DIVISION ONE
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IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SCOTT FERRIS and JANE DOE FERRIS, husband and wife; and DYER & FERRIS L.L.C., an Arizona limited liability company, MARK SLEETH and JOAN SLEETH, husband and wife, Petitioner, v. THE HONORABLE DOUGLAS L. RAYES, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, MARY MARJORIE SLEETH f.k.a. MARY MARJORIE FOLEY, Real Party in Interest.	1 CA-SA 10-0087 DEPARTMENT D Maricopa County Superior Court No. CV 2009-019631 DECISION ORDER

This special action came on regularly for conference on May 19, 2010, before Presiding Judge Michael J. Brown and Judges Sheldon H. Weisberg, and Jon W. Thompson. The Petitioners, Scott Ferris, his law firm Dyer & Ferris, and Mark Sleeth are Defendants in a lawsuit brought by real party in interest, Mary Marjorie Foley Sleeth ("Marge"), for defamation, abuse of process, invasion of privacy, and intentional

infliction of emotional distress. Petitioners assert that the superior court abused its discretion in (a) granting a motion to compel production of materials that are covered by attorney-client privilege and (b) ordering them to pay attorney's fees to Marge. Because they lack an equally plain, speedy, and adequate remedy by appeal, we accept jurisdiction and grant partial relief. *See State ex rel. Thomas v. Schneider*, 212 Ariz. 292, 130 P.3d 991 (App. 2006) (jurisdiction proper to consider application of attorney-client privilege); *Ulibarri v. Superior Court*, 184 Ariz. 382, 384, 909 P.2d 449, 451 (App. 1995) (special action proper when court orders disclosure of purportedly privileged information).

The procedural history is as follows. In December 2007, Mark Sleeth filed a petition seeking appointment as temporary and permanent guardian and conservator of his father, R.B. Sleeth; Mark also sought appointment as temporary successor trustee of R.B.'s living trust. Before his subsequent appointments, Mark hired Scott Ferris of Dyer & Ferris as counsel. The court appointed Mark first as temporary guardian and conservator and later as permanent guardian, conservator, and successor trustee.

In July 2008, R.B. and Marge were living together, and Marge filed a petition to remove Mark as guardian, trustee, and conservator. The superior court ruled in December 2008 that R.B.

was easily influenced and needed protection and replaced Mark with an independent private fiduciary. In March 2009, R.B. and Marge were married. In June 2009, the court appointed Managed Protective Services, Inc. as conservator and successor trustee.

In September 2009, Marge filed a tort action against Mark, Ferris, and Dyer & Ferris. Soon after, the court terminated the guardianship of R.B. In October, Jane Ann Geisler of Managed Protective Services sent an e-mail to Marge's counsel stating in part that she "waive[d] any and all Attorney/Client privilege that exists between the firm of Dyer & Ferris for the purpose of any communication with the Law Firm of Stegall & Katz."

In January 2010, Marge moved to compel Ferris and his firm to respond to a request for production of documents. The request for production is not part of our record, but apparently Marge sought "all handwritten notes, case notes, memos, emails or correspondence written from October 1, 2007 to the present addressing any issues relating to Marge or R.B. Sleeth." In her motion, Marge contended that because the successor trustee had waived the attorney-client privilege, under the reasoning adopted by the California Supreme Court in *Moeller v. Sanwa Bank*, 947 P.2d 279 (Cal. 1997), Mark no longer held the privilege.

Petitioners responded that their communications were protected by the attorney-client privilege codified in A.R.S. §

12-2234.[1] They distinguished *Moeller* and noted that Marge had not indicated how Mark's consultations with counsel on trust administration matters were relevant to her legal claims. In addition, Ferris argued that none of the exceptions in Arizona Supreme Court Rule 42, E.R. 1.6 that allow an attorney to reveal confidential information applied. Thus he could not reveal information without Mark's informed consent, which Mark had not given. Finally, Petitioners asked the court not to award attorney's fees for a justified withholding of documents.

The court found *Moeller* persuasive and ruled that the attorney-client privilege "rests with the [trustee's] office and not the individual." It granted the motion to compel, and because Petitioners had not produced a privilege log, had delayed in producing authority to support their refusal to provide documents, and had never produced non-privileged communications with third parties, the court granted Marge's request for attorney's fees.

In responding to this petition, Marge asks us to consider not only her rights but those of R.B. We decline to do so. She states that R.B. has filed a similar suit against Mark and Ferris and that the parties have agreed to consolidate

[1]Section 12-2234(A) (2003) provides: "In a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment."

discovery in both actions, but we do not have in this record either the stipulation or R.B.'s complaint, although it appears that R.B. has asserted some additional claims. Nor does this record contain R.B.'s trust instrument or the retention agreement between Mark and Ferris. Because the court granted Marge's motion to compel, which is the subject of this special action, we confine our discussion to that ruling.

In *Moeller*, a successor trustee objected to the resignation and final accounting submitted by a bank/corporate trustee. 947 P.2d at 280-81. The successor demanded production of documents related to the trust's administration, *id*. at 281, but the bank refused and asserted that when represented by counsel, it, rather than the trust or the office of the trustee, was the client and that it had not waived its privilege. *Id*.

The California Supreme Court held that the Probate Code authorized a trustee to hire counsel and become that attorney's client,[2] and thus to hold an attorney-client privilege. *Id*. at 282. However, the court further held that the power to exercise the privilege belonged to the current occupant of the office of the trustee; therefore, when the new trustee

[2]Subsequently, the court held, however, that trust beneficiaries were not clients of a trustee's counsel and were not entitled to confidential attorney-client communications on matters of either trust administration or the trustee's possible individual liability. *Wells Fargo Bank v. Superior Court*, 990 P.2d 591, 593 (Cal. 2000).

took over, the privilege passed to the successor and the bank could no longer invoke it. *Id*. at 283. The court reasoned that a trustee's powers "are not personal to any particular trustee but, rather, are inherent in the office of trustee." *Id*. at 283. Thus, unless the trust instrument declared otherwise, the successor trustee assumed all of the predecessor's powers. *Id*.

In *Moeller*, the party seeking the privileged communications was a successor trustee who needed access to administration related communications in order to effectively continue to administer the trust. Here, the successor trustee has purported to waive the attorney-client privilege with respect to all communications between Mark and Ferris in favor of a stranger to the trust, and based on this waiver, that stranger, i.e. Marge, has asserted a right to obtain the communications.

We agree that a successor trustee must have access to communications between Mark and Ferris on matters of trust administration in order to fulfill her functions. Because she has the right to such access, she also may waive the attorney-client privilege between Mark and Ferris with respect to those communications and turn them over to Marge's counsel, if she so chooses.

But, as our case illustrates, relations are not always cordial between trustees and beneficiaries or other interested parties. The *Moeller* majority acknowledged that a trustee may

seek legal advice not only on purely administrative matters but also on defensive matters "out of concern for possible future charges of breach of fiduciary duty." 947 P.2d at 285. It suggested that a trustee may avoid disclosing the latter advice "by hiring a separate lawyer and paying for the advice out of its personal funds." *Id*. Of course, that case involved only advice on matters of administration. *Id*. at 286.

In dissent, Justice Chin[3] and two colleagues concluded that the trustee could not be divested of the attorney-client privilege by a successor. *Id*. at 289. The dissent reasoned that nothing in the evidence code "displace[d] the privilege, or designate[d] another as its holder, simply because a new person took over the client's fiduciary duties." *Id*. If "a gap in the law of privilege" resulted, the legislature would have to fill it. *Id*. at 290. The dissent also noted that "one obvious reason for a trustee to consult counsel on trust administration is to avoid breaches of trust and the concomitant personal liability." *Id*. But, the dissent questioned, how could trustees and their counsel "know when they have crossed the line and exposed their confidential communications to potentially hostile successors?" *Id*. And to employ "shadow counsel" would only increase the trustee's fees. *Id*. at 291.

[3]Justices Baxter and Brown, JJ., concurred.

We begin with the premise that the attorney client privilege should not be lightly cast aside. "The attorney-client privilege is one of the oldest recognized privileges for confidential communications." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It 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.*; *see also Granger v. Wisner*, 134 Ariz. 377, 379, 656 P.2d 1238, 1240 (1982) (privilege encourages clients to disclose all information so that "attorney may provide effective legal representation"); *Ulibarri*, 184 Ariz. at 384, 909 P.2d at 451 (accord). Only when a lawyer is fully acquainted with the facts can he tailor his advice to the precise situation.

If the privilege *in toto* is simply transferred from one trustee to the next without recognition that a trustee may have sought advice beyond that of administration, no trustee can fully and frankly disclose concerns regarding issues beyond purely administrative matters or expect to keep confidential his communications related to other possible concerns. Such a rule would impede the candid discussions the privilege is intended to foster. Furthermore, the suggestion that a trustee hire separate counsel makes little sense if the trustee later could be reimbursed for that expense by the trust, which would merely

elevate form over substance. And the suggestion is impractical if the trustee could not be reimbursed because only a wealthy trustee would receive independent legal advice.

Therefore, we conclude that the attorney-client privilege may be waived by the successor trustee/conservator/guardian as to matters purely related to administration, but that communications not related to administration are subject to the attorney-client privilege held here by Mark. Some of the communications Marge seeks also may be shielded by the attorney work-product doctrine asserted by Ferris. The superior court must conduct an *in camera* review to determine which communications between Mark and Ferris were administrative-related and therefore waivable by the successor and which were not. Accordingly, we grant partial relief and remand for that review. In light of our decision, we vacate the attorney's fee award to Marge pending further proceedings below.

_/s/_____
SHELDON H. WEISBERG, Judge