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New York Relaxes Strict Privity Requirement To Allow Legal Malpractice Claim By Personal Representative Of Estate Against Estate Planning Attorney

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There have long been two schools of thought as to whether there was a strict privity requirement in legal malpractice actions in the estate planning context. The majority has either relaxed the principle of privity or granted standing to beneficiaries or estates. For example, in Montana, an estate has standing to bring a legal malpractice action. *See The Stanley L and Carolyn M. Watkins Trust*, 92 P.3d 620 (Mont. 2004). While in New Hampshire named beneficiaries have standing to bring claims in negligence against an estate planning attorney. *See Simpson v. Calivas*, 650 A2d 318 (NH 1994). Florida found that the privity requirement was satisfied because the estate stands in the shoes of the testator. *Espinosa v. Sparber, Shevin, Rosen and Heilbronner*, 612 So.2d 1378 (Fla 1993).

In contrast, the minority rule is that in the absence of privity, an estate may not maintain an action for legal malpractice. States such as Alabama, Maine, Maryland, Ohio, and Nebraska still apply strict privity to malpractice actions commenced by beneficiaries against estate planning attorneys. Under this rule, the only person in privity with the estate planning attorney who drafted the documents was the person or people for whom the documents were drafted. In other words, strict privity precludes estate planning legal malpractice actions on behalf of the estate or the beneficiaries.

Two strict privity states, Texas and New York, have carved out an exception to the rule. New York was the most recent state to adopt the exception. Texas has allowed malpractice claims brought by the personal representative of the decedent's estate holding that privity exists between the parties. *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex 2006). In *Belt*, the Texas Supreme Court held that the estate stands in the shoes of a decedent and therefore has the capacity to maintain the malpractice claim on the estate's behalf. *Id.*, at 787. In a recent case, the New York Court of Appeals has agreed with the Texas Supreme Court and similarly relaxed the strict privity requirement.

In *Estate of Schneider v. Finmann*, 2010 N.Y. Slip. Op. 5281 (NY June 17, 2010), the New York Court of Appeals held that privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney. The case was based upon the decedent's series of transfers of a \$1,000,000.00 life insurance policy that inevitably ended up as part of the taxable estate. The decedent's estate alleged that the estate attorney was negligent in advising the decedent to transfer, or failing to advise the decedent not to transfer, the policy which resulted in an increased estate tax liability. The Court reasoned that the personal representative of an estate should not be prevented from raising a negligent estate planning claim against the attorney who caused harm to the estate. Prior to this case, the strict privity rule left the estate with no recourse against an attorney who negligently planned the estate.

In New York, the Court was clear that strict privity still applies with respect to beneficiaries' and other third-party individuals' estate planning malpractice claims absent fraud or other circumstances because it would produce "undesirable results – uncertainty and limitless liability." *Schneider*, at *3. This case relaxes the strict privity rule *only* so far as to permit malpractice actions by the personal representative of the estate.

