ENTRY No. 09AA.201

DECISION WRITTEN BY MAGISTRATE EVA CAL

Motion to Remove Administrator filed by RICHARD SAM LEHMAN and LUCOM WORLD PEACE LIMITED in the testamentary estate proceedings of the late WILSON CHARLES LUCOM.

ORDER APPEALED FROM

FIRST SUPERIOR COURT FOR THE FIRST JUDICIAL CIRCUIT.

Panama, this twelfth (12th) day of August, two thousand and nine (2009)

HAVING SEEN:

In Order No. 203 of February 19, 2009, the Fifth Civil Circuit Court for the First Judicial Circuit of Panama decided to deny the Motion to Remove the Administrator filed by RICHARD SAM LEHMAN and LUCOM WORLD PEACE LIMITED in the testamentary estate proceedings of the late WILSON CHARLES LUCOM.

Inasmuch as the firm of TAPIA, LINARES Y ALFARO, the movers' judicial attorney-in-fact, filed an appeal before said order became final and timely supported its appeal, the court whose decision was being appealed admitted the appeal and forward the case file to this Superior Court.

It should be stated that Ms. Marta Lucía Cañola, acting in her own behalf and in her capacity as court-appointed administrator in the Testamentary Estate Proceedings of the late WILSON CHARLES LUCOM, filed a pleading opposing the appeal.

After the assignment of the appeal to the court and the curing of any procedural defects, it is fitting, therefore, to address the appeal that has been filed and to this effect we shall first make

a brief summary of the appeal filed, of the order being appealed from, and of the arguments raised, and then we shall issue our decision.

THE APPEAL FILED

The firm of TAPIA, LINARES Y ALFARO, acting in its capacity as judicial attorney-in-fact for RICHARD SAM LEHMAN in his capacity as executor designated in the will, and of LUCOM WORLD PEACE LIMITED, trustee of the FUNDACION WILSON C. LUCOM trust, filed the Motion to Remove the Administrator appointed by Order No. 1147 of November 21, 2007, Ms. Marta Lucía Cañola.

The Motion sets forth the following facts: that Order No. 229 of March 6, 2006, issued by the Fourth Circuit Judge, had designated Rubén Darío Carles as court-appointed administrator of the estate of the late WILSON CHARLES LUCOM, which appointment had been stayed as the result of the appeal filed against said order; that Order No. 1147 of November 21, 2007, issued by the Fifth Court, had designated Ms. Marta Lucía Cañola as court-appointed administrator of said estate; that under Article 552 of the Judicial Code, applicable by analogy, the administrator may be removed for ineptitude, embezzlement or abuse in the discharge of his or her office; that the fees set for the administrator have not been set following the legal procedure established in paragraph 4 of Article 1057 of the Judicial Code, in addition to the fact that said fees do not comport with the monthly income; that the administrator has arrogated to to herself functions beyond those of an administrator by having conducted and investigation into and rendered an opinion on alleged irregularities engaged in by Mr. RICHARD SAM LEHMAN in his capacity as executor; that Article 1610, nowadays Article 1584, of the Judicial Code establishes that administrators of estates shall have such powers as the law bestows upon executors, among them: "monitoring the execution of everything else ordered in the will and, if fair, upholding its

validity in and out of court" and "taking the necessary precautions for the conservation and custody of the property, with the intervention of the present heirs"; that the administrator has not performed those functions as she has not taken steps to defend the will but, to the contrary, has adopted a passive stance, before and after the Fifth Judge issued Order No. 716 of July 3, 2008, in the Motion to Disencumber Property filed by Hilda Piza Lucom, in which it was ordered to disencumber monies in foreign banks in the amounts of B/. 3,400,000.00 and B/. 370,000.00 belonging to the estate; that the administrator adopted a similar passive stance when the attempt was made to put B/. 4,000,000.00, also belonging to the estate, in the hands of third parties; that inasmuch as the legal representation of the estate has been held in abeyance and the administrator cannot discharge that function, her mission is to make known to the trier of fact that he may not proceed to issue an order to lift [*sic.*] or to admit acts against the estate, as these would be null and void; and that the appointment of an administrator is a jurisdictional act of the judge responsible for said appointment under the law, an appointment which he can make freely and in his absolute discretion, but that, under Article 1582 of the Judicial Code, administration of the estate in testamentary proceedings is incumbent upon the executor, and that, therefore, the appointment of Ms. Marta Lucía Cañola is in contravention of the aforesaid legal provision.

Said Motion was admitted and referred to the court under resolution of November 25, 2008. Ms. Marta Lucía Cañola answered the Motion in question and admitted that she had been appointed administrator but denied all of the charges made against her and described the strenuous efforts she was making as administrator.

THE ORDER UNDER APPEAL

In Order No. 203 of February 19, 2009, which is the resolution being appealed from, the Fifth Civil Circuit Judge for the First Judicial Circuit of Panama denied the removal of the

administrator of the estate of the late WILSON CHARLES LUCOM designated by the judge himself in Order No. 1147 of November 21, 2007.

In the whereas clauses of said order, the judge whose decision is being appealed from states, in the first place, that contrary to what the mover represents, his court has not, to date, set the fees of Ms. Marta Lucía Cañola in her office as administrator and that the mover is therefore lying.

He also states that, contrary to what the mover indicates, Ms. Marta Lucía Cañola has not overstepped her functions as administrator, as the report rendered by her resulted from the fact that it followed from numerous documents filed by Sam Lehman that he administered property belonging to the estate and that therefore she was indeed entitled to issue an opinion in connection therewith. He adds that it was the attorney-in-fact himself, Sam Lehman, who informed of the existence of a bank account in the United States which belonged to the estate, and that for this reason the court instructed the administrator to conduct investigations and, should this turn out to be true, to take the necessary steps to bring him [*sic.*] into the process. He concludes that the administrator's activities are in keeping with her functions.

With respect to the alleged passive attitude of the administrator, the lower court judge defends it by pointing out that this does not show ineptitude on the part of the administrator as she was not obligated to oppose the motion to disencumber property that was filed, and that ineptitude cannot be determined from an isolated fact but rather from a series of actions or omissions constitution a pattern of behavior that may be termed inept, and that this is not the case with Ms. Cañola who, to the contrary, has done a huge amount of work inventorying, conserving, and defending the assets of the estate, which translates into an active work of administration and

defense of said assets before administrative and judicial authorities, as reflected in the reports that have been filed and are known to the parties.

This being so, the judge whose decision is under appeal states that he can find no grounds to remove the administrator and therefore denies the motion.

ARGUMENTS BY THE PARTIES

The firm of TAPIA, LINARES Y ALFARO, judicial attorney-in-fact for RICHARD SAM LEHMAN and LUCOM WORLD PEACE LIMITED, trustee of the FUNDACION WILSON C. LUM trust, argues that the testator intended most of the corpus of the estate for the latter, for the benefit of poor children in Panama.

The aforementioned firm goes on to argue that the grounds for the present motion are the inept and abusive acts the provisional court-appointed administrator, Marta Lucía Ceñola, has engaged in, and that it had so been set forth in the motion with facts supported by documents and proceedings in the estate file, but that notwithstanding this, the order under appeal ruled that that the administrator had not overstepped her functions.

As regards ineptitude, in view of the passive stance adopted by the administrator with respect to the [motion to] disencumber property filed by Hilda Piza Blondet, the appellant firm states that the judge whose order is being appealed from found that there was not ineptitude but, that, rather, the administrator had made strenuous efforts; however, it [the firm] dissents from said finding as the judge ignored the evidentiary force of the proceedings and the omissions.

The attorney-in-fact states in its appeal that there exists a serious problem with the administration of the property and the execution of the will as set forth in the testament which is indeed being challenged by a motion to declare it null and void filed by Hilda Piza Blondet in spite of the fact that she had been appointed executrix by her husband.

It goes on to say that while the designation, appointment, and installation of the designated testamentary executors, RICHARD LEHMAN,CHRISTOPHER RUDY, and HILDA PIZA BLONDET, was being discussed, an individual of the moral standing, good reputation, and experience of Professor Rubén Darío Carles was designated as administrator, but that Executrix HILDA PIZA BLONDET has not allowed him to discharge that office and this has led to the designation of Marta Lucía Cañola to administer and conserve the corpus of the estate until such a time as it is possible to dispose of it in the manner contemplated by the testator.

The appellant attorney-in-fact continues saying that in view of the evidence in the case file, it is not possible to ignore that Cañola's administration has been lacking in positive results and it has rather unfolded in troubled fashion and not for the benefit of the interest pursued, not only because of her ineptitude but also because she has arrogated functions and powers that are not incumbent upon her.

The appellant firm adds that the very reports submitted by the administrator reveal their partial nature, as they focus only on such aspects as she deems relevant, but that Executrix Hilda Piza Blondet herself, in view of the lack of a full and detailed report, is asking that she render an accounting of the status of the bank accounts.

The appellant firm also says that the administrator has arrogated functions that are not incumbent upon her and that the best of example of this is the investigation of the designated executor she carried out under the pretext of complying with a court order, while an investigation such as the one that was carried out, involving property that is in a jurisdiction other than Panama's, has to be conducted through legally established channels and no through the assigning of the administrator and the use of private firms.

The attorney-in-fact filing the appeal notes that such activities of the administrator tend to prevent the executor of the estate from discharging his obligations or from being reinstalled in his functions, and are evidence of the administrator's partiality in favor of Mrs. Hilda Piza Blondet, who has kept the executor from performing his functions and who had also been designated as executrix by the testator but is now seeking to have the will voided.

With respect to the monthly reports, the appellant states that they fail to include a full report on all of the property bequeathed by the testator, a fact which in and of itself constitutes ineptitude, in addition to the fact that the Judge himself acknowledged in Order No. 203 of February 19, 2009, that he has not even set the administrator's fees, something which is inconceivable.

The appellant argues that the administrator has applied for authorization to sell an apartment in Punta Paitilla, of high monetary and social value, alleging --but not establishing-- that it is in a deteriorated state, and asks how could the apartment have come to be in such a state is she has been administering [it] since a year after estate proceedings were opened, which proves ineptitude in administering and conserving the property of the estate and also shows her liquidating capacity, for she has also sold other properties, such as cars she has described as junk, something which does not comport with or is included within her functions.

The appellant firm asks that the evidence offered in support of the appeal be analyzed and reviewed in order to ascertain that, although the administrator alleges she received the Hacienda Santa Mónica in poor conditions, she has also hired [personnel] and purchased horses with resulting problems and losses for the farm because, as she herself points out, the horses were not suitable for what was required and are sick, and this is a good example of the ineptitude the lower court overlooked in concluding that it may not be deemed that the administrator was

remiss and passive in the defense of the interests of Valores Globales, S.A., in the motion to disencumber property filed by HILDA PIZA BLONDET, the shares of which [corporation] should be considered as assets of the estate and which only Executor Richard Sam Lehman is defending for the benefit of the estate.

The attorney-in-fact concludes its appeal by pointing out that there exist numerous situations or facts which show the appeal to have grounds and that Administrator Marta Lucía Cañola should be removed and asks, therefore, that the appeal be granted.

On the other hand, Ms. Marta Lucía Cañola, in her extensive pleading opposing the appeal, begins by recounting the events that have transpired in the estate proceedings and says that Richard Lehman was declared to be the sole executor in the Order Declaring Heirs, despite the fact that testator had appointed three executors; that said order had been appealed from and rendered without effect but, that despite that, Lehman continued to act and incorrectly used estate funds in Florida, for which he must answer, and narrates acts carried out by Lehman which run contrary to the orders of the Panama court; she claims that Lehman has unduly spent in excess of B/. 600,000.00 from the accounts of the decedent in expenses which did not benefit the estate. She adds that credible evidence showed that Lehman is a greedy opportunist who seeks personal advantages and control of the assets of both the domiciliary and the ancillary estate in the United States and that therefore the expenses incurred in connection with the objections to Lehman's expenses are justified and proper. She states that Lehman is not entitled to any fees from the estate. Opposing counsel also brings up the resolution issued by a Florida judge in connection with the LUCOM estate, declaring Richard S. Lehman's appointment as ancillary Personal Representative of the Estate in Florida to be null and void, and ordering him to pay damages to the estate in excess of B/. 1,000,000.00, plus interest, and states that therefore he lacks moral

standing to accuse her. She advises that she has been constantly submitting reports to the court. She next lists all of the instances where she has had to intervene to prevent other persons from being adjudicated beaches belonging to HACIENDA SANTA MONICA which, in turned, is owned by the estate. She also alleges that she has had to defend sixteen (16) hectares occupied by Buenaventura Development, which refuses to turn over occupied land belonging to the estate, as well as labor cases which, due to bad advice by Mr. Crosbie, were not closed before the decedent's death and had to be attended to as the firm was in danger of being attached. She points out that the foregoing attests before the Court to the hard work she has had to contend with in administering the estate, in addition to attending to cases of cattle rustling, equine fever affecting the horses, maintenance of fences, claims by neighbors, not to mention her daily [*sic.*] trips to the farm three to five times a week to take care of it and attend to matters. She also alleges that cattle ranching is another area which was neglected for a long time, and this explains why there are problems with the animals to date, and that the lands were not made ready. With respect to apartment in Punta Paitilla, she states that at one time it was requested for the benefit of the estate, taking advantage of the fact that the national economy was experiencing a real estate boom, but that it has gone down. As regards fees, she indicates that the court has already set her fees as established by the rules, and with respect to the performance bond, that there is a petition pending before the court and that she will abide by whatever the court should decide.

Counsel opposing the appeal concludes by stating that the appellant is attempting to surprise the Court by pointing to the mote in somebody else's eye and not the beam in its client's, as may be seen in the judgment against its client from the Florida Judge. She states that by dint of all her acts, the care she has displayed, and the maintenance she has performed, she has been able to increase the value of the real estate, and that while Mr. Lehman speaks of 25 –

50 million, the assessed value of the farms at this time is much higher than those amounts. She says that the cars are indeed junk, as evidenced by the fact that they have not been moved for ten years; that is the case of the RR, which she has offered on the internet without getting any response, as it qualifies as an antique, and this has been stated by the mechanics who have inspected it, as well as the other cars.

The appellant administrator concludes by asking the court, with all due respect, to uphold the appealed order and to order the mover of the motion to pay punitive costs.

OPINION OF THE COURT

It should be made clear at the outset that although few resolutions are appealable in estate proceedings and that the order ruling on a motion to remove an administrator is not expressly established as an appealable resolution, this Superior Court considered that it should hear the present appeal in view of the fact that the order declaring heirs is appealable, and an executor, which in the ultimate analysis is the same thing as an administrator, was instituted in said declaration of heirs. In this regard, whatever is decided on in connection with the motion also affects the order declaring heirs and therefore, it must also be appealable.

In Order No. 203 of February 19, 2009, embodying the resolution under appeal, the Fifth Civil Circuit Court for the First Judicial Circuit of Panama --which is hearing the testamentary estate proceedings of the late WILSON CHARLES LUCOM a result of the disqualification of the Fourth Civil Circuit Judge-- decided to deny the Motion to Remove the Administrator designated by it in Order No. 1147 of November 21, 2007.

It is the opinion of this Superior Court that such decision must be revoked and, in its stead, the removal of the designated administrator, Marta Lucía Cañola, must be granted, albeit without considering the charges levies against her, *i.e.*, without weighing whether or not there

was any ineptitude on her part or whether or not she arrogated to herself functions that were not incumbent upon her as the administrator. We shall also dispense with Ms. Marta Lucía Cañola's defense, *i.e.*, we will not take into account the strenuous efforts which, according to her and to the Judge hearing the case, Ms. Marta Lucía Cañola has been making. It should also be made clear that we will pay no attention to Ms. Marta Lucía Cañola's comments about Mr. Richard S. Lehman, for what is at issue here is not that gentleman's behavior.

Let us see, then, why it is proper to revoke the appealed order.

This Superior Court knows that Order No. 1025 of July 15, 2006, from the Fourth Civil Circuit Court of the First Judicial Circuit of Panama declared opened the testamentary estate proceedings of the late WILSON CHARLES LUCOM and appointed RICHARD SAM LEHMAN as executor; Mr. Lehman appeared in the will as one of the executors. Said order was appealed from and the appeal was admitted, execution of the order being stayed pending the appeal. And, indeed, the first aspect challenged in the appeal has to do with the designation of the executor, an office which the judge under appeal considered was vested exclusively in Mr. Richard Sam Lehman, while Messrs. Richard Lehman and Christopher Rudy and Mrs. Hilda Piza Lucom had been designated as executors in the will, a conclusion at which this Superior Court arrived in its resolution of May 4, 2007, issued as a result of the appeal filed against Order No. 1025 of July, 2006. This Superior Court also knows that Order No. 229-2007 of March 6, 2007, from the Fourth Civil Circuit Court ruled to designate RUBEN CARLES as court-appointed administrator in the Testate Estate Proceedings of the late WILSON CHARLES LUCOM and ordered him to appear before the court to be installed in office. Said order was likewise appealed from and the appeal was admitted, without indicating whether the order was stayed or not pending the appeal.

It is readily evident from the foregoing that when the Fifth Circuit Judge took over the present Testamentary Estate Proceedings and when he issued Order No. 1147 of November 21, 2007, designating Ms. Marta Lucía Cañola as administrator of the Testamentary Estate of the late WILSON CHARLES LUCOM, there already existed a resolution designating RICHARD SAM LEHMAN as executor, and another resolution which had appointed RUBEN DARIO CARLOS as administrator, and that both resolutions were under appeal.

Pursuant to the provisions of Article 854 of the Civil Code, a testator may appoint one or more executors who may be heirs or parties not related to the estate, and pursuant to paragraph 4 of Article 864, *ibidem*, if the testator has not established the powers of the executor, the latter has among his powers the power "to take the necessary precautions for the conservation and custody of the property ..." In other words, the executor is an administrator of the estate designated by the testator in his will. This is confirmed by the definition in the Dictionary of the Royal Spanish Academy, twenty-first edition, which states that an executor is the "Person charged by the testator or the Judge with complying with the decedent's last will, having custody of his property and disposing of it as appropriate in accordance with the estate." The foregoing is also ratified by Article 1582 of the Judicial Code, which provides that "In testamentary estates, the administration of the property of the estate is incumbent upon the executor and, in his absence, upon the heirs, and in intestate estates, [it is incumbent] upon the heirs as they present themselves." In turn, Article 1584, *ibidem*, establishes that "Administrators of estates shall have the powers bestowed by law upon executors." This means, therefore, that both the administrator of an estate and the executor of an estate are the parties in charge of administering the property of the estate, but that the executor is designated by the decedent in his will and, therefore, is present only in testamentary estates, while the administrator is designated by the judge and, in

principle, is present in intestate estates when the heirs fail to come to an agreement, as provided in Article 1583 of the Judicial Code.

Albeit Article 1583 of the Judicial Code empowers the judge to appoint an administrator when the heirs fail to come to an agreement, this statute, in the opinion of this Superior Court, is contemplated only in the case of intestate estates, and in case that the heirs should not have come to an agreement to designate an administrator for the estate.

In testamentary estates, paragraph 4 of Article 1588 of the Judicial Code contemplates, in the absence of an executor, a motion by the declared heirs to ask the judge to provide for the administration of the estates, but this is only, we say it again, in the absence of an executor.

Inasmuch as we are in the presence of a testamentary estate in which the decedent designated one or several executors, depending on the interpretation given to the will, as the appellant firm points out, the designation of Ms. Marta Lucía Cañola violates Article 1582 of the Judicial Code which provides that the administration of the estate in testamentary estates is incumbent upon the executor. Consequently, the judge under appeal could not designate an administrator for the estate and, therefore, it is proper to remove the designated administrator but solely on those grounds.

And this is so because the will of the testator is law as against the estate, *i.e.*, the need to respect the will or the intent of the decedent is the supreme law in estate matters, a principle enshrined in Article 707 of the Civil Code. If the will of the testator was to have an executor, the Judge under appeal must respect the will of the testator and, therefore, [respect] the designation of the executor; only in the event that said executor could not discharge his office, could he, at the request of the heirs, designate an administrator.

Inasmuch as in the present Testamentary Estate Proceedings of WILSON CHARLES LUCOM he had designated one or more executors, the Judge under appeal could not agree to designate an administrator other than the executor or executors, as this violates the provisions of Article 1582 of the Judicial Code; consequently, the proper and lawful thing to do is to revoke the appealed order and, in its stead, remove the administrator designated, without ordering costs to be paid, under the provisions of Article 1077 of the Judicial Code.

Now, then, it is true that in Order No. 1025 of July 5, 2006, the Judge under appeal appointed RICHARD SAM LEHMAN as executor and that said order was appealed from and the appeal was admitted but the order was stayed pending the appeal and that, under paragraph 3 of Article 1138 of the Judicial Code execution of that resolution is stayed. And it is also true that, under said paragraph 3, the lower court judge may continue with the proceedings, but only with respect to that which is not necessarily dependent upon the resolution under appeal. Thus, if what is appealed is precisely the designation of the executor, the lower court judge can do nothing related to the matter of the executor lest he usurp a competence that is not his and violate paragraph 3 of Article 1138 of the Judicial Code.

It also true, however, that it seems senseless to maintain an estate without executor and administrator pending resolution of the appeal and even of a motion to vacate, because in this case the appeal was decided on May 4, 2007, but notice was given of a motion to vacate and, pursuant to Article 1172 of the Judicial Code, this Court's decision is likewise stayed.

The foregoing notwithstanding, this is no reason to allow the judge, in violation of the will of the testator, to designate another administrator and, consequently, to violate Article 1582 of the Judicial Code, in addition to the fact that paragraph 3 of Article 1138 of the Judicial Code establishes that when an appeal is admitted and the order is stayed, although he [the judge]

retains competence in the case, he does so only with respect to that which is not necessarily dependent upon the resolution under appeal. In other words, if what is at issue in the resolution under appeal is the designation of the executor, the court under appeal can hardly make a decision in connection with that issue. The sensible thing in this case would have been for the legatees appealing Order No. 1025 of July 5, 2006, to have gone before the court under appeal or, in fact, before the higher court, to ask that the appeal of said Order No. 1025 be admitted without staying the proceedings and not with the effect of staying them, as it was admitted. For if the judge under appeal admitted the appeal with a stay of the proceedings, the appellant, on the basis of paragraph 2, Article 1139 of the Judicial Code, could have asked that it be admitted without staying the proceedings, so as to avoid the estate being left without an executor pending a decision on the appeal.

Therefore, on the basis of the foregoing, the **FIRST SUPERIOR COURT OF THE FIRST JUDICIAL CIRCUIT**, administering justice in the name of the Republic and by the authority vested in it by law, **REVOKES** Order No. 203 of February 19, 2009, issued by the Fifth Civil Circuit Judge of the First Judicial Circuit of Panama in the Motion to Remove the Administrator filed by RICHARD SAM LEHMAN and LUCOM WORLD PEACE LIMITED in the Testamentary Estate Proceedings of the late WILSON CHARLES LUCOM and, in its stead, **REMOVES** Ms. Marta Lucía Cañola as administrator of the aforesaid Testamentary Estate inasmuch as her appointment violated the provisions of Article 1582 of the Judicial Code as well as of paragraph 3 of Article 1138 of the Judicial Code.

LET IT BE NOTIFIED.

Judge EVA CAL **Judge MIGUEL A. ESPINO G.**

JOSE JUAN KARAMAÑITES
Clerk of the Court