IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA EVIDENCE CODE **SC17-1005**

RESPONSE TO COMMENT OF THE CODE AND RULES OF EVIDENCE COMMITTEE AND THE FLORIDA PROBATE RULES COMMITTEE

Jonathan Adam Galler, Chair of the Florida Probate Rules Committee ("FPRC"), Perry Michael Adair, Chair of the Code and Rules of Evidence Committee ("CREC"), and John F. Harkness, Jr., Executive Director of The Florida Bar, file this response to comments.

The Committees received a Comment from Robert W. Goldman. Mr. Goldman's position is consistent with the position taken by the Florida Probate Rules Committee. The CREC does not address the merits of Mr. Goldman's comment other than to say that the concerns he raises as to the problems practitioners face given the current state of affairs are the concerns that drive CREC's position on the matter.

The Committees also received a Comment from George J. Taylor that said that "a successor fiduciary in determining whether to sue a former fiduciary or the fiduciary's attorneys for malpractice may not be able to obtain the documents necessary to evaluate or establish legal malpractice because the documents will be protected by the attorney-client privilege that existed between the former fiduciary and his/her/its attorneys." (*See* Taylor Comment 1–2.) The comment was reviewed by the Committees. The Committees did not change their positions based on Mr. Taylor's Comment. The CREC does not further take a position on the merits of Mr. Taylor's comments. The FPRC believes that Mr. Taylor's Comment is substantive in nature and, therefore, should be addressed to the Legislature, and not to a rules committee.

Mr. Taylor raises two substantive law concerns in his comment. First, under section 90.5021, Florida Statutes, a successor fiduciary will be unable to obtain attorney-client privileged documents from a former fiduciary or from a former testator or ward. This, he says, will present a challenging hurdle in pursuing a breach of duty or legal malpractice action against the lawyer for the former fiduciary or the former testator or ward. Second, he raises a concern that, under

section 90.5021, Florida Statutes, a former fiduciary will not be *permitted* to share attorney-client documents with a successor fiduciary.

Under Florida law, third-party intended beneficiaries of a will or a guardianship may have a right to bring malpractice actions against the lawyer for the principal (the testator or the ward) even though they were not in privity with the lawyer. *See Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner*, 612 So. 2d 1378, 1380 (Fla. 1993) (beneficiary under will); *Saadeh v. Connors*, 166 So. 3d 959, 964 (Fla. 4th DCA 2015) (ward). Nothing in section 90.5021, Florida Statutes, changes that right. What it does do, is place a former fiduciary's attorney-client documents in the same position of privilege and protection from discovery as the former testator's or ward's attorney-client documents. In other words, the communications between an attorney and a fiduciary are privileged and protected to the same extent as if that client were not a fiduciary.

Mr. Taylor raises his first substantive law concern in the context of *Bivins v. Rogers*, 207 F. Supp. 3d 321 (S.D. Fla. 2016). There, the decedent's personal representative sued the decedent's former guardian, and the former guardian's counsel, for breach of fiduciary duty and professional malpractice. Applying section 90.5021, Florida Statutes, the court did not allow the decedent's personal representative to obtain privileged communications between the former guardian and the former guardian's counsel.

First, it is worth noting that under the law prior to the enactment of section 90.5021, Florida Statutes, the decedent's personal representative would not necessarily have been able to obtain those communications under the common law fiduciary exception to the attorney-client privilege. *See Tripp v. Salkovitz*, 919 So. 2d 716, 718-9 (Fla. 2d DCA 2006) (agreeing with lower court that an *in camera* inspection will determine which documents containing confidential communications between the guardian and the guardian's counsel are related to the representation of the ward, and therefore discoverable, and which documents are related to representation of the guardian, and therefore are not discoverable).

Second, Mr. Taylor's concern is that the decedent's personal representative will not be able to obtain the decedent's attorney-client privileged documents. But that concern is different than, and does not arise from, the facts presented in *Bivins*. In *Bivins*, counsel represented the former *guardian* of the decedent. The decedent is not the holder of the privilege between the guardian and the guardian's counsel; the guardian is the holder of that privilege. The decedent's personal representative only holds the privileges the decedent had, not the privileges that the guardian had,

and the decedent's personal representative may, therefore, be able to obtain the decedent's attorney-client communications.

Mr. Taylor argues that section 90.5021, Florida Statutes, may make it more difficult to evaluate or establish a legal malpractice action. However, it is not more difficult than any other malpractice case, where the claimants were not the clients of the lawyer-defendant. It would create far too wide a hole in the attorney-client privilege, when often not even necessary to reveal attorney-client privileged communications in a malpractice case. That said, where necessary, the privileged communications possibly could be revealed under other exceptions to the privilege, either by a fiduciary asserting an advice of counsel defense, *Genovese v. Provident Life and Accident Ins. Co.*, 74 So. 3d 1064, 1069 (Fla. 2011), or counsel using the privileged information to defend himself as provided in section 90.502(4)(d), Florida Statutes (assuming the intended third-party beneficiary is standing in the shoes of counsel's client).

Mr. Taylor's second substantive law concern is that section 90.5021, Florida Statues, will prevent a former fiduciary from voluntarily sharing privileged communications with the successor fiduciary. The legislative summary analysis of CS/HB 325, which created section 90.5021, Florida Statutes, indicates that the statute was clearly meant to address the fiduciary exception to the attorney-client privilege. The legislative summary analysis does not address whether the statute was intended to bar succession of the privilege for fiduciaries. Whether or not the privilege succeeds from one fiduciary to the successor fiduciary seems to be an open question that is not fully addressed in section 90.5021, Florida Statutes. However, it certainly does not prohibit a former fiduciary from voluntarily sharing attorney-client communications with a successor fiduciary.

CREC has supported FPRC's request that this Court reconsider its prior decision not to adopt section 90.5021 as a Rule of evidence to the extent it is procedural because the Court's prior decision on that issue left uncertainty as to the viability of the privilege. CREC's position is that any uncertainty as to the viability of the attorney client privilege in any context is an impediment to the effective representation by attorneys who are impacted by that uncertainty. The attorney-fiduciary relationship is such a context.

The CREC has not taken a position as to the need for the statutory privilege in this context but deferred to the well-reasoned position taken by the FPRC that the privilege is necessary. The legislature has apparently determined that the privilege is appropriate. To the extent the statute is procedural, absent an adoption by this Court, counsel in this area, the fiduciaries they serve and the judges who

may be called upon to address a claim or challenge to the privilege face a dilemma. In summary, CREC supports the efforts of FPRC to address the present uncertainty surrounding the privilege.

WHEREFORE, the Florida Probate Rules Committee continues to respectfully request that the Court reconsider its previous ruling and treat this privilege like other privileges codified in chapter 90 and adopt chapter 2011-183, Laws of Florida, to the extent it is procedural. The Code and Rules of Evidence Committee respectfully requests that the Court resolve the conflict between the rules sets and reconsider its previous ruling to address the current uncertainty as to the viability of the privilege.

Respectfully submitted on September 5, 2017.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

We certify that this document was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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