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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

AMAN CHAUDHARY, Plaintiff and Appellant, v. HOWARD M. BARTNOF, et al. Defendants and Respondents.	B236833 (Los Angeles County Super. Ct. No. BC427084)

APPEAL from a judgment of the Superior Court of Los Angeles County, Soussan G. Bruguera, Judge. Reversed.

Kull and Hall and Kevin P. Hall, for Plaintiff and Appellant.

Howard Bartnof, in pro. per., for Defendants and Respondents.

INTRODUCTION

Plaintiff Aman Chaudhary filed a malpractice action alleging that Howard Bartnof negligently advised his father to transfer three properties from a family trust into a nonexistent sub-trust, thereby subjecting them to intestate succession. After Aman's father died, his second wife filed a probate petition asserting a community property interest in the three properties. Aman, the sole beneficiary of the trust, settled the probate petition and pursued this action.

Bartnof filed a successful motion for summary judgment alleging that he owed no duty of care to Aman. The trial court granted the motion. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Summary

On November 12, 1996, Vijendra and Sumitra Chaudhary created the "Vijendra Pal Chaudhary and Sumitra Sarojani Chaudhary Revocable Trust" (the Trust). The Trust was funded with property listed in an attached "Schedule of Community Property Assets," which included, among other things, three residences located in California. Section 5.3 of the Trust provided that, upon the death of the first spouse, any remaining assets were to be "distributed outright to the surviving [spouse]." Section 3.2 also authorized the surviving spouse to "amend, revoke or terminate" the Trust in any manner.

Although the Trust did not name a beneficiary, it permitted the surviving spouse to disclaim "[a]ny property or portion of property," which was then to be "administered or distributed according to the terms of the Disclaimer Trust, as set forth in Article Six." Article Six, in turn, provided that, on the death of the surviving spouse, the assets of any Disclaimer Trust were to be distributed to Aman Chaudhary, who was identified as the Vijendra and Sumitra's only child.

Sumitra died in 1998; Vijendra took no action related to the Trust. In 2000, Vijendra married Priscilla Raman-Chaudhary, who lived in Australia. Prior to their

marriage, Priscilla and Vijendra[1] signed a prenuptial agreement stating, in part: "The parties . . . . intend all property owned by either of them at the time of the marriage, and all additional property of any nature which either of them acquires after marriage, shall be the separate property of the party who receives and owns that property."

In 2008, Vijendra attempted to refinance a residence held in the Trust, which was located on Stagg Street, in Canoga Park, California (Stagg Street residence). Because the lender would not refinance the property until Sumitra's name had been cleared from the title, on September 24, 2008, Vijendra met with Howard Bartnof to discuss how to clear the title of the residence. During the meeting, Vijendra informed Bartnof that he wanted Aman to receive all of the Trust assets. He further explained that he did not intend Priscilla to obtain any Trust assets because she had signed a prenuptial agreement and had her own property. Bartnof informed Vijendra that he would "read the trust in order to determine how to prepare the deeds" necessary to clear the title. In the course of reviewing the Trust, however, Bartnof discovered that it "called for certain things to happen [upon] . . . the death of the first spouse" and "had some [additional] problems" that he believed Vijendra should address. Thereafter, Vijendra agreed to allow Bartnof to "advise him with respect to . . . rectifying any problems with the [T]rust."

On October 6, 2008, Bartnof sent Vijendra a letter with three documents that were described in the letter as follows:

"1. Affidavit – Death of Trustee: This is to remove your wife's name from title, as a result of her death, so that all future documents can be signed by you alone.

2. Quitclaim Deed: Pursuant to the terms of the Trust, at the death of the first spouse, the property is to be allocated between the survivor's sub-trust and the survivor individually, outright and free of trust. Since you are the surviving spouse, this deed allocates one-half to your sub-trust and your wife's share to you, outright and free of trust.

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[1] Because Aman, Vijendra, Sumitra and Priscilla share the same surname (or, in Priscilla's case, portions of the same surname) we refer to each of them by first name for clarity and convenience.

3: Quitclaim Deed: In order to handle the refinancing that you are arranging, all of the title has to be out of the trust and in your name alone. Since you own, individually, an undivided one-half interest from the deed just above, this deed transfers your share from your sub-trust out to you, individually outright and free of trust."

The letter directed Vijendra to sign and notarize the documents, and then "forward [them] directly to [the] lender [to] record them as part of the refinancing arrangements." The letter advised Vijendra that "once these documents are recorded, title to this property will not be in your trust – it will be in your name only and, if you pass away, it would be subject to probate administration. I have not prepared a deed transferring the house back into your share of the Trust because I have read the Trust and I do not find any provisions for distributions to anyone from your share of the Trust. Therefore, until there are amendments or some other arrangement made, after your death, the Trust would have to go into court to determine who would be the appropriate beneficiary. Further since you have remarried, there needs to be some mention, one way or another, about your current spouse. These deeds take care of your immediate needs for the refinancing but we need to discuss further the status of the Trust before title of your home is transferred back to this Trust."

On November 22, 2008, Vijendra sent Bartnof a hand written-letter stating: "I am sending you copies of documents we recorded. I have also enclosed samples of what I got at work. I need to have the property back in the trust and whatever else has to be done." Vijendra attached recorded copies of the affidavit of death and the two quit claim deeds that Bartnof had provided in the October 2 letter. Vijendra also attached two documents related to the Trust. The first document was a draft of a Trust "amendment" naming Aman as the sole beneficiary. The second document was a draft of a "statement of disclaimer" waiving any property rights that Priscilla might have in the Trust.

On December 2, 2008, Bartnof sent Vijendra a letter accompanied by seven documents that Vijendra was instructed to sign and notarize. The first document was a quitclaim deed transferring title to the Stagg Street property, which was currently held by Vijendra in his individual capacity, "back into the Survivor's Sub-Trust." The remaining

six documents pertained to the other two properties in the Trust which were located on Nestle Avenue and Malden Street. For each property, Bartnof provided three documents: an affidavit of death that was intended to "remove [Sumitra's] name from title . . . so that all future documents [related to the property could] be signed by [Vijendra] alone;" a quitclaim deed transferring title of Sumitra's half-interest in each property from the Trust to Vijendra "outright and free of trust," and transferring Vijendra's half-interest in each property from the Trust to his "Survivor's Sub-Trust;"[2] and a second quitclaim deed for each property transferring title to the half-interest held by Vijendra in his individual capacity "back into the Survivor's sub-trust."

The letter also stated that, after Vijendra "return[ed] the documents," Bartnof would "see that they are properly recorded . . . . [¶] After these documents are recorded, 100% of the title to these three properties will be in the Survivor's Sub-Trust and, therefore part of your estate. Please make sure that you contact me and let me know how your (the Survivor's Sub-Trust) share of the Trust should be amended/updated as we discussed the telephone."

Bartnof's notes from a December 4th phone call indicate that Vijendra informed Bartnof he would send the documents to the recorder's office himself and that Bartnof approved. The documents were recorded on December 9. At some point after the December 4th phone call, Vijendra informed Bartnof that he was traveling to Australia to visit Priscilla and provided him with copies of two signed, notarized documents with the caption "Second Amendment to Vijendra Pal Chaudhary and Sumitra Sarojani Chaudhary Revocable Living Trust." The documents – which were signed and executed on October 29, 2008 and November 25, 2008 respectively – contained identical text stating that because the Trust did not currently name a beneficiary, Vijendra had elected to exercise his "powers . . . to change or amend the trust" by naming Amar as its sole

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[2] As in the October 6 letter, Bartnof's letter of December 2 explained that "Pursuant to the terms of the Trust, at the death of the first spouse, the property is to be allocated between the survivor's sub-trust and the survivor individually, outright and free of trust. Since you are the surviving spouse, this deed allocates one-half to your sub-trust and your wife's share to you, outright and free of trust."

beneficiary. The only differences between the executed documents was the content of the notary's acknowledgment; the acknowledgement in the November 25th document stated that the notary's statements were made under the penalty of perjury while the October 29th document did not.

Bartnof reviewed the two executed "Second Amendments" and advised Vijendra they were "poorly drafted and worded" because they "le[ft] the property in trust in perpetuity for Aman." Bartnof also advised that the October 29th version of the amendment had "an improper notary jurat" that was "corrected" in the November 25th version. Vijendra did not alter either of the executed amendments and left the country for Australia. He died shortly after his return, without having any further conversations with Bartnof.

On February 3, 2009, Priscilla sent Bartnof a letter requesting copies of the "testamentary documents" and various personal items that had been in Vijendra's possession. Aman, who was aware Bartnof had been advising his father, retained Bartnof to "assist in dealing with" Priscilla's requests and in administering the Trust. On February 23, Priscilla's attorney sent a fax reiterating her request for a copy of the testamentary documents, which Bartnof provided on February 26.

Approximately one week later, Priscilla filed a probate petition asserting a community property interest in Vijendra's estate, including the Stagg Street property and the share of the other Trust properties that had been transferred first to Vijendra, and then to the "survivor's sub-trust." Priscilla claimed, in relevant part, that "the effect of the attempted transfers to the . . . Survivor's Sub-Trust . . . fail and are a nullity because such a sub-trust does not exist and has never existed . . . and because the trust, itself, had terminated" upon the death of Sumitra. Priscilla further alleged that because the transfers were ineffective, Vijendra's interest in the Stagg Street, Malden Street and Nestle Avenue properties were to pass as if he had died intestate. The petition included numerous additional claims related to Vijendra's estate, including allegations that: (1) the prenuptial agreement was unenforceable; (3) Priscilla qualified as a pretermitted spouse; and (3) the Second Amendment naming Aman as the sole beneficiary to the Trust had been forged.

After Priscilla filed her petition, Bartnof informed Aman he could no longer represent him in the probate proceedings. Aman retained a new attorney and, in August of 2009, entered into a settlement with Priscilla under which she was granted title to the Stagg Street residence.

B. Summary of Aman's Complaint

In 2010, Aman filed a complaint against Bartnof for "professional negligence" arising from his representation of Vijendra.[3] The complaint asserted that, "as the lawyer[] and advisor[] to Vijendra, [Bartnof] owed [a] dut[y] of care to Aman as the only named beneficiary of the Trust." It further asserted that Bartnof had breached this duty by, among other things: (1) advising Vijendra to transfer portions of the Trust assets to a "Survivor's Sub-Trust" that did not exist; (2) failing to advise that if "Vijendra transferred the properties to the Survivors Sub-Trust, he was at risk that the properties would pass by intestacy and that Priscilla would have a claim to the properties or an interest therein"; (3) failing to prepare a new trust, an amended trust or a "Survivor's Sub-Trust"; and (4) failing to advise that the Trust called for the Trust assets to be distributed outright to the surviving spouse upon the death of the first spouse.

The complaint also alleged claims for professional negligence and breach of fiduciary duty arising from Bartnof's representation of Aman in the probate proceedings against Priscilla. Both claims were predicated on Bartnof's alleged failure to respond to Priscilla's requests in a timely manner or to follow Aman's instructions to deliver Priscilla's personal effects to her counsel. Aman alleged that this conduct caused Priscilla to file the probate petition, which Aman had been forced to incur legal fees to defend.

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[3] The complaint named as defendants Howard Bartnof, in his personal capacity, and The Law Office of Howard M. Bartnof. We refer to the defendants collectively as Bartnof or defendant.

C. Bartnof's Motion for Summary Judgment

1. Summary of Bartnof's motion for summary judgment and evidence submitted in support thereof

On May 27, 2011, Bartnof filed a motion for summary judgment arguing that he did not owe Aman a duty of care arising out of the legal services provided to Vijendra. Although Bartnof conceded that an attorney may owe "a duty of care to an intended beneficiary of a will or trust," he asserted that such a duty applied only where the attorney had "drafted the wills or trusts . . . in which the plaintiff was expressly named as a beneficiary." Bartnof contended that because the undisputed evidence showed he had merely advised Vijendra in regards to the existing testamentary documents, "as a matter of law, [he] did not owe a duty of care to Aman."

Bartnof also argued that he owed Aman no duty in drafting the letters and quitclaim deeds referencing the nonexistent "Survivor's Sub-Trust," arguing: "Aman contends that Bartnof's negligence consists of writing a letter to Vijendra regarding one method of amending a revocable, amendable trust by establishing two sub-trusts. [¶] The flaw in such an argument is that a letter referencing a 'Survivor's Sub-Trust' in anticipation of amending a trust is not the equivalent of drafting a testamentary document. Nor were Quitclaim Deeds, drafted by Bartnof . . . testamentary documents." Bartnof further asserted that he had intended to create a new "Survivor Sub-Trust," but was "explicitly" told "not to do anything" until Vijendra returned from his trip. Vijendra, however, died before Barntof completed preparing the new trusts.

Bartnof also argued he was entitled to summary judgment because, in addition to "being unable to establish the existence of a duty, Aman[] . . . cannot establish that [the] alleged negligence caused him to suffer any damages." The entire argument on this issue consisted of a single paragraph with no citations to the evidence: "Aman will never be able to establish the element of causation for one reason. He cannot establish that the probate court would have granted [Priscilla's] . . . petition. Aman and Priscilla settled the case solely to mitigate his losses and to stop paying legal fees, even though Aman had

very strong arguments in his favor. Aman's settlement with his step-mother was not foreseeable by Bartnof. Aman will never be able to show what Priscilla . . . would have done, regardless of what Bartnof had done or failed to do all of which is pure speculation." Bartnof argued Aman was also incapable of establishing causation on the claims arising from his representation in the probate proceedings because there was no evidence Priscilla filed the petition based solely on Bartnof's 23 day delay in sending the requested testamentary documents and personal effects.

In support of his motion, Bartnof filed a declaration asserting that he was hired by Vijendra to "prepare an Affidavit . . . . removing [Sumitra] as a trustee from the [Trust] and Quitclaim Deeds transferring the title of Vijendra's residence . . . from the Trust into Vijendra's name as his sole property for the purpose of refinancing the [Stagg Street] property." Bartnof alleged that, in the course of reviewing the Trust, he identified "several problems . . . which [he] verbally brought to Vijendra's attention." Bartnof stated that, after sending the December 2 letter, he received the executed Second Amendments to the trust and "verbally told Vijendra that [they] were 'poorly drafted and worded.'" Vijendra, however, told him "not to do anything" until he came back from Australia and then died "having never contacted [Bartnof] to let him know how he wanted the trust updated or amended."

Bartnof also submitted deposition testimony in which he admitted Vijendra had stated that he wanted all three of the properties to remain within the Trust. Bartnof also testified that the "Survivor's Sub-Trust" was a new trust he had intended to create within the existing Trust. Bartnof contended that Vijendra was authorized to amend the Trust pursuant to section 3.2, thereby permitting him to establish the Survivor's Sub-trust . . ." Bartnof, however, stated he was "prevented from completing Vijendra's estate plan due to [Vijendra's] unexpected death."

2. Summary of Aman's opposition

In his opposition, Aman argued that Bartnof owed him a duty of care when advising Vijendra on Trust matters because Aman was the named beneficiary of the

Trust. According to Aman, the case law made clear that "where the settlor . . . expresses his or her intentions in a signed testamentary document . . . the attorney owes a duty of care to the designated beneficiaries." Aman further contended that Bartnof had provided no authority in support of his "conten[tion] that an estate planning attorney is never liable to a beneficiary for giving bad advice to a client unless the attorney also drafted the testamentary documents." Rather, according Aman, "[i]t is sufficient that testator retained the attorney and formally identified the beneficiary." Aman also argued that the evidence showed Bartnof had aided Vijendra in drafting the trust instruments in so far as he reviewed and provided advice about the content of the executed, Second Amendment.

Aman also argued that Bartnof had failed to demonstrate that there were no disputed issues of material fact on the issue of causation, which Aman characterized as a "a question . . . for the jury . . . unless the evidence is so clear that no reasonable person could disagree with it." Aman contended Bartnof had introduced no argument or evidence showing that Priscilla's probate claims would have failed in the absence of the settlement.

D. Trial Court's Order Granting the Motion for Summary Judgment

After hearing argument, the trial court issued a written order granting the motion for summary judgment, finding that Bartnof had made a preliminary showing that Aman could not establish that he was owed a duty of care in relation to legal services provided to his father, shifting the burden to plaintiff to demonstrate a triable issue of material fact.

The court concluded that Aman had failed to meet this burden, explaining: "[A prospective beneficiary] cannot maintain a cause of action for legal malpractice against the attorney who drafted the will but did not have it executed before the death of the testator.' [Citation.] In the instant case, the evidence shows that Defendant did not draft the Trust or the Second Amendments. . . . Instead, the evidence shows the Second Amendments were sent to Defendant *after* they had already been *drafted and executed by Vijendra*." [Emphasis in the original.] The trial court specifically rejected Aman's assertion that an attorney could owe a duty of care to a beneficiary "even if he did not

draft the testamentary documents." According to the court, the "cases cited by Plaintiff . . . all involve[d] situations where the attorney drafted the testamentary documents at issue. In the instant case . . . the evidence shows Defendant did not draft the Trust or Second Amendments."

The court further concluded that "the fact that [Bartnof] drafted the Quitclaim Deeds is not enough to create a triable issue of material fact, even where the Deeds referred to a non-existent 'Survivors Sub Trust.'" In support, the court cited case law holding that a quitclaim deed transferring property to a trust not in existence at the time the deed was still valid if it was executed in anticipation of the creation of the trust, and the trust was actually established at some point thereafter. The court also noted that the evidence indicated that Vijendra had "recorded the Quitclaim Deeds (and Affidavit) instead of returning them to Defendant as instructed, and . . . died before contacting Defendant to let him know how he wanted the Trust amended or updated."

On September 23, 2010, the trial court entered a judgment in favor of Bartnof. Aman filed a timely appeal.

DISCUSSION

A. Standard of Review

"'The standard for deciding a summary judgment motion is well-established, as is the standard of review on appeal.' [Citation.] 'A defendant moving for summary judgment has the burden of producing evidence showing that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to that cause of action. [Citation.] The burden then shifts to the plaintiff to produce specific facts showing a triable issue as to the cause of action or the defense. [Citations.] Despite the shifting burdens of production, the defendant, as the moving party, always bears the ultimate burden of persuasion as to whether summary judgment is warranted. [Citations.]' [Citation.]." (*Hypertouch, Inc. v. ValueClick, Inc.* (2011) 192 Cal.App.4th 805, 817 (*Hypertouch*).)

"'On appeal, we review de novo an order granting summary judgment. [Citation.] The trial court must grant a summary judgment motion when the evidence shows that there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. [Citations.] In making this determination, courts view the evidence, including all reasonable inferences supported by that evidence, in the light most favorable to the nonmoving party. [Citations.]' [Citation.]" (*Hypertouch, supra*, 192 Cal.App.4th at p. 818.)

B. The Trial Court Erred in Concluding That Bartnof Owed No Duty of Care to Aman When Advising Vijendra on Matters Related to the Trust

1. The Law Regarding Liability for Negligence in Estate Planning to Intended or Potential Beneficiaries

"To state a cause of action for legal malpractice, a plaintiff must plead '(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence.' [Citation.] '"'A key element of any action for professional malpractice is the establishment of a duty by the professional to the claimant. Absent duty there can be no breach and no negligence.'"' [Citation.] 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.' [Citations.]" (*Chang v. Lederman* (2009) 172 Cal.App.4th 67, 76 (*Chang*).)

a. The Biakanja and Lucas Decisions

"[U]ntil 1958, California followed the traditional view that a nonclient could not maintain an action against an attorney for malpractice." (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 320 (*Osornio*).) This "strict privity test for professional liability was rejected in *Biakanja* [*v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*)], in which the Supreme Court considered the liability of a notary public who had negligently allowed

the will of the plaintiff's brother, which left the entire estate to the plaintiff, to be improperly attested. As a result, the plaintiff received only his one-eighth intestate succession share of the estate." (*Chang, supra*, 172 Cal.App.4th at p. 77.) The Court explained that "[t]he determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (*Biakanja, supra*, 49 Cal.2d at p. 650.)

In *Lucas v. Hamm* (1961) 56 Cal.2d 583 (*Lucas*), "the Supreme Court faced a similar question of duty to intended beneficiaries, but in the context of an attorney's negligence. The beneficiaries sued the attorney who drafted the will and codicils in a manner that caused the instruments to fail because they ran afoul of statutory restraints on alienation and the rule against perpetuities. . . . [Citation.]" [¶] "[T]he court utilized the balancing test it enunciated previously in *Biakanja* to determine whether the attorney defendant owed a duty to the beneficiaries with whom defendant was not in privity." (*Osornio, supra*, 124 Cal.App.4th at p. 321.) "Because the defendant in *Lucas* was an attorney, however, in addition to the *Biakanja* factors the court held it was necessary to consider 'whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession.' [Citation.]" (*Chang, supra*, 172 Cal.App.4th at p. 77.)

The court concluded that all of the *Biakanja* factors weighed in plaintiffs' favor, explaining that the main purpose of the transaction – drafting a will – was to transfer property to the plaintiffs; it was foreseeable that plaintiffs would be harmed if the bequest was determined to be invalid; the harm would not occur but for defendant's negligence; denying recovery would impair the policy of preventing future harm because no other parties could assert claims against the attorney; and the imposition of liability to named beneficiary's would not place an undue burden on the profession.

b. Subsequent case law refining the duty of lawyers to intended beneficiaries

The *Biakanja* and *Lucas* principles, "which originated in cases involving the negligent drafting or execution of wills," have since been extended to other testamentary instruments, including trusts. (See *Bucquet v. Livingston* (1976) 57 Cal.App.3d 914, 922 [concluding that there was no rational basis for distinguishing a trust and a will for purposes of recognizing the drafting lawyer's duty of care to intended beneficiaries].) It is now well-established that an attorney may be held liable to the beneficiary if: (1) the attorney's professional negligence frustrates the testamentary intent in a legal instrument, and (2) the "beneficiaries clearly designated by the testator lose their legacy as a direct result of such negligence." (*Ventura County Humane Society v. Holloway* (1974) 40 Cal.App.3d 897, 903.)

In *Radovich v. Locke–Paddon* (1995) 35 Cal.App.4th 946, however, the court declined to extend the *Biakanja* line of cases to a "malpractice claim of a *potential* beneficiary identified in an *unsigned* will." (*Osornio, supra,* 124 Cal.App.4th at p. 324, italics in original.) The decedent in *Radovich* executed a will that provided trust income to her husband and her sister. Prior to her death, the decedent met with her attorney to discuss drafting a new will that would increase her husband's bequest. The decedent died without executing a new will and the husband filed a malpractice action against the attorney.

The court held that, under such circumstances, the attorney owed the plaintiff no duty of care. The court distinguished prior cases in which the will or trust at issue had actually been executed, explaining that there were "both practical and policy reasons for requiring more evidence of commitment than is furnished by a direction to prepare a will containing specified provisions. From a practical standpoint, common experience teaches that potential testators may change their minds more than once after the first meeting. . . . From a policy standpoint, we must be sensitive to the potential for misunderstanding and the difficulties of proof inherent in the fact that disputes such as these will not arise until the decedent --the only person who can say what he or she intended -- has died. Thus we

must as a policy matter insist on the clearest manifestation of commitment the circumstances will permit." (*Radovich, supra,* 35 Cal.App.4th at p. 964.)

The same court that decided *Radovich* reached a different conclusion in *Osornio, supra,* 124 Cal.App.4th 304, which involved a bequest that failed as the result of statutes imposing conditions on transfers to care custodians. The decedent executed a will naming her care custodian as the sole beneficiary of her estate. The care custodian filed a malpractice action alleging that the attorney who drafted the will negligently failed to advise the decedent that her intended beneficiary would be a presumptively disqualified donee, and failed to take appropriate measures ensuring that the testator's wishes would be carried out. The court held that, unlike in *Radovich*, there was no ambiguity as to the decedent's donative intent; the attorney, in turn, had failed to take the actions necessary to carry out that intent.

Finally, in *Chang*, *supra*, 172 Cal.App.4th 67, this Division considered whether an attorney owed a duty of care to a beneficiary of an executed trust who claimed "that the testator intended to revise [the] . . . estate plan to increase the gift to the beneficiary." (*Id*. at p. 72.) The decedent in *Chang* retained an attorney to prepare a revocable trust approximately six months before he married the plaintiff. The executed trust provided plaintiff with distributions of $30,000 in addition to some personal property. Five or six months after the marriage, when decedent was seriously ill, he instructed the attorney to revise his trust to leave the entire trust estate to plaintiff. The attorney refused to do so and the decedent died without making any further amendments to his trust. Plaintiff then sued the attorney for professional negligence.

After conducting a thorough survey of prior cases analyzing an attorney's duty to intended beneficiaries, *Chang* concluded an enforceable duty of care was generally found to apply where "the wills or trusts did not fail because of any defect in the expression of the testator's intent, but because of some failure either in other language of the instrument or in the circumstances of its execution. [¶] Conversely, when the claim . . . is that a will or trust, although properly executed and free of other legal defects, did not accurately express the testator's intent, no duty or liability to the nonclient potential beneficiary has

been recognized. That is, 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." (*Chang, supra*, 172 Cal.App.4th at p. 82.)

Chang also agreed with *Radovich's* observation that extending the "duty of care to unnamed potential beneficiaries" would "'impose an undue burden on the profession'" because "any disappointed potential beneficiary – even a total stranger to the testator – could [assert similar] factual allegations." (*Chang, supra*, 172 Cal.App.4th at pp. 83-84.) In the court's view, "without a finite, objective limit on the identity of individuals to whom they owe a duty of care, the burden on lawyers preparing wills and trusts would be intolerable." (*Id*. at p. 84.)

Finally, *Chang* concluded that these same concerns precluded a named beneficiary from "assert[ing] a legal malpractice claim not on the ground her actual bequest . . . 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. [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.)

2. The Trial Court Erred in Finding that Bartnof Did Not Owe Aman a Duty of Care

a. An attorney retained to advise a settlor on matters related to a pre-existing trust may owe a duty of care to the named beneficiaries

Aman argues that the trial court erred in concluding that a named beneficiary may not pursue a professional negligence claim against an attorney who did not draft the legal instrument describing the testator or settlor's intended bequest. Bartnof does not dispute the following facts: (1) Bartnof was retained by Vijendra to ensure the three properties in the Trust had a clear title; (2) Vijendra informed Bartnof that he wanted all three of the properties to remain in the Trust and that he intended Aman to receive all of the Trust assets; (3) Vijendra provided Bartnof a draft of an amendment naming Aman as the sole beneficiary of the Trust and later provided signed and notarized amendments naming Aman as the sole beneficiary; (4) Bartnof reviewed the executed amendments and advised Vijendra that he believed they were improperly worded; (5) Bartnof prepared a set of quitclaim deeds transferring a portion of the Trust properties from the Trust to Vijendra, in his individual capacity, and then from Vijendra to a non-existent "Survivor's Sub-Trust"; (6) Bartnof authored a letter informing Vijendra that once the quitclaim deeds were recorded, "100% of the title to these three properties" would be in a "Survivor's Sub-Trust" within the Trust. We conclude that, under these facts, Bartnof owed a duty of care to Aman

As the trial court correctly observed, in all of the published cases finding that an attorney owed an enforceable duty of care to an express beneficiary, the attorney-defendant drafted the testamentary instruments describing the beneficiary's bequest. We are not aware of any decision, however, that has specifically considered the issue presented here: whether an attorney retained to provide advice regarding a pre-existing trust and a subsequently-drafted amendment naming the beneficiary owes a duty of care to that beneficiary. We conclude that an attorney in Bartnof's position does owe a duty of care to an express beneficiary where, as here, there is no dispute as to the settlor's intent.

First, the rationale underlying the *Biakanja* line of cases apply equally whether the attorney was retained to draft a trust instrument in the first instance or provide advice regarding an instrument that was initially drafted by another party. In *Heyer v. Flaig* (1969) 70 Cal.2d 223, disapproved on other grounds in *Laird v. Blacker* (1992) 2 Cal.4th 606, 617, which "reaffirmed the basic principles of *Biakanja* and *Lucas*" (*Chang, supra*, 172 Cal.App.4th at p. 78), the Supreme Court explained: "When an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries. The attorney's actions and omissions will affect the success of the client's testamentary scheme; and thus the possibility of thwarting the testator's wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary." (*Heyer, supra*, 70 Cal.2d at p. 228.)

Although Bartnof did not personally draft the Trust or the Second Amendment, he was nonetheless retained to advise Vijendra what actions were necessary to preserve the intent expressed in those instruments (i.e., how to clear the titles to the properties without removing them from the Trust, the assets of which were to pass to Aman). He also reviewed an executed amendment naming Aman as the beneficiary and provided advice regarding the amendment's wording. It was therefore foreseeable that Bartnof's acts and omissions would affect Aman's interests.

Second, prior decisions have recognized an enforceable duty of care where the beneficiary's claims were not predicated on the manner in which the instrument was drafted, but rather on the attorney's failure to advise the testator of some fact that might frustrate the bequest described in that instrument. For example, in *Osornio*, 124 Cal.App.4th 304, the alleged negligence was the lawyer's failure to advise the testator that his intended beneficiary was presumptively disqualified under the Probate Code, and to advise taking the necessary steps to avoid disqualification. The court concluded that the attorney had breached a duty of care owed to the beneficiary by failing to advise the testator of the "appropriate actions" necessary to "carry out the . . . wishes[] that were expressed and formalized in [the] signed will." (*Osornio*, 124 Cal.App.4th at p. 336.)

Similarly, in *Garcia v. Borelli* (1982) 129 Cal.App.3d 24 (*Garcia*), the beneficiaries of a will asserted negligence in failing to advise that property held in joint tenancy would in fact be treated as community property following his death. The dispute between the testator's second wife and the residual beneficiaries resulted in a settlement in the probate action and a malpractice claim. Thus, as in *Osornio*, the beneficiaries' claims were not directly predicated on the manner in which the will had been drafted, but rather on the failure of the attorney to advise the testator of other facts that might frustrate the testator's expressed intent. The court concluded that, under such circumstances, the beneficiaries were owed a duty of care. (*Garcia, supra,* 129 Cal.App.3d at p. 32.)

Aman's claims are similar to those asserted in *Osornio* and *Garcia*. Aman contends that Bartnof, who was retained to provide advice regarding the Trust and the subsequently-drafted Second Amendment, negligently failed to inform Vijendra that Trust assets transferred to himself, and then to a non-existent survivor's sub-trust, might be subject to intestate succession. While it is true that the defendants in *Osornio* and *Garcia* drafted the legal instrument describing the testator's intent, this distinction is immaterial. In both cases, the plaintiffs' claims arose not from the text of the instrument itself, but rather from the attorneys' failure to properly inform their clients what actions were necessary to effectuate the intent expressed in the instrument.

Third, Aman's claims do not raise the sort of questions that normally preclude a prospective beneficiary from pursuing a professional negligence against the attorney of the testator or settler. As explained in *Chang*, courts have generally recognized an enforceable duty of care where "the wills or trusts did not fail because of any defect in the expression of the testator's intent, but because of some failure either in other language of the instrument or in the circumstances of its execution." (*Chang, supra,* 172 Cal.App.4th at p. 82.) On the other hand, courts have generally declined to recognize any duty where there are issues as to the decedent's intent. (*Ibid*.) Aman's claims fall into the former category. The parties do not dispute that Vijendra intended Aman to receive all of the Trust assets (as expressed in the executed Second Amendment Bartnof reviewed and provided advice about) and that Vijendra intended the three properties to

remain in the Trust. Aman claims, however, that Bartnof frustrated this intent by negligently advising Vijendra that he could clear the title to the Trust properties by transferring them to himself, in his individual capacity, and then into a non-existent Survivor's Trust. Aman's claims therefore raise no questions as to whether he was an intended beneficiary, but rather whether Bartnof negligently advised Vijendra in a manner that frustrated the undisputed intent exhibited in the documents Bartnof was retained to review (the Trust and the Second Amendment).

Finally, applying the six factor balancing test articulated in *Biakanja/Lucas* weighs in favor of extending the duty of care under the circumstances presented here. (See generally *Osornio, supra*, 124 Cal.App.4th at pp. 330-333 [applying six factor test to determine whether attorney owed duty of care in failing to advise testator that the intended beneficiary was a presumptively disqualified donee].) "To reiterate, these factors are: '[1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [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] 'whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession.'" (*Id.* at p. 330 [quoting *Lucas, supra*, 56 Cal.2d at p. 588.)[4]

The first and second factors clearly weigh in Aman's favor. The parties do not dispute that Vijendra instructed Bartnof to clear the title to the properties while keeping them in the Trust, and that Bartnof advised Vijendra about the wording of the executed amendment naming Aman as the Trust beneficiary. The transaction was thus intended to affect Aman and it was foreseeable that Bartnof's failure to exercise due care in carrying out his duties might injure Aman.

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[4] In *Lucas*, the Supreme Court omitted an additional factor identified in *Biakanja*: "the moral blame attached to the defendant's conduct." (*Biakanja, supra*, 49 Cal.2d at p. 650; *Lucas, supra*, 56 Cal.2d at p. 588.) As a result of this omission, "[c]ourts have generally disregarded the 'moral blame' factor in evaluating an attorney's duty to a nonclient." (See *Chang, supra*, 172 Cal.App.4th at p. 83, fn. 7; *Osornio, supra*, 124 Cal.App.4th at pp. 321 fn. 15, 330 fn. 27.)

The fifth factor – "the policy of preventing future harm" – also weighs in favor of imposing an extended duty of care on attorneys retained to review and provide advice in regards to an existing trust instrument and a subsequent, executed amendment naming the trust beneficiary. If named beneficiaries "are deprived of the right to suit against the attorney responsible for the failure of the intended [testamentary transfer], no one would be able to bring such action. . . . [¶] The imposition of duty . . . would thus promote public policy: it would encourage the competent practice of law by counsel representing testators, trustors, and other clients making donative transfers." (*Osornio, supra*, 124 Cal.App.4th at pp. 332-333; see also *Chang*, *supra*, 172 Cal.App.4th at p. 83.)

The sixth factor is not implicated because extending the duty of care in this case will place no undue burden on the profession. Courts have generally declined to extend the duty of care where doing so would either subject the attorney to a potentially "limitless" class of plaintiffs (i.e., third parties who claim that they should have been, but were not named in a bequest) or "compromise an attorney's primary duty of undivided loyalty to his or her client" (i.e., extending the duty of care in instances where an express beneficiary alleges the testator intended to bequeth more than the instrument describes). (*Radovich*, *supra*, 35 Cal.App.4th at p. 965.) Under the circumstances of this case, the attorney's duty of care remains narrowly circumscribed to the client and any beneficiary expressly named in the trust instruments.

The third and fourth factors – the degree of certainty that the plaintiff suffered injury and the closeness of the connection between the defendant's conduct and the injury – are largely duplicative of the causation element applicable to a cause of action for legal malpractice. (See *Chang*, *supra*, 172 Cal.App.4th at p. 76 ["To state a cause of action for legal malpractice, a plaintiff must plead '. . . (3) a proximate causal connection between the breach and the resulting injury'"].) Aman alleges that Bartnof's conduct – informing Vijendra that transferring the properties first to himself, and then to a nonexistent survivor's sub-trust, would place the properties back within the Trust – directly caused his injuries. As discussed in more detail below, although Bartnof disputes these allegations, we cannot resolve this factual dispute at this stage in the proceedings.

Accordingly, assuming Aman is able to establish his factual allegations, we weigh the third and fourth factors in his favor. (See *Osornio, supra*, 124 Cal.App.4th at pp. 331-332 [accepting plaintiff's factual allegations regarding causation for the purposes of assessing third and fourth factors regardless of whether the "facts may ultimately disclose that" defendant's conduct did not cause injury].)

For all of the reasons discussed above, we conclude that the rationale for extending "liability to beneficiaries of wills negligently drawn by attorneys" (*Lucas, supra*, 56 Cal.2d at p. 589) applies equally where the attorney was retained to advise a settlor on matters related to an existing trust and a subsequent, executed amendment naming the trust beneficiary.

b. The trial court erred in concluding that Bartnof did not owe a duty of care because Vijendra's death allegedly prevented the preparation of the survivor's sub-trust

The trial court also ruled that Aman was not owed a duty of care because the evidence showed that: (1) Bartnof intended to amend the Trust to create a survivor's sub-trust within the Trust; and (2) Vijendra died before Bartnof could complete these amendments. In support, the court cited case law explaining that a quitclaim deed transferring a property to a trust not in existence at the time the deed was executed is nonetheless valid if the deed was executed in anticipation of the creation of the trust, and the trust is created thereafter. (See *Luna v. Brownell* (2010) 185 Cal.App.4th 668, 675.)

The court erred. First, as a matter of law, whether Bartnof actually intended to establish a survivor's sub-trust, and whether he was prevented from doing so as a result of Vijendra's death, are not relevant to determining whether he owed a duty of care to Aman. Rather, those issues, relating to the manner in which Bartnof executed his legal duties, are relevant to the second and third elements necessary to state a cause of action for legal malpractice: breach of the duty owed and proximate causation.

Second, Bartnof's motion for summary judgment did not assert that the undisputed evidence showed he would have amended the Trust to establish the Survivor's Sub-Trust but for Vijendra's intervening death. Instead, he argued only that he was entitled to

summary judgment because "Vijendra *never* signed any will or trust or testamentary document *prepared by Defendant Bartnof*. Thus[,]. . . . *there is no legal duty running from Defendant Bartnof to Plaintiff Chaudhary as a matter of law*." (Emphasis in the original.)[5] Moreover, the evidence demonstrates an actual dispute whether Bartnof intended to establish a survivor's sub-trust. Bartnof alleged in his deposition testimony that he would have created the sub-trust, but was told not to take any further action on the Trust until Vijendra returned from Australia. Vijendra then died unexpectedly. Aman, however, contended that Bartnof's letters to Vijendra suggested that he simply misread the terms of the Trust, believing that it automatically created a survivor's sub-trust upon the death of the first spouse: "Pursuant to the terms of the Trust, at the death of the first spouse, the property is to be allocated between the survivor's sub-trust and the survivor individually, outright and free of trust. Since you are the surviving spouse, this deed allocates one-half to your sub-trust and your wife's share to you, outright and free of trust." In addition, the second letter, dated December 2, stated that once Vijendra recorded the quitclaim deeds, "100% of the title to these three properties will be in the Survivor's Sub-Trust and, therefore part of your estate."

Whether Bartnof intended to establish the survivor's sub-trust is a disputed issue of fact. Bartnof has never contended otherwise. Accordingly, summary judgment on this basis cannot be affirmed.[6]

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[5] Bartnof also argued that he was entitled to summary judgment on any professional negligence claim arising from his representation of Vijendra because Aman could not establish the element of causation. More specifically, Bartnof asserted that the allegations in the complaint demonstrated Aman elected to "settle the case with Priscilla, his father's surviving wife, and that is the sole reasons that [Aman] had any damages whatsoever." The trial court, however, did not address this argument and Bartnof does not assert this argument on appeal.

[6] Because we reverse the order granting summary judgment, we need not address whether the court properly dismissed the remaining claims in Aman's complaint.

DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings. Appellant is to recover his costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.