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PUT PRIVACY IN THE PAST: A MODERN APPROACH FOR DETERMINING WHEN WASHINGTON ATTORNEYS ARE LIABLE TO NONCLIENTS FOR ESTATE PLANNING MALPRACTICE

Kaitlyn C. Kelly*

Abstract: Even in the best of circumstances, an estate plan may leave intended beneficiaries frustrated. Occasionally, an attorney's alleged mistake in the execution of a will or administration of a trust sparks the beneficiaries' anger. Under Washington law, it is unclear whether intended beneficiaries may sue an estate planning attorney for malpractice. Generally, an estate planning attorney's client is a testator, not a testator's intended beneficiaries; thus, the intended beneficiaries are not in privity of contract with the attorney. Rather, the only individual in privity with the accused attorney is usually deceased at the time of a malpractice lawsuit. If a strict privity rule applies, courts will leave beneficiaries with few options to hold attorneys accountable for costly mistakes in the drafting or execution of estate planning documents. On the other hand, courts will expand the scope of liability too far if they allow any nonclient to sue an estate planning attorney for malpractice.

First, this Comment traces trends in Washington estate planning malpractice law. The discussion begins with two Washington State Supreme Court decisions that suggest a balancing test, rather than a strict privity rule, defines the scope of attorney malpractice liability to nonclients. Then it analyzes two Washington State court of appeals cases that demonstrate how the balancing test still favors privity in its application. Second, this Comment weighs the strengths and weaknesses of other jurisdictions' approaches to attorney malpractice liability to nonclients. Third, it considers different scenarios in which courts may hold an estate planning attorney liable to nonclients under Washington law. Finally, this Comment recommends that courts require nonclient intended beneficiaries to exhaust Washington's will and trust reformation statute before bringing a claim against an estate planning attorney.

INTRODUCTION

Washington courts need clarity when determining whether an intended beneficiary has standing to bring a malpractice action against an estate planning attorney. While the Washington State Supreme Court adopted a balancing test to address this issue,¹ recent Washington State court of appeals decisions suggest that a privity requirement remains in

* Thank you to Professor Karen Boxx for her thoughtful guidance and to the *Washington Law Review* staff for their editing assistance.

1. *Trask v. Butler*, 123 Wash. 2d 835, 842-43, 872 P.2d 1080, 1084 (1994). This Comment refers to Washington's balancing test as "the *Trask* balancing test."

certain circumstances.² The appellate decisions did not substantially change Washington law because the facts of each case addressed a narrow issue.³ The balancing test requires a case-by-case fact analysis, but with Washington courts seeing little variation in the facts that have come before them, they have not been able to develop case law applying the test's factors to the larger range of possible facts they might face in the future.

This Comment considers fact patterns in which Washington's balancing test⁴ may support a cause of action for a plaintiff who is not the defendant-attorney's client (a "nonclient").⁵ It recommends using Washington's will and trust reformation statute as an exhaustion requirement before intended beneficiaries may bring malpractice actions against estate planning attorneys.⁶ This solution attempts to provide attorney accountability without extending attorney liability too far.

Consider an individual who obtained an attorney and created an estate plan. An intended beneficiary later discovers the attorney acted negligently. Maybe the attorney failed to have witnesses attest to the signatures on the will, wrote incorrect names in the will, or did not draft a will at all. Without a valid estate plan in place, the intended beneficiary does not receive her intended gift. She wants to hold the attorney accountable for the mistake, so she files a malpractice lawsuit against the attorney in a Washington court. However, the court dismisses her claim because it finds that intended beneficiaries have no standing to bring such a claim. In many circumstances, Washington courts would leave intended beneficiaries in exactly this type of confusing, infuriating situation.

The above hypothetical raises a few potential estate planning errors, but it is not exclusive. Possible claims against estate planning attorneys include error in document execution; failure to adhere to a testator's goals or intent; error of law; failure to make necessary revisions to an estate plan when circumstances change; failure to properly investigate a testator's heirs or assets; failure to advise the testator on tax consequences or disclaimer options; breach of contract to draft an estate planning document; negligent planning that increases taxes; error in document drafting; execution of documents when the testator lacks

2. See generally *Linth v. Gay*, 190 Wash. App. 331, 360 P.3d 844 (2015); *Parks v. Fink*, 173 Wash. App. 366, 293 P.3d 1275 (2013).

3. See *Linth*, 190 Wash. App. 331, 360 P.3d 844; *Parks*, 173 Wash. App. 366, 293 P.3d 1275.

4. *Trask*, 123 Wash. 2d at 842-43, 872 P.2d at 1084.

5. See *infra* Part IV.

6. See *infra* Part V.

testamentary capacity; delay in implementing an estate plan; failure to limit legal representation to discrete issues; and failure to meet deadlines.⁷ With so much room for error, legal malpractice liability is a paramount concern for estate planning attorneys.⁸

This Comment explores the scope of estate planning malpractice liability for attorneys in Washington and considers room for improvement from both attorneys' and nonclients' perspectives. Part I discusses Washington legal malpractice law. Part II analyzes the development of Washington estate planning legal malpractice case law, identifying the shift from a balancing test to an apparent requirement of privity between the nonclient-plaintiff and attorney-defendant. The discussion begins with Washington State Supreme Court cases *Stangland v. Brock*⁹ and *Trask v. Butler*.¹⁰ Next, this Comment discusses Washington court of appeals decisions *Parks v. Fink*¹¹ and *Linth v. Gay*¹² and analyzes where Washington law stands after the *Linth* decision. On one hand, the decision suggests that the Washington State courts of appeal returned to a privity rule when deciding whether estate planning attorneys owe nonclients a duty of care.¹³ On the other hand, the Washington State courts of appeal likely intended to limit their decisions in *Parks* and *Linth* to the narrow factual settings of each: the failure to promptly execute a will and the failure to promptly execute a trust.¹⁴

7. Stephanie B. Casteel, Letitia A. McDonald, Jennifer D. Odom & Nicole J. Wade, *The Modern Estate Planning Lawyer: Avoiding the Maelstrom of Malpractice Claims*, 22 PROB. & PROP. 48 (Nov.–Dec. 2008).

8. George King, *Legal Malpractice—Estate, Will, and Succession Matters*, in 24 AM. JUR. PROOF OF FACTS 584–85 (2d ed. 1980) (“The expansion of estate practice into highly complex areas, coupled with the increasingly prevalent use of paralegals and other personnel in estate planning and probate work, have made counsel practicing in this field increasingly subject to negligence suits. As has been noted: ‘Recent studies and experience indicate that malpractice exposure is substantially higher in the areas of estate planning and estate administration than in general. The increase in availability and quality of legal education materials, especially in the tax field, together with the relatively clear ground rules for the administration of decedents’ estates narrow the margin for error.’” (quoting James R. Wade, *How to Avoid Probate Malpractice: A Probate Judge Offers Tips on Sidestepping Trouble in Estate Planning and Administration; Filing Delays Can Frequently Lead to Lawsuits*, 2 NAT’L L.J. 17 (July 7, 1980))).

9. 109 Wash. 2d 675, 747 P.2d 464 (1987).

10. 123 Wash. 2d 835, 872 P.2d 1080 (1994).

11. 173 Wash. App. 366, 293 P.3d 1275 (2013).

12. 190 Wash. App. 331, 360 P.3d 844 (2015).

13. See *infra* section II.D

14. See *infra* sections II.C and II.D; *Linth*, 190 Wash. App. at 334–35, 360 P.3d at 846–47; *Parks*, 173 Wash. App. at 368–73, 293 P.3d at 1276–79.

Part III studies the strengths and weaknesses of other jurisdictions' approaches to attorney liability in estate planning malpractice lawsuits. If presented with an opportunity to revisit the issue, Washington courts may look to other jurisdictions for guidance. Few states adhere to a strict privity rule.¹⁵ Most jurisdictions recognize an exception to the privity rule based on a balancing test, a third party beneficiary contract theory, or a foreseeability of harm tort theory.¹⁶ Some states in the majority group limit the exception by only recognizing causes of action for intended beneficiaries expressly named in estate planning documents.¹⁷

Part IV considers potential facts in which the *Trask* balancing test may dictate a different result than in the *Parks* and *Linth* decisions.¹⁸ Lower courts may appreciate this review of alternative facts because *Parks* and *Linth* both involved the narrow issue of prompt execution.¹⁹

Part V recommends that nonclient intended beneficiaries who wish to bring malpractice actions against estate planning attorneys must first exhaust their remedies under Washington's will and trust reformation statute.²⁰ If intended beneficiaries prove by "clear, cogent, and convincing evidence" that an estate planning document does not reflect the testator's intentions, then a court may reform the document.²¹ Therefore, courts have the power to make frustrated intended beneficiaries whole under the reformation statute without a malpractice action. Additionally, courts may hold estate planning attorneys accountable under the statute by imposing attorneys' fees on the attorneys allegedly at fault.²² This solution strikes a balance between holding Washington attorneys to a high ethical standard and making intended beneficiaries whole, while limiting the reach of potential attorney malpractice liability.

15. See *infra* section III.A.

16. See *infra* section III.B.

17. See *infra* section III.B.

18. See *infra* Part IV.

19. See generally *Linth*, 190 Wash. App. 331, 360 P.3d 844 (discussing an attorney's alleged failure to promptly execute trust documents); *Parks*, 173 Wash. App. 366, 293 P.3d 1275 (discussing an attorney's alleged failure to promptly execute a will).

20. WASH. REV. CODE § 11.96A.125 (2016).

21. *Id.*

22. WASH. REV. CODE § 11.96A.150 (2016).

I. WASHINGTON LEGAL MALPRACTICE LIABILITY: AN OVERVIEW

Legal malpractice is defined as “[a] lawyer’s failure to render professional services with the skill, prudence, and diligence that an ordinary and reasonable lawyer would use under similar circumstances.”²³ Claims of legal malpractice arise out of many different situations and are based on three different legal theories: negligence, breach of fiduciary duty, and breach of contract.²⁴ Under the now-disfavored²⁵ common law approach, attorneys did not owe a duty of care to third parties.²⁶ Therefore, such individuals did not have a cause of action against attorneys who allegedly harmed them.²⁷ However, the modern trend is for courts to extend malpractice causes of action to nonclients under limited circumstances.²⁸ Public policy considerations, the third party beneficiary doctrine in contract law, and tort theories support this modern trend.²⁹

To establish a malpractice claim in Washington, a plaintiff has the burden of establishing four elements: (1) the existence of an attorney-client relationship in which the attorney owes the client a duty of care; “(2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney’s breach of the duty and the damage incurred.”³⁰ This Comment focuses on the first element, the attorney-client relationship, because that element generally requires privity of contract between the defendant and the plaintiff. However, a plaintiff may sometimes establish the first

23. *Legal Malpractice*, BLACK’S LAW DICTIONARY (10th ed. 2014).

24. *See, e.g.*, *Bowman v. Two*, 104 Wash. 2d 181, 187, 704 P.2d 140, 143 (1985) (“Washington allows an action for legal malpractice to be framed either as a tort or a breach of contract.”); *Shoemaker v. Ferrer*, 143 Wash. App. 819, 830–32, 182 P.3d 992, 998–99 (2008) (plaintiffs’ legal malpractice claim was based on an attorney’s alleged breach of fiduciary duty); *Kelly v. Foster*, 62 Wash. App. 150, 154, 813 P.2d 598, 600 (1991) (“Like many [legal malpractice] cases, the basis of liability was a claimed breach of fiduciary duty.”).

25. *See infra* section III.B (discussing the modern majority approach).

26. *Savings Bank v. Ward*, 100 U.S. 195, 200, 205–06 (1879).

27. *Id.*

28. *Stangland v. Brock*, 109 Wash. 2d 675, 680, 747 P.2d 464, 467 (1987) (citing *Bowman*, 104 Wash. 2d at 186–87, 704 P.2d at 142).

29. David K. DeWolf & Keller W. Allen, *Attorney Malpractice—Duty to Nonclients*, in 16 WASHINGTON PRACTICE, TORT LAW AND PRACTICE 719–22 (4th ed. 2015); *see also infra* section III.B.

30. *Schmidt v. Coogan*, 181 Wash. 2d 661, 665, 335 P.3d 424, 427–28 (2014); *Hizey v. Carpenter*, 119 Wash. 2d 251, 260–61, 830 P.2d 646, 651 (1992).

element without a showing of privity.³¹ Even if a nonclient meets the first element without privity, a court may still dismiss the action if it finds that the attorney-defendant met the appropriate standard of care.³²

In Washington, attorneys meet the required standard of care by exercising “the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law.”³³ Regardless of practice area, attorneys must uphold this standard of care.³⁴ While the standard of care is high, it is not so high as to include “mere error[s] in judgment . . . if acting in good faith and in an honest belief that those acts and advice are well-founded.”³⁵ A poor legal outcome alone does not show that an attorney failed to meet his or her standard of care.³⁶ However, the duty does require attorneys to exercise reasonable and diligent care in following the client’s instructions.³⁷

The duty of care owed to a client by an attorney is a question of law for the court.³⁸ Disputes about whether two parties had an attorney-client relationship are questions of fact for a jury.³⁹ The jury instruction on the issue of duty to nonclients explains that the nonclient-plaintiff has the burden of proving that the attorney-defendant and the testator-client intended to establish a relationship for the nonclient-plaintiff’s benefit.⁴⁰ The instruction’s comments explain that courts rarely use the instruction because judges generally determine duty to nonclients as a matter of law in pretrial motions based on a balancing of factors, known as the *Trask* factors.⁴¹ Because some of the *Trask* factors are legal questions for a

31. See DeWolf & Allen, *supra* note 29.

32. *Stangland*, 109 Wash. 2d at 682–83, 747 P.2d at 468.

33. *Hizey*, 119 Wash. 2d at 261, 830 P.2d at 652.

34. Karl B. Tegland, *Standard of Care and Malpractice*, in 15 WASHINGTON PRACTICE, CIVIL PROCEDURE 421–22 (2d ed. 2016).

35. See *id.*

36. WASH. STATE SUPREME COURT COMM. ON JURY INSTRUCTIONS, LEGAL MALPRACTICE—NEGLIGENCE—STANDARD OF CARE, 6 WASH. PRACTICE, WASHINGTON PATTERN JURY INSTRUCTION CIVIL WPI 107.04 (6th ed. 2013).

37. See Tegland, *supra* note 34, at 422.

38. *Parks v. Fink*, 173 Wash. App. 366, 377, 293 P.3d 1275, 1280 (2013) (citing *Folsom v. Burger King*, 135 Wash. 2d 658, 671, 958 P.2d 301, 308 (1998)).

39. *Stiley v. Block*, 130 Wash. 2d 486, 501–02, 925 P.2d 194, 202 (1996); *Bohn v. Cody*, 119 Wash. 2d 357, 363–64, 832 P.2d 71, 74–75 (1992).

40. See WASH. STATE SUPREME COURT COMM. ON JURY INSTRUCTIONS, DUTY TO NON-CLIENT, 6 WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. WPI 107.02 (6th ed. 2013).

41. See WASH. STATE SUPREME COURT COMM. ON JURY INSTRUCTIONS, *supra* note 40, Note on Use.

judge to decide, courts should not give the *Trask* factors to the jury.⁴² Instead, the jury instruction should only relate to disputed issues of material fact regarding one or more of the *Trask* factors.⁴³

Like attorneys in all fields, estate planning attorneys may face malpractice liability for mistakes. Due to the technical nature of estate planning and the variety of knowledge required, attorneys in this area are particularly susceptible to malpractice liability.⁴⁴ The emotions and financial stability of intended beneficiaries adds concern:

Heirs or beneficiaries who feel that they have not received that to which they are entitled, or who are financially disappointed, are psychologically hurt and are often dealing with deep-seated family issues that were not dealt with before the decedent's death. This anger and frustration can finally be vented in a lawsuit against the family's advisors.⁴⁵

In some estate planning malpractice cases outside of Washington State, courts have held that intended beneficiaries may sue an attorney for malpractice even though the attorney and individual are not in privity of contract.⁴⁶ Under different circumstances, courts have held that intended beneficiaries may not sue estate planning attorneys for malpractice.⁴⁷ Washington courts have yet to hold an estate planning

42. See WASH. STATE SUPREME COURT COMM. ON JURY INSTRUCTIONS, *supra* note 40, Comments; DeWolf & Allen, *supra* note 29, at 720 ("The question of whether or not a duty is owed is a question of law for the court.").

43. See WASH. STATE SUPREME COURT COMM. ON JURY INSTRUCTIONS, *supra* note 40, Comments.

44. Casteel et al., *supra* note 7, at 49.

45. *Id.*

46. WILLIAM M. MCGOVERN, SHELDON F. KURTZ & DAVID M. ENGLISH, WILLS, TRUSTS, AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS, 530, 617–18 (4th ed. 2010); *see, e.g.*, Charleson v. Hardesty, 839 P.2d 1303, 1306–07 (Nev. 1992) (holding that attorneys who represent trustees in their trustee capacity owe a duty of care toward the trust's beneficiaries as a matter of law); Elam v. Hyatt Legal Servs., 541 N.E.2d 616, 618 (Ohio 1989) (holding that nonclients had standing to sue the attorney because the nonclients had vested interests in the estate and were in privity with the attorney once their interests vested); *see generally* Estate of Agnew v. Ross, 110 A.3d 1020 (Pa. Super. Ct. 2015) (holding that nonclient intended beneficiaries of will and trust amendment had standing to sue the drafting attorney when the attorney failed to present the documents to the testator before death, the attorney admitted his mistake, and he was aware that the nonclients would benefit from the documents' execution).

47. *See, e.g.*, Neal v. Baker, 551 N.E.2d 704, 706 (Ill. App. Ct. 1990) (holding that a nonclient intended beneficiary was unable to sue the estate executor's attorney for legal malpractice because the attorney was not hired by the executor with the intent to directly benefit the beneficiary); Barcelo v. Elliott, 923 S.W.2d 575, 576–78 (Tex. 1996) (holding that an estate planning attorney was not liable to nonclient for malpractice and did not have a duty to foresee that his client's grandchildren would be harmed from the trust's invalidity).

attorney liable to nonclients for malpractice liability. However, under certain circumstances, Washington courts may reach a different result.

II. WASHINGTON'S ESTATE PLANNING MALPRACTICE CASE LAW: THE SHIFT FROM PRIVACY TO POSSIBLE ATTORNEY LIABILITY

This section analyzes four seminal cases in Washington's estate planning legal malpractice law: *Stangland v. Brock*, *Trask v. Butler*, *Parks v. Fink*, and *Linth v. Gay*. Each of these cases involves estate planning attorney-defendants and frustrated intended beneficiary plaintiffs.⁴⁸ The cases set forth the general rule of legal malpractice: only an attorney's clients have standing to sue her for malpractice.⁴⁹ Nevertheless, the cases recognize an exception to that general rule under tort and contract theories articulated in *Stangland* and a balancing test further defined in *Trask* ("the *Trask* balancing test").⁵⁰ However, the modern decisions of *Parks* and *Linth* suggest that privity is a de facto requirement under the *Trask* balancing test⁵¹ despite the *Stangland* and *Trask* Courts' intentions to allow certain nonclients a cause of action.⁵²

A. *The Stangland Court Relaxed the Privity Requirement and Introduced a New Theory that Supports Nonclients' Potential Standing in Legal Malpractice Actions*

The *Stangland v. Brock* plaintiffs, Alvin Stangland and Bruce Kintschi, brought malpractice claims against two attorneys, Norman Brock and Kenneth Carpenter, and their law firm, Underwood, Campbell, Brock, & Cerutti, P.S.⁵³ Mr. Stangland and Mr. Kintschi

48. *Trask v. Butler*, 123 Wash. 2d 835, 838–89, 872 P.2d 1080, 1082–83 (1994); *Stangland v. Brock*, 109 Wash. 2d 675, 677, 747 P.2d 464, 465 (1987); *Linth v. Gay*, 190 Wash. App. 331, 332–35, 360 P.3d 844, 845–47 (2015); *Parks v. Fink*, 173 Wash. App. 366, 367–74, 293 P.3d 1275, 1276–79 (2013).

49. *Trask*, 123 Wash. 2d at 840, 872 P.2d at 1083; *Stangland*, 109 Wash. 2d at 679, 747 P.2d at 467; *Linth*, 190 Wash. App. at 337, 360 P.3d at 847; *Parks*, 173 Wash. App. at 377, 293 P.3d at 1280.

50. *Trask*, 123 Wash. 2d at 841, 872 P.2d at 1083; *Stangland*, 109 Wash. 2d at 680–81, 747 P.2d at 467.

51. See *Linth*, 190 Wash. App. at 341–42, 360 P.3d at 849–50; *Parks*, 173 Wash. App. at 377, 386–87, 293 P.3d at 1281, 1285–86.

52. *Trask*, 123 Wash. 2d at 843–44, 872 P.2d at 1084–85; *Stangland*, 109 Wash. 2d at 681, 747 P.2d at 468.

53. *Stangland*, 109 Wash. 2d at 676–77, 747 P.2d at 465.

claimed that the attorneys' negligence wrongfully limited their intended inheritance.⁵⁴

The decedent, Ralph Schalock, hired Mr. Brock as his attorney to draft a will leaving real property to Mr. Stangland and Mr. Kintschi and the residue of his estate to two other individuals.⁵⁵ When Mr. Brock wrote the will, Mr. Schalock owned a valuable farm, which was intended to be the real property devised to the plaintiffs. However, three years after Mr. Brock wrote the will, Mr. Schalock hired another attorney from the same firm, Mr. Carpenter, to prepare a real estate contract to sell his farm.⁵⁶ After the sale, a farm no longer existed to fulfill the gift in the will.

When Mr. Schalock passed away, Mr. Stangland and Mr. Kintschi sued the two attorneys and sought damages for the attorneys' alleged negligence.⁵⁷ They alleged that the attorneys were negligent by not fulfilling the decedent's intent to convey the farm to them, not advising the decedent about how the real estate sale would change his estate plan, and disregarding the decedent's testamentary intent.⁵⁸ The attorney-defendants responded with a motion to dismiss the complaint.⁵⁹ The trial court granted the attorneys' motion to dismiss the plaintiffs' negligence claims for failure to state a claim upon which relief could be granted.⁶⁰

On appeal, the Washington State Supreme Court focused on whether the plaintiffs established that the attorneys owed them a duty of care and had in fact breached that duty of care.⁶¹ The Court wrote:

Traditionally, privity of contract between the parties has been required as a basis for establishing a duty in a legal malpractice action. . . . However, . . . the modern trend is to relax the privity requirement, allowing legal malpractice actions to be brought by persons other than the clients of attorneys in some factual situations.⁶²

54. *Id.*

55. *Id.* at 677–78, 747 P.2d at 466. The two other individuals were Troy Rux and Joseph Kintschi. *Id.* at 678, 747 P.2d at 466.

56. *Id.* at 678, 747 P.2d at 466. Mr. Schalock sold his farmland to Frank and Janet Titchenal. *Id.*

57. *Id.* Before filing this lawsuit, the will was admitted to probate and the *Stangland* plaintiffs argued that they were entitled to the vendor's interest in the sale of the farmland, while the residue beneficiaries argued that they were entitled to it instead. The parties ended up settling in that dispute. *Id.*

58. *Id.*

59. *Id.* at 679, 747 P.2d at 466.

60. *Id.* The court of appeals certified the appeal to the Washington State Supreme Court. *Id.*

61. *Id.* at 679–80, 747 P.2d at 467.

62. *Id.*

Relying on a prior holding, the Court explained that an attorney might owe a duty to a nonclient under a multifactor balancing test or a third party beneficiary contract theory.⁶³

While the Court recognized that the attorneys in *Stangland* might have owed a duty of care to nonclients Mr. Stangland and Mr. Kintschi, it held that the attorneys met the required standard of care imposed by that potential duty.⁶⁴ The standard of professional care mandates attorneys to act with “that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law.”⁶⁵

Regarding the claims against Mr. Brock, the Court reasoned that holding him to the plaintiffs’ suggested duty “would be expanding the obligation of a lawyer who drafts a will beyond reasonable limits.”⁶⁶ The Court did not expect Mr. Brock to foresee the future when drafting Mr. Schalock’s will.⁶⁷ He did not have notice that Mr. Schalock would sell the farm and did not need to provide legal advice about how that future sale would change the estate plan because he could not reasonably predict that the future sale would happen.⁶⁸

Looking at the claims against Mr. Carpenter, the Court held that he did not have a duty to advise the decedent about how the sale of the farmland would affect the decedent’s estate plan.⁶⁹ The Court reasoned that this would require Mr. Carpenter to know the decedent’s estate plan.⁷⁰ Mr. Carpenter could not reasonably have such knowledge as it “would impose potentially staggering responsibilities on attorneys . . . and would markedly increase the cost of providing legal services.”⁷¹

The *Stangland* case marks an important point in the development of estate planning malpractice liability, even though the Court found that the attorneys in *Stangland* did not breach a potential duty of care owed to the intended beneficiaries.⁷² The Court recognized the modern trend

63. *Id.* at 680–81, 747 P.2d at 467 (citing *Bowman v. Two*, 104 Wash. 2d 181, 188, 704 P.2d 140, 143 (1985)).

64. *Id.* at 682–83, 747 P.2d at 468.

65. *Id.* (citing *Walker v. Bangs*, 92 Wash. 2d 854, 859, 601 P.2d 1279, 1282 (1979)).

66. *Id.* at 684, 747 P.2d at 469.

67. *Id.*

68. *Id.*

69. *Id.* at 685–86, 747 P.2d at 469–70.

70. *Id.*

71. *Id.* at 685, 747 P.2d at 469–70.

72. *Id.* at 682–83, 747 P.2d at 468.

to relax the privity requirement for legal malpractice actions.⁷³ Pointing to an earlier case, the *Stangland* Court saw that the trend was slowly surfacing under theories of third party beneficiary contract law and a multifactor balancing test.⁷⁴ The Court recognized that attorneys might have a duty of care to nonclients—given the right facts.⁷⁵ The setting in *Stangland* did not fit the mold, but the Court’s recognition of possible liability shows its willingness to expand the scope of estate planning malpractice liability.

The Court did not suggest that strict privity won the day. Instead, it expressed concern about expanding the obligations of a lawyer too far.⁷⁶ These potentially expansive and nebulous obligations require the Court to define limits on lawyers’ obligations. Potential limits include foreseeability and the subject of attorney advice.⁷⁷ Under the *Stangland* rationale, the attorney only had a duty to give adequate legal advice on the issue he was aware of—the will’s execution—not the issue of how a potential sale of real estate would change the estate plan.⁷⁸

The attorneys’ alleged breach of duty in *Stangland* was failure to give proper advice to a client, which in turn affected the intended beneficiaries.⁷⁹ Attorneys cannot reasonably perform their duties to a client if the law requires them to be well-versed in areas outside the scope of the legal issue for which a client hired them.⁸⁰ Just as the *Stangland* Court did not expect the estate planning attorney to advise his client about real estate legal issues, it did not expect the real estate attorney to advise his client about estate planning issues.⁸¹

The *Stangland* Court’s analysis suggests that lower courts should apply a balancing test or third party beneficiary theory to similar cases in the future.⁸² Nevertheless, lower courts have placed the Court’s concerns

73. *Id.* at 680, 747 P.2d at 467.

74. *Id.* (citing *Bowman v. Two*, 104 Wash. 2d 181, 186–87, 704 P.2d 140, 142–43 (1985)).

75. *Id.* at 680–83, 747 P.2d at 467–68.

76. *Id.* at 684, 747 P.2d at 469.

77. *Id.* at 683–84, 747 P.2d at 469.

78. *Id.* at 683–86, 747 P.2d at 468–70.

79. *Id.* at 678, 747 P.2d at 466.

80. *Id.* at 684, 747 P.2d at 469 (“When an individual retains an attorney to draft his will, the attorney’s obligation is to use the care, skill, diligence and knowledge that a reasonable, prudent lawyer would exercise in order to draft the will Once that duty is accomplished, the attorney has no continuing obligation to monitor the testator’s management of his property to ensure that the scheme originally established in the will is maintained.”).

81. *Id.* at 684–86, 747 P.2d at 469–70.

82. *Id.* at 681, 747 P.2d at 467.

about “staggering responsibilities on attorneys”⁸³ above the Court’s recognition of the privity requirement’s decreased significance.⁸⁴ The upcoming analysis of Washington court of appeals cases discusses this priority placement.⁸⁵

B. The Trask Court Extended Stangland’s Rejection of Privity by Establishing a Balancing Test to Determine Attorneys’ Duty of Care to Nonclients

In *Trask v. Butler*, the Washington State Supreme Court held that an attorney hired by an estate’s personal representative did not owe a duty of care to an estate beneficiary.⁸⁶ George Trask passed away, leaving two children, Laurel and Russell.⁸⁷ As the appointed personal representative of her father’s estate, Laurel hired an attorney to represent her in a quiet title action for property that George quitclaimed to Russell without the signature of George’s wife.⁸⁸ When George’s wife required medical care after his death, Laurel sold the family home to help with expenses and used the same attorney to assist her in that sale.⁸⁹ After George’s wife also passed away, Russell filed a malpractice lawsuit against Laurel’s attorney, Richard Butler.⁹⁰ Russell claimed that the advice to file a quiet title action for the quitclaimed property was negligent because it decreased the value of the land that was eventually sold for a bargain price.⁹¹

The issue in *Trask* was whether Russell met the first element of a malpractice claim⁹² against Mr. Butler: “the existence of an attorney-client relationship which gives rise to a duty of care to the plaintiff.”⁹³ As in *Stangland*, the Court noted that traditionally the only plaintiffs

83. *Id.* at 685, 747 P.2d at 467–70.

84. *Id.* at 680, 747 P.2d at 467. See generally *Linth v. Gay*, 190 Wash. App. 331, 360 P.3d 844 (2015); *Parks v. Fink*, 173 Wash. App. 366, 293 P.3d 1275 (2013).

85. See *infra* sections II.C, II.D.

86. 123 Wash. 2d 835, 845, 872 P.2d 1080, 1085 (1994).

87. *Id.* at 837, 872 P.2d at 1081–82. Because some of the *Trask* parties share a surname, the author refers to the individuals by their first names to avoid confusion.

88. *Id.* at 837–38, 872 P.2d at 1082. Laurel hired Richard Butler as her attorney. *Id.* at 838, 872 P.2d at 1082.

89. *Id.* at 838, 872 P.2d at 1082. In 1986, the homestead was sold to the Turkheimers for \$275,000. *Id.* In 1988, the sale was later litigated and set aside. *Id.* at 839, 872 P.2d at 1082.

90. *Id.* at 839, 872 P.2d at 1082.

91. *Id.*

92. *Id.* at 840, 872 P.2d at 1083.

93. *Id.* at 839, 872 P.2d at 1083.

who may bring malpractice lawsuits are those that were clients of the attorney-defendant, stating: “[u]nder traditional privity of contract rules Butler does not owe Russell, a nonclient, a duty of care.”⁹⁴ Again, like *Stangland*, the Court noted that courts relaxed the privity requirement and the first element may be met under a balancing test or third party beneficiary contract test without privity.⁹⁵

The Court further developed the legal theory under which a plaintiff could potentially meet the first element of a legal malpractice claim despite a lack of privity by combining the two leading approaches.⁹⁶ In synthesizing the third party beneficiary contract law test with the multifactor balancing test, the Court reduced confusion and developed six clear factors (“the *Trask* factors”) to balance in determining whether an attorney owes a nonclient-plaintiff a duty of care.⁹⁷ The *Trask* factors include the following:

- (1) the extent to which the transaction was intended to benefit 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;
- (5) the policy of preventing future harm; and
- (6) the extent to which the profession would be unduly burdened by a finding of liability.⁹⁸

After applying the *Trask* balancing test, the Court found that Mr. Butler did not owe a duty of care to Russell.⁹⁹ Still, the *Trask* factors are a significant development in Washington case law because they embody the trend in courts moving away from the privity requirement.

In *Trask*, the Court could not reasonably impose liability on the attorney-defendant because the beneficiaries were incidental rather than intended, the estate heirs could sue the personal representative instead of the attorney, and an unresolvable conflict of interest existed.¹⁰⁰ For these reasons, the Court held that the *Trask* factors favored the attorney who

94. *Id.* at 840, 872 P.2d at 1083.

95. *Id.* at 840–44, 872 P.2d at 1083–85.

96. *Id.* at 842–43, 872 P.2d at 1084.

97. *Id.* at 843, 872 P.2d at 1084.

98. *Id.*

99. *Id.* at 845, 872 P.2d at 1085.

100. *Id.*

was hired by the estate's personal representative.¹⁰¹ It addressed foreseeability concerns because the beneficiaries were incidental rather than intended.¹⁰² The Court also considered the availability of other means of justice and the desire to avoid potential conflicts of interest.¹⁰³ It reasoned that there is "a risk of divided loyalties because of a conflicting interest" if lawyers have duties to both nonclients and clients.¹⁰⁴

The *Trask* Court provided lower courts with guidance by establishing the *Trask* factors to apply in similar cases. However, lower courts may feel pressure to find that the *Trask* factors weigh in favor of attorneys because of the Court's concerns about attorney obligations and potential conflicts of interest.¹⁰⁵ The next two sections discuss two cases in which the Washington State courts of appeal applied the *Trask* balancing test without any indication that the *Trask* factors may weigh in favor of the nonclient beneficiary.¹⁰⁶

C. *The Parks Court Applied the Trask Balancing Test, but Still Held that the Estate Planning Attorney Did Not Owe a Duty of Care to Nonclients*

In *Parks v. Fink*, the Washington Court of Appeals Division I held that an attorney did not owe a prospective beneficiary a duty of care to promptly execute a will. In 2005, John Balko, a terminal cancer patient, executed a valid will devising his estate.¹⁰⁷ However, the will contained a typographical error: it left "Betty Rich" the residue of his estate instead of the intended "Betty Parks."¹⁰⁸

An attorney, Janyce Fink, legally advised Mr. Balko in various roles over six years.¹⁰⁹ She met with a hospitalized Mr. Balko to discuss this

101. *See id.* at 843–45, 872 P.2d at 1085–86.

102. *See id.* at 845, 872 P.2d at 1085.

103. *Id.*

104. *Id.* at 844, 872 P.2d at 1085.

105. *Id.* ("A conflict of interest arises in estate matters whenever the interest of the personal representative is not harmonious with the interest of an heir. Because estate proceedings may be adversarial, we conclude that policy considerations also disfavor the finding of a duty to estate beneficiaries.").

106. *Linth v. Gay*, 190 Wash. App. 331, 360 P.3d 844 (2015); *Parks v. Fink*, 173 Wash. App. 366, 293 P.3d 1275 (2013).

107. *Parks*, 173 Wash. App. at 368, 293 P.3d at 1276.

108. *Id.*

109. *Id.*

error and prepare a new will to correct it.¹¹⁰ On April 26, 2006, Ms. Fink brought a new will to the hospital with several blank spaces for Mr. Balko to complete.¹¹¹ Mr. Balko and Ms. Fink filled in the blank spaces on a new will and Mr. Balko signed the draft in Ms. Fink's presence.¹¹² One space that Mr. Balko filled in stated: "If Betty Parks does not survive me, I give the residue of my estate as follows: *Terry Parks (son of Betty Parks)*."¹¹³

Ms. Fink did not intend that draft to be the final version of the will because neither a witness nor notary was present.¹¹⁴ She allegedly explained to Mr. Balko that a will remains invalid until it is signed, witnessed, and notarized.¹¹⁵ She advised Mr. Balko to sign a final version of the draft with the proper formalities but he declined several times because he wanted to wait until he was in better health.¹¹⁶ In July 2007, Mr. Balko passed away before formally executing the April 2006 draft, meaning it did not revoke his previous will, dated 2005.¹¹⁷

Mr. Terry Parks, who would have benefitted from formal execution of the April 2006 draft, filed a malpractice claim against Ms. Fink and Fink Law Group PLLC.¹¹⁸ The trial court granted Ms. Fink's summary judgment motion because Mr. Parks did not have standing.¹¹⁹

On appeal, the court of appeals affirmed, holding that Ms. Fink did not owe Mr. Parks a duty of care.¹²⁰ The court emphasized the type of malpractice alleged here: failure to promptly execute a will.¹²¹ This kind of error is distinct from the duty of an attorney to ensure that a will meets the required formalities when executed and does not contain drafting errors.¹²² It differs largely because holding an attorney to this

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 368–69, 293 P.3d at 1276 (italics in original).

114. *Id.* at 369, 293 P.3d at 1277.

115. *Id.*

116. *Id.* at 370, 293 P.3d at 1277.

117. *Id.* at 373, 293 P.3d at 1278.

118. *Id.* at 373, 293 P.3d at 1279. Under the first will, Mr. Craig Eckland was the will's beneficiary after Betty Parks's death. *Id.* at 370, 293 P.3d at 1277. Under the proposed change to the will, Mr. Terry Parks would have taken Mr. Eckland's position. *Id.*

119. *Id.* at 373, 293 P.3d at 1279.

120. *Id.* at 389, 293 P.3d at 1287.

121. *Id.* at 378–79, 293 P.3d at 1281–82.

122. *Id.*; cf. *Biakanja v. Irving*, 320 P.2d 16, 18 (Cal. 1958) (holding that the defendant negligently failed to have decedent's will properly attested); *Licata v. Spector*, 225 A.2d 28, 30–31

standard of care for a nonclient's benefit conflicts with an attorney's duty of undivided loyalty to his or her client.¹²³

The *Parks* Court applied the *Trask* balancing test, but it only discussed two of the six *Trask* factors and made a quick determination that the attorney did not owe the nonclient a duty of care.¹²⁴ After weighing the *Trask* factors, the court held that imposing a duty of care on Ms. Fink to the nonclient, Mr. Parks, "would severely compromise the attorney's duty of undivided loyalty to the client and impose an untenable burden on the attorney-client relationship."¹²⁵ Because attorneys primarily owe a duty of loyalty to their clients, it would be difficult for attorneys to also follow intended beneficiaries' desires; while the beneficiaries may want a will executed swiftly to ensure their benefits, a client may wish to take extra time to consider his or her testamentary intentions.¹²⁶

Cases from several other jurisdictions were persuasive authority in the *Parks* Court's decision that an attorney does not owe nonclients a duty of prompt will execution.¹²⁷ The court aligned itself with the majority of other jurisdictions¹²⁸ and upheld Washington ethics rules while doing so.¹²⁹ Washington's ethics rules require attorneys to provide undivided loyalty to their clients, which attorneys should not sacrifice to meet another's needs or wishes.¹³⁰

The *Parks* decision provides lower courts with persuasive authority, but Washington case law provides little additional explanation of the *Trask* factors outside of this fact pattern. The *Parks* holding is likely limited to situations where the claim at issue is the failure to promptly execute an estate planning document, such as a will. If lower courts face

(Conn. C.P. 1966) (holding that an attorney negligently failed to meet statutory attestation requirements when executing decedent's will).

123. *Parks*, 173 Wash. App. at 378–79, 293 P.3d at 1281–82.

124. *Id.* at 377–78, 293 P.3d at 1280–81. The *Trask* factors discussed by the court were "the policy of preventing future harm" and "the extent to which the profession would be unduly burdened by a finding of liability." *Id.* at 377, 293 P.2d at 1281.

125. *Id.* at 368, 293 P.3d at 1276.

126. *See id.* at 379–83, 293 P.3d at 1282–84.

127. *Id.* at 379–88, 293 P.3d at 1282–86 (citing *Hall v. Kalfayan*, 118 Cal. Rptr. 3d 629 (Cal. Ct. App. 2010); *Radovich v. Locke-Paddon*, 41 Cal. Rptr. 2d 573 (Cal. Ct. App. 1995); *Krawczyk v. Stingle*, 543 A.2d 733 (Conn. 1988); *Sisson v. Jankowski*, 809 A.2d 1265 (N.H. 2002); *Rydde v. Morris*, 675 S.E.2d 431 (S.C. 2009)).

128. *See infra* section III.B

129. *Parks*, 173 Wash. App. at 388, 293 P.3d at 1286.

130. *Id.* at 388–89, 293 P.3d at 1286–87; *see also* *Tank v. State Farm Fire & Cas. Co.*, 105 Wash. 2d 381, 388, 715 P.2d 1133, 1137 (1986).

facts similar to *Parks*—a nonclient sues an estate planning attorney because the attorney failed to execute an estate planning document before the testator’s death—then the courts have clear guidance on how the *Trask* balancing test applies. Essentially, those facts require privity and the application of the *Trask* balancing test is a mere formality—as the following discussion of another court of appeals decision confirms.¹³¹ However, under different facts, lower courts question whether the *Trask* balancing test remains a mere formality.¹³²

D. The Linth Court’s Recent Holding Confirms that Washington Is Reaching Strict Privity Outcomes Even While Applying the Trask Balancing Test

In *Linth v. Gay*, the Washington State Court of Appeals Division II found *Parks* controlling in a malpractice claim brought by a trust beneficiary.¹³³ The court held that the attorney-defendant in *Linth* did not owe the nonclient trust beneficiary a duty of care where the attorney did not promptly execute trust documents.¹³⁴

In 2000, Evelyn Plant hired Carl Gay to create a living trust that provided \$100,000 and a life estate in a portion of property to Jennifer Linth.¹³⁵ Later that year, Ms. Plant amended the trust and appointed Daniel Doran as the new trustee after resigning from the position herself.¹³⁶ The amendment provided that \$50,000 and Ms. Plant’s property was to be given to a foundation in Ms. Plant’s name after Ms. Linth’s life estate terminated.¹³⁷ The amendment referenced a document that would set the terms of the nonprofit foundation.¹³⁸ However, the attorney failed to attach the document to the trust amendment.¹³⁹

While Ms. Plant was living, the attorney drafted some plans for the foundation, none of which the attorney formally executed.¹⁴⁰ When Ms. Plant passed away, the amendment’s validity was disputed because the

131. See *infra* section II.D.

132. See *infra* Part IV.

133. *Linth v. Gay*, 190 Wash. App. 331, 339, 360 P.3d 844, 849 (2015).

134. *Id.*

135. *Id.* at 333, 360 P.3d at 845–46.

136. *Id.* at 334, 360 P.3d at 846.

137. *Id.* The foundation was the Evelyn Plant Green Point Foundation. *Id.* at 333, 360 P.3d at 845.

138. *Id.* at 334, 360 P.3d at 846.

139. *Id.*

140. *Id.*

attorney never completed nor attached the referenced plans.¹⁴¹ In 2009, Ms. Linth, as a trust beneficiary, initiated malpractice claims against Mr. Gay, alleging that he had to a duty to attach the foundation plans to the trust amendment before his client's death.¹⁴² The superior court granted Mr. Gay's motion for summary judgment, holding that Mr. Gay did not owe a duty to Ms. Linth.¹⁴³ Ms. Linth appealed her claims to the Washington State court of appeals.¹⁴⁴

Ms. Linth also alleged that Mr. Gay negligently represented the successor trustee, Mr. Doran, after Ms. Plant passed away.¹⁴⁵ The court dismissed these claims based on the *Trask* decision.¹⁴⁶ Because Ms. Linth had alternative methods of holding Mr. Gay accountable for his duties to Mr. Doran, the court found the following concern expressed in *Trask* inapplicable: “[i]n finding a duty to beneficiaries under the multi-factor balancing test, we recognized ‘if the beneficiaries could not recover for the attorney’s alleged negligence, no one could.’”¹⁴⁷

The *Linth* Court found *Parks* controlling.¹⁴⁸ The issue in *Linth* was very similar to that in *Parks*; however, it revolved around the prompt execution of trust documents rather than the prompt execution of a will.¹⁴⁹ Because the facts closely resembled *Parks*, the court found its holding determinative.¹⁵⁰ The court stated, “as in *Parks*, the Trust documents were not properly executed before Plant’s death.”¹⁵¹

The *Linth* decision steered the direction of Washington case law toward requiring privity and continued the line of reasoning in *Parks*. As in *Parks*, the *Trask* balancing test took a backseat to privity in *Linth*. The court noted that alternative methods of justice for plaintiffs weighed in favor of dismissing the claims against the attorney.¹⁵² The court

141. *Id.* at 335, 360 P.3d at 846. Ms. Linth signed a Nonjudicial Dispute Resolution Agreement (NDRA) to resolve the Trust and Estate Dispute Resolution Act (TEDRA) action between her and Crista Ministries, a beneficiary under the original trust. Mr. Doran was removed as trustee in the NDRA. *Id.*

142. *Id.* at 337, 360 P.3d at 848. Ms. Linth and Mr. Gay agreed to toll the statute of limitations for Ms. Linth's claims against Mr. Gay. *Id.* at 335, 360 P.3d at 846.

143. *Id.* at 335, 360 P.3d at 846–47.

144. *Id.*

145. *Id.* at 341, 360 P.3d at 849.

146. *Id.* at 341–42, 360 P.3d at 849–50.

147. *Id.* at 341, 360 P.3d at 850.

148. *Id.* at 339, 360 P.3d at 849.

149. *Id.* at 333–34, 360 P.3d at 846.

150. *Id.* at 338–39, 360 P.3d at 848–49.

151. *Id.* at 339, 360 P.3d at 848–49.

152. *Id.* at 342, 360 P.3d at 850.

acknowledged that the *Trask* balancing test existed for a reason: to give nonclients some limited opportunities to sue for legal malpractice.¹⁵³ However, merely acknowledging the possibility of standing under the *Trask* balancing test does not give plaintiffs hope that they may actually have it.

As of summer 2016, Washington courts have not found in favor of nonclient-plaintiffs in estate planning cases under the *Trask* balancing test. The lack of precedent in favor of nonclients suggests that Washington is adhering more to strict privity than court opinions indicate. However, the possibility remains that under the right facts, a nonclient-plaintiff may have standing.

III. STATES VARY WIDELY IN THEIR APPROACHES TO ESTATE PLANNING ATTORNEYS' DUTIES TO NONCLIENTS

Jurisdictions across the nation address the issue of nonclient standing in malpractice actions using a range of methods. If Washington has an opportunity to address the issue again, courts will likely turn to leading cases in other jurisdictions for guidance. Important states to look to include California, Connecticut, Illinois, New Hampshire, and Pennsylvania because Washington relied on these jurisdictions when deciding *Stangland*,¹⁵⁴ *Trask*,¹⁵⁵ *Parks*,¹⁵⁶ and *Linth*.¹⁵⁷

A. *A Minority of States Adheres to the Strict Privity Rule and Holds that Nonclients Cannot Sue Estate Planning Attorneys for Malpractice*

A minority of states adheres to the strict privity rule. These states include Alabama,¹⁵⁸ Arkansas,¹⁵⁹ Colorado,¹⁶⁰ Maryland,¹⁶¹

153. *See id.* at 341–42, 360 P.3d at 849–50.

154. *Stangland v. Brock*, 109 Wash. 2d 675, 680–84, 747 P.2d 464, 467–69 (1987).

155. *Trask v. Butler*, 123 Wash. 2d 835, 841–42, 872 P.2d 1080, 1083–84 (1994).

156. *Parks v. Fink*, 173 Wash. App. 366, 379–89, 293 P.3d 1275, 1282–87 (2013).

157. *Linth*, 190 Wash. App. at 338–39, 360 P.3d at 848.

158. *See Robinson v. Benton*, 842 So. 2d 631, 637 (Ala. 2002); *Peterson v. Anderson*, 719 So. 2d 216, 218–19 (Ala. 1997).

159. *See* ARK. CODE ANN. § 16-22-310 (2005); *McDonald v. Pettus*, 988 S.W.2d 9, 12–14 (Ark. 1999).

160. *See Baker v. Wood, Ris & Hames, Prof'l Corp.*, 2016 CO 5, ¶¶ 20–28; *Allen v. Steele*, 252 P.3d 476, 482, 486 (Colo. 2011).

161. *See Noble v. Bruce*, 709 A.2d 1264, 1268, 1279 (Md. 1998).

Massachusetts,¹⁶² Nebraska,¹⁶³ Ohio,¹⁶⁴ and Virginia.¹⁶⁵ Under the strict privity rule, nonclients only have a cause of action against attorneys when the attorney commits fraud or a malicious or tortious act, such as negligent misrepresentation.¹⁶⁶ Otherwise, “[a] person authorized to practice law owes no duty except that arising from contract or from a gratuitous undertaking.”¹⁶⁷ Maine,¹⁶⁸ New York,¹⁶⁹ and Texas¹⁷⁰ apply the strict privity rule with a limited exception allowing a legal malpractice cause of action by an estate’s personal representative against an estate planning attorney.

Despite being a minority position, the strict privity rule is justified by confidentiality, predictability, and fairness principles. One court noted, “the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent.”¹⁷¹ Many courts applying the strict privity rule support the position by arguing that without it, the law would deny parties’ freedom of contract and the potential liability would impose a significant burden on the parties in contract.¹⁷² Strict privity protects the attorney-client relationship and confidential attorney-client communications.¹⁷³ It also

162. See *Miller v. Mooney*, 725 N.E.2d 545, 549–50 (Mass. 2000).

163. See *Lilyhorn v. Dier*, 335 N.W.2d 554, 555 (Neb. 1983).

164. See *Shoemaker v. Gindlesberger*, 118 Ohio St. 3d 226, 2008-Ohio-2012, 887 N.E.2d 1167, 1168; *Simon v. Zipperstein*, 512 N.E.2d 636, 638 (Ohio 1987).

165. See *Johnson v. Hart*, 692 S.E.2d 239, 243–44 (Va. 2010).

166. See *In re Hanes*, 214 B.R. 786, 823 (Bankr. E.D. Va. 1997); *Allen v. Steele*, 252 P.3d 476, 484 (Colo. 2011); *Estate of Schneider v. Finmann*, 933 N.E.2d 718, 720 (N.Y. 2010); *Leff v. Fulbright & Jaworski LLP*, 911 N.Y.S.2d 320, 321 (N.Y. App. Div. 2010).

167. See *Peterson v. Anderson*, 719 So. 2d 216, 218 (Ala. Civ. App. 1997) (citing *Shows v. NCNB Nat’l Bank of N.C.*, 585 So. 2d 880, 882 (Ala. 1991)); *Robinson v. Benton*, 842 So. 2d 631, 637 (Ala. 2002).

168. See *Nevin v. Union Trust Co.*, 1999 ME 47, ¶¶ 39–41, 726 A.2d 694, 701.

169. See *Estate of Schneider v. Finmann*, 933 N.E.2d 718, 719 (N.Y. 2010).

170. See *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 782 (Tex. 2006); *Barcelo v. Elliot*, 923 S.W.2d 575, 582 (Tex. 1996) (Spector, J., dissenting).

171. *Barcelo*, 923 S.W.2d at 577–79; see also *Baker v. Wood, Ris & Hames, Prof’l Corp.*, 2016 CO 5 ¶ 23 (quoting *Noble v. Bruce*, 709 A.2d 1264, 1270 (Md. 1998)) (“While the testator/client is alive, the lawyer owes him or her a ‘duty of complete and undivided loyalty.’ The strict privity rule protects an attorney’s obligation to direct his or her full attention to the needs of the client. An attorney’s preoccupation or concern with potential negligence claims by third parties might result in a diminution in the quality of the legal services received by the client as the attorney might weigh the client’s interests against the attorney’s fear of liability to a third party.”).

172. Joan Teshima, *Attorney’s Liability, to One Other Than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R. 4th 615, 624 (originally published in 1988).

173. Casteel et al., *supra* note 7, at 47.

limits the number of parties with standing, thereby decreasing lawsuits and promoting efficiency.¹⁷⁴

Notwithstanding its benefits, the strict privity rule may allow a negligent attorney to escape liability when intended beneficiaries only realize the attorney's mistake after a client's death. New York describes the tug-of-war at play between attorney liability and lack of accountability: "This rule effectively protects attorneys from legal malpractice suits by indeterminate classes of plaintiffs whose interests may be at odds with the interests of the client-decedent. However, it also leaves the estate with no recourse against an attorney who planned the estate negligently."¹⁷⁵ Because of strict privity's constraints, most jurisdictions recognize an exception to privity under certain circumstances.

B. A Majority of States Recognizes a Possible Cause of Action by Nonclients Under a Third Party Contract Theory, a Negligence Tort Theory, or a Balancing Test

The majority of states recognizes an exception to the strict privity rule based on one of three theories: (1) a third party beneficiary contract theory; (2) the foreseeable harm to third parties doctrine in tort law; or (3) a balancing test of several factors. The majority group includes the following states: California,¹⁷⁶ Connecticut,¹⁷⁷ Delaware,¹⁷⁸ District of Columbia,¹⁷⁹ Florida,¹⁸⁰ Georgia,¹⁸¹ Hawaii,¹⁸² Idaho,¹⁸³ Illinois,¹⁸⁴

174. *See id.*

175. *Estate of Schneider v. Finmann*, 933 N.E.2d 718, 720 (N.Y. 2010).

176. *See Lucas v. Hamm*, 364 P.2d 685, 687 (Cal. 1961) (applying a balancing test).

177. *Krawczyk v. Stingle*, 543 A.2d 733, 735 (Conn. 1988) ("[A] number of jurisdictions have recognized an exception to this general rule [of no liability] when the plaintiff can demonstrate that he or she was the intended or foreseeable beneficiary of the attorney's services."). *See generally Stowe v. Smith*, 441 A.2d 81 (Conn. 1981); *Licata v. Spector*, 225 A.2d 28 (Conn. C.P. 1966).

178. *See Pinckney v. Tigani*, No. Civ.A. 02C-08-129FSS, 2004 WL 2827896, *5–*8 (Del. Super. Ct. Nov. 30, 2004) (discussing various approaches including strict privity, a balancing test, and a third party contract theory).

179. *See Needham v. Hamilton*, 459 A.2d 1060, 1062–63 (D.C. 1983) (applying a tort theory).

180. *See Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378, 1380 (Fla. 1993) (applying a third party contract theory); *Kinney v. Shinholser*, 663 So. 2d 643, 646–47 (Fla. Dist. Ct. App. 1995) (same).

181. *See Young v. Williams*, 645 S.E.2d 624, 626 (Ga. Ct. App. 2007) (applying a third party contract theory).

182. *See Blair v. Ing*, 21 P.3d 452, 464–68 (Haw. 2001) (applying a balancing test after recognizing a cause of action was possible under both tort theories and contract theories).

Indiana,¹⁸⁵ Iowa,¹⁸⁶ Kansas,¹⁸⁷ Kentucky,¹⁸⁸ Louisiana,¹⁸⁹ Michigan,¹⁹⁰ Minnesota,¹⁹¹ Missouri,¹⁹² Montana,¹⁹³ New Hampshire,¹⁹⁴ New Mexico,¹⁹⁵ Oklahoma,¹⁹⁶ Oregon,¹⁹⁷ Pennsylvania,¹⁹⁸ Rhode Island,¹⁹⁹ South Carolina,²⁰⁰ South Dakota,²⁰¹ Washington,²⁰² West Virginia,²⁰³

183. *See* *Soignier v. Fletcher*, 256 P.3d 730, 732–34 (Idaho 2011); *Harrigfeld v. Hancock*, 90 P.3d 884, 889 (Idaho 2004) (holding that an attorney’s duty of care extended to named beneficiaries in will under a tort theory).

184. *See* *Ogle v. Fuiten*, 466 N.E.2d 224, 227 (Ill. 1984) (applying a third party contract theory, but suggesting that a tort theory may support a cause of action, too); *Pelham v. Griesheimer*, 440 N.E.2d 96, 100 (Ill. 1982) (“We conclude that, for a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party.”); *Neal v. Baker*, 551 N.E.2d 704, 706 (Ill. App. Ct. 1990) (“Plaintiff’s mere assertion that the attorney was hired with the intent to directly benefit plaintiff is not sufficient to state a cause of action. The *intent* plaintiff referred to in her complaint was nothing more than the general intent implicit in an executor hiring an attorney to assist in administering an estate. We hold no duty extends to a beneficiary under these circumstances.”).

185. *See* *Walker v. Lawson*, 526 N.E.2d 968, 968 (Ind. 1988) (applying a third party contract theory); *Ferguson v. O’Bryan*, 996 N.E.2d 428, 433 (Ind. Ct. App. 2013) (holding that a drafting attorney who is aware that intended beneficiaries exist may be liable to nonclients).

186. *See* *St. Malachy Roman Catholic Congregation of Geneseo v. Ingram*, 841 N.W.2d 338, 351 (Iowa 2013) (applying a tort theory); *Schreiner v. Scoville*, 410 N.W.2d 679, 682–83 (Iowa 1987) (recognizing a cause of action under both tort and contract theories).

187. *See* *Pizel v. Zuspahn*, 795 P.2d 42, 51 (Kan. 1990) (applying a balancing test).

188. *See* *Goodman v. Goldberg & Simpson, P.S.C.*, 323 S.W.3d 740, 747–48 (Ky. Ct. App. 2009) (applying a third party contract theory).

189. *See* *Woodfork v. Sanders*, 248 So. 2d 419, 425 (La. Ct. App. 1971) (applying a third party contract theory).

190. *See* *Mieras v. DeBona*, 550 N.W.2d 202, 211–12 (Mich. 1996) (discussing both tort and third party contract theories).

191. *See* *Francis v. Piper*, 597 N.W.2d 922 (Minn. Ct. App. 1999) (applying a third party contract theory).

192. *See* *Donahue v. Shughart, Thomson, & Kilroy, P.C.* 900 S.W.2d 624 (Mo. 1995) (applying a tort theory).

193. *See* *Stanley L. & Carolyn M. Watkins Trust v. Lacosta*, 2004 MT 144, 321 Mont. 432, 92 P.3d 620 (applying a tort theory).

194. *See* *Simpson v. Calivas*, 650 A.2d 318, 321 (N.H. 1994) (applying a tort theory).

195. *See* *Leyba v. Whitley*, 907 P.2d 172, 179 (N.M. 1995) (applying a balancing test).

196. *See* *Hesser v. Cent. Nat’l Bank & Trust Co. of Enid*, 1998 OK 15, ¶ 13, 956 P.2d 864, 867 (applying a third party contract theory).

197. *See* *Hale v. Groce*, 744 P.2d 1289, 1292–93 (Or. 1987) (discussing both a tort theory and a contract theory).

198. *See* *Guy v. Liederbach*, 459 A.2d 744, 746 (Pa. 1983) (applying a third party contract theory).

199. *See* *Credit Union Cent. Falls v. Groff*, 966 A.2d 1262, 1272 (R.I. 2009) (applying a third party contract theory).

200. *See* *Fabian v. Lindsay*, 765 S.E.2d 132, 141 (S.C. 2014) (recognizing claims under both tort and third-party beneficiary theories).

Wisconsin,²⁰⁴ and Wyoming.²⁰⁵ Mississippi has completely rid itself of the privity doctrine through legislation.²⁰⁶ Other jurisdictions have not directly addressed the issue. These states include: Arizona,²⁰⁷ Alaska, Delaware, Nevada, New Jersey,²⁰⁸ North Carolina, North Dakota, Tennessee,²⁰⁹ Utah,²¹⁰ and Vermont.²¹¹

Under what is known as the “Florida-Iowa Rule,” some jurisdictions hold that nonclients may only bring a lawsuit against an estate planning attorney if the testator named the nonclients in the will or trust.²¹² In Florida, liability only arises if “due to the attorney’s professional negligence, the testamentary intent, *as expressed in the will*, is frustrated, and the beneficiary’s legacy is lost or diminished as a direct result of that negligence.”²¹³ Likewise, in Iowa, liability only arises when “as a direct result of the lawyer’s professional negligence the testator’s intent as

201. See *Friske v. Hogan*, 2005 SD 70, ¶¶ 12–20, 698 N.W.2d 526, 530–31 (applying a third party beneficiary theory and holding that an attorney-client relationship was formed under a tort theory).

202. See *Trask v. Butler*, 123 Wash. 2d 835, 842–45, 872 P.2d 1080, 1084–85 (applying a balancing test).

203. See *Calvert v. Scharf*, 619 S.E.2d 197, 207 (W. Va. 2005) (applying a tort theory).

204. See *Auric v. Cont’l Cas. Co.*, 331 N.W.2d 325, 328 (Wis. 1983) (applying a tort theory); *Anderson v. McBurney*, 467 N.W.2d 158, 160–61 (Wis. Ct. App. 1991) (same).

205. See *In re Estate of Drwenski*, 2004 WY 5, ¶¶ 30–39, 83 P.3d 457, 464–67 (applying a balancing test).

206. See MISS. CODE ANN. § 11-7-20 (2016).

207. See *Fickett v. Super. Ct. of Pima Cty*, 27 Ariz. App. 793, 795 (Ariz. Ct. App. 1976) (applying a balancing test, although not in the estate planning context).

208. See *Petrillo v. Bachenberg*, 655 A.2d 1354, 1361–62 (N.J. 1995) (holding a real estate attorney may owe a duty of care to a nonclient relying on the attorney’s reports under a tort theory).

209. See *Wright v. Linebarger Googan Blair & Sampson, LLP*, 782 F. Supp. 2d 593, 612 (W.D. Tenn. 2011) (holding law firm was not liable to third party, yet recognizing that an attorney may be liable to third parties for negligent preparation of real estate documents under Tennessee law); *Harriet & Henderson Yarns, Inc. v. Castle*, 75 F. Supp. 2d 818, 824–25 (W.D. Tenn. 1999) (holding that nonclients could not bring a negligence cause of action against an attorney because they were neither the attorney’s clients nor third party intended beneficiaries).

210. See *Winters v. Schulman*, 1999 UT App 119, ¶¶ 24–26, 977 P.2d 1218, 1225 (holding that a nonclient may not recover from attorney for negligence under third party beneficiary theory unless the nonclient proves that the primary intent of the client’s relationship with the attorney was for the nonclient’s benefit).

211. See *Hedges v. Durrance*, 2003 VT 63, 175 Vt. 588, 590–91, 834 A.2d 1, 4–5 (holding that an attorney did not owe a duty of care to a nonclient in a different context).

212. See *Baker v. Wood, Ris & Hames, Prof’l Corp.*, 2016 CO 5, ¶¶ 44–50 (discussing the “Florida-Iowa” rule); *DeMaris v. Asti*, 426 So.2d 1153, 1154 (Fla. Dist. Ct. App. 1983); *Schreiner v. Scoville*, 410 N.W.2d 679, 683 (Iowa 1987); *Fabian v. Lindsay*, 765 S.E.2d 132, 138–41 (S.C. 2014) (discussing the “Florida-Iowa” rule, but ultimately rejecting it).

213. See *DeMaris*, 426 So.2d at 1154 (emphasis in original).

expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized."²¹⁴ Several states in the majority group have adopted this rule to limit the causes of action brought by nonclients. These states include: California,²¹⁵ Florida,²¹⁶ Hawaii,²¹⁷ Idaho,²¹⁸ Iowa,²¹⁹ Pennsylvania,²²⁰ South Carolina,²²¹ and South Dakota.²²²

C. *Washington Courts May Find the Approaches of California, Connecticut, Illinois, New Hampshire, and Pennsylvania Persuasive*

The Washington State Supreme Court relied on California,²²³ Connecticut,²²⁴ Illinois,²²⁵ and Pennsylvania²²⁶ when it decided

214. See *Schreiner*, 410 N.W.2d at 683.

215. See *Hall v. Kalfayan*, 118 Cal. Rptr. 3d 629, 636 (Cal. Ct. App. 2010) (holding that a court-appointed attorney did not owe a duty of care to a prospective beneficiary's conservator when the will did not name the prospective beneficiary).

216. See *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378, 1380 (Fla. 1993); *Babcock v. Malone*, 760 So. 2d 1056, 1056 (Fla. Dist. Ct. App. 2000) (holding that nonclient-plaintiffs could not sue the drafting attorney because the testator's will did not name them and the testator's intent was unclear).

217. See *Young v. Van Buren*, No. 28543, 2010 WL 4278321, at *3-4 (Haw. Ct. App. Oct. 29, 2010), *as corrected* (Nov. 23, 2010) (In an unpublished disposition, the court rejected malpractice claims brought by a testator's son because the son was not the intended beneficiary of the trust amendments and thus, the attorney did not owe him any duty.).

218. See *Soignier v. Fletcher*, 256 P.3d 730, 733-34 (Idaho 2011) ("Attorneys do not have to postulate whether a testator intended to do something other than what is expressed in the will. . . . [And] attorneys have no ongoing duty to monitor the legal status of the property mentioned in a testamentary instrument."); *Harrigfeld v. Hancock*, 90 P.3d 884, 888 (Idaho 2004).

219. See *Schreiner*, 410 N.W.2d at 682 (holding that "a lawyer owes a duty of care to the direct, intended, and specifically identifiable beneficiaries of the testator as expressed in the testator's testamentary instruments").

220. See *Guy v. Liederbach*, 459 A.2d 744, 746 (Pa. 1983) (holding that while California's balancing test was too broad, a nonclient may bring a cause of action if the client's will expressly named the nonclient intended beneficiaries and the testator's intent was to benefit the intended beneficiaries).

221. See *Fabian v. Lindsay*, 765 S.E.2d 132, 140 (S.C. 2014) (holding that beneficiaries named or identified in the estate planning document could bring a malpractice cause of action against the attorney for poor drafting).

222. See *Friske v. Hogan*, 2005 SD 70, ¶¶ 10-17, 698 N.W.2d 526, 529-31 (holding that there is an exception to the privity rule when a nonclient is the direct, intended beneficiary of the lawyer's services to the testator).

223. *Trask v. Butler*, 123 Wash. 2d 835, 841, 872 P.2d 1080, 1083-84 (1994) (citing *Goldberg v. Frye*, 266 Cal. Rptr. 483 (Cal. Ct. App. 1990)); *Stangland v. Brock*, 109 Wash. 2d 675, 680, 747 P.2d 464, 467 (1987) (citing *Heyer v. Flaig*, 449 P.2d 161 (Cal. 1969); *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961)).

Stangland and *Trask*. The court of appeals similarly relied on California,²²⁷ Connecticut,²²⁸ and New Hampshire,²²⁹ when deciding *Parks*. The leading cases in each of these jurisdictions may help predict how the *Trask* balancing test will apply in the future Washington cases.

1. *California's Balancing Test Is a Model for Many States, Including Washington*

California leads other jurisdictions in estate planning malpractice liability because of its early decision to overrule the strict privity rule and create a balancing test to determine whether nonclients have standing to sue estate planning attorneys.²³⁰ The balancing test, first set forth in *Lucas v. Hamm*,²³¹ considers the extent to which the testator intended the transaction to affect the beneficiary; the foreseeability of harm to the beneficiary; the degree of certainty that the beneficiary suffered the harm; the closeness of connection between the attorney's conduct and the injury; and the policy of preventing future harm.²³² In creating this test, California overruled a previous decision holding that a lack of privity between will beneficiaries and the drafting attorneys precludes the beneficiaries from having a cause of action against the attorneys.²³³

224. *Stangland*, 109 Wash. 2d at 681, 747 P.2d at 467 (citing *Stowe v. Smith*, 441 A.2d 81 (Conn. 1981)).

225. *Trask*, 123 Wash. 2d at 842, 872 P.2d at 1084 (citing *Neal v. Baker*, 551 N.E.2d 704, (Ill. App. Ct. 1990)); *Stangland*, 109 Wash. 2d at 681, 747 P.2d at 467 (citing *Pelham v. Griesheimer*, 440 N.E.2d 96 (Ill. 1982)).

226. *Stangland*, 109 Wash. 2d at 681, 747 P.2d at 467 (citing *Guy v. Liederbach*, 459 A.2d 744 (Pa. 1983)).

227. *Parks v. Fink*, 173 Wash. App. 366, 379, 385, 293 P.3d 1275, 1282, 1284 (2013) (citing *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958); *Hall v. Kalfayan*, 118 Cal. Rptr. 3d 629 (Cal. Ct. App. 2010); *Radovich v. Locke-Paddon*, 41 Cal. Rptr. 2d 573 (Cal. Ct. App. 1995)).

228. *Parks*, 173 Wash. App. at 379, 382, 293 P.3d at 1282, 1283 (citing *Krawczyk v. Stingle*, 543 A.2d 733 (Conn. 1988); *Licata v. Spector*, 225 A.2d 28 (Conn. C.P. 1966)).

229. *Parks*, 173 Wash. App. at 382–83, 293 P.3d at 1283–84 (citing *Sisson v. Jankowski*, 809 A.2d 1265 (N.H. 2002)).

230. *Lucas v. Hamm*, 364 P.2d 685, 687–88 (Cal. 1961) (overruling *Buckley v. Gray*, 42 P. 900 (Cal. 1895)).

231. *Id.*

232. *Id.*

233. *Id.* (overruling *Buckley v. Gray*, 42 P. 900 (Cal. 1895)).

California's multifactor balancing test has become a model for other jurisdictions.²³⁴ California courts have held that the test weighs in favor of the nonclients on some occasions²³⁵ and in favor of the attorney on other occasions.²³⁶ California's balancing test dictates that attorneys do not owe intended beneficiaries the duty to promptly execute a will or trust.²³⁷ Because of California's leading position in this area of the law, Washington's *Trask* balancing factors mirror California's factors.²³⁸ Likewise, in the prompt execution context, Washington applies the balancing test as California applies it—attorney-defendants are not liable to nonclients if the claim regards prompt execution.²³⁹

2. *Connecticut's Precedent Involving Prompt Execution of Estate Planning Documents Persuaded Washington Courts to Deny Attorney Liability for Failure to Promptly Execute Documents*

Connecticut's third party beneficiary theory, which supports the finding of a duty of care between attorneys and nonclients in limited circumstances, is persuasive authority in Washington decisions.²⁴⁰ As in several other jurisdictions, Connecticut holds that attorneys do not owe a duty of care to third parties for the prompt execution of estate planning

234. See *Blair v. Ing*, 21 P.3d 452, 459–60 (Haw. 2001); *Schreiner v. Scoville*, 410 N.W.2d 679, 681–82 (Iowa 1987); *Pizel v. Zuspann*, 795 P.2d 42, 48–50 (Kan. 1990); *Fabian v. Lindsay*, 765 S.E.2d 132, 137–38 (S.C. 2014).

235. See, e.g., *Heyer v. Flaig*, 449 P.2d 161, 162 (Cal. 1969) (holding that the attorney violated his duty of care because he negligently failed to advise his client of the effects of a post-testamentary marriage, causing the nonclient-plaintiffs to suffer “irremediable” damages).

236. See, e.g., *Hall v. Kalfayan*, 118 Cal. Rptr. 3d 629, 636 (Cal. Ct. App. 2010) (holding an attorney did not owe a duty of care to a prospective beneficiary to have a will executed before the testator's death); *Goldberg v. Frye*, 266 Cal. Rptr. 483, 489 (Cal. Ct. App. 1990) (holding that legatees could not sue the estate administrator's attorney because the primary purpose of the attorney-client relationship was not for the legatees' benefit).

237. See *Hall*, 118 Cal. Rptr. 3d at 636 (holding an attorney did not owe a duty of care to a prospective beneficiary to have a will executed before the testator's death).

238. *Trask v. Butler*, 123 Wash. 2d 835, 843, 872 P.2d 1080, 1084 (1994). The *Trask* factors include the extent to which the transaction was intended to benefit the plaintiff; the foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury; the policy of preventing future harm; and the extent to which the profession would be unduly burdened by a finding of liability. *Id.*

239. See *Linth v. Gay*, 190 Wash. App. 331, 338, 360 P.3d 844, 848 (2015); *Parks v. Fink*, 173 Wash. App. 366, 377, 293 P.3d 1275, 1280 (2013); cf. *Hall*, 118 Cal. Rptr. 3d at 636.

240. *Stangland v. Brock*, 109 Wash. 2d 675, 681, 747 P.2d 464, 467 (1987) (citing *Stowe v. Smith*, 441 A.2d 81 (Conn. 1981)); *Parks*, 173 Wash. App. at 379, 382, 293 P.3d at 1282, 1283 (citing *Krawczyk v. Stingle*, 543 A.2d 733 (Conn. 1988); *Licata v. Spector*, 225 A.2d 28 (Conn. C.P. 1966)).

documents.²⁴¹ In *Krawczyk v. Stingle*,²⁴² an attorney's client expressed a desire to execute a trust to replace an existing will.²⁴³ However, the client was hospitalized and passed away shortly after conveying that desire.²⁴⁴ Because of the short amount of time, the client never signed the trust documents.²⁴⁵ While the client's inability to sign the documents was unfortunate, the Court held that the attorney was not liable to the trust's intended beneficiaries for failure to execute the trust documents swiftly before the client's death.²⁴⁶

The Washington State court of appeals relied on the *Krawczyk* Court's reasoning when determining that estate planning attorneys did not owe a duty to nonclients to have estate planning documents promptly executed.²⁴⁷ Unlike cases in which attorneys fail to supervise a will's execution,²⁴⁸ the issue in *Krawczyk*, as well as *Parks* and *Linth*, was "whether such liability should be further expanded to encompass negligent delay in completing and furnishing estate planning documents for execution by the client."²⁴⁹ The *Krawczyk* Court distinguished the claim at issue from other claims of legal malpractice with widely persuasive reasoning.

3. *New Hampshire Authority Also Persuaded Washington to Deny Attorney Liability for Failure to Promptly Execute Estate Planning Documents*

The Washington State court of appeals viewed an influential New Hampshire case, *Sisson v. Jankowski*,²⁵⁰ as persuasive authority.²⁵¹ In *Sisson*, the Supreme Court of New Hampshire held that an attorney did not owe a duty of care to prospective will beneficiaries to see that the testator promptly executed the will in question.²⁵² The *Sisson* Court relied on different factors than those of other jurisdictions such as: "the

241. *Krawczyk*, 543 A.2d at 736.

242. *Id.*

243. *Id.* at 734.

244. *Id.*

245. *Id.*

246. *Id.* at 736.

247. *Parks v. Fink*, 173 Wash. App. 366, 379, 293 P.3d 1275, 1282 (2013) (citing *Krawczyk*, 543 A.2d 733).

248. *See Licata v. Spector*, 225 A.2d 28 (Conn. C.P. 1966).

249. *Krawczyk*, 543 A.2d at 735.

250. 809 A.2d 1265 (N.H. 2002).

251. *Parks*, 173 Wash. App. at 382–83, 293 P.3d at 1283–84 (citing *Sisson*, 809 A.2d 1265).

252. *Sisson*, 809 A.2d at 1268–69.

societal interest involved, the severity of the risk, the likelihood of the occurrence, the relationship between the parties, and the burden upon the defendant.”²⁵³

Outside of the prompt execution context, New Hampshire recognizes that a nonclient does not necessarily need a privity relationship with the attorney-defendant to bring a legal malpractice claim for negligent will drafting.²⁵⁴ Like other jurisdictions, New Hampshire found an exception to the privity rule appropriate under the third party beneficiary contract theory.²⁵⁵ The Court justified the exception, stating, “the obvious foreseeability of injury to the beneficiary demands an exception to the privity rule.”²⁵⁶

4. *Illinois’s Third Party Beneficiary Theory was Synthesized with a Balancing Test to Form Washington’s Modern Balancing Test*

Illinois’s authority on the third party beneficiary theory was persuasive authority in both the *Stangland* and *Trask* decisions.²⁵⁷ The test set forth in *Neal v. Baker*²⁵⁸ requires a nonclient to establish that both the primary purpose and intent of the attorney-client relationship was for the nonclient’s benefit.²⁵⁹ *Neal’s* test was previously established in *Pelham v. Griesheimer*.²⁶⁰ The *Trask* Court compared the third party beneficiary test to a balancing test, stating “[t]he two tests are indistinguishable in that their primary inquiry focuses on the purpose for establishing the attorney-client relationship . . . [t]o eliminate any confusion to trial courts we combine the two tests.”²⁶¹ Washington combined this third party beneficiary concept with a multifactor balancing test and synthesized the important factors in determining whether an attorney owes a duty to a nonclient.²⁶²

253. *Id.* at 1267 (citing *Hungerford v. Jones*, 722 A.2d 478 (N.H. 1998)).

254. *Simpson v. Calivas*, 650 A.2d 318, 321 (N.H. 1994).

255. *Id.*

256. *Id.* at 322.

257. *Trask v. Butler*, 123 Wash.2d 835, 842, 872 P.2d 1080, 1084 (1994) (citing *Neal v. Baker*, 551 N.E.2d 704, (Ill. App. Ct. 1990)); *Stangland v. Brock*, 109 Wash. 2d 675, 681, 747 P.2d 464, 467 (1987) (citing *Pelham v. Griesheimer*, 440 N.E.2d 96 (Ill. 1982)).

258. 551 N.E.2d 704 (Ill. App. Ct. 1990).

259. *Id.* at 705–06.

260. 440 N.E.2d 96, 100 (Ill. 1982) (“We conclude that, for a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party.”).

261. *Trask*, 123 Wash. 2d at 842, 872 P.2d at 1084.

262. *Id.* at 842–43, 872 P.2d at 1084.

5. *Pennsylvania's Exception to Privity for Nonclients Expressly Named in the Estate Planning Documents Persuaded Washington that Strict Privity Is on the Decline*

Washington noted an important early Pennsylvania decision, in which the court recognized an attorney's possible liability to nonclients for poor will drafting.²⁶³ In *Guy v. Liederbach*,²⁶⁴ the Supreme Court of Pennsylvania held that named beneficiaries in a will could bring a cause of action against an attorney who failed to properly draft the will.²⁶⁵ Rather than abolishing privity, Pennsylvania held that for a nonclient-plaintiff to maintain a lawsuit based in assumpsit, she must either show an attorney-client relationship exists or an attorney specifically undertook to furnish professional services.²⁶⁶ Under this reasoning, an unintended beneficiary of an estate planning document cannot sue an attorney for negligent drafting of the document.²⁶⁷ In acknowledging *Guy*, the *Stangland* Court further supported its notion that the privity trend was diminishing, largely because of the third party beneficiary theory on which *Guy* relied.²⁶⁸

IV. WASHINGTON COURTS NEED CLARITY: UNDER WHAT CIRCUMSTANCES MIGHT THE *TRASK* BALANCING TEST WEIGH IN FAVOR OF A NONCLIENT?

Washington is not in the strict privity camp, so the state may recognize a nonclient's cause of action against an attorney for legal malpractice. Yet, the breadth of that recognition remains undefined. In particular, the courts have not established whether it will limit causes of action to nonclients expressly named in estate planning documents or whether unnamed nonclients may also have causes of action.

The *Trask* balancing test requires a case-by-case analysis and has the potential to elicit different results under different facts.²⁶⁹ However, Washington case law lacks clarity regarding the *Trask* balancing test's application because the facts in precedent cases are similar and

263. *Stangland v. Brock*, 109 Wash. 2d 675, 681, 747 P.2d 464, 467 (1987) (citing *Guy v. Liederbach*, 459 A.2d 744 (Pa. 1983)).

264. 459 A.2d 744 (Pa. 1983).

265. *Id.* at 752–53.

266. *Id.* at 750.

267. *Id.* at 751. *See also* *Hess v. Fox Rothschild, LLP*, 925 A.2d 798, 806–07 (Pa. 2007).

268. *Stangland*, 109 Wash. 2d at 681, 747 P.2d at 467.

269. *See supra* Part I; section II.B.

narrow.²⁷⁰ As seen in *Parks* and *Linth*, in the case of prompt execution of estate planning documents, the *Trask* balancing test clearly weighs in favor of the attorney.²⁷¹ But Washington lower courts find themselves in the dark when applying the *Trask* balancing test in estate planning cases dealing with issues other than prompt execution. If such a case makes its way to the Washington State Supreme Court, the Court will have the opportunity to clarify the *Trask* balancing test and opine as to whether the test weighs in favor of the nonclient. The following fact patterns, which have appeared before other jurisdictions, may shift the weight on the *Trask* scale.

A. *If There Is a Delay in the Execution of Estate Planning Documents, the Trask Factors Likely Favor the Attorney*

In situations where a nonclient claims an estate planning attorney breached a duty of care by failing to promptly execute an estate planning document, the *Trask* factors and similar balancing tests in other jurisdictions come out the same way: courts do not hold attorneys liable to nonclients.²⁷² Both *Parks* and *Linth* hold that the *Trask* balancing test weighs in favor of the attorney when the client did not sign the estate planning document before death.²⁷³ Courts in many other jurisdictions hold the same.²⁷⁴ They commonly justify this position for two major reasons. First, it is possible that an estate planning document does not exist if the testator and attorney have not executed it. Second, without a signature attesting to the document's contents, the testator's intent is unclear.

The first rationale is based on the key distinction between negligent drafting cases and prompt execution cases. In the first situation, a tangible document exists and may be in effect, while in the second, the document may not even exist yet. A clear line exists between these

270. See *Linth v. Gay*, 190 Wash. App. 331, 339, 360 P.3d 844, 849 (2015); *Parks v. Fink*, 173 Wash. App. 366, 389, 293 P.3d 1275, 1287 (2013).

271. See *Linth*, 190 Wash. App. at 339, 360 P.3d at 849; *Parks*, 173 Wash. App. at 389, 293 P.3d at 1287.

272. See *Krawczyk v. Stingle*, 543 A.2d 733, 736 (Conn. 1988); *Sisson v. Jankowski*, 809 A.2d 1265, 1270 (N.H. 2002); *Rydde v. Morris*, 675 S.E.2d 431, 433–35 (S.C. 2009); *Linth*, 190 Wash. App. at 339, 360 P.3d at 849; *Parks*, 173 Wash. App. at 378, 293 P.3d at 1281.

273. *Linth*, 190 Wash. App. 331, 338, 360 P.3d 844, 848 (addressing the prompt execution of a trust attachment); *Parks*, 173 Wash. App. at 377, 293 P.3d at 1280 (addressing the prompt execution of a will).

274. See *Rydde*, 675 S.E.2d at 433–35; *Sisson*, 809 A.2d at 1270.

claims because “an attorney owes no duty to a prospective beneficiary of a nonexistent will.”²⁷⁵

The second rationale reasons that a testator’s intent is unclear until an executed document exists. Without a signature, many individuals, including the client’s attorney, cannot be certain that the document adequately reflects the testator’s intentions. Attorneys must not force a client to execute a document; rather, they must execute the document in the proper legal manner after clients affirmatively decide that they wish to execute it.²⁷⁶ An attorney may feel pressure to force a client to quickly sign a document if a third party has great stakes in the document and has standing to sue the attorney afterwards.²⁷⁷

Considering these rationales, some courts may find a bright-line rule requiring privity appropriate in prompt execution cases. However, the *Trask* balancing test is still necessary. In a recent Pennsylvania case, *Estate of Agnew v. Ross*,²⁷⁸ an attorney had a meeting with a near-death client who was prepared to execute an estate planning document.²⁷⁹ However, the attorney forgot to bring the document to the meeting, and the client passed away before signing it.²⁸⁰ The court allowed nonclient intended beneficiaries to bring a cause of action against the attorney under a third party beneficiary contract theory.²⁸¹

Although the issue in *Estate of Agnew* was failure of prompt execution, it stands in stark contrast to *Parks* and *Linth* because the testator’s intent was clear: he was prepared to sign the document and wished to do so.²⁸² The attorney’s mistake in not bringing the document to the client meeting was the only reason the client did not sign it, and likewise, the only reason the nonclients did not receive their intended

275. *Ryde*, 675 S.E.2d at 432.

276. *See id.* at 433–34.

277. *Krawczyk*, 543 A.2d at 736 (“Imposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily. Fear of liability to potential third party beneficiaries would contravene the attorney’s primary responsibility to ensure that the proposed estate plan effectuates the client’s wishes and that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen.”).

278. 110 A.3d 1020 (Pa. Super. Ct. 2015).

279. *Id.* at 1022.

280. *Id.* at 1028 (“[The attorney] also stated that [the testator] ‘would have signed the amendment had I prepared it, but because it was not with me, it was not discussed and until I discussed it with him I can’t say for certain he would have signed it.’ . . . Moreover, [the attorney] conceded that his failure to bring the 2010 Trust Amendment to that meeting was an ‘[o]versight.’”).

281. *Id.*

282. *Id.*

benefit.²⁸³ Under these facts, a bright-line rule would be too harsh, so a court's analysis under the *Trask* balancing test remains necessary.

B. If the Document's Express Provisions Frustrate the Testator's Intent, the Trask Factors May Favor the Nonclient

When presented with the right case, Washington may hold that nonclients expressly named in the estate planning document may bring a cause of action against the drafting attorney under the *Trask* balancing test, as other jurisdictions have held.²⁸⁴ Several states allow "a beneficiary [to] maintain a cause of action against the estate planning attorney only if the client's intent, as expressed in the will (or other document), is frustrated."²⁸⁵ This limitation requires that the frustration of a testator's intent be apparent on the face of the will in order to avoid parol evidence.²⁸⁶ For example, Idaho holds that nonclients named as beneficiaries in a testamentary instrument are an exception to the privity rule.²⁸⁷ Similarly, Iowa creates an exception to the privity requirement when "as a direct result of the lawyer's professional negligence the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized."²⁸⁸

If the testator named the plaintiffs in the estate planning document, then the *Trask* factors largely favor the nonclient-plaintiffs and support a legal malpractice cause of action. On its face, the document would benefit the nonclient-plaintiff. An estate planning attorney could probably foresee harm to the nonclient-plaintiff because the testator expressly named the nonclient. Also, the nonclient-plaintiff's injury would likely be connected to the estate planning attorney's conduct. Additionally, the profession would not be greatly burdened. Rather, allowing named nonclients to bring malpractice causes of action would

283. *Id.*

284. *See supra* section III.B.

285. Bradley E.S. Fogel, *Estate Planning Malpractice: Special Issues in Need of Special Care*, GP SOLO LAW TRENDS & NEWS: ESTATE PLANNING (May 2005), http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/0506_estate_estateplanning.html [<https://perma.cc/A3PM-PUJ5>]. *See also* Chang v. Lederman, 90 Cal. Rptr. 3d 758 (Cal. Dist. Ct. App. 2009); Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So. 2d 1378, 1380 (Fla. 1993); Schreiner v. Scoville, 410 N.W.2d 679, 683 (Iowa 1987).

286. Fogel, *supra* note 285.

287. Soignier v. Fletcher, 256 P.3d 730, 732–33 (Idaho 2011) (citing *Harrigfeld v. Hancock*, 90 P.3d 884 (Idaho 2004)).

288. *Schreiner*, 410 N.W.2d at 683.

encourage better drafting, strengthen client relations, and limit the number of plaintiffs who could bring legal malpractice actions to those expressly named.

Conversely, if the estate planning document does not name nonclient-plaintiffs, the *Trask* factors favor the attorney. In that circumstance, the face of the document does not clearly show that the testator intended to benefit the plaintiff through the testator's transaction, that the attorney could foresee the harm, or that the attorney's conduct certainly caused injury to the nonclient-plaintiff. From a policy perspective, preventing future harm may be difficult because of the challenge of determining whether an attorney named the correct individuals in estate planning documents. Additionally, legal malpractice actions would burden the estate planning profession if all frustrated nonclients unnamed in wills and trusts could bring malpractice lawsuits.

When presented with the right facts, Washington may hold that the *Trask* balancing test does not allow nonclients to bring a cause of action unless the testator expressly named them in the documents. However, such a result may be too harsh because the approach fails to account for situations where nonclient-plaintiffs lose their cause of action as a direct result of the attorney's negligence. For example, when a document does not expressly mention the nonclient-plaintiffs because of an attorney's negligent drafting error, the nonclient-plaintiffs would lose their cause of action.

Consider the fact pattern presented in an Oregon case, *Hale v. Groce*²⁸⁹: “[d]efendant, who is an attorney, was directed by a client to prepare testamentary instruments and to include a bequest of a specified sum to plaintiff. After the client's death, it was discovered that the gift was not included either in the will or in a related trust instrument.”²⁹⁰ The plaintiff's complaint alleged that the testator identified the intended beneficiary and told the attorney that he intended a \$300,000 gift for that individual at his death, yet none of the estate planning documents provided for that gift.²⁹¹ In *Hale*, the will and related trust document did not name the intended beneficiary because the drafting attorney negligently omitted the testator's intended gift for the nonclient.²⁹² The Court held that an attorney's negligence might give rise to a nonclient's cause of action against the attorney because a contract to include the

289. 744 P.2d 1289 (Or. 1987).

290. *Id.* at 1290.

291. *Id.* at 1293.

292. *Id.*

nonclient beneficiary in an estate planning document creates a duty to both the client and the nonclient beneficiary.²⁹³

These facts demonstrate circumstances in which the exception to the privity rule for intended beneficiaries expressly named in estate planning documents might be too narrow. The exception for expressly named plaintiffs appeals to courts because of its simplicity and bright line nature and appeals to attorneys because of its apparent outcome in favor of attorney-defendants under *Trask*.²⁹⁴ Yet, it could significantly curtail some deserving plaintiffs. For example, it does not provide the nonclient with recourse for situations when an attorney's negligence results in the omission of the nonclient's name.²⁹⁵

C. If the Residuary Clause Is Negligently Omitted from an Estate Planning Document, the Trask Factors May Favor the Nonclient

Under certain circumstances, the *Trask* balancing test may not only favor nonclients that the testator expressly named in estate planning documents, but also those nonclients who the attorney negligently excluded despite the testator's intentions. Intended beneficiaries of an estate may wish to bring a malpractice action against an attorney who fails to include a residuary clause in an estate planning document. If Washington determines that the *Trask* balancing test favors the nonclients in this setting, then it will likely fall into the camp of states that recognize a cause of action when an estate planning document clearly frustrates the testator's intent, even when the document does not expressly name the nonclients.

In *Arnold v. Carmichael*,²⁹⁶ Florida held that a nonclient had a cause of action against the estate planning attorney because the omission of the residuary clause frustrated the testator-client's intent.²⁹⁷ The court

293. *Id.* at 1292 ("Because under third-party analysis the contract creates a 'duty' not only to the promisee, the client, but also to the intended beneficiary, negligent nonperformance may give rise to a negligence action as well. Not every such contract will support either claim.").

294. *Chang v. Lederman*, 90 Cal. Rptr. 3d 758, 773 (Cal. Dist. Ct. App. 2009) ("Expanding the attorney's duty of care to include actual beneficiaries who could have been, but were not, named in a revised estate plan, just like including third parties who could have been, but were not, named in a bequest, would expose attorneys to impossible duties and limitless liability because the interests of such potential beneficiaries are always in conflict . . . Moreover, the results in such lawsuits, if allowed, would inevitably be speculative because the claim necessarily will not arise until the testator or settlor, the only person who can say what he or she intended or explain why a previously announced intention was subsequently modified, has died.").

295. *Hale*, 744 P.2d at 1293; see *infra* section IV.C.

296. 524 So. 2d 464 (Fla. Dist. Ct. App. 1988).

297. *Id.* at 466.

explained “[u]nder this exception, liability may be found on the part of an attorney if, due to the attorney’s professional negligence, testamentary intent as expressed in a will is frustrated, and the beneficiary’s legacy is lost or diminished as a direct result of that negligence.”²⁹⁸

Likewise, the District of Columbia found that an attorney breached a duty of care to a nonclient upon omitting a residuary clause in *Hamilton v. Needham*.²⁹⁹ The court explained, “[a] lawyer who admits that he omitted from a will a residuary clause requested by the testator and thereby causes the residual estate to pass by intestate succession has facially demonstrated an obvious lack of care and skill.”³⁰⁰ The court affirmed the trial court’s malpractice finding because the attorney-defendant did not offer any “meaningful facts to justify or excuse his failure and no real issue was presented as to causation.”³⁰¹

Under similar circumstances in Washington, the *Trask* factors would likely weigh in favor of a nonclient. The first factor, the extent to which the testator intended the transaction to benefit the plaintiff, favors the residuary beneficiary because the omitted provision intended to benefit her would cause significant harm. The second *Trask* factor, foreseeability of harm to the plaintiff, likely favors the nonclient if she can establish that the drafting attorney knew of the testator’s intention to leave a residuary benefit for her. The third and fourth *Trask* factors, the degree of certainty that the plaintiff suffered injury and the closeness of the connection between the attorney-defendant’s conduct and the injury, weigh in the nonclient’s favor because the omission would prevent the nonclient from receiving a benefit and cause injury to the nonclient from the attorney’s failure to adhere to the testator’s intentions. The fifth *Trask* factor, the policy of preventing future harm, favors the nonclient because omitting a residuary clause constitutes negligence.³⁰² The sixth *Trask* factor, the extent to which the profession would be unduly burdened by a finding of liability, favors the nonclient-plaintiff. A finding of liability in the context of residuary clause omissions does not

298. *Id.*

299. 519 A.2d 172, 175 (D.C. App. 1986) (holding that extrinsic evidence may be admitted to establish the testator’s intent and the attorney’s liability to intended beneficiaries after omitting a will’s residuary clause).

300. *Id.*

301. *Id.*

302. *Id.* (“A lawyer who admits that he omitted from a will a residuary clause requested by the testator and thereby causes the residual estate to pass by intestate succession has facially demonstrated an obvious lack of care and skill.”).

unduly burden the profession because the mistake does not occur often, and when it does, the profession supports attorney accountability for the mistake.³⁰³

Under the *Trask* balancing test, negligently omitting a residuary clause would likely open the door to a nonclient suit. In upholding this outcome, Washington would align itself with other states recognizing nonclients' standing, even if the nonclient did not appear in the estate planning document.³⁰⁴ While this seems to create broad liability for an estate planning attorney, the nonclients still have a significant evidentiary challenge of establishing that the testator clearly intended for their benefit even though the document does not mention their name.³⁰⁵ Attorney liability will not become sweeping because of this challenge.

V. NONCLIENTS SHOULD EXHAUST THE REMEDIES PROVIDED UNDER WASHINGTON'S REFORMATION STATUTE BEFORE BRINGING A MALPRACTICE CLAIM

To balance attorney liability and attorney accountability, this Comment proposes using Washington's will and trust reformation statute as an exhaustion requirement before nonclients bring a malpractice action against an attorney. This solution may avoid unjust enrichment when individuals other than the intended beneficiaries receive a gift that the testator did not intend for them. It may also make the nonclient intended beneficiaries whole without the need for a malpractice action against the estate planning attorney. On occasions where the statute does not serve to make the intended beneficiaries whole, then further action through a malpractice claim might provide a remedy.

303. *Mieras v. DeBona*, 550 N.W.2d 202, 209 (Mich. 1996) ("Testators do not ordinarily ask that a will be drafted solely to bequeath specific property with the intent that the residue of the estate will be distributed as if they died intestate . . . it is not unusual, in contrast with the omission of a residuary clause, for a will to fail to exercise a power of appointment."); see also *Arnold*, 524 So. 2d 464, 467 ("[Attorney] clearly had a duty to read the will before allowing it to be turned over to his client"); *Hamilton*, 519 A.2d 172, 175 ("A lawyer who admits that he omitted from a will a residuary clause requested by the testator and thereby causes the residual estate to pass by intestate succession has facially demonstrated an obvious lack of care and skill. No expert need guide the factfinder here.").

304. See *supra* section III.B.

305. Joan Teshima, *Attorney's Liability, to One Other Than Immediate Client, for Negligence in Connection with Legal Duties*, in 61 A.L.R. 4th 615, § 2 (1988) ("In most cases, the courts have recognized a will-drafting attorney's liability to an intended beneficiary whom the attorney negligently omitted when preparing the will, although proving such a cause of action when the attorney does not admit negligence may be complicated by the court's exclusion of evidence showing that the testator's intention was different from that disclosed in the will.").

A. *Washington's Reformation Statute Provides a Progressive Solution for Frustrated Intended Beneficiaries When the Estate Planning Document Has a Clear Mistake*

Beyond the *Trask* balancing test, Washington's reformation statute, RCW 11.96A.125,³⁰⁶ allows courts and intended beneficiaries to remedy the problem presented by a nonclient intended beneficiary's cause of action.³⁰⁷ The statute provides:

The terms of a will or trust, even if ambiguous, may be reformed by judicial proceedings . . . to conform the terms to the intention of the testator or trustor if it is proved by clear, cogent, and convincing evidence that both the intent of the testator or trustor and the terms of the will or trust were affected by a mistake of fact or law, whether in expression or inducement.³⁰⁸

Under common law, courts could not modify wills or trusts.³⁰⁹ Washington's adoption of this statute defies common law and allows for the modification of both wills and trusts either by court order or the parties' binding nonjudicial agreement.³¹⁰ The departure from common law and implementation of this statute coincides with the Restatement (Third) of Property, the Uniform Probate Code (UPC), and the Uniform Trust Code (UTC).³¹¹ Like Washington, the Restatement, the UPC, and

306. WASH. REV. CODE § 11.96A.125 (2016).

307. *Id.*

308. *Id.*

309. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1, cmt. c (AM. LAW INST. 2003) ("Until recently, courts have not allowed reformation of wills. The denial of a reformation remedy for wills was predicated on observance of the Statute of Wills, which requires that wills be executed in accordance with certain formalities. . . . modern authority is moving away from insistence on strict compliance with the statutory formalities Recent cases [and statutes] have begun to recognize that wills can be reformed.").

310. See Karen E. Boxx & Katie S. Groblewski, *Washington Trust Laws' Extreme Makeover: Blending with the Uniform Trust Code and Taking Reform Further with Innovations in Notice, Suits, and Representation*, 88 WASH. L. REV. 813, 890–91 (2013).

311. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (AM. LAW INST. 2003) ("A donative document, though unambiguous, may be reformed to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was. In determining whether these elements have been established by clear and convincing evidence, direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered."); UNIF. TRUST CODE § 415 (UNIF. LAW COMM'N 2010) ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intention was and that the terms [of the trust] were affected by a mistake of fact or law, whether in expression or inducement."); UNIF. PROB. CODE § 2-805 (UNIF. LAW COMM'N amended 2010) ("The court may reform the terms of a governing instrument, even if unambiguous, to

the UTC, other states also allow for the reformation of wills and trusts.³¹²

The Washington State Legislature first enacted the will and trust reformation statute in 2011. Then, in 2013, it amended the provision while amending several other provisions to reform the state's trust laws.³¹³ Support for the bill came largely from the state's desire to keep trusts in Washington by making the governing laws attractive. The bill also "makes a lot of other housekeeping changes to streamline the process and make trust administration and resolution of disputes more efficient and less costly."³¹⁴ The trust and will reformation provision is one such housekeeping element.

When utilized, the provision allows for the efficient and cheap resolution of trust and will disputes without malpractice litigation. Petitioners commence "judicial proceedings" under RCW 11.96A as "new action[s]."³¹⁵ The actions are "special proceeding[s] under the civil rules of court" governed by the procedural provisions of the chapter.³¹⁶ Filing a petition in the superior court with jurisdiction commences a judicial proceeding.³¹⁷ The clear, cogent, and convincing evidence standard limits courts' reformation power to those cases where a mistake of fact or law exists and inhibits the intent of a testator or trustor.³¹⁸ The statute continues to allow will or trust reformation without a finding of

conform the terms to the transferor's intention if it is proved by clear and convincing evidence what the transferor's intention was and that the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.").

312. See *In re Estate of Duke*, 352 P.3d 863, 879 (Cal. 2015) (California was "persuaded that authorizing the reformation of wills . . . serves the paramount purpose of the law governing wills without compromising the policies underlying the statutory scheme and the common law rules. If a mistake in expression and the testator's actual and specific intent at the time the will was drafted are established by clear and convincing evidence, no policy underlying the statute of wills supports a rule that would ignore the testator's intent and unjustly enrich those who would inherit as a result of a mistake."); *Erickson v. Erickson*, 716 A.2d 92, 98 (Conn. 1998) (holding that extrinsic evidence may be admitted to prove the testator's intent and an error may be corrected if clear and convincing evidence shows the testator's intent was frustrated by the error); *Engle v. Siegel*, 377 A.2d 892, 893-85 (N.J. 1977); *In re Herceg*, 747 N.Y.S.2d 901, 903-05 (N.Y. Surr. Ct. 2002).

313. H. 63-5344, Reg. Sess., at 5 (Wash. 2013) (House bill report) ("This bill levels the playing field with other states to encourage people to keep their trusts in Washington."); S. 63-5344, Reg. Sess. (Wash. 2013) (Senate bill report).

314. H. 63-5344, Reg. Sess., at 5 (Wash. 2013) (House bill report); S. 63-5344, Reg. Sess. (Wash. 2013) (Senate bill report).

315. WASH. REV. CODE § 11.96A.090 (2016).

316. *Id.*

317. WASH. REV. CODE § 11.96A.100 (2016).

318. WASH. REV. CODE § 11.96A.125 (2016).

clear, cogent, and convincing evidence through TEDRA agreements under RCW 11.96A.220.³¹⁹

By applying this statute, courts can lessen the exposure of an attorney's estate planning malpractice liability while still remedying the harm to intended beneficiaries. A court may award a nonclient attorneys' fees under RCW 11.96A.150 to hold attorneys accountable for their mistake or negligence in estate planning. The statute provides:

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party:

(a) From any party to the proceedings;

(b) from the assets of the estate or trust involved in the proceedings; or

(c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.³²⁰

This Comment urges Washington courts to require nonclient intended beneficiaries to exhaust RCW 11.96A.125 before bringing a malpractice cause of action. While the *Trask* balancing test has a clear result in cases where the prompt execution of a will or trust is at issue, the *Trask* balancing test does not have a clear result in other fact patterns. In order to reduce the harm of litigation and limit malpractice liability while still holding estate planning attorneys accountable, courts should impose RCW 11.96A.125 whenever possible and may impose attorneys' fees under RCW 11.96A.150 as punishment if necessary.

319. WASH. STATE BAR ASS'N, *Comments to 2012 Title 11 Revisions*, <http://www.wsba.org/Legal-Community/LegislativeAffairs/~media/Files/Legal%20Community/Legislative%20Affairs/2013/Trust%20Act.ashx> [https://perma.cc/8BC8-MBCK] ("This section is modified to clarify that the evidentiary standard contained in this section only applies to reformations by judicial procedure. It is long standing law in Washington that reformations may be made by agreement under RCW 11.96A.220 without application of the evidentiary standard.").

320. WASH. REV. CODE § 11.96A.150 (2016).

B. Washington Plaintiffs Should Exhaust the Reformation Statute Before Bringing Legal Malpractice Actions Like Plaintiffs Exhaust Probate Proceedings Before Bringing Tortious Interference with Inheritance Claims in Other States

Several other jurisdictions hold that tortious interference with an expected inheritance claims must be exhausted in probate proceedings before plaintiffs may bring such causes of action.³²¹ This Comment proposes that a similar exhaustion requirement should apply in Washington before a nonclient brings a legal malpractice cause of action.

While the state legislature could enact an exhaustion requirement, courts in other states have adopted a similar requirement through common law. Florida holds that “if adequate relief is available in a probate proceeding, then that remedy must be exhausted before a tortious interference claim may be pursued.”³²² In that case, the plaintiff could have brought an undue influence claim before a probate court and had the will declared invalid, thereby inheriting intestate because she was the only heir. The Court did not allow a subsequent tort action to bring the undue influence claim again.³²³ Similarly, a New Jersey appellate court noted that it was “in accord with a multitude of courts” when it held “that a claim for tortious interference with an anticipated inheritance is unavailable when an adequate probate remedy exists.”³²⁴ Likewise, Nebraska, which does not recognize claims of tortious interference with an expected inheritance, held that adopting that cause of action was unnecessary because it “would duplicate theories of recovery available to [the plaintiff].”³²⁵ The Court found that the remedies available in probate proceedings were adequate where “the action in the probate court would be to impose a constructive trust over the proceeds of the sale of real estate, as compared to an action for damages based upon the tort.”³²⁶

321. *See, e.g.*, *DeWitt v. Duce*, 408 So. 2d 216, 218 (Fla. 1981); *Litherland v. Jurgens*, 869 N.W.2d 92, 97 (Neb. 2015); *Garruto v. Cannici*, 936 A.2d 1015, 1022 (N.J. Super. Ct. App. Div. 2007).

322. *DeWitt*, 408 So. 2d at 218 (citing *Benedict v. Smith*, 376 A.2d 774 (Conn. 1977)).

323. *Id.*

324. *Garruto*, 936 A.2d at 1022 (citing cases from New Mexico, Arkansas, Maryland, Montana, Indiana, Illinois, Florida, Connecticut, North Carolina, Kentucky, Massachusetts, and Kansas).

325. *Litherland v. Jurgens*, 869 N.W.2d 92, 97 (Neb. 2015).

326. *Id.*

As noted above, Washington has not faced an appropriate fact pattern to clarify the *Trask* balancing test, let alone establish an exhaustion requirement. However, the facts of a recent California case demonstrate the practicality of such an exhaustion requirement. In *Paul v. Patton*,³²⁷ a testator intended to give “Other Assets—Personal Property” to his children from his first marriage in a trust.³²⁸ However, the attorney drafted the trust agreement to give the residue to the broad category: the client’s “beneficiaries.”³²⁹ The “beneficiaries” group included both the testator’s adult children and his second spouse, thereby giving the second spouse a larger portion of the estate than the testator intended and decreasing the amount intended for his children.³³⁰ The children first filed a petition to modify the trust agreement and obtained a letter from the drafting attorney who admitted that the trust did not reflect the testator’s intentions.³³¹ The modification action resulted in a settlement, in which the second wife still received more than the testator intended to give her.³³²

Following the settlement, the children proceeded with a professional negligence claim against the drafting attorney, which the trial court dismissed.³³³ The court of appeals reversed the dismissal, holding that the attorney may have owed a duty of care to the children because the testator clearly intended them to benefit from his estate.³³⁴

Although the court did not require the testator’s children to reform the will before bringing a cause of action against the attorney, they attempted to do so.³³⁵ The reformation action did not make the plaintiffs whole because it resulted in a settlement that unjustly enriched the second spouse.³³⁶ If the children had refused to settle, the reformation action may have made them whole because the attorney’s letter clearly evidenced the testator’s intentions and admitted a drafting error.³³⁷ Similarly, the *Hale v. Groce* plaintiffs brought an action to reform the

327. 185 Cal. Rptr. 3d 830 (2015).

328. *Id.* at 833.

329. *Id.*

330. *Id.*

331. *Id.* at 833–34.

332. *Id.* at 834.

333. *Id.*

334. *Id.* at 839.

335. *Id.* at 833–34.

336. *Id.*

337. *Id.*

will before bringing an action against the estate planning attorney.³³⁸ Like the *Paul* plaintiffs, the reformation action failed to make the *Hale* plaintiffs whole.

If a Washington court faced facts similar to *Paul v. Putton* and required the intended beneficiaries to first exhaust their remedies through the reformation statute, then fair results would likely follow. The nonclient-plaintiffs could potentially receive the portion of their father's estate due to them, prevent the second spouse's unjust enrichment, avoid litigation against the drafting attorney, yet still hold the attorney accountable by imposing an attorneys' fees obligation. Although the reformation exhaustion requirement adds an extra hurdle for beneficiaries, it would still provide a cause of action when the beneficiaries have a strong claim and cannot reach a reformation remedy. Like the *Hale v. Groce* plaintiff, if the reformation statute proved ineffective because the will or trust does not expressly provide a gift to the beneficiaries, then a Washington nonclient-plaintiff could still bring a cause of action against an attorney for a court to analyze under the *Trask* balancing test.³³⁹

CONCLUSION

The Washington State Supreme Court should give clear guidance to lower courts regarding the administration of the *Trask* balancing test. Thus far, the *Trask* balancing test has not weighed in favor of nonclient intended beneficiaries, but only a limited number of fact patterns have come before Washington courts.³⁴⁰ Under the right circumstances, the *Trask* balancing test may come out in favor of the nonclient rather than the attorney. Washington may allow a nonclient a cause of action against the drafting attorney if presented with facts concerning the negligent omission of a residuary clause or an estate planning document that frustrates the testator's intentions on its face.

Nonclient intended beneficiaries should use Washington's will and trust reformation statute, RCW 11.96A.125, to alleviate their harm before bringing a legal malpractice action against the attorney. Like states that require exhaustion in probate proceedings before plaintiffs

338. *Hale v. Groce*, 744 P.2d 1289, 1293 (Or. 1987) (*Hale* plaintiff brought a reformation action to reform the will and related trust document that failed to name him because the drafting attorney negligently omitted the testator's intended gift for the plaintiff); see *supra* section IV.B.

339. *Id.* at 1293.

340. See *Linth v. Gay*, 190 Wash. App. 331, 360 P.3d 844 (2015); *Parks v. Fink*, 173 Wash. App. 366, 293 P.3d 1275 (2013); WASH. STATE SUPREME COURT COMM. ON JURY INSTRUCTIONS, *supra* note 36.

may bring tortious interference with inheritance claims, Washington courts should require exhaustion by reformation before nonclient-plaintiffs may bring malpractice claims. Using this statute as an exhaustion requirement and requiring the attorney at fault to pay the intended beneficiaries' attorneys' fees holds attorneys accountable for estate planning work and deters negligent drafting and execution of estate planning documents. It also limits frivolous litigation by frustrated intended beneficiaries, and allows courts to make harmed intended beneficiaries whole outside of a malpractice lawsuit.