

<b>Matter of Arthur J. Neumann Trust</b>
2020 NY Slip Op 34481(U)
August 6, 2020
Surrogate's Court, Bronx County
Docket Number: 725P2003/D
Judge: Nelida Malave-Gonzalez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

## SURROGATE'S COURT, BRONX COUNTY

August 6, 2020

MATTER ARTHUR J. NEUMANN TRUST u/a/d  
February 16, 1987, as Restated and Amended for the  
Third Time on October 25, 2002

File No.: 725P2003/D

In this miscellaneous proceeding commenced by a trust beneficiary, Belinda Neumann Donnelly, seeking inter alia, the removal of the de facto trustee and the appointment of a corporate fiduciary in lieu of the successor trustee of the Trust, Melissa F. Neumann (movant), who moves for an order compelling Belinda to comply with a November 13, 2019 Demand for Discovery and Inspection, which seeks "[a]ll documents and/or communications which indicate that Melissa Neumann is ineligible to serve as successor trustee of the Appointed Trust." In support of the motion, the movant argues that Belinda objected to the request ostensibly on the basis that it is overly vague and compliance calls for the production of privileged attorney work product material. Belinda opposes the motion arguing the issue of the Movant's eligibility to serve as fiduciary is a legal determination to be made by the court, and thus "[a]scertaining which documents 'indicate'

ineligibility, therefore, necessarily requires the expertise and legal analysis of Belinda's attorneys to decide which documents support her case." The movant's reply argues that her attorney's request for a privilege log was rejected, thus triggering the instant motion.

Disclosure under CPLR article 31 affords a party broad and liberal discovery of matter material and necessary in litigation ( CPLR 3101; *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403 [1968]; *New York County DES Litigation v Eli Lilly Company*, 171 AD2d 119 [1st Dept 1991]; *Twenty Four Hours Fuel Corp v Hunter Ambulance Corp.*, 226 AD2d 175 [1st Dept 1996]). Of course, CPLR article 31 disclosure is available in surrogate's court proceedings (see *Siegel & Connors*, *New York Practice* § 343). The court is afforded broad discretion to supervise disclosure and its orders are upheld unless there is an abuse of that discretion (*Daniels v City of New York*, 291 AD2d 260 [1<sup>st</sup> Dept 2002]). An attorney's work product and trial preparation materials are exempt from disclosure (CPLR 3101 [c], [d]). An attorney's interviews, mental impressions and personal beliefs procured in the context of litigation are considered attorney work product (see *Corcoran v Peat, Marwick, Mitchell and Co*, 151 AD2d 443 [1<sup>st</sup> Dept 1989]).

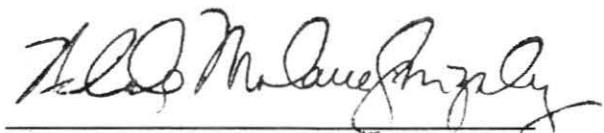
Although the requested information is germane to the movant's ability to defend against Belinda's application to preclude her as a successor trustee, the court agrees with the opposition that the request as demanded is improper. Attorney work product not only invokes documents, notes,

memoranda prepared by an attorney, but also an attorney's "mental impressions" and subjective interpretation (see *Corcoran v Peat, Marwick, Mitchell and Co.*, 151 AD2d at 444,445 [1<sup>st</sup> Dept 1989]).

Ineligibility to serve as a fiduciary is governed by the provisions of SCPA 707 and is a determination for the court to make. Thus, if an individual is a felon, under SCPA 707 (1) (d), clearly they may not serve as a fiduciary. That is a fact-driven straightforward issue. However, if the person is incompetent (see SCPA 707 [1] [b]) or is ineligible due to "substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office," the only means for Belinda's counsel to be aware of this information would stem from conversations and information necessarily obtained or learned as part of the litigation. Further, responding to the request would require Belinda's counsel to analyze and interpret which documents would render the Movant "otherwise unfit for the execution of the office," again a determination that is to be reached by the court. So too, responding to the request would open a window to counsel's mind concerning trial tactics and strategy, akin to, for example, asking the plaintiff in a personal injury action to provide information on how the defendant was negligent. The demand as noticed is improper and this information is squarely within the guise of attorney work product, which need not be produced. Accordingly, the motion is denied without prejudice to requesting the sought-after information in a narrowly tailored manner.

In a prior proceeding the de facto trustee argued that no less than 15 proceedings were brought in various forums by the trust beneficiary or someone on her behalf. Even if this statement is not accurate, there is no denial that there is great vitriol and animosity among the parties. Vexatious litigation will inevitably be the only constant in this and related proceedings. As such, this matter is ripe for mediation and pursuant to Chief Judge Janet DiFiore's directive concerning the presumptive use of ADR in all civil cases and the ADR Initiative of the court, this matter is hereby referred to mediation. The court's ADR Coordinator will contact the parties concerning the appropriate procedure to that end.

This decision constitutes the order of the court and the parties are directed to proceed accordingly.

  
HON. NELIDA MALAVE-GONZALEZ  
SURROGATE