

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-81298-CIV-MARRA/MATTHEWMAN

JULIAN BIVINS, as personal representative
of the ancillary estate of Oliver Wilson Bivins,

Plaintiff,

vs.

CURTIS CAHALLONER ROGERS, JR. as
former guardian, et al,

Defendants.

_____ /

ORDER¹

This cause is before the Court upon Plaintiff's Motion to Reopen Discovery and Renew Motions to Compel (DE 201). The Court has carefully considered the Motion and is otherwise fully advised in the premises.

Plaintiff seeks to reopen discovery in light of the recent settlement and waiver of privilege by Defendant Curtis Rogers, and his demand for the attorneys he hired as guardian for Oliver Bivins, Sr. to release all communications subject to attorney client/work product privilege. There are two questions that must be answered to rule on this motion: (1) Can a predecessor guardian waive attorney-client privilege and work product privilege? and (2) Who is the current guardian?

With respect to the first question, the Court concludes that a predecessor guardian cannot waive the attorney-client privilege. The position of a guardian is not personal to the individual appointed. A guardian acts as an arm of the court and effectively is a legal status that exists separate and apart from the person fulfilling the duties and responsibilities of the position. See,

¹ The Court presumes familiarity with its prior Orders.

e.g., Chicago Trust Co. v. Knabb, 196 So. 200, 204 (Fla. 1940) (“The fact that the personnel of the trustees was changed from time to time could have no effect on the rights of the parties. The successor trustee in each instance succeeded to all the rights.”); K.A.S. v. R.E.T., 914 So. 2d 1056, 1061 (Fla. Dist. Ct. App. 2005) (the guardian operates as an “arm of the court”); In re Wright, 668 So 2d 661, 663 (Fla. Dist. Ct. App. 1996) (a “court-appointed guardian [is] not [] a private individual serving a private interest, but rather [] an arm of the court fulfilling a regulated function.”). As a result, only the person currently holding the position or status of guardian can decide whether to waive the privilege.

With respect to attorney work product, that privilege is held by both the client and the attorney, and either the client or attorney can assert the privilege. See QBE Ins. Corp. v. Griffin, No. 2:08-cv-949-MEF, 2009 WL 2913478, at * 3 (M.D. Ala. Sept. 4, 2009) (“Unlike the attorney client privilege, which belongs only to the client, the work-product privilege is shared between the attorney and the client.”) (citing In re Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir.1986); Hanson v. U.S. Agency for Intern. Dev., 372 F.3d 286, 294 (4th Cir.2004)); see also In re Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994) (same). Given that the waiver cannot be unilateral, any waiver that is not agreed to by both the attorney and client is invalid.

In reply, Plaintiff states that Defendant Rodgers has not been discharged from his guardianship role, thereby suggesting that he is still guardian and can therefore waive the privileges. Consequently, the Court requests that the parties inform the Court as to the current guardian, as he or she is only the person who can waive the privilege. Once established, the Court can rule on the instant motion consistent with the dictates of this order.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the parties shall inform the Court as to identity of the current guardian **within 10 days of the date of entry of this**

Order.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County,
Florida, this 28th day of February, 2017.



KENNETH A. MARRA
United States District Judge