



Alerts

Colorado Supreme Court Upholds the "Strict Privity Rule" When Interpreting Attorney-Client Relationship

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Baker v. Wood, Ris & Hames, Professional Corporation, 364 P. 3d 872 (January 16, 2016)

Brief Summary

Colorado Supreme Court, *en banc*, analyzed whether dissatisfied beneficiaries of a testator-client's estate have standing to bring legal malpractice or contract claims against the attorney who drafted the testator's estate planning documents. The Court rejected the California Rule and Florida-Iowa Rule and confirmed the applicability of its long-established "strict privity rule."

Complete Summary

The Colorado Supreme Court, *en banc*, has held that attorneys are not liable to beneficiaries under a will and trust they drafted on behalf of the testator-client. The Court defined what is called the "strict privity rule" as "[w]here non-clients are concerned, an attorney's liability is generally limited to a narrow set of circumstances in which the attorney has committed fraud or a malicious or tortious act, including negligent misrepresentation."

Plaintiffs were Floyd Baker's children and the stepchildren of Floyd's wife, Betty Baker. Betty had two children by a prior marriage. Floyd retained the attorneys to prepare his estate plan and used a will and testamentary trusts to govern the disposition of the estate plan. Floyd's will provided that on his death, each of the four children would receive a \$10,000 distribution, and Betty would receive Floyd's condominium. The will further provided that the residue of Floyd's estate would be divided between a marital testamentary trust and a family testamentary trust. Betty was designated as the trustee and beneficiary of both of these trusts, with the right to receive principal and income derived from the assets of each trust. On Betty's death, the remaining trust assets would be divided equally among the four children.

Floyd died in 2003, survived by Betty and all four children. Before his death, certain of his assets were held in joint tenancy with Betty. Accordingly, when Floyd died, these assets passed directly to Betty as the surviving joint tenant. In addition, on Floyd's death, each child received his or her \$10,000 testamentary bequest, and the family and marital trusts were both funded, with the family trust receiving assets worth approximately \$929,000 and the marital trust receiving approximately \$64,000.

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Subsequently, Betty, in her individual capacity, retained one of the attorney-defendants to prepare her own estate plan. Betty executed her last will and testament in November 2004, and she signed two codicils thereafter. She died in February 2009, survived by one of her own children, Roosa, and Plaintiffs. Pursuant to Betty's will, the condominium that she owned was devised to Roosa, and the residue of her estate was to be divided among Roosa and Plaintiffs. Plaintiffs allege that the distribution of probate and non-probate assets following Betty's death resulted in Roosa's receiving seventy percent of Betty's assets, while Plaintiffs received only fifteen percent each. They further allege that after Betty's death, Roosa was anticipated to receive approximately \$3.2 million in assets from Floyd's will and Betty's will, while they would receive approximately \$962,000 each.

Plaintiffs sued the attorneys, asserting claims for, among other things, (1) breach of contract—third-party beneficiary, (2) professional negligence, and (3) fraudulent concealment and negligent misrepresentation. In support of these claims, Plaintiffs alleged that the attorneys had failed to advise Floyd of the impact of joint tenancy and that titling assets in joint tenancy and failing to sever joint tenancy properties would frustrate his intent to treat the children equally. Specifically, they alleged that (1) the attorneys' negligence allowed Betty to override Floyd's estate plan after his death; (2) the attorneys had drafted an estate plan for Betty that controverted Floyd's plan; and (3) Plaintiffs were the intended beneficiaries of Floyd's will, the attorneys had failed to advise them of the above-noted facts, and they suffered damages as a result of the attorneys' actions and inactions.

The attorneys moved to dismiss the complaint for failure to state a claim on which relief could be granted in that they owed no duty to Plaintiffs as non-client beneficiaries.

The Colorado Supreme Court agreed and dismissed the claims and held the strict privity rule is the law in Colorado. The Court held that attorneys owe no duties to non-clients absent allegations of fraud, a malicious or tortious act, including negligence misrepresentation. The court iterated the four policy reasons for justifying this limitation on attorney liability.

- First, limiting an attorney's liability to his or her clients protects the attorney's duty of loyalty to and effective advocacy for the client.
- Second, expanding attorney liability to non-clients could result in adversarial relationships between an attorney and third parties and thus give rise to conflicting duties on the part of the attorney.
- Third, if an attorney's duty of care were extended to third parties, then the attorney could be liable to an unforeseeable and unlimited number of people
- Finally, extending attorney liability to non-client beneficiaries risks suits by disappointed beneficiaries that would cast doubt on the testator's intentions long after the testator is deceased and unavailable to speak for himself or herself.

The Court rejected Plaintiffs' argument that the California Rule should apply which was first articulated in *Lucas v. Hamm*, 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685, 687 (1961). In that case, the California Supreme Court established the following approach for determining whether a beneficiary of an estate is entitled to bring an action against a testator's attorney for negligence in the drafting of a will:

[T]he determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm.

Next, the Colorado Supreme Court went on to reject the Florida-Iowa Rule as well. Under this theory,

[a]n attorney preparing a will has a duty not only to the testator-client, but also to the testator's intended beneficiaries, who may maintain a legal malpractice action against the attorney on theories of either tort (negligence) or contract (as third-party beneficiaries). However, 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) (citation omitted); see also *Schreiner v. Scoville*, 410 N.W.2d 679, 683 (Iowa 1987).

The Court held that contrary to each of the settled policies underlying the strict privity rule to which Colorado courts had long adhered, it perceived no justifiable policy reason for so extending attorney liability. This holding was noted to be particularly true given the common law and statutory remedies available to disappointed beneficiaries (e.g., claims involving fraud, malicious conduct, or negligent misrepresentation and claims for reformation of a governing instrument). In affirming the trial and court of appeals, the Court also rejected the Plaintiffs' fraudulent concealment claims.

Significance of Opinion

This decision is significant because the Colorado Supreme Court firmly halted the expansion of liability to attorneys to non-clients except in narrow circumstances where the attorney committed fraud or a malicious or tortious act, including negligent misrepresentation.

For more information, please contact [Caroline A. Mondschean](#).

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