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Tort Law (Legal Malpratice) - Attorneys May Owe a Duty to Statutory Beneficiaries Regardless of Privity: Leyba v. Whitley

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TORT LAW (LEGAL MALPRACTICE)—Attorneys May Owe a Duty to Statutory Beneficiaries Regardless of Privity: *Leyba v. Whitley*

I. INTRODUCTION

In *Leyba v. Whitley*,[1] the New Mexico Supreme Court held that an attorney handling a wrongful death case may owe a duty of reasonable care to the statutory beneficiaries to protect and maximize their interest in any proceeds obtained. The court did not require privity of contract between the attorney and the statutory beneficiary.[2] Instead, it adopted a multi-factor balancing test, prefaced by a threshold question of intent to benefit the plaintiff, to determine duty.[3] This Note examines the tests used to determine if an attorney owes a duty to a non-client, analyzes the *Leyba* decision, and discusses its implications for attorneys.

II. STATEMENT OF THE CASE

Phillip Urioste died in February, 1990.[4] His mother, Corrine Urioste, hired attorney Joseph E. Whitley to pursue an action against several medical care providers. Whitley had Corrine appointed as personal representative of her son's estate. He associated with attorney Daniel W. Shapiro to pursue wrongful death claims.[5] Prior to commencing a wrongful death action, Whitley and Shapiro secured a settlement in March, 1991 for over $500,000. Before settlement of the wrongful death claim, the attorneys determined that Candace Leyba's six-month child, Phillip LeRoy Urioste, was the sole statutory beneficiary of Phillip Urioste.[6] Phillip had fathered two other children who had been adopted by others prior to his death. The court did not review whether the right to the wrongful death proceeds of these two children survived their adoption.[7]

Whitley and Shapiro distributed the net settlement proceeds directly to Corrine in three separate checks all made payable only to "Corrine

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1. 120 N.M. 768, 907 P.2d 172 (1995).
2. *Id.* at 774, 907 P.2d at 178.
3. *Id.* at 775, 907 P.2d at 179.
4. Unless otherwise noted, the facts in this opinion are set out in *Leyba*, 120 N.M. at 769-71, 907 P.2d at 173-75.
5. *See* N.M. STAT. ANN. § 41-2-1 to -4 (Repl. Pamp. 1989). New Mexico's Wrongful Death Act allows for a personal injury claim to survive the death of the injured. N.M. STAT. ANN. § 41-2-1. The Act requires that even such action "shall be brought by and in the name of the personal representative or representatives of such deceased person." N.M. STAT. ANN. § 41-2-3.
6. New Mexico's Wrongful Death Act states: "[P]roceeds of any judgment obtained . . . shall be distributed as follows: . . . if there be no husband or wife, but a child or children, . . . then to such child or children . . . ." N.M. STAT. ANN. § 41-2-3. Phillip LeRoy was born nearly seven months after Phillip died. *Leyba*, 120 N.M. at 770, 907 P.2d at 174.
7. *See, e.g.*, J.P. Ludington, Annotation, *Child adopted by another as beneficiary of action or settlement for wrongful death of natural parent*, 67 A.L.R. 2d. 745 (1959) (discussing whether the right to wrongful death proceeds survive the adoption of children and Rust v. Holland, 146 N.E.2d 82 (Ill. Ct. App. 1957), *reprinted in* 67 A.L.R. 2d 739).

Urioste." The checks contained no annotation that they were paid to Corrine as fiduciary for Phillip LeRoy. Corrine spent more than $300,000 of the proceeds on herself and others. Of the total settlement, she reserved only $20,000 for Phillip LeRoy.

Candace Leyba is the mother and conservator of Phillip LeRoy Urioste. She commenced an action against Whitley and Shapiro in an attempt to recover the wrongful death proceeds for her infant son.

At trial, the parties presented conflicting evidence on the question of whether Whitley and Shapiro had advised Corrine of her fiduciary obligations. Corrine testified she believed the money was hers. Leyba presented testimony in which Corrine stated that Whitley had told her the money belonged to her. She also presented evidence that Whitley had prepared a contract for Corrine to purchase a mobile home which included a clause making Corrine's performance contingent upon a wrongful death recovery. Whitley and Shapiro, in their defense, presented sworn statements that they had advised Corrine the money was not hers and that other persons had advised Corrine of her fiduciary status. It was undisputed, however, that Whitley and Shapiro did not provide Corrine with written advice or instructions regarding her fiduciary obligations in connection with the settlement proceeds.

The trial court entered summary judgment in favor of Whitley and Shapiro. "[T]he Court of Appeals held that the attorneys did not owe a duty directly to Phillip LeRoy [Urioste] to ensure that he receive[d] the settlement proceeds."[8] The Court of Appeals stated, however, that Whitley and Shapiro owed a duty to their client, Corrine Urioste, to inform her that the money did not belong to her and that she had a fiduciary duty to distribute it to the child.[9] As a result, "[t]he attorneys would be liable to the child if they breached this duty to their client."[10]

The New Mexico Supreme Court granted certiorari to review the issue of whether the attorneys directly owed the statutory beneficiary a duty of reasonable care to protect his right to receive the net settlement proceeds of the wrongful death action. The supreme court held that the public policy of New Mexico supports a duty owed by the attorneys directly to the statutory beneficiary in a wrongful death action.[11]

III. BACKGROUND

A. Wrongful Death Actions in New Mexico

New Mexico has recognized an action for wrongful death since 1882.[12] The Wrongful Death Statute provides a cause of action to listed bene-

8. *Leyba*, 120 N.M. at 770, 907 P.2d at 174 (citing Leyba v. Whitley, 118 N.M. 435, 438-40, 882 P.2d 26, 29-31 (Ct. App. 1994), *rev'd*, 120 N.M. 768, 907 P.2d 172 (1995)).

9. *Leyba*, 118 N.M. at 445, 882 P.2d at 36.

10. *Leyba*, 120 N.M. at 770, 907 P.2d at 174.

11. *Id.*

12. *See* N.M. STAT. ANN. § 41-2-1.

ficiaries of a decedent when death prevents the injured party from maintaining the action.[13] The Wrongful Death Statute also promotes safety of life and limb by making negligence costly to the wrongdoer.[14] Since one purpose of the Wrongful Death Statute is to punish wrongdoers, there is no requirement of pecuniary injury to a statutory beneficiary, nor is there a requirement to have a statutory beneficiary at all.[15]

> The wrongful death act, which we have characterized as a survival statute, provides a cause of action for the benefit of the statutory beneficiaries to sue a tortfeasor for the damages, measured by the value of the decedent's life, which the decedent himself would have been entitled to recover had death not ensued.[16]

An action under the Wrongful Death Statute may be brought only by a personal representative.[17] New Mexico courts have construed broadly who may serve as a personal representative and bring suit, but it is typically the administrator of the estate of the deceased.[18] The personal representative is only a nominal party, whom the Legislature selected to act as the statutory trustee for the individual statutory beneficiaries.[19]

The personal representative may or may not have an interest in the proceeds of the wrongful death action.

B. Erosion of the Privity Requirement for Legal Malpractice Actions

Traditionally, only a client could bring a malpractice action against an attorney.[20] An attorney was not liable for non-intentional[21] harms he may have caused to non-clients while representing a client.[22] Courts regarded privity of contract as a requirement of liability in a malpractice action.[23] The United States Supreme Court first articulated this rule in *Savings Bank v. Ward*.[24] In *Ward*, the United States Supreme Court held that an attorney was not liable to non-client lenders, who, in reliance upon the attorney's title opinion, had suffered financial loss.[25] The attorney was not liable because no privity of contract existed, nor was there any evidence of fraud or collusion.[26]

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13. *See supra* note 5.
14. *See, e.g.*, Stang v. Hertz Corp., 81 N.M. 348, 350-51, 467 P.2d 14, 16-17 (1970).
15. *See* Hogsett v. Hanna, 41 N.M. 22, 29-30, 63 P.2d 540, 544-45 (1936).
16. Solon v. Wek Drilling Co., 113 N.M. 566, 568, 829 P.2d 645, 647 (1992).
17. N.M. STAT. ANN. § 41-2-3. *See also supra* note 5.
18. *See* Chavez v. Regents of the Univ. of New Mexico, 103 N.M. 606, 609, 711 P.2d 883, 886 (1985).
19. *See* Dominguez v. Rogers, 100 N.M. 605, 608, 673 P.2d 1338, 1341 (Ct. App.), *cert. denied*, 100 N.M. 689, 675 P.2d 421 (1983).
20. *See* 1 RONALD E. MALLEN & JEFFERY M. SMITH, LEGAL MALPRACTICE § 7.1, at 360 (3d ed. 1989).
21. Attorneys could be held liable to non-clients for intentional torts and in contract. *See id.* § 6, at 285.
22. *See id.* § 7.4, at 365.
23. *Id.* § 7.2, at 361.
24. 100 U.S. 195 (1879).
25. *Id.* at 205-06.
26. *Id. See also* Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y. 1931) (Justice Cardozo refused to expand privity in a case involving accountants, explaining that privity was intended to prevent unlimited liability to an indeterminate class of individuals.).

While many jurisdictions still articulate the general rule that an attorney owes a duty only to his client, "the vast majority of modern decisions have favored expanding privity beyond the confines of the attorney-client relationship where the plaintiff was intended to be *the* beneficiary of the lawyer's retention."[27] To recognize this duty, courts utilize balancing tests such as the California multi-factor balancing test or the third-party beneficiary test.[28] Regardless of the approach used, courts have held there must be a basis for a duty between the plaintiff and the attorney.[29]

The California multi-factor balancing test was established by the California Supreme Court in *Lucas v. Hamm*.[30] This six-criteria test, premised upon public policy considerations, is used to determine whether a duty exists to a third person. The six criteria are as follows: (1) the extent to which the transaction was intended to affect 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) whether recognition of liability under the circumstances would impose an undue burden on the profession.[31] Many jurisdictions have adopted this approach to determine duty in a variety of contexts not involving legal malpractice.[32]

While many of these jurisdictions have not yet applied this test, in cases of professional malpractice liability to third parties, the balancing factors have been favorably discussed as likely to have future application to attorneys and other professionals.[33] The California approach is premised upon a duty imposed by the judiciary as a matter of public policy;[34] contractual privity rights are, therefore, superfluous to the obligation.

Under the third-party beneficiary approach, conversely, the determinative question is whether both the attorney and the client intended the plaintiff to be the beneficiary of legal services.[35] The parties' intent, rather than judicial notions of public policy, determines whether the non-client may successfully sue the attorney. Thus, for courts adopting the third-party beneficiary test,[36] the determinative question is whether the principal purpose of the attorney's services is to benefit the non-client.[37] An incidental benefit will not suffice.[38]

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27. MALLEN & SMITH, *supra* note 20, § 7.10, at 379.
28. *See infra* notes 30-39 and accompanying text.
29. MALLEN & SMITH, *supra* note 20, § 7.11, at 381.
30. 364 P.2d 685 (Cal. 1961) (en banc), *cert. denied*, 368 U.S. 987 (1962).
31. *Id.* at 687-88.
32. *See* MALLEN & SMITH, *supra* note 20, § 7.11, at 383 n.5 (states that have adopted the California approach include Arizona, Connecticut, Georgia, Hawaii, Indiana, Maryland, Minnesota, Mississippi, North Carolina, New Jersey, New York, Oregon, Pennsylvania and Wisconsin).
33. *See id.* § 7.11, at 384.
34. *Id.* § 7.11, at 383.
35. *Id.* § 7.11, at 385.
36. This test is utilized primarily by Illinois and Florida. *See id.* § 7.11, at 384 n.8.
37. MALLEN & SMITH, *supra* note 20, § 7.11, at 384.
38. *Id.* § 7.11, at 385.

The Supreme Court of Washington found that absent privity of contract, Washington courts had applied both tests to ascertain if an attorney owed a duty to a non-client.[39] In order to clarify its law on the recognition of an attorney's duty to a non-client, the Washington Supreme Court created its own variation of the California multi-factor balancing test.[40] In *Leyba v. Whitley*, the New Mexico Supreme Court adopted this test for an attorney's duty to a non-client.[41]

1. Washington's Approach for Recognizing a Duty to a Non-Client

In *Trask v. Butler*,[42] the Supreme Court of Washington melded the California multi-factor balancing test and the third-party beneficiary test to determine if an attorney owed a duty to a non-client.[43] The Washington Supreme Court stated both tests were created to determine whether an attorney owes a duty to a non-client and both tests focus on the purpose of establishing the attorney-client relationship.[44]

The *Trask* court then created and adopted a "modified multi-factor balancing test."[45] The court applied a threshold inquiry as to whether the plaintiff is an intended beneficiary of the transaction to which the advice pertained.[46] The court emphasized the need for an intended, rather than incidental, beneficiary.[47] If there is no intent to benefit the non-client, then no duty exists, and the multi-factor test elements are not examined.[48] If there is an intent to benefit the third-party, then the remaining factors are examined: (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury, (4) the policy of preventing future harm, and (5) the extent to which the profession would be unduly burdened by a finding of liability.[49]

2. Defining "Intent to Benefit the Plaintiff"

Courts have repeatedly stated, regardless of which theory is used to ascertain a duty to a non-client, "the determinative question is, did *both* the attorney and the client intend the plaintiff to be the beneficiary of legal services?"[50] The test is "whether the intent to benefit actually existed, not whether there could have been an intent to benefit the third party."[51] Courts have been more willing to establish a duty, premised upon intent,

39. *See* Trask v. Butler, 872 P.2d 1080, 1083 (Wash. 1994) (en banc).
40. *Id.* at 1084.
41. 120 N.M. 768, 775, 907 P.2d 172, 179 (1995).
42. 872 N.M. 1080 (Wash. 1994) (en banc).
43. *Id.*
44. *Id.*
45. *See id.*
46. *See id.*
47. *See id.*
48. *Id.*
49. Trask v. Butler, 872 P.2d at 1084.
50. MALLEN & SMITH, *supra* note 20, § 7.11, at 385.
51. Flaherty v. Weinberg, 492 A.2d 618, 625 (Md. 1985).

in non-adversarial proceedings such as drafting wills for the benefit of intended beneficiaries.[52]

While no jurisdiction has specifically defined "intent to benefit," an attorney could contract with the paying client as to whom the intended beneficiary of the action is. The attorney then would know to whom a duty was owed besides the client. Examples of situations in which courts have held an attorney did not have a duty to a third-party because there was no intent to benefit include the following: an action brought by mortgagor home purchasers involving an attorney hired to represent the mortgagee in a home purchase;[53] an action brought by one of several incorporators against an attorney representing only one incorporator;[54] and an action brought by wives of clients against attorney for advising clients to sign loan documents for a second mortgage on their residences.[55] In addition, it has been held that an attorney does not owe a duty to unnamed members of a class action where the class was never certified.[56]

IV. RATIONALE OF THE *LEYBA* COURT

The *Leyba* court found an attorney pursuing a wrongful death action may have a duty to the beneficiaries of the action.[57] Recognition of duty is a question of law and based upon policy considerations.[58] The court stated New Mexico's public policy supports recognition of a duty owed by attorneys to statutory beneficiaries in a wrongful death action.[59] The court then examined New Mexico tort law for professional malpractice.[60]

New Mexico tort law recognizes "an attorney's duty to provide professional services with the skill, prudence, and diligence of attorneys of ordinary skill and capacity."[61] In *Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor*,[62] the court stated in order to recover on a claim for legal malpractice based upon negligence, a plaintiff must prove three elements: (1) the employment of the defendant attorney; (2) the

52. Pelham v. Griesheimer, 440 N.E.2d 96, 100 (Ill. 1982).

53. *See Flaherty*, 492 A.2d at 629.

54. *See* Torres v. Divis, 494 N.E.2d 1227, 1231 (Ill. App. Ct. 1986).

55. *See* York v. Stiefel, 458 N.E.2d 488, 492-93 (Ill. 1983).

56. *See* Formento v. Joyce, 522 N.E.2d 312, 316 (Ill. App. Ct. 1988).

57. Leyba v. Whitley, 120 N.M. 768, 770, 907 P.2d 172, 174 (1995).

58. *See id.* at 771, 907 P.2d at 175 (citing Schear v. Board of County Comm'rs, 101 N.M. 671, 672, 687 P.2d 728, 729 (1984) (emphasizing that while the question of negligence is for the jury, the issue of whether a duty exists is a question of law for the judge to decide); Calkins v. Cox Estates, 110 N.M. 59, 62, 792 P.2d 36, 39 (1990) (finding that public policy supported the recognition of a duty owed by a landlord to a child tenant for failure to maintain playground fences in a wrongful death action). *See also* Torres v. State, 119 N.M. 609, 894 P.2d 386 (1995); Madrid v. Lincoln County Medical Center, ____N.M. ____, 909 P.2d 14 (Ct. App. 1995), *cert. granted*, 120 N.M. 828, 907 P.2d 1009 (1995).

59. *Leyba*, 120 N.M. at 771, 907 P.2d at 175.

60. *See id.* at 772, 907 P.2d at 176.

61. *Id.* (citing Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor, 115 N.M. 159, 162-63, 848 P.2d 1086, 1089-90 (Ct. App.), *cert. denied*, 115 N.M. 60, 846 P.2d 1069 (1993)).

62. 115 N.M. 159, 848 P.2d 1086 (Ct. App.), *cert. denied*, 115 N.M. 60, 846 P.2d 1069 (1993).

defendant attorney's neglect of a reasonable duty; and (3) the negligence resulted in and was the proximate cause of loss to the plaintiff.[63]

Before *Hyden*, the New Mexico Supreme Court already had applied a multi-factor balancing test in a professional malpractice case.[64] In *Steinberg v. Coda Roberson Construction*,[65] the court eliminated the privity of contract requirement and applied an early version of the California multi-factor test for liability on a negligence theory.[66] The *Steinberg* court allowed a subsequent homeowner to recover from a building contractor damages still covered under a warranty given to the original homeowner.[67]

In *Wisdom v. Neal*,[68] a malpractice action, the Federal District Court of New Mexico, interpreting what it perceived to be New Mexico law, concluded that a lawyer's duty to a non-client would be recognized in New Mexico.[69] Judge Bratton applied the *Steinberg* multi-factor balancing test[70] and held that New Mexico law permitted the beneficiaries of a will to sue a lawyer who had incorrectly distributed the property of an estate per stirpes instead of per capita.[71]

In *Leyba*, the Supreme Court of New Mexico examined New Mexico case law and the case law of other jurisdictions on duty in a professional context and found that recognizing a lawyer's duty to a non-client in a wrongful death action is a logical step in New Mexico law.[72] The court found the Supreme Court of Washington's test, set forth in *Trask v. Butler*, for an attorney's duty to a non-client to be the most useful for determining an attorney's duty to a non-client in a wrongful death action.[73] The court stated that "[t]he authority of a personal representative to bring suit for wrongful death stems solely from the Wrongful Death Act . . . and the personal representative's sole task under that Act is to distribute any recovery in strict accordance with the statute."[74] Because the personal representative has no fiduciary interest in the action, "there can be no other purpose of an attorney-client agreement to pursue claims for wrongful death than to benefit those persons specifically designated by the Act as statutory beneficiaries."[75]

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63. *Id.* at 162-63, 848 P.2d at 1089-90. The second element is proven through expert testimony that services were below the standard of an attorney of ordinary skill and capacity. *Hyden*, 115 N.M. at 163, 848 P.2d at 1090.

64. *See* Steinberg v. Coda Roberson Constr., 79 N.M. 123, 440 P.2d 798 (1968).

65. *Id.*

66. *Id.* at 124-25, 440 P.2d at 799-800 (citing Stewart v. Cox, 362 P.2d 345 (Cal. 1961) (en banc) (finding that liability is a matter of policy and involves a balancing of factors)).

67. *Id.* at 124, 440 P.2d at 799.

68. 568 F. Supp. 4 (D. N.M. 1982).

69. *Id.*

70. *See id.* at 7-8.

71. *Id.*

72. *Leyba v. Whitley*, 120 N.M. 768, 775, 907 P.2d 172, 179 (1995).

73. *Id.*

74. *Id.* at 776, 907 P.2d at 180 (citing Henkel v. Hood, 49 N.M. 45, 47, 156 P.2d 790, 791 (1945)).

75. *Id.*

The court did recognize and adopt an "adversarial exception" to an attorney's duty to a non-client.[76] The court refused to find that a duty was owed to a non-client when the owing of such a duty would detract from the attorney's ethical obligation to act as an advocate for his client.[77] The court stated that, in a wrongful death action, public policy prevents recognition of a duty to a non-client when recognition would burden the attorney's relationship with the client.[78] The New Mexico Supreme Court previously had recognized the inappropriateness of an attorney owing a duty to an adverse party.[79] In *Garcia v. Rodey, Dickason, Sloan, Akin & Robb*,[80] the court stated:

> An attorney has no duty however to protect the interests of a non-client adverse party for the obvious reasons that the adverse party is not the intended beneficiary of the attorney's services and that the attorney's undivided loyalty belongs to the client. . . . An adverse party cannot justifiably rely on the opposing lawyer to protect him from harm . . . .[81]

V. THE IMPACT OF THE *LEYBA* DECISION UPON PRACTITIONERS

The decision in *Leyba* broadens the scope of an attorney's liability for malpractice. First, the court imposed additional duties and burdens on practitioners pursuing wrongful death actions. Second, the court strongly implied that attorneys representing parents or a "next friend" in an action involving a child additionally would owe a duty to that child.[82] Third, the court will likely hold that an attorney has a duty to a beneficiary of a will.

A. Obligations and Burdens on Practitioners Pursuing Wrongful Death Actions

An attorney pursuing a wrongful death action involving multiple beneficiaries is obligated to look for and identify potential conflicts among beneficiaries.[83] An attorney owes a duty to all of the beneficiaries, unless an adversarial relationship develops and the attorney expressly tells the adversarial parties he can no longer represent them.[84]

1. Potential Adversarial Relationships

The potential for an existing or future adversarial relationship amongst statutory beneficiaries is likely. The *Leyba* court failed to consider the

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76. *See id.*
77. *Id.* (citing Trask v. Butler, 872 P.2d 1080, 1085 (Wash. 1994) (en banc)).
78. *Leyba*, 120 N.M. at 778, 907 P.2d at 182.
79. *See* Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 106 N.M. 757, 761, 750 P.2d 118, 122 (1988).
80. *Id.*
81. *Id.* (citations omitted).
82. *See Leyba*, 120 N.M. at 776 n.5, 907 P.2d at 180 n.5.
83. *Id.* at 776. 907 P.2d at 180.
84. *Id.* at 778, 907 P.2d at 182.

complexity of relationships among multiple statutory beneficiaries. For example, a common, potentially adversarial, scenario exists when a mother/wife is a wrongful death action beneficiary and is interested in the funds to pay off debts, while one of her children, who is also a beneficiary, needs funds to provide for her well-being, and another child-beneficiary needs funds for higher education. All are beneficiaries and all have different, and possibly competing, needs. An attorney may be able to represent only one of these clients due to the clients' potentially adversarial relationship to each other arising from differing interests in the wrongful death action.

If an adversarial relationship could potentially develop between statutory beneficiaries, must an attorney always assume the existence of a conflict and plan his representation to include only the personal representative at the beginning of an action? If a separate attorney is required for each statutory beneficiary, the financial incentives for an attorney to handle a wrongful death action for a client who may receive one-third or less of the total proceeds may diminish. If a practitioner initially represents the personal representative and all of the beneficiaries harmoniously and then later becomes enmeshed in their adversarial relationships, can the practitioner withdraw at this time? The attorney who continues to represent one of the clients in a conflicted action also may have problems arising from any information he learned previously that is protected under the attorney-client privilege. Unfortunately, the *Lebya* decision does not give any guidance for handling these dilemmas.

The *Leyba* court did define the "adversarial exception" as a solution to potential conflicts arising under circumstances involving personal representatives who may not be statutory beneficiaries and children who are the only beneficiaries.[85] In many wrongful death cases, however, there are several statutory beneficiaries, with one of them serving as the personal representative. As indicated above, each beneficiary is likely to have different needs and expectations from a wrongful death action, resulting in an adversarial relationship.

In *Klancke v. Smith*,[86] the Colorado Court of Appeals, confronted with a similar case involving several adversarial beneficiaries, declined to recognize a duty owed by attorneys to the non-client statutory beneficiaries in a wrongful death action.[87] In this case, an adversarial relationship developed to such an extent that an attorney could not have represented both the personal representative and the other statutory beneficiaries.[88] The *Leyba* court considered *Klancke* in reaching its decision, but found that the adoption of an "adversarial exception" in *Leyba* would cover factual situations similar to those presented in *Klancke*.[89] In any case

85. *See id.* at 778, 907 P.2d at 182.
86. 829 P.2d 464 (Colo. Ct. App. 1991), *cert. denied*, ____P.2d ____(1992).
87. *Id.* at 467.
88. *See id.* at 466.
89. *Leyba*, 120 N.M. at 777, 907 P.2d at 181.

involving multiple beneficiaries, however, the "adversarial exception" will likely become the norm.

2. Steps an Attorney Must Take After the Recognition of an Adversarial Relationship

If the attorney needs to utilize the "adversarial exception" to eliminate a duty to a third-party, the *Leyba* court provided very specific guidance for terminating this duty. The court stated that an attorney's duty to a third party ends only upon communication by the attorney to the third party where the "third party knows or should know that he or she cannot rely on the attorney to act for his or her benefit."[90] Thus, in order to terminate a duty to the third party, the attorney must first, identify the conflict and second, communicate explicitly to the third party that he or she can no longer rely on the attorney for representation.

3. An Attorney May Use Contract to Define a Duty

An attorney can contract with the client and explicitly define who the intended beneficiary of the action is. The *Leyba* court's decision to adopt a balancing test to determine duty absent privity of contract, is premised on the requirement of a "mutual intent of the attorney and client to benefit" the third party.[91] Thus, by contracting with the client, the attorney will know specifically to whom he owes a duty. An attorney may create an ethical problem, however, if he is contracting to protect *his* best interests in regard to potential duties to third parties at the expense of his duty to his client and his client's interests.

Even if an attorney contractually determined the intended beneficiary, he still may not owe a duty to the statutory beneficiary. The *Leyba* court adopted a modified multi-factor balancing test.[92] "Intent to benefit" is the threshold, followed by a balancing of the remaining factors to determine if a duty is owed to the non-client.[93] Those remaining factors are the following: (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury; (4) the policy of preventing future harm; and (5) the extent to which the profession would be unduly burdened by a finding of liability.[94]

B. Actions Involving Parents or "Next Friend"

The *Leyba* court stated that "an attorney who agrees to represent a parent or next friend in pursuit of a cause of action for a child" would likely owe a duty to the child.[95] Since the child is the beneficiary of the

90. *Id.* at 778, 907 P.2d at 182.
91. *Id.* at 776, 907 P.2d at 180.
92. *See id. See also supra* notes 42-48 and accompanying text.
93. *Id.* at 775, 907 P.2d at 179.
94. *Leyba*, 120 N.M. at 775, 907 P.2d at 179. *See also supra* notes 42-48 and accompanying text.
95. *Leyba*, 120 N.M. at 776 n.5, 907 P.2d at 180 n.5.

action, where the parents are the clients, the attorney must now ensure that any action is also in the best interest of the child.

The New Mexico Court of Appeals examined attorney malpractice in an action on behalf of a child in *Collins* ex rel. *Collins v. Perrine*.[96] *Collins* involved an action against several hospitals for severe, permanent damage to an infant caused by delayed diagnosis and treatment of spinal meningitis.[97] The attorney settled part of the case on behalf of the child with approval of the parents as guardians and clients for a paltry sum.[98] The court found the attorney liable to the parents for negligently settling the case, despite the fact the parents had approved the settlement.[99] The *Leyba* court's reference to an attorney's duty to the child of such an action is a recognition of the principles used to decide *Perrine*.

C. *Action Involving Beneficiaries of a Will*

While the *Leyba* court adopted the modified multi-factor test for wrongful death, it did not disapprove of the holding by the federal district court in *Wisdom v. Neal* for legal malpractice in a negligently drafted will.[100] If a similar fact pattern for a negligently drafted will arose in a New Mexico state court today, that court's application of the test for duty adopted by *Leyba* would undoubtedly hold an attorney liable to a third-party beneficiary of a negligently drafted will. Applying the threshold "mutual intent to benefit the third party" test,[101] a court would find that the purpose of a client engaging a lawyer to draft a will is to benefit the intended beneficiaries of the will. A balancing of the remaining factors would strongly conclude the attorney owes a duty to the third party.

VI. CONCLUSION

In *Leyba*, the New Mexico Supreme Court held that an attorney owes a duty to a non-client in a wrongful death action absent an adversarial relationship between the personal representative and the statutory beneficiary. The court stated a duty also would be recognized in "next friend" suits and other statutory rights. The court left the door open to further expand an attorney's duty to a non-client. This holding requires practitioners to carefully examine their relationships with clients and non-clients who stand to directly benefit from the services the attorney is providing to the client.

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96. 108 N.M. 714, 778 P.2d 912 (Ct. App.), *cert. denied*, 108 N.M. 681, 777 P.2d 1325 (1989).
97. *Id.* at 715-16, 778 P.2d at 913-14.
98. *Id.* at 716, 778 P.2d at 914.
99. *Id.* at 717, 778 P.2d at 915.
100. *See Leyba*, 120 N.M. at 774, 907 P.2d at 178.
101. *Id.* at 775, 907 P.2d at 179.