Wisconsin's New Probate Code

A Handbook for Practitioners

Howard S. Erlanger

University of Wisconsin
Law School

Erlanger

Wisconsin's New Probate Code

University of
Wisconsin
Law School
1998

Wisconsin's New Probate Code

A Handbook for Practitioners

Wisconsin's New Probate Code

A Handbook for Practitioners

by

Howard S. Erlanger
Voss-Bascom Professor of Law
University of Wisconsin Law School

With the Assistance of
Julie D'Angelo

Published by
University of Wisconsin Law School

ISBN 0-910587-48-5
Library of Congress Card No. 98-075342
University of Wisconsin Law School
Continuing Education and Outreach
975 Bascom Mall, Room 2348
Madison, WI 53706
(608) 262-3833

To order additional copies of this publication or other law school publications, please contact Roger Bruesewitz, University of Wisconsin Law School, 975 Bascom Mall, Room 2348, Madison, WI 53706-1399; or call 1-800-355-5573 or (608) 262-3833.

CONTENTS

PREFACE

When the new probate code takes effect on January 1, 1999, it will have been thirty years since the substantive law of probate received a thorough review and revision in Wisconsin. The new code is the culmination of almost seven years of study and drafting by numerous dedicated and talented practitioners and others from all over the state.

The project began in 1992 when Jackson Bruce, a prominent Milwaukee estate planning and probate attorney, contacted Professor Howard Erlanger to suggest that he spearhead an effort to adopt the 1990 Uniform Probate Code (UPC) in Wisconsin. Jack served as a member of the UPC Joint Editorial Board which had just completed the revised UPC on behalf of the National Commissioners on Uniform Laws.

Jack also contacted the Real Property, Probate, and Trust Law Section of the State Bar to elicit its support and to obtain legislation drafting authority for this project. The section appointed me to chair what came to be known as the UPC Article II Committee, or the "Drafting Committee" for the new legislation. Other members of the committee included: R. Christian Davis, vice president of the Trust Division for Firstar Bank Madison; Kathleen A. Gray, partner with Quarles & Brady in Milwaukee; Brent E. Gregory, partner with Wrenn, Wille, Gregory & Lundeen in Milwaukee; Robert L. Kamholz, Jr., partner with Godfrey & Kahn in Milwaukee; and Diane K. O'Connor, partner with O'Connor & Sachs in Mequon.

Professor Erlanger served as reporter and academic liaison to the committee, and Ann J. Flynn provided research assistance. Before drafting the legislation, the committee's proposed revisions were approved by the Wisconsin Practitioner's Review Committee, a group of over twenty prominent probate practitioners from all over Wisconsin. In addition, the final draft of the legislation was approved by the Board of Directors of the Real Property, Probate, and Trust Law Section of the State Bar. With the

hard work and support of the legislation's main authors, State Senator Joanne Huelsman and State Representative Mark Green, as well as the support of many other state legislators, Assembly Bill 645 moved quickly through the legislative process. Governor Thompson signed the bill on May 11, 1998, as 1997 Wisconsin Act 188.

At this point, I must point out that the person most responsible for the successful completion of the project is Professor Erlanger. He worked countless hours consulting with and researching for our committee and, in addition to writing this book, he worked tirelessly in drafting the legislation needed to enact the substantive changes adopted by the committee. He also prepared the committee's commentary to the new code, which is included in an appendix to this volume.

Obviously, a lot has happened in the thirty years since Wisconsin's prior probate code was enacted. Our committee, with Professor Erlanger and Ann Flynn's assistance, undertook an extensive effort of comparing the 1990 UPC to the law in Wisconsin and crafting new substantive provisions that utilize the best aspects of each. To illustrate the need to update our prior probate code, let me focus on one of the more important aspects of this project: "unification" of the law relating to the distribution and interpretation of probate and nonprobate transfers.

By one account, when Wisconsin's old code was enacted in 1969, approximately 80% of wealth that changed hands at death passed via the probate process, with the remaining 20% passing under various forms of nonprobate transfers. Today, with increased use of revocable trusts and nonprobate transfers and with larger amounts of wealth being accumulated in retirement accounts, annuities, and insurance products, those percentages have reversed; it is now estimated that over 80% of wealth that changes hands at death passes outside the probate process, with this percentage projected to increase even more in the future.[1]

[1.] These statistics are taken from a presentation by Professor David English to the American College of Trust and Estate Counsel in Fall 1997.

With this reality, our committee had to ask the following questions: Although Wisconsin's prior code had detailed statutory provisions to deal with such matters as antilapse, ademption, abatement, and advancement in the context of probate transfers, why were there no parallel provisions to deal with those same issues vis a vis nonprobate transfers? Without such parallel provisions, the bulk of wealth, almost four to one, went uncovered when these problems arose, a paradox time will only exacerbate.

Likewise, why did the prior code automatically revoke probate transfers—but not nonprobate transfers—to a former spouse? Why did the old law have defined terms, disclaimer rules, survivorship rules, and slayer rules that differed as between probate and nonprobate property? The new code removes these dichotomies so that such rules apply to all forms of wealth transfer at death, both probate and nonprobate. Similarly, why did Wisconsin's old code require strict compliance with witnessing formalities to create or change a will, while an effective revocable trust—quickly becoming the centerpiece of estate planning—could be scratched out on a napkin with no adherence to formalities? As explained in more detail by Professor Erlanger, the new code does not erase this particular dichotomy completely, but it does bring the law regarding adherence to formalities in the context of probate transfers and nonprobate transfers closer together.

Although the new code is modeled after the 1990 UPC, there are several important differences, all of which are discussed in detail in Professor Erlanger's handbook. In my opinion, many of the departures from the 1990 UPC relate to differences between a practitioner's view of the world as contrasted to an academic's point of view. Our goal was to utilize the extensive knowledge, expertise, and effort of the country's foremost experts on the law of probate (such as David English, John Langbein, Richard Wellman, Lawrence Waggoner, and many others of national reputation) by granting a presumption in favor of the 1990 UPC, yet not lose sight of the fact that the substantive law must be "user friendly" for practitioners and the public. For example, the 1990 UPC would admit into probate any written document shown to reflect the decedent's testamentary intent. Although such a provision can be strongly supported from the standpoint of achieving the decedent's intent, our

committee felt it could result in excessive litigation; as a result, we did not adopt that particular UPC rule.

Professor Erlanger's handbook provides a very readable, yet comprehensive explanation of Wisconsin's new probate code. It explains in an easy to understand manner all aspects of the new law, how it differs from prior law, and why the changes were needed or desired. If your practice involves estate planning and probate, I am certain that you will find it to be an essential and invaluable reference book that you will want to keep within arm's reach.

Finally, I would like to ask that readers keep one thing in mind as they study the new code: No one will agree with every change enacted; indeed, no member of our committee agrees with every change. However, if you keep an open mind, I have no doubt that you will agree that, overall, the new code represents a substantial improvement in Wisconsin's substantive law of probate.

October 1998

David W. Reinecke, Chair
State Bar of Wisconsin
Section on Real Probate, Probate, and Trusts
UPC Article II Committee

FOREWORD

We are especially pleased to assist in publishing this book by a member of our faculty. Professors at the University of Wisconsin allocate their effort and evaluate their work in three areas: classroom teaching, scholarship, and service. Sometimes, these objectives are pursued separately, with activities directed, for example, solely at scholarly publication or solely at public service. But the impact and value of one's work increases greatly when efforts are directed at more than one objective at once. This is what Howard Erlanger has done with this book: by combining substantive knowledge and analysis with practical guidance and advice, he provides evidence of excellence in both scholarship and service. The result, we believe, is a resource that will help lawyers provide more competent representation to their clients.

We commend this book to you as the latest manifestation of the long-standing commitment of members of the faculty of the University of Wisconsin Law School to serve the citizens of this state by working to improve our legal system.

October 1998

David E. Schultz
Associate Dean
Continuing Education and Outreach
University of Wisconsin Law School

AUTHORS

HOWARD S. ERLANGER, who received his Ph.D. from the University of California at Berkeley and his J.D. from the University of Wisconsin Law School, is Voss-Bascom Professor of Law at the UW Law School in Madison. He teaches in the areas of wills, trusts, probate, marital property, and estate planning and is an Academic Fellow of the American College of Trust and Estate Counsel. Professor Erlanger is the recipient of several awards for his work, including the Charles Dunn Award from the Wisconsin State Bar for a series of articles (co-authored with June M. Weisberger) on marital property and estate planning, and the Steiger Award from the University of Wisconsin for excellence in teaching. Professor Erlanger was reporter for the State Bar committee that drafted the 1999 Wisconsin Probate Code.

JULIE D'ANGELO, a 1998 graduate of the University of Wisconsin Law School, is an associate with Balisle and Roberson, S.C., in Madison. Ms. D'Angelo's practice emphasizes estate planning and family law.

ACKNOWLEDGMENTS

We would like to offer our heartfelt thanks to the members of the State Bar Drafting Committee—especially Kathleen A. Gray, Robert L. Kamholz, Jr., and David W. Reinecke; Attorney Linda Roberson; and Professor June Miller Weisberger. Each of them read and commented on more drafts than they would care to remember and made many helpful suggestions that greatly improved the final version of these materials. In addition, the assistance of Attorneys Ann J. Flynn and Sarah E. Coyne was very helpful in the preparation of early drafts of the manuscript.

The authors also wish to recognize the efforts of three other staff members of the University of Wisconsin Law School, Continuing Education and Outreach. Roger Bruesewitz did a fantastic job of copyediting and layout, and Joanne D. Fitz and Patricia R. Smith were instrumental in transforming the rough drafts into phototypeset copy.

This book is dedicated to Pam Erlanger and Michael Falk, two spouses who haven't read it, but nonetheless contributed immeasurably to it.

INTRODUCTION 1

The 1999 Wisconsin Probate Code comprehensively revises the substantive law of probate, as contained in chapters 851, 852, 853, and 861 of the Wisconsin statutes.[1] These chapters cover definitions and general provisions (chapter 851), intestacy (chapter 852), wills (chapter 853), and family rights (chapter 861). As part of the revision, a new chapter 854—containing general rules applicable to all transfers at death—was created.

1.01 A Brief History of the New Code

The last comprehensive revision of the substantive provisions of the probate code occurred in the late 1960s,[2] during the period when the

---

*. [Editor's Note: Portions of this chapter are drawn from Erlanger, *Proposed Changes to the Wisconsin Probate Code*, 86:9 WIS. LAWYER 25-26 (1995).]

1. There are a few changes to other parts of the statutes. *See* chapter 6, *infra*.

The *procedural* law of probate, which is not affected by the revision, is contained in chs. 856-860, 862-868, and 878-879. Chapters 880-882, which deal with guardianship, trust funds, and adult adoption, are also considered part of the probate code and are unchanged. WIS. STAT. § 851.002.

2. *See* 1969 WIS. ACT 339. The provisions of that act were generally effective on April 1, 1971. *See* prior WIS. STAT. § 851.001 (1995-96).

original Uniform Probate Code (UPC) was being written and promulgated. Professor Richard Effland, one of the principal drafters of the 1969 Wisconsin Probate Code, was also one of the UPC drafters, and Wisconsin adopted many provisions that were similar or identical to those in the 1969 UPC. Wisconsin is not, however, considered to be a "UPC state." In the late 1980s, the Joint Editorial Board (JEB) of the UPC undertook a major revision of the UPC, and the National Conference of Commissioners of Uniform State Laws (NCCUSL) promulgated a new UPC in 1990[3]—creating the "1990 UPC."[4] Because of the close ties between Wisconsin probate law and of the UPC,[5] in 1992 the Real Property, Probate, and Trust Law Section of the Wisconsin State Bar created a committee to study the UPC revisions, consult with practitioners, and recommend changes for Wisconsin. The work of the committee, officially called the State Bar of Wisconsin Section on Real Property, Probate, and Trusts UPC Article II

---

3. The National Conference of Commissioners on Uniform State Laws (originally the Uniform Law Conference) was created in 1882. Wisconsin was an early participant, joining in 1893, and all states have participated since 1911. While it is best known for the Uniform Commercial Code, the conference has been concerned with probate legislation from its earliest days. In 1970, after promulgation of the first UPC, a Joint Editorial Board for the UPC was established to monitor the states' experiences with the code and to develop proposals for its revision. For discussions of the history of the NCCUSL and of the UPC, *see* ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1991); Bugge, *Commercial Law, Federalism, and the Future*, 17 DELAWARE J. CORPORATE LAW 11 (1992); BRUCE, JR., *Multistate Uniformity in Trust and Estate Substantive Law and Some New Wrinkles and Concepts: Revised Articles II and VI of the Uniform Probate Code*, TWENTY SIXTH ANNUAL PHILIP E. HECKERLING INSTITUTE ON ESTATE PLANNING, ch. 6 (1992); Langbein and Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871 (1992); Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891 (1992).

4. Fifteen states adopted enough of the 1969 UPC to be considered "1969 UPC states." As of the NCCUSL annual meeting in August 1997, eight of these states (Alaska, Arizona, Colorado, Hawaii, Minnesota, Montana, New Mexico, North Dakota) and one new state (South Dakota) had adopted enough of the 1990 UPC to be considered "1990 UPC states," while the remainder (Florida, Idaho, Maine, Michigan, Nebraska, South Carolina, Utah) had not. Uniform Probate Code, 8 U.L.A. 1 (1998).

5. In addition to the close connection in terms of legislative history, during the period in which the 1990 UPC was debated and adopted, two Wisconsin lawyers participated actively in the process: Lawrence Bugge of Madison was president of NCCUSL, and Jackson Bruce of Milwaukee was chair of the JEB.

Committee, is discussed in David Reinecke's preface to this handbook. The committee is referred to in this volume as the "Drafting Committee."

The Drafting Committee compared existing Wisconsin provisions to each UPC provision, proceeding from a presumption that the UPC should be considered to be the better rule of law. In the end, although the committee recommended adoption of many of the UPC provisions, it determined that, in some cases, the Wisconsin provision should be retained and, in others, the new rule should be a modified version of the UPC provision. After more than five years of work, the committee completed a proposal that was introduced in the legislature in January 1998,[6] passed in April, and signed into law in May 1998. Its effective date is January 1, 1999.[7]

Although the new code is heavily influenced by the 1990 UPC, there are numerous and substantial differences; hence Wisconsin cannot be said to have adopted the 1990 UPC. The major themes orienting the Drafting Committee's work were, however, in concert with those of the UPC:

- The code should focus on implementing the transferor's intent;
- Probate rules should, whenever possible, provide uniformity from state to state and take into account current public expectations;
- The rules relating to the distribution and interpretation of probate and nonprobate transfers should be similar;
- The code should consider the complexity of modern families; and
- The Wisconsin deferred marital property election should be simplified and revised to better accomplish its intended objectives.

This chapter summarizes the major changes embraced in the new code, identifies potential problems with respect to retroactivity and federal preemption, and concludes with a word on how the new code might affect those engaged in the everyday practice of trusts and estates in Wisconsin.

---

6. WIS. A.B. 645 (1997 sess.).

7. 1997 WIS. ACT 188 § 233. Copies of the complete act and the extensive legislative notes prepared on behalf of the Drafting Committee are included in the appendices of this handbook.

1.02 Focus on the Transferor's Intent

The Wisconsin Probate Code, like those of other states, is based on two important policies: protection against fraud and coercion and implementation of the transferor's intent. In large part, these policies can be pursued together; for example, the formalities of will execution serve to protect against undue influence, and by so doing help guarantee that a will truly represents the testator's desires. Yet, they also conflict—if the law overemphasizes protection through formalities, then some wills that genuinely reflect the testator's intent will not be admitted to probate merely because they do not meet certain technical formalities.

Even though strong arguments support the protective function of will formalities, to a great extent the public has been willing to forego the benefits of this function in favor of methods that facilitate the transfer of property at death. Increasingly, property passes to survivors through nonprobate means: living trusts, life insurance, annuity and deferred employment benefit plans, beneficiary designations, joint tenancy, survivorship marital property, joint and payable-on-death bank accounts, and the like. While all of these nonprobate methods involve some formal requirements, the formalities are significantly less burdensome than those for wills. In addition, disputes regarding nonprobate transfers almost always focus on the substance of the transaction and the transferor's intent, rather than on whether the formalities of transfer have been met.

The 1990 UPC dramatically reduces the formalities of will making, allowing, for example, *any* document to be admitted as the decedent's will—irrespective of compliance with any formalities—as long as there is clear and convincing evidence that the document was intended to be that person's will.[8] The Drafting Committee concluded that the effect of so substantial a relaxation in will formalities was too uncertain and opted instead to wait and see how those changes work out in other jurisdictions that have recently adopted them. The Drafting Committee did, however, reduce somewhat the formality surrounding will execution:

---

8. UPC § 2-503. This provision is sometimes known as a "dispensing power" or a rule of "harmless error."

- While under prior law two witnesses had to sign the will in the presence of the testator and in the presence of each other, the new code allows the witnesses to sign separately,[9] within a reasonable time after witnessing either the testator's signing or his or her acknowledgment of the signature.[10] Note that the purpose of the new provision is not to encourage sloppiness in the execution of wills; rather, it is assumed that careful practitioners will use the same formalities as before. However, the new rules will serve to make it somewhat easier to admit a will when the person executing the will was not aware of the formalities or was unable to comply with the strict witnessing requirement of the prior law.
- Under prior law, a witness (or spouse of a witness) who also was a beneficiary under the will was absolutely barred from receiving an amount greater than that which would be received under intestacy—even if the witness' participation was innocent and there were no evidence of wrongdoing. Under the new code, this limit on the rights of "interested witnesses" is *presumed* to apply, but it is subject to rebuttal with evidence that the testator intended the witness to receive the full transfer.[11]

The new code also facilitates admission of wills by adopting an *optional* procedure to preclude a challenge based on failure to comply with execution formalities. At the time of—or subsequent to—the execution of the will, the testator and witnesses may execute an affidavit attesting that there was compliance with the formalities. This "self-proving" procedure, which is already recognized in a majority of states, is determinative on questions of compliance with the formalities.[12]

---

9. The new code retains the prohibition on holographic wills.

10. WIS. STAT. § 853.03(2). A technical amendment may be necessary to fully implement the Drafting Committee's intent with respect to this statute.

11. WIS. STAT. § 853.07(2).

12. WIS. STAT. § 853.04. As noted, the procedure is *optional.* If there is no concern about a contest, a traditional attestation clause will do. However, the procedure may facilitate admission of the will in another jurisdiction.

The Drafting Committee also decided that there was at least one type of transfer—that of individual items of tangible personal property—for which the formalities should be greatly reduced. Under the new code, a testator can indicate in the will that he or she might leave a separate written statement directing that various items of tangible personal property—for example, jewelry or heirlooms—be distributed to specified beneficiaries. This statement must be signed and dated, but it need not be witnessed, and it may be created or revised after the execution of the will.[13] This procedure "legalizes" what has been a common informal practice. However, drafters should remember that one advantage of the informal practice was that it was most likely to be used in situations where there was a relatively small chance of conflict regarding the items transferred. Legalization of the procedure does not substantially change the risks associated with it.

Finally, the new code decreases the formality surrounding some aspects of will construction. Under the traditional law of wills, a will can be interpreted only using information contained "within the four corners of the document." The new code abrogates this rule as it applies to many issues of will construction and generally allows admission of extrinsic evidence to prove intent in those instances. The code does *not*, however, adopt a general rule allowing reformation of errors in wills.[14]

1.03 Provide Uniformity and Consider Public Expectations

Over the past several decades, there have been successful innovations in the probate codes of other jurisdictions, and many worthwhile suggestions from commentators in scholarly journals. The UPC attempts to embody the best of these, and the Drafting Committee, in turn, adopted most of them. In considering whether to adopt a change, the committee

---

13. WIS. STAT. § 853.32(2). This provision was enacted separately in May 1996 but was substantially revised in the new code. The provision applies to wills executed on or after May 3, 1996.

14. For an argument that such a rule *should* be adopted, *see* Langbein and Waggoner, *Reformation of Wills on the Ground of Mistake: Change in Direction in American Law?* 130 U. PA. L. REV. 521 (1982), and RESTATEMENT (THIRD) OF PROPERTY (Tent. Draft No. 1, 1995).

was sensitive to the principle that, whenever possible, it is desirable that probate law be uniform across states. Uniformity will become more important as people become even more mobile; already it is common for a person to have lived in several states or to own real estate in more than one state, and citizens generally expect that these behaviors will not affect their estate plan. This section discusses changes that affect only wills or intestacy. The following section addresses changes that speak more to the unification of the law of probate and nonprobate transfers.

With respect to intestacy, there are three noteworthy changes made primarily for the purpose of updating and achieving uniformity:

- If there are no takers among the parents or the descendants of the parents, then more remote relatives (*i.e.*, the descendants of the grandparents—aunts, uncles, cousins) are split into maternal and paternal groups, with the takers in each determined separately.[15] This contrasts with the next-of-kin approach taken in the prior code.
- In a second departure from the next-of-kin approach, the rights of relatives to take under intestacy are now limited to the descendants of the grandparents; if there are none, then the intestate estate escheats to the state.[16]
- Finally, in unusual situations, a testator may wish to provide that certain persons should be disinherited if part or all of the estate should pass by intestacy. The new code codifies this rule.[17]

The new code also makes a change that is "out of synch" with the UPC, by reverting to a rule of [strict] per stirpes for determining the rights of issue under intestacy.[18] The Drafting Committee concluded that this approach

---

15. WIS. STAT. § 852.01(1)(f).

16. WIS. STAT. § 852.01(1)(f) and (3). One consequence of this change is to reduce procedural problems when a decedent has a valid will but is survived by very distant relatives who under the prior law would have been entitled to notice.

17. WIS. STAT. § 852.10.

18. WIS. STAT. § 852.01(1)(b), (d), (f). The prior code used the rule of "modified per stirpes"; the UPC uses the rule of "per capita at each generation." These terms are defined at WIS. STAT. § 854.04 and are discussed in section 4.02B, *infra*.

was more in concert with both the public's and the bar's expectation regarding descent and distribution than was either the prior law or the approach of the UPC.

With respect to wills, changes primarily directed towards updating, uniformity, and meeting public expectations about wills include:[19]

- Clarification of the rights of the surviving spouse in situations where the decedent's will predates the marriage. Under the prior code, a subsequent marriage either had no effect on the will—if, for example, there was *any* provision for issue—or revoked the will in its entirety if the testator predeceased the new spouse. Following the UPC, unless there is sufficient evidence that the omission from the will was intentional, the surviving spouse receives an intestate share in that portion of the estate not willed to issue.[20]
- Modification of the rights of children who were mistakenly omitted from the will.[21] The new rules are partly based on the UPC but retain several features of prior law, including an expanded discretionary power in the court to determine the most likely intent of the testator and to modify the will accordingly.[22]
- Clarification of rules addressing the situation where a subsequent will or codicil does not expressly revoke the previous instrument, by creating rebuttable presumptions about the status of the previous will.[23]
- Clarification of the circumstances under which a previously revoked will may be "revived," by creating rebuttable presumptions about the

---

19. Two other provisions that were motivated in part by a concern with updating and uniformity are (a) the affidavit for self-proving a will and (b) the separate statement for passing tangible personal property. These provisions are discussed in the previous section.

20. WIS. STAT. § 853.11(2). Note that this right is for a "pretermitted"—*i.e.*: accidently omitted—spouse. This situation is different from one where a spouse has been intentionally omitted; in that case, the surviving spouse may qualify for the deferred marital property elective share.

21. WIS. STAT. § 853.25.

22. WIS. STAT. § 853.25(5).

23. WIS. STAT. § 853.11(1).

testator's intent.[24] The thrust of these provisions is to allow a prior will to be revived if that was the testator's intent.

- Codification of the doctrine of "incorporation by reference," which applies when a will seeks to include a separate document that does not itself meet the will execution requirements.[25]

1.04 Integrate Probate and Nonprobate Rules

One way in which the 1990 UPC moved dramatically to integrate the rules relating to probate and nonprobate transfers is its relaxation of the formalities of will execution. Nonetheless, as noted earlier, the Drafting Committee decided to keep many of the Wisconsin will formalities in spite of the fact that most nonprobate transfers may be implemented much more informally.[26] However in other areas, the committee thought it best to try to merge the law of probate transfers and nonprobate transfers.[27] To a great extent, this meant applying well-established probate "rules of construction" to the nonprobate arena and, in some cases, resolving differences that existed in prior law between the law of intestacy and the law of wills. The new code has an entirely new chapter, chapter 854, that collects the new general rules applying to all transfers at death.[28] These include:

---

24. WIS. STAT. § 853.11(6).

25. WIS. STAT. § 853.32(1).

26. A simple example drives home the contrast. If a person's property is in a revocable trust, he or she can make changes in the at-death dispositions by just writing out an amendment on a scrap of paper, with no formalities (other than any required by the trust instrument). However, if his or her property is owned outright, then will formalities are required to change at-death dispositions.

27. As trusts and other nonprobate transfers become increasingly common, the fact that there is nothing parallel to the "subsidiary law of wills"—a highly developed body of common law and statutory rules for dealing with common problems of construction and interpretation—has come to be recognized as a serious problem.

28. One issue that arises when probate rules are extended to nonprobate transfers is the liability of third party payers—such as insurance companies—who may distribute property to the "wrong" beneficiary and the liability of beneficiaries who receive property for which they are not eligible. In general, third parties acting in good faith are protected (WIS. STAT. §§ 854.23 and 854.24), and ineligible recipients are liable to the person entitled to the property under the statute (WIS. STAT. § 854.25).

- Creation of a 120-hour (five day) survivorship requirement for all transfers that require the recipient to survive in order to take.[29] Prior law provided a 72-hour survivorship requirement for intestacy, but for all other transfers that required a person to survive, survival by an instant was enough.[30] In addition, beneficiaries under a revocable trust are now explicitly required to survive in order to take;[31] under prior law, that was not necessarily the case.
- Creation of definitions for three different systems of representation—[strict] per stirpes, modified per stirpes, and per capita at each generation—that apply when there is a provision for a person's issue, and some of the person's issue have predeceased.[32]
- Extension of the antilapse rules—which apply when a named beneficiary has predeceased and there is no contingent beneficiary named—to apply to both probate and nonprobate transfers.[33]
- Integration of the rules on the status of adopted persons;[34] under the prior law, there were some differences between rules regarding transfers under intestacy and other transfers.
- Consolidation of the rules regarding the recipients of class gifts and, where necessary, extension to nonprobate transfers.[35]
- Creation of a single disclaimer statute, replacing the two that existed under prior law, and reconciling variations between them.[36]

---

29. WIS. STAT. § 854.03. This codifies a common drafting practice, although drafters usually use a longer period.

30. These transfers were governed by the UNIFORM SIMULTANEOUS DEATH ACT, which has been repealed as unnecessary.

31. WIS. STAT. § 701.115.

32. WIS. STAT. § 854.04.

33. WIS. STAT. § 854.06.

34. WIS. STAT. §§ 854.20 and 854.21(1).

35. WIS. STAT. §§ 854.21 and 854.22

36. WIS. STAT. § 854.13. Note that under a statute enacted in 1996, joint tenancies may now be disclaimed under state law.

- Creation of a single "slayer statute," reconciling a half dozen scattered statutes.[37]
- Modification of the rules regarding the effect of divorce on the decedent's estate plan and extension of these rules to nonprobate instruments.[38]
- Extension of a variety of other probate rules to cover all nonprobate transfers—which primarily will affect transfers under trusts. These include rules relating to: ademption—regarding what happens if a specific item is left to someone, but the item is not owned at death;[39] advancement—regarding the effect of lifetime gifts on transfers at death;[40] abatement—regarding the reduction of transfers when assets are insufficient to satisfy them;[41] nonexoneration of liens on specific transfers;[42] and no-contest clauses.[43]

All these rules essentially serve as *presumptions*; they yield to evidence—including extrinsic evidence—of contrary intent. In some instances, the statutes require that this evidence relate to interpretation of words in the document, but in other cases the evidence may be completely extrinsic.

1.05 Consider the Complexity of Modern Families

As the traditional family has become less common, more attention needs to be paid to the effects of divorce, remarriage, and the birth of nonmarital children on estate plans. One troublesome occurrence is the tendency for people to fail to revise their estate plans after divorce. This oversight usually means that both probate and nonprobate assets are

---

37. WIS. STAT. § 854.14.

38. These changes will be discussed in the following section.

39. WIS. STAT. § 854.08.

40. WIS. STAT. § 854.09.

41. WIS. STAT. § 854.18.

42. WIS. STAT. § 854.05.

43. WIS. STAT. § 854.19.

designated to be paid to the former spouse, and sometimes to relatives of the former spouse as well.

Wisconsin, like other states, has long had a probate rule providing that a divorced spouse will be treated as having predeceased the testator. However, the Wisconsin Supreme Court, like most other courts that have addressed the matter, has declined to extend this rule to nonprobate assets. The new code makes that extension[44] and also revokes transfers to relatives of the former spouse who are not also relatives of the decedent. Thus, for example, it revokes a transfer to a former stepchild but not a transfer to children born or adopted in the dissolved marriage. Of course, a person who wants a different result may simply provide for it in an estate plan made after the divorce; in addition, extrinsic evidence may be presented to rebut the presumption in the statute.

With respect to remarriage, the new code recognizes that in some cases stepparents become very close to their spouses' children. Thus, it presumes that, subject to contrary evidence, if a person leaves property to a stepchild in the current marriage, and that stepchild predeceases, the property will pass to the stepchild's descendants, if any.[45] This is the same antilapse rule that applies to the decedent's own children.

With respect to nonmarital children, the new code cross-references a recent statute that allows postmortem paternity proceedings[46] and recognizes paternity determined by courts in other jurisdictions.[47]

Finally, the "homestead protection" for the surviving spouse, which previously applied only in intestacy, has been expanded to allow the surviving spouse a "buy out" right in a home, if the home is part of the

---

44. WIS. STAT. § 854.15.

45. WIS. STAT. § 854.06(2).

46. WIS. STAT. § 852.05(4).

47. WIS. STAT. § 852.05(1) and (2).

intestate estate or if there is a marital property component and the home is not specifically transferred to a third party.[48]

1.06 Simplify Deferred Marital Property Rights

Under Wisconsin's Marital Property Act, each spouse has a one-half interest in all property that is acquired during the marriage from income derived from work or investments. All property is presumed to be marital property, although that presumption may be rebutted. But what of deferred marital property—income earned (and the assets acquired therefrom) while the spouses were married but before the act applied, either because they lived in a different state, or lived in Wisconsin before the act became effective in 1986? During the marriage, deferred marital property does not have to be shared. At death, the surviving spouse has elective rights to deferred marital property held by the decedent, in a nonreciprocal election; the decedent's estate has no similar rights to the deferred marital property held by the surviving spouse.

The prior code included separate elections for probate and nonprobate deferred marital property, with separate and complex calculations for each. Drawing on the 1990 UPC elective share provisions, the new code includes a single deferred marital property election that is simpler to use and that more closely tracks the partnership theory of marriage on which the Marital Property Act is based.

Under the new statute, the calculation of the election will in most cases be straightforward; the surviving spouse will be entitled to half the total value of *all* deferred marital property in the marriage—including deferred marital property that he or she already owns. To the extent that the surviving spouse already owns deferred marital property, or receives property *of any type* from the decedent, the elective right will be reduced. For example, if the decedent spouse owned $50,000 of deferred marital property, and the surviving spouse owned $100,000 of deferred marital property, the elective right would be one-half of the total of $150,000, or $75,000. However, the election would be deemed satisfied by the $100,000 of deferred marital property already owned by the surviving

48. WIS. STAT. § 861.21.

spouse. As under prior law, the estate of the decedent spouse has no elective rights to deferred marital property held by the surviving spouse.

1.07 Effect of the Code on Preexisting Instruments

The new code is effective on January 1, 1999. It applies to:

- Revocable governing instruments—wills, living trusts, beneficiary designations, and the like—existing on the effective date of the statute, and
- *All* instruments—including, for example, irrevocable trusts—executed on or after that date.[49]

To the extent that the new code applies to instruments executed before its effective date, an argument can be made that it is inappropriately retroactive. With respect to nonprobate transfers, this argument has been made successfully in at least one federal appellate case under the Contracts Clause of the U.S. Constitution, *Whirlpool Corp. v. Ritter*,[50] and at least one state supreme court case under the Contracts Clause of the Ohio Constitution.[51] Each of these cases involved a life insurance policy where a spouse was designated as beneficiary and that designation was executed before the law was changed to revoke such designations at divorce. Both courts found the retroactive application of the statute to be unconstitutional.

The Joint Editorial Board for the Uniform Probate Code has issued a statement rebutting the *Ritter* court on the grounds that:

- Such statutes affect the donative transfer component, rather than the contractual component, of life insurance;
- The default rules contained in these statutes are rules of construction that seek to implement, rather than defeat, the insured's expectations regarding the distribution of the policy proceeds; and

---

49. 1997 WIS. ACT 188 § 233.

50. 929 F.2d 1318 (8th Cir. 1991).

51. Aetna Life Insurance Co. v. Schilling, 67 Ohio St.3d 164, 616 N.E.2d 893 (1993).

- There is no United States Supreme Court authority for applying the Contracts Clause to legislative default rules.[52]

The Drafting Committee concluded that the UPC position is valid and should prevail in the courts.[53]

1.08 Possible Federal Preemption

The Employee Retirement Income Security Act of 1974 (ERISA)[54] is a comprehensive act that essentially federalizes the law relating to pensions and employee benefits provided by most private employers. ERISA's preemption language is unusually broad; rather than being limited to state laws that conflict with specific ERISA provisions, the act preempts any state laws that "relate to" employee benefit plans governed by ERISA.[55] Recent case law suggests a significant risk that this broad language will be interpreted as preempting state probate law—such as chapters 854 and 861—insofar as it affects the beneficiaries of pensions and benefits, even though ERISA supplies no substantive regulation in this area. This issue is discussed in more detail in section 4.02Q.

1.09 Conclusion: The New Code and Routine Estate Planning

The new code contains several provisions that will be important to estate planners, no matter what size estates they handle. Primary among these are the new definitions of the systems of representation,[56] the

---

52. 17 AMERICAN COLLEGE OF TRUST AND ESTATES COUNSEL NOTES 184 (1991); *see also* the general comment at the introduction to Part 7 of the UPC and Waggoner, *Spousal Rights in Our Multiple Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROPERTY, PROBATE, AND TRUST JOURNAL 683, at 699-701 (1992) .

53. *See* Drafting Committee Notes to § 233 of the act.

54. 29 U.S.C. §§ 1001 *et seq*.

55. Section 514(a) of ERISA provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" that ERISA governs. *See* 29 U.S.C. § 1144(a).

56. For example, under prior law, there was no definition of the term "by representation" except for intestacy and for the basic wills—and those definitions were contradictory. *See* discussion in section 4.02B, *infra*.

"separate statement" for transferring tangible personal property, the optional affidavit for making the will self-proved, the disclaimer of joint tenancy,[57] the 120-hour survivorship rule, and the new deferred marital property election. In addition, there is now a single set of rules of construction which apply to probate and nonprobate transfers.

Nonetheless, the primary purpose of the substantive part of the probate code is to be a stopgap; the code sets out *default* provisions to answer questions that result primarily from unexpected events, inadequate drafting, or inadequate execution of documents, and extends those provisions to "will substitutes" which have become an increasingly popular means of transferring property. In this sense, the new code provisions are *not* meant to alter standard practice. Rather, they address in a more comprehensive manner what happens when an individual fails to take action or when the attempt to act suffers from some defect. All estate planners agree that the intestacy rules have this character; we often tell clients that "you always have the estate plan the legislature wrote for you." But virtually all the rules in chapters 853 and 854 are also part of the legislature's estate plan: they tell what happens if someone gets divorced and does not change his or her estate plan; if a beneficiary predeceases and there is no contingent beneficiary; if the drafter fails to specify the status of adopted or nonmarital issue; if no period of required survivorship is specified; and so on. The new code has specific answers to these questions, far more—and hopefully better—answers than before. But in spite of the tremendous effort put into the creation of these statutes, everyone on the Drafting Committee hopes that they will seldom need to be used.

1.10 Organization of This Handbook

The remainder of this handbook reviews the major sections of the new probate code, chapter by chapter—chapter 2 looks at intestacy (chapter 852 of the statutes); chapter 3 looks at wills (chapter 853); chapter 4 reviews new chapter 854, which covers rules governing all transfers at death; chapter 5 considers changes regarding family rights (chapter 861), including a full discussion of the new deferred marital property elections; and

---

57. *See* note 36, *supra*.

chapter 6 reviews miscellaneous provisions in other chapters of the statutes.

Appendix A reprints Chapters 851, 852, 853, 854, and 861 of the new probate code, as well as revised chapter 701. Appendix B reprints 1997 Act 188, which created most of the provisions in the new code, and Appendix C reprints the Drafting Committee's Notes to Act 188. The Drafting Committee Notes include a note for each section of the act, including those that repeal or relocate sections of the prior code. As a result, these notes serve as a "conversion table"; one can look up any section of the prior law and quickly determine its status in the new code. The notes also serve as a quick index to the changes in the code; for each new provision, there is a capsule summary of the prior and new law.

1.11 A Note on Statutory Citation

Unless otherwise indicated, all references in this handbook to the Wisconsin statutes are to the 1997-98 statutes. These statutes include all acts enacted in the 1997-98 legislature, including those, like the new probate code, which were passed in mid-1998 and which may not be effective until a future year. Thus references to "prior" Wisconsin probate law in this handbook cite the 1995-96 statutes, even though the prior code was effective through 1998.

INTESTACY 2

2.01 Introduction

Wisconsin's intestacy statutes, chapter 852, attempt to provide for the orderly distribution of the probate estate of a decedent who has not expressed his or her intent regarding that distribution in a will. The new code makes some important substantive changes to these provisions and reorganizes the intestacy provisions in a manner that constitutes a significant conceptual break with prior law. Historically, all states have treated rules relating to intestate succession as a distinct area of law. Accordingly, under prior law all Wisconsin intestacy rules were located in a single chapter (most recently chapter 852) even where a rule had an essentially identical counterpart in another section of the statutes or in the common law. In addition, sometimes the provisions of a rule would vary

between intestacy and the law of wills, even though no clear policy existed to justify the disparate treatment of the same problem.[1] The new code divides the intestacy provisions into two categories:

- Rules unique to the intestacy context, such as "who are heirs";
- Rules that intestacy law shares with transfers at death under governing instruments of transfer, such as the requirement of survivorship for a designated period of time.

All rules unique to intestacy remain in chapter 852, while all the general rules governing transfers at death—whether under intestacy or under a "governing instrument"[2]—are located in new chapter 854. When an intestacy rule has been repealed and replaced with a general rule in chapter 854, a cross-reference to the new rule appears at the location of the prior rule.

This chapter will review the core of the current Wisconsin intestacy rules and will highlight the changes to these rules in the new code. Significant changes include:

- A change in the system of representation by which issue take, from "modified per stirpes" to "[strict] per stirpes";
- New provisions regarding the division of the intestate estate when the takers are the decedent's grandparents or more remote collateral relatives;
- A new provision allowing "negative wills," in which a testator can disinherit an individual or class from an intestate share;
- A new provision regarding debt owed to a decedent by an heir.

---

1. An example of the disparate resolution of the same problem under intestacy and wills is the issue of survivorship. Under prior WIS. STAT. § 852.01(2) (1995-96), an heir had to survive 72 hours in order to take. By contrast, the UNIFORM SIMULTANEOUS DEATH ACT governed wills and required survivorship by only a measurable instant. *See* prior WIS. STAT. § 851.55 (1995-96).

2. Following UPC § 1-201(19), in the new code any instrument governing transfer of property at death is generically called a "governing instrument." WIS. STAT. § 854.01.

2.02 Core Intestacy Provisions—Who Are Heirs?[3]

A. Surviving Spouse

No issue or all issue of the decedent are of the current marriage.[4] As under the prior law, Wis. Stat. § 852.01(1)(a)1 continues to provide that a surviving spouse receives the decedent's entire net intestate estate if:

- There are no surviving issue of the decedent, or
- The surviving issue are all issue of the decedent and the surviving spouse.[5]

Decedent had issue from outside the current marriage. As under the prior law, Wis. Stat. § 852.01(1)(a)2 continues to provide that, where there is at least one surviving issue of the decedent who is not also an issue of the surviving spouse—for example, where there is a second marriage and there are one or more children from the first marriage who survive the decedent—the surviving spouse receives:

- *One-half* of the *nonmarital* property in the decedent's net intestate estate, and
- *None* of the decedent's interest in *marital* property[6] included in the decedent's net intestate estate.[7]

---

3. The rights of heirs are detailed in revised WIS. STAT. § 852.01(1). The revised section includes a cross-reference to a new provision in WIS. STAT. § 852.10 authorizing "negative wills," a relatively uncommon situation that will be discussed in greater detail in section 2.03A, *infra*.

4. WIS. STAT. § 851.13 defines "issue" as "children, grandchildren, great-grandchildren, and lineal descendants of more remote degrees, including those who occupy that relation by reason of adoption under s. 854.20 and nonmarital children and their lineal descendants to the extent provided by s. 852.05."

5. *See* WIS. STAT. § 852.01(1)(a)1.

6. The decedent's estate will own an undivided half interest in each item of marital property as tenancy in common property with the surviving spouse. *See* WIS. STAT. § 861.01(1).

7. *See* WIS. STAT. § 852.01(1)(a)2. This statute was edited for clarity but not changed substantively in the new code.

There are at least three significant differences between Wisconsin law and the UPC

B. Heirs Other Than Spouse

Issue.[8] As under prior law, under intestacy the decedent's issue receive the share of the estate that does not pass to the surviving spouse or the entire estate if there is no surviving spouse.[9] Under the new code, however, if a child of the decedent has predeceased, that child's descendants take by the system of [strict] per stirpes.[10] Under [strict] per stirpes distribution, shares are created for surviving children and for deceased children who left issue, irrespective of whether *any* children survived. By contrast, the prior statute called for distribution "by representation," which was defined so that the "first cut" for shares was at the first generation at which there were surviving issue.[11] Hence, under the

---

regarding transfers to the surviving spouse. First, under the UPC, the surviving spouse will not receive the *entire* intestate estate if the decedent had no issue but: (1) one of the decedent's parents survives (UPC § 2-102(1)(i)), or (2) there are issue *of the surviving spouse* who are not also issue of the decedent (UPC § 2-102(1)(ii)). Second, compared to the Wisconsin intestacy provisions, the UPC is more generous to the surviving spouse with regard to community property; the UPC suggests that a surviving spouse in a community property state receive the decedent's entire interest in the couple's community property regardless of which other heirs survive. *See* UPC § 2-102A(b). Finally, the UPC is more generous than Wisconsin towards the surviving spouse with respect to individual property when there are children from outside the marriage. *See* UPC § 2-102(4). The Drafting Committee considered these alternatives but rejected them because the committee did not believe that the UPC provisions would comport with the desires of most Wisconsin intestate decedents.

8. *See* note 4, *supra*, for the definition of "issue." In this handbook, the terms "issue" and "descendants" are used interchangeably. The UPC, while also equating the definition of the two terms "issue" with that of "descendants" (UPC § 1-201(25)), prefers the word "descendant" because it more generically describes biological, adopted, and nonmarital children. *See* Comment to UPC § 2-103. The Drafting Committee decided to retain the term "issue" because of the frequency of awkward terminology like "descendants of the decedent" in the UPC.

9. *See* WIS. STAT. § 852.01(1)(b).

10. *See id.*

11. *See* the definition of "representation" at prior WIS. STAT. § 852.03(1) (1995-96). In the new code, "representation" is redefined to mean "[strict] per stirpes." *See* WIS. STAT. § 854.04(1); therefore, as a technical matter, it was not necessary to replace the reference to "by representation" with "per stirpes" in WIS. STAT. § 852.01(1). However, "by representation" was changed to "per stirpes" in order to highlight the changed definition of "by representation."

The UPC moves in the opposite direction, rejecting "per stirpes" distribution as being unrepresentative of what decedents would want and replacing it with distribution "per capita at each generation." *See* Comment to UPC § 2-106.

prior code if none of the decedent's children survived, the "first cut" was at the grandchildren's generation. The differences among the various systems of representation are discussed in detail in section 4.02B.

Other relatives. As under prior law, if the decedent leaves no surviving spouse and no issue, the estate will pass to the decedent's parents, if any; if there are no parents, then to the decedent's siblings and their issue; and, if there are no parents or issue of the parents, to the decedent's grandparents and their issue, including aunts and uncles and their descendants.[12] However, the new code makes significant changes in the operation of these provisions:

- ***Distribution is per stirpes.*** As discussed just above, in contrast to the rule under the prior statute, the issue of the decedent's siblings or grandparents now take under the rule of [strict] per stirpes.
- ***Change in shares for grandparents and their issue.*** When there are no surviving parents or issue of parents, the next takers were "the grandparents."[13] If there were fewer than four grandparents, they took equally. If there were no surviving grandparents, next in line were "the intestate's next of kin *in equal degree*."[14]

  The new code changes this distribution in two ways. First, when the level of the grandparents is reached, the net intestate estate is divided into *maternal and paternal shares* and each side takes one-half of the estate.[15] Second, if the maternal or paternal side has no surviving grandparent, the issue of those grandparents take by [strict] per

---

12. *See* WIS. STAT. § 852.01(1)(c)-(f).

The new code no longer contains the figure illustrating the computation of degree of kinship at prior WIS. STAT. § 852.03(2) (1995-96). Because the "next-of-kin" provision in prior WIS. STAT. § 852.01(1)(g) (1995-96) has been repealed, the figure is unnecessary. However, because other sections of the statutes cross-reference this figure, those sections have been amended to refer to this figure as it existed in its most recent form in the 1995 statutes.

13. *See* prior WIS. STAT. § 852.01(1)(f) (1995-96).

14. *See* prior WIS. STAT. § 852.01(1)(g) (1995-96) (emphasis added).

15. *See* WIS. STAT. § 852.01(1)(f)1 and 2. If one maternal or paternal grandparent predeceases, the entire one-half share goes to the surviving grandparent on that side. *Id.* This change is based on UPC § 2-103.

stirpes.[16] Shares of the maternal and paternal grandparents are combined only if one side has no surviving grandparent or issue of a grandparent:[17]

- ***Fewer collateral relatives eligible to take.*** The new code cuts off collateral relatives and escheats to the state earlier than did the prior law.[18] Under the prior law, if no grandparents survived the decedent, the takers were "the next of kin," no matter how distantly that kin may have been related. The new code, by contrast, limits collateral takers to the descendants of the grandparents.[19] If no such descendants survive, the decedent's net intestate estate will escheat to the state under Wis. Stat. § 852.01(3).[20] This limitation precludes inheritance by "laughing heirs"—collateral relatives who presumably have little significant relationship to the decedent. It also reduces the need to locate remote heirs for the sole purpose of giving notice of the proposed admission of a will.

2.03 Ancillary Rules Unique to Intestacy

A. Negative Wills

The new code allows a testator to disinherit an individual or class from an intestate share in cases where there is also a valid will.[21] The rule is

---

16. WIS. STAT. § 852.01(1)(f)1 and 2. Under the words of the statute, surviving issue of *either* grandparent take in the same way surviving issue of *both* grandparents take. For example, surviving children from a prior marriage of one of the grandparents take in the same way surviving children of the grandparents' marriage to each other take. This is consistent with the rule in WIS. STAT. at § 854.21(4) that half-blood relatives take the same as those of the whole blood.

17. *See* WIS. STAT. § 852.01(1)(f)3.

18. This change is based on UPC § 2-103.

19. *See* WIS. STAT. § 852.01(1)(f).

20. Practitioners who use "heirs" as a class of contingent beneficiaries or "takers in default" when a class is exhausted should make note of this change.

21. *See* WIS. STAT. § 852.10(1). WIS. STAT. § 852.10(3), which states that this section does not apply if the individual or all members of the class described in sub. (1) predecease the testator, has been added for completeness; it does not change the effect of the rule.

codified in new Wis. Stat. § 852.10 and is based on UPC § 2-101(b).[22] Under new Wis. Stat. § 852.10, if a decedent's valid will disinherits an individual or class and some part of the decedent's estate passes by intestacy, the share that would have passed to the disinherited person or class passes as if that person or each member of the class had disclaimed the intestate share—unless the recipients under the disclaimer are also specifically disinherited as individuals or as a class.[23] The authorization of negative wills represents a shift from prior case law, which generally followed the majority common law rule preventing disinheritance clauses in wills from affecting intestate shares.[24]

As discussed in the Comment to UPC § 2-101, the question of whether a will establishes an intent to disinherit is a separate question of will construction. A testator's intent is easy to discern when the testator states explicitly that someone is to receive none of his or her estate[25] or is to

---

22. New WIS. STAT. § 852.10 does not require that the will *expressly* limit the right of an individual to take under intestacy. This is different from the wording of UPC § 2-101(b), which provides that the will must expressly state the limit. However, a review of the examples in the Comment to UPC § 2-101(b) suggests that the UPC drafters do not intend that the requirement be taken literally.

23. *See* WIS. STAT. § 852.10(2). Thus, in the example in note 26, *infra*, Hector's children would be eligible to take his share unless *they* were also disinherited under the will.

24. *See, e.g.*, Will of Ziehlke, 230 Wis. 574, 284 N.W. 497 (1939) (holding a clause in a will disinheriting the testator's neices and nephews did not prevent them from taking under intestacy when a residual gift lapsed); Will of Rosnow, 273 Wis. 438, 78 N.W.2d 750 (1956) (holding that heirs under intestacy whom the testator explicitly disinherited could take when the testator's residual gift lapsed); Estate of Connolly, 65 Wis. 2d 440, 222 N.W.2d 885 (1974) (holding that heirs under intestacy whom the testator explicitly disinherited could take when the testator's residual gift lapsed).

Estate of Farber, 57 Wis.2d 363, 204 N.W.2d 478 (1973), held that the general rule does not apply where a disinheritance provision is accompanied by positive testamentary language regarding which heirs are to take. *Id.* at 368. The *Farber* court reasoned that because the testator expressed "beyond doubt" his or her intent to disinherit a person or class, that intention should be given effect under the basic rules of will construction. *Id.*

See also Heaton, *The Intestate Claims of Heirs Excluded by Will: Should "Negative Wills" Be Enforced?* 52 U. CHI. L. REV. 177 (1985).

25. For example, "My brother, Hector, is not to receive any of my property" or "brother Hector is disinherited." *See* Comment to UPC § 2-101.

receive only a limited portion of the estate.[26] A testator's intent is more difficult to discern where the will does not expressly disinherit an individual under all circumstances.[27] Problems of interpretation under new Wis. Stat. § 852.10 can be avoided by careful drafting that precludes any part of the estate passing by intestacy, backed up with an explicit statement of the testator's desires should a portion of the estate nonetheless be intestate.

The negative wills provision does not apply if the disinherited individual or class predeceases the testator.[28]

B. Escheat

The new code does not change Wisconsin's prior provisions regarding escheat;[29] however, as discussed above, escheat now occurs earlier than under the prior law.[30] As under prior law, if a decedent has no heirs under Wis. Stat. § 852.01(1), the intestate estate passes to the state and is added to the capital of the school fund.

C. Not a United States Citizen

New Wis. Stat. § 852.03(6), based on UPC § 2-111, clarifies that a person is not disqualified from taking as an heir merely because the person, or a person through whom he or she claims, is not, or at some time was not, a United States citizen.[31]

---

26. For example, "I devise $50.00 to my brother, Hector, and no more." *See id.*
An individual does not have to be mentioned by name in order to be excluded. Thus, if Hector is the testator's only brother, the testator could exclude him by referring to "my brother" in the disinheritance clause. *See id.* In addition, a testator can exclude a group or class of relatives, such as "my brothers and sisters," under this provision. *See id.*

27. For example, "I make no provision in this will for Hector."

28. WIS. STAT. § 852.10(3).

29. *See* WIS. STAT. § 852.01(3).

30. *See* discussion of collateral relatives in section 2.02B, *supra*.

31. For statutory provisions governing the right of aliens to acquire or distribute land by devise or descent, *see* WIS. STAT. § 710.01. Of course, either WIS. STAT. § 710.01 or WIS. STAT. § 852.03(6) may be preempted by federal law.

D. Debt Owed Decedent by Heir

New Wis. Stat. § 852.12 adopts UPC § 2-110, which provides that a debt owed to the decedent by an heir reduces that heir's share of the intestate estate; the statute includes the additional provision that declaration of bankruptcy does not discharge the heir's debt for purposes of intestacy. However, the debt can reduce only the debtor's share of the estate; where a debtor heir does not survive the decedent, that debt will not affect the intestate share of the debtor's issue.[32]

2.04 Ancillary Rules Not Unique to Intestacy

As noted in the introduction to this chapter, most ancillary rules not unique to intestacy have been repealed and replaced with uniform rules covering all transfers at death in chapter 854.[33] The operation of those rules is briefly summarized here; chapter 854 is discussed in more detail in chapter 4 of this handbook.

A. Survivorship

New Wis. Stat. § 854.03 imposes a survivorship requirement of *120 hours* on virtually all transfers at death.[34] This new requirement replaces the prior rule which required a 72-hour survival to take under intestacy.[35]

---

32. The disclaimer provisions in new WIS. STAT. § 854.13(7) prevent a living debtor from using disclaimer to avoid having the debt charged against his or her share of the decedent's estate under WIS. STAT. § 852.12. Consider the following example:

> A owed D $25,000, but the debt is uncollectible. A is due to receive $25,000 from D's intestate estate. Since the debt is enforceable only against A's share and not the share of A's issue, A wonders whether he can garner these funds for his issue by disclaiming the inheritance.

Even though a person who disclaims is treated as though he or she had precedeased, WIS. STAT. § 854.13(7)(a) provides that *only the property disclaimed* by the debtor devolves as if he or she had predeceased; disclaimer cannot be used to "rearrange" shares. In the example above, the amount disclaimed is zero. By contrast, where the debtor heir *actually* predeceases the decedent, the debt is ignored when computing the intestate shares of the debtor's issue and the issue would inherit $25,000. *See also* Comment to UPC § 2-110. Wisconsin's disclaimer provisions are discussed in more detail in section 4.03B, *infra*.

33. In each case where a rule has been repealed, the prior provision is replaced with a cross-reference to the new rule.

34. For transfers under a governing instrument, the rule yields to evidence of contrary intent.

35. *See* prior WIS. STAT. § 852.01(2) (1995-96).

B. Heir Who Kills Decedent

New Wis. Stat. § 854.14 consolidates prior statutory provisions governing situations in which a would-be recipient killed the decedent. As under the prior statute,[36] the intentional killing of a decedent revokes the killer's rights under intestacy[37] and the decedent's estate passes as if the killer disclaimed.[38] However, the details of the new provisions differ slightly from the prior provisions.[39]

C. Representation

As mentioned in note 11, the term "per stirpes" has been substituted for the words "by representation" in Wis. Stat. § 852.01(1)(b) and (d) in order to signal a change in the system of representation used in the new code. Under the prior statute, a call for "representation" in the intestacy statutes meant a "modified per stirpes" system of representation.[40] Under the new code, a call for distribution "by right of representation" or "by representation" results in a [strict] per stirpes distribution, as defined in Wis. Stat. § 854.04(1).

D. Nonmarital Child

The new code retains Wis. Stat. § 852.05(1), which governs inheritance *by* a nonmarital child or the child's issue from either parent, and Wis. Stat.

---

36. *See* prior WIS. STAT. § 852.01(2m) (1995-96).

37. *See* WIS. STAT. § 854.14(2)(c).

38. *See* WIS. STAT. t § 854.14(3).

39. For example, where there has been no judgment establishing criminal accountability or delinquency on the part of an heir, a person petitioning the court to determine whether that heir unlawfully killed the decedent need only prove his or her case by the preponderance of the evidence, rather than by clear and convincing evidence, as required under the old statute. *Compare* WIS. STAT. § 854.14(5)(c) and prior WIS. STAT. § 852.01(2m)(br) (1995-96). In addition, the new statute, at WIS. STAT. § 854.14(6)(b), contains a provision allowing a decedent to waive the application of this section by will. The old intestacy statute did not contain such a provision.

New WIS. STAT. § 854.14 is discussed in more detail in section 4.02I, *infra*.

40. The representation rule embodied in prior WIS. STAT. § 852.03(1) (1995-96) was what commentators refer to as "modified per stirpes." The rule in prior WIS. STAT. § 852.03(1) (1995-96) has been carried to the new statute as the definition of "modified per stirpes" at WIS. STAT. § 854.04(2).

§ 852.05(2), which governs inheritance *from* a nonmarital child by the father or his kindred. However, the new code expands these rules by allowing paternity to be established by a court of competent jurisdiction in another state.[41] It also adds a cross-reference to indicate that Wis. Stat. § 895.01(1), which addresses actions that survive death, applies to paternity proceedings under chapter 767.[42] Thus, for purposes of intestate succession, paternity can now be established even after the decedent's death.

Wis. Stat. § 852.05(1) provides that a nonmarital child (or the child's issue) may take under intestacy from either parent in the same manner as a marital child.[43] However, as under prior law, in order to succeed to the net intestate estate of his or her nonmarital father, one of the following must occur:

- The father must have been adjudicated to be the father in a paternity proceeding under chapter 767 or by a judgment of a court of competent jurisdiction in another state;[44]
- The father must have admitted in open court that he is the father;[45]

or

- The father must have acknowledged himself to be the father in a writing signed by him.[46]

Similarly, Wis. Stat. § 852.05(2) provides that a nonmarital father (or his kindred) can inherit property *from* a nonmarital child only if he has been adjudicated the father in a paternity proceeding under chapter 767 or by a judgment of a court of competent jurisdiction in another state.[47]

---

41. *See* WIS. STAT. § 852.05(1)(a) and (2).

42. *See* WIS. STAT. § 852.05(4).

43. *See* WIS. STAT. § 852.05(1)(intro).

44. *See* WIS. STAT. § 852.05(1)(a).

45. *See* WIS. STAT. at § 852.05(1)(b).

46. *See* WIS. STAT. § 852.05(1)(c).

47. These provisions do not apply to a child who becomes a marital child by the subsequent marriage of his or her parents. *See* WIS. STAT. § 852.05(3). The status of a nonmarital child who is legally adopted is governed by new WIS. STAT. § 854.20, the consolidated statute on the status of adopted persons. *See id.*

E. Homestead Protection

New Wis. Stat. § 852.09 provides that where an intestate estate includes an interest in a home, assignment of that interest to the surviving spouse is governed by Wis. Stat. § 861.21. Subsection 861.21(3), which is similar to the prior law on this issue,[48] provides that if an intestate estate includes an interest in a home, the entire interest in the home will be assigned to the surviving spouse upon petition by the spouse.[49] As under the previous law, "home" is broadly defined as a dwelling in which the decedent had an interest and that the surviving spouse occupies or intends to occupy at the time of the decedent's death.[50] If there is more than one such dwelling, the surviving spouse may designate one as the "home."[51]

New Wis. Stat. § 861.21 does not, however, give the surviving spouse a property right to the home. Rather, the spouse's right resembles a "buy out" right: the surviving spouse must pay for the value of the decedent's interest in the home that does not pass to the spouse under the intestacy provisions of Wis. Stat. § 852.01(1).[52]

F. Relatives of the Half Blood

Under new Wis. Stat. § 854.21(4), relatives of the half blood and relatives of the whole blood take in the same manner under the laws of intestacy and under all other transfers at death (subject to the contrary

---

48. *See* prior WIS. STAT. § 852.09 (1995-96).

49. *See* WIS. STAT. § 861.21(3).

50. *See* WIS. STAT. § 861.21(1)(b); *see also* prior WIS. STAT. § 852.09(2) (1995-96).

51. *See* WIS. STAT. § 861.21(1)(b).

52. WIS. STAT. § 861.21(4). The new "buy out" arrangement is similar to the arrangement under WIS. STAT. § 852.09(1) (1995-96) of the prior code, whereby the decedent's interest in the home would be assigned to the surviving spouse as part of his or her intestate share. However, unlike the prior statute, which provided for the automatic assignment of the decedent's homestead interest to the surviving spouse unless he or she filed a written request to the contrary, the new statute requires the surviving spouse to request assignment of the decedent's interest in the home. In addition, under the prior law, the court could assign the interest in the home to the surviving spouse subject to a lien for the value not covered by the spouse's intestate share; this option is not part of the new code.

intent of the person who executed a governing instrument). This is the same rule that applied to heirs under the prior intestacy statute.[53]

G. Posthumous Heirs

Under new Wis. Stat. § 854.21(5), persons conceived at the time a class is established and born after the death of the decedent can take as a member of that class. This rule is essentially the same as the prior rule under intestacy.[54]

H. Recipients Related by Two Lines

New Wis. Stat. § 854.21(6) creates a general rule regarding the rights of recipients related to the decedent by two lines of relationship. That rule states that a person who is eligible to receive part of a decedent's estate through two lines of relationship can take only one share—the larger of the two shares to which that person is entitled.[55]

I. Adopted Children

The prior provisions regarding the status of adopted persons for purposes of transfers under intestacy or under estate planning instruments[56] have been amended and relocated to new Wis. Stat. § 854.20. Much of the rule at new Wis. Stat. § 854.20 is based on prior Wis. Stat. § 851.51(1) and (2) (1995-96), which provide that, subject to evidence of contrary intent: an adopted person is treated as a birth child of his or her *adoptive* parents for inheritance purposes, and with some exceptions, an adopted person is *not* treated as a child of his or her *birth* parents for the same purposes.[57]

---

53. *See* prior WIS. STAT. § 852.03(3) (1995-96). New WIS. STAT. § 854.21, governing which persons are included in family groups or classes, is discussed in more detail in section 4.02M, *infra*.

54. *See* prior WIS. STAT. § 852.03(4) (1995-96). However, under the new statute, the posthumous heir must survive for at least 120 hours past birth. *See* WIS. STAT. § 854.03. New WIS. STAT. § 854.21, which governs which persons are included in family groups or classes, is discussed in more detail in section 4. 02M, *infra*.

55. This rule is discussed in more detail in section 4.02M, *infra*.

56. *See* prior WIS. STAT. § 851.51 (1995-96).

57. *See* WIS. STAT. § 854.20(2)(a) and (b). The adoption provisions are discussed in further detail in section 4.02L, *infra*.

J. Advancements

Prior Wis. Stat. § 852.11,[58] regarding the effect of lifetime gifts on intestate succession, has been repealed. The provisions of the prior rule have been replaced by a general rule regarding the effect of lifetime gifts to heirs and beneficiaries. The new rule, at Wis. Stat. § 854.09, applies to all transfers at death, not just transfers by will or intestacy.[59]

K. Disclaimer

An heir's interest under intestacy may be disclaimed in much the same way as under prior law.[60] The disclaimer provisions for probate and nonprobate transfers have been amended and consolidated at new Wis. Stat. § 854.13.[61]

---

58. *See* prior WIS. STAT. § 852.11 (1995-96).

59. The new statute is discussed in section 4.02G, *infra*.

60. In the prior code, the intestacy provisions contained a cross-reference to the wills chapter, which contained the disclaimer provisions for probate transfers. *See* prior WIS. STAT. §§ 852.13, 853.40 (1995-96).

61. The new disclaimer provisions are discussed in more detail in section 4.03B, *infra*.

WILLS 3

3.01 Introduction

Changes to the law of wills in the new code primarily reflect an increased emphasis on *fulfillment of the intent of the testator*—the actual intent, when it can be determined, or the presumed intent when actual intent is unknown. These changes have three major components:

- Relaxation of the formality of will execution, by removing the requirement that the testator and both witnesses simultaneously observe the complete process of attestation;
- Introduction of additional presumptions about the intent of the testator—for example, a presumption that a beneficiary be required to survive for more than just an instant; and
- Introduction of the principle that all presumptions regarding will construction, such as antilapse or revocation at divorce, yield to evidence of the testator's contrary intent—including evidence extrinsic to the "four corners" of the document.

The new code makes changes to almost all sections of chapter 853, the wills chapter of the statutes. This discussion of chapter 853 is organized around the major topics addressed in that chapter—execution, omitted spouse or child, revocation, revival, separate statement for disposition of tangible personal property, miscellaneous provisions, rules of construction, and the statutory (or "basic") will forms. The discussion proceeds by reviewing prior law[1] under each of these topics and highlighting the changes under the new code.

---

[1] The only sections of chapter 853 that are completely unchanged, and which therefore are not discussed in this chapter, are:

- WIS. STAT. § 853.01, which provides that one must be of sound mind and at least 18 years old in order to make or revoke a will;
- WIS. STAT. § 853.17, which limits the effect of a will provision that attempts to change the nonprobate beneficiary of a life insurance policy or annuity;
- WIS. STAT. § 853.18, which provides that a variety of transfers, such as those under life insurance policies, annuities, or pension plans, are valid even if they do not conform to the law of wills;
- WIS. STAT. § 853.31, which codifies the presumption that a will passes all of the testator's interest in property; and
- WIS. STAT. §§ 853.52-.54, 853.57-.58, and 853.60-.62 regarding basic wills. Other parts of the basic wills statute are discussed in section 3.10, *infra*.

The most significant of these changes include:

- Relaxation of the rules on will execution, so that the witnesses no longer are required to see each other sign.[2]
- Relaxation of the penalty for being an interested witness. Formerly, a witness and his or her spouse were barred from receiving more property than they would receive under intestacy; under the new code, this "purging" rule is reduced to a presumption.
- Creation of an *optional* affidavit procedure for "self-proved" wills; if this procedure is followed, then the validity of the execution of a will cannot be challenged.[3]
- Expansion of the circumstances under which a will that is properly executed under the law of another jurisdiction will be deemed to have complied with Wisconsin will execution formalities.
- Changes in the rules governing the rights of a spouse who is omitted in a will executed before the marriage.
- Changes in the rules governing the rights of a child omitted from the will.
- Creation of presumptions governing situations where it is unclear whether a subsequent will is intended to wholly or partially revoke a previous will.
- Changes to the rule governing revocation of transfers to a former spouse under a will made during the marriage.[4]
- Elimination of the "clear and convincing" evidence requirement to show the intent to revive a prior will that has been revoked; elimination of the requirement that the revived prior will be in existence and submitted to the court; and creation of presumptions about the testator's intent in this situation.
- Elaboration of the rules—originally enacted in 1996—regarding nontestamentary written statements to dispose of tangible personal property.

---

2. As under prior law, there is no requirement that the witnesses see the testator sign the will. *See* prior WIS. STAT. § 853.03(1) (1995-96).

3. A will can, however, be challenged on other grounds, such as undue influence or lack of testamentary capacity.

4. The provisions regarding former spouses have been moved to new chapter 854 and are discussed in section 4.02J, *infra*.

- Codification of common law rules on "incorporation by reference" and "events of independent significance."
- Repeal and recreation (in new chapter 854) of the rules regarding such matters as advancement, ademption, and transfers to a beneficiary who predeceased the testator ("antilapse"). The new rules apply to all transfers at death, not just those under wills, and some are substantially different from the prior law of wills. As mentioned above, these rules are now subject to rebuttal by evidence of the transferor's contrary intent, including evidence extrinsic to the will or other governing instrument. In addition, chapter 854 contains provisions governing matters not previously covered in chapter 853, but which have important effects on the law of wills and other governing instruments. These include imposition of a 120-hour survivorship requirement and definition of the term per stirpes and similar terms.[5]

3.02 Valid Execution

A. Strict Enforcement or "Substantial Compliance"?

Wisconsin's rules for will execution, like those of most states, are derived from the English Statute of Frauds of 1677 and the Wills Act of 1837.[6] These rules have at least four functions:[7]

- They provide reliable evidence of testamentary intent and of the terms of the will—the "evidentiary function."
- They result in considerable uniformity in the organization, language, and content of most wills, which greatly facilitates determination of whether a document was in fact intended to be a will—the "channeling function."
- They impress upon the testator the seriousness of what he or she is doing, which is deemed important because the testator does not

---

5. These rules are discussed in chapter 4, *infra*.

6. WAGGONER, ET AL., FAMILY PROPERTY LAW 169 (2d ed. 1997).

7. Langbein, *Substantial Compliance with the Wills Act*, 88 HAR. L. REV. 489 (1975), *drawing on* Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 34; Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941); and especially Gulliver and Tilson, *Classification of Gratuitous Transfers*, 51 YALE L. J. 1 (1941).

experience the "wrench of delivery" required for lifetime gifts—the "cautionary function."

- They protect the testator from fraud and coercion—the "protective function."

Enforcement of execution statutes is typically strict and has come under criticism for seeming to prefer form over substance. For example, in 1948 a commentator wrote:

> The philosophy of all this is obvious and familiar. It assumes that the more "safeguards against fraud" the better. It is likewise big-law-office philosophy: every testator must be forced to execute his will just as it would be done if the matter were being handled by a high-powered law firm. This overlooks one very important fact, namely that the only persons the execution of whose wills are likely to come into question are precisely those persons who do not have the job supervised by a high-powered law firm.[8]

More recently, reformers have focused on a collection of statutory and case law—known variously as "substantial compliance," a "dispensing power," or a rule of "harmless error"—as a remedy for the seeming rigidities of the traditional law of will execution. Under this approach, a court evaluates noncompliance with the formalities of execution by using an approach that "extend[s] to will formalities the harmless-error principle that has long applied to defective compliance with the formal requirements for will-substitute transfers."[9]

Recent interest in "substantial compliance" dates to a 1975 article by John H. Langbein, a leading authority on the law of wills, who argued that harmless errors in will execution should be excused.[10] When invoked by the courts without statutory authority, this approach is arguably limited to

---

8. Mechem, *Why Not a Modern Wills Act?* 33 IOWA L. REV. 501, 503 (1948).

9. RESTATEMENT (SECOND) OF PROPERTY § 33.1 comment g (1992). *See also* RESTATEMENT (THIRD) OF PROPERTY § 3.3 Reporter's Note (Tent. Draft No. 2 1998). The approach is discussed in detail in Langbein, *Substantial Compliance with the Wills Act*, note 7, *supra*, and Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987). *See also* Comment to UPC § 2-503.

10. Langbein, 88 HARV. L. REV. 489 (1975), note 7, *supra*.

"near miss" situations. For example, the *Restatement (Second) of Property* takes the position that:

> In the absence of a legislative corrective . . . the court should apply a rule of substantial compliance, under which a will is found validly executed if the document was executed in substantial compliance with the statutory formalities and if the proponent establishes by clear and convincing evidence that the decedent intended the document to constitute his or her will.[11]

Partly in response to perceived limitations on the substantial compliance approach—even in statutory form—reformers subsequently moved to a more general approach that focuses solely on the question of whether the document was intended to be decedent's will,[12] without regard to

---

11. RESTATEMENT (SECOND) OF PROPERTY § 33.1 comment g (1992); *see also* WAGGONER, ET AL., note 6, *supra*, at 186.

12. In the mid-1970s, two Australian provinces adopted legislation embodying the substantial compliance concept; one used the term "substantial compliance" in the legislation, and the other addressed more generally the question of whether it was beyond reasonable doubt that the document offered for probate was intended to be the decedent's will. Langbein reports that the first approach was "a flop," as "the courts in Queensland read 'substantial' to mean 'near perfect' and have continued to invalidate wills in whose execution the testator committed some innocuous error." Langbein, 87 COLUM. L. REV. 1 (1987), note 9, *supra*. The second approach, by contrast, resulted in "extensive development" of the law in South Australia. Langbein, 87 COLUM. L. REV. (1987), note 9, *supra*, at 9.

Meanwhile, adoption of the approach by United States courts has been slow. In the past three decades, there have been perhaps a half-dozen cases that have arguably embraced it; for example, In re Will of Ranney, 124 N.J. 1, 9-10, 589 A.2d 1339, 1343 (1991) (will substantially complied with statutory requirements where witnesses' signatures were on the self-proving affidavit only and not on the will); Robinson v. Ward, 239 Va. 36, 387 S.E.2d 735 (1990) (statutory witnessing requirements substantially satisfied where beneficiary/witness handwrote will for testatrix while testatrix dictated but did not sign as witness until later, outside the presence of the testatrix; beneficiary/witness is named in the will and, because she wrote it, her name as a beneficiary can serve as her name as a witness under the unique facts of this case); Succession of Guezuraga, 512 So.2d 366 (La. 1987) (statutory requirement that testator sign name at end of will and on each separate page substantially satisfied where testatrix signed page containing dispositive portion and first, but not last, page of attestation clause); In re Will of Kiefer, 78 Misc.2d 262, 264, 356 N.Y.S.2d 520, 522-23 (Sur. 1974) (will could be admitted to probate even though only one of two witnesses signed). *See also* case discussions in Bonfield, *Reforming the Requirements for Due Execution of Wills: Some Guidance from the Past*, 70 TUL. L. REV. 1893 (1996).

Ranney is the best known of these cases, and probably the one that has received the most commentary, in part because it is seen as pushing the doctrine the farthest. Another well

adherence to the formalities.[13] This approach—which has until recently been referred to as a "dispensing power," but now is coming to be called a "harmless-error rule"—was adopted by the 1990 UPC[14] and by the draft *Restatement (Third) of Property*.[15]

The Wisconsin Supreme Court, in several older wills cases, validated wills that "substantially" satisfied Wisconsin's execution formalities.[16] However, unlike courts employing the "substantial compliance" approach, the court in these cases did not allow an exception to the execution formalities on the grounds that there had been a "near miss" or that the object of the formalities had been met informally. Rather, in each of the Wisconsin cases, the court concluded that the wills in question did in fact

---

known case, In re Snide, 52 N.Y.2d 193, 418 N.E.2d 656 (1981), is often included in discussions of the harmless-error rule or dispensing power. In *Snide*, a couple executed reciprocal wills, but each spouse signed the other's. Rather than treat the matter as a problem of will execution (as done, for example, in the famous case of In re Pavlinko's Estate 394 Pa. 564, 148 A.2d (1959), where the will was not admitted), at the husband's death the court admitted the wife's will, as executed by the husband. It then used the doctrine of reformation of substantive mistake—rather than mistake in execution—to interpret the will.

13. It remains true, of course, that the closer the formalities were adhered to, the more likely that the document was intended to be a will.

14. UPC § 2-503. In 1997 the UPC changed the title of this provision from "Writings Intended as Wills, etc.," to "Harmless Error."

Statutes similar to the UPC rule have been adopted in several Australian provinces, the Canadian province of Manitoba, and Israel. RESTATEMENT (THIRD) OF PROPERTY § 3.3, statutory note (Tent. Draft No. 2, 1998). The UPC rule itself has been adopted in Hawaii, South Dakota, and Montana; Colorado has adopted it with regard to will execution, though not with respect to other documents (*e.g.*, codicils). *See* HAW. REV. STAT. § 560:2-503 (1997); S.D. CODIFIED LAWS ANN. § 29A-2-503 (1997); MONT. CODE ANN. § 72-2-523 (1997); COLO. REV. STAT. ANN. § 15-11-503 (West 1997). As of September 1998, the rule had been passed by the Michigan Legislature, and was awaiting action by the governor.

15. RESTATEMENT (THIRD) OF PROPERTY § 3.3 (Tent. Draft No. 2, 1998).

16. *See* Will of Griffith, 165 Wis. 601, 163 N.W. 138 (1917) (holding that "[m]ere informality, where the essentials required are substantially satisfied, is immaterial"; specifically, (1) the implied request of the deceased that the witness sign is sufficient under the statute and (2) the question whether the witness signed before or after the testator is unimportant because the statute requires only that the execution and attestation be part of one continuous and complete transaction); *see also* Estate of Lagershausen, 224 Wis. 479, 272 N.W.2d 469 (1937) (holding execution requirements were met even though the testator signed at the top of the page rather than at the bottom because the place of the testator's signing was a "mere irregularity").

comply with the basic elements specified in the statute. This distinction, though fine, is the core difference between the approach to substantial compliance by the *Restatement* and by Wisconsin courts to date.

The Drafting Committee considered adopting a harmless-error rule, but, mindful of the critical literature,[17] decided instead to take a series of much smaller steps toward relaxation of the formalities. However, nothing in the new code precludes a Wisconsin court from adopting a substantial compliance or harmless-error rule. In addition, if a will was executed in a jurisdiction that recognizes a harmless-error rule, it should be accepted under Wisconsin law if the execution satisfies the requirements of Wis. Stat. § 853.05, governing wills executed under the law of another jurisdiction.[18]

In any case, it should be borne in mind that approaches invoking a harmless-error rule are *remedial*. No commentator recommends that will execution be "sloppy," even in jurisdictions where these approaches apply.[19] Rather, the purpose of the rule is to validate documents that are unquestionably intended to be the decedent's will, in order to promote the policy of fulfilling the testator's intent.

---

17. The general critical literature on the UPC's dispensing power includes: Bonfield, note 12, *supra*; Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996); Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism* (Pts. 1 & 2), 43 FLA. L. REV. 167, 599 (1991).

The Wisconsin Drafting Committee was especially concerned that enactment of the dispensing power could greatly increase the number of disputes over documents that were *not* intended to be a will but would be brought forth by a proponent seeking advantage under them. The committee surmised that the number of instances of "misuse" of the doctrine—*e.g.*, for the purpose of gaining settlement leverage—would likely be greater than the number of instances where imperfect execution would be rehabilitated. As a result, the committee decided to adopt the somewhat relaxed execution rules of UPC § 2-502 (discussed in section 3.02C, *infra*) and to await the experience of those states that have adopted a harmless-error rule.

18. *See* discussion in section 3.02C, *infra*.

19. For example, the court in *Ranney*, note 12, *supra*, stated: "Our adoption of the doctrine of substantial compliance should not be construed as an invitation either to carelessness or chicanery. The purpose of the doctrine is to remove procedural peccadillos as a bar to probate." 124 N.J. 1, 14, 589 A.2d 1339, 1345.

B. Testator's Signature

As under previous law, under the new code, a will must be in writing.[20] However, some of the execution formalities have been relaxed. Under Wis. Stat. § 853.03(1) as amended, a will must be signed:[21]

- By the testator,
- By the testator with the assistance of another person with the testator's consent, *or*
- In the testator's name by another person at the testator's direction and in the testator's conscious presence.[22]

While these provisions are similar to those of the prior code, there are several changes. First, the new provisions explicitly provide that a person may assist the testator in signing the will if the testator consents.[23] This provision was inspired by the case of *Estate of DeThorne*,[24] in which a witness assisted the testator in signing the will by stabilizing his wrist. However, the Drafting Committee does not intend that the new provision reverse the key holding in *DeThorne* that, if the assistance is substantial, the testator must do more than passively accept it.[25]

---

20. WIS. STAT. § 853.03 (intro). One issue that may arise is whether nontraditional media can constitute a "writing." The Comment to UPC § 2-502, which has a provision similar to that in the new code, defines "in writing" to include any reasonably permanent record. However, at least one state has held that a tape recorded will is not a "writing." *See* Estate of Reed, 672 P.2d 829 (Wyo. 1983). In addition, it is not obvious how a will rendered in a nontraditional media would be "signed."

21. The Comment to UPC § 2-502 states that "there is no requirement that the testator's signature be at the end of the will." Regardless of whether this principle would be upheld by the Wisconsin courts, good practice dictates that a will be signed at the end.
On the question of whether the full signature must be used, see note 28, *infra*.

22. For a discussion of "conscious presence," see note 27, *infra*.

23. The UPC signature provisions, at UPC § 2-502(a)(2), do not explicitly include an assisted signing option.

24. 163 Wis.2d 387, 471 N.W.2d 780 (Ct. App. 1991).

25. *See* Drafting Committee Notes to WIS. STAT. § 853.03. In *DeThorne*, the court did not reach the question of whether *any* unrequested assistance in the signing of a will is impermissible.

Second, where there is a proxy signing—that is, where someone signs on behalf of the testator, rather than just assisting the testator—the code no longer requires that a testator *expressly* direct someone to sign on his or her behalf. Nonetheless, good practice calls for the direction to be as direct and explicit as possible.[26] Finally, if there is a proxy signing, it is sufficient that the signing occur in the testator's *conscious* presence, as defined in new Wis. Stat. § 851.035. The "conscious-presence" requirement is based on that in UPC § 2-502(a)(2); the comment to that UPC section explains that a signing is in the testator's "conscious presence" if it occurs within the range of the testator's senses, such as hearing, and not necessarily within the testator's line of sight.[27]

C. Witnesses

Signature requirements.[28] In the new code, the witnessing requirements of prior Wis. Stat. § 853.03(2) (1995-96) have been amended to reflect the more informal approach taken in UPC § 2-502(a)(3).[29] While

---

[26.] WIS. STAT. § 853.03(1). The holding in *DeThorne* shows the reluctance of a court to assume that a testator's passive acceptance of assistance reflects his or her intent. Although *DeThorne* is an assisted signing rather than a proxy signing case, a court is likely to exhibit the same reluctance in a proxy signing case.

[27.] The UPC Comment also cites the following cases as applying the "conscious-presence" test: Cunningham v. Cunningham, 80 Minn. 180, 83 N.W. 58 (1900) (conscious-presence requirement held satisfied where "the signing was within the sound of the testator's voice; he knew what was being done. . . ."); Healy v. Bartless, 73 N.H. 110, 59 A. 617 (1904) (individuals are in the decedent's conscious presence "whenever they are so near at hand that he is conscious of where they are and of what they are doing, through any of his senses and where he can readily see them if he is so disposed."); Demaris' Estate, 166 Or. 36, 110 P.2d 571 (1941) ("[W]e do not believe that sight is the only test of presence. We are convinced that any of the senses that a testator possesses, which enable him to know whether another is near at hand and what he is doing, may be employed by him in determining whether [an individual is] in his [conscious] presence. . . ."). Nonetheless, good practice calls for the proxy signing to take place in the direct line of sight of the testator whenever possible.

[28.] The Comment to UPC § 2-502, on which the new provisions are based, states that "signing may be by mark, nickname, or initials, subject to the general rules relating to that which constitutes a 'signature.'" While this statement is in the context of a discussion of witnessing, presumably it applies to the testator's signature as well.

[29.] The UPC allows additional informality beyond that provided in UPC § 2-502(a)(3). Holographic wills are allowed under *id.* at § 2-502(b); in addition, under the "harmless-error" rule of *id.* at § 2-503, if it can be shown by clear and convincing evidence that a document was

the requirement that there be at least two witnesses to the execution of a will is retained, new Wis. Stat. § 853.03(2) significantly relaxes the formalities of witnessing, mandating only that each of the witnesses sign within a reasonable time after witnessing one of following:[30]

- The signing of the will by the testator as described in Wis. Stat. § 853.03(1);
- The testator's implicit or explicit acknowledgment of his or her signature within "the conscious presence of each of the witnesses";[31]

or

---

intended to be a testator's will, then even a will that is not holographic can be admitted without attestation by witnesses. Neither of these provisions are adopted in the new code, although it is possible for a will that meets these criteria to be admitted under the conflicts of law principles of WIS. STAT. § 853.05, discussed in section 3.02G, *infra*.

30. In the new code—as under prior law and under UPC § 2-502—the testator is not required to "publish" the document as his or her will. *See*, for example, In re Zych's Will, 251 Wis. 108, 112, 28 N.W.2d 316 (1947) ("[I]t is not necessary that the testator formally publish an instrument as his will."); Estate of Dejmal, 95 Wis.2d 141, 289 N.W.2d 813 (1980) (Wisconsin statutes do not require the testator "to expressly declare the document to be his will or to specifically ask the proposed witness to sign in that capacity."); Estate of Tollefson, 198 Wis. 538, 540-41, 224 N.W. 739 (1929) (admitting to probate a letter written by the decedent and attached to a bank note directing payment to Mrs. Tollefson; holding that the decedent did not have to publish the letter as his "will" where it was properly signed and witnessed). *See also* note 16, *supra*.

Under traditional wills law, there was a requirement that a testator "publish" his or her will by declaring it to be a will in the presence of the witnesses. *See* In re Pulvermacher's Will, 305 N.Y. 378, 113 N.E.2d 525 (1953) (discussing the purpose of the publication requirement and holding that the necessary publication was not present); Hale's Will, 21 N.J. 284, 121 A.2d 511 (1956) (discussing the demands of the publication requirement and holding that the necessary publication was not present); Estate of Kelly, 99 N.M. 482, 660 P.2d 124 (Ct. App. 1983) (discussing the definition of publication).

31. The words "implicit or explicit" were included in the statute to avoid the implication that a new formality of acknowledgment has been created. Wisconsin case law has long maintained that explicit acknowledgment is not a requirement for proper will execution. *See* Will of Griffith, 165 Wis. 601, 605, 163 N.W. 138 (1917) (holding that an express request by the testator that the witnesses sign the will is not essential to the validity of the will; an implied request or an assent to the signing is sufficient); Will of Schacht, 175 Wis. 54, 56, 182 N.W. 981 (1921) (holding that a will is valid where the testatrix did not name the document as her will to the witnesses or request them to sign but where her attorney requested the witnesses to sign after they saw the testatrix execute the will). *See also* note 30, *supra*, noting that "publication" of a will is not a requirement in Wisconsin.

- The testator's implicit or explicit acknowledgment of the will within "the conscious presence of each of the witnesses."[32]

An acknowledgment need not be explicit but may be inferred from the testator's conduct; in addition, it need only take place within the "conscious" presence of the witnesses.[33] Finally, the new rule does not require that a witness sign immediately after witnessing the testator's signing or acknowledgment; it is sufficient that a witness sign within a "reasonable time" after witnessing the event.[34] The testator need not be present when the witness actually signs, and the witnesses do not need to sign in the presence of each other. However, contrary to the intent of the Drafting Committee, it is possible to interpret the language of the statute as requiring that the witnesses be present simultaneously for the testator's signature or acknowledgment.[35]

Under the prior code, witnesses were required to sign in the presence of the testator *and* in the presence of each other.[36] For example, in the recent case of *Estate of Kai*,[37] the Wisconsin Court of Appeals held that a will did not meet the statutory execution requirements where a witness was

---

32. WIS. STAT. § 853.03(2)(intro)-(c).

33. See the discussion of "conscious presence" and accompanying notes in section 3.02B, *supra.*

34. WIS. STAT. § 853.03(intro). According to the Comment to UPC § 2-502, "in a given case, the reasonable-time requirement could be satisfied even if the witnesses sign after the testator's death."

35. WIS. STAT. § 853.03(2). As enacted, the new code states that each witness must witness the testator's acknowledgment of his or her signature or the testator's acknowledgment of the will "within the conscious presence of *each of the witnesses*." WIS. STAT. § 853.03(2)(b)-(c) (emphasis added). This language could be interpreted to mean that each witness must observe the acknowledgment to the *other* witness, as well as to himself or herself. Such an interpretation would be contrary to the purpose of the new statute, which is to eliminate the need for both witnesses to be simultaneously present for *any* purpose. The problematic language is the result of a drafting oversight. The Drafting Committee intended the language to read "within the conscious presence of *the witness*." *See* Drafting Committee Notes to WIS. STAT. § 853.03.

36. *See* prior WIS. STAT. § 853.03(2) (1995-96).

37. 195 Wis.2d 681, 538 N.W.2d 860 (Ct. App. 1995, Unpublished).

in an adjacent room and could hear, but not see, the other witness sign the will. By contrast, it is very likely that the facts in *Kai* would constitute a valid execution under new Wis. Stat. § 853.03(2).

The changes to the witnessing formalities adopted in the new code are intended to avoid invalidating wills that are almost certain to represent the intent of the testator. The Drafting Committee concluded that these changes would not expand the opportunity for undue influence or fraud, because two witnesses are still required. In fact the use of two witnesses to whom the will is acknowledged at different times might even strengthen the case for the validity of the will.

Qualifications of witnesses. Under the new code, as under prior law, a person may act as a witness to a will if, at time of execution, that person is competent to testify in court to facts relating to execution, regardless of subsequent incompetence.[38]

One topic of concern regarding witnesses to wills is that of the *interested witness—i.e.*, a witness who stands to take under the will. On the one hand, the presence of an interested witness may be a "suspicious circumstance" that suggests that the witness may have exercised undue influence and then sought to minimize the number of people involved in execution of the will. On the other hand, it is also reasonable to assume that most interested witnesses are innocent participants and that the main effect of penalties for interested witnesses is to disrupt valid estate plans. There is significant variation in how this question has been resolved. Some states retain the traditional rule and invalidate the entire will if there is not the requisite number of disinterested witnesses. Others take the position that an interested witness does not raise any issue that cannot be resolved by the doctrine of undue influence. The latter position has been that of the UPC since its original promulgation in 1969.[39]

---

38. WIS. STAT. § 853.07(1).

39. *See* Comment to UPC § 2-505. The Comment to *id.* at § 2-505 explains the rationale of its rule as follows:

> Of course, the purpose of this [rule] is not to foster use of interested witnesses, and attorneys will continue to use disinterested witnesses in execution of wills. But the rare and innocent use of a member of the testator's family on a home-drawn will is not penalized.

In Wisconsin, the prior code provided that, unless there were two or more disinterested witnesses, any beneficial provisions of the will for a witness or the spouse of a witness were invalid to the extent they exceeded what the witness or spouse would have taken under intestacy.[40] In the new code, this "purging rule" is modified so that it is essentially a presumption.[41] As amended in the new code, the interested witness provisions of Wis. Stat. § 853.07 may be summarized as follows:

- Any beneficial provisions[42] of the will for a witness—or the spouse of the witness—are presumed invalid to the extent that they exceed what the witness or spouse would have received under intestacy.[43]
- The presumption does not apply if a will is also signed by two disinterested witnesses.[44]

This approach does not increase appreciably the opportunity for fraud or undue influence. A substantial devise by will to a person who is one of the witnesses to the execution of the will is itself a suspicious circumstance, and the devise might be challenged on grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as a witness, but to procure disinterested witnesses.

40. Prior WIS. STAT. § 853.07(2) (1995-96).

41. The bill introduced on behalf of the Drafting Committee adopted the rule of UPC § 2-505. At the request of a member of the Assembly Judiciary Committee, the bill was amended to contain the provision described in the text. *See* Assembly Amendment 1, to Assembly Substitute Amendment 1, to 1997 Assembly Bill 645.

42. WIS. STAT. § 853.07(3) provides some guidance as to what interests are "beneficial."

43. WIS. STAT. § 853.07(2)(b). Wisconsin is one of a small minority of states that disqualifies the spouse of a witness. *See* WAGGONER, ET AL., note 6, *supra*, at 203.

44. WIS. STAT. § 853.07(3)(c)1. Note, however, that the fact that an interested witness and his or her spouse receive less than the allowable amount apparently does not render that person "disinterested" for other purposes. For example, assume a will is signed by A, an interested witness who receives *less* than her intestate share; B, an interested witness who receives *more* than her intestate share; and C, a disinterested witness. The fact that A receives less than her intestate share does not create a second disinterested witness. Thus, the exception in WIS. STAT. § 853.07(3)(c)1 apparently would not apply.

- The presumption can be rebutted by sufficient evidence that the testator intended the full transfer to the interested witness to take effect.[45]

D. Recommended Method of Executing a Will

The relaxation of will execution formalities in the new code is *not* intended to alter standard practice in this area. Rather the purpose is to validate documents that are clearly intended to be the decedent's will. The following advice, adapted from the State Bar's *Workbook for Wisconsin Estate Planners* (3d ed. 1997), still applies under the new code:

> The attorney should introduce the client and the witnesses if they are not already acquainted with one another. The attorney should then ask the client:
>
> - Whether the document is the client's will;[46]
> - Whether the client has read the document and understands it;
> - Whether the will disposes of the client's property in the manner the client wishes;
> - Whether the client wishes the parties to act as witnesses on the will; and
> - Whether anyone has attempted to influence the client regarding the will content.
>
> The client can then sign the will in the witnesses' presence and the witnesses can in turn sign below the attestation clause. The client and the witnesses should all remain in the same room and watch the procedure until all of the parties have signed. . . .
>
> The presence of a beneficiary in the room while the will is signed can create a suspicion of undue influence. It may be perfectly natural for an elderly client to be transported to the attorney's office by a near relative who is also a beneficiary of the estate plan. However, such a beneficiary should be asked to wait outside and well away from the room in which the will is to be executed. . . .

---

45. WIS. STAT. § 853.07(2)(c)2.

46. The witnesses need not know the contents of the will. In fact, the witnesses need not even know that the document is a will. In re Estate of Dejmal, 95 Wis. 2d 141, 289 N.W.2d 813 (1980); Will of Zych, 251 Wis. 108, 28 N.W.2d 316 (1947). As a matter of good practice, however, the attorney should inform the witnesses that the document is a will.

In some cases, the attorney may wish to ask the client direct questions regarding an unusual disposition in the will at the time of execution and in front of the witnesses. For example, if the client wishes to exclude a natural beneficiary such as a child from any distribution, the attorney may wish to ask the client directly why the child is excluded. This allows the witnesses to hear and presumably remember the reasons why the client chose to exclude the child. This procedure should only be used, however, after the attorney has consulted with the client and the client has consented to reveal what might be very personal information. The attorney should remind any office personnel used as witnesses of their duty to maintain confidentiality in this situation, as in all client matters.

E. Holographic Wills

A holographic will is a will signed by the testator, written in the testator's handwriting,[47] and not attested to by witnesses. Although holographic wills have long been endorsed by the UPC[48] and are apparently admissible in about half of the states,[49] the new code retains prior law, which rejects admission of holographic wills in most instances.[50] A holographic will may be admitted in Wisconsin, however, if it meets the requirements of the "choice of law" statute, Wis. Stat. § 853.05. These requirements are discussed in section 3.02G.

F. Self-Proved Will

Since the mid-1970s, Wisconsin has had a procedure by which an *uncontested* will can be admitted to probate without the testimony of the

---

47. Jurisdictions that allow holographic wills differ as to how much of the will must be handwritten and as to whether it must be dated. *See, e.g.,* Comment to UPC § 2-502(b).

48. *See* UPC § 2-502(b). To satisfy the UPC requirements, holographic wills must contain a signature and "material portions" in the testator's handwriting. *Id.* Proponents of the holographic will may use extrinsic evidence to establish that the testator intended portions of the document not in the testator's writing to constitute the testator's will. *See id.* at § 2-502(c).

49. *See* Natale, Note, *A Survey of Holgraphic Will Statutes*, 17 HOFSTRA L. REV. 159 (1988).

50. WIS. STAT. § 853.03(2)(intro) requires that in order to be valid, a will must be signed by two or more witnesses.

witnesses. That procedure, codified at Wis. Stat. § 856.15(1), is one reason that virtually all wills drafted in Wisconsin contain an attestation clause reciting compliance with the formalities of execution.

The new code retains the former procedure and adds a new procedure, based on UPC § 2-504, that makes a will *self-proving*. Under the new procedure, if the self-proving procedure is complied with, the will cannot be challenged for lack of compliance with execution formalities, even if the will is subject to a contest on other grounds.[51] This procedure, in new Wis. Stat. § 853.04, is *entirely optional*. It can be especially useful for wills that may be probated in another jurisdiction. Many states have adopted some version of the UPC self-proving provision, and even in a state that has not adopted it, use of the procedure may bar a challenge based on the formalities.[52]

Under the new statute, a will becomes self-proved by having the testator and witnesses execute an affidavit certifying that:

- The testator intends the instrument to be his or her will;
- The testator signed the instrument willingly (or willingly directed another person to sign);
- The specific requirements of will execution were met; *and*
- The testator had proper mental capacity.[53]

---

51. WIS. STAT. § 853.04(3)(b).

A self-proved will may be admitted to probate without the testimony of any subscribing witness, but otherwise it is treated no differently from a will not self-proved. Thus, a self-proved will may be contested (except in regard to execution requirements), revoked, or amended by a codicil in exactly the same fashion as a will not self-proved. *See* Comment to UPC § 2-504.

52. All states apparently have adopted "choice of law" statutes or common law rules similar to UPC § 2-506 or WIS. STAT. § 853.05. *See* discussion in section 3.02G, *infra*. Use of one of the self-proving will procedures conclusively determines that the will was properly executed under WIS. STAT. § 853.03. *See* WIS. STAT. § 853.04(3)(b). In general, "choice of law" statutes provide that a will that was properly executed in the state of execution, at the time of execution, is valid in the forum state. Hence, compliance with the Wisconsin self-proving procedure should facilitate admission of the will in another jurisdiction.

53. Model forms, such as the one in UPC § 2-504 and WIS. STAT. § 853.04, generally include a statement that the testator was of sound mind, not under undue influence, and age 18 or over. However, these recitations do not seem necessary to establish that the *formalities*

Following the UPC, Wis. Stat. § 853.04 provides two model affidavit forms.[54] One is for use in situations where the affidavit is part of the will and is not executed as a separate instrument.[55] This is called the *one-step* procedure. The other form is designed for separate execution of the will and the affidavit—the *two-step* procedure.[56]

Either procedure will serve to make the will self-proved in Wisconsin, and the one-step procedure is likely to be preferred because it is less cumbersome. However, while a majority of the states have adopted self-proving procedures,[57] the majority of those states in turn require the two-step version.[58] Thus, the two-step procedure may be preferable in order to facilitate admission in those states without having to resort to the "choice of law" statute.[59] In any case, when using the two-step procedure, great care should be exercised to insure that *the will itself, and not just the affidavit,* is executed.[60] In addition, if the two-step procedure is used, the will should include a traditional attestation clause.

---

were complied with. Moreover, unlike the recitations regarding execution formalities, they would not be conclusive in a dispute on those issues.

54. The statute provides that the affidavit must be in "substantially the following form." WIS. STAT. § 853.04(1) and (2).

55. WIS. STAT. § 853.04(1).

56. WIS. STAT. § 853.04(2).

57. RESTATEMENT (SECOND) OF PROPERTY, statutory note to § 33.1 (1992).

58. *See* DUKEMINIER and JOHANSON, WILLS, TRUSTS, AND ESTATES 227 (5th ed. 1995).

59. *See* note 52, *supra*.

60. In some states that use the two-step procedure, probate has been denied where the affidavit was executed but the will itself was not signed. *See* Comment to UPC § 2-504. To avoid this result, the 1990 UPC and WIS. STAT. § 853.04(3)(a) provide that "a signature affixed to a self-proving affidavit is considered a signature affixed to the will, if necessary to prove due execution of the will."

Form for one-step procedure. The following model form is included in the statute, for situations where the will is to be simultaneously executed, attested, and self-proved:[61]

> I, ..., the testator, sign my name to this instrument this . . . . day of . . . ., and being first duly sworn, declare to the undersigned authority all of the following:
>
> 1. I execute this instrument as my will.
> 2. I sign this will willingly, or willingly direct another to sign for me.
> 3. I execute this will as my free and voluntary act for the purposes expressed therein.
> 4. I am 18 years of age or older, of sound mind and under no constraint or undue influence.
>
> Testator: . . . .
>
> We, ..., ..., the witnesses, being first duly sworn, sign our names to this instrument and declare to the undersigned authority all of the following:
>
> 1. The testator executes this instrument as his or her will.
> 2. The testator signs it willingly, or willingly directs another to sign for him or her.
> 3. Each of us, in the conscious presence of the testator, signs this will as a witness.
> 4. To the best of our knowledge, the testator is 18 years of age or older, of sound mind and under no constraint or undue influence.
>
> Witness: . . . .
> Witness: . . . .
>
> State of . . . .
> County of . . . .
> Subscribed and sworn to before me by . . . ., the testator, and by . . . ., and . . . ., witnesses, this . . . . day of . . . ., ...
> (Seal) . . . .
>
> (Signed): . . . .
> (Official capacity of officer): . . . .

61. WIS. STAT. § 853.04(1).

Form for two-step procedure. The following model form is included in the statute for situations where the will is to be executed by the testator and witnesses and then *subsequently* made self-proving:[62]

> State of . . . .
> County of . . . .
> We, ..., ..., and . . . ., the testator and the witnesses whose names are signed to the foregoing instrument, being first duly sworn, do declare to the undersigned authority all of the following:
> 1. The testator executed the instrument as his or her will.
> 2. The testator signed willingly, or willingly directed another to sign for him or her.
> 3. The testator executed the will as a free and voluntary act.
> 4. Each of the witnesses, in the conscious presence of the testator, signed the will as witness.
> 5. To the best of the knowledge of each witness, the testator was, at the time of execution, 18 years of age or older, of sound mind and under no constraint or undue influence.
>
> Testator: . . . .
> Witness: . . . .
> Witness: . . . .
>
> Subscribed and sworn to before me by . . . ., the testator, and by . . . ., and . . . ., witnesses, this . . . . day of . . . ., ...
> (Seal) . . . .
>
> (Signed): . . . .
> (Official capacity of officer): . . . .

G. "Choice of Law" Regarding Will Execution

The new code expands the "choice of law" provisions under which a will that does not meet Wisconsin formalities, but does meet those of another jurisdiction, will be admitted to probate. Under amended Wis. Stat. § 853.05, a will is considered validly executed if it is in writing and conforms to the formalities—at the time of execution or at the time of death—of:

- The place where the will was executed;
- The place where the testator resided, was domiciled, or was a national at the time of execution; *or*

---

62. WIS. STAT. § 853.04(2).

- The place where the testator resided, was domiciled, or was a national at the time of death.[63]

Compared to the prior rule, amended Wis. Stat. § 853.05 expands the range of situations under which Wisconsin will look to the law of another jurisdiction to deem a will properly executed; the amended statute may be the broadest such statute currently in force in the United States.[64] The purpose of this statute is to maximize the situations under which the formalities of will execution can be deemed satisfied. For example:

> A Wisconsin domiciliary executes a holographic will while vacationing in Utah. The will is properly executed for Wisconsin purposes if it meets Utah requirements as they existed at the time of execution or at the time of death.
>
> A Utah domiciliary executes a holographic will while vacationing in Wisconsin, and subsequently moves to Wisconsin or dies owning real property here. Again, the will is properly executed for Wisconsin purposes if it meets Utah requirements as they existed at the time of execution or at the time of death.[65]

3.03 Omitted Spouse/Premarital Will

The new code substantially changes the provisions for situations in which a surviving spouse is omitted from a will that the testator executed *before the marriage*. The new provisions are based on UPC § 2-301 and are located at Wis. Stat. § 853.11(2); their purpose is to remedy the apparent error of a testator who inadvertently neglected to change the will after marriage. The rights of the spouse as a spouse, rather than as an

---

63. WIS. STAT. § 853.05(1)(b).

64. Most states apparently have statutes or doctrine that recognize "foreign" wills. *See* Schoenblum, *Multijurisdictional Estates and Article II of the Uniform Probate Code*, 55 ALB. L. REV. 1291, n. 23 (1992). However, they are not uniform and sometimes contain ambiguities and internal conflicts. *Id.*

Amended WIS. STAT. § 853.05 is based on UPC § 2-506. However, the UPC language was expanded to make explicit that the applicable law can be the law at the time of execution or at the time of death. In addition, to increase clarity, the phrase "has a place of abode" was changed to "resided."

65. *See also* Comment to UPC § 2-506.

omitted beneficiary, are covered by the family rights provisions in chapter 861.

Under the new provisions, the "pretermitted" surviving spouse is entitled to the amount that he or she would have received had the decedent died intestate, subject to a number of significant restrictions:

- Devises[66] to or for the benefit of the decedent's children born before the marriage[67]— and to the issue of those children—are excluded from the base upon which the intestate share is calculated.[68]
- The surviving spouse is not entitled to a portion of the estate if the will *or extrinsic evidence* shows:
  — The will was made in contemplation of the marriage;[69] *or*
  — The testator intended to maintain the premarital will.[70]
- The surviving spouse is not entitled to a portion of the estate if the size of the testator's nonprobate transfers to the spouse—or other evidence such as the testator's statements about these transfers—indicates that these transfers were in lieu of transfers under the will.[71]

---

66. Note that under WIS. STAT. § 851.065, "devise" refers to a transfer of real *or personal* property under a will.

67. Unless they are also issue of the surviving spouse.

68. WIS. STAT. § 853.11(2)(b)1 and 2. This provision includes what might be called "indirect" devises under WIS. STAT. § 854.06 (predeceased transferee); WIS. STAT. § 854.07 (failed transfer and residue); WIS. STAT. § 854.21 (persons included in family groups or classes); and WIS. STAT. § 854.22 (form of distribution for transfers to family groups or classes).

69. WIS. STAT. § 853.11(2)(c)1.

70. WIS. STAT. § 853.11(2)(c)2. Specifically, the surviving spouse is not entitled to a portion of the estate if there is sufficient evidence that the testator intended the will to be effective notwithstanding any subsequent marriage or that the testator considered revising the will after the marriage but decided not to.

71. WIS. STAT. § 853.11(2)(c)3. The Comment to UPC § 2-301 cites Estate of Bartell, 776 P.2d 885 (Utah 1989), as an example of a case that discusses transfers outside a will in the context of the omitted spouse/premarital will provisions. That case held that a wife was not entitled to be treated as an "omitted spouse" where the testator transferred approximately one-third of his estate to her before he died, indicating that he intended to provide for her outside his will.

- The surviving spouse is not entitled to a portion of the estate if a marital property agreement provides for the spouse or specifies that the spouse is to have no rights in the testator's estate.[72]

The amount available to the surviving spouse is reduced by the amount the surviving spouse receives under the will or via the new elective share in deferred marital property.[73] It is satisfied by abating the shares of takers under the will, other than the "protected" issue discussed above.[74]

While the new statute generally reduces the likelihood that the premarital estate plan will be altered,[75] the provisions reflect the view, expressed by the drafters of the UPC, that

> [T]he intestate share of the spouse in that portion of the testator's estate not devised to certain of the testator's children . . . is what the testator

---

72. WIS STAT. § 853.11(2)(c)4.

73. WIS. STAT. § 853.11(2)(d)1. See also the provisions governing the deferred marital property election at *id.* at § 861.02. The Drafting Committee assumed that the amount given to the surviving spouse under WIS. STAT. § 853.11(2) will qualify for the federal estate tax marital deduction. For that reason, it was not reduced by a share of the taxes. *See* Drafting Committee Notes to WIS. STAT. § 853.11(2).

74. WIS. STAT. § 853.11(2)(b).

75. Under the prior statute, the testator's entire will would be revoked by a subsequent marriage unless there was no surviving spouse; the will indicated an intent that it not be revoked by a subsequent marriage; the will was drafted in contemplation of the marriage; the will made provision for issue of the decedent; or the testator and the spouse had entered into a marital property agreement as described in new WIS. STAT. § 853.11(2)(c)4. *See* prior WIS. STAT. § 853.11(2) (1995-96).

There are, however, some circumstances where the rights of the "pretermitted spouse" will be greater than under the prior law. These circumstances will occur primarily where the will leaves part, but not all, of the estate to issue. Under the new statute, the surviving spouse has a right to an intestate share of the part of the estate not left to issue born before the marriage, who are not also issue of the surviving spouse. Under the prior statute, the entire will was retained if there was *any* provision for *any* issue.

> would want the spouse to have if he or she had thought about the relationship of his or her old will to the new situation.[76]

The Comment to UPC § 2-301 provides the following example (adapted to fit Wisconsin law) of how a surviving spouse might receive a share of the probate estate:

> T's premarital will made various transfers to people other than his children and devised the residue of his estate "to my two children, A and B, in equal shares." A and B are children of T's prior marriage. B predeceases T, without leaving any descendants who survived T by 120 hours. T is survived by A and by T's new spouse SS. Under Wis. Stat. § 854.07 (failed transfer and residue),[77] B's half of the residue passes to A. Under Wis. Stat. § 853.11(2), SS is entitled to an intestate share in that portion of T's estate not covered by the residuary clause.

3.04 Omitted Children

The new code, at Wis. Stat. § 853.25, contains new provisions governing situations in which a testator fails to provide for his or her children. There are two types of situations to which the statute might apply: after-born or after-adopted children and living children omitted by mistake. Like the provisions for the omitted spouse, the provisions for omitted children are designed to carry out the testator's probable intent.[78] Because of the possibility that an omitted child was knowingly—not inadvertently—omitted, there are only narrow circumstances under which an omitted child is given the right to take.[79]

Moreover, the Drafting Committee was concerned that even when omission was unintentional, there is not a simple set of generic solutions

---

76. Comment to UPC § 2-301.

77. Failed transfer and residue is discussed in more detail in section 4.02E, *infra*.

78. Often, the best way to implement the testator's intent is to include provisions for children as a class; frequently this is a good approach even when the testator does not yet have children but may have some in the future.

79. Prior WIS. STAT. § 853.25(3) (1995-96), which imposes a statute of limitations on the rights of omitted children, was retained without change in the new code.

that apply. Hence, although the new statute generally is based on UPC § 2-302, the committee retained and significantly expanded the equitable adjustment feature of the prior statute.[80] Under that provision, the court has broad power to modify the share awarded to an omitted child, based on its determination of what the testator would have wanted to provide.[81] This provision is discussed in more detail in section 3.04C.

A. Children Born or Adopted After Execution of the Will

The new code provides that, subject to equitable adjustment by the court,[82] an omitted child born or adopted after the testator executes the will is entitled to a share in the probate estate unless any of the following apply:

- The omission of the child from the will was intentional;[83]
- The testator provided for the omitted child by transfer outside the will and intended that transfer to be in lieu of a testamentary provision;[84]
- The other parent of the child receives all or substantially all of the testator's estate under the will and the testator had no living child at the time of execution of the will;[85] *or*
- There were other children of the testator living at the time the will was executed, but none of them received a share.[86]

---

80. WIS. STAT. § 853.25(5).

81. *Id.*

82. *Id.*

83. WIS. STAT. § 853.25(1)(a)1. Note that, contrary to UPC § 2-302(b)(1), on which the exception is based, under the Wisconsin rule extrinsic evidence *can* be used to determine whether the omission was intentional.

84. WIS. STAT. § 853.25(1)(a)2. Intent regarding a nonprobate transfer may be inferred from the amount of the transfer or other evidence. *Id.* For a case discussing transfers outside a will in the context of the omitted spouse/ premarital will provisions, *see* Estate of Bartell, note 71, *supra*.

85. *See* WIS. STAT. at § 853.25(1)(b). This provision applies only to a parent who survives the testator and is entitled to take under the will.

86. *See* WIS. STAT. § 853.25(1)(c)1. Thus, as noted in the Comment to UPC § 2-302(b), a testator may preclude operation of WIS. STAT. § 853.25(1)(c) by making no provisions for

Unlike the prior statute governing the shares of omitted after-born or after-adopted children,[87] the new code determines the shares of these children based on whether or not the testator had issue living at the time he or she executed the will.

No children living at execution. If the testator had no children living at the time of execution of the will, an omitted after-born or after-adopted child may receive a share of the testator's estate equal to what the child would have received under intestacy.[88] In general, this entitlement is satisfied by pro rata abatement of the transfers, including specific bequests, to the other beneficiaries.[89] However, the court may make adjustments to preserve the intent of the testator.[90]

---

any present or future children or by reciting in the will that he or she intends to make no provision for then-living or future children.

While the prior Wisconsin statute also contained this exception, the Comment to UPC § 2-302(b) is helpful in understanding why the exception is appropriate:

> The rationale for the . . . rule is found in the empirical evidence . . . that suggests that even testators with children tend to devise their entire estates to their surviving spouses, especially in smaller estates. The testator's purpose is not to disinherit the children; rather, such a will evidences a purpose to trust the surviving parent to use the property for the benefit of the children, as appropriate.

87. Prior WIS. STAT. § 853.25(1) (1995-96) provided that omitted after-born or after-adopted children were entitled to receive a share of the testator's estate equal to the share that child would have received under intestacy, subject to certain restrictions.

88. WIS. STAT. § 853.25(1)(b).

89. WIS. STAT. § 853.25(4). The statute directs the court to take the omitted child's share from intestate property first. WIS. STAT. § 853.25(4)(a). Wisconsin's abatement procedure is based on prior WIS. STAT. § 853.25(4) (1995-96) and is different from that of the UPC.

90. Under WIS. STAT. § 853.25(4)(b), the court may make adjustments to preserve the intent of the testator if it is shown, by clear and convincing evidence, that the statutory apportionment would defeat the obvious intention of the testator regarding a specific gift or other provision in the will. In addition, the court may make an equitable adjustment under WIS. STAT. § 853.25(5).

As mentioned above, this section does not apply where a testator has devised most of his or her estate to the other parent of the omitted child and that parent survives and is entitled to take under the will.

Children living at execution. If the testator had children living at the time of execution of the will, the omitted after-born or after-adopted child may receive a proportionate share of the property left to the other children.[91] The interests of the other children abate pro rata in order to fund the omitted child's share,[92] subject to equitable considerations.[93]

These provisions governing situations in which a testator had children living at the time of execution are based on UPC § 2-302(a)(2).[94] The UPC Comment to that subsection illustrates these provisions with the following example:

> When G executed her will, she had two living children, A and B. Her will devised $7,500 to each child. After G executed her will, she had another child, C.
>
> C is entitled to $5,000. $2,500 (1/3 of $7,500) of C's entitlement comes from A's $7,500 devise (reducing it to $5,000); and $2,500 (1/3 of $7,500) comes from B's $7,500 devise (reducing it to $5,000).
>
> ***Variation***. If G's will had devised $10,000 to A and $5,000 to B, C would be entitled to $5,000. $3,333 (1/3 of $10,000) of C's entitlement comes from A's $10,000 devise (reducing it to $6,667); and $1,667 (1/3 of $5,000) comes from B's $5,000 devise (reducing it to $3,333).[95]

---

91. WIS. STAT. § 853.25(1)(c)2.

92. WIS. STAT. § 853.25(1)(c). To the extent feasible, the share granted to the omitted child is to be of the same character as that granted to the other children. *Id.* at § 853.25(1)(c)4.

93. *See* WIS. STAT. § 853.25(5).

94. According to the Comment to UPC § 2-302 (a)(2), the subsection is modeled on N.Y. Est. Powers & Trusts Law § 5-3.2.

95. While the Drafting Committee chose to adopt the UPC approach to situations in which the testator had children living at execution, some results under these provisions may not appear equitable to the other siblings. For example, when transfers under a will to then-living children are equal, the addition of the omitted child simply causes a redivision of the devises to the children so that all share equally. However, when transfers to then-living children differ, the omitted child receives a pro rata share of the total of the transfers, with his or her share coming proportionately from the other transfers. This may result in the omitted child receiving more than a child named in the will, as illustrated by the variation in the UPC example. This result may be altered by the court under WIS. STAT. § 853.25(5).

Issue of omitted child. If an omitted child predeceases the testator and leaves issue, the issue of the deceased child are entitled to the deceased child's share per stirpes.[96]

B. Living Issue Omitted by Mistake

If a testator failed to provide for a child or a deceased child's issue by mistake—for example, the mistaken belief that a child or issue of a deceased child was dead—the child or his or her issue receives the same share that he or she would have received had he or she been born or adopted after the execution of the will.[97] The mistake must be proved by clear and convincing evidence, and failure to mention a child or issue is not in itself evidence of mistake.[98]

C. Discretionary Power of Court to Assign Different Share

The new statute includes a very broad equitable adjustment provision under which a court may increase or decrease the share of the omitted child, or alter its form, in order to "best accord with the probable intent of the testator."[99] This provision, which is not in the UPC, signficantly expands an analogous provision in the former statute.[100]

---

96. The prior statute included a similar provision. *See* prior WIS. STAT. § 853.25(1)(b) (1995-96). Many states similarly extend their omitted child statutes to the issue of deceased children. *See* MCGOVERN, ET AL., WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS 108 (1988). However, UPC § 2-302 does not explicitly provide for the issue of an omitted child in this situation.

97. WIS. STAT. § 853.25(2).

98. Under the prior statute, living issue omitted by mistake were entitled to a share of the testator's estate equal to the share the child or issue would have received if the testator had died intestate. Prior WIS. STAT. § 853.25(2) (1995-96). The change in method of calculating the share is based on UPC § 2-302(c). Note, however, that UPC § 2-302(c) is limited to the mistaken belief that the child or issue of a deceased child was dead and does not require proof of the mistake by clear and convincing evidence.

99. WIS. STAT. § 853.25(5).

100. Under the prior law, a court could reduce, but not increase, the share of the omitted child. In addition, the court's discretion with regard to the form of the transfer was more limited. *See* prior WIS. STAT. § 853.25(5) (1995-96).

The Drafting Committee envisions that this provision will be used in a variety of situations not adequately covered by the core of the statute.[101] For example:

> T may have a child from a first marriage who becomes a wealthy celebrity. T may marry again, plan not to have children, and execute a will leaving everything to spouse, with T's siblings as contingent devisees, because the child from the first marriage does not need a portion of T's estate. Under this scenario, if T subsequently has children, is predeceased by spouse, and does not change the will, the after-born children will not qualify to receive anything.[102] The core provisions of the statute will treat the after-born children like the child from the prior marriage, even though T may not have wanted to omit the after-born children from the will. In this circumstance, the court may decide to give all or part of the estate to the after-born children, outright or in trust.[103]

3.05 Revocation

A. Revocation by Writing

For revocation of a will by writing, Wis. Stat. § 853.11(1)(a) retains the basic rule of the prior code:[104] a will is revoked, in whole or in part, by a subsequent will, provided it has been executed in compliance with the requirements of Wis. Stat. § 853.03 (governing wills executed in Wisconsin) or Wis. Stat. § 853.05 (governing written wills executed in other jurisdictions). The subsequent will can revoke the prior will expressly or by inconsistency between the terms of the subsequent will and those of the prior will. Under the new code, the definition of "will"

---

101. *See* Drafting Committee Notes to WIS. STAT. § 853.25(5).

102. The after-born children would not qualify under WIS. STAT. § 853.25(1)(c) because, where a testator had children living at the time the will was executed (which T did here), WIS. STAT. § 853.25(1)(c)1 limits the share of the after born children to the share given to the other children under the will (in this case, nothing).

103. WIS. STAT. § 853.25(5).

104. *See* prior WIS. STAT. § 853.11(1)(a) (1995-96).

includes codicils;[105] thus, codicils are no longer mentioned as a separate means of revocation by writing.

New Wis. Stat. § 853.11(1)(bm)1 elaborates this rule by providing that a subsequent will wholly revokes a prior will if the testator intended that result regardless of whether the subsequent will expressly revokes the prior will.[106] To aid in making that determination of the testator's intent, Wis. Stat. § 853.11(1)(bm)2 and 3 provide the following presumptions:[107]

- The testator is presumed to have intended the subsequent will to *replace* the prior will if the subsequent will completely disposes of the testator's probate estate.
- The testator is presumed to have intended the subsequent will to *supplement* the prior will if the subsequent will does not completely dispose of the testator's probate estate.

These new provisions are based on UPC § 2-507 (b), (c) and (d).[108] According to the UPC Comment, codification of these presumptions is desirable because some courts have had difficulty determining the appropriate rule to apply, especially when there is a subsequent will that has the general appearance of a document that is intended to be a complete disposition, but does not repeal previous wills and does not have a residual clause.[109]

---

105. WIS. STAT. § 851.31.

106. The statute does not limit the type of evidence that can be used to determine the testator's intent.

107. Either of these presumptions may be rebutted by clear and convincing evidence.

108. According to the Comment to UPC § 2-507, these provisions codify the standards set forth in the RESTATEMENT (SECOND) OF PROPERTY § 34.2 comment b (1991).

109. The Comment to UPC § 2-507 includes a lengthy example of the ambiguities that can occur, and the operation of the presumptions in resolving them.

B. Revocation by Physical Act

Consistent with the prior code,[110] under new Wis. Stat. § 853.11(1m), a will is revoked, in whole or in part, by the testator's burning, tearing, canceling, obliterating, or destroying the will, or part, *with the intent to revoke*. Alternatively, another person may revoke the will for the testator, if the revocatory act is at the testator's direction and in the testator's conscious presence.[111]

The new statute includes two changes, based on UPC § 2-507(a)(2): "destroying" the will is added as a method of revocation, and it is sufficient that a revocatory act done by another person under the testator's direction be in the testator's "conscious presence."[112] The Comment to UPC § 2-507 notes that determination of revocatory intent "may involve exploration of extrinsic evidence, including the testator's statement as to intent."

One issue left open by the new statute is the question of whether a burning, tearing, or canceling must touch the words of the will in order to be effective as an intended revocation. UPC § 2-507 states that these actions are effective in revoking all or part of the will, irrespective of whether they "touched any of the words on the will," but the Drafting Committee concluded that the question of whether "touching the words on the will" is a threshhold requirement for revocation by physical act is an issue which is best left to the courts.[113]

C. Revocation by Operation of Law

As under the prior code, all or part of a will may be revoked by operation of law because of changed circumstances. However, these provisions have been amended and have been consolidated in new chapter

---

110. *See* prior WIS. STAT. § 853.11(1)(b) (1995-96).

111. New WIS. STAT. § 851.035 defines "conscious presence." *See also* the discussion of conscious presence in the context of will signing and the accompanying note in section 3.02B, *supra*.

112. See note 111, *supra*.

113. *See* Drafting Committee Notes to WIS . STAT. § 853.11(1). Case law on this issue is discussed in the Comment to UPC § 2-507(a)(2).

854, which applies all transfers at death, irrespective of whether they are by will.[114]

Revocation by divorce. Transfers under a will to a former spouse are governed by new Wis. Stat. § 854.15.[115] The new rule revokes not only a will provision in favor of a former spouse but also revokes any provisions in favor of *relatives* of the former spouse.[116] In addition, the new rule applies to all revocable estate planning instruments. Unlike the prior rule, the new rule is a presumption that is subject to rebuttal through extrinsic evidence.

Beneficiary who killed the decedent. Rights under a will of a beneficiary who killed the decedent are governed by new Wis. Stat. § 854.14, which is substantially similar to the rule in the prior code.[117]

3.06 Revival

The possibility of "revival" of a will arises in the situation where a person:

- Has a will (will 1);
- Executes a subsequent will (will 2) that revokes will 1; and
- Then revokes will 2.

Obviously, if the testator wishes to revoke will 2, it is best for the testator to revoke that will with a new will or codicil and to state new

---

[114.] Prior WIS. STAT. § 853.11(4) (1995-96), which is retained in the new code, states that a will is revoked only as provided in prior WIS. STAT. § 853.11 (1995-96). This statement remains accurate because the prior rules governing revocation of provisions in favor of former spouses and beneficiaries who kill the decedent are replaced with cross-references to chapter 854. *See* WIS. STAT. § 853.11(3) and (3m).

[115.] In the prior code, transfers to a former spouse were governed by prior WIS. STAT. § 853.11(3) (1995-96). New WIS. STAT. § 854.15 is discussed in detail in section 4.02J, *infra*.

[116.] A provision in favor of a relative of a former spouse is not revoked if that person is also a relative of the decedent. WIS. STAT. § 854.15(1)(d).

[117.] *See* prior WIS. STAT. § 853.11(3m) (1995-96). New WIS. STAT. § 854.14 is discussed in more detail in section 4.02I, *infra*.

dispositions or at least expressly indicate the status of will 1. However, it is not uncommon for testators who are acting without legal counsel to make and revoke a series of wills without clearly indicating their intent as to whether in revoking their most recent will they intend to revive the previous one. New Wis. Stat. § 853.11(6), which is based on UPC § 2-509,[118] creates presumptions about the testator's intent in this situation. The effect of the new rules likely will be to increase the number of cases in which a prior will is deemed to have been revived, in part because of the elimination of the requirement of clear and convincing evidence of intent to revive.[119]

The new statute addresses two possibilities concerning the *method of revocation* of will 2—revocation by physical act and revocation by subsequent will (will 3).[120] When will 2 has been revoked by physical act, there is a distinction based on the content of will 2, depending on whether will 2 wholly or partly revoked will 1.

In general, the statute provides a presumption *against* revival of will 1 unless:

- Will 2 was revoked by physical act, *and*
- Will 2 only partially revoked will 1.[121]

If both these conditions are met, then there is a presumption *in favor of* revival.[122] A presumption for or against revival can be rebutted with evidence of the contrary intent of the testator.[123] Evidence may come from the circumstances surrounding the revocatory act or the terms of the

---

118. The order of UPC § 2-509(a) and (b) was reversed in an attempt to enhance clarity.

119. *See* prior WIS. STAT. § 853.11(6) (1995-96). Because the new statute does not state a standard of proof, the typical preponderance of the evidence standard applies. Also, the new statute removes the requirement that the will to be revived be produced. *See* note 126, *infra*.

120. *See* WIS. STAT. at § 853.11(1) and (1m).

121. WIS. STAT. § 853.11(6)(a).

122. *Id.*

123. WIS. STAT. § 853.11(6)(a)-(c).

revoking will (will 3) and from contemporary or subsequent statements by the testator.[124]

The Comment to UPC § 2-509 explains the reversal of the presumption when a partial revocation is itself revoked by physical act by arguing:

> The justification [for the presumption in favor of revival] is that where will 2 only partly revoked will 1, will 2 is only a codicil to will 1, and the testator knows (or should know) that will 1 does have continuing effect. Consequently, [the statute] . . . presumes that the testator's act of revoking will 2 (the codicil) was accompanied by an intent to revive or reinstate the revoked parts of will 1. . . .
>
> The presumption against revival imposed [by the statute for other situations] is justified because where will 2 wholly revoked will 1, the testator understood or should have understood that will 1 had no continuing effect. Consequently, [the statute] . . . presumes that the testator's act of revoking will 2 was not accompanied by an intent to revive will 1. . . .

The Comment does not explain why this distinction was not preserved for the situation where will 2 is revoked by will 3, rather than by physical act. But in any case, the most important feature of the statute may be the open-ended language, by which the UPC drafters intend to focus attention on the *determination of any intent of the testator* to revive will 1 when revoking will 2.[125]

[124.] WIS. STAT. § 853.11(6)(a)-(c). Under prior WIS. STAT. § 853.11(6) (1995-96), the situations under which a will could be revived were more limited. However, WIS. STAT. § 853.11(5)—which is retained in the new code—provides that the doctrine of "dependent relative revocation" remains applicable, thus leaving open the possibility of admission of a "conditionally revoked will" (such as will 2 in the example in the text) based on case law.

[125.] The Comment to UPC § 2-509 states that:

> [A]ll relevant evidence of intention is to be considered by the court on this question; the open-ended statutory language is *not* to be undermined by translating it into discrete subsidiary elements, all of which must be met, as the court did in Estate of Boysen, 309 N.W.2d 45 (Minn. 1981) (emphasis added).

If will 1 is successfully revived but the will is not available, its content, execution, and validity can be proved under Wis. Stat. § 856.17, the "lost wills" statute.[126]

Dependent relative revocation. Prior Wis. Stat. § 853.11(5) provides that, except as specified in the revival section,[127] the common law doctrine of dependent relative revocation as it applies in Wisconsin is unchanged; this provision is retained, unchanged, in the new code. However, as just discussed, the revival section has been changed to conform with the UPC.[128]

Dependent relative revocation is a complex doctrine that usually refers to situations in which a testator destroys his or her will under a mistaken belief that a new or prior will will be valid, but it turns out that the new will is invalid or that the prior will cannot be revived as intended by the testator. The doctrine is also sometimes applied more generally to deal with situations where a testator has purported to revoke his or her will upon a mistaken assumption of law or fact.[129] It is important to note that if the doctrine of dependent relative revocation applies, it is the *destroyed* will that is admitted by the court, *not* the new or prior will; for this reason the doctrine has been referred to as "the law of the second best." In any case, it is clear that the purpose of the doctrine is to remedy errors; it should never be relied upon in the planning context.

---

126. WIS. STAT. § 853.11(6)(d). The prior statute required that the original will be produced. *See* prior WIS. STAT. § 853.11(6) (1995-96).

WIS. STAT. § 856.17 states that it applies if a will is lost, destroyed by accident, or destroyed without the testator's consent. By creating a cross-reference to WIS. STAT. § 856.17 in WIS. STAT. § 853.11(6), the Drafting Committee intends to include under these criteria a will that was initially revoked and later revived but that cannot be located. *See* Drafting Committee Notes to WIS. STAT. § 853.11(6).

127. *See* WIS. STAT. § 853.11(6).

128. The Comment to UPC § 2-507 states that "dependent relative revocation should less often be necessary under the revised provisions of the code." One of the revisions referred to in the Comment, the new rules regarding revival of a will, has been adopted in Wisconsin's new code.

129. A "classic" article on the topic of dependent relative revocation is Palmer, *Dependent Relative Revocation and Its Relation to Relief for Mistake*, 69 MICH. L. REV. 989 (1971).

3.07 Disposition of Tangible Personal Property

Testators sometimes wish to make many specific bequests of tangible personnel property, disposing of many items, including many recipients, or both. Moreover, no matter what the length of the list, testators often want the flexibility of being able to change their bequests without executing a codicil. Many lawyers have facilitated this desire by providing a *precatory* statement in the will, noting that the testator plans to make such a list and requesting that the family abide by it.

The UPC has formalized this procedure and made it legally binding.[130] Wisconsin enacted a variation of the UPC procedure in 1996;[131] that statute is substantially amended in the new code and relocated to Wis. Stat. § 853.32(2). Under this procedure, in order for a transfer under a separate statement prepared after the execution of the will[132] to be legally binding:

- The will must refer to the separate statement;[133] the following language should suffice:

> I might leave a written statement or list disposing of items of tangible personal property. If I do and if my written statement or list is found and is identified as such by my personal representative no later than [30 days] after the probate of this will, then my written statement or list is to be given effect to the extent authorized by law.[134]

---

130. UPC § 2-513.

131. *See* prior WIS. STAT. § 853.16 (1995-96). This statute is effective only for wills executed on or after May 3, 1996. WIS. STAT. § 853.32(2)(a).

132. WIS. STAT. § 853.32(2)(b). If the statement was prepared before the will was executed, it can be incorporated by reference into the will. *See* WIS. STAT. § 853.32(1) and discussion in section 3.08C, *infra.*

133. WIS. STAT. § 853.32(2)(a).

134. Comment to UPC § 2-513. The suggested language in the UPC Comment goes on to provide that the disposition in the separate statement "is to take precedence over any contrary devise or devises of the same item or items of property in this will." This additional language is apparently intended to negate the "not specifically dipsosed of in the will" requirement. However, it is unlikely that the language would be effective in negating the requirement. *See* note 137, *infra*.

- Only tangible personal property may be transferred by this method.[135] There is, however, no limit on the type of tangible personal property that can be transferred,[136] nor on its value.
- The property transferred must not be the subject of a specific bequest in the will.[137] Note that a typical provision disposing of tangible personal property by will—*e.g.*: "my children shall divide my tangible personal property among themselves in such manner as they may agree" probably constitutes a specific bequest that would make the separate statement under Wis. Stat. § 853.32(2) inapplicable. Thus, the generic tangible personal property transfer clause in the will needs to be appropriately modified.[138]
- The separate statement must describe the items and transferees with reasonable certainty.[139] This does not mean, however, that each item must be separately identified. Rather, a reference to "all my tangible personal property," "all my tangible personal property located in my office," or similar "catch-all" language should suffice.[140]
- The separate statement must be signed and dated.[141]

---

135. *See* WIS. STAT. § 853.32(2)(a).

136. The UPC provision refers to tangible personal property "other than money." This phrase was omitted in the new code because, under current law, money is not tangible personal property. However, in the view of the Drafting Committee, money that has value apart from its use as legal tender, such as a coin collection, is tangible personal property.

137. *See* WIS. STAT. § 853.32(2)(a). The Comment to UPC § 2-513 implies that this requirement—that the transferred item not be the subject of a specific bequest in the will—can be waived by the testator in the will. However, since there is no supporting language in either UPC § 2-513 or in WIS. STAT. § 853.32(2), drafters should be cautious about relying on the Comment in this regard.

138. *See also* the caution noted in note 137, *supra*.

139. WIS. STAT. § 853.32(2)(a).

140. *See* Comment to UPC § 2-513.

141. WIS. STAT. § 853.32(2)(a). The UPC does not require that the separate writing be dated by the testator. Under WIS. STAT. § 853.32(2)(a), the signature and dating requirements apparently apply only to the original document, not to amendments. However, there is no doubt that the better practice is to create a new (original) document whenever possible or to sign and date any amendments to an original.

After the decedent's death, the following rules apply to administration under the document:

- A person who knows of the existence of, or who has custody of, the document must come forward with the information. The person is deemed to be in the same situation as a person who has information about, or custody of, a will.[142]
- Persons named in the document are not entitled to notice of proceedings as interested parties under Wis. Stat. § 879.03[143] because when the probate is opened, the court may not know whether a separate statement was in fact executed[144] and because of the added complication this would entail.
- If the document has not been located within 30 days of the appointment of the personal representative, then the personal representative may dispose of the property under the terms of the will. However, if the document is subsequently located, it controls further distributions.[145]
- If the personal representative operates according to the 30-day rule just described, then the *personal representative* is not liable for prior distribution or sale of the property.[146] However, the Drafting Committee assumes that since a late-discovered separate statement has the same status as a late-discovered will[147] or codicil, it should be binding on the parties until the estate is closed. For example, if the personal representative distributes an item of tangible personal property after the 30 days has passed and a list governing the item is

---

142. WIS. STAT. § 853.32(2)(d).

143. *See* WIS. STAT. § 853.32(2)(e).

144. If the court determines that there is a valid separate statement, it may order notice to the beneficiaries under the document as the court deems appropriate. WIS. STAT. §§ 851.21(1)(e), 879.03.

145. WIS. STAT. § 853.32(2)(c). The authorizing language in the will may modify this requirement. *See*, for example, the sample language on page 68.

146. *Id.*

147. Under WIS. STAT. § 851.31, a "will" is defined to include a separate statement under WIS. STAT. § 853.32(1) or (2).

> subsequently discovered before the estate is closed, the beneficiary designated to receive the item can recover the item from the person who erroneously received it.

Persons relying on Wis. Stat. § 853.32(2) should bear in mind that this statute codifies an informal procedure that will work best when there is no risk of fraud or of conflict among beneficiaries. In addition, it is unclear what the legal effect of a separate statement would be if the testator changed domicile to a state that did not have such a provision or which had different formalities for its execution.[148]

3.08 Miscellaneous Provisions

A. Contracts Concerning Succession

Under Wis. Stat. § 853.13, a contract regarding a will or devise may be established only by one of the following methods:

- Provisions of a will stating the material provisions of the contract;[149]
- An express reference in a will to a contract *and* extrinsic evidence proving the terms of the contract;[150]
- A valid written contract, including a marital property agreement; *or*
- Clear and convincing extrinsic evidence.

---

148. An analogous issue is the legal status of a separate statement executed in compliance with another state's law, when the will is probated in Wisconsin. A conflict of laws statute like WIS. STAT. § 853.05 may apply to these situations, depending on whether the separate statement is understood to constitute part of the will as executed.

149. WIS. STAT. § 853.13(1)(a).

150. WIS. STAT. § 853.13(1)(b). See also the provisions regarding incorporation by reference at WIS. STAT. § 853.32(1) and the discussion in section 3.08C, *infra*.

The Comment to UPC § 2-514, on which the new statute is based, clarifies the use of extrinsic evidence:

> Oral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision of the statute is not intended to affect normal rules regarding admissibility of evidence.

New Wis. Stat. § 853.13 is substantially similar to the prior statute regarding contractual wills.[151] Extrinsic evidence may still be used to establish the existence of a contract in lieu of reference in a will to the contract or of the contract itself,[152] and the presumption of a contract in cases of joint wills continues to be rejected.[153] However, the language of the statute now more closely follows that of UPC § 2-514 and its provisions include a few substantive changes. The statute now applies to contracts to make a will or devise,[154] contracts not to revoke a will or devise, and contracts to die intestate.[155] In addition, there now is a provision clarifying that a valid martial property agreement may include a contract to make (or not make) a will or devise or to die intestate.[156]

As under the prior law, the thrust of revised Wis. Stat. § 853.13 is to make it relatively difficult to establish the existence of a contract regarding succession;[157] commentators generally agree that such contracts are "litigation breeders" and are to be avoided. Many of the problems that commentators have noted regarding contracts relating to wills also apply to transfers under what might be called "will substitute agreements"—such as use of a marital property agreement (sometimes referred to as a

---

151. *See* prior WIS. STAT. § 853.13 (1995-96).

152. WIS. STAT. § 853.13(1)(d). The extrinsic evidence must meet the clear and convincing standard. WIS. STAT. § 853.13(1)(d). The UPC, by contrast, specifically requires a writing signed by the decedent evidencing the contract.

153. WIS. STAT. § 853.13(2). However, the language of this provision was altered to mirror that of UPC § 2-514 regarding joint wills.

154. WIS. STAT. § 851.065 defines "devise" as a testamentary disposition of any real or personal property by will.

155. WIS. STAT. § 853.13(1). By contrast, the prior statute applied only to contracts not to revoke a will. *See* prior WIS. STAT. § 853.13(1) (1995-96).

156. WIS. STAT. § 853.13(1)(c).

157. *See* Comment to UPC § 2-514.

"Washington Will") as an estate plan.[158] Nonetheless, there has been substantial interest in the will substitute agreement strategy.[159]

B. Equitable Election

Except for some editorial changes, new Wis. Stat. § 853.15 is the same as the prior law, which codified an equitable doctrine developed under the common law. As an "equitable election" statute, Wis. Stat. § 853.15 deals with the situation where:

- A will attempts to transfer property that actually belongs to another person *and*
- That other person is also a beneficiary under the will.

For ease of presentation, the discussion will refer to property that meets these conditions as the "disputed property."

The thrust of the statute is that the person who owns the disputed property cannot take under the will unless he or she transfers the disputed property to the other beneficiary—*i.e.*, to the beneficiary named to receive the disputed property under the will. If the owner of the disputed property does not elect to transfer his or her interest,[160] then, unless the will provides otherwise, the property given under the will to the owner of the disputed property passes to the other beneficiary instead.[161]

One situation in which the need for an equitable election under Wis. Stat. § 853.15 is likely to arise is where a will devises an *entire* interest in

---

158. *See* WIS. STAT. § 766.58(3)(f); *see also* WIS. STAT. § 766.58(3)(e).

159. For a discussion of advantages and disadvantages of "will substitute agreements" under the Marital Property Act, *see* CHRISTIANSEN, ET AL., MARITAL PROPERTY LAW IN WISCONSIN § 7.16(b) (1990).

160. If the owner of the disputed property does not file the election in a timely manner, then the owner will be deemed to have elected *not* to take under the will. WIS. STAT. § 853.15(2)(b).

161. WIS. STAT. § 853.15(1). The new code makes no substantive changes to these provisions. The procedure for election is in WIS. STAT. § 853.15(2).

an item of marital property—rather than just the decedent's interest—to a third party. Consider the following example:

> Spouse A's will leaves "the antique brass spittoon which I purchased on my trip to Europe in 1989" to A's child, C, and the remainder of the estate to spouse B.

If the spittoon is marital property, then A does not have the power to will the entire spittoon at A's death.[162] Ordinarily, if a person tries to devise something he or she does not own (for example, if A had willed the Brooklyn Bridge to C) the transfer would simply be void. But the facts in our example call for equitable intervention, because the item that A does not own—a half interest in the spittoon—is owned by *another taker under the will*. Under Wis. Stat. § 853.15, A's will is construed to read:

> I leave the antique brass spittoon which I purchased on my trip to Europe in 1989 to my child, C. I leave the remainder of my estate to my spouse, B, on condition that B transfers her half interest in the spittoon to C. However, if B declines to transfer her interest in the spittoon, then I leave the remainder of my estate to C.

Since the sole purpose of the statute is to implement the presumed intent of the testator, there are two important exceptions to the operation of the equitable election rule:

- The will may provide for a different result.[163] The easiest way to do this would be to make the language regarding the disputed property precatory—*e.g.*, "I request that my spouse transfer her interest in the spittoon to C." An alternative would be to include a general provision negating the effect of Wis. Stat. § 853.15 on any transfers under the will. The limit on both these solutions is the assumption that testator and drafter were aware of the conflict that has been created. It is likely, however, that often the conflict is inadvertent.

---

162. An example using nonmarital property would be: X owns land in joint tenancy with Y. X's will attempts to leave X's interest in the land to Z, and Y—who receives that interest as surviving joint tenant—is given other property under the will.

163. WIS. STAT. § 853.15(1)(a).

- The statute does not apply if the owner of the disputed property received it via a transfer or beneficiary designation made *after* the execution of the will.[164] In this case, it is assumed that by transferring the item to its owner, the testator intended a change in the estate plan. Thus, for example, if the spittoon in the example were individual property at the time the will was written, but subsequently became marital property (possibly via a marital property agreement), then the statute assumes that the testator no longer intends the entire interest in the spittoon to go to C.[165]

Finally, because of the risk that the testator's intent will be misconstrued, the statute only applies if the will *clearly purports* to give one beneficiary property that belongs to another. In the example above, the spittoon was described in a way that strongly implied that A was trying to pass the entire item to C. However, subtle changes in that description could easily generate ambiguity ("I leave *my* spittoon . . .") or negate the operation of the statute (I leave my interest in the spittoon . . .").

C. Incorporation by Reference

New Wis. Stat. § 853.32(1) codifies the common law rule of incorporation by reference, based on UPC § 2-510. Its provisions are equivalent to those of prior case law in Wisconsin.[166] Under Wis. Stat. § 853.32(1), a will may incorporate by reference another writing or document[167] if all of the following apply:

---

164. WIS. STAT. § 853.15(1)(c).

165. Obviously, the statute assumes a certain level of sophistication in the testator regarding ownership rules and also regarding the distinction between probate and nonprobate transfers.

166. *See* Estate of Erbach, 41 Wis.2d 335, 342, 164 N.W.2d 238 (1969).

167. To remove concern about whether a nontestamentary trust that receives distributions under the will is a "document" governed by this statute, WIS. STAT. § 853.32(3) states that such transfers are governed by WIS. STAT. § 701.08, which was not amended by the new code.

- The will, expressly or as construed from extrinsic evidence, manifests an intent to incorporate the other writing or document;[168]
- The other writing or document was in existence when the will was executed;[169]
- The other writing or document is sufficiently described in the will to permit identification with reasonable certainty;[170] *and*
- The will was executed in accordance with statutory requirements.[171]

D. Acts or Events of Independent Signficance

New Wis. Stat. § 853.325, based on UPC § 2-512, codifies the common law rule that a will may dispose of property by referring to outside acts or events, *as long as these acts or events have significance apart from their role in determining the disposition of property under the will.* Such events are known as "acts or events of independent significance." The new statute provides that:

---

168. WIS. STAT. § 853.32(1)(a).

169. WIS. STAT. § 853.32(1)(b). According to the Comment to UPC § 2-510, this requirement replaces the "sometimes troublesome requirement" under the common law that the will specifically refer to the document as being in existence when the will was executed.

170. WIS. STAT. § 853.32(1)(c).

Estate of Erbach, note 166, *supra*, offers an interesting illustration of Wisconsin's use of the four minimum necessary elements for incorporation by reference. In *Erbach*, the testatrix executed a handwritten instrument called "Codicil to the Will of Laura Erbach" in 1966, two days before she died. *Id.* at 338. In the instrument, which was duly signed and witnessed, she stated, "all other parts of my Last Will and Testatment shall remain the same." *Id.* In addition to this instrument, the testatrix had executed a valid will in 1945 and an invalid holographic will in 1965, which contained significantly different distributions of her estate. *Id.* The 1966 codicil was found folded with the 1945 will in the testatrix's safety deposit box. The supreme court held that the 1966 codicil did not meet the requirement that the document referenced in the codicil be identified with reasonable certainty because it was unclear from the language of the 1966 codicil whether the testatrix was referring to the 1945 will, the 1965 holographic instrument, or both taken together. *Id.* at 343. The court explained that the codicil itself must clearly identify the incorporated written material; a paper placed with a will is not part of a will and does not show intent to incorporate it. *Id.* at 344.

171. WIS. STAT. § 853.32(1)(d). The UPC does not include this fourth requirement explicitly, though it is clearly implied when the UPC refers to the incorporating document as a "will."

- The execution or revocation of another person's will qualifies as an event of independent significance. For example, it is permissible for a will to provide that, "I leave X property to the persons, and in the shares designated, in the residuary clause of my spouse's will."
- The statute applies irrespective of whether the acts or events occur before or after the execution of the will or before or after the testator's death. For example, it is permissible to leave property to "those employees of my company with five or more years of service on the date of my death" or to "those grandchildren living on the date of my daughter's death."

In the examples given, the events referred to all clearly have meaning apart from their significance for the will. At the other extreme, a transfer of "those gold coins in an envelope in the top drawer of my desk, marked 'for Susan'" is likely to violate the rule, because it appears to be an unattested testamentary transfer. We don't know when the envelope was put in the drawer, whether the number of gold coins was changed, or who changed them—if they were changed. Moreover, unlike the situation in the other examples, a court may find that adding or removing coins from the envelope served no purpose other than to define the testamentary transfer to Susan.

The case law on "acts or events of independent significance" varies considerably across jurisdictions and may depend on seemingly subtle differences; for example, transfers of the "contents of my safe deposit box at X bank" are frequently upheld. In addition, reported cases may be unrepresentative of unchallenged transfers or unappealed orders by probate courts. Nonetheless, good practice dictates avoidance of transfers that may be negated by this rule.

E. After-Acquired Property

As under prior law,[172] under revised Wis. Stat. § 853.29, a will is presumed to pass all the property the testator owns at death, including property acquired after execution or by the testator's estate after the

172. *See* prior WIS. STAT. § 853.29 (1995-96).

testator's death. Of course, this presumption is limited to the property the testator has the power to transfer by will.

While the new statute is similar to the prior law regarding after-acquired property, the language has been revised to track the language of UPC § 2-602, providing explicitly that a will is presumed to pass property acquired by the testator's estate after the testator's death. As noted in the Comment to UPC § 2-602, the inclusion of property acquired by the testator's estate ensures, for example, that bonuses awarded to an employee after his or her death pass under the will.[173]

F. Safekeeping of Wills

The new code retains Wis. Stat. § 853.09 without change. This section provides that "unless provided otherwise by county ordinance, any testator may deposit his or her will with the register in probate of the court of the county where he or she resides" for safekeeping. Note that in *State v. Gulbankian*,[174] the Wisconsin Supreme Court held that in order to avoid the appearance of solicitation and a breach of professional responsibility, an original will should be kept by the drafting attorney only "upon specific unsolicited request of the client."[175]

3.09 Provisions Consolidated in Chapter 854

As noted in the introduction, many rules that previously only applied to wills now apply to *all* transfers at death and are consolidated in new chapter 854 of the statutes.[176] In addition, some of the general rules in

---

173. The Comment to UPC § 2-602 notes that the rule reverses cases like Braman Estate, 435 Pa. 573, 258 A.2d 492 (1969). In *Braman*, Ruth predeceased her sister Mary by about one year. Mary left her residuary estate to Ruth "or her estate." The court held that although the property properly passed to Ruth's estate, it was not governed by her will because the will only applied to property Ruth owned at death. Instead, the property passed to Ruth's heirs under intestacy.

174. 54 Wis.2d 605, 196 N.W.2d 733 (1972).

175. State v. Gulbankian, note 174, *supra*, at 611-12.

176. New WIS. STAT. § 853.41 provides that new chapter 854 applies to all transfers under wills, including transfers under the statutory basic wills in subchapter II of chapter 853.

chapter 854 change the prior rule for wills. This section briefly summarizes the effect of the new chapter on the law of wills.

A. Required Period of Survivorship

Under prior law, if a beneficiary under a will survived by an instant, he or she was eligible to take under the will, unless the will provided otherwise.[177] Under the new code, Wis. Stat. § 854.03 imposes a requirement of survival by 120 hours on all transfers at death for which survivorship is required, unless the instrument governing the transfer provides otherwise.[178]

B. Advancement

Prior Wis. Stat. § 853.19 (1995-96), regarding the effect of lifetime gifts to a beneficiary under a will, has been repealed. The provisions of the prior rule have been replaced by a general rule regarding the effect of lifetime gifts to beneficiaries and heirs.[179] The new rule, Wis. Stat. § 854.09, applies to all transfers at death, not just transfers by will or intestacy.[180]

C. Ademption

The provisions in prior Wis. Stat. § 853.35 (1995-96), regarding nonademption of specific gifts, have been repealed. The prior rule has been replaced by new Wis. Stat. § 854.08, which applies a similar rule to all estate planning instruments.[181]

---

177. Situations of true simultaneous death were covered by the UNIFORM SIMULTANEOUS DEATH ACT. *See* prior WIS. STAT. § 851.55 (1995-96).

178. Extrinsic evidence may be used to construe the instrument. The new statute is discussed in section 4.02A, *infra*.

179. *See* prior WIS. STAT. § 852.11 (1995-96).

180. The new statute is discussed in section 4.02G, *infra*.

181. The new statute is discussed in section 4.02F, *infra*.

D. Disclaimer

The provisions in prior Wis. Stat. § 853.40 (1995-96), regarding disclaimer under wills, intestacy and powers of appointment, have been repealed. The prior rule has been replaced by new Wis. Stat. § 854.13, a general rule on disclaimer.[182]

E. Antilapse

The provisions in prior Wis. Stat. § 853.27 (1995-96), regarding the rights of the issue of a beneficiary who predeceases the testator, have been repealed. The prior rule has been replaced by new Wis. Stat. § 854.06 ("Predeceased Transferee"), which modifies the prior rule somewhat, and also extends it to include beneficiaries under all revocable estate planning instruments.[183]

F. Gift of Securities

The provisions in prior Wis. Stat. § 853.33 (1995-96), regarding gifts of securities, have been repealed. The prior rule has been replaced by new Wis. Stat. § 854.11, which applies a similar rule to all estate planning instruments.[184]

3.10 Basic Wills

The Basic Will and Basic Will with Trust are statutory forms designed primarily to meet the needs of married couples with or without children. The Basic Will allows the testator to make up to five specific or general bequests, with the residual distribution outright under one of two property disposition clauses.[185] One property disposition clause provides that all remaining probate assets pass to the spouse if living, or if the spouse does not survive, to the children by right of representation. An alternative property disposition clause provides that the residuary estate will be

---

182. The new statute is discussed in section 4.03B, *infra*.

183. The new statute is discussed in section 4.02D, *infra*.

184. The new statute is discussed in section 4.02H, *infra*.

185. Personal property not specifically bequeathed goes to the spouse, if living, or to the children.

distributed according to the laws of intestate succession. The alternative clause is primarily appropriate for unmarried people, although it could be relevant for a married person with children from outside the marriage.

The Basic Will with Trust has similar general provisions but adds a fairly standard trust for a family with minor (or near-minor) children.[186] If the spouse survives, the spouse takes all outright; if the spouse does not survive, then the residuary estate goes into a trust for the health, support, maintenance and education of the testator's children and the descendants of any deceased children. When the testator's youngest child reaches 21 (or a different age, if specified by the testator) the remaining property is distributed to the children by right of representation.

In addition to some technical changes,[187] the new code makes several small but important changes to the Basic Wills[188] which may be summarized as follows:

- To reduce confusion, the Basic Wills provisions are separated into subchapter II of chapter 853, covering Wis. Stat. §§ 853.50-853.62, as amended.
- The witnessing requirements for Basic Wills, which under the former law were stricter than those for "regular" wills, are repealed. The witnessing requirements for all wills are now the same.[189]

---

186. As originally enacted in 1984, the Basic Will with Trust included an option that would allow the testator to put the entire residual estate in trust, even if the spouse survived. *See* Erlanger and Crowley, *Warning: Trust B of the Wisconsin Basic Wills May Be a Hazardous Estate Plan*, 59 WIS. BAR BULL. 17 (1986). This option was removed in 1994 because it was deemed inappropriate for a statutory form.

187. Language is updated (*e.g.*, "children who are not legitimate" is changed to "nonmarital children" (WIS. STAT. § 853.50(3)); cross-references are updated to reflect changes in the code; and the trust for children is amended to remove the contradictory requirement that discretionary distributions be made "by right of representation," which creates mandatory shares. WIS. STAT. § 853.59 (Form).

188. In this discussion, the term "Basic Wills" will be used to refer to both the Basic Will and the Basic Will with Trust.

189. *See* WIS. STAT. § 853.51(1)(bc). The new witnessing requirements are at WIS. STAT. § 853.03 and are discussed in section 3.02C, *supra*.

- The definition of "by right of representation," which was different from the definition of this term for the purposes of intestacy under the prior law,[190] is changed to explicitly mean [strict] per stirpes. This is consistent with the change to [strict] per stirpes as the system of representation in intestacy.[191]
- A new provision clarifies that failure to comply with instructions, other than the requirements for the testator's and witnesses' signatures, does not affect the validity of the will.[192] This refers to *the validity of the will itself*; it does not, for example, change the rule in current Wis. Stat. § 853.54(2) that additions or deletions not provided for in the form will be ignored.[193]

---

190. *Compare* prior WIS. STAT. §§ 853.50(1) and 852.03(1) (1995-96).

191. *See* discussion in section 2.04C, *supra*.

192. WIS. STAT. § 853.51(2m).

193. The new rule is an extension of the rule in WIS. STAT. § 853.54(3) (which is retained from prior law) and applies to such matters as failure to date the will, indicate the location where it was signed, or indicate the witnesses' residences.

TRANSFERS AT DEATH 4

4.01 Introduction

New chapter 854 contains rules that apply to *all* transfers at death, irrespective of whether the transfer occurs under a statute—such as

intestacy—or under a "governing instrument"—documents of transfer such as a will, trust, joint tenancy with survivorship, P.O.D. bank account, or life insurance contract.[1] The provisions of new chapter 854 create default rules for the interpretation of common concepts in estate planning, such as:

- The definition of "representation";
- The status of adopted children, nonmarital children, persons related by half blood, and the like under transfers to groups or classes.

The new chapter also creates default rules to resolve many of the problems caused by gaps in estate plans, such as:

- Close order of death of decedent and beneficiary—by the imposition of a required period of survivorship;
- Changes in the relationship between the decedent and the beneficiary, such as divorce or the slaying of the decedent by the beneficiary—by revocation provisions;
- Changes in the property that is the subject of the transfer, such as sale or transfer of the property to the named beneficiary (or to someone else) before death—by ademption and advancement provisions;
- Transfer of property to a person who subsequently predeceased the transferor—by "antilapse" provisions;
- Insufficient property to fulfill the instructions in the document—by abatement provisions.

If there is a governing instrument, the default rules yield to evidence of the contrary intent of the transferor. Moreover, in a significant departure from prior Wisconsin law on wills,[2] contrary intent can be shown by evidence extrinsic to the document.[3] The rules of new chapter 854 provide

---

1. The definition of "governing instrument" is discussed in the following section of this chapter.

2. *See*, *e.g.*, Estate of Connolly, 65 Wis.2d 440, 453, 222 N.W.2d 885 (1974), where the supreme court declined to adopt the doctrine of "probable intent"—which would have allowed a court to receive extrinsic evidence, irrespective of the presence of an ambiguity—on the grounds that it would open a great many wills to attack by disappointed relatives or friends and would interject a significant element of uncertainty into the law.

3. This follows the provisions of the 1990 UPC, as explained in the Comment to UPC § 2-601.

a set of uniform provisions that drafters may incorporate explicitly or implicitly into their documents. *However, in most cases the intent of the transferor will be indicated best by careful drafting of the governing instrument and by amendment of the document when circumstances change.*

Following the UPC, the new code is silent on the question of the point in time at which the transferor's intent is to be ascertained. For example: assume a person executes a governing instrument leaving property to descendants "by representation." Perhaps at the time of execution, she has no idea what system of representation is dictated by the statute or intends per stirpes distribution. Then, several years later, she creates unequivocal extrinsic evidence that she wants the property to pass by the system of per capita at each generation. Which "intent" controls? Courts may tend to focus on intent at the time of execution, but the statute does not mandate that construction. In some circumstances, such as revocation of transfers because of divorce, the relevant intent will almost certainly be formed after the document has been executed, and it would seem appropriate for the courts to recognize this.

All of the rules in chapter 854 have counterparts in the prior law of intestacy and wills; however, courts have been reluctant to extend those rules to nonprobate transfers without specific authorization from the legislature.[4] The new code provides that authorization, by drawing on the UPC and the prior Wisconsin rules for probate transfers, to create a comprehensive set of rules that apply to all transfers at death.[5] Many of the

---

The text of the UPC itself only states that "in the absence of a finding of contrary intention," the rules of construction in the UPC control (UPC §§ 2-601, 2-701), and the UPC has been criticized for not affirmatively stating that extrinsic evidence is admissible, especially with respect to wills. *See* Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN. L. REV. 101, 128-129 (1991). In contrast to the UPC, the admissibility of extrinsic evidence is explicitly provided for in the new Wisconsin code.

4. *See*, *e.g.*, Bersch v. Van Kleek, 112 Wis.2d 594, 334 N.W.2d 114 (1983), which refused to apply the probate "revocation at divorce" rule to life insurance beneficiaries.

5. Chapter 854 goes further than the UPC in this regard. As will be noted in the discussion of individual rules, the UPC sometimes has separate rules for intestacy and transfers under wills, and the UPC does not extend all will construction rules to trusts. In general, chapter 854 transcends both those distinctions.

rules are quite similar to the prior rule for intestacy or wills; however, in some cases, the thrust of the rule has been changed substantially.

One consequence of the extension of the intestacy and wills rules to nonprobate transfers is that a party holding the property may transfer it to the beneficiary named in the instrument governing the transfer without realizing that chapter 854 dictates a different result—for example, a life insurance company may pay the proceeds to a former spouse named in the contract, contrary to the provision in new Wis. Stat. § 854.15. As long as such a transfer is in good faith, third parties are protected from liability.[6]

New chapter 854 applies to all transfers of property at death, whether by statute or governing instrument. A governing instrument is defined in Wis. Stat. § 854.01 to include *any estate planning instrument*:

- A will or trust;
- A contract or deed;
- An insurance or annuity policy;
- A pension, profit-sharing, retirement, or similar benefit plan;
- A marital property agreement under Wis. Stat. § 766.58(3)(f);[7]
- A beneficiary designation under Wis. Stat. § 40.02(8)(a);[8]
- An instrument under ch. 705;[9]
- An instrument that creates or exercises a power of appointment;
- Any other "dispositive, appointive, or nominative" instrument that transfers property at death.[10]

---

6. These protections are discussed in section 4.02O, *infra*.

7. This statutory section provides that spouses may agree to provide for some or all of their property to pass nonprobate upon the death of either of the spouses.

8. This statute defines a "beneficiary" for purposes of the Wisconsin Public Employe Trust Fund.

9. This provision includes joint and P.O.D. bank accounts under WIS. STAT. §§ 705.01-705.04, an instrument qualifying under the general nonprobate transfers provision of WIS. STAT. § 705.20, and transfer-on-death security registration under WIS. STAT. §§ 705.21-705.30.

10. An example of a common governing instrument not in the list but included in the "catch all" is the beneficiary designation on an IRA.

4.02 Rules for Interpretation and Implementation of Governing Instruments

A. Survivorship—Wis. Stat. § 854.03

In a significant departure from prior Wisconsin law, new Wis. Stat. § 854.03 requires that a person survive 120 hours—*i.e.*, five days—in order to receive property transferred under a statute or governing instrument that requires that the person survive an event.[11] Thus, for example, if a will transfers property to B, then B must survive 120 hours to take. If the transferee does not survive by the requisite period, then he or she is presumed to have predeceased.[12] The new provision essentially adopts the UPC rule on this issue[13] and expands it to cover special situations that can occur under Wisconsin's marital property law.[14] Wis. Stat. § 854.03 provides several exceptions to the 120-hour survivorship requirement, the most important of which relate to the existence of contrary provisions in

---

11. Under the new code, transfers under intestacy, wills, and revocable nonprobate instruments generally require that the beneficiary survive to take. See the discussion later in this section.

12. If it is unclear whether a transferee survived by 120 hours, he or she is presumed to have predeceased. WIS. STAT. § 854.03(1). This presumption can be rebutted by clear and convincing evidence. WIS. STAT. § 854.03(6).

In the case of property owned as survivorship property (*e.g.*, joint tenancies and survivorship marital property), the property is transferred to the coowners in proportion to their ownership interests unless it is established that one of the coowners survived the other(s) by at least 120 hours.

Posthumous issue must survive 120 hours past *birth*. *See* WIS. STAT. § 854.21(5).

13. The core of WIS. STAT. § 854.03 combines UPC § 2-104, which requires an heir to survive the decedent for 120 hours in order to take under intestacy, and UPC § 2-702, which creates a similar requirement for wills and other governing instruments.

14. WIS. STAT. § 854.03(3) provides that if a husband and wife die and there is insufficient evidence that one of them survived the other by 120 hours, half the marital property will be distributed as if it were the husband's individual property and he had survived; the other half will be distributed as if it were the wife's individual property and she had survived. WIS. STAT. § 854.03(4) provides similar rules for distribution of the proceeds of a life insurance policy, where survivorship by 120 hours is not established and there is no beneficiary other than the decedent's estate. The provisions are based on prior WIS. STAT. § 851.55(3m) and (4) (1995-96), which was part of Wisconsin's version of the UNIFORM SIMULTANEOUS DEATH ACT.

a governing instrument.[15] In addition, extrinsic evidence may be used to construe a governing instrument affected by this rule.[16]

Prior Wisconsin law, like that of most non-UPC states,[17] had a requirement of survival for a specified period only for transfers under intestacy.[18] For transfers under estate planning instruments, if survival was required, then survival for an instant was sufficient unless the instrument provided otherwise. Situations where there was insufficient evidence as to which of two or more people died first were handled under the Wisconsin version of the Uniform Simultaneous Death Act,[19] which has now been repealed. As explained in the Comment to UPC § 2-104:

> This section is a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die within a few days of one another. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died otherwise than simultaneously.[20]

---

15. WIS. STAT. § 854.03(5). The Comment to UPC § 2-702 contains examples of the application of these exceptions.

16. In adopting this rule allowing extrinsic evidence, WIS. STAT. § 854.03 follows UPC § 2-701, which provides that "In the absence of the finding of a contrary intention, the rules of construction in this Part control the construction of a governing instrument." It is not clear how the drafters of the UPC intended this principle to interact with the specific exceptions listed in individual statutes, such as UPC § 2-702, which creates the 120-hour survivorship requirement. The Drafting Committee intends the extrinsic evidence provision to have the same meaning that it has under the UPC. *See* Drafting Committee Notes to WIS. STAT. § 854.03.

17. In the pre-1990 UPC, the 120-hour survivorship requirement applied to intestacy and wills. The 1990 UPC extended it to all governing instruments. The rule also has been promulgated as a separate act. *See* UNIFORM SIMULTANEOUS DEATH ACT, 8B U.L.A. 32 (pocket part) (1993).

18. For Wisconsin intestacy, the required period was 72 hours. *See* prior WIS. STAT. § 852.01(2) (1995-96).

19. *See* prior WIS. STAT. § 851.55 (1995-96).

20. Another reason for the change to the across the board 120-hour rule is to avoid litigation over order of death when the relevant people die in a common accident. *See*, *e.g.*, Estate of Janus, 135 Ill. App.3d 936, 482 N.E.2d 418 (Ill. Ct. App. 1985).

Statutes, such as the intestacy statute, generally require that a person survive to receive benefits. Many estate planning instruments do not include language requiring survival in order to take, but most instruments operate under a presumption that requires survival. For example, the general law of wills requires that a beneficiary survive, because there is no transfer until the testator dies.[21] Most—but not all—nonprobate transfers, such as life insurance, joint tenancy, survivorship marital property, joint bank accounts, and the like, have a survivorship requirement imposed by the statute that authorizes them, by the terms of the creating document itself, or by common law rulings.[22]

Trusts are one example of a nonprobate vehicle for which survivorship is *not* required, absent a statutory provision such as provided in the new code. Under the common law, there is no requirement that a remainder beneficiary under a trust—even a revocable trust—live to the time of possession; if the remainder beneficiary dies before the life tenant, the remainder—which is already vested in the remainder beneficiary—passes to that person's estate.[23] For example, in *First National Bank of Bar Harbor v. Anthony*,[24] the settlor created a revocable trust with a retained right to income for himself and his wife and remainder to his three children. One of the children predeceased the settlor, and that child's estate claimed his share. The court held:

> [C]ases dealing with testamentary dispositions . . . are of little assistance on the issues before us. Because a will is not operative until the death of the testator, an interest in a testamentary trust cannot vest prior to that event. On the other hand, an inter vivos trust is operative from the moment of its creation. . . . The trust instrument before us contains no

---

21. "The rule of lapse is based on the proposition that a property interest cannot be *transferred* to a deceased person. Thus, a devise to a devisee who pedeceases the testator lapses, notwithstanding any contrary intent on the testator's part. The rule of lapse is not a question of construction." WAGGONER, ET AL., FAMILY PROPERTY LAW 976 (2d ed. 1997).

22. *See id.* at 449.

23. *Id.* at 447-79.

24. 557 A.2d 957 (Me. 1989).

> requirement that the remainder beneficiaries survive the life tenants and we see no reason to imply a requirement of survival.[25]

In a provision that has proven especially controversial with respect to interests in irrevocable trusts, the UPC imposes a survivorship requirement for *all* future interests in trusts.[26] In the new code, new Wis. Stat. § 701.115(1) adopts the UPC rule for transfers *under revocable trusts only*,[27] providing that:

> Unless a contrary intent is found, if a person has a future interest in property under a revocable trust and, under the terms of the trust, the person has the right to possession and enjoyment of the property at the grantor's death, the right to possession and enjoyment is contingent on the person's surviving the grantor. Extrinsic evidence may be used to show contrary intent.

B. Representation—Wis. Stat. § 854.04

A distribution "by representation" refers to the grandchildren or other issue of a designated person "stepping up" to take the place of someone at a previous generation who has predeceased. In the United States, at least

---

25. *Id.* at 958-60. According to Dukeminier and Johanson, "The position of the court in *Anthony* is the orthodox one. . . . Nonetheless, because a revocable trust is a will substitute, a couple of courts have, perhaps unwittingly, confused the situation" by finding a survivorship requirement. *See* DUKEMINIER and JOHANSON, WILLS, TRUSTS AND ESTATES 770, 773-74 (5th ed. 1995). *See also* WAGGONER, ET AL., note 21, *supra*, at 446-49.

26. UPC § 2-707. The rationale for the UPC rule, as explained in the Comment to UPC § 2-707, is that it will "prevent cumbersome and costly distributions to and through the estates of deceased beneficiaries of future interests, who may have died long before the distribution date." For a critical appraisal of the UPC provision, *see* Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 MICH. L. REV. 148 (1995); Dukeminier argues that the traditional rule of transmissible remainders serves to give the remainder beneficiary what is in effect a general testamentary power of appointment. He concludes that this preserves flexibility in trusts and is much preferable to the rigid substitution of the issue of the beneficiary, provided in the UPC. For a response to Dukeminier, *see* Waggoner, *The Uniform Probate Code Extends Antilapse-type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309 (1996).

27. The Drafting Committee considered extending the survivorship requirement to all future interests under trusts but decided to defer consideration of that issue to the courts or a future legislature.

three different systems of representation are used in statutes and estate planning documents. New Wis. Stat. § 854.04 names and defines these three systems of representation—as well as the concept of *per capita,* which is not a system of representation[28]—so that they can be meaningfully referred to in statutes and governing instruments. As will be discussed below, the Drafting Committee believes that the creation of these definitions will eventually work to reduce confusion that currently exists about distribution to a person's descendants under instruments of transfer governed by Wisconsin law.

The three systems of representation defined in the new statute are: per stirpes; modified per stirpes; and per capita at each generation. These systems of representation differ on two dimensions:

- The generation at which shares are created, if there is no surviving issue at the generation closest to the designated person;[29]
- The disposition of shares when there are two or more deceased persons at a generation at which shares have been created.

The choices made on these dimensions reflect differences in how the succeeding generations are viewed. For example, if all the children of a designated person have predeceased, there are at least two ways of viewing that person's grandchildren:

- As a group related to the designated person—*i.e.*, his or her grandchildren as a group, as in "my grandchildren";
- As a group of individuals linked to their ancestor in the family tree—*i.e.*, the grandchildren produced by a specific predeceased child, as in "my daughter's children, and my son's children."

---

28. If a distribution is to be made to a group or class per capita, the property is divided into as many shares as there are surviving members of the group or class, and each member receives one share. WIS. STAT. § 854.04(4). Thus, if an estate is to be divided among a person's issue per capita and the person is survived by two children and three grandchildren, then each of those people would receive one-fifth of the estate.

29. The designated person will usually be the transferor, as in "to my descendants, per stirpes," but the designated person could be someone else, as in "to the issue of my brother Samuel, by the method of per capita at each generation." The closest generation to the designated person will be that of the person's children.

In the great majority of situations, the system of representation will not be a concern in the estate plan because the children of the designated person are typically alive when a distribution is made.[30] Nonetheless, the less common fact patterns occur often enough that it is very important for practitioners to discuss the system of representation with the client, and to draft according to the client's preference. The system of representation is also very important in "dynastic," or generation-skipping, trusts.[31]

The three systems of representation are defined as follows:

Per stirpes; by representation. If a statute or governing instrument calls for distribution of property to the issue of a designated person "per stirpes":[32]

- The property is divided into equal shares *for the children* of that person. A share is allocated for each surviving[33] child and for each deceased child who left surviving issue.[34]

---

30. Thus a distribution to children, with grandchildren as contingent beneficiaries, will generally not be problematic because the children will survive. Even if one child has predeceased, the three modes will yield the same result, as long as no more than one of that child's children has predeceased as well.

31. In dynastic trusts, it may be *required* that all members of a preceding generation die before distribution to the succeeding generation. An example would be a trust providing that principal be distributed to grandchildren or their issue, perhaps after all children have died and there are no grandchildren under age 35. Most litigation over the system of representation occurs in cases like this, where large amounts of property may be at stake and the amount each recipient will take depends on events occurring long after the document was executed and on the system of representation that applies.

32. The definition employed here is based on UPC § 2-709(c) and is the system of representation used in the intestacy chapter under the new code. *See* WIS. STAT. § 852.01(1)(b), (d), and (f).

33. Recall that, absent evidence of contrary intent, survival must be by 120 hours. WIS. STAT. § 854.03.

34. WIS. STAT. § 854.04(1)(a).

- The share of any predeceased child is divided among that child's issue in the same way as the first division, repeating until the property is fully allocated among surviving issue.[35]

In addition, if a statute or governing instrument calls for distribution of property to the descendants of a designated person "by representation," then the per stirpes system applies.[36]

The definition of per stirpes used in the new code is often referred to in the literature as "strict" or "classic" per stirpes. By contrast, many—if not most—states construe "per stirpes" to mean what some commentators call "modern per stirpes,"[37] a system which is akin to what the Wisconsin Probate Code defines as "modified per stirpes."[38] For this reason, this book refers to the Wisconsin per stirpes system as "[strict] per stirpes."

Modified per stirpes.[39] If a statute or governing instrument calls for property to be distributed to the issue of a designated person by the system of "modified per stirpes":

- The property is divided into equal shares *at the generation nearest to the designated person that contains one or more surviving*[40] *issue.* A share is allocated for each surviving person at that generation and for each deceased person at that generation who left surviving issue.[41]

---

35. WIS. STAT. § 854.04(1)(b).

36. This is fundamentally different from the meaning of "by representation" under the UPC, where, in the absence of evidence of contrary intent, it refers to the system of *per capita at each generation.* UPC § 2-709(b). It is also different from the meaning of "representation" under the intestacy provisions of the prior Wisconsin Code, where it meant what is now called "modified per stirpes."

37. DUKEMINIER and JOHANSON, note 25, *supra*, at 81-82, 792-95.

38. WIS. STAT. § 854.04(2).

39. This system of representation is intended to be the same as that of prior WIS. STAT. § 852.03(1) (1995-96). *See* Drafting Committee Notes to WIS. STAT. § 854.04.

40. *See* note 33, *supra*.

41. WIS. STAT. § 854.04(2)(a).

- The share of a deceased person is divided among that person's issue in the same way, repeating until the property is fully allocated.[42]

Per capita at each generation. If a statute or governing instrument calls for property to be distributed to the issue of a designated person by the system of "per capita at each generation":

- The property is divided into equal shares *at the generation nearest to the designated person that contains one or more surviving*[43] *issue*. A share is allocated for each surviving person at that generation and for each deceased person at that generation who left surviving issue.[44]
- The shares of any deceased persons who left surviving issue *are combined and divided among their surviving issue as though all of those issue were the issue of one person,* repeating until the property is fully allocated.[45]

Note that under the logic of all three systems of representation, the following individuals are disregarded when determining shares:

- A deceased person who left no surviving issue,[46] and
- A person who has a surviving ancestor who is eligible to receive a share.[47]

In addition, if the transfer is made under a governing instrument (rather than under a statute), the statutory definitions yield to a finding of the contrary intent of the person who executed the instrument.[48]

---

42. WIS. STAT. § 854.04(2)(b).

43. *See* note 33, *supra*.

44. WIS. STAT. § 854.04(3)(a).

45. WIS. STAT. § 854.04(3)(b). This definition of per capita at each generation is based on that in UPC §§ 2-709(b) and 2-106.

46. WIS. STAT. § 854.04(5)(a).

47. WIS. STAT. § 854.04(5)(b).

48. WIS. STAT. § 854.04(6). Extrinsic evidence may be used to construe that intent. *Id.*

Insofar as the Drafting Committee could determine, under prior Wisconsin statutes and case law there were no established definitions for the terms per stirpes, modified per stirpes, or per capita at each generation. Moreover, the term representation was defined only with respect to two specific uses in the statutes, and these two definitions were inconsistent.[49] Many practitioners were confident that when used in an estate planning instrument, the term representation meant the system now defined as "per stirpes," while others were equally confident that the term meant the system now defined as "modified per stirpes," because that was the system provided for in the intestacy statutes.[50] There is also substantial disagreement about which mode is preferred by the "typical" client.[51]

The following illustrations and discussion are drawn from the Comment to UPC § 2-106. The discussion has been edited to conform to current Wisconsin usage.

[49.] The definition of representation used in the intestacy statute was the one now defined as "modified per stirpes" (*see* prior WIS. STAT. § 852.03(1) (1995-96)), while the definition used for the statutory basic wills was the one now defined as "per stirpes" (*see* prior WIS. STAT. § 853.50(1) (1995-96)).

[50.] *See* prior WIS. STAT. § 852.03(1) (1995-96). Under the new code, the system of representation used in intestacy has been changed to [strict] per stirpes. *See* WIS. STAT. § 852.01 and earlier discussion in section 2.04C, *supra*.

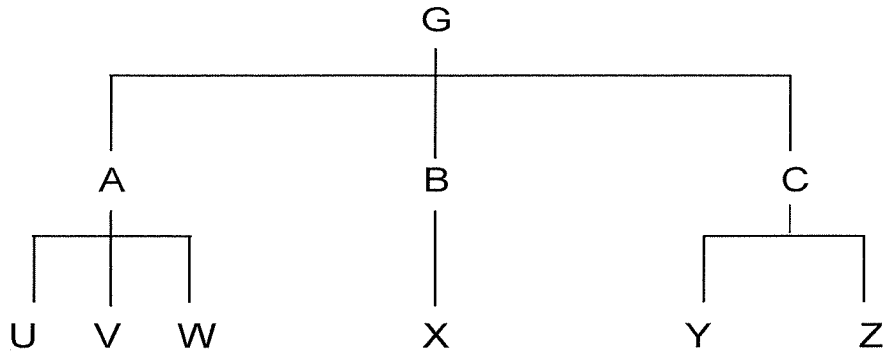
The use of these terms is inconsistent in other jurisdictions as well. In a large majority of states, courts interpret a per stirpes distribution to mean what the new code defines as *modified* per stirpes. Some states distinguish between gifts "by representation" (which pass by modified per stirpes) and gifts "per stirpes" (which pass by strict per stirpes); other variations abound. *See* DUKEMINIER and JOHANSON, note 25, *supra*, at 792-95; RESTATEMENT (THIRD) OF PROPERTY § 2.3 comment d (Tent. Draft No. 2, 1998); 23 AM. JUR. 2d *Descent and Distribution* § 73 (1983 updated 1997).

[51.] The Comment to UPC § 2-106 includes a summary of research conducted by Fellows of the American College of Trust and Estate Counsel suggesting that the per capita at each generation system of representation is preferred by most clients. *See* Comment to UPC § 2-106, *citing* Young, *Meaning of "Issue" and "Descendants,"* 13 ACTEC PROBATE NOTES 225 (1988). *See also* Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 66 NW. U. L. REV. 626 (1971).

However, the practitioners on the Drafting Committee were unanimous in their belief that the typical client prefers the [strict] per stirpes system of representation. For that reason, the intestacy provisions in the new code were changed from the modified per stirpes system to the [strict] per stirpes system.

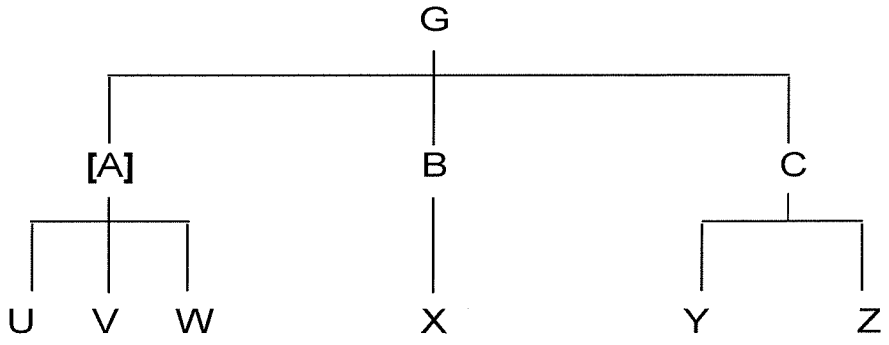
To illustrate the differences among the three systems, consider a family, in which G dies intestate. G has 3 children, A, B, and C. Child A has 3 children, U, V, and W. Child B has 1 child, X. Child C has 2 children, Y and Z. Consider four variations.

Variation 1: All three children survive G.



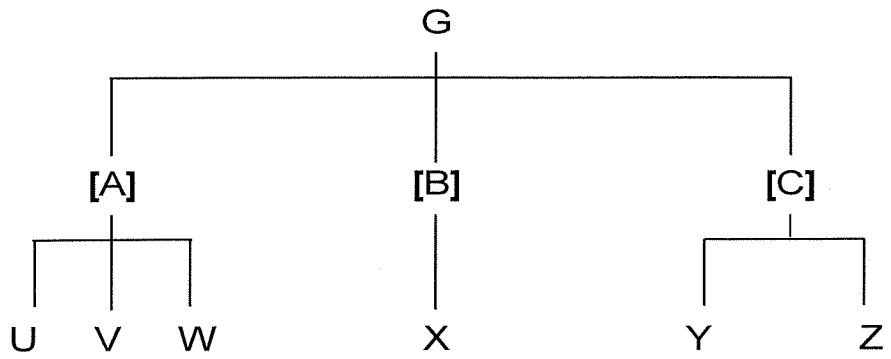
Solution: All three systems reach the same result: A, B, and C take 1/3 each.

Variation 2: One child, A, predeceases G; the other two survive G.



Solution: Again, all three systems reach the same result: B and C take 1/3 each; U, V, and W take 1/9 each.

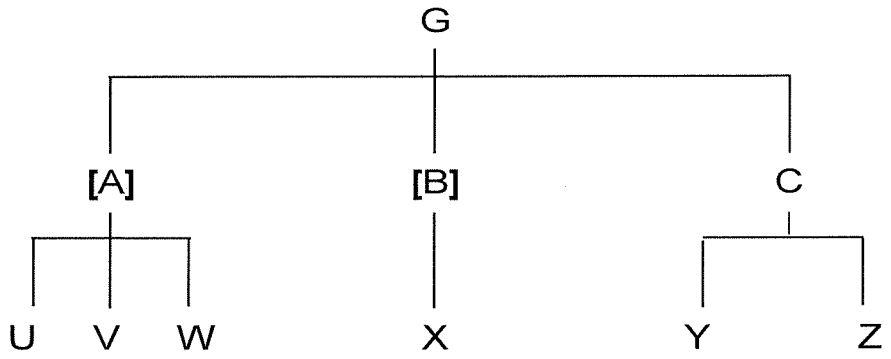
Variation 3: All three children predecease G.



Solution: The modified per stirpes and per capita at each generation systems reach the same result: U, V, W, X, Y, and Z take 1/6 each.

The [strict] per stirpes system gives a different result: U, V, and W take 1/9 each; X takes 1/3; and Y and Z take 1/6 each.

Variation 4: Two of the three children, A and B predecease G; C survives G.

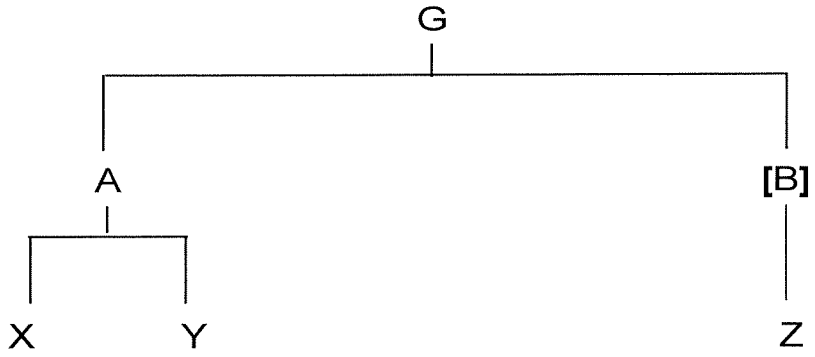


Solution: In this instance, the per capita at each generation system departs from the modified per stirpes system. The per capita at each generation system is premised on a desire to provide equality among those equally related. Under this system, C takes 1/3 and

the other two 1/3 shares are combined into a single share (amounting to 2/3 of the estate) and distributed as if C, Y, and Z had predeceased G; the result is that U, V, W, and X take 1/6 each. (2/3 divided by 4 equals 2/12 or 1/6.)

The result reached under modified per stirpes is the same as under the [strict] per stirpes system in this instance: C takes 1/3, X takes 1/3, and U, V, and W take 1/9 each.

Effect of disclaimer. Because the disclaimer statute provides that *only the disclaimed property* is distributed as though the disclaimant had predeceased,[52] a recipient cannot use disclaimer to effect a change in the division of an estate. To illustrate this point, consider the following example:



As it stands, G's estate is divided into two equal parts: A takes half and B's child, Z, takes the other half. Suppose, however, that A files a disclaimer under Wis. Stat. § 854.13. A cannot affect the basic division of G's estate by this maneuver, even if the system of modified per stirpes or per capita at each generation applies. In this example, the "disclaimed property" is A's share (1/2) of G's estate; thus the 1/2 interest renounced by A devolves to A's children, X and Y, who take l/4 each.

---

52. WIS. STAT. § 854.13(7)(a).

If the disclaimer statute had provided that G's "estate" is to be divided as if A predeceased G, under a modified per stirpes or per capita at each generation dispositive plan, A could have used disclaimer to increase the share going to his children from 1/2 to 2/3 (1/3 for each child) and to decrease Z's share to 1/3.

C. Nonexoneration of Encumbrances on Specifically Transferred Property—Wis. Stat. § 854.05

Under the new code, encumbrances on specifically transferred property[53]—what under a will would be termed a "specific bequest" or "specific devise"—are not extinguished unless the governing instrument, either expressly or as construed by extrinsic evidence, provides otherwise.[54]

Encumbrances include mortgages, liens, pledges, and other security agreements that are encumbrances on property.[55] If a debt that is secured by an encumbrance on specifically transferred property is satisfied out of other assets, the transferee may receive the property only by repaying the person or entity who held the assets used to pay the debt, unless the transferor intended otherwise.[56]

New Wis. Stat. § 854.05 is an extension of prior Wis. Stat. § 863.13 (1995-96), which provided that encumbrances of property specifically devised *under a will* would not be exonerated.[57] The new rule extends the

---

53. "Specifically transferred property" refers to both real and personal property.

54. WIS. STAT. § 854.05(2)(a) and (5).

55. WIS. STAT. § 854.05(1)(b).

56. WIS. STAT. § 854.05(2)(b) and (5). Parallel rules provide a similar result for debts against property held in joint tenancy or as survivorship marital property (WIS. STAT. § 854.05(3) based on prior WIS. STAT. § 863.13(2) (1995-96)) and for debts secured by life insurance on the decedent's life. (WIS. STAT. § 854.05(4) based on prior WIS. STAT. § 863.13(3) (1995-96).)

57. The Drafting Committee did not attempt to determine the status of an encumbrance on a specific bequest of personal property under prior WIS. STAT. § 863.13 (1995-96) (which referred to specific *devises*) or under the common law. Under prior law, there may have been a distinction between bequests and devises; for example, under WIS. STAT. § 990.01(4), a "bequest" includes a devise, but there is no parallel statement that "devise" includes a

"nonexoneration" rule to specific transfers under *any* governing instrument. In addition, it follows the parallel rule in the UPC in providing that a general directive in a governing instrument to pay debts does not give rise to a presumption of exoneration.[58]

The nonexoneration rule, like the other default rules in chapter 854, is based on the presumed intent of the person making the transfer. The common law assumes that testators wanted specific devises to move to the recipient "free and clear," with the debt paid out of the residual of the estate. The modern trend has been to reverse that presumption,[59] but that position is by no means universal.[60] In any case, the best practice is to determine the transferor's preference and draft that preference into the document whenever possible. The drafter should not assume that any given transfer fits the typical situation assumed by the statute,[61] and there is also no way to know what law will apply at the time the transfer actually takes place.

D. Predeceased Transferee; Antilapse—Wis. Stat. § 854.06

"Antilapse" refers to the situation where a beneficiary is required to survive the decedent[62] but predeceases instead. In this situation, ordinarily

---

bequest. This ambiguity is resolved in the new code, where "devise" covers both real and personal property. WIS. STAT. § 851.065. In addition, the new statute removes doubt by referring to the generic "transfer."

58. WIS. STAT. § 854.05(5); UPC § 2-607.

59. *See* Comment to UPC § 2-607.

60. Many states still follow the common law rule. *See* DUKEMINIER and JOHANSON, note 25, *supra*, at 471.

61. This is especially true given that the most common encumbered asset to be specifically transferred probably is a home, and tax and market considerations encourage homeowners to use "home equity" loans in preference to other lines of credit. Thus, WIS. STAT. § 854.05 can have the (perhaps unintended) effect of transferring routine debt to the recipient of the homestead.

62. In general, survivorship is required under wills and revocable nonprobate transfers. Under new WIS. STAT. § 701.115, this includes revocable trusts. For a discussion of the requirement of survival, *see* section 4.02A, *supra*.

the transfer would lapse and pass as part of the residue.[63] An "antilapse" statute changes this result for certain "covered" beneficiaries, in order to implement the presumed intent of the transferor.[64]

Under the new code, Wis. Stat. § 854.06 provides that, if a beneficiary of an outright transfer under a revocable governing instrument executed by the decedent does not survive the decedent,[65] and that beneficiary is:

- A grandparent or issue of a grandparent;[66] or
- A stepchild of the decedent (subject to Wis. Stat. § 854.15);[67]

---

63. Lapsed transfers from the residue are discussed later in this section.

64. The term "antilapse" is actually a misnomer as applied to the statutes in almost all states. Even if the statute applies, the transfer still lapses; *i.e.*, it does *not* go to the named beneficiary, or to the beneficiary's estate. However, instead of having the gift go to the residue of the transferor's governing instrument, a substitute gift to the issue of the beneficiary is created. (Two states, Iowa and Maryland, arguably have true antilapse statutes. Louisiana has none. *See* WAGGONER, ET AL., note 21, *supra*, at 350, 359-60.)

65. Under new WIS. STAT. § 854.03, survival must be for 120 hours unless the transferor has indicated otherwise.

For the purposes of this section, a predeceased transferee includes a transferee who is deemed to have predeceased under the disclaimer provisions of new WIS. STAT. § 854.13.

66. WIS. STAT. § 854.06(2)(a). This provision is subject to WIS. STAT. § 854.21 (defining persons included in family groups or classes).

67. WIS. STAT. § 854.06(2)(b). A "stepchild" is a child of the decedent's surviving, deceased or former spouse, who is not also a child of the decedent. WIS. STAT. § 854.06(1)(c).

Subject to evidence of contrary intent, new WIS. STAT. § 854.15 revokes provisions in favor of a former spouse and relatives of the former spouse who are not also relatives of the decedent transferor. Thus, if the decedent were divorced after creating the transfer, the transfer to a step-child would be presumed revoked, since by definition a stepchild is not a child of the decedent. Consider the following example:

Facts: A's revocable living trust leaves $5,000 to BC, who is the child of spouse B. BC predeceases A, leaving issue.

Analysis: Subject to sufficient evidence of A's contrary intent, the $5,000 would go to BC's issue. However, if A and B were to become divorced subsequent to A's creation of the trust, then the presumption would be reversed—unless there were sufficient evidence of A's contrary intent, the $5,000 would go to the residue of the trust.

and the beneficiary has issue who *do* survive the decedent, then the issue of the beneficiary take the transfer by the system of [strict] per stirpes,[68] unless there is a finding of contrary intent of the decedent.[69] If any requirement of the statute is not met, then the transfer becomes part of the residue of the governing instrument that created the transfer.[70]

The antilapse statute applies to any "revocable provision in a governing instrument executed by the decedent,"[71] including:

- A gift to an individual, whether or not the individual is alive at the time of the execution of the instrument;[72]
- A share in a class gift, if a member of the class dies after the execution of the instrument;[73]
- An appointment by the decedent under a power of appointment.[74]

As noted, the operation of the statute yields to a finding of the contrary intent of the transferor. Of course, the best evidence of that intent is an explicit designation of contingent beneficiaries in the governing

---

68. WIS. STAT. § 854.06(3). See the discussion of per stirpes representation in section 4.02B, *supra*.

69. Extrinsic evidence may be used to construe that intent. WIS. STAT. § 854.06(4).

70. *See* WIS. STAT. § 854.07. *See also* In re Radcliffe Estate, 194 Wis. 330, 216 N.W. 501 (1927).

71. A "revocable provision" is a provision that the transferor had the power to change or revoke immediately before death. WIS. STAT. § 854.06(1)(b).

72. WIS. STAT. § 854.06(1)(a)1. This provision is the same as that of prior WIS. STAT. § 853.27(2)(a) (1995-96).

73. WIS. STAT. § 854.06(1)(a)2. This provision is the same as that of prior WIS. STAT. § 853.27(2)(b) (1995-96). The Wisconsin rule is different from that of the UPC, where a class member is covered even if he or she died before the will was executed. *See* UPC § 2-603(a)(4).

74. WIS. STAT. § 854.06(1)(a)3. Issue who would otherwise be substituted for the deceased appointee may not become appointees if excluded under the terms of the power. This provision is the same as that of prior WIS. STAT. § 853.27(2)(c) (1995-96).

Application of an antilapse statute to powers of appointment, such as under WIS. STAT. § 854.06(1)(a)3, is apparently not common, but Halbach and Waggoner have argued that extension of the law to such powers is a "step long overdue." *See* Halbach and Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1123 (1992).

instrument; the statute provides that these beneficiaries will take in preference to the issue of the deceased beneficiary.[75] If there is a series of contingent transferees, but none survive, the substitute gift goes to the issue of the first designated transferee who is a "covered" relative and who has surviving issue.[76]

> ***Example: Facts:*** A provision in A's revocable trust states: "I leave the family spittoon to my longtime friend, Friend; if Friend does not survive me, then I leave the spittoon to my child, Child; if Child also does not survive me, then I leave the spittoon to my first cousin, Cousin. Friend, Child, and Cousin all predecease A; Friend and Cousin are survived by issue, but Child is not.
>
> ***Analysis:*** The first step is to work through the chain of named beneficiaries. Since Friend did not survive, we look to Child; since Child did not survive, we look to Cousin. Since Cousin did not survive, we look to the antilapse statute. The question now becomes, where does the statute attach—to the beginning of the chain (Friend), or to the end of the chain (Cousin)? Wis. Stat. § 854.06(4)(b) tells us to begin with the first group—or in this case, the first individual—*i.e.*, Friend. However, Friend is not a covered beneficiary for purposes of antilapse, because Friend is not a grandparent, issue of a grandparent, or stepchild. Therefore we look to Child. As A's issue, Child is a covered beneficiary; however, the statute does not apply because Child left no issue. Next we look to Cousin. As a first cousin, Cousin is a covered beneficiary. Therefore, Cousin's issue take the spittoon, per stirpes.

---

75. WIS. STAT. § 854.06(4)(b).

76. *Id.*

New Wis. Stat. § 854.06 is an extension and modification of the antilapse rule for wills at prior Wis. Stat. § 853.27 (1995-96).[77] Differences from the prior statute include:[78]

- The new provision yields to extrinsic evidence of contrary intent;[79]
- The new provision applies to revocable transfers under all governing instruments, not just wills;
- The class of "covered" relatives is limited to the transferor's grandparents or issue of the grandparents[80] but is extended to include the transferor's stepchildren;[81] and
- The system of representation is [strict] per stirpes.[82]

---

77. The new provisions are based on UPC §§ 2-603, 2-706, and 2-707. UPC § 2-603 applies the antilapse rule to wills; UPC § 2-706 applies the rule to nontestamentary governing instruments such as life insurance, retirement plans and P.O.D. accounts; UPC § 2-707 extends the antilapse rule to all future interests under trusts. The UPC provisions are very complex, and there are many differences between the new Wisconsin statute and the UPC.

The Drafting Committee assumed that courts will interpret the new rule to avoid inequitable situations, such as those discussed in the Comment to UPC § 2-603. The committee concluded that the statement of the rule of UPC § 2-603(c) (and similar provisions in §§ 2-706(c) and 2-707(c)) was too complex to justify its adoption, given the anticipated small number of situations in which it would apply. *See* Drafting Committee Notes to WIS. STAT. § 854.06.

78. Also note that the 120-hour survival rule of new WIS. STAT. § 854.03 applies to the issue of the transferee. For purposes of WIS. STAT. § 854.03, it appears that the "event" that needs to be survived by 120 hours is the death of the decedent, not the death of the beneficiary, even if the beneficiary dies during the 120 hours after the decedent's death. *See* WIS. STAT. § 854.06(3).

The new statute also reverses the case law regarding where the statute attaches if none of the beneficiaries in a chain of contingent beneficiaries survive. *See* Estate of Hillman, 122 Wis.2d 711, 363 N.W.2d 588 (1985) (holding that the prior antilapse statute (prior WIS. STAT. § 853.27(1) (1995-96)) applied to the *last* contingent beneficiary in a sequence).

79. Prior WIS. STAT. § 853.27(1) (1995-96) required that contrary intent be "indicated by the will."

80. Prior WIS. STAT. § 853.27 (1995-96) applied to any blood relative. *See* Estate of Haese, 80 Wis.2d 285, 259 N.W.2d 54 (1977).

81. The provision extending coverage of the antilapse rule to stepchildren is subject to WIS. STAT. § 854.15 (revocation of provisions in favor of the former spouse and relative of the former spouse). *See* note 67, *supra*.

82. Prior WIS. STAT. § 853.27 (1995-96) stated that "the issue as represent the deceased relative" take the deceased relative's share, but the system of representation was not specified.

A note regarding "words of survivorship." As noted above, the operation of the antilapse statute yields to the contrary intent of the decedent transferor, especially as stated in the governing instrument. But what if a document says, "I leave my family spittoon to my child, C, if C survives me"—as contrasted to simply: "I leave my family spittoon to my child, C"—with nothing said about what should happen if C does *not* survive?[83] What significance should be attached to the use of the clause, "if C survives me"?

There is a surprising amount of controversy on this issue, and the case law goes both ways.[84] The UPC adopts the position that words of survivorship are not in themselves sufficient indication of an intent to defeat antilapse provisions.[85] The UPC drafters argue that the intent behind such words is inherently ambiguous, and use of the clause usually results from boilerplate or happenstance, rather than from the considered judgment of the transferor. The contrary position is that most estate planners and clients believe that words of survivorship express the transferor's intent that, if the beneficiary predeceases, the transfer truly lapses—*i.e.*, that the antilapse rule *not* apply. By not including the UPC provision, the Drafting Committee adopted the latter position, which is the majority rule[86] and which is supported by Wisconsin case law.[87]

---

83. Assume also that there is no extrinsic evidence indicating the transferor's preferences; the transferor never thought about the question because it was taken for granted that children survive their parents.

84. *See* Comment to UPC § 2-603(b)(3). *See also* Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?* 77 MINN. L. REV. 639, 651-53 (1993); Fellows, *Traveling the Road of Probate Reform: Finding the Way to Your Will (A Response to Professor Ascher)*, 77 MINN. L. REV. 659 (1993).

85. UPC § 2-603(b)(3).

86. Comment to UPC § 2-603(b)(3); *see also* Halbach and Waggoner, note 74, *supra*, at 1105.

87. *See* Estate of Stewart, 270 Wis. 610, 72 N.W.2d 334 (1955) (holding that clause in decedent's will disposing of residue to children "living at the time of [his] death" prevails over antilapse statute that would allow decedent's grandchildren to take").

From a drafting point of view, the implication of this discussion of antilapse is straightforward: practitioners should determine the client's preferences, and each transfer should be accompanied by:

- An explicit designation of contingent beneficiaries, if any, including specific mention of the issue of beneficiaries, if they are to take; and/or
- A statement that if a given beneficiary—or all of the contingent beneficiaries—predeceases, the transfer becomes part of the residue.

If the residue itself is the subject of the transfer, then there should be a "worst case" beneficiary that is certain to be available.[88] If this strategy is followed, there will never be an antilapse problem.

E. Failed Transfer and Residue—Wis. Stat. § 854.07

New Wis. Stat. § 854.07 provides an order of disposition for transfers that lapse and are not "saved" by the antilapse statute:[89]

- If a lapse occurs in some part of a governing instrument other than the residuary clause, the transfer becomes part of the residue of the governing instrument;[90]
- If the lapse occurs in the residue,[91] and the residue is to be transferred to two or more people, then other transfers in the residue are increased proportionately;[92]
- If the residue cannot be effectively transferred because the shares of *all* beneficiaries lapse, and the governing instrument is not the

88. Typical "worst case" beneficiaries are the transferor's heirs under intestacy or a well-established charity.

89. Lapse and antilapse are discussed in section 4.02D, *supra*.

90. WIS. STAT. § 854.07(1).

91. Following the Comment to UPC § 2-604, a transfer of "all of my estate," or "all the assets in this trust" would constitute a residuary transfer.

92. WIS. STAT. § 854.07(2).

transferor's will, then the affected assets go to the "decedent's probate estate";[93]

- If the residue of a will cannot be effectively transferred because the shares of *all* beneficiaries lapse, then the affected assets pass by intestacy.[94]

New Wis. Stat. § 854.07 is based on UPC § 2-604 but has been extended to apply to all governing instruments, rather than just wills. The provisions of the new rule differ somewhat from those applicable to wills under prior Wisconsin law.[95]

As is typical for the provisions in chapter 854, the rules of Wis. Stat. § 854.07 yield to the contrary intent of the transferor, and that intent can be construed by extrinsic evidence.[96] As noted in the previous section, the best way to establish that intent is to make it explicit in the governing instrument.

---

93. WIS. STAT. § 854.07(3). The reference to the "decedent's probate estate" is to the estate of the decedent who executed the governing instrument. See Drafting Committee Notes to WIS. STAT. § 854.07(3).

94. WIS. STAT. § 852.01(1).

95. The rule that nonresiduary lapsed gifts go to the residue is consistent with prior Wisconsin case law for wills and is followed by a large majority of other United States jurisdictions with regard to wills. *See* In re Radcliffe Estate, 194 Wis. 330, 216 N.W. 501 (1927) (holding residue includes all property not otherwise effectively disposed of by will); *see also* WAGGONER, ET AL., note 21, *supra*, at 346.

The rule that lapsed gifts from the residue increase the shares of other takers under the residue is contrary to the rule for wills followed in most United States jurisdictions (*see* WAGGONER, ET AL., note 21, *supra*) and reverses the Wisconsin rule applied in Estate of Mory, 29 Wis.2d 557, 139 N.W.2d 623 (1966), and in subsequent unpublished cases. The UPC drafters believe that the new rule is more likely to comport with the intent of the transferor. *See* WAGGONER, ET AL., note 21, *supra*, at 346. In any case, note that the admissibility of extrinsic evidence means that the rule effectively only creates a presumption.

96. WIS. STAT. § 854.07(4).

F. Nonademption of Specific Gifts in Certain Cases—Wis. Stat. § 854.08

Ademption refers to the common law rule of will interpretation that basically says, "if it's not there, you don't get it."[97] Many states have statutes—such as prior Wis. Stat. § 853.35 (1995-96)—that provide for *non*ademption of specific gifts in certain circumstances. New Wis. Stat. § 854.08 reorganizes the rules of the prior statute and extends them to all governing instruments. Once again, the purpose of this statute is to implement the presumed intent of the transferor. The statute does not apply if the governing instrument— either expressly or as construed from extrinsic evidence—shows the intent that a transfer fail under the described circumstances,[98] or if the transferor gave the subject property to the beneficiary during life, with the intent of satisfying the specific gift.[99]

As extended to all governing instruments, the Wisconsin nonademption rules provide that the specific beneficiary may have the right to all or part of the proceeds if property that is the subject of a specific gift is:

- Sold by the person who executed the governing instrument within two years of the person's death;[100]
- Subject to any casualty compensable by insurance;[101] or
- Taken by condemnation prior to the death of the person who executed the governing instrument.[102]

---

97. In wills law, the doctrine is sometimes called "ademption by extinction" when the specific gift is simply gone, and "ademption by satisfaction" when it is gone because it has already been given to the recipient named in the will. Ademption by satisfaction is called "advancement" or "satisfaction" in Wisconsin and is covered by WIS. STAT. § 854.08. *See* section 4.02G, *infra*.

98. WIS. STAT. § 854.08(6)(a)1.

99. WIS. STAT. § 854.08(6)(a)2. Extrinsic evidence may be used to construe the transferor's intent in making the gift.

100. WIS. STAT. § 854.08(2).

101. WIS. STAT. § 854.08(3).

102. WIS. STAT. § 854.08(4).

The particular rules may be modified if the guardian or conservator of the transferor was involved in the transaction.[103]

Given that many transferors are likely to prefer outcomes different from those provided by the statute, careful drafting is called for whenever a governing instrument makes a specific transfer of an item of property that has significant value.

G. Advancement and Satisfaction—Wis. Stat. § 854.09

Sometimes a decedent made transfers during life that were intended to reduce what the recipient would receive at the decedent's death. In the doctrine and commentary on probate, the term "advancement" is typically used to refer to lifetime gifts intended to come out of the *intestate* share, and the term "satisfaction" (sometimes "ademption by satisfaction") is typically used to refer to gifts that are intended to reduce the recipient's share under a *will*. Under the common law, in many situations, there is a presumption that a gift made to a child taking as intestate heir or to a beneficiary under a will is an advance on what is to be received at death.[104] However, under both the prior and new codes, Wisconsin is in the group of states that has reversed the common law presumption by statute; under our law, lifetime gifts are presumed *not* to be advances.[105]

---

[103] WIS. STAT. § 854.08(5).

[104] For a discussion of the common law of advancement and of variations in the common law of satisfaction, see DUKEMINIER and JOHANSON, note 25, *supra*, at 121-22, 472.

[105] Given the great problems in proving the intent of the donor, whichever way the presumption goes, it is unlikely to be rebutted. The modern view—reflected in the Wisconsin statute—is that it is more likely that the donor did *not* intend lifetime gifts to be advances on what would be received at death. States adopting this view differ on what type of evidence can be used to rebut the presumption; some allow any evidence of the donor's intent. The UPC generally requires a *contemporaneous* writing by the donor; Wisconsin also requires a writing but has retained its prior provision that the decedent's acknowledgment that the gift is an advance need not be made contemporaneously with the gift.

The presumption that lifetime gifts are not advances has been criticized as essentially eliminating the doctrine of advancement in intestate estates, since people who do not write wills are unlikely to create the requisite documentation of an advance.

Under the prior code, there were separate provisions for advances in testate[106] and intestate[107] estates, but both were simply called "advancements." In Wis. Stat. § 854.09, the new code consolidates the prior code's separate provisions regarding advancements and extends the scope of coverage to all governing instruments.[108]

Under new Wis. Stat. § 854.09, a lifetime gift[109] made by a decedent will be treated as full or partial satisfaction of an at-death transfer[110] only if:

- The governing instrument—either expressly or as construed from extrinsic evidence—provides that the gift be taken into account;[111]

---

106. Prior WIS. STAT. § 853.19 (1995-96).

107. Prior WIS. STAT. § 852.11 (1995-96).

108. The UPC has separate provisions for advancement and satisfaction in UPC §§ 2-109 (advancements in intestate estates) and 2-609 (ademption by satisfaction); the provisions in those two sections are similar but not identical. The language of new WIS. STAT. § 854.09 generally tracks UPC § 2-609 and extends that language to cover the effects of lifetime transfers on *all governing instruments*, not just on probate transfers. However, the Wisconsin statute departs from the UPC in two significant ways, as detailed in the Drafting Committee Notes to WIS. STAT. § 854.09.

109. This includes an incomplete gift that became complete on the decedent's death. WIS. STAT. § 854.09(1). These gifts include beneficiary designations on revocable transfers such as life insurance contracts, trusts, or P.O.D. designations. *See* Comment to UPC § 2-609.

110. The rules of WIS. STAT. § 854.09 can apply even if the transfer at death is a specific transfer, for example a specific bequest under a will. The Comment to UPC § 2-609 gives the following example:

> If a testator makes a devise of a specific item of property, and subsequently makes a gift of cash or other property to the devisee, accompanied by the requisite written intent that the gift satisfies the devise, the devise is satisfied under this section even if the subject of the specific devise is still in the testator's estate at death (and hence would not be adeemed under the doctrine of ademption by extinction).

Also, the Comment to UPC § 2-109 emphasizes that a donee need not be a prospective heir under intestacy at the time of the lifetime gift; what matters is that the person is an heir at the donor's death. WIS. STAT. § 854.09 uses different language than that of the UPC, but is intended to achieve the same result.

111. WIS. STAT. § 854.09(1)(a).

- The decedent declared in a document—either expressly or as construed from extrinsic evidence—that the gift is an advance against what the transferee would receive at the decedent's death, whether or not the document was contemporaneous with the gift;[112] or
- The transferee acknowledged in writing—either expressly or as construed from extrinsic evidence—that the gift is an advance against what the transferee would receive at the decedent's death.[113]

If a lifetime gift is found to be an advance, the computation of the resulting shares is done by the "hotchpot" method, under common law. This method—which involves adding the advance to the hotchpot that will be distributed, and then deducting the advance from the recipient's share of the hotchpot—is explained and illustrated in the Comment to UPC § 2-109.[114]

To be an advance, a gift need not be outright. Rather, it can be in the form of a will substitute, such as designation of the recipient as the beneficiary of the decedent's life insurance policy or as the beneficiary of the remainder interest in a revocable inter vivos trust.[115]

If the recipient of the lifetime gift predeceases the decedent, the transfer is still treated as an advance, unless the transferor has declared otherwise in a document.[116] Thus, if a governing instrument transfers "$10,000 to my child C; or if C does not survive, then to C's children," and C does not survive, then any advance to C will be charged against the transfer to the children.

---

112. WIS. STAT. § 854.09(1)(b).

113. WIS. STAT. § 854.09(1)(c).

114. The Comment to UPC § 2-109 discusses a complication that arises in the hotchpot calculation if an heir disclaims. That situation does not apply under the Wisconsin Probate Code, because WIS. STAT. § 854.09(3) provides a rule different from UPC § 2-109(c).

115. Comments to UPC §§ 2-109 and 2-609.

116. WIS. STAT. § 854.09(3). The declaration can be express or as construed from extrinsic evidence. *Id.* The examples that follow assume that such a declaration does not exist.

It is important to note that the new code does not require that the advance be given to the same person who would be the recipient at death. The advance may, for example, have been a lifetime gift to a spouse or child of the at-death recipient. This is a change from the prior Wisconsin provisions, which defined advancements in testate and intestate estates as lifetime gifts to the at-death recipients.[117] The UPC, upon which the change is based, uses the following example to explain the purpose of such a provision:

> G's will made a $20,000 devise to his child, A. G was a widower. Shortly before his death, G in consultation with his lawyer decided to take advantage of the $10,000 annual gift tax exclusion and sent a check for $10,000 to A and another check for $10,000 to A's spouse, B. The checks were accompanied by a letter from G explaining that the gifts were made for tax purposes and were in lieu of the $20,000 devise to A. [The statute] . . . allows the $20,000 devise to be fully satisfied by the gifts to A and B.[118]

H. Gift of Securities—Wis. Stat. § 854.11

New Wis. Stat. § 854.11 establishes rules for dealing with problems that can emerge with respect to gifts of securities,[119] such as mergers, stock splits and stock dividends. The provisions are similar to those under the prior code.

Under the statute, in general:

- A transfer of securities includes any additional securities acquired by reason of the transferor's ownership of the specifically transferred securities.[120]

---

117. *See* prior WIS. STAT. § 852.11 and WIS. STAT. § 853.19 (1995-96).

118. Comment to UPC § 2-609.

119. The definition of security in WIS. STAT. § 854.11(1) is based on UPC § 1-201(43).

120. WIS. STAT. § 854.11(2). This provision is based on UPC § 2-605, expanded to include transfers under any governing instrument. It is similar to prior WIS. STAT. § 853.35(6) (1995-96), which applied to transfers of securities under wills.

- A gift of securities will be construed as specific.[121]

Both these provisions yield to a finding of contrary intent, which can be shown by extrinsic evidence.[122]

After-acquired securities[123] are presumed to be included in the transfer if—but not only if:[124]

- They were acquired as a result of ownership of the transferred securities;[125] and
- They were securities of:
  — The same organization acquired as a result of a plan of reinvestment,[126]
  — The same organization acquired by action initiated by the organization or any successor, related or acquiring organization,[127] or
  — Another organization acquired as a result of a merger, consolidation, reorganization or other distribution by the organization or any successor, related or acquiring organization.[128]

---

121. WIS. STAT. § 854.11(3). This provision is based upon prior WIS. STAT. § 853.33 (1995-96), expanded to include transfers under any governing instrument.

122. WIS. STAT. § 854.11(4).

123. WIS. STAT. § 854.11(2)(a).

124. WIS. STAT. § 854.11(2) is based on UPC § 2-605 (a). The UPC Comment to that section states that the list of conditions under which additional securities can be included is "not exclusive," and provides a variety of examples of other situations where the statute might apply.

125. WIS. STAT. § 854.11(2)(b).

126. WIS. STAT. § 854.11(2)(c)1.

127. WIS. STAT. § 854.11(2)(c)2. This provision does not include any such securities acquired by exercise of purchase options.

128. WIS. STAT. § 854.11(2)(c)3.

I. Beneficiary Who Kills Decedent—Wis. Stat. § 854.14

The new code contains a consolidated "slayer statute" at Wis. Stat. § 854.14,[129] which is organized to track UPC § 2-803 while retaining several unique provisions of prior Wisconsin law.[130] The Comment to UPC § 2-803 explains the purpose of the statute:

> It is now well accepted that the matter (of the killing of a decedent by a beneficiary) is not exclusively criminal in nature but is also a proper matter for probate courts. The concept that a wrongdoer may not profit by his or her own wrong is a civil concept, and the probate court is the proper forum to determine the effect of killing on succession to the decedent's property.

Subject to some important exceptions discussed below, under the statute the unlawful and intentional killing of the decedent:

- Revokes a provision in a governing instrument that, at the decedent's death, transfers or appoints property to the killer, confers a power of appointment on the killer, or appoints the killer to serve in any fiduciary or representative capacity.[131]
- Severs the interests of the decedent and killer in property held by them as joint tenants with the right of survivorship or as survivorship marital property and transforms them into tenancies in common or marital property.[132]
- Revokes every statutory right or benefit to which the killer may have been entitled by reason of the death of the decedent.[133]

---

129. Under prior Wisconsin law, "slayer statutes" appeared in at least six different places: WIS. STAT. §§ 632.485, 700.17(2), 852.01(2m), 853.11(3m), 895.43, and 895.435. These statutes were enacted at different times and were not fully consistent. The new statute consolidates the provisions in one place and eliminates the discrepancies among them.

130. Provisions that were retained from prior law are noted in the discussion that follows.

131. WIS. STAT. § 854.14(2)(a). Examples of fiduciary or representative appointments include personal representative, executor, trustee, or agent.

132. WIS. STAT. § 854.14(2)(b).

133. WIS. STAT. § 854.14(2)(c).

The statute does not limit its application to revocable transfers; rather it applies to all dispositions of property and all appointments.[134] In addition, the statute includes a provision that "wrongful acquisition of property by a killer not covered by this section shall be treated in accordance with the principle that a killer cannot profit from his or her wrongdoing.[135]

Provisions in favor of the killer are given effect as though the killer had disclaimed[136] the transfers.[137] Thus, the killer's issue are eligible recipients, either directly or by operation of the "antilapse" provisions of Wis. Stat. § 854.06.[138]

For purposes of this section,[139] a final judicial determination of criminal accountability for the unlawful and intentional killing of the decedent conclusively establishes the convicted person as the decedent's killer.[140] Likewise, an adjudication of delinquency on the basis of the unlawful and

---

134. This provision differs from that in the UPC, which is limited to revocable instruments. (However, as noted below, the UPC does have a provision stating that "a killer cannot profit from his or her wrongdoing.") The decision to explicitly not limit application of WIS. STAT. § 854.14 to revocable transfers is based on the provisions of prior WIS. STAT. § 895.435 (1995-96).

135. WIS. STAT. § 854.14(4). This provision is based on UPC § 2-803(f).

136. The statute states that the property will pass as though the killer had "disclaimed," rather than simply stating that it will pass as though the killer had predeceased. The wording, which is taken from the UPC, is used to emphasize that it is *only the killer's share* that is redirected; the distribution of the estate as a whole is not affected. The effect of disclaimer on property is discussed in section 4.03B, *supra*.

137. WIS. STAT. § 854.14(3). In the case of a revoked nomination in a fiduciary or representative capacity, the provision will be given effect as if the killer predeceased the decedent.

138. However, if the court finds this transfer inappropriate under the circumstances, it can modify the distribution under WIS. STAT. § 854.14(6)(a). See the discussion below of the exceptions to the application of this section.

139. This rule also applies for purposes of the deferred marital property elective share in WIS. STAT. § 861.02(8). See discussion at section 5.02C, *infra*.

140. WIS. STAT. § 854.14(5)(a). Following the Comment to UPC § 2-803(g), "criminal accountability" includes accountability of an accomplice or co-conspirator.

intentional killing of the decedent conclusively establishes the adjudicated person as the decedent's killer.[141] Absent a criminal conviction or a delinquency adjudication, the probate court, if requested by an interested person, will determine whether the killing was unlawful and intentional for purposes of this section using the "preponderance of the evidence" standard.[142]

There are two important exceptions to the operation of the rules in this section:

- The rules do not apply if the court finds that, under the circumstances of a specific case, the decedent's wishes would best be carried out by a different disposition of the property.[143]
- The rules do not apply if the decedent provided in his or her will, by specific reference to this section, that this section will not apply. Thus even if the waiver is to apply to a nonprobate instrument, the waiver itself must be in the decedent's will.[144]

J. Revocation of Provisions in Favor of Former Spouse—Wis. Stat. § 854.15

The new code provides for the revocation of provisions in favor of a former spouse or a relative of the former spouse, under a governing instrument executed by the decedent before a divorce or an annulment.[145]

---

141. WIS. STAT. § 854.14(5)(b). This provision is based on prior WIS. STAT. 852.01(2m)(bg) (1995-96).

142. WIS. STAT. § 854.14(5)(a). This standard replaces the higher "clear and convincing" standard in prior WIS. STAT. § 852.01(2m)(br) (1995-96).

143. WIS. STAT. § 854.14(6)(a).

144. The Drafting Committee concluded that the attestation requirement for wills would help insure that the waiver is intentional and genuine. *See* Drafting Committee Notes to WIS. STAT. § 854.14. Under the prior statutes, the decedent could waive the operation of the slayer rule in a will with respect to a beneficiary under the will or by contract with respect to the beneficiary of a contract. *See* prior WIS. STAT. § 853.11(3m)(am) and § 895.43 (1995-96). The UPC does not provide for such a waiver.

The most likely use of a waiver would be in a situation of assisted suicide.

145. WIS. STAT. § 854.15(2) and (3).

These provisions, which are based on UPC 2-804, expand a substantially narrower rule that has long existed in the Wisconsin statutes regarding wills.[146] The new statute differs from the prior law in three significant ways:

- Its provisions apply to all revocable governing instruments executed by the decedent, rather than to wills alone;[147]
- It revokes provisions to the former spouse *and any relatives of the former spouse* who are not also relatives of the decedent after the divorce or annulment;[148] and
- Rather than being an absolute rule, it essentially creates a presumption that yields to evidence of contrary intent.[149]

Note that neither the UPC nor the Wisconsin rule revokes transfers by relatives of one former spouse to the other former spouse. For example, while the statute revokes a transfer from a former stepparent to a former

---

146. *See* prior WIS. STAT. § 853.11(3) (1995-96).

147. Commentators have long argued that the revocation at divorce rule should be extended to nonprobate transfers. However, with just a few notable exceptions, courts have declined to do so, holding that it is a matter for the legislature. The decision in Bersch v. Van Kleek, 112 Wis.2d 594, 334 N.W.2d 114 (1983), which is reversed by the new statute, is typical. Case law and statutes in other jurisdictions are reviewed in the Comment to UPC § 2-804.

148. This provision reverses the holding in Estate of Graef, 124 Wis.2d 25, 368 N.W.2d 633 (1985) (holding revocation of testator's bequest of estate to former spouse did not extend to former spouse's parents, siblings or children). The UPC drafters argue that the extension to the relatives of the former spouse is justified because:

> [D]uring the divorce process or in the aftermath of the divorce, the former spouse's relatives are likely to side with the former spouse, breaking down or weakening any former ties that may previously have developed between the transferor and the former spouse's relatives.

This view is counter to that expressed in a substantial line of cases (including *Graef*) discussed in the Comment to UPC § 2-804, although those decisions were also affected by the absence of permissive language in the statutes under review.

149. WIS. STAT. § 854.15(5)(f). As discussed in section 4.01, *supra*, the statute does not mandate that this intent be formed when the transfer is created.

In contrast to the Wisconsin statute, the UPC rule is almost absolute, allowing exons to the revocation rule only where the express terms of the governing instrument, a court order, or a contract made between the decedent and the former spouse provide otherwise. *See* UPC § 2-804(b).

stepchild, it does not revoke a transfer from a former parent-in-law to a former child-in-law or from a former stepchild to a former stepparent.

Under Wis. Stat. § 854.15(3), a divorce or annulment:[150]

- Revokes any revocable[151] disposition of property[152] by the decedent to the former spouse or relative of the former spouse;[153]
- Revokes any revocable provision conferring a power of appointment on the former spouse or relative of the former spouse;[154]
- Revokes any revocable nomination of the former spouse or relative of the former spouse to serve in a fiduciary or representative capacity;[155]
- Revokes any disposition created by law to the former spouse or relative of the former spouse;[156] and
- Severs the interests of the decedent and the former spouse in property held by them as joint tenants with the right of survivorship or as survivorship marital property, transforming the coownership into a tenancy in common.[157]

---

150. The statute applies to a "divorce, annulment or similar event or proceeding." A "similar event or proceeding" is one that would that would prevent a spouse from being treated as a surviving spouse under the comprehensive definition of surviving spouse in new WIS. STAT. § 851.30. A "former spouse" under the statute is "a person whose marriage to the decedent has been the subject of a divorce, annulment or similar event."

151. "Revocable" is defined at WIS. STAT. § 854.15(1)(e). The statute does not apply to irrevocable instruments, on the assumption that the transferor intended such transfers to be effective irrespective of divorce. This is different from the treatment of irrevocable transfers under the "slayer statute," WIS. STAT. § 854.14, where public policy dictates that even irrevocable transfers be denied effect, unless there is unequivocal evidence of the decedent's contrary intent.

152. "Disposition of property" is defined broadly, to include "a transfer, including by appointment, of property or any other benefit to a beneficiary designated in a governing instrument."

153. WIS. STAT. § 854.15(3)(a).

154. WIS. STAT. § 854.15(3)(c).

155. WIS. STAT. § 854.15(3)(d).

156. WIS. STAT. § 854.15(3)(b).

157. WIS. STAT. § 854.15(3)(e)

However, these revocation provisions do not apply where they are contradicted by the express terms of a governing instrument, a court order, or a binding contract made between the decedent and the former spouse relating to the division of their property.[158] More fundamentally, they do not apply if there is a finding of contrary intent.[159]

Revoked provisions are given effect as if the former spouse and relatives of the former spouse disclaimed[160] the revoked provisions.[161]

K. Abatement—Wis. Stat. § 854.18

Abatement addresses the problem that occurs when there is insufficient property to satisfy the transfers called for by a governing instrument. This is a problem traditionally addressed in the law of wills, but one that could occur under a trust as well. New Wis. Stat. § 854.18 is based on the UPC abatement provisions for transfers under wills[162] and is similar to the provisions under prior law for Wisconsin wills.[163] The primary difference from prior law is that the provisions are expanded to cover all governing instruments, not just wills.

---

158. WIS. STAT. § 854.15(5)(a)-(c). *See also* note 149, *supra*.

In addition, the provisions do not apply where the divorce or annulment is nullified, or where the decedent and the former spouse have remarried each other.

Note that WIS. STAT. § 854.15(6) provides that the effect of a judgment of divorce, annulment, or legal separation on marital property agreements under WIS. STAT. § 766.58 is governed by WIS. STAT. § 767.266(1) (revocation of death provision in marital property agreement).

159. WIS. STAT. § 854.15(5)(d)-(f). Extrinsic evidence may be used to determine the decedent's intent. *Id.*

160. For the significance of the reference to disclaimer, *see* note 136, *supra*.

161. WIS. STAT. § 854.15(4). The antilapse provisions of WIS. STAT. § 854.06 would still apply, in the appropriate circumstances. *See* Comment to UPC § 2-804.

In the case of a revoked representative or fiduciary nomination, the revoked provisions are given effect as if the former spouse and/or relative died immediately before the divorce or annulment. WIS. STAT. § 854.15(4).

162. UPC § 3-902.

163. *See* prior WIS. STAT. § 865.11 (1995-96).

The statute is designed to approximate the way the transferor would want to abate the transfers under the instrument. Thus, if the governing instrument expresses an order of abatement or if the order of abatement in the statute would defeat the decedent's estate plan, the court is to modify the abatement in order to give effect to the intent of the transferor.[164] The order prescribed in the statute also yields to the abatement rules set out in various statutes related to family rights.[165]

Under new Wis. Stat. § 854.18, shares of distributees abate without priority between real and personal property, in the following order:[166]

- Property subject to intestacy, if the governing instrument is a will;
- Residuary transfers under the governing instrument;
- General transfers[167] under the governing instrument; and
- Specific transfers[168] under the governing instrument.

---

164. WIS. STAT. § 854.18(3). The reference to the "decedent's" estate plan is to the plan of the decedent who executed the governing instrument. See Drafting Committee Notes to WIS. STAT. § 854.18(3).

165. WIS. STAT. § 854.18(1)(a). The family rights abatement provisions are WIS. STAT. § 861.06 (satisfaction of deferred marital property elective share under *id.* at 861.02); WIS. STAT. § 853.11(2)(d) (satisfaction of share of omitted spouse under premarital will); WIS. STAT. § 853.25(1)(c)(satisfaction of share of child unintentionally omitted from parent's will).

166. WIS. STAT. § 854.18(1)(a).

167. A "general" transfer is one that confers a general benefit but not a specific asset; for example, the transfer of $10,000.

Following the wording of UPC § 3-902(a) and of prior WIS. STAT. § 863.11(1)(b) (1995-96), new WIS. STAT. § 854.18(1)(b) provides that "a general transfer or devise charged on any specific property or fund is a specific transfer to the extent of the value of the property on which it is charged and upon the failure or insufficiency of the property on which it is charged, it is a general transfer to the extent of the failure or insufficiency." The Drafting Committee understands this language to refer to a situation such as the following:

> D's will specifies that B shall receive $10,000 (a general transfer) from X bank account (specific property). Under WIS. STAT. § 854.18(1)(b), the $10,000 is treated as a *specific* transfer, to the extent that the bank account is available; the remainder abates as a *general* transfer.

168. A "specific" transfer is a transfer of a specific item of property, for example, a painting worth $10,000.

Abatement within each classification is in proportion to the amount of property that each of the beneficiaries would have received under the terms of the governing instrument.[169] If the subject of a preferred transfer is sold or used during the administration of the estate, that transfer will be satisfied by adjustments in, or contributions from, other interests in the remaining assets.[170]

L. Status of Adopted Persons—Wis. Stat. § 854.20 and § 854.21(1)

Rules regarding the status of adopted persons under the new code are located in two adjacent statutes: Wis. Stat. § 854.20 gives the general rules and applies them to *statutes* that refer to children or other issue—intestacy, antilapse, and the like; Wis. Stat. § 854.21(1) repeats those rules for *class gifts* in which adoption is a consideration—gifts to a person's "children," "issue," and the like. The provisions in the new statutes are similar to those of the prior code, with two significant changes:[171]

- Provisions are added to limit the effect of adult adoption under intestacy;[172]
- Extrinsic evidence of the transferor's intent is admissible when the issue of the status of an adopted person arises under a governing instrument.[173]

---

169. WIS. STAT. § 854.18(2)(a).

170. WIS. STAT. § 854.18(2)(b).

171. Two less important changes include clarification of the rule for stepparent adoption (*see* discussion in text) and clarification of the operation of the statute in the case of sequential adoption: if a person is adopted more than once (for example, because an adoptive parent died) then the former adoptive parent is treated as a birth parent for purposes of the statute. WIS. STAT. § 854.20(3).

172. WIS. STAT. § 854.20(4)(b) and § 854.21(1)(a)2. Prior WIS. STAT. § 851.51 (1995-96) did not contain such a provision. Adult adoption is authorized by chapter 882.

173. WIS. STAT. § 854.20(5) and § 854.21(7). By contrast, prior WIS. STAT. § 851.51 (1995-96) included adopted persons in class gifts unless the governing instrument *expressly* excluded them.

The Wisconsin rules, which generally take a "fresh start" approach to adoption by creating a new family bond and severing the old, are similar to those of the UPC[174] and many other states.[175]

Under the new statutes, a legally adopted[176] person is generally treated as a birth child[177] of the adoptive parents for purposes of:

- Intestate succession;[178]
- Any statute granting rights to children, issue or relatives in connection with the law of intestate succession or governing instruments;[179]
- Class membership, when a governing instrument transfers property to a class described as a person's issue, children, grandchildren, descendants, heirs, next of kin, etc., if the person's birth child would be a member of the class (assuming that the conditions for membership in the class are otherwise satisfied).[180]

---

174. Compare UPC §§ 2-114(b) and 2-705.

175. However, some states are more restrictive, and others are becoming concerned that in an age of "open adoption," the fresh start approach is outdated. The greatest variation among the states is with regard to (1) the question of whether ties to the birth family are severed, (2) the status of persons who were adopted as adults, and (3) the question of whether a presumption of family bond should apply when the transferor is not the adoptive parent.

176. Some states have case law supporting a notion of "constructive" or "equitable" adoption, but Wisconsin does not.

177. The Drafting Committee concluded that reference to "birth" parents is more descriptively accurate than the use of the term "natural" parents in prior WIS. STAT. § 851.51 (1995-96). Nonetheless, the committee was mindful that in this time of advanced reproductive technology, further refinement may be necessary. *See* Drafting Committee Notes to WIS. STAT. §§ 851.50, 851.51.

178. WIS. STAT. § 854.20(1).

179. *Id.*

180. WIS. STAT. § 854.21(1). Issue of the adopted person are also included if the other conditions are met.

However, these provisions operate only if at least one of the following applies:

- The decedent or transferor is the adoptive parent or adoptive child;[181]
- The adopted person was a minor at the time of adoption;[182] *or*
- The adopted person was raised as a member of the household by the adoptive parent from the child's fifteenth birthday or before.[183]

In addition, the provisions do not apply in the case of a transfer made under a governing instrument where there is a finding of contrary intent of the person who executed the instrument.[184]

Except for the special case of stepparent adoption, if the conditions of the statute are satisfied, the adopted person generally ceases to be treated as a child of his or her birth parents.[185]

---

181. WIS. STAT. §§ 854.20(4)(a) and 854.21(1)(a)1. If the adoptive parent is the transferor, it is highly likely that the he or she intends to include the adoptive child as one of his or her "children."

182. WIS. STAT. §§ 854.20(4)(b) and 854.21(1)(a)2. The concern of this and the following restriction is to avoid the situation where a person adopts his or her spouse or lover in order to "create an heir." Commentators differ on whether such adoptions are desirable; the statute simply assumes that, in the absence of evidence of evidence of contrary intent, this is not what the transferor wanted. The problem is that the transferor may never have contemplated the possibility, and that therefore his or intent will be unknown.

Note that the prior statute had similar restrictions for class gifts (*see* prior WIS. STAT. § 851.51(3)(c) (1995-96)), but not for other purposes (*see* prior WIS. STAT. § 851.51(1) (1995-96)).

183. WIS. STAT. §§ 854.20(4)(c) and 854.21(1)(a)3.

184. WIS. STAT. § 854.20(5). Extrinsic evidence may be used to construe that intent. *Id*. *See also* WIS. STAT. § 854.21(7).

185. WIS. STAT. § 854.20(2)(b) provides that if a birth parent dies and the child is subsequently adopted by a stepparent, then the child will continue to be treated as the child of the deceased birth parent for purposes of intestate succession and the provisions of governing instruments. In this case, the adopted child will be connected to three parental lines—the surviving birth parent's line, the deceased birth parent's line, and the adoptive stepparent's line—instead of two. This provision is considered important to encourage adoption of children who have lost a parent. It is also assumed that this situation is fundamentally different from one in which a parent has given up the rights of a parent and consented to the adoption of a birth child. This provision is based on prior WIS. STAT. § 851.51(2)(b) (1995-96). The

M. Other Persons Included in Class Gifts and Family Groups—Wis. Stat. § 854.21(2) - (7)[186]

The new code relocates and expands a number of provisions relating to persons included in class gifts or gifts to family groups such as heirs or next of kin.[187] If the transfer is made under a governing instrument, all these rules may be rendered inapplicable by evidence of contrary intent, including extrinsic evidence.[188]

- Under Wis. Stat. § 854.21(2), persons born to unmarried parents are included in class gifts and family groups if they would qualify as a taker under intestacy[189] *and* if either (a) the transfer is from a birth

---

Wisconsin position is different from that of the UPC, which provides that the child of a parent who has renounced his or her rights should still inherit from that parent and that parent's family. *See* UPC § 2-114(b) and Comment. Recall that if there is a governing instrument, the rule only functions as a presumption, not as a bar; the primary goal of the rule is to serve the intent of the transferor, if it can be determined.

WIS. STAT. § 854.20(2)(a) exists to avoid a technical problem, caused by the fact that in general adoption severs the relationship to the birth parents. The rule provides that if a child is adopted by a stepparent, the child will continue to be treated as the child of the birth parent whose spouse adopted the child; only the relationship to the absent parent is severed. This provision is based on prior WIS. STAT. § 851.51(2)(a) (1995-96), but was reworded to reverse the holding of Estate of Rohloff, No. 521-39 Milwaukee County, 1/12/87; *aff'd* 87-0447 Wis. Ct. App., 8/18/87 (unpublished) review denied, 143 Wis.2d 908, 420 N.W.2d 57 (2/9/88), which used this provision as a basis to interpret subsection (b) to mean that *any* child who has been adopted by a stepparent continues to inherit from and through the absent parent. *Rohloff* concerned a situation where the birth parents were divorced, and the parental rights of the decedent birth parent had been terminated prior to the adoption.

186. Provisions relating to adopted persons (WIS. STAT. § 854.21(1)) are discussed in the preceding section.

187. Similar rules existed in the prior code with respect to transfers under intestacy and reflect typical holdings under the common law. (Common law holdings may not, however, allow the admission of extrinsic evidence to determine the transferor's intent.)

188. WIS. STAT. § 854.21(7).

189. The provisions regarding the right of a nonmarital child to be an taker under intestacy are at WIS. STAT. § 852.05 and are discussed in chapter 2, *supra*.

parent or (b) the individual grew up in the home of the birth parent or certain close relatives.[190]

- Under Wis. Stat. § 854.21(3), relatives by marriage are excluded from class gifts and family groups.[191] For example, a transfer to children is presumed not to include stepchildren.
- Under Wis. Stat. § 854.21(4), relatives of the half blood take in the same manner as relatives of the whole blood.[192] For example, a transfer to "my siblings" is presumed to include half-siblings, who would take a whole share.[193]
- Under Wis. Stat. § 854.21(5), persons conceived before, but born after, the time that membership in a class is determined, are included in class gifts under a governing instrument and in transfers to a family group under intestacy.[194] The rule requires that the child survive 120 hours after birth.[195]
- Under Wis. Stat. § 854.21(6), a person who is eligible to receive a transfer through two lines of relationship is limited to the larger share.[196]

---

190. The wording of this provision is based on UPC §§ 2-705(a)&(b). This provision creates a substantial limitation on the "inheritance" rights of nonmarital children; the justification for the provision is that it likely represents the transferor's intent. As always, a transferor who wishes a different result may make an alternate provision.

191. The wording of this provision is based on UPC § 2-705(a).

192. The wording of this provision is based on *id.*

193. This provision represents the majority rule, but some states allocate only a half share to each half-blood relative, and others exclude half-blood relatives entirely.

194. WIS. STAT. § 854.21(5) merges prior WIS. STAT. § 700.12 (1995-96), which provided that after-born children are included in class gifts, and prior WIS. STAT. § 852.03(4) (1995-96), which provided a similar rule for intestacy.

The Drafting Committee considered providing for the application of this statute to situations where after-born issue are conceived after the parent's death using modern reproductive technology, but concluded that it had insufficient information to determine an appropriate rule in such circumstances.

195. The 120-hour survivorship provision parallels that of WIS. STAT. § 854.03.

196. This provision is an expansion of UPC § 2-113, which only applies to intestacy. The Comment to the UPC provision gives an example of its application.

N. Form of Distribution for Transfers to Family Groups or Classes—Wis. Stat. § 854.22

Wis. Stat. § 854.22(1) and (2) provide rules of construction for ambiguous references to family groups or classes. These rules are similar to those in the prior code.[197] The most significant difference[198] is that under the new code, extrinsic evidence may be used to show the contrary intent of the transferor.[199] The basic approach of the statute is to use the law of intestacy to resolve ambiguities:

- Wis. Stat. § 854.22(1) addresses the problem of who is included in the group if a statute or governing instrument creates an interest in a person's "heirs," "next of kin," or a similar term that ambiguously refers to members of the person's family. The statute provides that the property passes according to the law of intestacy of the designated person's domicile, as if the person had died just before the transfer was to take effect. Note that, absent evidence of contrary intent, the surviving spouse *is* included in the group; for example, a transfer to "the heirs of my sister Susan" will be presumed to go to Susan's husband, if he is living at the time that the transfer is to take place and if Susan had no children from outside the marriage.[200]
- Wis. Stat. § 854.22(2) addresses a somewhat narrower question of the same type: what happens if a statute or governing instrument creates a class gift in favor of a person's "descendants," "issue," or "heirs of the body." Here, again, the statute provides that the property passes according to the law of intestacy of the designated person's domicile, as if the person had died just before the transfer was to take

---

197. The new rule is based on UPC §§ 2-708 and 2-711 and is similar to prior WIS. STAT. § 700.11 (1995-96).

198. In addition, the new statute references the intestacy law of the domicile of the designated person, rather than Wisconsin intestacy law.

199. WIS. STAT. § 854.22(4).

200. WIS. STAT. § 852.01(1)(a)1. (The example assumes that Susan is (or was at her death) a Wisconsin domiciliary.) Note that if the surviving spouse has remarried at the time that the transfer is to take effect, then the surviving spouse will *not* be considered an heir of the designated individual. WIS. STAT. § 854.22(1).

> effect. As under sub. (1), the issue to be resolved could be that of who is an eligible recipient; for example, there could be a descendant who was adopted as an adult. More likely, the issue will be what system of representation applies, if some or all of the person's children have died before the date of the transfer. Thus, for example, if a grandparent creates a trust with income to children and remainder to "my descendants,"[201] the shares of the grandchildren would be determined by the system of [strict] per stirpes if the grandparent had been a Wisconsin domiciliary, but by per capita at each generation if the grandparent had been domiciled in a state that has adopted the intestacy provisions of the 1990 UPC.[202]

New Wis. Stat. § 854.22(3) deals with a technical matter: it abolishes the anachronistic "Doctrine of Worthier Title," which apparently has not been the law in Wisconsin in any case.[203]

---

[201] The analysis here should also apply if the remainder beneficiaries were "my grandchildren," but the statute is silent on that point.

[202] The example assumes that there is insufficient evidence of contrary intent.

Systems of representation are defined at WIS. STAT. § 854.04; the Wisconsin intestacy rule is at WIS. STAT. § 852.01(1)(b). *See* discussion in sections 4.02B and 2.02B, *supra*.

[203] The Doctrine of Worthier Title is an old common law doctrine that originally operated as an unmodifiable rule of law governing transfers of real property. Under the doctrine, a gift of a remainder to the grantor's own heirs was construed not as a gift to those heirs but as a reversion to the grantor. In its modern version, which continues to apply in some states, the doctrine applies to both real and personal property and creates a presumption—rather than a requirement—of a reversion to the grantor. Thus, a transfer of property in trust with "income to my sister for life, remainder to my next of kin" would result in a reversion to the grantor's estate at the sister's death.

While it does not appear that Wisconsin has ever embraced the doctrine, Illinois followed it until 1953 and as recently as 1983 was struggling with the question of how to apply the doctrine to documents drafted before its revocation. *See* City Bank and Trust v. Morrissey, 118 Ill. App. 3d 640, 454 N.E.2d 1195 (1983).

O. Protection of Third Parties—Wis. Stat. § 854.23 and § 854.24[204]

Operation of many of the rules in chapter 854 will result in situations where someone other that the named beneficiary of a nonprobate transfer will in fact be entitled to that asset. For example:

> A may have an account at a bank, naming C as payable-on-death (P.O.D.) beneficiary. What is the bank's liability if C claims the funds the day after A's death, but then dies before satisfying the 120-hour survivorship rule of Wis. Stat. § 854.03? Or what if A named B as beneficiary of a life insurance policy, but A and B were subsequently divorced? What is the insurance company's liability if it pays the proceeds to B, without inquiring about the divorce, or pays in spite of the fact that an agent of the company knew of the divorce?

These are the types of problems addressed in Wis. Stat. § 854.23.

Under Wis. Stat. § 854.23, if a payer—a person or institution holding property that is subject to a transfer at death—does not have written notice of a claimed lack of entitlement because of a provision in chapter 854, it can rely on the governing instrument, transfer property[205] to a named beneficiary, and take other actions in good faith without incurring any liability.[206] However, if proper notice[207] has been served, then this exemption from liability is removed for payers other than banks.[208] At that

---

[204] The provisions here are very similar to those protecting third parties who deal with property that is subject to the deferred marital property elective share. *See* section 5.02D, *infra*. The provisions of WIS. STAT. §§ 854.23 and 854.24 are based on similar provisions in UPC §§ 2-702, 2-706, 2-803, and 2-804.

[205] Note that the term "property" is defined broadly at WIS. STAT. § 851.27 as "any interest, legal or equitable, in real or personal property, without distinction as to kind, including money, rights of a beneficiary under a contractual arrangement, choses in action and anything else that may be the subject of ownership." The meaning of "chose in action" is discussed at footnote 6, p. 172, *infra*.

[206] WIS. STAT. § 854.23(2).

[207] WIS. STAT. § 854.23(3). Proper notice requires that the claimant mail written notice to the payer's main office or home by registered or certified mail, return receipt requested, or serve the claim upon the payer in the same manner as a summons in a civil action.

[208] WIS. STAT. § 854.23(5). The exemption for banks was added in a floor amendment, in order to be consistent with preexisting protections under WIS. STAT. §§ 701.19(11), 710.05,

point, the payer may either continue to hold the property pending instructions from the court or discharge its obligation by turning the property over to the relevant probate court.[209] Banks have the same options[210] but alternatively may distribute the property to the named beneficiary without liability.[211]

Thus, in the examples presented at the outset of this discussion, the bank and insurance company would not be liable for having distributed the asset to the "wrong" person. The insurance agent's knowledge of A and B's divorce would not suffice, because the statute requires notice of the *dispute*—not of the divorce—and because the notice must be sent to the insurance company's home office by registered or certified mail or served in the same manner as a summons in a civil action.[212] The bottom line is that banks and "innocent" third parties are protected; the dispute is between the named beneficiary and the person entitled to the asset under chapter 854.

Wis. Stat. § 854.24 contains similar provisions protecting a person who purchases property for value (or receives it in satisfaction of a legally enforceable obligation) from liability for the value of the property. Purchasers are not required to return the property and are not liable for the property's value unless the purchaser had notice of a claimed lack of entitlement under Wis. Stat. § 854.23(2).

---

and chapters 112 and 705 of the statutes. *See* Assembly Amendment 4, to Assembly Substitute Amendment 1, to 1997 Assembly Bill 645.

209. WIS. STAT. § 854.23(4).

210. WIS. STAT. § 854.23(5)(c).

211. WIS. STAT. § 854.23(5)(b).

212. WIS. STAT. § 854.23(3).

P. Personal Liability of Recipients Not for Value—Wis. Stat. § 854.25[213]

Wis. Stat. § 854.25 sets out the responsibilities of persons—such as persons B and C in the examples in the preceding section, who receive property[214] because they are the named beneficiary but who are not entitled to the property because of a provision in chapter 854:[215]

- A person who receives property to which he or she is not entitled is liable to the person who is entitled under chapter 854, irrespective of whether the recipient still has the property or its proceeds.[216]
- If an original recipient gratuitously transfers the property to another person, the subsequent donee also is personally liable for the share if (a) the donee still has the property or its proceeds, or (b) the donee knew or should have known of the liability.[217]

The recipients have the option of satisfying the liability by giving up either the property or its value.[218]

Thus, in the examples presented in the preceding section, B and C are personally liable for the insurance and bank account proceeds, irrespective of what they do with the funds. If they were to give the funds to another person, the liability of that person would depend on the factors listed.

---

213. The provisions here are very similar to those regarding "recipients not for value" of property that is subject to the deferred marital property elective share. *See* section 5.02D, *infra*.

214. Note that the term "property" is defined broadly at WIS. STAT. § 851.27. *See* note 205, *supra*.

215. The provisions of this section are an expansion of similar provisions in the UPC. *See* UPC §§ 2-702, 2-706, 2-803, and 2-804. WIS. STAT. § 854.25(2) extends the liability provisions of the UPC to subsequent recipients of property. WIS. STAT. § 854.25(3) contains a provision not found in the UPC, allowing the person entitled to the property to object to the mode of reimbursement chosen by the person who has improperly received the benefit if the mode chosen will create a hardship.

216. WIS. STAT. § 854.25(1).

217. WIS. STAT. § 854.25(2).

218. *Id.* However, the person entitled to the property under chapter 854 may appeal on the basis of a hardship that the chosen method of satisfaction may cause.

Q. Effect of Federal Preemption—Wis. Stat. § 854.26

The Employee Retirement Income Security Act (ERISA) is a comprehensive act that essentially federalizes the law relating to pensions and employee benefits provided by most private employers. ERISA's preemption language is unusually broad; rather than being limited to state laws that conflict with specific ERISA provisions, any state laws that "relate to" employee benefit plans governed by ERISA are preempted.[219] This broad language creates a risk that the courts will interpret the act as preempting state probate law—such as the provisions in chapters 854 and 861—that affects the beneficiaries of pensions and benefits, even though ERISA supplies no substantive regulation in this area.

Recent case law has been marked by an increasing trend towards ERISA preemption of state probate and property law. A recent United States Supreme Court decision, *Boggs v. Boggs*,[220] held that ERISA preempts state laws that allow a nonparticipant spouse to dispose of a community property interest in the other spouse's undistributed pension plan benefits.[221] Although the *Boggs* decision did not involve the UPC and, thus, does not speak substantively to probate issues, it may be a signal that the Court will allow federal preemption of some state probate law in this area. In addition, a recent decision by the Sixth Circuit Court of Appeals, *Metropolitan Life Insurance Company v. Pressley*,[222] held that, where a decedent did not change the beneficiary of his life insurance after a divorce and where the life insurance was an employee benefit, ERISA

---

219. Section 514(a) of ERISA provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" that ERISA governs. *See* 29 U.S.C. § 1144(a).

220. 117 S.Ct 1754 (1997).

221. *Boggs*, *id.* at 1761-62. The particular problem addressed by *Boggs* does not apply in Wisconsin because of the operation of WIS. STAT. § 766.62(5) (providing that the nonemployee spouse's marital property interest in the employee spouse's deferred employment benefit plan terminates if the nonemployee spouse predeceases).

222. 82 F.3d 126 (6th Cir. 1996), *cert. denied* 117 S. Ct. 2431 (June 9, 1997); *see also* Metropolitan Life Insurance Company v. Marsh, 119 F.3d 415 (6th Cir. 1997).

preempted a Michigan provision that a judgment of divorce extinguishes the right of the decedent's former spouse to any life insurance benefits.[223]

The UPC position on this issue is that ERISA should not preempt state probate law:[224]

> It is to be hoped that the federal courts will continue to show sensitivity to the primary role of state law in the field of probate and nonprobate transfers. To the extent that the federal courts think themselves unable to craft exceptions to ERISA's preemption language, it is open to them to apply state law concepts as federal common law. Because the Uniform Probate Code contemplates multistate applicability, it is well suited to be the model for federal common law absorption.

As an "avenue of reconciliation between ERISA preemption and the primacy of state law in this field," the UPC provides that once the proceeds of at-death transfers of employee benefits are received by the beneficiaries, state law controls.[225] New Wis. Stat. § 854.26 adopts this position by providing that if any provision in chapter 854 is preempted by federal law, and the affected property is transferred to a person who is not entitled to receive it under the chapter, then the "unentitled" recipient remains liable to the "proper" recipient as detailed under Wis. Stat. § 854.25. The recent Supreme Court decision in *Boggs*, however, raises a cautionary flag.

---

223. *Pressley*, 82 F.3d 126, 129-30. Two somewhat less recent cases on the issue include Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc., 830 F.2d 1009 (9th Cir. 1987),where the ninth circuit held that ERISA preempted the Montana nonclaim statute (UPC § 3-803, which is similar to WIS. STAT. § 859.02), and Mendez-Bellido v. Board of Trustees, 709 F.Supp. 329 (E.D.N.Y.1989),which went the other way: the court upheld the New York "slayer rule" against an ERISA preemption claim, reasoning that state laws prohibiting murderers from receiving death benefits are relatively uniform, and therefore there is little threat of creating a "patchwork scheme of regulations" that ERISA sought to avoid.

224. Comment to UPC § 2-804. *See also* Waggoner, *Spousal Rights in Our Multiple Marriage Society*, 26 REAL PROPERTY, PROBATE, AND TRUST JOURNAL 695-98 (1992).

225. Comment to UPC § 804. *See* UPC §§ 2-702(f)(2), 2-706(e)(2), 2-803(i)(2), 2-804(h)(2).

4.03 General Provisions

A. Choice of Law—Wis. Stat. § 854.10

The new code contains a rule allowing a transferor to select any state's law to give meaning and legal effect to a governing instrument, as long as the chosen law is not contrary to the public policy of Wisconsin. This rule, which is based on UPC § 2-703, is intended to apply regardless of the location of the property governed by the instrument.[226]

B. Disclaimer—Wis. Stat. § 854.13

New Wis. Stat. § 854.13 creates a single, reorganized disclaimer statute, integrating provisions from prior Wis. Stat. § 701.27 (1995-96) (which dealt with disclaimer of transfers under nontestamentary instruments) and prior Wis. Stat. § 853.40 (1995-96) (which dealt with disclaimer of transfers by will, intestacy or appointment). It resolves differences between the two prior statutes—primarily using the language of Wis. Stat. § 701.27—and makes a few substantive changes in addition to the statutory changes made in June 1996.

The important substantive differences between new Wis. Stat. § 854.13 and the pre-1996 statute are:

- Joint tenancies can now be disclaimed under Wisconsin law.[227] The disclaimed interest in a joint tenancy passes to the decedent's probate estate.[228]

[226.] Drafters should be cautious about referring to the law of another state, unless they are fully familiar with it. Moreover, there are practical limits to this provision. For example, it could not be used to validate a holographic will by referring to the law of a state that accepts holographs, because the will would have to be admitted to probate before the clause would become operative.

[227.] WIS. STAT. § 854.13(2)(b). This change was enacted by 1995 WIS. ACT 360. *See* prior WIS. STAT. § 701.27(2)(b) (1995-96). Even when disclaimer of joint tenancy was prohibited under pre-1996 state law, it was still likely valid for federal tax purposes. IRC § 2518(c)(3).

[228.] WIS. STAT. § 853.13(8). This statute applies even if there are two or more surviving joint tenants. For example:

> Assume A, B, and C are joint tenants. If C dies and B disclaims, then half of C's interest goes to A and half goes to C's probate estate.

- The new statute clarifies that any disclaimer which meets the requirements of IRC § 2518, or any other provision of federal law, constitutes an effective disclaimer under the new code.[229]
- There are several changes regarding disclaimer by a guardian: the right of a guardian to disclaim is now applicable to all transfers;[230] a conservator, as well as a guardian, may disclaim;[231] and disclaimer by a guardian or conservator now requires court approval.[232]
- An agent under a power of attorney (POA) may disclaim on behalf of the person who granted the POA, if the person who granted the POA had the power to disclaim and the POA specifically grants the power to disclaim.[233]

Most disclaimers are made in order to avoid the federal gift or estate tax;[234] thus, the most important consideration when planning a disclaimer

---

229. WIS. STAT. § 854.13(12)(b). The prior statute could be read as stating that the IRC exception applies only to the *form* of the disclaimer. *See* prior WIS. STAT. § 853.40(3)(b) (1995-96) and prior WIS. STAT. § 701.27(3)(b) (1995-96).

230. WIS. STAT. § 854.13(2)(f). Under prior law the authorization was explicit only for probate transfers. *See* prior WIS. STAT. § 853.40(2) (1995-96).

231. WIS. STAT. § 854.13(2)(f).

232. *Id.* It is the Drafting Committee's understanding that under the prior law, a guardian of an unmarried ward did not have the power to make a gift and the guardian of a married ward could make a gift only with court approval. Nonetheless, the committee concluded that disclaimer by a guardian should be allowed for all transfers, subject to court approval.

233. WIS. STAT. § 854.13(2)(g). The requirement that the POA document specifically grant the power to disclaim is included because disclaimer is analogous to making a gift and a specific grant is generally necessary for gifts by a POA.

234. Sometimes disclaimers are used in an effort to avoid obligations to creditors or to qualify for medical assistance under Title 19. The law in both these areas is in flux and should be thoroughly researched before a disclaimer is used for these purposes. *See*, *e.g.*, Tannler v. DHSS, 206 Wis.2d 386, 557 N.W.2d 434 (Ct. Ap. 1996), and generally, Medlin, *An Examination of Disclaimers Under UPC Section 2-801*, 55 ALB. L. REV. 1233 (1992).

Tannler concerned a situation where the surviving spouse declined to "take action to claim the statutorily required portion of a deceased spouse's estate." The court held that the failure to take action was nonetheless an "action" that resulted in divestment for purposes of determining Medicaid eligibility. Since exercise of disclaimer is an *active* behavior, *Tannler*

is to comply with the provisions of IRC § 2518.[235] Some of the more important requirements under the IRC include:

- The disclaimer must be in writing;[236]
- The disclaimer must be filed[237] within nine months of the time the transfer indefeasibly vests,[238] although there is an exception for transfers to persons under age 21.[239]
- The disclaimant cannot have accepted the disclaimed interest, nor benefited from it;[240]
- The disclaimant cannot have control over who receives the property;[241]
- The disclaimed property must pass to someone other than the disclaimant, unless the disclaimant is the donor's spouse.[242]

An issue that sometimes emerges is whether a disclaimer by one recipient may reduce the amount of property received by some of the other recipients. Consider the following examples:

---

would seem to apply with greater force to the use of disclaimer to attain or maintain Medicaid eligibility.

235. The provisions of WIS. STAT. § 854.13 generally track those of IRC § 2518; in addition, WIS. STAT. § 854.13(12) provides that any disclaimer that meets the requirements of IRC § 2518—or the requirements of any other federal law relating to disclaimers— constitutes an effective disclaimer under WIS. STAT. § 854.13.

236. WIS. STAT. § 854.13(2)(a); IRC § 2518(b)(1) (1997).

237. Methods of delivery are specified in WIS. STAT. § 854.13(5).

238. WIS. STAT. § 854.13(4); IRC § 2518(b)(2).

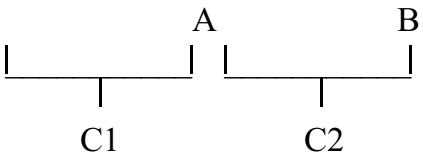
239. WIS. STAT. § 854.13(4)(d); IRC § 2518(b)(2)(B).

240. WIS. STAT. § 854.13(11)(a)3; IRC § 2518(b)(3).

241. WIS. STAT. § 854.13(11)(a)1; IRC § 2518(b)(4).

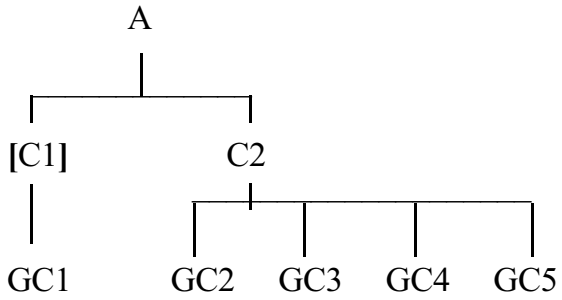
242. IRC § 2518(b)(4). The exception for disclaimers by the spouse of the donor is to allow the spouse to maximize the marital deduction under IRC § 2523 (gift tax) and IRC § 2056 (estate tax) by rearranging assets among various beneficiaries (including trusts), some of which benefit the spouse.

Example 1. A dies intestate, survived by spouse B, child C1 from a prior marriage, and child C2 from the current marriage. There are no grandchildren.



Since there is a child from outside the current marriage, under Wisconsin's intestacy provisions, the children will receive all of A's interest in marital property, and half A's interest in nonmarital property.[243] If C1 disclaims, C1 will be treated as predeceased. If C1 had *actually* predeceased, then there would be no child from outside the marriage, and B would receive the entire probate estate.[244] Does this mean that if C1 disclaims, the entire probate estate goes to B?

Example 2. A's will leaves the estate to A's children, and specifies the system of representation as *per capita at each generation*. Assume that A has two children, C1 and C2. C1 has predeceased, leaving one grandchild, GC1. C2 survives, and has four children, GC2, GC3, GC4, and GC5.



Under the per capita at each generation system of representation, the shares of predeceased issue at the same generation are combined and distributed to takers at the following generation.[245] Therefore, if C2 had

---

243. WIS. STAT. § 852.01(1)(a)2 and (1)(b).

244. WIS. STAT. § 852.01(1)(a)1.

245. WIS. STAT. § 854.04(3). *See* systems of representation discussed in section 4.02B, *supra*.

actually predeceased, the shares of C1 and C2 would be combined and divided equally among the five grandchildren. Will this be the result if C2 disclaims, and is treated as having predeceased?

The general policy of disclaimer is that disclaimer by one recipient cannot reduce the share of any other recipient. Thus the answer to the question posed by the two examples is "no." The statutory language that achieves this result is the provision that "the *disclaimed property* devolves as if the disclaimant had died before the decedent. . . ."[246] The statute disposes of the *disclaimed* property—not, for example, "the property subject to distribution." Thus, the predisclaimer shares of other recipients are not affected by the disclaimer.[247]

C. Penalty Clause for Contest—Wis. Stat. § 854.19

Under Wis. Stat. § 854.19, a provision in any governing instrument that attempts to impose a penalty against an interested person for contesting the governing instrument (or instituting other proceedings related to the instrument) will not be enforced if the court determines the person had

---

246. WIS. STAT. § 854.13(7) (emphasis added).

247. It is possible, of course, that as the result of the disclaimer the share of another recipient will *increase*. But again, this has to do with the distribution of the *disclaimed* property, and is not a reallocation of the original shares.

In theory, there are two issues that could arise under the language of WIS. STAT. § 854.13(7). The first, explained in the Comment to UPC § 2-801(d), is that the disclaimed property could be redistributed across *all* the beneficiaries, not just sent down the disclaimant's family line. Thus, the share of the disclaimant would be *reduced*. The second potential problem, discussed in the same UPC Comment and by Medlin, note 234, *supra*, is that under certain scenarios a beneficiary may be able to use disclaimer to increase the amount of property going to his or her family line, at the expense of other beneficiaries.

The UPC drafters remedy the first problem through long provisions in UPC §§ 2-801(d)(1) and (2) describing how the disclaimed interest devolves. A remedy to the problem identified by Professor Medlin involves using language such as that contained in the disclaimer provision of the South Carolina statutes. (*See* Medlin, note 234, *supra*, at 1261, n.162, *citing* § 62-2-106, S.C. STAT. ANN. (West 1997)(addressing representation and disclaimer by an intestate beneficiary)). The Drafting Committee considered these remedies at length, but concluded that, since both problems result from what the committee saw as implausible interpretations of the words of the statute, inclusion of the remedies in the statute would lead to confusion. The committee concluded that the plain meaning of the statute dictates the desired result discussed by the UPC Comment and by Professor Medlin.

probable cause for instituting the proceedings.[248] This provision is based on the UPC[249] and on Wisconsin case law[250] but is extended to apply to all governing instruments.[251] Most states have a rule of this type regarding wills, but several recent commentaries have been critical of it.[252]

Drafters contemplating use of a "no contest" clause—also known as an in terrorem clause—should remember to include a meaningful gift to potential challengers. Otherwise there will be no effective penalty even if the clause is enforced.

---

248. Note that there is a practical problem for a contestant who feels that he or she has a legitimate challenge; there is no way for a contestant to be certain he or she meets the probable cause requirement before instituting the proceedings.

249. UPC § 2-517.

250. In Will of Keenan, 188 Wis. 163, 205 N.W. 1001 (1925), the Wisconsin Supreme Court did not allow a penalty clause for contest to be enforced when there was probable cause that the contest was valid.

251. As a practical matter, the only governing instruments to which the rule is likely to apply are wills and trusts.

252. *See* discussion in WAGGONER, ET AL., note 21, *supra*, at 244.

FAMILY RIGHTS 5

5.01 Introduction

As under the prior code, chapter 861 details the rights of family members—primarily the surviving spouse—that exist irrespective of the decedent's intended estate plan. These rights are different from those of spouses and children who have been inadvertently omitted from a will, as provided for in chapter 853 of the statutes.[1] The rights of omitted family members are based on implementing the presumed intent of the decedent; if the omission was intentional, the omitted members have no recourse

1. *See* WIS. STAT. § 853.11(2) (premarital will) and WIS. STAT. § 853.25 (unintentional failure to provide for issue of testator).

under those statutes. By contrast, the rights in chapter 861 are based on public policy considerations and can override the contrary intent of the decedent.

In the new code, chapter 861 has three subchapters:

I. *Interest in Marital Property*, which includes prior Wis. Stat. §§ 861.01[2] and 861.015 (1995-96);[3]

II. *Elective Share in Deferred Marital Property*, which contains the new deferred marital property election;[4] and

III. *Other Rights, Allowances, and Exemptions*, which includes prior Wis. Stat. §§ 861.17 - 861.41 (1995-96), as amended, and a new provision that expands the surviving spouse's right to retain a home.

5.02 The New Deferred Marital Property Election

A. The Problem of "Unclassified" Property

The rationale behind all community or marital property systems is a partnership theory of marriage, which is implemented by providing a vested one-half interest in community or marital property for each spouse. Upon the death of a spouse, marital property converts into a tenancy in common between the surviving spouse and the successor to the decedent

---

2. WIS. STAT. § 861.01, which is retained from the prior code, primarily provides that the surviving spouse becomes a tenant in common with the successor in interest to the decedent's share of marital property.

3. WIS. STAT. § 861.015 provides procedures implementing a "directive" that the decedent may have made regarding certain closely held business interests. Under such a directive, the decedent's estate can buy out the surviving spouse's marital property interest in the business. This provision was amended to eliminate reference to the election regarding deferred marital property in probate under prior WIS. STAT. § 861.02 (1995-96). The directive no longer applies to deferred marital property because the new deferred marital property election is based on value and does not give the surviving spouse an interest in any specific property.

4. Prior WIS. STAT. §§ 861.02 - 861.13 (1995-96), which provided separate probate and nonprobate deferred marital property elections, have been repealed.

spouse's interest in the property.[5] Community or marital property systems also recognize that some property—*i.e.*, separate or individual property—is not a product of the marriage because it was brought to the marriage or acquired by gift or "inheritance" by one spouse. All rights to separate or individual property vest in the acquiring spouse, and the other spouse generally has no right to that property either during the marriage or at the death of the owner, although in a minority of jurisdictions—including Wisconsin[6]—the income or "fruits" of separate property are generally shared.[7]

A major wrinkle in community or marital property systems is the treatment of property acquired by spouses during a period when they were not subject to community property rules. In Wisconsin, property of spouses acquired during a period when the Wisconsin Marital Property Act did not apply to the marriage—*i.e.*, before the effective date of the act or while at least one spouse was domiciled outside of the state[8]—is unclassified. Some of this property *would have been* marital property if the Marital Property Act had applied when the property was acquired; some of it *would have been* individual property. If this property was acquired under a common law property system, such as existed in Wisconsin before the effective date of the act, then all interest in the property was vested in the acquiring spouse, regardless of whether the property would have been considered marital property under Wis. Stat. Chapter 766.

In part to avoid questions of unconstitutional "takings," the drafters of both the Uniform Marital Property Act and the Wisconsin act decided that neither adoption of the act nor spouses' change of domicile from a common

---

5. *See* WIS. STAT. § 861.01(1) and (2). For probate property, the successor in interest will be the decedent's estate, and eventually the takers of the estate under a will or intestacy. For nonprobate property, the successor in interest will usually be a designated beneficiary.

6. *See* WIS. STAT. § 766.31(4).

7. In Louisiana and Wisconsin, the spouse who owns the nonmarital property may execute a unilateral statement that reclassifies the income on that property as separate or individual property. *See*, *e.g.*, WIS. STAT. § 766.59.

8. *See* WIS. STAT. § 766.01(5) (defining determination date) and WIS. STAT. § 766.03(1) (applicability of ch. 766).

law property state to a marital property state should cause their property to be classified under the marital property system. Thus, both acts treat all unclassified property as individual property during the marriage.[9]

Since unclassified property is treated as individual property, the surviving spouse does not have a vested interest in the property at the death of the spouse who acquired the property. This result is acceptable for property that would have been the individual property of the decedent even if marital property rules had applied. But for property that would have been marital property, the result is to deny the surviving spouse the ownership benefits of the property, while also failing to provide him or her the protection of the spousal election available in common law property regimes. Therefore, unclassified property that would have been marital property—termed *deferred marital property* in Wisconsin[10]—requires a special rule to prevent disinheritance of the surviving spouse.[11]

B. Deferred Marital Property Elections Under Prior Law

Under prior law, deferred marital property was subject to two elections, which derived partly from Wisconsin's prior common law property "elective share" and partly from the UPC's augmented estate election provisions as they existed at the time the Wisconsin provisions were enacted.[12] One of these elections related to probate property, and the other to nonprobate property. Under the probate election provision, the surviving spouse could elect up to a half interest in each item of the decedent's

---

9. *See* WIS. STAT. § 766.31(8) and (9). *See also* UMPA § 4(h) and (i).

10. WIS. STAT. § 851.055. In other community property states, this property is generally referred to as "quasi-community property."

11. Note that the statute does not directly address the status of property that was separate property in a community property state but that would have been marital property had it been acquired under the WMPA. An example would be income from separate property held by a California domiciliary. The definition of deferred marital property would seem to include such property.

12. For a detailed explanation of the prior deferred marital property elections in Wisconsin, *see* Erlanger and Weisberger, *New Probate and Nonprobate Property Elections Under Wisconsin's Marital Property Act* (Pts. 1 and 2), 59 WIS. BAR BULL. 25 (Oct. 1986), 13 (Nov. 1986).

deferred marital property that was subject to probate administration.[13] However, this right was subject to a bar. The surviving spouse could not exercise any right to elect probate deferred marital property if that spouse had already received at least half of the property in eight specific asset categories, which generally included all the property the decedent could dispose of at death, adjusted for federal taxes.[14] However, if the surviving spouse was just one penny under the limit, then he or she could exercise the full probate deferred marital property election.

The nonprobate election operated differently. The surviving spouse could elect up to half the value of deferred marital property that the decedent disposed of through certain nonprobate transfers.[15] Instead of being subject to an "all or nothing" bar, this right was reduced to the extent that the decedent transferred property to the surviving spouse during life or at death. To determine the amount that the surviving spouse could elect under the nonprobate election, one first determined the total value of decedent's nonprobate transfers of deferred marital property that satisfied the various requirements of the statute.[16] The maximum elective right was equal to half the value of the total value of the transfers. The right was then generally reduced, dollar for dollar, by an amount equal to the value of transfers from the decedent to the surviving spouse.[17] This elective right had to be enforced in a separate action against the nonprobate beneficiaries, within three months after filing an election.[18]

---

13. *See* prior WIS. STAT. § 861.02 (1995-96).

14. *See* prior WIS. STAT. § 861.13 (1995-96). This provision was also part of chapter 861 prior to 1986 when Wisconsin was a common law property state. It served as a bar to the common law elective share.

15. *See* prior WIS. STAT. § 861.03 and § 861.05 (1995-96).

16. *See* prior WIS. STAT. § 861.05 (1995-96). One of the more important of these requirements was that the instrument of transfer must have been executed (or its depositive provisions materially changed) on or after April 4, 1984, the date that the Marital Property Act was signed by Governor Anthony Earl. Prior WIS. STAT. § 861.05(4) (1995-96).

17. *See* prior WIS. STAT. WIS. STAT. § 861.07(2) (1995-96). Transfers of deferred marital property only reduced the elective right by an amount equal to half their value. *See* prior WIS. STAT. § 861.07(2m) (1995-96).

18. *See* prior WIS. STAT. § 861.09 and § 861.11(4) (1995-96).

The prior Wisconsin deferred marital property elective system included a number of idiosyncratic elements that are not necessary to an elective system[19] and that proved to be problematic:

- By limiting the probate election with an absolute bar, instead of a dollar for dollar cutback, the prior statute could produce inequitable results. Those surviving spouses who fell just under the limit could exercise the full election, and thus receive a windfall, while those who fell just over the limit had no elective rights in the decedent's deferred marital property in probate. The result was arbitrary and put great weight on the valuation of the assets involved.
- The bifurcation into probate and nonprobate elections made the system unnecessarily complex and distorted the results by counting certain assets inconsistently in the various calculations.[20]
- The prior system did not consider the total assets of the surviving spouse, but rather considered only those assets that the surviving spouse acquired from the decedent.[21] As a result, a surviving spouse who received less than half of the decedent's disposable assets was generally able to exercise one or both elections, even if he or she

---

19. The elective approach to deferred marital property, which is retained in the new code, has at least two advantages over the "automatic" reclassification systems like that of UMPA. *See* UMPA § 18(a), 9A U.L.A. 139 (1987). First, it presumes in effect that the decedent's disposition of property will be appropriate and provides an alternative only when the surviving spouse is disinherited. Second, an elective system is more likely to be consistent with the expectations of the spouses, since property acquired under a common law property system would be subject to spousal election under that system.

20. For example, property acquired by the surviving spouse through the probate election was not included in that spouse's assets when determining the cutback for the nonprobate election. *See* prior WIS. STAT. § 861.07(1)(b) (1995-96). Again, this could result in a windfall to the surviving spouse who fell just under the bar for the probate election. Trusts were also valued differently for different purposes. *Compare* prior WIS. STAT. § 861.13(1)(c)1 and § 861.07(3) (1995-96).

21. An exception was the situation where the surviving spouse could not establish the source of his or her assets. For purposes of the cutback to the nonprobate property election, all such property was treated as if it had been received from the decedent. *See* prior WIS. STAT. § 861.07(4) (1995-96).

actually already held the majority—even the vast majority—of the deferred marital property in the marriage.[22]

• The prior system was by all accounts extremely difficult to understand and apply in practice.

These characteristics of the prior system departed substantially from the partnership theory of marriage. The marital property system gives each spouse an equal interest in marital property in recognition of their different but equally important contributions to the marriage. The Drafting Committee concluded that an elective procedure for unclassified property in a marital property system should be governed by the same rationale. The inequitable results that could easily occur under the prior system, combined with the high costs of determining the correct outcome under the statutes, were incompatible with the underlying rationale of the Wisconsin marital property system. Therefore, the new probate code replaces the prior deferred marital property elections with a single election that is more consistent with the partnership theory of marriage.

C. Deferred Marital Property Election Under the New Code

Overview. The new election is modeled on the elective share provisions for common law property states in the 1990 UPC.[23] The major changes from Wisconsin's prior deferred marital property elections[24] are these:

---

22. For example:

Assume that spouse A held $300,000 of property that would have been marital property and spouse B held $10,000 of property that would have been marital property. If B died and made no compensating transfers to A, A would have the right to elect $5,000 from B.

The exact form of the election would depend on a number of factors that need not be reviewed here.

23. For a detailed analysis of the relationship between the new Wisconsin elective share in deferred marital property and the UPC elective share in common law property jurisdictions, *see* Erlanger and Monday, *The Surviving Spouse's Right to Quasi-Community Property: A Proposal Based on the Uniform Probate Code*, 30 IDAHO L. REV. 671-95 (1994).

24. Prior WIS. STAT. §§ 861.02 - 861.13 (1995-96).

- The election is based on the amount of *all* deferred marital property in the marriage, not just that owned by the decedent. The surviving spouse is entitled to half that total, rather than half the deferred marital property owned by the decedent.
- Separate elections for probate and nonprobate deferred marital property have been eliminated and replaced by a single election.
- The new statute eliminates the "all or nothing" bar in the prior probate election.[25] The resulting system is somewhat similar to the "cut back" in the prior nonprobate election,[26] and includes any deferred marital property already held by the surviving spouse.
- The election is for a pecuniary amount, rather than for an item-by-item interest, in contrast to the prior probate election.[27]
- All nonprobate deferred marital property is subject to the election, in contrast to the prior nonprobate election, which limited covered nonprobate property to transfers made on or after April 4, 1984.[28]

As under prior law, the new election only applies to deferred marital property. Deferred marital property is unclassified property that *would have been marital property* had the Wisconsin Marital Property Act applied at the time the property was acquired.[29] Under the new code, as under prior law, *the surviving spouse has no right of election against the decedent spouse's marital property, individual property, or deferred individual property.*

The easiest way to determine whether property is deferred marital property may be to use what might be called the "language gambit": One simply tells the story of the acquisition of the property in relation to the act.

---

25. Prior WIS. STAT. § 861.13 (1995-96).

26. Prior WIS. STAT. § 861.07 (1995-96).

27. Prior WIS. STAT. § 861.02 (1995-96).

28. Prior WIS. STAT. § 861.05(4) (1995-96).

29. WIS. STAT. § 851.055. Note that a statutory definition of "deferred individual property," which is analogous to deferred marital property, is now included at WIS. STAT. § 861.018(2).

Example 1. Facts: A and B were married as Indiana domiciliaries in 1992 and established a Wisconsin domicile in 1996. In 1993, A received the family spittoon as a gift from his grandmother. ***Analysis:*** The spittoon is unclassified property because it was acquired at a time when the Marital Property Act did not apply to A and B's marriage.[30] But it *would have been individual property,* had the act applied when it was acquired.[31] Thus, the spittoon is A's deferred individual property.

Example 2. Facts: A and B were married as Indiana domiciliaries in 1992 and established a Wisconsin domicile in 1996. In 1993, A purchased a spittoon using funds that cannot be traced. ***Analysis:*** The spittoon is unclassified property. But had the act applied when it was acquired, the spittoon *would have been marital property* under the presumption that all property is marital property.[32] Thus, the spittoon is deferred marital property.

While these examples are straightforward, the same gambit works when analyzing a more complex situation:

Example 3: Facts: A and B were married as Indiana domiciliaries in 1992, and established a Wisconsin domicile in 1996. In 1993 A purchased a life insurance policy on his life, and there is no dispute that all premiums on this policy have been paid from an inheritance A received. ***Analysis:*** As of the date that the spouses established domicile in Wisconsin, the life insurance policy is unclassified. But had the act applied when it was acquired, the policy *would have been* covered by a special provision that states that "the ownership interest and proceeds of a policy issued after the determination date which designates the insured as owner are marital property, regardless of the classification of property used to pay premiums on the policy."[33] Thus,

---

30. *See* WIS. STAT. § 766.01(5) and § 766.03(1).

31. WIS. STAT. § 766.31(7)(a).

32. WIS. STAT. § 766.31(2). In addition, WIS. STAT. § 861.02(2)(a) provides a presumption that any property not classified as marital property is presumed to be deferred marital property. This latter section is relocated from prior WIS. STAT. § 858.01(2) (1995-96).

33. WIS. STAT. § 766.61(3)(a)1.

had the act applied, the life insurance policy *would have been marital property.*[34]

The basics of the election.[35] ***(a) Who is covered?*** The deferred marital property elective share is available to the surviving spouse[36] of a decedent who was domiciled in Wisconsin at the time of death.[37] There is no requirement that the surviving spouse be a Wisconsin domiciliary. If a decedent is not domiciled in Wisconsin but owns property with a Wisconsin situs, the rights of the surviving spouse are governed by the law of the state of the decedent's domicile.[38] A special rule applies in the situation where the surviving spouse caused the death of the decedent spouse.[39]

---

34. The policy will remain unclassified until a premium is paid from marital property (or from property that cannot be traced). Establishing a Wisconsin domicile does not cause assets to be reclassified. WIS. STAT. § 766.31(8). Payment of a premium from marital property will make the policy a "straddle policy" governed by WIS. STAT. § 766.61(3)(b).

35. The basics of the deferred marital property election are covered in WIS. STAT. § 861.02.

36. Surviving spouse is defined in new WIS. STAT. § 851.30. The surviving spouse must be living for the election to be filed, but other parties are authorized to file on behalf of the spouse. WIS. STAT. § 861.09. The rights of the surviving spouse can be waived under WIS. STAT. § 861.10.

37. WIS. STAT. § 861.02(7).

38. WIS. STAT. § 861.20. Thus, if an Illinois domiciliary has property in Lake Geneva, Wisconsin, the rights of the surviving spouse will be governed by the law of Illinois. This parallels the treatment under the Marital Property Act while both spouses are alive: the act only applies if the spouses have a determination date. WIS. STAT. § 766.03(1).

39. WIS. STAT. § 861.02(8). If the "slayer statute," WIS. STAT. § 854.14, would bar the surviving spouse from receiving transfers on account of the decedent spouse's death, then (1) the deferred marital property election is barred, and (2) the decedent spouse's estate has the right to elect as though the decedent were the survivor. This provision is intended to reverse the result in Krueger v. Rodenberg, 190 Wis.2d 367, 527 N.W.2d 381 (Ct. App. 1994), which held that the estate of Mrs. Rodenberg, who was murdered by her husband, had no legal or equitable claim to deferred marital property owned by him since under the prior code the election right only belonged to the "surviving spouse."

(b) What property is covered? The election applies to the "augmented deferred marital property estate," which is the total value[40] of all the deferred marital property of *both* spouses, irrespective of where the property was acquired or where the property is located, including real property located in another jurisdiction.[41] Wis. Stat. § 861.02(2)(b) summarizes the categories of deferred marital property included in the augmented deferred marital property estate:[42]

- Probate and nonprobate transfers of the decedent's deferred marital property, as detailed under Wis. Stat. § 861.03(1) to (3);
- Various gifts of deferred marital property made by the decedent during the two years before death, as detailed under Wis. Stat. § 861.03(4);[43]
- Any deferred marital property held by (or attributed to) the surviving spouse that would have been included in the above two categories had the surviving spouse been the one who had died, as detailed under Wis. Stat. § 861.04.

(c) Will the surviving spouse be entitled to the election? The purpose of the election is to insure that the surviving spouse ends up with an amount equal to half the value of the augmented deferred marital property estate.[44] In the typical situation, the surviving spouse will already hold

---

40. Valuation of the property is determined under WIS. STAT. § 861.05(2). Unlike the election regarding probate deferred marital property in the prior code, the new deferred marital property elective share is based on value and is not an item-by-item election. *Compare* prior WIS. STAT. § 861.02(1) (1995-96).

41. WIS. STAT. § 861.02(2)(b). While Wisconsin cannot on its own control the disposition of real property located in another jurisdiction, many states will defer to this provision under their own conflict of laws rules.

42. If deferred marital property is commingled with other types of property, but the deferred marital property component can be traced, then only that component is valued. WIS. STAT. § 861.05(2)(e).

43. During life, the decedent was free to make these transfers because during that period, deferred marital property is treated as individual property. WIS. STAT. § 766.31(9).

44. WIS. STAT. § 861.02(1). Thus, the election is reciprocal in its *calculation*, in that deferred marital property held by both spouses is considered. However, it is not reciprocal in

some deferred marital property,[45] and the value of the transfers from the decedent spouse to the surviving spouse during life or at death will easily exceed the remaining amount.

In a marital property system, the deferred marital property elective share is the only obligation that the decedent spouse has to the surviving spouse.[46] Thus, in the context of the deferred marital property elective share, a transfer to the surviving spouse from any source—the decedent's interest in marital property, deferred marital property, individual property, or deferred individual property—counts towards satisfaction of the elective share amount.[47] To the extent that these transfers are not sufficient to satisfy the elective share amount, the remainder is satisfied proportionally from the decedent's transfer of deferred marital property to third parties.[48]

> ***Example 1. Facts:*** A and B were married in 1983 as Illinois domiciliaries and established a Wisconsin domicile in 1993, where they remained domiciled until A's death this year. At A's death, A's share of the couple's marital property was worth $40,000, and A held $60,000 of individual property, $100,000 of probate deferred marital property, and $50,000 of nonprobate deferred marital property. B's share of the marital property was of course also $40,000, and B held $20,000 of individual property, and $30,000 of deferred marital property, some of which would pass under B's will, and some of which would pass

---

its *implementation*, in that only the surviving spouse, and not the estate of the decedent spouse, is eligible for the election.

45. Deferred marital property held by or attributed to the surviving spouse is counted first in satisfaction of the deferred marital property elective share amount. WIS. STAT. § 861.06(2)(b).

46. The surviving spouse already owns a half interest in each item of marital property, and the decedent has no obligation to share individual or deferred individual property. Of course, the surviving spouse also has selection, exemption, and allowance rights under WIS. STAT. §§ 861.31-.41 and a limited homestead protection under WIS. STAT. § 861.21.

47. WIS. STAT. § 861.06(2)(b).

48. WIS. STAT. § 861.06(3) and (4). Equitable adjustment of these shares is provided for by WIS. STAT. § 861.06(5). Personal liability of third party recipients—including the effects of federal preemption—is covered in WIS. STAT. § 861.07 and § 861.11. Proceedings for implementing the election are detailed in WIS. STAT. § 861.08 and § 861.09.

nonprobate if B were to die. A's will left $50,000 of individual property to B.

	A	B
Marital property	40,000	40,000
Individual property	60,000	20,000
Deferred marital property	150,000	30,000

Analysis: The augmented deferred marital property estate would consist of both A's and B's deferred marital property, totaling $180,000. B's elective share amount would be one half of that total, or $90,000. B's elective share amount is then satisfied out of the $30,000 of deferred marital property that B already holds, and the $50,000 transfer under A's will. This leaves $10,000 that B may elect from A's deferred marital property. Had the order of deaths been reversed, A would have had no elective right. The amount subject to election would have been $90,000, calculated the same way as in the example. However, this amount would be satisfied by the $150,000 of deferred marital property that A already held.

The analysis just described would be identical for a couple who were married and domiciled in Wisconsin prior to January 1, 1986, and who continued to live here after that date until one spouse died.

D. The New Election in Detail

Decedent's deferred marital property. The types of interests in deferred marital property that are included in the value of the augmented deferred marital property estate are delineated in Wis. Stat. § 861.03. The list is intended to be comprehensive and inclusive, covering:[49]

---

[49] The list is based on UPC §§ 2-204, 2-205, and 2-206. Some property interests in the list—for example, a general power of appointment—are very unlikely to occur in the deferred marital property context. The Drafting Committee considered narrowing the list, but decided that it was best to track the UPC, in order to emphasize the comprehensiveness of the list. *See* Drafting Committee Notes to WIS. STAT. § 861.03.

WIS. STAT. § 861.05(4), based on UPC § 2-208(c), provides that items will only be counted once, even if they are covered by more than one provision of WIS. STAT. § 861.03 or § 861.04.

- The decedent's probate transfers (including intestate transfers) of deferred marital property;[50]
- The decedent's nonprobate transfers of deferred marital property at death,[51] including—but not limited to—life insurance, joint tenancies,[52] payable on death arrangements, IRAs, pension plans, annuities, and nonprobate transfers of deferred marital property under a marital property agreement;
- Deferred marital property over which the decedent held a general power of appointment;[53]
- Deferred marital property over which the decedent had retained rights or benefits at the time of death;[54] and
- Transfers of deferred marital property within two years of death, including termination of powers of appointment, transfers of life insurance policies, and gifts of other property to the extent that aggregate transfers to any one donee in either of the two years exceeded $10,000.[55]

Various technical differences between the UPC and Wisconsin provisions are discussed in the Drafting Committee Notes to WIS. STAT. § 861.05(3) and (4).

50. WIS. STAT.§ 861.03(1).

51. WIS. STAT. § 861.03(2). Note the change from the prior code, which excluded nonprobate transfers for which the governing instrument was executed prior to April 4, 1984, the date that the original Marital Property Act was signed. *See* prior WIS. STAT. § 861.05(4) (1995-96).

52. This includes joint tenancies held with the surviving spouse. The surviving spouse's fractional interest in the joint tenancy is included in the augmented deferred marital property estate under WIS. STAT. § 861.04.

53. WIS. STAT. § 861.03(2)(d). WIS. STAT. § 861.03(2)(c) and (d) refer to a "presently exercisable" general power of appointment. As defined in WIS. STAT. § 861.018(6), the word "exercisable" refers only to whether the power is exercisable *by its terms*, not in fact; specifically, there is no requirement that the decedent be competent to exercise the power.

54. WIS. STAT. § 861.03(3). WIS. STAT. § 861.03(3)(a)(2), which is based on IRC §§ 2036 and 2038, does not appear in the UPC list but was added for completeness.

55. WIS. STAT. § 861.03(4). The $10,000 limit under WIS. STAT. § 861.03(4)(b)3 tracks the exemption under the federal gift tax as it existed in 1997. However, note that the gift tax exemption is based on calendar years, while the look-back period under this provision is based on the date of death.

The interests included are subject to limitations and adjustments under Wis. Stat. § 861.05.

Surviving spouse's deferred marital property. Under Wis. Stat. § 861.04, the value of the deferred marital property interests that would have been included if the *surviving spouse* had been the decedent is included in the augmented deferred marital property estate.[56] Where appropriate, valuation of the surviving spouse's deferred marital property interests takes into account the fact that the decedent did in reality predecease the spouse.[57] For example, insurance on the life of the surviving spouse is included at its cash surrender value as of the date of the decedent's death, not at its face value. Similarly, the deferred marital property component of a deferred employment benefit plan held by the surviving spouse would be valued at zero because of the operation of the terminable interest rule of Wis. Stat. § 766.62(5).[58]

Exclusions from the deferred marital property augmented estate. Under Wis. Stat. § 861.05(1), certain property interests are excluded from the augmented estate, even if those interests are deferred marital property and would otherwise be included under Wis. Stat. §§ 861.03 or 861.04.[59] These include:

- Any transfer under the federal Social Security system;
- Transfers of deferred marital property to the surviving spouse under Wis. Stat. § 861.33 (selection of personalty by surviving spouse) or

---

56. WIS. STAT. § 861.04(1). WIS. STAT. § 861.04(1) is based on UPC § 2-207. This is a major departure from prior Wisconsin law, which only considered the *decedent's* deferred marital property.

57. WIS. STAT. § 861.04(2).

58. Under WIS. STAT. § 766.62(5), the decedent's *marital property* interest in a deferred employment benefit plan held by the surviving spouse terminates at the decedent's death. Thus, if one were making an inventory of marital property assets after the decedent spouse's death, the surviving spouse's deferred employment benefit plan either would not be included or would be included and valued at zero. By analogy, the same result applies to the deferred marital property component of such a plan, with respect to the deferred marital property augmented estate.

59. These provisions are based on UPC § 2-208 and UPC § 2-207(a)(1)(iii).

Wis. Stat. § 861.41 (exemption of property assigned to surviving spouse);[60] and

- Transfers to a person other than the spouse, with the *written* joinder or *written* consent of the spouse.[61]

Valuation issues. General rules for valuation of property in the deferred marital property augmented estate are set out in Wis. Stat. § 861.05(2):[62]

- Probate property, life insurance, and life insurance transferred within two years of death are valued as of the decedent's death.[63]
- Property passing by right of survivorship, by a transfer payable or transferrable at death, by power of appointment at death, or by a

---

60. Transfers under WIS. STAT. §§ 861.33 and 861.41 are excluded because to do otherwise would defeat the purpose of those statutes. For example:

> Assume that a chair, a household furnishing worth $100, is in the augmented deferred marital property estate. The surviving spouse would be entitled to elect half the value of the chair, or $50, under WIS. STAT. § 861.02(1). However, absent the exclusion provision described above, selection of the chair under WIS. STAT. § 861.33(1)(a)3 would cause $100 of the decedent's obligation to the surviving spouse to be offset under WIS. STAT. § 861.06(2)(b)1.

Thus, the purpose of WIS. STAT. § 861.33—which is to transfer certain tangible personal property to the spouse at no charge regardless of the classification—would be defeated.

61. The requirement of *written* joinder or consent is stricter than the rule regarding nonprobate transfers of deferred marital property under prior WIS. STAT. § 861.05(2) (1995-96).

It is unclear whether a spouse's consent to "split" a gift for federal gift tax purposes or the filing of a joint return claiming a charitable contribution constitutes "consent" or "joinder" within the meaning of WIS. STAT. § 861.05(1)(c). For a discussion of an analogous issue with respect to gifts of marital property, see ERLANGER, MARITAL PROPERTY, TAXATION, AND ESTATE PLANNING IN WISCONSIN § 5.2 (1991).

62. These provisions are based in part on UPC § 2-208. The value of property included in the deferred marital property augmented estate includes "the commuted value of any present or future interest in deferred marital property and the commuted value of deferred marital property payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan or any similar arrangement." WIS. STAT. § 861.05(2)(f). The term "commuted value" is not defined in the statute but is intended by the Drafting Committee to have the same meaning as under the UPC. *See* Drafting Committee Notes to WIS. STAT. § 861.05.

63. *See* WIS. STAT. § 861.05(2)(a).

transfer with retained rights or benefits are valued immediately before the decedent's death.[64]

- A right, interest, or power that terminated within two years of death is valued as of the date that it terminated.[65]
- Other transfers within two years of death that are included in the augmented estate are valued as of the date of the transfer.[66]

Wis. Stat. § 861.05(3) creates a reduction for "an equitable proportion of funeral and burial expenses, administration expenses, other charges and fees and enforceable claims."[67]

Wis. Stat. § 861.05(4) provides that items will only be counted once, even if they are covered by more than one provision of Wis. Stat. §§ 861.03 or 861.04.[68] The statute directs that such items be included under the provision that yields the greatest value.

---

64. *See* WIS. STAT. § 861.05(2)(b). The Drafting Committee intends that, under the language of this provision, the deferred marital property component of a deferred employment benefit plan will be valued without regard to the operation of any rule under the Employee Retirement Income Security Act (ERISA) or the Retirement Equity Act (REA), both of which mandate transfers to the surviving spouse under certain circumstances. *See* Drafting Committee Notes to WIS. STAT. § 861.05.

For example:

> Assume that the decedent has a deferred employment benefit plan that is deferred marital property and that disposition of the plan is mandated by ERISA or REA. An argument can be made that this asset should be omitted from the deferred marital property augmented estate because spousal rights are covered by federal law and do not need state protection.

(*See*, *e.g.*, Erlanger and Weisberger, note 12, *supra*.) However, WIS. STAT. § 861.05(2)(b) provides that the value of the plan is included in the augmented estate, to the extent that it is deferred marital property.

65. *See* WIS. STAT. § 861.05(2)(c).

66. *See* WIS. STAT. § 861.05(2)(d).

67. With respect to "other charges and fees," it is expected that the property transferred under the election will qualify for the marital deduction and therefore should not bear any of the tax obligation of the estate. *See* Drafting Committee Notes to WIS. STAT. § 861.05.

68. This provision is based on UPC § 2-208(c).

Satisfaction. Provisions for the satisfaction of the deferred marital property elective share are contained in Wis. Stat. § 861.06.[69]

First, all property included in the augmented estate because it was deferred marital property already held by the surviving spouse is used to decrease the surviving spouse's elective right. This means that if the surviving spouse holds half or more of the deferred marital property in the marriage, the election will be ineffective.[70]

Second, the elective share is satisfied by any transfers from the decedent to the surviving spouse, by almost any means, including transfers mandated by state or federal law, such as ERISA or REA. The only exclusions are:

- Transfers under the federal social security system;[71]
- Property transferred under Wis. Stat. § 861.33 (selection of personalty) or Wis. Stat. § 861.41 (exemption of property assigned to the surviving spouse);[72]
- Property transferred to the surviving spouse under Wis. Stat. §§ 861.31 or 861.35 (family allowances), unless the court orders otherwise under Wis. Stat. §§ 861.31(4) or 861.35(3);[73]
- The first $5,000 of value of gifts from the decedent to the surviving spouse each year;[74]
- Certain gifts from the decedent to the surviving spouse that were subsequently gratuitously transferred by the surviving spouse;[75] and

---

69. These provisions are based on *id.* at § 2-209.

70. WIS. STAT. § 861.04.

71. WIS. STAT. § 861.06(2)(b)3. Social security transfers have already been excluded from the augmented deferred marital property estate; the exclusion here is different because it applies to the satisfaction of the elective share amount, which can be with property of *any* type.

72. WIS. STAT. § 861.06(2)(b)1. These provisions are discussed later in this chapter.

73. *Id*.

74. WIS. STAT. § 861.06(2)(b)4.a.

75. WIS. STAT. § 861.06(2)(b)4.b.

- Certain transfers in trust from the decedent that have been disclaimed by the surviving spouse.[76]

It is likely that in the vast majority of marriages, the deferred marital property elective share will be satisfied by transfers from the decedent to the spouse during life and at death, under Wis. Stat. § 861.06(2)(a) and (b). If that is not the case, then the balance of the elective share amount is satisfied primarily out of deferred marital property that was transferred to third parties at the decedent's death.[77] If a balance still remains, it is satisfied out of transfers from the augmented deferred marital property estate made to third parties within two years of the decedent's death.[78] Under limited circumstances, the court may make an equitable adjustment of these shares, if a proportionate share is uncollectible.[79]

[76.] Under WIS. STAT. § 861.06(1), "property transferred to the surviving spouse" is defined to include outright transfers that have been disclaimed. Transfers in trust that have been disclaimed are not included, unless the surviving spouse had a general power of appointment over the property in the trust during his or her lifetime or an interest in the trust after the disclaimer. This provision is based on the analysis in the Comment to UPC § 2-209 but is narrower in that only disclaimed transfers *in trust*, rather than all disclaimed transfers are excluded. As explained in the UPC Comment, the purpose of the provision is to allow the surviving spouse to disclaim an interest in a QTIP trust and take the elective share outright instead. However, the Drafting Committee concluded that the ability to disclaim an *outright* transfer and still qualify for the elective share could allow the surviving spouse to use the combination of disclaimer and the election to favor one set of beneficiaries over another.

[77.] WIS. STAT. § 861.06(3). Life insurance transferred from the augmented deferred marital property estate within two years of death is also included in the property available for satisfaction at this point.

[78.] WIS. STAT. § 861.06(4). Transfers of life insurance are not included because they have been included previously. *See* note 77, *supra*. Thus, the property remaining in this group is that described under WIS. STAT. § 861.03(4)(b)1 and 3:

- Termination, within two years of death, of a right or interest in, or power of appointment over, property that would have been included in the augmented deferred marital property estate if the right, interest, or power had not terminated until the decedent's death; and
- Transfers in excess of $10,000 per year to a single donee, within two years of death.

[79.] WIS. STAT. § 861.06(5). The equitable adjustment provision is not in the UPC.

Personal liability of "unentitled" recipients.[80] Under Wis. Stat. § 861.07, the original recipient of the decedent's deferred marital property transferred to others is always liable for his or her share as determined under Wis. Stat. § 861.06, irrespective of whether the recipient still has the property or its proceeds.[81] If an original recipient gratuitously transfers the property to another person, the subsequent donee also is personally liable for the share if the donee still has the property or its proceeds or if the donee knew or should have known of the liability.[82] The recipients have the option of satisfying the liability by giving up either the property or its value; however, the surviving spouse may ask the court to order a different method of satisfaction because of hardship.[83]

It is possible that federal law will preempt the enforcement of the deferred marital property election against some assets.[84] Wis. Stat. § 861.07(4) attempts to offset these effects by treating a person who would not have received property but for the preemption as an "unentitled" recipient. [85] If the attempt to overcome federal preemption is unsuccessful, the shares of other recipients may, under limited circumstances, be adjusted.[86]

Procedures for the election. Procedures for the election are detailed in Wis. Stat. § 861.08. The spouse must notify interested parties of the election.[87] The statute of limitations for filing the election is six months from the decedent's death, unless the surviving spouse can show cause for

---

80. These provisions are an extension of those in UPC § 2-210 and are similar to those created at new WIS. STAT. § 854.25(2), as discussed in section 4.02P, *supra*.

81. WIS. STAT. § 861.07(2)(a).

82. WIS. STAT. § 861.07(2)(b).

83. WIS. STAT. § 861.07(3).

84. The question of federal preemption is discussed in the context of WIS. STAT. § 854.26, section 4.02Q.

85. This provision is based on UPC § 2-210(b).

86. *See* WIS. STAT. § 861.06(5).

87. WIS. STAT. § 861.08(2).

an extension; in that case, the petition for an extension must be filed within the statute of limitations period, except in unusual circumstances.[88] The statute provides for a hearing,[89] but the Drafting Committee assumes that a hearing can be waived if all interested parties consent.[90] After the court has determined the liability of the holders of deferred marital property affected by the election, the surviving spouse may proceed against some or all of those recipients.[91]

Right of election by or on behalf of the surviving spouse. Under Wis. Stat. § 861.09, the surviving spouse must be living for the election to be filed, although it may be filed by a guardian, a conservator, or an agent under a power of attorney. The right of election by an agent is significantly broader than under the prior code, which had limited a guardian's ability to elect to situations where "additional assets are needed to the reasonable support of the surviving spouse. . ." and required court approval for election by a guardian ad litem.[92] The Drafting Committee deemed these restrictions inappropriate, given that (1) the election is similar to other rights that may be exercised by a guardian and (2) recent developments in the law relating to eligibility for Federal Medical Assistance (Title 19) benefits may require that the election be made.[93]

Waiver of right to elect; failure to elect. Under Wis. Stat. § 861.10, the surviving spouse may waive the right to elect in a marital property

---

88. WIS. STAT. § 861.08(3). Alternatively, the surviving spouse may withdraw a properly filed petition for an election at any time before the court has entered the final determination of the distribution of the decedent's estate. WIS. STAT. § 861.08(4).

89. WIS. STAT. § 861.08(5).

90. *See* Drafting Committee Notes to WIS. STAT. § 861.08. These provisions are based in part on UPC § 2-211.

91. WIS. STAT. § 861.08(5)(c) and (6).

92. *See* prior WIS. STAT. § 861.11(2) (1995-96).

93. *See* Drafting Committee Notes to WIS. STAT. § 861.09.

agreement enforceable under Wis. Stat. § 766.58[94] or by filing a signed document after the decedent's death.[95] The statute provides that failure to elect is not a transfer of property and is not a gift by the surviving spouse.[96] This provision is based on a similar provision in the prior code[97] and is believed sufficient to prevent the surviving spouse from being liable for gift tax.[98] It is probably not sufficient to keep the surviving spouse from being deemed to have divested the assets for Title 19 (Medical Assistance) purposes.[99]

Protection of "innocent third parties." Under Wis. Stat. § 861.11, if a third party payer—such as an insurance company—does not have written notice of an actual or intended filing of the deferred marital property election, it can rely on the governing instrument, pay to named beneficiary, and take other actions in good faith without incurring any liability.[100] However, if proper notice[101] has been served, then this exemption from liability is removed for third party payors other than banks.[102] At that point, the payer may either continue to hold the property pending instructions from the court or discharge its obligation by turning the property over to

---

94. Unless the waiver provides otherwise, a waiver of "all rights" in the property or estate of a present or prospective spouse is a waiver of all rights in the deferred marital property elective share. WIS. STAT. § 861.10(2).

95. WIS. STAT. § 861.10(1).

96. WIS. STAT. § 861.10(3).

97. *See* prior WIS. STAT. § 861.02(1) (1995-96).

98. *See* Drafting Committee Notes to WIS. STAT. § 861.10.

99. *See* Tannler v. DHSS, 206 Wis.2d 386, 557 N.W.2d 434 (Ct. App. 1996), holding that, for the purposes of determining Medicaid eligibility, failure to "take action to claim the statutorily required portion of a decedent spouse's estate" constituted divestment.

100. WIS. STAT. § 861.11(2)(a).

101. WIS. STAT. § 861.11(3) provides that written notice of an intent to file a petition for election or of an already filed petition must either (1) be mailed to the payer's main office or home by registered or certified mail (return receipt requested) or (2) be served upon the payer in the same manner as a summons in a civil action.

102. WIS. STAT. § 861.11(2)(b) and (5)(b).

the relevant probate court.[103] Banks have the same options,[104] but alternatively may distribute the property to the named beneficiary without liability.[105]

E. Some Additional Examples of the Operation of the Election

Example 2. Facts: Spouses A and B had the following property upon A's death in 1999. *All of the assets are deferred marital property.* A's will leaves "all my property" to child:

- Car worth $20,000, titled in A's name alone. B selected the car under Wis. Stat. § 861.33(1)(a)2.
- Stocks worth $100,000, titled in A's name alone; purchased for $50,000.
- IRA worth $100,000, titled in A's name, payable to B.
- Term life insurance on B's life, $100,000 face amount, payable to A.

Analysis: Since the car was selected, it is not included in the augmented deferred marital property estate.[106] The term life insurance on B's life is included, but its value is to take into account the fact that A died first[107] and may for our purposes be assumed to be zero. Thus, the augmented deferred marital property estate is $200,000—the value of the stocks and the IRA. The maximum deferred marital property elective share is $100,000. B has received $100,000 from the IRA,[108] and therefore the elective share is satisfied.

---

103. WIS. STAT. § 861.11(3)(a) and (b). The duties of the court in this situation are described in WIS. STAT. § 861.11(3)(c) and (d).

104. WIS. STAT. § 861.11(5)(c).

105. WIS. STAT. § 861.11(5)(b). The exemption for banks was added in a floor amendment, in order to be consistent with preexisting protections under WIS. STAT. §§ 701.19(11), 710.05, and chapters 112 and 705 of the statutes.

106. *See* WIS. STAT. § 861.05(1).

107. *See* WIS. STAT. § 861.04(2).

108. The car does not count towards satisfaction because selected property is excluded under WIS. STAT. § 861.05(1).

Item	Category	Value in augmented dmp estate	Contribution towards satisfaction
Car	dmp	0	0
Stocks	dmp	100,000	0
IRA	dmp	100,000	100,000
Life insurance on B	dmp	0	0

Arguably, B is at a disadvantage because distributions from the IRA are likely to be fully taxable at ordinary-income rates while the stock received new basis.[109] However, the satisfaction statute has no adjustment for this factor.

Example 3. Facts: At A's death, spouses A and B have the following deferred marital property in their marriage:

- Apartment house held by A and B as joint tenants,[110] worth $100,000.
- Stocks worth $140,000, titled in A's name alone.
- Retirement account from A's employment, worth $100,000, payable to child; assume that under ERISA and the Retirement Equity Act, all proceeds of the account must go to B.
- Bank account worth $10,000, titled in B's name, payable on death to A.

In addition, the spouses' homestead, titled in A's name alone, is marital property and is worth $100,000. A's will leaves A's "entire estate" to child, but B exercises the homestead rights under new Wis. Stat. § 861.21.

---

109. Some might see the IRA as a tax advantaged asset because of the spousal rollover option and the consequent opportunity for long term income tax deferral on subsequent growth. However, if B received the stocks, B could purchase a deferred annuity which would likely give similar deferral and would retain B's basis in the contributions. In any case, the point here is only to note that tax and investment attributes of the property are irrelevant to the satisfaction calculation.

110. Since the apartment house is stipulated to be deferred marital property, it must be a true joint tenancy under WIS. STAT. § 766.60(4), not survivorship marital property.

Analysis: All of the deferred marital property assets are in the augmented deferred marital property estate, which totals $350,000. The maximum deferred marital property elective share is $175,000. B already holds $60,000 of the deferred marital property—the P.O.D. bank account plus B's half of the apartment house held in joint tenancy. B receives an additional $150,000 from A—the second half of the joint tenancy, plus the proceeds of the retirement plan. (Under Wis. Stat. § 861.06(2)(b)3, A receives credit for the transfer of the retirement plan to B, even though it was involuntary.) The marital property homestead is not included in the augmented deferred marital property estate because it is not deferred marital property. In addition, it is irrelevant to the satisfaction of the election because B already has a vested interest in half, and B did not receive anything from A's half. The homestead right is a "buyout" right, not a property right, so it does not constitute a transfer of A's assets to B. All together, B has received $210,000 towards satisfaction, and the elective share is satisfied.

Item	Category	Value in augmented dmp estate	Contribution towards satisfaction
Apartment house	dmp	100,000	100,000
Stocks	dmp	140,000	0
Retirement account	dmp	100,000	100,000
Bank account	dmp	10,000	10,000
Homestead	mp	0	0

Example 4. Facts: At A's death, spouses A and B have the following deferred marital property in their marriage:

- Term life insurance on A's life, $500,000 face amount, payable to child.
- Retirement account from B's employment, worth $100,000, payable to A.

In addition, B holds a diamond brooch, received as a gift from A many years ago. The gift would have been B's individual property, had chapter 766 applied at the time;[111] therefore, it is deferred *individual* property. However, A used deferred *marital* property to pay for the brooch. The brooch was worth $6,000 at the time of the gift, and its current value is $20,000.

Analysis: Both the life insurance and B's retirement account are in the augmented deferred marital property estate. However, valuation of the retirement account takes into account the fact that B is the survivor.[112] Had chapter 766 applied to the account, A's interest in the account would have terminated at A's death.[113] Thus, the value of the retirement account is zero. The brooch is *not* included in the augmented deferred marital property estate, because A gave it away more than two years before death.[114] The augmented deferred marital property estate totals $500,000, and the maximum deferred marital property elective share is $250,000. Although the brooch was not included in the augmented estate, it is counted towards satisfaction of A's obligation, to the extent that it exceeds $5,000.[115] (The reason it is included towards satisfaction is that it is an asset that A was free to do with as A pleased,[116] and A chose to transfer it to B.)

---

111. *See* WIS. STAT. § 766.31(10).

112. *See* WIS. STAT. § 861.04(2).

113. *See* WIS. STAT. § 766.31(3) and § 766.62(5).

114. *See* WIS. STAT. § 861.03(4)(b).

115. WIS. STAT. § 861.06(2)(b)4.a. excludes "the first $5,000 of the value of the gifts from the decedent to the surviving spouse each year." This implies that the reference point should be the date of gift value, rather than the date of death value.

116. WIS. STAT. § 766.31(9) provides that unclassified property will be treated as individual property during marriage.

Item	Category	Value in augmented dmp estate	Contribution towards satisfaction
Life insurance on A	dmp	500,000	0
B's retirement account	dmp	0	0
Diamond brooch	dmp/dip	0	1,000

B is entitled to $249,000 in satisfaction of the deferred marital property elective share from the assets in the augmented deferred marital property estate passing to third parties;[117] in this case, that means the life insurance policy. B has six months from A's death to file for the election.[118] If B gives timely notice to the life insurance company, the company may be liable if it pays the proceeds to child.[119] If child collects the proceeds of the policy, child will be personally liable to B, irrespective of whether child retains the proceeds.[120]

5.03 Other Rights, Allowances, and Exemptions

New subchapter III of chapter 861 includes:

- Provisions from the prior code regarding the surviving spouse's right in real estate owned by a nondomiciliary decedent; and
- A new homestead provision;
- Amended provisions from the prior code regarding allowances, selections, and exemptions.

117. WIS. STAT. § 861.06(3).

118. WIS. STAT. § 861.08(1).

119. WIS. STAT. § 861.11(2)(b).

120. WIS. STAT. § 861.07(2)(a).

These provisions have been expanded somewhat, so that rights may be asserted by the surviving spouse or child (if applicable), by a conservator or guardian, or under a power of attorney.[121]

Surviving spouse's right in nondomiciliary decedent's real property located in Wisconsin. The new code includes prior Wis. Stat. § 861.20 (1995-96) without change. This section essentially provides that Wisconsin real estate owned by a decedent spouse who is not domiciled here will be governed by the law of the decedent's domicile. For intestacy[122] and for purposes of any right of the surviving spouse to elect against a will,[123] the property is treated as though it were located in the decedent's place of domicile.

Homestead protection. Under both the new and the prior codes, Wisconsin generally offers less homestead protection for the surviving spouse than do many other states.[124] Under the prior code, the only homestead protections at death[125] were under a seldom applicable provision for hardship situations,[126] and under intestacy, where if the decedent's intestate estate included an interest in a home, the surviving spouse had a right to have that interest assigned as part of his or her intestate share. If the value of the interest in the home exceeded the surviving spouse's intestate share, the interest was either assigned subject to a lien or the surviving spouse was required to pay the excess value to the personal

---

121. WIS. STAT. § 861.43. Court approval is not necessary, and a power of attorney need not specifically provide the power. The prior statute was silent on these issues.

122. *See* WIS. STAT. § 861. 20(2).

123. *See* WIS. STAT. § 861.20(1).

124. For example, in some states, the surviving spouse has the right to occupy the family home for his or her lifetime. In some states, the family home is exempt from execution by creditors, regardless of value. *See* DUKEMINIER and JOHANSON, WILLS, TRUSTS, AND ESTATES 478-79 (5th ed. 1995).

125. During life, a conveyance of the homestead that alienates any interest of a married person requires joinder by each spouse, irrespective of which spouse is listed as the owner and irrespective of the classification of the homestead under chapter 766. WIS. STAT. § 706.02(1)(f) and § 766.51(8).

126. *See* prior WIS. STAT. § 861.41(4) (1995-96), which is discussed in note 143, *infra*.

representative. Both these provisions are repealed under the new code and replaced by a buyout right when an interest in the home is in intestacy or when the home has a marital property component.

New Wis. Stat. § 861.21 provides that the surviving spouse can petition to have the home assigned to him or her if:

- If the *intestate estate* includes an interest in the home, no matter what its classification;[127] or
- There is a *marital property interest* in the home, and the home is not *specifically* transferred to someone else under a will or under a nonprobate governing instrument such as an inter vivos trust.[128]

As under the prior intestacy statute, the entire intestate interest is available for assignment; it is not limited by the size of the surviving spouse's intestate share.[129] Somewhat analogously, if there is a marital property interest in the home, the *entire* interest not specifically transferred—not just the marital property interest—is available for assignment to the surviving spouse.

Following the provision in the prior intestacy statute[130] "home" is very broadly defined and is not necessarily the homestead occupied by the spouses at the decedent's death. Rather, it can include "any dwelling in which the decedent had an interest and that at the time of the decedent's death the surviving spouse occupies or intends to occupy. If there are

---

127. WIS. STAT. § 861.21(3).

128. WIS. STAT. § 861.21(2).

129. In order for this provision to be relevant, the decedent must have had children from outside the marriage, so that WIS. STAT. § 852.01(1)(a)2 applies. Otherwise, the spouse would receive the entire intestate estate, and no assignment would be necessary. WIS. STAT. § 852.01(1)(a)1. If the decedent had children from outside the marriage and the decedent owned no individual or unclassified property, then the surviving spouse would receive nothing under intestacy. *See* WIS. STAT. § 852.01(1)(a)2.

130. *See* prior WIS. STAT. § 852.09(2) (1995-96).

several such dwellings, any one may be designated by the surviving spouse."[131]

This statute does not grant the surviving spouse more property than that provided under intestacy or under the governing instrument; the surviving spouse must pay for the interest, using any combination of property due from the decedent or funds acquired elsewhere, such as by mortgage.[132] The surviving spouse has one year from the date of death to arrange payment, unless the court extends the period.

> ***Example: Facts:*** During life, spouse A transferred a home and some stocks, all of which were titled in A's name alone, to a revocable trust. At A's death, the home (which was fully paid for) was worth $100,000, and the stocks were worth $80,000. The court has determined that under chapter 766, 10% of the home and all of the stocks are marital property; the remaining interest in the home is A's individual property. The trust provides that A's child C shall receive the assets of the trust at A's death.
>
> ***Analysis:*** Since there is a marital property interest in the home, and the trust does not specifically transfer that interest to a third party, the *entire* home may be assigned to surviving spouse B. B already owns a 5% interest in the home, worth $5,000, as well as a 50% in the stocks, worth $40,000. Spouse B has one year to come up with $95,000 to obtain the home from the trust. B may apply B's interest in the stocks towards that $95,000.

Family allowances. Wisconsin, like virtually all states, provides for a family allowance during the period of probate administration. As under prior law, Wis. Stat. § 861.31 provides that the court may, with or without notice to creditors, order an allowance as it determines appropriate for the

---

131. WIS. STAT. § 861. 21(1)(b). "Home" includes a house, mobile home, duplex, or an apartment in an apartment house or commercial building. It includes all of the surrounding land, unless the court sets off part of the land as severable. WIS. STAT. § 861. 21(1)(b) and 861.21(5).

132. The new statute eliminates the provision in prior WIS. STAT. § 852.09(1) (1995-96) allowing the court to assign the home subject to a lien in favor of the other takers.

support of the surviving spouse and children.[133] Under the prior law, only minor children were eligible;[134] under the new code, all *dependent* children are eligible.[135]

In addition to its typical support allowance during probate administration, Wisconsin may be the only United States jurisdiction that allows the probate court—under Wis. Stat. § 861.35—to order an additional, ongoing allowance for the surviving spouse, and under the new code, for dependent children.[136] As under the prior statute,[137] a postadministration allowance for support of children cannot be awarded if the decedent "has amply provided for each child" or if the surviving spouse is legally responsible for support and able to meet that obligation. In the case of an allowance for the surviving spouse, it cannot be awarded if he or she has ample means for his or her support.[138] In deciding whether to award such an allowance, there are a variety of factors that the court must consider, including the nature of creditors' claims and other resources available for support.[139] This list is the same as under the prior statute,[140] except that an additional factor to be considered is "whether the provisions of a marital property agreement will create a hardship for the surviving spouse."[141] This rule is more restrictive than that for waiver of

---

133. WIS. STAT. § 861.31(1m).

134. *See* prior WIS. STAT. § 861.31(1) (1995-96).

135. A "dependent child" is defined as a minor child of the decedent or an adult child of the decedent who was being supported by the decedent at the time of the decedent's death. WIS. STAT. § 861.31(1c). Inclusion of dependent children was suggested by UPC § 2-404.

136. WIS. STAT. § 861.35(1m). Under the prior code, the allowance for a child was limited to minor children and had to terminate when the child reached 18. *See* prior WIS. STAT. § 861.35(1) (1995-96).

137. *See* prior WIS. STAT. § 861.35(1) (1995-96).

138. WIS. STAT. § 861.35(1m)(a)-(c).

139. WIS. STAT. § 861.35(3).

140. *Compare* prior WIS. STAT. § 861.35(3)(1995-96) and new WIS. STAT. § 861.35(3) and (4). Except for the change noted in the text, the changes in the new statute are primarily editorial.

141. WIS. STAT. § 861.35(3)(e).

maintenance under Wis. Stat. § 767.26; the "hardship" language is drawn from the statute on division of property at divorce, Wis. Stat. § 767.255(2)(b), and is intended to have the same meaning as under that statute.[142]

In addition to the family allowances available under Wis. Stat. §§ 861.31 and 861.35, under Wis. Stat. § 861.41(1) and (2)—which are retained from the prior code—the court, upon petition of the surviving spouse, may set aside property worth up to $10,000 for the surviving spouse—exempt from the claims of creditors—if it determines that an assignment ahead of creditors is "reasonably necessary for the support of the spouse."[143]

Selection rights. As under prior law, Wis. Stat. § 861.33 provides that the surviving spouse can, subject to some restrictions,[144] "select"—*i.e.*, have on written demand—various items of personal property including an automobile, wearing apparel and jewelry held for personal use by the

---

142. *See* Drafting Committee Notes to WIS. STAT. § 861.35. However, the hardship provision under new WIS. STAT. § 861.35(3)(e) is distinct from the "public assistance" rule in current WIS. STAT. § 766.58(9)(b).

143. Under prior WIS. STAT. § 861.41(4) (1995-96), the court could include as part of the property assigned to the spouse "either a fee or life interest in the home." If the value of the interest in the home would exceed the amount set by the court under sub. (1), then the spouse was required to pay "the excess of the value of the interest over the amount set by the court." This resulted in a "Catch 22" situation: if the spouse could afford to pay for the home, then most likely the spouse would not be able to show that assignment of $10,000 ahead of creditors was necessary for his or her support. Prior WIS. STAT. § 861.41(4) (1995-96) has therefore been repealed and replaced with somewhat expanded homestead rights under new WIS. STAT. § 861.21.

Under prior WIS. STAT. § 861.41(3) (1995-96), property assigned under WIS. STAT. § 861.41(1) was applied against the right of the surviving spouse to take under the will, under intestacy, or under the deferred marital property election. Given that the purpose of WIS. STAT. § 861.41 is to provide additional property to the surviving spouse in a hardship situation, prior WIS. STAT. § 861.41(3) (1995-96) seemed inappropriate and was repealed.

144. Items that were specifically bequeathed are excluded, unless they are normal furnishings necessary to maintain the home. For this purpose, specifically bequeathed antiques, family heirlooms, and collections are not considered normal household furniture or furnishings. WIS. STAT. § 861.33(1)(b). In addition, a creditor can petition the court to impose a limit on the value of the items selected, if it appears that claims may not be paid in full. WIS. STAT. at § 861.33(2).

decedent or the surviving spouse,[145] household furnishings, and some additional items not used in business.[146]

The new statute tracks the prior rule, except that children are now included as persons who may select, if there is no surviving spouse. In addition, the dollar amounts in the statute are updated to reflect more contemporary values.[147] The personal representative may transfer the items without court order, even if the personal representative is the surviving spouse or the only child of the decedent.[148]

---

145. The *surviving spouse's* clothes and jewelry are included because of the probability that the decedent owned a half interest in at least some of them under chapter 766.

146. WIS. STAT. § 861. 33(1)(a). Note that, in general, there are no limits on the value of what can be selected. (For exceptions, *see* WIS. STAT. § 861.33(1)(a)4 and § 861.33(2).) Where the only bar is a dollar limit, the surviving spouse can select the item if he or she reimburses the estate for the excess value. WIS. STAT. § 861.33(3).

147. WIS. STAT. § 861.33(1)(a)(4) was amended to increase the amount of "other tangible personalty" that can be selected from $1,000 to $3,000, and WIS. STAT. § 861.33(2) was amended to create a $5,000 (rather than a $3,000) threshold where the court may limit the selection right on petition of a creditor.

148. WIS. STAT. § 861. 33(4).

MISCELLANEOUS PROVISIONS 6

This chapter reviews a potpourri of changes in the new code which did not fit easily into the discussion in the previous chapters.

6.01 Definitions

Chapter 851 sets out a series of definitions that apply throughout the probate code. It is important to note that these definitions refer to the use of the defined term *in the statutes*, not in estate planning instruments. Thus, for example, the term "heirs" is defined at Wis. Stat. § 851.09 of the new code, as it was in the prior code. But if the term is used in a "governing instrument," its meaning is governed by Wis. Stat. § 854.22(1), not by Wis. Stat. § 851.09.

New and amended definitions in chapter 851 and elsewhere in the new code include:

- Definition of "governing instrument," to include any estate planning or other instrument that transfers property at death;[1]
- Definition of "conscious presence" to mean "within the range of any of a person's senses";[2]

---

1. WIS. STAT. § 854.01. Governing instruments are discussed in section 4.01, *supra*.

2. WIS. STAT. § 851.035. This definition is based on the Comment to UPC § 2-502. The term appears in amended WIS. STAT. § 853.03(1) (proxy signing), WIS. STAT. § 853.03(2) (acknowledgment to witnesses), and WIS. STAT. § 853.11(1m) (revocation by physical act), as well as in other places in chapter 853.

- Revision of the definition of "deferred marital property, retaining the same meaning, but enhancing clarity.[3] A parallel definition of "deferred individual property" is also created;[4]
- Definition of "devise" to include *personal* property as well as real property, thus clarifying an ambiguity created by Wis. Stat. § 990.01(4) in the definitions chapter of the statutes.[5]
- Revision of the definition of "property" to clarify that the term refers to the rights of a beneficiary under a contractual arrangement, to choses in action,[6] and in general *anything that may be the subject of ownership*;[7]
- Definition of "surviving spouse." In general, the statute excludes from the status of surviving spouse persons: (1) who have obtained or consented to an invalid decree of divorce; (2) who have participated in a marriage ceremony with a third party after the decedent spouse obtained an invalid decree of divorce; or (3) who were party to a valid proceeding that purported to terminate all property rights based on the marriage;[8]

---

3. WIS. STAT. § 851.055.

4. *Id.* at § 861.018(2).

5. WIS. STAT. § 851.065. Based on UPC § 1-201(10). WIS. STAT. § 990.01(4), which remains unchanged, defines "bequest"—which traditionally refers only to personal property—to include a devise—which traditionally refers only to real property. However, it does not state the reverse, *i.e.*, that "devise" includes a bequest of personal property.

6. Choses in action were specifically listed as a type of "nontestamentary instrument" in prior WIS. STAT. § 701.27(1)(b) (1995-96), but the committee believes that they are better characterized as a type of property. See Drafting Committee Notes to WIS. STAT. § 851.27. A "chose in action" is a right (*e.g.*, the right to recover a debt) that can be enforced by legal action. It is distinguished from a "chose in possession," which is a tangible item capable of actually being possessed and enjoyed.

7. WIS. STAT. § 851.27. Based on UPC § 1-201(39). Note that the definition of property under this statute includes "interests" in property. Hence the Drafting Committee considered the phrase "property or an interest in property," which appeared in many statutes in the prior code, to be redundant. Similarly, the committee considered phrases like "payment, item of property, or benefit," which appear in various sections of the UPC, to be covered by the term "property." See Drafting Committee Notes to WIS. STAT. § 851.27.

8. WIS. STAT. § 851.30. Based on UPC § 2-802. The committee believes that WIS. STAT. § 767.255(1) implies that the latter condition would include a Wisconsin legal separation. *See* Drafting Committee Notes to WIS. STAT. § 851.30.

- Definition of "will" to include codicils, documents incorporated by reference—including a separate statement transferring tangible personal property under Wis. Stat. § 853.32(2)—and duplicate originals.[9] A "will" does not include a copy, but this does not prevent a copy from being proved as a will under the "lost will" statute, Wis. Stat. § 856.17.[10]

6.02 Limitations of Claims Against Trusts

The new code adds a provision that limits claims against trusts, detailing substantive provisions and procedures similar to those limiting claims against estates.[11] A trustee who has the duty or power to pay the debts of a decedent can impose a four-month statute of limitations on claims by unascertainable creditors through publication of a legal notice. Other creditors are entitled to actual notice, unless they have actual knowledge of the date on which the four-month period ends. Without such notice or knowledge, they have until one year after the decedent's death or 30 days after receiving notice or having actual knowledge of the deadline, whichever comes first. Claims are to be filed with the trustee, not with the probate court.

6.03 Exercise of Power of Appointment

The new code provides that, if the exercise of a power of appointment requires that the power holder expressly refer to that power, it is presumed

---

9. WIS. STAT. § 851.31. Adoption of this definition permits language in various statutes to be more consistent.

10. Note that, although this section defines wills as including documents incorporated by reference, not all will rules (*e.g.*, execution rules) apply to incorporation by reference. Rather, the requirements for proper incorporation by reference are governed by new WIS. STAT. § 853.32.

11. WIS. STAT. § 701.065. The statute is modeled after WIS. STAT. § 859.02 and § 859.48. It was added to the legislation at the last minute by Assembly Amendment 3, to Assembly Substitute Amendment 1, to 1997 Assembly Bill 645, and was not reviewed by the Drafting Committee.

that the purpose is to avoid inadvertent exercise of the power.[12] The purpose of the rule is to aid in resolving disputes when the power holder executes a document merely referring to "any property over which I have a power of appointment." The prior rule,[13] which had substantially stricter requirements, was repealed.[14]

6.04 "At-Death" Provisions in Marital Property Agreements

Wis. Stat. § 767.266—which provides for revocation of "at-death" provisions in a marital property agreement if the spouses subsequently get divorced—was amended to specify that *all* at-death provisions are revoked, irrespective of whether they provide for nontestamentary transfers under the agreement or for mandated transfers under other estate planning instruments.[15] The prior statute implied that only transfers *under the agreement* were covered. Note that if the marriage has been dissolved, this statute revokes *all* transfers at death under a marital property agreement, irrespective of who the beneficiaries are. By contrast, new Wis. Stat. § 854.15—which applies to documents other than a marital property agreement—revokes only transfers to the former spouse and relatives of the former spouse.[16]

---

12. WIS. STAT. § 702.03(1). The presumption can be rebutted by evidence of a contrary intent, which can be shown by extrinsic evidence. Based on UPC § 2-704 as extended by UPC § 2-701. The rationale and operation of the rule is explained in the Comment to UPC § 2-704.

13. Prior WIS. STAT. § 702.03(1) (1995-96).

14. The committee also considered replacing WIS. STAT. § 702.03(2) with UPC § 2-608, which covers the same issue as that rule but decided that the current rule is essentially the same rule as that of the UPC, but is clearer. Hence, the current language of WIS. STAT. § 702.03(2) was retained, but the committee noted that there is useful discussion of the rule in the Comment to UPC § 2-608. See Drafting Committee Notes to WIS. STAT. § 702.03.

15. The prior provision, WIS. STAT. § 767.266 (1995-96), was renumbered WIS. STAT. § 767.266(1).

16. New WIS. STAT. § 854.15, which is cross-referenced under new WIS. STAT. § 767.266(2), revokes all predissolution revocable estate planning provisions in favor of a former spouse and that spouse's relatives (who are not also the relatives of the decedent spouse), absent evidence of contrary intent. That provision is discussed in section 4.02J, *supra*.

6.05 Classification of Property at Death

New Wis. Stat. § 854.17 provides that classification of the property of a decedent spouse and surviving spouse is determined under chapter 766. This provision is identical to one at prior Wis. Stat. § 851.35 (1995-96), where it was inaptly located.

APPENDICES

Appendix A: Wisconsin Statutes (1997-98) as of January 1, 1999

Appendix B: 1997 Wisconsin Act 188

Appendix C: Drafting Committee Notes to 1997 Wisconsin Act 188

Appendix A reprints chapters 851, 852, 853, 854, and 861 of the new probate code, as well as revised chapter 701. Appendix B reprints 1997 Wisconsin Act 188, and Appendix C reprints the Drafting Committee's Notes to Act 188. There is a note for each section of the act, including those that repeal or relocate sections of the prior code. As a result, the Drafting Committee Notes can serve as a "conversion table"; one can look up any section of the prior law and quickly determine its status in the new code. The notes can also serve as a quick index to the changes in the code; for each new provision, there is a capsule summary of the prior and new law.

Appendix A

CHAPTER 851*
PROBATE — DEFINITIONS AND GENERAL PROVISIONS

SUBCHAPTER I
DEFINITIONS

851.002 Definitions. The definitions in ss. 851.01 to 851.31 apply to chs. 851 to 882.
History: 1979 c. 89; 1997 a. 188.

851.01 Administration. "Administration" means any proceeding relating to a decedent's estate whether testate or intestate.

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

851.035 Conscious presence. "Conscious presence" means within the range of any of a person's senses.
History: 1997 a. 188.

851.04 Court. "Court" means the circuit court or judge assigned to exercise probate jurisdiction.
History: 1977 c. 449.

851.05 Decedent. "Decedent" means the deceased person whose estate is subject to administration.

851.055 Deferred marital property. "Deferred marital property" means any property that satisfies all of the following:

(1) Is not classified by ch. 766.

(2) Was acquired while the spouses were married.

(3) Would have been classified as marital property under ch. 766 if the property had been acquired when ch. 766 applied.
History: 1985 a. 37; 1987 a. 393; 1997 a. 188.

851.06 Determination date. "Determination date" has the meaning given under s. 766.01 (5).
History: 1985 a. 37.

851.065 Devise. "Devise", when used as a noun, means a testamentary disposition of any real or personal property by will. "Devise", when used as a verb, means to dispose of any real or personal property by will.
History: 1997 a. 188.

851.07 Distributee. "Distributee" means any person to whom property of a decedent is distributed other than in payment of a claim, or who is entitled to property of a decedent under the decedent's will or under the statutes of intestate succession.

History: 1993 a. 486.

851.09 Heir. "Heir" means any person, including the surviving spouse, who is entitled under the statutes of intestate succession to an interest in property of a decedent. The state is an heir of the decedent and a person interested under s. 45.37 (10) and (11) when the decedent was a member of the Wisconsin veterans home at the time of the decedent's death.

History: 1973 c. 333 s. 201m; 1993 a. 486.

851.11 Intestate succession. "Intestate succession" means succession to title to property of a decedent by reason of ch. 852, without regard to whether the property descends or is distributed.

851.13 Issue. "Issue" means children, grandchildren, great-grandchildren, and lineal descendants of more remote degrees, including those who occupy that relation by reason of adoption under s. 854.20 and nonmarital children and their lineal descendants to the extent provided by s. 852.05.

History: 1981 c. 391; 1983 a. 447; 1997 a. 188.

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

851.17 Net estate. "Net estate" 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 those allowances are charged by the court against the intestate share of the recipient, administration, funeral and burial expenses, the amount of claims paid and federal and state estate taxes payable out of such property.

History: 1987 a. 27.

851.19 Person. "Person" includes natural persons, corporations and other organizations.

851.21 Person interested. (1) WHO ARE "PERSONS INTERESTED". The following are "persons interested":

(a) An heir of the decedent.

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

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

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

(e) Additional persons as the court by order includes as "interested persons".

(2) WHO CEASE TO BE "PERSONS INTERESTED". The following cease to be "persons interested":

(a) An heir of the decedent who is not a beneficiary under the will of the decedent, upon admission of the will to probate under ch. 856 or entry of a statement of informal administration under ch. 865.

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

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

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

(e) A beneficiary of a trust created under documents offered for probate as the will of the decedent upon the admission of the decedent's will to probate and the issuance of letters of trust to the trustee.

(3) ADDITIONAL PERSONS INTERESTED. In any proceedings in which the interest of a trustee of an inter vivos or testamentary trust, including a trust under documents offered for probate, conflicts with the trustee's duty as a personal representative, or in which the trustee or competent beneficiary of the trust cannot represent the interest of the beneficiary under the doctrine of virtual representation, the

beneficiary is a person interested in the proceedings.

History: 1973 c. 39; 1993 a. 486.

851.23 Personal representative. "Personal representative" means any person to whom letters to administer a decedent's estate have been granted by the court or by the probate registrar under ch. 865, but does not include a special administrator.

History: 1973 c. 39.

851.27 Property. "Property" means any interest, legal or equitable, in real or personal property, without distinction as to kind, including money, rights of a beneficiary under a contractual arrangement, choses in action and anything else that may be the subject of ownership.

History: 1997 a. 188.

851.29 Sale. "Sale" 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 of this section is to extend and not to limit the meaning of "sale".

851.30 Surviving spouse. (1) Subject to sub. (2), "surviving spouse" means a person who was married to the decedent at the time of the decedent's death.

(2) "Surviving spouse" does not include any of the following:

(a) An individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, if the decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each other or they subsequently hold themselves out as husband and wife.

(b) An individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a 3rd individual.

(c) An individual who was party to a valid proceeding concluded by an order purporting to terminate all property rights based on the marriage.

History: 1997 a. 188.

851.31 Will. "Will" includes a codicil and any document incorporated by reference in a testamentary document under s. 853.32 (1) or (2). "Will" does not include a copy, unless the copy has been proven as a will under s. 856.17, but "will" does include a properly executed duplicate original.

History: 1997 a. 188.

SUBCHAPTER II
GENERAL PROBATE PROVISIONS

851.40 Basis for attorney fees. (1) Any attorney performing services for the estate of a deceased person in any proceeding under chs. 851 to 879, including a proceeding for informal administration under ch. 865, shall be entitled to just and reasonable compensation for such services.

(2) Any personal representative, heir, beneficiary under a will or other interested party may petition the court to review any attorney's fee which is subject to sub. (1). If the decedent died intestate or the testator's will contains no provision concerning attorney fees, the court shall consider the following factors in determining what is a just and reasonable attorney's fee:

(a) The time and labor required.

(b) The experience and knowledge of the attorney.

(c) The complexity and novelty of the problems involved.

(d) The extent of the responsibilities assumed and the results obtained.

(e) The sufficiency of assets properly available to pay for the services, except that the value of the estate may not be the controlling factor.

History: 1975 c. 329; 1993 a. 490.

851.50 Status of adopted persons. The status of adopted persons for purposes of inheritance and transfers under wills or other governing instruments, as defined in s. 854.01, is governed by ss. 854.20 and 854.21.

History: 1997 a. 188.

851.55 Simultaneous death. The transfer of or title to property that depends upon priority of death with respect to 2 or more persons who die simultaneously is governed by s. 854.03.

History: 1977 c. 214, 449; 1983 a. 186; 1993 a. 486; 1997 a. 188.

851.70 Presumption in favor of orders. When the validity of any order or judgment of a circuit court in a probate proceeding or certificate to terminate a life estate or joint tenancy in a death tax proceeding is drawn in question in another action or proceeding, everything necessary to have been done or proved to render the order, judgment or certificate valid and which might have been proved by parole evidence at the time of making the order or judgment and was not required to be recorded shall, after 20 years from that time, be presumed to have been done or proved unless the contrary appears on the same record.

History: 1977 c. 449; 1987 a. 27.

851.71 Appointment and compensation of registers in probate. (1) In each county, the judges of the county shall appoint and may remove a register in probate. Appointments and removals may be made only with the approval of the chief judge. Before entering upon duties, the register in probate shall take and subscribe the constitutional oath of office and file it, together with the order of appointment, in the office of the clerk of circuit court.

(2) One or more deputies may be appointed in the manner specified in sub. (1).

(3) The salary of the register in probate and of any deputies shall be fixed by the county board and paid by the county.

(4) In counties having a population of 500,000 or more, the appointment under subs. (1) and (2) shall be made as provided in those subsections but the judges shall not remove the register in probate and deputy registers, except through charges for dismissal made and sustained under s. 63.10 or an applicable collective bargaining agreement.

History: 1977 c. 449; 1987 a. 153.

851.72 Duties of registers in probate. The register in probate shall:

(1) File and keep all papers properly deposited with him or her unless required to transmit such papers.

(2) Keep a court record of every proceeding in the court under chs. 851 to 880 under its proper title, a brief statement of the nature of the proceeding and of all papers filed therein, with the date of filing and a reference to where minute records can be found or to the microfilm or optical disk or electronic file where papers have been stored so that the court record is a complete index or brief history of each proceeding from beginning to final disposition.

(3) Keep a minute record and enter therein a brief statement of all proceedings of the court under chs. 851 to 880 during its sessions, all motions made and by whom, all orders granted in open court or otherwise, and the names of all witnesses sworn or examined. If this information is all included in the court record, the judge may direct that the minute record be no longer kept.

(5) Keep an alphabetical index to the court record and the file containing the original documents or microfilm, optical disk, or electronic copies thereof.

(6) Perform any other administrative duties as the judge directs.

(7) Except in counties having a population of 500,000 or more, perform the duties of clerk of the court assigned to exercise jurisdiction under chs. 48 and 938 unless these duties are performed by a person appointed under s. 48.04.

(8) When appointed deputy clerk under s. 851.75, perform such duties as the clerk of circuit court directs.

(9) In counties having a population of 500,000 or more, the register in probate shall be the department head as to all personnel, procurement, budget and related matters with reference to his or her office as register in probate. The register in probate shall appoint under ss. 63.01 to 63.16 as many deputy clerks as may be authorized by the county board, provided that the appointments shall be approved by the judge which the deputy shall serve. The deputy clerks shall aid the register

in probate and deputy registers in probate in the discharge of their duties.

(10) Submit a monthly report to the department of health and family services of the deadlines for filing claims against estates set under s. 859.01 during that month in the register's county. The report shall be filed in a form and manner that may be prescribed by the department of health and family services.

History: 1977 c. 449; Sup. Ct. Order, 136 W (2d) xx (1987); 1987 a. 193; 1993 a. 16, 172; 1995 a. 27 ss. 7187, 7188, 9126 (19); 1995 a. 77.

851.73 Powers of registers in probate. (1) The register in probate:

(a) May make orders for hearings when the judge is away from the county seat or unable to discharge duties or when given authority in writing by the judge and an application is made to the court in a proceeding under chs. 851 to 880 requiring notice of hearing. The order and notice when signed "by the court, ... , register in probate" has the same effect as if signed by the judge.

(b) Has the same powers as clerks of court to certify copies of papers, records and judicial proceedings. Copies certified byregisters in probate are receivable in evidence as if certified by clerks of court.

(c) Has the power to administer any oath required by law.

(d) Has, when appointed for this purpose, the powers of deputy clerks as provided in s. 59.40 (1).

(e) Has, when appointed for this purpose, the powers and duties of court reporters and assistant reporters specified in SCR 71.01.

(f) May refuse to accept any paper for filing or recording until the fee prescribed by s. 814.66 or other applicable statute is paid.

(2) Subsection (1) applies to duly authorized deputy registers in probate.

History: 1977 c. 449; Sup. Ct. Order, eff. 1-1-80; 1983 a. 347; 1995 a. 201.

851.74 Fees in probate matters. The fees of the register in probate are prescribed in s. 814.66.

History: 1977 c. 449; 1981 c. 317.

851.75 Register in probate may be appointed deputy clerk. With the written approval of the chief judge of the judicial administrative district, the circuit judges for the county may appoint the register in probate a deputy clerk. Appointments by the circuit judges under this section shall be revocable by the circuit judges, subject to the approval of the chief judge, at pleasure. The appointments and revocations shall be in writing and shall be filed in the clerk's office.

History: 1977 c. 449.

CHAPTER 852*
INTESTATE SUCCESSION

Cross-reference: See definitions in ch. 851.

852.01 Basic rules for intestate succession. **(1)** WHO ARE HEIRS. Except as modified by the decedent's will under s. 852.10 (1), any part of the net estate of a decedent that is not disposed of by will passes to the decedent's surviving heirs as follows:

(a) To the spouse:

1. If there are no surviving issue of the decedent, or if the surviving issue are all issue of the surviving spouse and the decedent, the entire estate.

2. If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of decedent's property other than marital property.

(b) To the issue, the share of the estate not passing to the spouse under par. (a), or the entire estate if there is no surviving spouse. If there are issue other than children, those of more remote degrees take per stirpes.

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

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

(f) If there is no surviving spouse, issue, parent or issue of a parent, to the grandparents and their issue as follows:

1. One-half to the maternal grandparents equally if both survive, or to the surviving maternal grandparent; if both maternal grandparents are deceased, to the issue of the maternal grandparents or either of them, per stirpes.

2. One-half to the paternal relations in the same manner as to the maternal relations under subd. 1.

3. If either the maternal side or the paternal side has no surviving grandparent or issue of a grandparent, the entire estate to the decedent's relatives on the other side.

(2) SURVIVORSHIP REQUIREMENT. Survivorship under sub. (1) is determined as provided in s. 854.03.

(2m) HEIR WHO KILLS DECEDENT. If a person under sub. (1) killed the decedent, the inheritance rights of that person are governed by s. 854.14.

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

History: 1977 c. 214, 449; 1981 c. 228; 1983 a. 186; 1985 a. 37; 1987 a. 222; 1987 a. 393 s. 53; 1991 a. 224; 1993 a. 486; 1997 a. 188.

852.03 Related rules. **(1)** PER STIRPES. If per stirpes distribution is called for under s. 852.01 (1) (b), (d) or (f), the rules under s. 854.04 apply.

(3) RELATIVES OF THE HALF BLOOD. Inheritance rights of relatives of the half blood are governed by s. 854.21 (4).

(4) POSTHUMOUS HEIRS. Inheritance rights of a person specified in s. 852.01 (1) who was born after the death of the decedent are governed by s. 854.21 (5).

(5) RELATED THROUGH 2 LINES. Inheritance rights of a person who is related to the decedent through 2 lines of relationship are governed by s. 854.21 (6).

(6) TAKING THROUGH OR BY ALIEN. No person is disqualified from taking as an heir because the person or a person through whom he or she claims is not or at some time was not a U.S. citizen. The rights of an alien to acquire or hold land in the state are governed by ss. 710.01 to 710.03.

History: 1993 a. 486; 1997 a. 188.

852.05 Status of nonmarital child for purposes of intestate succession. (1) A nonmarital child or the child's issue is entitled to take in the same manner as a marital child by intestate succession from and through his or her mother, and from and through his or her father if any of the following applies:

(a) The father has been adjudicated to be the father in a paternity proceeding under ch. 767 or by final order or judgment of a court of competent jurisdiction in another state.

(b) The father has admitted in open court that he is the father.

(c) The father has acknowledged himself to be the father in writing signed by him.

(2) Property of a nonmarital child passes in accordance with s. 852.01 except that the father or the father's kindred can inherit only if the father has been adjudicated to be the father in a paternity proceeding under ch. 767 or by final order or judgment of a court of competent jurisdiction in another state or has been determined to be the father under s. 767.62 (1) or a substantially similar law of another state.

(3) This section does not apply to a child who becomes a marital child by the subsequent marriage of the child's parents under s. 767.60. The status of a nonmarital child who is legally adopted is governed by s. 854.20.

(4) Section 895.01 (1) applies to paternity proceedings under ch. 767.

History: 1979 c. 32 s. 92 (2); 1979 c. 352; 1981 c. 391; 1983 a. 447; 1993 a. 486; 1997 a. 188, 191.

852.09 Assignment of home to surviving spouse. If the intestate estate includes an interest in a home, assignment of that interest to the surviving spouse is governed by s. 861.21.

History: 1993 a. 486; 1997 a. 188.

852.10 Disinheritance from intestate share. (1) A decedent's will may exclude or limit the right of an individual or class to succeed to property passing by intestate succession.

(2) The share of the intestate estate that would have passed to the individual or class described in sub. (1) passes as if the individual or each member of the class had disclaimed his or her intestate share under s. 854.13.

(3) This section does not apply if the individual or all members of the class described in sub. (1) predecease the testator.

History: 1997 a. 188.

852.11 Advancement. The effect of a lifetime gift by the decedent on the intestate share of an heir is governed by s. 854.09.

History: 1993 a. 486; 1997 a. 188.

852.12 Debts to decedent. If an heir owes a debt to the decedent, the debt shall be charged against the intestate share of the debtor, regardless of whether the debt has been discharged in bankruptcy. If the debtor fails to survive the decedent, the debt shall not be taken into account in computing the intestate shares of the debtor's issue.

History: 1997 a. 188.

852.13 Right to disclaim intestate share. Any person to whom property would otherwise pass under s. 852.01 may disclaim all or part of the property as provided under s. 854.13.

History: 1973 c. 233; 1977 c. 309; 1997 a. 188.

CHAPTER 853*
WILLS

Cross-reference: See definitions in ch. 851.

SUBCHAPTER I
GENERAL RULES

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.

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

(1) It must be signed by the testator, by the testator with the assistance of another person with the testator's consent or in the testator's name by another person at the testator's direction and in the testator's conscious presence.

(2) It must be signed by 2 or more witnesses, each of whom signed within a reasonable time after witnessing any of the following:

(a) The signing of the will as provided under sub. (1).

(b) The testator's implicit or explicit acknowledgement of the testator's signature on the will, within the conscious presence of each of the witnesses.

(c) The testator's implicit or explicit acknowledgement of the will, within the conscious presence of each of the witnesses.

History: 1993 a. 486; 1997 a. 188.

853.04 Self-proved will. (1) ONE-STEP PROCEDURE. A will may be simultaneously executed, attested and made self-proved by the affidavit of the testator and witnesses. The affidavit must be made before an officer authorized to administer oaths under the laws of the state in which execution occurs and must be evidenced by the officer's certificate, under official seal, in substantially the following form:

I, ..., the testator, sign my name to this instrument this .... day of ...., and being first duly sworn, declare to the undersigned authority all of the following:

1. I execute this instrument as my will.

2. I sign this will willingly, or willingly direct another to sign for me.

3. I execute this will as my free and voluntary act for the purposes expressed therein.

4. I am 18 years of age or older, of sound mind and under no constraint or undue influence.

Testator: ....

We, ..., ..., the witnesses, being first duly sworn, sign our names to this instrument and declare to the undersigned authority all of the following:

1. The testator executes this instrument as his or her will.

2. The testator signs it willingly, or willingly directs another to sign for him or her.

3. Each of us, in the conscious presence of the testator, signs this will as a witness.

4. To the best of our knowledge, the testator is 18 years of age or older, of sound mind and under no constraint or undue influence.

Witness: ....

Witness: ....

State of ....

County of ....

Subscribed and sworn to before me by ...., the testator, and by ...., and ...., witnesses, this .... day of ...., ...

(Seal) ....

(Signed): ....

(Official capacity of officer): ....

(2) TWO-STEP PROCEDURE. An attested will may be made self-proved at any time after its execution by the affidavit of the testator and witnesses. The affidavit must be made before an officer authorized to administer oaths under the laws of the state in which the affidavit occurs and must be evidenced by the officer's certificate, under official seal, attached or annexed to the will in substantially the following form:

State of ....

County of ....

We, ..., ..., and ...., the testator and the witnesses whose names are signed to the foregoing instrument, being first duly sworn, do declare to the undersigned authority all of the following:

1. The testator executed the instrument as his or her will.

2. The testator signed willingly, or willingly directed another to sign for him or her.

3. The testator executed the will as a free and voluntary act.

4. Each of the witnesses, in the conscious presence of the testator, signed the will as witness.

5. To the best of the knowledge of each witness, the testator was, at the time of execution, 18 years of age or older, of sound mind and under no constraint or undue influence.

Testator: ....

Witness: ....

Witness: ....

Subscribed and sworn to before me by ...., the testator, and by ...., and ...., witnesses, this .... day of ...., ...

(Seal) ....

(Signed): ....

(Official capacity of officer): ....

(3) EFFECT OF AFFIDAVIT. (a) A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the due execution of the will.

(b) Inclusion in a will of an affidavit in substantially the form under sub. (1) or (2) is

conclusive evidence that the will was executed in compliance with s. 853.03.

NOTE: Sub. (1) (form) and (2) (form are shown as renumbered from sub. (1) (a), (b) and (c) and sub. (2) (a), (b) and (c) by the revisor under s. 13.93 (1) (b).

History: 1997 a. 188; s. 13.93 (1) (b).

853.05 Execution of wills outside the state or by nonresidents within this state. (1) A will is validly executed if it is in writing and any of the following applies:

(a) The will is executed according to s. 853.03.

(b) The will is executed in accordance with the law, at the time of execution or at the time of death, of any of the following:

1. The place where the will was executed.

2. The place where the testator resided, was domiciled or was a national at the time of execution.

3. The place where the testator resided, was domiciled or was a national at the time of death.

(2) Any will under sub. (1) (b) has the same effect as if executed in this state in compliance with s. 853.03.

History: 1993 a. 486; 1997 a. 188.

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

(2) (a) Subject to pars. (b) and (c), a will is not invalidated because it is signed by an interested witness.

(b) Except as provided in par. (c), any beneficial provisions of the will for a witness or the spouse of a witness are invalid to the extent that the aggregate value of those provisions exceeds what the witness or spouse would have received had the testator died intestate. Valuation is to be made as of testator's death.

(c) Paragraph (b) does not apply if any of the following applies:

1. The will is also signed by 2 disinterested witnesses.

2. There is sufficient evidence that the testator intended the full transfer to take effect.

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

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

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

History: 1987 a. 403; 1997 a. 188.

853.09 Deposit of will in circuit court during testator's lifetime. (1) DEPOSIT OF WILL. Unless provided otherwise by county ordinance, any testator may deposit his or her will with the register in probate of the court of the county where he or she resides. The will shall be sealed in an envelope with the name and address of the testator, and the date of deposit noted thereon. If the will is deposited by a person other than the testator, that fact also shall be noted on the envelope. The size of the envelope may be regulated by the register in probate to provide uniformity and ease of filing. A county board may, by ordinance, provide that wills may not be deposited with the register in probate for the county. Wills deposited with the register in probate prior to the effective date of that ordinance shall be retained by the register in probate as provided under sub. (2).

(2) DUTY OF REGISTER IN PROBATE. The register in probate shall issue a receipt for the deposit of the will and shall maintain a registry of all wills deposited. The original will, unless withdrawn under sub. (3) or opened in accordance with s. 856.03 after death of the testator, shall be kept on file for the period provided in SCR chapter 72; 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, optical disk, electronic format or other method of comparable retrievability and

destroy the original. If satisfactorily identified, the reproduction is admissible in court for probate or any other purpose the same as the original document. Wills deposited with the county judge under s. 238.15, 1967 stats., shall be transferred to the register in probate and become subject to this section.

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

History: 1977 c. 449; 1981 c. 146; Sup. Ct. Order, 136 W (2d) xx (1987); 1993 a. 172, 486; 1995 a. 27.

853.11 Revocation. (1) REVOCATION BY WRITING. (a) A will is revoked in whole or in part by a subsequent will that is executed in compliance with s. 853.03 or 853.05 and that revokes the prior will or a part thereof expressly or by inconsistency.

(bm) 1. A subsequent will wholly revokes the prior will if the testator intended the subsequent will to replace rather than supplement the prior will, regardless of whether the subsequent will expressly revokes the prior will.

2. The testator is presumed to have intended a subsequent will to replace, rather than supplement, the prior will if the subsequent will completely disposes of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the prior will is revoked.

3. The testator is presumed to have intended a subsequent will to supplement, rather than replace, the prior will if the subsequent will does not completely dispose of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the prior will only to the extent of any inconsistency.

(1m) REVOCATION BY PHYSICAL ACT. A will is revoked in whole or in part by burning, tearing, canceling, obliterating or destroying the will, or part, with the intent to revoke, by the testator or by some person in the testator's conscious presence and by the testator's direction.

(2) PREMARITAL WILL. (a) *Entitlement of surviving spouse.* Subject to par. (c), if the testator married the surviving spouse after the testator executed his or her will, the surviving spouse is entitled to a share of the probate estate.

(b) *Value of share.* The value of the share under par. (a) is the value of the share that the surviving spouse would have received had the testator died with an intestate estate equal to the value of the net estate of the decedent less the value of all of the following:

1. All devises to or for the benefit of the testator's children who were born before the marriage to the surviving spouse and who are not also the children of the surviving spouse.

2. All devises to or for the benefit of the issue of a child described in subd. 1.

3. All devises that pass under s. 854.06, 854.07, 854.21 or 854.22 to or for the benefit of children described in subd. 1. or issue of those children.

(c) *Exceptions.* Paragraph (a) does not apply if any of the following applies:

1. It appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse.

2. It appears from the will or other evidence that the will is intended to be effective notwithstanding any subsequent marriage, or there is sufficient evidence that the testator considered revising the will after marriage but decided not to.

3. The testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

4. The testator and the spouse have entered into an agreement that complies with ch. 766 and that provides for the spouse or specifies that the spouse is to have no rights in the testator's estate.

(d) *Priority and abatement.* In satisfying the share provided by this subsection:

1. Amounts received by the surviving spouse under s. 861.02 and devises made by will to the surviving spouse are applied first.

2. Devises other than those described in par. (b) 1. to 3. abate as provided under s. 854.18.

(3) FORMER SPOUSE. The effect of a transfer under a will to a former spouse is governed by s. 854.15.

(3m) INTENTIONAL KILLING OF DECEDENT BY BENEFICIARY. If a beneficiary under a will killed the decedent, the rights of that beneficiary are governed by s. 854.14.

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

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

(6) REVIVAL OF REVOKED WILL. (a) If a subsequent will that partly revoked a previous will is itself revoked by a revocatory act under sub. (1m), the revoked part of the previous will is revived. This paragraph does not apply if it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator did not intend the revoked part of the previous will to take effect as executed.

(b) If a subsequent will that wholly revoked a previous will is itself revoked by a revocatory act under sub. (1m), the previous will remains revoked unless it is revived. The previous will is revived if it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator intended the previous will to take effect as executed.

(c) If a subsequent will that wholly or partly revoked a previous will is itself revoked by another, later will, the previous will or its revoked part remains revoked, unless it or its revoked part is revived. The previous will or its revoked part is revived to the extent that it appears from the terms of the later will, or from the testator's contemporary or subsequent declarations, that the testator intended the previous will to take effect.

(d) In the absence of an original valid will, establishment of the execution and validity of the revived will or part is governed by s. 856.17.

History: 1981 c. 228; 1983 a. 186; 1987 a. 222; 1993 a. 486; 1997 a. 188.

853.13 Contracts. (1) A contract to make a will or devise, not to revoke a will or devise or to die intestate may be established only by any of the following:

(a) Provisions of a will stating the material provisions of the contract.

(b) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract.

(c) A valid written contract, including a marital property agreement under s. 766.58 (3) (e).

(d) Clear and convincing extrinsic evidence.

(2) The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

History: 1995 a. 225; 1997 a. 188.

853.15 Equitable election if will attempts to dispose of property belonging to beneficiary. (1) NECESSITY FOR ELECTION. (a) Unless the will provides otherwise, this subsection applies if a will gives a devise to one beneficiary and also clearly purports to give to another beneficiary property that does not pass under the will but belongs to the first beneficiary by right of ownership, survivorship, beneficiary designation or otherwise.

(b) If the conditions in par. (a) are fulfilled, the first beneficiary must elect either to take under the will and transfer his or her property in accordance with the will or to retain his or her property and not take under the will. If the first beneficiary elects not to take under the will, unless the will provides otherwise his or her devise under the will shall be assigned to the other beneficiary.

(c) This section does not require an election if the property belongs to the first beneficiary because of transfer or beneficiary designation made by the decedent after the execution of the will.

(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 the beneficiary's 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 the beneficiary's property interest in accordance with the will has not been filed with the court within the time set by order, or if no order setting a time has been entered, then prior to the final judgment, the beneficiary is deemed to have elected not to take under the will.

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

History: 1983 a. 186; 1985 a. 37; 1987 a. 393 s. 53; 1993 a. 486; 1997 a. 188.

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

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

853.18 Designation of beneficiary, payee or owner. (1) Except as otherwise provided in ch. 766, no written designation in accordance with the terms of any insurance, annuity or endowment contract, or in any agreement issued or entered into by an insurance company in connection therewith, supplemental thereto or in settlement thereof, and no written designation made under a contract, plan, system or trust providing for pension, retirement, deferred compensation, stock bonus, profit-sharing or death benefits, or an employment or commission contract, of any person to be a beneficiary, payee or owner of any right, title or interest thereunder upon the death of another, or any assignment of rights under any of the foregoing, is subject to or defeated or impaired by any statute or rule of law governing the transfer of property by will, gift or intestacy, even though that designation or assignment is revocable or the rights of that beneficiary, payee, owner or assignee are otherwise subject to defeasance.

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

History: 1983 a. 186.

853.19 Advancement. The effect of a lifetime gift by the testator on the rights of a beneficiary under the will is governed by s. 854.09.

History: 1993 a. 486; 1997 a. 188.

853.25 Unintentional failure to provide for issue of testator. (1) CHILDREN BORN OR ADOPTED AFTER MAKING OF THE WILL. (a) *Applicability.* Except as provided in sub. (5), if a will fails to provide for a child of the testator born or adopted after execution of the will, the child is entitled to a share of the estate unless any of the following applies:

1. It appears from the will or from other evidence that the omission was intentional.

2. The testator provided for the omitted child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements

or is reasonably inferred from the amount of the transfer or other evidence.

(b) *Share if testator had no living child at execution.* Except as provided in sub. (5), if a will fails to provide for a child of the testator born or adopted after the execution of the will and the testator had no child living when he or she executed the will, the omitted child receives a share in the estate equal in value to that which the child would have received under ch. 852. This paragraph does not apply if the will devised all or substantially all of the estate to or for the benefit of the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will.

(c) *Share if testator had living child at execution.* Except as provided in sub. (5), if a will fails to provide for a child of the testator born or adopted after the execution of the will and the testator had one or more children living when he or she executed the will and the will devised property to one or more of the then-living children, the omitted child is entitled to share in the testator's estate as follows:

1. The portion that the omitted child is entitled to share is limited to devises made to the testator's then-living children under the will.

2. The omitted child is entitled to receive the share of the testator's estate, as limited in subd. 1., that the child would have received had the testator included all omitted after-born and after-adopted children with the children to whom devises were made under the will and had given an equal share of the estate to each child.

3. To the extent feasible, the interest granted an omitted child under this section shall be of the same character, whether equitable or legal, present or future, as that devised to the testator's then-living children under the will.

4. In satisfying a share provided by this paragraph, devises to the testator's children who were living when the will was executed abate ratably. In abating the devises of the then-living children, the court shall preserve to the maximum extent possible the character of the testamentary plan adopted by the testator.

(d) *Rights of issue.* Except as provided in sub. (5), if a child entitled to a share under this section dies before the testator, and the child leaves issue who survive the testator, the issue who represent the deceased child are entitled to the deceased child's share.

(2) LIVING ISSUE OMITTED BY MISTAKE. Except as provided in sub. (5), if clear and convincing evidence proves that the testator failed to provide in the testator's will for a child living at the time of making of the will, or for the issue of any then deceased child, by mistake or accident, including the mistaken belief that the child or issue of a deceased child was dead at the time the will was executed, the child or issue is entitled to receive a share in the estate of the testator, as provided under sub. (1), as if the child or issue was born or adopted after the execution of the will. Failure to mention a child or issue in the will is not in itself evidence of mistake or accident.

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

(4) FROM WHAT ESTATE SHARE IS TO BE TAKEN. Except as provided in sub. (5), the court shall in its final judgment assign a share provided under sub. (1) (b) as follows:

(a) First, from intestate property.

(b) Any balance from each devise to a beneficiary under the will in proportion to the value of the estate each beneficiary would have received under the will as written. If the intention of the testator, shown by clear and convincing evidence, in relation to some specific gift or other provision in the will would be defeated by assignment of the share as provided in this paragraph, the court may adopt a different apportionment and may exempt a specific devise or other provision.

(5) DISCRETIONARY POWER OF COURT TO ASSIGN DIFFERENT SHARE. If in any case under sub. (1) or (2) the court determines that the share is in a different amount or form from what the testator would have wanted to provide for the omitted child or issue of a deceased child, 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 intent of the testator.

History: 1993 a. 486; 1997 a. 188.

853.27 Lapse. The rights under a will of a beneficiary who predeceases the testator are governed by s. 854.06.

History: 1993 a. 486; 1997 a. 188.

853.29 After-acquired property. A will is presumed to pass all property that the testator owns at the testator's death and that the testator has power to transfer by will, including property acquired by the testator after the execution of the will or acquired by the testator's estate.

History: 1993 a. 486; 1997 a. 188.

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

853.32 Effect of reference to another document. (1) INCORPORATION. A will may incorporate by reference another writing or document if all of the following apply:

(a) The will, either expressly or as construed from extrinsic evidence, manifests an intent to incorporate the other writing or document.

(b) The other writing or document was in existence when the will was executed.

(c) The other writing or document is sufficiently described in the will to permit identification with reasonable certainty.

(d) The will was executed in compliance with s. 853.03 or 853.05.

(2) DISPOSITION OF TANGIBLE PERSONAL PROPERTY. (a) A reference in a will executed on or after May 3, 1996, to another document that lists tangible personal property not otherwise specifically disposed of in the will disposes of that property if the other document describes the property and the distributees with reasonable certainty and is signed and dated by the decedent.

(b) Another document under par. (a) is valid even if it does not exist when the will is executed, even if it is changed after the will is executed and even if it has no significance except for its effect on the disposition of property by the will.

(c) If the document described in par. (a) is not located by the personal representative, or delivered to the personal representative or circuit court with jurisdiction over the matter, within 30 days after the appointment of the personal representative, the personal representative may dispose of tangible personal property according to the provisions of the will as if no such document exists. If a valid document is located after some or all of the tangible personal property has been disposed of, the document controls the distribution of the property described in it, but the personal representative incurs no liability for the prior distribution or sale of the property, as long as the time specified in this paragraph has elapsed.

(d) The duties and liability of a person who has custody of a document described in par. (a), or information about such a document, are governed by s. 856.05.

(e) Beneficiaries under a document that is described in par. (a) are not interested parties for purposes of s. 879.03.

(3) TRANSFERS TO LIVING TRUSTS. The validity and implementation of a will provision that purports to transfer or appoint property to a living trust are governed by s. 701.08.

History: 1995 a. 234; 1997 a. 188 ss. 144, 145, 153.

853.325 Effect of reference to acts or events. A will may dispose of property by reference to acts or events that have significance apart from their effect on the disposition of property under the will and that do not occur solely for the purpose of determining the disposition of property under the will. Reference to the execution or revocation of another individual's will fulfills the requirements under this section. This section applies whether the acts or events

occur before or after execution of the will or before or after the testator's death.

History: 1997 a. 188.

853.33 Gift of securities. Section 854.11 governs gifts of securities under a will.

History: 1997 a. 188.

853.35 Nonademption of specific gifts in certain instances. The rights of a beneficiary with respect to a specific gift that is destroyed, damaged, sold or condemned before the testator's death are governed by s. 854.08.

History: 1993 a. 486; 1997 a. 188.

853.40 Disclaimer. A person to whom property would otherwise pass under a will may disclaim all or part of the property as provided in s. 854.13.

History: 1977 c. 309; 1983 a. 186; 1983 a. 189 s. 329 (26); 1985 a. 29, 37; 1987 a. 220; 1991 a. 39; 1997 a. 188.

853.41 Applicability of general transfers at death provisions. Chapter 854 applies to transfers under wills, including transfers under a Wisconsin basic will or basic will with trust.

History: 1997 a. 188.

SUBCHAPTER II
WISCONSIN BASIC WILLS

853.50 Definitions. In ss. 853.50 to 853.62:

(1) "By right of representation" means according to the method specified in s. 854.04 (1).

(2) "Children" includes all children whether born or adopted before or after a Wisconsin basic will or basic will with trust is executed.

(3) "Issue" means children, grandchildren, great-grandchildren, and lineal descendants of more remote degrees, including those who occupy that relation by reason of adoption under s. 854.20 and nonmarital children and their lineal descendants to the extent provided by s. 852.05.

(4) "Testator" means any person choosing to make a Wisconsin basic will or basic will with trust.

(5) "Trustee" means a person so designated in a Wisconsin basic will with trust and any other person acting at any time as the trustee under a Wisconsin basic will with trust.

(6) "Wisconsin basic will" means a Wisconsin basic will executed in accordance with ss. 853.50 to 853.62.

(7) "Wisconsin basic will with trust" means a Wisconsin basic will with trust executed in accordance with ss. 853.50 to 853.62.

History: 1983 a. 376; 1997 a. 188.

853.51 Execution of will. (1) The only method of executing a Wisconsin basic will or basic will with trust is for all of the following to occur:

(a) The testator shall do all of the following:

1. Complete the blanks, boxes and lines substantially in accordance with the instructions.

2. Sign the will.

(bc) The witnesses shall comply with s. 853.03 (2).

(2m) Any failure to comply with the instructions in a Wisconsin basic will or basic will with trust, other than the requirements for the testator's and witnesses' signatures, does not affect the validity of the will.

History: 1983 a. 376; 1997 a. 188.

853.52 Contents of wills. (1) There are 2 Wisconsin basic wills: the Wisconsin basic will and the Wisconsin basic will with trust.

(2) The Wisconsin basic will includes all of the following:

(a) The contents of the form for the Wisconsin basic will under s. 853.55.

(b) The full texts of each of the following:

1. The definitions under s. 853.50.

2. The clause under s. 853.57.

3. The property disposition clause under s. 853.58 adopted by the testator.

4. The mandatory clauses under s. 853.60.

(3) The Wisconsin basic will with trust includes all of the following:

(a) The contents of the form for the Wisconsin basic will with trust under s. 853.56.

(b) The full texts of each of the following:

1. The definitions under s. 853.50.

2. The clause under s. 853.57.

3. The property disposition clause under s. 853.59.

4. The mandatory clauses under ss. 853.60 and 853.61.

(4) Any person who prints forms for the Wisconsin basic will or basic will with trust shall place a signature line on each page of the printed document. A testator shall sign on each such line. Failure to comply with this subsection does not affect the validity of the will.

History: 1983 a. 376; 1993 a. 304.

853.53 Selection of property disposition clause. If more than one property disposition clause is selected or if none is selected, the residuary property of a testator who signs a Wisconsin basic will or basic will with trust shall be distributed to the testator's heirs as if the testator did not make a will.

History: 1983 a. 376.

853.54 Revocation or revision. (1) A Wisconsin basic will or a basic will with trust may be revoked and may be amended in the same manner as other wills.

(2) Any additions to or deletions from the face of the form of the Wisconsin basic will or basic will with trust, other than in accordance with the instructions, shall be ineffective and shall be disregarded.

(3) Notwithstanding sub. (2), any failure to print in the proper places, provide the full name of a person or charity to receive a gift, include residences or use the phrase "not used" where applicable does not affect the validity of a Wisconsin basic will or basic will with trust.

History: 1983 a. 376.

853.55 Wisconsin basic will. The following is the form for the Wisconsin basic will:

NOTICE TO THE PERSON WHO SIGNS THIS WILL:

1. THIS WILL DOES NOT DISPOSE OF PROPERTY WHICH PASSES ON YOUR DEATH TO ANY PERSON BY OPERATION OF LAW OR BY ANY CONTRACT. FOR EXAMPLE, THE WILL DOES NOT DISPOSE OF JOINT TENANCY ASSETS, AND IT DOES NOT NORMALLY APPLY TO PROCEEDS OF LIFE INSURANCE ON YOUR LIFE OR YOUR RETIREMENT PLAN BENEFITS.

2. THIS WILL IS NOT DESIGNED TO REDUCE TAXES. YOU SHOULD DISCUSS THE TAX RESULTS OF YOUR DECISIONS WITH A COMPETENT TAX ADVISER.

3. THIS WILL MAY NOT WORK WELL IF YOU HAVE CHILDREN BY A PREVIOUS MARRIAGE OR IF YOU HAVE BUSINESS PROPERTY, PARTICULARLY IF THE BUSINESS IS UNINCORPORATED.

4. YOU CANNOT CHANGE, DELETE OR ADD WORDS TO THE FACE OF THIS WISCONSIN BASIC WILL. YOU MAY REVOKE THIS WISCONSIN BASIC WILL, AND YOU MAY CHANGE IT BY SIGNING A NEW WILL.

5. THE FULL TEXT OF THIS WISCONSIN BASIC WILL, THE DEFINITIONS, THE PROPERTY DISPOSITION CLAUSES AND THE MANDATORY CLAUSES FOLLOW THE END OF THIS WILL AND ARE CONTAINED IN THE PROBATE CODE OF WISCONSIN (CHAPTERS 851 TO 882 OF THE WISCONSIN STATUTES).

6. THE WITNESSES TO THIS WILL SHOULD NOT BE PEOPLE WHO MAY RECEIVE PROPERTY UNDER THIS WILL. YOU SHOULD READ AND CAREFULLY FOLLOW THE WITNESSING PROCEDURE DESCRIBED AT THE END OF THIS WILL.

7. YOU SHOULD KEEP THIS WILL IN YOUR SAFE-DEPOSIT BOX OR OTHER SAFE PLACE.

8. IF YOU MARRY OR DIVORCE AFTER YOU SIGN THIS WILL, YOU SHOULD MAKE AND SIGN A NEW WILL.

9. THIS WILL TREATS ADOPTED CHILDREN AS IF THEY ARE BIRTH CHILDREN.

10. IF YOU HAVE CHILDREN UNDER 21 YEARS OF AGE, YOU MAY WISH TO USE THE WISCONSIN BASIC WILL WITH TRUST OR ANOTHER TYPE OF WILL.

11. IF THIS WISCONSIN BASIC WILL DOES NOT FIT YOUR NEEDS, YOU MAY WANT TO CONSULT WITH A LAWYER.

[A printed form for a Wisconsin basic will shall set forth the above notice in 10-point boldface type.]

WISCONSIN BASIC WILL OF

. . . . . .

(Insert Your Name)

Article 1. Declaration.

This is my will and I revoke any prior wills and codicils (additions to prior wills).

Article 2. Disposition of My Property

2.1. PERSONAL RECREATIONAL AND HOUSEHOLD ITEMS. Except as provided in paragraph 2.2, I give all my furniture, furnishings, household items, recreational equipment, personal automobiles and personal effects to my spouse, if living; otherwise they shall be divided equally among my children who survive me.

2.2 GIFTS TO PERSONS OR CHARITIES. I make the following gifts to the persons or charities in the cash amount stated in words (.... Dollars) and figures ($....) or of the property described. I SIGN IN EACH BOX USED. I WRITE THE WORDS "NOT USED" IN THE REMAINING BOXES. If I fail to sign opposite any gift, then no gift is made. If the person mentioned does not survive me or if the charity does not accept the gift, then no gift is made.

FULL NAME OF PERSON OR CHARITY TO RECEIVE GIFT. (Name only one. Please print.)	AMOUNT OF CASH GIFT OR DESCRIPTION OF PROPERTY.	SIGNATURE OF TESTATOR. ....
FULL NAME OF PERSON OR CHARITY TO RECEIVE GIFT. (Name only one. Please print.)	AMOUNT OF CASH GIFT OR DESCRIPTION OF PROPERTY.	SIGNATURE OF TESTATOR. ....
FULL NAME OF PERSON OR CHARITY TO RECEIVE GIFT. (Name only one. Please print.)	AMOUNT OF CASH GIFT OR DESCRIPTION OF PROPERTY.	SIGNATURE OF TESTATOR. ....
FULL NAME OF PERSON OR CHARITY TO RECEIVE GIFT. (Name only one. Please print.)	AMOUNT OF CASH GIFT OR DESCRIPTION OF PROPERTY.	SIGNATURE OF TESTATOR. ....

2..3. ALL OTHER ASSETS (MY "RESIDUARY ESTATE"). I adopt only one Property Disposition Clause in this paragraph by writing my signature on the line next to the title of the Property Disposition Clause I wish to adopt. I SIGN ON ONLY ONE LINE. I WRITE THE WORDS "NOT USED" ON THE REMAINING LINE. If I sign on more than one line or if I fail to sign on any line, the property will go under Property Disposition Clause (b) and I realize that means the property will be distributed as if I did not make a will in accordance with Chapter 852 of the Wisconsin Statutes.

PROPERTY DISPOSITION CLAUSES (Select one.)

(a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD BY RIGHT OF REPRESENTATION. ....

(b) TO BE DISTRIBUTED AS IF I DID NOT HAVE A WILL. ....

Article 3. Nominations of Personal Representative and Guardian

3.1. PERSONAL REPRESENTATIVE. (Name at least one.)

I nominate the person or institution named in the first box of this paragraph to serve as my personal representative. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes. I confer upon my personal representative the authority to do and perform any act which he or she determines is in the best interest of the estate, with no limitations. This provision shall be given the broadest possible construction. This authority includes, but is not limited to, the power to borrow money, pledge assets, vote stocks and participate in reorganizations, to sell or exchange real or personal property, and to invest funds and retain securities without any limitation by law for investments by fiduciaries.

FIRST PERSONAL REPRESENTATIVE

SECOND PERSONAL REPRESENTATIVE

THIRD PERSONAL REPRESENTATIVE

3.2. GUARDIAN. (If you have a child under 18 years of age, you should name at least one guardian of the child.)
If my spouse dies before I do or if for any other reason a guardian is needed for any child of mine, then I nominate the person named in the first box of this paragraph to serve as guardian of the person and estate of that child. If the person does not serve, then I nominate the person named in the second box of this paragraph to serve as guardian of that child.

FIRST GUARDIAN

SECOND GUARDIAN

3.3. BOND.
My signature in this box means I request that a bond, as set by law, be required for each individual personal representative or guardian named in this will. IF I DO NOT SIGN IN THIS BOX, I REQUEST THAT A BOND NOT BE REQUIRED FOR ANY OF THOSE PERSONS.

I sign my name to this Wisconsin Basic Will on ..... (date), at ..... (city), ... (state).
Signature of Testator .....
STATEMENT OF WITNESSES (You must use two witnesses, who should be adults.)
I declare that the testator signed the will in front of me, acknowledged to me that this document was his or her will *or* acknowledged to me that the signature above is his or her signature. The testator appears to me to be of sound mind and not under undue influence.
Signature ..... Residence Address: .....
Print Name
Here: ..... Date Signed: .....

Signature ..... Residence Address: .....
Print Name
Here: ..... Date Signed: .....

History: 1983 a. 376; 1997 A. 188.

853.56 Wisconsin basic will with trust. The following is the form for the Wisconsin basic will with trust:
NOTICE TO THE PERSON WHO SIGNS THIS WILL:
1. THIS FORM CONTAINS A TRUST FOR YOUR FAMILY. IF YOU DO NOT WANT TO CREATE A TRUST, DO NOT USE THIS FORM.
2. THIS WILL DOES NOT DISPOSE OF PROPERTY WHICH PASSES ON YOUR DEATH TO ANY PERSON BY OPERATION OF LAW OR BY ANY CONTRACT. FOR EXAMPLE, THE WILL DOES NOT DISPOSE OF JOINT TENANCY ASSETS, AND IT DOES NOT NORMALLY APPLY TO PROCEEDS OF LIFE INSURANCE ON YOUR LIFE OR YOUR RETIREMENT PLAN BENEFITS.
3. THIS WILL IS NOT DESIGNED TO REDUCE TAXES. YOU SHOULD DISCUSS THE TAX RESULTS OF YOUR DECISIONS WITH A COMPETENT TAX ADVISER.
4. THIS WILL MAY NOT WORK WELL IF YOU HAVE CHILDREN BY A PREVIOUS MARRIAGE OR IF YOU HAVE BUSINESS PROPERTY, PARTICULARLY IF THE BUSINESS IS UNINCORPORATED.
5. YOU CANNOT CHANGE, DELETE OR ADD WORDS TO THE FACE OF THIS WISCONSIN BASIC WILL WITH TRUST. YOU MAY REVOKE THIS WISCONSIN BASIC WILL WITH TRUST, AND YOU MAY CHANGE IT BY SIGNING A NEW WILL.

6. THE FULL TEXT OF THIS WISCONSIN BASIC WILL WITH TRUST, THE DEFINITIONS, THE PROPERTY DISPOSITION CLAUSES AND THE MANDATORY CLAUSES FOLLOW THE END OF THIS WILL AND ARE CONTAINED IN THE PROBATE CODE OF WISCONSIN (CHAPTERS 851 TO 882 OF THE WISCONSIN STATUTES).

7. THE WITNESSES TO THIS WILL SHOULD NOT BE PEOPLE WHO MAY RECEIVE PROPERTY UNDER THIS WILL. YOU SHOULD READ AND CAREFULLY FOLLOW THE WITNESSING PROCEDURE DESCRIBED AT THE END OF THIS WILL.

8. YOU SHOULD KEEP THIS WILL IN YOUR SAFE-DEPOSIT BOX OR OTHER SAFE PLACE.

9. THIS WILL TREATS ADOPTED CHILDREN AS IF THEY ARE BIRTH CHILDREN.

10. IF YOU MARRY OR DIVORCE AFTER YOU SIGN THIS WILL, YOU SHOULD MAKE AND SIGN A NEW WILL.

11. IF THIS WISCONSIN BASIC WILL WITH TRUST DOES NOT FIT YOUR NEEDS, YOU MAY WANT TO CONSULT WITH A LAWYER.

[A printed form for a Wisconsin basic will with trust shall set forth the above notice in 10-point boldface type.]

WISCONSIN BASIC WILL WITH TRUST OF

.....

(Insert Your Name)

Article 1. Declaration.

This is my will and I revoke any prior wills and codicils (additions to prior wills).

Article 2. Disposition of My Property

2.1. PERSONAL, RECREATIONAL AND HOUSEHOLD ITEMS. Except as provided in paragraph 2.2, I give all my furniture, furnishings, household items, recreational equipment, personal automobiles and personal effects to my spouse, if living; otherwise they shall be divided equally among my children who survive me.

2.2 GIFTS TO PERSONS OR CHARITIES. I make the following gifts to the persons or charities in the cash amount stated in words (.... Dollars) and figures ($....) or of the property described. I SIGN IN EACH BOX USED. I WRITE THE WORDS "NOT USED" IN THE REMAINING BOXES. If I fail to sign opposite any gift, then no gift is made. If the person mentioned does not survive me or if the charity does not accept the gift, then no gift is made.

FULL NAME OF PERSON OR CHARITY TO RECEIVE GIFT. (Name only one. Please print.)	AM0UNT OF CASH GIFT OR DESCRIPTION OF PROPERTY.	SIGNATURE OF TESTATOR. .....
FULL NAME OF PERSON OR CHARITY TO RECEIVE GIFT. (Name only one. Please print.)	AMOUNT OF CASH GIFT OR DESCRIPTION OF PROPERTY.	SIGNATURE OF TESTATOR. .....
FULL NAME OF PERSON OR CHARITY TO RECEIVE GIFT. (Name only one. Please print.)	AMOUNT OF CASH GIFT OR DESCRIPTION OF PROPERTY.	SIGNATURE OF TESTATOR. .....

FULL NAME OF PERSON OR CHARITY TO RECEIVE GIFT. (Name only one. Please print.)	AMOUNT OF CASH GIFT OR DESCRIPTION OF PROPERTY.	SIGNATURE OF TESTATOR. .....

FULL NAME OF PERSON OR CHARITY TO RECEIVE GIFT. (Name only one. Please print.)	AMOUNT OF CASH GIFT OR DESCRIPTION OF PROPERTY.	SIGNATURE OF TESTATOR. .....

2.3 ALL OTHER ASSETS (MY "RESIDUARY ESTATE"). I adopt only one Property Disposition Clause in this paragraph by writing my signature on the line next to the title of the Property Disposition Clause I wish to adopt. I SIGN ON ONLY ONE LINE. I WRITE THE WORDS "NOT USED" ON THE REMAINING LINES. If I sign on more than one line or if I fail to sign on any line, the property will be distributed as if I did not make a will in accordance with Chapter 852 of the Wisconsin Statutes.

IF YOU HAVE A SUBSTANTIAL ESTATE, CHOOSING CLAUSE (a) OR (b) MIGHT NOT BE THE MOST ADVANTAGEOUS TAX OPTION AVAILABLE TO YOU. If you have questions concerning the tax implications of these clauses, you should consult a competent tax adviser.

PROPERTY DISPOSITION CLAUSES (Select one.)

(a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN IN ONE TRUST TO PROVIDE FOR THE SUPPORT AND EDUCATION OF MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD BY RIGHT OF REPRESENTATION UNTIL I HAVE NO LIVING CHILD UNDER 21 YEARS OF AGE. .....

(b) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN IN ONE TRUST TO PROVIDE FOR THE SUPPORT AND EDUCATION OF MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD BY RIGHT OF REPRESENTATION UNTIL I HAVE NO LIVING CHILD UNDER ..... YEARS OF AGE. .....
(IF YOU DO NOT WANT 21 YEARS OF AGE TO APPLY, PRINT A DIFFERENT AGE, 18 OR ABOVE, IN CLAUSE (b) AND SIGN ON THE LINE BESIDE THAT CLAUSE.)

Article 3. Nominations of Personal Representative, Trustee and Guardian

3.1. PERSONAL REPRESENTATIVE. (Name at least one.)

I nominate the person or institution named in the first box of this paragraph to serve as my personal representative. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes. I confer upon my personal representative the authority to do and perform any act which he or she determines is in the best interest of the estate, with no limitations. This provision shall be given the broadest possible construction. This authority includes, but is not limited to, the power to borrow money, pledge assets, vote stocks and participate in reorganizations, to sell or exchange real or personal property, and to invest funds and retain securities without any limitation by law for investments by fiduciaries.

FIRST PERSONAL REPRESENTATIVE	

SECOND PERSONAL REPRESENTATIVE

THIRD PERSONAL REPRESENTATIVE

3.2. TRUSTEE. (Name at least one.)

Because it is possible that after I die my property may be put into a trust, I nominate the person or institution named in the first box of this paragraph to serve as trustee of that trust. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST TRUSTEE

SECOND TRUSTEE

THIRD TRUSTEE

3.3. GUARDIAN. (If you have a child under 18 years of age, you should name at least one guardian of the child.)

If my spouse dies before me or for any other reason a guardian is needed for any child of mine, then I nominate the person named in the first box of this paragraph to serve as guardian of the person and estate of that child. If the person does not serve, then I nominate the person named in the second box of this paragraph to serve as guardian of that child.

FIRST GUARDIAN

SECOND GUARDIAN

3.4. BOND.

My signature in this box means I request that a bond, as set by law, be required for each individual personal representative, trustee or guardian named in this will. IF I DO NOT SIGN IN THIS BOX, I REQUEST THAT A BOND NOT BE REQUIRED FOR ANY OF THOSE PERSONS.

I sign my name to this Wisconsin Basic Will With Trust on .....(date), at.....(city),..... (state).

Signature of Testator .....

STATEMENT OF WITNESSES (You must use two witnesses, who should be adults.)

I declare that the testator signed the will in front of me, acknowledged to me that this document was his or her will *or* acknowledged to me that the signature above is his or her signature. The testator appears to me to be of sound mind and not under undue influence.

Signature ..... Residence Address: .....
Print Name Here: ....

Signature ..... Residence Address: .....
Print Name Here: ....

History: 1983 a. 376; 1993 a. 304; 1997 a. 188.

853.57 Personal, recreational and household items. The following is the full text of paragraph 2.1 of the Wisconsin basic will and the basic will with trust:

If my spouse survives me, I give my spouse all my books, jewelry, clothing, personal automobiles, recreational equipment, household furnishings and effects, and other tangible articles of a household, recreational or personal use, together with all policies of insurance insuring any such items. If my spouse does not survive me, the personal representative shall distribute those items among my children who survive me, and shall distribute those items in as nearly equal shares as feasible in the personal representative's discretion. If none of my children survive me, the items described in this paragraph shall become part of the residuary estate.

History: 1983 a. 376.

853.58 Residuary estate; basic will. The following is the full text of the property disposition clauses referred to in paragraph 2.3 of the Wisconsin basic will:

(a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD BY RIGHT OF REPRESENTATION.

If my spouse survives me, then I give all my residuary estate to my spouse. If my spouse does not survive me, then I give all my residuary estate to my descendants by right of representation who survive me. If my spouse and descendants do not survive me, the personal representative shall distribute my residuary estate to my heirs at law, their identities and respective shares to be determined according to the laws of the State of Wisconsin in effect on the date of my death.

(b) TO BE DISTRIBUTED AS IF I DID NOT HAVE A WILL:

The personal representative shall distribute my residuary estate to my heirs at law, their identities and respective shares to be determined according to the laws of the State of Wisconsin in effect on the date of my death.

History: 1983 a. 376.

853.59 Residuary estate; basic will with trust. The following is the full text of the property disposition clause referred to in paragraph 2.3 of the Wisconsin basic will with trust, except that if a different age is specified by the testator in the Wisconsin basic will with trust, that specified age is substituted for 21 years in this section:

(a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN IN ONE TRUST TO PROVIDE FOR THE SUPPORT AND EDUCATION OF MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD UNTIL I HAVE NO LIVING CHILD UNDER 21 YEARS OF AGE.

(1) If my spouse survives me, then I give all my residuary estate to my spouse.

(2) If my spouse does not survive me and if any child of mine under 21 years of age survives me, then I give all my residuary estate to the trustee, in trust, on the following terms:

(A) As long as any child of mine under 21 years of age is living, the trustee shall distribute from time to time to or for the benefit of any one or more of my children and the descendants of any deceased child (the beneficiaries) of any age as much, or all, of the principal or net income of the trust or both, as the trustee deems necessary for their health, support, maintenance and education. Any undistributed income shall be accumulated and added to the principal. "Education" includes, but is not limited to, college, vocational and other studies after high school, and reasonably related living expenses. Consistent with the trustee's fiduciary duties, the trustee may distribute trust income or principal in equal or unequal shares and to any one or more of the beneficiaries to the exclusion of other beneficiaries. In deciding on distributions,

the trustee may take into account the beneficiaries' other income, outside resources or sources of support, including the capacity for gainful employment of a beneficiary who has completed his or her education.

(B) The trust shall terminate when there is no living child of mine under 21 years of age. The trustee shall distribute any remaining principal and accumulated net income of the trust to my descendants by right of representation who are then living. If principal becomes distributable to a person under legal disability, the trustee may postpone the distribution until the disability is removed. In that case, the assets shall be administered as a separate trust under this Wisconsin basic will with trust and the net income and principal shall be applied for the benefit of the beneficiary at such times and in such amounts as the trustee considers appropriate. If the beneficiary dies before the removal of the disability, the remaining assets shall be distributed to his or her estate.

(3) If my spouse does not survive me and if no child of mine under 21 years of age survives me, then I give all my residuary estate to my descendants by right of representation who survive me. If my spouse and descendants do not survive me, the personal representative shall distribute my residuary estate to my heirs at law, their identities and respective shares to be determined according to the laws of the State of Wisconsin in effect on the date of my death.

History: 1983 a. 376; 1993 a. 304; 1995 a. 225; 1997 a. 188.

853.60 Mandatory clauses. The Wisconsin basic will and basic will with trust include the following mandatory clauses:

(1) INTESTATE DISPOSITION. If the testator has not made an effective disposition of the residuary estate, the personal representative shall distribute it to the testator's heirs at law, their identities and respective shares to be determined according to the laws of the state of Wisconsin in effect on the date of the testator's death.

(2) POWERS OF PERSONAL REPRESENTATIVE. (a) In addition to any powers conferred upon personal representatives by law, the personal representative may do any of the following:

1. Sell estate assets at public or private sale, for cash or on credit terms.

2. Lease estate assets without restriction as to duration.

3. Invest any surplus moneys of the estate in real or personal property, as the personal representative deems advisable.

(b) The personal representative may distribute estate assets otherwise distributable to a minor beneficiary to any of the following:

1. The guardian of the minor's person or estate.

2. Any adult person with whom the minor resides and who has the care, custody or control of the minor.

3. A custodian, serving on behalf of the minor under the uniform gifts to minors act or uniform transfers to minors act of any state.

(c) On any distribution of assets from the estate, the personal representative may partition, allot and distribute the assets in kind, including undivided interests in an asset or in any part of it; partly in cash and partly in kind; or entirely in cash. If a distribution is being made to more than one beneficiary, the personal representative may distribute assets among them on a prorated or nonprorated basis, with the assets valued as of the date of distribution.

(3) POWERS OF GUARDIAN. A guardian of the person or of the estate nominated in the Wisconsin basic will or basic will with trust, and subsequently appointed, shall have all of the powers conferred by law.

History: 1983 a. 376; 1987 a. 191.

853.61 Mandatory clauses; basic will with trust. The Wisconsin basic will with trust includes the following mandatory clauses:

(1) INEFFECTIVE DISPOSITION. If, at the termination of any trust created in the Wisconsin basic will with trust, there is no effective disposition of the remaining trust

assets, then the trustee shall distribute those assets to the testator's then living heirs at law, their identities and respective shares to be determined as though the testator had died on the date of the trust's termination and according to the laws of the state of Wisconsin then in effect.

(2) POWERS OF TRUSTEE. (a) In addition to any powers conferred upon trustees by law, the trustee shall have all the powers listed in s. 701.16.

(b) In addition to the powers granted in par. (a), the trustee may:

1. Hire and pay from the trust the fees of investment advisers, accountants, tax advisers, agents, attorneys and other assistants for the administration of the trust and for the management of any trust asset and for any litigation affecting the trust.

2. On any distribution of assets from the trust, the trustee may partition, allot and distribute the assets in kind, including undivided interests in an asset or in any part of it; partly in cash and partly in kind; or entirely in cash. If a distribution is being made to more than one beneficiary, the trustee shall have the discretion to distribute assets among them on a prorated or nonprorated basis, with the assets valued as of the date of distribution.

3. The trustee may, upon termination of the trust, distribute assets to a custodian for a minor beneficiary under the uniform gifts to minors act or uniform transfers to minors act of any state. The trustee is free of liability and is discharged from any further accountability for distributing assets in compliance with this section.

(3) TRUST ADMINISTRATIVE PROVISIONS. The following provisions shall apply to any trust created by a Wisconsin basic will with trust:

(a) The interests of trust beneficiaries shall not be transferable by voluntary or involuntary assignment or by operation of law and shall be free from the claims of creditors and from attachment, execution, bankruptcy or other legal process to the fullest extent permissible by law.

(b) The trustee shall be entitled to reasonable compensation for ordinary and extraordinary services, and for all services in connection with the complete or partial termination of any trust created by this will.

(c) All persons who have any interest in a trust under a Wisconsin basic will with trust are bound by all discretionary determinations the trustee makes in good faith under the authority granted in the Wisconsin basic will with trust.

History: 1983 a. 376; 1987 a. 191.

853.62 Date of execution of will. Except as specifically provided in ss. 853.50 to 853.61, a Wisconsin basic will or basic will with trust includes only the texts of the property disposition clauses and the mandatory clauses as they exist on the day the will is executed.

History: 1983 a. 376.

CHAPTER 854*
TRANSFERS AT DEATH - GENERAL RULES

854.01 Definition. In this chapter, "governing instrument" means a will; a deed; a trust instrument; an insurance or annuity policy; a contract; a pension, profit-sharing, retirement or similar benefit plan; a marital property agreement under s. 766.58 (3) (f); a beneficiary designation under s. 40.02 (8) (a); an instrument under ch. 705; an instrument that creates or exercises a power of appointment or any other dispositive, appointive or nominative instrument that transfers property at death.

History: 1997 a. 188.

854.02 Scope. This chapter applies to all statutes and governing instruments that transfer property at death.

History: 1997 a. 188.

854.03 Requirement of survival by 120 hours. (1) REQUIREMENT OF SURVIVAL. Except as provided in sub. (5), if property is transferred to an individual under a statute or under a provision in a governing instrument that requires the individual to survive an event and it is not established that the individual survived the event by at least 120 hours, the individual is considered to have predeceased the event.

(2) COOWNERS WITH RIGHT OF SURVIVORSHIP. (a) In this subsection, "coowners with right of survivorship" includes joint tenants, owners of survivorship marital property and other coowners of property or accounts that are held under circumstances that entitle one or more persons to all of the property or account upon the death of one or more of the others.

(b) Except as provided in sub. (5), if property is transferred under a governing instrument that establishes 2 or more coowners with survivorship, and if it is not established that at least one of the coowners survived the others by at least 120 hours, the property is transferred to the coowners in proportion to their ownership interests.

(3) MARITAL PROPERTY. Except as provided in subs. (4) and (5), if a husband and wife die leaving marital property and it is not established that one survived the other by at least 120 hours, 50% of the marital property shall be distributed as if it were the husband's individual property and the husband had survived, and 50% of the marital property shall be distributed as if it were the wife's individual property and the wife had survived.

(4) LIFE INSURANCE. Except as provided in sub. (5), if the insured and the beneficiary under a policy of life or accident insurance have both died and it is not established that one survived the other by at least 120 hours, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary. If the policy is the marital property of the insured and of the insured's spouse and there is no alternative beneficiary except the estate or the personal representative of the estate, the proceeds shall be distributed as marital property in the manner provided in sub. (3).

(5) EXCEPTIONS. This section does not apply if any of the following conditions applies:

(a) The statute or governing instrument requires the individual to survive an event by a specified period.

(b) The statute or governing instrument indicates that the individual is not required to survive an event by any specified period.

(c) The statute or governing instrument deals with simultaneous deaths or deaths in a common disaster and the provision is relevant to the facts.

(d) The imposition of a 120-hour requirement would cause a nonvested property interest or a power of appointment to fail to be valid, or to be invalidated, under s. 700.16 or under the rule against perpetuities of the applicable jurisdiction.

(e) The application of this section to more than one statute or governing instrument would result in an unintended failure or unintended duplication of a transfer.

(f) The application of this section would result in the escheat of an intestate estate under s. 852.01 (3).

(6) EVIDENTIARY STANDARD. Unless the statute or governing instrument provides otherwise, proof that an individual survived the period required under subs. (1) to (4) must be by clear and convincing evidence.

(7) EXTRINSIC EVIDENCE. Extrinsic evidence may be used to construe a governing instrument affected by this section.

History: 1997 a. 188.

854.04 Representation; per stirpes; modified per stirpes; per capita at each generation; per capita. (1) BY REPRESENTATION OR PER STIRPES. (a) Except as provided in subs. (5) and (6), if a statute or a governing instrument calls for property to be distributed to the issue or descendants of a designated person "by representation", "by right of representation" or "per stirpes", the property is divided into equal shares for the children of the designated person. Each surviving child and each deceased child who left surviving issue are allocated one share.

(b) The share of each deceased child allocated a share under par. (a) is divided among that person's issue in the same manner as under par. (a), repeating until the property is fully allocated among surviving issue.

(2) MODIFIED PER STIRPES. (a) Except as provided in subs. (5) and (6), if a statute or a governing instrument calls for property to be distributed to the issue or descendants of a designated person by "modified per stirpes", the property is divided into equal shares at the generation nearest to the designated person that contains one or more surviving issue. Each survivor and each deceased person in that same generation who left surviving issue are allocated one share.

(b) The share of each deceased person allocated a share in par. (a) is divided among that person's issue in the same manner as under par. (a), repeating until the property is fully allocated.

(3) PER CAPITA AT EACH GENERATION. (a) Except as provided in subs. (5) and (6), if a statute or a governing instrument calls for property to be distributed to the issue or descendants of a designated person "per capita at each generation", the property is divided into equal shares at the generation nearest to the designated person that contains one or more surviving issue. Each survivor in that generation is allocated one share, and the shares of the deceased persons in that same generation who left surviving issue are combined for distribution under par. (b).

(b) The combined share created under par. (a) is divided among the surviving issue of the persons whose shares were combined in the same manner as under par. (a), as though all of those issue were the issue of one person. The process is repeated until the property is fully allocated.

(4) PER CAPITA. Except as provided in sub. (6), if a statute or governing instrument calls for property to be distributed to a group or class "per capita", the property is divided into as many shares as there are surviving members of the group or class, and each member receives one share.

(5) CERTAIN INDIVIDUALS DISREGARDED. For the purposes of this section, all of the following apply:

(a) An individual who is deceased and who left no surviving issue is disregarded.

(b) An individual who has a surviving ancestor who is an issue of the designated person is not entitled to a share.

(6) CONTRARY INTENT. This section does not apply if the transfer is made under a governing instrument and there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

History: 1997 a. 188.

854.05 No exoneration of encumbered property. (1) DEFINITIONS. In this section:

(a) "Debt" includes accrued interest on the debt.

(b) "Encumbrance" includes mortgages, liens, pledges and other security agreements that are encumbrances on property.

(2) GENERALLY. (a) Except as provided in sub. (5), all property that is specifically transferred by a governing instrument shall be assigned to the transferee without exoneration of a debt that is secured by an encumbrance on the property.

(b) If the debt that is secured by the encumbrance on the property is paid in whole or in part out of other assets, the specifically transferred property shall be assigned to the transferee only if any of the following applies:

1. The transferee contributes to the person or entity that held the assets that were used to pay the debt an amount equal to the amount that was paid.

2. The person or entity secures the amount described in subd. 1. through a new encumbrance on the property.

(3) JOINT TENANCY; SURVIVORSHIP MARITAL PROPERTY. Except as provided in sub. (5), if all or part of a debt that is secured by an encumbrance on property in which the decedent at the time of death had an interest as a joint tenant or as a holder of survivorship marital property is paid out of other assets as the result of a claim being allowed, the person or entity that makes the payment is subrogated to all rights that the claimant had against the property.

(4) INSURANCE. Except as provided in sub. (5), if all or part of a debt that is secured by an encumbrance on the proceeds payable under a life insurance policy in which the decedent was the named insured is paid out of other assets as the result of a claim being allowed, the person or entity that makes the payment is subrogated to all rights that the claimant had against the proceeds.

(5) CONTRARY INTENT. This section does not apply to the extent that a governing instrument, either expressly or as construed from extrinsic evidence, provides otherwise. A general directive to pay debts does not give rise to a presumption of exoneration.

History: 1997 a. 188.

854.06 Predeceased transferee. (1) DEFINITIONS. In this section:

(a) "Provision in a governing instrument" includes all of the following:

1. A gift to an individual whether or not the individual is alive at the time of the execution of the instrument.

2. A share in a class gift only if a member of the class dies after the execution of the instrument.

3. An appointment by the decedent 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.

(b) "Revocable provision" means a provision that the decedent had the power to change or revoke immediately before death.

(c) "Stepchild" means a child of the decedent's surviving, deceased or former spouse, and not of the decedent.

(2) SCOPE OF COVERAGE. This section applies to revocable provisions in a governing instrument executed by the decedent that provide for an outright transfer upon the death of the decedent to any of the following persons:

(a) A grandparent of the decedent, or issue of a grandparent, subject to s. 854.21.

(b) A stepchild of the decedent, subject to s. 854.15.

(3) SUBSTITUTE GIFT TO ISSUE OF COVERED TRANSFEREE. Subject to sub. (4), if a transferee under a provision described in sub. (2) does not survive the decedent but has issue who do survive, the issue of the transferee take the transfer per stirpes, as provided in s. 854.04 (1).

(4) CONTRARY INTENT. (a) This section does not apply if there is a finding of contrary intent of the decedent. Extrinsic evidence may be used to construe that intent.

(b) If the governing instrument designates one or more persons, classes or groups of people as contingent transferees, those transferees take in preference to those under sub. (3). But if none of the contingent transferees survives, sub. (3) applies to the first group in the sequence of contingent transferees that has one or more transferees specified in sub. (2) who left surviving issue.

History: 1997 a. 188.

854.07 Failed transfer and residue. (1) Except as provided in sub. (4) and s. 854.06, if an attempted transfer under a governing instrument fails, the attempted transfer becomes part of the residue of the governing instrument. This subsection does not apply if the attempted transfer is itself a residuary transfer.

(2) Except as provided in sub. (4) and s. 854.06, if the residue of a governing instrument is to be transferred to 2 or more persons, the share of a residuary transferee that fails passes to the other residuary transferees in proportion to the interest of each in the remaining part of the residue.

(3) If a governing instrument other than a will does not effectively dispose of an asset that is governed by the instrument, that asset shall be paid or distributed to the decedent's probate estate.

(4) This section does not apply if there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

History: 1997 a. 188.

854.08 Nonademption of specific gifts in certain cases. (1) ABROGATION OF COMMON LAW. The common law doctrine of ademption by extinction, as it might otherwise apply to the situations governed by this section, is abolished.

(2) PROCEEDS OF SALE. (a) Subject to sub. (6), if property that is the subject of a specific gift is sold by the person who executed the governing instrument within 2 years of the person's death, the specific beneficiary has the right to the following amounts if available under the governing instrument:

1. Any balance of the purchase price unpaid at the time of death, including any security interest in the property and interest accruing before death, together with the incidents of the specific gift.

2. A general pecuniary transfer equivalent to the amount of the purchase price paid to, or for the benefit of, the person within one year of the seller's death.

(b) Acceptance of a promissory note of the purchaser or a 3rd party is not considered payment, but payment on the note is payment on the purchase price; and for purposes of this section property is considered sold as of the date when a valid contract of sale is made. Sale by an agent of the person who executed the governing instrument or by a trustee under a revocable living trust created by the person is a sale by the person for purposes of this section.

(3) PROCEEDS OF INSURANCE ON PROPERTY. Subject to sub. (6), if insured property that is the subject of a specific gift is destroyed, damaged, lost, stolen or otherwise subject to any casualty compensable by insurance, the specific beneficiary has the right to the following amounts, if available under the governing instrument, reduced by any amount expended or incurred to restore or repair the property:

(a) Any insurance proceeds paid with respect to the property after the decedent's death, together with the incidents of the specific gift.

(b) A general pecuniary transfer equivalent to any insurance proceeds paid to, or for the benefit of, the decedent within one year of the decedent's death.

(4) CONDEMNATION AWARD. (a) Subject to sub. (6), if property that is the subject of a specific gift is taken by condemnation prior to the death of the person who executed the governing instrument, the specific beneficiary has the right to the following amounts if available under the governing instrument:

1. Any amount of the condemnation award unpaid at the time of death.

2. A general pecuniary transfer equivalent to the amount of an award paid to, or for the benefit of, the person who executed the governing instrument within one year of that person's death.

(b) In the event of an appeal in a condemnation proceeding, the award is, for purposes of this section, limited to the amount established on the appeal. Acceptance of an agreed price or a jurisdictional offer is a sale under sub. (2).

(5) SALE OR LOSS OF PROPERTY OF AN INCOMPETENT. Subject to sub. (6), if property that is the subject of a specific gift is sold by a guardian or conservator of the person who executed the governing instrument, or if a condemnation award or insurance proceeds are paid to a guardian or conservator, the specific beneficiary has the right to a general pecuniary transfer equivalent to the proceeds of the sale or the condemnation award, or the insurance proceeds, reduced by any amount expended or incurred to restore or repair the property if the funds are available under the governing instrument. This provision does not apply if the person who executed the governing instrument, 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 a sale by a guardian or conservator within 2 years of that person's death is a sale by that person for purposes of sub. (2).

(6) LIMITATIONS. (a) This section is inapplicable if any of the following applies:

1. The governing instrument, either expressly or as construed from extrinsic evidence, shows the intent that a transfer fail under the particular circumstances.

2. The person who executed the governing instrument gives property during the person's lifetime to the specific beneficiary with the intent of satisfying the specific gift. Extrinsic evidence may be used to construe that intent.

(b) If part of the property that is the subject of the specific gift is destroyed, damaged, sold or condemned, the specific gift of any remaining interest in the property is not affected by this section; but this section applies to the part affected by the destruction, damage, sale or condemnation.

(c) The amount that the specific beneficiary receives under subs. (2) to (5) is reduced by any expenses of the sale, by the expenses of collection of the proceeds of insurance, sale, or condemnation award and by any amount by which the income tax of the decedent or the decedent's estate is increased because of items covered by this section. Expenses include legal fees paid or incurred.

History: 1997 a. 188.

854.09 Advancement; satisfaction. (1) A gift that the decedent made during his or her lifetime, including an incomplete gift that became complete on the decedent's death, is treated as a full or partial satisfaction of a transfer at death to an heir under s. 852.01 (1) or a transferee under a governing

instrument executed by the decedent only if at least one of the following applies:

(a) The governing instrument, if any, either expressly or as construed from extrinsic evidence, provides that the gift be taken into account.

(b) The decedent declared in a document, either expressly or as construed from extrinsic evidence, that the gift is in satisfaction of, or an advance against, what the transferee would receive at the decedent's death, whether or not the document was contemporaneous with the gift.

(c) The transferee acknowledged in writing before or after the decedent's death, either expressly or as construed from extrinsic evidence, that the gift is in satisfaction of, or an advance against, what the transferee would receive at the decedent's death.

(2) For partial satisfaction, property given during life is valued as of the time that the transferee came into possession or enjoyment of the property or at the death of the person who executed the governing instrument, whichever occurs first.

(3) If the transferee fails to survive the person who executed the governing instrument, the gift is treated as a full or partial satisfaction of the transfer, unless the transferor has declared otherwise in a document, either expressly or as construed from extrinsic evidence.

History: 1997 a. 188.

854.10 Choice of law. The meaning and legal effect of a governing instrument are determined by the local law of the state selected by the transferor in the governing instrument, unless the application of that law is contrary to s. 861.02 or 861.31 or any other public policy of this state otherwise applicable to the disposition.

History: 1997 a. 188.

854.11 Gift of securities. (1) DEFINITION. In this section, "securities" includes all of the following:

(a) Any note, stock, treasury stock, bond, debenture, evidence of indebtedness, collateral trust certificate, transferable share or voting trust certificate.

(b) Any certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease.

(c) Any interest or instrument commonly known as a security.

(d) Any certificate of interest or participation in, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the instruments or interests specified in pars. (a) to (c).

(2) INCREASE IN SECURITIES; ACCESSIONS. Except as provided in sub. (4), if a person executes a governing instrument that transfers securities and at the time of the execution or immediately after execution the described securities are in fact governed by the instrument, the transfer includes additional securities that are governed by the instrument at the person's death if all of the following apply:

(a) The additional securities were acquired after the governing instrument was executed.

(b) The additional securities were acquired as a result of ownership of the described securities.

(c) The additional securities are any of the following types:

1. Securities of the same organization acquired as a result of a plan of reinvestment.

2. Securities of the same organization acquired by action initiated by the organization or any successor, related or acquiring organization, excluding any acquired by exercise of purchase options.

3. Securities of another organization acquired as a result of a merger, consolidation, reorganization or other distribution by the organization or any successor, related or acquiring organization.

(3) GIFT OF SECURITIES CONSTRUED AS SPECIFIC. Except as provided in sub. (4), a transfer of a stated number of shares or amount of securities is construed to be a specific gift if the same or a greater number of shares or amount of the securities was governed by the instrument at the time of, or

immediately after, execution of the instrument, even if the instrument does not describe the securities more specifically or qualify the description by a possessive pronoun such as "my".

(4) CONTRARY INTENT. This section does not apply if there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

History: 1997 a. 188.

854.13 Disclaimer. (1) DEFINITIONS. In this section:

(a) "Beneficiary under a governing instrument" includes any person who receives or might receive property under the terms or legal effect of a governing instrument.

(c) "Power" has the meaning given in s. 702.01 (4).

(2) RIGHT TO DISCLAIM. (a) *In general.* A person who is an heir, recipient of property or beneficiary under a governing instrument, donee of a power created by a governing instrument, appointee under a power exercised by a governing instrument, taker in default under a power created by a governing instrument or person succeeding to disclaimed property may disclaim any property, including contingent or future interests or the right to receive discretionary distributions, by delivering a written instrument of disclaimer under this section.

(b) *Joint tenants.* Upon the death of a joint tenant, a surviving joint tenant may disclaim any property that would otherwise accrue to him or her by right of survivorship and that is the subject of the joint tenancy by delivering a written instrument of disclaimer under this section.

(c) *Survivorship marital property.* Upon the death of a spouse, the surviving spouse may disclaim the decedent spouse's interest in survivorship marital property.

(d) *Partial disclaimer.* Property may be disclaimed in whole or in part, except that a partial disclaimer of property passing by a governing instrument or by the exercise of a power may not be made if partial disclaimer is expressly prohibited by the governing instrument or by the instrument exercising the power.

(e) *Spendthrift provision.* The right to disclaim exists notwithstanding any limitation on the interest of the disclaimant in the nature of a spendthrift provision or similar restriction.

(f) *Disclaimer by guardian or conservator.* A guardian of the estate or a conservator appointed under ch. 880 may disclaim on behalf of his or her ward, with court approval, if the ward is entitled to disclaim under this section.

(g) *Disclaimer by agent under power of attorney.* An agent under a power of attorney may disclaim on behalf of the person who granted the power of attorney if all of the following apply:

1. The person who granted the power of attorney is entitled to disclaim under this section.

2. The power of attorney specifically grants the power to disclaim.

(h) *After death.* A person's right to disclaim survives the person's death and may be exercised by the person's personal representative or special administrator upon receiving approval from the court having jurisdiction of the person's estate after hearing upon notice to all persons interested in the disclaimed property, if the personal representative or special administrator has not taken any action which would bar the right to disclaim under sub. (11).

(3) INSTRUMENT OF DISCLAIMER. The instrument of disclaimer shall do all of the following:

(a) Describe the property disclaimed.

(b) Declare the disclaimer and the extent of the disclaimer.

(c) Be signed by the disclaimant.

(d) Be delivered within the time and in the manner provided under subs. (4) and (5).

(4) TIME FOR EFFECTIVE DISCLAIMER. (a) *Present interest.* An instrument disclaiming a present interest shall be executed and delivered not later than 9 months after the effective date of the transfer under the governing instrument. For cause shown, the period may be extended by a court of

competent jurisdiction, either within or after the 9-month period, for such additional time as the court considers just.

(b) *Future interest.* An instrument disclaiming a future interest shall be executed and delivered not later than 9 months after the event that determines that the taker of the property is finally ascertained and his or her interest indefeasibly fixed. For cause shown, the period may be extended by a court of competent jurisdiction, either within or after the 9-month period, for such additional time as the court considers just.

(c) *Future right to income or profits.* Notwithstanding pars. (a) and (b), an instrument disclaiming the future right to receive mandatory distributions of income or profits from any source may be executed and delivered at any time.

(d) *Persons under 21.* Notwithstanding pars. (a) and (b), a person under 21 years of age may disclaim at any time not later than 9 months after the date on which the person attains 21 years of age.

(e) *Interests arising by disclaimer.* Notwithstanding pars. (a) and (b), a person whose interest in property arises by disclaimer or by default of exercise of a power created by a governing instrument may disclaim at any time not later than 9 months after the day on which the prior instrument of disclaimer is delivered, or the date of death of the donee of the power.

(5) DELIVERY AND FILING OF DISCLAIMER. (a) *Delivery.* In addition to any requirements imposed by the governing instrument, the instrument of disclaimer is effective only if, within the time specified under sub. (4), it is delivered to and received by any of the following:

1. The transferor of the property disclaimed, if living.

2. The personal representative or special administrator of the deceased transferor of the property.

3. The holder of legal title to the property.

(b) *Delivery to trustee.* If the trustee of any trust to which the interest or power relates does not receive the instrument of disclaimer under par. (a), a copy shall also be delivered to the trustee.

(c) *Filing.* When delivery is made to the personal representative or special administrator of a deceased transferor, a copy of the instrument of disclaimer shall be filed in the probate court having jurisdiction.

(d) *Failure to deliver or file.* Failure to deliver a copy of the instrument of disclaimer to the trustee under par. (b) or to file a copy in the probate court under par. (c), within the time specified under sub. (4), does not affect the validity of any disclaimer.

(e) *Recording.* If real property or an interest in real property is disclaimed, a copy of the instrument of disclaimer may be recorded in the office of the register of deeds of the county in which the real estate is situated.

(6) PROPERTY NOT VESTED. The property disclaimed under this section shall be considered not to have been vested in, created in or transferred to the disclaimant.

(7) DEVOLUTION IN GENERAL. (a) Unless the transferor of the property or donee of the power has otherwise provided, the disclaimed property devolves as if the disclaimant had died before the decedent or before the effective date of the transfer under the governing instrument. If the disclaimant is an appointee under a power exercised by a governing instrument, the disclaimed property devolves as if the disclaimant had died before the effective date of the exercise of the power. If the disclaimant is a taker in default under a power created by a governing instrument, the disclaimed property devolves as if the disclaimant had predeceased the donee of the power. This paragraph is subject to subs. (8), (9) and (10).

(b) A disclaimer relates back for all purposes to the date of the decedent's death or the effective date of the transfer under the governing instrument. If the disclaimant is an appointee under a power exercised under a governing instrument, the disclaimer relates back to the effective date of the exercise of the power. If the disclaimant is a taker in default under a power created by a governing instrument, the disclaimer relates back to the

last possible date for exercise of the power. A disclaimer of the future right to receive mandatory distributions of income or profits relates to the period stated in the disclaimer.

(8) DEVOLUTION OF DISCLAIMED INTEREST IN JOINT TENANCY. A disclaimed interest in a joint tenancy passes to the decedent's probate estate.

(9) DEVOLUTION OF DISCLAIMED INTEREST IN SURVIVORSHIP MARITAL PROPERTY. A disclaimed interest in survivorship marital property passes to the decedent's probate estate.

(10) DEVOLUTION OF DISCLAIMED FUTURE INTEREST. Unless the instrument creating the future interest manifests a contrary intent either expressly or as construed from extrinsic evidence, a future interest limited to take effect in possession or enjoyment after the termination of the interest which is disclaimed takes effect as if the disclaimant had died before the effective date of the governing instrument or, if the disclaimant is an appointee under a power exercised by a governing instrument, as if the disclaimant had died before the effective date of the exercise of the power.

(11) BAR. (a) *Actions that bar disclaimer.* A person's right to disclaim property is barred by any of the following:

1. The person's assignment, conveyance, encumbrance, pledge or transfer of the property or a contract therefor.

2. The person's written waiver of the right to disclaim.

3. The person's acceptance of the property or benefit of the property.

(b) *Effect upon successors in interest.* The disclaimer or the written waiver of the right to disclaim is binding upon the disclaimant or person waiving and all persons claiming through or under him or her.

(12) NONEXCLUSIVENESS OF REMEDY. (a) This section does not affect the right of a person to waive, release, disclaim or renounce property under any other statute, the common law, or as provided in the creating instrument.

(b) Any disclaimer that meets the requirements of section 2518 of the Internal Revenue Code, or the requirements of any other federal law relating to disclaimers, constitutes an effective disclaimer under this section.

(13) CONSTRUCTION OF EFFECTIVE DATE. In this section, the effective date of a transfer under a revocable governing instrument is the date on which the person with the power to revoke the transfer no longer has that power or the power to transfer the legal or equitable ownership of the property that is the subject of the transfer.

History: 1977 c. 309; 1983 a. 189 s. 329 (26); 1991 a. 39, 301; 1995 a. 360; 1997 a. 188 ss. 22 to 59, 175 ; Stats. 1997 s. 854.13.

854.14 Beneficiary who kills decedent. (1) DEFINITION. In this section, "disposition of property" means a transfer, including by appointment, of property or any other benefit to a beneficiary designated in a governing instrument or under a statute.

(2) REVOCATION OF BENEFITS. Except as provided in sub. (6), the unlawful and intentional killing of the decedent does all of the following:

(a) Revokes a provision in a governing instrument that, by reason of the decedent's death, does any of the following:

1. Transfers or appoints property to the killer.

2. Confers a power of appointment on the killer.

3. Nominates or appoints the killer to serve in any fiduciary or representative capacity, including personal representative, executor, trustee or agent.

(b) Severs the interests of the decedent and killer in property held by them as joint tenants with the right of survivorship or as survivorship marital property and transforms the interests of the decedent and the killer into tenancies in common or marital property, whichever is appropriate.

(c) Revokes every statutory right or benefit to which the killer may have been entitled by reason of the decedent's death.

(3) EFFECT OF REVOCATION. Except as provided in sub. (6), provisions of a governing instrument that are revoked by this section are given effect as if the killer

disclaimed all revoked provisions or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent. Except as provided in sub. (6), the killer's share of the decedent's intestate estate, if any, passes as if the killer had disclaimed his or her intestate share under s. 854.13.

(4) WRONGFUL ACQUISITION OF PROPERTY. Except as provided in sub. (6), a wrongful acquisition of property by a killer not covered by this section shall be treated in accordance with the principle that a killer cannot profit from his or her wrongdoing.

(5) UNLAWFUL AND INTENTIONAL KILLING; HOW DETERMINED. (a) A final judgment establishing criminal accountability for the unlawful and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section and s. 861.02 (8).

(b) A final adjudication of delinquency on the basis of an unlawful and intentional killing of the decedent conclusively establishes the adjudicated individual as the decedent's killer for purposes of this section and s. 861.02 (8).

(c) In the absence of a judgment establishing criminal accountability or an adjudication of delinquency, the court, upon the petition of an interested person, shall determine whether, under the preponderance of evidence standard, the killing was unlawful and intentional for purposes of this section and s. 861.02 (8).

(6) EXCEPTIONS. This section does not apply if any of the following applies:

(a) The court finds that, under the factual situation created by the killing, the decedent's wishes would best be carried out by means of another disposition of the property.

(b) The decedent provided in his or her will, by specific reference to this section, that this section does not apply.

History: 1997 a. 188.

854.15 Revocation of provisions in favor of former spouse. (1) DEFINITIONS. In this section:

(a) "Disposition of property" means a transfer, including by appointment, of property or any other benefit to a beneficiary designated in a governing instrument.

(b) "Divorce, annulment or similar event" means any divorce, any annulment or any other event or proceeding that would exclude a spouse as a surviving spouse under s. 851.30.

(c) "Former spouse" means a person whose marriage to the decedent has been the subject of a divorce, annulment or similar event.

(d) "Relative of the former spouse" means an individual who is related to the former spouse by blood, adoption or marriage and who, after the divorce, annulment or similar event, is not related to the decedent by blood, adoption or marriage.

(e) "Revocable", with respect to a disposition, provision or nomination, means one under which the decedent, at the time of the divorce, annulment or similar event, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the former spouse or former spouse's relative, whether or not the decedent was then empowered to designate himself or herself in place of the former spouse or the former spouse's relative, and whether or not the decedent then had the capacity to exercise the power.

(2) SCOPE. This section applies only to governing instruments that were executed by the decedent before the occurrence of a divorce, annulment or similar event with respect to his or her marriage to the former spouse.

(3) REVOCATION UPON DIVORCE. Except as provided in subs. (5) and (6), a divorce, annulment or similar event does all of the following:

(a) Revokes any revocable disposition of property made by the decedent to the former spouse or a relative of the former spouse in a governing instrument.

(b) Revokes any disposition created by law to the former spouse or a relative of the former spouse.

(c) Revokes any revocable provision made by the decedent in a governing instrument conferring a power of appointment on the former spouse or a relative of the former spouse.

(d) Revokes the decedent's revocable nomination of the former spouse or a relative of the former spouse to serve in any fiduciary or representative capacity.

(e) Severs the interests of the decedent and former spouse in property held by them as joint tenants with the right of survivorship or as survivorship marital property and transforms the interests of the decedent and former spouse into tenancies in common.

(4) EFFECT OF REVOCATION. Except as provided in subs. (5) and (6), provisions of a governing instrument that are revoked by this section are given effect as if the former spouse and relatives of the former spouse disclaimed the revoked provisions or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce, annulment or similar event.

(5) EXCEPTIONS. This section does not apply if any of the following applies:

(a) The express terms of a governing instrument provide otherwise.

(b) The express terms of a court order provide otherwise.

(c) The express terms of a contract relating to the division of the decedent's and former spouse's property made between the decedent and the former spouse before or after the marriage or the divorce, annulment or similar event provide otherwise.

(d) The divorce, annulment or similar event is nullified.

(e) The decedent and the former spouse have remarried.

(f) There is a finding of the decedent's contrary intent. Extrinsic evidence may be used to construe that intent.

(6) REVOCATION OF NONTESTAMENTARY PROVISION IN MARITAL PROPERTY AGREEMENT. The effect of a judgment of annulment, divorce or legal separation on marital property agreements under s. 766.58 is governed by s. 767.266 (1).

History: 1997 a. 188.

854.17 Classification; how determined. In chs. 851 to 882, classification of the property of a decedent spouse and surviving spouse is determined under ch. 766.

History: 1985 a. 37; 1997 a. 188 s. 92; Stats. 1997 s. 854.17.

854.18 Order in which assets apportioned; abatement. (1) (a) Except as provided in sub. (3) or in connection with the share of the surviving spouse who elects to take an elective share in deferred marital property under s. 861.02, a spouse who takes under s. 853.11 (2) or a child who takes under s. 853.25, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

1. If the governing instrument is a will, property subject to intestacy.

2. Residuary transfers or devises under the governing instrument.

3. General transfers or devises under the governing instrument.

4. Specific transfers or devises under the governing instrument.

(b) For purposes of abatement, a general transfer or devise charged on any specific property or fund is a specific transfer to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, it is a general transfer to the extent of the failure or insufficiency.

(2) (a) Abatement within each classification is in proportion to the amount of property that each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the governing instrument.

(b) If the subject of a preferred transfer is sold or used incident to administration of an estate, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

(3) If the governing instrument expresses an order of abatement, or if the decedent's estate plan or the express or implied purpose of the transfer would be defeated by the order of abatement under sub. (1), the shares of the distributees abate as necessary to give effect to the intention of the transferor.

History: 1997 a. 188.

854.19 Penalty clause for contest. A provision in a governing instrument that prescribes a penalty against an interested person for contesting the governing instrument or instituting other proceedings relating to the governing instrument may not be enforced if the court determines that the interested person had probable cause for instituting the proceedings.

History: 1997 a. 188.

854.20 Status of adopted persons. (1) INHERITANCE RIGHTS BETWEEN ADOPTED PERSON AND ADOPTIVE RELATIVES. Subject to sub. (4), a legally adopted person is treated as a birth child of the person's adoptive parents for purposes of intestate succession by, through and from the adopted person and for purposes of any statute conferring rights upon children, issue or relatives in connection with the law of intestate succession or governing instruments.

(2) INHERITANCE RIGHTS BETWEEN ADOPTED PERSON AND BIRTH RELATIVES. Subject to sub. (4), a legally adopted person ceases to be treated as a child of the person's birth parents for the same purposes as under sub. (1), except:

(a) If a birth parent marries or remarries and the child is adopted by the stepparent, for all purposes the child is treated as the child of the birth parent whose spouse adopted the child.

(b) If a birth parent of a marital child dies and the other birth parent remarries and the child is adopted by the stepparent, the child is treated as the child of the deceased birth parent for purposes of inheritance through that parent and for purposes of any statute conferring rights upon children, issue or relatives of that parent under the law of intestate succession or governing instruments.

(3) SEQUENTIAL ADOPTION. Subject to sub. (4), if an adoptive parent dies or his or her parental rights are terminated in a legal proceeding and the adopted child is subsequently adopted by another person, the former adoptive parent is considered to be a birth parent for purposes of this section.

(4) APPLICABILITY. Subsections (1), (2) and (3) apply only if at least one of the following applies:

(a) The decedent or transferor is the adoptive parent or adopted child.

(b) The adopted person was a minor at the time of adoption.

(c) The adopted person was raised as a member of the household by the adoptive parent from the child's 15th birthday or before.

(5) CONTRARY INTENT . This section does not apply if the transfer is made under a governing instrument and there is a finding of contrary intent of the person who executed the instrument. Extrinsic evidence may be used to construe that intent.

History: 1983 a. 447; 1993 a. 486; 1997 a. 188 ss. 96, 175; Stats. 1997 s. 854.20.

854.21 Persons included in family groups or classes. (1) ADOPTED PERSONS. (a) Except as provided in par. (b) or sub. (7), a gift of property by a governing 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 includes a person adopted by a person whose birth child would be a member of the class, and issue of the adopted person, if the conditions for membership in the class are otherwise satisfied and any of the following applies:

1. The transferor is the adoptive parent or adopted child.

2. The adopted person was a minor at the time of adoption.

3. The adopted person was raised as a member of the household by the adoptive parent from the child's 15th birthday or before.

(b) Except as provided in sub. (7), a gift under par. (a) excludes a birth child and his

or her issue otherwise within the class if the birth child has been adopted and would cease to be a child of the birth parent under s. 854.20 (2).

(2) INDIVIDUALS BORN TO UNMARRIED PARENTS. (a) Subject to par. (b) and sub. (7), individuals born to unmarried parents are included in class gifts and other terms of relationship in accordance with s. 852.05.

(b) In addition to the requirements of par. (a) and subject to the provisions of sub. (7), in construing a disposition by a transferor who is not the birth parent, an individual born to unmarried parents is not considered to be the child of a birth parent unless that individual lived while a minor as a regular member of the household of that birth parent or of that birth parent's parent, brother, sister, spouse or surviving spouse.

(3) RELATIVES BY MARRIAGE. Subject to sub. (7), terms of family relationship in statutes or governing instruments that do not differentiate between relationships by blood and relationships by marriage are construed to exclude relatives by marriage.

(4) RELATIVES OF THE HALF-BLOOD. Subject to sub. (7), terms of family relationship in statutes or governing instruments that do not differentiate between relationships by the half-blood and relationships by the full-blood are construed to include both types of relationships.

(5) POSTHUMOUS ISSUE. Subject to sub. (7), if a statute or governing instrument transfers an interest to a group of persons described as a class, such as "issue", "children", "nephews and nieces" or any other class, a person conceived at the time the membership in the class is determined and subsequently born alive is entitled to take as a member of the class if that person otherwise satisfies the conditions for class membership and survives at least 120 hours past birth.

(6) PERSON RELATED THROUGH 2 LINES. Subject to sub. (7), a person who is eligible to be a transferee under a statute or governing instrument through 2 lines of relationship is limited to one share, based on the relationship that entitles the person to the larger share.

(7) CONTRARY INTENT. This section does not apply if the transfer is made under a governing instrument and there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

History: 1997 a. 188.

854.22 Form of distribution for transfers to family groups or classes. (1) INTERESTS IN HEIRS, NEXT OF KIN AND THE LIKE. Subject to sub. (4), if a statute or governing instrument specifies that a present or future interest is to be created in a designated individual's "heirs", "heirs at law", "next of kin", "relatives", "family" or a term that has a similar meaning, the property passes to the persons, including the state, to whom it would pass and in the shares in which it would pass under the laws of intestacy of the designated individual's domicile, as if the designated individual had died immediately before the transfer was to take effect in possession or enjoyment. If the designated individual's surviving spouse is living and remarried when the transfer is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.

(2) TRANSFERS TO DESCENDANTS, ISSUE AND THE LIKE. Subject to sub. (4), if a statute or governing instrument creates a class gift in favor of a designated individual's "descendants", "issue" or "heirs of the body" the property is distributed among the class members who are living when the interest is to take effect in possession or enjoyment in the shares that they would receive under the laws of intestacy of the designated individual's domicile, as if the designated individual had then died owning the subject matter of the class gift.

(3) DOCTRINE OF WORTHIER TITLE ABOLISHED. The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor's "heirs", "heirs

at law", "next of kin", "distributees", "relatives" or "family", or a term that has a similar meaning, does not create or presumptively create a reversionary interest in the transferor.

(4) CONTRARY INTENT. This section does not apply if the transfer is made under a governing instrument and there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

History: 1997 a. 188.

854.23 Protection of payers and other 3rd parties. (1) DEFINITION. In this section, "governing instrument" includes a filed verified statement under s. 865.201, a certificate under s. 867.046 (1m) or a recorded application under s. 867.046 (5).

(2) LIABILITY DEPENDS ON NOTICE. (a) A payer or other 3rd party is not liable for having transferred property to a beneficiary designated in a governing instrument who, under this chapter, is not entitled to the property, or for having taken any other action in good faith reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, before the payer or other 3rd party received written notice of a claimed lack of entitlement under this chapter. However, a payer or other 3rd party is liable for a payment made or other action taken after the payer or other 3rd party received written notice of a claimed lack of entitlement under this chapter.

(b) Severance of a joint interest under the provisions of this chapter does not affect any 3rd-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship, unless a document declaring the severance has been noted, registered, filed or recorded in records appropriate to the kind and location of the property that are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(3) MANNER OF NOTICE. A claimant shall mail written notice of a claimed lack of entitlement under sub. (2) to the 3rd party's main office or home by registered or certified mail, return receipt requested, or serve the claim upon the 3rd party in the same manner as a summons in a civil action.

(4) DEPOSIT OF PROPERTY WITH COURT. (a) Upon receipt of written notice of a claimed lack of entitlement under this chapter, a 3rd party may transfer property held by it to the court having jurisdiction of the probate proceedings relating to the decedent's estate. If no proceedings have been commenced, the transfer may be made to the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the property and, upon its determination of the owner, shall order disbursement in accordance with the determination.

(b) Property transferred to the court discharges the 3rd party from all claims for the property.

(5) PROTECTION OF FINANCIAL INSTITUTIONS. (a) In this subsection:

1. "Account" has the meaning given in s. 705.01 (1) or 710.05 (1) (a).

2. "Financial institution" has the meaning given in s. 705.01 (3).

(b) Notwithstanding sub. (2), in addition to the protections afforded a financial institution under ss. 701.19 (11) and 710.05 and chs. 112 and 705 afinancial institution is not liable for having transferred an account to a beneficiary designated in a governing instrument who, under this chapter, is not entitled to the account, or for having taken any other action in reliance on the beneficiary's apparent entitlement under the terms of a governing instrument, regardless of whether the financial institution received written notice of a claimed lack of entitlement under this chapter.

(c) If a financial institution has reason to believe that a dispute exists as to the rights of parties, or their successors, to an account subject to a governing instrument, the financial institution may, but is not required to, do any of the following:

1. Deposit the account with a court as provided in sub. (4).

2. Refuse to transfer the account to any person.

(d) The protection afforded a financial institution under this subsection does not affect the rights of parties or their successors in disputes concerning the beneficial ownership of accounts.

History: 1997 a. 188.

854.24 Protection of buyers. A person who purchases property for value or who receives property in partial or full satisfaction of a legally enforceable obligation is neither obligated under this chapter to return the property nor liable under this chapter for the value of the property, unless the person has notice as described in s. 854.23 (3).

History: 1997 a. 188.

854.25 Personal liability of recipients not for value. (1) ORIGINAL RECIPIENTS. A person who, not for value, receives property to which the person is not entitled under this chapter shall return the property. If the property is not returned, the recipient shall be personally liable for the value of the property to the person who is entitled to it under this chapter, regardless of whether the recipient has the property, its proceeds or property acquired with the property or its proceeds.

(2) SUBSEQUENT RECIPIENTS. (a) If a recipient described in sub. (1) gives all or part of the property described in sub. (1) to a subsequent recipient, not for value, the subsequent recipient shall return the property. If the property is not returned, the subsequent recipient shall be personally liable to the person who is entitled to it under this chapter for the value received, if the subsequent recipient has the property, its proceeds or property acquired with the property or its proceeds.

(b) If the subsequent recipient described in par. (a) does not have the transfer described, its proceeds or the property acquired with the property or its proceeds, but knew or should have known of his or her liability under this section, the subsequent recipient remains personally liable to the person who is entitled to it under this chapter for the value received.

(3) MODE OF SATISFACTION. On petition of the person entitled to the property under this chapter showing that the mode of satisfaction chosen by the recipient in sub. (1) or (2) will create a hardship for the entitled person, the court may order that a different mode of satisfaction be used.

History: 1997 a. 188.

854.26 Effect of federal preemption. If any provision in this chapter is preempted by federal law with respect to property covered by this chapter, a person who receives property, other than for full consideration, which the person is not entitled to receive under this chapter is subject to s. 854.25.

History: 1997 a. 188.

CHAPTER 861*
PROBATE — FAMILY RIGHTS

SUBCHAPTER I
INTEREST IN MARITAL PROPERTY

Cross-reference: See definitions in ch. 851.

861.01 Ownership of marital property at death. (1) SURVIVING SPOUSE'S ONE-HALF INTEREST IN MARITAL PROPERTY. Upon the death of either spouse, the surviving spouse retains his or her undivided one-half interest in each item of marital property. The surviving spouse's undivided one-half interest in each item of marital property is not subject to administration. Ownership and management and control rights are set forth under ss. 857.01 and 857.015.

(2) INTEREST OF A 3RD PARTY IN MARITAL PROPERTY. A 3rd party who is a successor in interest to all or part of the decedent's 50% interest in marital property is a tenant in common with the surviving spouse.

(3) PERSONAL INJURY DAMAGES; LOST EARNINGS. To the extent that marital property includes damages for loss of future income arising from a personal injury claim of the surviving spouse, the surviving spouse is entitled to receive as individual property that portion of the award that represents an income substitute after the death of the other spouse.

History: 1983 a. 186; 1985 a. 37; 1987 a. 393.

861.015 Satisfaction of nonholding spouse's marital property interest in certain business property. (1) If following the death of a spouse property is subject to a directive under s. 857.015, the marital

property interest of the nonholding spouse in the property shall be satisfied within one year after the decedent spouse's death from other property which is of equal clear market value at the time of satisfaction. Except as provided under sub. (3), if the interest of the nonholding spouse under this section is not satisfied within one year after the decedent spouse's death, this section does not apply and the nonholding spouse's marital property interest in the property subject to the directive continues as if the directive had not been made.

(2) For purposes of this section, property subject to a directive is valued by its clear market value on the date of the decedent's death. Satisfaction of the nonholding spouse's marital property interest in the property subject to the directive shall be based on that value, plus any income from the property subject to the directive after the death of the decedent and before satisfaction. For purposes of determining the income from the property subject to a directive, such property shall be treated as a legacy or devise of property other than money under s. 701.20 (5) (b) 1.

(3) If the interest of the nonholding spouse under this section is not satisfied within one year after the decedent spouse's death because the clear market value of the property subject to the directive has not been determined, the court having jurisdiction of the decedent spouse's estate shall do either of the following:

(a) Order that the interest of the nonholding spouse shall be satisfied after the determination of clear market value, at a date specified by the court.

(b) Order that the interest of the nonholding spouse shall be satisfied before the determination of clear market value based on an estimate of the clear market value, subject to any necessary adjustment upon final determination of clear market value.

(4) The following property is not available to satisfy the nonholding spouse's marital property interest in the property subject to the directive:

(a) Property included in an order, or extension or revision of an order, for an allowance under s. 861.31 made before satisfaction of the nonholding spouse's interest.

(b) Property selected under s. 861.33 before satisfaction of the nonholding spouse's interest.

(c) Property included in an order for an allowance under s. 861.35 made before satisfaction of the nonholding spouse's interest.

(5) Satisfaction of a nonholding spouse's marital property interest under this section shall not adversely affect any of the following:

(a) The nonholding spouse's marital property interest in property not subject to the directive.

(b) The nonholding spouse's election under s. 861.02 of deferred marital property other than deferred marital property subject to the directive.

History: 1987 a. 393; 1997 a. 188.

SUBCHAPTER II
ELECTIVE SHARE IN DEFERRED MARITAL PROPERTY

861.018 Definitions. In this subchapter:

(1) "Augmented deferred marital property estate" means the property under s. 861.02 (2).

(2) "Deferred individual property" means any property that satisfies all of the following:

(a) Is not classified by ch. 766.

(b) Was brought to the marriage or acquired while the spouses were married.

(c) Would have been classified as individual property under ch. 766 if the property had been acquired when ch. 766 applied.

(3) "Nonadverse party" means a person who has a power relating to a trust or other property arrangement but who does not have a substantial beneficial interest that would be adversely affected by exercise or nonexercise of that power, except that "nonadverse party" does not include a person who has a

general power of appointment over property, with respect to that property.

(4) "Power" includes a power to designate the beneficiary of a beneficiary designation.

(5) "Power of appointment" includes a power to designate the beneficiary of a beneficiary designation.

(6) "Presently exercisable general power of appointment" means a power of appointment under which, at the time in question, the decedent held a power to create a present or future interest in himself or herself, his or her creditors, his or her estate or creditors of his or her estate and a power to revoke or invade the principal of a trust or other property arrangement, whether or not the decedent had the capacity to exercise the power at the time.

(7) "Property" has the meaning given in s. 851.27 and includes values subject to a beneficiary designation.

(8) "Right to income" includes a right to payments under a commercial or private annuity, an annuity trust, a unitrust or a similar arrangement.

(9) "Transfer" includes, but is not limited to, the following:

(a) An exercise or release of a presently exercisable general power of appointment held by the decedent.

(b) A lapse at death of a presently exercisable general power of appointment held by the decedent.

(c) An exercise, release or lapse of either of the following:

1. A general power of appointment that the decedent created in himself or herself.

2. A power under s. 861.03 (3) that the decedent conferred on a nonadverse party.

History: 1997 a. 188.

861.02 Deferred marital property elective share. (1) AMOUNT. The surviving spouse has the right to elect an amount equal to no more than 50% of the augmented deferred marital property estate as determined under sub. (2).

(2) AUGMENTED DEFERRED MARITAL PROPERTY ESTATE. (a) If the presumption of marital property under s. 766.31 (2) is rebutted as to the classification of an asset or a portion thereof, the asset or portion is presumed to be deferred marital property.

(b) The augmented deferred marital property estate is the total value of the deferred marital property of the spouses, irrespective of where the property was acquired or where the property is currently located, including real property located in another jurisdiction. It includes all types of property that fall within any of the following categories:

1. Probate and nonprobate transfers of the decedent's deferred marital property under s. 861.03 (1) to (3).

2. Decedent's gifts of deferred marital property made during the 2 years before the decedent's death under s. 861.03 (4).

3. Deferred marital property of the surviving spouse under s. 861.04.

(3) CALCULATION OF PROPERTY INTERESTS. Exclusions from the augmented deferred marital property estate, valuation of included property and reduction for expenses and claims are governed by s. 861.05.

(4) SATISFACTION. Satisfaction of the augmented deferred marital property elective share is governed by ss. 861.06, 861.07 and 861.11.

(5) PROCEEDINGS. Proceedings for the election are governed by ss. 861.08 and 861.09.

(6) WAIVER. Waiver of the deferred marital property elective share is governed by s. 861.10.

(7) APPLICABILITY OF ELECTION. (a) Unless the right has been waived under s. 861.10 or other limitations of this subchapter apply, the surviving spouse is eligible to make the election if at the time of the decedent's death the decedent is domiciled in this state.

(b) If a decedent who is not domiciled in this state owns real property in this state, the right of the surviving spouse to take an elective share in that property is governed by s. 861.20.

(8) SPECIAL PROVISION IF SURVIVING SPOUSE CAUSED DEATH OF DECEDENT. If the

surviving spouse unlawfully and intentionally kills the decedent, as determined under s. 854.14 (5), the estate of the decedent shall have the right to elect no more than 50% of the augmented deferred marital property estate as determined under sub. (2). The court shall construe the provisions of ss. 861.03 to 861.11 as necessary to achieve the intent of this paragraph.

History: 1983 a. 186; 1985 a. 37 ss. 144, 145; Stats. 1985 s. 861.02; 1987 a. 393; 1991 a. 224, 301, 315; 1993 a. 213; 1997 a. 188.

861.03 Augmented deferred marital property estate: decedent's probate property and nonprobate or other property transfers. Subject to s. 861.05, the augmented deferred marital property estate includes all of the following:

(1) DEFERRED MARITAL PROPERTY IN DECEDENT'S PROBATE ESTATE. The value of deferred marital property in the decedent's probate estate.

(2) DEFERRED MARITAL PROPERTY PASSING NONPROBATE AT DECEDENT'S DEATH. The value of deferred marital property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death, including the following:

(a) The decedent's fractional interest in deferred marital property that was held by the decedent with the right of survivorship.

(b) The decedent's ownership interest in deferred marital property that was held by the decedent in a form payable or transferable on death, including deferred employment benefit plans, individual retirement accounts, annuities and transfers under s. 766.58 (3) (f), or in coownership with the right of survivorship.

(c) Deferred marital property in the form of proceeds of insurance on the life of the decedent, including accidental death benefits, that were payable at the decedent's death, if the decedent owned the insurance policy immediately before death or if the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds.

(d) Deferred marital property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment, to the extent that the property passed at the decedent's death by exercise, release, lapse, default or otherwise.

(3) DEFERRED MARITAL PROPERTY TRANSFERRED WITH RETAINED RIGHTS OR BENEFITS. (a) The augmented deferred marital property estate includes the value of any deferred marital property transferred by the decedent in which the decedent retained rights or benefits, including but not limited to the following:

1. Deferred marital property in which the decedent retained the right to possession, use, enjoyment or income and that was irrevocably transferred, to the extent that the decedent's right terminated at or continued beyond the decedent's death.

2. Deferred marital property in which the decedent retained the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, to control the time at which designated persons shall possess or enjoy the property or income therefrom, or to alter or amend the terms of the transfer of the property, to the extent that the decedent's right terminated at or continued beyond the decedent's death.

3. Any transfer of deferred marital property, including transfer of an income interest, in which the decedent created a power of appointment, including the power to revoke or terminate the transfer or to consume, invade or dispose of the principal or income, if the power was exercisable by the decedent alone, by the decedent in conjunction with another person or by a nonadverse party, and if the power is for the benefit of the decedent, creditors of the decedent, the decedent's estate or creditors of the decedent's estate.

(b) The amount included under par. (a) 3. is the value of the property subject to the power of appointment if the power of appointment is over property, the value of the property that produces or produced the income if the power of appointment is over

income or the power valued at the higher amount if the power of appointment is over both income and property. The value is limited by the extent to which the power of appointment was exercisable at the decedent's death or the property passed at the decedent's death by exercise, release, lapse, default or otherwise.

(4) DEFERRED MARITAL PROPERTY TRANSFERRED WITHIN 2 YEARS PRIOR TO DEATH. (a) In this subsection, termination occurs:

1. With respect to a right or interest in property, when the right or interest terminates by the terms of the governing instrument or when the decedent transfers or relinquishes the right or interest.

2. With respect to a power of appointment over property, when the power terminates by exercise, release, lapse, default or otherwise.

3. With respect to a power of appointment under sub. (2) (d), when the power terminates by exercise or release.

(b) The augmented deferred marital property estate includes the value of any deferred marital property transferred by the decedent within the 2 years immediately preceding the decedent's death, including the following:

1. Deferred marital property that passed as a result of the termination of a right or interest in, or power of appointment over, property that would have been included in the augmented deferred marital property estate under subs. (2) (a), (b) or (d) or (3), if the right, interest or power had not terminated until the decedent's death. The amount included is the value of the property that would have been included if the property were valued at the time the right, interest or power terminated.

2. Transfers by the decedent of or relating to the deferred marital property component of an insurance policy on the life of the decedent, if the proceeds would have been included under sub. (2) (c) had the transfer not occurred. The amount included is the value of the insurance proceeds to the extent that they were payable at the decedent's death.

3. Any transfer of deferred marital property to the extent that it is not otherwise included in the augmented deferred marital property estate. The amount included is the value of the property at the time of the transfer, but only to the extent that the aggregate transfers to any one donee in either of the 2 years exceeded $10,000.

History: 1985 a. 37; 1987 a. 393; 1997 a. 188.

861.04 Augmented deferred marital property estate: surviving spouse's property and transfers to others. (1) Subject to s. 861.05, the augmented deferred marital property estate includes the value of any deferred marital property that would have been included under s. 861.03 had the surviving spouse been the decedent.

(2) Valuation of an interest under this section shall take into account the fact that the decedent predeceased the spouse. Subject to s. 861.05 (2), the surviving spouse shall be treated as having died on the date of the decedent's death.

History: 1997 a. 188.

861.05 Augmented deferred marital property estate: calculation of property interests. (1) EXCLUSIONS. The following are not included in the augmented deferred marital property estate:

(a) Transfers of deferred marital property to the extent that the decedent received full or partial consideration for the transfer in money or money's worth.

(b) Transfers under the U.S. social security system.

(c) Transfers of deferred marital property to persons other than the surviving spouse, with the written joinder or written consent of the surviving spouse.

(d) Transfers of deferred marital property to the surviving spouse under s. 861.33 or 861.41.

(2) VALUATION. (a) Property included in the augmented deferred marital property estate under s. 861.03 (1), (2) (c) and (4) (b) 2. is valued as of the date of the decedent spouse's death.

(b) Property included under s. 861.03 (2) (a), (b) and (d) and (3) is valued immediately before the decedent spouse's death.

(c) Property included under s. 861.03 (4) (b) 1. is valued as of the date that the right, interest or power terminated.

(d) Property included under s. 861.03 (4) (b) 3. is valued as of the date of the transfer.

(e) If deferred marital property is commingled with other types of property but the deferred marital property component can be identified, only that component is valued.

(f) The value of property included in the augmented deferred marital property estate includes the commuted value of any present or future interest in deferred marital property and the commuted value of deferred marital property payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan or any similar arrangement.

(3) REDUCTION FOR EQUITABLE PROPORTION OF EXPENSES AND ENFORCEABLE CLAIMS. The value of deferred marital property included in the augmented deferred marital property estate under s. 861.03 or 861.04 shall be reduced by an equitable proportion of funeral and burial expenses, administrative expenses, other charges and fees and enforceable claims.

(4) OVERLAPPING APPLICATION; NO DOUBLE INCLUSION. If the same property could be included in the augmented deferred marital property estate under more than one provision of s. 861.03 or 861.04, the property is included only once, and it is included under the provision that yields the greatest value.

History: 1985 a. 37; 1991 a. 301; 1997 a. 188.

861.06 Satisfaction of deferred marital property elective share. (1) DEFINITION. In this section, "property transferred to the surviving spouse" includes outright transfers that have been disclaimed by the surviving spouse. The term does not include transfers in trust that have been disclaimed by the surviving spouse, unless the surviving spouse had a general power of appointment over the property in the trust during his or her lifetime or an interest in the trust after the disclaimer.

(2) INITIAL SATISFACTION OF DEFERRED MARITAL PROPERTY ELECTIVE SHARE. If the surviving spouse makes the election under s. 861.02, the following categories of property are used first to satisfy the elective share amount:

(a) All property included in the augmented deferred marital property estate under s. 861.04.

(b) All marital, individual, deferred marital or deferred individual property, transferred to the surviving spouse:

1. From the decedent's probate estate, other than property transferred under s. 861.33 or 861.41, and other than property transferred to the surviving spouse under s. 861.31 or 861.35 except as ordered by the court under s. 861.31 (4) or 861.35 (4).

2. By nonprobate transfer at the decedent's death.

3. By operation of any state or federal law, other than transfers under the U.S. social security system.

4. By the decedent at any time during the decedent's life, except that the following shall be excluded:

a. The first $5,000 of the value of the gifts from the decedent to the surviving spouse each year.

b. Gifts received from the decedent that the surviving spouse can show were subsequently and gratuitously transferred in a manner that, had they been the deferred marital property of the surviving spouse, would not have been included in the augmented deferred marital property estate under s. 861.04.

(3) UNSATISFIED BALANCE. After the property under sub. (2) has been applied toward satisfaction of the deferred marital property elective share amount, the remainder of the elective share amount shall be satisfied proportionally from transfers to persons other than the surviving spouse of property included in the augmented deferred marital property estate under s. 861.03 (1), (2), (3) or (4) (b) 2.

(4) REMAINING UNSATISFIED BALANCE. After the property under subs. (2) and (3) has been applied toward satisfaction of the deferred marital property elective share amount, the remainder of the elective share amount shall be satisfied proportionally from transfers to persons other than the surviving spouse of property included in the augmented deferred marital property estate under s. 861.03 (4) (b) 1. or 3.

(5) EQUITABLE ADJUSTMENT OF SHARES. If all or part of a prorated share under sub. (2), (3) or (4) is uncollectible, the court may increase the prorated liability of recipients described under the same or another of the 3 subsections if all of the following conditions are satisfied:

(a) The court finds that an equitable adjustment is necessary to avoid hardship for the surviving spouse.

(b) No recipient or donee of a recipient is liable for an amount greater than the value of the deferred marital property subject to the election that was received.

History: 1997 a. 188.

861.07 Personal liability of recipients. (1) DEFINITION. In this section, "proceeds" includes:

(a) The consideration, in money or property, received in exchange for the property that is the subject of the transfer.

(b) Property acquired with the consideration received in exchange for the property that is the subject of the transfer.

(2) PERSONS LIABLE. The following persons are liable to make a prorated contribution toward satisfaction of the surviving spouse's deferred marital property elective share:

(a) Original recipients of the decedent's transfers of deferred marital property to others, irrespective of whether the recipient has the property or its proceeds.

(b) Donees of the recipients under par. (a) if the donees have the property or its proceeds. If a donee has neither the property nor its proceeds but knew or should have known of the liability under this section, the donee remains liable for his or her share of the prorated contribution.

(3) MODE OF SATISFACTION. (a) Subject to par. (b), a person who is liable under sub. (2) may either give up the proportional part of the decedent's transfers to him or her or pay the value of the amount for which he or she is liable.

(b) On petition of the surviving spouse showing that the mode of satisfaction chosen in par. (a) will create a hardship for the surviving spouse, the court may order that a different mode of satisfaction be used.

(4) EFFECT OF FEDERAL PREEMPTION. If any provision of this subchapter is preempted by federal law with respect to any property interest or benefit that is included under s. 861.03 and that would pass but for that preemption to a person other than the surviving spouse, the recipient, unless he or she is a recipient for value, is subject to subs. (1) to (3).

History: 1997 a. 188.

861.08 Proceeding for election; time limit. (1) GENERALLY. Except as the time may be extended under sub. (3), in order to make the election, the surviving spouse shall, within 6 months after the date of the decedent's death, do all of the following:

(a) File a petition for the election with whichever of the following applies:

1. The court that has jurisdiction of the probate proceedings relating to the decedent's estate if a judicial proceeding has been commenced.

2. The court that has jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence if no judicial proceeding has commenced.

(b) Mail or deliver a copy of the petition to the personal representative, if any, of the decedent's estate.

(2) NOTIFICATION OF INTERESTED PARTIES. The surviving spouse shall give notice, in the manner provided in ch. 879, of the time and place set for hearing the petition to any persons who may be adversely affected by the election.

(3) EXTENSION OF TIME FOR ELECTION. (a) Subject to par. (b), the court may grant the surviving spouse an extension for making an election if the surviving spouse petitions the court for an extension, gives notice as specified in sub. (2) and shows cause for an extension.

(b) The petition for extension of the time for making an election must be filed within 6 months after the decedent's death, unless the court finds all of the following:

1. That the surviving spouse was prevented from filing the action or naming a particular interested party for reasons beyond his or her control.

2. That failure to extend the time for making an election will result in hardship for the surviving spouse.

(4) WITHDRAWAL OF ELECTION. The surviving spouse may withdraw the petition for an election at any time before the probate court has entered the final determination of the distribution of the decedent's estate.

(5) COURT DETERMINATION OF LIABILITY. (a) After notice and hearing, the court shall determine the deferred marital property elective share amount and shall determine the property that satisfies that amount under ss. 861.06 and 861.07.

(b) If the personal representative does not hold the money or property included in the augmented deferred marital property estate, the court shall determine the liability of any person or entity that has any interest in the money or property or that holds that money or property.

(c) The surviving spouse may choose to seek relief from fewer than all recipients. However, any such action shall not cause any other recipient's liability to exceed the amount that he or she would have had to pay if all recipients had paid a prorated share.

(6) SUITS AUTHORIZED. An order or judgment of the court may be enforced in a suit for contribution or payment in other courts of this state or other jurisdictions.

History: 1997 a. 188.

861.09 Right of election by or on behalf of surviving spouse. The surviving spouse must be living in order for an election to be filed. If the surviving spouse does not personally file the election, it may be filed on the surviving spouse's behalf by the spouse's conservator, guardian or guardian ad litem, or by an agent of the spouse acting under a power of attorney.

History: 1997 a. 188.

861.10 Waiver of right to elect; failure to elect. (1) RIGHT TO ELECT MAY BE WAIVED. The right to elect a deferred marital property elective share may be waived by the surviving spouse in whole or in part. The waiver may take place before or after marriage. The waiver shall be contained in a marital property agreement that is enforceable under s. 766.58 or in a signed document filed with a court described in s. 861.08 (1) (a) after the decedent's death.

(2) WAIVER OF "ALL RIGHTS". Unless the waiver provides otherwise, a waiver of "all rights", or equivalent language, in the property or estate of a present or prospective spouse, or in a complete property settlement entered into because of separation or divorce, is a waiver of all rights in the deferred marital property elective share.

(3) FAILURE TO ELECT. Failure of a surviving spouse to elect is not a transfer of property and is not a gift from the surviving spouse to the decedent spouse's probate estate or to the beneficiaries of other transfers.

History: 1997 a. 188.

861.11 Protection of payers and other 3rd parties. (1) DEFINITION. In this section, "governing instrument" includes a filed verified statement under s. 865.201, a certificate under s. 867.046 (1m) or a recorded application under s. 867.046 (5).

(2) PAYER NOT LIABLE UNTIL NOTICE RECEIVED. (a) Upon a beneficiary's request for payment, a payer or other 3rd party who has received satisfactory proof of the decedent's death and who has not received written notice that the surviving spouse or his or her representative intends to file a petition for the deferred marital property elective share or that a petition for the election has

been filed is not liable for any of the following:

1. Causing any payment, item of property or other benefit included in the augmented deferred marital property estate under s. 861.03, to transfer directly to the beneficiary designated in a governing instrument.

2. Any other action in good faith reliance on the validity of a governing instrument.

(b) A payer or other 3rd party is liable for payments made or other actions taken after receipt of written notice of the intent to file a petition for the elective share or written notice that a petition for the elective share has been filed.

(3) METHOD OF NOTICE TO PAYERS. A written notice of the intent to file a petition for the election or written notice that a petition for the election has been filed shall fulfill one of the following requirements:

(a) Be mailed to the payer's or other 3rd party's main office or home by registered or certified mail, return receipt requested.

(b) Be served upon the payer or other 3rd party in the same manner as a summons in a civil action.

(4) OPTIONAL PAYMENT OF PROCEEDS TO COURT. (a) Upon receipt of written notice of the intent to file, or the filing of, a petition for the election, a payer or other 3rd party may pay any amount owed or transfer or deposit any item of property to or with whichever of the following applies:

1. The court that has jurisdiction of the probate proceedings relating to the decedent's estate if proceedings have been commenced.

2. The court that has jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence, if no judicial proceeding has commenced.

(b) Payments, transfers or deposits made to the court discharge the payer or other 3rd party from all claims for amounts paid or the value of property transferred or deposited.

(c) The court shall hold the funds or items of property. After the court makes its determination under s. 861.08 (5), it shall order disbursement in accordance with that determination. The court shall order disbursement to the beneficiary designated in the governing instrument if either of the following conditions applies:

1. No petition is filed in the court within the specified time under s. 861.08 (1).

2. A petition was filed but withdrawn under s. 861.08 (4) with prejudice.

(d) If payments have been made to the court or if property has been deposited with the court under par. (a), the court may order that all or part of the payments or property be paid to the beneficiary who is designated in the governing instrument, upon that beneficiary's petition to the court. Those payments shall be in an amount and subject to conditions consistent with this subchapter.

(5) PROTECTION OF FINANCIAL INSTITUTIONS. (a) In this subsection:

1. "Account" has the meaning given in s. 705.01 (1) or 710.05 (1) (a).

2. "Financial institution" has the meaning given in s. 705.01 (3).

(b) Notwithstanding sub. (2), in addition to the protections afforded a financial institution under ss. 701.19 (11) and 710.05 and chs. 112 and 705 afinancial institution is not liable for having transferred an account included in the augmented deferred marital property estate under s. 861.03 to a beneficiary designated in a governing instrument, or for having taken any other action in reliance on the beneficiary's apparent entitlement under the terms of a governing instrument, regardless of whether the financial institution received written notice of an intent to file, or the filing of, a petition for the deferred marital property elective share.

(c) If a financial institution has reason to believe that a dispute exists as to the rights of parties, or their successors, to an account subject to a governing instrument, the financial institution may, but is not required to, do any of the following:

1. Deposit the account with a court as provided in sub. (4).

2. Refuse to transfer the account to any person.

(d) The protection afforded a financial institution under this subsection does not affect the rights of parties or their successors in disputes concerning the beneficial ownership of accounts.

History: 1985 a. 37; 1987 a. 393 s. 53; 1997 a. 188.

SUBCHAPTER III
OTHER RIGHTS,
ALLOWANCES AND EXEMPTIONS

861.17 Rights in 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 ch. 852 and this chapter any property arrangement made by the decedent in fraud of those rights. A property arrangement in fraud of the rights of the surviving spouse means any of the following:

(a) 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 defeating the rights of the surviving spouse under ch. 852 and this chapter.

(b) Any breach of the good faith duty imposed by s. 766.15 made for the primary purpose of defeating the rights of the surviving spouse in or to marital property.

(2) An arrangement made before marriage, or within one year after marriage, or prior to April 1, 1971, to provide for issue by a prior marriage is not a fraudulent property arrangement within the meaning of this section.

(3) If the spouse is successful in an action to reach fraudulent property arrangements, recovery is limited to the share the spouse would receive under ch. 852 and this chapter. Other rules of this chapter apply so far as possible. Recovery forfeits any power of appointment which the surviving spouse possesses over the remaining portion of the fraudulently arranged property, except a special power.

(3m) If the spouse is successful in an action to reach fraudulent property arrangements involving marital property, recovery is limited to the surviving spouse's interest in the marital property. Other rules of this chapter apply so far as possible. Recovery forfeits any power of appointment which the surviving spouse possesses over the remaining portion of the fraudulently arranged marital property, except a special power.

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

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

History: 1983 a. 186; 1985 a. 37 s. 187; 1993 a. 486.

861.20 Surviving spouse's right in nondomiciliary decedent's real property in this state. (1) If a married person who does not have a domicile in this state dies and leaves a valid will disposing of real property in this state which is not the community property or marital property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in that property against the will of the decedent as if the property were located in the decedent's domicile at the decedent's death. The procedure of the decedent's domicile for electing against the will applies to such an election.

(2) If a married person who does not have a domicile in this state dies and has an interest in real property in this state that is not disposed of by will, the surviving spouse has the same right to the property under intestate succession as if the property were located in the decedent's domicile at decedent's death.

History: 1985 a. 37; 1987 a. 393.

861.21 Assignment of home to surviving spouse. (1) DEFINITIONS. In this section:

(a) "Governing instrument" has the meaning given in s. 854.01.

(b) "Home" means any dwelling in which the decedent had an interest and that at the time of the decedent's death the surviving spouse occupies or intends to occupy. If there are several such dwellings, any one may be designated by the surviving spouse. "Home" includes a house, a mobile home, a duplex or multiple apartment building one unit of which is occupied by the surviving spouse and a building used in part for a dwelling and in part for commercial or business purposes. "Home" includes all of the surrounding land, unless the court sets off part of the land as severable from the remaining land under sub. (5).

(2) IF MARITAL PROPERTY INTEREST IN HOME. Subject to subs. (4) and (5), if a married decedent has a marital property interest in a home, the decedent's entire interest in the home shall be assigned to the surviving spouse if the surviving spouse petitions the court requesting such a distribution and if a governing instrument does not provide a specific transfer of the decedent's interest in the home to someone other than the surviving spouse. The surviving spouse shall file the petition within 6 months after the decedent's death, unless the court extends the time for filing.

(3) IF INTEREST IN HOME IN INTESTATE ESTATE. Subject to subs. (4) and (5), if the intestate estate includes an interest in a home, the decedent's entire interest shall be assigned to the surviving spouse if the surviving spouse petitions the court requesting such a distribution. The surviving spouse shall file the petition within 6 months after the decedent's death, unless the court extends the time for filing.

(4) PAYMENT BY SURVIVING SPOUSE. The court shall assign the interest in the home to the surviving spouse upon payment of the value of the interest that does not pass to the surviving spouse under intestacy or under the governing instrument. Payment shall be made to the fiduciary holding title to the interest. The surviving spouse may use assets due him or her from the fiduciary to satisfy all or part of the payment in kind. Unless the court extends the time, the surviving spouse shall have one year from the decedent's death to pay the value of the assigned interest.

(5) SEVERANCE OF HOME FROM SURROUNDING LAND. 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, the court may set off for the home as much of the land as is necessary for a dwelling. 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.

History: 1997 a. 188.

861.31 Allowance to family during administration. (1c) In this section, "dependent child" means any of the following:

(a) A minor child of the decedent.

(b) An adult child of the decedent who was being supported by the decedent at the time of the decedent's death.

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

(2) The allowance may be made to the spouse for support of the spouse and any dependent children, or separate allowances may be made to the spouse and to the dependent children or their guardian, if any, if the court finds separate allowances advisable. If there is no surviving spouse the

allowance may be made to the dependent children or to their guardian, if any.

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

(4) The court may direct that the allowance be charged against income or principal, either as an advance or otherwise, but in no event may an allowance for support of dependent children be charged against the income or principal interest of the surviving spouse. The court may direct that the allowance for support of the surviving spouse, not including any allowance for support of dependent children, be applied in satisfaction of any of the following:

(a) Any entitlement of the surviving spouse under s. 853.11 (2).

(b) Any right of the surviving spouse to elect unders. 861.02.

History: 1971 c. 40; 1991 a. 301; 1997 a. 188.

861.33 Selection of personalty by surviving spouse or children. (1) (a) Subject to this section, in addition to all allowances and distributions, the surviving spouse, or if there is no surviving spouse the decedent's children, may file with the court a written selection of the following personal property, which shall thereupon be transferred to the spouse or children by the personal representative:

1. Wearing apparel and jewelry held for personal use by the decedent or the surviving spouse;

2. Automobile;

3. Household furniture, furnishings and appliances; and

4. Other tangible personalty not used in trade, agriculture or other business, not to exceed $3,000 in inventory value.

(b) The selection in par. (a) may not include items specifically bequeathed except that the surviving spouse or children may in every case select the normal household furniture, furnishings and appliances necessary to maintain the home. For this purpose antiques, family heirlooms and collections which are specifically bequeathed are not classifiable as normal household furniture or furnishings.

(c) If there is no surviving spouse and the selection is being made by fewer than all of the decedent's children, the child or children selecting the property must have the written consent of all of the other children, or the selection must be approved by the court.

(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 or children under this section to items not exceeding $5,000 in aggregate inventory value until such time as claims are paid in full or the court otherwise orders; or the court may require the spouse or children to retransfer property in excess of $5,000 or, at the option of the spouse or children, pay the excess in value over this amount.

(3) The surviving spouse or children may select items not specifically bequeathed of the type specified under sub. (1) (a) 4. exceeding in value the $3,000 limit or obtain the transfer of items exceeding the limit set by the court under sub. (2), by paying to the personal representative the excess of inventory value over the respective limit.

(4) Subject to sub. (1) (c), the personal representative has power, without court order, to execute appropriate documents to effect transfer of title to any personal property selected by the spouse or children under this section. A person may not question the validity of the documents of transfer or refuse to accomplish the transfer on the grounds that the personal representative is also the surviving spouse or the only child of the decedent.

History: 1973 c. 233; 1983 a. 192; 1991 a. 301; 1997 a. 188.

861.35 Special allowance for support of spouse and support and education of dependent children. (1c) In this section, "dependent child" has the meaning given in s. 861.31 (1c).

(1m) If the decedent is survived by a spouse or by children, the court may order an

allowance for the support and education of each dependent child and for the support of the spouse. This allowance may be made whether the estate is testate or intestate. If the decedent is not survived by a spouse, the court also may allot directly to any of the dependent children household furniture, furnishings and appliances. No allowance may be made under this section if any of the following apply:

(a) The decedent has amply provided for each child and for the spouse by the terms of his or her will and the estate is sufficient to carry out the terms after payment of all debts and expenses, or support and education have been provided for by any other means.

(b) In the case of dependent children, if the surviving spouse is legally responsible for support and education and has ample means to provide them in addition to his or her own support.

(c) In the case of the surviving spouse, if he or she has ample means to provide for his or her support.

(2) The court may set aside property to provide an 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 the trustee is no longer required for the support of the spouse or the support and education of any dependent child, 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 the decedent's estate.

(3) In making an allowance under this section, the court shall consider all of the following:

(a) The effect on claims under s. 859.25. The court shall balance the needs of the spouse or dependent children against the nature of the creditors' claims in setting the amount allowed under this section.

(b) The size of the estate.

(c) Other resources available for support.

(d) The existing standard of living.

(e) Whether the provisions of a marital property agreement will create a hardship for the surviving spouse.

(f) Any other factors that the court considers relevant.

(4) The court may direct that the allowance to the surviving spouse, not including any allowance for the support and education of dependent children, be applied in satisfaction of any of the following:

(a) Any entitlement of the surviving spouse under s. 853.11 (2).

(b) Any right of the surviving spouse to elect unders. 861.02 (1).

History: 1971 c. 213 s. 5; 1983 a. 186; 1991 a. 301; 1997 a. 188.

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

(2) The court shall grant the petition if it determines that an assignment ahead of creditors is reasonably necessary for the support of the 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.

History: 1983 a. 186; 1985 a. 37; 1987 a. 393 s. 53; 1997 a. 188.

861.43 Authority and powers of conservator, guardian or agent. A conservator, guardian or guardian ad litem of the spouse or of a child of the decedent, or an agent of the spouse or of a child of the decedent acting under a power of attorney, may on behalf of the spouse or child exercise any of the rights, apply for any of the allowances or make any of the selections that apply to the spouse or child under this subchapter.

History: 1997 a. 188.

CHAPTER 701*
TRUSTS

701.01 Definitions. As used in this chapter, unless the context indicates otherwise:

(1) BENEFICIARY. "Beneficiary" means a person who has a beneficial interest in a trust.

(2) CHARITABLE AND PRIVATE TRUST. To the extent that trust income or principal presently or in the future must be used by the trustee exclusively for a charitable purpose as defined in s. 701.10 (1), the trust is a "charitable trust"; any other trust is a "private trust", provided it is for the benefit of a person sufficiently identifiable to enforce the trust.

(3) COURT. "Court" means the court having jurisdiction.

(4) PROPERTY. "Property" means an interest in real or personal property.

(5) SETTLOR. "Settlor" means a person who directly or indirectly creates a living or testamentary trust or adds property to an existing trust.

(6) TESTAMENTARY AND LIVING TRUST. "Testamentary trust" means a trust subject to the continuing jurisdiction of the court assigned to exercise probate jurisdiction; "living trust" means any other trust, including a testamentary trust removed to this state from another state.

(7) TRUST. "Trust" means an express living or testamentary, private or charitable trust in property which arises as a result of a manifestation of intention to create it.

(8) TRUSTEE. "Trustee" means a person holding in trust title to or holding in trust a power over property. "Trustee" includes an original, added or successor trustee.

History: 1971 c. 66; 1977 c. 187 s. 135; 1977 c. 449; 1983 a. 189.

701.02 Purposes for which trusts may be created. A trust may be created for any lawful purpose.

History: 1993 a. 16, 437.

701.03 Passive trusts abolished. Except as provided in s. 706.08 (4), every trust, to the

extent it is private and passive, vests no title or power in the trustee, but the beneficiary takes a title corresponding in extent to the beneficial interest given the beneficiary. A trust is passive if the title or power given the trustee is merely nominal and the creating instrument neither expressly nor by implication from its terms imposes active management duties on the trustee.
History: 1989 a. 231.

701.04 Purchase money resulting trusts abolished. (1) If title to property is transferred to one person and all or part of the purchase price is furnished by another, the latter may not enforce a purchase money resulting trust.

(2) Creditors of the person furnishing all or part of the purchase price may enforce a resulting trust, in proportion to the amount of purchase price furnished, to the extent necessary to satisfy their demands, unless an intent to defraud creditors is disproved.

(3) Nothing in this section shall affect the right to enforce a valid express trust or to establish a constructive trust based on fraud, undue influence, breach of confidential relationship or other appropriate grounds.

701.05 Title of trustee; interest of beneficiaries. (1) Unless the creating instrument expressly limits the trustee to a lesser title or to a power, the trustee takes all title of the settlor or other transferor and holds such title subject to the trustee's fiduciary duties as trustee.

(2) If a trustee of a private trust has title to the trust property, a beneficiary has both a right to have the trustee perform the trustee's fiduciary duties and an equitable interest, present or future, in the trust property. If a trustee of a private trust holds only a power over property, a beneficiary has a right to have such trustee perform the trustee's fiduciary duties.

(3) In a private or charitable trust where the trustee takes all title of the settlor or other transferor and holds such title subject to the trustee's fiduciary duties as trustee, any interest expressly retained by the settlor or not effectively disposed of to others remains in the settlor, or the settlor's successors in interest, as an equitable reversionary interest and to this extent the settlor, or the settlor's successors, are beneficiaries of the trust. In a private trust where the trustee takes all title of the settlor or other transferor and holds such title subject to the trustee's fiduciary duties as trustee, any interest, present or future, created by the settlor in any other person is an equitable interest and such person is a beneficiary of the trust.
History: 1971 c. 66; 1991 a. 316.

701.06 Spendthrift provisions and rights of creditors of beneficiaries. (1) INCOME BENEFICIARIES. A settlor may expressly provide in the creating instrument that the interest in income of a beneficiary other than the settlor is not subject to voluntary or involuntary alienation. The income interest of such a beneficiary cannot be assigned and is exempt from claims against the beneficiary until paid over to the beneficiary pursuant to the terms of the trust.

(2) PRINCIPAL BENEFICIARIES. A settlor may expressly provide in the creating instrument that the interest in principal of a beneficiary other than the settlor is not subject to voluntary or involuntary alienation. The interest in principal of such a beneficiary cannot be assigned and is exempt from claims against the beneficiary, but a judgment creditor, after any payments of principal have become due or payable to the beneficiary pursuant to the terms of the trust, may apply to the court for an order directing the trustee to satisfy the judgment out of any such payments and the court in its discretion may issue an order for payment of part or all of the judgment.

(3) DISCLAIMER OR RENUNCIATION NOT AN ASSIGNMENT. A disclaimer or renunciation by a beneficiary of part or all of his or her interest under a trust shall not be considered an assignment under sub. (1) or (2).

(4) CLAIMS FOR CHILD SUPPORT. Notwithstanding any provision in the creating instrument or subs. (1) and (2), upon application of a person having a valid order

directing a beneficiary to make payment for support of the beneficiary's child, the court may:

(a) If the beneficiary is entitled to receive income or principal under the trust, order the trustee to satisfy part or all of the claim out of part or all of payments of income or principal as they are due, presently or in the future;

(b) In the case of a beneficiary under a discretionary trust, order the trustee to satisfy part or all of the claim out of part or all of future payments of income or principal which are to be made pursuant to the exercise of the trustee's discretion in favor of such beneficiary.

(5) CLAIMS FOR PUBLIC SUPPORT. Notwithstanding any provision in the creating instrument or subs. (1) and (2), if the settlor is legally obligated to pay for the public support of a beneficiary under s. 46.10 or 301.12 or the beneficiary is legally obligated to pay for the beneficiary's public support or that furnished the beneficiary's spouse or minor child under s. 46.10 or 301.12, upon application by the appropriate state department or county official, the court may:

(a) If such beneficiary is entitled to receive income or principal under the trust, order the trustee to satisfy part or all of the liability out of part or all of payments of income or principal as they are due, presently or in the future;

(b) Except as otherwise provided in par. (c), in the case of a beneficiary under a discretionary trust, order the trustee to satisfy part or all of the liability out of part or all of future payments of income or principal which are to be made pursuant to the exercise of the trustee's discretion in favor of such beneficiary;

(c) In the case of a beneficiary under a discretionary trust who is a settlor or a spouse or minor child of the settlor, order the trustee to satisfy part or all of the liability without regard to whether the trustee has then exercised or may thereafter exercise the trustee's discretion in favor of the beneficiary.

(5m) TRUST FOR DISABLED INDIVIDUAL. Subsection (5) does not apply to any trust that is established for the benefit of an individual who has a disability which has continued or can be expected to continue indefinitely, substantially impairs the individual from adequately providing for his or her own care or custody, and constitutes a substantial handicap to the afflicted individual if the trust does not result in ineligibility for public assistance under ch. 49. A trustee of a trust which is exempt from claims for public support under this subsection shall notify the county department under s. 46.215 or 46.22 in the county where the disabled beneficiary resides of the existence of the trust.

(6) SETTLOR AS BENEFICIARY. Notwithstanding any provision in the creating instrument and in addition to the remedies available under subs. (4) and (5) where the settlor is a beneficiary, upon application of a judgment creditor of the settlor, the court may, if the terms of the instrument require or authorize the trustee to make payments of income or principal to or for the benefit of the settlor, order the trustee to satisfy part or all of the judgment out of part or all of the payments of income or principal as they are due, presently or in the future, or which are payable in the trustee's discretion, to the extent in either case of the settlor's proportionate contribution to the trust.

(7) SUBSEQUENT MODIFICATION OF COURT'S ORDER. Any order entered by a court under sub. (4), (5) or (6) is subject to modification upon application of an interested person.

(8) EXEMPT ASSETS. Assets of a trust, to the extent they are exempt from claims of creditors under other statutes, shall not be subject to sub. (4), (5) or (6).

History: 1971 c. 66; 1977 c. 309, 418; 1985 a. 176; 1991 a. 316; 1997 a. 237.

701.065 Debts of decedents. (1) LIMITATIONS ON CLAIMS. (a) 1. A trustee who has a duty or power to pay the debts of a decedent may publish in the county in which the decedent resided, as a class 3

notice, under ch. 985, a deadline for filing claims with the trustee. The deadline shall be the date that is 4 months after the date of the first insertion of the notice.

2. Except as provided in pars. (b) and (c), if the trustee satisfies the requirements for the publication of the notice under subd. 1., all claims, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, are barred against the trustee, the trust property and any recipient of trust property unless filed with the trustee on or before the date specified in the notice under subd. 1.

(b) Notwithstanding par. (a) 2., a claim that is not filed on or before the date specified in the notice under par. (a) 1. is not barred if any of the following apply:

1. The claim is a claim based on tort, on a marital property agreement that is subject to the time limitations under s. 766.58 (13) (b) or (c), on Wisconsin income, franchise, sales, withholding, gift or death taxes, or on unemployment compensation contributions due or benefits overpaid, a claim for funeral or administrative expenses, a claim of this state under s. 46.27 (7g), 49.496 or 49.682 or a claim of the United States.

2. All of the following circumstances exist:

a. On or before the date specified in the notice under par. (a) 1., the trustee knew, or in the exercise of reasonable diligence should have known, of the existence of the potential claim and of the identity and mailing address of the potential claimant.

b. At least 30 days before the date specified in the notice under par. (a) 1., the trustee had not given notice to the potential claimant of the final day for filing his or her claim.

c. At least 30 days before the date specified in the notice under par. (a) 1., the claimant did not have actual knowledge of the date on which the claim would be barred.

(c) If an action is pending against a decedent at the time of his or her death and the action survives, the plaintiff in that action may serve a notice of substitution of party defendant on the trustee and file proof of service of notice in the court. Filing of proof of service on or before the deadline for filing a claim under par. (a) 1. gives the plaintiff the same rights against the trust as the filing of a claim. A judgment in any such action constitutes an adjudication for or against the trust.

(2) EFFECT OF STATUTE OF LIMITATIONS. A trustee shall not pay a claim that was barred by a statute of limitations at the time of the decedent's death. A claim not barred by a statute of limitations at the time of the decedent's death shall not be barred thereafter by a statute of limitations if the claim is filed with the trustee on or before the deadline for filing a claim under sub. (1) (a) 1.

(3) CLAIMS OF CREDITORS WITHOUT NOTICE. (a) A claim not barred by sub. (1) (a) 2. because of the operation of sub. (1) (b) 2. may be enforced against trust property only as provided in this subsection.

(b) The claimant shall file the claim with the trustee within one year after the decedent's death and within 30 days after the earlier of the following:

1. The date that the trustee gives notice to the potential claimant of the deadline for filing a claim under sub. (1) (a) 1.

2. The date that the claimant first acquires actual knowledge of the deadline for filing a claim under sub. (1) (a) 1.

(c) The claimant shall have the burden of establishing by the greater weight of the credible evidence that all of the circumstances under sub. (1) (b) 2. existed.

(d) This subsection does not extend the time for commencement of a claim beyond the time provided by any statute of limitations applicable to that claim.

(4) SATISFACTION OF CLAIM FROM OTHER PROPERTY. Failure of a claimant timely to file a claim as provided in this section does not bar the claimant from satisfying the claim, if not otherwise barred, from property other than trust property.

History: 1997 a. 188.

701.07 Living trusts. (1) VALIDITY. A living trust, otherwise valid, shall not be held invalid as an attempted testamentary disposition, a passive trust under s. 701.03, or a trust lacking a sufficient principal because:

(a) It contains any or all of the following powers, whether exercisable by the settlor, another person or both:

1. To revoke, modify or terminate the trust in whole or in part;

2. To exercise a power or option over property in the trust or over interests made payable to the trust under an employe benefit plan, life insurance policy, or otherwise;

3. To direct, during the lifetime of the settlor or another, the person to whom or on whose behalf the income or principal shall be paid or applied;

4. To control the administration of the trust in whole or in part;

5. To add property or cause additional employe benefits, life insurance, or other interests to be made payable to the trust at any time.

(b) The principal consists of a designation of the trustee as a primary or direct, secondary or contingent beneficiary under a will, employe benefit plan, life insurance policy or otherwise; or

(c) The principal consists of assets of nominal value.

(2) ELIGIBILITY TO RECEIVE ASSETS. A living trust shall be eligible to receive property from any source.

(3) CREDITORS' RIGHTS. If a settlor retains a power to revoke, modify or terminate which is exercisable in the settlor's favor, except when such power is exercisable only in conjunction with a person having a substantial adverse interest, the trust property to the extent it is subject to such power is also subject to the claim of a creditor of the settlor. This subsection shall not apply to trust property to the extent it is exempt from claims of creditors under other statutes.

History: 1971 c. 66; 1979 c. 110 s. 60 (4); 1991 a. 316.

701.08 Transfers to living trusts. (1) VALIDITY AND EFFECT. The order of execution of a living trust instrument and a will or other instrument purporting to transfer or appoint property to the trust evidenced by the trust instrument shall be disregarded in determining the validity of the transfer or appointment. No reference in any will to a living trust shall cause assets in such trust to be included in property administered as part of the testator's estate; nor shall it cause the trust or any portion thereof to be treated as a testamentary trust.

(2) GOVERNING TERMS. Property transferred or appointed by a will or by a beneficiary designation under an employe benefit plan, life insurance policy or other instrument permitting designation of a beneficiary to a living trust, the terms of which the testator or designator was the sole holder of a power to modify, shall be administered in accordance with the terms of the trust as they may have been modified prior to the testator's or designator's death, even though the will or beneficiary designation was not reexecuted or republished after exercise of the power to modify, unless the will or beneficiary designation expressly provides otherwise. Such property transferred or appointed to a living trust, which is subject to a power of modification requiring action or consent of a person other than the testator or designator, shall be administered in accordance with the terms of the trust instrument as they exist at the execution of the will or beneficiary designation, unless expressly otherwise provided. If the will or beneficiary designation expressly provides that the property shall be administered in accordance with the terms of the trust instrument as they may be modified thereafter, the will or beneficiary designation need not be reexecuted or republished after exercise of the power to modify.

(3) DISPOSITION WHEN NO EXISTING LIVING TRUST. If at the death of a testator a living trust has been completely revoked, or otherwise terminated, a provision in the testator's will purporting to transfer or appoint property to such trust shall have the following effect, unless the will provides otherwise:

(a) If the testator was a necessary party to the revocation or other termination of such trust, the provision in the testator's will shall be invalid;

(b) If the testator was not a necessary party to the revocation or other termination of such trust, the provision in the testator's will shall be deemed to create a testamentary trust upon the terms of the living trust instrument at the time the will was executed or as otherwise provided where sub. (2) is applicable.

History: 1971 c. 66; 1991 a. 316.

701.09 Transfers to testamentary trusts. **(1)** TESTAMENTARY TRANSFER TO TRUST OF ANOTHER. A transfer or appointment by will shall not be held invalid because it is made to a trust created, or to be created, under the will of another person if the will of such other person was executed, or was last modified with respect to the terms of such trust, prior to the death of the person making the transfer or appointment and such other person's will is admitted to probate prior to, or within 2 years after, the death of the person making the transfer or appointment. Property included in such a transfer or appointment shall not be considered property subject to administration as part of the other person's estate but shall pass directly to that other person's testamentary trustee, be added to the designated trust and administered as a part thereof.

(2) INVALID TESTAMENTARY TRANSFER. If such a transfer or appointment by will is not accepted by the testamentary trustee of such other person or if no will of such other person which meets the conditions specified in sub. (1) is admitted to probate within the period therein limited, and if the will containing such transfer or appointment by will makes no alternative disposition of the assets, the will shall be construed as creating a trust upon the terms contained in the documents constituting the will of such other person as of the date of death of the person making the transfer or appointment by will.

(3) LIFE INSURANCE PROCEEDS TRANSFERRED TO TRUST OF INSURED. A trustee named or to be named in the will of an insured person may be designated beneficiary of an insurance policy on the life of the insured if the designation is made in accordance with the terms of the policy. After admission of the insured's will to probate and issuance of letters to such trustee, the insurance proceeds shall be paid to the trustee to be administered in accordance with the terms of the trust as they exist at the death of the insured, and the proceeds may be commingled with other assets passing to the trust. Insurance proceeds paid to a testamentary trustee because of his or her designation as life insurance beneficiary shall not be subject to death tax to any greater extent than if the proceeds were payable to a beneficiary other than the insured's estate. The proceeds shall be inventoried for tax purposes only and shall not be subject to taxes, debts or charges enforceable against the estate or otherwise considered assets of the insured's estate to any greater extent than if the proceeds were payable to a beneficiary other than the insured's estate.

(4) EMPLOYE BENEFITS TRANSFERRED TO TRUST OF EMPLOYE. A trustee named or to be named in the will of an employe covered by any employe benefit plan or contract described in s. 815.18 (3) (j) or any annuity or insurance contract purchased by an employer that is a religious, scientific, educational, benevolent or other corporation or association not organized or conducted for pecuniary profit may be designated payee of any benefits payable after the death of the employe if the designation is made in accordance with the terms of the plan or contract. After admission of the employe's will to probate and issuance of letters to the trustee, the death benefits shall be paid to the trustee to be administered in accordance with the terms of the trust as they exist at the death of the employe, and the benefits may be commingled with other assets passing to the trust. Death benefits paid to a testamentary trustee because of his or her designation as payee are not subject to the death tax to any greater extent than if the benefits were payable to a beneficiary other

than the employe's estate. The benefits shall be inventoried for tax purposes only and are not subject to taxes, debts or charges enforceable against the estate or otherwise considered assets of the employe's estate to any greater extent than if the benefits were payable to a beneficiary other than the employe's estate.

(5) TRANSFER OF OTHER PROPERTY. Property other than that described in subs. (3) and (4) may be made payable to or transferred to a trustee named or to be named in the will of the transferor.

History: 1971 c. 66; Sup. Ct. Order, 67 W (2d) 585, 777 (1975); 1975 c. 218; 1987 a. 27; 1989 a. 278; 1991 a. 316.

701.10 Charitable trusts. (1) VALIDITY. A charitable trust may be created for any of the following charitable purposes: relief of poverty, advancement of education, advancement of religion, promotion of health, governmental or municipal purposes or any other purpose the accomplishment of which is beneficial to the community. No gift to charity, in trust or otherwise, is invalid because of indefiniteness. If a particular charitable purpose is not indicated and the trustee is not expressly authorized by the creating instrument to select such a purpose, the trustee has an implied power to select one or more charitable purposes. If a particular charitable purpose is not indicated and no trustee is named in the creating instrument, the court may appoint a trustee with such an implied power to select or may direct that the property be transferred outright to one or more established charitable entities.

(2) MODIFICATION AND TERMINATION. (a) If a purpose of a charitable trust is or becomes impractical, unlawful or impossible, the court may order the trust continued for one or more other charitable purposes designated by the settlor or, in the absence of such designation, order the property devoted to one or more other charitable purposes either by continuing the trust or by distributing the property to one or more established charitable entities. In determining the alternative plan for disposition of the property, the court shall take into account current and future community needs in the general field of charity within which the original charitable purpose falls, other charitable interest of the settlor, the amount of principal and income available under the trust and other relevant factors. The provisions of this subsection do not apply insofar as the settlor expressly provides in the creating instrument for an alternative disposition if the original trust fails; nor do they apply to gifts by several persons to a charitable entity on a subscription basis if the court finds that the donors intended their gifts to be limited to the original purpose and such purpose fails initially.

(b) If any administrative provision of a charitable trust or part of a plan set forth by the settlor to achieve the settlor's charitable purpose is or becomes impractical, unlawful, inconvenient or undesirable, and a modification of such provision or plan will enable the trustee to achieve more effectively the basic charitable purpose, the court may by appropriate order modify the provision or plan.

(c) If a charitable trust is or becomes uneconomic when principal and probable income, cost of administration and other relevant factors are considered, or in any event if the trust property is valued at less than $50,000, the court may terminate the trust and order outright distribution to an established charitable entity in the general field of charity within which the charitable purpose falls.

(d) It is the purpose of this subsection to broaden the power of the courts to make charitable gifts more effective. In any situation not expressly covered the court shall liberally apply the cy pres doctrine.

(e) The settlor if living, the trustee, the attorney general and an established charitable entity to which income or principal must be paid under the terms of the trust shall be persons interested in any proceeding under this subsection.

(3) ENFORCEMENT; NOTICE TO ATTORNEY GENERAL. (a) A proceeding to enforce a charitable trust may be brought by:

1. An established charitable entity named in the governing instrument to which income or principal must or may be paid under the terms of the trust;

2. The attorney general in the name of the state upon the attorney general's own information or, in the attorney general's discretion, upon complaint of any person;

3. Any settlor or group of settlors who contributed half or more of the principal; or

4. A cotrustee.

(b) In a proceeding affecting a charitable trust, notice must be given to the attorney general, but, except as provided in sub. (2), notice need not be given where the income or principal must be paid exclusively to one or more established charitable entities named in the governing instrument.

(4) ESTABLISHED CHARITABLE ENTITY. As used in this section, "established charitable entity" means a corporation, unincorporated association or trust operated exclusively for a charitable purpose defined in sub. (1).

History: 1971 c. 66; 1991 a. 316; 1993 a. 160.

701.105 Private foundations. (1) (a) In the administration of any trust which is a private foundation, as defined in section 509 of the internal revenue code, a charitable trust, as defined in section 4947 (a) (1) of the internal revenue code, or a split-interest trust as defined in section 4947 (a) (2) of the internal revenue code, all of the following acts shall be prohibited:

1. Engaging in any act of self-dealing as defined in section 4941 (d) of the internal revenue code, which would give rise to any liability for the tax imposed by section 4941 (a) of the internal revenue code.

2. Retaining any excess business holdings as defined in section 4943 (c) of the internal revenue code, which would give rise to any liability for the tax imposed by section 4943 (a) of the internal revenue code.

3. Making any investments which would jeopardize the carrying out of any of the exempt purposes of the trust, within the meaning of section 4944 of the internal revenue code, so as to give rise to any liability for the tax imposed by section 4944 (a) of the internal revenue code.

4. Making any taxable expenditures as defined in section 4945 (d) of the internal revenue code, which would give rise to any liability for the tax imposed by section 4945 (a) of the internal revenue code.

(b) This subsection shall not apply either to those split-interest trusts or to amounts thereof which are not subject to the prohibitions applicable to private foundations by reason of the provisions of section 4947 of the internal revenue code.

(2) In the administration of any trust which is a private foundation as defined in section 509 of the internal revenue code, or which is a charitable trust as defined in section 4947 (a) (1) of the internal revenue code, there shall be distributed, for the purposes specified in the trust instrument, for each taxable year, amounts at least sufficient to avoid liability for the tax imposed by section 4942 (a) of the internal revenue code.

(3) Subsections (1) and (2) shall not apply to any trust to the extent that a court of competent jurisdiction shall determine that such application would be contrary to the terms of the instrument governing such trust and that the same may not properly be changed to conform to such subsections.

(4) Nothing in this section shall impair the rights and powers of the courts or the attorney general of this state with respect to any trust.

History: 1971 c. 66; 1991 a. 39.

701.11 Honorary trusts; cemetery trusts. (1) Except under sub. (2), where the owner of property makes a testamentary transfer in trust for a specific noncharitable purpose, and there is no definite or definitely ascertainable human beneficiary designated, no enforceable trust is created; but the transferee has power to apply the property to the designated purpose, unless the purpose is capricious. If the transferee refuses or neglects to apply the property to the designated purpose within a reasonable time and the transferor has not manifested an intention to make a beneficial gift to the transferee, a resulting trust arises

in favor of the transferor's estate and the court is authorized to order the transferee to retransfer the property.

(2) A trust may be created for maintaining, keeping in repair and preserving any grave, tomb, monument, gravestone or any cemetery. Any cemetery company, association or corporation may receive property in trust for any of those purposes and apply the income from the trust to the purpose stated in the creating instrument.

(3) (a) A trust described in sub. (2) is invalid to the extent it was created for a capricious purpose or the purpose becomes capricious.

(b) If the assets of any trust described in sub. (2) are valued at less than $5,000 and the court finds that the cost of operating the trust will probably defeat the intent of the settlor or if the trustee, including a cemetery company, association or corporation, named in the creating instrument is improperly described, the court may order distribution of the assets on terms which will as nearly as possible carry out the settlor's intention.

History: 1989 a. 307.

701.115 Future interests in revocable trusts. (1) Unless a contrary intention is found, if a person has a future interest in property under a revocable trust and, under the terms of the trust, the person has the right to possession and enjoyment of the property at the grantor's death, the right to possession and enjoyment is contingent on the person's surviving the grantor. Extrinsic evidence may be used to show contrary intent.

(2) Survivorship under sub. (1) is governed by s. 854.03.

(3) The rights of the issue of a predeceasing beneficiary under sub. (1) are governed by s. 854.06.

History: 1997 a. 188.

701.12 Revocation, modification and termination of trusts with consent of settlor. (1) By written consent of the settlor and all beneficiaries of a trust or any part thereof, such trust or part thereof may be revoked, modified or terminated, except as provided under s. 445.125 (1) (a) 2. to 4.

(2) For purposes of this section such consent may be given on behalf of a legally incapacitated, unascertained or unborn beneficiary by the court after a hearing in which the interests of such beneficiary are represented by a guardian ad litem. A guardian ad litem for such beneficiary may rely on general family benefit accruing to living members of the beneficiary's family as a basis for approving a revocation, modification or termination of a trust or any part thereof.

(3) Nothing in this section shall prevent revocation, modification or termination of a trust pursuant to its terms or otherwise in accordance with law.

History: 1971 c. 66; 1977 c. 40; 1979 c. 175 s. 53; 1979 c. 221 s. 2202 (45); 1981 c. 64; 1995 a. 295.

701.13 Modification and termination of trusts by court action. (1) ANTICIPATION OF DIRECTED ACCUMULATION OF INCOME. When an accumulation of income is directed for the benefit of a beneficiary without other sufficient means to support or educate himself or herself, the court on the application of the beneficiary or the beneficiary's guardian may direct that a suitable sum from the income accumulated or to be accumulated be applied for the support or education of such person.

(2) APPLICATION OF PRINCIPAL TO INCOME BENEFICIARY. Unless the creating instrument provides to the contrary, if a beneficiary is entitled to income or to have it applied for the beneficiary's benefit, the court may make an allowance from principal to or for the benefit of such beneficiary if the beneficiary's support or education is not sufficiently provided for, taking into account all other resources available to the beneficiary.

(3) TERMINATION. In the case of a living trust where the settlor is deceased and in the case of any testamentary trust, regardless in either case of spendthrift or similar protective provisions, a court with the consent of the trustee may order termination of the trust, in

whole or in part, and the distribution of the assets that it considers appropriate if the court is satisfied that because of any substantial reason existing at the inception of a testamentary trust or, in the case of any trust, arising from a subsequent change in circumstances (including but not limited to the amount of principal in the trust, income produced by the trust and the cost of administering the trust) continuation of the trust, in whole or in part, is impractical. In any event, if the trust property is valued at less than $50,000, the court may order termination of the trust and the distribution of the assets that it considers appropriate.

(4) MARITAL DEDUCTION TRUSTS. In a trust where the income beneficiary also has a general power of appointment as defined in s. 702.01 (3) or where all accumulated income and principal are payable to such beneficiary's estate, any termination, in whole or in part, of the trust under sub. (3) can only be ordered in favor of such beneficiary.

(5) CHARITABLE TRUSTS. Subsections (2) and (3) do not apply to a trust where a future interest is indefeasibly vested in:

(a) The United States or a political subdivision for exclusively public purposes;

(b) A corporation organized exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual and no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation, and which does not participate or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office;

(c) A trustee or a fraternal society, order or association operating under the lodge system, provided the principal or income of such trust is to be used by such trustee or by such fraternal society, order or association exclusively for religious, charitable, scientific, literary or educational purposes or for the prevention of cruelty to children and animals, and no substantial part of the activities of such trustee or of such fraternal society, order or association is carrying on propaganda or otherwise attempting to influence legislation, and such trustee or such fraternal society, order, or association does not participate or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office; or

(d) Any veteran's organization incorporated by act of congress, or of its departments or local chapters or posts, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(6) OTHER APPLICABLE LAW. Nothing in this section shall prohibit modification or termination of any trust pursuant to its terms or limit the general equitable power of a court to modify or terminate a trust in whole or in part.

History: 1971 c. 66; 1983 a. 189 s. 329 (26); 1991 a. 316; 1993 a. 143.

701.14 Circuit court procedure in trust proceedings. **(1)** GENERALLY. A proceeding in the circuit court involving a living or testamentary trust may be commenced by a trustee or other person interested in the trust and, except as otherwise provided in this chapter, all probate procedure governing circuit courts, so far as it may be applicable, shall apply to such proceeding.

(2) NOTICE. If notice of a trust proceeding to a person interested in the trust, to the person's representative or guardian ad litem as provided in s. 701.15 or to other persons, is required by law or deemed necessary by the court, the court shall order such notice to be given as prescribed in s. 879.05 except that service by publication shall not be required unless ordered by the court. The court may order both personal service and service by publication on designated persons. Proof of service shall be made as provided in s. 879.07. Persons interested in the trust, on behalf of

themselves, or their representatives or guardians ad litem as provided in s. 701.15, on behalf of themselves and those whom they represent, may in writing waive service of notice and consent to the hearing of any matter without notice. Waiver of notice or an appearance by any person interested in the trust or the person's representative or guardian ad litem as provided in s. 701.15 is equivalent to timely service of notice.

(3) ATTORNEY FOR PERSON IN MILITARY SERVICE. At the time of filing a petition for a trust proceeding, an affidavit shall be filed setting forth the name of any person interested in the proceeding who is actively engaged in the military service of the United States. Whenever it appears by the affidavit or otherwise that any person in the active military service of the United States is interested in any trust proceeding and is not represented by an attorney, or by an attorney-in-fact who is duly authorized to act on the person's behalf in the matter, the court shall appoint an attorney to represent the person and protect the person's interest.

(4) VENUE. A proceeding involving a living trust shall be governed by ss. 801.50 to 801.62 so far as applicable and shall be regarded as a civil action for that purpose.

History: 1971 c. 66; Sup. Ct. Order, 67 W (2d) 585, 777 (1975); 1977 c. 449 s. 497; 1991 a. 220, 316.

701.15 Representation of others. Except as otherwise provided in ss. 701.12 and 701.13 (1), in a trust proceeding in the circuit court:

(1) POWER TO CREATE OR EXTINGUISH. The sole holder or all coholders of a power of revocation or a general power of appointment as defined in s. 702.01 (3) may represent any or all persons whose interests are subject to such power.

(2) GUARDIAN AD LITEM; VIRTUAL REPRESENTATION. Subject to sub. (1), the court may appoint a guardian ad litem for any person interested who is legally incapacitated, unascertained or unborn if such person is not already represented by a fiduciary having no adverse interest in the proceeding. A guardian ad litem may represent 2 or more such persons where they have a substantially identical interest in the proceeding. The court may dispense with or terminate the appointment of a guardian ad litem for such person if there is a legally competent person who is a party to the proceeding and has a substantially identical interest in it.

History: 1971 c. 66; 1977 c. 449; 1983 a. 189 s. 329 (26).

701.16 Testamentary trustees. (1) APPOINTMENT OF ORIGINAL TRUSTEE. (a) *Trustee named in will.* A trustee who is named or whose appointment is provided for in a will derives the authority to carry out the trust from the will and assumes the office of trustee upon the issuance of letters of trust by the court as provided in s. 856.29. A trustee named in a will may renounce the position by an instrument filed with the court having jurisdiction to admit the will to probate.

(b) *Other original trustee.* If a testamentary trust is created which fails to name a trustee, or the named trustee refuses to accept the position or predeceases the settlor and no alternate trustee is named in the will nor effective provision made for appointment of an alternate trustee, the court shall appoint a suitable person as trustee. Letters of trust shall be issued to such trustee as provided in s. 856.29.

(c) *Special trustee.* If it appears necessary, the court can appoint a special trustee until a regular trustee can be appointed. A special trustee may be appointed without notice and may be removed whenever the court so orders. Such special trustee shall give such bond as the court requires and shall have such powers as are conferred by the order of appointment and set forth in any letters of trust issued the special trustee.

(d) *Foreign trustee.* If a trustee is authorized to carry out a trust created by will admitted to probate outside this state, but not also admitted to probate in this state, the foreign trustee may have recorded in the office of the register of deeds of a county in which part of the subject matter of the trust is located a certified copy of the letters of

trust and filed with the register of probate of the same county a statement appointing the register of probate in his or her official capacity the trustee's resident agent for service of process. Thereafter the trustee may exercise all powers and have all the rights, remedies and defenses that the trustee would have if he or she received letters of trust from a circuit court of this state. Service of process shall be complete upon delivery of duplicate copies to the register of probate, one of which copies the register of probate shall promptly forward by registered mail to the foreign trustee.

(2) BOND. Prior to the issuance of letters of trust to an original testamentary trustee under sub. (1) or to a successor or added testamentary trustee under s. 701.17 (1), the court may require such trustee to give a bond in accordance with ch. 878 and conditioned on the faithful performance of such trustee's duties. If a settlor directs that a trustee serve without bond, the court shall give effect to this direction unless it determines that a bond is required by a change in the trustee's personal circumstances since the execution of the settlor's will. If the court requires a bond, and the trustee named in the will fails to furnish the required bond within a reasonable period of time after receiving notice of the bond requirement, the court may remove the trustee named in the will and appoint a successor trustee under s. 701.17. No bond shall be required of a trust company bank, state bank or national banking association which is authorized to exercise trust powers and which has complied with s. 220.09 or 223.02, nor shall a bond be required of a religious, charitable or educational corporation or society.

(3) INVENTORY. A testamentary trustee shall make and file a verified inventory of all property received from the settlor's personal representative or from any other source.

(4) ANNUAL ACCOUNTING. (a) A testamentary trustee is required to make and file a verified account annually with the court, except as provided in pars. (am) and (b). If the trustee is accounting on a calendar-year basis, the court may not require the trustee to file the annual account prior to April 15. Production of securities and other assets for examination is not necessary upon the filing of an annual account unless the court determines such production is necessary to ascertain the correctness of an account filed for a particular trust. In the case of a testamentary charitable trust a copy of the annual account filed with the court shall be filed with the attorney general.

(am) The annual accounting requirements under par. (a) do not apply to corporate trustees or to corporate cotrustees if those trustees or cotrustees agree, in their initial consent to act as trustees or cotrustees or in a subsequent filing with the register in probate for the county that has jurisdiction over the trust, to provide annual accounts to all persons interested, as defined in s. 851.21, who request those accounts by writing to the trustee or cotrustee. Each request is effective until the requester withdraws it or is no longer a person interested. A corporate trustee or cotrustee may withdraw its agreement by notifying the appropriate register in probate of its intent to do so.

(b) Except in the case of a testamentary charitable trust, the court may dispense with the requirement of an annual accounting where, due to the size or nature of the trust property, the duration of the trust, the relationship of the trustee to the beneficiaries or other relevant factors, compliance with such requirement is unnecessary or unduly burdensome on the trustee. Whether or not an annual accounting is required a beneficiary may petition the court to require an accounting and the trustee may petition for approval of the trustee's accounts on a periodic basis.

(c) Notwithstanding pars. (a), (am) and (b) the court may require an accounting at any time.

(d) Notwithstanding s. 879.47, trustees and cotrustees may submit to courts accounts in the format that they normally use for accounts submitted to beneficiaries under this subsection, if all of the information required by the court is included.

(5) FINAL ACCOUNTING. A verified final account is required upon the termination of a testamentary trust. Upon the petition of a surviving or successor trustee, a beneficiary, a personal representative of a deceased trustee or on its own motion, the court may order a verified account filed upon the death, resignation or removal of a testamentary trustee. The court may require such proof of the correctness of a final account as it considers necessary.

(6) DISCHARGE. No testamentary trustee or personal representative of a deceased trustee shall be discharged from further responsibility with respect to a testamentary trust until the court is satisfied upon notice and hearing that the requirements of this section have been met and it has received satisfactory proof that the trust property has been turned over to a successor or special trustee or, where the trust is terminated, distributed to the beneficiaries entitled to such property or turned over to a special trustee for distribution.

History: 1971 c. 66; 1977 c. 449; 1979 c. 32; 1987 a. 220; 1991 a. 316.

701.17 Successor and added trustees. (1) APPOINTMENT OF SUCCESSOR OR ADDED TRUSTEE. If there is a vacancy in the office of trustee because of the death, resignation or removal of a trustee, the court may appoint a successor trustee unless the creating instrument names or provides an effective method for appointing a successor. Upon the death of a sole trustee, title to the trust property does not pass to the trustee's personal representative but to the successor named in or appointed pursuant to the terms of the creating instrument or, in the case of a successor or special trustee appointed by the court, as provided in sub. (5). The court may in the exercise of a sound discretion appoint an additional trustee if necessary for the better administration of the trust, unless the creating instrument expressly prohibits such addition or provides an effective method for appointing an additional trustee. Subject to s. 701.16 (2), a successor or added testamentary trustee shall be issued letters of trust, at that trustee's request.

(2) APPOINTMENT OF SPECIAL TRUSTEE. If it appears necessary, the court may appoint a special trustee until a successor trustee can be appointed or, where a trust has terminated, to distribute the assets. A special trustee may be appointed without notice and may be removed whenever the court so orders. Such special trustee shall give such bond as the court requires and shall have the powers conferred by the order of appointment and set forth in any letters of trust issued the special trustee.

(3) POWERS OF SUCCESSOR OR ADDED TRUSTEE. Unless expressly prohibited in the creating instrument, all powers conferred upon the trustee by such instrument attach to the office and are exercisable by the trustee holding the office.

(4) POWERS OF COTRUSTEES. If one of several trustees dies, resigns or is removed, the remaining trustees shall have all rights, title and powers of all the original trustees. If the creating instrument manifests an intent that a successor trustee be appointed to fill a vacancy, the remaining trustees may exercise the powers of all the original trustees until such time as a successor is appointed.

(5) VESTING OF TITLE. A special or successor trustee is vested with the title of the original trustee and an added trustee becomes a joint tenant with the existing trustee in all trust property. The court may order a trustee who resigns, is removed or is joined by an added trustee to execute such documents transferring title to trust property as may be appropriate to facilitate administration of the trust or may itself transfer title.

History: 1971 c. 66; 1991 a. 316.

701.18 Resignation and removal of trustees. (1) RESIGNATION. A trustee may resign in accordance with the terms of the creating instrument or petition the court to accept the trustee's resignation and the court may, upon notice and hearing, discharge the trustee from further responsibility for the trust upon such terms and conditions as are

necessary to protect the rights of the beneficiaries and any cotrustee. In no event shall a testamentary trustee be discharged from further responsibility except as provided in s. 701.16 (6).

(2) REMOVAL. A trustee may be removed in accordance with the terms of the creating instrument or the court may, upon its own motion or upon a petition by a beneficiary or cotrustee, and upon notice and hearing, remove a trustee who fails to comply with the requirements of this chapter or a court order, or who is otherwise unsuitable to continue in office. In no event shall a testamentary trustee be discharged from further responsibility except as provided in s. 701.16 (6).

History: 1971 c. 66; 1991 a. 316.

701.19 Powers of trustees. (1) POWER TO SELL, MORTGAGE OR LEASE. In the absence of contrary or limiting provisions in the creating instrument, in the court order appointing a trustee or in a subsequent order, a trustee has complete power to sell, mortgage or lease trust property without notice, hearing or order. A trustee has no power to give warranties in a sale, mortgage or lease which are binding on the trustee personally. In this section "sale" includes an option or agreement to transfer for cash or on credit, exchange, partition or settlement of a title dispute; this definition is intended to broaden rather than limit the meaning of "sale". "Mortgage" means any agreement or arrangement in which trust property is used as security.

(2) COURT AUTHORIZATION OF ADMINISTRATIVE ACTION. (a) In the absence of contrary or limiting provisions in the creating instrument, in any case where it is for the best interests of the trust, on application of the trustee or other interested person, the court may upon notice and hearing authorize or require a trustee to sell, mortgage, lease or otherwise dispose of trust property upon such terms and conditions as the court deems just and proper.

(b) Despite contrary or limiting provisions in the creating instrument, upon application of a trustee or other interested person, a court may upon notice and hearing order the retention, investment, reinvestment, sale, mortgage, lease or other disposition of trust property if the court is satisfied that the original purpose of the settlor cannot be carried out, substantially performed or practically achieved for any reason existing at the inception of the trust or arising from any subsequent change in circumstances and the retention, investment, reinvestment, sale, mortgage, lease or other disposition of the property more nearly approximates the settlor's intention.

(c) Unless authorized in the creating instrument, a trustee may not be interested as a purchaser, mortgagee or lessee of trust property unless such purchase, mortgage or lease is made with the written consent of all beneficiaries or with the approval of the court upon notice and hearing. A representative of a beneficiary, under s. 701.15, may give written consent for such beneficiary.

(d) A trustee may not sell individually owned assets to the trust unless the sale is authorized in the creating instrument, made with the written consent of all beneficiaries or made with the approval of the court upon notice and hearing.

(3) WHEN MANDATORY POWER DEEMED DISCRETIONARY. If a creating instrument expressly or by implication directs a trustee to sell trust property and such property has not been sold for a period of 25 years after the creation of the trust, such direction to the trustee shall be deemed a discretionary power of sale.

(4) CONTINUATION OF BUSINESS BY COURT ORDER. In the absence of contrary or limiting provisions in the creating instrument, the circuit court may, where it is in the best interests of the trust, order the trustee to continue any business of a deceased settlor. The order may be issued without notice and hearing, in the court's discretion and, in any case, may provide:

(a) For conduct of the business solely by the trustee, jointly with one or more of the settlor's surviving partners or as a

corporation or limited liability company to be formed by the trustee;

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

(c) As between beneficiaries, the extent to which liabilities incurred in the continuation of the business are to be chargeable solely to a part of the trust property set aside for use in the business or to the trust 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 orders.

(e) Nothing in this subsection shall be construed as requiring a trustee to liquidate a business, including a business operated as a closely held corporation, when such action is not required by the creating instrument or other applicable law.

(4m) CONTINUATION OF BUSINESS BY DIRECTION OF SETTLOR. If the settlor directs retention of a business that is among the trust's assets in the trust document or by other written means, a trustee may retain that business during the settlor's lifetime without liability.

(5) FORMATION OF BUSINESS ENTITY. In the absence of contrary or limiting provisions in the creating instrument:

(a) The court may by order authorize a trustee to become a partner under ch. 178 or 179 and transfer trust property to the partnership in return for a partnership interest.

(aL) The court may by order authorize a trustee to become a member of a limited liability company under ch. 183 and transfer trust property to the limited liability company in return for an ownership interest.

(b) The court may by order authorize a trustee to organize a corporation for any purpose permitted by ch. 180, subscribe for shares of such corporation and transfer trust property to such corporation in payment for the shares subscribed.

(c) The court may by order authorize a trustee to form a corporation for any purpose permitted by ch. 181.

(d) An order under this subsection may in the court's discretion be issued without notice and hearing.

(6) REGISTRATION OF SECURITIES IN NOMINEE. Unless prohibited in the creating instrument, a trustee may register securities in the name of a nominee.

(7) PROXY VOTING OF STOCK. Unless the creating instrument contains an express prohibition or specifies the manner in which the trustee is to vote stock in a corporation or certificates of beneficial interest in an investment trust, the trustee may vote such stock or certificates by general or limited proxy, with or without power of substitution.

(8) PLATTING LAND. In the absence of contrary or limiting provisions in the creating instrument, the court may by order authorize a trustee to plat land which is part of the trust, either alone or together with other owners of such real estate. In such platting the trustee must comply with the same statutes, ordinances, rules and regulations which apply to a person who is platting the person's own land. The order under this subsection may in the court's discretion be issued without notice and hearing.

(9) JOINT TRUSTEES. (a) In the absence of contrary or limiting provisions in the creating instrument, any power vested in 3 or more trustees may be exercised by a majority. This paragraph shall not apply to living trusts created prior to July 1, 1971, or to testamentary trusts contained in wills executed or last republished prior to that date.

(b) A trustee who has not joined in exercising a power is not liable to an affected person for the consequences of the exercise unless the trustee has failed to discharge the trustee's duty to participate in the administration of the trust. A dissenting trustee is not liable for the consequences of an act in which the dissenting trustee joins at the direction of the majority of the trustees if the dissenting trustee's dissent is expressed in

writing to the other trustees at or before the time of the joinder.

(10) RESTRICTION ON EXERCISE OF POWERS. Unless the creating instrument negates application of this subsection, a power conferred upon a person in the person's capacity as trustee to make discretionary distributions of principal or income to himself or herself or to make discretionary allocations in the trustee's favor of receipts or expenses as between principal and income, cannot be exercised by the trustee. If the power is conferred on 2 or more trustees, it may be exercised by the trustees who are not so disqualified. If there is no trustee qualified to exercise the power, it may be exercised by a special trustee appointed by the court. This subsection shall not apply to living trusts created prior to July 1, 1971, or to testamentary trusts contained in wills executed or last republished prior to that date.

(11) PROTECTION OF THIRD PARTIES. With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust power and its proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers the trustee purports to exercise. A third person is not bound to assure the proper application of trust property paid or delivered to the trustee.

History: 1971 c. 66; 1979 c. 175 s. 50; 1991 a. 316; 1993 a. 112, 160, 486; 1995 a. 336.

701.20 Principal and income. (1) SCOPE OF SECTION. Unless otherwise stated, this section governs the ascertainment of income and principal and the apportionment of receipts and expenses in trusts and decedents' estates, to the extent not inconsistent with the provisions of a creating instrument. A person making an outright gift or establishing a trust may make provision in the creating instrument for the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the personal representative or trustee to do so and the provision where not otherwise contrary to law controls notwithstanding this section.

(2) DUTY OF TRUSTEE AS TO RECEIPTS AND EXPENDITURE. (a) A trust shall be administered with due regard to the respective interests of beneficiaries of income and principal. A trust is so administered with respect to the allocation of receipts and expenditures if a receipt is credited or an expenditure is charged to income or principal or partly to each:

1. In accordance with the terms of the creating instrument, notwithstanding contrary provisions of this section;

2. In the absence of any contrary terms of the creating instrument, in accordance with the provisions of this section; or

3. If neither of the rules of administration under subd. 1. or 2. is applicable, in accordance with what is reasonable and equitable in view of the respective interests of the beneficiaries.

(b) If the creating instrument gives the trustee discretion in crediting a receipt or charging an expenditure to income or principal or partly to each, no inference that the trustee has or has not improperly exercised such discretion arises from the fact that the trustee has made an allocation contrary to this section.

(c) After determining income and principal, the trustee shall charge to income or principal expenses and other charges as provided in sub. (12).

(3) INCOME; PRINCIPAL; CHARGES. As used in this section:

(a) "Income" is the return in money or other property derived from the use of principal, including, but not limited to, return received as:

1. Rent of real or personal property, including sums received for cancellation or renewal of a lease.

2. Interest, including sums received as consideration for the privilege of prepayment of principal, except as provided in sub. (7).

3. Income earned during administration of a decedent's estate as provided in sub. (5).

4. Corporation distributions as provided in sub. (6).

5. Accrued increment on bonds or other obligations issued at discount as provided in sub. (7).

6. Receipts from business and farming operations as provided in sub. (8).

7. Receipts from disposition of natural resources as provided in subs. (9) and (10).

8. Receipts from other principal subject to depletion as provided in sub. (11).

9. Proceeds of insurance relating to loss of income.

(b) "Principal" is property other than income, including, but not limited to:

1. Consideration received by the trustee on the sale or other transfer of principal or on repayment of a loan or as a refund or replacement or change in the form of principal.

2. Proceeds of property taken on eminent domain proceedings.

3. Proceeds of insurance upon property forming part of the principal.

4. Stock dividends, receipts on liquidation of a corporation, and other corporate distributions as provided in sub. (6).

5. Receipts from the disposition of bonds or other obligations as provided in sub. (7).

6. Receipts from disposition of natural resources as provided in subs. (9) and (10).

7. Receipts from other principal subject to depletion as provided in sub. (11).

8. Allowances for depreciation established under subs. (8) and (12) (a) 2.

9. Income added to and held as principal as provided in s. 701.21 (4).

(4) WHEN RIGHT TO INCOME ARISES; APPORTIONMENT OF INCOME. (a) Except as provided in par. (b), income earned or accrued in whole or in part before the date when an asset becomes subject to the trust shall be income when received.

(b) In the administration of a decedent's estate or of an asset becoming subject to a trust by reason of a will or by reason of the death of a decedent, income which is earned or accrued to the date of death of the decedent but not yet payable, including, but not limited to, income in respect of a decedent, or which is due but not yet paid, shall be added to principal when received.

(c) On termination of an income interest, the following amounts shall be classified as income and treated as if received prior to the termination.

1. Income collected but undistributed on the date of termination and not subject to s. 701.21 (4).

2. Income due but not paid to the trustee on the date of termination.

3. Income accrued.

(d) In determining accrued income, the following rules apply:

1. Corporate distributions to stockholders including distributions from a regulated investment company or by a trust qualified and electing to be taxed under federal law as a real estate investment trust shall be treated as accrued on the day fixed by the corporation for determination of stockholders of record entitled to distribution or, if no date is fixed, on the date of declaration of the distribution by the corporation.

2. Income in the form of periodic payments (other than corporate distributions to stockholders), including interest, rent and annuities, shall be treated as accruing from day to day.

3. Obligations for the payment of money which are sold by the issuer at a discount from their maturity value in lieu of interest payments shall be treated as accruing from day to day.

(5) INCOME EARNED DURING ADMINISTRATION OF A DECEDENT'S ESTATE. (a) Unless the will otherwise provides and subject to par. (b), debts, funeral expenses, estate taxes, property taxes prorated to the date of death, family allowances unless charged against income by the court, and administration expenses shall be charged against the principal of the estate.

(b) Unless the will otherwise provides, income from the assets of a decedent's estate

after the death of the decedent and before distribution, including income from property used to discharge liabilities, legacies and devises, shall be determined in accordance with the rules applicable to a trustee under this section and distributed as follows:

1. To legatees and devisees of specific property other than money, the income from the property bequeathed or devised to them less the following recurrent and other ordinary expenses attributable to the specific property: property taxes (excluding taxes prorated to the date of death), interest (excluding interest accrued to the date of death), income taxes (excluding taxes on income in respect of a decedent, capital gains and any other income taxes chargeable against principal) which accrue during the period of administration, ordinary repairs, and other expenses of management and operation of the property.

2. To all other legatees and devisees, except as provided in par. (d), the balance of the income, less the balance of the recurrent and other ordinary expenses attributable to all other property from which the estate is entitled to income, the distribution to be in proportion to their respective interests in the property at the time of distribution and based upon the value of the property at the date of death.

(c) Income received by a trustee under par. (b) shall be treated as income of the trust.

(d) A legatee, including a trustee, of a specific amount of money not determined by a pecuniary formula shall not be paid any part of the income of the estate but shall receive interest on any unpaid portion of the legacy for the period commencing one year after decedent's death at the legal rate set forth in s. 138.04.

(e) Unless the creating instrument otherwise provides, if a trust may be included in a decedent's gross estate for federal estate tax purposes, and if the trust is divided or distributed in whole or in part as a result of the decedent's death, this subsection shall apply during the period after the death of the decedent and before the division or distribution is complete. For this purpose, the assets of the trust shall be valued as of the decedent's death.

(6) CORPORATE DISTRIBUTIONS. (a) Except as provided in pars. (b), (c) and (d), all corporate distributions are income, including cash dividends, distributions of or rights to subscribe to shares or securities or obligations of corporations other than the distributing corporation, and the proceeds of the rights or property distributions. Except as provided in pars. (c) and (d), if the distributing corporation gives a stockholder an option to receive a distribution either in cash or in its own shares, the distribution chosen is income.

(b) Corporate distributions of shares of the distributing corporation, including distributions in the form of a stock split or stock dividend, are principal. A right to subscribe to shares or other securities issued by the distributing corporation accruing to stockholders on account of their stock ownership and the proceeds of any sale of the right are principal.

(c) Except to the extent that the corporation indicates that some part of a corporate distribution is a settlement of preferred or guaranteed dividends accrued since the trustee became a stockholder or is in lieu of an ordinary cash dividend, a corporate distribution is principal if the distribution is pursuant to:

1. A call of shares;

2. A merger, consolidation, reorganization, or other plan by which assets of a corporation are acquired by another corporation;

3. A total or partial liquidation of the corporation, including any distribution which the corporation indicates is a distribution in total or partial liquidation;

4. Any distribution of assets pursuant to a court decree or final administrative order by a government agency ordering distribution of the particular assets; or

5. Any distribution of securities other than shares of the distributing corporation on

which no gain or loss is recognized for federal income tax purposes.

(d) Distributions made from ordinary income by a regulated investment company or by a trust qualifying and electing to be taxed under federal law as a real estate investment trust are income. All other distributions made by the company or trust, including distributions from capital gains, depreciation, or depletion, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares, are principal.

(e) Corporate distributions other than cash which are deemed income under this subsection may be distributed in kind, or the trustee may instead distribute its cash equivalent on the date of distribution by the corporation.

(7) PREMIUM AND DISCOUNT. (a) Except as provided in par. (b), no provision may be made for amortization of premiums or for accumulation for discounts on bonds or other obligations for the payment of money. The proceeds of sale, redemption or other disposition of the bonds or obligations are principal.

(b) In the case of a bond or other stated obligation for the payment of money bearing no stated interest but payable or redeemable at maturity or at a future time at an amount in excess of the amount in consideration of which it was issued, the increment in value while held by the personal representative or trustee is income when realized.

(8) BUSINESS AND FARMING OPERATIONS. If a trustee uses any part of the principal in the operation of a business, including an agricultural or farming operation, as a sole proprietor, partner or member of a limited liability company, the net profits and losses of the business shall be computed in accordance with generally accepted accounting principles for a comparable business.

(a) Net profits from a business are income.

(b) Net losses from a business do not reduce other trust income for the fiscal or calendar year during which they occur but shall be carried into subsequent fiscal or calendar years and reduce the net profits of the business for those years.

(9) DISPOSITION OF NATURAL RESOURCES. (a) If any part of the principal consists of a right to receive royalties, overriding or limited royalties, working interests, production payments, net profit interests, or other interests in minerals, oil, gas, stone, gravel, sand or other natural resources in, on or under land, the receipts from taking the natural resources from the land shall be allocated as follows:

1. If received as rent on a lease or extension payments on a lease, the receipts are income.

2. If received from a production payment, the receipts are income to the extent of any factor for interest or its equivalent provided in the governing instrument. There shall be allocated to principal the fraction of the balance of the receipts which the unrecovered cost of the production payment bears to the balance owed on the production payment, exclusive of any factor for interest or its equivalent. The receipts not allocated to principal are income.

3. If received as a royalty, overriding or limited royalty, or bonus, or from a working, net profit, or any other interest in minerals or other natural resources, receipts not provided for in subds. 1. and 2. shall be apportioned on a yearly basis in accordance with this subdivision whether or not any natural resource was being taken from the land at the time the trust was established. There shall be added to principal as an allowance for depletion such portion of the gross receipts as shall be allowed as a deduction in computing taxable income for federal income tax purposes. The balance of the gross receipts, after payment therefrom of all expenses, direct and indirect, is income.

(b) If a trustee, on January 1, 1979, held an item of depletable property of a type specified in this subsection the trustee may continue to allocate receipts from the property in the manner used before January 1, 1979.

(c) This subsection does not apply to timber, water, soil, sod, dirt, peat, turf, mosses or interests in a partnership or limited liability company owning natural resources.

(10) TIMBER, WATER, SOIL, SOD, DIRT, PEAT, TURF, MOSSES OR AN INTEREST IN A PARTNERSHIP OR LIMITED LIABILITY COMPANY OWNING NATURAL RESOURCES. If any part of the principal consists of an interest in timber, water, soil, sod, dirt, peat, turf, mosses or a partnership or limited liability company owning natural resources, the receipts shall be allocated in accordance with sub. (2) (a) 3.

(11) OTHER PROPERTY SUBJECT TO DEPLETION. Except as provided in subs. (9) and (10), if the principal consists of property subject to depletion, including leaseholds, patents, copyrights, royalty rights and any rights to receive periodic payments under a contract or plan for deferred compensation or for the benefit of one or more of the employes of an employer, receipts shall be allocated in accordance with sub. (2) (a) 3.

(12) CHARGES AGAINST INCOME AND PRINCIPAL. (a) The following charges shall be made against income:

2. Ordinary expenses incurred in connection with the administration, management, or preservation of the trust property, including fees and expenses of attorneys, accountants, appraisers, investment counselors, custodians and agents, regularly recurring taxes assessed against any portion of the principal, all premiums on insurance other than life insurance, interest, maintenance, and ordinary repairs.

3. Any tax levied upon receipts defined as income under this section or the trust instrument and payable by the trustee.

(b) No allowance may be made for depreciation of any property held by the trustee unless the court directs otherwise.

(c) If charges against income are of unusual amount, the trustee may by means of reserves or other reasonable means charge them over a reasonable period of time and withhold from distribution sufficient sums to regularize distributions.

(d) The following charges shall be made against principal:

2. Charges not provided for in par. (a), including fees and expenses of attorneys, accountants, appraisers, investment counselors, custodians and agents, the cost of investing and reinvesting principal, the payments on principal of an indebtedness including a mortgage amortized by periodic payments of principal, expenses for preparation of property for rental or sale, and attorney fees and other expenses in judicial proceedings unless the court directs otherwise.

3. Extraordinary repairs or expenses incurred in making a capital improvement to principal, including special assessments.

4. Any tax levied upon profit, gain, or other receipts allocated to principal notwithstanding denomination of the tax as an income or franchise tax by the taxing authority.

5. If a death tax or generation skipping transfer tax is levied in respect to a trust, any amount apportioned to the trust, or any beneficial interest in the trust.

(dm) The following charges shall be made in equal portions against income and principal:

1. The trustee's regular compensation, whether based on a percentage of principal or income.

2. Special compensation of trustees, and trustee's compensation computed on principal as an acceptance, distribution, or termination fee.

(e) Regularly recurring charges payable from income shall be apportioned to the same extent and in the same manner that income is apportioned under sub. (4).

History: 1971 c. 40; 1977 c. 408; 1983 a. 189; 1985 a. 37; 1987 a. 27; 1987 a. 393 s. 53; 1991 a. 39; 1993 a. 112, 160; 1997 a. 188.

701.21 Income payments and accumulations. (1) DISTRIBUTION OF INCOME. Where a beneficiary is entitled to receive income from a trust, but the creating instrument fails to specify how frequently it is to be paid, the trustee shall distribute at

least annually the income to which such beneficiary is entitled.

(2) PERMITTED ACCUMULATIONS. No provision directing or authorizing accumulation of trust income shall be invalid.

(3) CHARITABLE TRUST ACCUMULATIONS. A trust containing a direction or authorization to accumulate income from property devoted to a charitable purpose shall be subject to the general equitable supervision of the court with respect to any such accumulation of income, including its reasonableness, amount and duration.

(4) DISPOSITION OF ACCUMULATED INCOME. Income not required to be distributed by the creating instrument, in the absence of a governing provision in the instrument, may in the trustee's discretion be held in reserve for future distribution as income or be added to principal subject to retransfer to income of the dollar amount originally transferred to principal; but at the termination of the income interest, any undistributed income shall be distributed as principal.

701.22 Distributions in kind by trustees; marital bequests. In case of a division of trust assets into 2 or more trusts or shares, any distribution or allocation of assets as an equivalent of a dollar amount fixed by formula or otherwise shall be made at current fair market values unless the governing instrument expressly provided that another value may be used. If the governing instrument 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 as such an equivalent 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 the governing instrument that the trustee may fix values for purposes of distribution or allocation does not of itself constitute authorization to fix a value other than current fair market value.

701.23 Removal of trusts. (1) REMOVAL TO FOREIGN JURISDICTION. Unless the creating instrument contains an express prohibition or provides a method of removal, a circuit court having jurisdiction of a trust created by a will admitted to probate in such court may, upon petition of a trustee or a beneficiary with the consent of the trustee and after a hearing as to which notice has been given to the trustee and other interested persons, order removal of such trust to another state where the court finds that such removal is in accord with the express or implied intention of the settlor, would aid the efficient administration of the trust or is otherwise in the best interests of the beneficiaries. Such order may be conditioned on the appointment of a trustee in the state to which the trust is to be removed and shall be subject to such other terms and conditions as the court deems appropriate for protection of the trust property and the interests of the beneficiaries. Upon receipt of satisfactory proof of compliance with all terms and conditions of the order, the court may discharge the local trustee from further responsibility in the administration of the trust.

(2) REMOVAL TO THIS STATE. Unless the creating instrument contains an express prohibition against removal or provides a method for removal, a court may, upon the petition of a foreign trustee or beneficiary with the consent of the trustee, appoint a local trustee to receive and administer trust property presently being administered in another state. The local trustee may be required to give bond conditioned on the faithful performance of his or her duties or to meet any other conditions required by a court in the other state before permitting removal of the trust to this state.

History: 1977 c. 449 s. 497; 1993 a. 486.

701.24 Applicability of ss. 701.01 to 701.23. Except as otherwise provided in s. 701.19 (9) (a) and (10), ss. 701.01 to 701.23 are applicable to a trust existing on July 1, 1971, as well as a trust created after such date and shall govern trustees acting under

such trusts. If application of any provision of ss. 701.01 to 701.23 to a trust in existence on August 1, 1971, is unconstitutional, it shall not affect application of the provision to a trust created after that date.
History: 1971 c. 66; 1977 c. 309.

701.25 Applicability of general transfers at death provisions. Chapter 854 applies to transfers at death under trust instruments.
History: 1997 a. 188.

701.26 Disclaimers of nonprobate transfers at death. A person may disclaim, under s. 854.13, any of the following:

(1) An interest in a joint tenancy, upon the death of another joint tenant.

(2) An interest in survivorship marital property, upon the death of the other spouse.

(3) An interest that is created by a nontestamentary instrument and transferred at death, upon the death that causes the transfer.
History: 1997 a. 188.

Appendix B

1997 WISCONSIN ACT 188

Date of enactment: **April 27, 1998**

1997 Assembly Bill 645

Date of publication*: **May 11, 1998**

AN ACT ***to repeal*** 632.485, 700.17 (2) (b) 2., 701.27 (1) (b), 701.27 (1) (d), 701.27 (2) (b) 2., 701.27 (3) (b), 701.27 (6) (title), 701.27 (6) (d), 701.27 (9), 851.001, 851.51 (title), 851.51 (3), 852.01 (1) (e), 852.01 (1) (g), 852.03 (2), 853.16 (title), 853.51 (2), 858.01 (2), 861.13 and 861.41 (3) and (4); ***to renumber*** 701.27 (1) (intro.), 701.27 (2) (title), 701.27 (2) (b) (title), 701.27 (2) (bm), 701.27 (2) (d), 701.27 (3) (title), 701.27 (3) (a) 4., 701.27 (4) (title), 701.27 (4) (c), 701.27 (4) (d), 701.27 (8) (title), 767.266 (title), 851.35, 853.16 (1), 853.51 (intro.) and 858.01 (1); ***to renumber and amend*** 700.17 (2) (b) 1., 701.27 (title), 701.27 (1) (a), 701.27 (1) (c), 701.27 (2) (a), 701.27 (2) (b) 1., 701.27 (2) (c), 701.27 (2) (e), 701.27 (3) (a) (intro.), 701.27 (3) (a) 1., 701.27 (3) (a) 2., 701.27 (3) (a) 3., 701.27 (4) (a), 701.27 (4) (b), 701.27 (4) (e), 701.27 (5), 701.27 (6) (a), 701.27 (6) (b) (title), 701.27 (6) (b), 701.27 (6) (c), 701.27 (7), 701.27 (8), 767.266, 851.51 (1) and (2), 852.01 (1) (f), 852.05 (1), 853.03 (2), 853.07 (2), 853.11 (1) (b), 853.15 (1), 853.16 (2), 853.51 (1), 861.31 (1), 861.31 (4), 861.35 (1) and 861.35 (3); ***to consolidate, renumber and amend*** 853.11 (1) (intro.) and (a); ***to amend*** 6.875 (1) (b), 48.92 (3), 146.34 (1) (j), 157.061 (7), 178.21 (3) (e), 242.01 (11), 252.15 (1) (eg), 615.03 (1) (c), 700.17 (2) (a), 701.20 (5) (b) 1., 702.08, 766.575 (3) (b), 766.58 (3) (f), 766.587 (6), 766.589 (7), 766.61 (2) (c) 2., 815.56, 851.002, 851.13, 851.27, 852.01 (1) (intro.), 852.01 (1) (a) 2., 852.01 (1) (b) and (d), 852.05 (2), 852.05 (3), 852.13, 853.03 (intro.), 853.03 (1), 853.11 (1) (title), 853.25 (2), 853.25 (4), 853.25 (5), 853.29, 853.50 (1), 853.50 (3), 853.55 (NOTICE) 6., 853.55 (NOTICE) 9., 853.56 (NOTICE) 7., 853.56 (NOTICE) 9., 853.59 (form) (a), 853.59 (form) (2) (a), 857.01, 857.015, 858.01 (title), 859.40, 859.41, 861.015 (1), 861.015 (3) (intro.), 861.015 (3) (a), 861.015 (3) (b), 861.31 (2), 861.33 (title), 861.33 (1) (a) (intro.), 861.33 (1) (a) 4., 861.33 (1) (b), 861.33 (2), 861.33 (3), 861.33 (4), 861.35 (title), 861.35 (2), 863.37 (1), 880.32 and 880.695 (1); ***to repeal and recreate*** 700.11, 700.12, 702.03 (1), subchapter II (title) of chapter 705 [precedes 705.20], 851.055, 851.55, 852.01 (2), 852.01 (2m), 852.03 (1), 852.03 (3), 852.03 (4), 852.09, 852.11, 853.05, 853.11 (2), 853.11 (3), 853.11 (3m), 853.11 (6), 853.13, 853.19, 853.25 (1), 853.27,

853.33, 853.35, 853.40, 853.55 (Article 3) 3.3., 853.56 (Article 3) 3.4., subchapter II (title) of chapter 861 [precedes 861.018], 861.02, 861.03, 861.05, 861.07, 861.09, 861.11, 863.11, 863.13, 895.43 and 895.435; and ***to create*** 632.695, 700.17 (2) (am), 700.26, 701.065, 701.115, 701.25, 701.26, 702.22, 705.09, 705.20 (3), subchapter III (title) of chapter 705 [precedes 705.21], 705.31, 706.105, 766.58 (3m), 767.266 (title), 767.266 (1) (b), 767.266 (2), subchapter I (title) of chapter 851 [precedes 851.002], 851.035, 851.065, 851.30, 851.31, subchapter II (title) of chapter 851 [precedes 851.40], 851.50, 852.01 (1) (f) 1., 852.01 (1) (f) 2., 852.01 (1) (f) 3., 852.03 (5) and (6), 852.05 (4), 852.10, 852.12, subchapter I (title) of chapter 853 [precedes 853.01], 853.03 (2) (a), (b) and (c), 853.04, 853.07 (2) (c), 853.11 (1) (bm), 853.32, 853.325, 853.41, subchapter II (title) of chapter 853 [precedes 853.50], 853.51 (1) (bc), 853.51 (2m), chapter 854, 856.05 (5), 856.16, 861.018, 861.04, 861.06, 861.08, 861.10, subchapter III (title) of chapter 861 [precedes 861.17], 861.21, 861.31 (1c), 861.31 (4) (a), 861.33 (1) (c), 861.35 (1c), 861.35 (3) (e), 861.35 (4) (a) and 861.43 of the statutes; **relating to:** changes to the probate code.

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

SECTION 1. 6.875 (1) (b) of the statutes is amended to read:

6.875 **(1)** (b) "Relative" means a spouse or individual related within the 1st, 2nd or 3rd degree of kinship under s. 852.03 (2), 1995 stats.

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

48.92 **(3)** Rights of inheritance by, from and through an adopted child are governed by ~~s. 851.51~~ ss. 854.20 and 854.21.

SECTION 3. 146.34 (1) (j) of the statutes is amended to read:

146.34 **(1)** (j) "Relative" means a parent, grandparent, stepparent, brother, sister, first cousin, nephew or niece; or uncle or aunt within the 3rd degree of kinship as computed under s. 852.03 (2), 1995 stats. This relationship may be by consanguinity or direct affinity.

SECTION 4. 157.061 (7) of the statutes is amended to read:

157.061 **(7)** "Family member" means a spouse or an individual related by blood, marriage or adoption within the 3rd degree of kinship as computed under s. 852.03 (2), 1995 stats.

SECTION 5. 178.21 (3) (e) of the statutes is amended to read:

178.21 **(3)** (e) A partner's right in specific partnership property is not subject to elective rights under s. 861.02 (1) ~~or 861.03~~ of a surviving spouse or to allowances to a surviving spouse, heirs, or next of kin.

SECTION 6. 242.01 (11) of the statutes is amended to read:

242.01 **(11)** "Relative" means an individual related by consanguinity within the 3rd degree of kinship as computed under s. 852.03 (2), 1995 stats., a spouse or an individual related to a spouse within the 3rd degree as so computed, and includes an individual in an adoptive relationship within the 3rd degree.

SECTION 7. 252.15 (1) (eg) of the statutes is amended to read:

252.15 **(1)** (eg) "Relative" means a spouse, parent, grandparent, stepparent, brother, sister, first cousin, nephew or niece; or uncle or aunt within the 3rd degree of kinship as computed under s. 852.03 (2), 1995 stats. This relationship may be by consanguinity or direct affinity.

SECTION 8. 615.03 (1) (c) of the statutes is amended to read:

615.03 **(1)** (c) A natural person who issues such an annuity to a relative by blood or marriage within the ~~third~~ 3rd degree of kinship as computed according to s. 852.03 (2), 1995 stats.

SECTION 9. 632.485 of the statutes is repealed.

SECTION 10. 632.695 of the statutes is created to read:

632.695 Applicability of general transfers at death provisions. Chapter 854 applies to transfers at death under life insurance policies and annuities.

SECTION 11. 700.11 of the statutes is repealed and recreated to read:

700.11 Interests in "heirs" and the like. (1) If a statute or governing instrument, as defined in s. 854.01, specifies that property is to be distributed to, or a future interest is to be created in, a designated individual's "heirs", "heirs at law", "next of kin", "relatives" or "family" or a term that has a similar meaning, or if a class gift in favor of "descendants", "issue" or "heirs of the body" does not specify the manner in which the property is to be distributed among the class members, the property is distributed according to s. 854.22.

(2) The common law doctrine of worthier title is abolished under s. 854.22 (3). Situations in which the doctrine may have applied are governed by s. 854.22 (1).

SECTION 12. 700.12 of the statutes is repealed and recreated to read:

700.12 After-born persons included in class gift. With respect to membership in a class under a class gift, the status of a person who was born after the membership in the class was determined is governed by s. 854.21 (5).

SECTION 13. 700.17 (2) (a) of the statutes is amended to read:

700.17 **(2)** (a) Each of 2 or more joint tenants has an equal interest in the whole property for the duration of the tenancy, irrespective of unequal

contributions at its creation. On the death of one of 2 joint tenants, the survivor becomes the sole owner; on the death of one of 3 or more joint tenants, the survivors are joint tenants of the entire interest~~, except that if~~. If a survivor disclaims under s. ~~701.27 (2) (b) 1.~~ 854.13 (2) (b), the joint tenancy is severed as of the date of death with respect to the disclaimed interest.

SECTION 14. 700.17 (2) (am) of the statutes is created to read:

700.17 **(2)** (am) Survivorship under par. (a) is governed by s. 854.03 (2). **SECTION 15.** 700.17 (2) (b) 1. of the statutes is renumbered 700.17 (2) (b) and amended to read:

700.17 **(2)** (b) If a joint tenant unlawfully and intentionally kills another joint tenant of the same property, the disposition of the deceased joint tenant's interest in the joint tenancy is ~~severed so that the interest of the decedent passes as the decedent's property and the killer has no right of survivorship as to that property~~ governed by s. 854.14.

SECTION 16. 700.17 (2) (b) 2. of the statutes is repealed.

SECTION 17. 700.26 of the statutes is created to read:

700.26 Applicability of general transfers at death provisions. Chapter 854 applies to a transfer at death under an instrument of transfer.

SECTION 17m. 701.065 of the statutes is created to read:

701.065 Debts of decedents. (1) LIMITATIONS ON CLAIMS. (a) 1. A trustee who has a duty or power to pay the debts of a decedent may publish in the county in which the decedent resided, as a class 3 notice, under ch. 985, a deadline for filing claims with the trustee. The deadline shall be the date that is 4 months after the date of the first insertion of the notice.

2. Except as provided in pars. (b) and (c), if the trustee satisfies the requirements for the publication of the notice under subd. 1., all claims, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, are barred against the trustee, the trust property and any recipient of trust property unless filed with the trustee on or before the date specified in the notice under subd. 1.

(b) Notwithstanding par. (a) 2., a claim that is not filed on or before the date specified in the notice under par. (a) 1. is not barred if any of the following apply:

1. The claim is a claim based on tort, on a marital property agreement that is subject to the time limitations under s. 766.58 (13) (b) or (c), on Wisconsin income, franchise, sales, withholding, gift or death taxes, or on unemployment compensation contributions due or benefits overpaid, a claim for funeral or administrative expenses, a claim of this state under s. 46.27 (7g), 49.496 or 49.682 or a claim of the United States.

2. All of the following circumstances exist:

a. On or before the date specified in the notice under par. (a) 1., the trustee knew, or in the exercise of reasonable diligence should have known, of the existence of the potential claim and of the identity and mailing address of the potential claimant.

b. At least 30 days before the date specified in the notice under par. (a) 1., the trustee had not given notice to the potential claimant of the final day for filing his or her claim.

c. At least 30 days before the date specified in the notice under par. (a) 1., the claimant did not have actual knowledge of the date on which the claim would be barred.

(c) If an action is pending against a decedent at the time of his or her death and the action survives, the plaintiff in that action may serve a notice of substitution of party defendant on the trustee and file proof of service of notice in the court. Filing of proof of service on or before the deadline for filing a claim under par. (a) 1. gives the plaintiff the same rights against the trust as the filing of a claim. A judgment in any such action constitutes an adjudication for or against the trust.

(2) EFFECT OF STATUTE OF LIMITATIONS. A trustee shall not pay a claim that was barred by a statute of limitations at the time of the decedent's death. A claim not barred by a statute of limitations at the time of the decedent's death shall not be barred thereafter by a statute of limitations if the claim is filed with the trustee on or before the deadline for filing a claim under sub. (1) (a) 1.

(3) CLAIMS OF CREDITORS WITHOUT NOTICE. (a) A claim not barred by sub. (1) (a) 2. because of the operation of sub. (1) (b) 2. may be enforced against trust property only as provided in this subsection.

(b) The claimant shall file the claim with the trustee within one year after the decedent's death and within 30 days after the earlier of the following:

1. The date that the trustee gives notice to the potential claimant of the deadline for filing a claim under sub. (1) (a) 1.

2. The date that the claimant first acquires actual knowledge of the deadline for filing a claim under sub. (1) (a) 1.

(c) The claimant shall have the burden of establishing by the greater weight of the credible evidence that all of the circumstances under sub. (1) (b) 2. existed.

(d) This subsection does not extend the time for commencement of a claim beyond the time provided by any statute of limitations applicable to that claim.

(4) SATISFACTION OF CLAIM FROM OTHER PROPERTY. Failure of a claimant timely to file a claim as provided in this section does not bar the

claimant from satisfying the claim, if not otherwise barred, from property other than trust property.

SECTION 18. 701.115 of the statutes is created to read:

701.115 Future interests in revocable trusts. (1) Unless a contrary intention is found, if a person has a future interest in property under a revocable trust and, under the terms of the trust, the person has the right to possession and enjoyment of the property at the grantor's death, the right to possession and enjoyment is contingent on the person's surviving the grantor. Extrinsic evidence may be used to show contrary intent.

(2) Survivorship under sub. (1) is governed by s. 854.03.

(3) The rights of the issue of a predeceasing beneficiary under sub. (1) are governed by s. 854.06.

SECTION 19. 701.20 (5) (b) 1. of the statutes is amended to read:

701.20 **(5)** (b) 1. To legatees and devisees of specific property other than money, the income from the property bequeathed or devised to them less the following recurrent and other ordinary expenses attributable to the specific property: property taxes (excluding taxes prorated to the date of death), interest (excluding interest accrued to the date of death), income taxes (excluding taxes on income in respect of a decedent, capital gains and any other income taxes chargeable against principal) which accrue during the period of administration, ordinary repairs, and other expenses of management and operation of the property. ~~For the purpose of this subdivision, property elected by a surviving spouse under s. 861.02 (1) is a bequest or devise to the surviving spouse.~~

SECTION 20. 701.25 of the statutes is created to read:

701.25 Applicability of general transfers at death provisions. Chapter 854 applies to transfers at death under trust instruments.

SECTION 21. 701.26 of the statutes is created to read:

701.26 Disclaimers of nonprobate transfers at death. A person may disclaim, under s. 854.13, any of the following:

(1) An interest in a joint tenancy, upon the death of another joint tenant.

(2) An interest in survivorship marital property, upon the death of the other spouse.

(3) An interest that is created by a nontestamentary instrument and transferred at death, upon the death that causes the transfer.

SECTION 22. 701.27 (title) of the statutes is renumbered 854.13 (title) and amended to read:

854.13 (title) **Disclaimer ~~of transfers under nontestamentary instruments~~.**

SECTION 23. 701.27 (1) (intro.) of the statutes is renumbered 854.13 (1) (intro.).

SECTION 24. 701.27 (1) (a) of the statutes is renumbered 854.13 (1) (a) and amended to read:

854.13 **(1)** (a) "Beneficiary under a ~~nontestamentary~~ governing instrument" includes any person who receives or might receive property ~~or an interest in property~~ under the terms or legal effect of a ~~nontestamentary~~ governing instrument.

SECTION 25. 701.27 (1) (b) of the statutes is repealed.

SECTION 26. 701.27 (1) (c) of the statutes is renumbered 854.13 (1) (c) and amended to read:

854.13 **(1)** (c) "Power" has the meaning ~~designated~~ given in s. 702.01 (4).

SECTION 27. 701.27 (1) (d) of the statutes is repealed.

SECTION 28. 701.27 (2) (title) of the statutes is renumbered 854.13 (2) (title).

SECTION 29. 701.27 (2) (a) of the statutes is renumbered 854.13 (2) (a) and amended to read:

854.13 **(2)** (a) *In general.* A person who is ~~a~~ an heir, recipient of property or beneficiary under a ~~nontestamentary~~ governing instrument, ~~person succeeding to a disclaimed interest created by a nontestamentary instrument,~~ donee of a power created by ~~nontestamentary~~ a governing instrument, appointee under a power exercised by ~~nontestamentary~~ a governing instrument ~~or~~, taker in default under a power created by ~~nontestamentary~~ a governing instrument~~;~~ or person succeeding to disclaimed property may disclaim any property ~~or interest in property~~, including contingent or future interests or the right to receive discretionary distributions, by delivering a written instrument of disclaimer under this section.

SECTION 30. 701.27 (2) (b) (title) of the statutes is renumbered 854.13 (2) (b) (title).

SECTION 31. 701.27 (2) (b) 1. of the statutes is renumbered 854.13 (2) (b) and amended to read:

854.13 **(2)** (b) Upon the death of a joint tenant ~~that occurs on or after June 7, 1996~~, a surviving joint tenant may disclaim any property ~~or interest in property~~ that would otherwise accrue to him or her by right of survivorship and that is the subject of the joint tenancy~~. A surviving joint tenant may disclaim the entire interest if he or she fulfills the requirements under section 2518 of the internal revenue code~~ by delivering a written instrument of disclaimer under this section.

SECTION 32. 701.27 (2) (b) 2. of the statutes is repealed.

SECTION 33. 701.27 (2) (bm) of the statutes is renumbered 854.13 (2) (c).

SECTION 34. 701.27 (2) (c) of the statutes is renumbered 854.13 (2) (d) and amended to read:

854.13 **(2)** (d) *Partial disclaimer.* Property may be disclaimed in whole or in part, except that a partial disclaimer of property passing by ~~nontestamentary~~ a governing instrument or by the exercise of a power may not be made if partial disclaimer is expressly prohibited by the governing instrument or by the instrument exercising the power.

SECTION 35. 701.27 (2) (d) of the statutes is renumbered 854.13 (2) (e).

SECTION 36. 701.27 (2) (e) of the statutes is renumbered 854.13 (2) (h) and amended to read:

854.13 **(2)** (h) *After death.* A person's right to disclaim survives the person's death and may be exercised by the person's personal representative or special administrator upon receiving approval from the court having jurisdiction of the person's estate after hearing upon notice to all ~~interested~~ persons interested in the disclaimed property, if the personal representative or special administrator has not taken any action which would bar the right to disclaim under sub. ~~(7)~~ (11).

SECTION 37. 701.27 (3) (title) of the statutes is renumbered 854.13 (3) (title).

SECTION 38. 701.27 (3) (a) (intro.) of the statutes is renumbered 854.13 (3) (intro.) and amended to read:

854.13 **(3)** (intro.) The instrument of disclaimer shall do all of the following:

SECTION 39. 701.27 (3) (a) 1. of the statutes is renumbered 854.13 (3) (a) and amended to read:

854.13 **(3)** (a) Describe the property ~~or interest~~ disclaimed~~;~~.

SECTION 40. 701.27 (3) (a) 2. of the statutes is renumbered 854.13 (3) (b) and amended to read:

854.13 **(3)** (b) Declare the disclaimer and the extent of the disclaimer~~;~~.

SECTION 41. 701.27 (3) (a) 3. of the statutes is renumbered 854.13 (3) (c) and amended to read:

854.13 **(3)** (c) Be signed by the disclaimant~~; and~~.

SECTION 42. 701.27 (3) (a) 4. of the statutes is renumbered 854.13 (3) (d).

SECTION 43. 701.27 (3) (b) of the statutes is repealed.

SECTION 44. 701.27 (4) (title) of the statutes is renumbered 854.13 (4) (title).

SECTION 45. 701.27 (4) (a) of the statutes is renumbered 854.13 (4) (a) and amended to read:

854.13 **(4)** (a) (title) ~~*Disclaiming a present*~~ *Present interest.* An instrument disclaiming a present interest shall be executed and delivered not later than 9 months after the effective date of the ~~nontestamentary~~ transfer under the governing instrument~~, except that, for~~. For cause shown, the period may be extended by a court of competent jurisdiction, either

within or after the 9-month period, for such additional time as the court ~~deems~~ considers just. ~~The effective date of a revocable instrument or contract is the date on which the person having the power to revoke no longer has the power to revoke it or to transfer to himself, herself or another person the equitable ownership of the property or interest which is the subject of the disclaimer.~~

SECTION 46. 701.27 (4) (b) of the statutes is renumbered 854.13 (4) (b) and amended to read:

854.13 **(4)** (b) (title) ~~*Disclaiming a future*~~ *Future interest.* An instrument disclaiming a future interest shall be executed and delivered not later than 9 months after the event that determines that the taker of the property ~~or interest~~ is finally ascertained and his or her interest indefeasibly fixed~~, except that, for~~. For cause shown, the period may be extended by a court of competent jurisdiction, either within or after the 9-month period, for such additional time as the court ~~deems~~ considers just.

SECTION 47. 701.27 (4) (c) of the statutes is renumbered 854.13 (4) (c).

SECTION 48. 701.27 (4) (d) of the statutes is renumbered 854.13 (4) (d).

SECTION 49. 701.27 (4) (e) of the statutes is renumbered 854.13 (4) (e) and amended to read:

854.13 **(4)** (e) *Interests arising by disclaimer.* Notwithstanding pars. (a) and (b), a person whose interest in property arises by disclaimer or by default of exercise of a power created by ~~nontestamentary~~ a governing instrument may disclaim at any time not later than 9 months after the day on which the prior instrument of disclaimer is delivered, or the date of death of the donee of the power~~, as the case may be~~.

SECTION 50. 701.27 (5) of the statutes is renumbered 854.13 (5), and 854.13 (5) (a) (intro.), 1. and 2., as renumbered, are amended to read:

854.13 **(5)** (a) *Delivery.* (intro.) In addition to any requirements imposed by the ~~creating~~ governing instrument, the instrument of disclaimer is effective only if, within the time specified under sub. (4), it is delivered to and received by any of the following:

1. The transferor of the property ~~or interest~~ disclaimed, if living~~;~~.

2. The personal representative or special administrator of the deceased transferor of the property~~; or~~.

SECTION 51. 701.27 (6) (title) of the statutes is repealed.

SECTION 52. 701.27 (6) (a) of the statutes is renumbered 854.13 (6) and amended to read:

854.13 **(6)** PROPERTY NOT VESTED. The property ~~or interest~~ disclaimed under this section shall be ~~deemed~~ considered not to have been vested in, created in or transferred to the disclaimant.

SECTION 53. 701.27 (6) (b) (title) of the statutes is renumbered 854.13 (7) (title) and amended to read:

854.13 **(7)** (title) DEVOLUTION IN GENERAL.

SECTION 54. 701.27 (6) (b) of the statutes is renumbered 854.13 (7) (a) and amended to read:

854.13 **(7)** (a) Unless the transferor of the property or donee of the power has otherwise provided, the disclaimed property ~~or interest disclaimed~~ devolves as if the disclaimant had died before the decedent or before the effective date of the ~~nontestamentary~~ transfer under the governing instrument~~; or if~~. If the disclaimant is an appointee under a power exercised by ~~nontestamentary~~ a governing instrument, the disclaimed property devolves as if the disclaimant had died before the effective date of the exercise of the power~~; or if~~. If the disclaimant is a taker in default under a power created by ~~nontestamentary~~ a governing instrument, the disclaimed property devolves as if the disclaimant had predeceased the donee of the power. This paragraph is subject to subs. (8), (9) and (10).

(b) A disclaimer relates back for all purposes to the ~~effective~~ date of the ~~nontestamentary~~ decedent's death or the effective date of the transfer under the governing instrument~~; or if~~. If the disclaimant is an appointee under a power exercised ~~by nontestamentary~~ under a governing instrument, the disclaimer relates back to the effective date of the exercise of the power~~; or if~~. If the disclaimant is a taker in default under a power created by ~~nontestamentary~~ a governing instrument, the disclaimer relates back to the last possible date for exercise of the power. A disclaimer of the future right to receive mandatory distributions of income or profits relates to the period stated in the disclaimer.

SECTION 55. 701.27 (6) (c) of the statutes is renumbered 854.13 (10) and amended to read:

854.13 **(10)** (title) ~~FUTURE~~ DEVOLUTION OF DISCLAIMED FUTURE INTEREST. Unless the instrument creating the future interest manifests a contrary intent either expressly or as construed from extrinsic evidence, a future interest limited to take effect in possession or enjoyment after the termination of the interest which is disclaimed takes effect as if the disclaimant had died before the effective date of the ~~nontestamentary~~ governing instrument or, if the disclaimant is an appointee under a power exercised by ~~nontestamentary~~ a governing instrument, as if the disclaimant had died before the effective date of the exercise of the power.

SECTION 56. 701.27 (6) (d) of the statutes is repealed.

SECTION 57. 701.27 (7) of the statutes is renumbered 854.13 (11), and 854.13 (11) (a) (intro.), 1., 2. and 3., as renumbered, are amended to read:

854.13 **(11)** (a) (title) ~~*Method*~~ *Actions that bar disclaimer.* (intro.) A person's right to disclaim property ~~or an interest in property~~ is barred by ~~the person's~~ any of the following:

1. ~~Assignment~~ The person's assignment, conveyance, encumbrance, pledge or transfer of the property ~~or interest~~ or a contract therefor~~;~~.

2. ~~Written~~ The person's written waiver of the right to disclaim~~; or~~.

3. ~~Acceptance~~ The person's acceptance of the property ~~or interest~~ or benefit of the property.

SECTION 58. 701.27 (8) (title) of the statutes is renumbered 854.13 (12) (title).

SECTION 59. 701.27 (8) of the statutes is renumbered 854.13 (12) (a) and amended to read:

854.13 **(12)** (a) This section does not ~~abridge~~ affect the right of a person to waive, release, disclaim or renounce property ~~or an interest in property~~ under any other statute, the common law, or as provided in the creating instrument.

SECTION 60. 701.27 (9) of the statutes is repealed.

SECTION 61. 702.03 (1) of the statutes is repealed and recreated to read:

702.03 **(1)** Unless a contrary intention is found, if a governing instrument, as defined in s. 854.01, creating a power of appointment expressly requires that the power be exercised by any type of reference to the power or its source, it is presumed that the donor's intention in requiring the reference was to prevent an inadvertent exercise of the power. Extrinsic evidence may be used to show contrary intent.

SECTION 62. 702.08 of the statutes is amended to read:

702.08 Disclaimer of powers. The donee of any power may disclaim all or part of the power as provided under s. ~~701.27 or 853.40~~ 854.13.

SECTION 63. 702.22 of the statutes is created to read:

702.22 Applicability of general transfers at death provisions. Chapter 854 applies to transfers at death under an instrument that creates or exercises a power of appointment.

SECTION 64. 705.09 of the statutes is created to read:

705.09 Applicability of general transfers at death provisions. Chapter 854 applies to transfers at death under this subchapter.

SECTION 65. Subchapter II (title) of chapter 705 [precedes 705.20] of the statutes is repealed and recreated to read:

CHAPTER 705

SUBCHAPTER II

NONPROBATE TRANSFERS AT DEATH

SECTION 66. 705.20 (3) of the statutes is created to read:

705.20 **(3)** Chapter 854 applies to transfers at death under this section.

SECTION 67. Subchapter III (title) of chapter 705 [precedes 705.21] of the statutes is created to read:

CHAPTER 705

SUBCHAPTER III

TRANSFER ON DEATH

SECURITY REGISTRATION

SECTION 68. 705.31 of the statutes is created to read:

705.31 Applicability of general transfers at death provisions. Chapter 854 applies to transfers at death under this subchapter.

SECTION 69. 706.105 of the statutes is created to read:

706.105 Applicability of general transfers at death provisions. Chapter 854 applies to transfers at death under a conveyance.

SECTION 70. 766.575 (3) (b) of the statutes is amended to read:

766.575 **(3)** (b) If within 14 business days after receiving the notice of claim the trustee receives, as purporting to support the claim, a decree, marital property agreement or proof that a legal action has been commenced, including a copy of an election filed pursuant to s. ~~861.03~~ 861.08 (1), to establish the validity of the claim, the trustee shall suspend distribution of the portion of the property to which the claim relates pending resolution of the validity of the claim.

SECTION 71. 766.58 (3) (f) of the statutes is amended to read:

766.58 **(3)** (f) Providing that upon the death of either spouse any of either or both spouses' property, including after-acquired property, passes without probate to a designated person, trust or other entity by nontestamentary disposition. Any such provision in a marital property agreement is revoked upon dissolution of the marriage as provided in s. 767.266 (1). If a marital property agreement provides for the nontestamentary disposition of property, without probate, at the death of the 2nd spouse, at any time after the death of the first spouse the surviving spouse may amend the marital property agreement with regard to property to be disposed of at his or her death unless the marital property agreement expressly provides otherwise and except to the extent property is held in a trust expressly established under the marital property agreement.

SECTION 72. 766.58 (3m) of the statutes is created to read:

766.58 **(3m)** Chapter 854 applies to transfers at death under a marital property agreement.

SECTION 73. 766.587 (6) of the statutes is amended to read:

766.587 **(6)** RIGHTS OF SURVIVING SPOUSE. Notwithstanding the fact that an agreement under this section is in effect at, or has terminated before, the death of a spouse who is a party to the agreement, the surviving spouse may elect under ~~ss.~~ s. 861.02 ~~(1) and 861.03~~. For the purpose of the election, in addition to the property described in s. 851.055, property acquired during marriage and after the determination date which would have been marital property but for the agreement is deferred marital property.

SECTION 74. 766.589 (7) of the statutes is amended to read:

766.589 **(7)** RIGHTS OF SURVIVING SPOUSE. Notwithstanding the fact that an agreement under this section is in effect at, or has terminated before, the time of death of a spouse who is party to the agreement, the surviving spouse may elect under ~~ss.~~ s. 861.02 ~~and 861.03~~. For the purpose of the election, in addition to the property described in s. 851.055, property acquired during marriage and after the determination date which would have been marital property but for the agreement is deferred marital property.

SECTION 75. 766.61 (2) (c) 2. of the statutes is amended to read:

766.61 **(2)** (c) 2. If within 14 business days after receiving the notice of claim the issuer receives at its home office, as purporting to support the notice of claim, a decree, marital property agreement, written directive signed by the beneficiary and surviving spouse, consent under sub. (3) (e) or proof that a legal action has been filed, including a copy of an election filed pursuant to s. ~~861.03~~ 861.08 (1), to secure an interest as evidenced in such a document, the issuer shall make payment or take action on the policy after the issuer receives from a court or from the claimant and the person directing action or payment written documentation indicating that the dispute has been resolved.

SECTION 76. 767.266 (title) of the statutes is renumbered 767.266 (1) (title).

SECTION 77. 767.266 (title) of the statutes is created to read:

767.266 (title) **Effect on transfers at death.**

SECTION 78. 767.266 of the statutes is renumbered 767.266 (1) (intro.) and amended to read:

767.266 **(1)** (title) REVOCATION OF ~~NONTESTAMENTARY DISPOSITION PROVISION~~ DEATH PROVISIONS IN MARITAL PROPERTY AGREEMENT. (intro.) Unless the judgment provides otherwise, a judgment of annulment, divorce or legal separation revokes a provision in a marital property agreement under s. 766.58 ~~which provides~~ that provides for any of the following:

(a) That, upon the death of either spouse, any of either or both spouses' property, including after-acquired property, passes without probate to a designated person, trust or other entity by nontestamentary disposition.

SECTION 79. 767.266 (1) (b) of the statutes is created to read:

767.266 **(1)** (b) That one or both spouses will make a particular disposition in a will or other governing instrument, as defined in s. 854.01.

SECTION 80. 767.266 (2) of the statutes is created to read:

767.266 **(2)** REVOCATION OF REVOCABLE TRANSFERS AT DEATH. Unless sub. (1) applies, revocation of revocable transfers at death by a former spouse to the other former spouse, or to relatives of the other former spouse, under an instrument executed before the judgment of annulment, divorce or legal separation is governed by s. 854.15.

SECTION 81. 815.56 of the statutes is amended to read:

815.56 Sheriff's deed; grantee if purchaser dead. In case the person who would be entitled to a deed of real estate sold on execution dies before the delivery of that deed the sheriff shall execute a deed to the person's executors or administrators. The real estate so conveyed shall be held in trust for the use of the heirs or devisees of the deceased person, subject to the surviving spouse's right to elect under ~~ss.~~ s. 861.02 (1) ~~and 861.03~~, but may be sold for the payment of debts in the same manner as lands of which the person died seized.

SECTION 82. 851.001 of the statutes is repealed.

SECTION 83. Subchapter I (title) of chapter 851 [precedes 851.002] of the statutes is created to read:

CHAPTER 851

SUBCHAPTER I

DEFINITIONS

SECTION 84. 851.002 of the statutes is amended to read:

851.002 Definitions. The definitions in ss. 851.01 to ~~851.29~~ 851.31 apply to chs. 851 to 882.

SECTION 85. 851.035 of the statutes is created to read:

851.035 Conscious presence. "Conscious presence" means within the range of any of a person's senses.

SECTION 86. 851.055 of the statutes is repealed and recreated to read:

851.055 Deferred marital property. "Deferred marital property" means any property that satisfies all of the following:

(1) Is not classified by ch. 766.

(2) Was acquired while the spouses were married.

(3) Would have been classified as marital property under ch. 766 if the property had been acquired when ch. 766 applied.

SECTION 87. 851.065 of the statutes is created to read:

851.065 Devise. "Devise", when used as a noun, means a testamentary disposition of any real or personal property by will. "Devise", when used as a verb, means to dispose of any real or personal property by will.

SECTION 88. 851.13 of the statutes is amended to read:

851.13 Issue. "Issue" means children, grandchildren, great-grandchildren, and lineal descendants of more remote degrees, including those who occupy that relation by reason of adoption under s. ~~851.51~~ 854.20 and nonmarital children and their lineal descendants to the extent provided by s. 852.05.

SECTION 89. 851.27 of the statutes is amended to read:

851.27 Property. "Property" means any interest, legal or equitable, in real or personal property, without distinction as to kind, including money, rights of a beneficiary under a contractual arrangement, choses in action and anything else that may be the subject of ownership.

SECTION 90. 851.30 of the statutes is created to read:

851.30 Surviving spouse. (1) Subject to sub. (2), "surviving spouse" means a person who was married to the decedent at the time of the decedent's death.

(2) "Surviving spouse" does not include any of the following:

(a) An individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, if the decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each other or they subsequently hold themselves out as husband and wife.

(b) An individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a 3rd individual.

(c) An individual who was party to a valid proceeding concluded by an order purporting to terminate all property rights based on the marriage.

SECTION 91. 851.31 of the statutes is created to read:

851.31 Will. "Will" includes a codicil and any document incorporated by reference in a testamentary document under s. 853.32 (1) or (2). "Will" does not include a copy, unless the copy has been proven as a will under s. 856.17, but "will" does include a properly executed duplicate original.

SECTION 92. 851.35 of the statutes is renumbered 854.17.

SECTION 93. Subchapter II (title) of chapter 851 [precedes 851.40] of the statutes is created to read:

CHAPTER 851

SUBCHAPTER II

GENERAL PROBATE PROVISIONS

SECTION 94. 851.50 of the statutes is created to read:

851.50 Status of adopted persons. The status of adopted persons for purposes of inheritance and transfers under wills or other governing instruments, as defined in s. 854.01, is governed by ss. 854.20 and 854.21.

SECTION 95. 851.51 (title) of the statutes is repealed.

SECTION 96. 851.51 (1) and (2) of the statutes are renumbered 854.20 (1) and (2) and amended to read:

854.20 **(1)** INHERITANCE RIGHTS BETWEEN ADOPTED PERSON AND ADOPTIVE RELATIVES. ~~A~~ Subject to sub. (4), a legally adopted person is treated as a ~~natural~~ birth child of the person's adoptive parents for purposes of intestate succession by, through and from the adopted person and for purposes of any statute conferring rights upon children, issue or relatives in connection with the law of intestate succession or ~~wills~~ governing instruments.

(2) (title) INHERITANCE RIGHTS BETWEEN ADOPTED PERSON AND ~~NATURAL~~ BIRTH RELATIVES. ~~A~~ Subject to sub. (4), a legally adopted person ceases to be treated as a child of the person's ~~natural~~ birth parents for the same purposes as under sub. (1), except:

(a) If a ~~natural~~ birth parent marries or remarries and the child is adopted by the stepparent, for all purposes the child is treated as the child of the ~~child's natural~~ birth parent ~~for all purposes;~~ whose spouse adopted the child.

(b) If a ~~natural~~ birth parent of a marital child dies and the other ~~natural~~ birth parent remarries and the child is adopted by the stepparent, the child is treated as the child of the deceased ~~natural~~ birth parent for purposes of inheritance through that parent and for purposes of any statute conferring rights upon children, issue or relatives of that parent under the law of intestate succession or ~~wills~~ governing instruments.

SECTION 97. 851.51 (3) of the statutes is repealed.

SECTION 98. 851.55 of the statutes is repealed and recreated to read:

851.55 Simultaneous death. The transfer of or title to property that depends upon priority of death with respect to 2 or more persons who die simultaneously is governed by s. 854.03.

SECTION 99. 852.01 (1) (intro.) of the statutes is amended to read:

852.01 **(1)** WHO ARE HEIRS. (intro.) ~~The~~ Except as modified by the decedent's will under s. 852.10 (1), any part of the net estate of a decedent ~~which the decedent has~~ that is not disposed of by will~~, whether the decedent dies without a will, or with a will which does not completely dispose of the decedent's estate,~~ passes to the decedent's surviving heirs as follows:

SECTION 100. 852.01 (1) (a) 2. of the statutes is amended to read:

852.01 **(1)** (a) 2. If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of ~~that portion of the decedent's net estate not disposed of by will consisting of~~ decedent's property other than marital property.

SECTION 101. 852.01 (1) (b) and (d) of the statutes are amended to read:

852.01 **(1)** (b) To the issue, the share of the estate not passing to the spouse under par. (a), 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~~. If there are issue other than children, those of more remote degrees take ~~by representation~~ per stirpes.

(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~~ per stirpes.

SECTION 102. 852.01 (1) (e) of the statutes is repealed.

SECTION 103. 852.01 (1) (f) of the statutes is renumbered 852.01 (1) (f) (intro.) and amended to read:

852.01 **(1)** (f) (intro.) If there is no surviving spouse, issue, parent or issue of a parent, to the grandparents and their issue as follows:

SECTION 104. 852.01 (1) (f) 1. of the statutes is created to read:

852.01 **(1)** (f) 1. One-half to the maternal grandparents equally if both survive, or to the surviving maternal grandparent; if both maternal grandparents are deceased, to the issue of the maternal grandparents or either of them, per stirpes.

SECTION 105. 852.01 (1) (f) 2. of the statutes is created to read:

852.01 **(1)** (f) 2. One-half to the paternal relations in the same manner as to the maternal relations under subd. 1.

SECTION 106. 852.01 (1) (f) 3. of the statutes is created to read:

852.01 **(1)** (f) 3. If either the maternal side or the paternal side has no surviving grandparent or issue of a grandparent, the entire estate to the decedent's relatives on the other side.

SECTION 107. 852.01 (1) (g) of the statutes is repealed.

SECTION 108. 852.01 (2) of the statutes is repealed and recreated to read:

852.01 **(2)** SURVIVORSHIP REQUIREMENT. Survivorship under sub. (1) is determined as provided in s. 854.03.

SECTION 109. 852.01 (2m) of the statutes is repealed and recreated to read:

852.01 **(2m)** HEIR WHO KILLS DECEDENT. If a person under sub. (1) killed the decedent, the inheritance rights of that person are governed by s. 854.14.

SECTION 110. 852.03 (1) of the statutes is repealed and recreated to read:

852.03 **(1)** PER STIRPES. If per stirpes distribution is called for under s. 852.01 (1) (b), (d) or (f), the rules under s. 854.04 apply.

SECTION 111. 852.03 (2) of the statutes is repealed.

SECTION 112. 852.03 (3) of the statutes is repealed and recreated to read:

852.03 **(3)** RELATIVES OF THE HALF BLOOD. Inheritance rights of relatives of the half blood are governed by s. 854.21 (4).

SECTION 113. 852.03 (4) of the statutes is repealed and recreated to read:

852.03 **(4)** POSTHUMOUS HEIRS. Inheritance rights of a person specified in s. 852.01 (1) who was born after the death of the decedent are governed by s. 854.21 (5).

SECTION 114. 852.03 (5) and (6) of the statutes are created to read:

852.03 **(5)** RELATED THROUGH 2 LINES. Inheritance rights of a person who is related to the decedent through 2 lines of relationship are governed by s. 854.21 (6).

(6) TAKING THROUGH OR BY ALIEN. No person is disqualified from taking as an heir because the person or a person through whom he or she claims is not or at some time was not a U.S. citizen. The rights of an alien to acquire or hold land in the state are governed by ss. 710.01 to 710.03.

SECTION 115. 852.05 (1) of the statutes is renumbered 852.05 (1) (intro.) and amended to read:

852.05 **(1)** (intro.) A nonmarital child or the child's issue is entitled to take in the same manner as a marital child by intestate succession from and through his or her mother, and from and through his or her father if ~~the~~ any of the following applies:

(a) The father has ~~either~~ been adjudicated to be the father in a paternity proceeding under ch. 767~~,~~ or by final order or judgment of a court of competent jurisdiction in another state.

(b) The father has admitted in open court that he is the father~~, or~~.

(c) The father has acknowledged himself to be the father in writing signed by him.

SECTION 116. 852.05 (2) of the statutes is amended to read:

852.05 **(2)** Property of a nonmarital child passes in accordance with s. 852.01 except that the father or the father's kindred can inherit only if the father has been adjudicated to be the father in a paternity proceeding under ch. 767 or by final order or judgment of a court of competent jurisdiction in another state.

SECTION 117. 852.05 (3) of the statutes is amended to read:

852.05 **(3)** This section does not apply to a child who becomes a marital child by the subsequent marriage of the child's parents under s. 767.60. The status of a nonmarital child who is legally adopted is governed by s. ~~851.51~~ 854.20.

SECTION 118. 852.05 (4) of the statutes is created to read:

852.05 **(4)** Section 895.01 (1) applies to paternity proceedings under ch. 767.

SECTION 119. 852.09 of the statutes is repealed and recreated to read:

852.09 Assignment of home to surviving spouse. If the intestate estate includes an interest in a home, assignment of that interest to the surviving spouse is governed by s. 861.21.

SECTION 120. 852.10 of the statutes is created to read:

852.10 Disinheritance from intestate share. (1) A decedent's will may exclude or limit the right of an individual or class to succeed to property passing by intestate succession.

(2) The share of the intestate estate that would have passed to the individual or class described in sub. (1) passes as if the individual or each member of the class had disclaimed his or her intestate share under s. 854.13.

(3) This section does not apply if the individual or all members of the class described in sub. (1) predecease the testator.

SECTION 121. 852.11 of the statutes is repealed and recreated to read:

852.11 Advancement. The effect of a lifetime gift by the decedent on the intestate share of an heir is governed by s. 854.09.

SECTION 122. 852.12 of the statutes is created to read:

852.12 Debts to decedent. If an heir owes a debt to the decedent, the debt shall be charged against the intestate share of the debtor, regardless of whether the debt has been discharged in bankruptcy. If the debtor fails to survive the decedent, the debt shall not be taken into account in computing the intestate shares of the debtor's issue.

SECTION 123. 852.13 of the statutes is amended to read:

852.13 Right to disclaim intestate share. Any person to whom property would otherwise pass under s. 852.01 may disclaim all or part of the property as provided under s. ~~853.40~~ 854.13.

SECTION 124. Subchapter I (title) of chapter 853 [precedes 853.01] of the statutes is created to read:

CHAPTER 853

SUBCHAPTER I

GENERAL RULES

SECTION 125. 853.03 (intro.) of the statutes is amended to read:

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

SECTION 126. 853.03 (1) of the statutes is amended to read:

853.03 **(1)** It must be signed by the testator, by the testator with the assistance of another person with the testator's consent or in the testator's name by ~~one of the witnesses or some other~~ another person at the testator's ~~express~~ direction and in the testator's conscious presence~~, such a proxy signing either to take place or to be acknowledged by the testator in the presence of the witnesses; and~~.

SECTION 127. 853.03 (2) of the statutes is renumbered 853.03 (2) (intro.) and amended to read:

853.03 **(2)** (intro.) It must be signed by 2 or more witnesses ~~in the presence of the testator and in the presence of each other.~~, each of whom signed within a reasonable time after witnessing any of the following:

SECTION 128. 853.03 (2) (a), (b) and (c) of the statutes are created to read:

853.03 **(2)** (a) The signing of the will as provided under sub. (1).

(b) The testator's implicit or explicit acknowledgement of the testator's signature on the will, within the conscious presence of each of the witnesses.

(c) The testator's implicit or explicit acknowledgement of the will, within the conscious presence of each of the witnesses.

SECTION 129. 853.04 of the statutes is created to read:

853.04 Self-proved will. (1) ONE-STEP PROCEDURE. A will may be simultaneously executed, attested and made self-proved by the affidavit of the testator and witnesses. The affidavit must be made before an officer authorized to administer oaths under the laws of the state in which execution occurs and must be evidenced by the officer's certificate, under official seal, in substantially the following form:

(a) I, ..., the testator, sign my name to this instrument this .... day of ...., and being first duly sworn, declare to the undersigned authority all of the following:

1. I execute this instrument as my will.

2. I sign this will willingly, or willingly direct another to sign for me.

3. I execute this will as my free and voluntary act for the purposes expressed therein.

4. I am 18 years of age or older, of sound mind and under no constraint or undue influence.

Testator: ....

(b) We, ..., ..., the witnesses, being first duly sworn, sign our names to this instrument and declare to the undersigned authority all of the following:

1. The testator executes this instrument as his or her will.

2. The testator signs it willingly, or willingly directs another to sign for him or her.

3. Each of us, in the conscious presence of the testator, signs this will as a witness.

4. To the best of our knowledge, the testator is 18 years of age or older, of sound mind and under no constraint or undue influence.

Witness: ....

Witness: ....

State of ....

County of ....

(c) Subscribed and sworn to before me by ...., the testator, and by ...., and ...., witnesses, this .... day of ...., ...

(Seal) ....

(Signed): ....

(Official capacity of officer): ....

(2) TWO-STEP PROCEDURE. An attested will may be made self-proved at any time after its execution by the affidavit of the testator and witnesses. The affidavit must be made before an officer authorized to administer oaths under the laws of the state in which the affidavit occurs and must be

evidenced by the officer's certificate, under official seal, attached or annexed to the will in substantially the following form:

State of ....

County of ....

(a) We, ..., ..., and ...., the testator and the witnesses whose names are signed to the foregoing instrument, being first duly sworn, do declare to the undersigned authority all of the following:

1. The testator executed the instrument as his or her will.

2. The testator signed willingly, or willingly directed another to sign for him or her.

3. The testator executed the will as a free and voluntary act.

4. Each of the witnesses, in the conscious presence of the testator, signed the will as witness.

5. To the best of the knowledge of each witness, the testator was, at the time of execution, 18 years of age or older, of sound mind and under no constraint or undue influence.

Testator: ....

Witness: ....

Witness: ....

(b) Subscribed and sworn to before me by ...., the testator, and by ...., and ...., witnesses, this .... day of ...., ...

(Seal) ....

(Signed): ....

(Official capacity of officer): ....

(3) EFFECT OF AFFIDAVIT. (a) A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the due execution of the will.

(b) Inclusion in a will of an affidavit in substantially the form under sub. (1) or (2) is conclusive evidence that the will was executed in compliance with s. 853.03.

SECTION 130. 853.05 of the statutes is repealed and recreated to read:

853.05 Execution of wills outside the state or by nonresidents within this state. (1) A will is validly executed if it is in writing and any of the following applies:

(a) The will is executed according to s. 853.03.

(b) The will is executed in accordance with the law, at the time of execution or at the time of death, of any of the following:

1. The place where the will was executed.

2. The place where the testator resided, was domiciled or was a national at the time of execution.

3. The place where the testator resided, was domiciled or was a national at the time of death.

(2) Any will under sub. (1) (b) has the same effect as if executed in this state in compliance with s. 853.03.

SECTION 131c. 853.07 (2) of the statutes is renumbered 853.07 (2) (a) and amended to read:

853.07 **(2)** (a) ~~A~~ Subject to pars. (b) and (c), a will is not invalidated because it is signed by an interested witness~~; but, unless the will is also signed by 2 disinterested witnesses~~.

(b) Except as provided in par. (c), any beneficial provisions of the will for a witness or the spouse of ~~the~~ a witness are invalid to the extent that ~~such provisions in the aggregate exceed in value~~ the aggregate value of those provisions exceeds what the witness or spouse would have received had the testator died intestate. Valuation is to be made as of testator's death.

SECTION 131m. 853.07 (2) (c) of the statutes is created to read:

853.07 **(2)** (c) Paragraph (b) does not apply if any of the following applies:

1. The will is also signed by 2 disinterested witnesses.

2. There is sufficient evidence that the testator intended the full transfer to take effect.

SECTION 133. 853.11 (1) (title) of the statutes is amended to read:

853.11 **(1)** (title) ~~SUBSEQUENT~~ REVOCATION BY WRITING ~~OR PHYSICAL ACT~~.

SECTION 134. 853.11 (1) (intro.) and (a) of the statutes are consolidated, renumbered 853.11 (1) (a) and amended to read:

853.11 **(1)** (a) A will is revoked in whole or in part by~~: (a) A~~ a subsequent will~~, codicil or other instrument which~~ that is executed in compliance with s. 853.03 or 853.05 and ~~which~~ that revokes the prior will or a part thereof expressly or by inconsistency~~; or~~.

SECTION 135. 853.11 (1) (b) of the statutes is renumbered 853.11 (1m) and amended to read:

853.11 **(1m)** (title) REVOCATION BY PHYSICAL ACT. ~~Burning~~ A will is revoked in whole or in part by burning, tearing, canceling ~~or~~, obliterating or destroying the will, or part, with the intent to revoke, by the testator or by some person in the testator's conscious presence and by the testator's direction.

SECTION 136. 853.11 (1) (bm) of the statutes is created to read:

853.11 **(1)** (bm) 1. A subsequent will wholly revokes the prior will if the testator intended the subsequent will to replace rather than supplement the prior will, regardless of whether the subsequent will expressly revokes the prior will.

2. The testator is presumed to have intended a subsequent will to replace, rather than supplement, the prior will if the subsequent will

completely disposes of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the prior will is revoked.

3. The testator is presumed to have intended a subsequent will to supplement, rather than replace, the prior will if the subsequent will does not completely dispose of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the prior will only to the extent of any inconsistency.

SECTION 137. 853.11 (2) of the statutes is repealed and recreated to read:

853.11 **(2)** PREMARITAL WILL. (a) *Entitlement of surviving spouse.* Subject to par. (c), if the testator married the surviving spouse after the testator executed his or her will, the surviving spouse is entitled to a share of the probate estate.

(b) *Value of share.* The value of the share under par. (a) is the value of the share that the surviving spouse would have received had the testator died with an intestate estate equal to the value of the net estate of the decedent less the value of all of the following:

1. All devises to or for the benefit of the testator's children who were born before the marriage to the surviving spouse and who are not also the children of the surviving spouse.

2. All devises to or for the benefit of the issue of a child described in subd. 1.

3. All devises that pass under s. 854.06, 854.07, 854.21 or 854.22 to or for the benefit of children described in subd. 1. or issue of those children.

(c) *Exceptions.* Paragraph (a) does not apply if any of the following applies:

1. It appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse.

2. It appears from the will or other evidence that the will is intended to be effective notwithstanding any subsequent marriage, or there is sufficient evidence that the testator considered revising the will after marriage but decided not to.

3. The testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

4. The testator and the spouse have entered into an agreement that complies with ch. 766 and that provides for the spouse or specifies that the spouse is to have no rights in the testator's estate.

(d) *Priority and abatement.* In satisfying the share provided by this subsection:

1. Amounts received by the surviving spouse under s. 861.02 and devises made by will to the surviving spouse are applied first.

2. Devises other than those described in par. (b) 1. to 3. abate as provided under s. 854.18.

SECTION 138. 853.11 (3) of the statutes is repealed and recreated to read:

853.11 **(3)** FORMER SPOUSE. The effect of a transfer under a will to a former spouse is governed by s. 854.15.

SECTION 139. 853.11 (3m) of the statutes is repealed and recreated to read:

853.11 **(3m)** INTENTIONAL KILLING OF DECEDENT BY BENEFICIARY. If a beneficiary under a will killed the decedent, the rights of that beneficiary are governed by s. 854.14.

SECTION 140. 853.11 (6) of the statutes is repealed and recreated to read:

853.11 **(6)** REVIVAL OF REVOKED WILL. (a) If a subsequent will that partly revoked a previous will is itself revoked by a revocatory act under sub. (1m), the revoked part of the previous will is revived. This paragraph does not apply if it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator did not intend the revoked part of the previous will to take effect as executed.

(b) If a subsequent will that wholly revoked a previous will is itself revoked by a revocatory act under sub. (1m), the previous will remains revoked unless it is revived. The previous will is revived if it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator intended the previous will to take effect as executed.

(c) If a subsequent will that wholly or partly revoked a previous will is itself revoked by another, later will, the previous will or its revoked part remains revoked, unless it or its revoked part is revived. The previous will or its revoked part is revived to the extent that it appears from the terms of the later will, or from the testator's contemporary or subsequent declarations, that the testator intended the previous will to take effect.

(d) In the absence of an original valid will, establishment of the execution and validity of the revived will or part is governed by s. 856.17.

SECTION 141. 853.13 of the statutes is repealed and recreated to read:

853.13 Contracts. (1) A contract to make a will or devise, not to revoke a will or devise or to die intestate may be established only by any of the following:

(a) Provisions of a will stating the material provisions of the contract.

(b) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract.

(c) A valid written contract, including a marital property agreement under s. 766.58 (3) (e).

(d) Clear and convincing extrinsic evidence.

(2) The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

SECTION 142. 853.15 (1) of the statutes is renumbered 853.15 (1) (a) and amended to read:

853.15 **(1)** (a) Unless the will provides otherwise, this subsection applies if a will gives a ~~bequest or~~ devise to one beneficiary and also clearly purports to give to another beneficiary ~~a~~ property ~~interest which~~ that does not pass under the will but belongs to the first beneficiary by right of ownership, survivorship, beneficiary designation~~, election under s. 861.02 (1)~~ or otherwise.

(b) If the conditions in par. (a) are fulfilled, the first beneficiary must elect either to take under the will and transfer his or her property ~~interest~~ in accordance with the will~~,~~ or to retain his or her property ~~interest~~ and not take under the will. If the first beneficiary elects not to take under the will, unless the will provides otherwise ~~the bequest or~~ his or her devise ~~given him or her~~ under the will ~~is to~~ shall be assigned ~~by the court~~ to the other beneficiary ~~in lieu of the property interest which does not pass under the will~~.

(c) This section does not require an election if the property ~~interest~~ belongs to the first beneficiary ~~by reason~~ because of transfer or beneficiary designation made by the decedent after the execution of the will.

SECTION 143. 853.16 (title) of the statutes is repealed.

SECTION 144. 853.16 (1) of the statutes is renumbered 853.32 (2) (a).

SECTION 145. 853.16 (2) of the statutes is renumbered 853.32 (2) (b) and amended to read:

853.32 **(2)** (b) Another document under ~~sub. (1)~~ par. (a) is valid even if it does not exist when the will is executed, even if it is changed after the will is executed and even if it has no significance except for its effect on the disposition of property by the will.

SECTION 146. 853.19 of the statutes is repealed and recreated to read:

853.19 Advancement. The effect of a lifetime gift by the testator on the rights of a beneficiary under the will is governed by s. 854.09.

SECTION 147. 853.25 (1) of the statutes is repealed and recreated to read:

853.25 **(1)** CHILDREN BORN OR ADOPTED AFTER MAKING OF THE WILL. (a) *Applicability.* Except as provided in sub. (5), if a will fails to provide for a child of the testator born or adopted after execution of the will, the child is entitled to a share of the estate unless any of the following applies:

1. It appears from the will or from other evidence that the omission was intentional.

2. The testator provided for the omitted child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(b) *Share if testator had no living child at execution.* Except as provided in sub. (5), if a will fails to provide for a child of the testator born or adopted after the execution of the will and the testator had no child living when he or she executed the will, the omitted child receives a share in the estate equal in value to that which the child would have received under ch. 852. This paragraph does not apply if the will devised all or substantially all of the estate to or for the benefit of the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will.

(c) *Share if testator had living child at execution.* Except as provided in sub. (5), if a will fails to provide for a child of the testator born or adopted after the execution of the will and the testator had one or more children living when he or she executed the will and the will devised property to one or more of the then-living children, the omitted child is entitled to share in the testator's estate as follows:

1. The portion that the omitted child is entitled to share is limited to devises made to the testator's then-living children under the will.

2. The omitted child is entitled to receive the share of the testator's estate, as limited in subd. 1., that the child would have received had the testator included all omitted after-born and after-adopted children with the children to whom devises were made under the will and had given an equal share of the estate to each child.

3. To the extent feasible, the interest granted an omitted child under this section shall be of the same character, whether equitable or legal, present or future, as that devised to the testator's then-living children under the will.

4. In satisfying a share provided by this paragraph, devises to the testator's children who were living when the will was executed abate ratably. In abating the devises of the then-living children, the court shall preserve to the maximum extent possible the character of the testamentary plan adopted by the testator.

(d) *Rights of issue.* Except as provided in sub. (5), if a child entitled to a share under this section dies before the testator, and the child leaves issue who survive the testator, the issue who represent the deceased child are entitled to the deceased child's share.

SECTION 148. 853.25 (2) of the statutes is amended to read:

853.25 **(2)** LIVING ISSUE OMITTED BY MISTAKE. ~~If~~ Except as provided in sub. (5), if clear and convincing evidence proves that ~~by mistake or accident~~ the testator failed to provide in the testator's will for a child

living at the time of making of the will, or for the issue of any then deceased child, by mistake or accident, including the mistaken belief that the child or issue of a deceased child was dead at the time the will was executed, the child or issue is entitled to receive a share in the estate of the testator ~~equal in value to the share which the child or issue would have received if the testator had died intestate. But failure~~, as provided under sub. (1), as if the child or issue was born or adopted after the execution of the will. Failure to mention a child or issue in the will is not in itself evidence of mistake or accident.

SECTION 149. 853.25 (4) of the statutes is amended to read:

853.25 **(4)** FROM WHAT ESTATE SHARE IS TO BE TAKEN. Except as provided in sub. (5), the court shall in its final judgment assign ~~the~~ a share provided ~~by this section~~ under sub. (1) (b) as follows:

(a) ~~From any~~ First, from intestate property ~~first;~~.

(b) ~~The~~ Any balance from each ~~of the beneficiaries~~ devise to a beneficiary under the will in proportion to the value of the estate each beneficiary would have received under the will as written~~, unless~~. If the ~~obvious~~ intention of the testator, shown by clear and convincing evidence, in relation to some specific gift or other provision in the will would ~~thereby~~ be defeated~~, in which case~~ by assignment of the share as provided in this paragraph, the court may adopt a different apportionment and may exempt a specific ~~gift~~ devise or other provision.

SECTION 150. 853.25 (5) of the statutes is amended to read:

853.25 **(5)** DISCRETIONARY POWER OF COURT TO ASSIGN DIFFERENT SHARE. If in any case under sub. (1) or (2) the court determines that the ~~intestate~~ share is in a ~~larger~~ different amount ~~than~~ or form from what 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~~.

SECTION 151. 853.27 of the statutes is repealed and recreated to read:

853.27 Lapse. The rights under a will of a beneficiary who predeceases the testator are governed by s. 854.06.

SECTION 152. 853.29 of the statutes is amended to read:

853.29 After-acquired property. A will is presumed to pass all property ~~which~~ that the testator owns at the testator's death and ~~which~~ that the testator has power to ~~transmit~~ transfer by will, including property

acquired by the testator after the execution of the will or acquired by the testator's estate.

SECTION 153. 853.32 of the statutes is created to read:

853.32 Effect of reference to another document. (1) INCORPORATION. A will may incorporate by reference another writing or document if all of the following apply:

(a) The will, either expressly or as construed from extrinsic evidence, manifests an intent to incorporate the other writing or document.

(b) The other writing or document was in existence when the will was executed.

(c) The other writing or document is sufficiently described in the will to permit identification with reasonable certainty.

(d) The will was executed in compliance with s. 853.03 or 853.05.

(2) DISPOSITION OF TANGIBLE PERSONAL PROPERTY.

(c) If the document described in par. (a) is not located by the personal representative, or delivered to the personal representative or circuit court with jurisdiction over the matter, within 30 days after the appointment of the personal representative, the personal representative may dispose of tangible personal property according to the provisions of the will as if no such document exists. If a valid document is located after some or all of the tangible personal property has been disposed of, the document controls the distribution of the property described in it, but the personal representative incurs no liability for the prior distribution or sale of the property, as long as the time specified in this paragraph has elapsed.

(d) The duties and liability of a person who has custody of a document described in par. (a), or information about such a document, are governed by s. 856.05.

(e) Beneficiaries under a document that is described in par. (a) are not interested parties for purposes of s. 879.03.

(3) TRANSFERS TO LIVING TRUSTS. The validity and implementation of a will provision that purports to transfer or appoint property to a living trust are governed by s. 701.08.

SECTION 154. 853.325 of the statutes is created to read:

853.325 Effect of reference to acts or events. A will may dispose of property by reference to acts or events that have significance apart from their effect on the disposition of property under the will and that do not occur solely for the purpose of determining the disposition of property under the will. Reference to the execution or revocation of another individual's will fulfills the requirements under this section. This section applies whether the acts or events occur before or after execution of the will or before or after the testator's death.

SECTION 155. 853.33 of the statutes is repealed and recreated to read:

853.33 Gift of securities. Section 854.11 governs gifts of securities under a will.

SECTION 156. 853.35 of the statutes is repealed and recreated to read:

853.35 Nonademption of specific gifts in certain instances. The rights of a beneficiary with respect to a specific gift that is destroyed, damaged, sold or condemned before the testator's death are governed by s. 854.08.

SECTION 157. 853.40 of the statutes is repealed and recreated to read:

853.40 Disclaimer. A person to whom property would otherwise pass under a will may disclaim all or part of the property as provided in s. 854.13.

SECTION 158. 853.41 of the statutes is created to read:

853.41 Applicability of general transfers at death provisions. Chapter 854 applies to transfers under wills, including transfers under a Wisconsin basic will or basic will with trust.

SECTION 159. Subchapter II (title) of chapter 853 [precedes 853.50] of the statutes is created to read:

CHAPTER 853

SUBCHAPTER II

WISCONSIN BASIC WILLS

SECTION 160. 853.50 (1) of the statutes is amended to read:

853.50 **(1)** "By right of representation" means ~~that the issue of a deceased person inherit the share of an estate that their immediate ancestor would have inherited, if living~~ according to the method specified in s. 854.04 (1).

SECTION 161. 853.50 (3) of the statutes is amended to read:

853.50 **(3)** "Issue" means children, grandchildren, great-grandchildren, and lineal descendants of more remote degrees, including those who occupy that relation by reason of adoption under s. ~~851.51~~ 854.20 and nonmarital children ~~who are not legitimate~~ and their lineal descendants to the extent provided by s. 852.05.

SECTION 162. 853.51 (intro.) of the statutes is renumbered 853.51 (1) (intro.).

SECTION 163. 853.51 (1) of the statutes is renumbered 853.51 (1) (a), and 853.51 (1) (a) 1., as renumbered, is amended to read:

853.51 **(1)** (a) 1. Complete the blanks, boxes and lines ~~according to~~ substantially in accordance with the instructions. ~~Any failure to comply with instructions described under s. 853.54 (3) does not affect the validity of the will.~~

SECTION 164. 853.51 (1) (bc) of the statutes is created to read:

853.51 **(1)** (bc) The witnesses shall comply with s. 853.03 (2).

SECTION 165. 853.51 (2) of the statutes is repealed.

SECTION 166. 853.51 (2m) of the statutes is created to read:

853.51 **(2m)** Any failure to comply with the instructions in a Wisconsin basic will or basic will with trust, other than the requirements for the testator's and witnesses' signatures, does not affect the validity of the will.

SECTION 167. 853.55 (NOTICE) 6. of the statutes is amended to read:

853.55 **(NOTICE)** 6. THE WITNESSES TO THIS WILL SHOULD NOT BE PEOPLE WHO MAY RECEIVE PROPERTY UNDER THIS WILL. YOU SHOULD READ AND CAREFULLY FOLLOW THE WITNESSING PROCEDURE DESCRIBED AT THE END OF THIS WILL. ~~ALL OF THE WITNESSES MUST WATCH YOU SIGN THIS WILL. EACH WITNESS MUST SIGN HIS OR HER NAME WITH YOU AND THE OTHER WITNESS PRESENT.~~

SECTION 168. 853.55 (NOTICE) 9. of the statutes is amended to read:

853.55 **(NOTICE)** 9. THIS WILL TREATS ADOPTED CHILDREN AS IF THEY ARE ~~NATURAL~~ BIRTH CHILDREN.

SECTION 169. 853.55 (Article 3) 3.3. of the statutes is repealed and recreated to read:

853.55 **(Article 3)** 3.3. BOND.

My signature in this box means I request that a bond, as set by law, be required for each individual personal representative or guardian named in this will. IF I DO NOT SIGN IN THIS BOX, I REQUEST THAT A BOND NOT BE REQUIRED FOR ANY OF THOSE PERSONS.

I sign my name to this Wisconsin Basic Will on ..... (date), at ..... (city), ... (state).

Signature of Testator

STATEMENT OF WITNESSES (You must use two witnesses, who should be adults.)

I declare that the testator signed the will in front of me, acknowledged to me that this document was his or her will *or* acknowledged to me that the signature above is his or her signature. The testator appears to me to be of sound mind and not under undue influence.

Signature Residence Address:
Print Name
Here: Date Signed:

I declare that the testator signed the will in front of me, acknowledged to me that this document was his or her will *or* acknowledged to me that the signature above is his or her signature. The testator appears to me to be of sound mind and not under undue influence.

Signature Residence Address:
Print Name
Here: Date Signed:

SECTION 170. 853.56 (NOTICE) 7. of the statutes is amended to read:

853.56 **(NOTICE)** 7. THE WITNESSES TO THIS WILL SHOULD NOT BE PEOPLE WHO MAY RECEIVE PROPERTY UNDER THIS WILL. YOU SHOULD READ AND CAREFULLY FOLLOW THE WITNESSING PROCEDURE DESCRIBED AT THE END OF THIS WILL. ~~ALL OF THE WITNESSES MUST WATCH YOU SIGN THIS WILL. EACH WITNESS MUST SIGN HIS OR HER NAME WITH YOU AND THE OTHER WITNESS PRESENT.~~

SECTION 171. 853.56 (NOTICE) 9. of the statutes is amended to read:

853.56 **(NOTICE)** 9. THIS WILL TREATS ADOPTED CHILDREN AS IF THEY ARE ~~NATURAL~~ BIRTH CHILDREN.

SECTION 172. 853.56 (Article 3) 3.4. of the statutes is repealed and recreated to read:

853.56 **(Article 3)** 3.4. BOND.

My signature in this box means I request that a bond, as set by law, be required for each individual personal representative, trustee or guardian named in this will. IF I DO NOT SIGN IN THIS BOX, I REQUEST THAT A BOND NOT BE REQUIRED FOR ANY OF THOSE PERSONS.

I sign my name to this Wisconsin Basic Will With Trust on ... (date), at..(city),.. (state).

Signature of Testator

STATEMENT OF WITNESSES (You must use two witnesses, who should be adults.)

I declare that the testator signed the will in front of me, acknowledged to me that this document was his or her will *or* acknowledged to me that the signature above is his or her signature. The testator appears to me to be of sound mind and not under undue influence.

Signature Residence Address:
Print Name
Here: Date Signed:

I declare that the testator signed the will in front of me, acknowledged to me that this document was his or her will *or* acknowledged to me that the signature above is his or her signature. The testator appears to me to be of sound mind and not under undue influence.

Signature Residence Address:
Print Name
Here: Date Signed:

SECTION 173. 853.59 (form) (a) of the statutes is amended to read:

853.59 **(form)** (a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN IN ONE TRUST TO PROVIDE FOR THE SUPPORT AND EDUCATION OF MY CHILDREN AND THE DESCENDANTS OF ANY

DECEASED CHILD ~~BY RIGHT OF REPRESENTATION~~ UNTIL I HAVE NO LIVING CHILD UNDER 21 YEARS OF AGE.

SECTION 174. 853.59 (form) (2) (a) of the statute is amended to read:

853.59 **(form)** (2) (a) As long as any child of mine under 21 years of age is living, the trustee shall distribute from time to time to or for the benefit of any one or more of my children and the descendants of any deceased child (the beneficiaries) ~~by right of representation~~ of any age as much, or all, of the principal or net income of the trust or both, as the trustee deems necessary for their health, support, maintenance and education. Any undistributed income shall be accumulated and added to the principal. "Education" includes, but is not limited to, college, vocational and other studies after high school, and reasonably related living expenses. Consistent with the trustee's fiduciary duties, the trustee may distribute trust income or principal in equal or unequal shares and to any one or more of the beneficiaries to the exclusion of other beneficiaries. In deciding on distributions, the trustee may take into account the beneficiaries' other income, outside resources or sources of support, including the capacity for gainful employment of a beneficiary who has completed his or her education.

SECTION 175. Chapter 854 of the statutes is created to read:

CHAPTER 854

TRANSFERS AT DEATH — GENERAL RULES

854.01 Definition. In this chapter, "governing instrument" means a will; a deed; a trust instrument; an insurance or annuity policy; a contract; a pension, profit-sharing, retirement or similar benefit plan; a marital property agreement under s. 766.58 (3) (f); a beneficiary designation under s. 40.02 (8) (a); an instrument under ch. 705; an instrument that creates or exercises a power of appointment or any other dispositive, appointive or nominative instrument that transfers property at death.

854.02 Scope. This chapter applies to all statutes and governing instruments that transfer property at death.

854.03 Requirement of survival by 120 hours. (1) REQUIREMENT OF SURVIVAL. Except as provided in sub. (5), if property is transferred to an individual under a statute or under a provision in a governing instrument that requires the individual to survive an event and it is not established that the individual survived the event by at least 120 hours, the individual is considered to have predeceased the event.

(2) COOWNERS WITH RIGHT OF SURVIVORSHIP. (a) In this subsection, "coowners with right of survivorship" includes joint tenants, owners of survivorship marital property and other coowners of property or accounts that are held under circumstances that entitle one or more persons to all of the property or account upon the death of one or more of the others.

(b) Except as provided in sub. (5), if property is transferred under a governing instrument that establishes 2 or more coowners with survivorship, and if it is not established that at least one of the coowners survived the others by at least 120 hours, the property is transferred to the coowners in proportion to their ownership interests.

(3) MARITAL PROPERTY. Except as provided in subs. (4) and (5), if a husband and wife die leaving marital property and it is not established that one survived the other by at least 120 hours, 50% of the marital property shall be distributed as if it were the husband's individual property and the husband had survived, and 50% of the marital property shall be distributed as if it were the wife's individual property and the wife had survived.

(4) LIFE INSURANCE. Except as provided in sub. (5), if the insured and the beneficiary under a policy of life or accident insurance have both died and it is not established that one survived the other by at least 120 hours, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary. If the policy is the marital property of the insured and of the insured's spouse and there is no alternative beneficiary except the estate or the personal representative of the estate, the proceeds shall be distributed as marital property in the manner provided in sub. (3).

(5) EXCEPTIONS. This section does not apply if any of the following conditions applies:

(a) The statute or governing instrument requires the individual to survive an event by a specified period.

(b) The statute or governing instrument indicates that the individual is not required to survive an event by any specified period.

(c) The statute or governing instrument deals with simultaneous deaths or deaths in a common disaster and the provision is relevant to the facts.

(d) The imposition of a 120-hour requirement would cause a nonvested property interest or a power of appointment to fail to be valid, or to be invalidated, under s. 700.16 or under the rule against perpetuities of the applicable jurisdiction.

(e) The application of this section to more than one statute or governing instrument would result in an unintended failure or unintended duplication of a transfer.

(f) The application of this section would result in the escheat of an intestate estate under s. 852.01 (3).

(6) EVIDENTIARY STANDARD. Unless the statute or governing instrument provides otherwise, proof that an individual survived the period required under subs. (1) to (4) must be by clear and convincing evidence.

(7) EXTRINSIC EVIDENCE. Extrinsic evidence may be used to construe a governing instrument affected by this section.

854.04 Representation; per stirpes; modified per stirpes; per capita at each generation; per capita. (1) BY REPRESENTATION OR PER STIRPES.

(a) Except as provided in subs. (5) and (6), if a statute or a governing instrument calls for property to be distributed to the issue or descendants of a designated person "by representation", "by right of representation" or "per stirpes", the property is divided into equal shares for the children of the designated person. Each surviving child and each deceased child who left surviving issue are allocated one share.

(b) The share of each deceased child allocated a share under par. (a) is divided among that person's issue in the same manner as under par. (a), repeating until the property is fully allocated among surviving issue.

(2) MODIFIED PER STIRPES. (a) Except as provided in subs. (5) and (6), if a statute or a governing instrument calls for property to be distributed to the issue or descendants of a designated person by "modified per stirpes", the property is divided into equal shares at the generation nearest to the designated person that contains one or more surviving issue. Each survivor and each deceased person in that same generation who left surviving issue are allocated one share.

(b) The share of each deceased person allocated a share in par. (a) is divided among that person's issue in the same manner as under par. (a), repeating until the property is fully allocated.

(3) PER CAPITA AT EACH GENERATION. (a) Except as provided in subs. (5) and (6), if a statute or a governing instrument calls for property to be distributed to the issue or descendants of a designated person "per capita at each generation", the property is divided into equal shares at the generation nearest to the designated person that contains one or more surviving issue. Each survivor in that generation is allocated one share, and the shares of the deceased persons in that same generation who left surviving issue are combined for distribution under par. (b).

(b) The combined share created under par. (a) is divided among the surviving issue of the persons whose shares were combined in the same manner as under par. (a), as though all of those issue were the issue of one person. The process is repeated until the property is fully allocated.

(4) PER CAPITA. Except as provided in sub. (6), if a statute or governing instrument calls for property to be distributed to a group or class "per capita", the property is divided into as many shares as there are surviving members of the group or class, and each member receives one share.

(5) CERTAIN INDIVIDUALS DISREGARDED. For the purposes of this section, all of the following apply:

(a) An individual who is deceased and who left no surviving issue is disregarded.

(b) An individual who has a surviving ancestor who is an issue of the designated person is not entitled to a share.

(6) CONTRARY INTENT. This section does not apply if the transfer is made under a governing instrument and there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

854.05 No exoneration of encumbered property. (1) DEFINITIONS. In this section:

(a) "Debt" includes accrued interest on the debt.

(b) "Encumbrance" includes mortgages, liens, pledges and other security agreements that are encumbrances on property.

(2) GENERALLY. (a) Except as provided in sub. (5), all property that is specifically transferred by a governing instrument shall be assigned to the transferee without exoneration of a debt that is secured by an encumbrance on the property.

(b) If the debt that is secured by the encumbrance on the property is paid in whole or in part out of other assets, the specifically transferred property shall be assigned to the transferee only if any of the following applies:

1. The transferee contributes to the person or entity that held the assets that were used to pay the debt an amount equal to the amount that was paid.

2. The person or entity secures the amount described in subd. 1. through a new encumbrance on the property.

(3) JOINT TENANCY; SURVIVORSHIP MARITAL PROPERTY. Except as provided in sub. (5), if all or part of a debt that is secured by an encumbrance on property in which the decedent at the time of death had an interest as a joint tenant or as a holder of survivorship marital property is paid out of other assets as the result of a claim being allowed, the person or entity that makes the payment is subrogated to all rights that the claimant had against the property.

(4) INSURANCE. Except as provided in sub. (5), if all or part of a debt that is secured by an encumbrance on the proceeds payable under a life insurance policy in which the decedent was the named insured is paid out of other assets as the result of a claim being allowed, the person or entity that makes the payment is subrogated to all rights that the claimant had against the proceeds.

(5) CONTRARY INTENT. This section does not apply to the extent that a governing instrument, either expressly or as construed from extrinsic evidence, provides otherwise. A general directive to pay debts does not give rise to a presumption of exoneration.

854.06 Predeceased transferee. (1) DEFINITIONS. In this section:

(a) "Provision in a governing instrument" includes all of the following:

1. A gift to an individual whether or not the individual is alive at the time of the execution of the instrument.

2. A share in a class gift only if a member of the class dies after the execution of the instrument.

3. An appointment by the decedent 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.

(b) "Revocable provision" means a provision that the decedent had the power to change or revoke immediately before death.

(c) "Stepchild" means a child of the decedent's surviving, deceased or former spouse, and not of the decedent.

(2) SCOPE OF COVERAGE. This section applies to revocable provisions in a governing instrument executed by the decedent that provide for an outright transfer upon the death of the decedent to any of the following persons:

(a) A grandparent of the decedent, or issue of a grandparent, subject to s. 854.21.

(b) A stepchild of the decedent, subject to s. 854.15.

(3) SUBSTITUTE GIFT TO ISSUE OF COVERED TRANSFEREE. Subject to sub. (4), if a transferee under a provision described in sub. (2) does not survive the decedent but has issue who do survive, the issue of the transferee take the transfer per stirpes, as provided in s. 854.04 (1).

(4) CONTRARY INTENT. (a) This section does not apply if there is a finding of contrary intent of the decedent. Extrinsic evidence may be used to construe that intent.

(b) If the governing instrument designates one or more persons, classes or groups of people as contingent transferees, those transferees take in preference to those under sub. (3). But if none of the contingent transferees survives, sub. (3) applies to the first group in the sequence of contingent transferees that has one or more transferees specified in sub. (2) who left surviving issue.

854.07 Failed transfer and residue. (1) Except as provided in sub. (4) and s. 854.06, if an attempted transfer under a governing instrument fails, the attempted transfer becomes part of the residue of the governing instrument. This subsection does not apply if the attempted transfer is itself a residuary transfer.

(2) Except as provided in sub. (4) and s. 854.06, if the residue of a governing instrument is to be transferred to 2 or more persons, the share of a residuary transferee that fails passes to the other residuary transferees in proportion to the interest of each in the remaining part of the residue.

(3) If a governing instrument other than a will does not effectively dispose of an asset that is governed by the instrument, that asset shall be paid or distributed to the decedent's probate estate.

(4) This section does not apply if there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

854.08 Nonademption of specific gifts in certain cases. (1) ABROGATION OF COMMON LAW. The common law doctrine of ademption by extinction, as it might otherwise apply to the situations governed by this section, is abolished.

(2) PROCEEDS OF SALE. (a) Subject to sub. (6), if property that is the subject of a specific gift is sold by the person who executed the governing instrument within 2 years of the person's death, the specific beneficiary has the right to the following amounts if available under the governing instrument:

1. Any balance of the purchase price unpaid at the time of death, including any security interest in the property and interest accruing before death, together with the incidents of the specific gift.

2. A general pecuniary transfer equivalent to the amount of the purchase price paid to, or for the benefit of, the person within one year of the seller's death.

(b) Acceptance of a promissory note of the purchaser or a 3rd party is not considered payment, but payment on the note is payment on the purchase price; and for purposes of this section property is considered sold as of the date when a valid contract of sale is made. Sale by an agent of the person who executed the governing instrument or by a trustee under a revocable living trust created by the person is a sale by the person for purposes of this section.

(3) PROCEEDS OF INSURANCE ON PROPERTY. Subject to sub. (6), if insured property that is the subject of a specific gift is destroyed, damaged, lost, stolen or otherwise subject to any casualty compensable by insurance, the specific beneficiary has the right to the following amounts, if available under the governing instrument, reduced by any amount expended or incurred to restore or repair the property:

(a) Any insurance proceeds paid with respect to the property after the decedent's death, together with the incidents of the specific gift.

(b) A general pecuniary transfer equivalent to any insurance proceeds paid to, or for the benefit of, the decedent within one year of the decedent's death.

(4) CONDEMNATION AWARD. (a) Subject to sub. (6), if property that is the subject of a specific gift is taken by condemnation prior to the death of the person who executed the governing instrument, the specific beneficiary has the right to the following amounts if available under the governing instrument:

1. Any amount of the condemnation award unpaid at the time of death.

2. A general pecuniary transfer equivalent to the amount of an award paid to, or for the benefit of, the person who executed the governing instrument within one year of that person's death.

(b) In the event of an appeal in a condemnation proceeding, the award is, for purposes of this section, limited to the amount established on the appeal. Acceptance of an agreed price or a jurisdictional offer is a sale under sub. (2).

(5) SALE OR LOSS OF PROPERTY OF AN INCOMPETENT. Subject to sub. (6), if property that is the subject of a specific gift is sold by a guardian or conservator of the person who executed the governing instrument, or if a condemnation award or insurance proceeds are paid to a guardian or conservator, the specific beneficiary has the right to a general pecuniary transfer equivalent to the proceeds of the sale or the condemnation award, or the insurance proceeds, reduced by any amount expended or incurred to restore or repair the property if the funds are available under the governing instrument. This provision does not apply if the person who executed the governing instrument, 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 a sale by a guardian or conservator within 2 years of that person's death is a sale by that person for purposes of sub. (2).

(6) LIMITATIONS. (a) This section is inapplicable if any of the following applies:

1. The governing instrument, either expressly or as construed from extrinsic evidence, shows the intent that a transfer fail under the particular circumstances.

2. The person who executed the governing instrument gives property during the person's lifetime to the specific beneficiary with the intent of satisfying the specific gift. Extrinsic evidence may be used to construe that intent.

(b) If part of the property that is the subject of the specific gift is destroyed, damaged, sold or condemned, the specific gift of any remaining interest in the property is not affected by this section; but this section applies to the part affected by the destruction, damage, sale or condemnation.

(c) The amount that the specific beneficiary receives under subs. (2) to (5) is reduced by any expenses of the sale, by the expenses of collection of the proceeds of insurance, sale, or condemnation award and by any amount by which the income tax of the decedent or the decedent's estate is increased because of items covered by this section. Expenses include legal fees paid or incurred.

854.09 Advancement; satisfaction. (1) A gift that the decedent made during his or her lifetime, including an incomplete gift that became

complete on the decedent's death, is treated as a full or partial satisfaction of a transfer at death to an heir under s. 852.01 (1) or a transferee under a governing instrument executed by the decedent only if at least one of the following applies:

(a) The governing instrument, if any, either expressly or as construed from extrinsic evidence, provides that the gift be taken into account.

(b) The decedent declared in a document, either expressly or as construed from extrinsic evidence, that the gift is in satisfaction of, or an advance against, what the transferee would receive at the decedent's death, whether or not the document was contemporaneous with the gift.

(c) The transferee acknowledged in writing before or after the decedent's death, either expressly or as construed from extrinsic evidence, that the gift is in satisfaction of, or an advance against, what the transferee would receive at the decedent's death.

(2) For partial satisfaction, property given during life is valued as of the time that the transferee came into possession or enjoyment of the property or at the death of the person who executed the governing instrument, whichever occurs first.

(3) If the transferee fails to survive the person who executed the governing instrument, the gift is treated as a full or partial satisfaction of the transfer, unless the transferor has declared otherwise in a document, either expressly or as construed from extrinsic evidence.

854.10 Choice of law. The meaning and legal effect of a governing instrument are determined by the local law of the state selected by the transferor in the governing instrument, unless the application of that law is contrary to s. 861.02 or 861.31 or any other public policy of this state otherwise applicable to the disposition.

854.11 Gift of securities. (1) DEFINITION. In this section, "securities" includes all of the following:

(a) Any note, stock, treasury stock, bond, debenture, evidence of indebtedness, collateral trust certificate, transferable share or voting trust certificate.

(b) Any certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease.

(c) Any interest or instrument commonly known as a security.

(d) Any certificate of interest or participation in, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the instruments or interests specified in pars. (a) to (c).

(2) INCREASE IN SECURITIES; ACCESSIONS. Except as provided in sub. (4), if a person executes a governing instrument that transfers securities and at the time of the execution or immediately after execution the described securities are in fact governed by the instrument, the transfer

includes additional securities that are governed by the instrument at the person's death if all of the following apply:

(a) The additional securities were acquired after the governing instrument was executed.

(b) The additional securities were acquired as a result of ownership of the described securities.

(c) The additional securities are any of the following types:

1. Securities of the same organization acquired as a result of a plan of reinvestment.

2. Securities of the same organization acquired by action initiated by the organization or any successor, related or acquiring organization, excluding any acquired by exercise of purchase options.

3. Securities of another organization acquired as a result of a merger, consolidation, reorganization or other distribution by the organization or any successor, related or acquiring organization.

(3) GIFT OF SECURITIES CONSTRUED AS SPECIFIC. Except as provided in sub. (4), a transfer of a stated number of shares or amount of securities is construed to be a specific gift if the same or a greater number of shares or amount of the securities was governed by the instrument at the time of, or immediately after, execution of the instrument, even if the instrument does not describe the securities more specifically or qualify the description by a possessive pronoun such as "my".

(4) CONTRARY INTENT. This section does not apply if there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

854.13 (2) (f) *Disclaimer by guardian or conservator.* A guardian of the estate or a conservator appointed under ch. 880 may disclaim on behalf of his or her ward, with court approval, if the ward is entitled to disclaim under this section.

(g) *Disclaimer by agent under power of attorney.* An agent under a power of attorney may disclaim on behalf of the person who granted the power of attorney if all of the following apply:

1. The person who granted the power of attorney is entitled to disclaim under this section.

2. The power of attorney specifically grants the power to disclaim.

(8) DEVOLUTION OF DISCLAIMED INTEREST IN JOINT TENANCY. A disclaimed interest in a joint tenancy passes to the decedent's probate estate.

(9) DEVOLUTION OF DISCLAIMED INTEREST IN SURVIVORSHIP MARITAL PROPERTY. A disclaimed interest in survivorship marital property passes to the decedent's probate estate.

(12) (b) Any disclaimer that meets the requirements of section 2518 of the Internal Revenue Code, or the requirements of any other federal law

relating to disclaimers, constitutes an effective disclaimer under this section.

(13) CONSTRUCTION OF EFFECTIVE DATE. In this section, the effective date of a transfer under a revocable governing instrument is the date on which the person with the power to revoke the transfer no longer has that power or the power to transfer the legal or equitable ownership of the property that is the subject of the transfer.

854.14 Beneficiary who kills decedent. (1) DEFINITION. In this section, "disposition of property" means a transfer, including by appointment, of property or any other benefit to a beneficiary designated in a governing instrument or under a statute.

(2) REVOCATION OF BENEFITS. Except as provided in sub. (6), the unlawful and intentional killing of the decedent does all of the following:

(a) Revokes a provision in a governing instrument that, by reason of the decedent's death, does any of the following:

1. Transfers or appoints property to the killer.

2. Confers a power of appointment on the killer.

3. Nominates or appoints the killer to serve in any fiduciary or representative capacity, including personal representative, executor, trustee or agent.

(b) Severs the interests of the decedent and killer in property held by them as joint tenants with the right of survivorship or as survivorship marital property and transforms the interests of the decedent and the killer into tenancies in common or marital property, whichever is appropriate.

(c) Revokes every statutory right or benefit to which the killer may have been entitled by reason of the decedent's death.

(3) EFFECT OF REVOCATION. Except as provided in sub. (6), provisions of a governing instrument that are revoked by this section are given effect as if the killer disclaimed all revoked provisions or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent. Except as provided in sub. (6), the killer's share of the decedent's intestate estate, if any, passes as if the killer had disclaimed his or her intestate share under s. 854.13.

(4) WRONGFUL ACQUISITION OF PROPERTY. Except as provided in sub. (6), a wrongful acquisition of property by a killer not covered by this section shall be treated in accordance with the principle that a killer cannot profit from his or her wrongdoing.

(5) UNLAWFUL AND INTENTIONAL KILLING; HOW DETERMINED. (a) A final judgment establishing criminal accountability for the unlawful and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section and s. 861.02 (8).

(b) A final adjudication of delinquency on the basis of an unlawful and intentional killing of the decedent conclusively establishes the adjudicated individual as the decedent's killer for purposes of this section and s. 861.02 (8).

(c) In the absence of a judgment establishing criminal accountability or an adjudication of delinquency, the court, upon the petition of an interested person, shall determine whether, under the preponderance of evidence standard, the killing was unlawful and intentional for purposes of this section and s. 861.02 (8).

(6) EXCEPTIONS. This section does not apply if any of the following applies:

(a) The court finds that, under the factual situation created by the killing, the decedent's wishes would best be carried out by means of another disposition of the property.

(b) The decedent provided in his or her will, by specific reference to this section, that this section does not apply.

854.15 Revocation of provisions in favor of former spouse. (1) DEFINITIONS. In this section:

(a) "Disposition of property" means a transfer, including by appointment, of property or any other benefit to a beneficiary designated in a governing instrument.

(b) "Divorce, annulment or similar event" means any divorce, any annulment or any other event or proceeding that would exclude a spouse as a surviving spouse under s. 851.30.

(c) "Former spouse" means a person whose marriage to the decedent has been the subject of a divorce, annulment or similar event.

(d) "Relative of the former spouse" means an individual who is related to the former spouse by blood, adoption or marriage and who, after the divorce, annulment or similar event, is not related to the decedent by blood, adoption or marriage.

(e) "Revocable", with respect to a disposition, provision or nomination, means one under which the decedent, at the time of the divorce, annulment or similar event, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the former spouse or former spouse's relative, whether or not the decedent was then empowered to designate himself or herself in place of the former spouse or the former spouse's relative, and whether or not the decedent then had the capacity to exercise the power.

(2) SCOPE. This section applies only to governing instruments that were executed by the decedent before the occurrence of a divorce, annulment or similar event with respect to his or her marriage to the former spouse.

(3) REVOCATION UPON DIVORCE. Except as provided in subs. (5) and (6), a divorce, annulment or similar event does all of the following:

(a) Revokes any revocable disposition of property made by the decedent to the former spouse or a relative of the former spouse in a governing instrument.

(b) Revokes any disposition created by law to the former spouse or a relative of the former spouse.

(c) Revokes any revocable provision made by the decedent in a governing instrument conferring a power of appointment on the former spouse or a relative of the former spouse.

(d) Revokes the decedent's revocable nomination of the former spouse or a relative of the former spouse to serve in any fiduciary or representative capacity.

(e) Severs the interests of the decedent and former spouse in property held by them as joint tenants with the right of survivorship or as survivorship marital property and transforms the interests of the decedent and former spouse into tenancies in common.

(4) EFFECT OF REVOCATION. Except as provided in subs. (5) and (6), provisions of a governing instrument that are revoked by this section are given effect as if the former spouse and relatives of the former spouse disclaimed the revoked provisions or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce, annulment or similar event.

(5) EXCEPTIONS. This section does not apply if any of the following applies:

(a) The express terms of a governing instrument provide otherwise.

(b) The express terms of a court order provide otherwise.

(c) The express terms of a contract relating to the division of the decedent's and former spouse's property made between the decedent and the former spouse before or after the marriage or the divorce, annulment or similar event provide otherwise.

(d) The divorce, annulment or similar event is nullified.

(e) The decedent and the former spouse have remarried.

(f) There is a finding of the decedent's contrary intent. Extrinsic evidence may be used to construe that intent.

(6) REVOCATION OF NONTESTAMENTARY PROVISION IN MARITAL PROPERTY AGREEMENT. The effect of a judgment of annulment, divorce or legal separation on marital property agreements under s. 766.58 is governed by s. 767.266 (1).

854.18 Order in which assets apportioned; abatement. (1) (a) Except as provided in sub. (3) or in connection with the share of the surviving spouse who elects to take an elective share in deferred marital

property under s. 861.02, a spouse who takes under s. 853.11 (2) or a child who takes under s. 853.25, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

1. If the governing instrument is a will, property subject to intestacy.
2. Residuary transfers or devises under the governing instrument.
3. General transfers or devises under the governing instrument.
4. Specific transfers or devises under the governing instrument.

(b) For purposes of abatement, a general transfer or devise charged on any specific property or fund is a specific transfer to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, it is a general transfer to the extent of the failure or insufficiency.

(2) (a) Abatement within each classification is in proportion to the amount of property that each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the governing instrument.

(b) If the subject of a preferred transfer is sold or used incident to administration of an estate, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

(3) If the governing instrument expresses an order of abatement, or if the decedent's estate plan or the express or implied purpose of the transfer would be defeated by the order of abatement under sub. (1), the shares of the distributees abate as necessary to give effect to the intention of the transferor.

854.19 Penalty clause for contest. A provision in a governing instrument that prescribes a penalty against an interested person for contesting the governing instrument or instituting other proceedings relating to the governing instrument may not be enforced if the court determines that the interested person had probable cause for instituting the proceedings.

854.20 Status of adopted persons.

(3) SEQUENTIAL ADOPTION. Subject to sub. (4), if an adoptive parent dies or his or her parental rights are terminated in a legal proceeding and the adopted child is subsequently adopted by another person, the former adoptive parent is considered to be a birth parent for purposes of this section.

(4) APPLICABILITY. Subsections (1), (2) and (3) apply only if at least one of the following applies:

(a) The decedent or transferor is the adoptive parent or adopted child.

(b) The adopted person was a minor at the time of adoption.

(c) The adopted person was raised as a member of the household by the adoptive parent from the child's 15th birthday or before.

(5) CONTRARY INTENT**.** This section does not apply if the transfer is made under a governing instrument and there is a finding of contrary intent of the person who executed the instrument. Extrinsic evidence may be used to construe that intent.

854.21 Persons included in family groups or classes. (1) ADOPTED PERSONS. (a) Except as provided in par. (b) or sub. (7), a gift of property by a governing 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 includes a person adopted by a person whose birth child would be a member of the class, and issue of the adopted person, if the conditions for membership in the class are otherwise satisfied and any of the following applies:

1. The transferor is the adoptive parent or adopted child.
2. The adopted person was a minor at the time of adoption.
3. The adopted person was raised as a member of the household by the adoptive parent from the child's 15th birthday or before.

(b) Except as provided in sub. (7), a gift under par. (a) excludes a birth child and his or her issue otherwise within the class if the birth child has been adopted and would cease to be a child of the birth parent under s. 854.20 (2).

(2) INDIVIDUALS BORN TO UNMARRIED PARENTS. (a) Subject to par. (b) and sub. (7), individuals born to unmarried parents are included in class gifts and other terms of relationship in accordance with s. 852.05.

(b) In addition to the requirements of par. (a) and subject to the provisions of sub. (7), in construing a disposition by a transferor who is not the birth parent, an individual born to unmarried parents is not considered to be the child of a birth parent unless that individual lived while a minor as a regular member of the household of that birth parent or of that birth parent's parent, brother, sister, spouse or surviving spouse.

(3) RELATIVES BY MARRIAGE. Subject to sub. (7), terms of family relationship in statutes or governing instruments that do not differentiate between relationships by blood and relationships by marriage are construed to exclude relatives by marriage.

(4) RELATIVES OF THE HALF-BLOOD. Subject to sub. (7), terms of family relationship in statutes or governing instruments that do not differentiate between relationships by the half-blood and relationships by the full-blood are construed to include both types of relationships.

(5) POSTHUMOUS ISSUE. Subject to sub. (7), if a statute or governing instrument transfers an interest to a group of persons described as a class, such as "issue", "children", "nephews and nieces" or any other class, a person conceived at the time the membership in the class is determined and subsequently born alive is entitled to take as a member of the class if

that person otherwise satisfies the conditions for class membership and survives at least 120 hours past birth.

(6) PERSON RELATED THROUGH 2 LINES. Subject to sub. (7), a person who is eligible to be a transferee under a statute or governing instrument through 2 lines of relationship is limited to one share, based on the relationship that entitles the person to the larger share.

(7) CONTRARY INTENT. This section does not apply if the transfer is made under a governing instrument and there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

854.22 Form of distribution for transfers to family groups or classes. (1) INTERESTS IN HEIRS, NEXT OF KIN AND THE LIKE. Subject to sub. (4), if a statute or governing instrument specifies that a present or future interest is to be created in a designated individual's "heirs", "heirs at law", "next of kin", "relatives", "family" or a term that has a similar meaning, the property passes to the persons, including the state, to whom it would pass and in the shares in which it would pass under the laws of intestacy of the designated individual's domicile, as if the designated individual had died immediately before the transfer was to take effect in possession or enjoyment. If the designated individual's surviving spouse is living and remarried when the transfer is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.

(2) TRANSFERS TO DESCENDANTS, ISSUE AND THE LIKE. Subject to sub. (4), if a statute or governing instrument creates a class gift in favor of a designated individual's "descendants", "issue" or "heirs of the body" the property is distributed among the class members who are living when the interest is to take effect in possession or enjoyment in the shares that they would receive under the laws of intestacy of the designated individual's domicile, as if the designated individual had then died owning the subject matter of the class gift.

(3) DOCTRINE OF WORTHIER TITLE ABOLISHED. The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor's "heirs", "heirs at law", "next of kin", "distributees", "relatives" or "family", or a term that has a similar meaning, does not create or presumptively create a reversionary interest in the transferor.

(4) CONTRARY INTENT. This section does not apply if the transfer is made under a governing instrument and there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

854.23 Protection of payers and other 3rd parties. (1) DEFINITION. In this section, "governing instrument" includes a filed verified statement

under s. 865.201, a certificate under s. 867.046 (1m) or a recorded application under s. 867.046 (5).

(2) LIABILITY DEPENDS ON NOTICE. (a) A payer or other 3rd party is not liable for having transferred property to a beneficiary designated in a governing instrument who, under this chapter, is not entitled to the property, or for having taken any other action in good faith reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, before the payer or other 3rd party received written notice of a claimed lack of entitlement under this chapter. However, a payer or other 3rd party is liable for a payment made or other action taken after the payer or other 3rd party received written notice of a claimed lack of entitlement under this chapter.

(b) Severance of a joint interest under the provisions of this chapter does not affect any 3rd-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship, unless a document declaring the severance has been noted, registered, filed or recorded in records appropriate to the kind and location of the property that are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(3) MANNER OF NOTICE. A claimant shall mail written notice of a claimed lack of entitlement under sub. (2) to the 3rd party's main office or home by registered or certified mail, return receipt requested, or serve the claim upon the 3rd party in the same manner as a summons in a civil action.

(4) DEPOSIT OF PROPERTY WITH COURT. (a) Upon receipt of written notice of a claimed lack of entitlement under this chapter, a 3rd party may transfer property held by it to the court having jurisdiction of the probate proceedings relating to the decedent's estate. If no proceedings have been commenced, the transfer may be made to the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the property and, upon its determination of the owner, shall order disbursement in accordance with the determination.

(b) Property transferred to the court discharges the 3rd party from all claims for the property.

(5) PROTECTION OF FINANCIAL INSTITUTIONS. (a) In this subsection:

1. "Account" has the meaning given in s. 705.01 (1) or 710.05 (1) (a).

2. "Financial institution" has the meaning given in s. 705.01 (3).

(b) Notwithstanding sub. (2), in addition to the protections afforded a financial institution under ss. 701.19 (11) and 710.05 and chs. 112 and 705 a financial institution is not liable for having transferred an account to a beneficiary designated in a governing instrument who, under this chapter, is not entitled to the account, or for having taken any other action in

reliance on the beneficiary's apparent entitlement under the terms of a governing instrument, regardless of whether the financial institution received written notice of a claimed lack of entitlement under this chapter.

(c) If a financial institution has reason to believe that a dispute exists as to the rights of parties, or their successors, to an account subject to a governing instrument, the financial institution may, but is not required to, do any of the following:

1. Deposit the account with a court as provided in sub. (4).

2. Refuse to transfer the account to any person.

(d) The protection afforded a financial institution under this subsection does not affect the rights of parties or their successors in disputes concerning the beneficial ownership of accounts.

854.24 Protection of buyers. A person who purchases property for value or who receives property in partial or full satisfaction of a legally enforceable obligation is neither obligated under this chapter to return the property nor liable under this chapter for the value of the property, unless the person has notice as described in s. 854.23 (3).

854.25 Personal liability of recipients not for value. (1) ORIGINAL RECIPIENTS. A person who, not for value, receives property to which the person is not entitled under this chapter shall return the property. If the property is not returned, the recipient shall be personally liable for the value of the property to the person who is entitled to it under this chapter, regardless of whether the recipient has the property, its proceeds or property acquired with the property or its proceeds.

(2) SUBSEQUENT RECIPIENTS. (a) If a recipient described in sub. (1) gives all or part of the property described in sub. (1) to a subsequent recipient, not for value, the subsequent recipient shall return the property. If the property is not returned, the subsequent recipient shall be personally liable to the person who is entitled to it under this chapter for the value received, if the subsequent recipient has the property, its proceeds or property acquired with the property or its proceeds.

(b) If the subsequent recipient described in par. (a) does not have the transfer described, its proceeds or the property acquired with the property or its proceeds, but knew or should have known of his or her liability under this section, the subsequent recipient remains personally liable to the person who is entitled to it under this chapter for the value received.

(3) MODE OF SATISFACTION. On petition of the person entitled to the property under this chapter showing that the mode of satisfaction chosen by the recipient in sub. (1) or (2) will create a hardship for the entitled person, the court may order that a different mode of satisfaction be used.

854.26 Effect of federal preemption. If any provision in this chapter is preempted by federal law with respect to property covered by this chapter, a person who receives property, other than for full consideration,

which the person is not entitled to receive under this chapter is subject to s. 854.25.

SECTION 176. 856.05 (5) of the statutes is created to read:

856.05 **(5)** APPLICABILITY OF SECTION. This section applies to wills, codicils, documents incorporated by reference under s. 853.32 (1) or (2) and information needed for proof of a lost will under s. 856.17.

SECTION 177. 856.16 of the statutes is created to read:

856.16 Self-proved will. A self-proving acknowledgment and affidavit included in a will are governed by s. 853.04.

SECTION 178. 857.01 of the statutes is amended to read:

857.01 Ownership in personal representative; management and control. Upon his or her letters being issued by the court, the personal representative succeeds to the interest of the decedent in all property of the decedent. The personal representative or surviving spouse may petition the court for an order determining the classification of property under ch. 766, and for other equitable relief necessary for management and control of the marital property during the administration of the estate. The court may make any decree under ch. 766, including a decree that the property be titled in accordance with its classification, to assist the personal representative or surviving spouse in managing and controlling the marital property and the decedent's property other than marital property during administration of the estate. During administration, the management and control rules under s. 766.51 apply to the property of a decedent spouse which is subject to administration and to the property of the surviving spouse. With regard to property subject to the election of the surviving spouse under s. 861.02 ~~(1)~~, the personal representative may manage and control the property while the property is subject to administration. The personal representative shall determine when, during administration, property shall be distributed to satisfy an election under s. 861.02 ~~(1)~~.

SECTION 179. 857.015 of the statutes is amended to read:

857.015 Management and control of certain business property by holding spouse. A spouse who holds property described under s. 766.70 (3) (a), (b) or (d) which is not also held by the other spouse may direct in a will or other signed writing that the marital property interest of the nonholding spouse in such property ~~and the election under s. 861.02 (1) against such property~~ be satisfied as provided under ~~ss.~~ s. 861.015 ~~and 861.02 (2)~~. The holding spouse shall identify in a will or other signed writing the property described under s. 766.70 (3) (a), (b) or (d) to which the directive applies. The signature of the holding spouse on a directive other than a will shall be acknowledged, attested or witnessed under s. 706.07. The estate of the holding spouse may not execute a directive under this section. If at the death of a spouse the surviving spouse is the

holding spouse, the surviving spouse may execute a directive under this section if executed within 90 days after the decedent spouse's death.

SECTION 180. 858.01 (title) of the statutes is amended to read:

858.01 (title) **Personal representative files~~; presumptions~~.**

SECTION 181. 858.01 (1) of the statutes is renumbered 858.01.

SECTION 182. 858.01 (2) of the statutes is repealed.

SECTION 183. 859.40 of the statutes is amended to read:

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 the decedent's debts, a 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 the inventory, which is liable for the payment of debts. The 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 the 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 fees incurred by the creditor in the action as approved by the court.

SECTION 184. 859.41 of the statutes is amended to read:

859.41 Creditor's action for property fraudulently 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 the decedent's debts, and the decedent conveyed any property ~~or any interest therein~~ with intent to defraud the decedent's 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 any property and subject it to sale ~~any property or interest therein~~. The 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 the 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 fees incurred by the creditor in such action as approved by the court.

SECTION 185. 861.015 (1) of the statutes is amended to read:

861.015 **(1)** If following the death of a spouse property is subject to a directive under s. 857.015, the marital property interest of the nonholding spouse in the property shall be satisfied within one year after the decedent spouse's death from other property which is of equal clear market value

at the time of satisfaction. Except as provided under sub. (3), if the ~~interests~~ interest of the nonholding spouse under this section ~~and s. 861.02 (2) are~~ is not satisfied within one year after the decedent spouse's death, this section does not apply and the nonholding spouse's marital property interest in the property subject to the directive continues as if the directive had not been made.

SECTION 186. 861.015 (3) (intro.) of the statutes is amended to read:

861.015 **(3)** (intro.) ?If the ~~interests~~ interest of the nonholding spouse under this section ~~and s. 861.02 (2) are~~ is not satisfied within one year after the decedent spouse's death because the clear market value of the property subject to the directive has not been determined, the court having jurisdiction of the decedent spouse's estate shall do either of the following:

SECTION 187. 861.015 (3) (a) of the statutes is amended to read:

861.015 **(3)** (a) Order that the ~~interests~~ interest of the nonholding spouse shall be satisfied after the determination of clear market value, at a date specified by the court~~; or~~.

SECTION 188. 861.015 (3) (b) of the statutes is amended to read:

861.015 **(3)** (b) Order that the ~~interests~~ interest of the nonholding spouse shall be satisfied before the determination of clear market value based on an estimate of the clear market value, subject to any necessary adjustment upon final determination of clear market value.

SECTION 189. Subchapter II (title) of chapter 861 [precedes 861.018] of the statutes is repealed and recreated to read:

CHAPTER 861

SUBCHAPTER II

ELECTIVE SHARE IN

DEFERRED MARITAL PROPERTY

SECTION 190. 861.018 of the statutes is created to read:

861.018 Definitions. In this subchapter:

(1) "Augmented deferred marital property estate" means the property under s. 861.02 (2).

(2) "Deferred individual property" means any property that satisfies all of the following:

(a) Is not classified by ch. 766.

(b) Was brought to the marriage or acquired while the spouses were married.

(c) Would have been classified as individual property under ch. 766 if the property had been acquired when ch. 766 applied.

(3) "Nonadverse party" means a person who has a power relating to a trust or other property arrangement but who does not have a substantial beneficial interest that would be adversely affected by exercise or nonexercise of that power, except that "nonadverse party"

does not include a person who has a general power of appointment over property, with respect to that property.

(4) "Power" includes a power to designate the beneficiary of a beneficiary designation.

(5) "Power of appointment" includes a power to designate the beneficiary of a beneficiary designation.

(6) "Presently exercisable general power of appointment" means a power of appointment under which, at the time in question, the decedent held a power to create a present or future interest in himself or herself, his or her creditors, his or her estate or creditors of his or her estate and a power to revoke or invade the principal of a trust or other property arrangement, whether or not the decedent had the capacity to exercise the power at the time.

(7) "Property" has the meaning given in s. 851.27 and includes values subject to a beneficiary designation.

(8) "Right to income" includes a right to payments under a commercial or private annuity, an annuity trust, a unitrust or a similar arrangement.

(9) "Transfer" includes, but is not limited to, the following:

(a) An exercise or release of a presently exercisable general power of appointment held by the decedent.

(b) A lapse at death of a presently exercisable general power of appointment held by the decedent.

(c) An exercise, release or lapse of either of the following:

1. A general power of appointment that the decedent created in himself or herself.

2. A power under s. 861.03 (3) that the decedent conferred on a nonadverse party.

SECTION 191. 861.02 of the statutes is repealed and recreated to read:

861.02 Deferred marital property elective share. (1) AMOUNT. The surviving spouse has the right to elect an amount equal to no more than 50% of the augmented deferred marital property estate as determined under sub. (2).

(2) AUGMENTED DEFERRED MARITAL PROPERTY ESTATE. (a) If the presumption of marital property under s. 766.31 (2) is rebutted as to the classification of an asset or a portion thereof, the asset or portion is presumed to be deferred marital property.

(b) The augmented deferred marital property estate is the total value of the deferred marital property of the spouses, irrespective of where the property was acquired or where the property is currently located, including real property located in another jurisdiction. It includes all types of property that fall within any of the following categories:

1. Probate and nonprobate transfers of the decedent's deferred marital property under s. 861.03 (1) to (3).

2. Decedent's gifts of deferred marital property made during the 2 years before the decedent's death under s. 861.03 (4).

3. Deferred marital property of the surviving spouse under s. 861.04.

(3) CALCULATION OF PROPERTY INTERESTS. Exclusions from the augmented deferred marital property estate, valuation of included property and reduction for expenses and claims are governed by s. 861.05.

(4) SATISFACTION. Satisfaction of the augmented deferred marital property elective share is governed by ss. 861.06, 861.07 and 861.11.

(5) PROCEEDINGS. Proceedings for the election are governed by ss. 861.08 and 861.09.

(6) WAIVER. Waiver of the deferred marital property elective share is governed by s. 861.10.

(7) APPLICABILITY OF ELECTION. (a) Unless the right has been waived under s. 861.10 or other limitations of this subchapter apply, the surviving spouse is eligible to make the election if at the time of the decedent's death the decedent is domiciled in this state.

(b) If a decedent who is not domiciled in this state owns real property in this state, the right of the surviving spouse to take an elective share in that property is governed by s. 861.20.

(8) SPECIAL PROVISION IF SURVIVING SPOUSE CAUSED DEATH OF DECEDENT. If the surviving spouse unlawfully and intentionally kills the decedent, as determined under s. 854.14 (5), the estate of the decedent shall have the right to elect no more than 50% of the augmented deferred marital property estate as determined under sub. (2). The court shall construe the provisions of ss. 861.03 to 861.11 as necessary to achieve the intent of this paragraph.

SECTION 192. 861.03 of the statutes is repealed and recreated to read:

861.03 Augmented deferred marital property estate: decedent's probate property and nonprobate or other property transfers. Subject to s. 861.05, the augmented deferred marital property estate includes all of the following:

(1) DEFERRED MARITAL PROPERTY IN DECEDENT'S PROBATE ESTATE. The value of deferred marital property in the decedent's probate estate.

(2) DEFERRED MARITAL PROPERTY PASSING NONPROBATE AT DECEDENT'S DEATH. The value of deferred marital property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death, including the following:

(a) The decedent's fractional interest in deferred marital property that was held by the decedent with the right of survivorship.

(b) The decedent's ownership interest in deferred marital property that was held by the decedent in a form payable or transferable on death, including deferred employment benefit plans, individual retirement

accounts, annuities and transfers under s. 766.58 (3) (f), or in coownership with the right of survivorship.

(c) Deferred marital property in the form of proceeds of insurance on the life of the decedent, including accidental death benefits, that were payable at the decedent's death, if the decedent owned the insurance policy immediately before death or if the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds.

(d) Deferred marital property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment, to the extent that the property passed at the decedent's death by exercise, release, lapse, default or otherwise.

(3) DEFERRED MARITAL PROPERTY TRANSFERRED WITH RETAINED RIGHTS OR BENEFITS. (a) The augmented deferred marital property estate includes the value of any deferred marital property transferred by the decedent in which the decedent retained rights or benefits, including but not limited to the following:

1. Deferred marital property in which the decedent retained the right to possession, use, enjoyment or income and that was irrevocably transferred, to the extent that the decedent's right terminated at or continued beyond the decedent's death.

2. Deferred marital property in which the decedent retained the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, to control the time at which designated persons shall possess or enjoy the property or income therefrom, or to alter or amend the terms of the transfer of the property, to the extent that the decedent's right terminated at or continued beyond the decedent's death.

3. Any transfer of deferred marital property, including transfer of an income interest, in which the decedent created a power of appointment, including the power to revoke or terminate the transfer or to consume, invade or dispose of the principal or income, if the power was exercisable by the decedent alone, by the decedent in conjunction with another person or by a nonadverse party, and if the power is for the benefit of the decedent, creditors of the decedent, the decedent's estate or creditors of the decedent's estate.

(b) The amount included under par. (a) 3. is the value of the property subject to the power of appointment if the power of appointment is over property, the value of the property that produces or produced the income if the power of appointment is over income or the power valued at the higher amount if the power of appointment is over both income and property. The value is limited by the extent to which the power of

appointment was exercisable at the decedent's death or the property passed at the decedent's death by exercise, release, lapse, default or otherwise.

(4) DEFERRED MARITAL PROPERTY TRANSFERRED WITHIN 2 YEARS PRIOR TO DEATH. (a) In this subsection, termination occurs:

1. With respect to a right or interest in property, when the right or interest terminates by the terms of the governing instrument or when the decedent transfers or relinquishes the right or interest.

2. With respect to a power of appointment over property, when the power terminates by exercise, release, lapse, default or otherwise.

3. With respect to a power of appointment under sub. (2) (d), when the power terminates by exercise or release.

(b) The augmented deferred marital property estate includes the value of any deferred marital property transferred by the decedent within the 2 years immediately preceding the decedent's death, including the following:

1. Deferred marital property that passed as a result of the termination of a right or interest in, or power of appointment over, property that would have been included in the augmented deferred marital property estate under subs. (2) (a), (b) or (d) or (3), if the right, interest or power had not terminated until the decedent's death. The amount included is the value of the property that would have been included if the property were valued at the time the right, interest or power terminated.

2. Transfers by the decedent of or relating to the deferred marital property component of an insurance policy on the life of the decedent, if the proceeds would have been included under sub. (2) (c) had the transfer not occurred. The amount included is the value of the insurance proceeds to the extent that they were payable at the decedent's death.

3. Any transfer of deferred marital property to the extent that it is not otherwise included in the augmented deferred marital property estate. The amount included is the value of the property at the time of the transfer, but only to the extent that the aggregate transfers to any one donee in either of the 2 years exceeded $10,000.

SECTION 193. 861.04 of the statutes is created to read:

861.04 Augmented deferred marital property estate: surviving spouse's property and transfers to others. (1) Subject to s. 861.05, the augmented deferred marital property estate includes the value of any deferred marital property that would have been included under s. 861.03 had the surviving spouse been the decedent.

(2) Valuation of an interest under this section shall take into account the fact that the decedent predeceased the spouse. Subject to s. 861.05 (2), the surviving spouse shall be treated as having died on the date of the decedent's death.

SECTION 194. 861.05 of the statutes is repealed and recreated to read:

861.05 Augmented deferred marital property estate: calculation of property interests. (1) EXCLUSIONS. The following are not included in the augmented deferred marital property estate:

(a) Transfers of deferred marital property to the extent that the decedent received full or partial consideration for the transfer in money or money's worth.

(b) Transfers under the U.S. social security system.

(c) Transfers of deferred marital property to persons other than the surviving spouse, with the written joinder or written consent of the surviving spouse.

(d) Transfers of deferred marital property to the surviving spouse under s. 861.33 or 861.41.

(2) VALUATION. (a) Property included in the augmented deferred marital property estate under s. 861.03 (1), (2) (c) and (4) (b) 2. is valued as of the date of the decedent spouse's death.

(b) Property included under s. 861.03 (2) (a), (b) and (d) and (3) is valued immediately before the decedent spouse's death.

(c) Property included under s. 861.03 (4) (b) 1. is valued as of the date that the right, interest or power terminated.

(d) Property included under s. 861.03 (4) (b) 3. is valued as of the date of the transfer.

(e) If deferred marital property is commingled with other types of property but the deferred marital property component can be identified, only that component is valued.

(f) The value of property included in the augmented deferred marital property estate includes the commuted value of any present or future interest in deferred marital property and the commuted value of deferred marital property payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan or any similar arrangement.

(3) REDUCTION FOR EQUITABLE PROPORTION OF EXPENSES AND ENFORCEABLE CLAIMS. The value of deferred marital property included in the augmented deferred marital property estate under s. 861.03 or 861.04 shall be reduced by an equitable proportion of funeral and burial expenses, administrative expenses, other charges and fees and enforceable claims.

(4) OVERLAPPING APPLICATION; NO DOUBLE INCLUSION. If the same property could be included in the augmented deferred marital property estate under more than one provision of s. 861.03 or 861.04, the property is included only once, and it is included under the provision that yields the greatest value.

SECTION 195. 861.06 of the statutes is created to read:

861.06 Satisfaction of deferred marital property elective share. (1) DEFINITION. In this section, "property transferred to the surviving spouse"

includes outright transfers that have been disclaimed by the surviving spouse. The term does not include transfers in trust that have been disclaimed by the surviving spouse, unless the surviving spouse had a general power of appointment over the property in the trust during his or her lifetime or an interest in the trust after the disclaimer.

(2) INITIAL SATISFACTION OF DEFERRED MARITAL PROPERTY ELECTIVE SHARE. If the surviving spouse makes the election under s. 861.02, the following categories of property are used first to satisfy the elective share amount:

(a) All property included in the augmented deferred marital property estate under s. 861.04.

(b) All marital, individual, deferred marital or deferred individual property, transferred to the surviving spouse:

1. From the decedent's probate estate, other than property transferred under s. 861.33 or 861.41, and other than property transferred to the surviving spouse under s. 861.31 or 861.35 except as ordered by the court under s. 861.31 (4) or 861.35 (4).

2. By nonprobate transfer at the decedent's death.

3. By operation of any state or federal law, other than transfers under the U.S. social security system.

4. By the decedent at any time during the decedent's life, except that the following shall be excluded:

a. The first $5,000 of the value of the gifts from the decedent to the surviving spouse each year.

b. Gifts received from the decedent that the surviving spouse can show were subsequently and gratuitously transferred in a manner that, had they been the deferred marital property of the surviving spouse, would not have been included in the augmented deferred marital property estate under s. 861.04.

(3) UNSATISFIED BALANCE. After the property under sub. (2) has been applied toward satisfaction of the deferred marital property elective share amount, the remainder of the elective share amount shall be satisfied proportionally from transfers to persons other than the surviving spouse of property included in the augmented deferred marital property estate under s. 861.03 (1), (2), (3) or (4) (b) 2.

(4) REMAINING UNSATISFIED BALANCE. After the property under subs. (2) and (3) has been applied toward satisfaction of the deferred marital property elective share amount, the remainder of the elective share amount shall be satisfied proportionally from transfers to persons other than the surviving spouse of property included in the augmented deferred marital property estate under s. 861.03 (4) (b) 1. or 3.

(5) EQUITABLE ADJUSTMENT OF SHARES. If all or part of a prorated share under sub. (2), (3) or (4) is uncollectible, the court may increase the

prorated liability of recipients described under the same or another of the 3 subsections if all of the following conditions are satisfied:

(a) The court finds that an equitable adjustment is necessary to avoid hardship for the surviving spouse.

(b) No recipient or donee of a recipient is liable for an amount greater than the value of the deferred marital property subject to the election that was received.

SECTION 196. 861.07 of the statutes is repealed and recreated to read:

861.07 Personal liability of recipients. (1) DEFINITION. In this section, "proceeds" includes:

(a) The consideration, in money or property, received in exchange for the property that is the subject of the transfer.

(b) Property acquired with the consideration received in exchange for the property that is the subject of the transfer.

(2) PERSONS LIABLE. The following persons are liable to make a prorated contribution toward satisfaction of the surviving spouse's deferred marital property elective share:

(a) Original recipients of the decedent's transfers of deferred marital property to others, irrespective of whether the recipient has the property or its proceeds.

(b) Donees of the recipients under par. (a) if the donees have the property or its proceeds. If a donee has neither the property nor its proceeds but knew or should have known of the liability under this section, the donee remains liable for his or her share of the prorated contribution.

(3) MODE OF SATISFACTION. (a) Subject to par. (b), a person who is liable under sub. (2) may either give up the proportional part of the decedent's transfers to him or her or pay the value of the amount for which he or she is liable.

(b) On petition of the surviving spouse showing that the mode of satisfaction chosen in par. (a) will create a hardship for the surviving spouse, the court may order that a different mode of satisfaction be used.

(4) EFFECT OF FEDERAL PREEMPTION. If any provision of this subchapter is preempted by federal law with respect to any property interest or benefit that is included under s. 861.03 and that would pass but for that preemption to a person other than the surviving spouse, the recipient, unless he or she is a recipient for value, is subject to subs. (1) to (3).

SECTION 197. 861.08 of the statutes is created to read:

861.08 Proceeding for election; time limit. (1) GENERALLY. Except as the time may be extended under sub. (3), in order to make the election, the surviving spouse shall, within 6 months after the date of the decedent's death, do all of the following:

(a) File a petition for the election with whichever of the following applies:

1. The court that has jurisdiction of the probate proceedings relating to the decedent's estate if a judicial proceeding has been commenced.

2. The court that has jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence if no judicial proceeding has commenced.

(b) Mail or deliver a copy of the petition to the personal representative, if any, of the decedent's estate.

(2) NOTIFICATION OF INTERESTED PARTIES. The surviving spouse shall give notice, in the manner provided in ch. 879, of the time and place set for hearing the petition to any persons who may be adversely affected by the election.

(3) EXTENSION OF TIME FOR ELECTION. (a) Subject to par. (b), the court may grant the surviving spouse an extension for making an election if the surviving spouse petitions the court for an extension, gives notice as specified in sub. (2) and shows cause for an extension.

(b) The petition for extension of the time for making an election must be filed within 6 months after the decedent's death, unless the court finds all of the following:

1. That the surviving spouse was prevented from filing the action or naming a particular interested party for reasons beyond his or her control.

2. That failure to extend the time for making an election will result in hardship for the surviving spouse.

(4) WITHDRAWAL OF ELECTION. The surviving spouse may withdraw the petition for an election at any time before the probate court has entered the final determination of the distribution of the decedent's estate.

(5) COURT DETERMINATION OF LIABILITY. (a) After notice and hearing, the court shall determine the deferred marital property elective share amount and shall determine the property that satisfies that amount under ss. 861.06 and 861.07.

(b) If the personal representative does not hold the money or property included in the augmented deferred marital property estate, the court shall determine the liability of any person or entity that has any interest in the money or property or that holds that money or property.

(c) The surviving spouse may choose to seek relief from fewer than all recipients. However, any such action shall not cause any other recipient's liability to exceed the amount that he or she would have had to pay if all recipients had paid a prorated share.

(6) SUITS AUTHORIZED. An order or judgment of the court may be enforced in a suit for contribution or payment in other courts of this state or other jurisdictions.

SECTION 198. 861.09 of the statutes is repealed and recreated to read:

861.09 Right of election by or on behalf of surviving spouse. The surviving spouse must be living in order for an election to be filed. If the surviving spouse does not personally file the election, it may be filed on the surviving spouse's behalf by the spouse's conservator, guardian or guardian ad litem, or by an agent of the spouse acting under a power of attorney.

SECTION 199. 861.10 of the statutes is created to read:

861.10 Waiver of right to elect; failure to elect. (1) RIGHT TO ELECT MAY BE WAIVED. The right to elect a deferred marital property elective share may be waived by the surviving spouse in whole or in part. The waiver may take place before or after marriage. The waiver shall be contained in a marital property agreement that is enforceable under s. 766.58 or in a signed document filed with a court described in s. 861.08 (1) (a) after the decedent's death.

(2) WAIVER OF "ALL RIGHTS". Unless the waiver provides otherwise, a waiver of "all rights", or equivalent language, in the property or estate of a present or prospective spouse, or in a complete property settlement entered into because of separation or divorce, is a waiver of all rights in the deferred marital property elective share.

(3) FAILURE TO ELECT. Failure of a surviving spouse to elect is not a transfer of property and is not a gift from the surviving spouse to the decedent spouse's probate estate or to the beneficiaries of other transfers.

SECTION 200. 861.11 of the statutes is repealed and recreated to read:

861.11 Protection of payers and other 3rd parties. (1) DEFINITION. In this section, "governing instrument" includes a filed verified statement under s. 865.201, a certificate under s. 867.046 (1m) or a recorded application under s. 867.046 (5).

(2) PAYER NOT LIABLE UNTIL NOTICE RECEIVED. (a) Upon a beneficiary's request for payment, a payer or other 3rd party who has received satisfactory proof of the decedent's death and who has not received written notice that the surviving spouse or his or her representative intends to file a petition for the deferred marital property elective share or that a petition for the election has been filed is not liable for any of the following:

1. Causing any payment, item of property or other benefit included in the augmented deferred marital property estate under s. 861.03, to transfer directly to the beneficiary designated in a governing instrument.

2. Any other action in good faith reliance on the validity of a governing instrument.

(b) A payer or other 3rd party is liable for payments made or other actions taken after receipt of written notice of the intent to file a petition for the elective share or written notice that a petition for the elective share has been filed.

(3) METHOD OF NOTICE TO PAYERS. A written notice of the intent to file a petition for the election or written notice that a petition for the election has been filed shall fulfill one of the following requirements:

(a) Be mailed to the payer's or other 3rd party's main office or home by registered or certified mail, return receipt requested.

(b) Be served upon the payer or other 3rd party in the same manner as a summons in a civil action.

(4) OPTIONAL PAYMENT OF PROCEEDS TO COURT. (a) Upon receipt of written notice of the intent to file, or the filing of, a petition for the election, a payer or other 3rd party may pay any amount owed or transfer or deposit any item of property to or with whichever of the following applies:

1. The court that has jurisdiction of the probate proceedings relating to the decedent's estate if proceedings have been commenced.

2. The court that has jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence, if no judicial proceeding has commenced.

(b) Payments, transfers or deposits made to the court discharge the payer or other 3rd party from all claims for amounts paid or the value of property transferred or deposited.

(c) The court shall hold the funds or items of property. After the court makes its determination under s. 861.08 (5), it shall order disbursement in accordance with that determination. The court shall order disbursement to the beneficiary designated in the governing instrument if either of the following conditions applies:

1. No petition is filed in the court within the specified time under s. 861.08 (1).

2. A petition was filed but withdrawn under s. 861.08 (4) with prejudice.

(d) If payments have been made to the court or if property has been deposited with the court under par. (a), the court may order that all or part of the payments or property be paid to the beneficiary who is designated in the governing instrument, upon that beneficiary's petition to the court. Those payments shall be in an amount and subject to conditions consistent with this subchapter.

(5) PROTECTION OF FINANCIAL INSTITUTIONS. (a) In this subsection:

1. "Account" has the meaning given in s. 705.01 (1) or 710.05 (1) (a).

2. "Financial institution" has the meaning given in s. 705.01 (3).

(b) Notwithstanding sub. (2), in addition to the protections afforded a financial institution under ss. 701.19 (11) and 710.05 and chs. 112 and 705 a financial institution is not liable for having transferred an account included in the augmented deferred marital property estate under s. 861.03 to a beneficiary designated in a governing instrument, or for having taken

any other action in reliance on the beneficiary's apparent entitlement under the terms of a governing instrument, regardless of whether the financial institution received written notice of an intent to file, or the filing of, a petition for the deferred marital property elective share.

(c) If a financial institution has reason to believe that a dispute exists as to the rights of parties, or their successors, to an account subject to a governing instrument, the financial institution may, but is not required to, do any of the following:

1. Deposit the account with a court as provided in sub. (4).

2. Refuse to transfer the account to any person.

(d) The protection afforded a financial institution under this subsection does not affect the rights of parties or their successors in disputes concerning the beneficial ownership of accounts.

SECTION 201. 861.13 of the statutes is repealed.

SECTION 202. Subchapter III (title) of chapter 861 [precedes 861.17] of the statutes is created to read:

CHAPTER 861

SUBCHAPTER III

OTHER RIGHTS,

ALLOWANCES AND EXEMPTIONS

SECTION 203. 861.21 of the statutes is created to read:

861.21 Assignment of home to surviving spouse. (1) DEFINITIONS. In this section:

(a) "Governing instrument" has the meaning given in s. 854.01.

(b) "Home" means any dwelling in which the decedent had an interest and that at the time of the decedent's death the surviving spouse occupies or intends to occupy. If there are several such dwellings, any one may be designated by the surviving spouse. "Home" includes a house, a mobile home, a duplex or multiple apartment building one unit of which is occupied by the surviving spouse and a building used in part for a dwelling and in part for commercial or business purposes. "Home" includes all of the surrounding land, unless the court sets off part of the land as severable from the remaining land under sub. (5).

(2) IF MARITAL PROPERTY INTEREST IN HOME. Subject to subs. (4) and (5), if a married decedent has a marital property interest in a home, the decedent's entire interest in the home shall be assigned to the surviving spouse if the surviving spouse petitions the court requesting such a distribution and if a governing instrument does not provide a specific transfer of the decedent's interest in the home to someone other than the surviving spouse. The surviving spouse shall file the petition within 6 months after the decedent's death, unless the court extends the time for filing.

(3) IF INTEREST IN HOME IN INTESTATE ESTATE. Subject to subs. (4) and (5), if the intestate estate includes an interest in a home, the decedent's entire interest shall be assigned to the surviving spouse if the surviving spouse petitions the court requesting such a distribution. The surviving spouse shall file the petition within 6 months after the decedent's death, unless the court extends the time for filing.

(4) PAYMENT BY SURVIVING SPOUSE. The court shall assign the interest in the home to the surviving spouse upon payment of the value of the interest that does not pass to the surviving spouse under intestacy or under the governing instrument. Payment shall be made to the fiduciary holding title to the interest. The surviving spouse may use assets due him or her from the fiduciary to satisfy all or part of the payment in kind. Unless the court extends the time, the surviving spouse shall have one year from the decedent's death to pay the value of the assigned interest.

(5) SEVERANCE OF HOME FROM SURROUNDING LAND. 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, the court may set off for the home as much of the land as is necessary for a dwelling. 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.

SECTION 204. 861.31 (1) of the statutes is renumbered 861.31 (1m) and amended to read:

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

SECTION 205. 861.31 (1c) of the statutes is created to read:

861.31 **(1c)** In this section, "dependent child" means any of the following:

(a) A minor child of the decedent.

(b) An adult child of the decedent who was being supported by the decedent at the time of the decedent's death.

SECTION 206. 861.31 (2) of the statutes is amended to read:

861.31 **(2)** The allowance may be made to the spouse for support of the spouse and any ~~minor~~ dependent children ~~of the decedent~~, or separate allowances may be made to the spouse and to the ~~minor~~ dependent children ~~of the decedent~~ or their guardian ~~if the minor children do not~~

~~reside with the surviving spouse or if for any other reason~~, if any, if the court finds separate allowances advisable. If there is no surviving spouse the allowance may be made to the ~~minor~~ dependent children ~~of the decedent~~ or to their guardian, if any.

SECTION 207. 861.31 (4) of the statutes is renumbered 861.31 (4) (intro.) amended to read:

861.31 **(4)** (intro.) 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~~ dependent children ~~of the decedent~~ be charged against the income or principal interest of the surviving spouse. The court may direct that the allowance for support of the surviving spouse, not including any allowance for support of ~~minor~~ dependent children, be applied ~~against any~~ in satisfaction of any of the following:

(b) Any right of the surviving spouse to elect under ~~ss.~~ s. 861.02 ~~(1) and 861.03~~.

SECTION 208. 861.31 (4) (a) of the statutes is created to read:

861.31 **(4)** (a) Any entitlement of the surviving spouse under s. 853.11 (2).

SECTION 209. 861.33 (title) of the statutes is amended to read:

861.33 (title) **Selection of personalty by surviving spouse or children.**

SECTION 210. 861.33 (1) (a) (intro.) of the statutes is amended to read:

861.33 **(1)** (a) (intro.) Subject to this section, in addition to all allowances and distributions, the surviving spouse, or if there is no surviving spouse the decedent's children, may file with the court a written selection of the following personal property, which shall thereupon be transferred to the spouse or children by the personal representative:

SECTION 211. 861.33 (1) (a) 4. of the statutes is amended to read:

861.33 **(1)** (a) 4. Other tangible personalty not used in trade, agriculture or other business, not to exceed ~~$1,000~~ $3,000 in inventory value.

SECTION 212. 861.33 (1) (b) of the statutes is amended to read:

861.33 **(1)** (b) The selection in par. (a) may not include items specifically bequeathed except that the surviving spouse or children may in every case select the normal household furniture, furnishings and appliances necessary to maintain the home. For this purpose antiques, family heirlooms and collections which are specifically bequeathed are not classifiable as normal household furniture or furnishings.

SECTION 213. 861.33 (1) (c) of the statutes is created to read:

861.33 **(1)** (c) If there is no surviving spouse and the selection is being made by fewer than all of the decedent's children, the child or children

selecting the property must have the written consent of all of the other children, or the selection must be approved by the court.

SECTION 214. 861.33 (2) of the statutes is amended to read:

861.33 **(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 or children under this section to items not exceeding ~~$3,000~~ $5,000 in aggregate inventory value until such time as claims are paid in full or the court otherwise orders; or the court may require the spouse or children to retransfer property in excess of ~~$3,000~~ $5,000 or, at the option of the spouse or children, pay the excess in value over this amount.

SECTION 215. 861.33 (3) of the statutes is amended to read:

861.33 **(3)** The surviving spouse or children may select items not specifically bequeathed of the type specified under sub. (1) (a) 4. exceeding in value the ~~$1,000~~ $3,000 limit or obtain the transfer of items exceeding the limit set by the court under sub. (2), by paying to the personal representative the excess of inventory value over the respective limit.

SECTION 216. 861.33 (4) of the statutes is amended to read:

861.33 **(4)** ~~The~~ Subject to sub. (1) (c), the personal representative has power, without court order, to execute appropriate documents to effect transfer of title to any personal property selected by the spouse or children under this section. A person may not question the validity of the documents of transfer or refuse to accomplish the transfer on the grounds that the personal representative is also the surviving spouse or the only child of the decedent.

SECTION 217. 861.35 (title) of the statutes is amended to read:

861.35 (title) **Special allowance for support of spouse and support and education of ~~minor~~ dependent children.**

SECTION 218. 861.35 (1) of the statutes is renumbered 861.35 (1m), and 861.35 (1m) (intro.) and (b), as renumbered, are amended to read:

861.35 **(1m)** (intro.) ?If the decedent is survived by a spouse or by ~~minor~~ children, the court may order an allowance for the support and education of each ~~minor child until he or she reaches a specified age, not to exceed 18,~~ dependent child and for the support of the spouse. This allowance may be made whether the estate is testate or intestate. If the decedent is not survived by a spouse, the court also may allot directly to ~~the minor~~ any of the dependent children household furniture, furnishings and appliances. No allowance may be made under this section if any of the following apply:

(b) In the case of ~~minor~~ dependent children, if the surviving spouse is legally responsible for support and education and has ample means to provide them in addition to his or her own support.

SECTION 219. 861.35 (1c) of the statutes is created to read:

861.35 **(1c)** In this section, "dependent child" has the meaning given in s. 861.31 (1c).

SECTION 220. 861.35 (2) of the statutes is amended to read:

861.35 **(2)** The court may set aside property to provide an allowance and may appoint a trustee to administer the property, subject to the continuing jurisdiction of the court. If ~~a child dies or reaches 18, or if~~ at any time the property held by the trustee is no longer required for the support of the spouse or the support and education of ~~the minor~~ any dependent child, 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 the decedent's estate.

SECTION 221. 861.35 (3) of the statutes is renumbered 861.35 (3) (intro.) and amended to read:

861.35 **(3)** (intro.) In making an allowance under this section, the court shall consider ~~the~~ all of the following:

(a) The effect on claims under s. 859.25 ~~and~~. The court shall balance the needs of the spouse or ~~minor child~~ dependent children against the nature of the creditors' claims in setting the amount allowed ~~hereunder. The court shall also consider the~~ under this section.

(b) The size of the estate~~, other~~.

(c) Other resources available for support~~, the~~.

(d) The existing standard of living ~~and any~~.

(f) Any other factors ~~it~~ that the court considers relevant.

(4) The court may direct that the allowance to the surviving spouse, not including any allowance for the support and education of ~~minor~~ dependent children, be applied ~~against any~~ in satisfaction of any of the following:

(b) Any right of the surviving spouse to elect under ~~ss.~~ s. 861.02 (1) ~~and 861.03~~.

SECTION 222. 861.35 (3) (e) of the statutes is created to read:

861.35 **(3)** (e) Whether the provisions of a marital property agreement will create a hardship for the surviving spouse.

SECTION 223. 861.35 (4) (a) of the statutes is created to read:

861.35 **(4)** (a) Any entitlement of the surviving spouse under s. 853.11 (2).

SECTION 224. 861.41 (3) and (4) of the statutes are repealed.

SECTION 225. 861.43 of the statutes is created to read:

861.43 Authority and powers of conservator, guardian or agent. A conservator, guardian or guardian ad litem of the spouse or of a child of the decedent, or an agent of the spouse or of a child of the decedent acting under a power of attorney, may on behalf of the spouse or child

exercise any of the rights, apply for any of the allowances or make any of the selections that apply to the spouse or child under this subchapter.

SECTION 226. 863.11 of the statutes is repealed and recreated to read:

863.11 Order in which assets appropriated; abatement. Shares of distributees abate in accordance with the rules under s. 854.18.

SECTION 227. 863.13 of the statutes is repealed and recreated to read:

863.13 No exoneration of encumbered property. Specifically devised property that is subject to a mortgage or other encumbrance is subject to the rules under s. 854.05.

SECTION 228. 863.37 (1) of the statutes is amended to read:

863.37 **(1)** If the laws, executive orders or regulations of the United States 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 or her behalf, the court, after notice to the person under s. 879.03, may~~,~~ by judgment or decree~~,~~ authorize such disposition of the 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.

SECTION 229. 880.32 of the statutes is amended to read:

880.32 Notes and mortgages of minor veterans. Notwithstanding any provision of this chapter or any other law to the contrary, any minor who served in the active armed forces of the United States at any time after August 27, 1940, and the husband or wife of such minor may execute in his or her own right, notes or mortgages, the payment of which is guaranteed or insured by the U.S. department of veterans affairs or the federal housing administrator under the servicemen's readjustment act of 1944 or the national housing act or any acts supplementary thereto or amendatory thereof. In connection with such transactions, such minors may sell, release or convey such mortgaged property ~~or any interest therein,~~ and litigate or settle controversies arising therefrom, including the execution of releases, deeds and other necessary papers or instruments. Such notes, mortgages, releases, deeds and other necessary papers or instruments when so executed shall not be subject to avoidance by such minor or the husband or wife of such minor upon either or both of them attaining the age of 18 because of the minority of either or both of them at the time of the execution thereof.

SECTION 230. 880.695 (1) of the statutes is amended to read:

880.695 **(1)** A person nominated under s. 880.62 or designated under s. 880.65 as custodian may decline to serve by delivering a valid disclaimer under s. ~~701.27, in the case of a nontestamentary disclaimer, or under s. 853.40 if other than a nontestamentary disclaimer,~~ 854.13 to the person who made the nomination or to the transferor or the transferor's legal representative. If the event giving rise to a transfer has not occurred

and no substitute custodian able, willing and eligible to serve was nominated under s. 880.62, the person who made the nomination may nominate a substitute custodian under s. 880.62; otherwise the transferor or the transferor's legal representative shall designate a substitute custodian at the time of the transfer, in either case from among the persons eligible to serve as custodian for that kind of property under s. 880.65 (1). The custodian so designated has the rights of a successor custodian.

SECTION 231. 895.43 of the statutes is repealed and recreated to read:

895.43 Intentional killing by beneficiary of contract. The rights of a beneficiary of a contractual arrangement who kills the principal obligee under the contractual arrangement are governed by s. 854.14.

SECTION 232. 895.435 of the statutes is repealed and recreated to read:

895.435 Intentional killing by beneficiary of certain death benefits. The rights of a beneficiary to receive benefits payable by reason of the death of an individual killed by the beneficiary are governed by s. 854.14.

SECTION 233.0INITIAL APPLICABILITY.

(1) This act first applies to deaths occurring on January 1, 1999, except with respect to irrevocable governing instruments executed before that date.

Appendix C

Drafting Committee Notes
to
1997 Wisconsin Act 188
Revision of Wisconsin Probate Code

Prepared for
State Bar of Wisconsin
Section on Real Property, Probate, and Trusts
UPC Article II Committee

David W. Reinecke (Madison), Chair
R. Christian Davis (Madison)
Kathleen A. Gray (Milwaukee)
Brent E. Gregory (Milwaukee)
Robert L. Kamholz, Jr. (Milwaukee)
Diane K. O'Connor (Mequon)

By Professor Howard S. Erlanger
University of Wisconsin Law School
Committee Reporter

With the assistance of Sarah E. Coyne, Julie D'Angelo, and Ann J. Flynn

§ 6.875(1)(b). Cross-references a table showing "degrees of kinship" at § 852.03(2) of the current intestacy statutes. The table is repealed by the new legislation; therefore, the cross-reference is amended to refer to the table as it appears in the 1995 stats.

§ 48.92(3). Cross-reference amended to reflect new statutes on status of adopted children at §§ 854.20 and 854.21.

§ 146.34(1)(j). Cross-references a table showing "degrees of kinship" at § 852.03(2) of the current intestacy statutes. The table is repealed by the new legislation; therefore, the cross-reference is amended to refer to the table as it appears in the 1995 stats.

§ 157.061(7). Cross-references a table showing "degrees of kinship" at § 852.03(2) of the current intestacy statutes. The table is repealed by the new legislation; therefore, the cross-reference is amended to refer to the table as it appears in the 1995 stats.

§ 178.21(3)(e). Amended to reflect consolidation of deferred marital property elections under revised chapter 861. It is the committee's view that this section, which is based on the Uniform Partnership Act, only limits the surviving spouse's right to elect specific partnership property, and does not reduce the surviving spouse's claim to the value of the property if the requirements of the deferred marital property election are satisfied.

§ 242.01(11). Cross-references a table showing "degrees of kinship" at § 852.03(2) of the current intestacy statutes. The table is repealed by the new legislation; therefore, the cross-reference is amended to refer to the table as it appears in the 1995 stats.

§ 252.15(1)(eg). Cross-references a table showing "degrees of kinship" at § 852.03(2) of the current intestacy statutes. The table is repealed by the new legislation; therefore, the cross-reference is amended to refer to the table as it appears in the 1995 stats.

§ 615.03(1)(c). Cross-references a table showing "degrees of kinship" at § 852.03(2) of the current intestacy statutes. The table is repealed by the new legislation; therefore, the cross-reference is amended to refer to the table as it appears in the 1995 stats.

§ 632.485. Repeals provision specifically dealing with life insurance beneficiary who kills the person insured under the contract. Cross-reference at new § 632.695 indicates that new chapter 854, which covers situations in which a beneficiary kills a decedent under § 854.14, applies to life insurance contracts.

§ 632.695. Creates cross-reference to indicate that new chapter 854 applies to transfers at death under life insurance policies and annuities.

§ 700.11. Repeals and recreates statute defining meaning of terms such as "heirs" and "next of kin" in instruments of transfer. Cross-references new definitions of these terms in § 854.22. Cross references § 854.22(3), which abolishes the "doctrine of worthier title."

§ 700.12. Repeals and recreates statute determining status of person born after membership in a class has been determined. Cross-references new, consolidated rule at § 854.21(5). The new rule includes a requirement that after-born issue survive 120 hours after birth, and, for transfers under governing instruments (*i.e.*, class gifts), allows any part of the rule to be negated by evidence of contrary intent under § 854.21(7). Contrary intent may be proved by extrinsic evidence.

§ 700.17(2)(a). Cross-reference amended to refer to new consolidated disclaimer statute at § 854.13.[1] Edited to enhance clarity.

---

[1] The text of new WIS. STAT. § 854.13 is currently located at WIS. STAT. § 701.27 because it was created from WIS. STAT. § 701.27 and has not yet been relocated. Pursuant to the protocol of the Legislative Reference Bureau (LRB) regarding statutes that are amended and moved, the amended statute appears in the bill under the current section number (in this case, WIS. STAT. § 701.27) and no reference is made at the new section number (in this case, WIS. STAT. § 854.13). Thus, while the cross-reference in WIS. STAT. § 700.17(2)(a) is to WIS. STAT. § 854.13, the relevant language in the bill is located at WIS. STAT. § 701.27 (sections 22-59 of the bill) and not at WIS. STAT. § 854.13.

§ 700.17(2)(am). Creates cross-reference to indicate that requirement of survivorship by 120 hours under new § 854.03 applies to survivorship under a joint tenancy (see § 854.03(2)), unless there is evidence of contrary intent under § 854.03(5). Contrary intent may be proved by extrinsic evidence.

§ 700.17(2)(b). Deletes provision specifically dealing with situation where one joint tenant kills another; creates new § 700.17(2)(b) to cross-reference new consolidated statute governing situations in which a beneficiary kills the decedent at § 854.14.

§ 700.26. Creates cross-reference to indicate that new chapter 854 applies to transfers at death under any instrument of transfer.

§ 701.065. Creates a new statute limiting claims against trusts, with substantive provisions and procedures similar to those limiting claims against estates under current §§ 859.02 and 859.15. This provision was added by Assembly Amendment 3, to Assembly Substitute Amendment 1, to 1997 Assembly Bill 645.

§ 701.115. Creates a new statute providing that a beneficiary under a revocable trust, who has a right to possession and enjoyment of property at the death of the grantor of the trust, must survive the grantor. This rule is subject to the contrary intention of the settlor of the trust. Contrary intent may be proved by extrinsic evidence.

This new statute reverses the majority common law rule and apparently reverses at least some Wisconsin case law. Under the majority common law rule, a person who receives an interest in a trust—even a revocable trust—is not required to survive the grantor unless the trust document explicitly requires survival. The purpose of the new rule is to make treatment of transfers at death under revocable trusts comparable to the treatment of transfers under wills and other revocable estate planning instruments. Note that, by requiring survivorship, this change also triggers operation of two related statutes, § 854.03 (requirement of survivorship by 120 hours) and § 854.06 (status of predeceased beneficiary, or "antilapse"). Both § 854.03 and § 854.06 are subject to the contrary intention of the decedent, which can be proven by extrinsic evidence.

§ 701.20(5)(b)1. Amends rule regarding income on specifically devised property to eliminate "specific bequest" treatment of property elected by the surviving spouse under the deferred marital property probate election. The current provision is not necessary under the revised deferred marital property election, because the election of deferred marital property in probate is no longer asset specific. The terms "legatees" and "bequeathed" have been retained in this statute, but note that the term "devise," which historically has meant a transfer of real property, has been defined to include personal property in new § 851.065.

§ 701.25. Creates cross-reference to indicate that new chapter 854 applies to transfers at death under trust instruments.

§ 701.26. Creates statute regarding disclaimers of joint tenancies and other nontestamentary transfers. Cross-references new consolidated rule on disclaimer at § 854.13.[2]

§ 701.27. Current § 701.27, the disclaimer statute for nontestamentary transfers, has been substantially amended and moved to new § 854.13.[3] Some of the amendments result from the repeal of current § 853.40, the disclaimer statute for wills and intestacy; others are for clarification. The final statute, which is summarized in the note to § 854.13, is assembled from four "sources": renumbered and amended provisions of current § 701.27, which are

---

2. Pursuant to the protocol of the LRB, the drafters of this bill could not reuse the section number "701.27" for this new statute on disclaiming nontestamentary transfers but, instead, had to create a new statutory section (WIS. STAT. § 701.26) to cross-reference the consolidated disclaimer statute at WIS. STAT. § 854.13. Usually, when the concepts of a current statute are being consolidated into a new statute, the current statute is repealed and LRB drafting rules allow the old statutory section number to be reused as what is, essentially, a cross-reference to the new statute. However, when a statute is moved and renumbered and most of the language of the current statute is retained, LRB drafting rules do not allow the old section number to be reused. Thus, in this case, because much of the language of WIS. STAT. § 701.27 was retained in WIS. STAT. § 854.13, the drafters of this bill had to use a new number (§ 701.*2**6***) to "cross-reference" § 854.13.

3. *See* note 1, *supra*, and comment to WIS. STAT. § 854.13.

shown in their entirety in §§ 22 through 59 of the act; provisions which are renumbered by §§ 22-59 but for which the text is not shown because they were not otherwise amended;[4] subparts of renumbered statutes where the subpart is deemed not to have been changed and, thus, is not mentioned at all in the act; and new provisions, which are located in those parts of § 175 of the act which relate to new § 854.13.

The term "or interest in property" is deleted in the revised statute because it was deemed redundant. See comment to § 851.27. The reference to “choses in action” is deleted because choses in action are included in the definition of property in amended § 851.27.

§ 702.03(1). Enacts UPC § 2-704 (which has been edited to eliminate redundancy), as extended by UPC § 2-701 (which allows extrinsic evidence; see cross-reference in UPC § 2-701 to comment to UPC § 2-601). The rule provides that, if the exercise of a power of appointment requires that the power holder expressly refer to that power, it is presumed that the purpose is to avoid inadvertent exercise of the power, unless there is evidence of a contrary intent (which can be proven by extrinsic evidence). The purpose of the rule is to aid in resolving disputes when the power holder executes a document merely referring to "any property over which I have a power of appointment." The rationale and operation of the rule is explained in the Comment to UPC § 2-704. The current rule of § 702.03**(1)**, which has substantially stricter requirements, is repealed.

The committee considered replacing current § 702.03**(2)** with UPC § 2-608, which covers the same issue as that rule. The committee decided that the current rule is essentially the same rule as that of the UPC, but is clearer. Hence the current language was retained, but the committee notes that there is useful discussion of the rule in the Comment to UPC § 2-608.

---

4. Note, for instance, that the bill does not contain the text of WIS. STAT. § 701.27(5)(a)3 (renumbered WIS. STAT. § 854.13(5)(a)3) because the bill does not change that subsection. By contrast, the bill does contain the text of amended subsections WIS. STAT. § 701.27(5)(a)(intro), 1 and 2. Although they do not appear in the legislation, subsections not repealed or amended by the bill are retained as part of the new statutes.

§ 702.08. Amends cross-reference to reflect consolidation of disclaimer provisions at § 854.13.

§ 702.22. Creates cross-reference to indicate that new chapter 854 applies to transfers under an instrument that creates or exercises a power of appointment.

§ 705.09. Creates cross-reference to indicate that new chapter 854 applies to transfers at death of multiple party and agency accounts.

Chapter 705 - Subchapter II and III. Divides current subchapter II "Nonprobate Transfers at Death; Transfer on Death Securities Registration" into two separate subchapters, in order to more clearly show the interrelationship of the TOD provisions, §§ 705.21-.31.

§ 705.20(3). Creates cross-reference to indicate that new chapter 854 applies to nonprobate transfers covered by § 705.20.

§ 705.31. Creates cross-reference to indicate that new chapter 854 applies to transfers under transfer on death security registration.

§ 706.105. Creates cross-reference to indicate that new chapter 854 applies to transfers at death under a conveyance.

§ 766.575(3)(b). Amends cross-reference to statute regarding filing of deferred marital property election.

§ 766.58(3)(f). Amends cross-reference to provision that revokes "at death" provisions of a marital property agreement upon dissolution of the marriage before death, to reflect renumbering of that provision from § 767.266 to § 766.266(1).

§ 766.58(3m). Creates cross-reference to indicate that new chapter 854 applies to transfers at death under a marital property agreement.

§ 766.587(6). Amends cross-references in statutory marital property agreement to reflect consolidation of deferred marital property election.

§ 766.589(7). Amends cross-references in statutory marital property agreement to reflect consolidation of deferred marital property election.

§ 766.61(2)(c)2. Amends cross-reference to statute regarding filing of deferred marital property election.

§ 767.266(1). Renumbers current statute revoking "at death" provisions of a marital property agreement if the marriage is dissolved before death. The statute is renumbered from § 767.266 to § 767.266(1), and a new title is created. Current § 767.266 is also amended to specify that all at death provisions are revoked irrespective of whether they provide for nontestamentary transfers *under the agreement* or for mandated transfers under *other* estate planning instruments. Note that if the marriage has been dissolved, this statute applies to *all* transfers at death under a marital property agreement, irrespective of who the beneficiaries are.

§ 767.266(2). Creates cross-reference to new § 854.15, which revokes all pre-dissolution revocable estate planning provisions in favor of a former spouse and that spouse's relatives (who are not also the relatives of the decedent spouse), absent evidence of contrary intent. This statute covers instruments other than marital property agreements, which are covered in renumbered sub. (1).

§ 815.56. Amends cross-reference in statute regarding deceased grantee of sheriff's deed, to reflect consolidation of deferred marital property elections.

§ 851.001. Repeals provision regarding effective dates of prior revisions to chapter 851. Effective dates of the new and revised provisions in this act are governed by the final section of the act.

§ Subchapter I, Chapter 851. Creates "Definitions" subchapter that includes current, amended, and new definitions in §§ 851.01 - 851.31. These definitions apply throughout the probate code.

§ 851.002. Amends statute numbers of definitions included in new subchapter to include new definitions.

§ 851.035. Creates statute defining of "conscious presence" as "within the range of any of a person's senses." This definition is based on the Comment to UPC § 2-502. The term appears in amended § 853.03(1) (proxy signing); § 853.03(2) (acknowledgment to witnesses) and § 853.11(1m) (revocation by physical act), as well as in other places in chapter 853.

§ 851.055. Definition of "deferred marital property" revised to enhance clarity. Note that "deferred individual property" is defined at new § 861.018(2).

§ 851.065. Creates definition of "devise" to include *personal* property as well as real property. Based on UPC § 1-201(10).

§ 851.13. Amends definition of "issue" to reflect new statute on rights of adopted persons at § 854.20.

§ 851.27. Amends definition of "property" to clarify that the term refers to the rights of a beneficiary under a contractual arrangement, to choses in action,[5] and in general *anything that may be the subject of ownership*. Based on UPC § 1-201(39). Note that the current definition of property under this statute includes "interests" in property. Hence the committee considers the phrase "property or an interest in property," which appears in many current statutes, to be redundant, and has removed references to "an interest in property" in

---

5. Choses in action are specifically listed as a type of "nontestamentary instrument" in current WIS. STAT. § 701.27(1)(b), but the committee believes that they are better characterized as a type of property. WIS. STAT. § 701.27(1)(b) has itself been repealed because it is replaced in substance by the definition of governing instrument in WIS. STAT. § 854.01.

those statutes. Similarly, the committee considers phrases like "payment, item of property, or benefit," which appear in various sections of the UPC, to be covered by the term "property."

§ 851.30. Creates definition of "surviving spouse," based on UPC § 2-802. In general, the statute excludes from the status of surviving spouse persons: (1) who have obtained or consented to an invalid decree of divorce; (2) who have participated in a marriage ceremony with a third party after the decedent spouse obtained an invalid decree of divorce; or (3) who were party to a valid proceeding that purported to terminate all property rights based on the marriage. The committee believes that § 767.255(1) implies that the latter condition would include a Wisconsin legal separation.

§ 851.31. Creates definition of "will" to include codicils, documents incorporated by reference, and duplicate originals. Adoption of this definition permits language in various statutes to be more consistent.[6] A "will" does not include a copy, but this does not prevent a copy from being proven as a will under the "lost will statute," § 856.17. Note that, although this section defines wills as including documents incorporated by reference, not all will rules (e.g., execution rules) apply to incorporation by reference. Rather, the requirements for proper incorporation by reference are governed by new § 853.32, part of which is based on current § 853.16.

§ 851.35. Moves provision regarding classification of property at death to § 854.17 in order to clarify that it is not limited to probate property.

§ Subchapter II, Chapter 851. Creates "General Probate Provisions" subchapter, to include current, amended, and new provisions in new §§ 851.40-.75, which apply only to probate

---

6. Some current statutes, like WIS. STAT. § 853.11(1)(a), refer to "will, codicil or other instrument" while others, such as WIS. STAT. § 853.03, refer to wills explicitly but to codicils only by implication. In the case of WIS. STAT. § 853.03, the use of the word "will" alone creates the incorrect impression that wills and codicils are not subject to the same execution formalities. Thus, a new definition of "will" that includes codicils and other documents will resolve these inconsistencies in the statutes.

property and probate procedure, or which are merely cross-reference provisions.

§§ New 851.50; former 851.51. Amends and renumbers current rule on status of adopted persons under statutes and estate planning instruments; replaces it with cross-reference to new statute at § 854.20.[7] Part of the new statute is based on current § 851.51(1) and (2), which are renumbered and amended to refer to instruments other than wills, and to refer to "birth" parents. The committee believes that reference to "birth" parents is more descriptively accurate than "natural parents," but is mindful that in this time of advanced reproductive technology, further refinement may be necessary. These and other changes are discussed in the note to § 854.20.

Current § 851.51(3) is repealed and replaced with an expanded rule at new § 854.21(1).

§ 851.55. Repeals Wisconsin version of Uniform Simultaneous Death Act, which has been replaced with a 120-hour survivorship rule at new § 854.03. The new survivorship rule applies to intestacy and to all governing instruments, absent evidence of contrary intent, which may be proven by extrinsic evidence.

§ 852.01(1) (intro). Simplifies language introducing intestacy distribution rules and adds cross-reference to new § 852.10, which deals with negative wills—situations in which a will disinherits someone who should take under partial intestacy.

§ 852.01(1)(a)2. Simplifies language detailing spouse's share in intestacy, when there are children from outside the marriage. There is no substantive change in the statute.

§ 852.01(1)(b), (d) and (e). Amends intestacy provisions under (b) and (d) regarding issue of the decedent and issue of the decedent's siblings to provide that they take "per stirpes," rather than

---

7. *See* note 2, *supra*, regarding the technical reason for the new statutory section number WIS. STAT. § 851.50.

"by representation." Repeals current (e) because under "per stirpes," persons in the same generation do not necessarily take equally.

"Per stirpes" is defined at new § 854.04(1) to mean what commentators refer to as "strict per stirpes," which is different from the rule embodied in current § 852.03(1), which commentators refer to as "modified per stirpes." Note that since § 854.04(1) defines "by representation" in the same way as "per stirpes," the only purpose of the change in wording at §§ 852.01(1)(b) and (d) is to highlight the changed mode of representation.

§ 852.01(1)(f) and (g). Amends intestacy provisions regarding collateral relatives. Under current § 852.01(1)(f), if there is no surviving spouse, issue, parent, or issue of a parent, the grandparents take. If there are no grandparents, under current § 852.01(1)(g) the takers are the "next of kin in equal degree." The new statute, § 852.01(1)(f)1-3, based on UPC § 2-103(4), gives the net intestate estate half to the maternal grandparents or their issue per stirpes, and half to the paternal grandparents or their issue per stirpes. Current § 852.01(1)(f) is amended as just discussed and subsection (g) is repealed.

§ 852.01(2). Repeals current requirement that an heir survive 72 hours to take and replaces it with a cross-reference to new § 854.03, which requires survival by 120 hours for *all* transfers at death (subject to contrary intent of a person executing an estate planning instrument).

§ 852.01(2m). Repeals provision specifically dealing with situation where a would-be heir kills the decedent; replaces it with a cross-reference to new consolidated “slayer statute” at § 854.14.

§ 852.03(1). Repeals current definition of "by representation" in intestacy, because that term has been replaced by the term "per stirpes" where applicable in § 852.01(1). Creates cross-reference to new rules governing "per stirpes" distribution at § 854.04.

§ 852.03(2). Repeals a figure showing the computation of degree of kinship under the civil law. This figure is made unnecessary for

intestacy by the repeal of the "next of kin" provision in current § 851.01(1)(g). However, it is cross-referenced by certain other statutes that used the term "relatives." See sections 1, 3, 4, 6, 7, and 8 of this act. Rather than move the figure to a different location, the cross-referencing statutes were amended to refer to this figure as it exists in the current, 1995 Statutes.

§ 852.03(3). Repeals current rule relating to status of half-blood relatives under intestacy. Creates cross-reference to new location of the rule in § 854.21(4), where it applies to all transfers at death, subject to the contrary intent of a person executing an estate planning instrument. Contrary intent may be proven by extrinsic evidence.

§ 852.03(4). Repeals current rule relating to status of posthumous heirs. Creates cross-reference to new location of the rule in § 854.21(5), where it applies to all transfers at death, subject to the contrary intent of a person executing an estate planning instrument. Contrary intent may be proven by extrinsic evidence.

§ 852.03(5). Creates cross-reference to new statute at § 854.21(6) regarding rights of recipients related to the decedent by two lines of relationship.

§ 852.03(6). Creates provision clarifying that a person is not disqualified from taking as an heir merely because the person or a person through whom he or she claims is not, or at some time was not, a U.S. citizen. Based on UPC § 2-111.

Current § 710.01 provides that an alien may acquire and hold land, or any right or interest in land, subject to various limitations in current § 710.02. Current § 710.02(2)(a) exempts inherited land from most of these limitations.

§ 852.05(1). Amends statute governing status of nonmarital child to include provision that, for purposes of inheritance *by* a nonmarital child or the child's issue, paternity may be established by a court of competent jurisdiction in another state.

§ 852.05(2). Amends statute governing status of nonmarital child to include provision that, for purposes of inheritance *from* a nonmarital child by a nonmarital father or his kindred, paternity may be established by a court of competent jurisdiction in another state.

§ 852.05(3). Amends cross-reference to statute regarding status of a nonmarital child who is subsequently adopted to refer to new consolidated statute on status of adopted persons at § 854.20.

§ 852.05(4). Creates cross-reference to indicate that § 895.01(1), which deals with actions that survive death, applies to paternity proceedings under chapter 767.

§ 852.09. Repeals current § 852.09 which deals with assignment of the homestead to the surviving spouse in intestacy. Creates cross-reference to new § 861.21, which provides for assignment of the homestead to the surviving spouse if the homestead is part of the intestate estate or if the decedent had a marital property interest in the home. Note that neither the old nor the new statute confers a property right; rather, it might be characterized as a "buy out" right.

§ 852.10. Adopts UPC § 2-101(b), which allows a testator to disinherit an individual or class from an intestate share. However, unlike UPC § 2-101(b), § 852.10 does not require that a will *expressly* limit the right of an individual to take under intestacy. The committee believes the approach of new § 852.10 is more consistent with the Comment to UPC § 2-101(b).

Note that the situation covered by this statute can only occur in cases where a will is admitted but nonetheless at least some of the probate estate passes intestate. As noted in the Comment to UPC § 2-101, the question of whether a will establishes an intent to disinherit is a separate question of will construction.

§ 852.10(3) has been added for completeness; it is not intended to change the effect of the rule.

§ 852.11. Repeals current § 852.11, which deals with advancement—the effect of lifetime gifts on intestate distribution. Creates cross-reference to new § 854.09, which deals with the effect

of lifetime gifts by the decedent on the intestate share of heirs or on the share of a beneficiary under an estate planning instrument.

§ 852.12. Adopts UPC § 2-110, which provides that a debt owed to the decedent by an heir reduces the share of that heir. The committee added language to provide that declaration of bankruptcy does *not* discharge a debt for purposes of this rule. In addition, the committee intends the Comment to UPC § 2-110, which explains the effect of disclaimer by an heir who owes a debt, to apply to this statute.

§ 852.13. Amends statute regarding disclaimer of intestacy property to cross-reference new consolidated rule on disclaimer at § 854.13.

Subchapter I, Chapter 853. Creates "General Rules" subchapter, to include current, amended, and new rules regarding wills in new and revised §§ 853.01-853.41.

§ 853.03. Amends will execution requirements to provide that a person may assist the testator in signing the will with the testator's consent. Absent a new interpretation by the courts, the committee assumes that the apparent holding in *Estate of DeThorne* [8] —that if the assistance is substantial the testator must explicitly request it rather than passively accept it—still applies.

Repeals requirement that the witnesses must sign in the presence of the testator and in the presence of each other, providing instead that witnesses must sign within a reasonable time after witnessing the testator's signing of the will, the testator's implicit or explicit acknowledgment of his or her signature, or the testator's implicit or explicit acknowledgment of the will. The testator's acknowledgment must take place within the witness's "conscious presence," as defined in new § 851.035. The current rule refers only to the witness's "presence." These changes are based on UPC § 2-502(a).

---

8. 163 Wis. 2d 387, 471 N.W.2d 780 (Ct. App. 1991).

As enacted, new WIS. STAT. §§ 853.03(2)(b) and (c) state that each witness must witness the testator's acknowledgment of his or her signature or the testator's acknowledgment of the will "within the conscious presence of *each of the witnesses*." (Emphasis added.) This language could be interpreted to mean that each witness must observe the acknowledgment to the *other* witness, as well as to himself or herself. Such an interpretation would be contrary to the purpose of the new statute, which is to eliminate the need for both witnesses to be simultaneously present for *any* purpose. The problematic language is the result of a drafting oversight. The Drafting Committee intended the language to read "within the conscious presence of *the witness*."

In new § 853.03(2) and (3) the words "implicit and explicit" were added to avoid the implication that a new formality of acknowledgment has been created. Wisconsin case law has long maintained that explicit acknowledgment is not a requirement for proper will execution.[9]

The committee considered adopting the principle sometimes called "dispensing power," "substantial compliance" or "harmless error," found in the provisions of UPC § 2-503. Under this principle, error in the execution of a purported will would be excused if the proponent of the document established by clear and convincing evidence that the document was intended to be the decedent's will. The committee is aware that there are some old Wisconsin cases that use the term "substantial compliance" in validating wills that arguably were not properly executed,[10] but does not believe that a broad doctrine of substantial compliance represents the current law of Wisconsin[11] and does not believe that a broad dispensing power or

---

9. *See, e.g.*, Estate of Griffith, 165 Wis. 601, 163 N.W. 138 (1917); *see also* Estate of Schacht, 175 Wis. 54, 182 N.W. 981 (1921); *see also* Estate of Tollefson, 198 Wis. 538, 224 N.W. 739 (1929).

10. *See, e.g.*, Estate of Lagershausen, 224 Wis. 479, 272 N.W. 469 (1937); *see also* Will of Griffith, 165 Wis. 601, 163 N.W. 138 (1917).

11. *See, e.g.*, Estate of DeThorne, note 8, *supra*, and accompanying text; *see also* Estate of Kai, 195 Wis. 2d 681, 538 N.W.2d 860 (Ct. App. 1995)(unpublished; full opinion at 1995 WL 385400).

substantial compliance doctrine should be adopted by the legislature at this time. However, if § 853.05 (execution under the law of another jurisdiction) applies, admission of a will in Wisconsin could be governed by the law of a jurisdiction that has adopted UPC § 2-503 or a similar rule.

§ 853.04. Creates two optional procedures for self-proved wills based on UPC § 2-504. If a will includes an affidavit affirming that it was executed in compliance with § 853.03, that affidavit is conclusive proof of due execution. The affidavit may be executed as part of the attestation ("one-step procedure") or after the will has been executed and witnessed ("two-step procedure"). A cross-reference to this provision has been created at new § 856.16. The Wisconsin statutes contain provisions for both procedures because there are states that require the two-step procedure. Note that, although the validity of the execution of a self-proved will cannot be challenged, those wills can still be challenged under other theories, such as or undue influence or lack of capacity.

§ 853.05. Amends the rules regarding deference to execution rules of non-Wisconsin jurisdictions to expand the number of covered situations. The revised statute covers written wills executed in conformity with (a) the law of the place where the will is executed, or (b) the law of the place where the testator resides, is domiciled, or is a national at the time of execution or at the time of death. The amended statute is based on UPC § 2-506, which is expanded to make explicit that the applicable law can be the law at the time of execution or at the time of death. The phrase "has a place of abode" used in the UPC was changed to "resided" for clarity.

§ 853.07(2) Current law provides that, unless there are two or more disinterested witnesses, any beneficial provisions of the will for a witness or the spouse of a witness are invalid to the extent they exceed what the witness or spouse would have taken under intestacy. The proposed legislation modifies this rule so that it is essentially a presumption.

The original bill prepared by the committee repealed § 853.07(2) and (3), and replaced them with a rule, based on UPC §

2-505, that neither the will nor any of its provisions is invalidated because it was signed by an interested witness. The committee concluded that the problem of interested witnesses is better handled by the general law governing undue influence. As noted in the Comment to UPC § 2-505, "a substantial devise by will to a person who is one of the witnesses to the execution of the will is itself a suspicious circumstance" which can lead to an inquiry into undue influence. At the request of a member of the Assembly Judiciary Committee, the bill was amended to contain the provision described. *See* Assembly Amendment 1, to Assembly Substitute Amendment 1, to 1997 Assembly Bill 645.

§ 853.11(1). Renumbers and amends current statute to elaborate on the methods of will revocation and to create presumptions to cover situations where the effect of revocation or the effect of a new will is ambiguous. Provides that a will or part may be revoked by writing or by destruction, and that if a will is revoked by another person by the testator's direction, it need only be in the testator's "conscious presence," which is defined in new § 851.035. The committee declined to adopt the language of UPC § 2-507(a)(2), which provides that a revocatory act performed with the requisite intent would be effective "whether or not the burn, tear, or cancellation touched any of the words of the will," thus retaining what the committee understands to be current Wisconsin case law to the contrary. The committee thought it best to leave this issue to the courts to examine on a case by case basis.

Provides that a subsequent will is presumed to *revoke* a prior will if the new will fully disposes of the testator's estate, but that the new will is presumed only to *supplement* the former will if it does not completely dispose of the estate. Based on UPC § 2-507(c) and (d). Under new § 851.31, a will includes a codicil and any document incorporated by reference. A will does not include a copy, but does include a properly executed duplicate original.

§ 853.11(2). Repeals current statute regarding rights of a surviving spouse under a will executed before the marriage, replacing it with a rule based on UPC § 2-301. Under current law, unless certain exceptions are met, the entire will is revoked by the

subsequent marriage, and the rules of intestacy control. Under the new statute, subject to an expanded list of exceptions, the surviving spouse is entitled to a share of the probate estate under a premarital will. A spouse who is not barred by the exceptions takes an amount equivalent to the spouse's intestate share in the part of the estate, less claims and expenses, not going to certain of the decedent's issue.[12] (The amount available under this provision is reduced by amounts received by the surviving spouse under the will or via the elective share in deferred marital property.) In general, the new statute reduces the likelihood that the premarital estate plan will be altered. However, in a situation where the will leaves some, but not all, the estate to issue, the rights of the surviving spouse may be increased.

§ 853.11(2)(b)3., 4., and 5. protect devises "to or for the benefit of" issue who are not of the marriage from a claim by the surviving spouse. The commitee considered using the language of UPC § 2-301, which refers only to devises "to a child ..." However, the Comment to UPC § 2-301 states that this language is meant to include devises "under trust or not." Thus, because the language of the comment is consistent with the broader language in current § 853.11(2)(a), which refers to "a provision for" issue, the committee decided to use the language "to or for the benefit of" [issue] in this section.

The committee assumes that the surviving spouse's share will qualify for the federal estate tax marital deduction. Thus, because that share of the estate will not generate any tax, it should not be reduced by taxes.

§ 853.11(3). Repeals current rule relating to revocation of will provisions in favor of a former spouse. Creates cross-reference to new § 854.15, which extends the former prohibition to relatives of the former spouse (subject to evidence of contrary intent, which can be proven by extrinsic evidence) and extends the rule to all estate

---

12. "Decedent's issue" refers to children born before the decedent's marriage to the surviving spouse who are not also the children of the surviving spouse, and to issue of those children, either directly or by operation of new WIS. STAT. §§ 854.06 (antilapse), 854.07 (failed transfer and residue), 854.21 and .22 (transfers to family groups and classes).

planning instruments. Note that current § 853.11(4) states that a will is revoked only as provided in § 853.11, even though new § 854.15 provides for revocation of provisions in a will in favor of a former spouse. The § 853.11(4) provision seems inaccurate at first glance, and the committee considered repealing it. However, the cross-reference in new § 853.11(3) to § 854.15 ensures that § 853.11 still covers all possible methods of revoking a will.

§ 853.11(3m). Repeals current "slayer statute" for wills. Creates cross-reference to new § 854.14 which creates a general "slayer statute" applying to all transfers at death.

Note that current § 853.11(4) states that a will is revoked only as provided in § 853.11, even though the new "slayer statute" in § 854.14 provides for revocation of a will when a beneficiary kills the decedent. The § 853.11(4) provision seems inaccurate at first glance, and the committee considered repealing it. However, the cross-reference in new § 853.11(3m) to § 854.14 ensures that § 853.11 still covers all possible methods of revoking a will.

§ 853.11(6). Repeals current rule on revival of wills and replaces it with new rule based on UPC § 2-509. The order of UPC § 2-509(a) and (b) has been reversed in an attempt to enhance clarity.

The rule is concerned with the situation where a will ("#2") has wholly or partially revoked a prior will ("#1"), and then will #2 is itself revoked. In general, there is a presumption *against* revival of the relevant parts of will #1. However in the situation where will #2 only *partially* revoked #1, and will #2 was itself revoked by physical act (rather than by a third will), the presumption is reversed.[13]

Repeals provision in current law which requires that the original will must be produced for revival to be effectuated and replaces it with a cross-reference to current § 856.17, which allows

---

[13] In any case, if will #2 was revoked by *physical act*, the applicable presumption can be rebutted by extrinsic evidence, including contemporaneous or subsequent statements by the testator. If will #2 was revoked by a third *will* ("#3"), then the presumption against revival can only be rebutted by the terms of will #3. *See also* Comment to UPC § 2-509.

the court to accept proof of contents of a missing will, under certain circumstances.[14]

§ 853.13. Repeals current rule relating to contractual wills and replaces it with language that more closely follows UPC § 2-514. However the broader Wisconsin provision allowing any extrinsic evidence to prove a contract, in contrast to the UPC requirement of a signed writing, was retained. In addition, the new statute includes a provision clarifying that a valid marital property agreement can prove a contract to make (or not make) a will or devise or to die intestate.

§ 853.15. Makes editorial changes to rule regarding equitable election in situations where the will attempts to dispose of property that actually belongs to someone else and that other person is also a beneficiary under the will. This situation is most likely to occur if a will purports to give the entire interest in an item of marital property (rather than just the decedent's interest) to a third party.

Repeals reference to current § 861.02(1) because, under new chapter 861, the deferred marital property election no longer grants item-by-item ownership.

§ 853.16(1) and (2). Renumbers and amends current provisions regarding "separate statements" disposing of personal property and relocates it as a subpart of new § 853.32, relating to incorporation by reference. New § 853.32 also adds some provisions to the current law; these are discussed in the note to § 853.32.

§ 853.19. Repeals current § 853.19, which deals with advancement—the effect of lifetime gifts on recipients under a will. Creates cross-reference to new § 854.09, which deals with the effects

---

[14] WIS. STAT. § 856.17 states that it applies if a will is lost, destroyed by accident or destroyed without the testator's consent. By creating the cross-reference to WIS. STAT. § 856.17 in WIS. STAT. § 853.11(6), the Drafting Committee intends to include under these criteria a will that was initially revoked and later revived, but that cannot be located.

of lifetime gifts by the decedent on the rights of heirs and of beneficiaries under estate planning instruments.

§ 853.25(1). Repeals current provision regarding omission of children born or adopted after the making of a will and replaces it with new statute which more closely follows UPC § 2-302. §§ 853.25(1)(a)-(c) are based on UPC § 2-302(a) and (b), reorganized to enhance clarity. Current § 853.25(1)(a)4, which allows extrinsic evidence of intentional omission, is retained as new § 853.25(1)(a)1; a similar but somewhat narrower provision is found at UPC § 2-302(b)(2). New § 853.25(1)(d) retains current § 853.25(1)(b), which provides that if the omitted child predeceases and leaves issue, the issue take the share that the omitted child would have received. An omitted child's share as determined under sub. (1) is subject to increase or decrease under the equitable adjustment provision of sub. (5).

§ 853.25(2). Amends current rule regarding living issue omitted by mistake to provide that one example of such an omission is the mistaken belief that a child or issue of a deceased child was dead at the time the will was executed. Amends provision defining share of qualified recipient to be the share he or she would receive under new § 853.25(1), rather than the intestate share which would be received under current § 853.25(1). Based on UPC § 2-302(c). An omitted child's share as determined under sub. (2) is subject to increase or decrease under the equitable adjustment provision of sub. (5).

§ 853.25(4). Makes editorial changes to reflect changes to § 853.25(1) and (2).

§ 853.25(5). Amends power of court to modify the share determined under § 853.25(1) or (2), significantly increasing the court’s discretion. At present a court can reduce, but not increase, a child's share as determined under the core provisions of the statute. Under the revised statute, the court can modify the *amount* or *form* of the share to fashion a transfer to the omitted child that will "best accord with the probable intent of the testator."

The committee intends that this provision, which is not in the UPC or in the current statute, operate in what might be a wide variety of situations not adequately covered by the core of the statute. For example, T may have a child from a first marriage who became a wealthy celebrity. T may marry again, plan not to have children, and execute a will leaving everything to spouse, with T's siblings as contingent devisees, because the child from the first marriage does not need a portion of T's estate. Under this scenario, if T subsequently has children, is predeceased by spouse, and does not change the will, those children will not qualify to receive anything under sub. (1)[15] or sub. (2).[16] Thus, the core provisions of the statute will treat the after-born children like the child from the prior marriage, even though T may not have wanted to omit the after-born children from the will. In this circumstance, the court may decide under sub. (5) to give all or part of the estate to the after-born children, outright or in trust.

§ 853.27. Repeals current § 853.27, which deals with the rights of the issue of a beneficiary who predeceases the testator. Creates cross-reference to new § 854.06, which modifies the rights somewhat and extends them to beneficiaries under all estate planning instruments, subject to evidence of contrary intent (which can be proven by extrinsic evidence).

§ 853.29. Amends provision regarding property acquired after execution of the will to more closely track language at UPC § 2-602.

§ 853.32(1). Codifies common law of incorporation by reference, based on UPC § 2-510. Cross-references current § 701.08, which governs transfers by will to living trusts, indicating that the changes in this section do not apply to situations governed by § 701.08.

---

15. Because, where a testator had children living at the time the will was executed (which T did here), (1)(c)1 limits the share of the after born children to the share given to the other children under the will (in this case, nothing).

16. Because they were not living when the will was executed.

§ 853.32(2). Current § 853.16, regarding non-will documents disposing of personal property, has been moved to § 853.32 as sub (2)(a) and (b). Additional paragraphs have been added to sub (2) to provide: (1) that a non-will document can be ignored if it has not been produced within 30 days after appointment of the personal representative—except where property described in the document has not been distributed completely, in which case the statement or list controls the further distribution of the property described in it; (2) that the personal representative incurs no liability for distributions made prior to the location of such a document, as long as the 30 days have elapsed; (3) that § 856.05 (delivery of will to court) governs the duties of a person who has custody of such a document; and (4) that recipients under such a list are not interested parties entitled to notice of the probate proceedings.

As long as the 30 day provision is complied with, the personal representative is not liable for property distributed before a non-will document is discovered. However, a person who has received property contrary to the instructions in the late-discovered document must return that property to the estate, if the document is accepted by the court. In this sense, a late-discovered document under § 853.32(2) has the same status as a late-discovered codicil.

Current § 853.16, which was enacted in the 1995-96 legislative session, is based on UPC § 2-513; the primary change is the addition of a requirement that the separate statement be dated. (Note that the signature and dating requirements apply only to the original document, not to amendments.) The UPC provision refers to tangible personal property "other than money." This phrase was omitted in the Wisconsin legislation because, under current law, money is not tangible personal property. However, in the view of the committee, money that has value apart from its use as legal tender, such as a coin collection, is tangible personal property.

Persons relying on § 853.32(2) should bear in mind that this statute codifies an informal procedure that will work best when there is no risk of fraud or of conflict among beneficiaries. In addition, it is unclear what the legal effect of a separate statement would be if the testator moved his or her domicile to a state that did not have such a provision or which had more stringent formalities.

§ 853.32(3). Creates cross reference to clarify that current § 701.08, which concerns transfers to a living trust, is unaffected by the more restrictive incorporation by reference rule in new 853.32(1).

§ 853.325. Codifies the common law of acts of independent significance, based on UPC § 2-512.

§ 853.33. Repeals current § 853.33, which deals with a specific gift of securities under a will. Creates cross-reference to new § 854.11, which applies a rule similar to that of current § 853.33 to all estate planning instruments. The new rule is subject to evidence of contrary intent, which can be proven by extrinsic evidence.

§ 853.35. Repeals current statute dealing with nonademption of certain specific gifts under a will. Creates cross-reference to new § 854.08, which applies a rule similar to that of current § 853.35 to all estate planning instruments. The new rule is subject to evidence of contrary intent, which can be proven by extrinsic evidence.

§ 853.40. Repeals current statute regarding disclaimers under wills, intestacy, and powers of appointment. Creates cross-reference to new consolidated rule on disclaimer at § 854.13.

§ 853.41. Provides that chapter 854 applies to all transfers under wills, including the statutory basic wills.

Subchapter II, Chapter 853. Creates "Wisconsin Basic Wills" subchapter to include current and amended provisions in §§ 853.50-853.62.

§ 853.50(1). Amends definition of "by right of representation" with respect to basic wills to mean "per stirpes," in conformity with the definition in new § 854.04(1).

§ 853.50(3). Amends cross-reference to reflect new statute on status of adopted children at § 854.20. Changes reference to "children who are not legitimate" to "nonmarital children."

§ 853.51(1)-(2). Repeals current witnessing requirements for basic wills, which are stricter than that for other wills, and replaces them with the new, less restrictive, requirements for execution of all wills under § 853.03.

Creates new section to provide that failure to comply with instructions, other than the requirements for the testator's and witnesses' signatures, does not affect the validity of the will. This refers to *the validity of the will itself*; it does not, for example, change the rule in current 853.54(2) that additions or deletions not provided for in the form will be ignored. The new rule is an extension of the current rule in 853.54(3) (which is retained) and applies to such matters as failure to date the will, indicate the location where it was signed, or indicate the witnesses' residences.

§ 853.55 (Article 3). Repeals and recreates part of basic will form to comport with amended § 853.51(2) regarding witnessing. Adds request for date of witnesses' signatures.

§ 853.55 (Notice). Amends basic will notice to comport with amended § 853.51(2) regarding witnessing. Also changes reference from "natural parent" to "birth parent." Note that the provision directing that witnesses to a will not be people who will receive property under the will is a suggestion, not a legal requirement.

§ 853.56 (Article 3). Repeals and recreates part of basic will with trust form to comport with amended § 853.51(2) regarding witnessing. Adds request for date of witnesses' signatures.

§ 853.56 (Notice). Amends basic will with trust notice to comport with amended § 853.51(2) regarding witnessing. Also changes reference from "natural parent" to "birth parent."

§ 853.59 (Form). Amends basic will with trust form to remove reference to "by right of representation" in context of discretionary distributions from a trust created from a residuary estate under § 853.56, paragraph 2.3. The current language is contradictory because representation creates mandatory shares while the basic will with trust

form provides for discretionary distributions to children and other beneficiaries from the trust as needed.

Chapter 854. Creates a new chapter to include general rules governing all transfers at death, probate (including intestacy) and nonprobate. Note that third parties who receive distributions in accord with a governing instrument, but who are not entitled to the distribution under this chapter, are covered by §§ 854.24-.25, and that the effect of federal preemption is covered by § 854.26. Third party payers are protected by § 854.23.

§ 854.01. Creates definition of "governing instrument," which means any estate planning or other instrument that transfers property at death.[17] The definition is based on UPC § 1-201(19).

§ 854.02. Provides that the chapter applies to all statutes and governing instruments that transfer property at death.

§ 854.03. Provides that all transfers that require that an individual survive an event require survival by at least 120 hours. The most important exceptions refer to the expression of a contrary intent in a governing instrument.

Current Wisconsin law addresses survivorship only with respect to transfers under intestacy, where 72 hour survivorship is required under § 852.01(2). The new statute is based on UPC §§ 2-104 and 2-702 as well as an adaptation of current § 851.55(3m) and (4). The language of UPC § 2-702 was modified to integrate UPC § 2-701, which provides that rules of construction yield to evidence of contrary intent and allows the use of extrinsic evidence for rebutting the rules of construction of governing instruments (see cross-reference in UPC § 2-701 to Comment to UPC § 2-601).

---

17. The statute includes in the definition of a "governing instrument" any instrument under chapter 705. Thus, governing instruments include the instruments of nonprobate transfer listed in WIS. STAT. § 705.20: insurance policies, contracts of employment, bonds, mortgages, promissory notes, certificated or uncertificated securities, account, custodial and deposit agreements, compensation plans, pension plans, individual retirement plans, employee benefit plans, trusts, conveyances, deeds of gift, marital property agreements, or other written instruments "of a similar nature."

Note that new § 854.03 renders the Uniform Simultaneous Death Act, current § 851.55, obsolete.

Also note that persons who take under a revocable trust at the grantor's death are now subject to a survivorship requirement under new § 701.115. Under the common law, persons who take under an *irrevocable* trust are not required to survive in order to take.

§ 854.04. Creates definitions of the terms "by representation," "per stirpes," "modified per stirpes," "per capita at each generation," and "per capita." The committee believes that the only definitions of any of those terms in the current statutes are the (conflicting) definitions of "by representation" for intestacy [current § 852.03(1)], and for the basic wills [current § 853.50(1)]. The bill codifies former § 852.03(1) as the definition of "modified per stirpes."[18] The basic wills' definition of "by representation" appears to be the same as the definition of "per stirpes" in the new statute and, thus, is amended to cross-reference the definition of "per stirpes" in § 854.04(1).

The definitions of "per stirpes" and "per capita at each generation" are based on those in UPC §§ 2-106 and 2-709. The Comment to UPC § 2-106 contains an extensive discussion of the similarities and differences between "per stirpes" and "per capita at each generation," with examples. The definition of "per capita" is based on Black's Law Dictionary. The new statute defines "by representation," when used without further explanation, to mean *"per stirpes"*; in UPC § 2-709(b), by contrast, "by representation" is defined to mean "per capita at each generation." If the transfer is under a governing instrument (rather than under a statute) the definitions in the statute yield to extrinsic evidence of contrary intent of the person who executed the governing instrument.

---

[18] The language of current WIS. STAT. § 852.03(1) has been modified to be parallel to the language describing the other modes of representation, and to clarify its meaning. In the current statute, shares are created for surviving heirs in the nearest degree of kinship and deceased persons "in the same degree" who left surviving issue. If "in the same degree" is misinterpreted to refer to the "nearest degree of kinship" rather than "the nearest degree of kinship *with surviving issue,*" the current definition of representation would be that of strict per stirpes.

§ 854.05. Extends the "nonexoneration" rule of current § 863.13— which provides that liens on specifically devised property are not extinguished—to specific transfers under any governing instrument. The committee intends that "specific transfer" refer to transfers of both real and personal property. The rule does not apply if a governing instrument, either expressly or as construed by extrinsic evidence, provides otherwise. Following UPC § 2-607, the revised rule states that a general directive to pay debts does not give rise to a presumption of exoneration.

§ 854.06. Extends the principle of the "antilapse" rule of current § 853.27 to revocable transfers under all governing instruments. However, the current rule is modified in several respects.

The current rule provides that if a predeceased beneficiary under a will was a relative of the decedent and there is no contingent beneficiary, then the issue "as represent" the deceased beneficiary take the transfer that would have gone to that beneficiary. Besides extending the rule to all revocable governing instruments, the new rule: (1) allows any evidence of contrary intent, not just as indicated in the instrument, to abrogate the rule; (2) limits the class of "covered" relatives to the decedent's grandparents or issue of the grandparents (under current § 853.27, a "covered" relative is any blood relative); (3) extends the class of "covered" relatives to include *the transferor's* stepchildren, subject to the new expanded provision regarding revocation at divorce (§ 854.15); (4) specifies that the issue take per stirpes; and (5) specifies that if a sequence of designated contingent transferees is exhausted,antilapse then applies to the *first* group in the sequence—*i.e.*, the issue of the first designated beneficiary who is a "covered" relative, and who has *surviving* issue, take. The latter provision is based on the comments to UPC § 2-603(b)(4). It reverses the approach taken in decisions like *Estate of Hillman*,[19] which hold that the antilapse statute applies to the last contingent beneficiary in a sequence.

The committee assumes that courts will interpret the new rule to avoid inequitable situations such as those discussed in the

---

[19.] 122 Wis. 2d 711, 363 N.W.2d 588 (1985).

comment to UPC § 2-603. The committee concluded that the statement of the rule of UPC § 2-603(c) (and similar provisions in §§ 2-706(c) and 2-707(c)) was too complex to justify its adoption, given the anticipated small number of situations in which it would apply.

The committee explicitly rejected the "words of survivorship" rule of UPC § 2-603(b)(3) and similar statutes, and the rationale for that rule as offered in the comments to UPC § 2-603(b)(3). However, the committee agrees with the underlying assumption of the UPC comment: such words are inherently ambiguous and provisions using words of survivorship should include an alternate transfer to take place if the designated transferee does not survive.

The committee considered extending the antilapse rule to all future interests under trusts, as in UPC § 2-707, but decided to defer consideration of that issue to the courts or a future legislature. Nonetheless, the wording of new § 854.06(1)(b) is intended to cover future interests under revocable trusts, if the transfer was revocable at the decedent's death. See new § 701.115.

Finally, note that the provisions of § 854.06 are default provisions that can, and should, be preempted by good drafting.

§ 854.07. Creates a rule providing that a failed nonresiduary transfer becomes part of the residue of the governing instrument.[20] In addition, if two or more people are residuary beneficiaries, and the transfer to one lapses, the lapsed share goes to the other residuary beneficiaries, unless § 854.06(1)(a) (antilapse) applies. The latter result is in contrast to the holding of *Estate of Mory*.[21] In addition, in contrast to the holdings in the cited cases, the new rule allows admission of extrinsic evidence of the testator's intent. Based on UPC § 2-604, but extended to apply to all governing instruments.

[20.] Note that the phrase "decedent's probate estate" in WIS. STAT. § 854.07(3) refers to the probate estate of the decedent who executed the governing instrument.

[21.] 29 Wis. 2d 557, 139 N.W.2d 623 (1966). See also two more recent unpublished cases, Estate of Meienburg (Ct. App. IV, No. 91-0553, Feb. 2, 1992), and Estate of Hoslett (Ct. App. III, No. 85-1661, June 24, 1986).

§ 854.08. Reorganizes and extends current § 853.35, which provides for nonademption of specific gifts in certain instances (such as when the subject of the transfer was recently sold, damaged, or destroyed) to cover transfers under all governing instruments.

§ 854.09. Combines current § 853.19 and § 852.11, which provide for advancement in testate and intestate estates respectively, into one set of provisions and extends the scope of coverage to all governing instruments. The new statute primarily tracks UPC § 2-609, and many of the comments to UPC § 2-609 and to UPC § 2-109 are applicable. Note that UPC § 2-601, which provides for the use of extrinsic evidence of the decedent's contrary intent, applies to UPC § 2-609 and has been integrated into the Wisconsin statute. However, the committee rejected the UPC rule in § 2-609(a) requiring that written evidence of a decedent's intent be contemporaneous with the gift and retained current law in that regard. The term "incomplete lifetime gifts that became complete on the decedent's death" refers to beneficiary designations on revocable transfers such as life insurance contracts, trusts, POD designations, and the like, based on the Comment to UPC § 2-609.

Under current Wisconsin law for both testate and intestate estates, if a lifetime gift would have counted against the share of the gift recipient, and the recipient predeceases the donor, the gift counts against the share to be received by the issue of the recipient. This is also the rule under UPC § 2-609 for testate estates, but is the reverse of the rule for intestacy under UPC § 2-109(c). Because the committee did not find a policy justifying the distinction between testate and intestate advancement made by the UPC, current law was retained.

Note that in order for a lifetime gift to be considered an advance, the statute does *not* require that the advance be given to the same person who would be the recipient at death. It may, for example, have been a lifetime gift to a spouse or child of the at-death recipient. This is a change in the current Wisconsin provision. See discussion in Comment to UPC § 2-609.

§ 854.10. Creates a rule allowing a transferor to select any state's law to give meaning and legal effect to a governing

instrument, as long as it is not inconsistent with the public policy of Wisconsin. Based on UPC § 2-703.

§ 854.11. Establishes rules for dealing with problems that sometimes emerge with respect to gifts of securities. Provides that additional securities acquired by reason of the transferor's ownership of specifically transferred securities are included in the transfer. Also provides that in general a gift of securities will be construed as specific. All provisions yield to a finding of contrary intent, which can be proven by extrinsic evidence.

§ 854.11(1) (definition of security) is based on UPC § 1-201(43), edited to improve clarity; § 854.11(2) (increase in securities) is based on UPC § 2-605, but is expanded to include transfers under any governing instrument and edited to improve clarity; § 854.11(3) (gift of securities construed as specific) is based on current § 853.33, expanded to include transfers under any governing instrument; § 854.11(4) (contrary intent) is based on UPC §§ 2-601 and 2-701. With respect to § 854.11(2), note that UPC § 2-605 has an extended comment that includes examples of the application of the rule and that explains that the rule does not set forth the only conditions under which additional securities of the type listed in § 854.11(2)(c)1, 2 and 3 are included in the transfer.

UPC § 2-605(b) states that "distributions in cash before death with respect to a described security are not part of the devise." The committee deemed the language redundant, because the statute only governs distributions of *securities*.

§ 854.13. Creates a single disclaimer statute, integrating provisions from former §§ 701.27 (disclaimer of transfers under nontestamentary instruments) and § 853.40 (disclaimer of transfers by will, intestacy or appointment), primarily using the language of § 701.27. The final language of § 854.13 is assembled from the four "sources" discussed in the note relating to changes to current § 701.27.

The primary differences between new 854.13 and the current statutes are: (1) under the new statute, the right of a guardian to disclaim is applicable to all transfers, while under current law the authorization only appears in § 853.40; also a conservator, as well as

a guardian, may disclaim; (2) under the new statute disclaimer by a guardian or conservator requires court approval; (3) the new statute clarifies that any disclaimer which meets the requirements of IRC § 2518, or any other provision of federal law, constitutes an effective disclaimer under the statute, while current law can be read as stating that the IRC exception applies only to the *form* of the disclaimer; and (4) the new statute provides that an agent under a power of attorney (POA) may disclaim on behalf of the person who granted the POA, assuming the person who granted the POA had the power to disclaim and that the POA specifically grants the power to disclaim.

The requirement that the POA document specifically grant the power to disclaim is included because disclaimer is analogous to making a gift and a specific grant is generally necessary for gifts by a POA. It is the committee's understanding that under current law, a guardian does not have the power to make a gift. Nonetheless, the committee concluded that disclaimer by a guardian should be allowed for all transfers, subject to court approval.

New § 854.13(7) states that the *disclaimed property* devolves as if the disclaimant had predeceased. In theory, there are two problems that could arise under this language. The first, explained in the Comment to UPC § 2-801(d), is that the disclaimed property could be redistributed across *all* the beneficiaries, not just sent down the disclaimant's family line. Thus, the share of the disclaimant would be *reduced*. The second potential problem, discussed in the same UPC Comment and by S. Alan Medlin in a 1992 Albany Law Review article,[22] is that under certain scenarios a beneficiary may be able to use disclaimer to *increase* the amount of property going to his or her family line, at the expense of other beneficiaries.[23]

The UPC drafters remedy the first problem through long provisions in UPC § 2-801(d)(1) and (2) describing how the disclaimed interest devolves. A remedy to the problem identified by

---

22. Medlin, *An Examination of Disclaimers Under UPC Section 2-801*, 55 ALB. L. REV. 1233 (1992).

23. If the designated mode of representation is per stirpes, as it is in the revised Wisconsin intestacy antilapse statutes, then the problem is not signficant. But, as explained in the comment to UPC § 2-801, the rule is important under certain fact scenarios when the mode of representation is per capita at each generation or modified per stirpes.

Professor Medlin involves using language such as that contained in the disclaimer provision of the South Carolina statutes.[24] The committee considered these remedies at length, but concluded that, since both problems result from what the committee sees as implausible interpretations of the words of the statute, inclusion of the remedies in the statute would lead to confusion. The committee believes that the plain meaning of the statute dictates the desired result discussed by the UPC Comment and by Professor Medlin.

§ 854.14. Under current law, "slayer statutes" appear in at least six different places: §§ 632.485; 700.17(2); 852.01(2m); 853.11(3m); 895.43; 895.435. These statutes, all directed to the same purpose, were enacted and amended at different times, so that their provisions are not fully consistent. The new statute consolidates the provisions in one place and eliminates discrepancies among them. It is organized to track UPC § 2-803, but alters the UPC language to enhance clarity and to retain several provisions of current Wisconsin law, including: the provision of current § 895.435, which does not limit the operation of the statute to revocable transfers or to transfers made by the decedent; the provision of current § 853.11(3m)(am) that allows the operation of the "slayer" rule to be altered by the court, with respect to wills (§ 853.11(3m)(a)) or waived by the decedent;[25] and the provision of current § 852.01(2m)(bg) that an adjudication of delinquency can establish the adjudicated individual as the killer. Note that, following UPC § 2-803, the standard of proof necessary to show that the killing was unlawful and intentional is changed from "clear and convincing" in the current statutes to "preponderance of the evidence." The UPC language allows a criminal conviction to trigger operation of the statute “after all right

---

[24] *See* Medlin note 22, *supra*, at 1261, n.162, *citing* § 62-2-106, S.C. STAT. ANN. (West 1997)(addressing representation and disclaimer by an intestate beneficiary).

[25] Current law allows the decedent to waive the operation of the slayer rule in a will (with respect to a beneficiary under the will) under WIS. STAT. § 853.11(3m)(am) or by contract (with respect to the beneficiary of the contract) under WIS. STAT. § 895.43. The new statute allows the decedent to waive the rule for *any* transfer, but only by will. The committee believes that the attestation requirement for wills helps insure that the waiver is intentional and genuine.

of appeal has been exhausted." This wording was used in the committee draft, but was amended to reflect the language of the current statute, which refers to a "final judgment of conviction" and a "final adjudication of delinquency." See Assembly Amendment, to Assembly Substitute Amendment 1, to 1997 Assembly Bill 645.

The statute provides that if the slayer is barred from taking, the affected property passes as though the slayer had disclaimed. This means that the issue of the slayer are eligible recipients, either directly or by operation of the "antilapse" provision, § 854.06. However, if the court finds this transfer inappropriate under the circumstances, it can modify the distribution under § 854.14(7)(a).

The statute states that the property will pass as though the killer had "disclaimed," rather than simply stating that it will pass as though the killer had predeceased. The wording, which is taken from the UPC, is used to emphasize that it is *only killer's share* that is redirected; the distribution of the estate as a whole is not affected. See also note to the new disclaimer statute, § 854.13.

§ 854.15. Creates a statute, based on UPC § 2-804, establishing rules for transfer of property which a decedent has left to his or her former spouse, when the governing instrument was executed prior to the divorce or equivalent termination of the marriage. The core of this statute is similar to current § 853.11(3); however the current statute only applies to wills and only revokes provisions in favor of the surviving spouse. The new provision applies to all governing instruments and extends to relatives of the former spouse (who are not also relatives of the decedent), thus reversing case law such as *Estate of Graef*.[26] Except for specific exceptions, the UPC rule is absolute; by contrast, the new Wisconsin provision allows extrinsic evidence to show the decedent's contrary intent. Note that neither the UPC nor the Wisconsin rule revokes transfers by relatives of one former spouse *to* the other former spouse. For example, while the statute revokes the transfer from a stepparent to a stepchild, it does not revoke a transfer from a former parent-in-law to a former child-in-law.

[26.] 124 Wis. 2d 25, 368 N.W.2d 633 (1985).

The statute states that the property will pass as though the former spouse or relative had "disclaimed," rather than simply stating that it will pass as though the he or she had predeceased. The wording, which is taken from the UPC, is used to emphasize that it is *only the former spouse or relative's share* that is redirected; the distribution of the estate as a whole is not affected. See also note to the new disclaimer statute, § 854.13.

§ 854.17. Note that current § 851.35 (classification of property at death) has been relocated to § 854.17 to clarify that it is not limited to probate property. See § 851.35.

§ 854.18. Provides for abatement of transfers when there is insufficient property to satisfy the transfers called for by a governing instrument. The new rule is based on UPC § 3-902, but is expanded to cover all governing instruments and is edited to enhance clarity. Replaces current wills provision in § 863.11, which has provisions similar to those of UPC § 3-902.[27]

§ 854.19. Provides that a "penalty clause for contest" will not be enforced if there was probable cause for instituting the contest. Based on UPC § 2-517, but extended to cover all governing instruments.

§ 854.20. Relocates and expands various provisions regarding the status of adopted children under statutes and governing instruments.[28] Current § 851.51(1) (inheritance rights between adopted person and adoptive relatives) is amended to include all governing instruments and relocated at § 854.20(1). Current § 851.51(2) is relocated to

---

[27] Note that the phrase "decedent's estate plan" in WIS. STAT. § 854.18(3) refers to the estate plan of the decedent who executed the governing instrument.

[28] The text of new WIS. STAT. § 854.20 is currently located at WIS. STAT. § 851.51 because it was created from WIS. STAT. § 851.51 and has not yet been relocated. Pursuant to the protocol of the Legislative Reference Bureau regarding statutes that are amended and moved, the amended statute appears in the bill under the current section number (in this case, WIS. STAT. § 851.51) and no reference is made at the new section number (in this case, WIS. STAT. § 854.20).

§ 854.20(2) and § 851.51(2)(a) is amended to limit the applicability of "inheritance through two lines" to situations where the birth parent predeceases and the child is adopted by the surviving parent's new spouse.[29] This amendment is intended to reverse what the committee judges to be an incorrect interpretation of current § 851.51(2)(a) in cases such as *Estate of Rohloff*,[30] and to provide a rule that the committee believes better comports with the probable intent of the decedent. In both § 854.20(1) and (2), the term "natural parent" is amended to read "birth parent." The new statute adds provisions to limit the effect of adult adoption,[31] to cover sequential adoption, and to allow a contrary finding of intent if a transfer is made under a governing instrument; extrinsic evidence may be used to show that intent.

§ 854.21. Relocates and expands various provisions related to persons generally included in class gifts or gifts to family groups such as heirs or next of kin. The language is based on UPC § 2-705.

Current § 851.51(3), which generally includes adopted children in class gifts and family groups, is amended to allow extrinsic evidence of contrary intent for transfers made under governing instruments and is relocated to § 854.21(1). Provisions regarding the effect of adult adoption (people adopted as adults are excluded by the § 854.21(1)(a)1-3 criteria) are the same as under new § 854.20(4), and are primarily based on current § 851.51(3). There is significant overlap between §§ 854.21(1) and 854.20. The committee intends § 854.21(1) to be a specific application of the principles in § 854.20.

---

29. The committee is aware that UPC § 2-114(b)(ii) appears to provide for a different result.

30. No. 521-539 Milw. Cty., 1/12/87; *aff'd* 87-0447 Wis. Ct. App., 8/18/87, unpub. In *Rohloff*, the court interpreted current § 851.51(2)(a) to allow inheritance through two lines where the parental rights had been terminated.

31. The current statute has provisions regarding adult adoption for class gifts (current WIS. STAT. § 851.51(3)), but not for other purposes. The provisions regarding adult adoption in the new statute are similar to those in current WIS. STAT. § 851.51(3); however extrinsic evidence of contrary intent is allowed for transfers made under governing instruments.

§ 854.21(2) creates a new provision stating that individuals born to unmarried parents are included in class gifts and family groups if they meet the requirements of amended § 852.05 (regarding status of such persons under intestacy) and if the transfer is from a birth parent *or* the person grew up in the home of the birth parent or certain close relatives. If the transfer is under a governing instrument, these rules may be rebutted by evidence of contrary intent, including extrinsic evidence.

§ 854.21(3) and (6) codify common law rules providing that relatives by marriage are excluded from class gifts and family groups, and that a person eligible to take under two lines is limited to the larger share. If the transfer is made under a governing instrument the rules yield to evidence of contrary intent, including extrinsic evidence.

§ 854.21(4) relocates the existing intestacy rule providing that relatives of the half blood take as whole blood (current § 852.03(3)) and expands it to cover governing instruments as well, subject to evidence of contrary intent, including extrinsic evidence.

§ 854.21(5) merges current § 700.12, which provides that after born children conceived before the decedent's death are included in class gifts, and current § 852.03(4), which provides a similar rule for intestacy. Most of the language of the new section is taken directly from current §700.12. Following UPC § 2-108, the new rule requires that the child survive 120 hours after birth and allows evidence of contrary intent, including extrinsic evidence, if the transfer is under a governing instrument. The committee considered providing for the application of this statute to situations when after-born issue are conceived after the parent's death using modern reproductive technology. The committee concluded that it had insufficient information to determine an appropriate rule in such circumstances and decided to leave the matter to the courts and to future legislation.

§ 854.22(1), (2), and (4). Constructs the meaning of a remainder gift to the "heirs" or the "issue" of a designated person, based on UPC §§ 2-708 and 2-711. The new statute is similar to current § 700.11, which is repealed and recreated as a cross-reference to § 854.22. The major differences are (1) the admissibility of extrinsic

evidence of contrary intent, consistent with UPC § 2-701,[32] and (2) reference to the intestacy law of the domicile of the designated person, rather than to Wisconsin intestacy law in chapter 852.

§ 854.22(3). Adopts UPC § 2-710, which abolishes the doctrine of worthier title. As a *rule of law*, this doctrine would provide that (1) a transfer by intestacy was preferred to an identical transfer to an heir by will and (2) a grantor could not limit a remainder to his or her heirs. As a *rule of construction*, the doctrine provides that a reversion in the grantor is preferred to a remainder in the grantor's heirs.

§§ 854.23 and 854.24. Protects payers, buyers, and other third parties who may take an action in good faith reliance on a person's apparent entitlement under the terms of a governing instrument before having notice that the person's entitlement is overridden by a provision of this chapter, such as § 854.03 (120 hour survival), § 854.06 (anti-lapse), § 854.14 (slayer rule), § 854.15 (revocation by divorce or similar event), etc. Based on provisions found in UPC §§ 2-702, 2-706, 2-803, and 2-804. Note that the term "property" has the broad meaning given in § 851.27.

If proper notice has been served, then this exemption from liability is removed for stakeholders other than banks. At that point, the stakeholder may either continue to hold the property pending instructions from the court, or discharge its obligation by turning the property over to the relevant probate court. Banks have the same options, but alternatively may distribute the property to the named beneficiary without liability. The exemption for banks was added in order to be consistent with preexisting protections under §§ 701.19[11] and 710.05, and chapters 112 and 705 of the statutes. In listing these specific statutory references, there is no intent to limit preexisting protections that banks might also have under other

---

[32] UPC § 2-708 states that the rule of construction only applies if a class gift "does not specify the manner in which the property is to be distributed among the class members." Given that UPC § 2-701 already provides for the rule to yield to contrary intent, this clause was deemed redundant.

sections of the statutes. See Assembly Amendment 4, to Assembly Substitute Amendment 1, to 1997 Assembly Bill 645.

§ 854.25. Provides for personal liability of persons who, directly or indirectly, gratuitously receive property they are not entitled to under a governing instrument. Based on provisions found in UPC §§ 2-702, 2-706, 2-803, and 2-804. § 854.25(2) expands the UPC provisions to specifically deal with the liability of subsequent recipients of the property; similar provisions are created at new § 861.07(2). § 854.25(3) expands the UPC provisions by providing that the person entitled to the benefit may object to the mode of reimbursement chosen by the person who has improperly received the benefit if the mode chosen will create a hardship. Note that the term "property" has the broad meaning given in § 851.27.

§ 854.26. Offsets the effects of federal preemption of a rule in this chapter. Based on provisions found in UPC §§ 2-702, 2-706, 2-803, and 2-804.

Because ERISA's preemption language is so broad,[33] there is a risk that federal courts will allow ERISA to preempt state probate law dealing with the transfer of employee benefits, even though ERISA supplies no substantive regulation in this area. The UPC position, articulated in the comment to § 2-804, is that ERISA should not preempt state law in this area. As a preventive measure, then, the UPC provides that once the proceeds of at-death transfers of employee benefits are received by the beneficiaries, state law controls.[34]

It is unclear whether this approach will succeed in preventing federal preemption. A recent United States Supreme Court decision,

---

33. Section 514(a) of ERISA provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" that ERISA governs. *See* 29 U.S.C. § 1144(a). Thus, ERISA preemption is not limited to state laws that conflict with specific ERISA provisions; rather, ERISA preempts any state laws that "relate to" employee benefit plans governed by ERISA.

34. *See* UPC §§ 2-702(f)(2), 2-706(e)(2), 2-803(i)(2), 2-804(h)(2).

Boggs v. Boggs,[35] raises the question of whether a state can, in fact, offset preemption by ERISA of statutory provisions governing transfers of employee benefits at death. In *Boggs*, the Court held that ERISA preempts state laws that allow a non-participant spouse to transfer by will a community property interest in the other spouse's undistributed pension plan benefits.[36] Although the *Boggs* decision did not involve the UPC and, thus, does not speak substantively to this legislation, it may be a signal from the United States Supreme Court that it will allow federal preemption of some state probate law, particularly in the area of employee benefits. In addition, a recent decision by the Sixth Circuit Court of Appeals, *Metropolitan Life Insurance Company v. Pressley*,[37] held that, where a decedent did not change the beneficiary of his life insurance after a divorce and where the life insurance was an employee benefit, ERISA preempted a Michigan law provision that a judgment of divorce extinguishes the right of the decedent's former spouse to any life insurance benefits.[38]

§ 856.05(5). Created to clarify the scope of the provisions in this section dealing with the duties and liabilities of a person with custody of a document needed for a probate proceeding.

§ 856.16. Creates cross-reference to new self-proved will provisions in § 853.04.

§ 857.01. Amends cross-reference to recreated deferred marital property election in § 861.02.

§ 857.015. Amends cross-reference to provisions in 861.015 governing the satisfaction of a nonholding spouse's deferred marital

---

35. 117 S.Ct 1754, 138 L.Ed.2d 45 (1997).

36. *Boggs*, note 35, *supra*, at 1761-62.

37. 82 F.3d 126 (6th Cir. 1996); *cert. denied* 117 S.Ct. 2431, 138 L.Ed.2d 193 (June 9, 1997); *see also* Metropolitan Life Insurance Company v. Marsh, 119 F.3d 415 (6th Cir. 1997).

38. *Pressley*, note 37, *supra*, at 129-30.

property interest in certain business property (*e.g.*, a partnership, a professional corporation or a corporation whose stock is not publicly traded). The new chapter 861 deferred marital property elections are no longer item-by-item, but instead are based on the value of all the deferred marital property in the marriage. Because of this change, which allows a nonholding spouse to elect one-half of the *value* of the decedent spouse's interest in these business properties, rather than of the property itself, there is less risk that a holding spouse will have to relinquish testamentary control over one-half of his or her interest in a closely-held business.

§ 858.01(2). Presumption that property not classified as marital property is deferred marital property is repealed in current chapter 858, where it arguably only applied to probate property, and relocated in chapter 861, at § 861.02(2)(a).

§ 859.40. Because the current definition of "property" under § 851.27 includes "any interest" in property, this section was amended to eliminate redundancy.

§ 859.41. Because the current definition of "property" under § 851.27 includes "any interest" in property, this section was amended to eliminate redundancy.

Chapter 861. Current §§ 861.02-861.13, dealing with the probate and non-probate deferred marital property elections, are repealed. Revised chapter 861 has three subchapters:

I. *Interest in Marital Property*, which includes current §§ 861.01 and 861.015;

II. *Elective Share in Deferred Marital Property*, which contains the new deferred marital property elections; and

III. *Other Rights, Allowances, and Exemptions*, which includes current §§ 861.17-861.41, as amended, and a new statute that expands the surviving spouse's right to retain a homestead.

New subchapter II is based on the approach outlined in Erlanger and Monday, "The Surviving Spouse's Right to Quasi-Community Property: A Proposal Based on the Uniform Probate

Code," 30 *Idaho Law Review* 671-695 (1994).[39] The major changes from the current deferred marital property elections (current §§ 861.02-861.13) are these:

- The election is based on the amount of *all* deferred marital property in the marriage, not just that owned by the decedent. The surviving spouse is entitled to half that total, rather than half the deferred marital property owned by the decedent.
- There are no longer separate elections for probate and nonprobate deferred marital property.
- The "all or nothing" bar in current § 861.13 is eliminated; the resulting system is somewhat similar to the "cut back" in current § 861.07, and includes any deferred marital property already held by the surviving spouse.
- The election is for a pecuniary amount, rather than for an item-by-item interest, in contrast to the current probate election in § 861.02.
- All nonprobate deferred marital property is subject to the election, in contrast to current § 861.05(4), which limits covered nonprobate property to transfers made on or after April 4, 1984.

§ 861.018. Creates definitions for use in this subchapter, based on UPC § 2-201. Note that “deferred marital property” is defined at § 851.055 while “deferred individual property” is defined at § 861.018(2).

§ 861.015. Repeals cross reference to former § 861.02(2), which governed the effect of a directive under § 857.015 on deferred marital property. See note to revised § 857.015.

§ 861.02. Creates the core structure of the new Elective Share in Deferred Marital Property, based on UPC §§ 2-202 and 2-203. The elective right is to no more than 50% of the augmented deferred marital property estate, which includes all deferred marital property in the marriage, *irrespective of which spouse holds it*, and also includes some gifts of deferred marital property made within two years of the decedent’s death. If the presumption of marital property

---

[39] Sarah Coyne assisted in the drafting of the statute and the preparation of these notes.

under § 766.31(2) is rebutted, property is presumed to be deferred marital property under new § 861.02(2)(a).

The election is applicable if the decedent was a Wisconsin domiciliary, irrespective of the domicile of the surviving spouse. If the decedent was not a Wisconsin domiciliary but owned real property in Wisconsin, then § 861.20 applies, and the rights of the surviving spouse are determined by the law of the decedent's domicile.

§ 861.02(8). Reverses the decision in *Krueger v. Rodenberg*,[40] which held that the estate of Mrs. Rodenberg, who was murdered by her husband, had no legal or equitable claim on deferred marital property owned by him.

§ 861.03. Delineates the types of interests in deferred marital property that are included in the augmented deferred marital property estate. The list is intended to be comprehensive and inclusive, covering the decedent's probate and nonprobate transfers at death, property over which the decedent held a general power of appointment, property over which the decedent had a retained interest, and certain transfers within two years of death. Only deferred marital property interests are included, not any other interest (*i.e.*, not the decedent's interest in marital property, individual property, or deferred individual property). In addition, the interests included are subject to limitations and adjustments under § 861.05. Based on UPC §§ 2-204, 2-205, and 2-206.[41] § 861.03(3)(a)(2), which is based on IRC §§ 2036 and 2038, is added for completeness. No distinction is made between probate and nonprobate elections, in contrast to current §§ 861.02 and 861.03.

§ 861.03(2)(a) includes the decedent's fractional interest in deferred marital property held in joint tenancy with right of

---

40. 190 Wis. 2d 367, 527 N.W.2d 381 (Ct. App. 1994).

41. UPC § 2-206 is included in WIS. STAT. § 861.03 by implication. The UPC contains separate provisions regarding a decedent's nonprobate transfers to third parties under UPC § 2-205 and a decedent's nonprobate transfers to the surviving spouse under UPC § 2-206. WIS. STAT. § 861.03 combines these UPC sections by removing the distinction.

survivorship. This includes joint tenancies held with the surviving spouse. The surviving spouse's fractional interest in the joint tenancy is also included in the augmented deferred marital property estate, under § 861.04.

§ 861.03(2)(c) and (d) refer to a "presently exercisable" general power of appointment. As defined in § 861.018(7), the word "exercisable" refers only to whether the power is exercisable *by its terms*, not in fact; specifically, there is no requirement that the decedent be competent to exercise the power.

§ 861.04. Provides that the augmented deferred marital property estate includes the value of any deferred marital property which would have been included under § 861.03, had the surviving spouse been the decedent. This is a major departure from the current law, which only considers the decedent's deferred marital property. Based on UPC § 2-207.

Where appropriate, valuation of an interest under this section shall take into account that the decedent predeceased the spouse. For example, for purposes of § 861.03(2)(c), proceeds of insurance on the life of the surviving spouse are not valued as if he or she were deceased. Similarly, a deferred employment benefit plan held by the surviving spouse would be valued at zero, because of the operation of the terminable interest rule of § 766.62(5).

§ 861.05(1). Provides for various exclusions from the augmented deferred marital property estate, when the item might otherwise be included under §§ 861.03 or 861.04. Based on UPC § 2-208 and UPC § 2-207(a)(1)(iii). Exclusions include any transfer under the federal Social Security system; transfers of deferred marital property to the surviving spouse under § 861.33 (selection of personalty by surviving spouse) or § 861.41 (exemption of property assigned to surviving spouse); and transfers to a person other than the spouse, with the *written* joinder or *written* consent of the spouse. The latter rule is stricter than the current rule regarding nonprobate transfers of deferred marital property (§ 861.05(2)). In addition, the current rule excluding non-probate transfers for which the governing instrument was executed prior to the signing of the original Marital Property Act (April 4, 1984) no longer applies.

Transfers under §§ 861.33 and 861.41 are excluded because to do otherwise would defeat the purpose of these statutes. For example, assume that item X, worth $100, is in the augmented deferred marital property estate. The surviving spouse would be entitled to elect half the value of X, or $50. Selection of X under § 861.33 would, however, cause $100 of the decedent's obligation to the surviving spouse to be offset. Thus, the purpose of § 861.33, which is to transfer certain personal property to the spouse at no charge, would be defeated.

§ 861.05(2), based in part on UPC § 2-208, creates rules for valuation. The committee intends that, under the language of § 861.05(2)(b), the deferred marital property component of a deferred employment benefit plan will be valued without regard to the operation of any rule under ERISA or REA.

The term "commuted value" used in § 861.05(2)(f) is not defined in the statute, but is intended by the Drafting Committee to have the same meaning as under the UPC.

§ 861.05(3) creates a reduction for the equitable proportion of expenses and enforceable claims, as determined by the court. With respect to "other charges and fees," it is expected that the property transferred under the election will qualify for the marital deduction and therefore should not bear any of the tax obligation of the estate.

§ 861.05(4), based on UPC § 2-208(c), provides that items will only be counted once, even if they are covered by more than one provision of § 861.03 or § 861.04. For this reason, the committee did not adopt the language repeatedly used in UPC § 2-205, stating that nonprobate transfers are only counted if they are "to or for the benefit of any person other than the decedent's estate or surviving spouse."

§ 861.06. Creates rules for the satisfaction of the deferred marital property elective share, based in general on UPC § 2-209:

First, all property included in the deferred marital property augmented estate under § 861.04 (deferred marital property already held by the surviving spouse) is applied. This means that if the surviving spouse holds half or more of the deferred marital property in the marriage, the election will be ineffective.

Second, the elective share is satisfied by any transfers from the decedent to the surviving spouse, by almost any means, including transfers mandated by state or federal law, such as ERISA or REA. The only exclusions are transfers under the federal social security system[42]; property transferred under § 861.33 (selection of personalty) or § 861.41 (exemption of property assigned to the surviving spouse); property transferred to the surviving spouse under §§ 861.31 or 861.35 (family allowances), unless the court orders otherwise under §§ 861.31(4) or 861.35(3); the first $5,000 of value of gifts from the decedent to the surviving spouse each year; certain gifts from the decedent to the surviving spouse that were subsequently gratuitously transferred by the surviving spouse; and certain transfers in trust from the decedent that have been disclaimed by the surviving spouse. The rule for disclaimed property, which is codified in § 861.06(1), is based on the analysis in the comment to UPC § 2-209.

The committee anticipates that in the vast majority of marriages, the deferred marital property elective share will be satisfied by transfers from the decedent to the spouse during life and at death, under § 861.06(2). If that is not the case, then the balance of the elective share amount is satisfied, pro rata, out of transfers of deferred marital property to third parties, except for two types of transfers. These exceptions are (a) termination, within two years of death, of a right or interest in, or power of appointment over, property that would have been included in the augmented deferred marital property estate if the right, interest, or power had not terminated until the decedent's death (§861.03(4)(b)(1)); and (b) transfers in excess of $10,000 per year to a single donee, within two years of death (§ 861.03(4)(b)(3)). If a balance still remains, it is satisfied out of the latter two groups of transfers. § 861.06(5) provides for equitable adjustment of these shares under limited circumstances, if a pro rata share is uncollectible. The equitable adjustment provision is not in the UPC.

---

42. Social security transfers were previously excluded from the augmented deferred marital property estate; the exclusion here is different because it goes to the satisfaction of the elective share amount, which can be with property of *any* type.

§ 861.07. Provides that the original recipient of the decedent's deferred marital property transfers to others is always liable for his or her share as determined under § 861.06, irrespective of whether the recipient has the property or its proceeds. If an original recipient gratuitously transfers the property to another person, the subsequent donee also is personally liable for the share if the donee still has the property or its proceeds, or if the donee knew or should have known of the liability. The recipients have the option of satisfying the liability by giving up either the property or its value; however, the surviving spouse may appeal on the basis of a hardship that the chosen method of satisfaction may cause. These provisions are an extension of those in UPC § 2-210, and similar to those created at new § 854.25(2).

§ 861.07(4), based on UPC § 2-210(b), offsets the effects of federal preemption of the satisfaction rules of this statute. See the comment to § 854.26. If the attempt to overcome federal preemption is unsuccessful, the shares of other recipients may, under limited circumstances, be adjusted under § 861.06(5).

§ 861.08. Creates procedures for the election. Interested parties must be notified of the election. In addition, the statute of limitations for filing the election is six months from the decedent's death, unless the surviving spouse can show cause for an extension and, except in unusual circumstances, the petition for an extension is filed within the statute of limitations period. The statute provides for a hearing, but the committee assumes that a hearing can be waived if all interested parties consent. Based in part on UPC § 2-211.

§ 861.09. The surviving spouse must be living for the election to be filed, although it may be filed by a guardian, a conservator, or an agent under a power of attorney. Current § 861.11(2) limits a guardian's ability to elect to situations where "additional assets are needed to the reasonable support of the surviving spouse. . ." and requires court approval for election by a guardian ad litem. These restrictions were deemed inappropriate given that (1) the election is similar to other rights that may be exercised by a guardian and (2) recent developments in the law relating to eligibility for Federal

Medical Assistance (Title 19) benefits may require that the election be made.

§ 861.10. The surviving spouse's right to elect may be waived in a marital property agreement enforceable under § 766.58, or by the spouse after the decedent's death. Failure to elect is not a transfer of property and is not a gift by the surviving spouse. The latter rule is based on current § 861.02(1) and is believed sufficient to prevent the surviving spouse from being liable for gift tax. It is less clear whether it is sufficient to keep the surviving spouse from being deemed to have divested the assets for Title 19 purposes.

§ 861.11. Protects "innocent third parties" who may act in good faith if they have no notice that the surviving spouse or his or her representative has filed or intends to file a petition for the deferred marital property elective share. If a stakeholder does not have written notice of an actual or intended filing of the deferred marital property election, it can rely on the "governing instrument" and pay to named beneficiary and take other actions in good faith without incurring any liability. § 861.11(1)(a). However, if proper notice has been served, then this exemption from liability is removed for stakeholders other than banks. At that point, the stakeholder may either continue to hold the property pending instructions from the court, or discharge its obligation by turning the property over to the relevant probate court. § 861.11(3). Banks have the same options, but alternatively may distribute the property to the named beneficiary without liability. § 861.11(5)(c). The exemption for banks was added in a floor amendment, in order to be consistent with preexisting protections under §§ 701.19[11] and 710.05, and chapters 112 and 705 of the statutes. In listing these specific statutory references, there is no intent to limit preexisting protections that banks might also have under other sections of the statutes. See Assembly Amendment 4, to Assembly Substitute Amendment 1, to 1997 Assembly Bill 645 and § 861.11(5)(b).

§ 861.21. Creates a new provision, replacing § 852.09 (spouse's right to assignment of homestead in intestacy) and § 861.41(4) (limited right of spouse to $10,000 interest in homestead in hardship

situations). The new statute, which is modeled on current § 852.09, provides that, upon petition, the home shall be assigned to the surviving spouse if (a) there is a *marital property interest* in the home, and a—probate or nonprobate—governing instrument does not specifically transfer the home to someone else; or (b) if the *intestate estate* includes an interest in the home, no matter what its classification. Under § 861.21(2) the *entire* interest not specifically transferred—not just the marital property interest—is available for assignment to the surviving spouse; under § 861.21(3), the entire intestate interest is available for assignment. The two provisions are intended to be cumulative, rather than alternative.

This statute does not grant the surviving spouse more property than that provided under the governing instrument or intestacy; the surviving spouse must pay for the interest, using any combination of property due from the decedent or funds acquired elsewhere, such as by mortgage. The surviving spouse has one year from the date of death to arrange payment, unless the court extends the period. Note that, following current § 852.09(2), "home" is very broadly defined and is not necessarily the homestead occupied by the spouses at the decedent's death.

§ 861.31. Amends class of eligible recipients of allowance to family during administration to include adult children of the decedent who were being supported by the decedent. Suggested by UPC § 2-404.

§ 861.33. Amends provisions for selection of personalty to include children as persons who may select, if there is no surviving spouse. Suggested by UPC § 2-403. In addition, § 861.33(1)(a)(4) is amended to increase the amount of "other tangible personalty" that can be selected from $1,000 to $3,000, and § 861.33(2) is amended to create a $5,000 (rather than the current $3,000) threshold where the court may limit the selection right on petition of a creditor. The amounts in the current statute date back at least to 1969.

§ 861.35. Amends class of eligible recipients of special allowance for spouse and children (which continues after administration of the estate) to include adult children of the decedent

who were being supported by the decedent. Suggested by UPC § 2-404.

§ 861.35(3)-(4). Edited to increase clarity. Amends list of factors that the court must consider in awarding a special allowance to include the provisions of a marital property agreement that creates a hardship for the surviving spouse. This rule is more restrictive than that for waiver of maintenance under § 767.26; the "hardship" language is drawn from the statute on division of property at divorce, § 767.255(2)(b), and is intended to have the same meaning as under that statute. However, the hardship provision under new § 861.35(3)(e) is distinct from the "public assistance" rule in current § 766.58(9)(b).

§ 861.41(3). Repeals provision requiring that assignment of property under § 861.41(1) be applied against the right of the surviving spouse to take under the will, under intestacy, or under the deferred marital property election. Given that the purpose of § 861.41 is to provide additional property to the surviving spouse in a hardship situation, the current provision seems inappropriate.

§ 861.41(4). Repeals largely inapplicable homestead protection for spouses. Under § 861.41(1) and (2), which are retained, the court may set aside property worth up to $10,000, exempt from the claims of creditors, if it determines that an assignment ahead of creditors is "reasonably necessary for the support of the spouse." Under current § 861.41(4), the court may include as part of the property assigned to the spouse "either a fee or life interest in the home." If the value of the interest in the home would exceed the amount set by the court under sub. (1), then the spouse is required to pay "the excess of the value of the interest over the amount set by the court." This results in a "Catch 22" situation: if the spouse can afford to pay for the home, then most likely the spouse will not be able to show that assignment of $10,000 ahead of creditors was necessary for his or her support. This homestead provision is replaced by a broader provision in new § 861.21.

§ 861.43. Provides that any of the allowances or selections provided in subchapter III of chapter 861 may be applied for by a conservator, a guardian, or an agent under a power of attorney (POA). Court approval is not necessary, and a POA need not specifically provide the power. The current statute is silent on these issues; the committee concluded that the rule developed for the deferred marital property election (new § 861.09) should apply to Subchapter III as well.

§ 863.11. Repeals current § 863.11 which deals with abatement in probate estates. Creates cross-reference to new § 854.18, which creates a similar rule applicable to all governing instruments transferring property at death.

§ 863.13. Repeals current § 863.13 which deals with nonexoneration of encumbered property specifically devised at death. Creates cross-reference to new § 854.05, which creates a similar rule applicable to all governing instruments transferring property at death.

§ 863.37(1). Amends section to eliminate redundancy, given that the current definition of "property" under § 851.27 includes "any interest" in property.

§ 880.695. Amends provision regarding disclaimer by guardian to cross-reference new disclaimer statute at § 854.13.

§ 895.43. Repeals provision dealing with situation where a would-be beneficiary of a contractual arrangement kills the decedent. Creates cross-reference to new consolidated slayer statute at § 854.14.

§ 895.435. Repeals provision dealing with situation where someone who would receive a benefit payable by reason of the death of another person kills that person. Creates cross-reference to new consolidated slayer statute at § 854.14.

Effective Date:

The act applies to revocable governing instruments existing on the effective date of the statute and to all instruments executed on or

after that date.[43] The committee chose the effective date of January 1, 1999 in order to allow practitioners to become familiar with the new law.

To the extent that the new law applies to instruments executed before its effective date, an argument can be made that it is inappropriately retroactive. With respect to nonprobate transfers, this argument has been made successfully in at least one federal appellate case under the Contracts Clause of the U.S. Constitution, *Whirlpool Corp. v. Ritter*,[44] and one state Supreme Court case under the Contracts Clause of the Ohio Constitution.[45] Both these cases involved a life insurance policy that designated a former spouse as beneficiary and that was executed before the law was changed to provide for the revocation of such designations at divorce. Both courts found the retroactive application of the statute to be unconstitutional.

The Joint Editorial Board for the Uniform Probate Code has issued a statement rebutting the position of the court in *Ritter* on the grounds that: (1) such statutes affect the donative transfer component, rather than the contractual component, of life insurance; (2) the default rules contained in these statutes seek to implement, rather than defeat, the insured's expectations regarding the distribution of the policy proceeds; and (3) there is no United States Supreme Court authority for applying the Contracts Clause to default rules.[46] The committee concluded that the UPC position is valid and should prevail in the courts.

---

43. *See* 1997 Wisconsin Act 188 § 233.

44. 929 F.2d 1318 (8th Cir. 1991).

45. Aetna Life Insurance Co. v. Schilling, 67 Ohio St.3d 164, 616 N.E.2d 893 (1993).

46. 17 AMERICAN COLLEGE OF TRUST AND ESTATES COUNSEL NOTES 184 (1991); *see also* the general comment at Part 7 of UPC.

INDEX

A

B

C

D

E

F

G

H

I

J

L

M

N

O

P

R

S

T