

Judgment rendered June 26, 2019.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 52,740-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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SUCCESSION
OF
THOMAS EDROE PESNELL

* * * * *

Appealed from the
Third Judicial District Court for the
Parish of Lincoln, Louisiana
Trial Court No. 13,129

Honorable James H. Boddie, Jr. (*Pro Tempore*), Judge

* * * * *

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Individual Legatee

* * * * *

Before PITMAN, GARRETT, and STONE, JJ.

PITMAN, J.

Aubry Matt Pesnell (“Matt”) and Robin Marie Pesnell (“Robin”) appeal the trial court’s judgment denying their petition to annul the probated testament of Thomas Edroe Pesnell (“the Testator”). For the following reasons, we affirm.

FACTS

The Testator died on February 11, 2018, and left a will and testament dated November 19, 2014 (the “Will”). On February 14, 2018, his widow, Shirley Ann Pesnell (“Shirley”), filed a petition to probate the Will and to be appointed as executrix. On that same date, the trial court signed an order that the Will be admitted to probate and executed and that Shirley be appointed executrix.

On April 4, 2018, Matt and Robin, the adult children of the Testator and legatees of the Will, filed a petition to annul the probated testament and, alternatively, to remove Shirley as executrix. They named Shirley as defendant in her capacities as executrix and as a legatee of the Will. They argued that the Will is null and void because it was not executed in accordance with the formalities required by La. C.C. art. 1577 for a notarial testament. They contended that the attestation clause is not the same or substantially similar to the declaration provided by La. C.C. art. 1577(2) in that it fails to attest that the Testator signed the Will in the presence of the notary and witnesses and does not attest that the Testator signed “on each other separate page.”

On June 22, 2018, Shirley filed answers, both in her capacity as executrix and as a legatee, and denied that the Will and/or the attestation clause are in any way legally deficient.

A hearing on the validity of the Will was held on September 20, 2018. The trial court found that the only deviation from La. C.C. art. 1577 in the Will was the absence of the words “on each other separate page” in the attestation clause. It stated that the question before it was whether this deviation is a material deviation or if the Will substantially complied with the formalities required of a notarial testament. It noted that the Testator did sign on each separate page of the Will and signed below the attestation clause. It found the Will to be in substantial compliance with the requirements of a notarial testament and decreed the Will to be valid.¹

On October 17, 2017, the trial court filed a judgment, which denied and dismissed with prejudice Matt and Robin’s petition to annul. It further reserved all other claims and demands in the petition to annul and any defenses by Shirley. It designated the judgment as a final judgment.

Matt and Robin appeal.

DISCUSSION

Matt and Robin argue that the Will contained an invalid attestation clause pursuant to La. C.C. art. 1577 and, therefore, that the trial court erred in failing to annul it. They contend that the attestation clause is not the same or substantially similar to the declaration provided in La. C.C. art. 1577 because (1) it only attests that the Testator signed the Will “at the end thereof” and does not attest that he signed “on each other separate page” and (2) it fails to attest that the Testator signed the Will in the presence of the notary and witnesses. Therefore, they contend that pursuant to La. C.C.

¹ Following the district court’s ruling, counsel for Shirley, in her capacity as a legatee, proffered the testimony of R.H. Madden, Aly Leggett and Joan Couch, the notary and witnesses, respectively.

art. 1573, the Will is absolutely null because it does not observe the formalities required by La. C.C. art. 1577.

In her capacity as executrix, Shirley argues that the Will is valid and the trial court's ruling should be affirmed. She states that the Will contains all substantive elements required by La. C.C. art. 1577 in that the Testator signed each page of the Will, did so in the presence of the notary and two witnesses and declared that the instrument he signed was his last will and testament. She agrees that the language of the attestation clause deviates from the suggested statutory form, but argues that the deviation was nonmaterial, that any ambiguity could be cured by parol evidence and that the form used was substantially compliant with the statute.

In her capacity as a legatee, Shirley argues that the ruling of the trial court should be affirmed. She states that the trial court properly found that the Will was signed on each page and with the notary and witnesses and, therefore, was substantially similar to the language suggested in La. C.C. art. 1577. She contends that the omission of the words "on each other separate page," when the Will was in fact signed on each separate page, and the placement of the words "in our presence" do not amount to such a material deviation as to invalidate the Will.

Questions of law are reviewed under a *de novo* standard of review. *Succession of Harlan*, 17-1132 (La. 5/1/18), 250 So. 3d 220.

A disposition mortis causa may be made only in the form of a testament authorized by law. La. C.C. art. 1570. In Louisiana, there are two forms of testaments: olographic and notarial. La. C.C. art. 1574. An olographic testament is one entirely written, dated and signed in the handwriting of the testator. La. C.C. art. 1575. A notarial testament is one

that is executed in accordance with the formalities of Louisiana Civil Code articles 1577 through 1580.1. La. C.C. art. 1576.

There is 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. *Successions of Toney*, 16-1534 (La. 5/3/17), 226 So. 3d 397, citing *In re Succession of Holbrook*, 13-1181 (La. 1/28/14), 144 So. 3d 845. However, the formalities prescribed for the execution of a testament must be observed or the testament is absolutely null. La. C.C. art. 1573. Louisiana courts have held wills invalid when they contain material deviations from form requirements, even in the absence of any indication of fraud. *Successions of Toney, supra*. While extrinsic evidence may be used to resolve ambiguity in a testament, extrinsic evidence cannot cure a testament which is materially defective on its face. *Id.* In an action to annul a notarial testament, the plaintiff always has the burden of proving the invalidity of the testament. La. C.C.P. art. 2932(B).

La. C.C. art. 1577 sets forth the formalities at issue in the case *sub judice* and states:

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 _____, ____.”

La. C.C. art. 1577 provides that a notarial testament “shall” be executed in a certain manner, and the word “shall” is mandatory. *In re Succession of Holbrook, supra, citing* La. R.S. 1:3. However, La. C.C. art. 1577 contains an allowance that the mandated attestation clause need only be “substantially similar” to the sample declaration provided in the statute. *Successions of Toney, supra*. The attestation clause requires the notary and witnesses to attest to three things: (1) the testator signed the will at its end and on each separate page; (2) the testator declared in the presence of the notary and witnesses that it (the instrument) was his will; and (3) in the presence of the testator and each other, they (the notary and witnesses) signed their names on a specified date. *Successions of Toney, supra, quoting Succession of Brown, 458 So. 2d 140 (La. App. 1 Cir. 1984)*.

The Will in this case consists of three pages and is dated November 19, 2014, at the top of the first page. The Will consists of seven paragraphs that are sequentially designated as “first” through “seventh.” The Testator signed his full name on the bottom of the first two pages on the designated signature lines. He signed his full name after the seventh paragraph on the third page, and the attestation clause also appears on the third page. The attestation clause states:

The Testator, THOMAS EDROE PESNELL, has signed this his Last Will and Testament at the end thereof, and has declared or signified in our presence that it is his Last Will and Testament and in the presence of the Testator and each other we have hereunto subscribed our names on this the 19th day of November, 2014.

Below this clause are the signatures of the Testator; the two witnesses, Joan Couch and Aly Leggett; and the notary, R.H. Madden, III, who is also an

attorney at law as shown by the Louisiana Bar Roll number included on his notarial stamp.

Unlike the testament in *Successions of Toney, supra*, that “test[ed] the limits of what constitutes compliance,” we find that the Will in the case *sub judice* was executed in accordance with the formalities of La. C.C. art. 1577 and that the language of the attestation clause is substantially similar to the language suggested in La. C.C. art. 1577(2). See *Succession of Hanna*, 52,664 (La. App. 2 Cir. 6/26/19), ___ So. 3d ___.

The case *sub judice* is also distinguishable from the recent case of *Succession of Rogers*, 51,267 (La. App. 2 Cir. 9/27/17), 243 So. 3d 1209, in which this court found that the testaments were invalid because the attestation clauses were not substantially similar to the sample attestation clause language. In *Succession of Rogers*, the witnesses signed one attestation clause, and the notary signed a separate attestation clause. The clause signed by the testator and the witnesses stated:

Signed on each page and declared by Ulysses Rogers, executor above named, in our presence to be his Last Will and Testament, and in the presence of the testator and each other we have hereunto subscribed our names on this 10th day of December, 1992.

The clause signed by the notary stated:

BEFORE ME, the undersigned authority, personally came and appeared ULYSSES ROGERS, who declared to me that the foregoing instrument is his Last Will and Testament. SWORN TO AND SUBSCRIBED before me on this 10th day of December, 1992.

Noting the three elements adopted in *Successions of Toney, supra*, from *Succession of Brown, supra*, this court found that the attestation clauses, considered in the aggregate, did not declare that the notary viewed the testator sign the testament at the end and on each other separate page, did not

declare that the witnesses signed in the presence of the notary and did not declare that the notary signed in the presence of the witnesses. This court further noted that it appeared that the notary originally signed on December 18, 1992, but then changed the date to December 10 to coincide with the date the witnesses signed, which suggested that the testament may not have been signed in the presence of both the witnesses and notary, but rather was signed on two separate occasions. Accordingly, this court determined that there was a material deviation from the codal requirements and declared the wills to be invalid. Although the case *sub judice* shares the deviation of not including the language “on each other separate page,” the testaments in *Succession of Rogers, supra*, contained additional, material deviations.

We note that although it is the best practice to use the sample declaration provided in La. C.C. art. 1577(2), the legislature does not mandate that this language be used. Although the attestation clause does not contain the phrase “on each other separate page,” we find that this deviation is non-material in this case where the Testator’s signature appears on each page of the three-page document and where the notary and witnesses attested to the Testator signing at the end of the document. We emphasize that there is a presumption in favor of the validity of testaments and find that the nonobservance of formalities in this case is not exceptionally compelling as to rebut that presumption.

Accordingly, this assignment of error lacks merit.

CONCLUSION

For the foregoing reasons, we affirm the trial court’s judgment denying the petition to annul the probated testament of Thomas Edroe

Pesnell filed by Appellants Aubry Matt Pesnell and Robin Marie Pesnell.

Costs of appeal are assessed to Appellants Aubry Matt Pesnell and Robin Marie Pesnell.

AFFIRMED.