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IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN RE THE MATTER OF THE)
ESTATE OF ELIAS S. WABOL,)
Deceased.)

CIVIL ACTION NO. 86-791

DECISION AND ORDER

THIS MATTER came before the Court on June 3, 1998, on the heirs¹ motion to remove Concepcion Wabol Moteisou (“Concepcion”) as the Administratrix. At the conclusion of the hearing, the Court took the matter under advisement and gave the parties the opportunity to submit proposed findings of fact and conclusions of law.

Having reviewed the parties’ submissions, the evidence received during the hearing, the credibility of the witnesses, and applicable laws, the Court now renders its decision.

I. Concepcion Is No Longer Competent To Serve As Administratrix Of This Estate.

The Commonwealth Code provides that the Commonwealth Rules of Probate Procedure shall govern the administration of an intestate estate. *See 8 CMC § 2923.* Rule 18 of the Commonwealth Rules of Probate Procedure directs the Court to appoint a person who “will

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¹ The heirs that brought the motion were Felomenia Wabol Muna, Carmen Wabol Nekaifes, Antonio Saures, and Maria Saures.

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1 best be able to administer the estate” under the circumstances.²

2 Conception testified that she had no idea what her job was as Administratrix of this estate.
3 She did not know how long this probate had been going on. She could not answer whether she had
4 ever discussed plans for the distribution of the estate. She could not remember how long the estate’s
5 counsel had been living on the estate’s property. She even admitted that she sniffs gasoline. Clearly,
6 Conception is no longer the person best able to administer this estate. She must therefore be
7 replaced.³

8

9 **2. Conception’s Fraudulent Act In Another Probate Also Disqualifies Her To**
10 **Continue As The Administratrix In This Case.**

11 In 1992, Conception opened the probate of her father Elias M. Wabol. See In Re Estate of
12 Elias Maligas Wabol, Civil Action No. 92-474. “Elias M.” is also the father of the decedent here, and
13 the father of the heirs who are now asking the Court to remove her as the Administratrix. In that case,
14 she executed a Petition for Letters of Administration that falsely stating that she was the only
15 surviving heir of Elias M. Wabol. *Heirs’ Exhibit “A.”* The Petition was filed while Conception was
16 also serving as the Administratrix in this case. Conception attended the court hearing where her
17 attorney presented the false Petition to the court. Based upon the representations in that Petition, real
18 property in Chalan Kanoa was improperly distributed to her(Conception), and not the other children
19 of Elias M. Wabol.

20 Conception then leased the Chalan Kanoa property and she kept the \$10,000.00 in rental
21 proceeds for herself. *Heirs’ Exhibit “B.”* The Chalan Kanoa property was an asset of the decedent
22 here as he was an heir of Elias M. Wabol. The Chalan Kanoa property should have been included
23 by Conception as an asset of this estate but she never moved to correct the inventory filed here.

24 As the Administratrix of both the Estate of Elias S. Wabol and as the Administratrix of the
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26 ² Unless otherwise stated, all references herein to a rule are to the Commonwealth Rules of Probate Procedure.
27

28 ³ The heirs have proposed that Carmen Nekaifes, the second oldest sister, be appointed to serve as the
Administratrix. Felomenia, the oldest sister, resides on Guam.

1 Estate of Elias M. Wabol, Concepcion occupied positions of trust with respect to all those interested
2 in the estates. Stone v. Gulf American Fire and Cas. Co., 554 So.2d 346, 359 (Ala. 1989) citing
3 Maryland Casualty Co., v. Owens, 261 Ala. 446, 451, 74 So.2d 608, 612 (1954); Durden v.
4 Neighbors, 232 Ala. 496, 168 So. 887, 889 (1936); Amos v. Toolen, 232 Ala. 587, 168 So. 687, 692
5 (1936).

6 When Concepcion was appointed as Administratrix for the Estate of Elias M. Wabol, she was
7 required to identify the heirs of Elias M. Wabol, so far as known to her. *See Rule 15*. She was under
8 an affirmative duty to disclose to the probate court the existence of Felomenia and Carmen, as heirs
9 of Elias M. Wabol; and Felomenia, Carmen, Antonio and Maria, as heirs of Elias S. Wabol. Smith
10 By Young v. Estate of King, 579 So.2d 1250, 1251 (Miss. 1991) citing Smith By and Through Young
11 v. Estate of King, 501 So.2d 1120, 1123 (Miss. 1987). Concepcion's act of withholding the names
12 of her sisters and brother as heirs constituted extrinsic fraud perpetrated against the court
13 administering the Estate of Elias M. Wabol. *See* Magofna v. Estate of Rufina Castro, 1 CR 685,
14 (N.M.I. 1983); *See also* Latta, et al. v. Western Inv. Co., et al., 173 F2d 99, 107 (9th Cir. 1949);
15 Purinton v. Dysonm, 8 Cal 2d 322 (1937); Caldwell v. Taylor, 218 Cal 471 (1933).

16 Based upon the foregoing, Concepcion must therefore be removed as the Administratrix here
17 given the clear breach of her duties to this Court.⁴

18
19 **3. Concepcion's Failure To Take Possession Of All Assets Of The Estate Also**
20 **Disqualifies Her from Continuing As Administratrix In This Case.**

21 Concepcion had the legal duty to take into her possession all assets of the Estate of Elias S.
22 Wabol on behalf of the other heirs. *See, Rules 10 and 20*. An administrator has the legal duty to
23 collect and preserve the decedent's assets, to pay the decedent's debts, and to account for her acts to
24 the other legal heirs and to deliver to them their intestate share. Bender v. City of Rochester, N.Y.,
25 765 F.2d 7, 12 (1985). Concepcion's fiduciary responsibility continues until the estate is closed.

26
27 ⁴ Ayers v. Liller, 499 A.2d 1309(Md.App.1985). *See also*, Matter of Estate of Flowers, 493 So.2d 950
28 (Miss.1986), wherein the court held that the failure of the intestate's administrator to disclose the existence of the
intestate's natural daughter to the court constituted a serious misrepresentation requiring the administrator's removal.

1 Matter of Estate of Bartlett, 680 P.2d 369, 377 (Qkl. 1984).⁵

2 Concepcion also had the related duty to disclose and to include in the inventory, all properties
3 which to her knowledge belonged to Elias S. Wabol. *See, Rules 9 and 19*. If any property not
4 included in the original inventory was discovered, Concepcion had the duty to make a supplementary
5 inventory and file it with this Court and serve copies thereof to the other heirs. Layton v State Bar,
6 789 P.2d 1026, 1033 (Cal. 1990).

7 Concepcion breached her fiduciary duties to the estate and to the other heirs when she
8 deliberately failed to disclose Elias S. Wabol's one-fourth (1/4) interest in the Chalan Kanoa property.
9 Worse, Concepcion deliberately and fraudulently obtained for herself a fee simple title to the whole
10 property to the exclusion of the other legal heirs of Elias S. Wabol. In Re Estate of Elias Maligas
11 Wabol, Civil Action No. 92-474.

12 The failure of Concepcion to disclose in this action the existence of the Chalan Kanoa
13 property clearly warrants her removal as the Administratrix of this Estate. See, Ayers v. Liller, 499
14 A.2d 1309, (Md.App.1985).⁶

15
16 **4. Concepcion's Lease Of Estate Property To Counsel Was Without Authority.**

17 On August 1, 1996, Concepcion, in her personal capacity and as the Administratrix of this
18 Estate, entered into a Residential Lease Agreement, renting out the sole asset of the estate to
19 Theodore R. Mitchell and Divina U. Mitchell. See Heirs' Exhibit "C" (hereinafter the "Residential
20 Lease"). Attorney Theodore R. Mitchell was serving as counsel to the Administratrix at the time the
21 Residential Lease was entered into. Mr. Mitchell still serves as counsel to the Administratrix and,
22 in fact, in this proceeding defended his lease of the property.

23 Under the Residential Lease, Concepcion agreed to lease the estate's property for a monthly
24

25 ⁵The heirs have pointed out that this estate has not been closed despite the fact that there is no issue over who
26 are the heirs and what property was left by the decedent. The pending litigation over leases to the property have never
27 prevented distribution, and despite continued demands by the heirs to distribute the estate since mid-1996, the
28 Administratrix has no plans to distribute the estate.

⁶Related to this point, Concepcion has been under order since December, 1986 to file quarterly reports of her
activities in this estate. Concepcion, however, has only filed one quarterly report, on December 16, 1996.

1 rent of \$1,000.00. However, the monthly rental was to be applied first to the cost of repairs effected
2 by Mr. Mitchell on the leased premises and thereafter to attorneys' fees claimed by Mr. Mitchell for
3 services rendered in Wabol v. Villacrusis, Superior Court Civil Action No. 84-397 and TransAmerica
4 v. Wabol, Superior Court Civil Action No. 93-441.

5 Attorney Mitchell admitted making in excess of \$20,000.00 in repairs to the property without
6 Court approval. See Administratrix's Exhibit "B." Concepcion had no idea what repairs or
7 improvements Mr. Mitchell made to the property at estate expense.

8 The Residential Lease provides that it cannot be canceled until Mr. Mitchell is fully paid all
9 that he claims for repairs and for attorneys' fees. *Heirs' Exhibit "C."* This Court has never approved
10 the attorneys' fees claimed by Mr. Mitchell.

11 The \$1,000.00 monthly rent provided for in the Residential Lease was to be apportioned
12 between fees owed personally by Concepcion to Mr. Mitchell, and fees owed by the estate to Mr.
13 Mitchell, based on how much of Concepcion's own property the estate's building that Mr. Mitchell
14 occupied had encroached. Concepcion never obtained Court approval for entering into the
15 Residential Lease on behalf of the Estate. Mr. Mitchell has been residing on the property for almost
16 two (2) years.

17 Prolonged litigation has made the estate's property unmarketable "for a long term lease." See
18 Declaration of Roy Alexander, Declaration of Tim Goodwin, and Declaration of Scot Thompson,
19 Exhibits "E," "F" and "G" to Declaration of Michael W. Dotts Re: Status Report, filed December 16,
20 1996. The heirs contend that Mr. Mitchell and Concepcion are prolonging the litigation intentionally
21 because to do so results in a free place for Mr. Mitchell to live and it reduces the personal legal fees
22 owed by Concepcion to Mr. Mitchell.

23 The property does have value if rented on a monthly basis. See Alexander Declaration, supra,
24 at para. 4. The estimate of Alexander is that the property is worth from \$0.65 to \$0.85 per square foot
25 per month. Id. Thompson's estimate is higher - \$0.75 to \$1.00 per square foot per month. Thompson
26 Declaration, supra, at para. 4. Goodwin's estimate is that the property should rent monthly from
27 \$0.50 per foot to \$1.00 per foot. Goodwin Declaration, supra, at para. 4.

28 Since the Residential Lease is for the entire property, the fair rental value for the full 4000

1 square foot building, based on the low and high estimates from Alexander, Goodwin and Thompson,
2 is that Mr. Mitchell should have been paying from \$2,000.00 to \$4,000.00 per month. TransAmerica
3 has also expressed its desire to rent the property from the heirs based on leases executed in 1991.
4 Under those leases, the fair monthly rental rate is \$2,043.25 per month.

5 Concepcion made no effort to determine what the fair monthly rental value was before leasing
6 the estate's property to Mr. Mitchell. She did not contact realtors or market the property. She did
7 not seek the Court's assistance or give the heirs the chance to express their views on the lease before
8 she leased the estate's property to Mr. Mitchell. The only person that Concepcion consulted with
9 over the lease of estate property to Mr. Mitchell was Attorney Jeanne Rayphand, Mr. Mitchell's law
10 partner.

11 The lease to Mr. Mitchell for a "credit" of something less than \$1,000.00 per month toward
12 unapproved attorney's fees, after Mr. Mitchell is reimbursed for the costs of any repairs that he made,
13 was less than half the estimated rental value testified to by Alexander and Thompson, and as offered
14 by TransAmerica. Over the twenty-two months Mr. Mitchell has been in occupancy, the estate has
15 received less than \$2,000 credit due to Mr. Mitchell's claim to the \$20,000.00 in repair costs that he
16 allegedly incurred. Had the property been leased out at the lowest estimate of the realtors (\$0.50 per
17 square foot per month) for the same period of time, the estate would have received \$44,000.00.

18 Rule 10 provides, in relevant part that: "No sale or other disposition of estate property will
19 be done without Court order." Rule 10, incorporated for intestate proceedings by Rule 20. The
20 Administratrix argues that a "lease" is not a "disposition" of estate property. The Court rejects such
21 argument on the grounds that Concepcion's lack of authority to sell or dispose of the estate's
22 property in issue here implies her lack of authority to lease the estate property without approval from
23 this Court.

24 The power of an executor to borrow money (24 C.J. p. 69), or lease (24 C.J. pp. 190, 191),
25 or continue his testator's business (24 C.J. pp.57-59), is derived only from the express terms
26 of the will or the statutes. Such authority if conferred, must be strictly pursued. 24 C.J.
pp.190, 191.

27 In Re Fleshman's Estate 5 P.2d 727, 728 (Idaho 1931) (hence loans or leases could only be made with
28 the approval of the probate court properly obtained). To hold otherwise would be absurd - a 55-year

1 lease would not be a “disposition” requiring this Court’s approval! Hence, the Administratrix
2 violated Rule 10 because she did not obtain such approval before she leased out the estates’ property
3 to Mr. Mitchell.

4 In addition, Concepcion did not obtain the Court’s consent before allowing Mr. Mitchell to
5 make more than \$20,000 in repairs to the estate’s property at the estate’s expense.⁷

6 An estate is primarily liable for those reasonable expenses of administration which
7 the court finds to have been incurred for the benefit of the estate.

8 In re Estate of Barcinas, 2 N.M.I. 437 (1992). See also In the Matter of the Estate of Manuel Fausto
9 Aldan, Civil Action No. 90-490, Slip.op. at 6 (N.M.I. February 13, 1997). Repairs and renovations
10 require Court approval before they are made because they are, in effect, a disposition of estate
11 property. Rule 10. Concepcion has again violated Rule 10 by allowing Mr. Mitchell to make repairs
12 to estate property at estate expense without first obtaining Court approval.

13 The Lease to Mr. Mitchell provides that Mr. Mitchell lives rent free, and that the estate
14 receives a portion of \$1,000 per month “credit” against some unknown amount owed to Mr. Mitchell
15 for legal services. In essence, this is an end run around the Court’s ability to determine how much
16 in attorneys fees are in fact owed to Mr. Mitchell as Mr. Mitchell is receiving the value of those fees
17 now, before they are approved by the Court.

18 Further, the heirs have been deprived of the opportunity to comment on Mr. Mitchell’s bill.

19 Although the court has broad discretionary powers in awarding the executor and attorney fees;
20 nonetheless, interested parties to a probate proceeding must be given a “meaningful
21 opportunity” to challenge the validity of fees requested for services to decedent’s estate,
22 including examination of and an ability to test the reasonableness of the fees.

23 Matter of Estate of Laas, 525 N.E.2d 1089 (Ill.App. 1st Dist. 1988). Felomenia, Carmen, Antonio and
24 Maria, as heirs, had the right to contest leasing the estate’s property to Mr. Mitchell, and to question
25 the deductions for repairs and attorney’s fees.

26 Concepcion leased the estate’s property to Mr. Mitchell at a below market rental rate and

27 ⁷At the evidentiary hearing, Mitchell offered to modify the Lease so that the estate will not bear this expense.
28 The point, however, is that neither the Administratrix nor her counsel gave the Court or the heirs the chance to object
to the Lease or the repair work before it was entered into by the Administratrix and her counsel. The after-the-fact
concession of Mitchell to release the estate from its obligation to pay for the repairs he decided to make only points out
that the Residential Lease was inherently unfair to the estate.

1 on terms that provided some of the rental "credit" would be applied to her personal legal bill with Mr.
2 Mitchell. Concepcion, as the Administratrix, occupies a position of trust and has the duty to maintain
3 an undivided loyalty to the estate. Ramsell v. Union Trust Co., 519 A.2d 1185, 1189 (Conn. 1987).
4 She was not allowed to deal with the estate's asset for personal profit or gain. In Re Estate of
5 Kennedy, 369 N.W.2d 63, 65 (Neb. 1985). It was therefore improper for Concepcion to use the asset
6 of the estate to pay her own debt to Mr. Mitchell. Petras v. Zaccone, 311 A.2d 751, 752 (Sct. N.J.
7 1973).

8 "[O]ne interested in an estate has the right to have its representative wholly free from
9 conflicting personal interests . . ." Corey v Corey, 120 Minn. 304, 310, 139 N.W. 509 (1913).
10 When the executor of an estate places itself in a position where its interests conflict with those
11 of the estate, the executor's ability to represent fairly the interests of the estate is irreparably
12 tainted. "When [such] a situation appears . . . it is the positive duty of the court to remove the
13 executor . . ." Davis v Roberts, 206 Mo.App. 125, 129, 226 S.W. 662 (1920).

14 Ramsell v Union Trust Co., 519 A.2d 1185, 1190 (Conn. 1987).

15 Concepcion was under a duty to Felomenia, Carmen, Antonio and Maria to administer the
16 estate for their best interests. Restatement (Second) of Trusts § 170. She is expected to act as a
17 prudent person dealing with the property of another, one who is required to act with care, diligence,
18 integrity, fidelity and sound business judgment. The Court also imposed upon her the duties of
19 honesty, loyalty, restraint from self-interest and good faith. See Matter of Green Charitable Trust,
20 431 N.W.2d 492 (Mich.App. 1988).

21 The duty of loyalty applicable to an administratrix is provided at Section 170, Restatement
22 (Second) of Trusts. The comments explain that a fiduciary must not purchase an interest in the
23 subject of the trust herself (Comment "j") or be guided by the interests of a third person (Comment
24 "q"). Here, the Administratrix has taken an interest in the estate's property to partially satisfy fees
25 she owes to Mr. Mitchell by leasing the property to him for a price that will in part be applied to her
26 personal account.⁸ She has allowed Mr. Mitchell to guide her into this transaction that he has an

27 ⁸ Mr. Mitchell offered to amend the Residential Lease to give the Estate full credit from his rent. Again, this
28 concession that the Residential Lease was unfair to the Estate comes too late. Rule 10 serves a purpose - to protect estate
property from bad business deals. Offering to rewrite the Residential Lease to eliminate the conflict of interest and self-
dealing of the Administratrix after she was caught does not absolve her of her wrongdoing.

1 interest in. The Administratrix has breached her duty of loyalty.

2 By the same token, Mr. Mitchell, by his very acts, has placed himself in a position where his
3 interests conflict with that of the Estate which he represents.

4 [A]n attorney who obtains an interest in the property of a client, where it is reasonably
5 foreseeable that his acquisition may become detrimental to the client, even though his
intention is said to aid the client, has acquired an interest adverse to the client.

6 Conner v. State Bar of California, 791, P.2d 312, 317 (Cal. 1990) (attorney disciplined for
7 involvement in a mortgage of client's property).

8 The prohibition against self-dealing by an estate fiduciary is equally applicable to the attorney
9 employed by the fiduciary.

10 The statute * * * forbidding purchasers [sic] by appraisers, relates to sales by execution only.
11 The disability of the appraiser in the present case, if it exists, arises under those general
principles of equity, which prevents those from acquiring a title, to whose discretion or
12 agency the management of a sale is confided.

13 *The application of this doctrine to trustees, executors, attorneys, and agents is familiar in all*
14 *the books. A majority of the court unite in the opinion, that the principle of exclusion attaches*
to every person, to whose integrity and judgment is committed the execution of any step
needful in making the sale.

15 *Where the law creates fiduciary relations, it seeks to prevent the abuse of confidence, by*
16 *insuring the disinterestedness of its agents. It holds the relation of judge and party, of buyer*
17 *and seller, to be entirely inconsistent. The temptation to abuse power for selfish purposes is*
18 *so great that nothing less than that incapacity is effectual, and thus a disqualification is*
wrought by the mere necessity of the case. Fullness of price, absence of fraud, and fairness
of purchase are not sufficient to countervail this rule of policy. To give it effect, it is
19 *necessary to recognize a right in the former owner, to set the sale aside in all cases on*
repayment of the money advanced. (Citations omitted).

20 Ollick v Rice, 476 N.E.2d 1062, 1071 (Ohio App. 1984).

21 Mr. Mitchell's contention that there has been no self-dealing because the estate has benefitted
22 from his lease of its property is not only untrue but misses the point that the transaction created a
23 prohibited conflict of interest:

24 [T]he beneficiary need only show that the fiduciary allowed himself to be placed in a position
25 where his personal interest *might* conflict with the interest of the beneficiary. It is
26 unnecessary to show that the fiduciary succumbed to this temptation, that he acted in bad
27 faith, that he gained an advantage, fair or unfair, that the beneficiary was harmed. Indeed, the
28 law presumes that the fiduciary acted disloyally, and inquiry into such matters is foreclosed.
The rule is not intended to compensate the beneficiary for any loss he may have sustained or
to deprive the fiduciary of any unjust enrichment. Its sole purpose and effect is prophylactic:
the fiduciary is punished for allowing himself to be placed in a position of conflicting interests
in order to discourage such conduct in the future. Though equity protects the beneficiary with
a gentle wand, it polices the fiduciary with a big stick. The trustee must avoid being placed

1 in such a position, and if he cannot avoid it, he may resign, or fully inform the beneficiaries
2 of the conflict, or upon so informing the court, request approval of his actions. Otherwise,
he proceeds at his peril.

3 Fulton Nat'l Bank v. Tate, 363 F.2d 562, 571-572 (5th Cir. 1966) (emphasis in original).

4 Had the Administratrix and her counsel followed the mandate of Rule 10 and sought court
5 approval of their proposed business dealing with estate property before entering into that deal, the
6 Court could have insured that the Administratrix was separately represented in the transaction, and
7 had done all her homework on determining a fair rental value and fair rental terms. The
8 Administratrix and her counsel instead chose to make their deal on their own without the Court's
9 guidance. They took this brash action at their own peril. Now, the only remedy is to remove them
10 from this Estate. Therefore,

11
12 **ORDER**

13 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

- 14 1. Concepcion Wabol Moteisou shall be and is hereby removed as Administratrix of
15 the Estate of Elias S. Wabol;
- 16 2. Carmen Nekaifes, the second oldest sister of the decedent, shall henceforth serve as
17 the Administratrix of this Estate;⁹
- 18 3. Attorney Theodore R. Mitchell shall be and is hereby removed as counsel to this
19 Estate. The Clerk of Court shall immediately transmit a certified copy of this Decision to the
20 Chairman of the Ethics Committee of the Northern Marianas Bar Association for appropriate
21 disciplinary action, if any, in respect to Mr. Mitchell.

22 ENTERED this 3rd day of August, 1998.

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ALEXANDRO C. CASTRO, Judge Pro Tem

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28 ⁹ The incoming administratrix should immediately look into the leased property to Mr. Mitchell and take appropriate action.