[ms-0494.009.00c2-003]

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CRAIG P. FITZGERALD, Plaintiff, v. ROBERT O. CONLEY and DOES I through V, inclusive, Defendants.	Case No. 413863 MEMORANDUM OF INTENDED DECISION

The above-entitled matter came on for trial in Department 11 on June 19, 1978. Plaintiff, Craig P. Fitzgerald, appearing in propria persona, and Robert O. Conley, the defendant, appearing in person and by counsel, Merle N. Schneidewind.

This matter was submitted by way of stipulation as to the facts, and the matter was taken under submission and respective counsel submitted points and authorities.

At a later date, one of said counsel informed the Court that a decision need not be made, in that a collateral action had been settled.

A long period of time elapsed and the Court is informed that there was a misunderstanding reference whether or not the Court should

make a decision.

The Court finds that the defendant called and asked the plaintiff to draft an antenuptial agreement prior to his then pending marriage approximately Christmas of 1969. Defendant, at said time, gave the plaintiff a copy of an antenuptial agreement which had been drawn up by another attorney reference a previous marriage of the defendant. The present agreement, which is the subject of this action, was then drafted and prepared by plaintiff, and the defendant and his present wife came to the plaintiff's office to review and sign the agreement. The agreement was a wedding gift from the plaintiff to the defendant, and the defendant never paid for said agreement to be prepared.

The primary issue raised by the pleadings and by the parties hereto is: Did the plaintiff-attorney owe a duty to the defendant based on the gift of an antenuptial agreement?

A duty will exist if the existence of an attorney-client relationship is determined. As a general rule, the determination is one of law. "However, where there is a conflict in the evidence the factual basis for the determination must first be determined, and it is for the trial court to evaluate the evidence." Meehan v. Hopps, 144 Cal.App.2d 284, 287 (1956).

Generally, all persons are required to use ordinary care to prevent others from being injured as a result of their conduct.

The Restatement Second of Torts provides in Section 324A:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as

> necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

In the case at bar, the plaintiff-attorney undertook to render services to the defendant, which he should have recognized as necessary for the protection of defendant's property. Therefore, it would be foreseeable that defendant would suffer harm if plaintiff did not exercise due care.

The fact that the plaintiff did not charge a fee should not alter the finding that a relationship of attorney-client existed. In In re Soale, 31 Cal.App. 144, 153 (1916) the court stated: "The fact that in this particular transaction he did not enter any fee charges against her does not change the situation at all, for he was entitled to charge such fees if he so desired." The court went on to find that the attorney had violated confidences of his client regarding business transactions, even though no fee was paid.

Witkins on California Evidence (Second Edition) at page 746 discusses the attorney-client privilege, and the same is discussed in the Evidence Code. The substance of Witkins and the Evidence Code is that once an attorney has been contacted in his professional capacity, the attorney-client relationship commences to exist, and it exists for the purpose of claiming the privilege and for the purpose

of acting on behalf of an individual, and it is for the purposes of establishing a duty and standard of care that is due from the attorney to the individual. The Court further looks to similar situations where appointed counsel represent indigent clients, and said services are performed for free. There are cases that indicate in such situations that appointed counsel enter into an attorney-client relationship, and said counsel are held to the same standard as though they were privately retained. Smith v. Superior Court of Los Angeles County, 68 Cal.2d 547.

Based on the foregoing, the Court finds that plaintiff-attorney owed a duty to defendant on the basis of an attorney-client relationship, and judgment should be entered accordingly.

Dated:

Judge of the Superior Court

M E M O

January 29, 1979

To: Judge Gilliam

From: Cindy Muckey, Research Assistant

Re: Craig P. Fitzgerald v. Robert A. Conley, 413863

ISSUE:

Did the plaintiff-attorney owe a duty to the defendant based upon the alleged gift of an Antenuptial Agreement?

ANSWER:

Irrespective of any alleged gratuitous rendering of services, an attorney-client relationship appears to have existed which is sufficient to support the contention that a duty was owed by the attorney to the client in performing such services.

DISCUSSION:

This suit was brought to have the court declare whether or not plaintiff-attorney owed a duty to defendant Robert O. Conley in the drafting of an Antenuptial Agreement. A duty will exist if the existence of an attorney-client relationship is determined. Generally this determination is one of law. "However, where there is a conflict in the evidence the factual basis for the determination must first be determined, and it is for the trial court to evaluate the evidence." Meehan v. Hopps, 144 Cal.App.2d 284, 287 (1956). The trial court must decide the conflicting evidence in light of the credibility of the witnesses. Meehan, supra at page 288. The credibility of the witnesses here is not ascertainable from the trial briefs and declarations, therefore, the judge's perception of the witnesses could change the outcome of this case.

Plaintiff maintains that a doner-donee relationship existed while defendant contends that an attorney-client relationship existed. The undisputed facts are: 1- that defendant called and asked plaintiff to draft an Antenuptial Agreement prior to his marriage; 2- that defendant gave plaintiff a copy of an Antenuptial Agreement drawn up by another attorney; 3- that the present agreement was drafted by plaintiff, and 4- that defendant and his wife-to-be came to plaintiff's office to review and sign the Agreement.

Plaintiff and defendant disagrees as to whether or not the product of the relationship was to be a wedding gift from a friend or the work-product of an attorney. Plaintiff alleges that he never intended their relationship to be one of employment, while defendant argues that he contacted plaintiff as an attorney and intended to pay plaintiff, although he can not remember receiving a billing statement for services.

The question whether one owes a duty to another must be decided on a case-by-case basis. Generally all persons are required to use ordinary care to prevent others from being injured as the result of their conduct.

The Restatement Second of Torts provides in section 324A:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

Here, the plaintiff undertook to render services to defendant which he should have recognized as necessary for the protection of defendant's property. Defendant could foreseeably suffer harm if plaintiff did not exercise due care.

An antenuptial agreement is not a typical wedding gift. While the finished product, the executed Antenuptial Agreement, may have been intended as a gift, the intermediate work product was completed by the attorney-plaintiff after initial contact by and subsequent consultations with the defendant. All contacts and consultations were at plaintiff's attorney office. Under such circumstances, it is reasonable that defendant believed that the relationship was one of attorney-client.

In a disbarment action, In re Soale, 31 Cal.App. 144, 153 (1916) the court stated: "The fact that in this particular transaction he did not enter any fee charges against her does not change the situation at all, for he was entitled to charge such fees if he so desired." There the court found that the attorney had violated confidences of the client regarding business transactions even though no fee was paid.

Here, the plaintiff-attorney conferred with defendant before drafting the document and before defendant signed the document. Plaintiff-attorney could have charged defendant for the services, and the fact that he did not, does not alter the relationship.

CONCLUSION

Plaintiff-attorney owed a duty to defendant on the basis of an attorney-client relationship.

Stipulated facts

atty - Duly

Fitzgerald v Cady

D called F said 1969 going to get married - have AK/Agg from before - [illegible]

Tulsa

P-1

D came in for interview

and F Drafted P's 2 - P-1

brought in by D

D took P-2 and signed on Xmas day - he got married

F never did it for compensation - merely gratuitously

F - never intended to be employed

Xmas present

F was an attorney and member of state bar

P-2

D does recolect that
work
what for was of if for
fee - a hourly rate

D does not recollect if
for a fee or not

Is if gift was a
duty owed

D's does not signate
① at time of 1st call
that A/N was weeping girl

② Not as to intent of F.

Deductions

10/19/78

Conley [Defendant]

believe personal contact
ask F to check on A/N
agreement previously drafted by
another firm

Since
did not want to go thru
property settlement agreement
as I had done with 1st
wife

Don't recall
fee

Recalls receiving bill but
not specifically for A/N

Don't recalling paying for

D " " that was
fee on X mas or
birthday gift.

My intent to pay for
services.

Never communicated to him
but would be right.

Cross

Depost page 8, L 2 - 14

P-1 took agreement to Fitzgerald

Specially recall saying not wanting to go thru with again

Page 9

No Remembering the statements were etc

Page 10

admits testimony

Discussion about

Fitzgerald

Not involved in funding
agreement for Miller - didn't
solicite anything from
client.

I said I would draft
agreement as Webing proposed
Didn't feel
① in employment
② could ~~leave~~ at any
time

I did not draft agreement
agreement - P1

P-2 drafted by F

Argument [Fitzgerald]

Relationship
what was given

of gift - was there a warranty
that he could be sued

what was in exchange
of gentries at that time.

"You don't get something
for Nothing?"

A/N Agreement or by tempting
<u>plus</u>.

Society & Public Policy

<u>Historical</u>
individual responsible
for self - Don't look to
see anyone -

perhaps individual Resp
on very m - maybe responsibility
belongs to someone else.

Mal practice (attorney)

~~Jeopard~~

12,000 to 190,000 for
past 3 years

perhaps Soc has been
involved with indemnified

Maybe have to accept blame
for self.

perhaps cut off
Indemnity

No C - have no
warranty

Schriefelbein (argument)

Assume gift

Should not client be told - go elsewhere

Do you need a fee for client - Atty relationship to arise.

This was solicitation for C to get A/N agreement

Makes this A/C relationship

<u>even tho</u>

1. No fee
2. told was a gift.

Fitzgerald (argument)

Legal clinic

atty liable

maybe delog. clients