NO. 412,249-**401**

CARL HENRY BRUNSTING, et al	§	IN PROBATE COURT
	§	
VS	§	NUMBER FOUR (4) OF
	§	
ANITA KAY BRUNSTING, et al	§	HARRIS COUNTY, TEXAS

ANITA AND AMY BRUNSTING'S JOINT BRIEF REGARDING TEXAS RULE OF EVIDENCE 503

TO THE HONORABLE JUDGES HORWITZ AND COMSTOCK:

ANITA BRUNSTING ("Anita") and AMY BRUNSTING ("Amy") in their capacities as co-trustees of the Brunsting Family Living Trust, files this Joint Brief Regarding Texas Rule of Evidence 503.

I. INTRODUCTION

During the recent hearings of January 24, 2019 and February 7, 2019, the Court considered (among other topics) a variety of issues pertaining to the deposition of Candace Kunz Freed ("Freed"). Freed (and her law firm, Vacek & Freed) provided legal counsel to Elmer and Nelva Brunsting, the original Founders of the Brunsting Family Living Trust (the "Founders").

There is an assumption, perhaps even an expectation that Freed will be asked to provide testimony about her communications and consultations with The Founders on a variety of matters related to the preparation and execution of the various trust documents, including without limitation: The Brunsting Family Living Trust of October 10, 1996 through and including the Appointment of Successor Trustees of December 21, 2010 (collectively, the "Trust Documents").

It has been suggested that Freed intends to assert the attorney-client privilege during the course of her deposition. As discussed herein, the attorney-client privilege **does not** apply to the issues expected to be addressed with Freed during her deposition.

II. ARGUMENT AND AUTHORITY

A. The attorney-client privilege does not apply.

1. The attorney-client privilege belongs to the client, not the attorney; and it does not survive past the lifetime of the testator.

At least as far back as the 1940's courts have considered whether attorneys can assert the attorney-client privilege after the death of their client. At least in the context of facts affecting execution or content of estate documents, they cannot.

In *Krumb v. Porter*, L.J. Gittinger, the attorney who drafted a Will for his client, asserted the attorney-client privilege when her capacity was challenged post-death. The Court determined that the attorney's testimony was not subject to the attorney-client privilege, stating as follows:

> It is well settled that the privilege relating to communications between attorney and client is one which may be claimed by the client. The privilege is not that of the attorney. 44 Tex.Jur. 1071, § 100. Furthermore, the rule is that:
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> > "In regard to the execution and drafting of wills the knowledge gained by the attorney is privileged during the lifetime of the testator. But the confidence reposed is temporary only and **after the death of the testator, the attorney may testify as to any facts affecting the execution or contents of the will**." McCormick and Ray, Texas Law of Evidence, page 318, § 227.
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> See, also, 44 Tex.Jur. 1067, § 96; *Pierce v. Farrar*, 60 Tex.Civ.App. 12, 126 S.W. 932; *Glover v. Patton*, 165 U.S. 394, 17 S.Ct. 411, 41 L.Ed. 760; *Hudson v. Fuson,* Tex.Civ.App., 15 S.W.2d 166. The latter case also holds that such testimony is not prohibited by Article 3716, Vernon's Ann.Civ.Stats., commonly referred to as the "dead man's statute." We therefore hold that the testimony of Gittinger can properly be considered in determining whether or not Mrs. Boyce had the necessary testamentary capacity at the time of the execution of the will.[1]

2. The attorney-client privilege does not apply when the attorney acts an attesting witness.

The Texas Rules of Evidence provide several exceptions to the attorney-client privilege. If the privilege applies at all, at least one of these exceptions applies in this situation. More

[1] *Krumb v. Porter* 152 S.W.2d 495, 497 (Tex.Civ.App. – San Antonio 1941, writ ref'd) [Emphasis Added].

specifically, TEX. R. EVID. 503(d)(4) states that there is an exception to the rule that attorney-client communications are privileged "if the communication is relevant to an issue concerning an attested document to which ***the lawyer is an attesting witness***" (Emphasis Added). Thus, since Freed is the lawyer who drafted the Estate and Trust documents that are the subject of this case, if Freed is also an attesting witness to signatures executing those documents, then TEX. R. EVID. 503(d)(4) allows Freed to testify about those documents and her communications with Nelva (and Elmer) concerning the drafting and execution of same without implicating the privilege.

In the case of *Cochran v. Cochran*, the First Court of Appeals reiterated the well-established rule that an attorney who witnesses a will is not incompetent to testify regarding the will, ***especially*** if the attorney drafted the will in question.[2] Given that the documents in question in this case, like the will discussed in *Cocharan,* are all testamentary in nature, the rule cited in *Cocharan* clearly applies here as well.

The only remaining question is whether a notary, Freed in this case, can be regarded as a witness when she did not specifically sign as a witness. In the case of *Brown v. Traylor*, the First Court of Appeals stated that a competent witness is one who "... receives no pecuniary benefit under the [document]..." and "... can attest, from direct or circumstantial facts, that the testator in fact executed the document they are signing."[3] The El Paso Court of Appeals followed the rationale of *Brown* in *In Re Estate of Kam*, where it held that, if the notary meets the requirements described in *Brown,* "... a notary can be a subscribing witness [to a testamentary document] even if he or she intended to sign only as a notary."[4] Since the purpose of Freed's signature on the documents as notary is to verify that Nelva was in fact the person who executed the documents,

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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] *Brown v. Traylor*, 210 S.W.3d 648, 661-62 (Tex.App.–Houston [1st Dist.] 2006).

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

and Freed is not a beneficiary under any of the documents, Freed can be regarded as a witness under the standard set forth in *Brown*, and her testimony as to Nelava's capacity to execute the documents fits squarely within the exception in TEX. R. EVID. 503(d)(4).

B. If the attorney-client privilege applies, it is waived by Amy & Anita.

1. An attorney does not have standing to mandamus a court's order compelling that attorney to respond to questions concerning client communications.

During the discussions of January 24, 2019 and February 7, 2019, Freed seemed to suggest that she would be obligated to challenge any order compelling her to testify regarding matters she felt were subject to the attorney-client privilege. However, it does not appear that Freed has standing to pursue a mandamus action in this circumstance. In *Cole v. Gabriel*, the Fort Worth Court of Appeals opined as follows:

> In this original mandamus proceeding, Kenneth M. Cole, Jr., the relator, seeks an order directing the Honorable Lee Gabriel, Judge of the 367th District Court of Denton County, to vacate her order that Cole, an attorney, respond to questions concerning his communications to Terrence Wickman, his client. Cole contends that the communications are privileged by virtue of rule 503 of the Texas Rules of Civil Evidence.
>
> We dismiss Cole's petition for writ of mandamus as having been improvidently granted, because Cole does not have standing to assert the lawyer-client privilege protected by rule 503 of the Texas Rules of Evidence in his individual capacity rather than on behalf of Wickman, his client.
>
> The respondent contends that Cole lacks standing to bring mandamus in this court on his own behalf in support of his client's privilege that Cole not answer questions concerning their confidential communications. Rule 503(c) of the Texas Rules of Civil Evidence provides that the lawyer-client privilege may be claimed by the lawyer only on behalf of the client. Also, *see Krumb v. Porter,* 152 S.W.2d 495, 497 (Tex.Civ.App.—San Antonio 1941, writ ref'd) and *Ex parte Lipscomb,* 111 Tex. 409, 239 S.W. 1101, 1103 (1922). An attorney as a witness has no personal interest in the matter, so that a refusal of a court to sustain his objections on the ground of privilege is not a denial of any privilege or immunity nor in any way erroneous as to him, although it might be so as to his client. *Ex parte Lipscomb,* 239 S.W. at 1103. Cole appears in this mandamus proceeding in his own behalf only, not in behalf of Wickman. Consequently, we agree that Cole does not have standing in his individual capacity to attack the respondent's order respecting the privilege of Wickman.[5]

[5] *Cole v. Gabriel*, 822 S.W.2d 296, 296-297 (1991).

Freed does not have standing to seek mandamus of an order compelling her to respond to questions concerning matters that she thinks are protected by the attorney-client privilege. The concern expressed by Freed during recent hearings is not supported by law.

2. If the attorney-client privilege does apply and/or Freed has standing/is obligated to challenge any order compelling her to testify, then Amy and Anita waive the privilege as to Freed's communications with the Founders.

If the attorney-client privilege does apply and/or Freed has standing/is obligated to challenge any order compelling her to testify, then Amy and Anita waive the privilege as to Freed's communications with the Founders. To be clear, Amy's waiver is provided in her individual capacity, as a co-trustee of the Brunsting Family Trust, a beneficiary of the Brunsting Family Trust, and as the successor executor named in Nelva's Will (although she has not yet been appointed to serve in that role.) Likewise, Anita's waiver is provided in her individual capacity, as a beneficiary of the Brunsting Family Trust, and as a co-trustee of the Brunsting Family Trust.

The waivers provided by Amy and Anita are limited specifically to the issue of the attorney-client privilege and any purported obligation Freed might have to challenge an order compelling her to testify. Other than the limited waiver addressed herein, neither Amy nor Anita (as individuals, co-trustees, successor executor and/or in any other capacity) waive, release or disclaim any rights, remedies claims or causes of action that may be pursued against Freed, Freed's law firm and/or any other party to this 401-proceeding.

[SIGNATURES ON THE FOLLOWING PAGE]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 1st day of March 2019, to all counsel of record/pro se parties via E-file and/or direct e-mail.

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