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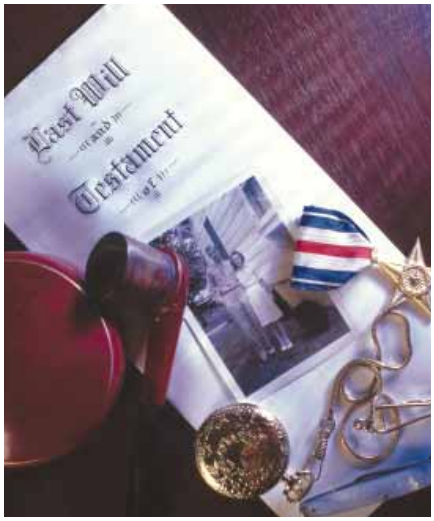

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A New Weapon for Objectants?

Probate Contests and Waiver of the Attorney-Client Privilege

Few legal protections are more widely recognized and relied upon than the attorney-client privilege. It is "the oldest among common-law evidentiary privileges [and] fosters the open dialogue between lawyer and client that is deemed essential to effective representation."[1] However, the Surrogate's Court practitioner should beware: recent decisions reveal not only that a decedent's privilege survives his death and may be asserted or waived by his executor,[2] but also that an objectant to probate may be able to waive the decedent's privilege as well.

A probate proceeding, whether contested or not, is a truth-finding process whereby the court determines whether the proffered will is a valid testamentary instrument.[3] SCPA 1408(1) obligates the Surrogate's Court in every probate proceeding to "inquire particularly into all the facts and [to] be satisfied with the genuineness of the will and the validity of its execution."[4]

This being the case, in the discovery stage of a contested probate proceeding, "CPLR Article 31 and SCPA 1404 are interpreted liberally to provide for disclosure," the objective being "to reveal, not conceal, facts regarding the validity of a will. Surprise at trial is to be avoided, and evidence that is material and necessary will be subject to disclosure under the liberal interpretation given the disclosure statutes."[5]

Such liberality is evident in one court's recent discussion of the scope of document discovery in a contested probate proceeding:

> As to document production in contested probate proceedings, among those items discoverable are documents which contain information as to: (i) a proponent's knowledge of decedent's assets prior to the will execution; (ii) the value of decedent's estate; (iii) whether decedent divested himself of assets in the years prior to his death; and (iv) any financial records of decedent or a proponent which might reveal information of this nature. Moreover, all transactions, financial and otherwise, between a decedent and a party alleged to have exerted domination over him are materials subject to inquiry where undue influence has been charged.[6]

However, such liberality can be tempered by the attorney-client privilege, which is frequently asserted in probate contests by a decedent's representative and which, according to CPLR 4503(a)(1), applies "[u]nless the client waives [it]."[7]

The decedent's best interests, and thus those of the decedent's estate, guide the application of the privilege to estate matters.[8] In discerning the best interests of the estate, the Legislature and the courts recognize "the notion that the client's wish for confidence comes to an end with his death, save for matters that will disgrace his memory."[9] "Indeed, [a] decedent would expect the confidentiality of [privileged] communications to be lifted *in the interests of resolving disputes over her Will and having the truth determined*."[10]

The Legislature has given effect to this expectation by enacting CPLR 4503(b), which states:

> Wills. In any action involving the probate, validity or construction of a will, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.

This exception to the attorney-client privilege, as amended through the years, is part of an "apparent legislative trend toward the freer admissibility of evidence ordinarily considered to be confidential."[11]

The courts, too, have given effect to this expectation, particularly through recent decisions regarding waiver of the privilege. Prior to these decisions, some authority held in dicta that the ability to waive the attorney-client privilege died with the decedent, thus depriving a personal representative of

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the right to waive on the decedent's behalf.[12] However, in *In re Colby*,[13] a 2001 decision, Surrogate Roth determined that an executrix could waive the decedent's attorney-client privilege in a fraud action brought on the decedent's behalf because "the purpose of the privilege, namely, to protect the client, . . . supports such conclusion."[14] Surrogate Roth explained, "Since the client could have waived the privilege to protect himself or to promote his interest, it is reasonable to conclude that, after his death, his personal representative stands in his shoes for the same purposes."[15]

The following year, in *Mayorga v. Tate*,[16] a legal malpractice case brought on a decedent's behalf, the Second Department also considered an executor's ability to waive his decedent's privilege. Tracing the privilege's historical development, the court noted that "the common law has always provided that an executor may, in the interest of the estate, waive the attorney-client privilege of the deceased client"[17] and agreed with Surrogate Roth's conclusion that "there is no appellate authority in New York to support the proposition that the New York Legislature has enacted any statute that requires a departure from the common-law rule in this respect."[18] It found that the cases that do support such a departure "unquestionably embrace a rule which is contrary to the common law, . . . and thus contradict the . . . Court of Appeals decision in *Spectrum Sys. Intl. Corp. v. Chemical Bank* in which it was expressly held that CPLR 4503 must be regarded as a mere codification of the common law."[19] In sum, the Second Department held that a decedent's personal representative has the right to waive on the decedent's behalf, explaining that "it makes no sense to prohibit an executor from waiving the attorney-client privilege of his or her decedent, where such prohibition operates to the detriment of decedent's estate."[20]

Recently, two surrogate's courts have adopted the views expressed in *Mayorga* and *In re Colby* by recognizing that an objectant had the right to waive the decedent's attorney-client privilege in a probate proceeding when it was in the best interests of the estate. One of these cases, *In re Bronner*,[21] involved a probate proceeding in which the objectant claimed, over the proponent's denial, that he had an interest in certain personal property of the decedent. The proponent claimed sole title to the subject asset.

The objectant moved to compel disclosure by a certain non-party witness, to wit, an attorney whom the decedent merely consulted about her testamentary plan shortly before she ultimately retained a different attorney to draft her will. Apparently, the decedent told the first attorney that she intended to give the objectant an interest in the property at issue, but told the second attorney, who actually drafted her will, the opposite. The proponent argued that the communications between the decedent and the first attorney were privileged and could not be discovered.

In deciding the issue, the Nassau County Surrogate's Court initially found that the communications in question were indeed privileged and that they did not fall under the narrow CPLR 4503(b) exclusion because the attorney whom the decedent first consulted did not actually prepare the proffered will. The court then explained that neither the decedent nor her preliminary-executrix had waived the privilege.[22]

Nevertheless, the court went on to hold that

> the objectant may waive the attorney-client privilege on behalf of the decedent in the interests of the estate in the truth-finding process. Contrary to the proponent's assertion, it would appear to be in the best interests of the estate that the entire substance of the [consultation with the first attorney] be divulged, to be evaluated by the trier of the fact in ascertaining the decedent's true intent, particularly since the decedent gave conflicting statements as to her wishes within a relatively short period of time.[23]

In *In re MacLeman*,[24] another probate proceeding, the Westchester County Surrogate's Court considered whether an objectant could compel the decedent's attorney to disclose documents concerning communications the latter had with the decedent. The proponent argued that they were protected by the attorney-client privilege. The court allowed the disclosure, stating:

> To the extent that the [objectant] seeks the production of documents related to the "preparation, execution or revocation" of the propounded instrument, a statutory exception to the attorney-client privilege exists in this will contest (*see* CPLR 4503[b]). *To the extent that the [objectant] seeks production of documents which relate to the valuation of decedent's assets, [the] objectant in the instant will contest[] is entitled to waive on decedent's behalf any attorney-client privilege applicable to the content of those documents*.[25]

In support of its holding, the court cites *Bronner* and *Mayorga*.

While the *Bronner* and *MacLeman* courts might have been among the first to explicitly allow an objectant to waive a decedent's attorney-client privilege in a probate proceeding, such decisions are not based on novel logic. To the contrary, they are based on precisely the same logic on which the common law rule allowing an executor to waive the decedent's attorney-client privilege is based,[26] to wit, to promote a decedent's best interests, and thus, those of his estate. From this flows the assumption that a person would want his confidences to be overridden in a probate proceeding in order to enable a court to properly discern and effectuate his true intent with regard to the disposition of his property after death.[27] The values underlying such logic and assumption – and of every probate proceeding – are the freedom of testation and the importance of carrying out the testator's intent. The holdings of *Bronner* and *MacLeman* are consistent with prior case law in that they are motivated by a pursuit of the truth about the testator's intentions and the instrument alleged to effectuate such intentions.[28]

Moreover, although the *Bronner* and *MacLeman* decisions contain no explicit reference to the well-settled "at issue" waiver doctrine, one could argue that they are nothing more than applications of it to probate proceedings. Under such doctrine, an "at issue" waiver may be found, *inter alia*, "where . . . defense and application of the privilege would deprive the adversary of vital information."[29] In each of these decisions, it appears that the court found the confidential communications at issue to be vital to the objectant because the court commented on their relevancy to the particular objections to probate and, by implication, to the validity of the propounded will.[30]

In point of fact, the Third Department in *In re Seelig*[31] implicitly recognized the applicability of the "at issue" waiver doctrine to probate proceedings.[32] There, the court considered whether the decedent's attorney-client privilege should be waived because the privileged communications under scrutiny were vital to the objectant's claim of undue influence. Ultimately, the court found no waiver, but only after it determined that such communications were not "vital" to the objectant. It stated, "[W]hile we agree that an invasion of the privilege may be necessary to determine the validity of a claim or defense alleging undue influence, we fail to conclude, upon our review of the privileged documents, that they contain any such vital information."[33]

Apparently, no other appellate division decisions address this point within the context of a contested probate proceeding. However, the law is continually evolving with a view towards more liberal disclosure. That being said, one thing is clear: regardless of whether waivers authorized under the *Bronner* and *MacLeman* decisions are properly based upon the "at issue" waiver doctrine or some other theory, the Surrogate's Court practitioner must appreciate their potential to empower an objectant to pierce the otherwise impenetrable barrier to disclosure created by the decedent's attorney-client privilege. ■

1. *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377, 575 N.Y.S.2d 809 (1991) (internal citations omitted).
2. *See Mayorga v. Tate*, 302 A.D.2d 11, 14–15, 19, 752 N.Y.S.2d 353 (2d Dep't 2002); *In re Colby*, 187 Misc. 2d 695, 698, 723 N.Y.S.2d 631 (Sur. Ct., N.Y. Co. 2001).
3. *See* SCPA 1408; *In re Snider*, NYLJ, Nov. 15, 1995, p. 37 (Sur. Ct., Suffolk Co.) ("The legislature in enacting SCPA 1408(2) has charged the court, in a probate proceeding, whether contested or not, with the responsibility of, inter alia, determining whether the testator at the time of the execution of the purported will was in all respected competent to make a will"); *In re Wharton*, 114 Misc. 2d 1017, 1020, 453 N.Y.S.2d 308 (Sur. Ct., Westchester Co. 1982) ("In the absence of objections, it is the duty of the Surrogate to satisfy himself that the instrument offered for probate was duly executed in conformance with statutory requirements").
4. SCPA 1408(1); *see In re Carter*, 123 Misc. 2d 940, 941, 475 N.Y.S.2d 230 (Sur. Ct., Yates Co. 1984).
5. 8 Warren's Heaton on Surrogate's Court Practice § 112.02(8) (2005).
6. *In re MacLeman*, 9 Misc. 3d 1119(A) at *4, 808 N.Y.S.2d 918 (Sur. Ct., Westchester Co. 2005) (internal citations omitted).
7. CPLR 4503(a)(1).
8. *See, e.g., Mayorga*, 302 A.D.2d at 14 (noting the common law rule that "an executor may, in the interest of the estate, waive the attorney-client privilege of the deceased client"); *Colby*, 187 Misc. 2d at 697–98 (using decedent's interests to determine whether decedent's representative may waive the privilege).
9. *In re Levinsky*, 23 A.D.2d 25, 31, 258 N.Y.S.2d 613 (2d Dep't 1965); *see In re Snider*, NYLJ, Nov. 15, 1995, p. 37 (Sur. Ct., Suffolk Co.) (discussing logic behind CPLR 4503(b)).
10. *In re Bronner*, 7 Misc. 3d 1023(A) at *4, 801 N.Y.S.2d 230 (Sur. Ct., Nassau Co. 2005) (internal citations omitted) (emphasis added); *see In re Snider*, NYLJ, Nov. 15, 1995, p. 37 (Sur. Ct., Suffolk Co.) (discussing "the notion that the decedent would expect the seal of confidentiality to be lifted in the interests of resolving disputes over his will").
11. *Snider*, NYLJ, Nov. 15, 1995, p. 37.
12. *See, e.g., In re Weinberg*, 133 Misc. 2d 950, 952, 509 N.Y.S.2d 240 (Sur. Ct., N.Y. Co. 1986).
13. 187 Misc. 2d 695, 723 N.Y.S.2d 631 (Sur. Ct., N.Y. Co. 2001).
14. *Id.* at 698.
15. *Id.*
16. 302 A.D.2d 11, 752 N.Y.S.2d 353 (2d Dep't 2002).
17. *Id.* at 14.
18. *Id.*
19. *Id.* at 15 (internal citation omitted); *see also Spectrum Sys. Int'l Corp.*, 78 N.Y.2d at 377.
20. *Mayorga*, 302 A.D.2d at 11–12, 18. The Second Department goes on to say: "That an executor . . . may exercise authority over all the interests of the estate left by the [decedent], and yet may not incidentally have the right, in the interest of that estate, to waive the [attorney client] privilege . . . would seem too inconsistent to be maintained under any system of law." *Id.* at 19 (brackets in original) (quoting 8 Wigmore, Evidence § 2329, at 639 (1961)).
21. 7 Misc. 3d 1023(A), 801 N.Y.S.2d 230 (Sur. Ct., Nassau Co. 2005).
22. *Id.* at *3.
23. *Id.* at *4 (emphasis added).
24. 9 Misc. 3d 1119(A), 808 N.Y.S.2d 918 (Sur. Ct., Westchester Co. 2005).
25. *Id.* at *5 (emphasis added).
26. *See, e.g., Mayorga*, 302 A.D.2d at 14 (setting forth provisions of common law).
27. For an excellent discussion of the application of this public policy to a probate proceeding, see *In re Snider*, NYLJ, Nov. 15, 1995, p. 37 (Sur. Ct., Suffolk Co.) (allowing objectant in probate contest to waive the decedent's statutory psychologist-client privilege).
28. *See id.*; *In re Levinsky*, 23 A.D.2d 25, 31, 258 N.Y.S.2d 613 (2d Dep't 1965). Interestingly, the Second Department recently affirmed a decision in a discovery proceeding in which the fiduciary of a decedent's estate was permitted to waive the decedent's privilege because the privileged evidence "constituted the best evidence of the decedent's intent in [disposing of his property]. *Moreover, the decedent would likely have waived the privilege herself because the dispute involved her only heirs*." *In re Bassin*, 28 A.D.3d 549, 550, 813 N.Y.S.2d 200 (2d Dep't 2006) (emphasis added). Clearly, probate and discovery proceedings can be governed by similar policy concerns.
29. *Jakobleff v. Cerrato, Sweeney & Cohn*, 97 A.D.2d 834, 835, 468 N.Y.S.2d 895 (2d Dep't 1983); *see Goetz v. Volpe*, 11 Misc. 3d 632, 812 N.Y.S.2d 294 (Sup. Ct., Nassau Co. 2006) (finding an "at issue" waiver); *Bolton v. Weil, Gotshal & Manges LLP*, 4 Misc. 3d 1029(A), 798 N.Y.S.2d 343 (Sup. Ct., N.Y. Co. 2004) (same). Such waiver may also be found when a client places the subject of a privileged communication in issue. *See, e.g., id.* at *3.
30. *Bronner*, 7 Misc. 3d 1023(A) at *4 ("Contrary to the proponent's assertion, it would appear to be in the best interests of the estate that the entire substance of the [privileged communication with the attorney] be divulged, to be evaluated by the trier of fact in ascertaining the decedent's true intent, particularly since the decedent gave conflicting statements as to her wishes within a relatively short period of time."); *MacLeman*, 9 Misc. 3d at *5 ("To the extent that the [objectant] seeks production of documents which relate to the valuation of assets . . . the objectant in [a] will contest [] is entitled to waive the privilege applicable to the content of those documents").
31. 302 A.D.2d 721, 724, 756 N.Y.S.2d 305 (3d Dep't 2003).
32. Courts have also applied the "at issue" waiver doctrine to discovery and turnover proceedings. For example, in a turnover proceeding brought by an estate fiduciary against a decedent's attorney-in-fact alleged to have improperly transferred decedent's property to himself, the First Department overturned a Surrogate Court's decision denying the respondent's motion to compel production of certain privileged communications. *In re Kislak*, 24 A.D.3d 258, 261, 808 N.Y.S.2d 174 (1st Dep't 2005)). The First Department held that "invasion of the privilege is required to determine the validity of the [petitioner's] claim or defense and application of the privilege would deprive [respondent] of vital information." *Id.*; *see In re Puckett*, 9 Misc. 3d 1116(A), 808 N.Y.S.2d 920 (Sur. Ct., Nassau Co. 2005).
33. *Seelig*, 302 A.D.2d at 724 (citing *New York TRW Title Ins., Inc. v. Wade's Canadian Inn & Cocktail Lounge, Inc.*, 225 A.D.2d 863, 638 N.Y.S.2d 800 (3d Dep't 1996) (discussing the "at issue" waiver doctrine)).