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Article 8

Parent and Child - Restitution - Obligation of Child to Reimburse State for Institutionalizing Indigent Parent

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Parent & Child — Restitution — Obligation of Child to Reimburse State for Institutionalizing Indigent Parent — Plaintiff, a state agency, brought an action to recover on a bond of Alfred and Ervin Schmidt and their wives guaranteeing the support, care, and maintenance of the named defendant's mother, which bond was executed in consideration of the mother's transfer of certain property to defendants. The theory under which recovery was sought was that the agency, by supplying support and maintenance in the form of institutionalization, became a third party beneficiary under the bond. *Held:* The obligation created by the bond of defendants was personal to their mother with no provision therein to create any obligation or to secure benefits to any third parties, consequently, the state agency not being a party to the bond cannot recover thereunder. *State Department of Public Welfare v. Schmidt et al. 39 N.W. (2d) 392 (Wisconsin 1949).*

That the state agency was properly denied recovery on a cause of action founded on the theory that it was a third party beneficiary to the bond must be conceded. However the facts of the case lend themselves to speculation as to whether the agency might not have fared more favorably by basing the action on the theory of quasi contract. In such an action the disposition of the case would necessarily revolve about the question, "Did the state confer a benefit upon the defendants?". Simple though this question seems it conceals a labyrinth of intricate problems concerning primarily the duty a child owes a parent to support him when the parent becomes incompetent while indigent, and secondly the element present in this type of litigation which considers the support and care of incompetents a statutory obligation of the state[1] which obligation is classified more in the nature of a public safety precaution than as a mere benefit to the person or persons directly benefited in a pecuniary manner.[2] Thirdly, the question of whether or not the state agency is precluded from this type of recovery because of the statutory nature of its duty of support and is consequent limitation to the statutory means of enforcing the personal obligation, also statutory, of the child under these conditions.[3] Although the third of these three points will be seen to be controlling upon further development it is nevertheless interesting to note that the same result will follow from a development of the first two.

First, under the facts here involved, does the child owe a duty of support? It is generally acknowledged that no such duty exists at

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[1] State Department of Public Welfare v. Shirley, 243 Wis. 276, 289, 10 N.W. 2d 215, 221 (1943); Patrick v. Baldwin, 109 Wis. 342, 85 N.W. 274 (1901); see Coffeen v. Preble, 142 Wis. 183, 125 N.W. 954 (1910).
[2] Richardson et al. v. Stuesser, 125 Wis. 66, 103 N.W. 261 (1905).
[3] Town of Saxville v. Bartlett, 126 Wis. 655, 105 N.W. 1052 (1906).

common law.[4] Statutory law in Wisconsin has created a duty,[5] but has done so in a merely prospective manner.[6] Thus the legal obligation may be said to be nonexistent until the legal machinery for fixing that obligation is set in motion by proper court action and becomes fixed. This result particularly follows the long line of decisions requiring strict construction of rights and duties created by statute and the necessity for strict adherance to the enabling legislation for the beneficiary of the statute to avail himself of its bounty.[7] Thus, until the machinery provided by statute by which the state can impose the obligation of support on the child is utilized, can it be said that the state is conferring any legal benefit upon the child, who until that time owes no legal duty of support, by merely caring for a legal stranger to the child?

Secondly, in husband-wife cases, where the duty of support by the husband is acknowledged by both common and statutory law,[8] in contradistinction to the child-parent support relationship, the courts take a dim view of institutionalization of the wife as a benefit to the husband. True their reasoning is prejudiced by the fact that institutionalization removes the wife from the home established by the husband.[9] But, when the courts take the view that a benefit does not exist even when the husband is the moving party in incompetancy proceedings, basing their decision on the premise that the incompetency is beyond the power of the husband to prevent or acquiesce in,[10] the public protection phase of the state's action is obviously paramount and controlling, and the pecuniary benefit to the husband incomplete and incidental. Applying this same line of reasoning to the child-parent relationship must lead to the same result.

The third phase of the question of quasi contractual recovery, that of whether or not the remedy is open to the state, is squarely met in *Town of Saxville v. Bartlett* where the court specifically states that since the state's right to reimbursement for care of incompetents is statutory and unknown to the common law, the remedy therein provided is exclusive. The statutory remedy[11] provides for the state agency fixing support liability thru judgment, but such duty is not im-

[4] 46 C. J. p. 1279 sec. 73.
[5] Wis. Stat. 49.07.
[6] Supra note 3.
[7] Ibid at page 658 "This is plainly a case where a new right has been created and a complete remedy for its enforcement has been provided with it. The law is well settled that in such a case the remedy provided is exclusive." The court then cites Hall v. Hinckley, 32 Wis. 362 (1873); State ex rel. Cook v. Houser, 122 Wis. 534, 595, 100 N.W. 964, 984 (1904), and is itself cited with approval in State Department of Public Welfare v. Shirley, supra note 1.
[8] 30 C.J. p. 516, sec. 29.
[9] Supra note 2.
[10] Ibid.
[11] Supra note 5.

posed until the commencement of the action and any action based on past care furnished must fail.[12]

As the above discussion precludes the possibility of state recovery for past care of indigent incompetents, it is appropriate now to consider the course of action provided by statute[13] to which the state is limited and in which the responsible family members, consisting of the father, mother, husband, wife and children of the dependent, shall have their liability fixed. The authorities having charge of the dependent person or the board in charge of the institution where the dependent person may be, must apply to the county judge of the county in which the dependent person resides for an order to compel maintenance and must serve a notice of such application upon the responsible family members at least ten (10) days before a hearing which the county judge must hold to hear the allegations and proofs in the matter. The county judge will then, by order, require maintenance from such relatives, if they be of sufficient ability, in the following order: first the husband or wife; then the father; then the children; and lastly the mother. The order will fix a weekly or monthly sum sufficient for the support of the dependent to be paid for a fixed period or until further order of the court. In the event that any responsible relative is unable wholly to maintain the dependent, but is able to contribute to such support, the judge may order two or more responsible relatives to maintain the dependent and specify the amount each shall contribute. If it be established that the responsible relatives are unable to wholly maintain the dependent but are able to contribute to such maintenance, the judge shall order a sum to be paid weekly or monthly by each relative in proportion to his ability. These orders may be enforced by proceedings as for contempt. Also, the state is safe in furnishing maintenance once the order has been made because the statute authorizes suit against any person disobeying such an order and recovery in the amount prescribed by the order.

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Taxation — Requirement that an Ordinary and Necessary Business Expense Must Be Reasonable — Taxpayer, a manufacturing corporation, deducted premiums paid on an employees' retirement annuity policy and contributions to a trust fund for employees' benefit from its gross income for 1940 and 1941 as an ordinary and necessary business expense.[1] The Tax Court disallowed this deduction ruling that the pay-

[12] Guardianship of Heck, 225 Wis. 636, 275 N.W. 520 (1937).
[13] Supra note 5.
[1] Sec. 23 (a) (1) (A) of the Internal Revenue Code. It was conceded that the payments were not qualified for deduction under Sec. 23 (p) as then in effect which allowed deductions for payments to pension and other plans under certain conditions.