



Failure to Inform Statutory Beneficiary of Conflict May Breach Lawyer's Duty

May 15, 2013

[Spencer v. Barber, 2013 WL 1339667 \(N.M. 2013\)](#)

Brief Summary

The New Mexico Supreme Court examined the interrelationship of the fiduciary and ethical duties owed by defendant attorney for defendant, the personal representative to the statutory wrongful death beneficiaries. The Court clarified that the adversarial exception does not bar “traditional tort claims against an attorney for misrepresentation, fraud, and collusion,” such as the attorney’s alleged misrepresentation. Likewise, the exception did not preclude plaintiff father’s malpractice claims because there was an issue of fact whether the attorney was negligent in his representation of the personal representative, and whether that failure harmed the father. Although the personal representative is the client, the statutory beneficiaries are always the intended beneficiaries of the retention. Here, there was a conflict in two respects. First, the attorney should not have pursued the mother’s interests in negotiating with the father before the wrongful death action was concluded. Second, there was evidence that the mother was a cause of the accident.

Complete Summary

A mother who was driving a vehicle with her daughter and granddaughter as passengers had been drinking. At some point, the mother stopped in the lane of an interstate highway, with her lights off, and tried to change drivers. The vehicle was hit by a truck, injuring the mother and causing injuries that ultimately killed her granddaughter and daughter.

The attorney represented the mother in her personal claim for injuries resulting from the accident, and in her capacity as personal representative for the daughter’s estate. The granddaughter died shortly before the daughter, so the her estate’s wrongful death claims belonged to the daughter’s estate. On the mother’s behalf, the attorney sued seven defendants, including the truck driver, the truck company and various insurers.

The mother and her ex-husband, the deceased daughter’s estranged father, were statutory co-beneficiaries of the daughter’s estate. The mother contended, however, that the father was not entitled to any wrongful death proceeds because he had abandoned their daughter. Because of the mother’s position, the attorney approached the father with a settlement agreement limiting the father’s entitlement to proceeds from any wrongful death recovery. The attorney informed the father that he



represented the mother, and convinced the father to sign the agreement. When the attorney sued the father on the mother's behalf to enforce the agreement, the father sued the mother and the attorney, alleging fraud, collusion, misrepresentation and malpractice.

Considering the attorney's motion for summary judgment, the New Mexico Supreme Court concluded that the Rules of Professional Conduct "provide guidance" in determining lawyers' obligations to their clients. As the intended beneficiaries of the relationship, statutory beneficiaries may sue a personal representative's attorney when the attorney fails to use reasonable skill and care in his representation of the personal representative. Because a lawyer owes different duties to the client personal representative than to the intended beneficiary, the rules are relevant to ascertain the scope of the duty owed by the attorney to the personal representative, and how a breach of those responsibilities may have harmed the beneficiary.

Here, the attorney argued that because he told the father that he represented the mother, an adversarial exception arose, permitting him to negotiate the settlement agreement. The Court disagreed. As to the statutory beneficiaries, the attorney had a nondiscretionary duty to distribute the wrongful death proceeds in a manner prescribed by statute.

Upon learning of the mother's position that the father was not entitled to recover anything, the attorney could have withdrawn from his representation of the mother as the personal representative of the daughter's estate. Likewise, he could have declined to represent the mother in her claim that the father was not entitled to a share of the wrongful death proceeds, or he could have deferred the legal battle until the wrongful death litigation concluded.

Negotiating the settlement was not completely prohibited, if the attorney provided enough information to the father to put him "on equal footing" with the attorney and the mother. The attorney would have been required to give the father information sufficient to enable him to understand why he needed independent representation, much like obtaining informed consent to a conflicted representation. The attorney's statement to the father that he represented the mother did not fulfill this requirement. Because there were multiple issues of fact arising from the attorney's conduct and discussions with the father, the Court denied summary judgment.

Finally, the Court noted that a conflict may arise when the personal representative may be liable for the death of the decedent. If there are statutory beneficiaries other than the personal representative, and there is a good faith basis to believe that the personal representative may have contributed to the death of the decedent, this constitutes a conflict of interest that may give rise to a malpractice cause of action. Because in this case, the attorney knew that the mother may have some liability, summary judgment could not be granted to the attorney.

Significance of Opinion

This decision is legally significant for a number of reasons. First, the Court relied heavily on the Rules of Professional Conduct to establish duties of care for the lawyer. Second, it clarified the adversarial



exception and what lawyers must do to obtain the exception's protection. Finally, the Court provided specific options and guidance for lawyers who find themselves in the attorney's position.

For more information, please contact [Terrence P. McAvoy](#), [Noah D. Fiedler](#) or your regular [Hinshaw attorney](#).

Hinshaw & Culbertson LLP prepares this publication to provide information on recent legal developments of interest to our readers. This publication is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. We would be pleased to provide such legal assistance as you require on these and other subjects if you contact an editor of this publication or the firm.

Copyright © 2013 Hinshaw & Culbertson LLP. All Rights Reserved. No articles may be reprinted without the written permission of Hinshaw & Culbertson LLP, except that permission is hereby granted to subscriber law firms or companies to photocopy solely for internal use by their attorneys and staff.

ATTORNEY ADVERTISING pursuant to New York RPC 7.1. The choice of a lawyer is an important decision and should not be based solely upon advertisements.