851.51 History: 1969 c. 339, 393; Stats. 1969 s. 851.51.

Legislative Council Note, 1969: This section governs the effect of adoption on inheritance and related matters. It makes certain changes in existing law: (1) it expressly provides for the effect of adoption on inheritance and wills as part of the probate statutes, rather than relying on 48.92 in the Children's Code; (2) it closes a gap in the law, under which a collateral relative may apparently not inherit through the adoptive parents; (3) it permits an adopted child to inherit from natural relatives in one special situation, as where a father dies and the wife remarries and the child is adopted by the stepfather (the changed law would enable the child to inherit from the natural paternal grandparents); and (4) it codifies the law regarding inclusion of adopted persons in class gifts under a will or other dispositive instrument.

The section adopts the basic principles underlying Wisconsin statutes, 237.04 and 48.92. However, it is an improvement upon those statutes, eliminating certain gaps in the law. Sections 237.04 and 48.92 have been criticized because they removed the inheritance subject-matter from its logical place and included it in a comprehensive Children's Code and also because they failed to provide expressly for inheritance by adoptive relatives other than adoptive parents. In fact the present statute suffers from attempting to combine both a general conceptual approach in 48.92 (1) and (2) and a specific but only partly inclusive approach in subsection (1) of that section. In this respect it is not as complete as the prior adoption statutes.

The first subsection deals with the status of an adopted person for purposes of inheritance by such person from his adoptive relatives, by adoptive relatives from the adopted person and by persons claiming through the adopted person (such as his children). It also broadens the coverage to secure to the adopted child and others claiming through him full rights under any other statutes such as the antilapse statute (853.27 replacing 238.13). In this respect it codifies the present case law illustrated by such cases as Sandon v. Sandon, 123 Wis. 603, 101 N.W. 1089 (1905) (pretermitted heir statute) and Estate of Holcombe, 259 Wis. 642, 49 N.W. 2d 914 (1951) (anti-lapse statute).

Sub. (2) generally terminates the relationship between an adopted person and his natural parents for the same purposes. The closing of adoption records in order to protect the child makes it desirable as a practical matter to limit inheritance in the statutory manner, to avoid complications of title in tracing natural relatives. This statute would preserve rights in 2 limited situations, only one of which is covered by the present law: where a natural parent marries or remarries and the child is adopted by the stepfather or stepmother. In the other situation, covered by sub. (2) (b), where a parent dies and the other natural parent remarries, and the child is adopted by the stepfather or stepmother, the present law would prevent the child from inheriting from his natural grandparents through the deceased parent. In such a situation, preserving inheritance rights by the adopted child is not likely to present any difficulties either in proving heirship or in embarrassment to the adoptive parents.

The Code is accompanied by an amendment to 48.92 eliminating the last sentence of sub. (1) and providing for cross reference to this Code.

Sub. (3) is new. It does not, however, involve any substantial change in existing law. The Wisconsin Supreme Court has reached the same result as a matter of judicial construction in Estate of Adler, 30 Wis. 2d 250, 140 NW 2d 219 (1966). The statute gives definitive shape to the construction. It also prevents a deliberate adoption of an adult to qualify the latter as a member of a class. In some states it has been possible to adopt one's own wife in order to make the latter a child within a class gift; the statute avoids such an absurd result. [Bill 5-S]

851.55 History: 1969 c. 339; Stats. 1969 s. 851.55.

Legislative Council Note, 1969: This is the Uniform Simultaneous Death Act as adopted in Wisconsin; it is the same as 237.10. [Bill 5-S]

851.61 History: 1969 c. 339; Stats. 1969 s. 851.61.

Legislative Council Note, 1969: This is 237.11 unchanged. [Bill 5-S]

CHAPTER 852.

Intestate Succession.

Legislative Council Note, 1969: (1) This chapter replaces chapter 237 on descent and 318.01 on distribution, with a single law governing the transfer of both real and personal property. Although the general pattern of 237.01 is retained, some changes are involved. This chapter is designed primarily for the small estate with normal family relationships; persons in the middle and upper wealth brackets are increasingly aware of the need for wills and estate planning. In most small estates the decedent wishes his spouse to have the bulk of the estate. Accordingly, unless there is issue by a prior marriage, the surviving spouse will receive the first $25,000 plus a share of any excess; this is an expansion of the concept in existing 318.01. This provision also saves the cost of guardianship if minor children are involved, unless the estate exceeds $25,000 after allowances.

(2) This chapter requires that an heir survive the intestate decedent by 72 hours in order to take. This prevents double probate in the common accident situation and in some cases serves to keep the property in the family. The provision is in line with the common practice of testators to require beneficiaries to survive a stated period to take, and is patterned on a proposal under study by the National Conference of Commissioners on Uniform State Laws.

(3) Instead of the existing law which gives the homestead to the surviving spouse for life or until remarriage, the surviving spouse has a right to the home in fee by applying the value of the home against the spouse's share in the total estate. The spouse thus has a

marketable interest, and the real property is not tied up. On the other hand, the spouse does not get a greater share of the estate by reason of the presence or absence of a home. [Bill 5-S]

852.01 History: 1969 c. 339; Stats. 1969 s. 852.01.

Legislative Council Note, 1969: This section replaces the following Wisconsin statutes on descent and distribution: 237.01, 237.02, 318.01, 233.01 and 233.23 insofar as applicable to the intestate situation. In general this section follows the existing pattern. However, it makes 3 significant changes amplified below: (1) it increases the share of the surviving spouse if there is no issue by a prior marriage, in order to simplify settlement of small intestate estates; (2) it eliminates present obsolete distinctions dependent upon the type of property owned by the decedent, in the interests of fairness and uniformity; and (3) it requires that an heir survive the decedent by 72 hours in order to inherit in line with provisions often found in wills, in order to avoid litigation in the common accident situation and to prevent double probate on the same property.

Any intestate succession statute can be defended on the grounds that the owner of wealth may make a different disposition if he wishes, merely by executing a will. But the fact remains that many people, the majority in fact, do not make wills and that human inertia is such that the situation is not likely to change greatly. Most people rely on the "will" made for them by law — the law of intestate succession. Hence any law of this kind must attempt to anticipate the wishes of the people who die having made no testamentary disposition. Any such statute suffers because it is difficult to anticipate human desires which are unexpressed (by definition) and which are bound to vary with many facts and circumstances which cannot be incorporated into a statute without making it unduly complex. The same statute must serve for the young man with a wife and minor children and for the older retired man whose children are grown and self-supporting, for the man with small resources and for the man with a fortune, for the man who has married several times and for the person who has never married. Any statute can be subjected to criticism because it does not satisfactorily meet some unusual situation. There is no such persons as the "average" intestate. Generally, however, wealthy individuals have greater reason to execute wills, and the statute should therefore be designed with the moderate and small estate in mind. Secondly, existing statutes were drawn over a century ago when the family was more interdependent and attitudes toward ownership by a widow were different from modern views. Modern wills give a better clue to the proper pattern of descent than do the present statutes. Nevertheless, existing statutes are a convenient starting point if only because they are familiar, have been accepted by people for years, and therefore affect attitudes.

This section makes one very substantial change in the legal structure of intestate succession in Wisconsin. Existing law treats real property in a different manner than personal property and even within the classification of real property draws a sharp distinction between the homestead and other real property. These distinctions are products of our inherited system of descent and distribution, drawn from the English law of prior centuries and abandoned in England by statute in 1925; the separate descent of the homestead is added as a purely American statutory innovation. The result of this hodgepodge of legislation is that inheritance rights are dependent upon the kind of property owned by the decedent. There is no longer any sound policy reason for retaining these distinctions, and the modern trend is toward a single system of inheritance (intestate succession) with abolition of common-law dower and curtesy. This statute provides a single rule for inheritance of all kinds of property. Although there is a strong argument for special treatment of the home, the present law of homestead and descent is illustrative of the complexities involved in attempting any such distinction. Moreover, most homes are owned jointly by husband and wife and do not pass under the intestate law at all (but go to the survivor because of the survivorship right in joint tenancy).

Sub. (1) (a) increases the amount passing to the widow where there is surviving issue of the same marriage, by giving the widow the first $25,000 out of the net estate. This is based on several grounds: (1) where the estate is small and the children are minors, it is desirable to give the entire estate to the widow, with the minor children protected by the substantial allowances which the court can make for them under 861.35 if this appears necessary for any reason; (2) where the estate is small, most testators wish prior provision to be made for the widow ahead of grown children; (3) with the elimination of the homestead right as such, the young widow needs a more substantial share in the balance of the estate. This $25,000 feature is not available if there are issue by a prior marriage, just as 318.01 (1) is presently qualified in the same manner. Providing the spouse with the first $25,000 presents an administration problem. As of what date is the property assigned to this share to be valued, date of death or date of distribution? If the property in the estate fluctuates between date of death and date of distribution, this will make a difference. The statutory language requires that the property be allocated at its value at time of distribution, in order to satisfy the share. But note that 852.09 (1) specifically treats inventory value as prima facie evidence of the value of the home. This approach protects the surviving spouse particularly against deflation in values, and the spouse at the same time benefits in case of inflation by the fractional share. It should be noted that this same problem is inherent in 318.01 (1) (b) and does not create difficulty.

The Wisconsin statute on descent (237.01) does not treat the surviving spouse as an heir to nonhomestead realty if there are issue of the decedent. However, the dower section (233.01) and the curtesy section (233.23) in effect provide an intestate share for the spouse

in such a situation. Since dower is reduced to an elective share in this revision, and real and personal property are treated alike, provision of an intestate share in both kinds of property for the spouse is a formal rather than substantative change.

Sub. (1) (a) 3 provides a more limited interest for the spouse if the decedent is survived by both the spouse and issue by a prior marriage. This follows the pattern in 318.01 and is a recognition of the need for greater protection for the children in this situation. The surviving spouse has no duty of support unless he or she had formally adopted the children. In this situation the surviving spouse is given only a fractional interest in the estate and not the first $25,000. It should also be noted that the provision for the first $25,000 does not extend to an election against a will, in which case the elective share statute gives only a fractional interest.

Sub. (1) (b) is the same as 237.01 (1), and sub. (1) (c) is the same as 237.01 (2). Likewise subsection (1) (d) is the same as 237.01 (3). However, sub. (1) (e) makes a slight change in existing law. Where decedent is survived by nieces and nephews all of the brothers and sisters being dead, 237.01 (4) has been held to govern rather than 237.01 (3). Schneider v. Payne, 205 Wis. 235, 237 N.W. 103 (1931). This result is not obvious on the face of the existing statute. Sub. (1) (e) provides the same equal distribution where only nephews and nieces survive. Suppose, however, that one niece predeceases the intestate and leaves surviving issue; under the existing statute such issue would not share because they are not of equal degree and there is no representation under 237.01 (4). Estate of Szaczywka, 270 Wis. 238, 70 N.W. 2d 600 (1955). Sub. (1) (e) allows representation on the theory that issue of brothers and sisters should be given the same pattern of distribution as issue of the decedent.

Sub. (1) (f) is new. It is, however, only declaratory of existing Wisconsin law, since a grandparent is the nearest in degree if decedent left no surviving spouse, parents, issue, brothers or sisters, or issue of brothers and sisters. See Estate of Kirkendall, 43 Wis. 167 (1877) where a grandparent inherited ahead of aunts and uncles.

This section contains no provision comparable to 237.01 (5) and (6). These subsections deal with a very specialized problem and were intended to preserve ancient notions of ancestral property and inheritance by the whole blood relatives. The precise purpose of sub. (5) and (6) of the existing statute appears vague in modern times. As a restriction on inheritance by brothers and sisters of the half blood, it is consistent with 237.03; but 852.01 eliminates any such restriction on inheritance by the half blood. As a restriction on inheritance by the surviving parent, it may have had greater utility in an era of high infant mortality; but the requirement that the child die under age seems meaningless otherwise. As an ancestral property notion, it seems ineffective; if there is an only child, the surviving parent would take and the property passes outside of the ancestral line. If the early interpretation of the existing statute as a redistribution of the deceased parent's estate is a clue, this may have been a crude substitute for a will clause requiring survival for a limited time (like the clause requiring any beneficiary to survive the final decree of distribution). Probably the purpose of the existing statute was to prevent an increase in the share passing to the widow. If the deceased child is a minor, probably the other children will be minors also and the widow will be charged with their support anyway. Concern that the widow not receive too large a share of an estate is not a modern public policy. If the husband wishes to prevent this, or to avoid the possibility of double taxation and double administration expense, he can do so by a carefully drawn trust instrument providing for the children until majority.

Sub. (2) is new. It is an extension of the purposes behind the Uniform Simultaneous Death Act. When two related persons die within a short time, there is often litigation to determine the sequence of deaths for purpose of inheritance. The frequency of automobile fatalities or airline crashes involving a married couple or parents and children makes the problem serious. The Uniform Act is only a partial solution. It does not prevent litigation because the act is inapplicable if the sequence of deaths can be established by evidence. Moreover, the modern will usually contains a clause requiring beneficiaries to survive the testator for a stated period (six months is common); these clauses eliminate the need for a second administration of the same property and assure that the property will pass to the decedent's relatives. This subsection achieves the same objectives for a person dying intestate. For example, husband and wife are killed in an automobile accident, the wife surviving for several hours. All or a substantial interest in the husband's estate would normally pass to the wife by intestacy. Without sub. (2), the same property would be the subject to a second administration as the estate of the wife. If there were no children, the same property in the wife's estate would then go to her family. Sub. (2) prevents these results; the property would go not to the wife's estate but to the next in line of the heirs of the husband (his children, or if none, his parents, brothers and sisters, etc.).

Sub. (3) provides for escheat if the decedent leaves no surviving relatives within the preceding subsections; it makes no change in the present rule of 237.01 (7) and 238.136. [Bill 5-S]

852.03 History: 1969 c. 339; Stats. 1969 s. 852.03.

Legislative Council Note, 1969: This section involves several minor changes in the Wisconsin law, in order to modernize it.

Sub. (1) defines "representation" in greater detail than 237.07. When read in conjunction with 237.01 (1), this definition has been interpreted variously when applied to an unusual case like Maud v. Catherwood, 67 Cal. App. 2d 636, 155 P. 2d 111 (1945), noted 33 Cal. L. Rev. 324 (1945). There decedent's children all predeceased him. He was survived by several grandchildren and by 2 great-grandchildren whose parents also predeceased de-

cedent. If the pattern of stirpital distribution were determined at the level of the living grandchildren, each of the great-grandchildren and each of the four surviving grandchildren would take one-sixth; but because the court determined representation at the level of the children, one great-grandchild took one-fourth, one grandchild took a fourth, 3 grandchildren took one-eighth, and the other great-grandchild took an eighth. The California Statutes were similar to 237.01 and 237.07. See also Note (1942) 140 A.L.R. 1141. The proposed definition is based on the Model Probate Code, s. 22 (c) and prevents such anomalous result. Since the point has never been decided in Wisconsin, this section would also eliminate litigation.

Sub. (2) is the same as the first sentence of 237.03 but a chart of relationship has been added for convenience.

Sub. (3) eliminates one of the last remnants of the ancient concept of "ancestral" property. The modern tendency has been in the direction of eliminating all distinctions between relatives of the half blood and of the whole blood. At a time when an adopted person has been accorded full rights, although sharing no blood relation with the intestate, it seems anomalous to limit inheritance by persons related through only one ancestor. Relationship is more a matter of interdependence and sharing than of blood. Thus if a husband has a child A by a first marriage, then remarries and with his second wife adopts a child B and later a child C is born to the couple, property inherited by C from the mother cannot on the death of C be inherited by A (who is of the half blood) but can be inherited by B (adopted but no blood relation). Moreover, if the property had originally been placed by A's father in joint tenancy with his 2nd wife and passed to her on his death and from her to C, a literal reading of the present statute would treat this as "ancestral" property of the 2nd wife rather than the husband. Our court very early rejected the application of the ancestral limitation in this section to personal property other than heirlooms, because of the difficulty of tracing. Estate of Kirkendall, 43 Wis. 167 (1877).

Sub. (4) is the same in substance as the second part of 237.07. However, the present wording is improved by making the birth relate to the death of the intestate rather than "parents". Thus a niece or nephew born after the death of decedent might share in the estate of an intestate by representation of a deceased brother or sister. [Bill 5-S]

852.05 History: 1969 c. 339; Stats. 1969 s. 852.05.

Legislative Council Note, 1969: The problem of illegitimate children is growing in incidence. Various related statutes minimize the scope of illegitimacy. Thus children born during the marriage are presumed to be legitimate — 328.39; an illegitimate child becomes legitimate upon the subsequent marriage of the parents — 245.25; and a child born to a married couple is legitimate even though the marriage is subsequently declared void — 245.25. Moreover, most illegitimate children become adopted, and their status becomes that of children of the adoptive parents. Nevertheless, it is important to modernize our statutes on inheritance by, from and through illegitimate persons. Although illegitimacy is still against public policy, any change in the inheritance laws will not promote illegitimacy but merely protect the innocent child.

The existing rules of inheritance under 237.05 and 237.06 are as follows:

(1) The child can inherit from his mother, but not from her kindred.

(2) The child can inherit from the father only if paternity is established by written and witnessed acknowledgment by the father, an adjudication of paternity, or admission in open court; he cannot inherit from paternal collateral relatives.

(3) Property of the illegitimate child is inherited by his mother and her relatives only. Although 237.05 contains no express exception, it seems clear that if the illegitimate child were to leave a surviving spouse or children, they should inherit under 237.01; other courts have so construed similar legislation. Pulliam v. Churchman, 108 Okla. 290, 236 P. 875 (1925).

The existing statutes were drafted with the young child in mind. This undoubtedly accounts for the failure to consider inheritance by a surviving spouse of the illegitimate person. It also accounts for failure to consider rights of issue of the illegitimate to inherit from the mother and from the acknowledged father of the illegitimate. All that 237.06 does is to make the illegitimate child an heir; it says nothing about his issue taking as heirs representing him. Probably the court would construe 237.06 as equivalent to the legitimation so far as inheritance by issue of the illegitimate person from the parents might be involved.

The ancient stigma attaching to illegitimacy bars inheritance from collateral relatives, either through the mother or through the father. If we bear in mind that the intestate succession can be avoided by a will, along with the changing social attitude toward the illegitimate child, the right of the illegitimate child to inherit from collateral relatives ought to be expanded. It is not uncommon for maternal grandparents to raise an illegitimate child without adoption. Accordingly, this section allows inheritance through the mother in any case and through the father in situations where the father has been established as such in the manner provided in sub. (1). The language in sub. (1) dealing with methods of proof of paternity is based on 237.06 but no longer requires a witness to a written acknowledgement signed by the father. That language has been given a liberal interpretation by the Supreme Court, a continuation of which should be assured by use of the same language in this section.

Sub. (2) broadens the scope of inheritance from the illegitimate child. As previously noted, 237.05 is too limited and may, if unaltered, create interpretation problems for the courts. This section makes applicable the normal rules of inheritance from an illegitimate child with the single exception that the father or his kindred can inherit only if the father has been formally adjudicated as such. While logic might seem to require that the father and his kindred should inherit in the

other situations where the illegitimate may inherit from the father and his kindred under sub. (1), this might open the door to fraud; hence the limitation.

As already noted, the incidence of this section will in fact be fairly small. Most illegitimate children are either legitimated by marriage of the parents or adopted by new parents. Sub. (3) makes clear that normal rules govern such cases.

The Committee carefully weighed the possibility that this section might encourage false claims, but decided this was not likely enough to justify unfair treatment in valid cases. Where substantial wealth is involved, a will or trust document is almost always executed. The objection that inclusion of illegitimate children may complicate proof of heirship and giving notice was also considered by the committee. This objection was also considered minimal; the possible presence of an illegitimate child is already a risk in case of the estate of the father or mother under existing law. [Bill 5-S]

852.09 History: 1969 c. 339; Stats. 1969 s. 852.09.

Legislative Council Note, 1969: This section is new. The surviving spouse receives the homestead under 237.02 for life or until remarriage, if there is surviving issue. This is unsatisfactory because the surviving widow often finds the house too large for her needs and it cannot be sold without the consent of the remaindermen. Moreover, the existing law is inequitable because the "homestead" may vary from an inexpensive home to a large hotel or a valuable combination residence-commercial property. This section would leave the choice to the widow or widower. If the property is unusually valuable, this is deducted from the share passing to the surviving spouse, so that nothing is gained at the expense of the children. Moreover, the homestead is taken in fee, rather than in terms of a limited and unmarketable life estate. This allows subsequent sale or mortgage as might be desirable in the future as circumstances change.

If decedent is survived by a spouse and no issue, there is no need for application of this section, because the surviving spouse takes the entire estate, including the homestead, under 852.01 (1) (a) 1. Since the share of the surviving spouse in other cases has been increased under 852.01, that share will normally be adequate to include the value of the home. However, there may be situations in which the value of the home exceeds the spouse's share. The last sentence of sub. (1) empowers the court with the discretion to adopt either of two methods for dealing with the situation; the court has to weigh both the interest of the surviving spouse and protection of the issue.

This section places the burden on the spouse of rejecting the home; otherwise it will be assigned as part of the share. The Committee felt that normally the spouse will want the home and that, if the home subsequently proves undesirable, it can be sold by the spouse.

This section is open to the criticism that it is dependent upon accurate appraisal. The Committee believed that in this State, where inheritance taxes are also dependent upon appraisal, the probate courts can be relied upon to maintain a fair and accurate system of appraisal. Any heir who feels that the value placed on the home is unfairly low and thus favors the surviving spouse can raise the objection in the probate proceedings prior to the final account.

Sub. (2) is designed to get away from existing difficulties involved in the definition of "Homestead". Since the intent of the statute is to provide a home for the surviving spouse, the latter should have the choice. Because the value will be charged against the share of the surviving spouse anyway, it is no longer necessary to be concerned about kinds of properties and commercial uses. In dealing with area problems, the preference in modern times ought to be in favor of keeping the land in a single unit rather than dividing it, as is necessary under existing law in the case of a farm part of which is a homestead. If the surviving spouse does not have a large enough share to take the entire farm as a unit, the court may divide the land but the burden is on the proponent to demonstrate that such a division is fair to all the heirs.

The section applies to any "interest" the decedent has in the home, whether outright ownership, an equity under a land contract, a lease, a unit in a condominium, a cooperative apartment, etc.

This section does not affect the problem of exemption from claims of creditors (the existing concept of "exempt homestead"); if the estate is insolvent, exemption from creditors is governed by 861.41. [Bill 5-S]

852.11 History: 1969 c. 339; Stats. 1969 s. 852.11.

Legislative Council Note, 1969: This section replaces 318.24-318.29. It makes little change in existing law. Sub. (1) corresponds to 318.27. It is based on the premise that gifts during lifetime, typically by a parent to a child, are not intended as advances but as separate gifts. If an advance is intended, it must be established by written proof. One minor change in the law is that of allowing the decedent to charge the gift in writing after the gift is made; the existing statute has been interpreted to allow a writing by the decedent only if contemporaneous with the gift, so that an entry in personal records at a time subsequent to the gift is not sufficient. Of course the heir can acknowledge the advance at any time and may under this section do so by oral statement in court. The statute does not apply to a loan to an heir, which may be proven without a writing in some situations.

Distinctions in the existing statute based on the kind of property advanced, real or personal, are immaterial under this section which treats real and personal property alike.

Sub. (2) is substantially the same as 318.28 but makes clear that the advance is charged to children of a deceased child to whom advances have been made even though the distribution is to all grandchildren other than by representation (where all children predecease

the decedent, grandchildren do not take by representation).

Sub. (3) corresponds to the last sentence of 318.27 on value, but with a minor change.

Because the probate branch of the county court has complete jurisdiction in Wisconsin over settlement of an estate, 318.29 has been omitted as superfluous. Likewise 318.25 states such an obvious proposition of the law of advancement that it has not been embodied in this section. Omission of these sections is not intended to change the law in any respect.

Technically the property advanced is not part of the estate for purposes of administration. It is merely considered for purposes of computing the shares of the heirs as though it were part of the estate, to be deducted from the share of the heir to whom the advance was made. Hence 318.24 has been omitted. The treatment of the advance is implicit in the wording of the new sub. (1). [Bill 5-S]

852.13 History: 1969 c. 339; Stats. 1969 s. 852.13.

Legislative Council Note, 1969: This section replaces 237.01 (8) and makes no change in substance. A slight change in procedure is made, however. The 180-day period in the existing statute dates from "receiving notice of the death of the intestate"; since there is no official notice sent to the heirs, this introduces some uncertainty in the law. This section dates the 180-day period from the granting of letters. It also allows the court to extend the time for cause shown; this is limited to a reasonable time. The heir who renounces must not only file with the court but also serve a copy on the personal representative.

The last sentence is new. It is intended to deal with the problem raised in the recent case Estate of Wettig, 29 Wis. 2d 239, 138 N.W. 2d 206 (1965). [Bill 5-S]

CHAPTER 853.

WILLS.

Legislative Council Note, 1969: (1) No major changes in execution of wills are contemplated. However, oral (nuncupative) wills are no longer valid.

(2) In line with the trend in other states a uniform minimum age of 18 years is provided.

(3) The law of revocation is codified (except for dependent relative revocation). Two minor changes are involved: a subsequent marriage generally revokes a will, and revival of a revoked will is permitted under special circumstances.

(4) The existing statutes providing for a child born after execution of the will or omitted by mistake are modified to give the court discretion as to the kind and amount of share the child should receive; and it is no longer necessary to mention the child in the will in order to prevent an objection to probate.

(5) The provisions on equitable election dealing with a will which mistakenly disposes of nonprobate property (such as joint tenancy assets) are clarified.

(6) The burden of establishing that any will is made under a contract not to revoke is extended to joint wills.

(7) A totally new provision ameliorates the effect of ademption by extinction if specifically devised or bequeathed property is sold, condemned or destroyed by fire or changed by corporate action.

(8) The administrative features of deposit of a will during testator's lifetime are changed, with provision for discretionary microfilming of deposited wills and destruction of originals after 25 years. [Bill 5-S]

853.01 History: 1969 c. 339; Stats. 1969 s. 853.01.

Legislative Council Note, 1969: This section replaces 238.01 and 238.05 and lowers the minimum age for testamentary capacity to 18 years on a uniform basis. The existing age requirement is 21 with exceptions for a married woman of 18 or older and for any minor who is in the military and naval forces.

The reasons for recommending a uniform lower age are as follows: (1) Minors today are increasingly owners of substantial amounts of property. In an era when accumulation of wealth was the major means of acquiring an estate, few, if any, men acquired an estate before they reached 21. Today the tax advantages of inter vivos gifts have induced parents and grandparents to make transfers, outright or in trust, for minors. Trusts created to comply with IRC s. 2503 (c) must either provide for payment to the minor's estate in event of death before 21 or give the minor a testamentary power of appointment (although under existing tax regulations it is not required that that the minor be able to exercise the power under state law). (2) Marriage of minors is increasingly frequent. Patterns of marriage and raising a family have changed drastically. There is more need for a minor to be able to make a will to provide for a changing family situation. (3) Our present law contains inconsistencies which are neither logical nor sound. The exceptions for the married woman of 18 and for a minor in military service can, of course, be rationalized. The exception for the married minor woman, which is apparently unique to Wisconsin, enables her to avoid the intestate laws which would give the entire estate to her husband as heir if there are no children, or to create trusts for children if there are any. But the married man under 21 has just as much need for estate planning as his minor wife. The exception for young men in the military forces is an outgrowth of historic accident and has been attacked as historically unsound. 21 Mod. L. Rev. 423 (1958). Wisconsin is one of only six states which lower the age for soldiers and sailors. Although the special exception for persons in military service can be justified on grounds of the increased peril, more minors are killed in automobile accidents than in the performance of military duties. (4) Minors can avoid existing limitations by resorting to legal devices which by-pass probate: insurance, joint bank accounts, government bonds with beneficiary designations, etc. (5) With modern public education, a young person of 18 ought to have sufficient judgment to make a testamentary disposition.

Eighteen states have already recognized these changed conditions and set the age of