NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 1624

RH
NAL

SUCCESSION OF ROSEMOND ALFRED ARCENEAUX, JR.

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Probate No. 93,695, Section 25
Honorable Wilson O. Fields, Judge Presiding

Joseph A. Prokop, Jr.
Courtney King Humphrey
Joseph A. Prokop, Jr.
& Associates
Baton Rouge, LA

Attorneys for Appellant
Celia Arceneaux Burton

Felix R. Weill
Weill & Dunn, L.L.C.
Baton Rouge, LA

and

David G. Koch
Koch Law Firm, L.L.C.
Baton Rouge, LA

Attorneys for Appellee
Patricia Kay Crossland Arceneaux

BEFORE: PARRO, WELCH, AND KLINE,[1] JJ.

Judgment rendered MAY 31 2013

---

[1] Judge William F. Kline, Jr., retired, is serving as judge ad hoc by special appointment of the Louisiana Supreme Court.

Welch J. concurs without reasons

PARRO, J.

Appellant challenges a trial court judgment, which found that the last will and testament of the decedent, dated March 2, 2010, was valid. For the reasons that follow, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Rosemond Alfred Arceneaux, Jr. (Alfred) died on June 22, 2011, while domiciled in East Baton Rouge Parish. Alfred had been married twice in his lifetime; at the time of his death, he was married to Patricia Kay Crossland Arceneaux (Kay). Four children were born to Alfred during his first marriage, namely, Celia Annette Arceneaux Burton (Celia), John Arceneaux, Brian Arceneaux, and Michael Arceneaux. No other children were born to Alfred, nor did he adopt anyone.

On November 21, 2000, Alfred executed a last will and testament in notarial form (the 2000 testament), in which he made a special bequest, leaving all of his interest in the family home and all household effects situated therein to his wife, Kay. He further made certain special and pecuniary bequests to his children.[2] Finally, he left the remainder of his estate to his children.

Thereafter, on March 2, 2010, Alfred executed a new last will and testament (the 2010 testament), which revoked all prior wills and codicils he had executed. In the 2010 testament, Alfred granted Kay a lifetime usufruct over all his assets, but only to the extent necessary to provide her a monthly payment of $5,500. The testament specifically prohibited Kay from expending additional sums of principal or interest. The balance of the estate was left to his children to share equally, subject to the usufruct.

On September 30, 2011, Celia filed a petition for probate of the 2000

[2] These bequests centered on a debt owed by John and Alfred's forgiveness of that debt in the 2000 testament. The testament provided that the other children were to be given a sum in dollars equal in value, if any, to the amount of John's debt that was still outstanding, along with any accrued interest, at the time of Alfred's death.

testament, which she alleged was in notarial form and, therefore, self-proving. In this petition, Celia sought to be appointed as the independent executrix[3] in accordance with the 2000 testament. She further sought to file a copy of the purported 2010 testament, which Celia alleged was invalid, because it did not contain a proper notarial attestation clause. With regard to the 2000 testament, the petition noted that, pursuant to LSA-C.C.P. art. 2891, a notarial testament does not need to be proven. However, Celia acknowledged in the petition that she was aware that Kay planned to oppose the probate of the 2000 testament; therefore, in her petition, Celia requested a contradictory hearing to address the probate of the 2000 testament. See LSA-C.C.P. art. 2901.

On November 18, 2011, Kay filed a petition for probate of the 2010 testament. Since that testament did not name an executor, Kay sought to be appointed as the dative testamentary executrix pursuant to the provisions of LSA-C.C.P. arts. 3083, 3097, and 3098. Kay further requested that the trial court set a contradictory hearing on the issue of the validity of the 2010 testament.

The trial court held a contradictory hearing on both of these issues on April 23, 2012. At this hearing, Kay introduced the testimony of William R. Mullins, III, the attorney who prepared and notarized the 2010 testament. Mr. Mullins testified, over the objection of Celia's counsel, concerning the events surrounding the signing of the 2010 testament. After this hearing, the trial court rendered judgment, declaring the 2010 testament to be valid, granting Kay's petition to probate the 2010 testament, and ordering that Alfred's last will and testament be executed and filed in accordance with law. The judgment further denied Celia's petition to probate the 2000 testament. It is from this judgment that Celia has appealed.

---

[3] Celia was designated to serve as the executrix of her father's succession in the 2000 testament.

DISCUSSION

The sole issue before this court is whether the 2010 testament is a valid notarial testament executed in accordance with the formalities of the appropriate provisions of the Louisiana Civil Code. See LSA-C.C. art. 1576. Although the intention of the testator as expressed in the testament must govern, the intent to make a testament, although clearly stated or proven, will be ineffectual, unless the execution thereof complies with codal requirements. See In re Hendricks, 08-1914 (La. App. 1st Cir. 9/23/09), 28 So.3d 1057, 1060, writ not considered, 10-0480 (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. Id.; see LSA-C.C. art. 1573. The purpose of the codal article in prescribing formalities for the execution of testaments is to guard against and prevent mistake, imposition, undue influence, fraud, or deception; to afford means of determining their authenticity; and to prevent the substitution of some other writing. In re Hendricks, 28 So.3d at 1060.

Nevertheless, the validity of a will is to be maintained if possible. Succession of Morgan, 257 La. 380, 386, 242 So.2d 551, 553 (1970). Courts are not required to give the notarial testament a strict interpretation. The legislature adopted the notarial testament from the common law in order to avoid the rigid formal requirements of the Louisiana Civil Code. See Succession of Guezuraga, 512 So.2d 366, 368 (La. 1987). The minimal formal requirements of the notarial testament are only designed to provide a simplified means for a testator to express his testamentary intent and to assure, through his signification and his signing in the presence of a notary and two witnesses, that the instrument was intended to be his last will and testament. Id.; Succession of Porche v. Mouch, 288 So.2d 27, 30 (La. 1973). In accordance with this legislative intent, courts liberally construe and apply the code articles, maintaining the validity of the will if at all possible, as long as it is

in substantial compliance with the law. See Succession of Guezuraga, 512 So.2d at 368. In deciding what constitutes substantial compliance, the courts look to the purpose of the formal requirements, which is to guard against fraud. Id.

The requirements of form for the notarial testament are set forth in LSA-C.C. art. 1577, which provides:

> 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 _____, _____."

Article 1577 provides that a notarial testament "shall be executed" in a certain manner. Thus, to properly execute a notarial testament, the following actions must be taken: (1) in the presence of a notary and two competent witnesses, the testator shall declare that the instrument is his testament; (2) in the presence of a notary and two competent witnesses, the testator shall sign his name at the end of the testament and on each other separate page of the testament; and (3) in the presence of the testator and each other, the notary and the witnesses shall sign the declaration set forth in Article 1577(2), or a declaration substantially similar. See LSA-C.C. art. 1577.

There must be an attestation clause, or clause of declaration, such as the one provided in LSA-C.C. art. 1577; however, its form is not sacrosanct. It may follow the form suggested in the code article or use a form substantially similar thereto. Succession of Morgan, 242 So.2d at 552. The attestation clause is designed to demonstrate that the facts and circumstances of the

confection and execution of the instrument conform to the statutory requirements. In construing the attestation clause of notarial testaments, the Louisiana Supreme Court has been most liberal in its determination of whether the clause complies in form and whether it evidences the requisites to supply validity to the instrument. See id. In construing an attestation clause, the courts do not require strict, technical, and pedantic compliance in form or in language. Rather, the courts examine the clause to see whether there is substantial adherence to form and whether it shows facts and circumstances that demonstrate compliance with the formal requirements for testamentary validity. See id. at 553. The law recognizes a presumption in favor of the validity of testaments in general, and proof of the nonobservance of formalities must be exceptionally compelling to rebut that presumption. In re Succession of Hebert, 12-281 (La. App. 3rd Cir. 10/3/12), 101 So.3d 131, 135.

Instead of the attestation or declaration clause specifically set forth in LSA-C.C. art. 1577(2), the 2010 testament contained the following clause:

> Signed on each page and declared by testator above named to be his last will and testament, and in his presence and in the presence of each other, we have hereunto subscribed our names as witnesses on this 2nd day of March, 2010, in the Parish of East Baton Rouge, State of Louisiana, within and for which the undersigned Notary Public is duly commissioned, qualified and sworn.

Below this clause, the 2010 testament was signed by Alfred, as the testator, Barbara S. White and Bridget High, as witnesses, and William R. Mullins, III, as the notary public. Alfred also signed the two-page testament at the bottom of the first page and at the end of the dispositive provisions of the testament on the second page.

On appeal, Celia contends that the trial court erred in finding that the 2010 testament was valid. Specifically, she contends that the clause in the 2010 testament does not strictly adhere to the statutory requirements of LSA-C.C. art. 1577, nor is it substantially similar to the attestation or declaration

clause required by that article, because it does not state that: (1) the testator declared or signified to the notary public and witnesses that the instrument was his last will and testament; (2) the testator signed the testament in the presence of the notary public and two competent witnesses; (3) the witnesses signed the testament in the presence of the notary public; and (4) the notary public signed the testament in the presence of the testator and two competent witnesses. We find these arguments to be without merit.

As a preliminary matter, we note that Celia does not contend that Alfred actually failed to sign the 2010 testament in front of a notary and two witnesses or that he did not declare this instrument to be his last will and testament. In fact, Celia specifically stated at the hearing on this matter before the trial court, and in her briefs to this court, that she was not challenging whether the appropriate procedure for executing a notarial testament had been followed. Furthermore, Celia has alleged no fraud in the execution of the 2010 testament. Rather, her argument is merely that the purported attestation clause in this testament does not contain the appropriate language to indicate that the proper procedure was followed.

In making her arguments, Celia interprets the attestation clause of the 2010 testament in a piecemeal fashion. First, she contends that the clause does not state that Alfred declared to the notary public and witnesses, in their presence, that the instrument was his last will and testament. However, a review of the clause indicates that it states that the 2010 testament was "[s]igned on each page and declared by testator ... to be his last will and testament ...."[4] The testator, witnesses, and the notary all signed immediately after this clause acknowledging and confirming this statement.

Celia next argues that the clause does not state that the testator signed the testament in the presence of the notary public and the two witnesses. It is

[4] In addition to this declaration, at the beginning of the testament itself, Alfred declared the instrument to be his will and stated, "I revoke all of my prior wills and codicils."

true that the clause does not contain the more traditional language suggested in Article 1577(2), which would clearly indicate that the testator had signed in the presence of the notary public and the witnesses. However, a common-sense reading of the clause demonstrates that it adequately establishes that Alfred signed the 2010 testament in the presence of the notary public and the two witnesses. Specifically, the attestation clause states that the 2010 testament was "[s]igned on each page ... and in his presence and in the presence of each other, we have hereunto subscribed our names as witnesses ...." As noted previously, immediately following this clause, Alfred, as the testator, the two witnesses, and Mr. Mullins, as the notary public, subscribed their names on the appropriate signature lines. Therefore, the witnesses and the notary public signed after the clause, clearly acknowledging and confirming that they had witnessed Alfred sign the 2010 testament. Accordingly, the attestation clause in the 2010 testament adequately establishes that the testator signed the testament in the presence of the notary public and two competent witnesses.

In her third and fourth challenges to the attestation clause, Celia contends that the clause does not state that the witnesses signed the testament in the presence of the notary public or that the notary public signed in the presence of the testator or the two competent witnesses. Celia appears to be basing this argument on the fact that the clause provides that all of the signatories, except the testator, acted "as witnesses[.]" According to Celia, the term "witnesses" cannot be used to mean the notary and two witnesses required by Article 1577.

A review of the attestation clause in the 2010 testament indicates that the clause was signed by Alfred, the two witnesses, and the notary public "in his [Alfred's] presence and in the presence of each other ...." Article 1577 requires the notary and two witnesses to sign a declaration attesting to the fact

that (1) they witnessed the testator carry out the requirements of Article 1577(1) (*i.e.*, declare to them that the instrument is his testament and sign his name at the end of the testament and on each other separate page); and (2) they are signing this declaration in the presence of the testator and each other. There is no requirement in this code article that the language of the declaration or attestation clause make reference to the term "witnesses" or "notary public." The code article merely states that the witnesses and the notary public must sign in the presence of each other and the testator. It is clear from the attestation clause of the 2010 testament that this requirement has been followed. Moreover, it is clear that, although the language in the attestation clause is not the same exact language as that set forth in Article 1577(2), the language is "substantially similar" within the meaning of that code article.

As stated previously, in construing an attestation clause, the courts do not require strict, technical, and pedantic compliance in form or in language. Rather, the courts examine the clause to see whether there is substantial adherence to form and whether it shows facts and circumstances that demonstrate compliance with the formal requirements for testamentary validity. See Succession of Morgan, 242 So.2d at 553. In addition, the law recognizes a presumption in favor of the validity of testaments in general, and proof of the nonobservance of formalities must be exceptionally compelling to rebut that presumption. In re Succession of Hebert, 101 So.3d at 135.

After a thorough review of the record, we find that Celia has failed to produce exceptionally compelling proof sufficient to rebut the presumption in favor of the validity of the testament in question. Accordingly, we find no manifest error and no error of law in the trial court's judgment, which found

that the 2010 testament was valid.[5]

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court. All costs in this matter are assessed to appellant, Celia Arceneaux Burton.

AFFIRMED.

[5] Celia has also challenged the trial court's decision to allow the notary public to testify concerning the circumstances surrounding the execution of the 2010 testament. However, because we have determined that the attestation clause was substantially similar to the language provided in Article 1577(2) and that the 2010 testament was therefore valid, we pretermit the issue of the propriety of allowing the testimony of the notary public.