

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 2199

EDNA R. HORRELL

VERSUS

GERARDO R. BARRIOS AND LISA C. MATTHEWS

*Qly*

**Judgment Rendered:** JUL 21 2010

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Appealed from the  
Twenty-Second Judicial District Court  
In and for the Parish of St. Tammany  
State of Louisiana  
Suit Number 2005-12893

Honorable Raymond S. Childress, Presiding

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Walter J. Horrell  
Covington, LA

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Gerardo R. Barrios and Lisa C.  
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BEFORE: CARTER, C.J., GUIDRY, PETTIGREW, MCDONALD, AND  
WELCH, JJ.

*Pettigrew, J concurs*  
*McDonald, J. dissents*  
*Carter, CJ dissents*  
*Welch, J concurs without reasons by CJ*

**GUIDRY, J.**

Plaintiff, Edna R. Horrell, appeals from a judgment of the St. Tammany Parish district court sustaining exceptions raising the objections of lack of subject matter jurisdiction and lis pendens filed by defendants, Gerardo Barrios and Lisa Matthews. For the reasons that follow, we reverse and remand.

**FACTS AND PROCEDURAL HISTORY**

Edward A. Horrell, Sr. died on July 9, 1993, survived by his wife, Clare, and five adult children. Edna Horrell is the wife of Walter Horrell, Edward's oldest son. The succession of Edward Horrell, Sr. has been pending in the civil district court for the parish of Orleans since 1993 and has resulted in substantial litigation between the heirs and the provisional administratrix, Lisa Matthews. See Matthews v. Horrell, 06-1973 (La. App. 1st Cir. 11/7/07), 977 So. 2d 62; Horrell v. Matthews, 06-1838 (La. App. 1st Cir. 8/15/07) (unpublished opinion); Horrell v. Horrell, 99-1093 (La. App. 1st Cir. 10/6/00), 808 So. 2d 363, writ denied, 01-2546 (12/7/01), 803 So. 2d 971; Succession of Horrell, 95-1598 (La. App. 4th Cir. 9/11/96), 680 So. 2d 725, writ denied, 96-2841 (La. 1/31/97), 687 So. 2d 403.

The instant case arises from a dispute regarding certain movable and immovable property located in Covington, Louisiana. At the time of his death, Edward Horrell owned a substantial amount of separate property, including a tract located on 19<sup>th</sup> Street in Covington. Walter and Edna Horrell have occupied the residence on this tract since before Edward Horrell's death.

In 1998, Ms. Matthews filed a detailed descriptive list wherein she listed the Covington property as an asset of Edward Horrell's succession. Thereafter, following the St. Tammany Parish district court's invalidation of a donation of the Covington property to Walter Horrell, which invalidation was affirmed by this court on appeal, Ms. Matthews amended the descriptive list to claim the household furnishings located in the house and outbuildings on the Covington property as

disputed assets of Edward Horrell's succession. Clare Horrell and the other heirs to the succession filed a motion to traverse the detailed descriptive list in 2002. Following a hearing on the traversal, the civil district court for the parish of Orleans issued a judgment on November 6, 2002, finding, in particular, that "[t]here are household furnishings situated in Covington, Louisiana, at the current residence of Walter J. Horrell that belong to the succession, including, but not limited to, a cabinet, sofa, and [four] chairs" and ordering Ms. Matthews to establish the 1993 value of "the household furnishings situated in Covington, Louisiana that were inherited by [Edward] Horrell and which were owned by [him] at the time of his death including, but not limited to, a cabinet, sofa, and [four] chairs" with the "value thereof ... to be listed as separate property on an amended descriptive list."

Thereafter, Gerardo Barrios was appointed by the Orleans Parish district court as the notary public charged with the duty of conducting an inventory of the movable property located in Covington. Due to Walter and Edna Horrell's resistance to allowing the inventory, Ms. Matthews filed a motion to compel inventory and appraisal, which was granted. However, despite the district court's order, Mr. Barrios was still unable to conduct an inventory of the movables at the Covington property.

On June 20, 2005, Edna Horrell filed a pro se action for damages, declaratory judgment, and a permanent injunction in St. Tammany Parish district court, naming Ms. Matthews and Mr. Barrios as defendants, and asserting that they were violating her rights by inventorying all movables at the Covington property, which included movables that she, and not the succession, owned. In her petition, Mrs. Horrell sought a judgment decreeing that she is the owner of all the corporeal movables located in her home or on the premises on which her home is located, awarding reasonable compensation for damages caused by the defendants, and

enjoining defendants from harassing her or disturbing her peaceable possession of her corporeal movables in any way, making any claim of ownership of the corporeal movables, or examining, inventorying, or appraising her corporeal movables.

Thereafter, the defendants filed exceptions raising the objections of improper venue, lack of subject matter jurisdiction, res judicata, lis pendens, vagueness and ambiguity, nonconformity with La. C.C.P. art. 891, failure to join a party, and no cause of action. Mrs. Horrell subsequently filed a supplemental and amending petition, acknowledging that she had forbidden Mr. Barrios from entering onto the Covington property and asserting that Mr. Barrios trespassed on her property and that the actions of the defendants are disturbing her peaceable possession of the immovable property at issue. Thereafter, the defendants reurged their exceptions.

Because Mr. Barrios had still been unable to obtain an inventory of the movables at the Covington property, Ms. Matthews filed a motion for contempt. Following a hearing on the motion, the Orleans Parish district court signed a judgment granting the motion and ordering that the inventory and appraisal of the movable property of Edward Horrell located in Covington take place on July 18, 2007. In accordance with the court's orders, Mr. Barrios and two appraisers took an inventory of all of the movable property located at the Covington property, and Mr. Barrios thereafter filed a procès verbal of the inventory.

In March 2009, Ms. Matthews filed a third amended descriptive list, including the items inventoried in Covington. On May 26, 2009, Mrs. Horrell filed a second supplemental and amending petition, asserting that Mr. Barrios had invaded her home and photographed and touched movables belonging to her.

On June 4, 2009, the St. Tammany Parish district court held a hearing on the exceptions previously asserted by the defendants. In a judgment signed on July 20,

2009, the district court sustained the exceptions raising the objections of lack of subject matter jurisdiction and *lis pendens* and dismissed Mrs. Horrell's action. Mrs. Horrell now appeals from this judgment.

## DISCUSSION

### Subject Matter Jurisdiction

In filing their exception raising the objection of lack of subject matter jurisdiction, the defendants asserted that because Mrs. Horrell's claims relate to property claimed by the succession of Edward Horrell, subject matter jurisdiction lies in Orleans Parish where the succession proceeding is pending. In support of their argument, the defendants relied on the venue provision found in La. C.C.P. art. 2811, which provides, in part, that "[a] proceeding to open a succession shall be brought in the district court of the parish where the deceased was domiciled at the time of his death." According to La. C.C.P. art. 44(B), the venue provided for in Article 2811 may not be waived, and non-waivable jurisdiction equates to jurisdiction *rationae materie*, or subject matter jurisdiction. Succession of Guitar, 197 So. 2d 921, 924 (La. App. 4th Cir. 1967); see also Interdiction of Watts, 04-2166, p. 4 (La. App. 1st Cir. 5/6/05), 903 So. 2d 552, 554.

Additionally, La. C.C.P. art. 81 provides:

When a succession has been opened judicially, until rendition of judgment of possession, the following actions shall be brought in the court in which the succession proceeding is pending:

- (1) A personal action by a creditor of the deceased; but an action brought against the deceased prior to his death may be prosecuted against his succession representative in the court in which it was brought;
- (2) An action to partition the succession;
- (3) An action to annul the testament of the deceased; and
- (4) An action to assert a right to the succession of the deceased, either under his testament or by effect of law.

The defendants assert that Mrs. Horrell's claims asserting her ownership over movables claimed by the succession of Edward Horrell comes within Article 81(4), and therefore, because Edward Horrell's succession was properly opened in Orleans Parish, and such venue is nonwaivable, subject matter jurisdiction over Mrs. Horrell's claims can only lie in Orleans Parish.

However, from our review of the record, we do not find that Mrs. Horrell's claims come within Article 81(4), or any of the other exclusive provisions outlined above. Contrary to the defendants' assertion, Mrs. Horrell is asserting a claim for damages, declaratory judgment, and a permanent injunction regarding her ownership of the movables and possession of the residence located at the Covington property. She is not asserting a right to the succession of Edward Horrell under his testament or by effect of law, i.e. as an heir.

Further, La. C.C.P. arts. 3135 and 3137 provide that a procès verbal of a public inventory or a descriptive list shall be accepted as prima facie proof of all matters shown therein, and that an interested person at any time may traverse the procès verbal or descriptive list by contradictory motion.<sup>1</sup> However, neither of these articles indicate that traversal is the exclusive method by which someone may assert ownership of property claimed by a succession.

Therefore, finding that the jurisdictional venue provisions regarding succession proceedings do not apply to Mrs. Horrell's claims, and there is nothing to suggest that the St. Tammany Parish district court did not have the legal power and authority to hear and determine Mrs. Horrell's claims for damages, declaratory judgment, and permanent injunction arising from her purported ownership and

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<sup>1</sup> See Succession of Willis v. Martin, 228 So. 2d 732 (La. App. 3rd Cir. 1969), writ refused, 230 So. 2d 93 (La. 1970) (wherein a party claiming ownership of property included in the detailed descriptive list filed a traversal to the descriptive list).

possession of movables and immovables where she resides, we find that the court erred in sustaining the defendants' exception as to subject matter jurisdiction.<sup>2</sup>

### **Lis Pendens**

Louisiana Code of Civil Procedure article 531 states that when two or more suits are pending in a Louisiana court or courts on the same transaction or occurrence, between the same parties in the same capacities, the defendant may have all but the first suit dismissed by excepting thereto as provided in Article 925. The test for deciding whether an exception raising the objection of lis pendens should be granted is to inquire whether a final judgment in the first suit would be res judicata in the subsequently filed suit. United General Title Insurance Co. v Casey Title, LTD., 01-600, p. 8 (La. App. 5th Cir. 10/30/01), 800 So. 2d 1061, 1065. The exception of lis pendens has the same requirements as the exception of res judicata, and is properly granted when the suits involve the same transaction and occurrence between the same parties in the same capacities. United General Title Insurance Co., 01-600 at p. 8, 800 So. 2d at 1065.

In the instant case, there is no dispute that there are two actions pending in two separate courts wherein the movables and immovable property located at the Covington property are at issue. However, the defendants have failed to establish that these suits involve the same transaction and occurrence between the same parties in the same capacities.

The "identity of the parties" pre-requisite for res judicata does not mean that the parties must be the same physical or material parties, so long as they appear in the same quality or capacity. See Jensen Construction Co. v. Department of Transportation and Development, 542 So. 2d 168, 171 (La. App. 1st Cir.), writ denied, 544 So. 2d 408 (La. 1989). Identity of parties is satisfied when a privy of

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<sup>2</sup> We do not address whether venue is appropriate in St. Tammany Parish, as the district court did not rule on the defendants' exception raising the objection of improper venue and neither party has assigned this as error.

one of the parties is involved. In connection with the doctrine of res judicata, a “privy” is one who, after the commencement of the action, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, purchase, or assignment. Five N Company, L.L.C. v. Stewart, 02-0181, p. 16 (La. App. 1st Cir. 7/2/03), 850 So. 2d 51, 61.

Mrs. Horrell filed her action seeking damages, declaratory judgment and a permanent injunction based on her alleged ownership and possession of movables and immovables located at the Covington property. Mrs. Horrell is not a party to the succession proceeding pending in Orleans Parish. Further, though Mrs. Horrell’s husband, Walter, is a party to the succession proceeding, he is not a party to Mrs. Horrell’s action, and there is no evidence that they appear in the same quality or capacity, or that he is a privy of Mrs. Horrell. As such, we find that that trial court erred in sustaining the defendants’ exception raising the objection of lis pendens.<sup>3</sup>

### **Recusal**

Mrs. Horrell finally asserts as error Judge Fendlason’s recusal from the matter. During a hearing on May 17, 2006, Judge Fendlason indicated that he was related to Mrs. Horrell, in that she was the granddaughter of his great uncle. Thereafter, the defendants’ filed a motion to recuse, but in an order signed on June 12, 2006, Judge Fendlason self-recused in accordance with La. C.C.P. art. 152 based on his relationship to one of the parties. The matter was subsequently reallocated to Judge Childress. However, Mrs. Horrell did not seek supervisory review of the district court’s order of recusal, and Judge Fendlason has since retired. Accordingly, we find that the issue of recusal is moot. See James v. Gordon, 95-1472, p. 4 (La. App. 3rd Cir. 12/4/96), 690 So. 2d 787, 790, writ

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<sup>3</sup> Having found that the defendants have failed to establish that these suits involve the same transaction and occurrence between the same parties in the same capacities, we pretermit discussion of the defendants’ argument regarding res judicata.



denied, 97-0756 (La. 5/1/97), 693 So. 2d 738; see also D.R.S. v. L.E.K., 09-1274 (La. App. 3rd Cir. 3/10/00), \_\_\_ So. 3d \_\_\_.

### **CONCLUSION**

For the foregoing reasons, we reverse the district court's judgment and remand this matter for further proceedings. All costs of this appeal are to be borne equally by Lisa Matthews and Gerardo Barrios.

**REVERSED AND REMANDED.**