

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR THE NEW CASTLE COUNTY**

DOUGLAS PINCKNEY,            )  
  )  
    Plaintiff,                    )  
  )  
                  v.                )  
  )  
BRUCE W. TIGANI,            )  
  )  
    Defendant.                 )

C.A. No. 02C-08-129 FSS

Submitted: July 30, 2004  
Decided: November 30, 2004

**OPINION AND ORDER**

Decision After Hearing and Briefing  
*Judgment for Defendant*

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Media, Pennsylvania, 19063. Attorney for Plaintiff.

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Delaware, 19899-1630. Attorneys for Defendant.

**SILVERMAN, J.**

This is a legal malpractice case. Plaintiff is a named beneficiary of a testamentary trust written by Defendant, a member of Delaware's and Pennsylvania's Bars, for a settlor living in Pennsylvania. The trust was drafted correctly, executed by the settlor, and it was enforceable. The problem is that although the estate probably had enough assets to fund the trust fully, due to restrictions on the assets Plaintiff only received a portion of the bequest. Plaintiff holds the attorney liable for not reviewing the settlor's finances and for not advising her to change her estate plan to free up more assets for Plaintiff.

The attorney's defense is in depth. First, Defendant contends that Plaintiff has no cause of action against him because Plaintiff was not Defendant's client. Next, Defendant contends that he was neither hired nor duty-bound to review the settlor's finances. He further relies on limitations and warnings in his letter of engagement with the settlor. Finally, Defendant argues that if his negligence is established somehow, Plaintiff has not proved Defendant caused Plaintiff's loss because no one can say what, if anything, settlor would have done had she been told that her assets were restricted and that she would have to change her estate plan to accomplish the trust's purpose.

The court, therefore, must consider whether Pennsylvania's or Delaware's law applies; whether Plaintiff has a cause of action under the applicable

law, i.e. whether Defendant had a duty to anyone to investigate the settlor's assets or provide better warning and, if so, whether Defendant was negligent. Finally, the court must consider whether Plaintiff proved that any negligence caused damage. The second issue just mentioned, to whom does a scrivener owe a duty of care, is a matter of first impression in Delaware.

Although the court's analysis is long and involved, this is not a close case. Plaintiff is confounded at every step. In summary, as a third-party beneficiary, Plaintiff has no cause of action under Pennsylvania's tort law. He also has failed to state a claim under Delaware law. Furthermore, even if he had a cause of action, Plaintiff does not have a case under Delaware's tort law because he has no expert who opines that Defendant violated Delaware's standard of care. Plaintiff cannot prove that Defendant was negligent, much less that, but for Defendant's negligence, Plaintiff would have received the full bequest.

## I.

On July 14, 1999, Joanne Pinckney contacted Defendant on Jeanne Pinckney's behalf to revise Jeanne's estate plan. As mentioned, Defendant is a lawyer admitted in Delaware and Pennsylvania. He specializes in estate work. Joanne told Defendant that Jeanne, Joanne's mother, was concerned that Jeanne's grandson, Plaintiff, would be disinherited by his father, Robert, and Jeanne wanted

to leave something for Plaintiff. Neither Joanne nor Jeanne followed-up with Defendant for several months, however. In December 1999, Defendant says that Matt Brown, Jeanne's financial advisor, contacted him on Jeanne's behalf. Defendant says that he told Brown that he was still waiting for financial information requested in July 1999, and that Brown said he would contact Joanne and remind her to send the financials. Plaintiff denies that. He suggests that had Brown been asked, Brown would have provided the necessary financial records.

On February 1, 2000, Joanne contacted Defendant again. She told him Jeanne's health was deteriorating and Jeanne wanted a Supplemental Declaration of Trust, quickly. Defendant had created a trust for Jeanne in 1995, and she wanted to amend it to divert \$250,000 from Robert's share to Plaintiff. Defendant says that he was told that there was no time to fully review all of Jeanne's finances and that "Jeanne had plenty. Jeanne just wants you to prepare the amendment."<sup>1</sup> Plaintiff denies that, too.

Using materials from the 1995 trust and the Irrevocable Life Insurance Trust prepared by another law firm, Defendant correctly drafted a proper Supplemental Declaration of Trust. He also spoke with Jeanne on February 7, 2000 to ensure that the modified trust was what Jeanne wanted, that he was authorized to

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<sup>1</sup> R. at 70:4-6.

deal with Joanne, and to confirm that Jeanne was not subject to undue influence. Jeanne listed her assets for Defendant: a \$1 million insurance policy and \$675,000 remaining from her husband's estate. Defendant says he again requested financial information and told Jeanne of the risk of proceeding without a full financial review. Pointing to the lack of any writing memorializing a warning, Plaintiff questions whether Defendant gave one.

Satisfied that the Supplemental Declaration of Trust reflected Jeanne's testamentary intent, Defendant sent Jeanne a draft on February 8, 2000, accompanied by a letter confirming his terms of engagement. The letter outlined the scope of representation, namely drafting the supplemental trust. The letter also explained:

Since this Supplemental Declaration of Trust is being forwarded to you on an expedited basis and without the opportunity to review and discuss your entire estate plan and the current value and titling of your assets, our engagement in this matter is limited to preparing the enclosed document in accordance with your instructions during our February 7, 2000 telephone conversation.

Defendant argues that his letter effectively limited the scope of his representation, while Plaintiff argues it did not. The letter, however, indisputably established that Defendant's contractual obligations did not include financial research. Those issues are discussed below.

In any event, Jeanne sent a letter on February 12, 2000, to Defendant

confirming receipt and her wish to proceed. On February 15, 2000 the Supplemental Declaration of Trust was in final form and sent to Jeanne with instructions for execution. Jeanne signed it on February 22, 2000 and returned a copy to Defendant on February 23, 2000.

On August 14, 2000, Jeanne died. Her estate could not fund the entire \$250,000 bequest to Plaintiff. As it turned out, a lot of Jeanne's assets were tied up in IRA's. Jeanne could have seen to it that the trust was funded, but she would have had to rely on a paid tax advisor to figure out how to rearrange her assets and what that would mean to her entire estate plan. This was not a situation, as Plaintiff implies, where Jeanne could have simply announced, "Take \$250,000 from Robert and give it to Douglas." In order to see to it that Plaintiff received \$250,000, Jeanne would have had to have made several decisions, starting with the decision to pay for more advice.

It is not clear that Jeanne was even willing to spend more money for advice, much less to rearrange her estate. Her financial advisor, Matt Brown, mentioned above, testified by deposition that he thought Jeanne did not want Defendant to review her financial picture. And although the record is complete, the court cannot determine either what it would have cost Jeanne in fees and taxes or how the other beneficiaries would have been affected if Jeanne had redrafted her estate

plan to be certain Plaintiff received the full bequest.

Eventually, Plaintiff received \$118,250 from a settlement with Jeanne's estate. Plaintiff executed a release for the estate, but reserved the right to pursue legal action against Defendant. Now, Plaintiff seeks the difference between the bequest and the settlement.

## **II.**

Plaintiff filed suit on August 12, 2002. Defendant answered on October 15, 2002. Discovery proceeded and on May 15, 2003, the parties filed cross-motions for summary judgement. On February 6, 2004 the court heard the motions, denying them without prejudice pending briefing. On February 13, 2004, the court heard Defendant testify. Otherwise, the evidence was submitted on paper, including depositions. Although Plaintiff bears the burden of proof, Defendant filed the first post-trial brief, on June 14, 2004. On July 15, 2004, Plaintiff submitted his opening post-trial brief. On July 29, 2004, Defendant filed his post-trial reply brief.

## **III.**

It is not easy to see the precise legal theory Plaintiff is pursuing. The complaint consists of twenty-eight paragraphs comprising one count. The first 21 paragraphs lay out the case's factual background. The remaining paragraphs articulate the cause of action. Specifically, the complaint alleges in its final

paragraphs:

23. At all times relevant, Defendant knew or should have known that Plaintiff was an intended third-party beneficiary of decedent's Will and Trust.
24. With knowledge that Plaintiff was a third-party beneficiary, Defendant was charged with a duty to ensure that Plaintiff was to receive the distribution provided for in the Trust.
25. The Defendant Tigani owed the Plaintiff as an intended third-party beneficiary of the Decedent's Last Will and Testament, the applicable standard of care required of lawyers engaged in estate planning.
26. Defendant Tigani deviated from the applicable standard of care required of lawyers and committed a culpable act of malpractice by failing to adequately advise the Decedent that in order to fund the Plaintiff's distribution provided in the Trust, that Decedent needed to change the beneficiary of her IRA accounts to her estate or to Trust.
27. As a result and direct proximate cause of the Defendant Tigani's negligence, the Plaintiff was damaged in that he failed to receive the full share of the Decedent's estate as intended by the Decedent.

Although, as shown above, the complaint charges Defendant with knowing that Plaintiff was a third-party beneficiary of the trust, the actual accusation concerns Defendant's alleged breach of "the standard of care." Moreover, the

complaint tries to allege that Defendant's "negligence" was the "proximate cause" of damage to Plaintiff. Thus, despite its mentioning Plaintiff's status as a third-party beneficiary, the complaint is for negligence, not breach of contract. Plaintiff simply alleges that Defendant owed Plaintiff, as a third-party beneficiary, a duty of care. Plaintiff, therefore, must prove all elements of his tort case -- negligence, causation and damages -- by a preponderance of the evidence.<sup>2</sup> Further, "[I]t is well settled under Delaware law that claims of legal malpractice must be supported by expert testimony."<sup>3</sup>

In passing, the court observes that Plaintiff's foregoing a contract claim was not oversight. First, Defendant's letter of engagement, presented above, effectively disclaims contractual liability for anything besides drafting. Moreover, even without the written disclaimer, Plaintiff's damage claim as a third-party beneficiary under this case's facts is attenuated and insubstantial.

#### IV.

The first issue is which state's law, Delaware's or Pennsylvania's, applies here. That matters because, as discussed below, under Pennsylvania law a

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<sup>2</sup> *Reybold Group, Inc. v. Chemprobe Technologies, Inc.*, 721 A.2d 1267, 1269-70 (Del. 1998).

<sup>3</sup> *Giordano v. Heiman*, Del. Supr. No. 458, 2000, Walsh, J. (January 18, 2001)(ORDER at 3).

disappointed beneficiary cannot pursue a tort claim against the estate's lawyer unless they had an attorney-client relationship, which Plaintiff did not have with Defendant. In Pennsylvania, a testator's lawyer has no duty to the beneficiary absent privity between them. If, however, Delaware's law applies and if it recognizes a duty to a beneficiary, that at least would allow Plaintiff to go forward.

Just as the complaint does not state clearly the legal theory it relies on, contract, tort or both, it also is unclear as to which State's law Plaintiff relies on, Pennsylvania's or Delaware's. Although the estate documents dictate that the trust will be governed by Pennsylvania law, this is a negligence action. So, it remains to be decided whether Delaware's or Pennsylvania's tort law applies. Delaware's conflict of laws analysis provides that the law of the state with "the most significant relationship" governs in tort cases.

Delaware has adopted the Restatement (Second) of Conflicts § 145, thus it controls whether Delaware's or Pennsylvania's law applies.<sup>4</sup> Section 145 gives priority to the state with most significant relationship to the occurrence and parties, using the principles described in Restatement (Second) of Conflicts § 6. Section 6 lists the following factors: (1) interstate and international system needs; (2) relevant forum policies; (3) relevant policies of other interested states in the particular issue;

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<sup>4</sup> *Travelers Indemnity Company v. Lake*, 594 A.2d 38, 47 (Del. 1991).

(4) protecting justified expectations; (5) basic policies underlying the field of law; (6) certainty, predictability, and uniformity of result; and (7) ease in determining and applying the law. Section 145, in turn, lists the relevant contacts to be considered when applying § 6, including: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) domicile; and (4) the place where the relationship between the parties is centered.

Here, the court must determine the site of the negligence for § 145's purposes. *LNC Investments, Inc. v. First Fidelity Bank, National Association*,<sup>5</sup> addresses a similar conflict of laws issue between New York law, which has a privity bar, and New Jersey law, which permits non-clients to bring malpractice actions. A group of investors in a trust sued the trustee, who then sought indemnification from the trust's lawyers. New York's courts, similar to Delaware's, focus on the parties' domiciles and the site of the alleged tort.<sup>6</sup> In *LNC Investments*, the defendant law firm was domiciled in New York, and the trustee was domiciled in New Jersey. The trust was executed and delivered in New York and governed by New York law. The court noted, however, that the "locus of the tort of professional malpractice is

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<sup>5</sup> 935 F.Supp. 1333 (S.D.N.Y. 1996).

<sup>6</sup> *Id.* at 1350.

somewhat less clear.”<sup>7</sup>

*LNC Investments* determined that the faulty advice was most likely given in New York, where the law firm was based.<sup>8</sup> The court then turned to the forum state, New York, and explained, “A state has a strong interest in regulating the conduct of a law firm licensed to practice within its borders, and a law firm consents to be so regulated when it locates its offices in a particular state.”<sup>9</sup> Thus, *LNC Investments* applied New York law.

Here, Plaintiff is a New Jersey resident. The settlor lived in Pennsylvania. Defendant has been an active member of the Delaware Bar for over twenty years. While Defendant also is a member of the Pennsylvania Bar, he maintains an office in Wilmington, Delaware. Any advice provided or work completed by Defendant for the settlor probably was performed in Delaware; therefore, although the injury occurred in Pennsylvania, Delaware is the place where the conduct giving rise to the injury occurred. Wilmington is where the relationship between the parties was centered because that is where all consultation, drafting and advice by Defendant were performed. Moreover, Delaware’s courts have a special

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1350-51.

interest in the standards of practice for Delaware lawyers. The question is close, but under the Restatement (Second) of Conflicts § 145's analysis, Delaware has the most significant relationship to the case and thus, Delaware law applies.

## V.

The second issue is whether, as a matter of law, Defendant owed any duty of care to Plaintiff. There are several approaches to standing in the estate planning, legal negligence context, including: strict privity, abandonment of privity altogether, and various middle-ground approaches, including Pennsylvania's third-party beneficiary rule.

### A. Strict Privity

Defendant urges the court to require strict privity by following *Robinson v. Benton*,<sup>10</sup> an Alabama Supreme Court decision reflecting the minority view barring malpractice actions absent privity, a direct relationship between the defendant lawyer and the plaintiff. *Robinson* involved an attorney who was directed by his client to destroy her will. *Robinson* failed to do it, and stepchildren that the testatrix wanted to disinherit took an equal share with her children. Citing Texas law,<sup>11</sup> *Robinson* upheld the privity bar and refused to consider the claim.

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<sup>10</sup> 842 So.2d 631 (Ala. 2002).

<sup>11</sup> *Id.* at 636, citing *Barcelo v. Elliot*, 923 S.W.2d 575 (Tex. 1996).

Strict privity, as applied in *Robinson*, is the approach historically followed by courts, but it has become outdated. In order to recover for legal malpractice, plaintiff must show that the attorney owed a duty of care to plaintiff, the attorney breached that duty, and the attorney's negligence proximately caused plaintiff's injury and damages.<sup>12</sup> Privity is a contract-based principle, preventing actions against the attorney by parties who do not have a significant nexus with the attorney.<sup>13</sup> Privity helps establish whether an attorney-client relationship exists. That relationship triggers the duty, the first prong of liability.

Strict privity, the rule in Alabama,<sup>14</sup> Maryland,<sup>15</sup> Nebraska,<sup>16</sup> Ohio,<sup>17</sup> Texas,<sup>18</sup> and, as mentioned, New York,<sup>19</sup> completely bars malpractice actions by

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<sup>12</sup> RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 8.1, at 555 (4th ed. 1996).

<sup>13</sup> George S. Mahaffey, Jr., *Cause-In-Fact and the Plaintiff's Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal*, 37 SUFFOLK U. L. REV. 393, 403-04 (2004).

<sup>14</sup> *Robinson v. Benton*, 842 So.2d 631, 637 (Ala. 2002).

<sup>15</sup> *Noble v. Bruce*, 709 A.2d 1264, 1275 (Md. 1998).

<sup>16</sup> *Lilyhorn v. Dier*, 335 N.W.2d 554, 555 (Neb. 1983).

<sup>17</sup> *Simon v. Zipperstein*, 512 N.E.2d 636, 638 (Ohio 1987).

<sup>18</sup> *Barcelo*, 927 S.W.2d 28, 30-31.

<sup>19</sup> *Viscardi v. Lerner*, 510 N.Y.S.2d 183, 185 (N.Y. App. Div. 1986).

beneficiaries against estate planning attorneys. Despite the harsh results potentially reached in strict privity states, it is noteworthy that “[e]ven those jurisdictions that profess to follow a strict rule of privity usually do not do so unambiguously . . . . In some of these jurisdictions, the courts explicitly recognize the possibility of exceptions to the rule.”<sup>20</sup> For example, in *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*,<sup>21</sup> the Supreme Court of Texas held that negligent misrepresentation by attorneys is actionable by third parties. The court painstakingly distinguished an earlier, contrary decision: “Under the tort of negligent misrepresentation, liability is not based on the breach of duty a professional owes his or her clients or others in privity, but on an independent duty to the nonclient based on the professional’s manifest awareness of the nonclient’s reliance on the misrepresentation and the professional’s intention that the nonclient so rely.”<sup>22</sup>

In the estate planning context, an attorney is usually sued by a disappointed heir or intended beneficiary rather than the client’s estate. The client’s

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<sup>20</sup> Feinman at 737.

<sup>21</sup> 991 S.W.2d 787 (Tex. 1999).

<sup>22</sup> *McCamish*, 991 S.W.2d at 791; see also Jason D. Pinkall, *From Barcelo to McCamish: A Call to Relax the Privity Barrier in the Estate-Planning Context in Texas*, 37 HOUS. L. REV. 1275 (2000).

death often triggers the action.<sup>23</sup> The client's injury, if discovered in time, is the expense of redrafting the will, whereas the intended beneficiary's loss is the bequest.<sup>24</sup> The prevailing rule now is that under some circumstances an intended beneficiary may bring a negligence action against an attorney. Courts rely on various theories, but the vast majority gives at least some beneficiaries standing to sue estate planning attorneys for legal negligence.

### **B. Non-Privity**

California completely abandoned the privity barrier in *Biakanja v. Irving*,<sup>25</sup> where a non-lawyer prepared a will and failed to have it witnessed properly. *Biakanja* held that the non-lawyer was liable, despite the lack of privity. *Biakanja* was refined three years later, in 1961, by *Lucas v. Hamm*.<sup>26</sup> In *Lucas*, an attorney drafted a trust violating the rule against perpetuities. *Lucas* found that a will's underlying purpose is to benefit the plaintiff beneficiaries; that the harm to the plaintiffs was foreseeable; and that because the testator had died, the important policy

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<sup>23</sup> See Cooper & Kidder, *Privity in Estate Planning Malpractice Actions: The Birth, Death and Resurrection of a Concept*, 17 CUMBERLAND L. REV. 1 (1986).

<sup>24</sup> *Heyer v. Flaig*, 449 P.2d 161, 165 (1969).

<sup>25</sup> 320 P.2d 16 (Cal. 1958).

<sup>26</sup> 364 P.2d 685 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962).

of preventing future harm could only be achieved by extending standing to the beneficiaries.<sup>27</sup> *Lucas* acknowledged that liability could be “large and unpredictable,” but according to *Lucas*, that concern is outweighed by the perceived need to compensate the injured beneficiary.<sup>28</sup> Several jurisdictions, including Washington<sup>29</sup> and Kansas<sup>30</sup> have adopted California’s balancing test, sometimes with minor modifications.<sup>31</sup>

### C. The Restatement (Second) of Contracts

Connecticut,<sup>32</sup> Virginia,<sup>33</sup> Oregon,<sup>34</sup> Michigan<sup>35</sup> and most importantly for present purposes, Pennsylvania have adopted the third-party beneficiary rule articulated in § 302 of the Restatement (Second) of Contracts. Until 1983,

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<sup>27</sup> *Id.* at 688.

<sup>28</sup> *Id.* at 688.

<sup>29</sup> 872 P.2d 1080 (Wash. 1994).

<sup>30</sup> 803 P.2d 42, *modified by* 803 P.2d 205 (Kan. 1990).

<sup>31</sup> MALLEN & SMITH, § 7.13, at 528 n.6; *see Donahue v. Shughart, Thomson, & Kilroy*, 900 S.W.2d 624, 627 (Mo. 1995)(Modifying California’s balancing test).

<sup>32</sup> *Stowe v. Smith*, 441 A.2d 81, 83 (Conn. 1981).

<sup>33</sup> *Copenhaver v. Rogers*, 384 S.E.2d 593, 596 (Va. 1989).

<sup>34</sup> *Hale v. Groce*, 744 P.2d 1289, 1292 (Or. 1987).

<sup>35</sup> *Mieras v. DeBona*, 550 N.W.2d 202, 229 (Mich. 1996).

Pennsylvania required strict privity in order to bring a malpractice action against an attorney who drafted a will.<sup>36</sup> In *Guy v. Liederbach*,<sup>37</sup> relied on by Plaintiff, a named beneficiary was asked by the drafting attorney to witness the will. This triggered the “interested witness” doctrine, which caused the will to become void. The named beneficiary, who was also the executrix, lost her entire inheritance.<sup>38</sup>

*Guy* allowed a limited cause of action. Noting the special nature of professional services agreements, *Guy* maintained the privity requirement in tort actions based on negligence. *Guy* held that “plaintiff must show an attorney-client relationship or a specific undertaking by the attorney furnishing professional services as a necessary prerequisite for maintaining such suits in trespass on a theory of negligence.”<sup>39</sup> In other words, *Guy* adopted strict privity for tort suits against lawyers. And that means Plaintiff does not have standing to bring this malpractice case under Pennsylvania’s law.

*Guy* does, however, permit recovery in some cases under contract law.

*Guy* explains, “The underlying contract is that between the testator and the attorney

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<sup>36</sup> Kelly Burlison Rushin, *Estate Planning Malpractice: Will Alabama Courts Relax the Privity Barrier?*, 52 ALA. L. REV. 1335, 1338 (2001).

<sup>37</sup> 459 A.2d 744 (Pa. 1983).

<sup>38</sup> *Id.* at 746.

<sup>39</sup> *Id.* at 750.

for the drafting of a will. The will, providing for one or more named beneficiaries, clearly manifests the intent of the testator to benefit the legatee.”<sup>40</sup> Thus, as a way to determine standing in contract cases, *Guy* adopts the third-party beneficiary principles in § 302 of the Restatement (Second) of Contracts.

*Guy* holds that a “named legatee” may sue the drafting attorney as an intended third-party beneficiary of the will. *Guy* limits standing to legatees named as “recipient[s] of all or part of the estate,”<sup>41</sup> explaining that standing is thus limited to those “where the intent to benefit is clear and the promisee (testator) is unable to enforce the contract.”<sup>42</sup>

Section 302 of the Restatement (Second) of Contracts provides a remedy to an intended beneficiary if recognizing the beneficiary’s right is “appropriate to effectuate the intention of the parties,” and “the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.”<sup>43</sup> *Guy* requires that the testator’s intent to benefit the plaintiff appear on the face of the

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<sup>40</sup> *Id.* at 750-51.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 747.

<sup>43</sup> *Guy*, 459 A.2d at 751.

instrument, which allows only the specifically named beneficiary to bring suit.<sup>44</sup> This, in turn, also limits the attorney's potential exposure.

If Delaware follows Pennsylvania's approach to standing, Plaintiff loses. But other courts have borrowed third-party beneficiary principles, employing them to define an attorney's duty in malpractice cases. For example, in *Pelham v. Griesheimer*,<sup>45</sup> plaintiffs brought a malpractice claim against their mother's divorce attorney for failing to notify their father's insurance carrier about the divorce decree. The decree named plaintiffs as the primary beneficiaries. Because of the lawyer's alleged oversight, the insurance proceeds went to the second wife.

The trial court dismissed for failure to state a claim, finding no privity between plaintiffs and the defendant-attorney. Plaintiffs' complaint was "couched in terms of negligence, not contract."<sup>46</sup> Even so, *Pelham* held that "the best approach is that plaintiffs must allege and prove facts demonstrating that they are in the nature of third-party beneficiaries of the relationship between the client and the attorney in order to recover in tort."<sup>47</sup> *Pelham* explained: "Analogizing the scope of the duty to

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<sup>44</sup> *Id.* at 750-51.

<sup>45</sup> 440 N.E.2d 96, 97 (Ill. 1982).

<sup>46</sup> *Id.* at 98.

<sup>47</sup> *Id.* at 99.

the concept of third-party direct beneficiary serves the purpose of limiting the scope of the duty owed by an attorney to nonclients.”<sup>48</sup> Ultimately, the plaintiff-children lost in *Pelham*. Although they had standing, the defendant-lawyer was deemed to have had no duty to his client’s children. The lawyer was hired in connection with the mother’s divorce, “not to represent her children’s interest.”<sup>49</sup>

Third-party beneficiary jurisdictions effectively limit liability to a smaller beneficiary class and thus present less challenging proof issues; the beneficiary must at least be named in the testamentary instrument. These jurisdictions focus on protecting the attorney-client relationship between attorney and testator, and do not interfere with attorneys’ loyalty to their clients.

For example, in *Krawczyk v. Stingle*,<sup>50</sup> the intended beneficiaries sued the testator’s attorney because the testator died without signing the trust instruments. The Connecticut Supreme Court held that the intended beneficiaries could not hold the attorney liable for the delay in executing the trust instruments.<sup>51</sup> *Krawczyk* reasoned that permitting such a suit “would not comport with a lawyer’s duty of undivided

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<sup>48</sup> *Id.* at 100.

<sup>49</sup> *Pelham v. Griesheimer*, 440 NE 2<sup>nd</sup> 96, 101 (Del. 1982).

<sup>50</sup> 543 A.2d 733 (Conn. 1988).

<sup>51</sup> *Id.* at 736.

loyalty to the client.”<sup>52</sup>

The court is unwilling to abandon privity outright in Delaware. Privity discourages grave robbing, it gives estates repose and it eliminates courtroom seances. Strict privity, however, invites overly harsh results. Lawyers are not entitled to bury their mistakes. Where a testator’s intent is apparent on the face of a testamentary instrument and the bequest fails solely due to the scrivener’s drafting, a disappointed heir should be allowed to proceed against the scrivener in contract and, perhaps, tort. Where the drafting is correct, yet the bequest fails for other reasons, the disappointed heir must allege facts that irrefutably lay the bequest’s failure at the scrivener’s door. Plaintiff’s allegations fall short.

## VI.

In this case, Plaintiff’s Complaint contains one count: Plaintiff alleges that “Defendant knew or should have known that Plaintiff was an intended third-party beneficiary of decedent’s Will and Trust.”<sup>53</sup> In his Post Trial Brief, Plaintiff insists that “there can be no doubt that Plaintiff is a classic example of what an intended ‘donee beneficiary’ is.”<sup>54</sup> Plaintiff alleges further that Defendant owed Plaintiff, “as

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<sup>52</sup> *Id.*

<sup>53</sup> Pl. Compl., D.I. 1, ¶ 23, at 4.

<sup>54</sup> Pl. Post Trial Br., D.I. 48, at 7.

an intended third-party beneficiary . . . the applicable standard of care required of lawyers engaged in estate planning.”<sup>55</sup> This duty, according to Plaintiff, includes “ensur[ing] that Plaintiff was to receive the distribution provided for in the Trust.”<sup>56</sup> Plaintiff alleges, finally, that Defendant “deviated from the applicable standard of care” and that, “[a]s a result and direct proximate cause of the Defendant’s negligence, Plaintiff was damaged in that he failed to receive the full share of the Decedent’s estate as intended by the Decedent.”<sup>57</sup> Accordingly, the Complaint sounds in tort, not contract.

The settlor’s original, testamentary intent was clear enough. It is undisputed that Jeanne intended to create a trust for Plaintiff. And it is equally undisputed that Defendant drafted a trust agreement reflecting the settlor’s original intent. The bequest undeniably failed because the settlor’s money went elsewhere. Although the court appreciates that, in theory, the estate could have been restructured to fund Plaintiff’s share of the trust, the settlor would have had to hire Plaintiff, or someone else, to review her financial situation. Then she would have had to agree to divert money from elsewhere. And although the court further appreciates that

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<sup>55</sup> *Id.* at ¶ 25, at 4.

<sup>56</sup> *Id.* at ¶ 24, at 4.

<sup>57</sup> *Id.* at ¶¶ 26-27, at 5.

Defendant's alleged negligence may have contributed to the settlor's failure to discover and correct her misimpression about her assets, Plaintiff's position nonetheless creates a series of "what ifs" involving someone who has passed on. This goes to the heart of the concerns favoring a privity requirement, and mandates the outcome here.

## VII.

\_\_\_\_\_As just discussed, the court should have dismissed the case on the pleadings. Plaintiff failed to state a claim under Delaware's or Pennsylvania's law. Nevertheless, the parties created a complete record and from the record the court also is satisfied that Plaintiff loses on the merits.

Both sides offer a legal expert's opinion as to the standard of care owed by a lawyer in Defendant's place. Plaintiff relies on a Pennsylvania expert to prove that Defendant failed in several ways to meet the standard of care. Specifically, Defendant allegedly failed: to advise the settlor that she needed to change the beneficiary on her IRA "or provide alternative funding"; to do all Defendant could to obtain financial information in connection with the work Defendant did; to make the settlor "aware" that her goals might not be met because Defendant did not have enough information; and to "put in writing" any warning he gave "so the woman could see it and understand that there could be a problem here."

Defendant questions Plaintiff's expert's competence because the expert is not a member of the Delaware Bar and because of his unfamiliarity with the standard of care in Delaware. Defendant seems to assume that Plaintiff is proceeding under Delaware's law. Plaintiff counters that: Defendant is a Pennsylvania attorney; settlor was a Pennsylvania resident; she received Defendant's advice in Pennsylvania; and the trust documents provide that they are governed by the laws of Pennsylvania. According to Plaintiff, balancing Pennsylvania's and Delaware's interests in the outcome here leads to the result: "Pennsylvania 10 and Delaware 0."

As discussed above, Defendant is not only a Pennsylvania attorney, he also is a Delaware attorney; he was in Delaware when he advised settlor; and he is appearing in a Delaware courtroom. All of which gives Delaware an interest in the case that certainly exceeds "0," as Plaintiff insists.

More importantly, Plaintiff's reliance on the case's Pennsylvania ties is double-edged. As discussed above, Defendant's duty of care under Pennsylvania's law does not extend to third-party beneficiaries, including Plaintiff. Thus, Plaintiff has no tort case against Defendant under established Pennsylvania law. Based on this case's facts, Plaintiff's only chance is in Delaware. Yet, Plaintiff is unprepared to prove his case under Delaware's law.

Even if Defendant could solve the choice of laws conundrum, he bears

the burden of proof. Despite the fact their opinions are largely *sui generis*, both experts have credibility. Plaintiff's expert acknowledged that the Supplemental Declaration of Trust was a "very fine document." Defendant successfully set up a trust, and Plaintiff received a settlement (\$118,250) from the trust. Testator's actual estate was unaffected by Defendant's suggested negligence; there were no additional taxes or administrative fees diminishing her estate incurred as a result of attorney error.

Nevertheless, Plaintiff argues that Defendant had a duty to verify the testamentary assets to ensure that they were enough to fund the trust corpus and fulfill the bequest. Alternatively, Plaintiff argues that Defendant breached his duty by failing to caution Jeanne that the modified trust might not accomplish her desired \$250,000 bequest if her assets were insufficient.

If the case boiled down to a battle of the experts, Defendant would win because Defendant's expert's credentials are better and his opinions are more authoritative, comprehensive and persuasive. Plaintiff did not meet his burden of proof. To the contrary, it appears that Defendant did not violate the standard of care.

Few courts hold that attorneys owe a duty to the beneficiaries to ensure

the testamentary assets' sufficiency.<sup>58</sup> In the Washington Supreme Court's words:

If we held that [the attorney] had such a duty, we would be expanding the obligation of a lawyer who drafts a will beyond reasonable limits ... an attorney's obligation is to use care to draft the will according to the testator's wishes. Once that duty is accomplished, the attorney has no continuing obligation to monitor the testator's management of his property to ensure that the scheme originally established in the will is maintained. The time and expense that would be required for the attorney to follow all of the testator's activities with respect to his property would prevent the attorney from being able to provide reliable and economical services to that client, and would constitute an overwhelming burden on the attorney's practice as a whole.<sup>59</sup>

Furthermore, it seems implicit that once Defendant advised the settlor, as he did, that he could not fully review her assets, the common-sense conclusion is that her bequest would fail if she did not have enough money. The court is not convinced that Defendant's failure, if true, to spell out the consequences of the testator's not having enough money amounts to legal negligence, as a matter of law. Defendant's expert's opinion buttresses that conclusion.

It may very well be good practice for a lawyer to "do the arithmetic and

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<sup>58</sup> See *Leak-Gilbert v. Fahle*, 55 P.3d 1054, 1058 (Okl. 2002); *Strangland v. Brock*, 747 P.2d 464, 469 (Wash. 1987); *Leavenworth v. Mathes*, 661 A.2d 632, 634 (Conn. App. 1995).

<sup>59</sup> *Strangland*, 747 P.2d at 469.

project for the client how the estate will be distributed,” and thereby show the client “why [he is] unable to afford a legacy to his favorite niece or a handsome bequest to his university.”<sup>60</sup> The standard for legal negligence, however, is not perfection; rather it is the “exercise the skill and knowledge ordinarily possessed by attorneys under similar circumstances.”<sup>61</sup> Experts who testify as to the standard of care are familiar with the standard skill and care ordinarily practiced by Delaware attorneys.<sup>62</sup> Here, the court is persuaded by Defendant’s expert’s evaluation that “Mr. Tigani met the standard of care.”<sup>63</sup> The court agrees that Defendant effectively limited the scope of his representation.<sup>64</sup> The court finds that this was an adequate, albeit not ideal, warning to Jeanne Pinckney and that Defendant did not breach his duty or commit negligence

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<sup>60</sup> Jerome A. Manning, Anita S. Rosenbloom, Alan S. Halperin and Seth D. Slotkin, PRACTISING LAW INSTITUTE, *Manning on Estate Planning* § 1:5 (2003).

<sup>61</sup> MALLEN & SMITH, § 19.2.

<sup>62</sup> *Brett v. Berkowitz*, 706 A.2d 509, 517-18 (Del. 1998).

<sup>63</sup> Dep. of Donald Sparks 12:8 (March 12, 2004).

<sup>64</sup> *Id.* at 17:9 - 18:3.

as a result. Having met his duty to his client, it follows that Defendant is not liable to Plaintiff.

**VIII.**

For the foregoing reasons, judgement is entered for Defendant.

**IT IS SO ORDERED.**

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Judge

oc: Prothonotary (Civil Division)