Can a Prospective Beneficiary Sue If the Intended Will Does Not Get Drafted or Executed in Time?

By Jeffrey P. Lewis

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In the seminal case, *Guy v. Liederbach,* 459 A.2d 744 (Pa. 1983), the Pennsylvania Supreme Court held that an intended beneficiary under a will can assert a claim against the lawyer who improperly drafted the will in a way that caused a loss of her legacy. In that case, the intended beneficiary lost her legacy because she witnessed the signing of the will, which occurred in New Jersey, where under New Jersey law (at least at the time) a beneficiary under a will forfeits his or her legacy if he or she witnesses its signing.

The dilemma presented by a lost legacy claim against the lawyer who drafted the will is the proposition that the lawyer represents the testator not the beneficiaries. No one has been harmed until the testator dies because it is always possible that the testator may "write" this beneficiary "out of the will." The subsequent estate has sustained no legal damages because the size of the estate does not change because an heir has lost his or her legacy. The estate is not diminished because legatee A instead of legatee B will inherit as a result of the lawyer's negligence, therefore, the estate would have no basis to sue.

If the general rule is applied that the claimant cannot state a malpractice claim unless he or she stands in privity with the lawyer, which standing is created by the existence of an attorney/client relationship, the prospective beneficiary has no claim. In *Guy*, the court enforced the "privity" rule and held that the prospective beneficiary could not assert a malpractice claim against the testator's lawyer sounding in tort. In so doing, it rejected the application of a six-pronged analysis, which has been applied in other jurisdictions, to carve out exceptions to the "privity" rule. But in what is a majority and not a plurality opinion (which, unfortunately, has not been an occurrence lately by this high court in cases involving legal professional liability issues), the court recognized a claim based upon an intended third-party beneficiary theory under Restatement (Second) of Contracts § 302 (1979). In other words, the prospective beneficiary has a claim if he or she can demonstrate circumstances that indicate the testator intended that the purported legatee benefit from the testator's estate.

Although the court in *Guy* utilizes an intended third-party beneficiary analysis instead of crafting an exception to the "privity" rule as applied elsewhere, the result is still that an intended heir under a will whose inheritance is thwarted by the negligence of the testator's lawyer can assert a claim. Regardless of which legal theory is applied, a claim by a disenfranchised heir has been recognized only where the will in question had actually been executed. What if, instead, the lawyer, knowing that the testator is dying, takes his or her sweet time in writing the will and the testator dies before he or she had the opportunity to execute the will? Would a beneficiary named in that unsigned will, new to the testator's estate plan, have a cause of action against the lawyer for taking too much time to prepare the will? A California intermediate appellate court recently considered this issue.

In *Hall v. Kalfayan,* Cal.Rptr.3d, 2010 WL 4969021 (Cal.App. 2 Dist.) (decided Dec. 8, 2010), the California Court of Appeals was faced with this very issue. A California statue allows for the estate planning of an incapacitated person to be altered by a court-appointed guardian of the estate with court approval. Under this statute, counsel for the guardian (called a *conservator* in California) first contacted defendant counsel in November 2004 to prepare a new will for the incapacitated person. This would be accomplished by a series of interviews by defendant counsel with his client to determine her wishes with respect to the disposition of her estate. Defendant counsel had previously represented the incapacitated person in the proceeding to appoint the conservator.

After going through the interview process, the defendant lawyer did not submit a draft will to the conservator's counsel until more than two years after he had been retained. That draft will gave the conservator 51 percent and the client's niece 49 percent of the estate. The incapacitated person died in August 2007, approximately two years and eight months after her counsel was first retained to write her will, without ever signing the new will or receiving court approval.

The conservator, in his personal capacity, brought a legal malpractice action against the defendant lawyer, contending that the lawyer's "failure to timely perform his duties had deprived him of the majority of [the incapacitated person's] estate." The trial court granted summary judgment in defendant counsel's favor based upon the premise that the defendant lawyer did not represent the conservator in any capacity and therefore owed him no duty and that the conservator "was not the beneficiary of an executed estate plan."

The appellate court affirmed. It analyzed a series of California appellate decisions in which the six-prong test rejected in *Guy* for overriding the "privity" rule in favor of a prospective beneficiary was considered. The court noted a common feature in each of these cases ruling in favor of the prospective beneficiary — "the testamentary instrument had been executed." It recognized "both practical and policy reasons for requiring more evidence of commitment than is furnished by a direction to prepare a will containing specified provisions. From a practical standpoint, common experience teaches that potential testators may change their minds more than once after the first meeting. Although a potential testator may also change his or her mind after a will is signed, we perceive significantly stronger support for an inference of commitment in a signature on testamentary documents than in a preliminary direction to prepare such documents for signature." The court also notes, as did the court in *Guy*, that recognizing liability under these circumstances could compromise the lawyer's undivided duty owed his or her client because of "the incentive … to exert pressure on his client to complete her estate planning documents summarily, or by making him the arbiter of a dying client's

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true intent." The court further notes that there was no certainty that the court would have approved the will had it been executed.

What is the moral of this story for practitioners? One must keep in mind whom one represents under these circumstances and that, unless the will in question had been signed, prospective beneficiaries may have no basis to assert a claim arising out of the preparation of a will. Since the California court used the six-prong test, and not an intended third-party beneficiary analysis, it remains to be seen if the result would be the same under Pennsylvania law. It is far better to timely complete the assignment to draft a new will than to find out.