

Memorandum in Support

NYSBA #32

June 1, 2016

S. 7807
A. 10357

By: Senator Bonacic
By: M. of A. Simotas
Senate Committee: Codes
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to attorney requirements regarding revocable trusts.

The attorney-client privilege is the oldest among the common-law evidentiary privileges and is codified in CPLR 4503.¹ It exists to foster open communication between an attorney and a client; indeed, its purpose is to ensure that a person seeking legal advice “will be able to confide fully and freely in his [or her] attorney, secure in the knowledge that his [or her] confidences will not later be exposed to public view to his [or her] legal detriment.”²

Although tension unquestionably exists between the public policies favoring complete discovery and shielding relevant evidence from disclosure, the attorney-client privilege “promotes the use of legal representation by assuring clients that they may freely confide in their counsel without fear that such confidences may be divulged.”³ Of course, to the extent that the privilege shields relevant evidence from disclosure, it obstructs the truth-finding process.⁴

Viewed through that lens, the attorney-client privilege “is not absolute and should be ‘strictly confined within the narrowest possible limits consistent with the logic of its principle.’”⁵ The application of the privilege is case-specific and, thus, is not susceptible to a clear, bright line rule.⁶

This is especially true in estate-related cases between heirs at law, devisees, legatees, or next of kin of the deceased client, where the communications between the client and an attorney who provided estate-planning services to the client are not privileged.⁷ Under CPLR 4503(b), a statutory exception to the attorney-client privilege exists, and excludes from protection “otherwise privileged” communications between an attorney and client concerning a will’s preparation, execution, and revocation in proceedings involving the probate, validity, or construction of a will.⁸

¹ CPLR 4503; *Matter of Bronner*, 7 Misc.3d 1023(A), at *2-3, 801 N.Y.S.2d 230 (Sur. Ct., Nassau County 2005).

² *See id.*

³ *See id.* at *3-4; *see Matter of Colby*, 187 Misc.2d 695, 696-97, 723 N.Y.S.2d 631 (Sur. Ct., New York County 2001).

⁴ *See id.*

⁵ *See id.*

⁶ *See id.*

⁷ CPLR 4503(b).

⁸ *See id.*

The underlying rationale is that the proceedings are not adverse to the deceased client's estate and the client would "expect the confidentiality of [otherwise privileged] communications to be lifted in the interests of resolving disputes over" his or her estate planning.⁹ Consequently, in the interests of the truth-finding process, courts have recognized that the attorney-client privilege does not apply and should not shield otherwise privileged material from disclosure, at least when the material concerns testamentary instruments.¹⁰

While CPLR 4503(b) unquestionably applies in probate contests, no similar statutory exception to the attorney-client privilege exists for contests concerning revocable trusts. The absence of a statutory exception to the attorney-client privilege in such trust contests is unjustified in light of the fact that revocable trusts function as the equivalents of wills.¹¹ Thus, the same evidentiary privileges and exceptions, including the exception to the attorney-client privilege currently codified in CPLR 4503(b), should govern in controversies concerning revocable trusts as well.¹²

Finally, in order to ensure that privileged material is not subject to disclosure during the life of a revocable trust's grantor, the amendment to CPLR 4503(b) specifically proposes that the exception to the attorney-client privilege, as it would apply to revocable trusts, would only be available after the grantor's death. Such provision may, however, be superfluous in light of the settled notion that a party other than a grantor only has standing to contest a revocable trust instrument after the grantor's death.¹³

Based on the foregoing, the New York State Bar Association **SUPPORTS** the passage and enactment of this legislation to amend CPLR 4503(b) to apply to contests concerning the validity of revocable trust instruments, which was developed by its Trusts and Estates Law Section.

⁹ *Matter of Bronner*, 7 Misc.3d 1023(A), at *2-3, 801 N.Y.S.2d 230 (Sur. Ct., Nassau County 2005).

¹⁰ *See id.*

¹¹ *Matter of Davidson*, 177 Misc.2d 928, 930, 677 N.Y.S.2d 729 (Sur. Ct., New York County 1998); *Matter of Tisdale*, 171 Misc.2d 716, 720, 655 N.Y.S.2d 809 (Sur. Ct., New York County 1997).

¹² *Cf. Matter of Leddy*, File No. 2013-374927/A (Sur. Ct., Nassau County Feb. 28, 2014) (a copy of which is annexed hereto as Exhibit "A") (in which Nassau County Surrogate Edward W. McCarty, III, declined to recognize that the exception to the attorney-client privilege codified in CPLR 4503[b] extends to revocable trusts, but found that the privilege did not apply in a dispute concerning an amendment to a revocable trust); *Matter of Levinsky*, 23 A.D.2d 25, 31, 258 N.Y.S.2d 613 (2d Dep't 1965) ("In any event, the present statute relating to an attorney's disclosure of confidential subjects in will matters (CPLR 4503, subd. [b]) is based on the notion that the client's wish for confidence comes to an end with his death, save for matters that will disgrace his memory; and it is suggested that the same rule ought to apply to 'deeds,' in which category the instant mortgage certificates seem to fit.").

¹³ *See Davidson*, 177 Misc.2d at 930.