CHAPTER 861.

Family Rights.

Legislative Council Note, 1969: (1) This chapter combines the concepts of dower from chapter 233 and allowances from 313.15. The committee studied and rejected proposals along the lines of the English Family Allowances (giving the court complete discretion as to how much of the estate should go to the family contrary to decedent's wishes) and community property (assuring the spouse a fixed share of all wealth acquired during the marriage). Our existing system is essentially a compromise, with discretionary allowances to take care of need and the dower-elective share to give the surviving spouse a fractional share in the marital wealth.

(2) Dower is retained but modified. It is made an elective share (one-third) in the probate estate without regard to the type of property involved; inchoate dower is abolished in the interests of title simplification and to accord with the principle of treating real and personal property alike. Because of the increasing practice of placing marital wealth in the wife's name for tax reasons, the surviving husband is given the same rights in his wife's property as she would have as survivor in his.

(3) In the event of election, the testator's testamentary scheme is preserved as much as possible. The electing spouse does not necessarily get one-third outright, but the value of interests such as life estates under the will are deducted if capable of valuation; hence election to avoid a trust is no longer possible.

(4) Advance family planning is facilitated by allowing a simple contract to bar dower (as in the second marriage situation) and by barring dower if the decedent leaves half of his total estate, including nonprobate assets such as life insurance and joint tenancy property, outright or in trust for the surviving spouse.

(5) A new statutory provision builds on the judicial concept of setting aside transfers to defeat the spouse's rights if the transfers are in "fraud" of such rights. The problem is essentially left to the courts to apply a flexible concept to meet unusual cases where one spouse depletes the probate estate deliberately to avoid election. On the other hand, where there is reason to disinherit the surviving spouse, as where the couple have separated, the court has discretion to reduce or eliminate any share for the survivor.

(6) Again the homestead concept as such is abandoned, but the surviving spouse can ask for assignment of the home as part of the elective share; the court can make such an assignment outright or can refuse to assign the home in a proper case where it would unduly disrupt the estate plan.

(7) Changes in allowances are minor. The family allowance during administration of the estate can be charged against the recipient's share in the estate, either principal or income. The selection of personalty by the spouse is expanded to include an automobile, and the miscellaneous property increased from $400 to $1,000; the spouse also has what amounts to a right to "buy" personalty not specifically bequeathed by paying the appraised value to the personal representative. The allowance for support and education of a minor child can be placed in trust, to assure that it goes for the designated purpose and to return the property to the estate plan if the child dies before the age set.

(8) A change in the exemption from creditors is made. The existing law is based on the homestead concept, but operates inequitably (the exempt homestead goes to an adult child who has no need, for example; but a needy widow loses out to creditors if decedent has only nonhomestead assets). 861.41 allows the probate court to set aside up to $10,000 for the surviving spouse if needed for support. Here as in the case of the allowances, the court is given standards and must consider assets outside the probate estate (life insurance, for example). [Bill 5-S]

861.03 History: 1969 c. 339, 393; Stats. 1969 s. 861.03.

Legislative Council Note, 1969: Although this section retains the concept of dower, the concept has been broadened and changed in certain respects. Dower as defined by 233.01 is an expansion of the common law concept with all of its archaic limitations such as the requirement of seisin; dower is supplemented by the homestead concept and the elective right in 233.14. Moreover, it is limited to a right in the widow; the corresponding interest of a husband in his wife's real property as curtailed by 233.23 is in effect no more than a share in her intestate estate. Since 852.01 gives the surviving spouse an intestate share and makes the spouse an heir, there is no longer any need for defining dower to include a share in intestate property. This section gives the surviving husband the same dower right in the wife's estate as she has in his. This is not only justified on the basis of equality of treatment, but also required by the increasing number of instances in which a husband who has put his savings in his wife's name finds on her death that she has disinherited him by her will. With the growing practice of both husband and wife working, and investments being made in the wife's name for tax reasons, there is greater need for some protection for the husband than in a society in which most wealth was earned by the husband and invested in his name.

Distinctions between real and personal property, and between homestead and nonhomestead realty, or based on the feudal concept of seisin, have been eliminated. Classic concern as to whether there is dower in equitable interests in land, such as in the purchaser's interest under a land contract, is avoided by the proposed section.

Inchoate dower is abolished. This move has long been advocated by those interested in title simplification. It will not leave the wife unprotected, as might be feared. Transfer of the home is still restricted by 235.01; and most homes are owned in joint tenancy anyway. Moreover, under existing law a husband can transfer unlimited amounts of personalty (such as stocks) without his wife's consent; it is anomalous to require her signature to a transfer of title to a vacant lot. Finally, the

surviving spouse is protected by the provisions of 861.17 against a deliberate scheme by the decedent to deplete his probate estate. [Bill 5-S]

861.05 History: 1969 c. 339, 424; Stats. 1969 s. 861.05.

Legislative Council Note, 1969: This section replaces in large measure 233.13 - 233.14 on elective share. The term "net probate estate" is different from "net estate" as defined in 851.17; as used in this section federal and state estate taxes are not deducted in computing the net probate estate for purposes of election. In this respect, this definition changes the rule in Will of Uihlein, 264 Wis. 362, 59 N.W.2d 641 (1952). This increases the amount of the elective share in the large probate estate, but is necessary because the increasing proportion of nonprobate assets may result in a tax burden capable of wiping out the probate estate.

An election against a will by a widow under existing law often results in distortion of the estate plan; dower gives her a one-third interest in each parcel of realty; the elective share in personalty passes to her outright free of any trust set up by the will. This section preserves the testamentary scheme to a greater degree by reducing the elective share of one-third by interests passing outright to the spouse under the will.

An election to take against the will forfeits all rights in the estate (except those preserved in reducing the elective share); this includes a right to share in intestate property. In this respect the statute makes no change in existing law. See Chapman v. Chapman, 128 Wis. 413, 107 N.W. 668 (1906). It should, however, be noted that where the spouse takes under the will, 852.01 (1) of the Intestate Succession chapter will give the spouse a share in intestate property; this changes the rule in Will of Uihlein, 264 Wis. 362, 59 N.W.2d 641 (1952). In the latter situation a testator would normally want the spouse to share in intestate property. Where the spouse elects against the will, however, the spouse is already taking a share of intestate property since that is included in the net probate estate on which the share is computed; moreover, under 861.13 the intestate property is used to satisfy the elective share.

The impact of election on powers of appointment and on powers of a trustee deserves special treatment. Sub. (2) sets forth the rules. The existing law is that an electing spouse retains powers of appointment created by the will, on the basis of the concept of a power as not an interest in property. See the Uihlein case cited above. This subsection provides for forfeiture of general and unclassified powers of appointment created in the spouse by the will. If the will creates a special power as defined in 232.01 (5), such as a "power to appoint among our issue", the spouse may retain such a power unless the will itself provides for forfeiture by an election; the reason is that such a power is primarily intended to benefit the class among whom appointment may be made, to allow for flexibility, rather than to benefit the donee. Powers in a trustee which may confer direct benefits on the spouse, such as a power to invade principal to meet the needs of the spouse, will likewise normally be nullified by an election against the will. The theory underlying this section is that the spouse may not elect against the will and still derive benefits under it, except as those benefits are used to reduce the elective share.

Sub. (3) ties this section with the ensuing sections, which may in appropriate cases operate to restrict or nullify the right to elect. [Bill 5-S]

861.07 History: 1969 c. 339; Stats. 1969 s. 861.07.

Legislative Council Note, 1969: This section replaces obsolete concepts of jointure which appear in 233.09-233.12 and is generally new. It is designed to facilitate advance family planning. Sub. (1) provides for barring the surviving spouse by simple written agreement. In order to prevent overreaching by a dominant spouse, consideration would still be necessary; this accords with the decision of the Wisconsin Supreme Court in Estate of Beat, 25 Wis. 2d 315, 130 N.W.2d 739 (1964). It applies to both antenuptial and postnuptial agreements. Such an agreement could, of course, be set aside by the court if the surviving spouse lacked capacity or was subject to undue influence or if the agreement was the product of overreaching or misrepresentation. No attempt has been made to embody such tests in the statute, but they are left to court determination as is true of a challenge on such grounds to any voluntary transfer or agreement. The statute reflects the present judicial policy of favorable treatment of agreements settling property rights between husband and wife, particularly in cases involving second marriages.

Sub. (2) is a completely new approach. The existing law allows a surviving widow to elect against a will and receive her statutory rights in the probate estate even though the deceased husband gave her the majority of his assets through nonprobate arrangements, such as life insurance payable to her or joint ownership passing to her by survivorship. This is obviously unfair, and this statutory provision bars the surviving spouse where he or she has received a majority of both probate and nonprobate assets considered together. In addition, the statute recognizes that such property may be tied up in an arrangement which would qualify for the marital deduction, rather than passing outright, and still constitute a bar. [Bill 5-S]

861.11 History: 1969 c. 339; Stats. 1969 s. 861.11.

Legislative Council Note, 1969: This section on procedure is based on the existing law embodied in 233.14 and 233.15 with some changes. The burden is still on the surviving spouse to file an election; otherwise the spouse is deemed to take under the will.

Although 233.14 allows election by a guardian, no criterion for such election is stated; whereas this section allows election in such a case only if additional assets are needed for the reasonable support of the spouse; election merely to swell the estate subject to guardianship is undesirable for the entire family.

Sub. (4) makes the right to elect personal. Under existing law if a widow dies within the statutory period and leaves issue by the deceased husband, election may be made by her personal representative. The right to elect is intended for the protection of the surviving spouse, not for the spouse's estate. If there are minor issue by the deceased testator, who have been disinherited, the court can protect them under 861.35. [Bill 5-S]

861.13 History: 1969 c. 339; Stats. 1969 s. 861.13.

Legislative Council Note, 1969: This section is new. The impact of election on distribution of the estate to other beneficiaries under the will is presently left to judicial determination. The court has used various concepts to ameliorate the distortion caused by election, including acceleration of future interests, sequestration, and construction; but in general the burden as to personal property falls on the residue while dower and homestead come out of specific parcels of realty regardless of their disposition under the will.

This section must be read in light of 861.05 which preserves as far as possible the testamentary plan by reducing the elective share by gifts to the surviving spouse to the extent they are capable of valuation. Moreover, dower is no longer a fractional share in each parcel of real estate, so that the problem of impact is different. This section basically places the burden on the residue, as does existing law as to the elective share.

Although the surviving spouse no longer has an absolute right to the home (by virtue of "homestead rights" under existing law), sub. (2) empowers the court to assign the home as part of the elective share if this will not unduly disrupt the testamentary plan. If the home is devised to a beneficiary other than the spouse, and there is sound reason to give the surviving spouse preference over the named beneficiary, the beneficiary will be compensated for loss of the home which the court would assign to the spouse. The court may, however, refuse to assign the home to the surviving spouse, and satisfy the elective share out of other property. [Bill 5-S]

861.15 History: 1969 c. 339; Stats. 1969 s. 861.15.

Legislative Council Note, 1969: This section corresponds to 233.16. Because the Code empowers the personal representative to sell both real and personal property, the section is no longer limited to a power of sale conferred expressly by will but applies to all estates. Hence the possibility of an election would in no way inhibit any transfer by the personal representative. This also follows from the basic concept of the new elective right, which does not confer rights in any particular piece of property in the estate. [Bill 5-S]

861.17 History: 1969 c. 339, 393; Stats. 1969 s. 861.17.

Legislative Council Note, 1969: This section is new. It is based on the judicial concept of allowing the surviving spouse to reach lifetime transfers made in "fraud" of the elective right. See Sederlund v. Sederlund, 176 Wis. 627, 187 N.W. 750 (1922); Mann v. Grinwald, 203 Wis. 27, 233 N.W. 582 (1930); Estate of Steck, 275 Wis. 290, 81 N.W. 2d 729 (1957); Estate of Mayer, 26 Wis. 2d 671, 133 N.W.2d 322 (1965). Although in none of those cases was the widow successful in setting aside or reaching the personal property transferred during lifetime, the Wisconsin Supreme Court affirmed in each opinion that it would allow such action in a proper case. It is the intent to fortify this judicial doctrine and give it procedural shape. It should be noted that this section becomes more important in light of abolition of inchoate dower by 861.03; inchoate dower at present restricts inter vivos transfer of realty to defeat the widow. This section is therefore necessary to prevent depletion of the probate estate at the expense of the surviving spouse.

The most difficult issue in modernizing family protection is that of proper treatment of the myriad forms of ownership which result in passage of wealth at death outside of the regular probate court processes. These nonprobate assets more often than not are greater than the probate assets. They include joint tenancy assets, in both real and personal property, variations of joint ownership such as joint bank accounts, life insurance, death benefits under pension and retirement plans, gifts in contemplation of death, bonds and share accounts payable on death to a named beneficiary, and revocable living trusts. The tax laws treat all or most of these as essentially testamentary in nature and hence taxable. Some states, notably Pennsylvania and recently New York, have adopted statutes including at least part of such nonprobate assets as subject to the elective share. Although the Committee considered such an approach, it was decided to retain the basic approach of the present Wisconsin law for the time being. It is intended that this section should be applied to reach deliberate plans to deplete the probate estate in order to defeat election by the surviving spouse. It is hoped that the very existence of the section will deter such plans. Although the test of "primary purpose" embodied in sub. (1) has been criticized as difficult of proof, it has the advantage of being familiar.

Sub. (2) permits transfer of assets, creation of joint tenancies or revocable trusts, and similar arrangements to be made for the benefit of children by a prior marriage if the arrangement is made before marriage to the surviving spouse or within a year after the marriage is entered into. Because persons now married may have intended to provide for issue by a prior marriage, they are able to do so within a year after the effective date of this Code without danger of having such arrangements challenged as a fraud on the rights of the spouse.

It is not necessary that the surviving spouse has elected to take against a will in order to bring an action to set aside fraudulent property arrangements. In this respect, the rule laid down in Estate of Mayer, supra, is changed by the statute. Thus if testator depleted his estate down to $5,000 by inter vivos

transfers designed to defeat his widow (as by placing $1,000,000 in a revocable living trust), and then left the entire estate of $5,000 to the widow, she can take under the will and still proceed against the trust. Otherwise, the decedent could simply let his depleted estate go under the law of intestate succession so that there would be no will to elect against, and thereby avoid the law.

It is the intent of sub. (4) to protect transfer agents, banks, insurance companies and the like as well as innocent purchasers for value. The interest of the surviving spouse is primarily to be asserted against the person receiving the property from the decedent by reason of the fraudulent transfer.

Sub. (5) sets a time limit on an action based on the theory of this section, but recognizes that it may be unfair to permit suit even within the time set (a proper case for laches). [Bill 5-S]

861.31 History: 1969 c. 339; Stats. 1969 s. 861.31.

Legislative Council Note, 1969: This section provides for an allowance to the family to enable the surviving spouse and minor children to live during the period of administration. It is substantially the same as 313.15 (2) with minor exceptions noted. It extends to the widower as well as the widow, in line with the policy of equal treatment and recognition that in some cases the family wealth will be in the wife's name. There are minor changes in the procedure, the section expressly recognizing that separate allowances for the spouse and for the minor children may be appropriate in some cases. Sub. (3) limits the initial order for the allowance to one year but permits extensions; the court also retains power to modify the allowance at any time.

Sub. (4) empowers the court to charge the allowance as an advance. This is new. While it is essential to provide an immediate source of funds for the family to live on, in substantial estates the allowance may result in unfair distribution; the court therefore is given power to charge the allowance as an advance. However, to assure that the marital deduction will not be jeopardized in any case, the court may not charge an allowance for support of minor children against the interest of the surviving spouse, whether income or principal.

In sub. (1) the court is directed to consider other resources available for support of the family as well as the size of the probate estate, in determining whether to make an allowance as well as how much of an allowance to set. [Bill 5-S]

861.33 History: 1969 c. 339; Stats. 1969 s. 861.33.

Legislative Council Note, 1969: This section providing for selection of personalty by the surviving spouse is more liberal than 313.15 (1) and contains some innovations. The spouse is allowed one automobile (almost a necessity in modern times) and the amount of miscellaneous personalty is increased from $400 to $1,000 and is limited to tangible personalty (the widow cannot "select" cash).

The relation of this selection to specifically bequeathed personalty is defined in sub. (1).

This section like the existing statute on allowances involves a built-in exemption from creditors. In rare instances the value of household furnishings and wearing apparel may be a very substantial amount; hence there is provision for limiting the total value of the selected personalty if creditors petition the court.

There is a new feature in sub. (3) allowing the spouse to select other personalty or personalty of greater value (such as a $5,000 boat) by paying to the personal representative the appraised value; this does not apply to items specifically bequeathed.

Once the selection has been filed (unless limited on petition of creditors) the selected items are no longer subject to administration and the personal representative has power to effect a transfer of title by whatever means are necessary. [Bill 5-S]

861.35 History: 1969 c. 339; Stats. 1969 s. 861.35.

Legislative Council Note, 1969: This section is substantially the same as 313.15 (3) under which the court can make an allowance for support and education of minor children. The only important change is procedural, enabling the court to set aside the amount in a trust so that rights of other persons are protected in the event the amount proves greater than needed for the intended purposes. It is not necessary, however, to create a trust if the amount is not substantial, or if it is inappropriate for other reasons.

This section like the preceding ones necessarily may reduce the estate available for payment of claims. Sub. (3) is a recognition of this problem and allows the court to balance the needs of the minor children against the interests of the creditors in an insolvent estate.

The Committee considered a dollar limitation on allowances under this section, but decided that flexibility was more important. Extension of the section to adult incompetent children was also considered, but is not recommended at this time. [Bill 5-S]

861.41 History: 1969 c. 339; Stats. 1969 s. 861.41.

Legislative Council Note, 1969: This section replaces the well-known "exempt homestead" provisions in our existing statutes.

Our existing law deals with the problem of protection of the family against claims of creditors in an ineffective and clumsy manner. Inchoate dower gives the widow a third of all nonhomestead realty ahead of creditors, regardless of need and regardless of value involved. Melms v. Pabst Brewing Company, 93 Wis. 140, 66 N.W. 244 (1896). The exempt homestead (the home up to $10,000 in value) passes to the widow or a child free of judgments and claims against the deceased owner, under 237.025 (or may be willed to them under 238.04); in either case the widow or the child may have no need for protection and may in fact be independently wealthy. Life insurance and joint tenancy property pass to the beneficiaries or survivor free of unsecured claims, regardless of amount. A terminal allowance of up to $2,000 under 313.15 (4) (a) may further increase the

amount of property passing to the family ahead of creditors. Thus the total escaping from legitimate creditor claims may be a staggering amount or a very small amount depending upon the composition of the estate, and may also have no relation to the need of the recipient.

This section makes a fresh approach. It bases the exemption directly on the need of the surviving spouse for support ahead of payment of creditors. It is limited to the surviving spouse, since the court can protect minor children under 861.35 ahead of creditors. There is no reason to protect adult children; they should have no right prior to creditors. Furthermore, the exemption does not depend on the presence or absence of a home in the estate, although under sub. (4) the court may assign the home (or a life estate) against the exemption. But if there is no home, the surviving spouse can be allocated other property.

The amount is limited to $10,000. However, the court is not required to allot this amount but may give a lesser amount or no exemption at all. In making this determination the court is directed to consider other assets available to the surviving spouse. This would include assets already owned by the survivor as well as assets acquired as surviving joint tenant or proceeds of life insurance or any other assets passing at death. [Bill 5-S]

CHAPTER 862.

Accounts.

Legislative Council Note, 1969: This chapter replaces chapter 317. [Bill 5-S]

862.01 History: 1969 c. 339; Stats. 1969 s. 862.01.

Legislative Council Note, 1969: This section is based upon and is a consolidation of ss. 310.20 (2), 312.11 and 317.05. [Bill 5-S]

862.03 History: 1969 c. 339; Stats. 1969 s. 862.03.

Legislative Council Note, 1969: This section is based upon present ss. 310.20 (2), 317.13 and 317.14, but it provides a complete procedure for getting accounts filed in estates when the original personal representative has failed to file. [Bill 5-S]

862.05 History: 1969 c. 339; Stats. 1969 s. 862.05.

Legislative Council Note, 1969: This section is a restatement of present s. 317.01 (1). [Bill 5-S]

862.07 History: 1969 c. 339; Stats. 1969 s. 862.07.

Legislative Council Note, 1969: This section is based upon present ss. 317.01 (2) and 317.02. [Bill 5-S]

862.09 History: 1969 c. 339; Stats. 1969 s. 862.09.

Legislative Council Note, 1969: This section is based upon present ss. 317.01 (2) and 317.11. [Bill 5-S]

862.11 History: 1969 c. 339; Stats. 1969 s. 862.11.

Legislative Council Note, 1969: This is one of the new requirements adopted for the purpose of keeping the persons interested in the estate periodically informed of the progress of the administration and aware of the facts which affect the share of the estate which they will receive. Persons interested "whose distribution is affected by the information, other than inheritance tax information, contained in the account" includes all those who receive a residual or fractional share of the estate, but does not include those who receive only specific or monetary bequests unless their bequest is subject to abatement. [Bill 5-S]

862.13 History: 1969 c. 339; Stats. 1969 s. 862.13.

Legislative Council Note, 1969: This section is based upon s. 317.15. [Bill 5-S]

862.15 History: 1969 c. 339; Stats. 1969 s. 862.15.

Legislative Council Note, 1969: This section is based upon present s. 317.05. [Bill 5-S]

862.17 History: 1969 c. 339; Stats. 1969 s. 862.17.

Legislative Council Note, 1969: This section is based upon present ss. 324.35 and 324.351. [Bill 5-S]

CHAPTER 863.

Closing Estates.

Legislative Council Note, 1969: This chapter replaces chapter 318. [Bill 5-S]

863.01 History: 1969 c. 339; Stats. 1969 s. 863.01.

Legislative Council Note, 1969: This section is new. The provision gives more power to the personal representative to speed distribution and reflects current practice. [Bill 5-S]

863.05 History: 1969 c. 339; Stats. 1969 s. 863.05.

Legislative Council Note, 1969: This section is new. See comment to s. 859.27. [Bill 5-S]

863.07 History: 1969 c. 339; Stats. 1969 s. 863.07.

Legislative Council Note, 1969: This section permits a person interested to assign his interest in the estate, but protects any personal representative who distributes property before he has knowledge of the assignment. [Bill 5-S]

863.09 History: 1969 c. 339; Stats. 1969 s. 863.09.

Legislative Council Note, 1969: This section is a restatement of present s. 318.01 (3) and (4). [Bill 5-S]

863.11 History: 1969 c. 339; Stats. 1969 s. 863.11.

Legislative Council Note, 1969: This section is a restatement of ss. 313.26, 313.27, and 313.28 and existing case law. [Bill 5-S]

863.13 History: 1969 c. 339; Stats. 1969 s. 863.13.

Legislative Council Note, 1969: Under this