SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Probate Proceeding, Will of

File No. 340361

PEARL B. KALIKOW,

Dec. No. 682

Deceased.

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This is a contested proceeding for the appointment of a fiduciary.

The decedent, Pearl Kalikow, died on January 4, 2006, leaving a will dated July 16, 2003 and two codicils dated September 29, 2004 and April 5, 2005, respectively ("will"). By order dated April 5, 2006, preliminary letters issued to Eugene Shalik and James C. DeVita . By objections dated May 23, 2007, objectants, beneficiaries under the will, objected to petitioners' appointment as co-executors on the grounds that they "do not possess the qualifications required of a fiduciary by reason of, inter alia, dishonesty, improvidence, want of understanding, conflict of interest and hostility towards the said Objectants." The objectants did not object to the admission of the will to probate and by decision dated December 10, 2007 (Dec. No. 602), this court granted the motion to admit the will and codicils to probate with the restriction that letters testamentary not issue except by further order of the court and denied the application seeking a stay of discovery.

Objectants served a subpoena duces tecum dated September 3, 2008 upon the Diocese of Rockville Centre (Diocese), James DeVita's former employer, seeking "[a]ll documents concerning James DeVita including, without limitation, personnel records, documents concerning complaints received with respect to James DeVita, documents concerning disciplinary actions taken with respect to James DeVita, and documents concerning the

termination or resignation of James DeVita." DeVita retired from the Diocese in 1993.

DeVita has moved pursuant to CPLR 2304 to quash the subpoena on the grounds, among other things, that it seeks documents not material and necessary to the issues in this proceeding. He also seeks a protective order pursuant to CPLR 3103 limiting disclosure by the Diocese. In the opposing papers, the objectants have agreed to limit their subpoena to documents regarding any allegation of improper conduct on the part of DeVita and any documents regarding the Diocese's investigation of the same.

Generally, there is full disclosure of all matter "material and necessary" to the prosecution or defense of an action or proceeding (CPLR 3101[a]). It is well-settled that the court has broad discretion over the discovery process to decide whether the information sought is indeed "material and necessary" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). The words "material and necessary" are interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy (*id., see also Andon v 302-304 Mott St. Assoc.*, 94 NY2d.740, 746 [2000]). In the Second Department, "[a] party seeking discovery from a nonparty witness must show special circumstances . . . The existence of such special circumstances is not established merely upon a showing that the information sought is relevant. Rather, special circumstances are shown by establishing that the information cannot be obtained through other sources" (*Tannenbaum v Tenenbaum*, 8 AD3d 360, 360 [2d Dept 2004] internal and other citations omitted]; *Attinello v DeFilippis*, 22 AD3d 514, 515 [2d Dept 2005]; *Lanzello v Lakritz*, 287 AD2d 601, 601 [2d Dept 2001]).

On a motion to quash a subpoena pursuant to CPLR 2304, the standard to be applied is whether the requested information "is utterly irrelevant to any proper inquiry" (*Anheuser-Busch,*

Inc. v Abrams, 71 NY2d 327, 332 [1988]; *Technology Multi Sources, S.A. v Stack Global Holdings,* 44 AD3d 931 [2d Dept 2007]). Under CPLR 3103, protective orders are designed to deny, limit, condition or regulate the "use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103[a]). "A motion for a protective order . . . is addressed to the sound discretion of the trial court . . ." (*Kaplan v Herbstein*, 175 AD2d 200 [2d Dept 1993]). The burden is on the moving party to establish the need for a protective order (*Koump v Smith*, 25 NY2d 287, 294 [1969]; *Vivitorian Corp. v First Cent. Ins. Co.,* 203 AD2d, 452, 452-453 [2d Dept 1994]).

DeVita asserts that the information sought by objectants is irrelevant as to whether or not he is an acceptable fiduciary and his qualification cannot turn on his conduct as a priest of the Diocese 15, 20 or 40 years ago. Objectants contend that broad discovery is appropriate where a nominated fiduciary's qualification and fitness to serve are called into question. Objectants assert that they have reason to believe that James was the subject of accusations concerning improper conduct while he was employed by the Diocese.

SCPA 707 sets forth the grounds for denying letters.

§707. Eligibility to receive letters
Letters may issue to a natural person or to a person authorized by law to be a fiduciary except as follows:
1. Persons ineligible
(a) an infant.
(b) an incompetent.
(c) a non-domiciliary alien except one who is a foreign guardian as provided in subdivision four of section one thousand seven hundred sixteen of this chapter, or one who shall serve with one or more co-fiduciaries, at least one of whom is resident in this state. Any appointment of a non-domiciliary alien fiduciary or a New York resident fiduciary hereunder shall be made by the court in its discretion.

(d) a felon.

(e) one who does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office.

2. Persons ineligible in court's discretion. The court may declare ineligible to act as fiduciary a person unable to read and write the English language.

Objectants rely upon SCPA 707(1)(e). This provision expands the grounds upon which denial of letters could be based (2 Warren's Heaton on Surrogate's Court Practice 33.02[6][e], 7th ed). A leading commentator has noted that "these grounds all contemplate a fiduciary likely to jeopardize estate property." (Turano, Practice Commentaries, Book 58A, McKinney's Consolidated Laws of New York, 707, p. 530). The grounds for disqualification are limited to those specified in SCPA 707 (*Matter of Shepard*, 249 AD2d 748 [3d Dept 1998]; *Matter of Foss*, 282 App Div 509 [1st Dept 1953]). The party alleging ineligibility has the burden of proof (*Matter of Krom*, 86 AD2d 689 [3d Dept 1982], *app dsmd*, 56 NY2d 505 [1982]).

In support of the subpoena, objectants submit the affidavit of an investigator wherein it is stated that he spoke to an alleged victim's mother who informed him that her daughter was sexually abused by DeVita approximately 30 years ago while he was a priest employed by the Diocese. Objectants assert that the diocesan records covering the investigation of said allegation bear on DeVita's fitness to serve as fiduciary. The court disagrees. Based upon the authorities cited above, it is clear that not only the grounds for disqualification are limited to those set forth, but also that the objectants must make a showing that the assets of the estate would be in jeopardy in the hands of the petitioner. Objectants have failed to demonstrate how an allegation of sexual abuse which took place over 30 years ago bears on DeVita's fitness to serve as fiduciary. This court is not the proper forum to adjudicate an allegation of sexual abuse. Under

such circumstances, the selection of the testator to determine who is most suitable to settle her estate should not lightly be disregarded (*Matter of Flood*, 236 NY 408, 410 [1923]; *Matter of Venezia*, 25 AD3d 717 [2d Dept 2006]).

Further, objectants' assertion that DeVita testified untruthfully at his deposition concerning whether or not the allegation of sexual abuse was investigated by the Diocese and he is, therefore, unfit to serve as fiduciary, is without merit. A review of DeVita's deposition testimony shows that he was only asked whether he was the subject of any investigation for any activities at Sacred Heart parish. Moreover, the dishonesty contemplated in the statute "must be taken to mean dishonesty in money matters from which a reasonable apprehension may be entertained that the funds of the estate would not be safe in the hands of the executor" (2 Warren's Heaton on Surrogate's Court Practice, §33.02[6][b], p 33-21 [7th ed]; *Matter of Flood*, 236 NY 408, 411 [1923]; *Matter of Martin*, 16 AD2d 807 [2d Dept 1962]). No such dishonesty has been shown. Finally, objectants opposed petitioner's request that the court consider a supplemental affidavit submitted by DeVita subsequent to the date on which the motion was submitted for decision. The court agrees with objectants and DeVita's untimely affidavit was not considered in rendering this decision.

Accordingly, the motion to quash the subpoena and for a protective order is granted in its entirety.

The above constitutes the decision and order of this court.

Dated: December 16 , 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court