

ESTATE PLANNING MALPRACTICE: WILL ALABAMA COURTS RELAX THE PRIVITY BARRIER?

INTRODUCTION

One of the most common reasons people hire attorneys is to draft their wills or to create some other type of testamentary instrument. Yet what happens when the drafting attorney fails to comply with the required formalities or commits an error that results in the denial of the inheritances for the intended beneficiaries? After all, the intended beneficiaries technically cannot bring a malpractice suit against the attorney because they were not clients of the attorney and are thus not in privity with him or her. States across the country differ on this issue, but the majority of states have relaxed the privity barrier and now allow intended beneficiaries to sue drafting attorneys. A few states retain the strict privity requirement and several states, including Alabama, have yet to rule on this specific issue. Of the states that have decided this issue, each has a slightly different test to be applied and slightly different reasons behind its holdings.

Part I of this Comment examines the majority viewpoint and its variations. Part II considers the minority viewpoint and its variations. Part III focuses on the law in Alabama, first considering parallels in other areas of the law and then considering a few cases specifically in the malpractice area. Part III concludes with a prediction of which position Alabama will take and addresses policy concerns and potential problems with such decisions.

I. THE MAJORITY VIEW: RELAXING THE PRIVITY BARRIER

Today, the majority of states have adopted some method of relaxing the privity barrier, thereby allowing intended beneficiaries to sue attorneys for estate planning malpractice. California was the first to do so with its balancing test.¹ Other states have followed California's lead with variations on the balancing test, the use of the third party beneficiary doctrine, and other methods.

1. *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958) (en banc).

A. *The Balancing of Factors Test and Third Party Beneficiary Theory*

1. *California*

California was the first state to allow third-party suits against attorneys for estate planning malpractice. *Biakanja v. Irving*² involved a notary who prepared a will for his client and failed to have it properly attested. As a result, the will was denied probate and the plaintiff, via intestate succession, received much less than she would have had the will been valid.³ The plaintiff then sued the defendant for negligently preparing the will.⁴ The defendant claimed that the plaintiff had no cause of action because she was a third party with whom he lacked privity.⁵ In deciding whether privity was required, the court looked to other areas of the law in which the privity barrier had already been relaxed.⁶ For instance, manufacturers may be liable to the ultimate consumer if their product is negligently made and results in harm to people despite the lack of privity between the manufacturer and the consumer (i.e., products liability).⁷ In the instant case, the Supreme Court of California stated that “[t]he determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors.”⁸

This test, which has come to be known as the balancing of factors test, requires a court to weigh the following factors:

[T]he extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, and the policy of preventing future harm.⁹

Applying these factors to the facts of the case at hand, the court found that the “transaction was intended to affect the plaintiff” since the will was clearly intended to facilitate the passing of the decedent’s estate to the plaintiff.¹⁰ The “harm” was foreseeable and certain; further-

2. *Biakanja*, 320 P.2d at 17.

3. *Id.*

4. *Id.*

5. *Id.* at 18.

6. *Id.* at 18.

7. *Biakanja*, 320 P.2d at 18. *See also* *Kalash v. Los Angeles Ladder Co.*, 34 P.2d 481, 482 (Cal. 1934); *Hale v. Depaoli*, 201 P.2d 1, 2-3 (Cal. 1948).

8. *Biakanja*, 320 P.2d at 19.

9. *Id.*

10. *Id.*

more, the "connection between the defendant's conduct and the injury suffered" was obviously close since it was the defective will that caused the plaintiff's loss.¹¹ Finally, the requisite "moral blame" was present since the defendant was not qualified to prepare and execute a will, but nonetheless did so.¹² The court decided that all of the factors were present but seemed to attach significant weight to the last one—the policy of preventing future harm. Because "[s]uch conduct should be discouraged and not protected by immunity from civil liability, as would be the case if plaintiff . . . were denied a right of action," the court decided that allowing the plaintiff to sue despite the lack of privity was a necessary policy.¹³

Three years later, in *Lucas v. Hamm*,¹⁴ the California Supreme Court refined the balancing of factors test.¹⁵ In that case, the Supreme Court dropped the fifth factor listed in *Biakanja*—the moral blame attached to the defendant's conduct¹⁶—while retaining the other factors.¹⁷ This time the court applied the newly-articulated test to an actual attorney who had prepared the will. The plaintiffs in *Lucas* alleged that the defendant attorney was negligent in his preparation of the will and had also breached the contract to prepare the will.¹⁸ Again, the court found that the factors, on balance, were sufficient to overcome the privity barrier and allow the plaintiffs to sue the defendant, even though they had no direct relationship with him.¹⁹ Specifically, the court held that "intended beneficiaries . . . who lose their testamentary rights because of failure of the attorney who drew the will to properly fulfill his obligations under his contract with the testator may recover as third-party beneficiaries."²⁰ The court added that the standard of care, "us[ing] such skill, prudence, and diligence as lawyers of ordinary skill and capacity . . . exercise in the performance of the tasks which they undertake," is "equally applicable whether the plaintiff's claim is based on tort or breach of contract."²¹ The defendant in this case was not found to have been negligent or liable for breach of contract because his actions had not fallen below the standard of care.²² However, the court was careful to point out that an attorney *can* be liable to someone other than his client, the testator.²³

11. *Id.*

12. *Id.*

13. *Biakanja*, 320 P.2d at 19.

14. 364 P.2d 685 (Cal. 1961) (en banc).

15. *See Lucas*, 364 P.2d at 687-88.

16. *Biakanja*, 320 P.2d at 19.

17. *Lucas*, 364 P.2d at 687.

18. *Id.*

19. *Id.* at 689.

20. *Id.*

21. *Id.*

22. *Lucas*, 364 P.2d at 690.

23. *Id.*

Clearly, these two cases²⁴ demonstrate that California will allow intended beneficiaries to bring suit for negligent drafting.

2. Florida

Florida has also relaxed the requirement of privity. It first decided to do so in *McAbee v. Edwards*.²⁵ In that case, the court held that the intended beneficiary of a will did have a cause of action against the drafting attorney despite the lack of privity.²⁶ The *McAbee* court relied heavily on California precedent in this area giving little, if any, of its own reasoning.²⁷ Furthermore, the court did not address whether these kinds of suits must be couched in contract or negligence terms.²⁸ However, because the plaintiff in this case sued on both contract and negligence theories, arguably either is acceptable in Florida.²⁹

In 1983, seven years after *McAbee*, Florida added the requirement that the testator's intent must have been frustrated by the attorney's malpractice.³⁰ *DeMaris v. Asti* first reiterated the holding in *McAbee* that an attorney has a duty to his client, the testator, as well as to the testator's intended beneficiaries.³¹ In addition, the court held that this duty arises only if, as a result of the attorney's negligence, "the testamentary intent, *as expressed in the will*, is frustrated, and the beneficiary's legacy is lost or diminished as a direct result of that negligence."³² "[T]he reasons being obvious," Florida refused to allow a disappointed beneficiary to use extrinsic evidence to show that he or she was denied an intended inheritance due to the attorney's negligence.³³ Like many other states, Florida permits only those beneficiaries named in the will to bring a malpractice suit against the drafting attorney.³⁴

3. Pennsylvania

Until 1983, Pennsylvania required strict privity in order to bring a malpractice suit against an attorney for negligently drafting a will. Then, in *Guy v. Liederbach*,³⁵ it joined the now majority viewpoint by relaxing

24. *Biakanja*, 320 P.2d at 19; *Lucas*, 364 P.2d at 687.

25. 340 So. 2d 1167 (Fla. 4th Dist. Ct. App. 1976).

26. *McAbee*, 340 So. 2d at 1170.

27. *See id.* at 1169-70.

28. *See id.*

29. *Id.* at 1168.

30. *DeMaris v. Asti*, 426 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1983).

31. *DeMaris*, 426 So. 2d at 1154.

32. *Id.* (emphasis in original).

33. *Id.*

34. *Id.*

35. 459 A.2d 744 (Pa. 1983).

the requirement of privity in these situations.³⁶ In *Guy*, a named beneficiary was instructed by the drafting attorney to witness the will.³⁷ Due to the drafting attorney's incorrect instructions, the will was voided and the named beneficiary, who was also the executrix, lost her entire inheritance.³⁸

The Pennsylvania Supreme Court, in seeking to resolve this issue, looked not only to Pennsylvania precedent but also to the precedent of other states, including that of California.³⁹ The court rejected California's standard as too broad but did find that a more limited cause of action for *named* beneficiaries should be allowed.⁴⁰ In doing so, the court decided that this cause of action should follow the third party beneficiary principles of Section 302 of the Restatement (Second) of Contracts.⁴¹ Thus, the court held that a "named legatee" may sue an attorney as the intended third party beneficiary of the contract for the drafting of a will between the attorney and the testator.⁴² The Pennsylvania court required that the will specifically name the legatee "as a recipient of all or part of the estate."⁴³ The court explained that this standard would be preferable to others, such as California's, because it granted standing to a limited class of beneficiaries—those "where the intent to benefit is clear and the promisee (testator) is unable to enforce the contract."⁴⁴

To determine whether a party qualifies as a third-party beneficiary, the court articulated a two-part test derived from Section 302 of the Restatement (Second) of Contracts:

[T]he recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties," and (2) the performance must "satisfy an obligation of the promisee to pay money to the beneficiary" or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised per-

36. *Guy*, 459 A.2d at 752-53.

37. *Id.* at 746.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Guy*, 459 A.2d at 746. The Restatement provides:

§ 302 Intended and Incidental Beneficiaries

(1) Unless otherwise agreed between 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.

RESTATEMENT (SECOND) OF CONTRACTS § 302 (1982)

42. *Guy*, 459 A.2d at 746.

43. *Id.*

44. *Id.* at 747.

formance."⁴⁵

When beneficiaries are named in a will, they are the intended beneficiaries for whom "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."⁴⁶ Clearly, the "circumstances which . . . indicate the testator's intent to benefit a named legatee" are the drafting of the will itself (i.e., the testator tells the drafting attorney whom he/she wishes to benefit under the will).⁴⁷

The court continued by explaining the policy reasons behind its decision to allow third-party beneficiary suits for malpractice. First, the court decided that the concern that the quality of legal services would be threatened by making lawyers potentially liable to non-clients was incorrect.⁴⁸ It stated that it could not "accept the proposition that insuring the quality of legal services requires allowing as limited a number of persons as possible to bring suit for malpractice."⁴⁹ Furthermore, the court believed that named beneficiaries who are deprived of their inheritance due to an attorney's failure to properly draft the will should not be left without recourse.⁵⁰ Thus, the court reasoned that allowing intended beneficiaries to sue as third-party beneficiaries pursuant to Restatement principles protects beneficiaries while not placing attorneys in undue jeopardy.⁵¹

In addition to addressing the privity issue under third-party beneficiary law, the Pennsylvania court also discussed eliminating the privity requirement in malpractice cases founded on negligence.⁵² Finding the concern that attorneys would be inundated with capricious lawsuits to be a valid one, the court retained the privity requirement in negligence-based malpractice actions.⁵³ Thus, in order to maintain such a suit, a plaintiff must show either an attorney-client relationship or a certain undertaking by the attorney.⁵⁴ Without one of those, the suit will be dismissed.

45. *Id.* at 751.

46. *Id.* at 752.

47. *Guy*, 459 A.2d at 752-53.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 752.

52. *Guy*, 459 A.2d at 750.

53. *Id.*

54. *Id.*

4. Michigan

Several years after California and Pennsylvania, Michigan also joined the majority of the states by allowing suits by intended beneficiaries. Michigan courts also use the theory of third-party beneficiary to find liability.

*Mieras v. DeBona*⁵⁵ involved named heirs who were suing the decedent's attorney for negligently drafting a will.⁵⁶ The Michigan Supreme Court held that named beneficiaries may sue an attorney, in tort, for the negligent breach of the standard of care owed the named beneficiaries as third-party beneficiaries to the contract to make the will.⁵⁷ However, the court also held that an attorney may not be liable for negligence in drafting a will if the will comported with the intent of the testator as embodied in the will.⁵⁸

In arriving at its holding, the Michigan court looked to the majority of other states that had already reached similar conclusions.⁵⁹ It also considered various policy concerns, the first of which was the accountability of attorneys.⁶⁰ Allowing beneficiaries to maintain an action against the testator's attorney is the only way to hold that attorney accountable for the breach of duty to his deceased client.⁶¹

The court was concerned that since "[n]o one else has a sufficient interest, can show damage, or possesses the will, [to bring such an action]," the attorney who negligently drafted a will would be cloaked in virtual immunity.⁶² Again, however, the beneficiaries must be named in the will since "it would be unsafe to permit an action claiming that a lawyer failed to follow his client-testator's directions to be maintained on the basis of testimony from disappointed beneficiaries."⁶³ The Michigan court looked back to an earlier decision⁶⁴ and gleaned what it calls the "'four corners of the instrument' formulation."⁶⁵ This "formulation" requires that liability be found only when the testator's intent is ascertainable from the four corners of the instrument itself and that intent is

55. 550 N.W.2d 202 (Mich. 1996).

56. *Mieras*, 550 N.W.2d at 203-04.

57. *Id.* at 207.

58. *Id.* at 209.

59. *Id.* at 207 (citing *DeMaris v. Asti*, 426 So. 2d 1153, 1154 (Fla. App. 1993); *Espinosa v. Sparber*, 612 So. 2d 1378 (Fla. 1993); *Schreiner v. Scoville*, 410 N.W.2d 679, 682 (Iowa 1987); *Flaherty v. Weinberg*, 492 A.2d 618 (Md. 1985); *Hale v. Groce*, 744 P.2d 1289 (Or. 1987); *Guy v. Leiderbach*, 459 A.2d 744 (Penn. 1983); *RESTATEMENT (SECOND) OF CONTRACTS* § 302 (1982)).

60. *Id.* at 207-08.

61. *Mieras*, 550 N.W.2d at 207-08.

62. *Id.*

63. *Id.* at 208.

64. *See id.* (citing *Ginther v. Zimmerman*, 491 N.W.2d 282 (Mich. Ct. App. 1992)).

65. *Mieras*, 550 N.W.2d at 209.

frustrated by "faulty drafting or improper attestation."⁶⁶ As a result, the plaintiffs in this case were unable to sustain their claim since it involved extrinsic evidence outside the four corners of the instrument in question.⁶⁷

B. Negligence and/or Torts as the Basis for Liability

1. District of Columbia

Although it uses a slightly different approach than the states discussed above, the District of Columbia has also relaxed the requirement of privity. In *Needham v. Hamilton*,⁶⁸ a beneficiary of a will sued the decedent's attorney for negligently drafting the will.⁶⁹ The court held that privity was not required when an intended beneficiary sues the attorney who drafted the will.⁷⁰ However, the D.C. court rejected the third-party beneficiary theory.⁷¹ The court found the theory unnecessary, stating that the "gravamen of the cause of action [was] negligence."⁷² Instead, the court held that the intended beneficiary should simply have a negligence-based malpractice action against the drafting attorney.⁷³ The D.C. court felt that allowing such a cause of action was well within the realm of sound public policy.⁷⁴ Since both the testator and the intended beneficiary have the same interests, the drafting attorney is not trying to represent conflicting interests (i.e., those of the testator are not adverse to those of the intended beneficiary if he is truly the intended beneficiary).⁷⁵ Furthermore, since this type of suit can only be brought by "the direct and intended beneficiaries of the will and not an indeterminate class," attorneys need not fear an abnormally excessive amount of litigation.⁷⁶

2. Iowa

Finally, Iowa has also extended liability for negligent will-drafting to include intended beneficiaries. However, it has added an additional limitation not seen, at least not explicitly, in the other jurisdictions that

66. *Id.* (citing *Ginther v. Zimmerman*, 491 N.W. 2d 282 (Mich. Ct. App. 1992)).

67. *Id.* at 209.

68. 459 A.2d 1060 (D.C. 1983).

69. *Needham*, 459 A.2d at 1061.

70. *Id.* at 1061.

71. *Id.*

72. *Id.*

73. *Id.* at 1062.

74. *Needham*, 459 A.2d at 1062.

75. *Id.*

76. *Id.* at 1063.

have taken the majority view. In *Schreiner v. Scoville*,⁷⁷ a named beneficiary under a will sued the attorney who had drafted the will for negligence resulting in the testator's intent being frustrated.⁷⁸ The Supreme Court of Iowa believed that the privity barrier should be relaxed to allow intended beneficiaries to bring suit in such a situation, subject to express limitations.⁷⁹ However, it was only relaxed enough to allow that an attorney has a duty of care "to the direct, intended, and specifically identifiable beneficiaries of the testator as expressed in the testator's testamentary instruments."⁸⁰

When such an action is brought in Iowa, it may be brought under either tort or negligence terms, but the Supreme Court points out that it "necessarily will center on the existence and breach of [the] duty of care."⁸¹ Furthermore, when a lawyer negligently drafts a testamentary instrument causing the testator's intent to be frustrated, the injury to the intended beneficiary is per se proximately caused by the negligence of the attorney.⁸² One additional limitation is added: "[A] cause of action ordinarily will arise only when as a direct result of the lawyer's professional negligence the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized."⁸³ Thus, if the testator's intent, as seen in the testamentary instruments, is fulfilled, no additional challenge will be permitted unless the drafting attorney admits negligence.⁸⁴

The Iowa court felt this was a necessary decision since potential liability would ensure that a drafting attorney will draft testamentary instruments with the utmost care and precision.⁸⁵ In addition, without such a cause of action the reason for hiring a lawyer, fulfilling the testator's intent for the disposal of his or her estate, "would be frustrated without remedy."⁸⁶ Finally, since the class of plaintiffs is so limited, attorneys do not have to be concerned that their relationships with their immediate clients, the testators, will be threatened (i.e., no conflict of interest).⁸⁷

77. 410 N.W.2d 679 (Iowa 1987)
78. *Schreiner*, 410 N.W.2d at 680.
79. *Id.* 682-83.
80. *Id.* at 682.
81. *Id.*
82. *Id.*
83. *Schreiner*, 410 N.W.2d at 683.
84. *Id.*
85. *Id.* at 682.
86. *Id.*
87. *Id.*

C. *Mixed Approaches to Liability: Missouri and Connecticut*

1. *Missouri: The Modified Balancing of Factors Test*

Missouri has taken a rather unique approach in allowing intended beneficiaries to sue the drafting attorney. The plaintiffs in *Donahue v. Shughart, Thomson, & Kilroy*⁸⁸ sued a drafting attorney and his law firm for malpractice since the attorneys had "failed to effectuate a transfer in accordance with the wishes of their client."⁸⁹ In determining whether the plaintiffs, non-clients of the attorney, could bring such a suit, the court looked at the balancing test and at the third-party beneficiary approach.⁹⁰ Because it found that these two approaches were irreconcilable, the Missouri court developed a modified balancing of factors test.⁹¹

Missouri modified the first factor of California's balancing test,⁹² the degree to which the transaction was meant to benefit the plaintiff, to show that "the factor weighs in favor of a legal duty by an attorney where the client *specifically intended* to benefit the plaintiffs."⁹³ In addition, the court explicitly noted that "the ultimate factual issue" that has to be proven was that "an attorney-client relationship existed in which the client specifically intended to benefit the plaintiff."⁹⁴ With these considerations in mind, the Missouri Supreme Court announced that its modified balancing test contained the following factors:

- (1) the existence of a specific intent by the client that the purpose of the attorney's services were to benefit the plaintiffs;
- (2) the foreseeability of the harm to the plaintiffs as a result of the attorney's negligence;
- (3) the degree of certainty that the plaintiffs will suffer injury from attorney misconduct;
- (4) the closeness of the connection between the attorney's conduct and the injury;
- (5) the policy of preventing future harm; and
- (6) the burden on the profession of recognizing liability under the circumstances.⁹⁵

The court believed that this test would properly allow intended beneficiaries to bring suit against drafting attorneys while still meeting the policy concerns of such suits.⁹⁶

88. 900 S.W.2d 624, 627 (Mo. 1995).

89. *Donahue*, 900 S.W.2d at 627.

90. *Id.* at 627-28.

91. *Id.* at 628.

92. *Id.* (citing *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958)).

93. *Id.* at 628.

94. *Donahue*, 900 S.W.2d at 628.

95. *Id.* at 629.

96. *Id.* at 628.

According to this court at least, the policy concerns include allowing an unlimited class of plaintiffs to bring suit and/or interfering with the attorney-client relationship.⁹⁷ Since the first factor can only be met by intended beneficiaries, the class of plaintiffs that can bring suit is limited.⁹⁸ It is this limited class of plaintiffs that prevents the undue burdening of the legal profession, thus enabling the sixth factor to be met.⁹⁹ In addition, "a benefit to one in an adversarial relationship to the client" would not satisfy the first factor, so again the attorney-client relationship would not be corrupted.¹⁰⁰ Finally, the court added that the extension of liability in these cases is necessary since otherwise no one else would be able to bring suit.¹⁰¹ This is necessary, according to the court, not just out of fairness, but also for policy reasons.¹⁰² These suits must be allowed under the fifth factor, the policy of preventing future harm.¹⁰³ The extension of liability is designed to ensure that attorneys do their work properly.¹⁰⁴

2. Connecticut: Contract, Tort, or Both

In 1981, Connecticut addressed the issue of whether privity is required for intended beneficiaries to bring suit in *Stowe v. Smith*.¹⁰⁵ *Stowe* was a breach of contract suit by the intended beneficiary against the drafting attorney.¹⁰⁶ The Connecticut Supreme Court held that the plaintiff had a cause of action as a third-party beneficiary to the contract to draft a valid will between the testator and the drafting attorney.¹⁰⁷ The court expressly added that "[u]nless a particular conflict between the rules of contract and tort requires otherwise, a plaintiff may choose to proceed in contract, tort, or both."¹⁰⁸

The *Stowe* case is particularly interesting because it does not require that the testator's intent, as expressed in the will, has been frustrated.¹⁰⁹ The court noted that because the will underlying this suit was completely valid, recovery would be more difficult than it would be in cases where the attorney's negligence resulted in an invalid will.¹¹⁰ The

97. *Id.*

98. *Id.*

99. *Donahue*, 900 S.W.2d at 628.

100. *Id.* at 628.

101. *Id.*

102. *Id.*

103. *Id.* at 629.

104. *Donahue*, 900 S.W.2d at 628.

105. 441 A.2d 81 (Conn. 1981).

106. *Stowe*, 441 A.2d at 82.

107. *Id.* at 82-83.

108. *Id.* at 84 (footnote omitted).

109. *See id.*

110. *Id.* at 84.

court's primary concern was that beneficiaries be able to sue the drafting attorney for negligence despite the lack of an attorney-client relationship.¹¹¹ Proving the damages is the plaintiff's problem.

While Connecticut does allow intended beneficiaries to sue the drafting attorney, this potential liability is not unlimited. For example, in *Krawczyk v. Stingle*,¹¹² the intended beneficiaries sued the decedent's attorney because the decedent died without signing the trust instruments.¹¹³ The plaintiffs claimed that the attorney was negligent in not having the trust documents signed before the decedent's death.¹¹⁴ The Connecticut court held that the intended beneficiaries, third parties, could not hold the decedent's attorney liable for the delay in the execution of the estate planning documents.¹¹⁵ This decision was based on the court's belief that permitting such a suit "would not comport with a lawyer's duty of undivided loyalty to the client."¹¹⁶ Because the "[i]mposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily," rather than doing as the client wished, Connecticut decided to withhold liability under these circumstances.¹¹⁷

Connecticut has also addressed the issue of liability when insufficient assets are present at the point when the testamentary instrument actually goes into effect.¹¹⁸ In *Leavenworth v. Mathes*,¹¹⁹ an attorney drafted a will for the testatrix but at the time of her death there were insufficient assets to fulfill the bequests to the plaintiffs.¹²⁰ The plaintiffs sued the drafting attorney for not investigating the testatrix's assets to see if she could satisfy the bequests.¹²¹ The appeals court held that an attorney does not owe "a duty to the beneficiaries to ensure the existence of testamentary assets when drafting the instrument."¹²² Thus, summary judgment for the defendant was proper.¹²³ As this case demonstrates, at least in Connecticut, attorneys can only be liable for drafting errors, and not for all of the problems that may arise with the estate.¹²⁴

111. *Stowe*, 441 A.2d at 84.

112. 543 A.2d 733 (Conn. 1988).

113. *Krawczyk*, 543 A.2d at 733.

114. *Id.*

115. *Id.* at 736.

116. *Id.*

117. *Id.*

118. *Cf. Milboer v. Mottolese*, No. 373081, 1996 WL 57022 (Conn. Super. Ct. Jan. 24, 1996).

119. 661 A.2d 632 (Conn. App. Ct. 1995).

120. *Leavenworth*, 661 A.2d at 633.

121. *Id.*

122. *Id.* at 634.

123. *Id.* at 635.

124. *Id.* at 634.

II. THE MINORITY VIEW: STRICT PRIVACY

A. *The Four Minority States*1. *New York*

New York maintains a well-established rule that attorneys are not liable to third parties for professional negligence absent fraud, maliciousness, or collusion. This rule was addressed with respect to estate planning in *Viscardi v. Lerner*.¹²⁵ The plaintiffs in *Viscardi* sued the attorney who had drafted their brother's will, claiming that he negligently failed to follow their brother's wishes, thereby causing their brother's wife to receive more than she allegedly should have under the will.¹²⁶ The New York court "decline[d] to depart from the firmly established privity requirement in order to create a specific exception for an attorney's negligence in will drafting."¹²⁷ The court recognized that many jurisdictions had already departed from the strict privity requirement but refused to follow their lead.¹²⁸ No specific reasons or policies behind the decision were given.¹²⁹

This issue was again addressed two years later in *Estate of Spivey v. Pulley*.¹³⁰ Here, an intended beneficiary, at the direction of the drafting attorney, witnessed the signing of the will, which resulted in the voiding of her residuary bequest.¹³¹ The beneficiary and the estate sued the drafting attorney.¹³² Relying on its earlier holding in *Viscardi*,¹³³ the court again refused to depart from its "firmly and recently enunciated precedent" to allow the intended beneficiary to sue the drafting attorney.¹³⁴ Furthermore, the New York court held that the estate also could not maintain the suit.¹³⁵ Because the estate itself had suffered no pecuniary damage and was also not in privity with the attorney, it did not have a cause of action.¹³⁶

New York's view that privity is required for beneficiaries to sue

125. 510 N.Y.S.2d 183 (N.Y. App. Div. 1986).

126. *Viscardi*, 510 N.Y.S.2d at 184-85.

127. *Id.* at 185.

128. *Id.*

129. *Id.*

130. 526 N.Y.S.2d 145 (N.Y. App. Div. 1988).

131. *Spivey*, 526 N.Y.S.2d at 146.

132. *Id.*

133. *Viscardi*, 510 N.Y.S.2d at 146.

134. *Spivey*, 526 N.Y.S.2d at 146.

135. *Id.* at 147.

136. *Id.*

drafting attorneys was continued in *Mali v. De Forest & Duer*.¹³⁷ This case pointed out again that drafting attorneys are not liable to beneficiaries with whom they are not in privity.¹³⁸ This was true despite the fact that the law firm had represented the plaintiff and his wife for many years in various matters, including their own estate planning.¹³⁹ While there may have been privity in other matters, there was no privity with respect to the will under which the plaintiff was an intended beneficiary.¹⁴⁰ Thus, under New York law, the plaintiff had no cause of action.¹⁴¹

A year later, in *Deeb v. Johnson*,¹⁴² an attempt was made to create an exception to New York's strict privity rule.¹⁴³ In this case the plaintiffs sued the drafting attorney claiming that his error in drafting caused estate taxes to be \$59,000 more than they should have been.¹⁴⁴ The plaintiffs first asserted that because the privity rule had been excepted for accountants, it should be for lawyers as well.¹⁴⁵ In addition, they claimed that even if the intended beneficiaries could not bring the malpractice suit, the estate itself could.¹⁴⁶ The New York court flatly rejected both arguments, stating that "courts of this State have not departed from the privity requirement in will drafting cases . . . whether brought by intended beneficiaries . . . or the estate itself."¹⁴⁷ New York courts, unlike most of the courts in the majority, apparently are not concerned by the fact that attorneys who negligently draft wills are essentially immune to liability.

More recently, *Conti v. Polizzotto*¹⁴⁸ addressed this issue in a case where the intended beneficiaries paid an attorney (the defendant) to draft a will for their aunt.¹⁴⁹ The court found that the fact that the beneficiaries of the will also arranged and paid for the drafting of the will was insufficient to establish "the type of relationship necessary to sustain [the] action."¹⁵⁰ Once again, New York flatly denied intended beneficiaries the right to sue the drafting attorney. Apparently, no circumstances exist that would cause the privity barrier to be relaxed in New York.

137. 553 N.Y.S.2d 391 (N.Y. App. Div. 1990).

138. *Mali*, 553 N.Y.S.2d at 392.

139. *Id.*

140. *Id.*

141. *Id.*

142. 566 N.Y.S.2d 688 (N.Y. App. Div. 1991).

143. *Deeb*, 566 N.Y.S.2d at 688-89.

144. *Id.* at 689.

145. *Id.*

146. *Id.*

147. *Id.* at 688 (citing *Viscardi v. Lerner*, 125 A.D.2d 662, 664 (N.Y. App. Div. 1986); *Mali v. De Forest & Dier*, 160 A.D.2d 297, 297-98 (N.Y. App. Div. 1990); *Rossi v. Boehner*, 116 A.D.2d 636, 637 (N.Y. App. Div. 1986); *Estate of Spivey v. Pulley*, 138 A.D.2d 563, 564 (N.Y. App. Div. 1988); *Kramer v. Belfi*, 106 A.D.2d 615 (N.Y. App. Div. 1984)).

148. 243 A.D.2d 672 (N.Y. App. Div. 1997).

149. *Conti*, 243 A.D.2d at 673.

150. *Id.* at 673.

2. Texas

Like New York, Texas firmly holds that, due to lack of privity, intended beneficiaries of a will cannot sue the attorney who drafted it for malpractice. *Barcelo v. Elliott*¹⁵¹ is the seminal case on this issue. In that case, the plaintiffs claimed that the attorney's negligence had resulted in an invalid trust, causing a "foreseeable injury to [them]" as beneficiaries.¹⁵² However, because the beneficiaries were not clients of the attorney, the court held that the attorney owed them no duty.¹⁵³ Thus, they could not maintain a malpractice suit against him.¹⁵⁴

The Texas Supreme Court also summarily rejected the plaintiffs' claim under a third-party beneficiary contract theory.¹⁵⁵ It simply stated that legal malpractice in Texas is a tort action governed solely by negligence principles.¹⁵⁶ Thus, for that reason as well as for the reasons discussed above, a third-party beneficiary contract claim is also disallowed.¹⁵⁷

3. Ohio

Like Texas, Ohio also decided that intended beneficiaries cannot sue drafting attorneys for negligence in preparing testamentary instruments. In *Simon v. Zipperstein*,¹⁵⁸ the son of the testator sued the drafting attorney for an error that allegedly allowed the testator's second wife to take under two documents and thereby receive more than was intended.¹⁵⁹ The Ohio Supreme Court held that "in the absence of fraud, collusion or malice," an attorney cannot be held liable in malpractice by a beneficiary who is not in privity with the attorney.¹⁶⁰ Thus, the privity barrier remains intact in Ohio.

4. Nebraska

Finally, Nebraska is the fourth member of the minority that adheres to strict privity. *St. Mary's Church of Schuyler v. Tomek*¹⁶¹ involved the "purported" beneficiaries of a will suing the drafting attorney for "fail-

151. 923 S.W.2d 575 (Tex. 1996).

152. *Barcelo*, 923 S.W.2d at 576.

153. *Id.* at 579.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Barcelo*, 923 S.W.2d at 579.

158. 512 N.E.2d 636 (Ohio 1987).

159. *Simon*, 512 N.E.2d at 636.

160. *Id.* at 638.

161. 325 N.W.2d 164 (Neb. 1982).

ing to accurately express decedent's wishes."¹⁶² Due to the alleged inaccuracy, plaintiffs received less than they otherwise would have.¹⁶³ The Nebraska Supreme Court decided that while attorneys must use reasonable skill and care in doing work for their clients, "ordinarily this duty does not extend to third parties."¹⁶⁴ The court did not discuss its reasons for this decision nor any policy concerns it may have had.

One year after *Tomek* the Nebraska Supreme Court reaffirmed its adherence to the requirement of strict privity in *Lilyhorn v. Dier*.¹⁶⁵ Again, the court declined to give any explanation for its decision and simply stated that "the duty to exercise reasonable care and skill which a lawyer owes his client ordinarily does not extend to third parties."¹⁶⁶ Since no attorney-client relationship was present between the plaintiff, an heir, and the attorney who had drafted the will that gave rise to the suit, the decision of the trial court to dismiss the claim was upheld.¹⁶⁷

B. Policy Reasons Behind the Minority View

Of the four states holding the minority view, only Texas and Ohio courts have fully explained why they maintain the strict privity barrier. The Texas Supreme Court explained the reasons behind its holding in *Barcelo* at length.¹⁶⁸ First, the court stated that tort liability would "create a conflict during the estate planning process, dividing the attorney's loyalty between his or her client and the third-party beneficiaries."¹⁶⁹ Since Texas rejected the concept relied upon in many other jurisdictions that only the named beneficiaries could bring suit, attorneys would then be subject to suits by those who failed to receive what they believed they should have from an estate (the disappointed heirs).¹⁷⁰ Instead, the Texas Supreme Court stated that a defect in a testamentary instrument brings up questions about the testator's true intent.¹⁷¹ Because the testator is, of course, deceased when the testamentary instrument actually goes into effect, his or her true intentions can no longer be ascertained. As a result, the Texas court concluded that "the greater good is served" not by allowing intended beneficiaries to sue negligent attorneys, but "by preserving a bright-line privity rule which denies a cause of action

162. *Tomek*, 325 N.W.2d at 165.

163. *Id.*

164. *Id.*

165. 335 N.W.2d 554 (Neb. 1983).

166. *Lilyhorn*, 335 N.W.2d at 555.

167. *Id.*

168. *Barcelo*, 923 S.W.2d at 575.

169. *Id.* at 578.

170. *Id.*

171. *Id.*

to all beneficiaries whom the attorney did not represent."¹⁷² This "bright-line rule," added the court, will prevent conflict and promote the most zealous representation of testators since attorneys need not be concerned with suits by third parties.¹⁷³

Ohio's decision in the *Simon* case was based on the court's belief that allowing such actions would create a conflict of interest because the attorney would be concerned not just with the needs of the testator-client but with possible liability from third parties.¹⁷⁴ Only one justice dissented based on the concern that an attorney who is negligent in these situations is essentially immune from liability under the majority's holding.¹⁷⁵ While this argument is hard to ignore, somehow Texas, New York, Ohio, and Connecticut have all managed to do so.

III. ALABAMA: PREDICTIONS, POLICIES, AND PROBLEMS

To date, Alabama has not specifically ruled on whether privity is required for intended beneficiaries to sue attorneys for negligently drafting testamentary instruments. An analysis of other areas of law suggests that, overall, Alabama could follow the majority of states on this matter. However, two cases in the past decade that have specifically dealt with malpractice in other areas show that there is also a strong possibility that Alabama could just as easily join the minority view. The following cases illustrate this point more precisely. In addition, policy concerns and potential problems are also discussed.

A. *Privity in Other Types of Negligence Cases: An Indication of What's to Come?*

Several construction industry cases have dealt with the ability of third parties to sue when they have been injured by a party's actions with whom they were not in privity. In *Berkel and Co. Contractors, Inc. v. Providence Hospital*,¹⁷⁶ a subcontractor, Berkel, laid piling in a hospital.¹⁷⁷ Berkel sued the hospital and the architect that had drafted the design for negligently directing the pile installation.¹⁷⁸ Both the hospital and the architect argued that they owed Berkel no duty of care because they were not in privity with Berkel.¹⁷⁹ The Alabama Supreme Court responded by stating that "Alabama courts have rejected the absence of

172. *Id.*

173. *Barcelo*, 923 S.W.2d at 578-79.

174. *Simon*, 512 N.E.2d at 638.

175. *Id.* at 639 (Brown, J., dissenting).

176. 454 So. 2d 496 (Ala. 1984).

177. *Berkel*, 454 So. 2d at 498.

178. *Id.* at 501.

179. *Id.*

privity of contract as a defense to a negligence action.”¹⁸⁰ Furthermore, the Court quoted an earlier case, explaining that even if

plaintiff [is] barred from recovering from defendant as a third party beneficiary to defendant’s contract with another, plaintiff may nevertheless recover in negligence for defendant’s breach of duty where defendant negligently performs his contract with knowledge that others are relying on proper performance and the resulting harm is reasonably foreseeable.¹⁸¹

Clearly, the Alabama Supreme Court has no problem with removing the privity barrier and allowing third parties to sue for negligence in the construction context.¹⁸² It would appear that an estate planning attorney also has “knowledge that others are relying on [his] proper performance” and could therefore be liable for negligently drafting a testamentary instrument.¹⁸³

The defendants in *Berkel* also claimed that regardless of privity, they still owed no duty to Berkel.¹⁸⁴ Interestingly, the Court stated that to determine duty in a construction setting, the court must analyze six factors—the same six factors in California’s balancing test.¹⁸⁵ Apparently, these factors are currently only used in the construction context in Alabama, but they could plausibly be used in other areas of law. California obviously has done so,¹⁸⁶ so it is not unthinkable that Alabama could employ them there as well, especially since they are already accepted in another area.

*McFadden v. Ten-T Corp.*¹⁸⁷ is also a construction-related case in which the Alabama Supreme Court dealt with the privity issue.¹⁸⁸ In that case, a woman sued the contractor who built the portion of the highway on which she was injured.¹⁸⁹ Despite the fact that the Highway Department had accepted the contractor’s work and assumed responsibility for the maintenance of the highway, the plaintiff was still found to have a cause of action against the contractor despite the lack of privity and the Highway Department’s acceptance of the work.¹⁹⁰ The Court held that “a

180. *Id.*

181. *Id.* (quoting *Federal Mogul Corp. v. Universe Constr. Co.*, 376 So. 2d 716 (Ala. Civ. App. 1979)).

182. This case does not address whether the plaintiff would have had third-party beneficiary status because the plaintiff did not assert such a claim. See *Berkel*, 454 So. 2d at 502 n.4.

183. *Id.* at 501 (quoting *Federal Mogul Corp. v. Universal Constr. Co.*, 376 So. 2d 716 (Ala. Civ. App. 1979)).

184. *Id.* at 502.

185. *Id.* at 503.

186. *Biakanja v. Irving*, 320 P.2d 16, 16 (Cal. 1958).

187. 529 So. 2d 192 (Ala. 1988).

188. *McFadden*, 529 So. 2d at 192.

189. *Id.* at 200.

190. *Id.*

defendant will not be relieved of liability merely on the basis of lack of privity, when, as a result of his negligence, third persons are injured."¹⁹¹ Here, the Court did not even mention that foreseeability is necessary, as it did in *Berkel*. Likewise, if a client accepts an attorney's work, it appears logical that the attorney could still be liable to the intended beneficiaries of that work if it was negligently done.

While Alabama apparently does not require privity to sue for negligence in most instances, *Smith v. Universal Scheduling Co.*¹⁹² discusses the scope of the duty of care that is owed to third parties in such cases.¹⁹³ Here, the plaintiff sued a consulting company that recommended the use of a certain machine that ultimately caused her injuries.¹⁹⁴ The consulting company was found not to owe a duty of care to the plaintiff, but the Court cited an earlier case in which it held that "the scope of the duty of care should be co-extensive with the class of persons who were the intended beneficiaries of the inspection."¹⁹⁵ Thus, only those third parties whom are the intended beneficiaries of a particular undertaking can overcome the privity requirement.¹⁹⁶ In the estate planning context, this fits perfectly. The "scope of the duty of care" exercised by the drafting attorney should extend to the intended beneficiary of the instrument(s) being drafted. In other words, the attorney would owe a duty to those beneficiaries named in the document, not to just anyone who claimed they should have benefited.

While the above cases demonstrate that privity is not a requirement for third parties suing for negligence, *Shows v. NCNB National Bank of North Carolina*¹⁹⁷ indicates that this is not necessarily true when those third parties are suing attorneys for malpractice.¹⁹⁸ The plaintiffs in *Shows* sued an attorney for malpractice for his work in drawing up a deed of conveyance between the purchasers of the plaintiff's property (at foreclosure) and a bank.¹⁹⁹ The Alabama Supreme Court held that "a person authorized to practice law owes no duty except that arising from contract or from a gratuitous undertaking."²⁰⁰ Thus, the case was dismissed.²⁰¹

The holding in *Shows* has been applied in an estate context. *Peterson v. Anderson*²⁰² involved an attorney who had drafted a will in which he

191. *Id.*

192. 736 So. 2d 562 (Ala. 1999).

193. *Smith*, 736 So. 2d at 562.

194. *Id.*

195. *Id.* at 563 (quoting *Armstrong v. Aetna Ins. Co.*, 448 So. 2d 353, 355 (Ala. 1983)).

196. *Id.*

197. 585 So. 2d 880 (Ala. 1991).

198. *Shows*, 585 So. 2d at 883.

199. *Id.*

200. *Id.*

201. *Id.*

202. 719 So. 2d 216 (Ala. Civ. App. 1997).

was named executor and was also a beneficiary.²⁰³ When the other beneficiaries learned of this, they filed a will contest and sued the attorney for violating his fiduciary duty to the testator.²⁰⁴ The Alabama Court of Civil Appeals reiterated the holding in *Shows* and found that the plaintiffs had no standing to maintain their action against the attorney.²⁰⁵

The above cases have all been concerned with the privity barrier in negligence based actions. Presumably, a third-party beneficiary action could also be sustained in an estate planning malpractice action. Because third-party beneficiary standing is alive and well in other contexts, it is possible it could be used in an estate planning context as well.²⁰⁶

The *Berkel* and *McFadden* cases alone indicate that Alabama has removed its privity barrier for third parties suing in negligence based actions. The other cases discussed support that view and also seem to allow third-party beneficiary suits. Whether it applies to estate planning malpractice is debatable, if not doubtful, especially in light of the holdings in *Shows* and *Peterson*. The defendant in *McFadden*, for instance, received approval for his work and turned control and maintenance of the highway over to the Highway Department.²⁰⁷ Despite the complete lack of privity in that case, the plaintiffs still had standing to sue.²⁰⁸ How is that situation any different than those in which the plaintiffs lacked privity with the attorney? Surely the attorneys realized their actions would have foreseeable consequences for others, at least to the same extent the hospital and architect did in *Berkel*²⁰⁹ or the contractor did in *McFadden*.²¹⁰ The cases discussed involving non-attorneys are difficult to reconcile with those involving attorneys. Apparently, Alabama courts are simply not willing to extend liability when it involves attorneys being sued.

B. Policy Concerns

The policy concerns Alabama will face when it decides whether to allow intended beneficiaries to sue the drafting attorney will be the same as those faced by other courts—conflicts of interest, serving the testator's intentions, a multiplicity of suits, and virtual immunity from liability. Most of the states in the majority have found ways to safeguard against the negative policy concerns. As mentioned above, Michigan, Pennsylvania, the District of Columbia, Missouri, Florida, and Iowa

203. *Peterson*, 719 So. 2d at 217.

204. *Id.*

205. *Id.* at 218-19.

206. See *Alexander v. Wade*, No. 2980274, 1999 WL 500049 (Ala. Civ. App. July 16, 1999).

207. *McFadden*, 529 So. 2d at 192.

208. *Id.*

209. *Berkel*, 454 So. 2d at 496.

210. *McFadden*, 529 So. 2d at 192.

permit only those beneficiaries named in the testamentary instrument to overcome the privity barrier.²¹¹ Thus, a limited class of plaintiffs prevents attorneys from being inundated by suits from disappointed beneficiaries. In addition, there is presumably no conflict of interest, because the named beneficiaries will have the same interests as the testator. That is, the testator obviously intends to provide some benefit to the named beneficiaries through the particular testamentary instrument. Likewise, the named beneficiaries are concerned that their bequest comes to them as the testator intended. Thus, both the testator and the named beneficiaries have the same interests. Allowing these suits also prevents attorneys from having essential immunity to liability for negligent will drafting.

However, all of the states have obviously not agreed with the above reasoning. Texas and New York adamantly adhere to the strict privity requirement, rejecting the policy behind the holdings of the majority of the states.²¹² The states adhering to the minority view, particularly Texas,²¹³ express great concern that the testator's true intentions will not be followed or that the drafting attorney will neglect those intentions because of his concerns over potential liability. This concern seems meritless when viewed in the light of the solutions developed by states in the majority and also when contrasted with the alternative—virtual immunity for the drafting attorneys. Perhaps the minority states are really concerned with protecting attorneys from liability rather than protecting the intentions of testators.

Alabama, as discussed above, may decide to insulate its attorneys from liability as those states in the minority have done. There are reasons for doing so, although those reasons seem contrived at best. Nonetheless, protecting attorneys from liability may be more appealing than providing them an incentive to do their work carefully. Liability is, after all, an incentive many are subject to despite a lack of privity, as illustrated by the construction cases.²¹⁴

C. Potential Problems

Even if Alabama does decide to follow the majority of other states and relax the privity requirement, several potential problems exist. Seemingly, the most obvious is determining who are the intended beneficiaries. However, this problem is easily solved, as discussed above, by limiting the class of plaintiffs to those who are specifically named in the

211. See discussion *supra* Parts I.A.2-4, I.B.1-2, I.C.1.

212. See discussion *supra* Parts III.A.1, III.A.2.

213. See *supra* Part III.A.2.

214. See *supra* text accompanying notes 192-96.

will or other testamentary instrument. Doing so provides a simple way of not only protecting lawyers from suits by disappointed beneficiaries but also of preventing courts from having to delve into extrinsic evidence to determine whether the testator intended to include a particular person in his or her will. This problem is so easily remedied that it is not even a valid concern.

An additional problem, unique to Alabama, arises due to the Alabama Legal Services Liability Act ("ALSLA").²¹⁵ This Act requires all malpractice actions to be brought under its provisions.²¹⁶ The Act also provides its own statute of limitations, "within two years after the act or omission or failure giving rise to the claim."²¹⁷

Recently, the Alabama Supreme Court determined when the statute of limitations begins to run for actions brought under this act. In *Ex parte Panell*, the Court held that "a legal-malpractice cause of action accrues, and the statute-of-limitations period begins to run, when 'the act or omission or failure giving rise to the claim' [actually] occurs, and not when the client first suffers actual damage."²¹⁸ Thus, the statute of limitations begins to run at the very moment the attorney does or fails to do something wrong, regardless of whether any damage is yet apparent.²¹⁹

Applying this holding to the issue at hand creates some difficulties. Would the statute of limitations begin to run when the will is negligently drafted? This would be the time "when 'the act or omission or failure giving rise to the claim' occurs."²²⁰ The ALSLA does contain a provision tolling the statute of limitations "if the cause of action is not discovered and could not reasonably have been discovered within such period."²²¹ The limitations period is tolled until the cause of action is discovered and then the plaintiff has six months to file.²²² Seemingly, this language would allow intended beneficiaries to sue (within six months) after it is discovered that some defect exists with the will or testamentary instrument unless some type of affirmative concealment is required on the part of the attorney to toll the limitations period. Judging from the plain language of the statute, this is not the case.²²³ Nonetheless, no one knows for certain how this will be construed until it is actually litigated.

The *Panell* holding was premised on judicial concern for the quality of legal services—the multiplicity of suits was threatening the quality

215. ALA. CODE § 6-5-570 to 581 (1993).

216. *Id.* § 6-5-573.

217. *Id.* § 6-5-574(a).

218. 756 So. 2d 862, 868 (Ala. 1999).

219. *Panell*, 756 So. 2d at 868.

220. *Id.*

221. ALA. CODE § 6-5-574(a).

222. *Id.*

223. *Id.*

and availability of legal services.²²⁴ This touching judicial concern could affect not only how the statute of limitations is construed, but also whether intended beneficiaries are even allowed to sue.

Clearly, should Alabama require strict privity and deny intended beneficiaries the right to sue, the most prominent problem will be the immunity of drafting attorneys. If drafting attorneys cannot be sued for negligently preparing wills or other testamentary instruments, they lack a sufficient incentive to do their work carefully and to use the necessary attention to detail. This is an alarming proposition and seems inherently unfair. After all, all types of professionals are subject to liability if they do their work negligently and cause harm to others. Why should attorneys be excepted from this? Perhaps the only answer is that judges are attorneys.

CONCLUSION

When considering other areas of law in Alabama, one would conclude that Alabama courts would likely relax the privity barrier and allow intended beneficiaries to sue the attorney responsible for a negligently drafted will. In addition, studying the reasoning and policies considered by the states that have relaxed the privity barrier demonstrates that very plausible reasons exist for doing so. However, the current cases in Alabama that involve attorney malpractice demonstrate a judicial reluctance to allow suits against attorneys. Thus, Alabama will probably not relax the privity barrier and allow drafting attorneys to be sued. As mentioned earlier, courts that do so often proclaim that they are protecting the true intentions of the testator when it seems they are really protecting attorneys. Alabama courts will likely make the same claim, that the testator's true intentions as well as the quality of legal services are being protected. Thus, intended beneficiaries will be denied the right to sue and drafting attorneys will be effectively insulated from liability.

Kelly Burleson Rushin

224. *Panell*, 756 So. 2d at 866-68.

