

**SUCCESSION OF BENSON A.
KANSAS**

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NO. 2017-CA-0477

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COURT OF APPEAL

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2007-00756, DIVISION "I-14"
Honorable Piper D. Griffin, Judge

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Judge Roland L. Belsome

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(Court composed of Chief Judge James F. McKay, III, Judge Edwin A. Lombard,
Judge Roland L. Belsome)

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**AFFIRMED IN PART; REVERSED AND RENDERED IN PART;
VACATED IN PART
DECEMBER 21, 2017**

In this succession proceeding, the Appellant, Jacob Kansas, appeals the trial court's judgment on his motion for new trial. For the following reasons, we reverse and render in part, vacate in part, and affirm in part.

FACTS AND PROCEDURAL HISTORY

Benson Kansas died testate on February 9, 2001. The only asset to Benson's estate was a condominium located at 1921 Prytania Street, Unit T, which was in poor condition. Jacob Kansas, an attorney and distant cousin to Benson, paid for his burial. In exchange, Raymond Kansas, Benson's brother, assigned his interest in his brother's estate to Jacob.

Through his wife, Jacob learned that Judge Max Tobias drafted the will in the late 1970's while in private practice. Jacob tried on several occasions to retrieve the will from Judge Tobias, who had indicated that he was trying to locate it. While waiting on the production of the will, Jacob paid extensive costs associated with the condominium, including cleaning fees, appraisals, past due condominium fees and property taxes. Finally, in January of 2007, Judge Tobias produced the will. On January 24, 2007, Jacob filed the following in association with the succession: a petition for recordation and execution of the testament, petition for appointment as dative testamentary administrator, sworn detailed descriptive list, administrative oath, letters of administration, and a proof of claim.¹ On the same day, the trial court recorded the will and appointed Jacob as the dative testamentary administrator.² Jacob was unable to locate the other heir, Rhonda

¹ Jacob filed an amended proof of claim on September 2, 2015.

² Benson's will appointed Judge Tobias as the executor of his estate; however, Judge Tobias declined his appointment since he was a sitting judge with this Court.

Borman, until early 2015, when he hired a new attorney, who happened to know her.

After locating Ms. Borman, on November 9, 2015, Jacob filed a rule to show cause why various succession issues should not be resolved. In particular, Jacob raised four issues to be addressed by the trial court, involving: 1) the assignment of succession right by Raymond, 2) renunciation of heirs, 3) reimbursement of expenses he personally paid on behalf of the estate, and 4) authority to sell the condominium. Rhonda's two sons, Matthew and Daniel Borman, who were successors in interest after her death, opposed the Rule to Show Cause filed by Jacob.

On July 26, 2016, after a hearing, the trial court issued a judgment, consisting of six rulings: 1) recognizing Raymond's assignment of succession interests to Jacob; 2) recognizing Jacob's one-half interest, Matthew Borman's one-fourth interest, and Daniel Todd Borman's one-fourth interest in the estate; 3) removing Jacob as administrator; 4) appointing Matthew Borman as dative testamentary executor; 5) denying the sale of the condominium; and 6) paying Jacob executor compensation and reimbursing Jacob for expenses he incurred after he was appointed administrator in 2007.

Jacob filed a motion for new trial. On January 6, 2017, the trial court granted the motion for new trial "for reargument only." After the hearing, it issued a judgment on the motion for new trial on February 7, 2017. The substance of the judgment remained substantially the same as the first judgment, other than increasing the reimbursement amount due to Jacob. This timely devolutive appeal follows.

STANDARD OF REVIEW

When the issues presented on appeal involve fact questions or mixed questions of law and fact, the manifest error standard applies; when the issues involve questions of law, the *de novo* standard applies. *Boes Iron Works, Inc. v. Gee Cee Grp., Inc.*, 16-0207, p. 8 (La. App. 4 Cir. 11/16/16), 206 So.3d 938, 946, writ denied, 17-0040 (La. 2/10/17), 216 So.3d 45. “A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial.” *Hamp's Constr., L.L.C. v. Hous. Auth. of New Orleans*, 10-0816, p. 3 (La. App. 4 Cir. 12/1/10), 52 So.3d 970, 973. “Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights.” *South East Auto Dealers Rental Ass'n, Inc. v. EZ Rent To Own, Inc.*, 07-0599, p. 5 (La. App. 4 Cir. 2/27/08), 980 So.2d 89, 93. When the court of appeal finds that a reversible error of law or manifest error of material fact was made in the trial court, it is required, whenever possible, to re-determine the facts *de novo* from the entire record and render a judgment on the merits. *Ferrell v. Fireman's Fund Ins. Co.*, 94-1252, p. 4 (La. 2/20/95), 650 So.2d 742, 745 (citation omitted).

LAW AND ANALYSIS

In this appeal, Jacob asserts four assignments of error: 1) the trial court erred in failing to award him reimbursement for all personal funds advanced in order to preserve the only succession asset, the condominium;³ 2) the trial court erred in removing Jacob as succession administrator; 3) the trial court erred in appointing Matthew Borman as dative testamentary executor; and 4) the trial court erred in denying the request to sell the condominium.

³ Notably, Jacob did not appeal the trial court's executor compensation award in the amount of \$1,125.00.

In the first assignment of error, Jacob argues that the trial court legally erred in failing to reimburse him for all expenses for the preservation of the condominium, particularly for those prior expenses incurred prior to being appointed as administrator of the estate. We agree.

Succession occurs at the death of a person. La C.C. art. 934. Immediately at the death of the decedent, universal successors acquire ownership of the estate. La. C.C. art. 935. Ownership of the same thing by two or more persons is ownership in indivision, or co-ownership. *See* La C.C. art. 797. Prior to the qualification of a succession representative, a successor may exercise rights of ownership with respect to his interests in a thing of the estate, as well as his interest in the estate as a whole. La. C.C. art. 938(A). A co-owner may, without the concurrence of any other co-owner, take necessary steps for the preservation of the thing that is held in indivision. La. C.C. art. 800. A co-owner who, on account of the thing held in indivision, has incurred necessary expenses, expenses for ordinary maintenance and repairs, or necessary management expenses paid to a third person, is entitled to reimbursement from the other co-owners in proportion to their shares.⁴

If a successor exercises his rights of ownership after the qualification of a succession representative, the effect of that exercise is subordinate to the administration of the estate. La. C.C. art. 938(B). The 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* La C.C.P. arts. 3191 and 3221. The succession representative may sell estate

⁴ If the co-owner who incurred such expenses had the enjoyment of the thing held in indivision, his reimbursement shall be reduced in proportion to the value of the enjoyment. La. C.C. art. 806.

property and pay estate debts, but only with the authorization of the court. *See* La. C.C.P. arts. 3261 and 3301.

Reviewing the facts of this case in the light of the applicable law, it is clear that Jacob, Matthew and Daniel became owners in indivision of Benson Kansas's condominium once they accepted their succession rights. At that point, as a co-owner of the condominium, Jacob had the right to exercise all rights of ownership of that property, including taking necessary steps for its preservation and management. We find the Appellees' argument that Jacob was a third party, and not a universal legatee, unpersuasive. Once Jacob accepted the assignment by Raymond, who was a universal legatee,⁵ he could exercise all of the rights Raymond could have asserted, including ownership rights. *See* La. C.C. art. 2650; *In re Succession of Chambers*, 14-1030, p. 4 (La. App. 3 Cir. 3/4/15), 160 So.3d 584, 586-87, *writ denied*, 15-0694 (La. 6/1/15), 171 So.3d 263 (wherein the appellate court found that a medical foundation that was assigned the rights of an heir was permitted to exercise all rights of that heir).

However, once Jacob was appointed as the administrator of the succession on January 24, 2007, those ownership rights became subordinate to the administration of the property, pursuant to the succession. And Jacob's rights to administer the property were subject to court approval. Therefore, once he was appointed by the court, Jacob could no longer make unilateral decisions about estate property; his decisions were subject to the authority of the court. *See Succession of Bell*, 06-1710 (La. App. 1 Cir. 6/8/07), 964 So.2d 1067, 1073 (where the appellate court found a universal successor was not entitled to reimbursement

⁵ La. C.C. art. 1585 states, in relevant part: "A universal legacy is a disposition of all of the estate, or the balance of the estate that remains after particular legacies."

of certain expenses incurred after the appointment of the administratrix, since those expenses were subject to court approval once an appointment was made).

It is evident from its reasons for judgment that the trial court ignored Jacob's ownership rights under La. CC. arts. 934-35, 938(A) and 800. In particular, it refused to reimburse him for ownership related expenses that were incurred prior to the appointment of an administrator. Since the trial court legally erred in failing to recognize lawful expenses incurred by Jacob before the succession was open, and subject to the authority of the court, we review this *de novo*.

The record reflects that Jacob expended the following expenses in association with the succession proceedings, or in order to preserve and manage the condominium.

1. Sanitizing Unit after Benson's death ⁶	\$434.27	(1/2 of \$868.54) ⁷
2. Settlement of Judgment and court costs for unpaid condominium fees	\$6,796.28	(1/2 of \$13,592.56)
3. Condominium dues	\$13,354.75	(1/2 of \$26,709.50)
4. Special Assessments	\$1,436.32	(1/2 of \$2,872.65)
5. Property Taxes	\$3,830.09	(1/2 of \$7,660.18) ⁸
6. Appraisals	\$387.50	(1/2 of \$775.00)
7. Court Costs	\$389.00 ⁹	
8. Succession Attorneys' Fees	\$5,722.53	
9. Executor Compensation	\$1,125.00	

⁶ Benson died in the unit, and his body was not discovered for several days.

⁷ Benson is entitled to a credit for one-half of the totals he paid in association with preservation and management of the entire estate. This amount represents a contribution in proportion to Matthew and Daniel's one-fourth ownership interest.

⁸ Jacob contends that he is due an additional \$5,645.00 in attorneys' fees and expenses related to defending a Petition to Quiet a Tax Sale on the condominium. However, there is nothing in the record to establish the amount of these payments. Consequently, Jacob is not entitled to sums not proven by the evidence at trial. *Succession of Sporn*, 900 So.2d 1054, 1063 (where this Court concluded that a succession representative who seeks court approval to pay fees must "meet a threshold burden of establishing the basis and amount of the fees," as well as prove that the fees were for the benefit of the estate, and as such, a legitimate estate debt).

⁹ Though Jacob contends he spent \$832.00 in courts costs, the record does not support this amount.

TOTAL: \$33,475.74

Given the foregoing, we reverse the trial court's judgment insofar as it denied reimbursement to Jacob Kansas for monies spent in association with the preservation and management of the property prior to the opening of succession proceedings. Accordingly, we render judgment in the amount of \$33,475.74, in the favor of Jacob Kansas for reimbursement of expenses in association with opening and administering the succession proceedings, and preserving and managing the condominium prior to opening succession, plus legal interest from the date of judicial demand until paid.

In the second assignment of error, Jacob argues that the trial court erred in removing him as dative testamentary executor. Jacob asserts that the trial court did not follow the proper procedure for removing and replacing him as a succession representative. In particular, he argues that since there was no motion filed, he was not given an opportunity for a contradictory hearing on the matter. In a related assignment of error, number three, he asserts that the trial court erred in appointing Matthew Borman as dative testamentary executor.

The record reflects that the trial court removed and replaced the representatives in the succession at the initial hearing and in the judgment on the motion for new trial, signed on February 7, 2017. The procedure for removal of a succession representative is governed by Louisiana Code of Civil Procedure articles 3182 and 3396.20. Article 3182 provides, in pertinent part, "The court on its own motion may, and on motion of any interested party shall, order the succession representative sought to be removed to show cause why he should not be removed from office." Similarly, Article 3396.20 authorizes the court "on

motion of any interested person, after a contradictory hearing” to remove an independent administrator for any of the reasons provided by applicable law. In a contested proceeding, these articles require a rule to show cause and a contradictory hearing to remove a succession representative. *See In re Succession of Cannata*, 14-1546 (La. App. 1 Cir. 7/10/15), 180 So.3d 355, 366, *reh'g denied*, (08/12/15), *writ denied*, 15-1686 (La. 10/30/15), 180 So.3d 303.

In this case, there was no motion for removal or rule to show cause issued directing Jacob to appear and show cause at a contradictory hearing why he should not be removed as a succession representative. Therefore, the issue was not properly before the court. The trial court issued its ruling removing Jacob and replacing him with Matthew at a hearing scheduled in connection with other motions filed by the parties. After the trial court conducted the hearing, it raised the removal issue indicating that there was a status conference regarding a request for removal and consent by the parties to resolve it at the current hearing.

We do not construe any off the record discussion as sufficiently placing Jacob on notice that he had to appear and show cause why he should not be removed as dative testamentary administrator of Benson’s succession. There was no motion, oral or written, on the record. Moreover, raising the issue after the submission of the hearing was not proper as Jacob had no opportunity to defend his position, object to the proceeding, or waive notice and proceed on the merits. Absent the required notice and contradictory hearing, the trial court erred in removing and replacing the succession representatives. To the extent the initial judgment and the February 7, 2017, judgment removed and replaced the succession representative, it is vacated.

In the final assignment of error, Jacob argues that the trial court erred in denying his request to sell the condominium. A succession representative may sell succession property in order to pay debts and legacies, or for any other purpose, when authorized by the court. La. C.C. P. art. 3261. In considering an application for authority to sell succession property, the trial court must give consideration to any opposition and reasons for same. If the court considers the sale in the best interest of the succession, it may authorize either the public or private sale of the succession property. *Succession of Tagliavore*, 500 So.2d 393, 396 (La. 1987). The approval of an application to sell succession property at private sale rests within the sound discretion of the trial court. *Succession of Tagliavore*, 500 So.2d at 397. Notably, the Bormans' did not raise any opposition to selling the condominium, other than asserting that the assignment issue needed to be resolved first. However, given that the trial court had serious concerns with the Jacob's administration of the succession, as evidenced in the record, we cannot say it abused its discretion in denying Jacob's request to sell the condominium. Accordingly, we affirm the trial court's judgment denying the sale of the property.

CONCLUSION

Given the foregoing, we reverse and render judgment in the amount of \$33,475.74, in the favor of Jacob Kansas for reimbursement of expenses associated with opening and administering the succession, as well as preserving and managing the condominium prior to opening the succession, plus legal interest from the date of judicial demand until paid. Additionally, we vacate the trial court's judgments removing and replacing the succession representative. Finally,

we affirm the trial court's judgment denying the sale of the property, all parties to bear their own costs.

**AFFIRMED IN PART; REVERSED AND RENDERED IN PART;
VACATED IN PART**