CASE NOTES

LIMITATION OF ACTIONS—BENEFICIARIES UNDER A WILL ARE CHARGED WITH KNOWLEDGE OF THE RULE AGAINST PERPETUITIES AND FOR PURPOSES OF THE DISCOVERY RULE THIS IMPUTED KNOWLEDGE CAUSES THEIR LEGAL MALPRACTICE CLAIM AGAINST THE DRAFTING ATTORNEY TO ACCRUE AT TESTATOR'S DEATH.—*Millwright v. Romer* (Iowa 1982).

On April 3, 1944, attorney L.W. Romer drew the last will and testament of James G. Summers.[1] In accordance with Summers' testamentary intention, Romer included in the will a provision creating a trust which provided that after the termination of a life estate in favor of Mrs. Summers certain real property was to be held in trust for Summers' two sons, Markel and Laurel.[2] This trust was to terminate at the death of both sons, at which time title was to vest in the testator's grandchildren, provided the youngest of the issue of both sons was at that time thirty-five years of age.[3] If this condition was not satisfied, the trust was to continue for the benefit of other family members until the youngest issue of the two sons reached age thirty-five.[4] At that time, the trust was to terminate and title to the real estate was to vest

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1. Millwright v. Romer, 322 N.W.2d 30, 31 (Iowa 1982).

2. *Id.*

3. In re Summers, No. 2-62811, slip op. at 1-2 (Iowa Ct. App. Dec. 27, 1979). The trust provision of the will provided as follows:

> At the death of both of my said sons, Laurel H. Summers and Markel Summers, this trust shall terminate, provided, the youngest of our grandchildren (said grandchildren being the issue of Laurel H. Summers and/or Markel Summers) shall have reaced the age of 35 years, but if the youngest of such grandchildren shall not have reached the age of 35 years, then said trust shall continue until the youngest of such grandchildren shall have reaced the age of 35 years, and of the income therefrom, ½ thereof, shall be distributed to Ann Summers, so long as she shall live or until said youngest grandchild, shall have attained the age of 35 years, whichever happens first. And the other one-half of said income shall be distributed as follows: - ½ to Gladys Summers the wife of Markel Summers, and one-half to the Children of Markel Summers, but in case the said Gladys Summers shall die prior to the termination of the trust as hereinafter provided, then said one-half share of said income shall be distributed equally among the children of the said Markel Summers. And in any event, after the death of said Laurel H. Summers and Markel Summers, and the youngest grandchild having attained said age of 35 years, said trust shall terminate and the title to said real estate shall vest in our grandchildren in equal shares.

Id.

4. *Id.*

in the grandchildren in equal shares.[5]

One year after he executed his will, James G. Summers died, and his will was admitted to probate.[6] On October 11, 1955, after the death of the testator's wife, the trust, of which Summers' two sons were life beneficiaries, was opened for administration and was administered thereafter without incident for twenty-two years.[7] L.W. Romer took no part in either the administration of the Summers estate or in the administration of the trust.[8]

On November 8, 1978, the district court sustained a challenge to the trust on grounds it violated the rule against perpetuities.[9] The Iowa Court of Appeals affirmed the judgment of the district court.[10] In accordance with the judgments, the trust was terminated and Summers' two sons, holders of life estates and his sole heirs at law, took title to the real estate in fee simple absolute.[11]

On February 12, 1980, Markel Summers and his children, Donna S. Millwright and James Markel Summers, brought a legal malpractice action against L.W. Romer, who by then was retired from practice as an attorney.[12] By a motion for summary judgment, Romer raised the defense of statute of limitations.[13] The trial court granted the motion for summary judgment on a finding that the plaintiffs had been aware of the provisions of the will for more than eight years and that, being charged with knowledge of the rule against perpetuities, the plaintiffs could not overcome the bar of the statute.[14]

The plaintiffs appealed to the Iowa Supreme Court, contending that the trial court erred in granting summary judgment for the defendant attorney.[15] The case was considered en banc, and six justices *held*, affirmed.[16] Under the discovery rule, beneficiaries under a will are charged with knowledge of the rule against perpetuities, causing their legal malpractice claim against the drafting attorney to accrue at testator's death. *Millwright v. Romer*, 322 N.W.2d 30 (Iowa 1982).

The court's opinion is significant - even provocative - for its unapo-

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5. *Id.*
6. Millwright v. Romer, 322 N.W.2d at 31.
7. *Id.*
8. *Id.*
9. *Id.*
10. In re Summers, 292 N.W.2d 877, 877 (Iowa Ct. App. 1979).
11. In re Summers, No. 2-62811, slip op. at 3 (Iowa Ct. App. Dec. 27, 1979).
12. Millwright v. Romer, 322 N.W.2d at 31.
13. *Id.* The defendant relied on §614.1(4), IOWA CODE (1981), which provides a five year limitation after accrual on all actions not otherwise treated by the code. Millwright v. Romer, 322 N.W.2d at 31.
14. *Id.*
15. *Id.*
16. *Id.* at 34. Three justices dissented. Justice Harris filed a brief but nonetheless caustic dissent. *Id.* Justices McCormick and Larson joined Justice Harris' dissent, and Justice Larson added his own views in a two paragraph opinion. *Id.* at 35.

logetic holding that under the vigilance required of them by law, all citizens are assumed to have knowledge of the statutory rule against perpetuities.[17] Perhaps of even farther reaching significance is the court's use of this presumption to conclude that, for purposes of the discovery rule, the plaintiffs had knowledge of the will's defects as of the day of the testator's death.[18] This holding places a sizeable burden on beneficiaries to a will seeking to establish a malpractice claim against the drafting attorney and suggests that the twenty year period of liberality in allowing such claims which began with *Lucas v. Hamm*[19] may be at an end in Iowa.

The court in *Millwright* addressed three issues. First was the question of when a tort action for legal malpractice based on a negligently drafted will would accrue.[20] Second, the court considered whether beneficiaries to a will may be charged with knowledge of the rule against perpetuities.[21] Finally, the court considered whether any of the policies supporting the application of the discovery rule to legal malpractice actions dictated an exception to the imputation of knowlege of the rule against perpetuities.[22]

Concerning the first issue of the accrual of a tort action for legal malpractice based on a negligently drafted will, the court noted that the general rule - that such an action accrued at the testator's death - represented a departure from the old rule that the action accrued at the time the negligence occurred.[23] The court noted that the general rule conflicted with Iowa's discovery rule which otherwise governed the accrual of legal malprac-

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17. *Id.* at 33. In Iowa, the statutory rule against perpetuities provided as follows: "Every disposition of property is void which suspends the absolute power of controlling the same, for a longer period than during the lives of persons then in being, and twenty-one years thereafter." §558.68, IOWA CODE (1981). In April, 1983 the general assembly enacted an extensive amendment to this section. *See* 1983 IOWA LEGISLATIVE SERV. 90 (1983).

18. Millwright v. Romer, 322 N.W.2d at 33-34.

19. 56 Cal.2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962).

20. Millwright v. Romer, 322 N.W.2d at 32.

21. *Id.* at 33.

22. *Id.* at 34. Not at issue in *Millwright* was the right of the plaintiff-beneficiaries to sue the defendant attorney for damages incurred through his malpractice. Prior to 1961, the courts of most states adhered to the privity rule which precluded beneficiaries of a will from suing the drafting attorney for damages suffered when a bequest miscarried due to a fault in the instrument; but in *Lucas v. Hamm* the Supreme Court of California held that a beneficiary could sue a drafting attorney as a third party beneficiary to the testator's contract. 56 Cal.2d at ___, 364 P.2d at 689, 15 Cal. Rptr. at 825. Eight years later in *Heyer v. Flaig*, 70 Cal.2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969), the Supreme Court of California found the third party beneficiary theory of recovery to be conceptually superfluous and held that since there could be no recovery without negligence, the crux of the action lay in tort. *Id.* at ___, 449 P.2d at 164, 74 Cal. Rptr. at 228. The holdings of both these cases were accepted by the court as a matter of course. Millwright v. Romer, 322 N.W.2d at 32 n.1. *See also* Brody v. Ruby, 267 N.W.2d 902, 906 (Iowa 1978)(discussing *Lucas* and *Heyer* in favorable terms).

23. *Id.*

tice actions.[24] The court resolved the issue by holding that in an action for malpractice by a beneficiary based on a negligently drafted will, the statute of limitations does not start to run until the beneficiary discovers the harm or, through the exercise of reasonable care, should have discovered the harm.[25]

The question before the court then became whether the plaintiffs, prior to February 12, 1975,[26] might have known by the use of the means of information within their reach that the will drawn by the defendant violated the rule against perpetuities.[27] Reasoning that all citizens are assumed to know the law and are charged with knowledge of the provisions of statutes, and that the rule against perpetuities has been part of the code of Iowa since 1851, the court held that the plaintiffs should have known of the defect in the will on the day the testator died.[28] Under this view, plaintiff Markel Summers' action against the defendant expired on April 14, 1950.[29] The actions of his two children would have extended beyond 1950 until one year after each reached the age of majority, but nevertheless would have run well before 1980 when the action was brought.[30] The statute of limitations having run against the claim of all plaintiffs, the court affirmed the trial court's summary judgment dismissing the petition.[31]

It was on this issue that Justices Harris and Larson disagreed with the majority.[32] In his brief dissent, Justice Harris left no doubt as to the depth of his disagreement with the majority.[33] Justice Harris relied on two propositions. First, the discovery rule is meant to raise a question of fact as to when a plaintiff knew or should have known of the injury he suffered.[34] That being the case, the plaintiffs should be given an opportunity to present their case to a jury and should not be prevented from doing so as a matter of

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24. *Id.* at 33. Iowa's discovery rule provides: "The limitation statute or statutes in malpractice cases do not start to run until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act." *Id.*

25. *Id.*

26. The February 12, 1975 date is established by counting back five years (i.e., the statutory limitations period) from February 12, 1980, the date the plaintiffs filed their action against the defendant. If the plaintiffs' action accrued prior to this date, it was barred by §614.1(4).

27. Millwright v. Romer, 322 N.W.2d at 33.

28. *Id.* at 33-34.

29. *Id.* at 34.

30. *Id.*

31. *Id.* at 34.

32. *Id.* at 34-35 (Harris and Larson, JJ., dissenting).

33. *Id.* at 34-35 (Harris, J., dissenting). Justice Harris opened his dissenting opinion with an amusing but nonetheless sarcastic question and answer which drew into sharp focus the nature of his concern: "Question: How do we bar a claim that a lawyer was negligent for misunderstanding the rule against perpetuities? Answer: By pretending laymen understand it." *Id.* at 34.

34. *Id.* at 35.

law.[35] Second, the rule against perpetuities is an inordinately complex rule which attorneys frequently misunderstand and misapply.[36] Inasmuch as transgressions of the rule by attorneys are so commonplace, the rule forms a signally inapposite foundation for barring a layman, through imputation of knowledge, from prosecuting a claim based on the rule against an attorney.[37]

Justice Larson, joining Justice Harris' dissent and also dissenting separately, directed his comments to what he considered the majority's questionable use of the discovery rule.[38] According to Justice Larson, the discovery rule was designed to ameliorate the harsh results which formerly arose through charging a plaintiff with knowledge of the facts giving rise to his claim despite the fact he was unaware of them.[39] By raising a presumption that all men know the law, the majority had imputed to the plaintiffs the very knowledge which the discovery rule was designed to make dependent on a showing of facts.[40] This result, Justice Larson concluded, stood the discovery rule on its head and allowed the granting of summary judgment in inappropriate circumstances.[41] Justice Larson did not take exception to the majority's imputation of knowledge of the rule against perpetuities, except to term it "artificial."[42]

In analyzing the court's handling of the discovery rule, it is important to note that the court had before it the opportunity to completely avoid applying the discovery rule.[43] As the court noted, the general rule governing a malpractice action by a beneficiary states that the statute of limitations begins to run at the testator's death.[44] Jurisdictions faced with a statute of limitations defense to a malpractice action, such as that at issue in *Millwright*, have applied this rule or the discovery rule in order to alleviate the harshness of the old "negligent act" rule, which started the statute of limitations running at the time the negligence occurred.[45] Had the court chosen to apply the general rule, it would have achieved the same result (i.e., the barring of the plaintiffs' claim) while avoiding any question as to the proper application of the discovery rule. Nonetheless, the court chose to apply the discovery rule to this action as it would have applied it to any legal malprac-

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35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* (Larson, J., dissenting).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 32.
44. *Id.* This rule or the discovery rule governs the accrual of beneficiary actions against the drafting attorney in most jurisdictions. Johnston, *Legal Malpractice in Estate Planning - Perilous Times Ahead for the Practitioner*, 67 IOWA L. REV. 629, 649 (1982).
45. *Id.* at 648.

tice action.[46] Since the court had a choice before it, its decision to apply the discovery rule must be viewed as purposeful.

Having chosen to apply the discovery rule, the court then proceeded to apply it in a manner which, though arguably Solomonic given the facts of the case,[47] is nonetheless somewhat unorthodox. The discovery rule developed as a legal device for allowing plaintiffs to maintain suits against professional defendants by postponing the period of limitations until discovery of the harm.[48] Under the discovery rule a plaintiff, who would otherwise have been barred by the statute of limitations, may maintain his action by raising an issue of fact as to whether he knew or should have known of the injury he suffered.[49] Given the nature of the discovery rule and the purposes for which it is generally applied, the court's imputation of knowledge to the plaintiffs in *Millwright* altered the rule's normal workings. As the dissenting Justices noted, there is a disharmony between an imputation of knowledge which operates as a matter of law, and an application of the discovery rule, which generally works to raise a question of fact.[50] Unfortunately, the majority opinion contains no hint as to the court's views on this question. Notwithstanding the fact that two Justices found the issue important enough to prevent them from concurring,[51] the court did not discuss the subject.

Apart from the question of whether it is correct to impute knowledge of statutes to plaintiffs seeking to establish their legal malpractice claim under the discovery rule, there remains the question of whether knowledge of the rule against perpetuities may be imputed. It is this portion of *Millwright* which will undoubtedly cause considerable consternation.

The rule against perpetuities, otherwise known as the rule against remoteness of vesting, is a rule of law the existence of which all attorneys are painfully aware, but the understanding of which few enjoy.[52] Its common law form or a modification thereof has been adopted by statute in many jurisdictions,[53] but its ubiquity has only facilitated its reputation for

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46. Millwright v. Romer, 322 N.W.2d at 32-33.

47. The court's resolution of the problem may be described as Solomonic because there is a tension between the statute of limitations and the discovery rule. *See generally* Note, *Legal Malpractice - Is the Discovery Rule the Final Solution?* 24 HASTINGS L.J. 795, 808 (1973)("The discovery rule more accurately effectuates the purposes behind an action for legal malpractice, but at the same time it drastically reduces the protection provided the legal profession by the statute of limitations"). The court in *Millwright* may have recognized the potentially limitless liability that could flow from the discovery rule and sought to limit it by an imputation of knowledge.

48. Note, *Legal Malpractice - Is the Discovery Rule the Final Solution?* 24 HASTINGS L.J. 795, 800 (1973).

49. Millwright v. Romer, 322 N.W.2d at 35 (Harris, J., dissenting).

50. *Id.* at 34-35 (Harris and Larson, JJ., dissenting).

51. *Id.*

52. Lucas v. Hamm, 56 Cal.2d at ___, 364 P.2d at 691, 15 Cal. Rptr. at 826.

53. Leach, *Perpetuities Legislation*, 67 HARV. L. REV. 1349, 1350 (1954).

malevolence.[54]

In support of its proposition that every citizen is assumed to know the law and is charged with knowledge of the provisions of statutes, the court in *Millwright* cited numerous cases from the United States Supreme Court,[55] as well as cases from various state supreme courts.[56] However, none of the

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54. The rule has been described as a "technicality-ridden nightmare" and a "dangerous instrumentality in the hands of most members of the bar." Lucas v. Hamm, 56 Cal.2d at ___, 364 P.2d at 691, 15 Cal. Rptr. at 826 (quoting Leach, *supra* note 53 at 1349). The California court also quoted the following statement:

> A long list might be formed of the demonstrable blunders with regard to its questions made by eminent men . . . , and there are few lawyers . . . who have not . . . fallen into the net which the Rule spreads for the unwary, or at least shuddered to think of how narrowly they have escaped it.

Lucas v. Hamm, 56 Cal.2d at ___, 364 P.2d at 691, 15 Cal. Rptr. at 826 (quoting J.S. GRAY, THE RULE AGAINST PERPETUITIES xi (4th ed. 1942)).

55. Cannon v. University of Chicago, 441 U.S. 677, 696-97 (For purposes of construing statutes, it is always appropriate to assume that legislators, like other citizens, know the law); Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 236, 243 (1944)(A state statute requiring payment to the state of deposit accounts abandoned for ten years is not an unconstitutional violation of due process because all persons holding property within a state must take note of the statutes regulating such ownership); North Laramie Land Co. v. Hoffman, 268 U.S. 276, 282-83 (1925) (States may condemn private real property for the construction of a road upon published notice without violating the due process clause because all citizens are charged with knowledge of statutes and of the procedures adopted by them, so long as such procedures are not unreasonable or arbitrary); Ketchum v. St. Louis, 101 U.S. 306, 315 (1880)(Those claiming under mortgages executed by a railroad company are chargeable with notice of the equitable lien upon the company's property created in favor of the county by an act of the legislature); Cooke v. United States, 91 U.S. 389, 401-02 (1875)(The procedures for retiring of treasury notes being public laws, all citizens who deal with the government in this respect are presumed to know of the exclusive authority of the Secretary of the Treasury to retire such notes).

56. Barber Pure Milk Co. of Montgomery v. Alabama State Milk Control Bd., 275 Ala. 489, 156 So.2d 351, 355 (1963)(Since all men are charged with knowledge of the law pertaining to their transactions, the orders of the Alabama State Milk Board, adopted eighteen months before the execution of the contract in question, entered into and defined the obligations of the parties); Atlas Realty Co. v. House, 123 Conn. 84, 192 A. 564, 567 (1937)(A defense of ignorance of the law will not bar a finding that a lender intentionally violated a usury statute since to allow such a defense would open the door to evasion of the law, a problem against which the maxim "everyone is presumed to know the law" militates); Dunlap v. Richmond & D.R. Co., 81 Ga. 136, 7 S.E. 283, 284 (1888)(An engineer who was sent by his employer to haul trains for another railroad, and was injured, cannot recover against his employer by arguing that he assumed the employer owned both roads since a public statute put him on notice that such was not the case); Neal v. Board of Supervisors, 243 Iowa 723, 728, 53 N.W.2d 147,150 (1952)(Where voters of a county vote on a proposed bond issue, they are charged with knowledge of the provisions of the statute regulating such issue and such provisions are to be read into the notice of the bond election); Twiehaus v. Rosner, 362 Mo. 949, 245 S.W.2d 107, 110 (1952)(Parties to a rental contract with an option to buy are charged with knowledge of statutes in effect at the time the contract was executed and which invalidated the contract); Giordano v. Mayor and Council of Dumont, 137 N.J.L. 740, 742, 61 A.2d 245, 247 (1948)(Where a building permit is illegally issued the recipient thereof may not contest its validity since he is charged with knowledge of the amendment to the zoning ordinance by which the permit became illegal); Hagerman v. Town of Hagerman, 19 N.M. 118, 124-25, 141 P. 613, 616 (1914)(A

cases cited dealt with the rule against perpetuities.[57] For purposes of classification, the cases may be divided into two groups: those in which knowledge of statutes is imputed to owners of real property,[58] and those in which such knowledge is imputed to businessmen.[59] It is well established that owners of property within a state are charged with knowledge of the statutes affecting the control and disposition of that property.[60] It is also well established that businessmen are commonly held to a higher degree of attentiveness to regulatory obligations in the conduct of their affairs.[61] These imputations of knowledge find their justifications in the protection of society as a whole from the burden of having to notify every person who is or may be affected by a change in the law.[62] Without such imputations of knowledge, members of the groups to whom regulatory measures are addressed would be able to avoid their responsibilities and flout society's will by conducting themselves in such a manner as to remain ignorant.[63]

It may be said that the plaintiffs in *Millwright* are members of a group (real property owners) to whom the regulatory measure, the rule against perpetuities, is addressed for the purpose of notifying them that they may not hold property which comes to them in violation of the rule. Under this view, the plaintiffs would fall within the property owner group of cases cited by the Iowa Supreme Court. On the other hand, it can be said with equal if not greater persuasiveness that the rule against perpetuities is addressed to testators and drafters of testamentary documents and is meant to put such citizens on notice that no disposition of property which violates the rule will be valid. Regardless of which approach is the more valid, there is nevertheless an anomaly at work when knowledge of a complex rule of law is imputed to a layman to defeat a malpractice claim founded on a violation of the same rule of law by an attorney. If a layman is charged with such knowledge, surely an attorney must be held to a standard somewhat higher.

In his dissenting opinion, Justice Harris pointed out what every attorney and student of law knows: few legal practitioners can boast knowledge

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statute is public notice of its contents and a contracting party, being charged with knowledge of such statute, may not complain that his remedy for breach of contract was limited by such statute); Shealey v. American Health Ins. Co., 220 S.C. 79, 85-86, 66 S.E.2d 461, 464 (1951)(Where an insurer knows that the insured is employed by the state, it is presumed to have notice and knowledge of the laws whereby the insured would be paid by workmen's compensation for a loss identical to that covered by the insurance).

57. The fact that the court was unable to cite a single case in which knowledge of the rule against perpetuities was imputed to laymen is itself an indication that the holding of the court will find little favor in other jurisdictions.

58. *See supra* notes 55 and 56 and accompanying text.

59. *Id.*

60. Texaco v. Short, 454 U.S. 516, 532 (1982).

61. *Id.* at 549 (Brennan, White, Marshall and Powell, JJ., dissenting).

62. *Id.* at 544.

63. Warren v. Stancliff, 157 Conn. 216, ___, 251 A.2d 74, 76 (1968).

of the rule against perpetuities.[64] That being so, Justice Harris argued that imputing knowledge of it to laymen was an unsatisfactory way to bar a legal malpractice action for its violation.[65] To bolster his arguments, Justice Harris relied on *Lucas v. Hamm*, a well known California Supreme Court decision in which it was held that inasmuch as violations of the rule are so commonplace, an attorney who commits a highly technical breach of the rule cannot be said to have failed to use such skill as ordinary lawyers commonly possess and exercise.[66] There is little doubt that the holding of the court in *Millwright* is contrary to that of *Lucas*.[67]

As the third and final issue in *Millwright*, the court considered whether any of the public policy reasons for application of the discovery rule to legal malpractice suits would support an exception to the presumption that all citizens know the law.[68] The court considered four rationales advanced in support of the discovery rule by the California Supreme Court in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*[69] and tersely rejected each one as inapplicable to the case at bar on grounds that the plaintiffs were at no time clients of the defendant.[70] The analysis presented in this section of the court's opinion is open to question since the court relied solely on *Neel* without reference to *Heyer v. Flaig*,[71] an earlier opinion without which the holding of *Neel* cannot fully be appreciated.

Neel was a straightforward legal malpractice case in which a client sued his attorney for his negligent failure to arrange for service of process, thereby causing the client's wrongful death action to be dismissed with prejudice.[72] In applying the discovery rule to the client's malpractice claim, the Supreme Court of California noted that in cases of malpractice by a professional, postponement of the accrual of the action until discovery by the victim finds its justification in the special nature of the relationship "between the professional man and his client."[73] The court in *Millwright* seized upon this language, particularly the words "between the professional man

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64. Millwright v. Romer, 322 N.W.2d at 34-35 (Harris, J., dissenting).

65. *Id.* at 35.

66. 56 Cal.2d at ___, 364 P.2d at 690, 15 Cal. Rptr. at 826.

67. However, the court in *Millwright* may have been correct to disregard the *Lucas* holding on the issue of the rule against perpetuities. Subsequent decisions in California make it uncertain that *Lucas* was correct when decided. *See* Johnston, *supra* note 44 at 661.

68. Millwright v. Romer, 322 N.W.2d at 34.

69. 6 Cal.3d 176, 179, 188, 491 P.2d 421, 422, 428, 98 Cal. Rptr. 837, 838, 844 (1971). The four rationales set out in *Neel* are as follows: (1) a client has a right to rely on the superior skill and knowledge of his attorney; (2) in the absence of the discovery rule, the attorney client relationship is denigrated; (3) a layman ordinarily does not have the ability to detect errors made by his attorney; and (4) a layman ordinarily does not have the opportunity to view errors made by his attorney. *Id.* at 179, 188, 491 P.2d at 422, 428, 98 Cal. Rptr. at 838, 844.

70. Millwright v. Romer, 322 N.W. 2d at 34.

71. 70 Cal.2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

72. 6 Cal.3d at ___, 491 P.2d at 422, 98 Cal. Rptr. at 838.

73. *Id.* at ___, 491 P.2d at 428, 98 Cal. Rptr. at 844.

and his client," and interpreted it in such a manner as to bar the plaintiffs' attempt to plead an exception to the normal limitations period. The court reasoned that the public policies supporting application of the discovery rule to legal malpractice actions could not be used by the plaintiffs in *Millwright* as a basis for pleading an exception to the imputation of knowledge of the rule against perpetuities for the simple reason that the plaintiffs were not the defendant's clients.[74]

This interpretation of *Neel* has a visceral appeal so long as emphasis is placed on the words "between the professional man and his client." But *Neel* is more properly understood, not by spotlighting one or two of its serviceable phrases, but by a consideration of *Heyer*, a case which preceded - in fact, presaged[75] - *Neel's* holding.

In *Heyer*, as in *Millwright*, beneficiaries under a will sued the drafting attorney for his negligent failure to fulfill the testator's testamentary directions.[76] In the course of its opinion in *Heyer*, the Supreme Court of California noted that an attorney drafting a will has a legal duty to exercise care for the protection not only of his client but for that of his client's beneficiary as well, and that this duty to the beneficiary was distinct from that owed the client.[77] The Supreme Court of California held that because of the nature of the relationship between the drafting attorney and the beneficiaries, public policy required that the attorney exercise his superior knowledge and skill in such a manner as not to harm those persons whose interests are foreseeable.[78]

Given the nature of the relationship between the attorney and the beneficiary as described in *Heyer*, as well as *Heyer's* status as harbinger of *Neel*, it is possible to see *Neel* in a light very different from that in which the court in *Millwright* viewed it. In considering the statements in *Neel* concerning the public policies supporting the application of the discovery rule to legal malpractice actions, a shift of emphasis from the words "between the professional man and his client" to "the nature of the relationship" shows that the attorney-beneficiary relationship described in *Heyer* can easily be encompassed within *Neel's* holding without distortion of *Neel's* meaning. In fact, to view *Neel* as the court in *Millwright* did is to interpret *Neel* as a limitation on *Heyer* - an interpretation for which there is scant authority, since *Neel* discussed *Heyer* in only favorable terms.[79] Such an interpre-

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74. Millwright v. Romer, 322 N.W.2d at 34.

75. 70 Cal.2d 223, ___, 449 P.2d 161, 168 n.7, 74 Cal. Rptr. 225, 232 n.7 (1969). The California Supreme Court noted that, at that time, the rule in medical malpractice cases that the statute runs from the date of discovery did not apply to legal malpractice, but very well could. *Id.* The rule prohibiting postponed accrual of actions in legal malpractice cases, the court added, rested on a tenuous basis. *Id.*

76. *Id.* at ___, 449 P.2d at 162-63, 74 Cal. Rptr. at 226-27.

77. *Id.* at ___, 449 P.2d at 165, 74 Cal. Rptr. at 229.

78. *Id.* at ___, 449 P.2d at 165, 74 Cal. Rptr. at 229.

79. Neel v. Magana, Olney, Levy, Cathcart & Gelfund, 6 Cal.3d at ___, 491 P.2d at 427,

tation of *Neel* also implies that *Neel* was a partial rejection of the purpose which the legal innovations adopted in both *Lucas* and *Heyer* were meant to achieve: the policy of preventing future harm.[80]

The court in *Millwright* rejected, or failed to recognize, the special nature of the attorney-beneficiary relationship discussed in *Heyer*. This rejection caused the court to employ a pre-*Lucas* privity rule in considering the plaintiffs' attempt to plead an exception to the normal limitations period. Rather than the beneficiary's interests "looming larger" than those of the testator, as in *Heyer*,[81] it is now the testator who, by virtue of his privity, may escape the imputation of knowledge,[82] while the beneficiary, who suffers damage far in excess of that of the testator, is relegated to an inferior status.[83]

The *Millwright* court's consideration of the public policy rationales supporting the discovery rule without a concomitant consideration of the peculiar features of a beneficiary's action against a drafting attorney, and the

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429 n.6, 98 Cal. Rptr. at 843, 845 n.26.

80. *See* Heyer v. Flaig, 70 Cal.2d at ___, 449 P.2d at 165, 74 Cal. Rptr. at 229; Lucas v. Hamm, 56 Cal.2d at ___, 364 P.2d at 688, 15 Cal. Rptr. at 824.

81. 70 Cal.2d at ___, 449 P.2d at 165, 74 Cal. Rptr. at 229.

82. Of course the court in *Millwright* held that all citizens are charged with knowledge of the rule against perpetuities. 322 N.W.2d at 33. This holding encompasses testators as well as beneficiaries. This does not mean, however, that a testator who knows of the contents of his will but discovers five years and one day later that certain of the will's bequests are void for violation of the rule against perpetuities will suffer the same fate as did the plaintiff-beneficiaries in *Millwright*. The testator, like the beneficiaries in *Millwright*, will plead an exception to the imputation of knowledge and, perforce, the normal limitations period, by arguing that the reasons for application of the discovery rule to legal malpractice support such an exception. But, unlike the beneficiaries in *Millwright*, the testator will succeed because he is in privity with the drafting attorney. Of course, the testator's remedy will be limited to the cost of drafting a new will. Thus, in the view of the court in *Millwright*, a testator who discovers a violation of the rule against perpetuities outside the normal limitations period may maintain a malpractice action, even though the damage he suffers will usually be slight. After the testator's death, a beneficiary who discovers a violation of the rule against perpetuities outside the normal limitations period may not maintain a malpractice action, notwithstanding the fact that his damage will ordinarily be great. This state of affairs is similar to that which prevailed prior to the advent of *Lucas v. Hamm*, when the privity rule barred beneficiaries from malpractice actions altogether.

83. The nature of the beneficiary's cause of action for malpractice as it is contrasted to that of the testator's was a question at issue in *Heyer*. 70 Cal.2d at ___, 449 P.2d at 167, 74 Cal. Rptr. at 231. The defendant in *Heyer* attempted to argue that in an action against the drafting attorney, the beneficiary could not enjoy a period of limitations greater than that which the testator would enjoy. *Id.* The defendant's argument proceeded from the assumption that the beneficiary's rights flowed wholly from the privity between the attorney and the testator. *Id.* The court in *Heyer* flatly rejected this characterization of the beneficiary's rights. *Id.* The court held that since the beneficiary's substantive rights suffer great and irrevocable damage while those of the testator suffer only slight damage, the beneficiary's rights must be considered as distinct from those of the testator. *Id.* In some instances, the court explained, the rights of the beneficiary are greater than those of the testator. *Id.* at ___, 449 P.2d at 168, 74 Cal. Rptr. at 231-32. It was this portion of *Heyer* that the court in *Millwright* rejected or failed to recognize.

public policies sought to be achieved by *Lucas* and *Heyer*, produced a skewed result. A monocular application of the rationale supporting the discovery rule, without a simultaneous appreciation of the very real and substantial relationship that exists between the drafting attorney and the beneficiary of a will caused the court's inquiry to resolve itself into a question of privity.

In conclusion, the court in *Millwright* reached a result which represented a substantial retreat from two trends. First, an imputing knowledge of the rule against perpetuities to laymen, the court departed from the company of those courts holding attorneys increasingly accountable for malpractice in the drafting of testamentary documents.[84] This departure may lead to some anomalous results. Under the courts' holding in *Millwright*, though a beneficiary's action is said to accrue when he discovers the wrong, being charged with knowledge of the rule against perpetuities and lacking privity, a beneficiary cannot prevent his action from accruing at the testator's death. Thus, it will behoove a circumspect beneficiary upon the testator's death to have an attorney inspect the will for violation of any statutory provision relating to the validity of testamentary instruments. Without this inspection, the beneficiary runs the risk of losing not only his bequest but his only means of being made whole against that loss. But if the attorney the beneficiary visits is one of the many who do not understand the rule against perpetuities, he may be no better off for the visit, since he will again be charged with knowledge of the rule should that attorney breach his duty by informing the beneficiary, erroneously, that his bequest is safe. Second, in resurrecting the privity rule and rejecting, or failing to recognize, the attorney's duty to the beneficiary, the court may have signaled its dissent from the trend toward a more liberal view of the substantive rights of beneficiaries. This dissent is likely to have significant repercussions for the drafters of wills in Iowa, considering that the developments of the last twenty years have been based on a recognition that it is the beneficiary, not the testator, who suffers real and substantial harm when a testamentary disposition of property miscarries.

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84. Johnston, *supra* note 44, at 650.