



1998

# Recent Developments: Noble v. Bruce: Testator's Beneficiaries May Not Maintain a Legal Malpractice Action against Testator's Attorney Where No Privity Exists between the Beneficiaries and the Attorney

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## Recommended Citation

Clark, Alexandra C. (1998) "Recent Developments: Noble v. Bruce: Testator's Beneficiaries May Not Maintain a Legal Malpractice Action against Testator's Attorney Where No Privity Exists between the Beneficiaries and the Attorney," *University of Baltimore Law Forum*: Vol. 29 : No. 1 , Article 15.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol29/iss1/15>

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## *Noble v. Bruce*

The Court of Appeals of Maryland unanimously held in *Noble v. Bruce*, 349 Md. 730, 709 A.2d 1264 (1998), that an attorney is not liable to a testator's beneficiaries in a malpractice action for providing negligent estate planning advice to a testator or for negligently drafting a will. Rejecting the balancing-factors theory and the third-party beneficiary theory, the court relied upon the strict privity-rule, which states that an attorney is not liable to non-clients for negligence in the absence of privity or a duty to them. Consequently, beneficiaries will be unable to sue the testator's attorney for malpractice even if the attorney was negligent.

The decision in *Noble v. Bruce* was the result of two consolidated cases: *Noble v. Bruce* and *Fauntleroy v. Blizzard*. In *Noble*, Mr. and Mrs. Long retained Charles A. Bruce, Jr. ("Bruce") to prepare their wills. Bruce prepared reciprocal wills for the Longs, who had substantial assets. The wills did not provide for a "by-pass" trust, which would have enabled the Longs to shelter 1.2 million dollars from federal estate taxes.

After Mr. and Mrs. Long died, the beneficiaries of the Longs' estates sued Bruce in the Circuit Court for Somerset County alleging that he was negligent in failing to provide tax-planning advice to the Longs. Bruce asserted in an affidavit that he did inform the Longs of the tax

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implications, but that the Longs did not wish to part with control of their assets during their lifetimes. Bruce filed a motion for summary judgment, which was granted by the circuit court. The Court of Special Appeals of Maryland affirmed, stating that the beneficiaries lacked standing to sue Bruce. The beneficiaries appealed to the Court of Appeals of Maryland.

In *Fauntleroy*, Ms. Jackson, the testator, retained T. Houghlett Henry, Jr. ("Henry") to prepare her will. Ms. Jackson bequeathed stock in Pittsburgh Des Moines Steel Company ("PDM") to the children and grandchildren of her brother-in-law. The will directed that all taxes were to be paid out of

the residuary estate. Henry subsequently sent Ms. Jackson a letter stating that the PDM stock would pay its own taxes as they discussed. At her death in 1994, Ms. Jackson owned, in addition to other property, 1.4 million dollars worth of PDM stock, and the estate and inheritance taxes totaled \$910,000. In accordance with the provisions of the will, the taxes were borne by the residuary legatees, the Fauntleroy's.

The Fauntleroy's brought suit in the Circuit Court for Talbot County against Henry's estate alleging that Henry was negligent in preparing the will, specifically, in providing that the taxes were to be paid from the residuary estate instead of from the proceeds of the sale of the stock. Henry's estate filed a motion to dismiss, which was granted because the beneficiaries lacked standing to sue. The Fauntleroy's appealed to the Court of Special Appeals of Maryland and filed a petition for writ of certiorari to the Court of Appeals of Maryland, which was granted.

In these consolidated cases, the issue before the Court of Appeals of Maryland was whether an attorney is liable in a malpractice action to non-client, third parties for providing negligent estate planning advice or for negligently drafting a will. *Noble*, 349 Md. at 733, 709 A.2d at 1266. In reaching its decision, the court evaluated three approaches applied

in attorney malpractice actions for negligent estate planning: the balancing-factors theory; the third-party beneficiary theory; and the strict-privity rule. *Id.* at 738, 709 A.2d at 1268.

Under the balancing-factors theory, the court considered “the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury, and the policy of preventing future harm.” *Id.* at 743, 709 A.2d at 1271 (quoting *Lucas v. Hamm*, 364 P.2d 685, 687 (Cal. 1961)). The court dismissed the balancing-factors theory as overly broad and unworkable. *Id.* at 744, 709 A.2d at 1271.

Next, the court discussed the third-party beneficiary theory. This theory is premised upon the existence of a duty between the attorney and the non-client. *Id.* at 746, 709 A.2d at 1272 (citing *Flaherty v. Weinberg*, 303 Md. 116, 134, 492 A.2d 618, 627 (1985)). An attorney will owe a duty to the non-client if, as a direct result of the transaction, the client intended to benefit the non-client. *Id.* at 747, 709 A.2d at 1272. (quoting *Flaherty*, 303 Md. at 130-31, 492 A.2d at 625). Therefore, once the non-client establishes that the attorney owed him a duty, he must prove the remaining elements of negligence. *Id.* at 747, 709 A.2d at 1273 (citing *Flaherty*, 303 Md. at 131, 492 A.2d at 625).

The court rejected the third-party beneficiary theory, articulating several reasons why the third-party beneficiary theory did not apply in these cases. First, neither attorney was retained by the testators to provide estate-planning advice on behalf of the beneficiaries. *Id.* at 752-53, 709 A.2d at 1276. Second, the client’s intent to benefit the non-client must be a direct purpose of the transaction or relationship. *Id.* at 754, 709 A.2d at 1276. The beneficiary of the will is not necessarily the beneficiary of the attorney-client relationship. *Id.* In the cases before the court, the testators intended to benefit themselves in planning their estates by retaining Bruce and Henry. *Id.* As a result, the beneficiaries of the wills were not third-party beneficiaries. *Id.*

The court further noted that Maryland courts generally apply the strict-privity test in attorney malpractice cases. *Id.* at 738, 709 A.2d at 1268 (citing *Wlodarek v. Thrift*, 178 Md. 453, 468, 13 A.2d 774, 481 (1940)). The court followed the rule of *Nat’l Savings Bank v. Ward*, 100 U.S. 195, 205-06 (1879), which held that a party not in privity with the attorney may not maintain a negligence action against the attorney. *Noble*, 349 Md. at 738, 709 A.2d at 1268. To maintain a cause of action for negligence or malpractice against an attorney, the plaintiff must prove the following: “1) the attorney’s employment; 2) his neglect of a reasonable duty; and 3) loss to the client proximately

caused by the neglect of duty.” *Id.* at 739, 709 A.2d at 1269 (citing *Kendall v. Rogers*, 181 Md. 606, 611-12, 31 A.2d 312, 315 (1943)). Thus, in the absence of a duty between the attorney and the third party, the third party may not maintain a negligence claim against the attorney. *Id.* (quoting *Flaherty*, 303 Md. at 134, 492 A.2d at 627).

To determine if a duty exists, the court will consider the relationship between the parties and the nature of the harm that could result from the lack of ordinary care. *Id.* (quoting *Jacques v. First Nat’l Bank*, 307 Md. 527, 534-35, 515 A.2d 756, 759-60 (1986)). Courts generally will find that no duty exists where the harm is purely economic and no privity exists between the parties. *Id.* at 740, 709 A.2d 1269 (citing *Jacques*, 309 Md. at 537, 515 A.2d at 761).

The court noted that public policy, such as the duty of loyalty to the client, conflict of interest between the testator and the beneficiaries, and unlimited liability to third parties justifies the strict-privity rule. *Id.* at 741-42, 709 A.2d at 1270. Thus, the attorney-client relationship will sustain an undue burden if a rule other than the strict-privity rule was adopted. *Id.* at 742, 709 A.2d at 1270. The court held that the strict-privity rule applies in this case; consequently, the beneficiaries can not maintain a cause of action against the attorneys because no employment relationship existed between the

attorneys and the beneficiaries. *Id.* at 752, 709 A.2d at 1275.

In *Noble v. Bruce*, the Court of Appeals of Maryland held that a third party not in privity with the attorney may not maintain a legal malpractice action against the attorney. With the adoption of the strict-privity rule in attorney malpractice actions, the court of appeals adopted a bright-line test, which effectively denies a cause of action to all beneficiaries who the attorney did not represent. The adoption of such a bright-line test is unquestionably harsh to the innocent beneficiaries because the testator almost certainly intended to benefit these individuals. The faulty drafting of a will or the negligent planning advice given to a testator could indeed deprive the beneficiaries of what the testator intended for them to have. Yet, the beneficiaries are seemingly without recourse. The court, however, did not foreclose the possibility that the testator's estate may stand in the shoes of the testator and meet the strict-privity test. Thus, the testator or the testator's estate might have a cause of action against the attorney for negligence, but damages may be limited to attorney's fees.

Regardless of the apparent harshness of this rule, a bright-line test is nonetheless necessary for several reasons. First, without a bright-line test, disgruntled beneficiaries will bring a flood of litigation. Second, all parties to a transaction will know that unless an employment relationship exists, non-clients cannot maintain a

cause of action for professional malpractice. Third, the strict-privity test protects the attorney-client relationship by ensuring that the attorney will act with complete loyalty to his client. The attorney's attention will thus be directed fully to the needs of his client and he will not have to balance the needs of the beneficiaries or fear liability from third parties. Fourth, a lawyer can represent his client zealously without having to fear a conflict of interest between his client and the beneficiaries. Finally, the strict-privity rule ensures that when the lawyer undertakes to represent a client, the lawyer will know exactly to whom potential liability could extend.