

Journal of Civil Law Studies

Volume 5

Number 1 *200 Years of Statehood, 300 Years of Civil*

Law: New Perspectives on Louisiana's Multilingual

Legal Experience

October 2012

Article 17

10-1-2012

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Repository Citation

Daniel Lee, *Malone v. Malone*, 5 J. Civ. L. Stud. (2012)

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***MALONE V. MALONE: STRICT APPLICATION OF
AUTHENTICITY REQUIREMENT OF FORMALITY OF
DONATIONS IN LOUISIANA***

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I. BACKGROUND

WEI, a Louisiana corporation, was a family business with two majority shareholders, Ken and Greg Malone.¹ When their father died in 2007, they each owned 849 shares, while their father owned two shares. His surviving spouse, Doris Malone, succeeded one share as part of her one-half interest in community property. The other share was succeeded by Ken and Greg in the capacity of legatees. Based on a judgment rendered in 2009, Ken and Greg Malone ended up having 849 and half shares each, and Doris had one share.

Later in 2009, Doris purported to execute a donation of her one share equally to Ken and Greg so that they would own 850 shares each. The act of donation was drawn up in the form of a notarial act but was not dated or notarized. It stated that Doris delivered her share to Greg and Ken and they accepted the donation by receiving the property, but it did not indicate whether the certificate of stock was in fact transferred by actual endorsement and delivery.

Greg was the manager of WEI, and Ken was an employee at the sales department of WEI. They had dispute about selling the business of WEI – Ken was for the sale, while Greg was against it. While considering quitting his employment from WEI, Ken requested certain documents from WEI’s attorney, including his mother’s donation of one share to her sons. The attorney warned

* J.D. & Graduate Diploma in Comparative Law, LSU Law Center, 2012. Special thanks to Prof. Olivier Moreteau for his superb revisions and suggestions, to Ms. Jennifer Lane for arranging everything smoothly, to Daniel On, Brian Flanagan and Aster Lee for proofreading and peer editing.

1. 77 So. 3d 1040 (La. App. 2 Cir. 2011).

him that the donation was not notarized and needed to be redone. Besides, it seems that Greg already knew the defect of the act of donation. However, Greg never shared with Ken his knowledge about the problem with the act of donation, so Ken did not have such notice.

On November 18, 2010, shortly before the annual shareholders meeting, Ken filed a derivative action against Greg, in his capacity as a shareholder of WEI. After the filing of the derivative action but before the shareholder's meeting, Doris executed an "irrevocable" proxy allowing Greg to vote any share held by her. On December 14, 2010, a shareholders meeting was held. In the meeting, Greg became the president of WEI and Ken lost his position as an officer. About a week after the meeting, Ken filed three actions to restrain the defendants and enjoin them from making executive decisions, and have the defendants recognize the donation at issue and administer transfer by the donation. The Louisiana Fifth Judicial District Court, Franklin Parish, finding for the defendants, held that the *inter vivos* donation was invalid. The Plaintiff appealed. The Court of Appeal of Louisiana, Second Circuit, confirmed, on the ground that the purported *inter vivos* donation of Doris' share was not in the form of an authentic act, and thus the transfer was not completed.

A donation *inter vivos* is a contract by which the donor divests himself/herself, at present and irrevocably, of a thing in favor of the donee who accepts.² A donation *inter vivos* should be made by authentic act.³ To be an authentic act under art. 1541, the act of donation should be notarized.

LA. CIV. CODE art. 1550 states that the donation of an incorporeal movable of the kind that is evidenced by a certificate may be made by authentic act or by compliance with the requirements otherwise applicable to the transfer of that particular kind of incorporeal movable. In addition, an incorporeal movable

2. LA. CIV. CODE art. 1468.

3. LA. CIV. CODE art. 1541

that is investment property⁴ may also be donated by a writing signed by the donor with donative intent and with direction of the transfer of the property to the donee. A share of a stock is an incorporeal movable in LA. CIV. CODE art. 473, so it may be subject to the application of art. 1550.

When the language of a statute is clear and unambiguous and its application does not render absurd consequences, no further interpretation should be made in search the legislative intent.⁵ If the language is susceptible of different meanings, it must be in conformance with the purpose of the law.⁶ Laws on the same subject matter must be interpreted in reference to each other in order to accomplish the purpose of the laws.⁷

The legislative history of LA. CIV. CODE art. 1550 shows that the legislature added this article as part of its revision of the Civil Code in 2008, but did not change the prior law requiring authentic act for donations incorporeal movables. It rather provided other means of completion of act of donation for incorporeal movables evidenced by a certificate. In addition to the legislative history, the pertinent jurisprudence proves that the formalities of an authentic act in such donation can be waived as long as the shares of stock are transferred pursuant to Louisiana's stock transfer laws.⁸ The Court found that article 1550 codified the jurisprudence.

It is obvious that the donation by Doris was not made by an authentic act or other ways in compliance with the requirements under Louisiana Commercial Laws, LA. REV. STAT. 10:8(101) *et seq.* In addition, there was no evidence of delivery or endorsement of the stock as required under LA. REV. STAT. 10:8(301) or

4. Investment property is as defined in Chapter 9 of the Louisiana Commercial Laws.

5. LA. CIV. CODE art. 9.

6. LA. CIV. CODE art. 10.

7. LA. CIV. CODE art. 13.

8. *Primeaux v. Libersat*, 322 So. 2d 147 (La. 1975); *Champagne v. Champagne*, 992 So. 2d 1071 (La. App. 1st Cir. 2008); *Succession of Payne v. Pigott*, 459 So. 2d 1231 (La. App. 1st Cir. 1984).

10:8(304) for the transfer of securities. Therefore, the donation by Doris was not completed and thus invalid.

Ken argued that the form of the donation instead satisfied the requirements of the second paragraph of LA. CIV. CODE art. 1550. However, the Court disagreed: as explained in Comment (b) of the 2008 Revision Comments of article 1550, the words “for his benefit” are intended “to cover situations when the transfer may not be directly to the donee’s account, but would be used to pay something for his benefit such as paying off debt to a bank for a child.” There was no record indicating that the donation by Doris was made in such purpose.

Moreover, the transfer still did not follow the formality requirements as required by LA. CIV. CODE art. 1550, or other pertinent stock transfer laws. Therefore, no matter how the signed writing described the transfer, the record showed that there was no delivery or endorsement as required by pertinent law and the transfer of one share by Doris was not made in the proper form and thus invalid.

II. COMMENTARY

This case emphasizes the formal requirement of donation *inter vivos* in Louisiana. Several Louisiana Civil Code articles show that the laws regarding act of donation *inter vivos* consistently require the necessity of forms by an authentic act.

Notarization is essential part of authentic act in regulating the formality of donation *inter vivos*. Notarization is generally done only by registered notary. Unless formally notarized as required by Louisiana Civil Code, an act of donation was invalid due to the lack of required formality. This is the case even when it satisfies other requirements such as signature by donor, signature by donee, and signature by two witnesses. The formality requirements for a donation must be strictly followed, since it is described explicit and clear enough in the Civil Code.

Moreover, even when the property which is being donated is subject to the rules of other pertinent law (e.g. stocks are subject to the laws regulating the transactions of stocks), the procedure of the donation itself must be made and evidenced in accordance with the formalities requirements of the donation under the Civil Code. In the instant case, the transfer of the property, one share of stock which had been owned by Doris Malone, was not evidenced to be transferred to Ken and Greg Malone. Thus the act of donation was in conformance neither with requirements under Louisiana Civil Code Articles nor with the requirements under pertinent part of Louisiana commercial law.

This case is a good example how the Louisiana's civil law on notary public is different from other civil law traditions. In Louisiana, basically any person can be appointed a notary public if he or she passes a written examination administered by the Secretary of the state of Louisiana.⁹ The licensed Louisiana attorneys are exempted from the examination requirement, so any attorney licensed to practice law in Louisiana may notarize any documents without further requirements.¹⁰

Notaries have broader powers in Louisiana than in other states. Unlike notaries in the other 49 states in the United States, Louisiana notaries may perform unique *civil law* notarial works. For example, notaries in Louisiana can perform many notarial acts which usually associate only with attorneys in other states, except legal representation.¹¹ However, their "advice" must be limited to purely *notarial* ones, since they are not allowed to give any legal advice to their clients.

A "notary" in a civil law country other than Louisiana is quite different in the scope of its roles. In a civil law country such as France, Italy, Spain, Germany, Mexico or South Korea, all notaries

9. LA. REV. STAT. 35:191.

10. *Id.*

11. Professional Civil Law Notary Association (<http://www.pclna.org/notaryinfo.html>).

are “public officials” who received educations as thoroughly as attorneys and judges.¹² Notaries are bound to *advise* the contracting parties before them, including diligent inquiries into the identity and legal capacity of the parties and legal consequences of their acts.¹³ If, either negligently or intentionally, a notary omits or misrepresents such advice, he or she is subject to disciplinary proceedings and to civil liability for malpractice.¹⁴

For example, in South Korea, all notaries are appointed, authorized and employed by the national government.¹⁵ Only attorneys, prosecutors, or judges may apply for the position of notary public. The notaries are subject to very intense supervision of district attorneys. Most importantly, the notaries, who are already attorneys, are obliged to give legal advice to the full extent to their clients, even if the clients did not ask for. Since nearly all business transactions and real property transactions use notarial services for its authentic authorization, the roles of notaries in Korea are fairly broad enough to overlap the roles of ordinary legal practices in those transactions.

If the instant case took place in other civil law countries, the notary who notarized the donation at issue would have informed the parties about the deficiency of required formality, or, at least, advise them the potential consequences the notarized act would encounter. Otherwise, the notary would be subject to a claim for malpractice. For these reasons, the troubling defects of form in the present case would have been prevented or remedied. While it is true that Louisiana recognizes broader scope of the role of notary public than other common law states, it is also distinguishable from other civil law traditions as well, not offering equivalent quality standards.

12. RUDOLPH SCHLESINGER ET AL., *COMPARATIVE LAW* 144-153, (7th ed., Foundation Press, 2009).

13. *Id.*

14. *Id.*

15. Korean Ethnicity and Culture Encyclopedia, Korean Laws and Administrations: “Notaries and Notarized Acts”, 現代行政法論, 1996.