IN THE CIRCUIT COURT OF MACON COUNTY, MISSOURI

MARY KATHRYN CROKER-WYSS, Plaintiff,	)	
vs.	)	Case No. **23MA-CC00020**
PHILIP BRISCOE, Personal Representative of the Estate of John Wilford Briscoe, *et al.*, Defendants.	)	

DEFENDANT BRANNON'S MOTION TO DISMISS

COMES NOW Defendant Joseph A. Brannon, and moves the Court to dismiss Plaintiff's Second Amended Petition for failure to state a claim upon which relief can be granted. In support thereof, Defendant states as follows:

Plaintiff's Second Amended Petition fails to allege facts to meet the requirement of the *Donahue* privity exception, in that the decedent client did not execute a testamentary document memorializing her alleged intent to leave an 80-acre parcel of property to Plaintiff.

The issue presented in this motion is whether this Court should expand the *Donahue* privity exception to grant standing to a non-client plaintiff to pursue a legal malpractice claim as a prospective beneficiary based on what the deceased client might have done. Notwithstanding the additional allegations in Plaintiff's Second Amended Petition, the ultimate question remains whether the deceased client specifically intended to benefit the non-client Plaintiff – an intent that Missouri appellate courts have required to be evidenced by a failed testamentary document, because naming a beneficiary in a testamentary document provides a clear and reliable manifestation of the client's intent. In the absence of an executed testamentary document, there is no clear indication based on admissible evidence that the deceased client intended to confer the specific benefit.

NO CAUSE OF ACTION BY NON-CLIENTS WHO CLAIM A SUCCESSFUL ESTATE PLANNING DOCUMENT SHOULD HAVE INCLUDED ADDITIONAL PROPERTY FOR THEM

Plaintiff does not claim she had an attorney-client relationship with Defendants. It is a well established general rule that the obligation of the attorney is to the client, not a third-party. An exception to the attorney-client privity requirement permits intended beneficiaries of a failed testamentary document to bring a legal malpractice action. *Donahue v. Shughart, Thompson & Kilroy*, 900 S.W.2d 624 (Mo. banc 1995). *See also Johnson v. Sandler, Balkin, Hellman & Weinstein*, 958 S.W.2d 42, 49 (Mo. App. W.D. 1997) (only "intended beneficiaries of failed testamentary transfers [have] some avenue of recovery in malpractice claims[.]") The *Donahue* exception does not apply here because Plaintiff has not alleged the failure of a testamentary document to transfer the 80-acre parcel. Nor has Plaintiff alleged any testamentary document identifying her as the sole beneficiary of the 80-acre parcel; nor has Plaintiff alleged admissible evidence showing that client Margaret Caldwell ("Client") intended Plaintiff to be the sole beneficiary of the 80-acre parcel.

The *Donahue* and *Johnson* Cases

In *Donahue*, testamentary transfers including a property deed were invalid, and thus failed to achieve the described transfer to the intended beneficiaries. The Missouri Supreme Court imposed on the drafting attorneys a legal duty to the non-client intended beneficiary where the failed testamentary document described the property and identified the non-client as an intended beneficiary under the failed document. *See also Johnson*, *Id.* at 49.

Under both *Donahue* and *Johnson*, non-clients had standing to pursue a legal malpractice action because the intent to benefit the non-clients was clearly manifested within the executed estate planning document that failed to fulfill its purpose: 1) the testamentary documents identified the plaintiffs as the intended beneficiaries; and 2) the testamentary documents identified the property intended to have been transferred to the plaintiffs.[1]

Accordingly, a client's intent to benefit a non-client must be determined from within the four corners of an executed document. "[T]he law of this state is, and for many years has been, well-settled that absent any ambiguity in the terms of a legal instrument, the intent of its maker, including the intent of a testator or the settlor of a testamentary or *inter vivos* trust, is to be ascertained from the four corners of the instrument without resort to parol evidence as to that intent." *Fallon v. Easley*, 686 S.W.3d 287, 293 (Mo. App. E.D. 2024). The *Donahue* and *Johnson* plaintiffs were able to maintain a cause of action because they were able to establish from executed documents that they were intended beneficiaries of specifically identified assets and property. *Donahue*, 900 S.W.2d at 629; *Johnson*, 958 S.W.2d at 52. Here, Plaintiff does not allege that the 2012 Beneficiary Deed, will, nor any other testamentary or other estate planning document failed to achieve its stated purpose. Without a failed testamentary document specifically identifying the beneficiary of the property, there can be no "intended" beneficiary that may proceed with a legal malpractice action.

SIMILAR CLAIMS WERE REJECTED IN *ALBERTS V. TURNBULL*

In *Alberts v Turnbull Conway*, the Western District rejected claims very similar to those alleged in Plaintiff's Second Amended Petition. 641 S.W.3d 370, 376 (Mo. App. W.D. 2022) (copy of opinion attached). In *Alberts*, the plaintiffs claimed the attorneys had a duty to ensure the client signed a testamentary document naming plaintiffs as beneficiaries. The trial court was

[1] However, attorneys owe no duty to "prospective beneficiaries" of an unsigned testamentary document. *Alberts v Turnbull Conway*, 641 S.W.3d 370, 375 (Mo. App. W.D. 2022).

correct in granting the defendants' motion to dismiss, because the *Alberts'* plaintiffs did not allege any failed testamentary document identifying them as beneficiaries to particular property. *See also Fall v. Easley*, 686 S.W.3d 287 (Mo. App. E.D. 2024) (affirming summary judgment in favor of defendant attorney).

A client's intent to benefit a non-client is speculative where the testamentary document is unsigned. *Alberts*, *Id.* Here, Client Caldwell's alleged intent is even more speculative as there exists no document naming Plaintiff as the sole beneficiary of the 80-acre parcel.

The risk of improper speculation is particularly high with estate planning documents because the deceased client can no longer testify as to her intent. *Alberts* at 377. Even if the client previously voiced intent to family or friends, that intent can change over time. *Alberts, Id.*

That Client Caldwell would have ultimately executed a beneficiary deed or other document leaving the 80-acre parcel solely to Plaintiff is necessarily speculative. *See Alberts* at 376. Imposing on an attorney a duty to prospective beneficiaries, who are not identified in executed documents, would invite claims premised on improper speculation regarding the deceased client's intent. *Alberts* at 377-378.

Plaintiff's Second Amended Petition does not allege the existence of any executed testamentary document showing that Client Caldwell intended Plaintiff to be the sole beneficiary of the 80-acre parcel. Because the client is deceased and cannot speak to her intentions, Plaintiff asks this Court to impose a duty on Defendant based on allegations that amount to inadmissible speculation or hearsay – or that even if taken as true, do not establish that the client would have executed a document transferring the 80-acres exclusively to Plaintiff. These allegations include:

a. Client Caldwell repeatedly stated it was her desire to leave the "Judy Place" to Plaintiff.

b. All other real estate of Client Caldwell passed by beneficiary deed.

c. The 80-acre parcel was disposed of through the will as estate residue.

d. Attorney Briscoe filed "Application for Letters of Administration" representing there was no real property in the estate.

e. The 80-acre 'frontage' was included in previous deeds.

f. The 2012 Beneficiary Deed used a description from the 1979 deed, which separately identified the 188-acre parcel and the 80-acre parcel, rather than using the "more modern" description in the 2010 Beneficiary Deed which combined the two parcels into a single 268-acre tract.

Harsh as it may seem, none of these allegations constitute admissible or reliable evidence of an intent by Client Caldwell to leave the 80-acre parcel solely to Plaintiff. Although Plaintiff contends the 80-acres should have been included in the 2012 Beneficiary Deed, her theory rests on hearsay and unproveable conjecture. For instance, while Plaintiff claims it was negligent for attorney Briscoe to use the 1979 deed with separate parcel descriptions, it is also plausible that he did so to comply with the client's instructions to transfer only the 188-acre parcel at that time.[2] The claim that Client Caldwell wanted the 80-acre parcel to be distributed exclusively to Plaintiff is grounded in improper speculation and, as explained in *Alberts*, fails under the *Donahue* analysis. *Alberts* at 377-379.

Furthermore, it is common for clients to change their minds about testamentary distributions, sometimes multiple times. *Alberts* at 377. An example of this is demonstrated by Client Caldwell's own changes to her estate planning. The 2010 Beneficiary Deed would have transferred the 80-acre parcel and the 188-acre parcel to both Plaintiff and her sister. Whereas, the 2012 Beneficiary Deed transferred only the 188-acre parcel, and solely to Plaintiff. Client

[2] Attorney Briscoe "[was] not sure whether it was intentional on [Client Caldwell's] part or a mistake on [his] part that one parcel containing 80 acres was omitted from the 2012 Beneficiary Deed[.]" *Ex. 3 to the Second Amended Petition.*

Caldwell's specific intent as to whether she would have executed a testamentary document leaving the 80-acre parcel exclusively to Plaintiff is unknowable and is inherently speculative. *See Alberts* at 377 & 378. Moreover, there is no "legal duty imposed upon attorneys (Defendants) to *prospective* beneficiaries for failure to prepare testamentary instruments that *might have been executed*[.]" *Alberts* at 378.

If the *Donahue* exception was not extended under the circumstances in *Alberts v. Turnbull* - where a testamentary document naming the plaintiffs as beneficiaries had been drafted but remained unsigned – then it would be even less appropriate to extend *Donahue* to the allegations presented here, where no document exists identifying Plaintiff as the sole beneficiary of the 80-acre parcel.

Conclusion

Plaintiff's Second Amended Petition fails to state a claim within the *Donahue* limited privity exception because Plaintiff does not allege facts demonstrating that the deceased client memorialized her alleged intent to transfer the 80-acre parcel solely to Plaintiff – an essential allegation necessary to establish that Defendant owed Plaintiff a duty of care. Without such duty, Plaintiff's legal malpractice action fails as a matter of law and, accordingly, the Court should dismiss Plaintiff's Second Amended Petition.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT JOSEPH A. BRANNON

Certificate of Service

On this 25th day of July 2025, the undersigned hereby certifies that the foregoing MOTION FOR JUDGMENT ON THE PLEADINGS and SUGGESTIONS thereto were served through the Court's electronic filing system to parties with counsel of record registered to file and receive notices through said electronic filing system.

FORD, PARSHALL & BAKER