THE ALIENABILITY OF EVIDENTIARY PRIVILEGES: OF PROPERTY AND EVIDENCE, BURDEN AND BENEFIT, HEARSAY AND PRIVILEGE

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"[G]overnment has no other end but the preservation of property . . . ."[1]

INTRODUCTION

Property and Evidence are two of the most ancient doctrinal areas in Anglo-American law. Courses devoted to these subjects are fixtures in the law school curriculum, and the subjects have generated a huge volume of commentary, including major treatises.[2]

Predictably, interfaces have developed between the doctrinal areas. For example, in hearsay doctrine, testimony about an unavailable declarant's out-of-court statement disserving his or her proprietary interest is considered so reliable that it is exceptionally admissible.[3] Thus, if there were a lawsuit between the declarant's successor in title and a third party, the declarant's statements would be admissible against the new owner over a hearsay objection. The assumption is that the typical person is so aware of and so concerned about his property interests that he would not say something contrary to those

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[1] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 53–54 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690).

[2] *See, e.g.*, 1 RICHARD R. POWELL, POWELL ON REAL PROPERTY (Michael Allan Wolf ed., 2005) [17 vols.]; 1 JOHN HENRY WIGMORE, EVIDENCE (Peter Tillers rev., 1983) [10 vols.].

[3] *See* FED. R. EVID. 804(b)(3).

interests unless it were true.[4] Moreover, in many jurisdictions, in a lawsuit against a new owner, a third party would not even have to invoke the declaration-against-interest hearsay exception. At common law, if a person's predecessor in title to property made a statement about title to property, the statement was admissible against the current title holder as a vicarious admission.[5] A Georgia statute refers to vicarious admissions by "privies in estate."[6]

On close scrutiny, however, the interface between Property and Evidence seems inconsistent. As the preceding paragraph indicates, a subsequent owner takes title burdened by hearsay evidence generated by his predecessor. The inconsistency is that while the subsequent owner must shoulder the burdens, he does not receive the evidentiary benefits. More specifically, as we shall see, the new owner generally does not receive the benefit of any evidentiary privileges that the predecessor enjoyed for statements relating to the property.

A recent California case involving a show business legend, the late Bing Crosby, is illustrative. The style of the case is *HLC Properties Ltd. v. Superior Court*.[7] The litigation centered on the question of the percentage royalty that Mr. Crosby was owed by his record company. The plaintiff, HLC, was a partnership formed by some of Mr. Crosby's surviving relatives and others. The defendant was MCA, a successor to Decca Records. The plaintiff claimed that for years the defendant had underpaid royalties under its contracts with Mr. Crosby. The defendant countered that the royalty provisions in the written contracts were ambiguous and that it was entitled to present extrinsic evidence of the parties' intentions. To gather such evidence, the defendant demanded the production of records documenting communications between Mr. Crosby and his attorneys about the contracts. The plaintiff objected to discovery on the ground that the documents were protected by the attorney-client privilege and that the plaintiff was entitled to assert the privilege.

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[4] *See* 2 CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 317, at 318 (John W. Strong ed., 5th ed. 1999).

[5] *See id.* § 260, at 161–62; *see also* David J. Langum, *Uncodified Federal Evidence Rules Applicable to Civil Trials*, 19 WILLAMETTE L. REV. 513, 521–22 (1983).

[6] GA. CODE ANN. § 24-3-32 (2005).

[7] 4 Cal. Rptr. 3d 898 (Ct. App. 2003), *rev'd*, 105 P.3d 560 (Cal. 2005).

The record indicated that during his lifetime, Mr. Crosby had assembled a business staff, sometimes called Bing Crosby Enterprises ("BCE"), to help him administer his properties. The contracts and properties themselves went into probate when Mr. Crosby died. As previously stated, after his death, some of Crosby's surviving relatives and third parties formed HLC. The probate court approved the transfer of the contracts and properties to HLC.

Based on this record, the trial judge overruled the plaintiff's objection. The trial judge found that during his lifetime, Bing Crosby was the client with control over any evidentiary privilege. The judge further ruled that although after his death Crosby's privilege passed to his personal representative, the privilege terminated when the representative was discharged at the end of probate.[8] In so ruling, the trial judge relied on section 953 of the California Evidence Code. That statute enumerates the holders of the attorney-client privilege:

> As used in this Article, "holder of the privilege" means:
>
> (a) The client when he has no guardian or conservator.
>
> (b) A guardian or conservator of the client when the client has a guardian or conservator.
>
> (c) The personal representative of the client if the client is dead.
>
> (d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence.[9]

The trial judge concluded that subdivision (c) is controlling when the original holder is a natural person rather than an entity. That conclusion dictated overruling the objection. If the privilege terminated on the discharge of Mr. Crosby's executor, there was no remaining privilege for HLC, or anyone else for that matter, to assert.

HLC sought an extraordinary writ to force the trial judge to sustain its objection. The intermediate appellate court, the Court of Appeal, issued the writ. Initially, the court held that even during Mr. Crosby's lifetime, he did not hold the privilege. Although he consulted the attorneys and held title to the properties that were the subject of the consultations, in the

[8] *Id.* at 900–02.

[9] CAL. EVID. CODE § 953 (Deering 2004).

court's view, BCE was the holder. Citing the reference to "organization" in section 953(d), the court declared: "[t]he record reveals a substantial gathering of creative and management personnel engaged in the business of contributing to, producing and exploiting entertainment programs and the services of Crosby . . . . Given its activities, Bing Crosby Enterprises was an on-going organization that held the attorney-client privilege . . . ."[10] Next, the court ruled that after Crosby's death, BCE could transfer the privilege to HLC.

Since the stakes were high—the amount of royalties in question ran into the millions—MCA understandably appealed. On appeal, in early 2005, a unanimous California Supreme Court reversed the lower court and reinstated the trial judge's ruling.[11] Reasoning in straightforward fashion, the court held that during Mr. Crosby's life, the privilege belonged to him. It noted that the official California Law Revision Commission comments provided three examples of unincorporated "organizations" capable of holding a privilege: labor unions; social clubs; and fraternal societies. The court added:

> [E]ach of the three unincorporated organizations the Commission lists is a collective entity that the Internal Revenue Code recognizes as having tax exempt status. Additionally, the assets of the listed organizations generally are not subject to probate administration when their individual members die. Here, there is no suggestion that [Bing Crosby] Enterprises qualified for tax exempt status, and the . . . recording contracts at issue were probated as part of Crosby's estate . . . .[12]

The court stated: "[h]ere, the trial [judge] found that Crosby, the natural person, not Enterprises or any other business organization, was the client who sought legal advice . . . . As a reviewing court, we may not disturb the trial court's finding if there is any substantial evidence to support it."[13] The court found ample evidence to sustain the trial judge's determination. The court next ruled that when Mr. Crosby died, the privilege automatically transferred to his personal representative, the executor of his estate. Finally, citing other Commission

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[10] *HLC Properties Ltd.*, 4 Cal. Rptr. 3d at 903.

[11] *See HLC Properties Ltd. v. Superior Court*, 105 P.3d 560, 569 (Cal. 2005).

[12] *Id.* at 565 (citations omitted).

[13] *Id.*; *see* Hudson Sangree, *Bing Crosby's Managers Lose Discovery Row*, DAILY RECORDER (Sacramento, Cal.), Feb.16, 2005, at 1.

comments to the Evidence Court, the court concluded that the privilege terminated when Mr. Crosby's representative was discharged. If so, there was no privilege left for HLC to assert.

The California Supreme Court's conclusion seems defensible as a matter of statutory construction. However, as a matter of logic and policy, that outcome is hardly inexorable. To begin with, there is respectable English authority that when a person becomes a successor in title to realty, he also becomes the holder of the prior owner's attorney-client communications with respect to the property.[14] Those authorities treat the privilege as one of the incidents of title, inuring to the benefit of the new owner.[15] Furthermore, in the case of entities such as corporations, the American authorities frequently hold that a successor entity takes both its predecessor's title and the evidentiary privileges for communications pertinent to the property.[16] The author had the opportunity to consult with the defense attorneys who prevailed before the California Supreme Court in the Crosby litigation.

At one point, when all the research and briefing had been completed, one of those attorneys astutely remarked that our research had not uncovered any good discussion of the policy question of whether a natural person's evidentiary privileges should be alienable. That remark sparked the author's interest in this subject.

The purpose of this Article is to initiate a discussion of that question and to share some preliminary thoughts on the topic. The thesis of this Article is that a natural person's evidentiary privileges should be inalienable both by operation of law and even by act of the parties. To develop that general thesis, the Article addresses four specific topics. The initial part of the Article analyzes the threshold question of whether, in terms of the alienability of privileges, it is justifiable to treat natural persons and entities differently. Positing that differential treatment is warranted, the next part of the Article deals with the issue of whether the attorney-client privilege of a property

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[14] *See* L.H. HOFFMAN, THE SOUTH AFRICAN LAW OF EVIDENCE 190 (2d ed. 1970) (citing Calcraft v. Guest, (1898) 1 Q.B.D. 759); M.N. HOWARD ET AL., PHIPSON ON EVIDENCE 507 (14th ed. 1990); ADRIAN KEANE, THE MODERN LAW OF EVIDENCE 583 (5th ed. 2000).

[15] *See* EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 6.5.2, at 87–88 (Cumulative Supp. 2006).

[16] *See* 1 *id.* § 6.5.2.c, at 573 (Richard D. Friedman ed., 2002).

owner should automatically pass to a successor titleholder. The third part discusses the related question of whether the privilege ought to be alienable by a voluntary act of the original holder. The final part of the Article asks whether the preceding analysis is, in effect, "much ado about nothing." Assuming that the general norm ought to be inalienability, should the original holder be able to circumvent that norm by the simple expedient of appointing the new titleholder his or her agent for the purpose of asserting or waiving the privilege? At the end of this line of analysis, hopefully this Article will not only construct a case for its general thesis, but even more importantly, yield some insight into the very nature of evidentiary privileges in American law.

I. IN TERMS OF THE ALIENABILITY OF PRIVILEGES, IS IT JUSTIFIABLE TO TREAT NATURAL PERSONS AND ENTITIES DIFFERENTLY?

The introduction observed that, in the United Kingdom, there is precedent that whether the original titleholder is a natural person or an entity, when it passes title to a successor, the successor takes both the predecessor's property interest and the attorney-client privilege for the predecessor's communications related to the property.[17] Whether the original holder is an entity or a natural person, the evidentiary privilege goes hand in hand with the related property.

In most jurisdictions within the United States, however, there is a sharp contrast between the judicial treatment of entities and natural persons. Section 953 of the California Evidence Code, previously quoted, reflects the contrast. In *HLC Properties Ltd.,* the California Supreme Court relied on subdivision (c), which states that the personal representative of a natural person is a successor holder of the person's privilege. Since the statute made no mention of heirs—the most obvious candidates to become successor holders after the representative—the court reasoned that the wording of subdivision (c) strongly implied that the privilege terminated upon the representative's discharge. Moreover, the implication from the statutory text confirmed the extrinsic legislative history indicating that the drafters intended to terminate the privilege when the probate court discharged the representative. However,

[17] *See supra* note 14.

subdivision (d) of the same statute provides that the expression, "holder of the privilege" includes: "[a] successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence."[18] Hence, while the privilege of a deceased natural person seemingly terminates under subdivision (c), when the person's representative is discharged, subdivision (d) appears to announce that a "successor" entity may assert a previous entity's privilege. Other American jurisdictions have reached this result by case law.[19]

By way of example, in *Commodity Futures Trading Commission v. Weintraub*,[20] the United States Supreme Court ruled that a corporation's bankruptcy trustee is entitled to waive the privilege for management's prebankruptcy communications with corporate counsel. To be sure, if a second corporation acquires only title to an isolated piece of property or asset belonging to another corporation, the second corporation does not become the holder of the right to the other corporation's evidentiary privilege.[21] However, when the management is also transferred to the second corporation, the new corporation is a successor in interest to the old entity,[22] and the right to assert or waive the privilege passes to the latter corporation.[23] The second corporation can become a successor in interest either by a consensual transaction or by operation of law such as subrogation.[24] Thus, at least in some cases, when an entity

[18] CAL. EVID. CODE § 953 (Deering 2004).

[19] *See* Ramada Franchise Sys. v. Hotel of Gainesville Assocs., 988 F. Supp. 1460, 1463 (N.D. Ga. 1997); Paul R. Rice, *A Quasi-Attorney-Client Privilege? West Virginia's Mislabeled Fiduciary Duty Exception*, 101 W. VA. L. REV. 311, 317 (1998) (citing Texaco, Inc. v. Phoenix Steel Corp., 264 A.2d 523 (Del. Ch. 1970) and stating the general rule that "[t]he trustee of a corporate client acquires the privilege rights of the client upon his appointment").

[20] 471 U.S. 343 (1985).

[21] *See Ramada*, 988 F. Supp. 2d at 1464; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. k (2000) (citing Sobol v. E.P. Dutton, Inc., 112 F.R.D. 99, 102–03 (S.D.N.Y. 1986) (sale of right to intellectual property) and NL Indus., Inc. v. Koomey, Inc., 647 F. Supp. 936, 936 (S.D. Tex. 1984) (transfer of patent)).

[22] *See* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:27, at 121–22 (2d ed. 1999).

[23] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. k (citing Dickerson v. Superior Court, 185 Cal. Rptr. 97, 99 (Ct. App. 1982)).

[24] *See* 1 RICE, *supra* note 22, § 4:43 at 250.

acquires title to property previously owned by another entity, the evidentiary privilege passes with the title.

Despite the English precedent and the partial alienability of entities' evidentiary privileges, it is submitted that the differential treatment of entities and natural persons is justifiable. An entity is a legal construct. The leading definition of an entity is "[a]n organization (such as a business or governmental unit) that has a legal identity apart from its members."[25] The artificial[26] entity is the sum of the legal relations created by the state.[27] In the contemplation of the law, at its essence, an artificial entity *is* the bundle of legal rights, powers, duties, and liabilities recognized by the state. When, to a substantial degree, another entity undertakes the identical rights, powers, duties, and liabilities, the new entity essentially *becomes* the prior entity.

The same cannot be said of natural persons. A natural person has an independent existence and reality apart from the state. Although a natural person may possess or have legal rights, powers, duties, and liabilities, the natural person cannot be equated with them; a natural person is not the mere sum of his or her legal rights and duties in the same sense that an artificial entity is. Likewise, one natural person does not become another natural person simply because the former acquires the legal rights and powers of the latter. A natural person cannot transfer his essence to another natural person in the same way that an entity can transfer its legal essence to another entity. When, as in a merger, one artificial entity has extensively assumed the other legal rights, powers, duties, and liabilities of another entity, it makes sense to say that the former has become the latter and should therefore succeed to the latter's evidentiary privileges. The same argument cannot be made in the case of natural persons.

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[25] BLACK'S LAW DICTIONARY 573 (8th ed. 2004).

[26] *See* 1 JOHN P. DAVIS, CORPORATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF GREAT BUSINESS COMBINATIONS AND OF THEIR RELATIONS TO THE AUTHORITY OF THE STATE 16–17 (1971) (stating that the corporate form is artificial and exceptional).

[27] *See id.* at 16. *See generally* FREDERICK HALLIS, CORPORATE PERSONALITY: A STUDY IN JURISPRUDENCE (1930). Chapter I is devoted to the Fiction Theory. "[T]he juristic person is nothing more than a *persona ficta.* The juristic person is a fiction and its author is the state." *Id.* at 7.

Suppose that Corporation *A* takes over the business of Corporation *B* and *B* dissolves. Corporation *A* accepts a complete assignment of all of Corporation *B*'s contract and property rights as well as a complete delegation of all of Corporation *B*'s duties. Since the rights and duties are constitutive of artificial entities such as corporations, Corporation *A* has become the same legal person as Corporation *B* in a way in which Alice can never become the same natural person as Brian. There are fundamental differences between natural persons and artificial entities. Given those differences, a court can consistently hold that a transfer of legal rights and duties entitles a successor entity to assert a predecessor entity's evidentiary privileges while simultaneously ruling that no matter how many rights and duties passed between two natural persons, one may not assert the privileges previously held by the other. In short, the current differential treatment of natural persons and entities in American privilege law is justifiable.

II. SHOULD A NATURAL PERSON'S EVIDENTIARY PRIVILEGE FOR COMMUNICATIONS RELATING TO HIS PROPERTY AUTOMATICALLY PASS TO A SUCCESSOR HOLDER OF THE TITLE TO THE PROPERTY?

As previously stated, under English law, when a natural person transfers title to property to a new titleholder, the new titleholder also takes the evidentiary privilege attaching to any communications between the prior titleholder and an attorney about the property.[28] The state of the law in the United States is radically different. In the United States, if the privilege survives the original holder's death,[29] the privilege passes to the decedent's personal representative.[30] Most often, the representative is the executor or executrix of the decedent's estate, named by the decedent in his or her will. If not, the probate court appoints an administrator or administratrix. If, under the jurisdiction's law, the privilege survives the discharge of the personal representative, the decedent's heir or heirs

[28] *See supra* note 14 and accompanying text.

[29] In some jurisdictions, the holder's death terminates the privilege. 1 IMWINKELRIED, *supra* note 15, § 6.5.2.b (Richard D. Friedman ed., 2002).

[30] *See, e.g.*, CAL. EVID. CODE § 953(c) (Deering 2004).

become the holders of the privilege.[31] On this issue, the American view is sounder.

Consider the categories of successor holders recognized under American law. Unless the decedent was single or the decedent's spouse is deceased or too elderly, the decedent is likely to designate his or her spouse as executor or executrix. Absent a designation by the decedent, the court will appoint an administrator or administratix. In most jurisdictions, there is a statutory preference for the appointment. California Probate Code § 8461 is illustrative. In pertinent part, it reads:

> [A] person in the following relation to the decedent is entitled to appointment as administrator in the following order of priority:
> (a) Surviving spouse or domestic partner as defined in Section 37.
> (b) Children.
> (c) Grandchildren.
> (d) Other issue.
> (e) Parents.
> (f) Brothers and sisters.
> (g) Issue of brothers and sisters.
> (h) Grandparents.[32]

The pattern continues. Heirship is determined by nearness of generation to the decedent.[33] In sum, under American law, in all probability the person who becomes successor holder by operation of law will be someone with a family relationship to the decedent. As a family member, the successor is in a good position to both know the decedent's privacy concerns and to care enough to respect them. As a member of the same family, the successor may share the decedent's privacy concerns. The law conferred the privilege on the original holder in order to protect his or her privacy,[34] and American law selects successor holders who, as fellow family members, are likely to be motivated to act to shield the decedent's personal privacy.

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[31] *See* EDMUND MORGAN, BASIC PROBLEMS IN EVIDENCE 116 (1961); 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5498, at 484 (1986).

[32] CAL. PROB. CODE § 8461 (Deering 2004); *see also* N.Y. SURR. CT. PROC. ACT LAW § 1001 (McKinney1995) (order of priority for granting letters of administration).

[33] *See, e.g.*, CAL. PROB. CODE § 240 (Deering 2004); N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 1998).

[34] *See* 1 IMWINKELRIED, *supra* note 15, § 5.1.1 (Richard D. Friedman ed., 2002); *see also* 8 WIGMORE, *supra* note 2, § 2285 (John T. McNaughton rev., 1961).

As we have seen, in England, by operation of law, the successor to the original holder's property interest takes the evidentiary privilege cloaking the original holder's attorney-client communications about the property. Yet, there may not be any family relationship between the original and successor holders. The two parties may be virtual strangers to each other. The successor holder may know little or nothing about the original holder's privacy concerns. For that matter, in the rare case in which the successor holder was familiar with the original holder's privacy preferences, the successor holder might have minimal motivation to observe those preferences. Quite to the contrary, if the transfer of title was an arm's length business transaction, the successor holder is far more likely to be motivated by his or her own economic interests and privacy concerns. If it serves those interests, the successor holder will waive the privilege even when the public disclosure of the information will be mortifying to the original holder.

The difference between English and American law thus poses the basic question of why the law should confer evidentiary privileges in the first instance. There is no historical evidence that the courts fashioned privileges for the specific purpose of safeguarding property interests. Rather, to borrow a phrase from Justice Harlan's famous concurrence in *Katz v. United States,*[35] the Supreme Court's seminal 1967 decision on the coverage of the Fourth Amendment, privileges were fashioned to "protect[] people, not places" or property.[36] Admittedly, when a client confidentially consults an attorney about a property transaction, the law grants an evidentiary privilege. However, the privilege does not attach only, or even primarily, because property rights are implicated. Instead, ultimately the law confers the privilege out of respect for the client as an autonomous person with cognitive and volitional ability;[37] the privilege facilitates the client's acquisition of advice which will better enable the client to make an intelligent choice as to his or her future.[38]

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[35] 389 U.S. 347 (1967).

[36] *Id.* at 351–53; *see* Sherry F. Colb, *A World Without Privacy: Why Property Does Not Define the Limits of the Right Against Unreasonable Searches and Seizures*, 102 MICH. L. REV. 889, 898, 903 (2004).

[37] 1 IMWINKELRIED, *supra* note 15, § 5.3.3.c(1)–(2), (11) (Richard D. Friedman ed., 2002).

[38] *See generally id.* § 5.3.3.

In some attorney-client consultations about property rights, the client has acute concerns about personal privacy, and those concerns will be close to the surface of the conversation between the client and the attorney. The property owner may want to transfer rights to a third party because of the owner's secret, intimate relationship with that person. Alternatively, the owner may want to deny property rights to a family member because of the latter's misconduct which, if publicly exposed, would be humiliating to the entire family. However, even in consultations in which privacy concerns are not as obvious, they are present whenever a privilege attaches. The privilege cannot come into play unless the original holder intended that the attorney would maintain the secrecy of the communication in the future.[39] On the face of the conversation, the client may be speaking "only" about his or her finances, but they are the client's personal finances. A client's financial plans and objectives are largely determined by the client's family and social relationships. Modernly, the courts have recognized that clients have a legitimate privacy interest in maintaining the confidentiality of personal financial information and records.[40] Some courts have gone to the length of proclaiming that there is a qualified constitutional right to informational privacy in such data.[41]

If the protection of privacy is the raison d'etre for granting privilege protection, there is no need to automatically transfer the original holder's evidentiary privilege to a third party merely because that person has taken title to property formerly owned by the original holder. Conferring holder status on the new owner in no way promotes the policy of privilege protection. The successor may not know the original holder's privacy preferences, and even if the successor did, he or she might not be inclined to invoke the privilege to protect those preferences. American law confers automatic holder status only on categories of persons who are likely to be sensitive to the original holder's personal privacy concern; by doing so, American law hues much more faithfully to the policy rationale for the creation of evidentiary privileges.

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[39] *Id.* § 6.8.2.

[40] *See* United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961); *see also* 1 IMWINKELREID, *supra* note 15, § 6.2.5, at 486–87 (Richard D. Friedman ed., 2002) (describing growing judicial and legislative recognition of the need to protect private financial information).

[41] *See* 1 IMWINKELREID, *supra* note 15, § 6.2.5, at 489 & n.338 (Richard D. Friedman ed., 2002).

III. SHOULD THE ORIGINAL TITLEHOLDER BE ABLE TO VOLUNTARILY ALIENATE HIS ATTORNEY-CLIENT PRIVILEGE PROTECTING COMMUNICATIONS RELATING TO THE PROPERTY TO A SUCCESSOR TITLEHOLDER?

If the original holder's privilege should not pass by operation of law to the new titleholder, should the law at least allow the original holder to voluntarily alienate the privilege to the new titleholder? That is a much closer question.

In most cases under American law, property rights are freely alienable,[42] and contract rights are assignable.[43] Yet, there are many instances in which that generalization breaks down. In a large number of cases, the courts have upheld restraints on the alienation of property.[44] By way of example, the courts have frequently sustained spendthrift trusts restricting the beneficiary's right to assign future income[45] and limitations on the rights of life tenants to alienate their estate.[46] Further, the courts have often sustained the validity of constraints on the alienability of corporate stock, especially in the setting of family-owned businesses.[47] In addition, certain types of causes of action are non-assignable.[48] Thus, there is authority that a claim for

[42] *See generally* 3 SIMES & SMITH, THE LAW OF FUTURE INTERESTS ch. 37 (John A. Borron, Jr. ed., 3d ed. 2004).

[43] *See* E. ALLAN FARNSWORTH, CONTRACTS § 11.4 (3d ed. 1999).

[44] *See, e.g.*, Coast Bank v. Minderhout, 392 P.2d 265, 268 (Cal. 1964) (stating that "reasonable restraints designed to protect justifiable interests of the parties" are valid), *overruled on other grounds by* Wellenkamp v. Bank of Am., 582 P.2d 970 (Cal. 1978); Tracey v. Franklin, 67 A.2d 56, 59 (Del. 1949) (explaining that the court will uphold a restraint that is "a reasonable means of accomplishing a purpose recognized as proper"); Lawson v. Redmoor Corp., 679 P.2d 972, 975 (Wash. Ct. App. 1984) (discussing that the court will sustain an indirect restraint if it is "reasonable [and] . . . justified by the legitimate expectations of the parties") (internal quotations and citations omitted).

[45] *See Coast Bank*, 392 P.2d at 268 (finding that spendthrift trust restrictions promote "the settlor's interest in protecting potentially improvident beneficiaries" from their own foolishness); Milner v. Outcalt, 219 P.2d 982, 984 (Wash. 1950) ("The essential idea of a spendthrift trust is that the beneficiary cannot deprive himself of the right to future income under the trust.").

[46] *See Coast Bank*, 392 P.2d at 268 (noting that certain reasonable restraints on alienation protect the interests of the remaindermen); Farkas v. Farkas, 38 S.E.2d 924, 926 (Ga. 1946).

[47] *See* Dixie Pipe Sales, Inc. v. Perry, 834 S.W.2d 491 (Tex. Ct. App. 1992). The court found that the restriction served the legitimate purpose of "keep[ing] the stock in the family." *Id.* at 494. The court stated in dictum that such a restriction might be invalid in the case of a large corporation with numerous, unrelated shareholders. *See id.*

[48] *See* Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders In

attorney malpractice cannot be assigned. In forbidding assignment, one court stressed "the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship."[49] More broadly, a restriction on the assignability of a contract right is valid when the relationship between the contracting parties is an intensely personal one,[50] and it would be unfair to require the obligor to render performance to an assignee he or she had not chosen. Suppose, for instance, that an individual agreed to serve as the personal, confidential secretary of a business executive. Subsequently, the executive attempts to assign the right to the individual's services to another businessperson. If the court upheld the assignment, the individual would have to serve as the confidential secretary of a different person.[51] It would be manifestly unjust to force the individual to do so because, in deciding whether to enter into the original agreement, the individual undoubtedly considered the

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Het Kapitaal Van Saybolt International B.V. v. Schreiber, 407 F.3d 34, 50 n.8 (2d Cir. 2005) ("Connecticut law does bar assignment of personal injury claims . . . ."); Essex Ins. Co. v. Five Star Dye House, Inc., 23 Cal. Rptr. 3d 696, 698 (Ct. App. 2005) (stating that causes or rights of action founded upon wrongs of a purely personal nature such as slander, assault and battery, negligent personal injuries, criminal conversation, seduction, breach of marriage promise, and malicious prosecution are not transferable or assignment), *depublished by* 111 P.3d 921 (Cal. 2005); Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 699 & n.1 (2005).

[49] Goodley v. Wank & Wank, Inc., 133 Cal. Rptr. 83, 87 (Ct. App. 1976).

[50] *See* Sally Beauty Co. v. Nexxus Products Co., 801 F.2d 1001, 1008 (7th Cir. 1986); Munchak Corp. v. Cunningham, 457 F.2d 721, 725 (4th Cir. 1972) (determining that in a contract for the personal services of a professional basketball player "the right to performance of a personal service contract requiring special skills and based upon the personal relationship between the parties cannot be assigned without . . . consent"); US Fax Law Ctr., Inc. v. IHIRE, Inc., 362 F. Supp. 2d 1248, 1251 (D. Colo. 2005) ("Under Colorado law, '[w]hile the law favors assignability of rights generally, it does not allow assignments for matters of personal trust or confidence, or for personal services.' ") (alteration in original) (quoting Roberts v. Holland & Hart, 857 P.2d 492, 495 (Colo. Ct. App. 1993)); Taylor v. Palmer, 31 Cal. 241, 248 (1866) ("Rare genius and extraordinary skill are not transferable, and contracts for their employment . . . cannot be assigned."); Martin v. City of O'Fallon, 670 N.E.2d 1238, 1241 (Ill. App. Ct. 1996) (finding that a labor union could not assign its right to demand arbitration against the city). The *Martin* court found that "the personal nature of the roles of each party" justified restricting the assignment of the right and the "right of a party to choose with whom he or she contracts underlies any determination of whether a contract is assignable." *Martin*, 670 N.E.2d at 1241; *see also* First Ill. Nat'l Bank v. Knapp, 615 N.E.2d 75, 78 (Ill. App. Ct. 1993); Rural Elec. Convenience Coop. Co. v. Soyland Power Coop., Inc., 606 N.E.2d 1269, 1275 (Ill. App. Ct. 1992); FARNSWORTH, *supra* note 43, § 11.4, at 715.

[51] *See* FARNSWORTH, *supra* note 43, § 11.4, at 715.

character and discretion of the business executive.[52] It would be inequitable to compel the individual to serve another businessperson.

Although, as we have seen, there are many instances in which property and contract rights are deemed inalienable, there is a plausible argument that it is especially appropriate to empower the original holder to transfer an evidentiary privilege. As Part II noted, the law confers privileges in large part out of respect for the holder's autonomy. The argument runs that the holder will be able to exercise that autonomy more effectively—that is, more intelligently—if the holder can consult an expert confidant such as an attorney before making an important life preference choice.[53] It arguably also promotes the holder's autonomy by giving effect to the holder's voluntary decision to transfer the privilege to the new titleholder.

By way of counter-argument, it initially might be contended that the original holder could err tragically in thinking that in the future, the new titleholder will act to protect the original holder's privacy. If that were the only counter-argument, though, the case against alienability would be weak. If the original holder is an autonomous person in a democratic society, he or she should presumptively be allowed to assess and run that risk. However, there is a further, more potent counter-argument. The case for permitting alienation rests on the implicit assumption that the only interests at stake are the personal privacy concerns of the original holder. However, evidentiary privileges are not mere private "commodities."[54] Rather, evidentiary privileges have a profound impact on the public interest. The successful assertion of a privilege can result in the suppression of reliable, critical evidence. It can deprive the courts of evidence they need to reach an accurate verdict. The public has a compelling interest in the effective functioning of the courts as fact-finding tribunals. That public interest is so substantial that in an

[52] *See id.*; *see also* Smith, Bell & Hauck, Inc. v. Cullins, 183 A.2d 528, 532 (Vt. 1962) ("[Where] the personal characteristics of the employment contract permeate the entire transaction . . . the employee's [promise] is confined to the employer with whom the undertaking was made.").

[53] 1 IMWINKELRIED, *supra* note 15, § 5.3.3.c(4)–(9) (Richard D. Friedman ed., 2002).

[54] *Cf.* Goodley v. Wank & Wank, Inc., 133 Cal. Rptr. 83, 87 (Ct. App. 1976) (stating that a claim for attorney malpractice is not a "commodity to be exploited" in the marketplace).

extreme case, it can override even a constitutionally-based privilege such as the Presidential privilege.[55] As the Supreme Court pointed out in the landmark case of *United States v. Nixon*,[56] there is a vital public interest in "the fair administration" of the justice system.[57] In *Nixon,* the Court ruled that even Presidential privilege had to yield to a "demonstrated, specific need for evidence in a pending criminal trial."[58] Although the public interest in discovering all the relevant facts is typically stronger in criminal cases, the same interest exists in civil litigation.[59] Thus, when the need for a privileged item of evidence in a civil case has been acute, some cases have analogized to *Nixon* and surmounted evidentiary privileges on constitutional grounds.[60]

The transfer of a privilege between an original titleholder and his successor is more than a purely private economic transaction. If the original holder of a privilege could transfer that privilege to a third party, the third party would be in a position to deny the courts needed evidence and frustrate the functioning of the public's premier dispute resolution tribunals. Placing that strain on the public interest might be justifiable if allowing the transfer significantly promoted the social policies inspiring the creation of evidentiary privileges. However, on close scrutiny, it becomes apparent that allowing the transfer would not effectuate the rationale for recognizing privileges. In truth, it would undercut that rationale.

To begin with, allowing the original holder to transfer the privilege to a successor titleholder would not serve the policies underpinning evidentiary privileges. It is true that doing so would permit the new titleholder to maintain the secrecy of the prior communications, if he chose to assert the privilege. However, the protection of that secrecy is not the privacy interest inspiring privilege law. As Dean Wigmore explained in his classic treatise, one of the central purposes of privilege law is to encourage laypersons to consult with and make revelations to

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[55] 2 IMWINKELRIED, *supra* note 15, § 7.6.4 (Richard D. Friedman ed., 2002).

[56] 418 U.S. 683 (1974).

[57] *Id.* at 713.

[58] *Id.*

[59] 2 IMWINKELRIED, *supra* note 15, § 11.5.3 (Richard D. Friedman ed., 2002).

[60] *See, e.g.*, Adams v. St. Francis Reg'l Med. Ctr., 955 P.2d 1169, 1186–87 (Kan. 1998); *see also* Baptist Mem'l Hosp.–Union County v. Johnson, 754 So.2d 1165, 1168–69 (Miss. 2000).

confidants such as attorneys.[61] Privilege law serves that purpose by giving the layperson assurances that: (1) a privilege attaches at the time of the communication, and (2) the privilege protection continues permanently, ordinarily terminating only if and when the holder chooses to waive the privilege. Those assurances will presumably make the layperson more willing to consult and confide. Allowing the original holder to transfer the privilege to a successor titleholder in no way enhances either assurance. Yet, upholding the transfer would enable the successor to obstruct a judicial search for truth. Thus, treating the transfer as effective impinges on the public interest without advancing the social policies that can countervail against the public interest and justify the obstruction.

Worse still, in the long term, upholding the transfer will undermine those social policies. Suppose that the courts adopt the view that such transfers are valid. Assume further that it becomes a matter of common, public knowledge that that is the state of the law. How would those assumptions affect the typical bargain for the purchase of property? On those assumptions, it will probably become a routine practice for the purchaser to demand that the seller both convey title to the property and transfer any related evidentiary privilege. If the purchaser is acting in his or her rational self-interest, he or she will naturally want to control the related privilege in the future. If disclosure of the privileged communications would damage their interests, they would want the power to suppress the communications by asserting the privilege. If disclosure would serve their interests, they would want the power to divulge the communications by waiving the privilege. The prospective buyer will have a practical incentive to bargain for all of the original holder's interests—lock, stock, barrel, and privilege. In short, treating the privilege as transferable would reduce the permanence of the protection presently afforded the original holder. At the time of his communication with the attorney, the original holder will realize that if he later attempts to sell the property, the prospective buyer will probably demand that the original holder surrender the privilege as well as title. The net result is that the privilege protection accorded the original will be less secure than it is under the current state of the law. At first blush, granting

[61] 8 WIGMORE, *supra* note 2, § 2285 (John T. McNaughton rev., 1961).

the original holder the power to transfer might seem to benefit the holder by expanding his or her bundle of legal rights. Paradoxically, that expansion would erode the primary privacy rights that the holder now enjoys under privilege law.

IV. EVEN IF EVIDENTIARY PRIVILEGES SHOULD BE DEEMED NON-TRANSFERABLE, SHOULD THE ORIGINAL HOLDER AS PRINCIPAL BE PERMITTED TO DESIGNATE THE NEW TITLEHOLDER AN AGENT, AUTHORIZED TO DECIDE, ON THE BASIS OF THE NEW TITLEHOLDER'S INTERESTS, WHETHER TO ASSERT OR WAIVE THE PRINCIPAL'S PRIVILEGE?

The preceding sections present an extended argument that as a matter of policy, evidentiary privileges should not be transferable to the new titleholder either by operation of law or even by the original holder's voluntary act. However, as may already have occurred to the reader, that argument will be much ado about nothing if the original holder can easily circumvent the prohibition by appointing the new titleholder as the original holder's permanent agent for the purpose of deciding, based on the new titleholder's interests, whether to waive or assert the privilege. Although this expedient has some superficial plausibility, in the final analysis it will prove ineffective.

Initially, assume that at the time of the conveyance of title, in general terms the original holder purports to appoint the new titleholder as his "agent" for the purposes of deciding whether to assert or waive the privilege. The agreement is ambiguous; it does not expressly state that the new titleholder may make the decision on the basis of an assessment of their personal interests. A question of interpretation arises: Should that general agreement be construed to mean that the new titleholder may make the decision on the basis of his own interests, or should the agreement be interpreted as requiring the new titleholder to protect the original holder's privacy interests? Without more, the courts would adopt the latter interpretation. As the *Restatement on Agency* points out, one of the inherent obligations of any agent is a duty of loyalty to the principal.[62] Given that duty, the agent

[62] *See* RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 387 (1958); *see also* LEONARD LAKIN & MARTIN SCHIFF, THE LAW OF AGENCY § 67, at 105 (1984) (explaining that the agent owes the principal an "absolute" duty of "undivided loyalty"; it is the agent's "supreme" duty to the principal); FLOYD R. MECHEM, OUTLINES OF THE LAW OF AGENCY § 500, at 345 (4th ed. 1952) (explaining that the

must act "solely for the benefit of the principal."[63] Being subject to fiduciary duties, an agent may not pursue his own interests.[64] This axiom is so well settled that "[i]f a relation is created for any other purpose, it is not [an] agency."[65] In that light, the courts would balk at interpreting the ambiguous provision as authorizing the new titleholder to make the decision on the basis of an assessment of his own interests. As an "agent," the new titleholder would be required to focus solely on the principal's interest. Of course, so interpreted, the agreement would be ineffective as a means of circumventing the prohibition. The new titleholder is bargaining for the right to make the decision on the basis of his own self-interest. The ambiguous agreement would not be construed as giving the new titleholder that right.

Alternatively, assume that the new titleholder bargained for and obtained an explicit agreement. The carefully drafted agreement says in no uncertain terms that although the original holder is appointing the new titleholder as an "agent," the "agent" may make the decision on the basis of an evaluation of his own interests—an agreement that explicit would serve as an effective expedient *if* the courts were willing to enforce the agreement. The rub is that the agreement is almost assuredly unenforceable on the ground of illegality. An agent is a fiduciary.[66] It is black letter law that a contract provision violating or impairing a fiduciary's duty of loyalty is illegal as offending public policy.[67] Illegal contract provisions are unenforceable.[68] Hence, no matter how express its wording, the provision will fail as an effective expedient. The upshot is that neither the original holder nor the new titleholder can escape from the norm that the original holder's evidentiary privilege is inalienable.

agent has a duty of "utmost loyalty to the interests of his principal").

[63] RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 387.

[64] *See id.* § 13 cmt. b; MECHEM, *supra* note 62, § 500, at 345.

[65] RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 387 cmt. a.

[66] *Id.* § 13.

[67] 7 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §16:13, at 391–94 (Richard A. Lord ed., 4th ed. 1997).

[68] *See* 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1373 (1962); *see also* FARNSWORTH, *supra* note 43, § 5.1.

CONCLUSION

In *HLC Properties Ltd.*, the California Supreme Court came to the right result. More importantly, the case highlights a long neglected issue in the law of evidentiary privileges, namely, the question of the alienability of privileges. The preceding analysis of that question yields important insights into the very nature of privileges.

Why should the law not provide that the related attorney-client privilege of a natural person who was the original titleholder passes to the new owner by operation of law when the original titleholder conveys related property to a new owner? Again, that is the English view. That outcome would be sound if evidentiary privileges were merely property rights. However, privileges are far more than economic commodities.[69] They are incidents of personal relationships between a natural person and a confidant, and they are designed to protect the privacy of the consultation.[70] In the typical case, the new titleholder will have little knowledge of or concern about the original holder's privacy preferences. Consequently, it would be inconsistent with the essential nature of the privilege to automatically treat the new owner as a successor holder of the privilege.

Similarly, why should the law not provide that, at least by voluntary act, a natural person who was the original titleholder may transfer the related privilege to the new owner? In part, the answer is that in the long term, a norm of transferability would undermine the protection for the original holder's privacy. Given a norm of transferability, eventually it would become a routine practice for the prospective buyer to demand the privilege as well as title to the property. The original holder's privacy protection would be less secure than it is under the current state of the law. However, that is only part of the answer. The other, more revealing, part of the answer is that the proponents of transferability overlook the fact that privileges have a profound impact on the public interest, often obstructing the judicial search for truth. It is one thing to allow the original holder to interpose an obstruction to protect the privacy which is the policy justification for creating the privilege in the first instance. It

[69] *See supra* note 54 and accompanying text.

[70] 1 IMWINKELRIED, *supra* note 15, § 5.3.3.c(11) (Richard D. Friedman ed., 2002).

would be quite another matter—an unjustifiable expansion of the privilege—to countenance obstruction by a third party whose secrecy interests have no connection to the original holder's privacy concerns.

In the final analysis, evidentiary privileges are incidents of personal relationships, which affect the compelling public interest in the judicial search for truth. Given their personal nature, they should not be treated as private economic commodities. Moreover, in Dean Wigmore's words, given their impact on the public interest, they must be "strictly confined within the narrowest possible limits consistent with the logic of" the privacy protection inspiring their creation.[71] The gist of that logic is that by assuring the original holder permanent privacy protection, the law encourages the holder to consult with and disclose to confidants such as attorneys. A norm of transferability not only would not further that logic; in addition, as we have seen, that norm would ultimately weaken the protection for the original holder's privacy. In a very real sense, the current norm of non-transferability is a corollary of the essential nature of natural persons' evidentiary privileges.

[71] 8 WIGMORE. *supra* note 2, § 2291, at 554 (John T. McNaughton rev., 1961).