

CHAPTER 861

PROBATE — FAMILY RIGHTS

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SUBCHAPTER I

INTEREST IN MARITAL PROPERTY

NOTE: The title to Subchapter I is shown as affected by 1983 Wis. Act 186, eff. 1-1-86. Prior to that date it is "Dower- Elective Share".

861.01 Ownership of marital property at death. (1) SURVIVING SPOUSE'S 50% INTEREST IN MARITAL PROPERTY. Upon the death of either spouse, the surviving spouse retains his or her undivided 50% interest in each item of marital property.

(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: 1986 a. 186.

NOTE: 1983 Wis. Act 186 creates this section eff. 1-1-86.

861.03 Dower. The surviving spouse, whether widow or widower, of any decedent dying after March 31, 1971, has dower in any property which the decedent owned at his death. Dower consists of the right to elect a share as provided in this chapter. For dower purposes, decedent is deemed to own property at his death if he has an interest which he can transmit by will and which would pass under the intestate succession laws if he leaves no will, whether the interest is legal or equitable. The inchoate dower right of the wife of any husband dying after March 31, 1971, is

abolished, and the curtesy right of the husband of any wife dying after that date is replaced by dower as herein provided.

History: 1983 a. 186.

NOTE: 1983 Wis. Act 186 repeals this section eff. 1-1-86.

861.05 Right to elective share; effect of election. (1) If decedent dies testate, the surviving spouse has a right to elect to take the share provided by this section. The elective share consists of one-third of the net probate estate, reduced by any property given outright to the spouse under the decedent's will. As used in this subsection, net probate estate means the net estate as defined in s. 851.17, including any property passing by intestate succession as well as under the will, but without deduction of the estate taxes.

(2) Except as to property applied under sub. (1) to reduce the elective share, an election to take under this section forfeits any other right to take under the will and under the law of intestate succession. If the will would otherwise create a power of appointment in the surviving spouse, the spouse by electing to take under this section retains the power only if it is a special power as defined in s. 702.01 (5) and the testator has not provided otherwise, but forfeits any other power of appointment.

(3) The right to elect may be barred under s. 861.07.

History: 1975 c. 331; 1983 a. 186.

NOTE: 1983 Wis. Act 186 repeals this section eff. 1-1-86.

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

861.07 How elective share barred. (1) BY WRITTEN AGREEMENT. The right of the surviving spouse to elect is subject to bar by the terms of a written agreement signed by both spouses. The agreement may be entered into before or after marriage. If the agreement provides that the

surviving spouse gives up rights in specified property but does not bar rights in other property, the spouse is barred only as to the specified property; and that property is excluded from the net probate estate for purposes of computing the share of the spouse under s. 861.05 and is not subject to s. 861.17.

(2) BY GIFT OF HALF OF DECEDENT'S PROBATE AND NONPROBATE ASSETS. (a) The surviving spouse 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. Joint annuities furnished by the decedent;
3. Proceeds of life insurance as to which decedent had any of the incidents of ownership at death;
4. Transfers within 2 years of death to the extent to which decedent did not receive consideration in money or money's worth;
5. Transfers by decedent during lifetime as to which the decedent has retained power, alone or in conjunction with any person, to alter, amend, revoke or terminate such transfer or to designate the beneficiary;
6. Payments from decedent's employer or from a plan created by the employer or under a contract between the decedent and the decedent's employer, but excluding worker's compensation and social security payments;
7. Property appointed by the decedent by will or by deed executed within 2 years of death, whether the power is general or special, but only if the property is effectively appointed in favor of the surviving spouse; and
8. Property in the joint names of the decedent and one or more other persons except such proportion as is attributable to consideration furnished by the persons other than the decedent.

(b) For purposes of this subsection the surviving spouse is deemed to receive any property as to which the surviving spouse is given all the income and a general power to appoint the principal; the spouse is deemed to receive life insurance proceeds settled by decedent on option if the spouse is entitled to the interest and has a general power to appoint the proceeds or to withdraw proceeds, or if the spouse is entitled to an annuity for life or instalments of the entire principal and interest for any period equal to or less than normal life expectancy of the spouse.

(c) As used in this section, "property in joint names" means all property held or owned under any form of ownership with right of survivorship, including conventional joint tenancy, cotenancy with remainder to the survivor, stocks, bonds or bank accounts in the name of 2 or

more persons payable to the survivor, U.S. government bonds either in co-ownership form or payable on death to a designated person, and shares in credit unions or savings and loan associations payable on death to a designated person or in joint form.

History: 1975 c. 147 s. 54; 1975 c. 199; 1983 a. 186, 192.

NOTE: 1983 Wis. Act 186 repeals this section eff. 1-1-86.

861.11 Procedure for electing. **(1) FILING WRITTEN ELECTION.** If the surviving spouse wishes to elect to take the share under s. 861.05, he must file with the court in which the decedent's estate is being administered an election in writing signed by him to take the share. The spouse may bar any right to elect under this chapter by filing with the court a writing, signed by the spouse in open court, electing to take under the will.

(2) ELECTION BY A GUARDIAN OR GUARDIAN AD LITEM. An election may be filed on behalf of the spouse by a guardian of an incompetent spouse or a guardian ad litem. Either a guardian or guardian ad litem may elect against the will only if additional assets are needed for the reasonable support of the 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 (whether or not owned by the spouse) available for his support. The election shall be subject to the approval of the court, with or without notice to other interested parties.

(3) TIME FOR FILING. The election shall be filed within 6 months after the date of decedent's death, except that upon petition filed by the surviving spouse, during but not after such 6-month period, the period may be extended by the court, for additional time as the court deems just, in event of the filing of a petition for appointment of a guardian for an incompetent spouse within such 6-month period, a contest of the will, a proceeding to obtain a judicial construction of the will, or other special circumstances justifying the delay in filing an election. In the event a will is admitted to probate later than 4 months after the date of the decedent's death, the period may be extended by the court for additional time as the court deems just, upon petition by the surviving spouse made within 6 months after the date of admission.

(4) DEATH OF SURVIVING SPOUSE. If the surviving spouse dies prior to filing an election, or approval by the court of an election filed by a guardian or guardian ad litem, the right to the elective share ceases with death.

History: 1973 c. 233; 1983 a. 186.

NOTE: 1983 Wis. Act 186 repeals this section eff. 1-1-86.

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861.13 Assignment of elective share. (1) Except as provided in sub. (2), property shall be applied in satisfaction of the elective share in the following order unless the will directs otherwise:

- (a) Any intestate property;
- (b) The residue under the will;

(c) After the residue is exhausted, each person receiving a nonresiduary gift under the will must contribute, in proportion to the value of his gift, to the remaining balance of the elective share, except that persons to whom the will gives tangible personal property not used in trade, agriculture or other business are not required to contribute unless the particular gift forms a substantial part of the total estate and the court specifically orders contribution because of the gift.

(2) Upon request of the surviving spouse, the court shall assign to the spouse the home if its value does not exceed the elective share, or if the spouse pays to the personal representative the excess of the value over the elective share, unless the court finds that such an assignment would unduly disrupt the testator's plan for disposition of his estate. If a specifically devised home is assigned to the spouse, the devisee is entitled to reimbursement from property which would otherwise be applied in satisfaction of the elective share under sub. (1); but if contribution is required under sub. (1) (c), the devisee is entitled to reimbursement reduced by the amount which he would have been required to contribute had he received the home. Home has the same meaning as under s. 852.09 (2) and is valued as under s. 852.09 (1).

History: 1983 a. 186.

NOTE: 1983 Wis. Act 186 repeals this section eff. 1-1-86.

8f. 1.15 Power of sale not affected by elective right. Nothing in this chapter limits the power of the personal representative to sell any property in the course of administration.

History: 1983 a. 186.

NOTE: 1983 Wis. Act 186 repeals this section eff. 1-1-86.

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, this chapter and s. 766.77 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, this chapter and s. 766.77.

(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.

NOTE: The section title and sub. (1) are shown as affected by 1983 Wis. Act 186, eff. 1-1-86. Prior to 1-1-86, the title has "nonprobate" preceding "property". Prior to 1-1-86, sub. (1) reads:

"(1) Nothing in this chapter precludes a court in an equitable proceeding from subjecting to the rights of the surviving spouse under 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 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 removing the property from the probate estate in order to defeat the rights of the surviving spouse under this chapter."

(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, this chapter and s. 766.77. 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.

NOTE: Sub. (3) is shown as affected by 1983 Wis. Act 186, eff. 1-1-86. Prior to 1-1-86, sub. (3) reads:

"(3) If the spouse is successful in an action to reach fraudulent property arrangements, recovery is limited to one-third of the total of the net probate estate as defined in s. 861.05 (1) and the fraudulently arranged property, reduced by any property received out of the probate estate (whether by intestate succession, election, or the terms of the will) and any property passing to the spouse under the fraudulent arrangement to the extent that such property would have reduced an elective share under s. 861.05 (1) if the property had passed by will. Failure of the spouse to elect against a will within the time allowed for election by this chapter does not bar the spouse from maintaining an action. Other rules of this chapter apply so far as possible. The suit may be barred if election is barred under s. 861.07. Recovery will forfeit any power of appointment over the remaining portion of the fraudulently arranged property, except a special power; and a power to pay over or apply principal or income may be exercised as to the property only as a similar power under a will could be exercised under s. 861.05 (2)."

(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.

NOTE: Sub. (3m) is created eff. 1-1-86 by Wis. Act 186.

(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.

SUBCHAPTER II

ALLOWANCES AND EXEMPTION FROM CREDITORS

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.

History: 1971 c. 40.

Revisor's Note, 1971: This section provides for a family allowance. The intention was to restrict it to the family of the decedent and this amendment makes it clear that minor children are not eligible unless they are children of the decedent

Requested by the probate code drafting committee. [Bill 165-S]

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. Decedent's wearing apparel and jewelry held for personal use;

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.

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

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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.

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

NOTE: This section is shown as affected by 1983 Wis. Act 186, eff. 1-1-86. Prior to that date, this section reads:

"861.35 Special allowance for support and education of minor children. (1) If decedent is survived by minor children, the court may order an allowance for the support and education of each minor child until he reaches a specified age, not to exceed 18. This allowance may be made whether the estate is testate or intestate; but no allowance may be made if the decedent has amply provided for each child by the terms of his will and if the estate is sufficient to carry out the terms after payment of all debts and expenses, or if support and education have been provided for by any other means, or if the surviving spouse is legally responsible for support and education and has ample means to provide them in addition to his own support. In any

case where the decedent is not survived by a spouse, the court also may allot directly to the minor children household furniture, furnishings and appliances.

(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 at any time the property held by the trustee is no longer required for the support and education of the minor child, or when the child dies or reaches 18, 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 decedent's estate.

(3) In making allowances under this section, the court must take into account the effect on claims under s. 859.25 and balance the needs of the minor child against the nature of the creditors' claims in setting the amount allowed hereunder."

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.

NOTE: Sub. (3) is shown as affected by 1983 Wis. Act 186, eff. 1-1-86. Prior to 1-1-86, sub. (3) reads:

"(3) The assignment of property shall be applied against any right of the surviving spouse to take under the will, under the intestate succession law, or under the elective share provided by s. 861.05."

(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