Attorney Liability and the *Tensfeldt* Case

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INTRODUCTION

In *Tensfeldt v. Haberman*, 2009 WI 77, ___ Wis. 2d ___, 768 N.W.2d 641, the Supreme Court addressed intentional tort and malpractice (negligence) claims against two estate-planning lawyers and their firm. Justice Bradley authored the opinion for the four-justice majority, dismissing all negligence claims and remanding the intentional tort claim for trial. Justice Roggensack, joined by Justice Ziegler, filed a separate opinion concurring with regard to the negligence claims but dissenting as to the intentional tort. Justice Gableman did not participate in the decision.

The intentional tort alleged against one of the defendant lawyers was aiding and abetting an unlawful act by drafting and helping execute estate plan documents that violated the judgment entered by the court in the testator's 1974 divorce. There was no dispute that the lawyer had drafted and helped execute such documents, or that those documents did not comply with the divorce judgment. The issue was whether it was unlawful for the testator to violate the divorce judgment.

The dissent reasoned that pursuant to section 893.40 of the Wisconsin Statutes, the divorce judgment lost all force and effect in 1994, twenty years after it was entered. Section I of this outline addresses this issue, which raises doubts about the enforceablity of all court judgments and thus should be of interest, if not concern, to all lawyers and litigants.

The dissent also reasoned that the divorce court never had authority to enter the divorce judgment. Section II, below, addresses this issue, which should be of interest to family lawyers and estate-planners.

In contrast to the spirited disagreement between the majority opinion and the dissent over the intentional tort, there was unanimity regarding the negligence claims. This outline

addresses three issues associated with the negligence claims: whether the defendants were protected by qualified immunity (Section III – the answer is yes), what it would take to show professional negligence (Section IV), and what it would take to show causation Section V).

I. SECTION 893.40, THE TWENTY-YEAR STATUTE OF REPOSE FOR ACTION ON A JUDGMENT.

"Would anyone seriously contend that a judgment dissolving a marriage, imposing an injunction, or declaring the rights and liabilities of parties to a justiciable issue terminated at the end of 20 years?"

(Richard H.W. Maloy and Cynthia Lynne, "The Life of a Money Judgment in Florida Is Limited – For Only Some Purposes," *Florida Bar Journal*, July, 2005, Volume 79, No.7)

A. The statute of repose: Section 893.40.

Section 893.40, relating to Action on Judgment or Decree, currently provides:

> Except as provided in ss. 846.04 (2) and (3) and 893.415, action upon a judgment or decree of a court of record of any state or of the United States shall be commenced within 20 years after the judgment or decree is entered or be barred.

This is a statute of repose. That is, the 20-year period begins to run when the judgment is entered, not when a cause of action on judgment accrues. If a cause of action on a judgment accrues after twenty years, the statute bars the action.

The statutes do not say what "action on judgment" means. Does "judgment" include only a money judgment, or also "a judgment dissolving a marriage, imposing an injunction, or declaring the rights and liabilities of parties"?

B. Section 893.40 and the *Tensfeldt* decision.

In *Tensfeldt*, the plaintiffs contended that their father had violated his divorce judgment by failing to maintain in effect a will leaving them at least two-thirds of his estate outright. They contended that this was a "wrongful act" and that the defendant lawyer aided and abetted that act by drafting and helping to execute a series of estate plan documents each of which violated that provision of the divorce judgment.

The divorce judgment was entered on December 5, 1974. Citing section 893.40, the defendants contended that after December 5, 1994, the divorce judgment no longer had any force or effect. The testator died in 2000. The defendants contended, and the two dissenting justices agreed, that the divorce judgment lost its force and effect in 1994 and that therefore when the testator died in 2000, he was not liable for violation of the no-longer-effective divorce judgment. They concluded that because the testator was not liable, the lawyer could not be liable for helping him (¶¶132-137).

The majority took no position regarding whether the divorce judgment lost its force and effect in 1994, holding that because the lawyer provided all of his estate-planning services to the testator before 1994, he had aided and abetted an unlawful act (¶¶55-58).

> Because the alleged tortious conduct at issue in this case – the drafting of the noncompliant estate plans – occurred between 1980 and 1992, we find no occasion to determine whether the court order to make a will continued to be enforceable in 2000, when [the testator] died. To resolve this dispute, it is sufficient to conclude that it was unlawful for [the testator] to violate the court order between 1980 and 1992.
>
> ¶57.

C. The unanswered question: Do divorce judgments loss their force and effect twenty years after they are entered?.

That settles the issue as far as the *Tensfeldt* case is concerned, but it obviously leaves unanswered a disturbing question about the effect of section 893.40: Does this statute mean that a divorce judgment – or for that matter any other judgment, such as a judgment granting injunctive relief, a declaratory judgment, or a consent judgment in a non-divorce case

-- loses force and effect twenty years after it is entered? Some legislative history is helpful in this regard.

D. Legislative history: Section 893.40.

Section 903.40's predecessors were not statutes of repose. Until 1979, when Chapter 893 underwent a thorough revision and reorganization, the statute relating to actions on judgments was a statute of limitation. Section 893.40's immediate predecessor, section 893.16(1), provided:

> Within 20 years. Within 20 years : (1) An action upon a judgment or decree of any court of record of this state or of the United States sitting within this state.

This is a statute of limitation, not repose. *Schafer v. Wegner*, 78 Wis.2d 127, 131, 254 N.W.2d 193 (1977).

Why did the 1979 legislature change this to a statute of repose? The Judicial Council Committee's Note provides no clue:

> This section has been created to combine the provisions of repealed ss. 893.16 (1) and 893.18 (1). A substantive change from prior law results as the time period for an action upon a judgment of a court of record sitting without this state is increased from 10 years to 20 years and runs from the time of entry of a judgment.

Judicial Council Committee's Note, 1979, to 1979 A.B. 326. This note indicates that a statute of repose now applies to "a judgment of a court of record sitting *without this state*," but does not flag the crucial fact that under 1979 A.B. 326 this statute of repose now also applies to "a judgment or decree of any court of record *of this state*."

As created in 1979, section 893.40 read:

> Action on judgment or decree; court of records. An action upon a judgment or decree of a court of record of any state or of the United States shall be commenced within 20 years after the judgment or decree is entered or be barred.

E. Legislative history: Actions for Child Support, Section 893.415.

In 2003, the Supreme Court issued its first opinion addressing section 893.40 in any detail. *State v. Hamilton*, 2003 WI 50, 261 Wis.2d 458, 661 N.W.2d 832, *aff'g In re Hamilton v. Hamilton*, 2002 WI App 89, 253 Wis.2d 805, 644 N.W.2d 243. The issue was whether section 893.40 barred an independent action by the state to recover child support arrearages. Justice Prosser, writing for a unanimous court, stated:

> ¶ 18. The statute's answer is seemingly clear: any action upon a judgment of a court of record must be commenced within 20 years after the judgment is entered. The statute is not limited to child support enforcement actions; it is much broader. Conversely, it does not except child support enforcement actions, as it excepts certain real estate foreclosures. See Wis. Stat. § 846.04(2), (3). No other statute sets time limitations for independent actions to collect arrearages on child support judgments. Thus, an independent action for child support arrearages is an action upon a judgment, governed by this statute of limitations.

The court held that section 893.40 barred the state's action. But the court felt uneasy about this result.

> ¶ 45. Although a strict application of § 893.40 in the context of child support obligations runs counter to the desire previously expressed by the legislature and courts to ensure that parents do not shirk their duty of child support, this inconsistency does not rise to the level of absurdity or utter contravention of public policy. Without such an effect, this court is bound to apply the language of § 893.40 as plainly directed. . . .
>
> ¶ 46. We also note that there are several aspects of the enforcement of child support obligations that mitigate any seemingly harsh result from applying § 893.40 in the context of child support judgments. . . .
>
> ¶ 47. Second, contempt proceedings remain a viable option for persons aggrieved by a parent's refusal to pay child support. In *Griffin*, we explained that the contempt sanction remains available "after the child reaches majority, and so long as that obligation imposed by court order continues." Griffin, 141 Wis.2d at 708.

> This is because a "parent's failure to pay child support after the child reaches majority is a continuing disobedience of a court order." *Id.* [citing *Marriage of Griffin v. Reeve*, 141 Wis.2d 699, 708, 416 N.W.2d 612 (1987)]

In *Tensfeldt*, the dissent cited *Hamilton* to support its position that the divorce judgment lost all force and effect after 1994. ¶¶ 133-134. The dissent does not consider whether section 893.40 still permitted a contempt action against the testator after 1994. The *Tensfeldt* majority completely ignored *Hamilton* in discussing section 893.40.

The immediate reaction to the *Hamilton* decision was the enactment of section 893.415, relating to action to collect support. The analysis of 2003 AB 624 by the Legislative Reference Bureau states**:**

> Under current law, an action on a judgment or decree of a court of record is barred unless it is commenced within 20 years after the judgment or decree was entered. The Wisconsin Supreme Court in *State v. Hamilton*, 2003 WI 50, determined that this statute of limitations applies to an independent action to collect delinquent child support owed under a judgment or order.
>
> Before the enactment of the current statute of limitations for an action on a judgment or decree, the statute of limitations for such an action was 20 years after the action accrued. In the context of collecting delinquent child support, that was interpreted as being 20 years after the youngest child under the support order reached majority.
>
> This bill codifies the previous interpretation of the statute of limitations for an action to collect delinquent child support. The bill provides that an action to collect child or family support owed under a judgment or order is barred if not commenced within 20 years after the youngest child under the order reaches the age of 18 or, if he or she is enrolled full–time in high school or its equivalent, reaches the age of 19.

F. Why should section 893.40 be a statute of repose?

Though the *Tensfeldt* majority did not find it necessary to consider whether the 1974 divorce judgment lost all force and effect after 1994, the possibility that it did concerned the court.

> The assertion that after 20 years a divorce judgment is no longer enforceable could have disastrous results for some litigants. For example, a 70-year-old divorcee who relied on long-term court-ordered maintenance could find that her only source of income was unexpectedly extinguished after 20 years.

¶57, footnote 24. When the *Hamilton* court expressed a similar concern regarding a twenty-year limit on child support, the legislature created an exception to section 893.40, but just for child support actions. Perhaps the legislature will react similarly to *Tensfeldt*, and create another exception for actions on divorce judgments. But this band-aid approach fails to confront the general question: Why should this be a statute of repose instead of a statute of limitation? Why did the 1979 legislature changed section 893.40 from a statute of limitation to a statute of repose?

Perhaps the answer lurks somewhere in the old files of the Judicial Council Committee or Legislative Reference Bureau. But if we look solely to the purpose of statutes of repose, this change makes no sense.

The purpose of a statute of repose is to set a time limit on lawsuits that depends not on when the plaintiff is injured or discovers the injury, but on the dates of other events relevant to a defendant's ability to defend and a court's ability to find the truth. Statutes of repose "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *U. S. v. Kubrick*, 444 U.S. 111, 117 (1979).

Thus section 893.89 bars certain actions relating to improvements to real property after 10 years from "the date of substantial completion of the improvement." Section 893.55 bars certain actions relating to "injury arising from any treatment or operation performed by, or from any omission by, a person who is a health care provider" after "five years from the date of the act or omission." In these cases the triggering events – which have nothing to do with when the injury occurs or is discovered –

arguably set in motion a process of "loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." In these cases, the legislature might conclude that the loss of evidence impairs the search for truth so much that a statute of repose, not merely a statute of limitation, is justified.

Does the entry of judgment set such a process in motion? Supposing the risk of lost evidence is the primary justification for having statutes of repose, it seems to have little application nowadays to Wisconsin actions on judgments, in which the court record is the primary evidence and its loss is not a risk. This was not always true, as suggested by this modern note to a provision in Justinian's *Code*:

> Nowadays records of judgments are permanent. . . . But for many years the records kept by the Roman magistrates were apparently private records, and for a long time were probably incomplete. . . . In any event, judgments and the papers connected therewith were not, during the periods mentioned, in any such permanent and readily available form as with us.

Fred H. Blume, *Annotated Justinian Code*, edited by Timothy Kearley (Second Edition), *Actio judicati,* note to 7.52.1. Emperor Antoninus to Stallator, February 18, 213, available at <http://uwacadweb.uwyo.edu/blume&justinian/> (found October 30, 2009).

It seems anomalous that a statute intended to bring closure to disputes should instead upset settled rights and obligations. Why shouldn't the legislature go back to a statute of limitations for actions on judgments?

II. ESTATE PLANNING AS PART OF THE DIVORCE PROCESS: THE LAW AFTER *TENSFELDT.*

A. Statutes.

1. Wis. Stat. §767.61 requires that the court divide "the property of the parties." The statute does not specify the potential recipients of the divided property. It does not limit the recipients to the parties.

This is an important point made by the Supreme Court majority opinion in *Tensfeldt*. §34.

2. Wis. Stat. §767.61 (3)(L) permits the divorce court to alter the presumption of equal division of property between the spouses after considering: "Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties." This provision has been interpreted as applying to marital *property* agreements rather than marital *settlement* agreements, in that the court need not accept such provisions of a marital *settlement* agreement as binding but rather must consider them as advisory (*Evenson v. Evenson*, 228 Wis. 2d 676, 598 NW 2d 232 (Ct App 1999), *Van Boxtel v. Van Boxtel*, 2001 WI 40, 242 Wis. 2d 474, 625 NW 2d 294). If such agreements are accepted by the court under the rule of *Rintelman v. Rintelman,* 118 Wis. 2d 587, 348 NW 2d 498 (1984), and incorporated into the judgment of divorce, there is no statutory justification for the position that such arrangements are unenforceable.

B. Case law previously relied upon for the position that you *can't* do estate planning as part of a divorce agreement: *Estate of Barnes*, 170 Wis. 2d 1, 486 NW 2d 575 (Ct App 1992) and *Vaccaro v. Vaccaro*, 67 Wis. 2d 477, 227 NW 2d 62 (1975).

Both of these cases involved stipulations requiring that the former husband maintain life insurance for the benefit of the minor children. These stipulations were incorporated into the divorce judgments, and in each case the children attempted to enforce the stipulation as a property right after they reached the age of majority. In both cases the courts (Supreme Court in *Vaccaro*, Court of Appeals in *Barnes*) concluded that the life insurance provision was in the nature of child support, since it was designed to secure child support for children during their minority, and was not a property right of the children that they could enforce after reaching the age of majority.

Some lawyers have opined that these cases preclude dealing with estate planning concerns as a part of the resolution of a divorce property division.

Others have believed that these cases simply provided that life insurance designed to secure a child support obligation does not confer a property right on the children, and that they did not address the larger issue of whether property rights could be conferred on children at the death of a parent.

C. Case law previously relied on for the proposition that parties can agree to include estate planning provisions in divorce marital settlement agreements: *Rintelman v. Rintelman*, 118 Wis. 2d 587, 348 N.W.2d 498 (1984), *aff'g* 115 Wis. 2d 206, 339 N.W.2d 612; *Bliwas v. Bliwas*, 47 Wis. 2d 635, 178 N.W.2d 35 (1970).

Rintelman dealt with the enforceability of a marital settlement agreement that was incorporated into the judgment of divorce. The agreement provided that the wife would receive maintenance for the duration of her lifetime, and at the divorce hearing the husband testified (in answer to a query from the judge) that he understood that this obligation would continue whether or not the wife remarried. She did remarry, and her former husband then asked the court to relieve him of the obligation to continue to pay maintenance to her. The Supreme Court concluded that the husband had agreed to life-time maintenance payments, that this agreement was incorporated as part of the divorce judgment, and that as a result the husband was estopped from requesting termination of that obligation. *Rintelman* established the rule that parties may agree to provisions that the court on its own could not order, and when they do so and the agreement is incorporated into a judgment, they are estopped from challenging those provisions.

Bliwas involved a post-judgment stipulation, incorporated into a court order, that reduced a father's child support obligation in exchange for his agreeing to contribute to the child's post-majority higher educational expenses. After the child reached the age of majority, the father sought relief from the judgment, arguing that the court had no jurisdiction to enter it. The parties agreed that in the absence of the stipulation, the court could not have ordered the contribution to post-majority educational expenses. The court enforced the stipulation and judgment, holding that the father was stopped from challenging it. The court explained:

> [W]here the court disposes of the property of the parties by stipulation in a manner in which it could not have disposed of the property in an adversary proceeding, the general rule applies that a

party who procures or consents to the entry of the decree is stopped to question its validity, especially where he has obtained a benefit from it.

Many lawyers have believed that the general principle articulated in *Rintelman* and *Bliwas* permits parties to enter into enforceable agreements regarding the disposition of property at the death of a party as part of a marital settlement agreement, even where the court could not have ordered such provisions in an order entered after a contested trial.

D. **A clear new rule**: *Tensfeldt* clarifies that parties can agree to engage in estate planning to benefit adult children or others as part of the divorce process. Important quote from *Tensfeldt*: "To the extent that *Barnes* can be read to imply that a property benefit for adult children cannot be incorporated into a court order, we reject the premise." §34.

Regarding *Barnes* and *Vaccaro*, *Tensfeldt* notes that the provisions at issue in those cases could have reasonably been interpreted as either property division or support-related, and the courts were not unreasonable in choosing the interpretation expressly provided for in the statutes at the time, i.e. concluding that they were support –related rather than conferring a property right. *Tensfeldt* goes on to distinguish itself from these cases by pointing out that at the time of the stipulation in that case, there were no minor children so the provision could not have been designed to protect the support rights of minor children and could not have been intended as child support. Moral: if you're doing estate planning as part of a marital settlement agreement, make your intentions very clear.

E. **Caveat: impact of Wis. Stat. §893.40** (see Point I, above). This statute was raised as a potential bar to the enforcement of a divorce judgment in *Tensfeldt* . The *Tensfeldt* court side-stepped the issue on the ground that the conduct engaged in by the attorney who drafted the will violating the requirements of the divorce judgment did so within the 20-year period, and thus the court was not required to reach the issue. In light of the dissent's position that any action brought to enforce the divorce judgment would have to be commenced within 20 years after entry of the judgment (at which point the cause of action may not have even arisen), legislative action seems advisable.

In the interim, careful drafting is necessary to deal with the statute of repose, and it is questionable whether a judgment incorporating an

agreement to make arrangements that are intended to last for more than 20 years can be enforced.

Note, however, that there remains a contractual remedy at law, provided that the agreement contains language specifying that it survives the judgment of divorce.

F. **Post-*Tensfeldt* case: *Pluemer v. Pluemer***, 2009 WL 3209288 (Wis. App., 10/08/09) is a dispute between a second wife claiming that she is a bona fide purchaser of life insurance insuring the life of her deceased husband and a minor child from the husband's first marriage who is the designated beneficiary of that life insurance pursuant to the divorce decree. Contrary to the decree, the deceased changed the beneficiary of the insurance from the child to his second wife.

The trial court granted summary judgment to the child, enforced the divorce decree, and imposed a constructive trust over the policy proceeds. The court of appeals reversed, denying summary judgment to both parties and permitting the second wife to have her day in court to attempt to prove that she was a bona fide purchaser of the policy.

Moral: it is possible that a decedent's failure to comply with obligations imposed by the divorce judgment will not result in the imposition of a constructive trust, which is an equitable remedy permitted by statute.

Possible response: the marital settlement agreement/divorce judgment should include an agreement to impose a constructive trust over policy proceeds if the beneficiary required by the decree is changed.

III. MALPRACTICE (NEGLIGENCE) CLAIMS BY NON-CLIENTS: QUALIFIED IMMUNITY UNDER *AURIC*.

In *Tensfeldt*, the plaintiffs brought professional negligence claims against two lawyers and their law firm. The lawyers had provided estate-planning services to the plaintiffs' father, but neither lawyer had provided professional services to the plaintiffs. The Supreme Court dismissed all negligence claims against both. All six justices who voted in this case agreed with this result.

To prevail in a legal malpractice (negligence) action, the plaintiff must show four things: (1) that the plaintiff was the lawyer's client, (2) that the lawyer's acts or omissions failed to comply with the professional legal standard of care, (3) that those acts or omissions caused the plaintiff to suffer damages, and (4) the amount of those damages. *Lewandowski v. Continental Casualty Co.*, 88 Wis.2d 271, 277, 276 N.W.2d 284, 287 (1979). The *Tensfeldt* decision sheds further light on each of the first three requirements, especially the exception to the first.

A. The attorney-client relationship: The estate-planning exception of *Auric v. Continental Casualty*.

1. **The rule and the exception.** The rule is that only a client may bring a professional negligence claim against a Wisconsin lawyer. In *Auric v. Continental Casualty Company*, however, the court carved out a narrow – we shall see just how narrow – exception to this rule, permitting, under certain circumstances, a non-client to bring a negligence claim against a lawyer who has provided estate planning services to a client. *Auric v. Continental Casualty Company*, 111 Wis. 2d 507, 331 N.W.2d 325 (1983).

2. **The facts**: In 1973, testator Goldstein had attorney Crawford draft a new will and revocable trust agreement to replace a previous will dated 1970. The 1973 will contained a specific bequest of $25,000 to Auric, Goldstein's brother. The 1970 will left nothing to Auric. Goldstein executed the new will and trust agreement. Both Crawford and his secretary signed the trust agreement as witnesses, but only Crawford signed the will. Goldstein died on April 13, 1975.

3. **The lawsuit**: Auric sued Crawford for professional negligence. Negligence was undisputed, but the circuit court dismissed Auric's complaint for lack of privity. The Supreme Court accepted Auric's petition for bypass and held that under the circumstances, public policy favored permitting Auric, a non-client named as a beneficiary in the 1973 will, to sue Crawford for damages. In its unanimous ruling, the Court set forth this rule: "the beneficiary of a will may maintain an action against an attorney who negligently drafted or supervised the execution of the will even though the beneficiary is not in privity with that attorney."

4. **Public policy underlying the *Auric* exception**. "In this state, there is a constitutional right to make a will and to have it carried out according to the testator's intentions. [Citations omitted.] This right reflects a strong concern that people should be as free as possible to dispose of their property upon their death. Allowing a will beneficiary to maintain a suit against an attorney who negligently drafts or supervises the execution of a will is one way to make an attorney accountable for his negligence. Accountability should result in increasing the care with which attorneys draft wills and see to their execution. It is consistent with and promotes this state's long-standing public policy supporting the right of a testator to make a will and have its provisions carried out. Public policy supports the imposition of liability on an attorney who acts negligently in drafting or supervising the execution of a will resulting in a loss to a beneficiary named therein. Therefore the lack of privity should not be a bar to this action." 111 Wis.2d at 513-514.

5. **Auric states a rule of qualified immunity.** Some reported decisions have called the *Auric* rule one of "standing." In *Tensfeldt*, the Court corrected this practice: "The circuit court, the court of appeals, and the parties refer to this issue as standing. Wisconsin liberally interprets the concept of standing, and parties who are aggrieved are generally thought to have standing to sue. [Citation omitted.] This issue is more properly understood as a question of whether an attorney is entitled to qualified immunity from lawsuits brought by third parties." ¶78, footnote 27.

6. **Auric is limited to estate-planning.** Courts have rejected all attempts to extend *Auric* to permit non-clients to bring professional negligence claims against lawyers outside the estate-planning context. *Krawczyk v. Bank of Sun Prairie*, 174 Wis.2d 1, 8 (footnote 2), 496 N.W.2d 218 (Ct.App. 1993) ("*Auric* has been strictly limited to the will-drafter/beneficiary relationship. See *Green Spring Farms* [*v. Kersten*], 136 Wis.2d at 326, 401 N.W.2d at 825.")

7. **Estate-planning claims under *Auric*.** Within the estate-planning context, four pre-*Tensfeldt* professional negligence actions resulted in reported decisions. Each action ended with judgment for the defendant lawyer on the negligence claims. In *Anderson* and

Beauchamp the courts rejected the negligence claims because the plaintiffs were not named in any estate planning document, as *Auric* requires. In *DeThorne* and *Glazer* the plaintiffs were named beneficiaries, but the courts concluded the defendant lawyers were not negligent.

a. ***Anderson v. McBurney***, 160 Wis.2d 866, 467 N.W.2d 158 (Ct.App. 1991) (petition to review denied). Alleged negligence in investigating heirship. The circuit court dismissed the negligence claim. The court of appeals affirmed: (1) The *Auric* exception did not apply (the non-client plaintiff was not named in either will); (2) the complaint did not allege harm resulting from the supposed negligence. The court of appeals sent intentional tort claims against the defendant back for trial.

b. ***DeThorne v. Bakken***, 196 Wis.2d 713, 539 N.W.2d 695 (Ct.App. 1995). Alleged negligent supervision of execution of will (testator received assistance executing his will though he had not requested it). After a two-day trial, the circuit court ruled that the defendant had complied with the applicable professional standard of care. The court of appeals affirmed. (In an earlier decision, the court of appeals had held that the will had been improperly executed and was therefore invalid. *Estate of DeThorne*, 163 Wis.2d 387, 471 N.W.2d 780 (Ct.App. 1991).)

c. ***Beauchamp v. Kemmeter***, 2001 WI App 5, 240 Wis.2d 733, 625 N.W.2d 297. Alleged negligent failure to prepare a new will. The circuit court dismissed the claim and the court of appeals affirmed: "as non-clients unnamed in any will documents, [the plaintiffs] have no standing to sue" the defendant lawyer.

d. ***Glazer v. Brookhouse***, (E.D. Wis. 2006); 471 F. Supp. 2d 945 (E.D. Wis. 2007); 2008 WL 168544 (E.D. Wis. 2008). Alleged negligence in aiding and allowing testator to amend trust agreement while testator lacked testamentary capacity. In its 2006 decision, the court ruled that, under *Auric*, the plaintiff "has standing to bring his negligence claim." In its 2008 decision, after a four-day trial, the court

found that the defendant lawyer had complied with the applicable standard of care.

7. **Applying *Auric* in the *Tensfeldt* case: Merely giving advice is not enough.**

a. The *Auric* rule, as applied in *Anderson* and *Beauchamp*, requires that a non-client plaintiff be named as a beneficiary in the estate planning documents. In *Tensfeldt*, it was undisputed that the will and trust agreement named each plaintiff as a beneficiary. The Supreme Court held, however, that the *Auric* rule also requires that the defendant attorney have drafted those documents or supervised their execution, not merely advised the testator regarding their legal effect. Because one defendant lawyer's "only role was giving [the testator] admittedly negligent advice," the court held that qualified immunity protected him. "Extending the *Auric* exception to attorneys who give negligent advice stretches the exception too far." ¶77.

b. The Court provides no explanation of why this would stretch *Auric* "too far." To be sure, *Auric* refers explicitly to suits only against attorneys who negligently draft or negligently supervise the execution of estate planning documents. But allowing non-client suits against a lawyer who negligently gives a testator incorrect legal advice on which the testator relies does not seem obviously contrary to the primary policy concern of *Auric*, to protect the testator's constitutional right to dispose of his estate as he wishes.

8. **Applying *Auric* in the *Tensfeldt* case: The attorney's conduct must thwart the testator's clear intent.**

a. The *Auric* court based its reasoning on the "constitutional right to make a will and to have it carried out according to the testator's intentions." 111 Wis.2d at 513. The *Tensfeldt* court relied on this constitutional right to dismiss the negligence claims against the other lawyer defendant. The Court held that the testator's constitutional right means that a non-client beneficiary must be able to establish that the

attorney's conduct *thwarted the decedent's clear intent*. ¶73.

> It is undisputed that [the lawyer] carried out the [testator's] explicit instructions when he crafted an estate plan that did not leave two-thirds of [the testator's] net estate outright to his children. To this end, we determine that the children's third party negligence claim cannot be maintained because they cannot establish that [the lawyer] negligence thwarted [testator's] clear intent. We conclude that the circuit court erred in denying [the lawyer's] motion for summary judgment on the negligence claim.

¶74. The best rationale for this – and it is a good one – is that it frees lawyers from reconciling divided loyalties. But what if the lawyer should not be loyal to the client?

b. The *Tensfeldt* plaintiffs had alleged that this lawyer defendant was negligent precisely because he *had* done what his client asked: He had helped his client violate a court order. The circuit court had reasoned that the constitutional right to make a will did not apply to that conduct:

> [The defendant] contends that to expose an attorney to liability to persons disappointed by a client's intended estate plan would frustrate our state's recognition of a person's sacred and constitutional right to dispose of their property by will as they choose. There is no merit to this reasoning. While our citizens clearly enjoy this right, it is also just as clearly recognized that people have the right by contract to voluntarily agree to exercise that right in a particular manner. That is what [the testator] did here, and there is no public policy interest in protecting a person like [the defendant] from liability for assisting a client to violate a court judgment that embodies that client's voluntary agreement.

On this view, the testator's intent was expressed in the divorce judgment. Neither the majority opinion nor the dissent addressed this reasoning.

9. **Is *Auric* dead?** In the quarter-century since *Auric*, there is no reported case in which a non-client has successfully sued an estate-planning lawyer. Have the courts in effect limited *Auric* to its facts?

IV. MALPRACTICE (NEGLIGENCE) CLAIMS: THE PROFESSIONAL STANDARD OF CARE.

A. Two different standards of care can apply in legal malpractice actions. See WI JI Civil 1023.5 and 1023.5A.

1. Non-specialist standard of care: What would a reasonably prudent lawyer do?

2. Specialist standard of care: What would a reasonably prudent lawyer *with special experience, knowledge, or skill in [specialty, for example estate planning]* do?

B. Which standard of care applies and whether a defendant has complied with that standard are ordinarily questions of fact for the jury.

1. Whether the specialist or non-specialist standard applies depends on whether the lawyer presented himself or herself to the public or client as having special experience, knowledge, or skill in the relevant area of law. WI JI Civil 1023.5A. This seems to be a question within the ordinary knowledge and experience of jurors, and it should not require expert testimony.

2. What the specialist or non-specialist standard requ*ir*es of the lawyer, and whether the lawyer met that requirement, is usually *not* within the ordinary knowledge and experience of the jurors. The jury usually will require expert testimony from qualified attorneys regarding these questions.

3. Expert testimony is not necessary if the standard of care is within the ordinary knowledge and experience of the jurors. *Olfe v.*

Gordon, 93 Wis.2d 173, 286 N.W.2d 573 (1980). *Olfe* concluded that expert testimony not necessary to show that an attorney's failure to follow a client's instructions did not comply with the standard of care. Does this entail that in *Tensfeldt* the lawyer would have been negligent if he had *failed* to draft estate plan documents that violated the divorce judgment?.

C. The result of a case can depend on which standard applies.

1. In *DeThorne v. Bakken*, the court applied a non-specialist standard of care, concluding that "a reasonably prudent attorney would not have necessarily concluded in 1989 that a testator needing assistance when executing his or her will had to make an express request for such assistance." 196 Wis.2d at 715-716.

2. In *Glazer v. Brookhouse*, the court concluded that "the gold standard" did not apply to the defendant lawyer, and that the lawyer's conduct was that of "a reasonably prudent attorney under the facts and circumstances of this case." 2008 WL 168544 (E.D. Wis. 1-17-2008) at 43.

D. **A *per se* "hired-gun" rule of negligence?** In *Tensfeldt*, the issue was whether the standard of care permitted a lawyer to help a client violate a court judgment. The plaintiffs' legal expert witness opined that it did not permit this; the defendants' expert opined that it did. The circuit court concluded that this was an issue for the jury. However the Supreme Court stated: "the parties agree that [testator] asked [lawyer] to draft the will in violation of the court judgment, and [lawyer] was not negligent in performing this service." ¶62. This language might be taken to suggest that if a lawyer does what a client requests, that lawyer is not negligent, no matter what the client requests. If this is what the Court means, it creates a *per se* rule that eliminates the use of expert testimony, as in *Olfe*.

E. **The effect of SCR 20 on malpractice claims.** But is that what the Court means?

What if the client asks the lawyer to act in violation of SCR 20:1.2(d)? In a footnote, the *Tensfeldt* Court notes that SCR 20:1.2(d) (2008) provides that an attorney "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent[.]" The Court comments: "We have stated that '[t]here is a critical distinction between

presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.' *Id.* cmt. 9. If a client insists upon pursuing an unlawful course of conduct, the attorney has one option – withdraw from the representation of the client. SCR 20:1.16(a)(1). We are mindful that a violation of the rules does not impose civil liability on an attorney per se." ¶62, footnote 25.

A violation of a rule does not impose liability per se, but "since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct." SCR 20: Preamble [20].

F. **A *per se* "hired-gun" rule of qualified immunity?** Does this mean that helping a client violate a court judgment might be negligent, i.e. violate the standard of care? The *Tensfeldt* Court does not say, and it is unclear why the decision even refers to SCR at all. Even if a violation of SCR 20:1.2(d) might be evidence of negligence, however, the Court's application of *Auric* would bar a non-client suit alleging harm from such negligence. Perhaps the way to understand *Tensfeldt* is to say that the Court has apparently adopted not a hired-gun rule of negligence, but a hired-gun rule of *qualified immunity*: A lawyer is immune from non-client claims (though perhaps nonetheless negligent) if he or she follows a client's instructions, even if those instructions are to violate the law. And perhaps the best justification of such a rule is that it protects lawyers from having to consider the conflicting interests of non-clients when serving a client.

G. **Litigation costs**. No one has won an *Auric* case since Auric. But there have been *Auric* cases that went to trial – a two-day trial in *DeThorne* and a four-day trial in *Glazer*, for instance. To be sure, the defendant lawyers won. But winning isn't everything – to win, the lawyers still had to engage in protracted litigation, which took a toll of time, money, and emotion. In *Glazer* the defendant was sued precisely for following his client's instructions; the plaintiff claimed the defendant should not have followed those instructions because the client was incompetent. A *per se* rule of immunity for following a client's instructions would have prevented this litigation.

H. **The availability of intentional tort claims.** *Tensfeldt* illustrates how the availability of intentional tort claims mitigates the possibly objectionable

effects of such a *per se* immunity rule. A defendant lawyer who is protected by qualified immunity for negligently doing what a client requests can still be liable if doing what the client requests constitutes an intentional tort.

The dissent in *Tensfeldt* reasoned that qualified immunity protected the lawyer against the intentional tort claim, ¶¶125-131. The majority rejected this position:

> [F]ailure to perform an obligation to a client is entirely distinct from conduct that assists the client committing an unlawful act to the detriment of a third party. . . . Here, [the lawyer] drafted documents that obtained for [the client] something he was not legally entitled to – an estate plan that violated a court judgment . . . Under these circumstances, [the lawyer] is not entitled to qualified immunity.

¶¶60, 64.

V. MALPRACTICE (NEGLIGENCE) CLAIMS: CAUSATION.

A. **The *Tensfeldt* facts.** In *Auric*, the Court found causation as a matter of law; the testator's intent, expressed in the will he executed, was thwarted by the lawyer's negligent failure to supervise properly the will's execution. In *Tensfeldt*, by contrast, the court held that evidence of causation was speculative. There the attorney told the testator incorrectly how his estate plan documents would distribute the estate. The testator approved the distribution the lawyer described and the documents were left unaltered. When the testator died, his estate was not distributed in the way he had approved. The actual distribution was not as beneficial to the plaintiffs as the distribution the testator had approved.

B. **Proving causation**. Proof of causation requires the answer to a counterfactual "what if" question. To show that the attorney's negligence caused them to suffer damages, the plaintiffs had to show that if the attorney had informed the testator properly, the testator would have had the lawyer change the estate plan documents to produce the distribution he had in fact approved.

C. **Testator's actual intent not sufficient evidence**. Is the evidence that *in fact* the testator had approved that distribution sufficient to get this causation question to the jury? The Supreme Court held unanimously that it was not. "Looking at this evidence, however, there is simply no way to make even an educated guess about what [the testator] would have done had he understood that this distribution plan would not be carried out." ¶81.

D. **What evidence would be good enough?** If the testator's actual choice of a distribution of his estate is not evidence of how he would have wanted to distribute it if properly advised, what could count as such evidence? The testator is dead; there is no way to ask him now what he would have done. If the lawyer had in fact advised the testator properly, we would know what the testator would have done. But in that case there would have been no negligence. Is there some other kind of evidence of what the testator would have done, evidence sufficient to get the question of causation to the jury?

E. **Claims by estate or personal representative.** The Court's reasoning with regard to causation and also the standard of care (see Section IV, above) will apply not merely to non-client (*Auric*) suits, but also to malpractice actions brought by the estate or personal representative against the estate-planning lawyer. Personal representatives stand in the shoes of the deceased testator and do not need to pass the *Auric* test.