



## Alerts

### Third-Party Intended Beneficiary of Estate Planning Document Has Standing to Bring Malpractice Claim Against Attorney for Drafting Error

December 2, 2014

*Lawyers for the Profession® Alert*

*Fabian v. Lindsay*, \_\_\_ S.E.2d \_\_\_, 2014 WL 5462562 (S.C. 2014)

#### Brief Summary

The South Carolina Supreme Court ruled that beneficiaries of an existing will or estate planning document have standing to pursue legal malpractice claims against an attorney whose drafting error defeats or diminishes the client's intent.

#### Complete Summary

Plaintiff brought a third-party beneficiary action for legal malpractice and breach of contract against an attorney and his law firm for making a drafting error in a trust instrument for plaintiff's late uncle. The drafting error effectively disinherited her. Plaintiff had been told by her uncle and his wife that she was being provided for in his estate plan. After plaintiff's uncle's death, however, defendants informed plaintiff that she would not be receiving anything from her uncle's trust based upon a distribution provision in the trust agreement prepared by defendants, which would make her uncle's other niece the sole and primary beneficiary of the trust.

Defendants filed a Fed. R. Civ. P. Rule 12(b)(6) motion to dismiss for failure to state a cause of action. The trial court granted the motion, finding that plaintiff could not assert a claim for legal malpractice because South Carolina law recognized no duty absent an attorney-client relationship, nor did any South Carolina court ever recognize a breach of contract action by an intended beneficiary of estate planning documents. The South Carolina Supreme Court ultimately reversed the trial court's decision.

This was an issue of first impression for the South Carolina Supreme Court. The Court acknowledged that the vast majority of jurisdictions in the United States have abandoned the traditional privity requirement for legal malpractice claims and now recognize such claims by a third-party beneficiary of a will or estate planning document against the lawyer when a drafting error defeats or diminishes the client's intent. The court noted that the jurisdictions that have eased the strict privity requirement typically used one of three approaches to determine whether the intended beneficiary of a will has standing to bring an action for legal malpractice: (1) the balancing of factors test, which originated in

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California; (2) the "Florida-Iowa" rule; and (3) breach of contract based on a third-party beneficiary contract theory.

Under the California balancing-of-factors test, the determination of whether an attorney will be held liable to a third-party beneficiary to a contract was a matter of policy and involved the balancing of various factors, among which are the extent to which the transaction was intended to affect the third-party beneficiary, the foreseeability of harm to him or her, the degree of certainty that he or she suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm. *Lucas v. Hamm*, 56 Cal. 2d 583, 15 Cal. Rptr. 821 (1961).

The "Florida-Iowa" rule provides that liability to the testamentary beneficiary can arise only if, due to the attorney's professional negligence, the testamentary intent, as expressed in the will, is frustrated and the beneficiary's legacy is lost or diminished as a direct result of that negligence. *DeMaris v. Asti*, 426 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1983); *Schreiner v. Scoville*, 410 N.W.2d 679, 683 (Iowa 1987).

The third-party beneficiary of contract theory allows a contract made for the benefit of third person to be enforced by that person if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to him or her. *Windsor Green Owners Ass'n v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004).

The South Carolina Supreme Court adopted both the California balancing-of-factors test and the third-party beneficiary of contract theory as applicable to the situation here, recognizing that a cause of action by a third-party intended beneficiary was not a radical departure from the existing law of legal malpractice that requires a lawyer-client relationship, which is equated with privity and standing. The Court held: "Where a client hires an attorney to carry out his intent for estate planning and to provide for his beneficiaries, there *is* an attorney-client relationship that forms the basis for the attorney's duty to carry out the client's intent. This intent in estate planning is directly and inescapably for the benefit of third-party beneficiaries. Thus, imposing an avenue for recourse in the beneficiary, where the client is deceased, is effectively enforcing the *client's intent*, and the third party is in privity with the attorney. It is the breach of the attorney's duty to the client that is the actionable conduct in these cases." 2014 WL 5462562 \*9.

### **Significance of Opinion**

This decision is significant because the issue was one of first impression for the South Carolina Supreme Court. South Carolina now joins the vast majority of jurisdictions allowing standing for intended third-party beneficiaries of a will or estate planning document to bring claims against the attorney whose drafting error defeats or diminishes the client's intent.

For more information, please contact [Terrence P. McAvoy](#).

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