Woodland Hills Trust & Estate Planning Council

Roundtable Discussion

Handout For:

"In the wake of *Grossman* and *Gordon*:
Professional Responsibility and the
Estate Planner's Duties to Clients and Non-Clients"

By Claudia Stone (NEMECEK & COLE) *and*
Matthew D. Kanin (GREENSPOONMARDER LLP)
Moderated by Jonathan Cole, Esq.

Thursday, March 13, 2025 @ 5:30 P.M.
Woodland Hills Country Club
21150 Dumetz Road
Woodland Hills, California
91364

Outline:

1. **The estate planning attorney's duties…:**
    a. **To Clients**
    b. **To Non-Clients**
    c. **Other theories**
2. **Do *Gordon v. ECJ* and *Grossman v. Wakeman* alter the landscape?**
    a. **"Clear, certain and undisputed"**
    b. **What are the advantages of this standard?**
    c. **What are the pitfalls?**
3. **The role of drafting counsel in subsequent litigation – instances and anecdotes of interest:**
    a. ***Miller v. Mackall***
    b. ***Cundall v. Mitchell-Clyde***
4. **Shaping "best practices" for your firm.**

Speaker Bios:

Claudia L. Stone – Claudia L. Stone is and has been a member of Nemecek & Cole since November 2004. Claudia is recognized for her handling of civil litigation through trial and, where possible, has resolved matters in alternative dispute processes and/or settlement. She has argued cases before California Courts of Appeal and the Ninth Circuit Court of Appeal. Prior to joining Nemecek & Cole, Claudia was a partner with Bronson, Bronson & McKinnon LLP. Claudia was also senior counsel with Allen Matkins, Leck, Gamble, Mallory & Natsis LLP.

Claudia earned her B.A. *cum laude* from University of California at Los Angeles, and her J.D. from Southwestern University School of Law. She is admitted to practice in California.

Matthew D. Kanin – Matthew D. Kanin is *Of Counsel* to Greenspoon Marder LLP, where his practice includes trust and estate disputes, conservatorships, probate and trust administration, civil litigation, and appeals since 2019. Matt is a Certified Specialist in Estate Planning, Trust and Probate Law (by the State Bar of California Board of Legal Specialization), and a member of the Los Angeles County Bar Association's (LACBA) Trust & Estates Executive Committee. He was a speaker for he 2024 and 2018 Limited Conservatorship CAC training, the 2022 CLA Elder Abuse Symposium, and numerous other professional associations. Since 2014, Matt has served actively on the CAC (formerly "PVP") panel and has served as appointed counsel in over 150 cases. He is also a native Angeleno and a third-generation California attorney.

Matt is a 2007 graduate of Loyola Law School, Los Angeles, California, and a 2004 graduate of the George Washington University in Washington D.C., where he majored in International Affairs and Philosophy.

A copy of his November, 2024 article (published in the *Daily Journal*) on *Gordon* and *Grossman* is attached.

Clear, certain, and undisputed: Who holds the estate planners accountable?

Matthew D. Kanin

An attorney who provides estate planning services (such as drafting revocable living trusts and wills) can be liable not just to the client who engaged him or her, but also to potential beneficiaries. *See Heyer v. Flaig* (1969) 70 Cal.2d 223, 225-226 (*"Heyer"*)("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"). After the California Supreme Court decided *Heyer*, two recent cases in the Court of Appeal explored the limits on the potential class of plaintiffs to whom the drafting attorney could face liability: *Gordon v. Ervin Cohen & Jessup, LLP* (2023) 88 Cal.App.5th 543 (*"Gordon"*), and *Grossman v. Wakeman* (2024) 104 Cal.App.5th 1014 (*"Grossman"*). Each of these cases hold that an attorney can be liable only to a third party if the intent of the client was "clear, certain, and undisputed." *Gordon* at 549; *Grossman* at 1024. This formulation compacts a much longer policy analysis into a single question. *Gordon* at 555-556.

"A lawyer retained to draft a client's will or trust has a duty to 'use such skill, prudence, and diligence as members of [the legal] profession commonly possess and exercise.' (Citation.) If the lawyer fails to do so, the client can sue for legal malpractice. What is more, the lawyer's duty—and the concomitant right to sue for legal malpractice—can extend to nonclients." Gordon at 549. In other words, the attorney owes a duty of care to the client; that duty could be asserted by the client during the client's lifetime, or a successor in interest, thereafter (Cal. Civ. Proc. Code § 366.1), and the attorney may owe an independent duty to beneficiaries.

The potential liability of an estate planner can remain dormant for years. Ordinarily, an action against an attorney for professional negligence must be brought within one year of the date when the plaintiff did, or reasonably should have, discovered the harm. Cal. Civ. Proc. Code. §340.6. However, when the alleged malpractice was in failing to conform the dispositive provisions of a will to a client's intent, the cause of action does not accrue when the drafting is done. *Heyer* at 225. It occurs when the transfer becomes irrevocable – which is often not prior to the death of the client. *Id.* Only then do the beneficiaries suffer "irremediable injury." *Id.* The result is that this is a "long-tail liability."

Professional negligence (whether asserted by the original client, a successor, or an intended beneficiary, as in Heyer) is not the only danger. Depending on the circumstances, a dissatisfied beneficiary or heir could assert other theories, such as interference with economic expectancy (See *Beckwith v. Dahl* (2012) 205 Cal. App. 4th 1039 (recognizing theoretical existence of the tort); malicious prosecution could come into play (See *Steiner v. Eikerling* (1986) 181 Cal. App. 3d 639) (liability for presenting forged will to probate). These tort claims create openings for a plaintiff to try inheritance disputes to a jury, even though the legislature has ostensibly abolished jury trials in will and trust contests (Cal. Prob. Code § 825). These alternative theories are not the current focus but share the common feature of being unlikely to arise until after death.

The main focus of *Heyer* was the accrual of the statute of limitations, not the existence of the tort duty or its contours. *Heyer, supra* at 225. The trial court had sustained the demurrer on statute of limitations grounds, and duty was not addressed. *Id.* at 226. Moreover, the theoretical existence of the duty had already been established in recent prior cases, *Lucas v. Hamm* (1961) 56 Cal.2d 583 (*"Lucas"*) and *Biakanja v. Irving* (1958) 49 Cal. 2d 647 (*"Biakanja"*) which notably involved a non-attorney providing estate planning services, i.e. unauthorized practice of law.) Citing *Lucas*, the *Heyer* decision noted that the duty extended only to "persons whose rights and interests are certain and foreseeable." *Heyer* at 229.

The question left open by *Heyer*, but not unanswerable, is when the attorney owes a duty of care to a nonclient heir or beneficiary. The *Gordon* court provides a superb articulation of the multi-factor analysis, which consist of:

- The extent to which the transaction [between the lawyer and the client] was intended to affect the nonclient plaintiff;
- The foreseeability of harm;
- The certainty of injury;
- The closeness of the connection

between the lawyer's conduct and the nonclient plaintiff's injury;

- The "moral blameworthiness" of the lawyer's conduct (not often applicable outside the *Biakanja* context);
- The policy of preventing future harm;
- The likelihood that imposing liability on the lawyer to the nonclient plaintiff might interfere with the lawyer's ethical duties to the client; and
- Burden on the profession (i..e. whether the recognition of the duty would interfere with the attorney's duty to his client, create conflicting duties, or lead to open-ended liability).

88 Cal.App.5th at 555-556. As a multi-factor policy approach, engaging in this analysis from scratch in every single case would be time-consuming and could potentially lead to inconsistent results. The *Grossman* and *Gordon* courts both distill the multi-factor analysis down to a question that is more susceptible to a yes-or-no answer: Was it "clear," "certain" and "undisputed" that the attorney's client intended the plaintiff to be a beneficiary? *Grossman* at 556. This a "heightened standard" (*Id.* at 557), and intentionally so: "[M]aking a lawyer liable in malpractice to a nonclient for failing to act in any role beyond the role of implementing the client's undisputed intent to benefit that nonclient is bad public policy because it places an 'incentive [on the lawyer] to exert pressure on the client to complete and execute estate planning documents summarily' (citation) a result that contravenes the lawyer's overarching duty of loyalty to the client." *Id.* at 560 (citing *Radovich v. Locke-Paddon* (1995) 35 Cal. App.4th 946, 965).

The takeaway from *Gordon* is that an estate planning attorney's primary focus should be on carrying out the intentions of the client for whom he has been appointed. If the nonclient plaintiff cannot allege that the client's intent was unclear, then they may lose at the pleadings stage, as in *Gordon*, where summary judgment was granted for the defendant law firm and partner attorney. *Id.* at 556-565. Even if a sufficient allegation of clear instruction is made, an attorney will have a defense on the merits if the evidence is uncontroverted as to what the instructions were, as in *Grossman*, where the jury verdict against the defendant attorney was reversed on appeal for insufficient evidence. 104 Cal. App.5th at 1023-1025.

The defendant attorney was exculpated in both *Grossman* and *Gordon*, with a court of review determining that there was no real question of fact. However, *Grossman* illustrates that it is possible for a case to proceed to trial, implying the possibility that the finder-of-fact will have to weigh conflicting evidence of client intent.

Estate planning attorneys should familiarize themselves with the specific facts of *both* of these cases and evaluate their best practices for documenting whether an estate plan delivered to a client for execution does clearly conform to the intent of the client. There are many ways of doing this, and some practitioners already have these steps in place. Those who do not should research options and implement such a system. Doing so will have salutary benefits not just in a hypothetical malpractice action but also in the event that a beneficiary or heir contests a will or trust.

Matthew D. Kanin is of counsel at Greenspoon Marder LLP.

88 Cal.App.5th 543
Court of Appeal, Second District, Division 2, California.

Bruce GORDON et al., Plaintiffs and Appellants,
v.
ERVIN COHEN & JESSUP LLP et al., Defendants and Respondents.

B313903
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Filed February 23, 2023
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As Modified on Denial of Rehearing March 20, 2023

Synopsis

Background: Client's son and his children brought action for legal malpractice against attorney and attorney's law firm, alleging that client retained attorney to amend her testamentary trust in way that disinherited three other grandchildren, that client again retained attorney to place three parcels of real estate held by trust into three limited liability companies (LLCs) and then gifted equal membership interests in LLCs to each of her three sons, and that LLC operating agreements did not adhere to client's intent because they did not prohibit sons from gifting their LLC membership interests to their children, thereby making it possible for membership interests in LLC to be passed to grandchildren whom client had disinherited from her testamentary trust. Defendants moved for summary judgment. The Superior Court, Los Angeles County, No. BC715251, Patricia D. Nieto, J., granted motion. Plaintiffs appealed.

[Holding:] The Court of Appeal, Hoffstadt, J., held that lawyer did not owe plaintiffs duty to draft LLC operating agreements in way that disinherited grandchildren.

Affirmed.

Procedural Posture(s): Petition for Rehearing; On Appeal; Motion for Summary Judgment.

West Headnotes (23)

[1] **Attorneys and Legal Services** Wills, trusts, and estates

A lawyer retained to draft a client's will or trust has a duty to use such skill, prudence, and diligence as members of the legal profession commonly possess and exercise; if the lawyer fails to do so, the client can sue for legal malpractice.

[2] **Attorneys and Legal Services** Existence of duty; necessity of attorney-client relationship

A key element of a claim of legal malpractice is the establishment of a duty by the lawyer to the claimant.

[3] **Appeal and Error** Other particular torts

Whether a duty exists for purposes of a legal-malpractice claim is a question of law that an appellate court independently assesses.

[4] **Appeal and Error** Plenary, free, or independent review

An appellate court independently determines whether a trial court's grant of summary judgment was appropriate. Cal. Civ. Proc. Code § 437c(c).

[5] **Attorneys and Legal Services** Ordinary or reasonable care

A lawyer has a duty to use such skill, prudence, and diligence as members of the legal profession commonly possess and exercise when representing a client.

[6] **Attorneys and Legal Services** Malpractice or negligence in general; nature and elements

A client may sue a lawyer for legal malpractice if the lawyer breaches the duty to use such skill, prudence, and diligence as members of the legal profession commonly possess and exercise, that breach proximately injures the client, and the client suffers actual loss or damage.

[7] **Attorneys and Legal Services** Third-Party Beneficiaries
Attorneys and Legal Services Wills, trusts, and estates

Although the lawyer's duty typically runs only to the client because that duty arises from the privity of contract that forms the lawyer-client relationship, a lawyer can sometimes owe a duty to third parties who are the intended beneficiaries of the lawyer's legal work for the client, such as when the lawyer is retained by the client to draft a will, a testamentary trust, or an inter vivos trust or gift.

1 Case that cites this headnote

[8] **Attorneys and Legal Services** Wills, trusts, and estates

The fact that a lawyer creates a will, trust, or gift for the client that benefits a third party does not automatically give rise to a duty running from the lawyer to the third party that is actionable in a malpractice claim.

1 Case that cites this headnote

[9] **Attorneys and Legal Services** Duties and Liabilities to Non-Clients

Because legal malpractice is a common-law tort, and because duty in the context of such torts reflects a conclusion made by the courts—based on considerations of public policy—that one person should be liable to another, the question of whether a lawyer has a duty to a nonclient third party is similarly based on an amalgam of competing public policy considerations.

[10] **Attorneys and Legal Services** Duties and Liabilities to Non-Clients

The first group of factors bearing on whether a lawyer should owe a duty to a nonclient looks to the extent to which the transaction between the lawyer and the client was intended to affect the nonclient; the clearer it is that the client intended to affect, that is, to benefit, the nonclient, the more foreseeable the harm due to any malpractice is to the nonclient, the greater the degree of certainty that the nonclient suffered injury, the greater the closeness of the connection between the lawyer's conduct and the nonclient's injury, and the more that recognizing a duty furthers the policy of preventing future harm.

[11] **Attorneys and Legal Services** Duties and Liabilities to Non-Clients

A factor courts consider in determining whether a lawyer owes a duty to a nonclient is the moral blame attached to the lawyer's conduct; however, this factor is rarely applied as part of the analysis of duty when it comes to claims of

legal malpractice.

[12] **Attorneys and Legal Services** Duties and Liabilities to Non-Clients

The second group of factors bearing on whether a lawyer should owe a duty to a nonclient examines the likelihood that imposing liability on the lawyer to the nonclient might interfere with the lawyer's ethical duties to the client.

[13] **Attorneys and Legal Services** Nature and Scope of Duty
Attorneys and Legal Services Duties and Liabilities to Non-Clients

A lawyer's paramount and primary duty is to the client and, more immediately, to carrying out the client's intent, so courts are less willing to impose a duty running from the client to a nonclient if recognizing that additional duty might interfere with the lawyer's chief duty to the client.

[14] **Attorneys and Legal Services** Duties and Liabilities to Non-Clients

The third group of factors bearing on whether a lawyer should owe a duty to a nonclient assesses whether the recognition of a duty running to the nonclient—and the resultant recognition of liability against the lawyer—would impose an undue burden on the profession, either by (a) making the lawyer subject to conflicting duties to different sets of nonclient beneficiaries, or (b) saddling the lawyer with open-ended liability that could act as a disincentive for lawyers to practice in that area of law and hence dry up access to the legal services in that area.

1 Case that cites this headnote

[15] **Attorneys and Legal Services** Third-Party Beneficiaries

A lawyer has a duty to a nonclient third party only if the client's intent to benefit that third party, in the way the third party asserts in their legal-malpractice claim, is clear, certain and undisputed.

3 Cases that cite this headnote

[16] **Attorneys and Legal Services** Third-Party Beneficiaries

It is only when a client's intent to benefit a nonclient third party is abundantly clear that courts can be sure that the third party's legal-malpractice claim is enforcing the client's wishes, which is the main purpose of a malpractice lawsuit—no matter who is prosecuting it.

1 Case that cites this headnote

[17] **Attorneys and Legal Services** Third-Party Beneficiaries

When a client's intent to benefit a nonclient meets the heightened standard of being clear, certain and undisputed, it is more likely that the nonclient's interests in prosecuting a legal-malpractice claim perfectly represent the client's interests, thereby reducing the likelihood that a duty running from the lawyer to the nonclient would put the lawyer in an ethical quandary.

[18] **Attorneys and Legal Services**🔑Third-Party Beneficiaries
Pleading🔑Nature and office of demurrer, and pleadings demurrable
Summary Judgment🔑Duties and liabilities of practitioners; negligence and malpractice

Requiring that a client's intent to benefit a nonclient be clear, certain and undisputed before the nonclient can bring a legal-malpractice claim reduces the danger of open-ended liability for lawyers because it can be decided as a matter of law, either on demurrer or summary judgment, because the nonclient would be unable to raise a factual dispute about the client's intent absent evidence that the client had a clear, certain and undisputed intent to benefit the nonclient.

2 Cases that cite this headnote

[19] **Attorneys and Legal Services**🔑Third-Party Beneficiaries

A lawyer owes no duty to a nonclient to effectuate the client's directive to "Do X" when the nonclient's legal-malpractice claim raises a question about what "X" is—that is, where there is a question about whether the client intended to benefit the nonclient or how the client intended to do so.

1 Case that cites this headnote

[20] **Attorneys and Legal Services**🔑Wills, trusts, and estates

A lawyer retained to draft a client's will or trust has no duty to remind the client to follow through with implementing the client's directive once the lawyer has prepared the requested documents, no duty to urge the client to consider alternative plans to forestall will contests by persons who would lose out once the client's intent was effectuated, no duty to effectuate an expression of intent from the client that falls short of a directive, and no duty to evaluate whether the client has the mental capacity to make a directive that disinherits a nonclient.

[21] **Attorneys and Legal Services**🔑Wills, trusts, and estates

Making a lawyer retained to draft a client's will or trust liable in malpractice to a nonclient for failing to act in any role beyond the role of implementing the client's undisputed intent to benefit that nonclient is bad public policy because it places an incentive on the lawyer to exert pressure on the client to complete and execute estate-planning documents summarily.

[22] **Attorneys and Legal Services**🔑Wills, trusts, and estates

Client's retention of lawyer to amend her testamentary trust in way that disinherited three grandchildren upon her death did not demonstrate clear, certain, and undisputed intent to prevent grandchildren from being assigned any ownership interest in limited liability companies (LLCs) owned by client and her sons, and thus lawyer who created LLC operating agreements did not owe nonclient heirs, who might have inherited greater interest in LLCs if grandchildren were disinherited, duty to draft operating agreements that disinherited grandchildren, notwithstanding nonclient heirs' argument that LLCs and trust were part of integrated estate plan, where client's intent to disinherit grandchildren appeared nowhere in operating agreements, client never expressed any discontent with terms of operating agreements, and lawyer was not required to second guess client's otherwise clear directive.

[23] **Evidence**🔑Questions of law or fact

In a legal-malpractice action, expert testimony is incompetent on the question whether a legal duty of care exists because this is a question of law for the court alone to decide.

**56 APPEAL from a judgment of the Superior Court of Los Angeles County, Patricia Nieto, Judge. Affirmed. (Los Angeles County Super. Ct. No. BC715251)

Attorneys and Law Firms

Complex Appellate Litigation Group, Rex S. Heinke, Jessica Weisel; Joshua R. Furman Law and Joshua R. Furman, Los Angeles, for Plaintiffs and Appellants.

Halpern May Ybarra Gelberg, Joseph J. Ybarra, Kevin H. Scott, Joel Mallord, Los Angeles; Ervin Cohen & Jessup and Allan B. Cooper, Beverly Hills, for Defendants and Respondents.

Opinion

HOFFSTADT, J.

*549 [1]A lawyer retained to draft a client's will or trust has a duty to "use such skill, prudence, and diligence as members of [the legal] profession commonly possess and exercise." (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199, 108 Cal.Rptr.2d 471, 25 P.3d 670 (*Coscia*).) If the lawyer fails to do so, the client can sue for legal malpractice. What is more, the lawyer's duty—and the concomitant right to sue for legal malpractice—can extend to nonclients, but only if the client's intent to benefit the nonclient is "clear," "certain" and "undisputed." (*Heyer v. Flaig* (1969) 70 Cal.2d 223, 229, 74 Cal.Rptr. 225, 449 P.2d 161 (*Heyer*), disapproved on other grounds by *Laird v. Blacker* (1992) 2 Cal.4th 606, 7 Cal.Rptr.2d 550, 828 P.2d 691; *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1097, 1098, 185 Cal.Rptr.3d 830 (*Paul*).)

But *when* is the client's intent clear, certain and undisputed enough that the **57 lawyer then owes the nonclient a duty? Here, the client retained an attorney to amend her testamentary trust in a way that disinherited the three children of one of her sons upon her death. Soon thereafter, the client retained the attorney to place three parcels of real estate held by the trust into three limited liability companies (LLCs) and then gifted equal membership interests in the LLCs to each of her three sons. Notably, the LLC operating agreements did not prohibit the sons from gifting *their* LLC membership interests to their children, thereby making it possible for membership interests in the LLC to be passed to the grandchildren whom the client had disinherited from her testamentary trust. Thus, this case presents the question: Does a client's intent to disinherit someone in a testamentary trust by itself constitute clear, certain and undisputed intent to disinherit them in every subsequent transaction the client makes with the property contained in the trust? We conclude that the answer is no, that the attorney in this case accordingly owed no duty to guard against that result, and that the trial court properly granted summary judgment to the attorney and his law firm sued in this case by certain beneficiaries of the testamentary trust. We accordingly affirm.

***550 FACTS AND PROCEDURAL BACKGROUND**

I. Facts

A. *The Gordon family*

Arnold and Claire Gordon married, and had three children in the 1940s—Jeffrey (born 1941), Bruce (born 1945), and Kenneth (born 1948).[1] Bruce married, and had two sons—Brian and Steven. Kenneth married, and had three children—Dara, Michael, and David. Jeffrey married, but had no children.

B. *The 1983 Gordon Family Trust*

In 1983, Arnold and Claire created The Gordon Family Trust, dated June 28, 1983 (the "family trust" or the "trust"). The trust was funded, in part, with several parcels of commercial real estate as well as stocks and other securities.

As pertinent here, the trust provided that it would be broken into three subtrusts—called Trust A, Trust B, and Trust C—upon the death of either Arnold or Claire. Trust A would hold all of the surviving spouse's separate

property as well as one-half of the couple's community property. Because the surviving spouse would be individually entitled to the property in Trust A, the surviving spouse would have the power to use and devise the income and principal of Trust A however they wished. Trust B and Trust C would hold all of the deceased spouse's separate property as well as the other half of the couple's community property. More specifically, Trust B would be a "bypass trust" containing stocks and other securities, while Trust C would be a qualified terminable interest property trust (or QTIP trust) designed to qualify for the unlimited federal estate tax marital deduction and contain various parcels of real property. Because the surviving spouse would not be personally entitled to the property in Trust B and Trust C, the surviving spouse's power to access the property in Trust B and Trust C would be more limited: The surviving spouse could draw upon the income generated from the property in those two subtrusts, but could invade or alienate the principal of those ****58** subtrusts only if needed for their "care, support and maintenance." Upon the surviving spouse's death, any property in Trust A not devised by the surviving spouse during her lifetime and all properties in Trust B and Trust C would be divided into shares among Arnold and Claire's still-living sons (or, to a lesser degree, a deceased son's spouse) and the grandchildren.

551 C.** ***Further events

1. *Arnold's death*

Arnold died on March 25, 1989.

2. *Claire's relationship with her family*

Among her three sons, Claire was "closest" with Kenneth. However, Claire had "strained relationship[s]" with Kenneth's wife and his three children.

Between 1997 and 2006, Claire went back and forth disinheriting one or more of Kenneth's children from the trust, and toward that end executed a number of amendments to the trust. In January 2006, Claire executed the twelfth and final amendment to the trust that disinherited all three of Kenneth's children under the trust.

These amendments were all drafted by attorney Reeve Chudd (Chudd), who was a partner at Ervin Cohen & Jessup LLP (the law firm).

Because Claire wanted to maintain her close relationship with Kenneth, she did not tell him about her disinheritance of his children until 2014 or 2015, and did not tell her son Bruce about it until 2016.

3. *Creation of the LLCs*

Soon after Claire executed the final amendment to the trust in January 2006, Claire's accountant told Chudd that Claire was now open to allowing her three sons to receive current income from three of the commercial real estate properties held in Trust C, and that doing so would reduce the estate taxes due upon her death because any subsequent appreciation in the value of those properties would—by virtue of this new arrangement—be "out of [the] Estate."

With Chudd's assistance, Claire took the following steps. First, Claire in December 2006 created three LLCs. Into each, she transferred one of the income-producing commercial properties in Trust C; consistent with that subtrust's limitations, Claire named Trust C as the owner of each LLC. Second, Claire had Trust C transfer ownership of each LLC to Trust A; in exchange, Trust A executed promissory notes to Trust C for the value of the properties. Third, and because the LLCs' ownership interests were in Trust A over which Claire had more control, Claire in April 2007 assigned a 30 percent interest in each LLC to each of her three sons and retained a 10 percent interest in each LLC for herself.

***552** As pertinent here, the operating agreement for each LLC drafted by Chudd provides that a member of the LLC can transfer his "Economic Interest" to anyone, but can only transfer his "Membership Interest" (which includes the right to vote as well as the "Economic Interest") (1) only "with[ ] the consent of all of the [other] Members" or (2) without that unanimous consent, but only if the transfer is to any of the "descendants of the marriage of [Claire and Arnold]" (either directly or through a trust).[2] Thus, nothing in the ****59** LLCs' operating agreements prevented Kenneth (or, for that matter, Jeffrey or Bruce) from transferring their membership interests to Kenneth's children. Although Claire never told Chudd that "her intention" "about inheritance" "had changed" in the time between her execution of the final amendment to the trust and her creation of the LLCs, Claire also never told Chudd that she wished to prohibit Kenneth's children from obtaining

membership interests in the LLCs. In the more than 10 years between the execution of these documents and Claire's death, Claire never told anyone that the terms of the operating agreements were inconsistent with her intent.

4. *Subsequent, unrestricted gifts to Claire's progeny*

In 2012, Claire made a gift of $2 million placed in a trust to her sons Kenneth and Jeffrey—with $1 million allocated to each. Those trust funds were to be distributed outright, and had no restrictions on how Kenneth or Jeffrey could use them.

***553** Claire also took out a life insurance policy, paid the premiums out of her own funds, and designated that the proceeds would be split between her sons (90 percent) and her grandchildren (10 percent), without any prohibition on Kenneth's children receiving their share of the proceeds.

5. *Claire's death*

Claire died on March 9, 2017, at the age of 100. By this time, the value of the Gordon family assets exceeded $40 million.

II. Procedural Background

A. *The pleadings*

Bruce and his sons Steven and Brian (collectively, plaintiffs) sued Chudd and the law firm (collectively, the lawyers) for legal malpractice on the theory that the lawyers in drafting the LLC operating agreements did not adhere to Claire's intent because they did not prohibit Kenneth's three children from inheriting any interests in the LLCs.[3] Had the operating agreements ****60** done so, plaintiffs alleged, Kenneth's interests in the LLCs would have passed to Jeffrey and Bruce upon Kenneth's death, such that Bruce would have a greater membership interest in the LLCs and Bruce's sons might inherit those shares if Bruce elected to devise his interests to them.

B. *Motion for summary judgment*

The lawyers moved for summary judgment on three grounds—namely, (1) they owed plaintiffs no duty of care, (2) plaintiffs' claim was time barred, and (3) Steven and Brian had too contingent of an interest to have standing to sue. After full briefing and a hearing, the trial court granted summary judgment. Specifically, the court ruled that plaintiffs had presented "no evidence of Claire's" intent to disinherit Kenneth's children from obtaining membership interests in the LLCs, such that the lawyers owed plaintiffs no duty to effectuate that intent; the court rejected plaintiffs' argument that Claire's intent to disinherit Kenneth's children in the "separate testamentary" trust translated to an intent to preclude their ownership of LLC interests.

C. *Appeal*

After judgment was entered, plaintiffs filed this timely appeal.

*554 DISCUSSION

[2] [3] [4]Plaintiffs argue that there is a triable issue of material fact as to whether the lawyers owed them a duty to draft the LLC operating agreements in a way that precluded Kenneth's children from obtaining any interest in the LLCs; as a result, plaintiffs urge, the trial court erred in granting summary judgment for the lawyers. Summary judgment is appropriate when the moving party shows that "[it] is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A party is entitled to judgment as a matter of law when, among other things, the nonmoving party (here, plaintiffs) cannot establish "[o]ne or more elements of [their] cause of action" (*id.*, subd. (o)(1); see *id.*, subd. (p)(2)). A " ' "key element" ' " of plaintiffs' sole cause of action for malpractice is " ' "the establishment of a duty by the [lawyer] to the claimant." ' " (*Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287, 1294, 135 Cal.Rptr.2d 888 (*Moore*); accord, *Bucquet v. Livingston* (1976) 57 Cal.App.3d 914, 921, 129 Cal.Rptr. 514 (*Bucquet*) [duty is the "all important element"].) Absent a duty, plaintiffs cannot establish an element of their malpractice

cause of action and defendants are entitled to summary judgment. Whether a duty exists is a question of law that we independently assess. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 57, 77 Cal.Rptr.2d 709, 960 P.2d 513.) We also independently determine whether a trial court's grant of summary judgment was appropriate. (*Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 273, 219 Cal.Rptr.3d 859, 397 P.3d 210.)

I. The Law of Malpractice

A. *A lawyer's duties, generally*

[5] [6]A lawyer has a "duty ... to use such skill, prudence, and diligence as members of [the legal] profession commonly possess and exercise" when representing a client. (*Coscia, supra*, 25 Cal.4th at p. 1199, 108 Cal.Rptr.2d 471, 25 P.3d 670.) A client may accordingly sue the lawyer for legal malpractice if the lawyer breaches ****61** that duty, that breach proximately injures the client, and the client suffers actual loss or damage. (*Ibid.*; *Budd v. Nixen* (1971) 6 Cal.3d 195, 200, 98 Cal.Rptr. 849, 491 P.2d 433.)

[7]Although the lawyer's duty typically runs only to the client because that duty arises from the privity of contract that forms the lawyer-client relationship (*Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523, 529, 15 Cal.Rptr.3d 735, 93 P.3d 337; *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2004) 131 Cal.App.4th 802, 826, 32 Cal.Rptr.3d 325), a lawyer can sometimes owe a duty to third parties who are the *intended* ***555** *beneficiaries* of the lawyer's legal work for the client, such as when the lawyer is retained by the client to draft a will, a testamentary trust, or an inter vivos trust or gift. (*Heyer, supra*, 70 Cal.2d at p. 228, 74 Cal.Rptr. 225, 449 P.2d 161; *Lucas v. Hamm* (1961) 56 Cal.2d 583, 590-591, 15 Cal.Rptr. 821, 364 P.2d 685 (*Lucas*); *Bucquet, supra*, 57 Cal.App.3d at pp. 920-921, 129 Cal.Rptr. 514; *Borissoff*, at p. 530, 15 Cal.Rptr.3d 735, 93 P.3d 337.)

[8] [9]The fact that a lawyer creates a will, trust, or gift for the client that benefits a third party does "not automatic[ally]" give rise to a duty running from the lawyer to the third party that is actionable in a malpractice claim. (*Bucquet, supra*, 57 Cal.App.3d at p. 921, 129 Cal.Rptr. 514; *Ventura County Humane Society v. Holloway* (1974) 40 Cal.App.3d 897, 903, 115 Cal.Rptr. 464 (*Ventura County Humane Society*); *Boranian v. Clark* (2004) 123 Cal.App.4th 1012, 1017, 20 Cal.Rptr.3d 405 (*Boranian*); *Moore, supra*, 109 Cal.App.4th at p. 1295, 135 Cal.Rptr.2d 888.) Because malpractice is a common law tort, and because "duty" in the context of such torts reflects a conclusion made by the courts—based on considerations of public policy—that one person should be liable to another (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734, 69 Cal.Rptr. 72, 441 P.2d 912; *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 221, 276 Cal.Rptr.3d 434, 483 P.3d 159; *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946, 954-955, 41 Cal.Rptr.2d 573 (*Radovich*)), the question of *whether* a lawyer has a duty to a nonclient third party is similarly based on an amalgam of competing public policy considerations.

[10] [11] [12] [13] [14]Fortunately, our Supreme Court has already articulated eight factors bearing on whether a lawyer should owe a duty to a nonclient, and those factors fall into three groups. The first group of factors looks to "the extent to which the transaction [between the lawyer and the client] was intended to affect the [nonclient] plaintiff" (the first factor). (*Lucas, supra*, 56 Cal.2d at p. 588, 15 Cal.Rptr. 821, 364 P.2d 685.) The clearer it is that the client intended to affect (that is, to benefit) the nonclient plaintiff, the more "foreseeabl[e]" the harm due to any malpractice is to the nonclient plaintiff (the second factor), the greater the "degree of certainty that the [nonclient plaintiff] suffered injury" (the third factor), the greater the "closeness of the connection between [the lawyer's] conduct and the [nonclient] plaintiff's injury" (the fourth factor), and the more that recognizing a duty furthers "the policy of preventing future harm" (the sixth factor).[4] (*Ibid.*; see also *Ventura County Humane Society, supra*, 40 Cal.App.3d at pp. 906-907, 115 Cal.Rptr. 464 [noting how the second through fourth as ****62** well as sixth factors largely turn on the first factor]; *Radovich, supra*, 35 Cal.App.4th at p. 964, 41 Cal.Rptr.2d 573 [same]; *Paul, supra*, 235 Cal.App.4th at p. 1098, 185 Cal.Rptr.3d 830 [same].) As vividly ***556** illustrated by the number of factors related to the client's intent to benefit the nonclient plaintiff, the clarity of the client's intent is accordingly "central to the duty analysis." (*Paul*, at p. 1097, 185 Cal.Rptr.3d 830.) The second group of factors examines the "likelihood that impos[ing] liability [on the lawyer to the nonclient plaintiff] might interfere with the [lawyer's] ethical duties

to the client" (the seventh factor). (*Boranian, supra*, 123 Cal.App.4th at p. 1017, 20 Cal.Rptr.3d 405; accord, *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 344, 134 Cal.Rptr. 375, 556 P.2d 737 (*Goodman*).) A lawyer's "paramount" and "primary" duty is to the client and, more immediately, to carrying out the client's intent (*Ventura County Human Society*, at pp. 904-905, 115 Cal.Rptr. 464; *Boranian*, at pp. 1014, 1019, 20 Cal.Rptr.3d 405), so courts are less willing to impose a duty running from the client to a nonclient plaintiff if recognizing that additional duty might interfere with the lawyer's chief duty to the client (*Boranian*, at p. 1018, 20 Cal.Rptr.3d 405; *Moore, supra*, 109 Cal.App.4th at p. 1299, 135 Cal.Rptr.2d 888). The third group of factors assesses whether the recognition of a duty running to the nonclient plaintiff—and the resultant "recognition of liability" against the lawyer—"would impose an undue burden on the profession" (the eighth factor) (*Lucas*, at p. 589, 15 Cal.Rptr. 821, 364 P.2d 685), either by (a) making the lawyer "subject to conflicting duties to different sets of [nonclient] beneficiaries" (*Moore*, at p. 1299, 135 Cal.Rptr.2d 888; *Boranian*, at p. 1020, 20 Cal.Rptr.3d 405), or (b) saddling the lawyer with open-ended liability that could act as a disincentive for lawyers to practice in that area of law and hence dry up access to the legal services in that area (*Ventura County Humane Society*, at p. 905, 115 Cal.Rptr. 464).

B. ***A lawyer's duty to a nonclient, specifically***

[15]After balancing the factors articulated above, the California courts have uniformly settled upon the following rule: A lawyer has a duty to a nonclient third party only if the client's intent to benefit that third party (in the way the third party asserts in their malpractice claim) is "clear," "certain" and "undisputed." (*Heyer, supra*, 70 Cal.2d at p. 229, 74 Cal.Rptr. 225, 449 P.2d 161 ["certain"]; *Paul, supra*, 235 Cal.App.4th at pp. 1097, 1098, 185 Cal.Rptr.3d 830 ["clear"; "undisputed"]; *Radovich, supra*, 35 Cal.App.4th at pp. 958-959, 41 Cal.Rptr.2d 573 ["certain"]; *Moore, supra*, 109 Cal.App.4th at p. 1299, 135 Cal.Rptr.2d 888 ["certain"].) In other words, courts will recognize a duty to a nonclient plaintiff—and thereby allow that plaintiff to sue the lawyer for legal malpractice—only when the plaintiff, as a threshold matter, establishes that the client, in a clear, certain and undisputed manner, told the lawyer, "Do *X*" (where *X* benefits the plaintiff).

There are a few reasons why the courts have consistently insisted upon this heightened showing when it comes to the clarity of the client's intent.

[16]First, it is only when the client's intent to benefit the nonclient third party is abundantly clear that the courts can be sure that the third party's malpractice claim is enforcing the *client*'s wishes, which is the " 'main purpose' " of ***557** a malpractice lawsuit—no matter who is prosecuting it. (*Paul, supra*, 235 Cal.App.4th at p. 1098, 185 Cal.Rptr.3d 830; accord, *Garcia v. Borelli* (1982) 129 Cal.App.3d 24, 32, 180 Cal.Rptr. 768 (*Garcia*); ****63** *Ventura County Humane Society, supra*, 40 Cal.App.3d at p. 903, 115 Cal.Rptr. 464.)

[17] [18]Second, the pertinent factors support the recognition of a duty running to the nonclient plaintiff only when the client's intent to benefit that nonclient is clear, certain and undisputed. When the client's intent meets this heightened standard, there is no doubt that the transaction between the lawyer and the client was intended to affect the nonclient plaintiff, which means that the injury to the plaintiff from the lawyer's negligence in carrying out that intent is foreseeable, the injury to the plaintiff is more certain, the connection between the lawyer's conduct and the plaintiff's injury is closer, and it is more likely that allowing the malpractice claim to move forward would prevent future harm. When the client's intent meets this heightened standard, it is more likely that the nonclient plaintiff's interests in prosecuting a malpractice claim perfectly represent the client's interests, thereby reducing the likelihood that a duty running from the lawyer to the nonclient plaintiff would put the lawyer in an ethical quandary. (*Paul, supra*, 235 Cal.App.4th at p. 1100, 185 Cal.Rptr.3d 830 [if "there is no dispute regarding the decedent's intent, the imposition of liability will not compromise the [lawyer's] duty of undivided loyalty to the testator"].) And when the client's intent meets this heightened standard, there is less danger that the lawyer will be subject to conflicting duties to different nonclient beneficiaries because only those beneficiaries as to whom the client's intent is crystal clear may sue for malpractice. This heightened standard also reduces the danger of open-ended liability for lawyers because it can be decided as a matter of law, either on demurrer or summary judgment (because a nonclient plaintiff would be unable to raise a factual dispute about the client's intent absent evidence that the client had a clear, certain and undisputed intent to benefit the plaintiff). (*Chang v. Lederman* (2009) 172 Cal.App.4th 67, 83, 90 Cal.Rptr.3d 758 (*Chang*) [so noting].)

California courts have routinely insisted that nonclient plaintiffs bringing malpractice claims adduce clear, certain and undisputed evidence of the client's intent to benefit them in the way they are seeking to vindicate. In *Heyer, supra*, 70 Cal.2d 223, 74 Cal.Rptr. 225, 449 P.2d 161, the client tasked her lawyer with drafting a will that left her estate only to the client's two daughters and told the lawyer she was about to get married. *Heyer* held that the daughters could sue the lawyer for malpractice when the lawyer failed to account for how the client's marriage would disrupt her clearly articulated intent to pass her estate to *only* her daughters. (*Id.* at pp. 225-229, 74 Cal.Rptr. 225, 449 P.2d 161.) In *Bucquet, supra*, 57 Cal.App.3d 914, 129 Cal.Rptr. 514, the client tasked the lawyer with drafting an inter vivos trust in a manner that would reduce estate taxes. *Bucquet* held that the trust's beneficiaries could sue when the lawyer's use of a general power of appointment (rather than a more tax-savvy mechanism) disrupted the client's clearly articulated intent to ***558** reduce those taxes. (*Id.* at pp. 918-919, 129 Cal.Rptr. 514.) In *Garcia, supra*, 129 Cal.App.3d 24, 180 Cal.Rptr. 768, the client tasked the lawyer with ensuring that some of the property that was delineated in his will remained his separate property and would be passed to his son. *Garcia* held that the son could sue the lawyer when the lawyer's careless drafting disrupted the client's clearly articulated intent to ensure that the property was designated as separate property. (*Id.* at pp. 29, 32, 180 Cal.Rptr. 768.) In *Osornio, supra*, 124 Cal.App.4th 304, 21 Cal.Rptr.3d 246, the client tasked her lawyer with drafting a will that would leave all of her property to the woman who served as the client's care ****64** custodian. *Osornio* held that the care custodian could sue the lawyer when the lawyer's failure to obtain a "certificate of independent review" necessary to permit an otherwise disqualified care custodian to inherit disrupted the client's clearly articulated intent to benefit the care custodian. (*Id.* at pp. 329, 334, 21 Cal.Rptr.3d 246.) And in *Paul, supra*, 235 Cal.App.4th 1088, 185 Cal.Rptr.3d 830, the client tasked his lawyer with drafting an amendment to his testamentary trust that gave several items of property to his children and *not* his wife. *Paul* held that the children could sue the lawyer when the lawyer's amendment allowing the wife also to inherit that property disrupted the client's undisputed intent that his children (and children alone) inherit. (*Id.* at pp. 1091, 1093, 1097, 185 Cal.Rptr.3d 830.)

C. *The limits of a lawyer's duty to a nonclient*

The carefully delineated rule that a nonclient plaintiff may sue a lawyer for malpractice only when the client's intent to "Do *X*" (that is, to do something to benefit that plaintiff) is clear, certain and undisputed means that there are several scenarios in which the lawyer owes *no* duty to that nonclient plaintiff. Two of those scenarios are relevant here.

[19]First and most obviously, a lawyer owes no duty to a nonclient plaintiff to effectuate the client's directive to "Do *X*" when the nonclient's claim raises a question about what "*X*" is—that is, where there is a question about whether the client intended to benefit *the plaintiff* or *how* the client intended to do so. (*Chang, supra*, 172 Cal.App.4th at p. 82, 90 Cal.Rptr.3d 758 [no liability to a third party "where there is a question about whether the third party beneficiary was, in fact, the decedent's intended beneficiary"]; *Boranian, supra*, 123 Cal.App.4th at p. 1018, 20 Cal.Rptr.3d 405 [no liability to a third party "where there is a substantial question about whether the third party was in fact the decedent's *intended* beneficiary"].)

Because uncertainty regarding the client's intent necessarily means that the client's intent is not clear, certain or undisputed, the absence of a duty in this scenario is unsurprisingly dictated by the analysis of the factors bearing on whether to recognize a duty. When the client's intent behind the directive to "Do *X*" is anything less than abundantly clear, there is by definition greater ***559** doubt about whether the transaction between the lawyer and the client was intended to benefit the nonclient plaintiff. As a consequence, the plaintiff's injury is a less foreseeable result of the lawyer's conduct, the plaintiff's injury is less certain, the connection between the lawyer's conduct and the plaintiff's injury is less close, and it is less likely that allowing the malpractice claim to move forward would prevent future harm. (*Paul, supra*, 235 Cal.App.4th at p. 1098, 185 Cal.Rptr.3d 830 [so noting].) When the client's intent is anything less than abundantly clear, it is more likely that the client's interests will end up conflicting with the nonclient plaintiff's interests, thereby placing the lawyer in an "untenable position of divided loyalty." (*Boranian, supra*, 123 Cal.App.4th at p. 1014, 20 Cal.Rptr.3d 405.) What is more, courts will inevitably encounter "difficulties of proof" in resolving this conflict because the one person who can most authoritatively speak to the client's intent—namely, the client—will in all cases involving testamentary interests

be dead. (*Moore, supra*, 109 Cal.App.4th at p. 1297, 135 Cal.Rptr.2d 888; *Radovich, supra*, 35 Cal.App.4th at p. 964, 41 Cal.Rptr.2d 573.) And when the client's intent is anything less than abundantly clear, there is a greater danger of conflicting duties between competing beneficiaries **65 as well as a greater likelihood that the lawyer will be hit with a flood of malpractice claims brought by nonclient plaintiffs asserting that the client "once promised them *X*" and the like; this potential liability would place an "intolerable" "burden" on the legal profession. (*Chang, supra*, 172 Cal.App.4th at p. 84, 90 Cal.Rptr.3d 758.)

California courts have unfailingly rejected the existence of a duty where there is a question about "*X*." In *Ventura County Humane Society, supra*, 40 Cal.App.3d 897, 115 Cal.Rptr. 464, the client directed the lawyer to designate that a charity with a specific name inherit part of her estate. When it later came to light that no charity bore that specific name provided by the client, a charity with a similar name sued the lawyer for malpractice. The court dismissed the claim, reasoning that the client's intent to benefit the plaintiff was "ambiguous," such that the plaintiff could not bring suit. (*Id.* at 902-905, 115 Cal.Rptr. 464.) And in *Chang, supra*, 172 Cal.App.4th 67, 90 Cal.Rptr.3d 758, the client executed a trust that named the nonclient plaintiff, but the plaintiff sued the lawyer for malpractice claiming that the client had intended to revise that trust to increase the plaintiff's share of the estate. The court dismissed the claim, reasoning that the client's intent to revise the bequest did not appear anywhere in the trust, that the plaintiff's assertion about the client's intent at best presented a "question" about the client's intent, and that simply raising a "question" about the client's intent did not meet the standard that the client's intent was abundantly clear. (*Id.* at pp. 82-84, 90 Cal.Rptr.3d 758.)

[20] [21]Second, a lawyer has no duty to a nonclient plaintiff beyond implementing the client's clear directive to "Do *X*" (when, as noted above, *X* benefits that nonclient plaintiff). The lawyer has no duty to remind the client to follow through with implementing the client's directive once the lawyer has prepared the requested documents (*560 *Radovich, supra*, 35 Cal.App.4th at pp. 954, 965, 41 Cal.Rptr.2d 573 [no duty for failing to remind the client to execute a new will that the client had asked the lawyer to draft]), no duty to "urge the [client] to consider ... alternative plan[s]" to forestall will contests by persons who would lose out once the client's intent was effectuated (*Boranian, supra*, 123 Cal.App.4th at pp. 1019-1020, 20 Cal.Rptr.3d 405), no duty to effectuate an expression of intent from the client that falls short of a directive (*Hall v. Kalfayan* (2010) 190 Cal.App.4th 927, 929, 935-938, 118 Cal.Rptr.3d 629) [no duty for failing to follow up with a client to see if the client wanted the lawyer to draft a new will when the client never asked the lawyer to do so, but had casually expressed a desire to change the then-existing disposition of her estate], and no duty to evaluate whether the client has the mental capacity to make a directive that disinherits the nonclient plaintiff (*Moore, supra*, 109 Cal.App.4th at p. 1290, 135 Cal.Rptr.2d 888). In other words, a lawyer's duty to a nonclient does not extend to being a babysitter, a risk mitigation strategist, a sounding board, or a mental health specialist for the client. Making a lawyer liable in malpractice to a nonclient for failing to act in any role beyond the role of implementing the client's undisputed intent to benefit that nonclient is bad public policy because it places an "incentive [on the lawyer] to exert pressure on the client to complete and execute estate planning documents summarily" (*Radovich*, at p. 965, 41 Cal.Rptr.2d 573), a result that contravenes the lawyer's overarching duty of loyalty to the client.

II. Analysis

[22]Applying the principles articulated above, we conclude that the lawyers did **66 not owe plaintiffs a duty to draft the LLC operating agreements in a way that disinherited Kenneth's children because Claire's intent to disinherit Kenneth's children from being assigned any interest in the LLCs was not, as a matter of law, clear, certain or undisputed. We reach this conclusion for two reasons.

First, this is the conclusion mandated by the governing legal rule because the undisputed facts in this case present the scenario where there is uncertainty about the intent of Claire that plaintiffs are trying to effectuate in their malpractice claim. Claire's intent to disinherit Kenneth's children from holding any interests in the LLCs appears nowhere in the LLC operating agreements themselves (*Chang, supra*, 172 Cal.App.4th at p. 82, 90 Cal.Rptr.3d 758 [intent is clear where nonclient plaintiff "was an *expressly named* beneficiary of an *express bequest*"]) and was never conceded by the lawyers (*Paul, supra*, 235 Cal.App.4th at p. 1100, 185 Cal.Rptr.3d 830 [intent is clear where lawyer admits to what client's intent was]). To the contrary, it is undisputed that Chudd informed Claire during a telephone conversation that the LLC operating agreements did not restrict Kenneth's children from inheriting Kenneth's

interests in the LLCs, that Claire never told Chudd of a desire to prevent Kenneth from passing his interests to his children, and that Claire—in the 10- plus years between executing the LLC operating agreements and her death—never expressed any discontent with the terms of the LLC operating agreements.

***561** Plaintiffs' chief response is that Claire *does* have a clearly articulated intent to prohibit Kenneth's children from receiving any interest in the LLCs. Plaintiffs' position boils down to the following syllogism: The LLCs and the testamentary trust are part of Claire's "integrated estate plan"; Claire expressed a clear intent to disinherit Kenneth's children from her testamentary trust when she amended it in 2006; therefore, Claire had the same clear intent to disinherit Kenneth's children from taking any interest in the LLCs.

We reject plaintiffs' argument for several reasons.

To begin, the net effect of the syllogism is to require a court to infer that the intent that a person has when fixing the distribution of their property at the time of their death is the intent they have when distributing any of that property through inter vivos transfers prior to their death. But this inference is not a reasonable one. Under plaintiff's syllogism, all it takes for an inter vivos transfer of property to be part of an "integrated estate plan" is that the property be subject to distribution under a will or testamentary trust and that the inter vivos transfer made after the will or trust is created be capable of reducing the amount of estate taxes due. Yet these attributes are true of *every* inter vivos transfer: Property not transferred away through an inter vivos transfer necessarily remains part of a person's estate and hence is always subject to distribution under the person's will or testamentary trust, and an inter vivos transfer of property will necessarily remove the property from the estate and hence always reduce estate taxes. Given the sheer breadth of inter vivos transfers that would be considered part of a person's "integrated estate plan," plaintiffs' proffered inference of intent is not reasonable because people regularly transfer their property to different recipients at different points in their lives. That is precisely what Claire did here. She clearly did not want Kenneth's children to inherit any of the property left in her estate at the time of her death, but evinced no qualms whatsoever about those children getting some of the $1 million she gave to Kenneth in 2012 or sharing in the life insurance proceeds that would be paid out when she died. Put differently, Claire quite reasonably had multiple different intents regarding ****67** Kenneth's children; consequently, her failure to tell Chudd that "her intention" "about inheritance" had changed between the final amendment to the trust and creating the LLCs was fully consistent with allowing Kenneth's children to receive interests in the LLCs. More to the point, and contrary to what plaintiffs repeatedly insist in their briefs, plaintiff's proffered inference is nowhere near compelling enough, by itself, to meet the high threshold necessary to create a duty that can support a malpractice claim by a nonclient plaintiff. That is because a person's intent regarding how to distribute their property when they die—even if it might allow a court to infer *some evidence* of their intent behind inter vivos transfers of their property—does not constitute evidence of a *clear, certain and undisputed* intent with regard to those inter vivos transfers.

***562** Further, an analysis of the various factors bearing on whether to recognize a duty supports our rejection of plaintiffs' "integrated estate plan" argument. Because a person's intent regarding the disposition of their property at the time of their death is fairly weak evidence of their intent with regard to inter vivos transfers, there is greater doubt that the client intended to benefit a nonclient plaintiff with a particular inter vivos transfer merely because the client intended to benefit that plaintiff in their testamentary disposition. This greater doubt means that the plaintiff's injury is a less foreseeable result of the lawyer's conduct in effectuating the inter vivos transfer, that the plaintiff's injury is less certain, that the connection between the lawyer's conduct and the plaintiff's injury is less close, and that it is less likely that allowing the malpractice claim to move forward would prevent future harm. This greater doubt also means that it is more likely that the client's interests will end up conflicting with the nonclient plaintiff's interests. And because the client's intent regarding the inter vivos transfer is murky when drawn solely from the client's testamentary intent, allowing a malpractice claim to exist whenever a client's inter vivos transfer deviates from the client's testamentary disposition of property would place an intolerable burden upon the legal profession by subjecting lawyers to malpractice claims by beneficiaries named in the will whenever a client takes the commonplace action of choosing to benefit different people with their inter vivos transfers than the people who will inherit from them at the time of death. Even if we confine our analysis of burden to the burden in a given case, and even though the universe of possible third-party malpractice plaintiffs would be limited to persons named in the will, such beneficiaries will be able to sue whenever any inter vivos transfer is made after a testamentary instrument is created; this would add up to quite a burden.

Second, we conclude that the lawyers did not owe plaintiffs a duty to draft the LLC operating agreements in

a way that disinherited Kenneth's children from obtaining any interest in the LLCs because such a duty would obligate the lawyers to act as a sounding board and babysitter, effectively requiring them to "second guess" Claire's otherwise clear directive. If, as plaintiffs urge, a client's intent regarding who should inherit their property at the time of death creates an inference of the same intent for any and all inter vivos transfers, then the client's previously expressed testamentary intent would forever after operate as a sort of "super-intent" that would seemingly be controlling unless and until the client affirmatively expressed a contrary intent. So in a case, such as this one, where the client says "Do *Y*" in effectuating an inter vivos transfer, a lawyer who knows that the client's will or testamentary trust says, "Do *X*" would be obligated ****68** to ask the client: "I know you said you wanted to 'Do *Y*' for this inter vivos transfer, but you previously said in your will or testamentary trust that you wanted to 'Do *X*,' so which is it—*X* or *Y*?" This calls upon the lawyer to second guess the ***563** client. What is more, it puts the lawyer in the middle of a potential conflict between the people who are the beneficiaries of *X* and the people who are the beneficiaries of *Y*.

Plaintiffs resist our analysis with what can be grouped into five further arguments.

First, plaintiffs urge that their syllogism is valid because a person's "integrated estate plan" always includes *both* their will and testamentary trusts *and* inter vivos transfers of property covered by that will or trust, such that a client is rightly presumed to have the same intent as to *all* aspects of their estate plan. For support, plaintiffs cite *Genger v. Delsol* (1997) 56 Cal.App.4th 1410, 66 Cal.Rptr.2d 527 and *Burch v. George* (1994) 7 Cal.4th 246, 27 Cal.Rptr.2d 165, 866 P.2d 92. *Genger* and *Burch* held that a beneficiary's assertion of an interest in property that is in the decedent's estate at the time of the decedent's death triggered the "no contest" clauses contained in each decedent's will or testamentary trust. (*Genger*, at pp. 1420-1422, 66 Cal.Rptr.2d 527; *Burch*, at pp. 251-263, 27 Cal.Rptr.2d 165, 866 P.2d 92.) These cases do not aid plaintiffs. To start, *Genger* and *Burch* are inapt. They deal with the scope of express "no contest" clauses in wills and testamentary trusts, and do no more than give effect to the "uncontroverted" intent of the testator as reflected in those express clauses. (*Burch*, at pp. 254-255, 258, 27 Cal.Rptr.2d 165, 866 P.2d 92.) Here, by contrast, plaintiffs are asking us to import a testator's intent from a testamentary trust into an inter vivos transfer document that, on its face, contradicts that testamentary intent. What is more, the challenges that triggered the no contest clauses in *Genger* and *Burch* concerned properties that were still part of the estates at the time of the testators' deaths (and thus subject to the "no contest" clauses in the wills or testamentary trusts); indeed, the property challenged in *Genger* was the very "cornerstone" of the decedent's "integrated estate plan"—a plan that would have "unravel[ed]" if left open to challenge. (*Genger*, at pp. 1421-1422, 66 Cal.Rptr.2d 527.) Here, by contrast, the property at issue has been *removed* from the Gordon family's estate by the inter vivos transfers at issue in this case. Thus, neither *Genger* nor *Burch* supports plaintiffs' broad assertion that everything a person does with the property they own after they make a will or testamentary trust is part of their "integrated estate plan."

Second, plaintiffs attempt to qualify their syllogism—and thereby narrow the reach of the inference of intent that it mandates—by arguing that an inter vivos transfer is part of a person's "integrated estate plan" (and hence subject to their proffered inference of intent) only where, as here, the inter vivos transfer has a "temporal proximity" to the person's earlier execution of their will or testamentary trust and where the inter vivos transfer is not "random." But how proximate in time must an inter vivos transfer be to be "temporally proximate"? And when is an inter vivos transfer "random" versus not random ***564** given that *all* transfers are necessarily intentional? These proffered "limits" on the scope of plaintiffs' inference of intent are malleable, flimsy and manipulable. They would make a lawyer's malpractice liability to nonclient plaintiffs turn on questions that would inevitably be subject to factual dispute and thus could not be resolved prior to trial; it would therefore ****69** place the same intolerable burden on lawyers as plaintiffs' unlimited syllogism.

Third, plaintiffs assert in their petition for rehearing that our application of the settled rule that a lawyer owes a nonclient third party no duty unless the client's intent to benefit that third party is clear, certain and undisputed erects a "bright-line rule" that "immunizes" lawyers from malpractice as long as the client signs whatever document an "unscrupulous and negligent" lawyer puts in front of her. Plaintiffs grossly mischaracterize our holding. We hold, as the courts before us uniformly have, that a nonclient third party can maintain a malpractice action only if there is clear, certain and undisputed evidence of the client's intent to benefit the third party, or to benefit the third party in the way he claims; here, plaintiffs failed to present sufficiently clear evidence that Claire intended to prohibit Kenneth's children from inheriting any interests in the LLCs.

Fourth, plaintiffs express their disagreement with several aspects of the trial court's reasoning in granting summary judgment—namely, that the trial court erred in (1) focusing on the intent "element," and (2) insisting that Claire's intent be derived from the LLC operating agreements, because that insistence somehow wrongly conflates the element of duty with the element of breach of duty. These disagreements are both irrelevant and incorrect. They are irrelevant because our task in independently evaluating the summary judgment ruling means that we are reviewing the court's ruling and not its reasoning. (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 455, 154 Cal.Rptr.3d 87.) Plaintiffs' disagreements are also incorrect. Plaintiffs' argument that only the intent "element" was at issue rests on a misapprehension of the law: The only "element" at issue is duty; intent is but one of many factors bearing on whether to recognize such a duty. And the trial court's insistence upon clear, certain and undisputed evidence of Claire's intent properly focuses on the very question of duty; the court was not examining the breach of duty element. Plaintiffs disagree, insisting that the clarity of the testator's intent is relevant to the *breach* element rather than the *duty* element. Plaintiffs are wrong: The cases we cite above all deal with the duty element, which is why they discuss the public policy factors that define duty (rather than the case-specific inquiry attendant to whether a lawyer's conduct in any given case breaches that duty). In their petition for rehearing, plaintiffs expand on their argument that the court erred in looking at the LLC operating agreements in a vacuum because, according to plaintiffs, Claire's intent to disinherit Kenneth's children would have been expressed in those operating agreements but for the lawyers' malpractice in drafting them contrary to her intent expressed in the trust and in not advising Claire about the complexities of the LLC transaction (specifically, how the transaction was consummated differently than first explained to Claire). Plaintiffs' argument fails for three reasons. It fails because plaintiffs are conflating duty and breach by focusing on whether the lawyers satisfied the standard of care in their rendering of legal services to Claire. Plaintiffs' argument fails because it presumes the conclusion we have rejected—that is, that Claire had the same intent to disinherit Kenneth's children with regard to every disposition of assets during her lifetime. And plaintiffs' argument fails because any inference that Claire misunderstood the LLC transaction does not amount to evidence of a clear, certain and undisputed intent by Claire to prevent the LLC interests from being passed on to Kenneth's children.

[23]Lastly, plaintiffs insist that any deficiencies in their case are cured by the declaration submitted by their expert witness, which they point out was never contradicted by a competing expert declaration from the lawyers. Plaintiffs are wrong. Plaintiffs' expert opined that (1) the LLCs "were a part of Claire's ... integrated estate plan" and that her intent regarding the LLCs "must" therefore "be viewed in concert with the trust agreement," and (2) the lawyers "breached the applicable standard[ ] of care." The first opinion effectively opines that the lawyers owe plaintiffs a duty. We have concluded otherwise, and "it is well settled that 'expert testimony is incompetent on the ... question whether [a legal] duty [of care] exists because this is question of law for the court alone' to decide." (*QDOS, Inc. v. Signature Financial, LLC* (2017) 17 Cal.App.5th 990, 1004, 225 Cal.Rptr.3d 869.) The ***565** second opinion that the lawyers breached the standard of care similarly suggests that they owed plaintiffs a duty in the first place. But that suggestion is wrong because it assumes its conclusion. (*Issakhani v. Shadow Glen Homeowners Assn., Inc.* (2021) 63 Cal.App.5th 917, 935, 278 Cal.Rptr.3d 270 ["The standard of care is relevant only if there is a duty of care for it to impose. The standard of care *presupposes* a duty; it cannot *create* one."].)

* * *

Because summary judgment was properly granted due to the absence of any duty running from the lawyers to plaintiffs, we have no occasion to reach the alternative grounds for affirmance (namely, that plaintiffs' claims are time barred or that Brian and Steven lack standing).

**70 DISPOSITION

The judgment is affirmed. The lawyers are entitled to their costs on appeal.

We concur:

LUI, P. J.

ASHMANN-GERST, J.

All Citations

88 Cal.App.5th 543, 305 Cal.Rptr.3d 53, 23 Cal. Daily Op. Serv. 1714, 2023 Daily Journal D.A.R. 1422

Footnotes

[1] Because these family members all share the same last name, we use first names for clarity's sake. We mean no disrespect.

[2] In full, sections 6.1 and 6.2 of the operating agreements (which were identical for each LLC) read as follows:

> "**6.1 Transfer and Assignment of Interests.** No Member shall be entitled to transfer, assign, convey, sell, encumber or in any way alienate (collectively, 'transfer') all or any part of his or her Membership Interest without the consent of all of the Members, which consent may be withheld unreasonably. The term 'Membership Interest' means Economic Interest plus all other rights of a Member under the Act or this Agreement, including, but not limited to, the right to vote or participate in the management of the Company and any right to information concerning the business and affairs of the Company. The term 'Economic Interest' means only the right to receive distributions of the Company's assets and allocations of income, gain, loss, deduction, credit and similar items from the Company pursuant to this Agreement and the Act. Notwithstanding the foregoing, without the consent of the other Members, a Member may assign his or her Membership Interest to (a) one or several of the descendants of the marriage of CLAIRE GORDON and the late ARNOLD G. GORDON, or (b) a trust for which such Member serves as one of the Trustees or as sole Trustee so long as the beneficiary or beneficiaries of any such trust who shall, upon the death [of] the original Member, inherit such original Member's interest transferred to said trust, shall be restricted to the descendants of the marriage of CLAIRE GORDON and the late ARNOLD G. GORDON."

> "**6.2 No Effect to Transfers in Violation of Agreement.** Any transfer in violation of this Article VI shall be null and void at the election of any non-transferring Member, that such Member may elect in his, her or its sole and absolute discretion. Any transferee other than a Transferee permitted by Section 6.1 ('the Assignee') shall be entitled to receive only the rights of an Economic Interest in the Company, and shall not have any other rights of a Membership Interest or be a Member, unless all of the non-transferring Members agree to admit the Assignee as a Member."

[3] Plaintiffs also sued for breach of fiduciary duty, but the trial court granted the lawyers' motion for judgment on the pleadings as to that claim and plaintiffs did not avail themselves of the leave to amend granted by the trial court. The claim is therefore dead.

[4] Another factor courts consider in determining whether a duty exists is the "moral blame attached to the [lawyer's] conduct" (the fifth factor). (*Biakanja v. Irving* (1958) 49 Cal.2d 647, 650, 320 P.2d 16.) However, this factor is "rarely appl[ied] as part of the[ ]" analysis of duty when it comes to claims of legal malpractice. (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 321, fn. 15, 21 Cal.Rptr.3d 246 (*Osornio*).)

104 Cal.App.5th 1012
Court of Appeal, Second District, Division 6, California.

Jeffrey G. GROSSMAN et al., Plaintiffs and Respondents,
v.
John Peter WAKEMAN, Jr., et al., Defendants and Appellants.

2d Civ. No. B329459 (Consl. w/ B332351)
|
Filed September 4, 2024

Synopsis

Background: Son and grandchildren brought legal-malpractice action against attorney and law firm arising from father's estate planning documents, prepared by attorney and law firm, that disinherited sons and grandchildren. After denying motion for nonsuit filed by attorney and law firm, the Superior Court, Ventura County, No. 56-2014-00456442-PR-TR-VTA, Henry J. Walsh, J., entered judgment on jury's special verdict finding in favor of son and grandchildren, awarding damages totaling $9.5 million, which was reduced by damages son and grandchildren obtained in separate probate action against father's wife, and awarding attorney fees and costs, and denied motion for judgment notwithstanding the verdict. Attorney and law firm appealed.

[Holding:] The Court of Appeal, Yegan, J., held that evidence of father's intent to leave estate to son and grandchildren was disputed, and thus attorney and law firm did not owe a duty to son and grandchildren, so as to preclude legal malpractice claim.

Reversed and remanded.

Procedural Posture(s): On Appeal; Judgment.

West Headnotes (12)

[1] Attorneys and Legal Services Wills, trusts, and estates

Evidence of father's alleged intent to leave his estate to son and grandchildren was disputed, and thus father's attorney and attorney's law firm, did not owe son and grandchildren a duty to draft trust leaving father's estate to son and grandchildren instead of fourth wife, so as to preclude legal malpractice claim filed by son and grandchildren against attorney and law firm arising from estate documents that disinherited son and grandchildren; attorney testified father wanted to leave everything to wife, medical opinion stated father was capable of making competent estate planning decisions, wife's personal assistant testified father said he was leaving his real property to wife, and father's former employee testified she heard father say he changed his will to leave everything to wife.

[2] Appeal and Error Other particular torts

Whether a duty of care exists, as would support legal malpractice claim, is a question of law that Court of Appeal independently assesses.

[3] Attorneys and Legal Services Questions of law or fact

While negligence in a legal malpractice action is ordinarily a question of fact, the existence of duty is generally one of law.

[4] Attorneys and Legal Services Third-Party Beneficiaries

A lawyer has a duty to a nonclient third party only if the client's intent to benefit that third party, in the way the third party asserts in their malpractice claim, is clear, certain and undisputed; when the client's intent meets this

heightened standard, there is less danger that the lawyer will be subject to conflicting duties to different nonclient beneficiaries because only those beneficiaries as to whom the client's intent is crystal clear may sue for malpractice.

[5] **Attorneys and Legal Services** Third-Party Beneficiaries

Rule that a lawyer has a duty to a nonclient third party only if the client's intent to benefit that third party is clear, certain, and undisputed, reduces the danger that the recognition of a duty running to the nonclient plaintiff, and the resultant recognition of liability against the lawyer, would impose an undue burden on the profession by saddling the lawyer with open-ended liability that could act as a disincentive for lawyers to practice in that area of law and hence dry up access to the legal services in that area.

[6] **Attorneys and Legal Services** Third-Party Beneficiaries

A lawyer has no duty to a nonclient, and hence no malpractice liability to that nonclient, beyond implementing the client's clear directive to do "X" when "X" benefits that nonclient.

[7] **Attorneys and Legal Services** Wills, trusts, and estates
Attorneys and Legal Services Wills, trusts, and estates

A lawyer who is persuaded of the client's testamentary capacity by his own observations and experience, and who drafts the will accordingly, fulfills the lawyer's duty of loyalty to the testator, and he should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will.

[8] **Attorneys and Legal Services** Wills, trusts, and estates
Attorneys and Legal Services Wills, trusts, and estates

A lawyer who is persuaded of his client's intent to dispose of her property in a certain manner, and who drafts the will accordingly, fulfills his duty of loyalty to his client and is not required to urge the testator to consider an alternative plan in order to forestall a claim by someone thereby excluded from the will.

[9] **Attorneys and Legal Services** Duties and Liabilities to Non-Clients

A lawyer's duty to a nonclient does not extend to being a babysitter, a risk mitigation strategist, a sounding board, or a mental health specialist for the client.

[10] **Attorneys and Legal Services** Wills, trusts, and estates

Making lawyer liable in malpractice to a nonclient for failing to act in any role beyond role of implementing client's undisputed intent to benefit that nonclient is bad public policy because it places incentive on the lawyer to exert pressure on the client to complete and execute estate planning documents summarily, a result that contravenes lawyer's overarching duty of loyalty to client.

[11] **Attorneys and Legal Services**👉Wills, trusts, and estates

Expanding the attorney's duty of care to include third parties who could have been, but were not, named in a bequest, would expose attorneys to impossible duties and limitless liability; moreover, the results in such lawsuits, if allowed, would inevitably be speculative because the claim necessarily will not arise until the testator or settlor, the only person who can say what he or she intended or explain why a previously announced intention was subsequently modified, has died.

[12] **Attorneys and Legal Services**👉Third-Party Beneficiaries

For a nonclient third party to maintain a malpractice action against client's attorney, the third party must show that the client's attorney knew or reasonably should have known of clear, certain and undisputed evidence of the client's intent to benefit the third party in the way the third party claims when the alleged malpractice occurred; attorneys are not clairvoyants capable of ascertaining the unexpressed intent of their clients.

***165** Henry J. Walsh, Judge, Superior Court County of Ventura (Super. Ct. No. 56-2014-00456442-PR-TR-VTA) (Ventura County)

Attorneys and Law Firms

Murphy Austin Adams Schoenfeld and Ellyn E. Nesbit, Sacramento, for Defendants and Appellants.

Ritt Hodges and D. Jay Ritt, Pasadena; Law Offices of Nicholas S. Nassif and Nicholas S. Nassif, Los Angeles, for Plaintiffs and Respondents.

Opinion

YEGAN, Acting P. J.

Attorney John Peter Wakeman, Jr. (Wakeman), and Wakeman Law Group, Inc., appeal the legal malpractice judgments entered against them following a jury trial. The judgments were in favor of respondents Jeffrey G. Grossman (Jeffrey), Alexis Grossman (Alexis), and Nicholas Grossman (Nicholas). They also appeal an order denying their motion for judgment notwithstanding the verdict. We reverse the judgments.

Respondents were not appellants' clients. Appellants' client was Dr. A. Richard Grossman (Richard), the father of Jeffrey and Peter Grossman (Peter). Peter is the father of Alexis and Nicholas, hereafter "the grandchildren." During the trial, Richard was described as "a huge name in ***166** the ... burn surgery community" who "had started the Grossman Burn Centers."

Richard died in March 2014 at the age of 81. His estate was valued at $18 million. Richard's 2012 estate planning documents, prepared by appellants, disinherited respondents and Peter. Richard's entire estate was left to his fourth wife, Elizabeth Grossman (Elizabeth), even though she was independently wealthy. Richard married Elizabeth in 2000, and they remained married until his death.

Although Richard's 2012 estate planning documents disinherited respondents, in a special verdict the jury expressly found that respondents were "the intended beneficiaries of" the documents. The jury further found that appellants had "breach[ed] the standard of care in the preparation" of the documents and that respondents had been damaged by appellants' negligence. The jury awarded damages totaling $9.5 million: $4.75 million to Jeffrey and $4.75 million to the grandchildren.

Appellants allege that they "owed no duty to [respondents]." They "owed a duty only to the decedent, Richard Grossman." Appellants contend, "[T]he absence of ... a duty to [respondents] establishes that [they] cannot be liable to [respondents], since duty is an essential element of a malpractice claim."

We conclude the evidence is insufficient to show that appellants owed a duty of care to respondents because there is no "clear, certain and undisputed evidence of [Richard's] intent" to benefit respondents by leaving his estate to them instead of to Elizabeth. (*Gordon v. Ervin Cohen & Jessup LLP* (2023) 88 Cal.App.5th 543, 564,

305 Cal.Rptr.3d 53 (*Gordon*).)

Factual Background

A 2003 restatement of Richard's revocable trust (the ARG Trust) equally divided the residue of his estate into two shares: one share for each of his two sons, Jeffrey and Peter. Elizabeth would receive only Richard's personal property.

In September 2011 Richard met with Wakeman. At the time of trial in 2022, for 30 years Wakeman had been certified by the State Bar as a specialist in estate planning, trust, and probate law. Richard told Wakeman that he wanted half of his estate to go to Jeffrey and the other half to go to the grandchildren, i.e., Peter's children. Richard said he did not want Peter to inherit a portion of his estate because "Peter had already been well provided for and he didn't really trust Peter to take care of his own kids."

On December 1, 2011, Wakeman met with Richard and Elizabeth. Wakeman testified that at the meeting Richard had said "he wanted to leave everything to Elizabeth and let her decide what to do with it." " 'All [Richard] said is, "I want it all to go to Elizabeth, and she can decide who gets what" ... [in her] [c]omplete discretion.' " Wakeman advised Richard " 'that he was essentially disinheriting his grandchildren and his ... son.' "

Richard told Wakeman "that Peter was likely to sue when he found out what Richard had done, so [Wakeman] advised Richard that it would be best for him to have a neurological exam to have contemporaneous documentation in his file as to his mental capacity." Richard did so. In a letter dated March 20, 2012, Dr. Peter Miao wrote: "[Richard] has been under my care for the past many years. He has had neurological exam recently and has had a complete neurological work up. I find him in sound mind & body and is capable of making competent financial and estate planning decisions."

On December 21, 2011, Wakeman sent Richard estate planning documents that, according to Wakeman, carried out Richard's ***167** instructions at the December 1, 2011 meeting. The documents included an irrevocable trust for Jeffrey and an irrevocable trust for the grandchildren. Wakeman explained: "[A]t the time these [irrevocable] trusts were done, the maximum amount that Richard could leave tax-free to either his children or his grandchildren was $5 million, and anything in excess of $5 million was subject to a 40 percent tax." "[I]t was contemplated that Richard would gift an interest in [real property he owned known as] Brookfield Farms into these two ... trusts in order to take advantage of the $5 million exemption that was available at the time." An inventory of Richard's property shows that, at the time of his death, Brookfield Farms constituted the bulk of his estate's value.

Wakeman also sent Richard an amendment and restatement of his revocable trust, the ARG Trust. Richard was named as the trustee of the trust, and Elizabeth was named as the successor trustee. The restatement provided that, upon Richard's death, the trustee shall make a gift of $25,000 to each of three named beneficiaries. Neither respondents nor Peter would receive a gift. The restatement continued, "[T]he Trustee shall distribute the rest, residue and remainder of the Trust Estate outright and free of trust to the Settlor's spouse, Elizabeth Rice Grossman." Wakeman testified, "[I]f Elizabeth predeceased Richard, then [the residue] was going to go 50-50, half to Jeff's trust and half to the grandkids' trust."

Wakeman met with Richard on January 17, 2012. The evening before the meeting, Elizabeth emailed Wakeman: "[Richard] doesn't want the beneficiaries changed ... he doesn't want his intentions changed. He wants his grandchildren's trust to get 50% of the net and Jeff's trust to get the other I think. We can discuss tomorrow. [¶] We are both a little confused on this ...."

On January 17, 2012, Richard signed the restatement of the ARG Trust. Richard again said he was leaving everything to Elizabeth and nothing to Jeffrey and the grandchildren "because Elizabeth will make sure they're taken care of."

At trial the following colloquy occurred between respondents' counsel and Wakeman:

> Q. And did you explain to [Richard] that Elizabeth didn't have to necessarily take care of them at all, based on the documents that he had signed?
>
> A. Yes.
>
> Q. And you're testifying that he understood that?
>
> A. Yes.
>
> Q. And he was okay with that?
>
> A. He was more than okay with it.
>
> Q. That's what he wanted?
>
> A. That's exactly what he wanted.

In March 2012 Richard signed Jeffrey's and the grandchildren's irrevocable trusts. In June 2012 Wakeman met again with Richard and Elizabeth. Richard said he did not want to fund these irrevocable trusts. Richard again said he wanted Brookfield Farms to go " '[o]utright' " " '100% to Elizabeth.' " Wakeman testified, "So what [Richard's] telling me is, 'I want Elizabeth to have everything, and for her to make a determination after I die what, if anything, she wants to put into those two [irrevocable] trusts' " for Jeffrey and the grandchildren.

Elizabeth testified: "[T]he reason that [Richard left his estate] to me was because he wanted me to have the flexibility to give money to the trusts of both the grandchildren and to Jeffrey .... [Richard] didn't really trust ... his son Peter Grossman to take care of his brother [Jeffrey] and ... [Peter's] children relative to college and that sort of thing, and he knew that I ***168** would." "[T]he bottom line was ... that he trusted me to take care of his grandchildren and his ... son, Jeffrey," who "has some disabilities."

Laurel Luby, Elizabeth's personal assistant, testified that, " '[p]robably [in] the summer of 2012,' " Richard had told her " 'that he was leaving Brookfield Farms to Elizabeth.' " Richard said " '[t]hat he trusted Elizabeth to do ... what he wished with his estate, that she would do it in the manner that he wanted. And he was assured that she would fund the trust for Jeffrey and for the grandchildren.' "

Meredith Rattay, a former employee of a Grossman Burn Center, testified that in 2012 "in the middle of a telephone conversation [Richard] just said, 'Well, I changed my will. I left everything to Elizabeth."

Respondents' witnesses testified that Richard had always expressed deep love and affection for Jeffrey and the grandchildren. Richard repeatedly said he intended to leave his estate to them. He never indicated that he intended to leave his estate to Elizabeth and let her decide how much Jeffrey and the grandchildren would receive. In October 2013 Richard told Dr. Karl Stein, "" 'I'm keeping the farm going to give to my grandchildren and my son.' "" Two days before Richard's death in 2014, Richard told Robert Wiltshire that "he wanted [Jeffrey] to be taken care of because he ... had special needs."

Dr. Jonathan Simons, Richard's stepson, testified that it was "utterly inconceivable that [Richard] would leave his estate to his fourth wife and ... disinherit his family." It was also "absurd" because "Elizabeth was worth considerably more money than Richard was." Elizabeth testified that in 2000 when she and Richard signed a prenuptial agreement, her "net worth" was "[a]round a hundred million" dollars.

As an expert witness on trusts and estate planning, respondents called attorney Robert Kehr. Kehr testified: "[T]he job of a competent lawyer is not simply to document what the client thinks should be done." "The lawyer is not a secretary; it's not just taking notes and writing stuff down.... The lawyer's an advisor, and where there are alternatives, they need to be suggested, with their pros and cons, their costs, and their risks." "I have not seen anything in the materials that I've reviewed that suggests there was any interaction of any significance between Mr. Wakeman and Dr. Richard Grossman about how to accomplish his goals and avoid what he was fearful of. What I have seen instead is that Mr. Wakeman effectively was taking dictation from Dr. Grossman and doing things that created problems and ... exacerbated family disputes. [¶] I've seen information that suggested that one of Dr. Richard Grossman's main concerns was to take care of his son Jeffrey, who was not fully able to take care of his own needs, and what happened as a result of this estate planning was that Jeffrey was essentially cut out of the ... estate."

Assuming that Richard had intended to benefit Jeffrey and the grandchildren, Kehr opined that Wakeman's actions fell "below the standard of care ... [b]ecause Jeffrey wasn't protected. Jeffrey was left in jeopardy by the actions and decisions made by Dr. Richard Grossman's fourth wife, Elizabeth ...."

When Richard died in 2014, "the ARG trust owned Richard's entire estate, including Brookfield Farms." The grandchildrens' and Jeffrey's 2012 irrevocable trusts remained unfunded. After Richard's death, each of the 2012 irrevocable trusts received one-half of the assets of Richard's IRA. Elizabeth had been the sole beneficiary of Richard's IRA, but in September ***169** 2012 she informed Wakeman that Richard wanted the beneficiary to be Jeffrey's and the grandchildren's 2012 irrevocable trusts. After Richard's death, a separate "2006 Jeffrey trust" was funded with "[a] $1 million life insurance policy."

Respondents brought a separate probate action against Elizabeth. Pursuant to a settlement of the action, the grandchildren received $2,843,466.39 from the proceeds of the sale of Brookfield Farms. Jeffrey received the same amount. The total amount of the settlement was credited against the jury's damages award of $4,750,000 for the grandchildren and $4,750,000 for Jeffrey. Thus, the damages award was reduced to $1,906,533.61 for the grandchildren and the same amount for Jeffrey ($4,750,000 – $2,843,466.39 = $1,906,533.61). As

additional damages consisting of reasonable attorney fees and costs, the trial court awarded $145,000 to the grandchildren and $145,000 to Jeffrey. Accordingly, the total amount of the judgment entered in favor of the grandchildren was $2,051,533.61. A judgment in the same amount was entered in favor of Jeffrey.

Appellants' Motion for Nonsuit and Request for Jury Instructions

Appellants moved for nonsuit on the ground that they did not owe a duty of care to respondents: "[I]t was not Mr. Wakeman's duty to ensure that [Richard] left Brookfield Farms or any other asset to [respondents]. His duty was to draft the trust documents to reflect his client's [i.e., Richard's] instructions, which is exactly what he did." The trial court denied the motion for nonsuit.

The trial court refused to give the following jury instruction requested by appellants: "Where there is a question about whether the third-party beneficiary was, in fact, the decedent's intended beneficiary – where intent is placed in issue – the lawyer will not be held accountable to the potential beneficiary." The requested instruction is a verbatim quotation from *Chang v. Lederman* (2009) 172 Cal.App.4th 67, 82, 90 Cal.Rptr.3d 758 (*Chang*).

Standard of Review

[1] [2] [3]The sole issue on appeal is whether appellants owed a duty of care to respondents even though respondents were not their clients. "Whether [such] a duty exists is a question of law that we independently assess." (*Gordon*, *supra*, 88 Cal.App.5th at p. 554, 305 Cal.Rptr.3d 53; see *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316, 21 Cal.Rptr.3d 246 ["On a question of law, we apply a de novo standard of review on appeal. [Citation.] While negligence [in a legal malpractice action] is ordinarily a question of fact, the existence of duty is generally one of law"]; *Chang*, *supra*, 172 Cal.App.4th at p. 76, 90 Cal.Rptr.3d 758 ["Whether a lawyer sued for professional negligence owed a duty of care to the plaintiff 'is a question of law and depends on a judicial weighing of the policy considerations for and against the imposition of liability under the circumstances' "]; *Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 754-755, 17 Cal.Rptr.2d 734 ["The degree of care and skill required to fulfill a professional duty ordinarily is a question of fact and may require testimony by professionals in the field .... However, expert testimony is incompetent on the predicate question whether the duty exists because this is a question of law for the court alone"].)

The Evidence Is Insufficient to Show that Appellants Owed Respondents a Duty of Care Because Richard's Alleged Intent to Benefit Respondents Is Not Clear, Certain, and Undisputed

Respondents argue: "It is undisputed that there is not one iota of evidence suggesting ***170** that Richard ever had a falling out with his three intended beneficiaries [Jeffrey and the grandhildren]. Indeed, ... there is a virtually unbroken solid wall of testimony from multiple friends, colleagues, family members, and percipient witnesses that Richard truly loved these close family members and fully wanted to provide for them." "The massive weight of the evidence is that Richard always intended to bequeath his estate to his sole Grandchildren and his special needs son Jeffrey."

Respondents claim that Elizabeth "had legally forsworn" any right to Richard's estate because "Elizabeth and Richard had signed a prenuptial agreement which provided that neither would inherit anything from the other and that all their money and assets would go to their respective heirs. Nothing in the trial record suggested that that prenuptial contract had ever been formally abrogated." But the 2000 prenuptial agreement permitted either party to bequeath property to the other party: "Nothing contained in this Agreement shall affect the right of either party hereto to transfer, convey, devise or bequeath any property to the other or to receive any legacy or devise or any other benefit expressly given by any will, codicil, trust or other instrument of the other executed after the date of this Agreement."

In contending that the judgment must be reversed, appellants primarily rely on *Gordon*, *supra*, 88 Cal.App.5th 543, 305 Cal.Rptr.3d 53. *Gordon* was decided in February 2023, approximately three months after the jury had returned its special verdict in the present case. *Gordon* clarified the duty that attorneys owe to nonclients such as respondents. Respondents acknowledge that *Gordon* "did not purport to cite new law or to change or overrule the holdings in any of the cases decided prior to it."

In *Gordon* the decedent (Claire) had three sons. Kenneth was one of the sons. Claire amended her trust to disinherit

Kenneth's three children. Thereafter, with the assistance of her lawyers, Claire created three limited liability companies (LLCs) and transferred property into each of them. Claire "assigned a 30 percent interest in each LLC to each of her three sons and retained a 10 percent interest in each LLC for herself." (*Gordon*, *supra*, 88 Cal.App.5th at p. 551, 305 Cal.Rptr.3d 53.)

After Claire died, her son "Bruce and his sons Steven and Brian [plaintiffs] ... sued [Claire's lawyers] for legal malpractice on the theory that the lawyers in drafting the LLC operating agreements did not adhere to Claire's intent because they did not prohibit Kenneth's three children from inheriting any interests in the LLCs. Had the operating agreements done so, plaintiffs alleged, Kenneth's interests in the LLCs would have passed to [Claire's two other sons] upon Kenneth's death ...." (*Gordon*, *supra*, 88 Cal.App.5th at p. 553, 305 Cal.Rptr.3d 53.)

The trial court granted the lawyers' motion for summary judgment. The Court of Appeal affirmed the judgment because of "the absence of any duty running from the lawyers to plaintiffs." (*Gordon*, *supra*, 88 Cal.App.5th at p. 565, 305 Cal.Rptr.3d 53.) The court noted: "A ""key element"" of plaintiffs' sole cause of action for malpractice is ""the establishment of a duty by the [lawyer] to the claimant."" [Citations.] Absent a duty, plaintiffs cannot establish an element of their malpractice cause of action and defendants are entitled to summary judgment." (*Id*. at p. 554, 305 Cal.Rptr.3d 53.)

Gordon continued: "A lawyer has a 'duty ... to use such skill, prudence, and diligence as members of [the legal] profession commonly possess and exercise' when representing a client.... [¶] Although the ***171** lawyer's duty typically runs only to the client because that duty arises from the privity of contract that forms the lawyer-client relationship [citations], a lawyer can sometimes owe a duty to third parties who are the *intended beneficiaries* of the lawyer's legal work for the client, such as when the lawyer is retained by the client to draft a will, a testamentary trust, or an inter vivos trust or gift." (*Gordon*, *supra*, 88 Cal.App.5th at pp. 554-555, 305 Cal.Rptr.3d 53; see *Lucas v. Hamm* (1961) 56 Cal.2d 583, 591, 15 Cal.Rptr. 821, 364 P.2d 685 ["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"]; *Heyer v. Flaig* (1969) 70 Cal.2d 223, 226, 74 Cal.Rptr. 225, 449 P.2d 161, disapproved on another ground in *Laird v. Blacker* (1992) 2 Cal.4th 606, 617, 620, 7 Cal.Rptr.2d 550, 828 P.2d 691 ["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"].)

[4]"[O]ur Supreme Court has ... articulated eight factors bearing on whether a lawyer should owe a duty to a nonclient ...." (*Gordon*, *supra*, 88 Cal.App.5th at p. 555, 305 Cal.Rptr.3d 53.) "After balancing [these] factors ..., the California courts have uniformly settled upon the following rule: A lawyer has a duty to a nonclient third party only if the client's intent to benefit that third party (in the way the third party asserts in their malpractice claim) is 'clear,' 'certain' and 'undisputed.' [Citations.]" (*Id*. at p. 556, 305 Cal.Rptr.3d 53.)

[5]"[W]hen the client's intent meets this heightened standard, there is less danger that the lawyer will be subject to conflicting duties to different nonclient beneficiaries because only those beneficiaries as to whom the client's intent is crystal clear may sue for malpractice." (*Gordon*, *supra*, 88 Cal.App.5th at p. 557, 305 Cal.Rptr.3d 53.) Moreover, this heightened standard reduces the danger that "the recognition of a duty running to the nonclient plaintiff – and the resultant 'recognition of liability' against the lawyer – 'would impose an undue burden on the profession' ... [citation] ... [by] saddling the lawyer with open-ended liability that could act as a disincentive for lawyers to practice in that area of law and hence dry up access to the legal services in that area [citation]." (*Id*. at p. 556, 305 Cal.Rptr.3d 53.)

Gordon concluded that the plaintiffs' evidence did not meet the heightened standard: "[T]he lawyers did not owe plaintiffs a duty to draft the LLC operating agreements in a way that disinherited Kenneth's children because Claire's intent to disinherit Kenneth's children from being assigned any interest in the LLCs was not, as a matter of law, clear, certain or undisputed." (*Gordon*, *supra*, 88 Cal.App.5th at p. 560, 305 Cal.Rptr.3d 53.)

Gordon set forth guidelines for determining whether a lawyer owes a duty of care to a nonclient: "[C]ourts will recognize a duty to a nonclient plaintiff – and thereby allow that plaintiff to sue the lawyer for legal malpractice – only when the plaintiff, as a threshold matter, establishes that the client, in a clear, certain and undisputed manner, told the lawyer, 'Do *X*' (where *X* benefits the plaintiff)." (*Gordon*, *supra*, 88 Cal.App.5th at p. 556, 305 Cal.Rptr.3d 53.) "California courts have unfailingly rejected the existence of a duty where there is a question about '*X*.' " (*Id*. at p. 559, 305 Cal.Rptr.3d 53.)

Here, there is a question about "*X*." According to

Wakeman, "*X*" was Richard's unequivocal direction to draft a document that would leave his entire estate to Elizabeth. ***172** Richard's intent to take this course of action was corroborated by the testimony of Elizabeth, Laurel Luby, and Meredith Rattay.

[6] [7] [8]Respondents' witnesses testified that Richard had said he wanted to leave his estate to respondents. But the issue is not what Richard told his friends and family members. The issue is what he told Wakeman. "[A] lawyer has no duty to a nonclient plaintiff beyond implementing the client's clear directive to 'Do *X*' (when ... *X* benefits that nonclient plaintiff)." (*Gordon*, *supra*, 88 Cal.App.5th at p. 559, 305 Cal.Rptr.3d 53.) Thus, "a lawyer 'who is persuaded of the client's testamentary capacity by his ... own observations and experience, and who drafts the will accordingly, fulfills that duty of loyalty to the testator[, and he] should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will.' [Citation.] [In addition,] a lawyer who is persuaded of his client's intent to dispose of her property in a certain manner, and who drafts the will accordingly, fulfills his duty of loyalty to his client and is *not* required to urge the testator to consider an alternative plan in order to forestall a claim by someone thereby excluded from the will ...." (*Boranian v. Clark* (2004) 123 Cal.App.4th 1012, 1019-1020, 20 Cal.Rptr.3d 405.)

[9] [10]"[A] lawyer's duty to a nonclient does not extend to being a babysitter, a risk mitigation strategist, a sounding board, or a mental health specialist for the client. Making a lawyer liable in malpractice to a nonclient for failing to act in any role beyond the role of implementing the client's undisputed intent to benefit that nonclient is bad public policy because it places an 'incentive [on the lawyer] to exert pressure on [the] client to complete and execute estate planning documents summarily' [citation], a result that contravenes the lawyer's overarching duty of loyalty to the client." (*Gordon*, *supra*, 88 Cal.App.5th at p. 560, 305 Cal.Rptr.3d 53.) "[W]hen the client's intent [to benefit a nonclient] is anything less than abundantly clear, there is ... a greater likelihood that the lawyer will be hit with a flood of malpractice claims brought by nonclient plaintiffs asserting that the client 'once promised them *X*' and the like ...." (*Id.* at p. 559, 305 Cal.Rptr.3d 53.)

[11]"Expanding the attorney's duty of care to include ... third parties who could have been, but were not, named in a bequest, would expose attorneys to impossible duties and limitless liability .... [Citation.] Moreover, the results in such lawsuits, if allowed, would inevitably be speculative because the claim necessarily will not arise until the testator or settlor, the only person who can say what he or she intended or explain why a previously announced intention was subsequently modified, has died." (*Chang*, *supra*, 172 Cal.App.4th at p. 86, 90 Cal.Rptr.3d 758.)

"Applying the principles articulated above, we conclude that [appellants] did not owe [respondents] a duty to draft" the 2012 restatement of the ARG Trust so as to leave Richard's estate to respondents instead of Elizabeth. (*Gordon*, *supra*, 88 Cal.App.5th at p. 560, 305 Cal.Rptr.3d 53.) "[S]uch a duty would obligate [appellants] to act as a sounding board and babysitter, effectively requiring them to 'second-guess' [Richard's] otherwise clear directive." (*Id.* at p. 562, 305 Cal.Rptr.3d 53.) Such a duty "would place an intolerable burden upon attorneys. Not only would the attorney be subject to potentially conflicting duties to the client and to potential beneficiaries, but counsel also could be subject to conflicting duties to different sets of beneficiaries. The testator's attorney would be placed in the position of potential liability to either the beneficiaries ***173** disinherited if the attorney prepares the [new] will [or trust] or to the potential beneficiaries of the new will [or trust] if the attorney refuses to prepare it in accordance with the testator's wishes." (*Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287, 1299, 135 Cal.Rptr.2d 888.)

Conclusion

[12]In *Gordon* the Court of Appeal stated: "We hold, as the courts before us uniformly have, that a nonclient third party can maintain a malpractice action only if there is clear, certain and undisputed evidence of the client's intent to benefit the third party, or to benefit the third party in the way [the third party] claims ..." (*Gordon*, *supra*, 88 Cal.App.5th at p. 564, 305 Cal.Rptr.3d 53.) The third party must show that the client's attorney knew or reasonably should have known of this evidence when the alleged malpractice occurred. Attorneys are not clairvoyants capable of ascertaining the unexpressed intent of their clients. (See *id.*, at p. 556, 305 Cal.Rptr.3d 53 [nonclient plaintiff must "establish[ ] that the client, in a clear, certain and undisputed manner, told the lawyer, 'Do X,' (where X benefits the plaintiff)"].) Because the evidence of Richard's alleged intent to leave his estate to respondents instead of Elizabeth is not clear, certain, and undisputed, as a matter of law the evidence is insufficient to show that appellants owed a duty of care to respondents in preparing the 2012 restatement of the ARG Trust.

Wakeman's testimony, together with the supporting testimony of Elizabeth, Laurel Luby, and Meredith Rattay, shows that the evidence of Richard's alleged intent was disputed.

If Richard had intended to leave his estate to respondents, there would have been no need for him to have obtained the letter from Dr. Miao attesting to his capability of "making competent financial and estate planning decisions." Wakeman advised Richard to obtain the letter because Richard said he wanted to disinherit his children and grandchildren and leave his entire estate to his independently wealthy fourth wife. The imposition of malpractice liability in these circumstances would not only be unjust, it would also "place an 'intolerable' 'burden' on the legal profession." (*Gordon*, *supra*, 88 Cal.App.5th at p. 559, 305 Cal.Rptr.3d 53.)

Disposition

The judgments are reversed. The matter is remanded to the trial court with directions to enter judgment in appellants' favor. The appeal from the order denying appellants' motion for judgment notwithstanding the verdict is dismissed as moot. Appellants shall recover their costs on appeal.

We concur:

BALTODANO, J.

CODY, J.

All Citations

104 Cal.App.5th 1012, 325 Cal.Rptr.3d 163, 2024 Daily Journal D.A.R. 8687

SEND / ENTER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

VINCENT MILLER, an individual, Plaintiff, vs. JOHN MACKALL, an individual, SEED, MACKALL & COLE, a California Law Firm, Defendants.	CV 06 - 7460 ODW (AJWx) ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendants John Mackall and Mackall & Cole's (collectively, "Defendants") Motion for Summary Judgment, filed November 9, 2007. Plaintiff Vincent Miller ("Plaintiff") filed his opposition on November 19, 2007 to which Defendants timely replied. On December 3, 2007 the Court heard oral argument on this matter. Having fully considered the arguments raised in support of and in opposition to the instant Motion, the Court rules as follows.

I. FACTS

Unless indicated otherwise, the following facts are material to the issue to be decided and are undisputed.

This is a case of an estate planning attorney's purported malpractice. Edwin M. Lehner ("Edwin") and Alberta M. Lehner ("Alberta") were husband and wife. (UF ¶ 1.)[1]

[1] The court cites to "Plaintiff's Statement of Genuine Issues in Opposition to Defendants' Motion for Summary Judgment."

Together, Edwin and Alberta had one child, Jeffrey Lehner ("Jeffrey"). (UF ¶ 2.) Alberta also had a child from a previous marriage, Diane Temte ("Diane"). (*Id.*) Plaintiff is Alberta's nephew. (UF ¶ 16.)

Defendant John Mackall ("Mackall") was Edwin and Alberta's estate planning attorney. In 1994, Mackall drafted two "pour-over" wills: one for Edwin and one for Alberta. (UF ¶¶ 3, 4, 8.) Both wills revoked all prior wills and left the balance of their estate to the Lehner Living Trust ("Lehner Trust"). (UF ¶ 17.)

The Lehner Trust consisted of essentially two alternative distribution scenarios depending upon whether Alberta predeceased Edwin. Because Alberta did, in fact, predecease Edwin, the relevant portions of the Lehner Trust are as follows: upon Alberta's death, Edwin's property would be held in a survivor's revocable trust, and Alberta's property would be divided between two irrevocable sub-trusts: the Family Trust and the Qualified Trust (the corpus of which, upon Edwin's death would be distributed to the Family Trust). (UF ¶ 22.) Jeffrey, or his living issue, would be the sole beneficiaries of the survivor's revocable trust, while the beneficiaries of the two sub-trusts would be Jeffrey and Diane, if they were living, or their issue if they were deceased. (UF ¶¶ 23, 25.) Following Edwin's death, Jeffrey's share of the Family Trust would be distributed to him outright, if he was alive, and Diane's share would be held in a special-needs lifetime trust, if she was alive. (UF ¶ 26.) Jeffrey, Plaintiff, and Plaintiff's wife, would be the remainder beneficiaries of Diane's lifetime trust. (*Id.*)

At the time of executing the Lehner Trust, Diane was suffering from cancer. (Opp'n at 4.) Thereafter, on March 21, 1999, Diane passed away. (UF ¶ 28.) Nearly four years later, Alberta died on April 24, 2003. (UF ¶ 31.) On December 7, 2005, Jeffrey murdered Edwin and committed suicide. (UF ¶ 34.) As a result of Diane predeceasing Alberta, Plaintiff's contingent interest never vested and any gift that may have been distributed to him had lapsed. (UF ¶ 28.)

II. LEGAL STANDARD

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263 (9th Cir. 1997).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp v. Catrett*, 477 U.S. 317, 323-24 (1986). That burden may be met by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. *Id.* at 323-34; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1968). "A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." *Addisu v. Fred Meyer*, 198 F.3d 1130, 1134 (9th Cir. 2000).

Only genuine disputes – where the evidence is such that a reasonable jury could return a verdict for the nonmoving party – over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 248; *see also Aprin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) (the nonmoving party must present specific evidence from which a reasonable jury could return a verdict in its favor). However, "it is not [the task] of the district court, to scour the record in search of a genuine issue of triable fact. [The courts] rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996); *see also Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001) ("The district court need not examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposing papers with adequate reference so that it could conveniently be found.").

III. DISCUSSION

Resolution of this Motion depends upon the answer to a single question: did Alberta and Edwin intend Plaintiff to be the sole residual beneficiary of their estate in the event their children predecease them? Predictably, Plaintiff contends that he is, and always has been, the intended beneficiary in the event the Lehners die without issue. (Opp'n at 5-6.) Because of this, Plaintiff argues, Mackall was negligent in not drafting a clause in the 1994 estate plan expressing that intent. (Opp'n at 6.) Defendants, on the other hand, assert that Plaintiff was not an intended beneficiary of the operative estate plan and thus, no duty was owed to him. (Mot. at 6.)

A legal malpractice action is composed of the same elements as any other negligence claim, i.e., "duty, breach of duty, proximate cause, and damage." *See Osornio v. Weingarten*, 124 Cal.App.4th 304, 320 (Ct. App. 2004) (citations omitted). "While other elements of a legal malpractice claim are generally factual and thus cannot be challenged on demurrer, the existence of the attorney's duty of care owing to the plaintiff is generally a question of law that may be addressed [by the court]." *Id.* (citations omitted).

It is well settled that "an attorney, by accepting employment to give legal advice or to render legal services, impliedly agrees to use ordinary judgment, care, skill and diligence in the performance of the tasks he undertakes." *Ventura County Humane Soc'y v. Holloway*, 40 Cal.App.3d 897, 903 (Ct. App. 1974) (citation omitted). Elaborating on this duty, case law has held that "an attorney who assumes preparation of a will incurs a duty not only to the testator client, but also to his intended beneficiaries, and lack of privity does not preclude the testamentary beneficiary from maintaining an action against the attorney based on . . . the tort theory of negligence." *Id.* (citing *Biakanja v. Irving*, 49 Cal.2d 647 (Cal. 1958)). An attorney's liability towards an intended beneficiary under the will, however, is not automatic. *Id.* Rather, courts will balance several factors to determine whether the attorney defendant owes a duty to the beneficiaries with whom defendant was

not in privity.[2] *See Biakanja*, 49 Cal.2d at 650.

Here, Plaintiff attempts to create a genuine issue of material fact by incorrectly conflating the issues of intent and duty. Plaintiff asserts "[w]hether a person is an intended beneficiary is a matter of policy and, in each specific case, requires a fact-intensive balancing of various factors." (Opp'n at 12.) This balancing test, however, is not dispositive of whether Plaintiff was, in the first instance, an intended beneficiary. Rather, the balancing of factors determines only whether an intended beneficiary is owed a duty. Thus, the Court, by necessity, must first determine whether Plaintiff was an intended beneficiary before it can decide whether he was owed any duty. If Plaintiff is not an intended beneficiary or if there is a "substantial question" as to whether he is an intended beneficiary, liability cannot be imposed. *See Boranian v. Clark*, 123 Cal.App.4th 1012, 1018 (Ct. App. 2004).

Plaintiff cannot prove that he was an intended beneficiary of Alberta and Edwin's estate in the event they died without issue. To begin, Plaintiff does not present any genuine dispute as to whether Alberta and Edwin even intended to have a residue clause in the operative estate plan. To be sure, Plaintiff presents evidence of the Lehners' prior wills containing a residue clause. This evidence, however, is insufficient. Alberta and Edwin's prior wills are not evidence of their intent to have the same residue clause (or, for that matter, the same residue beneficiary) in the present estate plan because those wills have since been revoked. Because a testator can revoke his or her will at anytime before death, *Cook v. Cook*, 17 Cal.2d 639, 646 (Cal. 1941), Alberta and Edwin's prior intent to have such a residue clause is of no import. Moreover, when the testamentary document is unambiguous (as it is here), the Court will not look to extrinsic evidence to determine whether it was error to not include an alternative distribution in the event the testator dies

[2] These factors include, (1) whether the transaction was intended to affect plaintiff; (2) the foreseeability of harm to plaintiff; (3) degree of certainty of plaintiff's injury; (4) closeness between defendant's conduct and plaintiff's injury; (5) policy of preventing future harm; and (6) extent of burden on profession.

without issue. This is so because testators are presumed to know the laws of intestacy. *See Estate of Dye v. Battles*, 92 Cal.App.4th 966, 973 (Ct. App. 2001). Thus, while it may have been unusual that Mackall refrained from discussing with the Lehners what would happen in the event they died without issue (UF ¶ 14), such abstention does not rise to the level of malpractice. And, even assuming it could, as discussed more fully below, Plaintiff would have no standing to make that argument.

Assuming, however, Mackall was negligent in not including a residue clause in the event Alberta and Edwin died without issue, as Defendants aptly inquire, "what would such a catch-all provision have said?" (Mot. at 21.) Plaintiff has shown no genuine dispute as to whether he was the sole intended beneficiary of such a (non-existent) clause. At the heart of this finding is the undisputed fact that Plaintiff's name was never mentioned during the 1994 estate planning meeting. (UF ¶ 16.) Plaintiff was not present at the estate planning meeting (UF ¶ 40), Plaintiff knew nothing of the Lehners' testamentary intentions (UF ¶ 42, 45), and the Lehners never told Plaintiff they would have given everything to him in the event they died without issue (UF ¶ 42, 43). In fact, during the estate planning meeting, there was never any discussion about what would happen to the Lehner estate in the event the Lehners died without issue. (UF ¶ 14.) Suffice to say that even if a residue clause was intended but negligently omitted, Defendants had no way of knowing that Plaintiff was to be the sole beneficiary of that clause.

Viewed appropriately, then, this case is readily distinguishable from nearly all the cases Plaintiff cites in which an intended beneficiary was found and a subsequent duty was imposed. In each of those cases the facts, in varying degrees, involved a testator who affirmatively instructed an attorney to do or not to do something in relation to the operative testamentary document. These cases then go on to establish that the attorney failed to comply with the testator's instructions, thereby depriving those respective plaintiffs of their intended legacy(ies). *See e.g. Creighton Univ. v. Kleinfeld*, 919 F.Supp. 1421 (E.D. Cal. 1995); *Biakanja*, 49 Cal.2d 702; *Heyer v. Flaig*, 70 Cal.2d 223 (Cal. 1969); *Lucas v. Hamm*, 56 Cal.2d 583 (Cal. 1961); *Osornio v. Weingarten*, 124 Cal.App.4th 304. This is

simply not the case here and Plaintiff does not argue to the contrary. (UF ¶¶ 16, 40, 42, 43, 45.) There is no evidence that Alberta or Edwin communicated with Defendants any intent to benefit Plaintiff other than in the contingent capacity in which he was provided for. Evidence of Plaintiff's close relationship to Alberta and Edwin is of no value unless it is shown that Defendants were made aware of that relationship during the drafting of the 1994 estate plan. *See Creighton*, 919 F.Supp. at 1425 ("The California Supreme Court has consistently held that an attorney who negligently fails to fulfill a client's testamentary *directions* incurs liability to the intended beneficiary.") (emphasis added) (citations omitted). Because Plaintiff's name was never mentioned, Defendants cannot simply presume that his clients' intent, as expressed in their previous wills, remained unchanged. In other words, "a lawyer who is persuaded of his client's intent to dispose of her property in a certain manner, and who drafts the will accordingly, fulfills his duty of loyalty to his client and is *not* required to urge the testator to consider an alternative plan in order to forestall a claim by someone thereby excluded from the will (or included in the will but deprived of a specific asset bequeathed to someone else)." *Boranian*, 123 Cal.App.4th at 1019-20 (emphasis in original). No evidence is presented to establish any dispute as to whether Defendants were not persuaded of Alberta and Edwin's intent to dispose of their property in the manner expressed in the Lehner Trust. Indeed, the Court's finding is supported further by the fact that Alberta could have amended the Lehner Trust at anytime up until her death in 2003. (UF ¶31). Because Plaintiff's share under the trust lapsed upon the death of Diane in 1999, the fact that Alberta had four years to amend the trust to provide for Plaintiff but did not (UF ¶ 30), supports Defendants position that Plaintiff was not an intended residual beneficiary of the Lehner estate.

As explained above, Plaintiff fails to present any genuine dispute as to whether he was an intended residual beneficiary. However, in order to fully address the papers before the Court, the Court notes that even assuming Plaintiff was an intended beneficiary, as a matter of law, no duty was owed to him. In making this determination, the Court need not go further than the first two factors in the *Biakanja* balancing test. There is no evidence

that the transaction between Alberta, Edwin and Defendants was intended to affect Plaintiff. To the contrary, the record establishes that the main, if not sole, purpose in drafting the 1994 estate plan was for the benefit of Alberta and Edwin's daughter Diane. (UF ¶ 14.)[3] It follows, then, that any harm to Plaintiff was no more foreseeable than it may have been to any other of the Lehners' intestate beneficiaries. Accordingly, even if the Court were to find that Plaintiff was an intended beneficiary, no duty would be owed to him.

IV. CONCLUSION

While the Court appreciates Plaintiff's plight, it cannot re-write the Lehner Trust. Thus, for the foregoing reasons, the Court finds that there are no genuine issues of material fact capable of precluding summary judgment. Accordingly, Defendants' Motion is GRANTED.

IT IS SO ORDERED.

DATED: December 7, 2007

OTIS D. WRIGHT II
UNITED STATES DISTRICT JUDGE

[3] Plaintiff attempts to dispute this fact by arguing that Mackall's notes during the 1994 estate planning meeting are incomplete and deficient. Plaintiff even purports to introduce expert testimony to establish as much. The Court finds, however, that Plaintiff's expert opinion as to the deficiency of Defendants' notes does not dispute Defendants' fact that the 1994 meeting focused primarily on discussions about Diane. Indeed, given the undisputed fact that Plaintiff's name was never mentioned during the 1994 meeting, the fact that Defendants' notes may be "incomplete" is irrelevant. Accordingly, the Court deems this fact undisputed.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Probate Division

Stanley Mosk Dept. - 5

BP124548

In re: MARTIN, JOHN W. - TRUST

March 19, 2018
8:30 AM

Honorable Maria E. Stratton, Judge

Evelyn Fortson, Judicial Assistant
Cynthia Piedra, Court Services Assistant

Latasha Bates (#12003), Court Reporter
Crisanta R Fulkerson, Deputy Sheriff

NATURE OF PROCEEDINGS: Ruling on Submitted Matter

The following parties are present for the aforementioned proceeding:

No appearances.

Out of the presence of the court reporter, the Court makes the following findings and orders:

The Court having taken the above captioned matter under submission on Monday, December 18, 2017 hereby rules as follows:

[Ruling on Submitted Matter]
BP124548
BP124639
John W. Martin Trust

This is the Court's proposed statement of decision. Objections shall be filed no later than April 15, 2018. If no objections are filed, the proposed statement of decision will become the Court's final decision without further order of the Court. Objections, if any, will be taken under submission on April 15, 2018.

On September 4, 2015, two trust petitions came on for court trial in Department 5, the Honorable Maria E. Stratton judge presiding. Exhibits were admitted into evidence as reflected in the minutes of the court. Witnesses Robert Cundall, Jamie Mann, Paul Kanin, David Gernsbacher, Carole Oster, Joan Larsen, Frances Diaz, and Vanessa Mitchell-Clyde testified. The trial continued over a two- year period, culminating in closing argument on December 18, 2017. On that date the court took the petitions under submission.

Cast

This is a story involving three neighbors living in the "Norma Triangle," a community of residences in West Hollywood, California. Decedent John W. Martin, a 78-year-old writer and former gossip columnist, owned a residence at 8967 Norma Place. Robert Cundall, a former hairdresser, owned a residence and rental units located at 8954 Norma Place. Frances Diaz, an attorney, lived in a residence in the same triangle.

Martin had two friends who feature prominently in this story: Vanessa Mitchell-Clyde, whose friendship with Martin dated to the 1950's, and Ronald Preissman. In a period of three months, Martin executed two trusts with very different dispositions of his assets. The parties have asked the Court to decide which trust is valid.

BP124548
In re: MARTIN, JOHN W. - TRUST

March 19, 2018
8:30 AM

Ruling

The petition filed September 16, 2010 by Robert Cundall is denied. (JTDs 1 through 4 are denied; JTD 5 is sustained.) The initial petition filed September 16, 2010, is denied as superseded by the amended petition filed May 31, 2012.

The petition filed September 3, 2010 by Vanessa Clyde is granted in part and denied in part. (JTDs 1 through 3 are granted; JTD 4 is denied without prejudice; JTD 5 is denied; JTD 6 objections are overruled in part and sustained in part in accordance with the court's rulings on the previous JTDs; JTDs 7 through 12 are moot as to this petition because they have been adjudicated in the Cundall petition. JTD 13 is denied.)

Vanessa Clyde is ordered to prepare and file a proposed order within ten court days as to each petition.

Statement of the Case

BP124639

On September 16, 2010, Robert Cundall filed a Petition for Instructions under Probate Code section 17200. On April 24, 2012, the court granted Cundall leave to file an Amended Petition. The amended petition is attached as an exhibit to the motion for leave to amend, filed April 24, 2012, and was deemed filed as of May 31, 2012. The amended petition was never filed as a separate pleading.

On June 27, 2012, Vanessa Clyde and Ronald Preissman filed their Objections to the amended verified petition. Thereafter Ronald Preissman settled with Cundall and did not participate in the trial.

The amended petition alleges that on February 11, 2009, decedent John Martin executed a trust (the "February Trust") and a quitclaim deed transferring his residence at 8967 Norma Place, West Hollywood, CA to himself as trustee. The February Trust names petitioner Robert Cundall successor trustee. Cundall is also named as sole beneficiary of the February Trust.

Three months later, on May 12, 2009, Martin revoked the February Trust and executed the "May Trust," which stated that the same property at Norma Place was to be distributed to Vanessa Clyde, Martin's longtime friend. The May Trust designated Ronald Preissman as successor trustee. Martin transferred the Norma Place property into the May Trust by way of a quitclaim deed. The deed, however, was signed by decedent as the grantor in his individual capacity rather than in his capacity as trustee of the February Trust.

Martin died on January 25, 2010. Petitioner Robert Cundall seeks a determination that the February Trust was not validly revoked by decedent and therefore all trust assets should pass to him according to the terms of the February Trust. Vanessa Clyde objects to the amended petition.

BP124548

On September 3, 2010, Vanessa Clyde and Ronald Preissman filed a Petition to Establish the Existence, Validity and Affairs of the John W. Martin Living Trust dated May 12, 2009. On November 19, 2010, petitioners filed a Supplemental Petiion. This petition contained new allegations in addition to the allegations set out in the original petition.

On January 11, 2011, Robert Cundall filed his Objection to the Supplemental Petition. On March 23, 2011, Vanessa Clyde and Ronald Preissman filed a Verified Second Supplement to the Petition. On August 14, 2014, Ronald Preissman filed a Withdrawal of the original petition and supplemental petitions.

In her petitions, Clyde alleges that on May 12, 2009, Martin executed a trust (the May Trust) and revoked his prior trust executed in February, 2009. She asks the court to determine that decedent validity executed the May Trust and validly revoked the February Trust; that Valerie Perrine, purported spouse of decedent, should take nothing from the Martin Estate; and that Robert Cundall, assisted by Frances Diaz, engaged in financial and fiduciary abuse of decedent and exercised undue influence with respect to any and all asset transfers, designations or conveyances from decedent to Cundall and/or Diaz.

Credibility of the Witnesses

Much of the evidence was not in dispute or established through written correspondence. The court found both Robert Cundall and Frances Diaz not credible primarily because they both separately acknowledged that each suffers from memory loss and their testimony bore that out. Robert Cundall appeared to become more and more unhinged as his examination by opposing counsel progressed. He later testified when questioned by his lawyer that he cannot remember many of the events in question. That was quite apparent from his testimony.

Frances Diaz also acknowledged several times when questioned by opposing counsel that she could not remember events that happened eight years ago. However, when she was testifying by narrative in her client's case-in-chief, she had no problems remembering what she wanted to convey. The court finds her not credible not only because of her stated memory loss, but also because the memory loss appeared to the court to be selective and her testimony, as a percipient witness and as drafting attorney of the February Trust, was defensive in tone and quite argumentative. Her mode of testifying suggested that she had an agenda that she wanted to put forward not only to protect her client's interests, but to protect her own. The court declines to rely on her testimony with respect to the core legal issues raised by these petitions. Consequently, the testimony is not discussed at length in this decision.

Facts

Cundall and Martin met as neighbors in the fall of 2007. They eventually went shopping, to the theatre, and on short local trips together, enjoying each other's company. Martin attended social events hosted by Cundall at his home.

According to Cundall, Martin loved Cundall's home and disliked his own residence, which needed repairs and updating. He especially like the way Cundall had decorated his home.

Martin met another neighbor Frances Diaz at a neighborhood party. In October 2008, Martin had to be hospitalized and he asked Diaz to feed his cat while he was gone. Cundall accompanied Diaz when she entered Martin's house to feed the cat. It was the first time Cundall had seen Martin's home. It was a cluttered, outdated, and unsafe mess, both inside and out. When Martin returned from the hospital he and Cundall agreed that Martin would move out of his home and into a rental unit located on Cundall's property while Cundall remodeled Martin's house. Cundall arranged for a contractor to estimate the repair job. The initial estimate in the fall of 2008 was around $81,000. (Exhibit 225) Martin agreed to pay for the renovations and mentioned he had an off-shore account from which he could withdraw funds for the remodel.

Cundall claimed at trial that he never discussed the cost of the remodel with Martin or the source of funds for the remodel because Martin told him not to worry about the cost. Cundall put up $30,000 of his own money initially to fund the remodel. He was not worried about reimbursement because he and Martin were friends. (He was in fact reimbursed.)

By November 17, 2008, Martin had moved out of his house and they were three weeks into the remodel. Already the cost of the remodel was $21,611.27.

At around the same time, Martin had engaged Diaz to create an estate plan for him and to manage his finances. To that end, Diaz contacted Martin's longtime bookkeeper, Carole Oster, to arrange the transfer of Martin's bill paying and financial management to Diaz. (Exhibit 103) She also gathered the paperwork necessary so Martin could (and did) name Cundall as beneficiary of his IRA at UBS. (Exhibit 106)

Cundall did not go over the financial aspect of the remodel with Martin; he left that to Diaz who was by now handling Martin's finances. He knew it was Diaz who showed the general estimate of $81,000 to Martin. He also disclaimed any responsibility for the actual remodel as he had hired a local contractor, Danilo, to supervise the work; this was directly contrary to his deposition testimony where he said he was the hands-on daily supervisor. Cundall billed himself as the decorator only. He had experience re-doing the homes of other friends. Cundall wanted to please Martin so he copied features of his own home, which he knew Martin liked.

The renovation ended up costing $219,000. It lasted over five months. (Exhibits 104, 105, 108, 109, 118, 119, 120, 121, 122, 130)

While the remodel was ongoing, Martin was consulting with Diaz about his estate plan. Diaz had taken over Martin's bill paying and financial management at Martin's request and by December, 2008, she had prepared trust documents for Martin's signature. Cundall hosted a Christmas party for 60 people that December which she and Martin attended. According to Cundall and Diaz, Martin left the party early because he was irked that Cundall had not paid enough attention to him at the party. Martin did not execute the proposed trust in December.

In January, 2009, Martin was briefly hospitalized. Upon his discharge, he was anxious to execute his trust documents. On February 9, 2009, he executed the documents drafted by Diaz. The February Trust named Martin as trustee and Cundall as successor trustee. It also named Cundall the sole beneficiary of the Trust, which also stated that Martin could revoke the trust by delivering a written revocation to the trustee or successor trustee signed by Martin and his attorney Frances Diaz. (Exhibit 111)

During this time Martin withdrew funds from his off-shore account to pay for the remodel. The costs kept escalating.

By March, 2009, five months into the remodel now topping $219,000, for reasons that remain unclear to the court, Martin decided that he wanted to regain control of his finances and his property. Whether he was upset at the escalating costs, whether his relationship with Cundall was strained, whether he did not like the remodel – it is unknown to the court. However, it is clear to the court that Martin was done with the status quo. He reinstated his former bookkeeper Carole Oster, who testified that Martin told her he thought Diaz and Cundall only wanted his property. He met with David Gernsbacher, an attorney he knew, and told Gernsbacher he was upset about documents he had signed and that Diaz and Cundall had taken over his life. Martin asked his friend Ronald Preissman for a referral to an attorney to redo his estate plan. Preissman referred him to attorney Paul Kanin with whom Martin met on March 30, 2009.

At their meeting Martin told Kanin that he was concerned about his ability to access his money because the trust documents said he could not access his funds without the consent of the successor trustee/beneficiary. The trust document also said Diaz had to be consulted before Martin could revoke or modify it. Martin also told Kanin that he thought Cundall and Diaz had stolen from him because the amounts missing from his bank accounts did not equal the amounts spent on the house. He told Kanin he wanted Diaz out of his life and instructed him not to speak to her. Martin knew he had spent his available cash on the remodel which negatively affected his liquidity, and that his remaining assets were his house, art, and personal effects. Kanin found Martin lucid and rational and agreed to create a new estate plan for him. Martin signed the retainer agreement. (Exhibit 126)

Kanin reviewed the February Trust and saw and disapproved of the provisions that troubled Martin. He believes they violated the Business & Professions Code. He began to work on a new trust – the May Trust. After reviewing the February Trust, Kanin also prepared a revocation of the February Trust and other documents in support of the new trust, which Martin executed. The May Trust designated Martin's friend Ronald Preissman as successor trustee and deleted Cundall as a beneficiary of the Trust, leaving the estate to Preissman and Clyde. (Article V, Exhibit 152) To Kanin, the proposed disposition seemed directed to the natural objects of his bounty, given Martin's personal circumstances (Martin had no children and incorrectly advised Kanin that his prior marriage to Valerie Perrine had been annulled), the falling out he appeared to have had with his neighbor and former successor trustee/beneficiary Cundall, and his expressed lack of confidence in Diaz.

While the May Trust was being drafted, on April 28, 2009, Martin showed his newly remodeled residence to a realtor and asked Cundall to remove his own possessions with which he had decorated the house from the premises. Martin and Cundall had a disagreement and it turned into a scene. The police were called and Cundall was stopped from entering Martin's residence. As Martin's power of attorney pursuant to documents

Martin had signed in February, Cundall called Martin's doctor because he thought Martin was acting strangely. He wrote two letters to APS, asking it to evaluate Martin. Cundall spoke to Diaz about the way Martin was acting and they both tried to contact Martin's doctors, which infuriated Martin when he learned of it. (See Exhibits 132, 133, 134, 137, 138, 141, 142, 143, 144, 162, 168, 169, 170, 174, 175 – correspondence and notes by Cundall and Diaz in May and June, 2009) According to Martin's correspondence at the time, this cemented his belief that they were trying to control him and his money. (Exhibits 135, 139, 140)

Between April 29 and May 12, 2009, Martin told Diaz he had retained an attorney to draft a new estate plan. Diaz then wrote several letters and emails over the next six weeks (a "barrage" according to Kanin) to Kanin and Preissman, asking for information about the new estate plan and stating her belief that Martin was out-of-his-mind. She also attempted to contact Martin's doctors to arrange for a psychiatric evaluation and she contacted APS to arrange for an intervention and interview. She maintained that Martin was playing everyone off each other and that he needed to be protected and hospitalized. Martin's physician of forty years, Dr. Kibowitz, was of the opinion that Martin was fine--that Martin was dramatic and needed to be the center of attention. Nonetheless they both persisted with numerous telephone calls, emails, and letters. At one point Carole Oster received so many emails from Diaz she told her to stop contacting her at her place of employment because she could not do her work. (Exhibit 300)

Meanwhile, Kanin finished the new estate plan and on May 12, 2009, Martin executed the trust documents, a pour-over will, assignments, revocations of the February Trust and prior powers of attorney, a quitclaim deed, and new powers of attorney. Jamie Mann was Kanin's assistant and notary. She saw Martin sign the documents (Exhibits 152, 153, 154, 156, 157, 158, 159) and she notarized them, not realizing that Martin gave her an expired California Driver's License as his identification. (Exhibit 229) On May 12, 2009 Kanin forwarded copies of all the documents to Martin, advising that he would notify Preissman, Diaz, and Cundall. He asked for the paperwork terminating the marriage to Valerie Perrine and gave Martin instructions on how to transfer title of his assets to the new trust. (Exhibit 160, 161) One month later, the law office recorded the documents. (Exhibit 192)

After the May Trust was signed, Diaz and Cundall continued to try to have Martin psychiatrically evaluated. Martin instructed Kanin not to spend time (and Martin's money) responding to Diaz. Cundall retained an attorney who gave Martin notice terminating his tenancy in Cundall's rental unit and also demanded that Martin settle up the remaining expenses on the remodel. (Exhibit 176)

Kanin had been retained for estate planning purposes only and concluded his services to Martin by drafting a First Amendment to disinherit Valerie Perrine so she could not take as an omitted spouse and a Second Amendment changing the disposition of his real property. Neither were executed by Martin. Martin engaged attorney David Gernsbacher as his legal counsel for other legal matters.

In June, Martin relocated back to his home with the help of Vanessa Clyde. On July 7, 2009, Martin was hospitalized briefly and then returned to his home. Martin suffered a flood from a sewer backup in his home in September, and had to relocate to a hotel during the repair period. He died at the hotel on January 25, 2010.

The court notes at this point that there was a quite a bit of testimony about post-death events; the beautiful quality of the remodel; the numerous and lovely thank-you notes and letters of apology Martin sent to Diaz and Cundall; the other professional entanglements among the neighbors and their circle of friends and family. That interesting testimony will not be recited here as the court finds it irrelevant to the question of the validity of the trusts. The evidence did, however, flesh out the portrait of John Martin as a man of old school manners and sensibilities, as a film industry fan, and as a purveyor of drama in every aspect of his life.

Findings

1. There is no evidence that John Martin lacked capacity to execute the May Trust.

To have testamentary capacity, a trustor must have an understanding of the nature and extent of his property, know the objects of his bounty, understand the plan being put in place and not be acting under delusions or hallucinations. (Anderson v. Hunt (2001) 196 Cal.App. 4th 722.) Paul Kanin's very credible testimony establishes that John Martin knew the state of his assets; knew who the natural objects of his bounty were; knew how he wanted to dispose of his assets; knew the provisions of the February Trust and why he wanted to change them. Martin put all of his assets into the trust and proposed a very simple disposition of his estate (it took up half a page of the multi-page trust document). Kanin testified that Martin was calm, thoughtful, funny, and incisive when they met.

Cundall's attempt to paint Martin as irrational and suicidal at and two months after the execution of the May Trust fails. That Martin was mercurial, changed his mind often, and was very dramatic did not appear to be new phenomena in his life, according to the credible testimony of Vanessa Clyde, his friend of 50 years. The execution of the May Trust was the natural consequence of a falling out or dissatisfaction with Cundall, the sole beneficiary of the February Trust. Even if Martin was misinformed about the behavior and motivations of Diaz and Cundall, being misinformed does not necessarily indicate lack of capacity. More is needed and there was nothing presented to persuade the court that Martin lacked testamentary capacity when he executed the May Trust.

2. There was no evidence that John Martin was the victim of undue influence by either Cundall or Diaz.

Courts have defined undue influence and unfair advantage as the subjugation of one person's will to that of another (Estate of Ricks (1911) 160 Cal. 467, 480, and Rice v. Clark (2002) 28 Cal.4th 89, 96); the subversion of the testator's free will (Estate of Sarabia (1990) 221 Cal.App.3d 599, 605); and the imposition of pressure that is so great that the mind gives way (Estate of Anderson (1921) 185 Cal. 700, 707).

There was no evidence that Robert Cundall and/or Frances Diaz unduly influenced Martin into executing the February Trust. It appears that Martin was in some sort of close personal relationship with Cundall during the fall of 2008 when the Trust was drafted. (The nature of the relationship was never testified to in detail, although there was in evidence a note seemingly from Martin to Cundall (Exhibit 226) professing his love for Cundall and his fantasy of being sexually intimate with him.) The relationships with Diaz and Cundall appeared to unfold in a natural manner, and not, as alleged by petitioner, because of a pre-planned conspiracy to defraud

Martin. The February Trust left Martin's estate to Cundall, which, in view of their warm relationship at the time, seems natural.

Moreover, Martin exhibited no particular vulnerability at the time of the drafting of the February Trust and there was no evidence that Cundall was involved in the drafting of the Trust or that he or Diaz exerted pressure upon him with respect to a particular disposition of his estate. Cundall had a social, not fiduciary, relationship with Martin up until the execution of the February Trust.

The inexplicable vehemence with which Cundall and Diaz reacted when they learned of the May Trust (the numerous emails and letters demanding and pleading for information and insisting that Martin was acting irrationally) was of concern to the court and initially presented the potential to infer that Cundall and Diaz were scheming to get Martin's estate all along. However, the court concludes that the evidence in that regard is just too thin to support such an inference. Cundall was credible when he testified that Martin broached and embraced the idea of a remodel of his house, of moving in with Cundall, and of paying for the renovations with his own money. Martin's own mercurial disposition also makes it difficult for the court to conclude that his conduct was the product of undue influence. He appeared to be his own man acting under his own steam to the very end.

3. The February Trust was validly revoked.

The February Trust provides at Section VII:

REVOCATION OF TRUST OR AMENDMENT
During the Grantor's lifetime, the grantor may revoke at any time, and/or the Grantor may amend, this Agreement by delivering to the Trustee and the Successor Trustee an appropriate written revocation or amendment, signed by the Grantor and his attorney, Frances L. Diaz.

Diaz testified, not reliably, that Martin wanted a "protectorate clause" to protect himself from being manipulated into changing his trust. Diaz obliged by drafting the provision requiring her signature as a condition precedent to revocation. Martin did not obtain Diaz's signature on May 12, 2009, when he revoked the February Trust. Cundall argues that the revocation was therefore ineffective.

The court disagrees. Probate Code section 15401(a)(2) provides:

A trust that is revocable by the settlor may be revoked in whole or in part by any of the following methods: . . . (2) By a writing (other than a will) signed by the settlor and delivered to the trustee during the lifetime of the settlor. If the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked pursuant to this paragraph.

By its terms, the February Trust did not provide an explicitly exclusive means of revocation. Therefore, Martin's May 12, 2009 revocation of the February Trust is valid. (See also Masry v. Masry (2008) 166 Cal.App.4th 738.)

4. The parties presented no evidence on the question of whether Valerie Perrine should take from the estate.

The evidence is insufficient on this issue. The subject of Martin's marriage to Valerie Perrine was addressed, at best, in passing. No marriage certificate was presented; no dissolution decree was presented. Moreover, Martin was presented with a First Amendment to the May Trust to disinherit Perrine specifically. (Exhibit 180) He did not sign it. No evidence was presented as to why he did not sign it. Therefore, Clyde's request that the court determine whether Valerie Perrine may take from the estate is denied without prejudice.

5. There is no basis to reform the February Trust.

Because the court does not find the testimony of Frances Diaz reliable, it cannot reform the trust as requested. Diaz's testimony was the only evidence that Martin wanted to be able to revoke the trust only with her consent. The request to reform the trust so that it reflects Martin's purported intent is denied.

6. Mistakes in the notarization of the quitclaim deed do not invalidate the transfer of the real property into the May Trust.

Cundall argues that the notary's use of an expired driver's license as valid identification for the notarization of the quitclaim deed invalidates the transfer of the real property into the May Trust. In addition, Cundall argues that the transfer of the property by John Martin, "a single man," is also invalid.

The Court disagrees. Estate of Haggstad (1993) 16 Cal.App.4th 943 validates a transfer of real property into a trust where the trust document clearly expresses the intent to include the property as a trust asset, notwithstanding the absence of a deed effectuating the transfer. (See also Carne v. Washington (2016) 246 Cal.App.4th 548.)

Here the May Trust expressly includes the real property on Norma Place as a trust asset. That the deed may have been notarized or framed incorrectly does not invalidate the transfer. The deed is superfluous.

The Court orders the Clerk to give notice. Moving party to notice all omitted parties.

CLERK'S CERTIFICATE OF MAILING/ NOTICE OF ENTRY OF ORDER

I, SHERRI R. CARTER, Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Notice of Entry of the above minute order of March 19, 2018 upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States Mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.