

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2005 CA 0089**

**IN RE: SUCCESSION OF ALBERT E. COOK, SR.**

Judgment Rendered: OCT - 6 2006

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On Appeal from the 32nd Judicial District Court  
In and for the Parish of Terrebonne, State of Louisiana  
Probate No. 9769, Division "B"

Honorable John R. Walker, Judge Presiding

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Robert J. Prejeant  
Houma, LA

Counsel for Appellants  
Joycelyn Brady Cook,  
Anita Cook Hazelwood,  
Kathy Lynn Cook,  
Ellen D. Cook, and  
Albert E. Cook, Jr.

James M. Funderburk  
Houma, LA

Counsel for Appellees  
Estate of Albert E. Cook, Sr.,  
and Terri Percle Cook

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**BEFORE: PARRO, McDONALD, AND HUGHES, JJ.**

*Parro, J. concurs (by jmm)*

## **HUGHES, J.**

This is an appeal from a final judgment and a judgment of possession in a succession proceeding by the adult children of the decedent, who contend trial court rulings made in favor of the decedent's putative surviving spouse were erroneous. For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

### **FACTS AND PROCEDURAL HISTORY**

At the time of his death on May 2, 1985, Albert E. Cook, Sr. (Mr. Cook) was living as husband and wife with Terri Percle Cook (Terri), with whom he had joined in a marriage ceremony on December 7, 1983. Terri was previously married to Richard Liner, from whom she had been divorced by judgment of the Thirty-Second Judicial District Court, rendered in open court on December 2, 1983, but not signed until December 12, 1983.

Mr. Cook was formerly married to Joycelyn Brady Cook (Mrs. Cook), from whom he had been divorced by judgment of the Thirty-Second Judicial District Court signed on September 23, 1983, and with whom he had four children who were living at the time of his death: Albert E. Cook, Jr. (Albert), Ellen Dawn Cook (Ellen), Anita Louise Cook Hazelwood (Anita), and Kathy Lynn Cook (Kathy). Mr. Cook had one other child with Mrs. Cook, Charlotte Cook, who predeceased him at age two; he had no other children.

On July 30, 1985, Terri filed a petition in the trial court seeking probate of the last will and testament of Mr. Cook and asking that she be appointed executrix of Mr. Cook's estate.

In his statutory will, executed March 19, 1985, Mr. Cook made the following special bequests to Terri: (1) an undivided 60% right, title, and interest in his residence (Lot 10, Block 21, Addendum 10, Summerfield

Place, located on Aspen Drive, and referenced in the will by its full legal description); (2) a lifetime usufruct on the remaining 40% of the aforementioned residence; (3) all furniture, appliances, furnishings, drapes, and appurtenances located within this residence; and (4) all right, title, and interest in and to the accounting business known as General Business Services (GBS), including accounts receivable, good will, cash in the business checking account, office furniture and fixtures, typewriters, desks, chairs, adding machines, calculators, and related appurtenances, said fixtures and equipment being described more fully therein. Mr. Cook made the following additional specific bequests in his will: to Anita, an Oldsmobile vehicle; to Ellen, a Cadillac vehicle; and to all four children, all remaining property to share and share alike. Mr. Cook further appointed Terri as executrix of the succession with full seizin and without necessity of bond or other security.

Following the initial filing of the July 1985 petition and December 1985 return of the notary appointed to enter Mr. Cook's safety deposit box, the four children of Mr. Cook filed a May 1986 motion to require the executrix to file an accounting within thirty days; an order to this effect was signed by the court. Terri responded by filing a June 1986 opposition. No disposition appears in the record with respect to these filings.

In December 1988 Terri filed the following: a "Petition for Authority to Execute *Dation En Paiement*" to Premier Bank of South Louisiana with respect to Lots 12 and 13 of Wildwood Heights Subdivision and Lot 9 of Hollywood Fields Subdivision, a "Detailed Descriptive List of Succession Property," and a "Sworn List of Succession Debts."<sup>1</sup> Notice of the intended

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<sup>1</sup> The detailed descriptive list itemized \$464,835.00 in separate property allegedly owned by Mr. Cook and \$5,000.00 in community property shared with Terri. The sworn list of succession debts itemized \$200,185.25 in separate debts and \$23,857.17 in total community debts.

*dation* was issued; however, no further action was taken to advance the conclusion of the affairs of the succession until 1999.<sup>2</sup>

On August 17, 1999 Mrs. Cook filed a motion alleging that she was a creditor of the estate of Mr. Cook by virtue of her status as co-owner with Mr. Cook of certain items of real estate. Mrs. Cook alleged that this property was left by Mr. Cook to their children and was not inherited by Terri. Mrs. Cook further sought an accounting from Terri, and asked the court to render a partial judgment of possession placing the Cook children in possession of the property at issue "subject to any claims of Joycelyn Brady Cook arising as a result of the termination of the matrimonial regime between Joycelyn Brady Cook and the decedent."

On September 22, 1999 Terri filed an accounting listing the assets and liabilities of Mr. Cook's estate. A judgment was signed by the trial court on December 7, 1999 homologating the accounting.

On September 1, 2000 Terri filed a "Petition for Possession of Particular Legacy" asking the trial court to place her in possession of the legacies made in her favor and representing to the court that she had paid all inheritance tax due on legacies to her.<sup>3</sup> A "Judgment of Possession of Particular Legacy" was signed by the trial court on September 1, 2000, recognizing Terri as the surviving spouse of the decedent and placing her in possession of the bequests made in her favor by Mr. Cook in his will.

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<sup>2</sup> A petition for authority to execute a quitclaim deed was filed by Terri in 1994, with respect to property owned separately by Mrs. Cook. Apparently either Mrs. Cook and/or her successors-in-interest sought the quitclaim deed to secure the release of any claim Mr. Cook may have had against his former wife's separate property. The executrix acknowledged in the motion that Mr. Cook in fact had no ownership interest in the property, and an order was issued by the trial court authorizing the executrix to execute the quitclaim deed.

<sup>3</sup> Terri also alleged that despite requests by her attorney to decedent's children, "they have not paid inheritance taxes due by them."

Thereafter on October 12, 2000 Terri filed a "Rule to Compel Heirs and Legatees to Pay Pro Rata Share of Louisiana Inheritance Taxes and Debts and Charges of the Estate and the Administration of the Estate."<sup>4</sup> The Cook children responded by filing an answer denying the allegations of the executrix, and further asserting that the judgment previously rendered homologating the final accounting should be vacated, since they claimed they were not served and that there was no publication of notice prior to its rendition. The Cook children further asserted a right to traverse the accounting given by the executrix and enumerated alleged deficiencies. A supplemental and amended petition was filed by the heirs on May 30, 2001, which joined their mother, Mrs. Cook, as a petitioner. In this pleading the heirs reiterated their objections to the accounting of the executrix, and further asserted Mrs. Cook's claim that items of property listed as belonging to the estate were acquired with her separate funds and were her separate property.

Terri denied these allegations in pleadings filed between June and September of 2001, amended the detailed descriptive list of assets and debts by asserting over \$97,000.00 in additional claims in her individual capacity, for maintenance of property of the estate, and asserted exceptions of prescription, no cause of action, and no right of action to certain claims of the Cook heirs and Mrs. Cook. In October of 2001 the Cook heirs filed a petition seeking the annulment of the judgment that had been rendered in September of 2000 placing Terri in possession of the particular legacies in her favor.

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<sup>4</sup> In this rule it was asserted that inheritance taxes were owed as follows: \$809.67 each by Anita and Ellen, and \$734.67 each by Albert and Kathy. It was further asserted that Anita and Ellen each owed \$9,882.08 as their pro rata share of the expenses of the estate, and that Albert and Kathy each owed \$9,460.35.

Thereafter the trial court rendered an interlocutory judgment, signed on July 29, 2002, in which it made the following rulings: Mrs. Cook and the decedent became separate in property in 1966 but continued to jointly own property;<sup>5</sup> Mrs. Cook was owed \$70,000.00 by decedent's estate; certain items of property (Hollywood Fields, Wildwood Estates, The Palms Apartments, and movables located in Mrs. Cook's Myrtle Grove home) should not be included as assets of the succession; valuations for the assets and debts of the estate were fixed; the proceeds from the sale of Leath Realty, Inc. stock donated by the decedent prior to his death to his children were held not to be succession assets but were to be included for tax purposes and to calculate the legitime; the exceptions and additional claims asserted by the executrix were denied; and it was held that the executrix was entitled to a fee of 2½% of the gross value of the estate. Further, the executrix was ordered to file an amended accounting, and the parties were given an opportunity for further traversal.<sup>6</sup>

Another interlocutory judgment was signed by the trial court on September 17, 2003, maintaining his prior rulings and ordering the inclusion of loans from Ellen and Terri in the principal amounts of \$5,000.00 as debts of the estate, with each note bearing interest at the rate of 12% through September 9, 2003; debts of the decedent to other heirs were found not to be entitled to interest. Further, the trial court held that Terri was not entitled to reimbursement of medical bills in the amount of \$6,824.43 for which

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<sup>5</sup> During the existence of their marriage, Mrs. Cook filed a petition for separation from Mr. Cook and obtained a judgment of separation, which was rendered on November 17, 1966, terminating the community property regime between Mr. and Mrs. Cook. When the parties thereafter reconciled, they did not reestablish the community by the requisite authentic act or act under private signature, as required by the law existing at that time. See Rearden v. Rearden, 568 So.2d 1111, 1116 (La. App. 2 Cir. 1990). Therefore, even though the parties continued to remain married until their divorce in 1983, they were separate in property from 1966 through 1983.

<sup>6</sup> An amended accounting was timely filed on September 6, 2002, and was traversed by Mrs. Cook and the Cook heirs on October 24, 2002.

insurance benefits had been received, and attorney's fees for the succession were fixed in the amount of \$33,812.17. The trial court also vacated its September 1, 2000 partial judgment of possession. A second amended accounting, including these rulings, was filed September 18, 2003.

Following a final trial of the matter, heard October 27, 2003, judgment was signed by the trial court on March 26, 2004, ruling: that the usufruct granted to Terri "does not burden the legitime" and recalling any prior interlocutory rulings to the contrary; that none of the legatees had tacitly accepted the succession and/or any acceptance was with benefit of inventory; that "none of the parties is required to sell any of their interests in any succession property;" that the total value of assets of the succession was \$288,585.00 and that the total debts of the succession were \$184,199.42 (less \$6,824.43 received in hospitalization insurance proceeds, for a net amount of \$177,374.99) for purposes of ascertaining whether there was an impingement on the legitime (noting that the executrix had paid and was entitled to credit for payment of \$49,361.20 in succession debts); that in lieu of the sale of estate property an "equalizing" payment in the amount of \$23,122.40 was owed *by* the estate to Terri, while "equalizing" payments were owed *to* the estate in the amounts of \$29,996.95 by Albert, \$24,303.45 by Kathy, \$32,434.79 by Anita, and \$11,387.21 by Ellen; that Mrs. Cook was a creditor of the estate in the amount of \$70,000.00 pursuant to the court's October 8, 2001 reasons for judgment; that the second amended final accounting filed by the executrix on September 18, 2003 was approved and homologated; that a judgment of possession was to be prepared and submitted to the court "sending the heirs and legatees into possession, provided that the said heirs or legatees shall pay their appropriate share of inheritance taxes;" that the judgment was a final judgment; and that the right

to assert claims for legal or other interest was reserved to the parties, should the judgment be modified.

A judgment of possession was signed in connection with the final judgment of the trial court, which specifically superceded and replaced all prior judgments, including the September 1, 2002 judgment of possession previously entered by the court, and which decreed: Albert E. Cook, Jr., Ellen Dawn Cook, Anita Louise Cook Hazelwood, and Kathy Lynn Cook to be the only surviving children of Albert E. Cook; Terri Percle Cook Dockery<sup>7</sup> to be the surviving spouse in community with Albert E. Cook and owner of a one-half interest in all community property; Terri Percle Cook Dockery to be owner of the corporeal and incorporeal movable property listed therein belonging to GBS, and all corporeal movable property located on the premises of the decedent's former Aspen Drive residence; Terri Percle Cook Dockery to be the 60% owner of the Aspen Drive home and granting her a lifetime usufruct over the remaining 40% interest; Anita Cook Hazelwood to be the owner of the Oldsmobile vehicle; Ellen Dawn Cook to be the owner of the Cadillac vehicle; and, Albert E. Cook, Jr., Ellen Dawn Cook, Anita Louise Cook Hazelwood, and Kathy Lynn Cook to be entitled to one-fourth shares each in the remaining property, which was listed as: 5 shares of stock in Leath Realty, Inc. (given to them prior to decedent's death), 100 shares of stock in LUC Enterprises, Inc., an undivided one-half interest in 16.6% shares of stock in Terrebonne Investments Corporation, an undivided one-half interest in 129 shares of stock in American Liberty Financial Corporation, an undivided one-half interest in the described Myrtle Grove Subdivision property, an undivided one-half interest in the described Greenacre Estates Subdivision property, and a 40% interest in the described

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<sup>7</sup> Terri remarried while this matter was pending.



Aspen Drive property, subject to the lifetime usufruct in favor of Terri Percle Cook Dockery.

Mrs. Cook and her children have appealed the final judgment and the judgment of possession of the trial court, asserting thirty-five assignments of error, which they indicate in their brief to this court present the following issues for review: (1) whether the trial court committed legal error in requiring the heirs to pay succession debts prior to being placed in possession of their inheritance; (2) whether the trial court erred in its assignment of values to succession assets; (3) whether the trial court committed legal error in concluding that Terri and the decedent were legally married and that a community property regime existed between them; (4) whether the trial court erred in assessing the debts of the estate; (5) whether the trial court erred in including in the succession, assets that were in fact the separate property of Mrs. Cook; (6) whether the trial court erred in failing to find misconduct on the part of Terri in her capacity as executrix of the estate; and (7) whether the trial court committed legal error in failing to find that the last will and testament of the decedent impinged on the legitime of the forced heirs.

### **LAW AND ANALYSIS**

The factual findings of a trial court made in connection with a succession proceeding, including determinations regarding ownership of alleged succession property and the value thereof, are subject to the manifest error standard of appellate review. See In re Succession of Haydel, 2000-0085, p. 9 (La. App. 1 Cir. 2/16/01), 780 So.2d 1168, 1174; **Succession of Hoover**, 517 So.2d 471, 473 (La. App. 1 Cir. 1987); **In re Successions of Mack**, 413 So.2d 642, 644 (La. App. 1 Cir. 1982).

When an appellate court's review is governed by the manifest error-clearly wrong standard, a two-part test applies to the appellate review of a factual finding: (1) whether there is a reasonable factual basis in the record for the finding of the trial court; and (2) whether the record further establishes that the finding is not manifestly erroneous. If there is no reasonable factual basis in the record for the trial court's finding, no additional inquiry is necessary to conclude there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a trial court's factual finding only if, after reviewing the record in its entirety, it determines the trial court's finding was clearly wrong. **Boudreaux v. Jeff**, 2003-1932, pp. 8-9 (La. App. 1 Cir. 9/17/04), 884 So.2d 665, 671, citing **Mart v. Hill**, 505 So.2d 1120, 1127 (La.1987), and **Stobart v. State, through Dep't of Transp. and Dev.**, 617 So.2d 880, 882 (La. 1993).

Where factual findings are based on determinations regarding the credibility of witnesses, the trier of fact's findings demand great deference and are virtually never manifestly erroneous or clearly wrong. Even though an appellate court may feel its own evaluations and inferences are more reasonable than the fact finder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. **Boudreaux v. Jeff**, 884 So.2d at 671, citing **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989), **Barham & Arceneaux v. Kozak**, 2002-2325 (La. App. 1 Cir. 3/12/04), 874 So.2d 228, 240, writ denied, 2004-0930 (La. 6/4/04), 876 So.2d 87, and **Secret Cove, L.L.C. v. Thomas**, 2002-2498 (La. App. 1 Cir. 11/7/03), 862 So.2d 1010, 1016, writ denied, 2004-0447 (La. 4/2/04), 869 So.2d 889.

In the instant case, appellants contend that the trial court erred in including in the estate of the decedent, property that they allege was either alienated by him prior to his death or was owned exclusively by Mrs. Cook. Appellants further contend that assets were improperly valued and that debts were also classified and valued improperly.

The "2nd Amended Final Accounting" filed by the executrix and approved by the trial court, valuing assets and liabilities, can be summarized as follows:

Decedent's Separate Property - Stocks

- (1) Proceeds from sale of 5 shares of stock in Leath Realty, Inc., given to the Cook children prior to Mr. Cook's death - \$30,000.00
- (2) 100 shares of stock in LUC Enterprises, Inc. - \$36,000.00
- (3) An undivided one-half interest in 16.6% shares of stock in Terrebonne Investments Corp. - \$6,640.00
- (4) An undivided one-half interest in 120 shares of stock in American Liberty Financial Corp. - \$195.00

Decedent's Separate Property - Real Estate

- (1) Lot 9, Block 1, Hollywood Fields, which was transferred to Premier Bank by *dation en paiement* on February 16, 1989, as authorized by the trial court on January 26, 1989 - \$0.00
- (2) An undivided one-half interest in Lot 41 and the east one-half of Lot 40, Addendum No. 2, in Myrtle Grove Subdivision, which was the residence of Mrs. Cook - \$85,000.00
- (3) An undivided one-half interest in Lot 22, Block 2, Greenacre Estates Subdivision - \$9,250.00
- (4) Lot 10, Block 21, Addendum No. 10, Summerfield Place, the former residence of decedent and then-current residence of Terri (Aspen Drive) - \$85,000.00

Decedent's Separate Property - Cash, Rights, and Credits:

- (1) A credit (formerly valued at \$138,250.00) owed on Palms Apartments situated on Lots 12 and 13, Block 5, Addendum No. 1 in Wildwood Heights, which was transferred to Premier Bank by *dation en paiement* pursuant to an order by the trial court on January 26, 1989 - \$0.00

Decedent's Separate Property - Movables:

- (1) All assets of GBS - \$29,000.00
- (2) An undivided one-half interest in furniture and movables located in the residence of Mrs. Cook - \$0.00
- (3) An Oldsmobile automobile - \$2,500.00
- (4) A Cadillac Fleetwood automobile - \$2,500.00

Community Property Owned Together with Terri:

(1) An undivided one-half interest in furniture and movables located in the Aspen Drive residence of decedent and Terri - \$2,500.00

Total of Succession Assets \$288,585.00

Debts of Decedent's Separate Estate Paid by Executrix:

(1) Chauvin Funeral Home	\$ 3,478.96
(2) Russell Redmond Monument	215.88
(3) Mrs. Cook for half cost of tomb	1,400.00
(4) Florist	254.40
(5) South Louisiana Bank	3,430.64
(6) Attorney's Fees to Mr. Funderburk	33,812.17
(7) Appraiser's fee	1,665.00
(8) Mortgage loans owed to Terrebonne Bank & Trust, cancelled by <i>dation</i> with transfer of property to Premier Bank	0.00

Total of Decedent's Separate Debts Paid by Executrix \$44,257.05

Unpaid Debts of Decedent's Separate Estate:

(1) Executrix fee	\$ 7,214.63
(2) Ellen	21,047.58
(3) Albert	900.00
(4) Kathy	6,593.50
(5) Elmiere Brady	5,000.00
(6) Terri	17,258.08
(7) Mrs. Cook	70,000.00

Total Unpaid Separate Debts \$128,013.79

Community Debts Paid by Executrix:

(1) D.H. Holmes, L.T.D.	\$ 418.37
(2) Beall-Ladymon	68.72
(3) Blair	49.61
(4) Goudchaux-Maison Blanche	512.34
(5) Danbury Mint	75.00
(6) State Farm homeowner's insurance	47.18
(7) South Central Bell	105.67
(8) D & D Electronics	77.38
(9) Globe Life & Acc. Insurance Co.	31.80
(10) Maria Immaculata School	79.25
(11) St. Matthews Episcopal Church	50.00
(12) Maria Immaculata Church	18.00
(13) Bishop's Stewardship Appeal	5.00
(14) South Louisiana Bank	3,113.42
(15) Private Duty Nurses	771.90
(16) Dave's Village Drugs, Inc.	73.72
(17) Daigle's Pharmacy	120.42
(18) Physicians Referral Service	481.00

(19) University of Texas System of Cancer Center	1,022.35
(20) Terrebonne General Hospital	374.18
(21) Terrebonne General Hospital	88.00
(22) Terrebonne General Hospital	13,648.86
(23) Terrebonne Anesthesia Associates	200.00
(24) Haydel Medical Center	200.00
(25) Internal Medicine Clinic	1,746.00
(26) Houma Radiology Associates	479.00

One-Half of Total of Community Debts (\$11,928.58) Paid by Executrix Less Amount Not Entitled to Reimbursement (\$6,824.43)

\$ 5,104.15

Total Succession Debts Paid by Executrix \$49,361.20

(Separate \$44,257.05 + Community \$5,104.15)

Total Unpaid Succession Debts \$128,013.79

(Separate)

Total Succession Debts \$177,374.99

**Value of Estate** \$111,210.01

(Total Succession Assets less Total Succession Debts)

(\$288,585.00 - \$177,374.99)

**Review of Succession Assets**

In addressing the validity of this listing of assets and debts, we first consider appellants' contention that the marriage between the decedent and Terri was invalid. There is no doubt that there existed an impediment to the marriage between Terri and the decedent at the time that their marriage ceremony took place on December 7, 1983, since Terri's divorce from her prior husband was not effective until the judgment of divorce was signed on December 12, 1983. The marriage between the decedent and Terri was therefore absolutely null. See Farrell v. Farrell, 275 So.2d 489, 491-92 (La. App. 1 Cir. 1973).

Notwithstanding, the trial court found as a matter of fact that Terri and Mr. Cook were in good faith in contracting their marriage, each believing that Terri's divorce from her former husband had been finalized. We can

find no manifest error in this finding of fact as it has a reasonable basis in the record; Terri's testimony was uncontradicted on this point.

Louisiana courts have broadly construed the putative marriage provisions of our Civil Code in favor of good faith parties in determining the civil effects of such a marriage. The jurisprudence has declared that among the civil effects flowing from a putative marriage are the right of the putative wife to her proportionate share of the community property, and the right of the putative wife to inherit as a wife in the succession of the husband. **Cortes v. Fleming**, 307 So.2d 611, 613 (La. 1973).<sup>8</sup> Therefore, Terri is entitled to the same rights as a legal wife with respect to Mr. Cook's succession proceeding. See **Zanders v. Zanders**, 434 So.2d 1213 (La. App. 1 Cir. 1983).

Consequently, Terri Percle Cook is entitled to be deemed the surviving spouse of Mr. Albert E. Cook, Sr., for these purposes, and we must conclude the trial court did not err in honoring the bequest of a lifetime usufruct over Mr. Cook's residence to Terri and the inclusion of "community" assets and debts, arising from the putative marriage between Terri and Mr. Cook, in the succession. Further, a lifetime usufruct to a surviving spouse was not considered an impingement on the legitime of the forced heirs at the time of Mr. Cook's death. See **Morgan v. Leach**, 96-0173 (La. App. 1 Cir. 9/27/96), 680 So.2d 1381, 1383-84.

We next examine the listing of the Leath Realty, Inc. stock as a succession asset. Appellants contend the stock should not have appeared as an asset of the estate since it was sold and the proceeds distributed by Mr.

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<sup>8</sup> This jurisprudential policy was based on former LSA-C.C. art. 117, which provided that a marriage, which has been declared null, nevertheless produces civil effects as it relates to the parties and their children, if it has been contracted in good faith. See Monica Hoff Wallace, *The Pitfalls of a Putative Marriage and the Call for a Putative Divorce*, 64 L.L.R. 71, 85 (2003). The substance of former LSA-C.C. art. 117 was substantially reproduced in the 1987 revision of the pertinent Civil Code articles as LSA-C.C. art. 96.

Cook to his children prior to his death. The executrix asserts the value of the donated stock was included in the detailed descriptive list for purposes of collation.

Appellants correctly assert that only descendants who are forced heirs can demand collation pursuant to LSA-C.C. art. 1235, and the forced heirs herein did seek the reduction of donations allegedly impinging on their forced portion under LSA-C.C. arts. 1504 and 1505. However, because we have determined that Terri was entitled to a spousal usufruct under Mr. Cook's will that did not, as a matter of law, constitute an impingement on the legitime of the forced heirs, neither collation nor calculation of the forced portion was warranted in this case. Thus we conclude the trial court erred in including the Leath Realty, Inc. stock value in the listing of estate assets.<sup>9</sup>

With respect to the LUC Enterprises, Inc. stock, Terri testified that LUC Enterprises was comprised of two buildings located on Highway 311, one of which housed Taylor Rental, an equipment rental business operated by Mr. Cook's business associates, Ronald Lajaunie and Glenn Usie. Terri denied any personal involvement in the business, but indicated that an appraisal valued the business concern at \$225,000.00. However, there was an outstanding loan on the property owed to First National Bank in the amount of \$91,000.00. The value of Mr. Cook's interest in the business was derived by subtracting the bank debt from the appraised value, and then figuring Mr. Cook's one-third interest, which amounted to approximately

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<sup>9</sup> Nevertheless, we note that LSA-R.S. 47:2406 requires that under the circumstances therein set forth, some inter vivos donations must be included in the computation of estate value for inheritance tax purposes; however, the statute has no bearing on an estate's value respecting a succession proceeding. See Francois v. Tufts, 571 So.2d 813, 816 (La. App. 4 Cir. 1990), writs denied, 575 So.2d 368, 369 (La. 1991). Because we remand this matter for reasons stated hereinafter, and since rulings made herein will necessitate an amendment to any inheritance tax return previously filed, we leave the question of whether the Leath stock should be included in such a tax return under the provisions of LSA-R.S. 47:2406 for consideration at that time. Any dispute concerning inclusion of those funds in the inheritance tax return would properly be an issue between the heirs in receipt of those funds and the state officials charged with the collection of inheritance tax.

\$45,000.00; this figure was then discounted to the \$36,000.00 value included in the detailed descriptive list for the succession. However, shortly after Mr. Cook's demise, First National Bank foreclosed on the outstanding \$91,000.00 debt and the LUC property was seized under executory process and sold to satisfy the debt. The record clearly reflects that neither Terri nor any of Mr. Cook's heirs ever received any monetary value from this entity and that the asset was lost when it was seized in foreclosure proceedings. Consequently, we conclude the trial court should have assigned a zero value to the LUC Enterprises, Inc. stock.

Next we address the issues raised by appellants relative to the claims of Mrs. Cook that assets included in the estate of Mr. Cook were purchased with her separate property and therefore were not the property of Mr. Cook. The trial court, after receiving all of the argument, testimony, and documentary evidence on this issue, did not rule in favor of Mrs. Cook. We can find no manifest error in this factual finding by the trial court. The title documents at issue show joint ownership in the names of Mrs. Cook and the decedent.<sup>10</sup> Evidence of sufficient specificity was not produced to overcome the ownership interest as set forth in the title documents.<sup>11</sup>

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<sup>10</sup> The acts of sale for the Myrtle Grove and Greenacre Estates properties show transfers of the properties to both Albert E. Cook and Joycelyn Brady Cook as purchasers. The Summerfield Place property was transferred solely to Albert E. Cook.

<sup>11</sup> While we were not favored with the reasons of the trial court for his ruling on this issue, we find the record reflects that some doubt as to the credibility of the witness(es) may have influenced his factual findings. When Mrs. Cook first advised the court of her intent to assert a claim against the succession in her August 1999 motion, she alleged that she and the decedent "co-owned ... certain real estate including a home and land in Houma, Louisiana, bearing the municipal address of 9810 East Park Avenue," which was her Myrtle Grove residence. (Emphasis added.) She further alleged that "[u]nder the terms of the last will and testament [of the decedent] ... all of the decedent's interest in immovable property co-owned by the decedent with his ex-wife, ... Joycelyn Brady Cook, was left to his children." (Emphasis added.) She further requested the court to "render a partial judgment of possession recognizing the children of the decedent as the owners of the interest in the immovable property owned by the decedent," subject to her claims arising out of the termination of her marriage to decedent. (Emphasis added.) Nevertheless, Mrs. Cook took a contrary position in her May 2001 petition, and alleged that the decedent did not have a co-ownership interest in the specified property, but rather it was owned exclusively by her. The record does not reflect that Mrs. Cook possessed any additional facts in 2001 that were unknown to her in 1999 that would account for two such contrary assessments of the ownership interest in these properties as between her and the decedent.



After a careful examination of the record with respect to the remainder of the assets listed, we can find no manifest error in the factual findings of the trial court as to the value of those assets.

### **Review of Succession Debts**

Because we have determined hereinabove that Terri Cook was entitled to be considered the putative spouse of Mr. Cook, we cannot say the trial court erred in approving the listing of "community" debts. Although appellants contest some items enumerated in the listing of community debts, we are unable to say that the trial court was without a reasonable basis in the record for his determination that the items included were debts of the community. We find no manifest error in this portion of the trial court judgment.

Further, although some succession debts or portions thereof were paid by checks drawn on Mr. Cook's business, GBS, prior to Terri's alleged acquisition of the franchise, we are unable to find error in the trial court's inclusion of these debts within the succession. While it is conceivable that succession debts paid by GBS may have been encompassed in the valuation of GBS as an asset, making a separate listing of them as debts of the succession duplicative, no evidence was introduced establishing such a fact. Consequently, we cannot conclude that the trial court erred in the listing of these succession debts.

However, we agree with appellants that the amount of attorney fees fixed by the trial court, \$33,812.17, includes fees engendered by the individual legal claims presented by Terri, in her individual capacity, in defense of her status as a putative spouse. The decedent's estate should not be charged for attorney's fees incurred by Terri in defending her interest under the will. See Succession of Bradford, 130 So.2d 702, 706-7 (La.

App. 2 Cir. 1961). After reviewing the entirety of the record, we believe that an equitable split of the total attorney fees would be 50% to the succession and 50% to Terri, individually. Accordingly, only 50% of the total \$33,812.17 of attorney fees awarded, or \$16,906.09, should be charged as an expense of the estate.

Appellants also claim that Terri should be disqualified as the succession executrix. A succession representative may be removed for the following reasons: (1) the representative becomes disqualified; (2) he has become incapable of discharging his duties; (3) he has mismanaged the estate; (4) he has failed to perform a duty imposed by law or order of court; (5) he has ceased to be domiciled in the state without appointing an agent for service of process; or (6) he has failed to give notice of application for appointment when required. LSA-C.C.P. art. 3182; Frederick William Swaim, Jr. and Kathryn Venturatos Lorio, *Successions and Donations*, § 16.10, p. 444 in Louisiana Civil Law Treatise, Vol. 10 (1995). The failure of a succession representative to file an annual accounting has been deemed a failure to perform a duty imposed by law and thus is a ground for removal of a succession representative. See Succession of Cucchero, 2002-0368, pp. 4-5 (La. App. 1 Cir. 2/14/03), 845 So.2d 450, 453-54. Further, the failure to account, keep adequate records, and an excessive length of administration by an executor/executrix demonstrate mismanagement of the estate. See Succession of Moore, 28 So.2d 465, 468 (La. App. Orl. 1946).

While it is true that in the instant case the executrix filed a detailed accounting when ordered to do so by the court, only three accountings were filed (in September of 1999, September of 2002, and September of 2003) over the entire eighteen years this proceeding was before the trial court. Moreover, it appears that no detailed accounting of the operation of Mr.

Cook's business, GBS, was ever made by the executrix. And although Terri alleged that a lack of cooperation on the part of the other heirs and a lack of liquid assets in the succession prevented her from bringing the succession to a close, those explanations are not adequate justifications to overcome the obvious neglect of the duty to close the succession as expeditiously as possible. See LSA-C.C.P. art. 3197.

Hence we believe the trial court abused its discretion in failing to remove Terri as executrix of the succession. We hereby order her removal, and remand the matter to the trial court to allow another qualified person to apply for appointment as dative testamentary succession representative. See LSA-C.C.P. arts. 3083 and 3098.

Although damages attributable to the executrix's mismanagement pursuant to LSA-C.C.P. art. 3191 were not proven, we believe the executrix fee awarded to Terri should be reduced to 50% of the statutory amount, leaving the remaining 50% of the fee to be paid to the succession representative appointed to complete the administration of this succession.

We further find the trial court miscalculated the amount of the executrix fee by failing to comply with LSA-C.C.P. art. 3351. Under LSA-C.C.P. art. 3351, unless there is an agreement or provision in the will otherwise, a succession representative is allowed 2½% of the amount of the *inventory* of the succession as a fee. The *inventory* of a succession encompasses only the assets owned by the decedent at the time of his death, and does not include those assets having no value. See LSA-C.C.P. arts. 3133 and 3136; **Succession of Harelson**, 289 So.2d 187 (La. App. 1 Cir. 1973).

Of the \$222,585.00 inventory of assets in the present case, the succession representative's fee should be \$5,564.62, rather than the trial

court's calculated fee of \$7,214.63, which was based on succession assets that included the \$30,000.00 in Leath Realty, Inc. and \$36,000.00 in LUC Enterprises, Inc. stock, both of which we have decided were inappropriately included in the assets of the estate. Accordingly, we order the succession representative's fee of \$5,564.62 to be divided as follows: 50% or \$2,782.31 to Terri, and the remainder of \$2,782.31 to the succession representative to be named upon remand of this matter.

We find no other error in the rulings of the trial court with respect to the listing of the remainder of the debts of the succession.

### **Adjustments to Estate Assets and Debts**

Applying the rulings of this court to the detailed descriptive list of assets and debts of the succession yields the following:

#### Decedent's Separate Property - Stocks

- (1) Proceeds from sale of 5 shares of stock in Leath Realty, Inc., given to the Cook children prior to Mr. Cook's death - \$0.00
- (2) 100 shares of stock in LUC Enterprises, Inc. - \$0.00
- (3) An undivided one-half interest in 16.6% shares of stock in Terrebonne Investments Corp. - \$6,640.00
- (4) An undivided one-half interest in 120 shares of stock in American Liberty Financial Corp. - \$195.00

#### Decedent's Separate Property - Real Estate

- (1) Lot 9, Block 1, Hollywood Fields, which was transferred to Premier Bank by *dation en paiement* as authorized by the trial court on January 26, 1989 - \$0.00
- (2) An undivided one-half interest in Lot 41 and the east one-half of Lot 40, Addendum No. 2, in Myrtle Grove Subdivision, which was the residence of Mrs. Cook - \$85,000.00
- (3) An undivided one-half interest in Lot 22, Block 2, Greenacre Estates Subdivision - \$9,250.00
- (4) Lot 10, Block 21, Addendum No. 10, Summerfield Place, the former residence of decedent and then-current residence of Terri - \$85,000.00

#### Decedent's Separate Property - Cash, Rights, and Credits:

- (1) A credit (formerly valued at \$138,250.00) owed on Palms Apartments situated on Lots 12 and 13, Block 5, Addendum No. 1 in Wildwood Heights, which was transferred to Premier Bank by *dation en paiement* pursuant to an order by the trial court on January 26, 1989 - \$0.00

Decedent's Separate Property - Movables:

- (1) All assets of GBS - \$29,000.00
- (2) An undivided one-half interest in furniture and movables located in the residence of Mrs. Cook - \$0.00
- (3) An Oldsmobile automobile - \$2,500.00
- (4) A Cadillac Fleetwood automobile - \$2,500.00

Community Property Owned Together with Terri:

- (1) An undivided one-half interest in furniture and movables located in the Aspen Drive residence of decedent and Terri - \$2,500.00

Total of Succession Assets \$222,585.00

Debts of Decedent's Separate Estate Paid by Executrix:

- (1) Chauvin Funeral Home \$ 3,478.96
- (2) Russell Redmond Monument 215.88
- (3) Mrs. Cook for half cost of tomb 1,400.00
- (4) Florist 254.40
- (5) South Louisiana Bank 3,430.64
- (6) Attorney's Fees to Mr. Funderburk 16,906.09
- (7) Appraiser's fee 1,665.00
- (8) Mortgage loans owed to Terrebonne Bank & Trust, cancelled by *dation* with transfer of property to Premier Bank 0.00

Total of Decedent's Separate Debts Paid by Executrix \$27,350.97

Unpaid Debts of Decedent's Separate Estate:

- (1) Executrix fee \$ 5,564.62
- (2) Ellen 21,047.58
- (3) Albert 900.00
- (4) Kathy 6,593.50
- (5) Elmire Brady 5,000.00
- (6) Terri 17,258.08
- (7) Mrs. Cook 70,000.00

Total Unpaid Separate Debts \$126,363.78

Community Debts Paid by Executrix:

- (1) D.H. Holmes, L.T.D. \$ 418.37
- (2) Beall-Ladymon 68.72
- (3) Blair 49.61
- (4) Goudchaux-Maison Blanche 512.34
- (5) Danbury Mint 75.00
- (6) State Farm homeowner's insurance 47.18
- (7) South Central Bell 105.67
- (8) D & D Electronics 77.38
- (9) Globe Life & Acc. Insurance Co. 31.80

(10) Maria Immaculata School	79.25
(11) St. Matthews Episcopal Church	50.00
(12) Maria Immaculata Church	18.00
(13) Bishop's Stewardship Appeal	5.00
(14) South Louisiana Bank	3,113.42
(15) Private Duty Nurses	771.90
(16) Dave's Village Drugs, Inc.	73.72
(17) Daigle's Pharmacy	120.42
(18) Physicians Referral Service	481.00
(19) University of Texas System of Cancer Center	1,022.35
(20) Terrebonne General Hospital	374.18
(21) Terrebonne General Hospital	88.00
(22) Terrebonne General Hospital	13,648.86
(23) Terrebonne Anesthesia Associates	200.00
(24) Haydel Medical Center	200.00
(25) Internal Medicine Clinic	1,746.00
(26) Houma Radiology Associates	479.00

One-Half of Total of Community Debts (\$11,928.58) Paid by Executrix Less Amount Not Entitled to Reimbursement (\$6,824.43)

\$ 5,104.15

Total Succession Debts Paid by Executrix \$32,455.12

(Separate \$27,350.97 + Community \$5,104.15)

Total Unpaid Succession Debts \$126,363.78

(Separate)

Total Succession Debts \$158,818.90

Value of Estate \$ 63,766.10

(Total Succession Assets less Total Succession Debts)

(\$222,585.00 - \$158,818.90)

Against this estate, Terri has claims for the \$32,455.12 in succession debts that she paid, the \$17,258.08 due for the loan with interest that she made to Mr. Cook prior to his death, and her \$2,782.31 executrix fee. Mrs. Cook is owed \$70,000.00 by this estate. Elmiere Brady is owed \$5,000.00 by the estate. Mr. Cook's children, Ellen, Albert, and Kathy, are owed \$21,047.58, \$900.00, and \$6,593.50, respectively. Also, a succession representative fee of \$2,782.31 is owed to the succession representative to be appointed on remand. There are no liquid assets that belong to this estate with which to pay these claims. Therefore, the trial court erred in entering a

judgment of possession prior to the liquidation of the debts of the estate, in accordance with the provisions of LSA-C.C.P. arts. 3241-3243, and 3301-3307. See Succession of Kilpatrick, 422 So.2d 483, 487 (La. App. 2 Cir. 1982), writ denied, 429 So.2d 126 (La. 1983).

Although a particular legacy must be discharged in preference to all others, payment of estate debts must precede payment of legacies in accordance with LSA-C.C. arts. 1600 and 1601. In order to pay estate debts, a succession representative may sell succession property pursuant to LSA-C.C.P. art. 3261. **Brousseau v. Puryear**, 2001-1829, p. 3 (La. App. 1 Cir. 1/23/02), 815 So.2d 897, 898, writ denied, 2002-0594 (La. 5/10/02). 815 So.2d 841. See also LSA-C.C.P. arts. 3271 and 3281.

Because numerous debts of the instant succession remained unpaid at the time the judgment of possession was rendered, the trial court erred in placing the legatees and heirs of Mr. Cook in possession of property of the estate while the estate remained in debt. Therefore, the judgment of possession is reversed, and the matter is remanded to the trial court for appointment of a new succession representative, with directions to continue the succession under administration until all debts have been settled. The new succession representative may apply to the trial court for authority to sell assets of the succession either by private or public sale, in accordance with authorities cited hereinabove, to satisfy the debts of the succession.<sup>12</sup>

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<sup>12</sup> Having decided the matters before the court on the bases stated, we deem it unnecessary to address any remaining assignments of error.

## CONCLUSION

For the reasons assigned herein, the judgments of the trial court are affirmed in part and reversed in part. The matter is remanded to the trial court for appointment of a new succession representative, and for additional proceedings in accordance with the foregoing. Each party is to bear his own costs of this appeal.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**