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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

BRIEF OF RESPONDENTS

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A. INTRODUCTION

The dispute in this attorney malpractice action centers on the scope of representation relating to attorney Stanyer's legal work on behalf of Lorna Stevenson.

Stanyer was retained by his client to prepare estate planning documents and tasked by Lorna Stevenson to do so in a way that would avoid any taxable event associated with her death. Stanyer had a duty to act in conformity with his client's directive, particularly when there was a legal mechanism in place which permitted the client to achieve her objective.

Stanyer claims his duty to his client only extended to providing advice regarding the potential impact of an estate tax. Stevenson asserts Stanyer's retention required he address the potential of any taxable event associated with his client's death. The scope of this disputed representation issue is a question of fact.

Stanyer has gone to great lengths in this case claiming he breached no duty owed his client, arguing his representation of Lorna Stevenson did not require he act on behalf of beneficiaries of a trust, sometimes denoted as 'remaindermen.' But he does not directly address whether he should have advised his client of the option to terminate a Trust no longer needed in order to avoid a taxable event associated with her death, and has not provided any testimony or authority addressing this issue.

Stevenson has never made any claim asserting a duty owed to anyone but Lorna Stevenson and made absolutely no claim of a separate duty owed beneficiaries of a trust. The Respondents Complaint simply alleged Stanyer breached his duty to Lorna Stevenson to act in accordance with her directive. The distinction between a duty owed the client and an alleged duty

owed beneficiaries of a trust was recognized by the trial court in denying Appellants Motion for Summary Judgment. On the Motion For Discretionary Review the distinction was respectfully but erroneously disregarded in the Commissioner's Ruling and review granted.

B. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The parties do not agree on the scope of representation by Stanyer and the trial court correctly found this to be a material issue of fact.

2. The Representative of an estate has standing to maintain an action against Stanyer for breach of his duty owed Lorna Stevenson.

3. As to the damage issue, Appellants have never offered expert testimony regarding application of Treasury Regulations relied upon in their argument, and the impact of these Regulations, if any, is an additional and material issue of fact.

C. RESTATEMENT OF THE CASE

This is a claim for legal malpractice. The Appellants submitted their Motion for Summary Judgment alleging Respondent's Complaint failed to state a viable claim against them, but the Motion overlooked material allegations in the Complaint dealing with the scope of Stanyer's representation as it directly related to the duty owed his client, Lorna Stevenson. The Summary Judgment Motion asserted neither the Estate of

Lorna Stevenson or the beneficiaries of her estate had standing to pursue legal claims despite the fact Stanyer's scope of retention was disputed. The trial court agreed the scope of retention was a disputed and material issue of fact and noted so in the Order Denying Motion for Summary Judgment. (CP 20)

On appeal Stanyer now claims Thomas Stevenson's Declaration resisting the Motion for Summary Judgment was insufficient to raise a material issue of fact regarding the scope of Stanyer's representation, but there was additional contextual evidence noted to support the claim.

Lorna Stevenson and her former husband, Richard Stevenson, were married many years and had five children. During that time the Stevenson's went to great lengths to preserve their estate for their children and to minimize any tax impact associated with their deaths. In 1983 they jointly created the Richard Stevenson Credit Shelter Trust, though the title may be a misnomer as it included the transfer of Lorna Stevenson's share of community property into the Trust. The terms of this Trust were directly incorporated into Dr. Stevenson's will, specifically stating it was intended "not to impose a federal estate tax," though it was clearly the intent of the Stevenson's to avoid the impact of any tax imposed as a result of death whether it be an estate tax or otherwise.

This Credit Shelter Trust transferred some of the Stevenson's community property to the Trust, named Lorna Stevenson as a trustee and provided a lifetime income for Mrs. Stevenson upon the death of Dr. Stevenson. At the time the Trust was created the Federal Estate Tax Exemption was $225,000.

Thirty-five years later, when Lorna Stevenson retained Stanyer for estate planning purposes, the Federal Estate Tax exemption had risen to five million dollars and was well above

the value of Lorna Stevenson's estate. By that time Mrs. Stevenson was 92 years old, in failing health and had not required income from the Credit Shelter Trust for some time. However, Mrs. Stevenson's expectation her death not result in a taxable event remained steadfast.

The Defendant clearly recognized his client's objective. Shortly following his retention by Lorna Stevenson, Mr. Stanyer authored an email to Tom Stevenson, stating:

> "... I'd also like to have a summary of her (Lorna Stevenson) assets and an estimate of her net worth, Including retirement accounts, life insurance, death Benefits, etc. ..*That information will allow me to Consider any potential estate tax issues.*" (CP 14)

Stevenson complied with Stanyer's request and provided this documentation, including a worksheet of assets held by Lorna Stevenson and the Richard Stevenson Trust. Stanyer clearly reviewed this material. When Stanyer produced his file notes in this litigation there was a notation adjoining the summary of trust assets to "get cc." Respondents believe this notation meant Stanyer intended to review the Trust documents, but such belief is now labeled as "rank speculation" by the Appellants, though they offer no other reason why Stanyer made such an entry[1]

Laying aside any issue of speculation attached to Stanyer's "get cc" notation, the worksheet he was provided established the value of the trust was substantial, with assets of $1,140,000 (CP

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[1] The Commissioner's Ruling accepting discretionary review referenced the notation to "get cc", stating its meaning was "speculative" and did not create an issue as to whether Stanyer believed his representation would include tax advice to Lorna Stevenson's children. No claim is made that Stanyer was required to provide any advice to Mrs. Stevenson's children. The notation is only material to the scope of representation issue and duty owed Lorna Stevenson.

17) and posed significant capital gains tax issues when the Trust expired upon the death of Lorna Stevenson.

Stanyer concluded Lorna Stevenson's assets were below state and federal estate tax threshholds, but the value of her estate would have remained below these threshholds even with a transfer of the Trust assets to her estate. Stanyer appears to have recognized there was a capital gains tax liability to the residual beneficiaries of the Trust upon Lorna Stevenson's death[2] and knew or should have known the Trust no longer served its original purpose. Coupled with Mrs. Stevenson's directive to avoid any tax imposed as the result of her death, Stanyer's error was the failure to go one step further, recognizing there was a statutory mechanism in place to address these circumstances in a simple and straightforward manner. Whether Stanyer was aware of the statutory mechanism discussed below is unknown.

RCW 11.96A.020 is a part of this state's Trust and Estate Resolution Dispute Act (TEDRA). The statute specifically addresses termination of a trust under these circumstances and states:

> "... If all parties agree to a resolution (of an estate or trust) of any such matter, then the agreement shall be evidenced by a written agreement signed by all parties ... the written agreement shall be binding and conclusive on all parties interested in the estate or trust.

Had this option of terminating the Trust and transferring its assets to Lorna Stevenson's ownership been suggested by Stanyer, the Trust would have been dissolved simply by written agreement of Lorna Stevenson and her beneficiaries, who took identical shares under both the terms of the Trust and provisions

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[2] Shortly after Lorna Stevenson passed away, Stanyer authored an email to Thomas Stevenson advising beneficiaries of the trust should "expect capital gains." (CP 14) (CP 17)

of her revised Will drafted by Stanyer. Had this option been posed, it would have satisfied the objectives of Mrs. Stevenson and had the concurrent effect avoiding a capital gains tax levied upon the beneficiaries of her estate in the approximate amount of $159.000.

These circumstances, including Lorna Stevenson's desire to avoid any taxable event as the result of her death as well as the elimination of capital gains taxes assessed against her beneficiaries through a TEDRA Termination of Trust, were not in dispute and were not the subject of Appellants original Motion for Summary Judgment. Instead, the Appellant claimed Stanyer's duty to Mrs. Stevenson was limited to simply drafting a will providing her children received equal shares of her estate, arguing the capital gains avoidance issue and TEDRA authorized termination of the Trust only benefitted Mrs. Stevenson's heirs in their role as residual trust beneficiaries. That argument overlooked the fact it was Lorna Stevenson's desire to avoid imposition of any tax as the result of her death and 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. These are the reasons why the trial court denied the Motion.

At the trial court level, Appellants argued estate beneficiaries could not be third party beneficiaries of an action based upon failure to recommend transfer of trust assets to Mrs. Stevenson prior to her death, despite the fact this action was only brought by Lorna Stevenson's Personal Representative. On appeal the Appellant attempts to refine their argument, claiming Lorna Stevenson's children are to be construed solely as "remaindermen" of the Richard Stevenson Credit Shelter Trust and not as beneficiaries of Mrs. Stevenson's estate when in fact

they are both. More to the point, this characterization is a somewhat meaningless exercise given the fact the Estate of Lorna Stevenson is the only plaintiff in the suit.

D. SUMMARY OF ARGUMENT

The trial court properly denied Appellants Motion for Summary Judgment on the basis there was a material issue of fact regarding the scope of Stanyer's retention on behalf of Lorna Stevenson. At the trial court level, Stanyer claimed his only job was to supply routine form documents with Lorna Stevenson's name interposed where appropriate and ensure his client's estate passed to her beneficiaries as directed. Stevenson submitted evidence and the facts establish Lorna Stevenson's objective was to avoid any taxable impact associated with her death. Both parties submit their position encompasses proper estate planning. 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 this court.

Appellants additionally argue the beneficiaries of Lorna Stevenson's estate are only to be construed as trust remaindermen of the Richard Stevenson Credit Shelter Trust and wrongly argue Respondent "conflates" legally separate concepts of trust remaindermen with estate beneficiaries. But it is ironic such a term has been invoked by a party failing to recognize the fact any characterization of beneficiaries is irrelevant in a lawsuit initiated only by the Estate of Lorna Stevenson.

Alternatively, Appellants argue a dense collection of treasury regulations would have prohibited termination of the trust as a practical matter and could not have been transferred to Lorna Stevenson's ownership in any event, claiming these regulations

would have conspired to characterize the transfer as an impermissible gift. Yet at the trial court level these regulations were never cited to the court and no expert testimony has ever been offered to support the Appellants contention. Further, Appellant fails to address the reality Lorna Stevenson transferred her own community property to the Trust at the time it was created, making it unlikely any transaction would be construed as a gift when it merely reverted back to her.

The trial court's ruling was proper and should be upheld, permitting further findings submitted by the trier of fact.

E. ARGUMENT

(a) Respondent's Claim is Brought Only on Behalf of The Estate of Lorna Stevenson. The Beneficiaries of Her Estate Make No Claim as Trust Remaindermen.

There are several contentions relied upon by Appellant which are either inaccurate or easily resolved from the record.

First, Appellant contends Stanyer was retained only to provide estate planning services, but for reasons unknown assumes estate planning excludes the provision of tax advice from these professional services. From the Respondent's viewpoint. tax planning is an integral part of estate planning and it is inaccurate to assume the majority of clients who seek the services of an estate planning attorney do so separate and apart from any consideration of potential tax issues.

If estate planning was limited as Stanyer contends to the preparation of wills, powers of attorney and advanced medical directives, all of which are form based documents subject to slight modifications, it would not require much specialization to be an estate planning attorney. Further, if Stanyer has authority

for the proposition estate planning is defined in such a manner as to exclude tax planning, the Appellants have yet to provide it.

Alternatively, Stanyer acknowledges he was to provide "estate tax planning" for Lorna Stevenson (Appellants brief, p. 13). The inference is that once Stanyer determined there was no potential estate tax liability his tax planning obligation was fulfilled. However, the Declaration of Thomas J. Stevenson submitted to the trial court established Lorna Stevenson's objective was that her death not occasion the imposition of any tax obligation. (CP 17) and the circumstantial evidence supports this contention.

It should be noted Stanyer submitted his own Declaration in support of Appellants Motion for Summary judgment. (CP 14) He did not assert any argument the standard of care required of an estate planning attorney providing tax planning advice was limited to consideration of estate tax issues, and his Declaration does not attempt to address a standard of care for estate planning attorneys.

Finally, the issue most pivotal to this appeal is the legal standing of the Estate of Lorna Stevenson, and not the standing of her Estate beneficiaries who are not parties to the action. The Appellants incorrectly claim these beneficiaries can only be characterized as trust remaindermen, presumably on the basis the capital gains tax liability assessed against the beneficiaries individually would stem from the sale of Trust assets following Lorna Stevenson's death. However, this argument ignores the fact that had the Trust been statutorily terminated as the Respondent claims it should have been, the assets of the Trust would have become assets of Lorna Stevenson's estate and enhanced the value of the estate to the extent of the Trust's

assets, while at the same time avoiding the imposition of any tax whatsoever as Lorna Stevenson desired.

The Complaint filed in this case was narrowly drafted in such a manner as to obviate the standing argument Appellants now advance. (CP 1). The Complaint states in paragraph VIII:

> *Lorna Stevenson's reasonable expectation associated with her estate planning was the avoidance of tax implications associated with her death. Defendants failure to act in furtherance of such expectation was negligent and below the applicable standard of care for a reasonably prudent estate planning attorney.*

The Plaintiff in this action is the Estate of Lorna Stevenson, not the beneficiaries of her estate individually. The Appellant incorrectly argues Stanyer's alleged negligence did not result in any harm to Lorna Stevenson or her estate. It appears likely Appellants will continue to cling to the unrealistic notion the beneficiaries of Lorna Stevenson's estate can only be characterized as trust remaindermen throughout the pendency of this appeal as they did at the trial court level but it misses the point when these same beneficiaries are not parties to the lawsuit.

It is also apparent, given the Appellants point of view, they will claim Stanyer satisfied his obligations as a matter of law merely because the beneficiaries received proportional interests in the estate as Lorna Stevenson directed through the will Stanyer drafted, regardless of the reality of those interests were diminished by Stanyer's failure to recommend transfer of trust assets to the estate.

(b) Thomas Stevenson, as Personal Representative of the Estate of Lorna Stevenson, Has Standing to Maintain This Action.

The only notable point of agreement between the parties to this appeal is the principle taught in law school that a personal

representative has standing to maintain an action on behalf of an estate, coupled with the acknowledgment Lorna Stevenson was Stanyer's client. From those limited topics of agreement the parties respective viewpoints part company over a rudimentary characterization of who is even the Plaintiff. The appellants seem determined to argue Stanyer somehow is being charged with a duty owed beneficiaries of an irrevocable trust, that Stanyer is being unfairly asked to provide tax advice to beneficiaries of the Trust and the Respondent wrongly assumes his representation was for the benefit of the remainder beneficiaries of the Trust. These arguments are illusory and have no basis in the record.

At the outset, it is acknowledged no Washington case imposes any duty owed beneficiaries or remaindermen of a trust to an attorney drafting a will on behalf of a testator. More meaningful is the fact Washington case law has consistently recognized an attorney drafting a will on behalf of his client owes a duty to the intended beneficiaries of the will in those cases in which a beneficiary is a named party or initiated the action. But again, these are not the circumstances presented by this matter. See, *Stangland v. Brock*, 109 Wn.2d 675, 747 P.2d 464 (1987); *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992); *Leipham v. Adams*, 77 Wn. App. 827, 894 P.2d 576(1995); and *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994).

It is recognized traditional appellate briefing typically contains an extensive analysis of pertinent case law, but the issue in this appeal is highlighted by the simple distinction referenced above: The Appellant contends no duty is owed by an attorney drafting a will to beneficiaries or remaindermen of a trust, and no authority suggests otherwise; The Respondent agrees an attorney drafting a will on behalf of his client owes a duty to the

intended beneficiaries of the will, and no authority suggests otherewise. But neither of these scenarios are relevant to an action where it is the Estate of the former client bringing the action against the attorney who undertook to perform estate planning for the decedent. Under these circumstances, the resolution of this appeal should be a simple factual determination which no amount of legal briefing will resolve.

It should be made clear this case is not brought over Stanyer's drafting of Lorna Stevenson's will, and no claim is made Stanyer did not at least get that part right. What he did not get right, however, is recommend to Lorna Stevenson the statutory termination of her Trust when performing a legal services on behalf of her estate, thereby enhancing the value of the estate and satisfying his client's objective there would be no taxable event associated with her death.

Finally, the Appellant goes to great lengths to discuss evolution of the duty concept by attorneys drafting wills to nonclient beneficiaries of a testator's estate. It is true this evolution occurred over a limited period of time, beginning with *Stangland v. Brock, supra.* and application of the third party beneficiary rule, to *Bohn v. Cody, supra.,* referencing a multifactor balancing test, and finally to *Trask v. Butler, supra.,* combining these dual concepts into a single and unified approach, resulting in legal standard applied to a nonclient litigants known as a modified multifactor test. While this evolution admittedly required time to mature, it had occurred over twenty years prior to the events in issue and has been firmly in place during the entirety of that time.

In this case the Appellants confuse (not conflate) separate issues of who was the client and who is the Plaintiff with who might directly benefit from a monetary verdict. The beneficiaries

of Lorna Stevenson's estate would clearly be the ultimate recipients of any monetary recovery, but Appellants overlook the fact these beneficiaries are neither plaintiffs in the case nor has any claim been advanced Stanyer owed them any legal duty.

(c) The Issue of Whether Termination of the Trust Would Have Resulted in a Technically Impermissible Gifting Remains Unresolved

Appellants finally assert interpretation of Internal Revenue Code sec. 1014(e) and it's impact to the circumstances of this case requires dismissal as a matter of law. Appellants reference but do not provide the text of an obtuse treasury regulation, offering a single example taken from the regulatory material.

The reality presents a complex tax issue. Neither counsel herein are qualified tax attorneys and this court is not a tax court. Without the guidance of expert testimony on the issue, none of the participants in this appeal can proceed with any certainty on this issue.

This issue should be remanded to the trial court for further proceedings along with the rest of the case. At this juncture the only portions of the record addressing the issue are the conclusory statements offered by Mr. Stanyer and Mr. Stevenson at the time the Motion was originally submitted. Stanyer stated the proposed transfer would be an impermissible gift (CP 14). Stevenson stated it would not. (CP 17). Additionally, Stevenson's material included correspondence from Ronald P. Douglas, a member of Stanyer's firm, suggesting the opposite position now advanced by Appellants, advising trust property could still be included as part of Lorna Stevenson's estate when the issue was recognized following her death. (CP 17)

Finally, while counsel herein makes no claim of tax expertise, the fact is that Lorna Stevenson transferred her community property interest in specific assets used to fund the Richard Stevenson Credit Shelter Trust at the time it was created. It is difficult to envision she would have been subject to imposition of a tax liability at the time this ownership reverted back to her on the basis it was a gift.

CONCLUSION

The court should affirm the trial court's denial of Stanyer's Motion for Summary Judgment and enter an Order remanding the case for further proceedings for the reasons stated herein.

DATED this 17th day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 17th day of October, 2018, addressed to the following: Via U.S. Mail and Email.

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