

67527-3

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NO. 67527-3-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

TERRY PARKS,
Appellant,

vs.

JANYCE LYNN FINK,

an individual,

and

FINK LAW GROUP PLLC,

a Washington professional limited liability company,

Respondents,

REPLY BRIEF OF APPELLANT

Vic S. Lam, WSBA# 25100
Attorney for Appellant
701 Fifth Avenue, Suite 4200
Seattle, WA 98104
Telephone: (206) 224-3788

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

ORIGINAL

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I. SUMMARY OF REPLY

Fink does not dispute that this Court should review all the evidence in the record de novo, without any deference to the trial court, and make its own decisions based on the facts and merits of the parties' positions.

Contrary to Fink's bare and unexplained assertion that Parks' evidence is inadmissible, clearly admissible evidence amply supports the facts presented by Parks, especially all the evidence admissible under ER 803(a)(3) related to a declarant's will. In fact, Fink's own self-serving, uncorroborated account of her alleged private interactions with the testator, John Balko, should be inadmissible under the Deadman's Statute; and even assuming admissibility, her account contradicts her own admitted actions.

The dispositive fact in this appeal is that this case involves a signed will. In cases involving a signed will, courts across the nation have found the named beneficiaries to have standing to sue the testator's negligent lawyers. Fink has not cited one single authority anywhere that has denied standing to an intended beneficiary identified in a "signed" will or estate planning document. In light of the rationale and policy reasons articulated by both the line of cases granting standing and the line of cases denying standing, it is clear that imposing a duty on Fink under the circumstances of this case will not burden our profession at all. To the contrary, it will

promote the attorney's effective pursuit of the client's objectives.

Fink asks this Court to apply no tenable standard at all, and to allow her to essentially dictate whether Parks has standing in this case by simply making up a story allegedly known only to Fink and the deceased testator. Allowing lawyers like Fink to do so and to invoke the unsigned-will cases to close the courthouse door to named beneficiaries of a signed will like Parks here amounts to granting immunity to dishonest negligent lawyers because all these lawyers would have to do to escape accountability and to leave the victims of their negligence with no remedy is blame their deceased testator clients. That is not and cannot be the rule of law in Washington or any other jurisdictions.

Fink's arguments on causation rely on her disputed, uncorroborated and self-serving story about the deceased Mr. Balko, which is inadmissible under the Deadman's statute. Her story now to blame her client and the testator, Mr. Balko, for the defects in the unattested 2006 Will stands in stark contradiction not only to her own actions, but also to the disinterested witnesses' accounts, all of which show that Ms. Fink did not fully realize how fatal the lack of witness attestation was to the 2006 Will until it was too late, after Mr. Balko had passed away. Even if admissible, Fink's story at best creates an issue of material fact on causation for the jury.

II. ARGUMENT IN REPLY

A. **Clearly Admissible Evidence Supports the Facts Presented by Parks, while Fink's Self-serving, Uncorroborated Account of her Alleged Private Interactions with the Testator, Mr. Balko, Should be Inadmissible under the Deadman's Statute, and even if Admissible, Would Contradict her Own Admitted Actions.**

Fink does not dispute that the applicable standard of review here is *de novo* (i.e. without any deference to the trial court, see State v. Kunze, 97 Wn. App. 832, 854, 988 P.2d 977 (1999)). Neither does Fink dispute the specific standards stated in Parks' opening brief: (1) any doubts as to the existence of factual disputes must be resolved against the moving party, Bohn v. Cody, 119 Wn.2d 357, 362, 832 P.2d 71 (1992); (2) summary judgment must be denied if the record shows any reasonable hypothesis which entitles the nonmoving party to relief, White v. Kent Medical Center, Inc., P.S., 61 Wn. App. 163, 175, 810 P.2d 4 (1991). Instead, Fink suggests without elaboration that the evidence presented by Parks is inadmissible (by citing to her unrestrained attempts in the trial court to strike everything of importance Parks submitted), and then quickly cuts short her argument by claiming that it is "not material" in any event. Fink Br. at 13. Parks submitted a memorandum to the trial court addressing various evidentiary issues and explaining why the evidence is admissible. See CP 263-267. Parks will briefly address Fink's half-hearted arguments regarding Parks' evidence below.

First, the trial court stated in its order that it has considered all the parties' submissions, including the post-oral-argument ones. See CP 321, line 28. Therefore, there is no issue with respect to the timing of any submission. Second, the trial court did not expressly make any evidentiary ruling, except excluding as hearsay Mrs. Parks' testimony that Ms. Fink informed Mr. Parks shortly before Mr. Balko's death that Mr. Parks was the main beneficiary under Mr. Balko's will. RP 7/1 (4:14-22). This ruling is erroneous because the statement from Ms. Fink to Mr. Parks was party admission (not hearsay) under ER 801(d)(2), and Mr. Parks' relating of the statement to Mrs. Parks immediately thereafter was admissible as present sense impression under ER 803(a)(1) and as excited utterance under ER 803(a)(2). This is a relatively minor point because Mr. Parks also testified to the same thing, CP 310 (lines 4-5), and ample other evidence exists to prove Ms. Fink's botching of the 2006 Will without realizing it, CP 310, 307 (line 25) to 308 (line 9), 169, 173, 311. Regardless, this Court makes its own evidentiary decisions without any deference to the trial court since the review is de novo. See State v. Karpenski, 94 Wn. App. 80, 104 fn.103, 971 P.2d 553 (1999) (no deference where the information the appellate court has is equal or superior to the trial court's).

It is important to point out that ER 803(a)(3) expressly provides a broader exception to the hearsay rule regarding a declarant's will:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Under ER 803(a)(3), Mr. Balko's then existing state of mind, plan, motive, design, as well as statements of his *memory and belief* relating to the execution, revocation, identification, or terms of the 2006 Will are all admissible. Moreover, a witness who personally observes an event can state an opinion, conclusion, or impression as to the event and may testify "about the state of mind of another, so long as the witness personally witnessed events or heard statements that are relevant to prove the other person's state of mind." State v. Contreras, 57 Wash.App. 471, 477, 788 P.2d 1114 (1990) (quoting 5A Karl B. Tegland, Washington Practice: Evidence Law And Practice §218(2), at 153 (3d ed.1989)).

Therefore, the fact that Mr. Balko wanted Betty Parks/Terry Parks to inherit the bulk of his estate, the fact that Mr. Balko believed that he had fully executed a valid will (the 2006 Will) with Ms. Fink in April 2006 before undergoing his experimental surgery, the fact that he felt relief at the time that it was done, the fact that he reconfirmed before his surgical procedure that the 2006 Will was indeed taken care of and at Fink's office, and the fact that Mr. Balko never wavered or changed his

mind about Terry Parks being his intended beneficiary before he died, are all established through the admissible testimonies of witnesses such as Victoria Doyle (CP 184-188, 318-319) and Lisa Kane (CP 189-190) who have no interest in the outcome of the lawsuit.

Ms. Fink's own conduct constitutes further admissible proof of the above facts, including her admittedly putting the executed original 2006 Will in an envelope stamped "original" and taking it back to her office for safekeeping for Mr. Balko, CP 307 (line 25) to 308 (line 9); her informing Mr. Parks that he was the main beneficiary under Mr. Balko's will when Mr. Balko was in coma, CP 178, 310 (lines 4-10); her hiring attorney William Dussault to represent both her and Mr. Parks (CP 169, 173), and acting with Mr. Parks as the co-personal representatives of Mr. Balko's estate as provided in the 2006 Will (CP 147, 169, 173, 311).

Fink wants this Court to disregard all these facts and to believe her uncorroborated story that Mr. Balko did not mean to sign the 2006 Will as a formal will (even though he actually signed and initialed it everywhere needed within the document) and mysteriously refused to have the 2006 Will witnessed by anyone (even though Ms. Fink never arranged for or brought any witnesses to Mr. Balko for this purpose at any time). Such self-serving testimony should be excluded under the Deadman's Statute, with provides in relevant parts:

. . . in an action or proceeding where the adverse party sues or defends . . . as deriving right or title by, through or from any deceased person, . . . then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, . . .

RCW 5.60.030.

The purpose of this statute is to prevent interested parties from giving self-serving testimony about conversations or transactions with a dead or incompetent person. The deadman's statute does not bar testimony which relates solely to the acts of the witness and not to a transaction with the incompetent person. But "an adversely interested party cannot testify indirectly to that to which he is prohibited from testifying [about] directly, and thereby create an inference as to what did or did not transpire between himself and the deceased person.

Lasher v. University of Washington, 91 Wn. App. 165, 169, 957 P.2d 229 (1998). The test for what constitutes an inadmissible transaction is whether the decedent, if living, *could* contradict the witness of his own knowledge. Wildman v. Taylor, 46 Wn. App. 546, 549, 731 P.2d 541 (1987) (emphasis added).

Mr. Parks' suit and Ms. Fink's defense are clearly derived from her transactions with the late Mr. Balko, i.e., his wills and related activities. Therefore, they are both incompetent witnesses with respect to any such "transactions" either of them had with the deceased or any "statements"

made to either of them or in either of their presence by the deceased.¹

Fink also wants this Court to believe her letters allegedly shown only to Mr. Balko five months or more later to "warn" him of the technical defect of the 2006 Will, but no one ever saw these letters or found any of them among Mr. Balko's belongings (including Ms. Doyle who lived with him and dutifully read letters for him, CP 187, lines 12-17). Moreover, these letters do not exist and cannot be found in Ms. Fink's own time and billing records. CP 174-176. In fact, her time entries do not indicate any concerns about the 2006 Will at all.²

¹ Leipham v. Adams, 77 Wn. App. 827, 833, 894 P.2d 576 (1995) apparently stated that the Deadman's statute did not apply to "third party beneficiaries" under Erickson v. Kerr, 125 Wn.2d 183, 883 P.2d 313 (1994), when holding that the Deadman's statute was waived in any event. However, Erickson merely stated, without explanation, that the Deadman Statute did not apply to the action brought by the wrongful death claimants in their individual capacity. Id. at 189-90 (citing Maciejczak v. Bartell, 187 Wash. 113, 60 P.2d 31 (1936), another wrongful death case). Maciejczak explained that a "cause of action for wrongful death" never belonged to the decedent, was "purely statutory" and involved "no contract or cause of action" to which the deceased was a party." See Maciejczak, 187 Wash. at 125-26. So, we know the Deadman's statute is inapplicable to the wrongful death claims because the claimants derive their rights from the wrongful death statute, not anything to which the deceased was a party. By contrast, the case at bar clearly involves a will and related interactions/transactions to which Mr. Balko was a party, and from which Mr. Parks' action and Ms. Fink's defense are derived. All the evils the Deadman's statute was designed to prevent are present in abundance here. Therefore, the Deadman's statute should apply in the case at bar. Regardless, it will be very helpful to have a definitive ruling on this issue going forward because Mr. Parks has thus far refrained from testifying about Mr. Balko's statements to him for fear of waiving the Deadman's statute.

² Fink also attempts in her brief to ask this Court to impermissibly draw inferences against Parks because Parks did not present any evidence from the computer expert in response to the summary judgment motion. First, Parks already presented ample evidence including Fink's own time records to contradict the fabricated letters. Second, Fink did not inform this Court that she deliberately delayed production of computer files for over half a year despite being previously ordered by the trial court to produce such files, and only produced the files not long before the motion for summary judgment. See CP 5-8, 561-end of CP. Parks needed time to analyze the electronic files and has a right

In short, the evidence Parks presented to prove Fink's botching the execution of the 2006 Will was ample and clearly admissible. By contrast, Fink's self-serving "evidence" attempting to put the blame on the deceased Mr. Balko was inadmissible and in any event contradicted not only neutral disinterested witnesses, but also her own actions and records.

B. The Dispositive Fact on this Appeal is that the Will was Signed in this Case; in Cases Involving a Signed Will, Courts Nationwide have Found Named Beneficiaries to Have Standing to Sue the Negligent Lawyers, and Fink has Cited No Authority Denying Standing in Such a Case.

A review of the authorities cited in both Parks' brief and Fink's brief leaves no doubt where the courts across the nation draw the line on whether to allow an intended beneficiary standing to sue the negligent lawyer. They have drawn the line to allow standing in cases involving a signed will and to deny standing in cases involving an unsigned will.

The more recent cases that have examined the two lines of cases are instructive. Hall v. Kalfayan, 190 Cal. App. 4th 927 (2010), examined the line of cases represented by Biakanja,³ Lucas⁴ and Heyer⁵ (relied on by Parks) and the line of cases represented by Radovich⁶ (relied on by

to make strategic decisions on when to use such evidence. Most importantly, all inferences must be made in light most favorable to Parks, and there should be no guessing what may or may not exist outside of the record.

³ Biakanja v. Irving, 49 Cal.2d 647, 648, 320 P.2d 16 (1958) .

⁴ Lucas v. Hamm, 56 Cal.2d 583, 588-91, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

⁵ Heyer v. Flaig, 70 Cal.2d 223, 228-29, 449 P.2d 161, 74 Cal.Rptr. 225 (1969).

⁶ Radovich v. Locke-Paddon, 35 Cal. App.4th 946, 41 Cal. Rptr.2d 573 (1995).

Fink). See Hall, 190 Cal. App.4th at 933-35. The Hall court contrasts the two lines of cases as follows:

In these cases [Biakanja, Lucas, Heyer], the testamentary instrument had been executed; the question was whether the will or trust had been negligently prepared so as to frustrate the testator's intent. But in cases where a potential beneficiary seeks to recover for negligence where the will or trust has not been executed, courts have refused to extend liability.

Hall, 190 Cal. App.4th at 935. Note that Hall uses the word "executed" to simply mean "signed," not "executed properly with attesting witnesses" or "executed and valid" because Biakanja, like the case at bar, involved an improperly executed will without the required attesting witnesses, see Biakanja, 49 Cal.2d at 648. Hall further points out that Radovich similarly "distinguished *Biakanja*, *Lucas*, and *Heyer* because in those cases the will had been *signed* by the decedent." Hall, 190 Cal. App.4th at 935 (emphasis added). "The same court that decided Radovich reached a different conclusion, based on the existence of an *executed* will," in a later case⁷. Hall, 190 Cal. App.4th at 936 (emphasis added).

In Osornio v. Weingarten, 124 Cal. App.4th 304, 21 Cal. Rptr.3d 246 (2004), the court distinguished its own prior decision (Radovich) by pointing out that the nonclient in Radovich "was a mere potential beneficiary under an unsigned draft will" and "there was no plain

⁷ Osornio v. Weingarten, 124 Cal. App.4th 304, 21 Cal. Rptr.3d 246 (2004).

expression of the testator's intention to benefit the plaintiff." Osornio, 124 Cal. App.4th at 336. By contrast, the will in Osornio was signed, providing "a clear expression" of the testator's intention. Id. Explaining the origin of its concern in Radovich for burden on the profession, the court stated:

[I]n *Radovich*, we expressed concern that the imposition of liability by an estate planning attorney to potential beneficiaries under *unsigned* estate planning documents could improperly compromise an attorney's primary duty of undivided loyalty to his or her client.

Osornio, 124 Cal. App.4th at 336 (emphasis original). Given the existence of a signed will, the court not only did not find undue burden on the legal profession, but it also found that imposing a duty owed by the attorney to the nonclient beneficiary "will promote the attorney's effective pursuit of the client's objectives." Id. at 338. Otherwise, "no one would be left to enforce the testator's right to be effectively represented." Id. Accordingly, the court allowed the intended beneficiary (Osornio) to sue the attorney for failing to advise the testator (Ellis) that Osornio was a presumptively disqualified donee and for failing to make arrangements for Ellis to obtain a Certificate of Independent Review from another attorney so that Osornio could overcome the presumption. Id. at 329, 338.⁸

⁸ The Biakanja-Lucas-Heyer line of cases and their principles were also extended to signed inter vivos trusts where the attorney owed the intended trust beneficiary a duty to

It is not disputed that the case at bar involves a signed will (the 2006 Will fully signed by Mr. Balko) with "a clear expression" of the intended beneficiaries. The fully executed will failed because of technical defects involving the statutorily required witness attestation for which the attorney, not the testator client, was and ought to be responsible. The line of cases granting standing to *intended beneficiaries of signed wills* should undoubtedly apply to this case, *not* the line of cases denying standing to *prospective beneficiaries of unsigned or not-yet-prepared wills*.

Courts across the nation have drawn the line between "signed" wills and "unsigned wills" based on all the principles and policy reasons stated in both lines of cases. Fink has not cited one single authority from anywhere that has denied standing to an intended beneficiary identified in a "signed" will or estate planning document.

C. Allowing Fink to Use Inapposite Unsigned-Will Cases to Close the Courthouse Door to Parks Would Amount to Applying an Untenable Standard that Grants Immunity to All Negligent Attorneys Who Choose to Blame Their Deceased Testator Clients.

Washington courts have long held that attorneys, not clients, are responsible for fulfilling the statutory attestation requirement when wills are executed or signed. See Ward v. Arnold, 52 Wn.2d 581, 328 P.2d 164 (1958); Schirmer v. Nethercutt, 157 Wash. 172, 288 P. 265 (1930); Parks

advise trustors of potential tax consequences. See Bucquet v. Livingston, 57 Cal. App.3d 914, 129 Cal. Rptr. 514 (1976).

Br. at 20-24. Courts in other states have also done so and have expressly given the intended beneficiaries the standing to sue for failed wills caused by improper attestation. See Auric v. Continental Casualty Co., 111 Wis.2d 507, 331 N.W.2d 325 (1983); Licata v. Spector, 26 Conn. Sup. 378, 225 A.2d 28 (1966); Biakanja v. Irving, 49 Cal.2d 647, 648, 320 P.2d 16 (1958); Parks Br. at 24-28.

Fink attempts to brush aside all these authorities with her self-serving uncorroborated story of what happened on April 26, 2006. Calling a signed will a "draft" will does not make it so. Her story is contradicted by her own actions of putting away the original executed 2006 Will in her office for safekeeping, of informing Mr. Parks he was the main beneficiary shortly before Mr. Balko passed way, and of hiring counsel to represent both her and Mr. Parks as co-personal representatives of Mr. Balko's estate as provided in the 2006 Will. Her dubious story is also contradicted by the testimonies of disinterested witnesses, especially Victoria Doyle. According to Ms. Doyle, Mr. Balko needed to, and believed he did, execute and finalize a valid will with Ms. Fink on April 26, 2006, before his scheduled experimental surgery, and he never wavered on the intended beneficiaries expressly identified in the signed 2006 Will. CP 186. Mr. Balko did not mysteriously or "inadvertently" signed and initialed the 2006 Will in full, and he did not refuse to have

attesting witnesses against Ms. Fink's advice. Fink cannot be allowed to close the courthouse door to Parks by simply making up a story to put the blame on the deceased testator.

Fink attempts to distinguish Auric by pointing out the lawyer there "admitted that he negligently forgot to have the second witness sign the will." Fink Br. at 28. If a negligent lawyer's admission to negligence were the determining factor for standing, then all a negligent lawyer needs to do to be immunized from suit and to close the courthouse doors to all victims of his/her negligence would be to falsely deny any fault and to concoct a story to blame the testator for the negligence. For example, if the lawyer in Auric had chosen to avoid responsibility by claiming that the testator came to his office to discuss a "draft" will and "inadvertently" signed the "draft" will without all the necessary attesting witnesses against his advice, then the intended beneficiary in Auric would have had no standing to hold the negligent lawyer responsible under Fink's rationale here. If the defendants in Licata and Biakanja had also fabricated similar stories to blame the testators for the lack of proper attestations, the intended beneficiaries in those cases would have had no standing, either, under Fink's rationale and arguments.

Fink also attempts to convince this Court that only "drafting" errors are actionable. No court has imposed such a limitation or has made

such a distinction. In fact, courts have expressly allowed actions against lawyers for errors related to will execution and other legal requirements. See Parks Br. at 21-27 (for cases involving will execution related errors); Osornio, 124 Cal. App.4th at 329 (error unrelated to drafting or execution of a will, but failure to advise and arrange for obtaining the Certificate of Independent Review related to a will). Moreover, courts have expressly grouped execution-error and drafting-error cases together to allow intended beneficiaries standing in that group of cases to sue negligent lawyers. See Hall, 190 Cal. App.4th at 935; Needham v. Hamilton, 459 A.2d 1060, 1062 (D.C. App.1983) ("the interests of the testatrix and the intended beneficiary with regard to the *proper drafting and execution* of the will are the same") (emphasis added). As a practical matter, drafting errors tend to affect only part of the bequests, while execution errors are much more serious and likely defeat all the intended bequests. Therefore, it makes little sense to hold negligent lawyers responsible for only drafting errors, but not for the more serious execution or other fatal legal errors that defeat the testator's entire intended bequests.

Frankly, if one applies Fink's rationale and logic to the drafting-error cases or any cases where standing is allowed, the negligent lawyers can always get away with defeating standing to the intended beneficiaries by blaming the deceased testators. For example, if a lawyer makes a

drafting error and negligently omits Item A from a will, the lawyer can simply do what Fink does, i.e. say he/she advised the testator in private about including Item A, but the testator mysteriously refused, and then argue it will be too much burden on the profession to give the intended beneficiary standing to prove otherwise because the only "admissible" evidence about the deceased is what the lawyer now says, and a lawyer cannot force a client to do what the client does not want to do. Under Fink's rationale/logic, the victim (intended beneficiary) of the lawyer's drafting error would also have no standing.

As a more specific example, if the lawyer in Osornio had chosen to lie and declared that he repeatedly advised the testator (Ellis) in private that she needed to get a Certificate of Independent Review, but Ellis never did what the lawyer advised for years before passing away, the intended beneficiary in Osornio would have had no standing to prove otherwise under Fink's rationale and logic.

Fink is asking this Court to apply no tenable standard at all and to allow Fink to essentially dictate whether Parks has standing in this case by simply making up a story allegedly known only to Fink and the deceased to call the executed 2006 Will a "draft" will and to create an imaginary conflict of interest between Mr. Balko and Mr. Parks, hoping this Court will apply the inapplicable line of cases involving unsigned or non-

existent wills. Allowing Fink to do so amounts to granting immunity to all dishonest negligent lawyers because all they have to do is blame their deceased testator clients to deny the victims of their negligence the necessary standing to hold them accountable.

D. Fink's Arguments on Causation Rest Solely on Her Disputed and Uncorroborated Story about the Deceased Testator, which, even if Admissible, not only Contradicts her Own Admitted Actions, but also the Accounts of Disinterested Witnesses.

Perhaps realizing her position on standing is untenable, Fink argues that this Court should affirm on the alternative ground of lack of causation. Fink's causation arguments, however, rely on her disputed and uncorroborated story about Mr. Balko who according to Fink inexplicably signed the 2006 Will against her advice without attesting witnesses and stubbornly refusing to correct the defect despite her repeated warnings until he passed away. As explained in detail in Parks' opening brief (p.6-8) and Section A above, this story contradicts not only her own admitted actions, but also the testimonies of disinterested witnesses.

Fink concedes that the 2005 Will contained a serious error ("Betty Parks" was listed as a non-existent "Betty Rich"), and that she was tasked with preparing a new will (the 2006 Will) at Mr. Balko's instructions to correct the mistake and to modify his intended testamentary disposition. On April 26, 2006, Ms. Fink brought the 2006 Will to Mr. Balko for him

to finalize and execute, which was substantially copied and modified from the final signed 2005 Will (even with similar blanks for Mr. Balko to fill out at the time of execution, see CP 140-151). Mr. Balko needed to execute the 2006 Will at that time because of his scheduled experimental surgery in May 2006. CP 186. Mr. Balko did finalize and sign the 2006 Will fully on April 26, 2006 as arranged by Ms. Fink, and then informed Victoria Doyle that he had just executed a new will with Ms. Fink and felt very relieved. CP 186 (lines 7-9). Mr. Balko reconfirmed just before the surgery to Ms. Doyle that his will and related paperwork had all been taken care of and were at Ms. Fink's office. CP 186 (lines 10-12). These facts are corroborated by Ms. Fink's own testimony that she put the executed original 2006 Will in an envelope stamped "original" and took it back to her office for safekeeping for Mr. Balko, CP 307 (line 25) to 308 (line 9). There is not a shred of evidence that Mr. Balko "inadvertently" or inexplicably executed a "draft" will against Ms. Fink's advice on April 26, 2006, other than Ms. Fink's now self-serving interrogatory answers in this lawsuit about what Mr. Balko allegedly said to her in private which is unknown to anyone else, assuming such evidence is even admissible under the Deadman's statute.

Clearly, Ms. Fink failed to properly memorialize Mr. Balko's testamentary intent by having the 2006 Will signed before attesting

witnesses as required by the statute.⁹ She also failed to obtain and destroy the 2005 Will which, as admitted by all, contained a non-existent major beneficiary and did not reflect Mr. Balko's testamentary intent. If Mr. Balko had died in the experimental surgery, and Betty Parks had survived, Betty Parks would have undoubtedly had standing to sue Fink for legal malpractice. Why would Mr. Parks be any different, now that Betty Parks did not survive, as they were both clearly identified beneficiaries in the executed 2006 Will? There was absolutely no conflict of interest and no divided loyalty in requiring Ms. Fink to have the pre-surgery execution of the 2006 Will done properly to comply with the technical requirements of the statute for a valid will. It is not an undue burden on the profession. In fact, imposing such a duty under the circumstances of this case will promote the attorney's effective pursuit of the client's objectives.

Fink's new "intervening cause" argument also relies completely on her self-serving story attempting to blame the deceased, which is clearly contradicted by her own conduct. When Mr. Balko went into the hospital for the last time in July of 2007 (well over a year after the 2006 Will was

⁹ Parks' expert witness Mr. Bruce Moen opined that such failure by Ms. Fink fell below the standard of care. Standard of care, the only subject in this case that requires an expert opinion, is part of the issues related to the merits of the cases. It has nothing to do with standing and is not an issue on appeal. That is why Parks' counsel did not discuss Mr. Moen's opinion in this appeal. Fink's accusation that Parks abandoned Mr. Moen's opinion and her attempt to confuse the issues by mischaracterizing Mr. Moen's opinion in making her arguments on standing are a red herring and should be disregarded.

executed), Ms. Fink informed Mr. Parks that he was the main beneficiary under Mr. Balko's will. CP 178, 310 (lines 4-10). She also hired attorney William Dussault to represent both her and Mr. Parks to probate Mr. Balko's estate and acted with Mr. Parks as the co-personal representatives of Mr. Balko's estate as provided in the 2006 Will (CP 147, 169, 173, 311). Clearly, Ms. Fink did not fully realize how fatal the lack of witness attestation was to the 2006 Will until it was too late. She could not have given the alleged warnings to Mr. Balko about the defects in the 2006 Will before Mr. Balko went into coma from which he never woke up. Even if Ms. Fink's self-serving story is admissible, Fink has at best created an issue of material fact on causation for the jury.

III. CONCLUSION

Mr. Parks respectfully asks this Court to rule that he has standing as a matter of law to present his legal malpractice case in court in order to hold Fink accountable for her wrongdoing.

This case involves some rather egregious conduct by a member of our profession, before and after the legal malpractice has been committed. Mr. Parks and his family still have faith that our legal system will hold lawyers accountable for what they do to their testator clients and intended beneficiaries. How this Court decides this case will encourage either diligence or dishonesty in our legal profession and will affect how the

public view the court system, our bar, and lawyers as a whole.

Respectfully submitted this 25th day of June, 2012.

Law Offices of Vic S. Lam, P.S.



Vic S. Lam, WSBA# 25100
Attorney for Appellant
701 Fifth Avenue, Suite 4200
Seattle, WA 98104
Email: vicslam@gmail.com
Telephone: (206) 224-3788
Facsimile: (206) 338-2117

CERTIFICATE OF SERVICE

I certify that, on this day, I caused to be served a true and correct copy of the forgoing document by email per agreement upon the following attorneys of record:

Jeff Smyth, WSBA# 6291
Shaunta Knibb, WSBA# 27688
Attorneys for Respondents
Smyth & Mason PLLC
701 Fifth Avenue, Suite 7100
Seattle, WA 98104

Dated this 25th day of June, in Seattle, King County, Washington.



Vic S. Lam
701 Fifth Avenue, Suite 4200
Seattle, WA 98104
Telephone: (206) 224-3788
Facsimile: (206) 338-2117

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Appendix

to

Reply Brief

(Out of State Authorities)

Page 514

129 Cal.Rptr. 514

57 Cal.App.3d 914

Barbara BUCQUET et al., Plaintiffs and Appellants,

v.

David LIVINGSTON, Defendant and Respondent.

Civ. 36445.

California Court of Appeal, First District, Second Division

May 3, 1976.

Hearing Denied July 1, 1976.

[57 Cal.App.3d 915] [Copyrighted Material Omitted]

[57 Cal.App.3d 916] Noland, Hamerly, Etienne & Hoss, Salinas, for plaintiffs-appellants.

John B. Marchant, Sedgwick, Detert, Moran & Arnold, San Francisco, for defendant-respondent.

TAYLOR, Presiding Justice.

Barbara Bucquet, her husband Howard, and their children, who are the beneficiaries of an inter vivos trust, brought this action for legal malpractice against David Livingston, [1] an attorney who drafted the trust instrument for the settlors, Barbara's parents, for the [57 Cal.App.3d 917] purpose of minimizing all taxes payable on the death of both. This appeal is from a judgment on the pleadings in favor of the attorney as to the sixth, seventh and eighth causes of action [2] of the amendment to the complaint, on the basis of our opinion in *Ventura County Humane Society v. Holloway*, 40 Cal.App.3d 897, 115 Cal.Rptr. 464, [3] as well as a stipulation between the parties in open court. [4] The precise question before us is whether the allegations of the complaint state a cause for malpractice insofar as the attorney should have known about the provisions of Internal Revenue Code section 2041, and advised the settlors of the potential tax consequences of the inclusion of a general power of appointment, and that this failure to advise the settlors of the adverse tax consequences of the retention of the power of appointment during George's life damaged the beneficiaries. As the amendment to the complaint alleged that on the death of George the full value of the trust, rather than merely a life estate, was taxed to Ruby, George's wife, for California inheritance tax purposes in the amount of \$50,000, and Ruby also

incurred additional federal and state gift taxes, as well as attorney's fees, we have concluded that the judgment must be reversed.

When a judgment has been rendered on the pleadings, the sole question on appeal is whether the complaint states a cause of action (*Burnand v. Nowell*, 84 Cal.App.2d 1, 2; *Union F.M. v. Southern Cal. F.M.*, 10 Cal.2d 671, 673). Accordingly, all of the allegations of the complaint must be taken as true (*Gill v. Curtis Publishing Co.*, 38 Cal.2d 273). The pertinent facts, as appear in the amendment to the complaint and the record [5] before us may be summarized as follows:

[57 Cal.App.3d 918] In July 1961, the settlor employed the attorney to perform the services necessary for the review and planning of his estate, and that of his wife, with the object of minimizing and avoiding federal estate taxes and California inheritance taxes otherwise payable at the death of each of them. Thereafter, the attorney prepared a revocable inter vivos trust specifically designating the beneficiaries, and George paid the attorney his fees. Both George and the attorney intended that the trust would accomplish the following: 1) on George's death, one-half of the principal would be available to Ruby, and would qualify the marital half for the marital deduction, pursuant to the federal estate tax (Int.Rev.Code, § 2056); 2) the other (or nonmarital) one-half would be available to Ruby during her lifetime but would not be subject to any federal estate tax or state inheritance tax at her death, and would pass ultimately to the beneficiaries.

George and Ruby executed the separate trust agreements prepared by the attorney in 1961. Only George's agreement is in issue here as it provided for the marital deduction as to one-half of the total assets. As to the nonmarital one-half, the trust agreement provided that the net income was to be paid to George during his lifetime and, if she survived him, to Ruby. Upon the death of the last survivor, the net income was to be paid to their only child, Barbara; on Barbara's death, the trust corpus, after payment of \$175,000 to Barbara's husband Howard, was to be divided among their children.

The trust included the following language in Article IX: 'George, or after his death or adjudicated incompetency, Ruby, if she is living, shall have the power at any time, by an instrument in writing delivered to the Trustees, to modify, alter, revoke, or terminate this agreement in whole or in part. . . .' Thus, the entire trust was made revocable by George, or after his death, by Ruby.

George died on July 27, 1964. After George's death, Ruby as a coexecutrix of the estate employed the attorney to probate George's estate and to represent her in tax

matters related to the probate of George's estate. The attorney was paid additional fees for these services. The attorney also failed to advise Ruby of the tax effect of the general power of appointment in her estate and of her ability to disclaim the power under the applicable federal and state laws. The attorney's [57 Cal.App.3d 919] professional relationship with Ruby continued until her death in September 1969.

After George's death, Ruby incurred California inheritance taxes on the nonmarital one-half as a consequence of her power of revocation. For tax purposes, she was treated as the owner of the nonmarital one-half of George's trust and not as a life tenant. The determination of the appropriate amount of California inheritance tax owed by Ruby also raised questions concerning the legal effect that the power of revocation would have upon Ruby's estate when she died. It became evident that the power of revocation in Ruby rendered the nonmarital one-half of the trust includable in her estate for both federal estate and California inheritance tax purposes. The record clearly indicates that George did not understand the tax consequences of the power of appointment and that the attorney corresponded with the state inheritance tax attorney as to the problems created by the power of appointment.

On March 21, 1969, Ruby executed a renunciation or disclaimer of the power of revocation in an attempt to prevent the nonmarital one-half from being included in her taxable estate. Ruby also assigned her life estate in the nonmarital one-half on the same date to make certain that none of the property in the nonmarital half of the trust would be included in her taxable estate for federal estate or California inheritance tax purposes. This assignment was executed because a substantial period of time had elapsed between the death of George on July 27, 1964, and Ruby's renunciation on March 21, 1969, and it was unclear whether the renunciation would be treated as effective or as a release.

Ruby died on September 18, 1969. The instant complaint was filed on August 10, 1970. As it was subsequently determined that Ruby's renunciation was effective and that the nonmarital one-half was not includable in her estate and passed to the beneficiaries free and clear, the parties to this action stipulated to the dismissal of the first five causes of action.

In addition to California inheritance taxes incurred by Ruby as the owner of the nonmarital one-half of the trust upon the death of George, Ruby incurred both federal and state gift taxes, allegedly a total sum of about \$50,000, as a result of her renunciation of her power of revocation over the nonmarital one-half of the trust and the assignment of her life estate in the nonmarital one-half of the trust. Ruby also incurred [57 Cal.App.3d 920] attorney's fees in the alleged amount of \$3,750 to effect the renunciation and the assignment. The gift taxes and attorney's fees were paid after Ruby's death.

On appeal, the attorney contends that: 1) George's intent was carried out since the record shows that the nonmarital one-half of the trust eventually passed free and clear of federal estate and California inheritance taxes to the beneficiaries; and 2) the gift and inheritance taxes and the attorney's fees paid were imposed on Ruby and were not chargeable to or paid out of the assets of the trust.

The attorney's first contention is based upon the stipulation in open court that the nonmarital one-half passed to the beneficiaries, free and clear, resulting in the dismissal of the five causes of action pertaining thereto. The attorney's contention, however, ignores the fact that the steps taken by Ruby that resulted in the gift tax liability were alleged to have reduced the corpus of the trust. In order to carry out George's intent, the instrument with Article IX, quoted above, could not stand. The attorney admitted that after George's death, the power of revocation resting in Ruby as a result of Article IX would have subjected the nonmarital one-half of the trust to both federal estate and state inheritance taxes, if Ruby had not taken remedial steps of renouncing her general power of appointment and assigning her life estate. The beneficiaries allege that as a result of these remedial actions forced upon Ruby by the negligent drafting of Article IX, the value of the trust and Ruby's estate were reduced so as to also reduce the share of the beneficiaries by the amounts of the additional state inheritance and federal gift tax payments, as well as the attorney's fees.

The attorney's second contention on appeal that the damage complained of was suffered by Ruby and not chargeable or paid out of the trust assets, ignores the posture of the instant matter. As indicated above, on our review of a judgment on the pleadings, all matters asserted in the complaint must be taken as true (Gill, supra at p. 275).

The attorney's third and major contention is that even assuming payment of the taxes and the attorney's fees from the trust assets, he had no duty to the beneficiaries sufficient to establish liability and that the judgment on the pleadings was properly granted on the basis of our opinion in *Ventura v. Holloway*, supra. As we said in *Ventura*, 40 Cal.App.3d at page 902, 115 Cal.Rptr. at page 467: 'The elements of a cause of action for professional negligence are, of course, well defined. These ingredients are: (1) the Duty of the [57 Cal.App.3d 921] professional to use such skill, prudence and diligence as other members of his profession commonly possess and exercise; (2) Breach of that Duty; (3) a Proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or Damage resulting from the professional negligence (citations). When these elements coexist, they constitute actionable negligence. On the other hand, absence of, or failure to prove, any of them is fatal to recovery. This applies especially to the all important element of duty.'

We also indicated, at page 903, 115 Cal.Rptr. 464, that an attorney, by accepting employment to give legal advice or to render legal services impliedly agrees to use ordinary judgment, care, skill and diligence in the performance of the tasks he undertakes (*Moser v. Western Harness Racing Assn.*, 89 Cal.App.2d 1, 7). This duty extends not only to the client, but also to the intended beneficiaries; a lack of privity does not preclude the testamentary beneficiary from maintaining an action against the attorney on either a contractual theory of third party beneficiary or a tort theory of negligence (*Heyer v. Flaig*, 70 Cal.2d 223, 74 Cal.Rptr. 225; *Lucas v. Hamm*, 56 Cal.2d 583, 15 Cal.Rptr. 821; *Biakanja v. Irving*, 49 Cal.2d 647). Liability to testamentary beneficiaries not in privity is not, however, automatic. All of the authorities indicate that a determination whether liability exists in a specific case is a matter of policy and involves the balancing of various factors, including: 1) the extent to which the transaction was intended to affect the plaintiff; 2) the foreseeability of harm to him; (3) the degree of certainty that the plaintiff suffered injury; 4) the closeness of the connection between the defendant's conduct and the injury suffered; 5) the moral blame attached to the defendant's conduct; and 6) the policy of preventing future harm (*Biakanja v. Irving*, supra, 49 Cal.2d 650; *Lucas v. Hamm*, supra, 56 Cal.2d 588, 15 Cal.Rptr. 821; *Ventura*, supra, 40 Cal.App.3d 903, 115 Cal.Rptr. 464).

An attorney may be liable to testamentary beneficiaries only if the stated test is fully met, that is, if due to the attorney's professional negligence the testamentary intent in a legal instrument is frustrated and the beneficiaries clearly designated by the testator lose their legacy as a direct result of such negligence (*Ventura*, supra, at 903, 115 Cal.Rptr. 464).

In *Lucas*, supra, our Supreme Court concluded that 'intended beneficiaries of a will who lose their testamentary rights because of failure of the attorney who drew the will to properly fulfill his obligations under his contract with the testator may recover' (P. 591 of 56 Cal.2d, p. 825 of 15 Cal.Rptr., P. 689 of 364 P.2d.) Similarly,

[57 Cal.App.3d 922] in *Heyer v. Flaig*, supra, 70 Cal.2d at page 229, 74 Cal.Rptr. at page 229, 449 P.2d at page 165, where an attorney failed to inform a testatrix of the legal effect of her intended marriage and as a consequence her daughters lost their legacies, the court saw a clear duty running to the intended beneficiaries, the daughters, and held that 'public policy requires that the attorney exercise his position of trust and superior knowledge responsibly so as not to affect adversely persons whose rights and interests are certain and foreseeable.' These principles are equally applicable to inter vivos trusts, like the instrument here in issue, as there is no rational basis for any distinction.

Arguably, the provisions of the Internal Revenue Code and applicable regulations on the subject are as

much of a 'technicality-ridden legal nightmare' as the California law on perpetuities, involved in *Lucas v. Hamm*, supra, 56 Cal.2d at page 592, 15 Cal.Rptr. 821. However, the marital deduction trust, such as the one drafted in the instant case, is one of the best known estate planning devices. Its details and tax consequences are all the more significant for a California attorney since it is well known that the original Internal Revenue Code amendments permitting marital deduction trusts were enacted to make available to residents of noncommunity property states certain tax benefits enjoyed by residents of community property states, such as California. Further, the pertinent provisions of Internal Revenue Code section 2041 making taxable for federal estate tax purposes a general power of appointment created after October 21, 1942, were first enacted in 1951, [6] ten years before the trust instrument here in issue was drafted. There, provisions were incorporated into Internal Revenue Code section 2041 in 1954 (68A Stats. 385, ch. 736, effective Aug. 16, 1954), seven years before the trust instrument here in issue was drafted. The potential consequences of the retention of a general power of appointment are a matter within the reasonable competence of an attorney. Although the question of whether the precise language creates a general power is a matter of federal law (*E. and M. Weir Foundation v. United States*, D.C., 362 F.Supp. 928, aff'd 2 Cir., 508 F.2d 894), [7] the creation of general and special powers of appointment is also a significant aspect of the law of trusts and estates, apart from any tax considerations. Further, as indicated above, the complaint alleged [57 Cal.App.3d 923] that the beneficiaries here also incurred federal and state gift taxes, as well as California inheritance tax consequences that could have been avoided by proper draftsmanship.

While the record indicates that the attorney was acquainted with certain provisions of the Internal Revenue Code, it also shows that he apparently overlooked the potential interpretation of the language of Article IX as a general power of appointment. His letter to George dated January 16, 1962, specifically referred to 'certain assets over which Ruby retained full control and are not in the trust.' He admitted that he could not remember whether at the time of his correspondence with the state inheritance tax attorney after George's death, he was aware of the position of the state agency as to the tax consequences of Article IX.

Here, it is alleged that the attorney was employed to plan George's estate and attempted to carry out George's intent that the nonmarital one-half of the inter vivos trust principal would ultimately pass to the beneficiaries, free of the burden of federal estate tax and California inheritance tax after Ruby's death. The attorney did so by applying a well established tax saving device, the marital deduction trust. [8] Thus, the 1961 transaction between George and the attorney was directly intended to affect the beneficiaries and the avoidance of federal estate tax and state inheritance tax was directly related to the amounts that George intended the beneficiaries to receive

after Ruby's death.

The inclusion of Article IX with language that could be interpreted as a general power of appointment necessitated Ruby's renunciation and transfer of her life estate that led to the reduced beneficial attributes of the marital deduction device. Thus, the damage to the beneficiaries in the event that the power continued after George's death was clearly foreseeable and became certain after he died. Without these necessary remedial steps, the entire value of the nonmarital one-half of the trust would have been included in Ruby's estate and would have been subject to federal estate and California inheritance taxes. As the complaint alleged that the trust corpus, as well as the estate of Ruby, was reduced by the error in draftsmanship, we must assume, for the purposes of this appeal in its present posture, that the beneficiaries lost an ascertainable portion of their testamentary rights because of the attorney's failure to [57 Cal.App.3d 924] advise either George before his death or Ruby after, that a general power of appointment was created by Article IX. We think under the above cited authorities, the beneficiaries have stated a cause of action. Of course, the facts as alleged may not be proved in a trial on the merits: for example, the attorney may be able to show at a later time either that the trust assets were in fact not diminished by the imposition of the additional taxes and attorney's fees, or that George and Ruby were advised of the potential consequences of Article IX, but chose to ignore these for other and more important family reasons.

Any reliance on Ventura is misplaced as that case is readily distinguishable on its facts. There, the alleged error was an ambiguous designation of the beneficiaries. The beneficiaries, however, were designated exactly in the manner specified by the testator--who apparently did not know that there were several charitable organizations that fit the description he provided to his attorney. Litigation ensued to determine which charitable organizations designated as organizations were the intended beneficiaries of the testator's bequest. After the conclusion of this litigation, one of the parties to the litigation brought suit against the testator's attorney for damages incurred in establishing its right to receive a share of the bequest. We held that the attorney had no duty to investigate and make specific the ambiguous designation of the charitable organization supplied to him by his client. We noted that imposing such a burden on the legal profession would amount to a requirement that an attorney draft litigation-proof documents. (Ventura, supra, 40 Cal.App.3d at p. 905, 115 Cal.Rptr. 464.) Aside from this consideration, we also held, as a matter of law, that the beneficiary organization was precluded from recovery as: 1) the trust purpose was clear and could be fully implemented since the testamentary intent was carried out and the beneficiaries under the residuary clause got their full share; and 2) the complaint was 'utterly devoid of any indication as to what the true intention of the testator . . . was. . . .' (Ventura, supra at p. 906, 115 Cal.Rptr. at p. 470.) Focusing on this omission

in the complaint, we continued at page 906, 115 Cal.Rptr. at page 470: 'It is obvious that in the absence of an allegation that the testator did intend to leave a part of his residuary estate to appellants specifically, it cannot be determined with any degree of certainty that appellants suffered harm or injury at all.'

In the instant case, of course, there was no ambiguity, either as to the tax saving intent of George or of the identity of the beneficiaries. In Ventura, we were concerned with establishing a precedent that would force attorneys to draft litigation-proof documents. Since in the instant [57 Cal.App.3d 925] case the intent and beneficiaries were specified and the beneficiaries were to receive certain assets, it can be determined to what extent they were damaged, if the allegations of the complaint can be proved.

Of course, here, no less than in Ventura, can we demand of attorneys an impossibly duty and a standard of care that requires litigation-proof documents. Nor, despite the recent recognition by our State Bar of taxation as a certifiable specialty, are we prepared to hold that an attorney engaged in estate planning has a duty to seek the advice of a certified tax specialist. As we have indicated in Ventura, supra, at page 903, 115 Cal.Rptr. 464, balancing of all of the relevant factors is essential. Here, we may take judicial notice of the outstanding reputation for integrity and competence during the long career of the sole practitioner (now retired) who was the attorney for George and Ruby in the instant case, and the amendment to the complaint alleges no conduct to which any moral blame can be attached. We are not aware of any cases or guidelines establishing in a civil case [9] a standard for the reasonable, diligent and competent assistance of an attorney engaged in estate planning and preparing a trust with a marital deduction provision. We merely hold that the potential tax problem of general powers of appointment in inter vivos or testamentary marital deduction trusts were within the ambit of a reasonably competent and diligent practitioner from 1961 to the present. Our recognition of the existence of a cause of action in the instant case also advances the judicially approved policy of preventing future harm and the standards of the legal profession, a matter that has been of great concern in recent years, both to the general public and to the profession, as well as the courts (Evid.Code, § 451, subd. (f)). Arguably, the interests of a beneficiary are even greater than those of the testator or settlor. After the death of the testator or settlor, a failure in the scheme of disposition works no practical effect except to deprive his intended beneficiaries of the intended bequest. The executor of an estate has no standing to bring an action for the amount of the bequest against an attorney who negligently prepared the estate plan since, in the normal case, the estate is not injured by such negligence, except to the extent of fees paid; only the beneficiaries suffer the real loss. Thus, the fact that Ruby's estate was not a party is of no significance here. Unless the beneficiaries can recover against the attorney,

no one could do so and the [57 Cal.App.3d 926] social policy of preventing future harm would be frustrated (Heyer v. Flaig, supra, 70 Cal.2d p. 228, 74 Cal.Rptr. 225; Lucas v. Hamm, supra, 56 Cal.2d at p. 589, 15 Cal.Rptr. 821).

Reversed.

KANE and ROUSE, JJ., concur.

NOTES:

[1] The attorney was sued as attorney for the settlor, as well as a trustee of the trust.

[2] These causes of action alleged, in sum, that as a result of the attorney's negligent draftsmanship, the beneficiaries received a smaller portion than the settlors intended, and also sought attorney's fees.

[3] The order granting the judgment on the pleadings here was filed on November 29, 1974, only a few months after our decision in Ventura, dated July 23, 1974.

[4] The stipulation provided, in part, for the dismissal of the first five causes of action that were no longer in issue at the time of the motion for a judgment on the pleadings, as subsequently set forth in our summary of the facts below. However, we have, of course, included the facts alleged in the first five causes of action to the extent that they were incorporated by reference in the subsequently filed causes of action of the amendment to the complaint.

[5] As a motion for a judgment on the pleadings is confined to the face of the pleading under attack (Buck v. Standard Oil Co., 157 Cal.App.2d 230, 233) and to matters of which we may take judicial notice (Kachig v. Boothe, 22 Cal.App.3d 626, 630, 99 Cal.Rptr. 393; Alford v. Hesse, 100 Cal.App. 66), we take judicial notice of the stipulation of the parties and the interrogatories and answers to the interrogatories. As the answers to certain correspondence and the attorney's deposition had also been supplied to the beneficiaries, we also take judicial notice of these apparently undisputed documents that were quoted in the trial brief. (Evid.Code, § 452.)

[6] Section 2 of the Powers of Appointment Act of 1951, Public Law 58, 82nd Congress, enacted June 28, 1951, amending what was then Internal Revenue Code section 811(f), the predecessor of Internal Revenue Code section 2041, which was enacted in 1954.

[7] The case held that since local law determines the right to inherit property, the federal courts will look to state law to determine the attributes of a power of appointment. Federal law, however, defines whether a power is 'general,' regardless of state terminology.

[8] We think this aspect of the case distinguishes it from an area of complex law and circumstances that call for

difficult choices among possible courses of action and procedural steps that we held not actionable in Banerian v. O'Malley, 42 Cal.App.3d 604, 613, 116 Cal.Rptr. 919.

[9] The only pertinent case our research has disclosed is United States v. DeCoster, 159 U.S.App.D.C. 326, 487 F.2d 1197, where Justice Bazelon of the District of Columbia Circuit Court of Appeals attempted to set form minimum standards for the effective aid of counsel in a criminal case.

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___ Cal.Rptr.3d ___

190 Cal.App.4th 927

CARLYLE HALL, Plaintiff and Appellant,

v.

LAWRENCE KALFAYAN, Defendant and Respondent.

B220320

California Court of Appeal, Second District, Fourth Division

December 8, 2010

APPEAL from a judgment of the Superior Court of Los Angeles County No. BC395733, Irving Shimer, Judge.

[190 Cal.App.4th 928] [Copyrighted Material Omitted]

[190 Cal.App.4th 929] COUNSEL

Lapidus & Lapidus and Daniel C. Lapidus for Plaintiff and Appellant.

Waxler, Carner, Brodsky, Barry Z. Brodsky and Brian D. Peters for Defendant and Respondent.

OPINION

EPSTEIN, P.J.

In this case, we conclude that a prospective beneficiary of a will cannot maintain a cause of action for legal malpractice against the attorney who drafted the will but did not have it executed before the death of the testator.

FACTUAL AND PROCEDURAL SUMMARY

Appellant Carlyle Hall had known Alexandra Turner since 1962 or 1963. In the late 1990's, Hall formed the belief that Ms. Turner was in need of a conservatorship; she had become increasingly reclusive, sometimes would not answer the telephone or the door, and was not cleaning up when her dog relieved himself inside her condominium. She exhibited signs of dementia.

In December 2001, Hall, through counsel, filed a petition to establish a conservatorship for Ms. Turner. The petition requested that Hall and Judith Chinello, a professional conservator, be appointed coconservators of

Ms. Turner's person, and that he be appointed conservator of her estate. In January 2002, respondent Lawrence Kalfayan was appointed as a probate volunteer panel (PVP) attorney to represent Ms. Turner's interests with respect to the conservatorship petition.

With Hall's assistance, Kalfayan met with Ms. Turner in February 2002. Her condominium was unclean and smelled strongly of dog and she had almost no food in her refrigerator. According to Kalfayan's report to the [190 Cal.App.4th 930] court, "Mrs. Turner had difficulty remembering the topic of discussion, and during any given conversation, would ask 'what were we talking about?'; She could not remember how long she had lived in her present dwelling, or where she lived prior to her current residence. She did not know what a conservatorship proceeding is, and did not know of the upcoming court hearing on February 14, 2002 and she appeared surprised when told of it." Although Ms. Turner expressed opposition to a conservatorship arrangement, "[s]he did express a strong interest in having Carlyle Hall 'be the one to help her, ' but only at such time as she needs help."; Kalfayan showed Ms. Turner a copy of an attachment to the petition in which she nominated Hall as conservator of the estate, and Hall and Chinello as conservators of her person; she did not recall signing the document and was confused as to its meaning. Ms. Turner confirmed she had a strong and long-lasting friendship with Hall, and stated "more than once during the meeting, that she trusts him completely and wants him to assist her—but only at such time as she needs it."; Kalfayan confirmed Ms. Turner's lengthy positive relationship with Hall in interviews with Turner's ex-husband, her accountant, and her niece.

Kalfayan asked Ms. Turner about her family. She mentioned a brother who was deceased, and when asked, recognized the name of her niece, Priscilla Waring. Ms. Turner told Kalfayan that she liked Priscilla but that they had not kept in contact since Ms. Turner moved to California. Asked about having Priscilla help her, Ms. Turner said she would not be comfortable with that, since Priscilla lives far away and they had not been in contact for a long time. Asked about two other individuals, Ms. Turner identified them as her two younger adopted siblings. She said she did not have a close relationship with either one and was not in contact with them. During this meeting, Ms. Turner told Kalfayan she wanted to leave a 17th century Japanese screen to Mr. Hall.

Kalfayan recommended a conservatorship, with Hall as conservator. He identified Ms. Turner's needs as including help paying bills, housekeeping, obtaining groceries, and obtaining medical care when needed. On March 6, 2002, the probate court appointed Hall to be Ms. Turner's conservator. The court discharged PVP Attorney Kalfayan, but ordered him to be notified "if the Conservatee is moved to a secured facility or if

proceedings concerning the Conservatee's estate planning documents are initiated....";

In 2004, Sean Higgins, who represented Hall as conservator, informed Kalfayan that given Ms. Turner's financial, physical and mental circumstances, Hall wished to proceed with the petition for substituted judgment (PSJ)[1] procedure to prepare and obtain court approval of an estate plan for Ms. Turner. Hall arranged for Kalfayan to meet with Ms. Turner in November [190 Cal.App.4th 931] 2004 to discuss her testamentary intentions. According to Kalfayan's notes from this meeting, Ms. Turner told him Hall should inherit her condominium because she was very fond of him; her niece, Priscilla Waring, should not get anything because Ms. Turner did not like her; no relative should receive any part of her estate; and she did not know who else to give money and articles to so the remainder of the estate should go to Hall and he could decide who to give things to.

According to Sean Higgins, the conservator's attorney, he spoke with Kalfayan in February 2005, and Kalfayan stated he had prepared a draft living trust for Ms. Turner. Kalfayan later asked Higgins to arrange for another meeting with Ms. Turner to review the estate plan. Kalfayan failed to meet with Ms. Turner on the date scheduled in March 2005, apparently the result of a miscommunication with Higgins. One or two other meetings with Ms. Turner were reportedly "of little substance"; because Ms. Turner was not feeling well or was not interested in discussing her estate plan.

In April 2005, Kalfayan had his final meeting with Ms. Turner. According to Kalfayan, Ms. Turner "expressed her desire to leave 'more than half' of her estate to Carlyle Hall and 'less than half' of her estate to her niece, Priscilla Waring. The expressions 'more than half' and 'less than half' were Ms. Turner's words." Asked to be more specific about the meaning of those terms, "Ms. Turner said 'a little more' to Mr. Hall and 'a little less' to Ms. Waring. She refused to discuss specifics beyond that, and made it clear that was all she cared to discuss about the matter." Kalfayan told Higgins that this last meeting had been productive, and that he would prepare a draft estate plan giving 60 percent of the estate to Hall and 40 percent of the estate to Ms. Turner's niece.

In late June 2005, Kalfayan notified the conservator's counsel that he had completed a draft of a living trust for Ms. Turner and would be transmitting it to him the next day. On August 10, 2005, Kalfayan sent Higgins the draft trust document, which provided that Hall would receive 55 percent of the estate. Higgins reviewed the draft trust and informed Kalfayan that he believed it would be "easier and more cost-effective for the petition for substituted judgment to seek approval of a will, rather than a trust." In September, Kalfayan agreed

to convert the trust into a will.

In mid October 2005, Kalfayan told Higgins he would transmit the draft will within the next week. When this was not received, Higgins sent a letter asking for a status update. On January 31, 2006, Kalfayan sent Higgins the draft will and a cover letter explaining that he had reduced the share of the [190 Cal.App.4th 932] estate to Hall to 51 percent, which he believed better reflected Ms. Turner's intent. He also indicated he would explain that change in the PSJ, which he would prepare and file in his capacity as PVP attorney.

On April 3, 2006, Kalfayan was reappointed as Ms. Turner's PVP counsel. Kalfayan filed the PSJ on May 24, 2006, with a hearing date of July 24, 2006. Kalfayan sent notice of hearing to interested parties, reviewed the probate notes, and attended the initial hearing on the petition. The hearing was continued for the purpose of clearing issues raised in the probate notes.

Kalfayan filed a supplement to the PSJ on September 22, 2006. Ms. Turner's niece, Priscilla Waring, filed objections to the petition in October. Ms. Waring subsequently contacted Kalfayan and advised him that she remembered the name of her aunt's former attorney and his law firm. Kalfayan contacted the attorney who confirmed that Ms. Turner and her ex-husband had prepared an estate plan consisting of a living trust and pour-over wills. Kalfayan contacted the attorney's former law firm and ultimately obtained copies of these documents.

On February 22, 2007, Kalfayan filed a second supplement to the PSJ, attaching copies of Ms. Turner's former estate planning documents. Kalfayan noted that the will and trust contained gifts to Ms. Turner's niece, to other family members who are now deceased, and to her ex-husband and his children. No gift was made to Hall. Kalfayan explained that this disposition was relevant to the conservatee's past donative practices. He also indicated the discovery of these testamentary instruments raised issues as to other persons entitled to notice of the proceedings.

The hearing on the PSJ was continued so that Kalfayan could give notice to the heirs of Ms. Turner's former husband. Kalfayan did not locate these individuals and the court denied the petition without prejudice on June 22, 2007.

Ms. Turner died in August 2007. Her new estate plan had not been approved by the court, and thus Hall received nothing. Ms. Turner's niece, the children of her former husband, and her adopted siblings are currently involved in litigation over who is entitled to her estate.

Hall brought this action for legal malpractice, alleging that Kalfayan's failure to timely perform his duties had deprived him of the majority of Ms. Turner's estate. The trial court granted Kalfayan's motion for

summary judgment on the ground that Kalfayan owed no duty to Hall, who was not his client and not the beneficiary of an executed estate plan. Hall filed this timely appeal from the judgment.

[190 Cal.App.4th 933] DISCUSSION

Hall's first amended complaint alleged a single cause of action for professional negligence. The elements of a claim for legal malpractice are: "(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence." (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199 [108 Cal.Rptr.2d 471, 25 P.3d 670].)

Kalfayan's summary judgment motion was premised on the lack of duty to Hall. He asserted as an alternative theory that Hall could not establish that Kalfayan's alleged negligence was the proximate cause of Hall's damages. The court granted the motion on the ground that there was no legal duty. We agree.

In California, as in other jurisdictions, the traditional rule was that an attorney could be held liable for professional negligence only to his or her own client. (*Chang v. Lederman* (2009) 172 Cal.App.4th 67, 76 [90 Cal.Rptr.3d 758].) But this strict privity test was rejected in a trio of cases involving testamentary instruments. In the first, *Biakanja v. Irving* (1958) 49 Cal.2d 647 [320 P.2d 16], the plaintiff's brother died after signing a will, prepared by a notary public, which purported to leave the decedent's entire estate to the plaintiff. The notary negligently failed to have the will properly attested, and it was denied probate. The plaintiff thus received only his one-eighth intestate succession share of the estate. Plaintiff sued the notary and recovered a judgment. The Supreme Court held the plaintiff should be allowed to recover, despite the absence of privity: "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (49 Cal.2d at p. 650.)

The second case is *Lucas v. Hamm* (1961) 56 Cal.2d 583 [15 Cal.Rptr. 821, 364 P.2d 685]. In that case, an attorney was asked to draft a will under which plaintiffs were to receive 15 percent of the residue of the estate. The attorney negligently drafted a will containing a residuary trust which violated the rule against

perpetuities and statutory restraints on alienation. After the death of the testator, the attorney advised the plaintiffs that the [190 Cal.App.4th 934] residual trust provision was invalid and the plaintiffs would be deprived of the entire amount to which they would have been entitled if the provision had been valid. The plaintiffs entered into a settlement with the blood relatives of the testator under which they received a lesser amount than that provided for them by the testator. They then sued the attorney for professional negligence. The Supreme Court extended the *Biakanja* principles to a negligent attorney: "As in *Biakanja*, one of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon the death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so and the policy of preventing future harm would be impaired." (56 Cal.2d at p. 589.) But the court added an additional factor for consideration: "whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession. Although in some situations liability could be large and unpredictable in amount, this is also true of an attorney's liability to his client. We are of the view that the extension of his liability to beneficiaries injured by a negligently drawn will does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss." (*Ibid.*) Thus the plaintiffs were allowed to proceed with their action against the attorney.

In the third case, *Heyer v. Flaig* (1969) 70 Cal.2d 223 [74 Cal.Rptr. 225, 449 P.2d 161], disapproved on other grounds in *Laird v. Blacker* (1992) 2 Cal.4th 606, 617 [7 Cal.Rptr.2d 550, 828 P.2d 691], it was alleged that the testatrix told her attorney she wanted to leave her entire estate to her two daughters, and also told him of her intended marriage. The attorney drafted a will which the testatrix signed shortly before she married. The will did not provide for her husband nor indicate the testatrix's intention not to provide for him. Upon her death, her husband claimed a portion of the estate as a posttestamentary spouse. The daughters sued the attorney, claiming he negligently failed to advise the testatrix of the consequences of a posttestamentary marriage and negligently failed to include any provision in the will as to the intended marriage. The court reaffirmed the principles set out in *Biakanja* and *Lucas*, explaining that the basis for extending tort liability to an intended beneficiary in the absence of privity was a breach of duty owed directly to the beneficiary: "When an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact

assumes a relationship not only with the client but also with the client's intended beneficiaries. The attorney's actions and omissions will affect the success of the client's testamentary [190 Cal.App.4th 935] scheme; and thus the possibility of thwarting the testator's wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary. In some ways, the beneficiary's interests loom greater than those of the client. After the latter's death, a failure in his testamentary scheme works no practical effect except to deprive his intended beneficiaries of the intended bequests." (70 Cal.2d at p. 228.)

In these cases, the testamentary instrument had been executed; the question was whether the will or trust had been negligently prepared so as to frustrate the testator's intent. But in cases where a potential beneficiary seeks to recover for negligence where the will or trust has not been executed, courts have refused to extend liability.

In *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946 [41 Cal.Rptr.2d 573] (*Radovich*), the decedent had an estate plan which provided for trust income to her husband and her sister. The decedent, who had breast cancer, met with the attorney to discuss drafting a new will under which the decedent's husband would receive 100 percent of the trust income. The attorney delivered a rough draft of the will to the decedent for her review. She told the attorney she intended to talk with her sister before finalizing the provisions of the proposed new will. The decedent died several weeks later without executing a new will. Her prior will was admitted to probate. Her husband then brought this action for legal malpractice against the attorney, claiming he was dilatory and negligent in preparing and failing to obtain the decedent's due execution of the draft will.

The court distinguished *Biakanja*, *Lucas*, and *Heyer* because in those cases the will had been signed by the decedent. (*Radovich*, *supra*, 35 Cal.App.4th at p. 959.) The court noted there were "both practical and policy reasons for requiring more evidence of commitment than is furnished by a direction to prepare a will containing specified provisions. From a practical standpoint, common experience teaches that potential testators may change their minds more than once after the first meeting. Although a potential testator may also change his or her mind after a will is signed, we perceive significantly stronger support for an inference of commitment in a signature on testamentary documents than in a preliminary direction to prepare such documents for signature. From a policy standpoint, we must be sensitive to the potential for misunderstanding and the difficulties of proof inherent in the fact that disputes such as these will not arise until the decedent;the only person who can say what he or she intended;has died. Thus we must as a policy matter insist on the clearest manifestation of commitment the circumstances will permit." (*Id.* at p. 964.) The court also observed that

"imposition of liability in a case such as this could improperly compromise an attorney's primary duty of undivided loyalty to his or her client, the decedent." (*Id.* at p. 965.)

[190 Cal.App.4th 936] Under the circumstances presented, the court held the attorney owed no duty to the potential beneficiary husband. (*See also Boranian v. Clark* (2004) 123 Cal.App.4th 1012, 1019 [20 Cal.Rptr.3d 405] [extension of an attorney's duty to a third party could compromise attorney's "primary duty of undivided loyalty by creating an incentive for him to exert pressure on his client to complete her estate planning documents summarily, or by making him the arbiter of a dying client's true intent";].)

The same court that decided *Radovich* reached a different conclusion, based on the existence of an executed will, in *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304 [21 Cal.Rptr.3d 246]. In *Osornio*, the decedent was a dependent adult who had her attorney draft a will naming her care custodian, Ms. Osornio, as the executor and sole beneficiary of her estate. The attorney negligently failed to advise the decedent that her intended beneficiary would be a presumptively disqualified donee because she was a care custodian, and failed to take appropriate measures so that the testator's wishes could be carried out. The bequest failed, and Ms. Osornio sued the attorney for professional negligence. The court held that the extension of liability to a nonclient in this instance would not impose an undue burden on the legal profession. The court distinguished the situation in *Radovich*, where the nonclient was a merely a potential beneficiary under an unsigned draft will, to the case before it, where there was a clear expression of the decedent's intent that Ms. Osornio be her sole beneficiary under a signed will. (124 Cal.App.4th at p. 336.) The court found none of the ambiguity concerning the testator's donative intent as was present in *Radovich*. "The attorney's duty here was to take appropriate action to carry out the testator's wishes;that were expressed and formalized in her signed will;that her intended beneficiary, Osornio, inherit her entire estate." (*Ibid.*)

The factual distinction between *Radovich* and *Osornio* guided the decision in *Chang v. Lederman*, *supra*, 172 Cal.App.4th 67. In *Chang*, the decedent and Ms. Chang lived together for several years before marrying. The decedent, who had been diagnosed with terminal cancer, retained an attorney to prepare a revocable trust approximately six months before he married Ms. Chang. The executed trust provided for distributions of \$30,000 and some personal property to Ms. Chang and \$10,000 to another individual; Ms. Chang was to vacate the residence within 30 days of the decedent's death; and the property was to be sold or leased for fair market rent. The residue of the trust estate was left to the decedent's only child. A first amendment to the trust, executed a month later, reduced the sum to be

distributed to Ms. Chang, eliminated the distribution to the other individual, and expressly left all other provisions of the trust unchanged. During that same period, the decedent executed a will to dispose of property he owned in Israel. After his marriage to Ms. Chang, the decedent executed a second will in Israel which apparently did not provide for her in any way and did not [190 Cal.App.4th 937] expressly revoke the trust, as amended. Then, five or six months after the marriage, when decedent was seriously ill, he instructed the attorney to revise his trust to leave the entire trust estate to Ms. Chang, with the understanding that she would give the decedent's son \$250, 000 when he turned 25. The attorney refused and told the decedent that if he modified the trust, the decedent would be sued by the successor trustee. The attorney also advised that the decedent should have a psychiatric evaluation before making changes to his estate plan. The decedent died a few weeks later without making any further amendments to his trust. After the will and trust were held valid, Ms. Chang sued the attorney for professional negligence, breach of fiduciary duty, and intentional infliction of emotional distress.

The court found no duty to Ms. Chang, who was only a potential beneficiary, not an expressly named beneficiary of an express bequest. "The difficulty... is that any disappointed potential beneficiary—even a total stranger to the testator—could make factual allegations similar in most respects to those in the second amended complaint; and, without requiring an explicit manifestation of the testator's intentions, the existence of a duty—a legal question—would always turn on the resolution of disputed facts and could never be decided as a matter of law." (*Chang v. Lederman*, supra, 172 Cal.App.4th at p. 83.) The court thus concluded that it would place an undue burden on the profession to hold that estate planners owe a duty of care to unnamed potential beneficiaries. "Without a finite, objective limit on the identity of individuals to whom they owe a duty of care, the burden on lawyers preparing wills and trusts would be intolerable." (*Id.* at p. 84.)

We agree with the *Radovich* and *Chang* courts that there is a need for a clear delineation of an attorney's duty to nonclients. The essence of the claim in the case before this court is that Kalfayan failed to complete the new estate plan for Ms. Turner and have it executed on her behalf by her conservator before her death, thereby depriving Hall of his share of her estate. In the absence of an executed (and in this instance, approved) testamentary document naming Hall as a beneficiary, Hall is only a potential beneficiary. Kalfayan's duty was to the conservatorship on behalf of Ms. Turner; he did not owe Hall a duty of care with respect to the preparation of an estate plan for Ms. Turner.

This conclusion is particularly appropriate in this case, where Ms. Turner herself had not expressed a desire to have a new will prepared and had only limited

conversation with Kalfayan about the disposition of her estate. In addition, there is no certainty that the court would have approved the PSJ. We also observe that extending Kalfayan's duty to potential beneficiaries of Ms. Turner's estate would expose him to liability to her niece, whose share of [190 Cal.App.4th 938] the estate would have been reduced. This is precisely the type of unreasonable burden on an attorney that militates against expanding duty to potential beneficiaries.

As a matter of law, Hall cannot establish duty, a necessary element for his claim for professional negligence. The trial court properly granted summary judgment on this basis.

DISPOSITION

The judgment is affirmed. Respondent is to have his costs on appeal.

We concur: MANELLA, J., SUZUKAWA, J.

Notes:

[1] The substituted judgment provisions in the Probate Code (§§ 2580-2586) are designed to protect the conservatorship estate for the benefit of the conservatee, and also for the benefit of the persons who will ultimately receive it from the conservatee or his or her personal representative. (*Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 397.)

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SIMONA OSORNIO, Plaintiff and Appellant,

v.

**LAWRENCE WEINGARTEN, as Personal
Representative, etc., Defendant and Respondent.**

H027258

California Court of Appeal, Sixth District

November 22, 2004

Trial Court: Monterey County Superior Court,
Super.Ct.No. M65034, Trial Judge: Hon. Michael S.
Fields

[124 Cal.App.4th 305]

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[124 Cal.App.4th 312] COUNSEL

Attorneys for Plaintiff and Appellant: David A.
Fulton, Cartwright, Fulton & Adams

Attorneys for Defendant and Respondent: Louis H.
Castoria, Debra S. Blum, Wilson, Elser, Moskowitz,

Edelman & Dicker.

OPINION

Walsh, J.[*]

In *Lucas v. Hamm* (1961) 56 Cal.2d 583 [15 Cal.Rptr. 821] (*Lucas*), our Supreme Court rejected the traditional rule that an attorney owed no duty to nonclients. The court held that beneficiaries could sue the attorney whose negligent preparation of a will caused them to lose their testamentary rights, where the attorney's engagement was intended to benefit the nonclient, and the imposition of liability would not place an undue burden upon the legal profession. (*Id.* at p. 591.)

Our case is one of first impression involving a potential extension of *Lucas*. Simona Osornio, a nonclient, was the named executor and sole beneficiary under a will. Because she was care custodian to the testator, a dependent adult, Osornio was a presumptively disqualified donee under Probate Code section 21350, subdivision (a)(6).[1] Accurately anticipating that a probate court would decide that she could not overcome that presumption by clear and convincing proof, Osornio claimed that the bequest to her failed because of the negligence of Saul Weingarten, the attorney who drafted the will on behalf of the testator.

Though Osornio's allegations are less than clear, her theory of negligence is apparently that Weingarten owed her a duty of care as the testator's intended beneficiary, and that, at the time the will was drawn, Weingarten: (1) failed to advise the testator that her intended beneficiary, Osornio, would be presumptively disqualified unless the testator obtained a Certificate of Independent Review from another attorney, under section 21351, subdivision (b) (hereafter § 21351(b)); and (2) failed to take appropriate measures to [124 Cal.App.4th 313] ensure that the testator's wishes were carried out by referring her to counsel to obtain such a certificate. The trial court sustained Weingarten's demurrer to the complaint without leave to amend, and Osornio appeals.

We conclude that the complaint, as drafted, did not state a cause of action. We find further, however, that nonclient Osornio could have readily amended the complaint to state a cause of action for professional negligence against attorney Weingarten under *Lucas* and its progeny. Accordingly, the trial court abused its discretion by sustaining the demurrer without leave to amend, and we reverse the judgment.

FACTS

I. Complaint

The facts recited below are from the allegations made in the complaint. In reviewing the propriety of the

trial court's sustaining of the demurrer, we, of course, accept as true the factual allegations properly pleaded in the complaint. (See *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 193 [126 Cal.Rptr.2d 908]; *Cryolife, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1152 [2 Cal.Rptr.3d 396].)

Weingarten was a licensed California attorney practicing law in the County of Monterey.[2] In the early 1990's the testator, Dora Ellis, retained Weingarten to draft a will. On or about September 19, 2001, Ellis requested that Weingarten prepare a new will that would (a) revoke her prior wills and codicils, and (b) name Osornio as the executor and sole beneficiary under Ellis's new will.

The September 19, 2001 will (2001 Will) prepared by Weingarten on behalf of Ellis "failed to include a Certificate of Independent Review as required by California Probate Code Section 21350 et seq." Therefore (the complaint alleges), Weingarten failed to exercise reasonable care in performing legal services for Ellis.

Osornio was the intended sole beneficiary of Ellis, and she would have received the entire value of Ellis's estate had Weingarten exercised reasonable care, skill, and diligence in preparing the 2001 Will. Osornio alleges [124 Cal.App.4th 314] that, as a direct and proximate result of Weingarten's negligence, she was precluded from receiving the value of the estate under the 2001 Will and was thereby damaged.

II. Other Relevant Facts

There are facts other than those alleged in the complaint that both appear undisputed and are material to our consideration of this appeal. These undisputed facts are disclosed in a written decision after trial in the probate court involving the Ellis estate.[3] That decision was attached to a request for judicial notice filed by Weingarten in support of his demurrer and was properly considered in connection with the demurrer. (See Evid. Code, § 452, subd. (d); *Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1299 [243 Cal.Rptr. 390] [in ruling on demurrer, "court may take judicial notice of the official acts or records of any court in this state"].)

Peggy Williams was the beneficiary under Ellis's prior will, dated October 7, 1993 (1993 Will); the prior will contained two codicils dated June 29, 1994, and July 10, 1997, respectively. Ellis died in May 2002. Williams filed a petition to probate the 1993 Will. Osornio objected to the Williams petition and filed a separate petition to probate the 2001 Will. Williams objected to the Osornio petition on the grounds of lack of capacity and undue influence. The dispute proceeded to trial in the probate court in June 2003.

The parties to the probate proceeding stipulated that

Osornio "was a care custodian of a dependent adult, Dora Ellis, in September 2001 and that the provisions of Probate Code Section 21350[subdivision] (a)(6) applied." Similarly, Osornio admitted in her opposition to the demurrer that she was Ellis's care custodian, "thus triggering the provisions of Probate Code Section 21350[subdivision] (a)(6)." It is further apparent that, at the time Ellis consulted Weingarten in September 2001, he was aware that Osornio was Ellis's care custodian.[4] The probate court concluded after trial—in its tentative decision dated August 29, 2003[5]—that Osornio had failed to satisfy her burden of establishing by clear and convincing evidence that the transfer of [124 Cal.App.4th 315] property to Osornio in the 2001 Will was not the product of fraud, menace, duress, or undue influence, as provided in section 21351, subdivision (d) (hereafter § 21351(d)).[6]

PROCEDURAL HISTORY

Osornio filed her complaint on May 20, 2003. Weingarten filed a general and special demurrer to the complaint. Weingarten contended, inter alia, that the complaint (a) failed to state facts sufficient to constitute a cause of action, (b) was uncertain, and (c) contained allegations that were heard and decided previously by the court. Osornio opposed the demurrer. After hearing, on December 3, 2003, the trial court sustained the general demurrer without leave to amend. The court entered a judgment of dismissal nunc pro tunc as of March 1, 2004.

Osornio filed a notice of appeal from the judgment on March 12, 2004. The appeal from the judgment was filed timely (Cal. Rules of Court, rule 2(a)(1)) and is a proper subject for appellate review. (Code Civ. Proc., § 904.1, subd. (a)(1); *Castro v. State of California* (1977) 70 Cal.App.3d 156, 158 [138 Cal.Rptr. 572].)

DISCUSSION

I. Standard Of Review

A general demurrer is appropriate where the complaint "does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) There are "long-settled rules" that appellate courts follow in addressing the merits of a challenge to a complaint by demurrer: "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court abused its discretion and we

reverse; if [124 Cal.App.4th 316] not, there is no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718].)

A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. (See Code Civ. Proc., § 589; *Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1706 [42 Cal.Rptr.2d 172].) On a question of law, we apply a de novo standard of review on appeal. (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 937 [29 Cal.Rptr.2d 669].) While negligence is ordinarily a question of fact, the existence of duty is generally one of law. (*Meighan v. Shore* (1995) 34 Cal.App.4th 1025, 1033 [40 Cal.Rptr.2d 744] (*Meighan*); *Banerian v. O'Malley* (1974) 42 Cal.App.3d 604, 612-613 [116 Cal.Rptr. 919] (*Banerian*).) Thus, a demurrer to a negligence claim will properly lie only where the allegations of the complaint fail to disclose the existence of any legal duty owed by the defendant to the plaintiff. (*Banerian, supra*, at p. 613.)

II. Issues On Appeal

The single issue raised on appeal is whether the court erred in sustaining Weingarten's general demurrer without leave to amend. This order was apparently founded upon the conclusion that Weingarten as a matter of law owed no duty to Osornio, a nonclient.[7] The issue on appeal contains two subquestions: (a) whether the court properly sustained the demurrer because the complaint, as drafted, failed to state a cause of action for professional negligence; and (b) whether the court abused its discretion by refusing Osornio leave to amend—i.e., that the court correctly concluded that there was no reasonable possibility that Osornio could amend the complaint to state a viable cause of action.

We first review: sections 21350 and 21351, concerning the presumptive disqualification of certain donees (including care custodians of dependent [124 Cal.App.4th 317] adults); the elements of a legal malpractice claim; the Supreme Court's decisions in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*), and *Lucas, supra*, 56 Cal.2d 583, the latter case having extended negligence claims to persons not in privity with attorneys in limited instances; and other California authorities addressing an attorney's duty of care to nonclients. Following this review, we address whether the trial court erred in sustaining Weingarten's demurrer, and whether it abused its discretion by denying Osornio leave to amend her complaint.

III. Probate Code Sections 21350 And 21351

Section 21350, subdivision (a) (hereafter, section 21350(a)), reads in relevant part: “ Except as provided in Section 21351 [governing exceptions], no provision, or

provisions, of any instrument shall be valid to make any donative transfer to any of the following: [¶] . . . [¶] (6) A care custodian of a dependent adult who is the transferor.” [8] A “ disqualified person” under the statute “ means a person specified in subdivision (a) of Section 21350, but only in cases where Section 21351 does not apply.” (§ 21350.5.) Other presumptively disqualified donees under section 21350(a), include: the draftsman of the instrument;[9] the draftsman's relative, domestic partner, cohabitant, or employee; the draftsman's law partner or shareholder; an employee of the law partnership or corporation in which the draftsman has an interest; one having a fiduciary relationship with the donor (including a conservator or trustee), who transcribes or causes the instrument to be transcribed; such fiduciary's relative, employee, domestic partner, or cohabitant; and a relative of, domestic partner of, employee of, or a cohabitant with, a care custodian of the donor who is a dependent adult. (§ 21350(a).)

The presumption of invalidity of donative transfers to specified individuals under section 21350(a)—including transfers to care custodians of dependent adults—does not apply, inter alia, where “[t]he instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature and consequences of the intended transfer, (2) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (3) signs and delivers to the transferor an original [124 Cal.App.4th 318] certificate . . . with a copy delivered to the drafter.” (§ 21351(b).)[10] This “ Certificate of Independent Review” must state that the attorney: reviewed the instrument; counseled the client/transferor concerning the nature and consequences of the subject transfer of property to the presumptively disqualified person under section 21350; was disassociated from any interest in the transferee; and concluded that the transfer to the presumptively disqualified person was valid because it was “ not the product of fraud, menace, duress, or undue influence.” (§ 21351(b).)

Presumptively disqualified donees under section 21350(a)—even without the transferor having obtained a Certificate of Independent Review under section 21351(b)—may rebut this presumption under very limited circumstances, where “[t]he court determines, upon clear and convincing evidence, but not based solely upon the testimony of any person described in subdivision (a) of Section 21350, that the transfer was not the product of fraud, menace, duress, or undue influence.” (§ 21351(d), italics added.)[11] This “ elevated proof burden” (*Rice v. Clark, supra*, 28 Cal.4th at p. 98) requires the proposed donee to “ persuade [the trier of fact] that it is highly probable that the fact is true.” (CACI No. 201 (2004 ed.); see also former BAJI No. 2.62 (2004 ed.); *In re Asia L.* (2003) 107 Cal.App.4th 498, 510 [132 Cal.Rptr.2d 733] [“ evidence must be so clear as to leave no substantial doubt”].)[12] Furthermore, in such proceeding, if the proposed donee fails to meet this

heightened burden of proving that the transfer was not the product of fraud, menace, duress, or undue influence, he or she "shall bear all costs of the proceeding, including reasonable attorney's fees." (§ 21351(d).) These costs in many instances will be substantial. (See *Estate of Shinkle* (2002) 97 Cal.App.4th 990, 1001, fn. 2 [119 Cal.Rptr.2d 42] [care custodian/beneficiary, after being determined a disqualified donee under section 21350(a), ordered to pay over \$114,000 in costs and attorney's fees].)

The intent of section 21350 was "to prevent unscrupulous persons in fiduciary relationships from obtaining gifts from elderly persons through undue influence or other overbearing behavior. [Citation.]" (*Bank of*

[124 Cal.App.4th 319] *America v. Angel View Crippled Children's Foundation* (1999) 72 Cal.App.4th 451, 456 [85 Cal.Rptr.2d 117].) The statute arose in response to reports of significant abuse of the attorney-client relationship by an attorney in Southern California who, inter alia, "reportedly drafted wills and trusts for thousands of elderly clients, naming himself as beneficiary. [Citations.]" (*Estate of Swetmann* (2000) 85 Cal.App.4th 807, 819, fn. 9 [102 Cal.Rptr.2d 457]; see also *Rice v. Clark, supra*, 28 Cal.4th at p. 97.)[13]

As originally enacted in 1993, section 21350(a) did not include care custodians of dependent adults among the class of presumptively disqualified donees. (See former § 21350, added by Stats. 1993, ch. 293, § 8, p. 2021.) In 1997, the Legislature amended section 21350(a) to include care custodians of dependent adults as presumptively disqualified donees. (See Stats. 1997, ch. 724, § 33; see also *Conservatorship of Davidson* (2003) 113 Cal.App.4th 1035, 1050 [6 Cal.Rptr.3d 702] [1997 amendment to section 21350 "was intended to apply to gifts made 'to practical nurses or other caregivers hired to provide in-home care.' [Citation.]"].)

IV. Required Elements Of A Professional Negligence Claim

In evaluating the sufficiency of Osornio's complaint, we note preliminarily that there are four essential elements of a professional negligence claim: "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence. [Citations.]" (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849]; see also *Ishmael v. Millington* (1966) 241 Cal.App.2d 520, 523 [50 Cal.Rptr. 592].)

A legal malpractice action is thus composed of the same elements as any other negligence claim, i.e., "duty, breach of duty, proximate cause, and damage. [Citation.]" (*Chavez v. Carter* (1967) 256 Cal.App.2d

577, 579 [64 Cal.Rptr. 350], disapproved on another ground in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 190, fn. 29 [98 Cal.Rptr. 837].) While other elements of a legal malpractice claim are generally factual and thus cannot be challenged on demurrer, the existence of the attorney's duty of care owing to the plaintiff is generally a question of law that may be addressed by demurrer. (*Goodman v. Kennedy* (1976)

[124 Cal.App.4th 320] 18 Cal.3d 335, 342 [134 Cal.Rptr. 375] (*Goodman*); *Banerian, supra*, 42 Cal.App.3d 604, 612-613.)

V. The *Biakanja* And *Lucas* Decisions

We start with the undisputed proposition that, in California, "[a]n attorney's liability for professional negligence does not ordinarily extend beyond the client except in limited circumstances." (*St. Paul Title Co. v. Meier* (1986) 181 Cal.App.3d 948, 950 [226 Cal.Rptr. 538]; see also Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2004) ¶ 6:240, p. 6-38 [attorney generally has no professional obligation to nonclient].) The Supreme Court very recently reiterated that "the general rule [is] that an attorney owes a duty of care, and is thus answerable in malpractice, only to the client with whom the attorney stands in privity of contract. [Citation.]" (*Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523, 530 [15 Cal.Rptr.3d 735].) Indeed, until 1958, California followed the traditional view that a nonclient could not maintain an action against an attorney for malpractice.[14] Thus, under former California law, a named beneficiary who was damaged as a result of the negligence of the attorney who drafted the will could not recover, due to the absence of any duty owed by the attorney to the nonclient/intended beneficiary. (See *Buckley v. Gray* (1895) 110 Cal. 339 (*Buckley*).)

In *Biakanja, supra*, 49 Cal.2d 647, the Supreme Court disapproved of *Buckley's* strict privity requirement. A will failed in *Biakanja* because, although notarized, its execution was not properly witnessed. (*Biakanja, supra*, 49 Cal.2d at p. 648.) The beneficiary under the failed will sued the notary public, who—engaging in the unauthorized practice of law—negligently drafted and supervised the will's execution. (*Ibid.*) The court held that a defendant's liability to a third person not in privity in a particular case "is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm. [Citations.]" (*Id.* at p. 650.) Applying these factors, the Supreme Court concluded that the notary owed a duty of care to the beneficiary, even in

the absence of privity. (*Id.* at pp. 650-651.)

[124 Cal.App.4th 321] In *Lucas, supra*, 56 Cal.2d 583, the Supreme Court faced a similar question of duty to intended beneficiaries, but in the context of an attorney's negligence. The beneficiaries sued the attorney who drafted the will and codicils in a manner that caused the instruments to fail because they ran afoul of statutory restraints on alienation and the rule against perpetuities. (*Id.* at pp. 586-587.) After noting that it had previously rejected *Buckley's* "stringent privity test" in *Biakanja* (*Lucas, supra*, at p. 588), the court held that "intended beneficiaries of a will who lose their testamentary rights because of failure of the attorney who drew the will to properly fulfill his obligations under his contract with the testator may recover as third-party beneficiaries." (*Id.* at p. 591.)

In so concluding, the court utilized the balancing test it enunciated previously in *Biakanja* to determine whether the attorney defendant owed a duty to the beneficiaries with whom defendant was not in privity. (*Lucas, supra*, 56 Cal.2d at p. 588.)[15] The court added a factor not present in its discussion in *Biakanja*, namely, "whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession." (*Lucas, supra*, 56 Cal.2d at p. 589.)[16]

The court determined that the first factor strongly favored the plaintiffs, since "one of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs." (*Lucas, supra*, 56 Cal.2d at p. 589.) It likewise concluded that it was foreseeable that plaintiffs would be harmed if the bequest was determined to be invalid, that the harm would not occur but for defendant's negligence, and that the harm would become certain upon the testator's death. (*Ibid.*) The court also held that denying recovery to plaintiffs/intended [124 Cal.App.4th 322] beneficiaries under these circumstances would impair the policy of preventing future harm: "[I]f persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so and the policy of preventing future harm would be impaired." (*Ibid.*) Finally, it concluded that the imposition of liability under these circumstances "does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss." (*Ibid.*) [17]

VI. Decisions Subsequent To *Lucas*

In the near half-century since the Supreme Court decided *Lucas*, California courts have considered numerous variations of the attorney's potential liability to nonclients. Some instances have involved an attorney's duty of care in the estate planning context, while others

have addressed negligence claims by nonclients in other business settings. In order to address fully the parties' respective contentions herein, we first review these California decisions.

A. Estate Planning Cases

In *Heyer, supra*, 70 Cal.2d 223, the Supreme Court addressed a legal malpractice claim brought by intended beneficiaries of a will. The two daughters of the testator—who were the sole beneficiaries—claimed that the attorney negligently failed to advise the mother that omitting a provision in the will concerning her intended marriage could result in the spouse asserting a claim to a portion of her estate in the event she predeceased him, under former section 70. (*Heyer, supra*, 70 Cal.2d at pp. 225-226.) [18]

Before addressing the central question before it (i.e., commencement of the statute of limitations), the *Heyer* court reiterated its holdings in *Biakanja* and *Lucas* that permitted, as a matter of policy, intended beneficiaries to recover in the absence of privity with the defendant: "When an attorney undertakes to fulfill the testamentary instructions of his client, he [124 Cal.App.4th 323] realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries. The attorney's actions and omissions will affect the success of the client's [testamentary] scheme; and thus the possibility of thwarting the testator's wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary. In some ways, the beneficiary's interests loom greater than those of the client. After the latter's death, a failure in his testamentary scheme works no practical effect except to deprive his intended beneficiaries of the intended bequests . . . only the beneficiaries suffer the real loss. We recognized in *Lucas* that unless the beneficiary could recover against the attorney in such a case, no one could do so and the social policy of preventing future harm would be frustrated." (*Heyer, supra*, 70 Cal.2d at p. 228.) [19] Applying *Lucas*, the court concluded that "[a] reasonably prudent attorney should appreciate the consequences of a post-testamentary marriage, advise the testator of such consequences, and use good judgment to avoid them if the testator so desires." (*Heyer, supra*, 70 Cal.2d at p. 229.)

Similarly, an attorney was held to owe a duty of care to intended beneficiaries to properly advise the testator of the law governing the property he intended to dispose of through his will. (See *Garcia, supra*, 129 Cal.App.3d 24.) The testator told his attorney that certain property in which he had a community property interest, as a matter of convenience, was held by his wife and him in joint tenancy. (*Id.* at p. 27.) After testator's death, his widow "terminated all joint tenancies in her favor, thus depriving the estate, and ultimately [plaintiffs], of Testator's community interest in this property." (*Id.* at p. 28.) Plaintiffs alleged that the attorney was negligent,

inter alia, in failing to advise the testator of legal presumptions governing title to his property and in failing to advise him of potential estate planning measures to ensure that his property would receive proper recognition upon his death. (*Id.* at p. 29.) While the appellate court focused mainly on a collateral estoppel issue,[20] it concluded that the plaintiffs alleged a viable theory of recovery against the testator's attorney. (*Id.* at p. 32.)

An estate planning attorney's duty of care to nonclients, under *Lucas* and *Heyer*, was extended to trust beneficiaries in *Bucquet v. Livingston* (1976) 57 Cal.App.3d 914 [129 Cal.Rptr. 514] (*Bucquet*). In that case, beneficiaries under an inter vivos trust claimed that the attorney for the trustors (husband and wife) negligently drafted the trust; he allegedly failed to advise the trustors of potential tax consequences resulting from including a general [124 Cal.App.4th 324] power of appointment in the trust. (*Id.* at p. 917.) The beneficiaries claimed that this negligence resulted in the wife's estate incurring unnecessary tax liability, which, in turn, reduced the share of the trust ultimately received by the beneficiaries. (*Id.* at p. 920.) The court held that the principles of *Lucas* and *Heyer* "are equally applicable to inter vivos trusts, like the instrument here in issue, as there is no rational basis for any distinction." (*Bucquet, supra*, at p. 922.)[21] It concluded that the complaint stated a cause of action, because the creation of the trust "was directly intended to affect the beneficiaries and the avoidance of federal estate tax and state inheritance tax was directly related to the amounts that [husband] intended the beneficiaries to receive after [wife's] death." (*Id.* at p. 923.)

Several cases have rejected unwarranted extensions of *Lucas/Heyer* in other estate planning contexts. In *Ventura County Humane Society v. Holloway* (1974) 40 Cal.App.3d 897 [115 Cal.Rptr. 464] (*Ventura*), the court rejected a malpractice claim by a class of potential beneficiaries (charities). They alleged that, as a result of the attorney's negligence, they were unable to take under the testator's will because the bequest—although containing the name selected by the testator—did not have a properly named beneficiary. (*Id.* at p. 901.)[22] The court refused to extend *Lucas*, holding that "no good reason exists why the attorney should be held accountable for using certain words suggested or selected by the testator which later prove to be ambiguous. . . . The duty thus created would amount to a requirement to draft litigation-proof legal documents. This unlimited liability . . . would result in a speculative and almost intolerable burden on the legal profession indeed." (*Ventura, supra*, at p. 905.)

Likewise, we rejected the malpractice claim of a potential beneficiary identified in an unsigned will. (See *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946 [41 Cal.Rptr.2d 573] (*Radovich*)). There, the attorney prepared a draft will—which made specific bequests to plaintiff and named him as an income beneficiary under a

charitable remainder trust—and delivered it to the testator. (*Id.* at p. 952.) Approximately two months after the attorney delivered the draft will, the testator died without having executed it. (*Ibid.*) Plaintiff asserted, inter alia, that the executor's counsel was negligent in failing to obtain the testator's signature on the will. (*Id.* at p. 953.)

We refused to expand the attorney's duty to nonclients under *Lucas/Heyer* to a potential beneficiary under an unsigned draft will. (*Radovich, supra*,

[124 Cal.App.4th 325] 35 Cal.App.4th at pp. 965-966.)[23] In so concluding, we noted that most of the *Biakanja* factors did not suggest the imposition of duty (*Radovich, supra*, 35 Cal.App.4th at pp. 963-965), and "that imposition of liability in a case such as this could improperly compromise an attorney's primary duty of undivided loyalty to his or her client, the decedent." (*Id.* at p. 965; see also *Goldberg v. Frye* (1990) 217 Cal.App.3d 1258 [266 Cal.Rptr. 483] [rejecting legatees' negligence claim against attorney for administrator, holding that principal purpose of attorney's engagement was to counsel fiduciary and not to benefit legatees, and attorney owed duty to administrator only].)

In a recent case, the First Appellate District, Division Two, similarly refused to extend an attorney's duty to a nonclient in the estate planning context. (See *Moore, supra*, 109 Cal.App.4th 1287.) In *Moore*, the testator's children alleged that the attorney who had drafted amendments to their father's estate plan that reduced the children's share was negligent in failing to ascertain his client's testamentary capacity. (*Id.* at p. 1290.) The children alleged that as a result of the attorney's failure to determine their father's testamentary capacity and to document that evaluation, they received less through their settlement of ensuing estate litigation than they would have received under their father's estate plan prior to execution of the questioned amendments. (*Ibid.*)

After extensive review of the relevant authorities and discussion of the *Biakanja/Lucas* factors, the court held that the testator's attorney owed no such duty to the beneficiaries. (*Moore, supra*, 109 Cal.App.4th at p. 1307.) The court concluded: "It may be that prudent counsel should refrain from drafting a will for a client the attorney reasonably believes lacks testamentary capacity or should take steps to preserve evidence regarding the client's capacity in a borderline case. However, that is a far cry from imposing malpractice liability to nonclient potential beneficiaries for the attorney's alleged inadequate investigation of evaluation of capacity or the failure to sufficiently document that investigation." (*Ibid.*)

Weingarten relies heavily on *Radovich* and *Moore* in support of his assertion that he owed no duty to Osornio as a matter of law. As we discuss in detail, (see part VIII C, *post*), neither case supports Weingarten's position. In

Radovich, plaintiff was merely a *potential* beneficiary under an *unsigned* draft will. We rejected his claim against the attorney who drafted the [124 Cal.App.4th 326] unsigned will, based in large part upon our concern that imposing liability would undermine the attorney's duty of loyalty to the client, (*Radovich, supra*, 35 Cal.App.4th at p. 965), a circumstance not presented here. Likewise, the appellate court in *Moore* concluded that requiring an attorney to ascertain and document his or her client's testamentary capacity "would place an intolerable burden on attorneys [because n]ot only would the attorney be subject to potentially conflicting duties to the client and to potential beneficiaries, but counsel also could be subject to conflicting duties to different sets of beneficiaries." (*Moore, supra*, 109 Cal.App.4th at p. 1299.) As we discuss, *post*, no such problem of conflicting loyalties arises here; imposing a duty upon Weingarten under the circumstances presented promotes the objectives of the client to transfer the client's estate to the nonclient/beneficiary.

B. Malpractice Cases by Nonclients in Other Settings

Several California decisions have followed *Lucas* in finding a duty of care owed by the attorney to a nonclient outside of the estate planning context. One appellate court extended *Lucas* to a nonclient who made a loan to the attorney's client. (See *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104 [128 Cal.Rptr. 901].) In *Roberts*, the plaintiff/lender alleged that he relied upon the attorney's letter opining that the client was a duly organized general partnership. (*Id.* at p. 107.) The appellate court held that the attorney owed a duty to plaintiff, and thus concluded that plaintiff stated a cause of action for negligent misrepresentation: "[T]he issuance of a legal opinion intended to secure benefit for the client . . . must be issued with due care, or the attorneys who do not act carefully will have breached a duty owed to those they attempted or expected to influence on behalf of their clients." (*Id.* at p. 111; see also *Courtney v. Waring* (1987) 191 Cal.App.3d 1434, 1443-1444 [237 Cal.Rptr. 233] [franchisor's attorneys who prepared misleading prospectus held liable to franchisees].)

In *Meighan, supra*, 34 Cal.App.4th 1025, the attorney failed to advise the client's wife of the existence of a loss of consortium claim arising out of the client's injuries, and the couple did not learn of the existence of such claim until after the statute of limitations had run. (*Id.* at pp. 1029-1030.) The court, applying the six-part analysis under *Biakanja* and *Lucas*, concluded that the attorney owed the couple—client and nonclient alike—a duty to inform them "of the existence of their rights under the consortium tort." (*Meighan, supra*, 34 Cal.App.4th at p. 1044; see also *Donald v. Garry* (1971) 19 Cal.App.3d 769, 772 [97 Cal.Rptr. 191] [attorney for collection agent who brought suit on obligation owed duty to creditor/assignor of claim to prosecute action

diligently].)

Other cases, however, have rejected attorney negligence claims brought by nonclients. For instance, in *Goodman, supra*, 18 Cal.3d 335, the plaintiffs [124 Cal.App.4th 327] alleged that they were damaged as a result of negligent advice given by the attorney to his clients concerning the issuance of stock. Plaintiffs ultimately purchased the stock from the clients; the sale was alleged to have violated certain securities laws, the result of which was that the stock purchased by plaintiffs was ultimately rendered valueless. (*Id.* at pp. 341-342.)

The Supreme Court rejected the negligence claim, concluding that the attorney had no relationship with the plaintiffs from which a duty of care arose. (*Goodman, supra*, 18 Cal.3d at pp. 343-344.) It noted that the advice was neither communicated to plaintiffs, nor was it given to enable the clients to satisfy any obligations to the plaintiffs. (*Id.* at p. 343.) The complaint did not allege "that plaintiffs had any relationship to defendant's clients or to the corporation as stockholders or otherwise when the advice was given." (*Id.* at p. 344.) The court also reasoned that plaintiffs were not parties upon whom the clients intended to confer a benefit when defendant provided the advice; they were only "parties with whom defendant's clients might negotiate a bargain at arm's length." (*Ibid.*) Moreover, the court concluded that a finding of duty under the circumstances presented would impose "an undue burden on the profession" [citation] and a diminution in the quality of legal services received by the client. [Citation.]" (*Ibid.*, fn. omitted.)[24]

[124 Cal.App.4th 328] It is against the foregoing backdrop of California decisions concerning questions of the attorney's duty to nonclients that we now address the question on appeal. We first consider whether the complaint, on its face, stated a cause of action for professional negligence. We then discuss whether the court properly denied Osornio leave to amend her complaint.

VII. Sufficiency Of The Osornio Complaint

As discussed above, the four elements of a legal malpractice claim are: "duty, breach of duty, proximate cause, and damage." (*Chavez v. Carter, supra*, 256 Cal.App.2d 577, 579.) It is not disputed that Osornio properly pleaded the latter three elements of negligence. The sole question—viewing only the four corners of the pleading—is whether the complaint alleged that Weingarten owed a legal duty to Osornio.

The complaint alleged that the 2001 Will "failed to include a Certificate of Independent Review as required by California Probate Code Section 21350 et seq." Osornio claimed in the next sentence of the complaint that, "[a]s such, Defendants failed to exercise reasonable care and skill" in representing Ellis. The complaint alleged that Osornio "was the intended sole beneficiary

of the Estate of Dora Ellis,” and that Osornio would have inherited the entirety of the Ellis estate, but for Weingarten’s negligence in preparing the 2001 Will.

We may consider in connection with Weingarten’s demurrer “any matter that is judicially noticeable under Evidence Code section 451 or 452. [Citation.]” (*Cryolife, Inc. v. Superior Court*, *supra*, 110 Cal.App.4th 1145, 1152, citing Code Civ. Proc., § 430.30, subd. (a).) California statutes are, of course, matters of which judicial notice *shall* be taken. (Evid. Code, § 451, subd. (a).) Thus, a complaint, while facially adequate, may fail to state a cause of action by referring to matters upon which judicial notice may be taken. (*Childs v. State of California* (1983) 144 Cal.App.3d 155, 159 [192 Cal.Rptr. 526].)

We readily conclude that the complaint failed to allege that Weingarten owed a duty of care to nonclient Osornio. Even assuming, arguendo, that the bare bones allegations of duty are facially sufficient, any claim of duty is directly refuted by sections 21350 and 21351, of which we take judicial notice. (See Evid. Code, § 451, subd. (a).) As we have seen, a Certificate of Independent Review is a document that is signed by independent counsel representing the transferor, who then “delivers to the transferor [the] original certificate . . . with a copy delivered to the drafter.” (§ 21351(b).) Contrary to the allegations of Osornio’s complaint, the certificate is not “included” in the testamentary instrument. Similarly, contrary to the implication in Osornio’s pleading, the draftsman of the instrument is not the person who *supplies* the certificate as part of his or her duties to the transferor.

[124 Cal.App.4th 329] We therefore conclude that the trial court properly held that Osornio’s complaint was subject to demurrer because of the failure to allege a legal duty on the part of Weingarten.

VIII. *Whether Osornio Should Have Been Granted Leave To Amend*

A. *Allegations of Proposed Amended Complaint*

In determining whether the court should have granted leave to amend, we disregard Osornio’s inartful pleading and examine whether there was a reasonable possibility that she could have amended her complaint to state a claim for legal malpractice. (See *Blank v. Kirwan*, *supra*, 39 Cal.3d 311, 318; *Okun v. Superior Court* (1981) 29 Cal.3d 442, 460 [175 Cal.Rptr. 157].) This requires us to first enunciate—as it appears from the opposition to demurrer and appellate briefs—Osornio’s *unpleaded* theory of negligence.

Irrrespective of the wording of the complaint, it is readily apparent that Osornio *could have alleged* that Weingarten breached a duty of care owed to her: Weingarten negligently failed to advise Ellis that the intended beneficiary under her 2001 Will, Osornio,

would be presumptively disqualified because of her relationship as Ellis’s care custodian.[25] Under this theory, Weingarten was negligent not only by failing to advise Ellis of the consequences of section 21350(a); he was also negligent in failing to address Osornio’s presumptive disqualification by making arrangements to refer Ellis to independent counsel to advise her and to provide a Certificate of Independent Review required by section 21351(b).[26]

Osornio could have alleged that, as a proximate result of this negligence, she—as third party beneficiary to Ellis’s engagement of Weingarten to draft the 2001 Will—was damaged. The damage was Osornio’s failure to inherit under the 2001 Will. Osornio could have alleged further that this failure to inherit occurred because: (a) there was no Certificate of Independent Review concerning the proposed donative transfer to Osornio under the 2001 Will; (b) said certificate would have been obtained but for Weingarten’s negligence in failing to advise Ellis and in failing to refer her to independent counsel; (c) absent this certificate, Osornio was required to prove by clear and convincing [124 Cal.App.4th 330] evidence (disregarding her own testimony) that the transfer of the estate to her under the 2001 Will was “*not* the product of fraud, menace, duress, or undue influence” (§ 21351(d), italics added); and (d) she was unable to meet this high burden of overcoming the presumption that she was a disqualified person under section 21350(a).

Having framed the potential amended complaint in this fashion, we must now address whether this proposed pleading sufficiently alleges a legal duty owed by Weingarten to the nonclient, Osornio. If we answer this question in the negative, we must affirm the trial court. If, however, we answer the question in the affirmative, we must necessarily find that the court abused its discretion by sustaining Weingarten’s demurrer without granting Osornio leave to amend.

B. *Balancing of Six Biakanjal/Lucas Factors*

Evaluating the existence of an attorney’s duty to a nonclient as “a matter of policy” (*Lucas, supra*, 56 Cal.2d 583, 588), we must balance the six *Biakanjal/Lucas* factors. To reiterate, these factors are: “ [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [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” (*Lucas, supra*, at p. 588), and [6] “whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession.” (*Id.* at p. 589.)[27]

1. *Transaction intended to affect plaintiff*

As we have seen from our discussion, *ante*, “[i]n

the cases finding duties owed to nonclients, the nonclients were the intended beneficiaries of the attorney's work or were relying on that work or were to be influenced by it (and the attorney knew or should have known this). [Citation.]” (*Assurance Co. of America v. Haven* (1995) 32 Cal.App.4th 78, 91 [38 Cal.Rptr.2d 25].) In balancing the factors to resolve the question of duty, “[t]he predominant inquiry . . . is whether the principal purpose of the attorney's retention [was] to provide legal services for the benefit of the plaintiff.” (*Goldberg v. Frye*, *supra*, 217 Cal.App.3d 1258, 1268; see also *Meighan*, *supra*, 34 Cal.App.4th 1025, 1041

[124 Cal.App.4th 331] [“ presence or absence of a client's intent that the plaintiff benefit from or rely upon the attorney's services is particularly significant in the determination of duty”]; 1 Mallen & Smith, *Legal Malpractice*, *supra*, § 7.8, pp. 701-702 [“ predominant inquiry” is whether principal purpose of client's retention of attorney was to benefit third party].)

Unquestionably, this factor supports Osornio. Here, there is no doubt that “the 'end and aim' of the transaction [i.e., the drafting of the 2001 Will] was to provide for the passing” of Ellis's estate to Osornio. (*Biakanja*, *supra*, 49 Cal.2d at p. 650.) The engagement of Weingarten by Ellis was clearly intended to benefit Osornio. In this respect, the Supreme Court's analyses in *Biakanja*, *Lucas*, and *Heyer* directly apply.

2. Foreseeability of harm to plaintiff

We have no trouble concluding that this factor similarly supports Osornio. It was clearly foreseeable at the time Weingarten drafted the 2001 Will that, if he failed to exercise due care to effectuate the testamentary transfer that Ellis intended upon her death, Osornio would be damaged. Again, the circumstances the Supreme Court addressed in *Biakanja*, *Lucas*, and *Heyer* are indistinguishable from this case.

In addition, the 2001 Will was a revocation of Ellis's prior 1993 Will, under which another person, Williams, was beneficiary. This relevant fact increased the foreseeability of harm to Osornio in the event that there was no Certificate of Independent Review of the 2001 Will. It concomitantly decreased the likelihood that Osornio would be able to meet her heavy burden (under § 21351(d)) of proving by clear and convincing evidence that the bequest was not the product of fraud, menace, duress, or undue influence.

3. Degree of certainty of plaintiff's injury

It is clear that Osornio sustained injury. Although Ellis intended under the 2001 Will that Osornio receive the entire estate, she will receive nothing if she is unable to rebut her presumptive disability under section 21350(a). Osornio's efforts to rebut the presumption have been unsuccessful. (See tentative decision *In re the Estate of Dora J. Ellis*, Monterey County Super. Ct. case nos.

MP 16152, MP16195, Aug. 29, 2003.) Assuming these efforts are ultimately unsuccessful, Osornio will sustain the definite injury of being deprived of the estate she would have received, but for her disqualification.

4. Closeness between defendant's conduct and plaintiff's injury

We acknowledge that Weingarten's conduct as might be alleged in a proposed amended complaint does not have the same degree of closeness to [124 Cal.App.4th 332] Osornio's injury found in many of the authorities, *ante*, finding a duty owed by the attorney to a nonclient. This is admittedly not a case—such as *Lucas*, *supra*, 56 Cal.2d 583, or *Heyer*, *supra*, 70 Cal.2d 223—where there are no possible intervening factors that might break the causal connection between the attorney's conduct and the nonclient's damage. Here, the facts may ultimately disclose that it would have been unlikely for a variety of reasons that Ellis would have obtained a Certificate of Independent Review, even had Weingarten advised her of the importance of seeking counsel to obtain it.[28] Under at least one scenario, however, Osornio may be able to establish that, but for Weingarten's failure to advise Ellis and refer her to independent counsel to address Osornio's presumptive disqualification under section 21350(a), Osornio would not have been damaged.

As is evident, the closeness of Weingarten's conduct to the injury here is one resolvable only after the presentation of significant evidence. It suffices to say that we conclude here that the absence of an extreme closeness between conduct and injury, by itself, should not trump a finding of an attorney's duty to a nonclient in a case that otherwise—applying the remaining five factors—warrants it.

5. Policy of preventing future harm

The case before us is similar to other cases in which courts have imposed a duty of care upon attorneys where beneficiaries are deprived of intended transfers of property as a result of failed wills or trusts. (See *Heyer*, *supra*, 70 Cal.2d 223; *Lucas*, *supra*, 56 Cal.2d 583; *Bucquet*, *supra*, 57 Cal.App.3d 914.) Here, unlike the circumstances in *Ventura*, *supra*, 40 Cal.App.3d 897—where the bequest failed due to the testator's inaccurate description of the beneficiary—the transfer of the estate failed through no fault of Ellis. If testamentary beneficiaries who are presumptively disqualified under section 21350(a)—such as Osornio—are deprived of the right to bring suit against the attorney responsible for the failure of the intended bequest, no one would be able to bring such action. The policy of preventing harm would thus be impaired. (See *Lucas*, *supra*, 56 Cal.2d at p. 589.)

We conclude that this fifth factor supports Osornio's claim. The imposition of duty under the circumstances before us would thus promote public policy: it would encourage the competent practice of law by counsel

representing [124 Cal.App.4th 333] testators, trustors, and other clients making donative transfers to persons presumptively disqualified under section 21350(a).

6. *Extent of burden on profession*

Consistent with *Lucas*, an important factor we must consider in evaluating Weingarten's potential duty to Osornio under the facts before us is whether the extension of liability here would "impose an undue burden on the profession." (*Lucas, supra*, 56 Cal.2d at p. 589.) We conclude that the extension of liability here will not impose such an undue burden. In making this determination, we are mindful that it is the general rule that attorneys will not be held liable to nonclients for their negligence, and that "[e]xceptions have been recognized only rarely, and then only when the specific facts of the case showed that the beneficiaries who sought standing to sue the fiduciary's attorney were intended, third party beneficiaries of the contract to provide legal services. [Citations.]" (*Borissoff v. Taylor & Faust, supra*, 33 Cal.4th 523, 530.)

An attorney "is expected . . . to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques. [Citations.] . . . [E]ven with respect to an unsettled area of the law, we believe an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem." (*Smith v. Lewis* (1975) 13 Cal.3d 349, 358-359 [118 Cal.Rptr. 621], disapproved on another ground in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851, fn. 14 [126 Cal.Rptr. 633].) Thus, the estate planning attorney owes a "duty to act with due care as to the interests of the intended beneficiary" (*Heyer, supra*, 70 Cal.2d 223, 229), which duty arises out of the agreement to provide legal services to the testator.

As one practice guide has explained: "An attorney who undertakes to assist a client in transferring property is necessarily assuming a duty to assist the client in making the transfer in a manner that does not unduly expose the transfer to attack." (1 California Estate Planning (Cont.Ed.Bar 2004) Property Transfer Obstacles, § 3.8, p. 106.) For instance, the Supreme Court in *Heyer* held that "[a] reasonably prudent attorney should appreciate the consequences of post-testamentary marriage, advise the testator of such consequences, and use good judgment to avoid them if the testator so desires." (*Heyer, supra*, 70 Cal.2d at p. 229.) Similarly, in *Bucquet*, the court held that the attorney responsible for drafting inter vivos trusts owed a duty [124 Cal.App.4th 334] to the trust beneficiaries to take appropriate steps known to competent attorneys to avoid federal estate tax and state inheritance tax, where such tax

avoidance would directly impact the amounts the beneficiaries would receive after the trustors' deaths. (*Bucquet, supra*, 57 Cal.App.3d at pp. 922-923; see also *Garcia, supra*, 129 Cal.App.3d 24 [attorney owed duty to intended beneficiaries to explain to testator statutory presumptions governing title to property and measures that might be taken to assure that property's true character was recognized upon testator's death].)

The existence of statutory limitations on donative transfers to certain classes of people is a matter known to competent estate planning practitioners. One practice guide devotes an entire chapter to a discussion of donees who are presumptively disqualified under section 21350(a). (See 1 California Trust and Probate Litigation (Cont.Ed.Bar 2004) Statutorily Disqualified Donees and Trustees, § 6A.1- 6A.40, pp. 145-175.) Other guides for California estate planning practitioners discuss donees who are presumptively disqualified under section 21350(a). (See, e.g., 1 California Will Drafting (Cont.Ed.Bar 2002) Professional Responsibility § 1.35, pp. 28-30; 1 California Estate Planning, *supra*, Property Transfer Obstacles, § 3.8, p. 106; 2 Ross, Cal. Practice Guide: Probate (The Rutter Group 2001) ¶¶ 16:517.15 to 16:517.28, pp. 16-149 to 16-153.) Indeed, the Legislature deemed the subject of such importance that, at the time it enacted section 21350 in 1993, the assembly bill included a separate statute under the Business and Professions Code, making an attorney's violation of section 21350 "grounds for discipline, if the attorney knew or should have known of the facts leading to the violation." (Bus. & Prof. Code, § 6103.6.)

An attorney drafting instruments on behalf of the transferor-client—the dispositive provisions of which include a proposed transfer to a presumptively disqualified person under section 21350(a)—must "assist the client in making the transfer in a manner that does not unduly expose the transfer to attack." (1 California Estate Planning, *supra*, § 3.8, p. 106.) We therefore hold that the attorney owes a duty of care: (1) to advise the client that, absent steps taken under section 21351(b), the subject transfer to the proposed transferee, if challenged, will have a significant likelihood of failing because of the proposed transferee's presumptive disqualification under section 21350(a); and (2) to recommend that the client seek independent counsel in an effort to obtain a Certificate of Independent Review provided under section 21351(b). Consistent with the authorities discussed, *ante*—including *Lucas*, *Heyer*, *Garcia*, and *Bucquet, supra*—this duty of care is owed to both the transferor-client and to the prospective transferee. In so holding, we conclude that this area of the law is *not* one—such as the *Lucas* court found to be the case with restraints on alienation and the rule against perpetuities—that is "a question of law on which reasonable doubt may be entertained by well-informed lawyers. [Citations.]" (*Lucas, supra*, 56 Cal.2d 583, 591.)

[124 Cal.App.4th 335] Further—as a matter related to the question of undue burden upon the profession—we find that the imposition of liability here would not result in the attorney becoming unduly preoccupied with the possibility of negligence claims from third parties who might have dealings with his or her clients. (See *Goodman, supra*, 18 Cal.3d 335, 344.) Under the facts presented here, at the time Ellis engaged Weingarten, he clearly knew of his client's desire that her care custodian, Osornio, be her sole beneficiary under the 2001 Will. This case does not present a situation where the attorney would be faced with conflicting loyalties in representing the client. (See, e.g., *St. Paul Title Co. v. Meier, supra*, 181 Cal.App.3d 948, 952 [attorney for purchaser owed no duty to incidental third party, escrow agent, because, inter alia, attorney's duty of loyalty to client should not be divided].) Thus, imposing liability here does not burden the attorney with concerns that “ ‘would prevent him from devoting his entire energies to his client's interests.’ [Citation.]” (*Goodman, supra*, at p. 344.) To the contrary, imposing a duty upon attorneys preparing instruments containing donative transfers to presumptively disqualified persons under section 21350(a) would promote public policy: it would encourage attorneys to devote their best professional efforts on behalf of their clients to ensure that transfers of property to particular donees are free from avoidable challenge.

Moreover, our holding does not suggest that an attorney must “ draft litigation-proof legal documents.” (*Ventura, supra*, 40 Cal.App.3d 897, 905.) We do not imply from our ruling here that a transferor's attorney guarantees the success of the client's intended transfer. (See *Lucas, supra*, 56 Cal.2d 583, 591 [absent express agreement, attorney is not “ insurer of the soundness of his opinions or of the validity of an instrument that he is engaged to draft”].) Thus, there may be cases (including, possibly, the one before us) in which the attorney is ultimately held not liable for the failed transfer, despite the attorney's failure to advise the client concerning the potential impact of section 21350(a). For instance, the attorney might avoid liability if the intended beneficiary is unable to establish that the attorney's negligence was the cause of the failed transfer (e.g., because it was unlikely that the client could have obtained a Certificate of Independent Review).

We thus conclude that imposition of duty upon an attorney toward third parties here “ does not place an undue burden on the profession, particularly when taking into consideration that a contrary conclusion would cause an innocent beneficiary to bear the loss.” (*Lucas, supra*, 56 Cal.2d at p. 589.)

C. *The Radovich and Moore decisions*

In arguing against a finding of duty under the narrow circumstances presented here, Weingarten relies

primarily upon our decision in *Radovich*,

[124 Cal.App.4th 336]*supra*, 35 Cal.App.4th 946, and on *Moore, supra*, 109 Cal.App.4th 1287. Neither case supports Weingarten's position in support of affirmance of the judgment.

In *Radovich*—a case factually distinguishable—we refused to extend an attorney's duty to a nonclient who was a mere *potential* beneficiary under an *unsigned* draft will. (*Radovich, supra*, 35 Cal.App.4th at pp. 965-966.) In that instance, there was no plain expression of the testator's intention to benefit the plaintiff: “ Although a potential testator may also change his or her mind *after* a will is signed, we perceive significantly stronger support for an inference of commitment in a signature on testamentary documents than in a preliminary direction to prepare such documents for signature.” (*Id.* at p. 964.) In contrast, here we have a clear expression of Ellis's intention that Osornio be her sole beneficiary under the signed 2001 Will.

Likewise, in *Radovich*, we expressed concern that the imposition of liability by an estate planning attorney to *potential* beneficiaries under *unsigned* estate planning documents “ could improperly compromise an attorney's primary duty of undivided loyalty to his or her client.” (*Radovich, supra*, 35 Cal.App.4th at p. 965.) Here, there is none of the ambiguity concerning the testator's donative intent as was presented in *Radovich*. Imposing liability in this instance would not compromise the attorney's duty of undivided loyalty to the testator. The attorney's duty here was to take appropriate action to carry out the testator's wishes—that were *expressed and formalized* in her signed will—that her intended beneficiary, Osornio, inherit her entire estate.

Moore, supra, also involved circumstances entirely distinct from those presented here. As noted, *ante*, the question in *Moore* was whether an attorney owed “ a duty to beneficiaries under a will to evaluate and ascertain the testamentary capacity of a client seeking to amend the will or to make a new will and . . . to preserve evidence of that evaluation.” (*Moore, supra*, 109 Cal.App.4th at p. 1290.) *Moore*, in essence, involved a challenge by beneficiaries to the last formalized expression of the client's testamentary intentions, and a claim of malpractice against the attorney for failing to investigate and document his own client's testamentary capacity. (*Ibid.*) Here, however, Osornio makes no such claim. Instead, she asserts that the 2001 Will *did* contain an accurate expression of Ellis's testamentary intentions, but the proposed transfer failed due to Weingarten's negligence in his representation of Ellis.

The *Moore* court rejected the beneficiaries' contention that the attorney owed them a duty to evaluate and document his client's testamentary intent, concluding that “ [f]irst and foremost, we believe the duty of loyalty of the attorney to the client may be compromised by

imposing a duty to beneficiaries in these circumstances.” (*Moore, supra*, 109 Cal.App.4th at p. 1298.) It [124 Cal.App.4th 337] reasoned that, unlike cases such as *Biakanja, Lucas*, or *Heyer*—where there was no potential for a conflict between the attorney’s duty to the client and any duty owing to the beneficiaries—there would be a clear conflict in imposing a duty where the intent of the testator was later challenged by the beneficiaries. (*Id.* at p. 1299.)[29] Accordingly, the court held that imposing such liability “ would place an intolerable burden upon attorneys.” (*Ibid.*)

Here, as we have discussed, *ante*, the imposition of liability upon attorneys to advise their transferor-clients concerning the potential disqualifying effects of transfers to persons identified in section 21350(a) does not impose an undue burden on the legal profession. Further, such a finding of duty—unlike the circumstances in either *Moore* or *Radovich*—will not compromise the attorney’s duty of undivided loyalty to the client-transferor. Moreover, unlike the duty theory rejected in *Moore*, our holding does not require the attorney to evaluate or document the capacity of his or her transferor-client. Instead, it imposes a duty upon the attorney to advise the client of section 21350(a)’s effect of potentially disqualifying the proposed donee, and to assist the client in attempting to eliminate those consequences to effectuate the client’s donative intentions.

The *Moore* court cited section 51 of the Restatement Third of Law Governing Lawyers as a basis for its rejection of attorney liability. (*Moore, supra*, 109 Cal.App.4th at pp. 1301-1302.) The Restatement supports our conclusion in this case. It provides in part: “[A] lawyer owes a duty to use care . . . [¶] . . . [¶] (3) to a nonclient when and to the extent that: [¶] (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer’s services benefit the nonclient; [¶] (b) such a duty would not significantly impair the lawyer’s performance of obligations to the client; and [¶] (c) the absence of such a duty would make enforcement of those obligations to the client unlikely.” (Rest.3d Law Governing Lawyers, § 51.) Plainly, each of these factors is satisfied here.

Furthermore, the comment explaining subsection (3) of section 51 of the Restatement—a comment which was also quoted by the *Moore* court

[124 Cal.App.4th 338] (*Moore, supra*, 109 Cal.App.4th at pp. 1301-1302)—similarly supports our holding: “ When a lawyer knows . . . that a client intends a lawyer’s services to benefit a third person who is not a client, allowing the nonclient to recover from the lawyer for negligence in performing those services may promote the lawyer’s loyal and effective pursuit of the client’s objectives. The nonclient, moreover, may be the only person likely to enforce the lawyer’s duty to the client, for example because the client has died. [¶] A nonclient’s claim under Subsection (3) is recognized only when

doing so will both implement the client’s intent and serve to fulfill the lawyer’s obligations to the client without impairing performance of those obligations in the circumstances of the representation.” (Rest.3d Law Governing Lawyers, § 51, com. f, p. 361.) Clearly, Osornio was the “ third person” that Ellis intended to benefit through the services Weingarten performed. It is equally clear that finding the existence of a duty owed by Weingarten to nonclient Osornio under the circumstances presented here will promote the attorney’s “ effective pursuit of the client’s objectives.” (*Ibid.*) Moreover, were we to conclude otherwise here, no one would be left to enforce the testator’s right to be effectively represented.

We thus disagree with Weingarten that “ *Moore* is on all fours” with the case before us. We conclude that neither *Moore* nor our decision in *Radovich* is controlling here.

D. Conclusion

We have balanced the factors that must be considered in evaluating the question of an attorney’s potential liability to third parties. As a matter of public policy, we must conclude that Weingarten owed a duty of care to Osornio under the facts as may be alleged in an amended complaint. Because Osornio could have amended her pleading to state a cause of action for professional negligence, the trial court abused its discretion by failing to grant Osornio leave to amend when it sustained the demurrer.

[124 Cal.App.4th 339] DISPOSITION

The judgment is reversed and, on remand, the trial court is directed to grant Osornio leave to file an amended complaint.

WE CONCUR: Premo, Acting P.J.,
Bamattre-Manoukian, J.

Notes:

[*] Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[1] All statutory references are to the Probate Code unless otherwise indicated.

[2] In the briefing on appeal, we were advised that Weingarten passed away on February 18, 2004, shortly before judgment was entered below. Accordingly, we entered an order in this appeal on September 14, 2004, substituting, as defendant and respondent, Lawrence A. Weingarten as personal representative of the estate of Saul Weingarten. This substitution of parties notwithstanding, for convenience, we refer to defendant and respondent as “ Weingarten” throughout this

opinion.

[3] *In re the Estate of Dora J. Ellis*, Monterey County Superior Court, case numbers MP16152 and MP16195.

[4] In the probate proceeding, both Weingarten and his paralegal, Anne Fingold, testified that Osornio accompanied Ellis to Weingarten's office on September 19, 2001. Fingold testified further that "it appeared to her that Ms. Ellis was dependent on her caretaker, Ms. Osornio."

[5] The tentative decision directed that counsel for Williams prepare a statement of decision consistent with the court's ruling. The parties have not provided us with any pleadings reflecting that the decision of the probate court is final. This fact notwithstanding, the arguments on appeal strongly suggest that both parties believe that the probate court has rendered a final decision adverse to Osornio. Therefore, any potential lack of finality of the probate court's decision is of no consequence to our consideration of the issues in this appeal.

[6] The actual finding of the probate court was: "Osornio has failed to satisfy her burden of rebutting the presumption of undue influence created by Probate Code Section 21351[subdivision] (d). Viewing the evidence as a whole, the Court finds the evidence before the Court is not sufficiently 'clear and convincing' to overcome the presumption that the will executed by Ms. Eillis on September 19, 2001, leaving all her estate to her caretaker, was not [*sic*] a product of undue influence."

[7] In addition to contending that he owed no duty to Osornio, Weingarten argued below that her claim was barred by collateral estoppel; he asserted that the probate court's previous ruling against Osornio's petition to probate the 2001 Will barred the malpractice claim. Weingarten does not advance this collateral estoppel argument on appeal. We therefore deem the contention waived. (See *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 [31 Cal.Rptr.2d 264]: "Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived.") The claim of collateral estoppel, in any event, is patently without merit. (See *Garcia v. Borelli* (1982) 129 Cal.App.3d 24, 30-32 [180 Cal.Rptr. 768] (*Garcia*) [determination of right of heirship and distribution in probate court did not act as collateral estoppel to beneficiary's legal malpractice claim against testator's attorney].)

[8] The statute defines the terms "dependent adult" and "care custodian" as follows: "For purposes of this section, the term 'dependent adult' has the meaning as set forth in Section 15610.23 of the Welfare and Institutions Code and also includes those persons who (1) are older than age 64 and (2) would be dependent adults, within the meaning of Section 15610.23, if they were between the ages of 18 and 64. The term 'care custodian' has the

meaning as set forth in Section 15610.17 of the Welfare and Institutions Code." (§ 21350, subd. (c).) As noted in our recitation of facts (part II, *ante*) Osornio has admitted that she was a care custodian of Ellis, a dependent adult.

[9] " 'Instrument' is broadly defined in [Probate Code] section 45 as 'a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property.'" (*Rice v. Clark* (2002) 28 Cal.4th 89, 97, fn. 4 [120 Cal.Rptr.2d 522].)

[10] Although not relevant to the issues on appeal, other instances in which donative transfers to persons identified in section 21350(a) are not presumed invalid are: where the transferee or the draftsman is the transferor's relative, cohabitant, or registered domestic partner (§ 21351, subd. (a)); or where, " [a]fter full disclosure of the relationships of the persons involved, the instrument is approved" by the court in a special proceeding. (§ 21351, subd. (c).)

[11] This option, however, is not available to the *draftsman* of the instrument, where the transferor has failed to obtain a certificate under section 21351(b). (§ 21351, subd. (e)(1).)

[12] This placement of the burden of proof upon the proponent of the instrument is, in effect, the converse of the typical will contest, where the contestant bears the burden of proving a basis to invalidate the instrument. (See § 8252, subd. (a); *Graham v. Lenzi* (1995) 37 Cal.App.4th 248, 255, fn. 5, 256 [43 Cal.Rptr.2d 407].)

[13] " The primary purpose of AB 21 [which, inter alia, added sections 21350 to 21355 of the Probate Code] is to strictly forbid attorneys from drafting (or causing to be drafted) wills that leave themselves, or relatives or business partners, gifts of more than insubstantial value, i.e., \$500." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 21 (1993-1994 Reg. Sess.) as amended Feb. 4, 1993, comments, p. 3.)

[14] For extensive reviews of multijurisdictional authorities on an attorney's duty to third parties, see generally: Annot., What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other than Immediate Client (1988) 61 A.L.R.4th 464; Annot., Attorney's Liability, to One Other than Immediate Client, for Negligence in Connection with Legal Duties (1988) 61 A.L.R.4th 615.

[15] The Supreme Court in *Lucas* actually recited only five of the six *Biakanja* factors, omitting factor number 5 quoted above, i.e., "the moral blame attached to the defendant's conduct." (*Lucas, supra*, 56 Cal.2d at p. 588; see also 1 Mallen & Smith, *Legal Malpractice* (5th ed. 2000) Liability to Nonclient—Negligence, § 7.8, p. 694 [identifying criteria considered in California as consisting of six factors—five *Biakanja* factors, excluding "moral blame" factor, and the *Lucas* factor of "burden on the profession"].) Our conclusion from a review of the California cases addressing the issue of an attorney's duty

to third parties is that courts often recite this “moral blame” factor mentioned in *Biakanja* but rarely apply it as a part of their analysis. (See, e.g., *Goodman, supra*, 18 Cal.3d 335, 343; *Heyer v. Flaig* (1969) 70 Cal.2d 223, 227 [74 Cal.Rptr. 225] (*Heyer*), disapproved on other grounds in *Laird v. Blacker* (1992) 2 Cal.4th 606, 617 [7 Cal.Rptr.2d 550]; *Morales v. Field, DeGoff, Huppert & MacGowan* (1979) 99 Cal.App.3d 307, 315 [160 Cal.Rptr. 239] (*Morales*).)

[16] The Supreme Court later enunciated another factor to consider in determining the existence of duty—a factor related to the question of “undue burden on the profession,” namely, whether imposing liability would impinge upon the attorney's ethical duties to his or her client. (See *Goodman, supra*, 18 Cal.3d at p. 344; see also *Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287, 1295 [135 Cal.Rptr.2d 888] (*Moore*).)

[17] Somewhat ironically, the Supreme Court—despite announcing that the intended beneficiaries had the *theoretical* right to recover against the attorney—ultimately rejected plaintiffs' claims. It concluded that, because of uncertainties in the law regarding the rule against perpetuities and restraints on alienation, “it would not be proper to hold that defendant failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise.” (*Lucas, supra*, 56 Cal.2d at p. 592.)

[18] Former section 70, which was repealed, effective 1985 (Stats. 1983, ch. 842, § 18, p. 3024), provided as follows: “If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless . . . the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received.” (Stats. 1931, ch. 281, § 70, p. 590; see also §§ 6560 to 6562.)

[19] The Supreme Court also noted that, while it held in *Lucas* that the intended beneficiary under a will could bring suit against the testator's attorney under both a theory of negligence and under a contractual theory of third-party beneficiary, “[t]his latter theory of recovery, however, is conceptually superfluous since the crux of the action must lie in tort in any case; there can be no recovery without negligence.” (*Heyer, supra*, 70 Cal.2d at p. 227.)

[20] See footnote 7, *ante*.

[21] See also *Morales, supra*, 99 Cal.App.3d 307 (counsel for trustee/executor owed duty to unrepresented remainderman beneficiary to disclose attorney's dual representation of parties in transaction involving trust).

[22] The will provided that 25 percent of the residuary estate would go to the “Society for the Prevention of

Cruelty to Animals (Local or National),” an entity that, as named, did not exist. (*Ventura, supra*, 40 Cal.App.3d at p. 901.)

[23] Another appellate court rejected a negligence claim under which the plaintiff asserted that he was deprived of a bequest that he would have otherwise received had the testator's attorney not prepared a subsequent will that was validly executed. (See *Hiemstra v. Huston* (1970) 12 Cal.App.3d 1043, 1048 [91 Cal.Rptr. 269] [case—unlike *Biakanja, Lucas*, or *Heyer*—involved a valid will that “contained no legal deficiency which prevented [testator's] wishes expressed therein from being carried out”].)

[24] In various contexts, California appellate courts have similarly held—after balancing the *Biakanja/Lucas* factors—that the attorney owed no duty of care to a nonclient. (See, e.g., *Mattco Forge, Inc. v. Arthur Young & Co.* (1995) 38 Cal.App.4th 1337, 1355-1357 [45 Cal.Rptr.2d 581] [attorney not liable to accounting firm hired as expert witness for attorney's client]; *Skarbrevik v. Cohen, England & Whitfield* (1991) 231 Cal.App.3d 692, 706-707 [282 Cal.Rptr. 627] [attorney for close corporation owed no duty of care to minority shareholder]; *Burger v. Pond* (1990) 224 Cal.App.3d 597, 606 [273 Cal.Rptr. 709] [no liability to future wife of client for alleged negligence in handling of client's divorce from first wife]; *Sooy v. Peter* (1990) 220 Cal.App.3d 1305, 1313-1314 [270 Cal.Rptr. 151] [attorney for junior lienholder not liable to counsel for third party (senior lienholder)]; *Schick v. Lerner* (1987) 193 Cal.App.3d 1321, 1331 [238 Cal.Rptr. 902] [attorney advising psychologist not liable to psychologist's patient]; *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 961-962 [226 Cal.Rptr. 532] [attorney not liable for negligence to unrepresented party in attorney's handling of real estate transaction for his client]; *St. Paul Title Co. v. Meier, supra*, 181 Cal.App.3d 948, 952 [attorney for purchaser of real estate not liable to escrow agent]; *Mason v. Levy & Van Bourg* (1978) 77 Cal.App.3d 60, 67-68 [143 Cal.Rptr. 389] [attorney not liable to referring attorney for former attorney's negligence in failing to properly prosecute case under contingency referral agreement]; *Held v. Arant* (1977) 67 Cal.App.3d 748, 751 [134 Cal.Rptr. 422] [second attorney for client not liable for indemnity to first attorney sued by client for legal malpractice]; *Norton v. Hines* (1975) 49 Cal.App.3d 917, 921 [123 Cal.Rptr. 237] [attorney not liable to adverse party in litigation]; *National Auto. & Cas. Ins. Co. v. Atkins* (1975) 45 Cal.App.3d 562, 564-565 [119 Cal.Rptr. 618] [attorney who obtained an attachment and attachment bonds in prior action owed no duty to insurance company that issued the attachment bonds to prosecute action diligently]; *De Luca v. Whatley* (1974) 42 Cal.App.3d 574, 575-576 [117 Cal.Rptr. 63] [attorney not liable for calling nonclient to testify as witness in client's criminal proceeding, even where witness thereby incriminated himself]; *Haldane v. Freedman* (1962) 204 Cal.App.2d 475, 478-480 [22 Cal.Rptr. 445] [attorney

representing mother in divorce proceeding not liable to children].)

[25] As noted in our discussion of facts, *ante*, it is apparent that Weingarten knew at the time he drafted the 2001 Will that Osornio was, in fact, Ellis's care custodian.

[26] This theory is borne out by the probate court's tentative decision. The court noted that Weingarten testified that " he did not refer [Ellis] to an independent attorney to counsel her about the nature and consequences of the intended transfer [of her estate to Osornio] and did not obtain a Certificate of Independent Review in compliance with Probate Code Section 21351."

[27] As we indicate in footnote 15, *ante*, in determining an attorney's duty to a nonclient, courts have generally not addressed the additional *Biakanja* factor, namely, " the moral blame attached to the defendant's conduct." (See *Biakanja*, *supra*, 49 Cal.2d 647, 650.) We agree that the " moral blame" factor is of limited usefulness in any analysis of duty. It suffices for us to say here that the balancing of the six relevant *Biakanja/Lucas* factors supports a finding that Weingarten owed a duty of care to Osornio.

[28] Weingarten also asserts that Osornio " nowhere alleges that she retained (or paid) Mr. Weingarten to prepare the Independent Certification." This argument misses the mark, and, indeed, makes no sense because: (1) it is the *client*, not the beneficiary, who is required to retain independent counsel under section 21351(b); and (2) Weingarten, as draftsman of the 2001 Will, could not prepare the Certificate of Independent Review required under section 21351(b).

[29] The Second District, Division One, has recently rejected negligence claims of beneficiaries against estate planning attorneys in two recent cases; neither case is final at this time. (See *Boranian v. Clark* (2004) 123 Cal.App.4th 1012 [20 Cal.Rptr.3d 405]; *Featherson v. Farwell* (2004) 123 Cal.App.4th 1022 [20 Cal.Rptr.3d 412].) In each case, Justice Vogel, writing for the court, relied upon *Moore* in concluding that the imposition of duty would place the attorney in a position of having divided loyalties between his or her client, the testator, and the beneficiary. In our case, as we have discussed, imposing a duty upon the attorney here raises no such conflict issues; the interests of the testator, Ellis, in disposing of her estate to the person named in her duly executed will, Osornio, do not conflict with Osornio's interests as beneficiary.
