

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	§	

CANDACE KUNZ-FREED’S BRIEF ON PRIVILEGE

TO THE HONORABLE JUDGE OF SAID COURT:

Candace Kunz-Freed (“Kunz-Freed”) files this Brief on Texas Rules of Evidence 503(d):

**I.
BRIEF**

1. The Court has requested briefing on the potential effect of Texas Rules of Evidence 503(d) on Kunz-Freed’s claims of privilege in her upcoming deposition. As the Court is aware, Rule 503(d) is an exception to the attorney-client privilege. Specifically, the attorney-client privilege cannot be invoked “if the communication is relevant to an issue concerning an attested document to which the lawyer is an attesting witness.” TEX. R. EVID. 503(d).

2. We could not find any cases interpreting Rule 503(d). However, reading the plain language suggests privilege does not apply to issues concerning the validity of a document. The exception does not prevent the privilege from being invoked against the remaining issues with respect to a document. Accordingly, Kunz-Freed does not intend to invoke the attorney-client privilege with respect to: (1) validity of the signatures on the attested document; (2) capacity issues; or (3) authentication. Kunz-Freed does intend to invoke the attorney-client privilege with

respect to any other questions. It will be an abuse of the Court's discretion to require Kunz-Freed to disclose privileged and confidential information not excepted by Rule 503(d).

3. The Court's January 24, 2019 Order Granting Motion to Compel provides the Court will be ruling upon the applicability of privilege as they are asserted during Kunz-Freed's deposition. The Texas Supreme Court's ruling in *West v. Solito*, 563 S.W.2d 240 (Tex. 1978) is very instructive on why this is not the ideal process. *See* Exhibit "A." In that case the court ordered a deposition and stated"

such witness shall testify ... and objections based upon the attorney-client privilege, or otherwise, are not waived, but are preserved and may be urged at the time of trial, and shall be determined by the Trial Court either on motion in limine or upon the tender of such testimony as evidence.

West, 53 S.W.2d at 243.

5. In a mandamus proceeding, the Texas Supreme Court reversed the trial court and held there were alternatives available to protect matters within the privilege from being disclosed. *Id.* at 245-46. One such option, which is applicable to this case, would be after the deposition for the examining party to apply to the Court for an order compelling the answers to the contested questions. *See Id.* at 246. This would allow all of the parties (including the court) to have ample time to evaluate the privilege and potentially brief the issue. Otherwise, invocation of privilege is being done on the fly and the Court is forced to make a hasty decision on what is a fundamental right. This option would afford greater protections for the applicable privilege. *See Id.*

6. As repeatedly discussed throughout this case, the attorney-client privilege belongs to the client and must be invoked on its behalf. TEX. R. EVID. 503(b). Consequently, Kuntz-Freed has an ethical obligation to assert any applicable privileges. Kunz-Freed's client is Nelva Brunsting (now her estate). Until this Court appoints a personal representative, there is no one on

behalf of the estate who can waive any privileges. **Kunz-Freed reiterates the dire need for this Court to appoint a personal representative.**

7. To get around any privilege concerns, Kunz-Freed provided a proposed privilege waiver to the five (and only) heirs of Nelva Brunsting. *See* Exhibit "B." Thus far, two heirs have refused to execute the waiver. The Court should give serious consideration to requiring the parties to waive any privilege. Kuntz-Freed prefers to openly discuss her legal work during her upcoming deposition, but unless the privileges are waived is severely hampered.

Respectfully submitted,

THOMPSON, COE, COUSINS & IRONS, L.L.P.

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ATTORNEYS FOR CANDACE KUNZ-FREED

CERTIFICATE OF SERVICE

I hereby certify that pursuant to the Texas Rules of Civil Procedure, on this the 1st day of March, 2019, a true and correct copy of this document has been forwarded by certified mail, facsimile and/or e-filing to all counsel.

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