STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1698

SUCCESSION OF NELL BOLEN HILLBURN

Judgment Rendered: June 10, 2011

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 99-30700

The Honorable William J. Crain, Judge Presiding

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

GAIDRY, J.

The universal successor or sole legatee under a purported testament appeals a judgment sustaining a peremptory exception of prescription, finding that his right to file and execute that testament was prescribed. We affirm.

FACTS AND PROCEDURAL HISTORY

The decedent, Nell Bolen Hillburn, died on December 8, 1996, while domiciled in St. Tammany Parish. The decedent had executed a testament in 1987, leaving half of her property to her surviving son, Cecil E. Hillburn (appellant); one-fourth of her property to Lynn Landry Hillburn (her daughter-in-law and the widow of her predeceased son); and the remaining one-fourth to Lynn Landry Hillburn's children, Vicki Lynn Hillburn Campbell and George Hillburn, III (appellees), subject to a usufruct in favor of Ms. Hillburn.[1] In 1991, a later testament, revoking the 1987 testament, was evidently executed, in which the decedent left all of her property to appellant.

On November 4, 1999, appellees filed a petition for the appointment of a notary to search for the decedent's testament and to take an inventory. Attached to the petition was a copy of the 1987 testament.[2] A court order was signed, appointing as notary the attorney who had prepared both testaments for the decedent's execution. Thereafter, no action was taken in the succession proceeding until May 15, 2007, when appellees filed a petition to place themselves in possession of the decedent's estate as intestate heirs. Appellees alleged that by letter dated November 11, 1999,

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[1] Lynn Landry Hillburn was married to Nell Bolen Hillburn's predeceased son, George Hillburn, Jr. Appellees are the decedent's grandchildren.

[2] Appellees were apparently unaware of the existence of the purported 1991 testament until sometime in late 1999.

their counsel had been informed by the attorney appointed as notary that appellant had produced the 1991 testament, and attached a copy of that purported testament to the petition. Appellees further alleged that the right to probate either the 1987 or the 1991 testament had prescribed.

On August 15, 2007, appellant filed an answer and third-party demand in response to the appellees' petition for possession as intestate heirs. He alleged that the prescriptive period for probating the 1991 testament was interrupted when he provided the testament to the court-appointed notary in 1999. Appellant also asserted a third-party demand against appellees' counsel and the court-appointed notary for their alleged negligence in failing to file and probate the 1991 testament.

On March 11, 2009, the appointed notary filed a detailed return with the 1987 and 1991 testaments, setting forth his explanation of the circumstances relating to the execution of the testaments and subsequent events. He also filed another detailed return, concluding that the decedent's estate had nothing to inventory. On the same date, he filed an answer to appellant's third-party demand.

On May 13, 2009, appellant filed an *ex parte* petition to probate the 1991 testament and to appoint himself as independent executor. Appellees filed an opposition to appellant's petition, incorporating a peremptory exception of prescription. The trial of appellant's petition and appellees' peremptory exception was held on March 4, 2010.[3] At the conclusion of the trial, the trial court sustained the exception and denied appellant's petition to probate the 1991 testament. The trial court's judgment was signed on March 30, 2010, and the trial court designated its judgment on the issue of prescription as a partial final judgment, pursuant to La. C.C.P. art. 1915(B).

[3] On the date of the hearing on appellees' exception at issue in this appeal, appellant dismissed his third-party demand against the court-appointed notary without prejudice.

Appellant then instituted this appeal, contending that the trial court erred in finding that the prescriptive period for probating the decedent's testament had accrued and in sustaining the peremptory exception of prescription on that basis.

DISCUSSION

Prescription of the Right to Probate a Testament

A succession is the transmission of the estate of the deceased to his successors. La. C.C. art. 871. Thus, the word "succession" is intended to mean the process by which heirs and legatees succeed to the property of the deceased. La. C.C. art. 871, Revision Comment – 1981. The successors of the deceased "have a right to possession after complying with appropriate procedural requisites." La. C.C. art. 871, Revision Comment – 1981. A civil action is a demand for the enforcement of a legal right, and is commenced by the filing of a pleading presenting the demand to a court of competent jurisdiction. La. C.C.P. art. 421. A succession proceeding is a civil action used to procedurally enforce the successors' right of possession to the estate of the deceased and to transmit his estate to the successors. *See Succession of Daigle*, 01-1777, p. 4 (La. App. 1st Cir. 6/21/02), 822 So.2d 83, 86, *writ denied*, 02-2389 (La. 11/22/02), 829 So.2d 1045.

The right to probate a purported testament in a succession proceeding prescribes five years after the date of the judicial opening of the succession of the deceased. La. R.S. 9:5643. Louisiana Code of Civil Procedure article 2893 also provides that "[n]o testament shall be admitted to probate unless a petition therefor has been filed in a court of competent jurisdiction within five years after the judicial opening of the succession of the deceased."

Liberative prescription is a mode of barring actions as a result of inaction for a period of time. La. C.C. art 3447. Liberative prescription is

interrupted when the obligee commences action against the obligor in a court of competent jurisdiction and venue. La. C.C. art. 3462. Prescription is also interrupted when one acknowledges the right of the person against whom he had commenced to prescribe. La. C.C. art. 3464. By analogy to the typical adversary civil action described in La. C.C.P. 3462, the prescriptive period applicable to the probate of a testament is interrupted by the filing of a petition to probate the testament in the proper court. *Daigle,* 01-1777 at p. 7, 822 So.2d at 88. If the petition to probate is filed within five years of the judicial opening of the succession, the probate of the testament can proceed; if it is filed more than five years later, it is procedurally barred. *Id.*

Appellant contends that the succession was not "judicially opened" until appellees filed their petition to be placed in possession of the decedent's estate in 2007.[4] Accordingly, he contends that his petition to probate the 1991 testament, filed in 2009, was timely.

There is only limited statutory or jurisprudential guidance for determining what acts constitute the "judicial opening" of a succession for purposes of La. C.C.P. art. 2893 and La. R.S. 9:5643. *See Succession of Laviolette*, 97-885, pp. 2-3 (La. App. 3rd Cir. 12/10/97), 704 So.2d 339, 340, and *Daigle*, 822 So.2d at 86. At the time that the decedent died in 1996, La. C.C. art. 934 provided that a succession "becomes open by death" of a deceased person.[5] The death of the decedent does not, however, serve as the

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[4] Appellees argue that appellant is bound by an admission in his answer to their petition for possession, in which he admitted their allegation that the succession was judicially opened on November 4, 1999. However, a judicial admission or confession is the express acknowledgment of an adverse fact. *Howard Trucking Co., Inc. v. Stassi*, 485 So.2d 915, 918 (La. 1986), *cert. denied*, 479 U.S. 948, 107 S.Ct. 432, 92 L.Ed.2d 382 (1986). Such an admission may be revoked only on the ground of error of fact. La. C.C. art. 1853. Questions of law cannot be judicially confessed or admitted. *Howard,* 485 So.2d at 918. The determination of when the succession was judicially opened is an issue of law. Accordingly, appellant is not bound by his "admission" in that regard.

[5] Louisiana Civil Code article 934 was amended by Acts 1997, No. 1421, § 1, effective July 1, 1999, to provide that "[s]uccession *occurs* at the death of a person." (Emphasis

"judicial opening" of the succession. *Succession of Laviolette*, 97-885, p. 2 (La. App. 3rd Cir. 12/10/97), 704 So.2d 339, 340. Louisiana Code of Civil Procedure article 2811 provides that "[a] *proceeding to open a succession* shall be brought in the district court of the parish where the deceased was domiciled at the time of his death." (Emphasis added.) The "judicial opening" of the succession, or the initiation of the civil action or proceeding presenting the claims of the successors, is what is contemplated in La. C.C.P. art. 2811. *Laviolette,* 97-885 at p. 2, 704 So.2d at 340.

In *Laviolette*, the trial court concluded that, consistent with the purposes of succession proceedings, the "judicial opening" of a succession occurs "when some step is taken to either: (1) place the heirs into possession of the deceased's estate; or (2) have a succession representative appointed." *Id.*, 97-885 at p. 3, 704 So.2d at 340. The court held that the filing of a petition for notice of application for appointment as administrator did not "judicially open" a succession. The court reasoned that because the request for notice was merely directed to the clerk of court and requested no relief from the court itself, it "should not serve as an event sufficient to commence the running of the prescriptive period." *Id.* The appellate court agreed with the trial court's reasoning, holding that "the 'judicial opening' of a succession requires a substantive act consistent with the purposes of a succession." *Id.* The appellate court further noted that the language of La. C.C.P. art. 3091 authorized the filing of a notice of application for appointment as administrator in the court in which a succession "may be opened," and that since such a notice could be filed prior to the opening of a

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added.) That change in language would seemingly obviate a legal distinction between the "opening" and the "judicial opening" of a succession after the amendment's effective date.

succession, it could not serve in itself to open a succession. *Id.*, 97-885 at p. 4, 704 So.2d at 340-41.

Louisiana Code of Civil Procedure article 2851 provides that "[i]f the deceased is believed to have died testate, any person who considers that he has an interest in *opening the succession* may petition a court of competent jurisdiction for the probate and execution of the testament." (Emphasis added.) It would therefore appear that a petition for probate of a testament also would constitute a procedural filing sufficient for a judicial opening of a succession.[6]

In *Daigle*, the surviving son of the decedent filed a petition to be appointed provisional administrator of his father's succession in 1989, and duly qualified in that capacity. In 1992, the decedent's surviving widow filed an opposition to the son's appointment as administrator, stating in the opposition that there was no need for an administration and that a testament existed. In 1999, the widow filed a petition for probate of the purported testament. We held, citing *Laviolette*, that the filing of a petition to be appointed provisional administrator is a pleading in a civil action that "judicially opens" the succession. *Daigle*, 01-1777 at pp. 4-5, 822 So.2d at 86-87.[7] However, we also held that the mere filing of the opposition to the appointment of a provisional administrator did not serve to present a legal demand for probate of the purported testament and to therefore interrupt the prescriptive period for probate of the testament, as the opposition "asked for no relief and did not notify anyone of any legal demand," but rather "simply

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[6] *See also* La. C.C.P. art. 561(A)(1)(c).

[7] *See also* La. C.C.P. art. 561(A)(1)(b). Louisiana Code of Civil Procedure article 3113 provides that when a provisional administrator is appointed, the court "shall order the taking of an inventory of the property of the succession . . ., unless [the inventory] has been ordered taken before." A petition or motion seeking the appointment of a notary to take an inventory of succession property, whether in connection with the appointment of a provisional administrator or otherwise, should also operate to judicially open a succession.

stated there was no need for an administration of the . . . estate and that a testament existed." *Id.*, 01-1777 at p. 8, 822 So.2d at 89.

Although arising in the converse context, the jurisprudence relating to abandonment of actions under La. C.C.P. art. 561 also provides some guidance by analogy in determining whether a pleading or other procedural action is sufficiently substantive in nature to judicially open a succession. In order to interrupt abandonment, a step in the prosecution or defense of an action must be "active," in the sense of moving the demand for enforcement of the right at issue forward and manifesting the party's intention to hasten the action to judgment, rather than merely "passive." *See Augusta Sugar Co. v. Haley*, 163 La. 814, 815-16, 112 So. 731, 732 (La. 1927); *Watt v. Creppel*, 67 So.2d 341, 343 (La. App. Orl. Cir.1953); and *Family Fed. Sav. & Loan Ass'n of Shreveport v. Huckaby*, 30,481, pp. 7-8 (La. App. 2nd Cir. 5/13/98), 714 So.2d 80, 84. In short, an active "step" in the prosecution of a civil action is a formal move intended to hasten the action toward judgment. *Better Heating & Air Conditioning Co., Inc. v. United Benefit Fire Ins. Co.*, 269 So.2d 502, 504 (La. App. 1st Cir. 1972). In the context of abandonment, such a step interrupts the time period for abandonment to take place; in the context of prescription under La. R.S. 9: 5643, a similar active step commences the prescriptive period to file a petition to probate a testament by "judicially opening" the succession.

From all of the foregoing, it is evident that the type of procedural step or action sufficient for the judicial opening of a succession must be an active, substantive, and significant step seeking affirmative relief intended to hasten the succession proceeding to final judgment placing the heirs in possession, as opposed to a merely passive or dilatory step seeking no affirmative relief or without any substantive relationship to the ultimate

purpose of a succession. The petition for appointment of a notary to search for the original of a purported testament and to take an inventory of the decedent's estate obviously seeks affirmative relief and is an active, substantive step toward the production of that testament for the potential purpose of proving and executing it or, in the case of a statutory or notarial testament, filing and executing it. Accordingly, the decedent's succession was judicially opened on November 4, 1999, and appellant's right to probate the purported 1991 testament prescribed on November 4, 2004.

Equitable Estoppel

Appellant further contends that the doctrine of equitable estoppel, or detrimental reliance, should apply to bar application of prescription.[8] We disagree. The theory of detrimental reliance, also referred to as promissory or equitable estoppel, is based upon La. C.C. art. 1967, which provides, in pertinent part, that "[a] party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying." *May v. Harris Mgmt. Corp.*, 04-2657, p. 5 (La. App. 1st Cir. 12/22/05), 928 So.2d 140, 144. The doctrine of detrimental reliance is designed to prevent injustice by barring a party from taking a position contrary to his prior acts, admissions, representations, or silence. *Suire v. Lafayette City-Parish Consol. Gov't*, 04-1459, 04-1460, 04-1466, p. 31 (La. 4/12/05), 907 So.2d 37, 59. To establish detrimental reliance, a party must prove three elements by a preponderance of the evidence: (1) a representation by conduct or word; (2) justifiable reliance; and (3) a change in position to one's detriment

[8] Estoppel is an affirmative defense that must be affirmatively pleaded in a defendant's answer. *See* La. C.C.P. art. 1005. Appellant did not affirmatively invoke the doctrine of equitable estoppel in his pleadings filed in the succession proceeding. However, it does appear that the issue was raised before the trial court and tried by express or implied consent of the parties. *See* La. C.C.P. art. 1154

because of the reliance. *Id.* It is difficult to recover under the theory of detrimental reliance, because estoppel is not favored in our law. *May*, 04-2657 at p. 6, 928 So.2d at 145.

Appellant attempts to excuse his own failure to file the 1991 testament and to have it executed by claiming that he justifiably relied upon appellees' inaction in the succession proceedings as evidence of their tacit acceptance of his status as universal successor. Louisiana Code of Civil Procedure article 2853 provides that a person in possession of a purported testament of a decedent "shall present it to the court with his petition praying that the document be filed in the record of the succession proceeding." However, even the person presenting the testament to the court is not required to seek its probate. *See* La. C.C.P. art. 2853 and 1A Frank L. Maraist, *Louisiana Civil Law Treatise* § 5.3 (2005). The undisputed evidence is that appellant had possession of the original 1991 testament and in fact delivered it to the notary. Additionally, La. C.C.P. art. 2855 provides that once a testament is found by a notary appointed to search for it, "[t]he original petitioner, *or any other interested person*, may petition for the probate of the testament so produced." (Emphasis added.) Appellant has cited no authority for his claim that prescription was somehow interrupted or suspended during the time period after the notary had possession of the 1991 testament but delayed in filing it with his return.

Given the foregoing, appellant had an affirmative duty on his own part, if he desired to invoke the benefit of the 1991 testament, to file it in the succession proceeding and to have it executed. His duty in that regard was at least equal, if not paramount, to any claimed duty on appellees' part. As the trial court correctly observed in its oral reasons for judgment, there was nothing that prevented appellant from filing the testament originally in his

possession and having it executed within five years of November 4, 1999. An heir cannot merely allege the existence of a testament, not file a petition to have it probated in the succession proceeding, and then claim that the applicable prescriptive period has been interrupted. *Daigle*, 01-1777 at p. 8, 822 So.2d at 89.

Appellant's claimed reliance on either appellees' inaction or his supposed belief that they would move forward to file and execute that testament cannot be considered justifiable under the law or the factual circumstances. Any detriment he suffered through the failure to probate the 1991 testament was attributable to his own inaction. Appellant has plainly failed to establish the applicability of equitable estoppel in his favor.

CONCLUSION

In summary, we find that the filing of a petition to appoint a notary to search for testaments and to take an inventory constitutes a "substantive act consistent with the purposes of a succession," and judicially opened the succession at issue. *See Laviolette*, 97-885 at p. 3, 704 So.2d at 340. Because the succession was judicially opened on November 4, 1999, appellant's petition for probate of statutory testament and appointment of independent executor, filed May 13, 2009, was procedurally barred under La. C.C.P. art. 2893, and his right to seek the filing and execution of the 1991 testament was prescribed under La. R.S. 9:5643.

DECREE

For the foregoing reasons, the judgment of the district court sustaining the peremptory exception of prescription and denying the filing and execution of the testament dated May 24, 1991, is affirmed. All costs of this appeal are assessed to the appellant, Cecil E. Hillburn.

AFFIRMED.