

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 and filed with the probate court.

COMMENT

This section permits a person interested to assign his interest in the estate, but protects any personal representative who distributes property before he is informed 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 state, 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

863.13

PROPOSED PROBATE CODE

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 for the recovery of such debt.

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. 879.05 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.

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. 879.05.

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 ac-

863.27

PROPOSED PROBATE CODE

cordance 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 or which is security for a debt 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. If a decree of partial distribution has been previously made, the judgment shall expressly confirm it, or, in accordance with s. 863.03 shall modify said decree and state specifically what modifications are made.

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.

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 subsection (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 the 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 purchasers for value from distributees of any property which was a part of the estate or their successors in title may rely upon the final judgment as conclusive for all purposes relating to the title to such property.

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 personally representative, within such time as the court may fix, 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

863.33

PROPOSED PROBATE CODE

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. 879.05, 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 of America.

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 of distribution (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 in the manner provided in ss. 856.11(4) and 879.05 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 ss. 237.01 and 238.136 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 administration, 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. 237.01 (7) 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 in the manner 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

PROPOSED PROBATE CODE

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 and discharging the personal representative. 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 be commenced within six years from the date of the order of discharge.

863.49 Inactive estates: summary closing

The probate judge in his discretion may by order upon his own motion and without notice summarily close any estate in which no paper has been filed for more than 5 years.

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) through (7), 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,

867.01

PROPOSED PROBATE CODE

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 in its discretion deems it necessary, it may in its discretion at any time during the proceeding appoint a special administrator to aid in the settlement.

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

(d) *Notice.* The court may in its discretion hear the matter without notice or order notice to be given pursuant to s. 879.05.

(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 in its discretion 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 s. 253.10 for jurisdiction and s. 856.01 for venue 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. 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

Subsection (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

(1) Certificate. 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

867.03

PROPOSED PROBATE CODE

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 venue 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, 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 of descent of property.** After hearing the evidence, if it shall appear to the satisfaction of the court who are the heirs of such decedent and their respective rights and interests in the property, 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.

(3) **Recording required.** Whenever the 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 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. (330.19(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 and venue 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 s. 253.10 for jurisdiction and s. 856.01 for venue 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 PROPOSED PROBATE CODE

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 inexpedient 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. 879.05.

867.13 Bond of special administrator

If it appears that anything of value will come into the hands of the special administrator, the court in its discretion 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 ss. 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. S. 331.345 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 non-appealable 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 the words "personal representative" as used in the statute 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 may determine. If notice of hearing upon the application for discharge is required, such notice shall be given pursuant to s. 879.05.

(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 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 subsection (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 subsection (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 subsection (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 subsection (3).

(3) Protection of probate under subsection (1). If within one year after probate under subsection (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 above provided.

(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 subsection (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 subsection (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 subsection (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 subsection (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

868.01

PROPOSED PROBATE CODE

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 for-

eign 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 non-resident 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 the provisions of subsections (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 shall have 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 subsection (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

868.03

PROPOSED PROBATE CODE

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 United States post office an envelope containing such notice addressed to such representative, as aforesaid, 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 subsection (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 subsection (12) and upon giving the notice provided in section 324.18, 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 subsection (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 subsection (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 sur-

868.03

PROPOSED PROBATE CODE

rendered 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 may direct, 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 subsection (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 shall otherwise order, 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. (330.19(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 s. 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 trus-

tee, 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, with the permission of the probate judge,

(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 personal 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 administrator, 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 be commenced within 6 years from the time when he was discharged.

(4) 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 main-

878.07**PROPOSED PROBATE CODE**

tain 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 be 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 notice.
- 879.09 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.
- 879.27 Appeals from county court.
- 879.29 Review by supreme 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.

SUMMARY OF CHAPTER

This chapter replaces chapter provisions that are scattered 324 and also contains many related throughout the probate chapters.

879.01

PROPOSED PROBATE CODE

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 and venue 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

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 in the manner prescribed in s. 879.05. 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 having known interests 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. The court may order both service by publication and personal service on designated persons.

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 in the manner set forth in sub. (2) or by personal service in the manner 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 in the manner 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.** Service shall be made by personal service either within or without the state at least 10 days before the hearing or proceeding. The service may be made by any person not a party.

(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 published notice no more than once in most estates.

879.07 Proof 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 (a) by the affidavit of the person who made the service, or if by the sheriff, by his certificate, showing the place and the time of service, and that he knew the person served to be the person for whom the notice was intended and that he delivered to and left with him a copy; if the person was not personally served, such affidavit or certificate shall state when, where and with whom a copy was left; or (b) 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 shall be presumptive evidence of its genuineness.

(3) **Publication.** Proof of service by publication shall be by affidavit as provided in s. 985.12.

879.09 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 person in

879.09

PROPOSED PROBATE CODE

the military service may waive notice on behalf of himself but cannot waive notice on behalf of anyone whom he represents.

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 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 in the manner set forth in s. 879.05(3) 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. 856.11(4) 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

879.23**PROPOSED PROBATE CODE**

persons in the same matter or proceeding, whose interests and rights in relation to such matter or proceeding are conflicting.

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 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.

879.27 Appeals from probate court

Any person aggrieved by any order or judgment of the probate court may appeal or take a writ of error therefrom to the supreme court, and ch. 274 applies. The appeal on behalf of any minor from an order of adoption may be taken by any person. In all cases the appeal on behalf of any minor or incompetent person may be taken and prosecuted by the guardian of his estate or by a guardian ad litem.

879.29 Review by supreme court

(1) **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.

(2) **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 child or person acting in behalf of the child on an appeal from an order of adoption or on an appeal by an alleged incompetent from an adjudication of incompetency, and no bond shall be required of any personal representative, guardian or trustee of a testamentary trust.

(3) **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.

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 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 unsuccess-

879.37

PROPOSED PROBATE CODE

ful 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 subsection (1), any person having the right of appeal from the determination of the court, may file with the court, within ten days after notice that the matter is to be contested, a written demand for a jury trial, and deposit ten dollars with the county treasurer, take his receipt therefor and file it with the court. If such issue is transferred 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 second Tuesday in January, April and October.

(5) **Selection of jurors.** Jurors and trial juries shall be drawn in the manner provided by ss. 255.04 to 255.09, except as otherwise provided herein, and trials by jury shall be in the manner provided by ss. 270.15 to 270.31; but in county courts having civil jurisdiction jurors and juries may be drawn in probate matters and jury terms had in the manner and according to the regulations required in civil cases in such courts.

(6) **Calendar.** Not more than ten 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 shall have been demanded, and such list shall constitute the jury calendar for such term of the probate court. Unless the court shall otherwise order, 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 ten dollars motion fees unless such party shall waive a jury trial in such proceeding. In case a continuance in any action up-

879.45

PROPOSED PROBATE CODE

on the jury calendar is asked by any other party, the court may grant such continuance and require payment of ten dollars motion fees in its discretion.

(7) **Pretrial conference.** The court may hold a pretrial conference in accordance with the procedure in 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 ten 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 there be tried and determined as a circuit court action. And 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 may be 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 may deem 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 made returnable and set for hearing on a day certain.

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 Estate of Cudahy, 196 Wis. 260, 210 statutes as interpreted and limited in 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

879.57

PROPOSED PROBATE CODE

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 or persons 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. In the event that 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 in its discretion 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 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 subsections (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.

879.59

PROPOSED PROBATE CODE

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 for disclosure, may subpoena witnesses and compel the production of evidence.

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 ten, and interest at five per cent 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 insur-

ance 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 one dollar, 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 in the manner provided in s. 262.06(1) for the service of summons.

ASSEMBLY AMENDMENT 1, TO ASSEMBLY BILL 280

May 4, 1967 - Offered by Assemblyman G.K. ANDERSON.

1 Amend the bill, as follows:

2 On page 85, line 7, after the period insert "To promote uniformity
3 in such fees and in recognition of the court's obligation to protect the
4 heirs of the estate, the fee of each appraiser shall be fixed by the court,
5 taking into consideration the time necessarily involved in the appraisal
6 and the responsibilities involved therewith, and any appraiser's fees
7 for an estate shall not exceed a total of \$100 unless extraordinary effort
8 and skills are required and such are found to be a fact by the court.".

9

10 (End)

11

12

13

14

15

16

17

18

19

20

ASSEMBLY AMENDMENT 2 ,
TO ASSEMBLY BILL 280IR B-5129
EP:jm:1

May 23, 1967 - Offered by Assemblymen DEVITT and McCORMICK,
by request of Milwaukee County.

1 Amend the bill, as follows:

2 1. On page 1, line 1, substitute "(1m) (b) and (c) and (3), 230.48 (1m)
3 (b) and (c) and (3)" for ", 230.48".

4 2. On page 1, line 5, after the semicolon insert "to renumber 230.47
5 (2) and 230.48 (2);".

6 3. On page 1, line 7, after "amend" insert "46.10 (1),".

7 4. On page 1, line 7, delete "49.08 (2),".

8 5. On page 1, line 8, after the semicolon insert "to repeal and re-
9 create 49.08 (2);".

10 6. On page 1, line 9, after "(4)" insert ", 230.47 (2), 230.48 (2)".

11 7. On page 2, line 22, after "SECTION 1." insert:

12 "46.10 (1) of the statutes is amended to read:

13 46.10 (1) Liability for outpatient services and supplies and for the
14 maintenance of patients in the institutions specified in this section and the
15 collection and enforcement of such liability is governed exclusively by
16 this section, except as provided in s. 49.08 (2) .

17 SECTION 1m."

18 8. On page 3, line 3, substitute "repealed and recreated" for "amended".

19 9. On page 3, delete lines 4 to 19 and insert therefor:

20 "49.08 (2) If any person prior to his death was a recipient of any

1 form of public assistance under this chapter or institutional care under
2 ch. 51, for which recovery is authorized by law, and at the time of death
3 held any property in joint tenancy, ss. 230.47 (2) and 230.48 (2) shall
4 apply and liability and recovery shall be the same as for recovery of
5 relief under sub. (1). Amounts may be recovered pursuant to this sub-
6 section for assistance or care granted both prior to and after the effective
7 date of this subsection (1967); and any amounts so recovered shall be paid
8 to the United States, this state and its political subdivisions in the propor-
9 tion in which they contributed to the payment of the assistance or care
10 granted."

11 10. On page 4, line 12, after "230.47" substitute "(1m) (b) and (c)
12 and (3)" for "and 230.48".

13 11. On page 4, after line 12, insert:

14 "SECTION 7c. 230.47 (2) of the statutes is renumbered 230.47 (3).

15 SECTION 7e. 230.47 (2) of the statutes is created to read:

16 230.47 (2) (a) Every petition for termination of a joint tenancy under
17 this section shall state whether the decedent was at any time prior to
18 death the recipient of any form of public assistance or institutional care.
19 If the petition fails to disclose that the decedent was not a recipient of
20 public assistance or institutional care, a copy of the petition shall be
21 sent by certified mail to the state department of public welfare and to the
22 clerk of the county of legal settlement of the decedent at the time of death
23 not less than 20 days prior to any court hearing under this section. Such
24 notice may be waived in writing by the county authority in charge of public
25 welfare of such county.

26 (b) Within 20 days after receipt of notice under par. (a) by the county
27 clerk, the county authority may file a claim in the proceeding alleging
28 liability under s. 49.08 (2). No certificate terminating joint tenancy
29 shall be issued or adjudication in a final judgment or order for assign-
30 ment regarding the termination of such joint tenancy shall be made or

1 given until the claim has been adjudicated. If the court finds in favor of
2 the claimant, it shall enter judgment on the claim stating the amount of
3 liability therefor. The judgment shall constitute a prior lien on such
4 property, real or personal, as the court designates and shall remain a
5 prior lien until satisfied or until the death of the surviving joint tenant
6 at which time recovery may be had by appropriate court proceedings with
7 respect to such property.

8 (c) The county authority shall file a copy of the judgment with a
9 description of the real property in the office of the register of deeds of
10 every county in which real property to which the judgment applies is
11 situated.

12 SECTION 7g. 230.48 (1m) (b) and (c) and (3) of the statutes are re-
13 pealed.

14 SECTION 7j. 230.48 (2) of the statutes is renumbered 230.48 (3).

15 SECTION 7L. 230.48 (2) of the statutes is created to read:

16 230.48 (2) (a) Every petition for termination of a joint tenancy under
17 this section shall state whether the decedent was at any time prior to
18 death the recipient of any form of public assistance or institutional care.
19 If the petition fails to disclose that the decedent was not a recipient of
20 public assistance or institutional care, a copy of the petition shall be
21 sent by certified mail to the state department of public welfare and to
22 the clerk of the county of legal settlement of the decedent at the time of
23 death not less than 20 days prior to any court hearing under this section.
24 Such notice may be waived in writing by the county authority in charge of
25 public welfare of such county.

26 (b) Within 20 days after receipt of notice under par. (a) by the county
27 clerk, the county authority may file a claim in the proceeding alleging
28 liability under s. 49.08 (2). No certificate terminating joint tenancy shall
29 be issued or adjudication in a final judgment or order for assignment re-
30 garding the termination of such joint tenancy shall be made or given until

1 the claim has been adjudicated. If the court finds in favor of the claimant,
2 it shall enter judgment on the claim stating the amount of liability therefor .
3 The judgment shall constitute a prior lien on such property, real or per-
4 sonal, as the court designates and shall remain a prior lien until satisfied
5 or until the death of the surviving joint tenant at which time recovery may
6 be had by appropriate court proceedings with respect to such property.

7 (c) The county authority shall file a copy of the judgment with a de-
8 scription of the real property in the office of the register of deeds of
9 every county in which real property to which the judgment applies is
10 situated." .

11

12

(End)

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

ASSEMBLY AMENDMENT 3 ,
TO ASSEMBLY BILL 280LRB-5186
AMS:kc:l

May 24, 1967 - Offered by Assemblyman G.K. ANDERSON.

- 1 Amend the bill, as follows:
- 2 1. On page 13, in lines 6, 8 and 9 delete "1968" and substitute "1969".
- 3 2. On page 17, in line 6, delete "1968" and substitute "1969".
- 4 3. On page 48, in line 30, delete "1968" and substitute "1969".
- 5 4. On page 178, in line 21, delete "1968" and substitute "1969".

6 (End)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

ASSEMBLY AMENDMENT 4 ,
TO ASSEMBLY BILL 280

LRB-5200
BB:jm:l

May 24, 1967 - Offered by Assemblyman KENYON.

- 1 Amend the bill, as follows:
- 2 On page 14, line 18, after "administration" insert ", funeral and
- 3 burial".
- 4
- 5 (End)
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20

ASSEMBLY AMENDMENT 5 ,
TO ASSEMBLY BILL 280

May 25, 1967 - Offered by Assemblyman KESSLER, by request of
Milwaukee County.

1 Amend the bill, as follows:

2 1. On page 1, line 7, after "253.10 (1)," insert "253.34 (1) (e) and
3 (g),".

4 2. On page 5, before line 6, insert:

5 "SECTION 10m. 253.34 (1) (e) and (g) of the statutes are amended
6 to read:

7 253.34 (1) (e) For receiving a will for safekeeping, except under
8 s. ~~310.02, \$1~~ 856.05 (1), \$5.

9 (g) For copies of records or other papers in the custody and charge
10 of registers in probate at the rate of 50 cents a page; and for the compari-
11 son and attestation of such copies as are not provided by the registers,
12 ~~25~~ 50 cents for each page, but the minimum charge in each of the above
13 mentioned instances is \$1, including the certificate."

14 3. On page 178, at approximately line 5, delete the line beginning
15 "253.34 (1) (e)".

16 (End)

17

18

19

20

ASSEMBLY AMENDMENT 6 ,
TO ASSEMBLY BILL 280

May 25, 1967 - Offered by Assemblymen FROEHLICH, DEVITT and
McKAY.

- 1 Amend the bill, as follows:
- 2 1. On page 91, after line 18, insert:
- 3 "(a) Provisions for the family of the decedent under ss. 861.31,
- 4 861.33 and 861.35."
- 5 2. On page 91, line 19, substitute "(b)" for "(a)".
- 6 3. On page 91, delete line 20 and substitute therefor:
- 7 "(c) Reasonable and necessary funeral and burial expenses."
- 8 4. On page 91, delete lines 21 and 22.
- 9 5. On page 91, after line 24, insert:
- 10 "(e) Claims by the county institutions or county welfare department
- 11 for medical care and maintenance and for assistance and support charge-
- 12 able to the decedent."
- 13 6. On page 91, line 25, substitute "(f)" for "(e)".
- 14 7. On page 91, line 27, substitute "(g)" for "(f)".
- 15 8. On page 91, line 30, substitute "(h)" for "(g)".
- 16 9. On page 92, line 1, substitute "(i)" for "(h)".
- 17 (End)
- 18
- 19
- 20

ASSEMBLY AMENDMENT 7 ,
TO ASSEMBLY BILL 280LRB-5316
MV:de:l

June 2, 1967 - Offered by Assemblyman HELD.

1 Amend the bill, as follows:

2 1. On page 13, delete lines 4 to 14 and substitute:

3 "851.001 EFFECTIVE DATE, PROBATE CODE. Except as pro-
4 vided in Section 27, Chapters 851 (except s. 851.51), 856, 857, 858,
5 859, 860, 862, 863 (except s. 863.13), 867, 868, 878, and 879 are ef-
6 fective as of July 1, 1969. Except as provided in Section 27, Chapters
7 852 and 861 and ss. 851.51 and 863.13 are effective as to any person
8 dying on or after July 1, 1969. Except as provided in Section 27, Chapter
9 853 is effective as to the will of any testator dying on or after July 1,
10 1969, except that it is inapplicable to a will executed prior to the publi-
11 cation of the chapter if it is proved the testator lacked testamentary
12 capacity at the time of such enactment, unless the testator subsequently
13 regained capacity to make a valid will and had such capacity for a period
14 of 6 months; a will so excepted is governed by the statutes applicable at
15 the time the testator executed his will."

16 2. On page 178, delete lines 20 to 23 and substitute:

17 "SECTION 27. EFFECTIVE DATE. This act shall take effect July 1,
18 1969, except as otherwise provided in this section, and it shall be pub-
19 lished in the official state paper immediately after its passage and ap-
20 proval and shall be printed in the 1967 session laws and in the 1967

1 statutes on tinted paper. Section 27 of this act shall be effective im-
2 mediately after passage and publication thereof. The remaining pro-
3 visions of this act shall not be effective until such time as the 1969 legis-
4 lature has completed final action on the bills which shall be submitted
5 by the State Bar of Wisconsin Probate Code Advisory Committees, for
6 the purpose of proposing amendments to this act; and such remaining
7 provisions shall not be effective until such time as they are enacted into
8 law by the 1969 legislature and approved by the governor."

9

10

(End)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

ASSEMBLY AMENDMENT 8 ,
TO ASSEMBLY BILL 280LRB-5562
PP:de:1

June 15, 1967 - Offered by Assemblymen N.C. ANDERSON, HELD and
UEHLING.

- 1 Amend the bill, as follows:
- 2 1. On page 22, line 13, after the first "the" delete all the material
3 in lines 13 and 14 and substitute "intestate's next of kin in equal degree.".
- 4 2. On page 135, line 14 after "fund" insert "provided, however,
5 that in those instances where money or other property is escheated to
6 the state, or deposited for safekeeping in the state treasury, or added
7 to the capital of the school fund, such money or property shall be held
8 by the state until such time as the court may determine, upon the claim
9 of a person asserting a right to such funds, that he is entitled thereto.
10 Such claim shall be made in the manner provided in s. 863.39 (3), except
11 that there shall be no limit upon the time within which such a claim may
12 be filed".
- 13 3. On page 135, line 21, after the second "money" insert "or property".
- 14 4. On page 135, line 30, after "interest" insert ", but including any
15 increments which may have occurred on securities held".

16
17
18
19
20

(End)

ASSEMBLY AMENDMENT 9,
TO ASSEMBLY BILL 280LRB -6218
EP:ks:1

June 30, 1967 - Offered by Assemblyman G. K. ANDERSON.

- 1 Amend the bill, as follows:
- 2 1. On page 13, lines 6, 8, and 9, substitute "January 1, 1970" for
- 3 "July 1, 1968".
- 4 2. On page 17, line 6, substitute "January 1, 1970" for "July 1, 1968".
- 5 3. On page 48, line 30, substitute "January 1, 1970" for "July 1, 1968".
- 6 4. On page 178, line 21, substitute "January 1, 1970" for "July 1, 1968".
- 7 5. On page 178, before the period in line 23, insert:
- 8 "and the probate code shall incorporate all acts relating thereto passed by the
- 9 1969 legislature. The act shall be published in the official state paper
- 10 immediately after its passage and approval and shall be printed in the
- 11 1967 session laws and statutes on tinted paper".

12 (End)

13

14

15

16

17

18

19

20

ASSEMBLY AMENDMENT 10 ,
TO ASSEMBLY BILL 280

LRB-6472
MV:kc:1

July 25, 1967 - Offered by Assemblyman SOIK.

- 1 Amend the bill, as follows:
- 2 1. On page 1, line 9, after "72.05 (4)" insert ", 319.115".
- 3 2. On page 10, before line 17, insert:
- 4 "SECTION 21m. 319.115 of the statutes is created to read:
- 5 319.115 GUARDIAN AD LITEM; MAXIMUM FEES FOR COURT
- 6 APPEARANCES. Any person appointed as a guardian ad litem in any
- 7 proceeding may charge not more than \$25 an hour for any appearances
- 8 in court."
- 9 3. On page 164, line 27, after "court" insert ", subject to s. 319.115,".
- 10 4. On page 168, delete line 5, and substitute:
- 11 "(1) To appraisers, a fee of \$20 an hour. The court shall appoint
- 12 appraisers who are members of one of the following recognized appraisal
- 13 organizations:
- 14 (a) The appraisal institute.
- 15 (b) Society of real estate appraisers.
- 16 (c) American right of way association."

17
18
19
20

(End)

ASSEMBLY AMENDMENT 11 ,
TO ASSEMBLY BILL 280

July 25, 1967 - Offered by Assemblyman SOIK.

1 Amend the bill, as follows:

2 On page 164, line 9, delete "or incompetent" and substitute therefor
3 ", if the court determines that such minor will not be represented by a
4 conscientious parent, or is incompetent,".

5 (End)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

ASSEMBLY AMENDMENT 12,
TO ASSEMBLY BILL 280

LRB -6476
MV:ks:l

July 25, 1967 - Offered by Assemblyman SOIK.

1 Amend the bill, as follows:

2 On page 168, line 3, delete "an amount to be fixed by the court" and
3 substitute "a fee of \$20 an hour to be paid by the state and not to be
4 chargeable to the estate".

5 (End)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

ASSEMBLY AMENDMENT 13,
TO ASSEMBLY BILL 280

LRB-6500
EP:de:1

July 27, 1967 - Offered by Assemblyman SOIK.

- 1 Amend the bill, as follows:
- 2 On page 168, after line 7, insert "(3a) To attorneys, \$25 an hour.
- 3 This fee applies to terminations of joint tenancy."
- 4
- 5 (End)
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20

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.

1 AN ACT to repeal 74.62 (2), 230.47, 230.48, chapters 233, 237 and 238,
2 287.43, 287.44, 296.41, chapters 310, 311, 312 (except 312.03, 312.08,
3 312.11 and 312.13), 313, 314, 315, 316 (except 316.45, 316.46, 316.48,
4 316.49 and 316.50), 317 (except 317.06), 318, 321 and 324 (except 324.35,
5 324.351 and 324.356); to renumber and amend 296.42, 312.03, 312.08,
6 312.11, 312.13, 316.45, 316.46, 316.48, 316.49, 316.50, 317.06, 324.35,
7 324.351 and 324.356; to amend 48.92 (1), 49.08 (2), 72.05 (1), 253.10 (1),
8 268.026, 287.19 and 323.32 and 323.34, as renumbered; and to create
9 48.92 (3), 72.05 (4) and TITLE XLII (chapter 851 to 853, 856 to 863, 867,
10 868, 878 and 879) of the statutes, relating to the Wisconsin probate code.

11 Analysis by the Legislative Reference Bureau

12 This proposal revises the Wisconsin probate code. The proposed
13 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.

14 In explanation of the proposal, the committees wrote:

15 "Because numerous changes have been made in the substantive chap-
16 ters (c. 852 on Intestate Succession replacing present c. 237, c. 853 on
17 Wills replacing present c. 238, and c. 861 on Family Rights replacing
18 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.
19 These changes do not constitute radical departures from present concepts;
the basic approach has been to build on and modernize our present laws
20 whenever possible.

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

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

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

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

18 3. Greater power is given to and at the same time greater responsi-
19 bility and accountability are placed on the personal representative. Pro-
20 visions are included which it is hoped will facilitate and require prompt
21 and effective work by all personal representatives."

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

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

25 "Comment" notes follow many sections and apply directly to the par-
26 ticular section after which they appear.

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

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

31 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 adop-
tive 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.~~

1a SECTION 2. 48.92 (3) of the statutes is created to read:

1 48.92 (3) Rights of inheritance by, from and through an adopted
2 child are governed by s. 851.51.

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

4 49.08 (2) If upon the death of any person any property prior to death
5 was held in joint tenancy, ~~then ss. 230.47 (1m) and (3) and 230.48 (1m)~~
6 ~~and (3) shall apply and~~ the liability and recovery shall be the same as
7 provided in sub. (1) except that it shall only be for relief furnished under
8 ss. 49.01 to 49.17 and the judge so finds, and if there is no personal
9 property or the personal property is insufficient to pay the debt and ob-
10 ligation and real property remains, the court shall enter judgment which
11 shall constitute a prior lien for the unsatisfied amount as hereafter pro-
12 vided and remain a prior lien until satisfied or until the death of the
13 surviving joint tenant at which time recovery may be had. The author-
14 ities or board shall file a copy of the judgment with a description of the
15 property in the office of the register of deeds of every county in which
16 real property of the joint tenant is located. This subsection is authority
17 only to counties having a population of 500,000 or more for relief furnished
18 by such counties and shall apply only to persons resident of such counties
19 at the time of death.

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

21 72.05 (1) All taxes imposed by ss. 72.01 to 72.24 shall be due and
22 payable at the time of decedent's death, except as hereinafter provided;
23 and except as provided in sub. (4) every such tax shall be and remain a
24 lien upon the property transferred until paid and the person to whom the
25 property is transferred and the administrators, executors and trust-
26 ees of every estate so transferred shall be personally liable for such tax
27 until its payment. Whenever the department of taxation is satisfied that
28 the collection of the tax will not thereby be jeopardized, it ~~shall have the~~
29 ~~power to~~ may release the lien hereby imposed with respect to all or any
30 part of the property transferred upon the advance payment of a fee of \$2.
31 The release of the lien of the tax, duly executed by the department of

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

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

6 72.05 (4) Sale. When any property is sold from an estate by a per-
7 sonal representative the lien described in sub. (1) is transferred to the
8 proceeds of the sale and the property passes from the estate free of any
9 such lien, and the person to whom the property is transferred has no
10 liability for such tax.

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

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

13 SECTION 8. Chapter 233 of the statutes is repealed.

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

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

16 253.10 (1) The jurisdiction of the county court shall extend to the
17 probate of wills and granting letters testamentary and of administration
18 on the estates of all persons deceased who ~~were~~ at the time of their
19 ~~decease inhabitants of or residents in the same county and of all who shall~~
20 ~~die without the state having any estate within such county to be adminis-~~
21 ~~tered~~ decease were domiciled in the county and of all persons deceased
22 who at the time of their decease were not domiciled in this state but who
23 had an estate within the county to be administered or probated, and to any
24 other cases authorized by law; to the appointment of guardians to minors
25 and others in the cases prescribed by law; to all matters relating to the
26 settlement of the estates of such deceased persons and of such minors
27 and others under guardianship; to all cases of constructions of wills admit-
28 ted to probate in such court; and to all cases of trusts and trust powers
29 created by will admitted to probate in such court, including administration
30 under ch. 323 of trusts created in accordance with s. 231.49 (1); and to

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

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

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

7 268.026 In an action, in a court of record, for damages founded
8 upon contract or upon a judgment, when it appears that the defendant is
9 interested, as heir, legatee or devisee, in the estate of a decedent and
10 that the defendant's property liable to execution is probably insufficient
11 to satisfy the plaintiff's claim for damages, the defendant may be enjoined
12 by the court, pending the action, from assigning or otherwise disposing of
13 his interest in such estate; and a receiver therefor may be appointed.
14 The judgment may compel the defendant to transfer sufficient of his inter-
15 est to satisfy the judgment or may adjudge such transfer. The remedy
16 given by this section is in addition to that given by ~~section 318.08 and by~~
17 proceedings supplementary to execution under ch. 273. If a receiver is
18 appointed, he shall give prompt notice thereof to the administrator or
19 executor.

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

21 287.19 If an action mentioned in s. 287.18 ~~be is~~ brought the plaintiff
22 must show that he has been or will be unable, with due diligence, to col-
23 lect his debt or some part thereof by proceedings in the county court or
24 from the personal representatives of the decedent ~~and that he brings his~~
25 ~~action pursuant to sections 313.22 to 313.25; and in such event, and except~~
26 as limited by s. 859.23, the plaintiff may recover the value of all the assets
27 received by all the defendants if necessary to satisfy his demand, and the
28 amount of the recovery shall be apportioned among the defendants in propor-
29 tion to the value of the property received by each of them; and the costs of the
30 action shall be apportioned in like manner; but no allowance or deduction shall
31 be made from such amount on account of other heirs or legatees or devisees to

1 whom assets have also been delivered or paid. The judgment shall ex-
2 press the amount recovered against each defendant for damages and costs.

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

4 SECTION 14. 296.41 of the statutes is repealed.

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

7 296.37 Before making an application to the court for changing or
8 establishing a name ~~or establishing an heirship~~ the applicant must cause
9 a notice thereof to be published, as a class 3 notice, under ch. 985, stating
10 therein the nature of the application, the time and place when and where
11 the same will be made.

12 SECTION 16. Chapters 310, 311 and 312 (except 312.03, 312.08,
13 312.11 and 312.13) of the statutes are repealed.

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

16 323.21 (1) Every ~~executor, administrator,~~ trustee and guardian,
17 shall verify by his oath every inventory required of him and such verifica-
18 tion shall be to the effect that the inventory is true of all property which
19 belongs to his decedent's or to the trust estate or his ward, which has
20 come to his possession or knowledge, and that upon diligent inquiry he
21 has not been able to discover any property belonging to such estates or
22 ward which is not included therein. The court, at the request of any
23 party interested, or on its own motion, may examine him on oath in re-
24 lation thereto, or in relation to any supposed omission therefrom.

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

30 323.23 The county court, upon the application of any ~~executor,~~

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

8 323.25 Whenever the county court ~~shall have~~ has reason to believe
9 that any ~~executor, administrator~~, trustee or guardian within its jurisdic-
10 tion has filed a false inventory, or claims as his own property, or permits
11 others to claim and retain property belonging to the estate which he repre-
12 sents, or is guilty of waste or mismanagement of the estate, or is unfit
13 for the proper performance of his duties, the court shall appoint a guard-
14 ian ad litem for any minor or incompetent person interested and shall
15 order such ~~executor, administrator~~, trustee or guardian to file his ac-
16 count. If upon the examination of such account the court ~~shall deem~~ deems
17 it necessary to proceed farther, a time and place for the adjustment
18 and settlement of said account shall be fixed by the court, and at least
19 10 days' notice thereof shall be given to such guardian ad litem, if any is
20 appointed, and to all persons interested. If, upon the adjustment of said
21 account, the court ~~shall be~~ is of the opinion that the interests of the estate,
22 and of the persons interested require it, such ~~executor, administrator~~,
23 trustee or guardian may be removed and another appointed.

24 323.27 RESALE BY TRUSTEE WITHOUT LICENSE. Whenever any
25 ~~executor, administrator or~~ testamentary trustee has purchased real
26 estate at judicial sale, under a judgment in an action in which he is plain-
27 tiff, or has redeemed real estate from a foreclosure or judicial sale, he
28 may sell and convey the same without license, upon such terms as he deems
29 best; and the proceeds arising from such sale shall be held by him the same
30 as he would have held the money due upon the debt by virtue of which he
31 purchased or held the money with which he redeemed such real estate.

1 SECTION 18. Chapters 313, 314, 315 and 316 (except 316.45, 316.46,
2 316.48, 316.49 and 316.50) of the statutes are repealed.

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

6 296.50 ~~No action for the recovery of any estate sold by an executor~~
7 ~~or administrator under the provisions of this chapter shall be maintained~~
8 ~~by any heir or other person claiming under the deceased testator or intes-~~
9 ~~tate unless it be commenced within five years next after the sale; and~~
10 No action for the recovery of any estate sold by a guardian shall be main-
11 tained by the ward or by any person claiming under him unless it ~~be~~ is
12 commenced within 5 years next after the termination of the guardianship,
13 excepting only that minors and others under legal disability to sue at the
14 time when the cause of action ~~shall accrue~~ accrues may commence their
15 action at any time within 5 years next after the removal of the disability.

16 296.52 A sale of real estate by ~~an executor, administrator or a~~
17 guardian shall not be avoided on account of any irregularity in the pro-
18 ceedings, ~~provided, it shall appear~~ if it appears that he was licensed to
19 make the sale by the county court having jurisdiction; that he gave a bond
20
21
22
23
24
25
26
27
28
29
30

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

5 296.54 If there ~~shall be~~ is any neglect or misconduct in the proceed-
6 ings of the ~~executor, administrator or~~ guardian in relation to such sale,
7 by which any person interested in the estate ~~shall suffer~~ suffers damages,
8 such aggrieved party may recover the same in an action on the bond of
9 such ~~executor, administrator or~~ guardian or otherwise, as the case ~~may~~
10 ~~require~~ requires .

11 296.56 The validity of a sale made by ~~an executor, administrator or~~
12 a guardian shall not be questioned by any person claiming under any title
13 that is not derived from or through the deceased persons or the ward, on
14 account of any irregularity in the proceedings; ~~provided, it shall appear if~~
15 it appears that the ~~executor, administrator or~~ guardian was licensed
16 to make the sale by a court having jurisdiction and that he did accordingly
17 execute and acknowledge, in legal form, a deed for the conveyance of the
18 premises .

19 296.58 Any ~~executor, administrator or~~ guardian who ~~shall~~ fraudu-
20 lently ~~sell~~ sells any real estate of his ~~testator, intestate or~~ ward, con-
21 trary to the provisions of law, shall be liable in double the value of the
22 land sold as damages, to be recovered in an action by any person having
23 an inheritance therein.

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

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

28 323.30 (1) Every trustee of a testamentary trust for charitable pur-
29 poses shall, prior to March of each year, account to the court having
30 jurisdiction thereof for the preceding calendar year and shall further

1 account ~~from time to time~~ as required by the court; and he may be exam-
2 ined by the court upon any matter relating to his account and his conduct
3 of such trust.

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

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

11 (4) No action of the court upon such account shall be final except it
12 be upon notice mailed to the attorney general and published under s.
13 ~~324.20~~ 879.05 (4).

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

17 SECTION 22. Chapter 321 of the statutes is repealed.

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

20 SECTION 24. 324.35, 324.351 and 324.356 of the statutes are re-
21 numbered 323.32, 323.34 and 323.36, and 323.32 and 323.34, as renum-
22 bered, are amended to read:

23 323.32 If ~~an executor, administrator,~~ a guardian or trustee
24 resides out of this state, or neglects to render his account within the
25 time provided by law or the order of the court, or neglects to settle the
26 estate according to law, or to perform any judgment or order of the court,
27 or absconds, or becomes insane or otherwise incapable or unsuitable to
28 discharge the trust, the county court may remove him and appoint his
29 successor; but no order of removal shall be made until the person affected
30 has been notified, as provided by s. ~~310.21~~ 879.67, or, if a resident,

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

3 323.34 If any ~~executor, administrator,~~ guardian or trustee ~~shall~~
4 ~~fail~~ fails to file his account as required by law or ordered by the court,
5 the court may, upon its own motion or upon the petition of any party in-
6 terested, issue a citation directed to the sheriff ordering and directing
7 the ~~executor, administrator,~~ guardian or trustee to show cause before
8 the court why he should not immediately make and file his reports or
9 accounts. Should any ~~executor, administrator,~~ guardian or trustee fail,
10 neglect, or refuse to make and file any report or account after having
11 been cited by the court so to do, or if he fails to appear in court as directed
12 by a citation issued under direction and by authority of the court, the
13 court may, upon its own motion or upon the petition of any interested
14 party, issue a warrant directed to the sheriff ordering that the ~~executor,~~
15 ~~administrator,~~ guardian or trustee be brought before the court to show
16 cause why he should not be punished for contempt for such failure, refus-
17 al, or neglect. If the court finds that such failure, refusal or neglect is
18 wilful or inexcusable, the ~~executor, administrator,~~ guardian or trustee
19 may be ~~punished for contempt by a fine~~ fined not to exceed \$50 or ~~by~~
20 ~~imprisonment~~ imprisoned not to exceed 10 days, or both.

21 SECTION 25. TITLE XLII (Chapters 851 to 853, 856 to 863, 867,
22 878 and 879) of the statutes is created to read:

23 TITLE XLII.

24 PROBATE CODE.

25 Chapter

- 26 851. Definitions and general provisions.
27 852. Intestate succession.
28 853. Wills.
29 856. Opening estates.
30 857. Powers and duties of personal representatives.

- 1 858. Inventory.
- 2 859. Claims.
- 3 860. Sale, mortgage and lease of property.
- 4 861. Family rights.
- 5 862. Accounts.
- 6 863. Closing estates.
- 7 867. Summary procedures.
- 8 868. Ancillary procedures.
- 9 878. Probate court bonds.
- 10 879. Notice, appearance, appeal and miscellaneous procedure.
- 11 CHAPTER 851.
- 12 DEFINITIONS AND GENERAL PROVISIONS
- 13 851.001 Effective date, probate code.
- 14 851.01 Administration.
- 15 851.03 Beneficiary.
- 16 851.05 Decedent.
- 17 851.07 Distributee.
- 18 851.09 Heir.
- 19 851.11 Intestate succession.
- 20 851.13 Issue.
- 21 851.15 Mortgage.
- 22 851.17 Net estate.
- 23 851.19 Person.
- 24 851.21 Person interested.
- 25 851.23 Personal representative.
- 26 851.25 Probate court.
- 27 851.27 Property.
- 28 851.29 Sale.
- 29 851.51 Status of adopted children for purposes of inheritance, wills
30 and class gifts.

1 851.55 Uniform simultaneous death act.

2 851.61 Decedent devolution of United States obligations in beneficiary
3 form.

4 851.001. EFFECTIVE DATE, PROBATE CODE. Chapters 851
5 (except s. 851.51), 856, 857, 858, 859, 860, 862, 863 (except s. 863.13),
6 867, 868, 878, and 879 are effective as of July 1, 1968. Chapters 852 and
7 861 and ss. 851.51 and 863.13 are effective as to any person dying on or
8 after July 1, 1968. Chapter 853 is effective as to the will of any testator
9 dying on or after July 1, 1968, except that it is inapplicable to a will ex-
10 ecuted prior to the publication of the chapter if it is proved the testator
11 lacked testamentary capacity at the time of such enactment, unless the
12 testator subsequently regained capacity to make a valid will and had such
13 capacity for a period of 6 months; a will so excepted is governed by the
14 statutes applicable at the time the testator executed his will.

15 851.01 ADMINISTRATION. "Administration" as used in title XLII
16 means any proceeding relating to a decedent's estate whether testate or
17 intestate.

18 851.03 BENEFICIARY. "Beneficiary" as used in title XLII means
19 any person nominated in a will to receive an interest in property other
20 than in a fiduciary capacity.

21 851.05 DECEDENT. "Decedent" as used in title XLII means the
22 deceased person whose estate is subject to administration.

23 851.07 DISTRIBUTE. "Distributee" as used in title XLII means
24 any person to whom property of a decedent is distributed other than in
25 payment of a claim, or who is entitled to property of a decedent under
26 his will or under the statutes of intestate succession.

27 851.09 HEIR. "Heir" as used in title XLII means any person, in-
28 cluding the surviving spouse, who is entitled under the statutes of intes-
29 tate succession to an interest in property of a decedent. The state is an
30 heir of the decedent and a person interested as provided in s. 45.37 (10)

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

3 851.11 INTESTATE SUCCESSION "Intestate succession" as used
4 in title XLII means succession to title to property of a decedent by reason
5 of the provisions of ch. 852, without regard to whether such property
6 descends or is distributed.

7 851.13 ISSUE. "Issue" as used in title XLII means children, grand-
8 children, great-grandchildren, and lineal descendants of more remote
9 degrees, including those who occupy such relation by reason of adoption
10 as provided in s. 851.51 and illegitimate persons and their lineal descend-
11 ants to the extent provided by s. 852.05.

12 851.15 MORTGAGE. "Mortgage" as used in title XLII means any
13 agreement or arrangement in which property is used as security.

14 851.17 NET ESTATE. "Net estate" as used in title XLII means all
15 property subject to administration less the property selected by the sur-
16 viving spouse under s. 861.33, the allowances made by the court under
17 ss. 861.31, 861.35 and 861.41 except as such allowances are charged by
18 the court against the intestate share of the recipient, administration
19 expenses, the amount of claims paid and federal and state estate taxes
20 payable out of such property (but not inheritance taxes).

21 851.19 PERSON. "Person" as used in title XLII includes natural
22 persons, corporations and other organizations.

23 851.21 PERSON INTERESTED. (1) Who are "persons interested".
24 The following are "persons interested" as used in title XLII:

25 (a) An heir of the decedent.

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

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

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

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

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

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

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

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

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

17 851.23 PERSONAL REPRESENTATIVE. "Personal representative"
18 as used in title XLII means any person to whom letters to administer a
19 decedent's estate have been granted by the court, but does not include a
20 special administrator.

21 851.25 PROBATE COURT. "Probate court" as used in title XLII
22 means the probate branch or branches of the county court or the county
23 court exercising its probate jurisdiction under s. 253.10.

24 851.27 PROPERTY. "Property" as used in title XLII means any
25 interest, legal or equitable, in real or personal property, without distinc-
26 tion as to kind.

27 851.29 SALE. "Sale" as used in title XLII includes an option or
28 agreement to transfer whether the consideration is cash or credit. It
29 includes exchange, partition and settlement of title disputes. The intent
30 in this definition is to extend and not to limit the meaning of "sale".

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

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

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

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

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

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

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

21 The section adopts the basic principles underlying Wisconsin statutes,
22 237.04 and 48.92. However, it is an improvement upon those statutes,
23 eliminating certain gaps in the law. Sections 237.04 and 48.92 have been
24 criticized because they removed the inheritance subject-matter from its
25 logical place and included it in a comprehensive Children's Code and also
26 because they failed to provide expressly for inheritance by adoptive rel-
27 atives other than adoptive parents. In fact the present statute suffers from
28 attempting to combine both a general conceptual approach in 48.92 (1) and
29 (2) and a specific but only partly inclusive approach in subsection (1) of
30 that section. In this respect it is not as complete as the prior adoption
31 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

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

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

17 Sub. (3) is new. It does not, however, involve any substantial change
18 in existing law. The Wisconsin Supreme Court has reached the same
19 result as a matter of judicial construction in Estate of Adler, 30 Wis.2d
20 250, 140 N.W.2d 219 (1966). The statute gives definitive shape to the
21 construction. It also prevents a deliberate adoption of an adult to qualify
22 the latter as a member of a class. In some states it has been possible
23 to adopt one's own wife in order to make the latter a child within a class
24 gift; the statute avoids such an absurd result.

25 851.55 UNIFORM SIMULTANEOUS DEATH ACT. (1) Where the
26 title to property or the devolution thereof depends upon priority of death
27 and there is no sufficient evidence that the persons have died otherwise
28 than simultaneously, the property of each person shall be disposed of as
29 if he had survived, except as provided otherwise in this section.

30 (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

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

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

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

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

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

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

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

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

29 851.61 DECEDENT DEVOLUTION OF UNITED STATES OBLIGA-
30 TIONS IN BENEFICIARY FORM. Where any resident of this state dies

1 possessed of any bonds or certificates of indebtedness of the United States
2 of America which are registered in his name, payable on death to another,
3 the unqualified ownership thereof and of the proceeds which may be de-
4 rived therefrom shall, on the death of the original owner, belong to such
5 named alternate payee, any law of this state to the contrary notwithstand-
6 ing.

7 COMMENT: This is 237.11 unchanged.

8 CHAPTER 852

9 INTESTATE SUCCESSION

10 852.01 Basic rules for intestate succession.

11 852.03 Related rules.

12 852.05 Status of illegitimate persons for purpose of intestate succession.

13 852.09 Assignment of home as part of share of surviving spouse.

14 852.11 Advancement in intestate estate.

15 852.13 Right to renounce intestate share.

16 SUMMARY OF CHAPTER: (1) This chapter replaces chapter 237 on
17 descent and 318.01 on distribution, with a single law governing the trans-
18 fer of both real and personal property. Although the general pattern of
19 237.01 is retained, some changes are involved. This chapter is designed
20 primarily for the small estate with normal family relationships; persons
21 in the middle and upper wealth brackets are increasingly aware of the
22 need for wills and estate planning. In most small estates the decedent
23 wishes his spouse to have the bulk of the estate. Accordingly, unless
24 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 guard-
ianship if minor children are involved, unless the estate exceeds \$25,000
after allowances.

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

28 (3) This chapter requires that an heir survive the intestate decedent
29 by 72 hours in order to take. This prevents double probate in the common
30 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

1 to require beneficiaries to survive a stated period to take, and is pat-
2 terned on a proposal under study by the National Conference of Commis-
sioners on Uniform State Laws.

3 (4) Instead of the existing law which gives the homestead to the sur-
4 viving spouse for life or until remarriage, the surviving spouse has a
5 right to the home in fee by applying the value of the home against the
6 spouse's share in the total estate. The spouse thus has a marketable
7 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 pres-
ence or absence of a home.

8 852.01 BASIC RULES FOR INTESTATE SUCCESSION. (1) Who are
9 heirs. The net estate of a decedent which he has not disposed of by will,
10 whether he dies without a will or with a will which does not completely
11 dispose of his estate, passes to his surviving heirs as follows:

12 (a) To the spouse:

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

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

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

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

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

2 (d) If there is no surviving spouse, issue or parent, to the brothers
3 and sisters and the issue of any deceased brother or sister by representa-
4 tion.

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

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

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

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

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

29 COMMENT: This section replaces the following Wisconsin statutes on
30 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

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

13 Any intestate succession statute can be defended on the grounds that
14 the owner of wealth may make a different disposition if he wishes, merely
15 by executing a will. But the fact remains that many people, the majority
16 in fact, do not make wills and that human inertia is such that the situation
17 is not likely to change greatly. Most people rely on the "will" made for
18 them by law — the law of intestate succession. Hence any law of this
19 kind must attempt to anticipate the wishes of the people who die having
20 made no testamentary disposition. Any such statute suffers because it
21 is difficult to anticipate human desires which are unexpressed (by defin-
22 ition) and which are bound to vary with many facts and circumstances
23 which cannot be incorporated into a statute without making it unduly com-
24 plex. The same statute must serve for the young man with a wife and
25 minor children and for the older retired man whose children are grown
26 and self-supporting, for the man with small resources and for the man
27 with a fortune, for the man who has married several times and for the
28 person who has never married. Any statute can be subjected to criticism
29 because it does not satisfactorily meet some unusual situation. There
30 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 fam-
ily 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.

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

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

14 Sub. (1) (a) increases the amount passing to the widow where there
15 is surviving issue of the same marriage, by giving the widow the first
16 \$25,000 out of the net estate. This is based on several grounds: (1) where
17 the estate is small and the children are minors, it is desirable to give
18 the entire estate to the widow, with the minor children protected by the
19 substantial allowances which the court can make for them under 861.35
20 if this appears necessary for any reason; (2) where the estate is small,
21 most testators wish prior provision to be made for the widow ahead of
22 grown children; (3) with the elimination of the homestead right as such,
23 the young widow needs a more substantial share in the balance of the
24 estate. This \$25,000 feature is not available if there are issue by a prior
25 marriage, just as 318.01 (1) is presently qualified in the same manner.
26 Providing the spouse with the first \$25,000 presents an administration
27 problem. As of what date is the property assigned to this share to be
28 valued, date of death or date of distribution? If the property in the estate
29 fluctuates between date of death and date of distribution, this will make a
30 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 evi-
dence 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.

26 The Wisconsin statute on descent (237.01) does not treat the surviving
27 spouse as an heir to nonhomestead realty if there are issue of the dece-
28 dent. However, the dower section (233.01) and the curtesy section (233.23)
29 in effect provide an intestate share for the spouse in such a situation.
30 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 substan-
tive change.

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

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

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

30 Sub. (1) (g) limits inheritance to relatives claiming through the intes-
tate's grandparents. More remote relatives are excluded. In recent
years there has been a trend toward limiting inheritance by remote rel-
atives, 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

1 half blood. As a restriction on inheritance by the surviving parent, it
2 may have had greater utility in an era of high infant mortality; but the
3 requirement that the child die under age seems meaningless otherwise.
4 As an ancestral property notion, it seems ineffective; if there is an only
5 child, the surviving parent would take and the property passes outside of
6 the ancestral line. If the early interpretation of the existing statute as
7 a redistribution of the deceased parent's estate is a clue, this may have
8 been a crude substitute for a will clause requiring survival for a limited
9 time (like the clause requiring any beneficiary to survive the final decree
10 of distribution). Probably the purpose of the existing statute was to pre-
11 vent an increase in the share passing to the widow. If the deceased child
12 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 sev-
eral hours. All or a substantial interest in the husband's estate would
normally pass to the wife by intestacy. Without sub. (2), the same prop-
erty 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.).

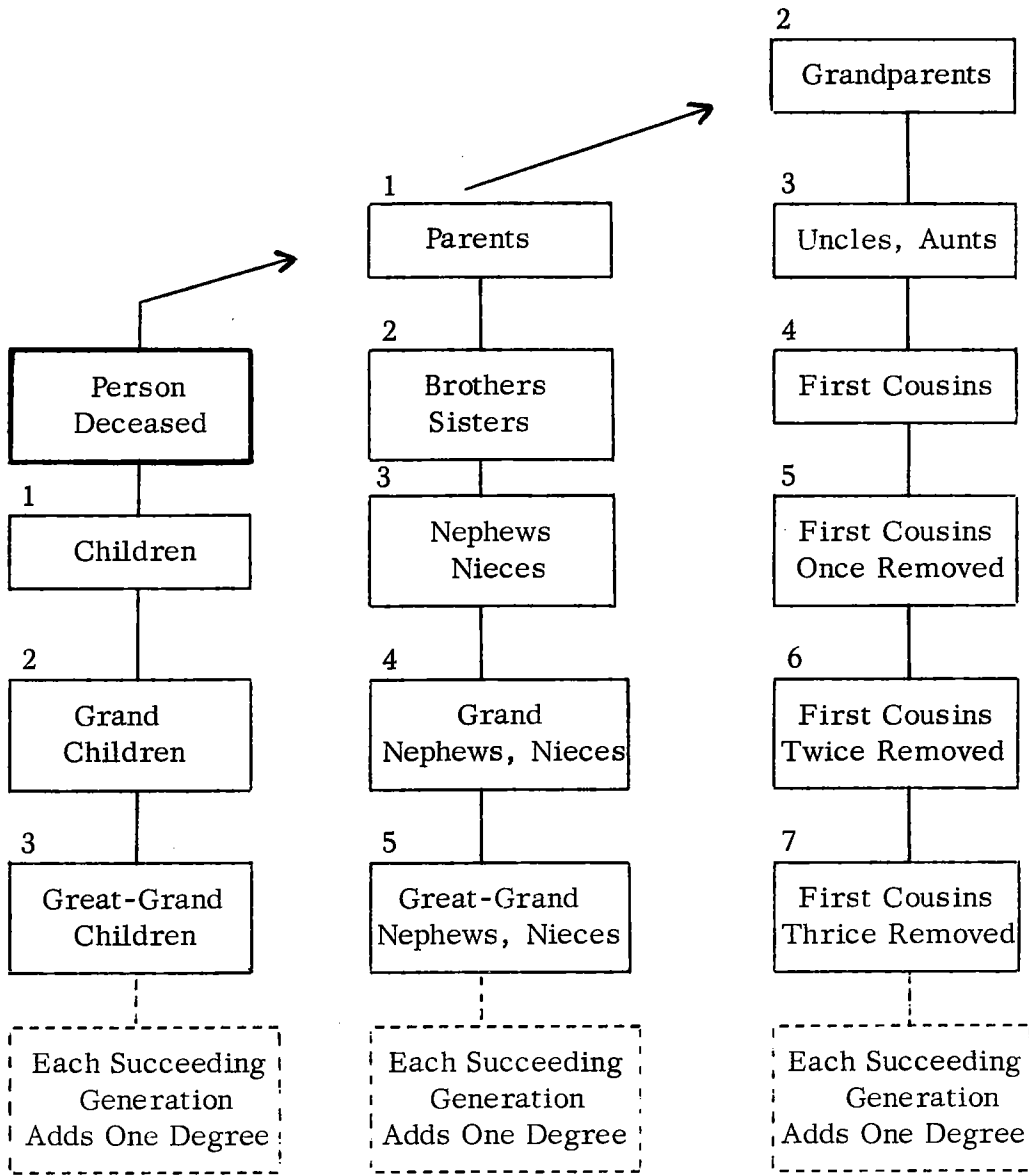
Sub. (3) provides for escheat if the decedent leaves no surviving
relatives within the preceding subsections; it makes no change in the
present rule of 237.01 (7) and 238.136.

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

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

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

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30



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

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

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

8 Sub. (1) defines "representation" in greater detail than 237.07. When
9 read in conjunction with 237.01 (1), this definition has been interpreted
10 variously when applied to an unusual case like Maud v. Catherwood, 67
11 Cal.App.2d 636, 155 P.2d 111 (1945), noted 33 Cal.L.Rev. 324 (1945).
12 There decedent's children all predeceased him. He was survived by several
13 grandchildren and by 2 great-grandchildren whose parents also predeceased
14 decedent. If the pattern of stirpital distribution were determined at the
15 level of the living grandchildren, each of the great-grandchildren and each
16 of the four surviving grandchildren would take one-sixth; but because the
17 court determined representation at the level of the children, one great
18 grandchild took one-fourth, one grandchild took a fourth, 3 grandchildren
19 took one-eighth, and the other great-grandchild took an eighth. The Cali-
20 fornia statutes were similar to 237.01 and 237.07. See also Note (1942)
21 140 A.L.R. 1141. The proposed definition is based on the Model Probate
22 Code, s. 22 (c) and prevents such anomalous result. Since the point
23 has never been decided in Wisconsin, this section would also eliminate
24 litigation.

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

27 Sub. (3) eliminates one of the last remnants of the ancient concept
28 of "ancestral" property. The modern tendency has been in the direction
29 of eliminating all distinctions between relatives of the half blood and of
30 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 ances-
tor. 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

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

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

8 852.05 STATUS OF ILLEGITIMATE PERSON FOR PURPOSES OF
9 INTESTATE SUCCESSION. (1) An illegitimate child or his issue is
10 entitled to take in the same manner as a legitimate child by intestate
11 succession from and through (a) his mother, and (b) his father if the
12 father has either been adjudicated to be such under ss. 52.21 to 52.45,
13 or has admitted in open court that he is the father, or has acknowledged
14 himself to be the father in writing signed by him.

15 (2) Property of an illegitimate person passes in accordance with s.
16 852.01 except that the father or his kindred can inherit only if the father
17 has been adjudicated to be such under ss. 52.21 to 52.45.

18 (3) This section does not apply to a child legitimated by the subse-
19 quent marriage of his parents under s. 245.25, and status of an illegiti-
20 mate child who is legally adopted is governed by s. 851.51.

21 COMMENT: The problem of illegitimate children is growing in incidence.
22 Various related statutes minimize the scope of illegitimacy. Thus child-
23 ren born during the marriage are presumed to be legitimate — 328.39;
24 an illegitimate child becomes legitimate upon the subsequent marriage of
25 the parents — 245.25; and a child born to a married couple is legitimate
26 even though the marriage is subsequently declared void — 245.25. More-
27 over, most illegitimate children become adopted, and their status becomes
28 that of children of the adoptive parents. Nevertheless, it is important to
29 modernize our statutes on inheritance by, from and through illegitimate
30 persons. Although illegitimacy is still against public policy, any change
31 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 estab-
lished by written and witnessed acknowledgment by the father, an adjudica-
tion of paternity, or admission in open court; he can not inherit from
paternal collateral relatives.

1 (3) Property of the illegitimate child is inherited by his mother and
2 her relatives only. Although 237.05 contains no express exception, it
3 seems clear that if the illegitimate child were to leave a surviving spouse
4 or children, they should inherit under 237.01; other courts have so con-
5 strued similar legislation. Pulliam v. Churchman, 108 Okla.290, 236 P.
6 875 (1925).

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

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

30 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

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

6 852.09 ASSIGNMENT OF HOME AS PART OF SHARE OF SURVIVING
7 SPOUSE. (1) If the intestate estate includes an interest in a home, the
8 interest of the decedent shall be assigned to the surviving spouse as part
9 of his or her share under s. 852.01 unless the surviving spouse files with
10 the court at or before the hearing on the final account a written request
11 that the home not be so assigned. The interest of the decedent in the
12 home is valued with all liens deducted. Inventory value is prima facie
13 the value of the interest in the home. If such value exceeds the share of
14 the surviving spouse under s. 852.01, the court may either (a) assign
15 the interest in the home to the surviving spouse subject to a lien in favor
16 of the other heirs for their respective interests in such excess, or (b)
17 assign the interest in the home to the surviving spouse upon payment by
18 the latter to the personal representative of the amount by which the value
19 of the interest exceeds such share of the spouse.

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

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

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

22 If decedent is survived by a spouse and no issue, there is no need
23 for application of this section, because the surviving spouse takes the
24 entire estate, including the homestead, under 852.01 (1) (a) (i). Since
25 the share of the surviving spouse in other cases has been increased under
26 852.01, that share will normally be adequate to include the value of the
27 home. However, there may be situations in which the value of the home
28 exceeds the spouse's share. The last sentence of sub. (1) empowers the
29 court with discretion to adopt either of two methods for dealing with the
30 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 subse-
quently 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

1 to the final account.

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

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

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

20 852.11 ADVANCEMENT IN INTESTATE ESTATE. (1) When gift
21 is an advance. A gift by the decedent during his lifetime to an heir is an
22 advance against his intestate share, to be taken into account by the court
23 in the final judgment, only if there is either a writing by the decedent
24 clearly stating that the gift is an advance (whether or not such writing is
25 contemporaneous with the gift) or the heir states by writing or in court
26 that the gift was an advance.

27 (2) Death of advancee before decedent. If a gift is made during life-
28 time to a prospective heir and such gift would have been an advance under
29 sub. (1) but for the death of the prospective heir prior to the decedent or
30 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.

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

14 Distinctions in the existing statute based on the kind of property ad-
15 vanced, real or personal, are immaterial under this section which treats
16 real and personal property alike.

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

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

24 Because the probate branch of the county court has complete jurisdic-
25 tion in Wisconsin over settlement of an estate, 318.29 has been omitted
26 as superfluous. Likewise 318.25 states such an obvious proposition of the
27 law of advancement that it has not been embodied in this section. Omis-
28 sion of these sections is not intended to change the law in any respect.

29 Technically the property advanced is not part of the estate for pur-
30 poses of administration. It is merely considered for purposes of com-
31 puting 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

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

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

17 The last sentence is new. It is intended to deal with the problem
18 raised in the recent case Estate of Wettig, 29 Wis.2d 239, 138 N.W.2d
19 206 (1965).

20 CHAPTER 853.

21 WILLS.

22 853.01 Capacity to make or revoke a will.

23 853.03 Execution of wills.

24 853.05 Execution of wills outside the state or by nonresidents within
25 this state.

26 853.07 Witnesses.

27 853.09 Deposit of will in county court during testator's lifetime.

28 853.11 Revocation.

29 853.13 When will is contractual.

30 853.15 Equitable election if will attempts to dispose of property belong-
ing to beneficiary.

853.17 Effect of will provision changing beneficiary of life insurance or
annuity.

- 1 853.19 Advancement in testate estate.
- 2 853.21 Renunciation of gift under will.
- 3 853.23 Renunciation of power of appointment or appointed property.
- 4 853.25 Unintentional failure to provide for issue of testator.
- 5 853.27 Rights of issue of beneficiary dying before testator (lapse).
- 6 853.29 After-acquired property.
- 7 853.31 Presumption that will passes all of testator's interest in property.
- 8 853.33 Gift of securities construed as specific.
- 9 853.35 Non-adeption of specific gifts in certain cases.

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

12 (2) In line with the trend in other states a uniform minimum age of
13 18 years is provided.

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

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

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

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

28 (7) A totally new provision ameliorates the effect of adeption by
29 extinction if specifically devised or bequeathed property is sold, condemned
30 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

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

2 The reasons for recommending a uniform lower age are as follows:

3 (1) Minors today are increasingly owners of substantial amounts of prop-
4 erty. In an era when accumulation of wealth was the major means of
5 acquiring an estate, few, if any, men acquired an estate before they
6 reached 21. Today the tax advantages of inter vivos gifts have induced
7 parents and grandparents to make transfers, outright or in trust, for
8 minors. Trusts created to comply with IRC s. 2503 (c) must either pro-
9 vide for payment to the minor's estate in event of death before 21 or give
10 the minor a testamentary power of appointment (although under existing
11 tax regulations it is not required that the minor be able to exercise the
12 power under state law). (2) Marriage of minors is increasingly frequent.
13 Patterns of marriage and raising a family have changed drastically. There
14 is more need for a minor to be able to make a will to provide for a chang-
15 ing family situation. (3) Our present law contains inconsistencies which
16 are neither logical nor sound. The exceptions for the married woman
17 of 18 and for a minor in military service can, of course, be rationalized.
18 The exception for the married minor woman, which is apparently unique
19 to Wisconsin, enables her to avoid the intestate laws which would give
20 the entire estate to her husband as heir if there are no children, or to
21 create trusts for children if there are any. But the married man under
22 21 has just as much need for estate planning as his minor wife. The
23 exception for young men in the military forces is an outgrowth of historic
24 accident and has been attacked as historically unsound. 21 Mod.L.Rev.
25 423 (1958). Wisconsin is one of only six states which lower the age for
26 soldiers and sailors. Although the special exception for persons in mil-
27 itary service can be justified on grounds of the increased peril, more
28 minors are killed in automobile accidents than in the performance of
29 military duties. (4) Minors can avoid existing limitations by resorting
30 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.

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

26 That the capacity to revoke a will is the same as the capacity to make
27 a will is implicit in our existing statute and is the basis for the last sen-
28 tence 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.

29 853.03 EXECUTION OF WILLS. Every will in order to be validly
30 executed must be in writing executed with the following formalities:

1 (1) It must be signed (a) by the testator, or (b) in the testator's
2 name by one of the witnesses or some other person at the testator's ex-
3 press direction and in his presence, such a proxy signing either to take
4 place or to be acknowledged by the testator in the presence of the wit-
5 nesses; and

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

8 COMMENT: This section makes no change in the Wisconsin law relating
9 to attested wills, with the possible addition of the requirement that the
10 proxy signature of another person for the testator be in the presence of the
11 witnesses or be acknowledged in their presence, and a very minor change
12 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 per-
missible method of testamentary disposition.

13 Wisconsin has fewer formalities for execution of wills than almost
14 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:
15 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.
16 2d 404 (1956). Nor is it necessary that the testator either sign in the
17 presence of the witnesses or acknowledge the signature in their presence:
18 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:
19 Will of Johnson, 225 Wis. 140, 273 N.W. 512 (1937). In fact, it is dif-
20 ficult 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
21 witnesses, nor indicate to them that it was a will she wanted them to sign.
22 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
23 Society, 92 Wis. 209, 65 N.W. 1037 (1896). This statute uses only the
24 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.
25 Normally, of course, they will subscribe or sign at the end of the will. In
26 all cases where a formal attestation clause is part of the will document,
the witnesses are attesting to all facts recited therein, including capacity
27 of the testator as well as matters relating to execution.

28 Although normally, where the testator signs in his own handwriting,
the signature need not be made or acknowledged in the presence of the
29 witnesses, no Wisconsin case has held that a proxy signature may be
made by another person for the testator outside the presence of the wit-
30 nesses. 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-
31

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

7 A signature in which the testator participates, as by touching the pen
8 guided by another, is a signature by him. Will of Wilcox, 215 Wis. 341,
9 254 N.W. 529 (1934). Hence such a signature would be within sub. (1) (a)
10 and not a proxy signature within sub. (1) (b). Nor would the proposed
11 statute change the existing law that a testator may sign a will by mark or
12 by proxy signature even though he is able to write: Will of Mueller, 188
13 Wis. 183, 205 N.W. 814 (1925) (holding what is now 990.01 (38) inappli-
14 cable to signature for purposes of the wills statute, 238.06).

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

24 The restrictions in the existing statutes are such that nuncupative
25 wills have extremely limited effectiveness, anyway. Those restrictions,
26 which originated in the 17th century, make little sense in a modern set-
27 ting and are illogical in the distinctions drawn. The courts have demon-
28 strated a hostile policy toward oral wills, and all of the appellate cases
29 in Wisconsin have invalidated such wills on one ground or another.

30 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 illiter-
acy, 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 nun-
cupative wills as with holographic wills or written wills attested by one

1 witness, neither of which are valid in Wisconsin.

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

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

16 853.05 EXECUTION OF WILLS OUTSIDE THE STATE OR BY NON-
17 RESIDENTS WITHIN THIS STATE. A will is validly executed if executed
18 according to s. 853.03 or if executed in accordance with either
19 of the following, provided that it is in writing: (a) the law of the place
20 where the will is executed; or (b) the law of the place where the testator
21 is domiciled at the time of execution of the will. Any such will has the
22 same effect as if executed in this state in compliance with s. 853.03.

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

29 The existing statute also contains a proviso that wills be in writing
30 "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

1 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.

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

5 853.07 WITNESSES. (1) Any person who, at the time of execution of
6 the will, would be competent to testify as a witness in court to the facts
7 relating to execution may act as a witness to the will. Subsequent incom-
8 petency of a witness is not a ground for denial of probate if the execution
9 of the will is otherwise satisfactorily proved.

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

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

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

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

25 COMMENT: Sub. (1) makes no change in existing Wisconsin law. It
26 merely states the obvious rules regarding competency. Sub. (2) adopts
27 the general principle of 238.08 and 238.09 but makes some change in
28 details of application. The language of this section is patterned on the
29 Model Probate Code s. 46 (s. 3 of the Model Execution of Wills Act). The
30 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-

31

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

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

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

18 Sub. (3) (a) merely codifies existing law. An executor may be a
19 witness under both our existing statute and this section without being
20 beneficially interested. Will of Lyon, 96 Wis. 339, 71 N.W. 362 (1897).
21 The same would be true of a trustee, an attorney named in the will to
22 handle the estate, or any other person whom the will directs the executor
23 to employ. However, this ceases to be the case if the will expressly pro-
24 vides for special compensation greater than that usual for the particular
25 services, as where the will names an executor and gives him a large
26 legacy in payment for his services. The express provision of 238.08
27 that a mere charge on land for payment of debts does not prevent a cred-
28 itor from being a witness has been eliminated as obsolete. This provision
29 dates back to the old Statute of George II (1752) at a time when land was
30 not subject to claims of creditors unless expressly charged by the will;
31 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) is 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 pre-
 deceases 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 TESTA-
TOR'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

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

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

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

22 COMMENT: This section permits deposit of a will by the testator during
23 his lifetime and continues existing law with only minor changes. Deposit
24 will be with the register in probate rather than the county judge, since the
25 function is administrative in nature. In order to facilitate record storage,
26 the register may regulate size of the envelope and has discretionary power
27 after 25 years to microfilm or otherwise reproduce the will and destroy
28 the original. It is unlikely that any will on file for more than 25 years
29 will ever be needed for probate. In counties where storage is not a prob-
30 lem, the register will undoubtedly retain original wills for a much longer
31 period rather than go to the expense of microfilming. A slight change in
the provision for withdrawal is reflected in the requirement for two wit-
nesses 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.

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

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

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

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

11 (a) The will indicates an intent that it not be revoked by subsequent
12 marriage or was drafted under circumstances indicating that it was in
13 contemplation of the marriage or makes provision for issue of the dece-
14 dent; or

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

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

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

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

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

1 codicil or part; or (b) if the revoking instrument is a codicil which re-
2 voked only a part of the will by inconsistency and not expressly, and the
3 evidence is insufficient to prove that the testator intended no revival.

4 Proof of testator's statements at or after the act of revocation is admis-
5 sible to establish intent. No will, codicil or part can be revived under
6 this subsection unless the original will or codicil is produced in court.

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

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

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

26 Undoubtedly there are other actions of a testator which clearly indi-
27 cate his intent to revoke a will, but which fall short of doing so under
28 both 238.14 and this section. Thus, In re Ladd, 60 Wis. 187, 18 N.W.
29 734 (1884) held that a will was not revoked where the testatrix wrote "I
30 revoke this will" with her name and the date on the back of the will; had
31 she written this across the face of the will it would have been a cancella-
32 tion within the statute and hence sufficient to revoke. But there are even
33 more "hard" cases where documents intended as wills fall short because
34 not properly executed. This section on revocation therefore retains exist-
35 ing minimal formalities.

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

1 loss of the will had access, or the like. In re Steinke's Will, 95 Wis.
2 121, 70 N.W. 61 (1897); Gavitt v. Moulton, 119 Wis. 35, 96 N.W. 395
3 (1903); Wendt v. Ziegenhagen, 148 Wis. 382, 134 N.W. 905 (1912); Will
4 of Donigian, 265 Wis. 147, 60 N.W.2d 732 (1953).

5 When the statute refers to revocation by physical act to the "will or
6 part", this includes an act done to a duplicate original, but not to a con-
7 formed or unformed copy. Will of Donigian, cited above; Will of Wehr,
8 247 Wis. 98, 18 N.W.2d 709 (1945).

9 Under our existing statute, the Supreme Court has held that the testa-
10 tor may not "ratify" loss or destruction of a will under circumstances
11 which do not comply with the statutory requirements. Estate of Murphy,
12 217 Wis. 472, 259 N.W. 430 (1935).

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

16 Sub. (2) and (3) deal with revocation by operation of law and introduce
17 a change in existing law. The only provision in our existing statutes is
18 found in 238.14, and reads: "nothing contained in this section shall pre-
19 vent the revocation implied by law from subsequent changes in the condi-
20 tion or circumstances of the testator." The Wisconsin Supreme Court
21 has hinted that the court has power to determine revocation based on
22 this section in situations not recognized at common law. Will of Wehr,
23 247 Wis. 98, 18 N.W.2d 709 (1945); Estate of Wilkins, 192 Wis. 111,
24 211 N.W. 652 (1927). Nevertheless, aside from divorce, the only change
25 in the testator's circumstances now recognized as automatically revoking
26 a will is a combination of marriage and birth or adoption of a child.
27 Glascott v. Bragg, 111 Wis. 605, 87 N.W. 853 (1901). Marriage alone
28 is not enough. Will of Lyon, 96 Wis. 339, 71 N.W. 362 (1897); Will of
29 Wehr, cited above. Nor is birth of issue alone enough. Will of Read,
30 180 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 Wiscon-
sin 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 com-
mon 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

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

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

22 The existing law whereby marriage plus birth of issue automatically
23 revokes a will operates without regard to the testator's intent and may
24 work a hardship in some cases. For example, a man acquires the family
25 business from his parents with the understanding that he will take care
26 of an invalid sister for life. In contemplation of marriage, he makes a
27 will providing for his intended wife and for any children born of the mar-
28 riage, with the balance left in trust for the invalid sister. Under existing
29 law this will is revoked by marriage plus birth of a child. Under this
30 section, it will remain in force. Sub. (2) would be inapplicable because
31 the will makes a provision for the spouse (and also indicates that it was
drafted in contemplation of the marriage). 853.25 on Pretermitted Chil-
dren 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 revoca-
tion. 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 re-
voked will, codicil or part thereof. Under existing law if a testator ex-
ecutes will No. 1, subsequently executes will No. 2 which expressly re-

1 vokes will No. 1, and later destroys will No. 2 with the intent that will
2 No. 1 be effective, the probate court is not permitted to probate will
3 No. 1 however clear the evidence may be that testator wanted his first
4 will as the effective document. Noon's Will, 115 Wis. 299, 91 N.W.
5 670 (1902); Estate of Laege, 180 Wis. 32, 192 N.W. 373 (1923); Estate
6 of Eberhardt, 1 Wis.2d 439, 85 N.W.2d 483 (1957). Nevertheless the
7 court can admit proof of testator's intent for the purpose of determining
8 whether revocation of will No. 2 was dependent or conditional upon reviv-
9 al of the first will; in a proper case the court can then allow probate of
10 the second will on the basis of the doctrine of dependent relative revoca-
11 tion. Estate of Callahan, 251 Wis. 247, 29 N.W.2d 352 (1947); Estate
12 of Alburn, 18 Wis.2d 340, 118 N.W.2d 919 (1962). Since the principle
13 reason for denying revival of the first will is to avoid the dangers of
14 oral proof of intent, and the very same evidence is now admitted to deter-
15 mine whether the second will (the one document testator intends to revoke
16 and has often destroyed) should be allowed for probate, it seems logical
17 to allow proof of the testator's intent to revive the first document.

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

1 revoke it.

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

11 238.19 was enacted in 1957 as the result of concern by some attorneys
12 that the marital deduction under the federal estate tax law might be lost
13 when a husband and his wife executed separate wills at the same time.
14 The concern was that the Internal Revenue Service might contend that
15 such wills were executed pursuant to contract or agreement that the sur-
16 viving spouse would not change her will, hence that she took subject to a
17 trust, and the husband's bequest to her was a terminable interest which
18 did not meet the requirements of IRC 2040. It now appears that, even if
19 there were an express agreement, the marital deduction would be allowed;
20 but it may be necessary to litigate the issue in the federal courts. Estate
21 of Emmet Awtry v. Comm'r, 221 F.2d 749 (8th Cir. 1955); Newman v.
22 United States, 176 F.Supp. 364 (S.D.Ill.1959); Schildmeier v. United
23 States, 171 F. Supp. 328 (S.D.Ind.1959). The tax matter is, however,
24 still not completely free from doubt. See Note 55 N.W.L. Rev. 727
25 (1961). The existing statute is ambiguous. Does it create a presumption,
26 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 evi-
dentiary requirement.

27 The existing judicial rule, indirectly indorsed by the provisions of
28 238.19 which except joint wills, making it easier to infer a contractual
29 arrangement where there is a joint will should be changed. In the first
30 place, joint wills are sometimes used without any intent to make a bind-
31 ing 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 infer-
ence that joint wills are pursuant to contract, any more than any other

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

3 853.15 EQUITABLE ELECTION IF WILL ATTEMPTS TO DISPOSE
4 OF PROPERTY BELONGING TO BENEFICIARY. (1) Necessity for
5 election. If a will gives a bequest or devise to one beneficiary and also
6 clearly purports to give to another beneficiary a property interest which
7 does not pass under the will but belongs to the first beneficiary by right
8 of ownership, survivorship, beneficiary designation or otherwise, the
9 first beneficiary must elect either to take under the will and transfer
10 his property interest in accordance with the will, or to retain his prop-
11 erty interest and not take under the will. If he elects not to take under
12 the will, the bequest or devise given him under the will is to be assigned
13 by the court to the other beneficiary in lieu of the property interest which
14 does not pass under the will. But this section does not require an election
15 in any case where the property interest belongs to the first beneficiary by
16 reason of transfer or beneficiary designation made by the decedent after
17 the execution of the will; the section does not apply to the elective right
18 of the surviving spouse under s. 861.05.

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

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

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

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

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

4 COMMENT: This section replaces 238.02 (2) and deals with the doctrine
5 of equitable election laid down in Will of Schaech, 252 Wis. 299, 31 N.W.
6 2d 614 (1947). The problem commonly arises if a testator mistakenly
7 attempts to dispose by will of assets which belong to a beneficiary by
8 survivorship in joint tenancy or beneficiary designation on life insurance
9 or government bonds. The doctrine allows a testator to make a testa-
10 mentary gift to one beneficiary on condition that he give up the assets
11 which he would otherwise have outside the will and which the testator
12 wills to another beneficiary. Each case involves two issues: (1) when
13 does the will require an election, and (2) what conduct on the part of the
14 beneficiary constitutes an election on his part to take under the will and
15 give up his other interests acquired outside the will.

16 Sub. (1) embodies the rule laid down in Will of Parker, 273 Wis. 29,
17 76 N.W.2d 712 (1955). Where a beneficiary owns property or has rights
18 aside from the will (for example, as the named beneficiary under a life
19 insurance policy on the life of the testator or as surviving joint tenant),
20 it is presumed that the testator did not wish to affect those rights by his
21 will; a will should require an election only if it "clearly" attempts to
22 dispose of the property.

23 Sub. (2) changes existing law on the 2nd issue. 238.02 (2) provides
24 that "acceptance of a bequest or devise" does not constitute an election
25 unless the will "so provides in express terms". Apparently this means
26 that the beneficiary can take under the will and also retain rights outside
27 the will unless the will expressly provides that acceptance of the bequest
28 or devise is an election. Since the doctrine of election is primarily de-
29 signed to relieve against mistake, this requirement in the existing statute
30 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, accept-
ance of the devise or bequest under the will is the clearest possible in-
dication 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.

29 853.17 EFFECT OF WILL PROVISION CHANGING BENEFICIARY
30 OF LIFE INSURANCE OR ANNUITY. (1) Any provision in a will which

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

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

10 COMMENT: This section is new and changes the Wisconsin law to achieve
11 uniformity. If a life insurance policy is payable to a named beneficiary
12 who survives the testator, in almost all states a provision in the insured's
13 will changing the beneficiary is ineffective. Largely due to an early court
14 misunderstanding regarding the nature of life insurance, Wisconsin per-
15 mits a change of the life insurance beneficiary by a provision in the will
16 in limited situations. Estate of Breitung, 78 Wis. 33, 46 N.W. 891, 47
17 N.W. 17 (1890). The rule does not apply if the insurance is payable to
18 a married woman or if the insurance is mutual benefit and the society
19 has a rule prohibiting change by will. Christman v. Christman, 163 Wis.
20 433, 157 N.W. 1009 (1916); Thomas v. Covert, 126 Wis. 593, 105 N.W.
21 922 (1906). Most insurance companies provide an exclusive method by
22 which the insured can change the beneficiary with specified formalities.

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

1 (whether or not such writing is contemporaneous with the gift), or the
1a beneficiary states by writing or in court that the gift was an advance.

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

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

12 COMMENT: This section is new. There is no statute dealing with the
13 effectiveness of inter vivos gifts to a beneficiary under the will if the
14 testator intends those gifts to be deducted from the bequest or legacy in
15 the will. At common law, which would prevail, the court would deal
16 with the problem as one of "ademption by satisfaction" and would allow
17 proof, including testimony as to oral statements, to establish whether
18 the gift is to be deducted or to be in addition to the will provision. The
19 court is aided by "presumptions"; thus, if the gift is to a child or a mem-
20 ber of the family, it is presumed to be in satisfaction of the will; if it is
21 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 intes-
tate estate (where written proof is required). To bring the testate situa-
tion into line with the intestate, this section parallels 852.11.

22 This section does not change the normal rules on ademption by extinc-
23 tion. 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.

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

27

28 853.21 RENUNCIATION OF GIFT UNDER WILL. Any person to
29 whom property is given by the terms of a will may renounce all of such
30 property, or any part of such property unless the will expressly pro-

1 hibits partial renunciation, by filing a signed declaration of such renun-
1a ciation with the probate court and serving a copy on the personal repre-
2 sentative within 180 days from admission of the will to probate; but the
3 court may grant additional time for cause shown, by order entered within
4 or after such 180 day period. Property includes rights of a beneficiary
5 of a trust under the will, including right to receive discretionary or con-
6 tingent distributions; and any provision in the will attempting to restrict
7 alienability of the interest of a beneficiary, whether under a trust or
8 otherwise, does not restrict the power to renounce such interest under
9 this section. No interest in the property or part thereof so renounced is
10 deemed to have vested in such person; but the renounced property or part
11 passes as if such person had predeceased the testator unless the will pro-
12 vides otherwise. However, a renunciation is invalid to the extent that
13 the person renouncing has prior to filing the renunciation effectively
14 assigned or contracted to assign the renounced property, if prior to entry
15 of the final judgment, or earlier distribution by the personal representa-
16 tive in reliance on the renunciation, the assignee files with the probate
17 court a copy of the assignment or contract and serves a copy on the per-
18 sonal representative.

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

24 The procedure for renunciation is the same as that provided in
25 852.13 and sets standards for renunciation within a reasonable time.
26 Partial renunciation is permitted unless the testator's will expressly
27 provides otherwise; this is undoubtedly the intent in modern times.

27 The most significant change is in the effect of renunciation. Normal-
28 ly the rule in 238.135 is sound and would prevail under this section as
29 a matter of regular rules of construction. However, if the testator has
30 provided a substitutionary gift or if the anti-lapse statute is applicable
31 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

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

7 853.23 RENUNCIATION OF POWER OF APPOINTMENT OR APPOINT-
8 ED PROPERTY. (1) If a will purports to create any power of appointment,
9 as defined in s. 232.01 (1), the donee may renounce the power entirely,
10 or partially renounce to the same extent that he may partially release
11 the power under s. 232.09 (1) (b), by filing a renunciation in the manner
12 and time provided in s. 853.21. To the extent that he renounces, such
13 power is deemed not to have been created in the donee at any time.

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

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

28 COMMENT: This section is new. It is necessary because of settled prop-
29 erty notions that a power of appointment is not technically an interest in
30 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) per-
mits him to renounce the power. There are some limitations inherent

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

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

11 853.25 UNINTENTIONAL FAILURE TO PROVIDE FOR ISSUE OF
12 TESTATOR. (1) Children born or adopted after making of the will. If
13 a testator fails to provide in his will for any child born or adopted after
14 the making of the will, such child is entitled to receive a share in the
15 estate of the testator equal in value to the share which the child would
16 have received if the testator had died intestate, unless the testator left
17 all or substantially all of his estate to the mother of the child, the testa-
18 tor eliminated all of his children known to him to be living at the time of
19 execution of the will from any share under the will, the testator provided
20 for the subsequently born or adopted child by a transfer or transfers out-
21 side the will and the intent that such transfer or transfers be in lieu of a
22 testamentary gift is either shown by statements of the testator or inferred
23 from the amount of the transfer and other circumstances, or in any other
24 case it appears from the will or evidence outside the will that such omis-
25 sion was intentional. If a child entitled to a share under this section
26 dies before the testator, and such child leaves issue who survive the
27 testator, the issue who represent such child are entitled to his share.

28 (2) Living issue omitted by mistake. If clear and convincing evidence
29 proves that by mistake or accident the testator failed to provide in his
30 will for a child living at the time of making of the will, or for the issue of
31 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

1 accident.

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

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

9 (a) from any intestate property first;

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

16 (5) Discretionary power of court to assign different share. If in any
17 case under sub. (1) or (2) the court determines that the intestate share
18 is a larger amount than the testator would have wanted to provide for the
19 omitted child or issue of a deceased child, because it exceeds the value
20 of a provision for another child or for issue of a deceased child under
21 the will, or that assignment of the intestate share would unduly disrupt
22 the testamentary scheme, the court may in its final judgment make such
23 provision for the omitted child or issue out of the estate as it deems would
24 best accord with the probable intent of the testator, such as assignment,
25 outright or in trust, of any amount less than the intestate share but approx-
26 imating the value of the interest of other issue, or modification of the pro-
27 visions of a testamentary trust for other issue to include the omitted
28 child or issue.

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

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

7 Sub. (1) provides for the afterborn child. The share provided by this
8 subsection is subject to adjustment under sub. (5). No share is available
9 in certain situations where the testator would not have wanted a share,
10 since the purpose of this whole section is to cure an apparent oversight
11 by the testator and is based on the theory that the testator would want
12 some provision for each child. No share is available where the testator
13 has left all or substantially all of his estate to the mother of the child.
14 Thus if a testator leaves all of his estate to his wife, a child born of such
15 marriage (or adopted) would take no share; the mother would normally
16 support the child anyway, and the testator could have changed his will
17 had he intended a share for the child. Similarly if the testator has one
18 or more children and makes no provision for them, it is highly probable
19 that he would have made no provision for a subsequently born child; us-
20 ually this is a case where the estate is left to the wife anyway, as in
21 Will of Read, 180 Wis. 497, 193 N.W. 382 (1923). Another situation
22 where the testator would not want a subsequent child to take a share is
23 that in which he makes up for the omission by a non-testamentary trans-
24 fer, such as a living trust or life insurance. Although the existing statute
25 provides for a share for the omitted child unless the testator's intent
26 to provide no share is apparent from the will, sub. (1) allows evidence
27 outside the will (extrinsic evidence) to show that the omission was inten-
28 tional. Compare the use of such evidence in Bresee v. Stiles, 22 Wis.
29 120 (1867); In re Donge's Will, 103 Wis. 497, 79 N.W. 786 (1899) and
30 Sandon v. Sandon, 123 Wis. 603, 101 N.W. 1089 (1905). However,
31 neither the reference to evidence outside the will nor the express pro-
vision 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 inter-
pretation 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

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

4 Sub. (3) has no counterpart in the existing statutes. Language in
5 . Will of Kurth, 241 Wis. 426, 6 N.W.2d 233 (1942) and in the earlier case
6 of Newman v. Waterman, 63 Wis. 612, 23 N.W. 696 (1885) indicated that
7 the time to present a claim as an omitted heir was "at the time of probate";
8 this may limit the claim to the proceedings on proof and allowance of the
9 will, or it may merely mean that the claim must be made prior to the
10 final decree and not in a collateral proceedings. This statute places a
11 definite time limit. It is believed that the 6 months period is ample time
12 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 allow-
ance 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.

13 Sub. (4) merely restates existing Wisconsin law embodied in 238.12.
14 The problem of disruption of a testamentary scheme, whether by unantici-
15 pated debts or taxes or by the elective share of the widow or the share of
16 the pretermitted heir, is a most difficult one. The court has to have free-
17 dom to do the best job it can to salvage the testamentary scheme. This
18 ought not to be done automatically on the basis of rules about kinds of
19 provisions in the will (whether realty is preferred over personalty,
20 whether the gift is specific, general, demonstrative, or residuary) but
21 should be done intelligently in light of the relationship of the beneficiaries
22 under the will to the testator and what the testator would probably have
23 wanted. 238.12 and sub. (4) give the county court the discretion to do
24 such an intelligent salvage operation, with the presumption in favor of
25 pro rata apportionment. While it may be argued that the choice of the
26 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 sur-
viving spouse).

27 Sub. (5) is new. It vests limited discretion in the county court. It
28 is based on the sound premise that any statute providing for an omitted
29 heir necessarily requires a rewriting of the testator's will. Rather than
30 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

1 situations to which this subsection would apply are: a will establishing
2 a sprinkling trust for testator's existing children and omitting any ref-
3 erence to afterborn children because testator anticipated no additional
4 children at his age but later adopted one (the court properly would modify
5 the trust to include the afterborn child rather than assigning a fixed
6 share); a will establishing a trust of the entire estate to pay income to
7 the widow for life, with principal to go at her death to his named children,
8 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).

9 853.27 RIGHTS OF ISSUE OF BENEFICIARY DYING BEFORE
10 TESTATOR (LAPSE). (1) Unless a contrary intent is indicated by the
11 will, if provision in the will is made for any relative of the testator and
12 such relative dies before the testator and leaves issue who survive the
13 testator, then such issue as represent the deceased relative are substi-
14 tuted for him under the will and take the same interest as he would have
15 taken had he survived the testator.

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

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

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

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

24 COMMENT: This section provides against "lapse" where the beneficiary
25 under a will predeceases the testator. It is designed to carry out the
26 normal intent of a testator who provides in his will for a child or other
27 relative, and the child dies before the testator and leaves issue who sur-
28 vive the testator. Thus, if testator leaves a bequest for a son, it is
29 assumed that had the testator thought about the possibility of the son dying
30 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

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

8 This section applies only to gifts to relatives as does the present
9 statute. It is not limited to heirs under s. 852.01 but may include more
10 remote relatives. It would exclude relatives by marriage; see Cleaver v.
11 Cleaver, 39 Wis. 96 (1875); Estate of Dodge, 1 Wis.2d 399, 84 N.W.2d
12 66 (1956). This section includes an adopted person who enjoys any degree
13 of relation by virtue of the adoption, by the provision of 851.51; 238.13
14 has been similarly interpreted.

15 Sub. (2) provides definite answers to certain situations as to which
16 238.13 is indefinite. Thus it is made clear that the statute applies where
17 the relative is dead at the time the will is executed (a "void" gift rather
18 than a case of "lapse") if the gift is to an individual. It is also uncertain
19 whether class gifts are included within the existing statute, although this
20 seems to have been generally assumed in two cases: Estate of Phillips,
21 236 Wis. 268, 294 N.W. 824 (1940) (holding statute inapplicable where
22 gift was to "my nephews and nieces" and issue of nephews and nieces who
23 died before execution of the will claimed under the statute); Estate of
24 Stewart, 270 Wis. 610, 72 N.W.2d 334 (1955) (statute again held inappli-
25 cable where gift was in trust for "all of my children living at the time of
26 my death" on grounds that will made "a different disposition" in favor
27 of the living children). Finally, there are no Wisconsin cases bearing
28 on the application of the anti-lapse statute to the exercise of a power of
29 appointment where the appointee predeceases the donee of the power; it
30 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 Restate-
ment, Property (1940) s. 350. Sub. (2) (c) includes both general and
special powers of appointment except where the special power of appoint-
ment could not have been exercised in favor of the persons taking under
this section.

This section substitutes "such issue as represent the deceased ben-
eficiary." Normally this would be the children. However, issue of sev-
eral 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 re-
garding 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

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

8 853.29 AFTER-ACQUIRED PROPERTY. A will is presumed to pass
9 all property which the testator owns at his death and which he has power
10 to transmit by will, including property acquired after the execution of
11 the will.

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

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

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

30 (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 con-
trary 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

1 statute. The most recent case is Estate of Zink, 15 Wis.2d 527, 113
2 N.W.2d 420 (1961) (holding that a residuary clause expresses the neces-
3 sary intent to dispose of the testator's entire property, including after-
4 acquired realty). See also Will of Smith, 176 Wis. 494, 186 N.W. 180
5 (1922); Estate of Buser, 8 Wis.2d 40, 98 N.W.2d 425 (1950). Neverthe-
6 less, the existing statutory language ought to be changed, not only to
7 reflect the liberal judicial interpretation but also to prevent hardship in
8 some cases beyond the scope of such interpretation.

9 This section adopts an intermediate approach. As to inclusion of
10 after-acquired property it essentially adopts a time-of-death construc-
11 tion. However, the Committee did not feel it necessary to propose a
12 broad statute favoring the time-of-death construction in all other types
13 of situations. In situations not covered by the statute the court is thus
14 free to explore the intent of the testator in the individual case, under nor-
15 mal rules of construction, and to adopt whatever presumption the court
16 feels more desirable for the particular kind of problem, although the
17 principle that "a will speaks as of the testator's death" will usually pre-
18 vail. This section follows the policy of uniform treatment for real and
19 personal property and accords with the oft-repeated rule that a testator
20 intends to dispose of all his property (the presumption against intestacy).

21 853.31 PRESUMPTION THAT WILL PASSES ALL OF TESTATOR'S
22 INTEREST IN PROPERTY. Any gift of property by will is presumed to
23 pass all the estate or interest which the testator could lawfully will in
24 such property unless it clearly appears by the will, interpreted in light
25 of the surrounding circumstances, that the testator intended to pass a
26 less estate or interest.

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

29 At common law a devise in a will was interpreted to pass only a life
30 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 con-
struction that 238.02 (1) was enacted. Our court has properly inter-
preted 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 con-
sider 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

1 devise passes all of the testator's real estate when the contest is between
2 the devisee and the heir. When, however, the contest is between the
3a devisee and another beneficiary under the will who claims that the de-
4 visee takes only a life interest and that there is a gift over to the other
5 beneficiary, the presumption has less weight. See Will of Ritchie, 190
6 Wis. 116, 208 N.W. 880 (1926) (reversing lower court); Will of Richter,
7 215 Wis. 108, 254 N.W. 103 (1934) (finding only a life estate where there
8 was gift over, with no mention of statute). This section is not intended to
9 change this result.

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

12 853.33 GIFT OF SECURITIES CONSTRUED AS SPECIFIC. Every
13 gift of a stated number of shares or amount of securities is construed
14 to be a specific gift if the testator owned the same or a greater number
15 of shares or amount of such securities at the time of execution of the
16 will, even though the will does not describe the securities more specif-
17 ically or qualify the description by a possessive pronoun such as "my",
18 unless the will expressly empowers the personal representative to pur-
19 chase securities to satisfy the bequest. "Securities" is used in this
20 section in the broadest possible sense and includes but is not limited to
21 stocks,, bonds and corporate securities of any kind, shares in an invest-
22 ment trust or common trust fund, and bonds or other obligations of the
23 United States, any state, other governmental unit or agency, foreign or
24 domestic.

25 COMMENT: This section is new. If a testator disposes by gift in his will
26 of a stated number of shares of securities, such as "100 shares of XYZ
27 common stock" or "\$5,000 of government bonds" and at the time of ex-
28 ecution of the will he owns that number of shares or that amount of bonds,
29 he presumably is thinking of the specific stock or bonds he then owns.
30 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.

1 853.35 NONADEMPTION OF SPECIFIC GIFTS IN CERTAIN CASES.

2 (1) Scope of section . It is the intent of this section to abolish the common
3 law doctrine of ademption by extinction in the situations governed by this
4 section; this section is inapplicable if the intent that the gift fail under
5 the particular circumstances appear in the will, or if the testator during
6 his lifetime gives property to the specific beneficiary with the intent of
7 satisfying the specific gift. Whenever the subject of the specific gift is
8 property only part of which is destroyed, damaged, sold or condemned,
9 the specific gift of any remaining interest in the property owned by the
10 testator at the time of his death is not affected by this section; but this
11 section applies to the part which would have been adeemed under the com-
12 mon law by the destruction, damage, sale or condemnation.

13 (2) Proceeds of insurance on property. If insured property which is
14 the subject of a specific gift is destroyed, damaged, lost, stolen or other-
15 wise subject to any casualty compensable by insurance, the specific bene-
16 ficiary has the right to: (a) any insurance proceeds paid to the personal
17 representative after death of the testator, with the incidents of the spec-
18 ific gift; and (b) a general pecuniary legacy equivalent to any insurance
19 proceeds paid to the testator within one year of his death; but the amount
20 hereunder is reduced by any amount expended or incurred by the testator
21 in restoration or repair of the property.

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

1 the purchase price; and for purposes of this section property is consid-
2 ered sold as of the date when a valid contract of sale is made. Sale by
3 an agent of the testator or by a trustee under a revocable living trust
4 created by the testator, the principal of which is to be paid to the personal
5 representative or estate of the testator on his death, is a sale by the tes-
6 tator for purposes of this section.

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

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

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

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

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

14 COMMENT: This section is new and changes the law. At common law,
15 if real or personal property were specifically given by will to a named
16 person, and the property were destroyed or sold between the time of
17 execution of the will and the testator's death, the devise or bequest failed;
18 the reason was that there was no property in the estate to satisfy the
19 specific gift. This doctrine, known as ademption by extinction, worked
20 without regard to the testator's intent. It was ameliorated to some extent
21 by various judicial approaches. Thus if testator devised "my residence"
22 to his wife, and sold the residence he owned at the time the will was
23 drafted and subsequently purchased another residence, the court would
24 apply the time-of-death construction; by relating the phrase "my resi-
25 dence" to the residence testator owned at death, ademption was avoided.
26 But if testator sold one residence and died pending negotiations to purchase
27 another residence, the wife was out of luck. If the testator sold on a
28 land contract, our Supreme Court has held that the devisee is entitled to
29 the unpaid balance on the land contract. Estate of Atkinson, 19 Wis.2d
30 272, 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.

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

8 CHAPTER 856
9 OPENING ESTATES

- 8 856.01 Jurisdiction.
9 856.03 Wills in court for safekeeping.
10 856.05 Delivery of will to court.
11 856.07 Who may petition for administration.
12 856.09 Petition for administration, contents.
13 856.11 Notice of hearing on petition for administration.
14 856.13 Will must be proved.
15 856.15 Proof of will and proof of heirs where uncontested.
16 856.17 Lost will, how proved.
17 856.19 Order admitting will.
18 856.21 Persons entitled to domiciliary letters.
19 856.23 Persons who are disqualified.
20 856.25 Bond of personal representative.
21 856.27 Appointment of special administrator if appointment of personal
22 representative is delayed.
23 856.29 Letters issued to trustee of testamentary trust.
24 856.31 Selection of attorney to represent estate.

25 SUMMARY OF CHAPTER: This chapter deals with procedure from
26 the initial petition through the appointment and bonding of the per-
27 sonal representative. It replaces chs. 310 and 311.

28 856.01 JURISDICTION. The jurisdiction of a proceeding for admin-
29 istration of a decedent's estate is as follows:

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

1a (2) If the decedent had no domicile in this state, then in any county
1 in this state where property of the decedent is located, and the probate
2 court which first exercises jurisdiction under this subsection has ex-
3 clusive jurisdiction.

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

6 856.03 WILLS IN COURT FOR SAFEKEEPING. When a will has
7 been filed with a probate court for safekeeping during the testator's life-
8 time, the court on learning of the death of the testator shall open the
9 will and give notice of the court's possession to the executor, if any,
10 named in the will, otherwise to some person interested in the provisions
11 thereof. If probate jurisdiction belongs to any other court such will shall
12 be delivered to such other court.

13 856.05 DELIVERY OF WILL TO COURT. (1) Duty and liability of
14 person with custody. Every person, other than the executor, having
15 the custody of any will shall, within 30 days after he has knowledge of
16 the death of the testator, file it in the proper probate court or deliver
17 it to the person named as executor therein. Every person named as
18 executor shall, within 30 days after he has knowledge that he is named
19 executor, and has knowledge of the death of the testator, file such will
20 in the proper probate court, unless the will has been otherwise deposited
21 with the court. Every person who neglects to perform any of the duties
22 required in this subsection, without reasonable cause, is liable in a
23 proceeding in probate court to every person interested in such will for
24 all damages caused by such neglect.

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

1 30 days after he has such information.

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

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

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

19 856.07 WHO MAY PETITION FOR ADMINISTRATION. (1) Generally.
20 Petition for administration of the estate of a decedent may be made by
21 any executor named in the will or by any person interested.

22 (2) After thirty days. If none of those named in sub. (1) has peti-
23 tioned within 30 days after the death of the decedent, petition for admin-
24 istration may be made by the public administrator, any person who was
25 guardian of the decedent at the time of the decedent's death, any credi-
26 tor of the decedent, anyone who has a cause of action or who has a right
27 of appeal which cannot be maintained without the appointment of a per-
28 sonal representative or anyone who has an interest in property which
29 is or may be a part of the estate.

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

1 state to petition for administration.

2 856.09 PETITION FOR ADMINISTRATION, CONTENTS. The
3 petition for administration shall comply with s. 879.01 and in addition
4 shall state:

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

7 (2) That the decedent left property requiring administration;

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

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

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

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

17 CROSS REFERENCES: Section 863.23 provides that a petition for
18 determination of heirship may be included in a petition for admin-
19 istration. Section 879.25 requires filing of an affidavit as to mili-
20 tary service. Section 268.23, Uniform Absence as Evidence of
21 Death and Absentee's Property Act, provides a procedure for deter-
22 mining the fact of death when evidence is not available.

22 856.11 NOTICE OF HEARING ON PETITION FOR ADMINISTRATION.

23 When a petition for administration is filed the court shall set a time for
24 proving the will, if any, for determination of heirship and for the appoint-
25 ment of a personal representative. Notice of hearing on the petition shall
26 be given as provided in s. 879.03 with the additional requirement that
27 when any person interested is represented by a guardian ad litem, notice
28 shall be given to both the person interested and his guardian ad litem.
29 A copy of the will which is being presented for proof shall accompany
30 each notice that is mailed or served.

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

3 856.13 WILL MUST BE PROVED. No will shall pass any property
4 unless it has been proved and admitted to probate.

5 856.15 PROOF OF WILL AND PROOF OF HEIRS WHERE UNCON-
6 TESTED. (1) Generally. The court may grant probate of an uncontested
7 will on the execution in open court by one of the subscribing witnesses
8 of a sworn statement that such will was executed as required by the
9 statutes and that the testator was of sound mind, of full age and not
10 acting under any restraint at the time of the execution thereof.

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

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

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

27 (5) When no competent subscribing witness in state. If no compe-
28 tent subscribing witness resides in this state at the time fixed for prov-
29 ing the will or if none of them, after reasonable diligence used can be
30 found in this state, the court may admit the testimony of other witnesses

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

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

5 856.17 LOST WILL, HOW PROVED. Whenever any will is lost,
6 destroyed by accident or destroyed without the testator's consent the
7 probate court has power to take proof of the execution and validity of
8 such will and to establish the same. The petition for the probate of
9 such will shall set forth the provisions thereof.

10 856.19 ORDER ADMITTING WILL. Every will, when admitted to
11 probate as prescribed by statute, shall have that fact signified thereon
12 by the court.

13 856.21 PERSONS ENTITLED TO DOMICILIARY LETTERS. Letters
14 shall be granted to one or more of the persons hereinafter mentioned,
15 who are not disqualified, in the following order:

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

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

19 (3) Any person whom the court may select.

20 856.23. PERSONS WHO ARE DISQUALIFIED. No person including
21 the executor named in the will is entitled to receive letters if he is under
22 21 years of age, of unsound mind, a corporation not authorized to act as
23 a fiduciary in this state, a nonresident of this state who has not appointed
24 a resident agent to accept service of process in all actions or proceedings
25 with respect to the estate and caused such appointment to be filed with the
26 court, or a person whom the court deems unsuitable for good cause
27 shown. Nonresidency may be a sufficient cause for nonappointment or
28 removal of a person in the court's discretion.

29 856.25 BOND OF PERSONAL REPRESENTATIVE. (1) Generally.
30 No person shall act as personal representative, nor shall letters be

1 issued to him until he has given a bond in accordance with ch. 878, with
2 one or more sureties, conditioned on the faithful performance of his
3 duties, to the judge of the court, or until the court has ordered that he
4 be appointed without being required to give bond. If the court does not
5 require a personal representative to give bond prior to his letters being
6 issued, the court may require him to give bond at any later time. The
7 requirement of a bond and the amount of the bond, if any, is solely with-
8 in the discretion of the court, except that no bond shall be required of
9 any trust company bank, state bank or national banking association which
10 is authorized to exercise trust powers and which has complied with s.
11 220.09 or 223.02.

12 (2) When two or more personal representatives. If 2 or more per-
13 sons are appointed personal representatives, the judge may require no
14 bond, may take a bond from each, take a joint bond from all or take a
15 bond from some but not all.

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

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

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

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

29 856.27 APPOINTMENT OF SPECIAL ADMINISTRATOR IF APPOINT-
30 MENT OF PERSONAL REPRESENTATIVE IS DELAYED. If, because
31 of an objection to the admission of a proposed will of a decedent or an

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

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

9 856.29 LETTERS ISSUED TO TRUSTEE OF TESTAMENTARY
10 TRUST. If the will of the decedent provides for a testamentary trust,
11 letters of trust shall be issued to the trustee as soon as feasible after
12 the admission of the will to probate. The trustee is a person interested
13 in the estate. The trustee if required to give bond shall not be required
14 to give bond until such time as assets are to be distributed to him as
15 trustee.

16 COMMENT: A testamentary trust is directly affected by many pro-
17 ceedings in the administration of an estate such as a will construction
18 or accounting.

19 856.31 SELECTION OF ATTORNEY TO REPRESENT ESTATE.
20 Whenever a corporate fiduciary is granted letters to administer an
21 estate, the person receiving the largest interest from the estate shall
22 name the attorney who shall represent the estate in all proceedings of
23 any kind or nature, unless good cause be shown before the court why
24 this should not be done. In case several persons receive a similar
25 interest and no person receives a larger interest, the attorney named
26 by the majority shall represent the estate, and if such persons are equal-
27 ly divided in their selection, the personal representative shall select
28 one of those named as attorney. In case of persons who are under
29 guardianship, their court appointed guardian shall make the selection,
except that in the case of minors having a natural guardian surviving,

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

3 CHAPTER 857

4 POWERS AND DUTIES OF PERSONAL REPRESENTATIVES

5 857.01 Title in personal representative.

6 857.03 Powers and duties of personal representative; in general.

7 857.05 Allowances to personal representative for expenses and services.

8 857.07 Allowances to personal representative for costs.

9 857.09 Procedure which may be followed when personal representative
10 fails to perform.

11 857.10 Failure to comply with certain statutes.

12 857.11 Ordering personal representative to appear; costs.

13 857.13 Powers of surviving personal representative.

14 857.15 When personal representative removed, resigns.

15 857.17 Validity of acts of personal representative prior to removal.

16 857.19 When will proved after letters issued.

17 857.21 Appointment of successor personal representative.

18 857.23 Rights and powers of successor personal representative.

19 857.25 Continuation of business.

20 857.27 Personal representative or trustee may form corporation.

21 857.29 Personal representative may plat land.

22 SUMMARY OF CHAPTER: This chapter contains the sections per-
23 taining to the personal representative which are presently scattered
24 throughout the probate chapters.

25 857.01 TITLE IN PERSONAL REPRESENTATIVE. Upon his letters
26 being issued by the court, the personal representative has title to all
27 property of the decedent.

28 COMMENT: This section gives the personal representative title
29 to both the real and personal property of the decedent and is con-
30 sistent with the policy of treating real and personal property in the
same way in all phases of probate procedure. Historically in Wis-
consin a personal representative has had title to personal property

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

3 857.03 POWERS AND DUTIES OF PERSONAL REPRESENTATIVE;
4 IN GENERAL. The personal representative shall collect and possess
5 all the decedent's estate; inventory all of the decedent's estate and all
6 property subject to inheritance tax and have appraised such as is required
7 by law; collect all income and rent from decedent's estate; manage the
8 estate and, when reasonable, maintain in force or purchase casualty and
9 liability insurance; contest all claims except claims which he believes
10 are valid and which are not objected to by a person interested; pay and
11 discharge out of such estate all expenses of administration, taxes, charg-
12 es, claims allowed by the court, or such payment on claims as directed
13 by the court; render accurate accounts; make distribution and do such
14 other things as directed by the court or required by law.

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

22 857.05 ALLOWANCES TO PERSONAL REPRESENTATIVE FOR
23 EXPENSES AND SERVICES. (1) Expenses. The personal representative
24 shall be allowed all necessary expenses in the care, management and
25 settlement of the estate.

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

1 be reduced or denied.

2 857.07 ALLOWANCES TO PERSONAL REPRESENTATIVE FOR
3 COSTS. When costs are allowed against a personal representative in
4 any action or proceeding the same shall be allowed him in his administra-
5 tion account unless it appears that the action or proceeding in which the
6 costs were taxed was prosecuted or resisted without just cause on his
7 part; and the court may determine, in rendering the judgment, whether
8 the costs shall be paid out of the estate or by the personal representative.
9 The court may allow as costs the sum paid by a personal representative
10 on any bond or undertaking given by him in the case.

11 857.09 PROCEDURE WHICH MAY BE FOLLOWED WHEN PERSONAL
12 REPRESENTATIVE FAILS TO PERFORM. When a personal representa-
13 tive fails to perform an act or file a document within the time required
14 by statute or order of the probate court the judge may upon his own
15 motion or upon the petition of any person interested order the personal
16 representative for such estate and his attorney to show cause why the
17 act has not been performed or the document has not been filed and shall
18 mail a copy of such order to the sureties on the bond of the personal
19 representative. If cause is not shown the judge shall determine who is
20 at fault. If both are at fault, the judge shall dismiss both and forthwith
21 appoint a personal representative and appoint an attorney acceptable to
22 such personal representative to complete the administration of the estate.
23 If only the personal representative is at fault, he shall be summarily
24 dismissed and the judge shall forthwith appoint another personal repre-
25 sentative to complete the administration and close the estate. If only the
26 attorney is at fault, the judge shall dismiss him and instruct the personal
27 representative to employ another attorney; if such personal representa-
28 tive fails to employ another attorney within 30 days, the judge shall
29 appoint an attorney. No other procedure for substitution of attorney
30 shall be required in such cases. The procedure set forth in this section

1 is not exclusive.

2 CROSS REFERENCE: This procedure is mandatory when the person-
3 al representative fails to comply with the requirements of ss. 862.17
4 and 863.35.

5 COMMENT: This procedure has been used for dormant estates since
6 1953 under 324.355. This section makes the procedure available
7 in the discretion of the court whenever a personal representative
8 fails to perform.

8 857.10 FAILURE TO COMPLY WITH CERTAIN STATUTES.

9 Failure of the personal representative to comply with ss. 858.03,
10 859.29 or 862.09 is prima facie evidence of neglect of duty.

11 857.11 ORDERING PERSONAL REPRESENTATIVE TO APPEAR;
12 COSTS. Whenever the court issues an order directed to the sheriff
13 requiring the personal representative to appear before it, all costs in-
14 curred by the court in such proceeding may be charged to the personal
15 representative personally and may be deducted from the fees which he
16 may receive for his services as personal representative.

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

20 857.13 POWERS OF SURVIVING PERSONAL REPRESENTATIVE.

21 Every power exercisable by co-personal representatives may be exer-
22 cised by the survivor or survivors of them when one or more is dead
23 or by the other or others when less than the number designated in
24 the will are appointed by the court or when an appointment is terminated
25 by order of the court or by resignation accepted by the court unless the
26 power is given in the will and its terms provide otherwise as to the ex-
27 ercise of such power.

28 857.15 WHEN PERSONAL REPRESENTATIVE REMOVED, RESIGNS.

29 The judge may accept the written resignation of any personal representa-
30 tive. When a personal representative becomes incompetent, disqualified,

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

11 857.17 VALIDITY OF ACTS OF PERSONAL REPRESENTATIVE
12 PRIOR TO REMOVAL. The resignation, removal or death of a person-
13 al representative after letters have been issued to him do not invalidate
14 his official acts performed prior to his resignation, death or removal.

15 857.19 WHEN WILL PROVED AFTER LETTERS ISSUED. When
16 after letters are issued to a personal representative by a probate court
17 in the estate of a decedent, whether testate or intestate, a will of such
18 decedent is proved and allowed by such court, the powers of such per-
19 sonal representative cease, and the court shall remove him. All acts
20 of such personal representative before his removal are as valid as if
21 such will had not been allowed.

22 857.21 APPOINTMENT OF SUCCESSOR PERSONAL REPRESENTA-
23 TIVE. When a personal representative dies, is removed by the court,
24 or resigns and such resignation is accepted by the court, the court may,
25 and if he was the sole or last surviving personal representative and
26 administration is not completed, the court shall appoint another person-
27 al representative in his place.

28 857.23 RIGHTS AND POWERS OF SUCCESSOR PERSONAL REPRE-
29 SENTATIVE. When a successor personal representative is appointed,
30 he has all the rights and powers of his predecessor or of the executor

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

4 857.25 CONTINUATION OF BUSINESS. (1) Generally. Upon a
5 proper showing, the court may by order authorize the personal repre-
6 sentative to continue any business of the decedent, but such order may
7 not be contrary to the provisions of the decedent's will. The order may
8 be with or without notice. If notice is not given to all interested persons
9 before the order is made, notice of the order shall be given within 5 days
10 after the order. The order may provide:

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

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

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

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

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

30 857.27 PERSONAL REPRESENTATIVES OR TRUSTEES MAY FORM
31 CORPORATION. The court may by order authorize the personal repre-

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

6 857.29 PERSONAL REPRESENTATIVE MAY PLAT LAND. The
7 court may by order authorize the personal representative to plat land
8 which is a part of the estate, either alone or together with other owners
9 of such real estate. In such platting the personal representative must
10 comply with the same statutes, ordinances, rules and regulations which
11 apply to a person who is platting his own land.

12 CHAPTER 858.

13 INVENTORY.

14 858.01 Inventory must be filed by personal representative.

15 858.03 Persons interested to be informed of inventory.

16 858.05 Order to file inventory.

17 858.07 Contents of inventory.

18 858.09 Inventory, verification, examination in court.

19 858.11 Inventory of partnership property and liabilities by survivor.

20 858.13 When appraisal necessary.

21 858.15 When appraisal not necessary.

22 858.17 Supplemental inventory and appraisal.

23 SUMMARY OF CHAPTER: This chapter replaces chapter 312.

24 858.01 INVENTORY MUST BE FILED BY PERSONAL REPRESENTA-
25 TIVE. Every personal representative, within a reasonable time but no
26 later than 6 months after his appointment unless the court has by order
27 extended or shortened the time, shall make and file with the court an
28 inventory of all property owned by the decedent. The inventory shall
29 also separately include all property which is required to be listed for
30 inheritance tax purposes only. The inventory when filed shall show the

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

5
6 CROSS REFERENCES: Section 72.01 describes property
7 subject to inheritance tax.

8 858.03 PERSONS INTERESTED TO BE INFORMED OF INVENTORY.

9 Not more than 5 days after filing any inventory with the court, the per-
10 sonal representative shall mail or deliver to all persons interested a
11 statement indicating that such inventory has been filed; and shall mail
12 or deliver to the surviving spouse and to all other persons interested,
13 except those whose only interest is as beneficiary of a monetary bequest
14 in a will, either a copy of such inventory or a statement indicating the
15 inventory value of each item of property in which the person has an inter-
16 est. If any person interested is represented by a guardian of the estate,
17 guardian ad litem or attorney for persons in military service, a copy of
18 the statement indicating that such inventory has been filed together with
19 a copy of the inventory or statement of inventory value shall be mailed
20 or delivered to the guardian of the estate, guardian ad litem or attorney
21 for persons in military service as well as to the person interested.
22 Failure of the personal representative to comply with the provisions of
23 this section does not affect the jurisdiction of the court as to persons
24 interested.

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

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

30 858.05 ORDER TO FILE INVENTORY. If any personal representa-

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

7 858.07 CONTENTS OF INVENTORY. The personal representative
8 shall include in the inventory all property subject to administration. For
9 information purposes the personal representative shall also include all
10 property over which the decedent had a power of appointment, life insur-
11 ance payable to beneficiaries other than the estate, benefits payable on
12 decedent's death under annuities or under a retirement plan, joint and
13 life tenancies, gifts which may have been made in contemplation of death
14 or taking effect upon death or made within 2 years prior to death and any
15 other property which may be subject to inheritance tax as a result of the
16 decedent's death. He shall include a statement of all encumbrances,
17 liens and other charges on any item.

18 858.09 INVENTORY, VERIFICATION, EXAMINATION IN COURT.
19 Every personal representative shall verify every inventory required of
20 him. Such verification is to the effect that to the best of his knowledge
21 the inventory includes all property of his decedent which is subject to
22 administration and all property which may be subject to inheritance tax
23 as a result of his decedent's death. The court, at the request of any per-
24 son interested in the estate or the property listed or on its own motion,
25 may examine the personal representative on oath in relation thereto or
26 in relation to any proposed addition thereto or deletion therefrom.

27 858.11 INVENTORY OF PARTNERSHIP PROPERTY AND LIABILI-
28 TIES BY SURVIVOR. The surviving partner of any deceased person
29 whose estate is being administered shall, whenever required by order of
30 the probate court, file with said court a verified inventory of the partner-

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

5 858.13 WHEN APPRAISAL NECESSARY. Except as provided in
6 s. 858.15 all inventoried property shall be appraised by one or more
7 disinterested persons appointed by the court. The appraisers shall
8 appraise each such item in the inventory and certify to the value thereof.
9 Where the estate is situated in 2 or more counties, appraisers may be
10 appointed for each county.

11 858.15 WHEN APPRAISAL NOT NECESSARY. Assets, the value of
12 which is readily ascertainable without the exercise of judgment on the
13 part of an appraiser, shall not be appraised. The value of such assets
14 shall be shown in the inventory and verified by the personal representa-
15 tive, and he shall provide such evidence of value as the court requires.
16 Where evidence satisfactory to the court is produced to establish the
17 value of any inventoried assets, no appraisal shall be required of such
18 assets, unless a formal appraisal is requested by the public administra-
19 tor.

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

21 858.17 SUPPLEMENTAL INVENTORY AND APPRAISAL. If any
22 property not included in the inventory comes to the knowledge of the
23 personal representative, he shall either make and file a supplemental
24 inventory thereof or include the same in his accounting. He shall cause
25 such property to be appraised unless it is of the type described in s.

26 858.15.

27 CHAPTER 859.

28 CLAIMS.

29 859.01 Limitation on filing claims against decedent's estates.

30 859.03 Continuance of separate action.

31 859.05 Time to file.

- 1 859.07 Notice; publication.
- 2 859.09 Transfer of claims when administration fails.
- 3 859.13 Form and verification of claims.
- 4 859.15 Effect of statute of limitations.
- 5 859.17 Claims not due.
- 6 859.19 Secured claims.
- 7 859.21 Contingent claims.
- 8 859.23 Payment of contingent claims by distributees.
- 9 859.25 Priority of payment of claims and allowances.
- 10 859.27 Execution and levies prohibited.
- 11 859.29 Information to persons interested.
- 12 859.31 Compromise of claims.
- 13 859.33 Contest of claims; procedure.
- 14 859.35 Prompt judgment; hearing if claim filed one year.
- 15 859.37 Judgment on claims.
- 16 859.39 Delay of payment of claims when funds are insufficient.
- 17 859.40 Creditor's action for property not inventoried.
- 18 859.41 Creditor's action for property fraudulently sold by decedent.
- 19 859.43 Encumbered assets; payment of debt.
- 20 859.45 Tort claims.
- 21 859.47 Payment of unfiled claims.
- 22 859.49 Last illness and funeral expense of deceased wife.
- 23 859.51 No impediment to summary settlement.

24 SUMMARY OF CHAPTER: This chapter replaces chapter 313.

25 859.01 LIMITATION ON FILING CLAIMS AGAINST DECEDENT'S
26 ESTATES. (1) Except as provided in sub. (2) and s. 859.03, all claims
27 against a decedent's estate including claims of the state and any subdivi-
28 sion thereof, whether due or to become due, absolute or contingent,
29 liquidated or unliquidated, shall be forever barred against the estate,
30 the personal representative and the heirs and beneficiaries of the dece-

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

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

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

10 859.03 CONTINUANCE OF SEPARATE ACTION. If an action is
11 pending against a decedent at the time of his death and the action survives,
12 the plaintiff in that action may serve a notice of substitution of party
13 defendant on the personal representative and file proof of service of
14 notice in the probate court. Filing of proof of service within the time
15 limited for filing claims in s. 859.05 gives the plaintiff the same rights
16 against the estate as the filing of a claim. A judgment in any such action
17 constitutes an adjudication for or against the estate.

18 859.05 TIME TO FILE. Upon the filing of an application for admin-
19 istration or at any time thereafter the court shall by order fix the time
20 (not less than 3 months nor more than 6 months from the date of the
21 order) within which claims against the decedent shall be presented or be
22 forever barred.

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

28 859.07 NOTICE; PUBLICATION. Notice of the time within which
29 creditors may present their claims and of the time when the same will
30 be examined and adjusted by the court shall be given by publication, as
31 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

1 the order setting time.

2 859.09 TRANSFER OF CLAIMS WHEN ADMINISTRATION FAILS.

3 Claims filed against the estate of a decedent following an order and
4 notice to creditors shall, if such administration proceeding for any rea-
5 son fails, be deemed filed upon notice to creditors in a subsequent admin-
6 istration proceeding. If the subsequent proceeding is in a different
7 county, such claims shall be transmitted to and filed in the proper court.

8 859.13 FORM AND VERIFICATION OF CLAIMS. (1) General

9 requirements. No claim shall be allowed unless it is in writing,
10 describes the nature and amount thereof, if ascertainable, and is sworn
11 to by the claimant or someone for him that the amount is justly due, or
12 if not yet due, when it will or may become due, that no payments have
13 been made thereon which are not credited, and that there are no offsets
14 to the same, to the knowledge of the affiant, except as therein stated.
15 The claim shall also show the post office address of the claimant.

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

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

20 859.15 EFFECT OF STATUTE OF LIMITATIONS. No claim shall
21 be allowed which was barred by any statute of limitations at the time of
22 the decedent's death. No claim shall be barred by statutes of limitation
23 which was not barred at the time of the decedent's death if the claim is
24 filed against the decedent's estate in the probate court within 6 months
25 from the date of the decedent's death or within the time fixed by the
26 probate court for filing claims, whichever is earlier.

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

1 859.17 CLAIMS NOT DUE. Upon proof of a claim which will become
2 due at some future time, the court may allow it at the present value
3 thereof, and payment may be made as in the case of an absolute claim
4 which has been allowed; otherwise the court may order the personal
5 representative to retain in his hands sufficient funds to satisfy the claim
6 upon maturity; or if the distributees give a bond to be approved by the
7 court for the payment of the creditor's claim in accordance with the terms
8 thereof, the court may order such bond to be given in satisfaction of such
9 claim and the estate may be closed.

10 859.19 SECURED CLAIMS. When a creditor holds any security
11 for his claim the security shall be described in the claim, and the judg-
12 ment allowing the claim shall also describe the security. The security
13 is sufficiently described if the security document is described by date
14 and by the recording or filing data. Payment of the claim shall be upon
15 the basis of: (1) the full amount thereof if the creditor surrenders his
16 security; or (2) if the creditor realizes on his security before receiving
17 payment, then upon the full amount of the claim allowed less the fair
18 value of the security.

19 CROSS REFERENCES: Section 859.13 deals with the form and ver-
20 ification of claims generally. Section 859.43 deals with the payment
21 of secured claims. Section 863.13 deals with the exoneration of
22 encumbered property.

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

25 859.21 CONTINGENT CLAIMS. If the amount or validity of a claim
26 cannot be determined until some time in the future, the claim is a con-
27 tingent claim regardless of whether the claim is based on an event which
28 occurred in the past or on an event which may occur in the future.
29 Except for claims of the type not required to be filed by s. 859.01,
30 contingent claims which cannot be allowed as absolute must, nevertheless,

1 859.17 CLAIMS NOT DUE. Upon proof of a claim which will become
2 due at some future time, the court may allow it at the present value
3 thereof, and payment may be made as in the case of an absolute claim
4 which has been allowed; otherwise the court may order the personal
5 representative to retain in his hands sufficient funds to satisfy the claim
6 upon maturity; or if the distributees give a bond to be approved by the
7 court for the payment of the creditor's claim in accordance with the terms
8 thereof, the court may order such bond to be given in satisfaction of such
9 claim and the estate may be closed.

10 859.19 SECURED CLAIMS. When a creditor holds any security
11 for his claim the security shall be described in the claim, and the judg-
12 ment allowing the claim shall also describe the security. The security
13 is sufficiently described if the security document is described by date
14 and by the recording or filing data. Payment of the claim shall be upon
15 the basis of: (1) the full amount thereof if the creditor surrenders his
16 security; or (2) if the creditor realizes on his security before receiving
17 payment, then upon the full amount of the claim allowed less the fair
18 value of the security.

19 CROSS REFERENCES: Section 859.13 deals with the form and ver-
20 ification of claims generally. Section 859.43 deals with the payment
21 of secured claims. Section 863.13 deals with the exoneration of
22 encumbered property.

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

25 859.21 CONTINGENT CLAIMS. If the amount or validity of a claim
26 cannot be determined until some time in the future, the claim is a con-
27 tingent claim regardless of whether the claim is based on an event which
28 occurred in the past or on an event which may occur in the future.
29 Except for claims of the type not required to be filed by s. 859.01,
30 contingent claims which cannot be allowed as absolute must, nevertheless,

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

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

11 (2) The court may order the personal representative to make dis-
12 tribution of the estate but to retain in his hands sufficient funds to pay
13 the claim if and when the same becomes absolute; but for this purpose
14 the estate shall not be kept open longer than 2 years after distribution
15 of the remainder of the estate has been made; and if such claim has not
16 become absolute within that time, distribution shall be made to the
17 distributees of the funds so retained, after paying any costs and expenses
18 accruing during such period but such distributees shall be liable to the
19 creditor to the extent provided in s. 859.23, if such contingent claim
20 thereafter becomes absolute. When distribution is so made to distribu-
21 tees, the court may require such distributees to give bond for the satis-
22 faction of their liability to the contingent creditor.

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

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

30 859.23 PAYMENT OF CONTINGENT CLAIMS BY DISTRIBUTEES.

31 If a contingent claim is filed and allowed against an estate subject to

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

13 859. 25 PRIORITY OF PAYMENT OF CLAIMS AND ALLOWANCES.

14 (1) Classes and priority. At the time of their allowance, all claims and
15 allowances shall be classified in one of the following classes. If the
16 applicable assets of the estate are insufficient to pay all claims and
17 allowances in full, the personal representative shall make payment in
18 the following order:

19 (a) Costs and expenses of administration.

20 (b) Reasonable funeral and burial expenses.

21 (c) Provisions for the family of the decedent under ss. 861.31,
22 861.33 and 861.35.

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

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

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

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

1 (h) All other claims allowed.

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

6 859.27 EXECUTION AND LEVIES PROHIBITED. No garnishment,
7 attachment or execution shall issue against nor shall any levy be made
8 against any property of the estate under any judgment or cause of action
9 against a decedent or a personal representative, but this section shall
10 not be construed to prevent the enforcement of mortgages, pledges,
11 liens or other security agreements upon real or personal property in
12 an appropriate proceeding.

13 859.29 INFORMATION TO PERSONS INTERESTED. Within 60 days
14 after the last day for filing claims against the estate, the personal rep-
15 resentative or special administrator shall mail or deliver to every per-
16 son interested whose distribution from the estate will be affected by the
17 allowance of claims against the estate, a statement listing all claims
18 which have been filed against the estate, and showing as to each claim
19 the name of the claimant, a brief description of the basis for the claim
20 and the amount claimed. If any such person interested is represented
21 by a guardian, guardian ad litem or attorney for persons in military ser-
22 vice, a copy of the statement shall be mailed or delivered to the guard-
23 ian, guardian ad litem or attorney for persons in military service as
24 well as to the person interested. Failure of the personal representative
25 or special administrator to comply with this section does not affect the
26 jurisdiction of the court as to persons interested.

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

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

1 859.31 COMPROMISE OF CLAIMS. When a claim against the estate
2 has been filed or suit thereon is pending, the creditor and personal rep-
3 resentative may, if it appears for the best interests of the estate, com-
4 promise the claim, whether due or not due, absolute or contingent,
5 liquidated or unliquidated; but if an objection to the claim has been filed
6 by a person interested no compromise of the claim may be made without
7 the consent of the objector.

8 859.33 CONTEST OF CLAIMS; PROCEDURE. (1) How contest
9 initiated. The personal representative or any person interested may
10 contest a claim or assert an offset or counterclaim in probate court only
11 if he mails a copy of the objection, offset or counterclaim to the claimant
12 and files the same with the court. Any offset or counterclaim so asserted
13 will be deemed denied by the original claimant.

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

19 859.35 PROMPT JUDGMENT; HEARING IF CLAIM FILED ONE
20 YEAR. The hearing on any claim, offset or counterclaim may be ad-
21 journed, when necessary from time to time, but the hearing shall be
22 concluded as soon as practicable. The court may on its own motion
23 after such notice as the court may direct to the claimant, the objector
24 and the personal representative, set for hearing any contested claim,
25 offset or counter claim, filed over one year. The court may disallow
26 all or any part of such claim, offset or counterclaim for nonprosecution.

27 859.37 JUDGMENT ON CLAIMS. Before setting a time for hearing
28 on the final account the court shall enter a judgment on the claims pre-
29 sented against the decedent and the offsets and counterclaims asserted
30 and stating how much was allowed for or against the estate in each case.

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

4 859.39 DELAY OF PAYMENT OF CLAIMS WHEN FUNDS ARE
5 INSUFFICIENT. If it appears at any time that an estate is or may be
6 insolvent, that there are insufficient funds on hand for payment of claims
7 in full or that there is other good and sufficient cause for delaying pay-
8 ment, the personal representative may report that fact to the court and
9 apply for any order that he deems necessary in connection therewith.

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

12 859.40 CREDITOR'S ACTION FOR PROPERTY NOT INVENTORIED.
13 Whenever there is reason to believe that the estate of a decedent as set
14 forth in the inventory may be insufficient to pay his debts any creditor
15 whose claim has been allowed may, on behalf of all, bring an action to
16 reach and subject to sale any property or interest therein, not included
17 in such inventory, which is liable for the payment of debts. Such cred-
18 itor's action shall not be brought to trial until the insufficiency of the
19 estate in the hands of the personal representative is ascertained; if
20 found likely that the assets may be insufficient, the action shall be
21 brought to trial; if such action is tried any property or interest therein
22 which ought to be subjected to the payment of the debts of the decedent
23 shall be sold in the action and the net proceeds used to pay such debts
24 and to reimburse the creditor for the reasonable expenses and attorney's
25 fees incurred by him in such action as approved by the court.

26 859.41 CREDITOR'S ACTION FOR PROPERTY FRAUDENTLY SOLD
27 BY DECEDENT. Whenever there is reason to believe that the estate of
28 a decedent as set forth in the inventory may be insufficient to pay his
29 debts, and the decedent conveyed any property or any interest therein
30 with intent to defraud his creditors or to avoid any duty, or executed

1 conveyances void as against creditors, any creditor whose claim has been
2 allowed may, on behalf of all, bring an action to reach and subject to sale
3 any property or interest therein. Such creditor's action shall not be
4 brought to trial until the insufficiency of the estate in the hands of the
5 personal representative is ascertained; if found likely that the assets
6 may be insufficient, the action shall be brought to trial; if such action is
7 tried any property or interest therein which ought to be subjected to the
8 payment of the debts of the decedent shall be sold in the action and the
9 net proceeds used to pay such debts and to reimburse the creditor for
10 the reasonable expenses and attorney's fees incurred by him in such
11 action as approved by the court.
12
13

14 859.43 ENCUMBERED ASSETS; PAYMENT OF DEBT. (1) Rights
15 of secured creditors not affected. Nothing in this chapter shall affect
16 or prevent any action or proceeding to enforce any mortgage, pledge,
17 lien or other security agreement against property of the estate.

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

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

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

30 859.45 TORT CLAIMS. (1) Filed within time limited. If within
31 the time limited for filing claims a claim based on a cause of action in

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

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

22 CROSS REFERENCE: Chapter 287 deals with actions against distrib-
23 utees.

24 COMMENT: This section is new. The Wisconsin Court has con-
25 sistently held that tort claims against a decedent do not have to be
26 filed in probate court. See Lounsbury v. Eberlein, 2 Wis.2d 112,
27 86 N.W.2d 12 (1957).

28 859.47 PAYMENT OF UNFILED CLAIMS. Where a personal rep-
29 resentative has, in good faith, paid claims against the estate without the
30 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

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

4 859.49 LAST ILLNESS AND FUNERAL EXPENSE OF DECEASED
5 WIFE. The reasonable expense of her last illness and funeral may, if
6 properly presented, be paid by the personal representative of the estate
7 of a deceased wife and if so paid shall be allowed as a proper expenditure
8 even though her surviving husband could have been held liable for the
9 expense.

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

14 859.51 NO IMPEDIMENT TO SUMMARY SETTLEMENT. Nothing
15 in this chapter shall impede the summary procedure provided by s.
16 867.01 for closing small estates.

17 CHAPTER 860.

18 SALE, MORTGAGE AND LEASE OF PROPERTY

19 860.01 Power of personal representative to sell mortgage and lease.

20 860.05 Free of creditor's claims.

21 860.07 No warranties.

22 860.09 Contract of decedent to sell or lease.

23 860.11 Special provisions in will; personal representative's duty to
24 persons interested.

25 860.13 Who not to be purchaser, mortgagee or lessee without court
26 approval.

27 SUMMARY OF CHAPTER: This chapter replaces chapter 316.

28 860.01 POWER OF PERSONAL REPRESENTATIVE TO SELL,
29 MORTGAGE AND LEASE. A personal representative to whom letters
30 have been issued by the probate court and whose letters have not been

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

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

21 860.05 FREE OF CREDITOR'S CLAIMS. If property in an estate
22 is sold, mortgaged or leased by a personal representative, title passes
23 subject to the rights of creditors having a secured interest in the property
24 sold but free and clear of any right in creditors which is based on the
25 filing and allowance of a claim in the estate. The filing and allowance
26 of a claim in an estate does not make one a secured creditor.

27 CROSS REFERENCE: Section 72.05 (4) provides that property sold
28 from an estate by a personal representative passes free of any in-
29 heritance tax lien.

30 860.07 NO WARRANTIES. Except as provided in s. 860.09 (2),

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

4 860.09 CONTRACT OF DECEDENT TO SELL OR LEASE LAND.

5 (1) Generally. When any person legally bound to make a conveyance
6 or lease dies before making the same and the personal representative
7 fails or refuses to perform in accordance with the decedent's contract,
8 any person claiming to be entitled to such conveyance or lease may
9 petition the probate court for specific performance of the contract. Upon
10 satisfactory proof the court may order the personal representative to
11 make a conveyance or lease or may by its own order make a conveyance
12 or lease to the person entitled thereto upon the performance of the con-
13 tract.

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

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

24 860.11 SPECIAL PROVISIONS IN WILL; PERSONAL REPRESENTA-
25 TIVE'S DUTY TO PERSONS INTERESTED. (1) Restriction. If the will
26 of the decedent contains provisions which restrict the freedom of the per-
27 sonal representative to sell, mortgage or lease property, the personal
28 representative breaches his duty to the persons interested if he sells,
29 mortgages or leases such property other than in accordance with such
30 restrictions, except in the situation covered in sub. (4).

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

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

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

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

26 860.13 WHO NOT TO BE PURCHASER, MORTGAGEE OR LESSEE
27 WITHOUT COURT APPROVAL. The personal representative may not
28 be interested as a purchaser, mortgagee or lessee of any property in the
29 estate unless such purchase, mortgage or lease is made with the written
30 consent of the persons interested and of the guardian ad litem for minors

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

6 CHAPTER 861.

7 FAMILY RIGHTS.

8 SUBCHAPTER I. DOWER-ELECTIVE SHARE.

- 9 861.03 Dower.
- 10 861.05 Right to elective share; effect of election.
- 11 861.07 How elective share barred.
- 12 861.09 Denial of election or reduction of share when decedent and sur-
13 viving spouse are living apart.
- 14 861.11 Procedure for electing.
- 15 861.13 Assignment of elective share.
- 16 861.15 Power of sale not affected by elective right.
- 17 861.17 Rights in non-probate property transferred in fraud of surviving
18 spouse.

19 SUBCHAPTER II. ALLOWANCES AND EXEMPTION
20 FROM CREDITORS.

- 21 861.31 Allowance to family during administration.
- 22 861.33 Selection of personalty by surviving spouse.
- 23 861.35 Special allowance for support and education of minor children.
- 24 861.41 Exemption of property to be assigned to surviving spouse.

25 SUMMARY OF CHAPTER: (1) This chapter combines the concepts of
26 dower from chapter 233 and allowances from 313.15. The committee
27 studied and rejected proposals along the lines of the English Family
28 Allowances (giving the court complete discretion as to how much of the
29 estate should go to the family contrary to decedent's wishes) and com-
30 munity 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.

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

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

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

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

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

31 (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 sup-
port 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 nonhome-
stead 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

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

3 861.03 DOWER. The surviving spouse, whether widow or widower,
4 of any decedent dying after June 30, 1968, has dower in any property
5 which the decedent owned at his death. Dower consists of the right to
6 elect a share as provided in this chapter. For dower purposes decedent
7 is deemed to own property at his death if he has an interest which he can
8 transmit by will and which would pass under the intestate succession laws
9 if he leaves no will, whether such interest is legal or equitable. The
10 inchoate dower right of the wife of any husband dying after June 30, 1968,
11 is abolished, and the curtesy right of the husband of any wife dying after
12 the same date is replaced by dower as herein provided.

13 COMMENT: Although this section retains the concept of dower, the con-
14 cept has been broadened and changed in certain respects. Dower as de-
15 fined by 233.01 is an expansion of the common law concept with all of
16 its archaic limitations such as the requirement of seisin; dower is sup-
17 plemented by the homestead concept and the elective right in 233.14.
18 Moreover, it is limited to a right in the widow; the corresponding inter-
19 est of a husband in his wife's real property as curtailed by 233.23 is in
20 effect no more than a share in her intestate estate. Since 852.01 gives
21 the surviving spouse an intestate share and makes the spouse an heir,
22 there is no longer any need for defining dower to include a share in
23 intestate property. This section gives the surviving husband the same
24 dower right in the wife's estate as she has in his. This is not only justi-
25 fied on the basis of equality of treatment, but also required by the in-
26 creasing number of instances in which a husband who has put his savings
27 in his wife's name finds on her death that she has disinherited him by
28 her will. With the growing practice of both husband and wife working,
29 and investments being made in the wife's name for tax reasons, there
30 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 home-
stead 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-

1 tected, as might be feared. Transfer of the home is still restricted by
2 235.01; and most homes are owned in joint tenancy anyway. Moreover,
3 under existing law a husband can transfer unlimited amounts of personalty
4 (such as stocks) without his wife's consent; it is anomalous to require
5 her signature to a transfer of title to a vacant lot. Finally, the surviving
6 spouse is protected by the provisions of 861.17 against a deliberate
7 scheme by the decedent to deplete his probate estate.

8 861.05 RIGHT TO ELECTIVE SHARE; EFFECT OF ELECTION.

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

22 (2) Except as to property applied under sub. (1) to reduce the elec-
23 tive share, an election to take under this section forfeits any other right
24 to take under the will and under the law of intestate succession. If the
25 will would otherwise create a power of appointment in the surviving
26 spouse, such spouse by electing to take under this section retains the
27 power only if it is a special power as defined in s. 232.01 (5) and the
28 testator has not provided otherwise, but forfeits any other power of
29 appointment. A power to pay more than the income or annuity or with-
30 drawals, 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,

1 cannot be exercised in favor of the electing spouse.

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

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

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

24 An election to take against the will forfeits all rights in the estate
25 (except those preserved in reducing the elective share); this includes
26 a right to share in intestate property. In this respect the statute makes
27 no change in existing law. See Chapman v. Chapman, 128 Wis. 413,
28 107 N.W. 668 (1906). It should, however, be noted that where the spouse
29 takes under the will, 852.01 (1) of the Intestate Succession chapter will
30 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 sit-
uation 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 inter-
est in property. See the Uihlein case cited above. This subsection pro-
vides for forfeiture of general and unclassified powers of appointment
created in the spouse by the will. If the will creates a special power as

1 defined in 232.01 (5), such as a "power to appoint among our issue," the
2 spouse may retain such a power unless the will itself provides for for-
3 feiture by an election; the reason is that such a power is primarily in-
4 tended to benefit the class among whom appointment may be made, to
5 allow for flexibility, rather than to benefit the donee. Powers in a trust-
6 ee which may confer direct benefits on the spouse, such as a power to
7 invade principal to meet the needs of the spouse, will likewise normally
8 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.

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

11 861.07 HOW ELECTIVE SHARE BARRED. (1) By written agreement.

12 The right of the surviving spouse to elect is subject to bar by the terms
13 of a written agreement signed by both spouses. Such an agreement may
14 be entered into before or after marriage. If the agreement provides
15 that the surviving spouse gives up rights in specified property but does
16 not bar rights in other property, the spouse is barred only as to the
17 specified property; and such property is excluded from the net probate
18 estate for purposes of computing the share of the spouse under s. 861.05
19 and is not subject to the provisions of s. 861.17.

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

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

23 COMMENT: This section replaces obsolete concepts of jointure which
24 appear in 233.09 — 233.12 and is generally new. It is designed to fa-
25 cilitate advance family planning. Sub. (1) provides for barring the sur-
26 viving spouse by simple written agreement. In order to prevent over-
27 reaching by a dominant spouse, consideration would still be necessary;
28 this accords with the decision of the Wisconsin Supreme Court in Estate
29 of Beat, 25 Wis.2d 315, 130 N.W.2d 739 (1964). It applies to both ante-
30 nuptial 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 over-
reaching or misrepresentation. No attempt has been made to embody
such tests in the statute, but they are left to court determination as is

1 true of a challenge on such grounds to any voluntary transfer or agree-
2 ment. The statute reflects the present judicial policy of favorable treat-
3 ment of agreements settling property rights between husband and wife,
4 particularly in cases involving second marriages.

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

16 861.09 DENIAL OF ELECTION OR REDUCTION OF SHARE WHEN
17 DECEDENT AND SURVIVING SPOUSE ARE LIVING APART. In any case
18 where the decedent and the surviving spouse were living apart at the time
19 of the decedent's death, whether or not there has been a judgment for
20 legal separation, the court in its discretion may deny any right to elect
21 against the will, may reduce the elective share of the spouse to such
22 amount as the court deems reasonable and proper, or may grant the full
23 elective share in accordance with the circumstances of the particular case.
24 The court shall consider the following factors in deciding what elective
25 share, if any, should be granted: length of the marriage, whether the
26 marriage was a first or subsequent marriage for either or both of the
27 parties, the contribution of the surviving spouse to the decedent's prop-
28 erty either in the form of services or transfers of property, length
29 and cause of the separation, and any other relevant circumstances.

30 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 adul-
terous widow to claim dower. Estate of Davis, 167 Wis. 328, 167 N.W.
819 (1918). The difficulty, however, of providing a fixed rule for sep-
arated couples has led to the proposed section which would vest discre-
tion in the court to deal with individual cases on the basis of all available

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

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

12 861.11 PROCEDURE FOR ELECTING. (1) Filing written election.

13 If the surviving spouse wishes to elect to take the share provided by s.
14 861.05, such spouse must file with the court in which the decedent's
15 estate is being administered an election in writing signed by the spouse
16 to take such share. The spouse may bar any right to elect under this
17 chapter by filing with the court a writing, signed by the spouse in open
18 court, electing to take under the will.

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

29 (3) Time for filing. The election must be filed within 6 months
30 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

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

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

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

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

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

30 861.13 ASSIGNMENT OF ELECTIVE SHARE. (1) Except as pro-
31 vided in sub. (2), property shall be applied in satisfaction of the elective
share in the following order unless the will directs otherwise:

27 (a) Any intestate property;

28 (b) The residue under the will;

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

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

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

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

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

30 Although the surviving spouse no longer has an absolute right to the
home (by virtue of "homestead rights" under existing law), sub. (2) em-
powers 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 benefi-
ciary will be compensated for loss of the home which the court would

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

4 861.15 POWER OF SALE NOT AFFECTED BY ELECTIVE RIGHT.

5 Nothing in this chapter limits the power of the personal representative
6 to sell any property in the course of administration.

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

15 861.17 RIGHTS IN NONPROBATE PROPERTY TRANSFERRED IN
16 FRAUD OF SURVIVING SPOUSE. (1) Nothing in this chapter precludes
17 a court in an equitable proceeding from subjecting to the rights of the
18 surviving spouse under this chapter any property arrangement made by
19 the decedent in fraud of such rights. A property arrangement in fraud
20 of the rights of the surviving spouse means any transfer or acquisition of
21 property regardless of the form or type of property rights involved,
22 made by the decedent during marriage or in anticipation of marriage for
23 the primary purpose of removing the property from the probate estate
24 in order to defeat the rights of the surviving spouse under this chapter.

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

29 (3) If the spouse is successful in an action or actions to reach such
30 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

1 of the probate estate (whether by intestate succession, election, or the
2 terms of the will) and any property passing to the spouse under the fraud-
3 ulent arrangement to the extent that such property would have reduced an
4 elective share under s. 861.05 (1) if the property had passed by will.

5 Failure of the spouse to elect against a will, if any, within the time
6 allowed for election by this chapter does not bar the spouse from main-
7 taining an action. Other rules of this chapter shall apply so far as pos-
8 sible. Recovery may be denied or reduced in accordance with s. 861.09;
9 and the suit may be barred if election is barred under s. 861.07. Recov-
10 ery will forfeit any power of appointment over the remaining portion of
11 the fraudulently arranged property, except a special power; and a power
12 to pay over or apply principal or income may be exercised as to such
13 property only as a similar power under a will could be exercised under
14 s. 861.05 (2).

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

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

24 COMMENT: This section is new. It is based on the judicial concept of
25 allowing the surviving spouse to reach lifetime transfers made in "fraud"
26 of the elective right. See Sederlund v. Sederlund, 176 Wis. 627, 187
27 N.W. 750 (1922); Mann v. Grinwald, 203 Wis. 27, 233 N.W. 582 (1930);
28 Estate of Steck, 275 Wis. 290, 81 N.W.2d 729 (1957); Estate of Mayer,
29 26 Wis.2d 671, 133 N.W.2d 322 (1965). Although in none of those cases
30 was the widow successful in setting aside or reaching the personal prop-
erty 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

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

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

26 Sub. (2) permits transfer of assets, creation of joint tenancies or
27 revocable trusts, and similar arrangements to be made for the benefit
28 of children by a prior marriage if the arrangement is made before mar-
29 riage to the surviving spouse or within a year after the marriage is en-
30 tered into. Because persons now married may have intended to provide
31 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

1 person receiving the property from the decedent by reason of the fraudu-
2 lent transfer.

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

5 SUBCHAPTER II.

6 ALLOWANCES AND EXEMPTION FROM CREDITORS.

7 861.31 ALLOWANCE TO FAMILY DURING ADMINISTRATION.

8 (1) The court may, without notice or on such notice as the court directs,
9 order payment by the personal representative or special administrator
10 of such allowance as it determines necessary or appropriate for the
11 support of the surviving spouse and any minor children during the admin-
12 istration of the estate. In making or denying such order the court shall
13 consider the size of the probate estate, other resources available for
14 support, existing standard of living, and such other factors as it consid-
15 ers relevant.

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

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

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

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

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

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

24 861.33 SELECTION OF PERSONALTY BY SURVIVING SPOUSE.

25 (1) Subject to this section, the surviving spouse may file with the court
26 a written selection of the following personal property, which shall there-
27 upon be transferred to such spouse by the personal representative: (a)
28 decedent's wearing apparel and jewelry held for personal use, (b) one
29 automobile, (c) household furniture, furnishings and appliances, and
30 (d) other tangible personalty not used in trade, agriculture or other
31 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, furnish-
ings and appliances necessary to maintain the home; for this purpose any
antiques, family heirlooms and collections which are specifically bequeath-
ed 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

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

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

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

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

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

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

30 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 cred-
itors) 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.

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

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

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

27 COMMENT: This section is substantially the same as 313.15 (3) under
28 which the court can make an allowance for support and education of minor
29 children. The only important change is procedural, enabling the court to
30 set aside the amount in a trust so that rights of other persons are pro-
31 tected 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.

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

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

9 861.41 EXEMPTION OF PROPERTY TO BE ASSIGNED TO SURVIVING
10 SPOUSE. (1) After the amount of claims against the estate has been
11 ascertained, the surviving spouse may petition the court to set aside
12 as exempt from the claims of creditors under s. 859.25 (1) (h) an amount
13 of property reasonably necessary for the support of such spouse, not
14 to exceed \$10,000 in value, if it appears that the assets are insufficient to
15 pay all claims and allowances and still leave the surviving spouse such
16 an amount of property in addition to selection and allowances.

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

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

27 (4) If the decedent's estate includes an interest in a home, the court
28 may upon request of the spouse include as part or all of the property
29 assigned to the spouse hereunder either a fee or a life interest in the
30 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

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

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

8 Our existing law deals with the problem of protection of the family
9 against claims of creditors in an ineffective and clumsy manner. Inchoate
10 dower gives the widow a third of all non-homestead realty ahead of cred-
11 itors, regardless of need and regardless of value involved. Melms v.
12 Pabst Brewing Company, 93 Wis. 140, 66 N.W. 244 (1896). The exempt
13 homestead (the home up to \$10,000 in value) passes to the widow or a
14 child free of judgments and claims against the deceased owner, under
15 237.025 (or may be willed to them under 238.04); in either case the
16 widow or the child may have no need for protection and may in fact be
17 independently wealthy. Life insurance and joint tenancy property pass
18 to the beneficiaries or survivor free of unsecured claims, regardless of
19 amount. A terminal allowance of up to \$2,000 under 313.15 (4) (a) may
20 further increase the amount of property passing to the family ahead of
21 creditors. Thus the total escaping from legitimate creditor claims may
22 be a staggering amount or a very small amount depending upon the com-
23 position of the estate, and may also have no relation to the need of the
24 recipient.

25 This section makes a fresh approach. It bases the exemption direct-
26 ly on the need of the surviving spouse for support ahead of payment of
27 creditors. It is limited to the surviving spouse, since the court can pro-
28 tect minor children under 861.35 ahead of creditors. There is no reason
29 to protect adult children; they should have no right prior to creditors.
30 Furthermore, the exemption does not depend on the presence or absence
31 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.

- 1 862.03 Account of incompetent, deceased or removed personal repre-
la sentative.
- 2 862.05 What charged to personal representative.
- 3 862.07 Value at which to account: what accounts to contain.
- 4 862.09 Hearing on settlement of account; notice.
- 5 862.11 Copy of account to be given to persons interested.
- 6 862.13 Objections to account.
- 7 862.15 Settlement of account.
- 8 862.17 Accounts: failure of personal representative to file.

9 SUMMARY OF CHAPTER: This chapter replaces chapter 317.

10

11 862.01 WHEN PERSONAL REPRESENTATIVE SHALL ACCOUNT.

12 Every personal representative shall file in the court a verified account
13 of his administration

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

15 (2) Upon the revocation of his letters;

16 (3) When he submits his application to resign;

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

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

21 862.03 ACCOUNT OF INCOMPETENT, DECEASED OR REMOVED
22 PERSONAL REPRESENTATIVE. (1) Incompetent personal representative.

23 If a personal representative is adjudged incompetent, his account shall
24 be filed by his guardian, or if his guardian fails to file then by his bonds-
25 man, if any. If neither the guardian nor the bondsman files an account,
26 the court shall direct the public administrator to file the account of the
27 incompetent personal representative.

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

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

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

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

14 862.05 WHAT CHARGED TO PERSONAL REPRESENTATIVE. Every
15 personal representative shall be charged in his accounts with all the prop-
16 erty of the decedent which comes to his possession; with all profit and
17 income which comes to his possession from the estate and with the pro-
18 ceeds of all property of the estate sold by him.

19 862.07 VALUE AT WHICH TO ACCOUNT: WHAT ACCOUNTS TO
20 CONTAIN. The personal representative shall account for the property
21 of the decedent at the value at which it is shown in the inventory. Accounts
22 rendered to the court by a personal representative shall be for a period
23 distinctly stated and shall show by debit and credit each item with which
24 he is chargeable. The account shall first show the total value of the prop-
25 erty with which he is chargeable according to the inventory or, if there
26 has been a prior accounting, the amount of the balance of the prior ac-
27 count; it shall show all income or other property received and gains or
28 losses from the sale of any property; and it shall show all payments,
29 charges and losses. The final account shall also itemize all property
30 available for distribution and all property previously distributed and

1 show its inventory value or if acquired by the personal representative
2 during administration, its acquisition value; it shall contain a proposed
3 distribution schedule showing as to each distributee the property being
4 distributed to him or previously distributed to him and showing its inven-
5 tory value, or if acquired by the personal representative during ad-
6 ministration, its acquisition value, and in addition showing its estimated
7 value as of the last day covered by the final account or if previously dis-
8 tributed, its value at the time it was distributed. The final account shall
9 also show as to each distributee the estimated inheritance tax payable out
10 of his distribution.

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

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

19 862.09 HEARING ON SETTLEMENT OF ACCOUNT; NOTICE. Upon
20 the filing of any account, the court shall set a date for hearing and notice
21 thereof shall be given in accordance with s. 879.03. Unless notice is
22 waived the account must be filed not less than 3 weeks before the date
23 set for hearing. An account so filed may be brought up to date on the
24 day of the hearing. If any account shows that the assets in the estate
25 are insufficient to pay the creditors in full, notice of that fact and of the
26 filing of the account shall be given to all creditors who have filed claims
27 against the estate and whose claims have not been disallowed.

28 862.11 COPY OF ACCOUNT TO BE GIVEN TO PERSONS INTER-
29 ESTED. At the time he gives notice of hearing of allowance of any account
30 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

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

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

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

17 862.13 OBJECTIONS TO ACCOUNT. At the hearing on an account
18 of a personal representative or at any time prior thereto, any person
19 interested may file objections to any item or omission in the account.
20 All such objections shall be specific.

21 862.15 SETTLEMENT OF ACCOUNT. The court must be satisfied
22 of the correctness and legality of the account before allowing it. If the
23 personal representative is present at the hearing, he may be examined
24 on oath upon any matter relating to his account and the settlement of the
25 estate. The court may refuse to approve the account unless the personal
26 representative is present at the hearing.

27 862.17 ACCOUNTS: FAILURE OF PERSONAL REPRESENTATIVE
28 TO FILE. If any personal representative fails to file his account as
29 required by law or ordered by the court, the court may, upon its own
30 motion or upon the petition of any person interested either order the
31 personal representative to file such account by a day certain or the court

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

5 CHAPTER 863.

6 CLOSING ESTATES.

- 7 863.01 Distribution of specific property to distributee and partial dis-
8 tribution before final judgment.
- 9 863.05 Execution and levies by creditors of distributees prohibited.
- 10 863.07 Assignment by distributee.
- 11 863.09 Allowance for tombstone and care of grave.
- 12 863.11 Order in which assets appropriated; abatement.
- 13 863.13 No exoneration of encumbered property.
- 14 863.15 Right of retention.
- 15 863.16 Value used in distribution of fractional shares.
- 16 863.17 Partition by agreement.
- 17 863.19 Valuation used in distribution of estate assets.
- 18 863.21 Construction of will, notice.
- 19 863.23 Determination of heirship and proof of heirship.
- 20 863.25 Petition for final judgment.
- 21 863.27 Contents of final judgment.
- 22 863.29 Recording final judgment.
- 23 863.31 Conclusiveness of final judgment.
- 24 863.33 Estates to be completed promptly: time limits.
- 25 863.35 Dormant estates.
- 26 863.37 Distribution of money or other property where payment or trans-
27 fer is prohibited.
- 28 863.39 Escheats.
- 29 863.41 Receipts to be filed.
- 30 863.43 Distribution to ward: notice.

1 863.45 Receipts from guardians.

2 863.47 Order of discharge of personal representative.

3 863.49 Inactive estates: summary discontinuance.

4 SUMMARY OF CHAPTER: This chapter replaces chapter 318.

5 863.01 DISTRIBUTION OF SPECIFIC PROPERTY TO DISTRIBUTEE
6 AND PARTIAL DISTRIBUTION BEFORE FINAL JUDGMENT. Before final
7 judgment has been rendered the personal representative may deliver to
8 any distributee possession of any specific property to which he is en-
9 titled under the terms of the will or any statute. The personal representa-
10 tive may make one or more partial distributions of the estate, provided
11 that other distributees and claimants are not prejudiced thereby. The
12 personal representative may require the distributees to give security
13 for the return of such property.

14 863.05 EXECUTION AND LEVIES BY CREDITORS OF DISTRIBUTEES
15 PROHIBITED. No garnishment, attachment or execution shall issue
16 against nor shall any levy be made against any property of the estate
17 under any judgment or cause of action against any distributee of the
18 estate.

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

21 863.07 ASSIGNMENT BY DISTRIBUTEE. If any person interested
22 in an estate assigns all or part of his interest therein (other than an
23 interest not assignable by the specific language of the will) as collateral
24 or otherwise and the assignee serves a copy thereof on the personal
25 representative of the estate and files a copy with the probate court in
26 which the estate is being administered before the entry of the final judg-
27 ment and before the property or interest covered by the assignment has
28 been distributed in accordance with s. 863.01, the probate court shall
29 assign to such assignee in the final judgment such interest or part of the
30 interest of the assignor included within such assignment to the extent

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

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

11 863.09 ALLOWANCE FOR TOMBSTONE AND CARE OF GRAVE.

12 (1) Tombstone. In case no provision is made in the will for a tombstone
13 or monument or marker at the grave of the decedent, and none has been
14 erected, the personal representative may expend a reasonable sum for
15 a tombstone or monument or marker at the grave of the decedent. The
16 expenditure shall be subject to the approval of the court and is classed
17 as funeral expense.

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

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

23 863.11 ORDER IN WHICH ASSETS APPROPRIATED; ABATEMENT.

24 (1) General rules. Except as provided in sub. (2), and except as pro-
25 vided in s. 853.25 dealing with the shares of pretermitted heirs and in
26 s. 861.13 dealing with the share of the surviving spouse who elects to
27 take against the will, shares of the distributees abate, without any pref-
28 erence or priority as between real and personal property, in the following
29 order: (a) property not disposed of by the will; (b) residuary bequests;
30 (c) general bequests; (d) specific bequests. A general bequest charged
31 on any specific property or fund is, for purposes of abatement, deemed

1 property specifically bequeathed to the extent of the value of the thing on
la which it is charged. Upon the failure or insufficiency of the thing on
2 which it is charged, it is deemed a general bequest to the extent of such
3 failure or insufficiency. Abatement within each classification is in pro-
4 portion to the amounts of such property each of the beneficiaries would
5 have received had full distribution of such property been made in accord-
6 ance with the terms of the will.

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

12 863.13 NO EXONERATION OF ENCUMBERED PROPERTY. (i)
13 Generally. All specifically devised property shall be assigned to the
14 beneficiary without exoneration unless the will of the decedent provides
15 that a debt which is secured by a mortgage, lien, pledge or other security
16 agreement which constitutes an encumbrance on property which is specif-
17 ically devised should be paid out of other assets in the estate and the prop-
18 erty assigned to the beneficiary free of the encumbrance. Unless the
19 will provides to the contrary, if the debt or interest on the debt which
20 is secured by the encumbrance on the specifically devised property is
21 paid in whole or in part out of other assets in the estate, such specifically
22 devised property shall be assigned to the beneficiary only if: (a) the ben-
23 eficiary contributes to the estate an amount equal to the amount which
24 the estate has paid, or (b) the personal representative secures such
25 amount for the estate through a new encumbrance on such specifically
26 devised property. If the estate is not reimbursed under (a) or (b), the
27 personal representative shall sell such specifically devised property,
28 reimburse the estate from the proceeds of such sale and assign the bal-
29 ance of the proceeds, if any, to the specific beneficiary.

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

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

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

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

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

18 863.15 RIGHT OF RETENTION. When a distributee of an estate is
19 indebted to the estate, the amount of the indebtedness if due, or the pres-
20 ent worth of the indebtedness, if not due, shall be treated as an offset by
21 the personal representative against property of the estate to which such
22 distributee is entitled. In contesting such offset such distributee shall
23 have the benefit of any defense which would be available to him in a direct
24 proceeding by the personal representative for the recovery of such debt.

25 863.16 VALUE USED IN DISTRIBUTION OF FRACTIONAL SHARES.
26 In distributing property to distributees who receive fractional shares of
27 the estate under the statutes of descent and distribution or under pro-
28 visions in a will, the personal representative shall divide the property
29 among the distributees on the basis of the value of the property at the
30 time of distribution unless the will, if any, provides otherwise.

1 863.17 PARTITION BY AGREEMENT. Property passing by statute
2 or by will to persons as joint tenants or tenants in common may be par-
3 titioned among such persons by the judgment of the probate court assign-
4 ing such property, provided a petition therefor is filed with the court
5 prior to such judgment signed by all persons interested in the property
6 involved. The petition must set out the manner in which the property
7 is to be divided and the agreement of all persons interested in the prop-
8 erty involved.

9 863.19 VALUATION USED IN DISTRIBUTION OF ESTATE ASSETS.
10 If a general bequest of estate assets, including a pecuniary bequest, in
11 a dollar amount fixed by formula or otherwise is satisfied by a distribu-
12 tion in kind, the distribution shall be made at current fair market values
13 unless the will expressly provides that another value may be used. If
14 the will requires or permits a different value to be used all assets avail-
15 able for distribution, including cash, shall unless otherwise expressly
16 provided be so distributed that the assets, including cash, distributed
17 in satisfaction of the bequest will be fairly representative of the net
18 appreciation or depreciation in the value of the available property on the
19 date or dates of distribution. A provision in a will that the personal
20 representative may fix values for the purpose of distribution does not
21 of itself constitute authorization to fix a value other than current fair
22 market value.

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

26 863.21 CONSTRUCTION OF WILL, NOTICE. Notice of hearing upon
27 a petition for the construction of a will shall be given as provided in
28 s. 879.05

29 863.23 DETERMINATION OF HEIRSHIP AND PROOF OF HEIRSHIP.
30 In every administration of an estate in which notice to creditors is required

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

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

12 863.25 PETITION FOR FINAL JUDGMENT. After the payment of the
13 allowances, debts, taxes, funeral expenses and expenses of administra-
14 tion and when, if necessary, a fund has been withheld from distribution
15 for the payment of contingent claims, for meeting possible tax liability
16 or for any other reasonable purpose, the personal representative shall,
17 if the estate is in a condition to be closed, file his final account and at
18 the same time petition the court for hearing on the final account and
19 for final judgment assigning the estate to such persons as are entitled to
20 the same. Notice of hearing shall be given in accordance with s. 879.03.

21 863.27 CONTENTS OF FINAL JUDGMENT. In the final judgment
22 the probate court shall approve the final account, designate the persons
23 to whom assignment and distribution is being made and assign to each
24 of them the property or proportions or parts of the estate or the amounts
25 to which each is entitled in accordance with the terms of the will or the
26 statutes of descent and distribution. The findings of fact which support
27 the judgment shall include a determination of the heirs of the decedent;
28 facts showing that all jurisdictional requirements have been met; the date
29 of death of the decedent and his testacy or intestacy; facts relating to
30 the payment of state inheritance and estate tax, state income tax and

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

11
12
13

14 CROSS REFERENCE: The 6-month limitation on rehearing inher-
15 itance tax determination provided in s. 72.15 (11) will run even
16 though the final judgment indicates that property is being withheld
17 from distribution until possible liability for claims etc. is determined
18 in the future, unless in the order determining inheritance tax, the
19 probate court reserves jurisdiction to redetermine inheritance tax.
20 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.

21
22

23 863.29 RECORDING FINAL JUDGMENT. (1) Recording required.
24 Whenever the final judgment assigns an interest in real property, assigns
25 a debt which is secured by an interest in real property or shows the ter-
26 mination of a life estate or an interest as a joint tenant in real property
27 or in a debt which is secured by an interest in real property, such final
28 judgment, a certified copy of such final judgment or a certified abridg-
29 ment thereof as described in sub. (2) shall be recorded by the personal
30 representative in the office of the register of deeds in each county in
this state in which such real property is located.

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

7 863.31 CONCLUSIVENESS OF FINAL JUDGMENT, (1) Generally.
8 The final judgment is a conclusive determination of the persons who are
9 the successors in interest to the estate of the decedent and of the extent
10 and character of their interests therein, subject only to the right of appeal
11 and the right to reopen the judgment. It operates as an assignment or
12 final adjudication of the transfer of the right, title and interest of the
13 decedent to the distributees therein designated.

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

26 863.33 ESTATES TO BE COMPLETED PROMPTLY; TIME LIMITS.
27 (1) Generally. All estates are to be completed as soon as reasonably
28 possible and without unnecessary delay.

29 (2) Personal representative to petition within 18 months. The per-
30 sonal representative shall within 18 months after the issuance of letters

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

10 (3) Court may require sworn statement and hearing. Whenever a
11 personal representative petitions for an extension of time, the court may
12 by order require the personal representative, within such time as the
13 court fixes, to file an accounting together with an affidavit stating the
14 reasons for the delay in settlement of the estate and the additional time
15 necessary for the settlement of the estate. The court may by order fix
16 a time and place for hearing on such petition and require notice of the
17 hearing together with a copy of the accounting and statement of the per-
18 sonal representative to be served upon all persons interested in accord-
19 ance with s. 879.05.

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

25 863.35 DORMANT ESTATES. If final judgment is not entered in an
26 estate within 3 years after filing of the petition for administration and
27 the estate is not open pursuant to an order extending time in accordance
28 with s. 863.33, the judge shall order the attorney and the personal rep-
29 resentative for such estate to show cause why final judgment has not been
30 entered and shall follow the procedure set forth in s. 857.09.

1 863.37 DISTRIBUTION OF MONEY OR OTHER PROPERTY WHERE
2 PAYMENT OR TRANSFER IS PROHIBITED. Where the laws of the United
3 States, or executive orders, or regulations pursuant thereto prohibit
4 payment, conveyance, transfer, assignment or delivery of property or
5 interest therein to a legatee, devisee, ward or beneficiary of an estate
6 or trust or to any person on his behalf, the probate court, after due notice
7 to such person as prescribed by s. 879.03, may, by judgment or decree,
8 authorize such disposition of such property or interest therein, as is or
9 may be permissible under or in conformity with the laws, executive orders
10 or regulations of the United States.

11 863.39 ESCHEATS. (1) Generally. If any legacy or intestate prop-
12 erty is not claimed by the distributee within 120 days after entry of final
13 judgment (or within the time designated in such judgment) it shall be con-
14 verted into money and paid to the state school fund.

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

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

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

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

10 863.41 RECEIPTS TO BE FILED. Within 120 days after the final
11 judgment is signed the personal representative shall file with the court
12 receipts from distributees for all personal property assigned in the final
13 judgment, unless the court extends the time.

14 863.43 DISTRIBUTION TO WARD: NOTICE. At least 10 days prior
15 to distribution of a share or legacy for the benefit of a minor or incompe-
16 tent for whom a guardian of his estate has been appointed, the personal
17 representative shall notify the court appointing such guardian of the estate,
18 in writing, the total property to be distributed to the guardian of the estate
19 for the benefit of his ward. An affidavit of mailing said notice shall be
20 filed before making such distribution.

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

24 863.45 RECEIPTS FROM GUARDIANS. If a distributee of an estate
25 is a minor or an incompetent and has within this state a guardian of his
26 estate, the personal representative shall deliver the money or other
27 property to the guardian, take a receipt from the guardian and file the
28 receipt with the court of probate. The court of probate shall transmit
29 a certified copy of the receipt to the court which appointed the guardian.

1 CROSS REFERENCES: Section 319.04 describes the situations in
2 which a guardian is not required for a minor or incompetent. Section
3 319.29 provides procedure for payment to and receipt by a foreign
guardian.

4 863.47 ORDER OF DISCHARGE OF PERSONAL REPRESENTATIVE.

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

15 863.49 INACTIVE ESTATES: SUMMARY DISCONTINUANCE. The
16 probate judge may by order upon his own motion and without notice sum-
17 marily discontinue any administration in which no paper has been filed
18 for more than 5 years and may cancel the bond, if any.

19 CHAPTER 867.

20 SUMMARY PROCEDURES.

21 867.01 Summary settlement of small estates.

22 867.03 Termination of joint tenancy and life estate.

23 867.05 Determination of descent of property.

24 867.07 Grounds for appointment of special administrator.

25 867.09 Who may petition for appointment of special administrator.

26 867.11 Notice of hearing on petition for appointment of special admin-
27 istrator.

28 867.13 Bond of special administrator.

29 867.15 Letters of special administration; no appeal.

30 867.17 Powers, duties and liabilities of special administrator.

1 867.19 Compensation of special administrator.

2 867.21 Termination of authority and discharge of special administrator.

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

6 867.01 SUMMARY SETTLEMENT OF SMALL ESTATES. (1) When
7 available. The probate court shall summarily settle the estate of a de-
8 ceased person without the appointment of a personal representative: (a)
9 whenever the estate, less the amount of the debts for which any property
10 in the estate is security, does not exceed in value the costs, expenses,
11 allowances and claims set forth in s. 859.25 (1) (a) to (g); or (b) whenever
12 the estate less the amount of the debts for which any property in the estate
13 is security, does not exceed \$5,000 in value and the decedent is survived
14 by a spouse from whom he is not living apart or one or more minor chil-
15 dren or both. An estate, administration of which has been commenced
16 under ch. 856, may be terminated under this section at any time that it
17 is found to meet the requirements of this section.

18 (2) Procedure. Any person who has standing to petition for admin-
19 istration of the estate under s. 856.07 has standing to petition for sum-
20 mary settlement.

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

1 the names and post-office addresses of their guardians .

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

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

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

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

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

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

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

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

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

17 CROSS REFERENCES: See ss. 253.10 and 856.01 for jurisdiction
18 for administration of estates. Section 319.28 provides for
19 summary closing by guardian of small estate of ward. See s. 851.61
20 for transfer of United States obligations in beneficiary form. See s.
21 103.39 for payment of decedent's wages by employer directly to de-
22 cedent's dependents. See s. 895.41 (3) for payment of decedent's
23 employee's cash bond by employer directly to decedent's dependents.
24 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.

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

28 867.03 TERMINATION OF JOINT TENANCY AND LIFE ESTATE.

29 When a domiciliary of this state dies who immediately prior to his death
30 had an estate for life or an interest as a joint tenant in any property, or

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

16 CROSS REFERENCES: Section 863.27 deals with the termination of
17 life estate and joint tenancy in the final judgment of an estate. Section
18 72.176 requires that inheritance tax be determined in every proceed-
ing for termination of joint tenancy or life estate.

19 867.05 DETERMINATION OF DESCENT OF PROPERTY. (1) Petition.
20 Six years or more after any person dies intestate, leaving an estate which
21 a probate court in this state has jurisdiction to administer, any person
22 interested in such estate or in any property in such estate may petition
23 the probate court which has jurisdiction to administer such estate, to
24 determine the descent of the property in such estate. Such petition shall
25 be verified and shall show, as particularly as known or can with due dili-
26 gence be ascertained, the time and place of death and domicile of such
27 decedent, that the estate has not been administered and the other facts
28 which authorize the proceeding, the names, post-office addresses
29 and relationship to the decedent of all heirs and their grantees
30 entitled to any interest in said property, stating who, if any, are
31 minors or under legal disability, and the names and residences

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

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

10 (3) Judgment after hearing on notice. The court may hear the peti-
11 tion after notice of hearing given in accordance with s. 879.03, and after
12 hearing the evidence, if the court is satisfied who the heirs of the dece-
13 dent are and what their respective rights and interests in the property
14 are, the court shall determine the same and in its judgment shall name
15 the persons entitled to interests therein and the property to which each
16 is entitled.

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

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

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

28 867.07 GROUNDS FOR APPOINTMENT OF SPECIAL ADMINISTRA-
29 TOR. Whenever it appears by petition to probate court that a person has
30 died and the court would have jurisdiction for the administration of his

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

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

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

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

11 (4) That it appears to be necessary to conserve or administer the
12 estate of a decedent before letters can be issued to a personal representa-
13 tive.

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

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

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

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

22 867.09 WHO MAY PETITION FOR APPOINTMENT OF SPECIAL
23 ADMINISTRATOR. Petition for the appointment of a special administra-
24 tor may be made by any person who has standing to petition for adminis-
25 tration of the estate under s. 856.07, and waiting periods stated in that
26 section do not apply.

27 867.11 NOTICE OF HEARING ON PETITION FOR APPOINTMENT OF
28 SPECIAL ADMINISTRATOR. The court shall determine whether notice
29 of the hearing for the appointment of a special administrator need be
30 given. If the court deems notice of such hearing unnecessary or inex-

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

4 867.13 BOND OF SPECIAL ADMINISTRATOR. If it appears that
5 anything of value will come into the hands of the special administrator,
6 the court may require him to give bond in such amount as the court deems
7 reasonable, except that no bond shall be required of any trust company
8 bank, state bank or national banking association which is authorized to
9 exercise trust powers and which has complied with s. 220.09 or 223.02.
10 If the person appointed special administrator is subsequently appointed
11 personal representative, his bond given as special administrator contin-
12 ues in effect as his bond as personal representative unless otherwise
13 ordered by the court. Section 895.345 does not apply to bonds of special
14 administrators.

15 867.15 LETTERS OF SPECIAL ADMINISTRATION; NO APPEAL.
16 Upon the appointment of a special administrator, letters of special admin-
17 istration shall be issued to the special administrator by the court. An
18 order appointing a special administrator is a nonappealable order.

19 867.17 POWERS, DUTIES AND LIABILITIES OF SPECIAL ADMIN-
20 ISTRATOR. A special administrator has the same powers, duties and
21 liabilities as a personal representative except as expressly limited by
22 order of the court. By order the court may expressly grant him powers
23 and impose duties in addition to those granted by statute to personal
24 representatives as may be necessary to accomplish the purpose for which
25 he is appointed.

26 CROSS REFERENCE: As defined in s. 851.23 "personal representa-
27 tive" as used in title XLII does not include "special administrator".

28 867.19 COMPENSATION OF SPECIAL ADMINISTRATOR. The
29 special administrator shall be allowed all necessary expenses incurred
30 in the care and management of the estate and the performance of his
31 duties; for his services he shall be allowed such compensation as the

1 court finds to be reasonable. If a special administrator is subsequently
2 appointed personal representative, his compensation as special adminis-
3 trator may be considered and fixed at the time his compensation as per-
4 sonal representative is determined.

5 867.21 TERMINATION OF AUTHORITY AND DISCHARGE OF
6 SPECIAL ADMINISTRATOR. (1) When no personal representative is to
7 be appointed. The special administrator shall be discharged whenever
8 the court is satisfied that he has properly performed his duties. Before
9 discharging the special administrator the court may require him to file
10 any accounts or reports which the court deems necessary. Such discharge
11 may be granted with or without notice as the court determines. If notice
12 of hearing upon the application for discharge is required, such notice shall
13 be given pursuant to s. 879.03.

14 (2) Upon granting letters to a personal representative. Upon the
15 granting of letters to a personal representative of the estate of the dece-
16 dent the power of the special administrator ceases, and the special admin-
17 istrator shall forthwith file his account and deliver to the personal repre-
18 sentative all property of the estate which the special administrator has
19 in his possession. The court may accept the written receipt of the per-
20 sonal representative as evidence of such delivery and upon approving his
21 account shall discharge the special administrator. If the special adminis-
22 trator is appointed personal representative, he need not file an account
23 as special administrator unless his bond is not continued as his bond as
24 personal representative. If no accounting as special administrator is
25 made he shall account for the special administration in his account as
26 personal representative.

27 CHAPTER 868.

28 ANCILLARY PROCEDURES.

29 868.01 Uniform probate of foreign wills act.

30 868.03 Uniform ancillary administration of estates act.

31 868.05 Foreign wills; certificate of assignment.

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

3 868.01 UNIFORM PROBATE OF FOREIGN WILLS ACT. (1) Probate
4 on proof of domiciliary probate; effect. The written will of a testator
5 who died domiciled outside this state, which upon probate may operate
6 upon any property in this state, shall be admitted to probate upon proof
7 that it stands probated or established in the jurisdiction where the testator
8 died domiciled and is not being contested there. A will probated under
9 this subsection is sufficient to operate on any property within the terms
10 of the will, subject to any limitations upon its operation imposed by the
11 law of the jurisdiction where the testator died domiciled. Rights to take
12 against the will are not affected by this subsection.

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

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

1 of real property, also recorded as provided herein.

2 (4) Effect of rejection of will at domicile. Final rejection of the will
3 from probate or establishment in the jurisdiction where the testator died
4 domiciled is conclusive in this state except where the will has been re-
5 jected solely for a cause which is not ground for rejection of a will of a
6 testator who died domiciled in this state, in which case the will neverthe-
7 less may be admitted to probate under sub. (5).

8 (5) Original probate; when allowed. Original probate of the will of a
9 testator who died domiciled outside this state, which upon probate may
10 operate upon any property in this state and is valid under the laws of this
11 state, may be granted if the will does not stand rejected from probate or
12 establishment in the jurisdiction where the testator died domiciled, or
13 stands rejected from probate or establishment in the jurisdiction where
14 the testator died domiciled solely for a cause which is not ground for
15 rejection of a will of a testator who died domiciled in this state. The
16 court may delay passing on the application for probate under this subsec-
17 tion pending the result of probate or establishment or contest at the dom-
18 icile or on the application for probate under sub. (1).

19 (6) Proof of will by probate in nondomiciliary jurisdiction. If a tes-
20 tator dies domiciled outside this state, an authenticated copy of his will
21 and of the probate or establishment thereof in a jurisdiction other than
22 the one in which he died domiciled shall be sufficient proof of the contents
23 and legal sufficiency of the will to authorize the admission of the will to
24 probate under sub. (5) if no objection is made thereto. This subsection
25 does not authorize the probate of any will which would not be admissible
26 to probate under sub. (5), nor, in case objection is made to the will, to
27 relieve proponent from offering proof of the contents and legal sufficiency
28 of the will except that the original will need not be produced unless the
29 court so orders.

30 (7) Authentication and translation. Proof contemplated by this section

1 may be made by authenticated copies of the will and the records of judicial
2 proceedings with reference thereto. If the will has not been probated but
3 is otherwise established under the laws of the jurisdiction where the tes-
4 tator died domiciled, its contents and establishment may be proved by
5 the authenticated certificate of the notary or other official having custody
6 of the will or having authority in connection with its establishment. If
7 the respective documents or any part thereof are not in the English lan-
8 guage, verified translations may be attached thereto and shall be regarded
9 as sufficient proof of the contents of the documents unless objection is
10 made thereto. If any person in good faith relies upon probate under this
11 section he shall not thereafter be prejudiced because of inaccuracy of
12 such translations, or because of proceedings to set aside or modify the
13 probate on that ground.

14 (8) General law to apply. Except where otherwise provided, the law
15 of this state relating to wills and to the probate, contest and effect thereof
16 shall apply in case of a testator who died domiciled outside this state.

17 (9) Uniformity of interpretation. This section shall be so interpreted
18 and construed as to effectuate its general purpose to make uniform the law
19 of those states which enact it.

20 CROSS REFERENCES: See s. 223.12 as to capacity of foreign trust
21 company. Section 72.12 requires notice to public administrator
22 when petitioning for ancillary letters.

23 868.03 UNIFORM ANCILLARY ADMINISTRATION OF ESTATES

24 ACT. (1) Definitions. As used in this section:

25 (a) "Representative" means an executor, administrator, testamentary
26 trustee, guardian or other fiduciary of the estate of a decedent or a ward
27 duly appointed by a court and qualified. It includes any corporation so
28 appointed, regardless of whether the corporation is eligible to act under
29 the law of this state. This section does not change the powers or duties
30 of a testamentary trustee under the nonstatutory law or under the terms

1 of a trust.

2 (b) "Foreign representative" means any representative who has
3 been appointed by the court of another jurisdiction in which the decedent
4 was domiciled at the time of his death, or in which the ward is domiciled,
5 and who has not also been appointed by a court of this state.

6 (c) "Local representative" means any representative appointed as
7 ancillary representative by a court of this state who has not been appointed
8 by the domiciliary court.

9 (d) "Local and foreign representative" means any representative
10 appointed by both the domiciliary court and by a court of this state.

11 (2) Application for ancillary letters and notice thereof. (a) Quali-
12 fications of and preference for foreign representative. Any foreign rep-
13 resentative upon the filing of an authenticated copy of the domiciliary
14 letters with the probate court may be granted ancillary letters in this
15 state notwithstanding that the representative is a nonresident of this state
16 or is a foreign corporation. If the foreign representative is a foreign
17 corporation it need not qualify under any other law of this state to author-
18 ize it to act as local and foreign representative in the particular estate if
19 it complies with subs. (4) and (5). If application is made for the issuance
20 of ancillary letters to the foreign representative, the court shall give
21 preference in appointment to the foreign representative unless the court
22 finds that it will not be for the best interests of the estate or the decedent
23 has otherwise directed.

24 (b) Intervention upon application. When application is made for issu-
25 ance of ancillary letters any interested person may intervene and pray for
26 the appointment of any person who is eligible under this section or the law
27 of this state.

28 (c) Notice to foreign representative. When application is made for
29 issuance of ancillary letters to any person other than the foreign represen-
30 tative, the applicant shall send notice of the application by registered
31 mail to the foreign representative if the latter's name and address are

1 known and to the court which appointed him if the court is known. These
2 notices shall be mailed upon filing the application if the necessary facts
3 are then known, or as soon thereafter as the facts are known. If notices
4 are not given prior to the appointment of the local representative, he shall
5 give similar notices of his appointment as soon as the necessary facts
6 are known to him. Notice by ordinary mail is sufficient if it is impossible
7 to send the notice by registered mail. Notice under this paragraph is not
8 jurisdictional.

9 (3) Denial of ancillary letters. The court may deny the application
10 for ancillary letters if it appears that the estate may be settled conven-
11 iently without ancillary administration. Such denial is without prejudice
12 to any subsequent application if it later appears that ancillary administra-
13 tion should be had.

14 (4) Bond. No nonresident shall be granted ancillary letters unless
15 he gives an administration bond.

16 (5) Agent to accept service of process. No nonresident shall be
17 granted ancillary letters and no person shall be granted leave to remove
18 assets under sub. (7), until he files in the court an irrevocable power of
19 attorney constituting the clerk of the court his agent to accept and be sub-
20 ject to service of process or of notice in any action or proceeding relating
21 to the administration of the estate. The clerk shall forthwith forward to
22 the representative at his last known address any process or notice so
23 received, by registered mail requesting a return receipt signed by address-
24 ee only. Forwarding by ordinary mail is sufficient if when tendered at
25 a U.S. post office an envelope containing such notice addressed to such
26 representative is refused registration.

27 (6) Substitution of foreign for local representative. (a) Application
28 and procedure. If any other person has been appointed local representative,
29 the foreign representative, not later than 14 days after the mailing of
30 notice to him under sub. (2), unless this period is extended by the court because
31 the foreign representative resides outside continental United States or in

1 Alaska, or for other cause which the court deems adequate, may apply
2 for revocation of the appointment and for grant of ancillary letters to him-
3 self. Ten days' written notice of hearing shall be given to the local rep-
4 resentative. If the court finds that it is for the best interests of the estate,
5 it may grant the application and direct the local representative to deliver
6 all the assets, documents, books and papers pertaining to the estate in
7 his possession and make a full report of his administration to the local
8 and foreign representative as soon as the letters are issued and he is
9 qualified. The local representative shall also account to the court. The
10 hearing on the account may be forthwith or upon such notice as the court
11 directs. Upon compliance with the court's directions, the local repre-
12 sentative shall be discharged.

13 (b) Effect of substitution. Upon qualification, the local and foreign
14 representative shall be substituted in all actions and proceedings brought
15 by or against the local representative in his representative capacity, and
16 shall be entitled to all the rights and be subject to all the burdens arising
17 out of the uncompleted administration in all respects as if it had been
18 continued by the local representative. If the latter has served or been
19 served with any process or notice, no further service shall be necessary
20 nor shall the time within which any steps may or must be taken be changed
21 unless the court in which the action or proceedings are pending so orders.

22 (7) Removal of assets to domiciliary jurisdiction. (a) Application.
23 Prior to the final disposition of the ancillary estate under sub. (12) and
24 upon giving the notice provided in s. 879.03, the foreign representative
25 or the local and foreign representative may apply for leave to remove all
26 or any part of the assets from this state to the domiciliary jurisdiction
27 for the purpose of administration and distribution.

28 (b) Prerequisites to granting application. Before granting such ap-
29 plication, the court shall require compliance with sub. (5) and the filing

1 of a bond by the foreign representative or of an additional bond for the
2 protection of the estate and all interested persons unless the court finds
3 that the bond given under sub. (4) by the local and foreign representative
4 is sufficient.

5 (c) Granting application; terms and consequences. Upon compliance
6 with this subsection, the court shall grant the application upon such con-
7 ditions as it sees fit unless it finds cause for the denial thereof or for
8 postponement until further facts appear. The granting of the application
9 shall not terminate any proceedings for the administration of property in
10 this state unless the court finds that such proceedings are unnecessary.
11 If the court so finds, it may order the administration in this state closed,
12 subject to reopening within one year for cause.

13 (8) Effect of adjudications for or against representatives. A prior
14 adjudication rendered in any jurisdiction for or against any representa-
15 tive of the estate shall be as conclusive as to the local or the local and
16 foreign representative as if he were a party to the adjudication unless it
17 resulted from fraud or collusion of the party representative to the pre-
18 judice of the estate. This subsection shall not apply to adjudications in
19 another jurisdiction admitting or refusing to admit a will to probate.

20 (9) Payment of claims. No claim against the estate shall be paid in
21 the ancillary administration in this state unless it has been proceeded
22 upon in the manner and within the time required for claims in domiciliary
23 administrations in this state.

24 (10) Liability of local assets. All local assets are subject to the
25 payment of all claims, allowances and charges, whether they are estab-
26 lished or incurred in this state or elsewhere. For this purpose local
27 assets may be sold in this state and the proceeds forwarded to the repre-
28 sentative in the jurisdiction where the claim was established or the charge
29 incurred.

30 (11) Payment of claims in case of insolvency. (a) Equality subject
31 to preferences and security. If the estate either in this state or as a

1 whole is insolvent, it shall be disposed of so that, as far as possible, each
2 creditor whose claim has been allowed, either in this state or elsewhere,
3 shall receive an equal proportion of his claim subject to preferences and
4 priorities and to any security which a creditor has as to particular assets.
5 If a preference, priority or security is allowed in another jurisdiction but
6 not in this state, the creditor so benefited shall receive dividends from
7 local assets only upon the balance of his claim after deducting the amount
8 of such benefit. Creditors who have security claims upon property not
9 exempt from the claims of general creditors, and who have not released
10 or surrendered them, shall have the value of the security determined by
11 converting it to money according to the terms of the security agreement,
12 or by such creditor and the personal representative by agreement, arbitra-
13 tion, compromise or litigation, as the court directs, and the value so de-
14 termined shall be credited upon the claim, and dividends shall be computed
15 and paid only on the unpaid balance. Such determination shall be under
16 the supervision and control of the court.

17 (b) Procedure. In case of insolvency and if local assets permit,
18 each claim allowed in this state shall be paid its proportion, and any bal-
19 ance of assets shall be disposed of in accordance with sub. (12). If local
20 assets are not sufficient to pay all claims allowed in this state the full
21 amount to which they are entitled under this subsection, local assets
22 shall be marshaled so that each claim allowed in this state shall be paid
23 its proportion as far as possible, after taking into account all dividends
24 on claims allowed in this state from assets in other jurisdictions.

25 (12) Transfer of residue to domiciliary representative. Unless the
26 court otherwise orders, any movable assets remaining on hand after pay-
27 ment of all claims allowed in this state and of all taxes and charges levied
28 or incurred in this state shall be ordered transferred to the representative
29 in the domiciliary jurisdiction. The court may decline to make the order
30 until such representative furnishes security or additional security in the

1 domiciliary jurisdiction, for the proper administration and distribution of
2 the assets to be transferred.

3 (13) General law to apply. Except where special provision is made
4 otherwise, the law and procedure in this state relating generally to admin-
5 istration and representatives apply to ancillary administration and repre-
6 sentatives.

7 (14) Uniformity of interpretation. This section shall be so interpreted
8 and construed as to effectuate its general purpose to make uniform the law
9 of those states which enact it.

10 CROSS REFERENCES: See s. 287.16 as to power of foreign repre-
11 sentative to act in this state when no personal representative has
12 been appointed in this state. Section 72.12 requires notice to public
13 administrator when petitioning for ancillary letters.

14 868.05 FOREIGN WILLS; CERTIFICATE OF ASSIGNMENT. (1)
15 Petition. If a will devising or bequeathing property in this state or any
16 interest therein has been admitted to probate in any state, and 6 years
17 has passed since the death of the decedent, the probate court of any county
18 in which any of such property is situated may, upon petition accompanied
19 by an authenticated copy of such will and its probate, issue a certificate
20 of assignment as provided herein.

21 (2) Certificate. If it appears that the foreign will has been so ad-
22 mitted to probate and that no Wisconsin inheritance tax is owing or that
23 the tax has been paid, the court may issue a certificate so showing; the
24 certificate shall give the names of the beneficiaries, a description of the
25 property and interest of each in said property. The certificate or a du-
26 plicate or a certified copy thereof when recorded in the office of the reg-
27 ister of deeds of the county in which the property is situated shall be prima
28 facie evidence of the facts therein recited.

29 CROSS REFERENCES: See s. 235.56 as to power of a foreign per-
30 sonal representative and s. 235.57 as to power of heir or legatee of
31 non-resident decedent to satisfy mortgage on real estate in this state.
Section 72.12 deals with jurisdiction to determine inheritance tax on

1 property of non-resident decedents.

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

5 CHAPTER 878.

6 PROBATE COURT BONDS.

7 878.01 Probate court bonds.

8 878.03 Corporate fiduciaries.

9 878.05 Additional bond; reducing bond; sureties discharged.

10 878.07 Actions on bonds.

11 878.09 Actions on bonds in name of judge.

12 878.11 Money, to whom paid.

13 878.13 Action not barred; partial defense; stay of execution.

14 SUMMARY OF CHAPTER: This chapter replaces chapter 321.

15 878.01 PROBATE COURT BONDS. (1) Generally. All bonds required
16 by law to be taken in or by order of the probate court shall be for such
17 sum and with such sureties as the court directs, except when otherwise
18 provided by law. Such bonds shall be for the security and benefit of all
19 persons interested and shall be taken to the judge of the probate court,
20 and in any probate court having more than one judge, shall run to all of
21 the judges of said court, except where they are required by law to be
22 taken to the adverse party. No such bond shall be deemed sufficient un-
23 less it has been examined and approved by the judge or the register in pro-
24 bate and his approval indorsed thereon in writing and signed by him; but
25 his failure so to do shall not render the bond void.

26 (2) Sureties. When individuals act as sureties, each must be a
27 resident of this state, and shall give satisfactory evidence as to his finan-
28 cial responsibility, and, when required, shall do so before the judge, or
29 some other officer designated by him.

30 CROSS REFERENCE: Section 204.07 authorizes bonds by licensed
surety corporations.

1 878.03 CORPORATE FIDUCIARIES. The probate court shall not
2 require bond from any corporate fiduciary which has complied with the
3 requirements of s. 220.09 or 223.02.

4 878.05 ADDITIONAL BOND; REDUCING BOND; SURETIES DIS-
5 CHARGED. The probate judge may, at any time, require additional bond
6 from any personal representative, special administrator, guardian or
7 trustee and may, upon application, enter an order, with or without notice,
8 reducing the amount of any bond, when he is satisfied that no injury can
9 result therefrom to those interested in the estate.

10 CROSS REFERENCE: Section 895.38 provides a procedure for the
11 discharge of a surety from future liability.

12 878.07 ACTIONS ON BONDS. (1) Who may bring. Actions may be
13 brought on the bonds of personal representatives, special administrators,
14 guardians and trustees in the probate court;

15 (a) By any creditor when the amount due him has been ascertained
16 and ordered paid by such court, if the personal representative, special
17 administrator, guardian or trustee neglects to pay the same when de-
18 manded;

19 (b) By any distributee to recover his share of the estate, after the
20 court has declared the amount due to him, and ordered it paid or delivered
21 if the personal representative, special administrator or trustee fails to
22 pay or deliver the same when demanded; and

23 (c) By any creditor, distributee, or other person aggrieved by any
24 maladministration, when it appears that the personal representative,
25 special administrator, guardian or trustee has failed to perform his duty
26 in any other particular.

27 (2) When ordered. Whenever a personal representative, special
28 administrator, guardian or trustee refuses or neglects to perform any
29 order or judgment for rendering an account, or upon a final settlement,
30 or for the payment of debts or distributive shares, the judge of such
31 court shall cause the bond of such personal representative, special ad-

1 administrator, guardian or trustee to be prosecuted for the benefit of all
2 concerned, and the money collected thereon shall be applied in satisfac-
3 tion of such order or judgment in the same manner as such property
4 ought to have been applied by such personal representative, guardian or
5 trustee.

6 (3) Limitation as to liability of surety on fiduciary's bond. No action
7 shall be maintained against the sureties on any bond given by a personal
8 representative, special administrator, guardian or trustee unless it is
9 commenced within 6 years from the time when he was discharged.

10 (4) Separate and joint actions; action by ward; accounting, when
11 unnecessary. Any action upon such bond by or in behalf of one person
12 interested does not bar or in any way affect the right of any other person
13 interested to maintain an action thereon, but separate actions or a joint
14 action may be maintained thereon by or in behalf of any or all persons
15 interested. Nor does any such action impair any other remedy of the
16 ward. No accounting is necessary before bringing an action against
17 sureties when the personal representative, special administrator, guard-
18 ian or trustee dies or moves out of the state or becomes incompetent.

19 878.09 ACTIONS ON BONDS IN NAME OF JUDGE. All actions upon
20 bonds issued to a probate judge or judges shall be brought in the name of
21 the probate judge or judges in office at the time the action is commenced.
22 If judgment is rendered for the plaintiff, it shall be for the amount found
23 due and costs of suit, and shall specify the amount found due to each par-
24 ticular person for whose benefit it is brought; but no judgment or execu-
25 tion against the sureties on any bond shall exceed the amount of the penalty
26 thereof, exclusive of costs.

27 878.11 MONEY, TO WHOM PAID. All moneys recovered on any judg-
28 ment in favor of the judge of the probate court, shall be paid over to such
29 person, other than the defendant therein, who is then the rightful personal
30 representative, special administrator, guardian or trustee, and such

1 moneys shall be assets in his hands to be administered according to law;
2 but if there is no personal representative, special administrator, guard-
3 ian or trustee, other than the defendant, such moneys shall be paid to the
4 persons entitled thereto upon their giving receipts therefor, which receipts
5 shall be filed with the probate court.

6 878.13 ACTION NOT BARRED; PARTIAL DEFENSE; STAY OF EX-
7 ECUTION. No action brought upon the bond of any personal representative,
8 special administrator, guardian or trustee shall be barred or dismissed
9 by reason merely that any former action was prosecuted on such bond,
10 but any payment of damages made or collected from the sureties or any
11 of them on any judgment in an action previously begun by any party on
12 such bond shall be applied as a total or partial discharge of the liability
13 thereon; and such partial defense may be pleaded by answer or supplemen-
14 tal answer as may be proper. The court may, when it is necessary, stay
15 execution on any judgment rendered in such action until the final determin-
16 ation of any other action commenced upon the bond.

17 CHAPTER 879.

18 NOTICE, APPEARANCE, APPEAL AND
19 MISCELLANEOUS PROCEDURE.

- 20 879.01 Petitions to probate court.
21 879.03 Notice: court order.
22 879.05 Notice: manner of giving.
23 879.07 Proof of service of notice.
24 879.09 Notice requirement satisfied by waiver of notice.
25 879.11 Notice requirement satisfied by appearance.
26 879.13 Delayed service of notice.
27 879.15 Appearances, how made.
28 879.17 Attorney, appearance by.
29 879.19 Attorney, notice to.
30 879.21 Appearance by public administrator for person domiciled in
31 foreign country.

- 1 879.23 Guardian ad litem.
- 2 879.25 Attorney for person in military service.
- 3 879.26 Waiver of right to certain documents.
- 4 879.27 Appeals from probate court.
- 5 879.31 Extension of time for appeal; retrial.
- 6 879.33 Costs, when allowed: judgment for.
- 7 879.35 Costs in will contests.
- 8 879.37 Attorney fees in contests.
- 9 879.39 Security and judgment for costs.
- 10 879.41 Fees in probate court.
- 11 879.43 Money judgment in favor of estate.
- 12 879.45 Jury trials, practice.
- 13 879.47 Papers, preparation and filing.
- 14 879.49 Papers, withdrawal.
- 15 879.51 Court not to delay in setting matter for hearing.
- 16 879.53 Hearing set for a day certain.
- 17 879.55 Correction of clerical errors in court records.
- 18 879.57 Public administrator; personal representative, guardian.
- 19 879.59 Compromises.
- 20 879.61 Discovery proceedings.
- 21 879.63 Action by person interested to secure property for estate.
- 22 879.65 Annuity table.
- 23 879.67 Out of state service on personal representative.
- 24 879.69 Court must rule on petition.

25 SUMMARY OF CHAPTER: This chapter replaces chapter 324 and
26 also contains many related provisions that are scattered throughout
27 the probate chapters.

28 879.01 PETITIONS TO PROBATE COURT. All applications to probate
29 courts, except motions in matters at issue, shall be made by verified
30 petition. All petitions must show the jurisdiction of the court and the

1 interest of the petitioner. All petitions, except those for statutory cer-
2 tificates or for ex parte orders in proceedings already pending, shall
3 also show the names and post-office addresses of all persons interested,
4 so far as known to the petitioner or ascertainable by him with reasonable
5 diligence; and shall indicate who are minors or otherwise under disability,
6 and the names and post-office addresses of their guardians. No defect of
7 form or substance in any petition shall invalidate any proceedings.

8 879.03 NOTICE: COURT ORDER. (1) How given. If notice of any
9 proceeding in probate court is required by law or deemed necessary by
10 the court and the manner of giving notice is not directed by law, the court
11 shall order notice to be given as prescribed in s. 879.05. The court may
12 order both service by publication and personal service on designated per-
13 sons.

14 (2) Who entitled to notice. The following persons are entitled to
15 notice:

16 (a) Any person interested unless he is represented by a guardian ad
17 litem or guardian of the estate or unless he is represented by another per-
18 son under the doctrine of virtual representation.

19 (b) Any guardian ad litem, guardian of the estate and attorney for
20 person in the military service for any person interested.

21 (c) The attorney general where a public charitable trust is involved,
22 and in all cases mentioned in s. 852.01 (3).

23 (3) Domiciliary of a foreign country. If the petition for administra-
24 tion shows, or if it appears, that any person interested is a domiciliary
25 of a foreign country, the court may cause the notice of hearing of such
26 petition or of any subsequent proceeding that may then be pending to be
27 given the consul, vice consul or consular agent of such foreign country
28 by mailing a copy of the notice in a sealed envelope. the postage prepaid,
29 addressed to such consul, vice consul or consular agent at his post-office
30 address, at least 20 days before the hearing. If it is shown to the court
31 that there is no such consul, vice consul or consular agent of such foreign

1 country, the court may direct that such notice be so mailed to the public
2 administrator.

3 (4) When order does not specifically designate persons interested.

4 If the order does not specifically designate the persons to whom notice
5 is to be given, the order shall be deemed to refer to the persons set forth
6 in the petition for such hearing or otherwise shown by the record as being
7 persons interested and to the post-office addresses set forth or otherwise
8 shown therein. Such order and record shall be conclusive in all collateral
9 actions and proceedings as to the names being the names of all persons
10 interested and as to the reasonable diligence of the personal representa-
11 tive in determining the post-office addresses.

12 CROSS REFERENCE: Section 856.11 requires notice to both an
13 interested person and his guardian ad litem or guardian of the estate
14 when giving notice of hearing on petition for administration. Section
15 851.21 defines "persons interested".

16 879.05 NOTICE: MANNER OF GIVING. (1) Generally. Unless the
17 statute requiring notice in a particular proceeding provides otherwise,
18 notice required in the administration of an estate or other proceeding
19 shall be given either by mail as set forth in sub. (2) or by personal serv-
20 ice as set forth in sub. (3). The first notice given by mail in any admin-
21 istration or other proceeding must be accompanied by notice by publication
22 given as set forth in sub. (4). Notice by publication in addition to mailed
23 notice is required for subsequent hearings if the name or the post-office
24 address of one or more persons entitled to notice has not been ascertained.

25 (2) Service by mail. Service shall be made by first class mail either
26 within or without the state at least 20 days before the hearing or proceed-
27 ing upon any person whose post-office address is known or can with rea-
28 sonable diligence be ascertained.

29 (3) Personal service. Personal service shall be made at least 10
30 days before the hearing as provided by s. 262.06, except as that section
provides for service by publication and except that substituted service

1 under s. 262.06 (1) (b) may not be made outside this state.

1a (4) Service by publication. Unless a statute provides otherwise
2 every probate court notice required to be given by publication shall be
3 published as a class 3 notice in a newspaper published in the county eli-
4 gible under ch. 985, as the court by order directs.

5 COMMENT: The only change from existing procedure is to require
6 publication as a class 3 notice only once in most estates.

7 879.07 PROOF OF SERVICE OF NOTICE. (1) Mail. Proof of
8 service by mail shall be by the affidavit of the person who mailed the
9 notice showing when and to whom he mailed it and how it was addressed.

10 (2) Personal service. Proof of personal service shall be made as
11 provided in s. 262.17 (1) or by the written admission of service by the
12 person served if he is competent and an adult, and the subscription of
13 his name to such admission is presumptive evidence of its genuineness.

14 (3) Publication. Proof of service by publication shall be by affidavit
15 as provided in s. 985.12.

16 879.09 NOTICE REQUIREMENT SATISFIED BY WAIVER OF
17 NOTICE. Persons who are not minors or incompetent, on behalf of them-
18 selves, and duly appointed guardians ad litem and guardians of the estate
19 on behalf of themselves and those whom they represent, may in writing
20 waive the service of notice upon them and consent to the hearing of any
21 matter without notice except that guardians ad litem cannot waive the notice
22 of a hearing to prove a will or for administration on behalf of those whom
23 they represent. An attorney for a person in the military service may waive
24 notice on behalf of himself but cannot waive notice on behalf of anyone
25 whom he represents. Waiver of notice by any person is equivalent to
26 timely service of notice.

27 879.11 NOTICE REQUIREMENT SATISFIED BY APPEARANCE. An
28 appearance by a person who is not a minor or incompetent is equivalent
29 to timely service of notice upon him. An appearance by a guardian of the
30 estate is equivalent to timely service of notice upon him and upon his ward.
31 An appearance by a guardian ad litem is equivalent to timely service of notice

1 upon him and except at a hearing to prove a will or for administration is
2 equivalent to timely service of notice upon those whom he represents. An ap-
3 pearance by an attorney for a person in the military service is equivalent to
4 timely service of notice upon him but does not satisfy a requirement for
5 notice to anyone whom he represents.

6 879.13 DELAYED SERVICE OF NOTICE. If for any reason notice
7 to any person is insufficient, the court may at any time order service of
8 notice together with such documents as are required by law as set forth
9 in s. 879.26 and require the person to show cause why he should not
10 be bound by the action already taken in the proceedings as though he had
11 been seasonably served with notice. Such person may consent in writing
12 to be bound.

13 879.15 APPEARANCES, HOW MADE. In any proceeding in probate
14 court or before any probate judge appearances shall be made as follows:

15 (a) A minor or incompetent person shall appear by his guardian ad
16 litem, who shall be an attorney, or by the guardian of his estate, who
17 may appear by attorney;

18 (b) A personal representative shall appear by attorney; and

19 (c) Every other person shall appear either in person or by attorney.

20 879.17 ATTORNEY, APPEARANCE BY. The attorney who first
21 appears for any party or person interested shall be recognized as his
22 attorney throughout the matter or proceeding unless another attorney is
23 substituted in accordance with s. 256.27 (3).

24 879.19 ATTORNEY, NOTICE TO. When a person interested who is
25 not a minor or incompetent has retained an attorney to represent him and
26 the attorney has mailed a notice of retainer and request for service to
27 the attorney for the personal representative and filed a copy with the
28 court, any notice which would be given to the person interested shall
29 instead be given to the attorney; such attorney may waive notice for the
30 person interested as provided in s. 879.09.

1 879.21 APPEARANCE BY PUBLIC ADMINISTRATOR FOR PERSON
2 DOMICILED IN FOREIGN COUNTRY. When notice has been given to the
3 public administrator as specified by s. 879.03 (3) that a person domiciled
4 in a foreign country, not represented by a consul, vice consul or consular
5 agent, is interested in an estate, the public administrator shall appear
6 for such person and be allowed his compensation and necessary expendi-
7 tures in the same manner as a guardian ad litem.

8 879.23 GUARDIAN AD LITEM. A guardian ad litem shall be appoint-
9 ed for any person interested who is a minor or incompetent and has no
10 guardian of his estate, or where such guardian of his estate fails to appear
11 on his behalf or where the interest of the person who is a minor or incom-
12 petent is adverse to that of the guardian of his estate. A guardian ad litem
13 may be appointed for persons not in being or presently unascertainable
14 and for persons having successor or contingent interests. The court
15 may appoint the guardian ad litem at the time of making the order for
16 hearing the matter, and require notice thereof and of such hearing to
17 be served upon such guardian ad litem; or such guardian ad litem may
18 be appointed on the day of the hearing and before any proceedings are
19 had. The guardian ad litem shall continue to act throughout the proceeding
20 in relation to the same estate or matter until proper distribution to or
21 for the benefit of the minor or incompetent has been completed, unless
22 earlier discharged by the court, but if a will creates a testamentary
23 trust, a guardian ad litem appointed in the administration of the estate
24 has no responsibility in regard to the administration of the trust unless
25 reappointed for that purpose. The guardian ad litem shall be an attorney
26 admitted to practice in this state and shall be allowed compensation and
27 his necessary expenditures to be fixed by the court and paid out of the
28 estate, but no attorney shall appear or be appointed as guardian ad litem
29 for different persons in the same matter or proceeding, whose interests
30 and rights in relation to such matter or proceeding are conflicting. A
31 guardian ad litem shall be discharged by the court at any time that it

1 appears that his ward no longer has an interest in the estate. The court
2 may dispense with or terminate the appointment of a guardian ad litem for
3 a person having a successor or contingent interest who is legally incom-
4 petent, unborn or presently unascertainable, if there is a living person,
5 sui juris, having in the judge's opinion a substantially identical interest,
6 who is a party to the proceeding and whose interest is not adverse.

7 879.25 ATTORNEY FOR PERSON IN MILITARY SERVICE. At the
8 time of filing a petition for administration of an estate an affidavit setting
9 forth facts showing whether or not any of the persons interested in such
10 matter are actively engaged in the military service of the United States
11 shall be filed. Whenever it appears by such affidavit or otherwise that
12 any person in the active military service of the United States is interested
13 in any administration and is not represented by an attorney, the judge shall
14 appoint an attorney to represent such person and protect his interest and
15 no further proceedings shall be had until such appointment has been made.
16 The attorney for a person in the military service shall be an attorney
17 admitted to practice in this state and shall be allowed compensation and
18 his necessary expenditures to be fixed by the court and paid out of the
19 estate, but no attorney shall appear or be appointed for different persons
20 in the same matter or proceeding, whose interests and rights in relation
21 to such matter or proceeding are conflicting.

22 879.26 WAIVER OF RIGHT TO CERTAIN DOCUMENTS. Any per-
23 son who is not a minor or incompetent may in writing waive his right to
24 be given (1) a statement that the inventory has been filed and a copy of
25 the inventory or a statement of the inventory value of each item of prop-
26 erty in which he has an interest as provided in s. 858.03, (2) information
27 as to claims filed as provided in s. 859.29 and (3) a copy of accounts as
28 provided in s. 862.09.

29 879.27 APPEALS FROM PROBATE COURT. (1) Appeal is to supreme
30 court. Any person aggrieved by any appealable order or judgment of the
31 probate court may appeal or take a writ or error therefrom to the supreme

1 court.

2 (2) Effect of title XXV. In all matters not otherwise provided for
3 in this chapter relating to appeals from probate courts to the supreme
4 court, the law and rules of practice set forth in title XXV govern.

5 (3) Time limit. The time within which a writ of error may be issued
6 or an appeal taken to obtain a review by the supreme court of any appeal-
7 able order or judgment of the probate court is limited to 60 days from
8 the date of entry thereof, except as provided in s. 879.31.

9 (4) Who may appeal on behalf of minor or incompetent. In all cases
10 the appeal on behalf of any minor or incompetent person may be
11 taken and prosecuted by the guradian of his estate or by a guardian
12 ad litem.

13 (5) Limitation on bond and costs. On appeals from probate courts
14 to the supreme court no bond shall be required of, or costs awarded
15 against any alleged incompetent or person acting in behalf of an alleged
16 incompetent on an appeal from an adjudication of incompetency, and
17 no bond shall be required of any personal representative, guardian or
18 trustee of a testamentary trust.

19
20 CROSS REFERENCE: Where bond not required, see
21 s. 274.16.

22
23 879.31 EXTENSION OF TIME FOR APPEAL; RETRIAL. If any per-
24 son aggrieved by any act of the probate court shall, from any cause with-
25 out fault on his part, omit to take his appeal within the time allowed, the
26 court may, upon his petition, notice to the adverse party, and hearing,
27 and upon such terms and within such time as it deems reasonable, but
28 not later than 6 months after the act complained of, by order allow an
29 appeal, if justice appears to require it, with the same effect as though
30 done seasonably; or the court may reopen the case and grant a retrial.

1 COMMENT: This provision reduces to 6 months the time during
2 which it is possible to bring an appeal. This is consistent with the
3 procedure in civil actions.

4 879.33 COSTS, WHEN ALLOWED; JUDGMENT FOR. Costs may
5 be allowed in all appealable contested matters in probate court to the
6 prevailing party, to be paid by the losing party or out of the estate as
7 justice may require; and when costs are allowed they shall be taxed by
8 the register in probate after the notice required in ch. 271. When costs
9 are allowed, the court shall render judgment therefor, stating in whose
10 favor and against whom the same is rendered and the amount thereof; and
11 a list of the items making such amount shall be filed with the papers in
12 the case.

13 879.35 COSTS IN WILL CONTESTS. Costs may be awarded out of
14 the estate to an unsuccessful proponent of a will if he is named as an ex-
15 ecutor therein and propounded the document in good faith, and to the un-
16 successful contestant of a will if he is named as an executor in another
17 document propounded by him in good faith as the last will of the decedent.

18 879.37 ATTORNEY FEES IN CONTESTS. Reasonable attorney fees
19 may be awarded out of the estate to the prevailing party in all appealable
20 contested matters, to an unsuccessful proponent of a will if he is named
21 as an executor therein and propounded the document in good faith, and
22 to the unsuccessful contestant of a will if he is named as an executor in
23 another document propounded by him in good faith as the last will of the
24 decedent.

25 879.39 SECURITY AND JUDGMENT FOR COSTS. In all cases men-
26 tioned in s. 879.33 the probate court may require the claimant or con-
27 testant to give a bond in such sum and with such surety as is approved
28 by the court, to the effect that he will pay all costs that may be awarded
29 by such court in such proceeding against him. A judgment for costs shall
30 be against the claimant or contestant and the surety.

1 879.41 FEES IN PROBATE COURT. Fees in probate court shall be
2 allowed:

3 (1) To appraisers, an amount to be fixed by the court,

4 (2) To jurors, the same fees as provided in s. 255.25,

5 (3) To witnesses and interpreters, the same fees as provided in
6 s. 885.05, and to expert witnesses, the same fees as provided in s.
7 271.04 (2).

8 (4) Travel as fixed by the court;

9 (5) In cases not provided for, a fair compensation shall be allowed
10 by the court.

11 879.43 MONEY JUDGMENT IN FAVOR OF ESTATE. (1) Enforcement.
12 All money judgments in probate court in favor of an estate may be enforced
13 through the probate court, after costs have been taxed as provided in s.
14 270.66. The pertinent provisions of ch. 272, relating to executions
15 apply.

16 (2) Stay of execution. Execution of such judgments may be stayed
17 as provided in title XXV.

18 (3) Docket. Such judgments may be docketed in the office of the
19 clerk of circuit court, upon the filing therein of a certified transcript
20 of such judgment.

21 (4) Lien. Such judgment when docketed as aforesaid is a lien upon
22 the real estate of the debtor as provided in s. 270.79.

23 879.45 JURY TRIALS, PRACTICE. (1) Generally. Jury trials may
24 be had in probate court in all cases in which a jury trial may be had of
25 similar issues under s. 270.07.

26 (2) Demand. In all cases provided in sub. (1), any person having
27 the right of appeal from the determination of the court, may file with the
28 court, within 10 days after notice that the matter is to be contested, a
29 written demand for a jury trial, and deposit \$10 with the county treasurer,
30 take his receipt therefor and file it with the court. If such issue is trans-

1 ferred for trial to the circuit court, as provided in this section, the judge
2 of the probate court may order said deposit refunded to the depositor, and
3 the county treasurer upon presentation of such order shall refund said
4 amount.

5 (3) Framing issues; transfer. Upon filing such demand and receipt,
6 the court may order an issue to be framed by the parties within a fixed
7 time, and the matter shall be placed upon the calendar for the next jury
8 term of the court. The probate court may transfer the matter or cause,
9 and the record thereof, to the circuit court of such county for trial.

10 (4) Jury terms. Three jury terms of the probate court shall be held
11 each year (if there are jury cases ready for trial at such times), com-
12 mencing respectively on the 2nd Tuesday in January, April and October.

13 (5) Selection of jurors. Jurors and trial juries shall be drawn as
14 provided by ss. 255.04 to 255.09, except as otherwise provided herein,
15 and trials by jury shall be as provided by ss. 270.15 to 270.31; but in
16 county courts exercising civil jurisdiction jurors and juries may be
17 drawn in probate matters and jury terms had in the manner required
18 in civil cases in such courts.

19 (6) Calendar. Not more than 10 days prior to each jury term the
20 clerk shall prepare, in the order of their date of issue, a list of cases in
21 which a trial by jury has been demanded, and such list shall constitute
22 the jury calendar for such term of the probate court. Unless the court
23 otherwise orders, every case on such calendar which shall not be disposed
24 of at said term shall stand continued to the next jury term, and be placed
25 on the jury calendar for such term. If the party who demanded the jury
26 trial shall ask to have such action continued for the term, after the com-
27 mencement of the term at which such action is for trial, such continuance
28 shall be granted only upon payment of \$10 motion fees unless such party
29 waives a jury trial in such proceeding. In case a continuance in any
30 action upon the jury calendar is asked by any other party, the court may

1 grant such continuance and require payment of \$10 motion fees.

2 (7) Pretrial conference. The court may hold a pretrial conference
3 in accordance with s. 269.65.

4 (8) Costs. In all jury cases costs shall be allowed as a matter of
5 course to the prevailing party, the items and taxation of which shall be
6 as in circuit court.

7 (9) Transfer to circuit court. Any party to the controversy may
8 within 10 days after notice that a jury trial has been demanded, have the
9 matter transferred to the circuit court of the county for trial. Upon the
10 filing of such demand for transfer, the judge of the probate court shall
11 immediately cause the record and proceedings in the matter to be certi-
12 fied to the circuit court, and the same shall then be tried and determined
13 as a circuit court action. In case the matter is one where the probate
14 court has the right to fix the fees or compensation of the attorneys, per-
15 sonal representatives or guardians, the circuit court may determine such
16 fees or compensation. The circuit court may render such judgment as is
17 proper, or make such order therein as the probate court ought to have
18 made and may remit the case to the probate court for further proceedings,
19 or make any order or take any action therein to enforce its own judgment
20 as the circuit court deems best. The probate court, after such cause is
21 remitted, shall proceed therein in accordance with the determination
22 of the circuit court.

23 COMMENT: This section retains the existing statute on jury trials
24 in probate court.

25 879.47 PAPERS, PREPARATION AND FILING. The attorney for any
26 person desiring to file any paper in probate court is responsible for the
27 preparation of such paper. All papers shall be legibly written on sub-
28 stantial paper and shall state the title of the proceeding in which they are
29 filed and the character of the paper. Uniform forms shall be used when
30 suitable and available. If papers are not so written or if uniform forms
31 are not used when suitable and available, the court may refuse to receive

1 and file them. The court shall show on all papers the date of their filing.

2 CROSS REFERENCE: Section 253.21 provides for adoption of uniform
3 forms.

4 879.49 PAPERS, WITHDRAWAL. No paper filed in any matter may
5 be withdrawn without leave of the court or the judge, and when a paper is
6 withdrawn a copy thereof, attested by the judge or register in probate,
7 shall, if required, be left in its place.

8 879.51 COURT NOT TO DELAY IN SETTING MATTER FOR HEAR-
9 ING. When a petition and proposed order for hearing are filed, the court
10 within 10 days thereafter shall set a time for hearing.

11 879.53 HEARINGS SET FOR A DAY CERTAIN. All matters in pro-
12 bate court requiring notice of hearing shall be set for hearing on a day
13 certain. Such matters shall be heard on the day set or as soon thereafter
14 as counsel may be heard.

15 879.55 CORRECTION OF CLERICAL ERRORS IN COURT RECORDS.
16 Upon verified petition to a probate court by any person interested or his
17 successor in title praying that clerical errors in its records be corrected
18 as specified in the petition, the court shall order a hearing thereon. The
19 hearing shall be held without notice or upon such notice as the court re-
20 quires. If the court requires notice, it shall be given to those persons
21 interested who will be affected by such change in the records. If on such
22 hearing the court finds its record incorrect as a result of clerical error,
23 it shall make its record conform to the truth. Such corrected record
24 shall be as valid and binding as though correctly made and entered at the
25 proper time.

26 COMMENT: This provision follows existing statutes as interpreted
27 and limited in Estate of Cudahy, 196 Wis. 260, 210 N.W. 203 (1928).

28 879.57 PUBLIC ADMINISTRATOR; PERSONAL REPRESENTATIVE,
29 GUARDIAN. Whenever it is found by the court to be necessary to appoint
30 a personal representative or guardian and there appears to be no person

1 in the state to petition for such appointment or there appears to be no
2 suitable person to be so appointed, the court shall, upon its own motion
3 or upon the petition of the public administrator, grant administration of
4 an estate of a decedent or guardianship of the estate of minor or incompe-
5 tent person to the public administrator, and he shall thereupon take
6 possession of the estate and protect and preserve the same, and proceed
7 with the administration and with the care and management of the estate.
8 Such authority to the public administrator in the administration or guard-
9 ianship may be revoked at any time upon the appointment and qualification
10 of a personal representative or guardian, or when for any other cause the
11 court deems it just or expedient; but such revocation does not invalidate
12 his acts performed prior to revocation of his authority and does not impair
13 the public administrator's rights to receive from the estate his legal
14 charges and disbursements, to be determined by the probate court.

15 CROSS REFERENCE: For duty of public administrator as to inher-
16 itance taxes, see s. 72.17.

17 879.59 COMPROMISES. (1) Between claimants; parties. The court
18 may authorize personal representatives and trustees to adjust by compro-
19 mise any controversy that may arise between different claimants to the
20 estate or property in their hands to which agreement such personal rep-
21 resentatives or trustees and all other parties in being who claim an inter-
22 est in such estate and whose interests are affected by the proposed com-
23 promise shall be parties in person or by guardian as hereinafter provided.

24 (2) Between testate and intestate distributees; parties. The court
25 may likewise authorize the person or persons named as executor in one
26 or more instruments purporting to be the last will and testament of a
27 person deceased, or the petitioners for administration with such will or
28 wills annexed, to adjust by compromise any controversy that may arise
29 between the persons claiming as devisees or legatees under such will or
30 wills and the persons entitled to or claiming the estate of the deceased

1 under the statutes regulating the descent and distribution of intestate
2 estates, to which agreement or compromise the persons named as exec-
3 utors or the petitioners for administration with will annexed, as the case
4 may be, those claiming as devisees or legatees and those claiming the
5 estate as intestate shall be parties, provided that persons named as
6 executors in any instrument who have renounced or shall renounce such
7 executorship and any person whose interest in the estate is unaffected by
8 the proposed compromise shall not be required to be parties to such
9 compromise.

10 (3) Parties subject to guardianship. Where a person subject to
11 guardianship is a necessary party to a compromise under this section he
12 shall be represented in the proceedings by his guardian or by a special
13 guardian appointed by the court, who shall in the name and on behalf of the
14 party he represents make all proper instruments necessary to carry into
15 effect any compromise that is sanctioned by the court.

16 (4) Persons unknown or not in being. If it appears to the satisfaction
17 of the court that the interests of persons unknown or the future contingent
18 interests of persons not in being are or may be affected by the compromise,
19 the court shall appoint some suitable person to represent such interests
20 in the compromise and to make all proper instruments necessary to
21 carry into effect any compromise that is sanctioned by the court.
22 If by the terms of any compromise made pursuant to this section
23 money or property is directed to be set apart or held for the benefit of or
24 to represent the interest of persons subject to guardianship or persons
25 unknown or unborn, the same may in a proper case be deposited in any
26 trust company, or any state or national bank within this state, authorized
27 to exercise trust powers, or with the public administrator, and shall
28 remain subject to the order of the court.

29 (5) Court approval required. An agreement of compromise made
30 in writing pursuant to this section, if found by the court to be just and
31 reasonable in its effects upon the interests in said estate or property of

1 persons subject to guardianship, unknown persons, or the future contin-
2 gent interests of persons not in being, shall be valid and binding upon
3 such interests as well as upon the interests of adult persons of sound
4 mind.

5 (6) Procedure. An application for the approval of a compromise
6 pursuant to this section shall be made by petition duly verified, which
7 shall set forth the provisions of any instrument or documents by virtue
8 of which any claim is made to the property or estate in controversy and
9 any and all facts relating to the claims of the various parties to the con-
10 troversy and the possible contingent interests of persons not in being and
11 all facts which make it proper or necessary that the proposed compromise
12 be approved by the court. The court may entertain such application prior
13 to the execution of the proposed compromise by all the parties required
14 to execute it and may permit the execution by the necessary parties to be
15 completed after the inception of the proceedings for approval thereof if
16 the proposed compromise has been approved by the estate representatives
17 described in sub. (1) and (2). The court shall inquire into the circum-
18 stances and make such order or decree as justice requires.

19 CROSS REFERENCE: Section 859.31 provides for compromise of
20 creditor's claims against the estate.

21 COMMENT: This section retains the existing statute on compromises
22 which was held constitutional in Estate of Jorgenson, 267 Wis. 1, 64
23 N.W.2d 430 (1954).

24 879.61 DISCOVERY PROCEEDINGS. Any personal representative or
25 any person interested who suspects that any other person has concealed,
26 stolen, conveyed or disposed of property of the estate, or is indebted to
27 the decedent, or has in his possession or under his control or has knowl-
28 edge of concealed property of the decedent, or has in his possession or
29 under his control or has knowledge of writings which contain evidence of
30 or tend to disclose the right, title, interest or claim of the decedent to

1 any property, or has in his possession or under his control or has knowl-
2 edge of any will of the decedent, may file a petition in the probate court
3 so stating, and the court upon such notice as it may direct, may order such
4 other person to appear before the said court or court commissioner for
5 disclosure, may subpoena witnesses and compel the production of evidence
6 and may make such order in relation to such matter as may be just and
7 proper.

8 879.63 ACTION BY PERSON INTERESTED TO SECURE PROPERTY
9 FOR ESTATE. Whenever there is reason to believe that the estate of a
10 decedent as set forth in the inventory does not include property which
11 should be included in the estate, and the personal representative has failed
12 to secure such property or to bring an action to secure such property,
13 any person interested may, on behalf of the estate, bring an action in the
14 court in which the estate is being administered to reach such property and
15 make it a part of the estate. If such action is successful, such person
16 interested shall be reimbursed from the estate for the reasonable expenses
17 and attorney's fee incurred by him in such action as approved by the court
18 but not in the excess of the value of the property secured for the estate.

19 879.65 ANNUITY TABLE. The present value of any estate, annuity
20 or interest of beneficiary may be computed on the basis of the American
21 Experience Table of Mortality with Craig's Extension below age 10, and
22 interest at 5% per annum. The Northampton Table of Mortality and inter-
23 est at the aforesaid rate may be used where it is impracticable to use the
24 aforesaid basis. Any court or judge by whom any such present value is
25 to be determined may transmit to the commissioner of insurance such
26 statement of the facts as he may require, and said commissioner shall
27 thereupon make the necessary computation and certify same without
28 charge. The present value of an immediate annuity of \$1, on the above
29 basis for a single life is as follows:

AMERICAN EXPERIENCE FIVE PER CENT SINGLE LIFE.

	Present		Present		Present
Age	Value	Age	Value	Age	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,

1 notice or process of the probate court, and service cannot be made in this
 2 state, such service may be made as provided in s. 262.06 (1) for the
 3 service of summons.

4 879.69 COURT MUST RULE ON PETITION. When the personal
 5 representative petitions for a ruling or order in regard to any matter
 6 connected with the administration of the estate, the court, after hearing
 7 on notice as provided in s. 879.03 shall make a ruling or grant or deny
 8 the petition by order.

9 SECTION 26. In the sections listed in column "A" below, the
 10 cross references to the sections in "B" are changed as shown in col-
 11 umn "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
14 45.37 (12) (i)	311.05	867.01
15 45.37 (12) (i)	313.03	859.07
16 48.911	Ch. 324	Ch. 879
17 49.08 (1)	313.08	859.01
18 49.25	313.15	861.31, 861.33 and 861.35
19 49.26 (3) (c)	311.05	867.05
20 49.26 (3) (c)	313.03	859.07
21 72.15 (2) (a)	317.11	862.09
22 72.17 (1)	237.09	867.05
23 72.17 (1)	310.075	868.05
24 72.17 (1)	230.47	867.03
25 103.39 (2)	313.16	859.25
26 157.06 (2)	324.20	879.05 (4)
27 182.24	230.48	867.03
28 231.36 (4)	324.18 to 324.20	879.03
29 231.49 (1)	312.01	858.07
30 231.50 (1) (a)	324.29	879.23
31 245.25	237.06	1965 Stats.
32 253.10 (3)	Ch. 313	Ch. 859
33 253.10 (5)	318.03 (4)	863.39 (3)
34 253.21 (1) (a)	Title XXIX	Titles XXIX and XLII
35 253.26	Title XXIX	Titles XXIX and XLII
36 253.30 (1)	Title XXIX	Titles XXIX and XLII

1	A	B	C
2	Statute sections	Old cross references	New cross references
3	253.32 (2)	Title XXIX	Titles XXIX and XLII
4	253.32 (3)	Title XXIX	Titles XXIX and XLII
5	253.33 (1) (a)	Title XXIX	Titles XXIX and XLII
6	253.34 (1) (e)	310.02	856.05 (1)
7	262.02 (3)	Title XXIX	Titles XXIX and XLII
8	274.01 (2)	311.02	856.07 (2)
9	276.14 (1)	237.02 (2)	1965 Stats.
10	276.14 (1)	314.06	879.65
11	296.36	296.42	296.37
12	319.06 (2)	324.18	879.05
13	319.08 (3) (intro.)	324.18	879.05
14	319.13 (1)	Ch. 321	Ch. 878
15	319.16 (4)	312.06	879.61
16	319.16 (4)	312.07	879.61
17	319.28	311.05	867.01
18	323.05	324.18	879.03
19	323.06 (1)	324.18	879.03
20	323.06 (2)	312.11	323.25
21	893.16 (2)	321.02	878.07
22	895.04 (2)	237.01	852.01
23	895.38 (5)	Ch. 317	Ch. 862
24	895.41 (3)	313.16	859.25
25	895.42 (3)	324.18	879.03
26	957.263	313.08	859.01
27	957.263	313.15	861.31, 861.33 & 861.35

28 SECTION 27. SECTIONS 1 to 13, 16 to 24 and 26 become effective
29 as of July 1, 1968. SECTIONS 14 and 15 become effective upon passage
30 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	Old Sections	New Prob.Code
4	233.01	861.03	238.11	853.25 (2)
5		852.01 (1)	238.12	853.25 (4)
6	233.02	861.03	238.13	853.27
		852.01 (1)	238.135	853.21
7	233.03 to 233.08	None	238.136	852.01 (3)
	233.09 to 233.12	861.07 (1)	238.14	853.11
8	233.13	861.05 (2)	238.15	853.09
9	233.14	861.05	238.16	None
		861.11 (1), (3)	238.17	None
10	233.15 (1)	861.11 (2), (4)	238.18	856.13
11	(2)	861.11 (3)	238.19	853.13
	233.16	861.15	238.20	856.19
12	233.17 to 233.22	None	310.01	856.03
13	233.23	861.03	310.02	856.05 (1)
		852.01 (1)	310.03	856.05 (4)
14	237.01	852.01	310.031	856.05 (3)
15	237.02	852.01	310.04	856.11 (1)
		852.09	310.045 (1)	879.01
16	237.025	861.41	310.05 (1)	879.09
17	237.03	852.03 (2), (3)	310.05 (2)	879.03 (3)
	237.04	851.51	310.06 (1)	856.15 (1)
18	237.05	852.05 (1)	310.06 (2)	856.15 (2), (3)
19	237.06	852.05 (2)	310.06 (3)	856.15 (4)
	237.07	852.03 (1), (4)	310.06 (4)	856.15 (3)
20	237.08	None	310.06 (5)	856.15 (5)
21	237.09	867.05	310.07	868.01
	237.10	851.55	310.075	868.05
22	237.11	851.61	310.09	None
23	238.01	853.01	310.10	856.17
	238.02 (1)	853.31	310.11	863.21
24	238.02 (2)	853.15	310.12	856.21
25	238.03	853.29	310.14	857.03
	238.04	861.41	310.15	856.25
26	238.05	853.01	310.16	856.23
27	238.06	853.03		857.13
		853.07	310.17	856.23
28	238.07	853.05	310.18	856.25
29	238.08	853.07		857.23
	238.09	853.07	310.19	857.13
30	238.10	853.25 (1)		857.23

	Old Sections	New Prob.Code	Old Sections	New Prob.Code
1	310.20 (1)	856.25	312.09	None
2		857.13	312.10	None
3		857.15	312.11	857.09
4	310.20 (2)	857.21		857.15
5		862.01		862.01
6	310.21	862.03	312.13	860.01
7	310.25	879.67	312.15	None
8	310.27	856.31	312.16	859.40
9	311.01	857.27	312.17	859.40
10		856.01	313.01	859.01
11	311.02	856.07	313.03 (1)	859.05
12		856.07	313.03 (2)	None
13		856.21	313.03 (3)	859.07
14	311.03	856.23	313.03 (5)	859.29
15	311.04	856.11 (1)		859.35
16	311.05	856.25	313.03 (6)	859.09
17	311.06	867.01	313.03 (7)	859.51
18	311.07	867.07	313.04	859.07
19	311.075	867.11	313.05 (1)	859.13
20	311.08	867.15		859.29
21	311.09 (1) to (6)	867.13	313.05 (2)	859.15
22	311.09 (7)	867.17		859.33
23	311.10	867.19	313.05 (3)	859.33
24	311.11	867.21	313.05 (4)	859.29
25	311.12	857.23		859.35
26	311.13	857.19	313.06	859.37
27	311.14	857.23		879.43
28	311.16 (1)	857.19	313.07	859.17
29	311.16 (2)	879.57	313.08	859.01
30	311.16 (3)	879.57	313.09	860.01
31	312.01 (1)	879.21	313.093	860.13
32		858.01	313.095	860.01
33		858.07	313.10	859.01
34	312.01 (2)	858.13		859.03
35	312.01 (3)	858.15	313.12	None
36	312.01 (4)	None	313.13	863.33
37	312.02	858.11	313.14	859.39
38	312.03 (1)	858.09		863.33
39	312.03 (2)	858.05		863.35
40	312.04	857.03	313.15 (1)	861.33
41	312.05	None	313.15 (2)	861.31
42	312.06	879.61	313.15 (3)	861.35
43	312.07	879.61	313.15 (4)	None
44	312.08	879.61	313.16	859.25

	Old Sections	New Prob.Code	Old Sections	New Prob.Code
1				
2	313.17	859.37	316.23	None
3		859.39	316.235	860.05
4	313.18	859.39	316.24	860.05
5	313.19	859.39	316.25	None
6	313.20	859.39	316.26	None
7	313.21	859.39	316.27	None
8	313.22	859.21	316.28	None
9	313.23	859.21	316.29	None
10	313.25	859.23	316.30	None
11	313.26	863.11	316.31	None
12	313.27	863.11	316.32	None
13	313.28	863.11	316.33	None
14	313.29	None	316.39	None
15	313.30	None	316.40	None
16	313.31	None	316.41	860.13
17	313.32	None	316.43	None
18	314.05	None	316.45	None
19	314.06	879.65	316.46	None
20	314.07	None	316.47	859.43
21	315.02	867.05	316.48	None
22	315.03	867.05	316.49	None
23	315.04	867.05	316.50	None
24	315.05	867.05	316.51	None
25	315.06	867.05	316.52	860.09
26	316.01	None	316.53	860.09
27	316.02	None	316.54	860.09
28	316.03	None	316.55	860.09
29	316.07	None	317.01 (1)	862.05
30	316.09	None	317.01 (2)	862.07
31	316.10	857.29		862.09
32	316.105	None	317.02	862.07
33	316.11	None	317.03	None
34	316.12	None	317.04	857.03
35	316.13	None		857.25
36	316.14	None	317.05	862.01
37	316.15	None		862.15
38	316.16	None	317.06	Renumber
39	316.17	None	317.07	None
40	316.18	None	317.08	857.05
41	316.19	None	317.09	857.07
42	316.20	None	317.10	859.47
43	316.21	None	317.105	857.03
44	316.22	None	317.11	862.09
45			317.13	862.03

	Old Sections	New Prob.Code	Old Sections	New Prob.Code
1	317.14	862.03	324.01	879.27
2	317.15	862.13	324.04	879.27
3	318.01 (1)	852.01 (1)	324.05	879.31
4	318.01 (3)	863.09 (2)	324.11	879.33
5	318.01 (4)	863.09 (1)	324.12	879.35
6	318.02	879.03 (2) (c)	324.13 (1)	879.37
7	318.03	863.39	324.13 (2)	879.23
8	318.04	None	324.14	879.39
9	318.06 (1)	863.25	324.15	879.43
10	318.06 (2)	863.25	324.16	879.27
11		863.27	324.17	879.45
12	318.06 (3)	863.31	324.18 (1) (a)	879.03
13	318.06 (4)	863.27		879.05
14		863.29	324.18 (1) (b)	879.03 (2) (c)
15	318.06 (5)	863.47	324.18 (2)	879.09
16	318.06 (7)	863.23	324.18 (3)	879.11
17	318.06 (8)	863.37	324.18 (4)	879.05 (3)
18	318.06 (9)	863.17	324.18 (5) (a)	879.07 (2)
19	318.06 (10)	863.07	324.18 (5) (b)	879.07 (2)
20	318.065	863.29 (2)	324.18 (5) (c)	879.07 (3)
21	318.07	863.43	324.18 (5) (d)	879.07 (1)
22	318.075	863.45	324.19	879.03 (1)
23	318.08	None	324.20 (1)	879.05 (4)
24	318.10	None	324.20 (2)	None
25	318.12	None	324.21	879.55
26	318.15	863.19	324.22	879.55
27	318.24	852.11	324.23	879.55
28	318.25	852.11	324.24	879.53
29	318.26	852.11	324.25	None
30	318.27	852.11	324.26	None
31	318.28	852.11	324.27	879.41
32	318.29	852.11	324.29 (1)	879.15
33	318.30	None	324.29 (2)	879.23
34	318.31	879.59	324.29 (3)	879.17
35	321.01	878.01		879.23
36	321.015	878.05	324.29 (4)	879.25
37	321.02	878.07	324.30	879.47
38	321.03	878.09		879.49
39	321.04	None	324.31	868.03
40	321.05	None	324.35	857.15
41	321.06	878.11	324.351	862.17
42	321.07	None	324.355	857.09
43	321.08	878.13		863.35
44	324.001	851.23	324.356	None
			324.36	879.13

1

CROSS REFERENCE TABLE

2

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.

3

4

New Prob.Code	Old Sections	New Prob.Code	Old Sections
851.01 to 851.29	New	853.25	238.10 to
851.51	237.04		238.12
851.55	237.10	853.27	238.13
851.61	237.11	853.29	238.03
852.01 (1)	237.01 (1) to	853.31	238.02 (1)
	237.02	853.33	New
	233.01	853.35	New
	233.02	856.01	311.01
	233.23	856.03	310.01
	318.01 (1)	856.05 (1)	310.02 (1), (2)
852.01 (2)	New	856.05 (2)	New
852.01 (3)	237.01 (7)	856.05 (3)	310.031
	238.136	856.05 (4)	310.03
852.01 (4)	New	856.07	311.01
852.03 (1)	237.07		311.02
	237.03	856.09	New
	237.03	856.11	310.04
	237.07		311.03
852.05	237.05	856.13	238.18
	237.06	856.15 (1)	310.06 (1)
852.09	237.02	856.15 (2)	310.06 (2)
852.11	318.24 to	856.15 (3)	310.06 (2), (4)
	318.29	856.15 (4)	310.06 (3)
852.13	237.01 (8)	856.15 (5)	310.06 (5)
853.01	238.01	856.17	310.10
	238.05	856.19	238.20
853.03	238.06	856.21	310.12
853.05	238.07		311.02
853.07	238.06	856.23	310.16
	238.08		310.17
	238.09		311.02
853.09	238.15		324.35
853.11	238.14	856.25	310.15
853.13	238.19		310.18
853.15	238.02 (2)		310.20 (1)
853.17	New		311.04
853.19	New	856.27	New
853.21	238.135	856.29	New
853.23	New	856.31	310.25

30

	New Prob.Code	Old Sections	New Prob.Code	Old Sections
1	857.01	New	859.13	313.05 (1)
2	857.03	310.14	859.15	313.05 (2)
3		312.04	859.17	313.07
4		317.04	859.19	New
5	857.05	317.105	859.21	313.22
6	857.07	317.08		313.23
7	857.09	317.09	859.23	313.25
8		312.11	859.25	313.16
9	857.10	324.355	859.27	New
10	857.11	New	859.29	313.03 (5)
11	857.13	New		313.05 (1), (4)
12		310.16	859.31	New
13		310.19	859.33	313.05 (2), (3)
14	857.15	310.20 (1)	859.35	313.03 (5)
15		310.20 (1)		313.05 (4)
16		312.11	859.37	313.06
17		324.35		313.17
18	857.17	New	859.39	313.14
19	857.19	311.12 to		313.17 to
20		311.14		313.21
21	857.21	310.20 (1)	859.40	312.16
22	857.23	310.18		312.17
23		310.19	859.41	287.43
24		311.11		287.44
25		311.13	859.43	New
26	857.25	317.04	859.45	New
27	857.27	310.27	859.47	317.10
28	857.29	316.10	859.49	New
29	858.01	312.01 (1)	859.51	313.03 (7)
30	858.03	New	860.01	312.13
31	858.05	312.03 (2)		313.09
32	858.07	312.01 (1)		313.095
33	858.09	312.03 (1)	860.05	316.235
34	858.11	312.02		316.24
35	858.13	312.01 (2)	860.07	New
36	858.15	312.01 (3)	860.09	316.52 to
37	858.17	New		316.55
38	859.01	313.08	860.11	New
39		313.10	860.13	313.093
40	859.03	313.10		316.41
41	859.05	313.03 (1)	861.03	233.01
42	859.07	313.03 (3)		233.02
43		313.04		233.23
44	859.09	313.03 (6)	861.05	233.13
45				233.14

	New Prob.Code	Old Sections	New Prob.Code	Old Sections
1	861.07 (1)	233.09 to	863.17	318.06 (9)
2		233.12	863.19	318.15
3	(2)	New	863.21	310.11
	861.09	New	863.23	318.06 (7)
4	861.11 (1)	233.14	863.25	318.06 (1), (2)
5	(2)	233.15 (1)	863.27	230.47 (3)
	(3)	233.14		318.06
6		233.15 (2)	863.29 (1)	318.06 (4)
7	(4)	233.151 (1)	863.29 (2)	318.06 (4)
	861.13	New		318.065
8	861.15	233.16	863.31 (1)	318.06 (3)
9	861.17	New	863.31 (2)	New
	861.31	313.15 (2)	863.33	313.13
10	861.33	313.15 (1)		313.14
11	861.35	313.15 (3)	863.35	313.14
	861.41	237.025		324.355
12		238.04	863.37	318.06 (8)
13	862.01	310.20 (2)	863.39	318.03
		312.11	863.41	New
14		317.05	863.43	318.07
15	862.03	310.20 (2)		(25 Wis.3d 1x)
		317.13	863.45	318.075
16		317.14		(25 Wis.2d 1x)
17	862.05	317.01 (1)	863.47	318.06 (5)
18	862.07	317.01 (2)	863.49	New
		317.02	867.01	311.05
19	862.09	317.01 (2)	867.03	230.47
		317.11		230.48
20	862.11	New	867.05	237.09, ch. 315
21	862.13	317.15	867.07	311.06
	862.15	317.05	867.09	New
22	862.17	324.351	867.11	311.07
23		324.35	867.13	311.08
	863.01	New	867.15	311.075
24	863.05	New	867.17	311.09 (1) to (6)
25	863.07	318.06 (10)	867.19	311.09 (7)
	863.09 (1)	318.01 (4)	867.21	311.10
26	863.09 (2)	318.01 (3)	868.01	310.07
27	863.11	313.26	868.03	324.31
		313.27	868.05	310.075
28		313.28	878.01	321.01
29	863.13	New	878.03	New
	863.15	New	878.05	321.015
30	863.16	New	878.07	321.02

	New Prob.Code	Old Sections	New Prob.Code	Old Sections
1	878.09	321.03	879.25	324.29 (4)
2	878.11	321.06	879.26	New
3	878.13	321.08	879.27	324.01
	879.01	310.045 (1)		324.16
4	879.03 (1)	324.18 (1) (a)		324.04
5		324.19	879.31	324.05
	879.03 (2) (a)	324.18 (1) (a)	879.33	324.11
6	879.03 (2) (b)	New	879.35	324.12
7	879.03 (2) (c)	318.02	879.37	324.13 (1)
		324.18 (1) (b)	879.39	324.14
8	879.03 (3)	310.05 (2)	879.41	324.27
9	879.03 (4)	324.18 (1) (a)	879.43	313.06
	879.05 (1)	324.18 (1) (a)		324.15
10	879.05 (2)	324.18 (1) (a)	879.45	324.17
11	879.05 (3)	324.18 (1) (a), (4)	879.47	324.30
	879.05 (4)	324.18 (1) (a)	879.49	324.30
12		324.20	879.51	New
13	879.07 (1)	324.18 (5) (d)	879.53	324.24
	879.07 (2)	324.18 (5) (a), (b)	879.55	324.21 to
14	879.07 (3)	324.18 (5) (c)		324.23
15	879.09	310.05 (1)	879.57	311.16 (1), (2)
		324.18 (2)	879.59	318.31
16	879.11	324.18 (3)	879.61	312.06
17	879.13	324.36		312.07
	879.15	324.29 (1)		312.08
18	879.17	324.29 (3)	879.63	New
19	879.19	New	879.65	314.06
	879.21	311.16 (3)	879.67	310.21
20	879.23	324.13 (2)	879.69	New
21		324.29 (2), (3)		
22				
23				
24				
25				
26				
27				
28				
29				
30				