

FILED

NOV 28 2019

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 35970-I-III

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

THOMAS J. STEVENSON, Personal Representative of the ESTATE OF
LORNA STEVENSON,

Respondents,

vs.

BRENT T. STANYER and DOUGLAS, EDEN, PHILLIPS, DERUYTER
AND STANYER, P.S., a Washington professional services corporation,

Appellants.

REPLY BRIEF OF APPELLANTS

David A. Kulisch, WSBA #18313
Stephanie R. Taylor, WSBA #32038
Randall Danskin, P.S.
1500 Bank of America Financial Ctr
601 West Riverside Avenue
Spokane, WA 99201-0653
(509) 999-4039

Attorneys for Appellants

TABLE OF CONTENTS

	<u>Page</u>
A. INTRODUCTION.....	1
B. ARGUMENT	2
(1) There Is Genuine Issue of Material Fact regarding the Parties’ Agreement on the Scope of Representation	5
(2) Washington Courts Have Long Held That an Attorney Owes Duties Only to Those Who are Intended Beneficiaries of the Representation	7
(3) Even Assuming Respondent Has Standing to Sue, the Trial Court Erred When it Concluded that There Were Genuine Issues of Material Fact With Respect to Whether Respondent Could Prove Damages	10
(a) The Termination of the Trust Would Have Resulted in a Gift to Lorna from the Remaindermen.....	10
CONCLUSION	11

TABLE OF AUTHORITIES

Page(s)

Cases

Karan,

110 Wn. App..... 10

Stangland v. Brock,

109 Wn.2d 675, 747 P.2d 464 (1987)..... 7

Strait v. Kennedy,

103 Wn. App. 626, 13 P.3d 671 (2000)..... 10

Trask v. Butler,

123 Wn.2d 835, 872 P.2d 1080 (1994)..... 5, 10

Statutes

IRC § 1014(e) – (e)..... 10

Regulations

Treas. Reg. §25.2511-1 (h)(6) 11

A. INTRODUCTION

There are several *undisputed* items that are central to the issues at hand:

1. Stanyer was retained by Ms. Stevenson (“Lorna”) to prepare estate planning documents. (Brief of Respondents, p. 1)
2. Stanyer had a duty to act in conformity with his client’s directive. (Brief of Respondents, p. 1)
3. Stanyer had no duty to anyone other than Lorna Stevenson. (Brief of Respondents, p. 1)
4. Stanyer had no separate duty owed to beneficiaries of a trust. (Brief of Respondents, p. 1)
5. At no time did Lorna, Thomas, or Louise Everett, request that Stanyer review, plan, advise, or perform income tax planning or provide income tax advice for the administration of the Trust. CP 34, CP 36
6. Stanyer was retained by Lorna thirty-five (35) years after the funding of the Trust. (Brief of Respondents, p. 3)
7. Respondent understood that Stanyer was requesting information to aid him in understanding whether there were any estate tax issues associated with Lorna’s Estate. (Brief of Respondents, p. 4).

B. ARGUMENT

It is important to understand the mechanism of the Richard Thomas Stevenson Credit Shelter Trust (“Trust”). Contrary to Respondent’s assertion that Lorna and her husband “jointly created the Richard Stevenson Credit Shelter Trust” (Brief of Respondents, p. 2), a credit shelter trust is a testamentary trust created in Mr. Stevenson’s Last Will and Testament. CP 36, CP 76. The purpose of a credit shelter trust (also known as a “bypass trust”) is to fund “just enough of a decedent’s estate . . . , so that the estate can take advantage of the unified credit against estate taxes.” *Black’s Law Dictionary*, 1574 (8th ed. 2004) (Emphasis added).¹ The Trust was funded at Mr. Stevenson’s death with that portion of Mr. Stevenson’s Estate necessary to avoid estate taxes.

It is also important to note that contrary to Respondent’s assertion that the Trust was funded with Lorna’s community property (Brief of Respondents, p. 3) in reality, a bypass trust can only hold a value equal to,

¹ A credit shelter trust (or “bypass” trust) is a specialized trust that provides immunity for most estates from federal (and state) estate tax. Streng, 800-3rd T.M., *Estate Planning*, V.C., p. A-58. At the Decedent’s death, a portion of the Decedent’s estate equal to the Decedent’s estate tax exemption amount is placed in an irrevocable trust for the lifetime benefit of the surviving spouse (or other named beneficiary). *Id.* Thereafter, this trust is excluded from the beneficiary’s gross estate (for estate tax purposes) upon such beneficiary’s death. *Id.* In this way, the amount placed in this trust is “sheltered” from estate tax at the death.

the Decedent's one-half of the community property and any separate property. *Black's Law Dictionary*, 1574 (8th ed. 2004). However, a Trustee and a Personal Representative of a Decedent's Estate are authorized, under Washington law, to "[s]elect any part of the trust estate in satisfaction of any partition or distribution, in kind, in money or both; make non-pro rata distributions of property in kind; allocate particular assets or portions of them or undivided interests in them to any one or more of the beneficiaries without regard to the income tax basis of specific property allocated to any beneficiary and without any obligation to make an equitable adjustment." RCW 11.98.070(15)². Thus, following the death of a spouse, the Personal Representative, Trustee and Surviving Spouse can agree to a non pro rata funding of the community property into the Trust in order to more efficiently fund the Trust.³ By way of example, if a Decedent and his surviving spouse had a bank account worth \$100,000 and a house worth \$100,000, then rather than the Trust owing one-half of the house and one-half of the bank account, the Personal Representative and the Surviving

² Note that a Personal Representative has all of the authority as a Trustee and thus, can utilize the non-pro rata funding authority granted under RCW 11.98.070(15). RCW 11.68.090(1)

³ The community property of a married couple can be utilized in the non-pro rata funding of a trust because the whole of the community is subject to probate. RCW 11.02.070.

Spouse can agree that the house would pass to the Trust (in its entirety) and the bank account would pass (in its entirety) to the Surviving Spouse. Under this scenario, the surviving spouse is not placing her community property into the Trust; rather, the surviving spouse is exchanging her one-half interest in a community asset for the Decedent's community property interest in another asset of equal value.

Per Respondent's admissions, the stated purpose of the Trust was to avoid the imposition of "federal estate tax". (Brief of Respondents, p. 3). Respondent cannot unilaterally impute an intention that the purpose was something broader than the stated goal.

Per the terms of the Trust, Lorna was the permissible distributee of the Trust during her lifetime and was entitled to the income from the trust and as much principal as "reasonably necessary only for the purposes of [Lorna's] health, education, support, and maintenance in her accustomed manner of living, to the extent the trust income is insufficient to accomplish this purpose." CP 79. Thomas concedes that Lorna "no longer required income from the trust" (CP 113) and as such, was not entitled to principal distributions.

At no time did Lorna, Thomas, or Louise Everett, request that Stanyer review, plan, advise, or perform income tax planning or provide income tax advice for the administration of the Trust. CP 34, CP 36.

Neither the Estate nor the Estate beneficiaries suffered any damages resulting from Stanyer's estate planning and estate plan advice. CP 18. Lorna's estate plan was effectuated as she intended, and thus, Lorna's estate was not required to pay state or federal estate taxes. Moreover, even if Lorna had an unstated goal of avoiding income tax upon the distribution of her estate, that goal was met with respect to the assets held in Lorna's estate.

(1) There Is No Genuine Issue of Material Fact regarding the Parties' Agreement on the Scope of Representation

There is no dispute that Lorna retained Stanyer to provide estate planning services for her – that was the entire scope of Stanyer's representation.

To establish a claim for legal malpractice a plaintiff must prove the following elements: (1) the existence of an attorney-client relationship which gives rise to a duty of care to the plaintiff; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the plaintiff; and (4) proximate causation between the attorney's breach of duty and the damage incurred. *Trask v. Butler*, 123 Wn.2d 835, 840, 872 P.2d 1080 (1994) (internal citations omitted).

Here, as a matter of law, Respondent is unable to establish any of the required elements. The parties have stipulated that the only person to whom Stanyer owed a duty was Lorna Stevenson. The entire scope of

Stanyer's representation was to provide estate planning services and estate tax planning for Lorna. It is further undisputed that Stanyer did not represent trustees of the Trust, the remainder beneficiaries of the Trust, or the Trust itself.

Respondents provide no evidence nor make a claim suggesting that Stanyer was asked to review the Trust documents, provide income tax planning, or give income tax advice for the Trust, the trustees of the Trust, or the remainder beneficiaries.

Respondent repeatedly asserts that Lorna told Respondent (not Stanyer) it was her "intent that her death not result in a taxable event to her estate or the beneficiaries of her estate." CP 113. There is absolutely no evidence that Lorna expressed any such intent to Stanyer. Moreover, Stanyer's declaration, his correspondence, his billing records, the completed estate documents, and the exchanged emails present uncontroverted evidence that Lorna never asked Stanyer to provide income tax planning or income tax advice to her, the Trust, or the remainder beneficiaries of the Trust. Respondent's bare assertion does not create a genuine issue of material fact. CR 56(e); *Celotex, Id.*

Notably, Respondent, in his capacity as Personal Representative, does not argue that Stanyer's alleged negligence resulted in any loss to Lorna or to the Estate beneficiaries of Lorna. Rather, per Respondent's

claims, the alleged loss lies squarely with the remainder beneficiaries of the Trust. As noted in Respondent's Brief, Stanyer **owed no duty to these remainder beneficiaries.** Thomas fails to establish that a genuine issue of material fact exists regarding the scope of Stanyer's representation of Lorna.

(2) Washington Courts Have Long Held That an Attorney Owes Duties Only to Those Who are Intended Beneficiaries of the Representation

Washington courts have recognized that an attorney who agrees to draft a will for his client may owe some duty to the intended beneficiaries of the will, either under the multi-factor balancing test or the third party beneficiary theory. *Stangland v. Brock*, 109 Wn.2d 675, 681, 747 P.2d 464 (1987) (Internal citations omitted). Here, however, Respondent has conceded that Stanyer only owed a duty to Lorna.

It is important then, to look to what Respondent is actually alleging.

- Respondent is alleging that it was Lorna's "desire to avoid imposition of any tax as a result of her death." (Brief of Respondent, p. 6). However, Respondent provides no support for this assertion.
- Respondent is alleging that Stanyer "ignored the reality that transfer of the Trust assets to Mrs. Stevenson would have enhanced the value of her estate, the same estate for which

Stanyer was providing estate planning services.” (Brief of Respondent, p. 6). However, the record is clear that this was not within the scope of Stanyer’s representation. An estate planning attorney is not retained to “enhance the value” of a client’s estate. Rather, an estate attorney is retained to draft documents to effectuate the client’s desires and to provide advice regarding mechanisms to minimize estate tax considerations.

Respondent has failed to present any admissible evidence to show that Lorna or Stanyer expected Stanyer to provide income tax advice or income tax planning for the benefit of the remainder beneficiaries of the Trust. Specifically, there is no written or oral retention agreement, no emails, no correspondence, and no writing to substantiate that Lorna asked Stanyer to review the Trust or provide income tax planning or income tax advice for the Trust or the remainder beneficiaries.

The Trustees, if the Trustees were concerned about the income tax consequences associated with the death of the income beneficiary, should have retained Mr. Stanyer, or separate counsel, to assist the Trustee in making appropriate administrative decisions. As noted in Respondent’s declaration, Respondent knew there were income tax issues, but choose not to consult with counsel. CP 113 (¶5).

Respondent stated that “if there is a legally acceptable definition narrowing the term “estate planning” to Stanyer’s limited rendition of professional services, the Appellants have yet to provide it to the Court. However, Appellants would respectfully submit that it has provided a clear line of cases, including *Stangland v. Brock*, which stands for the following:

When an individual retains an attorney to draft his will, the attorney's obligation is to use the care, skill, diligence and knowledge that a reasonable, prudent lawyer would exercise in order to draft the will according to the testator's wishes. Once that duty is accomplished, the attorney has no continuing obligation to monitor the testator's management of his property to ensure that the scheme originally established in the will is maintained.

Stangland, at pp. 684-85 (Emphasis Added).

Here, Mr. Stanyer used the “care, skill, diligence and knowledge” of a reasonable estate planning lawyer and revised Lorna’s estate plan to accomplish her goals. Stanyer requested information necessary to determine whether estate tax planning was required, and, upon receiving the financial source information, realized that no such planning was required.

No reasonable estate-planning attorney will, or should, expand unilaterally the agreed upon scope of representation without the client’s consent or approval. Moreover, no reasonable estate-planning attorney should expand the scope of representation unilaterally to serve a new and different client, e.g., the Trust or remainder beneficiaries of the Trust. Respondent asks this Court to alter dramatically the relationship between

estate planning and tax planning and further asks the Court to impose a duty upon estate planning attorneys to perform tasks and work far outside an estate planning attorney's scope of representation, in contravention of the Rules of Professional Conduct. RPC 1.2. The Washington Supreme Court and Division One of the Court of Appeals have already ruled that similar attempts to muddy this boundary led to untenable conflicts of interest for the attorney and thus burden the profession. *Trask*, 123 Wn.2d at 844; *Karan*, 110 Wn. App. at 83; *Strait*, 103 Wn. App. at 637.

(3) Even Assuming Respondent Has Standing to Sue, the Trial Court Erred When it Concluded that There Were Genuine Issues of Material Fact With Respect to Whether Respondent Could Prove Damages

(a) The Termination of the Trust Would Have Resulted in a Gift to Lorna from the Remaindermen

As noted in Appellate's prior brief, the IRS disallows any step-up in basis for property that was acquired by the decedent by gift within 1 year of his or her death, if the property is to pass (either directly or indirectly) back to the individual(s) making the gift as a result of her passing.⁴

⁴ IRC § 1014(e) –

(e) **Appreciated Property acquired by decedent by gift within 1 year of death –**
(1) **In general.** -- In the case of a decedent dying after December 31, 1981, if –(A) appreciated property was acquired by the decedent by gift during the 1-year period ending on the date of the decedent's death, and (B) such property is acquired from the decedent by (or passes from the decedent to) the donor of such property (or the spouse of such donor), the basis of such property in the hands of such donor (or Spouse) shall be the adjusted basis of such property in the hands of the decedent immediately before the death of the decedent.

The regulations supporting this code section provide an example directly on point:

(h) The following are examples of transactions resulting in taxable gifts and in each case it is assumed that the transfers were not made for an adequate and full consideration in money or money's worth:

...

(6) If A is possessed of a vested remainder interest in property, subject to being divested only in the event he should fail to survive one or more individuals or the happening of some other event, an irrevocable assignment of all or any part of his interest would result in a transfer includible for Federal gift tax purposes.

Treas. Reg. §25.2511-1 (h)(6) (Emphasis Added).

The Treasury Regulation and the Code Section are clear and unambiguous. Respondent's proposed income tax avoidance scheme would not work.⁵

CONCLUSION

The Court should reverse the trial court's denial of Stanyer's Motion for Summary Judgment and enter an order granting summary judgment to Stanyer, for the reasons stated herein.

⁵ As noted above, because of the statutory mechanism for non-pro rate funding of a credit shelter trust with community property, Respondent's argument that Lorna would just be receiving her community assets back from the Trust is without merit.

Respectfully submitted,



David A. Kulisch, WSBA #18313
Stephanie R. Taylor, WSBA #32038
Randall Danskin, P.S.
1500 Bank of America Financial Center
601 West Riverside Avenue
Spokane, WA 99201-0653
(509) 747-2052
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 29th day of November, 2018, addressed to the following:

Mr. Stephen Haskell Stephen Haskell Law Offices 1901 E. Westminster Lane Spokane, WA 99223 Haskellaw1@gmail.com	<input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Email Transmission - Agreed to by the parties
---	---


Print Name: David H. Kutisch