

NOT DESIGNATED FOR PUBLICATION

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STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 CA 0184

SUCCESSION
OF
MONTIE HOLT GONZALES

Judgment Rendered: NOV 06 2015

Appealed from the
23rd Judicial District Court
In and for the Parish of Assumption, Louisiana
Trial Court Number 6857

Honorable Jessie M. LeBlanc, Judge

Jess J. Waguespack
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Attorney for Appellant
Warren Gonzales

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Attorney for Appellee
Montie Grey Sibley

BEFORE: WHIPPLE, C.J., WELCH, AND DRAKE, JJ.

WELCH, J.

In this succession proceeding, Warren Gonzales, Jr. appeals a declaratory judgment decreeing that three tracts of land that he and his wife, Montie Holt Gonzales, purchased during their marriage were co-owned by them. He also appeals the trial court's judgment removing him as dative testamentary executor of his wife's estate. For reasons that follow, we affirm and issue this memorandum opinion in compliance with Uniform Rules—Courts of Appeal, Rule 2-16.1(B).

Warren and Montie Gonzales were married on November 8, 1997. They both had been married previously, and Mrs. Gonzales had one son, Montie Grey Sibley, who was born of her first marriage.¹ Prior to their marriage, Mr. and Mrs. Gonzales executed a marriage contract modifying the legal regime of community of acquets and gains to a contractual regime of separate property. In May of 2009, Mrs. Gonzales was diagnosed with a brain tumor, and she died on October 31, 2010.

Between Mrs. Gonzales's diagnosis and her death, she executed three wills. Mrs. Gonzales's first will, which was executed on October 2, 2009, left her estate to her son, Mr. Sibley. In Mrs. Gonzales's second will, executed on May 7, 2010, she declared that four specifically described tracts of immovable property located in Assumption Parish in the area known as "Lower Texas," which were purchased during her marriage to Mr. Gonzales, were the separate property of Mr. Gonzales. In that will, she bequeathed any interest she may have had in those tracts of land to her husband and left the remainder of her property to her son. In her third will, executed on July 27, 2010, Mrs. Gonzales left all of her property to her son, "less and except to following described property, to wit:." However, there was no property listed or described in the third will.

¹ In addition, Mr. Gonzales had three children during his first marriage.

On August 3, 2010, one week later after executing the third will, Mrs. Gonzales signed an affidavit essentially stating that her husband had found the first will she executed² and that he pressured her to write the May 7, 2010 will to state that the immovable property was his separate property; however, she stated that this was not true because the property was paid for with community funds. She further stated that she executed a new will on July 27, 2010, which “correctly stat[ed] her desires.”

On November 8, 2010, Mr. Sibley filed a petition to probate his mother’s July 27, 2010 will. Since that will did not name an executor, Mr. Sibley requested in his petition that he, as the sole heir to his mother’s estate, be named the executor of the estate. He also requested that letters testamentary be issued to him so that he could file a detailed descriptive list of the estate. On December 7, 2010, an order was issued by the trial court probating the will; however, the order did not appoint Mr. Sibley as the executor of the estate. It is undisputed that Mr. Sibley did not file a petition for notice of the filing of an application for appointment as administrator as provided for in La. C.C.P. art. 3091, nor did his petition to probate the July 27, 2010 will specifically pray for such notice.³

On March 14, 2012, Mr. Gonzales filed a petition seeking to be appointed as dative testamentary executor of the succession. In the petition, Mr. Gonzales stated that while Mr. Sibley had petitioned the court to be appointed as executor, he had not been appointed. Mr. Gonzales alleged that Mr. Sibley was a member of the

² We note that in her affidavit, Mrs. Gonzales stated that Mr. Gonzales found the will that she executed on September 29, 2009; however, the record does not reveal that a will was executed on that date. Rather, the record reflects that she executed a will on October 2, 2009. Nonetheless, from Mrs. Gonzales’s statements in her affidavit, it is clear that she intended to state that Mr. Gonzales found her first will, pressured her to write the second will, and she then wrote the third will to reflect her true intent.

³ Louisiana Code of Civil Procedure article 3091 states that an interested person desiring to be notified of the filing of an application for appointment as administrator, may, at any time after the death of the deceased, petition the court in which the succession has been opened for such notice. In addition, La. C.C.P. art. 3092 sets forth the form requirements for such petition.

United States Coast Guard, that he had been transferred to a base in Massachusetts, and that his last known mailing address was “1818 Amvets Ave., Falmouth, Massachusetts, 02540.” Mr. Gonzales further alleged that more than ten days had elapsed since his wife’s death and that as of the date of the filing of his petition, no one had filed a petition for notice of application of appointment of dative testamentary executor in accordance with La. C.C.P. art. 3091, as evidenced by the Certificate of the Clerk of Court attached to his petition.

On March 20, 2012, the trial court signed an order appointing Mr. Gonzales as the dative testamentary executor of the succession. The order also decreed that letters testamentary be issued to Mr. Gonzales and that he file a detailed descriptive list of property belonging to the succession as soon as it could be determined. The testamentary letters were issued to Mr. Gonzales on March 22, 2012.

On March 26, 2012, Mr. Sibley filed a petition asking that Mr. Gonzales’s request to be appointed dative testamentary executor be denied. He claimed that the appointment of a dative testamentary executor was unnecessary and would create an undue financial burden on the estate because the estate had no current debt, he was the sole heir, and he was requesting that he be placed in possession of the estate. He further asserted that since he had already requested to be made executor of the estate in his original petition for probate, Mr. Gonzales’s petition for appointment as dative testamentary executor constituted a cross-claim, and therefore, a contradictory hearing should be held if an executor was to be appointed. Mr. Sibley later filed a detailed descriptive list, which listed as assets of the estate a one-half interest in each of the four tracts of immovable property in Assumption Parish that were referred to in his mother’s May 7, 2010 will as the separate property of Mr. Gonzales.

On May 25, 2012, Mr. Gonzales filed a rule to show cause in which he asserted that Mr. Sibley had no procedural grounds upon which to attack his appointment as dative testamentary executor and could only seek his removal in

accordance with La. C.C.P. art. 3182. He also objected to Mr. Sibley's detailed descriptive list on the basis that all of the immovable property on the list was acknowledged by the decedent to be his separate property.

In response, on December 26, 2012, Mr. Sibley filed a motion to remove Mr. Gonzales as dative testamentary executor. Therein, he asserted that because two persons sought to be named executor of the estate, a contradictory hearing should have been required prior to the issuance of the letters testamentary. He also alleged that Mr. Gonzales was not the proper person to be named the executor of the estate since Mr. Gonzales's position was adverse to the heir of the estate, he had threatened Mr. Sibley's life, and he had failed to post a bond or to provide an inventory or detailed descriptive list upon which the amount of the bond could be determined.

On January 17, 2014, Mr. Gonzales filed a petition for declaratory judgment, seeking to be declared the sole owner of the four tracts of immovable property in Assumption Parish that were listed as assets of the succession and described in the May 7, 2010 will. He alleged that all of the tracts of land were paid for solely from his funds, and he requested that the court decree that the properties belonged to him and that the decedent had no interest in the properties as a joint owner.

A trial on the motion to remove Mr. Gonzales as dative testamentary executor and Mr. Gonzales' petition for declaratory judgment was held on June 6, 2014. Following the conclusion of the trial, in well-written, detailed reasons for judgment, the trial court granted Mr. Sibley's motion to remove Mr. Gonzales as dative testamentary executor of the estate and stated that the court would require a contradictory hearing prior to the appointment of any executor. The trial court concluded that while Mr. Sibley's petition did not specifically request that he be given notice of the filing of an application for the appointment of a dative testamentary executor, it was clear that he was a party interested in the appointment of an administrator by virtue of his filing of the petition to probate the will and his

request to be appointed as executor. The trial court also found that Mr. Sibley's petition substantially complied with the notice provisions set forth in La. C.C.P. art. 3091. Further, the trial court stressed that Mr. Gonzales acknowledged, in his petition seeking appointment as dative testamentary executor, that he knew the whereabouts of Mr. Sibley.

With respect to the declaratory judgment action, the trial court found that the documents and evidence demonstrated that the parties agreed to be co-owners of the disputed properties. The trial court declared those properties to be co-owned in indivision by Mr. and Mrs. Gonzales, but found the fourth tract of land to be the separate property of Mr. Gonzales.⁴ The court observed that for three of the tracts, both Mr. and Mrs. Gonzales were listed as purchasers on the acts of sale. The court stressed that Mr. Gonzales knew that Mrs. Gonzales was listed as a buyer on the acts of sale, but chose not to have her removed. It also stressed that both Mr. and Mrs. Gonzales obligated themselves on a mortgage for funds to make improvements on the property, and that the property was purchased to have a place for Mrs. Gonzales to ride her horses.⁵

A judgment in accordance with the trial court's ruling was signed on September 30, 2014, and it is from this judgment that Mr. Gonzales has appealed. On appeal, Mr. Gonzales contends that the trial court abused its discretion in removing him as dative testamentary executor because there was no basis in law or fact for doing so. He argues that his removal was not based on whether he was "qualified" to serve as executor, but rather, based on his failure to give Mr. Sibley notice before his ex-parte appointment as executor. Mr. Gonzales claims Mr. Sibley

⁴ The parties stipulated that one of the four tracts, which was purchased solely by Mr. Gonzales, was Mr. Gonzales's separate property.

⁵ Following the issuance of the final judgment, Mr. Gonzales and Mr. Sibley both filed petitions to be appointed as dative testamentary executor at a contradictory hearing. The trial court refused to issue an order for a contradictory hearing on October 29, 2014, noting that it had been divested of jurisdiction pending the resolution of this appeal.

did not file a request for notice in compliance with La. C.C.P. arts. 3091 and 3092, and thus, notice was not required and his appointment was valid. Mr. Gonzales also claims that he is more qualified to serve as the executor because he lives on the property that is claimed to be jointly owned by him and the decedent, whereas Mr. Sibley lives out of state.

After a thorough review of the record and the applicable law, we find that the trial court's judgment removing Mr. Gonzales as dative testamentary executor and ordering a contradictory hearing prior to appointing a succession administrator was correct. As Mr. Gonzales correctly points out, he was removed because he failed to give notice to Mr. Sibley before his ex-parte appointment as executor. While Mr. Sibley did not file a request for notice in strict compliance with La. C.C.P. arts. 3091 and 3092, he did file, within ten days of his mother's death, a request (in his petition to probate) to be appointed executor, although that request was never ruled upon. When Mr. Gonzales petitioned the court to be appointed dative testamentary executor, he acknowledged that Mr. Sibley had sought to be appointed as executor. The purpose of the notice provisions set forth in La. C.C.P. arts. 3091, *et seq.* is to put the public on notice that there is a party interested in the appointment of an executor and to give interested persons a voice in the selection of the executor. See Succession of Minacapelli, 457 So.2d 794, 796 (La. App. 1st Cir. 1984); Succession of Revere, 393 So.2d 153, 155 (La. App. 1st Cir. 1980); Succession of Schneider, 371 So.2d 1380, 1384 (La. App. 1st Cir. 1979). We agree with the trial court herein that Mr. Sibley "complied with the spirit of the law." Under the specific facts of this case, Mr. Sibley's petition to probate and his request therein to be appointed executor, together with Mr. Gonzales's admission in his pleading that he knew Mr. Sibley had sought to be appointed executor of the estate and that he knew of Mr. Sibley's current whereabouts was sufficient to serve the purpose of La. C.C.P. arts. 3091 and 3092. As such, Mr. Sibley was an interested party entitled to notice of Mr.

Gonzales's application for appointment and to a contradictory hearing under La. C.C.P. art. 3093. Thus, the trial court correctly removed Mr. Gonzales as dative testamentary executor and required a contradictory hearing. See Succession of Schneider, 371 So.2d at 1384-1385.

Mr. Gonzales further contends on appeal that the trial court erred in finding that the immovable property was jointly owned because there was no basis in law or fact for such a finding. He argues that the trial court misapplied the law regarding joint ownership and abused its discretion by failing to give due regard to the evidence showing that he supplied all of the funds to purchase the property. However, based on the evidence and applicable law, we find that the trial court's judgment declaring that the disputed tracts of immovable property were co-owned by the decedent and Mr. Gonzales was reasonably supported by the record.

During the trial, Mr. Gonzales testified regarding the funds used to purchase the subject properties. Although he claimed that all of the properties were purchased exclusively with his separate funds, he acknowledged that the checks written to purchase the properties were drawn on a joint account in his name and Mrs. Gonzales's name. In addition, the acts of sale pursuant to which the three tracts were purchased listed both Mr. and Mrs. Gonzales as the buyers. While the evidence showed that Mr. Gonzales had used some of his separate funds to purchase one of the tracts (*i.e.*, funds from the sale of his separate home in Belle Rose, which were deposited into the joint account), Mrs. Gonzales had signed the purchase agreement for that tract as a buyer and had executed a mortgage with her husband on that tract to secure funds to make improvements on the properties. Thus, the trial court's conclusion that the three disputed tracts of land were co-owned by Mr. Gonzales and the decedent is not manifestly erroneous or clearly wrong.

Accordingly, the September 30, 2014 judgment is affirmed. All costs of this appeal are assessed to appellant, Warren Gonzales.

AFFIRMED.