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Carlos E. Lazarus

SUCCESSIONS AND DONATIONS

*Carlos E. Lazarus**

DONATIONS INTER VIVOS: FORMAL REQUIREMENTS—ONEROUS AND REMUNERATIVE DONATIONS

In addition to the purely gratuitous donation inter vivos, articles 1523-25 of the Louisiana Civil Code also contemplate the making of gratuitous dispositions which either impose charges on the recipient or compensate him for services rendered. These are denominated onerous and remunerative donations, respectively. But these articles also provide that these dispositions do not constitute *real donations* if the value of the thing given does not *manifestly* exceed the value of the charge imposed or if the value of the service to be compensated, appreciable in money, is *little inferior* to the value of the gift, and that consequently, in such cases, the "rules peculiar to donations" do not apply.[1] These articles were the basis for the decision in *Succession of Danos*,[2] in which the succession representative sought to obtain certain bank certificates of deposit from the defendant, who alleged that the certificates had been given to her by the deceased for services she had performed for him. Having determined that the aggregate value of the certificates ($26,091.97) greatly exceeded (by one-half) the value of the services ($12,110), the First Circuit Court of Appeal, although declaring that the "trial judge was correct in holding that it was a remunerative donation," must have

*Professor of Law, Louisiana State University.

1. The necessary implication is that these dispositions are in reality commutative contracts in which the onerous character of the contract prevails, there being no *animus donandi* on the part of the donor. This is particularly true of a disposition made in compensation for services which constitutes a veritable *dation en paiement* in which the services rendered have a monetary value (article 1525 says "appreciated in money") for which the donee would have the legal right to enforce payment. Otherwise, the disposition would constitute a simple donation, unless the donor had acknowledged himself as debtor by virtue of the natural obligation created by the services. *See* Succession of Henry, 158 La. 516, 104 So. 310 (1925).

In the opinion of the writer, although the question whether the value of the gift *manifestly* exceeds the value of the charges or whether the value of the services is *little inferior* to the value of the gift appears, by the language used in articles 1524 and 1525, to be relative to the values involved and is to be determined in each case as any other question of fact, article 1526 fixes a mathematical formula which apparently allows the court to reach a determination of the issue as a matter of law. Thus, where the value of the gift exceeds by one-half the value of the charge imposed or the value of the service to be compensated, and in which the disposition partakes of both a commutative and a gratuitous contract, the gratuitous character of the contract prevails and it is therefore subject to the rules of donations.

2. 359 So. 2d 679 (La. App. 1st Cir.), *cert. denied*, 362 So. 2d 577 (La. 1978).

determined that the disposition was purely gratuitous because it affirmed the trial court's judgment declaring it null for lack of form.[3]

TESTAMENTARY DISPOSITIONS: FORMAL REQUIREMENTS—CAPACITY

In *Succession of Kite*,[4] the surviving children of the deceased brought an action to annul the probated statutory will of the deceased, alleging that the testator did not know how to read and that, therefore, the will was invalid.[5] In affirming the lower court's judgment declaring the will invalid, the appellate court noted that although the evidence adduced by the defendant-proponent tended to show that the testator could identify numbers in a telephone directory and further established that the testator could sign his name, the defendant had absolutely failed to produce any evidence establishing the testator's ability to read.[6]

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3. Article 1536 provides that donations of incorporeal rights must be made by an act passed before a notary public and two witnesses.

A similar question was presented to the Second Circuit Court of Appeal in *Burkes v. Barbour*, 364 So. 2d 1059 (La. App. 2d Cir. 1978), in which the deceased, by an act under private signature, had assigned his shares in a savings and loan association to the defendant and had added the name of the defendant to the savings account book and in the records of the association; the attempted donation was declared null for noncompliance with article 1536 of the Civil Code. The court also held that the disposition could not have been characterized as a remunerative donation because the services alleged to have been performed by the defendant had been already fully compensated in cash.

An identical question was presented to, and an identical result reached by, the Fourth Circuit Court of Appeal in *Succession of Palermo*, 359 So. 2d 1040 (La. App. 4th Cir. 1978), which involved bank savings and checking accounts and savings accounts in building and loan associations alleged to have been donated by the delivery of the passbooks and other documents of title.

4. 366 So. 2d 602 (La. App. 3d Cir. 1978).

5. LA. R.S. 9:2443 (Supp. 1952), *as amended by* 1964 La. Acts No. 123, provides in pertinent part: "[T]hose who know not how or are not able to read, cannot make dispositions in the form of the will provided for in Revised Statutes 9:2442, nor be attesting witnesses thereto." Insofar as applicable to the capacity of the testator, this provision would not prevent a person who is unable to read from making a valid statutory will if confected pursuant to Act 333 of 1976, which amended Revised Statutes 9:2442 to provide the method for and the formalities to be observed in the confection of the testament when the testator is blind or is unable to read. *See The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Successions and Donations*, 37 LA. L. REV. 421 (1977).

6. Although it should be observed that the testimony on behalf of the plaintiffs appeared to preponderate in favor of the testator's complete illiteracy, it appears that the court was more concerned with the inability of the defendant to establish the capacity of the testator than with the ability of the plaintiffs to prove the incapacity of the deceased at the time of the making of the will. It is true that article 2932 of the Code of Civil Procedure ordains that if the action to annul a probated testament is instituted within three months from the date of probate, as was the case here, the defendant has the burden of proving the *authenticity* of the testament and its *validity as to*

A nuncupative will by private act was declared null in *Succession of Roussel*[7] for non-compliance with the formalities required by articles 1581 and 1594 of the Civil Code.[8] The will had been dictated by the testator to a notary in Vacherie, Louisiana, a community situated partly in St. James Parish and partly in the parish of St. John the Baptist. Of the six Vacherie residents who had witnessed the will,[9] four resided in the St. James side of the town and two in the St. John the Baptist side.[10] Adhering strictly to the provisions of the above cited articles of the Code, the Louisiana Supreme Court, thus determining that there were only four qualified witnesses residing in the parish where the will was executed, declared it an absolute nullity under article 1595.

There were at least four cases during this term in which the requirements of article 1588 of the Civil Code were invoked. In *Succession of Posey*,[11] the trial judge refused to admit to probate a hand-printed document as an olographic will because it had not been written and signed in longhand. In affirming, however, the appellate court based its decision on the grounds that the proponent had failed to produce the two credible witnesses required by article 2883 of the Code of Civil Procedure to prove that the document had been written by the deceased. Hence, it found it unnecessary to resolve the other issue.[12]

In *Succession of Montero*,[13] the Fourth Circuit Court of Appeal,

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form; nevertheless, it is the plaintiff in nullity who bears the burden of proving the incompetency of the deceased at the time of the confection of the will. Lewis v. DeJean, 251 So. 2d 124 (La. App. 3d Cir.), *cert. denied*, 259 La. 879, 253 So. 2d 215 (1971). This issue was presented this term in the Fourth Circuit Court of Appeal in *Succession of Zinsel*, 360 So. 2d 587 (La. App. 4th Cir. 1978), in which a judgment dismissing a petition to annul a statutory will was affirmed, the plaintiff having failed to discharge his burden of establishing lack of testamentary capacity.

7. 373 So. 2d 155 (La. 1979).

8. These articles require that the testament be executed in the presence of five witnesses residing *in the place, i.e., in the parish*, in which the will is received.

9. The report of the case does not indicate whether the six subscribing witnesses were in addition to the notary to whom the will appears to have been dictated, or whether the notary was counted as one of the six. Nor does it indicate why the testament was not initially offered for execution as a nuncupative will by public act, without probate.

10. This was a determination of fact made from the evidence presented, which was contrary to the determination made by the Fourth Circuit Court of Appeal. *See* Succession of Roussel, 365 So. 2d 908 (La. App. 4th Cir. 1978).

11. 367 So. 2d 1243 (La. App. 3d Cir. 1979).

12. It is suggested that a document, whether hand-printed or written in longhand, meets the "entirely written" requirement of article 1588 of the Civil Code. *Cf.* Prudhomme v. Savant, 150 La. 526, 90 So. 640 (1921) (admitting to probate a typewritten document as a nuncupative will by public act).

13. 365 So. 2d 929 (La. App. 4th Cir. 1978).

on the authority of *Succession of Boyd*,[14] properly upheld the validity of an olographic will dated "5/29/74," the evidence showing beyond dispute that it had been written on May 29, 1974, while the testator was awaiting surgery. *Succession of White*,[15] on the other hand, presented a more delicate question. The district judge denied the probate of a purported olographic will bearing only the month and day "November 15" because, without a year or suggested year in the hand of the testator, there was no date at all (as distinguished from an ambiguous date). Therefore, it failed to conform to the requirements for the olographic will. Also relying on *Boyd*, the Second Circuit Court of Appeal reversed, taking the position that the document indeed had a date, although an incomplete one, and remanded the case for the purpose of admitting extrinsic evidence to resolve the ambiguity.[16]

In *Succession of Burke*,[17] the questioned document was a printed form—designed for a statutory will—that the deceased had completed by filling in the blanks in his own hand.[18] In affirming the

14. 306 So. 2d 687 (La. 1975).

15. 367 So. 2d 161 (La. App. 4th Cir. 1979).

16. This is indeed a departure from the position taken by the Louisiana Supreme Court in *Succession of Lefort*, 139 La. 51, 71 So. 215 (1916), and in *Succession of Boyd*, 306 So. 2d 687 (La. 1975). In *Lefort*, the court stated:

> There is a physical difference between a document without a date and one with an uncertain date. There is a legal difference between supplying a missing date, or any part of it, by facts outside the will, and establishing certainty concerning an ambiguity, or uncertainty, or doubt in an existing date. The former cannot be done because it is of the essence of the validity of a will that it be dated "by the hand of the testator" (C.C. 1588, [1581]), and it cannot be "dated" in any other way . . . .

139 La. at 78, 71 So. at 235. And in *Succession of Boyd*, after quoting the above passage, Justice Dixon continued:

> The approach used in the Succession of Lefort . . . is supported by reason, and comes much closer to accomplishing the public policy of the State. . . . There is a physical difference, said the court in *Lefort*, between a document without a date and one with an uncertain date. An absent date cannot be supplied, for it must come from the hand of the testator. An ambiguous date is an entirely different matter . . . .

306 So. 2d at 692. The writer submits that the decision of the trial court was correct. A "date" that lacks any of its component parts (the day, month, and year) or a date in which the component parts are unclear or ambiguous and cannot be reasonably ascertained by other admissible evidence constitutes no date at all. It is unfortunate that the supreme court was not given the opportunity to pass upon this very important issue.

17. 365 So. 2d 858 (La. App. 4th Cir. 1978).

18. The hand-written portions of the document were the date "Jan. 15, 1961" and the words "to my sister Delia (Mrs. M. J. Derbes); my interest in property at 6315 West End Blvd.—Also whatever Bank Balance I have in the Whitney National Bank, City Branch Bank—and Insurance as covered by Policy of F. F. Hansell & Bro. Ltd. To be shared equally with my other sister Mrs. C. A. Schreiner." *Id.* at 859.

decision of the trial judge to admit the document to probate as an olographic will, the Fourth Circuit Court of Appeal noted that although the printed form contained many words that had to be disregarded, the necessary *animus testandi* was unmistakably present in the words written by the deceased which were in themselves sufficient "to provide the essential formalities for an olographic will."[19]

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19. *Id.* at 860. The writer is in agreement that the presence of extraneous printed matter, such as might appear in letterheads or business stationery, should not affect the validity of an otherwise valid olographic testament. Succession of Heineman, 172 La. 1057, 136 So. 51 (1931); Jones v. Kyle, 168 La. 728, 123 So. 306 (1929). The same may be said of words appearing on printed forms such as those considered in the *Burke* case. But the rationale of these cases should not be unduly extended. Although article 1589 of the Civil Code provides that words added by another are considered not written, it is obvious that it has reference only to words added by another *without the consent or approval* of the testator. If it were not so, it would be within the power of anyone to frustrate the will of the testator by simply inserting additional words therein. If, however, the words are added by another with the consent of the testator, it is evident that the testament will not have been confected by the testator *entirely by his own hand*; and it would, for that very reason, be invalid. *See* Succession of Walsh, 116 La. 185, 117 So. 777 (1928).