Discovery in Probate Court Litigation

By David L. J. M. Skidmore

Discovery in probate court proceedings can be quite interesting—gold coins buried in the basement, exotic dancers who marry into the family, and elders who hear aliens knocking on the windows. You can't make this stuff up.

Discovery in probate litigation is governed by the same court rules that apply to general civil litigation unless there is a specific probate court rule that differs.[1] Document production requests to parties and subpoenas to nonparties, depositions of parties and witnesses, and interrogatories are all commonplace in contested probate court matters. Probate litigation does raise some unique discovery and privilege issues, however. This article considers those unique issues and provides practical considerations for common types of probate lawsuits.

Beginning discovery in probate court

A party seeking relief from the probate court starts an action by filing either a petition (e.g., a petition to invalidate a will codicil on the basis of undue influence) or a complaint (e.g., a complaint for conversion of estate assets). A petition commences a proceeding (e.g., *In re Jones Trust*), while a complaint commences a civil action (e.g., *Successor Trustee of Jones Trust v Dan Defendant*).[2] In a proceeding, the scope of discovery "is limited to matters raised in any petitions or objections pending before the court."[3] In a civil action, the scope of discovery is governed by MCR 2.302(B), which applies to all civil litigation.[4] Hence, the scope of discovery in a proceeding is intended to be narrower than in a civil action.

When fraud or concealment in relation to an estate, trust, or protected person is alleged, Section 1205 of the Estates and Protected Individuals Code[5] provides a unique discovery device—examination before the probate court. First, a complaint must be filed under oath with the probate court "by a fiduciary, beneficiary, creditor, or another interested person of a decedent's or ward's trust or estate…."[6] Second, the complaint must include one or more of the following allegations against the person identified in the complaint (who would presumably be named as the defendant):

(a) The person is suspected of having, or has knowledge that another may have, concealed, embezzled, conveyed away, or disposed of the trustee's, decedent's, or ward's property.

(b) The person has possession or knowledge of a deed, conveyance, bond, contract, or other writing that contains evidence of, or tends to disclose, the right, title, interest, or claim of the trustee, decedent, or ward to any of the trust or estate.

(c) The person has possession or knowledge of a decedent's last will.[7]

If these preconditions are satisfied, the court may "order a person to appear before the court and be examined upon the matter of [the] complaint…."[8] "If the person ordered [to appear] refuses to appear and be examined, or refuses to answer the interrogatories asked of the person that relate to the complaint, the judge may by warrant commit the person to the county jail to remain in custody until that person submits to the order of the court."[9]

Attorney-client privilege in probate litigation

Waiver

Under Michigan law, attorney-client privilege generally survives the client's death.[10] However, the personal representative of the deceased client's estate has the authority to waive the privilege. "After the death of the client, the privilege may be waived by his representative."[11] The personal representative should waive the privilege only if the waiver would benefit or protect the estate. "The privilege could only be waived by the administrator for the protection of the estate, and not for the dissipation or the diminution thereof."[12]

In *Eicholtz v Grunewald*,[13] the personal representative's waiver of attorney-client privilege was disallowed because it did not benefit the estate. The plaintiffs brought suit to enforce an alleged oral agreement between their late mother and father to make reciprocal wills, binding upon the survivor, and to set aside conveyances made by the father to the plaintiffs' sibling, Rose, after the mother's death. The plaintiffs' lawsuit was opposed by Rose, who was appointed executrix of both parents' respective estates. At trial, Rose called her late parents' attorney as a witness. The attorney testified that the parents had not intended to make reciprocal wills that were binding upon the survivor. The trial court overruled the plaintiffs' objection that such testimony was barred by attorney-client privilege, and rendered judgment against the plaintiffs, who appealed.

The appellants claimed that the trial court erred by admitting the attorney's testimony regarding privileged communications with his late clients. The Michigan Supreme Court recited the rule that "[t]he privilege could only be waived by the administrator for the protection of the estate, and not for the dissipation or the diminution thereof."[14] Applying that rule, the Court concluded the waiver was for the protection of Rose, not the estates, and was therefore unenforceable:

> It was for [Rose Grunewald's] personal benefit to waive the privilege and consent to receiving the attorney's testimony. The testimony of the attorney tended to benefit Rose Grunewald individually, and not to benefit the estate…. Under such circumstances, Rose Grunewald was not acting in the capacity of personal representative of the deceased in waiving the privilege, her attempted waiver was not for the benefit of the estate, and was ineffectual to bind the estate.[15]

However, the Court found other reasons why attorney-client privilege did not bar admission of the attorney's testimony: first, the parents had waived the privilege by allowing Rose to be present at the attorney meetings; and second, as discussed *infra*, attorney-client privilege does not apply in a will or trust contest.[16]

Will or trust contest

Attorney-client privilege does not apply to communications regarding the deceased client's testamentary intentions in a will or trust contest. "The great weight of the authorities and the text-writers is that communications between attorney and client during the preparation of a will are not privileged. This rule where the contest is between parties not strangers to the estate appears to be universal, except where a statute controls."[17] Accordingly, such communications are freely discoverable, and it is not necessary for the personal representative to waive attorney-client privilege in a will or trust contest.[18] Similarly, court approval is not necessary, although it is not uncommon for an attorney to refuse

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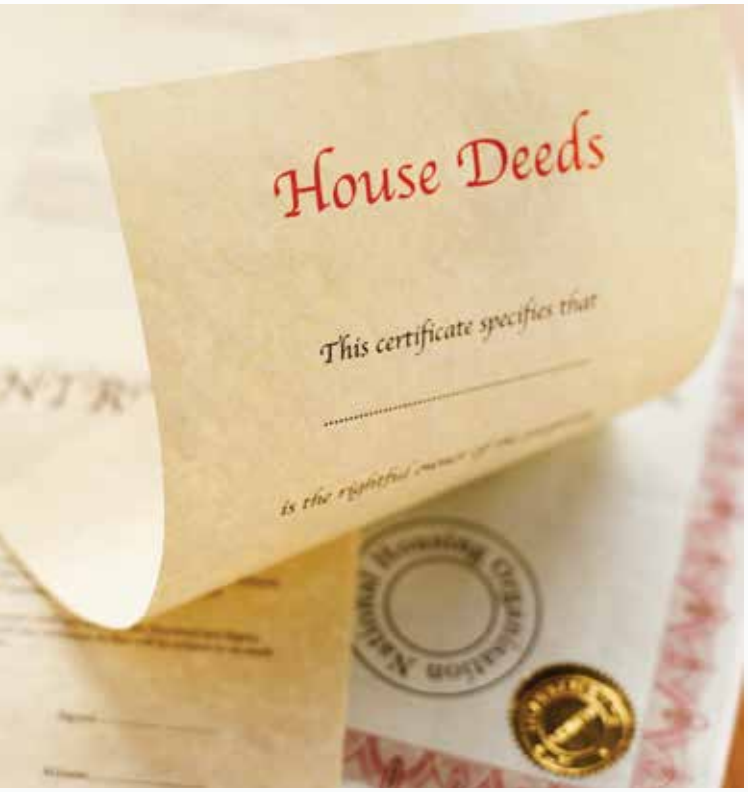
to disclose such communications until the party seeking discovery obtains a court order.

Fiduciary exception

Litigation between a fiduciary and a beneficiary of the trust/estate raises an interesting question regarding attorney-client privilege: may the fiduciary assert the privilege to shield discovery of communications between the fiduciary and legal counsel if the communications related to the administration were paid for by the trust/estate and predated any dispute between the fiduciary and the beneficiary? While Michigan law on this question is nonexistent, other jurisdictions have recognized a fiduciary exception to the attorney-client privilege.

Riggs National Bank of Washington, D.C. v Zimmer[19] is the leading American case on the fiduciary exception. In *Riggs*, the trustees of a trust asked their law firm for a legal opinion regarding potential tax litigation between the trust and the state of Delaware. In response, the law firm provided a legal memorandum to the trustees, and the trustees paid the law firm's invoice from trust assets. Subsequently, trust beneficiaries brought a surcharge action against the trustees, related to the tax litigation about which the trustees had consulted the law firm. During discovery, the trustees declined to produce the legal memorandum, asserting attorney-client privilege, and the beneficiaries moved to compel production.[20]



The court observed there was no threatened or pending litigation between the trustees and the beneficiaries when the legal memorandum was procured. Instead, the only anticipated litigation was tax litigation with the state of Delaware. The legal advice sought by the trustees could therefore only have related to the trustees' administration of the trust for the benefit of the beneficiaries. Accordingly, the beneficiaries were the ultimate or real clients of the law firm. Moreover, the trustees paid the law firm from the trust, which was a "strong indication of precisely who the real clients were[,]"[21] given that Delaware trust law permitted an attorney to be paid from the trust only when such services were necessary for proper trust administration or otherwise benefited the trust.[22]

Ultimately, the court ruled that the privilege could not be invoked against the beneficiaries, because they—not the trustees—were the real clients being served by the law firm:

> As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that He is personally being served. And, the beneficiaries are not simply incidental beneficiaries who Chance to gain from the professional services rendered. The very intention of the communication is to aid the beneficiaries.... The fiduciary obligations owed by the attorney at the time he prepared the memorandum were to the beneficiaries as well as to the trustees. In effect, the beneficiaries were the clients of Mr. Workman as much as the trustees were, and perhaps more so.[23]

Alternately, the court concluded that, even if the privilege did apply, the policy interests behind the fiduciary exception outweighed the policy interests behind the privilege: "The policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is here ultimately more important than the protection of the trustees' confidence in the attorney for the trust."[24]

Certainly, nobody challenges the right of a fiduciary to confidential communications with legal counsel once a dispute with the beneficiaries has arisen. But when legal advice is rendered to a fiduciary in relation to routine trust/estate administration, the beneficiaries should be able to access that advice, which was procured to enable the fiduciary to fulfill its duties to the beneficiaries. Despite the absence of Michigan legal authority, this rule seems to be implicitly followed in practice by the Michigan probate litigation bar, at least in this author's experience.

Discovery considerations in probate court disputes

When a legal instrument or property conveyance is challenged on the basis of alleged mental incapacity, all of the following are proper subjects for discovery: diagnosed mental illness, signs of impaired cognitive abilities, confusion, memory lapses, delusions, the failure to recognize people, paranoia, irrationality, medical records, driver's license restrictions, substance abuse, and prescription medication. Counsel should question the testator's friends and

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family to determine whether they noticed anything unusual at the time of the challenged transaction.

In an undue influence case, it is virtually impossible to obtain direct evidence because such influence tends to happen behind closed doors with no witnesses present. Consequently, the law has developed a circumstantial evidence test, under which undue influence will be presumed when (1) a fiduciary or confidential relationship existed between the defendant and alleged influencer, (2) the defendant had the opportunity to influence the alleged victim, and (3) the alleged victim did something that benefited the defendant.[25] Discovery should encompass the elements of this presumption. Was the defendant an attorney-in-fact under durable power of attorney for the victim, creating a formal fiduciary relationship? Did the victim repose confidence and trust in the defendant over important matters, creating a confidential relationship? Did the defendant spend time alone with the victim?

Undue influence, when it occurs, tends to follow a pattern. The victim is susceptible to influence physically, mentally, or both. The victim comes to rely on the defendant for major living needs, such as assistance with staying in the victim's longtime residence. The defendant isolates the victim from or poisons the victim's mind against friends and family. The defendant convinces the victim that the defendant is the victim's only friend in the world. The defendant creates a bubble-like cocoon around the victim, with the defendant and the victim on the inside and everyone else on the outside. This pattern should be explored in discovery.

Discovery may be sought of the decedent's statements of intent regarding the disposition of his or her property. The hearsay exception set forth at MRE 803(3) determines whether this evidence will be admissible at trial: "A statement of the 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 declarant's will."[26] Hence, if such statements relate to the declarant's will, they are admissible under MRE 803(3) whether they are retrospective ("I wrote ABC in my will because…") or prospective ("I'm going to write XYZ in my will because…"). However, if such statements of intent relate to the declarant's trust, contractual assets, or joint bank accounts, they are admissible under MRE 803(3) only if they are prospective and forward-looking.

Conclusion

Subject to the governing rules, discovery in probate litigation may be limited only by your imagination: the live-in guardian who hoarded soiled cat litter and empty recyclables in the ward's house; the elderly father who gave away the family farm at the same time he was seeing demons emerge from the air vents in his nursing-home room; the beneficiary's boyfriend who tried to extort a certain quantity of silver bars from the trustee, then invited the trustee to invest in a proposed cancer-curing hot-tub clinic in Haiti….

Happy hunting! ■

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ENDNOTES

1. MCR 5.001(A); MCR 5.131(A), (B).
2. MCR 5.101(B), (C).
3. MCR 5.131(B).
4. See MCR 5.131(B).
5. MCL 700.1205.
6. MCL 700.1205(1).
7. *Id.*
8. *Id.*
9. MCL 700.1205(2).
10. *Lorimer v Lorimer*, 124 Mich 631, 637; 83 NW 609 (1900).
11. *Grand Rapids Trust Co v Bellows*, 224 Mich 504, 511; 195 NW 66 (1923).
12. *McKinney v Kalamazoo-City Sav Bank*, 244 Mich 246, 253; 221 NW 156 (1928).
13. *Eicholtz v Grunewald*, 313 Mich 666; 21 NW2d 914 (1946).
14. *Id.* at 671, quoting *McKinney*, 244 Mich at 253.
15. *Id.*
16. *Id.* at 672.
17. *In re Loree's Estate*, 158 Mich 372, 377; 122 NW2d 623 (1909) (holding that the trial court erred by applying attorney-client privilege to exclude the testimony of the testator's attorney regarding the testator's prior will).
18. *Grand Rapids Trust Co*, 224 Mich at 511 ("The rule [that the attorney-client privilege may be waived by the deceased client's personal representative] does not apply to instructions given to an attorney for the preparation of a will, in a will contest.").
19. *Riggs Nat'l Bank of Washington, DC v Zimmer*, 355 A2d 709 (Del Ch 1976).
20. *Id.* at 710.
21. *Id.* at 712.
22. *Id.* at 711—712.
23. *Id.* at 713—714.
24. *Id.* at 714.
25. *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976).
26. MRE 803(3).