Louisiana Law Review

Volume 24 | Number 2
The Work of the Louisiana Appelate Courts for the 1962-1963 Term: A Symposium
February 1964

Private Law: Successions and Donations

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of appeal reversed and held that there was a violation of the covenant because the purpose of the restriction was not only to prevent cars from parking on the streets and the incidental noises, and so forth, but also to limit the size of the commercial buildings so as to preclude those businesses which need very large or numerous buildings.

While disposing of the immediate litigation, the opinion of the court of appeal does not clarify the penetrating issue raised by the trial judge as to whether the court may disregard the clear language of a properly-established building restriction under the pretext of enforcing the substance and intent which the court distills out of the document. The court of appeal's technique might argue for the affirmative; their holding could be argued the other way. How far is it necessary for real estate developers to go into details of intent when they set up new subdivisions?

SUCCESSIONS AND DONATIONS

*Carlos E. Lazarus**

Succession of Butler[1] involved the validity of a revocatory act in the form of a testament which was offered for probate as the statutory will of the decedent. The act was attacked on the grounds (1) that the formalities prescribed by the statute had not been complied with, not having been signed by the testatrix who had merely affixed her mark, and (2) that the testatrix was precluded from making a statutory will because she could not read.[2] The instrument in question had been executed before

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1. 152 So. 2d 239 (La. App. 4th Cir. 1963), *cert. den.*, 244 La. 668, 153 So. 2d 153 (1963).

2. LA. R.S. 9:2442 (Supp. 1962): "In addition to the methods provided in the Louisiana Civil Code, a will shall be valid if in writing (whether typewritten, printed, mimeographed, or written in any other manner), and signed by the testator in the presence of a notary public and two witnesses in the following manner:

"(1) Testator. In the presence of the notary and both witnesses the testator shall signify to them that the instrument is his will and shall sign each separate sheet of the instrument.

"(2) Notary public and witnesses. The notary and both witnesses must sign at the end of the will

"(a) In the presence of the testator, and

"(b) In the presence of each other.

"(3) The foregoing facts shall be evidenced in writing above the signatures of the notary public and witnesses and the testator at the end of the will. Such

a notary and two witnesses and it contained a recital of the declaration of the testatrix that she had never learned to write as an explanation of her "cross mark instead of her signature."[3] From the act of superscription it is evident that the instrument was initially intended as a nuncupative will by public act.[4] As such, however, it would have been invalid for lack of the necessary number of witnesses. The majority of the court affirmed the probate judge's conclusion that the conflicting evidence adduced preponderated to the effect that the decedent was able to read,[5] and held that the decedent's "X" mark constituted a signature within the contemplation of the requirements of the statute.[6]

As originally proposed in the legislature, the second section of the statute which now corresponds to R.S. 9:2443 provided: "Those who know not how to read, *and those who know not how or are not able to sign their names,* cannot make dispositions in the form of the will herein provided for, *nor be attesting witnesses thereto.*" The fact that the italicized language was deleted before the bill was enacted into law forms the basis for the position of the majority of the court that "had the legislature intended to require the testator to affix a signature to the will by actually writing his name . . . [it] would have spelled

declaration may be in the following form or a form substantially similar thereto: (a) Signed (on each page) and declared by testator 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 ..... day of ....., 19 ....."

LA. R.S. 9:2443 (Supp. 1962): "Those who know not how or are not able to read, cannot make dispositions in the form of the will provided for in R.S. 9:2442."

3. ". . . Mrs. Lorenza Domingue . . . did not know how to writ (sic) her name for the reason that she has never learned to write, and makes her cross mark *instead of her signature.*" Succession of Butler, 152 So. 2d 239, 240 (La. App. 4th Cir. 1963).

4. "It was thus that said last will and testament was dictated to me, Notary, by said Mrs. Lorenza Domingue, in the presence and hearing of said witnesses and written down by me, Notary, in the presence of said witnesses and said testatrix. I, Notary, then read said last will and testament to said testatrix in a clear and audible voice, in the presence and hearing of said testatrix and said witnesses, when said testatrix declared that she persisted in the same — all of which was done at one and the same time, without interruption and without turning aside to other acts." *Id.* at 241.

5. The dissenting judge, in view of the express declaration of testatrix that she had never learned to write, expresses grave doubt that she could read. "And while it is not a necessary corollary that an individual who reads likewise knows how to write, in 999 cases out of 1,000 I believe that one who does not know how to write and never had known how to write, such as the testator in this case, never at anytime knew how *to read.*" *Id.* at 244.

6. "We are of the opinion that the words 'signed' and 'signature' appearing on this statute do not mean that a testator must literally write his or her name. An X mark, properly witnessed, fulfills the requirements thereof in this respect." *Id.* at 243.

out this requisite without the slightest equivocation."[7] In the absence of transcriptions of legislative committee reports and debates, it is impossible to state with any degree of certitude what was the reason for the amendment of the bill before its enactment into law,[8] and while the position taken by the majority of the court is plausible, it is most improbable, as the dissenting judge indicates, that the legislature would have permitted a person who could not sign his name to use this kind of a will or to be a witness thereto.[9] On the other hand, it is equally plausible that the deletion of the negative exclusionary language was made because it was deemed unnecessary in view of the positive requirement of the first section of the statute requiring this kind of a will to be "in writing . . . and *signed* by the testator." Words are generally understood in their most usual signification,[10] and it is a cardinal rule of statutory construction that legislative intent must primarily be ascertained from the language used and not from conjectures *aliunde*, and that it is only where the statute is of doubtful meaning that resort can be had to elements beyond the words of the statute.[11]

7. *Id.* at 243. In support of this position, the majority opinion refers to a Comment, 28 TUL. L. REV. 288, 289 (1954), wherein the writer concludes that the fact that the language in question was deleted from the original bill "seems to indicate a liberal attitude on the part of the legislature regarding the *signature of the testator and of the attesting witnesses.*" (Emphasis added.) While there is no doubt that the purpose of the 1952 legislation was to adopt a form of a will free of the many technicalities connected with the making of the nuncupative wills provided for by the Civil Code, yet because of the comparatively few requirements imposed by the new form, it should not be too difficult for a qualified notary to properly observe and comply with these requirements.

8. As a matter of fact the entire bill was amended in the Senate before final passage, after it had been approved in the House in its original form.

9. "If the legislature intended the words 'sign' to include a testator's mark as well as his signature, then it also must have intended to allow the witness and the notary to 'sign' by means of a mark. The statute itself indicates on its face that this was not the desired result, because subsection (3)(a) of Section 2442 requires the will to end with a declaration that it was 'subscribed' by the witnesses and the notary in the presence of each other and of the testator. . . ." Succession of Butler, 152 So. 2d 239, 243-44 (La. App. 4th Cir. 1963).

10. LA. CIVIL CODE art. 14 (1870).

11. LA. CIVIL CODE art. 13 (1870): "When a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit."

LA. CIVIL CODE art. 14 (1870): "The words of law are generally to be understood in their most usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the words."

LA. CIVIL CODE art. 16 (1870): "When the words are dubious, their meaning may be sought by examining *the context* with which the ambiguous words, phrases and sentences may be compared, in order to ascertain their true meaning." (Emphasis added.)

LA. CIVIL CODE art. 18 (1870): "The universal and most effectual way of discovering the true meaning of a law, *when its expressions are dubious*, is by considering the reason and spirit of it, or the cause which induced the Legislature to enact it." (Emphasis added.)

The terms "sign" and "signature" ordinarily and usually connote the writing of the name of the signer and not his "X" mark which, when it is affixed, ordinarily signifies that he could not "sign" by conventional signature or did not know how to write his name.[12] As pointed out by the dissenting judge, the statute "is impregnated with the view that the testator must be able to read and at least write his name,"[13] and that to hold that an "X" mark is sufficient to satisfy the requirement of signature in a statutory testament not only does violence to the clear and unmistakable language of the statute, but also opens the door to the perpetration of fraud.[14] Significantly, no reference is made in the opinion to *Succession of Guidry*[15] wherein the same circuit court of appeal held that the cross mark of the testator appearing on a nuncupative testament by public act did not satisfy the requirement of signature, even though it was the ordinary method by which decedent customarily signed documents and business papers,[16] and that it was error on the part of the trial judge to admit evidence tending to establish that the mark was actually the signature of the testator.[17]

In *Succession of McLellan*[18] the testator bequeathed to the surviving spouse (1) the usufruct of all his property and (2) the disposable portion of his estate which consisted, apparently, solely of his one-half interest in the community of acquets formerly existing between him and his surviving widow. Two of testator's children by a previous marriage brought suit against the widow to reduce the disposition in favor of the widow insofar

12. That this was the concept of the notary who drafted this testament is evident from the recital contained in the instrument that the testatrix made her cross mark *instead* of her signature. See *supra* note 3.

"All that relates to this kind of servitude is determined by laws or particular regulations."

13. Succession of Butler, 152 So. 2d 239, 243 (La. App. 4th Cir. 1963).

14. "If the majority opinion is allowed to stand, the likelihood that forged testaments will be probated is greatly increased because of the virtual impossibility of properly identifying a mere mark or scratch as that of the testator." *Id.* at 244.

15. 145 So. 2d 613 (La. App. 4th Cir. 1962), *cert. den.*, 1963.

16. "The contention of appellees that the cross or X mark appearing on the will in question satisfies the requirement of signature because it constitutes the ordinary signature or method by which decedent customarily signed documents and business papers and thereby eliminated the necessity of expressly mentioning the reason for testatrix's failure to sign by conventional signature, is clearly without foundation under the laws of this state." *Id.* at 616.

17. "It also follows that the learned trial court erred . . . in admitting evidence over appellants' objection to establish that the cross or X mark appearing on the testament in question was the signature of the alleged testatrix."

18. 144 So. 2d 291 (La. App. 4th Cir. 1962).

as it impinged upon their legitime, specifically praying to be recognized as owners of their proportionate share of their forced portion free of the usufruct in favor of the widow. The court of appeal, relying on article 1752 of the Civil Code[19] which has to do with donations between husband and wife, affirmed the lower court's judgment in favor of the plaintiffs, holding that under the express provisions of that article, the widow was entitled either to the "usufruct of the property or the disposable portion in naked ownership" but not to both.[20] A third child of the testator, issue of the latter's marriage with his widow, also received his proportionate share of the legitime, but as to him, the disposition of the usufruct thereon in favor of the widow was not disturbed.[21]

Under article 1746[22] of the Civil Code, one of the spouses may give to the other all that he or she may give to a stranger. To this general rule, however, several exceptions were made which more or less restricted the spouses' power of alienation by establishing a fixed disposable portion in certain situations. For example, under article 1752 as originally enacted, a person who contracted a second marriage having children by a former marriage could give to his spouse only the usufruct of a child's share, which could in no case exceed one-fifth of the donor's estate.[23] In 1882 the quantum was increased to one-third of the donor's property, which could be given either in full ownership or in usufruct.[24] In such cases, therefore, instead

19. LA. CIVIL CODE art. 1752 (1870), as amended, La. Acts 1916, No. 116: "A man or a woman who contracts a second marriage, having a child or children by a former marriage, can give to his wife, or she to her husband, either by donation inter vivos or by last will and testament, in full property or in usufruct, all of that portion of his estate, or her estate, as the case may be that he or she could legally give to a stranger."

20. "Therefore, the defendant herein is entitled to the usufruct of the property or the disposable portion in naked ownership, but not both." Succession of McLellan, 144 So. 2d 291, 295 (La. App. 4th Cir. 1962).

21. As to this child, his legitime would be burdened with a usufruct in favor of the surviving spouse anyhow. LA. CIVIL CODE art. 916 (1870); Succession of Moore, 40 La. Ann. 531, 4 So. 460 (1888); Winsberg v. Winsberg, 233 La. 67, 96 So. 2d 44 (1957).

22. LA. CIVIL CODE art. 1746 (1870): "One of the married couple may, either by marriage contract or during the marriage, give to the other, in full property, all that he or she might give to a stranger."

23. LA. CIVIL CODE art. 1752 (1870): "A man or a woman, who contracts a second or subsequent marriage, having children by a former one, can give to his wife, or she to her husband, only the least child's portion, and that only as a usufruct; and in no case shall the portion, of which the donee is to have the usufruct, exceed the fifth part of the donor's estate."

24. LA. CIVIL CODE art. 1752 (1870), as amended, La. Acts 1882, No. 13: "A man or a woman who contracts a second or subsequent marriage, having children by a former one, can give to his wife, or she to her husband either by

of being governed by article 1493 of the Civil Code,[25] the disposable quantum was subject to the limitations of article 1752, so that where the donor or testator having children by a former marriage made a donation in favor of his wife, the donation could, at the option of the children, be reduced to one-third of the donor's property either in full ownership or in usufruct.[26] The 1916 amendment of article 1752 which increased the disposable quantum to the portion which can legally be given to a stranger, has now eliminated the problem in this respect, but only as to the *quantum*. The article still provides that this disposable portion can be given only in "full property or in usufruct."[27] It appears, therefore, that the plaintiffs in this case could have insisted on a reduction of the disposition to the widow to the disposable portion, or to the usufruct on that disposable portion.[28] As it is, the only effect of the judgment is to recognize the forced heirs of the testator as entitled to their legitime free of the usufruct thereon in favor of the widow, which result could have been reached without any difficulty by the simple application of article 1710 of the Civil Code which provides that no charges or conditions can be imposed by the testator on the legitimate portion of the forced heirs.[29]

Two cases, *Succession of Willis*[30] and *Succession of Andrews*,[31] restate the rule of *Cormier v. Myers*[32] that evidence of duress, force, or undue influence is inadmissible for the purpose of invalidating a testament unless present at the making of the will and then only for the purpose of showing mental testamentary incapacity.[33] In each case, the disposition in the

donation or by last will and testament, in full property, or in usufruct, not exceeding one-third of his or her property."

25. LA. CIVIL CODE art. 1493 (1870): "Donations *inter vivos* or *mortis causa* can not exceed two-thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one-half, if he leaves two children; and one-third, if he leaves three or a greater number. . . ."

26. Succession of Braswell, 142 La. 948, 77 So. 886 (1918).

27. LA. CIVIL CODE art. 1752 (1870), as amended, La. Acts 1916, No. 116. LA. CIVIL CODE art. 1754 (1870): "Husbands and wives can not give to each other, indirectly beyond what is permitted by the foregoing dispositions. . . ."

28. Succession of Braswell, 142 La. 948, 77 So. 886 (1918).

29. Since these plaintiffs were not the issue of the marriage between the testator and the surviving spouse, the latter would not, under article 916 of the Civil Code, be legally entitled to the usufruct on the portion inherited by them. Consequently, the burdening of their legitime with a usufruct in favor of the survivor would be a charge prohibited by article 1710.

30. 149 So. 2d 218 (La. App. 2d Cir. 1963), *cert. den.*, 244 La. 132, 150 So. 2d 589 (1963).

31. 153 So. 2d 471 (La. App. 4th Cir. 1963).

32. 233 La. 259, 65 So. 2d 345 (1953).

33. In both cases the court finds that the evidence adduced was insufficient

wills, whereby the nurse who had attended the testator professionally during the illness of which he died was made residuary legatee, were attacked as being contrary to the public policy said to be expressed by article 1489 of the Civil Code, alleging that although not within the letter of the article, a nurse came within the spirit thereof because the article prohibits those who have professionally ministered to the testator during his illness from benefiting by any donations made to them during that sickness by reason of the influence they can exert over the ill. In support of their position, opponents relied on *Cormier v. Myers*,[34] wherein the Supreme Court had indicated that, while the keeper of a boarding house for the aged is not expressly included within the terms of article 1489, he was nevertheless included within the spirit thereof.[35] In both cases the courts of appeal conclude that a registered nurse is not precluded *eo nomine* by the terms of the article from receiving donations made to them by the patient whom they attend, and reject the public policy argument as being unsound, the expressions of the Supreme Court in the *Cormier* case to the contrary notwithstanding, such expressions being *obiter dicta*.[36] Granting that nurses may be in a position to exert the same influence over the sick as doctors and ministers of the gospel, both appellate courts take the position that whether they should be excluded or not is a legislative and not a judicial question.[37]

Succession of Centani[38] was an action to annul a nuncupative will by public act under which the defendant had been sent into possession some nine years previously. The action was based on the fact that the will was dictated in a language under-

to sustain a finding that the testator was mentally incapable at the time of the confection of the testament.

34. 223 La. 259, 65 So. 2d 345 (1953).

35. " 'The public policy of this State, as expressed in Article 1489 . . . prohibits those who attend a sick person, or who wait on them professionally during their last illness, from benefiting by a donation inter vivos, or mortis causa, because of the influence they can exert over the ill. While the keeper of a boarding house for the aged and infirm is not included in this category by letter, the spirit is there.' " *Id.* at 273, 65 So. 2d at 350.

36. Any doubt as to the correctness of this conclusion has been removed by the Supreme Court in its per curiam denying writs in the *Willis* case: ". . . The assertion of the Court of Appeal that statements made in Cormier v. Myers . . . are dicta, is correct." Succession of Willis, 244 La. 132, 150 So. 2d 589 (1963).

37. "As the vocation of nursing has been practiced since the early days of Christianity, the redactors of our civil code obviously did not intend to include nurses under Article 1489. Whether the lawmakers should have also listed nurses because they are in a position to exert the same influence over the ill as doctors is not a judicial question." Succession of Willis, 149 So. 2d 218, 220 (La. App. 2d Cir. 1963).

38. 142 So. 2d 636 (La. App. 4th Cir. 1962).

stood only by one of the witnesses who translated it into English as it was being written by the notary. Reasoning from *Miller v. Miller*,[39] wherein it had been held that although the total failure to read a nuncupative will by private act was a formal defect which would render the will null, an action to declare its nullity could not be instituted after the five-year prescription of article 3542 of the Civil Code had run,[40] the Court of Appeal for the Fourth Circuit holds that while the inability of a necessary witness to a nuncupative will by public act to understand the language in which the testament is written or that in which it is dictated also renders the testament null,[41] the action of nullity prescribes by five years.[42] In *Succession of Pizani*,[43] where the action of nullity was timely instituted, the court held invalid a will executed in the nuncupative form by public act, because of the absence of the recital that the testament had been read back to the testator in the presence of witnesses. In the case of a statutory will, however, the failure to read it aloud does not render it null.[44]

39. 32 La. Ann. 437 (1880).

40. "There can be no doubt that the reading of the nuncupative will by private act is necessary to its validity; but C.C. 1649, in pointing out what proof is required to probate such a will, does not enumerate proof that the will was read. Whether or not this singular divergence between what is required for the validity of the will and the quantum of proof required for the probate renders null a probate made according to the requisites of C.C. 1649, is a question we need not consider, because we think the plaintiff's case, in so far as it attacks for nullity of form, is barred by the prescription of five years, which has been pleaded." *Id.* at 440-41.

41. "The inability of a necessary witness to a nuncupative will by public act to understand either the language in which the will is written or the language in which the same is dictated renders the will null; and such a will is also null where the testator does not understand the language in which the notary wrote and read the will. Debaillon v. Fuselier, 159 La. 1044, 106 So. 559; Lataprie v. Baudot, 152 La. 177, 92 So. 776; Succession of D'Auterive, 39 La. Ann. 1092, 3 So. 341; Gonzales v. Gonzales, 13 La. 104." Succession of Centani, 142 So. 2d 636, 638 (La. App. 4th Cir. 1962).

42. The decision is in accord with prior jurisprudence. See Succession of Semere, 10 La. Ann. 684 (1855) and Succession of Justus, 47 La. Ann. 302, 16 So. 841 (1895) in which an action to annul a will defective as to form because of the failure to state the residence of the witness was held prescribed by 5 years from the date of probate. See also Cox v. Lea's Heirs, 110 La. 1030, 35 So. 275 (1902).

43. 146 So. 2d 16 (La. App. 4th Cir. 1962).

44. 244 La. 203, 151 So. 2d 493 (1963). This question had been raised in, but not adjudicated upon by, the court of appeal when the case was before it. See Succession of Pizani, 148 So. 2d 836 (La. App. 4th Cir. 1963).