Title

Fiduciary malpractice in the coordinated drafting of trust instruments for married couples: When equity's restitution for unjust enrichment may be the only remedy

Text

The lawyer-agent owes an equity-based fiduciary duty of undivided loyalty to the client-principal. Incidents of that overarching duty are the sub-duties of confidentiality and full disclosure. Assume a lawyer proposes to perform coordinated estate planning services for a husband and wife, each with children from prior relationships only. Here is one situation where it would have been better had each been represented in the process by separate counsel. The lawyer, in consultation with the couple, prepares for husband a revocable inter vivos trust that will ultimately terminate in favor of husband's children and wife's children in equal shares across the board. During the drafting process husband out of earshot of the wife informs lawyer that, unbeknownst to wife, husband has three children born out of wedlock ("non-marital" children) in addition to his three born in wedlock while he was in a prior marriage ("lawful" children). The lawyer refrains from informing the wife, who is the lawyer's co-client/co-principal, of this critically relevant piece of information and continues on with the dual representation. Before the drafting process is completed, lawyer secretly tweaks the instrument's boilerplate to remove the requirement that takers under the trust be "lawful" issue only. The "non-marital" children were unaware of any of this. The trust was funded just before the husband predeceased the wife, who died shortly after he did. See generally my JDSUPRA posting (Aug. 10, 2010) "Lawyer Codes and Common Law," https://www.jdsupra.com/legalnews/lawyer-codes-common-law-33210/.

The wife's three children have now brought a timely, that is not laches barred, equitable action against the husband's three innocent "non-marital" children for unjust enrichment, the enrichment being a consequence of the *fraud perpetrated against the wife by the husband in concert with her/their lawyer* to keep her in the dark as to the very existence of husband's three "non-marital" children. To make matters worse, the lawyer, *qua* lawyer, unlike her husband*, qua* spouse, also had owed her a classic agency-based fiduciary duty of full disclosure. The equitable restitution requested by her three children is judicial transfer of the

"non-marital" children's trust-derived property interests to all the "lawful" children, each to take an equal share of the equitable reallocation. That the wife's children are not, and never have been, in a relationship of contract and/or agency with the couple's lawyer is not a defense to the imposition of the equitable remedy of restitution for unjust enrichment. See §8.15.61 of *Loring and Rounds: A Trustee's Handbook* (2026), which section is set forth in the appendix below. The innocence and all-around cluelessness of the "non-marital" children also is not a defense. See §7.2.3.3 of the handbook. Things might have been different had they been BFPs, that is had they in good faith paid full value for the trust-derived equitable property rights. See §8.15.63 of the handbook. An UTC §415 reformation action brought by the "lawful" children also may not be an option in that the text of the trust instrument accurately reflects the husband's true intent, fraudulent though it may have been.

During discovery the wife's children served on the lawyer a subpoena directing him to produce all hard copy and soft copy materials pertaining to the preparation of the *husband's* revocable inter vivos trust. The lawyer objected to the subpoena, citing the attorney-client privilege, which the husband's executor/personal representative declined to waive. Her children countered by invoking the testamentary exception to the attorney-client privilege. In *Steele v. Kenna*, 2026 WL 451532 (N.C. App. 2026), the court concluded that the logic of the exception's application to wills applies with equal force to revocable inter vivos trusts. Further, the court observed that a number of North Carolina's sister states have applied the exception to such trusts.

Appendix

§8.15.61 *The Privity Barrier (Scrivener Malpractice)* [from *Loring and Rounds: A Trustee's Handbook* (2026).

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, that is an action *at law* against the scrivener.[1093] *If the settlor is deceased*, there may be a privity barrier in doing so. Over the last 60 years or so we have seen the barrier reinforced in some jurisdictions,[1094] afforded reluctant deference in others,[1095] and dismantled in still others.[1096] Maryland's "third-party beneficiary" exception to the strict privity rule is ultra-narrow in scope, namely that the nonclient 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.[1097]

Let's review in the trust context the privity doctrine and its public policy rationale. The deceased settlor had been in an agency relationship with the drafting attorney, not with the trust beneficiaries.[1098] The settlor-principal and attorney-agent also were in a contractual relationship with one another incident to that agency relationship. The fiduciary duties of the attorney-agent ran solely to the client-principal.[1099] Thus, an estate-planning attorney's duty of care may not be expanded to include non-clients for whom the attorney owes no fiduciary duties, for such an expansion would unfairly saddle the attorney with a mishmash of conflicting and distracting equitable and legal duties that would exacerbate his or her professional liability.[1100] Unfair to the attorney and unfair to the settlor-client. The beneficiaries, and those who would be beneficiaries but for the malpractice, therefore, should lack

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[1093] *See, e.g.*, Est. of Carlson, 895 N.E.2d 1191 (Ind. 2008).

[1094] *See, e.g.*, Fredriksen v. Fredriksen, 817 N.Y.S.2d 320 (App. Div. 2006).

[1095] *See, e.g.,* Peleg v. Spitz, 2007 Ohio 6304 (Ct. App. 2007).

[1096] *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").

[1097] *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).

[1098] *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).

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[1100] *See* Waterbury v. Nelson, 557 P.3d 96, 103 (N.M. 2024).

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."[1101]

How about if the trustee were to bring the action? The trustee, as is the case with the non-client victim, would not have been in privity of contract with the scrivener and thus also would lack standing to bring a malpractice action against the scrivener. Instead, the trustee would owe a fiduciary duty to the beneficiaries designated in the version of the governing instrument currently in force to defend their presumptive equitable property rights. The trustee 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. For similar reasons the settlor's personal representative also should be constrained both by equity's fiduciary principle and by the law's strict privity rule from bringing a legal malpractice action for the negligent drafting of the trust instrument. As to the trustee's duty to defend the trust generally, see §6.2.6 of this handbook.

Practice tip. 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 having the victim first seek to remedy by way of damages mitigation the trust scrivener's core drafting mistake, this via an equitable Uniform Trust Code §415 reformation action. See generally §8.15.22 of this handbook. The decision whether to attempt to initiate an action at law against the scrivener for damages can come later. The Maryland Supreme Court obliquely suggested as much in *Bennett v. Gentile* (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."[1102] 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.

In a jurisdiction that has not enacted some version of UTC §415, the lawyer for a third-party victim of scrivener negligence might consider having the victim bring in the first instance not an action at law against the scrivener but an action in equity

[1101]Fredriksen v. Fredriksen, 817 N.Y.S.2d 320, 321 (App. Div. 2006). *See also* Peleg v. Spitz, 2007 Ohio 6304 (Ct. App. 2007) (confirming that under Ohio law, as of 2007, intended or potential trust beneficiaries have no legal remedy for damages suffered as a result of scrivener malpractice).

[1102]Bennett v. Gentile, 321 A.3d 34, 45 (Md. 2024).

against those who, whether innocent or not, have been unjustly enriched at the victim's expense by the scrivener's mistake. See generally §8.15.78 of this handbook. Equitable restitution might take the form of a re-ordering of the equitable property rights in the entrusted property that would endeavor to reflect whatever arrangement the deceased settlor had intended.

General cross-reference. For more on whom counsel represents when a trust is involved, see generally §8.8 of this handbook.