

## CHAPTER 861

## PROBATE — FAMILY RIGHTS

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## SUBCHAPTER I

## INTEREST IN MARITAL PROPERTY

**NOTE:** 1985 Wis. Act 37, which created ss. 861.03 to 861.13, contains explanatory notes. These notes also may be found in legislative council information memorandum 85-7, part 1.

**861.01 Ownership of marital property at death. (1) SURVIVING SPOUSE'S ONE-HALF INTEREST IN MARITAL PROPERTY.** Upon the death of either spouse, the surviving spouse retains his or her undivided one-half interest in each item of marital property. The surviving spouse's undivided one-half interest in each item of marital property is not subject to administration. Ownership and management and control rights are set forth under ss. 857.01 and 857.015.

**(2) INTEREST OF A 3RD PARTY IN MARITAL PROPERTY.** A 3rd party who is a successor in interest to all or part of the decedent's 50% interest in marital property is a tenant in common with the surviving spouse.

**(3) PERSONAL INJURY DAMAGES; LOST EARNINGS.** To the extent that marital property includes damages for loss of future income arising from a personal injury claim of the surviving spouse, the surviving spouse is entitled to receive as individual property that portion of the award that represents an income substitute after the death of the other spouse.

**History:** 1983 a 186; 1985 a 37; 1987 a 393

New probate and non-probate property elections under Wisconsin's marital property act Erlanger and Weisberger. WBB Oct. and Nov. 1986.

**861.015 Satisfaction of nonholding spouse's marital property interest in certain business property. (1)** If following the death of a spouse property is subject to a directive under s. 857.015, the marital property interest of the nonholding spouse in the property shall be satisfied within one year after the decedent spouse's death from other property which is of equal clear market value at the time of satisfaction. Except as provided under sub. (3), if the interests of the nonholding spouse under this section and s. 861.02 (2) are not satisfied within one year after the decedent spouse's death, this section does not apply and the nonholding spouse's marital property interest in the property subject to the directive continues as if the directive had not been made.

**(2)** For purposes of this section, property subject to a directive is valued by its clear market value on the date of the decedent's death. Satisfaction of the nonholding spouse's marital property interest in the property subject to the directive shall be based on that value, plus any income from the property subject to the directive after the death of the decedent and before satisfaction. For purposes of determining the income from the property subject to a directive, such

property shall be treated as a legacy or devise of property other than money under s. 701.20 (5) (b) 1.

**(3)** If the interests of the nonholding spouse under this section and s. 861.02 (2) are not satisfied within one year after the decedent spouse's death because the clear market value of the property subject to the directive has not been determined, the court having jurisdiction of the decedent spouse's estate shall:

(a) Order that the interests of the nonholding spouse shall be satisfied after the determination of clear market value, at a date specified by the court; or

(b) Order that the interests of the nonholding spouse shall be satisfied before the determination of clear market value based on an estimate of the clear market value, subject to any necessary adjustment upon final determination of clear market value.

**(4)** The following property is not available to satisfy the nonholding spouse's marital property interest in the property subject to the directive:

(a) Property included in an order, or extension or revision of an order, for an allowance under s. 861.31 made before satisfaction of the nonholding spouse's interest.

(b) Property selected under s. 861.33 before satisfaction of the nonholding spouse's interest.

(c) Property included in an order for an allowance under s. 861.35 made before satisfaction of the nonholding spouse's interest.

**(5)** Satisfaction of a nonholding spouse's marital property interest under this section shall not adversely affect any of the following:

(a) The nonholding spouse's marital property interest in property not subject to the directive.

(b) The nonholding spouse's election under s. 861.02 of deferred marital property other than deferred marital property subject to the directive.

**History:** 1987 a 393.

**861.02 Election of deferred marital property. (1)** In addition to the right to elect under s. 861.03 and unless barred under s. 861.13, at the death of a spouse whose domicile is in this state the surviving spouse may elect, under s. 861.11, not more than a one-half interest in any or all items of the deferred marital property then owned by the decedent spouse which is subject to administration, reduced by any of that elected property which is used to satisfy obligations for which the property is available under s. 859.18. Property elected by a surviving spouse under this subsection, except to the extent that no other property is available to satisfy the obligation, is not subject to claims for the decedent's funeral expenses, to

federal death taxes against the decedent's estate or to taxes imposed under subch. III of ch. 72, 1989 stats., against the decedent's estate. Failure of a surviving spouse to elect under this subsection is not a transfer of property and does not result in a gift from the surviving spouse to the decedent spouse's estate or any beneficiary of the estate.

**(1m)** For purposes of the election under sub. (1), deferred marital property then owned by the decedent spouse which is subject to administration includes real property located in another state and owned by the decedent spouse at his or her death which:

(a) Would be classified as deferred marital property, if located in this state; and

(b) Would be subject to administration, if located in this state.

**(2)** (a) If the deferred marital property subject to administration includes property which is subject to a directive under s. 857.015, an election under sub. (1) against such property shall be satisfied within one year after the decedent spouse's death from other property which is of equal clear market value at the time of satisfaction. Except as provided in par. (c), if the interests of the surviving spouse under this subsection and s. 861.015 are not satisfied within one year after the decedent spouse's death, this subsection does not apply and the surviving spouse's election against the property subject to the directive shall be satisfied as if the directive had not been made.

(b) For purposes of this subsection, property subject to a directive is valued by its clear market value on the date of the decedent's death. Satisfaction of the nonholding spouse's election against the property subject to a directive shall be based on that value, plus any income from the property subject to the directive after the death of the decedent and before satisfaction. For purposes of determining the income from the property subject to a directive, such property shall be treated as a legacy or devise of property other than money under s. 701.20 (5) (b) 1.

(c) If the interests of the nonholding spouse under this subsection and s. 861.015 are not satisfied within one year after the decedent spouse's death because the clear market value of the property subject to the directive has not been determined, the court having jurisdiction of the decedent spouse's estate shall:

1. Order that the interests of the nonholding spouse shall be satisfied after the determination of clear market value, at a date specified by the court; or

2. Order that the interests of the nonholding spouse shall be satisfied before the determination of clear market value based on an estimate of the clear market value, subject to any necessary adjustment upon final determination of clear market value.

(d) The following property is not available to satisfy the election against the property subject to the directive:

1. Property included in an order, or extension or revision of an order, for an allowance under s. 861.31 made before satisfaction of the nonholding spouse's interest.

2. Property selected under s. 861.33 before satisfaction of the nonholding spouse's interest.

3. Property included in an order for an allowance under s. 861.35 made before satisfaction of the nonholding spouse's interest.

(e) Satisfaction of a surviving spouse's interests under this subsection shall not adversely affect any of the following:

1. The surviving spouse's marital property interest in property not subject to the directive.

2. The surviving spouse's election under sub. (1) of property other than property subject to the directive.

**History:** 1983 a. 186; 1985 a. 37 ss. 144, 145; Stats. 1985 s. 861.02; 1987 a. 393; 1991 a. 224, 301, 315

**NOTE:** 1991 Wis. Act 301, which affected this section, contains extensive legislative council notes.

Deferred marital property under (1) is property subject to administration for all purposes including payment of claims under 879.63. In Matter of Estate of Moccerro, 168 W (2d) 313, 483 NW (2d) 310 (Ct. App. 1992).

**861.03 Election of augmented marital property estate.** In addition to the right to elect under s. 861.02 (1), at the death of a spouse whose domicile is in this state the surviving spouse may, under s. 861.11, elect not more than one-half of the augmented marital property estate. The augmented marital property estate consists of the value of property described under s. 861.05. The amount elected is subject to reduction as provided under s. 861.07. The amount elected shall be satisfied and apportioned as provided under s. 861.09.

**History:** 1985 a. 37; 1987 a. 393.

**861.05 Transfers included in augmented marital property estate.** (1) In this section:

(a) "Bona fide purchaser" has the meaning given under s. 766.57

(b) "Property transferred by the decedent spouse" includes contracts or other arrangements under which the property is payable to a person other than the surviving spouse or the decedent spouse's estate at the death of the decedent spouse.

**(2)** For the purpose of determining the augmented marital property estate under s. 861.03, a surviving spouse may include the value of the decedent spouse's deferred marital property transferred by the decedent spouse without the consent of the surviving spouse to a person other than the surviving spouse or the decedent spouse's estate and other than a bona fide purchaser if any of the following applies:

(a) The decedent retained at the time of death the possession or enjoyment of or the right to income from the property.

(b) The decedent retained at the time of death a power alone or in conjunction with another person to amend, revoke or terminate the transfer or to consume, invade or dispose of the principal for the decedent's benefit.

(c) The decedent held the property at the time of death with a person other than the surviving spouse with the right of survivorship.

(d) The decedent retained at the time of death the right to make the property payable to a person other than the surviving spouse, including the right to designate a person other than the surviving spouse as the beneficiary of any life insurance, accident insurance, joint annuity, pension or similar arrangement.

**(3)** (a) Property is valued under this section as of the decedent's death. The value of property is included in this section only to the extent that the decedent did not receive adequate consideration for the transfer.

(b) The surviving spouse's beneficial interest in a trust, life estate, insurance policy, retirement plan, annuity or other arrangement described in this section is valued as follows:

1. A mandatory income interest is valued in accordance with valuation tables used by the internal revenue service for estate tax purposes.

2. A mandatory income interest together with a general testamentary power of appointment is valued at 100% of the trust.

3. A lifetime unlimited power of withdrawal is valued at 100% of the property subject to the power.

4. A discretionary or any other beneficial interest or power is valued at zero.

(4) This section only applies to transfers on or after April 4, 1984, for which the instrument necessary to effect the transfer was executed by the decedent spouse on or after April 4, 1984, or transfers for which the instrument necessary to effect the transfer was executed by the decedent spouse before April 4, 1984, and the dispositive provisions were materially changed on or after April 4, 1984.

History: 1985 a. 37; 1991 a. 301

NOTE: 1991 Wis. Act 301, which affected this section, contains extensive legislative council notes.

**861.07 Property of surviving spouse charged against elective share of augmented marital property estate. (1)** In this section:

(a) "Property derived or received from the decedent" includes but is not limited to the following:

1. Property held at the time of the decedent's death by the decedent and the surviving spouse with the right of survivorship.

2. Property appointed to or for the spouse by the decedent's exercise of a general or special power of appointment.

(b) "Property derived or received from the decedent" does not include property acquired by the surviving spouse under s. 861.02 (1).

(2) If there is an election of the augmented marital property estate by the surviving spouse under s. 861.03, the share elected shall be reduced by the value of the following property:

(a) Property of the decedent spouse transferred to or for the surviving spouse by will or under intestate succession.

(am) Property transferred to or for the surviving spouse at or because of the decedent's death, to the extent that the property was derived or received from the decedent by means other than testate or intestate succession without adequate consideration.

(b) Property owned by the surviving spouse at the decedent's death, to the extent that the property was derived or received from the decedent without adequate consideration.

(c) Property transferred by the surviving spouse to any person other than the decedent at any time during marriage, to the extent that the property was derived or received from the decedent without adequate consideration and to the extent that the property was transferred without the receipt of adequate consideration.

(2m) The amount of the reduction under sub. (2) shall be decreased by one-half the value of the property included in the reduction which is deferred marital property or which would have been deferred marital property if retained by the decedent, except property described in sub. (2r).

(2r) If property described under this section is a joint tenancy exclusively between spouses which is governed by ch. 700, one-half of the joint tenancy transfers to the donee spouse at the death of the decedent spouse and shall be valued as of that date.

(3) Property described under this section which is owned by the surviving spouse at the decedent's death, which is transferred to the surviving spouse at or because of the decedent's death or which is transferred to the surviving spouse by will or intestate succession is valued as of the date of the decedent's death. Property described under this section which has been transferred by the surviving spouse is valued at the time the transfer became irrevocable or at the decedent's death, whichever occurs first. The surviving spouse's beneficial interest in a trust, life estate, insurance policy, retirement plan, annuity or other arrangement described in this section is valued as follows:

(a) A mandatory income interest is valued in accordance with valuation tables used by the internal revenue service for estate tax purposes.

(b) A mandatory income interest together with a general testamentary power of appointment is valued at 100% of the trust.

(c) A lifetime unlimited power of withdrawal is valued at 100% of the property subject to the power.

(d) A discretionary or any other beneficial interest or power is valued at zero.

(4) For the purpose of this section, the surviving spouse has the burden of proving that property owned by him or her at the decedent's death or property transferred by him or her during the marriage was not derived or received from the decedent.

History: 1985 a. 37; 1987 a. 393 s. 53; 1991 a. 301

**861.09 Satisfaction and apportionment of augmented marital property estate. (1)** After a hearing, the court shall determine the amount remaining after reducing the surviving spouse's share of the augmented marital property estate under s. 861.07 and shall order that the amount be satisfied as provided in sub. (2).

(2) The amount remaining after reducing the surviving spouse's share of the augmented marital property estate under s. 861.07 shall be satisfied, in proportion to the percentage elected under s. 861.03, from each item of property the value of which was included under s. 861.05 to determine the value of the augmented marital property estate, apportioned among transferees of the property in proportion to the value of their interests in the property. Only the original transferees from or appointees of the decedent, and any donees of those transferees to the extent the donees have the property or its proceeds, are subject under this section to contribution to satisfy the election of the augmented marital property estate. A person liable for contribution may satisfy the contribution with the property transferred to him or her or by paying the value of the property as computed under s. 861.03. Failure of a surviving spouse to seek contribution from a person liable for contribution is not a transfer of property and does not result in a gift from the surviving spouse to the person liable for contribution. Satisfaction of the election of the augmented marital property estate under this section may not adversely affect the interest of a bona fide purchaser under s. 766.57 (1) and (2).

History: 1985 a. 37; 1991 a. 301

**861.11 Procedure for electing. (1)** A surviving spouse who wishes to elect under s. 861.02 (1) or 861.03 or both shall, for each election, file a written instrument of election with the court in which the decedent's estate is being administered. The surviving spouse shall deliver a copy of the written instrument to any personal representative or special administrator of the decedent spouse. If no personal representative or special administrator has been appointed, the court shall appoint a special administrator under s. 867.07 (7).

(2) An election under s. 861.02 (1) or 861.03 may be filed by a guardian on behalf of a spouse or by a guardian ad litem. A guardian or guardian ad litem may elect only if additional assets are needed for the reasonable support of the surviving spouse, taking into account the probable needs of the spouse, the provisions of the will, any nonprobate property arrangements made by the decedent for the support of the spouse and any other assets available for the spouse's support. An election by a guardian ad litem is subject to the approval of the court having jurisdiction of the decedent spouse's estate.

(3) (a) Except as provided in pars. (b) and (c), no written election under sub. (1) may be filed or delivered later than 6 months after the date of the decedent spouse's death.

(b) If within 6 months after the date of the decedent spouse's death the surviving spouse files a petition for extension and notifies all interested parties, the court having jurisdiction of the decedent spouse's estate may extend the 6-month period for additional time as the court considers just, because of the filing of a petition for appointment of a guardian for an incompetent surviving spouse within the 6-month period, a contest of the will, a proceeding to obtain a judicial construction of the will or any other special circumstance justifying a delay in delivery of an election.

(c) If a will is admitted to probate later than 4 months after the date of the decedent spouse's death and if the surviving spouse files a petition for extension within 6 months after the date of admission, the court having jurisdiction over the decedent spouse's estate may extend the 6-month period for additional time as the court considers just.

(4) Within 3 months after filing an election, the surviving spouse shall commence a separate action in circuit court against any person who may be liable for contribution under s. 861.09.

(5) If the surviving spouse dies before filing a written election under sub. (1) or to approval by the court of an election filed by a guardian or guardian ad litem, the right to election ceases with death.

History: 1985 a. 37; 1987 a. 393 s. 53

#### 861.13 Barring election of certain property at death. (1)

(a) In this section, "property in joint names" means any property held or owned under any form of ownership with the right of survivorship, including survivorship marital property, property which passes to the surviving spouse as provided in s. 766.58 (3) (f), property held in conventional joint tenancy, property held in cotenancy with a remainder to the survivor, a stock, bond or bank account in the name of 2 or more persons payable to the survivor, a U.S. government bond in coownership form or payable on death to a designated person and a share in a credit union, savings bank or savings and loan association payable on death to a designated person or in joint form.

(b) The right of the surviving spouse to elect under s. 861.02 (1) is barred if the surviving spouse receives at least one-half of the total of the following property, such property to be reduced by the amount of the federal estate tax payable by reason of such property:

1. The net estate.
2. A joint annuity furnished by the decedent.
3. Proceeds of a life insurance policy in which the decedent had an ownership interest at death.
4. A transfer within 2 years of death to the extent to which the decedent did not receive consideration in money or money's worth.
5. A transfer by the decedent during lifetime if the decedent retained power, alone or in conjunction with any person, to alter, amend, revoke or terminate the transfer or to designate the beneficiary.
6. A payment from the decedent's employer, from a plan created by the employer or under a contract between the decedent and the decedent's employer, except for a worker's compensation or social security payment.
7. Property appointed by the decedent by will or by a deed executed within 2 years of death, whether the power is general or special, if the property is effectively appointed in favor of the surviving spouse.

8. Property in joint names of the decedent and one or more other persons except any property attributable to consideration furnished by any person other than the decedent.

(c) For the purpose of this subsection:

1. The surviving spouse receives any property with respect to which he or she is given all of the income and a general power to appoint the principal.

2. The surviving spouse receives life insurance proceeds settled by the decedent on option if the surviving spouse is entitled to the interest and has a general power to appoint the proceeds or to withdraw proceeds, or if the surviving spouse is entitled to an annuity for life or to instalments of the entire principal and interest for any period equal to or less than the normal life expectancy of the spouse.

(2) A surviving spouse who unlawfully and intentionally killed the decedent spouse may not elect under s. 861.02 (1) or 861.03 Section 852.01 (2m) (b) to (c) applies to this subsection.

History: 1985 a. 37; 1987 a. 222; 1987 a. 393 s. 53; 1991 a. 221.

#### 861.17 Rights in property transferred in fraud of surviving spouse. (1)

Nothing in this chapter precludes a court in an equitable proceeding from subjecting to the rights of the surviving spouse under ch. 852 and this chapter any property arrangement made by the decedent in fraud of those rights. A property arrangement in fraud of the rights of the surviving spouse means any of the following:

(a) Any transfer or acquisition of property, regardless of the form or type of property rights involved, made by the decedent during marriage or in anticipation of marriage for the primary purpose of defeating the rights of the surviving spouse under ch. 852 and this chapter.

(b) Any breach of the good faith duty imposed by s. 766.15 made for the primary purpose of defeating the rights of the surviving spouse in or to marital property.

(2) An arrangement made before marriage, or within one year after marriage, or prior to April 1, 1971, to provide for issue by a prior marriage is not a fraudulent property arrangement within the meaning of this section.

(3) If the spouse is successful in an action to reach fraudulent property arrangements, recovery is limited to the share the spouse would receive under ch. 852 and this chapter. Other rules of this chapter apply so far as possible. Recovery forfeits any power of appointment which the surviving spouse possesses over the remaining portion of the fraudulently arranged property, except a special power.

(3m) If the spouse is successful in an action to reach fraudulent property arrangements involving marital property, recovery is limited to the surviving spouse's interest in the marital property. Other rules of this chapter apply so far as possible. Recovery forfeits any power of appointment which the surviving spouse possesses over the remaining portion of the fraudulently arranged marital property, except a special power.

(4) The surviving spouse has no rights against any person dealing with the property without actual knowledge, or receipt of written notice, of the claim of the spouse. A person who has knowledge of facts and circumstances sufficient to put him on inquiry as to a claim by the spouse does not have actual knowledge and is not required to make further inquiry. This subsection does not protect a gratuitous donee from the original beneficiary of the fraudulent arrangement.

(5) Every such suit must be brought within 3 years of decedent's death, but may be barred by laches at an earlier date.

History: 1983 a. 186; 1985 a. 37 s. 187

SUBCHAPTER II  
OTHER RIGHTS, ALLOWANCES AND  
EXEMPTIONS

**861.20 Surviving spouse's right in nondomiciliary decedent's real property in this state.** (1) If a married person who does not have a domicile in this state dies and leaves a valid will disposing of real property in this state which is not the community property or marital property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in that property against the will of the decedent as if the property were located in the decedent's domicile at the decedent's death. The procedure of the decedent's domicile for electing against the will applies to such an election.

(2) If a married person who does not have a domicile in this state dies and has an interest in real property in this state that is not disposed of by will, the surviving spouse has the same right to the property under intestate succession as if the property were located in the decedent's domicile at decedent's death.

History: 1985 a. 37; 1987 a. 393.

**861.31 Allowance to family during administration.** (1) The court may, without notice or on such notice as the court directs, order payment by the personal representative or special administrator of an allowance as it determines necessary or appropriate for the support of the surviving spouse and any minor children of the decedent during the administration of the estate. In making or denying the order the court shall consider the size of the probate estate, other resources available for support, existing standard of living, and any other factors it considers relevant.

(2) The allowance may be made to the spouse for support of the spouse and any minor children of the decedent, or separate allowances may be made to the spouse and to the minor children of the decedent or their guardian if the minor children do not reside with the surviving spouse or if for any other reason the court finds separate allowances advisable. If there is no surviving spouse the allowance may be made to the minor children of the decedent or to their guardian.

(3) The initial order for support may not exceed one year but may be extended for additional periods of not to exceed one year at a time, and is subject to revision or termination at any time by further order of the court.

(4) The court may direct that the allowance be charged against income or principal, either as an advance or otherwise, but in no event may an allowance for support of minor children of the decedent be charged against the income or principal interest of the surviving spouse. The court may direct that the allowance for support of the surviving spouse, not including any allowance for support of minor children, be applied against any right of the surviving spouse to elect under ss. 861.02 (1) and 861.03.

History: 1971 c. 40; 1991 a. 301.

NOTE: 1991 Wis. Act 301, which affected this section, contains extensive legislative council notes.

Widow's allowances and the IRC. Miller, 54 MLR 193

**861.33 Selection of personalty by surviving spouse.** (1) (a) Subject to this section, in addition to all allowances and distributions, the surviving spouse may file with the court a written selection of the following personal property, which shall thereupon be transferred to the spouse by the personal representative:

1. Wearing apparel and jewelry held for personal use by the decedent or the surviving spouse;
2. Automobile;

3. Household furniture, furnishings and appliances; and
4. Other tangible personalty not used in trade, agriculture or other business, not to exceed \$1,000 in inventory value.

(b) The selection in par. (a) may not include items specifically bequeathed except that the surviving spouse may in every case select the normal household furniture, furnishings and appliances necessary to maintain the home. For this purpose antiques, family heirlooms and collections which are specifically bequeathed are not classifiable as normal household furniture or furnishings.

(2) If it appears that claims may not be paid in full, the court may upon petition of any creditor limit the transfer of personalty to the spouse under this section to items not exceeding \$3,000 in aggregate inventory value until such time as claims are paid in full or the court otherwise orders; or the court may require the spouse to retransfer property in excess of \$3,000 or, at the option of the spouse, pay the excess in value over this amount.

(3) The surviving spouse may select items not specifically bequeathed of the type specified under sub. (1) (a) 4 exceeding in value the \$1,000 limit or obtain the transfer of items exceeding the limit set by the court under sub. (2), by paying to the personal representative the excess of inventory value over the respective limit.

(4) The personal representative has power, without court order, to execute appropriate documents to effect transfer of title to any personal property selected by the spouse under this section. A person may not question the validity of the documents of transfer or refuse to accomplish the transfer on the grounds that the personal representative is also the surviving spouse.

History: 1973 c. 233; 1983 a. 192; 1991 a. 301.

This section is constitutional. In Matter of Estate of Eisenberg, 90 W (2d) 620, 280 NW (2d) 359 (Ct. App. 1979)

**861.35 Special allowance for support of spouse and support and education of minor children.** (1) If the decedent is survived by a spouse or by minor children, the court may order an allowance for the support and education of each minor child until he or she reaches a specified age, not to exceed 18, and for the support of the spouse. This allowance may be made whether the estate is testate or intestate. If the decedent is not survived by a spouse, the court also may allot directly to the minor children household furniture, furnishings and appliances. No allowance may be made under this section if any of the following apply:

(a) The decedent has amply provided for each child and for the spouse by the terms of his or her will and the estate is sufficient to carry out the terms after payment of all debts and expenses, or support and education have been provided for by any other means.

(b) In the case of minor children, if the surviving spouse is legally responsible for support and education and has ample means to provide them in addition to his or her own support.

(c) In the case of the surviving spouse, if he or she has ample means to provide for his or her support.

(2) The court may set aside property to provide an allowance and may appoint a trustee to administer the property, subject to the continuing jurisdiction of the court. If a child dies or reaches 18, or if at any time the property held by the trustee is no longer required for the support of the spouse or the support and education of the minor child, any remaining property is to be distributed by the trustee as directed by the court in accordance with the terms of the decedent's will or to the heirs of the decedent in intestacy or to satisfy unpaid claims of the decedent's estate.

(3) In making an allowance under this section, the court shall consider the effect on claims under s. 859.25 and shall

balance the needs of the spouse or minor child against the nature of the creditors' claims in setting the amount allowed hereunder. The court shall also consider the size of the estate, other resources available for support, the existing standard of living and any other factors it considers relevant. The court may direct that the allowance to the surviving spouse, not including any allowance for the support and education of minor children, be applied against any right of the surviving spouse to elect under ss. 861.02 (1) and 861.03.

**History:** 1971 c. 213 s. 5; 1983 a. 186; 1991 a. 301.

**NOTE:** 1991 Wis. Act 301, which affected this section, contains extensive legislative council notes.

**861.41 Exemption of property to be assigned to surviving spouse.** (1) After the amount of claims against the estate has been ascertained, the surviving spouse may petition the court to set aside as exempt from the claims of creditors under s. 859.25 (1) (h) an amount of property reasonably necessary for the support of the spouse, not to exceed \$10,000 in value, if it appears that the assets are insufficient to pay all claims and allowances and still leave the surviving spouse such an amount of property in addition to selection and allowances.

(2) The court shall grant the petition if it determines that an assignment ahead of creditors is reasonably necessary for the

support of the spouse. In determining the necessity and the amount of property to be assigned, the court must take into consideration the availability of a home to the surviving spouse and all other assets and resources available for support.

(3) The assignment of property shall be applied against any right of the surviving spouse to take under the will or under the intestate succession law or to elect under ss. 861.02 (1) and 861.03.

(4) If the decedent's estate includes an interest in a home, the court may upon request of the spouse include as part or all of the property assigned to the spouse either a fee or a life interest in the home, to the extent of the decedent's interest therein. If the value of the interest in the home requested by the spouse would exceed the amount set by the court under this section, the court may nevertheless assign the interest to the spouse upon payment to the personal representative of the excess of the value of the interest over the amount set by the court. The court may require a new appraisal or use the original inventory value. Home has the same meaning as provided in s. 852.09 (2).

**History:** 1983 a. 186; 1985 a. 37; 1987 a. 393 s. 53.