NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CW 1177

SUCCESSIONS OF
PAULINE WAYNE, WIFE OF/AND PAUL WAYNE

DATE OF JUDGMENT: MAY 31 2019

ON APPEAL FROM THE TWENTY FIRST JUDICIAL DISTRICT COURT
NUMBER 2017-30086, DIVISION C, PARISH OF TANGIPAHOA
STATE OF LOUISIANA

HONORABLE ROBERT H. MORRISON, III, JUDGE

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BEFORE: WELCH, CHUTZ, AND LANIER, JJ.

Disposition: APPEAL CONVERTED TO APPLICATION FOR SUPERVISORY WRIT; WRIT GRANTED; JUDGMENT REVERSED.

Welch concurs with reasons.
Chutz concurs for reasons assigned by Judge Lanier.

CHUTZ, J.

In these intestate succession proceedings, appellant, Beau Wayne Beaver, in his capacity as the administrator of the successions of Pauline and Paul Wayne, appeals the trial court's judgment decreeing that three bank accounts were the separate property of appellee, Cheryl Wayne Davis. For the following reasons, we convert the appeal to an application for supervisory writ, grant the writ, and reverse the trial court's judgment.

PROCEDURAL AND FACTUAL BACKGROUND

On March 16, 2017, the successions of Pauline and Paul Wayne were opened with Beaver appointed as administrator of each. Pauline died on February 11, 2017, shortly after Paul had passed away on January 12, 2017. Pauline and Paul had been married but once, to each other, and had two children: Davis, who survived her parents, and Sarah Ann Wayne Beaver, who predeceased her parents. Sarah had two children, Beaver and his brother, William Bart Beaver, who survived their mother and her parents. On May 17, 2017, averring that she was the legal heir of Pauline and Paul, Davis filed a motion for, among other things, the removal of Beaver as the administrator of her parents' successions. She subsequently filed a petition for declaratory judgment, on August 9, 2017, contending that her parents had donated a checking account and two savings accounts to her before their deaths. Thus, she sought a judgment declaring that the proceeds in each account were her separate property and that Beaver, as administrator for the successions, had wrongfully withdrawn the money in each account.

After a two-day hearing, the trial court rendered a judgment declaring that it was the intent of Pauline and Paul to each donate their checking account and two savings accounts to Davis and, therefore, the three banking accounts were the separate property of Davis and not assets of the successions. Additionally, the

judgment ordered the successions to return the money in each bank account to Davis along with any accrued interest. This appeal by Beaver as administrator of the successions followed.

APPELLATE JURISDICTION

Appellate courts have a duty to examine subject matter jurisdiction sua sponte, even when the parties do not raise the issue. ***Texas Gas Exploration Corp. v. Lafourche Realty Co., Inc.***, 2011-0520 (La. App. 1st Cir. 11/9/11), 79 So.3d 1054, 1059, writ denied, 2012-0360 (La. 4/9/12), 85 So.3d 698. Subject to certain exceptions, appeals from orders or judgments rendered in succession proceedings are governed by the same rules applicable to appeals in ordinary proceedings. See La. C.C.P. art. 2974. The Code of Civil Procedure grants the right to an immediate appeal of certain judgments rendered in succession proceedings; however, the present judgment is not among those identified by the Code. See La. C.C.P. art. 3308 (judgment homologating tableau of distribution may be suspensively appealed), La. C.C.P. art. 3337 (judgment homologating final account is a "final judgment"), La. C.C.P. arts. 2122 and 2974 (governing appeals of orders appointing or removing a succession representative); ***Succession of Jaga***, 2016-1291 (La. App. 1st Cir. 9/15/17), 227 So.3d 325, 327-28.

The judgment on appeal determines only certain issues in the successions, namely, the ownership of three assets included by the administrator in the descriptive lists. The resolution of those issues, however, does not conclude the successions. The heirs have not been placed in possession of their respective portions of the estates, nor has a judgment been rendered homologating final accounts by the current administrator. See La. C.C.P. art. 3337. In addition,

Davis's motion to remove Beaver as the administrator of Pauline's and Paul's successions has not been adjudicated.[1]

The judgment before us is limited to issues of the ownership of three assets claimed as items of succession property that have arisen during the course of the succession, which are not conclusive of the proceeding. Consequently, the judgment is a partial judgment that may be appealed only if authorized by La. C.C.P. art. 1915. See ***Succession of Jaga***, 227 So.3d at 328 (judgment finding that certain parties were children of the decedent, the estate consisted solely of separate property, the ownership of certain property, and the marital portion as well as the fractional amount thereof was a partial judgment subject to appeal only as provided under Article 1915); see also ***In re Succession of Faget***, 2006-2159 (La. App. 1st Cir. 9/19/07), 984 So.2d 7, 10 (judgment declaring surviving spouse to be co-owner of family home was partial judgment subject to appeal only under Article 1915).

The judgment does not fall within any of the categories of partial judgments subject to immediate appeal under Article 1915A. Therefore, the appeal of the judgment is governed by Subsection B of that article, which provides that a partial judgment "shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay." La. C.C.P. art. 1915B(1). The trial court did not designate the judgment as final for purposes of immediate appeal or make a determination that there was no just reason for delay. Therefore, the judgment is not a final judgment for purposes of immediate appeal. See La. C.C.P. art. 1915B(2). Consequently, this court lacks appellate jurisdiction to consider the present appeal. See La. C.C.P. arts. 1841, 1911, and 2083.

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[1]Although the court minutes indicate that Davis's motion for removal of the administrator of the successions and other relief was before the court at the two-day hearing, the record is devoid of any ruling by the trial court insofar as the relief sought in the motion.

Nevertheless, La. Const. art. V, § 10(A) provides that a court of appeal has "supervisory jurisdiction over cases which arise within its circuit." Because Beaver filed the motion for appeal within the thirty-day delay provided for seeking supervisory writs, we exercise our discretion to convert his appeal to an application for supervisory writ, and consider the merits of his appeal under our supervisory jurisdiction. See La. Uniform Rules -- Court of Appeal, Rule 4-3; ***KAS Properties, LLC v. Louisiana Bd. of Supervisors for Louisiana State Univ.***, 2014-0566 (La. App. 1st Cir. 4/21/15), 167 So.3d 1007, 1010. See also ***Stelluto v. Stelluto***, 2005-0074, (La. 6/29/05), 914 So.2d 34, 39 (noting that the decision to convert an appeal to an application for supervisory writ is within the discretion of the appellate courts).

DISCUSSION

On appeal, Beaver challenges the trial court's conclusion that Pauline and Paul intended to donate the three bank accounts to Davis. Donative intent is a factual issue. See ***Montet v. Lyles***, 93-1724 (La. App. 1st Cir. 6/24/94), 638 So.2d 727, 730, writ denied, 94-1985 (La. 11/18/94), 646 So.2d 377. As such, it is subject to the manifest error standard of review. A court of appeal may not set aside a trial court's factual finding unless it is manifestly erroneous or clearly wrong. A trial court's factual finding is manifestly erroneous/clearly wrong when, after review of the entire record, the appellate court finds both that no reasonable factual basis exists for the finding and that it is manifestly erroneous or clearly wrong. See ***Stobart v. State, Through Dep't of Transp. and Dev.***, 617 So.2d 880, 882 (La. 1993).

A donation inter vivos is a contract by which a person, called the donor, gratuitously divests himself, at present and irrevocably, of the thing given in favor of another, called the donee, who accepts it. La. C.C. art. 1468. The donee has the burden of proving the donation, and this proof must be strong and convincing. In

order for a donation to be valid, there must be a divestment, accompanied by donative intent. ***Schindler v. Biggs***, 2006-0649 (La. App. 1st Cir. 6/8/07), 964 So.2d 1049, 1053.

Since neither Pauline nor Paul left a will, Davis's claim to relief is predicated on acts of inter vivos donations of the three bank accounts to her from her parents. Davis offered testimonial and documentary evidence in support of her burden of proving by strong and convincing evidence that her parents donated all the moneys in the accounts to her.

Checking Account

Davis submitted into evidence photocopies of information related to the checking account, which shows that the First Guaranty Bank (FGB) checking account was initially opened in January 1971. On June 28, 2001, a "Change Legal Title" form was executed as a new checking account in the name of Pauline, Paul, and Davis with each affixing their respective signatures to the "Change Legal Title" form, agreeing to the terms and conditions stated on pages 1 and 2. Among those conditions on the first page were "Backup Withholding Certifications," signed by Paul, providing his taxpayer identification number indicating that the number of signatures required for withdrawals was "1."[2] The second page, entitled "Signature Authorization Form/(Personal Account)," apparently included information of the earlier joint account in the names of Pauline or Paul, their respective social security numbers, and the signature of each. Paul certified the accuracy of his taxpayer identification number, other information related to his

[2] Additional terms and conditions included that the initial deposit was "$0.00"; facsimile signatures were not allowed; and that each signatory agreed to the terms of Electronic Funds Transfer, Truth in Savings, and Funds Availability Disclosures. None of the disclosures were offered into evidence.

status with the Internal Revenue Service, and receipt of a copy of FGB's statement of disclosure for deposit accounts.[3]

Davis testified that in June 2001, she was added to her parents' joint checking account at FGB to assist them in bill paying "or if [she] ever needed to use it." Her parents continued to use the money in the account after her name was added, and account deposits consisted only of retirement checks that her parents received. Davis admitted she never paid taxes on any earning from the FGB account and that Paul kept the FGB checkbook, although she explained that she had loose checks she could have used at her discretion. She did not use any of the money in the account until "the latter years." She testified that at that time, in addition to helping her father with bill paying, she also paid a personal credit card bill and gave money to her daughter. Without referencing any specific dates, Davis stated that her father often referred to the money in the FGB account as "hers," and asked for permission from her to spend it. Davis was certain her parents intended for her to have the money in the checking account to the exclusion of their other heirs because in June 2012, they told her that the money in the account was hers.

The testimony of Davis's daughter, Leanne Lambert, was also adduced at trial. Leanne testified that she never discussed the circumstances surrounding the addition of her mother's name to the FGB checking account with her grandparents. In conformity with her mother and also without specifying dates, Leanne described instances where her grandparents told Davis that they were spending her money or said to Leanne that they were spending her mother's money. Although her grandparents never referred to the money in the account as belonging to anyone other than Davis, Leanne acknowledged that that neither Pauline nor Paul ever said that they did not intend to leave a portion of the money to their other heirs.

[3]The third and fourth pages included account activity and a maintenance history.

Based on the evidence admitted into the record, we are unable to conclude that Davis sustained her burden of proving by strong and convincing proof that Pauline and Paul irrevocably divested themselves of the FGB checking account in her favor so as to support a finding of donative intent. The signature card executed in June 2001 was insufficient to establish donative intent, particularly since Davis testified that she was added for the purpose of assisting her parents in paying their bills. Moreover, the FGB checking account statements from January 4, 2016 through January 4, 2017, overwhelmingly demonstrate that Paul retained control of the account. A transaction involving Davis's signature does not appear until December 19, 2016. Leanne's testimony failed to corroborate her mother's so as to establish her grandparents' intention to donate the money in the FGB account solely to Davis and to the exclusion of Pauline's and Paul's other heirs. Davis identified June 2012 as the date that supported her certainty that her parents intended for her to have the money in the FGB account. But Davis's testimony alone that a verbal donation was made to her in June 2012 was insufficient to satisfy her heightened burden of proof. See ***Butler v. Reddick***, 431 So.2d 396, 399 (La. 1983) ("the self-serving testimony of the donee that [the donor] wanted her to have the [thing given]" is insufficient to establish donative intent without any other corroborative evidence). Thus, the trial court erred in finding that Pauline and Paul presently and irrevocably divested themselves of the FGB checking account in favor of Davis so as to support the conclusion that the account was Davis's separate property.

Savings Accounts

Davis submitted into evidence photocopies of the Tangipahoa Parish Teachers' Credit Union (TPTCU) savings accounts in the names of Pauline and Paul, respectively, to which Davis was added as a joint owner. According to the documents, Pauline was the member/owner of one account and Paul was the

member/owner of the other. In each one, the signatures of Pauline, Paul, and Davis were affixed in a section entitled, "Authorization." According to the recitals in that section for each savings account, by signing, the signatories agreed to the terms and conditions as well as receipt of the membership and account agreement and various disclosures.[4] Nothing on the page containing the signatures of Pauline, Paul, and Davis indicated an ownership interest in favor of Davis. Instead, Davis relied on the third page of each account document wherein she was listed as a joint owner alongside Pauline on one account and Paul on the other. Davis admitted that she had not filled out the information but stated that each third page of the respective account information accurately reflected the account ownership that she had executed with her parents on June 6, 2012, the date each signatory signed on the preceding page. Davis stated that she had a distinct recollection of the two pages having been part of one packet. She also noted that the box indicating "Joint with Access to the Account after the Death of One or More Parties" was checked by the person who filled out the account ownership section of each account.

In addition, Davis recalled that in the summer of 2012, her parents discussed their affairs with her because they were aging. Pauline and Paul advised Davis that they wanted her to have access to moneys in the savings accounts and that they were going to sign the joint owner cards giving the moneys to her. Davis said that she only had one conversation with her parents about their intentions to give her the moneys in the saving accounts and that no one else was present at the time. After June 6, 2012, Davis believed the moneys in the saving accounts were hers and, as with the checking account, recounted that her father referred to the moneys as hers.

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[4] The disclosures included truth-in-savings and funds-availability provisions. The signatories also agreed to any amendments TPTCU made from time to time. And if applicable, the signatories agreed to the Electronic Funds Transfer Agreement and Disclosure.

Davis acknowledged that the account statements were sent to her parents' house, which is also where the passbooks were kept, and that from June 2012, only Pauline and Paul used the accounts. Davis explained that her parents were the only ones who made deposits into the accounts, that she never had, and that there were no withdrawals until the successions claimed the TPTCU saving accounts as assets of the successions. Additionally, all the taxes on interest that the accounts earned were paid by Pauline and Paul. Pointing to the medical and financial power of attorney that each of her parents executed in her favor on December 20, 2016, Davis suggested that they had done so to make it clear that they intended for her to have the moneys in the two savings accounts. But Davis also testified that while she could make gifts in accordance with the terms of a power of attorney, she did not gift the moneys in the savings accounts to herself because she believed she already owned them.

As with the FGB checking account, Leanne testified that her grandparents indicated that the moneys in the savings accounts were Davis's but conceded that she never discussed ownership of the savings accounts with her grandparents. Leanne admitted that Pauline and Paul never advised her that it was their intention to donate the moneys in the two savings accounts solely to her mother.

The TPTCU documents do not contain any provisions sufficient to establish Pauline's or Paul's intention to presently and irrevocably divest themselves of their savings accounts in favor of Davis. Additionally, Pauline's and Paul's actions of having the savings accounts' statements sent to their home, keeping their passbooks there, their use and control of the accounts, and their payment of all taxes show that, despite having named Davis as a co-owner on their savings accounts, they never irrevocably divested themselves of the "entire thing" as required to effectuate a valid donation. In light of Davis's heightened burden of proving, by strong and convincing evidence, that her parents intended to donate the

moneys in the two savings accounts to her, her testimony unaccompanied by any acts by Pauline or Paul relinquishing control over their savings accounts, is insufficient to establish donative intent. See ***Butler***, 431 So.2d at 399. Thus, the trial court erred in finding the two TPTCU saving accounts were Davis's separate property.

Davis's reliance on ***Succession of Love***, 2016-245 (La. App. 3d Cir. 9/28/16), 201 So.3d 1027, to suggest the trial court correctly determined that the three bank accounts were her separate property, is misplaced. In ***Succession of Love***, a month after the donor learned that he had terminal cancer and two months before he died, he hired a driver to help him deliver items he owned, such as his tools, to people he wished to have them. He also added the donee, his wife, to his banking accounts, converting them to joint accounts. ***Id.***, 201 So.3d at 1029. The testimony of the donee regarding the donor's intent as to the bank accounts was corroborated by that of two close personal friends, who indicated that the donor specifically told them that he wanted to take care of the donee financially and that he wanted his wife to be able to pay some things off with the money that he was leaving her. ***Id.***, 201 So.3d at 1032. Thus, the ***Succession of Love*** court concluded that the donor's donative intent at the end of his life was evidenced by the corroborative testimony of close friends as well as his acts of divestment of his possessions in the two months after he was diagnosed with terminal cancer. ***Id.***, 201 So.3d at 1032.

In this case, Pauline and Paul converted their bank accounts to joint accounts with Davis years before their deaths, and they never fully relinquished control of the accounts. Moreover, the only evidence of Pauline's and Paul's intent to donate

the accounts was the testimony of Davis, which was insufficient to support her burden of proof.[5]

DECREE

For these reasons, we convert the appeal to an application for a supervisory writ and grant the writ. Because the record is devoid of strong and convincing evidence sufficient to support a finding of the requisite donative intent by Pauline and Paul to irrevocably divest themselves of the FGB checking account in favor of Davis, the trial court's factual conclusion is manifestly erroneous. Therefore, that portion of the trial court's judgment, declaring that the FGB checking account is the separate property of Davis, and not an asset of the successions of Pauline and Paul, as well as its order directing Beaver as succession administrator to return to Davis the principal amounts of $39,809.05 and $3,974.40, along with any accrued interest, are reversed.

Moreover, because the record is devoid of strong and convincing evidence sufficient to support a finding of the requisite donative intent by Pauline and Paul to irrevocably divest themselves of the TPTCU saving accounts, the trial court's factual conclusion was manifestly erroneous. That portion of the trial court's judgment, declaring the TPTCU savings accounts of owners/members Pauline (No. 611) and Paul (No. 138) are the separate property of Davis, and not assets of their successions, as well as its order directing Beaver as succession administrator to return to Davis proceeds withdrawn from the savings accounts in the amounts of $93,340.22 and $103,647.50, together with accrued interest respectively, is

[5] Because we have concluded that the trial court was manifestly erroneous in its factual finding that Pauline and Paul had the requisite donative intent in favor of Davis relative to the FGB checking account and the two TPTCU savings accounts, unlike the court in ***Succession of Love*** that found donative intent on the part of the donor, 201 So.3d at 1032, it is unnecessary for us to determine whether La. C.C. art. 1550 applies under the facts of this case, and we pretermit such a discussion.

reversed.[6] Appeal costs are assessed against plaintiff-appellee, Cheryl Wayne Davis.

APPEAL CONVERTED TO APPLICATION FOR SUPERVISORY WRIT; WRIT GRANTED; JUDGMENT REVERSED.

[6] Beaver assigned as error the trial court's admission of uncertified photocopies of the information related to the TPTCU savings accounts, urging that each is hearsay and not subject to a valid exception under La. C.E. art. 803. Given Davis's lack of familiarity with TPTCU's record-keeping procedures, we question whether she was an "other qualified witness" necessary to support the admission of the documents as records of regularly conducted business under Subsection (6). See e.g., ***Larios v. Martinez***, 2017-514 (La. App. 5th Cir. 2/21/18), 239 So.3d 1041, 1046. But see ***State ex rel. Guste v. Green***, 94-1138 (La. App. 1st Cir. 6/23/95), 657 So.2d 610, 613-14 (There was nothing to indicate any lack of trustworthiness, and appellants did not make any showing that their substantial rights had been affected.). Likewise we are not convinced that the documents are admissible as a hearsay exception under Subsection (15) as statements in documents affecting an interest in property. See 30B Fed. Prac. & Proc. Evid. § 6923 (2018 ed.) (Courts should apply the exception to admit statements in formal property documents, along with written claims on property, which have been filed with a local jurisdiction.). But because after a review of the documents we have nevertheless concluded that Davis did not sustain her burden of proof, we pretermit any discussion of whether the trial court committed error by admitting the documents into evidence.

SUCCESSIONS OF PAULINE WAYNE, WIFE OF/AND PAUL WAYNE

2018CA1177

COURT OF APPEAL
FIRST CIRCUIT STATE OF LOUISIANA

BEFORE: WELCH, CHUTZ, AND LANIER, JJ.

LANIER, J., CONCURS WITH THE RESULTS, AND ASSIGNS ADDITIONAL REASONS.

I respectfully concur with the majority's opinion. I concur with the majority that the trial court manifestly erred in finding Davis satisfied her burden of proving that her parents intended to donate the moneys in the accounts at issue to her. However, I write separately because I believe there was also an error of law. A review of the record and applicable jurisprudence reveals that the donations are lacking in form.

A donation inter vivos shall be made by authentic act under the penalty of absolute nullity, unless otherwise expressly permitted by law. La Civ. Code art. 1541. Moreover, La. Civ. Code art. 1550 provides, in pertinent part, as follows with regard to the form required for the donation of certain incorporeal movables, such as the accounts at issue in the instant case:

> The donation or the acceptance of a donation of an incorporeal movable of the kind that is evidenced by a certificate, document, instrument, or other writing, and that is transferable by endorsement or delivery, may be made by authentic act or by compliance with the requirements otherwise applicable to the transfer of that particular kind of incorporeal movable.

It appears the trial court relied on the third circuit case of **Succession of Love**, 2016-245 (La. App. 3 Cir. 9/28/16), 201 So.3d 1027, to suggest the parents' interests in the accounts were divested and Davis accepted the donations via her signature on the ownership transfer documents. But see, **In re Succession of Elie**, 2010-525 (La. App. 3 Cir. 11/3/10), 50 So.3d 262, 265 (third circuit holding that "funds deposited into a joint bank account remain the property of its original owner and his or her estate at death, absent an authentic act of donation" and that "[t]he right of

withdrawal, or having one's name listed on the account, is not tantamount to ownership"). I find that we are not bound by the third circuit's decision in **Succession of Love**.

Rather, in accordance with Article 1550, in order for a valid donation to occur with the accounts at issue, either an authentic act or "compliance with the requirements otherwise applicable to the transfer of that particular kind of incorporeal movable" was required, neither of which we have in this case. Thus, I find the trial court legally erred in finding that these were valid donations.