WAIVER OF CONFIDENTIAL PRIVILEGES

by Curtis E. Shirley

In general, plaintiffs in a will contest are entitled to the same information as the defendants, privileged or not. This is certainly true as to medical records. *Haverstick v. Banet, 370 N.E.2d 341 (Ind. 1977).* The drafting attorney file is another matter. If an attorney witnesses a will, the testator herself waives any attorney client privilege by having asked the attorney to serve as a witness.

As stated by the Court in *Gast v. Hall, 858 N.E.2d 154 (Ind.App. 2006):* "The attorney-client privilege is one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States,* 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998). "The privilege is intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Id.* The privilege generally excludes testimony of communications between a client and her attorney regarding the preparation of a will. *Brown v. Edwards,* 640 N.E.2d 401, 404 (Ind.Ct.App.1994). The privilege survives even after the death of the client. *Buuck v. Kruckeberg,* 121 Ind.App. 262, 271, 95 N.E.2d 304, 308 (1950). However, an exception to the posthumous survival of the privilege exists when "a controversy arises concerning the validity of the will or between the claimants under the will[.]" *Briggs v. Clinton County Bank & Trust Co. of Frankfort, Ind.,* 452 N.E.2d 989, 1012 (Ind.Ct.App.1983). Stated succinctly, the "testamentary exception" is as follows: "[C]ommunications by a client to the attorney who drafted his or her will, concerning the will and transactions leading to its execution, generally are not, after the client's death, protected as privileged communications in a suit between the testator's heirs, devisees, or other parties who claim under him or her[.]" 81 Am.Jur.2d *Witnesses* § 374 (2004). *See also Estate of Meyer v. Burke,* 747 N.E.2d 1159, 1166 n. 4 (Ind.Ct.App.2001) (noting that testamentary exception is limited to evidence pertaining to preparation of will or other similar documents), *trans. denied.*

"When the communications between a decedent and his attorney do not result in an executed will, the communications do not fall within the exception to the attorney-client privilege and thus are confidential." *Gould, Larson, Bennet, Wells and McDonnell, P.C. v. Panico,* 273 Conn. 315, 869 A.2d 653, 655 (2005). The Court explained the distinction between communications with attorneys who prepare executed wills and attorneys who do not as follows:

> "When a decedent executes his will, he knows that it will be made public and established as his will in court before it can become effective. If the will does not reflect the testator's will, but rather that of another who induced him by undue influence to make it, we impute to the decedent an interest that he would not want such a will to be accepted as his own. If we were to protect his otherwise privileged communications under such circumstances, we would be helping to perpetuate the deceit and fraud, contrary to the decedent's interest. Therefore, we allow the attorney who prepared the executed will to disclose all that he knows concerning the testator's state of mind. When the communications do not, however, result in an executed will,

> the decedent does not assume the attorney's file, notes or memory will become part of any court proceedings and therefore we cannot assume that the decedent expected his communications to be made public. In short, in the absence of an executed will, we do not infer that the decedent intended to waive those communications to effectuate his intent. Therefore, the established exception, which is consistent with the purposes of the privilege, should not be construed or applied so as to defeat its purpose."

Above paragraphs from *Gast v. Hall, 858 N.E.2d 154, 163-64 (Ind.App. 2006). But see Pence v. Waugh, 34 N.E. 860 (Ind. 1893); Kern v. Kern, 55 N.E. 1004, 1006 (Ind. 1900); Briggs v. Clinton County Bank, 452 N.E.2d 989 (Ind.App. 1983); Estate of Voelker, 396 N.E.2d 389, 399 (Ind.App. 1979); Schutz v. Leary, 106 N.E.2d 705, 707 (Ind.App. 1952).*

The advantage here is to the Estate. The personal representative is free to waive the attorney client privilege so an attorney can testify about the decedent's conversations disinheriting the plaintiff, even if such conversations did not lead to a document being signed. However, discussions and notes about the decedent wanting to keep the plaintiff as an heir may never see the light of day.

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