# CHAPTER 861

## PROBATE — FAMILY RIGHTS

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### SUBCHAPTER I

### INTEREST IN MARITAL PROPERTY

**Cross–reference:** See definitions in ch. 851.

**NOTE: 1985 Wis. Act 37, which created ss. 861.03 to 861.13, contains explanatory notes.**

**861.01 Ownership of marital property at death. (1)** SURVIVING SPOUSE'S ONE–HALF INTEREST IN MARITAL PROPERTY. Upon the death of either spouse, the surviving spouse retains his or her undivided one–half interest in each item of marital property. The surviving spouse's undivided one–half interest in each item of marital property is not subject to administration. Ownership and management and control rights are set forth under ss. 857.01 and 857.015.

**(2)** INTEREST OF A 3RD PARTY IN MARITAL PROPERTY. A 3rd party who is a successor in interest to all or part of the decedent's 50 percent interest in marital property is a tenant in common with the surviving spouse.

**(3m)** PERSONAL INJURY DAMAGES; LOST EARNINGS. Section 766.31 (7m) determines the rights of a surviving spouse to that part of a personal injury claim that represents future lost earnings of the surviving spouse.

**(4)** ENFORCEMENT OF SURVIVING SPOUSE'S MARITAL PROPERTY RIGHTS IN NONPROBATE ASSETS. Section 766.70 applies to enforcement of a surviving spouse's marital property rights in nonprobate assets.

**(5)** DIVISION OF MARITAL PROPERTY ON AGGREGATE BASIS. Section 766.31 (3) (b) determines how marital property may be divided upon the death of a spouse.

**History:** 1983 a. 186; 1985 a. 37; 1987 a. 393; 2005 a. 216.

New probate and non–probate property elections under Wisconsin's marital property act. Erlanger and Weisberger. WBB Oct. and Nov. 1986.

Wisconsin's New Probate Code. Erlanger. Wis. Law. Oct. 1998.

**861.015 Satisfaction of nonholding spouse's marital property interest in certain business property. (1)** If following the death of a spouse property is subject to a directive under s. 857.015, the marital property interest of the nonholding spouse in the property shall be satisfied within one year after the decedent spouse's death from other property which is of equal clear market value at the time of satisfaction. Except as provided under sub. (3), if the interest of the nonholding spouse under this section is not satisfied within one year after the decedent spouse's death, this section does not apply and the nonholding spouse's marital property interest in the property subject to the directive continues as if the directive had not been made.

**(2)** For purposes of this section, property subject to a directive is valued by its clear market value on the date of the decedent's death. Satisfaction of the nonholding spouse's marital property interest in the property subject to the directive shall be based on that value, plus any income from the property subject to the directive after the death of the decedent and before satisfaction. For purposes of determining the income from the property subject to a directive, such property shall be treated as a legacy or devise of property other than money under s. 701.1115.

**(3)** If the interest of the nonholding spouse under this section is not satisfied within one year after the decedent spouse's death because the clear market value of the property subject to the directive has not been determined, the court having jurisdiction of the decedent spouse's estate shall do either of the following:

(a) Order that the interest of the nonholding spouse shall be satisfied after the determination of clear market value, at a date specified by the court.

(b) Order that the interest of the nonholding spouse shall be satisfied before the determination of clear market value based on an estimate of the clear market value, subject to any necessary adjustment upon final determination of clear market value.

**(4)** The following property is not available to satisfy the nonholding spouse's marital property interest in the property subject to the directive:

(a) Property included in an order, or extension or revision of an order, for an allowance under s. 861.31 made before satisfaction of the nonholding spouse's interest.

(b) Property selected under s. 861.33 before satisfaction of the nonholding spouse's interest.

(c) Property included in an order for an allowance under s. 861.35 made before satisfaction of the nonholding spouse's interest.

**(5)** Satisfaction of a nonholding spouse's marital property interest under this section shall not adversely affect any of the following:

(a) The nonholding spouse's marital property interest in property not subject to the directive.

(b) The nonholding spouse's election under s. 861.02 of deferred marital property other than deferred marital property subject to the directive.

**History:** 1987 a. 393; 1997 a. 188; 2005 a. 10; 2013 a. 92.

SUBCHAPTER II

DEFERRED MARITAL PROPERTY ELECTIVE SHARE AMOUNT

**861.018 Definitions.** In this subchapter:

**(1)** "Augmented deferred marital property estate" means the property under s. 861.02 (2).

**(2)** "Deferred individual property" means any property that satisfies all of the following:

(a) Is not classified by ch. 766.

(b) Was brought to the marriage or acquired while the spouses were married.

(c) Would have been classified as individual property under ch. 766 if the property had been acquired when ch. 766 applied.

**(3)** "Nonadverse party" means a person who has a power relating to a trust or other property arrangement but who does not have a substantial beneficial interest that would be adversely affected by exercise or nonexercise of that power, except that "nonadverse party" does not include a person who has a general power of appointment over property, with respect to that property.

**(4)** "Power" includes a power to designate the beneficiary of a beneficiary designation.

**(5)** "Power of appointment" includes a power to designate the beneficiary of a beneficiary designation.

**(6)** "Presently exercisable general power of appointment" means a power of appointment under which, at the time in question, the decedent held a power to create a present or future interest in himself or herself, his or her creditors, his or her estate or creditors of his or her estate and a power to revoke or invade the principal of a trust or other property arrangement, whether or not the decedent had the capacity to exercise the power at the time.

**(7)** "Property" has the meaning given in s. 851.27 and includes values subject to a beneficiary designation.

**(8)** "Right to income" includes a right to payments under a commercial or private annuity, an annuity trust, a unitrust or a similar arrangement.

**(9)** "Transfer" includes, but is not limited to, the following:

(a) An exercise or release of a presently exercisable general power of appointment held by the decedent.

(b) A lapse at death of a presently exercisable general power of appointment held by the decedent.

(c) An exercise, release or lapse of either of the following:

1. A general power of appointment that the decedent created in himself or herself.

2. A power under s. 861.03 (3) that the decedent conferred on a nonadverse party.

**History:** 1997 a. 188.

Wisconsin's New Probate Code. Erlanger. Wis. Law. Oct. 1998.

**861.02 Deferred marital property elective share amount. (1)** AMOUNT. The surviving spouse has the right to elect an amount equal to no more than 50 percent of the augmented deferred marital property estate as determined under sub. (2).

**(2)** AUGMENTED DEFERRED MARITAL PROPERTY ESTATE. (a) If the presumption of marital property under s. 766.31 (2) is rebutted as to the classification of an asset or a portion thereof, the asset or portion is presumed to be deferred marital property.

(b) The augmented deferred marital property estate is the total value of the deferred marital property of the spouses, irrespective of where the property was acquired, where the property was located at the time of a relevant transfer, or where the property is currently located, including real property located in another jurisdiction. It includes all types of property that fall within any of the following categories:

1. Probate and nonprobate transfers of the decedent's deferred marital property under s. 861.03 (1) to (3).

2. Decedent's gifts of deferred marital property made during the 2 years before the decedent's death under s. 861.03 (4).

3. Deferred marital property of the surviving spouse under s. 861.04.

**(3)** CALCULATION OF PROPERTY INTERESTS. Exclusions from the augmented deferred marital property estate, valuation of included property and reduction for expenses and claims are governed by s. 861.05.

**(4)** SATISFACTION. Satisfaction of the augmented deferred marital property elective share amount is governed by ss. 861.06, 861.07, and 861.11, irrespective of where the property was acquired, where the property was located at the time of a relevant transfer, or where the property is currently located, including real property located in another jurisdiction.

**(5)** PROCEEDINGS. Proceedings for the election are governed by ss. 861.08 and 861.09.

**(6)** WAIVER. Waiver of the deferred marital property elective share amount is governed by s. 861.10.

**(7)** APPLICABILITY OF ELECTION. (a) Unless the right has been waived under s. 861.10 or other limitations of this subchapter apply, the surviving spouse is eligible to make the election if at the time of the decedent's death the decedent is domiciled in this state.

(b) If a decedent who is not domiciled in this state owns real property in this state, the rights of the surviving spouse in that property are governed by s. 861.20.

**(8)** EFFECT IF DEATH CAUSED BY SPOUSE. Section 854.14 (2) (c) and (3m) (d) applies to election of deferred marital property if the decedent's surviving spouse unlawfully and intentionally killed the decedent.

**History:** 1983 a. 186; 1985 a. 37 ss. 144, 145; Stats. 1985 s. 861.02; 1987 a. 393; 1991 a. 224, 301, 315; 1993 a. 213; 1997 a. 188; 2005 a. 216.

**NOTE: 1991 Wis. Act 301 contains legislative council notes.**

Deferred marital property under sub. (1) is property subject to administration for all purposes, including the payment of claims under s. 879.63. In Matter of Estate of Moccero, 168 Wis. 2d 313, 483 N.W.2d 310 (Ct. App. 1992).

Wisconsin's New Deferred Marital Property Election. Erlanger. Wis. Law. April 1999.

**861.03 Augmented deferred marital property estate: decedent's probate property and nonprobate or other property transfers.** Subject to s. 861.05, the augmented deferred marital property estate includes all of the following:

**(1)** DEFERRED MARITAL PROPERTY IN DECEDENT'S PROBATE ESTATE. The value of deferred marital property in the decedent's probate estate.

**(2)** DEFERRED MARITAL PROPERTY PASSING NONPROBATE AT DECEDENT'S DEATH. The value of deferred marital property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death, including the following:

(a) The decedent's fractional interest in deferred marital property that was held by the decedent with the right of survivorship.

(b) The decedent's ownership interest in deferred marital property that was held by the decedent in a form payable or transferable on death, including deferred employment benefit plans, individual retirement accounts, annuities and transfers under s. 766.58 (3) (f), or in co–ownership with the right of survivorship.

(c) Deferred marital property in the form of proceeds of insurance on the life of the decedent, including accidental death benefits, that were payable at the decedent's death, if the decedent owned the insurance policy immediately before death or if the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds.

(d) Deferred marital property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment, to the extent that the property passed at the decedent's death by exercise, release, lapse, default or otherwise.

**(3)** DEFERRED MARITAL PROPERTY TRANSFERRED WITH RETAINED RIGHTS OR BENEFITS. (a) The augmented deferred mari-

tal property estate includes the value of any deferred marital property transferred by the decedent in which the decedent retained rights or benefits, including but not limited to the following:

1. Deferred marital property in which the decedent retained the right to possession, use, enjoyment or income and that was irrevocably transferred, to the extent that the decedent's right terminated at or continued beyond the decedent's death.

2. Deferred marital property in which the decedent retained the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, to control the time at which designated persons shall possess or enjoy the property or income therefrom, or to alter or amend the terms of the transfer of the property, to the extent that the decedent's right terminated at or continued beyond the decedent's death.

3. Any transfer of deferred marital property, including transfer of an income interest, in which the decedent created a power of appointment, including the power to revoke or terminate the transfer or to consume, invade or dispose of the principal or income, if the power was exercisable by the decedent alone, by the decedent in conjunction with another person or by a nonadverse party, and if the power is for the benefit of the decedent, creditors of the decedent, the decedent's estate or creditors of the decedent's estate.

(b) The amount included under par. (a) 3. is the value of the property subject to the power of appointment if the power of appointment is over property, the value of the property that produces or produced the income if the power of appointment is over income or the power valued at the higher amount if the power of appointment is over both income and property. The value is limited by the extent to which the power of appointment was exercisable at the decedent's death or the property passed at the decedent's death by exercise, release, lapse, default or otherwise.

**(4)** DEFERRED MARITAL PROPERTY TRANSFERRED WITHIN 2 YEARS PRIOR TO DEATH. (a) In this subsection, termination occurs:

1. With respect to a right or interest in property, when the right or interest terminates by the terms of the governing instrument or when the decedent transfers or relinquishes the right or interest.

2. With respect to a power of appointment over property, when the power terminates by exercise, release, lapse, default or otherwise.

3. With respect to a power of appointment under sub. (2) (d), when the power terminates by exercise or release.

(b) The augmented deferred marital property estate includes the value of any deferred marital property transferred by the decedent within the 2 years immediately preceding the decedent's death, including the following:

1. Deferred marital property that passed as a result of the termination of a right or interest in, or power of appointment over, property that would have been included in the augmented deferred marital property estate under subs. (2) (a), (b) or (d) or (3), if the right, interest or power had not terminated until the decedent's death. The amount included is the value of the property that would have been included if the property were valued at the time the right, interest or power terminated.

2. Transfers by the decedent of or relating to the deferred marital property component of an insurance policy on the life of the decedent, if the proceeds would have been included under sub. (2) (c) had the transfer not occurred. The amount included is the value of the insurance proceeds to the extent that they were payable at the decedent's death.

3. Any transfer of deferred marital property to the extent that it is not otherwise included in the augmented deferred marital property estate. The amount included is the value of the property at the time of the transfer, but only to the extent that the aggregate transfers to any one donee in either of the 2 years exceeded $10,000.

**History:** 1985 a. 37; 1987 a. 393; 1997 a. 188.

**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.

**(2m)** When the surviving spouse is treated as the decedent under sub. (1), the decedent is not treated as the surviving spouse for the purposes of s. 861.05 (1) (e) or (2m).

**History:** 1997 a. 188; 2005 a. 216.

**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 spouse who did not make the transfer, with the written joinder or written consent of that 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, or of assets in an individual retirement account that are traceable to the rollover of a deferred employment benefit plan, held by the surviving spouse that would have terminated under s. 766.62 (5) had it been marital property.

**(2)** VALUATION OF DECEDENT'S PROPERTY AND TRANSFERS. (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.

**(2m)** VALUATION OF SURVIVING SPOUSE'S PROPERTY AND TRANSFERS. The surviving spouse's property included in the augmented deferred marital property estate under s. 861.04 (1) is valued in the same manner as the decedent spouse's property included in the augmented deferred marital property estate is valued under sub. (2), subject to the following:

(a) The surviving spouse shall be treated as having died after the decedent on the date of the decedent's death notwithstanding the 120–hour survival requirement under s. 854.03 (1).

(b) Life insurance on the surviving spouse's life shall have the value of the deferred marital property component of the interpolated terminal reserve and the unused portion of the term premium of the policy as of the date of the decedent's death.

**(3)** REDUCTION FOR EQUITABLE PROPORTION OF EXPENSES AND ENFORCEABLE CLAIMS. The value of deferred marital property included in the augmented deferred marital property estate under s. 861.03 or 861.04 shall be reduced by an equitable proportion of funeral and burial expenses, administrative expenses, other charges and fees and enforceable claims.

**(4)** OVERLAPPING APPLICATION; NO DOUBLE INCLUSION. If the same property could be included in the augmented deferred marital property estate under more than one provision of s. 861.03 or 861.04, the property is included only once, and it is included under the provision that yields the greatest value.

**History:** 1985 a. 37; 1991 a. 301; 1997 a. 188; 2005 a. 216.

**NOTE: 1991 Wis. Act 301 contains legislative council notes.**

**861.06 Satisfaction of deferred marital property elective share amount. (1)** DEFINITION. In this section, "property transferred to the surviving spouse" includes outright transfers that have been disclaimed by the surviving spouse. The term does not include transfers in trust that have been disclaimed by the surviving spouse, unless the surviving spouse had a general power of appointment over the property in the trust during his or her lifetime or an interest in the trust after the disclaimer.

**(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:

(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 any beneficial interest in property transferred in trust:

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 gifts from the decedent to the surviving spouse each year. Each gift shall be 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.

**(3)** UNSATISFIED BALANCE. After the property under sub. (2) has been applied toward satisfaction of the deferred marital property elective share amount, the remainder of the elective share amount shall be satisfied proportionally from transfers to persons other than the surviving spouse of property included in the augmented deferred marital property estate under s. 861.03 (1), (2), (3) or (4) (b) 2.

**(4)** REMAINING UNSATISFIED BALANCE. After the property under subs. (2) and (3) has been applied toward satisfaction of the deferred marital property elective share amount, the remainder of the elective share amount shall be satisfied proportionally from transfers to persons other than the surviving spouse of property included in the augmented deferred marital property estate under s. 861.03 (4) (b) 1. or 3.

**(5)** EQUITABLE ADJUSTMENT OF SHARES. If all or part of a prorated share under sub. (2), (3) or (4) is uncollectible, the court may increase the prorated liability of recipients described under the same or another of the 3 subsections if all of the following conditions are satisfied:

(a) The court finds that an equitable adjustment is necessary to avoid hardship for the surviving spouse.

(b) No recipient or donee of a recipient is liable for an amount greater than the value of the deferred marital property subject to the election that was received.

**(6)** VALUATION. The value of property used to satisfy the deferred marital property elective share includes the value of any property transferred outright to the surviving spouse, the commuted value of any present or future interest in property transferred to the surviving spouse, and the commuted value of property payable to the surviving spouse under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement.

**History:** 1997 a. 188; 2005 a. 216.

**861.07 Personal liability of recipients. (1)** DEFINITION. In this section, "proceeds" includes:

(a) The consideration, in money or property, received in exchange for the property that is the subject of the transfer.

(b) Property acquired with the consideration received in exchange for the property that is the subject of the transfer.

**(2)** PERSONS LIABLE. The following persons are liable to make a prorated contribution toward satisfaction of the surviving spouse's deferred marital property elective share amount:

(a) Original recipients of the decedent's transfers of deferred marital property to others, irrespective of whether the recipient has the property or its proceeds.

(b) Donees of the recipients under par. (a) if the donees have the property or its proceeds. If a donee has neither the property nor its proceeds but knew or should have known of the liability under this section, the donee remains liable for his or her share of the prorated contribution.

**(3)** MODE OF SATISFACTION. (a) Subject to par. (b), a person who is liable under sub. (2) may either give up the proportional part of the decedent's transfers to him or her or pay the value of the amount for which he or she is liable.

(b) On petition of the surviving spouse showing that the mode of satisfaction chosen in par. (a) will create a hardship for the surviving spouse, the court may order that a different mode of satisfaction be used.

**(4)** EFFECT OF FEDERAL PREEMPTION. If any provision of this subchapter is preempted by federal law with respect to any property interest or benefit that is included under s. 861.03 and that would pass but for that preemption to a person other than the surviving spouse, the recipient, unless he or she is a recipient for value, is subject to subs. (1) to (3).

**History:** 1997 a. 188; 2005 a. 216.

**861.08 Proceeding for election; time limit. (1)** GENERALLY. Except as the time may be extended under sub. (3), in order to make the election, the surviving spouse shall, within 6 months after the date of the decedent's death, do all of the following:

(a) File a petition for the election with whichever of the following applies:

1. The court that has jurisdiction of the probate proceedings relating to the decedent's estate if a judicial proceeding has been commenced.

2. The court that has jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence if no judicial proceeding has commenced.

(b) Mail or deliver a copy of the petition to the personal representative, if any, of the decedent's estate.

**(2)** NOTIFICATION OF INTERESTED PARTIES. The surviving spouse shall give notice, in the manner provided in ch. 879, of the time and place set for hearing the petition to any persons who may be adversely affected by the election.

**(3)** EXTENSION OF TIME FOR ELECTION. (a) Subject to par. (b), the court may grant the surviving spouse an extension for making an election if the surviving spouse petitions the court for an extension, gives notice as specified in sub. (2) and shows cause for an extension.

(b) The petition for extension of the time for making an election must be filed within 6 months after the decedent's death, unless the court finds all of the following:

1. That the surviving spouse was prevented from filing the action or naming a particular interested party for reasons beyond his or her control.

2. That failure to extend the time for making an election will result in hardship for the surviving spouse.

**(4)** WITHDRAWAL OF ELECTION. The surviving spouse may withdraw the petition for an election at any time before the probate court has entered the final determination of the distribution of the decedent's estate.

**(5)** COURT DETERMINATION OF LIABILITY. (a) After notice and hearing, the court shall determine the deferred marital property elective share amount and shall determine the property that satisfies that amount under ss. 861.06 and 861.07.

(b) If the personal representative does not hold the money or property included in the augmented deferred marital property estate, the court shall determine the liability of any person or entity that has any interest in the money or property or that holds that money or property.

(c) The surviving spouse may choose to seek relief from fewer than all recipients. However, any such action shall not cause any other recipient's liability to exceed the amount that he or she would have had to pay if all recipients had paid a prorated share.

**(6)** SUITS AUTHORIZED. An order or judgment of the court may be enforced in a suit for contribution or payment in other courts of this state or other jurisdictions.

**History:** 1997 a. 188.

**861.09 Right of election by or on behalf of surviving spouse.** The surviving spouse must be living in order for an election to be filed. If the surviving spouse does not personally file the election, it may be filed on the surviving spouse's behalf by the spouse's conservator, guardian or guardian ad litem, or by an agent of the spouse acting under a power of attorney.

**History:** 1997 a. 188.

**861.10 Waiver of right to elect; failure to elect.** **(1)** RIGHT TO ELECT MAY BE WAIVED. The right to elect a deferred marital property elective share amount may be waived by the surviving spouse in whole or in part. The waiver may take place before or after marriage. The waiver must be contained in a marital property agreement that is enforceable under s. 766.58 or in a signed document filed with a court described in s. 861.08 (1) (a) after the decedent's death.

**(2)** WAIVER OF "ALL RIGHTS". Unless the waiver provides otherwise, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse, or in a complete property settlement entered into because of separation or divorce, is a waiver of all rights in the deferred marital property elective share amount.

**(3)** FAILURE TO ELECT. Failure of a surviving spouse to elect is not a transfer of property and is not a gift from the surviving spouse to the decedent spouse's probate estate or to the beneficiaries of other transfers.

**History:** 1997 a. 188; 2005 a. 216.

**861.11 Protection of payers and other 3rd parties.** **(1)** DEFINITION. In this section, "governing instrument" includes a filed verified statement under s. 865.201, a certificate under s. 867.046 (1m) or a recorded application under s. 867.046 (5).

**(2)** PAYER NOT LIABLE UNTIL NOTICE RECEIVED. (a) Upon a beneficiary's request for payment, a payer or other 3rd party who has received satisfactory proof of the decedent's death and who has not received written notice that the surviving spouse or his or her representative intends to file a petition for the deferred marital property elective share amount or that a petition for the election has been filed is not liable for any of the following:

1. Causing any payment, item of property or other benefit included in the augmented deferred marital property estate under s. 861.03, to transfer directly to the beneficiary designated in a governing instrument.

2. Any other action in good faith reliance on the validity of a governing instrument.

(b) A payer or other 3rd party is liable for payments made or other actions taken after receipt of written notice of the intent to file a petition for the elective share amount or written notice that a petition for the elective share amount has been filed.

**(3)** METHOD OF NOTICE TO PAYERS. A written notice of the intent to file a petition for the election or written notice that a petition for the election has been filed shall fulfill one of the following requirements:

(a) Be mailed to the payer's or other 3rd party's main office or home by registered or certified mail, return receipt requested.

(b) Be served upon the payer or other 3rd party in the same manner as a summons in a civil action.

**(4)** OPTIONAL PAYMENT OF PROCEEDS TO COURT. (a) Upon receipt of written notice of the intent to file, or the filing of, a petition for the election, a payer or other 3rd party may pay any amount owed or transfer or deposit any item of property to or with whichever of the following applies:

1. The court that has jurisdiction of the probate proceedings relating to the decedent's estate if proceedings have been commenced.

2. The court that has jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence, if no judicial proceeding has commenced.

(b) Payments, transfers or deposits made to the court discharge the payer or other 3rd party from all claims for amounts paid or the value of property transferred or deposited.

(c) The court shall hold the funds or items of property. After the court makes its determination under s. 861.08 (5), it shall order disbursement in accordance with that determination. The court shall order disbursement to the beneficiary designated in the governing instrument if either of the following conditions applies:

1. No petition is filed in the court within the specified time under s. 861.08 (1).

2. A petition was filed but withdrawn under s. 861.08 (4) with prejudice.

(d) If payments have been made to the court or if property has been deposited with the court under par. (a), the court may order that all or part of the payments or property be paid to the beneficiary who is designated in the governing instrument, upon that beneficiary's petition to the court. Those payments shall be in an amount and subject to conditions consistent with this subchapter.

**(5)** PROTECTION OF FINANCIAL INSTITUTIONS. (a) In this subsection:

1. "Account" has the meaning given in s. 705.01 (1) or 710.05 (1) (a).

2. "Financial institution" has the meaning given in s. 705.01 (3).

(b) Notwithstanding sub. (2), in addition to the protections afforded a financial institution under ss. 701.1012 and 710.05 and chs. 112 and 705 a financial institution is not liable for having transferred an account included in the augmented deferred marital property estate under s. 861.03 to a beneficiary designated in a governing instrument, or for having taken any other action in reliance on the beneficiary's apparent entitlement under the terms of a governing instrument, regardless of whether the financial institution received written notice of an intent to file, or the filing of, a petition for the deferred marital property elective share amount.

(c) If a financial institution has reason to believe that a dispute exists as to the rights of parties, or their successors, to an account subject to a governing instrument, the financial institution may, but is not required to, do any of the following:

1. Deposit the account with a court as provided in sub. (4).

2. Refuse to transfer the account to any person.

(d) The protection afforded a financial institution under this subsection does not affect the rights of parties or their successors in disputes concerning the beneficial ownership of accounts.

**History:** 1985 a. 37; 1987 a. 393 s. 53; 1997 a. 188; 2005 a. 216; 2013 a. 92.

SUBCHAPTER III

OTHER RIGHTS, ALLOWANCES AND EXEMPTIONS

**861.17 Rights in property transferred in fraud of surviving spouse. (1)** Nothing in this chapter precludes a court in an equitable proceeding from subjecting to the rights of the surviving spouse under ch. 852 and this chapter any property arrangement made by the decedent in fraud of those rights. A property arrangement in fraud of the rights of the surviving spouse means any of the following:

(a) Any transfer or acquisition of property, regardless of the form or type of property rights involved, made by the decedent during marriage or in anticipation of marriage for the primary purpose of defeating the rights of the surviving spouse under ch. 852 and this chapter.

(b) Any breach of the good faith duty imposed by s. 766.15 made for the primary purpose of defeating the rights of the surviving spouse in or to marital property.

**(2)** An arrangement made before marriage, or within one year after marriage, or prior to April 1, 1971, to provide for issue by a prior marriage is not a fraudulent property arrangement within the meaning of this section.

**(3)** If the spouse is successful in an action to reach fraudulent property arrangements, recovery is limited to the amount the spouse would receive under ch. 852 and this chapter. Other rules of this chapter apply so far as possible. A spouse who recovers under this subsection forfeits any power of appointment that the surviving spouse possesses over the remaining portion of the fraudulently arranged property, except a special power.

**(3m)** If the spouse is successful in an action to reach fraudulent property arrangements involving marital property, recovery is limited to the surviving spouse's interest in the marital property. Other rules of this chapter apply so far as possible. Recovery forfeits any power of appointment which the surviving spouse possesses over the remaining portion of the fraudulently arranged marital property, except a special power.

**(4)** The surviving spouse has no rights against any person dealing with the property without actual knowledge, or receipt of written notice, of the claim of the spouse. A person who has knowledge of facts and circumstances sufficient to put the person on inquiry as to a claim by the spouse does not have actual knowledge and is not required to make further inquiry. This subsection does not protect a gratuitous donee from the original beneficiary of the fraudulent arrangement.

**(5)** Every such suit must be brought within 3 years of decedent's death, but may be barred by laches at an earlier date.

**History:** 1983 a. 186; 1985 a. 37 s. 187; 1993 a. 486; 2005 a. 216.

**861.20 Surviving spouse's right in nondomiciliary decedent's real property in this state. (1)** If a married person who does not have a domicile in this state dies and leaves a valid will disposing of real property in this state which is not the community property or marital property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in that property against the will of the decedent as if the property were located in the decedent's domicile at the decedent's death. The procedure of the decedent's domicile for electing against the will applies to such an election.

**(2)** If a married person who does not have a domicile in this state dies and has an interest in real property in this state that is subject to administration but not disposed of by will, the surviving spouse has the same right to the property under intestate succession as if the property were located in the decedent's domicile at decedent's death.

**History:** 1985 a. 37; 1987 a. 393; 2005 a. 216.

**861.21 Assignment of home to surviving spouse or surviving domestic partner. (1)** DEFINITIONS. In this section:

(a) "Governing instrument" has the meaning given in s. 854.01 (2).

(b) "Home" means any dwelling in which the decedent had an interest and that at the time of the decedent's death the surviving spouse or surviving domestic partner occupies or intends to occupy. If there are several such dwellings, any one may be designated by the surviving spouse or surviving domestic partner. "Home" includes a house, a mobile home, a manufactured home, a duplex or multiple apartment building one unit of which is occupied by the surviving spouse or surviving domestic partner and a building used in part for a dwelling and in part for commercial or business purposes. "Home" includes all of the surrounding land, unless the court sets off part of the land as severable from the remaining land under sub. (5).

**(2)** DECEDENT'S PROPERTY INTEREST IN HOME. Subject to subs. (4) and (5), if a married decedent or decedent in a domestic partnership has a property interest in a home, the decedent's entire interest in the home shall be assigned to the surviving spouse or surviving domestic partner if the surviving spouse or surviving domestic partner petitions the court requesting such a distribution and if a governing instrument does not provide a specific transfer of the decedent's interest in the home to someone other than the surviving spouse or surviving domestic partner. The surviving spouse or surviving domestic partner shall file the petition within 6 months after the decedent's death, unless the court extends the time for filing.

**(4)** PAYMENT BY SURVIVING SPOUSE OR SURVIVING DOMESTIC PARTNER. The court shall assign the interest in the home under sub. (2) to the surviving spouse or surviving domestic partner upon payment of the value of the decedent's interest in the home that does not pass to the surviving spouse or surviving domestic partner under intestacy or under a governing instrument. Payment shall be made to the fiduciary holding title to the interest. The surviving spouse or surviving domestic partner may use assets due him or her from the fiduciary to satisfy all or part of the payment in kind. Unless the court extends the time, the surviving spouse or surviving domestic partner shall have one year from the decedent's death to pay the value of the assigned interest.

**(5)** SEVERANCE OF HOME FROM SURROUNDING LAND. On petition of the surviving spouse or surviving domestic partner or of any interested person that part of the land is not necessary for dwelling purposes and that it would be inappropriate to assign all of the surrounding land as the home under sub. (2), the court may set off for the home as much of the land as is necessary for a dwelling. In determining how much land should be set off, the court shall take into account the use and marketability of the parcels set off as the home and the remaining land.

**History:** 1997 a. 188; 2005 a. 216; 2007 a. 11; 2009 a. 28.

**861.31 Allowance to family during administration. (1m)** The court may, without notice or on such notice as the court directs, order payment by the personal representative or special administrator of an allowance as the court determines necessary or appropriate for the support of the surviving spouse or surviving domestic partner and any minor children of the decedent during the administration of the estate. The court shall consider the size of the probate estate, other resources available for support, the existing standard of living, and any other factors it considers relevant.

**(2)** The court may order that an allowance be made to the spouse or surviving domestic partner for support of the spouse or surviving domestic partner and any minor children of the decedent, or that separate allowances be made to the spouse or surviv-

ing domestic partner and to the minor children of the decedent or their guardian, if any, if the court finds separate allowances advisable. If there is no surviving spouse or surviving domestic partner, the court may order that an allowance be made to the minor children of the decedent or to their guardian, if any.

**(3)** The initial order for support may not exceed one year but may be extended for additional periods of not to exceed one year at a time, and is subject to revision or termination at any time by further order of the court.

**(4)** The court may order that the allowance be charged against income or principal, either as an advance or otherwise, but the court may not order that an allowance for support of minor children of the decedent be charged against the income or principal interest of the surviving spouse or surviving domestic partner. The court may order that the allowance for support of the surviving spouse or surviving domestic partner, not including any allowance for support of minor children of the decedent, be applied in satisfaction of any of the following:

(a) Any entitlement of the surviving spouse under s. 853.12.

(b) Any right of the surviving spouse or surviving domestic partner to elect under s. 861.02.

**History:** 1971 c. 40; 1991 a. 301; 1997 a. 188; 2005 a. 216; 2009 a. 28.

**NOTE: 1991 Wis. Act 301 contains legislative council notes.**

Widow's allowances and the IRC. Miller, 54 MLR 193.

**861.33 Selection of personalty by surviving spouse or surviving domestic partner. (1)** (a) Subject to this section, in addition to all allowances and distributions, the surviving spouse or surviving domestic partner may file with the court a written selection of the following personal property, which shall then be transferred to the spouse or domestic partner by the personal representative:

1. Wearing apparel and jewelry held for personal use by the decedent or the surviving spouse or surviving domestic partner;

2. Automobile;

3. Household furniture, furnishings and appliances; and

4. Other tangible personalty not used in trade, agriculture or other business, not to exceed $3,000 in inventory value.

(b) The selection in par. (a) may not include items specifically bequeathed except that the surviving spouse or surviving domestic partner may in every case select the normal household furniture, furnishings, and appliances necessary to maintain the home. For this purpose antiques, family heirlooms, and collections that are specifically bequeathed are not classifiable as normal household furniture or furnishings.

**(2)** If it appears that claims may not be paid in full, the court may, upon petition of any creditor, limit the transfer of personalty to the spouse under this section to items not exceeding $5,000 in aggregate inventory value until the claims are paid in full or the court otherwise orders, or the court may require the spouse to retransfer property in excess of $5,000 or, at the option of the spouse, pay the excess in value over this amount.

**(3)** The surviving spouse may select items not specifically bequeathed of the type specified under sub. (1) (a) 4. exceeding in value the $3,000 limit or obtain the transfer of items exceeding the limit set by the court under sub. (2), by paying to the personal representative the excess of inventory value over the respective limit.

**(4)** The personal representative has power, without court order, to execute appropriate documents to effect transfer of title to any personal property the spouse selects under this section. A person may not question the validity of the documents of transfer or refuse to accomplish the transfer on the grounds that the personal representative is also the surviving spouse of the decedent.

**History:** 1973 c. 233; 1983 a. 192; 1991 a. 301; 1997 a. 188; 2005 a. 216; 2009 a. 28.

This section is constitutional. In Matter of Estate of Eisenberg, 90 Wis. 2d 620, 280 N.W.2d 359 (Ct. App. 1979).

**861.35 Special allowance for support of spouse or domestic partner and support and education of minor children. (1m)** If the decedent is survived by a spouse, domestic partner, or by minor children, the court may order an allowance for the support and education of each minor child until he or she reaches a specified age, not to exceed 18, and for the support of the spouse or domestic partner. This allowance may be made whether the estate is testate or intestate. If the decedent is not survived by a spouse or domestic partner, the court also may allot directly to the minor children household furniture, furnishings, and appliances. The court may not order an allowance under this section if any of the following applies:

(a) The decedent has amply provided for each minor child and for the spouse or domestic partner by the transfer of probate or nonprobate assets, or support and education have been provided for by any other means.

(b) In the case of minor children, the surviving spouse or surviving domestic partner 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 or surviving domestic partner, he or she has ample means to provide for his or her support.

**(2)** The court may set aside property to provide an allowance and may appoint a trustee to administer the property, subject to the continuing jurisdiction of the court. If a child dies or reaches the age of 18, or if at any time the property held by the trustee is no longer required for the support of the spouse or domestic partner or the support and education of the minor child, any remaining property is to be distributed by the trustee as the court orders in accordance with the terms of the decedent's will or to the heirs of the decedent in intestacy or to satisfy unpaid claims of the decedent's estate.

**(3)** In making an allowance under this section, the court shall consider all of the following:

(a) The effect on claims under s. 859.25. The court shall balance the needs of the spouse, domestic partner, or minor children against the nature of the creditors' claims in setting the amount allowed under this section.

(b) The size of the estate.

(c) Other resources available for support.

(d) The existing standard of living.

(e) Whether the provisions of a marital property agreement will create a hardship for the surviving spouse.

(f) Any other factors that the court considers relevant.

**(4)** The court may order that the allowance to the surviving spouse or surviving domestic partner, not including any allowance for the support and education of minor children, be applied in satisfaction of any of the following:

(a) Any entitlement of the surviving spouse or surviving domestic partner under s. 853.12.

(b) Any right of the surviving spouse or surviving domestic partner to elect under s. 861.02 (1).

**History:** 1971 c. 213 s. 5; 1983 a. 186; 1991 a. 301; 1997 a. 188; 2005 a. 216; 2009 a. 28.

**NOTE: 1991 Wis. Act 301 contains legislative council notes.**

**861.41 Exemption of property to be assigned to surviving spouse or surviving domestic partner. (1)** After the amount of claims against the estate has been ascertained, the surviving spouse or surviving domestic partner may petition the court to set aside as exempt from the claims of creditors under s. 859.25 (1) (h) an amount of property reasonably necessary for the support of the spouse or domestic partner, not to exceed $10,000 in value, if it appears that the assets are insufficient to pay all claims and allowances and still leave the surviving spouse or surviving domestic partner such an amount of property in addition to selection and allowances.

**(2)** The court shall grant the petition if it determines that an assignment ahead of creditors is reasonably necessary for the support of the spouse or domestic partner. In determining the necessity and the amount of property to be assigned, the court must take into consideration the availability of a home to the surviving spouse or surviving domestic partner and all other assets and resources available for support.

**History:** 1983 a. 186; 1985 a. 37; 1987 a. 393 s. 53; 1997 a. 188; 2009 a. 28.

**861.43 Authority and powers of conservator, guardian or agent.** A conservator, guardian or guardian ad litem of the spouse or of a child of the decedent, or an agent of the spouse or of a child of the decedent acting under a power of attorney, may on behalf of the spouse or child exercise any of the rights, apply for any of the allowances or make any of the selections that apply to the spouse or child under this subchapter.

**History:** 1997 a. 188.