Privity, Duty, and Loss: In Swanson v. Ptak, 268 Neb. 265, 682 N.W.2d 225 (2004), the Nebraska Supreme Court Again Endorses Privity in Legal Malpractice Actions

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I. INTRODUCTION

The threat of malpractice—that word attorneys dread—is considered by some to be a growing threat in the practice of wills and estates law, where brothers, sisters, spouses, cousins, and friends battle each

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other for gifts of money or property from a decedent’s estate. Professor Marvin Begleiter suggests that “[o]ne of the major developments in the law over the last 40 years has . . . been the number of lawsuits against attorneys for malpractice in estate planning.” While many legal tasks, such as the high number of formalities required in the execution of a will, are intended to protect testamentary instruments from changes that might frustrate a decedent’s intent, they can be minefields for even the most exacting attorneys. The distribution of property when a decedent fails to draft a will can also be taxing. While heirs scramble to determine their shares under a state’s intestacy laws, attorneys may be required to exclude seemingly deserving heirs such as stepchildren or in-laws from the division of property if they do not take under the state’s statutes. Heirs or friends who fail to take a share—either because of an intestacy scheme that excludes them or their exclusion from a will—may be disappointed by their plight and seek revenge on an otherwise innocent attorney. Scholar Jennifer Knauth has suggested that “the genesis of legal malpractice claims lies in unfulfilled client expectations,” and this aphorism seems particularly applicable to the unfulfilled expectations of these so-called “disappointed beneficiary[ies].”

However, while attorneys practicing in the wills and estates field may dread the threat of a malpractice lawsuit, their fears are at least partially unfounded. First, estate-related malpractice claims are but a small portion of the malpractice claims filed in the United States. The American Bar Association (“ABA”) recently reported that only nine percent of malpractice claims from 1996 to 1999 arose in the areas of estates, trusts, and probate. Compare this figure to malprac-

1. Martin D. Begleiter, The Gambler Breaks Even: Legal Malpractice in Complicated Estate Planning Cases, 20 Ga. St. U.L. Rev. 277, 277 (2003); see also John Teshima, What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other than Immediate Client, 61 A.L.R. 4th 464 § 2 (Westlaw 2004) (observing that there have recently been “a greater number of cases being brought on theories of attorneys’ liability to third parties for malpractice”).
2. In re Snide, 418 N.E.2d 656, 658 (N.Y. 1981) (Jones, J., dissenting) (observing that laws like the Statute of Wills were “designed for the protection of testators, particularly against fraudulent changes in or additions to wills”).
tice claims arising from personal injury cases, which constitute twenty-four percent of legal malpractice actions, and those arising from real estate transactions, which constitute seventeen percent of malpractice claims.7 Further, in only approximately 2.2% of estate, trust, and probate cases did a plaintiff win a judgment in court, while sixty-nine percent abandoned their malpractice claims without payment.8 This is not to suggest that malpractice actions are not a frightening, interruptive part of a professional law practice, but merely that the "threat" of malpractice actions in the estates context may be overrated.

Second, in Nebraska and a few other states across the nation,9 the common law requires that the parties to a malpractice suit be in privity.10 In other words, they must be joined in a formal relationship, typically signified by the presence of a contract.11 Consequently, third parties who are negatively affected by the negligent drafting or execution of a will—these are the "disappointed beneficiaries"—probably have no claim against the attorney who drafted or executed the will because they are not contractually linked to her.12 The only individuals who would be in privity are the attorney and her original client who, in a typical wills and estates malpractice case, is already deceased.13 Thus, Nebraska attorneys are at least partially insulated from plaintiff malpractice victories brought by a next-of-kin or other potential beneficiaries. Nebraska scholar Ronald Volkmer, who in 1995 produced a thorough examination of Nebraska's privity requirement in attorney malpractice cases,14 asserts that the privity rule gives Nebraska attorneys little liability-related incentive to more cautiously draft or execute documents that make donative transfers.15 Volkmer concludes that they "have enjoyed 'virtual immunity' for negligent will drafting and other estate planning related activities."

7. Id.
8. Id. at 31.
9. See infra section II.B.
12. One court has aptly named this group "non-client beneficiar[ies]." Blair v. Ing, 21 P.3d 452, 458 (Haw. 2001).
14. See Volkmer, supra note 5.
15. Id. at 333.
16. Id.
In 2004, the Nebraska Supreme Court again endorsed the privity requirement for attorney malpractice cases, although on a set of unusual facts. In 1997, Nebraska resident Wilma Pritchard died intestate, effectively excluding her niece-in-law, Leota Swanson, from an inheritance under Nebraska's intestacy laws. David Ptak, Pritchard's attorney and later her estate's personal representative, attempted to procure from the rightful heirs an inheritance for Swanson, bargaining with Pritchard's siblings to provide Swanson with approximately one-fourth of Pritchard's estate. After giving Swanson a check for $99,000—an early partial distribution to assist her with the purchase of a condominium—the heirs decided not to share the estate. Ptak was forced to file suit against Swanson on the estate's behalf to recover the funds, and Swanson filed suit against Ptak alleging, among other things, professional negligence in his failure to obtain the remainder of her share in the estate. The Nebraska Supreme Court rejected Swanson's claims, holding that Swanson and Ptak were not in privity as required under Nebraska law to sustain a claim of professional negligence. Put simply, "Ptak had no professional duty to secure a gratuitous agreement from [Pritchard's] heirs for the benefit of Swanson."

In the typical estate planning malpractice case, it is the disappointed beneficiary who seeks access to funds in an estate that she feels she was denied. However, in Swanson, the court was asked whether a non-beneficiary to a decedent's estate could recover damages from a personal representative who gave her a portion of the estate and then took it back. The court determined that Ptak only had duties to himself, as an attorney, and to the estate, as a personal representative. Thus, despite Swanson's seemingly obvious reliance, the court held that Ptak owed no duty to her.

A court that bases an attorney's liability on a privity requirement in this manner views the contractual relationship as the fountainhead of the attorney's duty to the client (or, as it were, lack of duty to the non-client). If the attorney and third party are not bound by a contractual relationship, the attorney is held to have had no legal duty to her. A lack of privity thus precludes discussion of whether a duty existed. And, because no duty can exist outside the contract, the privity requirement effectively bars an entire class of plaintiffs—non-client beneficiaries—from being able to state a claim for attorney malprac-

18. Id. at 266, 682 N.W.2d at 228.
19. Id.
20. Id. at 267, 682 N.W.2d at 228.
21. Id. at 267, 682 N.W.2d at 229.
22. Id. at 272, 682 N.W.2d at 232.
23. Id.
PRIVITY, DUTY, AND LOSS

This seems incredibly problematic in a field that places a premium on professional competence and loyalty. This Note will argue that the Nebraska Supreme Court missed an opportunity to reconsider the entrenched common law rule in Nebraska requiring privity in legal malpractice actions. Part II briefly explores the role of privity nationally and in Nebraska, while Part III discusses the facts of Swanson. Part IV explores the implied relationship doctrine, concluding that the harshness of the privity requirement for clients who reasonably relied on what they assumed to be an attorney–client relationship outweighs any benefits it may have to the legal profession.

This Note does not suggest that any of the attorneys involved in the Swanson dispute were professionally negligent or somehow escaped liability because of the privity requirement, nor should such conclusions be inferred. It seems evident from the facts iterated by the court that Ptak’s actions were intended only to help Swanson procure a portion of her uncle’s estate, a gift that her aunt’s intestacy effectively denied her. Accordingly, this Note only suggests that the court should reevaluate the privity requirement, providing at least the possibility of relief to non-clients whose professional negligence claims are often summarily dismissed. At issue is whether a plaintiff’s claims should be barred from court because his relationship with the attorney does not accord with traditional or contractual notions of the attorney–client relationship and not whether any particular acts constituted professional negligence.

II. PRIVITY IN CONTEXT

Because so many scholars have provided thorough reviews of the privity requirement, the intent of this Part is to provide but a brief overview of the weight accorded the privity requirement in state courts before addressing privity in Nebraska. However, malpractice scholars Ronald Mallen and Jeffery Smith explain that while the movement in state law is toward the abrogation of the strict privity requirement, “[g]eneralizations concerning the state of the law are neither accurate nor reliable” because the “rules concerning the requirement of privity have been in a state of transition for almost three

decades. Nevertheless, particular facts, the subject matter, and the relationship of the parties may create a duty of care.  

A. The Origins of Strict Privity

In a case for professional negligence against an attorney, the plaintiff—client or non-client—must establish that the attorney owed a duty to adhere to a certain standard of care in his dealings with the plaintiff. As a general rule, if an attorney and client are bound by a contractual relationship—if they are in privity—the attorney has assumed a duty to meet that standard of care. Thus, by demonstrating that privity existed, generally by showing that there was a contract between the parties, a plaintiff can legally establish that the attorney owed him or her a duty. Conversely, some malpractice plaintiffs who cannot show that privity of contract existed are unable

27. Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C., 135 Cal. Rptr. 2d 888, 892 (Cal. Ct. App. 2003); see also Gravel v. Schmidt, 247 Neb. 404, 408, 527 N.W.2d 199, 202 (1995) (holding that plaintiffs alleging legal malpractice must demonstrate, as per a typical negligence claim, that the attorney owed plaintiff a duty, that the duty was breached, and that the breach caused plaintiff's damages); Begleiter, supra note 1, at 281 (observing that "[a]n attorney is liable, whether in contract or in negligence, only if he had a duty to the party making the claim"). Note that, in addition to professional negligence, there are a variety of methods through which a plaintiff can seek recovery for legal malfeasance, including negligent misrepresentation. See, e.g., Buras v. Marx, 892 So. 2d 83, 85 (La. Ct. App. 2004) (explaining that the elements for a negligent misrepresentation claim include "1) the existence of an attorney-client relationship, 2) negligent misrepresentation by the attorney, and 3) damages caused by the alleged negligence"); Mallen & Smith, supra note 25, § 7.14. An individual could also sue in the wills and estates context under the tort of interference with expectancy of inheritance, which provides that "[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for the loss of the inheritance or gift." Restatement (Second) of Torts § 774B (1979). However, because negligence-based actions are "the most common form of a legal malpractice action," Mallen & Smith, supra note 25, § 8.13, and because Nebraska legal malpractice cases are pleaded as professional negligence actions, Gravel, 247 Neb. at 408, 527 N.W.2d at 202, professional negligence actions are the focus here.

28. See generally Bradley Ctr. Inc. v. Wessner, 296 S.E.2d 693, 695 (Ga. 1982) (observing, in the context of a medical malpractice suit, that privity creates a relationship between the two parties "establish[ing] the legal duty to conform to a standard of conduct").

30. Id. Keeton explains the fact that the contractually-based relationship nonetheless creates a tort-based duty: "[B]y entering into a contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation sounding in tort and not in contract, to act in such a way that B will not be injured." Id.
to establish that a duty existed and cannot state a claim for professional negligence.

The existence of the privity bar to third-party malpractice actions has its historical roots in English common law. In *Winterbottom v. Wright*, the Exchequer of Pleas refused the claim of a plaintiff injured when a coach "gave way and broke down." The court held that there was "no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action." The court rejected the suit because there was no privity, expressing its concern that individuals might have open-ended liability to third parties if any third party could bring suit demonstrating a contractual relationship.

Thirty-seven years later in *National Savings Bank of District of Columbia v. Ward*, the U.S. Supreme Court followed the holding in *Winterbottom*, explaining that "[b]eyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party... unless there is something in the circumstances of this case to take it out of that general rule." At issue in *Savings Bank* was whether an attorney who engaged in a title search for his client could be held liable by a third party, who relying on the attorney's conclusions, loaned money to the client, who then defaulted. The Supreme Court denied recovery for the third party plaintiff, observing "that there was no relation between the parties from which any contract could be implied, nor any relation between the parties from which any duty could arise." In justifying the Court's decision, Justice Clifford again invoked what seems to be the most often cited reason for limiting attorney liability: he explained that "[t]he only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty."

State courts that followed this line of cases in professional malpractice cases typically held that "privity of contract was required before a tort action could arise from a breach of duty created by contract—i.e., limiting liability to contracting parties." The privity re-

33. *Id.* at 402.
34. *Id.* at 405.
35. 100 U.S. 195 (1879) (memorandum).
36. *Id.* at 200. The court cited *Winterbottom* later in the case as support for this conclusion. *Id.* at 203.
37. *Id.* at 195–98.
38. *Id.* at 200.
39. *Id.* at 203.
40. *Leak-Gilbert v. Fahle*, 55 P.3d 1054, 1059 (Okla. 2002). As this quote indicates, a central concern among privity advocates is courts' inability to limit an attorney's
quirement thus served two purposes. First, liability was limited to the attorney and client who contracted together, so third parties who were not parties to an existing contract, including non-client beneficiaries, were unable to establish liability even if the attorney breached the contract. Second, privity activated the liability arising from an attorney's breach of contract because liability was limited to the contracting client. Without privity there was no duty, so without privity there was no actionable breach.

Today, only nine states continue to recognize the strict privity requirement in legal malpractice cases in the estate law field,41 including Nebraska, Arkansas, Alabama, New York, Ohio, and Maryland.42 The privity requirements in these states may be set out in statutory or common law forms, or both. In Arkansas, for example, the General Assembly has codified the strict privity rule in professional malpractice cases, stating clearing that “[n]o person licensed to practice law in Arkansas . . . shall be liable to persons not in privity of contract with the person . . . for civil damages resulting from acts, omissions, decisions, or other conduct in connection with professional services performed by the person . . . .”43 In Alabama, the common law insulates

liability to certain third parties in certain factual situations. However, as is discussed infra in section IV.C, the states that have adopted standing rules in legal malpractice cases other than strict privity—a majority of U.S. states—have found ways to limit professional malpractice liability to case-by-case determinations of the facts therein.

41. Begleiter, supra note 1, at 282; see also MALLEN & SMITH, supra note 25, § 7.7 (observing the waning influence of the strict privity doctrine nationwide).
42. See, e.g., Robinson v. Benton, 842 So. 2d 631 (Ala. 2002) (declining to abrogate privity and adopt a third-party beneficiary approach out of concern that liability for attorneys would be exponentially expanded); Jackson v. Ivory, 120 S.W.3d 587 (Ark. 2003) (holding that Arkansas's statutory scheme requires that a plaintiff “have direct privity of contract with the” attorney in a liability action); Noble v. Bruce, 709 A.2d 1264, 1275 (Md. 1998) (declining to “create a new rule in Maryland governing attorney liability to nonclients arising out of will drafting or estate planning”); Swanson v. Ptak, 268 Neb. 265, 270, 682 N.W.2d 225, 230 (2004) (“Under Nebraska law, a lawyer owes a duty to his or her client to use reasonable care and skill in the discharge of his or her duties, but ordinarily this duty does not extend to third parties absent facts establishing a duty to them.”); Mali v. De Forest & Duer, 553 N.Y.S.2d 391, 392 (N.Y. App. Div. 1990) (holding that “[i]t is well established in New York that, absent fraud, collusion, malicious acts or other circumstances, [attorneys] are not liable to the beneficiaries of such will or other third parties not in privity”); Simon v. Zipperstein, 512 N.E.2d 636, 638 (Ohio 1987) (per curiam) (observing 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”).
43. ARK. CODE ANN. § 16-22-310(a) (Lexis 1999). Arkansas’s statute does provide exceptions in cases of fraud or intentional misrepresentation or, in very specific factual situations, if “a primary intent of the client was for the professional services to benefit or influence the particular person bringing the action.” Id. § 16-22-310(a)(2). However, this intent-based exception only applies if the attorney
attorneys from malpractice liability, because they "owe[] no duty except that arising from contract or a gratuitous undertaking."44

Courts in New York and Ohio are adamant that strict privity is "well-established" in their states.45 For example, in a 1987 case, the Ohio Supreme Court rejected a young man's claim that his father's will was negligently drafted.46 The will promised both the son and the father's second wife a one-third share of the father's estate.47 However, the father and second wife had signed a prenuptial agreement three years before the will was drafted that gave the second wife an interest in the father's estate.48 When the father died, the second wife claimed both her share under the will and the prenuptial agreement, and the probate court granted both.49 The son's mother then filed suit for malpractice on his behalf, arguing that the drafting attorney was negligent for having failed to "renounce the antenuptial agreement or make any provision in the will creating a setoff as a result of the debt created by the antenuptial agreement."50 The Ohio Supreme Court rejected these claims, holding 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."51

Regardless of whether the privity requirement arises from statute or common law, its effect is to deny recovery to individuals who are not in a contractual relationship with the allegedly negligent attorney and thus to individuals the court classifies as non-clients. Because their approaches are closer to the historic English and American common law cases that denied recovery absent a contractual relationship, states that continue to require strict privity in legal malpractice actions have dutifully ignored or dismissed the fact that most states provides a writing to the client explaining who the beneficiaries of the professional services would be and then sends a copy of the writing to the beneficiary. The beneficiaries who were "intended to so rely" on the attorney's services could then maintain an action against the attorney, but the Arkansas Supreme Court denied recovery in one instance to children who sued for malpractice because a copy of the codicil that would have provided their devises had never been sent to them. Jackson, 120 S.W.3d at 595; McDonald v. Pettus, 988 S.W.2d 9 (Ark. 1999). This writing requirement seems to approach, at least in formality, a contractual requirement between the third party and attorney.

44. Robinson, 842 So. 2d at 635 (quoting Shows v. NCNB Nat'l Bank of N.C., 585 So. 2d 880, 882 (Ala. 1991)).
45. Mali, 553 N.Y.S.2d at 392; Simon, 512 N.E.2d at 638.
46. Simon, 512 N.E.2d at 637.
47. Id.
48. Id.
49. The opinion is not explicit, but presumably the wife's claim of both "shares" decreased the portion of the estate available to the son.
50. Simon, 512 N.E.2d at 637.
51. Id. at 638.
have now abrogated the privity requirement. Again, the continued adherence to the privity requirement seems to reflect decisions by the courts in these states, first, that no actionable duty exists to non-clients and, second, that non-clients are not entitled to recover damages from negligent attorneys.

B. The New Majority: States without a Strict Privity Requirement

Currently, only nine states continue to require contractual privity for plaintiffs alleging legal malpractice claims arising from wills and estates transactions. The modern state law trend is to recognize "the existence of a duty beyond the confines of those in privity to the attorney–client contract." Among states that have abrogated strict privity, two of the most commonly-invoked alternatives to strict privity are the California balancing approach and the "Florida–Iowa" rule.

The California balancing test was first set out in 1958 in Biakanja v. Irving, a case that signaled the beginning of the end of the strict privity requirement. In Biakanja, the plaintiff sued the notary public that drafted her brother's will after the court denied probate because the will had been improperly attested. Where the plaintiff would have received the entire estate under her brother's will, she received only a one-eighth share under California's intestacy laws. Thus, as a result of the mistaken attestation, the plaintiff lost a significant portion of her brother's estate. The California Supreme Court, observing that the state had required privity in professional negligence actions, held that:

"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, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty

52. Begleiter, supra note 1, at 282; see also MALLEN & SMITH, supra note 25, § 7.7 ("Relying upon annotations and commentators, some courts have said that a strict privity requirement is the majority rule. Such comments may reflect the holdings and dictum of the majority of the decisions under particular facts, but do not accurately characterize the state of the law in the United States.").
53. MALLEN & SMITH, supra note 25, § 7.8.
54. Fogel, supra note 13, at 271.
55. Id. at 283. Scholarship on privity in the malpractice context has flourished in light of these changes. The Maryland Court of Appeals noted that the topic "has been the subject of many articles in recent years." Noble v. Bruce, 709 A.2d 1264, 1268 (Md. Ct. App. 1998).
56. 320 P.2d 16 (Cal. 1958).
57. Volkmer, supra note 5, at 298–99 (observing that the decision in Biakanja marked the beginning of the California Supreme Court's privity "revolution").
58. Biakanja, 320 P.2d at 19.
59. Id.
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.60

Because the notary's behavior "was not only negligent but was also
highly improper" and "[s]uch conduct should be discouraged and not
protected by immunity from civil liability," the court held that holding
the plaintiff to a privity requirement would be inappropriate.61 Impor-
tantly, the court did not conclude that all third-party plaintiffs
would be allowed to state a cause of action for legal malpractice.
Rather, it set out a fact-dependent test, outlined above, that neither
allowed, nor precluded, every third-party malpractice claim.

Three years after its decision in Biakanja, the California Supreme
Court affirmed the balancing test in Lucas v. Hamm.62 The holding in
Lucas has since been utilized by courts in other states, including Wis-
consin, Hawaii, Minnesota, and Connecticut.63 Because it allows a
plaintiff to make out a legal malpractice claim without demonstrating
strict privity, states that have adopted this approach emphasize the
attorney's action and the plaintiff's harm, rather than whether the
plaintiff has pleaded facts suggesting the existence of a formal attor-
ney-client relationship.

The State of California also nurtured a second popular alternative
to strict privity in estate planning malpractice cases.64 The Califor-
nia Court of Appeals laid the framework for what scholars have
deemed the "Florida–Iowa Rule,"65 which uses the decedent's stated
intent as a benchmark for analyzing a third party's ability to recover
in a malpractice suit. First set out in Ventura County Humane Soci-
ety, Inc. v. Holloway,66 the Florida–Iowa rule provides, according to

60. Id. at 19 (emphasis added).
61. Id.
62. 364 P.2d 685 (Cal. 1961). The First Division of the California Court of Appeals
recently reaffirmed the role of the balancing test in California jurisprudence, ob-
serving that, following Biakanja, the California Supreme Court considered two
additional factors to be critical to the duty determination. "One is the likelihood
that imposition of liability might interfere with the attorney's ethical duties to the
client . . . . The Supreme Court has also considered the related question of
whether the imposition of liability would impose an undue burden on the profes-
Kennedy, 556 P.2d 737 (Cal. 1976); Lucas, 364 P.2d 685).
63. Stowe v. Smith, 441 A.2d 81, 84 (Conn. 1981); Blair v. Ing, 21 P.3d 452, 465 (Haw.
2001); Goldberger v. Kaplan, Strangis & Kaplan, 534 N.W.2d 734, 738 (Minn. Ct.
App. 1995) (using the Lucas factors to determine the recovery of non-clients
under a third party beneficiary theory, but ultimately denying recovery to plain-
tiff); Auric v. Continental Cas. Co., 331 N.W.2d 325 (Wis. 1983).
64. Fogel, supra note 13, at 283.
65. Id.
66. 115 Cal. Rptr. 464 (Cal. Ct. App. 1974). Note that California no longer uses this
approach. See supra notes 32, 36 and accompanying text.
the Florida Supreme Court, "a limited exception to the strict privity requirement . . . where it can be demonstrated that the apparent intent of the client in engaging the services of the lawyer was to benefit a third party."^{67} This approach is similar to a contract-based third party beneficiary theory because it, according to the Iowa Supreme Court, "focuses upon whether the primary purpose of the client–attorney relationship was to benefit the non-client."^{68}

Under the Florida–Iowa rule, the third-party plaintiff must show that their (1) "interest in the estate is either lost, diminished, or unrealized" and that (2) "the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part" as (3) a "direct result of the lawyer's professional negligence."^{69} Thus, the relationship between the beneficiary and decedent, rather than the relationship between the beneficiary and the attorney, is key under this test. Again, courts using this approach neither preclude nor allow all third-party plaintiffs to state a claim, but conduct a fact-dependent inquiry. In addition to its use in Florida and Iowa, this intent-based approach has been adopted in other states, including New Hampshire, Illinois, and Oregon.^{70}

C. Indirect Privity and the Kurtenbach Approach

Set between the theoretical bookends of strict privity, which requires a contractual relationship, and the California and Florida–Iowa rules, which allow recovery to third parties outside the contract if the facts of the case suggest that recovery is merited, is the notion of indirect privity, or an implied attorney-client relationship. This third, but limited, approach to an attorney's liability to a third party is based on the notion that an attorney-client relationship can arise without a contract through the implicit nature of attorney's and client's interaction.\(^\text{71}\) In Kurtenbach v. TeKippe,\(^\text{72}\) the Iowa Supreme Court an-

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69. Holsapple v. McGrath, 575 N.W.2d 518, 521 (Iowa 1998) (quoting Schreiner v. Scoville, 410 N.W.2d 679, 683 (Iowa 1987)). The Iowa Supreme Court also allows third parties to recover for negligence attending the preparation of nontestamentary documents if the beneficiary can demonstrate that "he or she was specifically identified, by the donor, as an object of the grantor's intent." Id. at 520.
71. George A. Locke, Existence of Attorney Client Relationship, 48 AM. JUR. PROOF OF FACTS 2d 525 (Westlaw 2004). Locke explains: Although it is clear that not every instance of contact between a lawyer and a lay party does result in the creation of an attorney-client relationship, it is also true that in most jurisdictions such a relationship can
nounced that it would be willing to *imply* an attorney–client relationship if certain facts existed. Such a relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.73

This last consent-related element "may be established by proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it."74

In *Kurtenbach*, an investor sued an attorney, TeKippe, with whom he had no legal contract but who provided legal advice to him on several occasions.75 Kurtenbach sought TeKippe's advice in setting up several corporations but failed to report sales of stock in the corporations to the Iowa Commissioner of Insurance, as was required under Iowa law.76 The corporations' investors sued Kurtenbach "on a theory of rescission because of his failure to report the stock sales," and Kurtenbach in turn filed suit against TeKippe, alleging that TeKippe had been negligent in failing "to advise him of his obligation to report the sales."77 The Iowa Supreme Court outlined the test above, but rejected Kurtenbach's claim, holding that while TeKippe had undertaken some duties to Kurtenbach, investigation of the stock sales was not one of them.78 Accordingly, the court declined to overturn the trial court's determination that no attorney–client relationship existed. In spite of this result, the *Kurtenbach* test has appeal, as is discussed in section IV.A, infra, because it affords a remedy for some individuals that rely on an attorney's advice or assistance, but does not completely nullify the privity requirement.

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72. 260 N.W.2d 53 (Iowa 1977). This doctrine has also been utilized by the Nebraska Supreme Court. See *Swanson v. Ptak*, 268 Neb. 265, 266, 682 N.W.2d 225, 228 (2004) (holding that the plaintiff in an estate-related malpractice case may be able to sidestep the strict privity requirement if she could establish an implied attorney–client relationship).

73. *Kurtenbach*, 260 N.W.2d at 56 (construing *Anderson v. Lundt*, 206 N.W. 657 (Iowa 1925)).

74. Id. (emphasis added).

75. Id. at 55.

76. Id.

77. Id.

78. Id. at 57.
D. Professional Negligence in Nebraska

Despite its waning appeal on the national scene, strict privity in professional malpractice actions has been and remains the rule in Nebraska. The Nebraska Supreme Court has repeatedly held—frequently without discussion—that a “lawyer’s duty to his or her client . . . does not extend to third parties absent some facts which establish a duty.” As the use of the word “duty” may indicate, legal malpractice actions in Nebraska are grounded in tort: while the “attorney-client relationship rests in contract,” a claim against an attorney for “professional misconduct does not give rise to a breach of contract action, but, rather, gives rise to a professional negligence action.” Thus, in order to prove a professional negligence claim against a lawyer, the plaintiff has the burden of demonstrating that the attorney had a duty to him or her, that the attorney breached that duty, and that this breach was the proximate cause of the plaintiff’s damages.

Drawing on the U.S. Supreme Court’s holding in Savings Bank, the Nebraska Supreme Court announced in 1980 that a “lawyer owes a duty to his client to use reasonable care and skill in the discharge of his duties, but ordinarily this duty does not extend to third parties.” At issue in the Nebraska case of Ames Bank v. Hahn were allegations of negligence by the bank against attorney Howard F. Hahn in connection with a real estate transaction. The bank pleaded that a deed drafted by Hahn did not correctly identify the property at issue,
and that it had “relied upon the misrepresentations made by Hahn” that the company offering mortgages on the land as security actually owned the land described. \(^88\) The Douglas County District Court dismissed the claims, and the Nebraska Supreme Court affirmed, holding that the bank offered no evidence that Hahn, who was not its attorney, owed it any duty of reasonable care. \(^89\)

The rule established in *Ames Bank* proved to be popular with the court, and it has often been repeated in the years leading up to its 2004 decision in *Swanson*, in which the court rejected the plaintiff’s attempt to, using the court’s previous language, “enlarge the scope of an attorney’s liability to third parties.” \(^90\) The court’s decision in *Swanson* echoed previous Nebraska jurisprudence in the area of estate planning malpractice, which likewise echoed the decision in *Ames Bank*. Simply put, “an attorney who drafts a will owes no duty to the beneficiaries, but, rather, owes a duty to the decedent only.” \(^91\) Thus, the attorney only owes a duty to his client.

As was seen above, other states’ methods for dealing with privity include balancing equitable considerations like reliance and the decedent’s intent. These alternatives to the traditional notion of contractual privity let plaintiffs state a cause of action for professional negligence even if they lack a contract. The Nebraska Supreme Court has contemplated two methods through which a third-party plaintiff could establish an attorney’s duty without a contract, although it has construed both approaches so narrowly as to make them virtually worthless for Nebraska malpractice plaintiffs.

First, if a plaintiff and the attorney lacked a contract, the court allows the plaintiff to present “some [other] facts which establish a duty.” \(^92\) In other words, in the absence of an express contract for services, a third-party plaintiff may be able to limbo under the privity bar if she can demonstrate other facts that show a duty on the attorney’s behalf. \(^93\) However, the court does not explain what facts might estab-

88. *Id.* at 354, 287 N.W.2d at 688.
89. *Id.* at 357, 287 N.W.2d at 689.
93. Accordingly, this seems to be just a method through which a malpractice plaintiff could evidence an attorney-client relationship without showing that she signed a contract with the attorney. If this is true, the “facts establishing a duty” standard does not eliminate the privity requirement but merely provides a different way, other than a contract, to show that an attorney-client relationship, and thus privity, existed.
lish a duty under this standard, although it frequently rejects the possibility that the plaintiff has actually demonstrated such facts. In fact, because the court has repeatedly endorsed its privity requirement, Nebraska scholar Ronald Volkmer suggests that the “fact that the will beneficiary is a ‘nonclient’ ends the matter. Unless the Nebraska court is willing to reconsider its position, there are no facts which can be pleaded to ‘establish the duty.’”

Second, the court suggested in 1991 that the plaintiff may be able to establish an implied attorney-client relationship. In McVaney v. Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, the court adopted the implied relationship approach first set out by the Iowa Supreme Court in Kurtenbach v. TeKippe. When the building that held McVaney’s veterinary practice was “destroyed by a natural gas explosion,” McVaney hired a law firm to help him obtain an insurance claim for his loss. Although he was able to recover under the insurance policy, he sued the firm for malpractice, alleging that it failed to file a negligence claim on his behalf against the local utility company, despite the law firm’s oral agreement to do so. Because the firm represented McVaney in other matters and because Baird Holm attorney Gerald Laughlin frequently discussed with McVaney the possibility of filing an action against the utility company, the court held that “a reasonable finder of fact could determine that the [client-attorney] relationship existed” with respect to this claim. Although the court ultimately affirmed a verdict for the law firm on other grounds, the court allowed McVaney to state a malpractice action against the firm.

Despite the flexibility that the implied relationship approach could provide to plaintiffs, McVaney is the only case in which the court allowed a claim on the basis of an implied relationship. The court has since held that the facts of McVaney—particularly the longstanding

94. Importantly, although the court has yet to elaborate on this standard, it has never held that issues like the decedent’s intent or the harm to the plaintiff were facts that could establish a duty.
95. See, e.g., Landrigan, 227 Neb. at 836, 420 N.W.2d at 314 (observing that “no attorney-client relationship existed between appellants and defendants, and . . . no other facts or circumstances were shown which establish a duty to appellants”); Ames Bank, 205 Neb. at 356, 287 N.W.2d at 689 (“There was no allegation that Hahn was employed by the plaintiff, and there was no allegation of facts which would otherwise establish a duty from Hahn to the plaintiff.”).
96. Volkmer, supra note 5, at 318 (emphasis added).
98. 260 N.W.2d 53 (Iowa 1977).
99. McVaney, 237 Neb. at 453, 466 N.W.2d at 503.
100. Id. at 456–57, 466 N.W.2d at 505.
101. Id. at 460, 466 N.W.2d at 506–07.
102. Admittedly, the Kurtenbach approach, while providing more means through which a plaintiff can state a case, also provides additional liability for attorneys currently protected by the strict privity requirement.
relationship between Baird Holm and McVaney—are requirements for a court to imply an attorney-client relationship. As will be set out in Part IV, infra, this narrow conception of an “implied relationship” prevents the court from providing an equitable result for many plaintiffs who are otherwise barred from presenting their claims to a jury.

III. LEOTA’S LOSS TO BEAR: THE FACTS OF SWANSON

Finally, we turn to the Nebraska Supreme Court’s most recent endorsement of the privity requirement in attorney malpractice cases. The controversy in Swanson v. Ptak stems from an apparently errant distribution made from a decedent’s estate to a relative who would not have received a distribution under Nebraska’s intestacy laws. In 1998, Norfolk, Nebraska resident Wilma L. Pritchard died intestate, leaving an estate of approximately $1 million. The estate consisted largely of gifts that Wilma inherited from her husband, Allan Pritchard, who passed away in 1997. Norfolk attorney David H. Ptak had previously represented the Pritchards, and family members, including Allan’s niece, Leota Swanson, gathered at his office following Wilma’s death. At that meeting, Ptak explained the distribution of Wilma’s estate under Nebraska’s intestacy laws and suggested that Wilma’s only relatives—her brother, Thomas Fillmore, and her sister, Nona Wittler—inherit the entirety of the estate “unless they agreed to surrender half of the estate to Allan’s family, including Swanson.” Ptak then “diagrammed for the family members the approximate distribution of the estate if such an agreement were reached,” which would have included a $250,000 share for Swanson. The family appointed Ptak as the estate’s personal representative, and he sent a letter on October 7, 1998, to the interested family members discussing this plan to share the estate. The letter included the following language:

If this is correct and you are agreeable to this distribution of the estate, I will need to prepare an agreement to be signed by Wilma’s heirs which consents to

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104. 268 Neb. 265, 682 N.W.2d 225.
105. Id. at 266, 682 N.W.2d at 225.
106. The couple was childless and Allan died intestate, so Wilma inherited the total of his estate in accord with Nebraska’s intestacy laws. In Nebraska, the surviving spouse receives the “entire intestate estate” if the decedent has no surviving children or parent. Neb. Rev. Stat. § 30-2302 (Supp. 2003). If the decedent was widowed and had no surviving children or parents, the intestate estate would be distributed to the decedent’s parents’ issue through representation. Id. § 30-2303(3).
107. Wittler was deceased by the time the Nebraska Supreme Court decided the case in July 2004.
108. Swanson, 268 Neb. at 266, 682 N.W.2d at 228.
109. Id. at 266, 682 N.W.2d at 228.
Correspondence between the parties, including Swanson, continued in this vein, with Ptak suggesting that the estate would be split in half between the Pritchards' heirs.

Apparently believing she would soon receive part of her aunt's estate, Swanson asked Ptak in June 1999 for an early portion of her share so she could purchase a condominium. In response, Ptak sent her a check for $99,000. However, Swanson's claim on the estate then deteriorated rapidly, as Wilma's siblings informed Ptak that they would not share the estate. Ptak asked Swanson to return the $99,000 distribution and then filed suit against her when the money was not returned. Swanson then filed suit against Ptak alleging professional negligence, breach of contract, and negligent failure to furnish accurate information. Swanson also "alleged that Ptak's negligence caused her (1) to incur legal fees defending against Ptak's lawsuit for the return of the $99,000, (2) to make gifts to each of her two children of $10,000, and (3) to fail to receive the remaining $90,900 of her one-fourth share of Wilma's estate."

In the District Court of Madison County, Ptak was successful in moving to strike the third allegation and in moving for summary judgment, which the court granted following a determination that "Ptak owed no legal duty to Swanson." Swanson appealed this finding and the dismissal of her case, and the Nebraska Supreme Court took up the issue. Explaining that "[u]nder Nebraska law, a lawyer owes a duty to his or her client to use reasonable care and skill in the discharge of his or her duties," the court rejected Swanson's contention that she had been Ptak's client because they had no written agreement and he never billed her for any services. Further, it rejected her assertion that a relationship existed because "she 'felt' that as personal representative of the estate, he was representing her legal interests." The court explained that Ptak, who was both an attorney and personal representative of Wilma's estate, provided legal services to himself as personal representative and thus could not have provided services to her, and affirmed summary judgment for Ptak.

110. Id. at 266, 682 N.W.2d at 228.
111. Id. at 267, 682 N.W.2d at 228.
112. The court noted that "[i]n his subsequent deposition testimony, Fillmore denied that he had ever agreed to share any portion of the estate with Swanson." Id.
113. Id. at 267, 682 N.W.2d at 229.
114. Id. at 267–68, 682 N.W.2d at 229.
115. Id. at 266, 682 N.W.2d at 228.
116. Id. at 270, 682 N.W.2d at 230.
117. Id. at 269, 682 N.W.2d at 230.
118. Id.
119. Id. at 269–70, 682 N.W.2d at 230.
PRIVITY, DUTY, AND LOSS

The Nebraska Supreme Court alluded to the possibility that Swanson could have demonstrated other "facts establishing [Ptak's] duty" or an implied attorney-client relationship, but ultimately held that neither existed.\textsuperscript{120} First, the court held that Swanson offered no facts establishing a duty on Ptak's part given the "tenuous" nature of their associations.\textsuperscript{121} Again, this seemed like Swanson's opportunity to demonstrate that Ptak owed her a duty even without a contract, but the court, as had been Volkmer's prediction,\textsuperscript{122} outright rejected this possibility for third parties in the wills and estates context: "[T]he duty of a lawyer who drafts a will on behalf of a client does not extend to heirs or purported beneficiaries who claim injury resulting from negligent draftsmanship."\textsuperscript{123} In effect, because of the privity requirement, there is no way that wills and estates malpractice plaintiffs in Nebraska can establish a duty other than through an attorney-client relationship. Failing as she did to establish an attorney-client relationship, the court rejected Swanson's claim, concluding that "Ptak had no professional duty to secure a gratuitous agreement from Wilma's heirs for the benefit of Swanson."\textsuperscript{124}

Second, the court rejected the conclusion that Swanson had an implied relationship with Ptak under the Kurtenbach\textsuperscript{125} test. Recalling its decision in McVaney,\textsuperscript{126} the court noted that it had acknowledged an implied attorney-client relationship because "there was evidence of a longstanding relationship between the client and the attorney and there was both general and specific discussion of what action the client wished the attorney to undertake with regard to a specific matter."\textsuperscript{127} The court then read these facts as narrowing the application of Kurtenbach, and denied recovery, because Swanson only demonstrated that "she understood that Ptak was advocating for her" and there was no pre-existing attorney-client relationship or contract.\textsuperscript{128} Again, the existence of a formal attorney-client relationship rules the court's analysis, in spite of its attention to other facts or implications that might give rise to a legal duty. By falling back on its decision in McVaney and other strict privity cases, the court in Swanson refused to revisit Nebraska's continued adherence to this requirement, a position that makes less sense in light of national trends.

\textsuperscript{120.} Id. at 271, 682 N.W.2d at 231.
\textsuperscript{121.} Id. at 272, 682 N.W.2d at 231.
\textsuperscript{122.} See supra note 96 and accompanying text.
\textsuperscript{123.} Swanson, 268 Neb. at 272, 682 N.W.2d at 231.
\textsuperscript{124.} Id. at 271, 682 N.W.2d at 231.
\textsuperscript{125.} Kurtenbach v. TeKippe, 260 N.W.2d 53 (Iowa 1977). See supra section II.C.
\textsuperscript{127.} Swanson, 268 Neb. at 270–71, 682 N.W.2d at 231.
\textsuperscript{128.} Id.
IV. NEBRASKA'S MISSED OPPORTUNITY

Nebraska's continued adherence to the privity requirement runs contrary to the increasing willingness of states to reconsider, loosen, or abrogate the privity requirement altogether. In the 1990s,

[s]tate courts nationwide re-examined the "strict privity" rule and found the rule wanting. The "modern trend," the new assault upon the citadel of privity, was proceeding "apace" once more. Against this onslaught stood a lonely outpost of state court decisions, clinging to the bar of privity. No state court stood out so starkly and lonely as the Nebraska Supreme Court.129

Nebraska's highest court is aware of its increasingly unique position in malpractice jurisprudence. Nebraska's pattern jury instructions, which are drafted by the court, acknowledge that "[t]he Court retains a conservative view of the liability of attorneys to third parties," even though "other jurisdictions have expanded attorney liability to third persons in specialized circumstances."130 However, this self-awareness did not induce the court to reconsider its position in Swanson.

At issue is not simply whether Nebraska is out of step with the majority of state courts.131 Instead, the crux of the matter is the ability of individuals who cannot evidence an attorney-client relationship to nonetheless have their day in court when they have experienced a loss because of an attorney's professional negligence. In order to provide some means of recovery for individuals like Swanson, the Nebraska Supreme Court should abrogate or, at the very least, ease Nebraska's privity requirement. Since the majority of states have eliminated the privity requirement, it is not difficult to suggest that "[t]he requirement of privity in a legal malpractice action should be put to a well-deserved burial."132 However, if the court is not prepared to abrogate the requirement altogether, it might instead make the Kurtenbach approach a meaningful tool for plaintiffs' recovery. Given the unique facts in her case, even lightening the strict privity requirement would not guarantee Swanson a recovery, as a jury still may not have found Ptak liable. But, should the court give real weight to the Kurtenbach idea, plaintiffs whose reliance on an attorney's actions which lead them to incur some monetary injury may at least be able to present their cases to a jury.

129. Volkmer, supra note 5, at 300. Volkmer also observed in 1995 that the Nebraska Supreme Court had "recently declined an opportunity to re-visit the issue of privity." Id. at 296. Volkmer's observation is as applicable following Swanson as it was in 1995.


131. Volkmer, supra note 5, at 295–96.

A. Privity as Proof of No Duty

The key feature of the strict privity requirement is that, in those states that require it, a lack of privity typically precludes discussion of whether a duty existed. Courts imagine that the duty flows from the contractual relationship, so if the attorney and non-client are not bound by a contractual relationship, the attorney is held to have had no legal duty to her. Because no duty can exist outside the contract, the privity requirement effectively bars an entire class of plaintiffs—non-client beneficiaries—from being able to state a claim for attorney malpractice.

It is for this reason that many states, including California and Florida, have abrogated the direct privity requirement. The rules adopted in these states, including the balancing- and intent-based schemes, focus on the circumstances of the particular case. Rather than precluding discussion of the nature of the plaintiff's claims by reverting (or perhaps regressing) to a determination that the plaintiff's claims are barred by a lack of contractual privity, these states consider factors such as the decedent's intent and the foreseeability of the plaintiff's harm.

By contrast, states that require strict privity do not often discuss these kinds of equitable considerations—considerations that reflect the compensatory element of tort negligence actions. In Swanson, Swanson requested that Ptak, while believing that he represented her, make a $99,000 distribution from the estate to purchase a condominium and make gifts to her children. The court regarded Swanson's belief that Ptak was her attorney as misinformed, at least in part because it observed that Ptak had no legal authority as personal representative to distribute funds to Swanson. The court's conclusion notwithstanding, it seems easy to infer that Swanson did, in fact, rely on Ptak's actions by using the distribution she received. Yet Swanson, because the court pays no heed to these equitable considera-

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134. Espinosa v. Sparber, Shevin, Shapo & Heilbronner, 612 So. 2d 1378 (Fla. 1993); Holsapple v. McGrath, 575 N.W.2d 518 (Iowa 1998).
136. See, e.g., id. (considering the "foreseeability of harm" to the plaintiff); Holsapple, 575 N.W.2d at 520 (considering whether the plaintiff at issue had foreseeably relied on the attorney's actions).
137. THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 1 (2001).
139. Id. at 270, 682 N.W.2d at 230 (explaining that "[a]lthough Swanson's unilateral belief that Ptak was acting as her attorney may have been sincere, it was based on a misunderstanding of his duties as personal representative of the estate") (emphasis added).
140. Id. at 271, 682 N.W.2d at 231 (holding that Ptak "could [not] compel persons who are lawful heirs to share the estate with persons who are not").
tions, has no remedy. Again, at issue here is not whether the distribution—or any other actions by Ptak—was negligent, but whether a plaintiff should be summarily barred from bringing the issue of negligence to a jury, in spite of her reliance, because she did not sign a contract with the attorney.

B. Abrogation and an Alternative: The Kurtenbach Approach

Because the strict privity requirement precludes the Nebraska Supreme Court from considering issues like an individual's reliance on an attorney's action or the foreseeability of that reliance, the court should eliminate the privity requirement. There is potentially too much to be lost by beneficiaries—namely the right to state a claim and have their day in court—to completely preclude them from recovery simply because they lack a contractual relationship. However, if the court is unwilling to abrogate strict privity, it has another alternative. The court can breathe life into the alternative to strict privity it has only once invoked by allowing plaintiffs to reach a jury by demonstrating an implied relationship.\textsuperscript{141} Rather than narrowing recovery under Kurtenbach to factual situations similar to those in McVaney,\textsuperscript{142} namely the pre-existing attorney-client relationship, the Nebraska Supreme Court ought to analyze each case individually using the Kurtenbach factors. Again, the Kurtenbach test allows the plaintiff to establish an implied attorney-client relationship if she can demonstrate the following:

(1) a person [sought] advice or assistance from an attorney, (2) the advice or assistance sought pertain[ed] to matters within the attorney's professional competence, and (3) the attorney express[ly] or impliedly agree[d] to give or actually gives the desired advice or assistance.\textsuperscript{143}

The facts of Swanson, at least as identified in the opinion, seem to fit the elements of the Kurtenbach test. First, Swanson sought the advice of an attorney. Along with the other members of her family, Swanson visited with Ptak following the death of her aunt-in-law in order to seek his advice about the distribution of the estate.\textsuperscript{144} Wilma did not have a will, so the meeting was not held simply to facilitate the distribution of prearranged transfers. Rather, it seems the family sought Ptak's legal advice as to the distribution of Wilma's property under Nebraska's intestacy laws. Second, the information Swanson sought seems to have been within the scope of Ptak's professional compe-

\textsuperscript{141} Kurtenbach v. TeKippe, 260 N.W.2d 53 (Iowa 1977).
\textsuperscript{143} Kurtenbach, 260 N.W.2d at 56 (construing Anderson v. Lundt, 206 N.W. 657 (Iowa 1925)).
\textsuperscript{144} Swanson, 268 Neb. at 266, 682 N.W.2d at 228.
tence, at least because he was familiar enough with Nebraska's intestacy laws to suggest a distribution scheme to the family. Finally, the court might imply Ptak's agreement to give the advice or assistance because he communicated with the family to coordinate Swanson's distribution and provided her with the initial $99,000 share.

This "thicker" consideration of the plaintiff's case, in which facts like the attorney's agreement to give advice are at issue, is more fair for plaintiffs than dismissing the case upon an initial determination that no privity exists. The importance of the Kurtenbach approach is to provide plaintiffs with, at the very least, the opportunity to present their cases to a jury. But for the implied relationship test to be a meaningful resource for plaintiffs, the Nebraska Supreme Court must expand its interpretation of an implied relationship beyond facts indicating the plaintiff and attorney had a longstanding relationship, as seems to be required under McVaney.

Importantly, under Kurtenbach, third-party plaintiffs would still be required to show that they had a substantial interaction with the attorney. The approach merely provides a different—not necessarily lower—evidentiary burden for the third party: in lieu of providing evidence of an express oral or written contract identifying a relationship between the parties, the plaintiff can instead offer evidence suggesting legal advice was sought and purposefully given by the attorney. In other words, the attorney must still owe a duty to the third party, but the court allows the plaintiff to use evidence other than a written or oral contract to establish this duty. Thus, the implied relationship test provides a different method for the plaintiff to demonstrate that an attorney-client relationship existed but does not completely eliminate the privity requirement. Regardless of which path it may ultimately take, the court missed an opportunity in Swanson to fully reconsider the role of privity in professional malpractice cases in Nebraska.

C. The Myth of "Automatic Liability"

Admittedly, Swanson may not have found relief in Nebraska even if the privity restriction was loosened, or abolished altogether, because even "[a]bolishing the privity rule does not automatically make lawyers liable." The ability to state a claim, as in any case, does not guarantee a victory on the facts. Swanson might have lost her case

145. Id.
146. Id. at 266-67, 682 N.W.2d at 228.
148. At least, the court's analysis in Swanson suggests that this is the case. Swanson, 268 Neb. at 270-71, 682 N.W.2d at 231.
149. Volkmer, supra note 5, at 309.
even if allowed her day in court, as a jury could determine that there 
had been no professional negligence on Ptak's part. In fact, this 
may be the most likely scenario. It is an extremely difficult proposi-
tion to make that Ptak was negligent in not sending some portion 
of Wilma's estate her way since Swanson had no claim under Nebraska's 
intestacy laws. While her reliance seems clear under the facts re-
counted in the opinion, Swanson was not even an intended 
beneficiary 
as per the typical estate-related malpractice case. Further, the facts 
of the case seem to fit the Kurtenbach test, but a jury may have little 
sympathy for malpractice allegations that are leveled against an at-
torney who (1) tried to help a non-beneficiary procure a share of her 
gistory's estate, (2) worked with the family to secure a share for her, 
and (3) contacted Swanson as soon as he realized the family did not 
wish to divide the estate. Thus, even if the Nebraska Supreme Court 
had denied summary judgment and allowed Swanson to reach a jury, 
she may not have recovered at trial.

The possibility that Swanson may not have won on the facts even 
with a broader interpretation of Kurtenbach supports the argument 
that the strict privity requirement could be loosened without opening 
attorneys to "automatic" liability. Perhaps the most common justifi-
cation for the privity requirement is the belief that strict privity 
"greatly limits malpractice liability." However, the Iowa Supreme 
Court explained that its loosening of the privity requirement was 
"carefully limited so as not to 'expose lawyers to a virtually unlimited 
potential for liability.'" In fact, the nature of the balancing, intent, 
and Kurtenbach tests is to provide recovery for some plaintiffs, but not 
to preclude or allow all plaintiffs to state a claim. The inquiry in these 
cases is more fact-intensive because the courts must consider, for ex-
ample, whether the decedent evidenced some intent to devise a gift to 
the third party plaintiff or "the moral blame attached to the defen-
dant's conduct." However, it is this focus on the facts of each indi-
vidual case that limits recovery: not all plaintiffs in a state that

150. A recent survey of estate-related malpractice cases by author Martin Begleiter 
offers no help in this regard. Begleiter, supra note 1, at 287–341. The Swanson 
fact pattern does not fit into any of the many categories identified, which include 
cases in which the decedent's intent was not effectuated, cases involving the rule 
against perpetuities, and cases in which testamentary capacity was at issue. Id.
151. Volkmer, supra note 5, at 309.
152. Begleiter, supra note 1, at 286. Begleiter identifies several other justifications for 
privity, including protection of the "integrity and solemnity of the will" and the 
need to protect the relationship between the attorney and decedent. The privity 
requirement also purportedly "protects attorney-client confidentiality." Id. at 
346.
Scoville, 410 N.W.2d 679, 681 (Iowa 1987)).
154. Holsapple, 575 N.W.2d at 520.
utilizes the Kurtenbach approach will be able to, for example, show that the attorney, without a contract, agreed to provide legal advice or that the plaintiff relied on such advice. Thus, while recovery is not patently barred for all third-party plaintiffs, nor should it be, the plaintiffs' interactions with their defendant—attorneys must still fit a template of facts in order to state a claim.

Finally, as was discussed in Part I, the ABA reports that only nine percent of malpractice cases in the late 1990s (the most recent statistics available) arose from estate-related cases, and of those only 2.2% resulted in plaintiff victories in court. Admittedly, there has been a 0.62% increase in estate-related malpractice claims since a similar 1985 ABA study. However, this miniscule increase—less than one percent of cases nationally—suggests that the nearly national abrogation of strict privity has clearly not resulted in an “open season” on wills and estates attorneys. Even if states do not approach third-party standing in the same manner, the fact that these systems are functioning in the vast majority of state courts suggests that the benefit of giving certain third parties their day in court outweighs the concern that abrogating privity will open the malpractice floodgates. The prediction that abrogation (or weakening) of the privity requirement would prompt open-ended malpractice liability for attorneys has not come to pass.

D. Privity and Loss-Bearing

In addition to these more practical considerations, there are policy-related reasons to reevaluate the strict privity requirement, including traditional tort notions of loss-bearing. The theoretical foundations of tort law stress shifting loss away from the innocent party, because an important function of tort actions “is to restore plaintiffs to the position they were in prior to the injury by awarding monetary damages.” This is precisely why courts may choose to impose a

157. See supra note 74 and accompanying text.
158. In fact, this is exactly the problem with Nebraska’s current interpretation of the Kurtenbach exception—the template of acceptable facts is so narrow that few plaintiffs fit within it.
159. See AM. BAR ASS’N, supra note 6, at 7.
160. Id. at 5. Changes in the number of malpractice claims by area of law from 1985 to 1999 range from an increase in claims of 7.62% for business transaction commercial law to a decrease of 8.94% in real estate claims. Id.
161. KEETON, supra note 29, § 4.
162. Id. § 92, para. 1. “Tort obligations are . . . imposed by law on policy considerations to avoid some kind of loss to others.” Id.
163. KÖNIG & RUSTAD, supra note 137, at 1.
duty on one party in order to induce that party to adhere to a certain standard of care.\textsuperscript{164}

Further, if an injured plaintiff—including a third-party plaintiff—is barred from bringing an action, "the injury or property loss would fall to the victim, his or her family members, or the taxpayers."\textsuperscript{165} Accordingly, the California Supreme Court concluded in 1961 that the elimination of strict privity "does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss."\textsuperscript{166} The privity requirement, by sweeping together third parties who do not have a reasonable claim with those who have foreseeably relied on an attorney's advice or actions, precludes innocent parties who may have suffered a loss from recovering, and thus shifts the cost of legal malfeasance onto these innocent or at least potentially more innocent parties.

Proponents also suggest that economic advantages arise when an attorney's duty is limited, including "keep[ing] legal malpractice insurance costs under control, [and] keep[ing] the cost of legal services to the community in check."\textsuperscript{167} However, this effect comes at an obvious secondary cost—precluding what might be wholly legitimate claims by third parties simply because their relationship with the attorney did not accord with traditional notions of a formal attorney-client relationship. If, as the Model Rules of Professional Conduct indicate, attorneys should strive to "be [a] competent, prompt and diligent"\textsuperscript{168} advocate who "zealously asserts the client's position under the rules of the adversary system,"\textsuperscript{169} then protection of these third parties as an end in itself is a valuable goal.

Finally, many states that have eliminated the privity requirement have adopted approaches that provide warning to attorneys that some liability may result from their actions, particularly those that emphasize foreseeability, reliance, and attorney consent. Under these approaches, including Kurtenbach, attorneys need not fear liability to any third party that might claim a benefit from, for example, a poorly drafted will. Under Kurtenbach, liability is limited to situations in which an attorney "expressly or impliedly" agrees to give advice on a topic within his professional competence.\textsuperscript{170} Thus, should an attorney with knowledge and experience in will drafting provide negligent advice or service to another individual, the attorney's liability is based

\begin{itemize}
\item \textsuperscript{164} Keeton, supra note 29, § 93, para. 6.
\item \textsuperscript{165} Koenig & Rustad, supra note 137, at 2.
\item \textsuperscript{166} Lucas v. Hamm, 364 P.2d 685, 688 (Cal. 1961) (emphasis added).
\item \textsuperscript{167} Pinkall, supra note 25, at 1276.
\item \textsuperscript{168} See Model Rules, supra note 24, para. 4.
\item \textsuperscript{169} Id. para. 2.
\item \textsuperscript{170} Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977) (construing Anderson v. Lundt, 206 N.W. 657 (Iowa 1925)).
\end{itemize}
on his consenting to give the advice in the first place. That an attorney has consented to give advice, or has in fact given such advice without expressly consenting to do so, suggests that she had adequate warning that liability might result. A liability structure such as the one advocated here also better comports with the notions of personal responsibility that underlie the doctrine of negligence, as an attorney's liability is founded in her willing engagement to provide advice or services to a client who has sought her help.

V. CONCLUSION

Teresa Stanton Collett observes that although "[i]n many jurisdictions only the 'client' has standing to sue for injuries resulting from an attorney's negligence," many "estate planners and elder law specialists regularly counsel individuals who expect the lawyer to consider the interests of others—spouses, children, parents, or other family members."\(^{171}\) Although these expectations are different from those at issue in \textit{Swanson}, in which the attorney was not retained by the decedent's family for estate planning purposes, Collett's observation goes to perhaps the best justification for abrogating the privity requirement—the fact that many decedents work from the assumption that the attorney is not just working for them, but for their families. Leota Swanson may not have had a successful claim even if Nebraska's strict privity requirement was eliminated. But in order to provide Nebraskans with the opportunity to have their day in court, the Nebraska Supreme Court should, at the very least, subject the privity requirement to a methodical reconsideration. The potential of an expanded \textit{Kurtenbach} approach, one which includes a more generous sweep of potential malpractice plaintiffs than merely those with pre-existing attorney-client relationships, is to provide recovery for otherwise innocent plaintiffs who have experienced a loss due to an attorney's negligence, while still maintaining limits on attorney liability to third parties.

\textit{Tracy M. Mason}
