"ATTORNEY CLIENT PRIVITY IS ALIVE AND WELL NOW,
EVEN WHEN YOU'RE DEAD."

By Gary E. Bashian, Esq.*

Until quite recently, Estate practitioners were protected from Estate planning malpractice claims by Estate representatives by the often overlooked protections afforded by the doctrine of Privity. However, with their unanimous June 2010 decision in the *Estate of Saul Schneider v Finmann*[i], the New York Court of Appeals has relaxed this traditional safeguard and allowed for a new cause of action in the State against a negligent Estate planning attorney.

Although the *Schneider* decision represents a marked change from the prior bar on suits by personal representatives against a negligent Estate planning attorney, its rationale is far from revolutionary, and its rather narrow ruling endeavors to balance the interests of both Estate representatives and their legal counsel.

In the *Estate of Saul Schneider v Finmann* The Court of Appeals has ruled that a Personal Estate representative "stands in the shoes of the decedent," and therefore has "the capacity to maintain a malpractice claim in the Estate's behalf[ii]."

Mr. Schneider was represented by Mr. Finmann and his firm from early 2000 to his passing in late 2006. Plaintiffs, the personal representatives of his Estate, alleged that based on the advice of his counsel the decedent purchased a $1 million life insurance policy and over the next several years he transferred the policy in and out of a number of limited liability partnerships of which he was the principle owner, and then subsequently transferred the policy back to himself. Upon Mr. Schneider's death, this series of transactions resulted in the proceeds of the life insurance policy to be included in as part of his gross taxable Estate.

At trial level, the Nassau County Supreme Court granted Defendant's summary Judgment motion for plaintiff's failure to state a cause of action pursuant to CPLR §3211(a)(7), which was later affirmed by the Appellate Division Second Department.

The Appellate Division Second Department invoked the "well established rule in New York" articulated in Estate of *Spivey v Pulley*[iii] "with respect to attorney malpractice that absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not libel to third parties, not in Privity, for harm caused by professional negligence,"[iv] and did not allow the Estate to bring an action under EPTL §11-3.2(b). As noted by the Appellate Division Second Department, New York Courts have strictly applied Privity in the past and disallowed negligence claims against an Estate planner in its absence.

Privity, although most frequently associated with the jurisprudence of Contract law, has been intertwined with the history and development of Tort law, and by extension Negligence actions, for quite some time. This doctrine, and its application, evolved as a shield Defendants could use to defeat a Plaintiff's claims where there was not a significant enough relationship between the parties for an enforceable duty to develop between one and the other. Without establishing Privity, through either direct or successive associations, a plaintiff simply can not enforce a promise or warranty against another party. This is both a practical and protective doctrine as it offers a built in limitation to the liability a professional may be exposed to for their alleged Negligence. It prevents the potentially limitless liability that might be incurred for a single act if parties that have not personally contracted with the professional were afforded standing to sue.

However, the *Schneider* decision brings the New York Courts into line with a growing majority of States that allow such claims against a Negligent attorney Estate planner. The New York Court of Appeals has now held that "Privity, or a relationship sufficiently approaching Privity, exists between the personal representative of an Estate and the Estate planning attorney"[v] and has granted standing to a new class of plaintiffs, the personal representatives of an Estate, that it had previously denied.

The *Schneider* Court relied heavily on the reasoning articulated in the Texas Supreme Court ruling *Belt v Oppenheimer* which involved a similar suit by the personal representatives an Estate who brought an action against the attorney planners for negligently incurring "over $1.5 million in tax liability that could have been avoided by competent Estate planning." [vi]

Like *Schineder*, *Belt* made its way to the highest State Court by way of two motions for summary judgment granted in favor of Defendant and appealed by Plaintiff. The lower Texas Courts had reasoned that an Estate planning malpractice action could not accrue during a decedent's lifetime. Such an action was only ripe upon death, and therefore could not "survive" the decedent to be actionable by the Estate. However, in *Belt*, the Texas Supreme Court determined that the attorney's Negligent act itself necessarily took place during the decedent's lifetime, which allowed for the representative of the Estate to bring suit just as the client himself might have done if they discovered the Negligence when they were still alive. This justiciable interest is therefore enough to confer standing to the Estate representative in a Negligence action as the Personal Estate representative essentially takes the place of the Decedent.

For those concerned practitioners that feel they have been suddenly burdened with greater liabilities in their practice, it should be noted that *Schneider* far from throws the door wide open for all possible claims against Estate attorneys. The Court of Appeals stressed that beneficiaries of the Estate and other third party claimants will still need to have to show Privity, fraud, or other special circumstances in order to bring malpractice claims such as these. Furthermore, the Court highlights the fact that the result of *Schneider* fully "comports with EPTL §11-

3.2(b) which generally permits the personal representative of a decedent to maintain an action for injury to person or property after that person's death."[vii] While this statute has, until now, been more commonly used to maintain wrongful death or injury to property on behalf of a decedent, this new ruling reasonably augments the scope of EPTL §11-3.2 to include the malpractice action for Negligence. The right to sue a lawyer for malpractice while the client is alive, is a right that survives the client, and vests in the Estate.

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[i] (210 NY Slip Op. 05281)
[ii] (Citing *Belt v Oppenhimer* 192 SW 3d 780, 787 (Tex 2006))
[iii] (138 AD2d 563, 564 (1988))
[iv] (60 AD 3d 892, 893)
[v] (210 NY Slip Op. 05281)
[vi] (192 SW 3d 780, 782)
[vii] (210 NY Slip Op. 05281)