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Attorney Malpractice in Will Drafting: Will South Carolina Expand Privity to Impose a Duty to Intended Beneficiaries of a Will?

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Pickelsimer: Attorney Malpractice in Will Drafting: Will South Carolina Expand
**ATTORNEY MALPRACTICE IN WILL DRAFTING:
WILL SOUTH CAROLINA EXPAND PRIVACY
TO IMPOSE A DUTY TO INTENDED BENEFICIARIES OF A WILL?**

I. INTRODUCTION

In 1842, *Winterbottom v. Wright*¹ announced the English common law rule that privity of contract must exist in order for a duty to extend to a third party.² The United States Supreme Court adopted this concept of privity thirty-seven years later in *Savings Bank v. Ward*.³ In *Ward*, the Court refused to hold an attorney who erroneously certified that his client had good title to property liable for the damages to the bank that relied on the attorney's certification.⁴ Instead, the Court found that, absent fraud or collusion, an attorney is not liable to those who are not the attorney's clients.⁵

Although the defense of privity began to fall in other areas of the law early in the twentieth century,⁶ the requirement for privity in legal malpractice cases stood as an absolute barrier to liability to third parties until 1958.⁷ Since then, the vast majority of states, utilizing a variety of tests and factors, have abandoned the strict privity requirement in legal malpractice cases.⁸ South Carolina case law, however, is silent as to whether a frustrated beneficiary has standing to bring an action for legal malpractice against the attorney who drafted a will.⁹

Part II of this Comment begins by surveying South Carolina legal malpractice case law, focusing on the requirement for privity between the attorney and the party seeking to bring an action for malpractice and identifying the elements required to state a claim for legal malpractice. Part III explores in detail the South Carolina Court of Appeals's decision in *Henkel v. Winn*, emphasizing the opinion's failure

1. *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402 (Exch.).

2. *Id.* at 403.

3. 100 U.S. 195, 205–06 (1879).

4. *See id.* at 196, 207.

5. *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, unless the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty.” (citing *Langridge v. Levy*, (1837) 150 Eng. Rep. 863, 866 (Exch.))).

6. *See* Bradley E.S. Fogel, *Attorney v. Client—Privity, Malpractice, and the Lack of Respect for the Privacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 269–70 (2001) (citing *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916) (holding a manufacturer of a dangerous product owed a duty of care to the foreseeable users of its product regardless of whether privity existed between the manufacturer and the user injured by the product)).

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

8. *See generally* 4 RONALD E. MALLIN & JEFFERY M. SMITH, *LEGAL MALPRACTICE* § 32.4 (2006 ed.) (discussing the prevailing rules and approaches to legal malpractice in will drafting and the privity requirement).

9. *Henkel v. Winn*, 346 S.C. 14, 18 n.3, 550 S.E.2d 577, 579 n.3 (Ct. App. 2001) (identifying the lack of precedent directly addressing this issue in South Carolina).

to decide whether an attorney drafting a will owes a duty of care to intended beneficiaries who are not in privity with the attorney.¹⁰ Part IV outlines the tests other jurisdictions have used to answer the question raised in *Henkel* of attorney liability to third parties. Part V applies these different tests to the facts in *Henkel*, predicting the most likely outcome under each. Part VI forecasts that a South Carolina court will probably adopt the Florida-Iowa rule in deciding whether intended beneficiaries must be in privity with the drafting attorney to have standing to bring a legal malpractice action based on the drafting and execution of a will. Part VII concludes.

II. THE CURRENT STATUS OF SOUTH CAROLINA LEGAL MALPRACTICE CASE LAW

In decisions consistent with the privity requirement established by the United States Supreme Court in *Savings Bank v. Ward*,¹¹ South Carolina courts have held that attorneys acting in their professional capacity only owe a duty of care to their clients.¹² The South Carolina Supreme Court has also refused to impose liability on attorneys based on breach of an express warranty to obtain a specific result.¹³ However, an attorney may be held liable “where, in addition to representing [the] client, [the attorney] breaches some independent duty to a third person or acts in [the attorney’s] own personal interest, outside the scope of [the attorney’s] representation of the client.”¹⁴

In South Carolina, “[t]o prevail in a legal malpractice claim, the plaintiff must satisfy the following four elements: (1) the existence of an attorney-client relationship; (2) breach of duty by the attorney; (3) damage to the client; and (4) proximate causation of client’s damage by the breach.”¹⁵ As the court noted in *Henkel*, South Carolina courts have not directly addressed whether an intended beneficiary has standing to bring a legal malpractice action based on negligence in drafting and executing a will.¹⁶

10. *Id.*

11. 100 U.S. 195, 205–06 (1879).

12. See *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) (“[A]n attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.” (quoting *Gaar v. N. Myrtle Beach Realty Co.*, 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986))); *Am. Fed. Bank v. No. One Main Joint Venture*, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996) (“Before a claim for malpractice may be asserted, there must exist an attorney-client relationship.”).

13. *Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 27, 531 S.E.2d 282, 286 (2000) (citing *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 436, 472 S.E.2d 612, 614 (1996)). (finding that recovery under a “breach of express warranty theory would change the current standard of care for attorneys” and “inhibit[] the frank discussion between attorney and client concerning the merits of the case.”).

14. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995).

15. *Hitchcock*, 340 S.C. at 26, 531 S.E.2d at 285 (citing *Smith*, 322 S.C. at 436, 472 S.E.2d at 614).

16. *Henkel v. Winn*, 346 S.C. 14, 18 n.3, 550 S.E.2d 577, 579 n.3 (Ct. App. 2001).

III. THE COURT IDENTIFIES THE ISSUE, BUT LEAVES THE QUESTION OPEN IN *HENKEL V. WINN*

A. *Factual Background and Procedural History*

In *Henkel*, a widow brought a claim for legal malpractice against the attorneys who drafted her husband's will.¹⁷ The husband, who had an advanced stage of cancer, and wife, who was pregnant with their first child, met with an attorney, Winn, on two occasions to discuss "their estate plans and wills."¹⁸ Prior to the second meeting, Winn asked Moore, another attorney in the firm, to assist in the engagement.¹⁹ Seven days after the second meeting, Moore mailed a draft of the wills, along with a cover letter, to the husband and wife.²⁰

In her complaint, the wife asserted that her husband intended for her to receive "specific bequests to her in addition to leaving her one-half of the probate assets."²¹ According to the wife, the husband instructed the attorneys to draft the will so that she would "have received all of the couple's jointly owned property and the proceeds from her husband's retirement plan and savings investment accounts plus one-half of the life insurance proceeds, stocks and bonds, and his interest in the marital home."²² After the husband died eight months later and the will was admitted for probate, the wife discovered the will left her only one-half of the husband's estate as calculated for federal estate tax purposes.²³ She contended the will did not effectuate her husband's intent and brought a claim for professional negligence against the attorneys who drafted the will.²⁴

The wife appealed the trial court's grant of summary judgment to the attorneys.²⁵ At trial, the court found that the "Husband's execution of the will indicated he was aware of its content and nature;" the wife, who had read the letter explaining her husband's will before his death, "was estopped from claiming that the will was contrary to her husband's instructions" to the attorneys; and the wife's

17. *Id.* at 17, 550 S.E.2d at 578.

18. *Id.* at 15, 550 S.E.2d at 577.

19. *Id.*

20. The letter explained the following:

Robert leaves to Nancy that amount which, when added to the assets passing to Nancy outside his Will (but not his tangible personal property), will equal one-half of his estate . . . I do want to remind you of the fact that your Wills will operate only on the property in your probate estates. To the extent that property passes directly to each other or to someone else in the form of insurance proceeds, as jointly owned property with rights of survivorship and/or pursuant to beneficiary designations under any employer or other plans, your Wills will not operate on these assets. I believe we discussed the advisability of Robert naming his estate as the beneficiary of part or all of his life insurance.

Id. at 16, 550 S.E.2d at 578.

21. *Id.*

22. *Id.* at 16–17, 550 S.E.2d at 578.

23. *Id.* at 16, 550 S.E.2d at 578.

24. *See id.* at 17, 550 S.E.2d at 578.

25. *Id.*

“failure to inform [the] [a]ttorneys that the will and letter were inconsistent with Husband’s intent was an intervening and superseding cause of [her] injury.”²⁶ Although the attorneys argued that the wife did not have standing to bring the suit, the trial court did not find it necessary to address this argument.²⁷

B. *The Privity Arguments*

On appeal, the attorneys reasserted their position that the wife lacked standing to bring the action for negligence directly, citing cases from Maryland, Ohio, Nebraska, New York, Texas, and Virginia.²⁸ In response, the wife asserted that the attorneys had established an attorney-client relationship between themselves and both the husband and the wife.²⁹ The wife cited case law from other jurisdictions and argued that the vast majority of those deciding the issue allow intended beneficiaries to bring suit against attorneys who prepared a testator’s will.³⁰

The court in *Henkel* affirmed the decision of the trial court without addressing the privity issue and found that the record did not establish any breach of duty on the attorneys’ part.³¹ The court refused to consider extrinsic evidence in determining whether the will accurately reflected the husband’s testamentary intent.³² In a footnote, the court briefly discussed but did not answer the question of whether the

26. *Id.*

27. Order at 9–10, *Henkel v. Winn*, No. 98-CP-23-4279 (Ct. C.P. County of Greenville Sept. 16, 1999) (“Defendants also argue that Plaintiff has no standing to bring a negligence action against Defendants, since she was not in privity with the client of Defendants. They cite numerous cases from other jurisdictions but acknowledge that there is not a South Carolina case on point. The Court finds it unnecessary to address this issue.”).

28. Final Brief for Respondents at 14–15, *Henkel v. Winn*, 346 S.C. 14, 550 S.E.2d 577 (Ct. App. 2001) (No. 98-CP-23-4279) (“While the law in South Carolina on this issue remains unsettled, the Wyche law firm also maintains that its duty of care in the preparation of [the husband’s] Will was to [the husband] exclusively and not to [his wife] since she was not in privity with them.”).

29. Reply Brief of Appellant at 4, *Henkel v. Winn*, 346 S.C. 14, 550 S.E.2d 577 (Ct. App. 2001) (No. 98-CP-23-4279) (presenting the acts of the attorneys in addressing all correspondence to the husband and wife jointly, billing the husband and wife jointly, and receiving payment from the husband and wife’s joint checking account as evidence that wife acted in privity with husband and attorneys).

30. *Id.* at 5–6 (citing *Lucas v. Hamm*, 364 P.2d 685, 688 (Cal. 1961) (en banc); *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958) (en banc); *Stowe v. Smith*, 441 A.2d 81, 84 (Conn. 1981); *Licata v. Spector*, 225 A.2d 28, 31 (Conn. C.P. 1966); *Ogle v. Fuiten*, 466 N.E.2d 224, 227 (Ill. 1984); *Jewish Hosp. v. Boatmen’s Nat’l Bank*, 633 N.E.2d 1267, 1276 (Ill. App. Ct. 1994); *Walker v. Lawson*, 514 N.E.2d 629 (Ind. Ct. App. 1987), *vacated*, 526 N.E.2d 968 (Ind. 1988); *Desire Narcotics Rehab. Ctr., Inc. v. White*, 732 So. 2d 144, 146 (La. Ct. App. 1999); *Johnson v. Sandler, Balkin, Hellman & Weinstein, P.C.*, 958 S.W.2d 42, 48 (Mo. Ct. App. 1997); *Hesser v. Ctr. Nat’l Bank & Trust Co. of Enid*, 956 P.2d 864, 868 (Okla. 1998); *Hale v. Groce*, 730 P.2d 576, 577 (Or. Ct. App. 1986), *rev’d on other grounds*, 744 P.2d 1289 (Or. 1987); *Persche v. Jones*, 387 N.W.2d 32, 35–36 (S.D. 1986); *Schirmer v. Nethercutt*, 288 P. 265, 267–68 (Wash. 1930); *Auric v. Cont’l Cas. Co.*, 331 N.W.2d 325, 329 (Wis. 1983)).

31. *Henkel*, 346 S.C. at 18, 550 S.E.2d at 579.

32. *Id.* (“Because the will was duly executed and admitted for probate, we must presume the Husband knew and understood its contents. Moreover, the testator’s intent must be determined from the will itself.”).

wife had standing to bring the action for legal malpractice.³³ But the court of appeals did indicate that a plaintiff may have to be in privity with the attorney to bring an action for legal malpractice.³⁴

IV. THE CURRENT STATUS OF THE STRICT PRIVACY REQUIREMENT IN OTHER JURISDICTIONS

While courts generally had held that testators and, more commonly, their personal representatives had standing to bring a legal malpractice action against attorneys for negligent will drafting,³⁵ the absence of privity stood as an absolute bar to actions brought by intended beneficiaries of wills based on the attorney's negligence in drafting the will.³⁶ In actions brought on behalf of the estate, courts typically limited damages to either the fees paid to the attorney for drafting the will or the cost of obtaining a new will which would adequately accomplish the testator's intent.³⁷ Because the estate was not injured, personal representatives lacked standing to bring an action on behalf of intended beneficiaries of the will who claimed an attorney's negligent will drafting frustrated the intent of the testator.³⁸

Today only a minority of states adhere to the strict requirement of privity. The vast majority of states have relaxed the privity requirement, allowing intended beneficiaries standing to bring legal malpractice actions under a number of

33. *Id.* at 18 n.3, 550 S.E.2d at 579 n.3 ("Initially, we note that Wife may not have standing to assert a claim for malpractice based on her husband's will. There is a split among other jurisdictions as to whether a frustrated beneficiary can sue the will's drafter.").

34. *Id.* ("Although never addressed directly in South Carolina, related case law indicates that a plaintiff in an attorney malpractice action may have to be in privity with the attorney.").

35. See generally MALLIN & SMITH, *supra* note 8, § 32.4 (discussing issues surrounding the standing of personal representatives and beneficiaries of the estate to bring suit against attorneys for negligent estate planning and will drafting).

36. See, e.g., *Buckley v. Gray*, 42 P. 900, 900 (Cal. 1895) (declining to allow liability to extend to parties outside the attorney-client relationship), *abrogated by* *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958).

37. See, e.g., *Heyer v. Flaig*, 449 P.2d 161, 167 n.6 (Cal. 1969) (noting that estates can only sue for attorney's fees paid to attorneys who negligently draft wills); *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*, 568 S.E.2d 693, 695 (Va. 2002) (finding the personal representative did not have standing to bring an action against the attorney for malpractice resulting in adverse tax consequences to the estate "because the cause of action for legal malpractice asserted . . . did not come into existence during [the testator's] lifetime and thus did not survive [the testator's] death"). But see *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 787 (Tex. 2006) (finding personal representatives have standing to bring an action for malpractice causing adverse tax consequences to the estate if they "demonstrate that the decedent intended to minimize tax liability for the estate as a whole").

38. *Bucquet v. Livingston*, 129 Cal. Rptr. 514, 521 (Ct. App. 1976) ("The executor of an estate has no standing to bring an action for the amount of the bequest against an attorney who negligently prepared the estate plan since, in the normal case, the estate is not injured by such negligence, except to the extent of fees paid; only the beneficiaries suffer the real loss.").

formulations, which include balancing tests, negligence actions based in tort, and third-party beneficiary contract theories.³⁹

A. Jurisdictions that Have Moved Away from the Strict Privity Requirement

The jurisdictions that have eased the strict privity requirement typically use one of the following three approaches to determine whether the intended beneficiary of a will has standing to bring an action for legal malpractice:⁴⁰ (1) the balancing of factors test, which originated in California;⁴¹ (2) “the Florida-Iowa rule,”⁴² and (3) breach of contract based on a third-party beneficiary contract theory.⁴³

1. The Balancing of Factors Test

The seminal case expanding privity to intended beneficiaries of wills is *Biakanja v. Irving*.⁴⁴ In *Biakanja*, the California Supreme Court overturned two earlier cases in which it held third-party beneficiaries of wills did not have standing to bring actions for legal malpractice because the attorneys were not in privity with the third-party beneficiaries.⁴⁵ In *Biakanja*, a notary prepared a will devising and bequeathing all of the testator’s property to the plaintiff.⁴⁶ The will was denied probate because the notary had failed to obtain proper attestation of the testator’s signature on the will.⁴⁷

In overturning its prior decisions, the California Supreme Court cited the growing number of jurisdictions moving away from the strict privity requirement in other areas of the law.⁴⁸ The court further noted that “[r]ecovery has been

39. Ronald R. Volkmer, *Attorney Liability to Nonclients: The Need to Re-Examine Nebraska’s Privity Rule*, 29 CREIGHTON L. REV. 295, 300 (1995) (quoting Bruce S. Ross, *Legal Malpractice in Estate Planning and Administration*, 18 ACTEC NOTES 248, 250 (1993)) (reporting that many jurisdictions in recent years moved away from the strict privity requirement and allow suits for negligence in will drafting under the balancing of factors test, third-party beneficiary theory, or other formulations).

40. *Id.*; see MALLIN & SMITH, *supra* note 8, § 32.4.

41. See *Lucas v. Hamm*, 364 P.2d 685, 687 (Cal. 1961) (en banc).

42. See Bradley E.S. Fogel, *Attorney v. Client—Privity, Malpractice, and the Lack of Respect for the Privacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 283 (2001).

43. See *Guy v. Liederbach*, 459 A.2d 744, 751 (Pa. 1983).

44. 320 P.2d 16 (Cal. 1958) (en banc).

45. *Id.* at 19.

46. *Id.* at 17.

47. *Id.*

48. *Id.* at 18.

When *Buckley v. Gray* [] was decided in 1895, it was generally accepted that, with the few exceptions noted in the opinion in that case, 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.

Id.

allowed in some cases to a third party not in privity where the only risk of harm created by the negligent performance of a contract was to an intangible interest.”⁴⁹

To determine on a case-by-case basis whether intended beneficiaries of a will have standing to bring an action, the court set forth a multi-factor test:⁵⁰

[T]he extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, and the policy of preventing future harm.⁵¹

In applying the factors and finding the facts in *Biakanja* sufficient to support extending privity to allow the plaintiff standing to recover, the court concluded that “the ‘end and aim’ of the transaction was to provide for the passing of [the testator’s] estate to plaintiff” and that the terms of the will made it foreseeable that the plaintiff would experience a loss “if faulty solemnization caused the will to be invalid.”⁵²

Although *Biakanja* involved a notary,⁵³ the California Supreme Court extended its holding to apply to attorneys in *Lucas v. Hamm*.⁵⁴ In explaining the policy behind its holding, the court made the following statement about estate planning and wills:

[T]he main purpose of the testator in making his agreement with the attorney is to benefit the persons named in [the] will and this intent can be effectuated, in the event of a breach by the attorney, only by giving the beneficiaries a right of action, [and] we should recognize, as a matter of policy, that they are entitled to recover as third-party beneficiaries.⁵⁵

49. *Id.* (construing *Glanzer v. Shepard*, 135 N.E. 275 (N.Y. 1922)).

50. *Id.* at 19 (“The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors . . .”).

51. *Id.*

52. *Id.* (“As [the testator] died without revoking his will, [the] plaintiff, but for [the] defendant’s negligence, would have received all of the [testator’s] estate, and the fact that [the plaintiff] received only one-eighth of the estate was directly caused by [the] defendant’s conduct.”).

53. *Biakanja* also involved a criminal violation for the unauthorized practice of law, which may explain why the court included the fifth element of the test—moral blame associated with the conduct. *See id.*

54. 364 P.2d 685, 689 (Cal. 1961) (en banc) (“We conclude that intended beneficiaries of a will who lose their testamentary rights because of failure of the attorney who drew the will to properly fulfill his obligations under his contract with the testator may recover as third-party beneficiaries.”).

55. *Id.*

The court in *Lucas* cited *Biakanja* for the factors used to determine whether a defendant should be found in privity with a third-party, excluding (for no stated reason) the fifth factor—the moral blame attached to the defendant’s conduct.⁵⁶

In the years following *Biakanja* and *Lucas*, a number of other jurisdictions adopted the balancing of factors test and eliminated the strict privity requirement in legal malpractice actions brought by intended beneficiaries.⁵⁷ In *Donahue v. Shughart, Thomson & Kilroy, P.C.*, the Missouri Supreme Court moved away from a strict privity requirement in attorney malpractice cases and adopted a modified version of the balancing of factors test established in *Biakanja* and *Lucas*,⁵⁸ reconciling the balancing of factors test and third-party beneficiary contract theory:

The two most common approaches do not appear to be irreconcilable. The first factor of the balancing test addresses the extent to which the transaction was intended to benefit the plaintiff and bears a remarkable resemblance to the third party beneficiary theory. The question of whether the client had a specific intent to benefit the plaintiff plays an important role in determining if a legal duty exists under the balancing of factors test. The first factor . . . should be modified to reflect that the factor weighs in favor of a legal duty by an attorney where the client *specifically intended* to benefit the plaintiffs. With that modification, that approach is an appropriate method for determining an attorney’s duty to non-clients.⁵⁹

The court reasoned that the modified balancing of factors test negated arguments suggesting that allowing suits by those not in privity would extend liability to unlimited classes of potential plaintiffs and would infringe upon the attorney-client relationship.⁶⁰ The fact that the test emphasized a specific intent to benefit a particular intended beneficiary sufficiently limited the group of possible plaintiffs.⁶¹ Thus, the court adopted a modified balancing of factors test with a special emphasis on the first factor—“the existence of a *specific intent* by the client that the purpose of the attorney’s services were to benefit the plaintiffs.”⁶²

56. *Id.* at 687 (citing *Biakanja*, 320 P.2d at 19).

57. *See, e.g.*, *Pizel v. Zuspahn*, 795 P.2d 42, 51 (Kan. 1990) (“We find the California cases persuasive. We conclude that an attorney may be liable to parties not in privity based upon the balancing test developed by the California courts.”); *see also* *Fickett v. Super. Ct.*, 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”); *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 629 (Mo. 1995) (en banc) (“[T]he question of legal duty of attorneys to non-clients will be determined by weighing the factors in the modified balancing test.”).

58. 900 S.W.2d at 629.

59. *Id.* at 628 (italics also bolded in original).

60. *Id.*

61. *Id.*

62. *Id.* at 629 (emphasis added).

2. *The Florida-Iowa Rule*

The Florida-Iowa rule actually developed from the California Court of Appeals's opinion in *Ventura County Humane Society v. Holloway*,⁶³ which was decided several years after *Biakanja* and *Lucas*.⁶⁴ In *Ventura County Humane Society*, the attorney drafted a will that included an ambiguous bequest to the "SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS (Local or National)."⁶⁵ The plaintiffs and other humane societies filed claims in probate court, requiring a lengthy hearing to determine the merits of the claims, which resulted in extensive legal expenses and delayed distributions from the estate.⁶⁶ Despite finding the plaintiffs had standing to bring the action under the balancing of factors test established in *Biakanja* and *Lucas*, the court determined that "an attorney may be held liable to the testamentary beneficiaries only . . . if due to the attorney's professional negligence the testamentary intent expressed in the will is frustrated and the beneficiaries clearly designated by the testator lose their legacy as a direct result of such negligence."⁶⁷

Although *Ventura County Humane Society* has not been overruled,⁶⁸ a later decision by the California Court of Appeals limited the rule to cases where ambiguities in the will are the result of the testator providing poor instructions to the drafting attorney.⁶⁹ Florida and Iowa courts, however, adopted the holding in *Ventura County Humane Society* and established the Florida-Iowa rule for determining when intended beneficiaries have standing to assert claims for legal malpractice.⁷⁰ The Florida-Iowa rule limits the focus to the testamentary intent "as

63. 115 Cal. Rptr. 464 (1974).

64. See Fogel, *supra* note 42, at 283.

65. *Ventura County*, 115 Cal. Rptr. at 466.

66. *Id.* at 466–67.

67. *Id.* at 468 (emphasis omitted).

68. Fogel, *supra* note 42, at 284.

69. See *Bucquet v. Livingston*, 129 Cal. Rptr. 514, 520 (Ct. App. 1976) ("Any reliance on *Ventura* is misplaced as that case is readily distinguishable on its facts. There, the alleged error was an ambiguous designation of the beneficiaries. The beneficiaries, however, were designated exactly in the manner specified by the testator . . .").

70. Fogel, *supra* note 42, at 283.

expressed in the will,”⁷¹ consequently barring the use of extrinsic evidence to contradict the testator’s intent as expressed in the will.⁷²

For example, in the Florida case *Arnold v. Carmichael*, a client contacted an attorney to modify and replace a will that had been prepared by another attorney.⁷³ The attorney redrafted the will, making the changes the client requested, and left it with his secretary without reading the will after the secretary had entered the changes.⁷⁴ In redrafting the will, the attorney negligently omitted a residuary clause contained in the previous will, resulting in the division of the residuary estate among eleven heirs of the testatrix instead of the two plaintiffs the testatrix intended.⁷⁵ The *Arnold* court found that the attorney was negligent in failing to read the will before the testatrix executed it and “[the attorney’s negligence] was a proximate cause of the [plaintiffs’] loss.”⁷⁶ In reaching this conclusion, the *Arnold* court relied on an affidavit from the attorney who drafted the second will in which he admitted that he did not review the will after having it prepared or before the testatrix signed it.⁷⁷ The court noted that the attorney’s affidavit “supplied evidence independent of the testimony of the intended beneficiaries to show that the testatrix’s intent was frustrated.”⁷⁸

The focus of the Florida-Iowa rule on the testamentary intent as expressed in the will prevents it from opening the door to malpractice liability to every frustrated beneficiary. For example, in *Stept v. Paoli*,⁷⁹ frustrated beneficiaries of a trust filed a legal malpractice action alleging that the attorneys’ negligence in drafting a trust caused the beneficiaries to pay over \$100,000 in federal estate taxes.⁸⁰ The trial court, relying on Florida precedent, dismissed the complaint, finding the plaintiffs had no cause of action for legal malpractice because the trust “did not contain the

71. *DeMaris v. Asti*, 426 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1983) (“An attorney preparing a will has a duty not only to the testator-client, but also to the testator’s intended beneficiaries, who may maintain a legal malpractice action against the attorney on theories of either tort (negligence) or contract (as third-party beneficiaries). However, liability to the testamentary beneficiary can arise only if, due to the attorney’s professional negligence, the testamentary intent, *as expressed in the will*, is frustrated, and the beneficiary’s legacy is lost or diminished as a direct result of that negligence.”) (citation omitted); *Schreiner v. Scoville*, 410 N.W.2d 679, 683 (Iowa 1987) (“[W]e hold a cause of action ordinarily will arise only when as a direct result of the lawyer’s professional negligence the testator’s intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary’s interest in the estate is either lost, diminished, or unrealized.”).

72. *See Arnold v. Carmichael*, 524 So. 2d 464, 466–67 (Fla. Dist. Ct. App. 1988) (“In the context before the court . . . the proper concern appears to be simply to limit or prevent liability (under the privity exception) based on evidence of testamentary intent *in conflict* with the express terms of a validly executed will.”).

73. *Id.* at 465–66.

74. *See id.* at 466.

75. *See id.* at 465, 466.

76. *Id.* at 467.

77. *See id.* at 466, 467.

78. *Id.* at 467.

79. 701 So. 2d 1228 (Fla. Dist. Ct. App. 1997).

80. *Id.* at 1229.

expressed intent of the testator to avoid or minimize taxes.”⁸¹ In *Stept* the court affirmed the trial court’s decision, emphasizing that “[t]he Supreme Court of Florida observed that although the rule of privity has been relaxed in will drafting instances, it is only relaxed to the extent that the testamentary intent expressed in the will is frustrated.”⁸²

Additionally, Florida courts have refused to grant intended beneficiaries standing to bring malpractice actions against drafting attorneys for legal fees the beneficiaries incurred to resolve ambiguities in trusts.⁸³ For example, in *O’Neill v. Sacher*, the beneficiary of a pour over trust filed an action for legal malpractice against the attorney who drafted the trust to recover legal fees and costs incurred in a lawsuit filed to clarify an ambiguity in the trust.⁸⁴ In denying the beneficiary’s claim for malpractice, the court explained the following:

[W]e recognized—as a narrow exception to the general requirement that an attorney has no duty to a non-client—that an attorney may be liable to a testamentary beneficiary where the testamentary intent, as expressed in the will, is frustrated due to professional negligence with a resulting loss or diminution of the beneficiary’s legacy. Although the beneficiary’s costly lawsuit was spawned by an ambiguity in the testamentary instruments, it was not established that imprecision in draftmanship caused a frustration of the testator’s intent as expressed in the will and trust documents.⁸⁵

Michigan and Maryland courts have followed the Florida-Iowa rule and reached similar conclusions. In *Micras v. DeBona*,⁸⁶ the Michigan Supreme Court refused to look “beyond the four corners of the will” and denied the plaintiff’s claim for negligent will drafting where the lawyer, despite having followed the testator’s

81. *Id.* (citing *Kinney v. Shinholser*, 663 So. 2d 643, 646 (Fla. Dist. Ct. App. 1995)); *accord* *Angel, Cohen & Rogovin v. Oberon Invest., N.V.*, 512 So. 2d 192, 194 (Fla. 1987) (citing *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958) (en banc)) (“For the beneficiaries’ action in negligence to fall within the exception to the privity requirement, testamentary intent as expressed in the will must be frustrated by the attorney’s negligence and as a direct result of such negligence the beneficiaries’ legacy is lost or diminished. We see no reason to expand this limited exception and specifically reject the invitation to adopt California’s balancing of factors test.”).

82. *Stept*, 701 So. 2d at 1229 (citation omitted). *Contra* *Bucquet v. Livingston*, 129 Cal. Rptr. 514, 519–20 (Ct. App. 1976) (finding standing for the plaintiff to bring an action for legal malpractice under the California balancing of factors test in facts analogous to *Stept*).

83. *See, e.g., O’Neill v. Sacher*, 526 So. 2d 771, 772 (Fla. Dist. Ct. App. 1988) (“[W]here an ambiguity in testamentary instruments drafted by an attorney does not result in a frustration of testamentary intent there is no liability to a non-client.”).

84. *Id.*; *see also O’Neill v. Sacher*, 451 So. 2d 1032, 1033 (Fla. Dist. Ct. App. 1984) (“At the heart of this litigation is a conflict among provisions of the daughter’s 1974 trust, the mother’s will and the codicil to the mother’s will concerning the responsibility to pay expenses for the Plantation Key residence while Mr. Austin lives there.”).

85. *O’Neill*, 526 So. 2d at 772.

86. 550 N.W.2d 202 (Mich. 1996).

intent by disinheriting the testator's daughter, failed to exercise a general power of appointment to exclude the daughter as a beneficiary of the testator's marital trust.⁸⁷ Similarly, in *Kirgan v. Parks*,⁸⁸ the Maryland Supreme Court held that no cause of action for malpractice existed when "the will is valid, the testamentary intent *as expressed in the will* has been carried out, and there is no concession of error by the [drafting] attorney."⁸⁹

3. *The Third-Party Beneficiary Contract Theory*

The balancing of factors test, although grounded in tort law, provides a remedy similar to the third-party beneficiary approach, which is based on contract law.⁹⁰ Unlike jurisdictions allowing intended beneficiaries standing to bring actions under tort or contract theories,⁹¹ attorneys in jurisdictions adopting tests based on third-party beneficiary contract law are only liable to non-clients when the "primary purpose behind the establishment of the attorney-client relationship is to benefit the non-client."⁹²

In *Pelham v. Griesheimer*, the Illinois Supreme Court, after finding the primary purpose of the attorney-client relationship was an action for divorce, refused to extend the attorney's duty to the children who asserted the attorney was negligent for not ensuring they were named beneficiaries of the couple's life insurance policies.⁹³ The court found that extending a duty to non-clients could create conflicts which would interfere with the attorney-client relationship.⁹⁴

In *Guy v. Liederbach*,⁹⁵ an attorney allowed a beneficiary to sign the will as a witness, thereby voiding the bequest to the beneficiary.⁹⁶ The court rejected the balancing of factors test and tort causes of action and held that the beneficiary's cause of action against the attorney for malpractice could only exist under third-

87. *Id.* at 203–04, 209 ("Plaintiffs' claims depend[ed] on extrinsic evidence beyond the four corners of the will").

88. 478 A.2d 713 (Md. Ct. Spec. App. 1984).

89. *Id.* at 718–19 ("Where the language of a will is plain and unambiguous, no extrinsic evidence is admissible to show that the testator's intention was different from that which the will discloses . . .").

90. See MALLEN & SMITH, *supra* note 8, § 32.4.

91. See, e.g., *Blair v. Lawrence* N.C. ING, 21 P.3d 452, 464 (Haw. 2001) ("Therefore, we hold that, where the relationship between an attorney and a non-client is such that we would recognize a duty of care, the non-client may proceed under either negligence or contract theories of recovery.").

92. Craig D. Martin, Comment, *Liability of Attorneys to Non-Clients: When Does a Duty to Non-Clients Arise?*, 23 J. LEGAL PROF. 273, 275–76 (1999); accord *Pelham v. Griesheimer*, 440 N.E.2d 96, 100 (Ill. 1982) ("[F]or a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party. Under such proof, recovery may be allowed, provided that the other elements of a negligence cause of action can be proved." (citing Comment, *Liability of Lawyers to Third Parties for Professional Negligence in Oregon*, 60 OR. L. REV. 375, 385 (1981))).

93. 440 N.E.2d at 97, 101.

94. See *id.* at 101.

95. 459 A.2d 744 (Pa. 1983).

96. *Id.* at 747.

party beneficiary contract theory,⁹⁷ remanding the case for further proceedings.⁹⁸ Utilizing the third-party beneficiary analysis from the *Restatement (Second) of Contracts* section 302(1),⁹⁹ the court adopted a two-part test to determine when a beneficiary has standing to enforce the attorney-client contract through an action for legal malpractice.¹⁰⁰ In order for a beneficiary to have standing under the Pennsylvania rule, the beneficiary must prove enforcement of the contract is “appropriate to effectuate the intention of the parties” and that the client intended “to give the beneficiary the benefit of the promised performance.”¹⁰¹

The holding in *Guy* and the language of section 302(1) are consistent with the language in section 51 of the *Restatement (Third) of the Law Governing Lawyers*,¹⁰² which imposes the following duty of care on attorneys:

- [A] lawyer owes a duty to use care . . .
- (3) to a nonclient when and to the extent that:
 - (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer’s services benefit the nonclient;
 - (b) such a duty would not significantly impair the lawyer’s performance of obligations to the client; and
 - (c) the absence of such a duty would make enforcement of those obligations to the client unlikely¹⁰³

Thus, the *Restatement (Third) of the Law Governing Lawyers*, although much narrower in scope than the *Restatement (Second) of Contracts*, concurs with the Pennsylvania rule from *Guy* and with other jurisdictions that have allowed liability based on a third-party beneficiary contract theory.

97. *Id.* at 752 (“[A]lthough a plaintiff on a third party beneficiary theory in contract may in some cases have to show a deviation from the standard of care, as in negligence, to establish breach, the class of persons to whom the defendant may be liable is restricted by principles of contract law, not negligence principles relating to foreseeability or scope of the risk.”).

98. *Id.* at 753.

99. *Id.* at 751.

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

RESTATEMENT (SECOND) OF CONTRACTS § 302(1) (1979).

100. See *Guy*, 459 A.2d at 751–52.

101. *Id.* at 751, 752 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 302).

102. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (1998).

103. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(3)(a)–(c).

While Pennsylvania declined to extend privity to allow for tort based actions, some states allow plaintiffs to bring actions based in contract, tort, or both.¹⁰⁴ In *Stowe v. Smith*, the testator hired an attorney to prepare a will that would place half of her estate in trust to be distributed to the plaintiff once he reached fifty years of age, but if the plaintiff died before turning fifty, the plaintiff's issue would receive the trust's assets.¹⁰⁵ The attorney prepared the will and informed the testator that it comported with her instructions.¹⁰⁶ Relying on the attorney's representations, the testator signed the will without reading it.¹⁰⁷ The testator died six days after executing the will.¹⁰⁸ After the will was admitted to probate, the plaintiff learned the attorney had erroneously drafted the will in such a manner that the assets of the trust were to be distributed to the plaintiff's issue when the plaintiff attained the age fifty rather than to the plaintiff.¹⁰⁹ After appealing the probate of the will based on the attorney's negligence, the plaintiff entered a settlement in which he received three-quarters of the share the testator had intended the plaintiff to receive.¹¹⁰

In *Stowe*, the issue was not whether the testator's intent as expressed in the will was frustrated or whether the will was defective. Instead, the question was whether the beneficiary, despite the validity of the will, had standing to bring an action against the attorney whose negligence frustrated the testator's intended *effect* of the will.¹¹¹ The court found that the intended beneficiary had standing to bring the action:

If the [attorney] thwarted the wishes of the testatrix, an intended beneficiary would also suffer an injury in that after the death of the testatrix the failure of her testamentary scheme would deprive the beneficiary of an intended bequest. It therefore follows that the benefit which the plaintiff would have received under a will prepared in accordance with the contract is so directly and closely connected with the benefit which the [attorney] promised to the testatrix that under the allegations of the complaint the plaintiff would be able to enforce the contract.¹¹²

104. See, e.g., *Blair v. Lawrence* N.C. ING, 21 P.3d 452, 464 (Haw. 2001) (allowing recovery under actions based in contract or tort); *Stowe v. Smith*, 441 A.2d 81, 84 (Conn. 1981) (allowing both contract and tort actions) (citations omitted).

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

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. See *id.* at 84 ("Because no invalidity appears on the face of the will, the present case may very well present greater obstacles to recovery than cases in which intended beneficiaries brought actions against attorneys who prepared ineffective wills.").

112. *Id.* at 83 (citing 4 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS §§ 782, 786 (1951); 2 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 357 (3d. ed. 1959)).

B. Jurisdictions Maintaining Strict Privity

Despite the move away from strict privity that began in California in the 1960s, a number of states have held fast to the strict privity requirement in legal malpractice actions.¹¹³ Courts in these jurisdictions have refused to allow non-client intended beneficiaries standing to bring malpractice actions under any theory of recovery.

For example, New York maintains a clear rule that attorneys are not liable to third parties for professional negligence absent fraud, maliciousness, or collusion.¹¹⁴ In *Viscardi v. Lerner*, the plaintiffs contended the attorney's negligence in drafting the testator's will destroyed their inheritance.¹¹⁵ The plaintiffs argued that had the will been drafted as the testator intended, they would have inherited one-half of the estate as residuary beneficiaries.¹¹⁶ As evidence of the testator's true intent, the plaintiffs introduced handwritten instructions from the testator to his attorneys.¹¹⁷ The court in *Viscardi* "decline[d] to depart from the firmly established privity requirement in order to create a specific exception for an attorney's negligence in will drafting" and held that "dismissal of the complaint was proper on the basis of the lack of privity between the plaintiffs and the [attorneys] who drafted the subject will."¹¹⁸

New York courts have upheld the strict privity requirement in denying claims brought by the estate and beneficiaries when an attorney's failure to properly direct the execution of a will resulted in failure of part of the will.¹¹⁹ Likewise, a New York court, using the term "privity" as a term of art to mean the attorney-client relationship rather than contractual privity,¹²⁰ found that a law firm that represented

113. *Mali v. De Forest & Duer*, 553 N.Y.S.2d 391, 392 (App. Div. 1990) (citing *Viscardi v. Lerner*, 510 N.Y.S.2d 183, 185 (App. Div. 1986); *Rossi v. Boehner*, 498 N.Y.S.2d 318, 318–19 (App. Div. 1986)) (holding that attorneys "are not liable to the beneficiaries of such will or other third parties not in privity who might be harmed by their professional negligence"); *Barcelo v. Elliot*, 923 S.W.2d 575, 578 (Tex. 1996) ("[T]he 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.").

114. *Mali*, 553 N.Y.S.2d at 392 (citing *Viscardi*, 510 N.Y.S.2d at 185; *Rossi*, 498 N.Y.S.2d at 318); *Estate of Spivey v. Pulley*, 526 N.Y.S.2d 145, 146 (App. Div. 1988). *But see* *Crossland Sav. FSB v. Rockwood Ins. Co.*, 700 F. Supp. 1274, 1282, 1284 (S.D.N.Y. 1988) (allowing a third party to bring a legal malpractice action "[w]hen a lawyer at the direction of her client prepares an opinion letter which is addressed to the third party or which expressly invites the third party's reliance.").

115. *Viscardi*, 510 N.Y.S.2d at 185.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Estate of Spivey*, 526 N.Y.S.2d at 146, 147 ("[S]ince the decedent's estate suffered no pecuniary loss by virtue of the alleged malpractice and since . . . there existed no privity between it and the defendant . . . the decedent's estate possesses no cause of action against the defendant in its own right.").

120. *See Mali v. De Forest & Duer*, 553 N.Y.S.2d 391, 392 (App. Div. 1990). Privity is defined as "[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter. . . ; mutuality of interest." BLACK'S LAW DICTIONARY 1237 (8th ed. 2004). "[P]rivity of Contract" is defined as "[t]he relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so." *Id.*

the family in estate planning and other matters was not in privity with the plaintiff with respect to the will where the firm prepared the will for the plaintiff's father, under which the plaintiff was the personal representative and a beneficiary.¹²¹ Even when the beneficiaries of the will arranged for and paid for the attorney's services, New York declined to find the beneficiaries had standing to sustain an action against the attorney for malpractice.¹²²

Unlike these New York cases that summarily dismiss arguments for relaxed privity, in *Barcelo v. Elliott*,¹²³ the Texas Supreme Court detailed the approaches of other jurisdictions and its reasons for rejecting them.¹²⁴ In *Barcelo*, the plaintiffs, who were remainder beneficiaries under a trust the probate court had found invalid, sued the attorney who drafted the trust for malpractice, claiming the attorney's "negligence caused the trust to be invalid, resulting in foreseeable injury to the plaintiffs."¹²⁵

The court in *Barcelo* rejected the broad cause of action created by the balancing of factors test because "[s]uch 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."¹²⁶ The court further reasoned that "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."¹²⁷

The court further expressed concern about eroding the policy underpinning the rule of strict privity.¹²⁸ Although some jurisdictions "limited the cause of action to beneficiaries specifically identified in an invalid will or trust," the *Barcelo* court found that a number of situations may arise which could create conflict between the beneficiary's interests and the interests of the client.¹²⁹

The *Barcelo* court also refused to allow actions for legal malpractice based on a third-party beneficiary contract theory because in Texas legal malpractice actions are grounded in tort.¹³⁰ The Texas Supreme Court then reaffirmed its "bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent" in order to "ensure that attorneys may in all cases zealously

121. *Mali*, 553 N.Y.S.2d at 392 (finding that, although the law firm represented the plaintiff and "were long time legal advisors to the entire family," the plaintiff was not in privity with the firm with regard to the will).

122. *Conti v. Polizzotto*, 663 N.Y.S.2d 293, 294 (App. Div. 1997).

123. 923 S.W.2d 575 (Tex. 1996).

124. *Id.* at 577-79.

125. *Id.* at 576.

126. *Id.* at 578.

127. *Id.*

128. *Id.*

129. *Id.* ("Suppose, for example, that a properly drafted will is simply not executed at the time of the testator's death. The document may express the testator's true intentions, lacking signatures solely because of the attorney's negligent delay. On the other hand, the testator may have postponed execution because of second thoughts regarding the distribution scheme. In the latter situation, the attorney's representation of the testator will likely be affected if he or she knows that the existence of an unexecuted will may create malpractice liability if the testator unexpectedly dies.").

130. *Id.* at 579.

represent their clients without the threat of suit from third parties compromising that representation.”¹³¹

Ohio and Nebraska, like New York and Texas, have maintained the strict privity requirement for legal malpractice actions.¹³² Consistent with the reasoning of the Texas Supreme Court in *Barcelo*, in *Simon v. Zipperstein*, the Ohio Supreme Court explained an attorney’s obligation “is to direct his attention to the needs of the client, not to the needs of a third party not in privity with the client.”¹³³

V. ANALYZING THE FACTS OF *HENKEL V. WINN* UNDER THE DOMINANT TESTS

In *Henkel*, the South Carolina Court of Appeals noted that whether an intended beneficiary has standing to bring an action for legal malpractice for negligent will drafting was an issue of first impression in South Carolina.¹³⁴ The court, however, declined to address the issue and decided the case on other grounds.¹³⁵ This Part applies the tests for standing discussed in Part IV—the balancing of factors test, the Florida-Iowa rule, the third-party beneficiary contract theory, and strict privity requirement—to the facts in *Henkel* and attempts to predict both the likely outcome under each test and which approach the South Carolina Supreme Court will probably adopt in deciding the question in the future.¹³⁶

A. *Henkel Under the Balancing of Factors Test*

Under the balancing of factors test, courts evaluate “the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to [the plaintiff], 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

131. *Id.* at 578–79.

132. See *Lilyhorn v. Dier*, 335 N.W.2d 544, 555 (Neb. 1983) (citing *St. Mary’s Church v. Tomek*, 325 N.W.2d 164, 165 (Neb. 1982)) (holding the duties lawyers owe clients in will drafting do not extend to third parties); *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.”). But see *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 789 (Tex. 2006) (recognizing 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[,]” and finding that allowing personal representatives to bring legal malpractice suits on behalf of estates in estate planning “strikes the appropriate balance between providing accountability for attorney negligence and protecting the sanctity of the attorney-client relationship”).

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

134. 346 S.C. 14, 18 n.3, 550 S.E.2d 577, 579 n.3 (Ct. App. 2001).

135. *Id.*

136. Note that a court applying any of these tests will determine whether a frustrated will beneficiary has standing to bring an action based on the pleadings, see S.C. R. Civ. P. 12(b)(6); if the pleadings are sufficient to survive demurrer, after limited factual determination during discovery, see S.C. R. Civ. P. 56.

preventing future harm.”¹³⁷ In *Henkel*, the testator intended the transaction (the will) to benefit the plaintiff, his children, and his sisters.¹³⁸ In fact, the will did confer a benefit on the plaintiff, although not to the extent the plaintiff contended the testator intended.¹³⁹

The foreseeability of harm to the intended beneficiary was minimal in *Henkel*. According to the record, the attorneys mailed the will and a cover letter explaining the will to the plaintiff and the testator so each could review the will before executing it.¹⁴⁰ Thus, the facts in *Henkel* support the conclusion that the attorneys acted to ensure the testator understood the effect of the will and to minimize the risk of harm or mistake. Consequently, harm to the plaintiff was far from certain.

The trial court, rather than the appellate court, addressed the factor of the closeness of the connection between the defendant’s conduct and the injury suffered. The trial court found the plaintiff’s and the testator’s failure to object to the will before the testator’s death was an intervening and superseding cause of the plaintiff’s injury.¹⁴¹

The testator in *Henkel* reviewed and executed a will and later amended the will, which was admitted to probate after the testator’s death.¹⁴² As a result, allowing the plaintiff beneficiary standing to bring an action for malpractice would serve little purpose in preventing future harm. Thus, it seems unlikely that a court applying the balancing of factors test would find the plaintiff in *Henkel* had standing to bring an action for legal malpractice. However, a court utilizing this test might still grant the plaintiff standing to bring an action for malpractice because some courts applying the test have emphasized the test’s first factor—the extent to which the transaction was intended to affect the plaintiff.¹⁴³ The facts in *Henkel* undoubtedly satisfy the first factor.

B. *Henkel Under the Florida-Iowa Rule*

If a South Carolina court were to apply the Florida-Iowa rule, plaintiffs like *Henkel* would not have standing to bring an action for legal malpractice. Under this rule, “liability to the testamentary beneficiary can arise only if, due to the attorney’s professional negligence, the testamentary intent, *as expressed in the will*, is frustrated, and the beneficiary’s legacy is lost or diminished as a direct result of that negligence.”¹⁴⁴ The *Henkel* court found the express language of the will was clear

137. *Lucas v. Hamm*, 364 P.2d 685, 687 (Cal. 1961) (en banc) (citing *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958) (en banc)).

138. *Henkel*, 346 S.C. at 16–17, 550 S.E.2d at 578.

139. *Id.* at 16, S.E.2d at 578.

140. *Id.*

141. See Order, *supra* note 27, at 9; *Henkel*, 346 S.C. at 16, 550 S.E.2d at 578.

142. *Henkel*, 346 S.C. at 16, 550 S.E.2d at 578.

143. See, e.g., Fogel, *supra* note 42, at 282 (“Even though ‘intent to affect’ is merely one of the six *Lucas* factors, courts following *Lucas* rely most heavily on this factor.”).

144. *DeMaris v. Asti*, 426 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1983); *Schreiner v. Scoville*, 410 N.W.2d 679, 683 (Iowa 1987) (“[W]e hold a cause of action ordinarily will arise only when as a direct result of the lawyer’s professional negligence the testator’s intent as expressed in the testamentary

and unambiguous.¹⁴⁵ Therefore, a South Carolina court applying the Florida-Iowa rule will refuse to consider extrinsic evidence offered by plaintiffs to show the testator's intent was anything other than the intent expressed in the will, effectively precluding plaintiffs from presenting extensive evidence to support their claims.

C. *Henkel Under the Third-party Beneficiary Contract Theory*

To succeed in jurisdictions applying the third-party beneficiary contract theory, a beneficiary must prove enforcement of the contract is "appropriate to effectuate the intention of the parties" and that the client intended "to give the beneficiary the benefit of the promised performance."¹⁴⁶ The limited facts developed in *Henkel* do not lend themselves to an evaluation under this theory. Because the court found the will controlling and free of latent defects, it refused to consider extrinsic evidence of the testator's intent.¹⁴⁷ Accordingly, under these limited facts, the first prong of the test would fail because there was no tangible evidence that the will did not effectuate the testator's true intent.

D. *Henkel Under the Strict Privity Requirement*

States adhering to a strict privity requirement maintain that attorneys are not liable to third parties for professional negligence absent fraud, maliciousness, or collusion.¹⁴⁸ In South Carolina, "an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client."¹⁴⁹

In *Henkel*, the plaintiff did not claim the attorneys committed fraud, acted maliciously, or participated in a conspiracy in order to deprive her of the benefit she believed the testator intended her to receive.¹⁵⁰ Furthermore, under the strict privity requirement, an attorney-client relationship must exist between the plaintiff and the

instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized.").

145. *Henkel*, 346 S.C. at 19, 550 S.E.2d at 579 ("Because the will was properly executed and probated, we find that [the plaintiff] cannot establish that [the testator's] intent was anything other than as expressed in [the] will.").

146. *Guy v. Liederbach*, 459 A.2d 744, 751, 752 (Pa. 1983) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 302(1) (1979)).

147. *Henkel*, 346 S.C. at 19, 550 S.E.2d at 579 ("A will evidences the testator's intent at the moment of execution and may differ dramatically from statements he or she may have made in the past. Therefore, extrinsic evidence of intent may not be considered absent a latent ambiguity in the will.") (footnote omitted).

148. See *Mali v. De Forest*, 553 N.Y.S.2d 391, 392 (App. Div. 1990) (citing *Viscardi v. Lerner*, 510 N.Y.S.2d 183, 185 (App. Div. 1986); *Rossi v. Boehner*, 498 N.Y.S.2d 318, 318–19 (App. Div. 1986)); *Simon v. Zipperstein*, 512 N.E.2d 636, 638 (Ohio 1987).

149. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) (quoting *Gaar v. N. Myrtle Beach Realty Co.*, 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986)); see *Am. Fed. Bank v. No. One Main Joint Venture*, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996) ("Before a claim for malpractice may be asserted, there must exist an attorney-client relationship.").

150. *Henkel*, 346 S.C. at 17, 550 S.E.2d at 578.

attorney in order for the plaintiff to have standing to bring an action for legal malpractice.¹⁵¹ Although a plaintiff, such as in *Henkel*, may allege attorneys were engaged to jointly represent the plaintiff and the testator, authority from strict privity jurisdictions suggests that some courts may strictly construe what appears to be joint representation as separate engagements with regard to wills.¹⁵²

VI. THE APPROACH SOUTH CAROLINA COURTS WILL LIKELY ADOPT

A South Carolina court addressing the issue of attorney liability to third party beneficiaries would probably adopt the Florida-Iowa rule. In essence, *Henkel* is an example of an application of the Florida-Iowa rule. The court in *Henkel*, like courts following the Florida-Iowa rule, refused to look beyond the four corners of the will for a contrary intent of the testator because the will, on its face, was clear and unambiguous.¹⁵³ The *Henkel* court found that the will had been properly executed and submitted for probate and that the will had conferred a benefit upon the intended beneficiary,¹⁵⁴ albeit less than the beneficiary asserted the testator intended.¹⁵⁵

Thus, as courts following the Florida-Iowa rule have held, the mere fact that the magnitude of the benefit is not what the beneficiary anticipated does not give that frustrated beneficiary a cause of action for legal malpractice; instead, the plaintiff must show that the drafting attorney's negligence frustrated the testator's intent as expressed in the will.¹⁵⁶

VII. CONCLUSION

When a South Carolina appellate court decides the issue of whether an intended beneficiary has standing to bring an action against an attorney for negligent will drafting, South Carolina will probably adopt the Florida-Iowa rule. Although strict adherence to the testator's expressed intent in the will may preclude actions against some attorneys who were truly negligent in preparing the instrument, the "four-corners" approach under the Florida-Iowa rule does not throw open the doors of the courtroom to every frustrated or disappointed beneficiary by eroding the privity

151. See, e.g., *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 783 (Tex. 2006) ("[I]n Texas, a legal malpractice claim in the estate-planning context may be maintained only by the estate planner's client.").

152. See, e.g., *Conti v. Polizzotto*, 663 N.Y.S.2d 293, 294 (App. Div. 1997) ("The plaintiffs' status as beneficiaries of that will, and their mere claim that they instructed the [attorneys] to draft the instrument in accordance with the decedent's expressed intentions, fail to suggest the existence between the parties of the type of relationship necessary to sustain this [legal malpractice] action.").

153. *Henkel*, 346 S.C. at 19, 550 S.E.2d at 579 ("Because the will was properly executed and probated, we find that Wife cannot establish that Husband's intent was anything other than as expressed in his will.").

154. *Id.* at 18, 550 S.E.2d at 579.

155. *Id.* at 16, 550 S.E.2d at 578.

156. See *DeMaris v. Asti*, 426 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1983); *Schreiner v. Scoville*, 410 N.W.2d 679, 683 (Iowa 1987).

requirement to a point of uncertainty. Allowing intended beneficiaries to bring legal malpractice actions where the drafting attorney's negligence frustrated testator's intent as expressed in the will and rendered the will ineffective, will provide a remedy for frustrated beneficiaries without invading or adversely affecting the province of the attorney-client relationship.

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