IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

Case No.: 4D13-4831

LT Case No. 502010CA008347XXXXMBAA

KARIM H. SAADEH
Appellant,

vs.

MICHAEL CONNORS,
COLLETTE MEYER, ESQ., ET.AL.
Appellees.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF FACTS

Karim Saadeh ("Saadeh") sued Defendant/Appellee Colette Meyer, Esq., ("Meyer") for the breach of her duties to Saadeh that occurred while Saadeh was a Ward and Meyer was the attorney for the Guardian, Deborah Barfield ("Barfield" or "ETG"). The Court below granted Summary Judgment dismissing that claim based upon a holding that Meyer owed no duty to Saadeh.

Saadeh was the subject of involuntary incapacity and emergency temporary guardianship proceedings in the Probate Division of the 15th Judicial Circuit. In accordance with § 744.331, Fla. Stat., a three person Examining Committee was appointed and directed to examine Saadeh for capacity and report in writing to the Court. *See* Affidavit of Karim Saadeh; App. Tab 1 (R.5594-5600). Jacob Noble ("Noble") was appointed by the Court as Saadeh's attorney pursuant to § 744.331. Fla. Stat. *See* Order Appointing Counsel[1]; App. Tab 3 (R.1853).

On May 20, 2009, following an evidentiary hearing, Barfield was appointed as the Emergency Temporary Guardian ("ETG") of Saadeh. *See* Order Appointing Emergency Temporary Guardian; App. Tab 4 (R. 5696-5697). The guardianship court granted Barfield plenary powers, stripping Saadeh of all rights except the right to vote. *See id.* (The order granted Barfield the "Full power to have the care,

[1] Noble is likewise sued below for professional negligence.

custody and control of the Ward, to exercise all delegable legal rights and powers to the Ward [with the exception of the Ward's right to vote], to administer the property of the Ward . . . ."). Although Saadeh and Barfield were adversaries with respect to the ultimate issue of incapacity, Barfield was Saadeh's plenary guardian responsible for his person and his property.

Saadeh was now a Ward. Barfield was his plenary Guardian. Meyer was the attorney for the Guardian. One of three core issues presented on this appeal is whether at that moment, Meyer, as the attorney for the Guardian, owed a duty to act in the best interests of the Ward.

Before the issue of capacity was determined, Meyer and Noble appeared before the guardianship court on May 21, 2009 and reported a global settlement of the case.[2] They provided the guardianship court with an agreed Order.[3] Pursuant to the terms of the settlement, Barfield continued to serve as Saadeh's plenary

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[2] Although an Examining Committee was appointed, the settlement was approved before the reports of the committee members were received by the guardianship court. Oddly, at least one and probably two of the Examining Committee members supplied reports to Meyer and Noble indicating that Saadeh was not incapacitated in any fashion. Instead of waiting for the final report, Meyer and Noble came up with a scheme have Saadeh execute a Trust.

[3] Initially these lawyers submitted an Order signed on May 21, 2009 that dismissed both the Incapacity and Guardianship Petitions against Saadeh. However, an amended Order was promptly submitted to the Probate Judge the next day that dismissed the Incapacity case but continued the guardianship case. This May 22, 2009 Order became the operative Order. . *See* Orders dated May 21, 2009; App. Tab 5 (R. 5699-5701) and May 22, 2009; App. Tab 6 (R.1865-1867).

guardian, Saadeh was ordered to execute a trust and Saadeh's assets were to be transferred to that trust, whereupon the Guardianship would terminate. The trust was in lieu of a guardianship. At this point, there is no longer an adversary proceeding and plainly the Guardian and her attorney must act in Saadeh's best interests.

Michael Connors was engaged to draft the trust. According to Connors, Meyer contributed to the drafting of the trust. See Excerpt from Deposition of Michael Connors; App. Tab 27 (R. 5776-5781). When the trust was first presented to Saadeh to sign, it was plainly labeled an "Irrevocable Trust" and Saadeh refused to sign it. See Saadeh Affidavit; App. Tab 1 (R. 5594-5600).

The May 22 Order did not authorize an irrevocable trust. An irrevocable trust is a trust that cannot be revoked by the Settlor of the trust acting alone. § 736.0103, Fla. Stat. (2007)("(17) 'Revocable,' as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.").

On June 24, 2009, Saadeh met privately with Meyer. Although Saadeh was escorted to this meeting by his court appointed lawyer, Noble promptly left Saadeh alone with Meyer. It appears undisputed that Meyer proceeded to explain to Saadeh exactly how the proposed trust agreement would work. According to Meyer, Saadeh would be provided with a fund each month which would be under

his exclusive control and would be sufficient to meet all of his needs. According to Meyer, Saadeh would have his life back as before. After receiving Meyer's advice, Saadeh agreed to sign the trust that Meyer and Connors had drafted. See Saadeh Affidavit; App. Tab 1 (R.5594-5600). A core issue on this appeal is whether Meyer was providing Saadeh with legal advice which would meet the privity requirements for suing Meyer for malpractice.

Saadeh signed the Trust agreement later the same day. The Trust was plainly labeled "Revocable Trust" but it was not revocable. Neither Meyer or Connors advised Saadeh that the Trust was an "irrevocable trust" that exposed him to adverse tax consequences once the trust was funded. Neither Meyer nor Connors advised Saadeh to have a tax professional review the trust before he signed it.

The following day, Saadeh met privately with Meyer and executed various transfer documents prepared by Meyer…including real property deeds and stock transfer agreements. *See* Transfer Documents; App. Tab. 8 (R.5760-5768). Saadeh's court appointed attorney, Noble, was not present and did not prepare or review the transfer documents. Meyer did not advise Saadeh that executing these transfer documents exposed Saadeh to significant tax liability. Nor did Meyer advise Saadeh to obtain advice from a tax professional. See Saadeh Affidavit; App. Tab 1 (R.5594-5600). It was the execution of these transfer documents that created the tax liabilities. Once again, a core question is whether Meyer, by preparing

these transfer documents is providing a legal service directly to Saadeh which would meet the privity requirements for suing Meyer for malpractice.[4]

Soon after funding the Trust, Saadeh learned that it was an "irrevocable" trust and that he could owe millions of dollars in taxes. Saadeh engaged new counsel (Michael Singer and Irwin Gilbert) and sought to establish his capacity and revoke the trust. Notwithstanding the Order Approving Settlement, the Probate Court reappointed an Examining Committee to assess Saadeh's capacity. *See* App. Tab 12; *see also Jasser v. Saadeh*, 97 So.3d 241, 246 (Fla. 4th DCA 2012) ("The court also reappointed the examining committee for the purpose of determining Saadeh's incapacity."). App. Tab 2 (R.5616-5622). In so doing, the Probate Judge sought to determine if Saadeh was incapacitated and thus whether a trust was warranted as a least restrictive alternative to a permanent guardianship.

The Examining Committee unanimously found Saadeh to have full capacity. On September 9, 2009, the Probate Court entered an Order finding Saadeh was not incapacitated and removed the powers granted to Barfield, restoring those powers to Saadeh. See App. Tab 13; *See also Jasser v. Saadeh*, 97 So.3d 241, 246 (Fla. 4th

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[4] Although Meyer helped write the Trust document, Meyer is not the lawyer for the Trust. In Preparing real property deeds and stock transfer agreements so that Saadeh could transfer his property to the Trust, Meyer must have been representing Saadeh or purporting to act for the benefit of Saadeh.

DCA 2012)("Based upon the unanimous determination of the examining committee that Saadeh was competent, the court dismissed the [incapacity] petition.") App. Tab 2 (R.5616-5622).

On December 22, 2009, the Probate Court entered an Order granting summary judgment finding that the Trust was void *ab initio.* See App. Tab 14 (R.5606-5614). The Probate Judge found that Meyer and Noble had not reported the existence of an earlier executed revocable trust for Saadeh and had failed to advise the Court that: (i) the proposed trust would be irrevocable by Saadeh; and (ii) there were tax consequences associated with the Trust.

An appeal was taken to the 4th District Court of Appeals by both Meyer and by the trustees of the Trust. *See* App. Tabs 15 and 16. In separate decisions, the 4th DCA rejected both appeals. In a lengthy written decision, the Court of Appeals held that it was improper to settle the incapacity case without first determining the threshold issue of incapacity. See *Jasser v. Saadeh*, 97 So. 3d 241 (Fla.4th DCA 2012) App. Tab 2 (R.5616-5622) and *Barfield v. Saadeh*, 79 So.3d 35 (Table) (Fla. 4th DCA 2012)(*per curiam affirmed*) App. Tab 28.

In 2010, Saadeh commenced this lawsuit. In his Amended Complaint, Saadeh contends that (i) Meyer, as attorney for the Guardian, owed him a duty of care to act in his best interests akin to the duty owed by the Guardian; (ii) Meyer directly provided Saadeh with legal advice and services in the drafting of the trust,

advising Saadeh as to the mechanics of the Trust and drafting the documents to transfer Saadeh's property to the Trust, and (iii) should privity not be found, in the alternative, Saadeh was the sole intended beneficiary of the work performed by Meyer resulting in a duty of care notwithstanding the absence of privity.

According to Saadeh, the Trust was negligently drafted, was mislabeled a "revocable trust" when in fact it was irrevocable, and Meyer should have warned him of the tax consequences when Saadeh signed the trust and when he signed the transfer documents that funded the Trust. As a consequence, Saadeh incurred economic damages in having the trust found to be void.

In 2012, Meyer moved for summary judgment contending that Saadeh lacked privity and could not sue for professional negligence. *See* Meyer's first motion for summary judgment; App. Tab 17 (R.1844-1900). Meyer contended that she represented Barfield, an adverse party, and therefore could not represent Saadeh. Meyer argued that Saadeh was represented by other attorneys, ***e.g.*** Noble. Meyer cited to statutes that prohibit the attorney for the Guardian from also representing the Ward. That Motion for Summary Judgment was denied. *See* Order denying first motion; App. Tab 18 (R.2493).

In 2013, Meyer engaged Jack Scarola as her attorney. In July of 2013, Judge Kelley rotated out of this Division and Judge Blanc took it over. Meyer then moved a second time for summary judgment on precisely the same grounds as her

prior motion for summary judgment that the Court earlier denied. The facts had not changed, nor the law, but this time the lower court granted the motion for summary judgment despite presence of issues of fact as to whether Saadeh was the intended beneficiary of Meyer's services as attorney for the guardian and whether Meyer entered into a direct role as an attorney advising Saadeh since she advised Saadeh directly in the absence of Saadeh's other counsel and drafted documents for Saadeh to sign to transfer Saadeh's assets to the trust.

In granting the second motion for summary judgment, the trial court viewed the question as to whether Meyer acted as Saadeh's lawyer and/or otherwise owed him a duty of care to be a question of law. Respectfully, these were issues of fact to be decided by the jury and the lower Court erred.

STANDARD OF REVIEW

"The appellate court reviews *de novo* a summary judgment, examining the record in a light most favorable to the non-moving party." *Louis v. Chrysalis Ctr., Inc.*, 121 So. 3d 633 (Fla. 4th DCA 2013); *Trinidad v. Florida Peninsula Ins. Co.*, 121 So. 3d 433, 437 (Fla. 2013)("de novo review is the appropriate standard governing this Court's analysis because the question presented for review was resolved on summary judgment.") "As this is an appeal from a summary judgment, we accept as true Appellants' version of facts supported by the record." *Hodge v. Cichon*, 78 So. 3d 719, 721 (Fla. 5th DCA 2012).

SUMMARY OF ARGUMENT

The lower court entered an order that found that Meyer had no duty to Saadeh, reasoning in part that she obtained no duty because Saadeh had his own lawyer. The lower court focused on the fact that Meyer represented Barfield as an 'adverse' party and was statutorily prohibited from representing Saadeh. This analysis was flawed because it was immaterial whether Saadeh also had a court appointed lawyer and immaterial whether Saadeh disputed that he was incapacitated. First, a guardian and her attorney both owe a duty of care to the *Ward* without respect to whether the Guardianship was temporary or not. A guardian and her lawyer must not waste the Ward's estate by exposing the Ward to needless and avoidable taxes. Second, the adversary proceeding was terminated by Meyer and Noble on May 22, 2009. Meyer and Noble had, improperly, resolved that Saadeh would have a trust in lieu of a plenary guardianship which presupposed that he was incapacitated. On the one hand the guardian and her attorney have no duty to an Allegedly Incapacitated Person in proceedings to impose a guardianship, temporary or permanent. On the other hand, after the guardian is appointed, temporarily or permanently, the guardian and her attorney owe a duty to the Ward to protect the ward's person and property. While the guardian and her attorney did not owe any duties to Saadeh in the adversarial proceedings, they both owed a duty to Saadeh to protect his property in the administration and disposition of his

guardianship estate and property. Negligently drafting a trust, failing to tell the Court and Saadeh that the trust was irrevocable, failing to advise Saadeh of adverse tax consequences amounts to a breach of that duty. Saadeh suffered damages in that he incurred significant costs in avoiding the taxes and dissolving the trust.

Here, the trial court erred because it focused on the fact that Saadeh was represented by a court appointed attorney in the litigation with the guardian over whether Saadeh was in need of an emergency temporary guardian and whether he was incapacitated. This focus left the trial judge with the view that Saadeh was attempting to sue opposing counsel in violation of the general rule that a party cannot sue the attorney for his adversary. Of course that general rule is grounded in the well founded principal that opposing counsel owes no duty to protect the interests of the party which is adverse to his client, even in settlement. This analysis is flawed in the unusual area of guardianship law which is akin to trust and estate law. The lower court's analysis fails to recognize that a guardian's attorney's duty to a ward is concomitant with the guardian's duty to the ward. Both the guardian and the guardian's attorney owe a duty to the ward to protect the ward's property. Had the Guardian and her attorney stolen the property, or given it away or recklessly invested the property and incurred losses, both would be liable without regard to how many attorneys were appointed for the Ward.

The guardian and the guardian's attorney were *initially* adverse to Saadeh with respect to the need for appointment of the ETG and whether Saadeh was incapacitated or not. However, neither could be or were ever adverse to Saadeh with respect to the disposition of his property. Moreover, as stated, the adversary proceedings had terminated before Meyer drafted the Trust, before she met privately with Saadeh to explain the trust document and before she drafted deeds and stock transfer documents for Saadeh to sign.

In this case, the ETG was appointed and then there was an order entered purportedly settling the petition for incapacity. That order discharged the examining committee, dismissed the incapacity proceedings, and ordered that a trust be executed by Saadeh. At that point in the proceedings, there were no longer any adverse parties and the guardian, the guardian's attorney and the ward all had a common interest—to protect the property of the ward. It is this interest that drives the duties of the parties. The guardian and the guardian's attorney are not adverse to the ward in the disposition of his person or property. Instead, they are charged with protecting the ward's person and property.

As explained below, Meyer owed a duty to Saadeh either because she undertook to give him legal advice and services or because Saadeh was the intended beneficiary of the work she performed. Certainly the Guardian had no interest in the Trust or whether the trust was irrevocable or not and did not benefit

from it. The other arguments raised on summary judgment are likewise addressed even though these arguments were not specifically adopted by the lower court.

While there may have been a conflict of interest between the guardian and ward over the imposition of a guardianship, there was never a conflict of interest between the guardian and ward and the guardian's attorney over the protection of the ward's property. As such, there was no bar to suit when that ward is damaged by the failure of the guardian and her attorney to protect the ward's property.

ARGUMENT

I. SAADEH COULD SUE MEYER FOR NEGLIGENCE BECAUSE HE WAS THE INTENDED BENEFICIARY OF MEYER'S SERVICES.

A plaintiff pursuing a negligence claim against a lawyer must assert facts sufficient to establish that the plaintiff was proximately damaged by the acts of a lawyer which breach the duty of care owed by that lawyer to the plaintiff. *Brennan v. Ruffner,* 640 So.2d 143 (Fla. 4th DCA 1994). Generally, an attorney is not liable to a plaintiff in the absence of privity unless another basis exists to find that a duty is owed by that lawyer to the plaintiff. *Id.*

The requirement for privity can be avoided if the plaintiff was the intended beneficiary of the lawyer's services. *See McAbee v. Edwards,* 340 So.2d 1167 (Fla. 4th DCA 1976). The relaxation of the privity requirement is not limited to the intended beneficiaries of poorly drafted wills. There is no privity

requirement for any third-party who is a known intended beneficiary of the attorney's services:

> While ordinarily a party must share privity of contract with an attorney before he may bring suit for legal malpractice, the rule of privity is relaxed in Florida and a third party may bring suit despite the absence of privity where it was the apparent intent of the client to benefit the third party. *Angel, Cohen & Rogovin v. Oberon Investment, N.V.,* 512 So.2d 192 (Fla.l987). Appellants pled in their complaint that they were intended third party beneficiaries. The *Oberon* court recognized that the most obvious example of the third party intended beneficiary exception to the privity rule is in the area of will drafting; however, the court did not limit the exception to will drafting cases. The trial court's order indicates consideration of the sufficiency of this complaint based solely upon whether it came within the "testamentary exception" to the privity requirement, and this was the stated basis for the trial court's order granting the motion to dismiss with prejudice. We conclude that this error requires reversal . . . .

Greenberg v. Mahoney Adams & Criser, P.A., 614 So. 2d 604, 605 (Fla. 1st DCA 1993). All that Saadeh must show is that Meyer otherwise owed him a duty of care to overcome the lack of privity of contract. *See Baskerville–Donovan Eng'rs, Inc. v. Pensacola Exec. House Condo. Ass'n,* 581 So.2d 1301, 1303 (Fla.1991)("However, lack of privity does not necessarily foreclose liability if a duty of care is otherwise established.").

The proposed trust was a repository for all of Saadeh's property---that is, all of the property that the Guardian and her attorney were responsible to protect. The Guardian was not a trustee of the proposed trust. The Guardian's lawyer was

not a lawyer for the Trustees of the trust. The only possible beneficiary of this work by Meyer is Karim Saadeh.

The fact that Meyer represented Barfield against Saadeh in the incapacity and ETG proceedings is not dispositive as held by the trial court. Instead, one must look at the interests involved to determine whether Saadeh was the intended beneficiary of Meyer's work on the trust.

> While the general rule in Florida is that an attorney owes a duty of care only to his client and not to third parties, an attorney owes a duty to a third party if the attorney was hired for the purpose of benefitting a third party. *See, e.g., Espinosa,* 612 So.2d at 1379–80; *Oberon,* 512 So.2d at 194. Because the intended benefit rule requires the specific intent to benefit the third party, it is accepted that an attorney is not liable to the third party for malpractice alleged to have occurred during adversarial proceedings on the rationale that adversaries would never desire to benefit one another. *Wild v. Trans World Airlines, Inc.,* 14 S.W.3d 166, 168 (Mo.App.Ct.2000); *Donahue v. Shughart, Thomson & Kilroy, P.C.,* 900 S.W.2d 624, 625 (Mo.1995); *Onita,* 843 P.2d at 897.

Dingle v. Dellinger, 39 Fla. L. Weekly D322 (Fla. 5th DCA 2014).

In *Dingle*, the lawyer was hired by Millhorn to prepare a quitclaim deed. Dingle sued the lawyer who prepared the deed for malpractice, asserting he was the intended beneficiary of the lawyer's work. The lawyer argued that he could not be liable in legal malpractice to a non-client because the cases that allowed third party beneficiaries to sue were limited to cases where there was only "one side" to

the transaction. He argued that in this real estate transaction there was a buyer and a seller---two sides. The appellate court rejected this analysis, holding

> "This case involved a real estate transaction, typically a two-sided transaction. However, here, there was no adversarial relationship or differing interests to be protected, as the Dingles' interests were not in conflict with Whiteway or Kyreakakis, thus suggesting a one-sided transaction. See generally Freedom Mortg. Corp. v. Burnham Mortg., Inc., 720 F. Supp. 2d 978 (N.D. Ill. 2010)

Like *Dingle,* in Saadeh's case, there were no "differing interests to be protected". The trust, as a purported settlement of Saadeh's incapacity case, involved no one's interests other than Saadeh's.

Saadeh asserts that Meyer met with him privately on June 24, 2009 and provided him with legal advice regarding how his proposed trust would work and that it would be his trust, for his benefit and would be revocable. See Affidavit of Karim Saadeh; App. Tab 1 (R. 5594-5600). See June 13, 2013, Deposition of Karim Saadeh at pages 26, 27, 35, 109, 110 & 112; App. Tab 19 (R.5572-5584). Meyer made express statements regarding Saadeh's ability to control the trust and disbursements made from it. Meyer told Saadeh that the "trust was for him" and if he signed it all the legal proceedings would end and he "would get his life back" as before. Meyer does not deny meeting with Saadeh and does not deny much of Saadeh's description of what she told him. In oral argument, Meyer's attorney made the analogy to a mediation, arguing that he always used the vehicle of a

mediation to speak directly to the opposing client…to make his case directly to the opposing client. The trial court also analogized Meyer's discussions with Saadeh as akin to a prosecutor's statements to the defendant during a plea conference. So Meyer would argue, and the trial court erroneous agreed, that if her statements to Saadeh were made in a mediation or a plea conference, those statements could not be construed as legal advice and she could not be held liable to Saadeh.

These analogies fail for a number of reasons. This was not a mediation nor a plea conference. Saadeh had already (according to Meyer) entered into a settlement which had been incorporated into an Order. So this meeting with Meyer was not a settlement negotiation nor a plea conference where the deal would be explained to Saadeh.[5] Saadeh points out that Meyer met with Saadeh privately. This is not analogous to a mediation or a plea conference and raises *issues of fact* as to what role Meyer was playing. Saadeh attested that Meyer was giving him legal advice that he relied upon in deciding to execute the Trust on June 24, 2009. *See* Affidavit of Karim Saadeh; App. Tab 1 (R. 5594-5600). Saadeh also asserts that Meyer sought payment from Saadeh for the time spent with him in conference

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[5] Since all of Saadeh's legal and civil rights had been removed with the exception of the right to vote, Saadeh could not negotiate a contract or modifications to the settlement approved by the Court. *Cf. Jasser v. Saadeh,* 97 So. 3d 241, 248 (Fla. 4th DCA 2012) ("In this case, the order delegated to the ETG all legal rights, reserving only the right to vote to the ward. Thus, the court removed the ward's right to contract.") App. Tab 2 (R.5616-5622).

on June 24, 2009. Saadeh attests that Meyer failed to disclose the tax consequences of the proposed trust. *See* Affidavit of Karim Saadeh; App. Tab 1 (R.5594-5600). Saadeh argues that if Meyer gave him legal advice to sign a Trust, but failed to advise him either (i) there would be adverse tax consequences; or (ii) he needed to seek advice from a tax professional, it would constitute a breach of the duty of care owed by Meyer.

The gravamen of Meyer's second Motion for Summary Judgment, as with her first, is that she was not in privity with the plaintiff, she was legally prohibited from acting as Saadeh's lawyer due to a conflict, Saadeh had his own attorneys and Saadeh considered Meyer his adversary and therefore Meyer owed him no duty of care. However, as discussed below, Meyer did not need to be in privity with Saadeh as he was the intended beneficiary of her services, the prohibition against representing Saadeh does not absolve her from the duty to act in the best interests of Saadeh as a ward, Saadeh's view of Meyer as his adversary is in reality an issue of fact as to whether Saadeh was the intended beneficiary of Meyer's services not resolvable at summary judgment, and the ultimate issue of whether Meyer owed Saadeh a duty of care is a genuinely disputed fact issue which must be resolved by the jury.

II. ATTORNEY CLIENT RELATIONSHIP

Whether an attorney client relationship which results in a professional duty of care is created is an issue of fact. If Meyer met with Saadeh and performed a legal service for him and for which Saadeh could be called upon to pay, it raises triable issues of fact. Those issues of fact, including the question of whether Meyer owed a duty of care to Saadeh as an attorney, must be submitted to a jury.

One hallmark of an attorney client relationship is the right to control the attorney-client privilege. If a beneficiary of a trust or a Ward in a guardianship would have the right to control that privilege, it would illustrate the existence of an attorney client relationship between the Ward and the attorney for the Guardian. In *Jacob v. Barton*, 877 So.2d 935 (Fla. 2d DCA), the court was confronted with a dispute as to whether the beneficiary of a trust could discover communications between the Trustee and his lawyers. That court held that:

> "In some circumstances, however, the beneficiary may be the person who will ultimately benefit from the legal work the trustee has instructed the attorney to perform. See, *e.g.*, *Riggs Nat'l Bank of Washington, D.C. v. Zimmer,* 355 A.2d 709, 711 (Del.Ch. Ct.1976) (noting that legal memorandum concerning trust tax issues, written before beneficiaries' litigation against trustee began, was prepared for the benefit of the trust beneficiaries) (cited in *Compson,* 629 So.2d at 850). In that situation, the beneficiary may be considered the attorney's "real client" and would be the holder of the lawyer-client privilege. *Whitener,* 715 So.2d at 982.

In *Tripp v. Salkovitz*, 919 So.2d 716 (Fla. 2nd DCA 2006) the personal representative of a deceased Ward sued the guardian and the guardian's attorney for "negligence and breach of fiduciary duty" for failing to properly manage the Ward's financial affairs and to protect the [Ward's] residence from foreclosure sale. *Id.* at 718. The *Tripp* court held that the communications/documents between the guardian's attorney and the guardian are discoverable by the Ward if the "documents are specifically related to the representation of the Ward's interest and are thus discoverable because the privilege now belongs to the Estate as the Ward's successor in interest." *See id.* at 719. The *Tripp* court relied on *Jacob v. Barton supra.*

Meyer rendered invoices to Saadeh for the time expended with him on June 24, 25, 2009. A copy of her invoice is annexed to her petition for fees; App. Tab 20 (R. 5797-5854). On page 5 of her July 15, 2009 invoice, Colette Meyer (depicted as "CM") bills 9.25 hours which included her time for meeting with Mr. Saadeh. That invoice is part of the supporting documentation for Meyer's Petition to require Saadeh to pay those fees. *See* App. Tab 20 (R. 5797-5854).

Saadeh does not cite solely to the meeting with Meyer on June 24, 2009. Saadeh likewise cites to Meyer's preparation of real property deeds and stock transfer agreements for his execution. See Transfer Documents at App. 8 (R. 5760-5768). Meyer also submitted those documents as part of her first motion for

summary judgment. App. Tab 17 (R. 1844-1900). Meyer admits that she performed this work in order to fund the Trust. In her affidavit in support of her first Motion for Summary Judgment, Meyer states:

> 12. On June 25, 2009, with the knowledge and consent of Noble, I met with the Plaintiff and the Plaintiff executed deeds and corporate documents transferring property and corporate stock into the trust, in accordance with the settlement. Copies of the deeds and corporate documents are attached hereto as **Composite Exhibit "5."**
>
> 13. At no time did I provide legal advice to Plaintiff regarding transfer documents executed by the Plaintiff on June 24, 2009. In fact, the deeds prepared specifically state: "This deed was prepared without benefit of title examination and/or consultation as to the tax consequences thereof." Deeds at p. 2.[3]

Affidavit of Collette Meyer; App. Tab 21 (R. 1849-1879).

Saadeh contends that it was the funding of the trust that led to adverse tax consequences. The deeds and transfer documents prepared by Meyer effectuated the funding of the trust. In that instance, Meyer met privately with Saadeh and was solely responsible for the preparation of the deeds and stock transfer documents.

For the purpose of this Motion for Summary Judgment the question is whether Meyer provided legal services to Saadeh such that it satisfies the requirements for privity. Meyer's assertion that she gave no tax advice is not exculpatory. If she performs legal services for Saadeh, she must do so in a manner consistent with the duty owed. Her failure to provide tax advice was an act of negligence---it was a breach of the duty---not evidence that the duty was not owed.

Likewise, Meyer's argument that she was conflicted and not permitted to represent Saadeh is not evidence as to whether she represented Saadeh---it is evidence that she should not have supplied legal advise or services to Saadeh. It would not excuse her from liability, it would expose her to other sanctions.

In *Dingle v. Dellinger*, 39 Fla. L. Weekly D322 (Fla. 5th DCA 2014), the attorney being sued for malpractice argued that he could not owe a duty to the plaintiff on a third party beneficiary theory because he had a conflict with that party. The question of conflict was resolved by the Court by examining the facts and was rejected.

The plaintiff has raised sufficient issues of fact to establish that Meyer provided direct legal advice and legal services sufficient to satisfy privity for the purpose of having standing to sue Meyer for breach of professional duty.

III. MEYER OWED SAADEH A DUTY OF CARE BECAUSE HE WAS THE INTENDED BENEFICIARY OF HER SERVICES AS THE ATTORNEY FOR THE GUARDIAN AND A TRIABLE ISSUE OF FACT EXISTED AS TO WHETHER SAADEH WAS THE INTENDED BENEFICIARY OF HER SERVICES WHICH PRECLUDED SUMMARY JUDGMENT.

In 1996 a Circuit Judge asked the Attorney General for an Opinion as follows:

> Does an attorney representing a guardian of a person adjudicated incapacitated and who is compensated from the ward's estate for such services assume a duty to the ward as well as to the guardian**?**

See Fla. Att. Gen. Op. 96-94.[6] The Attorney General responded as follows:

> In sum:
>
> Since the ward is the intended beneficiary of the guardianship, an attorney who represents a guardian of a person adjudicated incapacitated and who is compensated from the ward's estate for such services owes a duty of care to the ward as well as to the guardian.

See Fla. Att. Gen. Op. 96-94. In that opinion, the Attorney General analyzed *Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Assoc., Inc.,* 581 So.2d 1301, 1303 (Fla. 1991) in opining that the attorney for the guardian owed a duty a care directly to the Ward, quoting the Supreme Court as follows:

> "Third-party beneficiary principles have been employed recently in tort law to expand liability where a duty of care exists between a third party and a professional, again despite the lack of direct contractual privity. However, this Court has clearly distinguished between privity and duty of care as separate means of proving a professional's liability. Clearly, privity between the parties may create a duty of care providing the basis for recovery in negligence. . . . However, lack of privity does not necessarily foreclose liability if a duty of care is otherwise established."

Meyer argues that the Attorney General Opinion turns on a finding of incapacity, which did not occur in Saadeh's case. Here Meyer argues that the conflict with Saadeh over the pending incapacity proceeding distinguishes the Saadeh case from the premise of the Opinion. Saadeh asserts that the Opinion is

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[6] *See* http://www.myfloridalegal.com/ago.nsf/Opinions/EC4BB94C5106D5B5852563F60052F39A

not dependent upon whether incapacity was found, but is dependent upon whether a guardianship is created.[7]

There can be no question but a duty of care was owed by the Guardian with respect to maintaining Saadeh's property once she was appointed and took control over all of Saadeh's property. Even if the capacity proceeding remained, the Guardian could not be excused from that duty. The damage claimed by Saadeh is based in part upon a breach of that duty, i.e., subjecting Saadeh to unnecessary tax liabilities because of negligence in fashioning the trust and failing to give critical warning of his exposure if he funded the trust.

However, Saadeh asserts that on June 24, 2009, there was no adverse relationship between Saadeh and the Guardian (or her lawyer) with respect to the incapacity proceeding, because the incapacity proceeding had been dismissed by the agreed order entered on May 22, 2009. Even the pending emergency temporary guardianship proceeding was resolved by that same Order.[8]

The Attorney General's Opinion turns not on incapacity, but upon the creation of a guardianship estate…that is what triggers the duty of care. The fact

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[7] Of course, Meyer had already dismissed the adversary proceeding before she began to draft the trust or the transfer documents.

[8] Notwithstanding the language of the Amended Order on May 22, 2009 which appeared to dismiss the Incapacity case but maintain the guardianship case, In Florida you cannot maintain a guardianship case without also bringing an incapacity case.

that a guardian has control over the ward and the ward's property triggers the duty, not the title of guardian. The analysis is also based upon the premise that legal services rendered to a Guardian are for the benefit of the Ward.

In *Rushing v. Bosse,* 652 So. 2d 869 (Fla. 4th DCA 1995), the Fourth DCA adopted the same analysis:

> Ordinarily, an attorney's liability for legal malpractice is limited to those with whom the attorney shares privity of contract. *See Brennan v. Ruffner,* 640 So.2d 143 (Fla. 4th DCA 1994). Defendants argue here, as they did to the trial court below, that legal malpractice is not cognizable in this case because no privity existed between the child and defendants giving rise to a duty owed by defendants to the child. However, despite defendants' protestations, a limited exception to the privity requirement has been carved out where a plaintiff is an intended third-party beneficiary of an attorney's actions and it is the apparent intent of the client to benefit the third party. *See Angel, Cohen and Rogovin v. Oberon Inv., N.V.,* 512 So.2d 192, 193-94 (Fla. 1987). We do not read *Oberon* as creating an exception to the privity requirement limited solely to the area of will drafting. *See Greenberg v. Mahoney Adams & Criser, P.A.,* 614 So.2d 604 (Fla. 1st DCA 1993), *review denied,* 624 So.2d 267 (Fla. 1993). Although privity of contract may create a duty of care providing the basis for recovery in negligence, lack of privity does not necessarily foreclose liability if a duty of care is otherwise established. *See Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Ass'n, Inc.,* 581 So.2d 1301, 1303 (Fla. 1991).
>
> In this case, not only was the child the intended beneficiary of the adoption, but defendants were the attorneys for the adoptive parents, who evidently intended to benefit the child by adopting her. *Compare Brennan.* Since Chilton also served as an intermediary for the child, there were additional responsibilities that he owed directly to the child.1 In this case, we are thus dealing with a private placement adoption through an intermediary.

There is no privity requirement for any third-party who is a known intended beneficiary of the attorney's services:

> While ordinarily a party must share privity of contract with an attorney before he may bring suit for legal malpractice, the rule of privity is relaxed in Florida and a third party may bring suit despite the absence of privity where it was the apparent intent of the client to benefit the third party. *Angel, Cohen & Rogovin v. Oberon Investment, N.V.,* 512 So.2d 192 (Fla.l987). Appellants pled in their complaint that they were intended third party beneficiaries. The *Oberon* court recognized that the most obvious example of the third party intended beneficiary exception to the privity rule is in the area of will drafting; however, the court did not limit the exception to will drafting cases. The trial court's order indicates consideration of the sufficiency of this complaint based solely upon whether it came within the "testamentary exception" to the privity requirement, and this was the stated basis for the trial court's order granting the motion to dismiss with prejudice. We conclude that this error requires reversal . . . .

Greenberg v. Mahoney Adams & Criser, P.A., 614 So. 2d 604, 605 (Fla. 1st DCA 1993). The first DCA did not describe the circumstances that warranted reversal in its opinion. However, the opinion is clear that if a third-party is an intended beneficiary of the attorney's services, then the third-party does not have to be in privity to bring a malpractice action.

In Florida, when an emergency temporary guardian is appointed as the guardian over an alleged incapacitated person, a guardian/ward relationship is created:

> We need not resolve the issue in this case, however, because an emergency temporary guardian was appointed for Appellant. Thus, unlike *Ehrlich,* where a guardianship was apparently never

> established for appellant because she was characterized only as a "potential ward" *(see* 985 So.2d at 640) or "alleged ward" *(see* 10 So.3d at 1211), **here, Appellant was a ward during the pendency of the incapacity proceeding because an emergency temporary guardian was appointed for her.** *See* § 744.102(22), Fla. Stat. (defining "ward" as "a person for whom a guardian has been appointed"). The examining committee fees were incurred, and ordered, while the emergency temporary guardian had legal control over Appellant's property and, therefore, the fees were properly assessed against her under section 744.331(7)(b). For these reasons, we affirm the trial court's order requiring Appellant to pay the examining committee fees.

Faulkner v. Faulkner, 65 So. 3d 1167, 1169-70 (Fla. lst DCA 2011)(emphasis added). *Faulkner* distinguishes the facts in the 4th DCA *Ehrlich* case. In *Erhlich,* there was no emergency temporary guardian appointed. Instead, there was simply a petition to determine incapacity filed and no emergency temporary guardian was appointed over the alleged incapacitated person before petition for incapacity was heard. As such, neither examining committee fees nor attorney's fees could be assessed against the alleged incapacitated person:

> As we did in *Ehrlich* v. *Severson,* 985 So.2d 639 (Fla. 4th DCA 2008), with regard to fees of the examining committee, we reverse the award of fees to the attorney for the alleged ward. In this case involving the same involuntary petition to determine competency in which the subject was not found incompetent, any award of fees incurred by counsel appointed to represent the subject must come, if at all, from the petitioner. *See§* 744.331(7)(c), Fla. Stat. (2007) (''If the petition is dismissed, costs and attorney's fees of the proceeding may be assessed against the petitioner if the court finds the petition to have been filed in bad faith").

Ehrlich v. *Allen,* 10 So. 3d 1210 (Fla. 4th DCA 2009).

In the guardianship proceeding, a guardianship was created. Unlike *Ehrlich*, where no guardianship estate was created, in this case Meyer petitioned for fees in the guardianship court, *see* Petitions at App. Tab 20 (R. 5797-5854), and obtained a ruling from the Probate Arbitrator that she was entitled to fees[9]. *See* App. Tab 29.

Saadeh argues that he was the intended beneficiary of the Trust…not Barfield. Likewise, he is the intended beneficiary of the guardianship. He asserts that the services of Meyer, which also included contributing to the drafting of the Trust, were services performed under the auspices of the Guardian but for Saadeh's benefit. The Trust and the transfer of his property into the Trust was analogous to the facts in *Rushing.* This is a disputed and triable issue of fact.

IV. THE FACT THAT SAADEH HAD OTHER ATTORNEYS DOES NOT ABSOLVE MEYER OF HER RESPONSIBILITY TO SAADEH AS THE INTENDED BENEFICIARY OF HER SERVICES.

Meyer argues that she cannot be held liable to Saadeh because she was not the proximate cause of Saadeh's damages. Essentially she is arguing that others advised him and it was their duty to protect his interests, not hers. The arguments and facts set forth above show that she did owe a duty as well as did

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[9] Saadeh points out in his Memo of Law in Opposition to the second Motion for Summary Judgment at pages 4-5, that Meyer filed Petitions for legal fees pursuant to § 744.108(2), Fla. Stat. See App. Tab 22. Meyer's entitlement to fees under section 744.108 depends on whether the services she rendered benefited Saadeh and whether no conflict of interest existed between her and Saadeh.

others. The fact that others might have prevented the harm to Saadeh is a fact issue for the jury:

> The defendants' second argument is that the plaintiff will be unable to prove that his damages are the result of their alleged negligence. According to the defendants, the plaintiff cannot prove that the results would have been different if they had acted differently, because numerous factors might have influenced the outcome. However, the effects that these factors would have had on the plaintiffs situation, and the various outcomes which might have resulted from alternative actions by the defendants, are likewise issues of fact which remain in dispute.

Winston v. Brogan, 844 F. Supp. 753, 757 (S.D. Fla. 1994). *Brogan* is another example of a case where an intended third party beneficiary of an attorney's services was allowed to sue the attorney for negligence. This issue of fact also precluded the entry of summary judgment in Meyer's favor.

V. THE EXISTENCE OF A CONFLICT OF INTEREST WOULD NOT BE DISPOSITIVE AS TO THE EXISTENCE OF A DUTY

Meyer argues that she was precluded from being Saadeh's lawyer. The trial court appears to have agreed with her argument. She cites to § 744.331, Fla. Stat. which requires the Court to appoint a lawyer for an "AIP". She argues that the attorney for a Petitioner under Chapter 744 cannot simultaneously represent the Respondent AIP. She cites to testimony by Saadeh in which he describes Meyer as the "enemy". However, at most, these are all reasons why Meyer should not give legal advice to Saadeh. These facts do not resolve whether Meyer actually gave

legal advice to Saadeh, performed legal services directly for Saadeh or whether Saadeh was the intended beneficiary of her legal services.

An issue of fact exists as to whether these conflicts existed on June 24th and 25th, 2009, when the trust was executed and the documents transferring assets to the trust was executed by Saadeh. It appears that the incapacity proceeding had been dismissed and that the petition for appointment of a guardian was essentially abandoned. The May 22, 2009 Order even provided for the termination of the Emergency Temporary Guardianship following specific events.

Meyer suggests that Saadeh cannot sue her for malpractice for her advice or actions if he considered Meyer his "enemy". Saadeh testified at deposition that on June 24, 2009 he listened to Meyer's advice and trusted it…relied upon it. See June 13, 2013, Deposition of Karim Saadeh at p. 110, Exhibit A to Plaintiff's Statement. App. Tab. 19 (R. 5572-5584). The parties do not dispute that prior to June 24, 2009 Saadeh refused to execute a trust as required by the May 22, 2009 Order. The parties do not dispute that on the morning of June 24, 2009, Saadeh met with Meyer, listened to Meyer and then agreed to sign the Trust. The parties do not dispute that after this meeting, Meyer, Saadeh and others went to lunch and then to the offices of Michael Connors where Saadeh signed the Trust. Whether Saadeh relied upon Meyer's advice or not is an issue of fact to be determined by a jury.

The fact that there may have been conflicts between Saadeh and Meyer and Barfield is not dispositive because the question isn't whether they were adverse as to anything, but instead the question is whether they were adverse with respect to the protection of Saadeh's property through estate planning vis-à-vis the execution and funding of a trust. The guardianship court had ordered a trust so there was no adversity between the parties on this issue. Since they were not at odds over the trust, the guardian and her attorney had a duty to have Saadeh execute a trust that did not harm his estate.

The Fifth DCA recently reversed summary judgment for a guardian's lawyer who was sued by the Ward's heirs. The case had a strikingly similar fact pattern because the attorneys that were sued were not the decedent's attorneys but instead were the decedent's guardian's attorneys:

> The court appointed Henry Duffett, Imogene Strickland and Walton Cowart as guardians. At the guardians' request, the probate court entered an order directing the implementation of the Yong estate plan in an effort to, among other things, reduce the estate's tax liability. When [the ward] died some two and one-half years later, however, Yong's plan still had not been fully implemented.
>
> Consequently, Appellants filed a negligence action alleging they were the intended beneficiaries of [the ward's] estate because they were beneficiaries under [the ward's] wills. They named as defendants Scott W. Cichon, Andrew C. Grant and J. Lester Kaney, l**awyers for the guardians** appointed by the probate court, and also Cobb & Cole, P.A. **Appellants claimed the corpus of Cowart's estate was significantly reduced by much higher estate taxes due to**

> **Appellees' failure to implement the Yong estate plan as the probate court ordered**.

Hodge v. Cichon, 78 So. 3d 719, 721 (Fla. 5th DCA 2012)(emphasis added). The guardian's lawyers moved for summary judgment on the exact grounds relied upon below:

> Appellees filed a motion for summary judgment and argued to the trial court that Appellants lacked standing because no attorney-client relationship existed between them and Appellants. Further, **they posited that an attorney-client relationship could not have existed due to the adversarial nature of the parties' positions.** Without this relationship, Appellees asserted a condition precedent had not been met, and therefore Appellants lacked standing to bring this action.

Hodge at 721 (emphasis added). The trial court granted summary judgment and the Fifth DCA reversed holding:

> While there may have been animosity or acrimony among the various heirs and beneficiaries, the actions of retained counsel and the direction of the court in ordering the implementation of the estate plan were intended to benefit all and harm none. As noted in *Winston*, and as appears herein, **while there may be conflict among the parties, there is no indication of a conflict of interest regarding the need to maximize the estate vis-à-vis less taxes and estate preservation.** 844 F.Supp. at 756. If the dispute concerns whether or not Appellants were intended beneficiaries, the issue is one of fact for the jury to determine. *See id.* at 757.

Hodge at 722-23.. *Hodge* is strikingly similar. The guardian's attorneys are being sued by the ward's estate for failing to protect the ward's property from devastating tax consequences. If the heirs can sue the guardian's attorney, then it certainly must be true that the ward has standing to sue or that at least there is an

issue of fact over whether he was the intended beneficiary of the guardian's attorney's work.

VI. ADDITIONAL ISSUES OF FACT:

Although Meyer cites to a statement by Saadeh that he never spoke with Ms. Meyer outside the Courtroom, Saadeh testified that in fact he met with Meyer in a conference room in the courthouse where she explained the trust to him. *See* June 13, 2013, Deposition of Karim Saadeh. App. Tab 19 (R. 5572-5584).

Although Saadeh viewed Meyer as his enemy, he also believed that she was there to be on his side and protect his interests:

> Q. My question relates to Ms. Meyer. Was it your understanding that because Ms. Meyer was representing your children as your enemies, that Ms. Meyer was your enemy?
>
> A. Any person that was against me was my enemy.
>
> Q. Did that include Ms. Meyer while she was representing your children?
>
> A. Yes. But she's the one who came and advised me. If she came and advised me, does it mean she was with me?

June 13, 2013, Deposition of Karim Saadeh p. 43. App. Tab 19 (R. 5572-5584). Karim Saadeh further explains that Collette Meyer told him that he would get his life back if he signed the trust:

> A. She advised me that if I signed the trust, my life would be free.

June 13, 2013, Deposition of Karim Saadeh p. 61; App. Tab 19 (R. 5572-5584). Again Karim Saadeh explains that Collette Meyer explained the trust to him:

> Q. When Mr. Noble did all these bad things you have told us he did, Ms. Meyer wasn't there, was she?
>
> A. She wasn't. She was when it was about the trust and she advised me. She was talking to Noble and told him that he's not going to be in the meeting when she was explaining what the trust meant. He told her, take care of him.

June 13, 2013, Deposition of Karim Saadeh, p. 109; App. Tab 19 (R. 5572-5584).

Saadeh raised issues of fact as to the role Meyer played. In quoting Jacob Noble on June 24, 2009 (cited above), as Noble telling Meyer "take care of him" and then leaving Saadeh alone with Meyer, an issue of fact arises as to whether Noble and Meyer have established for Saadeh that Meyer rather than Noble was "taking care of him", i.e. providing legal advice.

Saadeh also raised the issue that Meyer told him on June 24, 2009 that the trust he would sign would be a "revocable trust":

> Q. And when did Ms. Meyer tell you this?
>
> A. After the court, they took me to a room and we had like a meeting.

May 15, 2012, Deposition of Karim Saadeh p. 158; App. Tab. 23 (R. 5586-5592). She also told him that the trust was revocable:

> Q. Who told you it was revocable?

> A. Ms. Meyer told me. Ms. Meyer, she put it on the board and she says, This trust for you -- this trust is for you and then it goes to your kids, one, and the last one is for you, also. And she -- after that, she ask me, We need one of the kids have the -- be able to sign the checks for Big Dollars with you.

May 15, 2012, Deposition of Saadeh p. 103, ln. 23 – p. 104, ln. 10; App. Tab 23 (R. 5586-5592).

Saadeh likewise raise issues of fact in his affidavit in opposition to the Motion for Summary Judgment; App. Tab 1 (R. 5594-5600). In part, Saadeh attested as follows:

> 18. Ms. Meyer talked to me as my lawyer. She advised me to sign the trust. She did not say the trust would be irrevocable. She did not tell me there would be gift tax that I would have to pay.
>
> 19. Based upon the advice of Ms. Meyer, I agreed to sign a revocable trust. We then went to a restaurant for lunch with Ms. Meyer and my daughters. Later that day, we went to Mr. Connors office. Mr. Noble was not there. Mr. Connors showed me a trust that was different than what he had shown me before. This trust had the words "Revocable Trust" on the first page. I did not understand the words in the trust. I believed that the trust would be as Mr. Meyer described it to me. I signed it. I believed what Ms. Meyer told me because I put trust in her. I needed to trust her because I was not able to understand the words and she did. I believed that the case would be over and I would have my life back as before.
>
> 20. I learned later that the trust was an irrevocable trust. I learned later that the trust had no provision for an account with money I controlled. Really, I controlled nothing. I was not even allowed to talk with my children about what they did with the trust.

> 21. No one told me that I needed to consult with another lawyer to get tax advice about the trust. No one asked me if I spoke to Mr. Singer or an accountant about the trust. I was not given a copy of the trust so that I could give it to Mr. Singer to review.

Saadeh alleges Meyer supplied misleading and incorrect information pertaining to the terms of the trust. The Fourth DCA in *Jasser v. Saadeh,* 97 So. 3d 241, 249 (Fla. 4th DCA 2012) held that the trust was in fact an irrevocable trust, as did the Trial Court in its written decision of December 22, 2009. Saadeh points out that he had no control over the trust whatsoever. If proven, these allegations would support a claim that Meyer breached the duty she owed as attorney for the guardian and breached the duty she assumed by giving Saadeh this advice.

The affidavit of Michael Singer establishes that he was not provided with a copy of the trust in advance of June 24, 2009 and so he was unable to advise Saadeh as to its consequences. App. Tab. 10 (R. 5602-5604). Singer testifies that Meyer would not give him a copy of the trust. While it is unclear at best if Singer was Saadeh's lawyer on June 24, 2009, given Saadeh's earlier loss of the legal power to engage him, it would not matter if Singer was no allowed to see the trust or advise Saadeh about it.

VII. THE LITIGATION PRIVILEGE IS INAPPLICABLE:

Meyer argues that she cannot be sued by Saadeh because he was her adversary in the incapacity and temporary guardianship proceedings and therefore the litigation privilege precludes Saadeh from amending his complaint if the Court grants Meyer's summary judgment motion as to Saadeh's pending claims. Meyer further argues that the litigation privilege applies because everything she said or did was related to the pending incapacity and temporary guardianship proceedings.

The fundamental flaw with Meyer's argument is that it fails to acknowledge that in guardianship proceedings the interests of the guardian and the guardian's attorney are not always adverse to the ward's interests. As *Jacob* and *Tripp* show, a fact based inquiry must be made into whether the work being performed is for the benefit of purely the ward, the ward and guardian, or purely the guardian. A guardianship involves the State using its powers to interfere in the usually sacrosanct domain of the constitutional right to control one's own property, to be the master of one's own destiny, and to make decisions for oneself, whether they be good or bad. A guardianship is not instituted to protect capacitated persons from a folly of their own making. It can only protect incapacitated persons from such folly.

Guardianship proceedings have no winners and losers. There are only those who need the protection of the courts because they are incapacitated and those who

do not. The court must determine what's in the best interest of those that are incapacitated and leave be those that are not. The participants in the process likewise have an overriding interest to find out and implement what is in the best interest of the alleged incapacitated person and the ward. A guardian has no separate interest in the proceeding other than to do what is in the best interest of the ward. There may be situations where adversity arises, such as when one seeks fees or when one seeks to impose a guardianship against an unwilling potential or actual ward. When a guardian takes action with respect to the property of a ward, the guardian has discretion over what should be done because the ward's powers have been removed and granted to the guardian. When the attorney for the guardian acts in such situations, the attorney and the guardian have a common goal, do what is best for the ward. In that situation, the ward and the guardian are not adverse and the ward is truly the guardian's attorney's client. *See Jacob* and *Tripp*.

In this case, the guardian had no separate interest in imposing a trust on the ward. The proceedings had not progressed to the stage where the guardian was duty bound to explore least restrictive alternatives, much less impose one. The May 22, 2009 Order could not sanction or authorize the formation of the trust because incapacity had not yet been determined when the order was entered. Therefore, the order could not impose a trust because there was no need for a least

restrictive alternative. *See Jasser v. Saadeh*, 97 So. 3d 241, 247 (Fla. 4th DCA 2012)("If the court does not find a need for a plenary guardianship, then there is no need for a least restrictive alternative. The court could not order any less restrictive alternative before it found incapacity on the part of the ward."). App. Tab 2 (R. 5616-5622).

Therefore, since a trust could not legally be a part of the process, there could not be any adversarial relation in regards to it. The ward and guardian weren't at the stage in the proceedings where they could negotiate what would be the best form of the trust or where the guardian's attorney would need to try to convince the ward that one form of trust was more advantageous than another. The ward's execution of a trust has nothing to do with the purposes of the incapacity proceedings if it is created prior to a determination of incapacity. Therefore, the trust can only be entered for the ward's benefit. The guardian could gain nothing advantageous to her in the litigation of the incapacity proceedings or in the temporary guardianship from the trust being executed by the Plaintiff. Therefore, it could only have been created and then executed because it was something the ward desired or it was in his best interest. The guardian would have no reason related to the litigation for proposing any particular form of trust. As such, all of the services rendered by the guardian and her attorney that were related to the trust could only be for the benefit of the ward. In that circumstance, the ward is truly

the guardian's attorney's client and the guardian's attorney owes a duty of care to the ward both as a professional and under the law.

The claims that the ward (Saadeh) would or could bring against the guardian's attorney (Meyer) must be rooted in her breach of her duty of care while providing services that are either (a) purely for the benefit the ward (Saadeh), (b) partly for the benefit of the ward (Saadeh) and partly for the guardian (Barfield), or (c) intended to benefit the ward (Saadeh). The litigation privilege does not bar such claims because they are either malpractice claims or akin to a malpractice claim. No Florida court has ever ruled that claims against one's own attorney are barred by the litigation privilege. However, courts in other states have so held:

> Donahue cites no cases holding the litigation privilege bars malpractice actions based on an attorney's litigation-related acts or omissions, and we have found none. We perceive no sound reason why litigators should be exempted from malpractice liability, and therefore decline to extend the litigation privilege's protection to the present case.

Kolar v. Donahue, McIntosh & Hammerton, 145 Cal. App. 4th 1532, 1541 (Cal. Ct. App. 2006). The litigation privilege simply has no application in this breach of duty case.

CONCLUSION

Saadeh sued Meyer, an attorney, for professional negligence based upon a series of events which began in May of 2009. It is undisputed that Meyer represented Barfield as Petitioner in incapacity and guardianship petitions filed in the Probate Division of this Court.

It is undisputed that Barfield's Petition for Appointment of an Emergency Temporary Guardian of Saadeh was granted on May 29, 2009. Barfield was appointed Saadeh's guardian and Saadeh then became a Ward. Barfield was awarded plenary powers over Saadeh pending a final disposition of the Incapacity Petition.[10]

Three days later, Meyer and Noble appeared in the Probate Court and reported a settlement of the case. On May 21, 2009, the Court executed an "Agreed Order" which dismissed the respective cases and ordered Saadeh to execute a trust as the least restrictive alternative to a plenary guardianship. The following day, the Court was provided with a corrected Order which dismissed the incapacity petition but continued the guardianship case. It was plain from the Order that no party was actually still pursuing the appointment of a permanent

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[10] The appointment of an ETG is not based upon a determination of incapacity or likelihood of success on the merits of a Petition alleging incapacity. An ETG is appointed pursuant to Fla. Stat. 744.3031 based upon a determination that the AIP is at risk of being exploited.

guardian and the temporary plenary guardian was left appointed over Saadeh the ward pending certain events. The Order resolved the pending petitions and directed Saadeh to execute a Trust as the least restrictive alternative to a permanent guardianship.

In moving for summary judgment, Meyer contended that since the underlying proceedings were adversary, she cannot be found to have any duty to Saadeh. See Meyer's Second Motion for Summary Judgment at page 3; App. Tab 24 (R. 5428-5484). However, the alleged adversarial nature of the proceedings terminated when Meyer and Noble obtained an Order approving the purported settlement and dismissed the incapacity proceedings. Meyer and Saadeh could no longer be found to be adverse to each other with respect to the issue of incapacity or guardianship. More importantly, Meyer and Saadeh were not adverse as to the entry of a trust that was supposed to be revocable and not have adverse tax consequences. Either of which could have been avoid if Meyer had either properly advised Saadeh that the trust was irrevocable by him alone or that putting his assets into the irrevocable trust would cause tax liabilities, or if not comfortable giving such tax advice, sending him to a tax advisor before funding the trust.

Saadeh is the intended beneficiary of the work performed by Meyer. It does not appear that Meyer's client Barfield has any interest in the trust or its terms. Barfield is not the Trustee or the beneficiary of the trust. Certainly she has no

competing interest in the trust. To the extent that Saadeh's claims rely in part upon the assertion that he was the intended beneficiary of the legal work, the alleged absence of privity would be immaterial. Moreover, it is a justiciable issue of fact that precludes entry of summary judgment.

On June 24, 2009, at a court hearing before the Probate Judge, the Judge reiterated that Barfield continued to serve as Saadeh's Guardian with full plenary powers.[11] Plainly, along with these powers over Saadeh and his property, the Guardian still owed the concomitant duty of care to Saadeh. As the Attorney for the plenary guardian, Meyer owed the same duty to Saadeh. The absence of privity is likewise immaterial if a duty is otherwise owed by Meyer. *Rushing v. Bosse,* 652 So. 2d 869 (Fla. 4th DCA 1995).

Saadeh has raised sufficient issues of fact that will require a trial to determine if Meyer provided him legal advice and legal services such that would otherwise satisfy the privity requirement. Saadeh testifies that Meyer advised him as to the workings of the trust on June 24, 2009 and that the trust would be revocable. Michael Connors testified that Meyer assisted in the drafting of the Trust. Meyer herself provides the evidence that she prepared deeds and other

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[11] A transcript of the June 24, 2009 hearing before judge Oftedal is part of the Summary Judgment record. See App. Tab 25 (R. 5725-5758).

transfer documents for Saadeh to execute in order to transfer his property into the trust.

Saadeh contends that it was the transfer of these assets, accomplished through the documents prepared by Meyer that resulted in the adverse gift tax consequences that give rise to his claim for damages. *See* Affidavit of Randall Doane, Esq.; App. Tab 26 (R. 5770-5774). Meyer's alleged failings as an attorney in advising her real client the ward, Saadeh, to whom she owed a duty of care either directly or as an intended beneficiary of her services, precludes the application of the litigation privilege.

There were material issues of fact as to whether Saadeh was the intended beneficiary of the work performed by Meyer that precluded the entry of summary judgment on behalf of Meyer. The fact that Meyer was adverse to Saadeh in some other aspects of the guardianship and incapacity proceeding does not mean that she was adverse to Saadeh when it came to protecting his property. The fact that Meyer may have represented his children or even harbored an intent to help Saadeh's children despite not being their lawyer, or even if Saadeh viewed her as their lawyer, does not absolve Meyer from her responsibility as a lawyer for a guardian entrusted to deal in the property of the ward with due care. Meyer failed to protect the interests of the one person that the guardianship proceedings were designed to protect, Saadeh. For Meyer to escape liability because Saadeh viewed

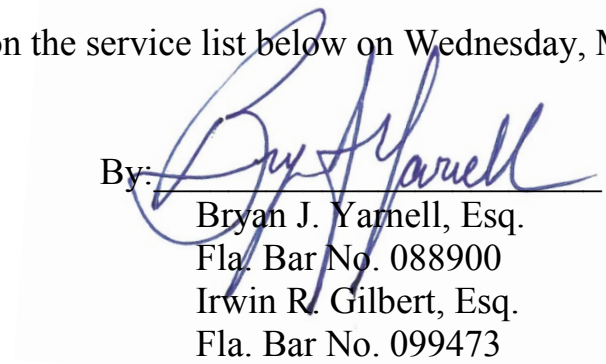
her for what she was, a compromised individual who failed to adhere to the highest standards of the legal profession in an area of law fraught with opportunity for over-reaching, does not mean that Saadeh also believed her as to the only thing that mattered to him—that the trust was revocable such that he could undue any harm she attempted by simply revoking the trust. Inasmuch as Meyer was the attorney for the guardian appointed to care for Saadeh's property, she owed him a duty irrespective of anyone's including Mr. Saadeh's, view of her loyalties. Her loyalty was legally and ethically required to be in one place when it came to Saadeh's property, to Saadeh to do no harm. She abdicated that responsibility and actively worked against him. She should not escape liability but instead should be held to task for her treachery against the Ward. At the very least, there is a triable issue of fact as to whether Saadeh was the intended beneficiary of her services which precluded entry of summary judgment. Respectfully, the trial court's judgment should be reversed and it should be stated clearly in the jurisprudence of this state that a guardian and the guardian's attorney owe a duty of care to the ward that is actionable by the ward when either breaches that duty.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this motion complies with the font requirements of Rule 9.100(1) of the Florida Rules of Appellate Procedure by using a Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served, via U.S. Mail upon the service list below on Wednesday, March 26, 2014.

By: 

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