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## Claim Seeking Recovery of Excessive Estate Taxes Did Not Survive Death of Client

April 1, 2013

[\*Jeanes v. Bank of America\*, 2013 WL 856385 \(Kan. 2013\)](#)

### Brief Summary

Because the injury resulting from alleged legal malpractice — *i.e.*, excessive estate taxes — did not arise until after the testator's death, the legal malpractice cause of action accrued when the testator died. Because the injury came about only after death, the legal malpractice cause of action did not survive to the estate's administrator. Excessive estate taxes occurring only after the death were not an escalation of fees paid for a defective estate plan.

### Summary

The testator hired the attorney to create trust documents and a will, including all later amendments. When the testator died, her gross estate totalled approximately \$39,500,000, and her resulting estate and inheritance taxes were almost \$22 million. The administrator of the testator's estate sued several parties, including the attorney, for negligence and breach of fiduciary duty.

On appeal from the attorney's successful summary judgment motion, the Kansas Supreme Court determined that the administrator's malpractice claim on behalf of the estate for negligent estate planning did not survive the testator's death to provide a cause of action for the administrator. The Court determined that, in general, a cause of action accrues as soon as the right to maintain a legal action arises. However, Kansas case law provided, and the Court agreed, that a legal malpractice cause of action arises when the plaintiff suffers "substantial injury."

The Court rejected the administrator's argument that the estate tax damages were an escalation of harm caused by the attorney during the testator's life. Specifically relying on *Rutter v. Jones, Blechman, Woltz & Kelly*, 264 Va. 310, 568 S.E.2d 693 (2002), the Court found that the estate tax liabilities did not occur until after the testator's death. The Court declined to adopt the reasoning of the Texas Supreme Court in *Belt v. Oppenheimer Blend Harrison & Tate*, 192 S.W.3d 780 (Tex. 2006), where that Court held that legal malpractice claims accrue when "facts have come into existence that authorize a claimant to seek a judicial remedy." Rather, the Kansas Supreme Court again followed the damage rule consistently applied by Kansas courts before it.

Because the administrator's cause of action did not accrue during the testator's lifetime, it could not survive her death. A cause of action does not survive in favor of a personal representative of a



decedent unless it accrued in favor of the decedent in his lifetime. The cause of action thus did not qualify as a survival action under the Kansas statutes, and required dismissal.

### **Significance of Opinion**

This decision is legally significant because it provides additional guidance on accrual. More importantly, the decision will serve as authority relating to a fairly common trusts and estates legal malpractice claim, and provides the basis for a defense in those actions.

For further information, please contact [Terrence P. McAvoy](#) or [Noah D. Fiedler](#).

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