DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ERICA ELLERSON,

Appellant,

v.

BRENDEN S. MORIARTY, ESQUIRE, and THE MORIARTY LAW FIRM, P.A., a Florida Professional Association,

Appellees.

No. 2D20-2653

June 23, 2021

Appeal from the Circuit Court for Manatee County; Edward Nicholas, Judge.

Eric M. Bradstreet of St. Denis & Davey, P.A., Jacksonville, for Appellant.

Bruce Bellingham and Michael J. McGirney of Spector Gadon Rosen Vinci, LLP, St. Petersburg, for Appellees.

MORRIS, Judge.

Erica Ellerson appeals from a final order dismissing her legal malpractice action with prejudice. The underlying action was initiated against Brenden S. Moriarty, Esquire, and the Moriarty Law Firm, P.A. (collectively Moriarty), after a bequest of property made to Ellerson in a trust created by her grandmother could not be fulfilled due to Moriarty's alleged failure to prepare a deed conveying the property to the trust. We conclude that the trial court erred by dismissing the complaint for failure to state a cause of action where there were critical factual issues as to whether Moriarty specifically undertook the duty to fund the trust, and therefore, we reverse.

BACKGROUND

Ellerson's grandmother retained Moriarty in January 2018 to assist her with portions of her estate planning. Moriarty drafted an amendment to Ellerson's grandmother's trust, and in that amendment, it provided that Ellerson would take ownership of an

undivided interest in real property located at 17th Street West in Palmetto, Florida (the 17th Street Property).[1]

Ellerson's grandmother passed away in August 2018. However, because no deed had ever been prepared to transfer the 17th Street Property into the trust, it was an unfunded devise and, therefore, Ellerson did not receive her undivided interest in the property.

Ellerson then filed suit, alleging that she was an intended third-party beneficiary of the attorney-client relationship between Moriarty and her grandmother. She alleged that Moriarty never limited the scope of his duty to her grandmother to exclude advice or services to fund the trust and, in fact, had had conversations with Ellerson and her grandmother about drafting and recording deeds transferring the real property into the trust. Ellerson further contended that Moriarty failed to draft and record the deed

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[1] That amendment also provided that Ellerson would take a one-quarter interest in two other real estate parcels owned by her grandmother, but on appeal, Ellerson appears to focus solely on the devise of the 17th Street Property. Thus that is the devise we will address herein.

transferring the 17th Street Property, failed to confirm the existence of a pour-over will drafted by other counsel and failed to draft a new pour-over will, and otherwise failed to properly ensure that the trust was funded to fully effectuate Ellerson's grandmother's intent as expressed in the trust amendment.

Moriarty filed a motion to dismiss the legal malpractice action raising various grounds, including Ellerson's lack of standing due to an absence of privity between the parties and because, according to Moriarty, no duty arose from Ellerson's allegations as a matter of law.

After conducting two hearings, the trial court dismissed Ellerson's complaint with prejudice. In doing so, the trial court reasoned that Moriarty's only obligation to Ellerson, a third-party beneficiary, was to draft a facially valid trust amendment that set forth Ellerson's grandmother's intent. The trial court rejected the argument that Moriarty could be held liable for the failure of the devise due to his failure to draft and record a deed conveying the 17th Street Property into the trust. This appeal follows.

ANALYSIS

We review an order of dismissal with prejudice de novo. *McManus v. Gamez*, 276 So. 3d 1005, 1007 (Fla. 2d DCA 2019). This includes a dismissal that is predicated on a party's lack of standing. *Home Title Co. of Md., Inc. v. LaSalla*, 257 So. 3d 640, 642-43 (Fla. 2d DCA 2018).

> A motion to dismiss tests the legal sufficiency of a complaint to state a cause of action; it does not turn on issues of ultimate fact. *Holland v. Anheuser Busch, Inc.,* 643 So. 2d 621, 624 (Fla. 2d DCA 1994). Therefore, in ruling on a motion to dismiss, [a trial] court is confined to the four corners of the complaint and must take as true all well-pleaded, material facts. *Temples v. Fla. Indus. Constr. Co.,* 310 So. 2d 326 (Fla. 2d DCA 1975); *Gennaro v. Leeper,* 313 So. 2d 70 (Fla. 2d DCA 1975).

DeMartino v. Simat, 948 So. 2d 841, 843 (Fla. 2d DCA 2007).

In an action for legal malpractice, a plaintiff must ordinarily allege and prove that he or she has privity with the attorney, that the attorney neglected a reasonable duty owed to the plaintiff, and that the attorney's negligence was the proximate cause of the plaintiff's loss. *See Dingle v. Dellinger*, 134 So. 3d 484, 487 (Fla. 5th DCA 2014); *Arnold v. Carmichael*, 524 So. 2d 464, 466 (Fla. 1st

DCA 1988). Ellerson was not in privity of contract with Moriarty in the traditional sense.

> However, Florida courts have recognized a limited exception to the privity requirement to allow intended testamentary beneficiaries under certain circumstances to maintain malpractice actions against attorneys: "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. In some ways, the beneficiary's interests loom greater than those of the client. After the latter's death, a failure in his testamentary scheme works no practical effect except to deprive his intended beneficiaries of the intended bequests."

Arnold, 524 So. 2d at 466 (quoting *McAbee v. Edwards*, 340 So. 2d 1167 (Fla. 4th DCA 1976)). Thus, if a plaintiff and attorney are not in privity, the plaintiff must be an intended third-party beneficiary of the attorney's services. *Dingle*, 134 So. 3d at 487-88.

"Intended third-party beneficiaries of testamentary documents have standing to bring an action for legal malpractice 'if they are able to show "that the testator's intent as expressed in the will is

frustrated by the negligence of the testator's attorney." ' " *Passell v. Watts*, 794 So. 2d 651, 652 (Fla. 2d DCA 2001) (quoting *Hare v. Miller, Canfield, Paddock & Stone*, 743 So. 2d 551, 553 (Fla. 4th DCA 1999)); *see also Angel, Cohen & Rogovin v. Oberon Inv., N.V.*, 512 So. 2d 192, 194 (Fla. 1987) ("For the beneficiaries' action in negligence to fall within the exception to the privity requirement, testamentary intent as expressed in the will must be frustrated by the attorney's negligence and as a direct result of such negligence the beneficiaries' legacy is lost or diminished."); *Gunster, Yoakley & Stewart, P.A. v. McAdam*, 965 So. 2d 182, 184 (Fla. 4th DCA 2007) (holding that trial court did not err in denying appellants' motion for partial summary judgment because appellees demonstrated they had standing to bring suit against appellants where appellees' father's intent, as expressed in his will, was frustrated by appellants' negligence and appellees' legacy was diminished as a direct result of that negligence); *Arnold*, 524 So. 2d at 466 (recognizing intended third-party beneficiary exception to privity requirement); *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.*, 467 So. 2d 315, 317 (Fla. 3d DCA 1985) (acknowledging the

proposition "that an attorney preparing a will has a duty not only to the testator-client, but also to the testator's intended beneficiaries" and that, therefore, "[i]n limited circumstances, . . . an intended beneficiary under a will may maintain a legal malpractice action against the attorney who prepared the will, if through the attorney's negligence a devise to that beneficiary fails" (first citing *DeMaris v. Asti*, 426 So. 2d 1153 (Fla. 3d DCA 1983); and then citing *McAbee*, 340 So. 2d 1167)).

Here, Ellerson alleged that she was an intended third-party beneficiary of her grandmother's trust and that her grandmother intended for the 17th Street Property to pass to Ellerson as set forth in the trust. Ellerson also alleged that due to Moriarty's negligence in failing to draft and record a deed, the trust was not funded with that property and, therefore, that particular devise failed. This was sufficient to allege Ellerson's standing.

The fact that this appeal involves the consideration of a grantor's intent as stated in a trust, versus that of a testator's intent as stated in a will, does not preclude the application of the intended third-party beneficiary exception to the privity

requirement. *See Passell*, 794 So. 2d at 652-53 (analyzing intended third-party beneficiary issue as applied to a trust); *Dingle*, 134 So. 3d at 488 (recognizing that the intended third-party beneficiary "exception to the rule of privity is not limited to will drafting cases" (citations omitted)). Assuming that Ellerson's allegations are true, as a trial court must when ruling on a motion to dismiss,[2] there are critical factual issues that could only be resolved upon the taking of evidence: whether Moriarty limited the scope of his retention such that he was not required to assist in funding the trust and whether he expressly agreed in conversations to draft and record a deed in order to effectuate Ellerson's grandmother's intent to pass the 17th Street Property to Ellerson as set forth in the trust amendment. Those factual issues are crucial to determining whether Moriarty owed a duty to Ellerson. *Cf. Gunster, Yoakley & Stewart, P.A.*, 965 So. 2d at 183 (concluding that the "trial court did not err in submitting to the jury the question of whether Gunster Yoakley had a duty to fund a revocable trust during [the] decedent's lifetime").

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[2] *DeMartino*, 948 So. 2d at 843.

We reject Moriarty's argument that Ellerson cannot state a cause of action because she cannot rely on extrinsic evidence—here, the alleged conversations that Ellerson and her grandmother had with Moriarty—to prove that Moriarty undertook a specific duty to prepare and record a deed to fund the trust with the 17th Street Property. It is true that in *Lorraine*, the court explained that "a disappointed beneficiary may not prove, by evidence extrinsic to the will, that the testator's testamentary intent was other than that expressed in the will." 467 So. 2d at 318 (citing *DeMaris*). But that is a much different situation than where a party claiming to be an intended third-party beneficiary intends to rely on extrinsic evidence to prove that an attorney's negligence resulted in the frustration of a grantor's intent as expressed in a trust document.

Here it is undisputed that Ellerson's grandmother's intent—as expressed in the trust amendment—was to devise the 17th Street Property to Ellerson. Ellerson alleges that Moriarty never limited the scope of his retention to exclude the funding of the trust with the 17th Street Property. To the contrary, Ellerson alleges that Moriarty had conversations with Ellerson and her grandmother

about Moriarty's preparation and filing of the necessary deed so that the property would pass under the trust in order to effectuate Ellerson's grandmother's intent. Thus, Ellerson is not attempting to use extrinsic evidence to contradict her grandmother's intent as expressed in the trust amendment. Rather, she is relying on extrinsic evidence to show that her grandmother's intent—as expressed in the trust amendment—was frustrated. The use of extrinsic evidence in this manner is permissible. *See Arnold*, 524 So. 2d at 467 (concluding, in a legal malpractice action, that attorney's affidavit in which he asserted that a residuary clause had been inadvertently omitted from the redrafted will he prepared for the testatrix was admissible because it was relevant to the issues of the frustration of the testatrix's intent and of the attorney's negligence).

Indeed, the use of extrinsic evidence might be the only way to prove that an attorney specifically undertook the duty to fund a trust devise. Trust documents generally address the grantor's testamentary intent as it pertains to devises of real and personal property. But a grantor's testamentary intent is different from the

methods used to effectuate that intent. Were we to conclude that an intended third-party beneficiary cannot state a cause of action where he or she relies on the use of extrinsic evidence to prove that the grantor's intent as provided in the trust document was frustrated due to an attorney's negligence, we would, in effect, be granting immunity to every attorney who agrees to but fails to fund a trust and/or trust amendment which he or she drafted. The trial court focused on the facial validity of the trust amendment, but that does not answer the question of whether Moriarty was negligent where it is alleged that he did not limit the scope of his services but instead expressly agreed to take further actions in order to effectuate Ellerson's grandmother's intent as expressed in the facially valid trust devise.

Moriarty's reliance on *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378 (Fla. 1993), does not require us to affirm. In that case, the testator's original will and first codicil failed to provide for after-born children. *Id.* at 1379. While the testator had communicated his desire to provide for an after-born child to his attorney, the testator failed to sign a second will that

did so provide, and a second codicil drafted by the attorney failed to provide for the after-born child. *Id.* The after-born child wanted to introduce extrinsic evidence to explain her father's testamentary intent to include her, but the Florida Supreme Court explained the dangers of doing so, opining that "the risk of misinterpreting the testator's intent increases dramatically." *Id.* at 1380. The court also noted the possibility that the admission of extrinsic evidence "heightens the tendency to manufacture false evidence that cannot be rebutted due to the unavailability of the testator." *Id.* Because there was neither a stated expression to exclude or include after-born children in the will, the court concluded that the testator's after-born child could not be considered an intended third-party beneficiary for purposes of a legal malpractice claim. *Id.*

The facts of *Espinosa* are not the facts of this case. This case does not involve a party seeking to claim intended third-party beneficiary status despite not being named in the testamentary document. Rather, it is undisputed that Ellerson was named as an intended third-party beneficiary in the trust amendment and that her grandmother intended to devise the 17th Street Property to her.

Thus, unlike in *Espinosa*, where there was a dispute about the testator's intent as expressed in the original will and codicils,[3] in this case, the grantor's intent as expressed in the trust amendment is clear. The only dispute is about whether Moriarty was negligent in failing to take actions to effectuate that clear intent.

Permitting Ellerson's suit to go forward here does not necessarily expand the scope of an attorney's duty to intended third-party beneficiaries beyond the duties owed to the attorney's client. It merely allows Ellerson the opportunity to prove whether or not Moriarty specifically undertook the duty to draft and record a deed for the 17th Street Property so as to effectuate Ellerson's grandmother's intent as set forth in the trust amendment. Moriarty argues that an attorney has no generalized duty to ensure that his or her client's devises are actually funded, citing case law from other jurisdictions. But beyond the fact that such cases are

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[3] For a similar reason, we reject Moriarty's reliance on *Kinney v. Shinholser*, 663 So. 2d 643, 645 (Fla. 5th DCA 1995), which dealt with a will provision that failed to detail the testator's alleged intention to minimize taxes, thereby precluding the introduction of extrinsic evidence to prove otherwise.

nonbinding on this court, we find them factually distinguishable. This case does not involve a devise referring generally to any interests in any trusts or property that the grantor had at the time of the grantor's death thereby raising the issue of whether an attorney is obligated to continue to monitor the status of property mentioned in a testamentary document. *Cf. Soignier v. Fletcher*, 256 P.3d 730 (Idaho 2011) (explaining that where a will included a devise of "beneficial interests" that the grantor had in any trusts if any existed at the time of the testator's death but where no such interests existed upon the testator's death, the will was not deficient because "attorneys have no ongoing duty to monitor the legal status of the property mentioned in a testamentary instrument"); *Stangland v. Brock*, 747 P.2d 464, 465-66, 469 (Wash. 1987) (en banc) (concluding that where testator's will provision devised "any and all real property owned by me at the time of my death" to the appellant, but where testator subsequently sold the "only real property of substantial value" prior to his death, the attorney who drafted the will had no continuing obligation to monitor whether the testator continued to own the property and to advise the testator as

to the effect of the sale on his testamentary intent). Rather, in this case, Ellerson's grandmother intended to devise the 17th Street Property, and Ellerson alleges that despite Moriarty's verbal assertion that he would draft and record a deed for that property to be transferred into the trust, he failed to do so. Thus Ellerson alleges that her grandmother's testamentary intent was frustrated from the outset. The fact that Ellerson alleges an express verbal agreement by Moriarty to undertake that duty also distinguishes this case from *Leavenworth v. Mathes*, 661 A.2d 632, 633-35 (Conn. App. Ct. 1995).

Furthermore, we are not convinced that permitting a claim such as Ellerson's to move forward necessarily results in a conflict of loyalties between Ellerson, her grandmother, any other named beneficiaries, and Moriarty. Ellerson alleges that due to Moriarty's negligence, her grandmother's expressed testamentary intent regarding the 17th Street Property was frustrated and that, as a result, Ellerson's legacy was lost. Nothing more. Allowing the complaint to proceed does not mean that Ellerson will ultimately prevail. She still must prove that Moriarty specifically undertook

the duty that forms the basis of her allegations. But her complaint should not have been dismissed based on the conclusion that it failed to state a cause of action.

We recognize that the trial court believed its decision rested on a purely legal issue: whether an attorney could be held liable to an intended third-party beneficiary for failure of a trust devise where the trust document was facially valid. But as explained herein, that issue can only be determined after consideration of whether Moriarty specifically undertook the additional duty to fund the trust which is dependent on factual evidence, something that Ellerson was precluded from presenting due to the dismissal of her complaint.

We conclude that Ellerson's complaint contains allegations sufficient to bring it within the intended third-party beneficiary exception to the privity requirement and that, therefore, Ellerson had standing to sue Moriarty. The complaint contains sufficient ultimate facts, which, if proven, establish that (1) Ellerson was an intended third-party beneficiary of her grandmother's trust; (2) her grandmother intended for the 17th Street Property to pass to her;

(3) Moriarty did not limit the scope of his services to exclude the drafting and recording of a deed related to the 17th Street Property to fund the trust; and (4) Moriarty expressly agreed in conversations with Ellerson and her grandmother that he would draft and record a deed to transfer the 17th Street Property into the trust to effectuate Ellerson's grandmother's intent. Accepting, without finding, the complaint's allegations as true, Ellerson's grandmother's intent was frustrated by Moriarty's alleged negligence in agreeing to but failing to draft and record the aforementioned deed and, as a result, Ellerson's legacy was lost. Accordingly, the complaint stated a cause of action, and the trial court erred in dismissing Ellerson's complaint with prejudice.[4]

Reversed and remanded.

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[4] Our disposition should in no way be interpreted to mean that an attorney has an inherent duty to or implicitly agrees to fund a trust which he or she drafted in the absence of an express agreement to do so. That is not the issue before us, and we leave its resolution for another day.

Further, our decision that the complaint should have survived a motion to dismiss should not be interpreted as an opinion on the merits of the underlying complaint.

CASANUEVA and STARGEL, JJ., Concur.

Opinion subject to revision prior to official publication.