

## CHAPTER 854

## TRANSFERS AT DEATH — GENERAL RULES

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**854.01 Definition.** In this chapter, “governing instrument” means a will; a deed; a trust instrument; an insurance or annuity policy; a contract; a pension, profit-sharing, retirement or similar benefit plan; a marital property agreement under s. 766.58 (3) (f); a beneficiary designation under s. 40.02 (8) (a); an instrument under ch. 705; an instrument that creates or exercises a power of appointment or any other dispositive, appointive or nominative instrument that transfers property at death.

**History:** 1997 a. 188.

**854.02 Scope.** This chapter applies to all statutes and governing instruments that transfer property at death.

**History:** 1997 a. 188.

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

**854.03 Requirement of survival by 120 hours. (1) REQUIREMENT OF SURVIVAL.** Except as provided in sub. (5), if property is transferred to an individual under a statute or under a provision in a governing instrument that requires the individual to survive an event and it is not established that the individual survived the event by at least 120 hours, the individual is considered to have predeceased the event.

**(2) CO-OWNERS WITH RIGHT OF SURVIVORSHIP.** (a) In this subsection, “co-owners with right of survivorship” includes joint tenants, owners of survivorship marital property and other co-owners of property or accounts that are held under circumstances that entitle one or more persons to all of the property or account upon the death of one or more of the others.

(b) Except as provided in sub. (5), if property is transferred under a governing instrument that establishes 2 or more co-owners with survivorship, and if it is not established that at least one of the co-owners survived the others by at least 120 hours, the property is transferred to the co-owners in proportion to their ownership interests.

**(3) MARITAL PROPERTY.** Except as provided in subs. (4) and (5), if a husband and wife die leaving marital property and it is not established that one survived the other by at least 120 hours, 50% of the marital property shall be distributed as if it were the husband’s individual property and the husband had survived, and 50% of the marital property shall be distributed as if it were the wife’s individual property and the wife had survived.

**(4) LIFE INSURANCE.** Except as provided in sub. (5), if the insured and the beneficiary under a policy of life or accident insurance have both died and it is not established that one survived the other by at least 120 hours, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary. If the policy is the marital property of the insured and of the insured’s spouse and there is no alternative beneficiary except the estate or the personal representative of the estate, the proceeds shall be distributed as marital property in the manner provided in sub. (3).

**(5) EXCEPTIONS.** This section does not apply if any of the following conditions applies:

(a) The statute or governing instrument requires the individual to survive an event by a specified period.

(b) The statute or governing instrument indicates that the individual is not required to survive an event by any specified period.

(c) The statute or governing instrument deals with simultaneous deaths or deaths in a common disaster and the provision is relevant to the facts.

(d) The imposition of a 120-hour requirement would cause a nonvested property interest or a power of appointment to fail to be valid, or to be invalidated, under s. 700.16 or under the rule against perpetuities of the applicable jurisdiction.

(e) The application of this section to more than one statute or governing instrument would result in an unintended failure or unintended duplication of a transfer.

(f) The application of this section would result in the escheat of an intestate estate under s. 852.01 (3).

**(6) EVIDENTIARY STANDARD.** Unless the statute or governing instrument provides otherwise, proof that an individual survived the period required under subs. (1) to (4) must be by clear and convincing evidence.

**(7) EXTRINSIC EVIDENCE.** Extrinsic evidence may be used to construe a governing instrument affected by this section.

**History:** 1997 a. 188.

**854.04 Representation; per stirpes; modified per stirpes; per capita at each generation; per capita. (1) BY REPRESENTATION OR PER STIRPES.** (a) Except as provided in subs. (5) and (6), if a statute or a governing instrument calls for property to be distributed to the issue or descendants of a designated person “by representation”, “by right of representation” or “per stirpes”, the property is divided into equal shares for the children of the designated person. Each surviving child and each deceased child who left surviving issue are allocated one share.

(b) The share of each deceased child allocated a share under par. (a) is divided among that person’s issue in the same manner as under par. (a), repeating until the property is fully allocated among surviving issue.

**(2) MODIFIED PER STIRPES.** (a) Except as provided in subs. (5) and (6), if a statute or a governing instrument calls for property to be distributed to the issue or descendants of a designated person by “modified per stirpes”, the property is divided into equal shares at the generation nearest to the designated person that contains one or more surviving issue. Each survivor and each deceased person in that same generation who left surviving issue are allocated one share.

(b) The share of each deceased person allocated a share in par. (a) is divided among that person's issue in the same manner as under par. (a), repeating until the property is fully allocated.

(3) PER CAPITA AT EACH GENERATION. (a) Except as provided in subs. (5) and (6), if a statute or a governing instrument calls for property to be distributed to the issue or descendants of a designated person "per capita at each generation", the property is divided into equal shares at the generation nearest to the designated person that contains one or more surviving issue. Each survivor in that generation is allocated one share, and the shares of the deceased persons in that same generation who left surviving issue are combined for distribution under par. (b).

(b) The combined share created under par. (a) is divided among the surviving issue of the persons whose shares were combined in the same manner as under par. (a), as though all of those issue were the issue of one person. The process is repeated until the property is fully allocated.

(4) PER CAPITA. Except as provided in sub. (6), if a statute or governing instrument calls for property to be distributed to a group or class "per capita", the property is divided into as many shares as there are surviving members of the group or class, and each member receives one share.

(5) CERTAIN INDIVIDUALS DISREGARDED. For the purposes of this section, all of the following apply:

(a) An individual who is deceased and who left no surviving issue is disregarded.

(b) An individual who has a surviving ancestor who is an issue of the designated person is not entitled to a share.

(6) CONTRARY INTENT. This section does not apply if the transfer is made under a governing instrument and there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

**History:** 1997 a. 188.

A will clause providing for "equal shares to the then living issue of donor's three daughter-beneficiaries in this trust, and/or the then living issue of any deceased issue of donor's three daughter-beneficiaries, by right of representation" required distribution per capita among the grandchildren and by representation among their children. In re Bowler Trust, 56 Wis. 2d 171, 201 N.W.2d 573 (1972).

**NOTE:** The preceding case was decided prior to the adoption of 1997 Wis. Act 188, which made extensive revisions to the Wisconsin Probate Code and does not relate directly to this section.

#### 854.05 No exoneration of encumbered property.

(1) DEFINITIONS. In this section:

(a) "Debt" includes accrued interest on the debt.

(b) "Encumbrance" includes mortgages, liens, pledges and other security agreements that are encumbrances on property.

(2) GENERALLY. (a) Except as provided in sub. (5), all property that is specifically transferred by a governing instrument shall be assigned to the transferee without exoneration of a debt that is secured by an encumbrance on the property.

(b) If the debt that is secured by the encumbrance on the property is paid in whole or in part out of other assets, the specifically transferred property shall be assigned to the transferee only if any of the following applies:

1. The transferee contributes to the person or entity that held the assets that were used to pay the debt an amount equal to the amount that was paid.

2. The person or entity secures the amount described in subd. 1. through a new encumbrance on the property.

(3) JOINT TENANCY; SURVIVORSHIP MARITAL PROPERTY. Except as provided in sub. (5), if all or part of a debt that is secured by an encumbrance on property in which the decedent at the time of death had an interest as a joint tenant or as a holder of survivorship marital property is paid out of other assets as the result of a claim being allowed, the person or entity that makes the payment is subrogated to all rights that the claimant had against the property.

(4) INSURANCE. Except as provided in sub. (5), if all or part of a debt that is secured by an encumbrance on the proceeds payable under a life insurance policy in which the decedent was the named

insured is paid out of other assets as the result of a claim being allowed, the person or entity that makes the payment is subrogated to all rights that the claimant had against the proceeds.

(5) CONTRARY INTENT. This section does not apply to the extent that a governing instrument, either expressly or as construed from extrinsic evidence, provides otherwise. A general directive to pay debts does not give rise to a presumption of exoneration.

**History:** 1997 a. 188.

**854.06 Predeceased transferee.** (1) DEFINITIONS. In this section:

(a) "Provision in a governing instrument" includes all of the following:

1. A gift to an individual whether or not the individual is alive at the time of the execution of the instrument.

2. A share in a class gift only if a member of the class dies after the execution of the instrument.

3. An appointment by the decedent under any power of appointment, unless the issue who would take under this section could not have been appointees under the terms of the power.

(b) "Revocable provision" means a provision that the decedent had the power to change or revoke immediately before death.

(c) "Stepchild" means a child of the decedent's surviving, deceased or former spouse, and not of the decedent.

(2) SCOPE OF COVERAGE. This section applies to revocable provisions in a governing instrument executed by the decedent that provide for an outright transfer upon the death of the decedent to any of the following persons:

(a) A grandparent of the decedent, or issue of a grandparent, subject to s. 854.21.

(b) A stepchild of the decedent, subject to s. 854.15.

(3) SUBSTITUTE GIFT TO ISSUE OF COVERED TRANSFEREE. Subject to sub. (4), if a transferee under a provision described in sub. (2) does not survive the decedent but has issue who do survive, the issue of the transferee take the transfer per stirpes, as provided in s. 854.04 (1).

(4) CONTRARY INTENT. (a) This section does not apply if there is a finding of contrary intent of the decedent. Extrinsic evidence may be used to construe that intent.

(b) If the governing instrument designates one or more persons, classes or groups of people as contingent transferees, those transferees take in preference to those under sub. (3). But if none of the contingent transferees survives, sub. (3) applies to the first group in the sequence of contingent transferees that has one or more transferees specified in sub. (2) who left surviving issue.

**History:** 1997 a. 188.

A will clause providing that if any beneficiary dies within 5 months of the testator, the deceased beneficiary's share is to be treated as if the beneficiary predeceased the testator, served to pass a deceased beneficiary's share to her children under the anti-lapse statute. Firehammer v. Marchant, 224 Wis. 2d 673, 591 N.W.2d 898 (Ct. App. 1999).

**854.07 Failed transfer and residue.** (1) Except as provided in sub. (4) and s. 854.06, if an attempted transfer under a governing instrument fails, the attempted transfer becomes part of the residue of the governing instrument. This subsection does not apply if the attempted transfer is itself a residuary transfer.

(2) Except as provided in sub. (4) and s. 854.06, if the residue of a governing instrument is to be transferred to 2 or more persons, the share of a residuary transferee that fails passes to the other residuary transferees in proportion to the interest of each in the remaining part of the residue.

(3) If a governing instrument other than a will does not effectively dispose of an asset that is governed by the instrument, that asset shall be paid or distributed to the decedent's probate estate.

(4) This section does not apply if there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

**History:** 1997 a. 188.

Under a will leaving "my homestead which I occupy at the time of my death" to a son, the home in which the testator lived when the will is executed should be

awarded to the son even though the testator became ill and was confined to a nursing home for a year prior to his death and the home was rented. *Estate of Gotthart*, 56 Wis. 2d 563, 202 N.W.2d 397 (1972).

A purported residuary clause made only specific and general bequests, making no dispositive provision for the residuum. Although contrary to the implied wish of testator, the spouse inherited the residuum. In *Matter of Estate of McWilliams*, 78 Wis. 2d 328, 254 N.W.2d 277 (1977).

**NOTE:** The preceding cases were decided prior to the adoption of 1997 Wis. Act 188, which made extensive revisions to the Wisconsin Probate Code and do not relate directly to this section.

**854.08 Nonademption of specific gifts in certain cases.** (1) **ABROGATION OF COMMON LAW.** The common law doctrine of ademption by extinction, as it might otherwise apply to the situations governed by this section, is abolished.

(2) **PROCEEDS OF SALE.** (a) Subject to sub. (6), if property that is the subject of a specific gift is sold by the person who executed the governing instrument within 2 years of the person's death, the specific beneficiary has the right to the following amounts if available under the governing instrument:

1. Any balance of the purchase price unpaid at the time of death, including any security interest in the property and interest accruing before death, together with the incidents of the specific gift.

2. A general pecuniary transfer equivalent to the amount of the purchase price paid to, or for the benefit of, the person within one year of the seller's death.

(b) Acceptance of a promissory note of the purchaser or a 3rd party is not considered payment, but payment on the note is payment on the purchase price; and for purposes of this section property is considered sold as of the date when a valid contract of sale is made. Sale by an agent of the person who executed the governing instrument or by a trustee under a revocable living trust created by the person is a sale by the person for purposes of this section.

(3) **PROCEEDS OF INSURANCE ON PROPERTY.** Subject to sub. (6), if insured property that is the subject of a specific gift is destroyed, damaged, lost, stolen or otherwise subject to any casualty compensable by insurance, the specific beneficiary has the right to the following amounts, if available under the governing instrument, reduced by any amount expended or incurred to restore or repair the property:

(a) Any insurance proceeds paid with respect to the property after the decedent's death, together with the incidents of the specific gift.

(b) A general pecuniary transfer equivalent to any insurance proceeds paid to, or for the benefit of, the decedent within one year of the decedent's death.

(4) **CONDEMNATION AWARD.** (a) Subject to sub. (6), if property that is the subject of a specific gift is taken by condemnation prior to the death of the person who executed the governing instrument, the specific beneficiary has the right to the following amounts if available under the governing instrument:

1. Any amount of the condemnation award unpaid at the time of death.

2. A general pecuniary transfer equivalent to the amount of an award paid to, or for the benefit of, the person who executed the governing instrument within one year of that person's death.

(b) In the event of an appeal in a condemnation proceeding, the award is, for purposes of this section, limited to the amount established on the appeal. Acceptance of an agreed price or a jurisdictional offer is a sale under sub. (2).

(5) **SALE OR LOSS OF PROPERTY OF AN INCOMPETENT.** Subject to sub. (6), if property that is the subject of a specific gift is sold by a guardian or conservator of the person who executed the governing instrument, or if a condemnation award or insurance proceeds are paid to a guardian or conservator, the specific beneficiary has the right to a general pecuniary transfer equivalent to the proceeds of the sale or the condemnation award, or the insurance proceeds, reduced by any amount expended or incurred to restore or repair the property if the funds are available under the governing instru-

ment. This provision does not apply if the person who executed the governing instrument, subsequent to the sale or award or receipt of insurance proceeds, is adjudicated competent and survives such adjudication for a period of one year; but in such event a sale by a guardian or conservator within 2 years of that person's death is a sale by that person for purposes of sub. (2).

(6) **LIMITATIONS.** (a) This section is inapplicable if any of the following applies:

1. The governing instrument, either expressly or as construed from extrinsic evidence, shows the intent that a transfer fail under the particular circumstances.

2. The person who executed the governing instrument gives property during the person's lifetime to the specific beneficiary with the intent of satisfying the specific gift. Extrinsic evidence may be used to construe that intent.

(b) If part of the property that is the subject of the specific gift is destroyed, damaged, sold or condemned, the specific gift of any remaining interest in the property is not affected by this section; but this section applies to the part affected by the destruction, damage, sale or condemnation.

(c) The amount that the specific beneficiary receives under subs. (2) to (5) is reduced by any expenses of the sale, by the expenses of collection of the proceeds of insurance, sale, or condemnation award and by any amount by which the income tax of the decedent or the decedent's estate is increased because of items covered by this section. Expenses include legal fees paid or incurred.

**History:** 1997 a. 188.

**854.09 Advancement; satisfaction.** (1) A gift that the decedent made during his or her lifetime, including an incomplete gift that became complete on the decedent's death, is treated as a full or partial satisfaction of a transfer at death to an heir under s. 852.01 (1) or a transferee under a governing instrument executed by the decedent only if at least one of the following applies:

(a) The governing instrument, if any, either expressly or as construed from extrinsic evidence, provides that the gift be taken into account.

(b) The decedent declared in a document, either expressly or as construed from extrinsic evidence, that the gift is in satisfaction of, or an advance against, what the transferee would receive at the decedent's death, whether or not the document was contemporaneous with the gift.

(c) The transferee acknowledged in writing before or after the decedent's death, either expressly or as construed from extrinsic evidence, that the gift is in satisfaction of, or an advance against, what the transferee would receive at the decedent's death.

(2) For partial satisfaction, property given during life is valued as of the time that the transferee came into possession or enjoyment of the property or at the death of the person who executed the governing instrument, whichever occurs first.

(3) If the transferee fails to survive the person who executed the governing instrument, the gift is treated as a full or partial satisfaction of the transfer, unless the transferor has declared otherwise in a document, either expressly or as construed from extrinsic evidence.

**History:** 1997 a. 188.

**854.10 Choice of law.** The meaning and legal effect of a governing instrument are determined by the local law of the state selected by the transferor in the governing instrument, unless the application of that law is contrary to s. 861.02 or 861.31 or any other public policy of this state otherwise applicable to the disposition.

**History:** 1997 a. 188.

**854.11 Gift of securities.** (1) **DEFINITION.** In this section, "securities" includes all of the following:

(a) Any note, stock, treasury stock, bond, debenture, evidence of indebtedness, collateral trust certificate, transferable share or voting trust certificate.

(b) Any certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease.

(c) Any interest or instrument commonly known as a security.

(d) Any certificate of interest or participation in, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the instruments or interests specified in pars. (a) to (c).

**(2) INCREASE IN SECURITIES; ACCESSIONS.** Except as provided in sub. (4), if a person executes a governing instrument that transfers securities and at the time of the execution or immediately after execution the described securities are in fact governed by the instrument, the transfer includes additional securities that are governed by the instrument at the person's death if all of the following apply:

(a) The additional securities were acquired after the governing instrument was executed.

(b) The additional securities were acquired as a result of ownership of the described securities.

(c) The additional securities are any of the following types:

1. Securities of the same organization acquired as a result of a plan of reinvestment.

2. Securities of the same organization acquired by action initiated by the organization or any successor, related or acquiring organization, excluding any acquired by exercise of purchase options.

3. Securities of another organization acquired as a result of a merger, consolidation, reorganization or other distribution by the organization or any successor, related or acquiring organization.

**(3) GIFT OF SECURITIES CONSTRUED AS SPECIFIC.** Except as provided in sub. (4), a transfer of a stated number of shares or amount of securities is construed to be a specific gift if the same or a greater number of shares or amount of the securities was governed by the instrument at the time of, or immediately after, execution of the instrument, even if the instrument does not describe the securities more specifically or qualify the description by a possessive pronoun such as "my".

**(4) CONTRARY INTENT.** This section does not apply if there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

**History:** 1997 a. 188.

**854.13 Disclaimer. (1) DEFINITIONS.** In this section:

(a) "Beneficiary under a governing instrument" includes any person who receives or might receive property under the terms or legal effect of a governing instrument.

(c) "Power" has the meaning given in s. 702.01 (4).

**(2) RIGHT TO DISCLAIM.** (a) *In general.* A person who is an heir, recipient of property or beneficiary under a governing instrument, donee of a power created by a governing instrument, appointee under a power exercised by a governing instrument, taker in default under a power created by a governing instrument or person succeeding to disclaimed property may disclaim any property, including contingent or future interests or the right to receive discretionary distributions, by delivering a written instrument of disclaimer under this section.

(b) *Joint tenants.* Upon the death of a joint tenant, a surviving joint tenant may disclaim any property that would otherwise accrue to him or her by right of survivorship and that is the subject of the joint tenancy by delivering a written instrument of disclaimer under this section.

(c) *Survivorship marital property.* Upon the death of a spouse, the surviving spouse may disclaim the decedent spouse's interest in survivorship marital property.

(d) *Partial disclaimer.* Property may be disclaimed in whole or in part, except that a partial disclaimer of property passing by a governing instrument or by the exercise of a power may not be made if partial disclaimer is expressly prohibited by the governing instrument or by the instrument exercising the power.

(e) *Spendthrift provision.* The right to disclaim exists notwithstanding any limitation on the interest of the disclaimant in the nature of a spendthrift provision or similar restriction.

(f) *Disclaimer by guardian or conservator.* A guardian of the estate or a conservator appointed under ch. 880 may disclaim on behalf of his or her ward, with court approval, if the ward is entitled to disclaim under this section.

(g) *Disclaimer by agent under power of attorney.* An agent under a power of attorney may disclaim on behalf of the person who granted the power of attorney if all of the following apply:

1. The person who granted the power of attorney is entitled to disclaim under this section.

2. The power of attorney specifically grants the power to disclaim.

(h) *After death.* A person's right to disclaim survives the person's death and may be exercised by the person's personal representative or special administrator upon receiving approval from the court having jurisdiction of the person's estate after hearing upon notice to all persons interested in the disclaimed property, if the personal representative or special administrator has not taken any action which would bar the right to disclaim under sub. (11).

**(3) INSTRUMENT OF DISCLAIMER.** The instrument of disclaimer shall do all of the following:

(a) Describe the property disclaimed.

(b) Declare the disclaimer and the extent of the disclaimer.

(c) Be signed by the disclaimant.

(d) Be delivered within the time and in the manner provided under subs. (4) and (5).

**(4) TIME FOR EFFECTIVE DISCLAIMER.** (a) *Present interest.* An instrument disclaiming a present interest shall be executed and delivered not later than 9 months after the effective date of the transfer under the governing instrument. For cause shown, the period may be extended by a court of competent jurisdiction, either within or after the 9-month period, for such additional time as the court considers just.

(b) *Future interest.* An instrument disclaiming a future interest shall be executed and delivered not later than 9 months after the event that determines that the taker of the property is finally ascertained and his or her interest indefeasibly fixed. For cause shown, the period may be extended by a court of competent jurisdiction, either within or after the 9-month period, for such additional time as the court considers just.

(c) *Future right to income or profits.* Notwithstanding pars. (a) and (b), an instrument disclaiming the future right to receive mandatory distributions of income or profits from any source may be executed and delivered at any time.

(d) *Persons under 21.* Notwithstanding pars. (a) and (b), a person under 21 years of age may disclaim at any time not later than 9 months after the date on which the person attains 21 years of age.

(e) *Interests arising by disclaimer.* Notwithstanding pars. (a) and (b), a person whose interest in property arises by disclaimer or by default of exercise of a power created by a governing instrument may disclaim at any time not later than 9 months after the day on which the prior instrument of disclaimer is delivered, or the date of death of the donee of the power.

**(5) DELIVERY AND FILING OF DISCLAIMER.** (a) *Delivery.* In addition to any requirements imposed by the governing instrument, the instrument of disclaimer is effective only if, within the time specified under sub. (4), it is delivered to and received by any of the following:

1. The transferor of the property disclaimed, if living.

2. The personal representative or special administrator of the deceased transferor of the property.

3. The holder of legal title to the property.

(b) *Delivery to trustee.* If the trustee of any trust to which the interest or power relates does not receive the instrument of disclaimer under par. (a), a copy shall also be delivered to the trustee.

(c) *Filing.* When delivery is made to the personal representative or special administrator of a deceased transferor, a copy of the instrument of disclaimer shall be filed in the probate court having jurisdiction.

(d) *Failure to deliver or file.* Failure to deliver a copy of the instrument of disclaimer to the trustee under par. (b) or to file a copy in the probate court under par. (c), within the time specified under sub. (4), does not affect the validity of any disclaimer.

(e) *Recording.* If real property or an interest in real property is disclaimed, a copy of the instrument of disclaimer may be recorded in the office of the register of deeds of the county in which the real estate is situated.

(6) **PROPERTY NOT VESTED.** The property disclaimed under this section shall be considered not to have been vested in, created in or transferred to the disclaimant.

(7) **DEVOLUTION IN GENERAL.** (a) Unless the transferor of the property or donee of the power has otherwise provided, the disclaimed property devolves as if the disclaimant had died before the decedent or before the effective date of the transfer under the governing instrument. If the disclaimant is an appointee under a power exercised by a governing instrument, the disclaimed property devolves as if the disclaimant had died before the effective date of the exercise of the power. If the disclaimant is a taker in default under a power created by a governing instrument, the disclaimed property devolves as if the disclaimant had predeceased the donee of the power. This paragraph is subject to subs. (8), (9) and (10).

(b) A disclaimer relates back for all purposes to the date of the decedent's death or the effective date of the transfer under the governing instrument. If the disclaimant is an appointee under a power exercised under a governing instrument, the disclaimer relates back to the effective date of the exercise of the power. If the disclaimant is a taker in default under a power created by a governing instrument, the disclaimer relates back to the last possible date for exercise of the power. A disclaimer of the future right to receive mandatory distributions of income or profits relates to the period stated in the disclaimer.

(8) **DEVOLUTION OF DISCLAIMED INTEREST IN JOINT TENANCY.** A disclaimed interest in a joint tenancy passes to the decedent's probate estate.

(9) **DEVOLUTION OF DISCLAIMED INTEREST IN SURVIVORSHIP MARITAL PROPERTY.** A disclaimed interest in survivorship marital property passes to the decedent's probate estate.

(10) **DEVOLUTION OF DISCLAIMED FUTURE INTEREST.** Unless the instrument creating the future interest manifests a contrary intent either expressly or as construed from extrinsic evidence, a future interest limited to take effect in possession or enjoyment after the termination of the interest which is disclaimed takes effect as if the disclaimant had died before the effective date of the governing instrument or, if the disclaimant is an appointee under a power exercised by a governing instrument, as if the disclaimant had died before the effective date of the exercise of the power.

(11) **BAR.** (a) *Actions that bar disclaimer.* A person's right to disclaim property is barred by any of the following:

1. The person's assignment, conveyance, encumbrance, pledge or transfer of the property or a contract therefor.
2. The person's written waiver of the right to disclaim.
3. The person's acceptance of the property or benefit of the property.

(b) *Effect upon successors in interest.* The disclaimer or the written waiver of the right to disclaim is binding upon the disclaimant or person waiving and all persons claiming through or under him or her.

(12) **NONEXCLUSIVENESS OF REMEDY.** (a) This section does not affect the right of a person to waive, release, disclaim or renounce property under any other statute, the common law, or as provided in the creating instrument.

(b) Any disclaimer that meets the requirements of section 2518 of the Internal Revenue Code, or the requirements of any other federal law relating to disclaimers, constitutes an effective disclaimer under this section.

(13) **CONSTRUCTION OF EFFECTIVE DATE.** In this section, the effective date of a transfer under a revocable governing instrument is the date on which the person with the power to revoke the transfer no longer has that power or the power to transfer the legal or equitable ownership of the property that is the subject of the transfer.

**History:** 1977 c. 309; 1983 a. 189 s. 329 (26); 1991 a. 39, 301; 1995 a. 360; 1997 a. 188 ss. 22 to 59, 175; Stats. 1997 s. 854.13.

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

Unless barred by statute, a debtor can disclaim bequest, thus defeating a creditor's action under 813.026. Estate of Goldhammer v. Goldhammer, 138 Wis. 2d 77, 405 N.W.2d 693 (Ct. App. 1987).

Except for a tax-related "qualified disclaimer", the 9-month time limit for disclaimer of a future interest commences on the death of the life tenant. Estate of Balson, 183 Wis. 2d 31, 515 N.W.2d 474 (Ct. App. 1994).

**NOTE:** The preceding cases were decided prior to the adoption of 1997 Wis. Act 188, which made extensive revisions to s. 853.40 and resulted in the creation of s. 854.06.

**854.14 Beneficiary who kills decedent. (1) DEFINITION.** In this section, "disposition of property" means a transfer, including by appointment, of property or any other benefit to a beneficiary designated in a governing instrument or under a statute.

(2) **REVOCATION OF BENEFITS.** Except as provided in sub. (6), the unlawful and intentional killing of the decedent does all of the following:

(a) Revokes a provision in a governing instrument that, by reason of the decedent's death, does any of the following:

1. Transfers or appoints property to the killer.
2. Confers a power of appointment on the killer.
3. Nominates or appoints the killer to serve in any fiduciary or representative capacity, including personal representative, trustee, or agent.

(b) Severs the interests of the decedent and killer in property held by them as joint tenants with the right of survivorship or as survivorship marital property and transforms the interests of the decedent and the killer into tenancies in common or marital property, whichever is appropriate.

(c) Revokes every statutory right or benefit to which the killer may have been entitled by reason of the decedent's death.

(3) **EFFECT OF REVOCATION.** Except as provided in sub. (6), provisions of a governing instrument that are revoked by this section are given effect as if the killer disclaimed all revoked provisions or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent. Except as provided in sub. (6), the killer's share of the decedent's intestate estate, if any, passes as if the killer had disclaimed his or her intestate share under s. 854.13.

(4) **WRONGFUL ACQUISITION OF PROPERTY.** Except as provided in sub. (6), a wrongful acquisition of property by a killer not covered by this section shall be treated in accordance with the principle that a killer cannot profit from his or her wrongdoing.

(5) **UNLAWFUL AND INTENTIONAL KILLING; HOW DETERMINED.** (a) A final judgment establishing criminal accountability for the unlawful and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section and s. 861.02 (8).

(b) A final adjudication of delinquency on the basis of an unlawful and intentional killing of the decedent conclusively establishes the adjudicated individual as the decedent's killer for purposes of this section and s. 861.02 (8).

(c) In the absence of a judgment establishing criminal accountability or an adjudication of delinquency, the court, upon the petition of an interested person, shall determine whether, under the preponderance of evidence standard, the killing was unlawful and intentional for purposes of this section and s. 861.02 (8).

**(6) EXCEPTIONS.** This section does not apply if any of the following applies:

(a) The court finds that, under the factual situation created by the killing, the decedent's wishes would best be carried out by means of another disposition of the property.

(b) The decedent provided in his or her will, by specific reference to this section, that this section does not apply.

**History:** 1997 a. 188; 2001 a. 102.

### 854.15 Revocation of provisions in favor of former spouse. (1) DEFINITIONS.

(a) "Disposition of property" means a transfer, including by appointment, of property or any other benefit to a beneficiary designated in a governing instrument.

(b) "Divorce, annulment or similar event" means any divorce, any annulment or any other event or proceeding that would exclude a spouse as a surviving spouse under s. 851.30.

(c) "Former spouse" means a person whose marriage to the decedent has been the subject of a divorce, annulment or similar event.

(d) "Relative of the former spouse" means an individual who is related to the former spouse by blood, adoption or marriage and who, after the divorce, annulment or similar event, is not related to the decedent by blood, adoption or marriage.

(e) "Revocable", with respect to a disposition, provision or nomination, means one under which the decedent, at the time of the divorce, annulment or similar event, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the former spouse or former spouse's relative, whether or not the decedent was then empowered to designate himself or herself in place of the former spouse or the former spouse's relative, and whether or not the decedent then had the capacity to exercise the power.

**(2) SCOPE.** This section applies only to governing instruments that were executed by the decedent before the occurrence of a divorce, annulment or similar event with respect to his or her marriage to the former spouse.

**(3) REVOCATION UPON DIVORCE.** Except as provided in subs. (5) and (6), a divorce, annulment or similar event does all of the following:

(a) Revokes any revocable disposition of property made by the decedent to the former spouse or a relative of the former spouse in a governing instrument.

(b) Revokes any disposition created by law to the former spouse or a relative of the former spouse.

(c) Revokes any revocable provision made by the decedent in a governing instrument conferring a power of appointment on the former spouse or a relative of the former spouse.

(d) Revokes the decedent's revocable nomination of the former spouse or a relative of the former spouse to serve in any fiduciary or representative capacity.

(e) Severs the interests of the decedent and former spouse in property held by them as joint tenants with the right of survivorship or as survivorship marital property and transforms the interests of the decedent and former spouse into tenancies in common.

**(4) EFFECT OF REVOCATION.** Except as provided in subs. (5) and (6), provisions of a governing instrument that are revoked by this section are given effect as if the former spouse and relatives of the former spouse disclaimed the revoked provisions or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce, annulment or similar event.

**(5) EXCEPTIONS.** This section does not apply if any of the following applies:

(a) The express terms of a governing instrument provide otherwise.

(b) The express terms of a court order provide otherwise.

(c) The express terms of a contract relating to the division of the decedent's and former spouse's property made between the decedent and the former spouse before or after the marriage or the divorce, annulment or similar event provide otherwise.

(d) The divorce, annulment or similar event is nullified.

(e) The decedent and the former spouse have remarried.

(f) There is a finding of the decedent's contrary intent. Extrinsic evidence may be used to construe that intent.

**(6) REVOCATION OF NONTESTAMENTARY PROVISION IN MARITAL PROPERTY AGREEMENT.** The effect of a judgment of annulment, divorce or legal separation on marital property agreements under s. 766.58 is governed by s. 767.266 (1).

**History:** 1997 a. 188.

Retroactive application of sub. (3) (a) is constitutional. *Allstate Life Insurance Co. v. Hanson*, 200 F. Supp. 2d 1012 (2002).

New Probate Code Affects Estate Planning at Divorce. *Hughes*. *Wis. Law*. March 1999.

**854.17 Classification; how determined.** In chs. 851 to 882, classification of the property of a decedent spouse and surviving spouse is determined under ch. 766.

**History:** 1985 a. 37; 1997 a. 188 s. 92; Stats. 1997 s. 854.17.

### 854.18 Order in which assets apportioned; abatement.

**(1)** (a) Except as provided in sub. (3) or in connection with the share of the surviving spouse who elects to take an elective share in deferred marital property under s. 861.02, a spouse who takes under s. 853.11 (2) or a child who takes under s. 853.25, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

1. If the governing instrument is a will, property subject to intestacy.

2. Residuary transfers or devises under the governing instrument.

3. General transfers or devises under the governing instrument.

4. Specific transfers or devises under the governing instrument.

(b) For purposes of abatement, a general transfer or devise charged on any specific property or fund is a specific transfer to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, it is a general transfer to the extent of the failure or insufficiency.

**(2)** (a) Abatement within each classification is in proportion to the amount of property that each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the governing instrument.

(b) If the subject of a preferred transfer is sold or used incident to administration of an estate, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

**(3)** If the governing instrument expresses an order of abatement, or if the decedent's estate plan or the express or implied purpose of the transfer would be defeated by the order of abatement under sub. (1), the shares of the distributees abate as necessary to give effect to the intention of the transferor.

**History:** 1997 a. 188.

**854.19 Penalty clause for contest.** A provision in a governing instrument that prescribes a penalty against an interested person for contesting the governing instrument or instituting other proceedings relating to the governing instrument may not be

enforced if the court determines that the interested person had probable cause for instituting the proceedings.

**History:** 1997 a. 188.

**854.20 Status of adopted persons.** (1) **INHERITANCE RIGHTS BETWEEN ADOPTED PERSON AND ADOPTIVE RELATIVES.** Subject to sub. (4), a legally adopted person is treated as a birth child of the person's adoptive parents for purposes of intestate succession by, through and from the adopted person and for purposes of any statute conferring rights upon children, issue or relatives in connection with the law of intestate succession or governing instruments.

(2) **INHERITANCE RIGHTS BETWEEN ADOPTED PERSON AND BIRTH RELATIVES.** Subject to sub. (4), a legally adopted person ceases to be treated as a child of the person's birth parents for the same purposes as under sub. (1), except:

(a) If a birth parent marries or remarries and the child is adopted by the stepparent, for all purposes the child is treated as the child of the birth parent whose spouse adopted the child.

(b) If a birth parent of a marital child dies and the other birth parent remarries and the child is adopted by the stepparent, the child is treated as the child of the deceased birth parent for purposes of inheritance through that parent and for purposes of any statute conferring rights upon children, issue or relatives of that parent under the law of intestate succession or governing instruments.

(3) **SEQUENTIAL ADOPTION.** Subject to sub. (4), if an adoptive parent dies or his or her parental rights are terminated in a legal proceeding and the adopted child is subsequently adopted by another person, the former adoptive parent is considered to be a birth parent for purposes of this section.

(4) **APPLICABILITY.** Subsections (1), (2) and (3) apply only if at least one of the following applies:

(a) The decedent or transferor is the adoptive parent or adopted child.

(b) The adopted person was a minor at the time of adoption.

(c) The adopted person was raised as a member of the household by the adoptive parent from the child's 15th birthday or before.

(5) **CONTRARY INTENT.** This section does not apply if the transfer is made under a governing instrument and there is a finding of contrary intent of the person who executed the instrument. Extrinsic evidence may be used to construe that intent.

**History:** 1983 a. 447; 1993 a. 486; 1997 a. 188 ss. 96, 175; Stats. 1997 s. 854.20.

### 854.21 Persons included in family groups or classes.

(1) **ADOPTED PERSONS.** (a) Except as provided in par. (b) or sub. (7), a gift of property by a governing instrument to a class of persons described as issue, lawful issue, children, grandchildren, descendants, heirs, heirs of the body, next of kin, distributees or the like includes a person adopted by a person whose birth child would be a member of the class, and issue of the adopted person, if the conditions for membership in the class are otherwise satisfied and any of the following applies:

1. The transferor is the adoptive parent or adopted child.

2. The adopted person was a minor at the time of adoption.

3. The adopted person was raised as a member of the household by the adoptive parent from the child's 15th birthday or before.

(b) Except as provided in sub. (7), a gift under par. (a) excludes a birth child and his or her issue otherwise within the class if the birth child has been adopted and would cease to be a child of the birth parent under s. 854.20 (2).

(2) **INDIVIDUALS BORN TO UNMARRIED PARENTS.** (a) Subject to par. (b) and sub. (7), individuals born to unmarried parents are included in class gifts and other terms of relationship in accordance with s. 852.05.

(b) In addition to the requirements of par. (a) and subject to the provisions of sub. (7), in construing a disposition by a transferor

who is not the birth parent, an individual born to unmarried parents is not considered to be the child of a birth parent unless that individual lived while a minor as a regular member of the household of that birth parent or of that birth parent's parent, brother, sister, spouse or surviving spouse.

(3) **RELATIVES BY MARRIAGE.** Subject to sub. (7), terms of family relationship in statutes or governing instruments that do not differentiate between relationships by blood and relationships by marriage are construed to exclude relatives by marriage.

(4) **RELATIVES OF THE HALF-BLOOD.** Subject to sub. (7), terms of family relationship in statutes or governing instruments that do not differentiate between relationships by the half-blood and relationships by the full-blood are construed to include both types of relationships.

(5) **POSTHUMOUS ISSUE.** Subject to sub. (7), if a statute or governing instrument transfers an interest to a group of persons described as a class, such as "issue", "children", "nephews and nieces" or any other class, a person conceived at the time the membership in the class is determined and subsequently born alive is entitled to take as a member of the class if that person otherwise satisfies the conditions for class membership and survives at least 120 hours past birth.

(6) **PERSON RELATED THROUGH 2 LINES.** Subject to sub. (7), a person who is eligible to be a transferee under a statute or governing instrument through 2 lines of relationship is limited to one share, based on the relationship that entitles the person to the larger share.

(7) **CONTRARY INTENT.** This section does not apply if the transfer is made under a governing instrument and there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

**History:** 1997 a. 188.

### 854.22 Form of distribution for transfers to family groups or classes.

(1) **INTERESTS IN HEIRS, NEXT OF KIN AND THE LIKE.** Subject to sub. (4), if a statute or governing instrument specifies that a present or future interest is to be created in a designated individual's "heirs", "heirs at law", "next of kin", "relatives", "family" or a term that has a similar meaning, the property passes to the persons, including the state, to whom it would pass and in the shares in which it would pass under the laws of intestacy of the designated individual's domicile, as if the designated individual had died immediately before the transfer was to take effect in possession or enjoyment. If the designated individual's surviving spouse is living and remarried when the transfer is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.

(2) **TRANSFERS TO DESCENDANTS, ISSUE AND THE LIKE.** Subject to sub. (4), if a statute or governing instrument creates a class gift in favor of a designated individual's "descendants", "issue" or "heirs of the body" the property is distributed among the class members who are living when the interest is to take effect in possession or enjoyment in the shares that they would receive under the laws of intestacy of the designated individual's domicile, as if the designated individual had then died owning the subject matter of the class gift.

(3) **DOCTRINE OF WORTHIER TITLE ABOLISHED.** The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor's "heirs", "heirs at law", "next of kin", "distributees", "relatives" or "family", or a term that has a similar meaning, does not create or presumptively create a reversionary interest in the transferor.

(4) **CONTRARY INTENT.** This section does not apply if the transfer is made under a governing instrument and there is a finding of contrary intent of the person who executed the governing instrument. Extrinsic evidence may be used to construe that intent.

**History:** 1997 a. 188.

**854.23 Protection of payers and other 3rd parties. (1)**

**DEFINITION.** In this section, “governing instrument” includes a filed verified statement under s. 865.201, a certificate under s. 867.046 (1m) or a recorded application under s. 867.046 (5).

**(2) LIABILITY DEPENDS ON NOTICE.** (a) A payer or other 3rd party is not liable for having transferred property to a beneficiary designated in a governing instrument who, under this chapter, is not entitled to the property, or for having taken any other action in good faith reliance on the beneficiary’s apparent entitlement under the terms of the governing instrument, before the payer or other 3rd party received written notice of a claimed lack of entitlement under this chapter. However, a payer or other 3rd party is liable for a payment made or other action taken after the payer or other 3rd party received written notice of a claimed lack of entitlement under this chapter.

(b) Severance of a joint interest under the provisions of this chapter does not affect any 3rd–party interest in property acquired for value and in good faith reliance on an apparent title by survivorship, unless a document declaring the severance has been noted, registered, filed or recorded in records appropriate to the kind and location of the property that are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

**(3) MANNER OF NOTICE.** A claimant shall mail written notice of a claimed lack of entitlement under sub. (2) to the 3rd party’s main office or home by registered or certified mail, return receipt requested, or serve the claim upon the 3rd party in the same manner as a summons in a civil action.

**(4) DEPOSIT OF PROPERTY WITH COURT.** (a) Upon receipt of written notice of a claimed lack of entitlement under this chapter, a 3rd party may transfer property held by it to the court having jurisdiction of the probate proceedings relating to the decedent’s estate. If no proceedings have been commenced, the transfer may be made to the court having jurisdiction of probate proceedings relating to decedents’ estates located in the county of the decedent’s residence. The court shall hold the property and, upon its determination of the owner, shall order disbursement in accordance with the determination.

(b) Property transferred to the court discharges the 3rd party from all claims for the property.

**(5) PROTECTION OF FINANCIAL INSTITUTIONS.** (a) In this subsection:

1. “Account” has the meaning given in s. 705.01 (1) or 710.05 (1) (a).
2. “Financial institution” has the meaning given in s. 705.01 (3).

(b) Notwithstanding sub. (2), in addition to the protections afforded a financial institution under ss. 701.19 (11) and 710.05 and chs. 112 and 705 a financial institution is not liable for having transferred an account to a beneficiary designated in a governing instrument who, under this chapter, is not entitled to the account, or for having taken any other action in reliance on the beneficiary’s apparent entitlement under the terms of a governing instru-

ment, regardless of whether the financial institution received written notice of a claimed lack of entitlement under this chapter.

(c) If a financial institution has reason to believe that a dispute exists as to the rights of parties, or their successors, to an account subject to a governing instrument, the financial institution may, but is not required to, do any of the following:

1. Deposit the account with a court as provided in sub. (4).
2. Refuse to transfer the account to any person.

(d) The protection afforded a financial institution under this subsection does not affect the rights of parties or their successors in disputes concerning the beneficial ownership of accounts.

**History:** 1997 a. 188.

**854.24 Protection of buyers.** A person who purchases property for value or who receives property in partial or full satisfaction of a legally enforceable obligation is neither obligated under this chapter to return the property nor liable under this chapter for the value of the property, unless the person has notice as described in s. 854.23 (3).

**History:** 1997 a. 188.

**854.25 Personal liability of recipients not for value.**

**(1) ORIGINAL RECIPIENTS.** A person who, not for value, receives property to which the person is not entitled under this chapter shall return the property. If the property is not returned, the recipient shall be personally liable for the value of the property to the person who is entitled to it under this chapter, regardless of whether the recipient has the property, its proceeds or property acquired with the property or its proceeds.

**(2) SUBSEQUENT RECIPIENTS.** (a) If a recipient described in sub. (1) gives all or part of the property described in sub. (1) to a subsequent recipient, not for value, the subsequent recipient shall return the property. If the property is not returned, the subsequent recipient shall be personally liable to the person who is entitled to it under this chapter for the value received, if the subsequent recipient has the property, its proceeds or property acquired with the property or its proceeds.

(b) If the subsequent recipient described in par. (a) does not have the transfer described, its proceeds or the property acquired with the property or its proceeds, but knew or should have known of his or her liability under this section, the subsequent recipient remains personally liable to the person who is entitled to it under this chapter for the value received.

**(3) MODE OF SATISFACTION.** On petition of the person entitled to the property under this chapter showing that the mode of satisfaction chosen by the recipient in sub. (1) or (2) will create a hardship for the entitled person, the court may order that a different mode of satisfaction be used.

**History:** 1997 a. 188.

**854.26 Effect of federal preemption.** If any provision in this chapter is preempted by federal law with respect to property covered by this chapter, a person who receives property, other than for full consideration, which the person is not entitled to receive under this chapter is subject to s. 854.25.

**History:** 1997 a. 188.