NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 0351

IN THE MATTER OF THE SUCCESSION OF WILLIE WILLARD SEAL

Judgment Rendered: September 10, 2010

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Docket Number 13210

The Honorable Robert H. Morrison, III, Judge Presiding

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C. Glenn Westmoreland **Livingston, LA**	**Counsel for Plaintiffs/Appellants, Jessie Seal, Henry Seal, Irma Seal Wilson, Eleanor Seal Stravica, Bonnie Seal Dupree, Charles Arbour, Karen Arbour Wagner, Connie Arbour and Nancy Arbour, the Children and Grandchildren of the Decedant**
Kenneth S. Moran **Mandeville, LA**	**Counsel for Defendant/Appellee, Ronald Keith Klein**

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

WHIPPLE, J.

This case is before us on appeal from a trial court judgment denying a petition to annul the Last Will and Testament of the decedent, Willie Willard Seal. For the following reasons, we reverse.

FACTS AND PROCEDURAL HISTORY

On July 31, 2001, Willie Willard Seal executed his "Last Will and Testament" ("the will") wherein he directed that his residuary estate be distributed to Ronald Vincent Klein and Karen E. Klein, his nephew and niece.[1] According to the will, the decedent was not married and had no children of his own. On December 14, 2008, Willie Willard Seal died.

On March 25, 2009, certain siblings of the decedent and their heirs, to wit, Jessie R. Seal, Henry D. Seal, Irma Seal Wilson, Eleanor Seal Stravica, Bonnie Seal Dupree, Charles Arbour, Jr., Karen Arbour Wagner, Connie Arbour, and Nancy Arbour (hereinafter "plaintiffs"), filed a joint petition to declare the will invalid. In response to an exception of vagueness filed by Ronald Klein, plaintiffs filed an amended petition on July 15, 2009, specifically alleging that the attestation clause contained in the will was invalid and that it failed to meet the requirements of LSA-C.C. art. 1577.

On August 24, 2009, the matter was heard before the trial court and taken under advisement. The trial court then issued written reasons for judgment denying the petition to annul the will and signed a judgment in conformity with its reasons. The plaintiffs filed the instant appeal, contending that the trial court erred in failing to declare the will invalid due to the inadequacy of its attestation clause.

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[1]The will further provided for contingent beneficiaries in the event that Ronald or Karen predeceased the decedent.

DISCUSSION

Louisiana Civil Code article 1577 addresses the requirements of form for notarial testaments and provides as follows:

> The notarial testament shall be prepared in writing and dated and shall be executed in the following manner. If the testator knows how to sign his name and to read and is physically able to do both, then:
>
> (1) In the presence of a notary and two competent witnesses, the testator shall declare or signify to them that the instrument is his testament and shall sign his name at the end of the testament and on each other separate page.
>
> (2) In the presence of the testator and each other, the notary and the witnesses shall sign the following declaration, or one substantially similar: "In our presence the testator has declared or signified that this instrument is his testament and has signed it at the end and on each other separate page, and in the presence of the testator and each other we have hereunto subscribed our names this ____ day of _____, ____."[2]

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[2]The comments to article 1577 provide as follows:

(a) This article reproduces the substance of R.S. 9:2442. It does not change the law.

(b) The testator need not sign after both the dispositive or appointive provisions of this testament and the declaration, although the validity of the document is not affected by such a "double" signature. The testator is disposing of property, appointing an executor or making other directions in the body of the testament itself. He need only sign at the end of the dispositive, appointive or directive provisions. The witnesses and the notary are attesting to the observance of the formalities; they need only sign the declaration.

(c) The testator's indication that the instrument contains his last wishes may be given verbally or in any other manner that indicates his assent to its provisions.

(d) The instrument must be in writing. The form of the writing (typewritten, mimeographed or any other form) is immaterial. Moreover, there is no requirement that the testament be written in the English language, or even in Roman characters. So long as it is written in a language that the testator can read and understand, the protections to assure verity of the provisions are satisfied.

(e) The ability of the testator to verify that the contents of the written document express his last wishes for the disposition of his property is the mechanism to assure accuracy. Thus he must have the intellectual ability to read the will in the manner in which it is written, and must have the same ability to show his assent by signing his name.

(f) This Article does not require that the testator actually read the testament at the time of its execution. Clearly, he should not omit the reading if he is not wholly satisfied that the instrument reflects his wishes accurately. Louisiana

Thus, in order to be valid as to form, (1) the testator must declare or signify in the presence of a notary and two witnesses that the instrument is his last will and testament; (2) the testator must sign his name at the end of the testament and on each separate page; and (3) the notary and two witnesses must sign a declaration in the presence of each other and the testatrix attesting that the formalities of LSA-C.C. art. 1577(1) have been followed. Succession of Siverd, 2008-2383, 2008-2384 (La. App. 1st Cir. 9/11/09), 24 So. 3d 228, 230. The primary purpose of the statute authorizing this type of will is to afford a simplified means of making a testament whereby the authenticity of the act can be readily ascertained and fraudulent alteration of it will be most difficult. Succession of Richardson, 2005-0552 (La. App. 1st Cir. 3/24/06), 934 So. 2d 749, 751, writ denied, 2006-0896 (La. 6/2/06), 929 So. 2d 1265.

Moreover, although the intention of the testator as expressed in the testament must govern, the intent to make a testament, although clearly stated or proved, will be ineffectual unless the execution thereof complies with codal

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courts have frequently observed that " ... signatures to obligations are not mere ornaments. If a party can read, it behooves him to examine an instrument before signing it;.... " *Snell v. Union Sawmill Company*, 159 La. 604, 105 So. 728 (1925); *Boult v. Sarpy*, 30 La. Ann. 494 (1878).

(g) This Article requires that the testament be dated but intentionally does not specify where the date must appear, nor does it require that the dating be executed in the presence of the notary and witnesses or that the dating be made by the testator. It is common practice to have a typewritten testament that is already dated, and that testament should be upheld if it is valid in all other respects. The first paragraph of the Article states that "the ... testament shall be prepared in writing and shall be dated", and the subsequent language (with reference to execution) intentionally contains no language that refers to the dating having been executed in the presence of the witnesses or the notary. Nor is there any requirement that the testator be the one to date the testament. The critical function of the date is to establish a time frame so that, among other things, in the event of a conflict between two presumptively valid testaments, the later one prevails. A subsequent testament that contains a provision that revokes all prior testaments obviously revokes the earlier testament, and one primary function of the date is to establish which of the two testaments is the later one.

requirements. Succession of Hendricks, 2008-1914 (La. App. 1st Cir. 9/23/09), 28 So. 3d 1057, 1060, writ not considered, 2010-0480 (La. 3/26/10), 29 So. 3d 1256. A material deviation from the manner of execution prescribed by the code will be fatal to the validity of the testament. Succession of Hendricks, 28 So. 3d at 1060. The formalities prescribed for the execution of a testament must be observed or the testament is absolutely null. LSA-C.C. art. 1573. Although its form is not sacrosanct, there must be an attestation clause, or clause of declaration signed by the **witnesses** and the **notary**. Succession of Richardson, 934 So. 2d at 751.

On appeal, plaintiffs contend that the will does not comport with the dictates of LSA-C.C. art. 1577 in that the notary and witnesses failed to sign a declaration stating that, in their presence, "the testator has declared or signified that this instrument is his testament and has signed it at the end and on each other separate page, and in the presence of the testator."

As the trial court correctly observed, "the will is in the rough form of a notarial testament, in accordance with the provisions of the Civil Code." Specifically, the dispositive portions of the will are contained on the first page and the decedent signed at the bottom of the page. Thus, the propriety of this portion of the will is not the main focus on appeal. Instead, as the appellants contend and the trial court recognized, the remaining provisions of the will are not in the form provided by LSA-C.C. art. 1577 and are in dispute.

Specifically, the initial clause signed by the witnesses states:

> We, the undersigned, hereby certify that the above instrument, which consists of 2 pages, including the pages(s) [sic] witch [sic] contain the witness signatures, was signed in our sight and presence by **William Donald Falgout** (the "Testator"), who declared this instrument to be his/her Last Will and testament [sic] and we [sic] the Testator request and in the Testor's [sic] sight and presence, and in sight and persence [sic] of each other, do hereby subribe [sic] our names as witness [sic] on the date shown above.
>
> WitnessSignature: M. Posey [signed]
> Name: Margo Posey

City: Livingston
State: LA

WitnessSignature: S. Stewart [signed]
Name: Sallye Stewart
City: Livingston
State: LA

WitnessSignature: L. Sykes [signed]
Name: Lindsay Sykes
City: Livingston
State: LA

(Emphasis added).

Thus, even pretermitting the significance of the misidentification of the testator in this provision, the above provision, while setting forth that the will was signed by the testator in the presence of the witnesses and declared to be his last will and testament, this purported attestation clause fails to state that the will was signed by the testator in the presence of the **notary** or that the witnesses themselves signed in the presence of the **notary**.

Additionally, the next paragraph of the instrument provides:

> I Willie Willard Seal, the Testator, sign my name to this instrument this 31 day of July, 2001 and being first duly sworn, do hereby declare to the undersigned authority that I sign [sic] execute this instrument as my Will and that I sign it willingly, in the presence of the undersigned witnesses, that I execute it as my free and voluntary act for the purposes expressed in the Will, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.
>
> Testator Signature: Willie Seal [signed]
> Willie Willard Seal

Thus, as the trial court also recognized, "[w]hile this paragraph states that the testator is declaring to the 'undersigned authority', which is presumably the notary, that he is to sign or is signing it[,] the provision does not state that it was actually signed in the presence of the **notary** and of the **witnesses**." (Emphasis added).

An additional paragraph follows, setting forth that:

We, M. Posey And, Sallye Stewart And Lindsay Stykes[,] the witnesses, sign our names to this instrument being first duly sworn, and do hereby declare to the undersigned authority that the Testator signs and executes this instrument as the Testator's Will and that the Testator signs it willingly in our presence, and that the Testator executes it as the Testator [sic] free and voluntary act for the purposes expressed in the will, and that each of us, in the presence and hearing of the Testator, at the Testator's request, and in the presence of each other, hereby sign this will, on the date of this instrument, as witness to the Testator's signing, and that to the best of our knowledge the Testator is eighteen years of age or older, of sound mind and memory, and under no constraint or influence, and the witnesses are of adult age and otherwise competent to be witness [sic].

WitnessSignature: M. Posey [signed]
Name: Margo Posey
City: Livingston
State: LA

WitnessSignature: S. Stewart [signed]
Name: Sallye Stewart
City: Livingston
State: LA

WitnessSignature: L. Sykes [signed]
Name: Lindsay Sykes
City: Livingston
State: LA

STATE OF LOUISIANA
COUNTY OF AVOYELLES

Subscribed, sworn to and acknowledged before me by Willie Willard Seal, the testator, and subscribed and sworn to before me Penn Armand and Mary Armand and Eddie Armand, witnesses, this 31st, day of July, 2001.

Jasper Brock [signed]
Notary public, or other officer
authorized to take and certify
acknowledgments and administer oaths

Thus, while again pretermitting the misidentification of the witnesses in the provision "Subscribed, sworn to and acknowledged" by the notary, the remainder of this purported attestation by the notary fails to state that the testator (1) declared the will to be his last will and testament to the notary, (2) in the presence

of the witnesses, as required by LSA-C.C. art. 1577. Thus, the instrument does not contain the requisite notary's attestation.

Moreover, with respect to the statements by the witnesses set forth in the paragraph preceding the notary's statement, while this paragraph indicates that the witnesses were "sworn," that "the Testator signs it willingly in our presence," and that the witnesses sign "in the presence and hearing of the **Testator** . . . and in the presence of each other, . . . as witness to the Testator's signing," this clause likewise does not clearly state that the will and necessary signatures were signed in the presence of all persons, including the notary. Thus, this paragraph likewise is defective.

In its Reasons for Judgment, the trial court noted, "while not closely resembling the model attestation clause recited in Article 1577, the provisions of this testament seem to basically comply with the requirements of law, except as to a clear statement that the will was signed and declared by the testator to be his last will in the presence of the witnesses *and* the notary, simultaneously," and that "[t] he above quoted provisions are, at best ambiguous." However, despite recognizing these defects, the trial court concluded that the will was valid "based upon the testimony of the subscribing notary, Jasper Brock, that he, along with the witnesses and the Testator, more than likely signed the testament as indicated, and in the presence of one another." The trial court then noted the general edicts favoring upholding wills where the testator's intentions seem clear, and denied plaintiffs' petition to annul the will.

Although the trial court recognized these flaws in the testament, and that the purported attestation clause by the witnesses does not comply with the statutory requirements, the court upheld the will after finding that the notary, witnesses, and testator "more than likely" signed the will in the presence of one another. Thus, the trial court essentially determined that the notary's signature at

the end of the will under the general "sworn and subscribed" clause, rather than under an "attestation clause," was sufficient to comply with the mandates of LSA-C.C. art. 1577. In doing so, the trial court erred.

As set forth in LSA-C.C. art. 1577, the notary "shall sign" a declaration stating that: (1) the testator signed or declared in his presence that the instrument is his testament, (2) has signed it at the end and on each other separate page, and (3) in the presence of the testator and each other he has signed his name. See LSA-C.C. art. 1577(2). Moreover, the jurisprudence has consistently held that where a will is merely notarized, but there is no declaration signed by the notary, such a clause is not in compliance with LSA-C.C. art. 1577. Further, such defects constitute a substantive defect fatal to the validity of the will and cannot be cured through the subsequent testimony of the witnesses and the notary. See Succession of Richardson, 934 So. 2d at 751. See also Succession of Brown, 458 So. 2d 140, 143 (La. App. 1st Cir. 1984) (attestation clause by testator in which he swears before notary that he executed document in presence of witnesses and notary fatally defective because clause did not recite notary and witnesses signed in presence of testator and each other); Succession of Carlton, 2009-1339 (La. App. 3rd Cir. 4/7/10), 34 So. 2d 3d, 1015, 1017-1018 (defect in will containing no attestation clause is fatal and cannot be cured by affidavits of witnesses and notary advanced to establish instrument was signed by witnesses and notary in presence of testator and each other); Succession of Simno, 2006-1169 (La. App. 4th Cir. 12/29/06), 948 So. 2d 315, 316-317 (attestation by testator is no substitute for requirement of an attestation clause by notary and witnesses); Succession of Slay, 99-1753 (La. App. 3rd Cir. 5/17/00), 764 So. 2d 102, 104-106, writ denied, 2000-2481 (La. 11/13/00), 774 So. 2d 144 (although will need not be read in presence of notary and witnesses, attestation clause must indicate testator declared to **notary** and witnesses he is signing document as his last will and testament.

Attestation clause by witnesses and notary must reflect testator so declared and that notary and witnesses signed in presence of each other. Evidence showing absence of fraud will not cure such defects.).

We recognize that the documents at issue were seemingly prepared by a lay person. Nonetheless, the requisites of law still apply. Accordingly, although we recognize that the result mandated herein may seem harsh, we are bound to follow the law applicable to and governing such instruments. As previously recognized by this court, if there is any area of our civil law in which the goal of certainty of result has particular significance, it is that of successions. Succession of Hendricks, 28 So. 3d at 1060 (citing J. Gaidry's concurrence in Succession of Richardson, 934 So. 2d at 752).

With reference to plaintiffs' arguments concerning other alleged errors and or deficiencies on the face of the will, because we find the will is null as it fails to meet the requirements for a valid attestation clause as set forth in LSA-C.C. art. 1577, we decline to address these issues.[3]

CONCLUSION

Based on the above and foregoing reasons, the August 24, 2009 judgment of the trial court is reversed. Costs of this appeal are assessed against the appellee, Ronald Keith Klein.

REVERSED.

[3]Plaintiffs additionally cite the following errors and/or deficiencies in the will: (1) that the will, which was drafted by a lay person, Carol Armand, states that it was executed in Avoyelles Parish, but that it was actually executed in Livingston Parish; (2) that in one paragraph of the will, the testator is erroneously named and identified as "William Donald Falgout;" (3) and that while the will listed Penn Armand, Mary Armand, and Eddie Armand as witnesses, the actual witnesses whose signatures appear on the will were Margo Posey, Sallye Stewart, and Lindsey Sykes.