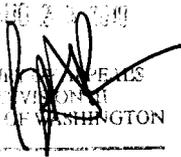


FILED

AUG 7 2010  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: 

No. 35970-I-III

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

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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.

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BRIEF OF APPELLANTS

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## A. INTRODUCTION

This is an attorney malpractice action brought by Thomas J. Stevenson, in his capacity as Personal Representative of the Estate of Lorna Stevenson (“Thomas”) against attorney Brent Stanyer and the law firm of Douglas, Eden, Phillips, DeRuyter and Stanyer, P.S. (collectively referred to as “Stanyer”) relating to Stanyer’s representation of Lorna Stevenson (“Lorna”) during her lifetime. The dispute involves whether Stanyer, who Lorna retained to prepare her estate planning documents, owed a duty to the remainder beneficiaries of the Richard Stevenson Credit Shelter Trust, an irrevocable testamentary trust (“Trust”) that was established by Lorna’s deceased husband for Lorna’s benefit during her lifetime.<sup>1</sup> Specifically, whether Stanyer had a duty to advise Lorna (and the non-client remainder beneficiaries of the Trust) to terminate the irrevocable Trust and transfer the Trust assets outright to Lorna so that the remainder beneficiaries could avoid income tax consequences upon the ultimate disposal of the assets in the Trust following Lorna’s death.

## B. ASSIGNMENTS OF ERROR

### (1) Assignments of Error

- a. The trial court erred in denying Stanyer’s motion for summary

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<sup>1</sup> Appellant uses first names for Lorna Stevenson and Thomas Stevenson to avoid confusion and not to be disrespectful in any way.

judgment in its Order dated March 4, 2018.

- a. The Trial Court erred when it found there was a genuine issue of material fact whether Stanyer's services were intended to benefit the non-client remainder beneficiaries of the Trust.
- c. The Trial Court erred when it determined that Thomas, in his capacity as Personal Representative of the Estate of Lorna Stevenson had standing to sue for damages on behalf of the remainder beneficiaries of the Trust.
- d. The Trial Court erred when it applied the *Trask v. Butler* factors and found there existed genuine issues of material fact that precluded summary judgment.
- e. The Trial Court erred when it concluded a TEDRA action would not result in a "gift" from the remainder beneficiaries of the Trust to Lorna under Treas. Reg. §§26.2511-1(f), (h)(6), which prevents a step-up in any Trust property's basis.
- f. The Trial Court erred when it concluded IRC § 1014 (e) did not prevent a step-up in the real property's basis, which prevents the remainder beneficiaries of the Trust from proving any damages.

(2) Issues Pertaining to the Assignments of Error

- a. If no genuine issue of material fact exists regarding the parties' agreement on the scope of representation, did the Trial Court err in denying summary judgment?
- b. If the parties' agreement on the scope of representation did not intend to benefit the non-client remainder beneficiaries of the Trust, did the Trial Court err in denying summary judgment?
- c. If Thomas sued solely as the Personal Representative of Lorna's Estate, did the court err in determining the suit could seek damages for the non-client remainder beneficiaries of the Trust?
- d. If an analysis of the *Trask v. Butler* factors shows that the remainder beneficiaries of the Trust were not intended beneficiaries of Stanyer's representation and did not otherwise satisfy any of the remaining *Trask v. Butler* factors, did the Trial Court err in denying summary judgment?
- e. Even if Thomas satisfied the *Trask v. Butler* factors, if Treas. Reg. §§26.2511-1(f), (h)(6) mandates any attempt to transfer or assign the beneficial interests of the non-client remainder beneficiaries of the Trust is a "gift", did the Trial Court err in determining that

the remainder beneficiaries of the Trust could demonstrate damages?

- f. Even if Thomas satisfied the *Trask v. Butler* factors, if IRC § 1014 (e) mandates that Thomas' proposed TEDRA action would not result in a step-up in basis, did the Trial Court err in determining that the remainder beneficiaries of the Trust could demonstrate any damages?

C. STATEMENT OF THE CASE

In November of 2015, Lorna hired Brent Stanyer with the law firm of Douglas, Eden, Phillips, DeRuyter and Stanyer, P.S. to prepare estate planning documents for the disposition of her estate. CP 34 and CP 51. Stanyer was tasked to review Lorna's Will and Codicil, her Durable Powers of Attorney for Health Care and Property Management, and her Health Care Directive and draft new documents that reflected current law and her current wishes. CP 32 and CP 51. Per the terms of the engagement letter, Lorna, individually, was the sole client. CP 51.

At the time that Stanyer undertook the representation, Lorna was ninety-two (92) years old. CP 33. Lorna authorized Stanyer to communicate with Thomas regarding the representation. CP 33. In fact, Thomas was at the initial meeting and was Stanyer's primary source for information. CP

32. Stanyer understood that Thomas was a certified public accountant and Thomas was employed previously as the Managing Partner in the Spokane offices of Moss Adams. CP 33. As such, Stanyer understood that Thomas had sophisticated knowledge and education to assist Stanyer with Lorna's estate plan. CP 33. In addition to Thomas, Lorna also authorized Stanyer to work with her daughter, Ms. Louise Everett, who is also a certified public accountant. She is the Corporate Director of Finance and Chief Financial Officer ("CFO") of Davenport Hotels. CP 33.

In order to draft the appropriate estate documents for Lorna, Stanyer requested a list of Lorna's assets to ensure that she was not subject to Washington or federal estate taxes. CP 33 and CP 44. Stanyer stated: "I'd also like to have a summary of her assets, and an estimate of her net worth . . . **That information will allow me to consider any potential state estate tax issues.**" CP 44. (Emphasis added.) Thomas provided Stanyer a list of Lorna's assets. CP 33 and CP 46. Included on the list of Lorna's assets were the fair market value of several assets held in the irrevocable testamentary Trust that was created for Lorna's benefit. CP 46.

Thomas claims that Stanyer's "get cc" scribble on the list of assets creates a genuine issue of material fact whether Stanyer agreed to perform federal income tax planning and provide federal income tax advice for the Trust and its remainder beneficiaries. CP 44, CP 106. Thomas did not

provide Stanyer with a copy of the Trust at that time and, in fact, did not provide Stanyer with a copy of the Trust until after Lorna's death. CP 36.

The Trust was an irrevocable trust established under the Last Will and Testament of Richard Thomas Stevenson, Lorna's deceased husband. CP 36, CP 76. The Trust had been funded approximately thirty (30) years prior to Lorna's retaining Stanyer. 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.

In or about February 2016, and based upon the financial information provided to Stanyer, Stanyer drafted a revised Last Will and Testament for Lorna, along with updated Durable Powers of Attorney for Health Care and Property Management. CP 35. This revised estate plan formalized Lorna's wishes that her estate pass in equal shares to her children. CP 51.

On August 6, 2016, nine months after her initial consultation with Stanyer, Lorna passed away. Lorna's Last Will and Testament was admitted to probate under Spokane County Cause Number 16-4-01277-1. CP 35, CP 36. Stanyer's representation of Lorna for her estate planning and estate taxes work was completed on February 1, 2016. CP 35.

Since Lorna's estate plan was effectuated as she intended, neither Lorna's estate nor the Estate beneficiaries paid any state or federal estate taxes. However, the remainder beneficiaries of the Trust claim they may be obligated to pay federal income taxes on the capital gains from the sale of lake property, the Trust's primary asset. CP 114. Notwithstanding this claim, neither the Estate nor the Estate beneficiaries suffered any damages resulting from Stanyer's estate planning and estate plan advice. CP 18.

Shortly after Lorna's death, Thomas contacted Stanyer to inquire, for the first time, as to the federal income tax consequences to the non-client remainder beneficiaries of the Trust, after arranging for the sale of the lake property. CP 36. Specifically, Thomas inquired as to whether the Trust's assets would receive a step-up in the assets' basis because of Lorna's death. CP 36. After reviewing the Trust, Stanyer opined the trust was an irrevocable trust established thirty (30) years ago, and thus, the assets held in the Trust were not assets of Lorna's estate so the assets would not receive a step-up in basis under Internal Revenue Code ("IRC") § 1014. CP 36.

Unhappy with this result, Thomas asserted that Stanyer, as Lorna's estate planning attorney, had a duty to the non-client remainder beneficiaries of the Trust to consider and perform income tax planning and provide income tax advice to the Trust and its remainder beneficiaries. CP 36. Further, Thomas asserted that Stanyer had a duty to advise Lorna and the remainder beneficiaries of the Trust to institute a TEDRA action. CP 106-07. Thomas then claims that Stanyer should have advised the non-client remainder beneficiaries of the Trust to transfer their respective interests in the Trust to Lorna prior to her death, and terminate the Trust. CP 107. Thomas asserts that this advice, if given, would have resulted in a stepped-up basis for the lake property. CP 114.

However, during Lorna's lifetime, neither Lorna nor Thomas ever asked Stanyer to provide income tax planning advice or income tax planning for Lorna or the Trust. CP 34. Neither Lorna, Thomas, nor Louise Everett requested that Stanyer review any of the Trust documents at any time. CP 34. During Lorna's lifetime, Lorna and Thomas were co-trustees for the Trust. CP 36. Stanyer provided the trial court with emails, billing records, and correspondence between Stanyer, Lorna, and Thomas showing that the scope of representation was solely related to Lorna's revised will, durable power of attorney, and health directive. CP 33-36 and CP 39-52. In addition, Stanyer provided the trial court the revised estate planning

documents showing the entire extent and scope of his work. CP 54-70. None of these documents suggests that Stanyer's scope of work involved income tax planning or income tax advice to Lorna, Thomas, the remainder beneficiaries of the Trust, or the Trust itself.

On or about May 3, 2017, Thomas, in his capacity as Personal Representative of Lorna's Estate (and not in his capacity as Trustee of the Trust) filed a lawsuit against Stanyer and the law firm of Douglas, Eden, Phillips, DeRuyter and Stanyer, P.S. CP 1-2.

On or about February 6, 2018, Stanyer filed a Motion for Summary Judgment on the grounds that: (1) Thomas failed to show a genuine issue of material fact existed that Stanyer owed a duty to the Remainder beneficiaries of the Trust; (2) Thomas, as Personal Representative of Lorna's Estate, had no standing to file suit to benefit the Remainder beneficiaries of the Trust; (3) Stanyer had no duty to provide income tax planning and income tax advice to Lorna, the Trust, or the Remainder beneficiaries of the Trust; (4) Thomas failed to demonstrate a genuine issue of material fact to show that Stanyer proximately caused the Estate beneficiaries any damage; and, (5) Thomas failed to demonstrate a genuine issue of material fact to show that Stanyer proximately caused the Remainder beneficiaries of the Trust any damage. CP 12.

A hearing on the Motion for Summary Judgment was held on March

9, 2018 wherein the Court determined that there were material issues of fact and denied Stanyer's Motion for Summary Judgment. CP 157.

D. SUMMARY OF ARGUMENT

The trial court's denial of the Appellants' Motion for Summary Judgment is contrary to law because Thomas failed to establish that there existed a genuine issue of material fact as to the scope of Stanyer's representation. Further, a Personal Representative of an Estate represents only the Estate and cannot make a claim on behalf of the remainder beneficiaries of the Trust. Moreover, Thomas failed to establish that Stanyer had a duty, as an estate planning lawyer, to Lorna, the Trust, or the Remainder beneficiaries of the Trust to provide income tax planning and income advice benefitting the Trust or remainder beneficiaries of the Trust.

Alternatively, in the event that the Court determines that Thomas has standing to sue on behalf of the remainder beneficiaries of the Trust, neither the Estate beneficiaries nor the remainder beneficiaries of the Trust, respectively, can prove Stanyer proximately caused damage to either group of beneficiaries.

The trial court's ruling should be reversed and Summary Judgment should be awarded.

E. ARGUMENT

(1) The Trial Court Erred When it Found there was a Genuine Issue of Material Fact Whether Stanyer's Services were Intended to Benefit the Remainder beneficiaries of the Trust.

(a) Standard of Review

The trial court's pre-trial decision to deny summary judgment on the legal issue of whether an attorney owes duties to third parties is reviewed *de novo*. *Linth v. Gay*, 190 Wn.App. 331, 336, 360 P.3d 844 (2015); *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn.App. 689, 698-99, 324 P.3d 743, *review denied*, 181 Wn.2d 1008, 335 P.3d 941 (2014).

(b) There is no Genuine Issue of Material Fact regarding the Parties' Agreement on the Scope of Representation

The Trial Court determined that there were genuine issues of material fact precluding summary judgement. However, based upon the uncontroverted record before the Court, 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) (citing, *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992); *Stangland v. Brock*, 109 Wn.2d 675, 679, 747 P.2d 464 (1987)). Here, as a matter of law, the Thomas is unable to establish any of the required elements.

Here, the alleged "aggrieved" parties are the non-client remainder beneficiaries of the Trust who may be required to pay income tax on the gains from the sale of the lake property. It is undisputed that the remainder beneficiaries of the Trust ("Trust") were not Stanyer's clients.<sup>2</sup>

Summary judgment is appropriate only if no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. *Young v. Key Pharmaceuticals*, 112 Wn.2d 619, 626-27, 818 P.2d 1056 (1991).

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. *See LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party

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<sup>2</sup> As noted above, the non-client remainder beneficiaries are not before the Court; rather, Thomas in his capacity as Personal Representative of Lorna's Estate filed suit, on behalf of the Estate beneficiaries, who cannot demonstrate any "negligence" in drafting of the revised estate documents and no damage resulting therefrom...

with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,” then the trial court should grant the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *see also T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630–32 (9th Cir.1987).

In Stanyer’s declaration, he states that Lorna was his sole client. Also, he states that the entire scope of his representation was to provide estate planning services and estate tax planning for Lorna. Stanyer did not represent trustees of the Trust, the remainder beneficiaries of the Trust, or the Trust itself. Stanyer was not 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. Stanyer provided the trial court with emails, billing records, correspondence, and estate documents that demonstrated the limited scope of his representation. Stanyer was asked to revise Lorna’s will, power of attorney, and health care directive. Stanyer completed those tasks to Lorna’s satisfaction and Lorna executed the revised documents on February 1, 2016.

Thomas asserts a genuine issue of material fact exists because Stanyer requested a copy of Lorna’s assets. Stanyer’s request specifically

states that the sole purpose of the request was to evaluate whether Lorna's estate was liable for estate taxes. Then, Thomas makes a leap of logic and claims that Stanyer's cryptic notation, "get cc", establishes a genuine issue of material fact showing that Stanyer intended to provide income tax planning and income tax advice regarding the Trust and the remainder beneficiaries of the Trust. Thomas' assertion is rank speculation and does not represent admissible evidence that creates a genuine issue of material fact. CR 56(e); *Celotex, Id.*

Thomas also asserts that Lorna told Thomas it was her "intent that her death not result in a taxable event to her estate or the beneficiaries of her estate." CP 113. Thomas does not claim that Lorna expressed this intent to Stanyer. Moreover, Stanyer's declaration, his correspondence, his billing records, the 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. Thomas' bare assertion does not create a genuine issue of material fact. CR 56(e); *Celotex, Id.*

Notably, Thomas, 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 Thomas' claims, the alleged loss lies squarely with the remainder beneficiaries of the Trust. Thomas fails

to establish that a genuine issue of material fact exists regarding the scope of Stanyer's representation of Lorna.

(c) A Personal Representative Has no Standing to Sue on Behalf of Anyone Other than the Estate

Thomas is attempting to extend the duties of an estate planning attorney to beneficiaries of an irrevocable trust. Stanyer did not draft the Trust; Stanyer did not represent the Trustees in the funding of the Trust; and, most importantly, Stanyer did not represent the Trustees in the administration of the Trust. In fact, the facts clearly illustrate that the only reference to the Trust was in the financial information Thomas provided to Stanyer.

The clear and uncontroverted evidence presented to the trial court demonstrates that Stanyer's sole client in this matter was Lorna and Stanyer was retained to provide Lorna with estate planning services. Stanyer was not retained to provide income tax planning services or income tax advice to the remainder beneficiaries of the Trust.

Thomas is unable to demonstrate that Stanyer's representation was for the benefit of the remainder beneficiaries of the irrevocable Trust that was established by Lorna's late husband's Will over thirty (30) years ago. CR 56(e); *Celotex, Id.* Thomas fails to present a genuine issue of material fact to show Stanyer represented the remainder beneficiaries of the Trust.

A Personal Representative has the authority to maintain and prosecute such actions as pertain to the management and settlement of the estate. RCW 11.48.010. As noted herein, neither the Estate nor the Estate beneficiaries were harmed. Thus, the Personal Representative has no standing to sue on behalf of the Estate for damages alleged to be suffered by the remainder beneficiaries of the Trust.

(d) 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) (citing, *Heyer v. Flaig, supra*; *Lucas v. Hamm, supra*; *Needham v. Hamilton*, 459 A.2d 1060 (D.C.1983); *Guy v. Liederbach, supra*; *Stowe v. Smith, supra*; *McAbee v. Edwards*, 340 So.2d 1167 (Fla. Dist. Ct. App. 1976)).

However, the Stangland Court notes the reasoning for this extension of duty is that the drafting of the will is intended to benefit the beneficiaries; thus, it is foreseeable that the beneficiaries may be harmed if the will is drafted improperly. *Id.* The uncontroverted evidence here establishes that

Stanyer properly drafted Lorna's estate documents. The estate beneficiaries received the intended benefits of Lorna's Will. As noted above, the aggrieved parties in this matter are the remainder beneficiaries of the Trust, who may be required to pay federal income taxes on the capital gain after the sale of the lake property. The remainder beneficiaries of the Trust are not Stanyer's clients.

Historically, Washington has used two approaches to determine whether an attorney owed a duty to a non-client: (i) the third party beneficiary test; and, (ii) the multifactor balancing test. *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992); *Stangland v. Brock*, 109 Wn.2d 675, 747 P.2d 464 (1987); *Bowman v. John Doe Two*, 104 Wn.2d 181, 187-88, 704 P.2d 140 (1985).

The third party beneficiary test, developed by an Illinois Court, required the non-clients to prove they were the intended beneficiaries of the attorney-client relationship. *Bowman*, 104 Wn.2d at 188. "A nonclient must prove that the primary purpose and intent of the attorney-client relationship is to benefit or influence the third party." *Neal v. Baker*, 551 N.E.2d 704, 705 (Ill. App. 3d 1990). In *Neal*, the Illinois court dismissed the beneficiary's cause of action, finding that the beneficiary had no standing to sue an estate attorney for legal malpractice because the plaintiff failed to show that the primary purpose and intent of the attorney-client relationship

was to benefit the beneficiary. Rather, the primary purpose of the representation was for the attorney to assist the executor in administering the estate. *Id.* at 706.

The second test, developed by California Courts, is the multifactor balancing test and involves analysis of the following six factors to determine whether an attorney client relationship existed: (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 defendant's conduct and the injury; (5) the policy of preventing future harm; and, (6) the extent to which the profession would be unduly burdened by a finding of liability. *Bohn v. Cody*, 119 Wn.2d at 365 (emphasis added). The threshold inquiry under the multifactor balancing test is whether the attorney's services were intended to affect the non-client (the plaintiff in the malpractice suit). *Stangland*, 109 Wn.2d at 680.

The Washington Supreme Court, in *Trask*, noted that the two tests in current usage were "indistinguishable in that their primary inquiry focuses on the purpose for establishing the attorney-client relationship." 123 Wn.2d at 842. Thus, the Court combined the two tests to eliminate any confusion by trial courts regarding which test to apply. *Id.*

In *Trask*, the Court adopted a modified multifactor balancing test to

determine whether a non-client has the requisite standing to sue an attorney for legal malpractice. As noted above, the elements of the test are as follows: (1) The extent to which the transaction was intended to benefit 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 defendant's conduct and the injury; (5) The policy of preventing future harm; and (6) The extent to which the profession would be unduly burdened by a finding of liability. *Id.* at 824-43, 872 P.2d 1080.

In adopting the modified multifactor balancing test, the *Trask* Court held that the threshold question (“the *Trask* Test”) is whether the non-client is the intended beneficiary of the attorney-client relationship. That is, was the plaintiff “an intended beneficiary of the transaction to which the [attorney’s] advice pertained”? If the answer is no, that is the end of the inquiry. 123 Wn.2d at 843.

By definition, the attorney could have no duty to a non-client where the advice was not intended to benefit that person (attorneys do not have a duty to the world at large or to all parties benefitted in an estate plan). Consequently, the non-client plaintiff had no standing to sue. *Leipham v. Adams*, 77 Wn. App. 827, 832, 894 P.2d 576 (1995). The *Trask* analysis advances beyond the threshold question only if the court determines that the attorney-client relationship is intended to benefit the plaintiff.

If and only if a court concludes that the attorney's representation of the client was intended to benefit the non-client does a court move to step two: analysis under factors two through six. "While the answer to the threshold question does not totally resolve the issue, no further inquiry need be made unless such an intent exists." 123 Wn.2d at 843.

Thomas did not 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 Thomas' declaration, Thomas knew there were income tax issues, but choose not to consult with counsel. CP 113 (¶5). The income tax consequences to the remaindermen of an irrevocable trust, of which Lorna was an income beneficiary only, is well outside the scope of Lorna's estate planning needs and outside the scope of Stanyer's estate planning retention and should have

been addressed by counsel retained by the Trustees.

This Court need not go beyond the threshold question because Stanyer's representation of Lorna was intended to benefit only Lorna in her capacity as Testatrix (and client). It is obvious that the attorney-client relationship between Stanyer and Lorna was not intended to benefit the non-client remainder beneficiaries of an irrevocable Trust established by a third party.<sup>3</sup> There is no dispute that the Lorna's Estate and the Estate beneficiaries received exactly what Lorna intended and suffered no damage. Based upon the uncontroverted facts below, the Court's inquiry need go no further than the *Trask* Test. However, Thomas asserts Stanyer should have foreseen this potential issue somehow.

In *Stangland v. Brock*, 109 Wn.2d 675, the Supreme Court referenced California law and the multi-part tests used to determine standing, i.e., the *Trask* factors. Although the Court found standing based upon a third party beneficiary standing argument. In *Stangland*, the Court found that the third party beneficiaries of the estate were intended beneficiaries of the attorney-client relationship. But, the Court's analysis has no application here because Thomas cannot demonstrate any harm to

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<sup>3</sup> It is undisputed that the Estate beneficiaries and the remainder beneficiaries of the Trust are identical. However, Thomas continues to conflate these separate groups and claim that Stanyer owed a duty to both groups, while failing to present any evidence that Stanyer's representation was intended to benefit the remainder beneficiaries of the Trust. CP 54, CP 76-77

the Estate beneficiaries. Rather, Thomas claims Stanyer should have anticipated the harm to the remainder beneficiaries of the Trust and argues that Stanyer should have unilaterally expanded the scope of his representation.

However, Thomas ignores significant findings upon which the *Stangland* case holding turned, stated at pp. 684-85:

If we held that Brock had such a duty, we would be expanding the obligation of a lawyer who drafts a will beyond reasonable limits. **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.** . . . We conclude, therefore, that Brock had no duty to advise Schalock when the real estate contract was drafted of its effect on his testamentary distribution.  
(Emphasis added.)

Here, Mr. Stanyer used the “care, skill, diligence and knowledge” of a reasonable estate planning lawyer and revised Lorna’s estate plan exactly as she requested. Moreover, Mr. Stanyer achieved Lorna’s intent, i.e., that her estate paid no state or federal estate taxes. Thomas conflates the estate beneficiaries’ interest with the interests of the remainder beneficiaries of the Trust. This error is fatal to Thomas’ argument that Stanyer’s scope of representation should be expanded to include the latter’s federal income tax exposure.

(e) The remaining *Trask v. Butler* factors show the Remainder Beneficiaries of the Trust were not Intended Beneficiaries of Stanyer's Representation

Even if the Court concludes that the Personal Representative is the appropriate party to represent the remainder beneficiaries of a Trust; and even if the Court were to determine that Thomas somehow passes the initial test under *Trask*, Thomas fails the remaining factors of the multi-balancing test.

(i) The Alleged Harm to the Remainder Beneficiaries of an Irrevocable Trust was not Foreseeable

The harm to the remainder beneficiaries of the Trust was not foreseeable. Stanyer's limited scope of representation did not require him to protect the interests of the remainder beneficiaries of the Trust. Moreover, the Trust beneficiaries are not without a remedy. The Trust beneficiaries may sue the Trustee of the Trust for failing to seek and obtain tax advice before Lorna's death. In *Trask*, the Court held that a fiduciary has a duty to act in the estate's best interest. 123 Wn.2d 835 at 843. If the fiduciary's conduct falls below this standard, the beneficiaries could bring a cause of action against the Trustee for breach of its fiduciary duty. Thus, if the Trustee did not appropriately seek out income tax advice and the beneficiaries suffered damages as a result, the Trustee may be liable. *Id.*

(ii) Thomas Cannot Demonstrate that the Estate, the Estate Beneficiaries or Even the Trust Beneficiaries suffered any injury

Thomas cannot establish that the Estate or Estate beneficiaries suffered any injury for the reasons stated above. Moreover, Thomas cannot establish that the remainder beneficiaries were the intended beneficiaries of his Stanyer's representation or that they suffered any injury for the reasons stated hereafter.

(iii) Because Thomas Cannot Establish Injury, Thomas Cannot Establish a Connection Between Stanyer's Conduct and the Injury

Thomas cannot establish any connection between Stanyer's drafting of estate documents and any injury. Stanyer performed his responsibility to provide Lorna with revised estate plan documents within the standard of care. Thomas does not dispute that fact. The revised estate plan documents carried out Lorna's intent and passed her estate assets exactly as she planned. Thomas does not dispute that fact. Stanyer did not cause injury to the estate or Estate beneficiaries. Thomas does not dispute that fact.

Since Thomas cannot establish a genuine issue of material fact that Stanyer's scope of representation included income tax advice or income tax planning for Lorna, the Trust, or the remainder beneficiaries of the Trust, Thomas cannot meet the necessary proof for this subtest.

(iv) There is No Potential of Preventing Future Harm

Thomas cannot demonstrate how a lawsuit against Stanyer prevents future harm. 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. Thomas 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. Thomas cannot meet the necessary proof for this subtest.

(v) The Practice of Law would be Unduly Burdened by a Finding of Liability

For the reasons set forth in subpart (iv), the legal profession would be unduly burdened by a finding that Stanyer should have undertaken to provide income tax analysis and income tax planning advice to a non-client.

Such an extension of the estate planning client, estate planning attorney relationship means that neither the client nor the attorney knows what services expected, what the scope of representation will be, what

services should be billed, or paid by the client. 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.

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

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

Even if Thomas were somehow able to demonstrate that Stanyer had some duty to the remainder beneficiaries of the Trust, Thomas cannot demonstrate that his proposal would lead to any savings.<sup>4</sup>

Importantly, the very benefit that Thomas seeks (i.e., a step-up in basis to the value of the asset as of Lorna's date of death) is specifically disallowed under IRC § 1014(e).

Thomas' claim is based on a theory that the remainder beneficiaries of the Trust lost a step-up in basis in the lake property held in the Trust.

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<sup>4</sup> Stanyer reiterates its position that no such duty could ever exist, given the limited scope of Stanyer's representation of Lorna.

Thomas alleges that Stanyer should have advised Lorna, prior to her death, to ask the remainder beneficiaries of the Trust to enter into a non-judicial binding agreement under RCW 11.96A.220 (“TEDRA”) to terminate the irrevocable trust and allow her to claim the Trust assets as her own.<sup>5</sup>

As a result of that termination, Thomas argues, the real property would have been included in Lorna’s estate, and, as a result, the lake property would have been included in Lorna’s estate and passed to the Estate beneficiaries. Then, the Estate beneficiaries would have received the lake property and a “stepped-up” basis in the lake property to the fair market value at Lorna’s death.<sup>6</sup> The ultimate goal of this purported tax planning and tax analysis, according to Thomas, was to reduce or eliminate federal income tax consequences from the capital gains upon the sale of the lake property. A tax that fell upon the remainder beneficiaries of the Trust.

However, Thomas’ argument fails. Under Internal Revenue Code (“IRC”) § 1014(e), 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.<sup>7</sup> Rather, the property passing back

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<sup>5</sup> Thomas’ proposed TEDRA action ignores a number of impediments, both legal and practical, to his proposed solution.

<sup>6</sup> This argument ignores the issues created by the *Trask* analysis performed above.

<sup>7</sup> IRC § 1014(e) –

to the donors receives a “carry-over” basis, that is, the basis established at the death of Richard Stevenson. In other words, the remainder beneficiaries, or Estate beneficiaries, could not have achieved the hoped for result, even if Stanyer had advised the parties to do what Thomas proposed.

The remainder beneficiaries of the Trust, by virtue of federal law and the trust instrument, held a vested remainder interest in the Trust. If the remainder beneficiaries entered into a Non-Judicial Binding Agreement under RCW 11.96A.220 to terminate the Trust in favor of Lorna, the remainder beneficiaries are deemed to have made a “gift” of their beneficial trust interests to Lorna. Treas. Reg. §25.2511-1(f) . These regulations provide a specific example:

(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**

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(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.

**interest would result in a transfer includible for Federal gift tax purposes.**

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

This analysis demonstrates why the uniformity of the Estate beneficiaries and remainder beneficiaries of the Trust is legally significant. The same individuals would have made a gift of their beneficial interests in the Trust to Lorna and these same people would have received the same assets from Lorna's estate upon her death. This is exactly the scenario that IRC § 1014(e) was intended to present. Moreover, Stanyer likely would have violated RPC 1.2 (d) had he recommended Thomas' proposal.

(b) Once a Gift is Established, Federal Law Dictates that the Basis of Property Gifted Within One Year Does Not Receive a Step-up in Basis.

As noted above, the giving up of a remainder interest in a trust qualifies as a "gift" under federal law. As a result, the "gift" of each remainder beneficiary's trust interests to Lorna triggers the provisions of IRC § 1014(e). Since it is undisputed that the Estate beneficiaries and the remainder beneficiaries of the Trust are the same individuals, Thomas proposed scheme would not have achieved his desired result, for the reasons stated above. Thus, the first two requirements precluding the step-up are met under IRC § 1014(e).

The final step is the timing.

- **November 6, 2015** -- Stanyer was made aware of the creditor shelter trust in an email from Thomas whereby Thomas references assets contained in the “credit shelter trust information”;
- **February 1, 2016** – Lorna executed her estate documents;
- **August 6, 2016** -- Less than one year after the initial meeting with Stanyer and less than six (6) months after the execution of her revised estate plan documents, Lorna passed away.

Thomas’ sole claim for negligence is that Stanyer, at some point between November 6, 2015 and August of 2016, should have advised the “parties” (defined under TEDRA as any person interested in the Trust) to enter into a Non-Judicial Binding Agreement under TEDRA to terminate the Trust and transfer the trust property to Lorna. Thereafter, if the parties had agreed to engage in this transaction, Thomas argues that the assets would have been included in Lorna’s estate and would have received a step-up in basis to the property’s fair market value at Lorna’s date of death.

However, as noted above, the tax implications of the termination of the Trust are deemed a gift from the remainder beneficiaries of the Trust to Lorna.<sup>8</sup> Because the property passed back to the exact same beneficiaries

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<sup>8</sup> A transfer by a taxpayer for less than adequate consideration constitutes a gift. IRC § 2512(b)

under Lorna's Will as would have taken under the Trust, and because the transaction happened within one year of her death, IRC § 1014(e) is implicated and the step-up in basis is disallowed.<sup>9</sup> As a result, neither the remainder beneficiaries of the Trust nor the Estate beneficiaries can establish any damages.

### 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.

Respectfully submitted,



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<sup>9</sup> Even had Mr. Stanyer recommended such a course of action when retained in November 2015, Lorna Thomas died within a year of his initial representation and the outcome is the same.

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 23<sup>rd</sup> day of August, 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
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Stephanie R. Taylor