

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KATHRYN MENNEN, SARAH MENNEN,)
NANCY MENNEN, as natural guardian for)
[A.M.], SHAWN MENNEN, and JOHN)
MENNEN,)

Plaintiffs,)

v.)

C.A. No. 8432-ML)

WILMINGTON TRUST COMPANY, a)
Delaware Corporation, GEORGE JEFFREY)
MENNEN, and The TRUST ESTABLISHED)
BY GEORGE S. MENNEN FOR THE)
BENEFIT OF GEORGE JEFFREY MENNEN,)
a Delaware trust.)

MASTER'S REPORT
(Motion to Compel and Motion to Intervene)

Date Submitted: July 2, 2013

Final Report: July 25, 2013

Kevin G. Abrams, J. Peter Shindel, Jr., and Matthew L. Miller of Abrams & Bayliss LLP, Wilmington, Delaware; Attorneys for Plaintiffs.

Thomas W. Briggs, Jr., Jay N. Moffitt, Matthew R. Clark and Brendan W. Sullivan of Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware; Attorneys for Defendant Wilmington Trust Company.

Jeffrey S. Cianciulli of Weir & Partners LLP, Wilmington, Delaware; Attorneys for Defendant George Jeffrey Mennen.

Brian J. Ralston and Jessica A. Montellese of Potter Anderson & Corroon LLP, Wilmington, Delaware; Attorneys for Owen J. Roberts.

LEGROW, Master

INTRODUCTION

Before me are two motions filed in this case in which the beneficiaries of a trust allege that the trustees have violated their fiduciary duties and engaged in a host of breaches of trust. The first motion seeks to compel the production of documents (the “Motion to Compel”), and was brought by the plaintiffs, Kathryn Mennen, Sarah Mennen, John Mennen, Shawn Mennen, and Nancy Mennen as natural guardian for A.M., who is a minor. The plaintiffs are beneficiaries (the “Beneficiaries”) of a trust created in 1970 by George S. Mennen for the benefit of John H. Mennen dated November 25, 1970 (the “Trust”). The defendants, Wilmington Trust Company (“Wilmington Trust”) and George Jeff Mennen (“Jeff Mennen” or “Jeff”)¹, who were the co-trustees of the Trust, contend that I should deny the Motion to Compel in its entirety because the requested documents are protected by attorney-client privilege and/or the work product doctrine. For the reasons set forth below, I conclude that some, though not all, of the documents at issue are protected by privilege, and I therefore recommend that the Court grant in part and deny in part the Motion to Compel. The second motion seeks leave to intervene in this action and is brought by the individual co-trustee of the trust established by George S. Mennen for the benefit of George Jeffrey Mennen and his issue dated November 25, 1970 (“Jeff’s Trust”). I recommend that the Court grant the motion to intervene.

¹ Jeff Mennen, in his opposition to the Motion to Compel, notes that the plaintiffs have recited his name inaccurately and reserves the right to object to this misnomer in the future. *See* Def. George Jeff Mennen’s Opp. to Pls.’ Mot. to Compel (hereinafter “Jeff’s Opp.”) p. 1 n.1. For the sake of clarity, I use certain of the parties’ first names. No disrespect is intended.

BACKGROUND

On March 22, 2013, the Beneficiaries filed their 27 count Verified Complaint in this Court alleging several breaches of trust by Wilmington Trust and Jeff Mennen as the two trustees (the “Co-Trustees”) of the Trust. The Complaint seeks, *inter alia*, removal of the Co-Trustees and damages in excess of \$100 million as a result of alleged breaches of the Co-Trustees’ fiduciary duties. The Complaint also names Jeff’s Trust as a defendant, and alleges one count against it.

This action was preceded by a petition for instructions that Wilmington Trust filed on May 25, 2012 to remove Jeff as the individual co-trustee of the Trust (the “Petition Action”). In the Petition Action, Wilmington Trust alleged that the Trust was a directed trust that required Wilmington Trust to follow the direction of the individual trustee with respect to certain trustee powers and responsibilities, and that investment decisions directed by Jeff had caused the Trust to lose a substantial portion of its value. In the Petition Action, Wilmington Trust sought (1) removal of Jeff as individual trustee, (2) an order authorizing the adult beneficiaries of the Trust to appoint a successor individual co-trustee, and (3) access to certain investment information Jeff allegedly was withholding. Curiously, although the Beneficiaries were identified as interested parties and received notice of the Petition Action, they did not immediately appear in that action. Instead, after Wilmington Trust indicated that its attempts to contact the Beneficiaries had gone unanswered for a number of years, I appointed a guardian *ad litem* to represent the interests of A.M., the minor beneficiary. It was not until this action was filed in March

2013 that the Beneficiaries appeared in this Court. At that point, the Petition Action was stayed by agreement of the parties, and the guardian *ad litem* was dismissed from service.

An expedited schedule was entered in this case, and the parties proceeded to conduct discovery. Unfortunately, that process has not been without hurdles. In their responses to the Beneficiaries' first request for the production of documents, both Wilmington Trust and Jeff asserted that the attorney-client privilege and/or the work product doctrine protected several categories of responsive documents and that they intended to withhold those documents. Specifically, Wilmington Trust refused to produce any of its internal or external communications with counsel related to the Petition Action. Additionally, Wilmington Trust has refused to create a privilege log for the documents it has withheld relating to the Petition Action. Finally, Wilmington Trust has raised an advice of counsel defense but has refused to produce the documents related to that defense. For his part, Jeff Mennen continues to withhold a small number of documents on attorney-client privilege and work product grounds.

Through this motion, the Beneficiaries seek to compel Wilmington Trust to produce "all privileged documents related to the Trust through March 22, 2013," the date they filed their Verified Complaint, as well as "all privileged documents related to the Trust" and created thereafter if "not created in connection with [the] defense" of this action.² In addition to the communications with counsel related to the Petition Action,³ the Beneficiaries seek the production of legal "advice and documents related to

² Pls.' Mot. to Compel the Production of Privileged Documents by Def. Wilmington Trust Company and Def. George Jeffrey Mennen (hereinafter "Mot. to Compel") p. 14.

³ I will refer to these as the "Petition Action Documents."

[Wilmington Trust's] duties and powers" under the Trust agreement.⁴ The Beneficiaries also seek an order compelling Jeff to produce three specific documents that relate to events that occurred before the Petition Action was commenced.⁵

The Beneficiaries assert that under *Riggs National Bank of Washington D.C. v. Zimmer*,⁶ Wilmington Trust must turn over all documents related to the Petition Action because that action presumably was brought on behalf of the Beneficiaries, who were, in effect, the ultimate clients of the attorneys ostensibly representing Wilmington Trust. The Beneficiaries also contend that communications between Wilmington Trust and its attorneys regarding Wilmington Trust's powers and duties under the Trust agreement are not privileged as to the Beneficiaries because, as with communications relating to the Petition Action, these communications were created on behalf of the Beneficiaries. Further, the Beneficiaries argue that Wilmington Trust impermissibly attempts to use the privilege as both a sword and a shield by asserting an advice of counsel defense while claiming that the documents related to that defense are protected.

Wilmington Trust responds that *Riggs* i) does not apply to the documents that Wilmington Trust is withholding, and ii) is no longer good law. Although it has backed away from the second argument,⁷ Wilmington Trust maintains that it was the ultimate client in the Petition Action because the legal advice Wilmington Trust procured was

⁴ I will refer to these as the "Powers and Responsibilities Documents."

⁵ I will refer to these as "Jeff's Documents."

⁶ 355 A.3d 709 (Del. Ch. 1976).

⁷ *Kathryn Mennen, et al. v. Wilmington Trust Company, et al.*, C.A. No. 8432-ML (July 2, 2013) (TRANSCRIPT) (hereinafter "Transc.") at 60:5–11 (counsel for Wilmington Trust explaining that the Court does not need to reach the question of whether *Riggs* is still good law.)

intended for its benefit, not for the benefit of the Beneficiaries. Wilmington Trust further asserts that because litigation reasonably was anticipated between itself and the Beneficiaries when it retained counsel regarding the events giving rise to the Petition Action, and because Wilmington Trust paid for the legal advice it sought rather than dipping into the Trust assets to pay the fees, the factors identified in *Riggs* as appropriate in resolving the privilege question do not support the application of a fiduciary exception to attorney-client privilege. Finally, Wilmington Trust contends that the Beneficiaries' assertion that Wilmington Trust is improperly withholding documents related to an advice of counsel defense is premature as Wilmington Trust is still reviewing documents, making privilege determinations, and deciding whether to pursue an advice of counsel defense.

For his part, Jeff Mennen contends that the motion to compel primarily is directed at Wilmington Trust, and, to the extent that it is not, the documents he seeks to withhold clearly fall outside of *Riggs*. Jeff has withheld three documents;⁸ each was created before the Petition Action was filed. The Beneficiaries ask this Court to compel the production of those documents as well as any privileged documents created after the commencement of the Petition Action that are unrelated to Jeff's defense in that action. Jeff responds that he is not withholding any documents other than the three at issue. He claims that two of the withheld documents are protected by the attorney-client privilege, and that the other is

⁸ The Beneficiaries initially asserted that Jeff was withholding four documents, but one document was a duplicate of another. *See* Jeff's Opp. ¶ 1.

protected by the work product doctrine. For each, Jeff argues that the Beneficiaries have failed to carry their burden to show that they are entitled to Jeff's Documents.

ANALYSIS

A. The Reasoning in *Riggs* is Good Law

As an initial matter, I note that, contrary to what Wilmington Trust argues in its brief opposing this motion, the reasoning in *Riggs* was not superseded or abrogated by subsequent changes to Delaware law. Wilmington Trust argues that the Delaware Supreme Court's adoption of Rule 502 of the Delaware Uniform Rules of Evidence ("Rule 502") makes clear that a trustee is the ultimate client of the lawyer it retains, not the beneficiaries of the trust. According to Wilmington Trust, Rule 502(d) identifies the only six exceptions to the attorney-client privilege, and because no fiduciary exception is identified therein, no fiduciary exception exists in Delaware.

This argument finds no support in the law. First, a comment to the most recent version of Rule 502 specifically identifies *Riggs* as a Delaware case "illustrating the law covered by [Rule 502]."⁹ Similarly, Rule 501 of the Delaware Uniform Rules of Evidence includes a comment explaining that Article 5, which addresses privileges in Delaware's evidence rules generally, "is consistent (except for minor refinements) with existing Delaware law."¹⁰ Together, these comments signify that *Riggs* remains illustrative of Delaware law regarding attorney-client privilege. That is, *Riggs* does not

⁹ Cmt. to D.R.E. 502.

¹⁰ Cmt. to D.R.E. 501.

conflict with any of the Delaware Uniform Rules of Evidence and is still good law.¹¹ Second, the holding in *Riggs* was simply a specific application of the doctrine articulated in *Garner v. Wolfingbarger*,¹² which this Court repeatedly has applied in a variety of contexts since Rule 502 last was amended in 2001.¹³ Whether this doctrine technically is an “exception” to the privilege, or instead “results in its nonapplication”¹⁴ is not relevant to divining the continued viability of *Riggs*. It is plain that the law underlying *Riggs* remains valid notwithstanding the amendment to Rule 502.

Although *Riggs* continues to be the law in Delaware, the Beneficiaries bear the burden of showing that *Riggs* applies to each of the categories of documents that they seek to compel. As such, I must consider the applicability of *Riggs* to this dispute between the Beneficiaries and Wilmington Trust.

In *Riggs*, the application of the fiduciary exception to the attorney-client privilege primarily turned on a determination of who the “real” or “ultimate” client was, meaning the person for whose benefit the legal advice was procured. *Riggs*, and subsequent

¹¹ See *In re Adoption of Del. Uniform Rules of Evidence* ¶ 2 (Del. Feb. 1, 1980) (noting that the D.R.E. “superseded any *inconsistent* rules of evidence” adopted by Delaware courts) (emphasis added). As discussed above, however, *Riggs* is not inconsistent with the Delaware Uniform Rules of Evidence. Rather, the committee of lawyers and judges formed to adopt the rules of evidence that would govern this State decided to list *Riggs* as an example of a common law rule of privilege consistent with Rule 502. Further, this Court has discussed and distinguished *Riggs* in recent cases. See *N.K.S. Distributors, Inc. v. Tigani*, 2010 WL 2011603 (Del. Ch. May 7, 2010) (suggesting a narrow reading of *Riggs* and distinguishing the facts in the case from those in *Riggs*). As the Beneficiaries point out, courts generally do not distinguish cases that are no longer good law.

¹² 430 F.2d 1093 (5th Cir. 1970). See *In re Heizer Corp*, 1987 WL 19560, at *2 (Del. Ch. Nov. 9, 1987); Donald J. Wolfe & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 7.02(c)(3), at 7-45 (2012).

¹³ See, e.g. *Ryan v. Gifford*, 2007 WL 4259557, at *2-3 (Del. Ch. Nov. 30, 2007); *In re Fuqua Industries, Inc. S’holder Litig.*, 2002 WL 991666, at *3-4 (Del. Ch. May 2, 2002).

¹⁴ *In re Fuqua Industries S’holder Litig.*, 2002 WL 991666, at *4.

federal cases that discussed it, identified several factors that courts should consider in making this determination. These include: (i) the purpose of the legal advice; (ii) whether litigation was pending or threatened between the trustee and the beneficiaries at the time the advice was obtained; and (iii) the source from which the legal fees associated with the advice were paid.¹⁵ I will consider each of these factors in turn for each of the categories of documents the Beneficiaries seek to compel.

B. Wilmington Trust May Withhold the Petition Action Documents

i. The Purpose of the Legal Advice Was to Benefit Wilmington Trust

The Beneficiaries argue that, as in *Riggs*, the Petition Action documents were prepared for their benefit, not for the benefit of Wilmington Trust, which means that the Beneficiaries were the ultimate clients. The Beneficiaries assert that it would be a “startling admission” if Wilmington Trust was to claim that it was not acting on behalf of the Beneficiaries in seeking the removal of Jeff Mennen.¹⁶ The Beneficiaries’ hyperbolic proclamations of shock and awe at a corporation’s actions on its own behalf suggest either an unhealthy lack of cynicism or an admirable bent toward literary flair. In either event, I do not find the admission to be among the most surprising things in this case. As the affidavits submitted by Wilmington Trust bear out, the corporate trustee saw the writing on the wall and took steps (whether or not effective) to minimize exposure. In one affidavit, Beth A. Ungerman, who serves as a Vice President and Senior Counsel at

¹⁵ See *Riggs*, 355 A.2d at 711–12. See also *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2322 (2011) (listing these three factors as the basis for the determination of who the “real client” was in *Riggs*); *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 232 (3d Cir. 2007) (listing the same three factors).

¹⁶ Mot. to Compel ¶ 21.

Wilmington Trust, avers that the advice she sought from Morris, Nichols, Arsht & Tunnell LLP (“Morris Nichols”) was for the benefit of Wilmington Trust. Specifically, she states that in early 2012, Wilmington Trust retained Morris Nichols to advise Wilmington Trust as to its “options and alternatives for positioning itself” in the event the Beneficiaries brought claims against it.¹⁷ Wilmington Trust also submitted an affidavit of the Morris Nichols attorney Ms. Ungerman consulted, who affirms that Ms. Ungerman contacted the firm in early March 2012 in connection with Wilmington Trust’s concern that it would be sued by the Beneficiaries.¹⁸ These affidavits indicate that the legal advice Wilmington Trust received surrounding the Petition Action was in fact obtained for the benefit and protection of Wilmington Trust.

Moreover, the progression of the Petition Action makes it plain to even a casual observer that Wilmington Trust was acting to protect its own interests. To that end, once the Petition Action had been filed, Wilmington Trust sought instructions from this Court before it followed any directions issued by Jeff regarding the Trust. In addition, the fact that the Beneficiaries’ interests were not necessarily aligned with Wilmington Trust was clear to all involved and was implicit in my decision to appoint a guardian *ad litem* to represent the minor beneficiary. The first guardian *ad litem* withdrew shortly into his investigation of the matter, after he concluded that he might have to take action adverse to Wilmington Trust, which the appointed attorney could not do in light of his

¹⁷ Affidavit of Beth A Ungerman in Support of Wilmington Trust Company’s Opp. to Pls.’ Mot. to Compel the Production of Privileged Documents (hereinafter “Ungerman Aff.”) ¶ 5.

¹⁸ Affidavit of Thomas R. Pulsifer in Support of Wilmington Trust Company’s Opp. to Pls.’ Mot. to Compel the Production of Privileged Documents ¶ 3.

representation of Wilmington Trust in other matters. The second guardian *ad litem* appointed by the Court indicated without reservation that he intended to bring claims against Wilmington Trust on behalf of the minor beneficiary. Indeed, the mere fact that the Trust had lost a substantial portion of its value would have caused any corporate trustee to retain counsel to consider its potential liability and ways to limit exposure. It is, to say the least, unsurprising that Wilmington Trust took such a step.

ii. There Was a Threat of Litigation between Wilmington Trust and the Beneficiaries

In *Riggs*, the Court explained that because there were “no allegations of litigation, or even threats of it, against the trustees” at the time the requested document was created, there was nothing requiring the trustees to seek legal advice personally.¹⁹ For this reason, the Court presumed that the trustees were, or at least should have been, acting only on behalf of the beneficiaries.²⁰ As the Third Circuit explained, the *Riggs* court placed significance on the fact that the trustee lacked “a legitimate personal interest in the legal advice obtained.”²¹ Pending litigation against the trustee is not, however, a prerequisite to finding that the trustee had a legitimate personal interest in legal advice. That determination must be made in light of all of the facts at hand.

Wilmington Trust and the Beneficiaries disagree as to what qualifies as a threat of litigation and when such a threat arose between them. The Beneficiaries assert that Wilmington Trust’s subjective anticipation of litigation does not satisfy the *Riggs*

¹⁹ *Riggs*, 355 A.2d at 711.

²⁰ *See id.*

²¹ *Wachtel*, 482 F.3d at 232.

standard, and that Wilmington Trust did not face an actual threat of litigation in the time period leading up to its filing of the Petition Action. According to Ms. Ungerman's affidavit, however, and consistent with the petition for instructions filed in the Petition Action, it was the February 2012 bankruptcy of Wave2Wave Communications, Inc., the Trust's largest investment, that prompted Wilmington Trust to seek legal advice.²² Wilmington Trust claims that this event, and the attendant decline in the value of the Trust, caused it to anticipate that the Beneficiaries might make claims against Wilmington Trust due to its role as corporate trustee, and that at the time Ms. Ungerman consulted Morris Nichols, Wilmington Trust saw itself as adverse to Jeff Mennen *and* the Beneficiaries.²³ These sworn statements, and the fact that both appointed guardians *ad litem* noted a real possibility that the Beneficiaries would bring claims against Wilmington Trust, strongly suggest that Wilmington Trust faced a threat of litigation under *Riggs*.

iii. Wilmington Trust Paid for the Legal Advice

Although the *Riggs* Court noted that the payment of legal fees out of the trust assets was a strong indication of precisely who the real client was, in general, payment of legal fees out of the trust is not dispositive of that issue. Delaware law confirms that a trustee's retention of counsel, and its payment of counsel's fees out of trust funds, does not operate as a waiver of the attorney-client privilege. Under 12 *Del. C.* § 3333,

a fiduciary may retain counsel in connection with any claim that has or *might be* asserted against the fiduciary, and the

²² Ungerman Aff. ¶ 4-5.

²³ *Id.* ¶¶ 5, 8.

payment of counsel fees and related expenses from the fund with respect to which the fiduciary acts as such shall not cause the fiduciary to waive or to be deemed to have waived any right or privilege including, without limitation, the attorney-client privilege.²⁴

It also is notable that this section of the Delaware Code specifically contemplates a fiduciary seeking legal advice in anticipation of claims that *might* be asserted against it. This language strongly suggests that our law recognizes a risk of litigation more broadly than just when litigation specifically is “threatened.”

Here, the legal fees and expenses incurred by Wilmington Trust in connection with the Petition Action were paid by M&T Bank, which, along with its affiliates, owns Wilmington Trust. The Beneficiaries argue that this fact is not particularly informative as to who the real client was in this case, because the Trust did not have adequate liquid assets to pay the legal fees. To counter that assertion, Wilmington Trust submitted an affidavit of Mark A. Oller, an Administrative Vice President and Managing Director for Wilmington Trust, in which he avers that the Trust had sufficient assets to cover the legal expenses incurred in connection with the Petition Action.²⁵ Specifically, Mr. Oller explains that the Trust could have liquidated its position in a limited partnership, which would have provided sufficient liquidity to pay legal fees.²⁶ The Beneficiaries contest whether this liquidation proposal would have worked. Nevertheless, I am persuaded that Wilmington Trust’s payment of the Petition Action legal fees, at the very least, weighs in

²⁴ 12 *Del. C.* § 3333 (emphasis added).

²⁵ Affidavit of Mark A. Oller in Support of Wilmington Trust Company’s Opp. to Pls.’ Mot. to Compel the Production of Privileged Documents ¶ 6.

²⁶ *Id.* ¶¶ 7, 8.

favor of finding that Wilmington Trust intended to receive legal advice that primarily would benefit itself. At a minimum, the fact does not weigh in favor of concluding that the Beneficiaries were the real client for purposes of the Petition Action.

iv. The Attorney-Client Privilege Applies to the Petition Action Documents but Wilmington Trust Must Create a Privilege Log

Taken together, the above discussed factors indicate that Wilmington Trust's claim of attorney-client privilege as to the Petition Action Documents is well-founded. Wilmington Trust sought and paid for legal advice for its benefit and protection, and that advice led to its decision to bring the Petition Action. Though the Petition Action may serve the Beneficiaries' interests, the Beneficiaries cannot be said to be the "real clients" who received the legal advice that led to the filing of that action. Wilmington Trust also has asserted that the work product doctrine applies to some of the documents it has withheld. Work product protection shields the mental impressions, conclusions, opinions, and legal theories of lawyers in their work, and requires a party seeking discovery to show both a substantial need of the materials in the preparation of his case as well as undue hardship in obtaining the substantial equivalent of the materials by other means.²⁷ Because I have found that the Petition Action Documents are protected by the attorney-client privilege under the analysis set forth in *Riggs*, I do not reach the question of work product protection at this time. Wilmington Trust must, however, create a privilege log for the Petition Action Documents. Once the privilege log has been produced, the Beneficiaries may be able to show the requisite substantial need and undue

²⁷ Ch. Ct. R. 26(b)(3).

hardship for particular documents that are not otherwise privileged or for which the privilege may have been waived.

A privilege log is further necessitated by the fact that *Riggs* applies only selectively to the categories of documents that Wilmington Trust has withheld, and in fact, those categories are not yet fully formed. Wilmington Trust has argued that the Beneficiaries essentially are seeking an advisory opinion because Wilmington Trust is still in the process of producing documents and making privilege determinations. I have attempted to address the “live privilege issues” presented by the parties, the parties appeared to resolve some privilege issues during the July 2, 2013 teleconference,²⁸ and I hope – however unrealistically – that my reasoning in this report will guide the parties in addressing any remaining disputes. Nevertheless, a final resolution as to all privilege disputes will be enabled by Wilmington Trust’s production of a privilege log. Wilmington Trust’s complaints regarding the inefficiency of producing a privilege log in this matter are not particularly compelling in litigation involving the depletion of a trust that once was worth more than \$100 million. The parties should, however, be reasonable and practical in fashioning the privilege log. It may be unnecessary to engage in document-by-document logging, particularly where certain categories of documents can be precisely defined, *e.g.*, internal law firm communications, draft pleadings, and so forth. The Court of Chancery’s Guidelines for Practitioners endeavor to indicate some of

²⁸ Transc. at 33:19–35:2 (counsel for Wilmington Trust explaining that “if there is a law firm or lawyer representing the interests of the trust in connection with a bankruptcy or a financial transaction ... [or where there was] use of the trust fund’s money in a transaction, we believe that those documents would not be privileged.”).

the ways parties may work to alleviate unnecessary logging, and I encourage the parties to be both creative and reasonable.

C. The Powers and Responsibilities Documents

In addition to the documents surrounding the Petition Action, the Beneficiaries also seek to compel the production of documents containing legal advice related to Wilmington Trust’s duties and powers as they are spelled out in the Trust agreement. This issue is particularly important because one of the legal issues on which this case may turn, at least from Wilmington Trust’s perspective, is whether and to what extent the trust agreement created a “directed trust” that required Wilmington Trust to follow the investment direction of the individual trustee. Wilmington Trust argues that legal advice about what a trustee must do under the terms of a trust instrument is privileged because the trustee has a distinct and “legitimate personal interest” in the advice.²⁹ Wilmington Trust contends that the purpose of such advice is to guide the trustee, and that the focus of the advice is on the protection of the trustee rather than the rights of the beneficiaries.³⁰ In *Riggs*, however, this Court specifically noted that “[a] beneficiary is entitled to inspect opinions of counsel procured by the trustee to guide him in the administration of the trust” and that beneficiaries must have “knowledge of the affairs and mechanics of the trust management” in order for them to hold the trustee to the proper standards of care

²⁹ Wilmington Trust Company’s Opposition to Pls.’ Mot. to Compel the Production of Privileged Documents (hereinafter “Wilmington Trust’s Opp.”) ¶ 18 (citing *Wachtel*, 482 F.3d at 232).

³⁰ *See id.* Wilmington Trust selectively quotes from *Riggs* to bolster this position, but these out of context phrases do not provide support for its proposition.

and honesty.³¹ Therefore, in the interest of preserving the policy of full disclosure that is essential to the trustee-beneficiary relationship, Wilmington Trust must produce the Powers and Responsibilities Documents.

I note, however, that, as with most things, context matters. The context in which the Powers and Responsibilities Documents were created ultimately will determine whether a document is privileged, particularly in light of my earlier holding. Any documents that could be categorized as Powers and Responsibilities Documents but were prepared in connection with the Petition Action or the action now pending between Wilmington Trust and the Beneficiaries (the “Beneficiary Action”), may qualify as privileged as to the Beneficiaries because by that point, the interests of Wilmington Trust and the Beneficiaries were at odds.

D. The “At-Issue” Exception to Attorney-Client Privilege May Apply

Finally, Wilmington Trust has acknowledged that if it plans on pursuing an advice of counsel defense, it will “have to waive its privilege to withhold confidential communications regarding its powers and duties”³² Nonetheless, Wilmington Trust appears to be equivocating as to whether it ultimately will assert an advice of counsel defense. Wilmington Trust assured the Beneficiaries that it would decide before the July 23, 2013 deadline for substantial completion of the document production. To the extent it

³¹ *Riggs*, 355 A.2d at 712 (quoting II Scott on Trusts, 3d Ed., §173 and citing Bogert on Trusts, 2d Ed., § 961).

³² Wilmington Trust’s Opp. ¶ 19.

has not done so, Wilmington Trust should so advise the Beneficiaries within two business days. Wilmington Trust's hedging on this front is not well taken.³³

E. The Documents Withheld by Jeff Mennen

There are only three documents at issue between the Beneficiaries and Jeff Mennen. Jeff claims attorney-client privilege for two of those documents ("Jeff's Privileged Documents"), and he argues that the work product doctrine applies to the third (the "Work Product Document"). The Beneficiaries concede that Jeff's Privileged Documents are in fact privileged.³⁴ Both of these documents are legal memoranda relating to two companies on whose boards Jeff once sat. Since the creation of these documents, those two companies have emerged from bankruptcy as a single entity, On-Site Analysis, Inc., a company which is 100% owned by the Trust. The Beneficiaries argue that as the beneficial owners of On-Site, they also are the beneficial owners of any privileged information relating to On-Site's predecessors. To support this argument, they cite a 1938 New York state case, *In re Witkind's Estate*, which explains that corporations can be required to provide a full report of corporate transactions to an estate where the corporation is wholly owned by the estate.³⁵ The court in *In re Witkind's Estate*, however, was not addressing a matter of attorney-client privilege, and the Beneficiaries, having conceded that these two documents are privileged, offer no applicable exception that would require the production of these documents.

³³ To the extent there is overlap between these documents and the Powers and Responsibilities Documents, the Powers and Responsibilities Documents should be produced regardless of Wilmington Trust's decision on the advice of counsel defense.

³⁴ Pls.' Reply Br. at p. 22 (stating that "[w]hile these corporations still existed, they held the attorney-client privilege").

³⁵ 4 N.Y.S.2d 933, 945 (Sur. May 23, 1938).

Jeff next argues that because the Work Product Document, a January 23, 2003 memorandum titled the “JOC Litigation: Strategy For Legal Representation,” was created in anticipation of a litigation, it is entitled to work product protection. Where a party is claiming the protection of the work product doctrine for a document created in anticipation of separate litigation, Delaware courts extend work product protection only when “the two cases are closely related in parties or subject matter.”³⁶ I cannot conclude that this case is closely related to the “JCO Litigation” in either party or subject matter. In oral argument, counsel for Jeff suggested that Jeff’s involvement in both cases satisfies the requirement.³⁷ I disagree. Concluding that the presence of one party in both cases constitutes closely related litigation likely would confer almost automatic work-product protection on documents created in separate litigation, no matter how dissimilar the issues or interests. As such, Jeff cannot continue to shield this document from discovery.

F. The Motion to Intervene

As a separate matter, the individual trustee of Jeff’s Trust, Owen J. Roberts, has moved under Court of Chancery Rule 24 for leave to intervene in this action.³⁸ Count XXVII of the Beneficiaries’ Verified Complaint states a claim against Jeff’s Trust and asserts that “equity requires the transfer of assets from Jeff’s Trust to the [Beneficiaries’] Trust.”³⁹ Trustee Roberts argues that, as the legal owner of all assets held in Jeff’s Trust and as a fiduciary to its beneficiaries, he has a duty to defend against litigation that could

³⁶ *Ramada Inns, Inc. v. Drinkhall*, 490 A.2d 593, 596 (Del. Super. 1985) (discussing *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 153 (D. Del. 1977)).

³⁷ Transc. at 63:9-16.

³⁸ The corporate trustee of Jeff’s Trust, Wilmington Trust, recently resigned.

³⁹ Compl. ¶ 274.

affect the assets of the trust.⁴⁰ The Beneficiaries do not dispute that Trustee Roberts' intervention is proper under Rule 24, which allows for intervention in an action when

the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest⁴¹

The Beneficiaries, however, assert that Jeff's Trust also must be represented, despite the intervention of Trustee Roberts. In support of their argument, the Beneficiaries cite the "modern trend recognizing trusts as separate legal entities."⁴² To that end, the Beneficiaries suggest that Trustee Roberts' counsel also should represent Jeff's Trust as a separate legal entity.

No Delaware case directly addresses the question of whether a trust is a separate legal entity, and although some statutes list trusts as legal "persons" for the purpose of particular sections of the Delaware Code,⁴³ no section of Delaware's trust law defines an express trust as a separate legal entity. It is significant that the Delaware General Assembly explicitly stated in Chapter 38 of the Delaware Decedents' Estates and Fiduciary Relations Code that a statutory trust "is a separate legal entity" that "may sue

⁴⁰ See, e.g., *Restatement (2d) Trusts* § 178 (the trustee "is under a duty to the beneficiary to defend action which may result in a loss to the trust estate, unless under all the circumstances it is reasonable not to make such defense"); 12 *Del. C.* § 3325(25) (a trustee may "[p]rosecute or defend an action, claim or judicial proceeding in any jurisdiction to protect trust property ...").

⁴¹ Ct. Ch. R. 24(a)(2).

⁴² May 20, 2013 Letter from Kevin G. Abrams on behalf of plaintiff Beneficiaries (citing *Restatement (Third) of Trusts* § 2 & cmt. a, cmt. i (2003)).

⁴³ The Beneficiaries cite 6 *Del. C.* § 18-1101(12) and 6 *Del. C.* § 17-1101(14), which define "Person" for purposes of the Delaware LLC Act and the Delaware Revised Uniform Limited Partnership Act, respectively, to include "any ... form of trust").

and be sued”⁴⁴ but has not similarly altered the definition of a common law trust. Under the current state of our law, the common law rule is that a trust is not a separate legal entity, unless specifically defined as such for purposes of a particular statute.⁴⁵

The Beneficiaries are concerned that allowing Owen J. Roberts to intervene as the individual trustee of Jeff’s Trust would leave Jeff’s Trust unrepresented, despite the fact that it has been named as a defendant in this action and is a potential source of recovery for the Beneficiaries should their claims prove meritorious. Court of Chancery Rule 17 directly addresses this concern. Rule 17(a) lists a “trustee of an express trust” as an example of “the real party in interest in a matter,” and provides that a trustee may sue in his own name.⁴⁶ The Rule then goes on to state that “joinder ... of the real party in interest ... shall have the same effect as if the action had been commenced in the name of the real party in interest.” As such, now that Trustee Roberts has intervened as a defendant in this action, the case will proceed as though Trustee Roberts, rather than Jeff’s Trust, had been named as a defendant.

CONCLUSION

For the foregoing reasons, I concluded that the Petition Action Documents are protected by the attorney-client privilege. Although Wilmington Trust may withhold those documents, it must produce a privilege log listing any withheld documents. I further find that Wilmington Trust must produce any Powers and Responsibilities

⁴⁴ 12 *Del. C.* § 3801(g); 3804(a).

⁴⁵ See *Restatement (Third) of Trusts* § 2 (defining a trust as “a fiduciary relationship with respect to property”).

⁴⁶ Ct. Ch. R. 17(a).

Documents that do not relate to the Petition Action or the Beneficiary Action, and those documents that are not produced also must be logged. Additionally, I conclude that the document over which Jeff Mennen claimed work product protection should be produced. Finally, the motion for leave to intervene filed by Owen J. Roberts as individual co-trustee of Jeff's Trust should be granted, without any order requiring additional or separate representation of Jeff's Trust. I recommend that the Court enter an order consistent with these findings. This is my final report in this matter and exceptions may be taken in accordance with Court of Chancery Rule 144.

Respectfully submitted,

/s/ Abigail M. LeGrow
Master in Chancery