TITLE XXIX.

Proceedings in County Courts.

CHAPTER 310.

PROBATE OF WILLS.

310.01 Wills in judge's keeping. Every county judge who has a will in his possession shall open it and announce his possession thereof in open court on the first session thereof after he shall have notice of the testator's death; and shall give notice of his possession to the executor therein named, if any, otherwise to some person interested in the provisions thereof. If probate jurisdiction belongs to any other court such will shall be delivered to the executor or such other court. [*Supreme Court Order, effective Jan. 1. 1934*]

310.02 Delivery of will to court; duty of executor. (1) Every person, other than the executor, having the custody of any will shall, within thirty days after he has knowledge of the death of the testator, deliver the same into the proper county court or to the person named as executor therein. Every person named as executor shall, within thirty days after he has knowledge that he is named executor, and has knowledge of the death of the testator, present such will to the county court which has jurisdiction of the probate thereof, unless the will has been otherwise deposited with the court.

(2) Every person who shall neglect to perform any of the duties required in this section, without reasonable cause, shall be liable to each and every person interested in such will for all damages caused by such neglect. [*Supreme Court Order, effective Jan. 1, 1934*]

310.03 Liability for neglect. If any person having the custody of any will after the death of the testator shall, without reasonable cause, neglect to deliver the same to the county court having jurisdiction thereof, after he shall have been duly notified by such court for that purpose, he may be committed to the jail of the county by warrant issued by such court and there be kept in close confinement until he shall deliver the will as required. [*1933 c. 190 s. 1*]

Note: On an appeal from a judgment on the probate of wills executed by the surviving maker of an unprobated joint will, executed by such testatrix and her husband, where it appears that knowledge of the execution and the contents of the unprobated joint will came to the county court and to counsel for the proponents and the contestants, and the record discloses no reason for the failure to probate, and where it also appears that after the death of the husband there was a conference of the parties in interest, followed by the administration of the husband's estate as an intestate estate, the supreme court must presume, in view of 310.03, that there was some good and sufficient reason for not probating the joint will. Will of Faulks, 246 W 319, 17 NW (2d) 423.

310.04 Notice of proving will. When a petition for the probate of a will is presented, the county court shall appoint a time and place for proving the will; and notice of the hearing shall be given as provided in section 324.18. [*Supreme Court Order, effective Jan. 1, 1934; Supreme Court Order, effective Jan. 1, 1940*]

Cross Reference: Orders signed by register in probate, see 253.27.

Note: When controversy whether testator died testate is not being fully tried, and will require determination of alleged later will, court should on own motion suspend proceeding and permit hearing on later will. Will of Burns, 210 W 499, 246 NW 704.

310.045 Petition to county court. All applications to county courts shall be made by verified petition. All petitions must show the jurisdiction of the court, and the inter-

est of the petitioner, and his right to apply to the court. The petition for probate of a will or for administration shall state the names and residences of the surviving spouse and heirs of the decedent and of the legatees and devisees, so far as known, or can, with reasonable diligence, be ascertained; and who are minors or otherwise under disability, and the names and residences of their guardians in this state. [*Court Rule II part; Supreme Court Order, effective Jan. 1, 1934; Supreme Court Order, effective July 1, 1943*]

Comment of Advisory Committee: The uniform forms adopted by the county judges require that the names and addresses of the legatees be given. Where the petition is to probate a will, there is the same reason for naming the beneficiaries that there is for naming the heirs. Both classes are interested and their interests are to some extent adverse; and there is considerable advantage in having the addresses of all interested persons. Again, the reason for giving the names and addresses of guardians of heirs applies to guardians of legatees. [Re Order effective July 1, 1943]

Note: In a proceeding for the appointment of a special administrator, where the absentee had disappeared under circumstances tending to indicate suicide, the court had no authority to appoint a special administrator until the court had determined the fact of death. In re Ott's Estate, 228 W 462, 279 NW 618.

310.05 Immediate hearing. (1) WAIVER OF NOTICE. Upon making application for the probate of a will or for letters of administration, if all parties interested enter their appearance in writing, waive the notice required in sections 310.04 and 311.03, and consent to an immediate hearing, letters testamentary or of administration may be granted as if notice had been given.

(2) NONRESIDENT HEIR, LEGATEE; NOTICE OF FOREIGN CONSUL. If the application for letters testamentary or of administration shall show that any heir, devisee or legatee is a resident of a foreign country, the court shall cause the notice of hearing of such application to be given to a consul, vice consul or consular agent of such foreign country by mailing a copy of the notice in a sealed envelope, the postage prepaid, addressed to such consul, vice consul or consular agent at his post-office address, at least twenty days previous to the day appointed for hearing. The notice required by this subsection is not jurisdictional.

310.06 Proof of uncontested will. If no person shall contest the probate of a will the court may grant probate thereof on the testimony of one of the subscribing witnesses, if such witness shall testify that such will was executed in all particulars as required by the statutes and that the testator was of sound mind at the time of the execution thereof. If none of the subscribing witnesses shall reside in this state at the time fixed for proving the will or if none of them, after due diligence used, can be found in this state, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will and may admit proof of his handwriting and that of the subscribing witnesses. [*Supreme Court Order, effective Jan. 1, 1934*]

Note: In proceedings to probate a will, a witness who testifies before the subscribing witnesses have testified is guilty of perjury if he testifies falsely. Stetson v. State, 204 W 250, 235 NW 539.

A contract to withdraw pending objections made in good faith to the probate of a will in consideration of an agreement by the favored beneficiary to pay the objectors certain sums at the closing of the estate, resulting in a disposition different from the will, is determined to be void as against public policy. Taylor v. Hoyt, 207 W 520, 242 NW 141.

One of the three wills executed by the decedent within a week was offered for probate. The parties in interest were before the court. All the evidence bearing upon the mental competency of the testator and his susceptibility to undue influence was before the court. All interested parties were given an opportunity to present evidence in addition to what was offered by the proponent. No additional evidence was offered nor was it contended that any existed. Under those facts and circumstances it was competent and proper for the court to determine the validity or invalidity of all the wills and determine whether the decedent died testate or intestate so that the court could promptly proceed with the administration of the estate. In re Kalskop's Will, 229 W 356, 281 NW 646.

Where the evidence established that a typewritten will, in the possession of the principal beneficiary at the death of the testator, had been drawn by an attorney and dated April 29, 1937, and had been delivered by him at about that time, to the testator, unexecuted, and that the executed will, when offered by the principal beneficiary for probate was torn and mutilated in such a manner as to obliterate the last numeral of the year date and as to warrant a suspicion that this had been done by someone after execution of the will, designedly to conceal the true date of execution, the trial court, on the record made, could deny probate of such will for insufficiency of convincing proof of execution subsequent to the execution of another will executed on April 7, 1938, notwithstanding testimony of attesting witnesses of the first mentioned will that it was executed in July, 1939. Will of Frederiksen, 246 W 263, 16 NW (2d) 819.

Undue influence, burden of proof, presumptions, mental impairment, in will cases, are examined and decisions on the subject are examined at length. Will of Faulks, 246 W 319, 17 NW (2d) 423.

310.07 Foreign wills; domestic probate, effect. Any will admitted to probate without this state and in the place of the testator's domicile may be admitted to probate and recorded in this state. When a copy of any such will and the judgment admitting it to probate duly authenticated, shall be produced by the executor or other person interested therein to the county court, such court shall appoint a time and place of hearing, and cause notice thereof to be given as required by section 310.04. If on the hearing it shall appear to the court that the order or decree admitting such will to probate was made by a court of competent jurisdiction and is still in force, the copy and the probate thereof shall be filed

and recorded, and the will shall have the same force and effect as if it had been originally proved and allowed in this state and the subsequent proceeding may be the same. [*1935 c. 176*]

Note: The county court, in which ancillary proceedings for administration of nonresident's estate were begun after probate of his will in the state of his residence, had jurisdiction to construe the will as affecting realty in the county. In re Hebblewhite's Will, 228 W 259, 280 NW 384.

The county court, in which ancillary proceedings for administration of the estate of a nonresident were commenced after his will had been admitted to probate in the state of his residence, had jurisdiction and authority to construe the will so far as it related to a devise of real estate located in the county. Will of Ruppert, 233 W 527, 290 NW 122.

310.08 Foreign will; original probate. Where a decedent died domiciled in another state and the will of said decedent disposes of real estate in this state, any county court of a county in which any of such real estate is located, may admit said will to probate. Notice to creditors and to public administrator and department of taxation shall be given as in the case of wills of decedents domiciled in Wisconsin at time of death and an executor or administrator may be appointed. [*1935 c. 176; 1943 c. 20*]

Note: Generally, in the absence of statutory provision to the contrary, the proper jurisdiction for the probate of a will, in chief, is at the place of the domicile of the testator, and the probate elsewhere should be ancillary, but a will can be admitted to probate in a competent court of any state in which an administrator could have been appointed had the decedent died intestate, and probate in a state other than at the domicile can be had although the will has not been admitted to probate in the state of the decedent's domicile. Estate of Joyce, 233 W 370, 298 NW 579.

310.09 Will executed in enemy country during war time. Whenever, after a declaration of war between the United States and a foreign state or country, a copy of a will executed in such foreign state or country, by a resident thereof, purporting to be authenticated by a court of such foreign state or country, and containing a bequest, legacy or devise of property within this state in favor of a citizen of the United States, shall be produced by the executor or other person interested therein to the county court, with or without a copy of the record admitting the same to probate, such court shall appoint a time and place of hearing, and cause notice thereof to be given as required by section 310.04. If on such hearing, had before the expiration of three months after the declaration of peace following upon such war, it shall appear to the satisfaction of the court that such will is genuine, the same may be admitted to probate, and the same, with the order so admitting the same, shall be filed and recorded, and such will shall then have the same force and effect as if it had been originally proved and allowed by said court.

310.10 Lost will, how proved. Whenever any will of real or personal estate shall be lost or destroyed by accident or design the county court shall have power to take proof of the execution and validity of such will and to establish the same. The petition for the probate of such will shall set forth the provisions thereof. The circuit court shall have the same power in an action brought for that purpose.

310.11 Construction of will, notice. The notice of hearing upon a petition for the construction of a will shall be given as provided in section 324.18. [*Supreme Court Order, effective Jan. 1, 1934; Supreme Court Order, effective Jan. 1, 1940*]

Note: If, following the language and provisions of a will, step by step, there is no ambiguity, and the intent of the testator is fairly discernible, there is no legitimate occasion for resorting to rules of construction to which courts are obliged to turn for aid in solving ambiguities. Will of Trautwein, 208 W 107, 241 NW 334.

A legacy "unto the Congregational Sunday School of the State of Wisconsin" is construed under the evidence as a sufficient bequest to Wisconsin Congregational Conference. Will of Southard, 208 W 148, 242 NW 583.

In construing a will the county court had jurisdiction to determine that a trust was created thereunder for the testator's widow in accordance with an antenuptial agreement, and the judgment and determination of the court in reference thereto, not appealed from, was conclusive upon all parties. Estate of Wittwer, 216 W 432, 257 NW 626.

Under a will bequeathing in paragraph "fourth" $5,000 to the wife of the testator out of the proceeds of a life policy free from any trusts or remainders if she survived the testator, and bequeathing in paragraph "sixth" certain property to the wife in trust, and subsequently providing in paragraph "ninth" that the bequests given to the wife in trust "under paragraphs 4 and 6" should be subject to a trust in favor of a minor, the $5,000 from the proceeds of the life policy is determined to be an absolute bequest to the surviving wife, not subject to the trust subsequently created. Will of Loewenbach, 222 W 467, 269 NW 323.

Where a will provided that the amounts due the testatrix from her children at the time of her death as represented by their notes should be deducted from their respective bequests, notes in the possession of the testatrix at the time of her death, signed by her son and payable to her, although an action thereon was barred by the statute of limitations, are deductible from his share. Estate of Flierl, 225 W 493, 274 NW 422.

In the construction of wills, the early vesting of estates is favored, and absolute estates are favored over defeasible estates. In a devise to one person in fee, and in case of his death without issue to another, the death referred to is death during the lifetime of the testator, unless the language of the will shows a different intention. Will of Sauer, 226 W 270, 276 NW 293.

In proceedings brought in the county court thirty-five years after the probating and recording of a will devising real estate, rulings, whereby an amendment of a description was made and a construction of the will was made which adversely affected the title of one who long prior to such proceedings had purchased from a devisee in reliance on the record as it stood at the time of

purchase, were not binding on such purchaser where he had not been given notice of the proceedings and was not a party thereto; and in a subsequent action to quiet title against such purchaser, the circuit court properly entered on a construction of the will as an original proposition to determine its effect on the purchaser's title. Malzahn v. Teagar, 235 W 631, 294 NW 36.

An unappealed judgment of the county court, made in a proceeding for the construction of a will, construing provisions relating to the treatment of debts of legatees to the testator in arriving at their proportionate shares of the estate, and adjudicating specifically as to a land contract on which a legatee was indebted to the testator, was res adjudicata in a subsequent proceeding for the construction of the will involving the same interested parties and the same subject matter. Estate of Greeneway, 236 W 503, 295 NW 761.

Whether denominated an order or a judgment, a determination of the county court, establishing the construction of a will in response to a petition under 310.11, is a "judgment," within 270.53 (1), which is appealable, and which, if not appealed from, is res adjudicata and binding on all the parties as a final determination on the point, in the absence of fraud or imposition on the trial court. Estate of Bosse, 246 W 252, 16 NW (2d) 832.

"If the language of a will is clear when read with the generally accepted rules of grammar and punctuation in mind, and when the result reached is not patently absurd, there is no room for judicial construction." Will of Petit, 246 W 620, 18 NW (2d) 339.

310.12 Letters testamentary. When a will shall have been admitted to probate the court shall issue letters testamentary thereon to the person named executor therein, if he is legally competent, accepts the trust, and gives bond when and as required by law. [*Supreme Court Order, effective Jan. 1, 1934*]

Note: A nominee named in a will is not "legally incompetent," and the court cannot refuse to grant letters testamentary to him, merely because he is not a resident of this state, or because of objections going merely to his temper, disposition, habits and moral character, rendering him obnoxious to parties interested in the estate. The fact that a daughter, named as executrix in her mother's will, was not a resident of this state, that she took possession of the decedent's personal property and refused to deliver it to a special administrator on demand until after consulting her attorney, that she was indebted to the estate in some unascertained amount, and that mutual distrust, dislike and unfriendliness existed betwen her and the other principal beneficiaries, objecting to her appointment as executrix, did not establish that she was "legally incompetent" to act as executrix and did not justify the county court in refusing to appoint her as executrix. Estate of Svacina, 239 W 436, 1 NW (2d) 780.

Where a widow, as executrix of her husband's will, had in her possession at the time of her death $16,000 admittedly belonging to the husband's estate, and her will directed her executor, who was her son, to pay such sum to the legatees, one of whom was the son, nominated in the husband's will, the appointment of the son as administrator de bonis non with the will annexed of the father's estate, under bond of $15,000, was not an abuse of discretion. The appointment of the son as administrator de bonis non with the will annexed was not an abuse of discretion on the ground that the son was a nonresident and had no property in Wisconsin. Will of Reimers, 242 W 233, 7 NW (2d) 857.

310.13 [*Renumbered 310.07 by 1935 c. 176*]

310.14 Executor's bond; separate bonds. (1) Every executor, before he shall enter upon the execution of his trust and before letters testamentary shall issue, shall give a bond to the judge of the county court in such sum as he may direct, with one or more sureties, with conditions as follows:

(a) To make and return to the county court, within three months, a true and perfect inventory of all the goods, chattels, rights, credits and estate of the deceased, whether disposed of by the will or not, which shall come to his possession or knowledge or to the possession of any other person for him;

(b) To administer, according to law and the will of the testator, all his goods, chattels, rights, credits and estate which shall at any time come to his possession or to the possession of any other person for him, and out of the same to pay and discharge all debts, legacies and charges chargeable on the same or such dividends thereon as shall be ordered and adjudged by the county court;

(c) To render a true and just account of his administration to the county court within one year and at any other time when required by such court;

(d) To perform all orders and judgments of the county court.

(2) When two or more persons shall be appointed executors of any will the county court may take a separate bond from each, with sureties, or a joint bond from all, with sureties.

Note: See note to 317.01, citing Estate of Howey, 216 W 94, 256 NW 620.

In the absence of equitable considerations, or exceptional circumstances, an executor or administrator is personally liable to an attorney whom he employs. Juergens v. Ritter, 227 W 480, 279 NW 51.

Debts owing from an executor to a testator automatically become assets in the executor's hands on his acceptance of his appointment, to be treated as cash in the executor's hands, regardless of the executor's insolvency at the time of his acceptance or thereafter. [Decisions in previous cases reviewed, and rule adhered to as established policy in this state.] Estate of Tuttle, 242 W 144, 7 NW (2d) 575.

310.15 County courts; executor's bond. If the executor shall be sole or residuary legatee instead of the bond prescribed in section 310.14 he may give a bond in such sum and with such sureties as the court may direct, with a condition only to pay all the debts and legacies of the testator. An executor named in any will may be exempt from giving bond, when the testator has so ordered or requested in his will, unless the county court shall order otherwise; and such court may require a bond, with sureties, of any such executor at any time pending the settlement of the estate.

310.16 Administration on failure of executor to qualify. If an executor refuses to accept the trust or for twenty days after the probate of the will, neglects to give bond as required, the court may grant letters testamentary to the other executors named, who are capable and will accept the trust and give bond. If all named executors neglect to qualify, if no executor is named or if those named are not legally competent, the court shall grant administration of the estate, with the will annexed, as provided in sections 311.02 and 311.03. [*Supreme Court Order, effective Jan. 1, 1934*]

310.17 Minor named as executor. When the person named executor is a minor at the time of proving the will, administration shall be granted with the will annexed, during his minority, unless there is another executor named who accepts the trust and gives bond; and in such case the executor who shall have letters testamentary shall administer the estate until the minor becomes twenty-one years of age, when he may be admitted as joint executor on giving the requisite bond. [*Supreme Court Order, effective Jan. 1, 1934*]

310.18 Bond and duty of administrator with will annexed. Every person who shall be appointed administrator with the will annexed shall, before entering upon the execution of the trust, give bond to the judge of the county court in the same manner and with the same conditions as is required of an executor, and shall proceed in all things to execute the trust in the same manner as an executor would be required to do.

310.19 Power of executor who acts, and of administrator with will annexed. When all the executors appointed in any will shall not be authorized, according to the provisions of this chapter, to act as such, such as are authorized shall have the same authority to perform every act and discharge every trust required and allowed by the will, and their acts shall be as valid and effectual for every purpose as if all were authorized and should act together; and administrators with the will annexed shall have the same authority to perform every act and discharge every trust as the executors named in the will would have had, and their acts shall be as valid and effectual for every purpose.

310.20 Executors; vacancies, resignations, administrations de bonis non. (1) When an executor or administrator shall die, or his authority shall be otherwise terminated, the remaining executor or administrator may execute the trust; if there shall be no other executor or administrator the court shall grant administration of the estate not already administered. The court may accept the written resignation of any administrator or executor.

(2) Whenever an administrator de bonis non is appointed the court shall cite him and his predecessor or the latter's personal representative to appear at a stated time and place to settle the predecessor's account; upon such settlement the property of the estate shall be paid and delivered to the new administrator. [*Stats. 1931 s. 310.23; Supreme Court Order, effective Jan. 1, 1934; Supreme Court Order, effective Jan. 1, 1938*]

Note: The appointment of an administrator de bonis non with the will annexed is subject to the provisions of 311.02 (1), that administration of the estate of an intestate shall be granted to the widow, widower or heirs, or both, as the county court may think proper, etc. Will of Reimers, 242 W 233, 7 NW (2d) 857.

310.21 Service on nonresident executor or administrator. When it shall be necessary to serve upon an executor or administrator any order, notice or process of the county court, and service cannot be made in this state, such service may be made by publication, or personally without the state, in the same manner and with the same effect as is provided for the service of summons upon nonresident defendants in an action in the circuit court. [*Supreme Court Order, effective Jan. 1, 1934*]

310.22 [*Renumbered section 324.35 by Supreme Court Order, effective Jan. 1, 1934*]

310.23 [*Renumbered section 310.20 by Supreme Court Order, effective Jan. 1, 1934*]

310.24 [*Renumbered section 370.01 sub. (45) by 1933 c. 190 s. 2*]

310.25 Selection of attorney to represent estate. Whenever a firm or corporation of any kind is named as administrator or executor of an estate, he or she who is nearest of kin and who receives any interest in the estate, and if there be no bequest of any kind, then the party receiving the largest amount or interest from the estate, shall name the attorney who shall represent the estate in all proceedings of any kind or nature, unless good cause be shown before the court why this should not be done. In case of equal division in number of kin or persons having the largest and similar interest, then said executor or administrator shall select one of those named; otherwise, the majority shall govern. In case of infants; people insane or otherwise incapacitated, the natural guardian shall act in behalf of the infant; and in case of no natural guardian the guardian created by the court shall govern the selection. [*Stats. 1931 s. 311.04*]