

# What is Privity and Why Does it Matter?

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Imagine that your mother was married to your stepfather. Your relationship with your stepfather was cordial but he also had children from a prior marriage. Your mother assured you that you would get half of her assets. Your mother passes away, and not long after, your stepfather also passes. In the midst of overwhelming grief, you find out that due to a mistake in the drafting of your mother's estate plan, all of your mother's assets are going to your stepsiblings and you will not receive anything. You call an attorney and tell them you want to file a lawsuit against your mother's estate planning attorney because you did not get one-half of your mother's assets, as was promised. Do you have a case?

*The result will depend on which state your mother resided and how that state views privity.*

## Strict Privity

Third parties are not afforded standing to enforce contract benefits. In estate planning, strict privity was historically applied to the attorney-client relationship. That meant only the person for whom the attorney drafted documents could pursue a claim if anything went wrong with the estate plan. The problem is that many mistakes in estate planning are discovered only after the decedent has died. Under strict privity, heirs and beneficiaries directly affected by those mistakes are precluded from pursuing claims against estate planning attorneys.

### Example:

In the 2016 case of *Baker v. Wood, Ris & Hames, P.C.*, Colorado reaffirmed its adherence to the strict privity doctrine. The plaintiffs, Floyd Baker's two daughters, claimed that their father had intended to divide his estate equally between them and their two stepsiblings. Despite this claim, at his death, Mr. Baker held significant assets in joint tenancy with his second wife. This resulted in most of Mr. Baker's estate being distributed to his stepchildren rather than the plaintiffs. The plaintiffs claimed that the estate planning attorney failed to advise Mr. Baker that the significant number of assets held in joint tenancy could result in the plaintiffs not receiving an equal share of his estate. The Court applied strict privity and rejected plaintiffs' claims for lack of standing.

Despite the *Baker* case and the historical application of strict privity to estate planning, states are increasingly adopting more expansive doctrines that allow third parties to pursue claims against estate planning attorneys. The persons allowed to pursue claims and the basis for a valid claim varies by state. Examples of some of the different positions taken by select states are discussed below.

## What Current Precedents Mean for You

In the New York case of *Schneider v. Finmann*, the personal representative alleged that the estate planning attorney committed negligence by not recommending that the decedent's life insurance policy be taken out of decedent's estate and transferred to an irrevocable life insurance trust. Because the policy remained in the decedent's estate, the proceeds were subject to estate tax. As a result, the decedent's estate incurred estate taxes that would not otherwise have been incurred. The court found that it would be unfair for a decedent's right to pursue a malpractice action to die with the decedent. Thus, the court found that the personal representative was not barred by strict privity from pursuing a malpractice claim against the estate planning attorney.

When analyzing whether heirs and beneficiaries have standing to pursue a claim against the drafting estate planning attorney, a key factor is whether the third party was an intended beneficiary of the estate plan. Two main approaches are used in this analysis.

#### **Approach #1: The Lucas Rule**

The first approach is referred to as the Lucas Rule (or sometimes the California Rule). This approach comes from a California case and uses a balancing of factors approach to determine whether a third party can bring claims against an estate planning attorney. In *Fabian v. Lindsay*, South Carolina adopted the Lucas Rule and allowed a claim by a niece who failed to inherit from her uncle's estate due to an alleged drafting error by her uncle's estate planning attorney. The Court stated a third-party beneficiary of a will or estate planning document was entitled to pursue a cause of action against a lawyer whose drafting error defeats or diminishes the client's intent.

#### **Approach #2: The Florida-Iowa Rule**

The second approach is sometimes referred to as the Florida-Iowa Rule. The Florida-Iowa Rule allows for a third party to pursue a claim against an estate planning attorney if, due to an estate planning attorney's negligence, the testator's intent expressed in a decedent's will is frustrated and the beneficiaries clearly designated by the testator do not benefit as intended. The Florida-Iowa Rule is viewed as more restrictive than the Lucas Rule because the intent of the testator must be expressed in the estate planning document itself; outside evidence cannot be considered.

Even in states where strict privity has been expanded, the recognition of an intent to benefit a third party is not automatic. In the Texas case of *Flores v. Branscomb PC*, the decedent hired counsel to prepare a new will prior to her death. The new will would have named the decedent's granddaughter as her executor and as a beneficiary. The decedent died before signing the new will, and the granddaughter sued the decedent's attorneys for malpractice. The granddaughter argued that the estate planning privity rule did not apply, because an implied attorney-client relationship existed between her and the attorneys. The court acknowledged that implied attorney-client relationships exist but saw no evidence to support such a relationship was present in this situation. In this case, the court held that the granddaughter's subjective belief that an implied attorney-client relationship existed was insufficient to support her claim.

Attorneys want to do the best they can for their clients and do not want to make mistakes. Despite this, however, for a variety of reasons mistakes sometimes happen. A common scenario involves clients allowing their attorney to lead the estate planning discussion and following the course of action the attorney deems best with limited client input. There is nothing wrong with following an attorney's estate planning recommendation, but it is important that clients provide their attorney with all the information necessary to make a proper assessment of the client's estate planning needs. In other words, clients should be active participants in the process and make their intentions clear. If that happens and things should go wrong, the client's heirs may be able to do something about it.

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