BRUCE A. O'KREPKI, INDEPENDENT EXECUTOR OF THE SUCCESSION OF RICHARD E. O'KREPKI

VERSUS

PENELOPE BRODTMANN O'KREPKI

C/W

SUCCESSION OF RICHARD E O'KREPKI

NO. 24-CA-530 C/W
24-CA-531

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 749-364 C/W 742-430, DIVISION "K"
HONORABLE ELLEN SHIRER KOVACH, JUDGE PRESIDING

April 02, 2025

JOHN J. MOLAISON, JR.
JUDGE

Panel composed of Judges Susan M. Chehardy,
Jude G. Gravois, and John J. Molaison, Jr.

AFFIRMED

JJM
SMC
JGG

COUNSEL FOR PLAINTIFF/APPELLANT,
BRUCE A. O'KREPKI, IN HIS CAPACITY AS INDEPENDENT EXECUTOR
OF THE SUCCESSION OF RICHARD E. O'KREPKI

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PENELOPE "PENNY" O'KREPKI

Wade P. Webster

MOLAISON, J.

The appellant, Bruce O'Krepki, seeks this Court's review of the trial court's July 16, 2024 judgment. For the following reasons, we affirm this judgment.

FACTS AND PROCEDURAL HISTORY

On May 4, 2015, Bruce O'Krepki ("Bruce"), individually and in his capacity as executor of the succession of his father, Richard E. O'Krepki ("decedent"), filed a Petition for Declaratory Judgment naming Penelope O'Krepki ("Penny"), the decedent's surviving spouse and Bruce's stepmother, as a defendant. Bruce's petition sought a court order declaring that Penny and the decedent had a separate property regime and that Penny had no interest in the assets the decedent possessed at the time of his death on August 11, 2014. Much litigation followed, resolving most disputes regarding the succession. *See In re: Succession of O'Krepki*, 16-50 (La. App. 5 Cir. 5/26/16), 193 So.3d 574, *writ denied*, 16-1202 (La. 10/10/16), 207 So.3d 406.

On June 24-25, 2024, the court conducted a two-day bench trial on the petition and amended petitions for declaratory judgment to resolve Bruce's claims for (1) reimbursement of funds Penny withdrew from a joint checking account owned by her and the decedent, (2) reimbursement of a portion of the purchase price and renovation of immovable property co-owned by Penny and the decedent, (3) reimbursement of a one-million-dollar check that Penny claimed was a gift from the decedent, and (4) reimbursement for Penny's use of a tax credit. The trial court rendered judgment ordering Penny to reimburse the succession for one-half of the funds withdrawn from the joint checking account and denied all other claims for reimbursement.[1] This timely appeal followed.

[1] The trial court also denied Bruce's claim for reimbursement of the trade-in value of a car the decedent purchased for Penny, but Bruce does not appeal that ruling.

LAW AND DISCUSSION

Withdrawal from the Joint Checking Account

Although separate in property, the decedent and Penny had a joint checking account at First Bank and Trust. On the day the decedent died, Penny withdrew the balance of $31,968.84 from this account. The trial court found that these funds were co-owned by the decedent and Penny in equal shares and held that Penny owed the succession one-half of the amount withdrawn.

On appeal, the appellant argues that the decedent opened the joint checking account with his separate funds and Penny has the burden of proving they deposited co-owned funds into this account. The appellant argues Penny must trace those funds, proving that she withdrew the co-owned funds and not the decedent's separate funds. The appellant contends that because Penny offered no such proof, the trial court erred in ordering that Penny only repay one-half of the funds withdrawn from the joint checking account. We find no merit to this argument.

In a bench trial, the trial court is the finder of fact. *Vincent v. Nat'l Gen. Ins. Co.*, 23-554 (La. App. 5 Cir. 10/9/24), 2024 WL 4447924. The standard of appellate review for factual determinations is the manifest error standard, which precludes the setting aside of a trial court's factual findings unless they are clearly wrong in light of the record viewed in its entirety. *Reyes v. Clasing*, 13-791 (La. App. 5 Cir. 3/12/14), 138 So.3d 61, 64. A two-part test must be satisfied to reverse a fact-finder's determination based on manifest error: 1) the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and 2) the appellate court must also determine that the record establishes that the finding is clearly wrong. *Id.* On appeal, the issue before the court is not whether the trier of fact was right or wrong, but whether the fact-

finder's conclusion was reasonable. *Jones v. Mkt. Basket Stores, Inc.*, 22-841 (La. 3/17/23), 359 So.3d 452, 463.

A review of the record in this case supports the trial court's judgment ordering Penny to reimburse the succession one-half of the funds she withdrew from the joint checking account on the day the decedent died. The evidence at trial shows that the funds in the joint checking account came from checks drawn on the decedent's separate checking account held at Fidelity Investments. However, Julian Brignac, the decedent's long-time accountant and attorney, testified that the decedent and Penny deposited $176,135.00 of rental payments from co-owned property into the Fidelity checking account. Mr. Brignac unequivocally testified that half of these funds belong to Penny. Mr. Brignac also testified that the decedent and Penny deposited hundreds of thousands of dollars from selling a co-owned home into the same account. Thus, the trial court was not manifestly erroneous in determining that Penny had to reimburse the succession only one-half of the funds she withdrew from the joint checking account.

Reimbursement for purchase and improvements on immovable property

In July 1992, the decedent and Penny purchased property at 800 Rue Charters in the DeLimon subdivision ("the DeLimon property") in Metairie for $384,500.00. The act of sale lists both the decedent and Penny as the purchasers. The couple renovated the property after the purchase. In his third amending petition for declaratory relief, the appellant does not dispute that Penny possesses an equal co-ownership interest in this property, but claims the succession is entitled to reimbursement for all economic and monetary contributions and expenditures made from the separate funds of the decedent, including acquisition, necessary and extraordinary expenses, maintenance, and repairs. The trial court found that the succession is not entitled to reimbursement of any portion of the purchase price or renovation costs associated with this property.

On appeal, the appellant states that the succession seeks a declaratory judgment recognizing the ownership shares of each spouse and a disposition of the sale proceeds if the property is sold based on the spouses' relative contributions. In his convoluted argument to this Court, the appellant states: "The Succession does not seek 'reimbursement' for the funds Richard used to purchase the co-owned property. Rather, it seeks to rebut the presumption that co-owners possess equal shares based on contributions made by each and to allocate the sales proceeds of the DeLimon Property accordingly." The appellant then asks that this court "decree ownership in proportion to the amount and consideration contributed by Richard and Penny," or "split the proceeds" of any sale of the property equally "after deducting each party's contributions."

The appellant's argument that the succession is entitled to reimbursement of the acquisition costs of the DeLimon property is contrary to the appellant's statement in his third amending petition for declaratory relief, i.e., Penny possesses an equal co-ownership interest in this property. Further, as this Court has previously held in this case, a co-owner of property held in indivision is entitled to reimbursement for expenses of maintenance and management of the property, not the reimbursement of funds used towards the property's purchase price. *In re Succession of O'Krepki*, 16-50 (La. App. 5 Cir. 5/26/16), 193 So.3d 574, 581, *writ denied*, 207 So.3d 406, 16-1202 (La. 10/10/16). Thus, the succession is not entitled to any reimbursement from Penny for the decedent's funds used to purchase the DeLimon property.

In his brief, the appellant contends that the decedent spent "at least an additional $65,000.00 improving" the DeLimon property. In denying the appellant's claim for reimbursement of renovations to this property, the trial court stated that the succession offered no proof of any amounts spent on the renovation.

At trial, Mr. Brignac, the decedent's accountant and attorney, testified that the decedent and Penny's 2002 income tax return depreciation and amortization schedule, introduced into evidence, shows the value of the DeLimon property at $450,000.00. Mr. Brignac testified that the value difference is the property's improvement costs. Counsel questioned Penny about the renovation costs. As a licensed interior designer, she took charge of the renovations and oversaw the work. Penny spent full days over many months overseeing the renovation. When questioned about the payments for the renovation, Penny testified that renovation bills went to the decedent's office for payment.

The record on appeal does not contain any evidence regarding the cost of the improvements on the DeLimon property. Hence, we find no manifest error in the trial court's denial of the appellant's claim for reimbursement of the costs of improvements to this property.

The One-Million-Dollar Check

In the second amended petition for declaratory judgment, the appellant alleges the decedent gave Penny a one-million-dollar check shortly before he died for "the payment of emergency expenses, recurring household expenses, and the remaining Northline construction punch list items." Penny deposited these funds into her separate checking account. The appellant requested the return of these funds to the succession with interest. Relying on Penny's testimony that the decedent handed her the one million dollar check without restrictions or instructions, and the absence of any evidence surrounding this issue, the trial court found that this check was a donation to Penny.

On appeal, the appellant argues that the trial court erred because Penny failed to prove the decedent's donative intent. The appellant relies on Mr.

Brignac's testimony to support his claim that this check was not a gift to Penny.[2] Mr. Brignac testified that before his death, the decedent told him that Penny was concerned that "if Bruce was out of town and Penny needed money for emergency purposes, that she wouldn't have access to it." Mr. Brignac advised the decedent to deposit this check into the joint checking account so Penny could access the money. Mr. Brignac admitted that he did not have any evidence regarding household expenses, emergency expenses, or punch list items on the Northline property for the period around July and August 2014. Mr. Brignac noted that two and a half years earlier, the decedent wrote a four million dollar check to Penny and indicated on the check that this was a gift. The one million dollar check bears no such notation.

Penny testified that shortly before the decedent died, they were in the family room of their home, and Bruce let himself into the home. Penny told the decedent that this made her uncomfortable, and she thought, "Bruce was acting like our home was his home." The decedent told her to bring his checkbook to him; the decedent wrote the check to Penny and handed it to her. Penny testified that the decedent did not mention how to use this money, and it was her understanding that it was hers to deposit into her account. Exhibits from the joint checking account introduced into evidence show that in April, May, and June of 2014, the decedent wrote checks from his separate account to Penny for $50,000.00. Penny testified these checks paid household expenses by depositing them into the joint checking account. Penny was unaware of any conversation regarding this check between Mr. Brignac and the decedent. However, when questioned about Mr. Brignac's testimony regarding the household or emergency expenses funds, Penny explained

[2] The trial court denied Penny's motion in limine seeking to exclude hearsay testimony by Mr. Brignac regarding statements made to him by the decedent. Penny filed an answer to this appeal asking this Court to reverse the trial court's ruling on the motion in limine and exclude this testimony from consideration on appeal. The resolution of the motion in limine is not necessary to address the appellant's assignment of error regarding the one-million-dollar check.

that the decedent "liked to keep things peaceful as best he could." In her brief, Penny explains that if the decedent made such a statement to Mr. Brignac, it was to avoid Mr. Brignac telling Bruce that the decedent had gifted one million dollars to Penny.

Donative intent is a factual issue subject to the manifest error standard of review. *Succession of Love*, 16-245 (La. App. 3 Cir. 9/28/16), 201 So.3d 1027, 1030. Under the manifest error standard of review, the issue before the appellate court is not whether the trier of fact was right or wrong, but whether the fact-finder's conclusion was reasonable. *Jones*, 359 So.3d at 463. The appellate court may not merely decide whether it would have found the facts of the case differently and substitute its opinion for the trial court's determination because the trial court is in a unique position to see and hear the witnesses as they testify. *Reyes*, 138 So.3d at 64. When there is a conflict in testimony, reasonable determinations of credibility and reasonable inferences of fact may not be disturbed on appeal. *Id.* The reason for this principle of review is based not only upon the trial court's better capacity to evaluate witnesses, but also upon the proper allocation of trial and appellate functions between the respective courts. *Id.* When the fact-finder bases its determination on the credibility of one of two or more witnesses, the finding can rarely be manifestly erroneous. *Jones*, 359 So.3d at 463.

In her reasons for judgment, the trial judge stated that she found the testimony of Mr. Brignac regarding the one-million-dollar check "questionable" because the amount of this check is inconsistent with the decedent's habit of depositing funds into the joint account and is vastly disproportionate to the other checks deposited into the joint account for household expenses. Penny's testimony supports this reasonable conclusion, as does the evidence presented at trial, and proof is absent regarding extraordinary household expenses and expenses for the Northline property. Accordingly, we find no manifest error in the trial court's

determination that the one-million-dollar check was a donation to Penny by the decedent.

The Tax Overpayment/Credit

The evidence at trial established that throughout their marriage, the decedent and Penny filed joint federal and state tax returns prepared by Mr. Brignac. In 2013, there was a substantial overpayment of taxes. After the decedent died, Mr. Brignac and Tambi Farish, an accountant hired by Penny after the decedent died, determined that it was beneficial for the succession and Penny to file a joint return for 2014. Mr. Brignac prepared and filed the 2014 federal and state tax returns. After filing the returns, a total tax credit of $276,315.00 existed. Ms. Farish prepared Penny's 2015 federal and state tax returns, and Penny paid her 2015 federal and state tax liabilities using this credit. The appellant claims that the tax credit is the property of the succession and that by signing the authorization to allow Mr. Brignac to file the 2014 tax returns, Penny agreed to reimburse the succession for using this credit. The appellant contends that the trial court erred in finding no agreement between Penny and the succession regarding this credit.

Mr. Brignac testified regarding emails between himself and Ms. Farish. These emails are in evidence. On October 8, 2015, Mr. Brignac emailed Ms. Farish that there should be "an accounting and a truing up of the overpayment between Penny and Richard's succession." Mr. Brignac testified that he sent his worksheets to Ms. Farish, explaining how he calculated the amount of the tax credit Penny could use for her 2015 tax liabilities. Mr. Brignac sent another email to Ms. Farish on October 14, 2015, asking for confirmation that "Penny is okay with the returns." He requested that Ms. Farish have Penny sign the e-file signature page and return it to him so he could file the 2014 tax returns. Ms. Farish complied. Mr. Brignac testified that by signing the consent to allow him to e-file

the 2014 tax returns, Penny agreed to reimburse the succession for her use of the tax credits.

Mr. Brignac testified that "true up" means reconciling. He admitted that he should have stated in the email that Penny would "pay her share." Mr. Brignac acknowledged that he did not have any documentation from Ms. Farish stating that Penny agreed to repay the entire tax overpayment to the succession.

Ms. Farish testified that Penny retained her to review the 2014 tax return. She did not review the worksheets prepared by Mr. Brignac because she was hired solely to review the 2014 returns based on the supporting documents provided by Penny and the succession. Ms. Farish was unfamiliar with the term "truing up" and did not ask Mr. Brignac for any clarification regarding these emails. Ms. Farish never gave Penny an opinion on the worksheets prepared by Mr. Brignac, but she did forward the emails and the worksheet to Penny and her attorney. Ms. Farish testified that Penny never authorized her to enter into any agreements regarding the tax overpayments on her behalf.

Ms. Farish testified that there was an overpayment of $198,542.00 on the 2014 federal tax return that Penny used to pay her 2015 federal tax liability. There was an overpayment of $33,878.00 on the Louisiana return that Penny used to pay her 2015 state tax liability. According to Ms. Farish, only Penny could use these tax overpayments; the overpayments could not be applied to the 2015 estate tax return. She explained that when a joint return is filed during the year that one spouse dies and there is an overpayment, the overpayment applies to the surviving spouse's tax account. In Ms. Farish's experience, the government issues a refund check for overpayments to the surviving spouse.

Bruce testified that he and Mr. Brignac discussed allowing Penny to use the tax credit. He approved Penny's use of the credit with the expectation that she would repay the funds to the succession.

Penny testified that the decedent paid the income tax during the marriage. She recalled that Mr. Brignac told her that the tax overpayments were hers to use. After Bruce requested that she pay the succession tax credit amount, she identified her email to Ms. Farish, stating that Mr. Brignac told her the tax overpayments were hers to use.

One who demands the performance of an obligation must prove the existence of the obligation. La. C.C. art. 1831. Here, the appellant did not carry his burden of proving that Penny agreed to repay the succession the amount of the tax credit. In her reasons for judgment, the trial judge found that the parties did not reach an agreement on the tax credit. We agree. The record does not contain evidence of any communication regarding this alleged agreement from Penny or her attorney. Although the appellant introduced emails between Mr. Brignac and Ms. Farish regarding the need to "true up," there was no explanation of the term "true up." Mr. Brignac even admitted that he should have stated that Penny "agreed to pay her share." In one email, Mr. Brignac acknowledges the need to forward the "proposal" to Penny's attorney and obtain Penny's consent. Still, there was no explanation of the "proposal" or evidence of securing consent from Penny or her attorney. Furthermore, Mr. Brignac prepared the taxes for Penny and the decedent during their marriage. Thus, there is no merit to the argument that Penny's signature giving Mr. Brignac authority to e-file the joint 2014 tax returns is evidence of her agreement to reimburse the succession the tax credit.

The appellant argues that even if the trial court did not err in finding the parties did not agree on the tax credit, Penny was unjustly enriched by using the tax overpayment for her benefit. The appellant contends that Penny's refusal to reimburse the succession is not justified because the overpayment did not belong to her, and it was clear that the succession expected her to reimburse it. We disagree.

To succeed on an unjust enrichment claim, the plaintiff must prove by a preponderance of the evidence all five elements: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the resulting impoverishment; (4) an absence of justification or cause for the enrichment and impoverishment; and (5) the lack of another remedy at law. *Berthelot v. Berthelot*, 17-1332 (La. App. 1 Cir. 7/18/18), 254 So.3d 735, 738. The evidence at trial indicates that the succession benefitted from filing a joint tax return for 2014. Penny's use of the tax credit did not impoverish the succession. Bruce and Mr. Brignac, who represent the succession, agreed to Penny's use of the tax credit, so her use was not unjust. Further, the evidence shows that Penny was justified in using the tax credit because it resulted from an overpayment on a joint tax return, and this overpayment could not be used for the estate tax return. Ms. Farish testified that when there is an overpayment on a joint return after one spouse has died, the overpayment belongs to the surviving spouse. Mr. Brignac never disputed Penny's statement that he told her that the overpayment was hers to use. Thus, the appellant did not prove unjust enrichment.

Costs on Appeal

In her answer to this appeal, Penny prayed for a judgment awarding her all costs incurred on appeal. An appellate court may award damages, including attorney fees, for frivolous appeals. It may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as its judgment may be considered equitable. La. C.C.P. art. 2164. We construe this provision strictly because it is penal. *Neal Through Henshaw v. Cash*, 54,579 (La. App. 2 Cir. 6/29/22), 343 So.3d 324, 328. Although the appellant was unsuccessful in proving its claims, and this Court did not find merit in the appellant's arguments on appeal, we cannot say that this appeal is frivolous. Accordingly, we deny Penny's request for costs incurred on appeal.

CONCLUSION

For the foregoing reasons, we affirm the trial court's July 16, 2024 judgment.

AFFIRMED

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **APRIL 2, 2025** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

Curtis B. Pursell

CURTIS B. PURSELL
CLERK OF COURT

24-CA-530
C/W 24-CA-531

E-NOTIFIED
24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE ELLEN SHIRER KOVACH (DISTRICT JUDGE)
J. ANDREW MIERAS (APPELLANT)
KATHRYN W. MUNSON (APPELLANT)
RICHARD C. STANLEY (APPELLANT)
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