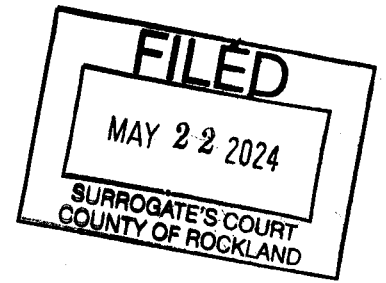


**SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND**



----- X
PROBATE PROCEEDING, WILL OF :

JOHN J. KOMAR, SR., :

Deceased :
----- X

File No. 2023-557/D

DECISION AND ORDER

Hon. Keith J. Cornell, Surrogate:

Before the Court is a Notice of Motion filed by Robert K. Fischl, Esq. seeking to quash a subpoena for document production pursuant to CPLR §2304 served upon him by counsel for the Respondent, John J. Komar, III, in this contested probate proceeding. The movant seeks a protective order pursuant to CPLR §3103(a) as well.

The Court considered the following documents in rendering this decision: Notice of Motion dated April 9, 2024 with Affirmation in Support; Affirmation in Opposition to Motion to Quash of Michael S. Kutzin, Esq.; Affirmation in Reply of Robert Fischl, Esq.; transcript of guardianship proceeding dated November 2, 2022, in Index No. 034393/2021.¹

BACKGROUND

John J. Komar, Sr. (the “Decedent”) died on July 17, 2023. Competing probate petitions have been filed in connection with his estate. In the first probate proceeding John J. Komar, III seeks appointment as fiduciary to probate an instrument dated December 12, 2018. That proceeding is currently held in abeyance. In the second proceeding Tracy Lennon Nervegna (Decedent’s granddaughter) seeks probate of an instrument dated October 25, 2021. This motion

¹ The Court notes the Petitioner in this proceeding did not submit a response to the Motion.

is in response to discovery sought by John J. Komar, III in his challenge to the 2021 Will. The proceeding is in the pre-objection phase of discovery pursuant to SCPA § 1404.

In July 2021, John J. Komar, III sought to be appointed guardian of the Decedent pursuant to MHL Art. 81 in a proceeding in Supreme Court, Rockland County. Ultimately, on July 17, 2023, the Supreme Court (J. Thorsen) appointed a neutral individual to serve as Decedent's guardian. (Transcript annexed to Kutzin, Affirmation in Opposition, Exhibit A; hereinafter "Transcript", and Order dated July 17, 2023 at Exhibit C).

On March 5, 2024, attorney for Respondent, John J. Komar, III had a subpoena duces tecum dated January 19, 2024 served on Mr. Fischl seeking copies of his complete attorney files, communications and documents in his possession and control in connection with an alleged Last Will and Testament prepared by Mr. Fischl and executed by Decedent and other estate planning documents he prepared for Decedent between October 25, 2018 and July 17, 2023; seeking all communications between Mr. Fischl and Tracy Lennon Nervegna and Nicholas Nervegna regarding the guardianship proceeding; and his complete attorney file, all medical records and reports and all communications regarding Mr. Fischl's representation of Decedent in the guardianship proceeding. The subpoena requires the requested production "all within twenty days of service [there]of." (Fischl Affirmation in Support, Exhibit 1).

Mr. Fischl acknowledges that he was the attorney draftsman of the purported Will dated 2021 and related estate planning documents, and does not oppose being deposed and producing documents in connection with said legal services. (Fischl Affirmation in Support 6, 7).²

Fischl filed the motion to quash because he opposes the discovery of documents in connection with the 2021 guardianship proceeding in Supreme Court, Rockland County, Mr.

² At the time the motion was fully submitted Mr. Fischl had not produced his file related to the will preparation and execution which Respondent claims demonstrates Fischl's bad faith. (Affirmation in Opposition 23).

Fischl claims that he was counsel to Decedent in the guardianship proceeding and therefore documents prepared in the course of that representation are protected by the attorney-client privilege.

Specifically, Mr. Fischl seeks to quash the subpoena in question on the basis that it is defective for failing to contain a date certain for document production; it is overly broad, unduly burdensome and seeks material that is not germane to the representation of the decedent concerning the estate; it seeks communications between himself and Decedent that are confidential and protected by privilege; and it seeks documents already in Respondent's possession or that do not exist. (Fischl Affirmation in Support 3,4).

In his Opposition Respondent's counsel details attempts to resolve Mr. Fischl's objections to the subpoena prior to the submission of the Motion. (Kutzin Affirmation in Opposition ¶¶ 15-19). Mr. Kutzin recounts that he offered to refrain from contesting Fischl's claim of privilege subject to a privilege log indexing materials that would not be provided, but Fischl rejected the offer. (*Id.* at ¶¶ 17-18).

Respondent's counsel avers that the requested information is relevant and discoverable under the "3/2" rule set forth in Uniform Surrogate's Court Rule NYCRR §202.27. This rule provides that, absent a showing of special circumstances, discovery is limited to three years prior to the date of the propounded instrument and two years thereafter, or to the date of the decedent's death, whichever is shorter. The time period set forth in the subpoena complies with this rule as it seeks production for the period October 25, 2018 through the date of Decedent's death, July 17, 2023. The guardianship proceeding, which served to assess Decedent's capacity, was ongoing at the time the 2021 instrument was executed. According to Respondent, information and documents assembled in that proceeding have relevance to Decedent's capacity at the time the Will was

executed. (Kutzin Affirmation in Opposition ¶ 26).

Moreover, counsel argues that Mr. Fischl cannot assert attorney-client privilege because he was removed as counsel for Decedent by Acting Supreme Court Justice Thorsen on November 29, 2022. (Kutzin Affirmation in Opposition ¶ 2). He asserts there is no privilege preventing disclosure of Fischl's files related to the estate planning documents he prepared for Decedent during the ongoing guardianship proceeding. (Id. ¶ 4). Further, he asserts that no privilege ever existed between Mr. Fischl and the Petitioner or her agents because he never represented her. (Id. ¶ 25).

DISCUSSION

The first objection to the subpoena based on the alleged defect pursuant to CPLR §2304 is without merit as the document includes a timeframe for production - within twenty days of service.

As to relevancy, the Court concludes that the information in the movant's guardianship file is clearly relevant in this proceeding as it speaks to the Decedent's mental capacity when he executed the Will at issue. See Matter of Rosenblatt (Schloegl), 82 Misc. 3d 1217(A), 2024 WL 1337926 (Surr. Ct. Queens Co. 2024) (contents of decedent's guardianship file could be characterized as "newly discovered evidence" relevant to probate contest).

The Court further finds that the subpoena is not overly broad. The language setting forth the documents requested falls within the parameters of CPLR §3120(2) which requires identification of the sought items "by individual item or category" and a description of "each item and category with reasonable particularity." See Matter of Soluri, 40 Misc. 3d 1207(A) (Surr. Ct. Nass. Co. 2013).

The salient issue before the Court is whether Mr. Fischl is to be afforded a protective order based on the attorney-client privilege for documents prepared and procured in the guardianship proceeding.

Fischl relies upon CPLR §4503(b) which requires an attorney draftsman to disclose information as to the preparation of a will in a probate proceeding but prohibits such disclosure as to communications otherwise subject to attorney-client privilege if it will “tend to disgrace the memory of the decedent.” However, Mr. Fischl does not point to any specific information that would tend to cause such disgrace in this case. (Fischl Affirmation in Support ¶ 7). Rather, he offers derogatory accusations regarding documents submitted by the Respondent in the guardianship proceeding and complains that the subpoena is “shocking in its overbreadth.” *Id.*

Before ruling on whether Mr. Fischl is entitled to the attorney-client privilege the Court must address the threshold question did Mr. Fischl and the Decedent ever enter an attorney-client relationship? The substitution of counsel proffered by Mr. Fischl is not dispositive. (Fischl Affirmation in Reply, Exhibit A).

On November 29, 2022, after a full hearing on the issue, Judge Thorsen disqualified Mr. Fischl as counsel for Decedent in the guardianship proceeding and replaced him with a court appointed attorney.³ (Transcript, p. 53, lines 18-20). Specifically, the Court observed that *Decedent did not freely and independently choose Mr. Fischl as his counsel.* (*Id.*, p. 53, lines 13-14). (Emphasis added). To this Court’s knowledge no appeals of that order were filed.

Ultimately, the Court found that Decedent lacked the capacity and competence to manage his own affairs. The judgment and order finally resolving the guardianship proceeding, dated July 17, 2023, gave the guardian authority to “retain counsel in the State of Florida necessary to protect

³ Fischl’s purported Co-counsel, Mr. Goll, was also removed as counsel for Decedent (Transcript p.53, lines 18-20).

the [Decedent's] property interests in Florida and to investigate and bring appropriate legal action including a disgorgement proceeding against ROBERT K. FISCHL, ESQ. for legal fees paid to him from the [Decedent's] funds for alleged legal representation." (Kutzin Affirmation in Opposition, Exhibit C, p.11).

The attorney-client privilege is a creature of statute and prohibits an attorney from disclosing a confidential communication had with his client in the course of professional employment unless the client waives the privilege. (See CPLR §4503; see also CPLR §3101(b); D'Alessio v. Gilberg, 205 AD2d 8, 10 (2d Dept 1994)). The work product privilege (see CPLR §3101 [c]) encompasses documents that would naturally be considered the product of an attorney's work, such as notes reflecting interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs "countless other tangible and intangible things." Victory Markets, Inc. v. Purer, 51 AD2d 895 (1st Dept 1976), citing Hickman v. Taylor, 329 US 495 (1947). As the privilege serve to shield evidence from discovery and thereby potentially thwart the factfinding process, it is to be strictly construed. See D'Alessio v. Gilberg, 205 A.D. 2d at 10. The burden of proving each element of the privilege rests on the party asserting it. See Matter of Priest v. Hennessy, 51 NY2d 62, 68-69 (1980); Matter of Kirk, 32 Misc. 3d 1205 [A], 2011 NY Slip Op 51185 [U]; People v. Radtke, 155 Misc. 2d 21, 23-24 (Sup. Ct. Queens Co. 1992).

The elements of the attorney-client privilege are that: (1) there is an attorney-client relationship, i.e., the attorney was contacted in his/her capacity as such for the purpose of obtaining legal advice; (2) the information sought to be protected is a confidential communication made to the attorney for the purpose of obtaining legal advice or services; and, (3) there is no strong public policy which mandates disclosure. Estate of Adrienne Bono, 2015_NYLJ LEXIS 5260 (Surr. Ct. Bronx Co. 2015) (internal citations omitted). In this case, Mr. Fischl has not sufficiently met his

burden to prove each element of the privilege. He cannot establish that he has met the very first element as this precise issue was resolved against him in a prior court order. Here, the Supreme Court disqualified Mr. Fischl as counsel for Decedent in the guardianship proceeding. (Transcript, p. 53, lines 18-20). Specifically, the Court observed that Decedent *did not freely and independently choose Mr. Fischl as his counsel.* (Id., p. 53, lines 13-14) (emphasis added). The Supreme Court found that Decedent did not contact Mr. Fischl to be his attorney in the guardianship proceeding.

In its final ruling, the Court found that Decedent lacked the capacity and competence to manage his own affairs. The judgment and order resolving the guardianship proceeding, dated July 17, 2023, gave the guardian authority to “retain counsel in the State of Florida necessary to protect the [Decedent’s] property interests in Florida and to investigate and bring appropriate legal action including a disgorgement proceeding against ROBERT K. FISCHL, ESQ. for legal fees paid to him from the [Decedent’s] funds for alleged legal representation.” (Kutzin Affirmation in Opposition, Exhibit C, p.11). Given these facts, Mr. Fischl cannot be afforded the protection of the attorney-client privilege as such a relationship was never established. Cf. Estate of Adrienne Bono, 2015 NYLJ LEXIS 5260.

Further, the Court agrees with Respondent’s contention that communications between Mr. Fischl, the attorney drafter of the Will and related documents, and Petitioner are relevant and are not privileged. The Petitioner was favored under the subject Will, and Decedent testified she had procured Mr. Fischl for him. These issues are relevant to determining the validity of the subject Will. See Matter of Soluri, 40 Misc. 3d 1207(A) (Surr. Ct. Nass. Co. 2013). Mr. Fischl has not asserted a valid basis for privilege in this instance.

The Court also agrees that any of Decedent's medical records procured by Mr. Fischl that may not have already been produced in the guardianship proceeding are discoverable as any prior privilege has been pierced.

The Court finds the remaining contentions without merit.

ORDERED, that Motion to Quash is **DENIED**, and it is further

ORDERED, that Motion for a protective order is **DENIED**, and it is further

ORDERED, that the movant comply with the subpoena duces tecum within twenty days of this Decision and Order; and it is further

ORDERED, that the parties appear for a compliance conference on June 25, 2024 at 10:00.

This constitutes the decision and order of the Court.

Dated: New City, New York
May 22, 2024



HON. KEITH J. CORNELL
Rockland County Surrogate