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

----------x

In the Matter of the Intermediate Account by Kathleen Trotman as the Executor of the Estate of

EILEEN G. SHEERIN,
a/k/a EILEEN SHEERIN,

Deceased.

----------x

File No. 347960/B

Dec. No. 26963

In this proceeding by Kathleen Trotman to judicially settle her intermediate account as executor of the estate of Eileen G. Sheerin, respondent Patricia Sheerin Baltes moves for an order (1) compelling Kathleen to answer certain questions that her attorney directed her not to answer at her SCPA 2211 examination; (2) directing Kathleen to pay from her own funds for Patricia's legal fees and court reporting fees incurred at the SCPA 2211 examination; (3) compelling Kathleen to produce copies of her personal banking records for the years 2005 to present and her personal federal and state income tax returns for tax years 2005-2009; (4) denying commissions to Kathleen; and (5) directing Kathleen to pay the costs associated with this motion. Kathleen opposes the motion.[1]

---

[1]Initially, Kathleen asserts that the court is without jurisdiction to hear and determine the motion because Patricia's moving papers contain the caption of the probate proceeding in which a decree was previously entered rather than of the pending accounting proceeding. From the content of the moving papers and the relief sought, it is evident that Patricia's motion is with respect to the accounting proceeding. The court will address the motion despite the incorrect caption.

Kathleen also asserts that the motion is jurisdictionally defective because the notice of motion does not state to whom the motion was addressed. Kathleen relies on section 212.10 of the Uniform Rules for Trial Courts. This particular section governs district courts in New York State. There is no companion rule in the Uniform Rules for Surrogate's Courts, and, in any event, the moving papers contain an affidavit of service by mail that shows service of the moving papers upon Kathleen's attorney.

Kathleen further asserts that the court should reject the motion because Patricia is designated in the notice of motion as a distributee and, since the will has been probated, Patricia does not have standing to move in her capacity as a distributee. Again, Kathleen's argument is

The decedent died on July 7, 2007, leaving two children, Kathleen and Patricia. The decedent's last will and testament dated May 21, 2004 was admitted to probate on September 7, 2007 and letters testamentary were issued on that date to Kathleen, the nominated executor. Under Article THIRD of the will, the decedent bequeathed to each of Kathleen and Patricia one-half of her residuary estate per stirpes.

After Patricia filed a petition to compel Kathleen to account, Kathleen agreed to do so, and, in September 2008, she filed a proceeding to judicially settle her intermediate account as executor for the period from July 7, 2007 to August 22, 2008. The parties attempted unsuccessfully to settle the matter and a SCPA 2211 examination of Kathleen was conducted on September 14, 2010. During the examination, Kathleen's attorney directed Kathleen not to answer certain questions posed to her by Patricia's attorney. Patricia now asks the court to compel Kathleen to answer these questions.

SCPA 2211 allows the fiduciary to be examined under oath by any other party "as to any matter relating to his or her administration of the estate." Pursuant to SCPA 2211 (2), "the party conducting the examination shall be entitled to all rights granted under article thirty-one of the [CPLR] with respect to document discovery . . ."

Disclosure in New York State civil actions is guided by the principle of "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]). The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by

---

unavailing. However characterized in the notice of motion, Patricia has standing to bring this motion as the respondent in the accounting proceeding.

sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]; *see Tower Ins. Co. of N.Y. v Murello,* 68 AD3d 977 [2d Dept 2009]). The Court of Appeals' interpretation of "material and necessary" in *Allen* has been understood "to mean nothing more or less than 'relevant' " (Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3101:5).

Kathleen argues that it "would be serious and reversible legal error and unconstitutional state action in violation of [Kathleen's] rights to due process and equal protection for the court to even consider" Patricia's motion because the motion was made prior to the time that a copy of the SCPA 2211 deposition transcript was sent to Kathleen's counsel in what her counsel terms as a "direct violation of CPLR § 3116 (a)." CPLR 3116 (a) requires that the deposition transcript be sent to the witness for signature and that the witness can make changes in form or substance to his or her answers with reasons provided for the changes. If the witness fails to sign the transcript and return it within 60 days, the transcript may be used as though it was signed (*see* CPLR 3117). Here, Patricia is asking for relief with respect to questions posed to Kathleen that her attorney directed her not to answer. Thus, there are no answers to these particular questions that Kathleen could have changed if she had been provided with a copy of the transcript before the motion was made.

Moreover, the cases upon which Kathleen relies are inapposite. For example, in *Martinez v 123-16 Liberty Avenue Realty Corp.* (47 AD3d 901, 902 [2d Dept 2008]), the Second Department found that there was no evidence that unsigned deposition transcripts that were submitted in conjunction with a motion and cross motion for summary judgment had been

previously forwarded to the respective witnesses for review pursuant to CPLR 3116 (a) and, therefore, were not admissible evidence. Here, the transcripts are not being proffered as evidence, but merely to obtain rulings.

The SCPA 2211 transcript is replete with questions which Kathleen's attorney directed her not to answer and which Patricia's attorney marked for a ruling. Generally, the only time an attorney is permitted to direct his client not to answer a question is when the answer would violate the attorney-client privilege or the question is patently irrelevant *(see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). The majority of the questions at issue herein fall under the Court of Appeals' interpretation of "material and necessary" (*id.*). Accordingly, the court grants Patricia's motion to compel Kathleen to answer all the questions marked for a ruling with the exception of the questions found in the transcript at: (1) page 15, line 2; (2) page 15, lines 19-20; (3) page 16, line 3; (4) page 63, lines 6-8; (5) page 63, lines 22-24; (6) page 65, lines 12-14; (7) page 65, lines 20-21; (8) page 66, line 6; (9) page 130, lines 17-19. These specific questions appear to be patently irrelevant to the accounting proceeding.

As to the questions with respect to a power-of-attorney that the decedent is alleged to have executed with Kathleen as her attorney-in-fact, although Kathleen has not accounted as attorney-in-fact, actions she may have taken under the power may have impacted the assets that Kathleen marshaled as executor of the estate. The questions asked with respect to the power-of-attorney are narrow enough in scope to be relevant to the accounting proceeding and the assets that formed the decedent's estate. Further, the court on its own motion directs Kathleen to commence an accounting proceeding of her actions as attorney-in-fact within 60 days of the date of this decision and order (*see Matter of Morrison*, 268 AD2d 435 [2d Dept 2000]).

Patricia also seeks to compel Kathleen to produce her personal banking records for the years 2005 to present and her personal federal and state income tax returns for tax years 2005-2009. These documents were requested during the SCPA 2211 examination; a demand for discovery and inspection of these documents, if such a demand exists, has not been supplied to the court. The motion for these documents is denied at this time. If Patricia wishes to discover these documents, she should make a proper demand under CPLR 3102 (a). The court notes that on the record as it stands, Patricia has not made the requisite showing that "relevant information possibly contained therein cannot be obtained from any alternative source, such as other financial or business records" (*Lorenz Diversified Corp. v Falk*, 44 AD3d 910 [2d Dept 2007], quoting *Constentino v Schwartz*, 155 AD2d 640, 641 [2d Dept 1989]).

Patricia's motion to deny executor's commissions to Kathleen is denied at this time; Kathleen's entitlement to commissions will be addressed if and when Patricia files an objection to Kathleen receiving commissions and after a hearing or a motion for summary judgment. Patricia's motion for attorney's fees, court reporting fees and for the costs associated with making this motion is denied.

This is the decision and order of the court.

Dated: February 10, 2011

EDWARD W. McCARTY III
Judge of the
Surrogate's Court