

## CHAPTER 863

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**863.01 Distribution of specific property to distributee and partial distribution before final judgment.** Before final judgment has been rendered the personal representative may deliver to any distributee possession of any specific property to which he is entitled under the terms of the will or any statute. The personal representative may make one or more partial distributions of the estate, provided that other distributees and claimants are not prejudiced thereby. The personal representative may require the distributees to give security for the return of such property.

**863.05 Execution and levies by creditors of distributees prohibited.** No garnishment, attachment or execution shall issue against nor shall any levy be made against any property of the estate under any judgment or cause of action against any distributee of the estate.

**Cross Reference:** Chapter 816 and 813.026 provide remedies for creditors through the appointment of a receiver

**863.07 Assignment by distributee.** If any person interested in an estate assigns all or part of his or her interest therein (other than an interest not assignable by the specific language of the will) as collateral or otherwise and the assignee serves a copy thereof on the personal representative of the estate and files a copy with the court in which the estate is being administered before the entry of the final judgment and before the property or interest covered by the assignment has been distributed under s. 863.01, the court shall assign to the assignee in the final judgment the interest or part of the interest of the assignor included within the assignment to the extent that the assignment is valid as determined by the court, after giving effect to any

credits to which the assignor may prove himself or herself entitled. A personal representative incurs no liability to an assignee of a person interested for any acts performed or distribution made by the personal representative prior to the time a copy of the assignment is received by the personal representative or he or she has actual knowledge of the assignment.

**History:** 1977 c. 449.

**863.09 Allowance for tombstone and care of grave. (1) TOMBSTONE.** In case no provision is made in the will for a tombstone or monument or marker at the grave of the decedent, and none has been erected, the personal representative may expend a reasonable sum for that purpose. The expenditure is subject to the approval of the court and is classed as funeral expense.

**(2) CARE OF GRAVE.** The court may order the personal representative to pay a suitable amount for perpetual care of the grave of the decedent. The expenditure is classed as funeral expense.

**Cross Reference:** For court orders concerning perpetual care of graves, see 157.11 and 157.125.

**863.11 Order in which assets appropriated; abatement. (1) GENERAL RULES.** Except as provided in sub. (2), and in ss. 853.25 and 861.13, shares of the distributees abate, without any preference or priority as between real and personal property, in the following order: (a) property not disposed of by the will; (b) residuary bequests; (c) general bequests; (d) specific bequests. A general bequest charged on any specific property or fund is, for purposes of abatement, deemed property specifically bequeathed to the extent of the value of the thing on which it is charged. Upon the failure or insufficiency of the thing on which it is

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charged, it is deemed a general bequest to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of that property each of the beneficiaries would have received had full distribution of that property been made in accordance with the terms of the will.

**(2) CONTRARY PROVISIONS, PLAN OR PURPOSE.** If the provisions of the will or the testamentary plan or the express or implied purpose of the bequest would be defeated by the order of abatement stated in sub. (1), the shares of the distributees abate in such other manner as may be found necessary to give effect to the intention of the testator.

A general direction to pay debts requires that the federal estate tax be deducted from the gross estate before computing the marital deduction as opposed to a contention that the full deduction be allowed since the tax should be paid from assets going to other heirs. *Greene v. United States*, 476 F (2d) 116.

**863.13 No exoneration of encumbered property.**

**(1) GENERALLY.** All specifically devised property shall be assigned to the beneficiary without exoneration unless the will of the decedent provides that a debt which is secured by a mortgage, lien, pledge or other security agreement which constitutes an encumbrance on property which is specifically devised should be paid out of other assets in the estate and the property assigned to the beneficiary free of the encumbrance. Unless the will provides to the contrary, if the debt or interest on the debt which is secured by the encumbrance on the specifically devised property is paid in whole or in part out of other assets in the estate, the specifically devised property shall be assigned to the beneficiary only if: (a) the beneficiary contributes to the estate an amount equal to the amount which the estate has paid, or (b) the personal representative secures such amount for the estate through a new encumbrance on the specifically devised property. If the estate is not reimbursed under (a) or (b), the personal representative shall sell the specifically devised property, reimburse the estate from the proceeds of the sale and assign the balance of the proceeds to the specific beneficiary.

**(2) JOINT TENANCY.** If all or any part of a debt which is secured by a mortgage, lien, pledge or other security agreement which constitutes an encumbrance on property in which the decedent at the time of his death had an interest as a joint tenant, is paid out of assets in the estate as the result of a claim being allowed against the estate, the estate is subrogated to all rights which the claimant had against the property, unless the will of the decedent provides to the contrary.

**(3) INSURANCE.** If all or any part of a debt which is secured by a mortgage, lien, pledge or other security agreement which constitutes an encumbrance on the proceeds payable under a life insurance policy in which the decedent was the named insured, is paid out of assets in the estate as the result of a claim being allowed against the estate, the estate is subrogated to all rights which the claimant had against the proceeds, unless the will of the decedent provides to the contrary.

**Cross Reference:** See 859.43 which deals with payment of debts which are secured by an encumbrance on property in the estate.

**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 him in a direct proceeding by the personal representative for the recovery of the debt.

**863.16 Value used in distribution of fractional shares.** In distributing property to distributees who receive fractional shares of the estate under the statutes of descent and distribution or under provisions in a will, the personal representative shall divide the property among the distributees on the basis of the value of the property at the time of distribution unless the will provides otherwise.

**863.17 Partition by agreement.** Property passing to persons as joint tenants or tenants in common may be partitioned among those persons by the judgment of the court assigning the property, if a petition therefor signed by all persons interested in the property involved is filed with the court prior to the judgment. The petition must set out the manner in which the property is to be divided and the agreement of all persons interested in the property involved.

**History:** 1977 c. 449.

**863.19 Valuation used in distribution of estate assets.** If a general bequest of estate assets, including a pecuniary bequest, in a dollar amount fixed by formula or otherwise is satisfied by a distribution in kind, the distribution shall be made at current fair market values unless the will expressly provides that another value may be used. If the will requires or permits a different value to be used, all assets available for distribution, including cash, shall

unless otherwise expressly provided be so distributed that the assets, including cash, distributed in satisfaction of the bequest will be fairly representative of the net appreciation or depreciation in the value of the available property on the dates of distribution. A provision in a will that the personal representative may fix values for the purpose of distribution does not of itself constitute authorization to fix a value other than current fair market value.

The valuation of assets for distribution is the current market value at the time of distribution. Estate of Naulin, 56 W (2d) 100, 201 NW (2d) 599.

**863.21 Construction of will, notice.** Notice of hearing upon a petition for the construction of a will shall be given under s. 879.05. If a petition for final judgment contains a request for construction of a will, the notice of hearing on such petition shall include, or be accompanied by, specific notice of the request for construction, the reasons therefor and a copy of the petition or the part thereof requesting construction.

**History:** 1975 c. 331.

When the proposed final decree uses language different from that appearing in the will or construes the will in the sense of ascertaining the meaning of the testator rather than following express, clear instructions, a record of the reasons for the construction should be made, a special notice of the proposed construction of the will should be given to the parties interested, and a copy of the petition for such construction should accompany such notice. [To the extent prior cases rest on the proposition that no special notice of construction of a will need be given, they are overruled.] Estate of MacLean, 47 W (2d) 396, 177 NW (2d) 874.

Where a will mistakenly assumes that the homestead is in joint tenancy, the homestead does not pass by intestacy, it falls into the residue, which was set up for the benefit of the surviving wife. Estate of Sneeberger, 54 W (2d) 657, 196 NW (2d) 662.

The supreme court declines to adopt the doctrine of probable intent, which would allow a court to receive extrinsic evidence, irrespective of the presence or absence of an ambiguity, to ascertain the likely intention of the testator. Estate of Connolly, 65 W (2d) 440, 222 NW (2d) 885.

**863.23 Determination and proof of heirship.** In every administration of an estate in which notice to creditors is required, except in proceedings under ch. 865, the persons who are the heirs of the decedent shall be determined by the court after hearing. Proof and determination of heirship may be had under this section in an estate administered informally under ch. 865 if desired by the personal representative or interested persons. Notice of the hearing is required except in summary assignment under s. 867.02. Notice shall be given under s. 879.03 but shall include notice by publication under s. 879.05 (4). Determination of heirship shall not be made until after the testimony or deposition of one or more witnesses is reduced to writing and filed. A petition for determination of heirship may be included in the petition for administration, petition for approval of final account and final judgment or in a separate petition; and the notice may be included in the notice of hearing

on any of the petitions, or in the notice to creditors.

**History:** 1971 c. 40; 1973 c. 39; 1975 c. 331.

**Cross Reference:** See 856.15 which provides for proof of heirship outside the county.

**Revisor's Note, 1971:** Under s. 867.02 no notice to heirs is required if the estate is under \$10,000. Notice to creditors is still required under s. 867.02 (2) (d). Requested by probate code drafting committee. [Bill 165-S]

**863.25 Petition for final judgment.** Except where final settlement is by sworn statement under s. 865.16, after the payment of the allowances, debts, taxes, funeral expenses and expenses of administration and when, if necessary, a fund has been withheld from distribution for the payment of contingent claims, for meeting possible tax liability or for any other reasonable purpose, the personal representative shall, if the estate is in a condition to be closed, file the final account and at the same time petition the court for hearing on the final account and for final judgment assigning the estate to the persons entitled to the same. Notice of hearing shall be given under s. 879.03. If the petition requests the construction of a will, the notice shall comply with the requirements under s. 863.21.

**History:** 1973 c. 39; 1975 c. 331, 421.

**863.27 Contents of final judgment.** In the final judgment the court shall approve the final account, designate the persons to whom assignment and distribution is being made and assign to each of them the property or proportions or parts of the estate or the amounts to which each is entitled. The findings of fact which support the judgment shall include a determination of the heirs of the decedent; facts showing that all jurisdictional requirements have been met; the date of death of the decedent and the decedent's testacy or intestacy; facts relating to the payment of state inheritance and estate tax, state income tax and claims and charges against the estate; and if the decedent immediately prior to death had an estate for life or an interest as a joint tenant in any property in regard to which a certificate of termination has not been issued, under s. 867.04, shall set forth the termination of the life estate or the right of survivorship of any joint tenant. Every tract of real property in which an interest is assigned or terminated shall be specifically described. If a fund is withheld from distribution for the payment of contingent claims, for meeting possible tax liability or for any other reasonable purpose, the judgment shall provide for the distribution of the fund if all or a part of it is not needed.

**History:** 1971 c. 40 s. 93; 1977 c. 449.

**Cross Reference:** The 6-month limitation on redetermining the inheritance tax provided in 72.30 (4) will run even though the final judgment indicates that property is being withheld

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from distribution until possible liability for claims, etc. is determined in the future, unless in the order determining inheritance tax, the probate court reserves jurisdiction to redetermine inheritance tax. Section 701.20 (4) provides the method for allocating estate income among distributees and requires that the amount of any net probate income distributed by the personal representative to any trustee or other distributee shall be stated in the final judgment.

**863.29 Recording final judgment. (1)** RECORDING REQUIRED. Whenever the final judgment assigns an interest in real property, assigns a debt which is secured by an interest in real property or shows the termination of a life estate or an interest as a joint tenant in real property or in a debt which is secured by an interest in real property, the final judgment, a certified copy of the final judgment or a certified abridgment thereof as described in sub. (2) shall be recorded by the personal representative in the office of the register of deeds in each county in this state in which the real property is located.

**(2) ABRIDGED FINAL JUDGMENT.** In lieu of a certified copy of the final judgment assigning the estate, the personal representative may record an abridgment of the final judgment including the portions that relate to and affect title to real property in the county in which the abridgment is recorded. The accuracy of the abridgment shall be certified by the judge or the register in probate of the court which assigned the estate.

**863.31 Conclusiveness of final judgment.**

**(1) GENERALLY.** The final judgment is a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interests therein, subject only to the right of appeal and the right to reopen the judgment. It operates as an assignment or final adjudication of the transfer of the right, title and interest of the decedent to the distributees therein designated.

**(2) AS TO PURCHASERS FOR VALUE FROM DISTRIBUTEES.** After the final judgment has been recorded in the office of the register of deeds in the county in which the real estate is located, purchasers for value of real estate which is described in the final judgment from distributees or their successors in title may rely on the final judgment as conclusive insofar as it purports to transfer to the distributees any title which the decedent held in the real estate at the time of his death, except to the extent that there has been a transfer of an interest in the real estate by the personal representative under ch. 860 or s. 863.01 of which the purchaser has actual notice or of which he has constructive notice because of recording in the office of the register of deeds in the county in which the real estate is located.

**863.33 Estates to be completed promptly.** All estates are to be completed as soon as reasonably possible and without unnecessary delay.

**863.35 Dormant estates. (1)** If under formal administration final judgment is not entered in an estate within 18 months after filing of the petition for administration and the estate is not open pursuant to an order extending time, the judge shall order the attorney and the personal representative for the estate to show cause why final judgment has not been entered and shall proceed under s. 857.09.

**(2)** If under informal administration under ch. 865 the estate has not been closed by sworn affidavit within 18 months after filing of the petition for administration and the estate is not open pursuant to an order extending time, the probate registrar shall order the personal representative for the estate to show cause why the estate has not been closed. If cause is not shown the probate registrar shall appoint a new personal representative acceptable to all interested parties other than creditors of the deceased who shall proceed under ch. 865.

History: 1971 c. 40; 1973 c. 39

**863.37 Distribution of money or other property where payment or transfer is prohibited. (1)**

If the laws, executive orders or regulations of the United States prohibit payment, conveyance, transfer, assignment or delivery of property or interest therein to a legatee, devisee, ward or beneficiary of an estate or trust, or to any person on his or her behalf, the court, after notice to the person under s. 879.03, may, by judgment or decree, authorize such disposition of the property or interest therein, as is or may be permissible under or in conformity with the laws, executive orders or regulations of the United States.

**(2) (a)** Whenever payment of a legacy or a distributive share cannot be made to the person entitled to payment or it appears that the person may not receive or have the opportunity to obtain payment, the court may, on petition of a person interested or on its own motion, order that the money be deposited in the state school fund. Claims on funds deposited in the school fund under this subsection may be made under s. 863.39 within 10 years after the date of publication under s. 14.58 (15). When a claimant to the funds resides outside the United States or its territories the court may require the personal appearance of the claimant before the court.

**(b)** Notwithstanding par. (a), whenever moneys arising from an unclaimed legacy or

unclaimed intestate property have been deposited with the state treasurer on or after April 1, 1971, but before April 30, 1980, claims may be made for the property under s. 863.39 within 10 years after April 30, 1980.

**History:** 1977 c. 449; 1979 c. 221.

**863.39 Escheats. (1) GENERALLY.** If any legacy or intestate property is not claimed by the distributee within 120 days after entry of final judgment, or within the time designated in the judgment, it shall be converted into money as close to the inventory value as possible and paid to the state school fund. If money escheats to the state, or is deposited for safekeeping in the state treasury, the money shall be held by the state until the court determines, upon the claim of a person asserting a right to the funds, that he or she is entitled to the funds. The claim shall be made under sub. (3).

**(2) FOREIGN DISTRIBUTEE.** If notice is given to a distributee domiciled in a foreign country under s. 879.03 and he is not heard from within 120 days after entry of final judgment of distribution (or within a longer time designated in such judgment) the property which he would take shall not escheat, but shall descend as intestate property.

**(3) RECOVERY OF MONEY FROM STATE TREASURER.** (a) The money received by the state treasurer under sub. (1) or s. 852.01 (3) shall be paid to the owner on proof of the person's right thereto. Within 10 years after the date of publication under s. 177.12, the claimant may file in the probate court in which the estate was settled a petition alleging the basis of his or her claim. The court shall order a hearing upon the petition, and 20 days' notice of the hearing and a copy of the petition shall be given by the claimant to the department of revenue and to the attorney general, who may appear for the state at the hearing. If the claim is established it shall be allowed without interest, but including any increment which may have occurred on securities held, and the court shall so certify to the department of administration, which shall audit and the state treasurer shall pay the claim out of the appropriation under s. 20.585 (1) (j). Before issuing the order distributing the estate, the court shall issue an order determining the inheritance tax due, if any. If real property has been adjudged to escheat to the state under s. 852.01 (3) the probate court which made the adjudication may adjudge at any time before title has been transferred from the state that the title shall be transferred to the proper owners under this subsection.

(b) Notwithstanding par. (a), whenever moneys arising from an unclaimed legacy or

unclaimed intestate property have been deposited with the state treasurer on or after April 1, 1971, but before April 30, 1980, claims may be made for the property under this section within 10 years after April 30, 1980.

**History:** 1979 c. 221

**Cross References:** See ch. 24 for procedure for handling escheated lands

See 895.42 as to deposit of undistributed money and property with public administrator or bank with trust powers

The personal representative of a known deceased person is a proper party to claim an unclaimed legacy. The court can determine the date of death to determine entitlement to the fund. Estate of Rosenstein, 47 W (2d) 494, 177 NW (2d) 372.

**863.41 Receipts to be filed.** Within 120 days after the final judgment is signed the personal representative shall file with the court receipts from distributees for all personal property assigned in the final judgment, unless the court extends the time.

**863.43 Distribution to ward; notice.** At least 10 days prior to distribution of a share or legacy for the benefit of a minor or incompetent for whom a guardian of his estate has been appointed, the personal representative shall notify the court appointing the guardian of the estate, in writing, the total property to be distributed to the guardian of the estate for the benefit of his ward. An affidavit of mailing the notice shall be filed before making the distribution.

**Cross Reference:** See 880.125 which requires probate court, before approving disbursement of funds to a guardian, to be satisfied as to the sufficiency of the guardian's bond.

**863.45 Receipts from guardians.** If a distributee of an estate is a minor or an incompetent and has within this state a guardian of his or her estate, the personal representative shall deliver the money or other property to the guardian, take a receipt from the guardian and file the receipt with the court. The court shall transmit a certified copy of the receipt to the court which appointed the guardian.

**History:** 1977 c. 449

**Cross References:** See 880.04 which describes the situations in which a guardian is not required for a minor or incompetent.

See 880.29 which provides procedure for payment to and receipt by a foreign guardian

**863.47 Order of discharge of personal representative.** Upon proof of the recording of certified copies of the final judgment or abridgments thereof, if required by s. 863.29, and upon the filing of receipts from the distributees for all other property assigned in the final judgment, or other evidence of transfer satisfactory to the court, the court shall enter an order finding those facts, discharging the personal representative and canceling his bond.

**History:** 1973 c. 233.

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**863.49 Inactive estates; summary discontinuance.** The court may by order upon its own motion and without notice summarily discontinue any administration in which no paper

has been filed for more than 5 years and may cancel the bond.

**History:** 1977 c. 449.