COURT OF APPEALS RULES THERE IS PRIVITY BETWEEN THE ESTATE PLANNER AND THE CLIENT'S PERSONAL ESTATE REPRESENTATIVE: BUT NO PRIVITY TO BENEFICIARIES OF THE ESTATE

By Gary E. Bashian, Esq.*

The traditional protection from legal malpractice claims afforded Estate practitioners by the doctrine of Privity has been relaxed by a recent New York Court of Appeals decision.

In the *Estate of Saul Schneider v Finmann*[i], a unanimous 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 on the Estate's behalf[ii]."

As many know, New York was one of the few remaining States that continued the precept that there was no Privity between a client's Estate and an attorney. Without this relationship of Privity, a personal Estate representative did not have the necessary standing to bring a malpractice suit against a negligent Estate planner. Now, such an action no longer requires strict attorney client Privity as the Court has ruled that "Privity, or a relationship sufficiently approaching Privity, exists between the personal representative of an Estate and the Estate planning attorney,"[iii] thus imposing a duty upon the Estate planner towards the personal representative of an Estate as would exist between an attorney and live client.

This newly imposed duty between the attorney and the Estate's personal representative establishes the threshold element necessary to bring a negligence action which was formerly denied to the personal Estate representative. Where it is found that this duty has been breached by an attorney, causation of damages is proved, and based on the actual damages that result to the Estate, the client's Estate now has a claim for malpractice in its quiver of arrows that should send quivers of concern to all Estate planning attorneys who have acted casually because of their belief that they would be protected by the old law. Although most attorneys will explain in detail orally the Estate, gift and income tax options and issues, there will now be lawsuits against attorneys who know the laws and tax consequences, explained all of the laws and tax consequences, but did not put it in writing. Even better, a writing acknowledged by the signature of the client.

The *Estate of Saul Schneider v Finmann*[iv] presented a situation that, until now, left a negligent Estate planning attorney immune from recourse by the former client's Estate. Mr. Schneider was represented by Mr. Finmann and his firm from early 2000 to his passing in late 2006. Plaintiff, the duly appointed personal representative 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 in his own individual name. Upon Mr. Schneider's death, this series of transactions resulted in the proceeds of the life insurance policy to be included as part of his gross taxable Estate. At the trial level, the Nassau County Supreme Court predictably 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 on the same grounds.

The Appellate Division Second Department invoked the "well established rule in New York" expressed in Estate of *Spivey v Pulley*[v] "with respect to attorney malpractice that absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties, not in Privity, for harm caused by professional negligence,"[vi] and did not allow the Estate to bring an action under Estates Powers and Trusts Law (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.

Upon being heard by the New York Court of Appeals though, *Schneider* was not summarily dismissed for failure to state a cause of action. Indeed, New York's highest Court, relying heavily on the reasoning articulated in the Texas Supreme Court case *Belt v Oppenheimer*[vii], determined that the personal representative of the Estate could pursue the malpractice cause of action against the allegedly negligent Estate planner. However, Estate beneficiaries and other third parties are still bared from bringing malpractice actions against Estate planners for negligent planning.

Belt v Oppenheimer[viii] involved a similar suit in Texas 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." [ix] The *Belt* court reasoned that although damages did not occur to the Estate until after the death of the client, the negligent act occurred while the decedent was alive. If the decedent had discovered this prior to death, he could have brought suit against the Estate planner to recover fees, and for costs to restructure the Estate in order to ameliorate the negligence. Therefore, if the injury occurs during the client's lifetime, a claim of malpractice survives the client's death and is justiciable by the personal Estate representative. Logically, the Estate is standing in the same shoes as the dead client, and is essentially the alter ego of the dead client.

Schneider seems to have adopted the Texas Supreme Court's reasoning, indicating that "the personal representative of an Estate should not be prevented from raising a negligent Estate planning against the attorney who caused harm to the Estate. The attorney planner surely knows that minimizing the tax burden of the Estate is one of the central tasks entrusted to the professional."[x]

Though the *Schneider* decision is far from revolutionary, and the rather narrow ruling endeavors to balance the interests of both Estate representatives and their legal counsel within the framework of the EPTL 11-3.2(b) which allows the personal representative of an Estate to maintain an action for "injury to person or property" after the testator's death, the real question is what will be the scope of liability and the dollar amount of damages that a negligent planner may be exposed to for their malpractice.

While the New York Court of Appeals has specifically stated that this new application of the Privity requirement ensures that Estate planning attorneys will not be subject to "undesirable results, uncertainty, and limitless liability,"[xi] it remains probable that if the reasoning of the *Belt* Court, cited above, were pushed to its logical extreme, it would result exactly in the "undesirable results, uncertainty, and limitless liability" that both New York and Texas' highest Courts were specifically trying to avoid.

For example, if the personal Estate representative truly does "stand in the shoes of the decedent,"[xii] then arguably they would be able to bring any variety of negligence claims on behalf of the Estate that are not prohibited by statute or common law. *Schneider* indicates that the basis of a malpractice action would flow from the failure to fulfill "one of the central tasks entrusted to the professional." What constitutes the essential duty of the Estate planner that, if breached, would be ruled negligence, and what method the Court will use to calculate damages, remain open issues to be determined by the Courts based on the unique and particular facts of each case.

There will, therefore, undoubtedly be many new actions throughout the Courts as personal Estate representatives bring suit where they suspect they have a cause of action due to negligent planning. Clearly, only time, and the inevitable litigation that the *Schneider* case will produce, can answer these questions.

Estate planners in New York must take great care when addressing their clients' needs as this application of Privity will have significant repercussions throughout their practices. It would behoove all attorneys to make sure their file contains enough memos and correspondence, confirmed by the client in writing explaining the details and implications of the Estate plan as it is structured. This will be especially important where the client makes a decision to do something that will clearly, or may, result in additional taxes or other damages that that client's Estate could pursue post death.

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

[x] 210 NY Slip Op. 05281
[xi] 210 NY Slip Op. 05281
[xii] 210 NY Slip Op. 05281 (Citing Belt v *Oppenheimer*192 SW 3d 780, 787 (Tex 2006))