

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION  
08 CVD 12310

GARY D. RENTZ, DONNA A. RENTZ, )  
KRISTA C. LISTER )

v. )

BRAD COOPER )

DEFENDANT'S MOTION TO COMPEL  
OPPOSING COUNSEL TO DISCLOSE  
INFORMATION

NOW COMES the Defendant, by and through counsel, and respectfully moves this Court to Order opposing counsel, Alice Stubbs, to disclose to Defendant, Nancy Cooper's statements relating to Defendant's fitness as a father. Ms. Cooper made these statements to opposing counsel while Ms. Stubbs was representing Ms. Cooper in a separation action. Ms. Cooper is now deceased. Defense counsel requests disclosure of these statements on the basis that (1) the person who made these statements is now deceased, (2) under *In Re Miller* statements made by a deceased person that relate to a third party are not protected by attorney-client privilege; and, (3) even if these statements were protected by attorney client privilege this privilege was waived when Ms. Cooper published these statements to her husband Mr. Cooper, a third party. In the alternative, Defendant asks this Court for an *in camera* review of these statements to determine which statements are outside the purview of the attorney-client privilege and subject to disclosure.

1. Upon information and belief, Ms. Cooper hired Ms. Stubbs to represent her in separation proceedings. Ms. Cooper declared an intent to separate from her husband, Defendant Mr. Cooper.
2. Upon information and belief, Ms. Cooper told Ms. Stubbs that her husband was a fit father and that she believed it would be in her daughters' best interest to continue to have contact with their father. To this end, Ms. Cooper told Ms. Stubbs that she wanted her husband to have joint-custody of their children. Ms. Cooper's faith in her husband's parental abilities is memorialized in the Coopers' separation agreement. See Attachment #1 Separation Agreement ¶ 13.
3. Mr. Cooper's fitness as a father has been called into question by this Court's temporary assignment of custody to Plaintiffs, the children's maternal grandparents and aunt.

4. Ms. Cooper's convictions regarding her husband's fitness as a father are crucial to a custody determination.
5. Ms. Cooper disappeared and has been reported to be dead as of July 12, 2008 and consequently can no longer speak to Mr. Cooper's fitness as a father. Ms. Stubbs was made party to information about Mr. Cooper's fitness as a father during her previous representation of Ms. Cooper.
6. "While communications made by a client to an attorney which pertain to the culpability or interests of the client are privileged and ordinarily remain privileged after the client's death, communications between an attorney and a client that relate to or concern the interests, rights, activities, of a third party, the disclosure of which would not tend to harm the client, do not logically fall within North Carolina's definition of attorney-client privileged information." *In Re Miller*, 357 N.C. 316 (2003), *aff'd*, 358 N.C. 364 (2004).
7. "Upon a non-frivolous assertion that the attorney-client privilege does not apply, with a proper, good-faith showing by the party seeking disclosure of communications, the trial court may conduct an *in camera* review of the substance of the communications; to the extent any portion of the communications relate solely to a third party, such communications are not within the purview of the attorney-client privilege, and the trial court may compel the attorney to provide the substance of the communications ..." *In Re Miller*, 357 N.C. 316 (2003), *aff'd*, 358 N.C. 364 (2004). The Court has discretion to limit disclosure of information to the extent that the information would inure to the detriment of the former client or her family. Such detriment could exist if the client, or her family, were to be subject to civil or criminal liability. In this instance, neither Ms. Cooper nor her family would be subject to civil or criminal liability if information regarding her husband's fitness as a father were to be disclosed. Indeed, if anything, such disclosure would benefit Ms. Cooper as it would shed light on her wishes for her children's custody. *In Re Miller*, 357 N.C. 316 (2003), *aff'd*, 358 N.C. 364 (2004).
9. In the alternative, counsel asks this Court to review the information concerning Mr. Cooper's parenting *in camera* to determine which of these statements affect Mr. Cooper's interests and rights, and the extent to which they would result in Plaintiffs' civil or criminal liability. To the extent that this Court determines that these statements do affect Mr. Cooper's rights without resulting in Plaintiffs' criminal or civil liability counsel asks this Court to order the disclosure of these statements.
10. In addition, counsel asks this Court to order Ms. Stubbs to disclose Ms. Cooper's statements regarding her husband's fitness as a parent on the basis that a client waives attorney client privilege when the client

publishes the originally protected information to a third party. *State v. Murvin*, 304 N.C. 523 (1981); *State v. Brown*, 327 N.C. 1 (1990); *State v. Van Landingham*, 283 N.C. 589 (1973); *Brown v. American Partners Federal Credit Union*, 183 N.C.App. 529 (2007).

11. Upon information and belief, Ms. Cooper relayed to Mr. Cooper the contents of her discussions with Ms. Stubbs relating to his fitness as a parent. In fact, Ms. Cooper forwarded Mr. Cooper an e-mail from Ms. Stubbs with a draft of the separation agreement. This agreement details his adequacy as a parent. See Attachment # 2 e-mail from Ms. Cooper to Mr. Cooper with Separation Draft Agreement attached.
12. In so informing her husband, Ms. Cooper waived her attorney-client privilege with respect to these communications bringing the statements relating to Mr. Cooper's parenting abilities outside the purview of the privilege. Consequently, counsel asks that this Court order Ms. Stubbs to reveal any and all of Ms. Cooper's statements supporting her decision to pursue a joint-custody agreement with Mr. Cooper.
13. Further still, counsel submits that either requiring disclosure of Ms. Stubbs information regarding Mr. Cooper's fitness as a father or reviewing this information *in camera* to determine whether it is subject to disclosure, is critical to providing Mr. Cooper with fairness of process. Ms. Cooper's parents, likely through their discussions with Ms. Stubbs regarding her former representation of their daughter, have access to privileged information that Mr. Cooper does not have. In the interest of justice, this Court should review and permit the disclosure of information supporting Mr. Cooper's fitness as a parent.
14. Finally, a court's priority in a child custody proceeding is to act in the best interests of the child. Information provided by the deceased to her attorney about her husband's fitness as a father is critical to this Court's ability to act in the child's best interests and critical to the Court's ability to maintain the presumption that children should remain with their parents.

Wherefore Defendants ask this Court to :

(1) Order the disclosure of Ms. Cooper's statements relating to Mr. Cooper's fitness as a parent on the basis that these statements are unprotected by attorney client privilege. These statements are so unprotected because:

- (a) Ms. Cooper published this information by disclosing it to a third-party, her husband, thereby removing these statements from the purview of the privilege; and

(b) These statements solely relate to a third party and therefore, under *In Re Miller* these statements fall outside the privilege;

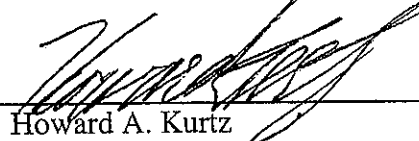
**OR**

(2) Review these statements *in camera* to determine the extent to which they are unprotected by attorney client privilege and order the disclosure of those statements that fall outside the privilege;

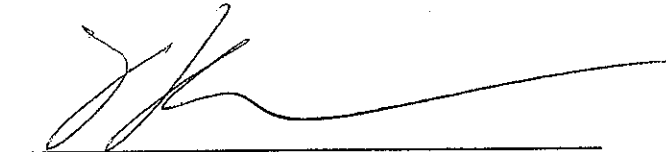
**OR**

(3) order any other relief that this court deems appropriate.

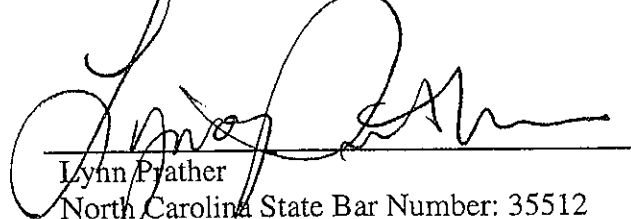
RESPECTFULLY SUBMITTED this the 23<sup>rd</sup> day of July 2008.



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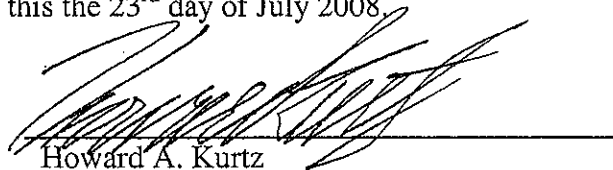
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CERTIFICATE OF SERVICE

The undersigned attorneys for the Defendant certify that on this day, the foregoing MOTION was served upon the attorney of record for the Plaintiffs in this action by hand delivery as follows:

Alice C. Stubbs  
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RESPECTFULLY SUBMITTED this the 23<sup>rd</sup> day of July 2008,



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