Louisiana Law Review

Volume 20 | Number 3
April 1960

Donations Mortis Causa - Requirement of "Ability to Read" Under New Wills Act

Hugh T. Ward

should adopt a rule similar to that proposed by the American Law Institute which would require a "rational basis"[25] to appear in the evidence in support of any verdict upon which the jury is to be instructed.

J. C. Parkerson

DONATIONS MORTIS CAUSA — REQUIREMENT OF "ABILITY TO READ" UNDER NEW WILLS ACT

Decedent's niece petitioned for the probate of her aunt's last will and testament which had been confected under the provisions of the new wills act.[1] Other collateral relatives of decedent opposed probate of the will, contending that the decedent was unable to read at the time the will was confected as required by the statute.[2] The proponents offered the testimony of eight witnesses in their attempt to prove that the testatrix was able to read.[3] The lower court held the will to be null because the pro-

25. ALI MODEL PENAL CODE § 1.08(5), Tentative Draft No. 5 (1956). "The court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." *Id.* at 30. The comment which follows this section states that: "Subsection (5) states that the court shall instruct the jury with respect to included offenses only in cases where the evidence makes it appropriate to do so. Where the proof goes to the higher inclusive offense and would not justify any other verdict except a conviction of that offense or an acquittal, it would be improper to instruct the jury with respect to included offenses. Instructions with respect to included offenses in such cases might well be an invitation to the jury to return a compromise or otherwise unwarranted verdict." *Id.* at 42.

1. La. Acts 1952, No. 66, incorporated as LA. R.S. 9:2442-2444 (Supp. 1958).

2. Four witnesses were called by the opponents. Two of these witnesses, who had been rather close associates of the decedent, testified that they had assisted her in such things as making change, reading menus, paying bills, and making telephone calls. These witnesses were unrelated to any of the parties and were apparently completely disinterested.

The other two witnesses were related to the testatrix and would have shared in her estate had she been held to have died intestate. One of these witnesses unequivocally stated that he knew that the decedent could not read.

3. Three of these witnesses were related to the deceased and were named legatees under the will. Their testimony consisted generally of their observations of the testatrix reading the paper.

The attorney before whom the will was executed and who was appearing for the proponents in the case also testified. He stated that he had left a draft of an olographic will with the decedent the day before the confection of the statutory instrument for her to copy. The draft had been in "large lettering." This witness further testified that he had asked the decedent whether she could read and had received an affirmative answer.

A sister of one of the legatees under the statutory will testified that she had seen the decedent copying from the draft of the olographic will left with her by the attorney.

One of the witnesses to the confection of the will stated that the attorney had read the will aloud and that the testatrix was also reading it aloud at the time. This witness was a client of the attorney before whom the will was executed.

The wife of the attorney was another witness to the confection of the will and

ponents had failed to carry the burden of proving that the decedent could read at the time the will was confected. On appeal, *held*, reversed. A decision as to which party had the burden of proving the ability of the testatrix to read is unnecessary since the proponents have assumed and sustained that burden. *Succession of Thibodeaux*, 116 So.2d 525 (La. 1959).

Under the Louisiana Civil Code testaments disposing of property mortis causa may take any of four forms, i.e., nuncupative by public act,[4] nuncupative under private signature,[5] mystic,[6] and olographic.[7] A few illustrations of some of the formalities required in the confection of these testaments will make clearer the simplicity which characterizes the new wills act. The nuncupative will by public act must be dictated to a notary and read back to the testator in the presence of three witnesses residing in the place[8] where the will is executed, or five witnesses not so residing.[9] This procedure must be completed without interruption.[10] The nuncupative will under private signature may be written by the testator or dictated to another in the presence of five witnesses residing in the place where the will is executed or seven witnesses not so residing.[11] This type of will may also be confected by the testator's presentation of the instrument which has previously been written to the same number of witnesses, accompanied by a declaration that it is his last will.[12] In either case the nuncupative will under private signature must be read in the presence of the testator and the witnesses by the testator or one of the witnesses.[13] The mystic will is confected by the testator's

testified that the decedent read the will along with the attorney *or* followed him as he read. She further stated that the decedent signed the will in the presence of the attorney and both witnesses.

A handwriting expert advanced his opinion that the body of the olographic will which was purportedly copied from the draft left with the decedent by the attorney had been copied by the decedent.

4. LA. CIVIL CODE art. 1578 (1870).

5. *Id.* art. 1581.

6. *Id.* art. 1584.

7. *Id.* art. 1588.

8. *Id.* art. 1594 explains "in the place" to mean the parish where the will is confected.

9. *Id.* art. 1578.

10. *Ibid.* Under Article 1579 the testator must sign the instrument unless he does not know how or is not able; in which case express mention of his failure to sign and the reasons therefor must be contained in the testament. Under Article 1580 the will must be signed by all the witnesses if all can write, or at least by one of them for all if the others cannot write.

11. *Id.* art. 1581. Under the provisions of Article 1583, if the will is confected in the country, three witnesses residing in the place, or five without will suffice, if more witnesses cannot be obtained.

12. *Id.* art. 1581.

13. *Id.* art. 1582. This instrument must be signed by the testator if he knows

presentation of the instrument to a notary and three witnesses. To preserve secrecy the instrument may be sealed prior to presentation or in the presence of the notary and witnesses.[14] This form of testament may not be used by those who cannot write and those who cannot sign their names.[15] The only formal requirements of an olographic will are that it be entirely written, dated, and signed by the hand of the testator.[16]

In 1952 the Louisiana Legislature adopted the new wills act.[17] Apparently, the purpose of this legislation was to provide a method of disposing of property mortis causa without many of the technicalities connected with those methods provided by the Civil Code. Under this act the will may be written in any manner[18] and must be signed by the testator in the presence of a notary and two witnesses. The testator must sign each page of the will and the notary and witnesses must also sign at the end of the will below an attestation stating that the formal requirements have been met.[19] Another requirement of the statute is that the testator must have the ability to read.[20] It can readily be seen that the formal requirements of the new wills act are much less demanding than those forms provided for in the Civil Code, with the possible exception of the olographic form. Three reported cases in addition to the instant case have been decided under the new wills act. In *Succession of Pope*,[21] the will was held invalid because of a violation of the requirement that the notary, witnesses, and testator sign the instrument in the presence of each other.[22] *Succession of Eck*[23] involved a will with a

how or is able, and by at least two of the witnesses if the others do not know how. Those who do not know how to sign must affix their mark.

14. *Id.* art. 1584.

15. *Id.* art. 1586.

16. *Id.* art. 1588.

17. La. Acts 1952, No. 66, incorporated as LA. R.S. 9:2442-2444 (Supp. 1958).

18. "[A] will shall be valid if in writing (whether typewritten, printed, mimeographed, or written in any other manner)." La. Acts 1952, No. 66, § 1, incorporated as LA. R.S. 9:2442 (Supp. 1958).

19. "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 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. Acts 1952, No. 66, § 1, incorporated as LA. R.S. 9:2442 (Supp. 1958).

20. *Id.* 9:2443. It is interesting to note that the act, when presented to the legislature, contained the requirement that "those who know not how or are not able 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." The requirement as to the ability of the testator to write was deleted before passage of the act. See Comment, 28 TUL. L. REV. 288, 289 (1954).

21. 230 La. 1049, 89 So.2d 894 (1956).

22. "In the presence of the notary and both witnesses the testator . . . shall

double attestation clause with the signature of the testator after the first and the signature of the notary and witnesses after the second of the clauses. The opponents of the will argued that the statutory requirement that the attestation clause be above the signature of the notary, witnesses, and *testator* at the end of the will had been violated.[24] Noting that the purpose of the requirement that the will be signed at the end was to prevent fraudulent additions thereto, the court determined that the *end* of the will meant that place where the dispositive provisions ended and therefore did not include the second of the attestation clauses below which only the signature of the notary and witnesses appeared.[25] The court further pointed out that the requirement that the testator, notary, and witnesses sign below the attestation clause had been met since the testator had signed below the first such clause and the notary and witnesses below the second. The *Eck* decision also stands for the proposition that the competency of witnesses to a will under the new wills act is to be determined by the provisions on that subject in the Civil Code. In *Succession of Nourse*[26] the testator's signature appeared only once on each page of the instrument. The validity of the will was attacked on the theory that the statute required the testator to sign on each separate sheet of the instrument and *also* sign the attestation clause at the end of the will.[27] In disposing of this argument the court held that the signature of the testator fulfilled the formal requirements of the statute.

The court in the instant case was faced with the problem of applying the statutory requirement that the testator have the ability to read in order to confect a will under the new wills act. The lower court had found that the proponents had not sustained the burden of proving that the testatrix could read at the time the will was confected. Although the Supreme Court declined the opportunity to decide which party had the burden of proof under the circumstances, it reversed the lower court's decision, finding

sign each separate sheet of the instrument. 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." La. Acts 1952, No. 66, § 1, incorporated as LA. R.S. 9:2442 (Supp. 1958).

23. 233 La. 764, 98 So.2d 181 (1957).
24. See note 19 *supra*.
25. See Note, 32 TUL. L. REV. 521 (1958).
26. 234 La. 691, 101 So.2d 204 (1958).
27. See note 19 *supra*.

that the proponents of the will had assumed and carried the burden of proving the ability of the testatrix to read. Under the evidence adduced upon the trial of the case it appears that the court might well have affirmed the lower court's decision that the testatrix did not have the ability to read at the time the will was confected.[28] In view of the fact that the Supreme Court will usually accept a lower court's findings on questions of fact where the credibility of witnesses is involved,[29] the instant decision may be indicative of a liberal attitude toward the statutory requirement that a testator have the ability to read in order to make use of the new wills act.

Since the comparatively few formal requirements imposed by the new wills act are devised to prevent fraudulent practices, it appears that they should be rigidly enforced. However, when there is no indication of fraud, such as in the instant case, it is felt that the court may properly take a more liberal attitude as to the weight of conflicting evidence in construing the formal requirements of a testament.

Hugh T. Ward

FEDERAL JURISDICTION — DOCTRINE OF EQUITABLE ABSTENTION APPLIED TO CIVIL RIGHTS CASE

Declaratory and injunctive relief were sought in a three-judge federal district court[1] convened to hear constitutional challenges to five Virginia segregation laws.[2] Federal jurisdiction was

28. See notes 2 and 3 *supra.*

29. See, e.g., Orlando v. Polito, 228 La. 846, 84 So.2d 433 (1955).

1. 28 U.S.C. § 2281 (1952) provides that the following factors will necessitate the convening of a three-judge court: (1) injunctive relief must be requested; (2) plaintiff must ask that state officers be restrained from enforcing a state statute or an order of a state administrative agency; (3) the contention must be made that the statute or order violates the Federal Constitution. The fact that a three-judge court always sits as a court of equity has enabled the doctrines of equitable discretions to enter the picture. See MOORE, COMMENTARY ON THE JUDICIAL CODE 51-54 (1949); Comment, 19 LOUISIANA LAW REVIEW 813 (1959).

2. 4 VA. CODE §§ 18-349.9—18-349.37 (Supp. 1958); 7 VA. CODE §§ 54-74, 54-78, 54-79 (1958).

3. 28 U.S.C. § 1343 (1952): "*Civil Rights and Elective Franchise*

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person;

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United Staes, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

"(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;