

STATE OF LOUISIANA ** PARISH OF FRANKLIN

FIFTH JUDICIAL DISTRICT COURT

SUCCESSION OF
PEGGY MARIE McDOWELL TRAYLOR

FILED: _____

PROBATE DOCKET NO.: 41,291

DEPUTY CLERK

**AMENDED MEMORANDUM IN OPPOSITION TO
MOTION TO QUASH**

I. FACTUAL BACKGROUND

PEGGY MARIE McDOWELL ELLINGTON TRAYLOR (“Decedent”) died domiciled in Franklin Parish on August 22, 2009. The Decedent was first married to Noble Ellington, II. Of that marriage two children were born: 1) NOBLE EDWARD ELLINGTON, III (“Noble”); and 2) FRED RYAN ELLINGTON (“Ryan”), both of whom are major domiciliaries of Franklin Parish, Louisiana. After the marriage to Noble Ellington, II ended in divorce, the Decedent then married Judge Chet D. Traylor (Ret.) on or about November 11, 1997. A community of acquets and gains existed between the Decedent and Judge Traylor (Ret.). The Decedent, however, brought into the marriage substantial separate property, much of which is believed to have been mortgaged to secure community debts and used to purchase assets during the marriage to Judge Traylor (Ret.). No children were born of the Decedent’s marriage to Judge Traylor (Ret.). The Decedent died intestate, survived by two children, Noble and Ryan, and a surviving spouse, Judge Taylor (Ret.). The two children, Noble and Ryan, applied for, and have been appointed by this Honorable Court, as Independent Co-Administrators of this succession proceeding by Order dated February 24, 2010. A search for the Decedent’s will is ongoing, but none has been located thus far by either Noble or Ryan.

Upon their appointment the Administrators began efforts to take possession of the Decedent’s property and collect information necessary to prepare and file a Detailed Descriptive List. They sought, in accordance with La. C.C.P., Art. 3136, to itemize all property, both separate and community, describe all debts of the Decedent and provide a listing of the fair market value of all property as of the date of death. The Administrators made a good faith amicable effort to gain information from Judge Traylor (Ret.) about the Decedent’s various bank accounts and other assets and liabilities. Exhibit “A” and Exhibit “B”. Judge Traylor (Ret.), as acknowledged at Page 1 of

his Memorandum, “*resisted production*” of this information. The Administrators after exhausting all amicable efforts then, using other lawful means, caused to be issued a *subpoena duces tecum* and records only deposition to Franklin State Bank for production of banking records pertaining to “Peggy Marie McDowell Traylor and/or Chet D. Traylor”. Judge Traylor (Ret.) continues to “*resist production*” by filing the pending Motion to Quash.

II. **The Administrators have a duty, and the authority, to take possession, control, and administer all of the property belonging to the Decedent, both separate and community, including the surviving spouse’s community interest.**

Upon Ryan and Noble being issued Letters of Administration, a succession proceeding was created in which the Administrators have a duty to take possession, control, and full administration of all the property belonging to the Decedent. La. C.C.P., Art. 3211, 3221. The Administrators have a duty to pay all debts before any property may be distributed to any of the heirs. La. C.C., Art. 1415, et. seq.

Ryan and Noble’s duty to take possession and control of property extends not just to their Mother’s one-half (½) interest in the community property but **also to Judge Traylor’s (Ret.) interest in all community property**. *Prejean vs. First Mississippi Corporation, Inc.*, 506 So. 2d 885, 887-8, (La. 3rd Cir. 1987), *writ denied* 508 So. 2d 69 (1987). (“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 judgment of possession”). The Administrators’ possession of all community property is particularly critical where there are significant *community* debts that, as here, must be paid and the usufructuary has evidenced no willingness to cooperate but, instead, has “resisted production”. Possession of all community property by the Administrators is even more urgent where, as here, there are community debts that are secured by the Decedent’s *separate* property and the usufructuary “*resists production*”.

The purpose of an administration of a Decedent’s estate is to protect and safeguard **all** of the Decedent’s property so that **all** of the creditors are paid first and, if anything remains after payment of all debts, then the residual property is available for distribution **by the Court** to the heirs in accordance with their interest under our law. The Administrators have an unmistakable and clear fiduciary duty that is owed to all creditors and heirs. La. C.C.P., Art. 3191, *Succession of Hearn*,

412 So. 2d 692, 700 (La. 2nd Cir., 1982) writ denied 415 So. 2d 215. (“A succession representative is a fiduciary. An Executor owes his duties to legatees, creditors, and heirs.”)

Here the Administrators’ efforts to fulfil their fiduciary duties and take possession, control and administration of all community property has been met with resistance by the surviving spouse. The Administrators’ duty to take possession, control and administer assets to pay all debts owed to creditors is being opposed by Judge Traylor (Ret.). Judge Traylor (Ret.) even *resists production* of information about the Decedent’s assets and debts. Judge Traylor (Ret.) has *de facto* possession and control over most of the community property and the Decedent’s books and records, including bank records. Judge Traylor’s (Ret.) resistance and lack of cooperation (Exhibits “A”, “B”, and “C”) has forced the Administrators to seek information about the Decedent’s property, and her debts, through other lawful means: a *subpoena duces tecum* issued to by this Honorable Court to Franklin State Bank for production of banking records that accrued during the marriage and to the current date. No records are currently sought for dates prior to the marriage. The records currently sought are believed essential to the Administrators if they are to fulfill their fiduciary duties. The Motion to Quash should be denied so the banking records are available to the Administration and the administration of the estate can go forward in an ordinary fashion under our law.

III. **All property acquired during the marriage and now in the possession of Judge Chet D. Traylor (Ret.) is presumed to be community property.**

Judge Traylor (Ret.) has resisted production of the banking records, taking the position the subpoena is too broad because the subpoena seeks the production of bank accounts in Judge Traylor’s (Ret.) name alone. Our law provides that all property acquired during a marriage is presumed to be community property and that a spouse who claims otherwise has the burden to prove otherwise. La. C.C., Art. 2340. Judge Traylor (Ret.) will be unable to show that any of the requested accounts was funded with his separate property. All of the accounts were funded with either the Decedent’s substantial separate funds she brought into the marriage or community income. All of the bank debts were contracted during the marriage and, thus, are community. However, even if the accounts were funded with some of Judge Traylor’s (Ret.) separate property the information would, nevertheless, be discoverable. La. C.C.P., Art. 1422. All of the requested information is relevant and not privileged. The Motion to Quash should be denied so that the estate administration may advance.

IV. **Judge Chet D. Traylor (Ret.) does not have a usufruct over any of the community property.**

Judge Traylor (Ret.) contends he has a legal usufruct which, he argues, insulates the financial records from discovery. Our law does provide a usufruct in favor of the surviving spouse (La. C.C., Art. 890), provided the surviving spouse first files an inventory (La. C.C., Art. 570) and then posts the required bond (La. C.C., Art. 573) and finally the Court recognizes his usufruct. Judge Traylor (Ret.) has refused to prepare and file the required inventory despite amicable requests having been made of him to do so. Exhibit “C”. Further, Judge Traylor (Ret.) has made no effort to have this Court either set the amount, or post, the required bond. Accordingly, Judge Traylor (Ret.) has no claim to a usufruct over any of the community property. That usufruct can be claimed only after complying with the requirements of our law which, to date, has been resisted by Judge Traylor (Ret.). After complying with the law (filing an inventory and posting security) this Honorable Court may then consider a Judgment of Possession recognizing a legal usufruct which, to date, this Court has not been asked to recognize. However, even if the usufruct were recognized by the Court the information sought by the subpoena is relevant and not privileged and, thus, discoverable. The Motion to Quash should be denied.

V. **Judge Traylor (Ret.) has cited no law to support his Motion to Quash.**

The Motion to Quash cites no law to support “*resisting production*” of information about the Decedent’s assets and debts. Judge Traylor’s (Ret.) Memorandum states the subpoena “... seeks information prohibited to the Co-Administrators” without any support from the law. His Memorandum states that the subpoena is “... a violation of his privacy rights” without any specification of these privacy rights. He does cite the Code of Criminal Procedure (La. C.C.P., Art. 732) dealing with subpoenas in criminal trials. That provision of the law has no bearing whatsoever in this civil succession matter, a matter clearly governed by the Code of Civil Procedure. Book VI, Louisiana Code of Civil Procedure.

In summary, Judge Traylor (Ret.) supports his Motion to Quash with no law whatsoever. His Motion to Quash is unsupported by any law. The unsupported Motion must be denied so that the administration of this Succession proceeding can go forward for the protection of all creditors and heirs.

VI. CONCLUSION

The Independent Co-Administrators of this succession proceeding have a fiduciary obligation under our law to take possession, control, and administer of **all** property belonging to the Decedent, including the surviving spouse's undivided one-half of the community. Further, the Administrators have a duty to prepare and file a Detailed Descriptive List in which they itemize all items of property, including debts. Judge Traylor (Ret.) has resisted all good faith efforts by the Administrators to obtain needed information about the community assets and debts and has actively "*resisted production*" of various books and records, including banking records, that are needed in order to prepare and file the Detailed Descriptive List required by our law. The banking records of Franklin State Bank, generated after the marriage, are believed by the Administrators to contain critically relevant information as to: (1) the Decedent's property that was brought into the marriage, (2) the disposition of that property during the marriage, (3) the amount of property remaining as of the date of death; and (4) the ultimate disposition of that property after death. For these reasons Judge Traylor's (Ret.) Motion to Quash should be denied at the costs of Judge Traylor (Ret.). The Court should enter an order sustaining the *subpoena duces tecum* issued to Franklin State Bank and denying the Motion to Quash. The administration of this Succession proceeding can then go forward in an orderly fashion and in accordance with our law.

RESPECTFULLY SUBMITTED,

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INDEPENDENT CO-ADMINISTRATORS

CERTIFICATE

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

Monroe, Louisiana, this ____ day of _____, 2010.

Of COUNSEL