

The Representation of Beneficiary-Fiduciaries in Trust and Estate Litigation

By Hans Juhl – Ryan Swanson & Cleveland PLLC & Gail Mautner – Lane Powell PC

Even prior to obtaining a legal education, many people instinctively recognize conflicts of interest as being a complicating factor in legal representation.

Law students are drilled in professional responsibility courses about the importance of avoiding conflicts of interest. Indeed, the rules by which we govern ourselves, the Rules of Professional Conduct, are clear “ a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client...”¹ Trust and estate litigators often pose a different question. What happens when an individual client has two necessarily conflicted interests? Specifically, what do we do when our client serves in the capacity as a fiduciary, owing the highest of legal obligations to beneficiaries and creditors, but is also a beneficiary in conflict with other beneficiaries, or is a putative creditor or debtor of the estate, whose expectation is that their individual interests will be represented? This situation is not uncommon. A significant number of estates that end up in litigation are served by a fiduciary who was appointed by a family member because such person was a child or sibling who was also a natural beneficiary of the testator or trust settlor’s estate plan. Often, family dynamics are not as the testator expected, and the beneficiaries’ differing interpretations of the estate plan, or individual documents, are not in harmony. The nominated fiduciary has a duty to defend the estate plan² but also has an interest in the estate itself, which would be diminished or enlarged depending on the estate document’s interpretation. In this common

hypothetical, how does the attorney for the fiduciary properly advise the client?³

It is well settled that the attorney representing the fiduciary normally has no duty to the “non-client” beneficiaries. The most oft-cited case for this proposition is *Trask v. Butler*.⁴ In *Trask*, the petitioner, attorney Richard Butler, represented Laurel Slaninka as personal representative of her father’s estate and as attorney in fact for her mother.⁵ In her capacity as personal representative for their father’s estate and attorney in fact for their mother, Laurel sued her brother Russell Trask to quiet title to a parcel of property gifted to Russell by their father and a second parcel of property occupied by her mother upon which Russell had constructed a building and driveway. Butler represented Laurel in these actions and in the subsequent sale to a third party of the real property occupied by Laurel and Russell’s mother.⁶

After their mother’s death, the superior court removed Laurel from her position as personal representative, finding that she had breached her fiduciary duties by attempting to set aside the gift of real property to her brother Russell and selling the property occupied by their mother on disadvantageous terms.⁷ Following Laurel’s removal and the appointment of an interim personal representative, the sale to the third party was set aside. The interim personal representative then resigned, making way for Russell’s appointment as personal representative of both of his and Laurel’s parents’ estates.⁸ Russell threatened to sue Laurel. Laurel

received a release from Russell after negotiating away her beneficial interest in the estates, and an assignment of claims she may have had, in her capacity as beneficiary, against Butler.⁹ Russell sued Butler on his own behalf, and as assignee of Laurel’s potential claims, for malpractice. Butler moved for dismissal on the basis that he had no contractual privity with the estates’ beneficiaries. The trial court declined to grant Butler’s motion, and Butler’s appeal directly to the Supreme Court for discretionary review was accepted.¹⁰

The Supreme Court, sitting *en banc*, agreed with Butler that he owed no duty to the estates’ beneficiaries, applying a “modified multi-factor balancing test” to determine the circumstances under which a non-client could prove a duty owed by an attorney. The court identified the following elements:

- 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.

The court concluded that the threshold question was whether the plaintiff was an intended beneficiary of the transaction to which the lawyer’s representation pertained.¹¹ The court distinguished between a lawyer’s role in drafting estate planning documents,

Continued...

Continued from page 14...

The Representation of Beneficiary-Fiduciaries in Trust and Estate Litigation

acknowledging that the estate beneficiaries may prove a duty was owed by the drafting attorney,¹² and when the claim was being made against the attorney representing the estate's fiduciary representative. The court found that, in the latter circumstance, the beneficiaries had both recourse against the personal representative for breaches of fiduciary duty resulting from her attorney's advice and the ability to take proactive measures to protect themselves in the course of the estate's administration.¹³ The personal representative, the court found, may have recourse in a legal malpractice suit against her attorney, but the beneficiaries would not.¹⁴

The court further found that public policy weighed against a finding that the personal representative's attorney owed a duty to the beneficiaries, finding that imposing such a duty would detract from the attorney's ethical obligations to his client. The court specifically acknowledged that the divided loyalties between the estate's fiduciary representative and the beneficiaries risked a conflict of interest, particularly where the personal representative's interest "is not harmonious with the interests of the heir." The court found that estate beneficiaries are incidental, rather than intended, beneficiaries of the advice of the personal representative's attorney; that the beneficiaries had a direct cause of action against a malfeasant personal representative; and that, as a policy matter, "the unresolvable conflict of interest an estate attorney encounters in deciding whether to represent the personal representative, the estate, or the estate heirs unduly burdens the legal profession."¹⁵ The court found that Butler was, therefore, entitled to dismissal of Russell's claims.

More recently, Division One of the Court of Appeals considered similar facts in an unpublished

decision, *Benjamin v. Singleton*.¹⁶ Relying on *Trask*, the court found that the former personal representative's attorney was not liable to the estate's beneficiaries. The appellate court opined that "[r]equiring [the personal representative's attorney] to act in the best interest of the estate or all its heirs would create the risk of interfering with her duty of undivided loyalty to him. The risk of such interference outweighs the risk of harm to the other beneficiaries."¹⁷

Though neither the *Trask* nor *Benjamin* courts addressed the situation of an attorney whose personal representative client was also a beneficiary, both decisions implicitly acknowledge the potential conflict of interest inherent in the representation of a client who has a duty to act in the estate's best interests, and an interest in acting in her own best interests, which might be adverse to those of the estate. The question that remains is whether one attorney can represent a client in both capacities while avoiding that conflict of interest. Even if counsel prudently advised their client that counsel's representation was limited to advising the client in her fiduciary role, and the counsel requested a waiver of the potential conflict, it remains unclear if such actions are sufficient to protect the attorney. As a practical matter, the client may not understand the distinction between the attorney's advice given to the client in her capacity as personal representative and advice the attorney would give to the client as a beneficiary. Moreover, if the attorney provides the client with advice, as personal representative, that contradicts the client's personal interests, the client may lose confidence in the attorney's counsel, leading to an interruption of the attorney-client relationship that the *Trask* case intended to protect.

Therefore, in order to avail herself of the protection of *Trask*,

the attorney's only solution is a potentially unwieldy one: insisting that the client retain individual counsel to protect her interest as heir or beneficiary. Bifurcation of the representation will benefit both the attorney and client. The attorney will be comforted that the purpose and intent of her advice is not being confused, and the client will have the ability to genuinely demonstrate to hostile co-beneficiaries that she is not using estate resources to fund her individual representation.

This conclusion is also supported by the Rules of Professional Conduct ("RPC"). Both comments 3 and 4 to RPC 1.7 prohibit the attorney from concurrently representing clients with conflicts of interest. Comment 3 requires an attorney to decline the representation of a client when a conflict of interest exists prior to the undertaking of the representation. This is likely to be the case if the attorney is contacted to represent the fiduciary/beneficiary when litigation has already been commenced. Comment 4 requires the attorney to withdraw upon a conflict of interest arising. This addresses a scenario where an attorney representing the personal representative purely in an administrative capacity wishes to continue that representation after litigation ensues, the outcome of which would affect the fiduciary's beneficial interest in the estate. In either case, the commentary to RPC 1.7 would appear to suggest, conclusively, that the attorney is prohibited from representing the fiduciary client's interests personally when those interests are adverse to other duties or interests held by the client.

Bifurcating the client's representation would appear to be a simple and appropriate solution. Practically, however, challenges remain. First, the client is not likely

Continued...

Continued from page 15...

The Representation of Beneficiary-Fiduciaries in Trust and Estate Litigation

to relish the thought of involving additional counsel, paying that counsel personally, and spending more time to assist the additional counsel in the representation. From the attorney's perspective, the idea of being adverse to one's own client feels unnatural and contrary to our ethical obligation to advocate for the best outcome for a client. Imagine the discomfort it would cause the attorney and the client if the litigation engagement required the attorney to cross-examine her client, sitting in her capacity as individual beneficiary.

In spite of these practical challenges, when the adversity exists (or, even when the potential for adversity is apparent or likely), advising the client that he must seek representation in his individual capacity is generally the necessary and appropriate practice. The risk of inadvertently breaching the attorney's ethical responsibilities, or creating the perception of doing so, is simply too great. The courts have extended protection to counsel for the fiduciary from liability to hostile beneficiaries, but it is incumbent upon the estate litigation bar to

take advantage of that protection by behaving prudently to avoid actual or perceived conflicts of interest. The only way to fully address the conflict of interest inherent in the representation of a beneficiary-fiduciary is to address the conflict head on, and, where appropriate, to insist that the client have competent representation in both capacities. Despite the practical difficulties, where there is apparent or likely conflict, bifurcating the representation between different counsel is the only effective way to do this.

1 WA RPC 1.7(a)

2 See *In re Estate of Black*, 116 Wn. App. 476, 490, 66 P.3d 670, 677 (2003), *aff'd on other grounds*, 153 Wn. 2d 152, 102 P.3d 796 (2004), *citing* *In re Estate of Jolly*, 3 Wn.2d 615, 626–27, 101 P.2d 995 (1940).

3 This article addresses issues of potential or actual conflicts that might result in litigation. Of course, there are any number of circumstances where the fiduciary duties of a personal representative or trustee do not conflict with the individual's personal interests as a beneficiary, or where the interests of all beneficiaries are aligned with each other, such that there is no conflict requiring separate representation for the individual in his or her capacity as a beneficiary. Counsel for a fiduciary evaluating whether separate counsel is necessary for the client's individual interests as beneficiary must examine each situation in its own right and with sensitivity to its own context. No single result of this analysis will always be correct for every situation.

4 123 Wn. 2d 835, 872 P.2d 1080 (1994). See also WA RPC 1.7 fn 40 ("Under Washington case law, in estate administration matters the client is the personal representative of the estate.")

5 *Trask*, 123 Wn. 2d at 837.

6 *Id.* at 838.

7 *Id.*

8 *Id.* at 839.

9 *Id.*

10 *Id.*

11 *Id.* at 843.

12 See e.g., *Stangland v. Brock*, 109 Wn. 2d 675, 680, 747P.2d 464 (1987).

13 Compare *In re Guardianship of Karan*, 110 Wn. App. 76, 86, 38 P.2d 396 (2002), where the Court of Appeals applied the *Trask* factors and found a duty on the part of counsel for the guardian towards the incapacitated person who was at the heart of the reason for the guardianship ("The *Trask* court based its decision in part on the premise that a beneficiary can take an active role in estate matters by retaining an attorney or communicating with the personal representative. [Citation omitted.] But a three-year-old cannot do this.")

14 *Id.* at 844.

15 *Id.* at 845.

16 *Benjamin v. Singleton*, No. 77684-3-I, 2019 WL 350709 (Wash. Ct. App. Jan. 28, 2019).

17 *Id.*