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Appeals Court Holds No Duty to Nonclient Trust Beneficiary in Legal Malpractice Case

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This past Fall, Division II of the Court of Appeals concluded in a legal malpractice case that a lawyer who prepared a trust and a later amendment for the lawyer's client did not owe a duty to a prospective beneficiary of the trust. *Linth v. Gay*, ___ Wn. App. ___, 360 P.3d 844 (2015), involved an asserted error in preparing an amendment to a client's trust. A prospective trust beneficiary who was affected negatively by the asserted error sued the lawyer who prepared the amendment for legal malpractice. On summary judgment, the lawyer argued that he owed no duty to the trust beneficiary because she was not his client. The trial court agreed and dismissed the case. Division II affirmed.

Division II began by noting that a legal malpractice claimant must ordinarily show that the claimant is a current or former client of the lawyer or law firm involved, citing *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992). In this instance, the prospective trust beneficiary conceded that she had never been the lawyer's client. Instead, the beneficiary argued that the lawyer owed her a duty under a limited exception to *Hizey's* "privity" rule articulated in *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994). *Trask* outlined a "modified multi-factor balancing test" that focusses heavily on whether a nonclient was a specific intended beneficiary of the legal services involved.

Division II observed that *Trask* itself concluded that no duty was owed to incidental estate beneficiaries. Division II also noted that Division I recently reached the same conclusion regarding will beneficiaries in *Parks v. Fink*, 173 Wn. App. 366, 293 P.3d 1275 (2013). Division II then distinguished *In re Guardianship of Karan*, 110 Wn. App. 76, 38 P.3d 396 (2002), where Division III found that a nonclient ward was an intended beneficiary of a guardianship and, therefore, met the *Trask* test. Finding that *Linth* was closer to *Parks* than *Karan*, Division II held that the trust beneficiary in *Linth* did not meet the *Trask* test and affirmed the dismissal of her claim.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington,

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