

CHAPTER 808

APPEALS AND WRITS OF ERROR

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808.01 Definitions. In this chapter:

(1) "Appeal" means a review in an appellate court by appeal or writ of error authorized by law of a judgment or order of a circuit court.

(2) "Appellate court" means the supreme court under ch. 751 or the court of appeals under ch. 752.

History: 1977 c. 187; 1991 a. 189.

A party which accepts the benefits of a judgment does not waive the right to take an appeal which does not involve a reversal of that part of the judgment under which the benefit was received. *Estreen v. Bluhm*, 79 W (2d) 142, 255 NW (2d) 473

808.02 Writ of error. A writ of error may be sought in the court of appeals.

History: 1977 c. 187.

808.03 Appeals to the court of appeals. (1) APPEALS AS OF RIGHT. A final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment or order entered in accordance with s. 806.06 (1) (b) or 807.11 (2) or a disposition recorded in docket entries in ch. 799 cases or traffic regulation or municipal ordinance violation cases prosecuted in circuit court which disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding.

(2) **APPEALS BY PERMISSION.** A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:

(a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;

(b) Protect the petitioner from substantial or irreparable injury; or

(c) Clarify an issue of general importance in the administration of justice.

History: 1977 c. 187; 1979 c. 192; Sup. Ct. Order, 130 W (2d) xxi.

Judicial Council Note, 1979: Sub. (1) is amended to modify the statutory definition of the final judgment or final order that may be appealed as a matter of right to the court of appeals. Most types of cases decided in circuit court have a final judgment or order entered with the office of clerk of court. Because of the volume of traffic regulation and municipal ordinance violation cases prosecuted in circuit court, the prevailing custom in Wisconsin counties is to only record the dispositions of those cases in docket entries. Requiring counties to meet the present statutory requirement in s. 808.03 (1) for the entry of a final judgment or order in all cases for purposes of having an appealable matter is unnecessarily burdensome and costly. The term "traffic regulation cases" refers to only those traffic violation cases in which the penalty is a civil forfeiture. [Bill 396-S]

Judicial Council Note, 1986: Sub. (1) is amended to clarify that docket entries in small claims and other ch. 799 cases may be final orders from which an appeal may be taken as of right. See 1979 Judicial Council Note to sub. (1) [Re Order eff. 7-1-86]

Appeal cannot be taken from order before it is entered. *Ramsthal Adv. Agency v. Energy Miser, Inc.* 90 W (2d) 74, 279 NW (2d) 491 (Ct. App. 1979).

See note to 805.15, citing *Earl v. Marcus*, 92 W (2d) 13, 284 NW (2d) 690 (Ct. App. 1979).

Test to determine whether decision is final order or judgment is whether trial court contemplated that additional formal document would be entered

with respect to matter covered in decision. *Frederick v. City of Janesville*, 92 W (2d) 685, 285 NW (2d) 655 (1979)

Pretrial order denying motion to dismiss on double jeopardy grounds is nonfinal order appealable only under (2). *State v. Jenich*, 94 W (2d) 74, 288 NW (2d) 114 (1980).

Order waiving jurisdiction over juvenile is appealable under (2). *State ex rel. A. E. v. Green Lake County Cir. Ct.* 94 W (2d) 98, 288 NW (2d) 125 (1980).

See note to 974.05, citing *State v. Rabe*, 96 W (2d) 48, 291 NW (2d) 809 (1980).

See note to 801.08, citing *Heaton v. Independent Mortuary Corp.* 97 W (2d) 379, 294 NW (2d) 15 (1980).

Orders relating to venue are appealable by permission under (2). *Aparacor, Inc. v. DILHR*, 97 W (2d) 399, 293 NW (2d) 545 (1980)

See note to 801.08, citing *Grulkowski v. Dept. of Transp.* 97 W (2d) 615, 294 NW (2d) 43 (Ct. App. 1980).

Order enjoining town from conducting incorporation referendum under 60.81 terminated only matter in litigation with respect to town, although ch. 66 incorporation proceedings had not been finally determined by the order. In re *Incorporation of Town of Fitchburg*, 98 W (2d) 635, 299 NW (2d) 199 (1980)

Court order setting aside an administrative order and remanding case to administrative agency was appealable as of right. *Bearns v. DILHR*, 102 W (2d) 70, 306 NW (2d) 22 (1981)

Where counterclaim for abuse of process, severed for trial, was not yet determined, judgment dismissing complaint was not appealable under (1). *Brownsell v. Klawitter*, 102 W (2d) 108, 306 NW (2d) 41 (1981)

Order for new trial is not appealable as of right. *Wick v. Mueller*, 105 W (2d) 191, 313 NW (2d) 799 (1982)

See note to 806.06, citing *Radoff v. Red Owl Stores, Inc.* 109 W (2d) 490, 326 NW (2d) 240 (1982)

Trial court did not have jurisdiction to award attorney's fees after filing of notice of appeal of another issue. In re *Marriage of Hengel v. Hengel*, 120 W (2d) 522, 355 NW (2d) 846 (Ct. App. 1984)

Court commissioner's order under 757.69 (1) dismissing criminal proceeding was not "final order" under 808.03 (1). *State v. Trongeau*, 135 W (2d) 188, 400 NW (2d) 12 (Ct. App. 1986)

Appellate court has no jurisdiction to review denial of postconviction motion if there is no final written order denying that motion on file in clerk of court's office. *State v. Malone*, 136 W (2d) 250, 401 NW (2d) 563 (1987)

Criminal defendant's right to appeal continues after death, regardless of cause of death. *State v. McDonald*, 144 W (2d) 531, 424 NW (2d) 411 (1988)

Judgment resolving merits of 42 USC 1983 action is final and appealable under (1) though attorney's fee issue remains unresolved. *ACLU v. Thompson*, 155 W (2d) 442, 455 NW (2d) 268 (Ct. App. 1990)

Circuit court's retained jurisdiction in board of review certiorari actions under 70.47(13) does not affect finality of order for appeal purposes. *Steenberg v. Town of Oakfield*, 157 W (2d) 674, 461 NW (2d) 148 (Ct. App. 1990)

See note to 343.305 citing *State v. Borowski*, 164 W (2d) 730, 476 NW (2d) 316 (Ct. App. 1991)

Wisconsin Court of Appeals Appellate Jurisdiction. *Klein and Leavell Wis. Law. Sept.* 1991.

808.04 Time for appeal to the court of appeals. (1) INITIATING AN APPEAL. An appeal to the court of appeals must be initiated within 45 days of entry of judgment or order appealed from if written notice of the entry of judgment or order is given within 21 days of the judgment or order as provided in s. 806.06 (5), or within 90 days of entry if notice is not given, except as provided in this section or otherwise expressly provided by law.

(2) An appeal under s. 227.60 or 799.445 shall be initiated within 15 days after entry of judgment or order appealed from.

(3) Except as provided in subs. (4) and (7), an appeal in a criminal case or a case under ch. 48, 51 or 55 shall be initiated within the time period specified in s. 809.30.

(4) An appeal by the state in either a criminal case under s. 974.05 or a case under ch. 48 shall be initiated within 45 days of entry of judgment or order appealed from.

(5) A person imprisoned or in the intensive sanctions program on a criminal sentence against whom a civil final judgment or order is rendered has 120 days in which to appeal the civil judgment or order.

(6) When a party to an action or special proceeding dies during the period allowed for appeal, the time to appeal is the time permitted by law or 120 days after the party's death, whichever is later. If no personal representative qualifies within 60 days after the party's death, any appellant may have a personal representative appointed under s. 856.07 (2).

(7) An appeal by a party other than the state from a judgment or order terminating parental rights or granting adoption shall be initiated by filing the notice required by s. 809.30 (2) (b) within 40 days of the date of entry of the judgment or order appealed from. Notwithstanding s. 809.82 (2) (b), this time may not be enlarged.

(8) If the record discloses that the judgment or order appealed from was entered after the notice of appeal was filed, the notice of appeal shall be treated as filed after such entry and on the day thereof.

History: 1977 c. 187; 1979 c. 32 s. 92 (9), (14); 1979 c. 89, 221; 1981 c. 152; 1981 c. 314 ss. 130, 146; 1983 a. 183, 219; 1983 a. 491 s. 23; 1985 a. 182 s. 57; Sup. Ct. Order, 130 W (2d) xxi; Sup. Ct. Order, 136 W (2d) xxviii; 1989 a. 56 s. 259; 1989 a. 192; 1991 a. 39; Sup. Ct. Order, 168 W (2d) xxii

Judicial Council Note, 1983: Sub. (2) requires expedited initiation of appeals in recall and eviction cases as well as cases in which the validity of a state law is attacked in federal district court. Sub. (3) references the appeal deadline for criminal, juvenile, mental commitment and protective placement appeals. Sub. (4) references the appeal deadline for appeals by the state in criminal and children's code cases. [Bill 151-S]

Judicial Council Note, 1986: The amendment to sub. (1) clarifies the time limit for notice of entry by cross-referencing s. 806.06 (5) [Re Order eff. 7-1-86]

Judicial Council Note, 1986: Subs. (3) and (4) are amended by removing references to a repealed statute. Sub. (7) requires a party other than the state to commence an appeal from a judgment or order terminating parental rights or granting an adoption by filing notice of intent to pursue relief in the trial court within 40 days after entry. It also prohibits enlargement of this time by the court of appeals. [Re Order eff. 7-1-87]

Judicial Council Note, 1992: Subsection (8) is analogous to Rule (4) (a) (2) of the Federal Rules of Appellate Procedure. It is intended to avoid the delay, confusion and prejudice which can result from dismissing appeals solely because they are filed before the judgment or order appealed from is entered. Appeals from judgments or orders which have not been entered are still dismissible. [Re Order effective July 1, 1992]

Notice under (1) may not be given before judgment is entered. Sub-Zero Freezer Co. v. Manhattan Life Ins. Co. 90 W (2d) 76, 279 NW (2d) 492 (Ct. App. 1979).

See note to 799.24, citing Mock v. Czernierys, 113 W (2d) 207, 336 NW (2d) 188 (Ct. App. 1983).

To shorten appeal period under (1), formal, captioned and signed notice of entry of judgment stating date of entry must be served on opposing party within 21 days of entry date and must be filed. In re Marriage of Soquet v. Soquet, 117 W (2d) 553, 345 NW (2d) 401 (1984).

Date stamped on judgment didn't control as to date of actual filing. Matter of Estate of Ristau, 144 W (2d) 421, 424 NW (2d) 203 (1988).

See note to 785.03, citing Matter of Contempt in State v. Simmons, 150 W (2d) 178, 441 NW (2d) 308 (Ct. App. 1989).

Under (1), notice of entry of judgment must be given within 21 days of entry of judgment, not of signing, consistent with 806.06 (5). Linnmar, Inc. v. First Enterprises, 161 W (2d) 706, 468 NW (2d) 753 (Ct. App. 1991).

See note to 805.17 citing Salzman v. DNR, 168 W (2d) 523, 484 NW (2d) 337 (Ct. App. 1992).

808.05 Bypass. The supreme court may take jurisdiction of an appeal or any other proceeding pending in the court of appeals if:

(1) It grants direct review upon a petition to bypass filed by a party;

(2) It grants direct review upon certification from the court of appeals prior to the court of appeals hearing and deciding the matter; or

(3) It, on its own motion, decides to review the matter directly.

History: 1977 c. 187.

808.07 Relief pending appeal. (1) EFFECT OF APPEAL. An appeal does not stay the execution or enforcement of the judgment or order appealed from except as provided in this section or as otherwise expressly provided by law.

(2) **AUTHORITY OF A COURT TO GRANT RELIEF PENDING APPEAL.** (a) During the pendency of an appeal, a trial court or an appellate court may:

1. Stay execution or enforcement of a judgment or order;
2. Suspend, modify, restore or grant an injunction; or
3. Make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered.

(am) During the pendency of an appeal, the trial court may hear and determine a motion filed under s. 806.07.

(b) Except as provided in s. 655.27 (5) (a) 3, relief under this subsection may be conditioned upon the filing of an undertaking in the trial court.

(3) **UNDERTAKING FOR COSTS.** An undertaking for costs is not required unless specifically required by statute, or, except as provided in s. 655.27 (5) (a) 3, by the trial court acting in its discretion.

(4) **PROCEEDINGS AGAINST A SURETY.** A surety on an undertaking is subject to the jurisdiction of the trial court and irrevocably appoints the clerk of that court as the surety's agent for service of any papers affecting his or her liability on the undertaking. A person may seek to enforce the surety's liability by filing a motion in the action or proceeding in the trial court in which the undertaking was filed.

(5) **PUBLIC OFFICIALS.** A person or agency suing or being sued in an official public capacity is not required to execute an undertaking as a condition for relief under this section unless, except as provided in s. 655.27 (5) (a) 3, required by the court in its discretion.

(6) **SURETIES ON UNDERTAKINGS.** A surety shall file with the undertaking an affidavit that the surety has a net worth in property within this state not exempt from execution which exceeds the amount of the undertaking, except as provided in s. 632.17 (2). The respondent may by motion object to the sufficiency of a surety within 10 days after service of a copy of the undertaking.

History: 1977 c. 187; 1979 c. 32; 1979 c. 110 s. 60 (9); 1983 a. 158, 219; Sup. Ct. Order, 130 W (2d) xxii; 1985 a. 332.

Judicial Council Note, 1986: Sub. (2) (am) carries forward the authority of trial courts to hear and determine motions for relief from judgment during the pendency of an appeal. Authority of the appellate court to hear and determine such motions under prior sub. (2) (a) 4 has been repealed. [Re Order eff. 7-1-86]

Postjudgment order of circuit court denying motion under (2) (a) 4 [now (2) (am)] is not reviewable on appeal from judgment. Chicago & N.W.R.R. v. Labor & Ind. Rev. Comm. 91 W (2d) 462, 283 NW (2d) 603 (Ct. App. 1979).

Under (1) and 808.075 (1), circuit court has authority to confirm sheriff's sale even though appeal of judgment of foreclosure and sale is pending. Community Nat. Bank v. O'Neill, 157 W (2d) 244, 458 NW (2d) 385 (Ct. App. 1990).

808.075 Permitted court actions pending appeal. (1) In any case, whether or not an appeal is pending, the circuit court may act under ss. 804.02 (2), 805.15, 805.16, 805.17 (3), 806.07, 806.08, 806.15 (2), 806.24 (4), 808.07 (1) and (2) and 809.12.

(2) In a case appealed under s. 809.30, the circuit court retains the power to act on all issues until the notice of appeal has been filed with the clerk of the trial court. Thereafter, the circuit court may act only as provided in subs. (1) and (4).

(3) In a case not appealed under s. 809.30, the circuit court retains the power to act on all issues until the record has been transmitted to the court of appeals. Thereafter, the circuit court may act only as provided in subs. (1) and (4).

(4) The circuit court may act as to the following despite the pendency of an appeal:

(a) In a case under ch. 48:

1. Review of actions by a guardian under s. 48.023.
2. Review of nonsecure custody orders under s. 48.207.
3. Review of secure detention orders under s. 48.208 and secure detention status reviews under s. 48.209 (1) (e).

4. Hearing for child held in custody under s. 48.21.
5. Hearing upon involuntary removal under s. 48.305.
6. Revision of dispositional order under s. 48.363.
7. Extension of dispositional order under s. 48.365, unless s. 48.362 applies.
8. Review of permanency plan under s. 48.38 (5).
9. Release of confidential information under s. 48.396 or 48.78.
- (b) In a case under ch. 51:
 1. Disposition, modification and extension of commitment under s. 51.20 (13).
 2. Reexamination of commitment under s. 51.20 (16).
 3. Enforcement of patient rights under s. 51.61.
 4. Commitment, conditional release, recommitment and discharge under s. 971.17 of a person found not guilty by reason of mental disease or defect.
- (c) In a case under ch. 55:
 1. Review, modification or termination of protective placement under s. 55.06 (10).
 2. Hearing required upon transfer under s. 55.06 (9).
 3. Enforcement of patient's rights under s. 55.07.
- (d) In a case under ch. 767:
 1. Revision of orders for legal custody or periods of physical placement under s. 767.24, 767.325, 767.327 or 767.329.
 2. Issuance or modification of orders for visitation rights under s. 767.245.
 3. Annual adjustment of child support under s. 767.33.
 4. Revision of judgment for child support, maintenance payments or family support payments under s. 767.32 or 767.51.
 5. Order for temporary maintenance, temporary child support or for suit money, counsel fees and disbursements in the appellate court under s. 767.39.
 6. Property division, where the court has expressly or impliedly reserved jurisdiction, provided the court does not revise or modify its final division of property.
 7. Vacation or modification of judgment under s. 767.37 (2).
 8. Revocation of judgment under s. 767.38.
 9. Enforcement of payments under s. 767.30 or 767.51.
 10. Enforcement of orders under s. 767.305 or 767.51.
 11. Enforcement or modification of assignments under s. 767.265 or 767.51.
- (e) In a case under chs. 701 or 853 to 879:
 1. Any matter, unless the appellate court directs the trial court not to act on specific issues or the trial court declines to act because the matter directly affects the issues on appeal.
- (f) In a case under ch. 880:
 1. Review a bond under s. 880.125, 880.13 or 880.60 (9).
 2. Release of deposited funds under s. 880.13 (2) (b).
 3. Order for visitation by grandparents under s. 880.155.
 4. Appointment of successor guardian under s. 880.17.
 5. Approval of guardian's exercise of marital property rights under s. 880.173.
 6. Approval of management of property under s. 880.19.
 7. Direction for use of estate for benefit of wards under s. 880.21.
 8. Examination of annual accounts and assets under s. 880.25.
 9. Removal of guardian under s. 880.251.
 10. Determination of petitions for instructions to guardian.
 11. Termination of guardianship under s. 880.26.
 12. Restoration of specific legal rights under s. 880.33 (3).
 13. Authorization of purchase of home for ward under s. 880.60 (15) (a).

(g) In a criminal case:

1. Release on bond under s. 809.31 or 969.01 (2).
 2. Modification or revocation of bond under s. 969.01 (2) (e) or 969.08.
 3. Imposition of sentence upon revocation of probation under s. 973.10 (2) (a).
 4. Determination of sentence credit under s. 973.155.
 5. Modification of a condition of probation or extension of probationary term under s. 973.09 (3) (a).
 6. Modification of sentence.
 7. Commitment, conditional release, recommitment and discharge under s. 971.17 of a person found not guilty by reason of mental disease or defect.
- (5) Notwithstanding the limitations of this section, any party may petition the appellate court for remand to the circuit court for action upon specific issues.
- (6) In addition to sub. (5), the appellate court may remand the record to the circuit court for additional proceedings while the appeal is pending.
- (7) Upon completion of an action taken by the circuit court under sub. (1), (4), (5) or (6) of this section, the clerk shall send a copy of the judgment or order to the appellate court.

History: Sup. Ct. Order, 146 W (2d) xvi; 1989 a. 86

Judicial Council Note, 1988: In *In re Marriage of Hengel v Hengel*, 120 Wis. 2d 522, 355 N. W. 2d 846 (Ct. App. 1984), the court of appeals held that since there is no specific statutory exception, the trial court had no competence to enter an order requiring the husband to contribute to his wife's attorney's fees for representation in the trial court after a notice of appeal had been filed. Section 808.075 is created to specify the actions that may be taken in circuit court after a notice of appeal has been filed in cases appealed under s. 809.30 and after transmittal of the record to an appellate court in other cases.

Matters affecting trusts and estates have historically been treated as a series of special proceedings, and the trial court is charged with ongoing supervision and administrative duties affecting such matters. Because of the ongoing involvement of the trial court, sub. (4) (e) reserves full competence to act, unless it is determined that competence should be restricted as to specific issues [Re Order effective Jan. 1, 1989]

See note to 808.07, citing *Community Nat. Bank v. O'Neill*, 157 W (2d) 244, 458 NW (2d) 385 (Ct. App. 1990).

See note to 805.16 citing *Schmidt v. Smith*, 162 W (2d) 363, 469 NW (2d) 855 (Ct. App. 1991).

When court of appeals remands an appeal to the trial court for Girouard determination, court of appeals has jurisdiction to review that trial court decision without need for filing second notice of appeal. *State v. Jacobus*, 167 W (2d) 230, 481 NW (2d) 642 (Ct. App. 1992). See also note to 814.29 citing *Girouard v. Jackson Circuit Ct.* 155 W (2d) 148, 454 NW (2d) 792 (1990).

808.08 Further proceedings in trial court. When the record and remittitur are received in the trial court:

(1) If the trial judge is ordered to take specific action, the judge shall do so as soon as possible.

(2) If a new trial is ordered, the trial court, upon receipt of the remitted record, shall place the matter on the trial calendar.

(3) If action or proceedings other than those mentioned in sub. (1) or (2) is ordered, any party may, within one year after receipt of the remitted record by the clerk of the trial court, make appropriate motion for further proceedings. If further proceedings are not so initiated, the action shall be dismissed except that an extension of the one-year period may be granted, on notice, by the trial court, if the order for extension is entered during the one-year period.

History: 1977 c. 187.

"Further proceedings" under 801.58 (7) and 808.08 (3) have same definition. *State ex rel. Ondrasek v. Circuit Ct.*, 133 W (2d) 177, 394 NW (2d) 912 (Ct. App. 1986)

808.09 Reversal, affirmance or modification of judgment.

Upon an appeal from a judgment or order an appellate court may reverse, affirm or modify the judgment or order as to any or all of the parties; may order a new trial; and, if the appeal is from a part of a judgment or order, may reverse, affirm or modify as to the part appealed from. In all cases an appellate court shall remit its judgment or decision to the court below

and thereupon the court below shall proceed in accordance with the judgment or decision.

History: 1977 c. 187

Court of Appeals may not direct circuit court to enter judgment of conviction of lesser included offense when jury verdict of guilty on greater offense is reversed for insufficiency of evidence and jury was not instructed on lesser included offense *State v Myers*, 158 W (2d) 356, 461 NW (2d) 777 (1990).

808.10 Review by the supreme court. A decision of the court of appeals is reviewable by the supreme court only upon a petition for review granted by the supreme court. The petition for review shall be filed in the supreme court within 30 days of the date of the decision of the court of appeals.

History: 1977 c. 187; 1979 c. 192

Judicial Council Note, 1979: This section is amended to more properly describe the function of the supreme court in reviewing decisions of the court of appeals. The supreme court decides whether to accept jurisdiction of a case from the court of appeals after a petition to review, not a petition to appeal, is filed with the supreme court. See s. 809.62 [Bill 396-S].

"Decision" under this section is the final decision disposing of case. In *Interest of A. R.* 85 W (2d) 444, 270 NW (2d) 581 (1978).

If petition is not received by clerk of supreme court within 30 days, court loses subject matter jurisdiction. The objection is not subject to waiver, and will be raised on the court's own motion. *First Wis. Nat. Bank of Madison v. Nicholaou*, 87 W (2d) 360, 274 NW (2d) 704 (1979).

Untimely service of petition filed under this section does not affect jurisdiction, but opposing party may move to dismiss under Rule 809.83 (2). *State v. Rhone*, 94 W (2d) 682, 288 NW (2d) 862 (1980).

Petitions for review by the Wisconsin supreme court. 1979 WLR 1176.

808.11 Printing specifications. Briefs and appendices in cases before the supreme court shall be printed, typed, duplicated or reproduced clearly on paper of permanent quality, and in conformity with such rules as the court may prescribe with regard to organization, binding, color of print, and size of print, paper and margin.

History: 1975 c. 160; 1977 c. 187 s. 83; Stats. 1977 s. 808.11.