Judgment rendered December 22, 2004.
Application for rehearing may be filed
within the delay allowed by art. 2166,
La. C.C.P.

No. 39,275-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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SUCCESSION OF ROBERT SEWELL, JR.

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Appealed from the
Fourth Judicial District Court for the
Parish of Ouachita, Louisiana
Trial Court No. 03-0635

Honorable J. N. Dimos, Judge

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SIR CLYDE LAIN, II — Counsel for Appellants Robert Dewayne Sewell and Richard Tyrone Sewell

WRIGHT & UNDERWOOD, L.L.P.
By: Patrick H. Wright, Jr. — Counsel for Appellee Mary Murth Sewell

DIANNE HILL — Counsel for Appellee Robertine C. Gholston

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Before BROWN, WILLIAMS and DREW, JJ.

DREW, J.:

Robert Dewayne Sewell and Richard Tyrone Sewell contest a stipulated judgment of possession complaining about: (1) fees to an improperly qualified administrator and the attorney appointed to represent the succession; (2) the failure to recognize the claims of certain creditors; and (3) the failure to require the surviving spouse to post security for her usufruct over the community property. For the reasons set forth below, we affirm in all respects.

FACTS

Robert Sewell, Jr., died on January 6, 2003. Sewell had been married four times and had two children, Robert Dewayne Sewell and Richard Tyrone Sewell, both by his second wife, Blanche Ausberry Sewell. At the time of his death, Sewell was married to Mary Murth Sewell (Murth). On February 14, 2003, his children, Robert and Richard, filed a request for notice of the filing of application for appointment as administrator of their father's estate.

On March 27, 2003, a petition for appointment as administrator was filed in Ouachita Parish by Murth, the surviving spouse, to open the succession of her late husband. Her petition alleged that Sewell died intestate and requested that she be appointed the administrator of his succession. The matter was set for hearing on April 23, 2003. On April 10, 2003, Sewell's children filed an opposition to Murth's petition on the basis that they were their father's only heirs and were willing to accept his succession unconditionally.

In appellate briefs, all parties acknowledge that they agreed that Charles Traylor, III, would be appointed the administrator of Sewell's succession, with Patrick Wright serving as the attorney for the court-appointed administrator. The judgment to that effect was signed on April 30, 2003.

After the appointment of the administrator, three separate proofs of claim were filed in the succession proceedings by Sewell's creditors. Bank One Corporation filed a proof of claim for $80,489.79 as the amount due on a promissory note executed by Sewell on October 18, 2002. Bank One also filed a claim through its agent, NCO Financial Systems, Inc., for $950.00 as the amount due in revolving credit card charges. Lastly, G.S. Financial Services, Inc., filed a proof of claim for $925.45 as the amount due for hospital services provided to Sewell in the year preceding his death.

On January 5, 2004, Sewell's two children filed a sworn detailed descriptive list of the succession assets and liabilities along with a rule asking that the other parties be ordered to show cause why the Sewell children should not be placed in possession of the succession property and the administrator of the succession dismissed. On January 28, 2004, the administrator filed his own sworn detailed descriptive list along with a petition for homologation of tableau of distribution. The matter was set for hearing on March 15, 2004.

At the March 15 hearing, the parties entered into a stipulation under which the heirs would be placed into possession. While the record contains no transcript of the proceedings, the court minutes reflect that the parties

stipulated that Murth was entitled to her one-half interest in the community property and usufruct over the other half. Robert and Richard Sewell were recognized as decedent's sole heirs and thus entitled to possession of all his separate property and ownership of his one-half interest in the community property subject to Murth's usufruct. With respect to the administrator (Mr. Traylor) and succession attorney (Mr. Wright), the minutes expressly state:

> Mr. Wright's attorney fees in the amount of $9,000.00 and Mr. Traylor's fee of $1,200.00 will be paid out of the succession. A judgment will be signed in accordance to those stipulations relieving Mr. Wright and Mr. Traylor of any further responsibility after the judgment is signed. . . .

A judgment of possession in accordance with these stipulations was signed on May 17, 2004. The attorney for the heirs did not sign the judgment of possession submitted to and signed by the court. On May 26, 2004, the heirs filed a timely motion for new trial on the basis that:

- the fees granted to Mr. Traylor and Mr. Wright should not have been awarded because of Mr. Traylor's failure to properly qualify and because Mr. Wright's legal work did not warrant a $9,000.00 award;
- the judgment failed to address the claims of estate creditors; and
- the judgment failed to require Murth to post security for her usufruct over decedent's half of the community property.

The motion for new trial was denied by order signed on May 26, 2004.

DISCUSSION

Fees for the Administrator and the Succession Attorney

The heirs argue that Traylor's failure to post security, to take an oath and to be issued letters of administration prevented him from:

- properly qualifying as an administrator under the provisions of the Louisiana Code of Civil Procedure; and

- being entitled to an administrator's fee.

As to Mr. Wright's fee, the heirs argue that the record is devoid of any evidence of legal work warranting a fee of $9,000.00.

Procedurally, a consent judgment is not appealable when "voluntarily and unconditionally acquiesced in." La. C.C.P. art. 2085. It may, however, be appealed when a party indicates that the judgment lacked the prerequisite consent. *Pittman v. Pittman*, 2001-2528 (La. App. 1st Cir. 12/20/02), 836 So. 2d 369, *writ denied*, 2003-1365 (La. 9/19/03), 853 So. 2d 642. The jurisprudence also indicates that this lack of prerequisite consent can be evidenced by the filing of a motion for new trial. *Polk v. Polk*, 1998-1788 (La. App. 3rd Cir. 3/31/99), 735 So. 2d 737.

Mr. Traylor was appointed administrator of the succession and Mr. Wright as the administrator's attorney at the hearing of April 23, 2003. These appointments were confirmed by judgment signed on April 30, 2003. The heirs did not seek review of this judgment. The record further indicates that at the hearing on the heirs' motion to be sent into possession of the succession property, the parties agreed to the discharge of both the administrator and succession attorney and to the stipulated awards of $1,200.00 and $9,000.00 as their respective fees.

While the heirs subsequently filed a motion for new trial, they did not argue therein, nor have they argued to this court, that the judgment of possession does not correctly reflect the stipulations made at the March 15, 2004, hearing. Nor did the heirs argue that they were induced to enter into the stipulations through some mistake of fact. Absent proof that the heirs'

consent to the agreements was somehow vitiated or tainted, this court will not entertain an appeal from the stipulated award of fees for the succession administrator or the succession attorney even though the attorney's fee appears high under these facts.

Failure to Recognize Claims of Succession Creditors

The heirs argue that the trial court erred in sending them into possession of the succession property without recognizing the claims of certain creditors in the judgment of possession.

The heirs of an intestate succession which is under administration may be sent into possession at any time prior to the homologation of the final tableau of distribution by filing a petition for possession, the proceeding for which "shall be contradictory with the administrator." La. C.C.P. art. 3362. In the present case, the heirs filed a petition for possession which was served on the succession administrator, who was present at the hearing of March 15, 2004. The parties made their agreement, and the trial court rendered a judgment of possession placing the heirs in possession of succession property.

La. C.C.P. art. 3061 provides in pertinent part:

> The judgment shall recognize the petitioners as the heirs, legatees, surviving spouse in community, or usufructuary, as the case may be, of the deceased, send the heirs or legatees into possession of the property owned by the deceased at the time of his death, and recognize the surviving spouse in community as entitled to the possession of an undivided one-half of the community property, and of the other undivided one-half to the extent that he has the usufruct thereof.

La. C.C.P. art. 3062 provides:

> The judgment of possession rendered in a succession proceeding shall be prima facie evidence of the relationship to the deceased of the parties recognized therein, as heir, legatee, surviving spouse in community, or usufructuary, as the case may be, and of their right to the possession of the estate of the deceased.

Nothing in these articles describing the procedural mechanism by which heirs are sent into possession of succession property indicates that any prejudice can come to creditors as a result thereof. The heirs have cited no authority for the proposition that creditors who have filed formal written proof of their claim are entitled to have that claim recognized in a judgment of possession or that the failure to do so in any way prejudices their right to pursue payment of those debts. To the contrary, as heirs who accepted the decedent's succession unconditionally and without benefit of inventory, the appellants bound themselves for the debts and obligations of the deceased as if they themselves had contracted their father's debts. La. C.C. art. 961. It has not been shown how the claims of creditors have been illegally prejudiced.

Failure to Require Murth to Post Security

The heirs also argue that the trial court erred in failing to require Murth to post security for her usufruct over the heirs' one-half interest in the former community property. La. C.C.P. art. 3154.1 (repealed by Act No. 158, 2004 Louisiana Legislative Session) allowed successors, other than children of the marriage, to demand security from a usufructuary who has use of former community or separate property of the decedent. We need not reach the issue of whether the heirs in the present case were entitled to relief under this article because the record is devoid of any evidence that such a demand for

security was ever made. Since no demand for relief was made, the trial court could not have erred in failing to grant it.

Request for Additional Attorney's Fees

The administrator contends in his brief that the arguments raised on appeal are frivolous and accordingly seeks additional attorney's fees. Because this issue was not raised by appeal or by an answer to appellants' appeal, frivolous appeal damages, costs or attorney's fees are not now assessable. *Hill v. Cloud*, 26,391 (La. App. 2d Cir. 1/25/95), 648 So. 2d 1383, *writ not considered*, 95-0486 (La. 3/17/95), 651 So. 2d 260.

DECREE

The judgment of the trial court is AFFIRMED. All costs of this appeal are assessed to appellants.