

2010 WL 1280372 (La.App. 4 Cir.) (Appellate Brief)
Court of Appeal of Louisiana, Fourth Circuit.

Theodore Louis MANICHIA, Plaintiff - Appellant,
v.
Carole Garell MAHONEY and Lanny Joseph Garell, Defendants - Appellees.

No. 2010-CA-0087.
March 24, 2010.

Civil Appeal from the Twenty-Fifth Judicial District Court for the Parish of Plaquemines
State of Louisiana, No. 56-048, Division "A" Honorable Kevin D. Conner Presiding

Original Brief on Behalf of Appellees, Carole Garell Mahoney and Lanny Joseph Garell

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***1 STATEMENT OF THE CASE**

In June 2005, Theodore "Louis" Manichia donated property to his niece and nephew by authentic act before Charles Arceneaux (Attorney and Notary Public) and two witnesses, reserving for himself usufruct over the house. (R-9). At the time of the donation, Louis Manichia lived a simple life as a retired farmer. He had accumulated land and a home; he had saved \$170,000 in C.D.'s (R-294, 551, 586); he received a small Social Security check (R-290, 547), and he retained all of his personal possessions he had accumulated over the years. All was well.

In December, 2005, along came Kathleen Burmaster, a younger woman who (1) moved into Louis Manichia's home, (2) soon thereafter obtained Louis Manichia's Power of Attorney to handle his affairs (R-187, 543), (3) encouraged Louis Manichia to

re-write his Will leaving everything to Kathleen Burmaster (R-291), and (4) apparently encouraged Louis Manichia to revoke the Donation.

Louis Manichia ultimately filed a petition to nullify the Donation, alleging the Donation was not properly executed before a Notary and two witnesses, and subsequently alleging that Louis Manichia did not sign the Donation. After extensive discovery (including the depositions of the Notary and two witnesses and the hiring of a handwriting expert), it became apparent that the Donation *was* in proper form and executed by Louis Manichia. Accordingly, Appellee filed a Motion for Summary Judgment to declare the Donation valid.

Approximately one month before the scheduled trial (after the cutoff dates to amend pleadings), additional claims were filed by Appellant, including nullity of donation pursuant to [CC art. 1498](#) (Donation *omnium bonorum*). The trial Court, despite the expired cutoff date, allowed the late-filed pleadings, giving Appellant every opportunity to assert his claim. The trial was continued and the *2 hearing on the summary judgment was delayed, but ultimately heard on July 27, 2009 (R-567).

ACTION OF TRIAL COURT

The trial Court determined that Louis Manichia was the owner of Certificates of Deposit in addition to reserving a usufruct to his home on the donated property. (11-535). The Court found that the amount of \$170,000 that Mr. Manichia had in C.D.'s at the time of the donation along with the usufruct of the home that he maintained, did not support Appellant's application under [La, C.C, art. 1498](#), Nullity of Donation *inter vivos* of the entire patrimony. (R-536). Accordingly, the trial Court granted Appellees' Motion for Summary Judgment. ¹

ASSIGNMENT OF ERRORS

None.

ISSUES FOR REVIEW

At the time of the Donation in June, 2005, did Louis Manichia dispose of all of his property allowing the nullification of a donation pursuant to [C.C. 1498](#), or did he reserve for himself sufficient assets for his subsistence, namely: (1) \$170,000 in C.D.'s, (2) usufruct of the home, (3) Social Security benefits, and (4) all of his personal property?

LAW AND ARGUMENT

Louis Manichia is currently 77 years old. When he was 72 years old, he intended to donate land to his niece and nephew (Carole and Lanny Garell), reserving for himself the usufruct of the house. (R-9). Louis Manichia hired his attorney (Charles Arceneaux) to prepare and notarize the act of donation (R-271). *3 Apparently, Mr. Manichia was getting his **finances** in order as his brother, Sam, had previously done. Sam had similarly donated land to his relatives, subject to a usufruct.

Louis Manichia was a man of simple means; through his hard work he had saved \$170,000 which he had invested in C.D.'s (R-294, 551, 586); he owned a house which was paid for. He was receiving a small Social Security check (R-290, 547) which also entitled him to health insurance. Mr. Manichia had done what he intended to do - get his **finances** in order by donating land, retaining the usufruct, and retaining a substantial sum of money in C.D.'s. All was well. So, what happened to cause Louis Manichia to want to revoke the Donation?

The answer is simple. Kathleen Burmaster.

Ms. Burmaster (a younger woman than Mr. Manichia), was recently divorced, and needed a place to stay. Ms. Burmaster has successfully taken control of this **elderly** gentleman. She maneuvered her way into the home of Louis Manichia and has taken over Mr. Manichia's **finances** (R-543, 187). Kathleen Burmaster added her name to Louis Manichia's checking account (R-289). Kathleen Burmaster has even obtained the Power of Attorney to represent Mr. Manichia in all of his affairs. In fact, Kathleen Burmaster was successful in having Mr. Manichia re-write his will leaving *everything* to Kathleen Burmaster, (R-291).² Apparently, Kathleen Burmaster is on a mission to now obtain as much out of Louis Manichia's estate as possible. If Kathleen Burmaster can successfully nullify this Donation at issue, then *she* will inherit the donated property at the time of Louis Manichia's death.³

***4** *Prior* to Kathleen Burmaster's moving in with Louis Manichia, there was no issue as to the Donation. *After* Kathleen Burmaster moved in, she went to work to nullify the donation. Four attorneys were ultimately hired to overturn the Donation, alleging the Donation was null and void: Elizabeth Hammant (R-487), Terry Sercovich (R-13), Steve Griffith (R-58), and now Robert Harvey for this appeal. Initially, the litigation focused on whether the Donation was in proper "form." Appellants argued:

First: The Donation did not meet proper form.

Depositions were taken, including the Notary and witnesses. After the depositions, it was undisputed that the Donation was in property form - executed before the Notary and two witnesses. (Interestingly, Appellant did not appeal this portion of the trial Court's decision.)

Second: Louis Manichia did not sign the Donation, i.e., it was a forgery.

Nevertheless, Appellant's own handwriting expert confirmed Louis Manichia signed the Donation. (Interestingly, Appellant did not appeal this portion of the trial Court's decision.)

After a lengthy pre-trial conference with the Court, Louis Manichia fired his third attorney (Steve Griffith) and began representing himself with the "assistance" of Kathleen Burmaster, ostensibly through a "Power of Attorney." Despite repeated objections by Appellee, Kathleen Burmaster was practicing law without a license. Despite the trial Court's suggestion for Louis Manichia to hire a fourth attorney to replace the recently fired attorney, Kathleen Burmaster continued to "represent" Mr. Manichia.

Apparently, Kathleen Burmaster scoured every law book possible and came up with two more theories to nullify the Donation. Despite the fact that the 6/3/09 ***5** "cutoff" date to amend pleadings passed, (over Appellees' objections) the trial Court graciously allowed the amended pleading to be filed and to include these two other theories to nullify the Donation:

First. Appellant alleged the Donation was null for ingratitude (C.C. art. 1558). Although Appellant failed to present any relevant evidence to support the claim of ingratitude [the law requires (1) the Donee attempted to take the life of Donor, or (2) Donee be guilty of cruel treatment], the Court simply determined any allegations of ingratitude has prescribed. (Again, Appellant did not appeal this ruling by the trial Court.)

Lastly, in a last-ditch effort to nullify the Donation, Appellant relies upon C.C. art. 1498 to suggest he had divested himself of his entire patrimony, not reserving to himself enough for subsistence. Hence, Appellant has abandoned all of his previous arguments, and now relies upon the late-filed defense of C.C. 1498, "Nullity of Donation *inter vivos* of the entire patrimony."

Appellee will now demonstrate why Appellant's late-filed, last-ditch effort is without merit; hence, the trial Court's judgment to declare the Donation valid should be maintained.

At the time the Donation was made, Louis Manichia did not divest himself of his entire patrimony, and had reserved to himself enough for subsistence.

At the time of the Donation, Louis Manichia was a retired farmer, receiving a small Social Security check for his previous years of work. (R-290, 554). Although he donated property to his niece and nephew, Louis Manichia maintained the usufruct of the home for life; the house was debt-free, without any mortgage. Further, Louis Manichia had several C.D.'s which were held by his *6 niece and nephew for safe keeping. (R-204). The C.D.'s approximated \$170,000, (R-294, 496, 551, 536). Unquestionably, with the house, pension and C.D.'s, Louis Manichia was able to live in a lifestyle he was accustomed to - a simple country lifestyle of a retired, hard working farmer. See *Bourgreat v. Dumoulin*, 1857, 12 La. Ann. 204.

Mr. Manichia wanted for nothing. **Then** came Kathleen Burmaster. She moved in with Mr. Manichia. She took over his **finances**. She became a co-signator on his checking account. (R-289). She has his Power of Attorney. (R-187). She filed proceedings to interdict him for medical reasons. (R-2). However, she wants more. She wants to nullify the Donation so that, at Louis Manichia's death, she will inherit the donated property as per the newly written Will. ⁴ This lawsuit is not about Louis Manichia, but about Kathleen Burmaster's greed.

If Louis Man chia did not have sufficient funds to support himself, rest assured Kathleen Burmaster would not have moved in with him, a man many years her senior.

Valid Donation.

Louis Manicaha has not appealed the trial Court's determination that the Donation was valid as to form and substance. The Notary (Charles Areneaux) clearly testified that Louis Manichia intended to donate the property to his niece and nephew. The Donation was not coerced, forced, or manipulated by anyone. Louis Manichia himself requested the Donation be prepared by Charles *7 Arceneaux. He executed the Donation before the Notary and two witnesses, making it an authentic act. As an authentic act, it constitutes full proof of the agreement, as against the parties, the heirs and successors. Louis Manichia's intentions are further noted by Louis Manichia's execution of a Will on 1/10/05, leaving the property at issue to Appellees. (R-284). Clearly, Louis Manichia intended to donate the property at the time of the Donation. (See *C.C. 1835*). Not until Kathleen Burmaster arrived on the scene did any issue arise.

Subsistence

Admittedly, at Louis Manichia's deposition few questions were asked relative to his **finances** at the time of the Donation. Why? The answer is simple. Appellant *first* raised this new issue of "subsistence": (1) *After* the Trial Order scheduling trial for 8/31/09; (2) *After* a Motion for Summary Judgment was filed; (3) *After* the deposition of Louis Manichia; and (4) *After* the cutoff date of June 3, 2009. Nevertheless, the record is complete with facts which confirm Louis Manichia was **financially** sound at the time of the Donation.

At the Motion for Summary Judgment, because the Court only recently presented with the "subsistence" argument, the Court asked one simple question to Louis Manichia, "What did he have in C.D.'s?" Kathleen Burmaster (Louis Manichia's representation through "Power of Attorney") replied "\$170,000." (R-586). Appellant now wants to retract this statement, recognizing Louis Manichia was in good **financial** position at the time of the Donation, with (1) Social Security, (2) usufruct of the house, and (3) \$170,000 in C.D.'s. Appellant now alleges the \$170,000 is "phantom" money. (See Appellant's brief, pp. 5 & 4.)

*8 The record, however, is clear that Louis Manichia had C.D.'s totaling \$170,000. *First*, Louis Manichia and Kathleen Burmaster confirmed at the Motion for Summary Judgment that the C.D.'s totaled \$170,000 (R-586.) *Second*, in Louis Manichia's affidavit admitted into the record, he admitted having \$170,000 in C.D.'s as of 12/1/05 (R-551). *Third*, in Louis Manichia's own exhibits filed in the record, Louis Manichia states he had "certificates of deposit totaling \$170,000." (R-294 & R-199). *Lastly*, the C.D.'s (which were provided to his niece and nephew for "safe keeping") were returned to Louis Manichia in

December, 2005. (R-496). Interestingly, when the \$170,000 in C.D.'s were returned to Louis Manichia a receipt was provided; the initials "KBB" appear on the receipt. (R-496). These are the initials of Kathleen Burmaster, who demanded the return of the C.D.'s, and who received the C.D.'s with Louis Manichia present.

Ward of the State

Louis Manichia is not destitute nor a ward of the State. In his brief to this Honorable Court, Louis Manichia appears to concede that he had \$170,000 in C.D.'s at the time of the Donation. However, Appellant now suggests he now only has \$29,000 in cash. The issue of subsistence is to be determined *at the time of the Donation*, not five years later. Otherwise, every donation would be suspect and subject to nullity long after its execution. Hence, the **financial** status of the Donor must be examined at the time the donation is made.

Burden of Proof

Appellant has not introduced any evidence to establish that he did not reserve sufficient funds for his subsistence *at the time the Donation was made*. *9 *Holecomb v. Baker*, 459 So.2d 158 (2nd Cir. 1984). Five years later, Appellant apparently still has assets available for subsistence, despite living with and supporting Kathleen Burmaster for the past five years. The burden rests upon the plaintiff (Appellant) at trial to prove that the Donor has not reserved enough for his subsistence. *Lamkin v. Hanna*, (La. App. 2nd Cir. 1961), 135 So.2d 659. The Court must look at Donor's assets at the time the donation was made and according to Donor's *previous* habits and condition in life. See *Bourgreat v. Dumoulin*. *infra*. Further, pursuant to La. C.C.P. 966 (c) (2), if the adverse party (Appellant) fails to produce factual support sufficient to establish that he will be unable to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. In the case at bar, Appellant has failed to establish any facts to establish that *at the time the Donation was made*, Louis Manichia could not maintain his subsistence, based on his previous habits and condition in life.

At the time of the Donation, Mr. Manichia had the full and complete usufruct of the house. He was and is still receiving a Social Security check (with corresponding insurance); he had \$170,000 in C.D.'s at the time of the Donation. At the time of the Donation, Louis Manichia was **financially** sound, with sufficient funds for his subsistence.

CONCLUSION

The Donation by Louis Manichia to his niece and nephew was by an authentic act before a Notary (attorney) and two witnesses. At the time of the Donation, Louis Manichia reserved for his subsistence: (1) \$170,000 in C.D.'s, (2) usufruct over the house, (3) Social Security income and corresponding insurance, and (4) all of his personal property. Clearly, Louis Manichia reserved for himself enough for his subsistence based upon his assets, previous lifestyle and needs at *10 the time of this Donation. Accordingly, the trial Court's granting of the Motion for Summary Judgment should be maintained.

RELIEF SOUGHT

The Judgment of the trial Court granting the Motion for Summary Judgment should be maintained.

Footnotes

- 1 The trial court ruled on various other issues, however, none of the other decisions of the trial court have been appealed and, therefore, are not before this Honorable Court.
- 2 Prior to the new Will, Louis Manichia executed a Will on 1/10/05, leaving the land and C.D.'s to Donees. (R-38).
- 3 Kathleen Burmaster has since filed Interdiction proceedings of Louis Manichia for "medical purposes." See (R-2).

- 4 Interestingly, by Will dated 1/10/05 (only five months before the Donation to Lanny Garell and Carole Garell Mahoney), Louis Manichia executed a Will granting Lanny Garell and Carole Garell Mahoney the property at issue, and the C.D.'s which he owned. (R-38).

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