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“DEAD MAN TALKING”

**TESTAMENTARY EXCEPTIONS TO THE ATTORNEY-CLIENT AND
DOCTOR-PATIENT PRIVILEGE**

I. Introduction.

Frequently in will contest litigation, counsel for the personal representative asserts the attorney-client and doctor-patient privileges in response to the contestant's request for production of the decedent's estate planning records and medical records. The personal representative's refusal to produce the decedent's records results in lengthy and expensive pre-trial discovery disputes.

Where testamentary capacity and undue influence is alleged, the central issue is the true intent of the testator and, accordingly, the notion that the estate planning attorney's file is privileged is inane. Consequently, most judges, relying upon persuasive case law both from the U.S. Supreme Court (*Swidler & Berlin and Hamilton v. United States*, 524 U.S. 399, 118, S.Ct. 2081, 141 L.Ed.2d 379 (1998)) and Colorado Supreme Court (*Wesp v. Everson*, 33 P.3d 191 (Colo. 2001)), will ultimately deny the motion for protective order and grant the motion to compel production. In order to avoid this unnecessary delay and expense, is it time that Colorado codify the testamentary exception to the attorney-client and doctor-patient privileges?

II. Testamentary Exception to Attorney-Client Privilege; Colorado Common Law Recognizes the Testamentary Exception.

Since 1905, the Colorado Supreme Court has recognized the testamentary exception to the attorney-client privilege. *In re Shapter's Estate*, 35 Colo. 578, 587, 85 P. 688, 691 (1905). In *Shapter*, the Court rejected an argument that an attorney could not testify about client communications related to the decedent's will, stating that "after [the client's] death and when the will is presented for probate, we see no reason why ... the attorney should not be allowed to testify as to directions given to him by the testator so that it may appear when the instrument presented for probate is or is not a will of the alleged testator" Fifty years later, the Colorado Supreme Court, in *Denver National Bank v. McLagan*, 133 Colo. 487, 491, 298 P.2d 386, 388 (1956), again held that the testamentary exception permits an attorney who writes a will to testify after the testator's death as to attorney-client communications related to the execution and validity of the will.

The Colorado Supreme Court in *Wesp v. Everson* recognized the testamentary exception to the attorney-client privilege, which allows an attorney who drafted a will of a deceased client to disclose privileged communications concerning the will and its execution. The testamentary exception does not apply where the claim is not a will contest or a claim by succession. (See ACTEC Commentaries on Model Rules of Professional Conduct Fourth Edition 2006. Ethics Opinions MRPC 1.6, Page 81-83.)

III. Testamentary Exception to Doctor-Patient Privilege Where Decedent's Mental and Physical Condition is at Issue.

A. Will Contests Place the Decedent's Physical and Mental Condition at Issue: The doctrine of implied or constructive waiver of privilege should apply to circumstances of controversy over the decedent's testamentary intent. Upon the filing of the contestant's petition, which commences a formal testacy proceeding pursuant to C.R.S. § 15-12-401, *et seq.*, the "sound mind" of the deceased is placed in controversy. Just as the commencement of a will contest based on lack of testamentary capacity and extraordinary susceptibility to undue influence effectuates an implied or constructive waiver of the estate-planning attorney's attorney-client privilege, the same implied or constructive waiver of privilege must exist in regard to the physician-patient privilege. Indeed, in the case law, one constructive waiver often is cited as the rationale for the other. (See *Clark v. District Court*, 668 P.2d 38 (Colo. 1983); *Johnson v. Trujillo*, 977 P.2d 152 (Colo. 1999); *People v. Sisneros*, 55 P.3d 797 (Colo. 2002)).

B. Production of Decedent's Medical Records Should be Automatic: As a practical matter, it is well established that evidence as to the decedent's condition of health is discoverable in will contests where testamentary capacity has been alleged. The personal representative of the estate actually should provide access to medical records voluntarily as a matter of informal discovery. *Estate of Breeden v. Stone*, 992 P.2d 1167 (Colo. 2000); *Estate of Romero*, 126 P.3d 228 (Colo. App. 2005), *cert. denied* 2006 WL 349702 (Colo. 2006).

C. The Colorado Supreme Court in *In Re Shapter's Estate, Relying on Missouri Law (Thompson v. Ish, 12 S.W. 510 (Mo. 1889))*, Expressly Recognized the Testamentary Exception to the Doctor-Patient Privilege: In *Melton v. VanCamp*, 283 S.W.2d 593 (Mo. 1955), the Missouri Supreme Court held, relying upon *Thompson v. Ish, Id.*, that contestant heirs in a will contest could waive the doctor-patient privilege and cited such waiver as the basis for implied or constructive waiver of attorney-client privilege.

D. The State of Mind Exception to the Hearsay Rule 803(3) Permits Introduction Statements of the Decedent: In will contest litigation, the decedent's statements regarding his or her intent to make or revoke a will frequently are offered to prove the truth of the matter asserted. Because the statement is hearsay, however, it must fall under one of the recognized exceptions to the hearsay rule to be admissible. Rule 803(3) of the Colorado Rules of Evidence sets out the "state-of-mind" exception:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(3) Then existing mental, emotional, or physical condition.
A statement of declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to **the execution, revocation, identification, or terms of the declarant's will.**"
(Emphasis added.)

In *Murphy v. Glenn*, 964 P.2d 581 (Colo. App. 1998), the Colorado Court of Appeals upheld the trial court's admission of testimony from the decedent's accountant regarding his conversation with the testatrix that she and her husband had wills drawn at the same time,

the terms of the wills and the wife's understanding of the implications of the wills. In this case, the beneficiaries under mutual wills created by the wife and husband brought an action to impose a constructive trust against the beneficiaries of the wife's inter vivos trust by which the wife transferred, in contravention of a marital agreement, a substantial portion of the estate. During trial, the accountant was asked to describe the conversation with the wife which occurred in 1987, in which the wife stated she would never change her husband's will, that her will was the same as her husband's will, and that she would never go against her husband's wishes. The accountant also testified that the wife told him that she and her husband had drawn their wills at the same time, and that the wills were alike and provided that if one predeceased the other, the remaining spouse would receive everything and upon the surviving spouse's death, it would all go to both sets of relatives. (See, Tucker/Mieras "Dead Men Don't Lie" *Applicability of the State of Mind Hearsay Exception in Probate Litigation*, Colorado Bar Association Trust and Estate Section, Council Notes (March 2007).

IV. Are Motions to Dismiss or Summary Judgment Appropriate Prior to Discovery in Will Contests?

A. *The Sword & Shield*: Frequently, counsel attempts to use summary judgment as a sword and a shield. Counsel will refuse to produce documents, asserting the attorney-privilege or doctor-patient privilege, and file for summary judgment of dismissal of the petition for formal probate of an earlier will or the objection to probate of an existing will. This results in somewhat bizarre pre-trial litigation concerning the request to dismiss or for summary judgment.

B. *To File or Not to File? The Contestant Receives Discovery Before Summary Judgment*: Probate litigators must frequently decide whether to file a will contest prior to discovery. As a general rule, testamentary capacity and undue influence are issues of fact in formal testacy proceedings which would preclude motions to dismiss and summary judgment. *Scott v. Leonard*, 184 P.2d 138 (Colo. 1947). The contestant can advance a valid argument that absent discovery the personal representative/proponent motions are premature. The court must accept the contestant's (plaintiff's) pleadings as true, unless the depositions and admission on file, together with affidavits, clearly disclose that there is no genuine issue of material fact, with any doubts being resolved in the contestant's (plaintiff's) favor. *Norton v. Leadville Corp.*, 43 Col. App. 527, 610 P.2d 1348 (1979). The non-moving party is entitled to the benefit of all reasonable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party. *Clement v. Nationwide Mut. Fire Ins.*, 16 P.3d 223 (Colo. 2000). Where the record is not fully

developed on a material factual issue, summary judgment is not proper. *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984).

Insofar as the issue of a decedent's lack of testamentary capacity, requests for summary judgment should be denied on the grounds that the contestant is entitled to utilization of discovery procedures. The allegations of decedent's lack of testamentary capacity and extraordinary susceptibility to undue influence are necessarily matters for expert review and opinion. It is an abuse of discretion to refuse a contestant a fair opportunity to permit utilization of the discovery procedures provided by the Rules of Civil Procedure. *Miller v. First National Bank of Englewood*, 156 Colo. 358, 399 P.2d 999 (1965). Insofar as the allegation of undue influence, those allegations present disputed issues of material fact because undue influence is characteristically subtle, and proof of it necessarily circumstantial. *Blackman v. Edsall*, 17 Colo. App. 429, 68 P. 790 (1902). The absence in the pleading of a statement of direct evidence of influence does not mean that summary judgment is appropriate.

V. Who Should have Standing to Waive the Privilege?

A. Why Should the Personal Representative Control the Privilege? Frequently, the personal representative will take the position that he or she is the only one who has standing to waive the legal and medical privileges because the personal representative steps into the shoes of the decedent after death. Further, personal representatives frequently assert that it is their fiduciary duty to maintain the confidences of the decedent. Contestants contend that it is unjust and inequitable to allow the personal representative to have sole discretion as to waiver of the doctor-patient and attorney-client privileges, especially where he or she may be the sole devisee. The policy behind waiver is difficult to comprehend. Vesting the exclusive right to waive the legal and medical privileges in the personal representative often leads to absurd results where the personal representative as a proponent of the will is permitted to offer a drafting attorney or treating physician's testimony in the event that it is beneficial to his or her position, and withhold that information if it is detrimental under the will in question. *Estate of Romero*, 126 P.3d 228 (Colo. App. 2005), *cert. denied* 2006 WL 349702 (Colo. 2006).

The personal representative's refusal to execute releases for the estate planner's file and decedent's medical records often leads to costly removal proceedings. (See *Risbry v. Swan*, 124 Colo. 567, 239 P.2d 600 (1951); *Estate of Van Dyne*, Denver Probate Court, Case No. 96 PR 239, for doctrine of neutrality applied uniformly by the Denver Probate Court.)

B. Heirs Should have the Right to Waive the Privilege Too: The testimony of the drafting attorney and treating physician is usually reliable and most probative of the decedent's intent. *Romero, supra*. To make this information available to one party and withhold it from the other is manifestly unjust. It appears that the better approach would be to allow the heirs of the decedent as well as the personal representative to waive the doctor-patient and attorney-client privileges.

VI. Should Colorado Codify These Testamentary Exceptions?

A. The Growing Trend Across the United States is to Codify a Testamentary Exception: The National Conference of Commissioners on Uniform State Laws drafted the Uniform Rules of Evidence Act which includes both a testamentary exception to the attorney-client privilege and the doctor-patient privilege. While the Uniform Rules of Evidence Act is not binding on the states, it provides direction for state legislatures. Thirty-eight states have adopted all or part of the Uniform Rules of Evidence.

1. Attorney-Client Privilege

The Uniform Rules of Evidence provide there is no attorney-client privilege under the rules in section 502(d)(2):

as to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction inter vivos.

Twenty states have codified the testamentary exception to the attorney-client privilege. These states include Alaska, Arkansas, Delaware, Florida, Hawaii, Kentucky, Maine, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, South Dakota, Utah, Vermont, and Wisconsin. Other states, like Colorado, have case law providing for the exception at common law, but have not yet codified the exception.

2. Doctor-Patient Privilege

The Uniform Rules of Evidence provide there is no doctor-patient privilege under the rules in section 503(d)(3) when the communication is:

relevant to an issue of the [physical,] mental[,] or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

Twenty-one states have codified the testamentary exception to the doctor-patient privilege. These states are Alaska, Arkansas, Delaware, Florida, Hawaii, Idaho, Kentucky, Louisiana, Maine, Michigan, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Vermont, and Wisconsin. Similar to the attorney-client exception, other states have case law providing for the testamentary exception to the doctor-patient privilege but have not codified it.

VII. Conclusion.

Colorado now has common law that expressly recognizes a testamentary exception to the attorney-client privilege (*Wesp v. Everson, supra.*) and the doctor-patient privilege (*In re Shapter's Estate, supra.*). Although Colorado has not codified this exception, there is an obvious trend toward codifying the exception to either or both legal and medical privileges. Proponents of a testamentary exception to the legal and medical privileges recognize that in this unique area of the law privileges should be waived based upon a policy that disclosure of otherwise privileged information is the best way to accurately and efficiently settle decedent's estates consistent with the purposes of the Probate Code. C.R.S. § 15-10-102. As *Romero* establishes, the decedent's estate planning lawyer and treating doctor are the most critical witnesses in any will contest. Why should they not be permitted to testify as to the decedent's intent and physical and mental condition at the time of the execution of his or her will?

Those who are critical of the testamentary exceptions to the legal and medical privileges argue that doctors and lawyers will no longer be able to guarantee to their patient/client that their conversations will be kept confidential after death. As the trend to codify the testamentary exception to the legal and medical privilege grows, we inevitably will be faced with weighing the pros and cons in deciding what is best for Colorado.

Estate planning attorneys may need to review their engagement letters and amend them to include disclosure of the testamentary exception to the attorney-client privilege.

For example:

Confidentiality: Unless you authorize us to disclose information, we are required by the rules of ethics to maintain information about our representation of you as confidential, subject only to a few, limited exceptions. In addition, as you may know, communications between you and your lawyer are generally “privileged,” meaning that your lawyer cannot be forced to disclose those communications to others unless you consent or waive the privilege. **One exception to this privilege is in the event of a Will contest after your death. In that instance, our file would generally be “discoverable” and we could be required to testify about our conversations with you.**

What does the estate planner do where he represents both husband and wife and the husband dies?

- Does the attorney owe ethical duties to protect the wife’s estate planning file from discovery?
- Does the wife’s attorney-client privilege and work product privilege survive her husband’s death?
- If so, how do you as the estate planning attorney protect privileged documents.