IN RE: INTERDICTION OF EUNICE LIRETTE GAMBINO

C/W

CALVIN J. GAMBINO, JR. AND
CYNTHIA A. GAMBINO, AS CURATOR FOR
INTERDICTEE EUNICE L. GAMBINO

VERSUS

CALVIN J. GAMBINO, SR. AND
BRAD JOSEPH GAMBINO

NO. 19-CA-152
C/W
19-CA-153

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON REMAND FROM THE LOUISIANA SUPREME COURT
ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 778-797 C/W 784-146, DIVISION "I"
HONORABLE NANCY A. MILLER, JUDGE PRESIDING

December 23, 2020

STEPHEN J. WINDHORST
JUDGE

Panel composed of Judges Fredericka Homberg Wicker,
Jude G. Gravois, and Stephen J. Windhorst

REVERSED; REMANDED

SJW
FHW
JGG

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WINDHORST, J.

Appellants, Calvin J. Gambino, Jr. and Cynthia A. Gambino curators for Eunice L. Gambino, appeal the trial court's January 9, 2019 judgment denying their "Petition to Nullify Act of Donation."[1] For the reasons that follow, we reverse the trial court's judgment finding that the Tangipahoa immovable property was Mr. Gambino's separate property. We conclude that the Tangipahoa immovable property is community property, and set aside the August 16, 2017 donation *inter vivos* to Brad Joseph Gambino. These consolidated cases are remanded to the trial court for further proceedings.

PROCEDURAL HISTORY and FACTS

Appellee, Calvin J. Gambino, Sr., and Eunice L. Gambino were married in 1952 and they had ten children: Calvin J. Gambino, Jr.; David J. Gambino; Cynthia A. Gambino; Laurie Gambino Kraemer; Joy Gambino Landry; Anthony J. Gambino; Catherine Gambino Rando; Linda Gambino Gunn; and Brad Joseph Gambino. Mr. and Mrs. Gambino had one child predecease them, Tina M. Gambino.

On August 16, 2017, Mr. Gambino executed a Donation *Inter Vivos* in favor of his son, Brad Joseph Gambino, of 94.67 acres of immovable property ("the immovable property") in Tangipahoa Parish.

On December 19, 2017, appellants, along with six siblings filed a petition to interdict their mother, Mrs. Gambino, contending that she had advanced dementia and Alzheimer's disease. At the same time, the siblings also filed a petition to interdict their father, Mr. Gambino. Brad Joseph Gambino did not join in either petition to interdict his parents. The trial court dismissed the petition to interdict Mr. Gambino, but granted the petition to interdict Mrs. Gambino, on January 1, 2018.[2]

[1] The parties submitted to this Court an amended judgment dated October 4, 2019 and a second amended judgment dated December 19, 2019.

[2] The judgment was signed February 20, 2018.

A consent judgment was entered into whereas it was agreed that appellants would serve as curators, and Mr. Gambino would serve as undercurator of Mrs. Gambino.

On May 24, 2018, appellants as curators for Mrs. Gambino filed a "Petition to Terminate Community Property Regime, and to Annul Donations." In the petition, appellants alleged that the August 16, 2017 donation of the immovable property was invalid. Specifically, appellants contended that (1) the immovable property was community property; (2) Mrs. Gambino did not have capacity to consent to the donation of the immovable property due to her medical condition; and (3) Mrs. Gambino did not jointly execute the written donation. On September 24, 2018, appellants filed a supplemental petition. On October 18, 2018, Mr. Gambino filed an answer to the petitions and a reconventional demand. On November 8, 2018, appellants filed an answer and opposition to the reconventional demand.

On November 14, 2018, the parties appeared before the trial court on appellants' claim to annul the August 16, 2017 donation of the immovable property. In the January 9, 2019 judgment, the trial court stated that Mr. Gambino "presented credible testimony, supported by corroborating evidence, sufficient to overcome the presumption of community." The trial court found that the immovable property at issue was Mr. Gambino's separate property and denied appellants' "Petition to Nullify Act of Donation." Appellants filed this appeal.

LAW

Property of married persons is generally characterized as either community or separate. La. C.C. art. 2335. Community property comprises: property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse; property acquired with community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other

property not classified by law as separate property. La. C.C. art. 2338. Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property. La. C.C. art. 2340; In re Succession of Firmin, 09-411 (La. App. 4 Cir. 04/21/10), 38 So.3d 445, 450, writ denied sub nom, Succession of Firmin, 10-1176 (La. 09/17/10), 45 So.3d 1046.

La. C.C. art. 2341, in part, classifies separate property as property acquired by a spouse prior to the establishment of a community property regime, property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used; property acquired by a spouse by inheritance or donation to him individually; and things acquired by a spouse as a voluntary partition of the community during the existence of a community property regime.

It is well-settled that the presumption that property acquired during the marriage is community property is a strong one. Further, the spouse seeking to rebut the strong presumption of community has the burden of proving that such assets are separate, and not community. Talbot v. Talbot, 03-814 (La. 12/12/03), 864 So.2d 590, 600; Ross v. Ross, 02-2984 (La. 10/21/03), 857 So.2d 384; Tullier v. Tullier, 464 So.2d 278, 282 (La. 1985); McCorvey v. McCorvey, 05-889 (La. App. 3 Cir. 02/01/06), 922 So.2d 694, writ denied, 06-435 (La. 04/28/06), 927 So.2d 295; In re Succession of Hebert, 03-531 (La. App. 1 Cir. 09/17/04), 887 So.2d 98, 100-101, writ denied, 04-2571 (La. 12/17/04), 888 So.2d 872. In this case, Mr. Gambino, must prove by a preponderance of the evidence that the immovable property is his separate property. Talbot, 864 So.2d at 600; McLaughlin v McLaughlin, 17-645 (La. App. 5 Cir. 05/16/18), 247 So.3d 1105, 1111. Proof by a preponderance of the evidence is defined as considering the evidence as a whole, the fact to be proved is

more probable than not. Talbot, 864 So.2d at 600; Boxie v. Smith-Ruffin, 07-264 (La. App. 5 Cir. 02/06/08), 979 So.2d 539, 545.

A trial court's findings regarding the nature of the property as community or separate is a factual determination subject to manifest error review. Biondo v. Biondo, 99-890 (La. App. 1 Cir. 07/31/00), 769 So.2d 94, 99; Ross, 857 So.2d at 395. An appellate court may not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong, and where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. Cole v. Department of Public Safety & Corrections, 01-2123 (La. 09/04/02), 825 So.2d 1134; Stobart v. State through Department of Transportation and Development, 617 So.2d 880 (La. 1993).). However, as this Court recently stated in Greene v. Greene, 19-37 (La. App. 5 Cir. 12/11/19), 286 So.3d 1103, 1128:

> When there is conflicting testimony, "reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable." Morris v. Morris, 04-676 (La. App. 5 Cir. 11/30/04), 889 So.2d 1048, 1054-55, writ denied, 04-3185 (La. 03/11/05), 896 So.2d 68. Only where "documents or objective evidence so contradict a witness's story, or the story itself is so internally inconsistent or implausible on its face that a reasonable factfinder would not credit the witness's story," may the appeals court find manifest error in the fact determined. Id."

DISCUSSION

On appeal, appellants contend that the trial court (1) erred in allowing a document into evidence; (2) erred in classifying the immovable property as separate property, not community property; and (2) erred in denying the petition to annul donation of the immovable property.

Appellants argue that Mr. Gambino did not overcome the strong presumption that the immovable property is community property. Specifically, appellants argue that (1) since the immovable property was purchased during Mr. and Mrs. Gambino's marriage, the property is community; (2) the mere statement by Mr.

Gambino in the act of sale that it is his separate property is not sufficient to overcome the presumption of community; (3) Mrs. Gambino did not join or concur in the act of sale or donation and she did not acknowledge that the immovable property was Mr. Gambino's separate property;[3] (3) Mr. Gambino cannot show that the funds used to purchase the immovable property were his separate funds; and (4) Mr. Gambino does not show that he reserved the civil and natural fruits of the alleged separate funds. Appellants argue that because the trial court erred in finding the immovable property to be Mr. Gambino's separate property, the trial court erred in denying the petition to annul donation of the immovable property.

Appellants contend that the trial court erred in admitting into evidence the Eureka Homestead Society passbook, which had not been previously produced in discovery. A trial court is granted broad discretion in determining the admissibility of evidence and its determinations will not be disturbed on appeal absent a clear abuse of that discretion. Aaron v. McGowan Working Partners, 16-696 (La. App. 5 Cir. 06/15/17), 223 So.3d 714, 729-730. Further, courts are to resolve the admissibility of evidence in favor of receiving the evidence. Dardeau v. Aucoin, 97–144 (La. App. 3 Cir. 11/5/97), 703 So.2d 695, 697; writ denied, 98–0359 (La. 3/27/98), 716 So.2d 889. Upon review of the record, we find the Eureka passbook was of little or no relevance, and considering the foregoing, we find the trial court did not abuse its discretion in admitting the passbook into evidence over appellants' objection. Further, we do not find that appellants were prejudiced by the admittance of the Eureka passbook. La. C.E. art. 103. Accordingly, we find that under the circumstances, the trial court did not abuse its broad discretion in admitting into evidence the Eureka passbook.

[3] See La. C.C. art. 2347 which provides that the concurrence of both spouses is required for the alienation of community immovable property.

Mr. Gambino presented very little supporting evidence to establish that the immovable property purchased in 1989 and subsequently donated in 2017 was his separate property and to rebut the strong presumption of community. Some of his testimony, particularly the alleged sources of the funds he claims are separate, is contradicted by other evidence. We find that the documents and objective evidence introduced at trial so contradict Mr. Gambino's story and Mr. Gambino's story itself is so internally inconsistent and implausible on its face that a reasonable factfinder would not credit his story. Greene, supra. We thus find that the trial court was manifestly erroneous in concluding that Mr. Gambino had rebutted the strong presumption of community, and in finding that the immovable property to be separate property, and by denying appellants' petition to annul donation of the immovable property.

Two facts were undisputed at trial: that Mr. and Mrs. Gambino were married in 1952; and that they did not enter into a prenuptial separation of property agreement upon their marriage. Thus, their marriage was a community property regime.

Mr. Gambino testified that he purchased the immovable property from Bobbie Lee Terrebonne by act of sale dated November 17, 1989, with his separate and paraphernal funds, which he withdrew from his accounts as shown by his "passbooks."[4] He testified that "every penny" of the funds in the accounts were from donations from his father and/or inheritance funds from his parents' successions and that no community funds were used to purchase the property in 1989. He subsequently donated this alleged separate immovable property to his son, Brad Joseph Gambino on August 16, 2017. In support of his testimony, Mr. Gambino

[4] Mr. Gambino produced his "passbooks" for his checking/savings accounts with (1) Fifth District Savings & Loan Association in the name of Calvin John Gambino or Anthony J. Gambino; (2) Eureka Homestead Society in the name of David James Gambino or Mr. Calvin John Gambino; (3) Algiers Homestead Association in the name of Mr. Calvin J. Gambino; and (4) Jefferson Savings and Loan Association in the name of Calvin J. Gambino.

submitted into evidence (1) his passbooks for his checking/savings accounts, which he designated as "separate and paraphernal funds" in his name and/or his name and his father's name; (2) the November 17, 1989 act of sale, which acknowledged that Mr. Gambino was purchasing the immovable property with his separate and paraphernal funds as his separate property; and (3) the August 16, 2017 act of donation, which stated that Mr. Gambino was donating his separate immovable property to his son, Brad Joseph Gambino.

In addition, Mr. Gambino was questioned extensively regarding what immovable property he owned and currently owns, when and what funds he used to purchase all of his properties before and after his marriage to Mrs. Gambino in 1952, what properties were sold, and whether it was possible that he deposited community funds in his separate accounts. Mr. Gambino, while not always clear regarding the timeline of all of his transactions before and after his marriage in 1952, testified that at no time did he use community funds to purchase the immovable property in 1989. He testified that (1) the funds in the passbooks were his separate and paraphernal funds that he received from his father through donations and/or from his inheritance after his parents passed away, and said passbooks were designated "separate and paraphernal funds;" (2) he spoke with Mrs. Gambino prior to purchasing the immovable property in 1989; (3) Mrs. Gambino understood and agreed that he would be purchasing the immovable property in his name as his separate property, using his separate and paraphernal funds; and (4) he subsequently donated his separate immovable property to his son, Brad Joseph Gambino, because he was the only child that wanted to continue the family business and that would help him with the business. Appellants offered no evidence to contradict Mr. Gambino's testimony or the limited evidence presented in support of his assertion that he used separate funds to purchase the immovable property as his separate property.

Mr. Gambino did not sustain his burden of providing sufficient proof that separate funds were used to purchase the immovable property necessary to rebut the strong presumption of community. His sometimes questionable testimony raises doubt as to the separate nature of the funds in the passbook accounts based on the following facts. Mr. Gambino consistently testified that he received all of the funds in the passbook accounts from donations from his father and/or inheritance funds he received after his parents passed away. However, Mr. Gambino's testimony as to the source or sources of the funds is not reflected in the passbook accounts, and is contradicted by other evidence. Other evidence and testimony showed that during the time frame that Mr. Gambino allegedly received donations from his father that were placed into his passbook accounts, (1) Mr. Gambino's father was interdicted and did not have the capacity to donate; and (2) Mr. Gambino served as his father's curator and was paid a curator's fee during the time his father allegedly placed donated funds into his separate passbook accounts. The earned curator's fees were community assets.

Mr. Gambino alleged that he received inheritance funds from his mother's estate in 1969; however, the passbook accounts do not date back to that time frame. Furthermore, the passbook accounts do not reflect any inheritance funds received from Mr. Gambino's father, who passed away three days prior to the purchase of the immovable property.

Considering the testimony, which was contradicted by other testimony and evidence, and the very limited evidence offered, Mr. Gambino did not provide sufficient evidence to meet his burden of rebutting the presumption that the funds in the accounts were community assets. Even assuming the passbook accounts legally contained funds and inheritance received from Mr. Gambino's parents, the passbook accounts also included community property funds in the form of dividends, and possibly the earned curator's fees.

La. C.C. art. 2339 provides that the natural and civil fruits of the separate property of a spouse are community property. A spouse my reserve them as his separate property by a declaration made in an authentic act or in an act under private signature duly acknowledged, a copy of which shall be provided to the other spouse prior to filing the declaration.[5] Id.

As to the fruits and revenues of immovables, the declaration is effective when a copy is provided to the other spouse and is filed in the conveyance records of the parish in which the immovable property is located. Id. As to fruits of movables, the declaration is effective when a copy is provided to the other spouse and is filed in the conveyance records of the parish in which the declarant is domiciled. Id.[6]

Mr. Gambino also had the burden of proving that the dividends were his separate property, but he did not reserve the dividends as his separate property by a declaration of paraphernality in compliance with La. C.C. art. 2339.[7] Since the dividends were not properly reserved, Mr. Gambino further had the burden of showing that the funds were not commingled to such a degree as to convert the alleged separate funds into community property.

The mere mixing of separate and community funds in a bank account does not of itself convert the entire account into community property. Biondo, 769 So.2d at 103. Only when separate funds are commingled with community funds indiscriminately so that the separate funds cannot be identified or differentiated from the community funds are all the funds characterized as community funds. Id.; Curtis v. Curtis, 403 So.2d 56, 59 (La. 1981). Therefore, where separate funds can be traced with sufficient certainty to establish the separate ownership of property paid for with

[5] Such a declaration is often referred to as a "declaration of paraphernality."

[6] See also La. C.C. art. 2342 declaration of acquisition of separate property.

[7] Additionally, it is unclear as to whether there were any natural and civil fruits derived from the immovable property. Mr. Gambino did not provide any evidence that he complied with the requirements of La. C.C. art. 2339 as to the immovable property, if necessary.

those funds, the separate status of such property will be upheld. Talbot, 864 So.2d at 600; Landwehr v. Landwehr, 547 So.2d 752, 755 (La. App. 4 Cir. 1989).

The alleged separate funds, which were comingled with community fruits and revenues, cannot be traced with sufficient certainty here. The passbook accounts show an accumulation of interest in the form of dividends in the amount of $4,368.92, which appears to have been used towards the purchase of the immovable property in 1989.[8] On their face, however, the passbook accounts indicate that Mr. Gambino most likely received additional unaccounted for dividends after his marriage and prior to the purchase of the immovable property, which would be deemed community funds.[9] As a result, Mr. Gambino was required to trace the funds with sufficient certainty to establish the separate nature of the immovable property purchased with those funds. Mr. Gambino did not provide any evidence to establish with sufficient certainty the separate nature of the funds and ownership of the immovable property. Additional doubt is cast upon Mr. Gambino's testimony because the funds alleged to have been separate donations from his father came when his father was interdicted and had no capacity to donate. Consequently, Mr. Gambino did not rebut by a preponderance of the evidence the strong presumption of community.

Based on a review of the limited and conflicting evidence, we find the trial court was manifestly erroneous in finding that Mr. Gambino sustained his burden of proving that the immovable property was his separate property and denying appellants' petition to annul donation of the immovable property. Accordingly, we

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[8] The Fifth District account shows an accumulation of dividends in the amount of $874.16 at the time of the withdrawal of the $70,000.00, leaving a balance of $7,747.07. The Jefferson Savings account shows an accumulation of dividends in the amount of $1,132.28 at the time of the withdrawal of the $7,985.60, leaving a zero balance. The Algiers account shows an accumulation of dividends in the amount of $2,362.48 at the time of the withdrawal of the $7,500.00 on August 8, 1989, leaving a balance of $272.45.

[9] The first entry in the Fifth District account is a beginning balance of $14,889.45 on August 17, 1988. The first entry in the Jefferson Savings account is a beginning balance of $4,767.66 on June 30, 1986. The first entry in the Algiers account is a beginning balance of $$13,410.54 on September 22, 1986.

reverse the trial court's judgment and remand to the trial court for further proceedings.

DECREE

For the reasons stated herein, we reverse the trial court's judgment finding that the Tangipahoa immovable property was Mr. Gambino's separate property. We conclude that the Tangipahoa immovable property is community property, and set aside the August 16, 2017 donation *inter vivos* to Brad Joseph Gambino. These consolidated cases are remanded to the trial court for further proceedings.

REVERSED; REMANDED

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **DECEMBER 23, 2020** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

Curtis B. Pursell

CURTIS B. PURSELL
CLERK OF COURT

19-CA-152
C/W 19-CA-153

E-NOTIFIED
24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE NANCY A. MILLER (DISTRICT JUDGE)
CHRISTY M. HOWLEY (APPELLANT)

MAILED
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