**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2005 CA 1994

SUCCESSION OF
BERTIE ROUX DEARMOND

**Judgment rendered September 20, 2006.**

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Appealed from the
23rd Judicial District Court
in and for the Parish of Ascension, Louisiana
Trial Court No. 13,762
Honorable Guy Holdridge, Judge

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CONLY DEARMOND, JR.

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**BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.**

**PETTIGREW, J.**

In this case, an heir of decedent, Bertie Roux DeArmond, appeals from a $25,000.00 money judgment rendered against him and a judgment ordering him to return the money to the decedent's succession. For the reasons that follow, we reverse in part and affirm in part.

## FACTS AND PROCEDURAL HISTORY

According to the record, Bertie Roux DeArmond died intestate on January 20, 2003. Prior to her death, Bertie was married to Agnew DeArmond, and four children were born of their marriage, Hazel DeArmond Patterson, George A. DeArmond, Jr., Ferrell J. DeArmond, and Conly J. DeArmond. Following Bertie's death, Hazel and George filed a petition seeking to have George appointed administrator of his mother's succession. The petition alleged that although the succession had no outstanding debts, there were debts due the succession, particularly $25,000.00, which the petition asserted had been withdrawn from succession funds by Conly J. DeArmond, Jr. ("Conly"), son of Conly J. DeArmond.[1] The petition further asserted it was necessary that the succession be administered so that these funds could be recovered.

After being appointed as administrator of his mother's succession, George filed a rule to show cause naming Conly as defendant-in-rule. The rule alleged that on February 21, 2003, Conly had unlawfully withdrawn $25,000.00 from a savings account belonging to Bertie and her husband and converted said funds to his personal use. George requested that Conly be served with a copy of the rule and be ordered to show cause, if any, why he should not immediately return the $25,000.00 to the duly authorized administrator of Bertie's succession. The matter was originally set for hearing on January 19, 2005, but was rescheduled for February 18, 2005, when service was unable to be effected on Conly. According to the record, Conly was personally served on February 15, 2005, with notice of the new hearing date.

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[1] At the time the instant proceedings were instituted, Conly J. DeArmond was deceased and survived by two major children, Karla DeArmond Braud and Conly J. DeArmond, Jr.

On February 18, 2005, Conly appeared in proper person for the hearing on the rule to show cause. Following a status conference in chambers with counsel for the succession and Conly, the parties returned to the courtroom at which time Conly admitted that he had withdrawn the $25,000.00 from the account in question. Thereafter, the trial court concluded: "Since Mr. DeArmond has agreed and admitted he withdrew the $25,000, the Court will issue an order that he be ordered to return the $25,000 to the succession." Counsel for the succession agreed to prepare an order and submit it to the trial court for signing. The following judgment, dated March 2, 2005, appears in the record before us:[2]

> IT IS ORDERED that there be Judgment rendered herein against the defendant-in-rule, CONLY J. DEARMOND, JR., in the amount of $25,000.00 plus legal interest from date of judicial demand, plus all costs of this proceeding.
>
> IT IS FURTHER ORDERED that said defendant-in-rule, CONLY J. DEARMOND, JR., immediately return said $25,000.00 removed from savings account #9425005763 of AmSouth Bank to the Succession of Bertie Roux DeArmond, by delivering same forthwith to the administrator of said succession.

It is from this judgment that Conly now appeals, assigning the following specifications of error:

> 1. The district court erred when it rendered a money judgment against Conly DeArmond, Jr., a non-party, through the use of a rule to show cause, in that the mandatory and non-waivable requirements of La. C.C.P. art. 1201 were circumvented.
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> 2. The district court erred in conducting a hearing on a rule to show cause without providing reasonable notice to Conly DeArmond, Jr.
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> 3. The judgment is an absolute nullity in that it was rendered without making Agnew DeArmond, a person described by La. C.C.P. art. 641, a party to these proceedings.

## USE OF SUMMARY PROCEEDINGS

In assignment of error number one, Conly asserts the money judgment rendered against him is an absolute nullity as the judgment was obtained through the use of a rule

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[2] Following this ruling by the trial court, a writ application seeking expedited consideration was filed on behalf of Conly. Noting that the March 2, 2005 judgment decided the merits of the case as to Conly and was therefore a final judgment, this court denied the writ application and remanded the matter to the trial court with instructions to grant Conly an appeal from the March 2, 2005 judgment.

to show cause and the service requirements of La. Code Civ. P. art. 1201 were not followed. Conly contends that Louisiana law does not allow a judgment to be rendered against a non-party, who has never been served or cited as required by Article 1201, through the use of summary proceedings. Rather, Conly argues, George's remedy, as administrator of Bertie's succession, was by ordinary process, and citation and service were essential to a valid and enforceable judgment.

In response to this argument, the succession acknowledges it could find no specific authority allowing the use of summary proceedings for the recovery of succession assets from third parties. Nonetheless, the succession asserts that any objection to the use of summary proceedings in this case was waived by Conly's appearance at the February 18, 2005 hearing and participation in same. With regard to the $25,000.00 money judgment rendered against Conly, the succession concedes that portion of the trial court's judgment should be vacated.[3]

Although the use of a summary proceeding to recover succession assets from third parties may not be proper in this case, we need not reach a decision regarding same. An objection to the unauthorized use of summary procedure is a dilatory exception that is waived unless timely pled in the trial court. La. Code Civ. P. arts. 926, 928. In the instant case, Conly failed to raise this issue by filing an exception in the trial court. Rather, his objection to the use of summary proceeding was raised for the first time on appeal. Thus, we conclude Conly waived any objection to the succession's alleged improper use of summary proceeding to recover the $25,000.00 withdrawn from succession funds by him. However, our inquiry does not end here.

We note that in filing the rule to show cause against Conly, George requested only that Conly be ordered to show cause why he should not be ordered to immediately return the $25,000.00 in cash withdrawn from succession funds. There was no prayer for a money judgment against Conly. Thus, when Conly received notice of the rule that had

[3] Although not addressed in brief, counsel for the succession conceded same in oral argument before this court, acknowledging responsibility for the error in the judgment submitted to the trial court.

been filed against him, he was not put on notice of the possibility of having a money judgment rendered against him. Moreover, at the February 18, 2005 hearing on the rule to show cause, the trial court indicated it would order that Conly return the $25,000.00 to the succession. Again, there was no mention of a money judgment in that amount against Conly. Nonetheless, when counsel for the succession submitted the judgment he had prepared for the trial court's signature, it included a paragraph rendering judgment against Conly "in the amount of $25,000.00 plus legal interest from date of judicial demand." As stipulated to by counsel for the succession at oral arguments before this court, this money judgment was improper and must be reversed.

**REASONABLE NOTICE**

In his second assignment of error, Conly contends he was not provided with reasonable notice of the hearing held in this matter. He further argues that "[b]ecause this should have been an ordinary proceeding, instead instituted through the use of a rule to show cause, [he] was denied his right to the delays afforded a party properly sued through citation and service, which is fifteen days." The succession counters, maintaining that based on La. Code Civ. P. art. 2595, a summary proceeding may be tried upon reasonable notice. The succession further notes that at the February 18, 2005 hearing, Conly did not object to the trial court going forward with the hearing, nor did he request a continuance. Thus, the succession asserts, Conly suffered no prejudice by the hearing going forward as scheduled.

Louisiana Code of Civil Procedure article 2595 provides, in pertinent part, as follows with regard to summary proceedings: "Upon reasonable notice a summary proceeding may be tried in open court or in chambers, in term or in vacation; and shall be tried by preference over ordinary proceedings, and without a jury, except as otherwise provided by law." Although Article 2595 does not require that any particular type or kind of notice be given, it does require that some procedure exist whereby the parties are afforded reasonable notice of hearing dates in summary proceedings. **Scott v. Scott**, 92-2378, p. 4 (La. App. 1 Cir. 6/24/94), 638 So.2d 1206, 1208.

According to the instant record, Conly was personally served with notice of the hearing on February 15, 2005, three days before the hearing. Conly appeared in court for the hearing in proper person. Both he and counsel for the succession requested a status conference with the judge, which was conducted in chambers and off the record. At no time did Conly object to the hearing or request a continuance. In fact, Conly willingly and voluntarily participated in the hearing and answered affirmatively when asked if he had withdrawn the $25,000.00 from his grandparents' account. Thus, the argument that he was somehow prejudiced by receiving only three days notice of the hearing is without merit.

**FAILURE TO JOIN INDISPENSABLE PARTY**

In his final assignment of error, Conly argues that because the judgment below has the effect of denying Agnew DeArmond, Bertie's widower, of substantial property rights, he should have been joined in the proceedings pursuant to La. Code Civ. P. art. 641.[4] Conly further alleges that because the judgment was rendered without making Agnew a party to the litigation, the judgment is an absolute nullity.

The succession asserts that once the funds are returned to the estate, Agnew will be placed in possession as owner of an undivided one-half and as usufructuary of the other undivided one-half.[5] Thus, rather than denying Agnew of substantial property rights as argued by Conly, the succession contends the judgment below actually has the practical effect of restoring these funds for the sole benefit of Agnew.

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[4] Louisiana Code of Civil Procedure article 641 provides as follows with regard to the joinder of parties needed for just adjudication:

> A person shall be joined as a party in the action when either:
> (1) In his absence complete relief cannot be accorded among those already parties.
> (2) He claims an interest relating to the subject matter of the action and is so situated that the adjudication of the action in his absence may either:
> (a) As a practical matter, impair or impede his ability to protect that interest.
> (b) Leave any of the persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations.

[5] See La. Civ. Code art. 890, which provides as follows: "If the deceased spouse is survived by descendants, the surviving spouse shall have a usufruct over the decedent's share of the community property to the extent that the decedent has not disposed of it by testament. This usufruct terminates when the surviving spouse dies or remarries, whichever occurs first."

We agree with the succession's argument on this issue. By filing the rule to show cause in question, George, acting as administrator of Bertie's succession, was simply attempting to recover succession funds that had been unlawfully removed by Conly. The March 2, 2005 judgment rendered by the trial court does not have any effect on Agnew's rights as to the succession funds sought to be recovered. Once Conly returns the funds to the succession, Agnew will have full control of the funds as indicated above. Conly's argument to the contrary is without merit.

**CONCLUSION**

For the above and foregoing reasons, we reverse that portion of the March 2, 2005 judgment that rendered a money judgment against Conly J. DeArmond, Jr. in the amount of $25,000.00 plus legal interest from the date of judicial demand. In all other respects, we affirm. All costs associated with this appeal are assessed equally between the parties.

**REVERSED IN PART; AFFIRMED IN PART.**