

Filed 9/29/03

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

HLC PROPERTIES LIMITED, et al.,

Petitioners,

v.

THE SUPERIOR COURT OF LOS
ANGELES COUNTY,

Respondent;

MCA RECORDS, INC., et al.,

Real Parties in Interest.

B167458

(Los Angeles County
Super. Ct. No. SC062601)

OPINION

ORIGINAL PROCEEDINGS; petition for extraordinary writ. Terry B. Friedman,
Judge. Petition granted.

Girardi & Keese, Thomas V. Girardi, Howard B. Miller; Law Offices of Mark A.
Brodka and Mark A. Brodka for Petitioner.

No appearance on behalf of Respondent.

Irell & Manella, Steven A. Marenberg, Steve Kang and Philip M. Kelly for Real
Parties in Interest.

On this petition for a writ of mandate we hold that an entity that is the legal successor of a deceased individual's ongoing business organization is, under Evidence Code section 953, subdivision (d),¹ the holder of the attorney-client privilege that belonged to that business organization.

FACTS AND PROCEDURAL HISTORY

A. Background Facts

Petitioner HLC Properties, Limited (HLC)², is a limited partnership formed in 1980 for the purpose of managing the entertainment empire created by Harry Lillis Crosby, professionally known as Bing Crosby (Crosby), who died in 1977. Crosby's personal representative and widow transferred to HLC his interests in various record masters, television programs, motion pictures, radio programs, music compositions, music publishing agreements, literary works, and the contract rights related to those interests, as well as the right of publicity. The general partner of HLC, Hillsborough Productions, Inc., was to manage the operations, including making all creative and business decisions about the interests transferred to HLC.

Before Crosby's death, the business interests transferred to HLC were owned by Crosby but managed and operated by a staff of employees that had managed Crosby's holdings for decades. Basil Grillo (Grillo), the manager and accountant who had run Crosby's organization for over 30 years, said that when he first began working for Crosby in 1945 or 1946, the Crosby operation was already so extensive that six months

¹ All further statutory references are to the Evidence Code unless otherwise indicated.

² Thomas E. O'Sullivan as trustee for the Wilma Wyatt Crosby Trust, a plaintiff in the underlying action, is also named as a petitioner but did not actively participate in this proceeding.

passed before he even met Crosby. That operation included musicians, singers, writers and agents, all of whom were involved in the creative and business aspects of records, motion pictures and radio and television programs. It also had interests in other fields. At times, business activities operated within formal entities. For example, Bing Crosby Productions was engaged in motion picture and television production. Bing Crosby Enterprises, Inc., was formed, but was later liquidated in the 1950's. The various businesses and entertainment interests of Crosby generally were managed under the name "Bing Crosby Enterprises," but that operation was not a formal entity.

It appears that any formal business entity that Crosby utilized for his operations was dissolved or otherwise liquidated, for there is no suggestion of the existence of such an entity at his death. There is no indication of how or in what manner those entities were terminated—whether by a formal dissolution or informal liquidation. Bing Crosby Enterprises continued operating after Crosby's death, and Crosby's personal representative continued to employ its staff and maintain its offices. In 1981, the probate court approved the transfer of the entertainment assets managed by Bing Crosby Enterprises to HCL, which, according to the HLC Properties, Ltd. Limited Partnership Agreement, was to "engage in the business of managing and controlling the property and rights."

B. The current dispute

On July 31, 2000, HLC filed a lawsuit against real parties in interest MCA Records, Inc., GRP Records, Inc., UMG Recordings, Inc., MCA, Inc., and Universal Studios, Inc. (collectively MCA), alleging they had underpaid royalties due on several recording contracts Crosby had entered into with MCA's predecessors in interest. In the course of pretrial discovery, MCA propounded a demand for production of documents to HLC. HLC responded by producing some documents but withholding others that it listed

in a privilege log as containing protected attorney-client communications.³ MCA did not file a motion to compel production of the documents withheld. MCA later issued a third-party deposition subpoena for production of documents to Crosby's former lawyers, who produced some documents, but HLC's attorney submitted a "supplemental privilege log," adding three documents to the original list. MCA did not file a motion to compel production of those additional documents.

Eight days before trial, MCA issued a subpoena to HLC, requiring it to produce at trial, 59 of the documents listed by HLC in its privilege logs. MCA notified HLC that it believed HLC had no privilege with respect to attorney-client communications in those 59 documents. At the final status conference in the case, MCA alerted the trial court that it had issued the subpoena and that the parties did not agree on whether the documents sought were privileged. The trial court gave the parties two days to file briefs on the issue. On the first day of trial, the court considered the enforceability of the subpoena in view of the attorney-client privilege objections. The trial court held that the privilege did not apply because the court interpreted the Evidence Code to provide that the privilege of an individual is terminated once the estate is wound up and the personal representative discharged. The trial court did not recognize Bing Crosby Enterprises as a holder of the privilege. This petition followed.

STANDARD OF REVIEW

We review the trial court's interpretation of Evidence Code provisions governing the attorney-client privilege de novo, as it presents a question of law. (*Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 868.)

³ Some of the documents were also withheld on the grounds they contained attorney work product or confidential income tax information. Those asserted privileges are not at issue here.

DISCUSSION

The attorney-client privilege permits the holder of the privilege to refuse to disclose any confidential communication between a client and a lawyer, with some exceptions that are not relevant here. (§ 954.) For purposes of the attorney-client privilege, a client is a person who retains or consults a lawyer for advice in his professional capacity. (§ 951.) A person “includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity.” (§ 175; see also § 954, subd. (c).)⁴

Section 953 of the Evidence Code defines the holder of the attorney-client privilege as the client; the guardian or conservator of the client if he or she has one; the personal representative of the client if the client is dead; or 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.” MCA argues that because of Crosby’s death, the winding up of his estate, and the discharge of his personal representative, there is no holder of the attorney-client privilege, and thus the privilege cannot be invoked. Under the common law, federal law and the law of a number of states, the attorney-client privilege continues to exist indefinitely after the client’s death. (Wydick, *The Attorney-Client Privilege: Does it Really Have Life Everlasting?* (1999) 87 Ky. L.J. 1165, 1169-70, 1184 (hereafter Wydick); 1 McCormick on Evidence (5th ed. 1999) § 94, p. 378; *Swidler & Berlin v. United States* (1998) 524 U.S. 399, 403, 407.) Notwithstanding that the California Evidence Code does not explicitly provide for the termination of the privilege, MCA points out that the California Law Revision Commission that helped draft the Evidence Code said that under that Code, the personal representative becomes the holder of the individual’s privilege only for the

⁴ Section 954, subdivision (c) defines “persons” as used in that subdivision (regarding the privilege as to the lawyer and a law corporation) as including “partnerships, corporations, limited liability companies, associations and other groups and entities.”

purpose of furthering the estate’s interests during its administration, and that when the administration of the estate is complete and the personal representative is discharged, the privilege terminates. (Recommendation Proposing An Evidence Code (Jan. 1965) 7 Cal. Law Revision Com. Rep. (1965), pp. 174-175 (Recommendation); *Swidler & Berlin, supra*, at p. 405, fn. 2.) The Law Revision Commission stated, “[a]lthough there is good reason for maintaining the privilege while the estate is being administered—particularly if the estate is involved in litigation—there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged.” (Recommendation at p. 175.) One authority has opined that “in at least twenty five [including California] of the fifty states, the evidence rules that codify the attorney-client privilege ought to be interpreted as terminating the privilege at the closing of the deceased client’s estate.” (Wydick, *supra*, 87 Ky. L.J. at p. 1183.)

We need not determine in this case whether and when the privilege terminates as to an individual decedent, for we hold that Bing Crosby Enterprises constituted an “organization,” and therefore that HLC, as successor to that business “organization,” is the holder of the privilege under section 953, subdivision (d).

Dictionary definitions of the word “organization” include the following: “any unified, consolidated group of elements. . . esp. a) a body of persons organized for some specific purpose . . . (Webster’s New World Dict. (3d college ed. 1988) p. 954).” (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1730); “a group of persons organized for some end or work”; or “the administrative personnel or apparatus of a business.” (Random House Webster’s College Dict. (2000) p. 933.)⁵ Consistent with these definitions, courts deciding cases in other contexts have concluded the term describes a group of persons working in pursuit of a common purpose. (See, e.g., *Sunkist*

⁵ Professor Melinkoff refers to the “amorphous flexibility” of the term “organization” and notes that it “may or may not be a legal entity.” (Melinkoff’s Dictionary of American Legal Usage (1992) p. 451.)

v. Winckler & Smith Co. (1962) 370 U.S. 19, 27, 29 [growers' marketing cooperative an organization for purposes of applying a federal statute that exempted certain organizations from anti-trust laws]); see Cal. U. Com. Code, § 1201, subd. (28).)

Under those definitions, the business staff assembled by Crosby to operate his entertainment interests qualifies as an organization under Evidence Code section 953, subdivision (d), for purposes of the succession to the attorney-client privilege. The 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. Although that organization took different forms over the years, incorporating itself or a portion of itself for a period during the 1940's to 1950's, by the time of Crosby's death, it managed his music, television, movie, literary and publicity rights. After his death, the business continued to operate, maintain offices and employ staff. Given its activities, Bing Crosby Enterprises was an on-going organization that held the attorney-client privilege regarding the communications sought by MCA. HLC became the "successor" of that "organization" and continues to operate the business. Bing Crosby Enterprises and subsequently HLC actually have engaged in business activities, and have not simply been repositories of the remaining assets of Crosby's estate. Therefore, HLC became the holder of Bing Crosby Enterprises' privilege. (§ 953, subd. (d).)

MCA and the trial court observed that various entities owned by Crosby simply dissolved, and that therefore there was no legal successor to any privilege held by those entities. The evidence does not establish that any of the privileged communications in issue were at one time held by any entity that has dissolved.⁶ But even if a privilege was possessed by one of those entities, that does not mean that the privilege no longer exists.

⁶ There is a suggestion that Bing Crosby Enterprises, Inc. dissolved sometime around the mid 1950's. Most of the documents in issue followed that period. It is not clear when the corporation was formed, although there was an estimate of around 1946. It appears that the unincorporated organization entitled Bing Crosby Enterprises preceded the corporation.

It is true that it has been said that a privilege of a corporation does not survive its termination (Model Evid. Code, rule 209, com. to clause (c), p. 145), and that the privilege does not pass from one entity to another through a simple transfer of assets, unless, perhaps, the transfer of the assets qualifies as a merger. (*Yosemite Inv. v. Floyd Bell, Inc.* (S.D. Ohio 1996) 943 F.Supp. 882, 883 (*Yosemite*) [the right to assert the attorney-client privilege “does not change hands with the bare assignment of assets”]; *Pilates, Inc. v. Georgetown Bodyworks* (D.D.C. 2000) 201 F.R.D. 261, 263 (*Pilates*).)

In California, however, a privilege possessed by a corporation can survive the corporation’s demise when there is a successor. (§ 953, subd. (d).) And a privilege can flow to a business that assumes the operations of another; i.e., when there is not just an assignment of some or all of the assets without the continuation of the business. The maintenance of the privilege in such situations is in recognition of the fact that new managers of an ongoing business must be able to assert (as well as waive) the privilege as a measure of operational control. (E.g. *Commodity Futures Trading Com. v. Weintraub* (1985) 471 U.S. 343, 348-349, 352-353 (*Commodity Futures*); *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1131, 1132; *Dickerson v. Superior Court* (1982) 135 Cal.App.3d 93, 98; *Yosemite, supra*, 943 F.Supp. at pp. 883-884; *Pilates, supra*, 201 F.R.D. at p. 263.)

There are analogous situations in which one taking over a business operation retains a privilege established prior to such a takeover. In *Commodity Futures, supra*, 471 U.S. 343, the court found a bankruptcy trustee succeeded to the debtor corporation’s attorney-client privilege in the same manner any new management team running the corporation would. The trustee became accountable for all of the corporation’s assets and bore a duty to maximize the value of the bankrupt estate. He was empowered to continue operating the corporation’s business, to enter into transactions, including the sale or lease of property, and to sue on behalf of the bankrupt estate as necessary to preserve its assets. In effect, the trustee ““completely ousted”” the corporation’s former directors and assumed full control of the business. That necessarily included the ability to control the

attorney-client privilege. (*Commodity Futures, supra*, 471 U.S. at pp. 349, 352-353, quoting H.R. Rep. No. 95-595, pp. 220-221 (1977).)

As noted above, the record does not indicate how all the formal entities owned by Crosby were terminated or that any such entity held the privilege at issue here. Moreover, the entertainment business of Crosby continued, seemingly unaffected by whether portions of it were conducted for a time within a corporate form. Bing Crosby Enterprises, in effect, took over and operated an ongoing business of any discontinued entity, and thus, retained the privilege. “So long as there is a holder in existence on behalf of a defunct entity client (partnership, corporation, etc.) the privilege survives the entity’s dissolution [See Evid. Code, § 953, subd. (d)].” (Vapnek, et al., *Cal. Practice Guide: Professional Responsibility* (The Rutter Group 2002) ¶ 7:267, p. 7-58.2.). Under the circumstances of this case, we conclude that a privilege was not lost because of the liquidation of any formal entity owned by Crosby.

Our conclusion that an entity designed to continue the business organization owned by a deceased individual succeeds to the organization’s attorney-client privilege finds support in Probate Code section 9760. This section authorizes a decedent’s personal representative to obtain authority to continue operating any unincorporated business venture in which the decedent was engaged “[i]f it is to the advantage of the estate and in the best interest of the interested persons.” (Prob. Code, § 9760, subd. (b).) This provision reflects the Legislature’s understanding that an ongoing concern may preserve or add value to the estate beyond the value of its component assets. (*California Emp. Etc. Com. v. Hansen* (1945) 69 Cal.App.2d 767, 770; *Estate of Allen* (1941) 42 Cal.App.2d 346, 351-352.) To preserve that value, the personal representative or other new manager of the business must be provided with the same degree of control available to the management of any other business that takes over an ongoing business. That includes control of the attorney-client privilege regarding confidential communications that belonged to the decedent’s business organization. (*Commodity Futures, supra*, 471 U.S. at pp. 348-349.)

DISPOSITION

The petition for writ of mandate is granted. The respondent court is directed to vacate its May 27, 2003 order granting MCA's Motion to Compel HLC and its Attorney to Comply with the Subpoena Duces Tecum, and to consider each document listed in HLC's privilege log to determine whether, in accordance with this opinion, the attorney-client privilege applies. Petitioners are awarded their costs in this proceeding.

CERTIFIED FOR PUBLICATION

MOSK, J.

We concur:

TURNER, P.J.

GRIGNON, J.