Legislative Council Note, 1955: This provision restates provisions now in s. 322.01 but is limited, as are the other sections in ch. 322 to the adoption of adults. The same change, in regard to the adoption by nonresidents of their relatives, is made in this section as was made in regard to the adoption of minors in s. 48.71. [Bill 444-S]

322.02 History: 1955 c. 575; Stats. 1955 s. 322.02.

Legislative Council Note, 1955: This section covers s. 322.04 (7) and a provision in s. 322.01. It differs from the provision in s. 322.01, which requires that in the case of a married petitioner his spouse must join in the petition, in that it allows the spouse to join in the petition and become an adoptive parent or, if he does not wish to become an adoptive parent, to consent to the adoption. This new provision is taken from the uniform adoption act. The committee, after careful consideration, was of the opinion that, since the adoption of adults involves considerations which differ greatly from those in the adoption of minors and frequently is a matter of establishing inheritance rights, only one spouse should be allowed to adopt just as long as the other spouse has knowledge of the adoption and consents to it. [Bill 444-S]

322.03 History: 1955 c. 575; Stats. 1955 s. 322.03.

Legislative Council Note, 1955: This section covers provisions in s. 322.01 of the present law with the same change, making the county where the petitioner resides a matter of venue, as is made in s. 48.83 on the adoption of minors. [Bill 444-S]

322.04 History: 1955 c. 575; Stats. 1955 s. 322.04.

Legislative Council Note, 1955: This section covers in summary form and by reference to ch. 48 the hearing, order, and legal effect of adoption. It should be noted that under this provision the court may make an investigation in the case of adoption of an adult if it considers that desirable; present statutes make no provision for an investigation in the case of an adult.

Since the legal effect of the adoption of an adult will be the same as that of a minor, the same changes in the law as discussed in the note to s. 48.92 will apply. [Bill 444-S]

CHAPTER 323.

Testamentary Trusts.

Editor's Note: The legislative histories which follow are the histories of the several sections of ch. 323 through 1969, including the effects of chapters 283, 339 and 411, Laws 1969. Various provisions of ch. 323 are restated in the new property law effective July 1, 1971. For more detailed information concerning the effects of ch. 283, Laws 1969, see the editor's note printed in this volume ahead of the histories for ch. 700.

323.01 History: 1874 c. 116 s. 2, 3; 1878 c. 119; R. S. 1878 s. 4025; Stats. 1898 s. 4025; 1909 c. 220; 1923 c. 120; 1925 c. 4; Stats. 1925 s. 323.01; 1955 c. 73; 1963 c. 269 s. 6; 1969 c. 283.

An executor entitled to hold the estate upon trusts implied from the will and which continue beyond the time his duties as executor continue is entitled to hold the estate as executor until he qualifies as trustee; and if he does not so qualify he holds as executor until settlement of hs final account. Schinz v. Schinz, 90 W 236, 63 NW 162.

Reasonable attorneys' fees for services rendered in conserving a trust estate are allowable to the trustees as expenses. Will of Rice, 150 W 401, 136 NW 956, 137 NW 778.

The title to trust property cannot vest in testamentary trustees until the bond required has been filed. Where executors who were also made testamentary trustees qualified as executors but not as trustees, and as executors they so administered the estate that the trust property was lost, they continued to hold title to the estate as executors and the sureties upon their bond as executors were liable for the loss of the trust estate. Karel v. Pereles, 161 W 598, 155 NW 152.

The power of equity courts to enforce administration of trusts is supervisory and is exercised only to carry out the settlor's intention, except where a deviation is necessary to carry out the intention as nearly as possible, but even then the rights of remaindermen will not be defeated. Will of Stack, 217 W 94, 258 NW 324.

Where a testamentary trust directed the trustee to apply the income thereof, as seemed necessary in its opinion, for the support and maintenance and comfort of a sister of the testator, a sanitorium, which, over a period of 7 years, had rendered weekly bills to the trustee for board, room and incidental expenses of the sister and her attendant, could not recover from the trustee, on the theory of implied contract, on a claim presented to the trustee on the death of the sister for medical services furnished to the sister over such period of 7 years without the knowledge of the trustee. Estate of Ray, 221 W 18, 265 NW 89, 266 NW 239.

Where each cestui que trust is entitled to an aliquot part of a definite trust fund, any of them may sue the trustee for his portion thereof without making the other cestuis que trust parties to the action. Graf v. Seymour State Bank, 221 W 122, 266 NW 222.

A trust company was guilty of a want of due diligence and ordinary care in the performance of its duties as trustee, and was liable to an estate for failure to present bonds for payment under a trust deed authorizing the mortgagor to pay the bonds before maturity at any interest-payment date on the publication of notice once each week for 3 weeks in a newspaper of general circulation in the City of Milwaukee, in which city the trust company had its place of business, where notice was so published in such a newspaper, which, however, was not examined by the trust company, and the holders of two-thirds in amount of the bonds acquired knowledge of the call for redemption and acted thereon in time to realize on their bonds before the trustee under the trust deed became insolvent, and where a recorded release of the trust deed was listed in a newspaper on the date set in the

notice of call for payment of the bonds, which listing the trust company did not discover although it examined such newspaper. Will of Church, 221 W 472, 266 NW 210.

Neither the parties interested in a trust estate nor the court in which it is being administered can substitute any other scheme for the disposition of the testator's estate than that which is stated in the valid provisions in his will. A provision of a will bequeathing a sum in trust to the testator's son, the income only to be paid to the son during his life, and at his decease such sum to be paid to his children, authorized the son to receive only the income from the trust fund; and a provision of the will directing the executor to purchase a farm and cause the title to be conveyed to the testator's son, to hold during his lifetime, and at his death to his children, devised a life estate to the testator's son in a farm which the executor was required to purchase, and the remainder to the son's children; and, consequently, all schemes pursuant to agreements between the executor of the testator's estate and the beneficiaries for the annual payment to the testator's son of any other amount than the annual income actually realized on the trust fund, and all decisions and orders of the county court approving any such agreements or substituted schemes, or the making of any payments thereunder otherwise than in accordance with the will, were void as beyond the power of the parties or the court. Will of Stanley, 223 W 345, 269 NW 550.

Under a will bequeathing $1,500 to the testator's son payable when the son became 23 years old, a trustee should have been appointed when the son reached 21 to hold the son's interest, and where a guardian continued to hold the interest she and a bondsman were liable to the extent the trustee would have been liable. Guardianship of Snyder, 224 W 200, 272 NW 1.

The trustee, in setting up separate accounts on its books for the share of each beneficiary in the trust estate after it paid one beneficiary in cash, did not establish any new "trusts" or new accounts so as to create rights in each beneficiary as in a separate trust for each, the trustee having no such intention and having no power to create a separate trust for each beneficiary either by a change in bookkeeping methods or otherwise under a will creating but one trust with each beneficiary thereof having an undivided interest in all of the trust assets. Will of Manegold, 234 W 525, 291 NW 753.

Title to trust real estate passes under the will creating the trust to the named trustees without any order of court assigning the property to them. Estate of Trowbridge, 244 W 519, 13 NW (2d) 66.

Where the plan of liquidation and distribution proposed by the trustees was predicated on the county court's acceptance of the trustees' determination of value, and this was disapproved and new values substituted, the trustees should be released from the plan and given the opportunity to submit other procedures for the approval of the county court if they so desire. Estate of Teasdale, 261 W 248, 52 NW (2d) 366.

Under 323.01 (4), providing that no bond shall be required from any charitable corporation where devises or bequests are given to it "in trust" for any of its purposes, a gift in trust may be made by will to a charitable corporation for uses within its corporate powers. Will of Hill, 261 W 290, 52 NW (2d) 867.

Where the will gives only the life use of the estate to the wife and is to be distributed among certain named persons at her death, and does not provide for sale or reinvestment of funds, a trustee should be appointed even though the will is silent as to such an appointment. Estate of Cobeen, 270 W 545, 72 NW (2d) 324.

Where the will provided for a trust for 5 years, and reserved the right to designate the beneficiaries by separate instrument, but no separate instrument was found by the time the estate was ready for distribution, the trust failed and the trust property passed as intestate property. Estate of Kessler, 271 W 512, 74 NW (2d) 146.

When testamentary trusts of long duration are involved, it is not good practice for a trustee to wait until the termination of the trust to have his accounts for the full period approved, although he can do this under 323.01 (4). Estate of Martin, 21 W (2d) 334, 124 NW (2d) 297.

On the duties of a trustee in respect to a testamentary trust see Estate of Martin, 39 W (2d) 437, 159 NW (2d) 660.

Legislation liberalizing nature of revocable inter vivos and life insurance trusts. Ruder, 1956 WLR 313.

323.02 History: 1874 c. 116 s. 4; R. S. 1878 s. 4026; Stats. 1898 s. 4026; 1925 c. 4; Stats. 1925 s. 323.02; 1969 c. 283.

323.025 History: 1955 c. 161; Stats. 1955 s. 323.025; 1963 c. 165; 1969 c. 283.

323.03 History: 1874 c. 116 s. 6, 7; R. S. 1878 s. 4027; 1878 c. 119; Ann. Stats. 1889 s. 4027; Stats. 1898 s. 4027; 1925 c. 4; Stats. 1925 s. 323.03; 1969 c. 283.

When a bank, nominated as trustee in a will creating a trust, renounced its right to serve, it left the estate in the same position as if no one had been nominated in the will, and hence, when the court was called on to appoint a successor to the trustee originally appointed, the will did not operate to compel the appointment of the bank. In the absence of controlling provisions in the will, the court, in appointing a successor trustee on the death of the trustee of a testamentary trust, has wide discretion and, although the wishes of the beneficiaries may be considered, the court is not bound to appoint their choice or the choice of some of them. Estate of Chapman, 258 W 442, 45 NW (2d) 927.

It is a general rule that a trust never fails for want of a trustee and, if a named trustee is in fact unqualified to be a trustee and declines to qualify, the court, in the exercise of its equity powers, may appoint a trustee or may execute the trust by its own officers. Will of Hill, 261 W 290, 52 NW (2d) 867.

323.035 History: 1951 c. 37; Stats. 1951 s. 323.035; 1969 c. 283.

Comment of Advisory Committee, 1951:

This new section insures application of the special trustee provision to testamentary trusts as well as other trusts. [Bill 90-S]

323.04 History: 1874 c. 116 s. 5; R. S. 1878 s. 4028; Stats. 1898 s. 4028; 1925 c. 4; Stats. 1925 s. 323.04; 1969 c. 283.

323.05 History: 1874 c. 116 s. 8; R. S. 1878 s. 4029; Stats. 1898 s. 4029; 1925 c. 4; Stats. 1925 s. 323.05; Sup. Ct. Order, 232 W ix; 1969 c. 283; 1969 c. 339 s. 27.

323.06 History: 1874 c. 116 s. 9; 1878 c. 119; R. S. 1878 s. 4030; Ann. Stats. 1889 s. 4030; Stats. 1898 s. 4030; 1925 c. 4; Stats. 1925 s. 323.06; Sup. Ct. Order, 232 W ix; 1951 c. 705; 1953 c. 440; 1957 c. 524; 1969 c. 283; 1969 c. 339 s. 27.

The power of the county court over real estate titles is strictly limited by sec. 4030, Stats. 1898. Acts in violation thereof are not only erroneous but beyond its power and void as to those over whom personal jurisdiction is not obtained by notice or by their appearance or assent. Bloor v. Smith, 112 W 340, 87 NW 870.

Where loss of a trust estate is threatened, the court may order a sale and cut off the interest of the contingent remaindermen in real estate constituting the corpus of the trust, provided that proceeds of sale are impressed with the trust and reinvested, but may not destroy the trust or lodge ownership of the corpus in residuary legatees free of interest of remaindermen. Sale of the corpus must be in good faith and solely for the benefit of the trust estate, and persons having a direct interest in defeating the trust should not be bidders at the sale. Will of Stack, 217 W 94, 258 NW 324.

Where a testamentary trustee entered into a contract of sale of trust property, subject to the approval of the county court, pursuant to an order of the court permitting the trustee to sell at private sale, the court had no power to refuse confirmation of the sale on the application of the trustee himself to refuse confirmation because the trustee in the interim had received a higher offer than the contract price of $16,000, there being no claim of mistake, misapprehension or inadvertence, and no suspicion of fraud, and no claim or finding that the $16,000 was disproportionate to the value of the property. Estate of Strass, 11 W (2d) 410, 105 NW (2d) 553.

Sale of trust property; receipt of higher offer before confirmation. Wild, 1961 WLR 338.

323.065 History: 1941 c. 198; Stats. 1941 s. 323.065; 1965 c. 334; 1969 c. 283.

323.07 History: 1933 c. 394; Stats. 1933 s. 323.07; 1941 c. 249; 1961 c. 25; 1969 c. 283.

The general rule is that charges incurred with respect to unproductive property, included in a trust, are payable out of the principal thereof unless the settlor manifested a different intention in the instrument creating the trust. Estate of Trowbridge, 244 W 519, 13 NW (2d) 66.

The owners of a contingent interest in the corpus of the trust cannot complain that the expenses for attorney fees and guardian ad litem fees allowed to the resigning trustee in his action for approval of his account and for discharge from liability as trustee should be paid out of the income of the trust, since they are not affected thereby; and the owner of the income of the trust cannot complain, where her attorney suggested to the trial court that such fees, if not paid by the plaintiff, should be paid out of the income rather than the corpus of the trust. Uihlein v. Albright, 244 W 650, 12 NW (2d) 909.

As a general rule, a trustee managing a business or performing other services for it earns the going rate which owners would pay a nontrustee for the same services, and such rate is a correct measure of the services which he renders the trust in so acting and of the compensation which a trial court may properly allow him therefor. The matter of trustees' compensation is for the court, and general rules relating thereto give way to the trial court's sound discretion influenced by the particular circumstances of each case, the fundamental criterion being reasonableness, determined in the light of the facts and circumstances. Estate of Teasdale, 261 W 248, 52 NW (2d) 366.

On proper accounting, charges against a trustee and burden of proof as to shortages see Estate of Martin, 21 W (2d) 334, 124 NW (2d) 297.

On liability as between co-trustees where one is only passively guilty of misconduct see Will of Mueller, 28 W (2d) 26, 135 NW (2d) 854.

Possible differences between the duty to account of a testamentary trustee and that of a trustee under a judicially imposed trust. McCann, 1964 WLR 733.

323.10 History: Sup. Ct. Order, 271 W v; Stats. 1957 s. 323.10; 1959 c. 132; 1969 c. 283.

Comment of Judicial Council, 1956: This section and 231.35 give statutory recognition to the doctrine of Ruggles v. Tyson, (1899) 104 W 500, 506, with respect to virtual representation of beneficiaries who are unborn or whose identity is unascertainable, but the power of the court to appoint a guardian ad litem, if deemed necessary, is preserved. The rule is made uniform for both testamentary and nontestamentary trust accountings. [Re Order effective Sept. 1, 1956]

See note to 324.29, citing Estate of Evans, 274 W 459, 80 NW (2d) 408, 81 NW (2d) 489.

323.21 History: Court Rules IX, X; Sup. Ct. Order, 212 W xxvii; Stats. 1933 s. 312.03; 1969 c. 283; 1969 c. 339 s. 18; 1969 c. 411 s. 4; Stats. 1969 s. 323.21.

323.23 History: R. S. 1849 c. 69 s. 10; R. S. 1858 c. 100 s. 10; R. S. 1878 s. 3827; Stats. 1898 s. 3827; 1925 c. 4; Stats. 1925 s. 312.08; Sup. Ct. Order, 212 W xxviii; 1969 c. 283; 1969 c. 339 s. 18; 1969 c. 411 s. 5; Stats. 1969 s. 323.23.

323.25 History: Court Rule XI; Sup. Ct. Order, 212 W xxviii; Stats. 1933 s. 312.11; 1969 c. 283, 339; 1969 c. 411 s. 6; Stats. 1969 s. 323.25.

323.27 History: 1871 c. 82 s. 1; R. S. 1878 s. 3268; Stats. 1898 s. 3268; 1925 c. 4; Stats. 1925 s. 287.17; 1933 c. 190 s. 16; Stats. 1933 s.

312.13; 1941 c. 245; 1957 c. 468; 1969 c. 283, 339; 1969 c. 411 s. 7; Stats. 1969 s. 323.27.

323.30 History: 1909 c. 233; Stats. 1911 s. 3927m; 1925 c. 4; Stats. 1925 s. 317.06; Sup. Ct. Order, 212 W xxxi; Sup. Ct. Order, 271 W xi; 1969 c. 283; 1969 c. 339 s. 22; Stats. 1969 s. 323.30.

323.32 History: R. S. 1849 c. 67 s. 9; R. S. 1858 c. 98 s. 9; R. S. 1858 c. 99 s. 12; R. S. 1878 s. 3803; Stats. 1898 s. 3803; 1905 c. 242 ss. 1, 2; Supl. 1906 ss. 3803, 3803a; 1907 c. 289; 1913 c. 407; Stats. 1913 s. 3803; 1925 c. 4; Stats. 1925 s. 310.22; Sup. Ct. Order, 212 W xxvi; Stats. 1933 s. 324.35; Sup. Ct. Order, 258 W x; 1969 c. 283, 339, 411; Stats. 1969 s. 323.32.

323.34 History: 1945 c. 536; Stats. 1945 s. 324.351; 1969 c. 283, 339, 411; Stats. 1969 s. 323.34.

323.36 History: 1953 c. 299; Stats. 1953 s. 324.356; 1969 c. 283, 339, 411; Stats. 1969 s. 323.36.

CHAPTER 324.

Appeals and Miscellaneous Provisions.

Editor's Note: The legislative histories which follow are the histories of the several sections of ch. 324 through 1969, including the effects of chapters 283, 339 and 411, Laws 1969. Sections 324.35, 324.351 and 324.356, as amended, are redesignated as sections of ch. 319, effective July 1, 1971. Various other provisions of ch. 324 are restated in a new probate code, effective April 1, 1971. For more detailed information concerning the effects of ch. 339, Laws 1969, see the editor's note printed in this volume ahead of the histories for ch. 851.

324.001 History: 1953 c. 300 s. 1; Stats. 1953 s. 324.001; 1969 c. 339.

324.01 History: R. S. 1849 c. 70 s. 20, 22; R. S. 1849 c. 85 s. 24; 1853 c. 85 s. 8; R. S. 1858 c. 49 s. 8; R. S. 1858 c. 101 s. 20, 22; R. S. 1858 c. 117 s. 24; R. S. 1878 s. 4031; 1891 c. 248; Stats. 1898 s. 4031; 1907 c. 593; 1919 c. 183 s. 1; 1925 c. 4; Stats. 1925 s. 324.01; 1929 c. 439 s. 11; 1933 c. 190 s. 82; 1943 c. 93; 1951 c. 290; 1969 c. 339; 1969 c. 366 s. 117 (2) (b).

Editor's Note: Ch. 183, Laws 1919, amended sec. 4031, Stats. 1917, to permit appeals to the supreme court from the orders and judgments of county courts in counties having a population of 15,000 or over. In a series of cases decided during the period 1919-33 the supreme court applied the rule that the orders from which appeals could be taken were those made appealable by the provisions of sec. 3069 (renumbered 274.33). Citations of the cases are: Estate of Beyer, 185 W 23, 200 NW 772; Will of Hughes, 187 W 14, 203 NW 746; Estate of Harter, 187 W 90, 203 NW 720; Will of Pattison, 190 W 289, 207 NW 292; Estate of Benesch, 206 W 582, 240 NW 527; and Estate of Lewis 207 W 155, 240 NW 818. See also Will of Jansen, 181 W 83, 193 NW 972. By the amendatory legislation of 1933 (sec. 82, ch. 190, Laws 1933) the provisions of ch. 274 were incorporated by reference in 324.01; and the amended statute was taken into account in Estate of Maurer, 234 W 601, 291 NW 764, and in subsequent cases.

The allowance of a counterclaim to a claim presented amounts to disallowance of the latter pro tanto, and is appealable. Parry v. Wright, 20 W 483.

Any person acquiring an interest under an administrator's sale may appeal from an order of the county court purporting to correct the proceedings but operating to divest the title acquired under the sale. Betts v. Shotton, 27 W 667.

The son of an insane heir of a testator to whom nothing was left by the will cannot himself appeal from the order admitting the will to probate; but he may apply on behalf of his parent for the appointment of a guardian ad litem and the allowance of an appeal after the expiration of the statutory time. Marx v. Rowlands, 59 W 110, 17 NW 687.

Sec. 4031, Stats. 1898, is exclusive and an outsider cannot take an appeal on behalf of minors. Guardianship of McLaughlin, 101 W 672, 78 NW 144.

A person who claims property of an alleged incompetent under a transfer is a person aggrieved within the meaning of sec. 4031. Ziegler v. Bark, 121 W 533, 99 NW 224.

The administrator is especially recognized as the party aggrieved by the decision of the county court and the appeal therefrom. Paulson's Will, 127 W 612, 107 NW 484.

One who, having been induced by false representations to purchase land from an administrator, has demanded rescission of the sale and opposed confirmation thereof, is a "person aggrieved" by an order of the county court confirming the sale, and may appeal from such order. Greiling v. Watermolen, 128 W 440, 107 NW 339.

The fact that an heir is present in county court at the time the will was admitted to probate and makes no objection does not estop him from taking an appeal. Bovee v. Johnson, 130 W 447, 110 NW 212.

Where a son has petitioned a county court for the appointment of a guardian for his father on the ground that he was incompetent to manage his property, he is the person aggrieved and may appeal from an order denying the petition. Merrill v. Merrill, 134 W 395, 114 NW 784.

One who merely claims but has not proved that she was named as executrix in the will which was refused probate is not entitled to appeal. Powers v. Powers, 145 W 671, 130 NW 888.

Upon appeal from an allowance of attorney fees in the final settlement of an executor's accounts the time begins to run when the formal order or judgment is entered, disposing of the whole matter as to all parties, not when the court may have announced the allowance and entered the amount in the record. Will of Rice, 150 W 401, 136 NW 956, 137 NW 778.

The governor of the soldiers' home at Milwaukee may appeal from an order of the county court requiring him to appear and be examined upon the citation of a public administrator. Mallory v. Wheeler, 151 W 136, 138 NW 97.