Trusts and Estates

Barbara A. Kluka

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[I]t may be admitted that many of the justifications for strict liability have force regarding professional medical services. The provider of medical services appears to stand in substantially the same position with respect to the patient as the seller of goods does with the consumer. The typical purchaser of medical services cannot evaluate the quality of care offered because medical services are complex and infrequently bought. The medical care market gives the purchaser little assistance in enabling the purchaser to evaluate what he or she is buying. It is generally the physician — not the patient — who determines the kind of services to be rendered and how often. It is the physician not the patient who prescribes other goods and services, e.g., drugs, therapy, and hospitalization, that should supplement the physician's services. The physician is in a better position than the patient to determine and improve the quality of the services, and the patient's reliance on the doctor's skill, care and reputation is perhaps greater than the reliance of the consumer of goods. The difficulties faced by plaintiffs in carrying the burden of proving negligence on the part of a doctor are well known . . . . The hospital and doctor are in a better position than the patient to bear and distribute the risk of loss. 68

Nevertheless, the effect of such a theory on medical malpractice insurance, the inherent differences between medical services and products, the need for readily available medical services, and the likelihood of increased medical costs from adopting such a theory presented strong enough public policy arguments to prevent the court from permitting such an extension of strict liability, at least at this time.

ROSS A. ANDERSON

TRUSTS AND ESTATES

I. Inheritance Tax Rates: Share of Surviving Spouse

In re Estate of Walker 1 dealt with the right of certain distributees to exempt from state inheritance tax a portion of the property received. 2 The amounts exempted in Wisconsin Stat-

68. 79 Wis. 2d at 468-69, 256 N.W.2d at 391 (footnotes omitted).

1. 75 Wis. 2d 93, 248 N.W.2d 410 (1977).
2. There are four classifications of distributees: Class A: surviving spouse, lineal
utes section 72.17 must be applied with the rates in Wisconsin Statutes section 72.18 to arrive at the net tax liability.

The court in *Walker* resolved the conflicting applications of these statutes as urged by the Department of Revenue and the surviving spouse. This particular problem of interpretation did not arise until 1971 when the language of section 72.18 was adopted. Finding that sections 72.17 and 72.18 were ambiguous when read together, the court ruled that the revenue department's computation was the result intended by the legislature.

The court relied primarily on legislative history to support its conclusion, and that reliance was well-placed. In December 1970 the Advisory Committee on Inheritance and Gift Tax con-
sidered the bill draft of section 72.18. As originally drafted the section read, "Class A distributees are subject to tax upon the balance of the first $25,000 over the exemption at the rate of 2.5%." Since that language could be interpreted to mean a Class A distributee would pay at the rate of 2.5 percent on the first $25,000 above the $50,000 exemption, the committee changed the language to read, "Class A distributees are taxed upon the balance, if any, of the first $25,000 over the exemption at 2.5%." The change reflected the committee’s intent that the recipient pay in the 7.5 percent bracket after the $50,000 exemption. Thus, it appears that the legislature intended the method of computation used by the Department of Revenue in Walker.

The Department’s interpretation was further supported by the 1973 amendment to section 72.18(1) which added this final sentence: “The personal exemption applies against the lowest bracket.” The Walker court noted that the added language "comes close to eliminating an ambiguity so that the section as amended makes clear on its face" the method of computation.

This method of computation also applies to other distributees eligible for an exemption. For example, under the current Wisconsin Statutes, a child receiving $30,000 from a parent is eligible for the $4,000 exemption provided in section 72.17(1). This $4,000 exemption is applied against the 2.5 percent bracket. Thus, the child will pay inheritance tax on $21,000 at the 2.5 percent rate and on the remaining $5,000 at the 5 percent rate. Although Walker created no new law, the Wisconsin Supreme Court’s construction of these statutes settled a question for which both sides had persuasive arguments.

II. INHERITANCE TAXABILITY: EMPLOYEE BENEFIT PLANS

The taxpayer in In re Estate of Puchner was a widow who received $72,000 from an employee benefit plan. The plan was

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10. (Emphasis added). This was the wording of § 72.18 as adopted by the legislature. See note 6 supra.
12. 75 Wis. 2d at 105, 248 N.W.2d at 416. The court, thus, read the amendment as a clarification of the statute.
14. 78 Wis. 2d 525, 254 N.W.2d 722 (1977).
created by a corporate resolution which provided payment to the widows of certain corporate officials. The employee made no contribution to the plan, had no right to name the beneficiary and had no right to receive benefits during his lifetime. None of the funds passed through the decedent's estate. The court's conclusion that the payments were subject to the Wisconsin inheritance tax was based on two determinations: (1) section 72.01(3)(c), and not section 72.01(3)(b), was the applicable statute; and (2) the payments were not excluded from tax under section 2039 of the Internal Revenue Code.

The first determination was reached by a reading of the two Wisconsin Statutes. Section 72.01(3)(b) described transfers intended to take effect at death. Prior to the enactment of section 72.01(3)(c), subsection (b) was used to determine the inheritance taxability of employee benefit plans. Section 72.01(3)(c) was created specifically for employee benefit plans. Thus, Mrs. Puchner's tax liability was decided under subsection (c).

The court's second determination involved the effect of the incorporation of section 2039 of the Internal Revenue Code into section 72.01(3)(c). Subsection (a) of section 2039 is a rule of

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15. Id. at 527-28, 254 N.W.2d at 723.
16. This section reads in part, "Benefits paid to a beneficiary under an employee benefit plan shall be taxable for inheritance tax purposes except to the extent that the proportionate share resulting from the employer's contribution would be excludible in the gross estate of the decedent under sec. 2039 of the internal revenue code." Wis. Stat. § 72.01(3)(c) (1967) (renumbered and amended 1971 Wis. Laws, ch. 310; current version at Wis. Stat. § 72.12(4)(c) (1975)). See note 31 infra.
17. This section reads,

When a transfer is of property, made without an adequate and full consideration in money or money's worth by a resident or by a nonresident when such nonresident's property is within this state, or within its jurisdiction, by deed, grant, bargain, sale or gift, intended to take effect in possession or enjoyment at or after the death of the grantor, vendor or donor, including any transfer where the transferor has retained for his life or for any period not ending before his death: 1 the possession or enjoyment of, or the right to the income, or to economic benefit from, the property, or 2 the right, either alone or in conjunction with any person, to alter, amend, revoke or terminate such transfer, or to designate the beneficiary who shall possess or enjoy the property, or the income, or economic benefit therefrom.

Wis. Stat. § 72.01(3)(b) (1965) (renumbered and amended 1971 Wis. Laws, ch. 310; current version at Wis. Stat. § 72.12(4)(b) (1975)).
19. See Estate of King, 28 Wis. 2d 431, 137 N.W.2d 122 (1965); Estate of Stone, 10 Wis. 2d 467, 103 N.W.2d 663 (1960); Estate of Sweet, 270 Wis. 256, 70 N.W.2d 645 (1955).
20. 78 Wis. 2d at 531, 254 N.W.2d at 725.
inclusion with respect to certain annuities which a decedent
received or had a right to receive during his lifetime. Subsec-
tion (b) of section 2039 limits the amount of the annuity inclu-
dible in the gross estate to the amount which is proportionate
to the part of the purchase price contributed by the decedent.
Section 2039(c) exempts amounts receivable under certain
plans which might otherwise be includible in the gross estate
under any provision of the Internal Revenue Code. The tax-
payer argued that all of section 2039 must be considered in
determining inheritance taxability of the decedent's employee
benefit plan. 21 Therefore, since the payments would not be in-
cludible in the gross estate under sections 2039(a) and (b) in
the first instance, the exclusion requirements of section 2039(c)
were not applicable. On the facts of this case the payments
could not have been reached for federal estate tax purposes
under sections 2039(a) and (b).

In contrast, the Department of Revenue contended that sec-
tion 72.01(3)(c) referred only to section 2039(c). The Depart-
ment argued that the payments to the widow in this case were
not entitled to exemption under subsection (c) and were, there-
fore, taxable under section 72.01(3)(c). 22 Agreeing with the
Department of Revenue, the court concluded that the language
in section 72.01(3)(c), "proportionate share resulting from
the employer's contribution," 23 referred only to the qualified
plans described in section 2039(c).

The court found that the plain language of section 72.01(3)
did not exempt both qualified and unqualified plans from the
Wisconsin inheritance tax. Thus, taxability under section
72.01(3) was determined by whether the benefit payments
would be totally excluded from the gross estate for federal es-
tate tax purposes under section 2039 or under any other section
of the Internal Revenue Code. However, the plain language of
section 72.01(3)(c) did not require total exclusion from the
gross estate for federal estate tax purposes. 24 Deciding the ex-

21. Id. at 535, 254 N.W.2d at 727.
22. Id. at 537, 254 N.W.2d at 728.
23. See note 16 supra.
24. 78 Wis. 2d at 537, 254 N.W.2d at 728. Since a benefit payment excluded from
the gross estate under § 2039(b) might be taxable under other federal estate tax
provisions, to escape Wisconsin inheritance tax, the benefit plan must be one of the
qualified plans referred to in § 2039(c).
25. Section 72.01(3)(c), note 16 supra, referred to an employer's contribution which
"would be excludible. . .under sec. 2039."
tent to which section 2039 was incorporated into section 72.01(3)(c) is typical of the problems a court must resolve in interpreting referential legislation. Despite the court’s analysis there remains the question of why the legislature did not specifically refer to section 2039(c) in the first instance if that was their intent.

There is another issue, not raised in Puchner, which existed in applying section 72.01(3)(c): Is the reference to section 2039 an improper delegation of legislative power? When a legislature adopts a rule in the form in which another lawmaking body has already passed it, there is clearly no delegation at all. However, if future laws, rules or regulations are included in the adoption, there is with equal clarity a delegation. Wisconsin case law provides that the statute adopted by reference is incorporated as of the time of adoption; subsequent changes in the adopted statute must be expressly included. Section 2039(c) of the Internal Revenue Code was amended in 1976 with respect to lump sum distributions. The current Wisconsin Statutes refer to section 2039 as amended. Yet the language of section 72.01(3)(c) still seems to contain a delegation of legislative power. Inheritance taxability of benefit payments under Wisconsin law depends on the total exclusion provision of section 2039(c) however Congress may decide to define that exclusion. Puchner illustrates the need for the Wisconsin legislature to develop its own specified criteria for inheritance taxation of employee benefit payments.

26. Referential legislation is a statute which adopts, wholly or in part, provisions of other statutes. See generally Read, Is Referential Legislation Worth While? 25 MINN. L. Rev. 261 (1941).


31. Benefits paid to a beneficiary under an employee benefit plan are taxable under this subchapter except to the extent that the proportionate share resulting from the employer’s contribution would be excludable from the gross estate of the decedent under s. 2039 of the 1954 internal revenue code as amended. This subsection applies whether or not there is a requirement for filing a federal estate tax return. Wis. STAT. § 72.12(4)(c) (1975) (formerly Wis. STAT. § 72.01(3)(c)). See note 16 supra.
III. TRUSTEE'S DUTY: DISTRIBUTING TRUST ASSETS

The appellant in In re Trust of Sensenbrenner sought a surcharge against trustees for depreciation in the value of assets between termination of the trust and distribution. The ground for the surcharge was unreasonable delay in distributing trust assets. The life-tenant beneficiary of the trust died on October 8, 1973. Trust assets were distributed to the remaindermen on April 30, 1974 (stocks) and June 14, 1974 (bonds).

Between October 1973 and June 1974, several problems arose: a trustee was appointed to replace the decedent who had been one of the three original trustees; legal advice was sought concerning a possible tax throwback problem; one of the remaining original trustees was hospitalized and died in February 1974; the surviving initial trustee, who was eighty years old, left Milwaukee to spend the winter in Florida; remaindermen were contacted regarding approval of the distribution plan and solicitation and receipt of waivers and consents.

The court concluded that although any one of the intervening factors might not justify delay in distribution, "[t]here was a continuous flow of trustee activity." The trial court's finding that delay was not unreasonable was supported by well-documented facts and circumstances in the record.

The significance of Sensenbrenner is the court's holding that the duty of a trustee to distribute trust assets is defined by the same standards which apply to trust management. The trustee must use due care and diligence and act as a prudent and provident person would act under the circumstances. A sanction arises on failure to use due care and diligence in performance of a duty within a reasonable time: a surcharge is assessed against the trustee for any loss of trust asset value caused by the delay.

Sensenbrenner established several important guidelines for

32. 76 Wis. 2d 625, 252 N.W.2d 47 (1977).
33. Id. at 630, 252 N.W.2d at 49.
34. Id. The market value of the trust fund corpus was only $2.5 million, and the appellant asserted the value of the trust assets declined by $595,000 during the delay.
35. Id. at 641, 252 N.W.2d at 54.
36. Id.
38. 76 Wis. 2d at 636, 252 N.W.2d at 52. See also RESTATEMENT (SECOND) OF TRUSTS § 345, comment f (1959).
trustees, particularly noncorporate trustees, engaged in trust asset distribution: (1) All of the circumstances are considered in examining the length of and justification for any delay, and accurate records of all relevant circumstances should be kept by the trustee; (2) the delay is less likely to be found unreasonable when the trustee engages in a "continuous flow of activity" directed at solving problems of distribution; and (3) a trustee is held to the same standard of performance in distributing assets as the standard imposed for trust management. The findings in Sensenbrenner have practical as well as precedential value. The possibility that the value of trust assets could depreciate considerably before actual distribution is a real one in these times of fluctuating economic conditions.

Barbara A. Kluka