No. 104
Estate of Saul Schneider,
Appellant,
v.
Victor M. Finmann, et al.,
Respondents,
et al.,
Defendant.

Nicholas J. Damadeo, for appellant.
Peter J. Mastaglio, for respondents.

JONES, J.:

At issue in this appeal is whether an attorney may be held liable for damages resulting from negligent representation in estate tax planning that causes enhanced estate tax liability. We hold that a personal representative of an estate may maintain a legal malpractice claim for such pecuniary losses to the

estate.

The complaint alleges the following facts. Defendants represented decedent Saul Schneider from at least April 2000 to his death in October 2006. In April 2000, decedent purchased a $1 million life insurance policy. Over several years, he transferred ownership of that property from himself to an entity of which he was principal owner, then to another entity of which he was principal owner and then, in 2005, back to himself. At his death in October 2006, the proceeds of the insurance policy were included as part of his gross taxable estate. Decedent's estate commenced this malpractice action in 2007, alleging that defendants negligently advised decedent to transfer, or failed to advise decedent not to transfer, the policy which resulted in an increased estate tax liability.

Supreme Court granted defendants' motion to dismiss the complaint for failure to state a cause of action. The Appellate Division affirmed (60 AD3d 892), holding that, in the absence of privity, an estate may not maintain an action for legal malpractice. We now reverse and reinstate plaintiff's claim.

Strict privity, as applied in the context of estate planning malpractice actions, is a minority rule in the United States.[1] In New York, a third party, without privity, cannot

[1] Now only a handful of jurisdictions apply strict privity to malpractice actions commenced by beneficiaries against estate planning attorneys (see Robinson v Benton, 842 So2d 631, 637 [Ala 2002]; Nevin v Union Trust Co., 726 A2d 694, 701 [Me 1999];

maintain a claim against an attorney in professional negligence, "absent fraud, collusion, malicious acts or other special circumstances" (Spivey v Pulley, 138 AD2d 563, 564 [2d Dept 1988]). Some Appellate Division decisions, on which the Appellate Division here relied, have applied strict privity to estate planning malpractice lawsuits commenced by the estate's personal representative and beneficiaries alike (Deeb v Johnson, 170 AD2d 865 [3d Dept 1991]; Spivey, 138 AD2d at 564; Viscardi v

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Noble v Bruce, 709 A2d 1264, 1275 [Md 1998]; Simon v Zipperstein, 512 NE2d 636 [Ohio 1987]; Lilyhorn v Dier, 335 NW2d 554 [Neb 1983]). Numerous jurisdictions have either relaxed the principle of privity or have granted standing to beneficiaries or estates (see The Stanley L and Carolyn M. Watkins Trust, 321 Mont 432, 438 [2004] [an estate has standing to bring a legal malpractice action]; Blair v Ing, 21 P3d 452, 464 [Hawai'i 2001] [non-client may bring a legal malpractice suit]; Simpson v Calivas, 650 A2d 318, 321 [NH 1994] [named beneficiaries have standing to bring claims in negligence against an estate planning attorney]; Espinosa v Sparber, Shevin, Rosen and Heilbronner, 612 So2d 1378, 1380 [Fla 1993] [estate stands in the shoes of the testator and satisfies the privity requirement]; Schreinder v Scoville, 410 NW2d 679, 681 [Iowa 1987] [intended beneficiaries may maintain a malpractice action against the decedent's attorney despite the absence of privity]). The Schreinder court cited to numerous jurisdictions that had a similar rule in place (see id. at 681-682). Texas treats the malpractice claims brought by beneficiaries and personal representatives of decedent's estates differently (see Barcelo v Elliott, 923 SW2d 575, 580 [Tex 1996] [non-client beneficiaries cannot maintain malpractice suits against estate planning attorneys because they lack privity]; cf. Belt v Oppenheimer, Blend, Harrison & Tate, Inc., 192 SW3d 780, 784-786 [Tex 2006] [departed from the Barcelo rule in suits brought by the personal representative of the decedent's estate and held that privity existed between the parties]).

Lerner, 125 AD2d 662, 663-664 [2d Dept 1986]; Rossi v Boehner, 116 AD2d 636 [2d Dept 1986]). This rule effectively protects attorneys from legal malpractice suits by indeterminate classes of plaintiffs whose interests may be at odds with the interests of the client-decedent. However, it also leaves the estate with no recourse against an attorney who planned the estate negligently.

We now hold that privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney. We agree with the Texas Supreme Court that the estate essentially "'stands in the shoes' of a decedent" and, therefore, "has the capacity to maintain the malpractice claim on the estate's behalf" (Belt v Oppenheimer, Blend, Harrison & Tate, Inc., 192 SW3d 780, 787 [Tex 2006]). 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. The attorney estate planner surely knows that minimizing the tax burden of the estate is one of the central tasks entrusted to the professional. Moreover, such a result comports with EPTL § 11-3.2(b)[2], which generally permits the personal

[2] "No cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed. For any injury an action may be brought or continued by the personal representative of the decedent" (EPTL § 11-3.2 [b]).

representative of a decedent to maintain an action for "injury to person or property" after that person's death.

Despite the holding in this case, strict privity remains a bar against beneficiaries' and other third-party individuals' estate planning malpractice claims absent fraud or other circumstances. Relaxing privity to permit third-parties to commence professional negligence actions against estate planning attorneys would produce undesirable results -- uncertainty and limitless liability. These concerns, however, are not present in the case of an estate planning malpractice action commenced by the estate's personal representative.

Accordingly, the order of the Appellate Division should be reversed, with costs, and defendants' motion to dismiss the complaint denied.

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Order reversed, with costs, and defendants' motion to dismiss the complaint denied. Opinion by Judge Jones. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith and Pigott concur.

Decided June 17, 2010