

ESTATE OF	§	IN PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

CARL HENRY BRUNSTING, et al	§
	§
V.	§
	§
ANITA KAY BRUNSTING, et al	§

**Anita Brunsting’s Response to Candace Kunz-Freed’s
Motions to Quash and for Protection**

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant, Anita Brunsting, files her response to Candace Kunz-Freed’s (“Kunz-Freed’s”) motions to quash and for protection, and would respectfully show the Court as follows:

I. Argument & Authorities

Kunz-Freed’s motions to quash and for protection should be denied for the following reasons:

A. Kunz-Freed argues that the attorney-client privilege prevents her deposition. Her argument ignores the differences in scope between the malpractice suit (the “Malpractice Suit”)¹ brought against her by the Estate of Nelva Brunsting (the “Estate”) and this probate/trust litigation case pending before this Court. The two cases are different. The Malpractice Suit was filed by a devisee (Carl Brunsting)(and not the Movant of this motion) alleging in part that Kunz-Freed was negligent. This case involves alleged malfeasance on the part of the co-trustees, Anita and Amy Brunsting, and further concerns the validity and enforceability of an instrument prepared by Kunz-Freed known as the Qualified Beneficiary Designation (“QBD”), as well as Decedent’s capacity *at the time* she executed the QBD.

1. As for the capacity issue, TEX. R. EVID. 503(d)(4) provides an exception to the attorney-

¹ The Malpractice Suit is currently pending in the 164TH District Court, but there is a motion to transfer the Malpractice Suit to this probate court. The underlying allegations in the Malpractice Suit are negligence, negligence per se, fraud, breach of fiduciary duty, etc.

client privilege where the attorney (Kunz-Freed) both prepares the document and acts as a witness of the testator's signature on the document. Texas courts have held that an attorney who is also a witness to a testator's signature on a document may testify as to the testator's capacity to execute that document,² and further held that a notary who notarized the document, such as Kunz-Freed, may also testify as a witness.³ Since Kunz-Freed would testify as to Decedent's capacity to execute the QBD in Kunz-Freed's capacity as the notary who witnessed Decedent's signature, and *not as* Decedent's counsel, such testimony fits squarely within the exception in TEX. R. EVID. 503(d)(4).

2. Kunz-Freed argues that before being permitted to depose Kunz-Freed on matters which may implicate the attorney-client privilege, Defendant must demonstrate that no less-intrusive means of discovery are available to obtain the same information. Assuming *arguendo* that Decedent could not question Kunz-Freed regarding Decedent's capacity without implicating the attorney-client privilege, since Kunz-Freed acted as both counsel *and* notary when Defendant executed the QBD, Kunz-Freed is the *best and only witness* who could testify to Decedent's capacity at that time.
 3. With regard to the validity and enforceability of the QBD, what Kunz-Freed may have said to the Decedent is not the issue. The issue is what is Kunz-Freed's opinion on the validity and enforceability of an instrument that she drafted.
- B. Kunz-Freed also asserts that since Decedent's attorney-client privilege passed to the Estate after her death, and there is no personal representative for the Estate at this time, there is no one to waive the attorney-client privilege so that this deposition may proceed. For reasons outlined above, the requested deposition does not concern any information which would be confidential under the attorney-client privilege, and, therefore, there is no need for any such waiver.
- C. In the alternative, should the Court determine that the deposition of Kunz-Freed would necessarily touch upon information subject to the attorney-client privilege, then the Court should use its authority under TEX. R. CIV. P. 192.4 to limit the scope of Kunz-Freed's deposition.

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² See *Cochran v. Cochran*, 333 S.W.2d 635, 643 (Tex. App.–Houston [1ST Dist.] 1960); citing *In re Estate of Hardwick*, 278 S.W.2d 258, 262 (Tex. App.–Amarillo 1954).

³ See *In re Estate of Kam*, 484 S.W.3d 642, 651 (Tex. App.–El Paso 2016); citing *Brown v. Traylor*, 210 S.W.3d 648, 661-62 (Tex.App.–Houston [1st Dist.] 2006), also citing *In re Estate of Teal*, 135 S.W.3d 87, 91-92 (Tex.App.–Corpus Christi 2002).

II. Prayer

For these reasons, Defendant asks the Court to deny Kunz-Freed's motions to quash and for protection, compel Kunz-Freed to give a deposition on a date certain, and award Defendant such other and further relief, both general or special, legal or equitable, to which Defendant may be entitled.

Respectfully submitted,

//s// Timothy J. Jadloski

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Certificate of Service

I certify that a true and correct copy of the foregoing was served upon the following:

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via eService, email, telefax, or first class mail, on this January 16, 2019.

//s// Timothy J. Jadloski

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