

**Matter of Linton**

2017 NY Slip Op 30999(U)

May 12, 2017

Surrogate's Court, New York County

Docket Number: 2016-1741 B

Judge: Nora S. Anderson

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SURROGATE'S COURT : NEW YORK COUNTY  
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New York County Surrogate's Court

Date: MAY 12, 2017

In the Matter of the Application of Jeffrey R. Linton,  
as Co-Preliminary Executor of the Estate of

File No. 2016-1741 B

ROBERT E. LINTON,

Deceased,

To Remove Myron A. Hyman as Co-Preliminary  
Executor.

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ANDERSON, S.

Petitioner, a preliminary co-executor of the estate of his father, Robert E. Linton ("decedent"), commenced this proceeding to revoke preliminary letters testamentary issued to his co-fiduciary, Myron A. Hyman ("respondent"), and to disqualify him from serving as executor. For the reasons set forth below, the court suspends the preliminary letters issued to respondent pending a final adjudication of the issues raised in this proceeding.

Decedent died on April 26, 2016, at the age of 90, survived by his wife and four adult children, one of whom is petitioner. In his will, decedent named his wife and respondent, a lawyer, as co-executors, and named respondent as sole trustee of a residuary trust created for the benefit of decedent's wife. Since decedent's wife suffers from dementia, she was unable to act as a fiduciary and thus petitioner, as the nominated successor co-executor, joined with respondent in petitioning to probate decedent's will. They were granted preliminary letters on June 2, 2016. A guardian ad litem (the "GAL") was appointed for decedent's wife in the probate proceeding and in this removal proceeding.

Petitioner and his siblings have beneficial interests in decedent's estate, while respondent does not. In the probate proceeding, they have objected to respondent's receipt of letters

testamentary and letters of trusteeship.

In the instant proceeding for respondent's removal, petitioner alleges that, prior and subsequent to decedent's death, respondent engaged in several self serving and fraudulent transactions while purporting to act for decedent's benefit in his capacity as decedent's lawyer and attorney-in-fact, and as fiduciary for his estate. Central to such allegations is petitioner's discovery of promissory notes totalling about \$500,000, reflecting loans made by decedent to a company, Red Sky Entertainment, or its successor, Blue Wave Entertainment (collectively, the "company"). Respondent admits that he owns 25 percent of the company and that he is an officer and employee of the company. Petitioner also discovered that, in the years leading up to decedent's death, decedent had made monthly payments totalling almost \$1 million for the company's "overhead expenses," which included respondent's salary. Petitioner alleges that respondent unduly influenced decedent to make these payments, all of which occurred after decedent had sold his own interest in the company.

Shortly after discovering the aforementioned promissory notes, which were payable on demand, petitioner, as preliminary co-executor, asked the company to repay the loans to decedent's estate, but the company, allegedly under respondent's instruction, did not comply. Respondent states that the proposed repayment "was not feasible nor possible nor, under these circumstances, appropriate," because the company might have legal defenses to petitioner's repayment demand (although respondent has offered to "recuse" himself from any decision relating to the notes). Respondent also questions whether petitioner can unilaterally demand repayment on behalf of the estate.

Petitioner states that, on April 27, 2016, the day after decedent died, respondent

“requested that petitioner obtain a check” for \$15,000 from decedent’s wife’s account, made payable to the company (the record is silent as to whether petitioner had any authority to access his mother’s funds). In support of this request, respondent told petitioner that decedent had made an “oral agreement” to continue funding the company’s overhead for six months following his death. When the GAL questioned respondent about this check, respondent replied that decedent had a long-standing practice of covering the company’s monthly overhead, which amounted to \$10,000 per month in 2015 and \$15,000 per month in 2016.

The crux of petitioner’s argument for removal is that respondent’s substantial interest as an owner, officer and employee of the company, of which the estate is a major creditor, substantially conflicts with his role as the estate’s fiduciary.

While a testator’s choice of a fiduciary is not to be lightly disregarded (*see Matter of Duke*, 87 NY2d 465, 473 [1996]; *Matter of Leland*, 219 NY 387 [1916]), respondent’s conduct subsequent to decedent’s death raises serious concerns. Respondent concedes the existence of the promissory notes and the amounts thereof, but his position unequivocally demonstrates that he has placed the interests of the company ahead of the interests of the estate. Respondent’s request (immediately after decedent’s death) that decedent’s wife’s own funds be drawn upon to pay the company’s overhead only adds to the court’s concern regarding respondent’s judgement. Respondent’s conflict of interest is thus not merely potential but actual. Faced with similar circumstances, courts have not hesitated to revoke or, at the very least, suspend letters (*see, e.g., Matter of Palma*, 40 AD3d 1157 [3d Dept 2007] [affirming Surrogate’s revocation of preliminary letters without a hearing in light of undisputed evidence demonstrating the preliminary executor’s existing conflicts and self-dealing]; *Matter of Busch*, NYLJ, April 12,

2004, at 18, col 1 [Sur Ct, Suffolk Cty] [suspending a co-executor whose position regarding her indebtedness to the estate was in conflict with the position taken by the two other co-executors]).

The parties' submissions to the court indicate that the vitriol between petitioner and respondent is impeding the orderly administration of the estate, including the timely filing of the estate tax return, which must be filed by July 2017. In her report, the GAL recommended that the court revoke respondent's preliminary letters; in a subsequent submission, she expressed support for petitioner's request that respondent at least be temporarily suspended.

The allegations contained in respondent's recently-filed cross-petition for revocation of *petitioner's* preliminary letters are merely conclusory and do not justify petitioner's removal or suspension at this time.

By contrast, the allegations against respondent, to the extent they are supported by undisputed facts and evidence in the record, warrant the temporary suspension of respondent's preliminary letters. Respondent's preliminary letters testamentary are hereby suspended pending final adjudication of this proceeding.

This decision constitutes the order of the court.

Dated: *May 12*, 2017

*NSA*  
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SURROGATE