



Fourth Floor
1 South Pinckney Street
P.O. Box 927
Madison, WI 53701-0927

Phone • (608) 257-9521
Fax • (608) 283-1709

Elizabeth A. Heiner
Direct Dial Number • (608) 283-1702
lheiner@boardmanlawfirm.com

December 8, 2004

VIA MESSENGER

Cathlene Hanaman, Legislative Attorney
Legislative Reference Bureau
One East Main, Suite 200
Madison, WI 53703

Re: Probate Trailer Bill LRB-0135P2

Dear Cathlene:

I enclose the comments from the Real Property, Probate and Trust Section of the State Bar to the November 4, 2004 draft of the Probate Trailer Bill. These comments include the comments from Professor Howard Erlanger.

As noted in his comments, please make the same changes to 700.27 as Professor Erlanger requested on his insert for 854.13. However, please note that the term "governing instrument" in 854.13 becomes "inter vivos governing instrument" in 700.27. In addition, 854.13(8) and (9) have no counterpart in 700.27.

Although Professor Erlanger initially added the term "intrinsic" to the phrase "as construed from *intrinsic or extrinsic* evidence," we decided against the change. I tried to catch all these changes. If I missed a change, please make it for me.

In response to the Drafter's Note dated September 16, 2004, we would like language added to the analysis to indicate the legislative intent that the changes to the provisions that are not found in the initial applicability section are either remedial or procedural and are presumed to apply retroactively. In addition, we would request that similar language be added to the relating clause. I'm enclosing a note from Professor Erlanger that includes the Committee Note Re Effective Date of the Trailer Bill. I assume that this note has been added to the drafting file.

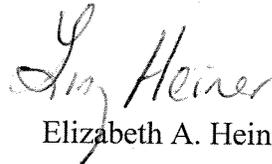
Cathlene Hanaman
December 8, 2004
Page 2

We plan to have this bill introduced in January, 2005. We hope to have all the enclosed changes included in the draft bill and one more chance to review the bill prior to December 20.

Again, we appreciate all of your work on this bill. Thank you.

Sincerely,

Boardman, Suhr, Curry & Field LLP
By



Elizabeth A. Heiner

EAH/jan
Enclosure
cc: Professor Howard Erlanger
Attorney Dave Reinecke

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LRB 0135/P2

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Were you able to check for similar provisions about disputed in Chs 700, 701, 705, 766 or 851-880? We would like to use the language of 766.62(4)(b) and (c) for all.

Thanks.

Suggested changes, per your memo of 9/16/04

relating to: miscellaneous modifications to the Wisconsin Probate Code. *[Somehow build in here that these are procedural or remedial modifications except as indicated in Section 216?]*

Analysis by the Legislative Reference Bureau

This bill primarily corrects technical errors and clarifies various provisions in 1997 Wisconsin Act 188, which modernized the Wisconsin Probate Code. This bill also continues the process of extending various interpretative rules from probate to nonprobate assets and of allowing extrinsic evidence to be used when interpreting the intent of the transferor, especially with respect to rules of construction. This bill also creates additional protections for a decedent spouse who is murdered by the surviving spouse. *[Somehow build in here that these are procedural or remedial modifications except as indicated in Section 216?]*

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

November 4, 2004

Returned to LRB = December 7, 2004

1 AN ACT *to repeal* 854.03 (3), 854.03 (4), 854.03 (7), 854.06 (1) (b), 854.13 (11)
2 (title), 854.14 (1), 854.21 (1) (a) 1., 2. and 3., 861.04 (2), 861.21 (3), 861.31 (1c),
3 861.33 (1) (c) and 861.35 (1c); *to renumber* 701.115 (1), 766.62 (4), 853.32 (1)
4 and 854.13 (2) (a); *to renumber and amend* 701.24, 701.26, 705.04 (2), 766.31
5 (3), 766.31 (6), 852.01 (1) (a) 2., 853.03 (2), 853.11 (2), 853.32 (2) (b), 854.01,
6 854.05 (5), 854.06 (4) (a), 854.08 (5), 854.13 (10), 854.13 (11) (a), 854.13 (11) (b),
7 854.15 (1) (e), 854.20 (1), 854.20 (2) (intro.), 854.20 (2) (a), 854.20 (2) (b), 854.20
8 (3), 854.20 (4), 854.21 (1) (a) (intro.), 857.03 (2) and 861.01 (3); *to amend* 30.541
9 (3) (d) 2. d., 40.02 (8) (a) 2., 71.05 (6) (a) 16., 71.05 (6) (b) 12., 71.05 (12) (d),
10 101.9211 (4) (b) 4., 342.17 (4) (b) 4., 700.11 (1), 701.115 (2), 701.115 (3), 701.20
11 (5) (d), 701.24 (title), 701.26 (title), 702.03 (1), 702.08, 705.06 (1) (c), 705.06 (2),
12 705.21 (12) (a), 705.27, 766.61 (7), 766.62 (2), 766.62 (5) (intro.), 767.266 (1) (b),
13 851.21 (1) (b), 851.31, 851.50, 852.01 (1) (b), 852.12, 853.11 (3), 853.11 (6) (c),
14 853.11 (6) (d), 853.18 (1), 853.32 (2) (a), 854.03 (2) (b), 854.03 (5) (d), 854.03 (6),
15 854.04 (1) (a), 854.04 (5) (intro.), 854.06 (4) (b), 854.07 (3), 854.08 (6) (a) 1.,

1 854.08 (6) (a) 2., 854.13 (title), 854.13 (2) (h), 854.13 (7) (a), 854.13 (8), 854.13
2 (9), 854.13 (12) (b), 854.14 (5) (a), 854.14 (5) (b), 854.14 (5) (c), 854.17, 854.18
3 (1) (a) (intro.), 854.18 (3), 854.20 (5), 854.21 (1) (b), 856.05 (5), 856.15 (1), 856.17,
4 subchapter II (title) of chapter 861 [precedes 861.018], 861.02 (title), 861.02 (4),
5 861.02 (6), 861.02 (7) (b), 861.05 (1) (c), 861.05 (2) (title), 861.06 (title), 861.06
6 (2) (title), 861.06 (2) (b) (intro.), 861.06 (2) (b) 4. a., 861.07 (2) (intro.), 861.10 (1),
7 861.10 (2), 861.11 (2) (a) (intro.), 861.11 (2) (b), 861.11 (5) (b), 861.17 (3), 861.21
8 (1) (a), 861.21 (2), 861.21 (4), 861.21 (5), 861.31 (1m), 861.31 (2), 861.31 (4)
9 (intro.), 861.31 (4) (a), 861.33 (title), 861.33 (1) (a) (intro.), 861.33 (1) (b), 861.33
10 (2), 861.33 (3), 861.33 (4), 861.35 (title), 861.35 (1m) (intro.), 861.35 (1m) (a),
11 861.35 (1m) (b), 861.35 (1m) (c), 861.35 (2), 861.35 (3) (a), 861.35 (4) (intro.),
12 861.35 (4) (a), 863.08, 863.15, 865.07 (1) (d), 867.03 (1g) (intro.), 867.03 (1g) (b)
13 and 867.035 (1) (a) 4.; **to repeal and recreate** 701.19 (10), 853.04 (3), 854.08
14 (5) (title), 856.16, 861.02 (8), 863.16 and 863.19; **to create** 40.18, 700.27,
15 701.115 (1) (a), 701.24 (2), 701.26 (1) (d), 701.26 (2), 705.04 (2) (a), 705.04 (2) (d),
16 705.04 (2) (e), 705.04 (2) (f), 705.21 (12) (am), 766.31 (1) (title), 766.31 (2) (title),
17 766.31 (3) (b), 766.31 (4) (title), 766.31 (5) (title), 766.31 (6) (title), 766.31 (6) (b),
18 766.31 (7) (title), 766.31 (7p) (title), 766.31 (8) (title), 766.31 (9) (title), 766.31
19 (10) (title), 766.62 (4) (b), 766.62 (4) (c), 851.055 (1m), 852.01 (1) (a) 2. b., 853.03
20 (2) (bm), 853.11 (2m), 853.32 (1) (bm), 853.32 (2) (am), 854.01 (1), 854.03 (5) (g),
21 854.03 (5) (h), 854.03 (5) (i), 854.03 (5) (j), 854.035, 854.06 (4) (am), 854.08 (5)
22 (a), 854.08 (5) (d), 854.115, 854.12, 854.13 (2) (a) 1., 854.13 (2) (gm), 854.13 (2)
23 (i), 854.13 (10) (b), 854.14 (3m), 854.20 (2) (am) 2. b. and c., 854.20 (2) (bm),
24 857.03 (2m), 861.01 (3m), 861.01 (4), 861.01 (5), 861.04 (2m), 861.05 (1) (e),
25 861.05 (2m), 861.06 (6), 880.61 (11m) and 880.675 (1m) of the statutes; and **to**

remedial

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affect 1997 Wisconsin Act 188, section 233 (1); **relating to:** miscellaneous modifications to the Wisconsin Probate Code.

except as noted in the following paragraph, this bill makes only remedial modifications to current law.

Analysis by the Legislative Reference Bureau

This bill primarily corrects technical errors and clarifies various provisions in 1997 Wisconsin Act 188, which modernized the Wisconsin Probate Code. This bill also continues the process of extending various interpretative rules from probate to nonprobate assets and of allowing extrinsic evidence to be used when interpreting the intent of the transferor, especially with respect to rules of construction. This bill also creates additional protections for a decedent spouse who is murdered by the surviving spouse.

INS ANALYSIS

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

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SECTION 1. 30.541 (3) (d) 2. d. of the statutes is amended to read:

30.541 (3) (d) 2. d. The limit in subd. 2. c. does not apply if the surviving spouse proceeds under s. 867.03 (1g) and the total value of the decedent's solely owned property subject to administration in the state, including boats transferred under this subdivision, does not exceed \$20,000 \$50,000.

SECTION 2. 40.02 (8) (a) 2. of the statutes is amended to read:

40.02 (8) (a) 2. In the absence of a written designation of beneficiary, or if all beneficiaries so designated die before filing with the department an application for any death benefit payable, the person determined in the following sequence: group 1, widow or widower; group 2, children if at least one child survives the participant, employee or annuitant, in which event the share of any deceased child shall be payable to the surviving spouse of the child or to the surviving children of the child if there is no spouse, or otherwise to the other eligible children in this group; group 3, grandchild; group 4, parent; group 5, brother and sister issue, as defined in s.

1 851.13, per stirpes, as described in s. 854.04 (1). No payment may be made to a person
2 included in any group 2 if there is a living person in any preceding group 1.

3 SECTION 3. 40.18 of the statutes is created to read:

4 **40.18 Applicability of other statutes. (1)** MARITAL PROPERTY RIGHTS.
5 Chapter 766 applies to ownership rights and remedies of a spouse in benefits
6 provided under this chapter.

7 **(2) TRANSFERS AT DEATH.** Chapter 854 applies to transfers at death under this
8 chapter.

9 **(3) DEFERRED MARITAL PROPERTY ELECTION.** Sections 861.018 to 861.10 apply to
10 the election rights of a surviving spouse in benefits provided under this chapter.

11 SECTION 4. 71.05 (6) (a) 16. of the statutes is amended to read:

12 71.05 **(6)** (a) 16. Any amount recognized as a loss under section 1001 (c) of the
13 ~~internal revenue code~~ Internal Revenue Code if a surviving spouse and a distributee
14 exchange their interests in marital property under s. ~~857.03 (2)~~ 766.31 (3) (b).

15 SECTION 5. 71.05 (6) (b) 12. of the statutes is amended to read:

16 71.05 **(6)** (b) 12. Any amount recognized as a gain under section 1001 (c) of the
17 ~~internal revenue code~~ Internal Revenue Code if a surviving spouse and a distributee
18 exchange their interests in marital property under s. ~~857.03 (2)~~ 766.31 (3) (b).

19 SECTION 6. 71.05 (12) (d) of the statutes is amended to read:

20 71.05 **(12)** (d) Property exchanged under s. ~~857.03 (2)~~ 766.31 (3) (b) shall be
21 treated as if acquired by gift for the determination of basis.

22 SECTION 7. 101.9211 (4) (b) 4. of the statutes is amended to read:

23 101.9211 **(4)** (b) 4. The limit in subd. 3. does not apply if the surviving spouse
24 is proceeding under s. 867.03 (1g) and the total value of the decedent's solely-owned

December 6, 2004
Amendment for 700.13

700.13 Remainders presumed not to shorten prior interest; acceleration of remainders. ...

(2) Unless the instrument of transfer manifests a contrary intent, either expressly or as construed from ~~intrinsic or extrinsic evidence~~, renunciation or release of an interest for life or years accelerates succeeding interests. Acceleration of a succeeding interest upon disclaimer of a preceding interest is governed by s. 700.27(8) and 854.13(10).

Committee Note

Allows extrinsic evidence to be used in the construction of intent of an instrument of transfer. Adds cross reference to acceleration triggered by disclaimer rather than by "renunciation or release."

1 property subject to administration in the state, including the manufactured homes
2 transferred under this paragraph, does not exceed ~~\$10,000~~ \$50,000.

3 **SECTION 8.** 342.17 (4) (b) 4. of the statutes is amended to read:

4 342.17 **(4)** (b) 4. The limit in subd. 3. does not apply if the surviving spouse is
5 proceeding under s. 867.03 (1g) and the total value of the decedent's ~~solely owned~~
6 property subject to administration in the state, including the vehicles transferred
7 under this paragraph, does not exceed ~~\$20,000~~ \$50,000.

8 **SECTION 9.** 700.11 (1) of the statutes is amended to read:

9 700.11 **(1)** If a statute, inter vivos governing instrument, as defined in s. 700.27
10 (1) (c), or governing instrument, as defined in s. 854.01 (2), specifies that property
11 is to be distributed to, or a future interest is to be created in, a designated individual's
12 "heirs", "heirs at law", "next of kin", "relatives" ~~or,~~ "family," or a term that has
13 a similar meaning, or if a class gift in favor of "descendants", "issue," or "heirs of the
14 body" does not specify the manner in which the property is to be distributed among
15 the class members, the property is distributed according to s. 854.22.

16 **SECTION 10.** 700.27 of the statutes is created to read:

17 **700.27 Disclaimer of transfers during life. (1) DEFINITIONS.** In this section:

18 (a) "Beneficiary under an inter vivos governing instrument" includes any
19 person who receives or might receive property under the terms or legal effect of an
20 inter vivos governing instrument.

21 (b) "Extrinsic evidence" has the meaning given in s. 854.01 (1).

22 (c) "Inter vivos governing instrument":

23 1. Means a gratuitous deed, inter vivos trust instrument, insurance policy,
24 contract, inter vivos instrument that creates or exercises a power of appointment, or

1 any other dispositive, appointive, or nominative instrument that transfers property
2 other than a governing instrument as defined in s. 854.01 (2).

3 2. Includes an inter vivos gift that is not subject to a written instrument.

4 (d) "Power" has the meaning given in s. 702.01 (4).

5 **(2) RIGHT TO DISCLAIM.** (a) *In general.* 1. In this paragraph, "person" includes
6 a person who is unborn or unascertained.

7 2. A person who is a recipient of property or beneficiary under an inter vivos
8 governing instrument, donee of a power created by an inter vivos governing
9 instrument, appointee under a power exercised by an inter vivos governing
10 instrument, taker in default under a power created by an inter vivos governing
11 instrument, or person succeeding to disclaimed property created by an inter vivos
12 governing instrument may disclaim any property, including contingent or future
13 interests or the right to receive discretionary distributions, by delivering a written
14 instrument of disclaimer under this section.

15 (b) *Partial disclaimer.* Property transferred under an inter vivos governing
16 instrument may be disclaimed in whole or in part, except that a partial disclaimer
17 of property passing by an inter vivos governing instrument or by the exercise of a
18 power may not be made if partial disclaimer is expressly prohibited by the inter vivos
19 governing instrument or by the instrument exercising the power.

20 (c) *Spendthrift provision.* The right to disclaim exists notwithstanding any
21 limitation on the interest of the disclaimant in the nature of a spendthrift provision
22 or similar restriction.

23 (d) *Disclaimer by a guardian or conservator.* A guardian of the estate or a
24 conservator appointed under ch. 880 may disclaim on behalf of his or her ward, with
25 court approval, if the ward is entitled to disclaim under this section.

1 (e) *Disclaimer by an agent under power of attorney.* An agent under a power
2 of attorney may disclaim on behalf of the person who granted the power of attorney
3 if all of the following apply:

4 1. The person who granted the power of attorney is entitled to disclaim under
5 this section.

6 2. The power of attorney specifically grants the power to disclaim.

7 (f) *Disclaimer by trustee.* The trustee of a trust named as a recipient of property
8 under an inter vivos governing instrument may disclaim that property on behalf of
9 the trust if the governing instrument authorizes disclaimer by the trustee. If the
10 governing instrument does not authorize disclaimer by the trustee, the trustee's
11 power to disclaim is subject to the approval of the court.

12 (g) *After death.* A person's right to disclaim survives the person's death and
13 may be exercised by the person's personal representative or special administrator
14 upon receiving approval from the court having jurisdiction of the person's estate after
15 hearing upon notice to all persons interested in the disclaimed property, if the
16 personal representative or special administrator has not taken any action that would
17 bar the right to disclaim.

18 (h) *Disclaimers of transfers at death.* A person who is a recipient of property
19 under a governing instrument, as defined in s. 854.01 (2), may disclaim such
20 property as provided in s. 854.13.

21 (3) INSTRUMENT OF DISCLAIMER. The instrument of disclaimer must meet the
22 provisions of subs. (4) and (5) and s. 854.13 (3) (a) to (c).

23 (4) TIME FOR EFFECTIVE DISCLAIMER. (a) *Present interest.* An instrument
24 disclaiming a present interest shall be executed and delivered not later than 9
25 months after the effective date of the transfer under the inter vivos governing

1 instrument. For cause shown, the period may be extended by a court of competent
2 jurisdiction, either within or after the 9-month period, for such additional time as
3 the court considers just.

4 (b) *Future interest.* An instrument disclaiming a future interest shall be
5 executed and delivered not later than 9 months after the event that determines that
6 the taker of the property is finally ascertained and his or her interest indefeasibly
7 fixed. For cause shown, the period may be extended by a court of competent
8 jurisdiction, either within or after the 9-month period, for such additional time as
9 the court considers just.

10 (c) *Future right to income or profits.* Notwithstanding pars. (a) and (b), an
11 instrument disclaiming the future right to receive mandatory distributions of
12 income or profits from any source may be executed and delivered at any time.

13 (d) *Persons under 21.* Notwithstanding pars. (a) and (b), a person under 21
14 years of age may disclaim at any time not later than 9 months after the date on which
15 the person attains 21 years of age.

16 (e) *Interests arising by disclaimer.* Notwithstanding pars. (a) and (b), a person
17 whose interest in property arises by disclaimer or by default of exercise of a power
18 created by an inter vivos governing instrument may disclaim at any time not later
19 than 9 months after the day on which the prior instrument of disclaimer is delivered,
20 or the date on which the donee's power lapses.

21 (5) DELIVERY AND FILING OF DISCLAIMER. (a) *Delivery.* In addition to any
22 requirements imposed by the inter vivos governing instrument, the instrument of
23 disclaimer is effective only if, within the time specified under sub. (4), it is delivered
24 to and received by any of the following:

- 25 1. The transferor of the property disclaimed.

Pg 9-10 Please make changes parallel to those for pages 36-38

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2. The transferor's legal representative.

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. Failure to deliver a copy of the instrument of disclaimer to the trustee within the time specified under sub. (4) does not affect the validity of any disclaimer.

(c) *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. ^{*Subject to (8)*} (a) Unless the inter vivos governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, the disclaimed property devolves as if the disclaimant had died before the effective date of the transfer under the inter vivos governing instrument. If the disclaimant is an appointee under a power exercised by an inter vivos 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 an inter vivos governing instrument, the disclaimed property devolves as if the disclaimant had predeceased the donee of the power.

(b) A disclaimer relates back for all purposes to the effective date of the transfer under the inter vivos governing instrument. If the disclaimant is an appointee under a power exercised under an inter vivos governing instrument, the disclaimer relates back to the effective date of the exercise of the power. If the disclaimant is a taker

1 in default under a power created by an inter vivos governing instrument, the
2 disclaimer relates back to the last possible date for exercise of the power. A
3 disclaimer of the future right to receive mandatory distributions of income or profits
4 relates to the period stated in the disclaimer.

5 **(8) DEVOLUTION OF DISCLAIMED FUTURE INTEREST.** (a) *Future interest held by a*
6 *person other than the disclaimant.* Unless the inter vivos governing instrument
7 provides otherwise, either expressly or as construed from extrinsic evidence, upon
8 the disclaimer of a preceding interest, a future interest held by a person other than
9 the disclaimant takes effect as if the disclaimant had died immediately before the
10 time of distribution or, if the disclaimant is an appointee under a power exercised by
11 a power of appointment, as if the disclaimant had died before the effective date of the
12 exercise of power.

13 (b) *Future interest held by the disclaimant.* A future interest held by the
14 disclaimant takes effect as described in par. (a) unless the court determines that
15 acceleration would contradict the donor's probable intent.

16 **(9) BAR.** Actions that bar disclaimer are as provided in s. 854.13 (11g).

17 **(10) EFFECT OF DISCLAIMER.** The effect of the disclaimer on the disclaimant and
18 any successors in interest is as provided in s. 854.13 (11m).

19 **(11) NONEXCLUSIVENESS OF REMEDY.** (a) This section does not affect the right of
20 a person to waive, release, disclaim, or renounce property under any other statute,
21 or the common law, or as provided in the inter vivos governing instrument.

22 (b) Any disclaimer that meets the requirements of section 2518 of the Internal
23 Revenue Code or of any other federal law relating to disclaimers constitutes an
24 effective disclaimer under this section or s. 854.13.

1 2. The power to make discretionary allocations of receipts or expenses as
2 between principal and income if the allocations are in his or her favor.

3 (b) If a power under par. (a) is conferred upon more than one person as trustee,
4 a person who is not disqualified to act under par. (a) may exercise the power for the
5 benefit of the person who is disqualified to act, unless the creating instrument
6 expressly provides otherwise. A special trustee appointed by a court may exercise
7 a power under par. (a) for the benefit of the disqualified person if no other trustee is
8 qualified to exercise the power.

9 (c) Paragraph (a) does not apply if any of the following applies:

10 1. The person is also the settlor of the trust, and the trust may be revoked or
11 amended by the settlor.

12 2. The terms of the creating instrument specifically limit the scope of the power
13 to expenditures and distributions of income or principal on the basis of an
14 ascertainable standard relating to the person's health, maintenance, support, or
15 education such that the person would not be subject to tax under section 2041 or 2514
16 of the Internal Revenue Code as a result of having or exercising the power.

17 3. The person is the spouse, widow, or widower of the settlor of the trust, and
18 a marital deduction has been allowed for federal gift or estate tax purposes with
19 respect to the trust property that is subject to the power.

20 4. The creating instrument negates the application of par. (a) with respect to
21 the power or indicates that provisions that are similar to par. (a) do not apply.

22 (d) Section 701.24 (2) governs the applicability of this statute.

23 **SECTION 16.** 701.20 (5) (d) of the statutes is amended to read:

24 701.20 (5) (d) A legatee, including a trustee, of a specific amount of money not
25 determined by a pecuniary formula shall not be paid any part of the income of the

1 estate but shall receive interest on any unpaid portion of the legacy for the period
2 commencing one year after decedent's death at the legal rate set forth in s. 138.04.
3 For purposes of this paragraph, the deferred marital property elective share amount
4 elected by a surviving spouse under s. 861.02 (1) is a bequest of a specific amount of
5 money not determined by a pecuniary formula.

6 SECTION 17. 701.24 (title) of the statutes is amended to read:

7 **701.24 (title) Applicability of ss. 701.01 to 701.23.**

8 SECTION 18. 701.24 of the statutes is renumbered 701.24 (1) and amended to
9 read:

10 701.24 (1) Except as otherwise provided in sub. (2) and s. 701.19 (9) (a) and (10),
11 ss. 701.01 to 701.23 are applicable to a trust existing on July 1, 1971, as well as a trust
12 created after such date, and shall govern trustees acting under such trusts. If
13 application of any provision of ss. 701.01 to 701.23 to a trust in existence on August
14 1, 1971, is unconstitutional, it shall not affect application of the provision to a trust
15 created after that date.

16 SECTION 19. 701.24 (2) of the statutes is created to read:

17 701.24 (2) Section 701.19 (10) is applicable to a trust existing on the effective
18 date of this subsection [revisor inserts date], as well as a trust created after that
19 date, and shall govern trustees acting under such trusts. If application of any
20 provision of s. 701.19 (10) to a trust in existence on the effective date of this
21 subsection [revisor inserts date], is unconstitutional, it shall not affect application
22 of the provision to a trust created after that date.

23 SECTION 20. 701.26 (title) of the statutes is amended to read:

24 **701.26 (title) Disclaimers of nonprobate transfers at death.**

1 **SECTION 21.** 701.26 of the statutes is renumbered 701.26 (1) and amended to
2 read:

3 701.26 (1) A person recipient may disclaim, under s. 854.13, any of the
4 following:

5 (a) ~~An~~ All or part of an interest in a joint tenancy, upon the death of another
6 joint tenant.

7 (b) ~~An~~ All or part of an interest in survivorship marital property, upon the death
8 of the other spouse.

9 (c) ~~An~~ All or part of an interest that is created by a nontestamentary instrument
10 and transferred at death, upon the death that causes the transfer.

11 **SECTION 22.** 701.26 (1) (d) of the statutes is created to read:

12 701.26 (1) (d) All or part of any other interest transferred under a governing
13 instrument, as defined in s. 854.01 (2).

14 **SECTION 23.** 701.26 (2) of the statutes is created to read:

15 701.26 (2) A recipient may disclaim, under s. 700.27, all or part of any interest
16 transferred under an inter vivos governing instrument, as defined in s. 700.27 (1) (c).

17 **SECTION 24.** 702.03 (1) of the statutes is amended to read:

18 702.03 (1) Unless the person who executed it had a contrary intention is found,
19 if a governing instrument, as defined in s. 854.01 (2), or an inter vivos governing
20 instrument, as defined in s. 700.27 (1) (c), creating a power of appointment expressly
21 requires that the power be exercised by any type of reference to the power or its
22 source, ~~it is presumed that~~ the donor's intention in requiring the reference was is
23 presumed to be to prevent an inadvertent exercise of the power. Extrinsic evidence
24 may be used to show contrary intent.

25 **SECTION 25.** 702.08 of the statutes is amended to read:

1 **702.08 Disclaimer of powers.** The donee of any power may disclaim all or
2 part of the power as provided under s. 700.27 or 854.13.

3 **SECTION 26.** 705.04 (2) of the statutes is renumbered 705.04 (2) (intro.) and
4 amended to read:

5 705.04 (2) (intro.) If the account is a P.O.D. account, on the death of the original
6 payee or the survivor of 2 or more original payees, ~~any sums remaining on deposit~~
7 ~~belong to the P.O.D. beneficiaries if surviving, or to the survivor of them if one or more~~
8 ~~die before the original payee. Payment may be made to a minor P.O.D. beneficiary,~~
9 ~~however, only in accordance with a procedure approved in ch. 880. all of the following~~
10 ~~apply:~~

11 (b) If there are 2 or more P.O.D. beneficiaries and they all survive, they shall
12 ~~be~~ are entitled to payment of the sums on deposit in accordance with such any written
13 instructions ~~as may have been that the owner~~ filed with the financial institution, ~~and~~
14 ~~or, if none the owner left no written instructions~~, to payment in equal shares. There

15 (c) If 2 or more persons succeed to ownership of the account, there is no further
16 ~~right of survivorship in the event of the death of one of 2 or more P.O.D. beneficiaries~~
17 ~~after their entitlement to payment has matured~~ unless the terms of the account
18 expressly provide for survivorship or for the account's continuance as a joint account.

19 **SECTION 27.** 705.04 (2) (a) of the statutes is created to read:

20 705.04 (2) (a) If there is one P.O.D. beneficiary and he or she survives, he or she
21 is entitled to payment of all sums remaining on deposit.

22 **SECTION 28.** 705.04 (2) (d) of the statutes is created to read:

23 705.04 (2) (d) Subject to the rights of financial institutions under s. 705.06 (1)
24 (c), if any P.O.D. beneficiary predeceases the original payee or the survivor of 2 or
25 more original payees, the amount to which the predeceased P.O.D. beneficiary would

1 have been entitled passes to any of his or her issue who would take under s. 854.06
2 (3).

3 **SECTION 29.** 705.04 (2) (e) of the statutes is created to read:

4 705.04 (2) (e) If no P.O.D. beneficiary or predeceased P.O.D. beneficiary's issue
5 who would take under s. 854.06 (3) survives the death of all owners, the account
6 belongs to the estate of the deceased sole owner or the estate of the last to die of
7 multiple owners.

8 **SECTION 30.** 705.04 (2) (f) of the statutes is created to read:

9 705.04 (2) (f) Payment may be made to a minor P.O.D. beneficiary only in
10 accordance with a procedure approved under ch. 880.

11 **SECTION 31.** 705.06 (1) (c) of the statutes is amended to read:

12 705.06 (1) (c) Any sums in a P.O.D. account may be paid, on request, to the
13 P.O.D. beneficiary upon presentation to the financial institution of proof of death
14 showing that the P.O.D. beneficiary survived all persons named as original payees
15 of the account. If more than one P.O.D. beneficiary is named and at least one of them
16 is predeceased, sums in the account may be paid to the surviving P.O.D. beneficiary
17 or beneficiaries upon presentation of proof of death of the other beneficiary, without
18 regard to claims by the issue of a predeceased beneficiary under s. 705.04 (2) (d). If
19 none of the named beneficiaries survive, the sums in the account may be paid to the
20 estate of the deceased sole owner or the estate of the owner who was the last to die
21 of multiple owners, without regard to claims by the issue of a predeceased beneficiary
22 under s. 705.04 (2) (d).

23 **SECTION 32.** 705.06 (2) of the statutes is amended to read:

24 705.06 (2) Payment made under this subchapter discharges the financial
25 institution from all claims for amounts so withdrawn. If the institution has reason

1 to believe that a dispute exists as to the rights of the parties to an account or their
2 successors it may, but shall not be required to, refuse to pay funds in the account to
3 any persons pending instructions from a court, or it may pay the proceeds to a court.

4 An institution may but need not recognize the authority of an agent, other than one
5 with continuing authority under s. 705.05 (3), until it knows of the fact of death or
6 adjudication of incompetence of all parties appointing such agent and has reasonable
7 opportunity to act.

8 (3) The protection provided by this section shall have no bearing on the rights
9 of parties or their successors in disputes concerning the beneficial ownership of funds
10 in or withdrawn from an account.

11 SECTION 33. 705.21 (12) (a) of the statutes is amended to read:

12 705.21 (12) (a) A reinvestment account associated with a security, a securities
13 account with a broker, a cash balance in a brokerage account, cash, cash equivalents,
14 interest, earnings, or dividends earned or declared on a security in an account, a
15 reinvestment account, or a brokerage account, whether or not credited to the account
16 before the owner's death.

17 SECTION 34. 705.21 (12) (am) of the statutes is created to read:

18 705.21 (12) (am) An investment agency, investment management, or custody
19 account with a trust company or a trust division of a bank with trust powers,
20 including the securities in the account, a cash balance in the account, and cash, cash
21 equivalents, interest, earnings, or dividends earned or declared on a security in the
22 account, whether or not credited to the account before the owner's death.

23 SECTION 35. 705.27 of the statutes is amended to read:

24 705.27 **Ownership on death of owner.** On death of a sole owner or the last
25 to die of multiple owners, ownership of securities registered in beneficiary form

1 passes to the beneficiary or beneficiaries who survive all owners and to any
2 predeceased beneficiary's issue who would take under s. 854.06 (3). On proof of death
3 of all owners and compliance with any applicable requirements of the registering
4 entity, a security registered in beneficiary form may be reregistered in the name of
5 ~~the beneficiary or beneficiaries who survive the death of all owners~~ successors to the
6 ownership interest. Until division of the security after the death of all owners,
7 ~~multiple beneficiaries surviving the death of all owners~~ successors to the ownership
8 interest hold their interests as tenants in common. If no beneficiary or predeceased
9 beneficiary's issue who would take under s. 854.06 (3) survives the death of all
10 owners, the security belongs to the estate of the deceased sole owner or the estate of
11 the last to die of multiple owners.

12 **SECTION 36.** 766.31 (1) (title) of the statutes is created to read:

13 766.31 (1) (title) GENERAL.

14 **SECTION 37.** 766.31 (2) (title) of the statutes is created to read:

15 766.31 (2) (title) PRESUMPTION.

16 **SECTION 38.** 766.31 (3) of the statutes is renumbered 766.31 (3) (intro.) and
17 amended to read:

18 766.31 (3) SPOUSE'S INTEREST IN MARITAL PROPERTY. (intro.) Each spouse has a
19 present undivided one-half interest in each item of marital property, but the subject
20 to all of the following:

21 (a) Terminable interest in deferred employment benefit plan. As provided in s.
22 766.62 (5), the marital property interest of the nonemployee spouse in a deferred
23 employment benefit plan or in assets in an individual retirement account that are
24 traceable to the rollover of a deferred employment benefit plan terminates at the
25 death of the nonemployee spouse if he or she predeceases the employee spouse.

1 SECTION 39. 766.31 (3) (b) of the statutes is created to read:

2 766.31 (3) (b) *Division based on aggregate value*
~~Nonproportional division of marital property~~ at death. 1.

3 Spouses may provide in a marital property agreement that at the death of a spouse
4 some or all of their marital property will be divided based on aggregate value rather
5 than divided item by item. However, at the death of a spouse, a marital property
6 agreement is not necessary for a division of marital property that is not item by item.

7 2. The surviving spouse and the successor in interest to the decedent's share
8 of marital property may enter into an agreement providing that some or all of the
9 marital property in which each has an interest will be divided based on aggregate
10 value rather than divided item by item.

11 SECTION 40. 766.31 (4) (title) of the statutes is created to read:

12 766.31 (4) (title) CLASSIFICATION OF INCOME.

Keep original.

13 SECTION 41. 766.31 (5) (title) of the statutes is created to read:

14 766.31 (5) (title) TRANSFER TO A TRUST.

15 SECTION 42. 766.31 (6) (title) of the statutes is created to read:

16 766.31 (6) (title) PROPERTY OWNED AT DETERMINATION DATE.

17 SECTION 43. 766.31 (6) of the statutes is renumbered 766.31 (6) (a) and
18 amended to read:

19 766.31 (6) (a) Date of marriage same as determination date. Property owned
20 at a If the date of marriage which occurs after 12:01 a.m. on January 1, 1986, is the
21 same as the determination date, the property owned at the determination date is
22 individual property of the owning spouse if, ~~at the marriage, both spouses are~~
23 domiciled in this state.

24 SECTION 44. 766.31 (6) (b) of the statutes is created to read:

1 766.31 (6) (b) *Date of marriage prior to determination date.* If the date of
2 marriage precedes the determination date, the property owned at the determination
3 date is not classified by this chapter but is subject to all of the following:

- 4 1. Subsections (8) and (9) govern property owned at the time of marriage.
- 5 2. Subsections (8) and (9) govern property acquired while the spouses were
6 married but before the determination date if the property would have been
7 individual property had it been acquired after the determination date.
- 8 3. Subsections (8) and (9) and s. 861.02 govern property acquired while the
9 spouses were married but before the determination date if the property would have
10 been marital property had it been acquired after the determination date.

11 **SECTION 45.** 766.31 (7) (title) of the statutes is created to read:

12 766.31 (7) (title) INDIVIDUAL PROPERTY AFTER DETERMINATION DATE.

13 **SECTION 46.** 766.31 (7p) (title) of the statutes is created to read:

14 766.31 (7p) (title) UNILATERAL STATEMENT.

15 **SECTION 47.** 766.31 (8) (title) of the statutes is created to read:

16 766.31 (8) (title) RIGHTS IN PROPERTY ACQUIRED BEFORE DETERMINATION DATE.

17 **SECTION 48.** 766.31 (9) (title) of the statutes is created to read:

18 766.31 (9) (title) TREATMENT OF PROPERTY ACQUIRED BEFORE THE DETERMINATION
19 DATE.

20 **SECTION 49.** 766.31 (10) (title) of the statutes is created to read:

21 766.31 (10) (title) RECLASSIFICATION.

22 **SECTION 50.** 766.61 (7) of the statutes is amended to read:

23 766.61 (7) If Except as provided in s. 854.14 (3m) (b) 2., if a noninsured spouse
24 predeceases an insured spouse, the marital property interest of the decedent spouse
25 in a policy which ~~that~~ that designates the surviving spouse as the owner and insured is

1 limited to a dollar amount equal to one-half of the marital property interest in the
2 interpolated terminal reserve and in the unused portion of the term premium of the
3 policy on the date of death of the deceased spouse. All other rights of the decedent
4 spouse in the ownership interest or proceeds of the policy, other than the marital
5 property interest described in this subsection, terminate at the decedent spouse's
6 death.

7 **SECTION 51.** 766.62 (2) of the statutes is amended to read:

8 766.62 (2) A deferred employment benefit attributable to employment of a
9 spouse occurring ~~while the spouse is married and~~ partly before and partly after the
10 determination date is mixed property. The marital property component of that mixed
11 property is the amount which results from multiplying the entire benefit by a
12 fraction, the numerator of which is the period of employment giving rise to the benefit
13 that occurred after the determination date and during marriage and the
14 denominator of which is the total period of employment giving rise to the benefit.

15 **SECTION 52.** 766.62 (4) of the statutes is renumbered 766.62 (4) (a).

16 **SECTION 53.** 766.62 (4) (b) of the statutes is created to read:

17 766.62 (4) (b) If a deferred employment benefit plan administrator has reason
18 to believe that a dispute exists as to the rights of parties, or their successors, to a
19 deferred employment benefit, the deferred employment benefit plan administrator
20 may do any of the following:

- 21 1. Deposit the payments with a court.
- 22 2. Refuse to make payments to any person pending instruction from a court.

23 **SECTION 54.** 766.62 (4) (c) of the statutes is created to read:

24 766.62 (4) (c) The protection afforded a deferred employment benefit plan
25 administrator under this subsection does not affect the rights of parties or their

1 successors in disputes concerning the beneficial ownership of deferred employment
2 benefits.

3 **SECTION 55.** 766.62 (5) (intro.) of the statutes is amended to read:

4 766.62 (5) (intro.) If Except as provided in s. 854.14 (3m) (c), if the nonemployee
5 spouse predeceases the employee spouse, the marital property interest of the
6 nonemployee spouse in all of the following terminates at the death of the
7 nonemployee spouse:

8 **SECTION 56.** 767.266 (1) (b) of the statutes is amended to read:

9 767.266 (1) (b) That one or both spouses will make a particular disposition in
10 a will or other governing instrument, as defined in s. 854.01 (2).

11 **SECTION 57.** 851.055 (1m) of the statutes is created to read:

12 851.055 (1m) Is not classified as individual property or marital property under
13 a valid marital property agreement, unless the marital property agreement provides
14 otherwise.

15 **SECTION 58.** 851.21 (1) (b) of the statutes is amended to read:

16 851.21 (1) (b) ~~A~~ Except as provided in s. 853.32 (2) (e), a beneficiary named in
17 any document offered for probate as the will of the decedent and includes a person
18 named or acting as a trustee of any trust, inter vivos or testamentary, named as a
19 beneficiary.

20 **SECTION 59.** 851.31 of the statutes is amended to read:

21 **851.31 Will.** “Will” Unless the context or subject matter indicates otherwise,
22 “will” includes a codicil and any document incorporated by reference in a
23 testamentary document under s. 853.32 (1) or (2). “Will” does not include a copy,
24 unless the copy has been proven as a will under s. 856.17, but “will” does include a
25 properly executed duplicate original.

1 **SECTION 60.** 851.50 of the statutes is amended to read:

2 **851.50 Status of adopted persons.** The status of adopted persons for
3 purposes of inheritance and transfers under wills or other governing instruments,
4 as defined in s. 854.01 (2), is governed by ss. 854.20 and 854.21.

5 **SECTION 61.** 852.01 (1) (a) 2. of the statutes is renumbered 852.01 (1) (a) 2.
6 (intro.) and amended to read:

7 852.01 (1) (a) 2. (intro.) If there are surviving issue one or more of whom are
8 not issue of the surviving spouse, one-half of decedent's property other than the
9 following property:

10 a. The decedent's interest in marital property.

11 **SECTION 62.** 852.01 (1) (a) 2. b. of the statutes is created to read:

12 852.01 (1) (a) 2. b. The decedent's interest in property held equally and
13 exclusively with the surviving spouse as tenants in common.

14 **SECTION 63.** 852.01 (1) (b) of the statutes is amended to read:

15 852.01 (1) (b) To the issue, per stirpes, the share of the estate not passing to the
16 spouse under par. (a), or the entire estate if there is no surviving spouse. ~~If there are~~
17 ~~issue other than children, those of more remote degrees take per stirpes.~~

18 **SECTION 64.** 852.12 of the statutes is amended to read:

19 **852.12 Debts to decedent.** If an heir owes a debt to the decedent, s. 854.12
20 governs the treatment of that debt shall be charged against the intestate share of the
21 debtor, regardless of whether the debt has been discharged in bankruptcy. If the
22 debtor fails to survive the decedent, the debt shall not be taken into account in
23 computing the intestate shares of the debtor's issue.

24 **SECTION 65.** 853.03 (2) of the statutes is renumbered 853.03 (2) (am) and
25 amended to read:

1 853.03 (2) (am) It must be signed by ~~2 or more witnesses, each of whom~~ at least
2 2 witnesses who signed within a reasonable time after ~~witnessing~~ any of the
3 following:

4 1. The signing of the will as provided under sub. (1), in the conscious presence
5 of the witness.

6 2. The testator's implicit or explicit acknowledgement of the testator's
7 signature on the will, ~~within~~ in the conscious presence of ~~each of the witnesses~~
8 witness.

9 3. The testator's implicit or explicit acknowledgement of the will, ~~within~~ in the
10 conscious presence of ~~each of the witnesses~~ witness.

11 **SECTION 66.** 853.03 (2) (bm) of the statutes is created to read:

12 853.03 (2) (bm) The 2 witnesses required under par. (am) may observe the
13 signing or acknowledgement under par. (am) 1. to 3. at different times.

14 **SECTION 67.** 853.04 (3) of the statutes is repealed and recreated to read:

15 853.04 (3) EFFECT OF AFFIDAVIT. The effect of an affidavit in substantially the
16 form under sub. (1) or (2) is as provided in s. 856.16.

17 **SECTION 68.** 853.11 (2) of the statutes is renumbered 853.12, and 853.12 (1),
18 (2) (intro.), (b) and (c), (3) (intro.) and (4) (intro.) and (b), as renumbered, are amended
19 to read:

20 853.12 (1) ENTITLEMENT OF SURVIVING SPOUSE. Subject to ~~par. (e)~~ sub. (3), if the
21 testator married the surviving spouse after the testator executed his or her will, the
22 surviving spouse is entitled to a share of the probate estate.

23 (2) VALUE OF SHARE. (intro.) The value of the share under ~~par. (a)~~ sub. (1) is the
24 value of the share that the surviving spouse would have received had the testator

1 died with an intestate estate equal to the value of the net estate of the decedent
2 testator less the value of all of the following: *Please see separate*
sheet for additional change.

3 (b) All devises to or for the benefit of the issue of a child described in ~~subd. 1.~~
4 par. (a).

5 (c) All devises that pass under s. 854.06, 854.07, 854.21, or 854.22 to or for the
6 benefit of children described in ~~subd. 1.~~ par. (a) or issue of those children.

7 **(3) EXCEPTIONS.** (intro.) ~~Paragraph (a)~~ Subsection (1) does not apply if any of
8 the following applies:

9 **(4) PRIORITY AND ABATEMENT.** (intro.) In satisfying the share provided by this
10 subsection section:

11 (b) Devises other than those described in ~~par. (b) 1. to 3.~~ sub. (2) (a) to (c) abate
12 as provided under s. 854.18.

13 **SECTION 69.** 853.11 (2m) of the statutes is created to read:

14 853.11 **(2m)** PREMARITAL WILL. Entitlements of a surviving spouse under a
15 decedent's will that was executed before marriage to the surviving spouse are
16 governed by s. 853.12.

17 **SECTION 70.** 853.11 (3) of the statutes is amended to read:

18 853.11 **(3)** ~~FORMER SPOUSE REVOCATION BY DIVORCE~~ *TRANSFER TO FORMER SPOUSE*
19 under a will to a former spouse is governed by s. 854.15. ~~The effect of a~~ A transfer

20 **SECTION 71.** 853.11 (6) (c) of the statutes is amended to read:

21 853.11 **(6)** (c) If a subsequent will that wholly or partly revoked a previous will
22 is itself revoked by another, later will, the previous will or its revoked part remains
23 revoked, unless it or its revoked part is revived. The previous will or its revoked part
24 is revived to the extent that it appears from the terms of the later will, or from the

December 6, 2004

CLARIFICATION RE SHARE OF OMITTED SPOUSE

Change to New 853.12:

(2) 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 testator, but the value of the net estate of the testator shall first be reduced by less the value of all of the following:

Explanation of Change:

There are two possible readings of the intro to (2) in the current statute. One would reduce the net estate by the value of the transfers to issue and then calculate the SS's hypothetical intestate share; the other would calculate the SS's hypothetical intestate share, and then subtract the transfers to issue. The difference in impact is substantial.

To see the difference in impact, consider a probate estate of 100k, all comprised of individual property, and a will that leaves half to the children and half to the decedent's brother. Under the first reading, the hypothetical intestate estate is $100 - 50 = 50k$; the omitted spouse would then take an intestate share in that amount, or 25k. Under the second reading, the hypothetical intestate estate is 100, the omitted spouse would take 50k, and then 50k [the children's share] would be subtracted, leaving zero.

The proposed change, while making the language more cumbersome, clearly indicates which "value" is to be reduced.

1 testator's contemporary or subsequent declarations, that the testator intended the
2 previous will or its revoked part to take effect.

3 **SECTION 72.** 853.11 (6) (d) of the statutes is amended to read:

4 853.11 (6) (d) In the absence of an original valid will, ~~establishment of the~~
5 execution and validity of the revived will or part ~~is governed by~~ may be established
6 as provided in s. 856.17.

7 **SECTION 73.** 853.18 (1) of the statutes is amended to read:

8 853.18 (1) Except as otherwise provided in s. 853.15 or 853.17 (1) or ch. 766,
9 no written designation in accordance with the terms of any insurance, annuity or
10 endowment contract, or in any agreement issued or entered into by an insurance
11 company in connection therewith, supplemental thereto or in settlement thereof,
12 and no written designation made under a contract, plan, system or trust providing
13 for pension, retirement, deferred compensation, stock bonus, profit-sharing or death
14 benefits, or an employment or commission contract, of any person to be a beneficiary,
15 payee or owner of any right, title or interest thereunder upon the death of another,
16 or any assignment of rights under any of the foregoing, is subject to or defeated or
17 impaired by any statute or rule of law governing the transfer of property by will, gift
18 or intestacy, even though that designation or assignment is revocable or the rights
19 of that beneficiary, payee, owner or assignee are otherwise subject to defeasance.

20 **SECTION 74.** 853.32 (1) of the statutes is renumbered 853.32 (1) (am).

21 **SECTION 75.** 853.32 (1) (bm) of the statutes is created to read:

22 853.32 (1) (bm) A writing or document is incorporated into a will under par.
23 (am) even if the writing or document is not executed in compliance with s. 853.03 or
24 853.05.

25 **SECTION 76.** 853.32 (2) (a) of the statutes is amended to read:

1 853.32 (2) (a) A reference in a will executed ~~on or after May 3, 1996,~~ to another
2 document that lists tangible personal property not otherwise specifically disposed of
3 in the will disposes of that property if the other document describes the property and
4 the distributees with reasonable certainty and is signed and dated by the decedent.
5 The court may enforce a document that is not dated but that fulfills all of the other
6 requirements under this paragraph.

7 **SECTION 77.** 853.32 (2) (am) of the statutes is created to read:

8 853.32 (2) (am) *Another document under par. (a) is valid if it*
~~The document~~ was signed in compliance with s. 853.03 (1) or
9 with the law of the place where the document was signed, or where the testator
10 resided, was domiciled, or was a national at the time the document was signed or at
11 the time of death, *even if it* ~~but~~ was not otherwise executed in compliance with s. 853.03 (2)
12 or 853.05.

13 **SECTION 78.** 853.32 (2) (b) of the statutes is renumbered 853.32 (2) (b) (intro.)
14 and amended to read:

15 853.32 (2) (b) (intro.) Another document under par. (a) is valid even if it any of
16 the following applies:

- 17 1. The document does not exist when the will is executed, ~~even if it.~~
- 18 2. The document is changed after the will is executed ~~and even if it.~~
- 19 3. The document has no significance except for its effect on the disposition of
20 property by the will.

21 **SECTION 79.** 854.01 of the statutes is renumbered 854.01 (intro.) and amended
22 to read:

23 **854.01 Definition Definitions.** (intro.) In this chapter, “governing:

24 (2) “Governing instrument” means a will; a deed; a trust instrument; an
25 insurance or annuity policy; a contract; a pension, profit-sharing, retirement, or

1 similar benefit plan; a marital property agreement under s. 766.58 (3) (f); a
2 beneficiary designation under s. 40.02 (8) (a); an instrument under ch. 705; an
3 instrument that creates or exercises a power of appointment; or any other
4 dispositive, appointive, or nominative instrument that transfers property at death.

5 **SECTION 80.** 854.01 (1) of the statutes is created to read:

6 854.01 (1) “Extrinsic evidence” means evidence that would be inadmissible
7 under the common law parole evidence rule or a similar doctrine because the
8 evidence is not contained in the governing instrument to which it relates.

9 **SECTION 81.** 854.03 (2) (b) of the statutes is amended to read:

10 854.03 (2) (b) Except as provided in sub. (5), if property is transferred under
11 a governing instrument that establishes 2 or more co-owners with right of
12 survivorship, and if ~~it is not established that~~ at least one of the co-owners ~~survived~~
13 did not survive the others by at least 120 hours, the property is transferred to the
14 co-owners in proportion to their ownership interests.

15 **SECTION 82.** ~~854.03 (3) of the statutes is repealed.~~

16 **SECTION 83.** ~~854.03 (4) of the statutes is repealed.~~

17 **SECTION 84.** 854.03 (5) (d) of the statutes is amended to read:

18 854.03 (5) (d) The imposition of a 120-hour survival requirement would cause
19 a nonvested property interest or a power of appointment to fail to be valid, or to be
20 invalidated, under s. 700.16 or under the rule against perpetuities of the applicable
21 jurisdiction.

22 **SECTION 85.** 854.03 (5) (g) of the statutes is created to read:

23 854.03 (5) (g) The statute or governing instrument specifies that this statute,
24 or one similar to it, does not apply.

25 **SECTION 86.** 854.03 (5) (h) of the statutes is created to read:

*Please drop these
changes. We
decided to keep
sub (3) + (4) in the
Stats.*

1 854.03 (5) (h) The transfer is under a governing instrument and the transfer
2 is controlled by a provision regarding survivorship that is included in a will, trust,
3 or marital property agreement executed by the transferor and that is intended to
4 apply to transfers under other governing instruments.

5 **SECTION 87.** 854.03 (5) (i) of the statutes is created to read:

6 854.03 (5) (i) The transfer is under a governing instrument and the person who
7 executed the governing instrument had a contrary intent. Extrinsic evidence may
8 be used to construe that intent.

9 **SECTION 88.** 854.03 (5) (j) of the statutes is created to read:

10 854.03 (5) (j) The imposition of a 120-hour survival requirement would be
11 administratively cumbersome and would not change the identity of the ultimate
12 beneficiaries of the property or the property that each beneficiary would receive.

13 **SECTION 89.** 854.03 (6) of the statutes is amended to read:

14 854.03 (6) EVIDENTIARY STANDARD. Unless the statute or governing instrument
15 provides otherwise, proof that an individual survived the period required under
16 ~~subs. (1) to (4)~~ this section must be by clear and convincing evidence.

17 **SECTION 90.** 854.03 (7) of the statutes is repealed.

18 **SECTION 91.** 854.035 of the statutes is created to read:

19 **854.035 Provision regarding survivorship.** If a will, trust, or marital
20 property agreement contains a provision regarding survivorship that is intended to
21 apply to transfers under other governing instruments, that provision shall control.
22 Extrinsic evidence may be used to construe the intent of the person who executed the
23 will, trust, or marital property agreement.

24 **SECTION 92.** 854.04 (1) (a) of the statutes is amended to read:

Hanaman, Cathlene

From: Howard Erlanger [hserlang@wisc.edu]
Sent: Monday, November 22, 2004 5:08 PM
To: Hanaman, Cathlene
Subject: planned amendment to 854.03 (6)

Hi Cathlene--

A question for you:

854.03 (6) of the statutes is to be amended to read:

854.03 (6) Evidentiary standard. Unless the statute or governing instrument provides otherwise, proof that an individual survived the period required under ~~subs. (1) to (4)~~ this section must be by clear and convincing evidence.

However, logically, it doesn't seem that sub [6] should apply to sub [5], so maybe the amendment isn't necessary?

Thanks.
Howie

12A

854.03 (1)

854.03 (1) (intro.)

(1) _____

_____ :

(a)

854.03 (1) (b) create

(b)

Sec

~~an~~

(1)(b)

an

(1)(b)



1 854.04 (1) (a) Except as provided in subs. (5) and (6), if a statute or a governing
2 instrument calls for property to be distributed to the issue or descendants of a
3 designated person “by representation”, “by right of representation”, or “per
4 stirpes”, the property is divided into equal shares for the designated person’s
5 surviving children of the designated person and for the designated person’s deceased
6 children who left surviving issue. Each surviving child and each deceased child who
7 left surviving issue are allocated one share.

8 **SECTION 93.** 854.04 (5) (intro.) of the statutes is amended to read:

9 854.04 (5) CERTAIN INDIVIDUALS DISREGARDED. (intro.) For the purposes of this
10 section subs. (1) to (3), all of the following apply:

11 **SECTION 94.** 854.05 (5) of the statutes is renumbered 854.05 (5) (a) and
12 amended to read:

13 854.05 (5) (a) This section does not apply ~~to the extent that a governing~~
14 ~~instrument, either expressly or as construed from extrinsic evidence, provides~~
15 ~~otherwise if the person who executed the governing instrument had a contrary~~
16 intent. Extrinsic evidence may be used to construe that intent.

17 (b) A general directive to pay debts does not give rise to a presumption of
18 exoneration.

19 **SECTION 95.** 854.06 (1) (b) of the statutes is repealed.

20 **SECTION 96.** 854.06 (4) (a) of the statutes is renumbered 854.06 (4) (intro.) and
21 amended to read:

22 854.06 (4) CONTRARY INTENT. (intro.) ~~This section~~ Subsection (3) does not apply
23 if there is a finding of any of the following applies:

24 (c) The person who executed the governing instrument had a contrary intent
25 of the decedent. Extrinsic evidence may be used to construe that intent.