

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0453

**SUCCESSION OF
SADIE RICKS McCOY**

—
**On Appeal from the 21st Judicial District Court
Parish of Tangipahoa, Louisiana
Docket No. 0000-9730261, Division "F"
Honorable Elizabeth P. Wolfe, Judge Presiding**
—

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Joyce Jackson and Holly Harvey**

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered September 10, 2010

PARRO, J.

James Timothy McCoy, Sr., the dative testamentary executor of the succession of his mother, Sadie Ricks McCoy, appeals a judgment disallowing certain legal fees and expenses he incurred and splitting the fee for administration of the succession equally between him and the original executrix, his sister, Joyce McCoy Jackson. For the following reasons, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Sadie Ricks McCoy died testate on April 9, 1997, survived by five adopted children. She and her deceased husband had adopted two boys during their marriage, and she adopted three girls after her husband's death. Her will designated one of her daughters, Joyce McCoy Jackson, as executrix, to serve without bond. The will did not provide for compensation for administering the succession. The decedent left all of her property, whether separate or community, in "equal undivided interests to [her] five children," and ordered that all of the immovable property remain undivided and unpartitioned for a period of five years from the opening of the succession, unless all of the heirs agreed to a division or partition, or unless the interest was being conveyed to a co-heir. Jackson performed a number of acts on behalf of the succession after being confirmed as executrix in July 1997, but did not file annual accounts and took no steps over a number of years to divide the property or conclude the succession. In December 2005, her brother, James Timothy McCoy, Sr. (McCoy), filed an action to remove her as executrix for failure to perform her duties. The trial court denied this request in a judgment signed on March 17, 2006; this court denied a writ application on the basis that this decision was within the trial court's discretion, and the supreme court also denied a writ application. Jackson took some steps toward administering the succession, including filing an accounting covering the period she had served as executrix. However, at a subsequent monitoring hearing, the trial court removed Jackson as executrix and appointed McCoy as executor.

Two months after being appointed, McCoy filed a suit for damages against Jackson and another sister, Holly McCoy Harvey. In the petition, he claimed that

Jackson had done nothing to preserve the succession assets, allowing some immovable property to deteriorate and allowing other properties to be occupied rent-free. Harvey was alleged to be one of the persons occupying a house belonging to the succession without paying rent. McCoy also claimed that two certificates of deposit totaling over \$41,000 that were property of the succession had been cashed in by Jackson and/or Harvey without accounting for the proceeds to the succession after their mother died. The lawsuit sought unspecified damages from Jackson and Harvey for mismanagement and conversion.

Most of the claims against Harvey were dismissed on motion for summary judgment on March 26, 2008. The remaining claims against her and Jackson were dismissed May 1, 2008, on a motion for involuntary dismissal of the suit, based on McCoy's failure to prove his case at trial by a preponderance of the evidence. No motion for new trial or appeal was filed with respect to these two judgments.

McCoy eventually prepared a final accounting, which was opposed by Jackson and Harvey. After a hearing on February 2, 2009, the court ruled that attorney fees and expenses incurred by McCoy in his action to remove Jackson as executrix were not to be paid out of the succession, nor were the attorney fees and expenses that he incurred in the unsuccessful lawsuit against his two sisters. On April 17, 2009, the court denied McCoy's motion requesting payment to him of \$4,375 as the executor's fee. On April 29, 2009, the court signed an order, granting a motion filed by Jackson, to apportion the executor's fee equally between herself and McCoy. McCoy moved for a new trial concerning this ruling. On July 15, 2009, the court signed a judgment prepared and submitted by McCoy's attorney that purportedly reflected the court's oral reasons for judgment concerning McCoy's attorney fees in the February 2, 2009 hearing. Jackson and Harvey moved for a new trial and/or modification of the judgment on the grounds that the judgment did not accurately summarize the court's rulings. In a hearing on August 24, 2009, the court denied McCoy's motion for reconsideration of the equal division of the executor's fee between him and Jackson. The court also reiterated its earlier ruling that \$3,825 for attorney fees incurred by

McCoy before he was established as dative executor was not to be paid out of the succession and that \$5,025 for attorney fees he incurred in litigating claims against Jackson and Harvey was also not to be paid out of the succession. A judgment to this effect was signed August 24, 2009. McCoy's motion for a new trial was denied in a judgment signed September 28, 2009. In this appeal, McCoy contests both of these judgments, assigning as error the court's disallowance of attorney fees incurred before he was established as executor, the disallowance of attorney fees incurred in pursuit of claims against Jackson and Harvey, and the split of the executor's fee equally between him and Jackson.¹

APPLICABLE LAW

Succession occurs at the death of a person. LSA-C.C. art. 934. A succession representative is a fiduciary with respect to the succession, and has the duty of collecting, preserving, and managing the property of the succession in accordance with law. See LSA-C.C.P. art. 3191.

An executor of a succession may obtain an attorney to aid in carrying out the executor's duties and to defend the succession against adverse claims made against it. See Succession of Jenkins, 481 So.2d 607, 609 (La. 1986). The costs of such legal representation may be charged to the succession. See Atkins v. Roberts, 561 So.2d 837, 841 (La. App. 2nd Cir. 1990). However, where the legal representation is primarily for the personal benefit of the executor and not the succession, such fees may not be paid from the property of the succession. See Succession of Haydel, 606 So.2d 42, 45 (La. App. 4th Cir. 1992). Whether or not an attorney's work was for the benefit of the succession is a question of fact that cannot be set aside absent manifest error. Id. at 45-46; In re Succession of Brazan, 07-0566 (La. App. 5th Cir. 12/27/07), 975 So.2d 53, 57. In a succession proceeding, an attorney representing particular heirs or claimants

¹ When an appellant has appealed from a final judgment, it is permissible for him to raise, and the court to consider in connection with the appeal, complaints relating to the denial of a motion for a new trial. Dural v. City of Morgan City, 449 So.2d 1047, 1048 n.2 (La. App. 1st Cir. 1984). However, if the assignments of error address only the merits of the substantive judgment, and not the denial of the motion for a new trial, the court does not separately review the denial of the motion for a new trial. See Uniform Rules of Louisiana Courts of Appeal, Rule 2-12.4. Since McCoy has only addressed the merits of the substantive judgment, we do not adjudicate the denial of the motion for a new trial.

has no claim against the estate for his services, even though such services benefited the other heirs. Succession of Meier, 204 So.2d 793, 797 (La. App. 4th Cir. 1967). Fees incurred by an heir attempting to hold the executor of the succession to the standard of care owed by the executor to the succession are not to be paid out of the succession. See Succession of Demarest, 418 So.2d 1368, 1375 (La. App. 4th Cir.), writ denied, 422 So.2d 158 (La. 1982); Brazan, 975 So.2d at 58.

As compensation for his services, an executor shall be allowed such reasonable amount as is provided in the testament in which he is appointed. In the absence of a provision in the testament or an agreement between the parties, the executor shall be allowed a sum equal to two and one-half percent of the amount of the inventory as compensation for his services in administering the succession. See LSA-C.C.P. art. 3351. If there is more than one succession representative, the compensation provided by Article 3351 shall be apportioned among them as the court shall direct. LSA-C.C.P. art. 3352.

The court may remove any succession representative who has mismanaged the estate or has failed to perform any duty imposed by law or by order of the court. See LSA-C.C.P. art. 3182; Succession of Crain, 450 So.2d 1372, 1374-75 (La. App. 1st Cir. 1984). Comment (h) of the official revision comments to LSA-C.C.P. art. 3351 points out that there is no statutory provision dealing with forfeiture of compensation where the administrator has been guilty of maladministration. The supreme court has ruled that, where an administrator has been guilty of gross negligence in handling the succession, he is not entitled to his compensation. Succession of Liles, 24 La. Ann. 490, 491 (1872); Succession of Touzanne, 36 La. Ann. 420 (1884); see also Succession of Vasquez, 07-0816 (La. App. 4th Cir. 1/16/08), 976 So.2d 209, 215. However, the imposition of this penalty is left to the sound discretion of the court. See Succession of Gandolfo, 173 La. 190, 203, 136 So. 561, 565 (1931).

DISCUSSION

In his first assignment of error, McCoy contends that the court erred in disallowing the \$3,825 in attorney fees he incurred in his ultimately successful attempt

to have Jackson removed as executrix. In refusing to order these fees to be paid out of the succession, the court noted that although the replacement of Jackson with McCoy did benefit the estate, McCoy had incurred these fees before he was executor; therefore, these fees were not properly charged to the succession.

The record shows that McCoy's initial attempt to have Jackson removed as executrix was unsuccessful. After a hearing on his allegations in February 2006, the court declined to remove her from her position and dismissed the petition for removal, providing written reasons for the decision. This court denied McCoy's application for supervisory writs,² stating that the trial court did not abuse its discretion in denying McCoy's request to remove Jackson as executrix in this matter and noting also that nothing precluded McCoy from re-urging her removal if she did not comply with the trial court's order.³ The trial court's reasons for judgment show that the court ordered Jackson to file an accounting of all revenues and/or expenses of the succession since April 9, 1997, and to comply with her other duties as executrix, with a monitoring hearing date of December 11, 2006. According to the record, Jackson filed a petition for private sale of two vehicles and an accounting covering the period from the death of the decedent through December 6, 2006. A monitoring hearing was held on December 11, 2006. Jackson did not appear at this hearing, but was represented by counsel.⁴ After hearing testimony from McCoy and another witness, the court found in favor of McCoy, removed Jackson as executrix, and appointed McCoy as dative testamentary executor.⁵ The court provided no written reasons for this judgment.

As noted by the district court, at the time McCoy incurred these attorney fees, he was not the executor, but was simply one of the heirs. An attorney representing particular heirs has no claim against the estate for his services, even though such

² Succession of Sadie Ricks McCoy, 06-0714 (La. App. 1st Cir. 7/24/06) (unpublished writ action).

³ The supreme court also denied writs. Succession of Sadie Ricks McCoy, 06-1966 (La. 11/9/06), 941 So.2d 43.

⁴ In designating the record for appeal, McCoy did not include a transcript of the monitoring hearing, so this court cannot review the evidence or the court's oral reasons for its decision.

⁵ The designated record does not show when or whether McCoy had re-filed a petition to remove Jackson as executrix.

services may have benefited the other heirs. Meier, 204 So.2d at 797. McCoy's litigation to remove Jackson as executor was an attempt by an heir to hold the executor to the standard of care owed by the executor to the succession. It was not an action by the executor to defend the succession from attack or to administer the succession. As such, the attorney fees incurred in such action were not chargeable to the succession, and we find no error in the court's decision concerning these fees.

McCoy's second assignment of error challenges the court's decision not to tax the succession with \$5,205 in attorney fees incurred by McCoy in his suit against Jackson and Harvey. He contends that as a fiduciary, he had a mandatory duty to take all reasonable steps to collect, preserve, and manage the property of the succession. He re-states in his brief to this court all of the allegations and arguments upon which his suit against his sisters was based, even though some of those claims were dismissed on summary judgment as legally groundless, and the rest were dismissed at trial for his failure to provide proof of the allegations. McCoy avers in his brief that his "only actual failing in this case was his inability to realize that the trial judge would ignore mandatory provisions of the Louisiana law and jurisprudence and then punish him for not knowing this before filing the suit" against Jackson and Harvey.

We are compelled to note that this insulting comment is wholly inappropriate and approaches constructive contempt of court by indicating disrespect for the dignity and authority of the court. See LSA-C.C.P. art. 224(10). McCoy was afforded several opportunities to present his case concerning mismanagement and conversion of succession assets by his two sisters. Obviously, under the facts presented, there was either no remedy as a matter of law, or he simply failed to provide sufficient evidentiary support to prove his allegations. If McCoy was so convinced that the trial court had erred in dismissing his claims against his sisters, he could have appealed those judgments. However, he chose not to do so, offering instead offensive comments in this appeal concerning the trial court's decision on this matter. Having reviewed the record, we note that the estate reaped absolutely no benefit from this litigation, and the pursuit of these claims occupied an inordinate amount of the court's time, not to

mention the legal expenses incurred by Jackson and Harvey in defending against these claims. The decision not to charge the succession with McCoy's attorney fees for this unsuccessful litigation was within the discretion of the district court, and we find no error and no abuse of discretion in that decision.

Finally, McCoy protests the court's decision to split the administrative fee equally between him and Jackson. He alleges again that she was guilty of gross neglect and mismanagement of the succession, and for that reason, she should not share in any of the administrative fees. However, even though the court removed Jackson as executrix, the record does not indicate the reasons for that decision, and the court later found that McCoy failed to prove his allegations against her. The record shows that Jackson took a number of steps in the year following her appointment as executrix, including paying inheritance and property taxes and filing suit to rescind a verbal agreement her mother had entered into to sell certain immovable property. She was prevented from managing some of the properties by another brother, Willie McCoy, who physically assaulted anyone who entered the property to maintain it, and obtained an injunction to stop his threats and harassment of her and her agents. Despite the injunction, Willie McCoy continued to refuse access to the property. Jackson testified that on the advice of her former attorney, she took no steps to divide the succession property, because she had been told that the Social Security Administration had a large claim against her mother's succession. She eventually obtained the services of a different attorney and, following the court's decision not to remove her as executrix, she attempted to follow the court's order by filing an accounting and petitioning for the private sale of some succession property. The court ultimately has discretion in deciding whether an executor should be denied compensation as a penalty for gross negligence. Based on our review of the record, since there was no finding of gross negligence or malfeasance on Jackson's part, we find no abuse of the trial court's discretion in allowing her to share in one-half of the executor's fee. See LSA-C.C.P. art. 3352.

CONCLUSION

Based on the foregoing, the judgment of August 24, 2009, is affirmed. All costs of this appeal are assessed against James Timothy McCoy, Sr.

AFFIRMED.