

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Date Submitted: April 14, 2010

Date Decided: May 7, 2010

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Re: *N.K.S. Distributors, Inc. v. Christopher J. Tigani, et al.*,
Civil Action No. 4640-VCP

Dear Counsel and Mr. Tigani:

This matter is before me on the motion of Christopher J. Tigani (“Chris”) to compel document production from Steven R. Director and Bayard, P.A. (collectively, the “SRD/Bayard Defendants”).¹ The SRD/Bayard Defendants have refused to produce certain requested documents on grounds of attorney/client privilege. The documents at issue are communications between the SRD/Bayard Defendants and Robert F. Tigani (“Bob”), the trustee of the Irrevocable Trust for the Benefit of Robert F. Tigani, dated

¹ Docket Item 284.

December 16, 1986 (the “RFT Trust”),² that the SRD/Bayard Defendants assert were made for the purpose of facilitating the rendition of professional legal services. For the reasons stated in this letter opinion, I deny the motion to compel.

During his life, Bob is the sole beneficiary of the RFT Trust.³ The Trust gives Bob the power to appoint one or more successor beneficiaries to whom the trust principal can pass on Bob’s death from the following group of persons: Chris, his brother, Robert F. Tigani, Jr., and the issue of either of them.⁴ On or about June 5, 2000, Bob exercised that power to appoint Chris as the sole successor beneficiary of the RFT Trust.⁵ As a beneficiary of the RFT Trust, Chris contends that the disputed documents must be produced because a trustee may not invoke the attorney/client privilege to withhold documents from a trust beneficiary.

Chris bases his argument primarily on *Riggs National Bank v. Zimmer*.⁶ In *Riggs*, the beneficiaries of a trust filed a motion to compel in connection with a surcharge action wherein the beneficiaries alleged the trustees breached the trust in regard to certain tax

² The RFT Trust is the majority shareholder of N.K.S. Distributors, Inc. (“NKS”).

³ RFT Trust Art. 4 ¶ A.

⁴ *Id.* at Art. 4 ¶ E.

⁵ It is not clear from the record whether Chris is still a successor beneficiary of the RFT Trust. For purposes of the pending motion, I assume he was a successor beneficiary at all relevant times.

⁶ 355 A.2d 709 (Del. Ch. 1976).

matters. The beneficiaries sought to compel production of a legal memorandum prepared in connection with the trustees' petition for instructions and in anticipation of potential tax litigation on behalf of the trust with the State of Delaware.⁷ Because the memorandum was prepared at a time when the trustees did not face any litigation requiring them to seek legal advice personally, the court found that "the legal services were performed at the request of the trustee[s] for the benefit of the beneficiaries of the trust."⁸ Having found that "the beneficiaries were the ultimate clients to be served" by the legal services, the court held that neither the attorney/client privilege nor the work product privilege applied and ordered the memorandum produced.⁹

Chris reads *Riggs* broadly, claiming it requires a trustee to produce to a beneficiary all communications containing legal advice pertaining to the trust or the trustee's performance of his duties. I read *Riggs* more narrowly. The holding in *Riggs* stems from the court's conclusion that the legal services in that case were performed for the benefit of the beneficiaries, who were the lawyer's ultimate clients. The SRD/Bayard Defendants were not performing legal services for Chris's benefit, however, but instead were advising Bob on how to deal with problems at NKS that Bob believed Chris was causing. Under these circumstances, Chris cannot be deemed the ultimate client of the

⁷ *Id.* at 710.

⁸ *Id.* at 711-12.

⁹ *Id.* at 714-17.

SRD/Bayard Defendants, but, rather, more closely resembled an adverse party. Accordingly, I find *Riggs* inapposite here.¹⁰ Moreover, neither the rationale for the decision in *Riggs* nor the principles of attorney/client privilege and trust law provide any justification for the beneficiary of a trust to receive documents covered by the attorney/client privilege where, as here, those documents were prepared on behalf of a trustee in preparation for litigation between a successor beneficiary and the trustee, who himself was the life beneficiary of the trust.

The fact that Chris is only a contingent beneficiary of the RFT Trust further distinguishes this case from *Riggs*. Although Bob had appointed Chris to be a successor beneficiary of the Trust upon Bob's death, there is no guarantee that Chris will remain a beneficiary of the RFT Trust because Bob has the ability to change the successor beneficiaries of the Trust at any time. Accordingly, Chris's interest in the RFT Trust is contingent on his being a successor beneficiary at Bob's death. Because he is only a contingent beneficiary, Chris's interest in the RFT Trust is more attenuated than the interests of the beneficiaries in *Riggs*, who were primary beneficiaries. As contingent

¹⁰ See *In re Estate of Calloway*, 1996 WL 361504, at *1-2 (Del. Ch. June 19, 1996).

beneficiaries do not have the same rights under a trust as its primary beneficiaries,¹¹ this provides a further basis for concluding that *Riggs* is distinguishable from this case.¹²

For the foregoing reasons, I conclude that Chris has not shown any justification for disregarding the SRD/Bayard Defendants' assertion of attorney/client privilege as to documents facilitating the rendition of legal services to Bob in his capacity as trustee. Therefore, I deny Chris's motion to compel.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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cc: All Counsel of Record

¹¹ *McNeil v. Bennett*, 792 A.2d 190, 203 (Del. Ch. 2001), *rev'd on other grounds*, 798 A.2d 503 (Del. 2002).

¹² Chris also cites *Valente v. Pepsico, Inc.* in support of his motion. 68 F.R.D. 361 (D. Del. 1975). Because that case does not involve a trust, I do not find it supportive of Chris's position.