

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 2054

IN THE MATTER OF THE  
SUCCESSION OF COLEY AUSTILL SCOTT, SR.

Judgment Rendered: FEB 14 2011

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Appealed from the  
Nineteenth Judicial District Court  
In and for the Parish of East Baton Rouge  
State of Louisiana  
Probate Number 81,518

Honorable Curtis A. Calloway, Judge

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individually and in his capacity  
as co-executor of the  
Succession of Coley Austill  
Scott, Sr.

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individually and in his capacity  
as co-executor of the  
Succession of Coley Austill  
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BEFORE: CARTER, C.J., GUIDRY, AND PETTIGREW, JJ.

## GUIDRY, J.

This is an appeal of a judgment annulling a probated testament pursuant to a motion to annul filed on March 30, 2007, by the testator's daughter, Dawn Scott. In the motion, Dawn Scott asserted that the September 13, 2004 notarial testament of Coley Austill Scott, Sr. should be declared invalid, because the testator "lacked the mental and physical capacity to understand, formulate, and legally execute a binding Last Will & Testament" and because the testament was a result of the undue influence exercised over the testator by his then wife.<sup>1</sup>

The following persons and entity were named as legatees in the testament: Coley A. Scott, Jr. ("Buddy"), Charles A. Scott, Steven S. Scott, Forrest Scott, Katie Robison, and the Dawn Scott Trust. At the time Dawn Scott filed her motion to annul, one of the legatees, Katie Robison, had died and her two sons – Buddy Scott and Charles Scott – were named the representatives of her succession. However, neither Katie Robison nor her succession was cited as a defendant in the motion to annul the probated testament. Dawn Scott named only the following persons, in their specified capacities, as parties to the action: Buddy Scott, individually and as testamentary co-executor of the Succession of Coley Austill Scott, Sr.; Charles Scott, individually; Forrest Scott, individually and as trustee of the Dawn Scott Trust; and Steven Scott, individually and as testamentary co-executor of the Succession of Coley Austill Scott, Sr.

Louisiana Code of Civil Procedure article 2931 states that "[a] probated testament may be annulled **only** by a direct action brought in the succession proceeding **against the legatees**, the residuary heir, if any, and the executor, if he has not been discharged. The action shall be tried as a summary proceeding." (Emphasis added.) Although the Succession of Coley Austill Scott, Sr. was still

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<sup>1</sup> Following a four-day trial, the court found merit in Dawn Scott's motion and in a judgment signed December 23, 2008, decreed the September 13, 2004 testament to be "null, void, and invalidated."

under administration at the time of Katie Robison's death, as a legatee in the September 13, 2004 testament, the law required that the action to annul be brought directly against her or more specifically, her succession. See La. C.C.P. art. 426. Moreover, because Katie Robison was deceased at the time the motion to annul was filed, Dawn Scott was required to bring the action against the representatives of Katie Robison's succession. See La. C.C.P. art. 734; see also Succession of Hoffpauir, 411 So. 2d 714, 716 (La. App. 3d Cir. 1982)(wherein the court dismissed the underlying action because the action was filed against the defendant in her individual capacity and not as the representative of the decedent's succession as required by law).

Article 2931 expressly required that the nullity action be brought against Katie Robison. The record before us discloses that a separate action was brought to nullify the judgment granting Dawn Scott's motion to annul probated testament on the basis of her failure to join the Succession of Katie Robison in those proceedings. The trial court in that matter dismissed that nullity action on the basis of no right of action and waiver; however, on appeal of the judgment in that matter, this court reversed the judgment of the trial court and remanded the matter for further proceedings. See Succession of Katie Robison v. Scott, 10-0719 (La. App. 1st Cir. 11/3/10)(unpublished decision).

Therefore, pursuant to La. C.C.P. arts. 645 and 927(B), we hereby notice the non-joinder of a party needed for just adjudication. Article 2931 states that "[a] probated testament may be annulled **only** by a direct action brought in the succession proceeding against the legatees" (emphasis added), and as a consequence of Dawn Scott's failure to join the Succession of Katie Robison in the action to annul the September 13, 2004 probated testament, the judgment was unlawfully rendered.

Accordingly, we hereby vacate the December 23, 2008 judgment and remand this matter to the trial court for joinder of the succession of Katie Robison, through its duly appointed succession representatives, and for retrial. See Terrebonne Parish School Board v. Bass Enterprises Production Company, 02-2119, pp. 6-7 (La. App. 1st Cir. 8/8/03), 852 So. 2d 541, 545-46, writs denied, 03-2786 and 03-2873 (La. 1/9/04), 862 So. 2d 984 and 985; Lawly Brooke Burns Trust v. R K R, Inc., 96-1231, pp. 9-10 (La. App. 1st Cir. 3/27/97), 691 So. 2d 1349, 1354. All costs of these proceedings are assessed to Steven S. Scott.

**VACATED AND REMANDED.**