

LPL Claims Without Privity: Support for a Bright Line Rule

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We recently handled a legal malpractice case on behalf of an attorney in which the plaintiff had not been a client of the attorney. Like most legal malpractice cases, the claim arose from an underlying lawsuit. In that matter, the attorney was retained by the Administratrix of her son's estate to prosecute a wrongful death action against a municipality that was allegedly responsible for her son's death. The Administratrix informed the attorney that the decedent did not have any children and that she was the sole heir to her son's estate. The Letters Testamentary that were granted to the Administratrix were consistent with her representations. The attorney was successful in settling the wrongful death action for a substantial sum. A number of months later, a civil action was commenced against the attorney by a woman who claimed that her two young children were fathered by the decedent and were the only heirs to the decedent's estate. The woman, on behalf of her children, asserted claims against the attorney sounding in professional negligence and breach of fiduciary duty.

We promptly filed preliminary objections to the complaint seeking to have each of the claims dismissed, arguing that, under Pennsylvania law, the claims were not viable because the attorney had not previously represented the plaintiff or her

minor children. *Guy v. Liederbach*, 501 Pa. 47, 51, 459 A.2d 744, 746, 750 (1983). Under *Guy*, an attorney can only be held liable to a third party under a breach of contract, third-party beneficiary theory. Typically, such circumstances involve claims brought against an attorney by a named beneficiary of an estate where the beneficiary's interests were alleged to have been harmed as a result of the attorney's conduct or omission. Under *Guy*, such claims are only viable if the third party is specifically identified as a beneficiary in a fully executed testamentary document. This has come to be known as the intended beneficiary rule.

In response to our preliminary objections, the plaintiff cited a newly-minted Pennsylvania civil jury instruction that provides that third parties can assert professional negligence and breach of fiduciary duty claims against an attorney in the absence of privity and without being specifically named as a beneficiary in an executed testamentary document or other agreement. There had been no recent developments in this area of the law in Pennsylvania; thus, we were surprised that the jury instruction had been changed. The new instruction includes a comment where the subcommittee acknowledges that Pennsylvania jurisprudence does not provide for professional negligence claims

against attorneys brought by third parties, but that “[i]t is the subcommittee’s position that the alternate charge represents the enlightened view of an attorney’s responsibility.” (The inappropriateness of including a jury instruction that is inconsistent with the law is a subject for another article.) Nonetheless, we were confronted with a defense to our preliminary objections that was supported by persuasive authority. Fortunately, during the pendency of the preliminary objections, the Pennsylvania Supreme Court decided the case of *Estate of Agnew v. Ross*, 152 A.3d 247, 259 (Pa. 2017), in which it reiterated its previous holding in *Guy*. After considering *Agnew* in our supplemental brief, the court sustained our preliminary objections and dismissed the claims against our client.

While many states have obviated the need for privity in legal malpractice claims, other states have adopted the intended beneficiary theory embraced in *Guy* and *Agnew*. Still others adhere to a strict privity requirement. The fact pattern and case result in *Agnew* serve to illustrate how policy considerations warrant the need to restrict legal malpractice claims to clients and named third-party beneficiaries in executed testamentary documents and contracts for legal services. In *Agnew*, the attorney had drafted a Will and amendments to Agnew’s Revocable Trust. As of 2010, Agnew’s Will bequeathed specific gifts of cash and property to selected friends and family members, including relatives of Agnew’s late wife, and the residue of his estate to the Revocable Trust. The Trust directed that upon Agnew’s death, the remaining principal and accumulated income of the Trust should be distributed to pay the balance of any

amounts due in the Will that the Estate was otherwise unable to pay. Thereafter, the Trust was to provide for five \$250,000 scholarships to four local universities. If there were any assets remaining in the trusts after those distributions, the residue was to be divided amongst three of the universities.

Agnew’s health was failing, and he entered hospice care. During that time, he summoned his attorney in order to make changes to his estate plan. The attorney met with Agnew, who explained that he wanted to limit the amounts distributed from the Trust to the universities and increase the amounts he wanted to provide to his late wife’s relatives. Agnew informed the attorney that he would give him further details at a later time.

Subsequently, one of Agnew’s late wife’s relatives contacted the attorney and informed him that Agnew wanted to amend the Trust to provide that the residue in the Trust be divided into equal shares among Agnew’s wife’s relatives. The attorney drafted the amendment to the Trust, specifically identifying Agnew’s late wife’s relatives as the recipients of any residue in the Trust. There was no suggestion that Agnew was unduly influenced by anyone, and there was no suggestion that Agnew was incompetent. The attorney emailed a draft of the Trust Amendment, which was received and reviewed by Agnew. Shortly thereafter, the attorney met with Agnew in order to get the documents executed; however, the attorney failed to bring a copy of the Trust Amendment to the meeting. Agnew died shortly thereafter. The Trust Amendment was never executed. Agnew’s wife’s relatives did not receive the residue from the Trust; thus, they initiated a legal

malpractice action against the attorney. During those proceedings, the attorney acknowledged his failure to bring the document to Agnew for execution.

At first glance, the plaintiffs in *Agnew* would seem to fall into the special class of plaintiffs who would have been permitted to prosecute a legal malpractice action under a third-party beneficiary theory pursuant to *Guy*. The plaintiffs were certainly named as beneficiaries in the Trust Amendment. They, however, were not named as beneficiaries to an executed document. The plaintiffs were, therefore, unable to demonstrate that Agnew intended to leave the residue of the Trust to them. Pennsylvania, like most jurisdictions, does not permit extrinsic evidence to be used to determine whether a testator intended to benefit third parties. To do so would undermine the integrity of properly executed estate documents. Accordingly, the *Agnew* court held that the plaintiffs did not have standing to assert legal malpractice claims against Agnew's lawyer.

Given the fact pattern in *Agnew*, it cannot be disputed that the result was harsh from the perspective of the plaintiffs in that case. The attorney defendant did not dispute that he erred in failing to bring the Trust Amendment to his meeting with Agnew. There was no suggestion that Agnew did not intend that his wife's relatives receive the residue from the Trust. The Pennsylvania Supreme Court recognized the harshness of the result, but it also recognized that permitting third parties to prosecute claims against attorneys in the absence of privity or under a third-party beneficiary theory would likely serve to diminish the zealous advocacy attorneys

should provide for their actual clients, and may open the door for frivolous claims brought by disgruntled heirs to estates and others who did not enter into an attorney-client relationship with the attorney.

When drafting trust documents, attorneys are not required to advocate in the interests of their client's potential heirs. They should zealously advance their client's interests by ensuring that the documents they prepare accurately reflect their client's testamentary intentions. Once testamentary documents are properly executed, estate attorneys owe a duty to those individuals specifically named in the documents. The plaintiffs in *Agnew* argued that when taking the evidence as a whole, the attorney should have been found liable to them because he admitted that he was retained to draft the Trust Amendment that provided for them and admitted that he failed to bring that document to Agnew for execution. On balance, it would seem that they had a strong case. Bright lines, however, are needed in determining whether an attorney's duty of care should be extended to non-clients. Although the facts in *Agnew* would seem to suggest that the plaintiffs should have prevailed, without a bright line rule, less persuasive fact patterns could give rise to civil actions brought by third parties at an alarming rate.

Even under the facts in *Agnew*, there was never a guarantee that Agnew would have executed the Trust Amendment if it had been presented to him by his attorney. Indeed, clients often request that attorneys draft estate documents for their review and consideration at a later date, perhaps depending upon the evolution of the testator's relationship with potential heirs. The testator may simply choose to not sign

the documents. Under any array of circumstances, there could be disgruntled heirs seeking to point the finger at the attorney whom they believe caused their misfortune. In the absence of a bright line rule as adopted in *Guy* and reiterated in *Agnew*, attorneys could end up engaging in conflicts of interest, unduly pressuring their clients into advancing the interests of third parties in ways that may not be consistent with their client's wishes. Such concerns could impinge upon an attorney's duty of undivided loyalty to his or her client. Not having a bright line rule would also enhance the risk of misinterpretation of the testator's intent, undermine an attorney's loyalty to his client, and encourage fraudulent claims. Additionally, attorneys could be forced to disclose confidential communications with their client in order to defend themselves from claims brought by third parties.

Traditionally, an attorney-client relationship was required in order to assert a legal malpractice claim against an attorney. California was the first state to abandon the strict privity requirement when it applied a balancing test to determine if an attorney breached a duty of care to a non-client. *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958). The balancing test involves several factors, including: (1) "the extent to which the transaction was intended to affect the plaintiff"; (2) "the foreseeability of harm to [the plaintiff]"; (3) "the degree of certainty that the plaintiff suffered injury"; (4) "the closeness of the connection between the decedent's conduct and the injury suffered"; (5) "the moral blame attached to the defendant's conduct"; and (6) "the policy of preventing future harm." Obviously, these esoteric factors can lead to

inconsistent results and numerous frivolous claims.

The Restatement (Third) of the Law Governing Lawyers attempts to tighten the standard set forth in *Biakanja* without reaching the bright line rule set forth in *Guy* and *Agnew*. The Restatement provides for a duty owed to third parties when: "(a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the non-client; (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and (c) the absence of such a duty would make enforcement of those obligations to the client unlikely." Restat 3d of the Law Governing Lawyers, § 51 (3rd 2000). Terms like "significantly" and "unlikely" not only hinder an attorney's efforts at zealous advocacy, they invite inconsistent outcomes, an increase in the number of claims against attorneys, and increases in malpractice insurance premiums. Moreover, the first factor in this test is whether "the lawyer knows" that his client intended that a third party benefit from the lawyer's representation. There are few circumstances in which it can be demonstrated that the lawyer would "know" of his client's intentions short of having the third party's name appear in an executed document that reflected the client's intentions. Again, lawyers are often asked to draft documents for their client's review that may not fully reflect the client's intentions. Perhaps the client desires to leave options on the table or is waiting for a potential beneficiary to prove worthy of a benefit before executing a testamentary document or other agreement. If extrinsic evidence is inadmissible for determining a testator's intentions, it should not be

admissible in order to determine whether a lawyer “knows” of those intentions.

In recent years, many jurisdictions have abandoned the strict privity requirement for legal malpractice cases. Some jurisdictions have adopted the intended beneficiary rule as set forth in *Guy*, which permits recovery by third parties only under a third-party beneficiary breach of contract theory when the third party is identified as an intended beneficiary in an executed testamentary document. Other states opened the door for legal malpractice suits filed by unnamed persons who claim to have been intended beneficiaries of an attorney-client relationship. This author

believes that the intended beneficiary rule sufficiently serves to benefit third parties who were indisputably intended to benefit from the lawyer’s services while preserving the lawyer’s ability to zealously advocate on behalf of his or her client.



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