

# Refusal to Extend Intended Third-Party Beneficiary Status

In the seminal case, *Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744 (1983), the Pennsylvania Supreme Court first addressed the issue of whether a lost legatee could assert a claim against the lawyer who had negligently drafted the will that prompted his or her loss. The legatee lost her inheritance because she had executed the will as a subscribing witness, which under New Jersey law then in effect disqualifies the witness as an heir under the will. The defendant lawyer contended that the legatee could not assert a claim against him because of a lack of privity — the lawyer had represented the testator when he drafted the will and not the named beneficiary. In the Supreme Court, that argument worked in defense of the legal malpractice claim sounding in tort. But in response to the breach of contract claim, the court held, in a decision comprising only a majority of four, that the named beneficiary could assert a claim as an intended third-party beneficiary of the contract between the lawyer and his client under Restatement (Second) of Contracts § 302.

Based upon Section 302, the court applied a two-part test to determine one's status as an intended third-party beneficiary under a contract between others: "(1) the recognition of the beneficiary's right must be 'appropriate to effectuate the intention of the parties,' and (2) the performance must 'satisfy an obligation of the promisee to pay money to the beneficiary' or 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.'" The court viewed the first part of the test as stating a standing requirement, which acts as a mechanism to restrict application of the second part of the test, "which defines the intended beneficiary as either a creditor beneficiary...or a donee beneficiary." Applying this test, the court held that "a third party to a legal services contract has standing to bring an action against the testator's lawyer to enforce a failed legacy where 'the intent to benefit [the third party] is clear and the promisee (testator) is unable to enforce the contract.'"

*Guy* is an "easy" case in that the testator had signed a will that had testamentary effect and clearly stated her intent that Guy should inherit her estate. But what if the legatee is not specifically identified by name but is instead identified by status, i.e. "my niece"? What if the intended beneficiary is not named in the will at all, but there is collateral evidence, that is, evidence of intent that is not found within the four corners of the will, that establishes the testator's intent that someone inherit? Could such a person assert a breach of contract claim against the lawyer whose client had instructed him to include such a person in the will and yet failed to do so? The Pennsylvania Supreme Court revisited this area of the law in a recent decision.

## **"An attorney owes no obligation to potential heirs to have testamentary documents executed promptly or at all."**

In *Agnew Estate v. Ross*, 2017 WL 262065 (Pa.), the defendant lawyer drafted both a trust amendment and a will for his client, among other documents, based upon instructions from one of the beneficiaries, who was also the named executrix, that his client had changed his mind as to the distribution of his estate. According to her, the client wanted to change the proposed distribution to divide the residue of the estate's assets into five equal shares and to also make specific bequests to the beneficiaries' children. The defendant lawyer intended to accomplish these requests by drafting both an amendment to a trust and a new will, which he did and forwarded drafts via the named executrix to his client for review. Unless both documents were duly executed, these changes to benefit the beneficiaries and their children would not occur.

The defendant lawyer took the will to his client, who was in hospice, but failed to take the trust amendment, which the defendant lawyer admits was his mis-

take. As a result, the will but not the trust amendment was executed. The client died without having executed the trust amendment, thus the intended legatees did not inherit as intended.

The intended beneficiaries and the client's estate sued the defendant lawyer, alleging claims for legal malpractice and breach of contract based upon their alleged status as intended third-party beneficiaries to the contract for the legal work performed by defendant lawyer for his client. Specifically, they contended that the defendant lawyer's failure to present the trust amendment to his client for sig-

nature was a breach of contract. The trial court sustained the preliminary objections to the legal malpractice claim sounding in tort for lack of privity, i.e. defendant lawyer had not represented the beneficiaries.

However, the breach of contract claim proceeded through discovery after which the trial court granted the defendant lawyer's summary judgment motion with respect to the breach of contract claims. The trial court found that, to recover, the intended beneficiaries "would need to show that there is an 'otherwise valid' document naming them as recipients of all or part of the estate." Because the client had not duly executed the trust amendment, which stated his testamentary intent in favor of the intended beneficiaries, nor any other such document, the trial court found that the beneficiaries lacked competent evidence to establish the testator's true intent.

A three-judge panel of the Superior Court reversed the decision. That court consid-

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ered the defendant lawyer's admissions that he had "made a mistake by not presenting the...Trust Amendment for [client's] signature at the...meeting" and this was an "oversight." In distinguishing the holding in another reported Superior Court decision where the defendant lawyer had just met his client, who was on his death bed, for the first time, "the panel focused on the fact that [defendant lawyer] had been [client's lawyer] for seven years prior to his drafting the...Trust Amendment."

With the exception of a concurring opinion by Chief Justice Saylor, the Supreme Court reversed the Superior Court panel supported by a nearly unanimous opinion. The court rejected the use of extrinsic evidence — that is, evidence that is extrinsic to what the testator states in the executed testamentary document itself — to prove testamentary intent. Otherwise, in the court's view, this would "open the door to fraud, result in the defeat of the testator's intention as well as nullify the provisions of the Probate Code, which require testamentary documents to be in writing and signed by the testator."

Such a holding is consistent with decisions made in other jurisdictions that "an attorney owes no obligation to potential heirs to have testamentary documents executed promptly, or at all." Such a holding

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is also consistent with Pennsylvania law that requires proof of actual loss to establish legal malpractice. The court notes that there is no presumption that a decedent who asked his counsel to make changes to his estate plan would have actually signed when presented with testamentary documents that reflect those changes.

The court distinguished its holding in *Guy* on the basis that the testator there had ex-

cuted a testamentary instrument in which he states the intention that the failed legatee inherit, whereas in *Agnew*, the testator had not executed the testamentary instrument that contains that declaration. What is not clear in the majority opinion, and which prompted Chief Justice Saylor in part to write his concurring opinion, is whether the “rule” announced by the court in this case also applies to beneficiaries who are not expressly named in the

testamentary instrument but can be identified, such as “my children.” He would include such “non-named beneficiaries” under this “rule.”

*Guy* and *Agnew* illustrate the Supreme Court's refusal to give a lost legatee a remedy against the testator's lawyer except in instances where the lost legatee is named in the executed testamentary instrument itself.

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