

IN THE OREGON TAX COURT  
MAGISTRATE DIVISION  
Income Tax

FRED W. FIELDS and SUZANNE FIELDS,	)	
	)	
Plaintiffs,	)	TC-MD 040659E
	)	
v.	)	
	)	
DEPARTMENT OF REVENUE,	)	<b>ORDER DENYING DEFENDANT'S</b>
State of Oregon,	)	<b>MOTIONS TO COMPEL</b>
	)	<b>PRODUCTION OF SUZANNE FIELDS'</b>
	)	<b>WILL and ORDER GRANTING</b>
Defendant.	)	<b>PLAINTIFFS' MOTION FOR</b>
	)	<b>PROTECTIVE ORDER</b>

This matter is before the court on several motions filed by Plaintiffs and Defendant. In essence, Defendant requests that the court compel Plaintiffs to produce the will of Suzanne Fields. Plaintiffs seek a protective order from the court denying the production of the will, claiming it is a privileged document. The parties have submitted the matter to the court on the written materials filed.

I. FACTUAL HISTORY

The order of events is as follows:<sup>1</sup>

- April 21, 2004: Plaintiffs filed a Complaint with this court challenging Defendant's assessment of income tax for tax years 1999 and 2000. Plaintiffs claim they were neither residents nor domiciliaries of the State of Oregon during those years.
- December 21, 2004: Defendant filed Defendant's Motion for Leave to Pursue Discovery.
- January 6, 2005: Plaintiffs filed Plaintiffs' Response to Defendant's Motion for Leave to Pursue Discovery objecting to Defendant's motion.
- January 21, 2005: The court issued its Order Granting Defendant's Motion for Leave to Pursue Discovery.
- January 24, 2005: Plaintiffs filed a letter with the court requesting that the case be set for mediation.

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<sup>1</sup> The list set forth in this order does not contain all events entered in the case. They are the events that provide sufficient background of the case and relate to the matters currently before the court.

- February 10, 2005: A telephone conference was held where the parties agreed that the case should be assigned to mediation. Magistrate Tanner was assigned to mediate the matter.
- June 17, 2005: Defendant filed Department's Motion to Compel Production of Documents and for Reasonable Attorney Fees. Contained within that motion was a request that Plaintiffs produce their wills.
- June 21, 2005: Plaintiffs filed their response to Defendant's motion.
- June 29, 2005: A telephone proceeding was held with Magistrate Tanner. Plaintiffs agreed to file a status report with the court in 10 days.
- July 8, 2005: Plaintiffs filed their report detailing the status of discovery. With regard to the wills, Plaintiffs advised that Fred Fields does not have a will and that "the status of any wills that may have existed for Suzanne Fields is not relevant to this proceeding." (Ptf's Report to the Court and Def Regarding Discovery at 2.)
- July 19, 2005: Defendant filed Department's Response to Plaintiffs' Report Regarding Discovery and Supplemental Motion to Compel Production, requesting again that Suzanne Fields' will be produced.
- August 4, 2005: Plaintiffs filed Plaintiffs' Motion for Extension of Time to Answer Defendant's Supplemental Motion to Compel Production. Plaintiffs requested until August 10, 2005, to file their response.
- August 8, 2005: Defendant filed an objection to Plaintiffs' extension request.
- August 8, 2005: Plaintiffs filed their Reply of Fred W. Fields and Suzanne Fields to Department's Response to Plaintiffs' Report Regarding Discovery/Motion for Protective Order.
- August 17, 2005: Defendant filed an objection to Plaintiffs' reply and their motion for a protective order.
- August 30, 2005: A telephone proceeding was held with Magistrate Tanner where Defendant advised the court that it was petitioning for special designation with the Regular Division of the Oregon Tax Court.
- September 14, 2005: The Regular Division entered an Order Denying Special Designation.
- October 17, 2005: A telephone conference was held with Magistrate Tanner where discovery matters were discussed. The parties agreed that the case should return to Magistrate Weidner "to issue an order in response to Plaintiffs' request for a protective order and Defendant's motion to compel production of Mrs. Fields' will. The parties

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request that the court's ruling be based on pleadings filed as of this date and neither party requests oral argument." (Journal Entry at 1.)

The parties have agreed that the case is ready for the court to rule on Defendant's Supplemental Motion to Compel Production and Plaintiffs' Motion for Protective Order.<sup>2</sup>

## II. ANALYSIS

Magistrate Division Rule 11 provides that, when discovery has been ordered in the Magistrate Division, "Regular Division Rules 36 through 46 shall apply." Rule 36 B(1) of the Regular Division Rules sets forth the types of materials that are discoverable. It states, in pertinent part:

"For all forms of discovery, parties may inquire regarding any matter, *not privileged*, which is relevant to the claim or defense of the party seeking discovery  
\* \* \*."

TCR 36 B(1) (emphasis added).

Defendant is requesting that Plaintiffs produce the will of Suzanne Fields, claiming it is relevant to the issue of domicile. Plaintiffs argue the will is not subject to disclosure because it is protected by the attorney-client privilege.

Rule 503 of the Oregon Evidence Code (OEC)<sup>3</sup> recognizes that communications between an attorney and his client are privileged and not subject to disclosure. It states, in pertinent part:

“(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

“(a) Between the client \* \* \* and the client's lawyer \* \* \* [.]”

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<sup>2</sup> Defendant had previously objected to Plaintiffs' late response to Defendant's Supplemental Motion to Compel Production. Based on the discussion during the telephone conference held October 17, 2005, the court is ruling only on whether Plaintiffs should be compelled to produce Suzanne Fields' will and whether a protective order is required. (*See* Journal Entry.) It is the court's understanding that the timeliness of Plaintiffs' response is no longer at issue.

<sup>3</sup> All references to the Oregon Evidence Code (OEC) are to 2003.

OEC 503(2). In *Frease v. Glazer*, 330 Or 364, 370, 4 P3d 56, 60 (2000), the Oregon Supreme Court recognized that “[t]he attorney-client privilege is one of the oldest and most widely recognized evidentiary privileges. \* \* \* The purpose of the privilege ‘is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice.’” (Citations omitted.)

The initial question for the court is whether the attorney-client privilege attaches to wills prepared by attorneys. Authorities generally agree that wills are privileged matters. Wigmore explains that “it can hardly be doubted that the execution and especially the contents [of wills] are impliedly desired by the client to be kept secret during his lifetime, and are accordingly a part of his confidential communication.” 8 J. Wigmore, *Evidence*, § 2314 (McNaughton rev 1961).

Wigmore’s statement is generally supported by case law:

“Courts have on several occasions addressed the issue of disclosure or surrender of a living testator’s will to a person other than the testator. Numerous cases have held or recognized, apparently without exception, that where a will has been prepared by an attorney, its contents are protected from disclosure or surrender, at least during the testator’s lifetime, by the attorney-client privilege. There appear to be no special rules governing the applicability of the privilege in this context; courts have simply recognized that communications with an attorney concerning a will (and, by extension, the will itself) are as privileged as any other attorney-client communication.”

Tim A. Thomas, Annotation, *Involuntary Disclosure or Surrender of Will Prior to Testator’s Death*, 75 ALR 4<sup>th</sup> 1144 (1990 & Supp 2005).

Based on the general authority, the court finds that wills prepared by attorneys are subject to the attorney-client privilege and, therefore, not subject to disclosure under TCR 36 B(1).

Defendant argues, however, that the court should hold an *in camera* proceeding to determine whether the privilege attaches. OEC 104 provides that “[p]reliminary questions concerning the \* \* \* existence of a privilege \* \* \* shall be determined by the court.” This court has already found, however, that wills are privileged materials. No inquiry is necessary to determine whether

privilege attaches. Yet, as noted in *Frease*, the privilege is “not absolute.” *Frease*, 330 Or at 370. A client may waive a privilege or the privilege may be subject to an exception to the privilege requirements. See OEC 503(4). The question is whether the court should hold an *in camera* proceeding to determine if the privilege has been waived or excepted.

In *United States v. Zolin*, 491 US 554, 109 S Ct 2619, 105 L Ed 2d 469 (1989), the United States Supreme Court considered when *in camera* review is appropriate for privileged information. The government in *Zolin* argued that the information sought to be discovered was subject to the crime-fraud exception to privileged information and requested an *in camera* review to determine whether the exception, in fact, applied. The Supreme Court expressed reservations about allowing an automatic use of the *in camera* process for reviewing privileged information.

The Court noted:

“A blanket rule allowing *in camera* review as a tool for determining the applicability of the crime-fraud exception \* \* \* would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk. There is also reason to be concerned about the possible due process implications of routine use of *in camera* proceedings. \* \* \*

“There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents. Courts of Appeals have suggested that *in camera* review is available to evaluate claims of crime or fraud only ‘when justified,’ \* \* \* or ‘[i]n appropriate cases’ \* \* \* Indeed, the Government conceded at oral argument (albeit reluctantly) that a district court would be mistaken if it reviewed documents *in camera* solely because ‘the government beg[ged it] to do so \* \* \*.’”

*Id.*, 491 US at 571. The Court then set forth the following standard for *in camera* review of privileged information:

“Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, the ‘judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person,’ \* \* \* that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.”

*Id.* at 572.

In *Frease*, the Oregon Supreme Court adopted the *Zolin* approach to *in camera* review of privileged information. The court stated: “We conclude that *Zolin* provides an appropriate framework for determining whether a trial court may order *in camera* review of allegedly privileged materials to determine if they fall within the crime-fraud exception \* \* \*.” *Frease*, 330 Or at 372.

This court observes that *Zolin* and *Frease* addressed whether privileged information was subject to the crime-fraud exception. Defendant in the subject appeal is not arguing that the crime-fraud exception applies to the will. It is unclear from Defendant’s filings why Defendant believes the subject will is not privileged. Defendant simply requests an *in camera* proceeding be held for Plaintiffs to “provide testimony, in response to specific questions, to establish whether the requirements for application of the attorney-client privilege have been met.” (Dept’s Objection to Reply at 4.) It makes sense, however, that the principles set forth in *Zolin* and *Frease* be applied beyond the crime-fraud exception to privileged information and extend to other requests for *in camera* review of privileged information. As already determined, a will prepared by an attorney is a privileged document. As a result, *in camera* review should be held only to determine if the privilege has been compromised. Without some reasonable basis to believe the privilege has been compromised, the court will not order an *in camera* review of Suzanne Fields’ will. To hold otherwise would be to allow Defendant to “engage in [a] groundless fishing expeditions[.]” *Zolin*, 491 US at 571.

Defendant claims that the court in *US v. Osborn*, 561 F2d 1334 (9<sup>th</sup> Cir 1977), found that an *in camera* proceeding should be held to review potentially privileged documents. Defendant argues that the Ninth Circuit “confirmed that the attorney-client privilege applies only if the proponent of the privilege demonstrates that the necessary underlying facts exist.” (Dept’s Objection to Reply at 3.) Defendant then quotes lengthy material from page 1339 of the ORDER TC-MD 040659E

decision, where the court observes it held an *in camera* review of certain materials and concluded that no privilege attached to the documentation. However, that discussion related to “items 5, 6, and 7.” *Osborn*, 551 F2d at 1339. The wills were identified as item 4. The court did not hold an *in camera* review of the wills because there were no wills to be reviewed. Instead, the parties were seeking testimony of the attorney who prepared the will. The Ninth Circuit reviewed the lower court’s determination that, once a testator has died, information related to that will is no longer privileged. The Ninth Circuit ruled that information related to a testator’s will remains privileged after death “unless sought to be disclosed in litigation between the testator’s heirs, legatees, devisees, or other parties \* \* \* .” *Id.* at 1340. Because the appeal did not relate to litigation between the testator’s heirs, the court concluded that “the attorney-client privilege may apply, depending upon the circumstances under which the communications between [the testator] and her attorney were made.” *Id.* The court sent the matter back to the District Court to inquire about “the circumstances under which the communications were made” and determine whether the privilege applies. *Id.*

This court observes initially that the *Osborn* case was decided prior to the United States Supreme Court’s ruling in *Zolin*. Furthermore, *Osborn* did not address the privileged nature of a will document. It simply held that, where there is a question of whether privilege has attached to a verbal communication or document, the court is allowed to establish a factual record to determine whether the privilege exists. In the subject case, it is clear that a will is a privileged document. The only inquiry required is whether that privilege has been waived. Without some reasonable basis to believe it has been waived, the court will not order Plaintiffs to produce the will for an *in camera* review.

Defendant argues that the Tax Court has previously recognized the relevance wills play in domicile cases and has ordered other taxpayers to produce wills in those types of appeals.

Defendant refers the court to *Oliverio v. Department of Revenue*, TC No 4457, 4458 (Order Granting Def’s Mot for Order Compelling Produc of Docs, Oct 4, 2000.) In that case, the Department of Revenue requested that the court compel the plaintiffs to produce their wills. The plaintiffs objected based on the private nature of the documents. The court held that the wills should be produced, noting that the plaintiffs could request that the court seal the information to protect their privacy. *See id.* at 5. The difference between the *Oliverio* case and the subject appeal, however, is that Plaintiffs are arguing that the will is a privileged matter not subject to disclosure. The plaintiffs in *Oliverio* never claimed the wills were privileged. As a result, the court never addressed the issue of privilege and whether it protected their wills from being discovered.<sup>4</sup>

### III. CONCLUSION

The parties have requested that the court rule on the motions “based on [the] pleadings filed[.]” (Journal Entry at 1, Oct 27, 2005.) Accordingly, the court finds that wills prepared by attorneys are protected by the attorney-client privilege from disclosure. *In camera* review is required only when the party opposing the privilege presents some information to form a reasonable belief that the privilege has been waived or is subject to a privilege exception. Defendant has provided the court with no reason to believe the will in the subject case is not a privileged document. As a result, the court finds that Plaintiffs should not be compelled to produce the will of Suzanne Fields. Now, therefore,

IT IS ORDERED that Defendant’s First Motion to Compel, as it relates to the production of Suzanne Fields’ will, and Defendant’s Supplemental Motion to Compel Production are denied; and

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<sup>4</sup> It may be that the wills in *Oliverio* were not prepared by an attorney. In that case, the attorney-client privilege would not apply to prevent disclosure.



IT IS FURTHER ORDERED that Plaintiffs' Motion for Protective Order is granted.

Dated this \_\_\_\_\_ day of November 2005.

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COYREEN R. WEIDNER  
MAGISTRATE

***This interim order may not be appealed. Any claim of error in regard to this order should be raised in an appeal of the magistrate's final written decision when all issues have been resolved. ORS 305.501.***

***This document was signed by Magistrate Coyreen R. Weidner November 17, 2005. The Court filed this document November 17, 2005.***