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.

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.

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.

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.

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

310.045 Petitions to county court. (1) GENERAL. All applications to county courts, except motions in matters at issue, shall be made by verified petition. All petitions must show the jurisdiction of the court and the interest of the petitioner. All petitions, except those for statutory certificates or for ex parte orders in proceedings already pending, shall also show the names and post-office addresses of all persons interested, so far as known to the petitioner or ascertainable by him with reasonable diligence; and shall indicate who are minors or otherwise under disability, and the names and post-office addresses of their guardians. No defect of form or substance in any petition shall invalidate any proceedings.

(2) PROBATE OR ADMINISTRATION. In a petition for probate of a will or for administration, the legatees and devisees and the surviving spouse and heirs of the decedent are

persons interested. Creditors who are not petitioners are not interested persons within the meaning of this subsection.

History: Sup. Ct. Order, 258 W vi; Sup. Ct. Order, 262 W x.

Comment of Judicial Council, 1952: The 1952 amendment eliminates the necessity of showing names and post-office addresses of persons interested if the petition is for a statutory certificate or for an ex parte order in proceedings already pending. These matters do not require notice and the reason for showing names and post-office addresses on petitions is to advise the court as to what persons are entitled to notice and the addresses of such persons. The last sentence is taken in part from section 12 of the Model Probate Code. It is important during the early stages of operation under the new rule to avoid unfortunate loss of jurisdiction through defects. [Re Order effective May 1, 1953]

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 or if it shall subsequently appear that any heir, devisee or legatee is a resident of a foreign country, the court shall cause the notice of hearing of such application or of such subsequent proceeding as may then be pending 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 20 days previous to the day appointed for hearing. If it shall be shown to the court that there is no such consul, vice consul or consular agent of such foreign country, the court may direct that such notice be so mailed to the public administrator. 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 no competent subscribing witness resides 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.

310.07 Probate of foreign wills. (1) PROBATE ON PROOF OF DOMICILIARY PROBATE; EFFECT. The written will of a testator who died domiciled outside this state, which upon probate may operate upon any property in this state, shall be admitted to probate upon proof that it stands probated or established in the jurisdiction where the testator died domiciled and is not being contested there. A will probated under this subsection is sufficient to operate on any property within the terms of the will, subject to any limitations upon its operation imposed by the law of the jurisdiction where the testator died domiciled. Rights to take against the will are not affected by this subsection.

(2) LOCAL CONTEST LIMITED; SETTING ASIDE LOCAL PROBATE. A will offered for probate under subsection (1) may be contested only upon the ground that the conditions of that subsection are not met or that it has been finally rejected from probate in this state; but probate under subsection (1) shall be set aside upon proof that probate or establishment of the will has been set aside in the jurisdiction where the testator died domiciled, if, within one year after such probate in this state under subsection (1), application is made in this state to set aside such probate upon such ground, or verified notice that proceedings have been taken to contest the will in the jurisdiction where the testator died domiciled, is filed, and in the case of real property, also recorded as provided in subsection (3).

(3) PROTECTION OF PROBATE UNDER SUBSECTION (1). If within one year after probate under subsection (1), verified notice that proceedings have been taken to contest the will in the jurisdiction where the testator died domiciled is filed in the court of this state where probate was granted, and, in the case of real property, also recorded in the office of the register of deeds in the county where the real property is located, the protection of probate ceases until proof that the domiciliary proceedings have been terminated in favor of the will or were never actually taken is filed and, in the case of real property, also recorded as above provided.

(4) EFFECT OF REJECTION OF WILL AT DOMICILE. Final rejection of the will from probate or establishment in the jurisdiction where the testator died domiciled is conclusive in this state except where the will has been rejected solely for a cause which is not ground for rejection of a will of a testator who died domiciled in this state, in which case the will nevertheless may be admitted to probate under subsection (5).

(5) ORIGINAL PROBATE; WHEN ALLOWED. Original probate of the will of a testator who died domiciled outside this state, which upon probate may operate upon any property in this state and is valid under the laws of this state, may be granted if the will does not stand rejected from probate or establishment in the jurisdiction where the testator died domiciled, or stands rejected from probate or establishment in the jurisdiction where the testator died domiciled solely for a cause which is not ground for rejection of a will of a testator who died domiciled in this state. The court may delay passing on the application for probate under this subsection pending the result of probate or establishment or contest at the domicile or of the application for probate under subsection (1).

(6) PROOF OF WILL BY PROBATE IN NONDOMICILIARY JURISDICTION. If a testator dies domiciled outside this state, an authenticated copy of his will and of the probate or establishment thereof in a jurisdiction other than the one in which he died domiciled shall be sufficient proof of the contents and legal sufficiency of the will to authorize the admission of the will to probate under subsection (5) if no objection is made thereto. This subsection does not authorize the probate of any will which would not be admissible to probate under subsection (5), nor, in case objection is made to the will, to relieve proponent from offering proof of the contents and legal sufficiency of the will except that the original will need not be produced unless the court so orders.

(7) AUTHENTICATION AND TRANSLATION. Proof contemplated by this section may be made by authenticated copies of the will and the records of judicial proceedings with reference thereto. If the will has not been probated but is otherwise established under the laws of the jurisdiction where the testator died domiciled, its contents and establishment may be proved by the authenticated certificate of the notary or other official having custody of the will or having authority in connection with its establishment. If the respective documents or any part thereof are not in the English language, verified translations may be attached thereto and shall be regarded as sufficient proof of the contents of the documents unless objection is made thereto. If any person in good faith relies upon probate under this section he shall not thereafter be prejudiced because of inaccuracy of such translations, or because of proceedings to set aside or modify the probate on that ground.

(8) GENERAL LAW TO APPLY. Except where otherwise provided, the law of this state relating to wills and to the probate, contest and effect thereof shall apply in case of a testator who died domiciled outside this state.

(9) 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. 253.

310.075 Foreign wills; certificate of assignment. (1) PETITION. If a will devising lands in this state, or any interest therein, has been admitted to probate in any state, the county court of any county in which any of such land is situated may, upon petition accompanied by an authenticated copy of such will and its probate, issue a certificate of assignment as provided herein.

(2) CERTIFICATE. If it appears that the foreign will has been so admitted to probate and that no Wisconsin inheritance tax is owing or that the tax has been paid, the court may issue a certificate so showing; the certificate shall give the names of the devisees, a description of the real estate and the interest of each in the real estate. The certificate or a duplicate or a certified copy thereof when recorded in the office of the register of deeds of the county in which such real estate is situated shall be prima facie evidence of the facts therein recited. The notice requirements of s. 318.06 (7) shall not apply to proceedings under this section.

History: 1951 c. 594; Sup. Ct. Order, 262 W vi.

Note: See 1952 comment of Judicial Council under 327.28.

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.

A final judgment of the county court determining certain provisions in a will to be a devise to the testator's then surviving children, and assigning the estate in accordance with such construction, even if erroneous, in the absence of fraud or imposition on the court or want of jurisdiction, must stand and is binding on the parties interested in the estate unless reversed, modified, or set aside in accordance with the statutes governing appeals and retrials and, after the time for appeal and retrial has expired without appeal taken or retrial applied for, the court cannot reconstrue the will and alter or set aside or replace such judgment. (Will of Inbusch, 193 W 10, distinguished.) Estate of White, 256 W 467, 41 NW (2d) 776.

Where the judgment had become finally binding, the completion of probate proceedings and distribution in the estate was required to be via termination of the trust and there could not then be a proceeding for the construction of the provisions in the will. The proper procedure was to have a construction or clarification of the judgment so far as it merely embodied provisions of the will in substantially the same language used in the will. Estate of Larson, 257 W 579, 44 NW (2d) 535.

Under a will bequeathing the residue of the testator's property, both real and personal, to his widow, to be hers during her lifetime with the privilege of using any portion of the corpus or principal, and bequeathing whatever might remain of the corpus or principal at the death of the widow to a son, a final judgment assigning the residue of the testator's personal property to the widow in trust involved a construction of the will, so that the county court had no jurisdiction to hear the widow's subsequent petition for a construction of the residuary clause of the will, filed long after the time for taking an appeal from the final judgment, and from a judgment denying the widow's petition for a correction of the final judgment, had passed. Estate of Lenahan, 258 W 404, 46 NW (2d) 352.

Where the proceeding was instituted after the time had expired within which to appeal from, or move to modify or set aside, the final judgment assigning an estate under a will creating a spendthrift trust, the county court had no jurisdiction to hear a petition of the divorced wife of a beneficiary for the construction of the will and for an order directing the trustee to pay over to the petitioner the income of such beneficiary in payment of the petitioner's claim against him for accrued alimony and support money. Estate of Austin, 258 W 578, 46 NW (2d) 861.

See note to 318.06, citing Will of Yates, 259 W 263, 48 NW (2d) 601.

See note to 318.06, citing Estate of Fritsch, 259 W 295, 48 NW (2d) 606.

A final decree, so far as assigning a share in a sum constituting the residue of the estate of the testatrix to a son of a deceased brother, as one of the residuary legatees entitled to share in the residue under the residuary clause of the will, was not a construction of the will deciding the question of who would be entitled to share, on the death of a foster daughter of the testatrix, in the remainder of a previously assigned trust fund created by another clause of the will for the benefit of such foster daughter. Will of Friend, 259 W 501, 49 NW (2d) 423.

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.

310.14 Duties of personal representatives. Personal representatives, other than special administrators, shall collect and possess all the decedent's personal estate except that selected under s. 313.15 (1); inventory and have appraised all the decedent's estate; collect all income and rent from such estate of which they have custody; preserve such estate and contest all claims except claims which they believe are valid and which are not objected to by an interested person; pay and discharge out of such estate all expenses of administration, taxes, charges, claims allowed by the court, or such dividends on claims as directed by the court; render just and true accounts; make distribution as the court directs and do such other things as are directed by the court or required by law.

History: 1953 c. 300.

310.15 Bond of personal representative. (1) No person shall act as personal representative, nor shall letters be issued to him until he has given a bond, with one or more sureties, conditioned on the faithful performance of his duties, to the judge of the court in such sum as the judge may direct but not less than the estimated value of the personal property plus one year's income from real estate.

(2) If 2 or more persons are appointed personal representatives, the judge may take a bond from each or a joint bond from all. The amount of each bond shall be not less than the estimated value of the personal property plus one year's income from real estate whether individual bonds or a joint bond is furnished.

(3) If any distributee, including one serving as personal representative, stipulates to a reduction of the bond and that his share of the estate stand as excess surety to the extent of the reduction, the judge may reduce the bond an amount equal to the estimated share of such distributee, provided that the bond shall be in an amount estimated to be sufficient to cover the debts, taxes, expenses of administration and interests of all persons not so stipulating.

(4) If a will requests that an executor serve without bond the judge may grant the

request or may at any time on his own initiative or upon request of any creditor or interested person require a bond with one or more sureties.

(5) If it appears that nothing of value except the proceeds of claims for personal injuries to the deceased or for his death will come into the hands of a personal representative, he need not initially give any bond, but he shall give a bond in an amount directed by the judge before receiving such proceeds, or before he assumes control over any other property of the estate.

(6) The provisions of s. 331.345 shall not apply to bonds of personal representatives.

History: 1953 c. 300.

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.

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.

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 Personal representatives, vacancies, resignations, administration de bonis non. (1) The judge may accept the written resignation of any personal representative. If a personal representative resigns, dies, or his authority is otherwise terminated the remaining personal representative may administer the estate; if there is no other personal representative the court on petition shall appoint one. He shall give bond as provided in s. 310.15.

(2) If the court appoints an administrator de bonis non, the court shall order him and his predecessor or his predecessor's personal representative to appear at a stated time and place upon notice to interested persons to settle the predecessor's account; upon such settlement the property of the estate shall be delivered to the new administrator.

History: 1953 c. 300.

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.

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.

This section does not apply where the testator by his will has designated the attorney to represent the executor, because of his intimate knowledge of the testator's affairs, and the corporate executor (administrator with the will annexed) is willing to employ such designated attorney as counsel. This section may have been aimed to prevent the real, or fancied, evil of corporations acting as executors playing favorites in selecting counsel, thus tending to create a monopoly in probate business by such favorite counsel, but it was not aimed at preventing a corporate executor from selecting as its counsel to probate an estate the attorney whom the testator had requested in his will to be so selected. Estate of Ogg, 262 W 181, 54 NW (2d) 175.