CHAPTER 856

OPENING ESTATES

Cross−reference: See definitions in ch. 851.

856.01 Jurisdiction. The jurisdiction of a proceeding for administration of a decedent's estate is as follows:

(1) If the decedent was domiciled in this state, in the county in this state where the decedent was domiciled at the time of the decedent's death.

(2) If the decedent had no domicile in this state, in any county in this state where property of the decedent is located, and the court which first exercises jurisdiction under this subsection has exclusive jurisdiction.

History: 1977 c. 449; 1993 a. 486.

Wisconsin's New Probate Code. Erlanger. Wis. Law. Oct. 1998.

856.03 Wills in court for safekeeping. If a will has been filed with a court for safekeeping during the testator's lifetime, the court on learning of the death of the testator shall open the will and give notice of the court's possession to the person named in the will to act as personal representative, otherwise to some person interested in the provisions of the will. If probate jurisdiction belongs to any other court, the will shall be delivered to that court.

History: 1977 c. 449; 2001 a. 102.

856.05 Delivery of will to court. (1) DUTY AND LIABILITY OF PERSON WITH CUSTODY. Any person, other than a person named in the will to act as personal representative, having the custody of any will shall, within 30 days after he or she has knowledge of the death of the testator, file the will in the proper court or deliver it to the person named in the will to act as personal representative. Any person named in a will to act as personal representative shall, within 30 days after he or she has knowledge that he or she is named to act as personal representative, and has knowledge of the death of the testator, file the will in the proper court, unless the will has been otherwise deposited with the court. Any person who neglects to perform any of the duties required in this subsection, without reasonable cause, is liable in a proceeding in court to every person interested in the will for all damages caused by the neglect.

(2) DUTY OF PERSON WITH INFORMATION. Any person having information which would reasonably lead him or her to believe in the existence of any will of a decedent of which he or she does not have custody and having information that no more recent will of the deceased has been filed with the court and that 30 days have elapsed after the death of the decedent, shall submit this information to the court within 30 days after he or she has the information.

(3) PENALTY. Any person who with intent to injure or defraud any person interested in a will suppresses or secretes any will of a person then deceased or any information as to the existence or location of any will or having custody of any will fails to file it in the court or to deliver it to the person named in the will to act as personal representative shall be fined not more than $500 or imprisoned in the county jail for not more than one year or both.

(4) LIABILITY FOR NEGLECT. If any person has custody of any will after the death of the testator and after a petition for administration has been filed, neglects without reasonable cause to deliver the will to the proper court after he or she has been duly notified in writing by the court for that purpose, he or she may be committed to the county jail by warrant issued by the court and there kept in close confinement until he or she delivers the will as required.

(5) APPLICABILITY OF SECTION. This section applies to wills and information needed for proof of a missing will under s. 856.17.

History: 1977 c. 449; 1997 a. 188; 2001 a. 102; 2005 a. 216.

856.07 Who may petition for administration. (1) GENERALLY. Petition for administration of the estate of a decedent may be made by any person named in the will to act as personal representative or by any person interested.

(2) AFTER 30 DAYS. If none of those named in sub. (1) has petitioned within 30 days after the death of the decedent, petition for administration may be made by any person who was guardian of the decedent at the time of the decedent's death, any creditor of the decedent, anyone who has a cause of action or who has a right of appeal which cannot be maintained without the appointment of a personal representative or anyone who has an interest in property which is or may be a part of the estate.

History: 1973 c. 90; 2001 a. 102.

Cross−reference: See s. 879.57 providing for a petition by any interested person for a special administrator when there appears to be no person in the state to petition for administration.

856.09 Petition for administration, contents. The petition for administration shall comply with s. 879.01 and in addition shall state:

(1) The name, age, domicile, post−office address and date of death of the decedent;

(2) That the decedent left property requiring administration;

(3) Whether the decedent left a will and the date of execution of the will;

(4) The name and post−office address of the person named in the will to act as personal representative;

(5) The name and post−office address of the person named as testamentary trustee in the will;

(6) The name and post−office address of the person for whom letters are asked and the facts which show the person's eligibility for appointment as personal representative.

History: 1993 a. 486; 2001 a. 102.

Cross−reference: See s. 863.23 providing for a petition for determination of heirship in a petition for administration.

Cross−reference: See s. 879.25 for requirement of filing of an affidavit as to military service.

Cross−reference: See ss. 813.22 to 813.34, Uniform Absence as Evidence of Death and Absentee's Property Act, for a procedure for determining the fact of death when evidence is not available.

856.11 Notice of hearing on petition for administration. When a petition for administration is filed, the court shall set a time for proving the will, if any, for determination of heirship and for the appointment of a personal representative. Notice of hearing on the petition shall be given as provided in s. 879.03 with the additional requirement that when any person interested is rep-

resented by a guardian ad litem, notice shall be given to both the person interested and the person's guardian ad litem. A copy of the will which is being presented for proof shall be sent to all persons interested, except those whose only interest is as a beneficiary of a monetary bequest or a bequest or devise of specific property. To those persons a notice of the nature and amount of the devise or bequest shall be sent.

History: 1993 a. 486.

Cross−reference: See s. 863.23 which provides for determination of heirship and proof of heirship.

When the heirs at law had not been heard from for 30 to 40 years, published notice of hearing on proof of the will was legal notice to the heirs under s. 856.11. In re Estate of Phillips, 92 Wis. 2d 354, 284 N.W.2d 908 (1979).

In probate actions, as in civil cases generally, the burden is on the petitioner to move the case forward. Theis v. Short, 2010 WI App 108, ___ Wis. 2d___, ___ N.W.2d ___, 09−1591.

856.13 Will must be proved; informal probate. No will shall pass any property unless it has been proved and admitted to probate or informally admitted to probate under ch. 865.

History: 1973 c. 39.

856.15 Proof of will and proof of heirs where uncontested. (1) GENERALLY. The court may grant probate of an uncontested will on the execution in open court by one of the subscribing witnesses of a sworn statement that the will was executed as required by the statutes and that the testator was of sound mind, of full age, and not acting under any restraint at the time of the execution thereof. If an uncontested will contains an attestation clause showing compliance with the requirements for execution under s. 853.03 or 853.05 or includes an affidavit in substantially the form under s. 853.04 (1) or (2), the court may grant probate without any testimony or other evidence.

(2) PROOF OUTSIDE THE COUNTY. Upon request of the petitioner, the petitioner's attorney or, if the petitioner is in the military service, the petitioner's attorney−in−fact, the court in which the estate is pending may by order direct that proof of heirs or proof of will, if uncontested, may be taken in open court in any county in this state, or by a judge having probate jurisdiction in any other state or territory of the United States, for use in the court in which the estate is pending.

(3) REMOVAL OF WILL FOR PROOF OUTSIDE THE COUNTY. If a will filed for probate is removed from the court in which the estate is pending so that it may be proved outside the county, it shall during its absence be replaced by a photographic copy or a certified copy thereof.

(4) WILL AND PROOF TO BE RETURNED AND FILED. After a will is proved in a court other than the court in which the estate is pending, the will and the proof of will shall be sent to the court in which the estate is pending. If no contest develops at the time fixed for proving the will in the court in which the estate is pending, the will and proof of will shall be filed as though made in the court in which the estate is pending.

(5) WHEN NO COMPETENT SUBSCRIBING WITNESS IN STATE. If no competent subscribing witness resides in this state at the time fixed for proving the will or if none of them, after reasonable diligence can be found in this state, the court may admit the testimony of other witnesses to prove the competency of the testator, the execution, proof of testator's handwriting and that of one of the subscribing witnesses.

History: 1975 c. 331; 1977 c. 449; 1991 a. 220; 2005 a. 216.

Cross−reference: See s. 863.23 which contains the general provisions in regard to proof of heirship and determination of heirship.

856.16 Self−proved will. (1) Unless there is proof of fraud or forgery in connection with the affidavit, if a will includes an affidavit in substantially the form under s. 853.04 (1) or (2), all of the following apply:

(a) The will is conclusively presumed to have been executed in compliance with s. 853.03.

(b) Other requirements related to the valid execution of the will are rebuttably presumed.

(c) A signature affixed to the affidavit is considered a signature affixed to the will, if necessary to prove the due execution of the will.

(2) Admission of a will under s. 856.13 or 856.15 is not dependent on the existence of a valid affidavit under s. 853.04.

History: 1997 a. 188; 2005 a. 216.

856.17 Missing will, how proved. If any will is lost, destroyed by accident, destroyed without the testator's consent, unavailable but revived under s. 853.11 (6), or otherwise missing, the court has power to take proof of the execution and validity of the will and to establish the same. The petition for the probate of the will shall set forth the provisions of the will.

History: 1977 c. 449; 2005 a. 216.

A petition in the alternative to establish one of 3 wills was proper and proof was sufficient to establish the last will as effective. Estate of Markofske, 47 Wis. 2d 769, 178 N.W.2d 9.

Lost wills: The Wisconsin law. Burrell and Porter, 60 MLR 351.

856.19 Order admitting will. Every will, when admitted to probate as prescribed by statute, shall have that fact signified thereon by the court.

Without a prima facie showing of fraud, a mere allegation is not sufficient to require a court to reopen the admission of a will to probate after the time for appeal expired. In Matter of Estate of Kennedy, 74 Wis. 2d 413, 247 N.W.2d 75.

856.21 Persons entitled to domiciliary letters. Letters shall be granted to one or more of the persons hereinafter mentioned, who are not disqualified, in the following order:

(1) The person named in the will to act as personal representative.

(2) Any person interested in the estate or the person's nominee within the discretion of the court.

(3) Any person whom the court selects.

History: 1993 a. 486; 2001 a. 102.

An attorney may not solicit, either directly or indirectly, to be named, or to have a relative named, executor in a will. State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972).

856.23 Persons who are disqualified. (1) A person including the person named in the will to act as personal representative is not entitled to receive letters if the person is any of the following:

(a) Under 18 years of age.

(b) Of unsound mind.

(c) A corporation not authorized to act as a fiduciary in this state.

(d) A nonresident of this state who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate and filed the appointment with the court.

(e) A person whom the court considers unsuitable for good cause shown.

(2) Nonresidency may be a sufficient cause for nonappointment or removal of a person in the court's discretion.

History: 1971 c. 213 s. 5; 1993 a. 486; 2001 a. 102.

A nominee may not be found "unsuitable" except upon grounds pertaining to capacity or competence to administer the estate. State ex rel. First National Bank & Trust v. Skow, 91 Wis. 2d 773, 284 N.W.2d 74 (1979).

If a trust document allows the beneficiaries to select a successor trustee but does not specifically allow appointment without court approval, the instrument should be read to permit nomination of a trustee subject to court approval. Matter of Sherman B. Smith Family Trust, 167 Wis. 2d 196, 482 N.W.2d 118 (Ct. App. 1992).

A finding of unsuitability is not limited solely to concerns of incapacity or incompetency. Given the myriad circumstances in which conflicts of interests may arise a conflicting personal interest may prevent an executor or administrator from doing his or her duty and render him or unsuitable. But disputes over what assets are included in the estate do not render a person unsuitable. Section 859.09 provides the framework for addressing such disagreements. Klauser v. Schmitz, 2003 WI App 157, 265 Wis. 2d 860, 667 N.W.2d 862, 02−3260.

A resident agent appointed under this section is not an indispensable party in an action involving the estate. Bugbee v. Donahue, 483 F. Supp. 1328 (1980).

856.25 Bond of personal representative. (1) GENERALLY. A person shall not act as personal representative, nor shall letters be issued to the person until the person has given a bond in accordance with ch. 878, with one or more sureties, conditioned on the faithful performance of the person's duties, to the judge of

the court, or until the court has ordered that the person be appointed without being required to give bond. If the court does not require a personal representative to give bond prior to the personal representative's letters being issued, the court may require the personal representative to give bond at any later time. The requirement of a bond and the amount of the bond is solely within the discretion of the court, except that no bond shall be required of any trust company bank, state bank or national banking association which is authorized to exercise trust powers and which has complied with s. 220.09 or 223.02.

(2) WHEN 2 OR MORE PERSONAL REPRESENTATIVES. If 2 or more persons are appointed personal representatives, the judge may require no bond, may take a bond from each, take a joint bond from all or take a bond from some but not all.

(3) SHARE OF ESTATE CAN STAND AS EXCESS SURETY. If any distributee, including one serving as personal representative, stipulates to a reduction of the bond and that the distributee's share of the estate stand as excess surety to the extent of the reduction, the judge may reduce the bond by an amount equal to the estimated share of such distributee.

(4) WHEN WILL WAIVES BOND. A direction or request in a will that the personal representative serve without bond is not binding on the court.

(5) SECTION 895.345 NOT TO APPLY. Section 895.345 does not apply to bonds of personal representatives.

History: 1993 a. 486.

856.27 Appointment of special administrator if appointment of personal representative is delayed. If for any cause, a personal representative is not appointed in an estate at the hearing on appointment, the court at the hearing shall appoint a special administrator to administer the estate until a personal representative is appointed.

856.29 Letters issued to trustee of testamentary trust. If the will of the decedent provides for a testamentary trust, letters of trust shall be issued to the trustee upon admission of the will to probate at the same time that letters are granted to the personal representative, unless the court otherwise directs. Upon issuance of letters of trust, the trustee shall continue to be interested in the estate, and beneficiaries in the testamentary trust shall cease to be interested in the estate except under s. 851.21 (3). This section shall apply to wills admitted to informal probate and letters issued in informal administrations.

History: 1973 c. 39.

If a trust document allows beneficiaries to select a successor trustee but does not specifically allow appointment without court approval, the instrument should be read to permit nomination of a trustee subject to court approval. Matter of Sherman B. Smith Family Trust, 167 Wis. 2d 196, 482 N.W.2d 118 (Ct. App. 1992).

A trustee has a duty to the trust beneficiaries to ensure that the personal representative transfers all property to which the trust is entitled. Even when the same person acts as trustee and personal representative the trustee has a duty to enforce claims the trust has against the personal representative. Old Republic Surety Co. v. Erlien, 190 Wis. 2d 400, 527 N.W.2d 389 (Ct. App. 1994).

856.31 Selection of attorney to represent estate. Whenever a corporate fiduciary is appointed as the sole personal representative, the person or persons receiving the majority interest from the estate may within 30 days after the date of the appointment select the attorney who shall represent the personal representative in all proceedings of any kind or nature, unless good cause is shown before the court why selection should not be so made, or unless the testator's will names the attorney or firm who shall represent the personal representative. The corporate fiduciary shall notify the persons who are entitled to name the attorney of this right within 5 days after appointment. In case a person is under disability, the court appointed guardian, if any, may act for such person under this section. In the case of a minor who has no court appointed guardian, the natural guardian, if any, may act for the minor. "Interest", as used in this section, means beneficial interest whether legal or equitable.

History: 1973 c. 233; 1975 c. 331, 421.

An attorney may not solicit, either directly or indirectly, to be named, or to have a relative named, executor in a will. State v. Gulbankian, 54 Wis. 2d 605, 196 N.W.2d 733 (1972).

A will provision directing that the named attorney represent the estate was upheld. In re Estate of Devroy, 109 Wis. 2d 154, 325 N.W.2d 345 (1982).