CHAPTER 851

PROBATE — DEFINITIONS AND GENERAL PROVISIONS

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SUBCHAPTER I

DEFINITIONS

851.002 Definitions. The definitions in ss. 851.01 to 851.31 apply to chs. 851 to 882.

History: 1979 c. 89; 1997 a. 188.

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

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.

851.035 Conscious presence. "Conscious presence" means within the range of any of a person's senses.

History: 1997 a. 188.

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 any property that satisfies all of the following:

(1) Is not classified by ch. 766.

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

(2) Was acquired while the spouses were married.

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

History: 1985 a. 37; 1987 a. 393; 1997 a. 188; 2005 a. 216.

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

History: 1985 a. 37.

851.065 Devise. "Devise," when used as a noun, means a testamentary disposition of any real or personal property by will. "Devise," when used as a verb, means to dispose of any real or personal property by will.

History: 1997 a. 188; 2015 a. 196.

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.

851.08 Domestic partner. "Domestic partner" has the meaning given in s. 770.01 (1) and "domestic partnership" has the meaning given in s. 770.01 (2).

History: 2009 a. 28.

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. 45.51 (10) and (11) when the decedent was a member of a Wisconsin veterans home operated by the department of veterans affairs under s. 45.50 at the time of the decedent's death.

History: 1973 c. 333 s. 201m; 1993 a. 486; 1999 a. 63; 2005 a. 22.

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. 854.20 and nonmarital children and their lineal descendants to the extent provided by s. 852.05.

History: 1981 c. 391; 1983 a. 447; 1997 a. 188.

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 or surviving domestic partner 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; 2009 a. 28.

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) Except as provided in s. 853.32 (2) (e), 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.

(f) A parent who is barred from inheriting from his or her child's intestate estate under s. 852.14 (3).

(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; 2005 a. 216; 2015 a. 224.

A trust for the benefit of grandchildren includes an illegitimate child whose parents entered into a void marriage after the child's birth. In re Trust of Parsons, 56 Wis. 2d 613, 203 N.W.2d 40 (1973).

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, including money, rights of a beneficiary under a contractual arrangement, choses in action, digital property, as defined in s. 711.03 (10), and anything else that may be the subject of ownership.

History: 1997 a. 188; 2015 a. 300.

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".

851.295 Surviving domestic partner. "Surviving domestic partner" means a person who was in a domestic partnership under ch. 770 with the decedent, at the time of the decedent's death.

History: 2009 a. 28.

851.30 Surviving spouse. (1) Subject to sub. (2), "surviving spouse" means a person who was married to the decedent at the time of the decedent's death.

(2) "Surviving spouse" does not include any of the following:

(a) An individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, if the decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each other or they subsequently hold themselves out as husband and wife.

(b) An individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a 3rd individual.

(c) An individual who was party to a valid proceeding concluded by an order purporting to terminate all property rights based on the marriage.

History: 1997 a. 188.

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

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

SUBCHAPTER II

GENERAL PROBATE PROVISIONS

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:

(a) The time and labor required.

(b) The experience and knowledge of the attorney.

(c) The complexity and novelty of the problems involved.

(d) 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.

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

An attorney's fee based on a contract to pay the attorney 4 percent of the gross estate violated sub. (2) (e). Reduction was a proper exercise of judicial discretion. Estate of Konopka, 175 Wis. 2d 100, 498 N.W.2d 853 (Ct. App. 1993).

Sub. (1) did not authorize payment for an attorney's services when it was in the estate's interest to let the interested parties litigate an issue and when, if the attorney's position prevailed, no property would have been added to the estate. Bell v. Neugart, 2002 WI App 180, 256 Wis. 2d 969, 650 N.W.2d 52, 01−2533.

Professional responsibility and probate practices. Martin, 1975 WLR 911.

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

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

851.55 Simultaneous death. The transfer of or title to property that depends upon priority of death with respect to 2 or more persons who die simultaneously is governed by s. 854.03.

History: 1977 c. 214, 449; 1983 a. 186; 1993 a. 486; 1997 a. 188.

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.

History: 1977 c. 449; 1987 a. 15; 2011 a. 10.

A county's collective bargaining agreement cannot supersede the authority of circuit judges to appoint the register in probate. Iowa County v. Iowa County Courthouse, 166 Wis. 2d 614, 480 N.W.2d 499 (1992).

A register in probate has a plain legal duty to file and keep all papers properly filed. The register may refuse to accept a paper for which the proper fee is not paid and has no other grounds for refusing a pleading. Estate of Reise, 2002 WI App 83, 251 Wis. 2d 472, 642 N.W.2d 568, 01−2939.

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. 54 and 851 to 879 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 disc or electronic 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. 54 and 851 to 879 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, optical disc, or electronic 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 chs. 48 and 938 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 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 services.

(11) Annually submit to the chief judge of the judicial administrative district the statement required under s. 55.18 (5) regarding the completion of annual reviews of protective placement orders under s. 55.18 (1).

History: 1977 c. 449; Sup. Ct. Order, 136 Wis. 2d xx (1987); 1987 a. 193; 1993 a. 16, 172; 1995 a. 27 ss. 7187, 7188, 9126 (19); 1995 a. 77; 2005 a. 264, 387; 2007 a. 20 s. 9121 (6) (a); 2015 a. 196.

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

A register in probate has a plain legal duty to file and keep all papers properly filed. The register may refuse to accept a paper for which the proper fee is not paid and has no other grounds for refusing a pleading. Estate of Reise, 2002 WI App 83, 251 Wis. 2d 472, 642 N.W.2d 568, 01−2939.

An alphabetical index under sub. (5) is not a court record and thus is open to public access under ss. 59.14 (1) [now 50.20 (3) (a)} and 19.31. The index may not, however, contain results of proceedings under chs. 55 and 880 [now ch. 54]. 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. 54 and 851 to 879 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.

(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. 59.40 (1).

(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.

(g) Shall have the duties and powers of a circuit court commissioner assigned to assist in probate matters and shall act in that capacity when designated to do so by a judge assigned probate jurisdiction.

(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; 1995 a. 201; 2001 a. 61 s. 117; 2005 a. 387.

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.