

PROBLEM:

§ 861.04 (Deferred marital property election) Valuation of life insurance on the life of the surviving spouse, and deferred employment benefit plans held by the surviving spouse. In the Committee Notes, we said:

§ 861.04. Where appropriate, valuation of an interest under this section shall take into account that the decedent predeceased the spouse. For example, for purposes of § 861.03(2)(c), proceeds of insurance on the life of the surviving spouse are not valued as if he or she were deceased. Similarly, a deferred employment benefit plan held by the surviving spouse would be valued at zero, because of the operation of the terminable interest rule of § 766.62(5).

However, a couple of people have pointed out that this result is not dictated by the statute. Regarding life insurance, if § 861.05(2)(a), 861.03(2)(c), and 861.04(2) are read together, it is possible to reach the result that life insurance on the life of the surviving spouse should be valued at face value. Similarly, the statute does not make clear how a deferred employment benefit plan held by the surviving spouse should be treated. Logically, if there is a terminable interest rule for marital property, it's hard to justify a different rule for deferred marital property. The Committee Note took the position that such a plan would be included in the augmented deferred marital property estate, but valued at zero. Alternatively, it could just not be included as deferred marital property, on the theory that under the terminal interest rule, at the death of the nonemployed spouse, the mp component of a deferred employment benefit plan held by the survivor is essentially reclassified as individual property. Nonetheless, it is possible to argue from the words of the statute that the terminable interest rule does not apply to deferred employment benefits that are deferred marital property. I have a memo from Mike Wilcox on both the life insurance and DEBP points, and it is possible that a position contrary to that of our Committee Note will be taken in the revision of the *Marital Property Law in Wisconsin* handbook.

AMENDMENT 1:

861.04 Augmented deferred marital property estate: surviving spouse's property and transfers to others. (1) Subject to s. 861.05, the augmented deferred marital property estate includes the value of any deferred marital property that would have been included under s. 861.03 had the surviving spouse been the decedent.

(2) ~~Valuation of an interest under this section shall take into account the fact that the decedent predeceased the spouse. Subject to s. 861.05 (2), the surviving spouse shall be treated as having died on the date of the decedent's death.~~

COMMITTEE NOTE:

Replaced by new §§ 861.05(1)(e) and 861.05(5).

AMENDMENT 2:

861.05 Augmented deferred marital property estate: calculation of property interests. (1) EXCLUSIONS. The following are not included in the augmented deferred marital property estate:

- (a) Transfers of deferred marital property to the extent that the decedent received full or partial consideration for the transfer in money or money's worth.
- (b) Transfers under the U.S. social security system.
- (c) Transfers of deferred marital property to persons other than the surviving spouse, with the written joinder or written consent of the surviving spouse.
- (d) Transfers of deferred marital property to the surviving spouse under s. 861.33 or 861.41.
- (e) The deferred marital property component of any deferred employment benefit plan held by the surviving spouse, which would have been subject to the terminable interest rule of s. 766.62(5) had it been marital property and had the surviving spouse been the decedent.

(2) VALUATION. (a) Property included in the augmented deferred marital property estate under s. 861.03 (1), (2) (c) and (4) (b) 2. is valued as of the date of the decedent spouse's death.

(b) Property included under s. 861.03 (2) (a), (b) and (d) and (3) is valued immediately before the decedent spouse's death.

(c) Property included under s. 861.03 (4) (b) 1. is valued as of the date that the right, interest or power terminated.

(d) Property included under s. 861.03 (4) (b) 3. is valued as of the date of the transfer.

(e) If deferred marital property is commingled with other types of property but the deferred marital property component can be identified, only that component is valued.

(f) The value of property included in the augmented deferred marital property estate includes the commuted value of any present or future interest in deferred marital property and the commuted value of deferred marital property payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan or any similar arrangement.

(3) REDUCTION FOR EQUITABLE PROPORTION OF EXPENSES AND ENFORCEABLE CLAIMS.

(4) OVERLAPPING APPLICATION; NO DOUBLE INCLUSION.

(5) VALUATION OF SURVIVING SPOUSE'S PROPERTY AND TRANSFERS. Deferred marital property included in the augmented deferred marital property estate by virtue of s. 861.04 shall be valued according to sub. (2), subject to the following provisions:

(a) The surviving spouse shall be treated as having died on the date of the decedent's death, but after the decedent.

(b) Life insurance (included by virtue of s. 861.03(2)(c)) shall be valued as though the surviving spouse were living, and the rule of s. 766.61(7) applied.

on the life of the surv. spouse

COMMITTEE NOTE:

New (1)(e) clarifies that the surviving spouse's *deferred marital property* interest in a deferred employment benefit plan is to be treated in a way analogous to treatment of the surviving spouse's *marital property* interest in such a plan. Under § 766.62(5), the decedent spouse's marital property interest would terminate, and essentially the total marital property component of the plan would be reclassified as the individual property of the surviving spouse. § 851.055(3) states that deferred marital property is property that "... would have been classified as marital property under ch. 766 if

the property had been acquired when ch. 766 applied.” Had chapter 766 applied, the surviving spouse’s deferred employee benefit plan would not have been marital property. 1997 Act 188 reached this result with a rule stating that valuation is to take into account the fact that the decedent spouse did in fact predecease (§ 861.04[2]). See Drafting Committee note to original § 861.04, and Erlanger, *Wisconsin’s New Probate Code* (1998), § 5.02E, Example 4. The revised statute reaches the same result in a more straightforward manner, by recognizing that once one takes into account the fact that the decedent predeceased, the deferred employment benefit plans held by the surviving spouse simply would not be marital property and thus would not be deferred marital property either.

New (5) clarifies rules regarding valuation of deferred marital property held by the surviving spouse. See also original Drafting Committee note to § 861.04. Note that new § 861.05(1)(e) provides that a deferred employment benefit plan held by the surviving spouse is not included in the augmented deferred marital property estate; therefore, there is no special rule for valuing it under § 861.05. See note to amended § 861.05(1)(e).

MINOR ISSUE: cleanup of terminology.
See committee note.

AMENDMENT:

861.06 Satisfaction of deferred marital property elective share amount.

(2) INITIAL SATISFACTION OF DEFERRED MARITAL PROPERTY ELECTIVE SHARE AMOUNT.
If the surviving spouse makes the election under s. 861.02, the following categories of property are used first to satisfy the elective share amount:

COMMITTEE NOTE:

Makes terminology consistent with that used in § 861.02(1).

PROBLEM:

§ 861.35 Allowance after period of administration. Lawyers at Michael Best have raised a concern about the addition of dependent children to this statute, which provides a special long term allowance for spouse and dependent children. I believe that the concern was that the decedent could not abrogate this statute with respect to dependent children. The argument would be that the protection of the spouse may represent a public policy preference, but that the purpose of the provision for a dependent child is probably to follow the intent of the decedent, rather than to create a new right. I have a memo from Dick Kabaker, outlining the concerns.

AMENDMENT:

861.35 Special allowance for support of spouse and support and education of dependent children. (1c) In this section, "dependent child" has the meaning given in s. 861.31 (1c).

(1m) If the decedent is survived by a spouse or by children, the court may order an allowance for the support and education of each dependent child and for the support of the spouse. This allowance may be made whether the estate is testate or intestate. If the decedent is not survived by a spouse, the court also may allot directly to any of the dependent children household furniture, furnishings and appliances. No allowance may be made under this section if any of the following apply:

(a) The decedent has amply provided for each dependent child and for the spouse by the terms of his or her will transfer of probate and nonprobate assets and the estate is sufficient to carry out the terms after payment of all debts and expenses, or support and education have been provided for by any other means.

(b) In the case of dependent children, if the surviving spouse is legally responsible for support and education and has ample means to provide them in addition to his or her own support.

(c) In the case of the surviving spouse, if he or she has ample means to provide for his or her support.

(d) In the case of an adult child of the decedent who was being supported by the decedent at the time of the decedent's death, an allowance shall be ordered only if the facts and circumstances indicate that the decedent intended to continue support of the child after death. Extrinsic evidence may be used to determine that intent, but a decedent's signed statement of intent that support not be awarded to an adult child shall be binding on the court.

COMMITTEE NOTE:

The special allowance serves two purposes: to support the surviving spouse and minor children, when other means are not available, and to continue the decedent's support of an adult child who was supported by the decedent, if the decedent intended to do so. The creation of sub (d) clarifies the operation of the statute in the latter instance. The amendment to (1m)(a) recognizes that a substantial part of a decedent's assets may pass outside of probate, and that the will is only one of several possible estate planning documents; this fact is also recognized by the language in (1m)(a) referring to support and education that "have been provided for by any other means."

EFFECTIVE DATE OF STATUTE:

Most of the provisions of the technical corrections bill simply clarify existing law and do not change it. The effective date for these provisions should be the same as that of 1997 Act 188:

This act first applies to deaths occurring on January 1, 1999, except with respect to irrevocable governing instruments executed before that date.

The following provisions create new rules, and thus should be effective beginning with the earliest legal date after the new act is signed, except with respect to irrevocable governing instruments executed before that date:

§ 40.xx new definition of "beneficiary" only

§ 701.19 (10) savings clause re IRC 2041, although since it is a liberalization, I don't think anyone would be harmed by making it apply retroactively.

✓ § 705.04(2) POD bank accounts.

✓ § 705.27 TOD Securities

✓ § 852.01(1)(a)2 – spousal share in complex intestacy *ta is common*

? § 853.32(2) Statement passing tangible personal property. *this may change (may be shorter)*
dating requirement, and trigger date only.

? § 854.03 120 hour survivorship. – reachout provision only

§ 854.08 Nonademption

✓ § 861.35 Allowance after period of administration.

854.12 Debt to transferor.

memorandum

December 27, 2000

TO: Pam Kahler

FROM: Howard Erlanger *Howe*

RE: Probate Code Technical Corrections

Pam-- Sorry for the delay in getting back to you. Enclosed are three memos:

Addenda to the drafting memo we gave you in September; basically these are changes that you have not seen yet.

Changes in response to the issues you raised regarding the proposed changes to the adoption statute

Changes in response to the issues you raised regarding the proposed changes to the slayer statute.

Since I need to limit my direct contacts with you in year 2001, please contact Dave Reinecke with any questions you have. I will be out of town until January 11th, but will be able to respond [usually through Dave] fairly quickly to any questions that come up. Obviously, at some point we will want to have some meetings to discuss specific language.

Thanks very much for your work on this project, and for your very helpful input.

done ✓

December 27, 2000

TO: Pam Kahler

FROM: Howard Erlanger

Questions regarding the proposed changes to the slayer statute.

I have redrafted the proposed amendments to s. 766.61(7) and s. 766.62(5). However, in preparing the amendments, I came to realize that they really should be placed in s. 854.14, not in chapter 766. Our approach has been to collect related provisions together, and not scatter them, but the September draft violates that principle. Similarly, the slayer rule for deferred marital property should be moved to s. 854.14 from chapter 861.

Hence, here is the revised proposal for the slayer statute, replacing the material from pages 26 and 27 of Sept '00 draft-20:

Create new s. 854.14(3m) EFFECT OF SPOUSAL SLAYING: [Is there a better term for this??]

(a) Surviving spouse's rights to life insurance, where decedent spouse is owner. If the surviving spouse unlawfully and intentionally kills the decedent spouse, the surviving spouse's ownership interest in a policy [.. defined in s. 766.61] on which the decedent spouse is the owner, or in the proceeds of such a policy, is limited to a dollar amount equal to one-half of the marital property interest in the interpolated terminal reserve and in the unused portion of the term premium of the policy on the date of death of the deceased spouse. All other rights of the surviving spouse in the ownership interest or proceeds of the policy, other than the marital property interest described in this subsection, terminate at the decedent spouse's death. [This section was originally proposed as new 766.61(6m).]

(b) Decedent spouse's rights to life insurance, where surviving spouse is the owner. If the surviving spouse unlawfully and intentionally kills the decedent spouse, s. 766.61(7) does not apply. At death the decedent spouse owns a fraction of each policy that has a marital property component and that designates the surviving spouse as the owner and insured; that fraction is equal to one half the portion of the policy that was marital property immediately before the death of the decedent spouse. [This section is an expansion of the amendment originally proposed to s. 766.61(7).]

(c) Decedent spouse's rights to deferred employment benefits held by the surviving spouse. If the surviving spouse unlawfully and intentionally kills the decedent spouse, s. 766.62(5) does not apply. At death, the decedent spouse owns a fraction

of each deferred employment benefit held by the surviving spouse that has a marital property component, including those described in s. 766.62(5); that fraction is equal to one half the portion of the benefit that was marital property immediately before the death of the decedent spouse. [This is an expansion of the amendment originally proposed to s. 766.62(5).]

(d) Decedent spouse's rights to deferred marital property. If the surviving spouse unlawfully and intentionally kills the decedent spouse, the estate of the decedent shall have the right to elect no more than 50% of the augmented deferred marital property estate as determined under s. 861.02(2), as though the decedent spouse were the survivor and the surviving spouse were the decedent. The court shall construe the provisions of ss. 861.03 to 861.11 as necessary to achieve the intent of this paragraph. [This is a modification of current 861.02(8), which would be repealed and replaced with a cross reference to the proposed new provision.]

Where did I
draft this?
(3)(d)
RA

December 27, 2000

TO: Pam Kahler
FROM: Howard Erlanger

Done ✓

Questions regarding the proposed changes to the adoption statute.

Regarding s. 854.20:

I have reconsidered the proposed changes to the adoption statute, with a focus on where the provisions against 'strategic adoption,' currently in s. 854.20(4) should apply. My conclusion is that they should only apply to sub (1). My reasoning is as follows:

Sub (1) gives "birth rights" to adoptees. Strategic adoption – ie adoption of friends and lovers as adults – is a potential problem here. Sub (4) should therefore apply.

Sub (2) terminates the link of the adoptee to the birth family, except in the case of certain step parent adoptions. If the person was adopted in the typical situation, then termination of links to the birth family is appropriate, because new links have been established. If the person was adopted as an adult in a way that doesn't qualify for "birth rights," then termination of links to the birth family still is appropriate, because the adopted person must have chosen to be adopted and thus to in a sense "reject" the birth family. It does not seem necessary to predicate termination of ties to the birth family on the establishment of ties to a new family. Thus, sub (4) should not apply.

Sub (3), regarding sequential adoption, only speaks to the situation in sub (2). Hence, sub (4) should not apply.

Given this situation, ideally sub (4) should be moved to be part of sub (1). Note that this is how the matter is handled in the parallel provision of s. 854.21(1). Similarly, sub (3) should be moved to be part of sub (2).

In any case, sub (5) should apply to all provisions of the statute.

Regarding s. 854.21

In considering the changes to s. 854.20, I noticed a problem in s. 854.21. Sub (1)(b) refers to "a gift under par (a)." This may be taken to mean that it only applies if the transfer *qualifies* under sub (a) – ie if it is what we are calling a "non-strategic" adoption. Given my analysis of s. 854.20 (2), s. 854.21(1)(b) should be changed to be parallel:

(b) Except as provided in sub. (7), a gift of property by a governing instrument to a class of persons described as issue, lawful issue, children, grandchildren, descendants, heirs,

heirs of the body, next of kin, distributees or the like excludes a birth child and his or her issue otherwise within the class if the birth child has been adopted and would cease to be a child of the birth parent under s. 854.20 (2).

Even if you disagree with my analysis of s. 854.20(2), the wording of s. 854.21(1) is incorrect. Sub (1)(a) should not refer to (b) as an exception, since (1)(a) is about including people who are adopted, while (b) is about excluding birth children. These are different rules, not exceptions to each other. Similarly, even if my other recommendations are not followed, the language in s. 854.21(1)(b) that refers to a gift under (a) needs to be changed, since (a) basically is about gifts to adopted people. Even though the intro applies to (b), the remainder of (a) describes a situation that does not apply.

PK

TECHNICAL CORRECTIONS DRAFT
ADDENDA TO DRAFTING INSTRUCTIONS OF 9/27/00

December 27, 2000

PROBLEM:

40.02(8) Definitions under ETF chapter. See comment. Two alternatives not chosen would be to make the benefit payable to the estate, or to "those persons and entities who receive the residue of the estate." The first of these alternatives has the problem of exposing the proceeds to claim of creditors; the second would probably be viewed by the Department as too cumbersome.

Revised 12/00 to change children to issue.

AMENDMENT:

40.02(8) [Definitions] (a) "Beneficiary" means:

1. The person, or a trust in which the person has a beneficial interest, so designated by a participant or insured employee or annuitant in the last written designation of beneficiary on file with, and in the form approved by, the department at the time of death, except as provided in s. 40.23 (4) (c). A written designation of beneficiary for a specified benefit plan applies only for determining beneficiaries under that specified benefit plan.
 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 issue, per stirpes 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.~~ No payment may be made to a person included in any group if there is a living person in any preceding group.
 3. The estate of the participant, employee or annuitant, if there is no written designation of beneficiary and no beneficiary determined under subd. 2. or par. (b) or if so specified in the last written designation of beneficiary filed prior to time of death.
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COMMITTEE NOTE:

Changes the "standard sequence" for the beneficiary designation on payments at death by the Employee Trust Funds to more closely approximate the preference of employees and annuitants. It is unusual for an estate plan to include spouses of children, and it would be unusual for a decedent to prefer parents or siblings over other beneficiaries named in a will.

PROBLEM:

701.19(10) See committee note. Revised 12/00 to add discharge of legal obligations and to create a list.

AMENDMENT:

Repeal current s. 701.19(10) and recreate as follows:

701.19 Powers of trustees.

10) RESTRICTION ON EXERCISE OF POWERS. (a) Subject to par. (b), none of the following powers conferred upon a person in the person's capacity as trustee can be exercised by the trustee:

1. The power to make discretionary distributions of principal or income to himself or herself.
2. The power to make discretionary distributions for the discharge of his or her legal obligations.
3. The power to make discretionary allocations in the trustee's favor of receipts or expenses as between principal and income.

If there is no trustee qualified to exercise the power, it may be exercised by a special trustee appointed by the court.

(b) Par. (a) does not apply if any of the following apply:

1. The trustee is also the settlor or creator of the trust, and the trust is revocable or amendable by the settlor.

2. The terms of the creating instrument specifically limit the scope of the power described in par. (a) to expenditures and distributions of income or principal upon an ascertainable standard, relating to the power holder's health, maintenance, support and education, such that the power holder would not be subject to tax under Sections 2041 or 2514 of the Internal Revenue Code of 1986, as from time to time amended.

3. The power is conferred on 2 or more trustees, and it is exercised by the trustees who are not disqualified under par. (a) to or for the benefit of the trustee who lacks the power, so long as such other trustee exercises the power without participation by the trustee who lacks the power, unless the creating instrument expressly provides otherwise. **Continued on next page.**

4. The trustee is the spouse, widow or widower of the settlor of the trust, and a marital deduction has been allowed for federal gift or estate tax purposes with respect to the trust property that is subject to such discretionary power.

5. The creating instrument negates application of this subsection.

COMMITTEE NOTE:

Former § 701.19(10) cast too broad a net, banning all discretionary power of a trustee to distribute to him or herself, irrespective of whether an adverse tax situation resulted. The new statute takes a more fine tuned approach, functioning much like a savings clause in an estate plan.

REFERENCE MATERIAL:

Current Wis Statute:

701.19(10) Restriction on exercise of powers. Unless the creating instrument negates application of this subsection, a power conferred upon a person in the person's capacity as trustee to make discretionary distributions of principal or income to himself or herself or to make discretionary allocations in the trustee's favor of receipts or expenses as between principal and income, cannot be exercised by the trustee. If the power is conferred on 2 or more trustees, it may be exercised by the trustees who are not so disqualified. If there is no trustee qualified to exercise the power, it may be exercised by a special trustee appointed by the court. This subsection shall not apply to living trusts created prior to July 1, 1971, or to testamentary trusts contained in wills executed or last republished prior to that date.

Connecticut Statute on which new statute is patterned:

§ 45a-487. Powers of trustees who are trust beneficiaries

(a) No person serving as trustee or cotrustee of a trust established by a will or inter vivos instrument shall have or be deemed to possess in his or her capacity as trustee discretionary power or authority to expend or distribute income or principal of the trust to himself or herself or for the discharge of such trustee's legal obligations, unless:

(1) The trustee is also the settlor or creator of the trust, and the trust is revocable or amendable by the settlor; or

(2) The trustee is the spouse, widow or widower of the settlor of the trust, and a marital deduction has been allowed for federal estate tax purposes with respect to the trust property that is subject to such discretionary power; or

(3) The terms of the will or governing trust instrument expressly grant such discretionary power, and such terms either:

(A) Include with a specific reference to this section an acknowledgment that the designated trustee is specifically intended to be both a holder of such power and a permissible beneficiary of the exercise of such power, notwithstanding any conflict of interest or tax consequence that may result from such fact; or

(B) Specifically limit the scope of such power to expenditures and distributions of income or principal upon an ascertainable standard, such as health, maintenance, support and education, as those terms are described in Sections 2041 and 2514 of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as from time to time amended.

(b) Unless a will or governing trust instrument expressly provides otherwise, the lack of such discretionary power by one trustee shall not impair any authority granted by the will or governing trust instrument to any other trustee or

cotrustee to make such distributions with respect to the same trust to or for the benefit of the trustee who lacks such power, so long as such other trustee exercises the power without participation by the trustee who lacks such power.

(c) This section shall take effect July 6, 1995, and shall apply to all wills, codicils, revocable inter vivos trust agreements and amendments thereto created by persons dying on or after October 1, 1995, and to irrevocable trusts established by inter vivos agreement executed on or after October 1, 1995.

PROBLEM:

853.11 Rights of spouse omitted in the will are buried in the statute on revocation. In the prior code that may have made sense, since the remedy in certain circumstances was revocation of the will. However that is no longer the remedy, so the rule is seriously misplaced.

AMENDMENT:

Repeal (2) and (3) and recreate as 853.12 Premarital will.

Create new (2): Entitlements of a surviving spouse under a decedent's premarital will are governed by 853.12.

853.11 Revocation.

(1) REVOCATION BY WRITING.

(1m) REVOCATION BY PHYSICAL ACT.

(2) Premarital will. (a) Entitlement of surviving spouse. Subject to par. (c), if the testator married the surviving spouse after the testator executed his or her will, the surviving spouse is entitled to a share of the probate estate.

(b) Value of share. The value of the share under par. (a) is the value of the share that the surviving spouse would have received had the testator died with an intestate estate equal to the value of the net estate of the decedent less the value of all of the following:

1. All devises to or for the benefit of the testator's children who were born before the marriage to the surviving spouse and who are not also the children of the surviving spouse.
2. All devises to or for the benefit of the issue of a child described in subd. 1.
3. All devises that pass under s. 854.06, 854.07, 854.21 or 854.22 to or for the benefit of children described in subd. 1. or issue of those children.

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

1. It appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse.
2. It appears from the will or other evidence that the will is intended to be effective notwithstanding any subsequent marriage, or there is sufficient evidence that the testator considered revising the will after marriage but decided not to.
3. The testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.
4. The testator and the spouse have entered into an agreement that complies with ch. 766 and that provides for the spouse or specifies that the spouse is to have no rights in the testator's estate.

(d) Priority and abatement. In satisfying the share provided by this subsection:

1. Amounts received by the surviving spouse under s. 861.02 and devises made by will to the surviving spouse are applied first.
2. Devises other than those described in par. (b) 1. to 3. abate as provided under s. 854.18.

(3) Former spouse. The effect of a transfer under a will to a former spouse is governed by s. 854.15.

3m) INTENTIONAL KILLING OF DECEDENT BY BENEFICIARY.

(4) OTHER METHODS OF REVOCATION. A will is revoked only as provided in this section.

(5) DEPENDENT RELATIVE REVOCATION.

(6) REVIVAL OF REVOKED WILL.

PROBLEM : *additional problem re disclaimer*

§ 854.13 Disclaimer. s. 854.13(7) states that the transferor may provide for how property shall devolve if disclaimed; otherwise the statute controls. However, the end of (7)(a) states that "this paragraph is subject to subs. (8), (9), and (10). Subs (8) and (9) provide that disclaimed interests in joint tenancy and survivorship marital property pass to the decedent's probate estate, without qualifying language regarding the decedent's intent for a different result. Thus, concern has been expressed that in a situation where survivorship property needs to be disclaimed, but the primary estate planning vehicle is a revocable trust, the need for a probate proceeding may be unnecessarily created. This assumes, I believe, that the rev trust has language stating the decedent's intent regarding the devolution of survivorship property that has been disclaimed.

Also some additional changes at Dec '00. – eg use of decedent vs transferror w/r 8 and 9.

Additional Issue: Note the difference in the intro to (7) - (9), versus (10), which states "Unless the instrument creating the future interest manifests a contrary intent either expressly or as construed from extrinsic evidence..." **Even with the amendment, the rules are not parallel: it is possible to conclude that extrinsic evidence can only be introduced for (10) and not for (7)-(9); on the other hand, (10) requires that the contrary intent be in the instrument that created the transfer, while (7) - (9) do not. ---- changes made 12/00.**

AMENDMENT:

854.13 Disclaimer.

(7) DEVOLUTION IN GENERAL. (a) Unless the transferor of the property or donee of the power ~~has otherwise provided~~ otherwise in a governing instrument either expressly or as construed from extrinsic evidence, the disclaimed property devolves as if the disclaimant had died before the decedent or before the effective date of the transfer

(8) DEVOLUTION OF DISCLAIMED INTEREST IN JOINT TENANCY. Unless the decedent provided otherwise in a governing instrument either expressly or as construed from extrinsic evidence, a A disclaimed interest in a joint tenancy passes to the decedent's probate estate.

(9) DEVOLUTION OF DISCLAIMED INTEREST IN SURVIVORSHIP MARITAL PROPERTY. Unless the decedent provided otherwise in a governing instrument either expressly or as construed from extrinsic evidence, a A disclaimed interest in survivorship marital property passes to the decedent's probate estate.

(10) DEVOLUTION OF DISCLAIMED FUTURE INTEREST. ~~Unless the instrument creating the future interest manifests a contrary intent either expressly or as construed from extrinsic evidence~~ Unless the transferor of a future interest or donee of the power under which a future interest was created provided otherwise in a governing instrument either expressly or as construed from extrinsic evidence, a future interest limited to take effect in possession or enjoyment after the termination of the interest which is disclaimed takes effect as if the disclaimant had died before the effective date of the governing instrument or, if the disclaimant is an appointee under a power exercised by a governing instrument, as if the disclaimant had died before the effective date of the exercise of the power.

COMMITTEE NOTE:

Amendment clarifies that the language at the beginning of (7)(a), regarding the ability of the

transferor to provide for alternate disposition of disclaimed interests in joint tenancy or survivorship marital property, applies to sub. (8) and (9) as well. Clarifies that the "other provision" must be in a governing instrument – although not necessarily the governing instrument that created the transfer -- but that it can be interpreted using extrinsic evidence. ** Need to confirm accuracy of change for [10]. But note that reference to *a* governing instrument, vs *the* governing instrument, is correct.

PROBLEM:

§ 861.06(b) doesn't say how to value property transferred to the surviving spouse in a trust. Valuation of a trust is covered in § 861.05(2)(f), but that statute only refers to the valuation of property included in the augmented deferred marital property estate. (Point raised by Kathy.) – **decided that need to clarify that trusts do count, but to leave the determination of how they are valued to the courts, because it will depend on such matters as the spouse's actual life expectancy and the nature of his or her rights to income and corpus**

§ 861.06(2)(b)4 (satisfaction of the elective share amount) excludes "the first \$5,000 of the value of the gifts from the decedent to the surviving spouse each year." This implies that the reference point should be the date of gift value, rather than the date of death value. It would be probably be good for us to decide which we want, and specify it in the statute. – **decided to do date of death** *gift*

AMENDMENT:

861.06 Satisfaction of deferred marital property elective share. (1) DEFINITION.

(2) INITIAL SATISFACTION OF DEFERRED MARITAL PROPERTY ELECTIVE SHARE. If the surviving spouse makes the election under s. 861.02, the following categories of property are used first to satisfy the elective share amount:

- (a) All property included in the augmented deferred marital property estate under s. 861.04.
- (b) All marital, individual, deferred marital or deferred individual property, transferred to the surviving spouse, including the value of the surviving spouse's beneficial interest of property transferred in trust: *in*

1. From the decedent's probate estate, other than property transferred under s. 861.33 or 861.41, and other than property transferred to the surviving spouse under s. 861.31 or 861.35 except as ordered by the court under s. 861.31 (4) or 861.35 (4).

- 2. By nonprobate transfer at the decedent's death.
- 3. By operation of any state or federal law, other than transfers under the U.S. social security system.
- 4. By the decedent at any time during the decedent's life, except that the following shall be excluded:
 - a. The first \$5,000 of the value of the gifts from the decedent to the surviving spouse each year, valued as of the date of the gift.

b. Gifts received from the decedent that the surviving spouse can show were subsequently and gratuitously transferred in a manner that, had they been the deferred marital property of the surviving spouse, would not have been included in the augmented deferred marital property estate under s. 861.04.

PROBLEM:

Conflict between 852.12 and 863.15 § 852.12 provides that a debt owed the decedent by a taker under intestacy is applied against the inheritance, even if the debt has been discharged in bankruptcy. This provision comes from the UPC. John Frank has noted that the provision conflicts with § 863.15, which provides that, in general, a distributee has the benefit of any defense against enforcement of a debt owed the estate:

852.12 Debts to decedent. If an heir owes a debt to the decedent, the debt shall be charged against the intestate share of the debtor, regardless of whether the debt has been discharged in bankruptcy. If the debtor fails to survive the decedent, the debt shall not be taken into account in computing the intestate shares of the debtor's issue.

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

At a minimum, we should provide a cross reference in 863.15 to the intestacy statute. But this conflict violates the Committee's principle of not making distinctions based on the means by which property is passed at death. Therefore, I believe that the conflict should be resolved. My resolution would be to leave it up to the court to decide on an equitable basis, but I know that's not likely to be popular. **Decision— go with rule in 852.12.**

John also argues that whatever the provision is, it should be general, to apply beyond probate proceedings; i.e., it should be in Chp. 854. I agree.

AMENDMENT:

852.12 Debts to decedent. If an heir owes a debt to the decedent, ~~the debt shall be charged against the intestate share of the debtor, regardless of whether the debt has been discharged in bankruptcy. If the debtor fails to survive the decedent, the debt shall not be taken into account in computing the intestate shares of the debtor's issue.~~ the status of the debt is determined under s. 854.12.

863.15 Right of retention. When a distributee of an estate is indebted to the estate, ~~the amount of the indebtedness if due, or the present worth of the indebtedness, if not due, shall be treated as an offset by the personal representative against property of the estate to which the distributee is entitled. In contesting the offset the distributee shall have the benefit of any defense which would be available to the distributee in a direct proceeding by the personal representative for the recovery of the debt.~~ the status of the debt is determined under s. 854.12.

854.12 Debt to transferor. (1)(a) Subject to sub (3), when a transferee under a governing instrument survives the transferor and is indebted to the transferor, the amount of the indebtedness if due, or the present worth of the indebtedness, if not due, shall be treated as an offset against

property to which the transferee is entitled.

(b) If an heir owes a debt to the decedent, the amount of the indebtedness if due, or the present worth of the indebtedness, if not due, shall be charged against the intestate share of the debtor. If the debtor fails to survive the decedent, the debt shall not be taken into account in computing the intestate shares of the debtor's issue.

(2) Subject to sub (3), in contesting the offset under sub (1) the recipient shall have the benefit of any defense which would be available to the recipient in a direct proceeding by the personal representative for the recovery of the debt, except that the recipient may not defend on the basis that the debt was discharged in bankruptcy, unless that discharge occurred before the execution of the governing instrument.

(3) CONTRARY INTENT. This section does not apply if the transfer is under a governing instrument and there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

COMMITTEE NOTE:

Combines current § 852.12 and § 863.15, which provide for treatment of debts owed by a recipient of property in testate and intestate estates respectively, into one set of provisions and extends the scope of coverage to all governing instruments. Resolves the contradictory provisions of the two statutes by adopting the rule of § 852.12:

NOTE: Need to be sure that the following is correct: unless that discharge occurred *before* the execution of the governing instrument.

QUESTION: Previous draft had the following sentence at the end of [a]: The amount treated as an offset shall be distributed as an asset of the transferee's probate estate. I have dropped it, because it does not seem to be correct, and at the moment, I don't know where it came from.

PROBLEM: In chp. 854, some of the rules yield to extrinsic evidence of contrary intent under all circumstances, while others yield only to extrinsic evidence used to interpret the governing instrument. Rules which yield to extrinsic evidence of contrary intent in general are: § 854.04 representation, et al; § 854.06 antilapse; § 854.07 failed transfer and residue; § 854.11 gift of securities; § 854.15 revocation at divorce; § 854.20 adoption; § 854.21 persons included in groups and classes; § 854.22 form of distribution for transfers to family groups and classes.

Changes in the “interpret the document” rule are included in my proposals regarding 120 hour survivorship and regarding nonademption. Changes are also made re disclaimer. Two additional changes are called for:

AMENDMENT:

854.05 No exoneration of encumbered property.

(5) **CONTRARY INTENT.** This section does not apply to the extent that a governing instrument, ~~either expressly or as construed from extrinsic evidence, provides otherwise~~ if there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent. A general directive to pay debts does not give rise to a presumption of exoneration.

854.18 Order in which assets apportioned; abatement.

(3) If the governing instrument expresses an order of abatement, or if the decedent’s estate plan or the ~~expressed or implied~~ purpose of the transfer, as expressed, implied, or determined through extrinsic evidence, would be defeated by the order of abatement under sub. (1), the shares of the distributees abate as necessary to give effect to the intention of the transferor.

COMMITTEE NOTE:
