

NOT DESIGNATED FOR PUBLICATION
SUCCESSION OF FARRELL * NO. 2009-CA-0100
JOSEPH DAVIS

*
COURT OF APPEAL

*
FOURTH CIRCUIT

*
STATE OF LOUISIANA

* * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2008-10086, DIVISION "J"
Honorable Herbert Cade, Judge

* * * * *

Judge Dennis R. Bagneris, Sr.

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(Court composed of Judge Charles R. Jones, Judge James F. McKay, III, and Judge Dennis R. Bagneris, Sr.)

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JUNE 10, 2009

REMANDED

Appellants/Intervenors, Sylvia Davis, individually and on behalf of her two minor grandchildren, Elizabeth Ashley Davis and Daniel Davis, appeal a partial judgment of possession whereby Farrell Joseph Gilbert was recognized as an heir of the decedent's estate and entitled to a usufruct for life of \$74,994.45 plus interest. Appellants/Intervenors also filed a petition of intervention to annul the judgment in the trial court. For the following reasons, we remand this matter to the trial court to hold a hearing on the petition to annul the partial judgment of possession.

FACTS

On October 2, 2008, Farrell Joseph Gilbert ("Mr. Gilbert") filed a petition to be sent into possession of the decedent's estate. Specifically, Mr. Gilbert alleges that his son, Farrell Joseph Davis, died on February 24, 2003 and that he should be recognized as an heir of the decedent and be entitled to the usufruct for life of decedent's estate. Mr. Gilbert also filed a detailed descriptive list of property, his affidavit of death, domicile and heirship, and the inheritance and estate transfer tax receipt. On that same day, the trial court signed a partial judgment of possession

ordering that Mr. Gilbert be recognized as decedent's heir and as such, be entitled to the usufruct for life of the \$74,994.45 plus interest.

On December 1, 2008, Appellants/Intervenors filed a motion for appeal and a petition of intervention to annul the partial judgment of possession on the basis that Mr. Gilbert is not legally recognized as the father of decedent and that Mr. Gilbert obtained the judgment of possession by fraud and/or ill practice.

Appellants/Intervenors alleged that they were never served with notice of any of the proceedings and that they are statutorily entitled to naked ownership of the entire estate of the decedent. Attached to Appellants/Intervenors petition for intervention to annul the partial judgment of possession is Ms. Sylvia Davis and Ms. Caroline Davis Smith's [the maternal grandmother and maternal aunt of decedent] affidavit of death, domicile and heirship, and an affidavit of Ms. Sylvia Davis.

DISCUSSION

In this appeal, Appellants/Intervenors seek to attack a partial judgment of possession in the trial court as a nullity. Specifically, Appellants/Intervenors allege that Mr. Gilbert is not legally recognized as the father of the decedent and that he obtained the partial judgment of possession by fraud and/or ill practices. Although Appellants/Intervenors filed a motion for appeal, we find that the trial court has jurisdiction to entertain the Appellants/Intervenors' petition to annul the partial judgment of possession.

Although the jurisdiction of the trial court over all matters in the case reviewable under the appeal is divested, and that of the appellate court attaches, on the granting of the order of appeal and the timely filing of the appeal bond, in the case of a suspensive appeal or on the granting of the order of appeal, in the case of

a devolutive appeal, we find La. C.C.P. art. 2005 contains a particular reservation of the trial court's jurisdiction. As stated by this Court in *Assensoh v. Diamond Nails*, 04-1130, 04-2067, p.5-6, (La. App. 4 Cir. 2/16/05) 897 So. 2d 806, 810,

Article 2005 provides that “[a]n action of nullity does not affect the right to appeal” and that “[a] judgment may be annulled prior to or pending an appeal therefrom, or after the delays for appealing have elapsed.” La. C.C.P. art. 2005. Simply stated, this article provides that “the two remedies may be sought simultaneously.” 1 Frank L. Maraist and Harry T. Lemmon, *Louisiana Civil Law Treatise: Civil Procedure* § 12.6 (1999). ‘[T]he defendant must bring an action for nullity when the basis of her or his attack on the judgment does not appear in the record and therefore cannot be corrected by appeal.’ *Id.* ‘[T]he practical effect behind requiring that the defendant bring an action to annul the judgment is to permit the introduction of additional evidence.’ *Decca Leasing Corp. v. Torres*, 465 So.2d 910, 915 (La. Ct. App. 2d Cir. 1985)

Based on La. C.C.P. article 2005, we find Appellants/Intervenors properly filed an appeal and a motion to annul the judgment simultaneously. Because we do not believe that we can determine, without an evidentiary record, the issues that accompany this appeal, we hereby remand this matter for an evidentiary hearing on the action of nullity.

REMANDED