SUMMARY
December 27, 2018

2018COA183

No. 18CA0160, *In the Matter of the Estate of Louis Rabin* — Probate — Duty of Personal Representative; Attorneys and Clients — Attorney-Client Privilege

A division of the court of appeals considers whether the right of a probate estate's personal representative to possession of the decedent's property under section 15-12-709, C.R.S. 2018, encompasses the right to access the decedent's non-probate legal files, or whether such access conflicts with the rule that the attorney-client privilege survives the death of the client. The division holds that it does not conflict, because the personal representative steps into the shoes of the decedent and becomes the privilege holder. Therefore, the personal representative is entitled to the legal files absent contrary instructions in the will.

COLORADO COURT OF APPEALS **2018COA183**

Court of Appeals No. 18CA0160
Routt County District Court No. 17PR30024
Honorable Michael A. O'Hara, Judge

In re the Estate of Louis Rabin, deceased.

Claudine Rabin,

Appellant,

v.

Mark A. Freirich,

Appellee.

ORDERS AFFIRMED IN PART
AND REVERSED IN PART

Division IV
Opinion by JUDGE TOW
Hawthorne and Nieto*, JJ., concur

Announced December 27, 2018

Cantafio Law, P.C., Ralph A. Cantafio, Mark J. Fischer, Steamboat Springs, Colorado; Legal Tree, LLC, Lisel A.T. Petis, Steamboat Springs, Colorado, for Appellant

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2018.

¶ 1 In this appeal, we are asked to reconcile two seemingly inconsistent long-standing legal maxims: (1) that the attorney-client privilege survives the death of the client and (2) that a decedent's personal representative has a right to take possession of all of the decedent's property. Specifically, petitioner, Claudine Rabin (Claudine),[1] as personal representative of the estate of her late husband, Louis Rabin (Louis), asserts that she has a right to possession of legal files in the possession of respondent, Mark A. Freirich, who is Louis's former attorney. Freirich counters that Claudine's request would violate Louis's attorney-client privilege, which survives his death.

¶ 2 We conclude that because the two maxims can coexist, they are not in conflict. Therefore, the latter rule should have been given effect in this case, and Claudine should have been given the files. Accordingly, we reverse the order quashing her subpoena for the files and the award of attorney fees, but otherwise affirm.

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[1] Because several individuals involved in this case share a common last name, we will refer to them by first name to avoid confusion. We intend no disrespect by doing so.

I. Background

¶ 3 Freirich represented Louis in over forty separate matters over the course of many years. One such matter involved the preparation of two promissory notes that became due upon Louis's death and were payable to his former wife, Suyue Rabin (Suyue). In a separate matter, Freirich notarized a quitclaim deed granting ownership of a parcel of property to Suyue and their daughter, Sulee Rabin (Sulee), while reserving a life estate to Louis. Freirich did not assist Louis in drafting his most recent will.

¶ 4 Upon Louis's death, and under the terms of his will, Claudine was named his personal representative in the administration of his estate. In probate proceedings, Claudine issued a subpoena demanding Freirich produce the "[e]ntire file of Louis Rabin." Freirich refused, claiming the documents were confidential and privileged, and filed a motion to quash the subpoena.

¶ 5 Soon after, Claudine's attorney clarified that he was seeking information concerning the "background, consideration or other matters concerning" the promissory notes held by Suyue. When those files were not provided, Claudine filed a motion to compel

production of "the full and complete file of the Deceased, Louis Rabin," held by Freirich.

¶ 6 In a hearing before the trial court, Freirich represented that he had turned over all documents concerning the promissory notes held by Suyue.[2] However, he had retained more than forty other files created during his representation of Louis.

¶ 7 The trial court ruled in favor of Freirich, finding that Louis's attorney-client privilege survived his death, that neither the estate nor the personal representative was the privilege holder, and that no exception existed to permit Freirich to dispense with the privilege. The trial court also awarded attorney fees to Freirich, finding that Claudine's pursuit of the files was groundless.

¶ 8 After the trial court ruled on the motions, Claudine filed a motion to reconsider, to which Freirich filed a response. In addition, Suyue filed a petition for allowance of claim, to which Claudine responded. Freirich, on his own behalf, then filed a reply to Claudine's response. Asserting that Freirich did not have

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[2] After the dispute had arisen, but before the hearing, Freirich determined that the documents related to the promissory notes were not privileged after all, since Suyue had been present during the discussions about and preparation of the notes.

standing to file the reply, Claudine filed a motion to strike and requested sanctions under C.R.C.P. 11 and C.R.C.P. 12(f).

¶ 9 Before the trial court ruled on the motion to reconsider or the motion to strike, the estate settled the claims relating to the promissory notes and quitclaim deed. This settlement did not purport to settle any disputes between Freirich and Claudine.

¶ 10 The trial court then denied the motion to reconsider and denied the motion to strike and for sanctions. In addition, the trial court found that the case would "soon be closed," that there was no longer any controversy in the matter, and that the "files were apparently no[t] necessary for an evaluation of claims against the estate."

¶ 11 Claudine now appeals both the order granting Freirich's motion to quash and awarding attorney fees and the order denying the motion to strike and the request for sanctions.

II. Attorney Files

¶ 12 Claudine argues that section 15-12-709, C.R.S. 2018, grants her the right to take possession of all client files relating to Freirich's representation of Louis. We agree.

A. Mootness

¶ 13 As a preliminary matter, we first address Freirich's claim that the issue is moot. Freirich argues that because he turned over those files relating to the promissory notes at issue, and because Claudine, Suyue, and Sulee have now resolved their disputes without the remaining files, the resolution of this issue would have no practical legal effect on the controversy. *See Giuliani v. Jefferson Cty. Bd. of Cty. Comm'rs*, 2012 COA 190, ¶ 13. We disagree.

¶ 14 While the record reflects that Claudine did indicate a particular interest in files pertaining to the promissory notes at issue in the dispute with Suyue, the subpoena issued requested the "[e]ntire file of Louis Rabin." Although the initial dispute that prompted the subpoena may no longer be in controversy, Claudine claimed an independent authorization to collect the remaining files under section 15-12-709. If a personal representative has a right to take possession of client files independent of any known or current dispute over the estate, the action to collect those files remains justiciable. And, of course, there remains the issue of whether the trial court erred in awarding fees.

B. Standard of Review

¶ 15 We review issues of statutory interpretation de novo. *Estate of Brookoff v. Clark*, 2018 CO 80, ¶ 5. We interpret statutory terms in accordance with their plain and ordinary meaning. *Id.* In interpreting a statute, we may not carve out an exception not provided for in the law; to write a special limitation into a statute is a function of the legislature and not the courts. *Id.* at ¶ 6 (citing *Packard v. Packard*, 33 Colo. App. 308, 309, 519 P.2d 1221, 1222 (1974)).

C. Whether the Personal Representative has a Right to Decedent's Files

¶ 16 Section 15-12-709 provides that,

> [e]xcept as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property; except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by the personal representative will be necessary for the purposes of administration.

¶ 17 The parties dispute whether Louis's files fall within the ambit of his property. In *People v. Felker*, 770 P.2d 402 (Colo. 1989), the

Colorado Supreme Court addressed this issue, albeit in a different context. In *Felker*, an attorney was facing disciplinary action, in part because she failed to deliver client files after withdrawing from representation. The court explicitly held that ABA Standards recommending a reprimand when a lawyer is negligent in dealing with client property are applicable to a lawyer who fails to deliver client files. *Id.* at 407 (citing Standards for Imposing Lawyer Sanctions § 4.13 (Am. Bar Ass'n 1986). Accordingly, it is clear that client files held by an attorney are property of the client.[3]

¶ 18 Under a plain reading of section 15-12-709, then, a personal representative "has a right to" client files held by an attorney for a decedent, except where a will provides otherwise.

¶ 19 In this case, Louis's will granted his personal representative "full power and authority to sell, transfer, grant, convey, exchange, lease, mortgage, pledge, or otherwise encumber or dispose of any or

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[3] Of course, there may be specific items contained in a client's file to which the client is not entitled, such as "documents related to the lawyer's representation of other clients that the lawyer used as a model from which to draft documents for the present client" or "documents that would be considered practice-related materials relating to the business of representing the client." Colo. Bar Ass'n Ethics Comm., Formal Op. 104, at 3 (revised Sept. 2018). Freirich does not identify any such documents in Louis's files.

all of the real or personal property" of the estate. It contained no provision limiting the personal representative's ability to take possession of or dispose of files held by his attorney. Accordingly, as the personal representative here, Claudine "has a right to" the client files. § 15-12-709.

¶ 20 Freirich, however, cites to separate concerns relating to confidentiality, the attorney-client privilege, and the particular facts of this case, which he argues counsel against release of the files. We are not convinced.

¶ 21 Freirich first notes that the attorney-client privilege survives the death of the client. *See Wesp v. Everson*, 33 P.3d 191, 200 (Colo. 2001). Consequently, he argues, requiring surrender of client files to the personal representative of an estate would run counter to the purposes of the attorney-client privilege and an attorney's duty of confidentiality.

¶ 22 Colorado's attorney-client privilege is codified in section 13-90-107(1)(b), C.R.S. 2018, which provides that "[a]n attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment."

¶ 23 Independent of the attorney-client privilege's bar against compelled testimony, Colo. RPC 1.6 requires an attorney to maintain the confidentiality of all "information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation," or one of several other exceptions applies. Like the attorney-client privilege, the duty of confidentiality survives the death of the client. *See* Colo. RPC 1.6 cmt. 20; Colo. RPC 1.9(c).

¶ 24 A personal representative, however, "succeeds to the rights and obligations of the Estate's decedent, effectively 'stepping into the shoes' of the decedent." *Colo. Nat'l Bank of Denver v. Friedman*, 846 P.2d 159, 163 (Colo. 1993). In other words, the right to claim the attorney-client privilege passes to the personal representative, who becomes the holder of the privilege. Thus, disclosing the privileged communications to the holder of the privilege does not itself violate the privilege.

¶ 25 Freirich next argues that a decedent may not wish for his spouse or other surviving family members to know information contained in client files. But our reading of section 15-12-709 does not provide for disclosure of otherwise confidential information to

all, or even any, family members. Instead, it grants the personal representative the right to client files absent a provision in the will stating otherwise. If a decedent does not want a particular individual to have access to such files, or to the information within them, he may deny that individual access by including a specific provision in the will, or by declining to name that person as a personal representative. Louis did neither here.

¶ 26 Finally, Freirich argues that client files are not in the same category of tangible property to be distributed in accordance with the decedent's will or the probate code. He appears to be arguing that the property access contemplated by section 15-12-709 is limited to property that can be devised or inherited, or at most to property that is related to the duties of the personal representative. His argument is unavailing.

¶ 27 A personal representative's duties include marshaling assets and resolving claims on behalf of and against the estate. For example, where there is a surviving claim on behalf of a decedent, the personal representative "owns the action for the benefit of the estate." *Espinoza v. O'Dell*, 633 P.2d 455, 466 (Colo. 1981) (quoting *Salazar v. Dowd*, 256 F. Supp. 220, 223 (D. Colo. 1966)). A

personal representative cannot know what rights, obligations, or surviving claims of the decedent may exist if she is denied the right to the decedent's client files, which may contain that information.

¶ 28 But more importantly, Freirich's attempt to limit the reach of section 15-12-709 lacks statutory support. Client files are tangible personal property, *see People v. Gutierrez*, 222 P.3d 925, 943 n.16 (Colo. 2009), and Freirich does not identify any provision of the probate code that creates an exception to section 15-12-709 for certain types of personal property, or that limits the reach of the provision to only property that can be devised or inherited. To the contrary, the probate code broadly defines property as "both real and personal property or any interest therein and anything that may be the subject of ownership." § 15-10-201(42), C.R.S. 2018. We decline to carve out an exception such as the one Freirich espouses.

¶ 29 In sum, Claudine, as the personal representative of the estate, steps into Louis's shoes. As such, she is the rightful owner of the files and is the holder of the attorney-client privilege absent

contrary direction in the will.[4] Consequently, providing the files to her does not amount to an abrogation of Louis's attorney-client privilege. In other words, what appeared at first blush to be a conflict between a personal representative's role and the survival of the attorney-client privilege is not a conflict after all. Because Claudine has a right to the files, the trial court erred in granting the motion to quash.[5] We thus reverse that order.

III. Attorney Fees in the Probate Proceeding

¶ 30 Because we reverse the trial court's decision regarding the personal representative's right to take possession of a decedent's files, it cannot be said that Claudine's position lacked substantial justification. Therefore, we also must reverse the award of attorney fees to Freirich.

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[4] Freirich's arguments appear to raise concerns that Claudine will be able to destroy the attorney-client privilege by disclosing the substance of Louis's communications to others. This concern, however, is not germane to our analysis. There is no indication in the record that Claudine seeks to make such disclosures. Thus, we leave for another day the exploration of the extent to which a personal representative's fiduciary obligation to the estate restricts such disclosures.

[5] Because we determine that Claudine has a right to the client files regardless of whether they are necessary to the administration of the estate, we need not address the applicability of the testamentary privilege.

¶ 31 Claudine further argues that Freirich's opposition to the subpoena and motion to compel lacked substantial justification and, therefore, the trial court should have awarded attorney fees to the estate. However, "[c]laims involving novel questions of law for which no determinative authority exists are not frivolous, groundless, or vexatious." *M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc.*, 962 P.2d 335, 338 (Colo. App. 1998). On the other hand, a particular argument on an issue of first impression may nevertheless be frivolous if the party fails to present any rational argument in support of it. *Layton Const. Co. v. Shaw Contract Flooring Servs., Inc.,* 2016 COA 155, ¶ 34. Here, we cannot conclude that Freirich failed to advance a rational argument. Accordingly, Claudine's pursuit of attorney fees pursuant to section 13-17-102, C.R.S. 2018, must fail.

IV. The Motion to Strike and Motion for Sanctions

¶ 32 Finally, Claudine argues that by filing a reply to a motion on an issue to which he was not a party, Freirich violated C.R.C.P. 11 and C.R.C.P. 12(f). Therefore, she asserts the trial court should have granted her combined motion to strike and motion for sanctions. We disagree.

¶ 33 C.R.C.P. 12(f) provides that the court "*may* order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading, motion, or other paper." (Emphasis added.) The use of the term "may" indicates a grant of discretion to the court. *Kailey v. Chambers*, 261 P.3d 792, 795 (Colo. App. 2011). We therefore review the trial court's denial of the motion to strike for an abuse of discretion. *See id.* Similarly, "[w]hether an attorney committed an infraction under Rule 11 is a decision committed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of discretion." *In re Trupp*, 92 P.3d 923, 932 (Colo. 2004).

¶ 34 The reader will recall that the reply filed by Freirich was not directly related to the motion to quash; rather, it was filed to address certain factual assertions in Claudine's response to Suyue's claim against the estate. However, before the trial court ruled on Claudine's request to strike the reply, the parties informed the court that they had reached a settlement agreement resolving Suyue's claim. As a result, Suyue's petition, Claudine's response, and Freirich's reply no longer had any bearing on an issue before the

trial court. *See Giuliani*, ¶ 13. Accordingly, the trial court did not abuse its discretion by summarily denying the motion to strike.

¶ 35 As to the request for sanctions, C.R.C.P. 11(a) provides, in relevant part, that an attorney's signature on a pleading indicates

> that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose . . . .

¶ 36 It further provides that if an attorney signs a pleading in violation of the rule, the court shall impose "an appropriate sanction" against that attorney. *Id.* And although the language of the rule indicates that it is limited to pleadings, C.R.C.P. 11 also applies to motions and other papers filed with the court. *Jensen v. Matthews-Price*, 845 P.2d 542, 543-44 (Colo. App. 1992).

¶ 37 In her motion, Claudine asserted that "[o]nly interested parties may file a reply." She invoked the court's authority under C.R.C.P. 12(f) to strike "any redundant, immaterial, impertinent, or scandalous matter" contained in a filing.

¶ 38 Freirich restricted his reply to those "portions of the Response to Suyue Rabin's Petition for Allowance of Claims . . . which allege

matters involving" Freirich. Significantly, the factual representations Freirich sought to correct in his reply were at least arguably germane to Claudine's still-pending motion for reconsideration of the court's ruling on the motion to quash the subpoena.

¶ 39 Claudine cites to no authority that makes clear such a filing warrants sanctions under C.R.C.P. 11, and she makes no argument that the trial court's ruling was arbitrary, unreasonable, or unfair. Therefore, we cannot find that the trial court abused its discretion in denying the request for sanctions.[6]

V. Conclusion

¶ 40 We reverse the order quashing the subpoena and the award of attorney fees. We affirm the denial of the motion to strike and the request for sanctions.

JUDGE HAWTHORNE and JUDGE NIETO concur.

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[6] In so ruling, we do not condone Freirich's actions in filing the reply. While Freirich, as the subject of the subpoena, was well within his rights to file papers in support of his effort to quash that subpoena, he was not a party to, and had no interest in the outcome of, Suyue's claim. Nonparty witnesses have no standing to file pleadings, motions, or other such papers merely because they do not like what is said about them. We simply hold here that an attempt to do so will not necessarily result in monetary sanctions.