

## CHAPTER 851

## PROBATE — DEFINITIONS AND GENERAL PROVISIONS

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NOTE: Chapter 339, laws of 1969, which recodified Wisconsin probate law, contains extensive notes explaining the revisions. Also see Wisconsin Annotations 1970 for a conversion table and notes.

**851.001 Effective date.** Chapter 851 (except s. 851.51), chs. 856, 857, 858, 859, 860, 862 and 863 (except s. 863.13), ch. 867 (except s. 867.02) and chs. 868, 878 and 879 are effective as of April 1, 1971. Chapters 852 and 861 and s. 863.13 are effective as to any person dying on or after April 1, 1971. Chapter 853 is effective as to the will of any testator dying on or after April 1, 1971, except that it is inapplicable to a will executed prior to the publication of the chapter if it is proved the testator lacked testamentary capacity at the time of the enactment, unless the testator subsequently regained capacity to make a valid will and had the capacity for a period of 6 months; a will so excepted is governed by the statutes applicable at the time the testator executed the will.

History: 1979 c. 89; 1981 c. 390.

**851.002 Definitions.** The definitions in ss. 851.01 to 851.29 apply to chs. 851 to 882.

History: 1979 c. 89.

Professional responsibility and probate practices Martin, 1975 WLR 911

**851.01 Administration.** "Administration" means any proceeding relating to a decedent's estate whether testate or intestate.

**851.03 Beneficiary.** "Beneficiary" means any person nominated in a will to receive an interest in property other than in a fiduciary capacity.

**851.04 Court.** "Court" means the circuit court or judge assigned to exercise probate jurisdiction.

History: 1977 c. 449.

**851.05 Decedent.** "Decedent" means the deceased person whose estate is subject to administration.

**851.055 Deferred marital property.** "Deferred marital property" means property acquired while spouses are married and while ch. 766 does not apply, which would have been marital property under ch. 766 if it were acquired when ch. 766 applied.

History: 1985 a. 37; 1987 a. 393.

**851.06 Determination date.** "Determination date" has the meaning given under s. 766.01 (5).

History: 1985 a. 37.

**851.07 Distributee.** "Distributee" means any person to whom property of a decedent is distributed other than in payment of a claim, or who is entitled to property of a decedent under the decedent's will or under the statutes of intestate succession.

History: 1993 a. 486

**851.09 Heir.** "Heir" means any person, including the surviving spouse, who is entitled under the statutes of intestate succession to an interest in property of a decedent. The state is an heir of the decedent and a person interested under s. 45.37 (10) and (11) when the decedent was a member of the Wisconsin veterans home at the time of the decedent's death.

History: 1973 c. 333 s. 201m; 1993 a. 486

**851.11 Intestate succession.** "Intestate succession" means succession to title to property of a decedent by reason of ch. 852, without regard to whether the property descends or is distributed.

**851.13 Issue.** "Issue" means children, grandchildren, great-grandchildren, and lineal descendants of more remote degrees, including those who occupy that relation by reason of adoption under s. 851.51 and nonmarital children and their lineal descendants to the extent provided by s. 852.05.

History: 1981 c. 391; 1983 a. 447.

**851.15 Mortgage.** "Mortgage" means any agreement or arrangement in which property is used as security.

**851.17 Net estate.** "Net estate" means all property subject to administration less the property selected by the surviving spouse under s. 861.33, the allowances made by the court under ss. 861.31, 861.35 and 861.41 except as those allowances are charged by the court against the intestate share of the recipient, administration, funeral and burial expenses, the amount of claims paid and federal and state estate taxes payable out of such property.

History: 1987 a. 27.

**851.19 Person.** "Person" includes natural persons, corporations and other organizations.

**851.21 Person interested.** (1) WHO ARE "PERSONS INTERESTED". The following are "persons interested":

(a) An heir of the decedent.

(b) A beneficiary named in any document offered for probate as the will of the decedent and includes a person named or acting as a trustee of any trust, inter vivos or testamentary, named as a beneficiary.

(c) A beneficiary of a trust created under any document offered for probate as the will of the decedent.

(d) A person named as personal representative in any document offered for probate as the will of the decedent.

(e) Additional persons as the court by order includes as "interested persons".

(2) WHO CEASE TO BE "PERSONS INTERESTED". The following cease to be "persons interested":

(a) An heir of the decedent who is not a beneficiary under the will of the decedent, upon admission of the will to probate under ch. 856 or entry of a statement of informal administration under ch. 865.

(b) A beneficiary named in documents offered for probate as the will of the decedent who is not an heir of the decedent, upon denial of probate to such documents.

(c) A person named as personal representative or testamentary trustee in the will of the decedent, upon the person's failure to be appointed, the denial of letters by the court, or upon the person's discharge.

(d) A beneficiary under the will of a decedent, upon full distribution to the beneficiary.

(e) A beneficiary of a trust created under documents offered for probate as the will of the decedent upon the admission of the decedent's will to probate and the issuance of letters of trust to the trustee.

(3) ADDITIONAL PERSONS INTERESTED. In any proceedings in which the interest of a trustee of an inter vivos or testamentary trust, including a trust under documents offered for probate, conflicts with the trustee's duty as a personal representative, or in which the trustee or competent beneficiary of the trust cannot represent the interest of the beneficiary under the doctrine of virtual representation, the beneficiary is a person interested in the proceedings.

History: 1973 c. 39; 1993 a. 486.

A trust for the benefit of grandchildren includes an illegitimate child whose parents entered into a void marriage after his birth. In re Trust of Parsons, 56 W (2d) 613, 203 NW (2d) 40.

Testamentary dispositions to "children" as including illegitimates—a change in Wisconsin law? 57 MLR 174.

**851.23 Personal representative.** "Personal representative" means any person to whom letters to administer a decedent's estate have been granted by the court or by the probate registrar under ch. 865, but does not include a special administrator.

History: 1973 c. 39.

**851.27 Property.** "Property" means any interest, legal or equitable, in real or personal property, without distinction as to kind.

**851.29 Sale.** "Sale" includes an option or agreement to transfer whether the consideration is cash or credit. It includes exchange, partition and settlement of title disputes. The intent of this section is to extend and not to limit the meaning of "sale".

**851.35 Classification; how determined.** In chs. 851 to 882, classification of the property of a decedent spouse and surviving spouse is determined under ch. 766.

History: 1985 a. 37.

**851.40 Basis for attorney fees.** (1) Any attorney performing services for the estate of a deceased person in any proceeding under chs. 851 to 879, including a proceeding for informal administration under ch. 865, shall be entitled to just and reasonable compensation for such services.

(2) Any personal representative, heir, beneficiary under a will or other interested party may petition the court to review any attorney's fee which is subject to sub. (1). If the decedent died intestate or the testator's will contains no provision concerning attorney fees, the court shall consider the following factors in determining what is a just and reasonable attorney's fee:

- The time and labor required.
- The experience and knowledge of the attorney.
- The complexity and novelty of the problems involved.
- The extent of the responsibilities assumed and the results obtained.

(e) The sufficiency of assets properly available to pay for the services, except that the value of the estate may not be the controlling factor.

History: 1975 c. 329; 1993 a. 490.

Cross-reference: See s. 865.16 (1m) review of attorney fees by the probate registrar.

Attorney's failure to communicate with one of the heir's in violation of a court order was an appropriate basis for reducing the attorney fees. In Matter of Estate of Huehne, 175 W (2d) 33, 498 NW (2d) 870 (Ct. App. 1993).

Attorney's fee based on contract to pay attorney 4% of the gross estate violated sub. (2) (e); reduction was proper exercise of judicial discretion. Estate of Konopka, 175 W (2d) 100, 498 NW (2d) 853 (Ct. App. 1993).

**851.51 Status of adopted persons for purposes of inheritance, wills and class gifts.** (1) INHERITANCE RIGHTS BETWEEN ADOPTED PERSON AND ADOPTIVE RELATIVES. A legally adopted person is treated as a natural child of the person's adoptive parents for purposes of intestate succession by, through and from the adopted person and for purposes of any statute conferring rights upon children, issue or relatives in connection with the law of intestate succession or wills.

(2) INHERITANCE RIGHTS BETWEEN ADOPTED PERSON AND NATURAL RELATIVES. A legally adopted person ceases to be treated as a child of the person's natural parents for the same purposes, except:

(a) If a natural parent marries or remarries and the child is adopted by the stepparent, the child is treated as the child of the child's natural parent for all purposes;

(b) If a natural parent of a marital child dies and the other natural parent remarries and the child is adopted by the stepparent, the child is treated as the child of the deceased natural parent for purposes of inheritance through that parent and for purposes of any statute conferring rights upon children, issue or relatives of that parent under the law of intestate succession or wills.

(3) CONSTRUCTION OF CLASS GIFT AS INCLUDING ADOPTED PERSONS. (a) A gift of property by will, deed or other instrument to a class of persons described as issue, lawful issue, children, grandchildren, descendants, heirs, heirs of the body, next of kin, distributees or the like includes a person adopted by a person whose natural child would be a member of the class or issue of the adopted person, if:

- The instrument does not expressly exclude adopted persons;
- The conditions for membership in the class are otherwise satisfied; and
- The adopted person was a minor at the time of adoption, or was adopted after having been raised as a member of the household by the adoptive parent from the child's 15th birthday or before.

(b) Unless the instrument expressly provides otherwise such a gift excludes a natural child and the natural child's issue otherwise within the class if the child has been adopted and would cease to be a child of the child's natural parents under sub. (2) for purposes of inheritance from the testator. This subsection applies to all wills, deeds, trusts or other instruments executed on or after April 1, 1971.

History: 1983 a. 447; 1993 a. 486.

A bequest to "children" executed in 1919 excludes adopted children. Will of Mitchell, 50 W (2d) 499, 184 NW (2d) 853.

A valid adoption of petitioner by his aunt would preclude his right to inherit as the son of his natural mother, although he would be entitled to inherit as a nephew. Estate of Komar, 68 W (2d) 473, 228 NW (2d) 681.

This section applies to adoptions made prior to its passage; the right to take by intestacy is determined on the date of the decedent's death. Matter of Estate of Jank, 186 W (2d) 409, 521 NW (2d) 162 (Ct. App. 1994).

Inheritance "by, through and from" an adopted person under the new statute. Taibl, 56 MLR 119.

**851.55 Uniform simultaneous death act.** (1) If the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he or she had survived, except as provided otherwise in this section.

(2) If property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon the beneficiary surviving another person, and both persons die, and there is no sufficient evidence that the 2 have died otherwise than simultaneously, the beneficiary shall be deemed not to have survived. If there is no sufficient evidence that 2 or more beneficiaries have died otherwise than simultaneously and property has been disposed of in such a way that at the time of their death each of such beneficiaries would have been entitled to the property if the beneficiary had survived the others, the property shall be divided into as many equal portions as there were such beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each of such beneficiaries had survived.

(3) Where there is no sufficient evidence that 2 joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than 2 joint tenants and all of them have so died the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants.

(3m) If a husband and wife die leaving marital property and there is not sufficient evidence that they died otherwise than simultaneously, except as provided in sub. (4) 50% of the marital property shall be distributed as if the husband had survived and 50% as if the wife had survived, and each 50% shall be distributed as if it were the individual property of the person deemed to survive.

(4) Where the insured and the beneficiary in a policy of life or accident insurance have died and there is not sufficient evidence that they have died otherwise than simultaneously, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary. If the policy is the marital property of the insured and of the insured's spouse and there is no alternative beneficiary except the estate or the personal representative of the estate, the proceeds shall be distributed as marital property under sub. (3m).

(5) This section shall not apply to the distribution of the property of a person who has died before June 26, 1941.

(6) This section shall not apply in the case of wills, living trusts, deeds or contracts of insurance, or any other situation where provision is made for distribution of property different from the provisions of this section, or where provision is made for a presumption as to survivorship which results in a distribution of property different from that herein provided.

(7) This section shall be so construed as to make uniform the law in those states which enact it.

(8) This section may be cited as the "Uniform Simultaneous Death Act".

History: 1977 c. 214, 449; 1983 a. 186; 1993 a. 486.

**851.70 Presumption in favor of orders.** When the validity of any order or judgment of a circuit court in a probate proceeding or certificate to terminate a life estate or joint tenancy in a death tax proceeding is drawn in question in another action or proceeding, everything necessary to have been done or proved to render the order, judgment or certificate valid and which might have been proved by parole evidence at the time of making the order or judgment and was not required to be recorded shall, after 20 years from that time, be presumed to have been done or proved unless the contrary appears on the same record.

History: 1977 c. 449; 1987 a. 27.

**851.71 Appointment and compensation of registers in probate.** (1) In each county, the judges of the county shall appoint and may remove a register in probate. Appointments and removals may be made only with the approval of the chief judge. Before entering upon duties, the register in probate shall take and subscribe the constitutional oath of office and file it, together with the order of appointment, in the office of the clerk of circuit court.

(2) One or more deputies may be appointed in the manner specified in sub. (1).

(3) The salary of the register in probate and of any deputies shall be fixed by the county board and paid by the county.

(4) In counties having a population of 500,000 or more, the appointment under subs. (1) and (2) shall be made as provided in those subsections but the judges shall not remove the register in probate and deputy registers, except through charges for dismissal made and sustained under s. 63.10 or an applicable collective bargaining agreement.

History: 1977 c. 449; 1987 a. 153.

County's collective bargaining agreement cannot supersede authority of circuit judge to appoint register in probate. *Iowa County v. Iowa County Courthouse*, 166 W (2d) 614, 480 NW (2d) 499 (1992).

**851.72 Duties of registers in probate.** The register in probate shall:

(1) File and keep all papers properly deposited with him or her unless required to transmit such papers.

(2) Keep a court record of every proceeding in the court under chs. 851 to 880 under its proper title, a brief statement of the nature of the proceeding and of all papers filed therein, with the date of filing and a reference to where minute records can be found or to the microfilm or optical disk file where papers have been stored so that the court record is a complete index or brief history of each proceeding from beginning to final disposition.

(3) Keep a minute record and enter therein a brief statement of all proceedings of the court under chs. 851 to 880 during its sessions, all motions made and by whom, all orders granted in open court or otherwise, and the names of all witnesses sworn or examined. If this information is all included in the court record, the judge may direct that the minute record be no longer kept.

(5) Keep an alphabetical index to the court record and the file containing the original documents or microfilm or optical disk copies thereof.

(6) Perform any other administrative duties as the judge directs.

(7) Except in counties having a population of 500,000 or more, perform the duties of clerk of the court assigned to exercise jurisdiction under ch. 48 unless these duties are performed by a person appointed under s. 48.04.

(8) When appointed deputy clerk under s. 851.75, perform such duties as the clerk of circuit court directs.

(9) In counties having a population of 500,000 or more, the register in probate shall be the department head as to all personnel, procurement, budget and related matters with reference to his or her office as register in probate. The register in probate shall appoint under ss. 63.01 to 63.16 as many deputy clerks as may be authorized by the county board, provided that the appointments shall be approved by the judge which the deputy shall serve. The deputy clerks shall aid the register in probate and deputy registers in probate in the discharge of their duties.

(10) Submit a monthly report to the department of health and social services of the deadlines for filing claims against estates set under s. 859.01 during that month in the register's county. The report shall be filed in a form and manner that may be prescribed by the department of health and social services.

History: 1977 c. 449; Sup. Ct. Order, 136 W (2d) xx (1987); 1987 a. 193; 1993 a. 16, 172.

Judges may grant supervisory authority to register in probate under sub. (6). *Manitowoc County v. Local 986A*, 170 W (2d) 692, 489 NW (2d) 722 (Ct. App. 1992).

Alphabetical index under (5) is not court record and thus is open to public access under 59.14 (1) and 19.31. Index may not, however, contain results of proceedings under chapters 55 and 880. 73 Atty. Gen. 16.

**851.73 Powers of registers in probate.** (1) The register in probate:

(a) May make orders for hearings when the judge is away from the county seat or unable to discharge duties or when given authority in writing by the judge and an application is made to the court in a proceeding under chs. 851 to 880 requiring notice of hearing. The order and notice when signed "by the court, \_\_\_\_\_, register in probate" has the same effect as if signed by the judge.

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(b) Has the same powers as clerks of court to certify copies of papers, records and judicial proceedings. Copies certified by registers in probate are receivable in evidence as if certified by clerks of court.

(c) Has the power to administer any oath required by law.

(d) Has, when appointed for this purpose, the powers of deputy clerks as provided in s. 59.38.

(e) Has, when appointed for this purpose, the powers and duties of court reporters and assistant reporters specified in SCR 71.01.

(f) May refuse to accept any paper for filing or recording until the fee prescribed by s. 814.66 or other applicable statute is paid.

(2) Subsection (1) applies to duly authorized deputy registers

in probate.

History: 1977 c. 449; Sup. Ct. Order, eff. 1-1-80; 1983 a. 347.

**851.74 Fees in probate matters.** The fees of the register in probate are prescribed in s. 814.66.

History: 1977 c. 449; 1981 c. 317.

**851.75 Register in probate may be appointed deputy clerk.** With the written approval of the chief judge of the judicial administrative district, the circuit judges for the county may appoint the register in probate a deputy clerk. Appointments by the circuit judges under this section shall be revocable by the circuit judges, subject to the approval of the chief judge, at pleasure. The appointments and revocations shall be in writing and shall be filed in the clerk's office.

History: 1977 c. 449.