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Abolishing the Privity Doctrine in Texas - Just Do It!

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ABOLISHING THE PRIVITY DOCTRINE IN TEXAS — *JUST DO IT!*

INTRODUCTION

Traditionally, liability for attorney malpractice was limited to circumstances where the claimant was in *privity of contract* with the attorney.[1] The general rule in Texas is that no cause of action in negligence may arise from a breach of duty unless there is privity of contract between the defendant and the injured party.[2] This so-called privity doctrine has been utilized in Texas jurisprudence as a complete defense to most legal malpractice claims for over sixty years.[3] Thus, in Texas, attorneys' exposure to malpractice is limited to actions brought by their clients because only clients have direct contractual relationships with attorneys. Historically, this narrow confine allowed Texas attorneys to determine whether to assume certain representations,

1. 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 7.1 (3d ed. 1989).

2. *See, e.g.*, Barcelo v. Elliott, 39 Tex. Sup. Ct. J. 607 (May 10, 1996); Dickey v. Jansen, 731 S.W.2d 581, 582 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); Bell v. Manning, 613 S.W.2d 335, 338 (Tex. App.—Tyler 1981, writ ref'd n.r.e.).

3. *See, e.g.*, Traders & General Ins. Co. v. Keith, 107 S.W.2d 710, 713 (Tex. Civ. App.—Amarillo 1937, writ dism'd) (citing 5 TEX. JUR. *Assignments to Bailment* § 63, at 473 (1930); Citizens' Nat'l Bank v. Morrison, 50 S.W.2d 346, 347 (Tex. Civ. App.—Austin 1932, no writ)).

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and moreover, to properly gauge the extent of their liability exposure.[4]

Over the past forty years, however, other American jurisdictions have expanded the scope of liability to include third parties not within the direct attorney-client relationship. Beginning with *Biakanja v. Irving*,[5] decided in 1958, the California Supreme Court first relaxed the privity doctrine by allowing an intended third party beneficiary to recover against a non-lawyer for improper execution of a will.[6] In *Biakanja*, a notary who was not an attorney negligently drafted a will for a testator that was invalid because the notary failed to have the will properly attested.[7] As a result, the named beneficiary received only one-eighth of the estate by intestacy and sued the defendant for negligence.[8] The principle issue was whether the defendant was under a duty of care to protect the plaintiff even though they were not in privity.[9] Predictably, the defendant-notary argued that he owed a duty only to the client-testator and not to the plaintiff-beneficiary.[10] Nonetheless, the California court found the defendant undertook to provide for the formal disposition of an estate by drafting and supervising execution of a will, an important transaction requiring specialized skills, and moreover, the defendant was not qualified to undertake such a task.[11] The court held the defendant's conduct "was not only negligent but was also highly improper" and "[s]uch conduct should be discouraged and not protected by immunity from civil liability, as would be the case if plaintiff, the only person who suffered a loss, were denied a right of action."[12]

In so holding, the California Supreme Court rejected historical precedent and announced a new standard to determine the applicability of the privity defense in California legal malpractice cases.[13] The court adopted a judicial balancing test that weighed the following six factors: 1) the extent to which the transaction was intended to affect the plaintiff; 2) the foreseeability of harm to the plaintiff; 3) the degree of certainty the plaintiff suffered injury; 4) the closeness between the attorney's conduct and the injury suffered; 5) the moral blame attached to the attorney's conduct; and 6) the policy of preventing future harm.[14] As a result, the California Supreme Court concluded the plaintiff should be allowed recovery "despite the absence of priv-

4. 1 MALLEN & SMITH, *supra* note 1, § 7.1, at 360. *See Barcelo*, 39 Tex. Sup. Ct. J. at 609-10; *Bell*, 613 S.W.2d at 339.
5. 320 P.2d 16 (Cal. 1958).
6. *Id.* at 19.
7. *Id.* at 17.
8. *Id.*
9. *Id.* at 18.
10. *Id.*
11. *Id.* at 19.
12. *Id.*
13. *Id.*
14. *Id.* at 19.

ity."[15] Therefore, for the first time since English courts enunciated the privity standard more than one hundred years earlier, an American court broke tradition and redefined the standard.[16]

Three years later, in *Lucas v. Hamm*,[17] the California Supreme Court chose to apply the *Biakanja* balancing test in a suit filed by trust beneficiaries against an attorney. In *Lucas*, the attorney-defendant, in violation of instructions and in breach of contract, negligently prepared a will containing invalid phraseology under the California Civil Code.[18] Later, upon the will's admission to probate, the defendant informed the plaintiffs of the will's invalid trust provision and advised them that they would be deprived of the entire amount set out in the trust provision unless they settled with the testator's blood relatives.[19] As a result, the plaintiffs entered into a settlement agreement and received a lesser amount than they would have received if the testamentary instrument had been valid. The plaintiffs subsequently sued the defendant for negligence. The trial court granted summary judgment for the defendant reasoning the lack of privity between the plaintiffs and the defendant precluded the plaintiffs from maintaining their suit.[20]

On appeal, the California Supreme Court overruled the lower court's decision and applied the *Biakanja* balancing test.[21] Noting the similarity between the notary in *Biakanja* and the attorney in *Lucas*, the court stated, "The same general principle must be applied in determining whether a beneficiary is entitled to bring an action for negligence in the drafting of a will when the instrument is drafted by an attorney rather than by a person not authorized to practice law."[22]

However, the attorney attempted to distinguish *Biakanja*, arguing the *Biakanja* decision should only apply to non-lawyer notaries and not attorneys.[23] The California Supreme Court rejected this argument and thus overruled the absolute privity barrier with regard to attorneys.[24] Specifically, the California Supreme Court held that attorneys who negligently draft wills under California law containing phraseology that proves invalid relating to restraints on alienation and the rule against perpetuities may be held liable to third party intended beneficiaries who are injured by the attorney's negligence.[25] The court reasoned, "[t]he lack of privity between plaintiffs and defendant [should]

15. *Id.*
16. *See, e.g.*, Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842).
17. 364 P.2d 685 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962).
18. *Id.* at 686.
19. *Id.* at 687.
20. *Id.* at 686-87.
21. *Id.* at 687.
22. *Id.* at 687-88.
23. *Id.* at 688.
24. *Id.*
25. *Id.* at 687-90.

not preclude plaintiffs from maintaining an action in tort against [the] defendant."[26]

Thereafter, a trend began developing throughout many American courts, which relaxed the privity doctrine in estate planning legal malpractice cases, particularly against attorneys accused of drafting testamentary documents which proved to be invalid or resulted in frustration of testamentary intent.[27] In these jurisdictions, a compensating remedy now exists for injured beneficiaries either under a third party beneficiary theory or a negligence theory. These courts base their reasoning on the assumption that it is the intended third party beneficiaries, not the testators, who are injured, therefore, the beneficiaries should have standing to sue testators' attorneys for negligence.

In the remaining jurisdictions continuing to adhere to the privity doctrine, including Texas, injured third party beneficiaries have no recourse against negligent attorneys who proximately cause their inju-

26. *Id.* at 688.

27. *See* Shriners Hosp. for Crippled Children v. Gardiner, 733 P.2d 1102 (Ariz. Ct. App. 1986) (trustee held liable for breach of fiduciary duty for delegating trustee's investment powers); Lucas v. Hamm, 364 P.2d 685 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962) (attorney who negligently drafts a will may be held liable to third party intended beneficiaries); Stowe v. Smith, 441 A.2d 81 (Conn. 1981) (third party beneficiary may maintain negligence action against attorney for drafting invalid trust provision in a will); Needham v. Hamilton, 459 A.2d 1060 (D.C. 1983) (intended will beneficiary may bring malpractice cause of action against drafting attorneys despite lack of privity); DeMaris v. Asti, 426 So. 2d 1153 (Fla. Dist. Ct. App. 1983) (will beneficiary may maintain a malpractice action against attorney who drafts the will); Ogle v. Fuiten, 466 N.E.2d 224 (Ill. 1984) (attorney held liable to intended beneficiaries for negligently drafting a will); Walker v. Lawson, 526 N.E.2d 968 (Ind. 1988) (action may be maintained by will beneficiary against attorney who drafted the will on basis that beneficiary is a known third party); Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987) (attorney may be held liable to devisee under will where attorney drafted testator's will naming devisee to receive land and attorney subsequently aided testator in partition sale of land); Pizel v. Zuspann, 795 P.2d 42 (Kan. 1990) (attorney may be liable for negligence to third party beneficiary despite lack of privity); Hill v. Willmott, 561 S.W.2d 331 (Ky. Ct. App. 1978) (attorney may be held liable for damage caused by his negligence to intended beneficiary despite lack of privity); Succession of Smith, 514 So. 2d 606 (La. Ct. App. [4 Cir.] 1987) (executor's attorney may be held liable to testator's heir for failing to follow proper procedures in obtaining judgment of possession rendered in succession proceeding); Flaherty v. Weinberg, 492 A.2d 618 (Md. 1985) (third party beneficiary may recover in negligence against attorney); Charleson v. Hardesty, 839 P.2d 1303 (Nev. 1992) (attorney who represents a trustee assumes a duty of care toward trust beneficiaries as a matter of law); Wisdom v. Neal, 568 F. Supp. 4 (D.N.M. 1982) (no attorney client relationship necessary for heirs to recover from attorney who improperly distributed estate); Rathblott v. Levin, 697 F. Supp. 817 (D.N.J. 1988) (attorney whose negligence in drafting will caused beneficiary to deplete the estate's assets in defending will contest may be held liable to beneficiary in malpractice action despite lack of privity); Hale v. Groce, 744 P.2d 1289 (Or. 1987) (attorney liable to alleged intended will beneficiary for failing to carry out direction of testator and include gifts to beneficiary); Guy v. Liederbach, 459 A.2d 744 (Pa. 1983) (attorney who failed to properly draft a will was held liable to will beneficiaries who lost their legacy); Stangland v. Brock, 747 P.2d 464 (Wash. 1987) (acknowledging the right of an estate beneficiary to bring a cause of action against a negligent attorney).

ries.[28] In Texas, for example, the only parties with standing to sue for negligence in estate planning legal malpractice cases are client-testators, who by factual circumstance must be deceased in order for wills to become operative. Unfortunately, until a will becomes operative, or fails to operate, there is no injury, and afterward, there is no one remaining alive with standing to maintain the malpractice action. Therefore, Texas attorneys escape liability while seriously injuring intended third party beneficiaries.

Today, rules concerning the extent to which attorneys may be held liable to persons outside the direct attorney-client relationship are still being formulated by courts throughout this country.[29] Nonetheless, the majority of modern decisions favor expanding the scope of liabil-

28. Robertson v. White, 633 F. Supp. 954 (W.D. Ark. 1986) (lawyers are liable to persons not in privity only for fraudulent misrepresentations, not negligent misrepresentations); Berger v. Dixon & Snow, P.C., 868 P.2d 1149 (Colo. Ct. App. 1993) (attorneys are not liable to nonclients in the absence of fraudulent or malicious conduct); Bush v. Rewald, 619 F. Supp. 585 (D. Haw. 1985) (attorneys not liable to third party investors for securities fraud); Gerber v. Peters, 584 A.2d 605 (Me. 1990) (attorney appointed in divorce proceedings as guardian *ad litem* of father's minor child did not owe a duty to the father because no attorney client relationship existed); Logotheti v. Gordon, 607 N.E.2d 1015 (Mass. 1993) (attorney of decedent whose will was determined to lack testamentary intent did not owe heirs a duty to be reasonably alert to indications decedent was incompetent); Ginther v. Zimmerman, 491 N.W.2d 282 (Mich. Ct. App. 1992) (alleged unnamed intended will beneficiaries have no cause of action against attorney who drafted will); Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261 (Minn. 1992) (a third party beneficiary may bring a malpractice action only when the client's sole purpose was to benefit the third party); Williams v. Bryan, Cave, McPheeters, McRoberts, 774 S.W.2d 847 (Mo. Ct. App. 1989) (intended will beneficiaries may not bring tort action against attorneys for negligently drafting will where will contest provides beneficiaries a complete remedy); St. Mary's Church v. Tomek, 325 N.W.2d 164 (Neb. 1982) (attorney who prepared testator's will owes no duty to purported will beneficiaries who claim attorney negligently drafted will); Spivey v. Pulley, 526 N.Y.S.2d 145 (N.Y. App. Div. 1988) (attorney not liable to beneficiary who brought legal malpractice action against attorney who drafted a will because there was no privity between the beneficiary and attorney); Chicago Title Ins. Co. v. Holt, 244 S.E.2d 177 (N.C. Ct. App. 1978) (indemnitor who was found liable under indemnity agreement was not in privity of contract with attorneys and thus could not maintain action); Lewis v. Star Bank, 630 N.E.2d 418 (Ohio Ct. App. 1993) (beneficiaries of a trust were not in privity with advising law firm at time law firm allegedly failed to give settlor proper tax advice and thus could not maintain a malpractice action); Franke v. Midwestern Okla. Dev. Auth., 428 F. Supp. 719 (W.D. Okla. 1976) (federal court applying Oklahoma law held that as a matter of law an attorney is not liable to third party with whom he was not in privity); Barcelo v. Elliott, 39 Tex. Sup. Ct. J. 607 (May 10, 1996) (attorney who negligently drafts a will or trust owes no duty of care to intended beneficiaries); Atkinson v. IHC Hosp., Inc., 798 P.2d 733 (Utah 1990) (holding state has never allowed recovery where third party liability was at issue); Copenhaver v. Rogers, 384 S.E.2d 593 (Va. 1989) (remaindermen under testamentary trust have no cause of action against testator's attorneys for negligence due to the lack of privity); Anderson v. McBurney, 467 N.W.2d 158 (Wis. Ct. App. 1991) (attorney not held liable to third parties for acts committed within scope of attorney-client relationship); Brooks v. Zebre, 792 P.2d 196 (Wyo. 1990) (prospective lessors of ranch have no cause of action against attorney for prospective lessees in the absence of attorney-client relationship).

29. 1 MALLEN & SMITH, *supra* note 1, § 7.10, at 379.

ity for legal malpractice beyond the narrow confines of the direct attorney-client relationship to include plaintiffs *expressly* intended as beneficiaries of the attorney's retention.[30]

During the past four years, there have been four important Texas estate planning legal malpractice cases involving the privity doctrine. The Texas Supreme Court granted writ of error in three out of four of these cases. Two of the cases were initially heard by the Houston First District Court of Appeals, and one each by the Dallas and Eastland appellate courts.

In the Dallas case, *Thomas v. Pryor*,[31] the Texas Supreme Court granted writ, but later dismissed it, remanding the case in accordance with a settlement agreement reached by the parties.[32] In the first Houston case, *Thompson v. Vinson & Elkins*,[33] the Texas Supreme Court denied error. However, in the latest Houston case, *Barcelo v. Elliott*,[34] the Texas Supreme Court granted writ and decided the case on May 10, 1996.[35] Not surprisingly, the Texas Supreme Court chose to utilize *Barcelo* to reaffirm its long-standing refusal to relax the privity doctrine. In the fourth case, *Oliver v. West*,[36] decided before the recent *Barcelo* decision, the Eastland Court of Appeals upheld summary judgment for the defendant, finding that the attorney owed no duty to heirs who were not the defendant's clients.[37]

The purpose of this comment is to provide future guidance to Texas courts in structuring a bright-line rule to determine third party nonclient standing in similar estate planning legal malpractice cases as an alternative to the current privity standard. Part I discusses and analyzes the evolution of the privity doctrine and the current theories supporting its relaxation as it relates to estate planning legal malpractice cases, particularly circumstances involving negligently drafted or executed wills. Part II examines the privity doctrine as it has been applied in Texas legal malpractice cases. Part III recommends abolishing the privity doctrine in Texas and offers a new standard to assist Texas courts in determining, with some degree of certainty and predictability, the circumstances under which negligent attorneys should be held liable to persons not within the direct attorney-client relationship.

30. *See, e.g.*, Stangland v. Brock, 747 P.2d 464 (Wash. 1987); DeMaris v. Asti, 426 So.2d 1153 (Fla. Dist. Ct. App. 1983); Heyer v. Flaig, 449 P.2d 161 (Cal. 1969).

31. 847 S.W.2d 303 (Tex. App.—Dallas 1992), *writ dism'd by agr.*, 863 S.W.2d 462 (Tex. 1993).

32. *See* Thomas v. Pryor, 863 S.W.2d 462 (Tex. 1993).

33. 859 S.W.2d 617 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

34. No. 01-94-00830-CV, 1995 WL 51054 (Tex. App.—Houston [1st Dist.] 1995, writ granted).

35. 39 Tex. Sup. Ct. J. 607 (May 10, 1996).

36. 908 S.W.2d 629 (Tex. App.—Eastland 1995, n.w.h.).

37. *Id.* at 631. As of the publication date, no writ had been filed in *Oliver*.

I. BACKGROUND

A. *The Privity Doctrine*

1. In General

The general privity doctrine as it pertains to legal malpractice is that an attorney will not be held liable for negligence to persons other than his clients due to the lack of a contractual relationship between the attorney and the third party.[38] In its broadest sense, *privity of contract* has been defined as a derivative interest founded on, or growing out of, contract connection, or bond of union between the parties.[39] Thus, historically, whether a person had standing in a negligence action was based on the theory of duty owed to him as a result of a contract, and whether or not he was a party to that contract.[40]

It is common knowledge that *privity of contract* exists when a person hires the legal services of an attorney where the retention and services of employment are rendered for the benefit of that person.[41] For example, in *Ward v. Arnold*,[42] a wife retained an attorney to draft a will for her husband, whereby she would be made the beneficiary of the residue of his estate.[43] The defendant, after contacting the husband to determine testamentary intent, prepared the will and mailed it to the wife with instructions for proper execution.[44] The wife, however, neglected to have the will properly executed, relying solely on the defendant's later advice that the will was not necessary and that, by law, if her husband died intestate, the wife would receive the residue in any event.[45] Thereafter, the husband died and the wife failed to receive her intended devise.[46] As a result, the wife sued the defendant for negligence, alleging the defendant knew the "husband was the owner of a substantial amount of separate property," and that if the defendant possessed reasonable knowledge and would have exercised "reasonable care under the standards of practice in the community," he should have known that under Washington probate law, if her husband died intestate, she would inherit only half of his separate estate.[47]

In holding that the wife could maintain a cause of action for malpractice in these circumstances, the Supreme Court of Washington stated:

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38. 1 MALLEN & SMITH, *supra* note 1, § 7.10, at 376-78.
39. Hodgson v. Midwest Oil Co., 17 F.2d 71, 75 (8th Cir. 1927).
40. *See* Francis H. Bohlen, *The Basis of Affirmative Obligations, in The Law of Tort*, 53 AM. L. REG. 209, 214-17 (1905).
41. 1 MALLEN & SMITH, *supra* note 1, § 7.2, at 361.
42. 328 P.2d 164 (Wash. 1958).
43. *Id.* at 165.
44. *Id.* at 165-66.
45. *Id.* at 166.
46. *Id.*
47. *Id.*

> The complaint plainly states that the defendant's services were engaged by the [wife], that the advice was given to her, and that the will with attached instructions was sent to her. The fact that the defendant contacted the husband to determine whether the proposed will expressed his true intentions does not change the relationship alleged. It is not contrary to public policy for one person to engage an attorney to write the will of another, naming him beneficiary.[48]

Similiarly, Texas courts have made it clear that only clients may maintain suits for negligence against attorneys due to the existence of privity between the parties. For example, in *Bryan & Amidei v. Law*,[49] the Fort Worth Court of Appeals stated:

> It is a general rule that the duties of the attorney which arise from the relation of attorney and client, are due from the attorney to his client only, and not to third persons. . . . No privity of contract exists between them and the attorney. For such injuries, therefore, as third persons may sustain by reason of the failure or neglect of the attorney to perform a duty which he owed to his client only, they have no right of action against the attorney.[50]

Therefore, in Texas the privity doctrine has historically served to exonerate attorneys from third party non-client liability. Moreover, proponents contend that the rule should be maintained in order to protect the sanctity of the direct attorney-client relationship.[51] The general concern is that creating a duty owed to third parties will inevitably harm attorneys' obligations of loyalty, independent judgment, zealousness, and confidentiality owed only to their clients.[52] Furthermore, it is argued that relaxation of the privity doctrine will increase the cost of legal malpractice insurance, resulting in an undue burden on the Texas legal profession and possible diminution in the quality of legal services and ultimately could make legal services more expensive.[53]

2. Historical Antecedents

The privity doctrine was firmly established in the English courts by 1842.[54] The precise origin of the doctrine is unclear, but the two lead-

48. *Id.* (citation omitted).

49. 435 S.W.2d 587 (Tex. Civ. App.—Ft. Worth 1968, no writ).

50. *Id.* at 593.

51. *See* Steven K. Ward, *Legal Malpractice in Texas,* 19 S. TEX. L.J. 587, 610-11 (1978).

52. *See* State Bar Rules, art. X, § 9, EC5-1 (Texas Code of Professional Responsibility), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (West 1988); Tex. Disciplinary R. Prof. Conduct 2.01 (1989), *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G app. A (West Supp. 1996) (State Bar Rules art. X, § 9).

53. *See* Bell v. Manning, 613 S.W.2d 335, 339 (Tex. App.—Tyler 1981, writ ref'd n.r.e.).

54. *See* Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842).

ing decisions most influential in American jurisprudence are *Winterbottom v. Wright*[55] and *Robertson v. Fleming*.[56]

In Winterbottom, a mail carrier was driving a mail coach owned and purchased by his employer, when due to defective manufacturing, the coach broke down, whereby the mail carrier was thrown from his seat and suffered personal injuries.[57] The primary issue in *Winterbottom* was whether the manufacturer should be held liable to the purchaser's employee for injuries caused by the manufacturing defect. The employee mail carrier had no direct business relationship with the manufacturer, yet sought compensation from the manufacturer for his injuries.[58] Consequently, due to the absence of a direct contractual relationship between the mail carrier and the manufacturer, the *Winterbottom* court concluded the mail carrier was prohibited from maintaining such an action against the manufacturer.[59] Lord Abinger, stating this was an action of first impression, wrote for the majority:

> There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.[60]

Lord Alderson, concurring with Lord Abinger, expressed the same concern and agreed privity was a necessary requisite for standing:

> If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty.[61]

Likewise, in *Robertson v. Fleming*,[62] an English court found the public policy of limiting liability to those in privity of contract outweighed any need to provide a remedy for plaintiffs suffering financial loss.[63] In *Robertson*, a debtor hired a solicitor to draft a security agreement for the benefit of his sureties.[64] The security agreement failed. In response, the sureties sued the solicitor for negligence.[65] Lord Camp-

55. 152 Eng. Rep. 402 (Ex. 1842).
56. 4 Macq. 167 (H.L. 1861).
57. *Winterbottom*, 152 Eng. Rep. at 403.
58. *Id.*
59. *Id.* at 405.
60. *Id.*
61. *Id.*
62. 4 Macq. 167 (H.L. 1861).
63. *Id.* at 177-82.
64. *Id.* at 169.
65. *Id.* at 168.

bell, writing for the *Robertson* court, stated that a duty arises only if there is privity between the parties:

> As this duty was not imposed by any general law . . . I never had any doubt that it could be established only by showing privity of contract between the parties . . . If this were a law a disappointed legatee might sue the solicitor employed by a testator to make a will in favor of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested. I am clearly of the opinion that this is not the law . . . and it can hardly be the law of any country where jurisprudence has been cultivated as a science.[66]

Consequently, the court did not assign liability to the attorney for improperly drafting the security agreement.

What is most significant about the *Robertson* decision is that it is one of the earliest published opinions applying the privity doctrine in a legal malpractice case. The reason that the English court likely placed this early limitation on recovery was because the tort of negligence was relatively new, and the English courts were concerned with defining its scope.[67] According to one commentator, "It has been asserted that the distinctions between contract and tort law had not sufficiently matured at the time of *Winterbottom* and *Robertson* to permit the respective courts to properly distinguish their spheres of influence."[68]

3. The American Doctrine

The leading American legal malpractice case applying the privity doctrine is *National Savings Bank v. Ward*.[69] In *National Savings*, an attorney was hired by a purchaser of real property to examine the seller's title in order for a mortgage lender to make a loan in reliance upon the title examination.[70] Later, the lender was unable to foreclose on the property when the purchaser defaulted because the attorney had negligently overlooked a prior recorded deed.[71] In response, the mortgage lender sued the attorney for malpractice.

The United States Supreme Court, following early English precedent, held in the absence of *privity of contract* there was no legally enforceable duty between the parties.[72] The *National Savings* Court stated:

> [T]he general rule is that the obligation of the attorney is to his client and not to a third party, and unless there is something in the

66. *Id.* at 177.
67. *See* 1 MALLEN & SMITH, *supra* note 1, § 7.4, at 364.
68. JOHN W. SALMOND, SALMOND ON THE LAW OF TORTS 11 (16th ed. 1973).
69. 100 U.S. 195 (1880).
70. *Id.* at 195-196.
71. *Id.* at 198.
72. *Id.* at 200-02.

> circumstances [fraud] of this case to take it out of the general rule, it seems clear that the proposition of the defendant [that there is no liability absent privity] must be sustained.[73]

The *National Savings* Court's reasoning was grounded in the same public policy considerations enunciated by the earlier English courts:

> [T]he person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect.[74]

Consequently, the *National Savings* Court held privity of contract was necessary for recovery, and the lack of privity acted as a bar to third party suits even when the attorney's negligence proximately causes the injuries.[75] The principle effect of the *National Savings* decision was to limit an attorney's exposure to legal malpractice, thus avoiding indeterminate litigation. Therefore, the initial American rule was that attorneys could not be held liable in negligence for injuries suffered by persons outside the direct attorney-client relationship.

Ironically, within the *National Savings* decision, the Supreme Court opened the door to the first American exception to the privity doctrine. The Court stated "unless there is something in the circumstances of this case to take it out of the general rule"[76] and "[n]either fraud nor collusion is alleged or proved,"[77] *privity of contract* is the standard to be used. This same standard was later utilized by Justice Cardozo in *Ultramares Corp. v. Touche*,[78] where he stated "[In the absence of fraud] the ensuing liability for negligence is one that is bounded by the contract, and is to be enforced between the parties by whom the contract has been made."[79]

Nevertheless, throughout most of the industrial revolution, a majority of courts retained the privity doctrine because it was consistent with pervasive public policy.[80] Many courts felt it necessary to fix certain definable boundaries on duty to permit entrepreneurs of the time to predict the extent of their liability exposure. As Walter Probert and Robert Hendricks state, "The enterpriser could chart his risks not

73. *Id.* at 200.
74. *National Savings*, 100 U.S. at 202.
75. *Id.* at 200.
76. *Id.* at 200.
77. *Id.* at 199.
78. 174 N.E. 441 (N.Y. 1931).
79. *Id.* at 448. Before addressing the negligence issue, the court reiterated that privity was not required if fraud was pled and proved. Concluding that fraud was not present, the privity issue became outcome determinative.
80. *See, e.g.*, Huset v. J.I. Case Threshing Mach. Co., 120 F. 865 (8th Cir. 1903).

only by choosing his contract relationships but also by means of the contract itself."[81]

However, as free wheeling capitalism began to give way to a more controlled and regulated economy, it was inevitable that the concept of duty would expand, and so too would the limitations on the privity doctrine.[82] Interestingly, most of the original cases limiting the doctrine first occurred in New York, a jurisdiction that presently strictly adheres to the privity standard in legal malpractice cases.[83]

In *Thomas v. Winchester*,[84] the New York Court of Appeals held that the privity doctrine should not apply in products liability cases.[85] In *Winchester*, a pharmacist negligently mislabeled a deadly extract.[86] A second pharmacist purchased the vial and unknowingly sold it to a customer who was injured by the deadly extract.[87] The customer sued the original pharmacist who mislabeled the medicine.[88]

In response, the original pharmacist asserted he owed no duty of care to the customer in the absence of contractual privity between himself and the customer.[89] However, the New York Court of Appeals imposed liability on the original pharmacist in order to deter future misconduct:

> The defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the probable consequences of the act.[90]

Thereafter, not surprisingly, as the gasoline motor car with its propensity for personal injury began to replace the horse and carriage, additional exceptions to the privity doctrine began to replace the earlier public policy concerns of indeterminate litigation.

For example, in *MacPherson v. Buick Motor Co.*,[91] the New York Court of Appeals limited application of the privity doctrine where personal injuries result from negligently manufactured goods.[92] In *MacPherson*, Justice Cardozo concluded negligent vehicle manufacturers should be held liable to motorcar passengers who are injured as

81. Walter Probert & Robert A. Hendricks, IV, *The Specter of Suits by Nonclients*, 67 A.B.A. J. 720 (1981).
82. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 93, at 622-27 (4th ed. 1971).
83. *See, e.g.*, Spivey v. Pulley, 526 N.Y.S.2d 145 (N.Y. App. Div. 1988).
84. 6 N.Y. 397 (1852).
85. *Id.* at 458-61.
86. *Id.* at 456.
87. *Id.* at 455-56.
88. *Id.*
89. *Id.* at 456-57.
90. *Id.* at 459.
91. 111 N.E. 1050 (N.Y. 1916).
92. *Id.* at 1053.

a result of manufacturing defects, even though the passengers lacked privity of contract with the manufacturer.[93] The court found that the defects in the automobile's wooden wheel could have been discovered by reasonable inspection, therefore, the only issue was whether the manufacturer owed a duty of care and vigilance to anyone but the immediate purchaser.[94] Justice Cardozo relied on the *Winchester* exception and stated the privity doctrine did not further public policy where personal injuries are involved:

> There is here no break in the chain of cause and effect. In such circumstances, the presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.[95]

As a result, the court held, "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. . . . [t]hen, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."[96]

Likewise, in *Glanzer v. Shepard*,[97] the New York Court of Appeals limited application of the privity doctrine in a negligent misrepresentation case. In *Glanzer*, a public weigher was hired by a seller to certify the weights and measures of certain goods.[98] A third party buyer relied on the certifications, and made a purchase that later turned out to be inaccurate due to the negligent certification.[99] In permitting recovery, Justice Cardozo stated reliance by the third party was the *end and aim* of the transaction.[100] Accordingly, the New York Court of Appeals held that even though the weigher was hired by the seller, and not the buyer, the weigher should be directly liable to the buyer for negligent misrepresentation.[101]

Cardozo's reasoning for imposing liability was based on the fact that the public weigher provided the certification with the intention of influencing the buyer's conduct, and therefore, a duty was owed to the buyer as well as to the seller who actually hired the public weigher.[102] The *Glanzer* court expressly disavowed the notion that privity of contract controlled: "The controlling circumstance is not the character of

93. *Id.* at 1054-55.
94. *Id.* at 1051.
95. *Id.* at 1053.
96. *Id.*
97. 135 N.E. 275 (N.Y. 1922).
98. *Id.* at 275.
99. *Id.*
100. *Id.*
101. *Id.* at 275-77.
102. *Id.* at 275-76.

the consequence, but its proximity or remoteness in the thought and purpose of the actor."[103] Thus, "[w]e state the defendant's obligation, therefore, in terms, not of contract merely, but of duty."[104]

Therefore, under Justice Cardozo's now universally recognized exceptions to the privity doctrine, the pendulum of public policy swung from protecting the marketplace toward creating duties where third party personal injuries were foreseeable, caused by negligent defendants, and redressable by the courts.[105] Moreover, because of their focus on the proximity of relationships, the intention of the contracting parties, and foreseeability of injury, these exceptions to the privity doctrine proved to be indispensable aspects in the development of the American concept of third party standing in legal malpractice cases.

B. Relaxation of the Privity Doctrine

During the 1980's, the American Bar Association compiled statistics which indicated 13% of all legal malpractice claims against attorneys were brought by persons other than attorneys' clients.[106] Approximately 18% of those claims related to estate planning matters.[107] Today, the majority of modern decisions favor relaxing the privity doctrine in these circumstances, thereby allowing such third party suits to proceed.[108] The ALR sets forth the general rule for relaxation of the doctrine:

> Whether an action by a nonclient against an attorney is based upon a contract theory [third party beneficiary] or upon a negligence theory, there still must be alleged and shown that the plaintiff, if not the direct employer-client of the defendant attorney, is a person or part of a class of persons specifically intended to be the beneficiary of the attorney's undertaking.[109]

Based upon this general principle, modern courts rely on two theories to determine whether attorneys owe a duty to non-clients: the negligence theory, and the third party beneficiary theory. Texas courts, however, preclude recovery under both theories. For example, in *Barcelo v. Elliott*,[110] the Houston First District Court of Appeals recently stated:

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103. *Id.* at 276.

104. *Id.* at 277.

105. *Id.* at 275-77.

106. *Profile of Legal Malpractice*, ABA Standing Comm. on Lawyer's Professional Liability (May 1986).

107. *Id.*

108. *See supra* note 27.

109. Joan Teshima, Annotation, *What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other Than Immediate Client*, 61 A.L.R. 4th 464, 468 (1988).

110. 1995 WL 51054 (Tex. App.—Houston [1st Dist.] 1995), *aff'd*, 39 Tex. Sup. Ct. J. 607 (May 10, 1996).

> Under current Texas law, an attorney is only subject to suit by his client for negligent preparation of estate planning documents. The rationale behind this rule is that only a person with whom the attorney has privity has standing to sue for malpractice. Intermediate courts of this state have applied this principle to preclude recovery under both a tort and third party-beneficiary theory.[111]

Nonetheless, the majority of modern decisions in other jurisdictions utilize one or both theories in relaxing the privity doctrine.

1. The Negligence Theory

The negligence theory from *Biakanja* attempts to establish a definition of duty based upon public policy considerations.[112] By focusing almost exclusively on the extent to which a particular transaction affects a claimant, the negligence theory, with its multiple factor balancing test, is a logical extension of Cardozo's *end and aim* analysis from *Glanzer*.[113] Different from a third party beneficiary theory, the negligence theory is broader in its application, and includes persons who may or may not be intended third party beneficiaries, but who may foreseeably be injured by an attorney's negligence.

The first factor of the balancing test examines the extent a particular transaction is intended to affect an intended beneficiary. The terminology used in this factor invokes the same legal standard used to determine whether a person is an intended beneficiary for purposes of determining the enforceability of third party beneficiary contracts.[114]

The second factor examines the foreseeability of harm to the beneficiary through conventional tort analysis. Even though the first factor originates in contract law, and the second in tort, both serve the same policy aim: the imposition of non-client liability on negligent attorneys. Moreover, in applying these factors, it is difficult to conceptualize circumstances where a will is drafted, providing for an intended beneficiary, where no foreseeable harm results from the will's failure due to negligent drafting.

A similar relationship exists between the third and fourth factors. The third factor probes the degree of certainty that an intended beneficiary suffered harm. The fourth factor examines the closeness between the conduct complained of and the harm actually suffered. Clearly, any investigation as to the closeness between conduct and harm generally presupposes with certainty that some harm occurred. Consequently, under this analysis, an attorney who prepares a will is

111. *Barcelo,* 1995 WL 51054 at *2 (citations omitted).

112. The California test involves various factors: 1) the extent to which the transaction was intended to affect the plaintiff; 2) the foreseeability of harm to the plaintiff; 3) the degree of certainty the plaintiff suffered injury; 4) the closeness between the attorney's conduct and the injury; and 5) the policy of preventing future harm. *Id.* at 19.

113. *See* Glanzer v. Shepard, 135 N.E. 275 (N.Y. 1922).

114. *See infra* note 126 and accompanying text.

generally held liable for negligence if the attorney prepares the will with the intent of transferring property to a beneficiary, and there is a close connection between the legatee's loss and the attorney's negligence.

The fifth factor is a pure policy determination as to whether finding liability in a particular instance will prevent future harm. In practice, this factor inevitably requires the imposition of liability. For instance, if an attorney drafts a will with the intention of transferring property to a beneficiary, and testamentary intent is frustrated by the attorney's negligence, the policy of preventing future harm almost always requires imposition of liability.

In *Heyer v. Flaig*,[115] the California Supreme Court applied the *Biakanja* balancing test and reasoned when an attorney accepts responsibility for effectuating the testamentary scheme of a client, the attorney "assumes a relationship not only with the client but also with the client's intended beneficiaries."[116] In *Heyer*, a testatrix hired an attorney to draft a will with the intent to transfer her entire estate to her two daughters. Shortly thereafter, the will was executed and the woman remarried.[117] The attorney, however, failed to advise the testatrix that her post-testamentary spouse could claim a portion of her estate under the California Probate Code, thus depriving the beneficiaries of their intended devise.[118] The testator died the following year and under California law her former spouse was awarded a share of her estate.[119] In response, the daughters, as intended third party beneficiaries, sued the attorney for negligence due to his failure to advise the mother that the change in her marital status affected the disposition of her estate.[120]

Although the *Heyer* court limited its holding to a ruling on the statute of limitations, the court held the intended beneficiaries had standing to sue the attorney.[121] The court reasoned that in failing to carry out a client's testamentary scheme, an attorney's acts and omissions not only affect the success of a client's testamentary scheme, but possibility of injury to intended beneficiaries is equally foreseeable.[122] The *Heyer* court recognized that this case was similar to the breach of duty found in *Lucas*, and extended a duty to the beneficiaries for public policy reasons, recognizing that unless will beneficiaries can recover against attorneys, no one can do so, thereby frustrating the social policy of preventing future harm.[123]

115. 449 P.2d 161 (Cal. 1969).
116. *Id.* at 164.
117. *Id.* at 162.
118. *Id.* at 163.
119. *Id.* at 162-63.
120. *Id.* at 163.
121. *Id.* at 165.
122. *Id.* at 164-65.
123. *Id.* at 165.

2. The Third Party Beneficiary Theory

The third party beneficiary theory probes whether the primary purpose of the attorney's retention is to provide legal services for the benefit of the injured claimant.[124] This analysis examines to what extent the transaction was intended to affect a particular beneficiary. Under the third party beneficiary theory, third party intended beneficiaries may sue attorneys who negligently draft wills, if the beneficiaries can show that a testator entered the attorney-client relationship with the *expressed* intent of conferring a benefit on them.[125] Consequently, under this theory, an enforceable duty arises for intended beneficiaries while no duty exists for incidental beneficiaries.

For example, if a testator hires an attorney to prepare a will and manifests an *expressed* intent to benefit a particular person, then the intended beneficiary has standing to maintain a malpractice action against the attorney, if the beneficiary fails to receive his devise due to the attorney's negligence. To distinguish between intended beneficiaries and incidental beneficiaries, the Restatement of Contracts states in pertinent part:

> (1) Unless otherwise agreed between the promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.[126]

In *Guy v. Liederbach*,[127] the Pennsylvania Supreme Court relied on the third party beneficiary theory and held that a named beneficiary, who was also the named executrix, could maintain a cause of action against an attorney who drafted the will.[128] In *Guy*, the attorney had directed the beneficiary to witness the will, thus voiding her entire legacy and her appointment as executrix.[129] Consequently, the court held that the plaintiff had a cause of action as a third party beneficiary:

> The underlying contract is that between the testator and the attorney for the drafting of a will. The will, providing for one or more named beneficiaries, clearly manifests the intent of the testator to

124. *See* 1 MALLEN & SMITH, *supra* note 1, at 384-85.
125. *See, e.g.*, Guy v. Liederbach, 459 A.2d 744, 750 (Pa. 1983).
126. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979).
127. 459 A.2d 744 (Pa. 1983).
128. *Id.* at 752-53.
129. *Id.* at 746.

> benefit the legatee. Under Restatement (Second) § 302(1), the recognition of the 'right to performance in the beneficiary' would be 'appropriate to effectuate the intention of the parties' since the estate either cannot or will not bring suit. . . . Being named beneficiaries of the will, the legatees are intended, rather than incidental, beneficiaries . . . for whom 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.' In the case of a testator-attorney contract, the attorney is the promisor, promising to draft a will which carries out the testator's intention to benefit the legatees. The testator is the promisee, who intends that the named beneficiaries have the benefit of the attorney's promised performance. The circumstances which clearly indicate the testator's intent to benefit a named legatee are his arrangements with the attorney and the text of his will.[130]

Not surprisingly, this specifically named legatee limitation appeals to attorney-defendants who contend the extension of recovery to third party beneficiaries will result in a "vast range of potential liability."[131] The *Guy* court retained the requirement of strict privity in actions against attorneys for negligence, stating, "[W]e agree with the appellants that the *Lucas* standard is too broad . . . ."[132]

3. A Tort or Contract Theory

A number of jurisdictions recognize causes of action in either tort or contract, typically placing a claimant in a position to elect to proceed under one or both theories. Professors Prosser and Keeton, however, find the distinctions between the two theories troublesome. Consequently, they have expressed hope that the availability of a contract or tort theory, for the same kind of loss with different requirements for both plaintiffs and defendants, will be reduced in order to simplify the law and reduce litigation costs.[133]

In *Stowe v. Smith*,[134] the Connecticut Supreme Court ruled that the plaintiffs could pursue either remedy when there was no conflict between the rules of contract and tort.[135] In *Stowe*, an attorney prepared a will in accordance with instructions from the testator to provide one-half of the estate in trust for the plaintiff.[136] The will was admitted to probate but due to an alleged drafting mistake the plaintiff was forced to accept a settlement of only three-fourths the intended devise.[137] Consequently, the plaintiff sued the defendant as a third party benefi-

130. *Id.* at 751-52.
131. Dickey v. Jansen, 731 S.W.2d 581, 583 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).
132. *Guy,* 459 A.2d at 746.
133. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 92, at 655 (5th ed. 1984).
134. 441 A.2d 81 (Conn. 1981).
135. *Id.* at 84.
136. *Id.* at 82.
137. *Id.*

ciary of the defendant's agreement with the testatrix. In holding that the plaintiff could maintain such a suit in either contract or tort, the Connecticut Supreme Court stated, "Unless a particular conflict between the rules of contract and tort requires otherwise, a plaintiff may choose to proceed in contract, tort, or both."[138]

Likewise, in *Schreimer v. Scoville*,[139] the Iowa Supreme Court allowed a cause of action under a contract or tort theory by a beneficiary against an attorney who drafted a will that resulted in failure of the intended devise.[140] In *Scoville*, an attorney prepared a will and codicil which named a devisee who was to receive land.[141] The same attorney, however, continued to represent the testator and aided the testator in a partition sale of the same land.[142] Consequently, the intended gift was determined adeemed.[143] In allowing the devisee's suit to proceed, the Iowa Supreme Court stated:

> In light of . . . various policy considerations, we conclude a lawyer owes a duty of care to the direct, intended, and specifically identifiable beneficiaries of the testator as expressed in the testator's testamentary instruments. The thrust of any action brought by such an individual, whether couched in terms of contract or tort necessarily will center on the existence and breach of this duty.[144]

C. *Negligence and Legal Malpractice*

1. Historical Antecedents

Historically, there has been great readiness to hold defendants liable for acts or omissions in connection with some affirmative line of conduct in which they engaged or for a dangerous condition they created.[145] According to one commentator, "The law of negligence . . . start[ed] from the idea of failure in the performance of a determinable provable legal duty" such as that which arises from a statute or prescription of the nature of the defendant's calling as a public or common one.[146] Therefore, historically, a duty of care was imposed on a person who undertook to do a thing, "with or about another's property, or to do something with or to him."[147]

Because negligence originally developed in circumstances where a defendant owed a duty to a plaintiff based on some relationship between them, many courts viewed negligence as being correlative to a

138. *Id.* at 84 (citation omitted).
139. 410 N.W.2d 679 (Iowa 1987).
140. *Id.* at 682.
141. *Id.* at 680.
142. *Id.*
143. *Id.*
144. *Id.* at 682 (citation omitted).
145. Bohlen, *supra* note 40, at 210-14.
146. 1 THOMAS A. STREET, THE FOUNDATION OF LEGAL LIABILITY 182 (1906).
147. *Id.* at 187.

duty not to cause harm to a plaintiff in the manner in which he was complaining.[148] Courts familiarized themselves with the concept of negligence arising from the need to determine whether a particular injury was "said to be a sufficiently proximate consequence of the defendant's act to entail liability."[149] Early courts answered this question by asking whether any ordinarily prudent man would have foreseen that damage might result from his act.[150] As a result, the basis of duty, under the modern law of negligence, is the duty to use care toward those who might *foreseeably* be harmed because the lack of care involves an unreasonable probability of harm.[151]

2. Modern Applications

The modern tort of legal malpractice, like any negligence action, consists of three principal elements. First, the attorney must owe a duty to the injured party. Second, the attorney must breach that duty. And third, the injuries suffered must be proximately caused by such breach.[152] However, the legal issues of causation and damages in estate planning legal malpractice cases differ from those in other legal malpractice actions. In other areas, the elements of causation and damages are generally difficult to prove. However, this is not necessarily true in estate planning cases.

For example, if a legal malpractice action is based on an attorney's failure to file a suit within the applicable statute of limitations, a plaintiff must prove that the attorney's action (or inaction) was the proximate cause of the injury, and that the plaintiff would have recovered but for the attorney's negligence.[153] Therefore, the plaintiff must prove two distinct elements: that the attorney was negligent in not filing the suit within the statute of limitations, and if the suit would have been filed in a timely manner, the plaintiff would have been successful in his recovery. Once the causal connection between the attorney's action and the loss is proven, damages may be established, and the amount of damages is measured by what the plaintiff would have received if his original suit had been properly filed.[154]

In estate planning cases, however, errors by attorneys generally avoid these difficult areas of proof. For instance, in some jurisdictions, if a named legatee in a will is allowed to serve as an attesting witness,

148. *Id.* at 187-88.

149. W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 450 (2d ed. 1937).

150. *See, e.g.*, MacPherson v. Buick Motor Co., 111 N.E. 1050, 1052-53 (N.Y. 1916).

151. Percy H. Winfield, *Duty in Tortious Negligence*, 43 COLUM. L. REV. 41, 44 (1934). However, Winfield felt there was no sound historical basis for this limitation on the duty to use care.

152. Trask v. Butler, 872 P.2d 1080, 1083 (Wash. 1994).

153. *See, e.g.*, Lysick v. Walcom, 65 Cal. Rptr. 406, 421 (Cal. Ct. App. 1968); Coon v. Ginsberg, 509 P.2d 1293, 1295 (Colo. Ct. App. 1973); Jackson v. Urban, 516 S.W.2d 948, 949 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

154. *Jackson*, 516 S.W.2d at 949.

the legatee must forfeit his particular devise.[155] In these circumstances, assuming breach of duty is proven, it is obvious that by allowing the legatee to serve as an attesting witness, the attorney proximately caused the legatee's failure to receive his bequest, and the amount of damages is the value of the lost legacy. Yet, while causation and damages in estate planning cases may seem to present little problem, third party recovery remains subject to the privity doctrine in many jurisdictions.

II. THE PRIVITY DOCTRINE IN MODERN TEXAS LEGAL MALPRACTICE CASES

Interestingly, most recent Texas non-client estate planning legal malpractice cases may be categorized into two distinct groups. The first group is composed of what may be called *discretionary* cases: cases arising as a result of an attorney having advised a client-testator of the relevant law, but leaving any subsequent action or inaction up to the client or attorney's discretion, and consequently, the exercise of such discretion results in injury to a third party beneficiary.[156] An example of this occurs when an attorney advises a client that he must change the signature card on a particular funds account in order to fulfill testamentary intent, but during his lifetime, the testator fails to change the signature card, thereby resulting in frustration of testamentary intent, and loss to the intended beneficiary.

The second group can be categorized as *non-discretionary* cases: cases arising as a result of the testator's attorney failing to comply with the ministerial requirements necessary for properly preparing and executing a will under the Texas Probate Code,[157] thus resulting in

155. *See, e.g.*, Woodfork v. Sanders, 248 So. 2d 419, 422 (La. Ct. App. 1971).

156. Black's Law Dictionary defines *discretionary* acts as follows:

> Those acts wherein there is no hard and fast rule as to course of conduct that one must or must not take and, if there is [a] clearly defined rule, such would eliminate discretion. Option open to [individuals] to act or not as they deem proper or necessary. . . . One which requires exercise in judgment and choice and involves what is just and proper under the circumstances.

BLACK'S LAW DICTIONARY 244 (5th ed. 1983).

157. Section 59(a) of the Texas Probate Code states:

> Every last will and testament, except where otherwise provided by law, shall be in writing and signed by testator in person or by another person for him by his direction and in his presence, and shall, if not wholly in the handwriting of the testator, be attested by two or more credible witnesses above the age of fourteen years who shall subscribe their names thereto in their own handwriting in the presence of the testator.

TEX. PROB. CODE ANN. § 59(a) (West Supp. 1996).

Furthermore, according to one commentator, the importance of properly preparing a will should never be minimized:

> [Attorneys] should approach [estate planning] with a realization that to the client the will is probably the most important document of his life . . . . By disposition of his property he intends to make provisions for other persons, generally for persons close and dear to him. The property may be the result

injury to a third party beneficiary. An example of a *non-discretionary* case arises when an attorney allows an intended beneficiary to act as a subscribing witness, thereby resulting in the intended beneficiary failing to receive his intended devise.

A. Discretionary Cases

In *Berry v. Dodson, Nunley & Taylor, P.C.*,[158] the San Antonio Court of Appeals declined to break with the Texas privity rule, holding that an attorney owes no duty to a third party in the absence of privity of contract.[159] *Berry* was a case of first impression in Texas: whether the privity requirement precludes a negligence action brought by the intended beneficiaries of a testator's estate against attorneys who failed to prepare a new will in accordance with the testator's instructions prior to his death.[160] In *Berry*, the testator hired the defendants while he was hospitalized with terminal cancer to prepare a new will to provide for his wife's children from a previous marriage, as beneficiaries, on an equal basis with his own children.[161] However, the testator died approximately sixty days after his initial consultation with the defendants.[162] During this time period, although the defendants had prepared a draft of the new will, the testator, exercising his own discretion, never executed the new will before his death.[163] Consequently, his previous will, excluding the children, was admitted to probate.[164] As a result, the testator's wife sued the defendants for negligence.

Not surprisingly, the defendants' motion for summary judgment was premised solely on the lack of privity and the lack of duty owed to the plaintiff.[165] However, the plaintiff argued that privity did exist on the basis of two telephone conversations she had with the defendants while they were assisting the testator.[166] The trial court granted summary judgment for the defendants.[167] On appeal, in affirming summary judgment, the San Antonio Court of Appeals stated, "While [the

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> of a lifetime of effort. Its dispositions will have lasting and significant effect . . . . Although the will is subject to change during the client's lifetime, his death will seal it forever, good or bad, right or wrong . . . . If the lawyer doubts his ability to produce the best possible will for the client, he should decline to prepare one.

John S. Miller, *Functions and Ethical Problems of the Lawyer in Drafting a Will*, 1950 U. ILL. L.F. 415, 423.

158. 717 S.W.2d 716 (Tex. App.—San Antonio 1986), *rev'd*, 729 S.W.2d 690 (Tex. 1987).

159. *Id.* at 719.

160. *Id.* at 717.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 717-18.

167. *Id.* at 717.

plaintiff] assisted her husband in communicating with [the defendants], her testimony does not establish a fact issue as to the existence of an attorney-client relationship between her or her family and [the defendants]."[168]

Similarly, in *Thompson v. Vinson & Elkins*,[169] the Houston First District Court of Appeals held the privity requirement "is well-reasoned and should not be 'relaxed' in a case brought against an attorney by parties who are not the attorney's clients, but who are instead would-be 'third party beneficiaries' of the attorney-client relationship."[170] In *Thompson*, the plaintiffs sued the defendants for wrongdoing in the handling of trust property.[171] The plaintiffs were residual trust beneficiaries under their aunt's will.[172] The aunt provided in her will that "the residue of her estate, after some specific bequests were made, was to be placed in a trust for the protection and well-being of her husband" and the plaintiffs.[173] The principal asset in the estate was the aunt's interest in the stock of a corporation.[174] The defendants were in turn hired by the trustee to represent the estate and trust in the process of distributing the trust's assets including the plaintiff's stock in the corporation.[175] The plaintiffs, however, alleged that the defendants implemented a plan to manipulate the plaintiffs into agreeing to take only book value for their stock under a redemption plan offered by the corporation.[176] Allegedly, the defendants failed to disclose to the plaintiffs that they also represented the corporation.[177] The plaintiffs sued the defendants under several theories, including "professional negligence."[178] In response, the defendants argued that the plaintiffs did not have standing to assert such a claim due to the lack of privity.[179] The defendants moved for summary judgment, claiming that "an attorney is not liable to . . . those not in privity to attorneys . . . for alleged failure to perform duties which the attorney owes only to his clients."[180] The trial court granted summary judgment for the defendants.[181]

168. *Id.* at 718.
169. 859 S.W.2d 617 (Tex. App.—Houston [1st Dist.] 1993, writ denied).
170. *Id.* at 622 (citing Dickey v. Jansen, 731 S.W.2d 581, 583 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.)).
171. *Id.* at 618.
172. *Id.* at 619.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 620.
177. *Id.*
178. *Id.*
179. *Id.* at 621. Dickey v. Jansen, 731 S.W.2d 581, 582 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e)).
180. *Id.* (citing *Dickey*, 731 S.W.2d at 582)).
181. *Id.* It should be noted that the summary judgment was based on the plaintiffs' conversion claim.

On appeal, the plaintiffs argued that the defendants wrongly advised the corporation that the plaintiffs' stock was subject to redemption.[182] However, the Houston First Court of Appeals stated, "Any claim here for the allegedly wrong advice supplied by the attorney rests with the wrongly advised party itself."[183] Consequently, the Houston court affirmed summary judgment for the defendants.

Recently, in *Oliver v. West*,[184] the Eastland Court of Appeals held that an attorney owes no duty to the heirs of a client for allegedly mishandling preparation of the client's will and for failing to properly ensure that the testator's intentions were ultimately fulfilled.[185] In *Oliver*, the plaintiffs asserted that their father hired the defendant to prepare a will to reflect their father's intention to divide certain IRA funds equally into thirds between the father's wife and the plaintiffs.[186] However, the signature cards on the IRA accounts designated the wife as the primary beneficiary, and consequently, the funds passed to the wife upon the father's death.[187]

The plaintiffs, as third party beneficiaries, sued the defendant for negligence and breach of contract.[188] The defendant moved for summary judgment, contending the plaintiffs were not in privity, and presented evidence that the defendant had told the father to check the signature cards at the bank and thus it was up to the father's discretion to change the cards since they did not reflect testamentary intent.[189] The trial court granted summary judgment.[190] On appeal, the plaintiffs argued the defendant's summary judgment evidence was hearsay and therefore inadmissible.[191] However, the Eastland Court of Appeals held the evidence "was not material to the trial court's granting of summary judgment because it did not relate to the issues of duty, privity, or lack of standing."[192] Consequently, the Eastland court affirmed summary judgment.[193]

B. Non-Discretionary Cases

In *Dickey v. Jansen*,[194] the Houston First District Court of Appeals held Texas law does not recognize a cause of action against an attorney for negligently preparing a will asserted by one not in privity with

182. *Id.* at 624.
183. *Id.*
184. 908 S.W.2d 629 (Tex. App.—Eastland 1995, n.w.h.).
185. *Id.* at 630-31.
186. *Id.* at 631.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 630.
191. *Id.* at 631.
192. *Id.*
193. *Id.* at 630.
194. 731 S.W.2d 581 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

the testator's attorney.[195] In *Dickey*, the plaintiffs' brother hired the defendant to create a trust payable as a life estate to his wife with the remainder payable to the plaintiff.[196] The trust was to have included mineral interests located in Louisiana.[197] However, under Louisiana law the trust provision in the will was invalid and unenforceable.[198] As a result, the plaintiffs alleged that due to the defendant's negligence, "the testator's Lousiana properties never became part of the trust res, resulting in their damage and loss."[199] Furthermore, the plaintiffs contended the defendant "had either actual or constructive knowledge that the trust provisions violated Louisiana law."[200] The plaintiffs sued the attorney for ineffectually preparing the trust provision. In response, the attorney filed for summary judgment arguing "an attorney is not liable to . . . those not in privity with attorneys . . . for alleged failure to perform duties which the attorney owes only to his clients."[201] On appeal, the Houston First District Court of Appeals affirmed summary judgment for the defendant and held "Texas law does not recognize a negligence cause of action in these circumstances, on the theory that an attorney owes a duty only to those parties in privity of contract with him."[202]

In *Thomas v. Pryor*,[203] the Dallas Court of Appeals held a named beneficiary of a will may not sue an attorney for negligence who allegedly fails to have a will properly signed by witnesses resulting in loss of the beneficiary's legacy.[204] In *Pryor*, a pro bono legal aid attorney prepared a will which named the plaintiff as the beneficiary of the residue of the testator's estate.[205] However, the will was not admitted to probate due to the attorney's failure to have the will signed, and consequently, the plaintiff, as a named third party beneficiary, sued the attorney for negligence.[206] In declining an "invitation to change existing Texas law prohibiting a beneficiary named in a will from bringing a suit for professional malpractice against an attorney who prepared the will,"[207] the Dallas Court of Appeals reasoned:

> Such liability would inject undesirable self-protective reservations into the attorney's counseling role. The attorney's preoccupation or concern with the possibility of claims based on mere negligence (as

195. *Id.* at 582.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 584 (Evans, C.J., dissenting).
200. *Id.*
201. *Id.* at 582.
202. *Id.* (citations omitted).
203. 847 S.W.2d 303 (Tex. App.—Dallas 1992), *writ dism'd by agr.*, 863 S.W.2d 462 (Tex. 1993).
204. *Id.* at 304-05.
205. *Id.* at 303-04.
206. *Id.* at 304.
207. *Id.* at 303.

> distinguished from fraud) by any with whom his client might deal would prevent him from devoting his entire energies to his client's interest. The result would be both an undue burden on the profession and a diminution in the quality of the legal services received by the client.
>
> . . .
>
> We must also reflect on the importance of the confidentiality that arises from the attorney-client relationship. The established rule is that an attorney cannot testify as to confidential communications made to the attorney by the client over the objection of the client or his heirs. Regarding drafting or executing a will, the privilege is effective during the testator's lifetime, but after the testator's death the attorney may testify to facts affecting the execution or contents of the will. Opening such scrutiny to third parties, such as will beneficiaries, would jeopardize the integrity of the testator's confidential communications to the testator's attorney.[208]

Similarly, in *Barcelo v. Elliott*,[209] the Houston First District Court of Appeals held that under Texas law, an attorney is only subject to suit by his clients for negligent preparation of estate planning documents.[210] In *Barcelo*, the plaintiffs' grandmother retained the defendant to prepare a will and an inter vivos trust agreement to include the plaintiffs as beneficiaries of a trust.[211] The grandmother subsequently died and the will was admitted to probate. The probate court, for reasons not disclosed in the trial record, entered judgment that the trust agreement was invalid and unenforceable as a matter of law.[212] As a result, the plaintiffs agreed to settle for what they contended was a substantially smaller share of the estate than they would have received pursuant to the valid trust.[213] In turn, the plaintiffs sued the defendant for negligence and breach of contract. The trial court granted summary judgment for the defendants based on no evidence of privity.[214] On appeal, the plaintiffs asserted two arguments:

> (1) public policy warrants the imposition of liability upon an attorney who negligently drafts estate planning documents that cause loss to the intended beneficiaries of such documents; and (2) writ histories of recent Texas intermediate appellate decisions indicate that the Texas Supreme Court is prepared to consider whether intended beneficiaries of an attorney-client agreement to prepare estate planning documents may sue the attorney for negligent

208. *Id.* at 305 (quoting Bell v. Manning, 613 S.W.2d 335, 339 (Tex. App.—Tyler 1981, writ ref'd n.r.e.)).

209. 1995 WL 51054 (Tex. App.—Houston [1st Dist.] 1995), *aff'd*, 39 Tex. Sup. Ct. J. 607 (May 10, 1996).

210. *Id.* at *2.

211. *Id.* at *1.

212. *Id.*

213. *Id.*

214. *Id.*

> preparation of such documents based upon a contractual third-party beneficiary theory.[215]

However, in affirming summary judgment for the defendants, the Houston First District Court of Appeals held "the plaintiffs in this case did not state a valid cause of action under existing Texas law."[216]

On May 10, 1996, the Texas Supreme Court decided *Barcelo*.[217] The issue as presented was "whether an attorney who negligently drafts a will or trust agreement owes a duty of care to persons intended to benefit under the will or trust, even though the attorney never represented the intended beneficiaries."[218] The court held "[b]ecause the attorney did not represent the beneficiaries, we . . . conclude that he owed no professional duty to them. We accordingly affirm the judgment of the court of appeals."[219] In so doing, the Texas Supreme Court refused to follow "[t]he majority of other states addressing this issue"[220] who have relaxed the privity barrier in the estate planning context. Instead, the court agreed "with those courts that have rejected a broad cause of action in favor of beneficiaries, . . . recogniz[ing] the inevitable problems disappointed heirs have with attempting to prove that a defendant-attorney failed to implement the deceased testator's intentions."[221]

The court reasoned, "This potential tort liability to third parties would create a conflict during the estate planning process, dividing the attorney's loyalty between his or her client and the third party beneficiaries."[222] The court addressed the potential conflicts that might arise:

> Plaintiffs contend in part that Elliott was negligent in failing to fund the trust during Barcelo's lifetime, and in failing to obtain a signature from the trustee. These alleged deficiencies, however, could have existed pursuant to Barcelo's instructions, which may have been based on advice from her attorneys attempting to represent her best interests. An attorney's ability to render such advice would be severely compromised if the advice could be second-guessed by persons named as beneficiaries under the unconsummated trust.[223]

III. ABOLISHING THE PRIVITY DOCTRINE IN TEXAS

Recently, the American Law Institute, in its Restatement (Third) of Law Governing Lawyers, attempted to set forth limited circumstances

215. *Id.* at *1.
216. *Id.*
217. 39 Tex. Sup. Ct. J. 607 (May 10, 1996).
218. *Id.* at 608.
219. *Id.*
220. *Id.* at 609.
221. *Id.*
222. *Id.*
223. *Id.* at 610.

in which attorneys would owe a duty of care to third party non-clients. Section 73 of Tentative Draft No. 7 states:

> For the purposes of liability . . . a lawyer owes a duty to use care . . . :
>
> (1) To a prospective client . . .
>
> (2) To a non-client when and to the extent that the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the non-client to rely on the lawyer's opinion or provision of other legal services, the non-client so relies, and the non-client is not, under applicable law, too remote from the lawyer to be entitled to protection;
>
> (3) To a non-client when and to the extent that the lawyer knows that a client intends the lawyer's services to benefit the non-client, and such a duty substantially promotes enforcement of the lawyer's obligations to the client and would not create inconsistent duties significantly impairing the lawyer's performance of those obligations; and
>
> (4) To a non-client when and to the extent that circumstances known to the lawyer make it clear that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation:
>
> (a) To prevent a crime imminently threatening to cause death or serious bodily injury to an identifiable person who is unaware of the risk; or
>
> (b) To prevent or rectify the breach of a fiduciary duty owed by a client to a non-client, when the non-client is not reasonably able to protect its rights and such a duty would not significantly impair the performance of the lawyer's obligations to the client.[224]

Furthermore, the authors set forth the following illustrations regarding potential application of Section 73:

> Client retains Lawyer to prepare and help in the execution of a will leaving Client's estate to Non-client. Lawyer prepares the will naming Non-client as the sole beneficiary, but negligently arranges for Client to sign it before an inadequate number of witnesses. Client's intent to benefit Non-client thus appears on the face of the will executed by Client. After Client dies, the will is held ineffective due to the lack of witnesses, and Non-client is thereby harmed. Lawyer is subject to liability to Non-client for legal malpractice in drafting the will.
>
> The facts being otherwise as stated in [paragraph 1], Lawyer arranges for Client to sign the will before the proper number of witnesses, but Non-client later alleges that Lawyer negligently wrote

224. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 (Tentative Draft No. 7, 1994). It should be noted that as of this publication date, the tentative draft had not been considered by the members of the American Law Institute, therefore, it should not be considered as representing the position of the Institute on any of the issues presented. Nonetheless, it serves to illustrate the potential for drafting a bright-line non-client standing rule.

> the will to name someone other than Non-client as the legatee. Client's intent to benefit Non-client thus does not appear on the face of the will. Non-client can establish the existence of a duty from Lawyer to Non-client only by producing reliable evidence that Client intended Non-client to be the legatee.
>
> The facts being otherwise as stated in [paragraph 1], Lawyer arranges for Client to sign the will before the proper number of witnesses. After Client's death, Heir has the will set aside on the ground that Client was incompetent, and then sues Lawyer for expenses imposed on Heir by the will, alleging that Lawyer negligently assisted Client to execute a will despite Client's incompetence. Lawyer is not subject to liability to Heir. Recognizing a duty by lawyers to heirs to use care in not assisting incompetent clients to execute wills would impair performance of lawyer's duty to assist clients even when the client's competence might later be challenged.[225]

Not surprisingly, these illustrations clearly demonstrate a distinction between *discretionary* and *non-discretionary* acts or omissions made by clients or attorneys regarding estate planning matters. However, there is an inherent problem with this Restatement. It suffers from the same overinclusiveness and uncertainty of liability as its predecessors, the California negligence theory and the third party beneficiary theory.

The California theory, as well as the third party beneficiary theory, have both proven overly broad in their application. The negligence theory, with its multiple factor public policy balancing test, almost always requires imposition of liability when an attorney prepares a will that results in frustration of testamentary intent because it is almost always foreseeable that will beneficiaries failing to receive their legacies suffer harm. Thus, imposition of liability is necessary to prevent future harms.

Likewise, the third party beneficiary theory requires imposition of liability if a testator *expresses* an intent to benefit a third party, and the third party fails to receive his intended devise regardless of the reason for its failure. Neither theory considers whether the act or omission giving rise to the loss was the result of an exercise of *discretion* by the client or attorney, and neither theory is administratively efficient, each requiring a case-by-case analysis to determine such liability.

Recently, conceding defeat in its effort to structure a bright-line rule, the Texas Supreme Court stated:

> In sum, we are unable to craft a bright-line rule that allows a lawsuit to proceed where alleged malpractice causes a will or trust to fail in a manner that casts no real doubt on the testator's intentions, while prohibiting actions in other situations. We believe the greater

225. *Id.* § 73 (Comment b, Illustrations 2-4).

> good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent. This will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.[226]

This recent decision begs the question whether Texas estate planning attorneys should always escape third party liability regardless of the severity of their malfeasance? If not, could the distinction between *discretionary* and *non-discretionary* cases be a relevant factor in the structuring of a bright-line rule to determine third party non-client standing as an alternative to the privity doctrine? If so, what type of rule would constitute a reasonable compromise between the need to provide attorneys with certainty and predictability as to third parties who may maintain suits against them and the necessity to provide adequate redress for injured third party will beneficiaries?

Here is one proposal:

> A lawyer shall be strictly liable to a non-client for damages resulting from an act (or failure to act) in the course of representation, whether by the attorney or client, only if the act (or failure to act) could not have been the result of an exercise of discretion by the client represented. In the absence of fraud or other intentional tort, a lawyer shall not otherwise be liable to a non-client for any act (or failure to act) in the course of representation.[227]

Under this proposed rule, a duty is established when the act or omission is not the result of a *discretionary* act exercised by the client or attorney, or in other words, strict liability is imposed for all *non-discretionary* acts leading to third party injury. For instance, Texas attorneys would be held strictly liable for such *non-discretionary* acts as failing to follow the proper procedures for preparing and executing a will under the Texas Probate Code, for wrongly advising a client of the proper law, or for drafting testamentary documents that later prove invalid as a result of the attorney's negligence. Yet, no liability would arise for *discretionary* acts or omissions committed by either clients or attorneys leading to third party injury such as when a testator fails to change the signature card on an IRA account in order to fulfill testamentary intent. This strict liability rule for *non-discretionary* acts or omissions is logical in that causation and damages are easily established in most estate planning cases, therefore the only issue in contention is whether an attorney should owe a duty to third party non-clients.

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226. *Barcelo*, 39 Tex. Sup. Ct. J. at 610.

227. This rule was developed by Professor Walter Wm. Hofheinz, Associate Professor at Texas Wesleyan University School of Law. This author served as a research assistant on a more comprehensive article by Professor Hofheinz regarding the same subject matter. I would like to express my sincere appreciation to him for his assistance with this comment.

For example, in *Thomas v. Pryor*,[228] the pro bono legal aid attorney failed to have the testator's will properly executed, therefore the will was not admitted to probate and the beneficiary of the residue of the testator's estate was denied her legacy.[229] Predictably, the Dallas Court of Appeals upheld summary judgment for the attorney due to the lack of privity between the attorney and the plaintiff.[230] Moreover, the *Pryor* court discussed at length the undesirable results that might arise if attorneys were preoccupied with third party liability resulting in attorneys' inability to devote their entire energies to their client's interests.[231]

However, if the pro bono attorney was not qualified to properly prepare a will, one of the most important documents an individual may prepare in his life, then he should have declined the representation.[232] More importantly, under the proposed strict liability rule, the attorney would have owed a duty to the beneficiary. Having breached that duty, the attorney would be strictly liable for his negligence, and therefore the beneficiary could have recovered damages in the amount of her lost legacy. It is notable that the *Pryor* court showed little concern for the beneficiary's loss suffered as a result of an apparently incompetent attorney. Furthermore, it strains logic to understand how properly following the law in preparing testamentary documents will result in an attorney not devoting his entire energy to his client's interest. The principal purpose of an estate planning representation is to fulfill testamentary intent by properly preparing and executing the testator's will.

In contrast, the attorney in *Oliver v. West*[233] would owe no duty to the third party beneficiary under the proposed rule. In *Oliver*, the attorney presented summary judgment evidence that he had advised the testator to change the signature cards on an IRA funds account in order to reflect the testator's testamentary intent.[234] However, during his lifetime, the testator failed to change the signature cards, resulting in frustration of testamentary intent and third party beneficiary loss.[235] Thus, the attorney clearly left the necessary acts regarding fulfillment of testamentary intent up to the client's discretion after properly advising the client of the necessity for such acts. In other words, the attorney did everything possible to fulfill his duty to his client, and in no way did the attorney's acts or omissions lead to the loss suffered

228. 847 S.W.2d 303 (Tex. App.—Dallas 1992), *writ dism'd by agr.*, 863 S.W.2d 462 (Tex. 1993).
229. *Id.* at 303-04.
230. *Id.* at 305.
231. *Id.*
232. Miller, *supra* note 157, at 423.
233. 908 S.W.2d 629 (Tex. App.—Eastland 1995, n.w.h.).
234. *Id.* at 631.
235. *Id.*

by the beneficiaries. Therefore, under the proposed rule, the *Oliver* attorney would not be held liable for the beneficiary's loss.

Similarly, in *Barcelo v. Elliot*,[236] an attorney was retained to prepare a will and an inter vivos trust agreement that later was found to be invalid and unenforceable as matter of law.[237] Under the proposed rule, the attorney would be held liable for the failure of such testamentary documents. However, no reason was given in *Barcelo* for the probate court's ruling as to the invalidity of the will in the trial court record.[238] Under the proposed rule, the burden would remain on the plaintiff to provide an adequate trial record to distinguish between *discretionary* and *non-discretionary* acts which lead to the beneficiary's loss. Therefore, in the absence of such evidence, even though he negligently drafted invalid testamentary documents, the attorney should not be held liable for negligence.

Obviously, the proposed rule needs further examination and analysis. Issues including the availability of punitive damages for intentional acts such as fraud or breach of fiduciary duty should be examined. For instance, different types of damages might be available for different types of wrongdoing to deter fiduciary misconduct. Nevertheless, the principal purpose of setting forth this proposed rule is to illustrate that structuring a bright-line, non-client standing rule as an alternative to the current privity standard is possible.

Recently, one commentator stated, "The long-established concept of privity, which forged a bond between lawyers and their clients through good times and bad, is crumbling."[239] Yet proponents continue to argue that it would be unfair to expose attorneys to the slippery slope of indeterminate liability if the current privity rule is relaxed.[240] But, is it not equally unfair to allow attorneys to completely escape liability for causing harm to intended third party beneficiaries regardless of the severity of the attorney's malfeasance?

Last, it should be noted that many arguments favoring the privity doctrine arise from an attorney's duties as described in the Code of Professional Responsibility. For example, Texas attorneys are subject to rule EC 5-1 of the Code of Professional Responsibility:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.[241]

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236. 39 Tex. Sup. Ct. J. 607 (May 10, 1996).
237. *Id.* at 608.
238. *Id.*
239. James Podgers, *Third-Party Problems,* 81 A.B.A. J. 64, 64 (Dec. 1995).
240. *Id.*
241. State Bar Rules, art. X, § 9, EC 5-1 (Texas Code of Professional Responsibility), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (West 1988).

Further, under the Model Rules, whether an attorney owes a duty to a non-client third party depends upon the balancing of an attorney's duty to represent his clients vigorously with an attorney's duty not to provide misleading information to third parties who may foreseeably rely on such information.[242] Obviously, the State Bar would need to reexamine its rules of professional conduct to ensure conformity with any bright-line, non-client standing rule.

CONCLUSION

It is time Texas joined the modern majority of jurisdictions that have relaxed the privity doctrine. It is unfair for Texas attorneys to negligently harm third party will beneficiaries regardless of the severity or reason for their malfeasance without some kind of redress available for the injured parties. The *Barcelo* court was correct in its reasoning that a bright-line rule is needed to avoid opening the flood gates of indeterminate litigation. It is time the Texas Supreme Court structured such a rule to discourage and deter future misconduct by negligent estate planning attorneys, yet at the same time provide protection for Texas attorneys against indeterminate liability.

Lief Kjehl Rasmussen

242. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3, 4.1 (1983).