Disgruntled Beneficiaries and Claims Against Estate Planning Attorneys

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In the typical claim brought by a disgruntled beneficiary, the beneficiary never had an attorney-client relationship with the attorney who drafted the estate plan, or who was the scrivener of the will. Accordingly, in circumstances where an attorney prepares a will, he or she owes a duty only to the testator, unless the attorney undertook a duty to the beneficiary. *See, Barner v. Sheldon*, 292 N.J. Super. 258, 265-66 (Law Div.), *aff'd*, o.b. 292 N.J. Super. 157 (App. Div. 1996).

In circumstances where the attorney prepares a will that excludes a child as a beneficiary, the attorney's duty is to prepare the will in accordance with the testator's expressed intent. No duty of care is owed to the beneficiary because the beneficiary's interest would be adversarial to the estate's interest and contrary to the will. Therefore, under such circumstances, a legal malpractice claim against the attorney would not state a claim.

Typically, the disgruntled beneficiary alleges that he or she had a right to inherit substantial monies, and that right was denied them because of the actions of the attorney as scrivener of the will or trust. It has been held that the attorney owes a duty only to his or her client, and the client is identified in the retainer agreement. *Albanese v. Lolio*, 393 N.J. Super. 355 (App. Div. 2007), *certif. denied*, 192 N.J. 597 (2007); *Estate of Fitzgerald v. Linnus*, 336 N.J. Super. 458, 472 (App. Div. 2001); *Barner v. Sheldon*, 292 N.J. Super. 258 (Law Div. 1995), *aff'd*, o.b. 292 N.J. Super. 157 (App. Div. 1996).

As noted by the court in *Pivnick v. Beck*, 326 N.J. Super. 474 (App. Div. 1999), "[N]o New Jersey decision has held that a disappointed heir has a malpractice claim against an attorney for allegedly disregarding the testator's drafting instructions, and leaving the heir less than the Testator allegedly intended." *Id.* at 482. On Dec. 7, 2000, the New Jersey Supreme Court affirmed the Appellate Division in *Pivnick v. Beck*, 165 N.J. 670 (2000).

In *Pivnick*, the Appellate Division noted that attorneys will not become insurers of the beneficiaries' testamentary expectations. *Pivnick*, 326 N.J. Super. at 484-485. Also, it must be kept in mind that a parent need not make testamentary provisions for a child. *Raynor v. Raynor*, 319 N.J. Super. 591, 612 (App. Div. 1999). Thus, "[i]t is well-settled that New Jersey law does not prohibit the disinheriting of an adult child." *In Re: Unanue*, 311 N.J. Super. 589, 596 (App. Div.), *certif. denied*, 157 N.J. 541 (1998), *cert. denied*, 526 U.S. 1051 (1999).

Therefore, when an attorney undertakes to prepare a will, the attorney's professional and fiduciary duties are owed to the testator, not the testator's potential beneficiary. Even when the attorney undertakes to represent the executor of a will, the attorney may not act in furtherance of the interests of the testator's beneficiaries when those interests are inconsistent with the testator's interest as expressed in the will. *See, Barner v. Sheldon*, 292 N.J. Super. 157, 158 (App. Div. 1996) (concluding that the defendant-attorney had no duty to advise the beneficiaries about potential favorable tax impact to them if they disclaim because that advice would conflict with the testator's intent).

Also, in *Albanese v. Lolio*, 393 N.J. Super. 355 (App. Div. 2007), *certif. denied*, 192 N.J. 597 (2007), the Appellate Division declined to extend the duty a lawyer owed to third parties who were beneficiaries of an estate the lawyer represented, or to hold that the attorney had an obligation to consider and advise all beneficiaries of the tax consequences of a bequest or legacy. In this legal malpractice case, plaintiffs—including the executrix of her mother's estate, her co-beneficiary sisters and the estate itself—appealed the trial court's order granting summary judgment to the defendant-attorneys. The case stemmed from advice given to the executrix on how to pay federal estate taxes that resulted in a large liability to each of the individual plaintiffs.

Patricia Albanese died on August 5, 2000. She was survived by three daughters, plaintiffs Clara Heffernan, Anne Albanese and Judy Albanese, all of whom were beneficiaries under the will. Clara, the decedent's executrix, retained the attorney, who had served as the decedent's attorney, and who had prepared the will with respect to the estate.

In *Albanese*, the plaintiffs alleged that they were not apprised of other options for paying the estate taxes aside from the using the estate's IRA, although they asserted that alternatives existed. The plaintiffs alleged that the attorneys never outlined options by which the decedent's executrix, Clara Heffernan, would pay the estate taxes. The plaintiffs asserted that the attorneys failed to advise them of their personal income tax liability that would result from withdrawing funds from the IRA, and they only became aware of the liability later when filing their individual 2001 tax returns. The attorneys contended that advice was given. Moreover, the attorneys asserted that personal income tax advice was not part of their representation of the estate, and they asserted that Clara never consulted with them for personal income tax advice. Clara did not recall in her deposition ever seeking or receiving personal income tax advice from the attorney.

The trial court held that allowing such claims would subject attorneys to a potentially infinite number of lawsuits from beneficiaries of an estate. The trial judge pointed out that there could be a situation where an estate had many beneficiaries whose interests could be adverse. The trial judge could not reason how the estate's attorney would owe each a duty, and be subject to liability for any potential violation of that duty. The trial court noted that it would put the attorneys in the precarious situation of having to anticipate potential

lawsuits from beneficiaries, taking their focus away from acting in the best interests of the estate. *Estate of Albanese*, 393 N.J. Super. at 367. The trial Judge, quoting from *Barner*, noted that an open-ended responsibility on the part of an attorney "might well paralyze the administration of an estate." *Barner v. Sheldon*, 292 N.J. Super. 258, 267 (1995).

The Appellate Division affirmed the summary judgment as to the plaintiffs Anne and Judy Albanese. However, the Appellate Division reversed as to plaintiff Clara because of the wording of the retainer agreement which created a relationship between the attorneys, on the one hand, and Clara "individually and as Executrix" on the other. The agreement required the attorneys to advise concerning proper steps to be taken for the purposes of fixing and paying any and all federal and state estate taxes, and other transfer taxes. The retainer also obligated the attorneys to advise and counsel as to "[p]ost-mortem planning, including, but not limited to, calculating tax needs." Therefore, given the wording of the retainer prepared by the attorneys, the Appellate Division held that Clara may have had a reasonable expectation of representation as an "individual," as well as in her capacity as executrix. *See*, *Restatement (Third) of the Law Governing Lawyers* §19 (2000), comment C.

In yet another case, *Estate of Fitzgerald v. Linnus*, 336 N.J. Super. 458 (App. Div. 2001), the plaintiff asserted that the attorney owed a duty not only to her, but to her children as the putative estate beneficiaries. The plaintiff alleged that the attorney negligently failed to advise her that she could disclaim a portion of her husband's life insurance proceeds in favor of the children, which would have resulted in a substantial estate tax savings upon her death. The attorney responded by denying that he was retained to provide estate planning services for the client, or that he owed such a duty to the client and her children. The motion judge agreed with the attorney and granted summary judgment. The Appellate Division affirmed, noting that, in New Jersey, the attorney's client is the executor of the estate, and not the estate itself. The trial judge in *Fitzgerald* noted that the *Barner* court stated, "It would be very dangerous to conclude that the attorney, through performance of his service to the Administrator, and by way of communication to estate beneficiaries, subjects himself to claims of negligence from the beneficiaries …. They are not owed a duty directly by the fiduciary's attorney."

The *Fitzgerald* court noted that the role of an attorney can be circumscribed by the terms of his or her engagement by the client. In that case, the retainer clearly delineated the attorney's role. Therefore, the Appellate Division rejected the plaintiff's suggestion that an attorney retained to represent an estate has an affirmative obligation to engage an executrix-wife in post-mortem estate planning.

Practice Tips

New Jersey recognizes limited retainer agreements. *Lerner v. Laufer*, 359 N.J. Super. 201 (App. Div. 2003). The *Lerner* court noted that under RPC 1.2(c), an attorney can limit the scope of representation, and it is not a breach of the standard of care for an attorney, under a precisely drafted retainer agreement, to

limit the scope of representation to not perform certain services. *Lerner* applies to retainers in connection with an attorney's representation involving estates, trusts, will drafting and tax advice. Therefore, it is recommended that attorneys draft their retainer agreements so that the scope of services is precisely defined. Such a retainer will serve to limit, and avoid, claims by non-clients. The limited retainer agreement can also be used in support of the attorney's summary judgment motion if suit is filed on behalf of the disgruntled beneficiaries.

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