

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

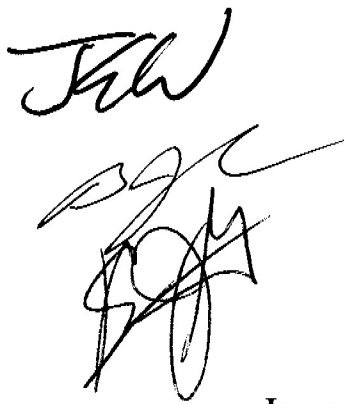
FIRST CIRCUIT

NUMBER 2010 CA 1316

IN THE MATTER

OF THE

SUCCESSION OF BERNICE MAE DAVID



Judgment Rendered: February 11, 2011

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Appealed from the  
Eighteenth Judicial District Court  
In and for the Parish of West Baton Rouge, Louisiana  
Trial Court Number 6,652

Honorable William C. Dupont, Judge

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C. Jerome D'Aquila  
New Roads, LA

Attorney for Appellant  
Donald Ray David

Mary E. Heck Barrios  
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Attorney for Appellee  
Veronica Hancock

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

Donald Ray David appeals a partial summary judgment in favor of Veronica D. Hancock, as the administratrix of the estate of Bernice Mae David, which declared that the funds represented by a subordinated certificate of indebtedness in the principal sum of \$97,749.20 were the property of the estate.<sup>1</sup> For reasons that follow, we affirm the judgment of the trial court in compliance with Uniform Rules—Courts of Appeal, Rule 2-16.1(B).

On September 8, 2008, Bernice Mae David died intestate. She was survived by her two children, Donald David and Veronica Hancock. Veronica Hancock was subsequently appointed as administratrix of the estate. Thereafter, on October 19, 2009, Veronica Hancock, in her capacity as the administratrix of the succession of Bernice David, filed a petition for return of succession property or for damages. Essentially, Veronica Hancock asserted that after the death of Bernice David, certain assets belonging to her had been converted by Donald David to his personal use without authority. Specifically, Veronica Hancock asserted that Donald David had converted a registered motor vehicle; the contents of the home of Bernice David; and a subordinated certificate of indebtedness, certificate number 947, series A, (“S.C.I. #947A”) issued by West Baton Rouge Credit in the name of Bernice David or Donald David, in the principal sum of \$97,749.20, which was payable on March 18, 2018. She further alleged that on May 5, 2009, Donald David negotiated S.C.I. #947A and converted the funds represented therein to his own name and for his own use by securing the issuance of subordinated certificate

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<sup>1</sup> The judgment was designated as final and appealable judgment pursuant to La. C.C.P. art. 1915(B). The trial court, however, neither made an express determination that there was no just reason for delay nor gave any other reasons for designating the judgment as final and appealable. At oral argument, counsel for both parties stated that the issue raised in this appeal was the only remaining contested issue in the succession and following the resolution of this issue, the succession proceeding would be concluded. Therefore, after a *de novo* review of the record and considering the factors set forth in **R.J. Messinger, Inc. v. Rosenblum**, 2004-1664 (La. 3/2/05), 894 So.2d 1113, we find that this partial summary judgment was properly designated as a final judgment.

of indebtedness, certificate number 982, series A, ("S.C.I. #982A") in his name only, payable on June 15, 2024. Veronica Hancock asserted that Donald David did not have the authority to convert funds belonging to the estate of Bernice David to his own use, since ownership of those funds had not been transferred to him in accordance with the requirements of law.

On February 24, 2010, Veronica Hancock filed a motion for summary judgment, asserting that there were no genuine issues of material fact as to whether S.C.I. #947A was an asset of the estate of Bernice David and that after the death of Bernice David, Donald David negotiated S.C.I. #947A and utilized those funds to obtain S.C.I. #982A in his name alone. Lastly, Veronica Hancock asserted that there was no evidence establishing that Bernice David donated that asset to Donald David prior to her death. Accordingly, Veronica Hancock sought summary judgment in her favor, declaring that S.C.I. #947A was the property of the estate of Bernice David and ordering that all assets of the estate of Bernice David be returned to the possession of Veronica Hancock.

In opposition to the motion for summary judgment, Donald David argued that S.C.I. #947A was donated to him by his mother. He claimed that S.C.I. #947A was a manual gift to him, and therefore, a formal act of donation was not necessary. Alternatively, he argued that S.C.I. #947A was a negotiable instrument and since it was made payable to either him or Bernice David, no act of donation was necessary. However, in opposition to the motion for summary judgment, Donald David offered no evidence.

After a hearing on April 13, 2010, the trial court rendered judgment in favor of Veronica Hancock declaring that the funds represented by S.C.I. #982A in the principal sum of \$97,749.20 were the property of the estate of Bernice David. A judgment in conformity with the trial court's ruling was signed on April 21, 2010, and it is from this judgment that Donald David appeals. On appeal, Donald David

asserts that the trial court erred in decreeing that the funds represented by S.C.I. # 982A were property of the estate.

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. **Granda v. State Farm Mutual Insurance Company**, 2004-2012, p. 4 (La. App. 1<sup>st</sup> Cir. 2/10/06), 935 So.2d 698, 701. Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

On a motion for summary judgment, the initial burden of proof is on the moving party. However, if the moving party will not bear the burden of proof at trial on the matter before the court, the moving party's burden of proof on the motion is satisfied by pointing out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the non-moving party must produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial. Failure to do so shows that there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2). Accordingly, once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. **Babin v. Winn-Dixie Louisiana, Inc.**, 2000-0078, p. 4 (La. 6/30/00), 764 So.2d 37, 40; see also La. C.C.P. art. 967(B).

Generally, summary judgment is "inappropriate for judicial determination of subjective facts, such as motive, intent, good faith or knowledge." **S.J. v. Lafayette Parish School Board**, 2006-2862, p. 5 (La. 6/29/07), 959 So.2d 884, 887. However, summary judgment may be granted on subjective intent when no issues of material fact exist concerning the pertinent intent. **Smith v. Our Lady of**

the **Lake Hospital, Inc.**, 93-2512 (La. 7/5/94), 639 So.2d 730, 751, citing **Simoneaux v. E.I. du Pont de Nemours and Co., Inc.**, 483 So.2d 908, 912 (La. 1986).

Summary judgments are reviewed on appeal *de novo*. **Granda**, 2004-2012 at p. 4, 935 So.2d at 701. Thus, this court uses the same criteria as the trial court in determining whether summary judgment is appropriate—whether there is a genuine issue of material fact and whether mover is entitled to judgment as a matter of law. **Jones v. Estate of Santiago**, 2003-1424, p. 5 (La. 4/14/04), 870 So.2d 1002, 1006.

A donation *inter vivos* is an act by which a person (the donor) gratuitously divests himself, at present and irrevocably, of the thing given in favor of another (the donee) who accepts it.<sup>2</sup> La. C.C. art. 1468. The burden of proving a donation is on the donee. **Succession of Woolfolk**, 225 La. 1, 9, 71 So.2d 861, 864 (1954). A donation *inter vivos* shall be made by authentic act<sup>3</sup> under the penalty of absolute nullity, unless otherwise expressly permitted by law. La. C.C. art. 1541.

One exception to the requirement of an authentic act is a manual gift, which is defined by La. C.C. art. 1543 as the donation *inter vivos* of a corporeal movable by the delivery of the thing to the donee. Another exception pertains to the donation *inter vivos* of negotiable instruments, which are governed by the provisions of the commercial paper laws of Louisiana, La. R.S. 10:1-101, *et seq.* rather than the form requirements of the Louisiana Civil Code. La. R.S. 10:3-104. However, these exceptions to the form requirements of La. C.C. art. 1541 do not dispense with the necessity of proving the intention on the part of the donor to

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<sup>2</sup> Under Louisiana law, property may be gratuitously disposed of in only two ways: (1) donations *inter vivos* (between living persons), or (2) donations *mortis causa* (in prospect of death). La. C.C. art. 1467. A donation *mortis causa* is only valid when done through a testament. La. C.C. art. 1570. Since Bernice David died intestate, there is not dispute that there was no valid donation *mortis causa* of S.C.I. #947A.

<sup>3</sup> See La. C.C. art. 1833.

give, *i.e.*, donative intent. In order for a donation to be valid, there must be a divestment, accompanied by donative intent. **Schindler v. Biggs**, 2006-0649, p. 7 (La. App 1<sup>st</sup> Cir. 6/8/2007), 964 So.2d 1049, 1053.

In this case, there is no dispute that the funds used to acquire S.C.I. #947A in the principal amount of \$97,749.20 were owned by Bernice David. The undisputed facts attached to the motion for summary judgment, which were not contradicted by Donald David, and the certified copies of the records from West Baton Rouge Credit established that prior to the death of Bernice David, she invested in several subordinated certificates of indebtedness through West Baton Rouge Credit. At first, she began acquiring the certificates in her name either alone or jointly with Veronica Hancock or Donald David. On February 26, 2008, approximately six months before her death, Bernice David negotiated seven separate certificates of indebtedness and consolidated them in S.C.I #947A in the amount of \$97,749.20. S.C.I. #947A was issued in the name of Bernice Mae David or Donald Ray David. After the death of Bernice David, on May 5, 2009, Donald David negotiated S.C.I. #947A and used those funds to purchase S.C.I. #982A in the principal sum of \$97,749.20 in his name only.

As previously noted, in opposition to the motion for summary judgment, Donald David argued that S.C.I. #947A was donated to him and that an act of donation was not necessary either because it was a manual gift to him or it was the donation of a negotiable instrument, neither of which are subject any form requirements. Thus, since Donald David is claiming that the asset was donated to him by Bernice David, he bears the burden of proof at trial on this issue.

Veronica Hancock satisfied her burden of proof on the motion for summary judgment by pointing out that there was an absence of factual support establishing that the asset had been donated. Thus, Donald David was required to produce factual support sufficient to establish that he would be able to satisfy his

evidentiary burden of proof at trial on this issue. However, he failed to do so. There was no dispute that Bernice David never executed an authentic act of donation to Donald David of S.C.I. #947A. While Donald David claims that S.C.I. #947A was a corporeal movable and was a manual gift to him by Bernice David, he offered no evidence establishing that Bernice David intended to donate it to him or that she delivered it to him. Insofar as Donald David claims that S.C.I. #947A was a negotiable instrument, which was in his name and in the name of Bernice David, and not subject to form requirements for donations *inter vivos*, again, he failed to offer any evidence establishing that Bernice David intended to donate it to him.

Thus, although donative intent is an issue of fact, in this case, no evidence was offered by Donald David creating a genuine issue of fact as to the existence of Bernice David's donative intent. Accordingly, we find that the trial court properly granted Veronica Hancock's motion for summary judgment decreeing that the funds represented by S.C.I. #982A in the principal sum of \$97,749.20 were the property of the estate of Bernice David. Therefore, the April 21, 2010 judgment of the trial court is affirmed. All costs of this appeal are assessed to the appellant, Donald Ray David.

**AFFIRMED.**