| | | |
|---|---|---|
| **SUCCESSION OF MARY LOUISE HELEN LEDA DE LA VERGNE ST. PAUL** | * | **NO. 2000-CA-0660** |
| | * | **COURT OF APPEAL** |
| | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
| | * | |
| | * | |

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-15308, DIVISION "J"
HONORABLE NADINE M. RAMSEY, JUDGE
* * * * * *
**JAMES F. MC KAY, III**
**JUDGE**
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge James F. McKay, III)

RANDALL A. SMITH
ANDREW L. KRAMER
SMITH, JONES & FAWER, L.L.P.
New Orleans, Louisiana
Counsel for Appellee

JOHN W. REDMANN
LAW OFFICE OF JOHN W. REDMANN
New Orleans, Louisiana
Counsel for Appellant

**AFFIRMED**

The defendant, Diane St. Paul Olivier, appeals the judgment of the trial court finding that Louise Helen Leda de la Vergne St. Paul lacked testamentary capacity to understand the nature and consequences of dispositions she made after January 1990, thereby annulling all wills and donations subsequent to her fourth will, dated December 28, 1988, including the December 31, 1990 Leda de la Vergne St. Paul Irrevocable Trust (Irrevocable Trust) and the probated January 2, 1991 olographic testament. We affirm this judgment.

**FACTS AND PROCEDURAL HISTORY**

Helen Louise Leda de la Vergne St. Paul (Leda) died July 31, 1998. She was survived by one son, Townsley St. Paul (Townsley), and one daughter, Diane St. Paul Olivier (Diane). Her son Hugh St. Paul (Hugh) predeceased her in August of 1993, and is represented by his two surviving daughters, Alexandra St. Paul (Alexandra) and Andrea St. Paul Bland (Andrea). Throughout the years from 1988 through 1992, Leda created and

signed a barrage of wills, trusts, and codicils to manage the disposition of her estate. Especially pertinent to the case at bar, Leda created a fourth will leaving her property equally to her three children with an extra portion to Diane and Hugh on December 28, 1988.

On December 31, 1990, Leda executed an irrevocable trust that was duly witnessed and notarized on January 2, 1991. The property placed in this irrevocable trust consisted of all of Leda's real, personal property and financial accounts; the income earned by the trust, and the principal if necessary, was to be distributed to Leda for her health and welfare during her lifetime. The irrevocable trust was to be terminated upon her death and all of the principal and accrued income was to be distributed to her three children in the following proportions: 5/12 to Diane, 5/12 to Hugh and 2/12 to Townsley. In this trust, Hugh and Diane were named co-trustees. After Hugh's death, his wife Annie Laurie Monte St. Paul took his place as co-trustee with Diane. Annie Laurie soon thereafter resigned leaving Diane as the sole trustee. Starting in 1988 and until her death, Leda created a flurry of wills, codicils, donations/gifts, powers of attorney, revocable trusts and irrevocable trusts with various named trustees. At trial, numerous witness

and documents were produced by both sides touting either the capacity or incapacity of Leda. After two days of trial, the trial court determined, as clarified in its reasons for judgment, that Leda was incompetent at the time she created both the olographic will and the irrevovable trust as well as any other testamentary actions executed after 1988. The trial court found that Leda's December 28, 1988 will reflected her last will and testament.

On September 1, 1998, Diane filed a petition to probate Leda's January 2, 1991 olographic testament, her eighth will, which left all of her personal possessions to Diane and named Diane as executrix. On November 25, 1998, Townsley, Andrea, and Alexandra filed a petition to annul testament or for declaratory relief, alleging Leda's lack of testamentary capacity to create the January 2, 1991 olographic will. In her answer to plaintiffs' petition, Diane filed a reconventional demand, and a third party demand against Townsley in which she sought a declaratory judgment from the trial court that she be given a "reasonable amount of time to wind down affairs of the [Irrevocable] Trust." Plaintiffs also filed a motion for a temporary restraining order and preliminary injunction to remove Diane as trustee of the irrevocable trust, and to appoint a provisional trustee. The trial

court granted this motion and appointed a provisional trustee.

**ASSIGNMENTS OF ERROR**

The defendant claims that the trial court erred in invalidating the December 31, 1990 irrevocable trust and the January 2, 1991 olographic will of Leda for lack of testamentary capacity. The defendant also claims that the trial court erred in not rendering judgment in her favor on the plaintiffs' allegations of breach of trust.

**STANDARD OF REVIEW**

Appellate courts may not set aside a trial court's finding of fact in the absence of "manifest error" or unless it is "clearly wrong". Rosell v. ESCO, 549 So.2d 840 (La.1989). Further, where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review. Id. As stated in ESCO, "In applying the manifestly erroneous--clearly wrong standard to the findings below, appellate courts must constantly have in mind that their initial review function is not to decide factual issues de novo." Id. at 844. Thus, if the trial court's decision is reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse even though the appellate court

would have weighed the evidence differently.

**DISCUSSION**

It is presumed that all persons have testamentary capacity. "All persons have capacity to make and receive donations *inter vivos* and *mortis causa*, except as expressly provided by law." La. C.C. art. 1470. "Capacity to donate *mortis causa* must exist at the time the testator executes the testament." La. C.C. art. 1471. "To have capacity to make a donation *inter vivos* or *mortis causa*, a person must also be able to comprehend generally the nature and consequences of the disposition that he is making." La. C.C. art. 1477.

In Succession of Lyons, 452 So.2d 1161 (La.1984), our Supreme Court set the standard that there is a presumption in favor of testamentary capacity and that the party alleging lack of testamentary capacity must overcome that presumption by clear and convincing evidence. Acts 1991, No. 363 Sec. 1, amended Civil Code Article 1482 to provide: "A person who challenges the capacity of a donor must prove by clear and convincing evidence that the donor lacked capacity at the time the donor made the donation *inter vivos* or executed the testament ..." This new article codifies

prior "jurisprudential law" in part, and also introduces new law in part. The burden of proof for overcoming the presumption of testamentary capacity under prior law was jurisprudentially changed in 1984 from the stringent criminal law standard of "beyond a reasonable doubt", to the more relaxed but nevertheless difficult standard of "clear and convincing" evidence." La. C.C. Art 1482 Comment (a). In determining testamentary capacity the question is whether the testator understood the nature of the testamentary act and appreciated its effects. Succession of Dowling, 93-1902 (La. App. 4 Cir. 2/25/94), 633 So.2d 846, 855. "As used in this Article the reference to the "nature" of the disposition means that the donor must be capable of understanding that he is making a gratuitous transfer of property that he owns to someone else who will become the owner of it, without recompense…" La. C.C. art. 1477, comment (d). "Cases involving challenges to capacity are fact-intensive. The courts will look both to objective and subjective indicia. Illness, old age, delusions, sedation, etc., may not establish lack of capacity but may be important evidentiary factors. If illness has impaired the donor's mind and rendered him unable to understand, then that evidentiary fact will establish that he does not have

donative capacity." La. C.C. art. 1477, comment (f). Where a testator's insanity is shown to be habitual and constant, there arises a presumption of insanity at the moment the will was executed. Cormier v. Myers, 223 So.2d 259 (La.1953); Succession of Hamiter, 573 So.2d 584 (La. App.2 Cir.1991). Furthermore, although a holding of incapacity may receive a closer scrutiny on appeal due to the presumption of capacity, as well as the need to show clear and convincing evidence, the standard of review is the same. Succession of Braud, 94-0668 (La. App. 4 Cir. 11/17/94), 646 So.2d 1168, 1170. In order to overcome this evidence of testamentary capacity, coupled with the legal presumption in favor of testamentary capacity, the plaintiffs are required to present clear and convincing proof that Leda did not have testamentary capacity at the time she executed the irrevocable trust and olographic will. To prove a matter by clear and convincing evidence, the party must "demonstrate that the existence of a disputed fact is highly probable, that is, much more probable than its nonexistence." Succession of Cole, 618 So.2d 554, 556 (La.App. 4 Cir.1993); State Bar Association v. Edwins, 329 So.2d 437 (La. 1976). Moreover, the determination of testamentary capacity is a question of fact upon which the trial judge's

findings will not be disturbed unless manifestly erroneous. Succession of Dorand, 596 So.2d 411 (La. App. 4 Cir. 1992), writ denied, 600 So.2d 661 (La.1992); Atkins v. Roberts, 561 So.2d 837, 839, (La. App 2 Cir. 1990).

At trial, both sides presented numerous witnesses to support their respective positions as to the testamentary capacity of Leda using both testimonial and anecdotal evidence. Leda's personal physician, Dr. Robert Miles, testified that as early as May of 1993, Leda suffered from cerebral atrophy correlated with senile dementia. He opined that this was not a condition that occurred overnight. Dr. Roniger, board certified in both neurology and psychiatry, testified that during his examination of Leda in May of 1991, in conjunction with an interdiction proceeding, that Leda was severely impaired. In making his diagnosis he relied on a history supplied by Leda's granddaughter, Andrea Bland, a video tape of Leda from March 20, 1991, interviews and statements from various family members, social and personal friends. He also testified that during his examination of Leda she did not understand why he was examining her. He testified that Alzheimer's was a gradual disease that did not manifest itself suddenly, and that based on the totality of the material reviewed and his prior examination

of Leda, that she suffered from significant dementia at the time the irrevocable trust and the January 2, 1991 olographic will were confected, and that she had in fact suffered from significant dementia from 1990 forward. Various personal and social friends and family members testified at trial as to various anecdotal situations during 1990 and 1991. They all confirmed that Leda had great difficulty recognizing them or could not recognize them at all, could not hold cognizable conversations, failed to associate familial relationships and had no sense of time and space. In fact one of Leda's caretakers, Frances Sanford, testified that Leda's daughter, Diane, locked the iron gates in front of her mother's home to lock Leda inside the home without keys and that the only frequent visitors were Diane and her husband. She testified that when these two visited Leda they would often take a briefcase and Leda into a bedroom and close the door. She also testified that despite caring for Leda since January 1, 1991, for five and one-half days a week, Leda did not always recognize her.

Diane presented several witnesses at trial to attest to Leda's mental capacity. In her deposition, Diane testified that she had concern as to her mother's mental capacity. She admitted that her mother had been diagnosed

with Alzheimer's and that she sought treatment for her mother at Baptist Hospital in May of 1991. She also testified that the purpose of putting a locked iron-gate at her mother's home was to prevent her mother from allowing strangers access to the home on Second Street. A cousin, Hughes de la Vergne, testified that he was the trustee of the Schmidt de la Vergne Trust and that Diane had contacted him during Christmas of 1990. She expressed that she was concerned about Leda's declining condition and that Leda's portion of that trust would ultimately be part of Leda's. He testified that Diane told him that the family had two alternatives, which were interdiction or an irrevocable trust. He advised her to go with irrevocable trust, which was ultimately created with the knowledge of all of the beneficiaries.

Various other witnesses testified as to anecdotal evidence of Leda's mental capacity, but could not give definite dates of their encounters with Leda. They could only comment on the perennial gatherings, "during Mardi Gras", at Leda's Second Street home. One witness, a family friend, George Lebouef, testified that he was a guest "during Mardi Gras" in 1989, 1990, and 1991 and that during one of these Mardi Gras gatherings he had Leda

sign a funeral policy and write a personal check for the premium. Nonetheless, he could not recall when and no evidence was presented at trial to corroborate this act. The defendant then called several attorneys, Steven Hayes, Emile Ramirez and Andrew Rinker, who had drafted and notarized several powers of attorney and other documents disposing of Leda's property at Diane's behest. They admitted that their meetings with Leda were brief and that they had no specific recollections of what was said or done at those respective times. Mr. Ramirez testified that Diane retained him to probate the January 2, 1991 olographic will. He recalled that he had prepared several power of attorney documents, at Diane's behest, placing Diane in charge of Leda's financial affairs and the donation dated December 9, 1990, giving all the household furnishings to Diane. Ramirez also notarized another power of attorney, which had a provision naming Diane curator of Leda's person and property.

Leda's incapacity, and her family's awareness thereof, is evidenced by the flurry of activity surrounding Leda's possessions and financial affairs within the period spanning June 12, 1990 through January 2, 1991; Leda executed three separate wills, five donations, three powers of attorney

documents or cancellations thereof and two trusts. Leda had clearly lost her ability to manage her affairs and her heirs sensing that, attempted to preserve or obtain portions of Leda's property. All of the influence apparently imposed on Leda by her heirs to create and re-create wills, donations, trusts and power of attorney documents, clearly indicate Leda's incapacity to think for herself or understand the consequences and importance of her actions.

Following the plaintiffs' presentation, it was established by clear and convincing evidence that Leda suffered severe dementia and Alzheimer's at the time the December 31, 1990 irrevocable trust and the January 2, 1991 olographic will were executed. It is abundantly clear that Leda could not understand the contents of those various documents that she confected nor appreciate their nature and consequences. By contrast, the defendant failed to establish that Leda had testamentary capacity. Accordingly, based on the evidence and testimony presented at trial, we cannot say that the trial court was manifestly erroneous in concluding that Leda lacked capacity when the irrevocable trust and the January 2, 1991 olographic will were confected. Because the trial court is present to personally observe the testimony and evidence presented at trial, its findings of fact must be accorded great

weight. Arceneaux v. Domingue, 365 So. 2d 1330 (La. 1978). We find no clear error in the trial court's decision. Therefore, these documents are invalid and the trial court's judgment determining that the only valid will is that of December 28, 1988, is affirmed.

The plaintiffs claim that the defendant abused her office as trustee of the irrevocable trust and that the trial court was not manifestly erroneous in removing her as trustee. In response to plaintiff's allegation, the defendant attempts to advance an argument, to this Court, supporting her claim that she did not abuse her office as trustee. The trial court granted the plaintiffs' motion for a permanent injunction, removing Diane as trustee and appointing Wanda Davis, an attorney, to serve as trustee.

A trustee may be removed according to the provisions of the trust instrument or by the proper court for sufficient cause shown. La. R.S. 9:1789. The statute contemplates more than a mere technical violation of the Trust Code as grounds for the removal of a trustee. Martin v. Martin, 95-0466 (La. App. 4 Cir. 10/26/95) 663 So.2d 519, 522; Curtis v. Breaux, 458 So.2d 582 (La. App. 3 Cir. 1984).

The trial court heard all of the evidence and made its fact-based judgment removing Diane as trustee of her mother's irrevocable trust. This is clearly under the auspices of the trial court and as such will not be disturbed on appeal. Moreover, the trial court in its reasons for judgment declined to find that Diane abused her office as trustee of the irrevocable trust and did not order her to repay monies she improperly dispersed. Instead, the trial court found that the evidence placed before it was inadequate to make a finding and ordered that Diane provide the plaintiffs with a full and current accounting of Leda's estate. The court also ordered that after the accounting had been tendered that the plaintiffs "shall then file any appropriate pleadings to challenge any expenditures reported in the accounting. The Court will determine the validity of any of Ms. Olivier's actions at such time". Furthermore, it is clear in the trial court's reasons for judgment that a final accounting has not been delivered to either the trial court or the plaintiffs. Accordingly, we will not address the merits of the trustee's abuse of her authority as it is not properly before this Court.

The defendant in her motion for summary judgment, which the trial court denied on August 23, 1999, argues that the plaintiffs and the trial court

were estopped from attacking the trust instrument on the ground of incapacity set out in La.C.C. art. 403 and 1926 and that the action is prescribed as set out in La. C.C. art 2032.

> **Art. 403 Contesting validity of acts after death**:
> After the death of a person, the validity of acts done by him can not be contested for cause of insanity, unless his interdiction was pronounced or petitioned for previous to the death of such person, except in cases in which the mental alienation manifested itself within ten days previous to the decease, or in which the proof of the want of reason results from the act itself which is contested.

> **Art. 1926 Attack on noninterdicted decedent's contract**:
> A contract made by a noninterdicted person deprived of reason at the time of contracting may be attacked after his death, on the ground of incapacity, only when the contract is gratuitous, or it evidences lack of understanding, or was made within thirty days of his death, or when application for interdiction was filed before his death.

La. R.S. 9:1735 states that a trust may be gratuitous or onerous.

Defendant claims that La. C.C. arts. 1909 and 1910 support her argument that La. C.C. art. 1926 applies. According to Article 1909, "[a] contract is onerous when each of the parties obtains an advantage in exchange for his obligation." Article 1910 states that "[a] contract is gratuitous when one party obligates himself towards another for the benefit of the latter, without obtaining any advantage in return."

Defendant's argument, in support of her position, asserts that the irrevocable trust was a contract and that it was onerous, as opposed to gratuitous, because there were charges upon the trust/trustee to manage the assets and pay for the support of the income beneficiary. Defendant further argues that Leda was never interdicted prior to her death nor were there interdiction proceedings before any court at the time of Leda's death and that pursuant to La. C.C. 1926, plaintiffs are estopped from pursing their claim for incapacity.

Irrevocable trusts are controlled by the Louisiana Trust Code, which was created for the specific purpose to handle these *sui generis* documents and to make common law trust estates to be practicable with our civil law concepts. Moreover, the purpose of La.C.C. art. 1926, is clearly to protect innocent third parties that contract with noninterdicted persons from attack on the grounds of alleged incapacity after the death of the contracting party, who cannot defend themselves.

Contrasting defendant's argument, the plaintiffs advance their argument that the irrevocable trust was not a contract but merely a document signed by Leda to assure her care and keep, for her remaining lifetime. After

Leda's death the residuals of the irrevocable trust were to be distributed to her three children, the beneficiaries of the trust. The irrevocable trust did not require nor seek anything in return from these three beneficiaries. No one was required to perform any task or take any responsibilities to be included in the benefits of the trust, after Leda's death. The only one who had obligations to the irrevocable trust was the trustee. While both Hugh and Diane were named as trustees, either could have declined to serve, but neither did. Additionally, the trust did not specify that if either refused to serve as trustee that they would be removed as beneficiaries. Hence, none of these factors change the essence of the trust, which was clearly gratuitous by its language.

Although both sides have presented persuasive arguments, this Court does not interpret this irrevocable trust to be a contract. It is merely a document prepared for the protection of the income beneficiary for her care and keep for the remainder of her life and leaving the residual estate to her beneficiaries. This irrevocable trust is controlled by the Louisiana Trust Code not Title III or Title IV of the Civil Code concerning conventional obligations and contracts. Although there may be some contractual fiduciary

obligation concerning the trustee, which may fall under the laws of conventional obligations and contracts, in this instance based on these facts, the nature of the trust toward its beneficiaries is not contractual in nature. As such we find that there is no contract as envisioned by La. C.C. art. 1926 that is applicable to the case *sub judice* and the plaintiffs are not estopped from pursuing an action against or attacking the trust instrument on the grounds of incapacity. Therefore, we find no error in the trial court's denial of the defendant's motion for summary judgment and affirm its decision.

The defendant also represents to this Court that the trial court erred in denying her peremptory exception of no cause of action, which objects to plaintiffs' petition and third party defendant's reconventional demand for failure to state a cause of action for invalidating the January 2, 1991 olographic will. Plaintiffs based their argument on Diane's undue influence upon Leda at the time the will in question was written. The trial court denied this exception of no cause of action on August 23, 1999.

Defendant argues that La. C.C. Articles 1479, 1480 and 1483 apply and that the trial court should have granted her exception.

> **Art. 1479. Nullity of donation procured through undue influence**
>
> A donation *inter vivos* or *mortis causa* shall be declared null

upon proof that it is the product of influence by the donee or another person that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor.

**Comment (b)** This article, like the proceeding Article, presumes a donor has capacity. Obviously, if a donor lacks capacity, then the entire donation or will is invalid for that reason alone, and issue of fraud and undue influence are irrelevant…

**Art. 1480. Nullity due to fraud, duress, or undue influence; severability of valid provision**
When a donation *inter vivos* or *mortis causa* is declared null because of undue influence or because of fraud or duress, it is not necessary that the entire act of donation or testament be nullified. If any provision contained in it is not the product of such means, that provision shall be given effect, unless it is otherwise invalid.

**Art. 1483. Proof of fraud, duress, or undue influence**
A person who challenges a donation because of fraud, duress, or undue influence, must prove it by clear and convincing evidence…

After a trial on the merits, the trial court found that the donor, Leda, lacked testamentary capacity to create the will and the irrevocable trust. The trial court did not base its judgment upon undue influence but solely upon lack of capacity. Since we are affirming the trial court's judgment concerning the finding of incapacity, this argument is rendered moot and will not be addressed by this Court.

Lastly, the defendant advances an argument raising issues of prescription. She claims that an action to revoke the trust for lack of

capacity prescribes within five years. Once again the defendant is arguing that the irrevocable trust is a contract. We again disagree for the reasons assigned above. Defendant also argues that an action against her, as the trustee, for reimbursement was time-barred.

First, personal actions are prescribed in La. C.C. art. 3499, which carries a ten year liberative prescriptive. In addition, La. R.S. 9: 2234 states that:

> A. An action for damages by a beneficiary against a trustee for any act, omission, or breach of duty shall be brought within two years of the date that the trustee renders, by actual delivery or mail to the beneficiary, or if the beneficiary lacks legal capacity, the beneficiary's legal representative, to the last known address of the beneficiary and that of the legal representative if any, an accounting for the accounting period in which the alleged act, omission, or breach of duty arising out of the matters disclosed therein occurred. However, such actions shall in all events, even as to actions within two years of disclosure, be filed within three years of the date the trustee renders an accounting for the accounting period in which the alleged act, omission, or breach of duty occurred…
>
> B. Any action by a beneficiary against a trustee other than those described on Subsection A of this Section is prescribed by two years beginning from the date that the trustee renders his final account to the beneficiary.
>
> C. The provisions of this Section are remedial and apply to all causes of action for damages without regard to the date when the alleged act, omission, or breach of duty occurred. The two-year…[ ] period of limitation provided for in this Section are peremptive periods within the meaning of Civil Code Article 3458, and

> in accordance with Civil Code Article 3461 may not be renounced, interrupted, or suspended. Notwithstanding the foregoing, a beneficiary shall have one year from July 9, 1999 to bring an action for damages against a trustee arising out of an act, omission, or breach of duty for a transaction disclosed in any prior accounting.

The defendant claims that 9:2234 states a prescriptive period for actions for breach of trust of one year from the date on which the trustee renders his final accounting. Furthermore, she avers that more than a year has passed since plaintiffs learned of the facts that give rise to the alleged breach of Diane's fiduciary duty as trustee of the irrevocable trust. She claims that plaintiffs' claims for monies distributed by the trustee since 1991, have prescribed on their face. We disagree.

The fact that the irrevocable trust has been declared invalid does not invalidate the fiduciary duty and obligation that Diane owes to the beneficiaries based on her actions as trustee. She accepted and assumed the role as trustee of the irrevocable trust. As such she has both a contractual and personal obligation to act responsibly in her fiduciary capacity during the entire period that she acted as trustee toward both the trust and its beneficiaries.

In the case at bar the beneficiaries could not know the extent of

the breach nor the fact that a breach had occurred until such time as the trustee, Diane, filed her final accounting. In fact, the trial court, in its reasons for judgment, ordered the defendant to provide the plaintiffs with a full and current accounting of Leda's estate, giving the plaintiffs an open door to review and challenge any expenditures reported in this accounting. Clearly, the trial court does not feel that a final accounting of the estate has been provided to either the court or the plaintiffs. Clearly the issue of breach of fiduciary duty is still open and the trial court has yet to rule on the merits.

We find that the plaintiffs' did not have constructive or actual knowledge of the alleged improper expenditures until October 31, 1998, when Diane produced her first accounting since the irrevocable trust was executed in January 1991. Thus, when the plaintiffs' filed their first amended supplemental third party reconventional demand four months later, on February 18,1999, demanding reimbursement of the alleged improper expenditures, the claims had not prescribed. Furthermore, the trial court has said that the plaintiffs may challenge any expenditure that may appear in the final accounting that it ordered. Accordingly, we deny defendant's exception of prescription.

For all of the aforementioned reasons we affirm the judgment of

the trial court.

**AFFIRMED**