the decedent, grandchildren do not take by representation).

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

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

Technically the property advanced is not part of the estate for purposes of administration. It is merely considered for purposes of computing the shares of the heirs as though it were part of the estate, to be deducted from the share of the heir to whom the advance was made. Hence 318.24 has been omitted. The treatment of the advance is implicit in the wording of the new sub. (1). [Bill 5-S]

852.13 History: 1969 c. 339; Stats. 1969 s. 852.13.

Legislative Council Note, 1969: This section replaces 237.01 (8) and makes no change in substance. A slight change in procedure is made, however. The 180-day period in the existing statute dates from "receiving notice of the death of the intestate"; since there is no official notice sent to the heirs, this introduces some uncertainty in the law. This section dates the 180-day period from the granting of letters. It also allows the court to extend the time for cause shown; this is limited to a reasonable time. The heir who renounces must not only file with the court but also serve a copy on the personal representative.

The last sentence is new. It is intended to deal with the problem raised in the recent case Estate of Wettig, 29 Wis. 2d 239, 138 N.W. 2d 206 (1965). [Bill 5-S]

CHAPTER 853.

WILLS.

Legislative Council Note, 1969: (1) No major changes in execution of wills are contemplated. However, oral (nuncupative) wills are no longer valid.

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

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

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

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

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

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

(8) The administrative features of deposit of a will during testator's lifetime are changed, with provision for discretionary microfilming of deposited wills and destruction of originals after 25 years. [Bill 5-S]

853.01 History: 1969 c. 339; Stats. 1969 s. 853.01.

Legislative Council Note, 1969: This section replaces 238.01 and 238.05 and lowers the minimum age for testamentary capacity to 18 years on a uniform basis. The existing age requirement is 21 with exceptions for a married woman of 18 or older and for any minor who is in the military and naval forces.

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

Eighteen states have already recognized these changed conditions and set the age of

18 as the minimum age requirement. This also is the age adopted in the Model Probate Code.

That the capacity to revoke a will is the same as the capacity to make a will is implicit in our existing statute and is the basis for the last sentence of 238.14 ("The power to make a will implies the power to revoke the same.") which was added in 1878 to eliminate any possible argument that a married minor woman could make a will but not revoke it. [Bill 5-S]

853.03 History: 1969 c. 339; Stats. 1969 s. 853.03.

Legislative Council Note, 1969: This section makes no change in the Wisconsin law relating to attested wills, with the possible addition of the requirement that the proxy signature of another person for the testator be in the presence of the witnesses or be acknowledge in their presence, and a very minor change in the signature of the witnesses, who no longer are required to subscribe but merely to sign. The section abolishes the use of oral wills as a permissible method of testamentary disposition.

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

Although normally, where the testator signs in his own handwriting, the signature need not be made or acknowledged in the presence of the witnesses, no Wisconsin case has held that a proxy signature may be made by another person for the testator outside the presence of the witnesses. Hence the requirement of sub. (1) (b) that such a signature be made or acknowledged in the presence of the witnesses may be the existing Wisconsin law. In any event, it seems like a reasonable safeguard for the proxy signature. Under this statute the person signing for the testator could be one of the two witnesses. The requirement of sub. (1) (b) is patterned after Penn. Stat. title 20, s. 180.2 (3). In most states such a separate requirement is unnecessary because every signature by the testator must be made or acknowledged in the presence of the witnesses.

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

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

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

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

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

by one witness, neither of which are valid in Wisconsin.

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

It should be noted that abolition of nuncupative wills would not affect the validity of gifts causa mortis, which allow transfers of personal property in expectation of death when the gift is completed by delivery. [Bill 5-S]

853.05 History: 1969 c. 339; Stats. 1969 s. 853.05.

Legislative Council Note, 1969: This section makes only minor changes in the Wisconsin law. It retains the existing choice of law provisions in general. It does, however, eliminate nuncupative wills; the existing exception for such wills was no doubt intended to preserve soldiers' and sailors' oral wills made outside the state. This exception has been dropped to accord with the recommendation that all nuncupative wills be treated as invalid.

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

Another possible choice of law would be testator's domicile at time of death, and some writers have advocated that it be an added choice. However, since a testator will rely at the time of execution on either the law of the place of execution or the law of his domicile at that time, there appears to be no need to add this fourth choice.

238.07 applies only to wills executed outside of Wisconsin. No such limitation is retained in this section. This is to permit a nonresident visiting in Wisconsin to execute a will in accordance with the law with which he is familiar. Normally this section will have its major incidence on wills executed in another state or country. [Bill 5-S]

853.07 History: 1969 c. 339; Stats. 1969 s. 853.07.

Legislative Council Note, 1969: Sub. (1) makes no change in existing Wisconsin law. It merely states the obvious rules regarding competency. Sub. (2) adopts the general principle of 238.08 and 238.09 but makes some change in details of application. The language of this section is patterned on the Model Probate Code s. 46 (s. 3 of the Model Execution of Wills Act). The normal result of sub. (2) is to invalidate any excess of gifts under the will to a witness over the amount which the witness would have taken by intestacy. The alternative would be to invalidate the excess over "what the witness would have received had the will been disallowed". The Committee considered and rejected this alternative largely on the grounds of administrative convenience. It would make a difference only in the case where testator's last will, witnessed by a beneficiary and heir, revoked a prior will in which the witnessing heir was given less than the intestate share. This section eliminates difficulties of computation which arise where the witness is a residuary beneficiary under the prior will, as well as the need of establishing the prior will in order to determine its validity and what the witness would have received under it. 238.09 is ambiguous on this problem.

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

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

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

Sub. (3) (b) is intended to take care of a special problem. It permits a person to act as witness where he would benefit under the antilapse statute or under an alternative gift by the will if another beneficiary predeceases the testator. The interest in such a case is so contingent that it ought not to disqualify. [Bill 5-S]

853.09 History: 1969 c. 339; Stats. 1969 s. 853.09.

Legislative Council Note, 1969: This section permits deposit of a will by the testator during his lifetime and continues existing law with only minor changes. Deposit will be with the register in probate rather than the county judge, since the function is administrative in nature. In order to facilitate record storage, the register may regulate size of the envelope and has discretionary power after 25 years to microfilm or otherwise reproduce the will and destroy the original. It is unlikely that any will on file for more than 25 years will ever be needed for probate. In counties where storage is not a problem, the register will undoubtedly retain original wills for a much longer period rather than go to the expense of microfilming. A slight change in the provision for withdrawal is reflected in the requirement for two witnesses rather than an oath subscribed by one where the testator has another person withdraw the will for him; the opportunity for fraud in such cases is minimized by the additional witness. [Bill 5-S]

853.11 History: 1969 c. 339; Stats. 1969 s. 853.11.

Legislative Council Note, 1969: A will can be revoked by a subsequent writing, by a physical act to the document itself, or by certain subsequent changes in circumstances from which revocation is implied. This section includes all of these methods and in addition deals with revival of a revoked will. This section makes minor changes in existing law and codifies other aspects; it is more comprehensive than 238.14.

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

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

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

Although witnesses might be required for the destruction of a will, the popular notion that a testator may revoke simply by destroying the will itself is too widespread to permit a change in the law. This section does not change existing law in this regard. That a will in the possession of the testator is missing at his death gives rise to a presumption of revocation, but this presumption is easily overcome by evidence that he referred to his will as still in force, that others who would benefit by loss of the will had access, or the like. In re Steinke's Will, 95 Wis. 121, 70 N.W. 61 (1897); Gavitt v. Moulton, 119 Wis. 35, 96 N.W. 395 (1903); Wendt v. Ziegenhagen, 148 Wis. 382, 134 N.W. 905 (1912); Will of Donigian, 265 Wis. 147, 60 N.W. 2d 732 (1953).

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

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

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

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

Sub. (2) changes the Wisconsin rule to provide that marriage alone operates to revoke a will. It is designed primarily to deal with

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

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

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

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

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

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

Sub. (6) changes existing Wisconsin law regarding revival of a revoked will, codicil or part thereof. Under existing law if a testator executes will No. 1, subsequently executes will No. 2 which expressly revokes will No. 1, and later destroys will No. 2 with the intent that will No. 1 be effective, the probate court is not permitted to probate will No. 1, however clear the evidence may be that testator wanted his first will as the effective document. Noon's Will, 115 Wis. 299, 91 N.W. 670 (1902); Estate of Laege, 180 Wis. 32, 192 N.W. 373 (1923); Estate of Eberhardt, 1 Wis. 2d 439, 85 N.W. 2d 483 (1957). Nevertheless the court can admit proof of testator's intent for the purpose of determining whether revocation of will No. 2 was dependent or conditional upon revival of the first will; in a proper case the court can then allow probate of the second will on the basis of the doctrine of dependent relative revocation. Estate of Callahan, 251 Wis. 247, 29 N.W. 2d 352 (1947); Estate of Alburn, 18 Wis. 2d 340, 118 N.W. 2d 919 (1962). Since the principle reason for denying revival of the first will is to avoid the dangers of oral proof of intent, and the very same evidence is now admitted to determine whether the second will (the one document testator intends to revoke and has often destroyed) should be allowed for probate, it seems logical to allow proof of the testator's intent to revive the first document.

Sub. (6) allows revival under certain restricted conditions. The party urging revival must usually prove the intent to revive by "clear and convincing" evidence. Only in one narrow situation is revival presumed, and that is where the second document was a codicil which did not expressly revoke the first will but revoked a part only by inconsistency; in such a case revival will be allowed unless there is sufficient proof that the testator intended not to revive the affected part of the prior will. This statute also makes proof of the testator's statements at or after the act of revocation admissible; this would not, it should be noted, affect other rules of evidence dealing with competency of particular witnesses, which may bar a particular witness from testifying to such statements. Finally the will or codicil which allegedly has been revived must be produced in the original and not proved by a copy. If the testator destroys his second will or a codicil with the intent that the first will be revived, revival would be allowed only where his first will was intact in its original form. [Bill 5-S]

853.13 History: 1969 c. 339, 393; Stats. 1969 s. 853.13.

Legislative Council Note, 1969: This section is intended to clarify the nature of 238.19 and also to remove any inference that joint wills are made pursuant to a contract not to revoke such wills. In the latter respect this changes existing law as expressed in the exception in 238.19 and the cases stemming from Doyle v. Fischer, 183 Wis. 599, 198 N.W. 763 (1924) (joint will construed as strong evidence of underlying contract). In the recent case Estate of Hoeppner, 32 Wis. 2d 339, 145 N.W. 2d 754

(1966) the Supreme Court felt bound to follow the precedent, but Justice Gordon (concurring) urged corrective legislation.

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

The existing judicial rule, indirectly endorsed by the provisions of 238.19 which except joint wills, making it easier to infer a contractual arrangement where there is a joint will should be changed. In the first place, joint wills are sometimes used without any intent to make a binding promise not to revoke such wills; and in any event the existing rule tends to invite litigation in joint will cases. This section, requiring clear and convincing evidence "apart from the will", destroys any inference that joint wills are pursuant to contract, any more than any other wills. But persons are free to make a contract not to revoke joint wills, just as they can contract not to revoke mutual wills or ordinary wills. [Bill 5-S]

853.15 History: 1969 c. 339; Stats. 1969 s. 853.15.

Legislative Council Note, 1969: This section replaces 238.02 (2) and deals with the doctrine of equitable election laid down in Will of Schaech, 252 Wis. 299, 31 N.W. 2d 614 (1947). The problem commonly arises if a testator mistakenly attempts to dispose by will of assets which belong to a beneficiary by survivorship in joint tenancy or beneficiary designation on life insurance or government bonds. The doctrine allows a testator to make a testamentary gift to one beneficiary on condition that he give up the assets which he would otherwise have outside the will and which the testator wills to another beneficiary. Each case involves two issues: (1) when does the will require an election, and (2) what conduct on the part of the beneficiary constitutes an election on his part to take under the will and give up his other interests acquired outside the will.

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

Sub. (2) changes existing law on the 2nd issue. 238.02 (2) provides that "acceptance of a bequest or devise" does not constitute an election unless the will "so provides in express terms". Apparently this means that the beneficiary can take under the will and also retain rights outside the will unless the will expressly provides that acceptance of the bequest or devise is an election. Since the doctrine of election is primarily designed to relieve against mistake, this requirement in the existing statute seems to nullify the entire doctrine. See Estate of Riley, 6 Wis. 2d 29, 94 N.W. 2d 233 (1959). Where the will is clearly intended to call for a choice by the beneficiary as a condition to taking under the will, acceptance of the devise or bequest under the will is the clearest possible indication of choice. Sub. (2) provides a procedure whereby the election can be required and determined. Part of the existing law is retained in the provision that participation in administration of the estate is not an election. Thus a beneficiary could petition for probate of the will and be appointed executor of the will and still have a free choice when the court requires a written election to be filed. [Bill 5-S]

853.17 History: 1969 c. 339; 1969 c. 411 s. 13; 1969 c. 424; Stats. 1969 s. 853.17.

Legislative Council Note, 1969: This section is new and changes the Wisconsin law to achieve uniformity. If a life insurance policy is payable to a named beneficiary who survives the testator, in almost all states a provision in the insured's will changing the beneficiary is ineffective. Largely due to an early court misunderstanding regarding the nature of life insurance, Wisconsin permits a change of the life insurance beneficiary by a provision in the will in limited situations. Estate of Breitung, 78 Wis. 33, 46 N.W. 891, 47 N.W. 17 (1890). The rule does not apply if the insurance is payable to a married woman or if the insurance is mutual benefit and the society has a rule prohibiting change by will. Christman v. Christman, 163 Wis. 433, 157 N.W. 1009 (1916); Thomas v. Covert, 126 Wis. 593, 105 N.W. 922 (1906). Most insurance

companies provide an exclusive method by which the insured can change the beneficiary with specified formalities.

In the interests of bringing Wisconsin into line with the majority of states and of eliminating now obsolete distinctions, this section changes the Wisconsin rule. It has no application if at the death of the testator there is no surviving beneficiary properly designated in accordance with the insurance contract or the company's bylaws; in that case the proceeds become payable to the personal representative and a provision in the will naming a beneficiary becomes an effective testamentary disposition of the proceeds. [Bill 5-S]

853.18 History: 1969 c. 82; 1969 c. 392 s. 66; Stats. 1969 s. 853.18.

853.19 History: 1969 c. 339; Stats. 1969 s. 853.19.

Legislative Council Note, 1969: This section is new. There is no statute dealing with the effectiveness of inter vivos gifts to a beneficiary under the will if the testator intends those gifts to be deducted from the bequest or legacy in the will. At common law, which would prevail, the court would deal with the problem as one of "ademption by satisfaction" and would allow proof, including testimony as to oral statements, to establish whether the gift is to be deducted or to be in addition to the will provision. The court is aided by "presumptions"; thus, if the gift is to a child or a member of the family, it is presumed to be in satisfaction of the will; if it is to a stranger, the presumption is that it is in addition to the will. Such presumptions are illogical today. Moreover, Wisconsin court rules are inconsistent with the existing statutory rule on advancements in the intestate estate (where written proof is required). To bring the testate situation into line with the intestate, this section parallels 852.11.

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

Because of tax advantages many wealthy testators engage in lifetime gift programs to deplete their probate estates. While this may require periodic review of their wills, these gifts are usually not regarded as advances. This statute carries out that intent. [Bill 5-S]

853.21 History: 1969 c. 339; Stats. 1969 s. 853.21.

Legislative Council Note, 1969: This section is new and parallels the provisions for renunciation of an intestate share in 852.13. It makes three changes in existing Wisconsin law: (1) it provides a procedure for renunciation, which is left to the discretion of the county court with no statutory guidance under existing law; (2) it modifies the common law rule on partial renunciation, which grew out of a now obsolete background and unnecessarily restricts partial renunciation; and (3) it changes the rule on effect of renunciation in 238.135.

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

The most significant change is in the effect of renunciation. Normally the rule in 238.135 is sound and would prevail under this section as a matter of regular rules of construction. However, if the testator has provided a substitutionary gift or if the antilapse statute is applicable this provision would achieve a different result. Thus if testator left a gift to his son, the son could renounce so that the property would pass to his children. This accords with the rule adopted for renunciation of an intestate share. It may handicap postmortem estate planning in a few situations, as where the son in our prior illustration wished to renounce so that the gift would be added to a residuary gift for charity. If the testator wishes to anticipate renunciation, he can under this section provide for its effect by the terms of his will. [Bill 5-S]

853.23 History: 1969 c. 339, 424; Stats. 1969 s. 853.23.

Legislative Council Note, 1969: This section is new. It is necessary because of settled property notions that a power of appointment is not technically an interest in property; nor is property appointed by a testator under a power considered as property passing under the testator's will within the meaning of the preceding section.

If a will purports to create a power of appointment in X, sub. (1) permits him to renounce the power. There are some limitations inherent in this rule. A power in X to appoint the property among charity is not a power of appointment as defined in 232.01 (1) because it is exercisable in a fiduciary capacity; hence it is not releasable nor can it be renounced under this section.

Sub. (2) permits renunciation of an appointment. Thus if X has a power of appointment by will, and his will appoints in favor of Y, Y can renounce by complying with the procedure of the preceding section. The consequences of such renunciation are set forth in the statute, and depend on the nature of the power itself and the presence or absence of an alternate appointment. [Bill 5-S]

853.25 History: 1969 c. 339; Stats. 1969 s. 853.25.

Legislative Council Note, 1969: This section builds on the principles embodied in 238.10 and 238.11, the so-called "pretermitted heir" statutes. It eliminates ambiguity existing in such statutes by providing for special cases which now have to be left to court interpretation. It also makes minor changes in existing law, notably in eliminating a share for the afterborn child where it is obvious that the testator would not have made any such provision had he thought about the problem and also in preventing inequality between existing children and the omitted child by changing the fixed nature of the share of the latter.

Sub. (1) provides for the afterborn child. The share provided by this subsection is subject to adjustment under sub. (5). No share

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

Sub. (2) deals with the rare problem of living descendants omitted by mistake. In order to bolster wills against false claims of mistake, the subsection places a heavy burden of proof on the child or issue of a deceased child who attempts to claim under the statute. By its very nature, mistake must be established by extrinsic evidence. The last sentence makes it clear that it is unnecessary to mention a child or issue in the will in order to preclude a claim of mistake; sometimes it is embarrassing to expressly disinherit a child.

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

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

Sub. (5) is new. It vests limited discretion in the county court. It is based on the sound premise that any statute providing for an omitted heir necessarily requires a rewriting of the testator's will. Rather than to provide a fixed share in all cases, as the existing statute does, even when it is obvious that the testator would have wanted a different provision for the omitted heir, this subsection permits the court to approximate the testator's intent had he foreseen this contingency. Examples of the situations to which this subsection would apply are: a will establishing a sprinkling trust for testator's existing children and omitting any reference to afterborn children because testator anticipated no additional children at his age but later adopted one (the court properly would modify the trust to include the afterborn child rather than assigning a fixed share); a will establishing a trust of the entire estate to pay income to the widow for life, with principal to go at her death to his named children, and again a child is born or adopted later (since outright assignment of a share would unduly disrupt the testator's scheme, the omitted child should be assigned a remainder interest under the trust similar to that for the other children). [Bill 5-S]

853.27 History: 1969 c. 339; Stats. 1969 s. 853.27.

Legislative Council Note, 1969: This section provides against "lapse" where the beneficiary under a will predeceases the testator. It is designed to carry out the normal intent of a testator who provides in his will for a child or other relative, and the child dies before the testator and leaves issue who survive the testator. Thus, if testator leaves a bequest for a son, it is assumed that had the testator thought about the possibility of the son dying before him, the testator would want the son's children to take his place under the will.

The section governs only if there is no expression of contrary intent in the will. Normally this will take the form of a gift over in event of the death of the named beneficiary. However, it may simply be in the form of a condition that the beneficiary take "if he survives me". 238.13 reads: "unless a different disposition shall be made or directed by the will". However, even though no different disposition is made, a gift expressly conditional on survival does not take effect under an antilapse statute. While similar language has been thus interpreted in other states, the proposed language ("Unless a contrary intent is indicated by the will") is clearer. Cf. Estate of Stewart, 270 Wis. 610, 72 N.W. 2d 334 (1955).

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

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

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

The Committee considered the desirability of codifying the law regarding disposition of a lapsed gift not saved by the statute, patterned on Model Probate Code s. 57 (a). However, it was decided not to include any provision on this subject. The interrelation of clauses in a modern will is often complex, so that effect of failure of one clause or gift upon the whole is better left to the courts to work out in light of the whole testamentary scheme in the individual case. Since it is clear under modern law (and 853.29) that a will can pass after acquired real estate, there is no need for a special provision that a lapsed devise passes under the residue in a proper case, rather than under the intestate law. [Bill 5-S]

853.29 History: 1969 c. 339; Stats. 1969 s. 853.29.

Legislative Council Note, 1969: This section builds on 238.03 but modernizes the statutory language so that a will is presumed to pass all after-acquired property, whether real or personal. This is the existing rule as to personalty, but changes the form of the rule as to realty.

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

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

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

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

property; it may affect the approach to other construction problems.

238.03 is the most limited of the three types of statutes. Although in its day it was intended as a "liberalizing" statute, it is now obsolete and restrictive. It has proved workable only because our Supreme Court has gone to considerable lengths to avoid literal application of the statute. The most recent case is Estate of Zink, 15 Wis. 2d 527, 113 N.W. 2d 420 (1961) (holding that a residuary clause expresses the necessary intent to dispose of the testator's entire property, including after-acquired realty). See also Will of Smith, 176 Wis. 494, 186 N.W. 180 (1922); Estate of Buser, 8 Wis. 2d 40, 98 N.W. 2d 425 (1950). Nevertheless, the existing statutory language ought to be changed, not only to reflect the liberal judicial interpretation but also to prevent hardship in some cases beyond the scope of such interpretation.

This section adopts an intermediate approach. As to inclusion of after-acquired property it essentially adopts a time-of-death construction. However, the Committee did not feel it necessary to propose a broad statute favoring the time-of-death construction in all other types of situations. In situations not covered by the statute the court is thus free to explore the intent of the testator in the individual case, under normal rules of construction, and to adopt whatever presumption the court feels more desirable for the particular kind of problem, although the principle that "a will speaks as of the testator's death" will usually prevail. This section follows the policy of uniform treatment for real and personal property and accords with the oft-repeated rule that a testator intends to dispose of all his property (the presumption against intestacy). [Bill 5-S]

853.31 History: 1969 c. 339; Stats. 1969 s. 853.31.

Legislative Council Note, 1969: This section makes no substantial change in the existing law.

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

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

This section includes personal as well as real property, although there never has been any doubt but that this is the rule as to personalty. [Bill 5-S]

853.33 History: 1969 c. 339; Stats. 1969 s. 853.33.

Legislative Council Note, 1969: This section is new. If a testator disposes by gift in his will of a stated number of shares of securities, such as "100 shares of XYZ common stock" or "$5,000 of government bonds" and at the time of execution of the will he owns that number of shares or that amount of bonds, he presumably is thinking of the specific stock or bonds he then owns. However, under existing rules of construction the court will construe the gift as a general gift. If the testator sells the stock or cashes the bonds after his will is drawn, the personal representative is under a duty to purchase stock or bonds to satisfy the bequest. Conversely, if the stock is augmented by a stock dividend prior to testator's death, the named beneficiary receives only 100 shares of stock and not the dividend. This section changes the rule and requires the court to construe the gift as specific, i.e., referring to the property owned by the testator at the time the will is executed. Hence the beneficiary would under the next section (853.35) get the benefit of the stock dividend. [Bill 5-S]

853.35 History: 1969 c. 339; Stats. 1969 s. 853.35.

Legislative Council Note, 1969: This section is new and changes the law. At common law, if real or personal property were specifically given by will to a named person, and the property were destroyed or sold between the time of execution of the will and the testator's death, the devise or bequest failed; the reason was that there was no property in the estate to satisfy the specific gift. This doctrine, known as ademption by extinction, worked without regard to the testator's intent. It was ameliorated to some extent by various judicial approaches. Thus if testator devised "my residence" to his wife, and sold the residence he owned at the time the will was drafted and subsequently purchased another residence, the court would apply the time-of-death construction; by relating the phrase "my residence" to the residence testator owned at death, ademption was avoided. But if testator sold one residence and died pending negotiations to purchase another residence, the wife was out of luck. If the testator sold on a land contract, our Supreme Court has held that the devisee is entitled to the unpaid balance on the land contract. Estate of Atkinson, 19 Wis. 2d 272, 120 N.W. 2d 109 (1963). Apparently the result would be different if the testator had sold and taken a mortgage back, however. The same kind of problem arises if the house burns down before the testator's death. Is the devisee entitled to the

fire insurance proceeds? In a somewhat analogous case our Supreme Court again prevented hardship by giving the insurance proceeds to the surviving joint tenant. Rock County Savings & Trust Co. v. London Assurance Co., 17 Wis. 2d 618, 117 N.W. 2d 676 (1962). The existing law not only involves uncertainty but requires costly litigation to reach a decision in each new case. This section is intended to settle the law.

The Committee decided that specific kinds of situations should be covered by the statute, rather than a broad statute abolishing the doctrine entirely. The resulting statute is only partly drawn from legislation in other states. The need for an antiademption statute was considered as great as the need for the antilapse statute which has been on the books for many years. The statute is intended to carry out the normal intent of the testator. [Bill 5-S]

CHAPTER 856.

Opening Estates.

Legislative Council Note, 1969: This chapter deals with procedure from the initial petition through the appointment and bonding of the personal representative. It replaces chs. 310 and 311. [Bill 5-S]

856.01 History: 1969 c. 339; Stats. 1969 s. 856.01.

Legislative Council Note, 1969: This is a restatement of present s. 311.01. [Bill 5-S]

856.03 History: 1969 c. 339; Stats. 1969 s. 856.03.

Legislative Council Note, 1969: This section is based upon present s. 310.01. [Bill 5-S]

856.05 History: 1969 c. 339; Stats. 1969 s. 856.05.

Legislative Council Note, 1969: Sub. (1) is a restatement of s. 310.02 (1) and (2).

Sub. (2) is new and places upon a person who has information concerning an unfiled will the duty to give this information to the court. It is intended to enable a person in this position to act without being considered an intermeddler.

Sub. (3) is a restatement of present s. 310.031.

Sub. (4) is a restatement of present s. 310.03. [Bill 5-S]

856.07 History: 1969 c. 339; Stats. 1969 s. 856.07.

Legislative Council Note, 1969: This section is based upon present ss. 311.01 and 311.02, however the section simplifies the classification of those who may petition for administration. [Bill 5-S]

856.09 History: 1969 c. 339; Stats. 1969 s. 856.09.

Legislative Council Note, 1969: This section is new and codifies present practice. [Bill 5-S]

856.11 History: 1969 c. 339; Stats. 1969 s. 856.11.

Legislative Council Note, 1969: This section is based upon present ss. 310.04 and 311.03. Present law is changed so that a copy of the will need not be sent to persons who receive only a specific or monetary bequest, but provides that they shall be informed of the nature and amount of the bequest. [Bill 5-S]

856.13 History: 1969 c. 339; Stats. 1969 s. 856.13.

Legislative Council Note, 1969: This section is based upon present s. 238.18. [Bill 5-S]

856.15 History: 1969 c. 339; Stats. 1969 s. 856.15.

Legislative Council Note, 1969: This section is a restatement of present s. 310.06. [Bill 5-S]

856.17 History: 1969 c. 339; Stats. 1969 s. 856.17.

Legislative Council Note, 1969: This section is a restatement of present s. 310.10. [Bill 5-S]

856.19 History: 1969 c. 339; Stats. 1969 s. 856.19.

Legislative Council Note, 1969: This section is based upon present s. 238.20, however, it has been modified to eliminate the need for one form in the administration of estates. [Bill 5-S]

856.21 History: 1969 c. 339; Stats. 1969 s. 856.21.

Legislative Council Note, 1969: This section is a restatement of ss. 310.12 and 311.02 and current practice. [Bill 5-S]

856.23 History: 1969 c. 339; Stats. 1969 s. 856.23.

Legislative Council Note, 1969: This section is based upon and is a consolidation of ss. 310.16, 310.17, 311.02 and 324.35. [Bill 5-S]

856.25 History: 1969 c. 339; Stats. 1969 s. 856.25.

Legislative Council Note, 1969: This section gives the court complete discretion to determine whether a bond will be required and the amount of the bond if one is required. [Bill 5-S]

856.27 History: 1969 c. 339; Stats. 1969 s. 856.27.

Legislative Council Note, 1969: This section is intended to expedite the administration of an estate when there is delay in the appointment of the personal representative. [Bill 5-S]

856.29 History: 1969 c. 339; Stats. 1969 s. 856.29.

Legislative Council Note, 1969: This section is new. As a testamentary trust is directly affected by proceedings in the administration of an estate (such as a will construction or accounting) the testamentary trustee is given standing to be heard in such matters. [Bill 5-S]

856.31 History: 1969 c. 339; Stats. 1969 s. 856.31.

Legislative Council Note, 1969: This section is based upon present s. 310.25. However, it requires the corporate fiduciary to notify those persons who have the right to name the