



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

Ronald Sklansky
Clearinghouse Director

Richard Sweet
Clearinghouse Assistant Director

Terry C. Anderson
Legislative Council Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE RULE 09-057

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated September 2008.]

1. Statutory Authority

Section ETF 10.01 (3r) creates a definition of the term “per stirpes” to mean the modified per stirpes distribution described in s. 854.04 (2), Stats. Section 854.04 (1), Stats., describes the traditional per stirpes distribution of an estate and provides that this method applies if a statute calls for property to be distributed “per stirpes.” Section 854.04 (2), Stats., describes the method of distribution if a statute calls for property to be distributed by “modified per stirpes.” Section 854.02, Stats., states that ch. 854, Stats., applies to all statutes that transfer property at death. Since s. 40.02 (8) (a) 2., Stats., provides that in the circumstances described in that provision the state shares payable to the issue of a person will be determined “per stirpes,” what statutory authority exists for determining by rule the term “per stirpes” as used in s. 40.02 (8) (a) 2., Stats., really means “modified per stirpes” as used in s. 854.04 (2), Stats.?

It might be argued that, in spite of the statement of scope in s. 854.02, Stats., the distribution provisions in s. 854.04, Stats., do not directly affect the provisions of ch. 40, Stats., because ch. 854, Stats., is part of what used to be known as Wisconsin’s Probate Code and has no application outside of the probate setting. Then, the new definition in s. ETF 10.01 (3r) could be described as merely adopting the language of s. 854.04 (2), Stats., rather than ignoring the language of ss. 854.02 and 854.04 (1), Stats. However, even if this argument is valid, what statutory authority exists for the department to alter the traditional notion of the term “per stirpes” by replacing it with a demonstrably different method of distribution under the term “modified per stirpes”?

2. Form, Style and Placement in Administrative Code

a. In the rule preface statement of statutes interpreted, all of the statutes interpreted by the rule should be listed.

b. In the rule preface statement of statutory authority, the correct citation is “: ss. 40.03 (2) (i), (ig), and (i) 4., and 227.11 (2) (a), Stats.”

c. The rule preface description of related statutes or rules is not very helpful. If there are statutory or rule provisions that are directly related to the rule, they should be listed.

d. The rule preface plain language analysis should note that each individual SECTION of the rule contains a note that describes the action taken by the department.

e. In s. ETF 10.01 (3r), the first cross-reference should read “s. 40.02 (8) (a) 2., Stats.”

f. Section ETF 10.70 (4) should read, in its final form, as follows:

ETF 10.70 (4) In case of death, disabling injury or disease, disclosure of personal information shall be made only to one or more of the following:

(a) The legal representative....

(b) The beneficiary of the deceased under s. 40.02 (8), Stats., as identified by the department.

(c) The duly authorized representative...identified in par. (b).

(d) The legal representative of the deceased individual's estate.

g. In s. ETF 10.70 (5) (b) 1., the notation “, Stats.,” should be inserted after the reference “s. 40.02 (8).”

h. In s. ETF 20.03 (4), the two cross-references should read “s. 40.02 (33) (b) 1. or 2., Stats.” and ss. 40.23, 40.63, and 40.73 (1) (c), Stats.

i. In s. ETF 20.04 (2) (b), the notation “, Stats.,” should be inserted after the statutory cross-reference. [See also ss. ETF 20.04 (2) (c), 20.37 (2) (intro.), and 20.39 (2) (a).]

j. In s. ETF 20.045 (1), the first two cross-references should read “s. 40.25 (1) or (4) or 40.73 (1) (a), Stats.,” and “s. 40.24 (1) or 40.73 (3), Stats.,”.

k. In SECTION 18, the notation “intro.” should be shown within parentheses both in the treatment section and in the text of the rule.

l. In s. ETF 20.37 (2) (intro.), the phrase “all of” should be inserted before the phrase “the following actions.” The subunits of sub. (2) should be renumbered as pars. (a) to (e). Finally, newly numbered pars. (c) and (d) should read: “Contact a person who may be a beneficiary, if the department learns the name of that person.” and “Contact the employer of a

person who may be a beneficiary, if the department learns the name of the employer.” [See also ss. 227.27 (1) and 990.001 (1), Stats.]

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In s. ETF 20.03 (4), delete “Calculating final average earnings for state elected officials.” The title is inconsistent with the other subsections of s. ETF 20.03 which do not contain titles.

b. In s. ETF 20.03 (4) (b), delete “sub. (1)” and substitute “par. (a).” It appears that this paragraph refers to the prior paragraph, not sub. (1).

c. In s. ETF 20.045, the note following should read: “This rule codifies the department interpretation that the deadline for making a change....” Also, the note does not seem to describe sub. (3).