Responsiveness and the Offeror's Duty to Read Closely

Business Integra, Inc. v. United States, 116 Fed.Cl. 328 (2014).

In 2010, the Department of Homeland Security (DHS) issued a request-for-proposals (RFP) solicitation for information-technology services. This RFP contemplated issuing multiple-award, indefinite-delivery/indefinite-quantity contracts that were solicited under two different "tracks" — small business and unrestricted.

Business Integra, Inc. (BI) submitted an offer on the small-business track; however, it was not awarded a contract because it had omitted labor-rate-pricing data for a single position in the fourth option year of its proposal. Because of the omission, BI's proposal was eliminated from consideration for award. After receiving a post-award debriefing, BI filed a bid protest with the Government Accountability Office (GAO) challenging DHS' determination that its proposal was not in conformance with the requirements of the solicitation.

The GAO denied the protest, reasoning that "[i]t is a fundamental principle of government contracting that, in a negotiated procurement such as this, a proposal that fails to conform to the material terms and conditions of the solicitation is considered unacceptable and may not form the basis for award." Furthermore, the GAO noted, "[t]he solicitation here clearly instructed offerors to propose labor rates for '**ALL** labor categories' and warned that failure to omit even a single rate would result in a 'material non-conformity' and 'offer ineligibility.' (emphasis in original)." Finally, the GAO reasoned that "because the protester failed to comply with the solicitation's unequivocal directive to do so, its proposal did not conform to the material terms of the RFP, and, therefore, could not be accepted for award." BI then filed a complaint with the U.S. Court of Federal Claims (COFC).

The COFC reviews bid protests under the standards in the Administrative Procedures Act. Under that standard, the COFC can only set aside an agency's decision if the agency's actions were arbitrary, capricious or not otherwise in accordance with the law. Here, besides the firm's claims, COFC considered two issues: first, whether the applicable solicitation's provision that proposals include all labor rates is a material term; and, second, what the Government's obligations were in addressing the errors, if any.

Materiality

Regarding materiality, BI argued that its errors were *de minimis* because the omitted price data would have amounted to only 0.0041 percent of the projected total value of its proposal. BI relied upon the GAO's opinion in *W.B. Constr. & Sons, Inc.*, B-405818 (Comp. Gen. Jan. 4, 2012), which held that failure to bid on a line item was a minor informality because the price of the item was *de minimis* compared to the total

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cost of the contract, about 0.077 percent, and would not have affected the competitive standings of the bidders; therefore, the agency should have waived the omission as a minor informality. COFC found BI's argument unpersuasive because the contract at issue was a Federal Acquisition Regulation (FAR) Part 15, negotiated procurement, and the contract in *W.B. Constr. & Sons, Inc.* was a sealed bid procurement under FAR Part 14. Specifically, the COFC pointed out, under Part 14, while the Government is required to seek clarification for minor irregularities, under Part 15, the Government is not; the Government is merely permitted to allow offerors to resolve "minor or clerical errors" instead.

In defining "minor or clerical errors," the COFC noted that Part 15 provides no definition for such errors; however, it found its opinion in *ST Net, Inc. v. U.S.*, 112 Fed. Cl. at 110 (July 25, 2013), to be persuasive. In *ST Net*, the protestor omitted pricing information in its proposal for a negotiated procurement which would have increased the total price by about 7 percent; however, while the COFC determined that the error was material, it was because of the importance of the price information to the Government's evaluation of the offer, not the dollar amount of the error. Here, BI attempted to distinguish *ST Net* by arguing that its error was substantially less than the error in *ST Net*. Again, the COFC did not find BI's argument persuasive because "[t]his argument is at odds with the solicitation, which explicitly states that omission of even a single labor rate, no matter its significance, will result in a material non-conformity." Eventually, the COFC found that the requirement to provide pricing for all labor categories for all years was a material term of the solicitation and that DHS reasonably construed BI's failure to submit complete pricing data as a material deficit.

Government's Obligations

Considering the Government's obligations in addressing the error, BI argued alternatively that, even if the error was not *de minimis*, the Government should have recognized the error and waived or corrected it. The COFC did not find this argument to be persuasive either, noting that BI's relied-upon authorities contemplated a FAR Part 14 sealed bid procurement, and not a FAR Part 15 negotiated procurement as the case at issue, and that "[b]ecause Business Integra's error was material, the government was under no obligation to waive the error or allow Business Integra to correct the error."

Prospective offerors should read RFPs closely, even in cases where an error is minor to the overall price of the proposal; it may involve an important non-price consideration. Especially if the Government specifically says so!

To review the *Business Integra, Inc.* decision, go to: *www.gao.gov/products/D06917*. To review the *W.B. Construction & Sons, Inc.* decision, go to: *www.gao.gov/products/P00061*.

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Marta-Ann Schnabel has joined the Patterson Resolution Group. Her practice areas include professional liability, business and commercial litigation, construction disputes, insurance coverage, and casualty litigation. Her training as a mediator includes studies at the Straus Institute for Dispute Resolution, Pepperdine University. She is currently the Chair of the Louisiana Supreme Court's Judicial Oversight Committee and served as the first woman president of the Louisiana State Bar Association.

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Bankruptcy Law

5th Circuit Adopts "Reasonably Likely to Benefit" Standard for Attorneys' Compensation

Barron & Newburger, P.C. v. Texas Skyline, Ltd. (In re Woerner), ____ F.3d ____ (5 Cir. 2015), 2015 WL 1591143.

Barron & Newburger, P.C. (B&N) represented a Chapter 11 debtor for 11 months until the debtor's case was converted to a case under Chapter 7. Upon termination of its services, B&N filed a fee application seeking approval of fees of approximately $130,000. The bankruptcy court allowed fees of $20,000, determining that the remainder of the fees were unreasonable mainly due to B&N's lack of success in the case and, more specifically, because B&N's services were not of an identifiable benefit to the debtor's estate. In analyzing the services rendered, the bankruptcy court applied the standard set forth by the 5th Circuit in *In re Pro-Snax Distributors, Inc.*, 157 F.3d 414 (5 Cir. 1998), in which the 5th Circuit applied a "hindsight" approach or actual "material benefit" approach in evaluating fee applications. That approach requires courts to determine whether services rendered actually "*resulted* in an identifiable, tangible, and material benefit to the bankruptcy estate." *Id.* at 426 (emphasis added).

On appeal, the 5th Circuit granted rehearing en banc to reexamine its decision in *Pro-Snax*, and, in particular, its application of the material-benefit standard. Upon a review of the plain language of Section 330, which sets forth the standard for approving compensation in bankruptcy cases, the legislative history of Section 330 and the standard applied in other circuits, the 5th Circuit concluded that rather than apply a material-benefit standard in evaluating fee applications, courts should apply the prospective standard — "reasonably likely to benefit the estate." Under this standard, courts need to look to "the necessity or reasonableness of legal services *at the time they were rendered*," rather than whether the services actually resulted in a material benefit to the estate. *Barron & Newburger*, at *8 (emphasis added).

The 5th Circuit noted that courts employing this reasonable-at-the-time standard usually consider the following factors: "the probability of success at the time the services were rendered, the reasonable costs of pursuing the action, what services a reasonable lawyer or legal firm would have performed in the same circumstances, whether the attorney's services could have been rendered by the Trustee and his or her staff, and any potential benefits to the estate (rather than to the individual debtor)." *Id.*

The 5th Circuit remanded the case to the bankruptcy court to determine whether B&N was entitled to its fees under the new reasonable-at-the-time standard.

Golf Channel Burned by Stanford's Ponzi Scheme

Janvey v. Golf Channel, 780 F.3d 641 (5 Cir. 2015).

For almost two decades, Stanford International Bank (Stanford) operated a multi-billion-dollar Ponzi scheme. In 2006, Stanford and the Golf Channel, Inc. entered into a two-year agreement pursuant to which the Golf Channel would provide marketing services to Stanford, including commercial airtime and live coverage of a golf tournament hosted by Stanford. Stanford entered into this agreement in an attempt to reach the Golf Channel's high-net-worth viewership that would be likely to invest in its Ponzi scheme. In connection with this advertising agreement, Stanford paid the Golf Channel approximately $5.9 million.

In 2009, the SEC uncovered the Stanford Ponzi scheme and filed a lawsuit in the Northern District of Texas. The district court appointed a receiver over Stanford. The receiver sued the Golf Channel to recover the $5.9 million as a fraudulent conveyance under the Texas Uniform Fraudulent Transfer Act (TUFTA). The Golf Channel asserted an affirmative defense under the TUFTA, *i.e.*, it received the payments in good faith and in exchange for reasonably

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equivalent value, the market value of the advertising on the Golf Channel. The district court agreed with the Golf Channel and held that, even though the payments to the Golf Channel were fraudulent conveyances, the Golf Channel was entitled to judgment as a matter of law on its affirmative defense. The district court stated, "Golf Channel looks more like an innocent trade creditor than a salesman perpetrating and extending the Stanford Ponzi scheme."

On appeal, the receiver argued the Golf Channel failed to prove the second element of its affirmative defense, *i.e.*, its advertising services provided reasonably equivalent value. The 5th Circuit analyzed value from the perspective of the creditors of the transferor, not market value. Applying this approach, the 5th Circuit found that the Golf Channel presented only evidence proving the *market* value of its services, and that it did not present any evidence that its services preserved the value of Stanford's estate or had any benefit from the creditors' perspective. The 5th Circuit then held that the Golf Channel's advertising services did not, as a matter of law, provide any value to Stanford's creditors, finding that while the Golf Channel's services may have been quite valuable to the creditors of a legitimate business, those services had no value to the creditors of a Ponzi scheme. The 5th Circuit rendered judgment in favor of the receiver, who was entitled to void the agreement, and the Golf Channel was required to return the full $5.9 million.

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All Means ALL in *Guillory*

Guillory v. Pelican Real Estate, Inc., 14-1539 (La. 3/17/15), ____ So.3d ____, 2015 WL 1208632.

The suit centers on the abandonment of an action as to one party. The record reflects that the suit was filed on June 25, 2008. On March 4, 2010, all parties participated in depositions. The next "step in prosecution" was on Dec. 17, 2012, when the plaintiffs sent written discovery directed to Pelican and did not serve the other defendants. The plaintiffs and Pelican engaged in the discovery process and settlement negotiations. On June 20, 2013, St. Paul, a separate defendant, filed an *ex parte* motion to dismiss plaintiffs'

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suit as abandoned.

The district court signed the motion, and plaintiffs filed a motion to vacate, which was denied because the discovery was not "served on all parties" and, therefore, did not constitute a step sufficient to interrupt the abandonment period.

The court of appeal, in a split decision, reversed the district court. The Louisiana Supreme Court ultimately reinstated the district court's judgment, which dismissed the action as to St. Paul because the wording in La. C.C.P. art. 561(B) states that the discovery must be served on all parties. Anything short of *all* cannot constitute a step in the prosecution as to that party.

Criminal and Civil Collide in *Lemoine*

Lemoine v. Wolfe, 14-1546 (La. 3/17/15), ____ So.3d ____, 2015 WL 1212165.

The Louisiana Supreme Court answered a certified question of the U.S. 5th Circuit Court of Appeals in *Lemoine v. Wolfe*. In *Lemoine*, the plaintiffs sued a number of defendants for malicious prosecution. All of the facts, as presented here, and in the Louisiana Supreme Court's Answer to the Certified Question, are presented in the facts most favorable to the plaintiffs, the Lemoines, as this issue was raised on summary judgment.

The facts that led to the suit read like a high school drama: Lemoine was a friend of Daniel Hoover. Hoover was having difficulties with his ex-wife, Kelly. After divorcing Hoover, Kelly married the son of the Hon. Elizabeth P. Wolfe, a sitting judge of the 21st Judicial District Court. It is unclear whether the domestic proceedings between Daniel and Kelly were in the 21st JDC or elsewhere. However, Lemoine took to the Internet, and along with Lori Hoover Barrient, Daniel's sister, began a dialogue questioning Kelly's actions. The dialogue also contained statements regarding Judge Wolfe.

In September 2009, Lori made a complaint to a detective with the Tangipahoa Parish Sheriff's Office regarding Lemoine's posts. In November, Kelly contacted the same detective and reported "being threatened and harassed by Internet postings that were authored by Scott Lemoine and others." According to the Lemoines, Judge Wolfe also contacted the detective to report her feelings regarding the posts.

Lemoine was ultimately arrested for alleged violations of La. R.S. 14:40.3, the "cyberstalking statute." At the time of his arrest, Lemoine was under federal supervised release on an earlier, unrelated charge. His discharge from his prior release was revoked by a federal district judge based on the results of a routine drug screen. Other details are omitted, due to space, regarding Lemoine's charge for solicitation for murder of Judge Wolfe.

Ultimately, in September 2010, the district attorney dismissed the cyberstalking charge pursuant to La. C.Cr.P. art. 691, which constitutes the basis for Lemoine and his wife's tort claim for malicious prosecution. Judge Wolfe moved for summary judgment. Five of the six elements for malicious prosecution were met. The sixth, however, was whether this dismissal pursuant to art. 691 counted as a bona fide termination of the proceedings in Lemoine's favor. As a part of her motion for summary judgment, Judge Wolfe attached an affidavit from an assistant district attorney in which he attested that the reason he dismissed the charges against Lemoine was not due to a lack of merit, but instead "the policy of the District Attorney . . . not to extradite a defendant for misdemeanor offenses," and that had "Mr. Lemoine been in Tangipahoa Parish, the District Attorney's office would have moved forward."

The certified question at hand is regarding this sixth element: whether the district attorney's dismissal pursuant to art. 691 constituted a bona fide termination of the criminal proceeding in his favor. The main hinge here is whether the circumstances surrounding the dismissal of the criminal proceeding support an inference that there existed a lack of reasonable grounds to pursue the criminal prosecution. Louisiana, like many other states, has adopted the position "that a *nolle prosequi* will constitute a bona fide termination in favor of the accused for purposes of the malicious prosecution cause of action where the circumstances surrounding the dismissal of the criminal proceeding support an inference that there existed a lack of reasonable grounds to pursue the criminal proceeding."

The Court left open for the court of appeals to resolve if, based on the record, there was sufficient evidence of a factual dispute as to the circumstances surrounding the dismissal of the cyberstalking prosecution such to preclude summary judgment on this element. The dismissal, and the district attorney's policies, will likely come into play here. Justice Hughes even hinted at this in his one-sentence dissent, wherein he stated that he "would find that the dismissal of the prosecution due to a policy of not extraditing misdemeanor defendants does not constitute a bona fide termination in favor of the malicious prosecution plaintiff."

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Conclusory Statements Regarding Predicate Traffic Violations Lead to Suppressed Evidence

United States v. Alvarado-Zarza, 782 F.3d 246 (5 Cir. 2015).

The U.S. 5th Circuit Court of Appeals recently issued a major decision regarding the suppression of evidence seized subsequent to stops for purported traffic infractions.

Marco Antonio Alvarado-Zarza was stopped by the Texas Highway Patrol near the U.S.-Mexico border. Like the vast majority of non-residential drug seizures, the case began with the patrolman initiating a traffic stop for a purported traffic violation, in this case, a Texas law requiring drivers to signal 100 feet in advance of a turn.

Instead of notifying the driver of his infraction and issuing a traffic ticket, the patrolman immediately began questioning Alvarado-Zarza and requested consent to search the vehicle, which was given. After the officer found cocaine in the car, he then advised the defendant of his rights. Alvarado-Zarza was charged with possession with intent to distribute a Schedule II narcotic. Before trial, he moved to suppress all evidence as fruits of a search subsequent to an illegal stop.

In support of his motion to suppress, the defendant provided expert-witness testimony from a private investigator who used the patrolman's dashcam video to recreate the scene of the traffic stop. Based on visual cues included in the video, the private investigator was able to conclude that the defendant signaled his turn 200 to 300 feet before his turn, two to three times more than the distance required by law. Accordingly, the defendant argued, the officer could not have reasonably suspected that a traffic violation had occurred, and thus the entire traffic stop was a pretext to search for drugs. On cross-examination by the defense, the officer could provide no explanation as to why he misjudged the distance so greatly while enforcing such a specific traffic regulation.

Despite clear evidence that the defendant had been improperly stopped, and despite that the government did not contest the measurements made by the expert witness, the district court denied the defendant's motion. In its written findings, the court stated that the expert witness lacked credibility because he could not answer complex mathematical questions regarding the differing rates of speed of each vehicle and complex scientific concepts such as the distortion effect caused by video from dashcams and its potential to affect depth perception. Finally, the district court found that, even if Alvarado-Zarza signaled more than 100 feet before turning, the officer reasonably suspected that he had not done so.

The 5th Circuit analyzed the lower court's finding in light of the fundamental "fruit-of-the-poisonous-tree doctrine." *See, United States v. Cotton*, 722 F.3d

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271, 278 (5 Cir. 2013). It should be noted that one major exception to this doctrine is when an arrestee consents to the search and that consent is: (1) "voluntarily given" and (2) "an independent act of free will." *United States v. Chavez-Villareal*, 3 F.3d 124, 127 (5 Cir. 1993). The same standard applies to an arrestee's admissions. *See, United States v. Tovar*, 719 F.3d 376, 387-88 (5 Cir. 2013). However, the district court failed to address each of these required elements, and the government conceded on appeal that if the stop is deemed illegal, the evidence must be suppressed.

Warrantless seizures are "per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *United States v. Hill*, 752 F.3d 1029, 1033 (5 Cir. 2014) (*quoting Katz v. United States*, 88 S.Ct. 507, 514 (1967)). One such exception comes from *Terry v. Ohio* and its progeny. 88 S.Ct. 1868, 1880 (1968). Under *Terry*, police officers may stop and briefly detain an individual if they reasonably suspect that criminal activity is occurring or about to occur. *Id.* Reasonable suspicion must be "particularized," *United States v. Cortez*, 101 S.Ct. 690, 695 (1981), meaning that "the police officer must be able to point to specific and articulable facts" justifying the stop, *Terry*, 88 S.Ct. at 1880. Additionally, reasonable suspicion cannot rest on a mistake of law or fact unless the mistake is objectively reasonable. *See, Heien v. North Carolina*, 135 S.Ct. 530, 536 (2014) (mistake of law); *Illinois v. Rodriguez*, 110 S.Ct. 2793, 2806 (1990) (mistake of fact).

Based on his own testimony, the officer thought that the signaling requirement applied to movement from a lane of travel into a turn lane when, if fact, the statute applies only to turns, not lane changes. Thus, he failed to construe the traffic statute narrowly. The court compared the results in *Heien* to the facts of the defendant's case, and found that, unlike in *Heien*, the statute in this case contains no ambiguity. Thus, the officer's mistake of law was not objectively reasonable.

With regard to the officer's mistake of fact, the court stated that it is unclear whether the district court's findings were intended to indicate that the expert incorrectly determined the points at which Alvarado-Zarza activated his turn signal, erred in measuring the distance between those points, or both. Either way, the video plainly supports the expert's conclusion that the defendant signaled well before the required 100 feet. The 5th Circuit rejected the *non sequitur* arguments of the district court regarding the speed of cars, which has no bearing on the measurement of distance, and video distortions, noting that no such distortion exists in the clear dashcam footage. Therefore, the district court erred in its rejection of the expert's testimony.

The final question is whether it was objectively reasonable for the officer to conclude that Alvarado-Zarza failed to signal 100 feet prior to turning when he, in fact, signaled 300 feet prior to turning. *See, Rodriguez*, 110 S.Ct. at 2806. The court reviewed jurisprudence from both state and federal courts that consistently agree that the government cannot carry its burden to demonstrate reasonable suspicion when the only evidence of the traffic infraction is an officer's "conclusory statements." The affirmation of this principle by the 5th Circuit provides another corollary to the standards initially set forth in *Terry*, specifically, that reasonable suspicion be supported by "specific and articulable facts." *See, Terry*, 88 S.Ct. 1880; *see also, Cortez*, 101 S.Ct. at 695.

In this case, the officer conceded that he could not "really be measuring" the exact signaling distance. The fact that the actual distance between the signal and the turn was approximately 300 feet, and that Officer Barrientos provided no explanation as to why he might have thought the distance was less than 100 feet, only reinforces this conclusion. Accordingly, the 5th Circuit reversed the district court's denial of the motion to suppress, and thereby established the principle that subsequent discovery of contraband does not alleviate the government of its burden to prove the validity of the predicate traffic stop.

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Community Property

Delaney v. McCoy, 49,523 (La. App. 2 Cir. 11/19/14), 152 So.3d 1049.

Applying *Hare v. Hodgins*, 586 So.2d 118 (La. 1991), the trial court held that Delaney was entitled to a share of McCoy's retirement benefits based on his rank in the Shreveport Fire Department at the time of the termination of the regime. His rise from a driver to deputy chief at retirement was due to extraordinary personal effort that led to a substantial increase in his retirement benefits. Although seniority played a part in his various promotions, he also had to pass written and working tests and evaluations to obtain and maintain the promotions. However, basing his benefits at retirement on his salary for his rank in 2004 was erroneous.

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The court of appeal remanded for a more accurate calculation of his salary on which to base the benefits and for consideration of other available benefits.

Paternity

In Re Succession of Hebert, 13-0954 (La. App. 3 Cir. 2/12/14), 153 So.3d 1101.

Because Ms. Coleman did not file a filiation action before she reached age 19, her claim was perempted under prior La. Civ.C. art. 209. The 2005 amendment to the filiation articles and enactment of La. Civ.C. art. 197, which redefined the peremptive period, and which would have allowed her to file a claim within one year of the alleged father's death, could not resurrect her already perempted claim. Further, even if art. 197 applied, she did not file pleadings to establish paternity within one year of Mr. Hebert's death. Her filing parentage tests into the record did not commence a proceeding. Because the recognized heir's exception of peremption was filed prior to the submission of the case to the court of appeal for oral argument, it was timely filed in the court of appeal under La. C.C.P. art. 2163.

Custody

Manno v. Manno, 49,533 (La. App. 2 Cir. 11/19/14), 154 So.3d 655.

In 2006, Ms. Manno alleged that Mr. Manno had abused their child and sought a protective order in juvenile court. She later moved to dismiss that proceeding and confirmed therein that she was not coerced into doing so. The parties entered into a consent judgment in their divorce proceedings in 2007, providing for joint custody, including a joint-custody-implementation plan. In 2011, she requested that his custody be supervised, claiming that the child was suffering from the alleged prior abuse. The trial court limited testimony to only events occurring after the consent judgment in 2007 and, after trying the case over three days and hearing from numerous experts, denied her request for supervised visitation. On appeal, she argued that the court was required to consider those past events in order to address the child's current situation. The court of appeal disagreed, finding that she had voluntarily dismissed the juvenile court proceedings and entered into the consent judgment, and thus she could not revisit those past claims. Moreover, the child and father had developed a good relationship over the past several years. The court of appeal further found that her late arising claims of coercion were without merit.

C.M.J. v. L.M.C., 14-1119, 156 So.3d 16 (La. 10/15/14).

After the trial court granted sole custody to the father, finding that the mother had mentally and physically abused the children by making false allegations of sexual and physical abuse by the father, had abused the court and medical system to her advantage, and had attempted to alienate the children from the father, the court of appeal reversed, finding that the trial court had erred in not allowing the children to testify, in not requiring a sexual-abuse evaluation and

in limiting the testimony of the maternal grandmother. The Supreme Court granted writs, reversed the court of appeal, and reinstated the trial court's judgments.

The Supreme Court agreed with the trial court that the children's testimony had been so tainted, particularly by a videotape made by the mother in which she clearly attempted to "coach" one of the children, that their testimony was unhelpful. In any event, testimony and records by the court-appointed evaluator included the children's claims, so that information had been made available to the trial court. Further, no new expert was needed to perform a sexual-abuse evaluation. The court-appointed evaluator did not err in not doing an evaluation, as the children's testimony was so tainted that an evaluation would be useless. The trial court did not err in relying on the evaluator's opinion that a sexual-abuse evaluation was not justified under the circumstances. Finally, the Supreme Court found that regardless of how the maternal grandmother's testimony was limited, her proffered testimony was very similar to that reported in the custody-evaluator's report, which the trial court had reviewed, so the evidence available to the court was not lacking.

Child Support

Hatfield v. Hatfield, 49,493 (La. App. 2 Cir. 11/19/14), 155 So.3d 70, *writ denied*, 14-2680 (La. 3/27/15), ____ So.3d ____, 2015 WL 1609628.

The trial court did not abuse its discretion in imputing a $100,000 income to Mr. Hatfield for child support purposes because of his failure to comply with the court's order that he produce income documentation to the special master who was attempting to determine his income, particularly after there was a hearing and testimony as to exactly what information the special master needed. Furthermore, Mr. Hatfield had been warned that if he did not provide the information, he would be imputed the $100,000 income. Further, there was no abuse in the court's order that he pay $3,500 in attorney's fees to Ms. Hatfield and that he pay the special master fees of $4,700, as La. Civ.C. art. 1471(C) allows the court to impose sanctions for failure to comply with a discovery order.

Carter v. Carter, 49,517 (La. App. 2 Cir. 11/26/14), 155 So.3d 81.

Because Mr. Carter did not introduce evidence to show that his claiming the child-dependency deductions would substantially benefit him without significantly harming the domiciliary parent, the trial court did not err in ordering that the deduction be alternated between the parties. The trial court did not err in including (1) VA non-taxable disability income to Mr. Carter as he failed to show that that amount was included in his military-retirement income; (2) seasonal income he received by working as an umpire; and (3) rental income he was receiving less property tax expenses, given that he proved no other expenses regarding that rental property. Further, the court was correct in not deviating from the child-support guidelines to account for his expenses for his new wife and children because he failed to show that the guidelines were unfair or that a deviation was in the best interest of the child. That the court had previously allowed a downward deviation did not entitle him to a continued downward deviation.

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Insurance, Tort, Workers' Compensation & Admiralty Law

Who Is An Employer? The *Ruiz* Factors

Johnson v. PPI Tech. Servs., L.P., No. 14-30423, ____ Fed.Appx. ____ (5 Cir. March 31, 2015), 2015 WL 1434928.

James Johnson was working as a drilling superintendent on the oil rig High Island VII off the coast of Nigeria when he was shot in the leg by Nigerian gunmen who boarded the rig using stairs that rig employees had left extended in violation of company security rules. He filed suit seeking remedies under the Jones Act, 46 U.S.C § 30104, and general maritime law against his employer, PPI Technology Services, L.P. (PPI Tech), and others. The district court ultimately granted PPI Tech's motion for summary judgment, finding as a matter of law that PPI Tech was not Johnson's employer.

The rig was staffed and operated under a complex multi-corporate Consulting Service Agreement (CSA). Afren operated the rig and contracted with PPI Technology Services Nigeria (PPIN) to provide services, including furnishing skilled, professional workers to PPI Tech and Petroleum Services Limited (PSL) for PPIN's business and operations. PPIN paid a monthly fee and reimbursement of employee expenses to PPI Tech. The CSA provided that PPIN and PSL would

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indemnify PPI Tech for all claims brought by PPIN's or PSL's employees for bodily injury. Contractually, PPI Tech acted as an employment agency for PPIN and PSL, staffing PPIN's jobsite. Johnson was recruited by PPI Tech. Under his employment contract with PSL, the parties agreed that Johnson was an independent contractor and not a PSL employee and that he had sole control over the manner and means of performance. To sustain Johnson's argument on appeal that he was PPI Tech's employee, he had to be able to demonstrate that he was a borrowed servant of PPI Tech.

In deciding the issue on appeal, the 5th Circuit considered nine factors, commonly referred to as the *Ruiz* factors, enunciated in *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 312-13 (5 Cir. 1969), which are used to determine when an employer has borrowed a servant:

(1) Who has control over the employee and the work he is performing?

(2) Whose work is being performed?

(3) Was there an agreement, understanding or meeting of the minds between the original and the borrowing employer?

(4) Did the employee acquiesce in the new work situation?

(5) Did the original employer terminate his relationship with the employee?

(6) Who furnished tools and place for performance?

(7) Was the new employment over a considerable length of time?

(8) Who had the right to discharge the employee?

(9) Who had the obligation to pay the employee?

No single factor is determinative; courts look to the venture as a whole. The district court held that all but Factor 8 weighed against a finding that Johnson was PPI Tech's borrowed servant. Johnson contested only the district court's conclusions as to Factors 1, 2 and 3. The court's findings were as follows:

Factor 1: Control. Johnson and his work were controlled by consultants employed by Afren, which had no relationship with PPI Tech.

Factor 2: Whose Work. Johnson was performing Afren's work on the High Island VII, as Afren owned the rights to the minerals it sought to extract from the seabed and Johnson was the company man on the rig.

Factor 3: Meeting of the Minds. Nothing in the CSA indicated an agreement that Johnson would work for PPI Tech rather than for PPIN, Afren or PSL.

Factor 8: Right to Discharge. The 5th Circuit concurred with the district court's assessment that the factor has only slight weight when balancing the issues governing the determination of a borrowing employer.

Further, the 5th Circuit agreed with the trial court's holding that the other five *Ruiz* factors did not support a conclusion that PPI Tech was Johnson's borrowing employer, affirming its summary judgment dismissing claims against PPI Tech.

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Trade Promotion Authority

Bipartisan Congressional Trade Priorities and Accountability Act of 2015, S. 995 (114th Congress).

On April 16, 2015, the U.S. Congress introduced legislation empowering the President to negotiate free trade agreements. The last iteration of such legislation, the 2002 Trade Promotion Authority legislation, expired in 2007. Despite the lack of congressionally delegated negotiating authority, President Obama is on the brink of completing the largest free trade agreement since the North American Free Trade Agreement. The proposed Trans-Pacific Partnership (TPP) Agreement with 11 Asia-Pacific nations will cover roughly 65 percent of global trade. The Bipartisan Congressional Trade Priorities and Accountability Act (TPA-2015) provides the Administration with the necessary authority to not only complete the TPP negotiations but also to continue progress on what would be the largest free trade agreement in the world — the proposed Transatlantic Trade and Investment Partnership (TTIP) between the United States and the European Union.

TPA-2015 contains three main components: (1) directs the Administration to conduct negotiations in the context of congressionally mandated objectives; (2) enhances the White House-Congress consultation process by providing greater access to negotiating texts; and (3) retains congressional approval of trade agreements through an up-or-down vote without amendments.

TPA-2015 contains many updated and new negotiating objectives that will guide U.S. trade policy over the next three to six years. Some of the highlights of TPA-2015 include:

► New digital-age trade objectives recognizing the importance and role of the Internet in international trade;

► Heightened protections for intellectual property, including provisions addressing government roles in cybersecurity;

► Agricultural provisions recognizing the critical importance of enforceable sanitary and phytosanitary measures and improper application of geographical indications;

► Updated labor and environment provisions recognizing core labor standards and environmental agreements;

► Elimination of trade barriers to cross-border investment;

► New negotiating objective for the first time addressing the role of currency manipulation in global trade;

► Statutory requirement that all members of Congress and their staffs have access to negotiating texts;

► Creation of a new Transparency Officer in the Office of the U.S. Trade Representative tasked with guiding congressional consultations;

► Extends Trade Promotion Authority for three years, with a three-year renewal option; and

► Provides a new compliance resolution allowing Congress to remove the expedited procedures for trade agreement approval (up-or-down vote without amendments) if the agreement does not satisfy TPA negotiating objectives.

2015 Annual Report: Committee on Foreign Investment

The Committee on Foreign Investment in the United States (CFIUS) published its annual report summarizing its activity in 2013. As previously reported in this section, CFIUS is a committee composed of various federal agency representatives that conducts national security reviews of foreign direct investment into the United States. The annual report shows a decline in reviewed transactions for 2013, but an increase in cases taken to the 45-day phase. China continues to lead the number of reviews.

CFIUS conducted 97 reviews in 2013, down from 114 in 2012. The total value of all U.S. mergers and acquisitions was above $122 billion. China leads the way with 22 reviews, followed by Japan with 18. Canada was third with 12, and the United Kingdom was involved in seven notified transactions. FDI in the manufacturing sector continues to account for the largest number of covered and reviewed transactions. Of note in the 2015 report is the conclusion by the U.S. Intelligence Community that one or more foreign governments or companies continue efforts to acquire U.S. companies involved in research, development or production of certain critical technologies.

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Mineral Law

Payment of Lessor's Royalties by Non-Participating Lessee

Fite Oil & Gas, Inc. v. SWEPI, L.P., No. 13-31244 (5 Cir. Feb. 5, 2015), 2015 WL 468981.

At issue in this case was the obligation to make payments to the lessors of a lessee that did not participate in the drilling of a unit well in DeSoto Parish. The parties are Fite Oil & Gas, Inc. and SWEPI, L.P. In October 2009, SWEPI informed Fite that it planned to drill a unit well in a unit approved by the Louisiana Commissioner of Conservation, which covered some of Fite's leased property.

Fite did not participate in the drilling of the well, which was completed by SWEPI in March 2010. The well did not provide a good revenue stream, and SWEPI did not recoup its costs of drilling. SWEPI did not pay any money to Fite because Fite elected not to share in the costs of the well. SWEPI also did not make any royalty payments to Fite's lessors or to Fite for its lessors' benefit. SWEPI claimed it did not owe any payments to lessors, pursuant to La. R.S. 30:10(A)(2)(b)(i), because it had not recouped its costs to drill the well. SWEPI argued that Fite should have paid its lessors out of its own pocket.

Fite filed a lawsuit in the U.S. District Court for the Western District of Louisiana seeking a declaratory judgment that SWEPI was responsible for the royalty payments to Fite's lessors. Fite's lessors were not party to this lawsuit. Both Fite and SWEPI filed cross-motions for summary judgment. The district court ruled in favor of SWEPI and held that Fite had the obligation to pay its lessors, but the court never ordered Fite to actually pay its lessors.

Fite appealed. The U.S. 5th Circuit, in analyzing the issues before it, held that the lawsuit was moot because the lessors' potential claims had prescribed under the three-year prescriptive period provided by La. Civ.C. art. 3494 for royalty claims. Fite argued that its suit had preserved its lessors' claims, but the court disagreed. As crafted, the lawsuit did not toll the prescriptive period for the lessors' potential claims because the suit was solely a controversy between Fite and SWEPI, which did not involve or preserve the lessors' claims.

Fite also argued that, although its lessors' potential claims against Fite itself would be royalty claims, their potential claims against SWEPI would be quasi-contractual claims under La. R.S. 30:10(A)(3) by owners of "unleased interests" for a share of production proceeds, and such claims prescribe in 10 years. The court held, however, that 30:10(A)(3) applies only if mineral interests are not leased to anyone, and the lessors' interests were leased to Fite.

The 5th Circuit vacated the district court's ruling and remanded the case to the district court to dismiss the litigation because it no longer contained any live case or controversy, as required for federal court jurisdiction.

Subsequent Purchaser Rule; Legacy Lawsuit

Bundrick v. Anadarko Petroleum Corp., 14-0993 (La. App. 3 Cir. 3/4/15), ____ So.3d ____, 2015 WL 895561.

This case involves alleged environmental contamination of seven tracts of land located in St. Martin Parish. Plaintiffs sued 23 oil and gas companies, claiming that ongoing oil and gas operations caused soil and groundwater contamination to plaintiffs' property. Plaintiffs claimed that defendants were negligent and strictly liable for the damage. Plaintiffs sought the types of damages that are typically prayed for in legacy lawsuits — money damages, stigma damages, diminution in property value, punitive damages, etc.

Defendants filed motions for summary judgment. At the outset of the hearing on the motions, the parties stipulated that plaintiffs purchased the property *after the mineral leases expired* and that plaintiffs did not obtain an assignment of their predecessors-in-interests' rights to proceed against the oil and gas companies for the alleged contamination. The trial court granted defendants' motions, finding that plaintiffs lacked any right of action against defendants.

Plaintiffs appealed the matter to the Louisiana 3rd Circuit Court of Appeal. Plaintiffs assigned 12 legal errors. After conducting an extensive analysis of Louisiana case law on the issue of the "subsequent purchaser doctrine," the 3rd Circuit found that:

(1) the subsequent purchase rule applies in matters involving mineral leases, pursuant to the 1st Circuit's holding in *Global Marketing Solutions, L.L.C. v. Blue Mill Farms, Inc.*, 13-2132 (La. App. 1 Cir. 9/9/14), 153 So.3d 1209;

(2) Article 11 of the Mineral Code does not provide that plaintiffs, as subsequent purchasers, may sue prior mineral interest owners without an assignment of their predecessors' rights because the right to sue is a personal right that is enforceable only by the property owner against the tortfeasor. Should the property pass to a subsequent owner, that owner has no right to sue the tortfeasor for the previously inflicted damage absent an assignment or subrogation of the prior owner's right to sue for that damage; and

(3) Mineral Code Articles 11 and 134 contemplate that leases convey personal rights only and that the current lessor can sue only a lessee or lessees for damage to his or her property that occurred while he or she owned it.

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Informed Consent: Alternative Therapies

Taylor v. La. Mut. Med. Ins. Co., 14-0727 (La. App. 4 Cir. 1/14/15), 158 So.3d 900.

The plaintiff was offered three treatment options for her uterine fibroid tumors — hysterectomy, myomectomy or Depo-Provera (birth control medication). She opted for a hysterectomy. During the surgery, her bowel was perforated.

A review panel concluded that the defendant breached no standard of care. The ensuing lawsuit was tried, judgment was rendered for the defendants, and Taylor appealed, contending that the defendants failed to obtain her informed consent by not offering her another treatment choice, namely Lupron (hormone agonist medication).

Physicians are "required to provide their patients with sufficient information to permit the patient himself to make an informed and intelligent decision on whether to submit to the proposed course of treatment." *Hondroulis v. Schuhmacher*, 553 So.2d 398, 411 (La. 1988). To avail themselves of the protections of the Louisiana Uniform Consent Law, physicians who will perform surgical procedures must "disclose reasonable therapeutic alternatives and risks associated with such alternatives…." La. R.S. 40:1299.40 (repealed and re-codified June 12, 2012, as La. R.S. 40:1299.96 and La. R.S. 39.1299.39.7). Although Louisiana's consent doctrine requires physicians to provide "*sufficient* information" to enable consent to be informed, physicians have no duty to disclose alternative treatment methods that are not accepted as reasonable. *Pertuit v. Tenant Louisiana Health Systems*, 10-0654 (La. App. 4 Cir. 9/22/10), 49 So.3d 932, 936-37.

After learning that Lupron would have allowed shrinkage of her fibroids, Taylor contended she would have been "interested in knowing" about that possibility because, according to her expert, it could have led to a vaginal hysterectomy instead of one done laparoscopically. Her expert further testified that the consent obtained by the defendant was inadequate because the information he gave did not contain "all practical alternatives."

The defendant and his expert witness contended that the standard of care did not require all possible alternatives to be disclosed, that recommending only three alternatives was reasonable, and that the Lupron alternative carried with it additional serious risks. They admitted that an American Congress of Obstetricians and Gynecologists article stated that Lupron could reduce the size of the tumor within three months of treatment, but both stated it was only a temporary fix. The defendant added that treatment with Lupron would have made the hysterectomy more difficult and that a vaginal hysterectomy was not an option for plaintiff because of her three prior Cesarean sections. Neither defense witness could see any benefit provided by Lupron for this patient.

The appellate court noted "there is no statutory requirement in Louisiana that a patient be informed of alternative therapies," yet Louisiana jurisprudence does require a physician to provide sufficient information and "disclose reasonable therapeutic alternatives." *Snider v. LAMMICO*, 13-0579 (La. 12/10/13), 130 So.3d 922, 930, 934. "Concomitantly, patients must be informed only of 'feasible or appropriate' alternative treatments." *Pertuit*, 49 So.3d at 937. The court of appeal concluded that the trial court committed no manifest error when it ruled that the defendant fulfilled her duty to obtain informed consent.

Abandonment

Hudson v. Town & Country Nursing Ctr., L.L.C., 49,581 (La. App. 2 Cir. 3/4/15), ____ So.3d ____, 2015 WL 889178.

The 2nd Circuit upheld a trial court's decision to dismiss the plaintiffs' medical-malpractice case as abandoned, pursuant to La. C.C.P. art. 561.

The plaintiffs had argued on appeal that formal discovery (interrogatories and request for production of documents) had been exchanged within three years of the defendant's motion and that art. 561B recites that any formal discovery served on all parties, whether or not filed in the record, is a step in the prosecution or defense of an action.

In the three-year period in question, the only document of record was a motion to withdraw and substitute counsel, which the court held was not a step in the prosecution of an action as contemplated by art. 561. *Johnson v. American Bell Fed. Credit Union*, 49,321 (La. App. 2 Cir. 10/1/14), 149 So.3d 1267.

The plaintiffs served the discovery on counsel of record for the two defendants who had first enrolled, but they did not serve them on later-substituted counsel within the three-year period prior to the motion to dismiss. Plaintiffs' counsel contended that she had never received, from anyone, notice of the withdrawal or substitution, and she was not aware that either had occurred, thus qualifying this case for one of the exceptions to the abandonment rule, *i.e.*, circumstances beyond the plaintiff's control or proving that the defendant took action inconsistent with an intent to treat the case as abandoned. *See, Wolf Plumbing, Inc. v. Matthews*, 47,822 (La. App. 2 Cir. 9/25/13), 124 So.3d 494, *writs denied*, 13-2510, 13-2516 (La. 1/17/14), 130 So.3d 949, 950.

The appellate court explained that although the mailing of discovery requests to counsel of record constitutes a step in the prosecution of an action, art. 561 requires service on *all* counsel of record, and mailing to the defendant's former counsel of record,

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though done within the applicable three-year period, is not "service on a party" as required by the language of art. 561 and authorized by La. C.C.P. art. 1313(A)(1) and 1474.

Similarly, two weeks after the *Hudson* opinion, the Supreme Court in *Guillory v. Pelican Real Estate Inc.*, 14-1539 (La. 3/17/15), ____ So.3d ____, 2015 WL 1208632, issued a *per curiam* on the same subject and ruled that neither discovery sent to only one party nor a subsequent Rule 10.1 discovery conference with only one defendant interrupted the abandonment period.

The court distinguished *Guillory* from its earlier decision in *Louisiana Department of Transportation & Development v. Oilfield Heavy Haulers, L.L.C.*, 11-0912 (La. 12/6/11), 79 So.3d 978, 984, in which it held that while correspondence scheduling a Rule 10.1 conference "serves as a step in the prosecution or defense of an action, as it is an essential component of a motion to compel," the plaintiff in *Oilfield* had served all parties with notice of the conference.

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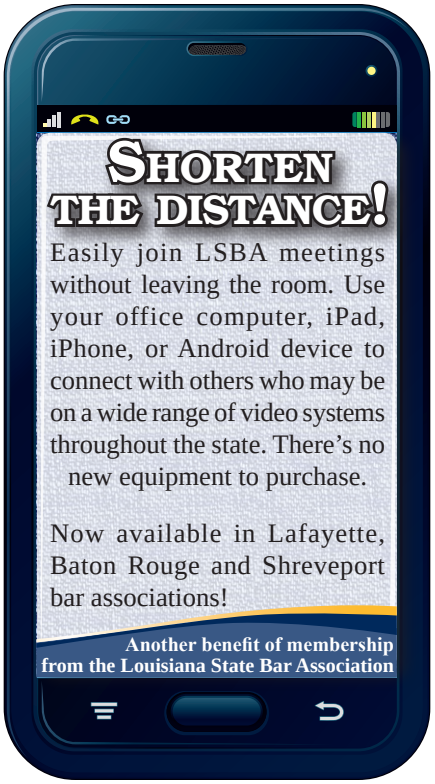

Courts Have No Jurisdiction to Review "Final" State Tax Assessments

Shields & Shields, A.P.L.C. v. State/La. Dept. of Rev., 14-0693 (La. App. 1 Cir. 3/4/15), ____ So.3d ____, 2015 WL 965746.

The 1st Circuit Court of Appeal affirmed a trial court's decision to dismiss Shields & Shields, A.P.L.C.'s (Shields) suit against the Louisiana Department of Revenue (Department) for the alleged improper seizure of funds, damages for breach of agreement, fraud, loss of use of funds, unjust enrichment and conversion for lack of subject-matter jurisdiction because Shield's claims were based on events that occurred after the Department's tax assessment became final and collectible.

In March 2009, the Department seized more than $50,000 from Shields' bank account pursuant to a warrant for distraint to satisfy a tax assessment that had become final and collectible. In January 2011, Shields instituted suit against the Department. Shields alleged that Shields' president/counsel met with Department employees and presented proof of the Department's errors in the tax assessment and seizure of funds, and that Department employees agreed that an error had been made and promised to return the funds.

In upholding the district court's dismissal of Shields' suit, the court found that all causes of action alleged by Shields to have been erroneously dismissed by the trial court were premised on events that occurred after the tax assessment became final and collectible pursuant to La. R.S. 47:1565. Shields had 60 days to pay the taxes under protest or appeal to the Louisiana Board of Tax Appeals. Shields did neither.

After the expiration of the 60-day period, Shields tried to challenge the assessment. The court held that if a taxpayer fails to timely appeal an assessment or make payment under protest, the taxpayer has no right of action to challenge the assessment and the trial court lacks subject-matter jurisdiction to review the assessment. The court further noted that La. R.S. 47:1565(C) provides that in cases involving alleged errors in tax assessments that are final, relief lies solely within the discretion of the Secretary of the Department to determine whether any error of fact or law was made. The court found that provision is clear that the courts do not have any jurisdiction to review those decisions of the Secretary. The court held that Shields did not appeal its assessment within the statutory time period and the court lacked subject-matter jurisdiction over all of Shields' causes of action.

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Trade-In Credit Properly Reduces Taxable Sales Price

GameStop, Inc. v. St. Mary Parish Sales & Use Tax Dept., 14-0878 (La. App. 1 Cir. 3/19/15), ____ So.3d ____, 2015 WL 1260311.

Louisiana's 1st Circuit Court of Appeal affirmed the district court's granting of partial summary judgment in favor of the taxpayer, GameStop, holding that GameStop properly applied trade-in credits in calculating its taxable sales prices.

In the normal course of its business, GameStop, a nationwide video-game retailer, accepts used games from its customers in exchange for cash or trade-in credit. Trade-in credit may be stored on an "Edge Card" to be used at GameStop at a later date. When customers use their Edge Card trade-in balances against purchases, GameStop computes sales taxes on the reduced purchase price of the game. After an audit of GameStop, St. Mary Parish Sales & Use Tax Department (the Parish) issued a notice of assessment to GameStop, and GameStop subsequently paid the amount under protest and filed suit to recover. Both parties filed motions for summary judgment regarding the issue of whether GameStop properly applied the trade-in credits relating to the Edge Card transactions and properly calculated the taxable sales price and resulting sales tax owed for each of the Edge Card

transactions.

The Parish took the position that sales tax was due on the total sales price of the games without any reduction in the sales price for trade-in credit. Under La. R.S. 47:301(13)(a), "sales price" is defined as "the total amount for which tangible personal property is sold, less the market value of any article traded in." The court noted that while this provision specifically excludes trade-in value from the determination of sales price, the statute does not define "trade in" or set forth any time frame within which such trade-in must occur. Because the term "trade in" must be liberally construed in favor of the taxpayer and against the Parish and because the plain language of La. R.S. 47:301(13)(a) does not restrict the timing of the trade-in nor suggest that a trade-in must occur simultaneously with the sale, the court found that GameStop's Edge Card transactions came within the meaning of "traded in" and the value of the items traded in can be excluded from the sales price. Thus, GameStop properly calculated the sales tax owed to the Parish based on the sales price of the items less the Edge Card credit amount.

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Deposit of Funds into Joint Savings Account as an Inter Vivos Gift

Succession of Gassiott, 14-1019 (La. App. 3 Cir. 2/4/15), ____ So.3d ____, 2015 WL 445850.

In this case, the husband in a separate-property regime deposited one-half of his proceeds from a medical-malpractice lawsuit into a joint savings account held with his wife. After the husband's death, the husband's heirs challenged the donation to his wife. The issue presented to the court was whether the husband's deposit of the funds into a joint savings account constituted a valid inter vivos gift.

The heirs argued that the donation was not valid because donations inter vivos must be by authentic act unless an exception applies, and there were no "special rules" applicable to a savings account. Accordingly, the default rule, which requires two witnesses and notary, must have been adhered to for the donation to be valid. La. Civ.C. art. 1541. However, the 3rd Circuit Court of Appeal disagreed, holding that, pursuant to La. Civ.C. art. 1550, an authentic act is not required for transfers evidenced by certificates or documents as long as the requirements applicable to that type of transfer have been met.

The court reasoned that the joint savings account was validly created, and, thus, once the husband negotiated the settlement check and deposited the funds into the joint account, when coupled with his donative intent, the donation was effectively complete. The court also noted that a donation inter vivos of a corporeal movable may be made by the delivery of the thing to the donee without any other formality. La. Civ.C. art. 1543. The court reasoned that the wife had the ability to withdraw the funds at any time, making the funds a corporeal movable, and, thus, the donation inter vivos was effectuated either via donation at the time of the creation of the account or via the conversion of the funds to a corporeal moveable upon the wife's withdrawal, thus requiring no formality.

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