

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2018 CA 0034

PETER J. ABADIE, JR.

VERSUS

ANN RAU ABADIE

CONSOLIDATED WITH

2018 CA 0035

ANN RAU

VERSUS

PETER ABADIE, JR.

Judgment rendered OCT 25 2018

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On Appeal from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
No. 2014-12804 c/w 2014-12821

The Honorable Dawn Amacker, Judge Presiding

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BEFORE: McDONALD, CRAIN, AND HOLDRIDGE, JJ.

W.J.C.
by (pt)

Crain J., concurs

HOLDRIDGE, J.

In this appeal, the plaintiff ex-husband appeals from a trial court judgment denying his claims to be reimbursed separate funds he had advanced to his defendant ex-wife during their marriage, which was governed by a separate property regime, and to be reimbursed his separate funds used to pay expenses on the matrimonial domicile, which was his ex-wife's separate property. Based on a careful review of the record before us, we affirm.

FACTS AND PROCEDURAL HISTORY

Before their marriage in 1993, Peter J. Abadie, Jr. ("Peter") and Ann Rau ("Ann") signed a matrimonial agreement to establish a separate property regime. Over twenty years later, on June 19, 2014, Peter filed a petition for damages naming Ann as a defendant, and, on the same day, Ann filed a petition for divorce.¹ Peter sought to revoke a premarital donation of antiques to Ann based upon her alleged ingratitude stemming from her adulterous affair. He also sought the repayment of \$507,950.00² that he allegedly loaned Ann from his separate funds from July 29, 1996, through September 2, 2011, for her personal use. Lastly, he sought reimbursement of approximately \$500,000.00³ of his separate funds used

¹ Peter filed his damages suit in a general jurisdiction division of the Twenty-Second Judicial District Court, and Ann filed her divorce action in a Family Court division of the same district court. Ann filed a peremptory exception of subject matter jurisdiction in Peter's suit, which the trial court denied. She sought supervisory writs from the ruling and this court granted writs based upon its finding that Peter's suit dealt with incidental matters associated with the dissolution of marriages pursuant to Rule 23.0 of the Family Court Rules of the Twenty-Second Judicial District Court. **Abadie v. Abadie**, 2014-1867 (La. App. 1 Cir. 3/30/15) (unpublished writ action), writ denied, 2015-0795 (La. 6/19/15), 172 So.3d 652. Peter's action was transferred to the Family Court division, and the two suits were then consolidated. The divorce was ultimately granted on December 4, 2014.

² Peter's petition contains the \$507,950.00 figure, but in his brief he states that he is only claiming \$435,350.00, which was the amount he deposited into Ann's checking account before November 25, 2009, the date on which he became an authorized signatory on the account.

³ Peter's petition contains the \$500,000.00 figure, but in his brief he states that the amount is \$377,393.15.

for expenses to maintain the matrimonial domicile, which was Ann's separate property. Peter later filed a first amending petition to assert an alternative claim of unjust enrichment pursuant to La. C.C. art. 2298.

Ann filed peremptory exceptions of prescription and no cause of action and alternatively, a dilatory exception of vagueness. At the scheduled hearing on the exceptions, the parties agreed that a Special Master should be appointed to hear the case, and the trial court signed a consent judgment to appoint a Special Master pursuant to La. R.S. 13:4165.

On June 9, 2016, the Special Master issued an "interim ruling" on Ann's exceptions of no cause of action and vagueness; the Special Master did not address Ann's prescription exception. The Special Master determined that the exception of no cause of action should be granted as to the causes of action relating to Peter's claims for reimbursement of funds spent for the matrimonial home⁴ and for funds spent for Ann's medical and car insurance (Paragraphs XVII and XV, \$1,811.90 and \$21,888.90), the cleaning of Ann's clothes (Paragraph XXVIII, \$4,616.28),⁵ Ann's Causeway Bridge tolls (Paragraph XXVI, \$2,052.00), and gas bills to assist Ann in marketing and selling companies for which she worked (Paragraph XXX, \$45,773.43). The Special Master determined the following allegations set forth possible causes of action, depending upon the evidence: the \$507,950.00 Peter

⁴ Peter detailed his claims in separate paragraphs in his petition. In Paragraph VIII, Peter alleged generally that he contributed \$500,000.00 from his separate funds to the running and maintenance of the matrimonial domicile, and he sought the return of those funds. See footnote 3. Peter then listed the specific claims related to funds spent for the matrimonial domicile as follows: the first mortgage (Paragraph IX); property taxes (Paragraph XI); homeowners insurance (Paragraph XIII); flood insurance (Paragraph XIV); water pump repair (Paragraph XVIII); trash pickup (Paragraph XIX); air conditioning (Paragraph XX); landscaping (Paragraph XXI); electricity (Paragraph XXIII); pest control (Paragraph XXIV); housecleaning (Paragraph XXV); home repairs due to Hurricane Katrina (Paragraph XXIX); plumbing (Paragraph XXXI); and miscellaneous repairs (Paragraph XXXII). These claims total \$273,750.49.

⁵ Peter alleged that he paid a dry cleaner "for extensive cleaning of Rau's clothing ... when an air conditioner overflowed into her closet, and following Hurricane Katrina, and at various other times at the matrimonial domicile."

expended “to allow [Ann] to make payments on her separate, personal bills and use as she saw fit” (Paragraph VII); his \$24,578.34 payment toward the second mortgage Ann placed on the matrimonial domicile to establish her personal line of credit (Paragraph X); his \$53,108.97 payment on the mortgage at Whitney Bank to start Ann’s pharmaceutical business (Paragraph XII); his \$1,182.50 payment for Ann’s jewelry insurance (Paragraph XVI); his \$12,454.07 payment of legal fees Ann incurred in suits she filed (Paragraph XXII); and his \$1,200.00 payment for furniture for the rear porch (Paragraph XXVII). The Special Master did not find that the grounds of the exception could be cured by any amendment. The Special Master also determined that the exception of no cause of action should be granted as to Peter’s unjust enrichment claim based upon her finding that Peter could not establish that there was an absence of justification or cause for Ann’s enrichment or his impoverishment, and he could not establish that there was no other remedy at law. The Special Master noted that the fact that some allegations stated a cause of action could defeat the entire exception of no cause of action, but she stated that such a ruling would not give the parties guidance as to what claims were viable. Moreover, the Special Master did not file the ruling on the exceptions in the record. The Special Master also stated that she would file the ruling on the exceptions when the trial was completed, and that the time for objecting to the ruling would start after it was filed and notice was sent to the parties.

As to Ann’s vagueness exception, the Special Master determined that Paragraphs VII, VIII, and XXXII of Peter’s petition were vague, but she had previously determined that Paragraphs VIII and XXXII failed to state a cause of action. As to Paragraph VII, the Special Master determined that the exception of vagueness should be granted because it was unclear whether the loans in Paragraph VII were for the same items as those listed in the remainder of the petition in

Paragraphs IX through XXXII. The Special Master gave Peter ten days to amend his petition to specify “the loans, their dates, and their purposes.” The Special Master deferred any ruling on further exceptions to the merits.

On June 22, 2016, Peter filed a motion for leave to file a third supplemental and amending petition,⁶ seeking to amend Paragraph VII to allege that he made 192 separate loans to Ann for her exclusive benefit by separate checks totaling \$507,950.00. He also attached an exhibit including the check numbers, dates, and amounts. He added that if the trial court determined that these advances and the other advances he had made were not loans, then alternatively they were donations, which he sought to revoke for ingratitude. The trial court granted the motion to amend on June 24, 2016.

On July 5, 2016, Peter filed a fourth supplemental and amending petition wherein he removed the word “loans” from Paragraph VII and simply alleged that he made 192 deposits into Ann’s separate bank account from his separate bank account. Peter characterized the deposits as corporeal movables donated to Ann as manual gifts. Peter then substituted new paragraphs for Paragraphs IX, X, and XI, alleging that the separate funds that were put towards the first and second mortgage on the home and towards property taxes were also manual gifts donated to Ann.

On the same date that Peter filed the fourth amending petition, Ann filed a motion to strike portions of the third amending petition and alternative exceptions of no cause of action and prescription if the motion to strike was not granted. On July 13, 2016, the day before the trial before the Special Master, Ann filed an answer and peremptory exceptions of no cause of action, prescription, and res judicata, a declinatory exception of insufficiency of service of process, and the

⁶ We note that the record does not contain a second supplemental and amending petition, so the designation of a third amending petition appears to be erroneous.

affirmative defense of fraud. She re-urged her contentions in her previously filed motion to strike.

The Special Master heard the case on July 14 and 15, 2016, considering issues raised in Peter's third and fourth supplemental petitions, that is, whether the monies Peter provided to Ann during the marriage could be considered donations subject to revocation for ingratitude.⁷ On September 28, 2016, the Special Master filed her report, recommending that Peter's third and fourth amending petitions be stricken and his suit be dismissed with prejudice. The Special Master then stated that if the trial court rejected the recommendation on the motion to strike, the allegations in the third and fourth supplemental and amending petitions should be considered as relating back to the original petition for damages. The Special Master recommended that her findings of fact should be affirmed, and that the trial court should dismiss Peter's third and fourth amending petitions. The Special Master issued findings of fact wherein she determined that the payments Peter made to Ann were not donations subject to revocation for ingratitude because he lacked donative intent at the time he made the donations.

On November 9, 2017, the trial court signed a judgment adopting the Special Master's report and recommendations and entering a final judgment in favor of Ann and against Peter, dismissing his case with prejudice.⁸ The trial court did not indicate whether it was dismissing the suit based on the procedural finding that

⁷ Due in part to the Special Master's ruling on Ann's exception of no cause of action, the only issue to be resolved at trial was the reimbursement of Peter's separate funds deposited into Ann's checking account. As to Peter's claim for revocation of the donation of antiques to Ann, according to the Special Master's report, the parties entered into a consent judgment dividing the movables on March 3, 2016, and dissolving the act of donation of the movables.

⁸ Peter filed an earlier appeal in this case but this court dismissed it because the judgment contained conditional language rendering it inappropriate for appellate review. **Abadie v. Abadie**, 2017-0769 c/w 2017-0770 (La. App. 1 Cir. 10/31/17) (unpublished action).

Peter could not file his amending petitions or based on the evidentiary finding on the merits that he lacked donative intent.

Peter appeals the November 9, 2017 judgment, raising three assignments of error. In his first assignment of error, he contends that the trial court erred in granting Ann's exception of no cause of action as to twenty categories of payments by him based on the court's conclusion that his reimbursement claims were barred by Paragraph 5 of the separate property agreement and were considered alimentary obligations pursuant to La. C.C. art. 98. In Peter's second assignment of error, he contends that the trial court erred in ignoring La. C.C.P. art. 1151 when it struck Peter's third and fourth supplemental and amending petitions. Lastly, in Peter's third assignment of error, he contends that the trial court erred in finding that he lacked donative intent when he deposited 192 checks from his separate property account into Ann's separate property account and wrote 1,529 checks to her creditors.

STANDARD OF REVIEW

Factual findings may not be set aside by this court unless we determine there is no reasonable basis for the findings and the findings are clearly wrong. **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993). If the findings are reasonable in light of the record viewed in its entirety, this court may not reverse even if convinced that had it been the trier of fact, it would have weighed the evidence differently. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). However, where one or more trial court legal errors interdict the fact-finding process, the "manifest error" or "clearly wrong" standard no longer applies, and if the record is otherwise complete, an appellate court should make its own independent *de novo* review of the record and render a judgment in accordance with a preponderance of the evidence. **Ferrell v. Fireman's Fund**

Insurance Company, 94-1252 (La. 2/20/95), 650 So.2d 742, 747; **Lind v. United Servs. Auto. Ass'n**, 2017-0217 (La. App. 1 Cir. 1/30/18), 242 So.3d 576, 581.

PAYMENTS RELATED TO MATRIMONIAL DOMICILE AND SUPPORT

In Peter's first assignment of error, he contends that the trial court erred in adopting the Special Master's ruling that Peter had no cause of action for reimbursement of his separate funds paid toward expenses related to the matrimonial domicile, which was Ann's separate property, and for those expenses for Ann's support.

An exception of no cause of action questions whether the law extends a remedy against the defendant to anyone under the factual allegations of the petition. **Badeaux v. Southwest Computer Bureau, Inc.**, 2005-0612 (La. 3/17/06), 929 So.2d 1211, 1217; **El-Mumit v. Fogg**, 88-0356 (La. App. 1 Cir. 9/28/17), 232 So.3d 590, 594-95. The exception is triable on the face of the petition and, to determine the issues raised by the exception, each well-pleaded fact in the petition must be accepted as true. **El-Mumit**, 232 So.3d at 594. Generally, no evidence may be introduced to support or controvert an exception of no cause of action. La. C.C.P. art. 931. However, where evidence is admitted without objection, such evidence may be considered in determining whether a legal remedy exists. **Emigh v. West Calcasieu Cameron Hospital**, 2013-2985 (La. 7/1/14), 145 So.3d 369, 372; **Frigon v. Universal Pictures, Inc.**, 2017-0993 (La. App. 1 Cir. 6/21/18), ___ So.3d ___, ___. In reviewing a district court's ruling sustaining an exception of no cause of action, appellate courts conduct a *de novo* review because the exception raises a question of law and the district court's decision is based only on the sufficiency of the petition. **El-Mumit**, 232 So.3d at 594-95.

According to the Special Master, Peter's expenditures related to the matrimonial domicile were not reimbursable partly due to Paragraph 5 of the parties' separate property agreement, which states:

Any increase or improvement of the separate property of either appearer, as separate property is set forth in this agreement, arising or made during the marriage of the appearers through the result of the common labor, expense, or industry of the appearers, shall not create any right to a reward in favor of that appearer, or the legal representatives of that appearer, to whom the property which has been increased or improved does not belong.

The Special Master then determined that many of the expenses concerning the home were not reimbursable under La. C.C. art. 98, which states, "Married persons owe each other fidelity, support, and assistance." The Special Master also stated that Peter was not entitled to reimbursement because he lived in the home and was not required to pay rent; therefore, he enjoyed the benefits of the utilities, repairs, and maintenance of the home. As to the items not related to the home, such as Ann's health and car insurance, clothes cleaning, tolls, and gasoline cards, the Special Master concluded that these were necessities of life and thus part of the alimentary obligation pursuant to La. C.C. art. 98.

Peter contends that the Special Master misinterpreted Paragraph 5 of the separate property agreement. According to Peter, his donations were not "common labor, expense, or industry" and he was not seeking a "reward" based on an increase or improvement in Ann's property. Peter argues that he merely seeks reimbursement of the separate funds he put toward expenses related to the home. He also argues that the Special Master erred in finding that he owed alimentary obligations to Ann where there was no community property regime and that the Special Master incorrectly combined the obligations found under La. C.C. arts. 98 and 2362.

Married persons owe each other the obligations of fidelity, support, and assistance under La. C.C. art. 98, regardless of whether their marriage is governed by a community property or separate property regime. **deKlerk v. deKlerk**, 2014-0104 (La. App. 4 Cir. 7/29/15), 174 So.3d 205, 209. The court in **deKlerk** considered claims for reimbursement pursuant to La. C.C. art. 2373, which provides that each spouse contributes to the expenses of the marriage in proportion to his or her means in the absence of a provision in the matrimonial agreement pertaining to the payment of marital expenses. **Id.** The Fourth Circuit commented that to determine whether a particular charge is an expense of the marriage, the court must determine the nature of the charge and the ultimate use of the item purchased. **Id.** at 210. The Fourth Circuit denied the ex-husband's claim for reimbursement of his separate funds used for the purchase of the family home, the construction of a pool, landscaping, electrical work, a porch, a driveway, and mortgage payments and for various household expenses and the family's activities of daily living.⁹ **Id.** at 211-212. As did the Special Master in the instant case, the court in **deKlerk** concluded that maintaining a home is an expense of a marriage. **Id.** at 210; see also **Krielow v. Krielow**, 93-2539 (La. 4/11/94), 635 So.2d 180, 187.¹⁰

In this case, the Special Master concluded that the expenses for support were “of an alimentary nature” under La. C.C. art. 98, but her characterization does not

⁹ The **deKlerk** case involved a separate property regime where the ex-husband was the sole wage earner in the marriage as the ex-wife took care of the children and the home and the matrimonial agreement contained no provision regarding marital expenses. See **Id.** at 209.

¹⁰ In **Krielow v. Krielow**, 635 So. 2d 180, 187 (La. 1994), in determining whether community obligations were incurred for the ordinary and customary expenses of the marriage, the supreme court recognized that house payments, taxes, and insurance premiums are ordinary and customary expenses of the marriage.

make those expenses part of a community property regime, as Peter contends. Louisiana Civil Code article 2362 states, “[a]n alimentary obligation imposed by law on a spouse is deemed to be a community obligation.” However, this reference does not make an alimentary obligation exclusively a part of the community property regime. As the Special Master correctly observed, “[Louisiana Civil Code article] 2362 relates to whether support and alimony payments made by one party to a prior spouse or children can be reimbursed to the subsequent spouse after termination of the marriage.” See 16 A. Carroll & R.D. Moreno, Louisiana Civil Law Treatise; Matrimonial Regimes, § 8:9 (4th ed. 2013). Additionally, Merriam-Webster’s Dictionary defines “alimentary” as “of or relating to nourishment or nutrition” and “furnishing sustenance or maintenance.” **Merriam-Webster Online Dictionary**, 2018. <http://www.merriam-webster.com> (9 Oct. 2018). An alimentary obligation does exist even in the presence of a separate property regime.

Lastly, Paragraph 5 of the separate property agreement does not give either party a right of reimbursement for any increase or improvement of either party’s separate property due to the investment of the other party’s separate funds. Contracts have the force of law between the parties, and the courts are bound to interpret them according to the common intent of the parties. See La. C.C. arts. 1983 and 2045. The separate property agreement contains no provision for reimbursement of separate property used to maintain the other spouse’s separate property. Moreover, Paragraph 5 implies that if the parties have no right of reimbursement for investments of their “common labor, expense, or industry,” that generate an improvement in the separate property, they correspondingly would have no right of reimbursement for investments of their separate property simply for maintenance of the matrimonial domicile that is the other’s separate property.

We note that in **Barber v. Barber**, 2009-0780 (La. App. 1 Cir. 5/7/10), 38 So.3d 1046, 1051, this court held that a contract provision virtually identical to Paragraph 5 effected a waiver of the spouse's right to reimbursement for contributions to the other spouse's estate. See **Strachan v. Eichin**, 2015-1431 (La. App. 1 Cir. 4/15/16), 195 So.3d 61, 66. For these reasons, the Special Master did not err in determining that Peter had no cause of action for reimbursement of his expenditures for the matrimonial domicile, particularly where he benefitted by living in the home during the marriage, and for the specific expenses discussed above for Ann. Thus, Peter's first assignment of error has no merit.

THIRD AND FOURTH AMENDING PETITIONS

In Peter's second assignment of error, he contends that the trial court erred in adopting the Special Master's ruling granting the motion to strike his third and fourth amending petitions. In Peter's third amending petition, filed less than a month before the trial, he alleged in Paragraph VII that he made 192 separate loans to Ann by separate checks totaling \$507,950.00, which were used by Ann for her "exclusive benefit." Peter also attached to the petition an exhibit listing the check numbers, the dates of the checks, the amounts, and the type of expense they represented. He then added that if the trial court determined that these advances were not loans, alternatively, all of the amounts paid directly to Ann or toward her obligations were donations.

In Peter's fourth supplemental and amending petition, filed less than two weeks before trial, he alleged that in October of 2013, Ann admitted she was having an affair. He also removed the word "loans" from Paragraph VII and simply alleged that he made 192 deposits into Ann's separate bank account from his separate bank account. Peter then alleged that his deposits of money were corporeal movables donated to Ann as manual gifts; he alleged that he relinquished

control of the funds when Ann accepted them. Peter then substituted new paragraphs for Paragraphs IX, X, and XI, alleging that the separate funds that were put towards the first and second mortgage on the home and towards property taxes were also manual gifts.

Ann filed a motion to strike pursuant to La. C.C.P. art. 964.¹¹ She argued that the allegations in the third amended petition were not well-grounded in facts and lacked the evidentiary support mandated by La. C.C.P. arts. 863 and 892.¹² Ann pointed out that the allegations that the funds were donations to Ann contradicted allegations that they were loans in the earlier petitions and in Peter's affidavit submitted in opposition to the exceptions. Ann also complained that the amending petition unfairly prejudiced her because multiple exceptions had been filed and were pending. Furthermore, for the two years in which the case had been pending, Peter repeatedly classified the payments to Ann as loans.

In ruling on the motion to strike, the Special Master recognized that because Ann had not filed an answer, La. C.C.P. art. 1151 allowed Peter to file his amending petitions without leave of court.¹³ The Special Master then referred to La. R.S. 13:4165 regarding the authority of a Special Master to regulate

¹¹ "The court on motion of a party or on its own motion may at any time and after a hearing order stricken from any pleading any insufficient demand or defense or any redundant, immaterial, impertinent, or scandalous matter." La. C.C.P. art. 964.

¹² Louisiana Code of Civil Procedure article 863(B) states that the signature of an attorney or a party to a pleading shall constitute a certification that he has read the pleading, that to the best of his knowledge, information, and belief formed after reasonable inquiry, it has evidentiary support, that it is warranted by existing law or a good argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose. Louisiana Code of Civil Procedure article 892 states, in pertinent part, "a petition may set forth two or more causes of action in the alternative, even though the legal or factual bases thereof may be inconsistent or mutually exclusive. In such case all allegations shall be made subject to the obligations set forth in Article 863."

¹³ In her ruling on the motion to strike, the Special Master initially noted that Peter was granted ten days to amend his petition to specify the loans, their dates, and their purposes in Paragraph VII. The Special Master stated that while the certificates of service indicated the amending petitions were timely filed, they actually were filed or received after the ten-day time period. However, the Special Master did not recommend that they be stricken on that basis.

proceedings as support for her authority to strike the amending petitions because they went beyond her ruling on the vagueness exception, which only allowed Peter to amend Paragraph VII to specify the loans at issue. In the interim ruling, the Special Master had previously ruled that Peter was not allowed to cure the grounds of the exception of no cause of action by amendment as to his reimbursement claims for expenses related to the matrimonial domicile and Ann's support. In the amending petitions, Peter classified the money he gave to Ann as donations rather than as loans, which were subject to revocation for ingratitude. Moreover, Peter also alleged that all of the advances set forth in the original petition, and specifically, those funds put toward the first and second mortgages and property taxes on the matrimonial domicile, were donations.

In deciding that the amendments were improper and should be stricken, the Special Master stated:

It is clear that when Peter saw the Interim Ruling, he decided that he was not going to prevail on the "loan" theory, so he changed his entire position to one of "donation." He saw that Ann had not filed an answer, so he amended his petition believing it related back to the original Petition for Damages and therefore his new donation claim would not be prescribed. This new theory was two years after his original Petition for Damages. Peter simultaneously abandoned his other claims for loan repayments with both his testimony at trial and his new amending petitions.

The Special Master then found that if the trial court rejected her recommendation on the motion to strike, the allegations in the amending petitions related back to the filing of Peter's original petitions pursuant to La. C.C.P. art. 1153, such that the new revocation of donation claims would not be prescribed

under La. C.C. art. 1558.¹⁴ The Special Master agreed with Peter that the same facts, that is, his payments made to Ann's bank account and payments made for the household, living, and other expenses, were alleged in the original and amending petitions. The Special Master did not find that the classification of those payments as loans or donations was a factual difference.

In considering Peter's second assignment of error, we initially note that we cannot determine whether the trial court based its dismissal of Peter's suit on the grant of Ann's motion to strike or on a finding that the payments Peter made were not donations. In its judgment, the trial court adopted the Special Master's report in its entirety, and in the report, the Special Master first recommended dismissal of Peter's suit based on the granting of the motion to strike the amending petitions and, then, if the trial court did not agree with this recommendation, dismissal of the suit alternatively based upon her finding that Peter lacked donative intent.¹⁵

As the Special Master stated, because Ann had not filed her answer, Peter had the right to file his third and fourth amended petitions without leave of court pursuant to La. C.C.P. art. 1151. Louisiana Code of Civil Procedure article 1151 states, "[a] plaintiff may amend his petition without leave of court at any time before the answer thereto is served." While the Special Master has the authority pursuant to La. R.S. 13:4165 to regulate the proceedings before her, and, in the consent judgment appointing her, the Special Master was given the authority to

¹⁴ Louisiana Code of Civil Procedure article 1153 states that "[w]hen the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading." Louisiana Civil Code article 1558 states, in pertinent part, "An action of revocation for ingratitude shall be brought within one year from the day the donor knew or should have known of the act of ingratitude."

¹⁵ The proper place for Peter to seek review of the erroneous ruling by the Special Master on his request to amend his petition would have been in the trial court since the court could have clarified the Special Master's ruling or recommitted with instructions.

establish a case management schedule and to set deadlines,¹⁶ she still was required to adhere to the Louisiana Code of Civil Procedure.¹⁷ For these reasons, we find that the Special Master erred in granting Ann's motion to strike Peter's third and fourth supplemental and amending petitions, and Peter's second assignment of error has merit. However, the Special Master allowed Peter to present all his testimony and evidence pertaining to his allegations that his advancement of his separate funds were donations; therefore, any error in ruling that the motion to strike should be granted was harmless. Although the parties refer to Peter's request for a continuance due to the absence of two witnesses, the record does not contain such a motion. Thus, if the trial court's adoption of the Special Master's report was based on the latter's recommendation that Peter's amended petitions be stricken, then we find that this legal error did not interdict the fact-finding process. See Ferrell, 650 So.2d at 747; Lind, 242 So.3d at 581.

DONATIONS

In his third assignment of error, Peter contends that the trial court through the adoption of the Special Master's report erred in finding that he lacked donative intent in the advancement of his separate funds to Ann and to her creditors.

The Special Master made the following pertinent findings of fact. The Special Master determined that the parties lived together in the matrimonial

¹⁶ The order appointing the Special Master states, in part:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, in due course, the Special Master shall address and make recommendations on the pending issues as timely as possible, by establishing a case management schedule which allows sufficient time and establishment of cut-off dates for discovery, and deadlines for obtaining stipulations, for meeting with the experts, for submissions by the parties, and/or any other action necessary to fulfill [her] duties as Special Master.

¹⁷ Louisiana Code of Civil Procedure article 1571A(2) states that "[District court rules] shall not allow the assignment of ordinary proceedings for trial except after answer filed." In this case, it appears that the case was set for trial before Ann's answer was filed. While the schedule and deadlines set by the Special Master are not of record, the parties refer to certain deadlines in post-trial memoranda that indicate the trial date was improperly set before Ann's answer was filed.

domicile from 1994 until 2013. The matrimonial domicile was Ann's separate property that she purchased in her name only, with her parents as cosigners. Peter was not an owner of that home because of the threat of a judgment against him. Ann left the matrimonial domicile in July of 2013 and committed adultery in August of 2013, which Peter discovered in October of 2013.

Ann worked during the marriage making less than \$60,000.00 per year until 2011, when her business "skyrocketed" and she started making over \$1,000,000.00 per year for the last three years of the parties' marriage. During the marriage, Peter retired early from the practice of law and became a writer. His \$9,800.00 per month income came from the annuities he had set up before his marriage to Ann and was more than three times Ann's monthly income until the last three years of the marriage.

Peter and Ann primarily used Ann's Capital One bank account (or its predecessor) to pay both of their living expenses. That account became a joint account in 2009, when Peter's name was added, not just as a signer but also as an owner, as evidenced by the name change on the account. The parties also used Peter's law office account, which he kept open, and Ann's business account to pay living and household expenses at times. Peter managed the parties' finances during the marriage. Deposits to Ann's Capital One account came from: Ann's salary, a line of credit in Ann's name, insurance proceeds from Hurricane Katrina damage, Ann's business account, and Peter's law firm account. Peter filed for bankruptcy in 2003 due to two large Texas creditors seeking money from a performance bond he signed, which was transferred from one job to another, creating a \$400,000.00 liability.

The Special Master accepted Peter's Microsoft Money Manager summary chart of the checks deposited into Ann's Capital One account or its predecessor.

The Special Master found that \$507,950.00 was deposited from Peter's separate accounts into Ann's Capital One account, which, as earlier stated, was converted to a joint account in 2009. The Special Master did not accept Peter's categorization of the entries on the chart.

The Special Master determined that Peter maintained control over the money he deposited into Ann's (and later the joint) account and the money he transferred to her line of credit. The Special Master also stated that Peter benefitted from the expenditures from Ann's account and from the expenditures from his account directly to pay living, household, and other expenses related to Ann's home. Lastly, the Special Master stated, "Peter's testimony that the payments to and on behalf of Ann were donations was not credible."

In her legal findings, the Special Master observed that Louisiana Civil Code article 1557 provides that a donation may be revoked for ingratitude if the donee has been guilty towards the donor of cruel treatment. The Special Master relied on the comments to article 1557 and the jurisprudence to conclude that if Peter could successfully classify the monies he provided to Ann during their marriage as donations, he might be able to revoke the donations due to ingratitude based on Ann's adultery. See **Whitman v. Whitman**, 31,814 (La. App. 2 Cir. 3/31/99), 730 So.2d 1048, 1053; La. C.C. art. 1557, comment c. Because the Special Master determined that Peter lacked the requisite donative intent to classify his payments to Ann as donations, she did not discuss whether La. C.C. art. 1557 would apply to the facts in this case, "i.e.[,] the transfer of funds from one account to another or the payment of household living and other expenses during a 20-year marriage." As the Special Master noted, for a donation to be valid, there must be a divestment of the property and the donor must have donative intent. **Schindler v. Biggs**, 2006-0649 (La. App. 1 Cir. 6/8/07), 964 So.2d 1049, 1053. The donor must have

the donative intent at the time the donations were completed. See Succession of Miller, 405 So.2d 812, 819 (La. 1981) (on rehearing).

In finding that Peter lacked the requisite donative intent, the Special Master considered Peter's pleadings, affidavit, and testimony, and found his testimony not credible. The Special Master noted that although Peter testified at trial that the monies he provided Ann were donations, for the previous two years in legal pleadings, he had classified them as loans. In his affidavit filed with his memorandum in opposition to Ann's exceptions, he stated he gave the following answer when Ann asked him whether she would have to repay his daughter Michele or his estate for the money he put in her account, if he died:

Not if you are living with me at the time of my death. The money I advanced to your account is a loan. If I die and you and I are living together, that loan dies with me. If you leave me before I die, all of the [monies] loaned become due.

He also stated that he discussed with his daughter and Ann that his estate would be left equally to both and that he would forgive Ann the loan obligation upon his death as long as she remained as his "loyal wife." If Ann was not living with him, then Michele could pursue the debt. At trial, Peter testified that although he originally thought of the payments as a loan, he no longer did so because "things have changed. . . ." The Special Master in her reasons for her ruling stated that what changed was her ruling on Ann's exceptions, Peter's request for a second continuance because his witnesses were unavailable, and the denial of his request for a continuance. At trial, Peter testified that after the Special Master's interim ruling, he met with his daughter and attorney and realized his financial transfers to Ann were not loans, but were donations based upon the law. The Special Master rejected Peter's classification, stating, "The realization in the summer of 2016 that these were not loans does not, after the fact, provide Peter with the donative intent

he required at the time the transfers or payments were made during his twenty-year marriage.”

On appeal, Peter initially asserts that once a person divests himself of a check, bond, or other instrument and the other party takes receipt, it becomes a manual gift. Peter contends there was no expectation of repayment by either party, and that “had [Ann] not committed adultery, and abandoned the matrimonial domicile, these monies would have remained with [Ann].” Peter relies on La. C.C. art. 1543, which provides, “The donation inter vivos of a corporeal movable may also be made by delivery of the thing to the donee without any other formality.” Lastly, Peter contends that merely depositing his checks into Ann’s bank account constituted a donation and that Ann’s acquiescence and use of the money constituted acceptance. He argues that even if he derived some benefit from Ann’s expenditure of the funds, they were still donations to her.

On appeal, Ann contends that Peter never truly divested himself of the money he transferred because he maintained control over the money and he derived a benefit from it as it was used to pay communal expenses.

Money is a corporeal movable and may be donated by manual gift. **Terrell v. Terrell**, 26,863 (La. App. 2 Cir. 5/10/95), 655 So.2d 600, 603. Although mere delivery of a corporeal movable is sufficient to effect a change in ownership, the burden of proving a donation was made rests on the party alleging the donation, who must show by strong and convincing proof that the donor had the intent to irrevocably divest himself of the thing and that delivery was made. See Montet v. Lyles, 93-1724 (La. App. 1 Cir. 6/24/94), 638 So.2d 727, 730, writ denied, 94-1985 (La. 11/18/94), 646 So.2d 377; **Adams v. Security Insurance Co. of Hartford**, 533 So.2d 140, 145 (La. App. 1 Cir. 1988), reversed in part on other grounds, 543 So.2d 480 (La. 1989); **Terrell**, 655 So.2d at 603. Even a donation

inter vivos by manual gift requires the simultaneous occurrence of the donor's intent to give and actual possession by delivery. **Adams**, 533 So.2d at 145. The alleged donor's outward acts, together with any admissible evidence of the relationship of the parties, are important to prove a manual donation. **Terrell**, 655 So.2d at 603. Donative intent is a question of fact. **Montet**, 638 So.2d at 730.

In the instant case, the Special Master did not find Peter's testimony on the issue of his donations to Ann credible. Having carefully reviewed the record in its entirety, we find that a reasonable factual basis exists for the Special Master's finding that Peter failed to demonstrate by strong and convincing evidence that he possessed donative intent. While Ann testified that she did not consider the advances Peter made to her loans, she also testified that they were "[a]bsolutely not" donations. According to both Ann's and Peter's testimony, he "paid" and "controlled" the family accounts. Ann explained that prior to her checking account becoming a joint account in 2009, Peter would have her sign blank checks and he would fill them out later to pay family bills. Ann stated that Peter also reviewed the checking account statements and balanced the accounts. When counsel for Ann asked Peter if he was alleging that he never benefited indirectly or directly from the money he transferred to Ann's checking account and that only Ann benefitted, Peter answered, "No. What I am saying is I took the \$507,000 from my separate money and I put it in her separate account." Ann's counsel then inquired: "Do you know what she did with the money after?" Peter replied, "Sure, because I looked at the account. **In fact, I wrote most of the checks on the account.**" (Emphasis added.) Peter answered affirmatively when asked, "So in your mind, because you had a [prenuptial agreement], any money that you put into Ann's account, regardless of what it went to pay, if it benefited you, if it didn't benefit you, you should get that money back, even if it already benefited you?" Peter

testified that it was possible at times that Ann did not know that he was transferring money into her account to pay communal expenses. Marc DeRouen, Ann's expert accountant, testified that Ann's account into which Peter deposited his checks also contained direct deposits from Ann's other separate account so that he could not ascertain from which source bills were paid. The testimony and evidence demonstrates that Peter did not divest himself of the money for which he seeks repayment because he retained control over the funds and some of the money was used to pay his expenses in addition to those of Ann and their joint marital expenses. Since Peter failed to carry his burden of proving the transfers he made were donative, his third assignment of error has no merit.

DECREE

For the above and foregoing reasons, we affirm the November 9, 2017 judgment. The costs of this appeal are assessed to Peter J. Abadie, Jr.

AFFIRMED.