



## Alerts

### Wisconsin Supreme Court Declines Invitation to Broaden Legal Malpractice Liability to Non-Client Will Beneficiaries

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*MacLeish v. Boardman & Clark LLP, 2019 WI 31*

#### Brief Summary

The children and beneficiaries of a father's will sued the attorneys who had administered their father's estate, arguing the attorneys were negligent for not construing his will as creating a trust, which caused the children to incur estate taxes upon their mother's death. The Wisconsin Supreme Court upheld summary judgment in favor of the attorneys finding that although the children had standing, they did not demonstrate their father's clear intent was to create a trust in his will.

#### Complete Summary

##### Underlying Estate Planning

An attorney with the defendant firm drafted a will for Charles MacLeish in 1967. MacLeish died in 1984. Another attorney at the firm then administered Charles' estate. Defendants advised Charles' wife, Thelma, to claim full use of the federal estate tax marital deduction. Thelma followed that advice and treated all of the assets of Charles' estate as though they passed directly to her. The effect of this action was that Charles' estate was not subject to estate tax in 1984; it would be subject to an estate tax at the time of Thelma's death. In 2008, Thelma died and her estate incurred a federal estate tax of \$261,343.

##### Malpractice Action

Charles and Thelma's children brought a legal malpractice action against defendants alleging that they could have avoided the taxes if they had administered Charles' estate differently. Specifically, they alleged that defendants should have construed Charles' will to create a trust for Thelma's lifetime benefit with the remainder to their four children.

The circuit court granted summary judgment in defendants' favor on the basis that the MacLeish children did not present evidence that Charles' intent was thwarted in the administration of the estate. The court of appeals affirmed and held that "Charles' will did not create a trust and, therefore, by definition the attorney's failure to read the will as creating a trust could not have thwarted any

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clear intent of Charles."

The Wisconsin Supreme Court addressed both whether the MacLeish children had standing to bring the malpractice action, and also whether they established that Charles' testamentary intent was thwarted in the administration of his estate.

The court declined to adopt the Restatement (Third) of the Law Governing Lawyers § 51 to expand Wisconsin precedent on non-clients' ability to bring legal malpractice actions. Section 51 of the Restatement sets forth several scenarios in which an attorney owes a duty of care to a non-client, broadening potential liability for attorneys. For example, Section 51 creates a duty to a non-client when the non-client "is not, under applicable tort law, too remote from the lawyer to be entitled to protection" and "the lawyer knows that the client intends as one of the primary objectives of the representation that the lawyer's services benefit the non-client." Section 51(2)(b), (3)(a). The court acknowledged that adopting Section 51 would expand attorney liability such that a third-party beneficiary would not need "to demonstrate that the testator's clear intent was thwarted in order to proceed with a legal malpractice claim." Instead, the court reaffirmed the standard set forth in its ruling in *Auric v. Continental Cas. Co.*, 111 Wis. 2d 507 (1983), declining to expand attorney liability to non-clients. The court held that the narrow *Auric* exception to the rule of non-liability of an attorney to a non-client applies to the administration of an estate in addition to the drafting and execution of a will. "That is, a non-client who is a named beneficiary in a will has standing to sue an attorney for malpractice if the beneficiary can demonstrate that the attorney's negligent administration of the estate thwarted the testator's clear intent." The court reasoned that the constitutional right to make a will and have it carried out according to the testator's intentions is implicated by the administration of a will just as it is by the will's drafting. However, the third-party beneficiary must still be able to establish that the attorney's failure thwarted the decedent's clear intent.

The court concluded that Charles' clear intent was not thwarted by defendants' administration of his estate. Charles' will did not include any of the elements required to form a trust and gave property to Thelma without any restrictions typical in a trust. The absence of the word "trust" in the section of the will giving property to Thelma was not dispositive. However, the will did use the word "trust" in describing events after Thelma's death, which indicated that Charles was aware of the mechanism of a trust, but chose not to use it in giving property to Thelma.

## Significance of the Opinion

The Wisconsin Supreme Court had the opportunity, but declined to extend attorney liability to non-clients by adopting the Restatement of Trusts § 51. Instead, the court held that its *Auric* rule remains the standard for non-client liability. The court further clarified that attorney liability to non-client estate beneficiaries can arise out of negligent estate administration as well as estate planning.

*For more information please contact Casey A. Hatton or Terrence P. McAvoy.*