

NO. 412,249-401

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	§	

**NON-PARTY WITNESS CANDACE KUNZ-FREED’S MOTION TO
QUASH AND MOTION FOR PROTECTION**

TO THE HONORABLE JUDGE OF SAID COURT:

Non-Party Witness Candace Kuntz-Freed (“Kuntz-Freed”) objects to and moves this Court to Quash Anita Brunsting’s (“Anita”) Notice of Intent to Take the Oral Deposition of Kunz-Freed, pursuant to the provisions of Rule 199.4 of the Texas Rules of Civil Procedure. Kunz-Freed also files her Motion for Protective Order, seeking to protect against the discovery sought by Anita, pursuant to Texas Rules of Civil Procedure 192.6. In support of these motions, Kunz-Freed respectfully states as follows:

**I.
BACKGROUND**

1. There are few things more disruptive to a person’s life and livelihood than being sued—especially when, as here, the person is accused of engaging in very serious acts of malpractice and the litigation has been ongoing for several years. Despite holding Kunz-Freed hostage and preventing her from having an opportunity to defend herself in a separate malpractice lawsuit, the parties in this case now want her deposition. Not only is that unjust but truly unreasonable to a fellow member of the State Bar.

2. Kunz-Freed was initially sued by Carl Henry Brunsting (“Carl”) on January 29, 2013 (the “Malpractice Case”)¹. On February 3, 2015, defense counsel took Carl’s deposition. During the deposition, Carl could not provide any testimony to support the allegations he asserted against Kunz-Freed². The next day, Carl’s lawyer contacted defense counsel and said she thought Carl was acting strange during his deposition and she believed he might be incapacitated³. On February 19, 2015 Carl filed an application to resign as executor. This Court granted the application in March 2015. *Since that time, the Malpractice Case has been in limbo as a representative of the estate has not been assigned.*

3. Over three years later, a representative of the estate has still not been appointed by this Court. Consequently, Kunz-Freed’s right to defend herself has been hampered by the parties in this litigation. Those same parties now want a free bite at the apple, but refuse to allow Kunz-Freed the opportunity to move forward in the Malpractice Case.

4. Until a successor executor is appointed, there is no plaintiff to pursue the action against Kunz-Freed. The issue of who will serve as the successor executor of the Estate of Nelva E. Brunsting and the Estate of Elmer Brunsting must be resolved prior to resolving the claims against Kuntz-Freed. The issue of who will serve as the successor executor of the Estate of Nelva E. Brunsting and the Estate of Elmer Brunsting should be resolved before Kunz-Freed is required to sit for her deposition in a lawsuit in which she is not a party. Therefore, the Court should grant Kunz-Freed’s Motion to Quash and Motion for Protective Order.

¹ See No. 2013-05455; *Carl Henry Brunsting, et al v. Candace L. Kunz-Freed, et al*; In the 164th Judicial District Court of Harris County, Texas.

² The viability of any claims against Kunz-Freed were further obliterated by the conclusions contained in the Report of the Temporary Administrator.

³ See the pending Motion for Sanctions against Carl and Bobbie Bayless.

II.
ARGUMENTS AND AUTHORITIES

A. MOTION TO QUASH

5. First and foremost, Kunz-Freed is not a party to this litigation and has not been properly served with the Notice of Deposition. *See* TEX. R. CIV. P. 176. On this basis alone, Kunz-Freed's Motion to Quash should be granted.

6. TEX. R. CIV. P. 199.4 permits a party to object to the time and place designated for an oral deposition. If the motion is filed by the third business day after service of the notice of deposition, the deposition is automatically stayed until such time as this motion can be determined. TEX. R. CIV. P. 21a and TEX. R. CIV. P. 199.4.

7. Pursuant to Texas Rule of Civil Procedure 199.4, a reasonable, convenient and appropriate time and place has not been arranged for all parties and counsel to attend this deposition. Anita unilaterally noticed this deposition. Both the undersigned and Kunz-Freed are unavailable for the deposition on the date chosen.

7. Anita served the deposition notices on November 27, 2018. Because this motion is filed within three business days of the date the deposition notice was served, this motion objecting to the date and time for the depositions stays the depositions until the motion can be determined by the court. TEX. R. CIV. P. 199.4.

B. MOTION FOR PROTECTIVE ORDER

8. Kunz-Freed asks this Court for a protective order against Anita's Notice of Deposition as she has not been properly served with the deposition notice. *See* TEX. R. CIV. P. 205.1 ("A party may compel discovery from a nonparty only ... by serving a subpoena compelling: (a) an oral deposition....").

9. Kunz-Freed further asks this Court for a protective order prohibiting Anita (or any of the parties in this lawsuit) from deposing her until after this Court appoints a personal representative of the estate. Any person affected by a discovery request has the right to seek protection from disclosure of documents by moving for a protective order. *See* TEX. R. CIV. P. 192.6(a); *In Re Shell E&P, Inc.*, 179 S.W.3d 125, 130 (Tex. App.—San Antonio 2005, orig. proc.); *In re Shipmon*, 68 S.W.3d 815, 821 (Tex. App.—Amarillo 2001, no pet.). A trial court may issue a protective order to protect a party served with discovery. *See* TEX. R. CIV. P. 192.6(b).

10. Kunz-Freed further asks this Court for a protective order prohibiting Anita (or any of the parties in this lawsuit) from deposing her as answering any questions regarding conversations with and the legal services performed on behalf of Nelva E. Brunsting and Elmer Brunsting are protected from privilege. *See* TEX. R. EVID. 503(b); *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004); *Keene Corp. v. Caldwell*, 840 S.W.2d 715, 719 (Tex. App.—Houston [14th Dist.] 1992, no writ) (under the lawyer-client privilege, the client prevents any other person from disclosing confidential communications made for the purpose of facilitating rendition of legal services to client). This privilege belongs to the respective estates. Again, until such time as a personal representative of the estate is appointed, there is no one with the power to consider waiving the applicable privileges.

11. Generally, an attorney of record in litigation is an advocate, not a fact witness, in the litigation process. Confidential communications between an attorney and client “promote effective legal services,” which “in turn promote[] the broader societal interest of the effective administration of justice.” *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 160 (Tex.1993) (orig. proceeding). While this interest must be balanced against “the aim of the modern discovery

process ... to yield full and complete information regarding the issues in dispute,” *id.*, waiver of the privilege “should not lightly be found.” *Id.* at 163. Here, Anita’s notice of deposition, containing no limitation as to subject matter is a clear attempt to discover privileged information. *See In re Baptist Hosps. of Se. Texas*, 172 S.W.3d 136, 140 (Tex. App.—Beaumont 2005, no writ.).

12. Neither Anita nor any of the parties in this case can provide a reason that Kunz-Freed should be subjected to deposition. *See Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159, 168 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (affirming trial court’s decision to grant motion for protection preventing lawyer from being deposed based on lawyer-client privilege); *In re Southpak Container Corp.*, 418 S.W.3d 360, 364 (Tex. App.—Dallas 2013, no pet.); *In re ExxonMobil Corp.*, 97 S.W.3d 353, 357 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (citing *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996)) (attorney-client privilege “attaches to the complete communication between attorney and client, including both legal advice and factual information”); *see also In re Baptist Hosps. of Se. Texas*, 172 S.W.3d at 145 (compelling deposition of opposing party’s attorney of record concerning subject matter of litigation is inappropriate under most circumstances; attorney’s activities in prosecuting client’s claims fell within work product definition).

12. “Core work product, which is not discoverable, is defined as the work product of an attorney, or his representative, that contains the attorney’s mental impressions, opinions, conclusions, or legal theories.” *In re Baptist Hosps. of Se. Texas*, 172 S.W.3d at 141 (citing TEX.R. CIV. P. 192.5(b)(1)). “If a court orders the discovery of non-core work product pursuant to Rule 192.5(b)(2), the court ‘must—insofar as possible—protect against disclosure of the

mental impressions, opinions, conclusions, or legal theories not otherwise discoverable.” *Id.* (quoting TEX. R. CIV. P. 192.5(b)(4)). As further noted in *In re Baptist Hosps.*:

Work product that does not fall within “core work product” may be discoverable, but “only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means.”

Id. (quoting TEX. R. CIV. P. 192.5(b)(2)).

12. Consistent with *In re Baptist Hosps. of Se. Texas.* and the Texas Rule of Civil Procedure, a showing of “substantial need” and “undue hardship” must be initially proven. *In re Burroughs*, 203 S.W.3d 858, 860 (Tex. App.—Beaumont 2006, no pet.). Thereafter, the scope of the questioning permitted must be specified and a protective order entered so as to guard against disclosure of any core work product or other privileged information. *See In re Baptist Hosps. of Se. Texas*, 172 S.W.3d at 145–46 (citing Tex. R. Civ. P. 192.5(b)(4)).

13. Rule 192.4 authorizes the Court to limit discovery methods permitted by the rules if the discovery is obtainable from some other source that is more convenient, less burdensome, or less expensive, or if the burden or expense of the proposed discovery outweighs its likely benefit. TEX. R. CIV. P. 192.4(a),(b). Generally, even when discovery of non-core work product is permitted because of substantial need and undue hardship under Rule 192.5(b)(2), a court should not order a deposition of an attorney on the subject matter of the litigation without requiring a showing that less intrusive discovery methods are unavailable to obtain the information sought. *See generally In re ExxonMobil Corp.*, 97 S.W.3d 353, 358 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (factual information may be obtained by means other than requiring production of privileged documents.). Written discovery requests may be less intrusive because they do not require an attorney to make an immediate decision on whether

a question involves work product or attorney-client privilege, and may not distract the attorney or involve the attorney as personally as a deposition. *See In re Baptist Hosps. of Se. Texas*, 172 S.W.3d at 145. If, as a last resort, the advocate's oral deposition is to be ordered, the area of questions permitted should be specified and a protective order entered, to protect against the disclosure of core work product and other privileged information. See TEX. R. CIV. P. 192.5(b)(4).

13. In this case, there has been no attempt to restrict the scope of Kunz-Freed's deposition. Nor has Anita shown that she has substantial need of the facts known by Kunz-Freed for the preparation of her case and that she is unable without undue hardship to obtain the substantial equivalent of the material by other means. It should be noted by the Court if Kunz-Freed's deposition goes forward, it would be the **first deposition taken in this case.** Accordingly, Kunz-Freed requests this Court to grant her Motion for Protective Order.

III. PRAYER FOR RELIEF

Non-Party Witness Candace Kunz-Freed respectfully requests that this Court issue an order Quashing Anita's Notice of Intent to Take the Oral Deposition of Kunz-Freed.

Respectfully submitted,

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

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**ATTORNEYS FOR NON-PARTY WITNESS
CANDACE KUNZ-FREED**

CERTIFICATE OF SERVICE

I hereby certify that pursuant to the Texas Rules of Civil Procedure, on this the 30th day of November 2018, 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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