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Appeals Court Weighs in on Successor Personal Representative Malpractice Claims

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Division I of the Washington Court of Appeals recently addressed whether a successor personal representative had standing to bring a legal malpractice claim against a law firm that had worked solely with an earlier personal representative. The answer was “no.” In reaching its conclusion, the Court of Appeals in *Benjamin v. Singleton*, ___ Wn. App. 2d ___, 436 P.3d 389, 2019 WL 1030331 (Jan. 28, 2019) relied primarily on *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994).

The initial personal representative in the underlying case had improperly spent over \$100,000 of estate assets for personal use. The probate court removed the initial personal representative when this came to light and appointed a successor personal representative. The law firm that had worked with the initial personal representative withdrew at that same time and new counsel was appointed to represent the successor personal representative. The successor personal representative then sued the first law firm for legal malpractice on a variety of theories oriented around the contention that the law firm should have taken steps to better protect the estate beneficiaries from the initial personal representative’s misconduct.

The defendant law firm moved to dismiss the legal malpractice complaint—arguing that the successor personal representative lacked standing. The trial court granted the motion. The Court of Appeals affirmed.

In doing so, the Court of Appeals first noted that generally only a client of a lawyer or law firm has standing to bring a legal malpractice claim against a lawyer. Under, among others, *Hizey v. Carpenter*, 119 Wn.2d 251, 260, 830 P.2d 646 (1992), one of the required elements of a legal malpractice claim is “[t]he existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client[.]” In the estate context, Washington law generally limits the attorney-client relationship to the particular personal representative for whom the services involved were rendered rather than the estate itself or the beneficiaries. *Matter of Estate of Larson*, 103 Wn.2d 517, 520-21, 694 P.2d 1051 (1985), for example, put it this way: “In probate, the attorney-client relationship exists between the attorney and the personal representative of the estate.”

In *Trask*, the Supreme Court outlined narrow alternative grounds for standing by non-clients pursuing a legal malpractice claim under a “modified multi-factor balancing test” focusing on:

“(1) the extent to which the transaction was intended to benefit the plaintiff;
“(2) the foreseeability of harm to the plaintiff;
“(3) the degree of certainty that the plaintiff suffered injury;
“(4) the closeness of the connection between the defendant’s conduct and the injury;
“(5) the policy of preventing future harm; and
“(6) the extent to which the profession would be unduly burdened by a finding of liability[.]”
123 Wn.2d at 843.

The Supreme Court in *Trask* found that a successor personal representative and estate beneficiaries did not meet this test in a case involving a lawyer whose services were provided to a prior personal representative who had allegedly committed misconduct. The Supreme Court in *Trask* reasoned that if a lawyer negligently advises an estate, the proper party to bring such a claim is the particular personal representative to whom the advice was rendered. If that person is no longer the personal representative, the *Trask* Court concluded that the beneficiaries had a remedy against the prior personal representative if the estate had been damaged by the conduct involved.

Given the holding in *Trask* on facts that it found analogous, the Court of Appeals in *Benjamin* found that the successor personal representative did not meet the *Trask* test either and affirmed the dismissal. Although not plowing any new ground, *Benjamin* offers a useful summary of Washington law on this point.

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, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.