

SUPREME COURT OF LOUISIANA

No. 95-C-2610

SUCCESSION OF STELLA VILLARRUBIA

LEMMON, J., Dissenting.

The issue, as the court of appeal correctly framed it, is whether the executrix of the succession carried her burden of proving that plaintiff waived or renounced his forced heirship rights. I agree with the appellate court's conclusion that the executrix failed to carry her burden.

The majority incorrectly characterized plaintiff's actions as a judicial confession under La. Civ. Code art. 1853. A judicial confession is a rule of evidence that deems the party's declaration to be proof of the facts or obligations therein confessed, but not of any other facts. Plaintiff's declaration, if a judicial confession, certainly did not confess a renunciation of his potential forced heirship rights. Plaintiff merely signed a receipt for the \$1,000 legacy, to which he was clearly entitled under the will, and acknowledged that he was not entitled to any other property under the will. While plaintiff also consented to the rendition of the judgment of possession based on the will, he did not waive or renounce any rights as a potential forced heir, nor did he receive any consideration for waiving or renouncing those rights.

The renunciation of succession rights by an heir must be express and will not be presumed.¹ La. Civ. Code art. 1017. The affidavit in this case cannot be construed as a renunciation of plaintiff's forced heirship rights when those rights were not even mentioned in the document. If the executrix intended for the affidavit to serve as a renunciation of forced heirship rights, the affidavit should have expressly stated that fact.

¹ "Renunciation is a formal act, which . . . can never be tacit" and "is never presumed." See 3 Marcel Planiol Treatise on the Civil Law § 2056 (La. State Law Inst. trans., 11th ed. 1959).

The case of Brown v. Drillers, Inc., 93-1019 (La. 1/14/94); 630 So. 2d 741, involved a similar issue -- whether a general release instrument executed by a wife barred her claim for the wrongful death of her husband that arose after execution of the release. This court's decision in Daigle v. Clemco Industries, 613 So. 2d 619 (La. 1993), rendered after execution of the release in the Brown case, repudiated prior jurisprudence precluding pre-death releases of wrongful death claims as contra bonos mores. In ruling in favor of the wife, this court in Brown extensively reviewed the jurisprudence regarding release instruments. Particularly relevant here is our discussion regarding the special treatment accorded releases of future actions. We noted that the court must consider both the state of the law and the facts surrounding the execution of the release in order to decide the intention of the contracting parties as to any release of an unaccrued cause of action. Applying that principle, we held in Brown (1) that the law at the time the release was executed precluded such a pre-death release of wrongful death claims and that this state of the law, while not dispositive, "sheds light on what the parties intended by the language employed in the instrument," and (2) that the parties did not contemplate the husband's death when the release was signed, having failed to even mention death in the release. Id. at 755.

Applying that same analysis to the present case buttresses my agreement with the court of appeal that the release did not constitute a waiver or renunciation of plaintiff's forced heirship rights. Plaintiff was not a forced heir under the law in effect at the time the release was signed. As in Brown, this state of the law "sheds light" on the intention of the parties that the release did not encompass a waiver or renunciation of plaintiff's potential forced heirship claim. Based on this "state of the law" factor and on the fact that the parties did not even mention forced heirship in the release instrument, I conclude that the parties did not reach an agreement for plaintiff's

renunciation of his potential forced heirship rights in contemplation of the eventuality that the special forced heirship provision at issue might be struck down. In my view, the executrix failed to carry her burden that plaintiff renounced his potential forced heirship rights, especially since renunciation must be express and cannot be presumed.

Perhaps plaintiff cannot reopen the succession to assert his rights as a forced heir, but plaintiff certainly can file an action against the residuary legatees for reduction of their donations. La. Civ. Code arts. 1502, 1518.