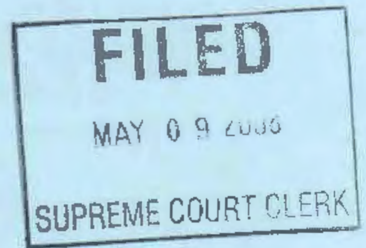

COMMONWEALTH OF KENTUCKY
IN THE SUPREME COURT OF KENTUCKY
CASE NO. 2007-SC-000250-DG

On review from the Court of Appeals of Kentucky – Case No. 2006-CA-000322-MR
an appeal from Pike Circuit Court – Civil Action No. 04-CI-01190

IRA E. BRANHAM, MILLER KENT CARTER, AND BRANHAM & CARTER, P.S.C. — **APPELLANTS**

VS.

ELIZABETH STEWART, GUARDIAN OF THE ESTATE AND THE PERSON OF GARY RYAN STEWART, AN INCOMPETENT ADULT — **APPELLEE**

BRIEF FOR APPELLEE

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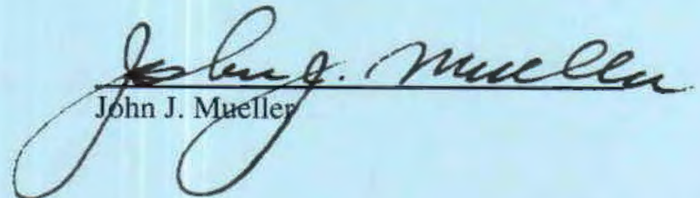
CERTIFICATE OF SERVICE THAT CR 76.12(6) REQUIRES

I certify that by ordinary U.S. Mail, postage and fees prepaid, I served a copy of this brief on The Honorable Eddy Coleman, Circuit Judge, Pike County Hall of Justice 172 Division Street, Room 435, Pikeville, Kentucky 41501, and on Mr. David C. Stratton, Stratton, Hogg & Maddox, P.S.C., 111 Pike Street, P.O. Box 1530, Pikeville, Kentucky 41502-1530.

Dated: May 8, 2008



John J. Mueller

STATEMENT CONCERNING ORAL ARGUMENT

Elizabeth Stewart, Guardian of the Estate and the Person of Gary Ryan Stewart, an Incompetent Adult,[A] requests oral argument. To resolve this case, this Court will need to resolve a material and substantial question of law. That question involves whether Ira E. Branham, Miller Kent Carter, and Branham & Carter, PSC[B] owed Gary Ryan Stewart the legal duties of care, knowledge, skill, diligence, loyalty, and confidentiality all Kentucky lawyers owe their clients. The resolution of this legal question essentially requires this Court to make a policy decision.[C] Stewart believes that oral argument will allow the parties to clarify the written arguments each has submitted to this Court. Stewart also believes that oral argument will allow each of the parties to answer questions the members of this Court may have concerning the issues this Court inevitably will have to resolve in determining such a material, substantial policy matter.

[A] In this brief, Elizabeth Stewart, Guardian of the Estate and the Person of Gary Ryan Stewart, an Incompetent Adult, will refer to herself as "Stewart."

[B] In this brief, Stewart will refer to Ira E. Branham, Miller Kent Carter, and Branham & Carter, PSC collectively as "Branham."

[C] *Ostendorf v. Clark Equipment Co.*, 122 S.W.3d 530, 533 (Ky. 2003) ("In Kentucky, the existence of a duty is a matter of law for the court because '[w]hen a court resolves a question of duty it is essentially making a policy determination.' *Mullins v. Commonwealth Life Ins. Co.,* Ky., 839 S.W.2d 245, 248 (1992).").

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A. A client has no need to employ a lawyer directly or personally. A principal may employ a lawyer to represent the principal through an agent. And when an agent employs a lawyer to represent the principal, rather than having a lawyer-client relationship with the agent, the lawyer has a lawyer-client relationship with the principal. 5

Missouri ex rel. McKittrick v. C. S. Dudley & Co., 340 Mo. 852, 102 S.W.2d 895 (1937) 5, 6

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Fox v. Willis, 390 Md. 620, 890 A.2d 726 (2006) 7

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Presnell Constr. Mgrs., Inc. v. EH Constr., LLC, 134 S.W.3d 575 (Ky. 2004) 17, 18

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McIntosh County Bank v. Dorsey & Whitney, LLP, 745 N.W.2d 538 (Minn. 2008) 28

Flaherty v. Weinberg, 303 Md. 116, 492 A.2d 618, 61 A.L.R.4th 443 (1985) 29

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RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4) 30, 31, 32

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First State Bank v. Catron, 268 Ky. 513, 105 S.W.2d 162 (1937) 31

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National Savings Bank v. Ward, 100 U.S. 195, 1879 WL 16535 (1879) . . . 33

Flaherty v. Weinberg, 303 Md. 116, 492 A.2d 618, 61 A.L.R.4th 443 (1985) 33, 34, 35, 36

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Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16 (1958) 35

Lucas v. Hamm, 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685 (1961) . . . 35

Osornio v. Weingarten, 124 Cal.App.4th 304, 21 Cal.Rptr.3d 246 (2004) . . 35

Ferguson v. Cramer, 349 Md. 760, 709 A.2d 1279 (1998) 36

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In re Guardianship of Karan, 110 Wash.App. 76, 38 P.3d 396 (2002) 37, 38, 39, 40, 42, 43

K.R.S. § 387.125(6) 37

In re Schober's Estate, 303 Minn. 226, 226 N.W.2d 895 (1975) 38, 42

Continental Ins. Companies v. Rowan's Estate, 252 Ark. 980, 482 S.W.2d 102 (1972) 38, 42

Kany v. Becks, 85 So.2d 843 (Fla. 1956) 38, 42

K.R.S. § 387.010(3) 38

T & M Jewelry, Inc. v. Hicks, ex rel. Hicks, 189 S.W.3d 526, 531 (Ky. 2006) 39

Leyba v. Whitley, 120 N.M. 768, 907 P.2d 172 (1995) 39

Estate of Treadwell ex rel. *Neil v. Wright*, 115 Wash.App. 238, 61 P.3d 1214 (2003) 39

Fickett v. Superior Court of Pima County, Arizona, 27 Ariz.App. 793, 558 P.2d 988 (1976) 40

Larsen v. Banner Health System, 2003 WY 167, 81 P.3d 196 (Wyo.2003) 41

Humboldt Bldg. Ass'n Co. v. Ducker's Executrix, 23 Ky.L.Rptr. 1073, 111 Ky. 759, 64 S.W. 671 (1901) 42

Daugherty v. Runner, 581 S.W.2d 12 (Ky.App. 1978) 42

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In re Schober's Estate, 303 Minn. 226, 226 N.W.2d 895 (1975) 44

Continental Ins. Companies v. Rowan's Estate, 252 Ark. 980, 482 S.W.2d 102 (1972) 44

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Hagan v. Farris, 807 S.W.2d 488 (Ky. 1991) 47, 48

Lasher v. Kentucky ex rel. Matthews, 418 S.W.2d 416 (Ky. 1967) 47, 49

Bilotta v. Kelley Co., Inc., 346 N.W.2d 616 (Minn. 1984) 48

Clohessy v. Bachelor, 237 Conn. 31, 675 A.2d 852 (Conn. 1996) 48, 49

George v. Jordan Marsh Co., 359 Mass. 244, 268 N.E.2d 915, 46 A.L.R.3d 762 (1979) 48

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COUNTER STATEMENT OF THE CASE

Stewart declines to accept Branham's statement of the case.

In July, 1997, Gary Ryan Stewart and his younger brother, Adam Tyler Stewart, were visiting their father, Gary Stewart, in Pike County, Kentucky. The brothers lived in Arkansas with their mother, Vicki Potter Backus. Gary Stewart and Backus had divorced before July, 1997.

While Gary Stewart, Adam Tyler Stewart, and Gary Ryan Stewart were traveling in an automobile on July 21, 1997, an accident involving another automobile occurred. Adam Tyler Stewart and Gary Stewart died in the accident. Gary Ryan Stewart suffered severe injuries, including a traumatic brain injury that leaves Gary Ryan Stewart incompetent today. At the time of the automobile accident, Gary Ryan Stewart was 15 years of age.

Vicki Potter Backus, Gary Ryan Stewart's mother, contracted with Ira E. Branham to provide legal representation for claims arising from the accident. At the time Backus contracted with Ira E. Branham, Ira E. Branham and Miller Kent Carter practiced law through a professional-service corporation they called Branham & Carter, P.S.C.

In August, 1997, pursuant to that contract to provide legal representation, Branham filed a complaint in the Pike Circuit Court against the tortfeasor. In that complaint, Branham asserted claims on behalf of Backus individually, on behalf of Backus as administratrix of the Estate of Adam Taylor Stewart, and as next friend of Gary Ryan Stewart. In the capacity of next friend of Gary Ryan Stewart, Backus asserted a tort claim seeking compensation for the injuries Gary Ryan Stewart suffered in the accident.[1]

Late in 1997, Backus filed a petition in the Pike District Court seeking appointment as

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[1] In this brief, Stewart will refer to this tort claim as "the tort claim."

guardian for Gary Ryan Stewart. Backus contracted with Branham to prepare the application for appointment of Backus as Gary Ryan Stewart's guardian. Pursuant to that contract, Branham prepared Backus's application. Ultimately, the Pike District Court appointed Backus guardian of Gary Ryan Stewart. The Pike District Court required Backus to post a bond in the amount of $5,000.

In early 1998, after being appointed guardian, Backus agreed to settle all tort claims arising out of the automobile accident, including the tort claim Backus asserted on behalf of Gary Ryan Stewart. Backus made an aggregate settlement of the tort claims, settling for a total of $1.3 million. Backus and Branham allocated $650,000 of the total settlement to Gary Ryan Stewart. Branham paid the net proceeds for Gary Ryan Stewart's claims to Backus as guardian.

Backus never filed any accounting in the guardianship proceedings. Ultimately, Backus dissipated all of the funds belonging to or intended for the benefit of Gary Ryan Stewart.

On January 19, 2000, Gary Ryan Stewart attained 18 years of age. Approximately six months later, Gary Ryan Stewart married Elizabeth Stewart.

In 2003, the Circuit Court of Scott County, Arkansas appointed Stewart as guardian for Gary Ryan Stewart.

In 2004, Stewart filed a civil action in the Pike Circuit Court against Branham, Miller Kent Carter, and Branham & Carter, P.S.C. In that civil action, Stewart asserted that Branham had a lawyer-client relationship with Gary Ryan Stewart concerning the tort claims. Based on that relationship, Stewart asserted claims that Branham committed legal malpractice and that Branham breached fiduciary duties Branham owed to Gary Ryan

Stewart. Branham denied having a lawyer-client relationship with Gary Ryan Stewart. Specifically, Branham asserted that he represented Backus on the tort claims, including the tort claims Backus asserted as next friend for Gary Ryan Stewart. Based on Branham's contention that he had no lawyer-client relationship with Gary Ryan Stewart, Branham also asserted that Stewart had no standing to maintain the legal-malpractice action.

On December 20, 2005, the Pike Circuit Court summarily dismissed the claims of lawyer malpractice and breach of fiduciary duty. That court found, as a matter of law, that Gary Ryan Stewart, who was a minor at the time Branham performed the legal services at issue, had no lawyer-client or other relationship with Branham.

Stewart timely appealed the summary judgment to the Court of Appeals of Kentucky. That court disagreed with the trial court and reversed the judgment. The court of appeals held "that an attorney-client relationship exists between an attorney and an infant when the infant's next friend pursues legal action on behalf of the infant."[2] It also held "that an attorney-client relationship exists between an attorney and a ward when a guardian pursues legal action on behalf of the ward."[3]

Branham filed a timely request that this Court accept this case for discretionary review. This Court has accepted the case for discretionary review.

ARGUMENT

I. STANDARD OF REVIEW

The Pike Circuit Court improperly granted summary judgment to Branham unless

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[2] *Opinion Reversing and Remanding*, entered March 9, 2007, Case No. 2006-CA-000322-MR, p. 5.

[3] *Opinion Reversing and Remanding*, entered March 9, 2007, Case No. 2006-CA-000322-MR, p. 6.

Branham showed that Stewart "could not prevail under any circumstances."[4]

In ruling on a motion for summary judgment, this Court must view the evidence in the light most favorable to the party opposed to the motion.[5] When this Court reviews a trial court's decision to grant summary judgment, this Court must determine whether the trial court correctly found that there were no genuine issues of material fact.[6]

Here, because the trial court determined the summary judgment exclusively on a legal issue, the existence of a duty,[7] this Court owes the trial court's decision no deference.[8] This Court reviews questions of law de novo.[9]

II. GARY RYAN STEWART STOOD IN A LAWYER-CLIENT RELATIONSHIP WITH BRANHAM CONCERNING BRANHAM'S PROSECUTION OF THE TORT CLAIMS

When an agent employs a lawyer to represent the agent's principal, the lawyer has a lawyer-client relationship with the principal. A minor's next friend acts as an agent for a minor when prosecuting the minor's tort claims. So, when a minor's next friend employs a lawyer to prosecute a minor's tort claims, the

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[4] *Schmidt v. Leppert*, 214 S.W.3d 309, 311 (Ky. 2007) (*citing Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky.1991)).

[5] *Schmidt*, 214 S.W.3d at 311 (*citing Steelvest*, 807 S.W.2d at 480).

[6] *Schmidt*, 214 S.W.3d at 311 (*citing Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App.1996)).

[7] *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 848 (Ky. 2007) ("The Carneyhans argue that the 'universal duty of care,' discussed in *Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell,* 736 S.W.2d 328 (Ky.1987), imposes a duty upon the Grand Aerie to exercise reasonable care in supervising its local chapters. The issue of whether the Grand Aerie had such a duty is a question of law."); and *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 248 (Ky. 1992) ("The question of duty presents an issue of law. 57A Am.Jur.2d Negligence § 20; Prosser and Keeton on Torts, § 37 (5th ed. 1984).").

[8] *Schmidt*, 214 S.W.3d at 311 (*citing Scifres*, 916 S.W.2d at 781).

[9] *Bob Hook Chevrolet Isuzu, Inc. v. Kentucky Transp. Cabinet*, 983 S.W.2d 488, 490 (Ky.1998) ("The construction and application of statutes is a matter of law and may be reviewed *de novo.*").

lawyer has a lawyer-client relationship with the minor. Consequently, the lawyer owes the minor legal duties (care, knowledge, skill, and diligence) and fiduciary duties (loyalty and confidentiality).

A. A client has no need to employ a lawyer directly or personally. A principal may employ a lawyer to represent the principal through an agent. And when an agent employs a lawyer to represent the principal, rather than having a lawyer-client relationship with the agent, the lawyer has a lawyer-client relationship with the principal.

Courts of other jurisdictions have long recognized, as an elementary principle of agency law, that a client has no need to employ a lawyer directly or personally. "As a general proposition, there is no doubt that an agent may be appointed to select an attorney to represent the principal..."[10] Discussing this elementary principle of agency law, the Supreme Court of Missouri stated that "[i]t is not necessary that this employment of an attorney should be made by the client in person, but like other contracts, may be made through a duly authorized agent..."[11] The Supreme Court of Mississippi has recognized this principle, saying that "[t]he retaining of an attorney may, like the making of any other contract, be done by an agent..."[12] And the Supreme Court of North Dakota has likewise recognized the principle. That court said, "[t]he employment of an attorney need not be made directly by the client."[13]

As a corollary to this long-recognized principle of agency law, when a duly authorized agent employs a lawyer to act for the agent's principal, the attorney will be the attorney of

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[10] *Missouri ex rel. McKittrick v. C. S. Dudley & Co.*, 340 Mo. 852, 859, 102 S.W.2d 895, 899 (1937).

[11] *McKittrick,* 340 Mo. at 859-860, 102 S.W.2d at 899.

[12] *Hirsch Bros. & Co. v. R. E. Kensington Co.*, 155 Miss. 242, —, 124 So. 344, 347, 88 A.L.R. 1 (1929) (*citing with approval* 6 *Corpus Juris* 630).

[13] *Moe v. Zitak*, 75 N.D. 222, 227, 27 N.W.2d 10, 13 (1947).

the client and not of the agent."[14] This, too, represents a long recognized principle of law. Relying on RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 320,[15] a bankruptcy court in Minnesota explained that "an agent acting on behalf of a disclosed principal can make a contract for retention, in which case the agent does not become part of the resulting attorney client relationship."[16]

In fact, "[a]n agent with proper authority may employ an attorney to bring suit in the name of his principal."[17] More important, when a duly authorized agent employs a lawyer to act for the agent's principal, "it is essential that the attorney so employed must represent the principal and not the agent."[18]

Even though no Kentucky court has expressly recognized these principles of agency law, these principles generally comport with Kentucky law on agency and corporations.

As long ago as 1856, this Court determined that when an officer of a corporation, acting as an agent of the corporation, enters into a contract for the corporation, so long as the agent had the authority to act in such manner, the corporation, as opposed to the officer personally, was the party to the contract.[19] This Court explained the reason for the rule, saying:

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[14] *McKittrick*, 340 Mo. at 859-860, 102 S.W.2d at 899.

[15] "[A] person making or purporting to make a contract for a disclosed principal does not become a party to the contract."

[16] *In re SRC Holding Corp.*, 352 B.R. 103, 169 (Bkrptcy., D.Minn. 2006).

[17] *Moe*, 75 N.D. at 227, 27 N.W.2d at13 (*citing Swartz v. D. S. Morgan & Co.*, 163 Pa. 195, 29 A. 974, 43 Am.St.Rep. 786).

[18] *McKittrick*, 340 Mo. at 859, 102 S.W.2d at 899.

[19] *Taylor v. Williams*, 17 B.Mon. 489, 56 Ky. 489, 1856 WL 4309.

As corporations have to make contracts by their agents, they are bound, wherever they are acting in the scope of the legitimate purposes of their institution, by the contracts which are made by their authorized agents, all of which contracts are regarded as the express contracts of the corporation; and in such cases the agent is not liable, unless he expressly makes himself so by the terms of the contract, or fails to express his agency in the body of the instrument which he executes, or to make known the capacity in which he is acting when he enters into the contract...The corporation had power, under its charter, in the exercise of its legitimate business, to execute such a writing as the one sued on. And as it must be assumed, from the statements in the answer of the defendant, that he was authorized to execute it as the agent of the corporation, it follows that he was not personally liable for the demand.[20]

Thus, when a duly authorized agent employs a lawyer to act for the agent's principal, "the attorney is the attorney of the principal and not of the agent,"[21] and the principal has a direct relationship with the lawyer.

B. A minor's next friend acts as an agent for a minor when prosecuting the minor's tort claims. So, when a minor's next friend employs a lawyer to prosecute a minor's tort claims, the lawyer has a lawyer-client relationship with the minor. Consequently, the lawyer owes the minor legal duties (care, knowledge, skill, and diligence) and fiduciary duties (loyalty and confidentiality).

Prochein ami, a next friend of a minor or an incompetent,[22] acts merely as an agent of

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[20] *Taylor*, 17 B.Mon. at —, 56 Ky. —, 1856 WL 4309, at *4-5.

[21] *Hirsch Bros. & Co.*, 155 Miss. at —, 124 So. at 347 (*citing with approval* 6 *Corpus Juris* 630).

[22] The highest court in Maryland in *Fox v. Willis*, 390 Md. 620, 628 fn.6, 890 A.2d 726, 731 fn.6 (2006), discussed "next friend." That court said, "PROCHEIN AMI. (Spelled, also, *prochein amy* and *prochain amy*). Next friend. As an infant cannot legally sue in his own name, the action must be brought by his *prochein ami;* that is, some friend (not being his guardian) who will appear as plaintiff in his name. Black's Law Dictionary, Revised Fourth Edition, (1968)." And in 1836, this Court said in *Bustard v. Gates*, 4 Dana 429, 34 Ky. 429, 1836 WL 2080, *5, that "[a]n infant can not appear in court, in person or by attorney, he sues by prochein ami; defends by guardian ad litem."

the incompetent.[23] As a matter of law, a "next friend" has the authority to employ a lawyer to represent the incompetent or minor, and to prosecute tort claims the incompetent or minor has the right to assert.[24] When a "next friend" exercises the authority to employ a lawyer to represent the incompetent or minor to prosecute tort claims the incompetent or minor has the right to assert, the lawyer represents the incompetent or minor.[25] This result follows naturally and logically by applying the long-recognized principles (1) that a client, such as a minor, has no need to employ a lawyer directly or personally and (2) that when a duly authorized agent employs a lawyer to act for the agent's principal, rather than representing the agent, the lawyer represents the client. In fact, the minor or incompetent has to make a contract with a lawyer to prosecute the minor's or incompetent's tort claims through a "next friend" or guardian.[26] Applying long-recognized principles of agency law to this situation, then, when a "next friend" enters into a contract with a lawyer concerning the minor's or the incompetent's business, the law regards the contract as the minor's or incompetent's. Thus, when a "next friend" exercises the authority granted the "next friend" by the law to employ a lawyer to represent the incompetent or minor to prosecute tort claims, the lawyer has a lawyer-client

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[23] *Cozine v. Bonnick*, 245 S.W.2d 935, 937 (Ky. 1952) ("The next friend, therefore, truly is a mere agent of the [incompetent or minor]..."); *Jones by and through Jones v. Cowan*, 729 S.W.2d 188, 189 (Ky.App. 1987) ("The next friend has traditionally been recognized as a mere agent of the child...").

[24] *Sanders v. Woodbury*, 146 Ky. 153, —, 142 S.W. 207, 208-209 (1912) ("[T]he next friend of an infant may employ counsel to represent him...").

[25] *See McKittrick*, 340 Mo. at 859-860, 102 S.W.2d at 899 (When a duly authorized agent employs a lawyer to act for the agent's principal, "the attorney will be the attorney of the client and not of the agent.").

[26] *Bustard*, 4 Dana at —, 34 Ky. at —, 1836 WL 2080 at *5 ("[A]ccording to the common law, ...an infant [cannot] prosecute a suit in his own person or by his attorney; the suit must be prosecuted by a *prochein ami*...").

relationship with the incompetent or minor.[27]

Here, Backus, as a "next friend," had the authority to employ a lawyer to prosecute Gary Ryan Stewart's tort claims. Backus exercised that authority. When Backus exercised that authority, she employed Branham to prosecute Gary Ryan Stewart's tort claims.[28] When Backus employed Branham to prosecute Gary Ryan Stewart's tort claims, she employed Branham to represent Gary Ryan Stewart.

When Backus employed Branham to prosecute Gary Ryan Stewart's tort claims, she did so in her capacity as Gary Ryan Stewart's "next friend." Backus employed Branham in her capacity as Gary Ryan Stewart's agent.[29] Accordingly, when Backus employed Branham to prosecute Gary Ryan Stewart's tort claims, Branham represented Gary Ryan Stewart, as opposed to Backus, concerning the tort claims.

When Backus employed Branham to prosecute Gary Ryan Stewart's tort claims, Backus prosecuted Gary Ryan Stewart's tort claims in Backus's name. Branham and Backus prosecuted Gary Ryan Stewart's tort claims in Backus's name merely to comply with a procedural rule.[30] This rule-imposed pleading requirement represents a mere procedural

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[27] *See McKittrick,* 340 Mo. at 859, 102 S.W.2d at 899 (When a duly authorized agent employs a lawyer to act for the agent's principal, "it is essential that the attorney so employed must represent the principal and not the agent.").

[28] Backus simultaneously employed Branham to pursue other claims, for her personally and for her in her capacity as Administratrix of the Estate of Adam Tyler Stewart.

[29] *Cozine*, 245 S.W.2d at 937; *Jones*, 729 S.W.2d at 189.

[30] CR 17.03(1), entitled "Infants and persons of unsound mind," provides that "[a]ctions involving unmarried infants or persons of unsound mind shall be brought by the party's guardian or committee, but if there is none, or such guardian or committee is unwilling or unable to act, a next friend may bring the action.".

device allowing Gary Ryan Stewart's claims to come before the trial court.[31] Under this procedural device, Backus was merely a nominal party to Gary Ryan Stewart's action asserting his tort claims.[32] Gary Ryan Stewart was the real party-in-interest in the action asserting the tort claims.[33] Gary Ryan Stewart was real party-in-interest because Gary Ryan Stewart had the right to receive the benefit of the proceeds of successful prosecution of the tort claims.[34]

When Backus, as Gary Ryan Stewart's agent, his "next friend," employed Branham to prosecute Gary Ryan Stewart's tort claims, she did so solely and exclusively for Gary Ryan Stewart and his benefit.[35] Branham undertook to prosecute Gary Ryan Stewart's claims, implicitly undertaking to do so solely and exclusively for Gary Ryan Stewart and his benefit. Branham actually prosecuted Gary Ryan Stewart's claims. In prosecuting Gary Ryan Stewart's claims, Branham operated under a duty to act for Gary Ryan Stewart and for Gary

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[31] This procedural device exists because, under the law, minors and incompetents lack capacity to bring an action to assert rights or claims for damages. *Bustard*, 4 Dana at —, 34 Ky. at —, 1836 WL 2080 at *5 ("[A]ccording to the common law, …an infant [cannot] prosecute a suit in his own person or by his attorney; the suit must be prosecuted by a *prochein ami*…").

[32] *Jones*, 729 S.W.2d at 190 ("We briefly summarize our law in this regard and conclude that the 'next friend' device is a procedural one by which a minor's claim is brought into court and a person acting as such is only a nominal party.").

[33] *Kash v. Kash's Guardian*, 260 Ky. 377, —, 85 S.W.2d 866, 867 (1935) ("The infant himself is the plaintiff.").

[34] *Harris v. Jackson*, 192 S.W.3d 297, 303 (Ky. 2006) ("The real party in interest is one who is entitled to the benefits of the action upon the successful termination thereof.").

[35] *Kash*, 260 Ky. at —, 85 S.W.2d at 867 ("The next friend is regarded as an agent…to represent the interest of the infant in the litigation.").

Ryan Stewart's benefit.[36]

Branham operated under a duty to act for Gary Ryan Stewart and for Gary Ryan Stewart's benefit in a direct lawyer-client relationship with Gary Ryan Stewart. That direct lawyer-client relationship between Branham and Gary Ryan Stewart, allows Stewart to prosecute claims of lawyer malpractice against Branham.[37]

III. GARY RYAN STEWART STOOD IN A LAWYER-CLIENT RELATIONSHIP WITH BRANHAM CONCERNING THE SETTLEMENT OF GARY RYAN STEWART'S TORT CLAIMS AND CONCERNING THE GUARDIANSHIP OVER GARY RYAN STEWART

When a lawyer represents a court-appointed guardian of a minor, the lawyer has a lawyer-client relationship with the minor. In that relationship, the lawyer owes the minor legal duties (care, knowledge, skill, and diligence) and fiduciary duties (loyalty and confidentiality).

Kentucky has long regarded a guardian as an agent of the ward.[38] A guardian

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[36] *Kentucky for Reynolds v. Kinnaird*, 49 Ky. 249, —, 10 B.Mon. 249, —, 1850 WL 3552, *1 (1850) ("The suit, although in the name of the Commonwealth, and prosecuted by 'a next friend,' is in truth for the sole and exclusive benefit of the ward; the judgment, if one be had, is for his benefit, and the money due from the guardian will be, when collected, his money."). *Also, Jones*, 729 S.W.2d at 190; and *Kash*, 260 Ky. at —, 85 S.W.2d at 867.

Accord, Kosak v. Trestman, 864 So.2d 214, 217-218, 2003-1056 (La.App. 2003) ("During the pendency of an interdiction proceeding, the proper person to file and prosecute any cause of action on Cantu's behalf is his curatrix...Thus, in her role as curatrix, the underlying suit was filed exclusively in the best interest of the interdict."); and *Sevigny v. New South Federal Sav. & Loan Ass'n*, 586 So.2d 884, 886 (Ala. 1991) ("When one accepts the agency, she implicitly covenants to use the powers conferred upon her for the sole benefit of the party conferring such power, consistent with the purposes of the agency relationship...Therefore, when one accepts the power of attorney, she impliedly covenants to use the powers bestowed upon her for the sole benefit of the one conferring that power on her, consistent with the purposes of the agency relationship represented by the power of attorney.") (attorney-in-fact).

[37] *See, generally*, 3 AM.JUR.2d *Agency* § 326 (2008 electronic version) ("A principal is generally entitled to the same remedies against third persons with respect to authorized acts and contracts of an agent as if they were made or done with the principal personally.").

[38] *Powell v. Gossum*, 18 B.Mon. 179, 1857 WL 4393, *5 (Ky. 1857) ("The guardian is no more than an agent provided by law for the ward."); *Southard v. Steele*, 3 T.B.Mon. 435, 1826 WL 1336, *6 (Ky. 1826) ("A guardian represents the ward for whom he acts, and is his general agent...").

certainly has the authority to employ a lawyer concerning matters affecting the guardianship. When a guardian exercises the authority to employ a lawyer, the guardian employs the lawyer solely to pursue the objectives of the guardianship, protection and preservation of the ward's assets for the ward's use and benefit.[39] Because the guardian employs the lawyer solely for the ward's benefit, the lawyer represents the incompetent or minor.[40] This result follows naturally and logically by applying the long-recognized principles (1) that a client, such as a minor, has no need to employ a lawyer directly or personally and (2) that when a duly authorized agent employs a lawyer to act for the agent's principal, rather than representing the agent, the lawyer represents the client. In fact, the minor or incompetent has to make a contract concerning the management of the minor's or incompetent's assets through a guardian. Applying long-recognized principles of agency law to this situation, then, when a guardian enters into a contract with a lawyer concerning the guardianship, the law regards the contract as the minor's or incompetent's. Thus, the lawyer has a lawyer-client relationship with the incompetent or minor.[41]

Here, Backus employed Branham to seek a guardianship over Gary Ryan Stewart.

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[39] *In re Schober's Estate*, 303 Minn. 226, 229, 226 N.W.2d 895, 897 (1975) ("It is clear from our statutes that the basic purpose of guardianship and the duties of a guardian are to protect the ward and his assets."); *Continental Ins. Companies v. Rowan's Estate*, 252 Ark. 980, 987, 482 S.W.2d 102, 106 (1972) ("The primary purpose in a guardianship for a minor's estate is to preserve and protect the assets of his estate during his minority..."); and *Kany v. Becks*, 85 So.2d 843, 845 (Fla. 1956) ("The very purpose of the law, Chapter 744, Florida Statutes 1953, and F.S.A., under which the appellee, Berrien Becks, was appointed guardian of the property of Louise Hewitt Porter is to preserve the property of the ward.").

[40] *See McKittrick,* 340 Mo. at 859-860, 102 S.W.2d at 899 (When a duly authorized agent employs a lawyer to act for the agent's principal, "the attorney will be the attorney of the client and not of the agent.").

[41] *See McKittrick,* 340 Mo. at 859, 102 S.W.2d at 899 (When a duly authorized agent employs a lawyer to act for the agent's principal, "it is essential that the attorney so employed must represent the principal and not the agent.").

Backus did so because in her capacity as Gary Ryan Stewart's "next friend," she had no authority to settle Gary Ryan Stewart's tort claims.[42] Backus employed Branham to establish the guardianship over Gary Ryan Stewart, to gain the authority to settle the tort claims, in her capacity as Gary Ryan Stewart's agent.[43] Accordingly, when Backus employed Branham, Branham represented Gary Ryan Stewart, as opposed to Backus, concerning the tort claims. Gary Ryan Stewart was the real party-in-interest in the action asserting the tort claims.[44] Gary Ryan Stewart was the real party-in-interest because Gary Ryan Stewart had the right to receive the benefit of the proceeds of successful prosecution of the tort claims.[45] And, Branham represented Gary Ryan Stewart concerning the guardianship because the guardianship existed to protect Gary Ryan Stewart and his assets (the proceeds of the settlement of his tort claims).

Branham operated under a duty to act for Gary Ryan Stewart and for Gary Ryan Stewart's benefit in a direct lawyer-client relationship with Gary Ryan Stewart. That direct lawyer-client relationship between Branham and Gary Ryan Stewart, allows Stewart to prosecute claims of lawyer malpractice against Branham.[46]

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[42] *Ambrose v. Graziani*, 197 Ky. 679, —, 247 S.W. 953, 954 (1923) ("The office of the next friend of an infant is confined to the bringing and prosecution of an action in the name of the infant for the benefit of the infant, and...his only duty and the only thing he is authorized to do is to prosecute in the name of the infant, and for the infant's benefit, his cause of action.").

[43] *Cozine*, 245 S.W.2d at 937; *Jones*, 729 S.W.2d at 189.

[44] *Kash*, 260 Ky. at —, 85 S.W.2d at 867 ("The infant himself is the plaintiff.").

[45] *Harris*, 192 S.W.3d at 303 ("The real party in interest is one who is entitled to the benefits of the action upon the successful termination thereof.").

[46] *See, generally*, 3 AM.JUR.2d *Agency* § 326 (2008 electronic version) ("A principal is generally entitled to the same remedies against third persons with respect to authorized acts and contracts of an agent as if they were made or done with the principal personally.").

An older case from an Arizona appellate court supports Stewart's position that Branham had a direct lawyer-client relationship with Gary Ryan Stewart. The Arizona court found in 1976 that "when an attorney undertakes to represent the guardian of an incompetent, he assumes a relationship not only with the guardian but also with the ward."[47] The court reached this conclusion because it accepted the position of the Supreme Court of Washington "that the real object and purpose of a guardianship is to preserve and conserve the ward's property for his own use, as distinguished from the benefit of others."[48]

Additionally, the Court of Appeals of Georgia found in *Toporek v. Zepp*[49] that a minor stood in a direct lawyer-client relationship with a lawyer who represented the minor's guardian *ad litem* in prosecuting the minor's personal-injury claim.[50] The Georgia court

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[47] *Fickett v. Superior Court of Pima County, Arizona*, 27 Ariz.App. 793, 795, 558 P.2d 988, 990 (1976).

[48] *Fickett*, 27 Ariz.App. at 795, 558 P.2d at 990 (*citing and quoting In re Michelson*, 8 Wash.2d 327, 335, 111 P.2d 1011, 1015 (1941)).

[49] 224 Ga.App. 26, 479 S.E.2d 759.

[50] A "guardian *ad litem*" under Georgia law functions as a "next friend" functions under Kentucky law. *Compare Clements v. Phillips*, 235 Ga.App. 588, 589, 510 S.E.2d 311, 312 (1998) ("Although a minor is required to appear through a guardian or next friend, the minor is the real party in interest, and the guardian or next friend 'is merely an officer of the court to protect the rights of the minor who is considered incapable of managing his own affairs.' *Kite v. Brooks,* 51 Ga.App. 531, 535, 181 S.E. 107 (1935)."), with *Goldfuss v. Goldfuss*, 609 S.W.2d 696, 698 (Ky.App. 1980) ("The obligation of a guardian ad litem is 'to stand in the infant's place and determine what his rights are and what his interests and defense demand. Although not having the powers of a regular guardian, he fully represents the infant and is endowed with similar powers for purposes of the litigation in hand.' *Black v. Wiedeman*, Ky., 254 S.W.2d 344, 346 (1953)."), and *Jones*, 729 S.W.2d at 189 ("The next friend has traditionally been recognized as a mere agent of the child, as is a guardian ad litem. *Kash v. Kash's Guardian,* 260 Ky. 377, 85 S.W.2d 866 (1935).").

See, generally, Fox, 390 Md. at 625-626, 890 A.2d at 730 ("Preliminarily, it is noteworthy that the term 'guardian *ad litem'* has been rarely used by the Maryland General Assembly or by this Court. When the term has been used by the General Assembly or by this Court, it usually has been synonymous with 'next friend' or '*prochein ami,'* which is one who brings suit on behalf of a minor or disabled person because the minor or disabled person

concluded "that when [the lawyer] undertook to consummate the settlement of [the minor's] claim against Sears, [the lawyer] entered into an attorney/client relationship with [the minor].[51] In reaching that conclusion, the court explained that the "defendant acted as the attorney for plaintiff's guardian ad litem."[52] The fact the "defendant acted as the attorney for plaintiffs guardian ad litem," failed to preclude the lawyer-malpractice claim. When the lawyer acted for the minor's guardian *ad litem*, the lawyer "clearly undertook to represent plaintiffs interests."[53] The Georgia court correctly determined that in the minor's tort action, "[the minor] was the real party with the legal interest warranting representation."[54] In these circumstances, the Georgia court decided that the lawyer entered directly into an attorney-client relationship with the minor when the lawyer undertook to consummate a settlement of the tort claim.[55]

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lacks capacity to sue in his or her own right, or synonymous with one who defends a suit against a minor or disabled person lacking the capacity to defend...The first mention of a 'guardian *ad litem'* by this Court appears to have been in *Davis v. Jacquin & Pomerait,* 5 H. & J. 100, 110 (1820), where the Court rejected the argument that an infant must sue by his or her guardian, pointing out that the law was changed by statute enacted in 1285: 'By the common law, infants were obliged to sue by guardian; but they were enabled by the Statute of Westminster the 2d, to sue by *prochein amy;* and the guardians of the person, and guardians *ad litem,* are essentially different in their creation and powers. The power of appointing the latter is incident to all Courts, and they are admitted by the Court for the particular suit, on the infant's personal appearance, without inquiring whether the person admitted is the guardian of the person of the plaintiff.'").

[51] *Toporek*, 224 Ga.App. at 28-29, 479 S.E.2d at 761.

[52] *Toporek*, 224 Ga.App. at 28, 479 S.E.2d at 761.

[53] *Toporek*, 224 Ga.App. at 28, 479 S.E.2d at 761.

[54] *Toporek*, 224 Ga.App. at 28, 479 S.E.2d at 761.

[55] *Toporek*, 224 Ga.App. at 28, 479 S.E.2d at 761 ("Consequently, we conclude that when defendant undertook to consummate the settlement of plaintiff's claim against Sears, defendant entered into an attorney/client relationship with plaintiff.").

Applying Kentucky law to the analysis the Georgia court used in *Toporek* leads to the conclusion "that when [Branham] undertook to consummate the settlement of [Gary Ryan Stewart's tort claims, Branham] entered into an attorney/client relationship with [Gary Ryan Stewart].[56] Branham settled Gary Ryan Stewart's tort claims. In settling those tort claims, Branham acted for Backus, who was acting as Gary Ryan Stewart's guardian. When Branham acted for Backus, who was acting as Gary Ryan Stewart's guardian, Branham implicitly undertook to act solely and exclusively for Gary Ryan Stewart and his benefit. In the words of the Georgia court, Branham "clearly undertook to represent [Gary Ryan Stewart's] interests."[57] This is so because Gary Ryan Stewart stood as the real party in the civil action asserting his tort claims with the legal interest warranting representation.[58] Therefore, at the latest, at the time when Branham undertook to consummate the settlement of Gary Ryan Stewart's tort claims, Branham entered into a lawyer-client relationship with Gary Ryan Stewart.

IV. GARY RYAN STEWART STOOD IN PRIVITY WITH BRANHAM WHEN BRANHAM PROSECUTED GARY RYAN STEWART'S TORT CLAIMS

When a minor's next friend employs a lawyer to represent the minor, the minor stands in privity with the lawyer. Because the minor stands in privity with the lawyer, the minor has standing to assert claims of lawyer malpractice and breach of fiduciary duty against the lawyer.

Stewart has no need to establish "privity of contract" between her ward, Gary Ryan Stewart, and Branham concerning Backus's employment of Branham to pursue Gary Ryan Stewart's tort claims. More than 20 years ago, this Court exposed the error of the defense of

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[56] *Toporek*, 224 Ga.App. at 28, 479 S.E.2d at 761.

[57] *Toporek*, 224 Ga.App. at 28, 479 S.E.2d at 761.

[58] *Harris*, 192 S.W.3d at 303 ("The real party in interest is one who is entitled to the benefits of the action upon the successful termination thereof.").

"privity of contract" in negligence actions.[59] In that same decision, this Court confirmed the demise of the erroneous defense of "lack of privity of contract."[60]

"Lack of privity of contract" presents no more a valid defense in an action seeking damages for a defective product, than in an action seeking damages for negligent services, such as a lawyer's services because "[t]here has never been any distinction under a negligence theory of liability between the treatment of goods and services."[61]

Gary Ryan Stewart's claims against Branham involve more than mere breach of a contract. His claims involve independent breaches of duty that Branham owed Gary Ryan Stewart.[62]

Yet, Stewart can establish that her ward, Gary Ryan Stewart, enjoyed "privity of contract" with Branham concerning Backus's employment of Branham to pursue Gary Ryan

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[59] *Tabler v. Wallace*, 704 S.W.2d 179, 186 (Ky. 1985) ("Following a landmark English case decided in 1842, *Winterbottom v. Wright,* 10 M. & W. 109, 152 Eng.Rep. 402 (1842), which *in fact* 'held only that the obligation of a contract could give no right of action to one who was not a contracting party (Prosser, *Law of Torts,* 4th Ed. 1971),' American courts erroneously applied to tort cases the contract doctrine of privity. They held that there must be a contractual relationship between the parties as a prerequisite to tort liability. This error was exposed and corrected for negligence cases by Justice Benjamin Cardozo in the landmark case of *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050 (1916).") (emphasis by italics in original text).

[60] *Tabler*, 704 S.W.2d at 186 (observing "the demise of the erroneous defense of privity in negligence cases" following "the landmark case of *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050 (1916).").

[61] *Tabler*, 704 S.W.2d at 186.

[62] *Presnell Constr. Mgrs., Inc. v. EH Constr., LLC*, 134 S.W.3d 575, 579-580 (Ky. 2004) ("Although privity is no longer required to maintain a tort action, 'one who is not a party to the contract or in privity thereto may not maintain an action for negligence which consists merely in the breach of the contract.' Accordingly, unless Presnell breached some duty to EH apart from its duties to DeLor under the contract – *i.e.* an independent duty – EH, who was, at the most, an incidental beneficiary of the contract between DeLor and Presnell, cannot maintain an action in negligence against Presnell.").

Stewart's tort claims.

In general, "'[p]rivity of contract' is '[t]he relationship between parties to a contract, allowing them to sue each other but preventing a third party from doing so.'"[63] Specifically in the context of claims for lawyer malpractice, "'privity' means the contractual connection or relationship that exists between the attorney and the client."[64]

The contractual connection or relationship that provides "privity" may arise by a contract made by an agent for a principal.[65] This principle applies even when the agent stands in a representative capacity for a person lacking capacity.[66] The representative owes the duty

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[63] *Presnell Constr. Mgrs.*, 134 S.W.3d at 579. *Accord, Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So.2d 1378, 1379-1380 (Fla. 1993) ("In a legal context, the term 'privity' is a word of art derived from the common law of contracts and used to describe the relationship of persons who are parties to a contract.") (considering privity while addressing standing to bring claim of lawyer malpractice).

[64] *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 622 (Tex.Civ.App. 1993).

[65] *Lexington Ins. Co. v. Western Roofing Co.*, 316 F.Supp.2d 1142, 1151 (D.Kan. 2004) ("It is a basic principle of agency law that '[t]he authorized contract of the agent with a third person is the contract of the principal, and the principal may sue thereon, though not named therein, and even though he or she was an undisclosed principal at the time the agent executed the contract.'...Thus, regardless of whether Western Roofing was aware of the existence of the agency relationship between CB Richard Ellis and Mid-America, Western Roofing did in fact contract with Mid-America and Mid-America is in fact entitled to sue Western Roofing on that contract in its capacity as a party to the contract. In other words, there is direct privity of contract between Mid-America and Western Roofing.") (citations omitted).

Cf. Simpson v. JOC Coal, Inc., 677 S.W.2d 305, 308 (1984) ("[U]pon making a contract for the benefit of a third party, privity between a promisor and a third party beneficiary, necessary to be a binding legal obligation, is created by operation of law, notwithstanding the fact that the primary purpose of the contracting parties was to benefit themselves ....") (*citing and quoting Lincoln National Life Ins. Co. v. Means,* 264 Ky. 566, 95 S.W.2d 264, 269 (1936)) (internal quotation-marks omitted).

[66] *See Stanley L. & Carolyn M. Watkins Trust v. Lacosta*, 321 Mont. 432, 437, 92 P.3d 620, 625, 2004 MT 144, ¶ 19 ("With regard to the Estate of Stanley L. Watkins (the Estate), Lacosta admits that Stanley was a client. Because the Estate stands in the shoes of the decedent, it is considered to be in privity with the attorney, and the personal representative has standing to prosecute a malpractice claim.").

to act in a manner intended to protect the interests of the represented party and that duty creates or supplies to the represented party "privity."[67]

Here, Backus employed Branham to prosecute Gary Ryan Stewart's tort claims. Backus did so acting in her capacity as Gary Ryan Stewart's "next friend." When Backus employed Branham to prosecute Gary Ryan Stewart's tort claims, Backus acted as Gary Ryan Stewart's agent.[68] When Backus acted as Gary Ryan Stewart's agent in employing Branham to prosecute Gary Ryan Stewart's tort claims, Branham entered into a contract with Backus in her representative, agency status as "next friend" of Gary Ryan Stewart. Because Backus entered into that contract in her representative, agency status as "next friend" of Gary Ryan Stewart, Backus was never a party to the contract; rather, Gary Ryan Stewart was, in essence, the party to the contract.[69] Because Gary Ryan Stewart was, in essence, the party to the

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[67] *Elam v. Hyatt Legal Services,* 44 Ohio St.3d 175, 176, 541 N.E.2d 616, 618 (Ohio 1989) ("It is the duty of a fiduciary of an estate to serve as representative of the entire estate. Such fiduciary, in the administration of an estate, owes a duty to beneficiaries to act in a manner which protects the beneficiaries' interests. We believe that this duty places the beneficiaries in privity with the executor.").

[68] *Cozine*, 245 S.W.2d at 937 ("The next friend, therefore, truly is a mere agent of the [incompetent or minor]..."); *Jones*, 729 S.W.2d at 189 ("The next friend has traditionally been recognized as a mere agent of the child...").

[69] *E.g., Tharp v. Farquar*, 6 B.Mon. 3, 1845 WL 3343, * (Ky. 1845) ("Though a contract be made with an agent, the right of action is with the principal, unless the obligation is express or clearly implies that payment is to be made to the agent."); and *Nash v. Towne*, 72 U.S. 689, 703, 1866 WL 9392, *11 (1866_ ("Where a simple contract, other than a bill or note, is made by an agent, the principal whom he represents may in general maintain an action upon it in his own name...").

See, generally, 3 AM.JUR.2d *Agency* § 326 (2008 electronic version) ("The authorized contract of the agent with a third person is the contract of the principal, and the principal may sue thereon, though not named therein..."); RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 6.01 ("When an agent acting with actual or apparent authority makes a contract on behalf of a disclosed principal, (1) the principal and the third party are parties to the contract; and (2) the agent is not a party to the contract unless the agent and third party agree otherwise."); RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 320 ("Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does

contract, Gary Ryan Stewart stands in privity with Branham.

Moreover, when Backus acted as Gary Ryan Stewart's agent in employing Branham to prosecute Gary Ryan Stewart's tort claims, Backus was discharging her duties as next friend "for the benefit of [Gary Ryan Stewart]..."[70] Because Backus was discharging her duties as next friend "for the benefit of [Gary Ryan Stewart]...," as a matter of law, Backus intended Gary Ryan Stewart to benefit exclusively from Branham's services in prosecuting Gary Ryan Stewart's tort claims.[71] Branham knew Backus was employing him to prosecute Gary Ryan Stewart's tort claims in her capacity as "next friend." When Branham brought an action to assert Gary Ryan Stewart's tort claims, Branham designated Backus as "next friend." Presumably, as a lawyer, Branham knew that Backus was prosecuting Gary Ryan Stewart's tort claims "for the benefit of [Gary Ryan Stewart]..."[72] Certainly, as a lawyer, Branham should have known that Backus was prosecuting Gary Ryan Stewart's tort claims "for the benefit of [Gary Ryan Stewart]..." Additionally, Gary Ryan Stewart paid the fees Branham charged for prosecuting Gary Ryan Stewart's tort claims.[73]

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not become a party to the contract.").

[70] *Ambrose*, 197 Ky. at —, 247 S.W. at 954.

[71] *Ambrose*, 197 Ky. at —, 247 S.W. at 954 ("The office of the next friend of an infant is confined to the bringing and prosecution of an action in the name of the infant for the benefit of the infant, and ...his only duty and the only thing he is authorized to do is to prosecute in the name of the infant, and for the infant's benefit, his cause of action.").

[72] *Ambrose*, 197 Ky. at —, 247 S.W. at 954; and *Seigle v. Jasper*, Ky.App., 867 S.W.2d 476, 481 (1993) ("Coots performed the work at the request of Peoples Bank knowing the work was being done to benefit the Seigles in closing their loan...The Seigles have sued Coots for negligence. One issue before the trial court was whether or not Coots' duty to exercise ordinary care in the performance of the title examination extended to the Seigles. We hold that it did.").

[73] *Seigle*, 867 S.W.2d at 481 ("[T]he Seigles paid Coots' attorney's fees...The Seigles have sued Coots for negligence. One issue before the trial court was whether or not

Backus employed Branham in a representative capacity. Branham admits Backus was his client. But, in the civil action in which Branham prosecuted Gary Ryan Stewart's tort claims and in which Branham admits Backus was his client, Backus stood in Gary Ryan Stewart's shoes. In these circumstances, Gary Ryan Stewart, through his new representative, Stewart, has standing to sue Branham[74] because privity existed between Branham and Gary Ryan Stewart, "despite [his] minority."[75]

The Court of Appeals of Georgia essentially followed this analysis when it considered whether a minor stood in privity with a lawyer who represented the minor's guardian *ad litem* in prosecuting the minor's personal-injury claim.[76,77] In *Toporek*, the lawyer "acted as the attorney for [the minor's] guardian *ad litem*."[78] The court explained that "in doing so, [the

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Coots' duty to exercise ordinary care in the performance of the title examination extended to the Seigles. We hold that it did.")

[74] *Watkins Trust*, 321 Mont. at 437, 92 P.3d at 625, 2004 MT 144 at ¶ 19 ("With regard to the Estate of Stanley L. Watkins (the Estate), Lacosta admits that Stanley was a client. Because the Estate stands in the shoes of the decedent, it is considered to be in privity with the attorney, and the personal representative has standing to prosecute a malpractice claim.").

[75] *Seigle*, 867 S.W.2d at 481 ("Coots performed the work at the request of Peoples Bank knowing the work was being done to benefit the Seigles in closing their loan; and the Seigles paid Coots' attorney's fees...The Seigles have sued Coots for negligence. One issue before the trial court was whether or not Coots' duty to exercise ordinary care in the performance of the title examination extended to the Seigles. We hold that it did."); and *Toporek v. Zepp*, 224 Ga.App. 26, 28, 479 S.E.2d 759, 761 (1997) ("As the intended beneficiary of the relationship between her guardian ad litem and defendant, plaintiff also was in privity with defendant, despite her minority...").

[76] *Toporek*, 224 Ga.App. at 26, 479 S.E.2d at 759.

[77] *See* footnote 49, pages 14-15 of this brief, for authority for the proposition that a "guardian *ad litem*" under Georgia law functions as a "next friend" functions under Kentucky law.

[78] *Toporek*, 224 Ga.App. at 28, 479 S.E.2d at 761.

lawyer] clearly undertook to represent [the minor's] interests."[79] The court determined that "[the minor] was the real party with the legal interest warranting representation."[80] In analyzing the issues in the case, the court rejected the argument that the lawyer represented only the guardian *ad litem*, as opposed to representing the minor. The court explained why it rejected this argument:

> In cases like this, to suggest that the guardian alone is the attorney's client, and not the minor, is to ignore the guardian *ad litem's* representative capacity and the minor's direct interest.[81]

Therefore, because "[the minor] was the real party with the legal interest warranting representation, ...[a]s the intended beneficiary of the relationship between her guardian ad litem and [the lawyer], [the minor] also was in privity with [the lawyer], despite [the minor's] minority."[82] The court concluded "that when [the lawyer] undertook to consummate the settlement of [the minor's] claim against Sears, [the lawyer] entered into an attorney/client relationship with [the minor].[83]

Here, Gary Ryan Stewart stood as the real party in the civil action asserting his tort claims with the legal interest warranting representation.[84] As the real party with the legal interest warranting representation, Gary Ryan Stewart was the intended beneficiary of the relationship between Backus and Branham. At the latest, at the time when Branham

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[79] *Toporek*, 224 Ga.App. at 28, 479 S.E.2d at 761.

[80] *Toporek*, 224 Ga.App. at 28, 479 S.E.2d at 761.

[81] *Toporek*, 224 Ga.App. at 28, 479 S.E.2d at 761.

[82] *Toporek*, 224 Ga.App. at 28, 479 S.E.2d at 761.

[83] *Toporek*, 224 Ga.App. at 28-29, 479 S.E.2d at 761.

[84] *Harris*, 192 S.W.3d at 303 ("The real party in interest is one who is entitled to the benefits of the action upon the successful termination thereof.").

undertook to consummate the settlement of Gary Ryan Stewart's tort claims, Branham entered into a lawyer-client relationship with Gary Ryan Stewart. Thus, privity existed between Branham and Gary Ryan Stewart.

Because privity existed between Branham and Gary Ryan Stewart, Stewart has standing to assert claims by Gary Ryan Stewart that Branham committed lawyer malpractice and breached fiduciary duties Branham owed Gary Ryan Stewart.

V. GARY RYAN STEWART STOOD IN PRIVITY WITH BRANHAM CONCERNING THE GUARDIANSHIP OVER GARY RYAN STEWART

When a ward's guardian employs a lawyer concerning matters relating to the guardianship, the ward stands in privity with the lawyer. Because the ward stands in privity with the lawyer, the ward has standing to assert claims of lawyer malpractice and breach of fiduciary duty against the lawyer.

Just as Stewart has no need to establish "privity of contract" between her ward, Gary Ryan Stewart, and Branham concerning Backus's employment of Branham to pursue Gary Ryan Stewart's tort claims, Stewart has no need to establish "privity of contract" between Gary Ryan Stewart and Branham concerning the guardianship over Gary Ryan Stewart. As Stewart explained earlier in this brief,[85] Kentucky rejected the erroneous defense of "lack of privity of contract" more than 20 years ago.[86] And because "[t]here has never been any distinction under a negligence theory of liability between the treatment of goods and

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[85] Pp. 16-18.

[86] *Tabler*, 704 S.W.2d at 186 ("Following a landmark English case decided in 1842, *Winterbottom v. Wright,* 10 M. & W. 109, 152 Eng.Rep. 402 (1842), which *in fact* 'held only that the obligation of a contract could give no right of action to one who was not a contracting party (Prosser, *Law of Torts,* 4th Ed. 1971),' American courts erroneously applied to tort cases the contract doctrine of privity. They held that there must be a contractual relationship between the parties as a prerequisite to tort liability. This error was exposed and corrected for negligence cases by Justice Benjamin Cardozo in the landmark case of *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050 (1916).") (emphasis by italics in original text).

services,"[87] "lack of privity of contract" presents no more a valid defense in an action seeking damages for a defective product, than in an action seeking damages for negligent services, such as a lawyer's services.

Gary Ryan Stewart's claims against Branham relating to the guardianship proceedings involve more than mere breach of a contract. His claims involve independent breaches of duty that Branham owed Gary Ryan Stewart.[88]

Yet, Stewart can establish that her ward, Gary Ryan Stewart, enjoyed "privity of contract" with Branham concerning the guardianship proceedings over Gary Ryan Stewart.

In general, "'[p]rivity of contract' is '[t]he relationship between parties to a contract, allowing them to sue each other but preventing a third party from doing so.'"[89] Specifically in the context of claims for lawyer malpractice, "'privity' means the contractual connection or relationship that exists between the attorney and the client."[90]

The contractual connection or relationship that provides "privity" may arise by a

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[87] *Tabler*, 704 S.W.2d at 186.

[88] *Presnell Constr. Mgrs., Inc.*, 134 S.W.3d at 579-580 ("Although privity is no longer required to maintain a tort action, 'one who is not a party to the contract or in privity thereto may not maintain an action for negligence which consists merely in the breach of the contract.' Accordingly, unless Presnell breached some duty to EH apart from its duties to DeLor under the contract – *i.e.* an independent duty – EH, who was, at the most, an incidental beneficiary of the contract between DeLor and Presnell, cannot maintain an action in negligence against Presnell.").

[89] *Presnell Constr. Mgrs., Inc.*, 134 S.W.3d at 579. *Accord, Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So.2d 1378, 1379-1380 (Fla. 1993) ("In a legal context, the term 'privity' is a word of art derived from the common law of contracts and used to describe the relationship of persons who are parties to a contract.") (considering privity while addressing standing to bring claim of lawyer malpractice).

[90] *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 622 (Tex.Civ.App. 1993).

contract made by an agent for a principal.[91] This principle applies even when the agent stands in a representative capacity for a person lacking capacity.[92] The representative owes the duty to act in a manner intended to protect the interests of the represented party and that duty creates or supplies to the represented party "privity."[93]

Here, Backus employed Branham to establish a guardianship over Gary Ryan Stewart. Branham did so. Backus became the court-appointed guardian over Gary Ryan Stewart" and, thereby became Gary Ryan Stewart's agent.[94] So, when Backus, as Gary Ryan Stewart's

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[91] *Lexington Ins. Co. v. Western Roofing Co.*, 316 F.Supp.2d 1142, 1151 (D.Kan. 2004) ("It is a basic principle of agency law that '[t]he authorized contract of the agent with a third person is the contract of the principal, and the principal may sue thereon, though not named therein, and even though he or she was an undisclosed principal at the time the agent executed the contract.'...Thus, regardless of whether Western Roofing was aware of the existence of the agency relationship between CB Richard Ellis and Mid-America, Western Roofing did in fact contract with Mid-America and Mid-America is in fact entitled to sue Western Roofing on that contract in its capacity as a party to the contract. In other words, there is direct privity of contract between Mid-America and Western Roofing.") (citations omitted).

Cf. Simpson v. JOC Coal, Inc., 677 S.W.2d 305, 308 (1984) ("[U]pon making a contract for the benefit of a third party, privity between a promisor and a third party beneficiary, necessary to be a binding legal obligation, is created by operation of law, notwithstanding the fact that the primary purpose of the contracting parties was to benefit themselves ....") (*citing and quoting Lincoln National Life Ins. Co. v. Means,* 264 Ky. 566, 95 S.W.2d 264, 269 (1936)) (internal quotation-marks omitted).

[92] *See Watkins Trust*, 321 Mont. at 437, 92 P.3d at 625, 2004 MT 144 at ¶ 19 ("With regard to the Estate of Stanley L. Watkins (the Estate), Lacosta admits that Stanley was a client. Because the Estate stands in the shoes of the decedent, it is considered to be in privity with the attorney, and the personal representative has standing to prosecute a malpractice claim.").

[93] *Elam,* 44 Ohio St.3d at 176, 541 N.E.2d at 618 ("It is the duty of a fiduciary of an estate to serve as representative of the entire estate. Such fiduciary, in the administration of an estate, owes a duty to beneficiaries to act in a manner which protects the beneficiaries' interests. We believe that this duty places the beneficiaries in privity with the executor.").

[94] *Powell*, 18 B.Mon. at —, 1857 WL 4393 at *5 ("The guardian is no more than an agent provided by law for the ward."); *Southard*, 3 T.B.Mon. at —, 1826 WL 1336 at *6 ("A guardian represents the ward for whom he acts, and is his general agent...").

guardian, employed Branham to settle Gary Ryan Stewart's tort claims, Backus was discharging her duties as guardian solely for Gary Ryan Stewart's benefit. Thereafter, Backus operated under a legal obligation to manage Gary Ryan Stewart's assets solely to pursue the objectives of the guardianship, protection and preservation of Gary Ryan Stewart's assets for his use and benefit.[95] Because the guardian employs the lawyer solely for the ward's benefit, the lawyer represents the incompetent or minor.[96]

VI. THE COMMON-LAW TESTS THAT COURTS HAVE ADOPTED FOR DETERMINING WHETHER A LAWYER OWES DUTIES IN THE ABSENCE OF PRIVITY REPRESENTS THE PROPER TEST FOR DETERMINING WHETHER GARY RYAN STEWART STOOD IN A RELATIONSHIP WITH BRANHAM CONCERNING THE SETTLEMENT OF GARY RYAN STEWART'S TORT CLAIMS AND CONCERNING THE GUARDIANSHIP OVER GARY RYAN STEWART

Branham argues that "the best guideline for establishing when, and if, a duty is created between attorney (sic) and a beneficiary is set out in the *RESTATEMENT OF LAW GOVERNING LAWYERS*."[97] Yet, in making this argument, Branham discusses only

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[95] *Schober's Estate*, 303 Minn. at 229, 226 N.W.2d at 897 ("It is clear from our statutes that the basic purpose of guardianship and the duties of a guardian are to protect the ward and his assets."); *Continental Ins. Companies*, 252 Ark. at 987, 482 S.W.2d at106 ("The primary purpose in a guardianship for a minor's estate is to preserve and protect the assets of his estate during his minority..."); and *Kany*, 85 So.2d at 845 ("The very purpose of the law, Chapter 744, Florida Statutes 1953, and F.S.A., under which the appellee, Berrien Becks, was appointed guardian of the property of Louise Hewitt Porter is to preserve the property of the ward.").

[96] *See McKittrick*, 340 Mo. at 859-860, 102 S.W.2d at 899 (When a duly authorized agent employs a lawyer to act for the agent's principal, "the attorney will be the attorney of the client and not of the agent.").

[97] *Brief on Behalf of Appellants, Ira E. Branham, Miller Kent Carter and Branham and Carter, P.S.C.*, p. 5.

Branham actually refers to the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

In this brief, Stewart will refer to Brief on Behalf of Appellants, Ira E. Branham, Miller Kent Carter and Branham and Carter, P.S.C. as "Appellant's Brief." And in this brief, Stewart will cite to *Brief on Behalf of Appellants, Ira E. Branham, Miller Kent Carter and Branham and Carter, P.S.C* as "*Appellant's Brief*, p. ___."

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4).[98]

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 contains four subsections. The first subsection addresses a lawyer's duties to a prospective client.[99] The second subsection addresses a lawyer's liability when the lawyer invites, or allows a client to invite, a third party to rely on the lawyer's opinion or services.[100] The third subsection addresses a lawyer's duties and liability when a non-client seeks to enforce the lawyer's duties to the lawyer's client.[101] And the last subsection addresses a lawyer's duties and liabilities when a lawyer knows a client has breached a fiduciary duty to another.[102]

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 provides an unsatisfactory test for determining a lawyer's liability to a non-client in the absence of privity.

A. RESTATEMENT OF LAW GOVERNING LAWYERS § 51 provides an inappropriate test for determining whether in the absence of privity of contract and for determining, in the absence of privity of contract, to whom a lawyer owes a duty.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 contains two subsections that this Court could use as the test for determining a lawyer's liability to a nonclient in the absence of privity. RESTATEMENT (THIRD) OF THE LAW GOVERNING

[98] *Appellant's Brief*, pp. 5-6.

[99] *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(1)* (2000); *cmt. d, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51* (2000).

[100] *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(2)* (2000); *cmt. e, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51* (2000).

[101] *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(3)* (2000); *cmt. f, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51* (2000).

[102] *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4)* (2000); *cmt. h, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51* (2000).

LAWYERS § 51(3) represents one of those sections. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4) represents the other.

These subsections, "although related in their justifications, differ in application."[103] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(3) applies "[w]hen a lawyer knows...that a client intends a lawyer's services to benefit a third person who is not a client..."[104] In contrast, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4) applies "when a lawyer helps a client-fiduciary to carry out a duty of the fiduciary to a beneficiary recognized and defined by trust or other law."[105]

1. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(3) provides an unsatisfactory test for determining whether in the absence of privity of contract and for determining, in the absence of privity of contract, to whom a lawyer owes a duty.

Under RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(3), duty exists only when intention to benefit the non-client represents "one of the primary objectives of the representation..."[106] In contrast, under the common law, duty exists in the absence of privity when the third party stands as an intended beneficiary of the lawyer's services.[107] Under the common law, in determining whether a lawyer owed a third party any duty, a court would ask

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[103] *Cmt. f, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51* (2000).

[104] *Cmt. f, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51* (2000).

[105] *Cmt. f, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51* (2000).

[106] *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(3)* (2000).

[107] *McIntosh County Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 547 (Minn. 2008) ("We reaffirm the rule of law announced in *Marker* [*v. Greenberg*, 313 N.W.2d 4 (Minn.1981)] that in order for a third party to proceed in a legal malpractice action, that party must be a direct and intended beneficiary of the attorney's services. To determine the extent of the duty owed to the direct and intended beneficiary of the attorney's services, we will consider the so-called *Lucas* [*v. Hamm*, 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685, 687 (1961)] factors.").

whether duty exists only when the non-client stood as an intended beneficiary of the lawyer's services. Unlike the common law, the Restatement creates a duty only when the non-client received the benefit of the lawyer's services as "one of the primary objectives of the representation..." This test, "one of the primary objectives of the representation...," represents a rather substantial, and unjustified, deviation from more than 150 of jurisprudence addressing tort liability in the absence or privity of contract.[108]

The test the drafters of the Restatement propose, unnecessarily injects factual issues into the analysis of duty. The test requires a court to analyze all the motives of a client in employing a lawyer. A court could confidently conclude that "one of the primary objectives of the representation..." was to benefit the third party only after analyzing all of the motives of the client in employing the lawyer.

The drafters of the Restatement offer no reason for adopting the test, "one of the primary objectives of the representation," in place of the well-established legal principles governing tort liability in the absence of privity that courts have adopted over the preceding 150 years or so. The drafters of the Restatement offer no justification for deviating from the

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[108] *E.g., Flaherty v. Weinberg*, 303 Md. 116, 123, 492 A.2d 618, 621, 61 A.L.R.4th 443 (1985) ("Despite *National Savings Bank* [*v. Ward,* 100 U.S. 195, 25 L.Ed. 621 (1880)] and its progeny, the rule of strict contractual privity has been relaxed in modern jurisprudence. Beginning with an 1852 decision by the Court of Appeals of New York, American courts expressed a willingness to depart from the strict contractual privity rule. *See Thomas v. Winchester,* 6 N.Y. 397, 407-10 (1852) (ultimate consumer could sue manufacturer who negligently mislabeled a bottle of poison, although the consumer bought the bottle from a druggist). Subsequent decisions have confirmed that, in the words of Chief Judge (later Justice) Cardozo, "[t]he assault upon the citadel of privity is proceeding in these days apace." *Ultramares Corp. v. Touche, Niven & Co.,* 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931); *see Glanzer v. Shepard,* 233 N.Y. 236, 135 N.E. 275 (1922) (Cardozo, J.) (privity of contract not required in cases involving economic loss caused by negligent services); *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050 (1916) (Cardozo, J.) (privity of contract not required in cases where the manufacturers' negligence caused physical injury to a third party).").

judicially established, common-law test, third-party intended beneficiary.

This Court should reject the use of RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(3) to determine whether a lawyer owes a duty to a non-client in the absence of privity.

2. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4) likewise represents an unsatisfactory test for determining whether in the absence of privity of contract and for determining, in the absence of privity of contract, to whom a lawyer owes a duty.

Under RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4), duty exists only "when a lawyer helps a client-fiduciary to carry out a duty of the fiduciary to a beneficiary recognized and defined by trust or other law."[109] More important, duty exists in only two circumstances and then only when the nonclient is otherwise unable adequately to protect the nonclient's rights. First, duty exists where the fiduciary commits a breach that constitutes a crime or a fraud and the lawyer knew appropriate action was required to prevent or to rectify the breach.[110] Second, duty exists where the lawyer assisted, or is assisting, the client's breach.[111] And duty only exists involving a small class of third parties:

> The duty recognized by Subsection (4) is limited to lawyers representing only a limited category of the persons described as fiduciaries — trustees, executors, guardians, and other fiduciaries acting primarily to fulfill similar functions. Fiduciary responsibility, imposing strict duties to protect specific property for the benefit of specific, designated persons, is the chief end of such relationships. The lawyer is hence less likely to encounter conflicting

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[109] *Cmt. f, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51* (2000).

[110] *Cmt. f, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51* (2000) ("The duty recognized by Subsection (4) arises only when the lawyer knows that appropriate action by the lawyer is necessary to prevent or mitigate a breach of the client's fiduciary duty...The duty stated in Subsection (4) applies only to breaches constituting crime or fraud...").

[111] *Cmt. f, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51* (2000) ("The duty stated in Subsection (4) applies [when] the lawyer has assisted or is assisting the fiduciary.").

> considerations arising from other responsibilities of the fiduciary-client than are entailed in other relationships in which fiduciary duty is only a part of a broader role. Thus, Subsection (4) does not apply when the client is a partner in a business partnership, a corporate officer or director, or a controlling stockholder.[112]

Thus, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4) presents a rule too narrow to represent a general basis for determining when a lawyer owes a non-client a duty in the absence of privity.

Additionally, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4) presents a confused test, with internal conflicts involving other provisions of RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4) improperly treats guardians as the equivalent of trustees, executors, and estate administrators. Stewart acknowledges that Kentucky law generally treats guardians, trustees, executors, and estate administrators all as fiduciaries.[113] But, a guardian is unlike a trustee, an executor, or an estate administrator. In any guardianship, a guardian always represents a single ward having an interest in conflict to no other person to whom the guardian owes duties in relation to the guardianship. In contrast, trustees, executors, and estate administrators may represent multiple persons or classes of persons, each having interests in conflict with others to whom the trustee owes duties. A guardian takes no legal or beneficial interest in the property of the guardian's ward. A guardian merely controls, and manages, the ward's property for the ward's benefit. Trustees, executors, and

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[112] *Cmt. f, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51* (2000).

[113] *First State Bank v. Catron*, 268 Ky. 513, —, 105 S.W.2d 162, 165 (1937) ("The same general principles apply to all persons occupying a fiduciary relationship in transactions of this character whether they be executors, trustees, guardians, or committee for an incompetent."); and *Robson's Guardian v. Robson*, 213 Ky. 625, —, 281 S.W. 789, 790-791 (1926) ("A guardian is as much a fiduciary as an executor or administrator.").

estate administrators, on the other hand, take title to the property subject to trust obligations.[114]

In addition, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51, including RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4), proceeds on the basis of an absence of a lawyer-client relationship between the lawyer and the party claiming the lawyer owes duties. But, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14, entitled "Formation of a Client-Lawyer Relationship," recognizes that even though a guardian employs the lawyer, a lawyer sometimes actually represents a guardian's ward. "Individuals who are legally incompetent, for example some minors or persons with diminished mental capacity, often require representation to which they are personally incapable of giving consent...A guardian for such an individual may retain counsel for the

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[114] *E.g., Edwards v. Cardarelli*, 65 R.I. 236, —, 14 A.2d 693, 695 (R.I. 1940) ("It is well settled that a guardian, unlike a trustee, executor or administrator, does not take legal title to his ward's personal property, but is merely invested with power to control and manage such property. Both legal and beneficial titles remain in the ward."); and *Richardson v. Passumpsic Savings Bank*, 111 Vt. 181, —, 13 A.2d 184, 185 (1940) ("A guardian of the property of a person who is under an incapacity is a trustee in the broad sense of the term. He is under a duty to his ward to deal with the property for the latter's benefit. A guardian like a trustee is a fiduciary. He is not, however, a trustee in the strict sense. He is entrusted with the possession and management of his ward's property but he does not take title to it. Scott on Trusts, § 7; Rest. of Trusts, § 7.").

Also, see, generally, 76 AM.JUR.2d *Trusts § 14* (Personal representatives of decedents' estates are fiduciaries, but they are not trustees. Although many of the rules applicable to trustees are applicable to executors and administrators, and also to guardians and conservators, many other rules of trust law are not. Furthermore, an executor or administrator owes duties to estate creditors in addition to the general duties the fiduciary owes to the beneficiaries of the estate."); and 76 AM.JUR.2d *Trusts § 15* ("Even though a guardianship has been characterized as a trust relation of the most sacred character, a guardianship is not a trust. The offices of trustee and of guardian may be distinguished in that while a trustee has title to trust property, a guardian usually does not. A guardian ordinarily has only powers and duties respecting property to which the ward holds title. Similarly, conservatorships are not trusts.").

incapacitated person, subject in some instances to court approval."[115] Because a lawyer sometimes represents the guardian and sometimes, under RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000), represents the ward, sometimes RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (2000) governs to determine whether the lawyer owes duties to the ward and sometimes that provision is by its own terms inapplicable. Such a situation inherently carries a risk of confusion.

B. Either of the established common-law tests for determining duty in the absence of privity, the multi-factor balancing test and intended third-party beneficiary test, represent an appropriate test for determining whether in the absence of privity of contract and for determining, in the absence of privity of contract, to whom a lawyer owes a duty.

Traditionally, courts have limited the liability of lawyers to claims by clients and those in privity with the client, denying claims by non-clients and third persons.[116] Under this traditional rule, "privity of contract between the parties has been required as a basis for establishing a duty in a legal malpractice action."[117]

But, this traditional rule "had its doctrinal origins in *Winterbottom v. Wright,* 10 Messon & Welsby 109, 153 Eng.Rep. 402 (1842), where Chief Baron Lord Abinger suggested in dicta that because only parties to a contract could sue on that contract, only those parties could also sue in tort. Some commentators have noted that American courts

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[115] *Cmt. d, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14* (2000).

[116] *National Savings Bank v. Ward*, 100 U.S. 195, 200, 1879 WL 16535, *5 (1879) ("Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party..."); and *Flaherty*, 303 Md. at 121, 492 A.2d at 620 ("A majority of American courts evidently continue to adhere to the view expressed in a 105-year-old Supreme Court decision holding that absent fraud, collusion, or privity of contract, an attorney is not liable to a third party for professional malpractice.").

[117] *Strangland v. Brock*, 109 Wash.2d 675, 680, 747 P.2d 464, 467 (Wash. 1987) (*en banc*).

erroneously interpreted Lord Abinger's suggestion to mean that no action could exist in tort because of the absence of privity."[118] Thus, this traditional rule represents the embodiment of the erroneous defense of "privity of contract" in negligence actions that this Court acknowledged in *Tabler* constituted a distortion or misreading of the actual ruling in that "landmark English case..."[119]

"Lack of privity of contract" presents no more a valid defense in an action seeking damages for negligent services, such as a lawyer's services, than in an action involving a defective product. "There has never been any distinction under a negligence theory of liability between the treatment of goods and services."[120]

This Court should announce that it will follow "the modern trend" – this Court should "relax the privity requirement, allowing legal malpractice actions to be brought by persons other than the clients of attorneys in some factual situations."[121] This Court should allow claims against lawyers by those to whom the lawyer owes a duty of care.

The Courts that have abandoned the strict-privity requirement in lawyer-malpractice claims have principally followed one of two theories for determining to which non-client third parties a lawyer owes duties.[122] The first theory originated in California. Under the

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[118] *Flaherty*, 303 Md. at 122 fn. 3, 492 A.2d at 621 fn. 3.

[119] *Tabler*, 704 S.W.2d at 186.

[120] *Tabler*, 704 S.W.2d at 186.

[121] *Strangland*, 109 Wash.2d at 680, 747 P.2d at 467.

[122] *Flaherty*, 303 Md. at 123, 492 A.2d at 623 ("Consistent with the erosion of the strict privity requirement in the above areas, a growing number of jurisdictions have made inroads into this requirement in attorney malpractice cases by employing one of two basic conceptual models: (1) the balancing of factors theory, or (2) the third party beneficiary theory.").

California theory, the court applies a multi-factor test to determine whether the lawyer owes the claimant a duty.[123] The second theory finds duty in favor of a claimant who is an intended third-party beneficiary of the contract between the lawyer and the lawyer's client.[124]

The six-criteria "balancing test" that originated in California

A court "[e]valuating the existence of an attorney's duty to a nonclient as 'a matter of policy'...must balance the six *Biakanja*[125]/*Lucas*[126] factors."[127,128] "Under this policy-based approach, the court balances the following factors in determining whether to impose a duty on attorneys not in privity with third parties: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to the defendant's conduct;

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[123] *Strangland*, 109 Wash.2d at 680, 747 P.2d at 467.

[124] *Strangland*, 109 Wash.2d at 681, 747 P.2d at 467 ("The second theory for finding a duty between the attorney and the plaintiff in the absence of privity is based on the concept of a third party beneficiary contract. The plaintiff must prove that he or she was intended to benefit from the established attorney-client relationship. *See, e.g., Guy v. Liederbach,* 501 Pa. 47, 459 A.2d 744 (1983); *Pelham v. Griesheimer,* 92 Ill.2d 13, 20, 64 Ill.Dec. 544, 440 N.E.2d 96 (1982); *Stowe v. Smith,* 184 Conn. 194, 441 A.2d 81 (1981).").

[125] *Biakanja v. Irving*, 49 Cal.2d 647, 320 P.2d 16 (1958).

[126] *Lucas v. Hamm*, 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685 (1961).

[127] *Osornio v. Weingarten,* 124 Cal.App.4th 304, 330, 21 Cal.Rptr.3d 246, 263 (2004).

[128] "The *Lucas* court employed the Biakanja balancing test, but omitted without explanation the moral blame standard. In its place, the court inserted a standard relating to whether the recognition of liability to beneficiaries under a will would impose an undue burden on the legal profession. Subsequent decisions, however, have specified the moral blame standard. *See, e.g., Heyer v. Flaig,* 70 Cal.2d 223, 449 P.2d 161, 74 Cal.Rptr. 225 (1969)." *Flaherty*, 303 Md. at 125 fn. 5, 492 A.2d at 622 fn. 5.

and (6) the policy of preventing future harm."[129]

The third-party beneficiary of the client's contract with the lawyer

"In order for the third-party beneficiary exception to apply, [Maryland's highest court] explained that the nonclient 'must allege and prove that the intent of the client to benefit the nonclient was a direct purpose of the transaction or relationship.'"[130] Whether liability exists depends on "whether the intent to benefit actually existed, not whether there could have been an intent to benefit the third party."[131]

The proper test

Stewart believes that either the multi-factor balancing test or the third-party intended beneficiary test, represents an appropriate or proper test for this Court to use in determining whether a lawyer owes a particular third party, non-client a duty.

VII. UNDER EITHER OF THE COMMON-LAW TESTS, IN THE ABSENCE OF PRIVITY, BRANHAM OWED GARY RYAN STEWART DUTIES WHEN BRANHAM SETTLED THE TORT CLAIMS AND WHEN BRANHAM ACTED CONCERNING THE GUARDIANSHIP OVER GARY RYAN STEWART

Even in the absence of privity, a lawyer representing a "next friend" of a minor or incompetent owes duties to the minor or incompetent. Even in the absence of privity, a lawyer representing a guardian of a minor, incompetent, or infirm person, owes duties to the minor, incompetent, or infirm person.

If this Court finds that Gary Ryan Stewart had no relationship with Branham relating to the settlement of Gary Ryan Stewart's tort claims and the subsequent guardianship and this Court elects to "relax the privity requirement, allowing legal malpractice actions to be

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[129] *Flaherty*, 303 Md. at 124, 492 A.2d at 622.

[130] *Ferguson v. Cramer*, 349 Md. 760, 766, 709 A.2d 1279, 1282 (1998) (*citing to Flaherty*, 303 Md. at 130-131, 492 A.2d at 625).

[131] *Ferguson*, 349 Md. at 766, 709 A.2d at 1282 (*citing to Flaherty*, 303 Md. at 130-131, 492 A.2d at 625).

brought by persons other than the clients of attorneys in some factual situations," Gary Ryan Stewart qualifies under either of the prevailing theories as a non-client to whom Branham owed duties.

A. A lawyer representing a guardian of a minor, incompetent, or infirm person, owes duties to the minor, incompetent, or infirm person.

1. Under the six-criteria balancing test, a lawyer representing a guardian of a minor, incompetent, or infirm person, owes duties to the minor, incompetent, or infirm person.

Stewart contends that Branham, representing Backus as Gary Ryan Stewart's guardian, owed duties to Gary Ryan Stewart because Gary Ryan Stewart enjoyed a direct lawyer-client relationship with Branham. Additionally, Stewart contends that when Branham represented Backus, as Gary Ryan Stewart's guardian, Gary Ryan Stewart stood in privity with Branham.

But, if this Court disagrees with both of those contentions, Stewart contends that under the six-criteria balancing test,[132] Branham, representing Backus as Gary Ryan Stewart's guardian, owed duties to Gary Ryan Stewart.

The extent to which the settlement of Gary Ryan Stewart's tort claims was intended to affect Gary Ryan Stewart

Gary Ryan Stewart's tort claims belonged to Gary Ryan Stewart. Backus and Branham prosecuted the tort claims to recover damages Gary Ryan Stewart suffered. They did so for Gary Ryan Stewart's benefit and protection.[133] The proceeds of the settlement of or

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[132] *See, generally, In re Guardianship of Karan,* 110 Wash.App. 76, 38 P.3d 396 (2002) (applying multi-factor balancing test discussed in *Trask v. Butler,* 123 Wash.2d 835, 840, 872 P.2d 1080 (1994) – the Supreme Court of Washington originally adopted a version of the multi-factor balancing test in *Bohn v. Cody,* 119 Wash.2d 357, 832 P.2d 71 (1992)).

[133] K.R.S. § 387.125(6) ("A guardian may institute...actions, claims, or proceedings in any jurisdiction for the protection of the ward's estate. Subject to the approval of the court

of a judgment on Gary Ryan Stewart's tort claims belonged to Gary Ryan Stewart. The primary reason for settling Gary Ryan Stewart's tort claims was to benefit Gary Ryan Stewart.

"The primary reason to establish a guardianship is to preserve the ward's property for his or her own use. It is not for the benefit of others."[134] So, Backus and Branham sought a guardianship over Gary Ryan Stewart to preserve Gary Ryan Stewart's property for Gary Ryan Stewart's use. The law never intended the guardianship of Gary Ryan Stewart to benefit anyone other than Gary Ryan Stewart. Thus, the guardianship over Gary Ryan Stewart was exclusively for Gary Ryan Stewart's benefit.

Additionally, as Gary Ryan Stewart's guardian, Backus was merely "to manage [Gary Ryan Stewart's] financial resources."[135] Gary Ryan Stewart, then, enjoyed the right to benefit from those proceeds. At least, the law intended that Gary Ryan Stewart would enjoy the benefit of those proceeds.

Consequently, the settlement of Gary Ryan Stewart's tort claims was intended to

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in which the action, claim, or proceeding has been filed, a guardian may settle or compromise the action, claim, or proceeding on behalf of the ward...Upon approval of a settlement or compromise, a guardian may execute a release on behalf of the ward. A guardian shall receive any proceeds from a settlement for management in accordance with the provisions of this statute.).

[134] *Guardianship of Karan*, 110 Wash.App. at 85, 38 P.3d at 400 (*citing In re Guardianship of Michelson,* 8 Wash.2d 327, 335, 111 P.2d 1011 (1941)).

Accord, *Schober's Estate*, 303 Minn. at 229, 226 N.W.2d at 897 ("It is clear from our statutes that the basic purpose of guardianship and the duties of a guardian are to protect the ward and his assets."); *Continental Ins. Companies*, 252 Ark. at 987, 482 S.W.2d at 106 ("The primary purpose in a guardianship for a minor's estate is to preserve and protect the assets of his estate during his minority..."); and *Kany*, 85 So.2d at 845 ("The very purpose of the law, Chapter 744, Florida Statutes 1953, and F.S.A., under which the appellee, Berrien Becks, was appointed guardian of the property of Louise Hewitt Porter is to preserve the property of the ward.").

[135] K.R.S. § 387.010(3).

affect Gary Ryan Stewart, directly and substantially. And the guardianship over Gary Ryan Stewart was intended to affect Gary Ryan Stewart and his assets, directly and substantially.

The foreseeability of harm to Gary Ryan Stewart

"In deciding whether harm was foreseeable, Kentucky courts look to the general foreseeability of harm, not to whether the particular, precise form of injury could be foreseen."[136] Foreseeability of harm exists whenever "injury of some kind to some person within the natural range of effect of the alleged negligent act could have been foreseen."[137]

A reasonably competent lawyer should have foreseen that if the lawyer failed to assure that Backus took steps to discharge Backus's obligations "to preserve [Gary Ryan Stewart's] property for his...use" when dealing with the proceeds of Gary Ryan Stewart's tort claims, Backus could dissipate Gary Ryan Stewart's funds.[138] Thus, Branham recognized, or should have recognized, that Gary Ryan Stewart would suffer harm, injury, or damage if Branham breached the duty of care when settling Gary Ryan Stewart's tort claims and when establishing the guardianship over Gary Ryan Stewart.

The degree of certainty that Gary Ryan Stewart suffered injury

Except for the annuity that Branham distributed to Gary Ryan Stewart as part of the

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[136] *T & M Jewelry, Inc. v. Hicks, ex rel. Hicks*, 189 S.W.3d 526, 531 (Ky. 2006).

[137] *T & M Jewelry*, 189 S.W.3d at 531.

[138] *See Leyba v. Whitley*, 120 N.M. 768, 907 P.2d 172 (1995) (claim by conservator of minor child against lawyer who settled wrongful-death claim because personal representative dissipated proceeds of settlement of wrongful-death claim intended to benefit minor child); *Estate of Treadwell* ex rel. *Neil v. Wright*, 115 Wash.App. 238, 61 P.3d 1214 (2003) (claim by guardianship estate of incapacitated adult against lawyer who established guardianship because guardian depleted guardianship funds); and *Guardianship of Karan*, 110 Wash.App. at 76, 38 P.3d at 397 (guardian of a minor allowed to assert a claim against lawyer whom child's mother hired to secure guardianship order for child's estate because child's mother dissipated child's funds).

settlement, Backus dissipated all of the proceeds of the settlement of Gary Ryan Stewart's tort claims. Moreover, Gary Ryan Stewart has little likelihood of ever recovering from Backus, who is virtually judgment proof. Consequently, Gary Ryan Stewart has suffered injury or damage.[139]

The closeness of the connection between Branham's conduct and Gary Ryan Stewart's damages

Branham disputes that any injury or damages that Gary Ryan Stewart suffered bear any close connection to Branham's conduct. Stewart feels confident that at trial, she will establish that Branham's conduct in handling the guardianship over Gary Ryan Stewart, represents a proximate, as opposed to a remote, cause of the injuries and damages Gary Ryan Stewart suffered. Branham failed to take steps to protect Gary Ryan Stewart after Backus failed to file the inventory that Kentucky law required her to file. Branham failed to take steps to protect Gary Ryan Stewart after Backus failed to file the accounting of her stewardship that Kentucky law required her to file. Consequently, Branham "knew or should have known that the guardian was acting adversely to his ward's interests..."[140] In these circumstances, "the possibility of frustrating the whole purpose of the guardianship became foreseeable as did the possibility of injury to [Gary Ryan Stewart]."[141] And in these circumstances, Branham's breaches of the duty of care bear a direct closeness to the injury or damage that Gary Ryan Stewart suffered.

The moral blame attached to Branham's conduct/whether the recognition of

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[139] *See Guardianship of Karan*, 110 Wash.App. at 85, 38 P.3d at 401 ("It is not disputed that Amanda suffered harm. She lost three-quarters of her estate. And she had no meaningful recourse against the judgment-proof guardian.").

[140] *Fickett*, 27 Ariz.App. at 795, 558 P.2d at 990.

[141] *Fickett*, 27 Ariz.App. at 795, 558 P.2d at 990.

liability to Gary Ryan Stewart will impose an undue burden on the legal profession

"This factor is used to determine whether the defendant is morally culpable before imposing liability. Moral blame generally results from situations in which the defendant had direct control over establishing and ensuring proper procedures to avoid the harm caused or where the defendant is the party best in the position to prevent the injury."[142]

Stewart concedes that Branham bears no moral blame for Backus's dissipation of Gary Ryan Stewart's funds. But, Branham stood in a position to prevent harm, injury, or damage to Gary Ryan Stewart. So, Branham does bear moral blame for failing to take reasonable steps he easily could have taken with little or no cost or burden, steps that, if taken, could have prevented or minimized the injury or damage to Gary Ryan Stewart.

This Court will impose no undue burden on the legal profession in Kentucky if it recognizes Branham's liability to Gary Ryan Stewart for failing to exercise due care in protecting Gary Ryan Stewart for financial harm by Backus, as guardian. Stewart acknowledges that a lawyer faces the potential of conflicts-of-interest when the lawyer simultaneously represents clients with opposing interests. But, in the case of a lawyer representing a guardian and the guardian's ward, because the guardian statutorily owes legal and fiduciary duties to the ward, particularly concerning the management and use of the ward's assets and funds, no conflict and no potential for conflict exists. Though the guardian is a party to the lawyer-client relationship, the guardian is merely a nominal party to the relationship. Because "[t]he primary reason to establish a guardianship is to preserve the

[142] *Larsen v. Banner Health System,* 2003 WY 167, ¶ 30, 81 P.3d 196, 205 (Wyo.2003).

ward's property for his or her own use,"[143] and because the law in no way intends for guardianship to benefit any other person, including the guardian, the lawyer's obligation is to protect the interests of the ward. This is so because the legitimate interests of the guardian are inseparable from those of the ward.[144]

In addition, Kentucky lawyers already owe their clients legal duties of care that include care, skill, knowledge, and diligence.[145] And Kentucky lawyers already owe their clients fiduciary duties of loyalty, confidentiality, and good faith.[146] If this Court recognizes

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[143] *Schober's Estate*, 303 Minn. at 229, 226 N.W.2d at 897 ("It is clear from our statutes that the basic purpose of guardianship and the duties of a guardian are to protect the ward and his assets."); *Continental Ins. Companies*, 252 Ark. at 987, 482 S.W.2d at 106 ("The primary purpose in a guardianship for a minor's estate is to preserve and protect the assets of his estate during his minority..."); and *Kany*, 85 So.2d at 845 ("The very purpose of the law, Chapter 744, Florida Statutes 1953, and F.S.A., under which the appellee, Berrien Becks, was appointed guardian of the property of Louise Hewitt Porter is to preserve the property of the ward.").

[144] *See Guardianship of Karan*, 110 Wash.App. at 86, 38 P.3d at 401 ("A potential conflict of interest arises when the lawyer simultaneously represents clients with opposing interests...[T]he legitimate interests of the guardian here are inseparable from those of the ward.").

[145] *Humboldt Bldg. Ass'n Co. v. Ducker's Executrix*, 23 Ky.L.Rptr. 1073, —, 111 Ky. 759, —, 64 S.W. 671, 672-673 (1901) ("[T]he attorney is liable for the want of such skill, care, and diligence as men of the legal profession commonly possess and exercise in such matters of professional employment...When one seeks and obtains admission to that profession dealing with so many important and involved affairs of men, and holds out his services to be engaged by those standing in need of such, he engages that he possesses to an ordinary extent the technical knowledge commonly possessed by those in the profession, and that he will give to the matters submitted to him such care and attention as is ordinarily given similar affairs by men of this profession."); and *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky.App. 1978) ("As stated by the author in Wade, The Attorney's Liability for Negligence, 12 Vand.L.Rev. 755, 762 (1959), the standard of care is generally composed of two elements care and skill. The first has to do with care and diligence which the attorney must exercise. The second is concerned with the minimum degree of skill and knowledge which the attorney must display.").

[146] *Daugherty*, 581 S.W.2d at 16 ("Since the relationship of attorney-client is one fiduciary in nature, the attorney has the duty to exercise in all his relationships with this client-principal the most scrupulous honor, good faith and fidelity to his client's interest.).

Branham's liability to Gary Ryan Stewart for breaches of the duty of care in handling the guardianship over Gary Ryan Stewart, Kentucky lawyers will owe those in Gary Ryan Stewart's position duties no greater, no broader, and no more onerous than the duties Kentucky lawyers already owe clients having a direct relationship with the lawyer. If this Court recognizes Branham's liability to Gary Ryan Stewart for breaches of the duty of care in handling the guardianship over Gary Ryan Stewart, Kentucky lawyers will incur no substantial costs in discharging the duties they will owe those in Gary Ryan Stewart's position. And if this Court recognizes Branham's liability to Gary Ryan Stewart for breaches of a duty of care in handling the guardianship over Gary Ryan Stewart, Kentucky lawyers will face risks no more substantial than they presently face when dealing with and for clients having a direct relationship with the lawyer.

The policy of preventing future harm

Minors and incompetents who need a guardianship are particularly vulnerable. Even with a guardianship, guardians can take advantage of a minor or an incompetent. The courts, therefore, undertake an enhanced role in protecting wards of guardianship.[147] "Policy considerations favor finding a duty in the interests of preventing future harm."[148]

2. Under the third-party beneficiary theory, a lawyer representing a guardian of a minor, incompetent, or infirm person, owes duties to the minor, incompetent, or infirm person.

Gary Ryan Stewart qualifies as an intended, creditor beneficiary of the contract

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[147] *See Guardianship of Karan*, 110 Wash.App. at 85, 38 P.3d at 401 ("In matters involving the welfare of minors and other legally incompetent individuals, the courts assume a particular duty to protect the interests of the ward. *Durham v. Moe,* 80 Wash.App. 88, 91, 906 P.2d 986 (1995).").

[148] *Guardianship of Karan*, 110 Wash.App. at 85, 38 P.3d at 401 (*citing In re Guardianship of Ivarsson,* 60 Wash.2d 733, 738, 375 P.2d 509 (1962)).

Backus, as Gary Ryan Stewart's guardian, made with Branham. "The primary reason to establish a guardianship is to preserve the ward's property for his or her own use. It is not for the benefit of others."[149] So, when Backus, acting as Gary Ryan Stewart's guardian, employed Branham to settle Gary Ryan Stewart's tort claims, Backus acted to discharge her duties to protect Gary Ryan Stewart and his assets. Therefore, when Backus employed Branham to settle Gary Ryan Stewart's tort claims, she made the contract for Gary Ryan Stewart's benefit.

Additionally, Backus contracted to pay Branham for his services using Gary Ryan Stewart's assets or funds. Consequently, Gary Ryan Stewart was a party to the consideration that Branham received for his services.

When Backus employed Branham to establish a guardianship over Gary Ryan Stewart, Backus acted to advance Gary Ryan Stewart's interests. Unless Backus secured appointment as Gary Ryan Stewart's guardian, Backus lacked the power and authority to settle Gary Ryan Stewart's tort claims.[150] When Backus employed Branham to establish a guardianship over Gary Ryan Stewart, Backus also acted to discharge her duties to protect Gary Ryan Stewart and his assets. Therefore, when Backus employed Branham to establish a

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[149] *Schober's Estate*, 303 Minn. at 229, 226 N.W.2d at 897 ("It is clear from our statutes that the basic purpose of guardianship and the duties of a guardian are to protect the ward and his assets."); *Continental Ins. Companies*, 252 Ark. at 987, 482 S.W.2d at 106 ("The primary purpose in a guardianship for a minor's estate is to preserve and protect the assets of his estate during his minority..."); and *Kany*, 85 So.2d at 845 ("The very purpose of the law, Chapter 744, Florida Statutes 1953, and F.S.A., under which the appellee, Berrien Becks, was appointed guardian of the property of Louise Hewitt Porter is to preserve the property of the ward.").

[150] *Ambrose*, 197 Ky. at —, 247 S.W. at 954 ("The office of the next friend of an infant is confined to the bringing and prosecution of an action in the name of the infant for the benefit of the infant, and ...his only duty and the only thing he is authorized to do is to prosecute in the name of the infant, and for the infant's benefit, his cause of action.").

guardianship over Gary Ryan Stewart, she made the contract for Gary Ryan Stewart's benefit.

Additionally, Gary Ryan Stewart qualifies as an intended, creditor beneficiary of the contract Backus, as Gary Ryan Stewart's guardian, made with Branham because Gary Ryan Stewart was "a party to the consideration" Branham was to receive under the contract to establish the guardianship. Gary Ryan Stewart paid the fees Branham charged for prosecuting Gary Ryan Stewart's tort claims.

VIII. The Existence Of Kentucky's Statutory Scheme In No Way Affects Whether Lawyers Who Violate Duties To Those Wards, Should Bear Liability For Violating The Duties The Lawyer Owed In The Circumstances

Branham essentially argues that as a matter of policy, because Kentucky has a comprehensive statutory scheme governing guardianships, wards of a guardianship have no need for a tort remedy against lawyers who represent guardians. Long established law contradicts this argument.

Duty can exist in the absence of a comprehensive statutory scheme.[151] But, duty can also exist when a comprehensive statutory scheme governs an activity or pursuit.[152] In fact, statutory schemes sometimes define the duty of care.

In cases asserted against lawyers who represented guardians, the courts in the State of

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[151] *Greyhound Corp. v. White*, 323 S.W.2d 578, 582 (1959) ("[T]here is a common law duty upon everyone to exercise ordinary care not to injure other people.").

[152] *E.g., Southern Mining Co. v. Saylor*, 264 Ky. 655, —, 95 S.W.2d 236, 241 (1936) ("The rule is that a statute creates a liability per se for negligence only when it imposes the duty of care for the special benefit of a particular group or class of persons, not when it merely defines a degree of care to be exercised under special circumstances in the interest of the general public. Schimdt v. Merchants Despatch Transp. Co., 270 N. Y. 287, 200 N.E. 824. And whether the duty to exercise ordinary care not to injure another is imposed by the common law or a statute, failure to perform the duty constitutes "negligence," and renders the party liable for injuries resulting therefrom. Crawford v. Atlantic Coast Line R. Co. (S. C.) 184 S.E. 569.").

Washington have rejected arguments similar to Branham's argument. In both *Treadwell*, 115 Wash.App. at 238, 61 P.3d at 1214, and *Guardianship of Karan*, 110 Wash.App. at, 38 P.3d at 396, the Washington court recognized that Washington provides a comprehensive statutory scheme to protect wards of guardians.[153] Yet, in each of those cases, the Washington court allowed the ward to sue the lawyer who represented the guardian. Implicitly, then, the Washington court rejected the argument Branham makes in this case, or some variation on the argument. This Court should do likewise. This Court should reject Branham's policy argument.

IX. NO LEGITIMATE REASON JUSTIFIES MAKING THIS COURT'S DECISION IN THIS MATTER PROSPECTIVE

Branham contends "that in the event this Court chooses to extend for the first time the attorney-client relationship, that (sic) the duty not be applied retroactively to this case."[154] Branham believes that "[t]his is a case of first impression and [consequently] it is not equitable to hold Branham liable for the breach of a duty that did not exist at the time in question."[155]

Branham's belief and his suggestion about prospective application of the rule both run counter to settled principles of law governing the retroactive effect of a judicial decision. "The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student."[156] "The general rule that judicial decisions

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153 *REVISED CODE OF WASHINGTON Chapters 11.88 and 11.92.*

154 *Appellant's Brief*, p. 10.

155 *Appellant's Brief*, p. 10.

156 *United States v. Security Industrial Bank*, 459 U.S. 70, 79, 103 S.Ct. 407, 413, 74 L.Ed.2d 235 (1989).

are given retroactive effect is basic in our legal tradition."[157] This principle "stemmed from the idea adhered to by Blackstone that judges do not create, but instead find the law."[158] Consequently, courts apply judicial decision retroactively because "[a] decision interpreting the law...does no more than declare what the law had always been."[159]

Yet, this Court possesses the inherent power to make its decision in this case retroactive or prospective.[160] This Court "can make a decision applicable only to future fact situations, or to future fact situations and to the instant case, or to all situations, past or future."[161]

"The chief reason for denial of retrospective application has been to preserve property rights acquired in reliance upon the law that is being changed by the new decision."[162] This Court also applies a decision prospectively "to prevent confusion and expense arising from the unsettling of matters deemed to have been settled under the old law."[163] And, this Court also applies a decision prospectively "to avoid injustice or hardship."[164] "This is true where property rights are involved and parties have acted in reliance on the law as it existed, and a

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[157] *Newman v. Emerson Radio Corp.*, 48 Cal.3d 973, 978, 772 P.2d 1059, 1062, 258 Cal.Rptr. 592, 595 (1989).

[158] *Newman*, 48 Cal.3d at 979, 772 P.2d at 1062, 258 Cal.Rptr. at 596 (internal quotation marks omitted).

[159] *Newman*, 48 Cal.3d at 979, 772 P.2d at 1062, 258 Cal.Rptr. at 596.

[160] *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991) ("It is within the inherent power of a Court to give a decision prospective or retrospective application. ").

[161] *Lasher v. Kentucky ex rel. Matthews*, 418 S.W.2d 416, 419 (Ky. 1967).

[162] *Lasher*, 418 S.W.2d at 419.

[163] *Lasher*, 418 S.W.2d at 419.

[164] *Hagan*, 807 S.W.2d at 490.

contrary result would be unconscionable."[165]

In the area of torts, though, courts usually apply a decision retroactively.[166] So, "in cases of civil tort liability in which new causes of action are recognized, the new theory of liability is applied to the parties in the case."[167]

This Court's decision will in no way change any property rights that Branham or anyone else acquired in reliance upon any previously announced decision or legal principle. If this Court finds that Branham owed Gary Ryan Stewart duty in the absence of privity, Branham will suffer no injustice or hardship. Rather, because this Court will merely be "declar[ing] what the law had always been,"[168] Branham will only face liability he has always faced, based on the law as this Court declares it.

In contrast, if this Court were to grant prospective affect to its decision in this case, this Court would essentially deny Gary Ryan Stewart justice. This Court would deny Gary Ryan Stewart relief against Branham simply because Gary Ryan Stewart presented the courts of Kentucky with a question about a lawyer's tort duty that the Kentucky courts had previously never answered.[169] Even those who present courts with issues of first impression

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[165] *Hagan*, 807 S.W.2d at 490.

[166] *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616, 624 fn. 4 (Minn. 1984) ("The general rule is to give retroactive effect to judicial decisions in the area of substantive tort law. ").

[167] *Clohessy v. Bachelor*, 237 Conn. 31, 57, 675 A.2d 852, 865 (Conn. 1996).

[168] *Newman*, 48 Cal.3d at 979, 772 P.2d at 1062, 258 Cal.Rptr. at 596.

[169] *See George v. Jordan Marsh Co.*, 359 Mass. 244, 249, 268 N.E.2d 915, 918, 46 A.L.R.3d 762 (1979) ("The defendants argue that there is no authority under existing Massachusetts law for the proposition that the intentional infliction of mental or emotional distress provides a separate and distinct basis of tort liability.' That is true only because the precise question has never been presented to this court for decision...No litigant is automatically denied relief solely because he presents a question on which there is no Massachusetts judicial precedent.").

should enjoy a remedy. After all, when a court answers a question of first impression, such as Branham's duty in the absence of privity, the court "does no more than declare what the law had always been."[170] So, this Court should reward Gary Ryan Stewart for his industry and for Stewart's industry in securing a declaration of law on an issue of tremendous importance to the Bar and the people of Kentucky.[171] This Court should follow "[t]he general rule that judicial decisions are given retroactive effect...."[172] and this Court should apply the decision in this case to Branham.[173]

CONCLUSION

Under the law, Stewart can establish at trial (1) that Branham stood in a lawyer-client or other relationship with Gary Ryan Stewart when Branham prosecuted Gary Ryan Stewart's tort claims in the name of Backus, as Gary Ryan Stewart's "next friend," and (2) that Branham breached duties he owed Gary Ryan Stewart in that relationship.

Also, under the law, Stewart can establish at trial (1) that Branham stood in a lawyer-client or other relationship with Gary Ryan Stewart concerning settlement of Gary Ryan Stewart's tort claims and the handling of the guardianship over Gary Ryan Stewart and (2) that Branham breached duties he owed Gary Ryan Stewart in that relationship.

Because at trial, Stewart can establish a lawyer-client or other relationship with

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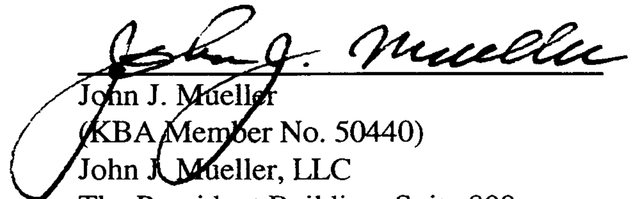
[170] *Newman*, 48 Cal.3d at 979, 772 P.2d at 1062, 258 Cal.Rptr. at 596.

[171] *Cf. Lasher*, 418 S.W.2d at 419 ("As pointed out in Haney [v. City of Lexington, Ky., 386 S.W.2d 738], to make a law-changing decision applicable to the instant case is in effect to reward the appellant for his industry in attacking the soundness of the old law.).

[172] *Newman v. Emerson Radio Corp.*, 48 Cal.3d 973, 978, 772 P.2d 1059, 1062, 258 Cal.Rptr. 592, 595 (1989).

[173] *See Clohessy*, 237 Conn. at 57, 675 A.2d at 865.

Branham giving rise to legal and fiduciary duties in favor of Gary Ryan Stewart, Stewart asks this Court to affirm the Court of Appeals of Kentucky, which reversed the entry by Judge Coleman of summary judgment in favor of Branham. Stewart asks this Court then to remand Civil Action No. 04-CI-01190 to Pike Circuit Court for further proceedings, including trial by a jury of the factual and legal issues, consistent with the Court's opinion.



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