

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 1932

THE SUCCESSION OF WAYNE GORDON WASCOM

Judgment rendered: MAY - 2 2008

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On appeal from the 22<sup>nd</sup> Judicial District Court  
Parish of St. Tammany, State of Louisiana  
Number 2005-30230  
The Honorable William J. Knight, Judge Presiding

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Karen W. Hoover and  
Kevin G. Wascom

BEFORE: PARRO, KUHN, AND DOWNING, JJ.

*Parro, J., concurs.*

**DOWNING, J.**

The intervenor, Ms. Kimen Wascom Glendening, appeals a summary judgment rendered in favor of the co-executors of the Succession of Wayne G. Wascom (the estate of her deceased grandfather), which denied the causes of action stated in her petition of intervention. In the petition of intervention, Ms. Glendening claimed to be a 5% owner/member of MKWW, L.L.C. (MKWW), a company claimed by the succession as an asset wholly owned by Wayne G. Wascom. After a thorough review of the record and applicable law, we agree with the trial court that summary judgment was proper and affirm.

Ms. Glendening presented no direct evidence of her purported ownership interest in MKWW. Rather, in order to establish her claim to a 5% ownership interest in MKWW, she attempted to repudiate a document entitled, "Amendment to Articles of Organization of MKWW Company L.L.C. by Unanimous Consent of All Members and Manager," executed in authentic form on October 12, 1995, by Ms. Glendening,<sup>1</sup> her grandfather, Wayne G. Wascom, and her grandmother, Marian F. Wascom, almost ten years prior to her grandfather's death. That document clearly and explicitly transfers Ms. Glendening's purported 5% interest in the company to Mr. Wascom. In pertinent part, it provides:

Kimen Wascom Nguyen no longer desires to remain a member of the limited liability company and she desires to and does hereby and by these presents transfer, deliver and convey all of her membership interest unto Wayne G. Wascom in consideration of his assuming and holding her harmless in connection with any and all obligations and liabilities of every nature and description relating to the limited liability company.

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By this act, Kimen Wascom Nguyen ceases to be a member of the limited liability company and Wayne G. Wascom assumes her position and membership and in so doing specifically accepts all the rights and responsibilities and obligations in connection therewith.

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<sup>1</sup> At the time this document was executed, Ms. Glendening's married name was Kimen Wascom Nguyen.

In her petition of intervention, Ms. Glendening acknowledged the existence of the document and asserted that it was an act of donation. She then further asserted that the donation (and alternatively, the contract, should it be deemed to be one by the trial court) was null on several different and alternative bases.<sup>2</sup> Essentially, Ms. Glendening argues the donation is an absolute nullity for being in violation of La. C.C. art. 1530, among other irregularities. Alternatively, if the document is deemed to be a contract, Ms. Glendening asserts it, too, is invalid and should be annulled on grounds of vices of consent. Specifically, Ms. Glendening claims that her grandfather promised to pay her future student loans in exchange for her executing the document and transferring to him her 5% interest in MKWW. She further asserts that in reliance on that promise, she attended law school and received her JD degree, amassing approximately \$90,000.00 in student loans in the process. Given that the legacy of \$20,000.00 left to her in her grandfather's will was insufficient to pay off her student loans, Ms. Glendening now asserts that the contract should be invalidated on the ground of vice of consent.

The co-executors of the Succession of Wayne G. Wascom, Karen W. Hoover and Kevin G. Wascom, two of Mr. Wascom's other grandchildren, rejected Ms. Glendening's claims as baseless, asserting that the document executed by Ms. Glendening in October 1995, was a valid, enforceable contract and evidences a clear transfer of her 5% interest in MKWW to Wayne G. Wascom. After Ms. Glendening filed the petition of intervention in the succession, the co-executors filed a motion for summary judgment on the same bases as their initial rejection of Ms. Glendening's claim. In support of their motion, the defendants introduced the aforementioned document evidencing the transfer, asserting its validity as a

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<sup>2</sup> First, she asserted the donation was conditioned on the payment of future debts; thus, it violated La. C.C. art. 1530. Alternatively, she claimed that the document was a donation in disguise, because she did not receive anything of value in return. Further, she purported to revoke the document pursuant to La. C.C. art. 1559, based on acts of ingratitude on the part of her grandfather that were made known to her after his death in March 2005. She also claimed that the document was invalid for nonconformity with La. C.C. art. 1833, governing authentic acts. Finally, and in the event that the court deemed the document to be a contract, she claimed the contract was invalid for lack of true cause, as well as for vices of consent and error.

bilateral, commutative contract with onerous terms that should be applied as written. According to the defendants, the document represents reciprocal obligations, whereby each party obtained an advantage: Mr. Wascom received Ms. Glendening's 5% interest in MKWW in exchange for Mr. Wascom's personal assumption of any and all of the company's obligations and liabilities. The defendants argued in the alternative, should the document be deemed to be a donation, that it was a valid donation, satisfying all formalities required of an authentic act.

Also in support of the motion, defendants introduced the deposition testimony of Martha L. Jumonville, Mr. Wascom's attorney and the notary public before whom the particular document at issue herein was executed. Ms. Jumonville testified regarding the initial set-up of the company MKWW, for which she prepared all organizational documents in March 1994. She testified that Mr. Wascom was experiencing significant financial problems and pending bankruptcies at the time, and desired the company to be organized so that Mrs. Wascom was the primary (95%) owner, and Ms. Glendening, his granddaughter, was given a minor (5%) interest. According to Ms. Jumonville, Mr. Wascom's reason for naming Ms. Glendening as a minor interest holder was that she lived fairly close and would be conveniently available to be a signatory and/or otherwise act on behalf of the company should Mrs. Wascom become ill or otherwise be unavailable. Ms. Jumonville likened the situation to someone adding another person as a name on a bank account with the intention and understanding that no ownership interest in the account funds actually vested in that other person, and the limited purpose of their being named is for signatory purposes should the true bank account owner be unavailable to do so.

Ms. Jumonville also provided testimony concerning the identity of the witness signatures on the document at issue herein – the amendment whereby Ms.

Glendening purportedly transferred her 5% interest to Mr. Wascom in October 1995. First, Ms. Jumonville attested that the document was executed in full compliance with authentic act formalities, and with all signatories present. She identified the witnesses who signed the document and also testified that she personally remembered meeting Ms. Glendening and being present when she signed the document. She also testified that the amendment was executed at Mr. Wascom's request, once he reached a more comfortable position with his financial situation and no longer worried about the negative impact that situation might have on MKWW. Ms. Jumonville testified that the intent was that Ms. Glendening would relinquish her "apparent" 5% interest in return for Mr. Wascom taking over and holding Ms. Glendening harmless in connection with any obligations or liabilities in connection with MKWW.

Ms. Jumonville testified she did not know anything about, nor had she ever been privy to any conversations concerning any other inducements or promises made in exchange for Ms. Glendening's executing the document. She specifically testified that she had never heard or been told anything about any promise by Mr. Wascom to pay Ms. Glendening's student loans. She also specifically denied the allegation in Ms. Glendening's petition of intervention that she had not been present when Ms. Glendening signed the document, stating that such an allegation was totally false. She also testified that she did not get the impression that Ms. Glendening ever felt that she had a real interest in MKWW, but that everyone was operating under the intention and impression that her membership interest was for the limited purpose of being another signatory on the company's accounts if needed.

Ms. Glendening opposed the summary judgment motion in a memorandum contending primarily that there was a genuine issue of material fact regarding the classification of the document as a donation or a contract. In support of her

opposition, she introduced an affidavit executed by her, together with a memorandum in which she argued that the donation in disguise was an absolute nullity for being in violation of La. C.C. art. 1530, which prohibits a donation made on condition of paying other debts and charges than those that existed at the time of the donation. In the alternative, Ms. Glendening asserted that she did not receive anything of value for the transfer of her 5% interest because her grandfather had failed on his promise to pay off her student loans if she signed the transfer document. She further contended that if the document were deemed to be a contract, it was invalid because the cause stated therein was a “false cause,” because she neither personally signed any debts nor otherwise had any obligations to MKWW. Moreover, she argued that there was no exchange of anything of value, because the debts and obligations of a limited liability company do not follow or flow through to its members.

Ms. Glendening relied on the deposition testimony of Ms. Jumonville to support her claim that the document was actually a donation in disguise. In further support of her opposition to the motion for summary judgment, Ms. Glendening filed into the record a “Statement of Material Facts Not in Dispute,” listing nine statements of allegedly undisputed facts. The Louisiana Rules for District Courts contain provisions specifying the requirements for opposing and supporting motions for summary judgment. In particular, La. Dist. Ct. R. 9.10(3) requires that a memorandum in opposition to the motion must contain a list of the material facts that the opponent contends are genuinely disputed and a reference to the document proving that each such fact is genuinely disputed, with the pertinent part designated. The intervenor’s list contains no such reference or designations as required by the rule; hence, we consider it to have no evidentiary value.

Based on our *de novo* review of the foregoing evidence, we agree with the trial court that the intervention should fail because intervenor has failed to meet her

burden on summary judgment, which shifted to her upon defendants' initial showing that she would be unable to annul the transfer document by which she relinquished the 5% interest in MKWW.

Most recently, in **Samaha v. Rau**, 07-1726 (La. 2/26/08), \_\_\_ So.2d \_\_\_, our supreme court reiterated the burden of proof on summary judgments after the 1997 amendments. The law now first places the burden of producing evidence at the hearing on the motion for summary judgment on the mover, normally the defendant, who can meet that burden by submitting affidavits or by pointing out the absence of factual support for an essential element in the opponent's case. Here, the defendants submit that the four corners of the document itself clearly and sufficiently reflect a valid transfer of Ms. Glendening's claimed 5% interest in MKWW and that no further attempt need be made to determine the intent of the parties. In the alternative, defendants submitted the deposition testimony of Ms. Jumonville to establish that Ms. Glendening would be unable to prove the invalidity of said document. At that point, Ms. Glendening, who bears the burden of proof at trial, must come forth with competent evidence demonstrating that she will be able to meet her burden at trial.

For the following reasons, we find Ms. Glendening failed to meet her burden of proof regarding the alleged invalidity of the transfer document; thus, she failed to establish a genuine issue of material fact, which mandates the granting of the motion. Because the basis of Ms. Glendening's repudiation of the transfer document is an oral agreement she purportedly had with her grandfather, which is contrary to that which is stated in the written document, and because her grandfather is now deceased, Ms. Glendening is bound by the heavier evidentiary standard provided by La. R.S. 13:3722, more commonly known as the "dead man's statute." That statute provides that the debt or liability of the deceased *must* be proved by the testimony of "*at least one creditable witness other than the*

*claimant, and other corroborating circumstances.*” (Emphasis added). As noted above, the only evidence submitted by Ms. Glendening in opposition to the motion herein was the deposition testimony of Ms. Jumonville and her own self-serving affidavit. We find absolutely nothing in the testimony of Ms. Jumonville to support Ms. Glendening’s claim that the transfer document was intended to be anything other than what it clearly represents: a transfer, for consideration, of her 5% interest in MKWW to her grandfather. Although Ms. Glendening’s affidavit states otherwise, pursuant to the statutory mandates of La. R.S. 13:3722, this is simply insufficient evidence to meet her burden under the circumstances of this case.

Moreover, we must reject Ms. Glendening’s assertion that the transfer lacks consideration or that it was conditioned on the payment of future debts in violation of La. C.C. art. 1530. Very clearly, the document represents reciprocal obligations: in exchange for the transfer of her 5% interest in the company back to her grandfather, he agreed to personally assume any and all of her existing obligations and liabilities related to the company. Simply stated, Ms. Glendening failed to produce factual support sufficient to establish that she will be able to satisfy her evidentiary burden of proof at trial. Thus, there is no genuine issue of material fact, and the defendants are entitled to judgment as a matter of law, dismissing her claims.

Accordingly, the judgment of the trial court is affirmed. The intervenor, Kimen Wascom Glendening, is assessed all costs of this appeal.

**AFFIRMED.**