

Matter of Lewner

2020 NY Slip Op 34582(U)

June 15, 2020

Surrogate's Court, New York County

Docket Number: File No. 2019-2967/C/D

Judge: Nora S. Anderson

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This opinion is uncorrected and not selected for official publication.



SURROGAT S COURT: NEW YORK COUNTY

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 In the Matter of the Application of
 aig Lewner, as Co-Administrator of
 the Estate of

File No. 2019-2967/C/D

JOSEF LEWNER,

Deceased,

To Remove Charles Lewner as
 o-Administrator.

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A N D E R S O N, S.

Petitioner, as co-administrator of the estate of Josef
 Lewne , commenced this proceeding to suspend and ultimately
 evoke the letters of administration of his co-fiduciary,
 ha les Lewner ("respondent"). In the alternative, petitioner
 asked the court to direct respondent to cooperate with
 petitione to the extent required to make estate tax payments
 (S PA 2102[6]). For the reasons set forth below, the court
 suspends the letters of administration issued to respondent
 pending a final adjudication of the issues raised in this
 emoval p oceeding.

Decedent died intestate on April 27, 2019, survived by his
 son, respondent, and two grandchildren (one of whom is

petitioner), as his distributees. Letters of co-administration is used to petitioner and respondent on November 6, 2019.

Decedent's estate, with an estimated value in excess of \$32,000,000, includes his one-third elective share interest in the estate of his predeceased spouse.

Decedent's spouse, Leah Lewner, died on May 19, 2016, leaving a purported will. According to respondent's petition for probate in Leah's estate, that estate was valued at \$8,750,000, with cash and rental income exceeding \$3,000,000. Preliminary letters testamentary issued to respondent in Leah's estate on June 10, 2016. Decedent's MHL Article 81 guardian exercised Josef's right of election against Leah's Will, which, if admitted to probate, would give the entire probate estate to respondent.

Petitioner alleges that respondent is unfit to serve as a fiduciary in Josef's estate (SCPA 711[8]), citing numerous instances of respondent's failure to perform his fiduciary duties as co-administrator in this estate, as preliminary executor in Leah's estate, and as Josef's sometime-guardian and special guardian (he was relieved in the guardianship at his own request after applications had been made for his removal). For example in Josef's estate, respondent refused to co-sign checks

for estimated federal and New York State estate tax payments, despite petitioner's numerous requests to respondent and his counsel, and his refusal to cooperate eventually resulted in tax delinquencies (the bank requiring both fiduciaries' signatures), leaving this large estate subject to accrual of substantial interest, plus penalties, for each day of delinquency.

Even more concerning than respondent's lack of judgment in failing to make timely tax payments in this estate is his total failure to move Leah's probate proceeding forward and to administer Leah's estate. In the present proceeding, petitioner alleges that respondent, as fiduciary of Leah's estate, has failed to perform even the most basic fiduciary duties, such as marshalling estate assets, opening any estate account, obtaining a tax identification number, making estate tax payments, filing estate tax returns and income tax returns, including Leah's final income tax returns as well as fiduciary income tax returns for the estate, despite the fact that the estate assets include rental property generating substantial income.

In his own pleading, respondent addresses the petition's specifics only with general denials and vague allegations against his co-fiduciary based on merely "information and belief."

Two of respondent's dubious denials are belied by documentation attached to the petition such as the fact that respondent's time in office as Josef's MHL guardian and special guardian was beset by issues arising from respondent's failure to pay valid claims, and to file annual accounts and from his refusal to distribute income to the guardianship estate. In a letter annexed to the present petition as an exhibit, respondent's own counsel conceded that Leah's estate taxes had yet to be paid years after her death.

The court's own records confirm that the probate proceeding for Leah's estate has been in limbo since respondent commenced it in 2016. In addition, respondent failed to file an inventory of assets as required by court rules (22 NYCRR 207.20).

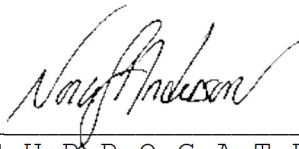
At a conference with the court, respondent was given the opportunity to amend or supplement his answer with specific responses to petitioner's detailed allegations of misconduct in Leah's estate. Respondent has chosen not to do so. In that light, respondent's general denials of petitioner's allegations as to serious malfeasance and want of understanding are deemed to be, in effect, admissions (see CPLR 3018[a]; SCPA 302[2]; *DeSouza v Khan*, 128 AD3d 756 [2d Dept 2015]; *Gilberg v Lennon*, 193 AD2d 646 [2d Dept 1993])["to the extent the portions of the

answer constitute improper denials, they may be deemed admissions"]).

The allegations against respondent, to the extent they are supported by undisputed facts and evidence in the record, warrant the suspension of respondent's letters of administration. Accordingly, the letters of administration issued to Charles Lewner are suspended pending final adjudication in this proceeding.

Settle order consistent with this decision. Clerk to Notify.

Dated: June 15, 2020



S U R R O G A T E