CHAPTER 324.

APPEALS AND MISCELLANEOUS PROVISIONS.

324.001 Personal representative. "Personal representative" as used in title XXIX includes executor, administrator, special administrator, administrator de bonis non, administrator with will annexed, ancillary administrator and public administrator, when the latter is administering an estate, but does not include guardian or trustee.

History: 1953 c. 300.

324.01 Appeals from county court. Any person aggrieved by any order or judgment of the county court may appeal therefrom to the supreme court, and the provisions of chapter 274 shall apply. But no appeal may be taken on any claim unless the part thereof in dispute amounts to at least $20. The appeal of any minor from an order of adoption may be taken by any person. In an appeal from an order of adoption, if the child is a minor, the state department of public welfare is a party and shall be served with notice of appeal. In all other cases the appeal of any minor or incompetent person may be taken and prosecuted by his general guardian or by a guardian ad litem.

History: 1951 c. 290.

It is not decided whether an administrator de bonis non, who theoretically has no interest in a judgment of the county court construing a will, can appear in support of such judgment on appeal as a matter of right; but the supreme court may consider his brief and oral argument. Estate of White, 256 W 467, 41 NW (2d) 776.

Where the testator in his will expressly requested that a certain attorney be retained as counsel to represent the estate, and the administrator with the will annexed was willing to employ him as such counsel, such attorney had a sufficient interest in the subject matter to qualify as a "person aggrieved" by orders denying his petition to be appointed counsel, and appointing a different attorney requested by the testator's sister, so as to be entitled to appeal therefrom. Estate of Ogg, 262 W 181, 54 NW (2d) 175.

324.04 Review by supreme court. (1) The time within which a writ of error may be issued or an appeal taken to obtain a review by the supreme court of any order or judgment of the county court is limited to sixty days from the date of the entry thereof, except as provided in section 324.05.

(2) On appeals from county courts to the supreme court no bond shall be required or costs awarded against any child or person acting in behalf of the child on an appeal from an order of adoption; and no bond shall be required of any executor, administrator, guardian, trustee or alleged insane or incompetent person.

(3) A bill of exceptions may be settled, served and filed in the manner and under the restrictions required in the circuit court.

(4) In all matters not otherwise provided for in this chapter relating to appeals from county courts to the supreme court, and jury trials in county courts, the law and rules of practice relating to circuit courts shall govern.

Cross Reference: When bond not required, see 274.16.

Where the respondent not only accepted and retained the appellant's notice of appeal and briefs, before making a motion to dismiss the appeal for not having been taken within the time limited by 324.04, but also filed its own brief containing arguments on the merits, the respondent thereby participated in the proceedings in the supreme court to such an extent as to waive all objection to the court's jurisdiction of the appeal, so that jurisdiction was conferred by 269.51 (1), despite the belated taking of the appeal. Guardianship of Barnes, 275 W 356, 82 NW (2d) 211.

324.05 Extension of time for appeal; retrial. If any person aggrieved by any act of the county court shall, from any cause without fault on his part, omit to take his ap-

peal within the time allowed, the court may, upon his petition and notice to the adverse party, and upon such terms and within such time as it shall deem reasonable, but not later than one year after the act complained of, allow an appeal, if justice appears to require it, with the same effect as though done seasonably; or the court may reopen the case and grant a retrial, but the order therefor must be made within one year after the act complained of.

The testatrix's next of kin and sole heir at law resided outside the state, had no actual notice of the hearing to probate the will, was not represented at the proceeding, and promptly retained counsel on learning of the admission of the will to probate. Delay in filing a petition to reopen the matter and grant a retrial to permit contesting the will on grounds of alleged testamentary incapacity and undue influence was caused by counsel's withholding of the petition while he attempted to arrange a settlement with the beneficiaries under the will. The petition was filed within the time limited by this section, judgment dismissing the petition was an abuse of discretion, especially since the record did not disclose that the rights of the beneficiaries were adversely affected by the delay. Estate of Trimpey, 257 W 481, 44 NW (2d) 308.

Under this section, authorizing an extension of the 60-day period permitted by 324.04 (1) for taking an appeal to the supreme court from an order or judgment of the county court, an adverse party could waive the petition and notice and give his consent to an extension during the period when the trial court was empowered to act after notice duly given, and the trial court thereby had jurisdiction to enter an extension order within such time; but if the method of procuring the extension order was irregular for not being on notice but only by stipulation, such irregularity was waived under 269.51 (1) by the adverse party's conceded participation in the appeal without first moving that it be dismissed. Estate of Schaefer, 261 W 431, 53 NW (2d) 427.

On the record made in the case, both on the trial and on a motion for a new trial, the trial court did not abuse its discretion in refusing to grant a new trial to the administrator on grounds that his attorney had been neglectful in preparation for trial, had failed to heed the administrator's suggestions concerning available witnesses, and, instead of objecting to the competency of the claimants for compensation for services to testify as to their transactions with the decedent, had merely cross-examined them. Estate of Schaefer, 261 W 431, 53 NW (2d) 427.

Held no abuse of discretion to deny an extension of time to appeal on the ground that the party was not advised of the time limit until too late to arrange finances for the appeal. Estate of Shaver, 266 W 591, 64 NW (2d) 191.

It was within the discretion of the county court to reopen proceedings in the interest of justice within one year after a will had been admitted to probate, and it was not necessary in such case that the petition for reopening, which alleged among other things the existence of evidence establishing the decedent's lack of testamentary capacity, should allege facts showing a fraud on the court or surprise or misrepresentation. Will of Strahlendorf, 272 W 435, 76 NW (2d) 334.

See note to 313.06, citing Estate of O'Brien, 273 W 223, 77 NW (2d) 609.

The provisions allowing an extension of the time for taking an appeal from the county court should be liberally construed. Estate of Steck, 273 W 303, 77 NW (2d) 715.

See note to 269.16, citing Estate of Steck, 273 W 303, 77 NW (2d) 715.

A widow who had elected to take her distributive share of the estate of her deceased husband, instead of taking under his will, and who thereafter discovered a trust agreement executed by the husband and predating the will, was not precluded by the filing of such election from petitioning the county court that such trust agreement be admitted to probate as testamentary in character and constituting the will of the husband, and that the already admitted will stand as a codicil thereto, and the widow was a "person aggrieved" by an order denying the petition on the ground that the trust agreement constituted a trust inter vivos, so as to be entitled to appeal therefrom; and likewise, the executrix appointed in the estate of the widow after her death was a "person aggrieved." Estate of Steck, 273 W 303, 77 NW (2d) 715.

324.11 Costs, when allowed; judgment for. Costs may be allowed in all appealable contested matters in county court, excepting in jury trials, to the prevailing party, to be paid by the losing party or out of the estate as justice may require; and when costs are allowed they shall be taxed by the judge at the rates allowed in circuit court and upon like notice; but the attorney fees shall not exceed twenty-five dollars, and shall be allowed only when an attorney appears for the prevailing party. When costs are allowed, the court shall render judgment therefor, stating in whose favor and against whom the same is rendered and the amount thereof; and a list of the items making such amount shall be filed with the papers in the case.

In proceedings involving an appealable contested matter in county court, it was discretionary with the trial court whether to allow costs to the prevailing party, and the court's failure to allow costs to the claimants prevailing against the estate was not an abuse of discretion. Will of Gudde, 260 W 79, 49 NW (2d) 906.

324.12 Costs in will contests. Costs shall not be awarded to an unsuccessful contestant of a will unless he is a special guardian appointed by the county or circuit judge, or is named as an executor in a paper propounded by him in good faith as the last will of the decedent.

The allowance of costs to unsuccessful contestants of a will was proper where such contestants were the executors named in a prior will and the trial court determined that they had propounded it in good faith as the last will of the decedent. Estate of Miller, 265 W 420, 61 NW (2d) 813.

324.13 Attorney's fees, will contests. (1) In a contest upon the probate of any will, or in relation to any trust created therein, or for the allowance of any account required of an executor or trustee, the court may, if the contest is necessary or meritorious, allow to the proponent of such will and to the successful contestant in such proceedings a reasonable attorney's fee to be paid out of the estate of the decedent; and the court may allow to the proponent if successful on his appeal or to such contestant if finally success-

ful on appeal a reasonable attorney's fee for services on such appeal to be paid out of said estate.

(2) A guardian ad litem for a necessary party to a proceeding to probate a will, or in a proceeding to construe a will, or in a proceeding in the settlement of an estate, may be allowed compensation and his necessary expenditures, to be fixed by the court, and paid out of the estate or property in controversy.

A statement of the supreme court in a case decided in 1921, concerning the maximum allowance permissible to attorneys in the probate of an estate of a given value, is no longer to be considered as a guide, since the duties and responsibilities of attorneys have increased greatly in the intervening 30 years and compensation reasonable and customary in 1921 is no longer so. Estate of Teasdale, 261 W 248, 52 NW (2d) 366.

The trial court's allowance to the successful litigant for attorney fees is to be sustained unless clearly unreasonable. Considering the difficulty of the question involved, the successful appeal from the trial court's allowance of the claim, the amount of $3,090 involved, and the work done by the attorney, the trial court's allowance of $300 to the successful litigant here for attorney fees is deemed unreasonably low by $200. Estate of Marotz, 263 W 99, 56 NW (2d) 856.

The matter of attorney fees for services rendered in the administration of an estate is for determination by the court, and a stipulation as to fees, which is not a contract but is at most a suggestion to the court as to what amounts should be allowed in the way of fees, is not binding on the court. An attorney, who accepts payment of the amounts allowed to him as fees by order of the court, cannot maintain an appeal from such order even though he may not have intended to relinquish such right. Will of Hill, 264 W 410, 59 NW (2d) 437, 60 NW (2d) 254.

See note to 318.31, citing Estate of Jorgensen, 267 W 1, 64 NW (2d) 430.

(1), relating to the allowance of a reasonable attorney's fee to the successful party on an appeal "to be paid out of the estate" of the decedent, authorizes the supreme court to make an allowance for an attorney's fee but not to charge the same against the share of the unsuccessful party in the estate of the decedent. Will of Fehlhaber, 272 W 327, 75 NW (2d) 444.

324.14 Security and judgment for costs. In all cases mentioned in section 324.11 the county court may require the claimant or contestant to give a bond in such sum and with such surety as shall be approved by the court, to the effect that he will pay all costs that may be awarded by such court in such proceeding against him. A judgment for costs shall be against the claimant or contestant and the surety.

324.15 Judgment, how enforced; execution; lien. (1) All money judgments in favor of an estate shall have the same force and effect as judgments in the circuit court, and may be enforced by execution. The pertinent provisions of chapter 272, relating to executions, shall apply to such executions except as otherwise provided in this section.

(2) Any such judgment for more than ten dollars may be docketed in the circuit court as circuit court judgments are docketed, upon filing therein a certified transcript of such judgment. Such judgment when so docketed shall be a lien upon the real estate of the debtor in the same manner and for the same length of time as judgments rendered and docketed in the circuit court. When execution shall issue from the county court upon such judgment, in case the same has been docketed as aforesaid, it shall recite the time of docketing.

324.16 Writs of error. Writs of error to obtain a review by the supreme court of proceedings of the county court shall be allowed, and taken in accordance with ch. 274, relating to writs of error.

History: 1951 c. 61.

324.17 Jury trials, practice. (1) Jury trials may be had in county court in all appealable cases in which a jury trial may be had of similar issues in circuit courts.

(2) In all cases provided in subsection (1), any person having the right of appeal from the determination of the court, may file with the court, within ten days after notice that the matter is to be contested, a written demand for a jury trial, and deposit ten dollars with the county treasurer, take his receipt therefor and file it with the court. If such issue is transferred for trial to the circuit court, as provided in this section, the judge of the county court may order said deposit refunded to the depositor, and the county treasurer upon presentation of such order shall refund said amount.

(3) Upon filing such demand and receipt, the court may order an issue to be framed by the parties within a fixed time, and the matter shall be placed upon the calendar for the next jury term of the court. The county court may transfer the matter or cause, and the record thereof, to the circuit court of such county for trial.

(4) Three jury terms of the county court shall be held each year (if there are jury cases ready for trial at such times), commencing respectively on the second Tuesday in January, April and October.

(5) Jurors and trial juries shall be drawn in the manner provided by sections 255.04 to 255.09, except as otherwise provided herein, and trials by jury shall be in the manner provided by sections 270.15 to 270.31; but in county courts having civil jurisdiction jurors and juries may be drawn in probate matters and jury terms had in the manner and according to the regulations required in civil cases in such courts.

(6) Not more than ten days prior to each jury term the clerk shall prepare, in the order of their date of issue, a list of cases in which a trial by jury shall have been demanded, and such list shall constitute the jury calendar for such term of the county court. Unless the court shall otherwise order, every case on such calendar which shall not be disposed of at said term shall stand continued to the next jury term, and be placed on the jury calendar for such term. If the party who demanded the jury trial shall ask to have such action continued for the term, after the commencement of the term at which such action is for trial, such continuance shall be granted only upon payment of ten dollars motion fees unless such party shall waive a jury trial in such proceeding. In case a continuance in any action upon the jury calendar is asked by any other party, the court may grant such continuance and require payment of ten dollars motion fees in its discretion.

(7) In all jury cases costs shall be allowed as a matter of course to the prevailing party, the items and taxation of which shall be as in circuit court.

(8) Any party to the controversy may within ten days after notice that a jury trial has been demanded, have the matter transferred to the circuit court of the county for trial. Upon the filing of such demand for transfer, the judge of the county court shall immediately cause the record and proceedings in the matter to be certified to the circuit court, and the same shall there be tried and determined as a circuit court action. And in case the matter is one where the county court has the right to fix the fees or compensation of the attorneys, executors, administrators or guardians, the circuit court may determine such fees or compensation. The circuit court may render such judgment as may be proper, or make such order therein as the county court ought to have made and may remit the case to the county court for further proceedings, or make any order or take any action therein to enforce its own judgment as the circuit court may deem best. The county court, after such cause is remitted, shall proceed therein in accordance with the determination of the circuit court.

History: 1953 c. 61.

324.18 Notice in county court; mode of service; proof of service. (1) MODE OF SERVICE. (a) If notice is required by statute, it shall be given either by service thereof upon all persons interested (whether within or without the state) at least 10 days before the hearing or proceeding in the manner in which a circuit court summons is required to be served, other than by publication; or by publication of the notice as provided by s. 324.20. When service is by publication, the court, except in the matter of notice to creditors, shall order a copy of the notice mailed to every interested person whose post-office address is known or can with reasonable diligence be ascertained at least 20 days before the hearing or proceeding. If the order does not specifically designate the persons to whom such notice shall be mailed, the order shall be deemed to refer to the persons and addresses set forth in the petition for such hearing or otherwise shown by the record as having known interests and known post-office addresses. Such order and record shall be conclusive in all collateral actions and proceedings as to the knowledge and ascertainability with reasonable diligence of the names and post-office addresses of all persons interested. The court may order both service by publication and personal service on designated persons.

(b) Notice of all hearings or proceedings where a public charitable trust is involved shall be mailed to the attorney general at least 20 days before the hearing or proceeding.

(2) WAIVER OF NOTICE. Persons who are sui juris, and duly appointed and qualified guardians ad litem in behalf of themselves and those for whom they are acting, may in writing waive the service of notice upon them and consent to the hearing of any matter without notice except that a guardian ad litem shall not waive the notice for a petition to prove a will or the petition for administration.

(3) EFFECT OF APPEARANCE. A general appearance by a competent adult person is equivalent to timely personal service of notice upon him.

(4) WHO MAY SERVE NOTICE. The notice may be served by any person not a party.

(5) PROOF OF SERVICE. Proof of the service of the notice shall be as follows:

(a) By the affidavit of the person who made the service, or if by the sheriff, by his certificate, showing the place and the time of the service, and that he knew the person served to be the person for whom the notice was intended and that he delivered to and left with him a copy; if the person was not personally served such affidavit or certificate shall say when, where and with whom the copy was left.

(b) By the written admission of the person served if he be competent and an adult. The subscription of his name to such admission shall be presumptive evidence of its genuineness.

(c) In case of publication, by the affidavit of the publisher or printer or his foreman or principal clerk showing the notice and specifying the date of the first and of the last

publication; and the affidavit of the person who mailed the notice showing when and to whom he mailed it.

History: Sup. Ct. Order, 258 W viii; Sup. Ct. Order, 271 W xi.

Cross Reference: Enforcement of public charitable trust by attorney general, see 231.34. Requirement of publication of notice in re public trust, see 317.06.

Comment of Advisory Committee, 1951: The change from "may" to "shall" in 324.18 (1) makes mailing a copy of the notice mandatory, when service is by publication, to avoid possible claims of lack of jurisdiction. See Mullane v. Central Hanover Bank & Trust Co. 70 S. Ct. 653. The long insertion is to make clear that the court has reviewed both the list of interested parties and the diligence used in securing addresses. On that foundation the validity of the notice can be established. [Re order effective July 1, 1951]

Probate proceedings are proceedings in rem, but the due process requirements of the 14th amendment must still be met. A recognized exception to the notice requirement is made where there has been virtual or class representation of the person in question. Estate of Evans, 274 W 459, 80 NW (2d) 408, 81 NW (2d) 489.

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

Where the petition for administration was made by the minor daughter of the decedent, by guardians, neither such minor petitioner nor the decedent's divorced wife, who was not an interested person, was entitled to notice of the hearing on the petition, so that the county court did not lack jurisdiction for want of such notice. Lack of notice of hearing on the petition for administration to a guardian ad litem appointed for the minor petitioner did not render the entire administration proceeding void, whatever effect it may have had on the validity of the choice of administrators who were appointed. Estate of Bobo, 275 W 452, 82 NW (2d) 328.

324.19 Notice, when fixed by court order. If notice of any proceedings in county court is required by law or deemed necessary by the court and the manner of giving the same is not directed by law, the court shall order notice to be given in the manner prescribed by section 324.18.

History: Sup. Ct. Order, 258 W ix.

324.20 Publication of notices. (1) All county court notices required to be given by publication shall be printed once a week for three successive weeks (unless a different length of publication is expressly required by law) in such newspaper, published in the county, as the court shall by order direct; such notices shall be printed in the English language, but may be published in a newspaper printed in any other language, if in the opinion of the court, it shall be more likely to give notice to the interested persons. If no newspaper is published in such county, the publication shall be in such newspaper published in this state as the court shall order; notices published under section 316.18 shall be in a newspaper published in the county where the land is situated, and if there be none so published, then in such newspaper as the court shall direct. No county judge or register in probate shall order the publication of any such notice in any newspaper controlled by him or in which he has any pecuniary interest, if there be any other newspaper published in his county.

(2) Any county judge, register in probate or other officer of any court, who shall neglect or refuse to carry out or violate any provisions of this section, shall forfeit not less than fifty dollars for each such neglect, refusal or violation.

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

324.21 Records, how amended. Any county court may amend, correct and perfect its record of any matter transacted therein in such manner as may be necessary to make the same conform to the truth.

324.22 Correction of court records; notice of hearing. (1) Upon verified application to a county court by any person interested, praying that its records be amended, corrected or perfected, as specified in the application, the court shall order a hearing thereon and notice of the hearing shall be given as provided in section 324.18.

(2) If the error in the court record is obvious or is purely clerical, the court may hear the application and correct the error without notice, or upon such notice as the court may direct.

324.23 Hearing; amendment, effect. If on such hearing the court shall find its record incorrect, incomplete or imperfect it shall make it conform to the truth. Such amended, corrected and perfected record shall be as valid and binding as though correctly made and entered at the proper time.

324.24 Hearings set for term; calendar, how disposed of. (1) All matters in county court requiring notice of hearing shall be made returnable and set for hearing at a term of court. All such matters by brief titles shall be entered in a book called the court calendar.

(2) Uncontested matters shall be first disposed of in their order on such calendar, followed by the disposition of contested matters in like manner, unless the court shall otherwise direct.

324.25 Citation. An order to account or to appear in the county court shall state explicitly what the party cited is required to do, and shall be served in the manner provided for service of summons in circuit court or, if the party cited is the personal representative or his attorney, in the manner provided for service of papers in s. 269.34.

History: Sup. Ct. Order, effective January 1, 1958.

324.26 Forms of notices. In all matters and proceedings in any county court wherein such court shall order notice to be given to parties interested therein of the time and place of the hearing thereof, by publication or otherwise, it shall not be necessary to publish in full or to serve a complete copy of such order; but a notice containing a brief statement of the matter to be heard, sufficient to fairly inform those interested of the nature of the proposed proceeding and the estate involved, with the residence or late residence of the owner of such estate (and a notation of persons, if any, who appear to be interested but whose addresses are unknown and unascertainable) and stating the time and place of such hearing, shall be sufficient, and any number of different matters may be included in the same notice, and such notice may be substantially as follows:

STATE OF WISCONSIN, County Court for .... County. } In Probate.

Notice is hereby given that at the .... term of the county court to be held in and for said county at the courthouse in the (city, village or town) of ...., in said county, on the first Tuesday of ...., A.D. 19.., the following matters will be heard and considered:

The application of A. B. for the appointment of an administrator of the estate of C. D., late of the (city, village or town) of ...., in said county, deceased.

The application of A. B. to admit to probate the last will and testament of C. D., late of the (city, village or town) of ...., in said county, deceased.

The application of A. B. for the appointment of a guardian of the person and estate of C. D., an insane person of the (city, village or town) of ...., in said county.

The application of A. B., administrator of the estate of C. D., late of the (city, village or town) of ...., in said county, deceased, to sell a piece of real estate belonging to such estate, described as follows (here describe particularly), in said county.

Note: (Omit if inapplicable) The post-office addresses of the following persons who appear to be interested are unknown and unascertainable: ...., ...

By order of the court.

Dated. E. F., Judge.

History: Sup. Ct. Order, 258 W ix.

Comment of Advisory Committee, 1951: The 2 inserts, in the introduction and in the form of notice, are to set up a form of notice which is most likely to reach persons whose names are known but whose addresses are unknown. [Re order effective July 1, 1951]

324.27 County court fees and costs. Fees in the county court shall be allowed:

(1) To appraisers, an amount to be fixed by the court in its discretion;

(3) In all cases, travel, as provided in circuit court;

(4) To jurors, interpreters and witnesses the same fees as provided in circuit court;

(5) In cases not provided for, a reasonable compensation shall be allowed by the court.

History: 1951 c. 635.

324.29 Appearances, how made. (1) IN PERSON OR BY ATTORNEY. Every person not under disability may appear in and conduct or defend any proceeding in county court or before any county judge in person or by attorney and not otherwise. Every person under disability shall appear and conduct or defend by his guardian ad litem, who shall be an attorney, or by the general guardian of his property, who may appear by attorney; but a guardian ad litem shall be appointed in all cases where the minor or incompetent has no general guardian of his property, or where such general guardian fails to appear on his behalf, or where the interest of the minor or incompetent is adverse to that of such general guardian. The county judge shall make an entry in his minutes of every appearance stating when, how and by whom it was made, and shall not proceed further in the cause, matter or proceeding until such entry is made.

(2) GUARDIANS AD LITEM. When it shall be necessary to appoint a guardian ad litem for any person under disability, the court may appoint such guardian at the time of making the order for hearing the matter, and require notice thereof and of such hearing to be served upon such guardian; or such guardian may be appointed on the day of the hearing, and before any proceedings are had. The guardian ad litem shall continue to act throughout the proceeding in relation to the same estate or matter, until its final settlement or conclusion, unless otherwise ordered. In the discretion of the court, the appointment may be revoked and another guardian ad litem appointed.

(3) ATTORNEYS. No attorney shall appear, or be appointed as guardian ad litem, for different persons in the same matter or proceedings, whose interests and rights in

relation to such matter or proceeding shall be conflicting. The attorney who shall first appear for any party shall be recognized as his attorney throughout the matter or proceeding, unless another is substituted with his consent in writing, or for good cause shown upon application to the court, and after notice to such attorney, if residing in the state and his residence is known, and by order of the county court.

(4) PERSONS IN MILITARY SERVICE. At the time of making the order for the hearing of any matter in county court, the moving party shall make and file an affidavit setting forth the facts showing whether or not any of the parties interested in such matter are actively engaged in the military service of the United States. Whenever it shall appear by such affidavit or otherwise that any person in the active military service of the United States is interested in any proceeding pending in county court and is not represented by an attorney the judge shall appoint an attorney to represent such person and protect his interest and no further proceedings shall be had until such appointment has been made. An attorney appointed by the court to represent any person in the military service in any proceeding in the probate of an estate may be allowed compensation and his necessary expenditures to be fixed by the court, and paid out of the estate.

History: 1953 c. 107, 298; 1955 c. 165.

Where a minor son of the petitioner and the trust beneficiary, whose income the petitioner sought to reach, was not a party to the proceeding and had no financial interest in the outcome, and the county court had no jurisdiction to hear the petition, and the income due to such beneficiary from the trust could not be reached for the purpose asked nor for the payment of fees, an order directing the trustee to pay fees to a guardian ad litem needlessly appointed was erroneous. Estate of Austin, 258 W 578, 46 NW (2d) 861.

A guardian ad litem does not represent children born after the proceeding, if the interests are adverse, and therefor the decree is not res adjudicata as to such after-born children, Estate of Evans, 274 W 459, 80 NW (2d) 408, 81 NW (2d) 489.

324.30 Papers; filing; withdrawal. All papers in any matter shall be fairly and legibly written on substantial paper and have indorsed thereon the title of the proceeding in which they are filed, and the character of the paper; and if not so written and indorsed, the judge may refuse to receive and file the same. He shall indorse all papers with the dates of their delivery to him. No paper filed in any matter shall be withdrawn without leave of the court or judge, and when a paper is withdrawn a copy thereof, attested by the judge, shall, if required, be left in its place.

324.31 Uniform ancillary administration of estates act. (1) DEFINITIONS. As used in this section:

(a) "Representative" means an executor, administrator, testamentary trustee, guardian or other fiduciary of the estate of a decedent or a ward duly appointed by a court and qualified. It includes any corporation so appointed, regardless of whether the corporation is eligible to act under the law of this state. This section does not change the powers or duties of a testamentary trustee under the nonstatutory law or under the terms of a trust.

(b) "Foreign representative" means any representative who has been appointed by the court of another jurisdiction in which the decedent was domiciled at the time of his death, or in which the ward is domiciled, and who has not also been appointed by a court of this state.

(c) "Local representative" means any representative appointed as ancillary representative by a court of this state who has not been appointed by the domiciliary court.

(d) "Local and foreign representative" means any representative appointed by both the domiciliary court and by a court of this state.

(2) APPLICATION FOR ANCILLARY LETTERS AND NOTICE THEREOF. (a) *Qualifications of and preference for foreign representative.* Any foreign representative upon the filing of an authenticated copy of the domiciliary letters with the probate court may be granted ancillary letters in this state notwithstanding that the representative is a nonresident of this state or is a foreign corporation. If the foreign representative is a foreign corporation it need not qualify under any other law of this state to authorize it to act as local and foreign representative in the particular estate if it complies with the provisions of subsections (4) and (5). If application is made for the issuance of ancillary letters to the foreign representative, the court shall give preference in appointment to the foreign representative unless the court finds that it will not be for the best interests of the estate or the decedent shall have otherwise directed.

(b) *Intervention upon application.* When application is made for issuance of ancillary letters any interested person may intervene and pray for the appointment of any person who is eligible under this section or the law of this state.

(c) *Notice to foreign representative.* When application is made for issuance of ancillary letters to any person other than the foreign representative, the applicant shall send notice of the application by registered mail to the foreign representative if the latter's name and address are known and to the court which appointed him if the court is known.

These notices shall be mailed upon filing the application if the necessary facts are then known, or as soon thereafter as the facts are known. If notices are not given prior to the appointment of the local representative, he shall give similar notices of his appointment as soon as the necessary facts are known to him. Notice by ordinary mail is sufficient if it is impossible to send the notice by registered mail. Notice under this paragraph is not jurisdictional.

(3) DENIAL OF ANCILLARY LETTERS. The court may deny the application for ancillary letters if it appears that the estate may be settled conveniently without ancillary administration. Such denial is without prejudice to any subsequent application if it later appears that ancillary administration should be had.

(4) BOND. No nonresident shall be granted ancillary letters unless he gives an administration bond.

(5) AGENT TO ACCEPT SERVICE OF PROCESS. No nonresident shall be granted ancillary letters and no person shall be granted leave to remove assets under subsection (7), until he files in the court an irrevocable power of attorney constituting the clerk of the court his agent to accept and be subject to service of process or of notice in any action or proceeding relating to the administration of the estate. The clerk shall forthwith forward to the representative at his last known address any process or notice so received, by registered mail requesting a return receipt signed by addressee only. Forwarding by ordinary mail is sufficient if when tendered at a United States post office an envelope containing such notice addressed to such representative, as aforesaid, is refused registration.

(6) SUBSTITUTION OF FOREIGN FOR LOCAL REPRESENTATIVE. (a) *Application and procedure.* If any other person has been appointed local representative, the foreign representative, not later than 14 days after the mailing of notice to him under subsection (2), unless this period is extended by the court because the foreign representative resides outside continental United States or in Alaska, or for other cause which the court deems adequate, may apply for revocation of the appointment and for grant of ancillary letters to himself. Ten days' writen notice of hearing shall be given to the local representative. If the court finds that it is for the best interests of the estate, it may grant the application and direct the local representative to deliver all the assets, documents, books and papers pertaining to the estate in his possession and make a full report of his administration to the local and foreign representative as soon as the letters are issued and he is qualified. The local representative shall also account to the court. The hearing on the account may be forthwith or upon such notice as the court directs. Upon compliance with the court's directions, the local representative shall be discharged.

(b) *Effect of substitution.* Upon qualification, the local and foreign representative shall be substituted in all actions and proceedings brought by or against the local representative in his representative capacity, and shall be entitled to all the rights and be subject to all the burdens arising out of the uncompleted administration in all respects as if it had been continued by the local representative. If the latter has served or been served with any process or notice, no further service shall be necessary nor shall the time within which any steps may or must be taken be changed unless the court in which the action or proceedings are pending so orders.

(7) REMOVAL OF ASSETS TO DOMICILIARY JURISDICTION. (a) *Application.* Prior to the final disposition of the ancillary estate under subsection (12) and upon giving the notice provided in section 324.18, the foreign representative or the local and foreign representative may apply for leave to remove all or any part of the assets from this state to the domiciliary jurisdiction for the purpose of administration and distribution.

(b) *Prerequisites to granting application.* Before granting such application, the court shall require compliance with subsection (5) and the filing of a bond by the foreign representative or of an additional bond for the protection of the estate and all interested persons unless the court finds that the bond given under subsection (4) by the local and foreign representative is sufficient.

(c) *Granting application—terms and consequences.* Upon compliance with this subsection, the court shall grant the application upon such conditions as it sees fit unless it finds cause for the denial thereof or for postponement until further facts appear. The granting of the application shall not terminate any proceedings for the administration of property in this state unless the court finds that such proceedings are unnecessary. If the court so finds, it may order the administration in this state closed, subject to reopening within one year for cause.

(8) EFFECT OF ADJUDICATIONS FOR OR AGAINST REPRESENTATIVES. A prior adjudication rendered in any jurisdiction for or against any representative of the estate shall be as conclusive as to the local or the local and foreign representative as if he were a party to the adjudication unless it resulted from fraud or collusion of the party representative to

the prejudice of the estate. This subsection shall not apply to adjudications in another jurisdiction admitting or refusing to admit a will to probate.

(9) PAYMENT OF CLAIMS. No claim against the estate shall be paid in the ancillary administration in this state unless it has been proceeded upon in the manner and within the time required for claims in domiciliary administrations in this state.

(10) LIABILITY OF LOCAL ASSETS. All local assets are subject to the payment of all claims, allowances and charges, whether they are established or incurred in this state or elsewhere. For this purpose local assets may be sold in this state and the proceeds forwarded to the representative in the jurisdiction where the claim was established or the charge incurred.

(11) PAYMENT OF CLAIMS IN CASE OF INSOLVENCY. (a) *Equality subject to preferences and security.* If the estate either in this state or as a whole is insolvent, it shall be disposed of so that, as far as possible, each creditor whose claim has been allowed, either in this state or elsewhere, shall receive an equal proportion of his claim subject to preferences and priorities and to any security which a creditor has as to particular assets. If a preference, priority or security is allowed in another jurisdiction but not in this state, the creditor so benefited shall receive dividends from local assets only upon the balance of his claim after deducting the amount of such benefit. Creditors who have security claims upon property not exempt from the claims of general creditors, and who have not released or surrendered them, shall have the value of the security determined by converting it to money according to the terms of the security agreement, or by such creditor and the personal representative by agreement, arbitration, compromise or litigation, as the court may direct, and the value so determined shall be credited upon the claim, and dividends shall be computed and paid only on the unpaid balance. Such determination shall be under the supervision and control of the court.

(b) *Procedure.* In case of insolvency and if local assets permit, each claim allowed in this state shall be paid its proportion, and any balance of assets shall be disposed of in accordance with subsection (12). If local assets are not sufficient to pay all claims allowed in this state the full amount to which they are entitled under this subsection, local assets shall be marshaled so that each claim allowed in this state shall be paid its proportion as far as possible, after taking into account all dividends on claims allowed in this state from assets in other jurisdictions.

(12) TRANSFER OF RESIDUE TO DOMICILIARY REPRESENTATIVE. Unless the court shall otherwise order, any movable assets remaining on hand after payment of all claims allowed in this state and of all taxes and charges levied or incurred in this state shall be ordered transferred to the representative in the domiciliary jurisdiction. The court may decline to make the order until such representative furnishes security or additional security in the domiciliary jurisdiction, for the proper administration and distribution of the assets to be transferred.

(13) GENERAL LAW TO APPLY. Except where special provision is made otherwise, the law and procedure in this state relating generally to administration and representatives apply to ancillary administration and representatives.

(14) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: 1951 c. 252; 1955 c. 352.

324.35 Accounts, failure of fiduciaries to file. If an executor, administrator, guardian or trustee resides out of this state, or neglects to render his account within the time provided by law or the order of the court, or neglects to settle the estate according to law, or to perform any judgment or order of the court, or absconds, or becomes insane or otherwise incapable or unsuitable to discharge the trust, the county court may remove him and appoint his successor; but no order of removal shall be made until the person affected has been notified, as provided by section 310.21, or, if a resident, such notice as the court deems reasonable to show cause at a specified time why he should not be removed.

History: Sup. Ct. Order, 258 W x.

The county court did not abuse its discretion in refusing to remove executors alleged to have mismanaged the estate and to have improperly diverted funds from certain corporations controlled by the executors under a will creating a trust, but the entire matter may be reviewed in a further proceeding or at the time the executors file their final account, and if advantages gained by any of the fiduciaries personally were detrimental to others interested in the estate as beneficiaries or otherwise, the rules set out in Estate of Peabody, 218 W 541, and Estate of Teasdale, 261 W 248, can be applied. Estate of Landauer, 264 W 456, 59 NW (2d) 676.

Executors, who were directors of several corporations only by virtue of stock held by the estate, were fiduciaries and, in proceedings for their removal as executors for alleged mismanagement and improper diversion of corporate funds, they should disclose all relevant information on proper showing to the court, and there was no error in directing them to produce corporate records without following 180.43, relat-

ing to the rights of stockholders to examine corporate records, such statute not being applicable here and not being exclusive. Estate of Landauer, 264 W 456, 59 NW (2d) 676.

324.351 Accounts; failure of fiduciaries to file. If any executor, administrator, guardian or trustee shall fail to file his account as required by law or ordered by the court, the court may, upon its own motion or upon the petition of any party interested, issue a citation directed to the sheriff ordering and directing the executor, administrator, guardian or trustee to show cause before the court why he should not immediately make and file his reports or accounts. Should any executor, administrator, guardian or trustee fail, neglect, or refuse to make and file any report or account after having been cited by the court so to do, or if he fails to appear in court as directed by a citation issued under direction and by authority of the court, the court may, upon its own motion or upon the petition of any interested party, issue a warrant directed to the sheriff ordering that the executor, administrator, guardian or trustee be brought before the court to show cause why he should not be punished for contempt for such failure, refusal, or neglect. If the court finds that such failure, refusal or neglect is wilful or inexcusable, the executor, administrator, guardian or trustee may be punished for contempt by a fine not to exceed $50 or by imprisonment not to exceed 10 days, or both.

324.355 Dormant estates. If final judgment is not entered in an estate within 3 years after filing of the petition for probate or administration, the judge shall order the attorney and the personal representative for such estate to show reasonable cause why final judgment has not been entered and shall mail a copy of such order to the sureties on the bond of the personal representative. If reasonable cause is not shown the judge shall determine who is at fault. If both are at fault, the judge shall dismiss both and forthwith appoint a personal representative and appoint an attorney acceptable to such personal representative to complete the probate or administration of the estate. If only the personal representative is at fault, he shall be summarily dismissed and the judge shall forthwith appoint another personal representative to complete the administration and close the estate. If only the attorney is at fault, the judge shall dismiss him and instruct the personal representative to employ another attorney; if such personal representative fails to do so within 30 days, the judge shall appoint an attorney. No other procedure for substitution of attorney shall be required in such cases. The judge may apportion the fees allowed.

History: Sup. Ct. Order, 262 W xi.

Comment of Judicial Council, 1952: The public generally does not understand that the judge does not set the pace at which probate and administration proceed. While the court may have inherent power to cite persons responsible for delaying administration, it seems preferable to have a mandatory statute requiring personal representatives and lawyers to explain the delay. This rule should provide additional incentive for procrastinators to get estates closed in less than 3 years; give the judge clear authority to determine the reasons for delay in administration of estates long pending in his court; give the personal representative and attorney a fair chance to explain the delay; and permit the judge to take the steps necessary to expedite administration by dismissing the persons at fault. [Re Order effective May 1, 1953]

324.356 Formal accounting by guardians and trustees. The judge may at any time require an accounting by any guardian or trustee at a hearing after notice to all interested persons including sureties on the bond of a guardian or trustee. The sureties on a bond of a guardian or trustee may once in every 3-year period petition the court for such a hearing.

History: 1953 c. 299.

324.36 Delayed service of notice. (1) In case the county court fails, because of insufficient notice, to acquire jurisdiction of the subject matter or of a person who is a necessary party in any proceeding, the court may at any time order service of the proper notice and may require the person to show cause why he should not be bound by the action already taken in the proceeding as though he had been seasonably notified. This provision for delayed notice applies to minors and incompetents. The notice may be served in the regular manner or as the court directs.

(2) Such person may appear and defend and the procedure shall be the same as to him and he shall have the same remedies and relief he would have been entitled to had he been seasonably served with notice. The court may amend any order or judgment to make it conform to the changed conditions resulting from the delayed notice and proceedings thereon.