

NOT DESIGNATED FOR PUBLICATION

**SUCCESSION OF EDWARD A.
HORRELL, SR.**

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NO. 2003-CA-0482

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COURT OF APPEAL

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 93-11701, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge

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Judge David S. Gorbaty

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(Court composed of Judge Joan Bernard Armstrong, Judge David S.
Gorbaty, Judge Edwin A. Lombard)

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IN PROPER PERSON, APPELLEE

AFFIRMED

In this appeal, Walter J. Horrell, Sr. contends that the trial court erred in several of its rulings concerning his father's succession. Appellees have answered the appeal, alleging three additional assignments of error. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

We adopt the description of the complex procedural history of this succession proceeding found in *Succession of Horrell*, 95-1598, 95-1599 (La. App. 4 Cir. 9/11/96), 680 So.2d 725 (*Horrell I*), and *Succession of Horrell*, 97-2115 (La. App. 4 Cir. 3/25/98), 709 So.2d 1069 (*Horrell II*). Edward A. Horrell, Sr. died on July 9, 1993. He was survived by his wife of fifty years, Clare Horrell, and five adult children, Walter J. Horrell, Sr.,

Michael Horrell, Edward A. Horrell, Jr., Gaye Coffey, and Marie Elise LeCour.

Clare Horrell filed a petition and order for appointment of administratrix and a sworn descriptive list to initiate intestate succession proceedings. Walter also initiated a separate succession proceeding by filing a separate petition to probate a purported testament of Mr. Horrell. *Horrell II*, 97-2115, p. 2, 709 So.2d at 1070. The two separate succession proceedings were consolidated. After the trial court upheld the validity of the purported testament filed by Walter for probate, Walter was appointed executor of this succession, and Clare was ordered to deliver the succession property to him. Walter served as executor until the will that he filed for probate was invalidated by this court. In due course, the trial court appointed Lisa C. Matthews as provisional administratrix to administer the succession.

Lisa Matthews filed an Amended Detailed Descriptive List of Succession Assets and Debts (“Amended Descriptive List). In the Amended Descriptive List, the following succession property is identified as “disputed succession assets”:

- (a) Contents of Safe Deposit Box at Alerion Bank, New Orleans, LA, Harrison Ave. Branch, in the name of Mr. & Mrs. Horrell, Account # 591311303;
- (b) Contents of Safe Deposit Box at FNBC, New Orleans, LA, Harrison Ave. Branch, in the name of Mr. and Mrs. Horrell, Account

unknown;

(c) Claim against Clare Younger Horrell for one-half of purchase price of lots 6 and 7, Square 3, Phase 1, JOURDAN RIVER SHORES, Hancock County, Mississippi, as per the official plat of said subdivision on file in the Office of the Clerk of the Chancery Court of Hancock County, Mississippi (6175 Pontiac Drive, Bay St. Louis, MS); and

(d) Claims against Edward A. Horrell, Jr. and Clare Y. Horrell for taking the money from two Jefferson Parish contracts.

Appellees filed a Motion to Traverse Amended Detailed Descriptive List of Succession Assets and Debts (“Motion to Traverse”). The purpose of this Motion to Traverse was to involve the trial court in determining the proper classification of the “disputed succession assets” listed on the Amended Descriptive List. Walter subsequently filed Exceptions of No Cause of Action, No Right of Action, Prematurity, and Unauthorized Use of Summary Procedure. Appellees opposed those exceptions, and moved for partial summary judgment on certain issues related to the Amended Descriptive List and the Motion to Traverse.

After a hearing, the trial court rendered judgment denying Walter’s exceptions and granting appellees’ Motion for Partial Summary Judgment. A trial was held on the remaining unresolved issues, and a judgment with reasons was entered in November, 2003. This appeal followed.

DISCUSSION

Appellant Walter J. Horrell, Sr. alleges that the trial court erred in

failing to dismiss him from the rule to traverse based on his exceptions of no right of action and no cause of action.

Any interested person may traverse a descriptive list by contradictory motion served on the succession representative who filed the list. La. C.C.P. art. 3137. As heirs of the succession, appellees are clearly interested persons who may traverse the Amended Descriptive List filed in this succession. In a manner consistent with La. C.C.P. art. 3137, the appellees' Motion to Traverse was filed by contradictory motion and served on Ms. Matthews, the provisional administratrix.

The purpose of the exception of no cause of action is to test the legal sufficiency of the petition, and the exception is tried on the face of the proceedings. *Doe v. Energy Services, Inc.*, 608 So.2d 685 (La. App. 4 Cir. 1992). Courts must overrule the exception of no cause of action "unless the allegations affirmatively establish that under no facts admissible under the allegations of the petition does plaintiff state a cause of action." *Harrison v. Redd*, 93-2100 (La. App. 4 Cir. 3/29/94), 635 So.2d 404.

Because Article 3137 specifically provides for an action to traverse a descriptive list filed in succession proceedings, the Motion to Traverse

clearly states a cause of action, and the exception of no cause of action was properly denied. Likewise, Article 3137 provides that any interested person may traverse a descriptive list. As heirs, the Horrells are interested persons. As such, they have a right of action to traverse the Amended Descriptive List filed in this succession.

Walter also filed an exception of prematurity, contending that the Horrells' Motion to Traverse was premature, because Ms. Matthews' Amended Descriptive List was not proper. The exception of prematurity is designed to test whether the judicial cause of action has yet come into existence. *Steed v. St. Paul's United Methodist Church*, 31,521 (La. App. 2 Cir. 2/24/99), 728 So.2d 931. La. C.C.P. art. 3137 provides that "[a]ny interested person may traverse the descriptive list at any time..." The Horrells are interested persons in this proceeding. Thus, they have the right to traverse the descriptive list at any time. Walter's exception of prematurity was properly denied.

Walter also urged the exception of unauthorized use of summary procedure. The traversal of a descriptive list is an expressly authorized summary proceeding. La. C.C.P. art. 3137. This exception was also

properly denied.

Appellant next argues that the trial court's findings of fact relevant to the Alerion and FNBC bank box contents are erroneous. He also contends that his mother is a spoliator and must essentially disprove Walter's allegations of other bank box contents.

A court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." *Rosell v. ESCO*, 549 So.2d 840 (La. 1989). In *Mart v. Hill*, 505 So.2d 1120 (La. 1987), the Louisiana Supreme Court posited a two-part test for the reversal of a factfinder's determinations:

- 1) The appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and
- 2) The appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). *Id.* at 1127 (quoting *Arceneaux v. Domingue*, 365 So.2d at 1333 (La. 1978)).

This test dictates that the appellate court must do more than simply review the record for some evidence that supports or controverts the trial court's finding. *Id.* The appellate court must review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous.

Nevertheless, the issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's

conclusion was a reasonable one. See generally, *Cosse v. Allen-Bradley Co.*, 601 So.2d 1349, 1351 (La.1992); *Housley v. Cerise*, 579 So.2d 973, 976 (La.1991); *Sistler v. Liberty Mutual Ins. Co.*, 558 So.2d 1106, 1112 (La.1990). Even though an appellate court may feel its own evaluations and inferences are more reasonable than those of the factfinder, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. *Arceneaux v. Domingue*, 365 So.2d 1330 (La.1978). However, where documents or objective evidence so contradict the 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, the court of appeal may find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. *Rosell*, 549 So.2d at 844-45. Nonetheless, this court has emphasized that "the reviewing court must always keep in mind that 'if the trial court or jury's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *Housley v. Cerise*, 579 So.2d 973, 976 (La. 1991), (quoting *Sistler v. Liberty Mutual Ins. Co.*, 558 So.2d 1106, 1112 (La.1990)).

Courts have recognized that "[t]he reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts." *Canter v. Koehring Co.*, 283 So.2d 716, 724 (La.1973). Thus, where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Id.*

In the case at bar, the trial court found that all of the contents of Mr. and Mrs. Horrell's Alerion and FNBC bank boxes, including all miscellaneous coins and jewelry, had been turned over to the provisional administratrix by Mrs. Horrell on June 25, 1998. This finding is supported by the evidence. Ms. Matthews, the provisional administratrix, acknowledged receipt of the contents of the bank boxes from Mrs. Horrell. Among the items turned over were various papers, two pocket watches, and numerous coins. Ms. Horrell stated that she was not aware of any other assets or items that were contained in either bank box that do not appear on the list attached to Ms. Matthews' letter acknowledging receipt.

The trial court further found that there was no proof of cash, U.S. twenty-dollar gold eagle coins, or rings belonging to Mr. Horrell in either

bank box at the time of his death. These factual findings are also supported by the evidence. Mrs. Horrell avers that she did not see cash when she opened the safe deposit box. She also avers that she did not recall seeing any twenty dollar gold pieces in her husband's possession during their marriage.

Citing *Tujaque v. Courtiade*, 140 La. 779, 73 So.2d 862 (La. 1917), Walter asserts that Mrs. Horrell must prove that no succession property other than that produced to Mrs. Matthews was in the bank boxes at the time of Mr. Horrell's death. However, *Tujaque* is distinguishable from the case at bar. In that matter, the court found clear evidence that the decedent owned bonds that were in the bank box at the time of his death. The court also found that the decedent owned shares of stock, which were sold by the decedent's son prior to the decedent's death. Here, the trial court did not find the existence of any additional succession property in either bank box, other than what was delivered to Ms. Matthews. This assignment of error has no merit.

Appellant next contends that the trial court erred in holding that neither the succession nor decedent's heirs has a legally cognizable claim for reimbursement or recovery against Clare Horrell relating to the Jordan River Shores property located in Hancock County, Mississippi. Walter claims that

Mrs. Horrell owes the succession reimbursement for one-half of the purchase price of the Jourdan River Shores property, because the property became Mrs. Horrell's under Mississippi law at the moment of Mr. Horrell's death.

According to La. C.C. art. 2358, a spouse may have a claim for reimbursement against the other spouse upon termination of a community property regime. A community property regime terminates at death. La. C.C. art. 2356. Mr. Horrell could not have had a claim prior to his death, because such a claim could only come into existence upon his death.

Moreover, Mr. Horrell's heirs have no cognizable claim for reimbursement in this case. In Louisiana, a spouse has a claim for reimbursement against the other spouse when separate property is used to benefit community property, or when community property is used to benefit the separate property of the other spouse. La. C.C. arts. 2366, 2367.

Property in the possession of a spouse during the existence of the regime of the community of acquets and gains is presumed to be community property.

La. C.C. art. 2340. Here, the funds used to acquire the property at 6175 Pontiac Drive, Jourdan River Shores, Bay St. Louis, Mississippi, are presumed to have been community property, because they were acquired during Mr. and Mrs. Horrell's marriage. Had the Jourdan River Shores

property been situated in Louisiana, it would also be presumed to be community property, because it was acquired during the Horrells' marriage. There is no evidence that suggests that the property was acquired with anything other than community funds. Louisiana law does not provide for a claim for reimbursement when community funds are used to buy community property.

Lastly, the fact that the Jourdan River Shores property devolved to Mrs. Horrell by Mississippi's law of joint tenancy with rights of survivorship has no bearing on whether there is a cognizable claim for reimbursement. Louisiana courts have long recognized that the law of the situs of immovable property controls its disposition and devolution. *See, e.g., Succession of Martin*, 147 So.2d 53 (La. App. 2 Cir. 1962).

Mississippi's law of joint tenancy with rights of survivorship is a method of disposing of one's property at death, as a will substitute. *See In re Will and Estate of Strange*, 548 So.2d 1323 (Ms. 1989). Thus, Louisiana courts must respect the devolution of the Jourdan River Shores property to Mrs. Horrell. We find that the trial court properly ruled that there is no cognizable claim for reimbursement. This assignment of error lacks merit.

Appellant also argues that the trial court erred in granting summary judgment concerning certain jewelry. The rings inherited by the decedent

were neither on the descriptive list nor in the motion to traverse the descriptive list, and there is clearly a genuine issue of material fact precluding summary judgment, appellant contends.

A motion for summary judgment is proper when the pleadings, depositions, answers and admissions on file, together with affidavits submitted, show there is no genuine issue of material fact, so that the mover is entitled to judgment as a matter of law. *Bijou v. Ochsner Medical Foundation*, 95-3074 (La. 10/4/96), 679 So.2d 893. Once the party seeking summary judgment supports the motion and carries its burden of proof, the law requires the non-moving party to submit evidence showing the existence of specific facts establishing a genuine issue of material fact. *Tybussek v. Wong*, 96-1981 (La. App. 4 Cir. 2/27/97), 690 So.2d 225.

In the instant case, the trial court found that the Horrells' evidence proved that Mr. Horrell gave his mother's wedding band and diamond ring to Mrs. Horrell by manual donation. Walter came forward with no evidence to establish otherwise. Because the Horrells carried their burden, and no other party came forward with evidence to show the existence of a genuine issue of material fact, summary judgment was proper. This assignment of

error is without merit.

Finally, appellant avers that the trial court erred in refusing to admit Exhibit WH-1 into evidence. WH-1, a certified copy of the bid for the Eastbank job with a certified copy of the resulting contract, was not admitted into evidence, and was proffered.

At trial, Walter attempted to offer into evidence documents that were not produced to the Horrells during discovery, even though the Horrells requested to inspect and copy all documents or exhibits that may or will be used or introduced at trial. The trial court properly excluded these documents from evidence.

La. C.C.P. art. 1428 (2) provides in pertinent part:

A party is under a duty to seasonably supplement or amend a prior response if he obtains information upon the basis of which he knows that the response was incorrect when made, or he knows that the response though correct when made is no longer true and that the circumstances are such that a failure to amend the response is in substance a knowing concealment.

Even if Walter did not have the documents in his possession at the time of his response to the Horrells' document requests, once he came into possession of the documents, he should have supplemented his response, as per La. C.C.P. art. 1428. We find that the trial court properly excluded the

proffered documents from evidence. This assignment of error is without merit.

Appellees Clare Younger Horrell, Gaye H. Coffey, Michael J. Horrell, Edward Horrell, Jr., and Mary Elise Lecour answered the appeal. They aver that the trial court erred in finding that Edward Horrell, Jr. was not properly authorized to retain profits from the two Jefferson Parish contracts by the president of Horrell and Company, Inc., Mr. Horrell. Appellees next contend that the trial court erred in finding merit to the claim against Edward Horrell, Jr. and Clare Horrell for profits from Jefferson Parish contracts. Finally, appellees argue that the trial court erred in ordering the provisional administratrix to list the profits from the Jefferson Parish contract as undisputed community property on the descriptive list.

As discussed above, a court of appeal may not set aside the findings of fact of a trial court unless they are manifestly erroneous. *Rosell v. ESCO*, *supra*. These factual determinations regarding the authority of Edward Horrell to retain the profits of the contracts were made by the trial court after reviewing all of the evidence and listening to the testimony. We find that they are supported by the record and evidence adduced at the hearing.

The decedent was the sole shareholder of his corporation, Horrell and Company, Inc. He was also the sole director. The corporation had only two officers, the decedent, who served as president and treasurer, and Walter, who was the secretary. Neither Edward, Jr. nor Clare was an officer or director of Horrell and Company. Edward, Jr. offered no documentary evidence to establish any agreement between him and Horrell and Company, Inc. As such, we cannot say that the trial judge was clearly wrong or manifestly erroneous in her conclusions. This assignment of error has no merit.

CONCLUSION

Accordingly, for the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED