

**Matter of Axinn**

2010 NY Slip Op 32798(U)

September 30, 2010

Surrogate's Court, Nassau County

Docket Number: 358578

Judge: John B. Riordan

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SURROGATE'S COURT OF THE STATE OF NEW YORK  
 COUNTY OF NASSAU

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Probate Proceeding, Will of

File No. 358578

DONALD EVERETT AXINN,

Dec. No. 26567

Deceased.

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In this probate proceeding, respondents Michael Axinn and Jennifer Axinn-Weiss move to compel the co-executors of the estate, Joan Axinn, the surviving spouse of decedent, and Kenneth Katzman, accountant of decedent, to reproduce: (1) the original and/or photocopies of prior wills of the decedent; (2) un-redacted photocopies of two letters between decedent and the attorney/draftsman, Mr. Jonathan Mate, Esq., and; (3) un-redacted photocopies of notes taken by Mr. Mate during two separate in-person meetings with the decedent. For the reasons set forth below, an *in camera* review of said materials, in un-redacted form, is necessary.

In opposition to respondents' motion, the executors allege they are unable to locate any prior wills and will provide such in the event that they are located. In response to the redactions, the executors contend that Mr. Mate represented both decedent and decedent's surviving spouse, Joan Axinn, in connection with their estate plan, and had confidential communications with decedent and Joan, jointly and individually, concerning Joan's estate plan and assets, and that the contents of those communications concerning Joan's estate plan and assets are the subject of the redacted material and are, therefore, privileged, pursuant to the attorney-client privilege afforded by CPLR 4503, and not discoverable by third parties. The executors move for a protective order pursuant to CPLR 3101 concerning the alleged privileged redactions.

Although respondents further argue that the executors' response to their discovery demands is

untimely pursuant to CPLR 3122(a), service of a notice of motion for a protective order suspends disclosure of the particular matter in dispute (CPLR 3103[b]). The time limitations of CPLR 3122 do not apply where the material sought is claimed to be privileged or where discovery would be palpably improper (*McGuane by McGuane v M.C.A., Inc.*, 182 AD2d 1081 [4th Dept 1992]; *Aetna Ins. Co. v Mirisola*, 167 AD2d 270 [1st Dept 1990]). The documents sought in this matter are alleged to be privileged, and thus respondents' reference to CPLR 3122(a) is misplaced and the executors' motion for a protective order is timely and proper.

In actions involving the probate, validity or construction of a will, an attorney or his employee is required to disclose information as to the preparation, execution or revocation of any will or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent (CPLR 4503[b]).

Respondents contend in their motion that these documents are not privileged as they contain information pertaining to decedent and his will that the executors are required to disclose.

Ordinarily if a party objects to a discovery demand, that party is to serve a response which states with reasonable particularity the reasons for each objection. If objection is made to part of an item or category, the part is to be specified (Connors, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, CPLR C3122:1). Here, the executors objected to certain disclosures, by use of redactions, but failed to state the reason for such; providing materials in redacted form with a brief mention that the documents attached are "redacted" does not constitute as a valid reason for an objection to the disclosure.

The executors' opposition to respondents' motion is supported by Mr. Mate's sworn statement, affirming that his correspondences and notes were redacted "in order to preserve the confidential communications between myself and my client, Joan, and between myself and decedent concerning Joan's estate plan and assets." Mr. Mate's affirmation substantiates the existence of facts upon which

the motion is based, as it is his own writing which was redacted.

When a claim of privilege is presented, it may be advisable to conduct an *in camera* review of documents claimed to be privileged (*Montgomery Group, LLC. v Town of Montgomery*, 29 AD3d 585 [2d Dept 2006]). The court may defer determination of a motion to compel discovery until after an *in camera* inspection of certain materials by the court since it does not affect substantial rights (*Buhler v Sheridan*, 134 AD2d 822 [4<sup>th</sup> Dept 1987]).

CPLR 3122(b) establishes the requirement under New York law for a privileged document log when a party seeks to claim an attorney-client privilege. The Court of Appeals has recommended that a party seeking to protect documents from disclosure compile a privilege log, specifying the nature of the documents and the basis for the privilege claim, in order to aid the court in its assessment of a privilege claim and enable it to undertake *in camera* review (*In re Subpoena Duces Tecum to Jane Doe, Esq.*, 99 NY2d 434 [2003]). Here, the executors failed to provide a privilege log to explain the redactions. Merely responding with boilerplate claims of privilege, without a privilege log as required by CPLR 3122(b), is insufficient as a matter of law (*Anonymous v High School for Environmental Studies*, 32 AD3d 353 [2006]). Although this court will not mandate that a privilege log be produced, it is unable to fully assess an attorney-client privilege claim without further explanation by the executors as to the redacted material, which may be accomplished through an *in camera* review of said materials.

Respondents argue that the attorney-client privilege does not apply because the correspondence is addressed solely to decedent, regarding *his* estate plan, and the meetings between decedent and Mr. Mate took place in the presence of third parties. The executors allege that the redactions to each document were made in order to preserve the confidential communications between Mr. Mate and Joan

concerning Joan's own estate plan and assets. Redactions were made to the following four documents:

- (1) Correspondence dated December 19, 2006;
- (2) Correspondence dated January 29, 2009;
- (3) Attorney Notes dated December 5, 2008;
- (4) Attorney Notes dated January 30, 2009.

**Correspondence:**

The two pieces of correspondence consists of letters addressed solely to the decedent and signed by Mr. Mate. The letters are marked “Personal/Confidential.” The first sentence of each letter states, “The following is a summary of your estate plan which has now been revised...” The contents of the letters seem to relate directly to decedent's testamentary plan. This court cannot decipher the unknown, and an *in camera* review of these letters in un-redacted form is required to determine whether Joan's estate plan and assets are discussed in either letter and if the attorney-client privilege attaches.

**Attorney Notes dated December 5, 2008:**

Mr. Mate indicates on his notes that present at this meeting were decedent, Mark Hamer, and Kenneth Katzman. Respondents argue that the presence of Mark Hamer, a nominated co-trustee of the Donald Everett Axinn Trust and Kenneth Katzman, accountant to decedent, waives the attorney-client privilege. The attorney-client privilege attaches to confidential communications between an executor and an attorney, to the exclusion of third persons, including beneficiaries of the estate (CPLR 4503[a][2]). The presence of a third party during the communication between the attorney and the client indicates that the communication was not confidential. In such a case, the privilege does not attach (*In re Dehn's Will*, 75 Misc 2d 85 [Sur Ct 1973]; *In re Bennett's Will*, 166 AD 637 [4th Dept 1915]).

However, when the court deems the third person to be an “agent” of the attorney or the client,

the communications remain privileged. Here, there has been no claim by Joan that Hamer or Katzman were Joan's agents. Un-redacted copies of the notes from this meeting are to be provided to respondents.

**Attorney Notes dated January 30, 2009:**

Mr. Mate indicates that the decedent and Joan were present at this meeting. The executors contend that Joan is a client of Mr. Mate's and that any communication made during this meeting was confidential in respect to both clients present at the meeting. The attorney-client privilege seeks to insure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his or her confidences will not later be exposed to his or her legal detriment (*Priest v Hennessy*, 51 NY2d 62 [1980]). The attorney-client privilege has been codified under CPLR 4503(a)(1), which bars disclosure of any confidential communications between a client and his/her attorney. Again, an *in camera* review is necessary to determine whether Joan's estate plan or assets were the subject matter of Mr. Mate's notes.

Because a determination of whether documents are privileged is fact-specific, an *in camera* review of such documents may have to be undertaken before resolving the issue (*Spectrum Systems Intern. Corp. v Chemical Bank*, 78 NY2d 371 [1991]); *Nationwide Ins. Co. v Crisano*, 286 AD2d 670 [2d Dept 2001]). The burden of proving that all the requisites of the privilege are present falls on the person asserting the privilege (*In re Morrell's Estate*, 154 Misc 356 [Sur Ct, Kings County 1935]).

This court is aware that the attorney client privilege is “of the oldest among common law evidentiary privileges, fostering the open dialogue between lawyer and client that is deemed essential to effective representation” and will remain mindful of this throughout an *in camera* review (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371 [NY1991]).

A final determination on the motion to compel un-redacted copies of particular disclosure is held in abeyance pending an *in camera* review of the documents in un-redacted form.

Un-redacted copies of the documents shall be submitted to the court within 21 days of the date hereof.

This is the decision and order of the court.

Dated: September 30, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court