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Assault upon the Citadel of Privity: The Coexistence of Strict, Privity and Belt v. Oppenheimer, Blend, Harrison & (and) Tate, Inc. Comment.

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COMMENT

"ASSAULT UPON THE CITADEL OF PRIVITY":[1] THE COEXISTENCE OF STRICT PRIVITY AND *BELT V. OPPENHEIMER, BLEND, HARRISON & TATE, INC.*

C. JOHN MULLER IV

I. INTRODUCTION

The practicing attorney must have a complete understanding of legal malpractice liability.[2] Managing this risk can be a precarious

1. Ultramares Corp. v. Touche, 174 N.E. 441, 445 (N.Y. 1931) (Cardozo, C.J.).
2. *See* John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute*

responsibility when the law is not clearly defined. To make things worse, the steady erosion of attorney-client privity barriers makes it easier for third party non-clients to sue lawyers for legal malpractice.[3] This is the current state of matters in Texas since the Texas Supreme Court decided *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*[4] on May 5, 2006.[5] The *Belt* court determined that personal representatives of an estate may bring a malpractice claim against the decedent's attorneys.[6] Although

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Agreements to Arbitrate Client Malpractice Claims, 36 S. TEX. L. REV. 967, 969 (1995) (explaining that changes in legal malpractice over the last quarter of a century "have tended to expose lawyers to increased malpractice liability"). The article further noted that many states have adopted the discovery rule which can expose lawyers "to significant liability for years after the legal work has been completed." *Id.*; *see also* Paul D. Rheingold, *Legal Malpractice: Plaintiff's Strategies*, 15 No. 2 LITIG. 13, 14 (1989) ("Most common [legal malpractice defendants] are single practitioners. They are easy targets, usually understaffed, with few legal resources.").

3. Sean Pager, *Caveat Lawyer: The Restatement of the Law of Lawyers' "Invite to Rely" Standard for Attorney Liability of Nonclients*, 34 TORT & INS. L.J. 1121, 1121 (1999) ("The erosion of privity barriers has led to a dramatic growth in lawsuits filed against attorneys by third-party nonclients."). The article elaborated on the limits which various jurisdictions have imposed upon claims brought by plaintiffs who are not in privity with an attorney:

> Courts in different jurisdictions have sanctioned such claims under variant theories of negligence and third-party beneficiary doctrines. Specific rationales relied on by courts and commentators include a "balance of factors" test, gratuitous undertaking or reliance, negligent misrepresentation, professional negligence (malpractice), and fiduciary duties. Courts have generally been careful, however, to circumscribe the resulting exposure that attorneys face under any of these theories. One reason has been a fear of "indeterminate liability" famously described by then-Judge Cardozo in *Ultramares v. Touche*. This concern assumes added weight when one considers the special nature of the attorney-client relationship. Creating duties to third parties could detract from the attorney's proper focus on the client. As such, normal liability principles "must yield to the higher priority given to the lawyer's duties to the client of loyalty and zealous representation, and to maintenance of confidentiality, avoidance of conflicts of interest, and open access to courts."

Id. at 1121–22 (footnotes omitted).

4. Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780 (Tex. 2006).

5. *Id.* at 784 (stating that the court had confronted for the first time the question of whether the current law "bars suits brought *on behalf of* the decedent client by his estate's personal representatives").

6. *Id.* at 782 ("We hold . . . that there is no legal bar preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners."); *see also* TEX. PROB. CODE ANN. § 3(aa) (Vernon Supp. 2007) ("'Personal representative' or 'Representative' includes executor, independent executor, administrator, independent administrator, temporary administrator, together with their successors."); Austin Nursing Ctr., Inc. v. Lovato, 171 S.W.3d 845, 850 (Tex. 2005) (stating that generally only a personal representative has the right to file a claim for

Belt addressed legal malpractice in the estate-planning context, the court did not clearly state whether its holding is limited to estate-planning malpractice.[7] Thus, the *Belt* privity rule may expand legal malpractice liability well beyond the context of estate planning and affect other areas of legal practice in ways that the *Belt* court may not have intended.

The *Belt* court was concerned with two competing policies. On one hand, Texas is a "strict privity" state.[8] Under this strict privity rule, established in *Barcelo v. Elliott*,[9] an attorney does not owe a duty of care to the third party beneficiaries of their services.[10] Indeed, the purpose of strict privity is to encourage an attorney to zealously represent the interests of the client.[11] With strict privity in place, an attorney's loyalties are not conflicted.[12] An attorney

injury to the estate).

7. *See Belt*, 192 S.W.3d at 782–89 ("[N]o legal bar prevent[s] an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners."). The court repeatedly discussed its holding in the context of "estate-planning malpractice" but never mentioned if the holding is limited to legal malpractice based on negligent estate-planning. *Id.*; *see also* O'Donnell v. Smith (*O'Donnell III*), 234 S.W.3d 135, 144 (Tex. App.—San Antonio 2007, pet. filed) ("[N]othing in *Belt* compels us to conclude the Supreme Court intended to disallow a personal representative from bringing other types of malpractice claims on behalf of the estate.").

8. *See* Barcelo v. Elliott, 923 S.W.2d 575, 578 (Tex. 1996) (deciding that departing from a bright line privity rule "would subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under the will or trust"). The court stated that it agreed with out-of-state jurisdictions "that have rejected a broad cause of action in favor of beneficiaries." *Id.*; *see also* Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 265 (2001) (discussing the policies of the "strict privity" states, which include Texas); Kelli M. Hinson & Elizabeth A. Snyder, *Recent Developments in Texas Legal Malpractice Law*, 38 ST. MARY'S L.J. 1003, 1004–05 (2007) ("The effect of this principle, which is sometimes referred to as the 'privity barrier,' is that a plaintiff will be unable to establish the duty element of a legal malpractice claim unless he can show he was in privity of contract with the attorney he is seeking to sue.").

9. Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 1996).

10. *Id.* at 578 ("We believe 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.").

11. *See id.* at 578–79 (asserting that the strict privity rule "will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation"); *see also O'Donnell III*, 234 S.W.3d at 143 ("'[I]n *Barcelo* we held that an attorney's ability to represent a client zealously would be compromised if the attorney knew that, after the client's death, he could be second-guessed by the client's disappointed heirs.'" (quoting *Belt*, 192 S.W.3d at 787)).

12. *See Barcelo*, 923 S.W.2d at 578 ("[P]otential tort liability to third parties would create a conflict during the estate planning process, dividing the attorney's loyalty between

does not need to worry about the client's disgruntled heirs asserting claims for their supposed "lost inheritance."[13] On the other hand, there are the policy concerns enumerated in *Belt* that support a relaxed privity requirement. If an attorney owes no duty of care to either a beneficiary or the estate's personal representative, then an attorney is afforded de facto immunity for negligence if the attorney's malpractice is not discovered until after the client dies.[14] This is often the case in estate-planning

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his or her client and the third-party beneficiaries."). The court acknowledged that a strict privity rule would "ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation." *Id.* at 578–79; *accord* Robinson v. Benton, 842 So. 2d 631, 637 (Ala. 2002) ("'We believe that 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.'" (quoting *Barcelo*, 923 S.W.2d at 578)); Pettus v. McDonald, 36 S.W.3d 745, 751 (Ark. 2001) (dismissing a claim for legal malpractice for lack of privity); Nevin v. Union Trust Co., 1999 ME 47, ¶ 41, 726 A.2d 694, 701 (asserting that, when a beneficiary lacks privity with the testator's attorney, "the better rule appears to be not to allow individual beneficiaries to assert claims for negligence"); Noble v. Bruce, 709 A.2d 1264, 1279 (Md. 1998) (deciding to maintain the strict privity rule); Lilyhorn v. Dier, 335 N.W.2d 554, 555 (Neb. 1983) ("[A]s a general rule the duty to exercise reasonable care and skill which a lawyer owes his client ordinarily does not extend to third parties."); Viscardi v. Lerner, 510 N.Y.S.2d 183, 185 (N.Y. App. Div. 1986) ("The firmly established rule in New York State with respect to attorney malpractice is that absent fraud, collusion, malicious acts or other special circumstances, an attorney is not liable to third parties not in privity for harm caused by professional negligence."); Simon v. Zipperstein, 512 N.E.2d 636, 638 (Ohio 1987) ("It is by now well-established in Ohio that an attorney may not be held liable by third parties as a result of having performed services on behalf of a client, in good faith, unless the third party is in privity with the client for whom the legal services were performed, or unless the attorney acts with malice."); Copenhaver v. Rogers, 384 S.E.2d 593, 595 (Va. 1989) (holding that a plaintiff has no cause of action in tort absent privity).

13. *See, e.g.*, Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 787–88 (Tex. 2006) (stating that a rule which allows a beneficiary to assert a claim for their lost inheritance "would be barred by *Barcelo*"); *Barcelo*, 923 S.W.2d at 578 ("[C]ourts have recognized the inevitable problems with disappointed heirs attempting to prove that the defendant-attorney failed to implement the deceased testator's intentions."). The *Barcelo* court elaborated on the risks that a break from strict privity would create:

> [It] would subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under the will or trust. 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.

Barcelo, 923 S.W.2d at 578.

14. *See Belt*, 192 S.W.3d at 789 ("[P]recluding both beneficiaries and personal representatives from bringing suit for estate-planning malpractice would essentially immunize estate-planning attorneys from liability for breaching their duty to their clients."); *see also* Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN.

malpractice.[15] Because this de facto immunity could discourage an attorney's duty to use proper care,[16] the *Belt* court held that "[l]imiting estate-planning malpractice suits to those brought by either the client or the client's personal representative strikes the appropriate balance between providing accountability for attorney negligence and protecting the sanctity of the attorney-client relationship."[17]

In the same breath, the court noted "that beneficiaries often act as the estate's personal representative, and our holding today arguably presents an opportunity for some disappointed beneficiaries to recast a malpractice claim for their own 'lost' inheritance, which would be barred by *Barcelo*, as a claim brought on behalf of the estate."[18] The court referred to this circumstance as an "end run" around *Barcelo*.[19] One can see how an end run scenario could contravene strict privity since strict privity is exactly that—strict. Semi-strict privity is an oxymoron. Thus, the court enumerated two limitations on the *Belt* privity rule that would prevent the rule from impinging upon *Barcelo*.[20] However, if

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L. REV. 261, 265 (2001) ("The courts of the strict privity states have committed an equally egregious oversight by failing to recognize the absurdity of preventing all suits by beneficiaries. Moreover, strict privity fails to take advantage of the possible use of malpractice liability to encourage greater care by attorneys.").

15. *See* Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 265 (2001) (explaining that the ramifications of a conflict of interest are heightened in estate-planning malpractice "because the client is not the likely plaintiff"); Kelli M. Hinson & Elizabeth A. Snyder, *Recent Developments in Texas Legal Malpractice Law*, 38 ST. MARY'S L.J. 1003, 1004–05 (2007) (discussing the competing policy concerns that courts must address when damages are "not discovered until after the estate planning client has passed away and the estate plan is examined, litigated, or both").

16. *See* Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 265 (2001) ("[S]trict privity fails to take advantage of the possible use of malpractice liability to encourage greater care by attorneys.").

17. *Belt*, 192 S.W.3d at 789.

18. *Id.* at 787–88.

19. *Id.* at 788.

20. *See id.* (explaining that the temptation to misuse the *Belt* privity rule would be tempered by two limitations). The first limitation is "the fact that a personal representative who mismanages the performance of his or her duties may be removed from the position." *Id.* The second limitation is that "while the interests of the decedent and a potential beneficiary may conflict, a decedent's interests should mirror those of his estate." *Belt*, 192 S.W.3d at 787. The court stated that "[b]ecause the claim allowed under our holding today is for injuries suffered by the client's *estate*, any damages recovered would be paid to the estate and, only then, distributed in accordance with the decedent's

these limitations are not effective, then an attorney must consider both the interests of the client and the potential liability to a beneficiary.[21] This, of course, is the overriding policy concern behind the strict privity barrier.[22] Hence, a realistic end run scenario equates to the effective demise of strict privity.

Furthermore, the mere possibility of an end run scenario is sufficient to divide an attorney's interests. Although privity is only the first hurdle in establishing liability for negligence,[23] the costs of having to defend against these suits are often considerable.[24] To complicate matters, an attorney may not know who the client's future beneficiaries will be. In addition, the discovery rule may toll the statute of limitations on a legal malpractice claim for many decades.[25] In these cases, the attorney is prudent to assume the

existing estate plan." *Id.* at 788; *see also* Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 345 (Tex. 1992) (stating that damages in a surviving cause of action are awarded to the party who would have received them if the award had been included in the decedent's estate before death).

21. *See* Kelli M. Hinson & Elizabeth A. Snyder, *Recent Developments in Texas Legal Malpractice Law*, 38 ST. MARY'S L.J. 1003, 1005 (2007) (explaining that, in a legal malpractice claim, "the only potential plaintiffs . . . are the deceased's beneficiaries, who might have interests that conflict with one another and with that of the deceased client"). The article states that "[t]he privity rule is designed to protect the interests of the testator over the interests of any potential beneficiaries in controlling her relationship with her attorney as to the disposition of her assets over the interests of any potential beneficiaries." *Id.*

22. *See* Barcelo v. Elliott, 923 S.W.2d 575, 578–79 (Tex. 1996) (stating that the strict privity rule "will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation"); *see also* O'Donnell v. Smith (*O'Donnell III*), 234 S.W.3d 135, 143 (Tex. App.—San Antonio 2007, pet. filed) ("'[I]n *Barcelo* we held that an attorney's ability to represent a client zealously would be compromised if the attorney knew that, after the client's death, he could be second-guessed by the client's disappointed heirs.'" (quoting *Belt*, 192 S.W.3d at 787)).

23. *See* Peeler v. Hughes & Luce, 909 S.W.2d 494, 496 (Tex. 1995) (explaining that a plaintiff, to successfully assert a surviving legal malpractice claim, must show "that (1) the attorney owed the plaintiff a duty, (2) the attorney breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) damages occurred").

24. *See* Paul D. Rheingold, *Legal Malpractice: Plaintiff's Strategies*, 15 No. 2 LITIG. 13, 13–14 (1989) (pointing out that an attorney who must defend against a legal malpractice claim will typically need to employ the services of another lawyer who specializes in legal malpractice defense and may need to employ an accountant for complicated calculations of damages).

25. *See* Murphy v. Mullin, Hoard & Brown, L.L.P., 168 S.W.3d 288, 291 (Tex. App.—Dallas 2005, no pet.) (noting that the discovery rule tolls the statute of limitations "[b]ecause it is unrealistic to expect a lay client to have the legal acumen to perceive the negligence of his attorney in giving faulty [legal] advice, and because the injury flowing from faulty [legal] advice is objectively verifiable"). "[T]he Texas Supreme Court has recognized that the discovery rule applies to legal malpractice claims. Accordingly, such a

worst and account for the potential costs of defending against claims made by disgruntled beneficiaries; keep in mind, the attorney's loyalties are not only divided, but they may be skewed to the interests of the beneficiary.[26] The attorney would be liable only for the cost of reproducing his services if the attorney's negligence was discovered during the client's lifetime.[27] But if the same claim were brought by the decedent's beneficiaries, the attorney could be liable for the much greater cost of compensating the beneficiary for a "lost inheritance."[28] If an end run around *Barcelo* is possible, the prudent attorney will recognize this predicament, and the attorney's loyalties may be divided.

This Comment demonstrates how an end run around *Barcelo* is possible. Part II first examines the elements required for a personal representative to assert a decedent's malpractice claim. In particular, the requirement of privity is scrutinized. Part II then explores the history and purpose of the privity requirement and examines the position of various jurisdictions on the privity barrier. Finally, Part II considers the scope of the *Belt* privity rule. Part III questions whether the *Belt* privity rule is limited to the context of estate-planning malpractice, and asserts that a judicious attorney should assume that it is not. Part III next explores the *Belt* court's limitation on its privity rule and deduces that, in many circumstances, these limitations are ineffective. *O'Donnell v.*

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claim does not accrue until the claimant 'knows or in the exercise of ordinary diligence should know of the wrongful act and resulting injury.'" Kelli M. Hinson & Elizabeth A. Snyder, *Recent Developments in Texas Legal Malpractice Law*, 38 ST. MARY'S L.J. 1003, 1009 (2007) (quoting *Murphy*, 168 S.W.3d at 291).

26. *See* Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 311 (2001) ("[B]ecause the attorney's possible malpractice liability to the client is dwarfed by the possible liability to the beneficiaries, the recognition of a cause of action encourages the attorney to emphasize the beneficiary's interests to the detriment of the client's interests.").

27. *See* Noble v. Bruce, 709 A.2d 1264, 1278 (Md. 1998) (stating that damages may be limited to the attorney's fee in a cause of action for legal malpractice asserted by a client during his lifetime); *cf.* Martin D. Begleiter, *First Let's Sue All the Lawyers—What Will We Get: Damages for Estate Planning Malpractice*, 51 HASTINGS L.J. 325, 331 (2000) ("In general, the damage recoverable is the amount of plaintiff's loss.").

28. *See* Martin D. Begleiter, *First Let's Sue All the Lawyers—What Will We Get: Damages for Estate Planning Malpractice*, 51 HASTINGS L.J. 325, 332 (2000) (explaining lost bequest recovery and stating that "the general basis of recovery in legal malpractice actions in estate planning is the value of the bequest lost by plaintiff due to the attorney's negligence").

Smith,[29] the first case to apply the *Belt* privity rule, presents a clear example of the potential misuse of the rule. With this potential in mind, Part IV proposes two new limitations on the *Belt* privity rule that should effectively "protect[] the sanctity of the attorney-client relationship."[30]

II. BACKGROUND

A. *Personal Representatives: Establishing Legal Malpractice Claims*

"[A] legal malpractice claim is based on negligence and arises from an attorney's alleged failure to exercise ordinary care."[31] However, personal representatives generally cannot recast or bifurcate their legal malpractice claim into separate claims for breach of contract, breach of fiduciary duty, negligent misrepresentation, and violations of the Deceptive Trade Practices Act (DTPA).[32] In comparison to claims for legal malpractice, each of these separate causes of action has advantages and disadvantages for the individual plaintiff.[33] For example, claims for breach of fiduciary duty are subject to a four-year statute of limitation,[34] whereas claims for legal malpractice are subject to a two-year statute of limitation.[35] Lawyers have almost no liability exposure to plaintiffs claiming violation of the DTPA because

29. O'Donnell v. Smith (*O'Donnell III*), 234 S.W.3d 135 (Tex. App.—San Antonio 2007, pet. filed).

30. Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 789 (Tex. 2006).

31. Aiken v. Hancock, 115 S.W.3d 26, 28 (Tex. App.—San Antonio 2003, pet. denied) (citing Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989)). The Texas Supreme Court has further elaborated that "[i]f an attorney makes a decision which a reasonably prudent attorney *could* make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable." *Cosgrove*, 774 S.W.2d at 665.

32. *See* Kelli M. Hinson & Elizabeth A. Snyder, *Recent Developments in Texas Legal Malpractice Law*, 38 ST. MARY'S L.J. 1003, 1018–21 (2007) ("[A] plaintiff may not fracture legal malpractice claims into other causes of action.").

33. *See id.* (comparing the advantages and disadvantages between alternatives to legal malpractice actions).

34. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(5) (Vernon 2002); Kelli M. Hinson & Elizabeth A. Snyder, *Recent Developments in Texas Legal Malpractice Law*, 38 ST. MARY'S L.J. 1003, 1018 (2007).

35. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp. 2007); *see also* Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988) (discussing the statute of limitations for legal malpractice).

these actions are subject to a very broad personal service exception.[36] On the other hand, lawyers can be liable to non-clients in an action for negligent misrepresentation.[37] In any case, a personal representative is prohibited from manipulating legal malpractice claims into related causes of action.[38]

A personal representative can only assert a legal malpractice cause of action if the claim survives the death of the testator.[39] The *Belt* court considered for the first time the question of whether "a legal malpractice claim in the estate-planning context survives a deceased client."[40] The court determined that "no statute addresses the survivability of a cause of action,"[41] and instead applied common law principles: "'[A]t common law all causes of action for damages die with the person of the party injured, or the person inflicting the injury, except such damages as grow out of acts affecting the property rights of the injured party.'"[42] Therefore, a personal claim asserted on behalf of the decedent does not survive, whereas contract claims and claims asserting property damages do survive.[43] The *Belt* court determined that "legal malpractice claims alleging pure economic

36. *See* TEX. BUS. & COM. CODE ANN. § 17.49(c) (Vernon Supp. 2007) (stating that a cause of action cannot be brought under the DTPA for "damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill"); Ballesteros v. Jones, 985 S.W.2d 485, 498 (Tex. App.—San Antonio 1998, pet. denied) (forbidding a plaintiff to recast a cause of action based in negligence as a claim arising under the DTPA); *see also* Kelli M. Hinson & Elizabeth A. Snyder, *Recent Developments in Texas Legal Malpractice Law*, 38 ST. MARY'S L.J. 1003, 1019–20 (2007) (explaining that the "professional services exception" is usually broad enough to prevent DTPA claims for legal malpractice).

37. Kelli M. Hinson & Elizabeth A. Snyder, *Recent Developments in Texas Legal Malpractice Law*, 38 ST. MARY'S L.J. 1003, 1020–21 (2007); *see also* McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 792 (Tex. 1999) (explaining that the privity barrier does not apply to negligent misrepresentation claims because a "negligent misrepresentation claim is not equivalent to a legal malpractice claim").

38. *See* Kelli M. Hinson & Elizabeth A. Snyder, *Recent Developments in Texas Legal Malpractice* Law, 38 ST. MARY'S L.J. 1003, 1018–21 (2007) (detailing the various legal barriers to recasting legal malpractice claims into separate causes of action).

39. Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 784 (Tex. 2006) ("[I]f [a] legal malpractice claim is brought on behalf of the decedent's estate and survives the decedent, the [personal representative] may maintain a suit against the [decedent's a]ttorneys.").

40. *Id.*

41. *Id.*

42. *Id.* (quoting Johnson v. Rolls, 97 Tex. 453, 457, 79 S.W. 513, 514 (1904)).

43. *Id. See generally* 1 AM. JUR. 2D *Abatement, Survival and Revival* § 65 (2005) (discussing the survivability of causes of action).

loss survive in favor of a deceased client's estate, because such claims are necessarily limited to recovery for property damage."[44]

A personal representative asserting a surviving claim of legal malpractice on behalf of the estate must show "that (1) the attorney owed the plaintiff a duty, (2) the attorney breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) damages occurred."[45] The first of these elements is often referred to as the "privity barrier."[46] The privity barrier limits an attorney's "duty of care only to his or her client, not to third parties who may have been damaged by the attorney's negligent representation of the client."[47] In Texas, the privity barrier

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44. *Belt*, 192 S.W.3d at 785. In *Belt,* the Texas Supreme Court expressly disapproved of the holding in *Estate of Arlitt v. Paterson*, 995 S.W.2d 713 (Tex. App.—San Antonio 1999, pet. denied). *Belt*, 192 S.W.3d at 785. *Estate of Arlitt* held "that no legal malpractice claim accrue[d] before death when an estate-planning attorney's negligent drafting result[ed] in increased estate tax consequences." *Id.* at 785. The *Belt* court held otherwise:

> Even though an estate may suffer significant damages after a client's death, this does not preclude survival of an estate-planning malpractice claim. While the primary damages at issue here—increased tax liability—did not occur until after the decedent's death, the lawyer's alleged negligence occurred while the decedent was alive.

Id. at 786; *see also* Apex Towing Co. v. Tolin, 41 S.W.3d 118, 120 (Tex. 2001) (holding that a legal malpractice claim arises "when facts have come into existence that authorize a claimant to seek a judicial remedy"). "If the decedent had discovered this injury prior to his death, he could have brought suit against his estate planners to recover the fees paid to them." *Belt*, 192 S.W.3d at 786; *see also* Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999) (concluding that if an attorney clearly breaches his fiduciary duty then the client does not need to prove actual damages to receive an award for the attorney's fees); Galveston, H. & S.A.R.R. v. Freeman, 57 Tex. 156, 158 (1882) (stating that a legal malpractice cause of action "brought for damage to the estate and not for injury to the person, personal feelings or character, . . . upon the death, bankruptcy or insolvency of the party injured, passes to the executor or assignee as a part of his assets, because it affects his estate, and not his personal rights"); Traver v. State Farm Mut. Ins. Co., 930 S.W.2d 862, 871 (Tex. App.—Fort Worth 1996, no writ) (determining that a legal malpractice claim based in personal injury survives the death of client), *rev'd on other grounds*, 980 S.W.2d 625 (Tex. 1998).

45. Peeler v. Hughes & Luce, 909 S.W.2d 494, 496 (Tex. 1995).

46. *E.g.*, Barcelo v. Elliott, 923 S.W.2d 575, 577 (Tex. 1996) ("Without this 'privity barrier,' the rationale goes, clients would lose control over the attorney-client relationship, and attorneys would be subject to almost unlimited liability." (citation omitted)); Kelli M. Hinson & Elizabeth A. Snyder, *Recent Developments in Texas Legal Malpractice Law*, 38 ST. MARY'S L.J. 1003, 1004 (2007) ("The effect of this principle, which is sometimes referred to as the 'privity barrier,' is that a plaintiff will be unable to establish the duty element of a legal malpractice claim unless he can show he was in privity of contract with the attorney he is seeking to sue. Determining the existence of a legal duty is typically a question of law for the court.").

47. *Barcelo*, 923 S.W.2d at 577.

prevents the intended beneficiaries of an estate from successfully asserting a legal malpractice claim against a deceased testator's attorneys.[48] However, the *Belt* court decided that the privity barrier does not similarly apply to personal representatives asserting estate-planning malpractice claims.[49] Determining whether the privity barrier prevents a personal representative from asserting legal malpractice claims for causes of action other than negligent estate planning requires an understanding of why the privity barrier exists.

B. *The Evolution of the Privity Barrier*

The requirement of privity in legal malpractice cases originates from the 1879 case of *National Savings Bank v. Ward*.[50] In *Ward*, the Supreme Court held that an attorney is not liable to a non-client in the absence of fraud or collusion.[51] This decision was based on a fear that attorneys would be subjected to virtually unlimited liability if legal malpractice claims were not limited by the requirement of privity between the attorney and the plaintiff.[52] *Ward* set a precedent requiring such privity for any

48. *Id.* at 578 ("We believe 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."). The *Barcelo* court stated that "[t]his will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation." *Id.* at 578–79.

49. *Belt*, 192 S.W.3d at 782 ("[N]o legal bar prevent[s] an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners.").

50. Nat'l Sav. Bank v. Ward, 100 U.S. 195, 200 (1879) ("Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party . . . .").

51. *Id.* at 205–06 ("Where there is fraud or collusion, the party will be held liable, even though there is no privity of contract; but where there is neither fraud or collusion nor privity of contract, the party will not be held liable . . . .").

52. *See id.* at 202 ("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."). The *Ward* Court added that "[t]here 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." *Id.* at 202. In *Ward*, a non-client mortgagee of real property asserted that the borrower's attorney had committed legal malpractice by negligently examining the title to real property located in the District of Columbia. *Ward*, 100 U.S. at 196–97. The Court determined that when a negligent act is "imminently dangerous to the lives of others," such as when a pharmacist sells a poisonous medicine, then the wrongdoer is liable to all those who are injured by his actions, regardless of whether the wrongdoer is in privity with the injured party. *Id.* at 204. However, when the private party has not engaged in imminently dangerous activity, that party "is in general liable only to the party with whom

legal malpractice action in an effort to give parties control of their transactions.[53] However, after 1895, the privity defense established in *Ward* slowly began to narrow as its boundaries were tested by various contexts of legal malpractice claims.[54] In 1958, the privity requirement in estate-planning malpractice claims was first addressed by the California Supreme Court in *Biakanja v. Irving*.[55]

The *Biakanja* court determined that, in certain instances, a non-client beneficiary could maintain a suit against the party who prepared and drafted a will even though no privity existed between the parties.[56] The court held that "whether in a specific

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he contracted, and on the ground that negligence is a breach of the contract." *Id.* Because the *Ward* defendant-attorney's negligent acts were not imminently dangerous to human life, the Court maintained that an attorney owed no duty of care to a non-client third party who was subsequently harmed by his negligence. *Id.* at 200–05.

53. *See* Edward A. Carr, *Attorney Opinion Letters: Model Rule 2.3 and the Texas Experience*, 37 S. TEX. L. REV. 1127, 1139 n.47 (1996) (stating that *Ward* is "often cited as a leading privity case").

54. *See* Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 269 (2001) (stating that "the privity defense began to erode in other contexts" shortly after 1895). The article refers to *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1054 (N.Y. 1916), as "what is perhaps the most famous of these cases." Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 269 (2001). In *MacPherson*, Justice Cardozo stated that "[t]here is nothing anomalous in a rule which imposes upon *A*, who has contracted with *B*, a duty to *C* and *D*." *MacPherson*, 111 N.E. at 1054. Justice Cardozo acknowledged fifteen years later that "[t]he assault upon the citadel of privity is proceeding . . . apace." Ultramares Corp. v. Touche, 174 N.E. 441, 445 (N.Y. 1931).

55. Biakanja v. Irving, 320 P.2d 16 (Cal. 1958); *see* Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 270 (2001) (discussing the *Biakanja* court's decision to allow recovery between a non-client third party and a party who prepared a will based on a balancing of six factors). Although *Biakanja* addressed estate-planning malpractice, the defendant in *Biakanja* was a non-attorney who drafted and oversaw the execution of a will. *Biakanja*, 320 P.2d at 19 ("This was an important transaction requiring specialized skill, and defendant clearly was not qualified to undertake it. His conduct was not only negligent but was also highly improper. He engaged in the unauthorized practice of the law.").

56. *Biakanja*, 320 P.2d at 19 ("We have concluded that plaintiff should be allowed recovery despite the absence of privity . . . ."). The court explained:

> [I]n 1895, it was generally accepted that, with the few exceptions . . . there was no liability for negligence committed in the performance of a contract in the absence of privity. Since that time the rule has been greatly liberalized, and the courts have permitted a plaintiff not in privity to recover damages in many situations for the negligent performance of a contract.

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."[57] These factors included:

> [T]he extent to which the transaction was intended to affect the plaintiff, the forseeability 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.[58]

Following *Biakanja*, many jurisdictions began to deny a privity defense in some actions for estate-planning malpractice.[59]

Id. at 18.

57. *Id.* at 19.

58. *Id.*; *see* Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 267 (2001) (discussing the privity requirement and stating that "[i]n the estate planning context, the issue of privity is of particular concern because the plaintiff is generally a beneficiary of the client's estate, rather than the client"). A critical portion of this Comment's analysis is based on the policy concerns enumerated in the *Biakanja* six-factor test. From this seemingly arduous test, it can be seen that, even in the singular focus of estate-planning negligence, the decision to extend the requirement of privity to a non-client third party is not an all or nothing proposition. *Cf.* Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 270 (2001) (detailing the balance of several policy factors considered to extend privity to a non-client beneficiary). The relationship between the plaintiff and the testator's attorneys alone can be critical to the decision to discard the privity requirement. *See, e.g.*, *id.* (commenting on the "extent to which the transaction was intended to affect the plaintiff" when considering if a non-client beneficiary is in privity with a decedent's attorney). From the *Biakanja* test, it can be discerned that a break from the requirement of privity should be considered on a case-by-case or context-by-context basis, because the nature of the services performed by an attorney may define the extent to which any third party non-client may step into the deceased testator's shoes. "*Biakanja* held that the 'end and aim' of the testator in retaining the [party] to draft her will was to benefit the plaintiff." *Id.* (quoting *Biakanja*, 320 P.2d at 19).

59. *See* Linck v. Barokas & Martin, 667 P.2d 171, 173–74 (Alaska 1983) (allowing beneficiaries to assert a legal malpractice claim against a decedent's attorneys); Fickett v. Superior Court, 558 P.2d 988, 990 (Ariz. Ct. App. 1976) ("We are of the opinion that the better view is that the determination of whether, in a specific case, the attorney will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors . . . ."); Lucas v. Hamm, 364 P.2d 685, 689 (Cal. 1961) (permitting recovery by non-client beneficiaries based on a five factor test); Glover v. Southard, 894 P.2d 21, 24 (Colo. Ct. App. 1994) (indicating that the duty of care owed by an attorney may be extended to third party beneficiaries in some cases); Stowe v. Smith, 441 A.2d 81, 84 (Conn. 1981) (allowing a third party beneficiary to recover against an attorney under a contractual theory); Needham v. Hamilton, 459 A.2d 1060, 1062–63 (D.C. 1983) (acknowledging an exception to the privity barrier "when presented with third party

Another landmark case expanding legal malpractice liability was *Lucas v. Hamm*,[60] which omitted the "moral blame" factor of the *Biakanja* test and "relied heavily on [the] determination that the 'main purpose' of the transaction between the attorney-defendant and the testator was to benefit the plaintiff."[61] While theories of recovery varied within jurisdictions, the rationale for disposing of the privity requirement was often based on *Biakanja* or *Lucas*.[62]

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claims where it is alleged that the plaintiffs were the direct and intended beneficiaries of the contracted for services"); Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So. 2d 1378, 1380 (Fla. 1993) ("To bring a legal malpractice action, the plaintiff must either be in privity with the attorney, wherein one party has a direct obligation to another, or, alternatively, the plaintiff must be an intended third-party beneficiary."); Hamilton v. Powell, Goldstein, Frazer & Murphy, 306 S.E.2d 340, 342–43 (Ga. Ct. App. 1983) (allowing a third party beneficiary to recover against an attorney under a contractual theory); McLane v. Russell, 546 N.E.2d 499, 502–04 (Ill. 1989) ("To conclude that a duty exists, a court must find that the defendant and the plaintiff stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff."); Ogle v. Fuiten, 466 N.E.2d 224, 226–27 (Ill. 1984) (recognizing a cause of action for the intended beneficiaries of an attorney's services); Schreiner v. Scoville, 410 N.W.2d 679, 683 (Iowa 1987) (allowing a non-client beneficiary to assert a claim for legal malpractice); Pizel v. Zuspann, 795 P.2d 42, 50 (Kan. 1990) (adopting a six factor balancing test, based on *Biakanja* and *Lucas*, to determine when an attorney may be liable to third parties); Mieras v. DeBona, 550 N.W.2d 202, 207–08 (Mich. 1996) (allowing the intended beneficiaries of an estate to sue a decedent's attorneys); Stewart v. Sbarro, 362 A.2d 581, 588 (N.J. Super. Ct. App. Div. 1976) (explaining that an attorney's duty extends to the client as well as those persons who the attorney can anticipate will rely on him); Hale v. Groce, 744 P.2d 1289, 1290–92 (Or. 1987) (allowing "a claim as the intended beneficiary of defendant's professional contract with the decedent and a derivative tort claim based on breach of the duty created by that contract to the plaintiff as its intended beneficiary"); Hatbob v. Brown, 575 A.2d 607, 615 (Pa. Super. Ct. 1990) (determining that a third party beneficiary can sue a decedent's attorney in certain circumstances); Copenhaver v. Rogers, 384 S.E.2d 593, 596 (Va. 1989) (indicating that a beneficiary may be able to bring a cause of action under a third party beneficiary contract theory); Trask v. Butler, 872 P.2d 1080, 1084 (Wash. 1994) (allowing a cause of action for third party beneficiaries of an estate); Auric v. Cont'l Cas. Co., 331 N.W.2d 325, 329 (Wis. 1983) ("Allowing a will beneficiary to maintain a suit against an attorney who negligently drafts or supervises the execution of a will is one way to make an attorney accountable for his negligence."); *see also* Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 275 (2001) ("After the California Supreme Court breached the citadel of privity in estate planning . . . the overwhelming majority of courts [began to] allow beneficiaries to maintain a malpractice action against an attorney.").

60. Lucas v. Hamm, 364 P.2d 685 (Cal. 1961).

61. Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 271–73 (2001).

62. *See id.* at 275 (noting that the theories of recovery were different between the jurisdictions that followed the precedent set by *Biakanja* and *Lucas*). "*Biakanja* and *Lucas* met with the approval of courts in numerous states." *Id.*

Currently, only eight states—the strict privity states—continue to maintain an absolute privity requirement for beneficiary-plaintiffs in estate-planning malpractice suits.[63]

The Texas attorney-client privity rule was established in *Barcelo v. Elliott*.[64] *Barcelo* adopted the minority view: beneficiaries of an estate lack the requisite privity to sue their testator's attorney.[65] As a result, estate-planning attorneys owe no duty to beneficiaries and cannot be held accountable to beneficiaries for legal malpractice.[66] The rule is intended to foster an attorney's zealous

63. *See* Robinson v. Benton, 842 So. 2d 631, 637 (Ala. 2002) ("'We believe that 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.'" (quoting Barcelo v. Elliott, 923 S.W.2d 575, 578 (Tex. 1996))); Pettus v. McDonald, 36 S.W.3d 745, 751 (Ark. 2001) (noting a previous dismissal of a claim for legal malpractice brought by the beneficiaries due to lack of privity); Nevin v. Union Trust Co., 1999 ME 47, ¶ 41, 726 A.2d 694, 701 (asserting that when a beneficiary lacks privity with the testator's attorney, "the better rule appears to be not to allow individual beneficiaries to assert claims for negligence"); Noble v. Bruce, 709 A.2d 1264, 1279 (Md. 1998) (deciding to maintain the strict privity rule); Lilyhorn v. Dier, 335 N.W.2d 554, 555 (Neb. 1983) ("[A]s a general rule the duty to exercise reasonable care and skill which a lawyer owes his client ordinarily does not extend to third parties."); Viscardi v. Lerner, 510 N.Y.S.2d 183, 185 (N.Y. App. Div. 1986) ("The firmly established rule in New York State with respect to attorney malpractice is that absent fraud, collusion, malicious acts or other special circumstances, an attorney is not liable to third parties not in privity for harm caused by professional negligence."); Simon v. Zipperstein, 512 N.E.2d 636, 638 (Ohio 1987) ("It is by now well-established in Ohio that an attorney may not be held liable by third parties as a result of having performed services on behalf of a client, in good faith, unless the third party is in privity with the client for whom the legal services were performed, or unless the attorney acts with malice."); *Barcelo*, 923 S.W.2d at 578 ("We believe 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.").

64. Barcelo v. Elliott, 923 S.W.2d 575, 578 (Tex. 1996).

65. *See id.*

> We agree with those courts that have rejected a broad cause of action in favor of beneficiaries. These courts have recognized the inevitable problems with disappointed heirs attempting to prove that the defendant-attorney failed to implement the deceased testator's intentions . . . . Such a cause of action would subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under the will or trust. 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.
>
> Moreover, we believe that the more limited cause of action recognized by several jurisdictions also undermines the policy rationales supporting the privity rule.

Id.

66. *See id.* ("[W]e 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.").

loyalty to the client's interests.[67] Under the *Barcelo* rule, an attorney's interests are undivided.[68] Accordingly, attorneys can facilitate their clients' wishes without fear of being held accountable to disgruntled beneficiaries.[69]

However, strict privity can create harsh results. In instances where an attorney has actually committed malpractice, and the harm caused by the attorney is not discovered until after a testator dies, a negligent attorney will be afforded de facto immunity from prosecution for legal malpractice.[70] Moreover, "allowing estate-planning malpractice suits may help 'provide accountability and thus an incentive for lawyers to use greater care in estate planning.'"[71] As a result, strict privity states have met with consistent pressure to adopt a privity rule more in line with the majority view.[72] At the heart of the debate is the question of

67. *See id.* ("[P]otential 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.").

68. *See Barcelo*, 923 S.W.2d at 578 (declining to adopt a rule that would divide an attorney's loyalties).

69. *Cf. id.* (deciding that departing from a bright line privity rule "would subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under the will or trust").

70. *See* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 789 (Tex. 2006) ("[W]e note that precluding both beneficiaries and personal representatives from bringing suit for estate-planning malpractice would essentially immunize estate-planning attorneys from liability for breaching their duty to their clients."); *see also* Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 265 (2001) ("The courts of the strict privity states have committed an equally egregious oversight by failing to recognize the absurdity of preventing all suits by beneficiaries. Moreover, strict privity fails to take advantage of the possible use of malpractice liability to encourage greater care by attorneys.").

71. *Belt*, 192 S.W.3d at 789 (quoting *Barcelo*, 923 S.W.2d at 580 (Cornyn, J., dissenting)). *But see* Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 265 (2001) ("[A]n attorney's liability to the beneficiaries creates an interest that is potentially adverse to the client's interests.").

72. *See, e.g.*, Geoffrey C. Hazard, Jr., *The Privity Requirement Reconsidered*, 37 S. TEX. L. REV. 967, 986 (1996) ("[T]here is no reason for withholding liability for deceptive or seriously substandard performance by a lawyer that injured a third person . . . ."); Helen Bishop Jenkins, *Privity—A Texas-Size Barrier to Third Parties for Negligent Will Drafting—An Assessment and Proposal*, 42 BAYLOR L. REV. 687, 703 (1990) ("[P]ublic policy dictates dissolution of the privity barrier, which currently serves to tolerate a critical wrong without a compensating remedy."). *See generally* Lief Kjehl Rasmussen, *Abolishing the Privity Doctrine in Texas—Just Do It!*, 2 TEX. WESLEYAN L. REV. 559 (1996) (arguing for the abolition of the privity barrier).

which view will most effectively reflect public policy: the majority view, which may create a conflict of interest between the wishes of the testator and intended beneficiaries of an estate; or the minority view, which can afford negligent attorneys immunity from prosecution and may provide a disincentive to use proper care.[73]

C. *The* Belt *Privity Rule*

In *Belt*, the personal representatives of an estate—who were also its beneficiaries—claimed that the testator's estate-planning attorneys caused the probate estate to "incur[] over $1,500,000 in tax liability that could have been avoided by competent estate planning."[74] The trial court granted, and the court of appeals affirmed, summary judgment for the defendant-attorneys.[75] The court of appeals determined that no claim for malpractice had survived the death of the testator because no legal injury had accrued to the testator prior to death, and the plaintiffs were thereby barred from asserting a claim because they lacked privity.[76]

The Texas Supreme Court first disapproved of the appellate court's holding with regard to the "legal injury" rule.[77] The court determined that, although damages from legal malpractice may not be calculable before a testator's death, a legal injury from

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73. *See* Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 265–66 (2001) (noting that some courts have tried to find a compromise between the two views by trying "to chart a logical course between Sc[y]lla and Charybdis").

74. *Belt*, 192 S.W.3d at 782.

75. *See* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc. (*Belt II*), 141 S.W.3d 706, 706 (Tex. App.—San Antonio 2004), *rev'd* 192 S.W.3d 780 (Tex. 2006).

76. *Id.* at 706, 708 ("We hold that the independent executrixes of [the testator's] estate have no cause of action against the attorneys due to a lack of privity . . . ."). The court of appeals based its decision on *Estate of Arlitt v. Paterson*, 995 S.W.2d 713 (Tex. App.—San Antonio 1999, pet. denied). *Belt II*, 141 S.W.3d at 707. In *Estate of Arlitt*, the court of appeals "reasoned that no malpractice cause of action accrued prior to [the testator's] death because the injuries to [the testator's] estate arose after [the testator's] death; consequently, there was no cause of action to which the estate could succeed." *Id.* The *Belt* court concluded that, as in *Estate of Arlitt*, the asserted malpractice action had accrued after the testator's death and that because the plaintiff's claim had not survived the testator's death, the plaintiff's claims could not be asserted for lack of privity. *Id.* at 708.

77. *See Belt*, 192 S.W.3d at 785 (disapproving the holding of *Estate of Arlitt* "that no legal malpractice claim accrues before death when an estate-planning attorney's negligent drafting results in increased estate tax consequences").

malpractice is incurred at the time negligent legal advice is given.[78] The court reasoned that if a testator had discovered the negligent legal advice prior to death, then the testator would have had a viable claim for legal malpractice because the testator had paid for competent legal advice which was not received.[79] Because the testator's injury occurred before the testator's death, the estate's personal representatives could assert a surviving claim for property damage to the estate if the estate was in privity with the testator's attorneys.[80]

The *Belt* court next determined that, "because the estate 'stands in the shoes' of a decedent, it is in privity with the decedent's estate-planning attorney and, therefore, the estate's personal representative has the capacity to maintain [a surviving] malpractice claim on the estate's behalf."[81] In making this

78. *See id.* at 786 ("Even though an estate may suffer significant damages after a client's death, this does not preclude survival of an estate-planning malpractice claim."); Apex Towing Co. v. Tolin, 41 S.W.3d 118, 120 (Tex. 2001) (stating that a legal malpractice claim accrues "when facts have come into existence that authorize a claimant to seek a judicial remedy").

79. *Belt*, 192 S.W.3d at 786. The *Belt* court explained that "[w]hile the primary damages at issue here—increased tax liability—did not occur until after the decedent's death, the lawyer's alleged negligence occurred while the decedent was alive." *Id.*

80. *See id.* at 786–87 (proclaiming that an estate is in privity with the decedent's estate-planning attorneys and the estate's personal representative has standing to bring suit on behalf of the estate).

81. Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 787 (Tex. 2006); *accord* Stanley L. & Carolyn M. Watkins Trust v. Lacosta, 2004 MT 44, ¶ 19, 321 Mont. 432, ¶ 19, 92 P.3d 620, ¶ 19 (holding that an estate has standing to bring a legal malpractice claim against an attorney); Hosfelt v. Miller, No. 97-JE-50, 2000 WL 1741909, at *6, (Ohio Ct. App. Nov. 22, 2000) (concluding that a personal representative may properly bring a legal malpractice claim arising from errors in the rendering of estate-planning services); Sizemore v. Swift, 719 P.2d 500, 503 (Or. Ct. App. 1986) (reversing a summary judgment in favor of attorneys who had a legal malpractice claim brought against them for negligently drafting the will of the deceased). It is important to note that when the *Belt* court discussed the proposition that the estate "stands in the shoes" of the decedent, it did so explicitly in the context of claims for estate-planning malpractice. *See Belt*, 192 S.W.3d at 787 (indicating that because the estate "stands in the shoes" of the deceased testator, it is in privity with the decedent's estate-planning attorney). The court made no reference to the personal representative's ability to assert other legal malpractice claims on behalf of the decedent's estate. *See id.* at 789 (neglecting to address whether other legal malpractice claims could be alleged). The court cited three other jurisdictions that had similarly allowed a personal representative to maintain a claim on behalf of an estate. *Id.* at 787 n.6. In all those cases, the personal representative asserted a claim for estate-planning malpractice. *See Lacosta*, 2004 MT 44, ¶ 19, 321 Mont. 432, ¶ 19, 92 P.3d 620, ¶ 19 ("Because the [e]state stands in the shoes of the decedent, it is considered to be in privity with the attorney, and the personal representative has standing to prosecute a

decision, the court tried to "strike[] the appropriate balance" between the minority and majority positions in America regarding the privity barrier.[82] They struck this balance by holding that an estate is in privity with the testator's attorneys (thereby allowing a personal representative to assert a claim on its behalf), while maintaining the minority position that beneficiaries lack the requisite privity to sue their testator's attorneys.[83]

Thus, the *Belt* privity rule is seemingly in conflict with the existing *Barcelo* strict privity rule when a personal representative is also the beneficiary of the estate.[84] The *Belt* court noted "that beneficiaries often act as the estate's personal representative, and [the court's] holding today arguably presents an opportunity for some disappointed beneficiaries to recast a malpractice claim for their own 'lost' inheritance, which would be barred by *Barcelo*, as a claim brought on behalf of the estate."[85] The court nonetheless reasoned that the *Belt* and *Barcelo* rules could coexist.[86] The

malpractice claim."); *Hosfelt*, 2000 WL 1741909, at *6 ("We conclude that a decedent's legal malpractice claim arising from errors by an attorney in rendering estate-planning services is properly brought by the personal representative of the estate when excess estate taxes are paid by the estate in contravention of the decedent's intended estate plan."); *Sizemore*, 719 P.2d at 503 (pronouncing that an estate's executor was "the real party in interest" and could sue a deceased testator's attorneys for estate-planning malpractice).

82. *See Belt*, 192 S.W.3d at 789 ("Limiting estate-planning malpractice suits to those brought by either the client or the client's personal representative strikes the appropriate balance between providing accountability for attorney negligence and protecting the sanctity of the attorney-client relationship.").

83. *Id.*

84. *Compare* Barcelo v. Elliott, 923 S.W.2d 575, 578 (Tex. 1996) ("We believe 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."), *with Belt*, 192 S.W.3d at 782 ("We hold, to the contrary, that there is no legal bar preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners.").

85. *Belt*, 192 S.W.3d at 787–88.

86. *See id.* at 788 (discussing the means by which a beneficiary could be prevented from using the *Belt* privity rule "as an end run around *Barcelo*"). The *Belt* court referred to its previous decision to allow non-client third parties to sue for negligent representation, even though this rule violates the *Barcelo* strict privity rule:

> Since our decision in *Barcelo*, we have allowed non-clients to maintain negligent misrepresentation suits against attorneys despite a lack of privity. In doing so, we noted that the policy concerns expressed in *Barcelo* did not apply in the negligent misrepresentation context. Such suits arise only in situations where an attorney has determined that communication with the third party is compatible with the attorney-client relationship and the attorney receives consent from the client to communicate

court concluded that the addition of the *Belt* privity rule would not subject attorneys "to 'almost unlimited liability'" from disgruntled heirs serving as personal representatives because a personal representative can only bring viable claims for economic harm to the estate as a whole.[87] If a personal representative mismanages his duty by asserting a claim for only personal harm, the personal representative can be removed from his position.[88] Therefore, the

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with the non-client. Thus, we held that allowing the third party to bring a negligent misrepresentation claim would not cause the client to "lose control over the attorney-client relationship," a concern we expressed in *Barcelo*. Additionally, we found that allowing negligent misrepresentation claims by non-clients would not subject attorneys to "almost unlimited liability," because liability was limited to those situations in which the attorney provided information to a third party with the knowledge that the third party intended to rely on it.

Id. at 788 (citing McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 791, 793–94 (Tex. 1999)).

87. Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 787–99 (Tex. 2006) (quoting *McCamish*, 991 S.W.2d at 794). "Limiting estate-planning malpractice suits to those brought on behalf of a client's estate by a personal representative will prevent the client from 'losing control of the attorney-client relationship,' because the interests of the estate—which merely 'stands in the shoes' of the client after death—are compatible with the client's interests." *Id.* at 788–89. The court noted that "the interests of the decedent and a potential beneficiary may conflict . . . ." *Id.* at 787. "Thus, the conflicts that concerned us in *Barcelo* are not present in malpractice suits brought on behalf of the estate." *Id.*; *accord* Nevin v. Union Trust Co., 1999 ME 47, ¶ 41, 726 A.2d 694, 701 (stating that personal representatives and not beneficiaries should be able to sue for estate-planning malpractice because the interests of the estate and the interest of a beneficiary are not necessarily aligned).

88. Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 788 (Tex. 2006). Section 222(b)(4) of the Texas Probate Code provides:

> The court may remove a personal representative on its own motion, or on the complaint of any interested person, after the personal representative has been cited by personal service to answer at a time and place fixed in the notice, when . . . [t]he personal representative is proved to have been guilty of gross misconduct, or mismanagement in the performance of the personal representative's duties . . . .

TEX. PROB. CODE ANN. § 222(b) (Vernon Supp. 2007). The *Belt* court also discussed another limitation that would be placed on personal representatives asserting purely personal claims. *Belt*, 192 S.W.3d at 788. The court indicated that the benefit to personal representative-beneficiaries could be diluted by the intent of the testator. *Id.* Any damages paid by a negligent attorney would be paid to the estate and that award would be "distributed in accordance with the decedent's existing estate plan . . . . Thus, the recovery would flow to the disappointed beneficiary only if the estate plan had provided for such a distribution, fulfilling the decedent's wishes." *Id.* The court provided the example of a spouse asserting an estate-planning malpractice claim for negligent tax planning that adversely affected the spouse's inheritance. *Id.* at 788 n.8. "Under our holding today, a personal representative could maintain such a claim only if the representative established that the estate-planning attorney negligently failed to structure the estate in accordance

court held that "[l]imiting estate-planning malpractice suits to those brought by either the client or the client's personal representative strikes the appropriate balance between providing accountability for attorney negligence and protecting the sanctity of the attorney client relationship."[89]

III. ANALYSIS

A. *Does the* Belt *Privity Rule Apply Only to Estate-Planning Malpractice Claims?*

The *Belt* court held "that there is no legal bar preventing an estate's personal representative from maintaining a *legal malpractice* claim on behalf of the estate against the decedent's estate planners."[90] The court specifically addressed the issue of surviving claims in the context of general "legal malpractice."[91] However, when discussing the issue of privity, the court seemed to deliberately narrow the discussion to "estate-planning" malpractice.[92] The court specifically stated that allowing "estate-planning" malpractice suits to be brought by the testator's personal representative appropriately balanced the interests of preserving the attorney-client relationship and providing accountability for attorney negligence.[93] One could conclude from this distinction that the policy rationale supporting the *Belt* privity rule may not similarly apply when the rule is extended beyond the context of estate-planning malpractice.[94] A rational

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with the testator's wishes, and the estate incurred damages as a result." *Belt*, 192 S.W.3d at 788 n.8. Thus, the court decided that a personal representative-beneficiary "would not necessarily recover the lost inheritance should the malpractice claim succeed." *Id.* at 788. It is unclear how this is necessarily a limitation on personal representatives asserting personal claims. Rather, it seems to directly allow an intended beneficiary to gain at least some benefit from recasting a legal malpractice claim for their lost inheritance.

89. *Id.* at 789.

90. *Id.* at 782 (emphasis added).

91. *See* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 785–86 (Tex. 2006) (disapproving of *Estate of Arlitt*'s holding regarding legal malpractice in a case where the attorney's negligence resulted in increased tax consequnces). The court relied on its previous decision in *Apex Towing Co. v. Tolin*. *Id.*; Apex Towing Co. v. Tolin, 41 S.W.3d 118, 120 (Tex. 2001) (asserting that a legal malpractice claim accrues "when facts have come into existence that authorize a claimant to seek a judicial remedy").

92. *See Belt*, 192 S.W.3d at 787–89 (referring to "estate-planning" malpractice seven times and never using the general term "legal malpractice" in the text).

93. *Id.* at 789.

94. *See id.* at 787 (discussing the argument that the policy concerns of *Barcelo*

interpretation of the court's opinion could indicate that the *Belt* privity rule was limited to estate-planning malpractice.

However, the *Belt* privity rule has already been extended beyond the context of estate planning. In December 2004, the Fourth Court of Appeals first heard *O'Donnell v. Smith*,[95] which involved a legal malpractice claim asserted by O'Donnell as the personal representative of Corwin Denney's estate.[96] O'Donnell did not assert a claim for estate-planning malpractice; he claimed that Denney's attorneys had committed malpractice by negligently misclassifying assets on a federal estate tax return.[97] This return

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"should also bar suits brought by personal representatives of an estate"). The court noted that "in *Barcelo* we held that an attorney's ability to represent a client zealously would be compromised if the attorney knew that, after the client's death, he could be second-guessed by the client's disappointed heirs." *Id.* The court explained that this concern is not present in cases where an estate's personal representative asserts a surviving claim for property damage to the estate itself. *Id.* However, the court noted "that beneficiaries often act as the estate's personal representative," and that a beneficiary could only assert a claim if acting in a role of a personal representative of the estate. *Belt*, 192 S.W.3d at 787–88. That role entails the enforcement of the testator's wishes as expressed "in the decedent's existing estate plan," rather than a claim for personal loss. *Id.* at 788. A claim asserted by a personal representative for negligence outside of the estate-planning context would often require the beneficiary serving as a personal representative to interpret the intentions of the decedent and the deceased's attorney which were not expressed in the decedent's estate plan. That determination would easily entail second-guessing the decedent's intentions and, in many cases, would violate *Barcelo*'s strict privity barrier. *Cf.* Barcelo v. Elliott, 923 S.W.2d 575, 578 (Tex. 1996) (deciding that departing from a bright line privity rule "would subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under the will or trust").

95. O'Donnell v. Smith (*O'Donnell I*), No. 04-04-00108-CV, 2004 WL 2877330 (Tex. App.—San Antonio Dec. 15, 2004) (mem. op.), *vacated*, 197 S.W.3d 394, 394 (Tex. 2006) (per curiam).

96. *Id.* at *1.

97. *See id.* at *1 (describing the cause of action that O'Donnell claimed). Corwin Denney had married Des Cygne Gilcrease in California in 1959. O'Donnell v. Smith (*O'Donnell III*), 234 S.W.3d 135, 138 (Tex. App.—San Antonio 2007, pet. filed). Both had orally agreed before marriage that they would maintain considerable sums of previously owned stock as their separate property. *Id.* Denney and Gilcrease moved to Texas in 1962, where Denney acquired additional interest in both his and Gilcrease's stock interests. *Id.* The couple commingled their assets and in 1968 Gilcrease was killed in an automobile accident. *Id.* at 138–39. Gilcrease's will devised one-half of her estate to be held in trust by Denney during his lifetime. *Id.* at 138. The trust income went to Denney until his death and the residuary was to be divided among Gilcrease's six children. *O'Donnell III*, 234 S.W.3d at 138. Upon Gilcrease's death, Denney hired a Texas law firm to assist him in administering his wife's estate. *Id.* at 138–39. Although the property was presumed to be community property, the attorneys prepared, in accordance with Denney's wishes, a federal estate tax return for Denney, not listing Gilcrease's stock interests as assets owned at death. *Id.* at 139.

was then used by Denney to allegedly deprive his deceased wife's estate of nearly $1.5 million in assets that were to be held in trust for Denney's children.[98] Denney died twenty-nine years later, leaving the bulk of his considerable estate to charity.[99] Shortly thereafter, Denney's children sued his estate for approximately $25 million in damages.[100] O'Donnell settled Denney's children's claim for approximately $12.9 million and then filed suit against Denney's attorneys for legal malpractice.[101] The court of appeals did not reach the issue of privity because it determined that no cause of action accrued during Denney's lifetime.[102] *Belt* was decided shortly thereafter, and on appeal the Texas Supreme Court vacated the court of appeals' judgment and remanded the case for reconsideration in light of *Belt*.[103] On remand, the

98. *Id.*

99. *Id.*

100. O'Donnell v. Smith (*O'Donnell III*), 234 S.W.3d 135, 139 (Tex. App.—San Antonio 2007, pet. filed).

101. *Id.*

102. *O'Donnell I*, 2004 WL 2877330, at *2. O'Donnell argued that privity existed because the estate was asserting an "actionable wrong which Denney suffered before his death." *Id.* The court found that privity would only exist if "(1) a cause of action for legal malpractice accrued to Mr. Denney during his lifetime; and (2) such a cause of action would survive Mr. Denney's death and could be properly prosecuted by the representatives of his estate." *Id.* The court found that no cause of action accrued to Denney during his lifetime because "[a] cause of action does not accrue until facts have come into existence that authorize a claimant to seek a judicial remedy .... While ... damages may not be realized until some later date, a plaintiff must be able to establish some legal injury in order to bring a claim for legal malpractice in Texas." *Id.*; *see* Zidell v. Bird, 692 S.W.2d 550, 555 (Tex. App.—Austin 1985, no writ) (describing the legal injury rule).

103. O'Donnell v. Smith (*O'Donnell II*), 197 S.W.3d 394, 394 (Tex. 2006) (per curiam) ("[W]e grant the petition for review without reference to the merits, vacate the court of appeals' judgment, and remand this case to that court for reconsideration in light of our decision in *Belt*."). On remand, Denney's attorneys argued that "[t]he Supreme Court could have brought the claims in this suit within its holding in *Belt*, but it chose not to do so." Brief of Appellees on Remand at 14 n.1, O'Donnell v. Smith (*O'Donnell III*), 234 S.W.3d 135 (Tex. App.—San Antonio 2007, pet. filed) (No. 04-04-00108-CV), 2006 WL 3669144, at *14 n.1. Indeed, the supreme court made no indication of whether the *Belt* privity rule was applicable to *O'Donnell*; it merely noted that the Fourth Court of Appeals had relied on its own decision in *Belt* for its initial opinion. *O'Donnell II*, 197 S.W.3d at 394. Denney's attorneys noted that "[i]f the Supreme Court had intended *Belt* to control the privity analysis here, it could easily have reversed the judgment here in light of *Belt* and remanded for this Court to consider the remaining grounds for summary judgment, as it does often." Brief of Appellees on Remand at 14 n.1, *O'Donnell III*, 234 S.W.3d 135 (No. 04-04-00108-CV), 2006 WL 3669144, at *14; *see* Simpson v. Afton Oaks Civic Club, Inc., 145 S.W.3d 169, 170 (Tex. 2004) (per curiam) (reversing and remanding because the controlling case was recently decided).

defendant-attorneys argued that the *Belt* privity rule was limited to estate-planning malpractice claims.[104] Nonetheless, the court of appeals found that "nothing in *Belt* compels us to conclude the Supreme Court intended to disallow a personal representative from bringing other types of malpractice claims on behalf of the estate."[105] The court based this decision on two observations from the *Belt* opinion.[106]

First, the court of appeals noted that the *Belt* court had cited non-estate-planning holdings when it held that actions for legal malpractice survive the death of a testator.[107] When addressing the issue of survivability, the *Belt* court cited five out-of-state jurisdictions that allow a legal malpractice claim to survive a decedent.[108] All five of these cases involved claims for legal malpractice that were outside the context of estate-planning malpractice.[109] Thus, the *Belt* court held that all "legal

104. *See* Brief of Appellees on Remand at 10, *O'Donnell III*, 234 S.W.3d 135 (No. 04-04-00108-CV), 2006 WL 3669144, at *10 ("The *Belt* case did not abolish the privity rule, which continues to apply outside the estate-planning context."). The crux of Denney's attorneys' argument was that the *Belt* court went to great lengths to "draw[] the privity line narrowly, and open[] the door to legal malpractice suits by personal representatives against estate-planning lawyers only." *Id.* at 13. The attorneys noted that "[a]gain and again in the *Belt* opinion the Court invoked that limitation on its holding." *Id.*; *see* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 782 (Tex. 2006) ("[T]here is no legal bar preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners."); *id.* at 784 ("[W]e have never specifically considered whether a legal malpractice claim in the estate-planning context survives a deceased client."); *id.* at 785 ("We disapprove *Estate of Arlitt*'s holding that no legal malpractice claim accrues before death when an estate-planning attorney's negligence drafting results in increased estate tax consequences."); *id.* at 787 (citing other jurisdictions' holdings that the estate "is in privity with the decedent's estate-planning attorney"); *id.* at 789 (holding that personal representatives "may maintain an estate-planning malpractice claim against the Attorneys"); *Belt*, 192 S.W.3d at 789 (noting that "limiting estate-planning malpractice suits to those brought by either the client or the client's personal representative strikes the appropriate balance").

105. *O'Donnell III*, 234 S.W.3d at 144.

106. *See id.* at 142–44 (reviewing the rationale for the *Belt* court's holding with regard to survival of claims and the policy considerations behind the *Barcelo* strict privity rule).

107. *See id.* at 142 (discussing the rationale for the *Belt* court's holding in the subheading "Actions for Damage to Property Survive Death").

108. *See Belt*, 192 S.W.3d at 785 n.3 ("A number of other jurisdictions have allowed legal malpractice claims to survive a decedent.").

109. *See* Jones v. Siesennop, 371 N.E.2d 892, 895 (Ill. App. Ct. 1977) (holding that "[t]he survival statute is remedial in nature and is to be liberally construed" in a cause of action for an attorney's negligent representation in a real estate transaction); McStowe v. Bornstein, 388 N.E.2d 674, 675, 677 (Mass. 1979) (deciding that "contract actions survive a defendant's death by the common law" in a cause of action "alleging that the attorney

malpractice claims alleging pure economic loss survive in favor of a deceased client's estate, because such claims are necessarily limited to recovery for property damage."[110] However, it is difficult to see how the *Belt* court's reliance upon other jurisdictions regarding the issue of survivability can instruct on the court's intentions with regard to the issue of privity. The issues are separate. Survivability addresses the issue of which claims can be asserted after death; privity addresses the issue of whether one party owes another party a duty of care.[111]

Second, the court of appeals deemed that the *Barcelo* policy considerations behind the privity rule did not apply to *O'Donnell* because the plaintiff was not also a beneficiary of the estate.[112] The court of appeals noted that "the *Belt* court was careful not to overturn the long-standing privity rule discussed in *Barcelo*."[113] "Specifically, the *Belt* court reaffirmed the policy considerations behind the privity rule, including concerns about an attorney's ability to zealously represent his or her client without divided loyalties."[114] The defendant-attorneys argued that "O'Donnell's

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negligently had failed to commence an action on behalf of the plaintiff before the statute of limitations barred that action"); Johnson v. Taylor, 435 N.W.2d 127, 129 (Minn. Ct. App. 1989) (explaining that a legal malpractice claim is not barred by a survival statute in legal malpractice arising from a personal injury suit); Newbach v. Giaimo & Vreeburg, 618 N.Y.S.2d 307, 308 (N.Y. App. Div. 1994) (holding that a "legal malpractice claim survives a client's death and may be prosecuted by the client's estate representative" in a "complaint alleging legal malpractice in failing to effect a change of the beneficiary of decedent's life insurance policy"); Loveman v. Hamilton, 420 N.E.2d 1007, 1008 (Ohio 1981) (holding that a legal malpractice cause of action survived the death of a testator in a complaint alleging that the attorney was negligent for failing to file a claim prior to the expiration of the statute of limitations).

110. *Belt*, 192 S.W.3d at 785.

111. *See, e.g.*, Johnson v. Rolls, 97 Tex. 453, 457, 79 S.W. 513, 514 (1904) ("At common law all causes of action for damages die with the person of the party injured, or the person inflicting the injury, except such damages as grow out of acts affecting the property rights of the injured party."); Nat'l Sav. Bank v. Ward, 100 U.S. 195, 200 (1879) ("Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party.").

112. *See O'Donnell III*, 234 S.W.3d at 142–44 (discussing the rationale for the *Belt* court's holding in the subheading "Barcelo Policy Considerations Behind Privity Rule").

113. *Id.* at 142–43; *see Belt*, 192 S.W.3d at 787–89 (discussing at length how the policy concerns of *Barcelo* were not implicated by extending privity to a personal representative and indicating that several limitations could be placed on beneficiaries acting as personal representatives that seek to use the *Belt* privity holding as an end run around *Barcelo*).

114. *O'Donnell III*, 234 S.W.3d at 143; *see Belt*, 192 S.W.3d at 787 (citing *Barcelo*, 923 S.W.2d at 578–79) (addressing how its holding would not impinge upon the strict privity rule of *Barcelo*).

suit entails 'second-guessing' [the decedent's] own lifetime decisions."[115] Accordingly, the defendant-attorneys argued "that the policy considerations supporting the *Barcelo* privity bar should apply to this suit . . . ."[116]

The *O'Donnell* remand court decided that the argument failed for two reasons. First, the court determined that the "argument that O'Donnell's suit entails 'second-guessing' is based exclusively on [the defendant-attorney's] view of the evidence."[117] Second,

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115. *See* Brief of Appellees on Remand at 8, O'Donnell v. Smith (*O'Donnell III*), 234 S.W.3d 135 (Tex. App.—San Antonio 2007, pet. filed) (No. 04-04-00108-CV), 2006 WL 3669144, at *8 (arguing that they had prepared the decedent's federal estate tax return based on information provided by the decedent and according to his wishes during his lifetime). The attorney-defendant made the following argument:

> This case illustrates exactly why the [*Barcelo*] privity rule is a good one. [We] advised [the decedent] more than thirty years ago regarding the . . . stock classification issue, [Denney] heard that advice but made the final decision to classify the stock as his separate property, and now O'Donnell is suing [us] for not acting contrary to [Denney's] own decision. The policy reason behind the [*Barcelo*] privity rule is to avoid conflicting loyalties by the lawyer, who can act in complete regard for his client's wishes and not face suit because some third party later wants to second-guess those wishes. Because only [Denney] was [our] client, not O'Donnell, O'Donnell lacks privity with [us], and the summary judgment was proper.
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> . . . .
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> The entire $12.9 million O'Donnell paid to settle the . . . [c]hildren's claims . . . could be attributable to [a transaction that we] had nothing to do with . . . . Moreover, the $1.38 [million] paid to [one of the children] was the result of an agreement orchestrated by O'Donnell rather than any legitimate settlement of claims.
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> . . . .
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> [Denney] in his lifetime consistently maintained that the . . . stock was his separate property. He considered [our] advice to the contrary, including the suggestion that he file a declaratory judgment action to resolve the classification issue, and considered advice from his long-time financial adviser as well as California lawyers. [Denney] then confirmed his decision that the stock be characterized as his separate property. O'Donnell is estopped from taking a contrary position here, and may not sue [us] for following [our] client's explicit (and educated) instructions.

Id. at 8–9.

116. O'Donnell v. Smith (*O'Donnell III*), 234 S.W.3d 135, 143 (Tex. App.—San Antonio 2007, pet. filed).

117. *Id.* However, every argument is made on counsel's "view of the evidence." There is nothing to say that the argument was not also true. In fact, given the reality that twenty-nine years had passed, and the defendant-attorneys were the only living parties to the transaction, it would seem that their view of the evidence would be highly relevant. *Id.* at 138–39. Nonetheless, the court of appeals determined that "there appears to be a fact issue as to whether Denney would have followed the advice of his attorneys." *Id.* at 143. The court recognized that the decedent's attorneys had advised Denney that he was incorrect about the characterization of his wife's stock. *Id.* Furthermore, there was

the court stated:

> [A]lthough we agree the *Belt* opinion did not overrule *Barcelo*, we also believe that in *Belt* the Supreme Court foreclosed a *Barcelo* analysis for suits brought by personal representatives on behalf of an estate. As discussed by the Court in *Belt*:
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> > . . . [I]n Barcelo we held that an attorney's ability to represent a client zealously would be compromised if the attorney knew that, after the client's death, he could be second-guessed by the client's disappointed heirs. Accordingly, we held that estate-planning attorneys owe no professional duty to beneficiaries named in a trust or will. While this concern applies 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.
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> . . . Like *Belt*, the instant suit does not involve disappointed heirs or quarreling beneficiaries seeking to impose liability against a law firm that never represented them. Instead, as the personal representative, O'Donnell simply seeks to stand in Denney's shoes in order to prosecute Denney's legal malpractice suit against Denney's own attorneys. Nor do we have *Barcelo* issues concerning how Denney may have "intended" to apportion his estate. O'Donnell, as representative of Denney's estate, is seeking damages suffered *by* Denney's *estate*, purportedly as a result of the legal advice given to Denney by [his attorneys]. Finally, we do not have the concern that by allowing a personal representative to bring suit on behalf of the estate, the attorneys would be subject to "almost unlimited liability." As noted by the Court in *Belt*, "while the interests of the decedent and a potential beneficiary may conflict, a decedent's interests should mirror those of his estate." Here, the only claimant is the personal representative of the client's estate; as such, the suit should mirror the malpractice action that [the decedent] could have brought during his lifetime.
>
> In summary, nothing in *Belt* compels us to conclude the Supreme Court intended to disallow a personal representative from

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evidence that the attorneys advised Denney that he should "probably" get a declaratory judgment on the characterization of the property. After the decedent consulted his accountant he decided that "he did not care to go to court." *O'Donnell III*, 234 S.W.3d at 143. The court of appeals determined that "there is some evidence in this record that Denney would have heeded the advice of his attorneys had [they] advised Denney that the disputed assets should not have been excluded from his wife's estate." *Id.*

> bringing other types of malpractice claims on behalf of the estate. Accordingly, we conclude that *Belt* applies to the summary judgment record before us.[118]

Although the court's argument has merit, the effect of this decision is that Denney's children were potentially able to use their father's personal representative as a mechanism to recover some of their "lost" inheritance. *O'Donnell* demonstrates that the *Belt* privity rule does create an end run option around *Barcelo* in the absence of a judicial determination that a personal representative is acting purely in the personal interests of a beneficiary.

It is unclear if other courts will follow the Fourth Court of Appeals' reasoning. Nonetheless, in the absence of guidance from the Texas Supreme Court, lawyers are best advised to assume that the *Belt* privity rule does extend beyond the context of estate-planning malpractice.

B. *Can* Belt *and* Barcelo *Coexist?*

The *Belt* court made a considerable effort to reaffirm and distinguish *Barcelo*.[119] The court recognized the importance of the *Barcelo* strict privity barrier.[120] Without this barrier, a lawyer's loyalties are conflicted.[121] A lawyer must consider the interests of a client's beneficiaries while maintaining an obligation to the client.[122] It is irrelevant that privity will not necessarily

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118. *Id.* at 143–44 (citations omitted).

119. *See* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 787–88 (Tex. 2006) (citing *Barcelo*, 923 S.W.2d at 578–79) (addressing how their holding would not impinge upon the strict privity rule of *Barcelo*).

120. *See id.* (discussing the policy considerations of *Barcelo* to protect an attorney's duty to zealously represent a client).

121. *See Barcelo*, 923 S.W.2d at 578 ("[P]otential 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.").

122. *See id.* ("We agree with those courts that have rejected a broad cause of action in favor of beneficiaries.").

> These courts have recognized the inevitable problems with disappointed heirs attempting to prove that the defendant-attorney failed to implement the deceased testator's intentions. . . . Such a cause of action would subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under the will or trust. 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. Moreover, we believe that the more limited cause of action recognized by several jurisdictions also undermines the policy rationales

create liability to a non-client third party.[123] The threat of suit alone is enough to make a lawyer beholden to conflicting interests.[124] In particular, solo practitioners, who often have limited resources, will need to take special care when considering the risk of suit by intended beneficiaries.[125] Nonetheless, the court decided that a lawyer is effectively immunized from liability for negligence if both an estate's beneficiaries and personal representatives are not in privity with a decedent's attorneys.[126] Hence, one can discern the quandary over the competing policy interests of *Belt* and *Barcelo*.[127] The Texas Supreme Court recognized the conflict and explained that two limitations upon the *Belt* privity rule would prevent a beneficiary from impinging upon

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supporting the privity rule.

Id.

123. *See* Peeler v. Hughes & Luce, 909 S.W.2d 494, 496 (Tex. 1995) (enumerating the elements of a legal negligence claim that a plaintiff must prove in order for an attorney to be held liable for legal malpractice); *see also* Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989) (discussing how liability for legal malpractice is only established when an attorney breaches his duty of ordinary care); RESTATEMENT (SECOND) OF TORTS §§ 299, 299A (1965) (explaining that persons engaged in a profession or trade can be liable in a cause of action for want of competence).

124. *See* Paul D. Rheingold, *Legal Malpractice: Plaintiff's Strategies*, 15 No. 2 LITIG. 13, 13–14 (1989) (explaining the consequences of being sued and stating that "[u]nless the malpractice took place in a simple tort suit, [the lawyer] usually must consult a lawyer expert in the subject involved in the underlying case.") The article also indicated that an accountant's services are also necessary in certain cases where damages are not easily calculated. *Id.*

125. *See id.* ("Most common [legal malpractice cases] are [against] single practitioners. They are easy targets, usually understaffed, with few legal resources."). The article also stated that large firms also make good targets for legal malpractice suits because juries will hold them to a higher standard of care. *Id.* Furthermore, large firms typically "have insurance or at least the means to pay." *Id.*

126. *See* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 789 (Tex. 2006) ("[P]recluding both beneficiaries and personal representatives from bringing suit for estate-planning malpractice would essentially immunize estate-planning attorneys from liability for breaching their duty to their clients."); *see also* Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 265 (2001) ("The courts of the strict privity states have committed an equally egregious oversight by failing to recognize the absurdity of preventing all suits by beneficiaries. Moreover, strict privity fails to take advantage of the possible use of malpractice liability to encourage greater care by attorneys.").

127. *Compare Barcelo*, 923 S.W.2d at 578 ("We believe 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."), *with Belt*, 192 S.W.3d at 789 (explaining that, if both personal representatives and beneficiaries are barred from bringing suit, the strict privity rule effectively immunizes a negligent estate-planning attorney from liability).

Barcelo.[128] The first limitation was that a beneficiary could only gain benefit from asserting a personal claim if the decedent's estate plan had provided for distributions to the beneficiary.[129] The second limitation was the ability to remove personal representatives from their duties if they should mismanage their obligation by asserting "purely personal claims."[130] But are these limitations real?

From *Belt* and *O'Donnell*, one can see that the aforementioned end run around *Barcelo* might arise in two scenarios. The first is when a beneficiary serves as the personal representative of an estate.[131] The second is when a personal representative

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128. *See Belt*, 192 S.W.3d at 788–89 (explaining that a beneficiary can only gain benefit from a legal malpractice claim if the decedent had provided for the beneficiary in the estate plan and that the court can remove a beneficiary from their position as personal representative for pursuing purely personal claims).

129. *See id.* ("Limiting estate-planning malpractice suits to those brought on behalf of a client's estate by a personal representative will prevent the client from 'losing control of the attorney-client relationship,' because the interests of the estate—which merely 'stands in the shoes' of the client after death—are compatible with the client's interests."). The court indicated that the benefit to personal representative-beneficiaries would be diluted by the intent of the decedent. *Id.* Any damages paid by a negligent attorney would be paid to the estate and that award would be "distributed in accordance with decedent's existing estate plan." *Id.* at 788. "Thus, the recovery would flow to the disappointed beneficiary only if the estate plan had provided for such a distribution, fulfilling the decedent's wishes." *Id.* The court provided the example of a spouse asserting an estate-planning malpractice claim for negligent tax planning that adversely affected the spouse's inheritance. *Belt*, 192 S.W.3d at 788. The court stated: "Under our holding today, a personal representative could maintain such a claim only if the representative established that the estate-planning attorney negligently failed to structure the estate in accordance with the testator's wishes, and the estate incurred damages as a result." *Id.* at 788 n.8. Thus, the court decided that a personal representative-beneficiary "would not necessarily recover the lost inheritance should the malpractice claims succeed." *Id.* at 788.

130. *See* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 788 (Tex. 2006) (referring to provisions of the Texas Probate Code that allow the court to remove a personal representative if the personal representative is guilty of mismanaging their duties). The Texas Probate Code provides that:

> The court may remove a personal representative on its own motion, or on the complaint of any interested person, after the personal representative has been cited by personal service to answer at a time and place fixed in the notice, when . . . [t]he personal representative is proved to have been guilty of gross misconduct, or mismanagement in the performance of the personal representative's duties . . . .

TEX. PROB. CODE ANN. § 222(b) (Vernon Supp. 2007).

131. *See Belt*, 192 S.W.3d at 787–88 ("We note, however, that beneficiaries often act as the estate's personal representative, and our holding today arguably presents an opportunity for some disappointed beneficiaries to recast a malpractice claim for their own 'lost' inheritance, which would be barred by *Barcelo*, as a claim brought on behalf of the estate."); *see also* Creighton Univ. v. Kleinfeld, 919 F. Supp. 1421, 1425 (E.D. Cal.

compensates beneficiaries for their "purely personal" claim and then sues the decedent's attorneys for damages to the estate.[132] In either case, it is easy to see that *Belt*'s proposed limitations will not always protect the policy interests of *Barcelo*. The fact that a decedent's estate plan must first provide benefit to a beneficiary is hardly a limitation on the problem; it is more realistically a definition of the problem.[133] Additionally, how will a court be able to ascertain that a personal representative's intent is to assert a beneficiary's purely personal claim? Discerning a party's intentions is a difficult endeavor. Furthermore, the distinction between a harm endured by the estate and a personal harm is meaningless from the perspective of a beneficiary who feels slighted.

O'Donnell serves as a perfect example of the dilemma. Assuming that Denney's attorneys were not negligent in performing their duties, then O'Donnell's suit entailed second-guessing Denney's own decision "after considering and rejecting" his attorney's advice.[134] In this case, O'Donnell was effectively using the *Belt* privity rule as an end run around *Barcelo*. As the *Belt* court instructed, disgruntled beneficiaries could have been

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1995) (asserting a claim for legal malpractice arising from an attorney's alleged negligence in drafting ambiguous tax provisions in a will).

132. *See, e.g.*, O'Donnell v. Smith (*O'Donnell III*), 234 S.W.3d 135, 138–40 (Tex. App.—San Antonio 2007, pet. filed) (allowing the estate to sue for legal malpractice after the decedent's children accused the estate of mishandling the estate plan and jeopardizing their share of the estate).

133. *See Belt*, 192 S.W.3d at 788–89 (discussing the "limitation"). The court asserted that "recovery would flow to the disappointed beneficiary only if the estate plan had provided for such a distribution, fulfilling the decedent's wishes." *Id.* Thus, the court determined that a personal representative-beneficiary "would not necessarily recover the lost inheritance should the malpractice claim succeed." *Id.* Although this is true, the conflict between *Belt* and *Barcelo* arises in instances when an estate plan provides for a distribution to a beneficiary who wishes to assert a purely personal claim. This limitation is meaningless from the standpoint of the attorney who wishes to zealously represent a client. At the time services are rendered an attorney will not always know how the client's estate plan will benefit a beneficiary upon the client's death. In this case, the attorney will assume the worst: that the attorney's services could affect the beneficiaries of an estate. With this consideration in mind, the lawyer's *potential* liability is what creates a conflict between the interests of the client and the intended beneficiaries of an estate.

134. *O'Donnell III*, 234 S.W.3d at 143–44; *see, e.g.*, Brief of Appellees on Remand at 8, O'Donnell v. Smith (*O'Donnell III*), 234 S.W.3d 135 (Tex. App.—San Antonio 2007, pet. filed) (No. 04-04-00108-CV), 2006 WL 3669144, at *8 (arguing that they had prepared the decedent's federal estate tax return based on information provided by the decedent and according to his wishes during his lifetime).

removed from their role as personal representatives if they were asserting a purely personal claim.[135] However, the estate's beneficiaries were not asserting the claim; the claim was brought by the estate's non-beneficiary personal representative.[136] Thus, in this case, the only real limitation on the *Belt* privity rule's intrusion on *Barcelo* was not an issue. From this, one can see how to use the *Belt* privity rule as an end run around the *Barcelo* strict privity barrier. An end run in turn would have an adverse impact on an attorney's ability to zealously represent a client.[137] Furthermore, this type of gamesmanship necessarily leads to increased business costs for lawyers who must endure the necessary expense of defending against frivolous claims.[138]

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135. *See Belt*, 192 S.W.3d at 788 (referring to provisions of the Texas Probate Code that allow the court to remove a personal representative if the personal representative is guilty of mismanaging assigned duties); *see also* TEX. PROB. CODE ANN. § 222(b)(4) (Vernon Supp. 2007) (allowing a court, sua sponte or on the motion of an interested party, to remove a personal representative from this role for mismanaging responsibilities).

136. *See O'Donnell III*, 234 S.W.3d at 143 (explaining that the policy interests of *Barcelo* were not implicated in *O'Donnell* because the personal representative of the estate was not a beneficiary of the estate). Furthermore, the court of appeals believed *Belt* had "foreclosed a *Barcelo* analysis for suits brought by personal representatives on behalf of an estate." *Id.* The court noted that the *Belt* court supported their holding regarding the issue of survivability with claims for legal malpractice that were not in the estate-planning context. *Id.*

137. *See* Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 311 (2001) (explaining the effect of dividing an attorney's loyalties between the interests of the client and the interests of the client's intended beneficiaries). In addition to dividing an attorney's loyalties, allowing a beneficiary to assert a claim for legal malpractice after the client's death may encourage an attorney to consider the beneficiary's interest with greater weight than the interests of the client. *Id.* This is because an attorney's liability to the client is "dwarfed by the possible liability to the beneficiaries." *Id.* The damages awarded to a client for estate-planning malpractice are generally limited to the cost of the legal services provided. *Id.*; *see also* Noble v. Bruce, 709 A.2d 1264, 1278 (Md. 1998) (explaining that damages for estate-planning malpractice are limited to the cost of the services provided). In contrast, a beneficiary may receive a much larger award for damages equal to their lost inheritance. Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 311 (2001). The recognition of the attorney's greater potential liability to the beneficiary "encourages the attorney to emphasize the beneficiary's interests to the detriment of the client's interests." *Id.*

138. *See In re* Allied Chem. Corp., 227 S.W.3d 652, 667 (Tex. 2007) (Wainwright, J., dissenting) ("The truth is we all agree that improper tactical gamesmanship that skews accurate outcomes in the search for justice in the courts should be halted."); Chapa v. Garcia, 848 S.W.2d 667, 674 (Tex. 1992) (deciding to adopt a rule that would discourage gamesmanship); *see also* Paul D. Rheingold, *Legal Malpractice: Plaintiff's Strategies*, 15

The potential for abuse is clear: one could envision several end run scenarios. Take, for instance, an attorney who, according to his client's instructions, fails to file a survivable claim prior to the tolling of the statute of limitations.[139] If the client were to die shortly thereafter, would the client's personal representative be able to second-guess the client's own lifetime decision and assert a claim for legal malpractice? If an attorney assists a client who is near death to settle a debt at unfavorable terms,[140] will the client's personal representative claim that the estate has been damaged? If an attorney helps a client dispose of assets so that the client can receive Medicaid benefits,[141] will the client's personal representative claim that the decedent's attorney has harmed the estate for failure to explain the repercussion of the attorney's services? An attorney could guard against these suits by drafting a tightly-worded protective letter,[142] but is this not an example of the attorney's conflicted interests? There must be some

No. 2 LITIG. 13, 14 (1989) (explaining the costs of defending against a legal malpractice cause of action).

139. *See, e.g.*, McStowe v. Bornstein, 388 N.E.2d 674, 675, 677 (Mass. 1979) (deciding that "contract actions survive a defendant's death by the common law" in a cause of action "alleging that the attorney negligently had failed to commence an action on behalf of the plaintiff before the statute of limitations barred that action."); Johnson v. Taylor, 435 N.W.2d 127, 129 (Minn. Ct. App. 1989) (holding that a legal malpractice claim is not barred by a survival statute in legal malpractice arising from a personal injury suit); Loveman v. Hamilton, 420 N.E.2d 1007, 1008 (Ohio 1981) (concluding that a legal malpractice cause of action survived the death of a testator in a complaint alleging that an attorney was negligent for failing to file a claim prior to the expiration of the statute of limitations).

140. Jerome E. Bogutz & Jeffrey B. Albert, *A Survey of the Developing Pennsylvania Law of Attorney Malpractice*, PA. B. ASS'N Q., Apr. 1993, at 89. ("It now appears well settled in Pennsylvania that courts will not permit legal malpractice actions based on negligence in handling a settlement.").

141. *See* Stephen A. Moses, *Researcher: Medicaid Stifles LTC Ins. Purchases*, NATIONAL UNDERWRITERS, LIFE & HEALTH/FIN. SERVICES EDITION, Aug. 5, 1996, *available at* http://nationalunderwriter.com/archives/lh_archive/1996/l08-05/smck0032.asp (explaining how an attorney may assist senior citizens to divest or divert income so that the senior may gain access to Medicaid benefits); Jeffrey D. Voudrie, Guard Your Wealth for Seniors: Afraid of Losing Your Home to Medicaid? (Nov. 3, 2007), http://SeniorJournal.com/NEWS/GuardWealth/5-11-03ProtectHomefromMedicaid.htm (providing examples of ways to divert assets to gain access to Medicaid benefits).

142. *See* McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 794 (Tex. 1999) ("A lawyer may also avoid or minimize the risk of liability to a nonclient by setting forth (1) limitations as to whom the representation is directed and who should rely on it, or (2) disclaimers as to the scope and accuracy of the factual investigation or assumptions forming the basis of the representation or the representation itself.").

enforceable limits on the *Belt* privity rule if the court wishes to prevent the rule from being improperly used as an end run around *Barcelo.*

C. *Proposed Limitations to the* Belt *Privity Rule*

The adverse consequences of the *Belt* privity rule can be ameliorated in two ways. First, courts should limit the *Belt* privity rule to estate-planning malpractice. There are certainly other contexts of legal malpractice where the courts could logically extend the *Belt* privity rule. Nonetheless, the courts should consider the logical differences between surviving estate-planning claims and other legal malpractice claims and address those causes of action on a case-by-case basis. Second, where privity is extended to a personal representative, damages should be limited to the injury to the decedent.

There are logical differences between the nature of privity asserted by a personal representative in the context of estate-planning malpractice and non-estate-planning malpractice. A personal representative serves as the executor or administrator of an estate.[143] The personal representative's job is to effectuate the wishes of the decedent as expressed in an estate plan.[144] The personal representative is in no way charged with interpreting the decedent's lifetime intentions in other transactions.[145] Furthermore, a document expressing the client's intentions in non-estate-planning transactions often does not exist.[146] In these

143. *Cf.* Noble v. Bruce, 709 A.2d 1264, 1276 (Md. 1998) ("In cases involving wills, the beneficiary of a will is not necessarily the beneficiary of the attorney-client relationship."); Copenhaver v. Rogers, 384 S.E.2d 593, 596–97 (Va. 1989) ("There is a critical difference between being the intended beneficiary of an estate and being the intended beneficiary of a contract between a lawyer and his client."). The *Noble* court stated that the client's purpose for executing a will "may not be to benefit the beneficiaries named in the will, but rather to prevent the intestate distribution of assets." *Noble*, 709 A.2d at 1276. The court recognized that the testator's intent may have been "to exclude certain individuals who would otherwise inherit the testator's property without a will." *Id.*

144. 28 TEX. JUR. 3D *Decedents' Estates* § 232 (2007).

145. *Cf. id.* (omitting any reference to a personal representative's duty to ascertain the decedent's lifetime intentions).

146. *See generally* Jones v. Siesennop, 371 N.E.2d 892, 895 (Ill. App. Ct. 1977) (discussing a cause of action for an attorney's negligent representation in a real estate transaction); McStowe v. Bornstein, 388 N.E.2d 674, 675–77 (Mass. 1979) (stating a cause of action for legal malpractice where a lawyer allegedly failed to file a claim before the statute of limitations barred that action); Johnson v. Taylor, 435 N.W.2d 127, 129 (Minn. Ct. App. 1989) (same); Newbach v. Giaimo & Vreeburg, 618 N.Y.S.2d 307, 308 (N.Y. App.

cases, there is great potential for a personal representative to second-guess the decedent's lifetime decisions. To complicate matters, a client often seeks only to serve personal interests and may be less concerned with the estate.[147] If the decedent wishes to maximize lifetime benefits by leveraging against any future estate, a personal representative will always have the potential to second-guess the decedent's lifetime decisions.[148] The danger of being second-guessed is what makes a lawyer beholden to conflicting interests.

The *Belt* privity rule was intended to prevent a lawyer from having immunity from the lawyer's negligence while also protecting the attorney's ability to zealously represent a client.[149] One commentator has compared the balance to navigating Scylla and Charybdis.[150] On one side is the *Barcelo* concern for loyalty to the client; on the other is the *Belt* concern for creating accountability for negligence.[151] There are cases where a personal

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Div. 1994) (reviewing a cause of action alleging legal malpractice in failing to effect a change of the beneficiary of decedent's life insurance policy); Loveman v. Hamilton, 420 N.E.2d 1007, 1008 (Ohio 1981) (contemplating a legal malpractice claim where a lawyer was negligent for failing to file a claim prior to the expiration of the statute of limitations).

147. *See Noble*, 709 A.2d at 1276 ("The testator/client's intent and purpose in executing a will may not be to benefit the beneficiaries named in the will, but rather to prevent the intestate distribution of assets.").

148. *Cf. Jones*, 371 N.E.2d at 895 (considering whether the decedent's estate could bring a claim on behalf of the decedent for negligent representation); *Johnson*, 435 N.W.2d at 129 (concluding that a claim for legal malpractice survives the decedent's death); *Newbach*, 618 N.Y.S.2d at 308 (reviewing a claim "alleging legal malpractice in failing to effect a change of the beneficiary of decedent's life insurance policy"); O'Donnell v. Smith (*O'Donnell III*), 234 S.W.3d 135, 143 (Tex. App.—San Antonio 2007, pet. filed) (adjudicating a legal malpractice claim for alleged negligent preparation of a federal estate tax return).

149. Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 789 (Tex. 2006) ("Limiting estate-planning malpractice suits to those brought by either the client or the client's personal representative strikes the appropriate balance between providing accountability for attorney negligence and protecting the sanctity of the attorney-client relationship.").

150. Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 265–66 (2001) (referring to the Florida-Iowa rule extending privity to a beneficiary based on considerations of competing policy interests).

151. *Compare* Barcelo v. Elliott, 923 S.W.2d 575, 578 (Tex. 1996) ("We believe 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."), *with Belt*, 192 S.W.3d at 782 ("We hold, to the contrary, that there is no legal bar preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners.").

representative is distant from the client's transaction, and the nature of the services, by definition, serves the client at the expense of the estate.[152] These transactions are not good candidates for extension of the *Belt* privity rule. On the other hand, there are transactions similar to estate-planning transactions—those where the personal representative (the estate) is inherently made a party to the client's transaction and the danger of second-guessing is minimal.[153] Thus, when considering the logical distinction between estate-planning malpractice and other areas of legal malpractice, there seems to exist a sliding scale with regard to the extension of the *Belt* privity rule. Perhaps, when extending the *Belt* privity rule, the courts should adopt a multi-factor balancing test similar to that used in other states which have chosen to depart from strict privity.[154] Those who are not enthusiastic about a new multi-factor balancing test need not become agitated because, to some degree, this situation already exists. How else are practitioners to distinguish between purely personal claims and claims asserted for harms to the estate?

Additionally, the damages for a lawyer's estate-planning negligence may be limited to the harm to the decedent. This is the rule in Maryland.[155] The Kansas and California supreme courts

152. *Cf. Jones*, 371 N.E.2d at 895 (discussing a cause of action for an attorney's negligent representation in a real estate transaction); *Johnson*, 435 N.W.2d at 129 (same); *Newbach*, 618 N.Y.S.2d at 308 (discussing a cause of action alleging legal malpractice in failing to effect a change of the beneficiary of decedent's life insurance policy); *O'Donnell III*, 234 S.W.3d at 143 (discussing a legal malpractice claim for alleged negligent preparation of a federal estate tax return).

153. *Cf. Belt*, 192 S.W.3d at 782 (discussing an estate-planning malpractice claim for a cause of action involving negligent tax planning).

154. *See, e.g.*, Fickett v. Superior Court, 558 P.2d 988, 990 (Ariz. Ct. App. 1976) ("We are of the opinion that the better view is that the determination of whether, in a specific case, the attorney will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors . . . ."); Lucas v. Hamm, 364 P.2d 685, 687 (Cal. 1961) (extending privity to non-client beneficiaries based on a five factor test); *cf.* Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So. 2d 1378, 1380 (Fla. 1993) ("To bring a legal malpractice action, the plaintiff must either be in privity with the attorney, wherein one party has a direct obligation to another, or, alternatively, the plaintiff must be an intended third-party beneficiary."); Auric v. Cont'l Cas. Co., 331 N.W.2d 325, 329 (Wis. 1983) ("Allowing a will beneficiary to maintain a suit against an attorney who negligently drafts or supervises the execution of a will is one way to make an attorney accountable for his negligence.").

155. *See, e.g.*, Noble v. Bruce, 709 A.2d 1264, 1278 (Md. 1998) (stating that, when a beneficiary seeks damages in a legal malpractice cause of action filed against a testator's attorneys, "[d]amages . . . may be limited to the attorney's fee").

have also recognized the imbalance that is created in the absence of this limitation.[156] An attorney's liability to a living client for estate-planning malpractice is generally limited to damages for the value of reproducing the attorney's services.[157] Where that same negligence gives rise to a cause of action asserted on behalf of a beneficiary, damages are calculable for compensation for the beneficiaries' lost inheritance.[158] Usually, "the attorney's possible malpractice liability to the client is dwarfed by the possible liability to the beneficiaries."[159] In this case, the attorney's loyalties are not only divided, they are skewed to the interests of the beneficiary.[160] If the personal representative truly stands in the shoes of the decedent, then damages for an attorney's estate-planning negligence should be limited to harm suffered by the decedent and not by the beneficiary.[161] The decedent's harms would include damages for negligent tax planning but would

156. *See* Heyer v. Flaig, 449 P.2d 161, 164–65 (Cal. 1969) (discussing how a beneficiary's interests in some ways "loom greater than those of the client"); Pizel v. Zuspann, 795 P.2d 42, 50 (Kan. 1990) (quoting *Heyer*, 449 P.2d at 164–65) (addressing the damages owed to a client in comparison to potential damages owed to a beneficiary).

157. *See, e.g.*, *Heyer*, 449 P.2d at 164–65 (stating that damages for legal malpractice claims asserted by a client are limited to the attorney's fee); *Pizel*, 795 P.2d at 50 (quoting *Heyer*, 449 P.2d at 164–65) (addressing the damages owed to a client in comparison to potential damages owed to a beneficiary); *Noble*, 709 A.2d at 1278 (stating that, when a beneficiary seeks damages in a legal malpractice cause of action filed against a testator's attorney, "[d]amages . . . may be limited to the attorney's fee").

158. *See, e.g.*, *Heyer*, 449 P.2d at 164–65 (explaining the real loss to beneficiaries when an attorney negligently prepares an estate plan); *Pizel*, 795 P.2d at 50 (addressing the damages owed to a client in comparison to potential damages owed to a beneficiary); *Noble*, 709 A.2d at 1278 (discussing damages to a beneficiary due to estate-planning malpractice).

159. Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 311 (2001) (comparing an attorney's potential liability to a client to his potential liability to the client's intended beneficiaries).

160. *See id.* ("[B]ecause the attorney's possible malpractice liability to the client is dwarfed by the possible liability to the beneficiaries, the recognition of a cause of action encourages the attorney to emphasize the beneficiary's interests to the detriment of the client's interests."); *cf. Heyer*, 449 P.2d at 164–65 (stating that damages for legal malpractice claims asserted by a client are limited to the attorney's fee); *Pizel*, 795 P.2d at 50 (addressing the damages owed to a client in comparison to potential damages owed to a beneficiary); *Noble*, 709 A.2d at 1278 (stating that, when a beneficiary seeks damages in a legal malpractice cause of action filed against a testator's attorney, "[d]amages . . . may be limited to the attorney's fee").

161. *E.g.*, *Noble*, 709 A.2d at 1278 (discussing the possibility that an estate's personal representative could assert a decedent's claim for legal malpractice but indicating that damages "may be limited to the attorney's fee").

prevent exaggerated awards for apportionment issues. The adverse effects of making an end run around *Barcelo* would be mitigated by such a limitation.

IV. CONCLUSION

Whether these proposed limitations will effectively protect the policy concerns is a decision for the courts. Nonetheless, the Texas Supreme Court's guidance regarding the scope of the *Belt* privity rule alone will be of immense benefit. Nothing is worse than uncertainty. If the *Belt* privity rule extends beyond the context of estate-planning malpractice, then most attorneys' malpractice liability exposure has increased. In such a case, an attorney can purchase additional insurance and make it office policy to execute well-crafted protective letters. But the attorney who operates under the assumption that the *Belt* privity rule was only of consequence to estate-planning lawyers may be in for an unpleasant surprise. This is certainly unfair. It is one thing to be accountable for one's own negligence. It is another to inadequately prepare lawyers for potential liability. The Texas Supreme Court should provide guidance to lawyers on the scope and practical effect of the *Belt* privity rule.

As for the practicality of a multi-factor balancing test, the extension of the *Lucas* test would lend itself well to the *Belt* privity rule.[162] The Texas Supreme Court has determined that strict privity is the best policy in Texas.[163] Although the *Lucas* test was designed for cases where the courts seek to extend privity to a non-client beneficiary,[164] an equivalent rule would work well to make sliding scale distinctions. Thus, the *Lucas* test would account for the logical distinctions between legal services that offer various risks of second-guessing and the personal representative's true relation to the decedent. A parallel test would consider "the

162. *See* Lucas v. Hamm, 364 P.2d 685, 687 (Cal. 1961) (extending privity to non-client beneficiaries based on a five factor test).

163. Barcelo v. Elliott, 923 S.W.2d 575, 578 (Tex. 1996) ("We believe 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."); *see also* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 785 (Tex. 2006) (holding that privity exists between an estate and a decedent's attorneys but distinguishing and affirming the strict privity rule defined in *Barcelo*).

164. *See Lucas*, 364 P.2d at 687 (explaining that privity should be extended to a non-client beneficiary based on a number of policy considerations).

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, and the policy of preventing future harm."[165] *Lucas* "relied heavily on [the] determination that the 'main purpose' of the transaction between the attorney-defendant and the testator was to benefit the plaintiff."[166] If only this factor were adopted it would place a real and meaningful limitation on the potential misuse of the *Belt* privity rule.

An attorney's ability to zealously represent a client is critical.[167] Some attorneys may simply decline to provide certain legal services without the protection of strict privity. Those who choose to offer high-risk services will do so at increased costs. These attorneys will need to account for the costs of defending against frivolous claims and will need to consider their potentially exaggerated liability to disgruntled beneficiaries.[168] Therefore, these lawyers will face higher premiums for malpractice insurance and may need to increase their coverage. Additionally, the attorney will incur costs for the time and expense of preparing well-designed protective letters.[169] These lawyers will likely pass

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

166. Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 271–73 (2001).

167. *See Belt*, 192 S.W.3d at 788–89 (reaffirming the *Barcelo* strict privity rule); *Barcelo*, 923 S.W.2d at 578 ("[C]ourts have recognized the inevitable problems with disappointed heirs attempting to prove that the defendant-attorney failed to implement the deceased testator's intentions."); O'Donnell v. Smith (*O'Donnell III*), 234 S.W.3d 135, 143–44 (Tex. App.—San Antonio 2007, pet. filed) (discussing the need to protect an attorney's ability to zealously represent a client).

168. *See* John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX L. REV. 967, 969 (1995) (explaining that changes in legal malpractice over the last quarter of a century have "tended to expose lawyers to increased malpractice liability"); Bradley E.S. Fogel, *Attorney v. Client-Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 311 (2001) (describing how an attorney's estate-planning malpractice liability to a living client is usually dwarfed by their potential liability to a beneficiary); Paul D. Rheingold, *Legal Malpractice: Plaintiff's Strategies*, 15 No. 2 LITIG. 13, 13–14 (1989) (stating that a lawyer who must defend against a legal malpractice claim will need to employ specialists to assist with that defense).

169. *See* McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d

the additional costs of business on to the client. These changes may have the harshest impact on elderly clients. It is often these clients that seek the lawyer's services to leverage against the estate to create lifetime benefits.[170] These additional costs may place the attorney's service beyond their grasp. In the end, where an unfettered end run around *Barcelo* is plausible, the client loses.

787, 794 (Tex. 1999) ("A lawyer may also avoid or minimize the risk of liability to a nonclient by setting forth (1) limitations as to whom the representation is directed and who should rely on it, or (2) disclaimers as . . . assumptions forming the basis of the representation or the representation itself.").

170. *Cf.* Stephen A. Moses, *Researcher: Medicaid Stifles LTC Ins. Purchases*, NATIONAL UNDERWRITERS, LIFE & HEALTH/FINANCIAL SERVICES EDITION, Aug. 5, 1996, *available at* http://nationalunderwriter.com/archives/lh_archive/1996/l08-05/smck0032.asp (explaining how an attorney may assist senior citizens to divest or divert income so that the senior may gain access to Medicaid benefits); Jeffrey D. Voudrie, Guard Your Wealth for Seniors: Afraid of Losing Your Home to Medicaid? (2007), http://SeniorJournal.com/NEWS/GuardWealth/5-11-03ProtectHomefromMedicaid.htm (providing examples of ways to divert assets to gain access to Medicaid benefits).