

1989 Senate Bill 41

Date of enactment: **December 6, 1989**
Date of publication*: **December 18, 1989**

1989 WISCONSIN ACT 96

AN ACT *to repeal* 859.05; *to renumber and amend* 859.07; *to amend* 46.10 (11) (b), 49.08, 49.195 (1), 757.66, 766.70 (6) (a), 859.02 (2) (a), 859.03, 859.15, 859.21 (intro.), 859.29, 859.33 (1), 859.45, 859.47, 865.05 (1), 865.13 and 865.16 (1) (a); *to repeal and recreate* 859.01; and *to create* 857.31, 859.02, 859.07 (3) and 859.48 of the statutes; and *to affect* 1987 Wisconsin Act 27, section 3204 (47) (i), **relating to:** notice to potential claimants and recovery of claims against estates.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

PREFATORY NOTE: Under current law, most claims against a decedent's estate are barred unless filed with the probate court within a 90-day time period set by the court, notice of which is published 3 times in a newspaper qualified under s. 985.03, stats., [ss. 859.01 to 859.07, stats.]. In *Tulsa Professional Collection Services v. Pope*, 485 U.S. , 99L.Ed.2d 565 (1988), the U.S. Supreme Court found a similar Oklahoma statute unconstitutional, holding that notice to a decedent's creditors solely by publication violates the due process clause of the 14th amendment of the U.S. constitution.

This bill was developed by the judicial council's probate notice committee, whose members are listed in the last paragraph of this NOTE. The committee, formed at the request of the state bar, studied the relevant law and concluded that the changes herein contained would promote the efficient administration of estates while protecting the interests of potential claimants.

The bill essentially provides that certain claims are not barred if the claimant neither was given notice of the final date for filing claims nor actually knew of the pendency of the probate proceeding.

The bill creates no duty on the personal representative to identify and notify potential claimants, and exempts personal representatives from liability to either creditors or distributees of the estate for providing or not providing this notice. The bill allows claimants prejudiced by constitutionally inadequate notice of the claim period to file their claims, even if the estate assets have been distributed, for up to one year after the decedent's death, but any such claim must be filed within 30 days after the claimant first acquires actual knowledge of the probate proceeding.

The probate notice committee was chaired by Judge Thomas S. Williams and included Peter N. Brusky, Thomas A. Churchill, James A. Drill, Judge Raymond E. Gieringer, C. Vernon Howard, John E. Knight, Kenneth M. Orchard and Prof. Eva M. Soeka of Marquette University Law School, who served as committee reporter.

SECTION 1. 46.10 (11) (b) of the statutes is amended to read:

46.10 (11) (b) If a person who is liable under this section is deceased, a claim may be filed against the decedent's estate and the statute of limitations specified in s. ~~859.04~~ 859.02 shall be exclusively applicable. This paragraph applies to liability incurred on or after July 20, 1985.

SECTION 2. 49.08 of the statutes is amended to read:
49.08 Recovery of general relief paid. If any person is the owner of property at the time of receiving general relief under this chapter or as an inmate of any county or municipal institution in which the state is not chargeable with all or a part of the inmate's maintenance or as a tuberculosis patient provided for in ch. 149 and s. 58.06, or at any time thereafter, or if such person becomes self-supporting, the authorities charged with the care of the dependent, or the board in charge of the institution, may sue for the value of the general relief from such person or the person's estate; but except as hereinafter provided the 10-year statute of limitations may be pleaded in defense in any such action to recover general relief. Where the general relief recipient is deceased, a claim may be filed against the decedent's estate and the statute of limitations

specified in s. ~~859.04~~ 859.02 shall be exclusively applicable. The court may refuse to render judgment or allow the claim in any case where a parent, spouse, surviving spouse or child is dependent on such property for support. The court in rendering judgment shall take into account the current family budget requirement as fixed by the U.S. department of labor for such community or as fixed by the authorities of such community in charge of public assistance. The records kept by the municipality, county or institution are prima facie evidence of the value of the general relief furnished. This section shall not apply to any person who receives care for pulmonary tuberculosis as provided in s. 149.04.

SECTION 3. 49.195 (1) of the statutes is amended to read:

49.195 (1) If any parent at the time of receiving aid under s. 49.19 or at any time thereafter acquires property by gift, inheritance, sale of assets, court judgment or settlement of any damage claim, or by winning a lottery or prize the county granting such aid may sue the parent on behalf of the department to recover the value of that portion of the aid which does not exceed the amount of the property so acquired. The value of aid liable for recovery under this section may not include the value of work performed by a member of the family in a community work experience program under s. 46.215, 46.22 (1) (b) 11. or 49.50 (7j) (d). During the life of the parent, the 10-year statute of limitations may be pleaded in defense against any suit for recovery under this section; and if such property is his or her homestead it shall be exempt from execution on the judgment of recovery until his or her death or sale of the property, whichever occurs first. Notwithstanding the foregoing restrictions and limitations, where the aid recipient is deceased a claim may be filed against any property in his or her estate and the statute of limitations specified in s. ~~859.04~~ 859.02 shall be exclusively applicable. The court may refuse to render judgment or allow the claim in any case where a parent, spouse or child is dependent on the property for support, and the court in rendering judgment shall take into account the current family budget requirement as fixed by the U.S. department of labor for the community or as fixed by the authorities of the community in charge of public assistance. The records of aid paid kept by the county or by the department are prima facie evidence of the value of the aid furnished. Liability under this section shall extend to any parent or stepparent whose family receives aid under s. 49.19 during the period he or she is a member of the same household, but his or her liability is limited to such period. This section does not apply to medical and health assistance payments for which recovery is prohibited or restricted by federal law or regulation.

SECTION 4. 757.66 of the statutes is amended to read:

757.66 Recovery of legal fees paid for indigent defendants. Whenever a county or the state has paid for legal representation of an indigent defendant and the

county board or the department of justice so requires, the clerk of the court where representation for the indigent was appointed shall prepare, sign and file in the office of the register of deeds, in a record there to be kept for the purpose, a certificate stating the name and residence of the indigent beneficiary, the amount paid by the county or the state for his or her legal representation, the date when paid, the court and county in which the case was heard and such other information as the county board directs. If a certificate is filed within 6 months after payment is made by the county or the state it may, within the time after the filing provided by s. 893.86, commence an action to recover from the indigent defendant, or his or her estate if the action is commenced within the time set for filing claims by creditors, the amount paid by the county or the state for his or her legal representation. In any such action ss. ~~859.04~~ 859.02 and 893.86, so far as applicable, may be pleaded in defense. The claim shall not take precedence over the allowances in ss. 861.31, 861.33 and 861.35. The district attorney or the department of justice, as applicable, shall commence and prosecute all actions and proceedings necessary under this section to make the recovery when it appears that the indigent defendant or his or her estate is able to pay the claim.

SECTION 5. 766.70 (6) (a) of the statutes is amended to read:

766.70 (6) (a) Except as provided in pars. (b) and (c), if a gift of marital property during marriage by a spouse does not comply with s. 766.53, the other spouse may bring an action to recover the property or a compensatory judgment equal to the amount by which the gift exceeded the limit under s. 766.53. The other spouse may bring the action against the donating spouse, the gift recipient or both. The other spouse must commence the action within the earliest of one year after he or she has notice of the gift, one year after a dissolution or ~~within the time on or before the deadline~~ for filing claims a claim under s. ~~859.05~~ 859.01 after the death of either spouse. If the recovery occurs during marriage, it is marital property. If the recovery occurs after a dissolution or the death of either spouse, the recovery is limited to 50% of the recovery that would have been available if the recovery had occurred during marriage.

SECTION 6. 857.31 of the statutes is created to read:

857.31 Immunity of personal representative. A personal representative incurs no liability to any person as a result of any of the following:

(1) Giving notice to any potential claimant against the estate that proceedings to administer the estate are pending, the court in which the proceedings are pending and the deadline for filing a claim against the estate under s. 859.01 or 859.48.

(2) Not giving notice to any potential claimant against the estate that proceedings to administer the estate are pending, the court in which the proceedings are

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pending or the deadline for filing claims against the estate under s. 859.01 or 859.48, even if the personal representative knew, or in the exercise of reasonable diligence should have known, of the existence of the potential claim.

(3) Not informing distributees of their potential liability for claims not barred because of the operation of s. 859.02 (2) (b).

NOTE: This section clarifies that the personal representative has no duty to give notice to claimants of the date by which their claims must be presented, nor to warn distributees of potential claims.

SECTION 7. 859.01 of the statutes is repealed and recreated to read:

859.01 Time for filing claims. When an application for administration is filed, the court, or the probate registrar under informal administration proceedings, shall by order set a date as the deadline for filing a claim against the decedent's estate. The date shall be not less than 3 nor more than 4 months from the date of the order.

NOTE: This section is prior s. 859.05, stats., amended to give the court discretion to fix a date for the presentation of claims which is between 3 and 4 months from the date of the order, to avoid uncertainty regarding whether the proper date is that on which the order is granted, entered or first published.

SECTION 8. 859.02 of the statutes is created to read:

859.02 Limitation on claims. (1) Except as provided in sub. (2) and s. 859.03, all claims against a decedent's estate including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, are barred against the estate, the personal representative and the heirs and beneficiaries of the decedent unless filed on or before the date set under s. 859.01.

(2) A claim against a decedent's estate that is not filed on or before the date set under s. 859.01 is not barred if:

(a) It is a claim based on tort or on Wisconsin income, sales, withholding, gift, inheritance or estate taxes, a claim for funeral or administrative expenses or a claim of the United States; or

(b) All of the following circumstances exist:

1. On or before the date set under s. 859.01, the personal representative knew, or in the exercise of reasonable diligence should have known, of the existence of the potential claim and of the identity and mailing address of the potential claimant.

2. At least 30 days prior to the date set under s. 859.01, the personal representative had not given notice to the potential claimant of the final day for filing his or her claim and the court in which the estate proceeding was pending.

3. At least 30 days prior to the date set under s. 859.01, the claimant did not have actual knowledge that the estate proceeding was pending and of the court in which that proceeding was pending.

(3) Failure of a claimant timely to file a claim against a decedent's estate does not bar the claimant from satisfy-

ing the claim from property other than the decedent's estate.

NOTE: Subsection (1) is similar to prior s. 859.01 (1), stats. Subsection (2) (a) carries forward prior s. 859.01 (3), stats., without substantive change.

Subsection (2) (b) implements *Tulsa Professional Collection Services v. Pope*, 485 U.S. , 99L.Ed.2d 565 (1988). It removes from the bar of the nonclaim statute claims of creditors known to the personal representative, or discoverable by reasonable diligence, unless notice of the time for presenting claims is given to such creditors, or unless they have actual timely notice of the pendency of the proceeding and thus are not prejudiced by not being given such notice. Subsection (2) (b) does not create a duty on the personal representative to give notice to potential claimants. See created s. 857.31. It merely provides that some claims are not barred in certain circumstances. The procedure for enforcing such claims is specified in s. 859.48.

Subsection (3) carries forward the substance of prior s. 859.01 (4), stats.

SECTION 9. 859.02 (2) (a) of the statutes, as created by 1989 Wisconsin Act (this act), is amended to read:

859.02 (2) (a) It is a claim based on tort or on Wisconsin income, sales, withholding, gift, ~~inheritance or estate~~ or death taxes, a claim for funeral or administrative expenses or a claim of the United States; or

SECTION 10. 859.03 of the statutes is amended to read:

859.03 Continuance of separate action. If an action is pending against a decedent at the time of his or her death and the action survives, the plaintiff in that action may serve a notice of substitution of party defendant on the personal representative and file proof of service of notice in the court. Filing of proof of service ~~within the time limited on or before the deadline for filing claims in s. 859.05~~ a claim under s. 859.01 gives the plaintiff the same rights against the estate as the filing of a claim. A judgment in any such action constitutes an adjudication for or against the estate.

SECTION 11. 859.05 of the statutes is repealed.

SECTION 12. 859.07 of the statutes is renumbered 859.07 (1) and amended to read:

859.07 (1) Notice of the ~~time within which creditors may present their claims and of the time when the claims, as set by the court or probate registrar under informal administration proceedings, will be examined and adjusted by the court~~ deadline for filing a claim under s. 859.01 shall be given by publication, under s. 879.05 (4), and may be given with the notice for granting letters. ~~No date for examination and adjustment need be given in informal administration proceedings.~~ The first insertion shall be made within 15 days of the date of the order ~~setting the time.~~ In addition, if under s. 859.01,

(2) If the decedent was at the time of death or at any time prior thereto a patient or inmate of any state or county hospital or institution or any person responsible for any obligation owing to the state or county under s. 46.03 (18), 46.10 or 48.36, the personal representative shall send notice in writing of the ~~time within which cred-~~

itors may present their claims and of the time when the claims will be examined shall be sent ~~date set under s. 859.01~~ by registered or certified mail to the department of health and social services and the county clerk of the applicable county not less than 30 days before such examination ~~the date set under s. 859.01~~, upon such blanks and containing such information as the department or county clerk may provide. Prior to January 1, 1987, the applicable county is the county of legal settlement. On or after January 1, 1987, the applicable county is the county of residence, as defined in s. 49.01 (8g).

SECTION 13. 859.07 (3) of the statutes is created to read:

859.07 (3) The personal representative may at any time give notice to any potential claimant of the deadline for filing a claim against the estate under s. 859.01 or 859.48 and of the court in which the estate proceeding is pending.

SECTION 14. 859.15 of the statutes is amended to read:

859.15 Effect of statute of limitations. Except as provided in ss. 46.10 (11), 49.08 and 49.195 (1), a claim shall not be allowed which was barred by any statute of limitations at the time of the decedent's death. A claim shall not be barred by statutes of limitation which was not barred at the time of the decedent's death if the claim is filed against the decedent's estate in the court ~~within the time limited on or before the deadline~~ for filing claims a claim under s. 859.01.

SECTION 15. 859.21 (intro.) of the statutes is amended to read:

859.21 Contingent claims. (intro.) If the amount or validity of a claim cannot be determined until some time in the future, the claim is a contingent claim regardless of whether the claim is based on an event which occurred in the past or on an event which may occur in the future. Except for claims of the type not required to be filed under s. ~~859.01~~ 859.02, contingent claims which cannot be allowed as absolute must, nevertheless, be filed in the court and proved in the same manner as absolute claims. If allowed subject to the contingency, the order of allowance shall state the nature of the contingency. If the claim is allowed as absolute before distribution of the estate, it shall be paid in the same manner as absolute claims of the same class. In all other cases the court may provide for the payment of contingent claims in any one of the following methods:

SECTION 16. 859.29 of the statutes is amended to read:

859.29 Persons interested may be informed of claims. After the ~~last day~~ deadline for filing ~~claims a claim~~ against the estate ~~has expired under s. 859.01~~, any person interested in the estate may make a written request to the personal representative or special administrator for a statement listing all claims which have been filed against the estate. The statement shall show each claim,

the name of the claimant, a brief description of the basis of the claim, and the amount claimed. Within 5 days after receipt of the request, the personal representative shall mail or deliver a copy of the statement to the requester, including any guardian of the estate, guardian ad litem or attorney for a person in military service. Failure of the personal representative or special administrator to comply with this section does not affect the jurisdiction of the court as to persons interested.

SECTION 17. 859.33 (1) of the statutes is amended to read:

859.33 (1) HOW CONTEST INITIATED. The following persons may contest a claim or assert an offset or counterclaim in court: the personal representative, a guardian ad litem or a person interested who has the approval of the court. They may do so only by mailing a copy of the objection, offset or counterclaim to the claimant or personally serving the same upon the claimant and filing the same with the court. The objection, offset or counterclaim may be served at any time prior to entry of judgment on the claim, but if a copy of the claim has been mailed to or served under s. 859.01 (2) upon the personal representative or the attorney for the estate, the objection, offset or counterclaim shall be served upon or mailed to the claimant and filed with the court within 60 days after the ~~last date for filing claims~~ copy of the claim was mailed to or served upon the personal representative or the attorney for the estate. The personal representative shall not be obligated to assert any offset or counterclaim in court and may, if he or she deems it to be in the best interests of the estate, assert the offset or counterclaim in any separate action otherwise authorized by law outside the court proceedings. Any offset or counterclaim so asserted shall be deemed denied by the original claimant.

SECTION 18. 859.45 of the statutes is amended to read:

859.45 Tort claims. (1) FILED WITHIN TIME LIMITED. If, ~~within the time limited for filing claims~~, a claim based on a cause of action in tort or for contribution resulting from a cause of action in tort is filed on or before the deadline for filing a claim under s. 859.01 or 859.21 or a continuance is secured under s. 859.03, the claimant will receive the same protection in regard to payment as a claimant who has filed a claim which was required to be filed.

(2) NOT FILED WITHIN TIME LIMITED. A cause of action against a decedent in tort or for contribution resulting from a cause of action in tort is not defeated by failure to file the claim or commence or continue an action against the personal representative ~~within the time limited for on or before the deadline for filing claims a claim under s. 859.01~~ against an estate, but the failure relieves the court of all responsibility to protect the rights of the claimant and the claimant shall not be granted any of the protections under s. 859.21. If the claim is made absolute through court approved settlement or adjudication and a

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certified copy of the settlement or judgment is filed in the court in which the estate is being administered prior to the approval of the final account, it shall be paid prior to the distribution of the estate, otherwise the estate may be distributed as though the claim did not exist. After the final account has been approved, a claimant whose claim has been made absolute through court approved settlement or through adjudication may proceed against the distributees, but no distributee may be liable for an amount greater than that allowed under s. 859.23.

SECTION 19. 859.47 of the statutes is amended to read:

859.47 Payment of unfiled claims. If a personal representative has in good faith paid unfiled claims against the estate, the payments may be allowed upon proof that they were just demands against the estate and that they were paid ~~within the time limited for the presentation of on or before the deadline for filing claims under s. 859.01~~, or at any time with the consent of the heirs or beneficiaries affected by the payment. Notice that application will be made for such allowance shall be given under s. 879.03. Payment shall be allowed on a proportional basis with other claims of the same class if the estate is insolvent.

SECTION 20. 859.48 of the statutes is created to read:

859.48 Claims of creditors without notice. (1) A claim not barred by s. 859.02 (1) because of the operation of s. 859.02 (2) (b) may be enforced only as provided in this section.

(2) The claimant shall file the claim in the court in which the estate is administered within one year after the decedent's death and within 30 days after the earlier of the following:

(a) The date that the personal representative gives notice to the potential claimant of the deadline for filing a claim against the estate under s. 859.01 or this section and of the court in which the estate is administered.

(b) The date that the claimant first acquires actual knowledge that the estate is being or was administered and of the court in which the estate is administered.

(3) The claimant shall serve a copy of the claim upon or mail a copy of the claim to the personal representative or the attorney for the estate within 10 days after the claim is filed.

(4) In any proceeding under this section, the claimant shall have the burden of establishing by the greater weight of the credible evidence that all of the circumstances under s. 859.02 (2) (b) existed.

(5) If the claim is allowed, it shall be paid to the same extent as other claims of the same class. If allowed after the assets of the estate have been partially or fully distributed, any unpaid portion of the claim may be enforced by separate action against the distributees. No distributee is liable for any amount greater than that allowed under s. 859.23.

(6) This section does not extend the time for commencement of a claim beyond the time provided by any statute of limitations applicable to that claim.

NOTE: This section provides the mechanics of recovery for claims not barred by s. 859.02 because of s. 859.02 (2) (b).

If sufficient undistributed assets remain when the claim is presented, it is paid with others of its class. If insufficient assets remain, recovery from distributees by separate action is permitted to the extent allowed by s. 859.23, stats. Any such action must be brought within one year after the decedent's death and within 30 days after the claimant is given notice or acquires actual knowledge of the pendency of the proceeding.

SECTION 21. 865.05 (1) of the statutes is amended to read:

865.05 (1) Notice of application to initiate administration of an estate under this chapter shall be given to the persons entitled thereto under s. 879.03 (2) and (3) in accordance with s. 879.05, unless waived under s. 879.09. Notice to creditors shall be given in accordance with ~~ss. 859.05 and s.~~ 859.07.

SECTION 22. 865.13 of the statutes is amended to read:

865.13 Personal representative may pay claims.

The personal representative may pay in good faith just demands against the estate, whether filed as a claim or not, ~~within the time allowed on or before the deadline for filing claims a claim under s. 859.01~~, or at any time with the consent of the heirs or beneficiaries affected by the payment. In paying a claim the personal representative may deduct any counterclaim which the estate has against the claimant. Any claim filed shall be allowed or disallowed according to ch. 859.

SECTION 23. 865.16 (1) (a) of the statutes is amended to read:

865.16 (1) (a) Duly given notice to interested persons under s. 865.05 and to creditors under s. 859.07, and that the ~~time deadline~~ for filing ~~claims a claim under s. 859.01~~ has ~~expired passed~~ prior to the date of the statement;

SECTION 24. 1987 Wisconsin Act 27, section 3204 (47) (i), as last affected by 1987 Wisconsin Act 312, is amended to read:

[1987 Wisconsin Act 27] Section 3204 (47) (i) *Inheritance tax and gift tax repeal.* The treatment of sections 16.007 (6) (b) 2., 66.30 (2m) (e), 72.01 (3), (10), (11), (12), (14), (15) and (15m), 72.02, 72.05, 72.06, 72.07, 72.21 (3), 72.22 (1) and (3), 72.23 (title), (1) and (2), 72.25, 72.26, 72.28, 72.29, 72.30 (1) (title), (a) and (b), (2), (3) (a), (b), (bm), (c), (d) and (e), (4), (5), (6) and (7), 72.31 (title), (1) and (2) (title), (a), (b) and (c), 72.33 (1), (2) (intro.) and (4), 72.34 (1) to (6), 72.60 to 72.64, 73.03 (20), 75.521 (3) (am) 2, 112.06 (9), 182.24, 613.81 (by SECTION 2099ga), 701.09 (3) and (4), 701.20 (12) (d) 5., 705.06 (1) (intro.) and (d), 851.17, 851.70, ~~859.01 (3)~~, 863.27, 865.16 (1) (b), 865.20 (2), 867.01 (3) (a) 2., (e) and (f), 867.02 (2) (e) and (g), 867.045 (4) and 893.33 (5), chapter 72 (title) and subchapters I (title), II (title) and III

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(title) of chapter 72 of the statutes, the repeal of sections 72.01 (17), 72.12 to 72.20 and 72.22 (4) and subchapter IV of chapter 72 of the statutes and SECTIONS 3047 (3), 3200 (47) (a), 3201 (31) (a), (36) (a) and (b) and (53) (a) and 3202 (47) (a) of this act take effect on January 1, 1992. The repeal and recreation of section 71.05 (1) (g)

of the statutes takes effect on the day before the general effective date of 1987 Wisconsin Act 312.

SECTION 25. Effective dates. This act takes effect on the day after publication, except as follows:

(1) The amendment of section 859.02 (2) (a) of the statutes takes effect on January 1, 1992.
