

No. 45250-2-II

COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

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JENNIFER LINTH AND THE ESTATE OF CAROLYN  
LINTH, THE EVELYN PLANT TESTAMENTARY  
TRUST; AND THE FRANKLIN & EVELYN PLANT  
GREEN POINT FOUNDATION,

*Appellants,*

v.

CARL GAY AND ROBIN A. GAY, HUSBAND AND  
WIFE, AND THE MARITAL COMMUNITY  
COMPOSED THEREOF; *et al.*,

*Respondents.*

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ON APPEAL FROM CLALLAM COUNTY SUPERIOR COURT

(Hon. Keith Harper)

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**REPLY BRIEF OF APPELLANT JENNIFER LINTH**

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## I. SUMMARY OF ARGUMENT

Respondent Carl Gay owes a duty to Appellant Jennifer Linth *not* as the attorney for the Trustee of a Trust that he drafted for Mrs. Plant. All of Carl Gay's arguments in this appeal are based entirely on this mistaken premise. Instead, Carl Gay owes a duty to Jennifer Linth as the attorney for Mrs. Plant. In this role, Carl Gay utterly failed – by breaching his duties to Mrs. Plant – to ensure that Mrs. Plant's estate planning documents would effectively transfer her property upon her death in conformance with her expressed intentions. It is undisputed that Mrs. Plant intended to leave a life estate in a portion of her Green Point property to Jennifer Linth and that Mrs. Plant specifically directed Carl Gay to make sure this happened. It is also undisputed that, at the time he drafted the estate planning documents for Mrs. Plant, Carl Gay did not know of the estate tax consequences of burdening a gift to a 501(c)(3) non-profit corporation with a life estate. Finally, it is patently clear that Carl Gay had a concurrent conflict of interest by representing the Trustee of the Trust that he drafted for Mrs. Plant where that representation was materially adverse to the beneficiaries of that Trust. Carl Gay never obtained the required informed consent from either the Trustee or the beneficiaries of the Trust he drafted for Mrs. Plant. *See*, RPC 1.7. Breaches of each of these duties owed by Carl Gay to Mrs. Plant flow to Jennifer Linth as one of the beneficiaries of the Trust that Carl Gay ineffectively attempted to create for his client, Mrs. Plant. The trial court erred when it found that Carl Gay owed no duty to Jennifer Linth.

## II. ARGUMENT

### A. Respondent's Arguments Are Incorrectly Focused on the Duty of Care Owed by Carl Gay as Attorney for the Trustee.

In his Restatement of the Assignments of Error, Respondent Carl Gay reveals the reason why the trial court's Order Granting Summary Judgment<sup>1</sup> was in error. "Issue Two: May a litigant sue a trustee *and* the trustee's attorney?" Respondent's Brief at p. 5 (emphasis in original). Jennifer Linth has *not* brought this action against Carl Gay as the attorney for the Trustee. Jennifer Linth has brought this action against Carl Gay as the attorney for Mrs. Plant. This distinction is critical and dispositive of this appeal in favor of Jennifer Linth.

### B. The Trial Court Erred When It Found That Carl Gay Owed No Duty, as a Matter of Law, to the Beneficiaries of the Trust He Drafted for His Client, Mrs. Plant.

It is undisputed that the purpose for which Mrs. Plant retained Carl Gay as her lawyer was to provide for the effective transfer of her property upon her death. Certainly avoiding estate taxes, to the extent legally possible, can be presumed as another purpose for which Mrs. Plant retained Carl Gay to prepare her estate planning documents. Carl Gay failed to serve either of these purposes for his client. Jennifer Linth has claimed in her Complaint that Carl Gay was negligent in any one of several ways. CP:921-922. To reiterate, however, Linth sets forth below the specific duties owed by Carl Gay to his client, Mrs. Plant, and the facts from the record that show how he breached those duties:

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<sup>1</sup> CP: 22-24, RP: 41 (10/18/2013)

**1. Carl Gay Had a Duty to Advise Mrs. Plant of the Consequences of Signing the Amendment Without the Completed Exhibit Referenced in the Amendment.**

Carl Gay drafted both the original Trust Declaration and the First Amendment to the Declaration of Trust for Mrs. Plant. CP:69-91. When he drafted the Amendment, Carl Gay attempted to ensure an effective transfer of a portion of Mrs. Plant's property to a nonprofit Foundation, the terms of which, Gay wrote, were set forth in the "Foundation Plan," *"a copy of which is attached hereto marked Exhibit 1 and by this reference incorporated herein as though set forth in full."* CP:88-89 (emphasis added). It is undisputed that Carl Gay knew, after the Amendment was fully executed by Mrs. Plant, that the document he referenced "attached hereto" and "as though set forth in full," was not attached. He also knowingly maintained both the fully executed original Trust Declaration *and* the Amendment in his offices without the referenced Exhibit 1. Gay knew then, and now, the importance and necessity of attaching Exhibit 1 to the Amendment that he drafted and held for Mrs. Plant. *"Without the referenced attachment, the Amendment to the Trust was therefore incomplete and subject to challenge."* Respondent's Brief at p. 6 (emphasis added). This is the very essence of Carl Gay's breach of his duty to Mrs. Plant.

Carl Gay argues: (1) he could not force Mrs. Plant to create a Foundation Plan and (2) he was not the person charged with creating the Foundation Plan. Neither of these arguments address the question before this Court; namely, whether Carl Gay had a duty to his client, Mrs. Plant,



to (1) advise her that the Amendment was not effective until Exhibit 1 was complete and attached to the otherwise fully executed Trust document; or (2) advise her not to sign the Amendment *until* such time as the Foundation Plan referenced as Exhibit 1 was complete and ready to be attached to the Amendment. Because he knew Mrs. Plant had signed the Amendment before the referenced Exhibit was complete, and because he had drafted the Amendment, it is reasonable to charge Carl Gay with the affirmative duty to so advise his client, Mrs. Plant.

Carl Gay declares himself as a lawyer practicing over 30 years and as an expert in estate planning, “including the preparation of wills, trusts and other estate planning documents as well as creation of non-profit entities for a wide variety of clients.” (CP: 266-267). Of course Gay knew the importance and necessity of attaching the referenced “Foundation Plan” as Exhibit 1 to the Amendment in order to make it effective and he says so in his brief: “Without the referenced attachment, the Amendment to the Trust was therefore incomplete and subject to challenge.” Respondent’s Brief at p. 6. Knowing this, Gay held both the fully executed original Trust Declaration and the fully executed Amendment – without the referenced attachment – in his offices without ever advising Mrs. Plant of the potential consequences. *See*, CP:82-91 (showing Carl Gay’s corrections and changes to the Amendment *after* Mrs. Plant had signed it.) In fact, after she signed the Amendment, Carl Gay never again spoke with his client, Mrs. Plant. CP: 50-52.

The undisputed intentions of Mrs. Plant were not carried out upon her death because Carl Gay permitted an otherwise fully executed Amendment to Mrs. Plant's Trust Declaration to remain in existence without attaching the specifically referenced Exhibit 1. This single fact has caused disputes between and amongst those beneficiaries named in the original Trust Declaration and those beneficiaries named in the Amendment to the Trust Declaration. The single cause is Carl Gay's breach of the duty he owed to Mrs. Plant.

**2. Carl Gay Had a Duty to Know and Understand the Estate Tax Consequences of the Estate Plan That He Drafted for His Client, Mrs. Plant.**

Whether she left her Green Point property to CRISTA Ministries (as Mrs. Plant originally intended in her Declaration of Trust, CP: 74-77), or to the Green Point Foundation (that Mrs. Plant intended to create by the Amendment, CP:88-89), both are 501(c)(3) non-profit corporations that have particular estate tax planning requirements. By gifting real property to a charitable corporation, Mrs. Plant's estate would have avoided significant estate taxes. However, where that gift of real property is subject to a life estate, as it was drafted by Carl Gay, the estate taxes are significantly higher. In this case, "the estate tax could approach \$750,000 if there is no charitable deduction or only a small deduction allowed for the remainder interest to the charitable entity." CP:191. Simply put: "Carl Gay, legal counsel to Mrs. Plant, did not recognize the tax consequences of her estate plan." CP:200. Indeed, it was not until after Mrs. Plant died that Carl Gay realized the magnitude of his error and the effect it would have on Mrs. Plant's estate:

“The IRS could force [the] sale of the Green Point property to pay taxes frustrating Mrs. Plant’s estate plans.” CP:200. There are additional problems for Mrs. Plant’s estate due to Carl Gay’s failure to draft the Trust without ambiguity in order that the estate taxes be paid from the Trust residue. Carl Gay’s failure to know and understand the estate tax consequences of the Trust documents he drafted for Mrs. Plant has caused controversy over the interpretation and enforceability of the Trust, as amended, and has frustrated Mrs. Plant’s undisputed intentions as expressed to Carl Gay and as set forth in her estate planning documents. CP: 916-921.

**3. Carl Gay Had a Duty of Impartiality and Loyalty to Mrs. Plant.**

Carl Gay asserts that as of August 16, 2000, he became the lawyer for the Trustee of the Trust that he drafted. Respondent’s Brief at p. 1. Of course, he was also the lawyer for Mrs. Plant at that time. Upon her death, Carl Gay continued to owe a duty of impartiality and loyalty to Mrs. Plant related to the estate planning documents that he drafted for her. Carl Gay had a patently clear concurrent conflict of interest by representing the Trustee of the defective Trust that he drafted for Mrs. Plant at the same time that the beneficiaries of that Trust (1) accused the Trustee of breach of fiduciary duties, and (2) accused Carl Gay of failing to draft the Trust to effectively transfer Mrs. Plant’s assets in accordance with her intentions. RPC 1.7.

Moreover, on behalf of the Trustee, Carl Gay retained another lawyer (Butler) to give an opinion, ostensibly, about Carl Gay’s drafting

of the Trust documents.<sup>2</sup> The opinion was that the Trust documents were defective and that Carl Gay had a conflict of interest. CP:138-141; 120-121.

Carl Gay asserts that it was up to the Trustee to terminate him and to bring a claim against him. Respondent's Brief at p. 9. On the contrary; Carl Gay owed a duty of impartiality and loyalty to *Mrs. Plant* before he ever undertook his representation of the Trustee. It was up to Carl Gay, as a lawyer licensed to practice law in the State of Washington, to either withdraw from representing the Trustee or to obtain a waiver from both the Trustee and the beneficiaries of the Trust he drafted for Mrs. Plant. RPC 1.7; see, *In re Disciplinary Proceeding Against McKean*, 148 Wn.2d 849, 64 P.3d 1226 (2003); *In re Disciplinary Proceeding Against Hall*, 180 Wn.2d 821, 329 P.3d 870 (2014). Carl Gay did neither.

**C. Carl Gay Owed the Same Duties to Jennifer Linth That He Owed to Mrs. Plant Under the Multi-Factor Balancing Test.**

The parties agree that the test in Washington to determine whether an attorney owes a duty to a non-client is the multi-factor balancing test set forth by the Supreme Court in *Trask v. Butler*, 123 Wn.2d 835, 843, 872 P.2d 1080 (1994); see also, *Dewar v. Smith, et al.*, No. 69701-3-1/No. 70190-8-1, 2015 WL 315885 (Wn. App. Div. I Jan. 26, 2015) (*Trask* factors extended to find duty owed by accountant to non-client). And it is

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<sup>2</sup> Linth attempted to obtain the entire *Butler* opinion through discovery, but, the interrogatory was met with objection. What is before the court, however, is sufficient to raise an inference that Gay owed a duty of impartiality and loyalty to Mrs. Plant and, after her death, to the beneficiaries of the Trust that he attempted to create for Mrs. Plant.

the factual circumstances of each case that are critical to each decision and underscore the fact-specific analysis that is required of a court under the multi-factor balancing test set forth in *Trask*. See, *Parks v. Fink*, 173 Wn. App. 366, 377 n. 9, 293 P.3d 1275 (2013) (citations omitted). Every reasonable inference from the facts must be “indulged in favor of the nonmoving party” and all doubts must be resolved in favor of Jennifer Linth. See, *In re Guardianship of Karan*, 110 Wn. App. 76, 81, 38 P.3d 396 (2002), citing, *Bohn v. Cody*, 119 Wn.2d 357, 362, 832 P.2d 71 (1992).<sup>3</sup> Here, the *Trask* factors unequivocally establish a duty owed by Carl Gay, as the lawyer for Mrs. Plant, to Jennifer Linth, one of the intended beneficiaries of the Trust Carl Gay drafted for Mrs. Plant, and the trial court erred when it found to the contrary.

**1. The Most Important Inquiry Under the Multi-Factor Balancing Test Is the First One: The Extent to Which the Trust Documents Were Intended to Benefit Jennifer Linth. This Is Not in Dispute.**

Carl Gay freely admits that Mrs. Plant always intended to preserve her Green Point property as a retreat center for the benefit of religious and civic groups, but that she wanted her friend and caretaker, Jennifer Linth, to receive a life estate to occupy the residence. CP:121, 268. Gay drafted the original Trust Declaration and the Amendment for Mrs. Plant – both of which evidence Mrs. Plant’s intent to leave a life estate in a portion of her

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<sup>3</sup> It is worth noting that the same trial judge found that there was a question of fact concerning whether Carl Gay owed a duty to the Trust and the Foundation. RP: 6/21/2013 – pp.36-37.

Green Point property to Jennifer Linth. CP:74-76, 83-84, 89. Therefore, the attorney-client relationship of Carl Gay and Mrs. Plant was established, in part, to benefit Jennifer Linth.

**2. The Foreseeability of Harm to Jennifer Linth Cannot Be Disputed.**

In a legal malpractice action in the context of a lawyer who has drafted the Trust Declaration documents for a testator, it is foreseeable<sup>4</sup> that by failing to attach the Exhibit that is specifically referenced in the Amendment to that Trust Declaration (that the lawyer also drafted), the Amendment would be subjected to challenge by the beneficiaries of the Original Trust Declaration and by the beneficiaries of the Amendment to the Trust Declaration. *See, Harrigfeld v. Hancock*, 90 P.3d 884 (Idaho 2004) (Since one of the main purposes for preparing testamentary instruments is to provide for the transfer of property to those named in such instruments, the harm to those intended beneficiaries in the event of an attorney's negligent preparation of the instruments is clearly foreseeable.); *Blair v. Ing*, 21 P.3d 452, 460 (Haw. 2001), citing, *Lucas v. Hamm*, 364 P.2d 685, 685 (Cal. 1961), *cert. denied*, 38 U.S. 987, 82 S. Ct. 603, 7 L. Ed. 2d 525 (1962) (The damage to the beneficiaries in the event of invalidity of the bequest to them is clearly foreseeable; it becomes certain upon the death of the testator without any change of the will.).

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<sup>4</sup> And was foreseeable to Carl Gay: "Without the referenced attachment, the Amendment to the Trust was therefore incomplete and subject to challenge, especially by those whose interests were affected by either the adoption or non-adoption of the Amendment." Respondent's Brief at p. 6.

It is equally foreseeable that burdening the gift of real property to a 501(c)(3) charitable corporation with a life estate has significant estate tax consequences and that by failing to account for this, an estate will pay significantly more estate taxes than it otherwise would. The additional tax liability would further decrease Mrs. Plant's gifts to her intended beneficiaries.

Here, under *both* the original Declaration of Trust and the Amendment, Mrs. Plant intended for Jennifer Linth to have a life estate in a portion of her Green Point property. Mrs. Plant died without ever changing her estate documents to reflect any other intention. Also under both documents drafted by Carl Gay, Mrs. Plant made a gift of real property to a charitable corporation with a life estate attached. It cannot be disputed that the harm to Jennifer Linth by the failure of the Trust documents prepared by Carl Gay to effectively provide for a life estate for Jennifer Linth was foreseeable.

**3. The Degree of Certainty That Jennifer Linth Would Suffer, and Has Suffered, Injury Is Not in Dispute. The Most Glaring and Obvious of Her Injuries Is That She No Longer Has a Life Estate in the Green Point Home and Property.**

It cannot seriously be disputed that Jennifer Linth has suffered harm as a result of Carl Gay's breach of his duties to Mrs. Plant, and therefore to Jennifer Linth. Not only has Linth incurred significant attorney's fees, but also the loss of a life estate in Green Point that Mrs. Plant intended that she receive. CP: 810-817. There is pain and suffering

as well that cannot be ignored and comes with litigation over the dying wishes of a person with whom, no one disputes, was as close to Jennifer Linth as Mrs. Plant was.

Respondent argues, although not necessarily in response to *Trask* factor #3, that because Jennifer Linth has enjoyed the benefit of living in the residence at Green Point since Mrs. Plant died, and because she “stands to benefit significantly upon the sale of Green Point,” that Jennifer Linth has not been harmed by the negligence of Carl Gay. Respondent’s Brief at pp. 7 and 22, n.1. Leaving aside that Respondent cites to no facts in the record to support these assertions, the question for the Court is whether Linth would suffer harm, *and has*, as a result of Carl Gay’s negligence. *See*, CP: 810-817 (Declaration of Jennifer Linth). On this point there can be no dispute.

Finally, by arguing that Jennifer Linth has suffered no damages, Carl Gay is suggesting that Linth has enjoyed something akin to a life estate because she has lived on the Green Point property since Mrs. Plant died during these past years of litigation. This argument completely disregards the anxiety and uncertainty and distress that Jennifer Linth has had to live through; none of which she would have suffered had Carl Gay not breached his duties to Mrs. Plant. As stated by the Honorable Judge Verser:

There is no doubt that Ms. Plant intended to have Jennifer and Carolyn Linth live on that property for their lifetimes and that she wanted the property to be preserved as an environmental classroom for students of all ages and attempted to accomplish those goals through a foundation known as the Green Point Foundation and through the



Evelyn Plant Trust and the First Amendment to that trust. . . . There is [also] no question in the court's mind that Jennifer and Carolyn Linth became involved in this "disheartening" process for the sole purpose of exerting their best efforts to carry out the wishes of Evelyn Plant, and not for their own benefit.

CP:374-375. And in Jennifer Linth's own words:

[I] have incurred significant attorney fees over the last 10 years, loss of life estate and damages yet to be discovered. This whole controversy never should have happened.

CP: 812.

**4. The Fact That Jennifer Linth No Longer Has a Life Estate in Any Portion of the Green Point Property Is Directly Connected to the Negligence of Carl Gay.**

The connection between the alleged failures of Carl Gay to his client, Mrs. Plant, and the injury to the beneficiaries of the Trust, of which Jennifer Linth is one, is direct. *See, e.g., Jewish Hosp. v. Boatmen's Nat'l Bank*, 633 N.E.2d 1267, *rev. denied*, 642 N.E.2d 1282 (Ill. App. 1994) (Attorney who drafted will setting up testamentary trust owed duty of care to trust beneficiaries and was liable to them in negligence for their not having received as much as they should have due to attorney's alleged negligence in advising testator about tax consequences.); *see also, Johnson v. Sandler, Balkin, Hellman, & Weinstein, P.C.*, 958 S.W.2d 42 (Mo. Ct. App. 1997) (Attorney who undertakes to revise testamentary scheme of client should be aware of potential injury intended beneficiaries of testamentary scheme would suffer as result of any negligence of attorney.); *Fabian v. Lindsay, III, et al.*, 765 S.E.2d 132 (S.C. 2014) (Using multi-factor balancing test, held: beneficiaries of an existing will or

estate planning document may recover against attorney whose drafting error defeats or diminishes the client's intent).

Carl Gay points his finger at the Trustee, at Claudia Smith, and at Jennifer Linth as the cause of the problems with the Trust and Foundation and Mrs. Plant's estate. *But the only common denominator is Carl Gay.* Carl Gay drafted the original Trust Declaration and the Amendment with the language incorporating Exhibit 1 "as though set forth in full." Carl Gay knew that Mrs. Plant had signed the Amendment. Carl Gay knew that Exhibit 1 was not attached to the signed Amendment. Carl Gay held two fully executed – and conflicting – Trust documents in his office for his client, Mrs. Plant. Carl Gay never spoke with Mrs. Plant again after she signed the Amendment. Simply put, but for Carl Gay breaching his duties to his client, Mrs. Plant, there would be no litigation over her estate plan.

In *Moen v. Driscoll*, No. 51668-0-1, 2004 WL 1658976 (Wn. App. Div. I July. 26, 2004), *reported in* 14 No. 4 Andrews' Prof. Liab. Litig. Rep. 9<sup>5</sup>, Division I reversed and remanded for trial a summary judgment in favor of a lawyer in a malpractice action brought by several beneficiaries of a trust that lawyer drafted. The lawyer prepared a trust for Mary Bracelin, referring to an Attachment A, which was to be a list of assets that would be used to fund the trust. Bracelin signed the trust documents

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<sup>5</sup> The Andrews Professional Liability Reporter is a newsletter reporting on significant developments in this area of the law and it deemed this case worthy of reporting in its publication. Appellant is citing to this decision only because it was reported in Andrews, and only for its persuasive authority, not as binding precedent. *See*, GR 14.1.

but did not complete the Attachment A. The attorney reminded Bracelin, through Bracelin's daughter, to complete the Attachment A but had no further contact with Bracelin before she died. The trust failed because there was no Attachment A to the trust document. The beneficiaries sued the lawyer alleging that he had a duty to accurately advise Bracelin with her estate planning. In reversing the trial court on the issue relevant for the case at bar, the Court of Appeals held:

Here, the evidence presented could support an inference that but for [the lawyer's] failure to fully advise and assist [Bracelin] in the proper procedure for funding the trust, she would have actually funded the trust such that her specific bequests would be carried out, and the intended beneficiaries received less than expected from the estate and the estate incurred unnecessary costs in probate. Given the disputed facts on each element of the malpractice claim, summary judgment was not proper.

*Id.*

Likewise here the evidence supports *more* than an inference that but for Carl Gay's failure to fully advise and assist Mrs. Plant in the proper procedure for ensuring that the Amendment to the Trust would be effective upon her death, she would not have signed the Amendment before the Foundation Plan was complete, or she would have agreed to destroy the fully executed Amendment until such time as the Foundation Plan was complete and ready to be attached to the Amendment. Just like the attorney in the *Moen* case, there is no evidence that Carl Gay ever spoke with Mrs. Plant after she signed the Amendment. Just as the court

in *Moen* did, Linth requests that this Court reverse the Order granting summary judgment in favor of Carl Gay.

**5. Carl Gay's Arguments on Factor No.'s 5 and 6 Are Inapplicable to His Role as Lawyer for Mrs. Plant.**

There is every reason to impose a duty upon Carl Gay in his role as lawyer for Mrs. Plant precisely to avoid future harm of the sort suffered by Linth (*Trask* factor 5). Moreover, there can be no undue burden on the legal profession by requiring that members of the State Bar Association comply with standards of competency and standards of professional conduct (*Trask* factor 6). Unfortunately for Carl Gay, as with the rest of his brief, he has focused on the wrong client.

Carl Gray relies primarily upon the decision in *Parks v. Fink*, 173 Wn. App. 366, 293 P.3d 1275 (2013), to argue that imposing a duty on him toward Jennifer Linth would impose a risk of interfering with an attorney's duty of undivided loyalty to his client. The "critical duty issue" in *Parks* was "whether a duty is owed to an intended beneficiary where the attorney fails to ensure the decedent executes the will promptly." Division I of the Court of Appeals found that imposing such a duty on the legal profession would create a conflict of interest between the attorney representing the testator and the hopeful beneficiary who had not yet been established as a beneficiary.

It is undisputed that Jennifer Linth was established as a beneficiary of Mrs. Plant under *both* the original Trust Declaration and the Amendment. Moreover, the "critical duty issues" in the present case are

markedly different than the one in *Parks*, thereby making the facts and holding from *Parks* inapplicable here. Instead, the “critical duty issues” in the present case are:

1. Whether an attorney who holds himself out as an experienced trusts and estates lawyer and who drafts an Amendment to a Trust document that references an Attachment “as though set forth in full,” owes a duty to his client to advise her that the Amendment will not be valid and enforceable until such time as the Attachment is completed and attached, or, to advise the client not to fully execute the Amendment until such time as the Attachment referenced in the Amendment is complete and ready to attach in order to avoid any dispute between the original Trust and the Amendment to the Trust?
2. Whether an attorney who holds himself out as an experienced trusts and estates lawyer, owes a duty to his client, who has retained him for advice and counseling on estate planning and for drafting documentation to create a Trust, to know and understand estate tax laws and to advise that client about the estate tax consequences of the client’s planned Trust?
3. Whether an attorney who has a concurrent conflict of interest as defined by RPC 1.7 has a duty to withdraw or to obtain a waiver from both sides of the concurrent conflict?

No credible argument can be made that the legal profession will be unduly burdened by imposing any of these duties on an attorney, especially one who holds himself out as being an expert in the area of trusts and estates law.

Carl Gay also asserts that the holding in *Parks* applies because “in effect, what happened here is Evelyn failed to properly execute the Amendment to the Trust.” Respondent’s Brief at p. 19. On the contrary; as drafted by Carl Gay, Mrs. Plant’s Green Point residence, together with \$50,000.000 was to be conveyed by the Trustee:

. . . to a nonprofit corporation and tax-exempt private foundation to be created by trustee in accordance with the terms set forth on the document entitled [the Foundation Plan], a copy of which is attached hereto marked Exhibit 1 and by this reference incorporated herein as though set forth in full. . . .

CP:88-89. Mrs. Plant had properly executed both the original Trust Declaration and the Amendment. There is nothing in the Amendment – *drafted by Carl Gay* – that requires any further signatures from Mrs. Plant. Indeed, it is undisputed that Mrs. Plant had no involvement in drafting or creating the Foundation Plan after she gave the direction to create the Foundation, thereby defeating any argument that Mrs. Plant “failed to execute the Amendment.” *See*, CP: 876-877 (Only the Trustee – Dan Doran – and Claudia Smith were involved in preparing the Foundation Plan while Mrs. Plant was alive).

**D. The Facts and Holding in *Trask v. Butler* Do Not Apply to the Facts of This Case.**

The factual circumstances are critical to a decision under the multi-factor balancing test. *Parks*, 173 Wn. App. at 377 (2013). Even though the analysis from *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), is helpful, the facts and holding of *Trask* do not apply to the facts of this case. *Trask* held that there was no duty “owed from an attorney hired by the personal representative of an estate to the estate or to the estate beneficiaries.” *Id.* at 845. The Supreme Court gave three reasons for this holding, none of which apply to the case at bar.

First, the estate and its beneficiaries were incidental, not intended, beneficiaries of the attorney-personal representative relationship. Here, it is undisputed that Jennifer Linth was one of the *intended* beneficiaries of the relationship between Carl Gay and Mrs. Plant.

Second, the estate heirs in *Trask* could bring a direct cause of action against the personal representative for breach of fiduciary duty. Jennifer Linth *has* brought a direct action against the Trustee, Dan Doran, for breach of fiduciary duty. That claim remains in this lawsuit but, unlike the facts of the *Trask* case, the direct action against Trustee has no value since the corpus of the Trust has been depleted due to the negligence of the attorney that created the Trust. Moreover, the Trustee, Mr. Doran, has died.

Third, under the particular facts in *Trask*, the Supreme Court found there was an unresolvable conflict of interest between the personal representative (who was also a beneficiary) and the plaintiff beneficiary. Thus, there was a conflict of interest between the attorney representing the

personal representative and the plaintiff beneficiary. In the case at bar, and as set forth *supra*, there was never a conflict of interest between Mrs. Plant and Jennifer Linth with regard to Mrs. Plant's intention to care for Jennifer Linth through her estate plan. Thus, there is no conflict of interest between the attorney representing Mrs. Plant in drafting her estate planning documents and Jennifer Linth. Carl Gay's arguments to the contrary focus on his role as attorney for the Trustee, Dan Doran, and arguably, it is because of Gay's breach of his duties of impartiality and loyalty to Mrs. Plant, that all of the problems with the Trust and Foundation flow. Carl Gay's arguments about conflict of interest should be rejected by this Court.

Jennifer Linth has not brought this action against Carl Gay as the attorney for the personal representative of Mrs. Plant's estate. Nor has Jennifer Linth brought this action against Carl Gay as the attorney for the Trustee. Instead, Jennifer Linth has brought this action against Carl Gay as the attorney for Mrs. Plant whose undisputed purpose in retaining Gay was to prepare documents to effectively transfer her estate upon her death. Jennifer Linth was an intended beneficiary of the transaction between Carl Gay and Mrs. Plant.

It is important to note, as well, the following critical factual differences in *Trask* that add to the reason the holding from that case is inapplicable to the case at bar: There was no dispute in *Trask* about the competence of the attorney drafting the underlying estate planning documents, there was no dispute about the validity of those documents, and



the same attorney who was representing the personal representative was not responsible for drafting the defective estate planning documents. Even though the multi-factor balancing analysis set forth by the Supreme Court in *Trask* is applicable to the case at bar, the holding from *Trask* is not.

### III. CONCLUSION


Based upon the facts and arguments set forth herein, and those in her Opening Brief, Appellant Jennifer Linth respectfully requests that this Court enter an Order reversing the trial court's Order on Summary Judgment and remand this matter.

Respectfully submitted this 30<sup>th</sup> day of January, 2015.

**CARNEY BADLEY SPELLMAN, P.S.**

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**LAW OFFICE OF TOM SEGUINE**

By  for:  
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## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. I hereby certify that on January 30, 2015, I caused true and correct copies of the foregoing document to be electronically filed with the Clerk of the Court using the JIS -Link system, and which Clerk of Court will send notification of such filing to the following via email, and I sent via hard copies to the following:

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DATED this 30<sup>th</sup> day of January, 2015.

  
\_\_\_\_\_  
Val Plachy, Legal Assistant

**CARNEY BADLEY SPELLMAN**

**January 30, 2015 - 3:22 PM**

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