

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2009 CA 2289**

**SUCCESSION OF NITA MARIE LEBEAU**

Consolidated With

**2009 CA 2290**

**FIELDING CHADWICK PHILLIPS,  
KAY PHILLIPS ELLIOTT, PAMELA PHILLIPS SULZER,  
JAMES GARNET GENIUS, ALBERT SIDNEY GENIUS,  
MARGARET ANITA GENIUS, LAURIE GENIUS  
CHAPPLE AND JAMES RODNEY GENIUS**

**VERSUS**

**HERBERT R. WITTY**

Judgment Rendered: May 7, 2010

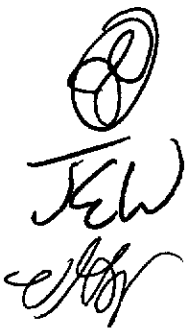
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On Appeal from the

On Appeal from the 18<sup>th</sup> Judicial District Court  
In and For the Parish of Pointe Coupee  
Trial Court Probate No. 17,268  
Trial Court No. 39,853

Honorable J. Robin Free, Judge Presiding

\* \* \* \* \*

Handwritten initials 'JEW' and a signature below them.

Neal R. Elliott, Jr.  
Baton Rouge, LA

Plaintiffs/Appellees  
Fielding Chadwick Phillips, et al.

J. Peyton Parker, Jr.  
Baton Rouge, LA

Counsel for Defendant/Appellant  
Herbert R. Witty

\* \* \* \* \*

**BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.**

## **HUGHES, J.**

This is an appeal from a judgment awarding a portion of the heirs in a succession proceeding damages against the succession executor on claims he mismanaged the estate and failed to assess a portion of the estate's expenses and charges against his mother's interest in the estate, which he inherited as her heir. For the reasons that follow, we amend the trial court judgment and affirm as amended.

### **FACTS AND PROCEDURAL HISTORY**

This succession proceeding was filed on April 24, 1981, following the death of the decedent, Nita Marie LeBeau, on April 18, 1981. A petition to probate Miss LeBeau's last will and testament was filed on May 6, 1981.

Miss LeBeau's will named the following as legatees of her immovable property: her sister, Alta LeBeau Witty, a two-thirds share; her nephew, Murray LeBeau, a one-sixth share; her nephew, Malcolm Genius, a twenty-fourth share; her niece, Shirley G. Phillips, a twenty-fourth share; her nephew, Winston Genius, a twenty-fourth share; and her nephew, Garnet Genius, a twenty-fourth share. The will provided that "[s]hould any of said legatees predecease me, the bequest to him or her, as stated above, shall be inherited by my lawful heirs according to law." Winston Genius predeceased Miss LeBeau.

Miss LeBeau's will further provided that all of her debts were to be paid out of the cash money that she left at her death, and that the balance of the cash money, after the payment of debts, was bequeathed to her sister, Alta LeBeau Witty.<sup>1</sup> Mrs. Witty was further bequeathed "the balance" of Miss LeBeau's estate. Mrs. Witty was also appointed executrix, and her

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<sup>1</sup> We note that all cash was applied to the debts of the succession.

son, Herbert R. Witty, was designated as the alternative executor in the event she was unable to serve.

Alta LeBeau Witty was confirmed as testamentary executrix for the succession of Miss LeBeau on May 6, 1981. Mrs. Witty filed a detailed descriptive list showing as assets of the succession: an interest in three tracts of immovable property valued at \$65,809.00; the mineral interests in the three tracts of land valued at \$1,184,576.00; mineral royalty checks received in the amounts of \$23,335.00 and \$49,892.00; and numerous bank accounts, savings accounts, and certificates of deposits valued at \$70,583.00. These assets totaled \$1,394,195.00. Debts of the succession were listed in the detailed descriptive list totaling \$74,240.00. The total value of the succession amounted to \$1,319,955.00.

On May 24, 1982 Mrs. Witty filed a petition for possession in the district court, requesting that she be placed in possession of her share of the immovable property of the succession and accepting the legacy unconditionally. Thereafter, the court signed a judgment sending Mrs. Witty into possession "of the legacy bequeathed to her by decedent of 2/3rds of the immovable property belonging to decedent."

Annual accounts were filed by Mrs. Witty on September 16, 1982 and on July 11, 1983. The district court issued judgments homologating these accounts on April 24, 1984 and March 16, 1984, respectively. Also on July 11, 1983 Mrs. Witty petitioned the district to be relieved of her duties as executrix, due to personal illness. Mrs. Witty's son, Herbert R. Witty, joined in the motion seeking to be appointed as the alternate executor. The motion was granted and Mr. Witty was appointed executor of the estate. Mrs. Witty died shortly afterward.

After his appointment as executor, Mr. Witty filed annual accounts on November 13, 1985 (for 1983-1985), March 4, 1987 (for 1986), March 18, 1988 (for 1987), June 1, 1989 (for 1988), May 11, 1990 (for 1989), May 13, 1991 (for 1990), June 9, 1992 (for 1991), November 24, 1993 (for 1992), May 19, 1994 (for 1993), February 17, 1995 (for 1994), January 14, 1997 (for 1995), January 14, 1997 (for 1996), February 6, 1998 (for 1997), March 18, 1999 (for 1998), May 4, 2000 (for 1999), July 13, 2004 (for 2000-2003), and February 26, 2007 (for 2004-2005). Judgments of homologation were signed by the district court as to all of these accounts.

On March 15, 2005 Mr. Witty applied to the trial court to be discharged as executor, to have Murray LeBeau placed in possession of his one-sixth legacy bequeathed to him under Miss LeBeau's will, and to have the three remaining one-twenty-fourth legacies, bequeathed to Shirley G. Phillips, Garnet Genius, and Malcolm Genius,<sup>2</sup> placed in the registry of the court.<sup>3</sup> Mr. Witty's motion was granted and the court issued a judgment placing Murray LeBeau in possession of his legacy and depositing the remaining legacies in the court's registry; the judgment further "discharged and relieved [Herbert R. Witty] of all responsibility as executor in [the] succession upon payment of all court costs and attorney fees [then] due." Subsequently, the heirs of Shirley G. Phillips and Malcolm Genius also filed

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<sup>2</sup> In this pleading, Mr. Witty stated that of the original legatees under the will, only Murray LeBeau was still living at that time. Further, it was asserted that Winston Genius, who inherited a twenty-fourth interest in the immovable property under Miss LeBeau's will, predeceased Miss LeBeau, and that his lapsed legacy was inherited by Mrs. Witty, although it does not appear that any of the judgments of possession rendered by the district court disposed of this interest. Because the heirs of the deceased legatees had not established to the satisfaction of the executor their right to inherit, those interests were initially deposited in the registry of the court.

<sup>3</sup> While Miss LeBeau's will bequeathed an interest in three tracts of immovable property, the executor found it necessary to petition the court for authority to sell the immovable property to pay debts of the succession, which was granted on February 28, 1994. Miss LeBeau's interest in the three tracts of land was stated as an 11% interest. The entire parcel was appraised as having a value of \$432,000.00, and the succession's interest was appraised as having an approximate value of \$47,520.00. The district court authorized the property to be sold for \$44,031.61, with the succession retaining the mineral rights. Thus, after this sale, the only rights to the immovable property left to be distributed to the heirs were the mineral rights.

petitions for possession and were placed in possession of their interests in the succession.

On March 14, 2006 Fielding Chadwick Phillips, Kay Phillips Elliott, Pamela Phillips Sulzer, James Garnet Genius, Albert Sidney Genius, Margaret Anita Genius, Laurie Genius Chapple and James Rodney Genius, as heirs of Shirley Genius Phillips, Garnet Genius, and Malcolm Genius, filed a separate action via their "Petition for Damages Arising from Testamentary Executor's Breach of Fiduciary Duty, Failure to Act as a Prudent Administrator and Breach of Duty to Close Succession," and named Mr. Witty as the defendant. In their petition for damages, these plaintiffs alleged that: Mr. Witty failed to file a final account in accordance with LSA-C.C.P. art 3332; a twenty-four year administration of the succession was unwarranted; Mr. Witty failed to timely contest the overpayment of inheritance and estate taxes; Mr. Witty profited as a shareholder or principal of H & W Exploration by means of the succession's contract for services with H & W Exploration; Mr. Witty failed to file an annual account for each and every year the succession was under administration; Mr. Witty kept the succession under administration in order to fund his executor's fee with the mineral royalty payments; the immovable property of the succession was wrongly sold in 1994 for less than market value; the immovable property should not have been sold and that, rather, they should have been placed in possession of the property; Mr. Witty breached his fiduciary duty to collect, preserve, and manage succession property in accordance with LSA-C.C.P. art. 3191; and, the imprudent administration and breach of fiduciary duties by Mr. Witty damaged the plaintiffs.

Mr. Witty filed an answer to the suit denying the allegations. In brief to the district court, Mr. Witty attributed many of the problems that had

arisen during the administration to the succession's first attorney, Sam D'Amico, who was replaced in 1993 (i.e., early distribution of legacy to Mrs. Witty, and the overpayment of taxes). Further, Mr. Witty asserted that the extended administration of the estate was owing in part to a 1984 claim by Amoco Production Company (Amoco) to recoup previously overpaid royalties amounting to \$240,284.44. Mr. Witty claimed that owing to his efforts, and those of his attorneys, he obtained the remission of \$118,000.00 in overpayments through a 1992 compromise with Amoco.

Thereafter, on January 26, 2007, Mr. Witty filed an exception of res judicata. Following a January 29, 2007 hearing, the district court granted the exception of res judicata "as to all accounts of the executor, Herbert R. Witty, in the record that have been duly homologated." The district court further ruled that "[a]s to these judgments, plaintiff[s]' suit is dismissed with prejudice." The executor was ordered to file "a last and final accounting for the period beginning January 2004 through March 5, 2005."

On February 26, 2007 in the succession proceeding, the executor filed an "Annual and Final Accounting ... for the Period of January 1, 2004 through December 31, 2005." On March 5, 2007 Fielding Chadwick Phillips, Kay Phillips Elliott, Pamela Phillips Sulzer, Albert Sidney Genius, Margaret Anita Genius, Laurie Genius Chapple and James Rodney Genius filed an "Opposition to 2004 and 2005 Annual and Final Accounting and Motion to Consolidate," asserting their rights as heirs of legatees Shirley Genius Phillips, Garnet Genius, and Malcolm Genius. The opposition alleged that the 2004 and 2005 "annual and final" account filed by the executor was not in compliance with the LSA-C.C.P. art. 3332 requirements for a *final* account in that there was no listing of *all* of the estate debts and legacies, or a breakdown of the proportionate shares of administrative

expenses to be borne by each respective legatee. The opposition further claimed that there was no full and complete account of the administration, and that it was erroneous for a *final* account to contain only *part* of the assets of a succession. The opposition further asserted that the executor failed to prove that he had paid his proportionate share of the total administrative expenses of the succession, as required by LSA-C.C. art. 1424. The opposition also sought consolidation of the succession proceeding with the separately-filed suit for damages against Mr. Witty.

On March 6, 2007 the trial court signed an order consolidating the two cases and setting the opposition for contradictory hearing. On May 15, 2007 the court signed a "Judgment Homologating Annual and Final Accounting."

The plaintiffs filed a motion for new trial as to the court's judgment sustaining Mr. Witty's *res judicata* exception, and after a July 17, 2007 hearing, the motion was denied. The plaintiffs then appealed the judgment. This court reversed, holding that prior trial court judgments homologating the executor's annual accounts did not foreclose the claim for damages sought by the plaintiff heirs. See Phillips v. Witty, 2008-0111 (La. App. 1 Cir. 6/6/08) (unpublished opinion), 986 So.2d 256 (table), 2008WL2332274, writ denied, 2008-1462 (La. 10/3/08), 992 So.2d 1017. The matter was remanded for further proceedings in accordance with the opinion of this court.

Upon remand, and following a trial held on April 14, 2009, the trial court rendered judgment in favor of "plaintiffs" in the amount of \$310,848.97, adopting the argument and post-trial memorandum of the plaintiffs as the reasons of the court for judgment.

Mr. Witty has appealed the judgment, and on appeal, asserts the following assignments of error:



I. The lower court erred in adopting plaintiffs/appellees['] theory that all of the royalty payments in the above succession during the administration of the succession in the amount of \$800,000 represented only 1/3 of the mineral interest in the property which was the property of the legatees.

II. The court "apparently" found that Herbert R. Witty, as executor, committed malfeasance as executor because the attorney for the estate, Sam D'Amico, put Mrs. Alta L. Witty in possession of her 2/3 legacy in the estate without putting the residual legatees in possession.

III. The court erred in adopting a "theory" proposed by plaintiffs/appellees without any proof and not consistent with the allegations in the original petition entitled: ["Petition for Damages Arising from Testamentary Executor's Breach of Fiduciary Duty, Failure to Act as a Prudent Administrator and Breach of Duty to Close Succession"].

IV. The District Court's decision was not based upon any evidence since none was presented by plaintiffs/appellees.

The plaintiffs/appellees have filed an answer to the appeal, asking this court to correct certain errors in the trial court judgment as to the names of the parties, to award legal interest on the judgment amount from the date of judicial demand, in accordance with LSA-C.C.P. art 1921, and to award costs.

On April 1, 2010 this court issued an order to the trial court, remanding this matter for the limited purpose of having the trial court sign a valid judgment, which specifically names the parties in favor of and against whom the May 15, 2009 judgment was rendered.<sup>4</sup> On April 19, 2010 the trial court signed an amended judgment that has been supplemented into the appellate record, and which provided that judgment was rendered in favor of Fielding Chadwick Phillips, Kay Phillips Elliott, Pamela Phillips Sulzer,

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<sup>4</sup> A judgment that fails to specifically order judgment in favor of or against anyone is defective. See **Jenkins v. Recovery Technology Investors**, 2002-1788, pp. 3-4 (La. App. 1 Cir. 6/27/03), 858 So.2d 598, 600; **Carter v. Williamson Eye Center**, 2001-2016, p. 2 (La. App. 1 Cir. 11/27/02), 837 So.2d 43, 44; **Rogers v. Custom Built Garage**, 2001-0356, p. 5 (La. App. 1 Cir. 3/28/02), 814 So.2d 693, 696; **Scott v. State**, 525 So.2d 689, 691 (La. App. 1 Cir. 1988), writ denied, 558 So.2d 1128 (La. 1990).

James Garnet Genius, Albert Sidney Genius, Margaret Anita Genius, Laurie Genius Chapple, and James Rodney Genius and against Herbert R. Witty.

## LAW AND ANALYSIS

### Propriety of Damage Award

In his assignments of error, Mr. Witty essentially contends that the plaintiffs/appellees failed to prove by a preponderance of the evidence that he did not bear his proportional share of the expenses and charges of the succession (as heir to his mother's share of Miss LeBeau's estate). Mr. Witty contends that the plaintiffs/appellees submitted no proof in support of their position.

However, at the April 14, 2009 trial of the matter, the entirety of both trial court records (**Succession of Nita Marie Lebeau**, Trial Court Probate No. 17,268, and **Phillips v. Witty**, Trial Court No. 39,853) were submitted into evidence, as well as Exhibits P-1 through P-5. Thus, Mr. Witty's assertion that the plaintiffs/appellees produced *no* proof is baseless, and the issue becomes whether the proof offered by the plaintiffs/appellees was sufficient to establish that Mr. Witty failed to bear his proportional share of the expenses and charges of the succession.

The plaintiffs/appellees' position has its basis in the judgment of possession rendered in favor of Mr. Witty's mother on May 24, 1982, sending Mrs. Witty into possession "of the legacy bequeathed to her by decedent of 2/3rds of the immovable property belonging to decedent." The plaintiffs/appellees contend that this judgment placed Mrs. Witty in possession of the immovable property and the mineral interests therein,

citing LSA-C.C. arts. 470,<sup>5</sup> 483,<sup>6</sup> and 488;<sup>7</sup> LSA-R.S. 31:5,<sup>8</sup> 31:7,<sup>9</sup> 31:15,<sup>10</sup> and 31:16.<sup>11</sup>

Exhibit P-1, a copy of a May 4, 1982<sup>12</sup> sale from Alta LeBeau Witty to H & W Exploration recorded in the Pointe Coupee Parish conveyance records, is indicative of Mrs. Witty's belief that she acquired ownership of the mineral rights along with the interest she received in the immovable via the 1982 judgment of possession. The property sold on May 4, 1982 was described in the act of sale, in pertinent part, as follows: "AN UNDIVIDED 2/3RDS INTEREST IN AND TO ALL OIL, GAS AND ANY AND ALL OTHER MINERAL INTERESTS IN AND TO THE FOLLOWING DESCRIBED PROPERTY: [property description omitted] Being the 2/3rds mineral interests in the above described properties bequeathed to

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<sup>5</sup> Louisiana Civil Code Article 470 provides: "Rights and actions that apply to immovable things are incorporeal immovables. Immovables of this kind are such as personal servitudes established on immovables, predial servitudes, mineral rights, and petitory or possessory actions."

<sup>6</sup> Louisiana Civil Code Article 483 provides: "In the absence of rights of other persons, the owner of a thing acquires the ownership of its natural and civil fruits."

<sup>7</sup> Louisiana Civil Code Article 488 provides in pertinent part: "Products derived from a thing as a result of diminution of its substance belong to the owner of that thing."

<sup>8</sup> Louisiana Revised Statute 31:5 provides: "Ownership of land includes all minerals occurring naturally in a solid state. Solid minerals are insusceptible of ownership apart from the land until reduced to possession."

<sup>9</sup> Louisiana Revised Statute 31:7 provides: "Minerals are reduced to possession when they are under physical control that permits delivery to another."

<sup>10</sup> Louisiana Revised Statute 31:15 provides: "A landowner may convey, reserve, or lease his right to explore and develop his land for production of minerals and to reduce them to possession."

<sup>11</sup> Louisiana Revised Statute 31:16 provides: "The basic mineral rights that may be created by a landowner are the mineral servitude, the mineral royalty, and the mineral lease. This enumeration does not exclude the creation of other mineral rights by a landowner. Mineral rights are real rights and are subject either to the prescription of nonuse for ten years or to special rules of law governing the term of their existence."

<sup>12</sup> Exhibit P-2 is a copy of an act of correction by the notary for the act of sale, Sam D'Amico, correcting the date stated in the act of sale from May 3, 1982 to May 4, 1982.

vendor by her sister, Nita LeBeau." The stated purchase price was \$733,904.00, and H & W Exploration's consent to the purchase was evidenced by the signature of its managing partner, Herbert R. Witty. The notary public for the act of sale was the first attorney for the Miss LeBeau's succession, Sam D'Amico.

Exhibit P-3, a copy of an April 15, 2005 sale from H & W Exploration to Herbert Witty and his wife, which was recorded in the Pointe Coupee Parish conveyance records, is also noteworthy. In that act of sale, H & W Exploration, represented by Herbert R. Witty, as its managing partner, and Nola Bench Witty, a general partner, sold the mineral interests at issue to Herbert Roland Witty and Nola Bench Witty, "for the consideration of a dissolution of the Partnership." Herbert Roland Witty and Nola Bench Witty signed the act of sale as both sellers and buyers.

In addition, all of the annual accountings filed in the succession record reflect that it was the position, as stated therein, of the executrix and the executor (Mrs. Witty and then, Mr. Witty) that Mrs. Witty had received her share of the immovable property *and* the mineral interests. In the nine annual accountings, filed by the succession's first attorney, Sam D'Amico, on behalf of Mrs. Witty and Mr. Witty, the estate's assets were listed and included legal descriptions of the undivided interests in three tracts of immovable property, followed by the listing as an asset the "[m]ineral interests in the above described properties." The listing of the immovable property and mineral interests therein was followed by this qualification: "LESS AND EXCEPTING the bequest of 2/3rds of the above described property heretofore delivered to the legatee, Alta LeBeau Witty as per

judgment dated May 24, 1982."<sup>13</sup> Similarly, in the first two annual accountings filed by the succession's current attorney, Mr. Parker, on behalf of Mr. Witty, the estate's assets were also listed and included legal descriptions of the undivided interests in the three tracts of immovable property, followed by the listing as an asset the "[m]ineral interests in the above described property." The listing of the immovable property and mineral interests therein was followed by this qualification: "LESS AND EXCEPTING the bequest of 2/3rds of the above described property heretofore delivered to the legatee, Alta LeBeau Witty as per judgment dated May 24, 1982."

Beginning in 1995, following the trial court's approval for sale of the immovable property interests in 1994, the listing of assets in the annual accountings did not list immovable property as an asset of the estate and listed only the "[m]ineral interest in the following property." The listing of the mineral interests as an asset was followed by the property descriptions for the three tracts of immovable property to which the mineral interests were attached, and then the annual accounts retained the following qualification: property and mineral interests therein was followed by this qualification: "LESS AND EXCEPTING the bequest of 2/3rds of the above described property heretofore delivered to the legatee, Alta LeBeau Witty as per judgment dated May 24, 1982."

Furthermore, correspondence and documents in the record from and related to Amoco indicated that Amoco was paying royalties both to the estate *and* to H & W Exploration.

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<sup>13</sup> Although we find it of no consequence, we note that in the first annual accounting filed by Mrs. Witty, this qualification was worded differently, as follows: "Decedent's bequest of 2/3rds of the above described immovable property to Alta LeBeau Witty, was delivered to said legatee as per judgment dated the 24th day of May, 1982."

Circumstances surrounding Mr. Witty's 2005 application to the trial court, seeking to be discharged as executor, are also significant. In connection with that pleading, Mr. Witty asked that one of the remaining heirs, Murray LeBeau, be placed in possession of his portion of the estate and that the interests of the remaining heirs (who had died during the succession administration and whose heirs had not yet established their rights of succession) be placed in the registry of the court. However, Mr. Witty did not find it necessary to ask the trial court to grant a judgment of possession in his favor as to the share of the estate's mineral interests that he inherited from his mother, Alta LeBeau Witty, presumably because he was cognizant that these interests were encompassed by the 1982 judgment of possession in favor of Mrs. Witty.<sup>14</sup>

Plaintiffs/appellees' position that Mrs. Witty had been placed in possession of her share of the estate's mineral interests, thus removing those assets from the estate of Miss LeBeau so that succession expenses were not deducted therefrom, is also bolstered by 1994 written reasons of the trial court relating to a dispute over attorney's fees charged by Sam D'Amico.<sup>15</sup> In those reasons, the trial court acknowledged, in its recitation of the factual and procedural history of the case, that the mineral interests associated with the portion of the estate's immovable property inherited by Mrs. Witty had been distributed to Mrs. Witty, were no longer under succession administration, and no longer subject to the deduction of succession

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<sup>14</sup> The estate's only remaining assets, at that time, were the mineral interests in the three tracts of immovable property previously sold during Mr. Witty's administration.

<sup>15</sup> We note that the original trial judge in this matter was Judge Ian W. Claiborne, and he rendered the 1994 judgment in favor of Sam D'Amico and assigned the referenced written reasons, dated February 11, 1994. Judge Claiborne was succeeded by the current trial judge in the matter, Judge J. Robin Free.

expenses and charges. The reasons of the trial court read, in pertinent part, as follows:

Mrs. Alta LeBeau ... sold her interests in the mineral rights which she inherited from her sister, Nita LeBeau, to a family partnership named H & W Exploration, of which Herbert Witty is the managing partner....

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Two-thirds of the immovable property, including mineral rights, has already been distributed to Alta LeBeau Witty, Mr. Witty's mother, by Judgment of Possession. Although that portion of the property is no longer in the Succession, the Estate of Alta LeBeau Witty and Mr. Witty as her sole heir and legatee is responsible for a pro-rata share of debts and charges of the Succession of Nita LeBeau, including Federal Estate Taxes, attorneys fees and costs of court.

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After all debts and charges are determined, Herbert R. Witty, as sole legatee and successor of Alta LeBeau Witty, will be required to pay a pro-rata share of these debts and taxes.

The judgment currently on appeal ruled in conformity with the 1994 trial court findings, and we conclude that the trial court records and the Pointe Coupee Parish conveyance records introduced as evidence in these consolidated cases constituted a sufficient basis for both the 1994 and the 2009 rulings. No contradictory evidence was submitted to the trial court by Mr. Witty.<sup>16</sup> Thus, we find no merit in Mr. Witty's assertions on appeal that

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<sup>16</sup> Although, in response to the plaintiffs/appellees' trial court discovery requests, Mr. Witty denied having had knowledge (prior to 1993) that his mother had been placed in possession of her portion of the LeBeau estate, the discovery responses were introduced into evidence by the plaintiffs/appellees rather than Mr. Witty. In particular, when requested to disclose why Mrs. Witty had been placed in possession of her succession interest by the 1982 judgment of possession while the other heirs' interests were left under administration for some twenty-four years, Mr. Witty answered: "I was not informed about the partial judgment of possession until I employed J. Peyton Parker, Jr., who informed me of this fact. It was the decision of my attorney, Sam D'Amico." (Mr. Parker enrolled as counsel of record in June of 1993.) We note that Mr. Witty's discovery response seemingly conflicts with the fact that he signed the 1983 act of sale, as the managing partner of H & W Exploration, whereby H & W Exploration acquired Mrs. Witty's mineral interests that she inherited from Nita LeBeau. We question whether Mr. Witty could have believed himself a *bona fide* purchaser of mineral interests from Mrs. Witty at a time when he claims he did not realize Mrs. Witty had yet acquired possession of the interests. Moreover, the failure of Mr. Witty to produce, at trial, royalty payment records, which should have been either in his possession or that of his attorney(s), to substantiate his contention that his mother's share of the estate's royalty proceeds were placed under the administration of the succession rather than paid directly to her and/or him as her successor, raises an unfavorable inference.

the plaintiffs/appellees' failed in their burden of proof.<sup>17</sup> Accordingly, the trial court judgment in favor of the plaintiffs/appellees, in the amount of \$310,848.97, is affirmed.<sup>18</sup>

#### Failure to Award Judicial Interest

In answer to this appeal, the plaintiffs/appellees contend the trial court failed to award judicial interest on the judgment amount from the date of judicial demand, in accordance with LSA-C.C. P. art 1921. Louisiana Code of Civil Procedure Article 1921 provides: "The court shall award interest in the judgment as prayed for or as provided by law." In their petition seeking damages, plaintiffs/appellees prayed for legal interest from the date of judicial demand until paid, along with an award of all costs. Therefore, the trial court judgment in their favor should have included legal interest and costs. Accordingly, we amend the judgment to award legal interest from the date of judicial demand, March 14, 2006, and all costs of these proceedings.

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Ordinarily, where a litigant fails to produce evidence or a witness available to him, and a reasonable explanation is not made for that course of action, there is a presumption that the production of such evidence or witness would have been adverse to his cause. **Wise v. Bossier Parish School Board**, 2002-1525, p. 12 (La. 6/27/03), 851 So.2d 1090, 1098.

<sup>17</sup> Nor do we find any merit in Mr. Witty's assertion that the trial court judgment is inconsistent with the allegations made by the plaintiffs/appellees in their petition for damages, since the plaintiffs/appellees asserted in their petition that Mr. Witty breached his fiduciary duty to collect, preserve, and manage succession property, imprudently administered the estate, and breached his fiduciary duties. These allegations were sufficient to put at issue the claim later specified in the opposition to the executor's final accounting that proportionate shares of administrative expenses were not borne by each respective legatee, particularly, Mr. Witty. Further, there is no indication that Mr. Witty objected in the trial court that the plaintiffs/appellees' arguments, subsequent to the filing of their petition, impermissibly expanded the scope of their pleadings.

<sup>18</sup> Based on the plaintiffs' arguments and post-trial memorandum, designated as the trial court's reasons for judgment, the judgment awarded in plaintiffs/appellees' favor is based on Mr. Witty's failure to contribute the proportional share of the succession expenses and charge out of his mother's share of the estate, which she was placed in possession of in 1982, and represents the value of the estate that the plaintiffs/appellees would have received from the estate had Mr. Witty assessed a proportional share of the estate's expenses and charges against Alta LeBeau Witty's portion of the estate, which he subsequently inherited. We have determined herein that the trial court did not err in finding that the plaintiffs/appellees were damaged by this act of mismanagement, imprudent administration, and/or breach of fiduciary duty on the part of Mr. Witty. Although Mr. Witty challenged in this appeal that such an award was warranted, he did not challenge the manner in which it was calculated. Therefore, we do not undertake an independent calculation of the damage amount awarded.



## CONCLUSION

For the reasons assigned, the May 15, 2009 judgment of the district court in favor of plaintiffs/appellees, Fielding Chadwick Phillips, Kay Phillips Elliott, Pamela Phillips Sulzer, James Garnet Genius, Albert Sidney Genius, Margaret Anita Genius, Laurie Genius Chapple, and James Rodney Genius, is hereby amended in part to award legal interest on the judgment amount from the date of judicial demand, March 14, 2006, until paid and to award costs in these consolidated cases; we affirm the judgment as amended. All costs of this appeal are to be borne by Herbert R. Witty.

**AMENDED; AFFIRMED AS AMENDED.**