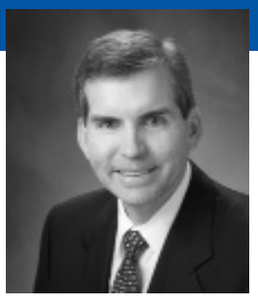
Lost Legatee Beneficiary Claims

Avoiding Liability



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The Supreme Court of Pennsylvania, in *Guy v. Liederbach*, 459 A.2d 744 (Pa. 1982), a plurality decision, first considered whether a lost legatee could assert a malpractice claim against the lawyer who drafted the will. In *Guy*, the lawyer had drafted a will for a then-Pennsylvania resident, the execution of which was witnessed by the named legatee. Eighteen years later, the testator died in New Jersey. Unfortunately for the legatee, a statute was then in effect in New Jersey, since repealed, that nullified any inheritance to any legatee who had witnessed the execution of a will. Because the will was probated in New Jersey the legatee was effectively disinherited, so she sued the lawyer who had drafted the will.

The lawyer defended on the basis that he had never represented the legatee; therefore, absent the existence of an attorney/client relationship, the legatee and the lawyer did not stand in privity. The legatee argued that the court should adopt the reasoning in *Lucas v. Hamm*, 56 Cal.21d 583, 264 P.2d 685, 15 Cal.Rptr. 821 (1961), which stated the so-called "California rule" for malpractice suits in negligence to allow a lost legatee to assert a claim in negligence. That rule is not a simple negligence standard but involves the application of a six-part balancing test on a case-by-case basis. The legatee also argued that she should be recognized as an intended third-party beneficiary, under Restatement (Second) of Contracts § 301 (1979), of the contract between the lawyer and the testator, arguing, in effect, that the lawyer, the "promisor," had promised the testator, the "promisee," that he would draft a will that would successfully benefit the intended legatee.

The appeal of these arguments is that the legatee would otherwise have no basis to remedy the real harm that occurred to her unless the court embraced at least one of these arguments. After all, in the instance of a lost legatee, the estate has not been damaged, that is, it has sustained no net loss or gain to its balance sheet; the assets in question would simply be inherited by someone else or by some other entity. Therefore, the estate has no basis to assert a malpractice claim against the lawyer.

The Supreme Court rejected adoption of the California rule, finding it "unworkable, and [that it] has led to ad hoc determinations and inconsistent results as the California courts have attempted to refine the broad *Lucas* rule." But the court did accept the third-party beneficiary argument, holding that it applies "where the intent to benefit is clear and the promisee [testator] is unable to enforce the contract." Obviously, since the testator would be dead when the legatee has sustained the harm, the testator would not be in a position to enforce the contract.

Guy involved an instance where the intended third-party beneficiary is beyond doubt because she was expressly named in the will. But, as the court noted in a footnote, there may be unnamed beneficiaries under a will who may be either intended or unintended beneficiaries for whom the "standing requirement may or may not be met." Under such circumstances, the court indicated that "the trial court must determine whether it would be 'appropriate' and whether the circumstances indicate an intent to benefit non-named beneficiaries. … In making that determination the trial court should be certain the intent is clear."

But the court's observation in the footnote in *Guy* is dicta because the legatee there was expressly named in the will. To enjoy intended third-party-beneficiary status, must the beneficiary have been expressly named in the will? The Superior Court considered that issue recently in *Estate of Agnew v. Ross*, 110 A.3d 1020 (Pa. Super. 2015); Petition for Allowance of Appeal granted, ___ A.3d ___ (2015).

Agnew involved a situation where the client had executed a will, but he had failed to execute a trust amendment prepared by his lawyer at the same time. The trust amendment provided that "the assets of the Revocable Trust were to be distributed equally to [his nieces and nephews]." He died before his lawyer realized that he had failed to present the trust amendment to his client for signature. A copy of that document had been provided to the client, but there is no evidence that he had ever signed it.

The nephews and nieces and the estate sued the lawyer and his firm. It was what they were to receive under the trust amendment — apparently never signed — and not what they were to receive under the will — that was signed — that provided the basis for their claim against the lawyer. In their complaint they asserted claims sounding in breach of contract, negligence and respondeat superior as against the firm. The trial court sustained preliminary objections on the basis that the estate was an improper party, against one of the nieces in her representative capacity of the estate and with respect to the negligence count due to the absence of an attorney/client relationship. The trial court later granted summary judgment in favor of the lawyer and his firm based upon a finding that none of the nephews and nieces qualified as intended third-party beneficiaries so as to give them a basis to assert a claim.

The trial court had relied upon *Gregg v. Lindsay*, 649 A.2d 935 (Pa.Super. 1994), a non-precedential decision, as the basis for its ruling. *Gregg* was non-precedential because one judge wrote the opinion, but the other two judges on the panel merely concurred with the result. In *Gregg*, the lawyer who was engaged by the would-be legatee drafted the will naming the would-be legatee and went to the hospital to meet with the would-be testator, who approved the will but could not sign it because there was no one available to witness the signature. When the lawyer returned the next day he learned that his client had been moved to another hospital, where the client died before he could sign the will. The Superior Court reversed a verdict against the lawyer because "there was no executed will which … could clearly establish an intent by the testator to benefit the third person."

In *Agnew*, the court in effect rejected the holding in *Gregg* and instead focused on the footnote in *Guy* that recognized that intended third-party-beneficiary status could be recognized even in the absence of a document signed by the testator (or settlor) so long as the proof of the intention was clear, direct and precise. Accordingly, the Superior Court reversed the trial court.

Apparently the Superior Court's decision will not be the last consideration of that case. The Supreme Court of Pennsylvania has granted *Agnew's* petition for allowance of appeal to determine whether the Superior Court erred and acted contrary to the Supreme Court's decision in *Guy* and to the Superior Court's previous decision in *Gregg* and its two other reported decisions.