STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 2059

BRIAN LOUIS ESCHETE

VERSUS

DESIREA R. ESCHETE

Judgment Rendered: FEB 27 2014

Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche, Louisiana
Docket Number 119110

Honorable Walter I. Lanier, III, Judge Presiding

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BEFORE: WHIPPLE, C.J., PARRO, McCLENDON, WELCH AND HIGGINBOTHAM, JJ.

Whipple, C.J. dissents for reasons assigned.

McCLENDON, J.

In this appeal, Desirea R. Eschete seeks review of a judgment declaring an act of donation null and void for lack of form. For the following reasons, we affirm.

FACTS

Brian Louis Eschete filed a petition for divorce on April 23, 2010, seeking a divorce from Desirea R. Eschete, appellant herein. On November 8, 2010, Mr. Eschete signed an act of donation, donating his one-half interest in the parties' matrimonial home to Ms. Eschete. On June 13, 2011, a judgment of divorce was rendered. Six months later, on December 14, 2011, Mr. Eschete filed a petition for nullity, alleging the act of donation was absolutely null.

The petition for nullity stated that the act of donation was signed at the law office of Rebecca N. Robichaux, who was Ms. Eschete's attorney in the divorce proceedings, and further alleged that the document should be declared null and void as it was signed outside the presence of a notary public, the two required witnesses, and the donee. Attached to the petition was a copy of the act of donation that Mr. Eschete received after signing. This copy reflected only his and Ms. Eschete's signatures, with the signature lines for the notary public and witnesses left blank. The petition also included a copy of the fully executed act of donation that was later filed in the public records, which was signed by Rebecca N. Robichaux, as notary public, and Connie Bourgeois and Ashleigh Smith, as witnesses.

At the trial on the petition for nullity, the trial court heard testimony from Mr. and Ms. Eschete, Ms. Robichaux, Ms. Bourgeois, and Ms. Smith. The trial court then rendered judgment, declaring the November 8, 2010 act of donation null and void because it was not executed "before" a notary public and two witnesses and it was not signed by the donor and by the donee at the same time and place.

On appeal, Ms. Eschete contends that the trial court erred: (1) in finding that Mr. Eschete did not sign in the presence of a notary and two witnesses; (2) in finding that Mr. Eschete offered sufficient evidence to overcome the legal presumption of the genuineness of an authentic act; and (3) in applying the rules governing interspousal

donations, which state that the act of donation shall be signed by the donor and donee at the same time and place.

ANALYSIS

Assignments of Error 1 and 2

Louisiana Civil Code article 1541 requires that donations *inter vivos* be done by authentic act under the penalty of absolute nullity, unless otherwise expressly permitted by law. An "authentic act" is defined by LSA-C.C. art. 1833 as a "writing executed before a notary public or other officer authorized to perform that function, in the presence of two witnesses, and signed by each party who executed it, by each witness, and by each notary public before whom it was executed." A material deviation from the manner of execution prescribed by the codal article governing authentic acts will be fatal to the act which purports on its face to be authentic. **Hardin v. Williams**, 468 So.2d 1302, 1304 (La.App. 1 Cir. 1985), aff'd, 478 So.2d 1214 (La. 1985). However, one seeking to invalidate an apparently authentic act must present strong and convincing proof of such magnitude as to overcome the presumption of verity of notarial acts. **Meltzer v. Meltzer**, 95-0551, 95-0552 (La.App. 4 Cir. 9/28/95), 662 So.2d 58, 61, writ denied, 95-2616 (La. 1/5/96), 666 So.2d 293.

In the present case, all of the parties agree that the document was signed by the donor, the donee, a notary, and two witnesses. All parties also agree that it was a donation of immovable property, not a sale. The issue with regard to the first and second assignments of error is whether the act of donation was "executed before" a notary public and "in the presence" of two witnesses.

Conflicting testimony was presented at the trial of this matter regarding the events surrounding Mr. Eschete's signing of the act of donation. Mr. Eschete candidly admitted that he signed the act of donation and testified that he signed the document at Ms. Robichaux's office around 10:30 a.m. on November 8, 2010 in the presence of Ms. Robichaux's secretary, Connie Bourgeois. Mr. Eschete claimed that he did not see Ms. Robichaux or Ms. Smith when he was signing the document.

In contrast, Ms. Robichaux, Ms. Bourgeois, and Ms. Smith testified that Mr. Eschete signed the document around 12:00 p.m., during the lunch hour. Ms. Robichaux, Ms. Bourgeois, and Ms. Smith all specifically testified that Mr. Eschete signed the document on a clipboard in the waiting room of the law office, after reviewing it with Ms. Bourgeois.

Ms. Robichaux testified that she was on the telephone in Ms. Bourgeois' office area, twelve feet away from the waiting room with the open door, and she could see Mr. Eschete as he signed. Ms. Robichaux testified that "I don't know what [Ms. Bourgeois] brought out for him to sign," but that she "saw him signing it." However, she indicated that "[t]he protocol is we go out with a clipboard and the document is on the clipboard. I assume that's ... what it was."

Ms. Smith acknowledged that she never went into the waiting room when Mr. Eschete was signing the document, although she understood the importance of actually "being there" and seeing the signature on a notarized document. However, Ms. Smith testified that she could see Mr. Eschete while she was making copies at the copy machine in Ms. Bourgeois' office area.

Ms. Bourgeois acknowledged that no one was in the waiting room with her when Mr. Eschete signed the act of donation. She further testified that if Ms. Robichaux and Ms. Smith were in the adjoining room, they could have seen the motion made by Mr. Eschete in signing, but they would not be able to see his signature on the document.

While the trial court appears to have accepted the testimony of Ms. Robichaux and Ms. Smith as credible and that they were, in fact, in an adjoining office with the door open with Ms. Robichaux on the phone and Ms. Smith making copies, the trial court found that "the writing was not executed before Ms. Robichaux and that ... Mr. Eschete was not in the presence of Ms. Smith at the signing of the document." Under these specific facts, we cannot conclude that the trial court erred in finding that the act did not meet the requirements of an authentic act as contemplated by LSA-C.C. art.

1833.[1] Clearly, the physical separation prevented the notary and one of the witnesses from observing Mr. Eschete affix his signature onto the act of donation.

As the trial court obviously recognized, the purpose of the authentic act requirements is to ensure the validity of a signature on a document and that the person whose name appears thereon is the person who actually signed the document. The notary and witnesses attest to seeing the party sign the document. **Zamjahn v. Zamjahn**, 02-871 (La.App. 5 Cir. 1/28/03), 839 So.2d 309, 315, writ denied, 03-0574 (La. 4/25/03), 842 So.2d 410. The notary and both witnesses are not required to sign the document at the same time as all parties to the contract, but they must be present to witness the contracting parties' signatures. **Brumfield v. Brumfield**, 457 So.2d 763 (La.App. 1 Cir. 1984).

Last, we note that while we have reviewed the case of **Finance Security Co. v. Williams**, 42 So.2d 902 (La.App. 1 Cir. 1949), cited and relied on by Ms. Eschete, we find the case to be distinguishable from the present matter. In that case, there was no question that the document was signed before a notary and the witnesses were called in by the notary while the parties were still present. Further, while this court recognized in **Finance Security Co.** that substantial compliance may be sufficient to meet the authentic act requirements, the Louisiana Supreme Court in **Hardin** recognized that the requirements for an authentic act must be strictly followed. See **Bonnett v. Mize**, 556 So.2d 228, 233 (La.App. 2 Cir.), writ denied, 559 So.2d 1360 (La. 1990). As such, the "substantial compliance" standard for authentic acts enunciated by this court in **Finance Sec. Co.** may no longer be viable.

Accordingly, we find no merit in assignment of error numbers one and two.[2]

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[1] While we recognize that the trial court, in its oral reasons, also alluded to "multitasking" and that "one must not multitask in performing an authentic act," we find it unnecessary to address this issue on appeal. Appeals are taken from judgments, not written reasons for judgment. **Wooley v. Lucksinger**, 09-0571 (La. 4/1/11), 61 So.3d 507, 572.

[2] Given our reasoning herein, we pretermit consideration of the issue of whether this act of donation is governed by LSA-C.C. art. 1747 and invalid thereunder as it was not signed at the same time and same place by the donor and by the donee.

CONCLUSION

The judgment of the trial court is hereby affirmed. Costs of this appeal are assessed to appellant, Desirea R. Eschete.

AFFIRMED.

BRIAN LOUIS ESCHETE

VERSUS

DESIREA R. ESCHETE

STATE OF LOUISIANA

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WHIPPLE, C.J., dissenting.

An authentic act in Louisiana is presumed to be valid, and this presumption is established in the interest of public order, to maintain peace among men and to prevent contestations concerning the proof or evidence of their conventions. One seeking to invalidate an apparently authentic act must present strong and convincing proof of such magnitude as to overcome the presumption of verity of notarial acts. Meltzer v. Meltzer, 95-0551, 95-0552 (La. App. 4th Cir. 9/28/95), 662 So.2d 58, 61, writ denied, 95-2616 (La. 1/5/96), 666 So.2d 293.

Accordingly, the issue currently before us is whether the evidence presented by Mr. Eschete constitutes **strong and convincing proof** that he did **not** sign the act of donation "before a notary public" and "in the presence of two witnesses," as contemplated by LSA-C.C. art. 1833. I find that Mr. Eschete failed to satisfy this required high burden of proof and, therefore, I respectfully dissent from the majority herein.

In Hardin v.Williams, 468 So.2d 1302 (La. App. 1st Cir.), aff'd by, 478 So.2d 1214 (La. 1985), this Court addressed the meaning of "before a notary public" and "in the presence of two witnesses." In Hardin, the notary testified that he did not see either the witnesses or the donor sign the act of donation; rather, the draftsman brought the document out for the notary to sign and the draftsman represented that **he** witnessed the donor's and witnesses' signatures to the act in an adjoining room. This Court found that the act of donation was null and void because the requirements of an authentic act were not complied with. Specifically, this Court stated, "We hold, as a matter of law, that unless the notary and attesting

witnesses are able to **visually observe** each other and the donor during the execution of the act of donation inter vivos, the instrument is not entitled to the status of authentic act." Hardin, 468 So.2d at 1304. (Emphasis added).

Unlike the facts in Hardin, the notary and witnesses in this case all testified that they saw, i.e., "visually observed," Mr. Eschete sign the document. Ms. Robichaux readily admitted that she was on the telephone in Ms. Bourgeois' office when Mr. Eschete signed the act of donation, and Ms. Smith readily admitted that she was making copies at a copy machine in Ms. Bourgeois' office area when Mr. Eschete signed the document. However, Ms. Robichaux and Ms. Smith also provided lengthy explanations as to the law office layout, noting, in particular, the small size of the office area and the fact that they were able to see Mr. Eschete sign the document despite being engaged with another task in the area adjoining the area where he was signing. Ms. Robichaux, Ms, Smith, and Ms. Bourgeois testified that Ms. Bourgeois's desk area is adjacent to the waiting room, that the door was open between the waiting room and desk area, and that someone at the desk area could see into the waiting room. Further, there was testimony that Ms. Robichaux's office policy is that she keeps the door open between the desk area and the waiting room when an opposing party who is not represented by counsel, such as Mr. Eschete, comes to the law office. Notably, the distance between the desk area and the furthest point in the waiting room was measured on the morning of the trial, and the total distance was shown to be only twelve (12) feet. Under these circumstances, I am unable to find that Mr. Eschete, who undisputedly signed the act, nonetheless established, by "strong and convincing proof" that the act was signed outside the presence of the notary and the witnesses.

Instead, the testimony and the record show that the notary and the two witnesses visually observed Mr. Eschete when he signed the act of donation. The only evidence offered to dispute the notary and two witnesses' testimony that they

saw Mr. Eschete execute the document was the self-serving testimony of Mr. Eschete. Given the burden imposed on him as the party challenging his authentic act, I am unable to find, as a matter of law, that Mr. Eschete's testimony alone is sufficient to overcome the strong presumption of validity of the authentic act.[1] Therefore, I respectfully disagree from the majority and find that the trial court erred in concluding that the act of donation was null and void for failure to meet the requirements of LSA-C.C. art. 1833.

Moreover, I also find that the trial court erred in declaring the act of donation null and void for failing to meet the requirements of LSA-C.C. art. 1747.[2] Louisiana Civil Code article 1747 adds additional requirements for executing *inter vivos* interspousal donations, stating that such acts must state that the donor makes the donation in contemplation of his prospective marriage or in consideration of his present marriage, as the case may be, and shall be signed at the same time and at the same place by the donor and by the donee.

All parties herein agree that the act of donation was not signed at the same time by Mr. and Ms. Eschete. Nevertheless, I question whether the subject act of donation is even governed by LSA-C.C. art. 1747. Also, assuming this act of donation is subject to the additional requirements of LSA-C.C. art. 1747, I do not find that the failure to meet said requirements renders the act of donation null and void. Article 1747 must be read in conjunction with the other code articles in the Civil Code chapter governing *inter vivos* interspousal donations, including, specifically, LSA-C.C. art. 1744, which provides in pertinent part:

> A donation inter vivos by a person to his future or present spouse in contemplation of or in consideration of their marriage that is **not**

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[1]In so concluding, I again note that Mr. Eschete does not dispute that he signed the act of donation. I find the following statement, *albeit* contained in the dissenting opinion in American Bank & Trust Co. in Monroe v. Carson Homes, Inc., 316 So.2d 732, 736 (La. 1975) to be persuasive, as follows: "The party executing the acts made a judicial acknowledgment that the acts were his. Juridical acts can not be more authentic than are these."

[2]Upon concluding that the act of donation was invalid under LSA-C.C. art. 1833, the majority pretermitted consideration of this issue.

made in accordance with the provisions of this Chapter shall be governed solely by the rules applicable to donations inter vivos in general. (Emphasis added)

Accordingly, in my view, the subject act of donation is not null and void for failure to meet the additional requirements of LSA-C.C. art. 1747, given that the act of donation is valid under LSA-C.C. art. 1833, the code article which generally governs authentic act requirements for *inter vivos* donations.

For the foregoing reasons, I respectfully dissent.