Title

Due to scrivener negligence, the dispositive provisions of a trust fail to reflect the deceased settlor's wishes: Can it be that there is no judicial remedy?

Text

Assume the deceased settlor of a trust had intended that his niece be included in the beneficiary class, but his estate-planning attorney had negligently made no provision for her in the governing instrument. After settlor's death the negligence is discovered. Is there no judicial remedy available to the niece? An action *at law* against the scrivener by a non-client of the scrivener, in this case the niece, for the tort of negligently drafting a trust instrument may be problematic in some jurisdictions in that the niece had not been in privity of contract with the scrivener. It was the deceased settlor who had been. The trustee as well would not have been in privity of contract with the scrivener and thus also would lack standing. Moreover, the trustee would owe a fiduciary duty to the designated beneficiaries to defend their equitable property rights incident to the particular trust relationship and thus would be acting ultra vires and in breach of the duty of loyalty were the trustee to squander trust assets in the cause of a competing non-beneficiary, the trust estate presumably not being entitled to participate in any damage award extracted by the non-client from the hapless tortfeasor-scrivener. The same goes for the settlor's probate estate. The public policy rationale for declining to expand an estate-planning attorney's duty of care to non-clients is that the attorney would be saddled with, and distracted by, conflicting duties and thus exposed to limitless liability. We can't forget that as an agent-fiduciary a lawyer is saddled with a duty to act solely in the interests of the client-principal. For more on the privity barrier in such situations see §8.15.61 of *Loring and Rounds: A Trustee's Handbook* (2025), which section is reproduced in its entirety in the appendix below.

Now a Uniform Trust Code § 415 equitable reformation action brought at the outset by the niece to remedy the scrivener's error of omission is a whole other matter. More direct. Less infected with competing public policy considerations. More jurisdictional uniformity and universality. No standing/ privity issue. UTC § 415 provides that "the court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlors' intention if it is proved by clear and convincing evidence what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement."

In a jurisdiction that has not enacted some version of UTC § 415, the niece might consider bringing an equitable action against those who, whether innocent or not, have been unjustly enriched at her expense by the scrivener's mistake, not against the scrivener himself or herself. See generally §8.15.78 of the handbook. Equitable restitution might take the form of an equitable re-ordering of the equitable property rights to reflect whatever arrangement the settlor had intended.

It is suggested that a lawyer for a third-party victim of scrivener negligence in the trust context is now skating on thin ice if he or she fails to give serious consideration to first seeking to remedy by way of damage mitigation the trust scrivener's core drafting mistake, this via an equitable UTC § 415 reformation action. The decision whether to proceed with an action at law

against the scrivener for damages can come later. The Maryland Supreme Court obliquely suggested as much in *Bennett v. Gentile*, 321 A.3d 34, 45 (Md. 2024): "In any event, in the context of a trust instrument, changes in the law...have, if anything, ameliorated the perceived harshness of the strict privity rule…We do not know whether…[the non-client plaintiff]…sought to invoke the court's …[reformation powers under Maryland's version of UTC § 415]... and, if she did not, we do not opine on whether a claim under…[it]…would have been appropriate or successful." In any case, in *Gentile* the non-client's recourse to the law was to no avail. If she in fact had not sought recourse in equity in the first instance, she probably should have done so.

Appendix

§8.15.61 *The Privity Barrier (Scrivener Malpractice)* [from *Loring and Rounds: A Trustee's Handbook* (2025)**.**

Trust litigation usually involves an adjudication of the rights of the beneficiaries and the duties of the trustee, followed by the granting of equitable relief when appropriate. Often, however, the root cause of the conflict is the governing instrument itself. Terms may be ambiguous or contingencies may not have been addressed. Those whom the settlor intended to share the equitable interest may have been left out. Or there may be tax liabilities that could have been avoided. Inevitably, the question will come up whether someone should be thinking about filing a separate legal malpractice tort action against the drafting attorney, *i.e.,* against the scrivener.[1098] If the settlor is deceased, there may be a privity barrier to doing this. Over the last fifty years, we have seen it reinforced in some jurisdictions,[1099] afforded reluctant deference in others,[1100] and dismantled in still others.[1101] Maryland's "third-party beneficiary" exception to the strict privity rule is ultra-narrow in scope, namely that the non-client of the trust scrivener must prove that the deceased settlor's "direct" and "primary" purpose in retaining the services of the scrivener had been to benefit the non-client. [1]

Here is the privity doctrine and its rationale: The settlor was in an agency relationship with the drafting

[1098]*See, e.g.*, Est. of Carlson, 895 N.E.2d 1191 (Ind. 2008).

[1099]*See, e.g.*, Fredriksen v. Fredriksen, 817 N.Y.S.2d 320 (App. Div. 2006).

[1100]*See, e.g.,* Peleg v. Spitz, 2007 Ohio 6304 (Ct. App. 2007).

[1101]*See, e.g.*, Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685 (1961); Bucquet v. Livingston, 129 Cal. Rptr. 514 (Ct. App. 1976). *But see* Radovich v. Locke-Paddon, 41 Cal. Rptr. 2d 573 (Ct. App. 1995) (attorney owed no duty to potential testamentary trust beneficiary of a will that was never executed); Chang v. Lederman, 90 Cal. Rptr. 3d 758 (Ct. App. 2009) ("Accordingly, we conclude a testator's attorney owes no duty to a person in the position of Chang, an expressly named beneficiary who attempts to assert a legal malpractice claim not on the ground her actual bequest (here, the $15,000 gift) was improperly perfected but based on an allegation the testator intended to revise his or her estate plan to increase that bequest and would have done so but for the attorney's negligence. Expanding the attorney's duty of care to include actual beneficiaries who could have been, but were not, named in a revised estate plan, just like including third parties who could have been, but were not, named in a bequest, would expose attorneys to impossible duties and limitless liability because the interests of such potential beneficiaries are always in conflict").

[1] *See, e.g.,* Bennett v. Gentile, 321 A.3d 34 (Md. 2024) (holding that the benefit the non-client-plaintiff would have derived from the deceased client's particular estate plan would have been incidental rather than direct even absent scrivener negligence).

attorney,[1102] not the beneficiaries. The settlor and attorney also were in a contractual relationship incident to the agency relationship. The duties of the lawyer-agent ran solely to the client-principal.[1103] The beneficiaries, and those who would be beneficiaries but for the malpractice, therefore, lack the standing to bring the malpractice action. "Absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties not in privity or near-privity for harm caused by professional negligence."[1104] This is as good an example as any of a wrong without a remedy.[1105]

And as to the trustee, his fiduciary duties run to those who, rightly or wrongly, are the beneficiaries, not to those who would be but for the scrivener's malpractice. For more on whom counsel represents when a trust is involved, the reader is referred to §8.8 of this handbook.

[1102]*See generally* Charles E. Rounds, Jr., *Lawyer Codes Are Just About Licensure, the Lawyer's Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles the Regulate the Lawyer-Client Fiduciary Relationship*, 60 Baylor L. Rev. 771 (2008).

[1103]*See generally* Charles E. Rounds, Jr., *Lawyer Codes Are Just About Licensure, the Lawyer's Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles the Regulate the Lawyer-Client Fiduciary Relationship*, 60 Baylor L. Rev. 771 (2008).

[1104]*See, e.g.*, Fredriksen v. Fredriksen, 817 N.Y.S.2d 320, 321 (App. Div. 2006).

[1105]*See, e.g.*, Peleg v. Spitz, 2007 Ohio 6304 (Ct. App. 2007) (confirming that under Ohio law, as of 2007, intended or potential trust beneficiaries has no legal remedy for damages suffered as a result of scrivener malpractice).