

## Marquette Law Review

---

Volume 49  
Issue 4 May 1966

Article 9

---

# Unauthorized Practice of Law: Necessity of Executor to Appear by Attorney in Probate Proceeding

Thomas E. Obenberger

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Thomas E. Obenberger, *Unauthorized Practice of Law: Necessity of Executor to Appear by Attorney in Probate Proceeding*, 49 Marq. L. Rev. 808 (1966).

Available at: <http://scholarship.law.marquette.edu/mulr/vol49/iss4/9>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

mission of records made in the regular course of business, including hospital records, required a foundation of testimony by the entrant or a showing that the entrant was dead, insane or beyond the jurisdiction of the court. In 1963 the Wisconsin Supreme Court, under its court rules power, promulgated a new statute similar to the federal shop-book rule which does not require such a foundation or showing for regular entries. But, the court qualified the federal rule by exempting hospital records containing medical diagnosis or opinion from the rule. Shortly thereafter the legislature repealed the statute as created by the supreme court and enacted the currently existing section 327.25 which is in substance the same as the federal shop-book rule. Under the federal rule, in the majority of circuits, hospital records made in the regular course of business and containing medical diagnosis and opinion are admissible without testimony by the entrant. Under the reenactment rule of construction the Wisconsin statute should now be similarly construed. However, the recent *Zweiffel*<sup>24</sup> case indicates that the Wisconsin Supreme Court has not forgotten the restriction they originally placed upon the shop-book rule in re medical diagnosis and opinion. It is concluded that any future decision recognizing the force of this now repealed exception to the shop-book rule will clearly be contrary to the existing section 327.25 and the applicable rule governing its construction. However, this conclusion is not intended to reflect the author's opinion to the relative merit of either the court's or the legislature's version of the statute.

It might further be noted that even if the court should hold that medical records containing diagnosis and opinion do not fall within the purview of the regular entry exception to the hearsay rule as embodied in the shop-book rule, this would not preclude a doctor other than the original entrant from forming and testifying as to an opinion based on the records even though the records were not admissible in evidence.<sup>25</sup>

LEE J. GERONIME

---

**Unauthorized Practice of Law: Necessity of Executor to Appear by Attorney in Probate Proceeding**—Petitioner J. Gordon Baker's mother died testate, naming him executor in her will. Petitioner, also a residuary legatee of a one-fourth share of the estate, retained attorneys, who appeared for him at the beginning of the probate proceedings. A petition to probate the will was filed, the will was admitted, and petitioner was appointed executor. An inventory was filed, disclosing personal property of \$167,863.14 and real estate worth \$4,000.

<sup>24</sup> *Zweiffel*, *supra* note 22.

<sup>25</sup> See *Sundquist v. Madison Railways C.* (1928) 197 Wis. 83, 221 N.W. 392, followed in *Chapnitsky v. McClove* (1962) 20 Wis. 2d 453, 122 N.W. 2d 400.

At this point, attorneys for petitioner informed him that their fee upon completion of the proceeding would be \$4,800, based on the state bar minimum fee schedule, but subject to the court's determination of reasonableness. Feeling that the fee so computed was excessive, petitioner paid the attorneys for the work performed to date and they withdrew. Petitioner did not retain another attorney, but personally prepared and presented to the court the following papers:

- 1) His final account and petition for allowance thereof;
- 2) A proposed notice of hearing on final account and determination of inheritance tax;
- 3) A proposed order determining inheritance tax; and
- 4) A proposed final judgment determining the distribution of personalty, assigning the interest in the real estate and terminating a life tenancy in other real estate.

County Court Judge Roang informed petitioner that since he, as executor, was acting for others, he was engaged in the practice of law, and would have to retain an attorney. Petitioner refused, and the papers were returned to him. Petitioner then sought a writ of mandamus from the Wisconsin Supreme Court. An alternative writ was issued, and Judge Roang made a return to it.

The Wisconsin Supreme Court, in denying the executor's petition for a writ of mandamus, held in *State ex rel. Baker v. County Court*<sup>1</sup> that, in general, the presentation of probate matters to the county court for adjudication is the practice of law and therefore subject to the court's control.

The supreme court, relying mainly upon article VII, sections 2 and 3<sup>2</sup> of the Wisconsin constitution has consistently held that it has the power to regulate the practice of law in Wisconsin. The court reaffirmed this power in the recent case of *State ex rel. Reynolds v. Dinger*, where it concluded that the regulation of the practice of the law is a judicial power and is vested exclusively in the supreme court; that the practitioner in or out of court, licensed lawyer or layman, is subject to such regulation; that whenever the court's view of the public interest requires it, the court has the power to make appropriate regulations concerning the practice of law in the interest of the administration of justice, and to modify or declare void any such rule, law, or

---

<sup>1</sup> 29 Wis. 2d 1, 138 N.W. 2d 162 (1965).

<sup>2</sup> Wis. CONST. art. VII, §2 provides in part, "The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace"; art. VII, §3 provides in part, "The supreme court shall have a general superintending control over all inferior courts."

regulation by whomever promulgated, which appears to the court to interfere with the court's control of such practice for such ends.<sup>3</sup>

While some courts have attempted to develop an all-inclusive definition of the practice of law, the Wisconsin Supreme Court has followed that general trend of judicial decisions which has determined each case of unauthorized practice of law upon its own particular facts.<sup>4</sup> In the past, Wisconsin cases have discussed the unauthorized practice of law with respect to real estate brokers,<sup>5</sup> insurance adjusters,<sup>6</sup> and appearances before administrative agencies,<sup>7</sup> among other situations. However, no prior Wisconsin case has discussed an unauthorized practice of law issue concerning the functions of an individual executor, who is personally interested in the estate. Indeed, this appears to be a matter of first impression in the entire nation.

In holding that the executor was engaged in the practice of law, and therefore subject to the supreme court's control, the court found that the petitioner had acted in behalf of another, thereby subjecting himself to section 256.30(2) of the Wisconsin Statutes, which provides:

Every person who shall appear as agent, representative or attorney, for or on behalf of any other person, or any firm, copartnership, association or corporation in any action or proceeding in or before any court of record, court commissioner, or judicial tribunal of the United States, or of any state, or who shall otherwise, in or out of court for compensation or pecuniary reward give professional legal advice not incidental to his usual or ordinary business, or render any legal service for any other person, or any firm, copartnership, association or corporation, shall be deemed to be practicing law within the meaning of this section.<sup>8</sup>

As the county court is a court of record,<sup>9</sup> it is necessary to show only that the executor of an estate is acting in behalf of others, or as a representative of the rights of others, to prove that his acts constitute the practice of law as defined in the statute. Keeping the principle in mind that each case of alleged unauthorized practice of law is to be decided on its particular facts, we must examine the acts of Baker, the executor, through which he indicated to the court that he had properly performed his duties; that the beneficiaries were entitled

<sup>3</sup> State *ex rel.* Reynolds v. Dinger, 4 Wis. 2d 193, 206, 109 N.W. 2d 685, 692 (1960).

<sup>4</sup> State *ex rel.* Junior Association of the Milwaukee Bar v. Rice, 236 Wis. 38, 294 N.W. 550 (1940).

<sup>5</sup> State *ex rel.* Reynolds v. Dinger, 14 Wis. 2d 193, 109 N.W. 2d 685 (1961).

<sup>6</sup> State *ex rel.* Junior Association of the Milwaukee Bar v. Rice, 236 Wis. 38, 294 N.W. 550 (1940).

<sup>7</sup> State *ex rel.* State Bar v. Keller, 16 Wis. 2d 377, 114 N.W. 2d 796 (1962).

<sup>8</sup> WIS. STAT. §256.30(2) (1963).

<sup>9</sup> WIS. STAT. §253.01 (1963) provides in part, "There is established in each county a county court which is a court of record . . ."

to distribution in certain proportions; that the state was entitled to certain amounts of taxes; and that the court should hear and determine these matters and enter appropriate orders and judgment.<sup>10</sup>

Wisconsin courts have long held that an executor or administrator serves as the representative of the rights of those interested in the estate. This principle has often been affirmed by the supreme court, with such statements as: "Speaking generally, an executor as well as an administrator is a trustee for the benefit of the beneficiaries named in the will";<sup>11</sup> "The relation of the executor to the heirs was fiduciary . . .";<sup>12</sup> "[T]he executor . . . represents the interests of the estate, including the collective interests of all legatees. . . ."<sup>13</sup>

The relation between the executor and the beneficiaries was definitively presented in *Estate of Hughes*, as follows:

While it is true . . . that an administrator does not represent a particular heir, he is the arm of the court employed under the law to collect and distribute the estate of the deceased. His interest in the estate is not and cannot be personal. To a certain extent he also represents the heirs of the deceased for it is in their interest that the law provides for the distribution of the estate by an administrator. An executor represents the testator, and it is part of his duty to see that the will of the testator is properly executed. He likewise represents the legatees for whose benefit the probate proceedings are had.<sup>14</sup>

The supreme court then held that the executor, when performing his duty of proposing to the county court an adjudication of the beneficiaries' rights which conforms to the law, is acting as a representative of the beneficiaries. Therefore, his presentation of such matters to the court for adjudication constitutes the practice of law. From this, the supreme court concluded: "When the executor is not an attorney, such matters must be presented for him by an attorney licensed to practice law."<sup>15</sup>

The mere fact that probate proceedings in a court of record are recognized as the practice of law is neither a new nor a novel conclusion. Several state courts have held that probate proceedings co-

<sup>10</sup> *State ex rel. Baker v. County Court*, 29 Wis. 2d 1, 6, 138 N.W. 2d 162, 15 (1965).

<sup>11</sup> *Will of Robinson*, 218 Wis. 596, 602, 261 N.W. 725, 728 (1935).

<sup>12</sup> *Will of Raebhen*, 230 Wis. 215, 222, 283 N.W. 815, 818 (1939).

<sup>13</sup> *Will of Hughes*, 241 Wis. 257, 259, 5 N.W. 2d 791, 792 (1942); see also *Estate of Greenwald*, 17 Wis. 2d 533, 117 N.W. 2d 609 (1962).

<sup>14</sup> *Will of Hughes*, *supra* note 13, at 263, 5 N.W. 2d at 794; see also *Wis. Stat. §112.01(1)(b)* (1963), which provides in part, "Fiduciary includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator . . ."; 33 C.J.S. *Executors and Administrators* §142, "An executor or administrator acts in a representative capacity and occupies a position of trust with respect to those interested in the estate."

<sup>15</sup> *State ex rel. Baker v. County Court*, 29 Wis. 2d 1, 8, 138 N.W. 2d 162, 16 (1965).

stitute the practice of law, the conduct of which is proper only when performed by one authorized and licensed to practice law. On this theory, Michigan has held it to be unlawful for a loan broker to practice in probate court for a fee;<sup>16</sup> Nebraska found the performance of administrative acts in probate court by one not an attorney, and a stranger to the estate, to be the practice of law;<sup>17</sup> Idaho fined an ex probate judge, no longer licensed to practice law, for advising parties and preparing probate papers as practicing law illegally;<sup>18</sup> and Washington held that a law clerk, who was not licensed to practice law, had practiced law illegally by appearing in probate court for parties and presenting papers in the settlement of the estate.<sup>19</sup>

However, the above cited cases may all be distinguished from the Wisconsin case herein discussed. In those cases, the persons who were accused of the unauthorized practice of law were in no manner personally interested in the estates. They were only involved in the probate proceedings because they were retained by the beneficiaries to act in their behalf, and in no case were those persons the executor named in the will, as was petitioner Baker. Therefore, the Wisconsin Supreme Court was not faced with an individual who wrongfully represented himself as having the power of an attorney, thereby causing others to seek his assistance in the probate matter. Petitioner Baker had made no such misrepresentation, but was merely acting as directed by the will of the decedent, as a party interested in the estate.

In addition, courts in several other states have held that the performance of probate functions by licensed attorneys on behalf of named corporate executors was an unauthorized practice of law.<sup>20</sup> However, these cases may be distinguished from Wisconsin's *Baker* decision in that the former all involved professional corporate banking fiduciaries as the named executor. The attorneys in all of those cases were employed by the corporate fiduciary, which received the legal fees charged by their employed attorneys. The executor in each case was barred from the probate proceedings because its acts amounted to the unauthorized practice of law by a banking corporation, in violation of the general principle that only licensed individuals may practice law. This conclusion is best stated in the case of *In re Otterness*,<sup>21</sup> where the Minnesota Supreme Court held:

<sup>16</sup>*Grand Rapids Bar Association v. Denkema*, 290 Mich. 56, 287 N.W. 377 (1939).

<sup>17</sup>*State ex rel. Wright v. Barlow*, 132 Neb. 166, 271 N.W. 282 (1937).

<sup>18</sup>*In re Brainard*, 55 Idaho 153, 39 P. 2d 769 (1934).

<sup>19</sup>*Ferris v. Snively*, 172 Wash. 167, 19 P. 2d 942 (1933).

<sup>20</sup>*State Bar Association of Connecticut v. Connecticut Bank & Trust Co.*, 146 Conn. 556, 153 A. 2d 453 (1959); *In re Otterness*, 181 Minn. 254, 232 N.W. 318 (1930); *Arkansas Bar Association v. Union National Bank of Little Rock*, 224 Ark. 48, 273 S.W. 2d 408 (1954); *Frazer v. Citizens Fidelity Bank & Trust Co.*, 393 S.W. 2d 778 (Ky. 1965).

<sup>21</sup>*In re Otterness*, *supra* note 20.

Neither a corporation nor a layman, not admitted to practice, can practice law, nor indirectly practice law by hiring a licensed attorney to practice law for others for the benefit or profit of such hirer. For this bank to employ defendant to conduct law business generally for others, for the benefit and profit of the bank, amounted to the unlawful practice of law by the bank. . . .<sup>22</sup>

Therefore, the true significance and uniqueness of the Wisconsin case rests on the fact that the named executor, Baker, who was a personally interested individual, was barred from proceeding with the probate and administration of the estate unless he appeared by an attorney. This case involved neither a stranger to the estate, nor a corporate fiduciary, as have cases in the past.

Accepting the court's decision that an executor, in representing the rights of another is practicing law and must therefore either be an attorney or retain legal counsel, several questions arise. When must an executor act through an attorney? Is it necessary for an attorney to perform all of the executor's duties, which range from the purely administrative or custodial, such as gathering the assets, to the presentation of matters in court for adjudication?

In answering these questions, two distinct approaches may be used. We may first look to the general regulatory principles which the Wisconsin Supreme Court has promulgated concerning the practice of law in areas other than probate proceedings; or, in the alternative, we may examine the specific duties of an executor<sup>23</sup> and determine which of

<sup>22</sup> *Id.* at 255, 232 N.W. at 319.

<sup>23</sup> WIS. STAT. §310.14 (1963), lists the following as duties of a personal representative:

Personal representatives, other than special administrators, shall collect and possess all the decedent's personal estate except that selected under s. 313.15(1); inventory and have appraised all the decedent's estate; collect all income and rent from such estate of which they have custody; preserve such estate and contest all claims except claims which they believe are valid and which are not objected to by an interested person; pay and discharge out of such estate all expenses of administration, taxes, charges, claims allowed by the court, or such dividends on claims as directed by the court; render just and true accounts; make distribution as the court directs and do such other things as are directed by the court or required by law.

See also STATE BAR OF WISCONSIN, HANDBOOK FOR WISCONSIN EXECUTORS AND ADMINISTRATORS, 2 (1965) which lists the following duties:

- 1) To take possession and protect the real and personal property, excepting the homestead and real estate specifically given by the will.
- 2) To keep real estate and personal property properly insured.
- 3) To receive the rents and payments due, and to collect interest, dividends and other income.
- 4) To make proper demand and collect all the debts, claims and notes due.
- 5) To assist in determining the names, ages, residences and degree of relationship of all possible heirs.

those duties do and which do not constitute the practice of law.

The general approach was discussed by the Wisconsin Supreme Court in *State ex rel. State Bar v. Keller*,<sup>24</sup> in which a layman was not considered to have been practicing law when he merely investigated facts for the purpose of reporting the same to his "client" or to use the information to testify before a court. The layman would be practicing law, however, if he advised his client or others concerning the rights or liabilities arising from his investigation. The supreme court directed that the layman should be enjoined

- (a) From giving legal advice and instruction to clients to inform them of their rights and obligations;
- (b) From the preparation for clients of documents requiring knowledge of legal principles not possessed by ordinary laymen; and
- (c) From appearing as an advocate asserting legal rights for a client before public tribunals which possess power and authority to determine the rights of such clients according to law.<sup>25</sup>

An examination of the alternative approach to the problem discloses a constantly changing attitude on the part of the court, as to which of the specific duties of an executor may, or must, be performed by the executor, rather than by an attorney. The court's early view was presented in *Will of Willing*,<sup>26</sup> which held generally that it was the executor's duty to carry out the terms of the will. He could only retain the advice of counsel, and properly incur the cost of legal expenses, when he reached a point in the execution of the will beyond which he could not safely proceed. The court stated: "He should not be expected, of course, to prepare papers relating to court proceedings. On the other hand, he should transact ordinary business connected with the estate without the aid of attorneys. This is what he is paid for."<sup>27</sup>

In a more recent decision,<sup>28</sup> the supreme court recognized that due to the increased complexity of estates and legal proceedings in general, it had become more essential for the executor to retain an attorney

- 6) To litigate or settle any pending lawsuits in which the dead person had an interest.
- 7) To keep the property of the estate in good repair.
- 8) To obey and perform all the orders of the probate court.
- 9) To determine and pay inheritance, estate and state and federal income taxes.
- 10) To pay the valid claims of creditors, and, of necessary, to sell the estate property to do so.
- 11) To distribute the remaining assets to the proper heirs.

<sup>24</sup> 16 Wis. 2d 377, 114 N.W. 2d 796 (1961).

<sup>25</sup> *Id.* at 389, 90, 114 N.W. 2d at 802.

<sup>26</sup> 190 Wis. 406, 209 N.W. 602 (1926).

<sup>27</sup> *Id.* at 414, 209 N.W. at 605.

<sup>28</sup> Estate of Braasch, 274 Wis. 569, 80 N.W. 2d 759 (1957).



than it had been in the past. However, the court still was reluctant to depart from *Will of Willing*, stating: "While an executor has the right to employ an attorney, even where the will does not say so, such authority is limited to the extent to which legal services are needed."<sup>29</sup>

Finally, in *Estate of Thrun*,<sup>30</sup> the Wisconsin Supreme Court decided that even though it was the usual function of an administratrix to pay out the distributive shares, there was no impropriety in having this service done by attorneys.

The court continued:

It would be inappropriate for the attorneys to perform non-legal services which would ordinarily be done by the administratrix if this were a technique to enlarge the fees charged to the estate . . . . In the absence of a showing that excessive fees were occasioned thereby, we are unable to discern any irregularity in the administratrix's having her attorney making the disbursement of distributive shares. Indeed, the legal ramifications surrounding the payment of funds to a minor under guardianship would justify Mrs. Hiller's decision to have her attorneys perform the function.<sup>31</sup>

In the instant *State ex rel. Baker* case, the supreme court answered the question of when an attorney is necessary by following the second approach herein discussed, and classified the executor's various functions in two ways; those that must be handled by an attorney, and those that may be handled by the executor. The court stated:

It may happen, of course, that in a particular proceeding there may be no difficult *legal problem*, and that a particular lay executor may successfully present the matter in such form as to protect the rights of everyone . . . . Nevertheless, the need for protection of beneficiaries in general from practice by unlicensed persons justifies the existence of a general rule and its application to this instance. To require the county court to determine, case by case, whether an unrepresented executor had properly protected the rights of all beneficiaries would impose an unmanageable burden.<sup>32</sup> (Emphasis added.)

Clearly, whenever any function of the executor may be seen to be a "legal problem," the act must be performed by an attorney. But, what of those functions that are not "legal problems," but are merely administrative acts, such as collecting debts, gathering the assets of the estate, paying claims, or preparing tax returns? The court continued:

We do not say that the submission to the court of every report in a probate or trust matter . . . constitutes the practice

<sup>29</sup> *Id.* at 572, 80 N.W. 2d at 761.

<sup>30</sup> 20 Wis. 2d 275, 121 N.W. 2d 759 (1963).

<sup>31</sup> *Id.* at 279, 280, 121 N.W. 2d at 761-762.

<sup>32</sup> *State ex rel. Baker v. County Court*, 29 Wis. 2d 1, 9, 138 N.W. 2d 162, 167 (1965).

of law. Whether such activity involves the practice of law in any particular instance would depend upon the *complexity* of the questions which necessarily must be resolved.<sup>33</sup> (Emphasis added.)

Therefore, unlike matters which are legal problems, there is no general rule with respect to administrative acts. The need for an executor to act through an attorney in the performance of these acts depends entirely upon the complexity of the functions involved. The executor himself may still perform the simpler purely administrative or managerial acts.

While a certain amount of confusion may be caused by attempts to differentiate between simple and complex non-legal problems, the reasonableness of the Wisconsin test is underscored when compared to a similar attempt and its result in Connecticut. The Connecticut Court, recognizing that a great many problems of a complex nature arise in the administration of decedent's estates, concluded that whether the performance of such acts constitutes the practice of law depends upon whether the acts performed were such as are commonly understood to be the practice of law.<sup>34</sup>

The most jarring aspect of the *State ex rel. Baker* decision springs from the supreme court's expansion of the rationale behind the county court's decision which was, nonetheless, affirmed by the supreme court. The county court, in refusing to act upon petitioner Baker's petitions, ruled that he represented the rights of others as an executor, and therefore was practicing law when he sought an adjudication of their rights before the court. The supreme court expanded this conclusion, stating:

It seems to us, however, that there is another basis on which Judge Roang's action could be sustained in the present case (where Mr. Baker does represent the interests of others) but which would also sustain the same action in a situation where the executor or administrator *appears to be the sole beneficiary, and to represent no other person.*<sup>35</sup> (Emphasis added.)

At this point, we must emphasize that when the court speaks of the executor as "representing no other person," it merely intends to say that there are no beneficiaries or persons directly interested in the estate other than the executor. The court clearly recognizes, however, that an executor always represents the interests of society in general, as well as the rights of persons who are indirectly interested in the estate, such as those who will demand marketable title to the estate

<sup>33</sup> *Id.* at 9, 10, 138 N.W. 2d at 167.

<sup>34</sup> *State Bar Association of Connecticut v. Connecticut Bank & Trust Co.*, 145 Conn. 222, 140 A. 2d 863, 870 (1958).

<sup>35</sup> *State ex rel. Baker v. County Court*, 29 Wis. 2d 1, 17, 138 N.W. 2d 162, 171 (1965).

property in the future.<sup>36</sup> Therefore, while the executor might not represent the rights of another particular person in a given situation, the executor always, by definition of his functions, acts in a representative capacity for the interests of society and "others" in general.

The "other basis" used by the court in affirming the county court's action is found in the court's conclusion that a probate court has *inherent power* to require the employment of an attorney at various steps of a particular administrative or probate proceeding, due to the functions of a probate court in protecting the interests of society in such matters as the devolution of property, security of title, and rights of creditors. The court concluded:

We deem the executor or administrator enough the officer of the court, and the interests of society in the proper transmission of property at death, sufficient that the probate court has inherent power to require such officer to retain counsel.<sup>37</sup>

Upon reading this conclusion, the first thought that comes to mind is that the supreme court has precluded any possibility of a lay executor performing his functions without first retaining an attorney, whether he represents the rights of other directly interested persons or not. In addition, the following language used by the court seems, on the surface, to require the use of an attorney for *all* functions of the probate proceeding, whether those acts require adjudication or merely involve managing of the estate's assets. The court stated:

There may, of course, be situations where the steps to be taken are so obviously uncomplicated that the court would have no hesitancy in entertaining and passing upon the particular petition even though it is not presented by an attorney. But, as previously suggested, to require the county court to determine case by case, whether each step of a proceeding had been properly taken would impose an unmanageable burden.<sup>38</sup>

Literally, on the basis of this language, it might appear that the supreme court would require an attorney to perform *all acts* in the probate and administration of decedent's estates, by refusing to require the county court to assume the burden of deciding which acts may be performed by an administrator or executor as well as by an attorney. This conclusion would seem to exceed the requirements of section 256.03(2),<sup>39</sup> and ignore all prior Wisconsin case law on this subject, including the earlier part of this decision.

A more careful analysis of the court's language, however, reveals that the court, in mentioning "passing upon the particular petition . . .

<sup>36</sup> *Id.* at 19, 138 N.W. 2d at 172.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Id.* at 18, 138 N.W. 2d at 172.

<sup>39</sup> WIS. STAT. §256.30(2) (1963); see text accompanying note 8 *supra*.

presented . . . in a proceeding" clearly intended to limit its conclusion to legal matters presented for adjudication by the administrator or executor, and did not intend, in addition, to encompass purely managerial acts. This interpretation is supported by referring to the nearly identical language used earlier in the decision by the court, that the county court would not be given the burden of determining whether the rights of all beneficiaries had been properly represented by the lay executor, and that this justified the existence of a general rule requiring an attorney when *legal problems* were involved.<sup>40</sup>

Therefore, it appears that while using the "inherent power of a probate court" to justify its conclusion that an attorney is needed even though the executor does not represent the rights of other persons directly interested in the estate, the court nevertheless intended that its test of "legal problem as opposed to complex or simple administrative act" should still be used in determining whether or not an attorney is needed in a particular situation.

On the basis of this decision, we may conclude that irrespective of whether or not the executor or administrator of a decedent's estate in Wisconsin represents the rights of other directly interested persons, or is a sole beneficiary representing the direct interests of no one but himself and only the indirect or general interests of society or others, he must retain an attorney to carry out the administration of the estate whenever a legal problem is presented to the court, or whenever a complex, as opposed to a simple administrative or custodial act must be performed.

In effect, the court has concluded that because of the nature of the executor's position in a probate or administrative proceeding, he necessarily acts as the representative of interests and rights other than his own. Therefore, while the lay executor may individually perform simple non-legal acts, he must retain licensed legal counsel to perform both complex non-legal acts and all legal functions, as the latter two functions necessarily involve the interests and rights of others, and constitute the practice of law in probate or administrative proceedings.

THOMAS E. OBENBERGER

---

<sup>40</sup> See text accompanying note 32 *supra*.