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Privity and the Role of Limited Letters in Legal Malpractice Actions

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In a significant decision this summer, *Schneider v. Finmann*, 15 NY3d 306 (2010), the Court of Appeals loosened the privity requirements in legal malpractice actions. Specifically, in *Schneider*, the Court of Appeals held for the first time that a personal representative has the same ability to sue the attorney who performed estate planning services as the decedent. The Court's rationale was that the personal representative "stands in the shoes" of the decedent and thus "has the capacity to maintain the malpractice action on the estate's behalf." Id. at 309.

The Court of Appeals limited this right to sue for negligent estate planning to the personal representative of the estate, holding that other interested persons are still barred from suing because of lack of privity of contract. However, limited letters pursuant to Surrogate's Court Procedure Act §702 could be utilized to further broaden the scope of privity to beneficiaries or even just individuals interested in an estate where the appointed fiduciary will not sue. However, due to the clear admonition that any recovery sought should only be for what the decedent could have sued for, letters should not issue for the purpose of seeking recovery for anyone other than the decedent. This article explores why the Surrogate's Courts should consider remaining vigilant in this regard and not issue limited letters to circumvent the policy of the Court of Appeals.

'Schneider v. Finmann'

In *Schneider*, the personal representative of the decedent's estate brought an action against the decedent's attorney-draftsman for legal malpractice alleging that the attorney-draftsman negligently advised the decedent concerning an insurance policy, which resulted in an increased estate tax liability. Id. at 308. The Supreme Court granted the attorney-draftsman's motion to dismiss, and the Appellate Division affirmed holding that there was no privity because the personal representative of the decedent's estate was not the client. The Second Department concluded that the personal representative was not in privity with the attorney and could not commence a legal malpractice action. Id. at 308.

In a landmark decision, the Court of Appeals reversed and reinstated the personal representative's

claim. The 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" because the estate essentially stands in the decedent's shoes. Id. at 309. In doing so, the Court relied heavily upon a Texas Supreme Court case, *Belt v. Oppenheimer, Blend, Harrison & Tate Inc.*, 192 SW3d 780 (Tex. 2006).

Despite extending privity to the personal representative, the Court of Appeals also cautioned that strict privity remains a bar against beneficiaries and other third-party individuals' malpractice claims absent fraud or other circumstances. The Court emphasized as a matter of policy that relaxing privity to permit third parties to commence professional negligence actions against estate planning attorneys would produce "undesirable results—uncertainty and limitless liability." Id. at 310. The Court determined that these results did not exist where an estate planning malpractice action was commenced by the estate's personal representative.

New York is in the minority in this strict view of privity. Only a few jurisdictions, including Alabama, Maine, Maryland, Ohio and Nebraska, apply strict privity to malpractice actions, and find that there is no privity where beneficiaries attempt to commence malpractice actions against the decedent's estate planning attorney. *Schneider* at fn. 1. In a majority of the states, a beneficiary allegedly harmed by a lawyer's negligence in drafting a will or a trust may bring a malpractice claim against the attorney, even though the beneficiary was not the attorney's client. Id.

Limited Letters

Despite the narrow holding in *Schneider*, the Court of Appeals' decision may have overlooked or did not consider an interesting anomaly under the Surrogate's Court Procedure Act (SCPA) §702, whereby individuals other than the personal representative of the estate could seek limited letters solely for the purpose of commencing a malpractice action against the attorney-draftsman.

For example, SCPA §702(9) states that limited letters may be granted to "commence and maintain any action or proceeding against the fiduciary, in his or her individual capacity, or against anyone else against whom the fiduciary fails or refuses to bring such a proceeding." Moreover, SCPA 702(8) states that limited letters can be granted "in the discretion of the court, to represent the estate in a transaction in which the acting fiduciary could not or should not act in his or her fiduciary capacity because of conflict of interest."

The fairly broad language of the statute could encompass precisely the situation that the Court of Appeals opined against. For example, a disappointed heir could commence a legal malpractice action against an attorney-draftsman alleging the estate planning did not conform to the decedent's wishes. This becomes particularly messy where the attorney-draftsman may be the executor under the will, or the fiduciary's counsel. These scenarios would seemingly fit squarely within the statute's provisions, leaving it to the court's discretion whether to grant limited letters.

In view of the Court of Appeals' admonition, it may be argued that the Court would entrust gatekeeping to the Surrogates in deciding, under the circumstances, whether the letters are truly being sought to recover what the decedent would want to recover or whether the letters are being used to enforce a

grievance of one other than the decedent. For instance, estate taxes could have been avoided if the decedent took full advantage of the marital deduction, but for reasons best known to the decedent, his estate plan did not call for it.

The Texas Cases

Unfortunately, in its relatively short *Schneider* decision, the Court of Appeals did not address the possibility of an individual obtaining limited letters, or otherwise detail the public policy behind its decision. However, the Texas Supreme Court case relied upon by the Court of Appeals provides some real guidance on this issue. In *Belt v. Oppenheimer, Blend, Harrison & Tate Inc.*, 192 SW3d 780 (2005), the Texas Supreme Court also found there was no legal bar preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against a decedent's estate planners. Yet, in making its decision, the Texas Supreme Court distinguished a prior decision, *Barcelo v. Elliott*, 141 SW3d 706 (1996), wherein the Court held that non-client beneficiaries could not maintain a suit against the decedent's estate planner because "the greater 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." *Belt*, 192 SW2d at 783 quoting *Barcelo*, 923 SW2d at 578.

In *Belt*, the Texas Supreme Court discussed at length the competing policy interests at play between its decision in *Belt* allowing a personal representative to maintain an action, and the decision in *Barcelo* wherein the beneficiaries could not maintain the action. These policy considerations included the threat of suits by disappointed heirs after a client's death, and the potential conflict this could create during the estate planning process by dividing the attorney's loyalty between the client and potential beneficiaries, as well as the difficult evidentiary burdens in lawsuits brought by bickering beneficiaries to prove how a decedent intended to distribute the estate. *Belt*, 192 SW2d at 783.

The *Belt* court determined that while these concerns apply when disappointed heirs seek to dispute the size of their bequest or their omission from an estate plan, it does not apply when an estate's personal representative seeks to recover damages incurred by the estate itself. For example, in cases where the allegations concern the depletion of the decedent's estate due to negligent estate tax planning, it is the estate that has been harmed, and the evidentiary support only includes evidence that the decedent intended to minimize tax liability for the estate as a whole. *Belt*, 192 SW2d at 787.

The policy considerations in *Belt* should provide a guidepost to New York courts in considering whether to grant limited letters to an individual for the sole purpose of commencing a legal malpractice action against an attorney-draftsman. Of tantamount concern should be whether the alleged damage or loss was to the estate itself—and not to disappointed heirs or even charities. The focus should be upon who was harmed.

The Court of Appeals was very clear that its decision was not an attempt to broaden the scope of privity outside the very narrow confines of the facts in *Schneider*—a personal representative of an estate suing the attorney-draftsman of the decedent's will for negligent estate planning. Limited letters ought not provide a substitute for the narrow and clear public policy ruling of the Court of Appeals.

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