NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 0629

SUCCESSION OF

MABEL THIBODAUX GROS THIBODAUX

Judgment Rendered: NOV 05 2018

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On Appeal from the 32nd Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
No. 22544

Honorable Juan W. Pickett, Judge Presiding

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BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

PENZATO, J.

In this succession proceeding, Jonathan P. Blanchard appeals from a judgment of possession and an interlocutory judgment denying a motion to disqualify the administrator of the succession.

FACTS AND PROCEDURAL HISTORY

Mabel Thibodaux Gros Thibodaux died on July 10, 2015. On August 14, 2015, her surviving children, Francis D. Gros, Jr., Alice Gros Metrejean, and Perry J. Gros (collectively the "Gros children"), filed a petition for independent administration and to appoint an independent administrator, alleging therein that Mrs. Thibodeaux died intestate. By order dated August 18, 2015, Francis D. Gros, Jr. was appointed independent administrator. Also on August 18, 2015, Jonathan P. Blanchard, Mrs. Thibodeaux' nephew, filed a petition to probate a copy of an olographic will and for his appointment as independent administrator of the succession. Mr. Blanchard's petition stated that Mrs. Thibodeaux left an olographic will dated October 12, 1976. According to the petition, the original will could not be located, and a copy was provided with the petition. On September 29, 2015, Mr. Blanchard filed an amended petition for probate indicating that the original will had been located.

The October 12, 1976 will provided, in pertinent part, as follows:

> I have been married only once, and that time to Francis D. Gros, who is now deceased. Of this marriage, there were born three children, Francis D. Gros Jr.[,] Alice Mae Gros, and Perry Joseph Gros.
>
> No other child has been born to me and no other child has been adopted by me and I have never been adopted by anyone.
>
> I direct that all debts allowed in my estate, expenses of administration of my estate and expenses of my last illness, funeral and interment be paid out of my estate.
>
> I hereby leave...the disposable portion of my estate to Jonathan Paul Blanchard, my nephew and godchild.

The matter came for hearing on October 19, 2015, on Mr. Blanchard's petition to probate the will and be appointed as independent administrator. The

Gros children did not contest the validity of the will; thus, the hearing focused on the proper party to serve as administrator of the succession. Mr. Blanchard recognized that the main issue involved an interpretation of the "disposable portion" of Mrs. Thibodaux' estate. Mr. Blanchard argued that in her will, Mrs. Thibodaux did not make a bequest to her children. He further argued that as none of the Gros children were forced heirs at the time of Mrs. Thibodaux' death, there was no forced portion, and the disposable portion was therefore one hundred percent. Accordingly, Mr. Blanchard contended that he was the sole legatee and the proper party to serve as administrator. The Gros children argued that at the time the will was written, they were forced heirs and that there was no evidence that Mrs. Thibodaux intended to disinherit her children. They further argued that Francis D. Gros, Jr. was competent to serve as administrator of the succession.

The trial court probated the olographic will, but did not find a compelling reason to remove Francis D. Gros, Jr. as the administrator of the succession. Nevertheless, the trial court rescinded his appointment as independent administrator, and reappointed him as administrator of the succession in the judgment signed October 30, 2015.

Mr. Blanchard then filed a motion seeking the disqualification of Francis D. Gros, Jr. as administrator of the testate succession pursuant to La. C.C.P. art. 3097(B),[1] and the appointment of Mr. Blanchard as independent executor of Mrs. Thibodaux' estate. Mr. Blanchard again argued that he was the sole legatee and thus the only person qualified to act as executor.

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[1] Louisiana Code of Civil Procedure art. 3097(B) provides that:

> No person may be appointed dative testamentary executor, provisional administrator, or administrator who is not the surviving spouse, heir, legatee, legal representative of an heir or legatee, or a creditor of the deceased or a creditor of the estate of the deceased, or the nominee of the surviving spouse, heir, legatee, or legal representative of an heir or legatee of the deceased, or a co-owner of immovable property with the deceased.

The Gros children opposed the motion, urging the court to consider the intent of the testator in interpreting the will and arguing that it was Mrs. Thibodaux' intent that her three children inherit fifty percent of her estate based upon the law in effect at the time she prepared the will. Thus, they argued that Francis D. Gros, Jr. was an heir and qualified to serve as administrator of the succession. The motion to disqualify Francis D. Gros, Jr. came on for hearing on January 25, 2016, at which time the court found there was no intent by Mrs. Thibodaux to disinherit her children, and they were forced heirs. A judgment was signed on February 12, 2016, denying the motion to disqualify Francis D. Gros, Jr. as executor and/or administrator of the succession of Mrs. Thibodaux, and decreeing the motion to appoint Mr. Blanchard independent executor moot. Mr. Blanchard filed an application for supervisory writs seeking a review of this judgment, but the writ was denied by this court. *In Re Succession of Thibodaux*, 2016-0425 (La. App. 1 Cir. 6/27/16) (unpublished writ action).

Thereafter, on December 7, 2017, Mr. Blanchard filed a motion for a judgment of possession, seeking to place all heirs in possession pursuant to the October 12, 1976 will. Once again, Mr. Blanchard argued that the disposable portion of the estate, which had been left to him pursuant to the will, was one hundred percent of the assets. The trial court signed a judgment on February 9, 2018, placing Mr. Blanchard into possession of an undivided one-half interest in Mrs. Thibodaux' property and placing the Gros children into possession of the other undivided one-half interest in Mrs. Thibodaux' property.

Mr. Blanchard appeals the February 9, 2018 judgment of possession, arguing that the trial court erred in finding that the Gros children were forced heirs of Mrs. Thibodaux, in failing to find that the disposable portion of Mrs. Thibodaux' estate was one hundred percent of the assets, and in putting the Gros children into possession as owners of fifty percent of Mrs. Thibodaux' estate. Mr. Blanchard

also appeals the February 12, 2016 judgment, arguing that the trial court erred in finding that Francis D. Gros, Jr. was qualified to serve as administrator of the succession.[2]

LAW AND DISCUSSION

Judgment of Possession

In interpreting a will, the function of the court is to determine and carry out the intention of the testator if it can be ascertained from the language of the will. *In re Succession of Templet*, 2007-0067 (La. App. 1 Cir. 11/2/07), 977 So. 2d 983, 986, writ denied, 2007-2329 (La. 2/1/08), 976 So. 2d 720. The intent of the testator controls the interpretation of his testament. La. C.C. art. 1611(A). If the language of the testament is clear, its letter is not to be disregarded under the pretext of pursuing its spirit. *Id.* The first and natural impression conveyed to the mind on reading the will as a whole is entitled to great weight. The testator is assumed to be conveying his ideas to the best of his ability so as to be correctly understood at first view. When a will is free from ambiguity, the will must be carried out according to its written terms, without reference to information outside the will. *In re Succession of Templet*, 977 So. 2d at 986.

Testate and intestate succession rights, including the right to claim as a forced heir, are governed by the law in effect on the date of the decedent's death. La. C.C. art. 870(B). At the time of Mrs. Thibodaux' death on July 10, 2015, forced heirs were defined by La. C.C. art. 1493(A) as "descendants of the first degree who, at the time of the death of the decedent, are twenty-three years of age or younger or descendants of the first degree of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their

[2] When an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory rulings prejudicial to him, in addition to the review of the final judgment appealed from. See *Landry v. Leonard J. Chabert Med. Ctr.*, 2002-1559 (La. App. 1 Cir. 5/14/03), 858 So. 2d 454, 461 n.4, writs denied, 2003-1748, 2003-1752 (La. 10/17/03), 855 So. 2d 761.

persons or administering their estates at the time of the death of the decedent."

There is no dispute that at the time of Mrs. Thibodaux' death, none of her children were forced heirs. Rather, the Gros children successfully argued in the trial court that it was Mrs. Thibodaux' intent at the time she prepared her will that her children inherit fifty percent of her estate, the amount to which they would have been entitled as forced heirs in 1976. In support of their argument, the Gros children cite *In re Succession of Dean*, 2012-0832 (La. App. 4 Cir. 4/3/13), 115 So. 3d 526. In that case, Mr. Dean executed a will in 1983 leaving his "beloved" children the "forced portion" of his estate and leaving his wife the disposable portion of his estate. As in this case, the Dean children were not forced heirs at the time of their father's death. The court concluded that La. C.C. art 1611(B) expressly authorized it to consider the law in effect at the time Mr. Dean made his will to ascertain his intent toward his children. The court found that there was no evidence or other indication that Mr. Dean intended to leave nothing to his children if the law had not required him to leave them their forced portion. Accordingly, the court held that the children were entitled to what would have been their forced portion at the time the decedent made the will. *In re Succession of Dean*, 115 So. 3d at 531.

The court in *Dean* recognized that a different conclusion was reached under similar facts in the case of *In re Succession of Collett*, 2009-70 (La. App. 3 Cir. 6/3/09), 11 So. 3d 724, writ denied, 2009-1485 (La. 10/2/09), 18 So. 3d 112. In his 1988 will, Mr. Collett bequeathed to his wife "the disposable portion of all of the property" of which he died possessed, and bequeathed to his three children "the forced portion of the property" of which he died possessed. At the time of Mr. Collett's death, his children were not forced heirs. The *Collett* court noted that instead of using a numerical value, such as one-half or some other fraction or portion of the estate, which would indeed signify a desire to leave something to the

children, Mr. Collett's will used legal terms, i.e., "forced portion" and "disposable portion." The *Collett* court concluded that at the time of Mr. Collett's death, his estate had no forced portion, and thus his wife was entitled to one hundred percent of his estate. *In re Succession of Collett*, 11 So. 3d at 727.

The facts in this case are distinguishable from both *Dean* and *Collett*. The Gros children are identified in the will, but there is no language reflecting a disposition by Mrs. Thibodaux to them of any part of her property. See La. C.C. art. 1469. Based on our reading of the will as a whole, we conclude that Mrs. Thibodaux identified her deceased spouse and her children by that marriage, directed that her debts be paid, and left the remainder of her estate to Mr. Blanchard. When the language of a will is clear, its letter is not to be disregarded under the pretext of pursuing its spirit. La. C.C. art. 1611(A). Thus we conclude that the trial court erred in failing to find that the disposable portion of the estate was one hundred percent of the assets and in placing the Gros children into possession of one-half of Mrs. Thibodaux' estate. We therefore vacate the judgment of possession.

Denial of Motion to Disqualify Administrator of Succession

A party seeking removal of a succession representative must prove by convincing evidence that the representative either breached his fiduciary duty to the succession under La. C.C.P. art. 3191 or the existence of one of the grounds for removal enumerated in La. C.C.P. art. 3182. *Succession of Dean*, 2017-0155 (La. App. 1 Cir. 3/29/18), 247 So. 3d 746, 762 (en banc), writ denied, 2018-00679 (La. 9/14/18), 252 So. 3d 479. Pursuant to La. C.C.P. art. 3182, the court may remove any succession representative who is or has become disqualified, has become incapable of discharging the duties of his office, has mismanaged the estate, has failed to perform any duty imposed by law or by order of court, has ceased to be a domiciliary of the state without appointing an agent as provided in Article 3097(4),

or has failed to give notice of his application for appointment when required under Article 3093.

A trial court is authorized to remove a representative only after such a showing is made. *Succession of Dean*, 247 So. 3d at 763. At that point, the trial court is vested with discretion in determining whether removal of a succession representative is appropriate under the particular facts. Absent an abuse of discretion, the trial court's decision regarding removal of a succession representative will not be disturbed on appeal. *Id.*

As noted above, Mr. Blanchard contended that Francis D. Gros, Jr. was disqualified to act as succession representative because he was not an heir or legatee of the deceased. We have found that the Gros children were not heirs or legatees of Mrs. Thibodaux, and therefore Francis D. Gros, Jr. is precluded by La. C.C.P. art. 3097(B) from being appointed succession representative. Thus, we find that the trial court abused its discretion in failing to remove him as succession representative as he is not qualified to act as such.

CONCLUSION

For the foregoing reasons, we vacate the February 9, 2018 judgment of possession and reverse the February 12, 2016 judgment denying the motion to disqualify Francis D. Gros, Jr. as administrator of the succession. We remand this matter for further proceedings consistent herewith. Costs of this appeal are assessed to Francis D. Gros, Jr., Alice Gros Metrejean, and Perry J. Gros.

FEBRUARY 9, 2018 JUDGMENT VACATED; FEBRUARY 12, 2016 JUDGMENT REVERSED; REMANDED.