CHAPTER 857

POWERS AND DUTIES OF PERSONAL REPRESENTATIVES

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Cross−reference: See definitions in ch. 851.

857.01 Ownership in personal representative; management and control. Upon his or her letters being issued by the court, the personal representative succeeds to the interest of the decedent in all property of the decedent. The personal representative or surviving spouse may petition the court for an order determining the classification of property under ch. 766, and for other equitable relief necessary for management and control of the marital property during the administration of the estate. The court may make any decree under ch. 766, including a decree that the property be titled in accordance with its classification, to assist the personal representative or surviving spouse in managing and controlling the marital property and the decedent's property other than marital property during administration of the estate. During administration, the management and control rules under s. 766.51 apply to the property of a decedent spouse which is subject to administration and to the property of the surviving spouse. With regard to property subject to the election of the surviving spouse under s. 861.02, the personal representative may manage and control the property while the property is subject to administration. The personal representative shall determine when, during administration, property shall be distributed to satisfy an election under s. 861.02.

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

A personal representative succeeds to the title of the decedent both as to real estate and personal property. In Matter of Estate of Omernik, 112 Wis. 2d 285, 332 N.W.2d 307 (1983).

857.015 Management and control of certain business property by holding spouse. A spouse who holds property described under s. 766.70 (3) (a), (b) or (d) which is not also held by the other spouse may direct in a will or other signed writing that the marital property interest of the nonholding spouse in such property be satisfied as provided under s. 861.015. The holding spouse shall identify in a will or other signed writing the property described under s. 766.70 (3) (a), (b) or (d) to which the directive applies. The signature of the holding spouse on a directive other than a will shall be acknowledged, attested or witnessed under s. 706.07. The estate of the holding spouse may not execute a directive under this section. If at the death of a spouse the surviving spouse is the holding spouse, the surviving spouse may execute a directive under this section if executed within 90 days after the decedent spouse's death.

History: 1987 a. 393; 1997 a. 188.

857.03 Powers and duties of personal representative; in general. (1) The personal representative shall collect, inventory and possess all the decedent's estate; collect all income and rent from decedent's estate; manage the estate and, when reasonable, maintain in force or purchase casualty and liability insurance; contest all claims except claims which the personal representative believes are valid; pay and discharge out of the estate all expenses of administration, taxes, charges, claims allowed by the court, or such payment on claims as directed by the court; render accurate accounts; make distribution and do any other things directed by the court or required by law.

(2m) The surviving spouse and the personal representative may petition the court to approve an exchange of interests in marital property as provided in s. 766.31 (3) (b) 3.

History: 1975 c. 331, 421; 1987 a. 393; 2005 a. 216.

Cross−reference: Ch. 877 deals generally with actions by and against personal representatives.

Cross−reference: Section 70.22 deals with assessment of personal property taxes on property in decedent's estates.

Cross−reference: Section 71.13 (2) requires the personal representative to file with the assessor of incomes such withholding tax returns (reports) for wages paid, sales tax returns and income tax returns as are due from the decedent and his estate.

As the holder of legal title to the assets of the estate, the personal representative has standing to bring a constitutional challenge against the statute upon which the claim of the appellant is based. Estate of Peterson, 66 Wis. 2d 535, 225 N.W.2d 644 (1975).

The personal representative's failure to inform the trial court that the high bidders in a sale of the testator's property had been occasional clients did not constitute a breach of fiduciary duty when the sale was publicly advertised, conducted under sealed bid, and authorized as to procedure by both the court and estate beneficiaries. Estate of Philbrick, 68 Wis. 2d 776, 229 N.W.2d 573 91975).

In the absence of a statute or a decedent's written directions, the burden of the federal and state estate taxes attributable to probate and nonprobate assets falls on the residue of the estate. The rationale for the "residuary rule" has generally been that the decedent intended property transferred outside probate to be free of the usual burdens imposed on the probate estate. Estate of Sheppard v. Schleis, 2010 WI 32, 324 Wis. 2d 41, 782 N.W.2d 85, 09−1021.

857.035 Disposition of patient health care records. If the decedent was a health care provider, as defined under s. 146.81 (1), who was an independent practitioner, the personal representative shall comply with s. 146.819.

History: 1991 a. 269.

857.04 Distribution of marital and other expenses. (1) Except as provided in sub. (2), the personal representative shall pay expenses of administration out of the decedent's interests in marital property and in property other than marital property on a prorated basis according to the value of those interests.

(2) To the extent possible, the personal representative shall pay special expenses attributable to the management and control of marital property from the marital property generating the expenses, and special expenses attributable to the management and control of the decedent's property other than marital property from the other property generating the expenses.

History: 1983 a. 186.

857.05 Allowances to personal representative for expenses and services. (1) EXPENSES. The personal representative shall be allowed all necessary expenses in the care, management and settlement of the estate.

(2) SERVICES. Subject to the approval of the court the personal representative shall be allowed for his or her services commissions computed on the inventory value of the property for which the personal representative is accountable less any mortgages or

liens plus net principal gains in the estate proceedings at a rate of 2 percent or a rate that the decedent and the personal representative, or the persons who receive the majority interest in the estate and the personal representative, agree to in writing; and such further sums in cases of unusual difficulty or extraordinary services as the court determines reasonable. If a personal representative is derelict in duty, his or her compensation for services may be reduced or denied.

(3) ATTORNEY FEES AND COMMISSIONS. If the personal representative or any law firm with which the personal representative is associated also serves as attorney for the decedent's estate, the court may allow him or her either executor's commissions, (including sums for any extraordinary services as set forth in sub. (2)) or attorney fees. The court may allow both executor's commissions and attorney fees, and shall allow both if the will of the decedent authorizes the payments to be made.

History: 1977 c. 449; 1979 c. 110 s. 60 (4); 1991 a. 124.

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

Sub. (3) allows an attorney to act as both personal representative and attorney for an estate but does not allow charging at the usual attorney's billing rate for nonprofessional services. Sherman v. Hagness, 195 Wis. 2d 225, 536 N.W.2d 133 (Ct. App. 1995), 94−2089.

A personal representative's obligation under a bond to reimburse the surety company's attorney fees incurred on the bond was an allowable expense of the personal representative under this section. Estate of Burgess v. Peterson, 214 Wis. 2d 180, 571 N.W.2d 432 (Ct. App. 1997), 96−1455.

Sub. (1) did not authorize payment for 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.

857.07 Allowances to personal representative for costs. When costs are allowed against a personal representative in any action or proceeding the same shall be allowed the personal representative in the personal representative's administration account unless it appears that the action or proceeding in which the costs were taxed was prosecuted or resisted without just cause on the personal representative's part; and the court may determine, in rendering the judgment, whether the costs shall be paid out of the estate or by the personal representative. The court may allow as costs the sum paid by a personal representative on any bond or undertaking given by the personal representative in the case.

History: 1993 a. 486.

A personal representative's obligation under a bond to reimburse the surety company's attorney fees incurred on the bond was an allowable expense of the personal representative under this section. Estate of Burgess v. Peterson, 214 Wis. 2d 180, 571 N.W.2d 432 (Ct. App. 1997), 96−1455.

857.09 Procedure which may be followed when personal representative fails to perform. If a personal representative fails to perform an act or file a document within the time required by statute or order of the court the court upon its own motion or upon the petition of any person interested may order the personal representative for the estate and his or her attorney to show cause why the act has not been performed or the document has not been filed and shall mail a copy of the order to the sureties on the bond of the personal representative. If cause is not shown the court shall determine who is at fault. If both are at fault, the court may dismiss both and then appoint a personal representative and appoint an attorney acceptable to the personal representative to complete the administration of the estate. If only the personal representative is at fault, he or she may be summarily dismissed and in that event the court shall then appoint another personal representative to complete the administration and close the estate. If only the attorney is at fault, the court may dismiss the attorney and instruct the personal representative to employ another attorney; if the personal representative fails to employ another attorney within 30 days, the court shall appoint an attorney. No other procedure for substitution of attorney is required in such cases. The procedure set forth in this section is not exclusive.

History: 1977 c. 449.

Cross−reference: This procedure is mandatory when the personal representative fails to comply with the requirements of ss. 862.17 and 863.35.

857.10 Failure to comply with certain statutes. Failure of the personal representative to comply with ss. 858.03, 859.29 or 862.11 is prima facie evidence of neglect of duty.

History: 1971 c. 211 s. 126.

857.11 Ordering personal representative to appear; costs. Whenever the court issues an order directed to the sheriff requiring the personal representative to appear before it, all costs incurred by the court in the proceeding may be charged to the personal representative personally and may be deducted from the fees which the personal representative may receive for the personal representative's services as personal representative.

History: 1993 a. 486.

857.13 Powers of surviving personal representative. Every power exercisable by copersonal representatives may be exercised by the survivors of them when one or more is dead or by the others when less than the number designated in the will are appointed by the court or when an appointment is terminated by order of the court or by resignation accepted by the court unless the power is given in the will and its terms provide otherwise as to the exercise of the power.

857.15 When personal representative removed, resigns. The judge may accept the written resignation of any personal representative. When a personal representative is adjudicated incompetent, disqualified, unsuitable, incapable of discharging the personal representative's duties, or is a nonresident of this state who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate and caused such appointment to be filed with the court, the court shall remove the personal representative. When any personal representative has failed to perform any duty imposed by law or by any lawful order of the court or has ceased to be a resident of the state, the court may remove the personal representative. When grounds for removal appear to exist, the court on its own motion or on the petition of any person interested shall order the personal representative to appear and show cause why the personal representative should not be removed.

History: 1993 a. 486; 2005 a. 387.

A personal representative's erroneous assessments of law, reached in good faith, do not establish any basis for removal. DiBenedetto v. Jaskolski, 2003 WI App 70, 261 Wis. 2d 723, 661 N.W.2d 869, 01−2189.

857.17 Validity of acts of personal representative prior to removal. The resignation, removal or death of a personal representative after letters have been issued to the personal representative do not invalidate the personal representative's official acts performed prior to the resignation, death or removal.

History: 1993 a. 486.

857.19 When will proved after letters issued. When after letters are issued to a personal representative by a court in the estate of a decedent, whether testate or intestate, a will of the decedent is proved and allowed by the court, the powers of the personal representative cease, and the court shall remove the personal representative. All acts of the personal representative before removal are as valid as if the will had not been allowed.

History: 1977 c. 449.

857.21 Appointment of successor personal representative. When a personal representative dies, is removed by the court, or resigns and the resignation is accepted by the court, the court may, and if the personal representative was the sole or last surviving personal representative and administration is not completed, the court shall appoint another personal representative in the personal representative's place.

History: 1993 a. 486.

857.23 Rights and powers of successor personal representative. A successor personal representative has all the rights and powers of his or her predecessor except that the succes-

sor may not exercise powers given in a will which by its terms are personal to the personal representative therein designated.

History: 1993 a. 486.

857.25 Continuation of business. (1) GENERALLY. Upon a proper showing, the court may by order authorize the personal representative to continue any business of the decedent, but the order may not be contrary to the provisions of the decedent's will. The order may be with or without notice. If notice is not given to all interested persons before the order is made, notice of the order shall be given within 5 days after the order. The order may provide:

(a) For the conduct of the business solely by the personal representative or jointly with one or more of the decedent's surviving partners or as a corporation or limited liability company to be formed by the personal representative;

(b) As between the estate and the personal representative, the extent of the liability of the estate and the extent of the liability of the personal representative for obligations incurred in the continuation of the business;

(c) As between distributees, the extent to which liabilities incurred in conduct of the business are to be chargeable solely to a part of the estate set aside for use in the business or to the estate as a whole; and

(d) As to the period of time for which the business may be conducted and such other conditions, restrictions, regulations, requirements and authorizations as the court orders.

(2) RIGHTS OF CREDITORS. Nothing contained in this section affects the rights of creditors against the estate or the personal representative. Expenses incurred in the operation of a business, other than those incurred to wind up and dispose of a business, are not considered costs and expenses of administration for the purpose of determining priority of payment under s. 859.25 and are subordinate to all claims and allowances listed in s. 859.25.

History: 1993 a. 112.

857.27 Personal representatives or trustees may form corporation or limited liability company. The court may by order authorize the personal representatives or trustees of the estate of a decedent or one or more of the personal representatives or trustees to organize a corporation or limited liability company for any of the purposes authorized by ch. 180, 181 or 183 and to subscribe for shares of the corporation or interests in the limited liability company and convey estate property to the corporation or limited liability company in payment for the shares or interests subscribed.

History: 1993 a. 112.

857.29 Personal representative may plat land. The court may by order authorize the personal representative to plat land which is a part of the estate, either alone or together with other owners of the real estate. The personal representative must comply with the same statutes, ordinances and rules which apply to a person who is platting the person's own land.

History: 1993 a. 486.

857.31 Immunity of personal representative. A personal representative incurs no liability to any person as a result of any of the following:

(1) Giving notice to any potential claimant against the estate that proceedings to administer the estate are pending, the court in which the proceedings are pending and the deadline for filing a claim against the estate under s. 859.01 or 859.48.

(2) Not giving notice to any potential claimant against the estate that proceedings to administer the estate are pending, the court in which the proceedings are pending or the deadline for filing claims against the estate under s. 859.01 or 859.48, even if the personal representative knew, or in the exercise of reasonable diligence should have known, of the existence of the potential claim.

(3) Not informing distributees of their potential liability for claims not barred because of the operation of s. 859.02 (2) (b).

History: 1989 a. 96.

857.35 Notification of spouse. If a personal representative who is not a surviving spouse becomes aware that any beneficiary other than the surviving spouse is designated to receive more than 50 percent of the proceeds of any life insurance policy or deferred employment benefit plan, the personal representative shall give the surviving spouse written information sufficient to identify the policy or plan and any beneficiary thereof. A surviving spouse may recover life insurance proceeds and deferred employment benefits under s. 766.70 (6).

History: 1983 a. 186; 1985 a. 37 s. 187.