

STATE OF LOUISIANA ** PARISH OF FRANKLIN
FIFTH JUDICIAL DISTRICT COURT

SUCCESSION OF
PEGGY MARIE McDOWELL TRAYLOR

FILED: _____

PROBATE DOCKET NO.: 41,291

DEPUTY CLERK

**SECOND SUPPLEMENTAL MEMORANDUM
OF INDEPENDENT CO-ADMINISTRATORS**

NOBLE EDWARD ELLINGTON, III and FRED RYAN ELLINGTON, Independent Co-Administrators of the *Succession of Peggy Marie McDowell Traylor* filed a Motion for Turn-Over Order in which the Petitioners seek the Court's assistance in obtaining various financial books and records of the deceased, together with possession of all assets belonging to the deceased currently in the possession of the surviving spouse. The surviving spouse, JUSTICE CHET D. TRAYLOR (RET.) has recently filed his "Memorandum in Opposition to Motion to Turn-Over" in which he takes the position that the law does not contemplate, or permit, the court appointed and duly acting Co-Administrators to obtain any of the books and records belonging to the community, or possession of any community property. Justice Traylor (Ret.) is opposed to the succession representatives having any right to possess *his* one-half (1/2) of any community property. His argument, succinctly stated, is that he "owns 1/2 and has a usufruct over the other 1/2" and, accordingly, he alone has the right to possess both halves of each item of community property. Respectfully, Justice Traylor (Ret.) misunderstands Louisiana succession law.

QUESTION: What assets does a succession representative administer?

ANALYSIS: Our law provides a succinct and clear definition of "succession". La. C.C., Art. 871 provides:

Succession is the transmission of the estate of the deceased to his successors. The successors thus have the right to take possession of the estate of the deceased after complying with applicable provisions of law. (emphasis added).

The word "succession" means the *process* by which heirs may, after complying with our law, succeed to the estate of the deceased. The term "estate" has a totally different meaning.

La. C.C., Art. 872 provides:

The estate of a deceased means the property, rights, and obligations that a person leaves after his death, whether the property exceeds the charges or the charges exceed the property, or whether he has only left charges without any property. The estate includes not only the rights and obligations of the deceased as they exist at the time of death, but all that has accrued thereto since death, and the new charges to which it becomes subject.

A succession administration is similar to a corporate liquidation, or a bankruptcy proceeding, in which all claims, of whatever nature, are asserted against all assets. All claims, in the interest of judicial economy, are consolidated and must be asserted in a single proceeding.

Our Courts have held that the payment of debts is the *raison d'être* of a succession. *Succession of Roberts*, 255 So. 2d 610 (La. App. 1st Cir. 1971), cert denied 257 So. 2d 148 (1972). The fundamental purpose of an administration is for the succession representative to pay debts and obligations and then deliver the residuum of the Decedent's assets to the heirs, free of debts, taxes and all other claims, including administrative expenses such as attorney and CPA fees. The succession representative cannot accomplish this goal unless he has the ability to pay **all** debts of the former community, all taxes and all administrative expenses.

The relevant articles of the Code of Civil Procedure give the succession representative authority over all property of the succession. La. C.C.P., Art. 3191, 3211, 3221. Article 3211 imposes a specific and express duty on the succession representative to take possession of **all** property. The statute provides:

A succession representative shall be deemed to have possession of **all** property of the succession and shall enforce **all** obligations in its favor. (emphasis added).

This statute imposes an obligation on the succession representative to collect and take possession and into custody all property, the purpose of which is to pay debts, taxes, administrative expenses, and then distribute the residuum to the rightful heirs as determined by the court. It is the succession representative, not the surviving spouse, that has the right of action to assert all claims in favor of the succession and defend all claims against the succession. *Anderson vs. Collins*, 648 So. 2d 1371 (La. App. 2nd Cir., 1995).

Liability for debt is a particularly important issue for any succession representative.

The law in this area is complex. It is possible, for example, for the community property to be liable for debts for which the Decedent had no personal liability. For example, La. C.C., Art. 2357 provides:

An obligation incurred by a spouse before or during the community property regime may be satisfied after the termination of the regime from the property of the former community and from the separate property of the spouse who incurred the obligation.

Stated in the alternative, the Decedent has *in rem*, but not personal, liability for a community debt incurred only by the surviving spouse. Succession assets must be made available to satisfy a community creditor's *in rem* claim. That liability, as a practical matter, cannot be discharged by the succession representative paying only half the debt and deflecting the creditor to the surviving spouse for payment of the remaining part of the unpaid debt. The liquidation function of an administration is best (most efficiently) accomplished by giving the succession representative authority over the entire community. It is logical for the succession representative to have authority to use **all** community property to discharge **all** community debts as would have been done by the Decedent during her lifetime. It appears highly desirable (necessary) that the succession representative shall have the power to alienate 100% of the community asset, rather than only an undivided one-half of the asset. As a practical matter there are no markets for an undivided one-half interest in "blackacre" or any other community asset. No one is interested in purchasing a half-interest in a car. Thus, there are pragmatic reasons to conclude that the succession representative should administer the "entire community" and not simply the Decedent's undivided one-half interest in the community assets. There is abundant case law to support the conclusion that the duly appointed succession representative has the right to possess the entire community interest.

The Third Circuit Court of Appeals in *Prejean vs. First Mississippi Corp., Inc.*, 506 So. 2d 885, 887-8 (La.3rd Cir. 1987), writ denied 508 So. 2d 69 (1987) held:

When a succession is under administration the surviving spouse's undivided one-half interest in the community is possessed by the administrator and as such, is under administration until the surviving spouse is placed in possession by a Judgment of Possession.

The Third Circuit correctly concluded the succession representative had the exclusive power to convey the entire (100%) interest in the community asset, not just the Decedent's one-half.

In *Prejean* the surviving spouse was found to have no power to convey the asset and no possessory rights until those rights are duly *recognized* by a Judgment of Possession. There are additional cases with similar holdings. In *Succession of Durham* the First Circuit held that the succession representative had the right to possess all the community stock of a corporation, could register all community stock in the name of the succession representative and could vote all the stock, all over

the objection of the surviving spouse, until such time as the surviving spouse was *recognized* as an owner of “her half” and placed in possession by a Judgment of Possession. *Succession of Dunham*, 428 So. 2d 876 (La. App. 1st Cir. 1983).

The *Dunham* Court, at page 879 held:

“... until a petition for possession is filed and a judgment of possession is obtained by the surviving spouse in community, the surviving spouse in community does not enjoy possession *de jure* of his or her undivided one-half of the community.”

The Fourth Circuit in *Succession of Sharp* held that the purpose of an administration is to “liquidate the community” in order to divide the net assets between the surviving spouse and heirs. *Succession of Sharp*, 288 So. 2d 413 (La. App. 4th Cir. 1973). The Fourth Circuit in *Sharp* appears to assume, without discussion, that a succession representative has the right to administer the entire community. Matters that are obvious often are not addressed by a court.

The Second Circuit, following other circuits, has held that the succession representative is entitled to possession of all the Decedent’s property, including royalty income bequeathed to the defendants. *Succession of Ramsey*, 385 So. 2d 919, 922 (La. App. 2d Cir. 1980) (“Even if there were no debts to be paid and these defendants would eventually be entitled to the ownership of all the royalties collected by them on succession property, the succession representative is still entitled to the possession of these funds until the defendants are recognized as owners of these funds and sent into possession of them by a judicial order”). In *Ramsey* the Court had determined there was a need for a succession proceeding and had appointed a succession representative. The Second Circuit squarely held the court appointed succession representative had all rights to possession.

Our law provides it is the succession representative who has the “right of action” to sue for the enforcement of all claims due the Decedent or his/her succession. La. C.C.P., Art. 685. The Second Circuit has held the “right of action” belongs exclusively to the succession representative while the succession is under administration. *Anderson vs. Collins*, 648 So. 2d 1371, 1379 (La. App. 2nd Cir. 1995), rehearing denied, writ denied. (“This leads to an orderly administration of the estate ...”). The Second Circuit recognized that if individual heirs or legatees were permitted to prosecute and defend claims a multiplicity of suits and lack of an orderly administration would result.

Other courts that have concluded that the succession representative, not the surviving spouse, is entitled to possession of both halves of the community include: *Succession of Armentor*, 426 So. 2d 1366 (La. App. 3rd Cir. 1983); *Thorn vs. Whiney National Bank*, 325 So. 2d 606 (La. App. 4th Cir. 1976); *Forston vs. Lake, Inc.*, 176 So. 2d 703 (La. App. 4th Cir. 1965); *Simpson vs. Colvin*, 138 So. 2d 438 (La. App. 3rd Cir. 1962); *Bird vs. Jones*, 4 La. Ann. 643 (La. 1850). In *Bird vs. Jones* the Louisiana Supreme Court, as early as 1850, recognized that the succession representative's right to possession is paramount to any possession asserted by any heir.

This issue has not escaped review and comment from learned commentators. One commentator has concluded:

The inescapable conclusion is that the primary function of an administration can be achieved equitably only by allowing the succession representative to administer the entire community, to use community property to pay community debts, and to allocate half of each community debt to the deceased spouse and half to the surviving spouse. **Problems in the Law of Successions: Succession Representatives, Surviving Spouses, and Usufructuaries**, *Karl W. Cavanagh*, La. L. Rev. pp.. 44-5 (1986).

CONCLUSION:

This succession proceeding was initiated when this Court recognized the need for the appointment of the Co-Administrators to administer this succession. The amount of debt remains unknown due to the surviving spouse's failure to provide financial records and his failure to file the required inventory and otherwise failure to disclose debts to the Co-Administrators. The succession representatives do have reasonable cause to believe there are substantial community debts, perhaps secured by mortgages on the Decedent's separate property, and perhaps debts for which the Decedent has no personal liability, only *en rem*. Moreover, the surviving spouse alleges claims for reimbursement. Furthermore, the surviving spouse has not filed the inventory required by law nor has the surviving spouse posted any bond to secure the claims of the naked owners, leaving the surviving spouse without a usufruct. For the foregoing reasons our law requires that the court appointed succession representatives be provided possession of all books and records of the deceased and, in addition, custody and actual possession of all community property. Only then will the succession representatives be able to orderly administer this succession proceeding by paying all community debts, paying all reimbursement claims proven by the surviving spouse, paying all administrative expenses, and then distributing the residuum of the Decedent's estate to the rightful

heirs, with Court approval. Justice Traylor (Ret.), after complying with the applicable provisions of our law, may ultimately be determined by this Court to have a right to take possession of *some part* of the residuum of this estate. In the meantime, Justice Traylor (Ret.) should be ordered to deliver possession of all community property of all types, and wherever located, to the court appointed Co-Administrators, all at his cost and expense. The administration of this succession can then move forward in an orderly manner as envisioned by our law.

RESPECTFULLY SUBMITTED,

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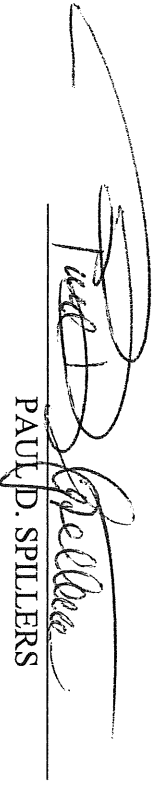
By: 
PAUL D. SPILLERS (#12341)

ATTORNEYS FOR NOBLE EDWARD
ELLINGTON, III and FRED RYAN ELLINGTON,
INDEPENDENT CO-ADMINISTRATORS

CERTIFICATE

I hereby certify that a copy of the above and foregoing Second Supplemental Memorandum has this day been mailed via U.S. Mail, postage prepaid, to Mr. Brady D. King, III, McNew, King, Mills, Burch & Landry, LLP, 2400 Forsythe Avenue, Suite 2, Monroe, Louisiana 71201 - Attorney for Justice Chet D. Traylor (Ret.); and to Mr. Samuel T. Singer, 6603 Main Street, Winnsboro, Louisiana 71295 - Attorney for Franklin State Bank.

Monroe, Louisiana, this 28th day of July, 2010.


PAUL D. SPILLERS