NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 2317

SUCCESSION
OF
MURRAY G. LEBEAU

Judgment Rendered: JAN 12 2012

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Appealed from the
18th Judicial District Court
In and for the Parish of Pointe Coupee
State of Louisiana
Case No. 41,184

The Honorable James J. Best, Judge

* * * * * * * *

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

Gaidry, J. - concurs in part and dissents in part with reasons

WELCH, J.

Intervenor, Hebert Roland Witty, a judgment debtor, appeals a judgment rendered in favor of plaintiffs, judgment creditors, declaring that the debtor did not transfer ownership of a particular legacy of cash in a Louisiana succession to a trust, ordering the attachment of the legacy, and ordering the deposit of the legacy into the registry of the court pending the final resolution of a devolutive appeal of the underlying money judgment. We reverse that portion of the judgment decreeing the transfer invalid and the legacy subject to seizure, and we order the trial court to hold a contradictory hearing on these issues. We affirm that portion of the judgment ordering that the legacy remain in the registry of the court, but amend the judgment to so reflect that the funds shall remain in the registry of the court pending final resolution of this matter.

BACKGROUND

Some of the facts forming the background for the instant appeal can be found in this court's decision in **Succession of LeBeau**, 2009-2289, 2009-2290 (La. App. 1st Cir. 5/7/10), 39 So.3d 848 (unpublished), writ denied, 2010-1283 (La. 9/17/10), 45 So.3d 1053, which led to the underlying money judgment against Mr. Witty. In 1981, a succession proceeding to probate the last will and testament of Nita Marie LeBeau was filed. Miss LeBeau named her sister, Alta Witty, along with several nieces and nephews, Murray LeBeau, Malcolm Genius, Winston Genius, Garnet Genius, and Shirley Genius Phillips, as legatees in her will. Mrs. Witty was initially appointed as the executrix of the succession, but in 1983, her son, Mr. Witty, was appointed as the executor of the estate after his mother was unable to serve due to illness.

On March 14, 2006, Fielding Chadwick Phillips, Kay Phillips Elliott, Pamela Phillips Sulzer, James Garnet Genius, Albert Sidney Genius, Margaret Anita Genius, Laurie Genius Chapple, and James Rodney Genius, the heirs of

Shirley Genius Phillips, James Garnet Genius, and Charles Malcolm Genius (hereafter collectively referred to as plaintiffs) filed a lawsuit against Mr. Witty, alleging Mr. Witty's imprudent administration of the succession, breach of fiduciary duties, and failure to pay his mother's proportionate share of succession expenses and charges as a general legatee. The lawsuit was consolidated with the succession proceeding. Following a trial, judgment was signed on May 15, 2009, in favor of plaintiffs and against Mr. Witty in the amount of $310,848.97.

Meanwhile, on December 5, 2007, Murray LeBeau, the nephew of Miss LeBeau, died, and his succession was opened on December 11, 2007. Mr. Witty and plaintiffs were named as legatees in Mr. LeBeau's will. Mr. Witty's particular legacy consisted of the cash sum of $100,000.00. On June 9, 2009, a little over three weeks following the rendition of the money judgment in favor of plaintiffs and while the delays for appealing the judgment were running, plaintiffs filed a motion seeking to attach or sequester Mr. Witty's particular legacy in the LeBeau succession proceeding. In their "Motion to Determine Whether a Writ of Attachment or Sequestration Should Issue," plaintiffs alleged that Mr. Witty was a nonresident with no resident agent for service of process and that there was a substantial risk that if he was placed in possession of his cash legacy, plaintiffs would be unable to execute their judgment upon the legacy once it became final and executory. They requested that the court allow the executor of Mr. LeBeau's succession to place Mr. Witty's cash legacy into the registry of the court until it was determined whether their interests as judgment creditors were sufficiently protected by a commercial security bond or until the delays had passed that would allow them to execute their money judgment. They further requested that the court enjoin the executor from distributing Mr. Witty's cash legacy prior to the holding of a show cause hearing on their motion.

On June 9, 2009, the trial court presiding over the Murray LeBeau

succession proceeding ordered the executor and Mr. Witty to show cause at a hearing set for August 7, 2009, why Mr. Witty's cash legacy should not be attached and placed into the registry of the court until Mr. Witty filed a suspensive appeal, pursued a devolutive appeal, or allowed all appeal delays to expire. The court further enjoined the executor from distributing Mr. Witty's cash legacy prior to the holding of a show cause hearing on plaintiffs' motion.

On June 11, 2009, the trial court signed a "Partial Judgment of Possession," placing Mr. LeBeau's heirs and legatees in possession of the majority of the succession property. The judgment recognized Mr. Witty as a particular legatee entitled to the ownership of the cash sum of $100,000.00 plus interest, less the amount of federal estate tax, for a net amount of $92,818.64. However, the executor was ordered not to deliver possession of this bequest to Mr. Witty in view of the court's June 9, 2009 order enjoining the executor from distributing the legacy pending the outcome of the motion filed by plaintiffs which had been scheduled for a hearing on August 7, 2009.

Before the hearing was held, on July 8, 2009, Mr. Witty filed a devolutive appeal from the May 15, 2009 money judgment. On July 16, 2009, Mr. Witty filed a petition of intervention in the succession proceeding, contesting plaintiffs' ability to attach his interest in the succession. In the petition, Mr. Witty pointed out that he had filed a motion for a devolutive appeal of the money judgment. He further alleged that he would show, "on the trial thereof," that he is not the owner of any legacy of Mr. LeBeau, but instead, had transferred any interests he may have had as a legatee into a trust dated June 5, 2009, entitled, "The Herbert Roland Witty Trust," providing that all of the assets of Mr. Witty, including his interest in Mr. LeBeau's succession, are owned by the trust. Mr. Witty asserted that since any interest he may have had in the LeBeau succession had been previously transferred to the trust, there was no inheritance available in the name of Mr. Witty for

plaintiffs to attach. Mr. Witty prayed that plaintiffs' motions be dismissed and the court order disbursement of Mr. Witty's legacy to the "Herbert Roland Witty Trust." Mr. Witty attached a letter from his attorney to the succession executor to the petition, dated June 5, 2009, asking that the check for Mr. Witty's net legacy be issued in the name of the Herbert Roland Witty Trust.

The hearing on plaintiffs' motion seeking the writ of attachment was continued to September 11, 2009. At that hearing, plaintiffs' attorney, the LeBeau succession executor's attorney, and an attorney stating that he represented the intervenor, the Herbert Roland Witty Trust, appeared. The executor made it clear that he had no real interest in the outcome of the matter, but only requested that the court direct him to whom to pay the net legacy. The intervenor offered into evidence a copy of the Herbert Roland Witty Trust instrument. Plaintiffs' attorney argued that the fact that Mr. Witty had taken a devolutive appeal of the money judgment changed the posture of the case because that appeal did not prohibit the judgment creditors from executing their judgment pursuant to a writ of *fieri facias*. The intervenor opposed the attachment or sequestration of Mr. Witty's legacy on the basis that Mr. Witty's interest in the succession had been transferred to a trust prior to the date on which plaintiffs attempted to attach the legacy, and therefore, when plaintiffs filed the motion to attach the legacy, the trust, not Mr. Witty, owned Mr. Witty's interest in the succession. The intervenor urged that plaintiffs could have attacked the trust by filing a revocatory action and proving that the trust was a sham or fraudulent, and indicated a Louisiana court would have jurisdiction over the trust in such an action because "we" (apparently referring to the trust) submitted to the jurisdiction of a Louisiana court by coming into court with respect to the instant motion. The intervenor also argued that the attachment ended because the devolutive appeal had been taken.

At the September 11, 2009 hearing, after hearing oral arguments, the court

stated that it was assuming, for argument sake, that the trust instrument was valid because no one argued that it was not valid and because the court was not conducting a revocatory hearing on the trust. The court narrowed the legal issue to whether a judgment creditor could attach or seize a legacy after that legacy had been placed into a trust. At the conclusion of the hearing, the court requested that the parties submit post-hearing briefs and took the matter under advisement.

On October 7, 2009, the trial court issued a written ruling in favor of the judgment creditors and further ordering that the cash representing Mr. Witty's particular legacy be deposited with the registry of the court. The ruling also directed that judgment be submitted accordingly.[1]

On October 20, 2009, plaintiffs' attorney submitted a proposed judgment for the trial court's signature. On November 3, 2009, the court refused to sign the proposed judgment on the grounds that it had reservations regarding the second paragraph of the proposed judgment concerning the purported transfer of Mr. Witty's interest in the succession to the trust. Specifically, the proposed judgment decreed that Mr. Witty did not effect a transfer or conveyance of his right or interest in the particular legacy and further, even if the transfer had been effected, it would not in any way have affected plaintiffs' right or ability to attach and seize the legacy.

On August 30, 2010, the trial court signed the judgment submitted by plaintiffs on the writ of attachment. The judgment granted plaintiffs' request to execute their money judgment by attaching and or seizing all rights, interests, and the cash representing Mr. Witty's particular legacy, but suspended the execution by attachment or seizure pending the outcome of Mr. Witty's devolutive appeal of the money judgment rendered against him. The court further decreed that that Mr.

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[1] Mr. Witty filed a notice of intention to apply for supervisory writs seeking review of the trial court's October 7, 2009 ruling. On June 7, 2010, this court denied the writ application without reasons.

Witty did not effect a transfer or conveyance of his right or interest in the particular legacy to the trust, and even if the transfer of Mr. Witty's interest to the trust had been effected, it would not in any way have affected the right of the plaintiff judgment creditors to attach or seize the legacy. The court ordered the executor in the LeBeau succession to deposit the sum of $92,818.64, representing the net amount of Mr. Witty's particular legacy, into the registry of the court. Lastly, the judgment ordered the Clerk of Court for the Parish of Pointe Coupee to release the net legacy and any interest accruing thereon, less any expenses associated therewith, to the prevailing party in the devolutive appeal of the money judgment upon receiving a certified copy of the final judgment.

On May 7, 2010, this court upheld the money judgment rendered against Mr. Witty and on September 17, 2010, the Louisiana Supreme Court denied Mr. Witty's writ application. **Succession of LeBeau**, 2009-2289, 39 So.3d 848, writ denied, 2010-1283, 45 So.3d 1053. Several days later, on September 21, 2010, plaintiffs filed a motion to order the clerk of court to deliver the funds in the registry of the court to them by issuing a writ of *fieri facias* to the sheriff to seize Mr. Witty's particular legacy and deliver the money to them in partial satisfaction of their money judgment. The trial court fixed the hearing on the motion for October 29, 2010.

On September 27, 2010, Mr. Witty filed a motion for a suspensive or a devolutive appeal, and the order granting the appeal was signed on October 1, 2010. On October 14, 2010, Mr. Witty filed an answer objecting to plaintiffs' motion to disburse the money held in the registry of the court on the basis that he had filed a supsensive appeal. While the record reflects that Mr. Witty did pay appeal costs, it does not reflect that a suspensive appeal bond was posted by Mr. Witty.

On December 3, 2010, the trial court signed a judgment ordering the clerk of

court to release money held in the registry of the court plus interest and less any expenses associated therewith to plaintiffs.

DISCUSSION

A writ of attachment or sequestration shall issue only when the nature of the claim and the amount, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by the petition verified by, or the separate affidavit of, the petitioner, his counsel, or agent. La. C.C.P. art. 3501. A writ of attachment may be obtained when the defendant is a nonresident who has no duly appointed agent for service of process in the state. La. C.C.P. art. 3541(5). Plaintiffs initially sought to obtain a writ of attachment on the basis that Mr. Witty was a nonresident of Louisiana without a registered agent for service of process. In his petition for intervention into the attachment proceeding, Mr. Witty acknowledged that he is a resident of Texas. No one disputed Mr. Witty's nonresident status at the hearing. Therefore, the grounds for obtaining a writ of attachment based on non-residency have been established in this case.

Mr. Witty contends that the trial court erred in finding that the ownership of the particular cash legacy to Mr. Witty was not transferred to a valid trust prior to the attachment of the funds held by the executor of the succession. He asserts that the court also erred in ordering that the cash sum representing the particular legacy be held in the registry of the court, as the plaintiffs' motion requested such relief only pending an appeal by Mr. Witty of the money judgment, and a devolutive appeal of that judgment was taken.

Mr. Witty urges that he has never questioned the ability of the judgment creditors to attach property that is in his name under C.C.P. art. 3541. However, he argues, at the time he transferred his interest in the legacy to the trust on June 5, 2009, his legacy had not yet been attached by plaintiffs. He further contends that the trust instrument, introduced into evidence at the hearing, is *prima facie*

evidence that a valid transfer of his interest in the succession had been made subject to the judgment creditor's ability to seize funds in a trust. He insists that the issue of whether a judgment creditor can seize the assets of the trust must be brought by the plaintiffs against the trust in a different proceeding.

We disagree. Mr. Witty raised the issue of ownership of the property sought to be attached in the attachment proceeding. In so doing, Mr. Witty changed the procedural posture of the attachment proceeding from one of simply determining whether the statutory grounds for the attachment existed to a significantly more complex dispute concerning the ownership of the legacy sought to be attached and whether, if Mr. Witty's interest in the legacy had in fact been validly transferred to an out-of-state trust, those funds still present in the state of Louisiana could be seized by Louisiana judgment creditors. While the parties may not have disputed the formal validity of the trust document at the attachment hearing, the timing of the transfer and whether it placed the proceeds of the cash legacy outside the reach of the Louisiana judgment debtors are at issue in this case.

Moreover, because the judgment debtor is a Texas resident, the trust is a Michigan trust, the trustee is apparently a nonresident, the judgment sought to be executed was rendered in Louisiana, and the cash representing the legacy is still in Louisiana, the proper resolution of the issues presented by Mr. Witty's intervention necessarily involves conflict of laws determinations. All of the issues raised by Mr. Witty's intervention in the attachment proceeding can only be determined after the holding of a contradictory hearing at which evidence is adduced on the conflicts of laws issues, the validity of Mr. Witty's purported transfer of his interest in a Louisiana legacy to a Michigan trust, and whether, if the transfer to the trust is valid, the trust is exempt from seizure. We conclude that the trial court committed clear error in decreeing the trust to be invalid and to be of no effect on the rights of the judgment creditors to seize the funds without holding such a

hearing.

For the above reasons, we reverse the trial court's judgment to the extent that it declared trust invalid and found the trust subject to seizure. We remand the case to the trial court for the holding of a contradictory hearing on the issues outlined above and for the addition of parties to the litigation that may be needed for a just resolution of all these issues. We affirm that portion of the judgment ordering that the net legacy be held in the registry of the court, but amend the judgment to reflect that the legacy shall be so held pending final resolution of this matter.[2]

CONCLUSION

For the foregoing reasons, the judgment appealed from is reversed in part, amended in part and as amended, affirmed, and the case is remanded for proceedings consistent with this opinion. Costs of this appeal are assessed 50% to appellants and 50% to intervenor, Herbert Roland Witty.

REVERSED IN PART; AMENDED IN PART AND AS AMENDED AFFIRMED; REMANDED

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[2] Plaintiffs claim that Mr. Witty's attempt to "shelter" his Louisiana assets and convert the rights of the particular legacy gave rise to another ground for the writ of attachment, which authorizes the writ to issue when the defendant has converted his property into money or evidences of debt, with the intent to place it beyond the reach of his creditors. La. C.C. P. art. 3541(3). Plaintiffs did not plead this ground for attachment below, but they certainly may plead this ground on remand.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 2317

SUCCESSION OF MURRAY G. LEBEAU

GAIDRY, J., concurring in part and dissenting in part.

I respectfully dissent with the opinion of this case in the following respects:

The valid existence of the trust established in the State of Michigan cannot be so overlooked as it is in the majority opinion, and as it was with the trial court. The appellant Mr. Witty, who is the settlor and beneficiary of the trust, cannot be the proper party to proceed against since he no longer had a property interest in the cash legacy once the trust had been established. The trust itself and the trustee then became the proper parties, as the property interest in the cash legacy transferred to the trustee upon the formation of the trust.

Despite the possibility that the appellees in fact have a right to the appellant's legacy that he attempted to protect with the formation of a trust in Michigan, the legal proceedings as initiated by the appellees were not proper in form or procedure. The discussion for these issues on which I dissent follow.

Ownership of the Cash Legacy

Ownership of property that is the subject of a particular legacy vests in the legatee upon the decedent's death and may be transmitted by the legatee to his heirs as of that time. 10 Kathryn Venturatos Lorio, *Louisiana Civil Law Treatise: Successions and Donations* § 13:4 (2nd Ed. 2009). Thus, Mr. Witty owned the cash legacy at the time of Mr. LeBeau's death on December 5, 2007 and could legally transmit ownership of it as of that time. The threshold legal issue in this appeal is whether he transferred his interests as owner to his trust, and, if so, what effect such transfer bears upon the appellees' efforts to attach or seize the money representing the legacy and the action taken by the trial court in that regard.

The majority opinion assumes that since Mr. Witty is a resident of the State of Texas, then the writ of attachment based on non-residency was proper; however, the actual ownership of the legacy did not lie with Mr. Witty. The timing of events is important here. On May 5, 2009, in a separate proceeding from this appeal, judgment was rendered in favor of the plaintiffs-appellees herein and against Mr. Witty. On June 5, 2009, Mr. Witty established the Herbert Roland Witty Trust in the State of Michigan, with Mr. Witty as sole beneficiary. Incidentally, there is little doubt that Mr. Witty knew that the appellees would make an attempt at seizing the money under the force of the new judgment, and his reason for creating the trust was obviously to shield the money from them.

Then, four days later on June 9, 2009, the appellees filed their motion "to determine whether a writ of attachment or sequestration should issue," thereby initiating a new series of proceedings that are the basis of this appeal. The evidence in the record clearly shows that the trust was created prior to the appellees' motion. This means that at the time the motion was

filed, the property interest in the cash had transferred from Mr. Witty to the trustee. The appellees were moving the court to seize money Mr. Witty no longer had. The money was now located in the trust under the care of trustee Dana Witty Gibbs, neither of which have ever been named parties in this matter at any time.

The appellees contend and the majority agrees that Mr. Witty did not validly donate or transfer his ownership interest in his particular cash legacy (an incorporeal movable) because the trust agreement was not in the form of an authentic act and there was no separate authentic act of donation. Citing La. C.C. art. 1542, they also contend that the trust agreement did not "identify the donor and the donee," and did not "describe the thing donated," as required by the article. The appellees emphasize that the attached schedule of trust property was not in authentic form and "only serves as an alleged inventory of trust property." The majority avers that since there is a Louisiana judgment, a Texas non-resident, and a Michigan trust, and the cash still physically rests in Louisiana, this matter must be remanded to resolve a conflict of law issue. Such a hearing isn't necessary, and the conflict of law issue, if it even exists, can be resolved now. The second sentence of La. C.C. art. 1542 provides that its requirements "are satisfied if the identities and description are contained in the act of donation *or are reasonably ascertainable from information contained in it, as clarified by extrinsic evidence, if necessary.*" (Emphasis added.) The schedule satisfies the requirements.

The trust at issue is a foreign trust. Louisiana Revised Statutes 9:2262.4 provides:

> A trust instrument executed outside this state in the manner prescribed by, and in conformity with, the law of the place of its execution, or the law of the settlor's domicile, at the

> time of its execution shall be deemed to be legally executed and shall have the same force and effect in this state as if executed in the manner prescribed by the laws of this state, provided the trust instrument is in writing and subscribed by the settlor.

See also La. C.C. art. 3538. Because the appellees have not shown that Texas law differs from that of Louisiana as to the requisite form of the donation to the trust, we will presume that that state's law is the same as that of Louisiana, and that the trust agreement and the transfer of Mr. Witty's ownership interest to the cash legacy were in valid form. *See Hayden v. Guardian Life Ins. Co. of Am.*, 500 So.2d 831, 833 (La. App. 1st Cir. 1986). It can therefore be reasonably concluded that Mr. Witty's ownership interest was validly transmitted to his trust prior to the attempted attachment by the appellees.

Under Louisiana law, title to the trust property vests in the trustee alone, and a beneficiary has no title to or ownership interest in trust property, but only a civilian "personal right" *vis-à-vis* the trustee, to claim whatever interest in the trust relationship the settlor has chosen to bestow. *Bridges v. Autozone Properties, Inc.*, 04-0814, p. 18 (La. 3/24/05), 900 So.2d 784, 796-97. Under the common law, a trustee also is considered as holding property in trust for the beneficiary of the trust, and the trustee has the legal title to the trust property. *See, e.g., Restatement (Second) Trusts* § 3(3) (1959) and *Black's Law Dictionary* 1546, 1553 (8th ed. 2004). Michigan statutory law accords with the common law rule regarding transfer of ownership of the trust property to the trustee. *See* MCL 700.7401. Thus, Ms. Gibbs as trustee owned the particular cash legacy upon the creation of the trust.

Is the Cash Legacy in Louisiana Subject to Attachment or Seizure?

The appellees contend that the particular cash legacy is subject to seizure in Louisiana pursuant to the authority of La. R.S. 9:2004, which at the time provides:

> A creditor may seize only:
>
> (1) An interest in income or principal that is subject voluntary alienation by a beneficiary.
>
> (2) A beneficiary's interest in income and principal, to the extent that the beneficiary has donated property to the trust, directly or indirectly. A beneficiary will not be deemed to have donated property to a trust merely because he fails to exercise a right of withdrawal from the trust.[1]

Subsection (2) "follows the laws of other states and the rule of the Restatement [Trusts (Second), § 156 (1959)] in providing that a settlor cannot create a spendthrift trust for his own benefit." La. R.S. 9:2004, Comments – 1964, (c).

The question of whether Louisiana law is applicable to seizure of the property of a Michigan trust executed in Texas naturally poses itself. Arguably, La. R.S. 9:2004 may apply to this situation. *See* La. C.C. art. 3536.[2] We need not definitively determine the issue at this time, however, for the following reasons.

The trust agreement provides that during Mr. Witty's lifetime, it "may be revoked partially or completely or amended in any respect" by him in writing at any time and without the consent of the trustee or any other person. Although the trust agreement grants the trustee broad administrative powers, it also provides that during Mr. Witty's lifetime he as settlor "may

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[1] The second sentence of subsection (2) was added by Acts 2010, No. 390, § 1, effective August 15, 2010. The act was expressly designated as having retroactive effect. *See* Acts 2010, No. 390, § 2.

[2] This codal article provides in part that "[r]eal rights in corporeal movables are governed by the law of the state in which the movable was situated at the time the right was required."

direct Trustee with respect to any matter concerning the administration, *distribution*, or investment of trust assets." (Emphasis added.) Mr. Witty thus retained considerable, if not virtually unlimited, authority over the administration of his trust and the distribution of its assets for the benefit of the beneficiary, himself.

Michigan law provides that a spendthrift trust is one that restrains either the voluntary or involuntary alienation by a beneficiary of his interest in the trust, or which, in other words, bars such interest from seizure in satisfaction of his debts. *In re Estate of Edgar*, 425 Mich. 364, 371-72, 389 N.W.2d 696, 699 (Mich. 1986). A spendthrift trust is created to provide a fund for the maintenance of the beneficiary and at the same time to secure it against his improvidence or incapacity. *Id.*

The general rule in the United States is that a spendthrift or discretionary trust created by a debtor for the debtor's own benefit, such as where the settlor is the sole beneficiary, or over which the debtor has authority, is not valid, and its assets may be reached by creditors. 90 C.J.S. *Trusts* § 286. Michigan law is in accord with this rule.

Based upon the foregoing, we need not indulge in a detailed interest analysis to determine the choice of law applicable to the issue of whether the appellees, as judgment creditors, can legally reach and execute against the funds held in Louisiana representing Mr. Witty's particular legacy. They can. Whether Louisiana or Michigan law applies, the result is the same: Louisiana has jurisdiction of the action seeking attachment and the funds belonging to the trustee in Louisiana are subject to execution in Louisiana. The ultimate question remaining for our determination is whether the funds at issue were validly attached or seized.

The Propriety of Attachment or Seizure of Trust Property

Louisiana's provisional remedy procedure, under which *ex parte* conservatory writs of attachment or sequestration may issue, has withstood constitutional scrutiny. *See Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974), and *Alessi v. Belanger*, 93-2047 (La. App. 1st Cir. 10/7/94), 644 So.2d 778, 787-89. However, the attachment or sequestration procedure must be "strictly and literally complied with" by reason of the "extremely harsh" nature of the remedy. *Barnett Marine, Inc. v. van den Adel*, 96-1029, p. 11 (La. App. 5th Cir. 4/9/97), 694 So.2d 453, 458-59, *writ denied*, 97-1236 (La. 9/26/97), 701 So.2d 983.

The issuance of a writ of attachment is predicated upon the filing of a verified petition, or a petition accompanied by a separate affidavit of the petitioner or his attorney, clearly setting forth the nature of the claim, its amount, its legal grounds, and the specific facts upon which the claim is based. *See* La. C.C.P. art. 3501. In this matter, the appellees' pleading seeking the attachment was styled as a contradictory motion or rule to show cause, rather than the typical pleading requesting *ex parte* attachment. Despite its caption, the pleading met the legal requirements for a petition seeking an attachment, except for the requirement of sworn verification of its allegations. The motion was not verified, nor were its allegations confirmed by a separate affidavit as expressly required by La. C.C.P. art. 3501. Although not specifically authorized by the Louisiana Code of Civil Procedure, such omission should not preclude the issuance of a writ of attachment after due notice and a contradictory hearing at which the requisite testimony or evidence supporting the writ is adduced.

Additionally, because it was issued without a sworn verification or affidavit, the *ex parte* injunctive relief issued on June 9, 2009, whether

viewed as a temporary restraining order under La. C.C.P. art. 3603 or the functional equivalent of a garnishment under a writ of attachment, lacked the requisite procedural and evidentiary foundation and was improperly granted. Louisiana Code of Civil Procedure article 3610 further provides that "[a] temporary restraining order or preliminary injunction shall not issue unless the applicant furnishes security in the amount fixed by the court, except where security is dispensed with by law." The record of this matter does not show that the appellees furnished any security for the issuance of the injunctive relief.

The injunctive relief granted was also improper on a substantive legal basis. An injunction is a harsh, drastic, and extraordinary remedy. *Lassalle v. Daniels*, 96-0176, p. 8 (La. App. 1st Cir. 5/10/96), 673 So.2d 704, 709, *writ denied*, 96-1463 (La. 9/20/96), 679 So.2d 435, *cert. denied*, 519 U.S. 1117, 117 S.Ct. 963, 136 L.Ed2d 848. The issuance of injunctive relief is limited to "cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law." La. C.C.P. art. 3601. Irreparable injury is that which cannot be adequately compensated in damages, or for which damages cannot be compensable in money. *Lassalle*, 96-0176 at p. 8, 673 So.2d at 709. Injunctive relief is obviously inappropriate as a remedy to assist execution of a money judgment for damages in a certain amount, as such a money judgment cannot by definition equate to "irreparable injury."

The trial court simply had no legal authority to preliminarily enjoin the executor from disbursing the funds representing the legacy, and such action was not cured by virtue of the contradictory hearing of September 11, 2009, as no proof of irreparable injury supporting injunctive relief was adduced, no security was furnished by the appellees, and, most importantly,

no notice of either the issuance of the temporary injunctive relief or the subsequent hearing was served on the trustee.

Although Mr. Witty did not formally object by exception to the appellees' failure to join the trust as a party in their action seeking the attachment, he did specifically raise the issue of the propriety of the requested attachment of the funds without the appellees bringing a revocatory action to annul the donation to the trust. The trustee would be an indispensable party to such an action to annul the donation of the legacy to the trust. *See* La. C.C. art. 2042. On appeal, Mr. Witty again urges that "[t]he issue of whether . . . the [appellees] can seize *assets of the trust* must be brought by [appellees] *against the trust* in a different proceeding." (Emphasis added.) As trust beneficiary, Mr. Witty clearly would have standing to raise the procedural issue of nonjoinder of the trustee as representative of the trust.

Although I may agree with the majority that the end result of this case may be that Mr. Witty's spendthrift trust provision is invalid and the cash legacy is subject to seizure by the appellees, we differ on the reason why and how to get there. The issue of the joinder of the trustee has properly (albeit obliquely) been raised in these proceedings in both the trial court and this court. Pursuant to the authority of La. C.C.P. arts. 645 and 927(B), I would notice *sua sponte* the objection of nonjoinder of a party needed for just adjudication of the appellees' action for attachment of Mr. Witty's legacy. The trustee of an express trust is the proper defendant in an action to enforce an obligation against a trust estate. La. C.C.P. art. 742. The trustee of the Herbert Roland Witty trust, as the presumptive owner of the legacy donated by Mr. Witty as settlor, clearly is a person who "claims an interest relating to the subject matter of the action and is so situated that the adjudication of the

action in [her] absence may . . . [a]s a practical matter, impair or impede [her] ability to protect that interest." *See* La. C.C.P. art. 641

No notice or service of process in these proceedings was directed to the trustee, as opposed to Mr. Witty himself as judgment debtor. Given the trustee's legal title to the trust property as its owner and the strict fiduciary duties of a trustee to preserve such property for the benefit of the trust beneficiary, it is obvious that the appellees' procedural actions and the trial court's judgment have implicated basic and fundamental constitutional concerns. As such, the trustee was constitutionally entitled to notice reasonably calculated to apprise her of the pendency of the action and to afford her an opportunity to present her objections. *See Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791, 795-98, 103 S.Ct. 2706, 2709-11, 77 L.Ed.2d 180 (1983).

In short, I maintain that although the appellees as judgment creditors do have the legal right to attach or to seize the trust property representing Mr. Witty's particular legacy in execution of the money judgment in their favor, they could not legally and constitutionally do so by means of the unorthodox procedural vehicles they heretofore utilized and without affording due process to the trustee by notice and an opportunity to be heard. The trial court's judgment is invalid, null, and without legal effect, and must be reversed. The peremptory exception of nonjoinder of a party needed for just adjudication should be raised *sua sponte* and sustained. This matter should also be remanded to the trial court for further proceedings consistent with this opinion.