

PROFESSIONAL LIABILITY UPDATE

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Boronian v. Clark (2004) 123 Cal.App.4th 1012

The Second District holds that there is no duty to an intended beneficiary of an estate plan when such a duty would compromise the attorney's duty of loyalty to the client.

After Marlene Farris and Placido Chavez moved in together Farris refinanced her house and used the proceeds to purchase a business for Chavez. Farris told her daughter that she had purchased the business as an asset for her family but she later decided to give the business to Chavez. When Farris was ill Chavez met with a lawyer, Laurence E. Clark, and asked him to prepare a will for Farris and documentation of a gift from Farris to Chavez. Clark understood from Chavez that Farris wanted Chavez to have the business, and her children to have her house and all of her remaining assets. Chavez told Clark that the debt incurred to purchase the business should remain as a lien against Farris's home. In drafting Farris's will and other documents Clark relied completely on information and directions from Chavez, but considered Farris his client.

When Farris was in rapid decline Clark prepared a will, a "confirmation of gift," and an "assignment of lease" and presented them to Farris. When Farris's nurse tried to interfere with Clark's visit she was turned away. Clark explained to

Farris that under the will the business would go to Chavez and everything else to her children, but did not tell Farris that her children would be responsible for the lien on the house. Later another nurse ordered Clark to leave and this nurse noted Farris was extremely sleepy and did not know the exact day or date. Medical notes from that morning indicated that Farris was sleepy, confused, and hallucinating.

When Farris's children sued Clark the trial court denied his motion for nonsuit premised on his lack of duty to Farris's children. The Court of Appeal reversed. Third party liability is a matter of policy and involves the balancing of various factors, including (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the lawyer's conduct and the injury suffered, (5) the moral blame attached to the lawyer's conduct, (6) the policy of preventing future harm, (7) the likelihood that imposition of liability

might interfere with the attorney's ethical duties to the client, and (8) whether the imposition of liability would impose an undue burden on the profession.

In the will context there is no third party liability where there is a substantial question about whether the third party was the decedent's intended beneficiary or where third party liability might interfere with the attorney's ethical duties to his client thereby imposing an undue burden on the profession.

Although an agreement to provide legal services to a testator can impose a duty to the intended beneficiary the primary duty is owed to the testator-client. If a duty to a presumed beneficiary creates an incentive for the attorney to pressure the client to complete estate planning documents summarily or to decide on a dying client's true intent it is an undue burden on the profession. Clark's sole duty was to Farris and did not include a duty to her beneficiaries to evaluate or ascertain his client's capacity to make a new will.

A lawyer who is persuaded of the client's testamentary capacity by observation and experience fulfills the duty of loyalty to the testator and should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will. Nor should an attorney be required to urge the testator to consider an alternative plan to forestall a claim by someone excluded from the estate plan. Otherwise the attorney would be subject to potentially conflicting duties to the client and to potential beneficiaries and also to conflicting duties to different sets of beneficiaries.

Beneficiaries of a will executed by an incompetent testator have a remedy by contesting the probate and challenging the will.

Comment: The factors for determining duty to third parties can easily be manipulated to allow for a finding of duty to a third party. Established precedent that limits duty due to an attorney's ethical obligations should guide trial courts. This case, and the companion case of *Featherston v. Farwell* (2004) 123 Cal.App.4th 1022 [PL Update No. 206] is another example of the refusal to extend attorney liability to third parties when an attorney's duty to the client would be compromised.