

Taxation: The Property Tax Exemption and Non-Profit Homes for the Aged

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RECENT DECISIONS

Taxation: The Property Tax Exemption and Non-Profit Homes for the Aged: In *Milwaukee Protestant Home for the Aged v. City of Milwaukee*,¹ the Wisconsin Supreme Court, in a four to three decision, granted tax-exempt status to a non-profit home for the aged in which the occupants pay fees in excess of the cost of the services they receive.

The Milwaukee Protestant Home for the Aged was founded in 1884 as a non-profit corporation solely for charitable purposes. The Home, always operated at a deficit, provided care for the aged regardless of their ability to pay and consequently had always been exempt from the payment of property taxes. In 1963, Bradford Terrace, the most recent addition to the Home, was opened for occupancy, but with a different financing arrangement from the rest of the Home. All the residents of Bradford Terrace are required to pay a founders fee from \$8,000 to \$15,500, depending on the size of the living unit desired, plus a monthly occupancy charge of from \$150 to \$160. In addition, all its residents pay for any special services they require. These charges exceed the operating costs of the addition and the excess is used to pay back the endowment fund, from which the construction costs of the addition had been borrowed. Taking note of the financing arrangement used for the new addition, the City of Milwaukee placed Bradford Terrace on the tax rolls under the "taxed in part" statute.² The Home paid the property tax under protest and sued for recovery. The trial court held in favor of the City and refused to grant a tax exemption, on the grounds that the addition is being operated for pecuniary profit.

The Background

The actual amount in controversy was only slightly over \$39,000 per year at the then existing rates, but the case is significant because it focuses on the financial difficulties of the city. With the costs and disbursements of local governments steadily rising, property taxation has become a major source of needed revenues. However, local governments are faced with the discouraging trend of a proportionally diminishing tax base. Nationally, the proportion of tax exempt property has gone from 4.6% of \$43,642,000,000 exempted in 1880, to

¹ 41 Wis. 2d 284, 164 N.W.2d 289 (1969).

² Wis. STAT. § 70.11(8) (1967) provides:

Where property for which exemption is sought pursuant to this section is used in part for exempt purposes and in part for pecuniary profit, then the same shall be assessed for taxation at such percentage of the full market value of said real and personal property as shall fairly measure and represent the extent of such use for pecuniary profit

23.4% of \$1,263,740,000,000 in 1961, and to 32.6% of \$1,748,630,000,000, or \$569,479,000,000, exempted in 1968.³

In Milwaukee, it is estimated that 25% of the property in the city is tax exempt for one reason or another.⁴ In the twelve months ending May 1, 1969, approximately \$22,500,000 worth of property was removed from the city tax rolls, more than \$16,000,000 of it through acquisition by tax-exempt organizations.⁵ \$1,210,694,250 worth of property in the City of Milwaukee was exempt from general taxation in the fiscal year ending April 30, 1969. Of that, \$183,899,000 is attributed to benevolent organizations such as hospitals and homes for the aged.⁶

All states grant tax-exempt status to some property. Some states do so without limitation, while others restrict exemptions to so-called essentials. The narrow or strict position generally grants exemptions only as an encouragement to those institutions which save the state money by private performance of some of the state's duties (e.g., a providing of food and shelter for the destitute). A more liberal philosophy grants tax exemptions to all institutions devoted to generally humanitarian goals (e.g., Boy Scouts' camps and art galleries).⁷ In Wisconsin, benevolent associations traditionally have been granted tax-exempt status for their real and personal property,⁸ and a 1967 legislative amendment specifically included "benevolent nursing homes and retirement homes for the aged."⁹

The Majority Opinion

In *Milwaukee Protestant Home for the Aged*, the majority of the supreme court interprets the 1967 amendment as a clear legislative policy decision that retirement homes for the aged are benevolent.¹⁰ The only question then remaining is whether the financing arrangements of the new addition meet the requirements for a non-profit operation.¹¹ To decide that issue, the court makes a logical extension of its previous decisions.

³ Meyers, *Tax Exempt Property: Another Crushing Burden for the Cities*, FORTUNE, May 1, 1969, at 76-79.

⁴ *Id.* at 77.

⁵ Milwaukee Journal, Sept. 14, 1969, § 2, at 2, col. 6. These tentative figures were presented by Robert E. Wood, State Supervisor of Assessments, to the Milwaukee County Board's Finance Committee on September 13, 1969.

⁶ Milwaukee Sentinel, Jan. 8, 1970, § 3 (Almanac), at 18, col. 6.

⁷ See Note, *Property Taxation of Non-Profit Rental Housing for the Aged*, 39 TEMPLE L. REV. 88 (1965); see also Note, *Exemption of Educational, Philanthropic and Religious Institutions from State Real Property Taxes*, 64 HARVARD L. REV. 288 (1950), in which the author designates Wisconsin as a "humanitarian" theory jurisdiction.

⁸ WIS. STAT. § 70.11(4) (1967) provides exemption for: "Property owned and used exclusively by . . . religious, educational or benevolent associations . . . while such property is not used for a profit."

⁹ WIS. LAWS 1967, ch. 64, adding to WIS. STAT. § 70.11(4) (1967).

¹⁰ 41 Wis. 2d at 293, 164 N.W.2d at 293.

¹¹ *Id.*

*Prairie du Chien Sanitarium Co. v. Prairie du Chien*¹² established three criteria for tax exempt status: "[I]t must appear that, (1) appellant is a benevolent association; (2) the personal property is used exclusively for the purposes of such association; (3) the real and personal property is not used for pecuniary profit."¹³ The court said the first criterion is not at issue, and the second is easily dismissed by the impossibility of any profit accruing to any individual.¹⁴ Therefore, the only issue to be resolved is whether the property is used for pecuniary profit. *Duncan v. Steeper*¹⁵ held that excess of income over expenditures is not a bar to tax-exempt status and *Sisters of St. Joseph v. Town of Plover*¹⁶ pointed out that the excess must be used to extend the benevolence. But, the majority said, the City is trying to add a fourth requirement for tax-exempt status: that some residents be admitted without charge.¹⁷ In rejecting this criterion, the majority again cites the *Duncan* case to show that in Wisconsin "benevolent" and "charitable" are broadly defined: "To help retired persons of moderate means live out their remaining years is 'benevolent' whether or not it is also considered, as we would consider it to be 'charitable.'"¹⁸ The court adds, finally, that the legislature simply did not provide that some free services be a requirement.¹⁹ Its discussion seems to confirm the observation that Wisconsin generally has been a so-called "humanitarian" theory jurisdiction, going beyond the "private performance of the state's duties" theory.²⁰ The majority opinion closes by refusing to view the addition's financial arrangements as a separate entity, saying that they can only be evaluated by examining the Home's total operation.²¹

The Dissenting Opinion

Justices Beilfuss, Wilkie, and Heffernan dissented, stating first, that tax exemption statutes are to be strictly construed against exemption.²² They then proceed to the benevolence issue, arguing that the residents of the new addition are the recipients of their own benevolence.²³ In effect, the minority takes the position that there is no

¹² 242 Wis. 262, 7 N.W.2d 832 (1943).

¹³ *Id.* at 264, 7 N.W.2d at 833.

¹⁴ 41 Wis. 2d at 294-95, 164 N.W.2d at 293-94.

¹⁵ 17 Wis. 2d 226, 116 N.W.2d 154 (1962).

¹⁶ 239 Wis. 278, 1 N.W.2d 173 (1941).

¹⁷ 41 Wis. 2d at 298-99, 164 N.W.2d at 296.

¹⁸ *Id.* at 300, 164 N.W.2d at 297. In this area of tax exempt status of specified organizations, the adjective "benevolent" is considered to have a broader definition than the word "charitable," and the distinction was specifically noted by Justice Robert Hansen, writing for the majority, 41 Wis. 2d at 299, 164 N.W.2d at 296. But later in the opinion, the two words seem to be used without attention to the distinction.

¹⁹ *Id.* at 300, 164 N.W.2d at 297.

²⁰ Note, *Exemption of Educational, Philanthropic and Religious Institutions from State Real Property Taxes*, 64 HARVARD L. REV. 288 (1950).

²¹ 41 Wis. 2d at 301-02, 164 N.W.2d at 297-98.

²² *Id.* at 303, 164 N.W.2d at 298.

²³ *Id.* at 304-05, 164 N.W.2d at 299.

charitable or benevolent element present when all residents pay the entire cost or more of all the services they receive. Thus, the element of benevolence is necessary for the tax exemption even though the organization is a non-profit one. In its absence, the minority concludes, the exemption should not be granted.

Comment

The majority of the court seems to assume that the legislature, in its 1967 amendment, had already decided that all homes for the aged are benevolent. But that assumption does not seem to be warranted by the language of the statute. The amendment specified: "*benevolent* nursing homes and retirement homes for the aged."²⁴ The logical assumption is that the word "benevolent" was meant to be a qualifying adjective for both "nursing homes" and "retirement homes for the aged." If so, not all non-profit nursing homes and retirement homes for the aged are to be included, but only those which are benevolent. For example, Wisconsin Statutes Sec. 70.11 (4) (1967) exempts the property of women's clubs. There is no limitation for benevolent women's clubs and presumably the legislature meant to exempt from taxation property owned by *all* women's clubs. But, by using the word "benevolent" before "nursing homes," the legislature also presumably meant to exempt from taxation property owned only by benevolent retirement homes. But, also, the majority's decision fails to give any limiting effect to "benevolent," and the reasons for that failure are not readily apparent. Section 70.11(4) explicitly states, however, "while such property is not used for profit," and, therefore, the distinction between benevolent and non-benevolent homes for the aged must be something other than mere non-profit status. This distinction is not clearly made in the court's statement that:

In Wisconsin, the question of public policy involved has been settled by the legislature. Wisconsin long has exempted from taxation property of a benevolent association, used exclusively for benevolent purposes and not for profit. In 1967, the Wisconsin legislature amended this statute to specifically add "benevolent nursing homes and retirement homes for the aged" as included in the tax exemption statute. This 1967 amendment did not change the existing law as to retirement homes for the aged. It merely clarified the legislative intent, and the reasons for such legislative clarification were set forth.

So the question before us is not whether operating a retirement home for the aged is a proper function of a benevolent institution. The legislature has answered that. The sole question here is whether the Milwaukee Protestant Home for the Aged meets the standards as to non-profit operation set forth in the tax exemption statute.²⁵

²⁴ Wis. Laws 1967, ch. 64 (emphasis added).

²⁵ 41 Wis. 2d at 292-93, 164 N.W.2d at 293 (footnotes omitted).

But the case seems to hold, however, that every non-profit home for the aged is benevolent and entitled to the property tax exemption.

Without alluding to the two theories—the “doing the state’s duty” theory and the “humanitarian” theory—the court opted for the latter. Under the “doing the state’s duty” theory, the exemption would not be granted because all the inhabitants of Bradford Terrace could and did pay for their own care. Under the “humanitarian” theory, any decision is purely a policy one: are non-profit homes for the aged to be encouraged through a favorable tax status? The majority answers in the affirmative, and Wisconsin continues to be a liberal “humanitarian” theory jurisdiction.

In its simplest terms, any distinction between the two theories really becomes one of adapting a broad or narrow definition of benevolence or charity. The narrow definition equates charity with some variation of almsgiving or aid to the poor and destitute—those not able to take care of their own needs. This is consistent with the “doing the state’s duty” theory. A broad definition, on the other hand, encompasses care for the physical, mental, and emotional well-being of the aged, even if, as here, they are able, and do in fact, pay for it. This is the “humanitarian” theory.

The appellate courts of other jurisdictions, in considering whether to grant tax exemptions for homes for the aged, while admittedly interpreting differently worded statutes and constitutions, are split evenly. Florida,²⁶ California,²⁷ Kansas,²⁸ Montana,²⁹ Pennsylvania,³⁰ Delaware,³¹ and now Wisconsin have all granted the exemption. Texas,³²

²⁶ Florida initially had denied the exemption in *Haines v. St. Petersburg Methodist Home*, 173 So. 2d 176 (Fla. App. 1965). But the legislature then amended the statute and specifically granted tax-exempt status to all non-profit licensed homes for the aged, FLA. STAT. ANN. § 192.06(14) (1969). In *Jasper v. Mease Manor, Inc.*, 208 So. 2d 821 (Fla. 1968), the Florida Supreme Court upheld the validity of the statute.

²⁷ *Fredericka Home for the Aged v. County of San Diego*, 35 Cal. 2d 789, 221 P.2d 68 (1950); see also *Fifield Manor v. County of Los Angeles*, 188 Cal. App. 2d 1, 10 Cal. Rptr. 242 (1961). In *Fredericka* all applicants for admission were required to pay an entry fee, but only 65% of the operating expenses came from the fees from the inhabitants. In *Fifield* the charges were less than the actual cost of operation.

²⁸ *Topeka Presbyterian Manor, Inc. v. Board of County Comm’rs*, 195 Kan. 90, 402 P.2d 802 (1965) (some residents were admitted who could not pay their share, and the income from residents did not exceed operating costs).

²⁹ *Bozeman Deaconess Foundation v. Ford*, 151 Mont. 143, 439 P.2d 915 (1968) (there was no actual profit and some residents were admitted who were unable to pay the full charge; the dissenters in *Milwaukee Protestant Home for the Aged* excluded *Bozeman* from those homes which gave free services. 41 Wis. 2d at 302, 164 N.W.2d at 302).

³⁰ *In re Tax Appeals of United Presbyterian Homes*, 428 Pa. 145, 236 A.2d 776 (1968) (the home never realized a profit and was open to some not able to pay).

³¹ *Electra Arms Apartment and Medical Center Foundation, Inc. v. City of Wilmington*, 254 A.2d 244 (Del. 1969).

³² *Hilltop Village, Inc. v. Kerreville Inc. School Dist.*, 426 S.W.2d 943 (Tex. 1968).

Ohio,³³ Illinois,³⁴ Oregon,³⁵ Minnesota,³⁶ Colorado,³⁷ and Missouri³⁸ have denied it. On an analogous issue, if not facts, a federal district court recently took the more conservative approach,³⁹ while at the same time the Internal Revenue Service took the liberal position.⁴⁰

Examination of the cases from the other states which have granted the exemption indicates that Wisconsin has gone further than the others, with the possible exceptions of Florida, where the exemption was provided by legislative enactment, and Delaware, which seems to allow a property tax exemption for all organizations not organized for profit (in Wisconsin, all Chapter 181 corporations). In the California, Kansas, Montana, and Pennsylvania cases the homes either took some residents who did not pay their full share or their operation showed no overall profit, or both, but Wisconsin has granted the exemption where there is no element of almsgiving at all and the revenues from the residents exceed the operating expenses.

If the Wisconsin legislature did not intend that all non-profit homes for the aged meeting the requirements of Chapter 181 should be exempt from property taxation, some additional guidelines will have to be set forth to determine which homes are benevolent and which are not. Further, if the legislature does feel the *Milwaukee Protestant Home for the Aged* decision is too broad an interpretation, there still remains the problem of whether it can effectively establish definite guidelines requiring a more conservative approach. The job will not be easy.

JOSEPH C. BRANCH

Constitutional Law—Judicial Intervention in Church Property Disputes: Every year a number¹ of church property disputes come before the civil courts. These controversies arise from schisms, political quarrels within churches, unions or mergers between churches, appointment of clergy, and expulsion of members. Although courts have tradi-

³³ *Philadelphia Home Fund v. Board of Tax Appeals*, 5 Ohio St. 2d 135, 214 N.E.2d 431 (1966); see also *Crestview of Ohio, Inc. v. Donahue*, 14 Ohio St. 2d 121, 236 N.E.2d 668 (1968).

³⁴ *Methodist Old Peoples Home v. Korzen*, 39, Ill. 2d 149, 233 N.E.2d 537 (1968).

³⁵ *Friendsview Manor v. State Tax Comm'n*, 247 Ore. 94, 420 P.2d 77 (1966), *aff'd on rehearing*, 247 Ore. 94, 427 P.2d 417 (1967); *Oregon Methodist Home v. Horn*, 226 Ore. 298, 360 P.2d 293 (1961).

³⁶ See *Madonna Towers v. Commissioner of Taxation*, 167 N.W.2d 712 (Minn. 1969), which quoted from Wisconsin's dissenting opinion.

³⁷ *United Presbyterian Ass'n v. Board of County Comm'rs*, 448 P.2d 967 (Colo. 1968).

³⁸ *Defenders' Townhouse, Inc. v. Kansas City*, 441 S.W.2d 365 (Mo. 1969).

³⁹ *Bank of Carthage v. United States*, 304 F. Supp. 77 (W.D. Mo. 1969) (a federal estate tax exemption was denied to a trust fund claimed to be for "charitable purposes" when the fund was used to maintain a cemetery which provided no free lots).

⁴⁰ See Rev. Rul. 69-545, 1969 INT. REV. BULL. No. 1969-44, at 10, where the same issue as in the nursing home cases is decided in favor of the tax exemption.

¹ About 10 cases per year from federal courts and the highest state courts appear in the digests.