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JUDGES

Court of Appeal

FIFTH CIRCUIT

STATE OF LOUISIANA

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February 2, 2021

RE: Case No. 19-CA-152 C/W 19-CA-153
In Re: Interdiction of Eunice Lirette Gambino
c/w
Calvin J. Gambino, Jr., et al
Versus
Calvin J. Gambino, Sr. and Brad Joseph Gambino

To all recipients of the opinion in the above referenced case:

On December 23, 2020, an opinion was rendered in the above case, which was on remand from the Louisiana Supreme Court. After reviewing the opinion, the following corrections have been made:

1. PAGE 4

- a. Indented first full paragraph (previously not indented)
- b. First Paragraph of Discussion, line 3 – corrected numbering:
“and (2) erred in denying the petition to annul donation of the immovable property” to “and (3) erred in denying the petition to annul donation of the immovable property”

2. PAGE 5

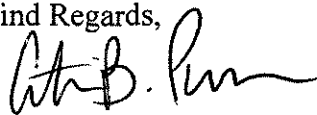
- a. Lines 4 and 5, Changed/corrected numbering:
“(3) Mr. Gambino cannot show that the funds used to purchase the immovable property were his separate funds; and (4)” to “(4) Mr. Gambino cannot show that the funds used to purchase the immovable property were his separate funds; and (5)”

3. PAGE 9

- a. Line 2, Changed/corrected:
“A spouse my reserve them” to “A spouse may reserve them”

A copy of the corrected pages are enclosed. Please substitute the corrected pages in the opinion previously sent.

Kind Regards,

A handwritten signature in black ink, appearing to read "C. B. Pursell", with a stylized flourish at the end.

Curtis B. Pursell
Clerk of Court

CBP/nfv

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 (3) 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 (4) Mr. Gambino cannot show that the funds used to purchase the immovable property were his separate funds; and (5) 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.

La. C.C. art. 2339 provides that the natural and civil fruits of the separate property of a spouse are community property. A spouse may 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.