

PROFESSIONAL LIABILITY UPDATE

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DUTY TO NON-CLIENTS

California Law

By Jennifer A. Becker

Osornio v. Weingarten (2004) 124 Cal.App.4th 304

The Sixth District holds that an estate-planning attorney owes a duty of care to a non-client beneficiary when there is no ambiguity about the testator's intent to benefit the non-client and imposing a duty would not impair the attorney's duty of loyalty to the testator-client.

Dora Ellis retained Lawrence Weingarten to prepare a will benefiting her care custodian Simona Osornio as the sole heir. Because Osornio was a care custodian, the Probate Code required another attorney to provide a Certificate of Independent Review. A beneficiary under Ellis's prior estate plan contested Osornio's probate petition and the trial court ruled that Osornio failed to overcome a presumption of invalidity due to the lack of certification. When Osornio sued Weingarten the trial court sustained his demurrer without leave to amend, finding that as a matter of law Weingarten owed no duty to Osornio, a non-client.

The Court of Appeal noted that case law has developed a balancing test for extending attorney liability to third parties 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.

Liability has been extended to third party beneficiaries in the estate-planning context since one of the main purposes of the engagement is to provide for the transfer of property to the third party. Absent third party liability there would be no liability and the policy of preventing future harm would be impaired. This concept is limited to cases where the estate planning attorney's negligence leads to a foreseeable loss to a readily identified beneficiary. Liability is denied where the identity of the intended beneficiary is uncertain, where the beneficiary is

identified only in an unsigned will, or where imposing a duty would impair the attorney's duty of loyalty to the testator-client.

It was clear that Osornio sustained injury because she was deprived of the estate. Although Weingarten did not owe a direct duty to Osornio, it is conceivable that Osornio could present evidence that Weingarten's error caused her injury. The absence of extreme closeness between conduct and injury should not preclude a finding of duty if application of the remaining factors warrants it.

If a presumptively disqualified beneficiary, such as Osornio, is precluded from suing the estate-planning attorney no one would be able to bring an action and the policy of preventing future harm would be impaired.

An attorney assumes a duty to transfer property a manner that does not unduly expose the transfer to attack. Statutory limitations on transfers to certain classes of people are well known to estate planning practitioners. The Legislature considered the subject so important that at the time it enacted the limitations the bill included a separate statute making an attorney's violation of the property transfer limitations grounds for discipline by the State Bar. The attorney owes a duty to the client and the prospective transferee to advise the client of the presumptive disqualification and steps to overcome the presumption, including a recommendation that the client seek independent counsel to obtain a Certificate of Independent Review.

Under the facts of this case a duty would not result in the attorney becoming unduly preoccupied with the possibility of negligence claims from third parties.

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Weingarten clearly knew of his client's desire that her care custodian be her sole beneficiary. Weingarten was not faced with conflicting loyalties and was not hindered in devoting his entire energies to Ellis's interests. In this circumstance imposing a duty would encourage attorneys to devote their best professional efforts on behalf of their clients to ensure that transfers of property to particular donees are free from avoidable challenge.

The court distinguished other estate planning cases holding that there is no liability to potential beneficiaries. In the context of an unsigned will there is no duty because there is a danger of compromising the attorney's primary duty of undivided loyalty to the client due to the ambiguity about the testator's donative intent. Similarly there is no duty to beneficiaries to evaluate and ascertain the testamentary capacity of a testator because this could conflict with the attorney's duty of loyalty to the client.

The Court held that Restatement Third of the Law Governing Lawyers supports its conclusion. It provides that a lawyer owes a duty to use care to a non-client when the lawyer knows that a client's primary objective is to benefit the non-client; a duty would not significantly impair the lawyer's performance of obligations to the client; and the absence of a duty would make enforcement of obligations to the client unlikely. The comment notes that a non-client's claim is recognized when doing so will implement the client's intent and fulfill the lawyer's obligations to the client without impairing performance of those obligations in the circumstances of the representation.

Comment: The balancing factors can be easily manipulated to argue for a finding of third party liability. While courts will not impose liability when doing so could result in conflicting loyalties to clients and third parties, they will not hesitate when duty to a third party coincides with the duty to the client.

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