# CHAPTER 318.

## ALLOWANCES, DISTRIBUTION, PARTITION.



**318.01 Distribution of personalty.** (1) RESIDUE. The residue, if any, of the personal estate of any intestate and the residue of the personal estate of a testator, not disposed of by his will and not required for the purposes mentioned in section 313.15, shall be distributed in the same proportions, and to the same persons, and for the same purposes, as prescribed for the descent and disposition of real estate in chapter 237, except that when the deceased shall leave a widow and lawful issue the widow shall be entitled to receive the same share of such residue as a child of such deceased, when there is only one child, and in all other cases one-third of such residue.

(3) ALLOWANCE FOR CARE OF GRAVE. In case there shall be no known heir or legatee or devisee residing in this state or in case there is no husband, widow or descendant, or no parent, brother or sister dependent upon the estate of the deceased, the court may order the executor or administrator to pay not to exceed one hundred dollars for perpetual care of the grave of the deceased as provided by subsection (9) of section 157.11.

(4) ALLOWANCE FOR TOMBSTONE. In case no provision is made in the will for a tombstone or monument or marker at the grave of the decedent, and none has been erected, the executor or administrator may expend a reasonable sum for a tombstone or monument or marker at the grave of his decedent. The expenditure shall be subject to the approval of the court and shall be classed as funeral expenses. [*1933 c. 190 s. 37*]

**Note:** For county court orders concerning perpetual care of graves, see 157.11 and 157.125.

The rule declared in Schuman v. Schuman, 80 W 479, 482, 60 NW 670 (November, 1891), was changed by chapter 23, Laws 1893, amending 237.01 (5). The decision held that said subsection did not apply to the distribution of personalty but the legislature made it applicable.

The law presumes that every gift, whether in trust or not, is accepted until the contrary is proved. Estate of Mead, 227 W 311, 277 NW 694, 279 NW 18.

In an administrator's action for the death of his decedent, an item of damages to pay for a grave marker was not a part of allowable funeral expenses, and was improperly allowed; the provision of (4) permitting an administrator to expend a reasonable sum for a grave marker, and classifying this expenditure as "funeral expenses," merely makes such classification for purposes of estate accounting and has no application to the recovery of funeral expenses in a death action. Hamilton v. Reinemann, 233 W 572, 290 NW 194.

In the absence of provision in the will, the authority of the executor to expend money for a monument is referable to (4), and if he contracts for a monument without the advice or approval of the county court he acts at his own risk and he cannot thereby conclude the court from exercising its discretion as to approval of the expenditure. The county court's allowance of only $500 on an expenditure of $875 made by an executor for a monument and markers for a deceased farmer who left an estate of $20,000 was not an abuse of discretion. Will of Poole, 235 W 625, 293 NW 918.

**318.02 Rights of state, notice to attorney-general.** In all cases mentioned in subsections (1) and (2) of section 318.03 it shall be the duty of the county court having jurisdiction thereof to notify the attorney-general of the interest or probable interest of the state in such estate immediately after the same shall come to the knowledge of such court; and the attorney-general shall appear for and protect the interests of the state therein.

**318.03 Escheats and unclaimed legacies and shares.** (1) HEIRS UNKNOWN. In case there shall be no known heir of the decedent, the residue of the estate, not disposed of by will, shall escheat and shall be ordered paid into the state school fund.

(2) UNCLAIMED LEGACIES AND SHARES. If any legacy or any share of intestate property shall be refused or shall not be claimed by the legatee or heir within two years after

the entry of final judgment by the county court, the executor or administrator shall convert the same into money and pay it to the state treasurer for the state school fund, and it shall be part of said fund until and unless refunded as in this section provided.

(3) APPLICATION FOR REFUND. The moneys received by the state treasurer pursuant to subsection (2) shall be paid to the owner on proof of his right thereto. The claimant may, within five years after the date of publication by the treasurer of notice of receipt thereof as provided by section 14.42 (15), file in the county court in which the estate was settled, a petition alleging the basis of his claim to the legacy or share. The court shall order a hearing upon the petition; and twenty days' notice thereof shall be given by the claimant to the attorney-general, who shall appear for the state at the hearing. If the claim is established it shall be allowed without interest; and the court shall so certify to the secretary of state, who shall audit and the state treasurer shall pay the same. [*Stats. 1931 s. 318.01 (2), 318.03, 318.06 (6); 1933 c. 190 s. 37*]

**Note:** See note to sec. 18, art. IV, Const., relating to escheats of personal property in Milwaukee county, citing Estate of Bulewicz, 212 W 426, 249 NW 534.

Escheat property turned over to trust company as provided by 318.06 (6), Stats. 1925 (revised and renumbered 318.03 in 1933), may be ordered paid into state treasury under present statutes. 24 Atty. Gen. 351.

The right to maintain an action to recover escheated property depends wholly upon statute; and in such an action the five-year limitation in this section applies. Gorny v. Trustees of Milwaukee County Orphans Board, 93 F (2d) 107.

**318.04 Lands distributed as personalty.** If any land held by an executor or administrator as mentioned in sections 312.10 and 312.13 shall not be sold by him as therein provided it shall be assigned and distributed to the same persons and in the same proportions as if it had been part of the personal estate of the deceased; and if, upon such distribution, the estate shall come to two or more persons partition thereof may be made between them in like manner as if it were real estate which the deceased held in his lifetime. [*1935 c. 214 s. 8*]

**318.05** [*Repealed by 1933 c. 190 s. 38*]

**318.06 Estates, assigning residue.** (1) DEDUCTIONS BEFORE JUDGMENT. After the payment of the debts, funeral charges and expenses of administration and after deducting all the allowances provided for in this chapter or when sufficient effects shall be reserved in the hands of the executor or administrator for the above purposes, the county court shall, by a judgment assign the residue of the estate, if any, to such persons as by law are entitled to the same.

(2) RIGHTS OF PARTIES. Such judgment may be made on the application of the executor or administrator or of any person interested in the estate. The court shall name therein the persons and assign to each the portion to which he is entitled. The right to recover any such portion from the executor or administrator or from any other person is hereby given to the person entitled thereto.

(3) JUDGMENT AS EVIDENCE. Any finding or determination as to heirship or assignment of real estate in any such judgment shall be presumptive evidence of any fact so found and of the right to the portion of any estate so assigned and shall be conclusive evidence thereof as to all persons appearing in any such proceeding and as to all persons claiming under them.

(4) TO APPLY TO REALTY. This section shall apply to all real estate described in any such judgment whether or not in the possession of the executor or administrator, and such judgment shall describe the real estate to be assigned and a certified copy of said judgment describing such real estate shall be recorded by the executor or administrator in the office of the register of deeds in each county wherein such real estate is located.

(5) ORDER OF DISCHARGE. Upon filing vouchers showing compliance with the foregoing judgment, the court shall enter an order finding such fact, discharging the executor or administrator and making the judgment absolute. Such order, or a certified copy thereof, shall be presumptive evidence of the facts therein adjudicated.

(7) PROOF OF HEIRSHIP. No order shall be made assigning the residue of any estate or determining who are the heirs of any deceased person until proof is filed that notice of such proceeding has been given or waived as provided by section 324.18 nor until the testimony or deposition of one or more witnesses is reduced to writing and filed and the court is, from such evidence, fully satisfied as to who are the persons entitled to such residue or are the heirs of such deceased person. [*1931 c. 259; 1931 c. 476 s. 6; 1933 c. 190 s. 37; Court Rule XIX; Supreme Court Order, effective Jan. 1, 1934; Supreme Court Order, effective Jan. 1, 1940*]

**Note:** A trustee in bankruptcy of the person appointed trustee under the will, seeking to set aside the appointment and recover assets in the hands of the appointee's surety, had no interest in the testator's estate entitling him to have the final judgment of distribution and assignment set aside. Such judgment, having been entered many years prior to the bankruptcy, and never having been appealed from by any of the parties in interest, was final and conclusive as to the assets of the testator's estate. Estate of Wittwer, 216 W 432, 257 NW 626.

The final decree of the county court distributing the estate of a testator does not of

itself transfer the title to property, but merely determines the persons entitled thereto and their respective interests therein. Latsch v. Bethke, 222 W 485, 269 NW 243.

The county court had jurisdiction to enter order discharging executors and administrators from their duties and liabilities, as against contention that they had conducted estate in such disregard of testator's directions to sell assets and set up trust funds that court had no jurisdiction to approve such conduct; and hence such order of discharge, however erroneous, until set aside, protected executors and administrators from citation for examination and from liability for alleged waste. Estate of Penny, 225 W 455, 274 NW 247.

Where the only account filed by a bank as trustee of a testamentary trust, which it had administered for 12 years, disclosed that certain mortgages were included in the trust fund, but no disclosure was made, in the account or on the hearing or otherwise, of the fact that the bank had owned the mortgages and sold them to itself as trustee in violation of its duty as trustee, and neither the county court nor any of the interested parties had any knowledge of such facts when an order was entered approving the final account and assigning the mortgages to the distributees of the trust fund, the county court, in proceedings brought by the distributees after the time for appeal had expired, should have set aside such order for fraud on the court for the bank's concealment of the fact of its self-dealing as trustee, and surcharged the bank as trustee, unless the distributees were barred from asserting such fraud by laches or by ratification or by other conduct subsequent to the order. Will of Cosgrove, 236 W 554, 295 NW 784.

**318.07 Receipts from guardians.** If a legatee or distributee of an estate be a minor or an incompetent person and has a general guardian the executor or administrator shall take from such guardian on delivery of the legacy or share, a receipt and file the same with the court of probate and such court shall transmit a certified copy of such receipt to the court which appointed such guardian. [*Supreme Court Order, effective Jan. 1, 1934*]

**318.08 Remedy of creditors of nonresident heirs and legatees; service of citation.** (1) Whenever any legacy or distributive share of any estate belongs to any debtor who has absconded from or is a nonresident of this state, any of his creditors may petition to intervene in the probate proceedings to compel the application of said legacy or distributive share to the payment of his debt, and whenever it shall be necessary a citation to such debtor to appear at a time certain may be served by publication.

(2) Such citation shall be served in the manner provided by section 324.18.

(3) Upon due proof of service of, and at the time fixed in said citation, said court shall proceed to consider such petition, and take proof, and grant such relief thereunder as shall be just, and any order, judgment or determination made in said proceedings shall be binding upon said debtor. If the claim is not a judgment and any issue shall arise in said proceedings relating to said debt, the court may stay such proceedings pending the final determination of said issue. The court may at any time require the petitioner to give a bond in such sum and with such sureties for costs and damages as it may deem proper. [*1933 c. 190 s. 39; Supreme Court Order, effective Jan. 1, 1940*]

**318.09** [*Repealed by 1933 c. 190 s. 40*]

**318.10 Partition of residue, when necessary, judgment.** (1) When the court shall assign the residue of any personal estate to two or more persons, it shall not be necessary to make partition or distribution of such estate; but when partition is requested by any party in interest prior to final judgment, and it appearing to the satisfaction of the court that partition can be made without damage or prejudice to the owners, partition may be made by three disinterested persons to be appointed by the court. Said court shall issue its warrant to them and they shall be sworn to a faithful discharge of their duties.

(2) Such partition, when completed and approved, shall be incorporated in and made a part of the final judgment. [*1933 c. 190 s. 41*]

**Revisor's Note, 1933:** If the partition is completed it should go into the judgment. Where the property is not divisible no partition should be ordered. The owners should be obliged to resort to regular partition, chapters 276 and 277. (Bill No. 123 S, s. 41)

Under 318.10 to 318.18, Stats. 1927, relating to the partition and distribution of the residue of estates by commissioners appointed for such purpose, the county court could withhold the entry of the final judgment or decree and incorporate the partition and distribution in that final judgment, or the court could accept and establish the report of the commissioners. Estate of Butts, 222 W 425, 268 NW 122.

**318.11** [*Repealed by 1933 c. 190 s. 42*]

**318.12 Notice of appointment of commissioners.** Notice of the time and place of hearing the application for the appointment of commissioners shall be given as provided by section 324.18. [*1933 c. 190 s. 43; Supreme Court Order, effective Jan. 1, 1940*]

**318.13 to 318.23** [*Repealed by 1933 c. 190*]

**318.24 Advancements part of estate.** Any estate, real or personal, that may have been given by an intestate as an advancement to any lineal descendant shall be considered as a part of the estate of the intestate, upon the division and distribution thereof among his heirs, and shall be taken by such descendant toward his share of the estate. [*1933 c. 190 s. 55*]

**Note:** Under will whereby testatrix devised estate to children equally on condition that any "indebtedness" to testatrix should be deducted from share of each, amount of

notes which were found attached to will within sealed envelope, together with memorandum showing that testatrix had given $1,500 for notes after they had become barred by statute of limitations, held deductible from share of child liable on notes. Estate of Weiss, 224 W 192, 271 NW 918.

**318.25 Advancement, how applied.** If the advancement shall exceed the share of the heir he shall be excluded from any further portion of the estate, but he shall not be required to refund any part of such advancement. [*1933 c. 190 s. 56*]

**318.26 Equalization of shares; not to be refunded.** If such advancement be made in real estate the value thereof shall, for the purposes mentioned in section 318.25, be considered a part of the real estate to be divided; and if it be in personal estate it shall be considered as a part of the personal estate; if in either case it shall exceed the share of real or personal estate respectively that would have come to the heir so advanced he shall not be required to refund any part of it, but shall receive so much less out of the other part of the estate as will make his whole share equal to those of the other heirs who are in the same degree with him. [*1933 c. 190 s. 57*]

**318.27 Gifts, when advancements; how valued.** All gifts and grants shall be deemed to have been made in advancement if they are expressed in the gift or grant to be so made or if charged in writing by the intestate as an advancement or acknowledged in writing as such by the child or other descendant. If the value of the estate so advanced shall be expressed in the conveyance or in the charge thereof made by the intestate or in the acknowledgment of the party receiving it such value shall govern in the division and distribution of the estate; otherwise it shall be estimated according to its value when given, as nearly as the same can be ascertained. [*1933 c. 190 s. 58*]

**318.28 Advancement to ancestor to affect child.** If any child or other lineal descendant, so advanced, shall die before the intestate, leaving issue, the advancement shall be taken into consideration in the division and distribution of the estate; and the amount thereof shall be allowed accordingly by the representatives of the heir so advanced in like manner as if the advancement had been made directly to them. [*1933 c. 109 s. 59*]

**318.29 Advancements, questions for court.** All questions as to advancements shall be determined by the county court, and shall be specified in the judgment assigning the estate. [*1933 c. 190 s. 60*]