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## Whose Beneficiaries are They Anyway? Copenhaver v. Rogers and the Attorney's Contract to Prepare a Will in Virginia

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WHOSE BENEFICIARIES ARE THEY ANYWAY? *COPENHAVER*  
*V. ROGERS* AND THE ATTORNEY'S CONTRACT TO PREPARE A  
WILL IN VIRGINIA

I. INTRODUCTION AND SCOPE

In a case of first impression in the Commonwealth, the Supreme Court of Virginia recently considered whether an attorney may be liable for drafting a will which results in the failure of a testamentary gift to intended beneficiaries. Historically, will beneficiaries had been denied a means of recovery against attorneys due to a lack of privity between the parties.<sup>1</sup> Although Virginia remains a "strict privity"<sup>2</sup> jurisdiction, it recognizes third-party contract beneficiary claims<sup>3</sup> and has legislatively abrogated the privity requirement in other areas of the law.<sup>4</sup> The plaintiffs in *Copenhaver v. Rogers*<sup>5</sup> sought to establish a third-party beneficiary claim as the intended beneficiaries of the contract between the deceased testator-client and the drafting attorney. The court implicitly recognized the potential viability of such a claim, yet concluded that the requisite cause of action had not been stated.<sup>6</sup> The court further surmised that under current Virginia law it would "no doubt be difficult for a litigant, in the case of this kind, to meet the requirements of third-party beneficiary claims."<sup>7</sup>

As the first Virginia case on point, *Copenhaver* appears to accept, albeit somewhat reluctantly, a theoretical basis for legal malpractice actions by intended beneficiaries of a contract to write a will. *Copenhaver* is significant precedent in the Commonwealth and may open the door for others to advance claims against attorneys for the negligent drafting of wills.<sup>8</sup> However, *Copenhaver* does expose the need to devise an equitable

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1. See *infra* notes 9-28 and accompanying text.

2. See *Copenhaver v. Rogers*, 238 Va. 361, 366, 384 S.E.2d 593, 597 (1989); *Ayyildiz v. Kidd*, 220 Va. 1080, 1085-86, 266 S.E.2d 108, 112-13 (1980). But see *infra* note 23 (discussing why *Ayyildiz* ought not be controlling precedent in wills cases).

3. VA. CODE ANN. § 55-22 (Repl. Vol. 1986); see *infra* note 60.

4. Virginia has abolished the privity requirement in actions involving claims for damages to persons or property. See *infra* note 61.

5. 238 Va. 361, 384 S.E.2d 593 (1989).

6. *Id.* at 371, 384 S.E.2d at 597-98.

7. *Id.* at 371, 384 S.E.2d at 598.

8. Cognizant of the malpractice crisis that exists in the legal community, this Note does not advocate a sweeping extension of attorney liability to non-clients. Non-client claims against lawyers have not developed heedlessly, but rather limited exceptions have evolved for those innocent parties that suffer the brunt of attorney negligence or incompetence. Indeed, the first case in this country to extend attorney liability to non-client beneficiaries of a will spoke to the issue of whether the legal profession would be unduly burdened. That court concluded that no such burden would be created, as the beneficiary in effect, is merely

solution to the problems ingrained in the traditional recovery theories which are fatal to these types of cases.

This Note will briefly examine the various approaches to non-client legal malpractice actions taken by other jurisdictions beginning with a historical account of the development of these actions. A discussion of *Copenhaver* and of the third-party beneficiary claim as it pertains to contracts to write wills and trusts in Virginia follows. This Note then advocates the adoption of the Restatement (Second) of Contracts position on third party beneficiary contracts when dealing with actions against lawyers by would-be beneficiaries.

## II. THE HISTORY OF THIRD-PARTY LEGAL MALPRACTICE CLAIMS

In order to bring a professional negligence claim against an attorney, the English common law required that the parties be in privity.<sup>9</sup> Although officially adopted as a rule of law in this country in 1879 in *Savings Bank v. Ward*,<sup>10</sup> the privity requirement had been assumed in Virginia nearly a century earlier.

Deciding *Stephens v. White*<sup>11</sup> in 1796, the Supreme Court of Virginia was the first American appellate court to consider a legal malpractice action.<sup>12</sup> In *Stephens*, the plaintiff claimed that his attorney failed to file a necessary pleading. The attorney defended this claim by stating that he had not been paid for his services. The court found that the attorney was liable for negligence because consideration was not necessary for a duty to arise under the attorney-client relationship.<sup>13</sup> This rationale is still valid today.<sup>14</sup> Thus, although the privity requirement is contractual in nature,<sup>15</sup>

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permitted to stand in the shoes of the client-testator, fortuitously silenced by death. See *Lucas v. Hamm*, 56 Cal.2d 583, —, 364 P.2d 685, 688, 15 Cal. Rptr. 821, 825 (1961), cert. denied, 368 U.S. 987 (1962). It is hoped that the views expressed in this Note will help to curtail legal malpractice by exposing to the bar the potential attorney liability that lies within all wills.

An examination of all of the possible bases of liability for the estate planner is beyond the scope of this Note. For discussion of those areas, see generally G. Johnston, *Legal Malpractice in Estate Planning — Perilous Times Ahead for the Practitioner*, 67 IOWA L. REV. 629 (1982).

9. *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842); see W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 668 (5th ed. 1984).

10. 100 U.S. 195 (1879). The adoption of the strict privity rule was not without qualifications, however. Exceptions would be made if the allegations against an attorney were based on fraud, collusion or if "the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty." *Id.* at 205-06.

11. 2 Va. (1 Wash.) 203 (1796).

12. J.R. Johnson, *Legal Malpractice: A Survey of the Virginia Law*, VA. B. NEWS 19, 19-20 (Apr. 1977); see Note, *Legal Malpractice in Virginia: Tort or Contract?* 16 U. RICH. L. REV. 907, 907 (1982).

13. *Stephens*, 2 Va. (1 Wash.) at 211-12.

14. See D. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE 2 (1980). "The at-

it is clear that all of the technical elements of contract formation need not be present; as used throughout this Note, "privity" may be broadly defined as that relationship which results from the lawyer's representation of his client.

Whereas the privity requirement had slowly begun to erode in other areas of the law,<sup>16</sup> it remained an absolute defense to all third-party legal malpractice claims until the early 1960's. The first step in disposing of the privity defense in this context was taken by the Supreme Court of California in *Lucas v. Hamm*.<sup>17</sup> The attorney in *Lucas* prepared a will which contained a provision establishing a testamentary trust. The duration of the trust violated the Rule Against Perpetuities,<sup>18</sup> rendering the trust void. The intended beneficiaries of the failed trust sued the drafting attorney. Under the strict privity rule, the only person who could have had

torney-client relationship is said to be contractual in nature. . . . Whether the attorney received or was to receive compensation is immaterial to the determination of whether an attorney-client relationship existed." *Id.* (footnotes omitted); *see also* *Guy v. Liederbach*, 501 Pa. 47, —, 459 A.2d 744, 749 (1983) (fee not "indispensable" in creating an attorney-client relationship).

15. D. MEISELMAN, *supra* note 14, at 2; *see, e.g.*, Annotation, *Attorney's Liability to One Other Than Immediate Client For Negligence In Connection With Legal Duties*, 61 A.L.R. 4th 615 (1988).

16. The landmark decision that dismissed the privity requirement in products liability cases is *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). After *MacPherson*, "the privity requirement began to assume less importance in one area of the law after another." *Schwartz v. Greenfield*, Stein & Weisinger, 90 Misc. 2d 882, —, 396 N.Y.S.2d 582, 583 (Sup. Ct. 1977).

17. 56 Cal.2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962).

18. Calling the Rule Against Perpetuities a "technicality-ridden legal nightmare," 56 Cal. 2d at —, 364 P.2d at 690, 15 Cal. Rptr. at 826 (quoting Leach, *Perpetuities Legislation Massachusetts Style*, 67 HARV. L. REV. 1349, 1349 (1954)), the *Lucas* court decided "it would not be proper to hold that the defendant failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise." *Id.*

In Virginia, attorneys owe clients a duty to carry out the client's matters with "a reasonable degree of care, skill and dispatch . . ." *Glenn v. Haynes*, 192 Va. 574, 581, 66 S.E.2d 509, 512 (1951); *see* Note, *supra* note 12, at 907-08.

Canon 6 of the Virginia Code of Professional Responsibility provides:

DR 6-101 *Competence and Promptness.*

(A) A lawyer shall undertake representation only in matters in which:

(1) The lawyer can act with competence and demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters. . . .

VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 (1983).

Judge Poff was more demanding of the degree of skill required in the legal profession. In a legal malpractice action, "courts have a responsibility to the client, to the profession, and to the public at large to make and enforce rules which promote excellence in the practice of the law and energize the distinctive rights and obligations of the lawyer-client relationship." *Allied Prod., Inc. v. Duesterdick*, 217 Va. 763, 767, 232 S.E.2d 774, 777 (1977) (Poff, J., dissenting).

standing to sue was the now deceased testator-client.<sup>19</sup> The court recognized that upholding the privity defense was tantamount to sanctioning attorney unaccountability, and found that significant public policy considerations<sup>20</sup> outweighed its retention. The modern trend that stems from this balancing test has been to allow limited exceptions<sup>21</sup> that relax the privity requirement in non-client suits.<sup>22</sup>

In the nearly thirty years since *Lucas*, courts have been split as to the propriety of the privity requirement in non-client legal malpractice cases. While the majority of jurisdictions appear to uphold the privity defense,<sup>23</sup> an ascending minority of courts reach conclusions to the contrary.<sup>24</sup> In the jurisdictions where such claims have been permitted, limited exceptions to the privity requirement have been granted to allow actions in

19. See *Lucas*, 56 Cal. 2d at \_\_\_, 364 P.2d at 688, 15 Cal. Rptr. at 824. "[I]f persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so, and the policy of preventing future harm would be impaired." *Id.* at \_\_\_, 364 P.2d at 688, 15 Cal. Rptr. at 824.

20. *Id.* at \_\_\_, 364 P.2d at 687-89, 15 Cal. Rptr. at 823-25; see *infra* notes 29-35 and accompanying text.

21. Privity is not wholly cast away, rather, courts are willing to make closely tailored, limited exceptions to the rule. See *Walker v. Lawson*, 514 N.E.2d 629, 634 (Ind. Ct. App. 1987), *vacated*, 526 N.E.2d 968 (Ind. 1988); *Flaherty v. Weinberg*, 303 Md. 116, \_\_\_, 492 A.2d 618, 624 (1985) (third-party beneficiary theory).

22. See *Schreiner v. Scoville*, 410 N.W.2d 679, 681 (Iowa 1987).

23. See D. MEISELMAN, *supra* note 14, at 105; Annotation, *supra* note 15, at 625; see also *Lilyhorn v. Dier*, 214 Neb. 728, 335 N.W.2d 554 (1983); *Spivey v. Pulley*, 138 A.D.2d 563, 526 N.Y.S.2d 145 (1988); *Victor v. Goldman*, 74 Misc. 2d 685, 344 N.Y.S.2d 672 (1973), *aff'd*, 43 A.D.2d 1021, 351 N.Y.S.2d 956 (1974); *Simon v. Zipperstein*, 32 Ohio St.3d 74, 512 N.E.2d 636 (1987); *Guy v. Liederbach*, 501 Pa. 47, \_\_\_, 459 A.2d 744, 749-50 (1983) (recognizing "overwhelming majority" privity rule).

Relying upon annotations and commentators, some courts have stated that a strict privity requirement is a 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.

The vast majority of such decisions concern factual situations where no jurisdiction would permit the plaintiff to bring a suit for negligence. Many reported decisions concern claims of opponents in litigation, yet no jurisdiction has found a duty by an attorney to an adverse party. . . . One way to measure the strength of the privity rule is to examine those decisions concerning claims by a would-be beneficiary of a will.

R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* 153-54 (2d ed. 1981) (footnotes omitted).

There is precedent in Virginia that an attorney's liability is generally only to the client. *Ayyildiz v. Kidd*, 220 Va. 1080, 1085, 266 S.E.2d 108, 112 (1980). It should be noted that *Ayyildiz* was a malicious prosecution case brought by an adverse party in the underlying medical malpractice action. It is submitted that *Ayyildiz* ought not be considered as authority in actions concerning the intended beneficiaries of wills and trusts.

24. D. MEISELMAN, *supra* note 14 at 105; see *Simon v. Zipperstein*, 32 Ohio St. 3d 74, \_\_\_, 512 N.E.2d 636, 639 (1987) (Brown, J., dissenting) (majority of courts); see, e.g., *Stowe v. Smith*, 184 Conn. 194, 441 A.2d 81 (1981); *Olge v. Fuiten*, 102 Ill. 2d 356, 466 N.E.2d 224 (1984); *Schreiner v. Scoville*, 410 N.W.2d 670 (Iowa 1987); *Flaherty v. Weinberg*, 303 Md. 115, 492 A.2d 618 (1985); *Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744 (1983).

tort,<sup>25</sup> third-party contract beneficiary theories,<sup>26</sup> and public policy considerations.<sup>27</sup> Consistent with their frequent overlap in application, an examination of these theories may show that they are all pieces of one concept—the need to provide an equitable, common sense solution to the plight of the intended beneficiary of a will, damaged by legal malpractice.<sup>28</sup>

### III. THE APPLICABLE THEORIES OF RECOVERY

#### A. *The Balance of Factors Test*

Several courts have allowed would-be beneficiaries a cause of action as a matter of sound public policy in order to meet the goals of providing a recovery to innocent parties and of discouraging the recurrence of such harm.<sup>29</sup> In balancing the factors presented by these cases, courts consider the following:

- 1) The extent to which the transaction was intended to affect the plaintiff,
- 2) the foreseeability of harm to the plaintiff,
- 3) the degree of certainty that the plaintiff suffered injury,
- 4) the closeness of the connection between the defendant's conduct and the injury, and
- 5) the prevention of future harm.<sup>30</sup>

25. *E.g.*, *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) *cert. denied*, 369 U.S. 987 (1962); *Herman v. Frey*, 537 N.E.2d 529 (Ind. Ct. App. 1989); *see D. MEISELMAN, supra* note 14, at 216-18.

26. *E.g.*, *Stowe v. Smith*, 184 Conn. 194, 441 A.2d 81 (1981); *Olge v. Fuiten*, 12 Ill. App. 3d 1048, 445 N.E.2d 1344 (1983); *Flaherty v. Weinberg*, 303 Md. 115, 492 A.2d 618 (1985); *Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744 (1983).

27. *E.g.*, *Fickett v. Superior Court*, 27 Ariz. App. 793, 558 P.2d 988 (1976); *Heyer v. Flaig*, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); *Needham v. Hamilton*, 459 A.2d 1060 (D.C. 1983).

28. *See Guy v. Liederbach*, 501 Pa. at \_\_\_, 459 A.2d at 753 (Nix, J., concurring). "It would be unconscionable to permit admitted actionable conduct to be insulated by the fortuitous death of the person recognized in the law to have standing to prosecute such a claim, where the brunt of the injury from such conduct is borne by a living party." *Id.*

29. *See supra* note 27.

30. *Lucas*, 56 Cal. 2d at \_\_\_, 364 P.2d at 687-88, 15 Cal. Rptr. at 823-24. The Supreme Court of California adopted this test from a case it had earlier considered which involved a notary public's liability to beneficiaries for the negligent drafting of a will. *See Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958).

The *Lucas* court omitted a sixth factor from the *Biakanja* test without explanation: the amount of moral blame to be attached to the defendant's actions. It is submitted that the *Lucas* court took the better view in deleting that element because moral blame does not fit with the notion of an unintentional, negligent act. Even highly competent, experienced members of the bar may be subject to the occasional error in draftsmanship.

Moral blame ought not enter into the equation, but lawyers should not be litigation proof

The balance of factors rationale has been the basis for finding that a duty of care existed between the attorney and the beneficiaries,<sup>31</sup> thus relaxing the strict privity requirement on the basis of policy. Alternatively, the same balance of factors test is used by courts to support the third-party beneficiary analysis, finding that policy considerations and the reality of the estate planning scheme<sup>32</sup> dictate that beneficiaries were clearly intended to benefit from a contract to write a will.<sup>33</sup> Although state courts are entrusted with furthering the public interest in providing actionable legal malpractice claims,<sup>34</sup> especially where the opposite result would render the attorney unaccountable to anyone,<sup>35</sup> the balance of factors test has been criticized as being overly broad and has not been generally accepted.<sup>36</sup>

### B. *The Tort Theory*

An attorney-client relationship impresses a duty upon the lawyer to handle the client's affairs in a competent manner. The attorney-client re-

when innocent beneficiaries are damaged through legal malpractice. "Lawyers, like other mortals, are liable for failure to exercise ordinary care, skill, and diligence." *Walker v. Lawson*, 514 N.E.2d 629, 631 (Ind. 1987) *vacated*, 526 N.E.2d 968 (Ind. 1988).

For a discussion of the theoretical origins underlying each element and an argument advocating the acceptance of the balance of factors test, see Note, *Legal Malpractice for the Negligent Drafting of a Testamentary Instrument*: *Schreiner v. Scoville*, 73 *Iowa L. Rev.* 1231, 1250 (1988).

31. *Wisdom v. Neal*, 568 F. Supp. 4, 7-9 (D.N.M. 1982).

32. See *infra* note 75 and accompanying text.

33. Compare *Lucas*, 56 Cal. 2d at \_\_\_, 364 P.2d at 689, 15 Cal. Rptr. at 825 (policy supports both tort and third-party beneficiary theories) with *Heyer v. Flaig*, 70 Cal. 2d 223, \_\_\_, 449 P.2d 161, 167, 74 Cal. Rptr. 225, 231 (1969) (third-party beneficiary theory is superfluous).

34. See *Allied Prod., Inc. v. Duesterdick*, 217 Va. 763, 767, 232 S.E.2d 774, 776-77 (1977) (Poff, J., dissenting).

[A] legal malpractice case involves standards, societal values, and public policies with infinitely broader impact. In unique ways, the quality of the practice of the legal profession affects the welfare of the body politic. . . . [C]ourts have a responsibility to the client, to the profession, and to the public at large to make and to enforce rules which promote excellence in the practice of the law and energize the distinctive rights and obligations of the lawyer-client relationship.

*Id.*

35. See *Lucas*, 56 Cal. 2d at \_\_\_, 364 P.2d at 688, 15 Cal. Rptr. at 824; *Heyer v. Flaig*, 70 Cal. 2d at 228, 449 P.2d at 165, 74 Cal. Rptr. at 229 (executor has no standing). The beneficiary is the only person who might be able to bring an action against the allegedly negligent lawyer. Even if the executor had standing, since the estate is not damaged by a failed disposition (the asset is still within the estate), the fact that the "estate has nothing to gain would remove any incentive for suit." *Guy v. Liederbach*, 501 Pa. 47, \_\_\_, 459 A.2d 744, 749 (1983).

36. See *Flaherty v. Weinberg*, 303 Md. 116, \_\_\_, 492 A.2d 618, 622 (1985). The balance of factors test has been considered too broad, unworkable, and conducive to inconsistent results. See *id.* and cases cited therein; *Essex v. Ryan*, 446 N.E.2d 368 (Ind. Ct. App. 1983); *Hale v. Groce*, 304 Or. 281, 744 P.2d 1289 (1987).

lationship, breach of the duty of care, damages, and proximate cause form the basis of the standard legal malpractice claim grounded in negligence.<sup>37</sup>

Recognizing that the damages from estate planning errors are inflicted upon the beneficiaries, not the deceased client or the estate itself,<sup>38</sup> and that these damages are foreseeable, some courts have broadened the lawyer's duty of care beyond the zone of strict privity to those actually harmed.<sup>39</sup> The lawyer breaches that extended duty owed to the beneficiaries in failing to effectuate a valid testamentary disposition. The tort recovery may be the sole basis of liability,<sup>40</sup> or it may run concurrently with a third-party beneficiary theory,<sup>41</sup> or still a hybrid of the two.<sup>42</sup> While both theories may be pled in the alternative,<sup>43</sup> "the better reasoned view . . . in . . . an action for the negligence of an attorney in the performance of professional services [in Virginia], while sounding in tort, is an action for breach of contract. . . ."<sup>44</sup>

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37. See *Byrd v. Martin, Hopkins, Lemon & Carter, P.C.*, 564 F. Supp. 1425, 1427 (W.D. Va. 1983) (construing the prima facie case for legal malpractice under Virginia law), *aff'd*, 740 F.2d 961 (4th Cir. 1984).

38. See *supra* note 35.

39. See *Schreiner v. Scoville*, 410 N.W.2d 679, 682 (Iowa 1987); *Hale v. Groce*, 83 Or. App. at \_\_\_, 730 P.2d at 577; *Heyer v. Flaig*, 70 Cal. 2d at \_\_\_, 449 P.2d at 167, 74 Cal. Rptr. at 231.

Persuaded by a modification on the *Lucas* balance of factors test, the court in *Schreiner v. Scoville* extended the attorney's duty of care to "the direct, intended, and specifically identifiable beneficiaries of the testator as expressed in the testator's testamentary instruments." *Schreiner v. Scoville*, 410 N.W.2d at 682. While commending the *Schreiner* court for holding as it did in this case of first impression in Iowa, one commentator has argued that the more flexible *Lucas* approach would better achieve increased attorney liability in estate planning matters. See Note, *supra* note 30, at 1254.

40. Calling the third-party beneficiary theory a "conceptual superfluity" the court in *Heyer v. Flaig* reasoned "the right of action sounds in tort and enures by reason of our determination that public policy requires the recognition of a duty of care on the part of the attorney which accrues directly to the third-party, the intended beneficiary." *Heyer v. Flaig*, 70 Cal. 2d at \_\_\_, 449 P.2d at 167, 74 Cal. Rptr. at 231 (1969); see *Needham v. Hamilton*, 459 A.2d 1060, 1061 (D.C. 1983) (gravamen of the cause of action is in negligence), *aff'd*, 519 A.2d 172 (D.C. App. 1986). But see *Guy v. Liederbach*, 501 Pa. 47, \_\_\_, 459 A.2d 744, 752 (1983) (tort analysis is based on a "common confusion" of negligence principles; although a breach of duty of care, liability restricted under contract rights).

41. *Garcia v. Borelli*, 129 Cal. App. 3d 24, 180 Cal. Rptr. 768 (1982); *Olge v. Fuiten*, 112 Ill. App. 3d 1048, 445 N.E.2d 1344 (1983).

42. Although pleading a third-party beneficiary claim, the court in *Hale v. Groce* decided that the contract between the lawyer and the testator "merely incorporate[d] by reference or by implication a general standard of skill and care to which the defendant would be bound independent of the contract." *Hale v. Groce*, 83 Or. App. 55, 58, 730 P.2d 576, 578 (1986).

43. See VA. CODE ANN. § 8.01-272 (Repl. Vol. 1984).

44. *Oleyar v. Kerr*, 217 Va. 88, 90, 225 S.E.2d 398, 400 (1976); see Note, *supra* note 12, at 907.



### C. *The Third-Party Beneficiary Theory*

When the parties to a contract intend that another shall receive all or part of the benefit of the performance, an enforceable interest accrues in the third party.<sup>45</sup> In the estate planning context, the traditional application of this theory casts the attorney in the role of the promisor, agreeing to confer the benefits of the contract to write a will upon those persons the client, as promisee, so designates. In exchange for this agreement, the attorney is paid consideration in the form of a fee. In sum, "the will is not the contract, but that which is contracted for."<sup>46</sup>

It is submitted that this traditional application of the third-party beneficiary doctrine does not realistically fit the estate planning scheme. Courts that have implemented the third-party beneficiary recovery for the drafting of testamentary instruments have admitted that it is the testator's intent as promisee which establishes the right of action.<sup>47</sup>

In Virginia, a plaintiff must allege and show that "the parties to the contract clearly and definitely intended it to confer a benefit upon him."<sup>48</sup> Virginia has long recognized that persons upon whom the parties to a contract intend to confer benefits may hold an actionable interest in seeing that the contract is performed.<sup>49</sup> In addition to being a strict privity jurisdiction,<sup>50</sup> Virginia strictly adheres to the traditional third-party beneficiary theory as well, as evidenced in *Copenhaver*.

### IV. COPENHAVER v. ROGERS

In November of 1982, Mr. and Mrs. Wythe M. Hull, Jr., employed Mr. Frank W. Rogers to "prepare and draft wills for the Hulls, evaluate the Hulls' assets, and take steps to minimize any 'transfer taxes'."<sup>51</sup> Mutual

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45. See generally E. FARNSWORTH, *CONTRACTS* 712-34 (1982); Corbin, *Contracts for the Benefit of Third Persons*, 46 *LAW. Q. REV.* 12 (1930). The elements of a third-party beneficiary claim are the existence of a contract in which the promisor intended to benefit the third-party, breach of that promise, and the resulting damages. *Olge v. Fuiten*, 112 Ill. App. 3d 1048, \_\_\_, 445 N.E.2d 1344, 1347 (1983).

46. *Guy v. Liederbach*, 501 Pa. 47, \_\_\_, 459 A.2d 744, 747, 751 (1983); see *Copenhaver v. Rogers*, 238 Va. 361, 369-70, 384 S.E.2d 593, 597 (1989) (quoting *Stowe v. Smith*, 184 Conn. 194, 196, 441 A.2d 81, 82 (1981)).

47. *E.g.*, *Lucas v. Hamm*, 56 Cal. 2d 583, \_\_\_, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 825 (1961), *cert.denied*, 368 U.S. 987 (1962); *Stowe v. Smith*, 184 Conn. 194, \_\_\_, 441 A.2d 81, 83 n.1 (1981); *Hale v. Groce*, 304 Or. 281, \_\_\_, 744 P.2d 1289, 1291 (1987); *Guy v. Liederbach*, 501 Pa. 47, \_\_\_, 459 A.2d 744, 750-52 (1983); see *infra*, notes 72-86 and accompanying text.

48. *Allen v. Lindstrom*, 237 Va. 489, 500, 379 S.E.2d 450, 457 (1989); *Professional Realty Corp. v. Bender*, 216 Va. 737, 739, 222 S.E.2d 810, 812 (1976).

49. *E.g.*, *Montague Mfg. Co. v. Homes Corp.*, 142 Va. 301, 128 S.E. 447 (1925); see 33 VA. CODE, ch. 116, § 2 (1849).

50. See *supra* note 2.

51. *Copenhaver v. Rogers*, 238 Va. 361, 361, 384 S.E.2d 593, 593 (1989).

wills were prepared and executed with, inter alia, identical provisions for the creation of a testamentary trust which would benefit the Hulls' two daughters with a remainder in their issue.<sup>52</sup>

Shortly after Mrs. Hull's death in November of 1984, Rogers realized that neither of the wills contained the necessary trust terms.<sup>53</sup> To rectify the omission in Mr. Hull's will, Rogers drafted a codicil supplying the missing trust terms. The codicil was executed on the same day that Mrs. Hull's will was offered for probate.<sup>54</sup>

Rogers then wrote to the Hull's two daughters<sup>55</sup> expressing the opinion that the terms supplied in another provision to set up a different trust in Mrs. Hull's will would save the defective trust. Rogers added that he would file a petition on behalf of the Dominion Trust Company, executor and trustee, to adopt his construction and uphold the trust. However, the petition as filed asked the court to declare the trust void as it lacked the needed trust terms. The court declared the trust invalid on those grounds.<sup>56</sup> The interest that was to be held in trust passed outright to the Hulls' daughters, Ellen H. Keever and Martha H. Copenhaver. Because the trust failed, both daughters' issue lost their remainder interest.<sup>57</sup> Complaining of their lost remainder interest, Martha Copenhaver's issue sued Rogers and his firm. The Copenhavers proceeded on a third-party beneficiary theory.<sup>58</sup> Alleging to be the intended beneficiaries of an oral contract<sup>59</sup> between the testator and Rogers, they relied upon the Virginia third-party beneficiary statute, section 55-22 of the Code of Virginia. Under section 55-22, a third party may enforce a "covenant or promise"

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52. The trust corpus was to be "in equal shares or in trust as hereinafter provided for their surviving issue per stirpes." *Id.* at 363, 384 S.E.2d at 594.

53. *Id.*

54. *Id.*

55. Rogers also prepared answers for the Copenhavers to use in the suit construing the validity of the trust. Assuming these acts established an attorney-client relationship between Rogers and the Copenhavers, it was one independent of the relationship between Rogers and the testator. As such, it could not provide the basis for finding that the Copenhavers were in privity with Rogers with respect to the services he provided to the testator. *Id.* at 365 n.1, 384 S.E.2d at 595 n.1.

56. *Id.* at 363-64, 384 S.E.2d at 594.

57. In addition to the lost remainder interest, the Copenhavers alleged the misdelivery of a \$250,000 check out of estate funds and negligent tax advice to Mr. Hull, who died in 1987. The allegedly negligent tax advice increased the generation transfer skipping tax paid by the estate by \$1,600,000. The total damages claimed by the Copenhavers totalled \$3,475,000. *Id.*

58. *Id.* at 366, 384 S.E.2d at 595.

59. *See id.* at 367, 384 S.E.2d at 595-96. Justice Thomas apparently did not question that the Copenhavers successfully pled the existence of a contract between Rogers and the Hulls. "[T]he contract on which they rely is oral." *Id.* Additionally, the court assumed, without deciding, that § 55-22 applied to oral contracts. *Id.* The essence of Justice Thomas' argument concerns the failure to allege that Rogers or the Hulls ever intended that anyone benefit from the contract to write the will. *See id.*

made under an "instrument" for the third party's benefit, "in whole or in part."<sup>60</sup> The trial court did not determine whether oral contracts were within the ambit of "instrument" in section 55-22.

Rogers filed a demurrer on grounds that the Copenhavers were not in privity nor was their action one for which Virginia had enacted antiprivty statutes.<sup>61</sup> The Copenhavers responded that privity was "irrelevant"

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60. VA. CODE ANN. § 55-22 (Repl. Vol. 1986) provides:

An immediate estate or interest in or the benefit of a condition respecting any estate may be taken by a person under an instrument, although he be not a party thereto; and if a covenant or promise be made for the benefit, in whole or in part, of a person with whom it is not made, or with whom it is made jointly with others, such person, whether named in the instrument or not, may maintain in his own name any action thereon which he might maintain in case it had been made with him only and the consideration had moved from him to the party making such covenant or promise. In such action the covenantor or promisor shall be permitted to make all defenses he may have, not only against the covenantee or promisee, but against such beneficiary as well.

VA. CODE ANN. § 55-22 (Repl. Vol. 1986).

Virginia should adopt the RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) ("Restatement") position in third-party beneficiary suits against lawyers in the estate planning area. A thorough discussion of whether § 55-22 does apply to oral contracts is beyond the scope of this Note. The Restatement makes no reference to an "instrument," as in VA. CODE ANN. § 55-22.

The word "instrument" has been used since Virginia's earliest versions of § 55-22, but the original intent does not appear to have been to bar third-party actions. See 33 Va. Code, ch. 116, § 2 (1849). In *Thacker v. Hubard & Appelby, Inc.*, 122 Va. 379, 94 S.E. 929 (1918), the court said, "[i]n actions upon parol contracts, the rule is well established that the party may sue thereon with whom the contract is made, or who is beneficially interested in it." *Id.* at 389, 94 S.E. at 931 (quoting *Jones v. Thomas*, 62 Va. (21 Gratt.) 96 (1871)). "Such was the state of the law at the time of the revision of the general statutes of the state in 1849." *Id.*; see Brief of Appellants at 29.

61. The Virginia General Assembly has twice spoken to the issue of privity:

Lack of privity between plaintiff and defendant shall be<sup>b</sup> no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods. . . . VA. CODE ANN. § 8.01-813 (Repl. Vol. 1984).

In cases not provided for in § 8.2-318 where recovery of damages for injury to person, including death, or to property resulting from negligence is sought, lack of privity shall be no defense.

VA. CODE ANN. § 8.01-223 (Repl. Vol. 1984). It appears that an argument could be made that the damages suffered by the loss of a testamentary gift comes within the scope of § 8.2-318, especially a devise of real property or a bequest of personalty as opposed to financial assets. Although the plaintiffs in *Copenhaver* alleged damages to their remainder interest, see *supra* note 57, and a remainder interest is clearly within the definition of property, they chose to proceed on a third-party beneficiary theory. However, as the trial court had denied a tort-based recovery as well as a third-party beneficiary claim in its decision and the Copenhavers had appealed the trial court's decision, the Supreme Court of Virginia considered the nature of the damages in its opinion. Stating that "this is a case involving a claim solely for economic losses," the court held that the Copenhavers had "no cause of action

as they were "third party beneficiaries of the wills and estate plans of their grandparents."<sup>62</sup> Being described as "issue," the Copenhavers needed to prove that they were members of a sufficiently definite class "clearly intended as beneficiaries" of the oral contract to draft their grandmother's will.<sup>63</sup> The trial court held 1) the strict privity rule barred an action in tort, and 2) it had not been shown that plaintiffs were "clearly intended"<sup>64</sup> to be beneficiaries (i.e., they were not members of a sufficiently designated class).<sup>65</sup>

On appeal to the Supreme Court of Virginia, the Copenhavers responded to the ruling of the trial court that they were adequately identified as the beneficiaries of the oral contract, and that section 55-22 of the Code of Virginia covered such contracts.<sup>66</sup> The court assumed, without deciding, that section 55-22 applied to oral contracts<sup>67</sup> and did not reach the issue of whether the Copenhavers were sufficiently identified to be "clearly intended" beneficiaries.<sup>68</sup> Instead, the court rested its ruling on a failure to allege that there was any intent that the Copenhavers should benefit from the oral contract between the attorney, Rogers, and the

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. . . in tort against Rogers . . . absent privity." *Copenhaver*, 238 Va. at 366, 384 S.E.2d at 595. Furthermore, Virginia strictly construes the statutes. *Sensenbrenner v. Rust, Orling & Neale*, 236 Va. 419, 423, 374 S.E.2d 55, 57 (1988).

62. *Copenhaver*, 238 Va. at 365, 384 S.E.2d at 595.

63. *Id.* at 366, 384 S.E.2d at 595.

64. Virginia requires that in order to state a third-party beneficiary claim, it must be alleged and proven that the parties to the contract clearly and definitely intended to confer the benefit of the performance on the third party. *See supra* note 48.

65. The opinion in *Copenhaver* affirmed the trial court's demurrer "because the Copenhavers left unanswered that portion of the trial court's ruling which stated that the Copenhavers failed to allege that they 'were . . . beneficiaries of the *principal contract*.'" *Copenhaver*, 238 Va. at 367, 384 S.E.2d at 596. (emphasis added by the Supreme Court of Virginia). It is submitted that the Supreme Court of Virginia misinterpreted the ruling of the court below. The trial court opinion, in pertinent part, reads:

In reciting from the bench why this particular case did not present the court with a classic third-party beneficiary claim as alleged by plaintiffs, the court observed that for a recovery under any third-party beneficiary claim it must be alleged and shown that the plaintiffs were clearly intended as beneficiaries of the principal contract. *See Professional Realty v. Bender*, 216 Va. 737 (1976). In this case, no grandchildren were designated by name and the bequest, at best, was intended for the benefit of a class of persons not yet determined and for which there is no certainty whatsoever that the plaintiffs would be included in that class.

Letter Opinion, *Copenhaver v. Rogers* (Va. Cir. Ct. of Smyth County, May 20, 1988).

In reading the actual ruling of the trial court, it becomes clear that the quoted portion spoke to the issue of class definiteness, not whether the Copenhavers left unanswered any portion of that ruling pertaining to failure to plead the existence of a contract made for their benefit.

66. VA. CODE ANN. § 55-22 (Repl. Vol. 1986) is highly remedial and should be liberally construed. *Norfolk-Portsmouth Newspapers, Inc. v. Stott*, 208 Va. 228, 156 S.E.2d 610 (1967); *Montague Mfg. Co. v. Homes Corp.*, 142 Va. 301, 128 S.E. 447 (1926).

67. *See supra* notes 59-60.

68. *Copenhaver*, 238 Va. at 367, 384 S.E.2d at 596.

testator.<sup>69</sup>

In several portions of their pleadings, the Copenhavers had referred to themselves as the "intended beneficiaries of the estates" of their grandparents.<sup>70</sup> The court differentiated the claim as pled from being the "intended beneficiary of the contract" between Rogers and the Hulls to prepare the will in question.<sup>71</sup> Writing for the court, Justice Thomas stated that "[t]here is a critical difference between being the intended beneficiary of an estate and being the intended beneficiary of a contract between a lawyer and his client."<sup>72</sup>

The court's reasoning exposes the predicament that a non-client beneficiary to a contract between a testator and a lawyer faces under the traditional third-party beneficiary analysis. In order to state a valid claim, the litigant must allege that a contract existed which indicates the parties' intent to give the third party the benefit of the performance. Even assuming the application of oral contracts under section 55-22 of the Code of Virginia, the litigants will be hard pressed to plead the facts sufficient to prove that the arrangement that transpired in the lawyer's office rested upon the *lawyer's* desire to confer any benefits upon them. Being designated in the will is not enough, as

the will is not the contract, but rather that which is contracted for. Furthermore, even if the naming of the legatee in the will is taken as indicating the testator's intent to benefit the legatee, it cannot be taken to indicate that the drafting attorney intended to confer any benefit. Thus it is very unlikely that a beneficiary could ever bring suit under the . . . [traditional] requirements.<sup>73</sup>

Even if the Copenhavers had pled that they were the intended beneficiaries of the contract of representation,<sup>74</sup> under traditional analysis the

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69. *Id.*

70. *Id.* at 368, 384 S.E.2d at 596.

71. *Id.*

72. Justice Thomas offered two examples to illustrate the difference between a beneficiary of an estate and a beneficiary of a contract. One was where a client requests a lawyer's services in preparing a will and does not care who gets what, as long as taxes are minimized. In such a situation, to Justice Thomas, "none could fairly be described as beneficiaries of the contract between the client and his attorney because the intent of the relationship was to avoid taxes as much as possible." *Id.* at 368-69, 384 S.E.2d at 597. No party named in the will could have an enforceable interest. In the second hypothetical, the client instructs the lawyer that unless the lawyer can guarantee that each grandchild will get a million dollars, he will take his legal business elsewhere. According to the court, this would make each grandchild an intended beneficiary of the contract between the lawyer and the client. *Id.* at 369, 384 S.E.2d at 597.

73. *Id.* at 370, 384 S.E.2d at 598.

74. They in fact have filed a new action in the Circuit Court of the City of Roanoke expressly pleading facts to prove they were intended third-party beneficiaries of the contract of representation between the drafting attorney and the testators. *Copenhaver v. Rogers*, Law No. CL-89001063 (Va. Cir. Ct. of Roanoke filed Nov. 8, 1989). They contend that

determinative intent is that of the lawyer as the promisor. It is submitted that the *testator's* intent in designating certain persons in a will ought to govern the issue of incidental versus intended beneficiaries. Yet under the traditional theory as espoused by the Supreme Court of Virginia, that intent would define the lawyer's contractual obligation to benefit those persons.

This is not a case of a mere technical flaw in pleading an established theory in a novel fact situation. The nature of the attorney-client employment relationship in the drafting of testamentary instrument does not lend itself to application under traditional means of third-party contract beneficiary analysis. Only by torturing the reality of estate planning can it be said that a lawyer ever personally promises to benefit those mentioned in a will which the lawyer drafts as a service for a client.<sup>75</sup>

In considering this same dilemma, the Supreme Court of Pennsylvania took a common sense, pro-active view that "persons who are named beneficiaries under a will who lose their intended legacy due to the failure of an attorney to properly draft the instrument should not be left without recourse or remedy. . . ."<sup>76</sup> Likewise in a case of first impression, the court in *Guy v. Liederbach*<sup>77</sup> weighed its traditional third-party beneficiary requirements against the approach taken in section 302 of the Second Restatement of Contracts ("Restatement").<sup>78</sup> In *Guy*, a witness to a

the prior action, as originally filed in the Circuit Court of Smyth County and decided by the Supreme Court of Virginia in *Copenhaver v. Rogers*, has no *res judicata* effect on the new action because defendant's demurrer in the prior action did not specifically allege that plaintiffs had failed to plead the facts necessary to support a third-party beneficiary cause of action at law.

Plaintiffs cite to statutory authority for the proposition that "[n]o grounds other than those stated specifically in the demurrer shall be considered by the court." VA. CODE ANN. § 8.01-273 (A) (Repl. Vol. 1984). Accordingly, they argue that a ruling on the demurrer can address only those grounds specifically raised, not all possible grounds for dismissal. Defendants contend that the prior action was a decision on the merits and that *res judicata* bars the Roanoke action. See, e.g., *Brunner v. Cook*, 134 Va. 266, 272, 114 S.E. 650, 651 (1922).

The new action was scheduled for argument before the Circuit Court of the City of Roanoke as this publication went to press, in May 1990.

75. "A third-party beneficiary is one intended to be benefitted by an exchange between a promisor and a promisee. It is a journey into artifice to say that an attorney scrivener of a will makes any promise to benefit a legatee of a will he writes for another." *Guy v. Liederbach*, 501 Pa. 47, —, 459 A.2d 744, 754 (1983) (McDermott, J., dissenting).

76. *Id.* at —, 459 A.2d at 752.

77. *Id.* at —, 459 A.2d at 744.

78. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979) states:

Intended and Incidental Beneficiaries

(1) Unless otherwise agreed between the promisor and the promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

will was also the named beneficiary. That act invalidated her legacy, and even though she witnessed the will under the direction of the testator's lawyer, no privity could exist between them because "he could not employ his expertise on her behalf in such a manner."<sup>79</sup> In considering her third-party beneficiary claim under a traditional analysis, the plaintiff in *Guy* would be met with the same obstacles as in *Copenhaver*.<sup>80</sup> Persuaded that the Restatement's interpretation provided a "properly restricted cause of action,"<sup>81</sup> the court overruled its traditional analysis for third-party beneficiary claims of this nature.<sup>82</sup>

Under the Restatement 302, a beneficiary must first establish standing to sue by pleading facts which show that the recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties.<sup>83</sup> This "appropriateness" standard grants the trial court considerable room for the exercise of discretion.<sup>84</sup> In accepting employment to draft a legally enforceable will, it is submitted that the trial court could be well within its discretion to find that the paramount purpose in designating beneficiaries is that they receive the gift benefits described in the will.<sup>85</sup> Logically, the parties do not contract for an invalid will. Moreover, as the executor or trustee cannot sue the drafting attorney for the failure of a testamentary gift,<sup>86</sup> granting the beneficiary standing to enforce the lawyer's performance to write a valid testamentary distribution is "appropriate." If the beneficiary cannot enforce it, no one can.

Whereas the traditional analysis depends upon allegations that the lawyer, as promisor, intended to confer benefits upon the designated parties in a will, the Restatement position is that once standing is recognized as appropriate in the beneficiary, he or she is an intended beneficiary if the circumstances indicate that the testator (promisee) intended to give the

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(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

It should be noted that under § 302, it is the intention of the promisee that defines the right of the beneficiary. Hence, unlike the artificial situation where the lawyer is deemed the promisor, conferring the benefits of his client's estate upon the beneficiary, the intent of the testator-client determines who is the intended beneficiary. It is submitted that this approach better describes the reality of the attorney-client relationship in contracting for the attorney's services to prepare a will.

79. 501 Pa. at \_\_\_, 459 A.2d at 751.

80. *See id.* at \_\_\_, 459 A.2d at 750-51.

81. *Id.* at \_\_\_, 459 A.2d at 751.

82. *Id.*

83. *Id.*

84. *Id.* at \_\_\_, 459 A.2d at 751.

85. *See Lucas v. Hamm*, 56 Cal. 2d 583, \_\_\_, 364 P.2d 685, 688, 15 Cal. Rptr. 821, 824 (1961); *Simon v. Zipperstein*, 32 Ohio St. 3d 74, \_\_\_, 512 N.E.2d 636, 639 (1987) (Brown, J., dissenting).

86. *See supra* notes 19 & 35.

benefits of the performance to the beneficiary.<sup>87</sup> Again, as the testator contracts for a legally valid will, the circumstances surrounding the arrangement with the lawyer to write the will indicate that the testator believed the will would properly dispose of the property in question to the benefit of designated beneficiaries.<sup>88</sup>

In *Hale v. Groce*,<sup>89</sup> the intended beneficiary sued the drafting attorney for failing to follow the client's direction to include a testamentary gift in the will or in a related trust.<sup>90</sup> Persuaded that this case presented not only a "plausible," but a "classic" example of the Second Restatement of Contracts definition of the third-party beneficiary, a unanimous Oregon Supreme Court followed the Pennsylvania court in *Guy* and the Connecticut court in *Stowe v. Smith*<sup>91</sup> by adopting the Restatement in the estate planning setting.

The Supreme Court of Virginia considered *Guy* but was "unwilling" to modify its third-party beneficiary position based on the Copenhavers' claim. The court called that claim "plainly inadequate,"<sup>92</sup> but where does that inadequacy lie? Even assuming that section 55-22 applies to oral contracts,<sup>93</sup> and the statute is "highly remedial,"<sup>94</sup> under traditional third-party analysis, litigants and courts will have to make-believe that when an attorney prepares a client's will, he or she makes a direct promise to benefit those who the client intends to benefit.

## V. CONCLUSION

In deciding its first case on the subject, Virginia has presented the bench and bar with an unworkable "remedy" for third-party beneficiary claims against lawyers for the negligent preparation of testamentary in-

87. *Guy*, 501 Pa. at \_\_\_, 459 A.2d at 751-52.

88. As the court in *Guy* stated:

In the case of a testator-attorney contract, the attorney is the promisor, promising to draft a will which carries out the testator's intention to benefit the legatees. The testator is the promisee, who intends that the name beneficiaries have the benefit of the attorney's promised performance. The circumstances which clearly indicate the testator's intent to benefit a named legatee are his arrangements with the attorney and the text of his will.

*Guy*, 501 Pa. at \_\_\_, 459 A.2d at 752.

89. 304 Or. 281, 744 P.2d 1289 (1987).

90. *Id.* at \_\_\_, 744 P.2d at 1290.

91. 184 Conn. 194, 441 A.2d 81 (1981). *Stowe* also recognized a cause of action based on RESTATEMENT (SECOND) OF CONTRACTS § 302 in a case involving a beneficiary under a will suing for legal malpractice. 184 Conn. at \_\_\_, 441 A.2d at 83.

92. *Copenhaver v. Rogers*, 238 Va. 361, 371, 384 S.E.2d 593, 598 (1989).

93. *Id.*; see *supra* notes 59-60.

94. *Id.* at 371, 384 S.E.2d at 598. *Norfolk-Portsmouth Newspapers, Inc. v. Stott*, 208 Va. 228, 156 S.E.2d 610 (1967); *Montague Mfg. Co. v. Homes Corp.*, 142 Va. 301, 128 S.E. 447 (1925).



struments. Barred in tort by rigid adherence to strict privity, persons who, but for attorney error, are intended to benefit under any will drafted in the Commonwealth will have to allege and prove a legal fiction that it is the attorney, and not the testator, who intended to benefit them. A more equitable approach would be to admit the reality of the situation and implement a means to achieve its objectives. Recognizing that the third-party beneficiaries are the testator's beneficiaries, and not the attorney's, seems to be the logical solution.

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