

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,

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred in summarily dismissing as a matter of law Terry Parks' legal malpractice action against Janyce Lynn Fink and Fink Law Group PLLC (Fink) for lack of standing.

Issues Pertaining to Assignment of Error No. 1:

1. Do the factors under the Trask Multifactor Balancing Test all militate in favor of Mr. Parks' standing to sue Fink for malpractice?
2. Should this case involving an clearly intended beneficiary of an improperly executed will be decided without regard to Washington authorities on improperly executed wills and by using out-of-state authorities involving potential beneficiaries of unsigned wills and alleged failure to have the unsigned wills signed or executed promptly?
3. Is a lawyer like Fink who mishandled the statutory witness attestation requirement in a will execution liable under Washington law and the laws of other jurisdictions?
4. Should there be a public policy distinction between requiring a lawyer to comply with the technical requirements of drafting a will and requiring a lawyer to comply with the technical requirements for its execution?
5. Does Washington's longstanding public policy of allowing a legal remedy for victims of attorneys' wrongdoing and preventing future

harm caused by legal malpractice support Mr. Park's standing in this case?

Assignment of Error No. 2: The trial court erred in considering the 6th Trask factor (burden on the profession) based on Fink's alleged factual scenario and in requiring a validly executed will as a condition precedent for Mr. Parks' standing.

Issue Pertaining to Assignment of Error No. 2:

6. When ruling on the issue of standing as a matter of law, did the trial court consider any reasonable hypothesis which entitles Mr. Parks (the nonmoving party) to relief and resolve doubts as to the existence of factual disputes against Fink (the moving party) as required by law?

7. Is it appropriate to treat intended beneficiaries of invalidly executed wills the same as potential beneficiaries of unsigned wills, when doing so in essence requires as a condition precedent a validly executed will for standing and entails that an heir to an invalidly executed will can never have standing?

II. STATEMENT OF THE CASE

This case involves Janyce Fink's failure to have the late Mr. John J. Balko, Jr.'s will execution properly witnessed on April 26, 2006. As a direct result such failure, Terry Parks, the intended beneficiary of the improperly executed will, lost a several million dollar inheritance provided in the will.

After Mr. Balko's mother, Evelyn Balko, passed away in 2002 and during the years Mr. Balko was suffering from terminal cancer, Mr. Balko was close to and received love and support from Betty Parks (his aunt), Terry Parks (Betty's son and his cousin), and Victoria "Laurie" Doyle (Mr. Balko's girlfriend) like a family. CP 208, 184, 189-190. Betty Parks became a surrogate mother to Mr. Balko. CP 189. Over several years before his death, Mr. Balko and Mr. Parks were very close. CP 184, 189-190. The two of them would spend many hours discussing life and what they cared about, including the missing children charity named Threechildren/Finding Our Children Under Stress, Inc. (FOCUS). CP 190. FOCUS is a Section 501(c)(3) non-profit organization dedicated to finding missing children and providing support to families of the missing. CP 178. The organization also provides education regarding child safety. CP 178. Since the mid-1990s, Mr. Parks has devoted himself to this charity full time without any compensation. CP 178. Mr. Balko joined Mr. Parks on the Board of Directors of FOCUS in May of 2006. CP 178, 181. Besides Betty Parks, no other relative was as close to Mr. Balko as Mr. Parks. CP 184, 189-190.

On November 9, 2005, Mr. Balko executed a will prepared by Alan Montgomery (the 2005 Will) in the presence of two witnesses brought to the hospital by Mr. Montgomery. CP 140-145, 191. It is not

disputed, and all parties agree, that the 2005 Will mistakenly stated Betty Parks as “Betty Rich,” a non-existent person. CP 140, 10, 185. Mr. Balko knew and discussed the mistake with Ms. Fink within days, and Ms. Fink took charge and insisted she would be the one to correct the mistake. CP 185 (lines 10-13).

In the spring of 2006, Mr. Balko decided that he did not want Craig Eckland, another cousin, to inherit one half of his residual estate as stated in the 2005 Will because of how Mr. Eckland treated him. CP 185-186. Mr. Balko decided to have Betty Parks as the sole main beneficiary of his estate and to have Betty Parks' son, Terry, take her place in the event she did not survive Mr. Balko. CP 186 (lines 3-6).

In accordance with the decedent’s instructions, Ms. Fink prepared a new will (CP 146-151). On April 26, 2006, Mr. Balko executed such a will (the 2006 Will) prepared by Ms. Fink shortly before his scheduled experimental stem cell transplant surgery in May of 2006. CP 185 (lines 7-9). Mr. Balko signed and dated all the signature blocks and initialed all the handwritten insertions with Ms. Fink there at his bedside, just as he would do in executing any other formal legal document. CP 146-151. Ms. Fink 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). Just as Ms. Fink, Mr. Balko believed he had

signed and finalized a valid will on April 26, 2006. CP 186 (lines 7-12).

Under the 2006 Will, Betty Parks was to receive the bulk of Mr. Balko's estate unless she predeceased Mr. Balko, in which case the inheritance was to go to Terry Parks. Mr. Balko never wavered or changed his mind about this intended distribution of his estate. CP 186 (lines 3-6), 190 (lines 15-16).

After Mr. Balko's surgeries and after Betty Parks' death, Mr. Balko contemplated making another new will in late September 2006 and early 2007. CP 186 (lines 13-16). Apparently not understanding the legal effect of the 2006 Will vis-à-vis the 2005 Will, Mr. Balko discussed the mistake in the 2005 Will in the context of making another will with attorney Alan Montgomery who prepared the 2005 Will. CP 192. In the telephone call, Mr. Balko was primarily complaining about Fink and her mishandling of his mother's estate. CP 192. The factual significance of Mr. Balko's call with Mr. Montgomery is unclear. Mr. Balko was an unsophisticated lay person who was gravely ill and had just had multiple surgeries at that time. The trier of fact will need to decide his intent and state of mind at the time he talked with Mr. Montgomery and what it means. Mr. Parks submits Mr. Balko did not understand the legal effects/interactions of the different

wills¹ and ultimately decided to rely on Fink's 2006 Will for the time being. The evidence confirms that both Ms. Fink and Mr. Balko believed the 2006 Will was valid until the time of Mr. Balko's death when it was too late.

We know this for several reasons. First, Ms. Fink kept the signed original of the 2006 Will at her office for safekeeping for Mr. Balko. CP 307 (line 25) to 308 (line 9). Second, Mr. Balko believed he had signed and finalized a valid will on April 26, 2006. CP 186 (lines 7-12). Third, when Mr. Balko was in a medically induced coma in the early July 2007, Ms. Fink informed Terry Parks that he was the main beneficiary under Mr. Balko's will, believing that the 2006 Will was valid. CP 178, 310 (lines 4-10).² Moreover, within days of Mr. Balko's death, Fink also hired attorney William Dussault to represent both her and Mr. Parks in "all proceedings with regard to Probate of the Estate of John J. Balko, Jr." CP 169, 173. In addition, Ms. Fink and Mr. Parks were acting for a while as the co-personal representatives of Mr. Balko's estate as provided in Fink's 2006 Will (CP 147, 169, 173, 311).

There is no doubt Ms. Fink failed to provide the required witness attestation and notary for Mr. Balko's actual execution of the 2006 Will on

¹ It is very understandable given that Mr. Balko's own lawyer, Janyce Fink, did not understand such effects and interactions.

² Prior statements by the deceased to Mr. Parks are redacted to avoid waiver of the Deadman's statute.

April 26, 2006 and did not realize the defect until it was too late. When Ms. Fink realized the defect at the time of Mr. Balko's death, and when Mr. Balko failed to wake up from his coma, she panicked and later suggested to Mr. Parks and Ms. Doyle that the 2006 Will be falsely witnessed. CP 186 line 22 to 187 line 11.

In this legal malpractice litigation, apparently attempting to rely on a line of out-of-state authorities that do not impose a duty on attorneys to have a will "promptly" executed, Fink takes the factual position that she took the 2006 Will to Mr. Balko on April 26, 2006 as merely a "draft" will for discussion. CP 11. She claims Mr. Balko inexplicably signed it that day, and then refused to sign it again in front of witnesses until he passed away. CP 11. Mr. Balko, of course, cannot be here to contradict whatever Fink wants to say about him now. Fink's story now is inconsistent with what she did with the signed 2006 Will after April 26, 2006 and how she acted when Mr. Balko passed away.

To support her story, Fink has produced "three letters" dated 9/24/2006, 1/18/2007 and 3/31/2007 respectively. Fink claims she wrote and delivered these letters to Mr. Balko, warning him that the 2006 Will was not valid. CP 12, 337-338, 340-349, 351-352. However, only Fink has these letters. No one else ever saw the letters, and no such letter was ever found in Mr. Balko's possession, even though Mr. Balko was a pack

rat and kept everything. CP 187 (lines 12-17). Moreover, Fink's time entries clearly do not show she wrote those letters and they do not reflect any concern over the 2006 Will. CP 174-176. In addition, Betty Parks predeceased Mr. Balko and passed away in July of 2006. CP 318, RP 7/1 (9:7-12).³ Fink claims she wrote the 1/18/2007 letter and included a final version of Mr. Balko's will, but that will listed the then already deceased Betty Parks as the main beneficiary inheriting 100% of the residue of the estate (CP 345). Parks submits that the trier of fact will decide that the three letters are fabrications and that Ms. Fink is not being truthful.

The bottom line is that Fink did not treat the executed 2006 Will as a "draft" will as she now claims. She kept the executed original 2006 Will in her office for safekeeping for Mr. Balko as she testified to in 2008. CP 307 (line 25) to 308 (line 9). Mr. Balko died believing he had a valid will at Fink's office. CP 186 (lines 7-12), 187 (lines 14-15).

Attempting to mitigate damages, Mr. Parks challenged the 2005 Will in a prior will contest action but was unsuccessful. Mr. Parks then initiated this legal malpractice action against Fink. CP 1-4. The trial court dismissed the legal malpractice action as a matter of law based on lack of standing and, in essence, kept Parks from seeking any redress in court. CP

³ References to RP are made by month and day followed by page and line numbers in parentheses separated by a colon. Unless indicated otherwise, the year for the RP references is 2011.

332-333. The trial court decided as a matter of policy that it was too great a burden on the legal profession to allow Mr. Parks standing, even though it agreed all the other five factors under the Trask six-factor test supported Parks' standing, including that Mr. Parks was an intended beneficiary of the 2006 Will. RP 7/7 (4:12-9:19). The decision was based on two out-of-state cases that involved unsigned wills. RP 7/7 (9:12-19). Terry Parks timely appealed. CP 324-325.

III. SUMMARY OF ARGUMENT

The standard of review in this case is *de novo*, and this Court independently performs the same inquiry as the trial court.

Under the Trask Multifactor Balancing Test, all factors militate in favor of Mr. Parks' standing to sue Fink for malpractice. The trial court agreed that Mr. Parks was an intended beneficiary, and that five of the six factors favored Mr. Parks' standing, but decided to use the sixth factor (burden on the profession) to trump them all and deny Mr. Park's standing as a matter of law. The trial court made its decision by improperly using Fink's disputed factual scenario about timing of will execution and by relying on the out-of-state authorities involving potential beneficiaries of unsigned wills and alleged lack of prompt execution. It distinguished all the applicable authorities by identifying distinctions without a difference. The trial court improperly lumped the case at bar with those out-of-state

cases involving unsigned wills, essentially requiring there to be a validly executed will for standing, ostensibly to avoid "undue burden" on the profession. This is circular reasoning (a logical fallacy) because it requires a validly executed will which by definition can never occur whenever a lawyer mishandled the will execution causing the will to be invalid.

As explained in detail in the next section, a lawyer like Ms. Fink who botched the statutory witness attestation requirement during a will execution is liable under Washington law and the laws of other jurisdictions. There is no difference between botching the technical requirements during the drafting of a will and botching the technical requirements during a will's execution, as far as public policy and the Trask factors are concerned on imposing liability on negligent lawyers. Washington's longstanding public policy of allowing victims of attorneys' wrongdoing to seek redress in court and of preventing future harm caused by such wrongdoing strongly supports Mr. Park's standing in this case.

Moreover, denying those in Mr. Parks' position the standing to hold negligent attorneys accountable not only deprives victims of such negligence of any recourse for remedy, but also gives negligent attorneys absolute immunity for all negligence in will executions. That should not be and is not the law of this State or any other State.

IV. ARGUMENT

A. The Standard of Review is De Novo.

It is well settled that the standard of review on summary judgment is *de novo*, and the appellate court engages in the same inquiry as the trial court. Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000); Botka v. Estate of Hoerr, 105 Wn. App. 974, 979, 21 P.3d 723 (2001). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ellis, 142 Wn.2d at 458. All facts submitted and all reasonable inferences from them are to be considered in the light most favorable to the nonmoving party. Id. 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). “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).

In the case at bar, this Court makes its own independent inquiry and its own *de novo* determination of (1) whether Terry Parks, as the intended beneficiary of the improperly executed 2006 Will, has standing to seek redress in court against Janyce Fink, the attorney responsible for the improper execution, (2) whether allowing standing for intended

beneficiaries of improperly executed wills creates any undue burden on the legal profession, and (3) whether Washington law gives attorneys complete immunity for botching technical requirements of will executions.

B. Terry Parks is an Intended Beneficiary of the Improperly Executed 2006 Will with Standing to Sue Fink under the Trask Multifactor Balancing Test.

To determine whether a lawyer owes a duty to a nonclient giving rise to standing to sue for malpractice, Washington applies a six-element test. Trask v. Butler, 123 Wn.2d 835, 842-43, 872 P.2d 1080 (1994); In re Guardianship of Karan, 110 Wn. App. 76, 81, 38 P.3d 396 (2002); Treadwell v. Wright, 115 Wn. App. 238, 243, 61 P.3d 1214 (2003).

Under this multi-factor balancing test, the court must determine:

1. The extent to which the transaction was intended to benefit the plaintiff;
2. The foreseeability of harm to the plaintiff;
3. The degree of certainty that the plaintiff suffered injury;
4. The closeness of the connection between the defendant's conduct and the injury;
5. The policy of preventing future harm; and
6. The extent to which the profession would be unduly burdened by a finding of liability.

Trask, 123 Wn.2d at 843; Karan, 110 Wn. App. at 82; Treadwell, 115 Wn. App. at 243. The threshold question is whether the nonclient plaintiff is an intended beneficiary of the transaction. Trask, 123 Wn.2d at 843.

Mr. Parks through counsel explained in the trial court how all six Trask factors strongly support his standing as follows:

First, the entire purpose and endeavor of making the 2006 Will was to arrange for the legally valid transfer of assets to the beneficiary expressly stated in that Will upon Mr. Balko's death. Plaintiff is the expressly stated "intended" beneficiary of that Will. We do not have a situation where a draft will was never signed. We have here a fully executed will that was not properly witnessed in accordance with the necessary legal requirements. Plaintiff is clearly the "intended" beneficiary of the concrete signed will, not a "prospective" beneficiary of an uncertain draft will that was never signed. Second, it is clearly foreseeable that failure to have the 2006 Will properly witnessed will cause the intended beneficiary, Plaintiff, to lose the entire inheritance provided in that Will. Third, there is no dispute that Plaintiff lost the entire estate he was to inherit under the 2006 Will, and he has no recourse against anyone except Defendants. Fourth, Ms. Fink's failure to have the 2006 Will properly witnessed directly caused the Will to be invalid and Plaintiff to lose the inheritance. The connection between the negligent conduct and the injury is direct. Fifth, it is sound public policy to require attorneys to attend to the details and to provide the means of having their clients properly execute a will in the presence of attesting witnesses. It is necessary to prevent future harm of lay testators signing invalid wills. Sixth, it is not a burden at all to impose such a duty on the legal profession because it is already part of the job of every attorney who helps his/her client make a will to have the will executed properly. The legitimate interests of the testator, Mr. Balko, and the intended beneficiary, Mr. Parks, to have the 2006 Will properly executed are inseparable and not adverse at all.

CP 216 (lines 1-19). In a motion for summary judgment on standing, it is critically important to take nonmovant Parks' version of events as given to consider the Trask factors, i.e. (1) Mr. Balko was executing, and believed with Ms. Fink that he had adequately executed, the 2006 Will on April 26,

2006 before his major experimental surgery; and (2) Ms. Fink mishandled the execution by failing to satisfy the statutory witness attestation requirement under RCW 11.12.020. CP 185-186, 146-151, 307-308.

The trial court agreed that Mr. Parks was an intended beneficiary (the first Trask factor). RP 7/7 (4:12-17). Fink did not dispute the second, third and fourth Trask factors as supporting Mr. Parks' standing. RP 7/7 (4:18-19). Under the fifth Trask factor, there is no doubt that very strong policy reasons exist for holding negligent lawyers accountable and preventing future harm, especially in this case where Ms. Fink is required to simply know and observe the basic requirements for a valid will execution. It is not a burden on the profession at all under the sixth Trask factor to require a lawyer to know and follow these simple requirements and to have a will executed properly.

As our Supreme Court has repeatedly recognized with respect to botched wills:

"if the [estate] beneficiaries could not recover for the attorney's alleged negligence, no one could."

Trask, 123 Wn.2d at 843 (citing Stangland v. Brock, 109 Wn.2d 675, 681, 747 P.2d 464 (1987); Karan, 110 Wn. App. at 84 ("in the matter of a botched will, third-party intended beneficiaries may have a cause of action in negligence against the drafting attorney under the multi-factor

balancing test").

Inexplicably, the trial court used Fink's factual scenario (i.e. Mr. Balko signed the 2006 Will as a draft without intending it to be executed or finalized) to consider the sixth Trask factor and even gave an example to that effect, RP 7/7 (6:10-20). Even assuming Ms. Fink's self-serving statements are admissible, the issue of Mr. Balko's intent when he signed the 2006 Will is at a minimum a question for the trier of fact. Ms. Fink's factual scenario is contradicted by her own actions and other evidence.

Had Mr. Balko treated the 2006 Will as a "draft" only and never made up his mind as Ms. Fink claims, (1) Ms. Fink would not have treated the fully signed and meticulously initialed 2006 Will like an original stored in an envelope labeled "original" for safekeeping for Mr. Balko at her office, CP 307 (line 25) to 308 (line 9); (2) Mr. Balko would not have expressed his state of mind, intent, plan, emotion and belief about the status and terms of the 2006 Will to his girlfriend Victoria Doyle, including that he had signed a new will in April 2006, CP 185-187; (3) Ms. Fink would not have told Mr. Parks that he was the main beneficiary before Mr. Balko passed away, CP 178, 310; (4) Ms. Fink would not have hired attorney William Dussault to represent both her and Mr. Parks in "all proceedings" with regard to the probate of Mr. Balko's estate, CP 169, 173; (5) Ms. Fink and Mr. Parks would not have acted for a while as the

co-personal representatives of Mr. Balko's estate as provided in the 2006 Will, CP 169, 173, 311; the list of evidence contradicting Fink's factual assertions will go on at trial.

Again, this legal malpractice case against Fink only requires her to know and fulfill the simple witness attestation requirement when Mr. Balko executed the 2006 Will on April 26, 2006. It is about improper will execution when the execution actually occurred, not about whether any lawyer should get any client to execute a will "promptly" or in a timely manner. The interests of the testator and the intended beneficiary of a will being executed at the time of execution are one and the same and wholly consistent. There is no conflict of interest that compromises a lawyer's loyalty to the testator or places any undue burden on the profession. Any burden is minimal under the sixth Trask factor and is no different from any other basic requirement for a lawyer to do an adequate job when performing any service.

Fink wants to blame Mr. Balko who is no longer here to contradict her by fabricating a factual scenario that Mr. Balko did not want to sign the will in front of witnesses and she could not get him to do it. One can certainly use this scenario to argue no duty to Mr. Parks because of potential conflict of interest and undue burden on the profession, but that scenario is not what happened in this case.

C. **The Out-of-State Authorities Relied on by Fink, Sisson and Radovich, Concern a Lawyer's Duty to Have an Unsigned Will Executed Promptly, Are Inapplicable to the Case at Bar, and the Policy Considerations Discussed Therein Actually Support Parks' Standing in this Case.**

Sisson v. Jankowski, 148 N.H. 503, 809 A.2d 1265 (2002), is a New Hampshire case about whether a lawyer has a duty to a prospective beneficiary to have an unsigned will timely corrected and executed before the testator passed away. In Sisson, the decedent testator did not request the will to be "executed by a date certain." Id. at 504. In fact, the lawyer brought two witnesses to the meeting for signing the estate planning documents, and the decedent testator "executed all the documents except his will." Id. When the lawyer returned with the revised will three days later, the testator was no longer competent to execute the will. Id. at 505. So, it was clear that the testator was given the opportunity to sign his will in front of witnesses, but chose not to sign. The Sisson court stated, "[t]he *narrow question before us* is whether the defendants owed the plaintiff a duty of care to ensure that the decedent executed the will *promptly*." Id. (emphasis added). After weighing the policy considerations, the court decided the potential for conflict between the interests of a prospective beneficiary and a testator militate against recognizing a duty to have an unsigned will executed *promptly*. Id. at 509.

The decision makes sense in cases involving unsigned draft wills

because there can be multiple unsigned draft wills with different potential beneficiaries, and owing a duty to these potential beneficiaries of unsigned wills compromises a lawyer's loyalty to the testator and puts undue burden on the profession.

However, the case at bar does not involve any unsigned draft will or any allegation that Fink failed to have any unsigned draft will executed promptly. This case is about Fink's failure to have the 2006 Will *properly* executed *when the execution actually occurred* on April 26, 2006. If one reads the Sisson court's reasoning carefully about why a duty is imposed in cases of negligent drafting of a will, it actually supports Parks' standing under the facts of this case.

The Sisson court reaffirms the prevailing rule that a lawyer owes a duty to a will beneficiary to draft the will non-negligently in conformity with the testator's wishes, but distinguishes it from a duty to have a will "executed promptly." Id. at 506-07. The policy reason is that "a testator and the beneficiary of a will have a *mutual interest* in ensuring that an attorney drafts the will non-negligently." Id. at 509. In the case at bar, Mr. Balko and Mr. Parks had the same *mutual interest* to have Fink non-negligently ensure the proper execution of the 2006 Will on April 26, 2006 when the execution occurred. There is no policy reason whatsoever for distinguishing proper drafting and proper execution of wills to meet

statutory requirements. There is no conflict of interest, no divided loyalty, and no undue burden on the legal profession to impose a duty on a lawyer to have a will executed *properly* at the time of will signing or execution.

Similarly, Radovich v. Locke-Paddon, 35 Cal. App.4th 946, 41 Cal. Rptr.2d 573 (1995) also involves the determination of whether a duty is owed to a "potential beneficiary" named in an "unsigned will." Id. at 950. Although the Radovich court answers the question in the negative, it specifically distinguishes Radovich from those cases upholding a duty owed to intended beneficiaries by expressly pointing out one critical difference, i.e. the decedent in Radovich *never signed* the will. Id. at 959.

The Radovich court also expressly restricted its holding by stating:

Our analysis should make clear that, consistent with our perception of the common law method, we have restricted our consideration, and thus necessarily the conclusion we have reached, to the circumstances of record before us. We hold only that for purposes of summary adjudication the record sufficiently establishes that Locke-Paddon and the law firm owed no duty to Radovich.

Id. at 966.

Again, the case at bar does not involve any unsigned draft will or any allegation regarding prompt or timely will execution. It is about improper execution at the time of execution and belongs with the same group of cases allowing standing for improper will execution or drafting, from which the Radovich court expressly distinguishes Radovich. Id. at

957-59. Treating this case at bar the same way as cases like Sisson and Radovich, which involve unsigned wills, essentially requires there to be a validly executed will for standing. This is circular reasoning and a logical fallacy because it begins with a premise of requiring a validly executed will which by definition can never occur whenever a lawyer botched the will execution.

D. Washington Allows Malpractice Actions Against Lawyers for Negligence in Not Only Drafting of a Will but Also Execution of a Will, and Intended Beneficiaries have Standing to Pursue Lawyers for Botching Attestation During Will Execution, Just as They can Do in Cases Involving Botched Will Drafting.

The Washington Supreme Court states:

In Stangland v. Brock, 109 Wn.2d 675, 747 P.2d 464 (1987), we acknowledged the right of an estate beneficiary to bring a cause of action against an attorney under the multifactor balancing test and the third party beneficiary test for errors in drafting a will. In finding a duty to beneficiaries under the multifactor balancing test, we recognized "if the beneficiaries could not recover for the attorney's alleged negligence, no one could." Stangland, at 681.

Trask, 123 Wn.2d at 843. The Karan court similarly acknowledges that "in the matter of a botched will, third-party intended beneficiaries may have a cause of action in negligence against the drafting attorney under the multi-factor balancing test." Karan, 110 Wn. App. at 84 (citing Trask and Stangland). There has been no dispute here that intended beneficiaries have standing to sue lawyers for negligence in will drafting, as lawyers do

have a duty to ensure proper will drafting. Do lawyers have the same duty to ensure proper witness attestation in will execution? The answer is yes.

Improper will execution due to the lack or defective attestation that renders a will invalid is actionable in Washington. See Ward v. Arnold, 52 Wn.2d 581, 328 P.2d 164 (1958), Schirmer v. Nethercutt, 157 Wash. 172, 288 P. 265 (1930). In Ward, the lawyer actually mailed the will to the testator's wife and gave detailed written instructions on executing it in the presence of two witnesses. Ward, 52 Wn.2d at 582. The testator executed the will but not in the presence of two witnesses because the lawyer had erroneously advised the wife (and presumably the husband through the wife) that a will was unnecessary. Id. The beneficiary wife sued the lawyer after the testator's death, as she could not inherit under the improperly executed, and therefore invalid, will. Id. at 583. Even though the testator and his wife could have had a valid will by following the lawyer's written instructions on executing the will, the court upheld a cause of action by the beneficiary wife against the lawyer for the botched execution. Id. at 585.

In Schirmer, the lawyer permitted the beneficiary of a will to attest as a witness in the will execution and thereby caused the beneficiary to be ineligible to inherit under the will. Schirmer, 157 Wash. at 174. It was the grandmother testator's "desire to give the beneficiary one-half of the

residue of her estate remaining after the payment of other legacies, debts and expenses, and she attempted to do so." Id. at 179. "That attempt was thwarted only by the error of the [lawyer] in causing the [beneficiary] to attest the will as a witness." Id. The Washington Supreme Court affirmed the verdict and judgment for the beneficiary against the lawyer. Id. at 183.

In the case *sub judice*, the acts and conduct of Ms. Fink during and after the will execution on April 26, 2006 speak volumes on whether she and Mr. Balko both believed the witness attestation in the 2006 Will was necessary for the 2006 Will to be valid. Just like the lawyers in Ward and Schirmer, Ms. Fink's failure to understand, observe and follow proper will execution requirements caused the 2006 Will to lack the necessary attestation and to be invalid.

Ward and Schirmer undoubtedly mandate a lawyer's duty to ensure proper attestation during will execution. Although the beneficiaries in both Ward and Schirmer procured the lawyers' services for the testators' will preparation and execution, there is no policy or logical reason to limit such a duty to only cases where a beneficiary procured the lawyer's services for the testator. Regardless of who procures or pays for a lawyer's services, a lawyer cannot proceed under RPC 1.7 with the services unless the testator and the beneficiary have a *mutual interest* (i.e. no conflict of interest) to have a particular will prepared and executed. Given that both the testator

and the intended beneficiary have the same mutual interest in having the will properly drafted and executed, there is no reason the lawyer owes a duty only to one but not the other because the *end and aim* of the entire undertaking is to pass the desired estate from the testator to the intended beneficiary. It makes no sense to limit Ward and Schirmer's mandate of a lawyer's duty to ensure proper attestation during will execution to only the relatively small number of situations where a beneficiary was involved in procuring the lawyer's service for the testator. If Ward and Schirmer were so limited, it would lead to the absurd result that, when testators hire the lawyers, the lawyers have complete immunity for botching will executions because no injury will occur until after a testator is dead, and after the testator is dead, no one else is a "client" who can sue the lawyer for the negligence.

Moreover, there is absolutely no policy reason for this immunity when the testator and the intended beneficiary have the same mutual interest to have a will *both drafted properly and executed properly*. A lawyer's duties to perform both tasks properly to achieve the mutual goal of the testator and the intended beneficiary cannot reasonably be separated, with liability imposed for improper drafting only, but not for improper execution.

Given the binding authorities of Ward and Schirmer on a lawyer's

duty to ensure proper attestation during will execution, and given the mutual interest (lack of conflict) between the testator and the beneficiary during will execution as well as other factors under the Trask multifactor balancing test, intended beneficiaries of wills botched during execution, not just in drafting, ought to have the same standing under Washington law to sue the negligent lawyers.

E. Other Jurisdictions Also Determine that Intended Beneficiaries have Standing to Sue Lawyers for Botching Attestation During Will Execution.

The Supreme Court of Wisconsin directly examined the issue of an intended beneficiary's standing to sue an attorney for botching attestation during will execution and concluded that the beneficiary can sue the attorney "who negligently drafted or supervised the execution of the will." Auric v. Continental Casualty Co., 111 Wis.2d 507, 509, 331 N.W.2d 325 (1983). In Auric, the testator signed the will, but one of the witnesses failed to sign the will. Id. at 510. As a result of the defect in execution, the probate court admitted the previous will to probate, not the improperly executed, invalid will. Id. at 510-11. The court in Auric explains:

Allowing a will beneficiary to maintain a suit against an attorney who negligently drafts or supervises the execution of a will is one way to make an attorney accountable for his negligence.

Accountability should result in increasing the care with which attorneys draft wills and see to their execution. . . .

Public policy supports the imposition of liability on an attorney who acts negligently in drafting or supervising the execution of a will resulting in a loss to a beneficiary named therein. Therefore the lack of privity should not be a bar to this action.

Id. at 513-14. The court went on to examine a similar multi-factor test and concluded that imposition of liability is proper. Id. at 514.

In Connecticut, intended beneficiaries of a will declared invalid due to the attorney's failure to provide the required attesting witnesses also have standing to sue the attorney. See Licata v. Spector, 26 Conn. Sup. 378, 225 A.2d 28 (1966). In Licata, the lawyer hired by the testator failed to provide for the required number of witnesses, and as a result the probate court declared the will invalid and refused to probate it. Id. at 378.

The Licata court explains:

The will, lacking the required number of witnesses, was declared invalid, and the children lost their legacies. In a real and material way, the loss resulting from the negligence was not the estate's but that of the disappointed beneficiaries. The potency of injury to the legatees if the will were declared invalid was patent. . . .

A testatrix consults her attorney and is given the assurance that the objects of her affection will receive their just legacies at her death. Neither she nor the beneficiaries, who, in all probability, do not know of the will's provisions or possibly even of the existence of the will, know of the disappointment that lies ahead - that her purpose will be completely thwarted because of the negligence of the drafter. The technical legal knowledge required in the drafting of a will and the atmosphere of privacy desired by

a testatrix with relation to both the contents of the will and the safekeeping of the will make it highly improbable that either the testatrix or the beneficiaries would ever be alerted to the almost inevitable results flowing from a defective will. The modus operandi would, in most cases, not lend itself to a detection of the error until it was too late to rectify - upon the death of the testatrix. Public policy would seem to favor the court's extending its equitable arm to assist innocent parties seeking just damages resulting from an error committed by another and affecting their rights, which error those innocent parties were never themselves able to correct. . . .

While the invalid will cannot be validated by judicial fiat, the allowing of a cause of action under the circumstances set forth in the complaint would seem to be in accord with the policy of the decision of our highest court to give a party who claims to have suffered a wrong at the hands of another every reasonable opportunity to establish his right to redress.

Id. at 381-82 (citations omitted).

In California, the intended beneficiary of a will invalidated for lack of attesting witnesses also has standing to sue the notary public who failed to have the will properly attested by witnesses. Biakanja v. Irving, 49 Cal.2d 647, 648, 320 P.2d 16 (1958). Examining multiple factors akin to the Trask factors, the California Supreme Court stated:

The "end and aim" of the transaction was to provide for the passing of Maroevich's estate to plaintiff. . . . Defendant must have been aware from the terms of the will itself that, if faulty solemnization caused the will to be invalid, plaintiff would suffer the very loss which occurred. As Maroevich died without revoking his will, plaintiff, but for defendant's negligence, would have received all of the Maroevich estate, and the fact that she received only one-

eightth of the estate was directly caused by defendant's conduct.

Id. at 650-51 (citations omitted).

The rationale and policy considerations behind allowing intended beneficiaries to have standing in the above botched will execution cases are the same as those stated in other botched will cases. See e.g. Heyer v. Flaig, 70 Cal.2d 223, 228-29, 449 P.2d 161, 74 Cal.Rptr. 225 (1969) (an attorney undertaking to fulfill the testamentary instructions of his client realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries); Lucas v. Hamm, 56 Cal.2d 583, 588-91, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (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 with the testator may recover as third-party beneficiaries); 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).

The rationale and policy considerations are the same because the duty to ensure proper will drafting and the duty to ensure proper will execution are fundamentally the same. They are both necessary to fully carry out the intent of the testator and to fulfill the mutual interest of the

testator and the intended beneficiary to have a valid will and to pass on the desired inheritance according to the will.

Here, Mr. Parks and Mr. Balko had the same mutual interest to have the 2006 Will properly executed with witness attestation on April 26, 2006. Fink negligently failed to provide the necessary witness attestation for Mr. Balko's will execution, likely because of her belief that it was not essential for its validity, which eventually caused the 2006 Will to be invalid. Under the Washington authorities discussed in Section D above as well as the authorities discussed in this Section E, Mr. Parks clearly has standing to pursue Ms. Fink for legal malpractice for botching the witness attestation requirement at Mr. Balko's will execution.

F. The Class of Non-clients Allowed Standing to Sue Lawyers in Washington Includes More than Intended Beneficiaries of Botched Wills Because of this State's Strong Public Policy of Allowing Victims of Wrongdoing to Seek Redress in Court and Preventing Future Harm.

The class of non-clients who are allowed standing to sue lawyers for malpractice in Washington is not limited to intended beneficiaries of botched wills. In Bohn v. Cody, the Washington Supreme Court carefully examined all the Trask factors and decided to impose on a lawyer a duty to non-clients who were actually the opposing parties. Bohn, 119 Wn.2d at 365-67. Despite the lawyer's duty of loyalty to his own client and his need to zealously represent his own client, the Washington Supreme Court

determined that imposing liability in Bohn would not unduly burden the legal profession because an attorney is simply required to advise the unrepresented party to seek independent counsel before the attorney discusses the transaction with that party. Id. at 367. The Bohn decision clearly indicates a strong public policy in Washington not to let attorneys commit wrongdoing with impunity, even if to benefit his own clients, as long as the duty to non-clients is reasonable under the circumstances.

This strong public policy has been reinforced in later cases. For example, in Karan, the court imposed on a guardian's attorney a duty to the ward and allowed the ward standing to sue the guardian's attorney for malpractice. Karan, 110 Wn. App. at 81 and 86. Contrasting the different facts in Trask where a separate action and remedy against the personal representative was available, Division III of this Court pointed out:

. . . direct action for breach against the guardian is likely to be an empty remedy absent a bond. In contrast to *Trask* the injury to the ward in this case is precisely that she was left without any meaningful remedy. The remedy would have been secured by the statutorily required bond, or rendered unnecessary by a properly blocked account.

Id. at 86. "[T]he legitimate interests of the guardian here are inseparable from those of the ward", id., just as the mutual interest of both Mr. Balko and Mr. Parks to have the 2006 Will executed properly on April 26, 2006 in the case at bar. Just as it is not an undue burden on the profession to

require the attorney in Karan to simply secure a bond or set up a blocked account, it is not an undue burden to require Ms. Fink to know the critical importance of and to provide attesting witnesses on April 26, 2006.

In Treadwell, this Court reaffirmed the reasoning and rationale to impose a duty to the ward on the guardian's attorney. Treadwell, 115 Wn. App. at 247. Although the guardian's attorney in Treadwell arguably had done more than the guardian's attorney in Karan, this Court still did not consider it sufficient and held the attorney responsible for failure to strictly comply with the statutory requirements. Id. at 250. Requiring a lawyer to comply with what the applicable law mandates will not unduly burden the profession and does not put lawyers in an ethical bind. Id.

Here, requiring Ms. Fink to simply comply with the statutory witness attestation requirement under RCW 11.12.020 does not unduly burden the profession and does not put Ms. Fink in any ethical bind. The duty that must be imposed on Ms. Fink to see to the proper execution of the 2006 Will on April 26, 2006 is a duty owed to an intended beneficiary who had the same mutual interest as the testator, Mr. Balko. It is a duty that simply requires Ms. Fink to know the importance of the statutory requirement and to help Mr. Balko fulfill it at the time of execution. Imposing such a duty on Ms. Fink is not, and cannot be, an undue burden on the legal profession. In fact, it is entirely consistent with Washington's

longstanding strong public policy of allowing victims of attorneys' wrongdoing to seek redress in court and of preventing future harm caused by such wrongdoing.

V. CONCLUSION

It is a gross miscarriage of justice to categorically deny standing to the entire class of victims of attorneys' wrongdoing to protect the wrongdoers in the legal profession at the expense of the public and those the legal profession is supposed to serve. Mr. Parks is denied standing as a matter of law to access the court to hold Ms. Fink accountable for botching Mr. Balko's will execution on April 26, 2006 and caused him to be unable to inherit over \$4 million dollars. After committing malpractice by misleading Mr. Balko and others to believe that Mr. Balko had signed a valid will in 2006, Ms. Fink has added insult to injury by lying and fabricating stories about what happened in order to escape liability. What Janyce Fink does in this case is not only legally wrong, but also morally reprehensible.

Washington law and public policy do not allow attorney wrongdoers to escape liability by putting words in their dead clients' mouths and hiding behind their dead clients who can no longer speak to contradict these attorneys. Mr. Parks must be given the opportunity to prove at trial that Ms. Fink did indeed botch the execution of the 2006

Will and that her factual assertions about Mr. Balko and about the 2006 Will are false and fabricated.

Denying one in Mr. Parks' position the standing to hold negligent attorneys accountable not only deprives victims of lawyers' wrongdoing of any recourse for remedy, but also entails giving negligent lawyers absolute immunity for all negligence in will executions. No jurisdiction should have such an unjust rule of law, and no court should allow itself to be used as the instrument of such injustice.

Mr. Parks respectfully asks this Court to (1) rule as a matter of law that Mr. Parks, as the intended beneficiary, has standing to sue Fink for legal malpractice, (2) reverse the trial court's denial of standing and summary dismissal of Mr. Parks' legal malpractice claims against Fink, and (3) remand for trial of these claims.

Mr. Parks hopes that this Court will do justice in this case by at least giving him access and the opportunity to prove his case in court.

Respectfully submitted this 16th day of April, 2012.

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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:

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Dated this 16th day of April, in Seattle, King County, Washington.



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Appendix

(Out of State Authorities)

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111 Wis.2d 507 (Wis. 1983)

331 N.W.2d 325

Robert AURIC, Plaintiff-Appellant,

v.

CONTINENTAL CASUALTY COMPANY and
Timothy P. Crawford,

Defendants-Respondents.

No. 82-1121.

Supreme Court of Wisconsin.

March 29, 1983

Argued March 1, 1983.

[331 N.W.2d 326]

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Merton N. Rotter (argued), Milwaukee, for plaintiff-appellant; Warshafsky, Rotter, Tarnoff, Gesler & Reinhardt, S.C., Milwaukee, on brief.

C. James Heft (argued), Racine, for defendants-respondents; Heft, Dye, Heft & Paulson, Racine, on brief.

DAY, Justice.

This is an appeal from a judgment of the circuit court for Racine county, James W. Wilbershede, Judge, which dismissed Robert Auric's (Auric) complaint. Auric appealed and filed a petition to bypass the court of appeals pursuant to section 808.05, Stats. 1979-80. This court granted the petition on November 8, 1982.

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There are three issues to be considered on appeal. The first issue is: May an attorney who drafted a will be held liable to a beneficiary of the will not in privity with the attorney for the attorney's negligence in failing to properly supervise the execution of the will?

The second issue is: Should the respondent be allowed to challenge a trial court order denying his motion for summary judgment when he has failed to file a notice [331 N.W.2d 327] of cross-appeal pursuant to section 809.10(2)(b), Stats. 1979-80. [1]

The final issue is: When does the statute of limitations in section 893.52, Stats. 1979-80 [2] commence to run in an action by a will beneficiary against an attorney for negligently supervising the execution of a will?

We conclude that the beneficiary of a will may maintain an action against an attorney who negligently drafted or supervised the execution of the will even though the beneficiary is not in privity with that attorney. We deny plaintiff-appellant's motion to dismiss the defendant-respondent's cross-appeal because the defendant failed to file a cross-appeal under section 809.10(2)(b), Stats., but raised the issue for the first time in his brief

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on appeal. We also conclude that the plaintiff, Auric's action was commenced within the period of the statute of limitations.

Accordingly, we reverse the decision of the trial court and direct the trial court to enter judgment in favor of the plaintiff in the amount of \$25,000, the amount bequeathed to him in the invalid will. We remand the case to the trial court to determine whether an award of prejudgment interest should be made. [3]

This action was tried on stipulated facts as follows.

The testator, Frank P. Goldstein, died on April 13, 1975. Prior to his death, the decedent had attorney Timothy P. Crawford draft a new Will and Revocable Living Trust to replace a previous will dated April 30, 1970. On July 24, 1973, Mr. Crawford had the decedent come to his office to execute the new will and trust. Crawford explained the provisions of the trust to the decedent, had him sign the document, and then both Crawford and his secretary signed the trust document as witnesses. Crawford then explained the provisions of the will to the decedent and had him sign that document. Crawford then signed as a witness. However, because of what was characterized as either "confusion" or a "mistake of the moment," Crawford's secretary failed to sign the will.

The 1973 will contained a specific bequest of \$25,000 to Robert Auric, who was Mr. Goldstein's brother. The 1970 will contained no such bequest.

On July 1, 1975, the Racine County Probate Court ordered the 1970 will admitted to probate and denied

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admission to the 1973 will because it was not executed as required by section 853.03(2), Stats. 1971, [4] which

required two subscribing witnesses.

Crawford specifically stipulated that his action in failing to obtain the signature of a second witness to the July 24, 1973 will was negligent but "clearly not fraudulent."

On March 12, 1981, Auric filed an action against Crawford. His action contained two claims--one based on a theory of [331 N.W.2d 328] breach of an implied contract and the other based on negligence.

On June 1, 1981, Crawford moved for summary judgment on the grounds that both claims were barred by the statute of limitations. On October 29, 1981, Judge Willbershede issued a written decision granting Crawford's motion on the contract action but denying the motion on the negligence action. Judge Willbershede reasoned that the breach of contract occurred on the date of the negligent act, July 24, 1973, and thus an action for breach of contract which was commenced on March 12, 1981, was brought well after the six-year statute of limitations for actions on contracts. Judge Willbershede, however, also concluded that the statute of limitations for the negligence action did not commence to run until the date Goldstein died, April 13, 1975, and thus the negligence action was commenced within the six-year period.

The case was then submitted to the trial court on the stipulated facts. The trial court issued a written decision on April 30, 1982, in which it ruled that Crawford was not liable to Auric for his negligent act because no privity

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existed between the two. The court therefore dismissed Auric's complaint in an order dated May 17, 1982.

Auric appealed and this court granted his petition to bypass the court of appeals.

The first issue is whether an attorney may be held liable to a beneficiary of a will not in privity with the attorney for the attorney's negligence in drafting or supervising the execution of the will.

While it has long been the general rule that an attorney is not liable to third parties for acts committed in the exercise of his duties as an attorney, this rule is not without exceptions. Where fraud has been involved, attorneys have been held liable to third parties. *Scandrett v. Greenhouse*, 244 Wis. 108, 11 N.W.2d 510 (1943). This exception was reaffirmed in *Goerke v. Vojvodich*, 67 Wis.2d 102, 108, 226 N.W.2d 211 (1975), a case in which the court affirmed a trial court's dismissal of a third-party complaint against an attorney because the complaint failed to state a cause of action in fraud or wrongful conduct.

The question is should an exception be recognized to

the general rule of attorney nonliability to third parties to allow a beneficiary of a will to sue an attorney for his negligence in drafting or supervising the execution of a will. This court has frequently stated that it is a question of public policy--and, thus, one appropriate for a determination by this court--as to whether liability should not be imposed even though damage is caused by the negligent act of another. *Kornitz v. Earling & Hiller, Inc.*, 49 Wis.2d 97, 102-103, 181 N.W.2d 403 (1970); *Coffey v. City of Milwaukee*, 74 Wis.2d 526, 541, 247 N.W.2d 132 (1976); *Ollerman v. O'Rourke Co. Inc.*, 94 Wis.2d 17, 51, 288 N.W.2d 95 (1980). The question of whether to impose liability upon the attorney here is one that involves a consideration of public policy.

Jurisdictions which have considered this question are divided on the issue. See Annot., Attorneys-Liability to

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Third Parties, 45 A.L.R.3d 1181. Where courts have shied away from allowing the imposition of liability, concern has been expressed that such liability may conflict with the duty an attorney owes to his client. *Clagett v. Dacy*, 47 Md.App. 23, 420 A.2d 1285, 1289-1290 (1980). Courts that have allowed the imposition of liability seem to recognize that it will make attorneys more careful in the execution of their responsibilities to their clients. *Lucas v. Hamm*, 56 Cal.2d 583, 15 Cal.Rptr. 821, 824, 364 P.2d 685, 688 (1961), cert. denied 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed.2d 525 (1962); *Licata v. Spector*, 26 Conn.Sup. 378, 381, 225 A.2d 28 (1966). This is especially true where the beneficiaries of wills have been the injured third parties because, as the court in *Licata* wrote, "public policy would seem to favor the court's extending its equitable arm to assist innocent parties seeking just damages resulting from an error committed by another and affecting their rights, which error those innocent parties were never themselves able to correct." 26 Conn.Sup. at 382, 225 A.2d 28.

[331 N.W.2d 329] In this state, there is a constitutional right to make a will and to have it carried out according to the testator's intentions. *Cowie v. Strohmeier*, 150 Wis. 401, 136 N.W. 956 (1912); *Estate of Ogg*, 262 Wis. 181, 186, 187, 54 N.W.2d 175 (1952); *Will of Wright*, 12 Wis.2d 375, 380, 107 N.W.2d 146 (1961). This right reflects a strong concern that people should be as free as possible to dispose of their property upon their death. Allowing a will beneficiary to maintain a suit against an attorney who negligently drafts or supervises the execution of a will is one way to make an attorney accountable for his negligence.

Accountability should result in increasing the care with which attorneys draft wills and see to their execution.

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It is consistent with and promotes this state's longstanding public policy supporting the right of a testator to make a will and have its provisions carried out. Public policy supports the imposition of liability on an attorney who acts negligently in drafting or supervising the execution of a will resulting in a loss to a beneficiary named therein. Therefore the lack of privity should not be a bar to this action.

Such a determination is consistent with decisions of other jurisdictions which have abandoned a strict privity test in will beneficiary suits against attorneys. Many of those courts have relied upon a balancing of the factors set out in *Lucas*. [5] Those factors 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, and the policy of preventing future harm." 15 Cal.Rptr. at 823, 364 P.2d at 687.

Examining these factors in light of the stipulated facts in this case, it is clear that this will was intended to bring direct benefit to the plaintiff. It was foreseeable that if the will was not admissible in probate it would cause harm to him. It is also clear that the plaintiff suffered a loss of his \$25,000 bequest and that loss resulted directly from the defendant's negligence. Finally, in order to prevent future harm to others similarly situated, the imposition of liability is proper.

Although the lack of privity does not bar this action, there remains the question of whether liability should be imposed in this specific case. Normally, such a factual determination would be one for the trial court to make.

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However, because this case is before the court on stipulated facts, the only task that remains is to apply the law to undisputed facts.

Here Crawford admits that he negligently supervised the execution of the will. That negligence resulted in the loss to Auric of a \$25,000 bequest. Since neither Crawford's liability nor the amount of damage is in dispute, we reverse the decision of the trial court and direct it to enter judgment in the plaintiff's favor in the amount of \$25,000. However, because of a factual dispute between the parties on the question of whether prejudgment interest should also be awarded, we remand the case to the trial court for a decision on that issue.

The second issue on appeal is whether the respondent's challenge to a trial court order denying his motion for summary judgment based on the defense of the running of the statute of limitations should be allowed where he has failed to raise the issue on cross-appeal under section 809.10(2)(b), Stats. Crawford raised the defense in his brief on appeal.

The appellant raised this issue in this court by a motion to dismiss the respondent's "attempted cross-appeal" and strike those portions of his brief relating to this question. We ordered the motion be held in abeyance until the case could be considered on the merits.

Section 809.10(2)(b), Stats., governs cross appeals and requires that a respondent who seeks modification of an order entered in a [331 N.W.2d 330] proceeding from which the appellant appealed must file a notice of cross-appeal within thirty days after filing of a notice of appeal. The defendant failed to do this but now seeks in his brief to raise the issue of the trial court's denial of his motion for summary judgment.

In *State v. Alles*, 106 Wis.2d 368, 316 N.W.2d 378 (1982), this court discussed the cross-appeal requirement contained in section 809.10(2)(b).

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It is clear that orders challenged on cross-appeal need not be final orders. *Alles*, 106 Wis.2d at 387-388, 316 N.W.2d 378. It is also true that a respondent may raise an issue in his briefs without filing a cross-appeal "when all that is sought is the raising of an error which, if corrected, would sustain the judgment..." *Alles*, 106 Wis.2d at 390, 316 N.W.2d 378. This Court wrote in *Alles*,

"The reason for this is the accepted appellate court rationale that a respondent's judgment or verdict will not be overturned where the record reveals the trial court's decision was right, although for the wrong reason. An appellate court, consistent with that percept [sic], has the power, once an appealable order is within its jurisdiction, to examine all rulings to determine whether they are erroneous and, if corrected, whether they would sustain the judgment or order which was in fact entered." *Alles*, 106 Wis.2d at 391, 316 N.W.2d 378.

Here, were we to conclude that the trial judge erred in denying Crawford's motion for summary judgment on the grounds that the negligence action was barred by the statute of limitations, such a decision would sustain the decision of the trial court. The issue is one that under *Alles* can be raised for the first time in briefs on appeal without having filed a cross-appeal. We therefore deny the appellant's motion.

The final issue is when did the statute of limitations under section 893.52, Stats., commence to run in a negligence action by a will beneficiary against an attorney who drafted and supervised the execution of the will.

Under section 893.52, an action must be commenced within six years after the cause of action accrues. In *Boehm v. Wheeler*, 65 Wis.2d 668, 223 N.W.2d 536 (1974), an action for damages for legal malpractice, this court held that for purposes of section 893.52 (then

section 893.19(5)), it

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was the date of injury rather than the date of the negligent act which commenced the running of the period of limitations. Wheeler, 65 Wis.2d at 676-677, 223 N.W.2d 536.

In the present case the negligent act occurred on July 24, 1973, the date attorney Crawford negligently supervised the execution of the will. The question is whether the injury to Auric occurred on the same date as the negligent act.

We conclude that Auric was not injured on the date of Crawford's negligent act but rather was injured on the date of Frank Goldstein's death for it was only after that date that Auric would have had an enforceable right under the July 24, 1973, will. [6] As the court of appeals properly determined in Estate of Eisenberg, 90 Wis.2d 620, 630, 280 N.W.2d 359 (1979), "a will does not create an enforceable right in a beneficiary until the testator has died." Therefore, Auric could suffer no injury before Goldstein died for at any point up until Goldstein's death, the will could have been changed and the bequest removed. Since Goldstein died on April 13, 1975, and the action was filed on March 12, 1981, the action was commenced within the six year period set out in section 893.52 (then section 893.19(5)).

Judgment of the trial court is reversed with directions to enter judgment in favor of the plaintiff in the amount of \$25,000 and cause remanded for further proceedings not inconsistent with this opinion.

Notes:

[1] Section 809.10(2)(b), Stats. 1979-80:

"809.10 Rule (Initiating the appeal) (2) MULTIPLE APPEALS (b) Cross-appeal. A respondent who seeks a modification of the judgment or order appealed from or of another judgment or order entered in the same action or proceeding shall file a notice of cross-appeal within the period established by law for the filing of a notice of appeal, or 30 days after the filing of a notice of appeal, whichever is later. A cross-appellant has the same rights and obligations as an appellant under ch. 809."

[2] Section 893.52, Stats. 1979-80:

"893.52 Action for damages for injury to property. An action, not arising on contract, to recover damages for an injury to real or personal property shall be commenced with 6 years after the cause of action accrues or be barred, except in the case where a different period is expressly prescribed."

[3] Although the damages here are liquidated and thus

prejudgment interest would normally be properly awarded (State ex rel. Schilling & Klingler v. Baird, 65 Wis.2d 394, 401, 222 N.W.2d 666 (1974)), the defendant claims the plaintiff waived his right to interest by certain acts prior to the bringing of this action. We remand the case to the trial court for a factual determination on this question.

[4] Section 853.03(2), Stats. 1971:

"853.03 Execution of wills. Every will in order to be validly executed must be in writing and executed with the following formalities: ...

"(2) It must be signed by 2 or more witnesses in the presence of the testator and in the presence of each other."

[5] See, Fickett v. Superior Ct. of Pina County, 27 Ariz.App. 793, 795, 558 P.2d 988 (1976); McAbee v. Edwards, 340 So.2d 1167, 1168-1169 (Fla.App.1976); Guy v. Liederbach, 279 Pa.Super. 543, 421 A.2d 333, 335 (1980).

[6] Other jurisdictions that have considered this question have determined that the statute of limitations does not commence to run until the testator's death. Heyer v. Flaig, 70 Cal.2d 223, 449 P.2d 161, 165, 74 Cal.Rptr. 225, 229 (1969); Shideler v. Dwyer, Ind., 417 N.E.2d 281, 290 (1981).

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320 P.2d 16

49 Cal.2d 647

VINKA BIAKANJA, Respondent,

v.

THOMAS J. IRVING, Appellant.

S. F. No. 19757.

Supreme Court of California

Jan. 17, 1958

In Bank.

[49 Cal.2d 648] COUNSEL

Lloyd J. Cosgrove and Herbert Chamberlin for Appellant.

Lenz, Jarvis, Miller & Decker, Martin J. Jarvis and Joseph E. Isaacs for Respondent.

OPINION

GIBSON, C.J.

Plaintiff's brother, John Maroevich, died, leaving a will which devised and bequeathed all of his property to plaintiff. The will, which was prepared by defendant, a notary public, was denied probate for lack of sufficient attestation. Plaintiff, by intestate succession, received only one-eighth of the estate, and she recovered a judgment against defendant for the difference between the amount which she would have received had the will been valid and the amount distributed to her.

Defendant, who is not an attorney, had for several years written letters and prepared income tax returns for Maroevich. The will was typed in defendant's office and "subscribed and sworn to" by Maroevich in the presence of defendant, who affixed his signature and notarial seal to the instrument. Sometime later Maroevich obtained the signatures of two witnesses to the will, neither of whom was present when Maroevich signed it. These witnesses did not sign in the presence of each other, and Maroevich did not acknowledge his signature in their presence.

An attorney who represented Maroevich's stepson in the probate proceedings testified that he had a telephone conversation with defendant shortly after Maroevich's death, in which defendant said he prepared the will and

notarized it. According to the attorney, defendant, in discussing how the will was witnessed, "admonished me to the effect that I was a young lawyer, I'd better go back and study my law books some more, that anybody knew a will which bore a notarial seal was a valid will, didn't have to be witnessed by any witnesses."

The court found that defendant agreed and undertook to prepare a valid will and that it was invalid because defendant negligently failed to have it properly attested. The findings are supported by the evidence.

The principal question is whether defendant was under a duty to exercise due care to protect plaintiff from injury and was liable for damage caused plaintiff by his negligence even though they were not in privity of contract. In *Buckley v. Gray* (1895), 110 Cal. 339 [52 Am.St.Rep. 88, 31 A.L.R. 862], it was held that a person who was named as a beneficiary under a will could not recover damages from an attorney who negligently drafted and directed the execution of the will with the result that the intended beneficiary was deprived of substantial benefits. The court based its decision on the ground that the attorney owed no duty to the beneficiary [49 Cal.2d 649] because there was no privity of contract between them. *Mickel v. Murphy*, 147 Cal.App.2d 718, relying on *Buckley v. Gray*, supra, held that a notary public who prepared a will was not liable to the beneficiary for failing to have it properly executed. When *Buckley v. Gray*, supra, was decided in 1895, it was generally accepted that, with the few exceptions noted in the opinion in that case, there was no liability for negligence committed in the performance of a contract in the absence of privity. Since that time the rule has been greatly liberalized, and the courts have permitted a plaintiff not in privity to recover damages in many situations for the negligent performance of a contract.

Liability has been imposed, in the absence of privity, upon suppliers of goods and services which, if negligently made or rendered, are "reasonably certain to place life and limb in peril." (See *Kalash v. Los Angeles Ladder Co.*, 1 Cal.2d 229, 231 [manufacturer of ladders]; *Hale v. Depaoli*, 33 Cal.2d 228, 231 [13 A.L.R.2d 183] [building contractor]; *Dahms v. General Elevator Co.*, 214 Cal. 733, 738-742 [elevator maintenance company]; *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 [111 N.E. 1050, Ann.Cas. 1916C 440, L.R.A. 1916F 696] [automobile manufacturer]; *Prosser, Torts* (2d ed. 1955), sections 84-85, p. 497 et seq.) There is also authority for the imposition of liability where there is no privity and where the only foreseeable risk is of damage to tangible property. (*Kolberg v. Sherwin-Williams Co.*, 93 Cal.App. 609, 613; *Brown v. Bigelow*, 325 Mass. 4 [88 N.E.2d 542, 543.]; *Ellis v. Lindmark*, 177 Minn. 390 [225 N.W. 395, 396-397]; *Dunn v. Ralston Purina Co.*, 38 Tenn.App. 229 [272 S.W.2d 479, 481 et seq.]; *Cohan v.*

Associated Fur Farms, 261 Wis. 584 [53 N.W.2d 788, 791-792]; see Prosser, supra, section 84, pp. 501-502.)

Recovery has been allowed in some cases to a third party not in privity where the only risk of harm created by the negligent performance of a contract was to an intangible interest. For example, in the leading case of *Glanzer v. Shepard*, 233 N.Y. 236 [135 N.E. 275, 23 A.L.R. 1425], a purchaser of beans overpaid the vendor in reliance on an erroneous certificate negligently furnished by a public weigher employed by the vendor. In holding the weigher liable to the purchaser, the court stated, in an opinion by Justice Cardozo, that the purchaser's use of the certificate was, to the weigher's knowledge, the "end and aim" of the transaction. (See also *Doyle v. Chatham & Phenix Nat. Bank*, 253 N.Y. 369 [171 N.E. 574, 71 A.L.R. 1405];

[49 Cal.2d 650] *Dickel v. Nashville Abstract Co.*, 89 Tenn. 431 [14 S.W. 896, 24 Am.St.Rep. 616]; *Anderson v. Spriestersbach*, 69 Wash. 393 [42 L.R.A.N.S. 176]; Rest., Torts, section 552, comment f.) In another group of cases the addressee of a telegram has been allowed to recover from the telegraph company for loss of the opportunity of a job because of the company's failure to deliver a message. (*Western Union Tel. Co. v. Bowman*, 141 Ala. 175 [37 So. 493]; *McPherson v. Western Union Tel. Co.*, 189 Mich. 471 [155 N.W. 557, 559.]; cf. *Western Union Tel. Co. v. McKibben*, 114 Ind. 511 [14 N.E. 894, 897-898]; *Barker v. Western Union Tel. Co.*, 134 Wis. 147 [114 N.W. 439, 440-441, 14 L.R.A.N.S. 533, 126 Am.St.Rep. 1017].)

Imposition of liability for injuries to intangible interests has been refused, however, in the absence of privity where any potential advantage to the plaintiff from the performance of the contract was only a collateral consideration of the transaction or where the injury to the particular person bringing suit was not foreseeable (*Ultramares Corp. v. Touche*, 255 N.Y. 170 [174 N.E. 441, 74 A.L.R. 1139]; *Phoenix Title & Trust Co. v. Continental Oil Co.*, 43 Ariz. 219 [1069-1071]; *Ohmart v. Citizens' Sav. & Trust Co.*, 82 Ind.App. 219 [145 N.E. 577]; cf. *MacKown v. Illinois Publishing & Printing Co.*, 289 Ill.App. 59 [6 N.E.2d 526].)

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. (Cf. Prosser, Torts (2d ed. 1955), sections 36, 88, 107, pp. 168, 172, 544-545, 747; 2 Harper and James, Torts (1956), section 18.6, p. 1052.) Here, the "end and aim" of the transaction was to provide for the passing of

Maroevich's estate to plaintiff. (See *Glanzer v. Shepard*, 233 N.Y. 236 [135 N.E. 275, 23 A.L.R. 1425].) Defendant must have been aware from the terms of the will itself that, if faulty solemnization caused the will to be invalid, plaintiff would suffer the very loss which occurred. As Maroevich died without revoking his will, plaintiff, but for defendant's negligence, would have received all of the Maroevich estate, and the [49 Cal.2d 651] fact that she received only one-eighth of the estate was directly caused by defendant's conduct.

Defendant undertook to provide for the formal disposition of Maroevich's estate by drafting and supervising the execution of a will. This was an important transaction requiring specialized skill, and defendant clearly was not qualified to undertake it. His conduct was not only negligent but was also highly improper. He engaged in the unauthorized practice of the law (Bus. & Prof. Code, section 6125; cf. *People v. Merchants Protective Corp.*, 189 Cal. 531, 535; *People v. Sipper*, 61 Cal.App.2d Supp 844, 848 [142 P2d 960]; *Grand Rapids Bar Ass'n v. Denkema*, 299 Mich. 56 [287 NW 377, 380]; *State ex rel Wyoming State Bar v. Hardy*, 61 Wyo 172 [156 P2d 309, 313]), which is a misdemeanor in violation of section 6126 of the Business and Professions Code [*] Such conduct should be discouraged and not protected by immunity from civil liability, as would be the case if plaintiff, the only person who suffered a loss, were denied a right of action.

We have concluded that plaintiff should be allowed recovery despite the absence of privity, and the cases of *Buckley v. Gray*, 110 Cal. 339 [52 Am.St.Rep. 88, 31 A.L.R. 862], and *Mickel v. Murphy*, 147 Cal.App.2d 718, are disapproved insofar as they are in conflict with this decision.

The judgment is affirmed.

Shenk, J., Carter, J., Traynor, J., Schauer, J., Spence, J., and McComb, J., concurred.

Notes:

[*] Section 6125 of the Business and Professions Code provides: "No person shall practice law in this State unless he is an active member of the State Bar."

Section 6126 of the Business and Professions Code provides: "Any person advertising himself as practicing or entitled to practice law or otherwise practicing law, after he has been disbarred or while suspended from membership in the State Bar, or who is not an active member of the State Bar, is guilty of a misdemeanor."

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74 Cal.Rptr. 225

70 Cal.2d 223, 449 P.2d 161

Arden Bovee HEYER et al., Plaintiffs and Appellants,

v.

Joseph Lawrence FLAIG, Defendant and Respondent.

L.A. 29571.

Supreme Court of California

Jan. 22, 1969.

In Bank [70 Cal.2d 224] Vernon S. Gray, Los Angeles, for plaintiffs and appellants.

Brill, Hunt, DeBuys & Burby, Los Angeles, Mitchell L. Lathrop, Pasadena, Crider, Tilson & Ruppe and Abe Mutchnick, Los Angeles, for defendant and respondent.

[70 Cal.2d 225] TOBRINER, Justice.

This case presents a single, basic question: When does the statute of limitations commence to run against an intended beneficiary of a will who, under the authority of *Lucas v. Hamm* (1961) 56 Cal.2d 583, 15 Cal.Rptr. 821, acquires a right of action against an attorney for malpractice in negligently failing to fulfill the testamentary directions of his client? Under the alleged facts of this case, we conclude that the limitations period starts from the date that the cause of action accrues: namely, the incidence of the testatrix' death when the negligent failure to perfect the requested testamentary scheme becomes irremediable and the impact of the injury occurs. Accordingly, the trial court erroneously sustained a demurrer to plaintiff's complaint on the ground that the statute of limitations bars the present action brought later than two years [1] after the defendant drafted the will. Since the plaintiffs filed their complaint within two years of the testatrix' death, the cause avoids the statutory bar.

The plaintiffs' complaint sets forth inter alia the following allegations: In December 1962 Doris Kilburn, the testatrix, retained defendant Flaig to prepare her will. She told defendant that she wished all of her estate to pass to her two daughters, plaintiffs in this action. She also told him that she intended to marry Glen Kilburn. On December 21, 1962, Doris Kilburn executed a will prepared by defendant. On December 31, 1962, she

married Glen Kilburn.

The will purports to leave the entire estate of Doris Kilburn to the plaintiffs. The testament however, does not mention the testatrix' husband, except that it names him executor. On July 9, 1963, Doris Kilburn died; thereafter the Los Angeles County Superior Court admitted to probate the above-described document as her last will and testament. In these probate proceedings, Glen Kilburn claimed a portion of the estate as a post-testamentary spouse under Probate Code section 70. [2]

Plaintiffs allege that defendant negligently failed to advise Doris Kilburn of the consequences of a post-testamentary [70 Cal.2d 226] marriage, and negligently failed to include in the will any provision as to the intended marriage. Plaintiffs allege further that, subsequent to the marriage, and up until the date of testatrix' death, the defendant negligently failed to advise her of the legal consequences of omitting from the will any provision relative to her husband's claim to a share of her estate. Plaintiffs allege that this negligence caused them to suffer damages in the amount of \$50,000. They also pray for \$50,000 punitive damages on the ground that defendant proceeded maliciously, in wanton disregard of their rights.

Alleging uncertainty, ambiguity, unintelligibility, failure to state facts sufficient to constitute a cause of action, and failure to state a cause of action by reason of the bar of the statute of limitations, section 339, subdivision 1, of the Code of Civil Procedure, defendant demurred to the complaint. On the stated basis that the statute of limitations bars the action because plaintiffs filed the complaint later than two years after the commission of the 'negligent act' (presumably the drafting of the will), [3] the trial court sustained the demurrer. Following plaintiffs' failure to take advantage of the court's leave to amend, the court granted defendant's motion to dismiss the action pursuant to section 581, subdivision 3, of the Code of Civil Procedure. From this dismissal plaintiffs appeal.

1. An attorney who negligently fails to fulfill a client's testamentary directions incurs liability in tort for violating a duty of care owed directly to the intended beneficiaries.

In the case of *Lucas v. Hamm*, supra, 56 Cal.2d 583, 15 Cal.Rptr. 821, we embraced the position that an attorney who erred in drafting a will could be held liable to a person named in the instrument who suffered deprivation of benefits as a result of the mistake. Although we stated that the harmed party could recover as an intended third-party beneficiary of the attorney-client agreement providing for legal services, we ruled that the third party could also recover on a theory of tort

liability for a breach of duty owed directly to him. At the heart of our decision in *Lucas v. Hamm* lay this recognition of duty.

In the earlier case of *Biakanja v. Irving* (1958) 49 Cal.2d 647, 65 A.L.R.2d 1358, we had held that a notary public who negligently failed to direct proper attestation [70 Cal.2d 227] of a will became liable in tort to an intended beneficiary who suffered damage because of the invalidity of the instrument. In that case, the defendant argued that the absence of privity deprives a plaintiff of a remedy for negligence committed in the performance of a contract. In rejecting this contention we pointed out that the inflexible privity requirement for such a tort recovery has been virtually abandoned in California. (49 Cal.2d at pp. 649--650, 320 P.2d at p. 19.) We then analyzed the bases for imposing such a duty: '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.'

Applying the *Biakanja* criteria to the facts of *Lucas*, the court found that attorneys incur a duty in favor of certain third persons, namely, intended testamentary beneficiaries. In proceeding to discuss the contractual remedy of such persons as the plaintiffs in *Lucas*, we concluded that 'as a matter of policy, * * * they are entitled to recover as third-party beneficiaries.' (56 Cal.2d at p. 590, 15 Cal.Rptr. at p. 825, 364 P.2d at p. 689.) The presence of the *Biakanja* criteria in a contractual setting led us to sustain not only the availability of a tort remedy but of a third-party beneficiary contractual remedy as well. This 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. This reading of *Lucas* is reinforced by the following language recited with approval in the case of *Eads v. Marks* (1952) 39 Cal.2d 807, 811, 260: 'It has been well established in this state that if the cause of action arises from a breach of a promise set forth in the contract, the action is ex contractu, but if it arises from a breach of duty growing out of the contract it is ex delicto. * * *'

In the recent case of *Connor v. Great Western Savings and Loan Association* (1968) Cal., 73 Cal.Rptr. 369, we held that a lending institution, which financed and 'shared in the control' (73 Cal.Rptr. 369) of a residential tract development, and 'cooperated' with the developer in that undertaking (id.), incurred liability in tort to the buyers of improperly built houses. We said that the lending [70 Cal.2d 228] institution owed a duty to the purchasers 'to exercise reasonable care to prevent the

construction and sale of seriously defective homes' (ditto opn., p. 23, 378 of 73 Cal.Rptr., p. 618 of 447 P.2d). *Connor*, like the preceding cited cases, recognizes that liability may flow from relationships which are not expressed by contract between the parties, not in 'privity' with each other, and that such duty could emanate from the policy considerations described in *Biakanja v. Irving*, supra, 49 Cal.2d 647. Indeed, the early common law posited 'rights and duties upon the relationship of parties within the socio-economic system rather than upon factors, such as consensual agreement, dependent on the will of individual litigants' and such relationship concepts served as the major framework of the legal structure. (See *Tobriner and Grodin, The Individual and the Public Service Enterprise in the New Industrial State* (1967) 55 Cal.L.Rev. 1247, 1249--1250.) The *Biakanja* line of cases does no more than apply to the issues there involved these concepts of duties and rights based upon the relationship between the tortfeasor and the injured parties.

Turning to the present case we therefore concentrate on the tortious aspect of defendant's conduct. We inquire as to whether there was such a duty; the breach, if any; the possibility of the bar of the statute of limitations.

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 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. Indeed, 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 the fees paid; only the beneficiaries suffer the real loss. We recognize 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.

The duty thus recognized in *Lucas* stems from the attorney's undertaking to perform legal services for the client but [70 Cal.2d 229] reaches out to protect the intended beneficiary. We impose this duty because of the relationship between the attorney and the intended beneficiary; 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.

Although the duty accrues directly in favor of the

intended testamentary beneficiary, the scope of the duty is determined by reference to the attorney-client context. Out of the agreement to provide legal services to a client, the prospective testator, arises the duty to act with due care as to the interests of the intended beneficiary. We do not mean to say that the attorney-client contract for legal services serves as the fundamental touchstone to fix the scope of this direct tort duty to the third party. The actual circumstances under which the attorney undertakes to perform his legal services, however, will bear on a judicial assessment of the care with which he performs his services.

We now examine the complaint in the present case. The complaint alleges that defendant negligently prepared a will purporting to carry out the testatrix' testamentary intention, to give her entire estate to the plaintiffs. The defendant's alleged negligence consisted of his omitting from the will any language which would defeat the rights of the testatrix' husband who could claim a statutory share of the estate as a post-testamentary spouse under Probate Code section 70.

In rendering legal services, an attorney must perform in such manner as 'lawyers of ordinary skill and capacity commonly possess and exercise' (*Estate of Kruger* (1900) 130 Cal. 621, 626, 33). 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. In the present case, defendant allegedly knew that the testatrix wished to avoid such consequences. Despite his knowledge that the testatrix intended to marry following the execution of the will, the attorney drafted a will which arguably lacked adequate provision against such consequences (cf. *Estate of Ryan* (1923) 191 Cal. 307). Furthermore, the complaint alleges that the defendant negligently failed to advise the testatrix that she should change her will after her marriage and continued this negligent omission until the time of her death. The complaint states a sufficient cause of action in tort under the doctrine of *Lucas*; we proceed, therefore,

[70 Cal.2d 230] to determine when the cause of action accrued so as to commence the running of the statute of limitations.

2. The statute of limitations does not commence to run until the testatrix' death, at which time the defendant's negligence becomes irremediable and before which time the plaintiffs possess no recognized legal interest in the testatrix' estate.

The continuing nature of the defendant's conduct as alleged in the complaint prevents the running of the statute of limitations before the testatrix' death. The negligence involved in the original drafting of the will continued after that date in defendant's failure to advise the testatrix of the possible undesired consequences if she died without having changed her will.

As to the plaintiffs' interests, defendant's action in negligently drafting the will and his omission in negligently failing to correct his error before the testatrix' death caused equally damaging consequences. Defendant owed a duty of care to the plaintiffs to effectuate in a non-negligent manner the testamentary scheme of the testatrix. Such a duty may extend beyond the date of the original drafting of the will when the attorney's negligent acts created a defective estate plan upon which the client might rely until her death. The duty effectively to fulfill the desired testamentary scheme continued until the testatrix' death, when the testatrix' reliance became irrevocable. Because defendant owed plaintiffs this continuing duty the cause of action did not accrue nor the statute of limitations commence to run until the defendant's negligence became irremediable. [4]

A second basic reason that bars the running of the statute until the testatrix' death lies in the fact that plaintiffs could not bring an action against defendant before that time. A statute of limitations does not commence to run until a cause of action accrues, and 'a cause of action * * * invariably accrues when there is a remedy available.' (*Irvine v. Bossen* (1944) 25 Cal.2d 652, 658, 13.)

An intended testamentary beneficiary acquires no recognized legal rights under a will until the testator dies, at [70 Cal.2d 231] which time his interest will vest or, indeed, possibly fail. (Cf. *Estate of Harvey* (1958) 164 Cal.App.2d 330, 332.) Before her death, the testatrix in the present case could have altered her will at any time and for any reason. Furthermore, she could have changed her testamentary intention to conform to the actual disposition of her estate under the 'defective' will; in such a case, the plaintiffs here would have suffered no actionable injury. Before the testatrix' death, the plaintiffs can state no cause of action because until that time there can be no injury.

To adopt a rule which would start the running of the statutory period from the date of some 'original' negligence, we would be compelled to accept the absurd proposition that the only plaintiff who could recover under the doctrine of *Lucas v. Hamm*, supra, 56 Cal.2d 583, 15 Cal.Rptr. 821, would be one whose testator had died and who could file a complaint prior to two years after the drafting of the will or after the occurrence of some other original negligent act. Such a rule would vitiate the decision of *Lucas* by allowing the right to enforce the duty there recognized to turn on mere fortuity.

We cannot accept defendant's argument that the application to the instant case of the present rule with respect to legal malpractice actions, i.e., that the statutory period commences to run from the time of the negligent act, requires a different result here. Cited by defendant and invoked by the trial court, that rule has recently been included in dicta by this court in the case of *Alter v.*

Michael, supra, 64 Cal.2d 480, 483, 50 Cal.Rptr. 553, 555, 155: '* * * the two-year period which governs a legal malpractice action runs from the time of the negligent acts (Bustamante v. Haet (1963) supra, 222 Cal.App.2d 413, 414--415, 35 Cal.Rptr. 176, and cases there cited).' The failure of the party injured to discover the negligence does not toll the running of the statute. (Eckert v. Schaal, supra, 251 Cal.App.2d 1, 6, 58 Cal.Rptr. 817.) The defendant argues that, under this rule, even if the testatrix herself had filed a complaint on the date of the present action the statute would have barred it. If plaintiffs here are not also barred, says defendant, we violate the rule that a third-party beneficiary is as much subject to the statute of limitations as the promisee to the contract which creates the rights of the beneficiary. (Bogart v. George K. Porter Co. (1924) 193 Cal. 197, 31 A.L.R. 1045.)

This argument proceeds from the erroneous assumption that the rights of an intended testamentary beneficiary recognized in Lucas flow exclusively from the attorney-client agreement. As we discussed supra, the court in Lucas merely extended [70 Cal.2d 232] the principle of Biakanja v. Irving, supra, 49 Cal.2d 647, 65 A.L.R.2d 1358, to attorneys, holding that by reason of public policy a duty of care arises directly in favor of a third person. Our analysis of the decision in Lucas points to the conceptual superfluity of the third-party beneficiary rationale of that case: the right of action sounds in tort and enures by reason of our determination that public policy requires the recognition of a duty of care on the part of the attorney which accrues directly to the third party, the intended beneficiary. The rule of Bogart v. George K. Porter Co., supra, 193 Cal. 197, should not be rigidly applied to a case in which the policy behind the rule may be inappropriate. [5]

A rule placing the beneficiary in the same position as the testatrix as to the running of the statute of limitations would be viable only if an action by either were equally available and vindicated identical substantive rights. We have noted that the intended beneficiary of a will acquires no cause of action until his testator's death, whereas the prospective testator may sue immediately to recover the cost of drafting the will. Furthermore, the interests at stake in an action by the intended beneficiary and in an action by the testator differ. The former seeks to recover an intended bequest which has been denied him because of the attorney's negligence. The latter seeks to perfect his testamentary scheme, now defective because of the attorney's negligence. In the latter case, the plaintiff's damages will be slight and the consequences of finding a statutory bar will be mild since the testator can create a new and effective estate plan. [6]

The intended beneficiary, on the other hand, suffers a great and irrevocable loss: he has nowhere to turn but to the attorney for compensation. Indeed, Lucas recognizes that unless the beneficiary can recover from the attorney

the beneficiary suffers a wrong without a compensating remedy. The duty which the attorney owes the beneficiary is separate and distinct [70 Cal.2d 233] from the duty owed the client; so, too, are the remedies for breaches of these duties. Hence, we violate no policy of Bogart in holding that the rights of the beneficiary may in some instances rise higher than those of his testator. [7]

In the present case we have determined that the plaintiffs' action would have been premature until the testatrix' death and that the defendant's negligence was continuing and incomplete until that time. Hence the statute of limitations does not commence to run until the testatrix'

[70 Cal.2d 234] death and consequently the trial judge erroneously sustained defendant's general demurrer on the ground of the bar of the statute of limitations.

We have concluded that the complaint in the present action withstands defendant's general demurrer. Although defendant also filed special demurrers, the trial court did not rule upon them. We do not decide that the complaint was not subject to the special demurrers; the trial court may in its discretion require the clarification of the alleged uncertainties and ambiguities. (Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal.2d 416, 425--426; Wennerholm v. Stanford Univ. School of Medicine (1942) 20 Cal.2d 713, 720, 141 A.L.R. 1358; Guilliams v. Hollywood Hospital (1941) 18 Cal.2d 97, 104.)

The judgment of dismissal is reversed with directions to the trial court to overrule the general demurrer and to rule on the points presented by the special demurrers.

TRAYNOR, C.J., and PETERS, BURKE and SULLIVAN, JJ., concur.

MOSK, J., concurs in the judgment.

McCOMB, Justice (dissenting).

I dissent. I would affirm the orders of dismissal for the reasons expressed by Mr. Justice Bishop in the opinion prepared by him for the Court of Appeal in Heyer v. Flaig (Cal.App.) 67 Cal.Rptr. 92.

NOTES:

[1] The two-year limitations period of Code of Civil Procedure section 339, subdivision 1, governs legal malpractice actions. (Alter v. Michael (1966) 64 Cal.2d 480, 50 Cal.Rptr. 553.)

[2] '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.'

[3] The trial judge relied upon the general rule for attorney malpractice actions that the statute of limitations 'begins to run at the time of the negligent act, Not at the time of discovery of the negligence. (Bustamante v. Haet (1963)) 222 CA 2d 413, 414 (35 Cal.Rptr. 176).'

[4] See Fazio v. Hayhurst (1966) 247 Cal.App.2d 200, 203, 55 Cal.Rptr. 370, wherein the court stated that when an action taken by a client, in reliance upon an attorney's advice, was freely revocable, the cause of action might not accrue until such action became irrevocable; see also, Shelly v. Hansen (1966) 244 Cal.App.2d 210, 215, 53 Cal.Rptr. 20; cf. Lally v. Kuster (1918) 177 Cal. 783, 761; Eckert v. Schaal (1967) 251 Cal.App.2d 1, 6, 58 Cal.Rptr. 817; Walker v. Pac. Ind. Co. (1960) 183 Cal.App.2d 513, 6 Cal.Rptr. 924.

[5] Even conceding the validity of alternative theories of recovery arising from the 'alternative' rationalia of Lucas, we suggest defendant's argument must fail because of the rule that when a case sounds both in contract and in tort the plaintiff has an election as to which theory of recovery he will pursue. (Comunale v. Traders & General Ins. Co. (1958) 50 Cal.2d 654, 663, 68 A.L.R.2d 883; Cason v. Glass Bottle Blowers Assn. (1951) 37 Cal.2d 134, 142, 21 A.L.R.2d 1387.) An election to pursue the action strictly in tort would destroy an automatic application of the Bogart rule to the present case.

[6] After the testator's death, no one but the intended beneficiary has an interest in the defeated bequest. The estate could sue only for the attorney's fees expended since presumably there will have been no other diminution of the estate funds due to the error.

[7] Throughout this discussion we have assumed that if the testatrix had lived and filed suit on the date of the present action, her action would be barred by the statute of limitations under the rule that the statutory period commences to run from the negligent act and not from the date of discovery of the negligence. We note the contrasting rule as to medical malpractice cases: the period does not commence to run until the discovery of the negligence. Although the latter rule applies to a different statute of limitations (Code Civ.Proc., § 340, subd. 3, one year), both rules stem from judicial decisions. In fact, the rule with respect to medical malpractice formerly was the same as the present rule for legal malpractice. (Gum v. Allen (1931) 119 Cal.App. 293.) The case which established the modern rule for medical malpractice cases (Huysman v. Kirsch (1936) 6 Cal.2d 302) involved a physician's negligently leaving a tube in the plaintiff's body following an operation. The plaintiff did not discover the negligence and bring suit until after one year from the date of the operation.

In announcing the rule of postponed accrual (until discovery of the negligence) in medical malpractice actions, we stated three theories in support of our

conclusion: '(1) There was a continuing duty to remove the tube, and hence a continuing tort, giving rise to new causes of action. (6 C.2d 308 ()). (2) The operation might be viewed as incomplete until removal of all the appliances used. (6 C.2d 311 ()). (3) The principle of the occupational disease cases was applicable, i.e., the statute should not run against the cause of action for such an injury during the time the plaintiff is unable, with care and diligence, to ascertain the cause. In this connection the court emphasized the fact of plaintiff's sole reliance on defendant physician for information as to her condition. (6 C.2d 312 ()).' (1 Witkin, Cal. Procedure (1954) Actions, § 133, p. 641.)

We note that the very theories which led to the rule in medical malpractice cases that the statute runs only from the date of discovery of the negligence could be applied to the instant situation: (1) There was a continuing duty on the part of defendant to correct the estate plan to conform in effect to the testatrix' true intentions, and hence a continuing tort up until the time of death giving rise to new causes of action. (2) The rendering of legal services with respect to the testamentary plan might be viewed as incomplete until the testatrix' death, when the will would become effective and when the attorney could no longer correct his original mistake. (3) The fact of defendant's asserted superior knowledge and skill and the testatrix' reliance on the defendant to order her affairs competently and in conformance with her testamentary desires argues strongly that the statute should not run against the testatrix as long as she was unable, with care and diligence, to ascertain the negligence. The judicial rule against postponed accrual of the statute of limitations in legal malpractice actions rests upon a tenuous basis. In any event, in the present case we have found, for the reasons expressed in the text, that, with respect to the intended beneficiaries of a will, the statute of limitations for attorney negligence cannot commence to run before the testatrix' death.

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26 Conn.Supp. 378 (Conn.Com.Pl. 1966)

225 A.2d 28

Samuel LICATA, Administrator (ESTATE of Lilly LICATA) et al.

v.

John A. SPECTOR.

No. 2934.

Court of Common Pleas of Connecticut, Windham County.

Nov. 9, 1966

[225 A.2d 29]

Robert W. Gordon, Manchester, for plaintiffs.

Regnier, Moller & Taylor, Hartford, for defendant.

GRILLO, Judge.

This is an action initiated by the administrator of the estate of Lilly Licata (first count) and the children of Lilly Licata (second count). The fundamental allegations of the first count are as follows: (a) The defendant, an attorney at law, was retained by Lilly Licata to draft her last will and testament; (b) the will failed to provide for the required number of witnesses (General Statutes § 45-161); (c) as a result of this deficiency, the Probate Court refused to admit the will into the Probate Court and declared the will invalid; (d) because of the drafter's negligence, certain assets of the estate have been diverted to persons other than those set forth in the will; (e)

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the decedent's estate has suffered loss and damage to the extent of \$7500. The second count incorporates the allegations of the first count with the exception of the paragraph relating to damages and alleges that as a result of the defendant's negligence in drafting the will certain assets of the decedent's estate which were, by the will, to have been distributed to the plaintiffs, named as beneficiaries in the will, were diverted to others.

The defendant demurs to the first count on the ground that that count fails to set forth any injuries or damages by the administrator. While it may be true that looking into the future trial it is difficult to see how the estate was damaged to the extent claimed, nevertheless there is an allegation, which of course the demurrer admits, of loss and damage to the decedent's estate in the amount of \$7500. The challenge proffered by the defendant's demurrer is predicated on the claim that certain elements of alleged damage are improper rather than on the basis that the complaint sets forth a defective cause of action. The demurrer was not the proper means of raising the question of improper elements of damage. Under the allegations of the complaint, the plaintiff administrator was entitled to at least nominal damages, since every invasion of a legal right imports damage. *Urvan v. Hartford Gas Co.*, 139 Conn. 301, 93 S.2d 292. An attack relating to the elements of damage should be made by motion and not by demurrer. *Seidler v. Burns*, 84 Conn. 111, 79 A. 53, 33 L.R.A., N.S., 291; *Lessard v. Tarca*, 20 Conn.Supp. 295, 133 A.2d 625; cf. *Foram v. Carangelo*, 153 Conn. 356, 216 A.2d 638.

The contention of the demurrer with reference to the second count is that the beneficiaries are owed no duty by the defendant and that furthermore there was no privity of contract existing between the plaintiff beneficiaries and the defendant. With reference to count two, it might be well

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to point out that the facts alleged therein, as in count one, set forth an action based on negligence arising out of a contractual relationship. *Dean v. Hershowitz*, 119 Conn. 398, 406, 177 A. 262. The question raised by the demurrer to count two, therefore, would seem to pose the question: Can a legatee under a will which is declared invalid and inoperative because of a lack of statutory requisites as to attesting witnesses, a defect allegedly caused by the drafter's negligence, maintain an action against the drafter for the loss sustained by the legatee in being deprived of his legacy under the will? A duty of care to perform such a contract may be justified by projecting into this field the cardinal principles of negligence law, and such a duty would be owed to those foreseeably injured by negligent performance, or nonperformance, in a way over and above the withholding of the benefit contracted for, i.e. the drafting of a proper will, without regard to any question of reliance under the contract. Liability for a negligent performance of a contract, or nonperformance, should be imposed where the injury to the [225 A.2d 30] plaintiff is foreseeable and where the contract is an incident to an enterprise of the defendant and there are adequate reasons from policy for imposing a duty of care to avoid the risk thus encountered, as an incident to the enterprise. 2 Harper & James, Torts § 18.6, pp. 1052, 1053. That the drafting of wills by an attorney is related to the 'enterprise' of the defendant needs no discussion. *State Bar Ass'n v. Connecticut Bank & Trust Co.*, 145 Conn. 222, 234, 140 A.2d 863, 69 A.L.R.2d 394.

Would the allegations set forth in the complaint permit evidence of a factual situation which would satisfy the requirements of the rule of foreseeability of harm? *Noebel v. Housing Authority*, 146 Conn. 197, 148 A.2d 766. On December 12, 1964, the defendant was consulted by the decedent for the admitted purpose

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of providing legacies to her children, and a last will was drafted by counsel, the defendant. The testatrix died February 18, 1965. The will, lacking the required number of witnesses, was declared invalid, and the children lost their legacies. In a real and material way, the loss resulting from the negligence was not the estate's but that of the disappointed beneficiaries. The potency of injury to the legatees if the will were declared invalid was patent. *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253. The will was declared invalid, and the financial damage to the plaintiffs ensued. Can there be any doubt as to what was the proximate cause, juridically considered, of the unfortunate event and that it would be well within the realm of reasonable foreseeability that such harm would be likely to result from the negligence? *Orlo v. Connecticut Co.*, 128 Conn. 231, 237, 21 A.2d 402; *Miner v. McNamara*, 81 Conn. 690, 72 A. 138, 21 L.R.A., N.S., 477.

Does the public policy of the state permit the imposition of a duty under the allegations set forth? There are cogent reasons why it does. A testatrix consults her attorney and is given the assurance that the objects of her affection will receive their just legacies at her death. Neither she nor the beneficiaries, who, in all probability, do not know of the will's provisions or possibly even of the existence of the will, know of the disappointment that lies ahead—that her purpose will be completely thwarted because of the negligence of the drafter. The technical legal knowledge required in the drafting of a will and the

atmosphere of privacy desired by a testatrix with relation to both the contents of the will and the safekeeping of the will make it highly improbable that either the testatrix or the beneficiaries would ever be alerted to the almost inevitable results flowing from a defective will. The modus operandi would, in most cases, not lend itself to a detection of the error until it was too late

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to rectify-upon the death of the testatrix. Public policy would seem to favor the court's extending its equitable arm to assist innocent parties seeking just damages resulting from an error committed by another and affecting their rights, which error those innocent parties were never themselves able to correct.

'(T)here is in this state a public policy involved in the establishment of every legally executed last will. This is a policy of ancient origin.' *Tator v. Valden*, 124 Conn. 96, 100, 198 A. 169, 171, 117 A.L.R. 1243. The purpose of this policy as enunciated by the orders of the General Court was to see that the estate of the testator was not wasted but improved for the best advantage of the children or legatees of the testator. *Ibid*. While the invalid will cannot be validated by judicial fiat, the allowing of a cause of action under the circumstances set forth in the complaint would seem to be in accord with the policy of the decision of our highest court to give a party who claims to have suffered a wrong at the hands of another every reasonable opportunity to establish his right to redress. *Gesualidi v. Connecticut Co.*, 131 Conn. 622, 631, 41 A.2d 771. Sociological impediments and legal considerations which sometimes dictate persuasive reasons as a matter of policy why the claimed cause of action should not [225 A.2d 31] be allowed are not present here. *Cf. Taylor v. Keefe*, 134 Conn. 156, 161, 56 A.2d 768.

The defendant contends, nevertheless, that, even admitting the tort, the plaintiffs have no standing to maintain this action because of lack of privity. That the sacrosanct shield of privity which formerly protected the promisor, in an action by a third party, was becoming tarnished was being recognized by jurists in the early part of the century. 'The assault upon the citadel of privity is proceeding in these days apace.' *Ultramares Corporation v. Touche*, 255 N.Y. 170, 180, 174 N.E. 441, 445, 74 A.L.R. 1139 (1931) (Cardozo, C.J.).

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Connecticut was one of the states at the vanguard of this legalistic revolution. *Bauer v. Devenis*, 99 Conn. 203, 121 A. 566 (1923). This process of attrition has continued. *Hamon v. Digliani*, 148 Conn. 710, 174 A.2d 294 (1961). The march found its way even into the legislative halls, and strangers to contracts are now accorded rights previously denied them, in rented motor vehicle cases. General Statutes § 14-154; *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 338, 143 A. 163, 61 A.L.R. 846; *Graham v. Wilkins*, 145 Conn. 34, 138 A.2d 705. Since 1916, when 'there came the phenomenon of the improvident Scot who squandered his gold upon a Buick, and so left his name forever imprinted upon the law of products liability,' [1] the bastion of privity has been battered. Prosser, 'The Assault upon the Citadel (Strict Liability to the Consumer),' 69 Yale L.J. 1099, 1100.

One state, previously embracing the doctrine of privity; *Buckley v. Gray*, 110 Cal. 339, 42 P. 900, 31 L.R.A. 862 (1895); has seen fit to abandon its previous position: '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.' *Biakanja v. Irving*, 49 Cal.2d 647, 650, 320 P.2d 16, 19, 65 A.L.R.2d 1358 (1958). This general principle must be applied in determining whether a beneficiary is entitled to bring an action against an attorney for negligence in drafting a will. *Lucas v. Hamm*, 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685 (1961); see *Ward v. Arnold*, 52 Wash.2d 581, 328 P.2d 164 (1958).

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The language employed by the court in *Fisk's Appeal*, 81 Conn. 433, 440, 71 A. 559, 562, involving an action based on an oral promise by the husband to an ailing wife to hold the title for the benefit of their children, an obligation he repudiated after her death, is particularly appropriate here in view of the factual situation: 'It is insisted that, if any cause of action existed against the decedent, it was only one in favor of the estate of Mrs. Fisk. But, while the agreement of trust was not made by the appellants, it was made by their dying mother for their sole benefit. They therefore have an equitable right of action * * *.'

The demurrer is overruled in toto.

Notes:

[1] *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1053, L.R.A. 1916F, 696.

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15 Cal.Rptr. 821

56 Cal.2d 583, 364 P.2d 685

Robert LUCAS et al., Plaintiffs and Appellants,

v.

L. S. HAMM, Defendant and Respondent.

S. F. 20269.

Supreme Court of California

Sept. 5, 1961.

In Bank

Rehearing Denied Oct. 4, 1961.

[56 Cal.2d 584] [Copyrighted Material Omitted]

[56 Cal.2d 585] [Copyrighted Material Omitted]

[56 Cal.2d 586] Reginald G. Hearn, San Francisco,
for plaintiffs and appellants.

Philip H. Angell, Scott Elder, Robert M. Adams, Jr.,
Angell, Adams, Gochnauer & Elder and B. E. Kragen,
San Francisco, for defendant and respondent.

GIBSON, Chief Justice.

Plaintiffs, who are some of the beneficiaries under the will of Eugene H. Emmick, deceased, brought this action for damages against defendant L. S. Hamm, an attorney at law who had been engaged by the testator to prepare the will. They have appealed from a judgment of dismissal entered after an order sustaining a general demurrer to the second amended complaint without leave to amend.

The allegations of the first and second causes of action are summarized as follows: Defendant agreed with the testator, for a consideration, to prepare a will and condicils thereto for him by which plaintiffs were to be designated as beneficiaries of a trust provided for by paragraph Eighth of the will and were to receive 15% of the residue as specified in that paragraph. Defendant, in violation of instructions and in breach of his contract, negligently prepared testamentary instruments containing phraseology that was invalid by virtue of section 715.2 and former sections 715.1 and 716 of the Civil Code relating to restraints on alienation and the rule against perpetuities. [1] Paragraph Eighth of these instruments

[56 Cal.2d 587] 'transmitted' the residual estate in trust and provided that the 'trust shall cease and terminate at 12 o'clock noon on a day five years after the date upon which the order distributing the trust property to the trustee is made by the Court having jurisdiction over the probate of this will.' After the death of the testator the instruments were admitted to probate. Subsequently defendant, as draftsman of the instruments and as counsel of record for the executors, advised plaintiffs in writing that the residual trust provision was invalid and that plaintiffs would be deprived of the entire amount to which they would have been entitled if the provision had been valid unless they made a settlement with the blood relatives of the testator under which plaintiffs would receive a lesser amount than that provided for them by the testator. As the direct and proximate result of the negligence of defendant and his breach of contract in preparing the testamentary instruments and the written advice referred to above, plaintiffs were compelled to enter into a settlement under which they received a share of the estate amounting to \$75,000 less than the sum which they would have received pursuant to testamentary instruments drafted in accordance with the directions of the testator.

(The third cause of action will be discussed separately because it concerns matters not involved in the first two counts.)

[56 Cal.2d 588] It was held in *Buckley v. Gray*, 110 Cal. 339, 31 L.R.A. 862, that an attorney who made a mistake in drafting a will was not liable for negligence or breach of contract to a person named in the will who was deprived of benefits as a result of the error. The court stated that an attorney is liable to his client alone with respect to actions based on negligence in the conduct of his professional duties, and it was reasoned that there could be no recovery for mere negligence where there was no privity by contract or otherwise between the defendant and the person injured. 110 Cal. at pages 342-343. The court further concluded that there could be no recovery on the theory of a contract for the benefit of a third person, because the contract with the attorney was not expressly for the plaintiff's benefit and the testatrix only remotely intended the plaintiff to be benefited as a result of the contract. 110 Cal. at pages 346-347. For the reasons hereinafter stated the case is overruled.

The reasoning underlying the denial of tort liability in the *Buckley* case, i. e., the stringent privity test, was rejected in *Biakanja v. Irving*, 49 Cal.2d 647, 648-650, 65 A.L.R.2d 1358, where we held that a notary public who, although not authorized to practice law, prepared a will but negligently failed to direct proper attestation was liable in tort to an intended beneficiary who was damaged because of the invalidity of the instrument. It was pointed out that since 1895, when *Buckley* was decided, the rule

that in the absence of privity there was no liability for negligence committed in the performance of a contract had been greatly liberalized. 49 Cal.2d at page 649. In restating the rule it was said that 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, and the policy of preventing future harm. 49 Cal.2d at page 650. The same general principle must be applied in determining whether a beneficiary is entitled to bring an action for negligence in the drafting of a will when the instrument is drafted by an attorney rather than by a person not authorized to practice law.

Many of the factors which led to the conclusion that the notary public involved in Biakanja was liable are equally [56 Cal.2d 589] applicable here. 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 prevent future harm would be impaired.

Since defendant was authorized to practice the profession of an attorney, we must consider an additional factor not present in Biakanja, namely, 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. The fact that the notary public involved in Biakanja was guilty of unauthorized practice of the law was only a minor factor in determining that he was liable, and the absence of the factor in the present case does not justify reaching a different result.

It follows that the lack of privity between plaintiffs and defendant does not preclude plaintiffs from maintaining an action in tort against defendant.

Neither do we agree with the holding in Buckley that beneficiaries damaged by an error in the drafting of a

will cannot recover from the draftsman on the theory that they are third-party beneficiaries of the contract between him and the testator. [2] Obviously the main purpose of a contract [56 Cal.2d 590] for the drafting of a will is to accomplish the future transfer of the estate of the testator to the beneficiaries named in the will, and therefore it seems improper to hold, as was done in Buckley, that the testator intended only 'remotely' to benefit those persons. It is true that under a contract for the benefit of a third person performance is usually to be rendered directly to the beneficiary, but this is not necessarily the case. (See Rest., Contracts, § 133, com. d; 2 Williston on Contracts (3rd ed.1959) 829.) For example, where a life insurance policy lapsed because a bank failed to perform its agreement to pay the premiums out of the insured's bank account, it was held that after the insured's death the beneficiaries could recover against the bank as third-party beneficiaries. Walker Bank & Trust Co. v. First Security Corp., 9 Utah 2d 215, 945 et seq. Persons who had agreed to procure liability insurance for the protection of the promisees but did not do so were also held liable to injured persons who would have been covered by the insurance, the courts stating that all persons who might be injured were third-party beneficiaries of the contracts to procure insurance. Johnson v. Holmes Tuttle Lincoln-Merc., Inc., 160 Cal.App.2d 290, 296 et seq.; James Stewart & Co. v. Law, 149 Tex. 392, 233 S.W.2d 558, 561-562, 22 A.L.R.2d 639. Since, in a situation like those presented here and in the Buckley case, the main purpose of the testator in making his agreement with the attorney is to benefit the persons named in his will and this intent can be effectuated, in the event of a breach by the attorney, only by giving the beneficiaries a right of action, we should recognize, as a matter of policy, that they are entitled to recover as third-party beneficiaries. See 2 Williston on Contracts (3rd ed. 1959) pp. 843-844; 4 Corbin on Contracts (1951) pp. 8, 20.

Section 1559 of the Civil Code, which provides for enforcement by a third person of a contract made 'expressly' for his benefit, does not preclude this result. The effect of the section is to exclude enforcement by persons who are only incidentally or remotely benefited. See Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 244; cf. 4 Corbin on Contracts (1951) pp. 23-24. As we have seen, a contract for the drafting of a will unmistakably shows the intent of the testator to benefit the persons to be named in the will, and the attorney must necessarily understand this.

Defendant relies on language in Smith v. Anglo-

[56 Cal.2d 591] California Trust Co., 205 Cal. 496, 502, and Fruitvale Canning Co. v. Cotton, 115 Cal.App.2d 622, 625, that to permit a third person to bring an action on a contract there must be 'an intent clearly manifested by the promisor' to secure some benefit to the third person. This language, which was not necessary to the decision in either of the cases, is unfortunate. Insofar as intent to benefit a third person is

important in determining his right to bring an action under a contract, it is sufficient that the promisor must have understood that the promisee had such intent. (Cf. Rest., Contracts, § 133, subs. 1(a) and 1(b); 4 Corbin on Contracts (1951) pp. 16-18; 2 Williston on Contracts (3rd ed. 1959) pp. 836-839). No specific manifestation by the promisor of an intent to benefit the third person is required. The language relied on by defendant is disapproved to the extent that it is inconsistent with these views.

We conclude 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.

However, an attorney is not liable either to his client or to a beneficiary under a will for errors of the kind alleged in the first and second causes of action.

The general rule with respect to the liability of an attorney for failure to properly perform his duties to his client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. Estate of Kruger, 130 Cal. 621, 626; Moser v. Western Harness Racing Ass'n, 89 Cal.App.2d 1, 7; Armstrong v. Adams, 102 Cal.App. 677, 684; see Wade, The Attorney's Liability for Negligence (1959) 12 Vanderbilt Law Rev. 755, 762-765; 5 Am.Jur. 336. The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions or of the validity of an instrument that he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers. See Lally v. Kuster, 177 Cal. 783, 786; Savings Bank v. Ward, 100 U.S. 195, 198, 25 L.Ed. 621;

[56 Cal.2d 592] 5 Am.Jur. 335; 7 C.J.S. Attorney and Client § 143, p. 980. These principles are equally applicable whether the plaintiff's claim is based on tort or breach of contract.

The complaint, as we have seen, alleges that defendant drafted the will in such a manner that the trust was invalid because it violated the rules relating to perpetuities and restraints on alienation. These closely akin subjects have long perplexed the courts and the bar. Professor Gray, a leading authority in the field, stated: 'There is something in the subject which seems to facilitate error. Perhaps it is because the mode of reasoning is unlike that with which lawyers are most familiar. * * * A long list might be formed of the demonstrable blunders with regard to its questions made by eminent men, blunders which they themselves have

been sometimes the first to acknowledge; and there are few lawyers of any practice in drawing wills and settlements who have not at some time either fallen into the net which the Rule spreads for the unwary, or at least shuddered to think how narrowly they have escaped it.' Gray, The Rule Against Perpetuities (4th ed. 1942) p. xi; see also Leach, Perpetuities Legislation (1954) 67 Harv.L.Rev. 1349 (describing the rule as a 'technicality-ridden legal nightmare' and a 'dangerous instrumentality in the hands of most members of the bar'). Of the California law on perpetuities and restraints it has been said that few, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman; that members of the bar, probate courts, and title insurance companies make errors in these matters; that the code provisions adopted in 1872 created a situation worse than if the matter had been left to the common law, and that the legislation adopted in 1951 (under which the will involved here was drawn), despite the best of intentions, added further complexities. (See 38 Cal.Jur.2d 443; Coil, Perpetuities and Restraints; A Needed Reform (1955) 30 State Bar J. 87, 88-90.)

In view of the state of the law relating to perpetuities and restraints on alienation and the nature of the error, if any, assertedly made by defendant in preparing the instrument, 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. The provision of the will quoted in the complaint, namely, that the trust was to terminate five years after the order of the probate court distributing the property to the trustee, could cause the trust to be [56 Cal.2d 593] invalid only because of the remote possibility that the order of distribution would be delayed for a period longer than a life in being at the creation of the interest plus 16 years (the 21-year statutory period less the five years specified in the will). Although it has been held that a possibility of this type could result in invalidity of a bequest (Estate of Johnston, 47 Cal.2d 265, 269-270; Estate of Campbell, 28 Cal.App.2d 102, 103 et seq.), the possible occurrence of such a delay was so remote and unlikely that an attorney of ordinary skill acting under the same circumstances might well have 'fallen into the net which the Rule spreads for the unwary' and failed to recognize the danger. We need not decide whether the trust provision of the will was actually invalid or whether, as defendant asserts, the complaint fails to allege facts necessary to enable such a determination, [3] because we have concluded that in any event an error of the type relied on by plaintiffs does not show negligence or breach of contract on the part of defendant. It is apparent that plaintiffs have not stated and cannot state causes of action with respect to the first two counts, and the trial court did not abuse its discretion in denying leave to amend as to these counts.

The third cause of action contains additional allegations as follows: After admission of the will and codicils to probate, Harold Houghton Emmick, Walton

Russell Emmick, Clelta Inez Spelman, and Retha Newell, hereinafter called the contestants, instituted a will contest. The executors, defendant, and the contestants tentatively reached a settlement agreement, subject to court approval, under which \$10,000 would be paid to the contestants from the assets of the estate in return for which each contestant would sign an 'appropriate release.' Defendant was negligent in the performance of his duties in that he caused to be executed on behalf of the estate and those interested therein, including plaintiffs, releases which did not preclude the contestants from a subsequent attack upon the validity of the testamentary instruments. After complete execution of the releases and their transmittal to escrow but before approval of the compromise [56 Cal.2d 594] by the court, defendant was advised by competent counsel that the residual clause of the will and codicils was invalid as a violation of the rule against perpetuities and that as a consequence the phraseology of the releases was inadequate to protect the estate and persons interested therein, and defendant was requested by competent counsel to modify the releases and insert appropriate language suggested by counsel under which the contestants would release the estate and persons interested in it from any claims of whatsoever kind or nature. Defendant refused to do so and also refused to call the court's attention to the recommendations. As a consequence of the failure to direct the matter to the attention of the court, the order approving the compromise was made on the assumption that the releases would give adequate protection. The sum of \$10,000 was paid to the contestants from the assets of the estate, and the releases were filed in the proceedings. Subsequently the contestants joined in a legal attack upon the validity of the residual clause of the will and codicils and by virtue of the invalidity of the clause participated in the settlement referred to above concerning paragraph Eighth of the will. If the releases had been prepared in accord with good legal practice they would have precluded such participation, with the result that plaintiffs would have received an additional sum of \$15,000 from the estate.

This cause of action, unlike the first two, does not concern defendant's conduct as attorney for the testator, but, rather, asserted negligence by him when acting as attorney for the executors with respect to the execution of releases in the settlement of a will contest based on lack of testamentary capacity. It is undisputed that the releases were adequate to preclude any further litigation of that contest, but plaintiffs assert that defendant had a duty to obtain releases which, in addition, would waive all other claims of the contestants against the estate and prevent them from subsequently attacking the validity of the trust provisions.

There are no allegations that the contestants, either at the time of the negotiations for the settlement or at the time of the signing of the releases, were willing to waive their rights to make other attacks upon the will after the settlement of that contest. In the absence of additional

allegations we must assume that the agreed sum of \$10,000 was intended solely for the settlement of the contest and the ground on which it was based, i. e., lack of testamentary capacity, and it would ordinarily be expected that the contestants would have demanded [56 Cal.2d 595] an additional sum for a more extensive waiver terminating their rights to attack the validity of the various provisions of the will. The written releases, of course, were required to conform to the settlement agreement. Under these circumstances it could well be argued that the attorneys for the contestants would have been derelict in their duty to their clients if they had approved broader releases. At most, under the allegations, defendant had a duty to request that the contestants sign broader releases, but there is no allegation that he failed to ask them to do so. The third count does not state a cause of action for negligence.

Although defendant pointed out in both the trial court and this court that there is no allegation that he could have secured releases different from the ones given, plaintiffs make no claim that they can amend their complaint so as to cure the deficiency, and we cannot properly hold that the trial court abused its discretion in denying leave to amend.

The judgment is affirmed.

TRAYNOR, SCHAUER, McCOMB, PETERS,
WHITE and DOOLING, JJ., concur.

NOTES:

[1] Former section 715.1 of the Civil Code, as it read at the times involved here, provided: 'The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a period longer than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of suspension must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain.'

Section 715.2 reads as follows: 'No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this section to make effective in this State the American common-law rule against perpetuities.'

Former section 716, as it read at the times involved here, provided: 'Every future interest is void in its creation which, by any possibility, may suspend the

absolute power of alienation for a longer period than in prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed. The period of time during which an interest is destructible pursuant to the uncontrolled volition and for the exclusive personal benefit of the person having such a power of destruction is not to be included in determining the existence of a suspension of the absolute power of alienation or the permissible period for the vesting of an interest within the rule against perpetuities.'

[2] It has been recognized in other jurisdictions that the client may recover in a contract action for failure of the attorney to carry out his agreement. (See 5 Am.Jur. 331; 49 A.L.R.2d 1216, 1219-1221; Prosser, Selected Topics on the Law of Torts (1954) pp. 438, 422.) This is in accord with the general rule stated in *Communale v. Traders & General Ins. Co.*, 50 Cal.2d 654, 663, 68 A.L.R.2d 883, that where a case sounds in both tort and contract, the plaintiff will ordinarily have freedom of election between the two actions.

[3] Defendant asserts that a provision of a will like the one quoted in the complaint could not cause a trust to be invalid unless it also appeared that there were contingent interests which could not vest within the statutory time or that the trust could not be terminated by the beneficiaries acting together within the statutory period. See *Estate of Phelps*, 182 Cal. 752, 759-760; *Estate of Heberle*, 155 Cal. 723, 726-727; Rest., Trusts, Second, § 337.

District of Columbia Court of Appeals Reports

NEEDHAM v. HAMILTON, 459 A.2d 1060
(D.C. 1983)

Robert C. NEEDHAM, Appellant, v. George E.
HAMILTON III, et al.,

Appellees.

No. 81-481.

District of Columbia Court of Appeals.

Argued November 25, 1981.

Decided April 12, 1983.

Appeal from the Superior Court, Fred L.
McIntyre, J.
Page 1061

George R. Clark, Washington, D.C., with
whom Virginia L. Riley, Washington, D.C., was
on the brief, for appellant.

James C. Gregg, Washington, D.C., with
whom James F. Bromley, Washington, D.C., was
on the brief, for appellees.

Before NEWMAN, Chief Judge, NEBEKER,
Associate Judge, and KELLY, Associate Judge,
Retired.^[fn*]

[fn*] Judge Kelly was an Associate Judge of the
court at the time of argument. Her status changed
to Associate Judge, Retired, on March 31, 1983.

NEBEKER, Associate Judge:

Robert C. Needham brought a legal
malpractice suit against the appellees based upon

their admitted negligence in the drafting of a will
which resulted in Needham's being denied the
extent of the estate the testatrix intended that he
take. The trial court ruled that because Needham
had not himself contracted for the drafting of the
will, his lack of privity barred the action.
Appellees' motion to dismiss was, therefore,
granted. We hold that the requirement of privity
does not extend to a malpractice suit brought by
the intended beneficiary of a will against the
attorneys who drafted it. Given our rationale for
disposition, we need not dwell upon a third party
beneficiary analysis for, in any event, the
gravamen of the cause of action is negligence.
We reverse and remand the case with directions
to reinstate the complaint.

The facts of this case are undisputed.
Needham was the nephew of Elizabeth McC.
Jones. In the summer of 1974, Mrs. Jones
directed the appellees to prepare a new last will
and testament for her. Between August and
December of 1974 several drafts of the will were
prepared by the appellees, each of which named
Needham in the thirteenth paragraph as the sole
residuary beneficiary. An identical provision was
contained in Mrs. Jones' earlier will which had
also been prepared by appellees. Around
December 5, 1974, the appellees delivered to
Mrs. Jones a draft will designating Needham as
the sole residuary beneficiary.

Sometime on or after December 5, 1974, Mrs.
Jones requested that appellees make further
changes in the draft will to include certain
specific bequests for her grandnieces and
grandnephews. In order to accomplish this,
appellees inserted a new thirteenth paragraph.
Due to some error, this new draft failed to
include any residuary clause. Mrs. Jones
executed this erroneous will on January 24, 1975,
and died on January 26, 1980. The omission was
not discovered until January 28, 1980, at which
time appellees admitted that Needham was to
have been named as the sole residuary
beneficiary.

The estate is presently in probate. Having not been provided for, Mrs. Jones' residuary estate will pass through intestacy. As such, Needham will receive one-half of that estate, the other half being shared between two additional intestate takers. Needham brought suit against appellees for recovery of the half of the residuary estate he will lose due to their error.

It is well established that "the general rule is that the obligation of the attorney is to his client, and not to a third party . . ." *National Savings Bank v. Ward*, 100 U.S. 195, 200, 25 L.Ed. 621 (1880). This denial of liability to anyone not in privity of contract is premised primarily upon two concerns: "(1) that to allow such liability would deprive the parties to the contract of control of their own agreement; and (2) that a duty to the general public would impose a huge potential burden of liability on the contracting parties." *Guy v. Liederbach*, 279 Pa. Super. 543, 547, 421 A.2d 333, 335 (1980) (appeal pending). See *Fickett v. Superior Court of Pima County*, 27 Ariz. App. 793, 558 P.2d 988 (1976); *Brody v. Ruby*, **Page 1062** 267 N.W.2d 902 (Iowa 1978); Annot., 45 A.L.R.3d 1181 (1972).

A thorough analysis of this general rule of nonliability to third parties was undertaken by Justice Cardozo in the landmark decision of *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931). There, a third party which relied to its detriment upon a negligently prepared certified balance sheet brought a damage suit against the public accountants responsible for the financial misrepresentations. The court held that absent fraud or collusion, liability for negligence resulting from honest mistake was "bounded by the contract and [was] to be enforced between the parties by whom the contract [had] been made." *Id.* at 189, 174 N.E. at 448. The court reasoned that to extend the duty to exercise reasonable care to persons beyond the party in privity might expose individuals "to a

liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Id.* at 179, 174 N.E. at 444. This court has followed the *Ultramares* analysis when presented with cases brought by third parties belonging to an "indeterminate class" unknown to the parties in privity. See *Thornton v. Little Sisters of the Poor*, 380 A.2d 593 (D.C. 1977) (negligence in making title report); *Long v. American Savings & Loan Ass'n*, 151 A.2d 770 (D.C. 1959) (negligence in making title examination).

The rule requiring privity is not, however, without exception. *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922), authored by Justice Cardozo prior to *Ultramares*, recognized that the law does impose a duty to exercise reasonable care which extends to third parties notwithstanding a lack of privity where the impact upon the third party is "not an indirect or collateral consequence," but the "end and aim of the transaction." *Id.* 233 N.Y. at 238-39, 135 N.E. at 275. Acknowledging this exception, this court has applied the *Glanzer* analysis when presented with third party claims where it is alleged that the plaintiffs were the direct and intended beneficiaries of the contracted for services. See *Security National Bank v. Lish*, 311 A.2d 833 (D.C. 1973); *Long v. American Savings & Loan Ass'n*, *supra*.

II

The application of the privity of contract rule to legal malpractice cases involving the drafting or execution of wills is a matter of first impression here. We are aware, however, that this same issue has been considered by other jurisdictions. With the exception of some courts of New York, courts recently confronted by this question have uniformly allowed the intended beneficiary to maintain a cause of action against the drafting attorney. See *Stowe v. Smith*, 184 Conn. 194, 441 A.2d 81 (1981); *Guy v. Liederbach*, *supra*; *Jaramillo v. Hood*, 93 N.M. 433, 601 P.2d 66 (1979) (cause of action

implied); *McAbee v. Edwards*, 340 So.2d 1167 (Fla. Dist. App. 1976); *Succession of Killingsworth v. Tuttle*, 292 So.2d 536 (La. 1974); *Woodfork v. Sanders*, 248 So.2d 419 (La. App. 1971); *Heyer v. Flaig*, 70 Cal.2d 223, 449 P.2d 161, 74 Cal.Rptr. 225 (1969); *Licata v. Spector*, 26 Conn. Sup. 378, 225 A.2d 28 (Conn. C.P. 1966); *Lucas v. Hamm*, 56 Cal.2d 583, 364 P.2d 685, 15 Cal.Rptr. 821 (1961), *cert. denied*, 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed.2d 525 (1962). *But see Maneri v. Amodeo*, 38 Misc.2d 190, 238 N.Y.S.2d 302 (1963). We acknowledged this trend in *Morowitz v. Marvel*, 423 A.2d 196 (D.C. 1980).

We hold that the better view is that which allows the intended beneficiary of a will a malpractice cause of action against the drafting attorneys. We reach this result for the following reasons. First, neither of the rationales supporting the requirement of privity applies to the situation presented. This is not a case in which the ability of a nonclient to impose liability would in any way affect the control over the contractual agreement held by the attorney and his client, as the interests of the testatrix and the intended beneficiary with regard to the proper drafting and execution of the will are the same. Additionally, this duty does not extend to the general public but only to a nonclient who was the direct
Page 1063
and intended beneficiary of the attorney-client relationship.

Second, it is obvious that "the main purpose of a contract for the drafting of a will is to accomplish the future transfer of the estate of the testator to the beneficiaries named in the will" *Lucas v. Hamm, supra*, 56 Cal.2d at 589-90, 364 P.2d at 688, 15 Cal.Rptr. at 824. This situation thus closely parallels that presented in *Glanzer* and therefore should fall within the *Glanzer* exception to the privity requirement. Conversely, the *Ultramares* analysis is inapplicable. While the exact amount of damage suffered by the intended beneficiary may not be

clear immediately, as is true here where the size of the residuary estate remains unknown until the will has been fully probated, the potential liability is not the type of "indeterminate amount" feared in *Ultramares*. Time is not indeterminate; the attorney is liable until the "duty effectively to fulfill the desired testamentary scheme" has been discharged. *Heyer v. Flaig, supra*, 70 Cal.2d at 230, 449 P.2d at 166, 74 Cal.Rptr. at 230. As already discussed, the right of action is only available to the direct and intended beneficiaries of the will and not to an "indeterminate class."

Reversed and remanded.

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41 Cal.Rptr.2d 573

35 Cal.App.4th 946

RAFAEL RADOVICH, Plaintiff and Appellant,

v.

**WILLIAM F. LOCKE-PADDON et al., Defendants
and Respondents.**

H012054

California Court of Appeal, Sixth District

June 8, 1995

[35 Cal.App.4th 947] [Copyrighted Material Omitted]

[35 Cal.App.4th 948] [Copyrighted Material Omitted]

[35 Cal.App.4th 949] [Copyrighted Material Omitted]

[35 Cal.App.4th 950] COUNSEL

Krause, Baskin & Ballentine, Marshall Warren
Krause and James S. Madow for Plaintiff and Appellant.

Grunsky, Ebey, Farrar & Howell, Frederick H. Ebey
and Leslie J. Karst for Defendants and Respondents.

OPINION

BAMATTRE-MANOUKIAN, J.

Plaintiff Rafael Radovich appeals from a judgment, for defendants William F. Locke-Paddon (an attorney) and the law firm by which Locke-Paddon was employed, based on summary adjudication of issues in consolidated civil actions. The trial court was called upon to answer two questions of law:

(1) Did Locke-Paddon or the law firm, in preparing a will for a client who died without executing the will, owe a duty of care to Radovich as a potential beneficiary named in the unsigned will? The trial court answered that they did not.

(2) Were any claims Radovich may have had against Locke-Paddon or the law firm, arising out of asserted breaches of fiduciary duties in other transactions, barred by the applicable statute of limitations? The trial court answered that they were.

We shall conclude that the trial court's answers were correct, and shall affirm the judgment.

[35 Cal.App.4th 951] The facts material to the issues before us are essentially undisputed.

Radovich married Mary Ann Borina (the decedent) in 1957. Shortly before they married, Radovich and the decedent signed a form of prenuptial agreement, prepared for the decedent by the law firm, which stated among other things that each party's property, owned at or acquired after the marriage, and each party's earnings after the marriage, should be and remain his or her separate property, and that "[n]o community property shall exist during the marriage"

It appears that the law firm may have prepared a will for Radovich in 1970; its provisions are not before us.

In November 1973 the decedent executed a will, prepared by the law firm, which, after specific gifts to Radovich and others, would give the residue of the estate to two charitable remainder trusts for the ultimate benefit of the Regents of the University of California upon the death of the last to die of Radovich, the decedent's sister, and the sister's husband. Under one of the trusts, specified income payments were to be made to Radovich during his lifetime, and then to the decedent's sister during her lifetime, and then to the sister's husband during his lifetime. Under the other trust, similar payments were to be made to the decedent's sister during her lifetime, and then to Radovich during his lifetime, and then to the sister's husband during his lifetime.

In January 1974 the decedent and her sister entered into a written partnership agreement intended to be a memorandum of a preexisting farming and real estate investment partnership between them known as "Borina Orchards." The agreement, prepared by the law firm, included a "consent of husbands" form on the face of which Radovich and the sister's husband, by their respective signatures, acknowledged "that the partnership agreement involves property which is wholly the separate property of our wives and in which we have no part."

In June 1985 Radovich executed a will, prepared by Locke-Paddon, which recited in part that "[a]ll of my estate is my separate property. My wife and I have no community property, as more fully set forth in a written agreement between us dated May 9, 1957."

In the trial court Radovich asserted, and neither Locke-Paddon nor the law firm denied, that Locke-Paddon and the law firm represented Radovich in 1987, in connection with acquisition and leasing of real property, and in 1989, in connection with exercise by a tenant on the real property of an option to extend its lease.

[35 Cal.App.4th 952] On June 21, 1991, Locke-Paddon met with the decedent to discuss drafting a new

will for her. At the meeting, Locke-Paddon learned that the decedent had been diagnosed as suffering from breast cancer, for which she had received chemotherapy treatments. In the trial court Radovich represented, and Locke-Paddon did not deny, that the purpose of the meeting was "to discuss the drafting of a new will under which [Radovich] was to receive 100% of the testamentary trust income for the rest of his life ...," and that Locke-Paddon did not discuss the new will with the decedent at any time after the June 1991 meeting.

Locke-Paddon declares that "I delivered a rough draft of [the decedent's] proposed new will to her on October 8, 1991, for her review and comments. Once this first draft had been delivered to [the decedent], it was my understanding that the next move was hers; I could not proceed any further with the preparation of the new will until she communicated to me her comments and whether she was satisfied with its provisions. Moreover, [the decedent] told me she intended to confer with her sister ..., who had a will with provisions similar to those of [the decedent's] 1973 will, before finalizing the provisions of the draft of the proposed new will."

The draft will Locke-Paddon prepared would have directed specific gifts to Radovich and others and would have given the residue of the estate to a charitable remainder trust for the ultimate benefit of the Greater Santa Cruz Unity Foundation and the Lucile Salter Packard Children's Hospital upon the death of Radovich. Specified income payments would have been made to Radovich, as the only income beneficiary, during his lifetime.

Locke-Paddon declares that the decedent "did not communicate with me regarding the draft of the new will prior to her death."

The decedent died on December 19, 1991. She had not executed a new will. Ultimately her 1973 will was admitted to probate.

Thereafter Radovich sued the decedent's sister, the Borina Orchards partnership, a corporation which allegedly had been wholly owned by the decedent and her sister, Locke-Paddon, and the law firm for breach of fiduciary duty and on other related theories, seeking a variety of relief. As subsequently amended, Radovich's complaint in his fiduciary duty action alleged in its fifth count that Locke-Paddon and the law firm had breached fiduciary duties to Radovich in that "they failed to inform [Radovich] of his community property rights; they failed to offer any advice to [Radovich] that his execution of the consent provision of the Borina partnership agreement, a provision which they prepared for his signature, was intended to thwart his [35 Cal.App.4th 953] community property rights; and they failed to obtain [Radovich's] consent to their continuing representation of [the decedent, her sister, the corporation, and the partnership], all of whom disputed and continue to dispute

[Radovich's] lawful community property rights." The fifth count added allegations to support claims for compensatory and punitive damages against Locke-Paddon and the law firm. In separate counts of the fiduciary duty action Radovich alleged that Locke-Paddon and the law firm had aided and abetted, and had conspired in, violations of duties owed him; these counts were subsequently dismissed and are not before us.

Radovich then brought a separate action for legal malpractice against Locke-Paddon and the law firm, alleging in his complaint that Locke-Paddon, individually and as a representative of the law firm, had been dilatory and negligent in preparing and, ultimately, in "fail[ing] to obtain [the decedent's] due execution of," the 1991 draft will. The complaint in the malpractice action alleged that the decedent's estate had been valued at approximately \$10 million.

The two actions were ordered consolidated. Shortly before trial, Locke-Paddon and the law firm moved for summary adjudication that (for purposes of the malpractice action) Locke-Paddon and the law firm owed no duty to Radovich "to draft and have executed in a prompt and diligent manner the proposed new will of [the] decedent ...," and that (as to the fifth count of the fiduciary duty action) Radovich's claim for breach of fiduciary duty against Locke-Paddon and the law firm was barred by the applicable statute of limitations, Code of Civil Procedure section 340.6.

The trial court granted summary adjudication as requested. When Radovich elected to dismiss the only other count of the fiduciary duty action then pending against Locke-Paddon and the law firm, the trial court entered judgment for both defendants in the consolidated actions. This appeal followed.

Review of summary judgment or summary adjudication "involves pure matters of law," which we review independently. (*Parsons Manufacturing Corp. v. Superior Court* (1984) 156 Cal.App.3d 1151, 1156 [203 Cal.Rptr. 419]; *AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064 [225 Cal.Rptr. 203].)

1. Duty

The theory of Radovich's malpractice action was that Locke-Paddon had owed a "duty of due care and reasonable diligence" to Radovich, "in

[35 Cal.App.4th 954] [Radovich's] capacity as the proposed 100% income beneficiary under the 1991 Will, to carry [the decedent's] testamentary wishes into effect in a reasonably prompt and diligent fashion," and that Locke-Paddon, in breach of his duty as so defined, had failed to obtain the decedent's "due execution of a final draft of the 1991 Will prior to her death"

The essence of this theory was that Locke-Paddon

had been guilty of *professional negligence* : that he had owed Radovich a duty to use such skill, prudence, and diligence as other attorneys commonly possess and exercise, that he had breached that duty, and that his breach had caused injury to Radovich. (Cf. *Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849]; *McDaniel v. Gile* (1991) 230 Cal.App.3d 363, 375 [281 Cal.Rptr. 242].)

Radovich asserts that Locke-Paddon, with knowledge of the decedent's life-threatening illness, fell short of the professional standard of skill, prudence, and diligence in three specific respects: by permitting three and onehalf months to elapse before delivering a draft will to the decedent, by preparing the draft in a "professionally incompetent" manner, and by making no effort, in the slightly more than two months between delivery of the draft and the decedent's death, to remind the decedent of what she needed to do to execute the will or even to find out whether she wished to execute it.

The question whether Locke-Paddon's performance did indeed fail to meet the professional standard of care is not before us. Nor is the question whether (if so) the described lack of care would expose Locke-Paddon and his law firm to liability to the decedent (who was their client for this purpose) or to the decedent's estate. The narrow question framed for the trial court, and for us on independent review, is whether (assuming Locke-Paddon had failed to meet the standard of care) Locke-Paddon and his firm would be liable to *Radovich* : whether Locke-Paddon's *duty* to use professional skill, prudence, and diligence extended beyond his client to an individual who would have benefitted had Locke-Paddon's client executed a will consistent with the draft he submitted to her but which she never signed. If Locke-Paddon owed no such duty to *Radovich*, then Radovich could not recover from Locke-Paddon or the law firm for the asserted breach of the duty.

Duty, in the context of negligence analysis, has been said to be " 'a shorthand statement of a conclusion, rather than an aid to analysis in itself.... "[D]uty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' " (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734 [69 Cal.Rptr. 72, 29 A.L.R.3d 1316],

[35 Cal.App.4th 955] quoting from Prosser, *Law of Torts* (3d ed. 1964) § 53, pp. 332-333; cf. *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397 [11 Cal.Rptr.2d 51].) " 'Courts ... have invoked the concept of duty to limit generally "the otherwise potentially infinite liability which would follow from every negligent act" ' " (*Bily v. Arthur Young & Co.*, *supra*, 3 Cal.4th at p. 397, quoting from *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 750 [167 Cal.Rptr. 70, 12 A.L.R.4th 701].)

In cases of assertedly negligent infliction of

physical injury or illness, it has sometimes been deemed sufficient to limit liability simply in terms of foreseeability: to subject the defendant to liability for only such injuries to others as "to the defendant at the time were reasonably foreseeable." (*Dillon v. Legg*, *supra*, 68 Cal.2d at p. 739; cf. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment* (1985) 37 Stan.L.Rev. 1513, 1526, quoted in *Thing v. La Chusa* (1989) 48 Cal.3d 644, 663 [257 Cal.Rptr. 865] [foreseeability " 'may set tolerable limits for most types of physical harm' "].) But increasingly in recent years our courts have recognized that a foreseeability limitation may not by itself be a sufficient safeguard against "potentially infinite liability" in cases of assertedly negligent infliction of various kinds of nonphysical harm. In such cases the courts have studied on a case-by-case basis the policy considerations which might or might not justify a finding of a pertinent duty. (Cf., e.g., *Bily v. Arthur Young & Co.*, *supra*, 3 Cal.4th at pp. 397-407 [scope of auditor's duty of care in performing audit]; *Thing v. La Chusa*, *supra*, 48 Cal.3d at pp. 663-664 [infliction of emotional distress on absent relative]; *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 300 [253 Cal.Rptr. 97] [scope of clergyman-counselor's liability to parents of suicide victim]; *Elden v. Sheldon* (1988) 46 Cal.3d 267, 273-277 [250 Cal.Rptr. 254] [emotional distress at witnessing injury to unmarried cohabitant].)

The narrow question whether attorneys in the position of Locke-Paddon and the law firm should owe a duty of care to potential beneficiaries such as Radovich in circumstances such as those of this case apparently has not yet been directly answered in a reported California decision.

Radovich asserts that a conclusion that Locke-Paddon owed him a duty of care is supported by the predictions of California text writers as well as by policy considerations enumerated in broadly analogous California cases.

The text writers Radovich quotes (all of whom published their remarks in California Continuing Education of the Bar estate planning materials) all [35 Cal.App.4th 956] counsel estate-planning attorneys, on pain of personal liability, to exercise diligence and skill. To emphasize their points the writers mention the "significant ... risk of being sued by someone who is not a client" (Brennan, *Challenges, Risks, and Malpractice Avoidance for the Estate Planning Attorney* (Cont.Ed.Bar 1991) 12 Estate Planning & Cal. Probate Rptr. p. 131), suggest that "[a] will file that is open at the client's death is an invitation to a law suit" (1 Cal. Will Drafting (Cont.Ed.Bar 1993) § 1.6, p. 1-9), and more specifically warn that "if the plaintiff can show that he or she was intended to be the testator's beneficiary, that the testator gave appropriate instructions to the attorney drafter, and that the attorney unreasonably delayed in preparation of the estate plan, no compelling public policy reason exists

for refusing to find the attorney liable in negligence." (Estate Planning (Cont.Ed.Bar 1992) § 2.25, pp. 82-83.) These writers are to be commended for undertaking to make vivid the unquestionable need for high standards of professional performance; the importance of sending such a message is a legitimate policy consideration which we shall weigh. But of course the writers' comments purport only to predict, and cannot authoritatively establish, what the law will be.

Radovich relies primarily on five cases, all of which cast light upon but none of which clearly resolves the issue here.

In *Donald v. Garry* (1971) 19 Cal.App.3d 769, 772 [97 Cal.Rptr. 191, 45 A.L.R.3d 1177], a creditor assigned his claim to a collection agency, whose attorney filed an action on the claim but then suffered the action to be dismissed for lack of diligent prosecution. The Court of Appeal ultimately concluded that the attorney's duty of care had extended to the creditor; it deemed its conclusion supported by a need to avoid procrastination in professional services which would be frustrated by permitting the attorney to avoid liability to the creditor whose claim he had been retained to collect simply because he had been retained for that purpose by an intermediary.

In *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 110-111 [128 Cal.Rptr. 901], a pleading case, the plaintiff alleged that defendant attorneys had undertaken, "on behalf of their clients, to assist in securing loans from various persons, including plaintiff, for the benefit of [the clients]," that the attorneys, without fraudulent intent, had prepared for their clients a misleading letter concerning the status of their clients' partnership, that the attorneys knew the letter would be shown to the plaintiff and intended it to influence the plaintiff's conduct, and that harm to the plaintiff was foreseeable. The Court of Appeal had "no difficulty" in concluding that these allegations stated a claim for negligent misrepresentation against the attorneys. (57 Cal.App.3d at p. 111.)

[35 Cal.App.4th 957] Radovich's three remaining cases are factually closer to this one, and are well known for their development of the modern law of the duty of care owed by a party performing a contract to a plaintiff who is *not* a party to the contract and in this sense is not "in privity with" the contracting party.

In *Biakanja v. Irving* (1958) 49 Cal.2d 647 [320 P.2d 16, 65 A.L.R.2d 1358], the plaintiff's brother had died after signing a will, prepared by a notary public, which purported to leave all the decedent's property to the plaintiff. The notary had negligently failed to have the will properly attested; the will was denied probate, and the plaintiff received only one-eighth of the estate. She sued the notary and recovered a judgment. The Supreme Court affirmed the judgment, noting that historically

liability to third persons (i.e., "in the absence of privity") for negligent performance of contractual covenants had been fairly strictly limited, but perceiving a trend away from the strict limitations and concluding "that plaintiff should be allowed recovery despite the absence of privity." (49 Cal.2d at p. 651.) *Biakanja* set down principles which have been often quoted and recently revalidated: "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. [Citations]" (49 Cal.2d at p. 650; cf. *Bily v. Arthur Young & Co.*, *supra*, 3 Cal.4th at pp. 397-398.) The Supreme Court noted that the passing of the brother's estate to the plaintiff had been the "end and aim" of the notary's undertaking to prepare the brother's will, and was also impressed by the foreseeability of the harm to the plaintiff, by the direct causal relationship between the notary's negligence and the harm to the plaintiff, and by the need to discourage unqualified and unauthorized practice of law: "Such conduct should be discouraged and not protected by immunity from civil liability, as would be the case if plaintiff, the only person who suffered a loss, were denied a right of action." (49 Cal.2d at p. 651.)

In *Lucas v. Hamm* (1961) 56 Cal.2d 583 [15 Cal.Rptr. 821], a pleading case, the Supreme Court, in dictum, indicated that the *Biakanja* principles would extend to an attorney who, in violation of the testator's instructions and in breach of his contract with the testator, negligently inserted invalid phraseology in the will the testator signed, with the result that following the testator's death the plaintiff's share of the estate was substantially less than the testator had apparently intended. The Supreme [35 Cal.App.4th 958] Court perceived that many of the *Biakanja* factors "are equally applicable here. 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 pp. 588-589.) The Supreme Court concluded that recognition of liability would not unduly burden the legal profession, that although there was no element of unauthorized practice of law that element had been "only a minor factor" in the *Biakanja* decision, and, in sum, that lack of privity would not

preclude a tort action by the plaintiff against the attorney. (56 Cal.2d at pp. 588-589.) The Supreme Court went on, still in dictum, to suggest that the plaintiff could also recover as a third party beneficiary of the contract between the attorney and the testator.

In *Heyer v. Flaig* (1969) 70 Cal.2d 223 [74 Cal.Rptr. 225], also a pleading case, it was alleged that the decedent had retained the defendant attorney to prepare a will leaving everything to the plaintiffs, that she had told the attorney that she planned to marry, that the attorney negligently omitted from the will language which would defeat the rights of the posttestamentary spouse, that the decedent executed the will, married, and subsequently died, and that as result of the attorney's omission the plaintiffs' share of the estate was substantially reduced by the claim of the posttestamentary spouse. On appeal after demurrer sustained, the dispositive issue was the date on which the statute of limitations would have begun to run against the plaintiffs, but preliminarily the Supreme Court reviewed the principles stated in *Biakanja* and *Lucas*. The court stated that the theory of tort liability to the intended beneficiary, "for a breach of duty owed directly to him," lay "[a]t the heart of our decision in *Lucas*...," and that *Lucas*'s third party beneficiary contract theory "is conceptually superfluous since the crux of the action must lie in tort in any case; there can be no recovery without negligence." (70 Cal.2d at pp. 226, 227.) *Heyer* strongly reinforced the theory that an attorney who "undertakes to fulfill the testamentary instructions of his client ... realistically and in fact assumes a relationship ... also with the client's intended beneficiaries," that "the possibility of injury to an intended beneficiary" is foreseeable should the client's testamentary plan fail after his or her death, and that in such an eventuality "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 [35 Cal.App.4th 959] do so and the social policy of preventing future harm would be frustrated. [¶] We impose this duty because of the relationship between the attorney and the intended beneficiary; 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." (*Id.* at pp. 228-229.)

The case before us differs from *Biakanja*, *Lucas* and *Heyer* in one significant respect: the decedent never signed the will Locke-Paddon drafted. While the crux of *Biakanja*, *Lucas* and *Heyer* was that a will the decedent had signed had been rendered wholly or partially ineffective, at least as to the beneficiaries, by the negligence of the person who had prepared the will, the crux of Radovich's claim is that a will potentially beneficial to him had never become effective because, assertedly due to Locke-Paddon's negligence, the decedent had not signed it.

Although we are aware of no California case that

has addressed the issue before us, Locke-Paddon and the law firm have called our attention to recent decisions in Connecticut and in Pennsylvania in cases factually similar to ours.

In *Krawczyk v. Stingle* (1988) 208 Conn. 239 [543 A.2d 733], the decedent had met, some 10 days before he died, with the defendant attorney and had informed her that he was soon to undergo open heart surgery and wanted to arrange for disposition of his estate. The decedent had directed the attorney to prepare two trust documents which were intended to benefit the plaintiffs and at the same time to avoid probate. Through a series of circumstances completion of the documents was delayed; by the time the attorney completed the documents the decedent was too ill to see her and he died without having signed the documents. The plaintiffs' theory of negligence liability against the attorney was that she should have acted more decisively to obtain the decedent's signatures on these or equivalent documents once she had been advised, approximately 24 hours before he died, that the decedent had suffered a heart attack and was gravely ill. The plaintiffs recovered a judgment against the attorney and her law firm. On appeal the defendants argued, among other things, that their motions for directed verdict and for judgment notwithstanding the verdict should have been granted because under the circumstances the attorney and her law firm did not have a duty to the plaintiffs.

The Connecticut Supreme Court agreed with this argument, and reversed the judgment with directions to enter judgment for the defendants. The court acknowledged the holdings of *Lucas*, and of similar cases from Connecticut [35 Cal.App.4th 960] and other jurisdictions; it stated that "[t]he question before us is whether such liability should be further expanded to encompass negligent delay in completing and furnishing estate planning documents for execution by the client." (208 Conn. at p. 245 [543 A.2d at p. 734].) It suggested that "[d]etermining when attorneys should be held liable to parties with whom they are not in privity is a question of public policy," and concluded "that the imposition of liability to third parties for negligent delay in the execution of estate planning documents would not comport with a lawyer's duty of undivided loyalty to the client. [¶] A central dimension of the attorney-client relationship is the attorney's duty of '[c]ontinuing devotion to the interest of the client.' [Citations.] This obligation would be undermined were an attorney to be held liable to third parties if, due to the attorney's delay, the testator did not have an opportunity to execute estate planning documents prior to death. Imposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily. Fear of liability to potential third party beneficiaries would contravene the attorney's primary responsibility to ensure that the proposed estate plan effectuates the client's wishes and that the client understands the available options and the legal and

practical implications of whatever course of action is ultimately chosen. These potential conflicts of interest are especially significant in the context of the final disposition of a client's estate, where the testator's testamentary capacity and the absence of undue influence are often central issues. [Citation.]" (*Id.* at pp. 245-247 [543 A.2d at p. 736].) The court found illustration of "the serious potential for conflicts of interest inherent in such situations" in the facts before it; in the court's view, "[p]rophylactic principles of public policy counsel against rules of liability that promote such conflicts of interest." (*Id.* at p. 247 [543 A.2d at p. 736].)

In *Gregg v. Lindsay* (1994) 437 Pa.Super. 206 [649 A.2d 935], Gregg, a longtime friend of the decedent's, had visited the decedent in a hospital intensive care unit where the decedent was confined after surgery. According to Gregg the decedent directed him to contact the decedent's attorney and have the attorney prepare a new will for the decedent which would make substantial provisions for Gregg. Gregg so advised the attorney (who had prepared the decedent's then current will which made no provision for Gregg) and also told the attorney that the decedent was in serious condition and that the will should be drafted and executed the same day or Gregg would find another attorney to do the job. The attorney drafted the will and took it to the decedent that evening; the decedent seemed unconcerned but said the revised will was acceptable. The attorney found the situation unusual and recommended that two subscribing witnesses be found. When he could not find subscribing witnesses at the hospital, the attorney proposed [35 Cal.App.4th 961] to return in the morning and, in the interim, to make a correction in the will. The decedent made no objection. But by the time the attorney returned, shortly after noon the following day, the decedent had been transferred to another hospital where he died, later that day, without having signed the will.

Gregg obtained a judgment against the attorney. The Superior Court of Pennsylvania reversed the judgment. Under Pennsylvania law Gregg could not have pursued a negligence theory against the attorney because he had not been the attorney's client; he was constrained to proceed instead on the theory that he had been the third party beneficiary of a contract between the attorney and the decedent. The superior court noted that in this case "there was no executed will which ... could clearly establish an intent by the testator to benefit the third person. Where one seeks to prove the existence of an oral contract for the making of a will, he assumes an exacting evidentiary burden which requires clear, direct and precise evidence of each of the elements to a valid contract." (649 A.2d at p. 940.) After review of the circumstances of the case before it the superior court concluded that "[t]his is nothing more than a case in which the testator died before he had executed a new will. His death did not confer upon a disappointed beneficiary a cause of action against the lawyer who drafted the will and who, with the testator's consent, deferred execution of the will until the

following day." (*Ibid.*) In the course of its discussion the superior court quoted with approval the Connecticut Supreme Court's discussion of the attorney-client relationship, in *Krawczyk*, which we have quoted above.

Radovich takes the position that on their particular facts both *Krawczyk* and *Gregg* were correctly decided, but that both cases should be limited to their facts and should be distinguished from this case. Radovich argues in policy terms that even a situation as "extreme" as that in *Krawczyk* "does not justify a general rule that an attorney can never be liable for his negligence when a decedent dies without executing a will. The *Krawczyk* general rule is much broader than necessary, harmful to the pursuit of healthy legal ethics, and unnecessarily protective of negligent conduct by lawyers. [¶] ... The client has asked his lawyer to put his testamentary wishes in a form which will accomplish his goals; to allow the lawyer to unreasonably and negligently delay that task without liability or responsibility would be to undermine loyalty to a client, not to enhance it." Thus Radovich in essence argues that a duty to a disappointed beneficiary should be found for the policy purpose of encouraging estate planning attorneys to meet an appropriate standard of care: "What we are asking is that pressure be put on the attorney to act ethically and responsibly" Radovich submits that such pressure may properly take the form of a judicially recognized duty to potential beneficiaries to meet this obviously desirable standard of care.

[35 Cal.App.4th 962] Locke-Paddon and the law firm suggest that such a rule would be unworkable in, for example, the hypothetical situation of a decedent who left four unexecuted draft wills each of which would have made a different testamentary disposition. Radovich responds that his rule should apply only where intent to benefit a particular beneficiary can be clearly established: he "argues for liability only when the ... breaches of duty and frustrations of testamentary intent presented by the likes of this case are present."

Radovich argues that "every one" of the *Biakanja* policy factors, and particularly each of those on which the Supreme Court in *Lucas* relied, supports his position here.

Radovich also appears to suggest that the fact Locke-Paddon and the law firm had from time to time represented *him* in other matters should somehow strengthen his argument that the attorneys' duty of care with respect to the decedent's draft will should extend to Radovich in the circumstances of record. We find this suggestion, as we understand it, unpersuasive: with respect to this particular transaction (cf. *Brandlin v. Belcher* (1977) 67 Cal.App.3d 997, 1001 [134 Cal.Rptr. 1]) it is clear that Locke-Paddon and the law firm were acting solely as the decedent's attorneys and not as Radovich's.

Locke-Paddon and the law firm rely primarily on the

Connecticut Supreme Court's analysis in *Krawczyk*, as quoted with approval in *Gregg*, arguing that the policy predicates for the *Krawczyk* decision are as compelling under California law as they were in Connecticut. They point out that our own Supreme Court has recently reaffirmed the fundamental importance of an attorney's duty of undivided loyalty to his or her client. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 289 [36 Cal.Rptr.2d 537]; cf. *Anderson v. Eaton* (1930) 211 Cal. 113, 116 [293 P. 788].) They also analyze each of the *Biakanja / Lucas* factors, and conclude that *Lucas* does not support "a rule of law encouraging attorneys to rush their clients into making [a testamentary] decision before they may be ready ...," and that such a rule "would be against public policy."

As we undertake to weigh the various policy factors the parties have identified, we note preliminarily that Radovich's repeated references to perceived shortcomings in Locke-Paddon's draftsmanship do not appear to advance his argument. Had the decedent signed the will, and had it developed after her death that errors in draftsmanship had vitiated the decedent's apparent testamentary intent, then we would have an analog to *Lucas* and to *Heyer*. But on its face the draft will is faulty only in cosmetic particulars; Radovich suggests no respect in which the draft, if the decedent had signed [35 Cal.App.4th 963] it, would have been ineffective to achieve the disposition of assets Radovich would have preferred. Nor does Radovich appear to suggest that it was perceived faults in the draftsmanship of the document which led the decedent not to sign it in the slightly more than two months before her death. We take the pertinent focus of Radovich's argument to be not on the quality of the draft Locke-Paddon prepared but rather on his delay in preparing it and on his asserted failure to encourage the decedent to take action on it once it was prepared.

Neither *Donald v. Garry* nor *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* is directly helpful to our analysis. In each the result was made explicable by special circumstances not present in the case before us: in *Donald* the sole purpose for which the attorney had been retained (albeit through an intermediary) was to collect the plaintiff's claim; in *Roberts*, which involved the unique elements of California's statutory tort of deceit by negligent misrepresentation (Civ. Code, §§ 1709, 1710), the attorneys were alleged to have affirmatively intended their letter to be used to influence the plaintiff's conduct. *Donald* did implicitly recognize the consideration, to which we shall return, that it may be undesirable as a policy matter to permit a negligent attorney wholly to escape liability to anyone.

Most of the *Biakanja* factors by no means as clearly militate in favor of a finding of duty here as in *Lucas*, *Heyer*, or *Biakanja* itself.

The "extent to which the transaction was intended to

affect" Radovich depends to some extent on one's perception of the nature of the transaction.

Radovich characterizes the June meeting between the decedent and Locke-Paddon as a significant commitment to a particular testamentary disposition, analogous to the decedent's signature on purportedly valid and effective testamentary documents (which thereafter remained unchanged until the decedent's death) in *Biakanja*, *Lucas*, and *Heyer*.

We are not persuaded by Radovich's characterization. From Radovich's perspective this is not as strong a case for an inference of commitment to the potential beneficiary, and thus, ultimately, for a finding of duty to that potential beneficiary, as either *Krawczyk* or *Gregg*.

In each of those cases the circumstances suggested that the decedent foresaw a possibility of death within a very short time within days or even hours and it may be inferred that the decedent understood that he would need to make and implement a decision without assurance that he would have an opportunity to change his mind.

[35 Cal.App.4th 964] The situation of the decedent in this case was significantly different: although she was aware of her cancer and, inferably, of its lethal potential, no one suggests that in June 1991 she believed her death was so imminent as to be likely to deny her an opportunity to give further thought to her testamentary plan after the will was drafted. Indeed she expressed an intention to discuss the draft with her sister, and it may be inferred that the decedent could reasonably have expected the sister to try to change her mind.

In this case, even more clearly than in *Krawczyk* or in *Gregg*, we see 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.

We conclude that in all the circumstances of record (including the circumstance that the decedent, given two months to sign the will, did not do so), the June meeting and preparation of the October will draft were insufficient

in and of themselves to manifest a commitment by the decedent to benefit Radovich.

By the same token, the "foreseeability of harm" to Radovich, the degree of certainty that he "suffered injury" attributable to Locke-Paddon's conduct, and the "closeness of the connection" between Locke-Paddon's conduct and the injury Radovich assertedly suffered are all significantly less in this case than they would have been in a case, such as *Biakanja*, *Lucas*, or *Heyer*, in which a new testamentary document had been signed by the decedent before she died.

On the other hand, the asserted deficiencies in Locke-Paddon's performance, if proven, would warrant significant "moral blame" and arguably should in some manner be sanctioned as a deterrent to "future harm" in similar circumstances. The strongest argument for Radovich's position, as he appears in his arguments to this court to recognize, is that if the duty of care [35 Cal.App.4th 965] of Locke-Paddon and the law firm is *not* extended to Radovich, in the circumstances of record Locke-Paddon and the law firm will be liable to no one and an opportunity to deter such conduct in future will be lost. Similar arguments were given substantial if not dispositive weight in *Biakanja*, *Lucas*, *Heyer*, and *Donald*, and the psychology of deterrence by potential liability was the apparent predicate for the continuing education texts from which Radovich has quoted.

But obviously the notion that liability can legitimately be imposed to deter carelessness cannot be applied arbitrarily or in a vacuum. Just as it would not do to award damages to a randomly selected bystander simply to bring home a message that the defendant and others like him or her should not be careless, so it would not do to make such an award, even to a rationally selected plaintiff, if in the circumstances the objective of deterrence is outweighed by countervailing policy considerations.

Countervailing policy considerations are present in this case.

We agree with *Krawczyk* 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. In a sense this is factually a stronger case for the point than was *Krawczyk*: here, notwithstanding his inexplicable delay in preparing the draft will in the first place, Locke-Paddon did get the draft to the decedent more than two months before she died. Thus here the decedent, unlike the decedent in *Krawczyk*, did have an opportunity to execute the testamentary document before death. Further, the undisputed facts make plain that it was the decedent's intent to give further thought to her testamentary plan and to consult with her sister. Even more clearly here than in *Krawczyk*, "[i]mposition of liability would create an incentive for an attorney to exert pressure on a client to

complete and execute estate planning documents summarily," without the additional consideration the decedent in this case said she intended to give them, and "[f]ear of liability to potential third party beneficiaries would contravene the attorney's primary responsibility to ensure that the proposed estate plan effectuates the client's wishes and that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen." (*Krawczyk v. Stingle*, *supra*, 208 Conn. at pp. 246-247 [543 A.2d at p. 736].)

We acknowledge that in the circumstances it would have been professionally appropriate, at least, for Locke-Paddon to have inquired of the decedent whether she had any question or wished further assistance in completing the change of testamentary disposition she had discussed with him. But on weighing relevant policy considerations we conclude that Locke-Paddon and the law firm cannot be held to have owed a duty to *Radovich* to have done so.

[35 Cal.App.4th 966] Our analysis should make clear that, consistent with our perception of the common law method, we have restricted our consideration, and thus necessarily the conclusion we have reached, to the circumstances of record before us. We hold only that for purposes of summary adjudication the record sufficiently establishes that Locke-Paddon and the law firm owed no duty to Radovich.

2. Statute of Limitations

The parties agree that the statute of limitations applicable to the fifth count of Radovich's fiduciary duty action is Code of Civil Procedure section 340.6, which provides in pertinent part that "[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first," subject to four enumerated tolling provisions. (Code Civ. Proc., § 340.6, subd. (a); cf. *Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1363-1364 [12 Cal.Rptr.2d 354].) Of the four, Radovich invokes only the provision that "[i]n no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that ... [¶] ... The plaintiff has not sustained actual injury" (Code Civ. Proc., § 340.6, subd. (a) (1).)

Radovich concedes that the asserted breaches of fiduciary duty alleged in his fifth count occurred more than four years before he filed his action. He argues, however, that the record does not show as matters of undisputed fact that he *discovered* the facts pertinent to his cause of action, or that he sustained *actual injury*, until the time of decedent's death less than a year before

he filed his fiduciary duty action. Radovich argues that for purposes of summary adjudication the record does not negate his assertion that the limitation period was tolled until the decedent's death.

a. *Discovery*

On its face Code of Civil Procedure section 340.6 states two distinct and alternative limitation periods: *one* year after actual or constructive *discovery*, or *four* years after *occurrence* (the date of the wrongful act or omission), whichever occurs first.

Before Code of Civil Procedure section 340.6 took effect in 1978, most legal malpractice actions had been held subject to the two-year statute of [35 Cal.App.4th 967] limitations applicable, under Code of Civil Procedure section 339, subdivision 1, to "[a]n action upon a contract, obligation or liability not founded upon an instrument in writing" Until 1971 this was regarded as an *occurrence* statute: "[T]he statute of limitations commenced to run when the facts constituting the cause of action *occurred*, no matter when these facts are discovered by the client." (Mallen, *Panacea or Pandora's Box? A Statute of Limitations for Lawyers* (1977) 52 State Bar J. 22, 23, italics added; cf. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 179, 183-186 [98 Cal.Rptr. 837] (*Neel*)).

In 1971 the Supreme Court held that as applied to legal malpractice Code of Civil Procedure section 339 should, in fairness to the client and in recognition of the fiduciary character of the attorney-client relationship, be a *discovery* statute: "[T]he statute of limitations for legal malpractice, as for all professional malpractice, should be tolled until the client *discovers*, or should discover, his cause of action." (*Neel, supra*, 6 Cal.3d at p. 179, italics added; cf. *id.* at p. 194.) The Supreme Court recognized "that the instant ruling will impose an increased burden upon the legal profession," in that "[a]n attorney's error may not work damage or achieve discovery for many years after the act, and the extension of liability into the future poses a disturbing prospect," and acknowledged "the possible desirability of the imposition of some outer limit upon the delayed accrual of actions for legal malpractice." (*Id.* at p. 192.) In 1971 the special statute of limitations for *medical* malpractice and related actions, Code of Civil Procedure section 340.5, was "four years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever first occurs." (Stats. 1970, ch. 360, § 1, p. 772; the statute was rewritten in 1975.) Thus section 340.5, as it then read, provided for both a form of occurrence limitation period and a discovery period, in the alternative. The Supreme Court suggested that "[a] similar, but possibly longer, absolute limit may be desirable in actions for legal malpractice [citations], or indeed in all actions for professional malpractice." (*Neel*, 6 Cal.3d at pp. 192-193, fn. omitted.)

In 1977 the Legislature enacted Code of Civil Procedure section 340.6, effective January 1, 1978, which followed the example of section 340.5 by providing for both a four-year *occurrence* period and a one-year *discovery* period, in the alternative. Manifestly the Legislature's intent was to impose (subject to several tolling provisions) the "longer, absolute limit" *Neel* had suggested. (Cf. *Baright v. Willis* (1984) 151 Cal.App.3d 303, 308 [198 Cal.Rptr. 510]; *Krusesky v. Baugh* (1982) 138 Cal.App.3d 562, 566 [188 Cal.Rptr. 57]; *Rubinstein v. Barnes* (1987) 195 Cal.App.3d 276, 281-283 [240 Cal.Rptr. 535]; Mallen, *An Examination of a Statute of Limitations for Lawyers* (1978) 53 State Bar J. 166; 3 Witkin, *Cal. Procedure* (3d ed. 1985) Actions, § 445, pp. 476-477.)

[35 Cal.App.4th 968] Given Radovich's concession that the asserted breaches of fiduciary duty occurred more than four years before he filed his action[1] (and assuming the limitation periods were not tolled), on its face Code of Civil Procedure section 340.6 would have barred Radovich's action by virtue of its four-year *occurrence* period "four years from the date of the wrongful act or omission" even if (as he asserts) Radovich did not *discover* the relevant facts until less than one year before he filed.

Radovich argues, to the contrary, that even the four-year period would not have begun to run until he was aware of the relevant facts.

Radovich's argument contradicts the plain language of Code of Civil Procedure section 340.6 and, if validated, would frustrate the manifest intent of the Legislature to place an outside time limitation (subject to tolling) on claims for legal malpractice.

To support his position Radovich relies on language from the Supreme Court's recent decisions in *ITT Small Business Finance Corp. v. Niles* (1994) 9 Cal.4th 245 [36 Cal.Rptr.2d 552] (*ITT*) and *Laird v. Blacker* (1992) 2 Cal.4th 606, 611 [7 Cal.Rptr.2d 550], from this court's decision in *Finlayson v. Sanbrook* (1992) 10 Cal.App.4th 1436 [13 Cal.Rptr.2d 406], and from opinions in cases which analyze other statutes of limitations.

In *ITT* the "narrow issue" before the Supreme Court was whether, in specified circumstances, "ITT suffered 'actual injury' under the *one-year* statute of limitations for attorney malpractice actions (Code Civ. Proc., § 340.6 ...)..." (*ITT, supra*, 9 Cal.4th at p. 248, italics added.) It was in this context that the Supreme Court said that "[s]ection 340.6 provides that legal malpractice actions shall commence running when the client discovers or should have discovered the facts constituting the malpractice ..." (9 Cal.4th at p. 248), that "[u]nder section 340.6, a malpractice action accrues once a former client 'discovers' the malpractice ..." (*id.* at p. 250), that "[s]ection 340.6 provides that ... knowledge ... must be present before a cause of action for legal malpractice will

accrue" (*id.* at p. 257), and that "a cause of action for legal malpractice accrues under section 340.6(a) when the former client 'discovers' the malpractice and is 'actually harmed by it' (*Id.* at p. 258.) We are satisfied that the Supreme Court [35 Cal.App.4th 969] intended each of these references to apply only to the one-year *discovery* period to which its review was narrowly directed.

In *Laird*, as well, the focus was on the meaning of "actual injury" for purposes of the one-year discovery statute. (*Laird v. Blacker*, *supra*, 2 Cal.4th at p. 609.) In a context similar in this respect to that of *ITT*, the Supreme Court said that "[s]ection 340.6 provides that the statute of limitations for legal malpractice commences when the client discovers, or should have discovered, the cause of action" (*Ibid.*), that when it adopted Code of Civil Procedure section 340.6 the Legislature "codified the discovery rule of *Neel*..." (2 Cal.4th at p. 611), and that "the focus of section 340.6 is on *discovery* of the malpractice and actual injury" (2 Cal.4th at p. 614.) Again we are satisfied that the Supreme Court intended to address only the one-year discovery period, and not the four-year occurrence period, which was not before it.

In *Finlayson* the issue before this court was whether the statute of limitations on a claim for attorney malpractice, based on an assertion that the attorney had missed the statute of limitations in an underlying action, should run from the date on which the statute was missed or from the later date on which defense summary judgments were entered *because* the statute had been missed. (*Finlayson v. Sanbrook*, *supra*, 10 Cal.App.4th at p. 1438.) In reaching a conclusion that the malpractice statute should run from the date on which the statute in the underlying action was missed,[2] this court said among other things that "there can be no doubt the Legislature intended to commence the statute upon *discovery* of the fact of damage rather than upon final confirmation of the amount of damage." (10 Cal.App.4th at p. 1442, italics added.) This oblique reference was by no means intended to effect a judicial revision of the plain language of Code of Civil Procedure section 340.6 with respect to the four-year occurrence statute, the effect of which as an "outside limit" this court explicitly and accurately restated in a footnote. (10 Cal.App.4th at p. 1442, fn. 6.)

Radovich also quotes from the Supreme Court's recent discussion of the statute of limitations applicable to defamation (Code Civ. Proc., § 340, subd. (3)), in which the court referred to "the common law 'discovery rule,' which provides that the accrual date may be 'delayed until the plaintiff is aware of her injury and its negligent cause.' [Citation.]" (*Bernson v. Browning-Ferris*

[35 Cal.App.4th 970] Industries (1994) 7 Cal.4th 926, 931 [30 Cal.Rptr.2d 440].) And Radovich cites other cases that deal with discovery requirements in contexts other than that of section 340.6. These analyses of other

statutes are not pertinent to section 340.6. It is apparent that in section 340.6 the Legislature has chosen to abrogate the common law rule and to enact a special rule for actions against attorneys for wrongful acts or omissions.

We have found no case in which a discovery proviso has been directly and unambiguously attributed to the four-year limitation period of Code of Civil Procedure section 340.6. Nor has Radovich given us any other basis on which we might judicially countermand the Legislature's clear direction that the four-year period is indeed an *occurrence* period which will run whether or not the plaintiff has discovered the malpractice.

b. Actual Injury

Code of Civil Procedure section 340.6's provision that "the period shall be tolled during the time that ... [¶] ... [t]he plaintiff has not sustained actual injury ..." applies to both the one-year discovery period and the four-year occurrence period. (*Gurkewitz v. Haberman* (1982) 137 Cal.App.3d 328, 336 [187 Cal.Rptr. 14].) Thus in practical effect neither period will begin to run until the plaintiff *has* sustained actual injury. (Cf. *Finlayson v. Sanbrook*, *supra*, 10 Cal.App.4th at p. 1438.) Radovich's assertion that he neither discovered the pertinent facts nor sustained actual injury until less than a year before he filed his action frames the dispositive issue on this appeal from a judgment based on summary adjudication: whether it appears without dispute, from all the papers submitted, that Radovich had sustained actual injury more than four years before he filed his fiduciary duty action. (Cf. Code Civ. Proc., § 437c, subd. (c).)

We are satisfied that such actual injury does so appear.

The words "actual injury" in Code of Civil Procedure section 340.6 lend themselves to relatively broad definition in the abstract. Before section 340.6 was enacted, the Supreme Court had held that a cause of action for legal malpractice would not accrue (and thus the statute of limitations would not run) until the plaintiff had suffered "appreciable and actual" harm (*Budd v. Nixen*, *supra*, 6 Cal.3d at pp. 198, 201) that had become "irremediable." (*Heyer v. Flaig*, *supra*, 70 Cal.2d at p. 230.) During the legislative deliberation that led to section 340.6, it was proposed that the limitation periods should be tolled so long as "[t]he plaintiff has not sustained *significant* injury" (Assem. Bill No. 298 (1977-1978 Reg. Sess.) as amended May 9, 1977, italics added; cf. Mallen, *Panacea or Pandora's Box? A Statute of Limitations for Lawyers*, *supra*, 52 State Bar J. 22, 24;

[35 Cal.App.4th 971] *Gurkewitz v. Haberman*, *supra*, 137 Cal.App.3d at pp. 335-336, 336 fn. 3; *Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417, 428 [173 Cal.Rptr. 917], disapproved in part in *Laird v. Blacker*, *supra*, 2 Cal.4th at p. 617.) In section 340.6 as enacted, the Legislature substituted the

word "actual" for "significant." (Stats. 1977, ch. 863, § 1, p. 2609.) The Legislature thus implicitly rejected requirements that the injury be "irremediable" (cf. *Laird v. Blacker*, *supra*, 2 Cal.4th at pp. 612, 616) or "appreciable" (cf. *Finlayson v. Sanbrook*, *supra*, 10 Cal.App.4th at p. 1442; but cf., e.g., *Pleasant v. Celli*, *supra*, 18 Cal.App.4th at p. 846 [one of several postsection 340.6 cases that have used the word "appreciable" in addition to "actual"]) or even "significant." (Cf. Mallen, *An Examination of a Statute of Limitations for Lawyers*, *supra*, 53 State Bar J. at p. 167; *Laird v. Blacker*, *supra*, 2 Cal.4th at p. 617 [disapproving Court of Appeal opinions which had invoked the earlier standards].) The Supreme Court has acquiesced in a perception that "the Legislature used the term 'actual' to focus on the fact that damage occurred, and eliminated all qualifiers to prevent confusion that would arise by requiring courts to consider the total amount of damages." (*Laird v. Blacker*, *supra*, 2 Cal.4th at p. 613; cf. also *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 226 [31 Cal.Rptr.2d 525]; Mallen, *An Examination of a Statute of Limitations for Lawyers*, *supra*, 53 State Bar J. at p. 167; 2 Mallen & Smith, *Legal Malpractice* (1993 supp.) § 18.11, p. 34.)

In short, as an abstract proposition the search for the first "actual injury" should be easy: the first injury of any kind to the plaintiff, attributable to the defendant attorney's malfeasance or nonfeasance, should suffice.

But to apply the abstract proposition to real facts is not invariably easy: "The variety of situations in which [attorney] error can occur, and the injuries that can result, make it difficult to formulate and apply bright-line tests for 'actual injury' that resolve statute of limitations problems in all settings.... [T]he facts and circumstances of each case determine when the plaintiff suffered actual injury. [Citation.]" (*Foxborough v. Van Atta*, *supra*, 26 Cal.App.4th at pp. 225-226.) The variety of the conclusions appellate courts have reached attests to the validity of these generalizations.

Nevertheless some patterns have emerged from the recent cases. The broad principle of general applicability which may be derived is that the effect of asserted legal malpractice should not be identified as actual injury until it has reached a point (on a continuum between the asserted malpractice and the point at which its injurious effects become "irremediable") at which injury has been made to appear with an empirical certainty sufficient to allay the law's distaste for speculation.

[35 Cal.App.4th 972] When the issue of actual injury will or may be resolved in a dispute-resolution proceeding separate from the malpractice action itself, the more recent cases have manifested unwillingness to find sufficient empirical certainty before initial disposition (by settlement, judgment, or otherwise) of the separate proceeding, and neither the occurrence nor the cost of the separate proceeding will itself be regarded as "actual

injury."

For example, in cases in which the malfeasance or nonfeasance assertedly occurred in the management of a litigation matter it has been suggested that "because the focus ... is the attorney's conduct in the underlying case, the statute of limitations should commence," and, implicitly, actual injury should be deemed to have first occurred, "on entry of adverse judgment or final order" in the underlying case itself. (*ITT*, *supra*, 9 Cal.4th at p. 250 [suggestions that actual harm may occur earlier disapproved]; *Laird v. Blacker*, *supra*, 2 Cal.4th at p. 615; cf. *Troche v. Daley* (1990) 217 Cal.App.3d 403, 410-412 [266 Cal.Rptr. 34].) The Supreme Court's apparent perception is that "the attorney's conduct in the underlying case" (*ITT*, 9 Cal.4th at p. 250) must be viewed as a whole, and that until the underlying case is completed there will be a significant possibility that the attorney will modify his or her conduct sufficiently to avoid actual injury to the client.

And in *ITT*, in which the malfeasance or nonfeasance assertedly occurred in a transaction context but there was a separate dispute-resolution proceeding an adversary proceeding in a bankruptcy court which might resolve the actual injury issue, the Supreme Court held that "in transactional legal malpractice cases, when the adequacy of the documentation is the subject of dispute, an action for attorney malpractice accrues on entry of adverse judgment, settlement, or dismissal of the underlying action." (*ITT*, *supra*, 9 Cal.4th at p. 258.) The Supreme Court reasoned that "[h]ad ITT prevailed in the adversary proceeding, it would have suffered no 'actual injury' from the initial attorney's preparation of the loan documents ..." (9 Cal.4th at p. 251), and that the "initial legal fees incurred by ITT were not sufficient 'actual injury' within the meaning of section 340.6(a) (1) because at the time the proceeding was filed and ITT hired counsel to defend the loan documentation, there was no actual harm attributable to malpractice." (*Id.* at pp. 252-253.) The Supreme Court indicated that resolution of a separate proceeding might take the form of an arbitration ruling (*id.* at pp. 251-253, analyzing *Sirott v. Latts* (1992) 6 Cal.App.4th 923 [8 Cal.Rptr.2d 206]) or of a dispositive ruling such as a summary judgment in a separate lawsuit (*ITT*, 9 Cal.4th at pp. 253-254, disapproving *Kovacevich v. McKinney & Wainwright* (1993) 16 Cal.App.4th 337 [19 Cal.Rptr.2d 692]).

But not every proceeding separate from the ultimate malpractice action in a transaction malpractice case will necessarily reach the issue of actual [35 Cal.App.4th 973] injury. In *Foxborough v. Van Atta*, *supra*, 26 Cal.App.4th at page 226,[3] Foxborough had retained the attorneys in 1979 to perform legal services in connection with a real property conversion and development project, charging the attorneys among other things to assure that certain annexations could be performed "automatically" (26 Cal.App.4th at p. 222), which is to say without

approval of other owners. Under an administrative regulation automatic annexations could only be performed within a three-year period; the period expired in 1983. In 1985 Foxborough sued another principal in the real estate transaction for relief based on an assertion that the other principal had failed to notify Foxborough of the three-year limitation. In March 1990 this first action culminated in judgment adverse to Foxborough; in June 1990 Foxborough sued the attorneys for failing to advise Foxborough of the three-year period or how to avoid its effect. The attorneys obtained summary judgment on Code of Civil Procedure section 340.6 grounds; Foxborough appealed, arguing that it had not suffered actual injury until the 1990 judgment was entered. The Court of Appeal affirmed, reasoning that "[u]nlike the context of *Laird*, [the attorneys'] alleged negligence did not occur in the [first] litigation. Instead, Foxborough alleged that the [first] litigation was one of the consequences of that negligence. The judgment in the [first] litigation was not the first realization of an injury from the alleged malpractice, but rather the loss of an alternative means for obtaining monetary relief for that injury. Though [the attorneys'] alleged negligence may have contributed to the [first] litigation judgment, that judgment was but the last in time of the alleged injuries." (26 Cal.App.4th at p. 226.)

In a case such as *Foxborough*, where the separate proceeding apparently would provide no occasion to assess whether the client had suffered actual injury, or in a case in which there is no separate proceeding at all, the Supreme Court has indicated it would consider other empirical indicia of actual injury, suggesting in *ITT*.

(1) That where an attorney assertedly failed to warn a seller of a business that the security for the buyer's obligation was inadequate, actual injury occurred not upon default on the secured obligation but upon subsequent sale of the collateral for an inadequate amount (*ITT, supra*, 9 Cal.4th at p. 253, disapproving *Johnson v. Simonelli* (1991) 231 Cal.App.3d 105 [282 Cal.Rptr. 205]); and

(2) That a case (involving pre-Code of Civil Procedure section 340.6 issues) in which a client for whom the attorney had drafted legal documents had employed new counsel to contest a tax deficiency assessment based on [35 Cal.App.4th 974] the documents, but then had conceded the tax liability and sued the attorney, should be disapproved to the extent it could be interpreted to mean that the malpractice cause of action accrued once the client employed new counsel; inferably the Supreme Court would have accepted the concession of liability as a sufficient indication of actual injury. (*ITT, supra*, 9 Cal.4th at pp. 255-256, analyzing *Horne v. Peckham* (1979) 97 Cal.App.3d 404, 417 [158 Cal.Rptr. 714].)

In *Foxborough* the Court of Appeal ultimately concluded that actual injury had occurred upon expiration

of the three-year period: "During the three-year period ..., [the attorneys'] alleged negligence created only the potential for harm, because Foxborough could have proceeded with the development and annexation. But when the three-year period for automatic annexation expired ..., Foxborough lost the right it had retained [the attorneys] to secure." (26 Cal.App.4th at p. 227.)

The matter before us, although it involves allegations of breach of fiduciary duty rather than of legal malpractice as such, is, like *ITT* and *Foxborough*, a case of asserted malfeasance in a transactional setting. But unlike *ITT* and *Foxborough* it involved no independent dispute-resolution proceeding at all: so far as the record reflects, until Radovich sued the defendants themselves he had neither brought nor been called upon to defend a proceeding of any kind. Thus, because there is no "underlying action," this matter does not come within *ITT*'s "narrow" holding that actual injury in a transaction malpractice case is to be established by "entry of adverse judgment, settlement, or dismissal of the underlying action." (9 Cal.4th at p. 258.)

Without the possibility of recourse to conclusions reached in separate proceedings, does actual injury appear with sufficient empirical certainty from those circumstances which are of record?

The record reflects that in 1957 Radovich entered into a prenuptial agreement which on its face was sufficient under California law to fix the property rights of the parties in accordance with its terms. (*Cheney v. City & County of San Francisco* (1936) 7 Cal.2d 565, 569 [61 P.2d 754]; *Barker v. Barker* (1956) 139 Cal.App.2d 206, 212 [293 P.2d 85]; cf. *In re Marriage of Dawley* (1976) 17 Cal.3d 342, 349 [131 Cal.Rptr. 3]; 1 Cal. Marital Dissolution Practice (Cont.Ed.Bar 1981) § 7.55, p. 217 et seq.) By its terms the agreement provided among other things that "[a]ll property owned by [the decedent] at the time of her marriage and all that may be acquired thereafter by gift, bequest, inheritance or devise, and all earnings earned by her subsequent to said marriage, shall be and remain her s[ep]arate [35 Cal.App.4th 975] property, together with the rents, issues and profits thereof," and that "[n]o community property shall exist during the marriage of the parties hereto." Radovich and the decedent were married later that year. In 1974 Radovich acknowledged in writing that the Borina Orchards partnership agreement "involves property which is wholly the separate property of" the decedent, and to this extent acknowledged the effect of the 1957 agreement. In 1985 Radovich acknowledged in writing that "[m]y wife [the decedent] and I have no community property, as more fully set forth in a written agreement between us dated May 9, 1957," the prenuptial agreement.

Radovich took the position that the law firm, and Locke-Paddon from the time he was first employed by the law firm in 1967, breached fiduciary duties to him in

connection with each of these transactions. The crux of his fiduciary duty action, as incorporated by reference into the fifth count directed to these defendants, was that these transactions had caused him injury by denying him community-property access to the decedent's earnings, and foreclosing his potential claims to community-property shares in the Borina Orchards businesses, "[t]hroughout the thirty-four years of the marriage" between 1957 and the death of the decedent in 1991.

Radovich's assertion that the wrongs of which he complained did not cause him injury until at or after the time of the decedent's death is inexplicable. Throughout his marriage to the decedent Radovich would have had a "present, existing and equal" interest (former Civ. Code, § 5105 [1969-1994] *id.* § 161a [1927-1969] provision is now in Fam. Code, § 751) in community property acquired by either of them during the marriage (including among other things their earnings, profits of any separate property business to which either contributed labor or skill, and the proceeds of community property thus accumulated), and the community property would have been subject in varying measure to his control and disposition and to application to his debts. (Cf. generally, 11 Witkin, Summary of Cal. Law (9th ed. 1990) Community Property.) Among other things such community property would have been subject to division between Radovich and the decedent in the event of a dissolution of the marriage. (*Id.* § 160 et seq.) Each of these considerations would have been of real and immediate benefit to Radovich "[t]hroughout the thirty-four years of the marriage," and it follows that the agreement by which he ostensibly relinquished any community-property right in the decedent's acquisitions (and the subsequent documents by which he acknowledged the agreement and its continuing effect) caused him immediate and actual injury throughout the same thirty-four years.

As thus analyzed, the matter before us is analogous to *Turley v. Wooldridge* (1991) 230 Cal.App.3d 586 [281 Cal.Rptr. 441] and *Hensley v. Caietti* (1993) 13 Cal.App.4th 1165 [16 Cal.Rptr.2d 837],

[35 Cal.App.4th 976] in each of which a Court of Appeal found actual injury upon execution of an agreement dividing marital property in the course of dissolution proceedings. In each instance the client asserted that the attorney had given inadequate advice and representation in connection with the agreement; in each instance the ongoing dissolution proceeding gave no occasion to test the client's hypothesis that the asserted malpractice had injured the client.

Turley involved the four-year occurrence period. With respect to the property-division aspects of the agreement, the Court of Appeal said: "If her claims of malpractice are true, Turley suffered actual harm when the Agreement was signed on June 21, 1982.... [T]he Agreement 'provides for its effectiveness on the date of

execution; provides for present transfers of interest in property and the effectiveness of the agreement or the transfers of property were not made contingent upon approval by the court and the provisions of the agreement relating to the transfer of property were not to be merged in the anticipated Interlocutory Judgment' By its terms, the Agreement was effective on the date it was signed by the parties. Therefore, the provisions awarding Turley inadequate support and less than her share of the community property were operational on that date. [Citations.] At that point, her damages were not speculative, but appreciable. The fact that she could have challenged the Agreement in an action for rescission or other contract relief, or the interlocutory judgment under section 473 or the court's equitable powers did not affect the date she suffered actual harm. When she signed the purportedly unfair Agreement on the alleged negligent advice of counsel and thereby rendered it effective, all essential elements of her cause of action for legal malpractice had occurred. There was no justification for tolling the statute of limitations beyond that point." (230 Cal.App.3d at pp. 592-593, fn. omitted.)

Hensley involved both the actual injury issue and Code of Civil Procedure section 340.6's provision for tolling during continuing representation by the attorney (Code Civ. Proc., § 340.6, subd. (a) (2)). On "actual injury," the plaintiff relied on *Laird*'s broad statement that the statute " 'commences on entry of adverse judgment or final order of dismissal.' " (13 Cal.App.4th at p. 1174, quoting from *Laird v. Blacker, supra*, 2 Cal.4th at p. 615.) The Court of Appeal concluded that "*Laird* is inapposite as it cannot reasonably be construed to have addressed the point whether events other than entry of an adverse judgment can satisfy the criteria of actual injury." (13 Cal.App.4th at p. 1174.) The court agreed with *Turley*'s conclusion but phrased its reasoning even more broadly: "Negligent legal advice which induces a client to enter into a binding contract resolving marital property and support issues results in actual injury at the point of entry. Entering a [35 Cal.App.4th 977] contract is a juril act which alters the legal relations of the parties and creates an obligation. [Citation.] The tortious inducement to enter into a contract which imposes noncontingent obligations is actionable at the time of contracting. [¶] Here the contract allegedly unfairly deprived Hensley of her fair share of community property. The facts adduced at the summary judgment proceeding compel the conclusion that the contractual allocation was effective immediately. The parties obtained possessory rights to the allocated chattels and realty and Hensley's former spouse was obliged to make a partial payment of the monetary offset 'forthwith.' The trial court, without correction, declared that 'the stipulation is effective and will be effective as of this morning.' " (*Id.* at p. 1175.) The Court of Appeal added that the fact the provisions of the agreement might subsequently be incorporated into a judgment would not postpone actual injury. (*Id.* at pp. 1175-1176.)

In *ITT* the defendant attorney cited *Hensley* in support of his argument that actual injury had occurred when *ITT* retained independent counsel in the adversary proceeding in bankruptcy. The Supreme Court responded that "*Hensley* is distinguishable on its facts. In *Hensley*, the stipulation to the marital settlement agreement acted immediately to deprive the plaintiff of certain property. Thus, once the stipulation was entered by the court, the plaintiff suffered 'actual injury' under section 340.6(a) (1).... By contrast, as noted above, *ITT* did not suffer 'actual injury' until it entered into the adverse settlement agreement with the debtor. In essence, the *Hensley* final settlement agreement, like the *ITT* settlement agreement with the debtor, acted as the benchmark from which the plaintiff could sue for legal malpractice, for that is the point the malpractice was both discovered and confirmed and the plaintiff was damaged." (9 Cal.4th at p. 255.)

Turley, *Hensley*, and the distinction the Supreme Court drew between *Hensley* and the circumstances of *ITT* all support our conclusion that for purposes of Code of Civil Procedure section 340.6 there was sufficient empirical certainty of actual injury in 1957, when Radovich executed the prenuptial agreement, as well as in 1974 and again in 1985 when he reaffirmed in writing the apparent effect of the 1957 agreement.

Radovich has asked that we take judicial notice of the facts that (after Locke-Paddon and the law firm were excused from the fiduciary duty action by virtue of the proceedings we now review) Radovich pursued his fiduciary duty action to trial and obtained a jury verdict and judgment that his signatures on the 1957 agreement and on the 1974 partnership agreement were obtained by the decedent's "fraud and/or undue influence," and that he was entitled (among other elements of recovery) to nearly \$1.8 million as the [35 Cal.App.4th 978] value his "community property rights" in the decedent's estate. Having solicited and received the parties' supplemental briefing on the issues raised by Radovich's request, we shall take notice of the judgment for purposes of discussion but shall conclude that the judgment is irrelevant to our conclusion that as to Locke-Paddon and the law firm the fiduciary duty action was properly found barred by Code of Civil Procedure section 340.6.

Radovich argues that because his assent to the 1957 prenuptial agreement, and his 1974 acknowledgment of the effect of that agreement, have been found to have been vitiated by fraud and overreaching, he cannot be said to have suffered actual injury, for purposes of Code of Civil Procedure section 340.6, by virtue of either the agreement or his subsequent ostensible acknowledgment of its effect. Alternatively he argues that the validity of the various documents was still in litigation at the time the summary adjudication motions were heard.

Locke-Paddon and the law firm colorably assert that Radovich's recently obtained judgment cannot be deemed relevant to this appeal inasmuch as the judgment was

obtained long after entry of the order appealed from, and even if relevant the jury's findings did not vitiate Radovich's acknowledgment, in 1985, that "[m]y wife and I have no community property, as more fully set forth in [the 1957] agreement"

We need not reach these assertions because we conclude that Radovich's arguments are unavailing in any event.

By his fiduciary duty action Radovich sought specified remedies for the injury we have enumerated: various judicial declarations and determinations, an accounting, penalties, compensatory and punitive damages, attorney fees and costs of suit, and other relief in the court's discretion. By recovering at least the compensatory damages and costs of suit reflected in the judgment he has placed before us, Radovich has by no means demonstrated that he was *not* injured more than four years before he filed his fiduciary duty action. To the contrary, his success in obtaining certain of the remedies he sought necessarily implies that the jury accepted his premise that he *had* been injured, and the facts make clear that the injury on which he based his successful claim for relief manifested itself first in 1957 and thereafter from time to time over the intervening years.

The fact that Radovich was able to obtain remedies for his injury would not negate the existence of the injury for purposes of Code of Civil Procedure section 340.6. *Laird* made clear that once actual injury has been found, the fact the injury is not "irremediable" is of no consequence to the [35 Cal.App.4th 979] section 340.6 issues: Although the injury must be "actual," the Legislature has rejected the requirement that it be "irremediable." (*Laird v. Blacker*, *supra*, 2 Cal.4th at pp. 614-615; cf. also *Turley v. Wooldridge*, *supra*, 230 Cal.App.3d at pp. 592-593 ["The fact that [the plaintiff] could have challenged the Agreement in an action for rescission or other contract relief ... did not affect the date she suffered actual harm"]; *Hensley v. Caietti*, *supra*, 13 Cal.App.4th at p. 1176 ["[t]he consideration that the injury attributable to entry into the contract may be remediable by the attack on the contract does not render the injury harmless"]; cf. also *Worton v. Worton* (1991) 234 Cal.App.3d 1638, 1652 [286 Cal.Rptr. 410].) As the Court of Appeal pointed out in *Foxborough*, "... when malpractice results in the loss of a right, remedy, or interest, or in the imposition of a liability, there has been actual injury regardless of whether future events may affect the permanency of the injury or the amount of monetary damages eventually incurred." (*Foxborough v. Van Atta*, *supra*, 26 Cal.App.4th at p. 227.)

In his reply brief Radovich belatedly argued that the conduct of Locke-Paddon and the law firm, as described in Radovich's fifth count, was "fraudulent" and thus that, by virtue of Code of Civil Procedure section 340.6's exception for "actual fraud," the section's limitation periods do not apply at all.

We normally follow the general rule "that *points raised in the reply brief for the first time will not be considered*, unless good reason is shown for failure to present them before. [Citations.]" (9 Witkin, Cal. Procedure, *supra*, Appeal, § 496, pp. 484-485.) In any event Radovich's argument would fail for want of a factual predicate: Radovich did in fact plead (in a form-book allegation to support a prayer for punitive damages) that the conduct of Locke-Paddon and the law firm "was fraudulent, malicious and oppressive," but he neither pled nor tendered facts to lend substance to this wholly conclusionary allegation.

The judgment is affirmed. Defendants and respondents shall recover their costs on appeal.

Premo, Acting P. J., and Elia, J., concurred.

Appellant's petition for review by the Supreme Court was denied September 14, 1995.

Notes:

[1] Code of Civil Procedure section 340.6 has been held to operate prospectively only. (*Krusesky v. Baugh, supra*, 138 Cal.App.3d at pp. 566-567.) As a practical matter this means, in the circumstances of this case, that the four-year *occurrence* statute could not have commenced until January 1, 1978, for wrongful acts or omissions which occurred before that date. Any period so postponed would have expired on January 1, 1982, nearly 10 years before Radovich filed his fiduciary duty action.

[2] Contra *Pleasant v. Celli* (1993) 18 Cal.App.4th 841, 850 [22 Cal.Rptr.2d 663]. Review was denied in both *Finlayson* and *Pleasant*, but the issue is now before the Supreme Court in *Adams v. Paul* * (Cal.App.), review granted September 29, 1994 (S041623), *McElroy v. Biddison* (1995) 36 Cal.App.4th 1488, 1498 [38 Cal.Rptr.2d 804], review granted May 18, 1995 (S045903), and *Moss v. Mavridis & Associates* (Apr. 6, 1994) B063743 (nonpub. opn.) review granted June 23, 1994 (S039876).

*Reporter's Note: For Supreme Court opinion see 11 Cal.4th 583.

[3] The Supreme Court denied review in *Foxborough* on October 20, 1994, two months before it filed *ITT*.

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809 A.2d 1265

Thomas K. SISSON

v.

Shari JANKOWSKI, esq. and another.

No. 2002-0129.

Supreme Court of New Hampshire.

November 15, 2002.

Submitted July 26, 2002.

Orr & Reno, P.A., of Concord (Ronald L. Snow & a. on the brief), for the plaintiff.

Devine, Millimet & Branch, P.A., of Manchester (Andrew D. Dunn and Kevin G. Collimore on the brief), for the defendants.

BROCK, C.J.

The United States District Court for the District of New Hampshire (*McAuliffe, J.*) has certified the following question of law, *see Sup.Ct. R. 34*:

Whether, under New Hampshire law and the facts as pled in plaintiff's verified complaint, an attorney's negligent failure to arrange for his or her client's timely execution of a will and/or an attorney's failure to provide reasonable professional advice with respect to the client's testamentary options (e.g., the ability to cure a draft will's lack of a contingent beneficiary

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clause by simply inserting a hand-written provision),

[809 A.2d 1266]

which failure proximately caused the client to die intestate, gives rise to a viable common law claim against that attorney by an intended beneficiary of the unexecuted will.

For the reasons stated below, we answer the certified question in the negative.

Because this question arose in the context of a motion to dismiss and absent a copy of the plaintiff's complaint, we assume the truth of the factual allegations

recited by the court in its certification order, and construe all inferences in the light most favorable to the plaintiff. *Hungerford v. Jones*, 143 N.H. 208, 209, 722 A.2d 478 (1998).

In December 1998, the decedent, Dr. Warren Sisson, retained the defendants, Attorney Jankowski and her law firm, Wiggin & Nourie, P.A., to prepare his will and other estate planning documents. According to the plaintiff, Thomas K. Sisson, the decedent informed Attorney Jankowski that he was suffering from cancer, did not want to die intestate, and, therefore, wished to prepare a will that would pass his entire estate to the plaintiff, his brother. The decedent told Attorney Jankowski that he was particularly interested in ensuring that none of his estate pass to his other brother, from whom he was estranged. The record, however, does not reflect any request by the decedent that the will be executed by a date certain.

Attorney Jankowski prepared a will and other estate planning documents and, in mid-January 1999, mailed them to the decedent for his review and execution. The decedent was injured in mid-January, however, and, therefore, did not receive the documents until January 22, 1999, when a neighbor delivered them to him at a nursing home. Three days later, the plaintiff contacted Attorney Jankowski to tell her that the decedent wanted to finalize his estate planning documents quickly because of his deteriorating condition.

On February 1, 1999, Attorney Jankowski and two other law firm employees visited the decedent in the nursing home to witness his execution of the estate planning documents. The decedent executed all of the documents except his will. After Attorney Jankowski asked him whether the will should include provisions for a contingent beneficiary, the decedent expressed his desire to insert such a clause, thereby providing that his estate would pass to a charity in the event the plaintiff predeceased him.

According to the plaintiff, the decedent's testamentary intent was clear as of the end of the February 1, 1999 meeting: the unexecuted will

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accurately expressed his intent to pass his entire estate to the plaintiff. Nevertheless, rather than modifying the will immediately to include a hand-written contingent beneficiary clause, modifying it at her office and returning later that day for the decedent's signature, or advising the decedent to execute the will as drafted to avoid the risk of dying intestate and later drafting a codicil, Attorney Jankowski left without obtaining the decedent's signature to the will.

Three days later, Attorney Jankowski returned with the revised will. The decedent did not execute it, however, because Attorney Jankowski did not believe he was competent to do so. She left without securing his signature and told him to contact her when he was ready to sign the will.

The plaintiff twice spoke with a Wiggin & Nourie attorney "to discuss Attorney Jankowski's inaction regarding the will." The attorney told him that he had spoken to other firm members about the situation. Nevertheless, after February 4, 1999, Attorney Jankowski made no attempt to determine whether the decedent regained [809 A.2d 1267] sufficient testamentary capacity to execute his will.

The decedent died intestate on February 16, 1999. His estate did not pass entirely to the plaintiff as he had intended, but instead was divided among the plaintiff, the decedent's estranged brother, and the children of a third (deceased) brother. The plaintiff brought legal malpractice claims against the defendants, alleging that they owed him a duty of care because he was the intended beneficiary of their relationship with the decedent.

For the purposes of this certified question, there is no dispute as to the decedent's testamentary intent: he wanted to avoid dying intestate and to have his entire estate pass to the plaintiff. Nor does the plaintiff claim that the defendants frustrated the decedent's intent by negligently preparing his will. Rather, the plaintiff asserts that the defendants were negligent because they failed to have the decedent execute his will promptly and to advise him on February 1 of the risk of dying intestate if he did not execute the draft presented at that meeting.

The narrow question before us is whether the defendants owed the plaintiff a duty of care to ensure that the decedent executed his will promptly. Whether a duty exists is a question of law. *Hungerford*, 143 N.H. at 211, 722 A.2d 478. A duty generally arises out of a relationship between the parties. *See MacMillan v. Scheffy*, 147 N.H. 362, 364, 787 A.2d 867 (2001). While a contract may supply the relationship, ordinarily the scope of the duty is limited to those in privity of contract with one another. *Id.* We have, in limited circumstances, recognized exceptions to the privity requirement where necessary to protect against reasonably foreseeable harm. *See Hungerford*, 143 N.H. at 211, 722 A.2d 478. "[N]ot every risk of harm that might be

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foreseen gives rise to a duty," however. *Id.* (quotation and brackets omitted). "[A] duty arises if the likelihood and magnitude of the risk perceived is such that the conduct is unreasonably dangerous." *Id.* (quotation and brackets omitted).

"When determining whether a duty is owed, we

examine the societal interest involved, the severity of the risk, the likelihood of the occurrence, the relationship between the parties, and the burden upon the defendant." *Id.* Ultimately, whether to impose a duty of care "rests on a judicial determination that the social importance of protecting the plaintiff's interest outweighs the importance of immunizing the defendant from extended liability." *Walls v. Oxford Management Co.*, 137 N.H. 653, 657, 633 A.2d 103 (1993).

In *Simpson v. Calivas*, 139 N.H. 1, 4, 650 A.2d 318 (1994), we recognized an exception to the privity requirement with respect to a will beneficiary and held that an attorney who drafts a testator's will owes a duty to the beneficiaries to draft the will non-negligently. In *Simpson*, a testator's son sued the attorney who drafted his father's will, alleging that the will failed to incorporate his father's actual intent. *Id.* at 3, 650 A.2d 318. The will left all real estate to the plaintiff, except for a life estate in "our homestead," which was left to the plaintiff's stepmother. *Id.* The probate litigation concerned whether "our homestead" referred to all of the decedent's real property, including a house, over one hundred acres of land and buildings used in the family business, or only to the house, and perhaps limited surrounding acreage. *Id.* The plaintiff argued that the decedent intended to leave him the buildings used in the family business and the bulk of the surrounding land in fee simple. *Id.* at 4, 650 A.2d 318. The plaintiff lost the will construction action, and then brought a malpractice action against [809 A.2d 1268] the drafting attorney, arguing that the decedent's will did not accurately reflect his intent. *Id.* at 3, 650 A.2d 318.

We held that the son could maintain a contract action against the attorney, as a third-party beneficiary of the contract between the attorney and his father, and a tort action, under a negligence theory. *Id.* at 7, 650 A.2d 318. With respect to the negligence claim, we concluded that, "although there is no privity between a drafting attorney and an intended beneficiary, the obvious foreseeability of injury to the beneficiary demands an exception to the privity rule." *Id.* at 5-6, 650 A.2d 318.

Simpson is consistent with the prevailing rule that a will beneficiary may bring a negligence action against an attorney who failed to draft the will in conformity with the testator's wishes. *See generally* R. Mallen & J. Smith, *Legal Malpractice* § 32.4, at 735 (5th ed.2000); *Stowe v. Smith*, 184 Conn. 194, 441 A.2d 81 (1981); *Lucas v. Hamm*, 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685, 688-89

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(1961), *cert. denied*, 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed.2d 525 (1962); *Succession of Killingsworth*, 292 So.2d 536, 542 (La.1973); *Hare v. Miller, Canfield, Paddock & Stone*, 743 So.2d 551 (Fla. Dist. Ct. App. 1999).

Simpson is not dispositive of the certified question,

however. The duty in *Simpson* was to draft the will non-negligently, while the alleged duty here is to ensure that the will is executed promptly. Courts in several jurisdictions have declined to impose a duty of care where the alleged negligence concerns the failure to have the will executed promptly. See *Krawczyk v. Stingle*, 208 Conn. 239, 543 A.2d 733 (1988); *Miller v. Mooney*, 431 Mass. 57, 725 N.E.2d 545 (2000); *Charia v. Hulse*, 619 So.2d 1099 (La.Ct.App.1993); *Radovich v. Locke-Paddon*, 35 Cal.App.4th 946, 41 Cal.Rptr.2d 573 (1995); *Babcock v. Malone*, 760 So.2d 1056, 1056-57 (Fla.Dist.Ct.App.2000). The majority of courts confronting this issue have concluded that imposing liability to prospective beneficiaries under these circumstances would interfere with an attorney's obligation of undivided loyalty to his or her client, the testator or testatrix.

In *Krawczyk*, 543 A.2d at 733-34, for instance, the decedent had met with his attorney approximately ten days before he died and informed her that he was soon to have open heart surgery and wanted to arrange for the disposition of his assets without going through probate. Accordingly, he directed the attorney to prepare two trust documents for his execution. *Id.* at 734. Completion of the trust documents was delayed, and by the time they were ready for execution, the decedent was too ill to see his attorney. He died without signing them. *Id.*

The Connecticut Supreme Court concluded that imposing liability to third parties for negligent delay in executing estate planning documents would contravene a lawyer's duty of undivided loyalty to the client. *Id.* at 736. As the court explained:

Imposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily. Fear of liability to potential third party beneficiaries would contravene the attorney's primary responsibility to ensure that the proposed estate plan effectuates the client's wishes and that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen. These potential conflicts of interest are especially significant in the context of the final disposition of a client's estate, where the testator's testamentary

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capacity and the absence of undue influence are often central issues.

Id.

The Massachusetts Supreme Judicial Court has similarly reasoned that:

[I]n preparing a will[,] attorneys can have only one client to whom they owe a duty of undivided loyalty. A client who engages an attorney to prepare a will may seem set

on a particular plan for the distribution of her estate.... It is not uncommon, however, for a client to have a change of heart after reviewing a draft will.... If a duty arose as to every prospective beneficiary mentioned by the client, the attorney-client relationship would become unduly burdened. Attorneys could find themselves in a quandary whenever the client had a change of mind, and the results would hasten to absurdity. The nature of the attorney-client relationship that arises from the drafting of a will necessitates against a duty arising in favor of prospective beneficiaries.

Miller, 725 N.E.2d at 550-51 (quotation, ellipses and brackets omitted).

We have recently reaffirmed the importance of an attorney's undivided loyalty to a client. See *MacMillan*, 147 N.H. at 365, 787 A.2d 867. In *MacMillan*, we declined to extend *Simpson* to permit the buyers in a real estate transaction to sue the sellers' attorney who prepared a deed, which failed to include a restrictive covenant. We ruled that there was no evidence that the primary purpose of employing the attorney to draft the deed was to benefit or influence the buyers. *Id.* Accordingly, we held that the buyers were not the intended beneficiaries of the attorney's services. *Id.* Moreover, we held that it was imprudent to impose liability upon the attorney under these circumstances because doing so would "interfere with the undivided loyalty which the attorney owes his client and would detract from achieving the most advantageous position for his client." *Id.* (quotation omitted).

Both parties cite compelling policy considerations to support their arguments. The plaintiff asserts that there is a strong public interest in ensuring that testators dispose of their property by will and that recognizing a duty of an attorney "to arrange for the timely execution of a

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will" will promote this public interest. He further argues that "[t]he risk that an intended beneficiary will be deprived of a substantial legacy due to delay in execution of testamentary documents" requires the court to recognize the duty he espouses. The defendants counter that recognizing a duty to third parties for the failure to arrange will potentially would undermine the attorney's ethical duty of undivided loyalty to the client.

After weighing the policy considerations the parties identify, we conclude that the potential for conflict between the interests of a prospective beneficiary and a testator militates against recognizing a duty of care. "It is the potential for conflict that is determinative, not the existence of an actual conflict." *Miller*, 725 N.E.2d at 550. Whereas a testator and the beneficiary of a will have a mutual interest in ensuring that an attorney drafts the will non-negligently, a prospective beneficiary may be interested in the will's prompt execution, while the testator or testatrix may be interested in having sufficient

time to consider and understand his or her estate planning options. As the Massachusetts Supreme Judicial Court recognized:

Confronting a last will and testament can produce complex psychological demands on a client that may require considerable periods of reflection. An attorney frequently prepares multiple drafts of a will before the client is reconciled

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to the result. The most simple distributive provisions may be the most difficult for the client to accept.

Id. at 551.

Creating a duty, even under the unfortunate circumstances of this case, could compromise the attorney's duty of undivided loyalty to the client and impose an untenable burden upon the attorney-client relationship. To avoid potential liability, attorneys might be forced to pressure their clients to execute their wills summarily, without sufficiently reflecting upon their estate planning options.

On balance, we conclude that the risk of interfering with the attorney's duty of undivided loyalty to the client exceeds the risk of harm to the prospective beneficiary. For these reasons, we join the majority of courts that have considered this issue and hold that an attorney does not owe a duty of care to a prospective will beneficiary to have the will executed promptly. Accordingly, we answer the certified question in the negative.

Remanded.

NADEAU, DALIANIS and DUGGAN, JJ., concurred.