

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

Agnes Josephine Rigsby

CASE NUMBER 99-10480

Chapter 7

**MEMORANDUM OPINION AND ORDER RE
MOTION TO RESOLVE ISSUE OF WAIVER OF ATTORNEY-CLIENT PRIVILEGE,
INCLUDING WORK PRODUCT DOCTRINE, AND WAIVER OF RIGHT OF CONFIDENTIALITY**

At issue in this case is whether or not the debtor, Agnes Josephine Rigsby executed a knowing, intelligent and informed waiver of the attorney-client privilege she allegedly had with the McIntire Law Corporation, Christopher D. McIntire and Michael V. McIntire while employed as the trustee of the Cherry Trust. The trust's successor trustee, Linda A. Paquette, filed a "Motion to Resolve Issue of Waiver of Attorney-Client Privilege, Including Work Product Doctrine, and Waiver of Right of Confidentiality" with the Court on June 4, 1999. The Court conducted a hearing on Paquette's motion and the various objections thereto on July 14, 1999. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

In November of 1993, the debtor, Agnes Josephine Rigsby, ("Rigsby"), was made trustee of the Cherry Trust. On February 1, 1995, the trust's sole beneficiary, Tracy Simmons, filed a petition to

remove Rigsby from this position based on allegations that Rigsby had misappropriated the trust’s assets for her own use. On September 17, 1998, the Superior Court of the State of California, County of Los Angeles, ordered removal of Rigsby as trustee and appointed Linda A. Paquette, (“Paquette”), as successor trustee. On January 11, 1999, the Superior Court issued a written opinion in which they found that “Agnes Rigsby,. . . intentionally and willfully breached her fiduciary duty of trust to beneficiary Tracy Simmons. Ms. Rigsby’s acts as trustee resulted in a loss of trust assets. Ms. Rigsby’s breach of fiduciary duty was a fraud or defalcation, while acting in a fiduciary capacity, within the meaning of the discharge provisions of the United States Bankruptcy Code.” The McIntire Law Corporation, Christopher D. McIntire and Michael V. McIntire, (hereinafter “McIntire”) represented Rigsby in the California Cherry Trust litigation.

One month to the day after the California decision, Rigsby filed the instant case.¹ McIntire was listed on the debtor’s petition as an unsecured creditor with a claim of \$80,747.61. McIntire subsequently filed a proof of claim for this amount. At her first meeting of creditors, Rigsby stated that in misappropriating trust assets, she followed her attorney’s advice to treat the trust money as her own.

On April 15, 1999, Paquette filed a “Motion for 2004 Examination” of the debtor. In said motion, Paquette stated that the 2004 questioning “would be limited to the subject matter of the debtor’s relationship to the unsecured creditor McIntire Law Corporation.” This Court granted Paquette’s motion on April 16, 1999.

¹Rigsby’s case was originally filed as a chapter 13, but was later converted to a 7.

In anticipation of Rigsby’s 2004 examination, the debtor, her counsel and Paquette appeared in this Court on April 22, 1999. At that appearance, Rigsby announced her intention to waive her attorney-client privilege with the McIntires. Upon the Court’s request, Rigsby’s waiver was reduced to writing. Such written waiver was filed on May 12, 1999 and contained the following language: “The debtor waives the attorney-client privilege, including the work product doctrine under any applicable laws of evidence and any right of confidentiality under any applicable laws of ethics relative to McIntire Law Corporation, its principals Michael V. McIntire, . . . Christopher D. McIntire, . . .”

Rigsby’s 2004 examination was conducted in her attorney’s office on May 13, 1999. During this examination, some questions arose as to the validity of Rigsby’s waiver of the privilege. As a result of this confusion, Paquette filed a “Motion to Resolve Issue of Waiver of Attorney-Client Privilege, including Work Product Doctrine, and Waiver of Right of Confidentiality” on June 4, 1999.

In addition to the debtor’s examination, the Court has granted permission for the McIntire’s 2004 examination to be taken in California. Due to the confusion over whether or not Rigsby has effectively waived the attorney-client privilege, the McIntires believe they are obligated to assert the privilege. The McIntires filed an objection to Paquette’s motion to resolve the issue on June 25, 1999, in which they allege Rigsby never effectively waived the privilege.

II. CONCLUSIONS OF LAW

Under California law,

. . . the power to assert the attorney-client privilege with respect to confidential communications a predecessor trustee has had with its attorney on matters concerning trust administration passes from the predecessor trustee to its successor upon the successor’s assumption of the office of trustee.

Moeller v. Superior Court, 947 P.2d 279, 288 (Cal. 1997). Said privilege does not attach to the trust itself, but to the trustee. It is the trustee who is the attorney’s client, not the trust. Should a trustee wish to preserve the attorney-client privilege for himself, he needs to retain separate counsel and pay for said representation out of its own, non-trust funds.

In the case at bar, the McIntires represented Rigsby, as trustee of the Cherry Trust, in the California litigation. Rigsby made several payments to the McIntires for this representation out of trust funds. As a result, this Court finds that the power to assert the attorney-client privilege with respect to any communications Rigsby had with the McIntires passed to Paquette upon her appointment as successor trustee. Rigsby, therefore, had no entitlement to either assert or waive the attorney-client privilege on April 22, 1999.

The Court also finds that the work product doctrine offers the McIntires no protection against production of documents.

[An attorney’s] contention that the requested materials were protected work product is without merit. The work product doctrine pertains to materials prepared by an attorney in preparation for litigation when the materials are sought by an adversary of the attorney’s client.

FRCP 26(b)(3) speaks of “documents and tangible things . . . prepared in anticipation of litigation or for trial by or for *another* party or by or for that *other* party’s representative . . .” (emphasis added). Thus the work product doctrine does not apply to the situation in which a client seeks access to documents or other tangible things created or amassed by his attorney during the course of the representation.

Spivey v. Zant, 683 F.2d 881, 885 (5th Cir. 1992); see also, *Roberts v. Heim*, 123 F.R.D. 614, 631 (N.D. Cal. 1988). In the case at bar, Paquette has stepped into the shoes of trustee for the Cherry Trust and has now acquired the right to either assert or waive the attorney-client privilege. As a result, Paquette is not an adverse party to the McIntires. The McIntires, therefore, are not entitled to assert the work product doctrine to protect their work product from Paquette.

III. ORDER

It is therefore **ORDERED** that the Court finds that no attorney-client privilege existed between the debtor, Agnes Josephine Rigsby, and the McIntire Law Corporation, at the time of Rigsby’s waiver.

It is **FURTHER ORDERED** that the McIntire Law Corporation, Christopher D. McIntire, and Michael V. McIntire, are not entitled to assert the attorney-client privilege, including work product doctrine, with respect to their handling of the Cherry Trust while Agnes Josephine Rigsby was trustee.

It is so ordered.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: August 2, 1999