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# Et Tu Counselor? Fiduciary's Attorneys' Ethical Duty to the Vulnerable

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## I. Introduction: Elder Abuse in a Nutshell

"Elder abuse, including the financial exploitation of vulnerable individuals is an 'often well-hidden problem'"[1] Reports of elder abuse rise steadily but remain grossly underreported.[2] Reasons for this include embarrassment, dependency upon the abuser, fear of isolation, and keeping the family name intact.[3] Attorneys believing themselves hampered in reporting by rules governing professional conduct contribute to the problem.[4]

## II. General Parameters

Duty of an attorney to a vulnerable person for whom his client serves as fiduciary is neither new nor novel. In *In re Fraser*,[5] the court considered an attorney's multiple instances of procrastination. One instance involved representing a guardian who, the court recognized, was a difficult client. The attorney refused to submit claims for payment to the guardian for approval based on his belief that it would not be in the financial best interests of the ward or estate. The court distinguished this incident from those justifying punishment:

> The respondent maintains and we agree that under the circumstances he would not have been justified in withdrawing as counsel until such time as the guardian had secured the agreement of some other attorney to take over the handling of the guardianship. As the respondent suggests, the attorney owes a duty to the ward, as well as to the guardian. Since the guardian in this case manifested a greater interest in obtaining money for herself than in serving the interest of the ward, it would

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1 Campbell v. Thomas, 897 N.Y.S.2d 460, 462 (N.Y. App. Div. 2010).

2 U.S. Dep't of Health & Human Servs., Admin. for Cmty. Living, *Statistics and Data*, Nat'l Ctr. on Elder Abuse, https://ncea.acl.gov/What-We-Do/Research/Statistics-and-Data.aspx [https://perma.cc/Q63T-6GKF].

3 Mary F. Radford, *What If Granny Wants to Gamble? Balancing Autonomy and Vulnerability in the Golden Years*, 45 ACTEC L.J. 221, 251 (2020).

4 *See id.* at 255.

5 523 P.2d 921, 922 (Wash. 1974).

> have been hazardous to the interest of the ward to turn the assets of her small estate over to the guardian.
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> It must be borne in mind that the real object and purpose of a guardianship is to preserve and conserve the ward's property for his own use, as distinguished from the benefit of others.[6]

"The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect."[7] Florida has held similarly. In *Saadeh v. Connors*,[8] the court found a duty to the ward flowing from counsel for the guardian as inherent to the nature of guardianship itself. Quoting from an Attorney General's opinion, the Court ruled:

> Under the state's guardianship statutes, it is clear that the ward is the intended beneficiary of the proceedings. Section 744.108, Florida Statutes, authorizes the payment of attorney's fees to an attorney who has "rendered services to the ward or to the guardian on the ward's behalf[.]" Thus, the statute itself recognizes that the services performed by an attorney who is compensated from the ward's estate are performed on behalf of the ward even though the services are technically provided to the guardian.[9]

## III. Proposed Tests

The "flow-through" of fiduciary duty from the lawyer to the vulnerable ward or principal evolves from privity in tort. The nexus between responsibility and liability is plain. Courts approach this in a number of ways, most commonly as in the cases discussed below.

### A. *Biakanja v. Irving*[10]

Thomas Irving drafted a will for a Mr. Maroevich[11] leaving everything to testator's sister. The will was held invalid. The estate passed via intestacy, and plaintiff received one-eighth as opposed to 100%. The court analyzed the duty owed by to Ms. Biakanja under tort standards. Breaking with precedent, the California Supreme Court held:

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6 *Id.* at 928.

7 *Id.*

8 166 So. 3d 959, 963 (Fla. Dist. Ct. App. 2015).

9 *Id.* at 964.

10 320 P.2d 16 (Cal. 1958).

11 Their relationship was unclear as Thomas Irving was a notary public rather than a lawyer. *Id.* at 17.

> [W]hether 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. Here, the "end and aim" of the transaction was to provide for the passing of Maroevich's estate to plaintiff. Defendant must have been aware from the terms of the will itself that, if faulty solemnization caused the will to be invalid, plaintiff would suffer the very loss which occurred. As Maroevich died without revoking his will, plaintiff, but for defendant's negligence, would have received all of the Maroevich estate, and the fact that she received only one-eighth of the estate was directly caused by defendant's conduct.[12]

Having established a *balancing test* as the standard for review, the court concluded:

> Defendant undertook to provide for the formal disposition of Maroevich's estate by drafting and supervising the execution of a will. This was an important transaction requiring specialized skill, and defendant clearly was not qualified to undertake it. His conduct was not only negligent but was also highly improper. He engaged in the unauthorized practice of the law.[13]

B. *Barcelo v. Elliott*[14]

Barcelo engaged Elliott for estate planning. Upon her death, the trust would terminate, its assets distributed in specific amounts to Barcelo's children and siblings, the remainder passing to Barcelo's six grandchildren. "The trust agreement contemplated that the trust would be funded by cash and shares of stock during Barcelo's lifetime . . . ."[15] For undisclosed reasons, the trust failed.[16] The grandchildren sued Elliott. The trial court granted him summary judgment.[17] The Texas Supreme Court affirmed.[18]

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12 *Id.* at 19.
13 *Id.*
14 923 S.W.2d 575 (Tex. 1996).
15 *Id.* at 576.
16 *Id.*
17 *Id.* at 577.
18 *Id.* at 579.

The case turned upon privity. The courted noted the traditional view that

> [a]t common law, an attorney owes a duty of care only to the client, not to third parties . . . damaged by the attorney's negligent representation of the client. Without this "privity barrier," . . . clients would lose control over the attorney-relationship, and attorneys would be subject to almost unlimited liability.[19]

Recognizing the modern trend of courts to remove or relax the privity barrier, the Texas Supreme Court declined:

> In sum, we are unable to craft a bright-line rule that allows a lawsuit to proceed where alleged malpractice causes a will or trust to fail in a manner that casts no real doubt on the testator's intentions, while prohibiting actions in other situations. We believe the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent.[20]

Importantly, *Barcelo* doesn't affect other deterrents and remedies, *e.g.*, sanctions, contempt, and disciplinary proceedings.

### C. *Mieras v. DeBona*[21]

Nita Ledbetter Jackson disinherited her daughter, Juanita Neville, and divided her estate among her other children. The new will did not exercise a general power of appointment conferred on Ms. Jackson under the terms of a marital trust established by her late husband, the father of the three children. In default of exercise of the power, Neville was entitled to one-third of the corpus of the trust upon Jackson's death. Mieras and Ledbetter sought to recover $208,722, Neville's received share of the corpus of the marital trust. In addition, they alleged DeBona failed to exercise due care in protecting Nita from undue influence. The trial court found the petition failed to state a claim.[22]

The Supreme Court reversed:

> Thus, if a lawyer who prepares a will erroneously is to be accountable for breach of the duty he owed his deceased client, the beneficiaries of the will must be able to maintain an action. No one else has a sufficient interest, can show damage, or possesses the will, to do so.

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19 *Id.* at 577.

20 *Id.* at 578-79.

21 550 N.W.2d 202 (Mich. 1996).

22 *Id*. at 203-04.

> It would be unconscionable to permit admitted actionable conduct to be insulated by the fortuitous death of the person recognized in the law to have standing to prosecute such a claim, where the brunt of the injury from such conduct is born by a living party. [Guy v. Liederbach, 501 Pa. 47, 64, 459 A.2d 744 (1983) (Nix, J., concurring).][23]

## IV. Confidences v. Mandatory Reporting

Using Oklahoma law as an example, some states require"[a]ny person having reasonable cause to believe that a vulnerable adult is suffering from abuse, neglect, or exploitation shall make a report as soon as the person is aware of the situation."[24] Note both the global reference to "any" person, and the command function of the word "shall." Unquestionably "[l]awyers are in a special position" to detect abuse of elderly and vulnerable clients.[25] Exploited elders may inform their attorney, or an attorney detects abuse during representation. However, clients refuse to authorize disclosure.

Oklahoma's *Rule 1.2* provides that an attorney "shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued."[26] Thus, when a lawyer discovers an elderly client victimized or abused, he's still obligated to abide by that client's wishes, including non-disclosure, unless authorized, or forbidden, to do so by another Rule. *Rule 1.6* provides, *inter alia,* that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." For example,

> a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm . . . (2) to prevent the client from committing: (i) a crime; or (ii) a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services [or] . . . (6) to comply with other law or a court order.[27]

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23 *Id.* at 207-08.

24 Okla. Stat. tit. 43A, § 10-104(A) (2020).

25 Sarah S. Sandusky, *The Lawyer's Role in Combating the Hidden Crime of Elder Abuse*, 11 Elder L.J. 459, 471 (2003).

26 Okla. Stat. tit. 5, § 1.2(a).

27 *Id*. § 1.6(b)(1), (b)(2), (b)(6).

Note the difference. While (b)(1) permits disclosure to prevent bodily harm or death, applicable to both harm by a wrongdoer, and self-neglect, (b)(2) allows disclosure of crimes or frauds perpetrated by the fiduciary client such as abuse of authority. But what about the client wishing to keep his victimization a secret?[28] Mandatory reporting per *Title 43A* provides an option.[29]

Statutory construction turns upon legislative intent grounded, initially, in statutory language. Plain, unambiguous statutes need no construction. Different provisions must be construed together, creating a harmonious whole.[30] Presumably, the Legislature expressed its intent in the statute, and intended what it expressed.[31]

*Title 43A, section 10-102* of the Oklahoma Statutes expressly recognizes many Oklahomans cannot manage their own affairs or protect themselves from exploitation, abuse, or neglect, striking a balance between autonomy and protection.

## V. Conclusion

As attorney-client relationship expands as to ethical and professional duties. Courts and the legal profession must adapt. Protective features of this trend co-exist with the role of the attorney as an officer of the court:

> [If] [the legal profession] serves its high purpose, if it vindicates its existence, [it] requires from those who have assumed its obligation a double allegiance, a duty toward one's client and a duty toward the court which, reconciled as they can be and are in fact reconciled in practice, make for justice . . . . It is the compliance with these limitations [imposed upon advocacy by the standards of the profession] that is the true reconciliation of the primary duty of fidelity to the client, with the constant and ever-present duty that the lawyer has as a part of the administration of justice owing to the minister of justice in the person of the judge.[32]

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28 Rule 1.14 (client under disability) may also support disclosure when applicable. *See id.* Rule 1.14(b), (c).

29 *See* Okla. Stat. tit. 43A, § 10-104(C)(2).

30 Rogers v. QuikTrip Corp., 230 P.3d 853, 859 (Okla. 2010).

31 TXO Prod. Corp. v. Okla. Corp. Comm'n, 829 P.2d 964, 969 (Okla. 1992).

32 Elliott E. Cheatham, *The Lawyer's Role and Surroundings*, 25 Rocky Mtn. L. Rev. 405, 410-11 (1953) (quoting William Taft, Ethics of the Law, Hubbard Lectures (1914)).