NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0447

IN THE MATTER OF THE SUCCESSION OF
ELSIE J. HOYT

DATE OF JUDGMENT: NOV 07 2014

ON APPEAL FROM TWENTY-FIRST JUDICIAL DISTRICT COURT
NUMBER 12931, DIVISION "G", PARISH OF LIVINGSTON
STATE OF LOUISIANA

HONORABLE JEROME M. WINSBERG, JUDGE PRO TEMPORE

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BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

Disposition: REVERSED AND RENDERED.

KUHN, J.

At issue in this appeal taken by defendant-appellant, Donny Mashon, is the validity of the Last Will and Testament executed by the decedent, Elsie J. Hoyt, on January 20, 2006. Concluding that the January 2006 testament did not meet codal requirements, we reverse the trial court judgment in favor of defendant-appellee, Mindy Stokes, annulling and setting aside the probate of an earlier testament and ordering that the January 2006 testament be executed.

FACTS AND PROCEDURAL BACKGROUD

Following Mrs. Hoyt's death in November 2006, her son, Donny Mashon, filed a petition for probate of the Last Will and Testament executed by her on December 11, 1995.[1] The trial court signed an order on July 3, 2008, appointing Mr. Mashon as executor of his mother's succession and ordering that the December 1995 testament be admitted to probate. Approximately eighteen months later, Mrs. Hoyt's granddaughter, Mindy Stokes, filed a petition to annul the probate of the December 1995 testament and to admit to probate the January 2006 testament executed by Mrs. Hoyt.[2] Mr. Mashon was named as a defendant in his capacity as the executor of his mother's succession.

Prior to trial, Mr. Mashon argued that the January 2006 testament was invalid because his mother lacked testamentary capacity, having dementia and

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[1] In its reasons for judgment and in the judgment itself, the trial court erroneously stated that Mrs. Hoyt executed the earlier testament on December 11, 2005. In fact, the testament that was presented by Mr. Mashon and initially admitted to probate was executed on December 11, 1995. Therefore, references throughout this opinion will be made to December 11, 1995, as the actual date of the earlier testament's execution, despite the erroneous references made in both the judgment and reasons for judgment.

[2] The December 1995 testament bequeathed Mrs. Hoyt's interest in five lots located on Wisteria Lane, Denham Springs, Louisiana, to Ronald Joseph Mashon, with a one-ninth interest in the remainder of all her property bequeathed to nine named legatees, including Donny Mashon, all subject to a lifetime usufruct in favor of Mrs. Hoyt's husband. The January 2006 testament bequeathed Mrs. Hoyt's interest in her residence located on Wisteria Lane, Denham Springs, Louisiana to her granddaughter, Mindy Stokes, and an undivided one-third interest in the remainder of all her property to each of her three surviving children, including Donny Mashon, all subject to a lifetime usufruct in favor of Mrs. Hoyt's husband. Incidentally, testimony was presented at trial that Mrs. Hoyt was concerned that the January 2006 testament might be challenged and, for that reason, on May 23, 2006, she executed an authentic act donating her interest in certain immovable property, including her residence, to Mindy Stokes.

having suffered a stroke and been hospitalized approximately two weeks before executing the testament. He further alleged that Ms. Stokes had unduly influenced Mrs. Hoyt to alter her prior testament to leave her residence to Ms. Stokes. At trial, Mr. Mashon raised an additional objection to the January 2006 testament after Peter Dudley, the attorney notary who prepared and notarized the testament, testified that the original testament signed by the testatrix, the witnesses, and himself was the only copy of the testament at the signing. Based on this testimony, Mr. Mashon orally moved to dismiss Ms. Stokes' petition due to noncompliance with the requirements of La. C.C. art. 1579 for executing a testament when the testatrix is sight-impaired. At the time of the testament's execution, Mrs. Hoyt's vision was impaired. The trial court denied the motion without comment, and took the remaining issues under advisement.

Subsequently, the trial court rendered written judgment in favor of Ms. Stokes and against Mr. Mashon, in his capacity as executor, annulling and setting aside the probate of the December 1995 testament and ordering the probate of the January 2006 testament executed by Mrs. Hoyt. In written reasons for judgment, the trial court concluded that Mr. Mashon failed to meet his burden of establishing that Mrs. Hoyt lacked testamentary capacity at the time that she executed the January 2006 testament. No reference was made to Mr. Mashon's allegation of noncompliance with Article 1579. Mr. Mashon now appeals, alleging in two assignments of error that: (1) the January 2006 testament was not properly executed in accordance with the formalities for execution of a sight-impaired testament; and (2) Mrs. Hoyt lacked testamentary capacity as a result of her well-documented dementia.

DISCUSSION

Although the intention of the testator, as expressed in the testament, must govern, the testator's intent, however clearly stated or proved, will be ineffectual if

the execution of the testament fails to comply with codal requirements. See ***Succession of Roussel***, 373 So.2d 155, 157 (La. 1979); ***Succession of 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. The formalities prescribed for the execution of a testament must be observed or the testament is absolutely null. La. C.C. art. 1573. Any material deviation from the manner of execution prescribed by the code will be fatal to the validity of the testament. See La. C.C. art. 1573; ***Succession of Hendricks***, 28 So.3d at 1060.

Moreover, the absence of fraud, or even the suggestion of fraud, does not justify courts in departing from the codal requirements, even to bring about justice in the particular instance, since any material relaxation of the codal rules will open up a fertile field for fraud, substitution, and imposition. ***Succession of Roussel***, 373 So.2d at 157; ***Succession of Hendricks***, 28 So.3d at 1060. The purpose of the codal articles 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. ***Succession of Roussel***, 373 So.2d at 158; ***Succession of Hendricks***, 28 So.3d at 1060. The goal of certainty of result has particular significance with respect to successions. See ***Succession of Hendricks***, 28 So.3d at 1060.

In the instant case, due to the impairment of Mrs. Hoyt's vision at the time of her January 2006 testament, the execution of the testament was subject to the formalities of Article 1579, which includes a requirement that the witnesses follow on copies of the testament the notary's reading of the testament to the testator. Specifically, Article 1579 provides, in pertinent part:

> When a testator ... is physically impaired to the extent that he cannot read ... the procedure for execution of a notarial testament is as follows:

> (1) The written testament must be read aloud in the presence of the testator, the notary, and two competent witnesses. **The witnesses ... must follow the reading on copies of the testament**. After the reading, the testator must declare or signify to them that he heard the reading, and that the instrument is his testament. If he knows how, and is able to do so, the testator must sign his name at the end of the testament and on each other separate page of the instrument. [Emphasis added.]

Although Ms. Stokes concedes that Article 1579 governed the execution of Mrs. Hoyt's January 2006 testament, she contends that the provisions of this article were complied with fully. At trial, Mr. Dudley testified generally that the January 2006 testament was executed in accordance with the codal requirements applicable to a testator who could not read due to physical impairment. Due to Mrs. Hoyt's vision problems, he read the testament aloud to her, and she acknowledged it was how she wanted it to read. Further, the attestation clause of the January 2006 testament conforms to the requirements of Article 1579 and includes a statement that the witnesses read along on copies as the testament was read aloud to the testatrix. However, Mr. Dudley was specifically asked on cross-examination whether the copy of the testament signed by the testatrix, the witnesses, and him was the only copy at the signing. He responded, "[y]es, it was only the original, because I was not at my office and didn't have the ability to make a copy."

On appeal, Mr. Mashon contends that Mr. Dudley's admission that only the original testament and no copies were present at the signing of the testament proves noncompliance with Article 1579. This contention has merit. Mr. Dudley's positive testimony establishes that, despite the statement in the attestation clauses that the witnesses followed his reading of the testament on copies, their doing so was a physical impossibility since Mr. Dudley admitted that there were no copies

of the testament at the signing.[3]

Furthermore, in ***Succession of Malone***, 509 So.2d 659, 662-63 (La. App. 3d Cir.), writ not considered, 511 So.2d 1146 (La. 1987), the Third Circuit cogently explained why the witnesses' failure to follow the reading on copies as the testament is read aloud to an illiterate testator is a fatal defect:

> When a testator does not know how to or is unable to read, he cannot assure for himself that the document accurately reflects his desires. **The requirements of La.R.S. 9:2443[4] provide a procedure which, if followed, gives the illiterate or sight-impaired testator reasonable assurance that his desires are in fact reflected in the document he is declaring to be his last will.** The failure of the witnesses to follow the reading on copies of the will frustrates the statute's purpose, since, in that event, the testator must rely on the notary's recitation of the document's contents. The testator is then left, not only unable to detect the deceitful practices of a dishonest notary, but is also unable to detect the mistakes of a careless one. **As the witnesses are the only ones who can verify that the notary has accurately recited the contents of the testament, they must do so in the statutorily prescribed manner by following the notary's reading on copies of the will.** [Emphasis added.]

We agree with this rationale and find it equally applicable in cases, such as the present one, where the testator is literate, but physically unable to read due to sight-impairment. Accordingly, the failure of the witnesses herein to comply with the requirement of Article 1579 that they follow the notary's reading on copies of the testament is fatal to the validity of the January 2006 testament. The trial court erred in rejecting Mr. Mashon's objection pointing out this fatal defect in the January 2006 testament.[5]

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[3] We reject Ms. Stokes' argument that the correct interpretation of Mr. Dudley's testimony is that he was not saying that there were no copies at the signing, but merely that there was only one original of the testament at the signing. This interpretation is not reasonable in light of the fact that opposing counsel specifically asked Mr. Dudley if the signed testament was the only "copy" and he replied that there was "only the original" and then explained why he could not make a copy.

[4] Former La. R.S. 9:2443 is the predecessor to and source of La. C.C. art. 1579 and, likewise, governed the execution of testaments by testators who were either unable to read or unable to read due to an impairment of their vision. Former La. R.S. 9:2443 was substantially similar to Article 1579 in all respects pertinent herein, including a requirement that witnesses to a testament follow the reading of the testament by the notary on copies of the testament. See La. R.S. 9:2443(B)(1) (prior to repeal by 1997 La. Acts, No. 1421, § 8, eff. July 1, 1999).

[5] Because we find merit in Mr. Mashon's first assignment of error regarding noncompliance with Article 1579, we pretermit consideration of his second assignment of error regarding Mrs. Hoyt's testamentary capacity.

CONCLUSION

For the reasons given, the judgment of the trial court in favor of Mindy Stokes and against Donny Mashon, in his capacity as executor, annulling and setting aside the probate of the testament executed by Elsie J. Hoyt on December 11, 1995, and ordering the probate of her January 20, 2006 testament is reversed, and judgment is hereby rendered reinstating the July 3, 2008 order that the December 11, 1995 testament be admitted to probate and that Mr. Mashon be appointed the executor of Elsie J. Hoyt's succession. Plaintiff-appellee, Mindy Stokes, is to pay all costs of this appeal.

REVERSED AND RENDERED.