SUCCESSION OF
RAYMOND ROY GENDRON (SR.)

NO. 21-CA-14

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE FORTIETH JUDICIAL DISTRICT COURT
PARISH OF ST. JOHN THE BAPTIST, STATE OF LOUISIANA
NO. 70,11, DIVISION "A"
HONORABLE MADELINE JASMINE, JUDGE PRESIDING

June 23, 2021

SUSAN M. CHEHARDY
CHIEF JUDGE

Panel composed of Judges Susan M. Chehardy,
Fredericka Homberg Wicker, and Jude G. Gravois

AFFIRMED.

SMC
FHW
JGG

COUNSEL FOR INTERVENOR/APPELLANT,
KAREN GENDRON, MARIA GENDRON LAMBERT, TRACEY GENDRON BOYLE, RAYE CLAIRE GENDRON, AND JUDY GENDRON KLINE

Robert R. Faucheux, Jr.
Christophe L. Faucheux
Isaac H. Ryan

COUNSEL FOR DEFENDANT/APPELLEE,
RAYMOND GENDRON, JR.

Michael A. McNulty, Jr.
Charles R. Jones

CHEHARDY, C.J.

In this succession proceeding, intervenors seek review of the trial court's February 22, 2019 judgment dismissing their claims after finding that they failed to carry their burden of proving the invalidity of the probated olographic testament by a preponderance of the evidence. For the following reasons, we affirm the trial court's judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Raymond Roy Gendron, Sr. ("Decedent" or "Mr. Gendron") died on June 5, 2015. At the time of his death, Decedent was living with and was married to Josephine Catalano Gendron, his wife of approximately 60 years. Of their marriage, six children were born: Karen Gendron, Maria G. Lambert, Tracey G. Boyle, Raye Claire Gendron, Judy G. Kline (collectively "the Gendron sisters," intervenors herein), and Raymond Gendron, Jr. ("Raymond, Jr.," defendant).[1]

On June 18, 2015, Mrs. Gendron filed a petition for probate of Decedent's last will and testament (the "Testament") in the Fortieth Judicial District Court for the Parish St. John the Baptist. Mrs. Gendron presented the Testament for probate, dated June 10, 1986, in olographic form, together with the requisite affidavit establishing that the Testament—written entirely in cursive—was wholly written, dated and signed in Decedent's handwriting. The affidavit supporting probate of the Testament was attested to by both Mrs. Gendron and Raymond, Jr.

In the Testament, which named Mrs. Gendron as executrix, Decedent bequeathed "to [his] wife the disposable portion of [his] estate," "the lifetime usufruct of the remainder of [his] estate," and directed the forced portion "under the Laws of this state" to go to his children. Letters testamentary were issued to Mrs. Gendron on June 23, 2015. After a brief administration by Mrs. Gendron as executrix of Decedent's estate, she filed a petition for possession on December 29,

[1] Decedent and Mrs. Gendron never adopted anyone, and he had no other children.

2015. A judgment of possession was signed on January 4, 2016, placing Mrs. Gendron in possession of the entirety of Decedent's estate, for at the time of Decedent's death, none of his surviving children qualified as forced heirs "under the Laws of this state." Shortly thereafter, Mrs. Gendron died on May 12, 2016.[2]

On July 7, 2016—over one year after their father's death, six months after his olographic Testament had been probated, and after their mother's death—the Gendron sisters intervened in the Succession of Mr. Gendron, Sr., contesting the validity of Decedent's probated Testament, by filing a "Petition to Reopen Succession and Recover Decedent's Funds and Petition to Annul the Decedent's Probated Testament." In their petition, the Gendron sisters challenged the authenticity of the probated Testament on the basis that it was a forgery and not entirely written, dated, and signed by Decedent. The Gendron sisters alleged that they were each familiar with their father's handwriting and that the June 10, 1986 Testament was incompatible with numerous handwriting samples in their possession known by them to have been written by their father. Thus, the Gendron sisters averred that the probated Testament was invalid as it was not entirely written, dated and signed by their father. Consequently, the Gendron sisters urged that their father died intestate, entitling them to be placed in possession of his estate. The Gendron sisters also attacked the affidavit of death, domicile, and heirship that stated that each of Decedent's children had attained the age of 24 years and, thus, were not forced heirs under the law, because at the time Decedent

[2] Mrs. Gendron died testate, leaving the disposable portion of her estate (including all that she had inherited from Decedent's estate) to her son, Raymond, Jr., thereby, in effect, disinheriting her five daughters. The Succession of Josephine Catalano Gendron was contested by the Gendron sisters, however, this Court recently affirmed the trial court's judgment finding that Mrs. Gendron's last will and testament was valid in form under La. C.C. art. 1577, and dismissing, with prejudice, the Gendron sisters' claims that Mrs. Gendron lacked testamentary capacity and that her will was the product of undue influence. *See Succession of Gendron*, 19-206, 20-269, 20-272 (La. App. 5 Cir. 4/28/21), --- So.3d ---, 2021 WL 1659853.

executed the Testament in 1986, the law provided that all descendants of the first degree were forced heirs.[3]

A two-day bench trial was held on July 25 and August 8, 2018, respectively. At trial, each of the Gendron sisters testified regarding the invalidity of the probated Testament. They also submitted numerous notes and letters known by them to be handwritten by their father, all of which were written partially in print and partially in cursive.[4] The Gendron sisters produced a handwriting expert, Robert Foley, who was stipulated as an expert in forensic document examination. Mr. Foley is certified by the American Board of Forensic Examiners as a handwriting expert. Using a methodology recognized by the industry, Mr. Foley compared exemplars of Decedent's handwritten notes to the probated Testament and, based on the inconsistences he observed in the writing styles, concluded that the Testament was "probably not written" entirely in Decedent's handwriting. In reaching this conclusion, Mr. Foley opined that the observed differences—between the writing styles found in the exemplars of Decedent's printed handwriting in his business and informal personal documents and the formal cursive writing found in the probated Testament—outweighed the similarities. For instance, he noted that the way the word "La Place" appeared at the top of the probated Testament differed from the way it appeared in the body of the Testament as "Laplace." According to all of the Gendron sisters, their father never wrote the word "Laplace" as one word, as seen in the body of the probated Testament.

Mr. Foley testified that Decedent's handwritten personal notes suggested that he wrote in a casual style, and not in the rigid style observed in the formal

---

[3] In the absence of a valid olographic testament disposing of the estate, Mr. Gendron died intestate, and each of the Gendron sisters would stand to inherit, along with Raymond, Jr., an equal portion of Decedent's estate, over which Mrs. Gendron would have enjoyed a lifetime usufruct. If, however, the validity of the probated Testament stands, the entirety of Decedent's estate would go to the Estate of Mrs. Gendron; the Gendron children, including Raymond, Jr., would inherit nothing from their father's estate.

[4] No document written solely in cursive was produced by either the Gendron sisters or Raymond, Jr.

probated Testament. Though Mr. Foley conceded that his examination would have been more conclusive had he had more exemplars that were written entirely by Decedent in cursive, he stood by his determination that the date and the body of the probated Testament were "probably not" written by Decedent; however, he testified that Decedent probably *did* actually sign the will. In short, because Mr. Foley had insufficient cursive exemplars for comparison, he could not determine that the handwriting in the body of the probated Testament was, indeed, that of Decedent; consequently, the differences having outweighed the similarities, he concluded that it probably was not.

Mary Ann Sherry testified as a handwriting expert on behalf of Raymond, Jr.[5] Contrary to Mr. Foley, who focused on the *differences* between the handwriting when comparing the documents, Ms. Sherry, in reaching her conclusion, concentrated on the *similarities*. Specifically, she compared the cursive letters and certain words written in Decedent's "hybrid," often illegible, style of writing found in his informal notes and letters, with the cursive writing contained in the probated Testament and, given the numerous similarities she observed, concluded that the handwriting in the exemplars and the handwriting in the probated Testament "definitely point[ed] to one writer"—Decedent.

In addition to comparing similar letter and word formations, Ms. Sherry observed that the formatting habits seen in the handwriting exemplars, such as the natural indentations and spacing between each paragraph, were identical to the formatting used in the probated Testament. She testified that there were other idiosyncratic habits noted in Decedent's writing style that were evident in both the exemplars and the Testament. For example, the unique way in which Decedent formed his capital "Es" and "Ls," and the fact that he tended to capitalize words beginning with "L" even where the word was not found at the beginning of a

[5] Ms. Sherry is not a member of the American Board of Forensic Examiners.

sentence, otherwise referred to as a "misplaced capital." According to Ms. Sherry, there was a sufficient number of cursive writings contained in the exemplars to support her conclusion that, when compared to the cursive writing in the probated Testament, based on the numerous similarities in the letter and word formations, the consistencies in the formatting habits, and the idiosyncratic habits, the entirety of the probated Testament was written in Decedent's own hand.

In addition to the expert witnesses, each of the Gendron sisters testified that she was familiar with her father's handwriting because she had worked for him in some capacity over the years. Each sister also testified that she did not recognize the handwriting in the probated Testament to be that of her father. The Gendron sisters focused largely on three factors: they never knew their father to have written entirely in cursive; he never wrote "Laplace" as one word using a small "p" as seen in the body of the probated Testament; and he never wrote the letter "J" in cursive as it was written (*i.e.*, "June") in the probated Testament.

Marie Gendron Lambert testified that she worked for her father for ten years, from 1998 to 2008. She claimed that her father did not even know how to write in cursive. On cross-examination, however, she conceded that he would "sometimes" write using a hybrid of block lettering and cursive, but never did he write solely in cursive. Marie also stated that her father was meticulous about his spelling and would never have spelled "revoke" as "revolke."

Raye Claire Gendron, who also worked for her father in 1976, testified that the cursive handwriting in the Testament was not her father's. She stated that because she never saw him write entirely in cursive, she did not know if her father knew how to write in cursive.

Similarly, Judy Gendron Kline, who claimed that she was familiar with "all of her father's handwriting," including how he wrote each letter of the alphabet,

testified that the probated Testament did not contain her father's handwriting because her father never wrote totally in cursive.

Karen Gendron, who also did not recognize the handwriting in the probated Testament as her father's, testified that her father wrote in a mixture of print and cursive, and that in her whole life, she had never seen him write an entire document in cursive.

Tracey Gendron Boyle, who had her father's power of attorney prior to his death, testified that before he died, her father showed her a two-page handwritten will that he had written; she was also shown a two-page handwritten will of her mother. Tracey stated that on the Tuesday following her father's death, while at her parents' home, her mother took out her father's two-page will, which she believed had attorney Roland St. Martin's notary "stamp" imprinted on the second page. Tracey placed the will in a green folder and took the will home with her.[6]

Tracey testified that on Thursday, June 11, 2015, she met her mother at the law office of William O'Regan because her mother wanted to see about probating her father's will and settling his estate. Tracey claimed that she presented Mr. O'Regan with both her father's two-page will and her mother's two-page will from the green folder. She stated that as she was removing her father's two-page will from the folder, her mother handed her an envelope that contained a one-page handwritten will that her mother claimed to be Decedent's. When she looked at the one-page document and asked her mother where it came from, Tracey claimed that the will was quickly "whisked away" as her mother said, "That's your dad's will."

Tracey testified that Mr. O'Regan placed two wills on his desk side-by-side and compared them (although it is unclear from Tracey's testimony as to which

[6] According to Tracey, she also placed her mother's two-page handwritten will, and three other wills of her mother that had been prepared by Mr. O'Regan, into the green folder.

two wills she was referring). Mr. O'Regan then asked to make copies of what Tracey believed to be the two wills of her father and the two-page handwritten will of her mother. However, Tracey then testified that she gave Mr. O'Regan "that envelope, that file folder," from which he pulled *one* of the wills, and stated, "This is your dad's will," and then went and made a copy of that will.

Tracey testified that when she left Mr. O'Regan's office, she went to a bank in Hammond and opened up a safety deposit box, in which she placed the original of her father's two-page will, in addition to her mother's various wills. According to Tracey, Mr. O'Regan contacted her the following day, June 12, 2015, asked if she could return the original of her father's will to him. Mr. O'Regan explained that because of the need to carry on her father's business, he needed the original will so it could be probated. Tracey testified that she went back to the bank, retrieved the original two-page will of her father, and delivered it to Mr. O'Regan.

Tracey testified that the first time she ever saw the one-page probated Testament, the handwriting on which she claimed she did not recognize and was not the handwriting of her father, was in her lawyer's office. Tracey also testified that approximately four-to-six weeks after her father died, Raymond, Jr. telephoned to tell her that "they" had null and voided her father's will.

Marie, Raye, and Karen each testified that it was unlikely that their father would sign a document without first reading it. According to Marie, Decedent was not the kind of person who would have allowed someone to write his will for him, and then present it to him to sign.

The testimony of defendant, Raymond, Jr., was, in most respects, consistent with that of his sisters. He stated that he had never seen his father write an entire document in cursive. He testified that because his father sometimes wrote fast or hurriedly, his handwriting was inconsistent. Raymond, Jr. testified that he was familiar with the probated Testament. He stated that he (and his mother) executed

an affidavit attesting that he was personally familiar with his father's handwriting and that the probated Testament was entirely written, dated, and signed by his father. He testified that, even though he never observed his father write a document solely in script, he did see his father sometimes write in broken script, and he was one hundred percent sure that the handwriting in the probated Testament was his father's. According to Raymond, Jr., prior to his father's Testament being probated, though he was not surprised given his parents' relationship, he was not aware that his father was leaving his entire estate to his mother.

Raymond, Jr. also testified that he never discussed his father's Testament with his sister, Tracey. Instead, he recalls that after their father died, when Tracey was continuing to assert her power of attorney over their father's business affairs, he conveyed to her that once their father died, her power of attorney became null and void.

Jerry Bordelon, a longtime friend and forty-year employee/associate of Decedent—and current employee of Raymond, Jr—testified that he was very familiar with Decedent's handwriting and that he recognized the handwriting in the probated Testament as that of Decedent. Mr. Bordelon also testified that "quite some time earlier," Decedent showed him a handwritten will that Decedent told him he had written according to the instructions of his longtime friend and attorney, Roland St. Martin. Mr. Bordelon identified the probated Testament as being the same will that Decedent had previously shown to him. Mr. Bordelon stated that Decedent kept this will in a safety lock box that he placed in a file cabinet located in his home office.

Over the objection of counsel, William O'Regan was called to testify on behalf of Raymond, Jr. His testimony was proffered.[7] Mr. O'Regan testified Mrs. Gendron, his longtime client, came to see him on Thursday, June 11, 2015, because her husband had recently died, and she wanted him to handle his succession and probate his olographic testament. Mr. O'Regan stated that he could not recall whether anyone accompanied Mrs. Gendron to his office on that Thursday, but does recall that Mrs. Gendron provided him with numerous documents, among which was a copy of Decedent's probated Testament. According to Mr. O'Regan, he did not make a copy of the Testament, but rather, kept the copy that Mrs. Gendron provided to him, as she did not have the original with her. Mr. O'Regan stated that he called Mrs. Gendron later that day requesting to see the original Testament, and was advised that Mrs. Gendron's daughter, Tracey, was in possession of the original.

Mr. O'Regan explained that as a result of his conversation with Mrs. Gendron, he contacted Tracey the following day, June 12, 2015, and identified himself as her mother's attorney.[8] He stated that he advised Tracey that her mother had asked him to handle her father's succession, and that he was seeking the original of her father's olographic Testament, which her mother claimed was in Tracey's possession. Mr. O'Regan testified that Tracey advised him that the

---

[7] At trial, the Gendron sisters objected to Mr. O'Regan's testimony on the bases that (1) he was enrolled as the attorney of record for Raymond, Jr., individually, and as independent executor of the Succession of Josephine Catalano Gendron, (2) he sat through Tracey's deposition, and (3) he withdrew as counsel of record only two weeks prior to trial. The judge, expressing concern that "at the time of the occurrence," Tracey *and* Mrs. Gendron had engaged Mr. O'Regan in an attorney/client relationship, took under advisement the issue of the propriety of Mr. O'Regan's testimony, and allowed the parties to file post-trial briefs addressing the issue. For purposes of fairness to both parties, and in the interest of judicial economy, Raymond, Jr. was allowed to proffer Mr. O'Regan's testimony. Though the trial court took the issue under advisement pending further briefing by the parties, the trial court's ultimate judgment and reasons for judgment are silent as to any ruling on the Gendron sisters' objection. As a general proposition, when a trial court's judgment is silent with respect to a party's claim, or an issue placed before the court, it is presumed the relief sought was denied. *See M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 07-2371 (La. 7/1/08), 998 So.2d 16, 27. Accordingly, we presume that the trial court overruled the Gendron sisters' objection regarding the admissibility of Mr. O'Regan's testimony. The Gendron sisters have not appealed the trial court's failure to rule.

[8] Mr. O'Regan testified that he took contemporaneous notes as he spoke to Tracey on the phone. A copy of his notes were proffered, and they are directly in accord with his trial testimony.

original Testament was in a safety deposit box (number 122) at Capitol One Bank in Hammond, Louisiana. She agreed to procure the Testament from the bank and bring it to him. Mr. O'Regan claimed that he specifically asked Tracey if she was aware of any wills by her father other than the copy of the Testament her mother had provided to him, and she advised that she knew of no other wills. In this regard, Tracey provided Mr. O'Regan with the name of an attorney, Ted Vicknair, whom she believed her father may have consulted. Mr. O'Regan stated that he then contacted Mr. Vicknair, who confirmed to him that there were no other wills.

Mr. O'Regan testified that he personally recalled that Tracey came to his office later that same day and delivered to him the original of the probated Testament. He denied that Tracey delivered to him—or that he ever received—a two-page handwritten testament written by Decedent that was notarized or contained the seal of Roland St. Martin. Mr. O'Regan stated that, on behalf of Mrs. Gendron, he prepared the petition to probate her deceased husband's olographic Testament and an affidavit to probate. He testified that on June 18, 2015, Mrs. Gendron returned to his office and he presented to her the original of the one-page document Tracey delivered to him at her request. He recalled that he specifically asked Mrs. Gendron if she was familiar with her husband's handwriting, which she indicated that she was, and she confirmed that the document was entirely written, dated and signed by her deceased husband in his own handwriting. Mrs. Gendron and Raymond, Jr., after having also confirmed this, both signed an affidavit attesting to this fact.

Mr. O'Regan testified that he was the attorney for Mrs. Gendron, *not* Tracey. He claimed that the only reason Tracey was present at his office was to deliver to him the original of the probated Testament that her mother had advised was in her possession.

At the close of trial, the trial judge took the case under advisement. On February 22, 2019, the trial judge issued judgment denying the Gendron sisters' petition to re-open the succession and recover Decedent's funds, and to annul Decedent's probated testament. In her written reasons, among other things, the trial judge noted Mr. Bordelon's testimony that Decedent had informed him of his intention to leave everything to his wife because "it was better that way than to split everything up; let her control everything." The trial judge also noted that the probated Testament was written more than 32 years ago, in 1986, at the same time Mrs. Gendron handwrote a will identical to Decedent's, leaving the forced portion to her children and the residual to Decedent. According to the trial court, no evidence was presented to overcome the presumption that both Decedent's and Mrs. Gendron's wills were written as indicated on June 10, 1986. The court also noted that the Gendron sisters presented no reason as to why the probated will would have been forged in 1986. Considering the entirety of the evidence, when coupled with Mr. Foley's conclusion that the probated will was *probably* not written by Decedent, the trial court concluded that the Gendron sisters failed to carry their burden of proving the invalidity of the probated will. This appeal followed.

ISSUES PRESENTED FOR REVIEW

The Gendron sisters present three issues for this Court's review: (1) whether the olographic testament of Mrs. Gendron was inadmissible hearsay; (2) whether the testimony of Jerry Bordelon regarding decedent's testamentary intent was inadmissible hearsay; and (3) whether Decedent's Testament met the statutory requirements of a valid olographic testament.

DISCUSSION

In will contest cases, the factual findings of the trial court are accorded great weight and will not be disturbed on appeal absent a finding of manifest error or

unless clearly wrong. *Succession of Bradley*, 20-168 (La. App. 5 Cir. 12/2/20), 309 So.3d 397, 403; *Succession of Olsen*, 19-348 (La. App. 5 Cir. 1/29/20), 290 So.3d 727, 734, *writ denied*, 20-362 (La. 6/3/20), 296 So.3d 1967. The reviewing court must review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous. *Succession of Bradley*, 309 So.3d at 403. However, when one or more trial court legal errors interdict the fact-finding process, the manifest error standard is no longer applicable, and, if the record is otherwise complete, the appellate court should make its own independent *de novo* review of the record and determine a preponderance of the evidence. *Ferrell v. Fireman's Fund Ins. Co.*, 94-1252 (La. 2/20/95), 650 So.2d 742, 747, *rev'd in part, on other grounds*, 96-3028 (La. 7/1/97), 696 So.2d 569, *reh'g denied*, 96-3028 (La. 9/19/97), 698 So.2d 1388.

A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. *See Lasha v. Olin Corp.*, 625 So.2d 1002, 1006 (La. 1993). Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights. *Evans v. Lungrin*, 97-541, 97-577 (La. 2/6/98), 708 So.2d 731, 735. Under *Evans*, a *de novo* review should be limited to consequential errors, which are those that have prejudiced or tainted the verdict rendered. *Wingfield v. State ex. rel. Dept. of Transportation and Development*, 01-2668, 01-2669 (La. App. 1 Cir. 11/8/02), 835 So.2d 785, 799. Thus, a *de novo* review should not be undertaken for every evidentiary error, as unnecessary steps of review not only usurp the fact-finder's function, but are a clear waste of judicial economy. *Id*. at 799.

Here, based on the trial court's written reasons for judgment, the Gendron sisters cite two particular instances in which they claim prejudicial evidentiary errors were made that interdicted the trial court's fact-finding function mandating a *de novo* review: (1) allowing into evidence the unauthenticated olographic

testament of Mrs. Gendron, which they claim was determinative of the outcome and not mere harmless error; and (2) allowing into evidence the hearsay testimony of Jerry Bordelon concerning statements he "heard" from Decedent regarding Decedent's testamentary intent, which they claim the trial court "improperly emphasize[d]" in reaching its conclusion that the Gendron sisters failed to carry their burden of proving the invalidity of the probated Testament by a preponderance of the evidence. The Gendron sisters argue that it is clear from the trial court's reasons for judgment, that the court's reliance on the inadmissible evidence "tainted" its fact-finding function, requiring this Court to conduct a *de novo* review of the evidence. We disagree.

We note the well-settled rule that a trial court's written reasons for judgment form no part of the judgment; appellate courts review judgments, not reasons for judgment. *Wooley v. Lucksinger*, 09-571 (La. 4/1/11), 61 So.3d 507, 572; *Bellard v. American Cent. Ins. Co.*, 07-1335 (La. 4/18/08), 980 So.2d 654, 671; *Alvarez v. Clasen*, 06-304 (La. App. 5 Cir. 10/31/06), 946 So.2d 181, 184. "The written reasons judgment are merely an explication of the trial court's determinations." *Wooley v. Lucksinger*, 61 So.3d at 572. Although a trial court expressly incorporates those reasons into its formal judgment, they are still merely reasons.

A trial court has wide discretion concerning the admissibility and relevancy of evidence, and a trial court's ruling will not be disturbed on appeal absent a clear abuse of discretion. *Succession of Olsen*, 290 So.3d at 735; *Succession of Davisson*, 50,830 (La. App. 2 Cir. 12/22/16), 211 So.3d 597, 604, *writ denied*, 17-307 (La. 4/7/17), 218 So.3d 111. On appeal, the reviewing court must consider whether the complained-of ruling was erroneous and whether the error affected a substantial right of the complaining party. La. C.E. art. 103; *Pratt v. Culpepper*, 49,627 (La. App. 2 Cir. 2/27/15), 162 So.3d 616, 621. If a party's substantial right

was not affected by an evidentiary ruling, reversal is not warranted. The complainant has the burden of proof. *Id.*

The 1986 Olographic Testament of Josephine Catalano Gendron

At trial, over the objection of the Gendron sisters' counsel, Raymond, Jr. introduced the purported one-page olographic testament of Mrs. Gendron, which appears to have been written, dated, and signed on June 10, 1986, the same day that Decedent prepared the probated Testament, and which contained reciprocal bequests. On the face of the document was written "VOID" with the initials "J.G.;" this testament was never probated. The trial judge admitted the testament into evidence based solely on Tracey's testimony that the signature on the document "looks like [her] mother's signature." The Gendron sisters contend that the evidence should have been excluded because, under La. C.E. art. 901, Tracey's testimony alone was insufficient to meet the requirements necessary to authenticate the document as the olographic testament of Mrs. Gendron. Moreover, because the testament was never probated, its validity could not be presumed.

Based on our review of the testimony supporting the admission of the document, we find that defense counsel failed to properly authenticate Mrs. Gendron's olographic testament, or otherwise lay a proper foundation for its admissibility. Consequently, we agree with the Gendron sisters that the evidence should have been excluded. Nonetheless, in light of the other admissible evidence in the record supporting the verdict, discussed *infra*, we conclude that even if the trial court erred in admitting and considering the unauthenticated testament of Mrs. Gendron, such error was harmless as did it not prejudice or taint the validity of the verdict, and such error would not be sufficient to trigger this Court's *de novo* review.

Hearsay Testimony of Jerry Bordelon

The Gendron sisters argue the trial court erred by admitting hearsay testified to by Jerry Bordelon, a 40-year employee and close friend of Decedent. Hearsay is a statement, other than the one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. La. C.E. art. 801(C). Hearsay is inadmissible except as otherwise specified in the Louisiana Code of Evidence or other legislation. La. C.E. art. 802. Hearsay is excluded because the value of the statement rests on the credibility of the out-of-court asserter who is not subject to cross-examination and other safeguards of reliability. *Trascher v. Territo*, 11-2093 (La. 5/8/12), 89 So.3d 357, 364. However, when an extrajudicial statement is offered for a purpose other than to establish the truth of the assertion, its evidentiary value is not dependent upon the credibility of the out-of-court asserter and the declaration or statement falls outside the scope of the hearsay rule. *Id.* The admission of hearsay testimony is subject to the harmless error analysis. *Finch v. ATC/Vancom Management Services Ltd. Partnership*, 09-483 (La. App. 5 Cir. 1/26/10), 33 So.3d 215, 221. Where hearsay evidence is admitted that is merely cumulative or corroborative of other evidence in the record, any error in its admission is harmless. *Id.*; *Brooks v. Southern University and Agr. and Mechanical College*, 03-231 (La. App. 4 Cir. 7/14/04), 877 So.2d 1194, 1203, *writ denied*, 04-2246 (La. 11/19/04), 888 So.2d 208.

Over the objection of counsel for the Gendron sisters, Mr. Bordelon testified that Decedent showed him a will he had handwritten and told him that his attorney, Roland St. Martin, had instructed him what to write in the will. Mr. Bordelon stated that after reading the handwritten will, he asked Decedent why he was leaving everything to his wife, and Decedent told him that he was "leaving everything to his wife" because "[he thought] it would be better off for [his] wife just taking control of everything and splitting it up" between the children since he

would "be dead and gone." The Gendron sisters contend that it is clear from the trial judge's written reasons for judgment that she relied, in part, on this inadmissible hearsay testimony in reaching her conclusion regarding the validity of the probated Testament.

In response, Raymond, Jr. argues that, while the testimony of Mr. Bordelon constituted hearsay, it was admissible under the exception to the hearsay rule found in La. C.E. art. 803(3), which excepts statements "of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), offered to prove the declarant's then existing condition or his future action." La. C.E. art. 803(3). According to Raymond, Jr., even though a statement of memory or belief is not excepted from the hearsay rule since Article 803 requires that the statement be made about existing conditions, not conditions or events from the past, the contemporaneous requirement has its own exception, which permits hearsay testimony regarding past actions and conditions as long as the statement "relates to the execution, revocation, identification, or terms of the declarant's testament." *Id.*

In this case, considering the exception to the hearsay rule found in La. C.E. art. 803(3), we find no error in the trial court's ruling allowing Mr. Bordelon to testify about what Decedent told him concerning the terms of his handwritten testament. Even if, however, the trial court's evidentiary ruling was erroneous, such an error was harmless. Considering the other admissible evidence contained in the record, discussed *infra*, we find that Mr. Bordelon's hearsay testimony did not prejudice or taint the verdict rendered. *See Wingfield,* 835 So.2d at 799. Moreover, contrary to the Gendron sisters' contention that the trial judge "improperly emphasize[d]" Mr. Bordelon's testimony in reaching the verdict in this case, our reading of the trial judge's written reasons leads us to conclude that

the trial judge actually may have discounted Mr. Bordelon's testimony. In particular, the trial judge's written reasons state:

> However, [Mr. Bordelon's] testimony overlooks the fact that on the same day the probated will was written, Mrs. Gendron did write out her own will, naming decedent as her residual legatee. Obviously, neither decedent or Mrs. Gendron knew which of them would die first. Thus, had she predeceased him, then decedent would have been left with the responsibility of splitting things up among the children, which was the desire of both of them at that time. *It should be noted that Mr. Bordelon is an employee of the defendant, and his testimony is what one would expect*. [Emphasis added.]

We conclude that neither of the alleged evidentiary errors cited by the Gendron sisters warrant a *de novo* review by this Court nor provide a basis upon which to reverse the trial court's judgment. We therefore are mandated to employ the manifest error/clearly wrong standard of review in determining whether the trial court erred in finding that the Gendron sisters failed to carry their burden of proving the invalidity of the probated Testament.

Validity of Decedent's Probated Testament

In the Gendron sisters' final assignment of error, they contend the trial court erred in concluding that the probated Testament met the statutory requirements of a valid olographic testament. Specifically, the Gendron sisters argue that the trial court erred in finding that they failed to carry their burden of proving that it was more probable than not that the probated Testament was not entirely written, dated, and signed in the handwriting of Decedent.

(1) Formal Requisites of an Olographic Testament

The Louisiana Supreme Court has held that "[f]or an olographic will to be valid, the testament must be entirely written, signed and dated in the handwriting of the testator. La. [C.C.] art. 1575 (formerly La. [C.C.] art. 1588)." *In re Succession of Aycock*, 02-701 (La. 5/24/02), 819 So.2d 290, 290.; *see also*

Succession of Plummer, 37,243 (La. App. 2 Cir. 5/14/03), 847 So.2d 188, *writ denied*, 03-1751 (La. 10/10/03), 855 So.2d 323. The only additional requirement is that the document itself must evidence testamentary intent. *Succession of Olsen*, 290 So.3d at 734; *Succession of Carroll*, 09-219 (La. App. 5 Cir. 12/8/09), 30 So.3d 11, 17. An olographic testament must be proved by the testimony of two credible witnesses that the handwriting on the instrument is entirely that of the testator. La. C.C.P. art. 2883; *Succession of Olsen*, 290 So.3d at 734.

The jurisprudence interpreting La. C.C.P. art. 2883 has held that the phrase "credible witnesses" includes individuals who are familiar with the testator's handwriting, as well as handwriting experts. *Succession of Plummer*, 847 So.2d at 188. Thus, proof that an alleged olographic will was entirely written, dated, and signed in the testator's handwriting is not limited to handwriting experts. A credible individual familiar with decedent's handwriting is competent to serve as a credible witness pursuant to La. C.C. P. art. 2883. *Id*. In short, the court must satisfy itself, through interrogation, from the written affidavits, or the depositions of the witnesses, that the handwriting and signature are those of the testator. La. C.C.P. art. 2883(A); *Succession of Olsen*, 290 So.3d at 734.

"Superimposed upon Louisiana courts' efforts when applying the statutory requirement for olographic and notarial wills to determine validity of such instruments is the fundamental notion that *the law favors the validity of wills.*" *Succession of Enos*, 20-329 (La. App. 3 Cir. 12/16/20), 310 So.3d 236, 239; *Succession of Brown*, 458 So.2d 140, 142 (La. App. 1 Cir. 1984). Moreover, when a testament is written in olographic form without the aid of counsel, the intention of the testator is to be given paramount importance. *In re Succession of Caillouet*, 05-957 (La. App. 4 Cir. 6/14/06), 935 So.2d 713, 716, *writ denied*, 06-1732 (La. 10/6/06), 938 So.2d 85.

Where a will has been probated as required by law, the probating of the will is *prima facie* proof of its genuineness; if the will is thereafter attacked, the burden of proof rests upon the opponent to prove its invalidity. *Succession of Lirette*, 5 So.2d 197, 198 (La. App. 1 Cir. 1941). In short, a probated testament is presumed to be valid.

(2) Burden of Proof

The plaintiff in an action to annul a probated testament has the burden of proving the invalidity thereof, unless the action was instituted within three months of the date the testament was probated. La. C.C.P. art. 2932.[9] Under this provision, once three months elapse from the date of the probate of an olographic testament, there arises a rebuttable presumption that the decedent's testament is valid. Thus, in the instant matter, having filed their petition to annul Decedent's Testament more than three months *after* it was probated, the burden of proving the invalidity of Decedent's Testament rested wholly upon the Gendron sisters. *See Succession of Brown*, *supra*, 458 So.2d at 142. Raymond, Jr. bore no burden of proof at all.

La. C.C.P. art. 2932 does not expressly provide the level of proof necessary to prove the invalidity of a probated will. In civil cases, Louisiana courts require the plaintiff to fulfill his or her burden to prove a *prima facie* case. *Carrier Corp. v. Cousins*, 15-24 (La. App. 5 Cir. 5/14/15), 170 So.3d 1168, 1171-72. In ordinary civil actions, the plaintiff, in general, has the burden of proof and must prove the facts at issue by a preponderance. *See Talbot v. Talbot*, 03-814 (La. 12/12/03), 864 So.2d 590, 598. Proof is sufficient to constitute a preponderance when the entirety of the evidence, both direct and circumstantial, shows the fact sought to be proved is more probable than not. *Hanks v. Entergy Corp*., 06-477 (La. 12/18/06), 944

[9] "[W]here a will has been probated as required by law, the probating of the [will] makes *prima facie* proof of the will's genuineness; if the will is thereafter attacked, the burden of proof rests on the opponent to prove its invalidity." *Succession of Lirette*, 5 So.2d 197, 198 (La. App. 1 Cir. 1941).

So.2d 564, 578; *Crescent City Motors, L.L.C. v. Rafidi*, 10-609 (La. App. 5 Cir. 12/14/10), 54 So.3d 1170, 1171. When a party that bears the burden of proof presents proof which is merely equal to its opponent's proof, the party with the burden fails to prove its contention by a preponderance of the evidence. *Hanks*, 944 So.2d at 583 (concurrence by Justice Weimer); *see also Succession of Smith v. Domangue*, 297 So.2d 717, 719 (La. App. 1 Cir. 1974) (wherein the court held that "[t]he weight of the evidence in this case on both sides is so nearly equal that the deciding factor herein is the party who must bear the burden of proof.").

As the party seeking to establish the invalidity of the probated Testament, the Gendron sisters bore the burden of presenting sufficient evidence to overcome the *prima facie* genuineness of Decedent's probated Testament (*i.e.*, the presumption of its validity) by which the trial judge could reasonably conclude that it was more probable than not that the Testament was *not* entirely written, dated, and signed in Decedent's handwriting. *See Landiack v. Richmond*, 05-758 (La. 3/24/05), 899 So.2d 535, 542. The trial court determined that the Gendron sisters failed to meet their burden. After reviewing the record in its entirety, we agree.

(3) Weighing of the Testimony and the Evidence

The Gendron sisters argue that a preponderance of the evidence showed that the probated Testament was not entirely in the handwriting of Decedent. They contend that of the hundreds of writing exemplars admitted into evidence that were known to be written in Decedent's handwriting, not one matched the handwriting contained in the probated Testament. Additionally, they claim that each Gendron sister testified consistently that she was familiar with her father's handwriting and that handwriting contained in the probated Testament was not that of Decedent.

The Gendron sisters, however, offered no testimony from disinterested fact witnesses.[10] Instead, they primarily relied on the testimony of their handwriting expert, Robert Foley, a certified forensic document examiner, to carry their burden of proof in this matter. After explaining his methodology[11] and analysis, Mr. Foley opined that the handwriting found in the numerous exemplars known to be that of Decedent—which consisted mainly of office notes and letters written to his daughters—was not consistent with the handwriting contained in the probated Testament. In particular, Mr. Foley testified that what "was most notable" to him was that the probated Testament was "heavily embossed," meaning it was "written with a lot of pressure" or "more deliberate," in contrast to the comparative handwriting of Decedent in the exemplars, which showed that Decedent wrote "very fast, rapidly … not so rigid looking" and that "even his letters showe[d] a lot of relaxation [and] speed in it." Mr. Foley conceded, however, that none of the exemplars provided to him for comparison were "formal" or "important documents" like a last will and testament.

Having identified more differences than similarities between the handwriting in the exemplars and the probated Testament, and following the recommended terminology for expressing opinions resulting from handwriting examinations,[12] Mr. Foley concluded that it was "more probable" that the date and the body of the

---

[10] We note that each of the Gendron sisters would benefit from a finding that the probated Testament was invalid. While an interest in the estate is not grounds for disqualification as a witness for purposes of La. C.C.P. art. 2883, such an interest is a factor affecting the credibility of their testimony. *Succession of Calhoun*, 28,233 (La. App. 2 Cir. 4/3/96), 674 So.2d 989, 991.

[11] According to Mr. Foley, the method he utilized in conducting his handwriting analysis of the known exemplars provided to him and the probated Testament is accepted by the American Board of Forensic Document Examiners. This method included a side-by-side comparison of similar letters, and/or letter combinations, and words from the Testament against words contained in the comparative samples in order to determine similarities and differences in individual habits that exist.

[12] Mr. Foley referenced the terminology recommended for expressing opinions resulting from handwriting examinations found in "the Scientific Working Group of Forensic Document Examiners (SWGDOG) Standard Terminology for Expressing Conclusions of Forensic Document Examiners section 4," which includes a five-opinion scale: (1) identified (definitive); (2) probable; (3) no opinion; (4) probably did not: and (5) eliminated. In discounting Ms. Sherry's expert testimony, he testified that she "oversimplified" the matter by "cherry picking" the similarity of individual letters and "extend[ing] it over to all the words" in the will to conclude that the handwriting in the exemplars and the Testament "looks similar enough in similarity and habit" to be that of the same person.

probated Testament were not handwritten by Decedent, but that it was "probable" that Decedent actually signed the document. The probated Testament was written entirely in cursive, whereas not one of the exemplars was written by Decedent solely in cursive. Consequently, "due to the fact that there was inadequate or insufficient cursive handwriting for comparison[,]" Mr. Foley testified that he could not state with certainty that the probated Testament was written entirely by Decedent. Instead, the strongest opinion he could give, which he clarified was not "a definitive opinion," was that Decedent "probably did not" write the probated Testament. In Mr. Foley's own words, "a definite opinion concerning the will … it can't be done" and "I can't exclude, but I also cannot include."

In turn, Raymond, Jr., offered the testimony of himself and three others: Jerry Bordelon, Decedent's employee and personal friend for 40 years; William O'Regan, his mother's longtime attorney; and Mary Ann Sherry, a handwriting expert certified in document examination. At trial, Raymond, Jr. testified that he was familiar with his father's handwriting and was 100 percent certain that the handwriting found in the probated Testament his father's. Additionally, Raymond testified that he executed a probate affidavit attesting that the olographic Testament presented for probate was entirely written, dated, and signed by Decedent.

Mr. Bordelon testified that having worked for Decedent for four decades, he was very familiar with Decedent's handwriting and he recognized the handwriting in the probated Testament to be that of Decedent. He also testified that he had actually seen Decedent's Testament, and he identified the probated Testament as being the same testament that Decedent once showed to him.

Mr. O'Regan, the lawyer responsible for opening the succession and probating Decedent's Testament, testified that his client, Mrs. Gendron, who was married to and lived with Decedent for over fifty years, executed an affidavit for probate attesting that she was familiar with her husband's handwriting, and that the

olographic Testament presented for probate was entirely written, dated, and signed by her husband. Mr. O'Regan also testified that, despite Tracey's testimony to the contrary, she presented him with the original of the probated Testament, and represented to him that Decedent had no other will. Mr. O'Regan contacted an attorney, Ted Vicknair, whose name and number Tracey provided to him, who confirmed that Decedent had no other will. According to Mr. O'Regan, the probated Testament was the only will of Decedent that was ever given to him.

Mary Ann Sherry, Raymond, Jr.'s handwriting expert, testified that when reviewing the documents provided to her, rather than focusing on the differences, she focused on the similarities in the cursive handwriting in the exemplars when compared to the cursive handwriting in the probated Testament. While Decedent habitually wrote in a hybrid of cursive and print, she found that he was capable of writing in cursive and "chose to write the will in cursive." Ms. Sherry stated that, whereas most of the exemplars were written with more speed, the Testament "was spontaneously written, it was not speedily written. One word followed the other." Ms. Sherry attributed the "deliberate" form of writing in the probated Testament to "the formality of the document."

Contrary to Mr. Foley's testimony, Ms. Sherry found the cursive handwriting contained in the hundreds of exemplars was sufficient in order for her to make a comparison with the cursive writing found in the probated Testament, and for her to reach the conclusion that Decedent wrote the probated Testament. In addition to the handwriting, Ms. Sherry testified that the formatting habits and other idiosyncratic habits identified in Decedent's writing style discussed *supra*, were consistent between the exemplars and the probated Testament, which further supported her conclusion that the probated Testament was entirely written, dated, and signed by Decedent.

The general rule that factual determinations made in the trial courts will not be set aside absent manifest error is also applicable in will contest cases. *In re Succession of Lovoi*, 00-1391 (La. App. 5 Cir. 12/27/00), 777 So.2d 627, 628. Under that standard, when evidence is presented which would support certain findings of fact, and those findings are reasonable in the context of the entire record, then those facts cannot be set aside by the appellate courts. *Id.* This is so even where the appellate court may have made different findings had it been sitting as the trier of fact. *Id.*

The factfinder is required to access the credibility of both expert and lay witnesses to determine the most credible evidence. *Johnson v. E.I. DuPont deNemours & Co., Inc*., 08-628 (La. App. 5 Cir. 1/13/09), 7 So.3d 734, 741. Where a conflict in the testimony exists, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed, even though the reviewing court may feel that its own evaluations and inferences are more reasonable. *McGlothlin v. Christus St. Patrick Hosp.*, 10-2775 (La. 7/1/11), 65 So.3d 1218, 1231; *Stobart v. State, Dep't of Transp. and Dev.*, 617 So.2d 880, 882 (La. 1993). Thus, where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989).

Expert testimony is weighed the same as any other evidence, and the trier of fact has the discretion to accept or reject, in whole or in part, the opinion expressed by an expert. *King v. Nat'l Gen. Assurance Co.*, 18-281 (La. App. 5 Cir. 12/12/18), 260 So.3d 1298, 1308. The effect and weight to be given to expert testimony is within the broad discretion of the trial court. *Normand v. Cox Communications Louisiana, L.L.C.*, 14-563 (La. App. 5 Cir. 12/23/14), 167 So.3d 163, *writ denied*, 15-158 (La. 4/10/15), 163 So.3d 815. The trier of fact may accept or reject any expert's view, even to the point of substituting its own

common sense and judgment for that of an expert witness where, in the fact finder's opinion, such substitution appears warranted by the evidence as a whole. The decision reached by the trial court regarding expert testimony will not be disturbed on appeal absent a finding that the trial court abused its broad discretion. *Allensworth v. Grand Isle Shipyard, Inc*., 15-257 (La. App. 5 Cir. 10/28/15), 178 So.3d 191, 195-96.

In the present case, the trial court weighed the testimony of the experts and lay witnesses, made credibility determinations, and concluded that based on the entirety of the evidence, the Gendron sisters failed to carry their burden of proving the invalidity of the probated Testament by a preponderance of the evidence. Essentially, the trial court's judgment in this case is based largely on the credibility of the witnesses. A trial court judgment based on credibility can virtually never be manifestly erroneous and thus it is not subject to reversal on appeal. *Rosell v. ESCO*, 549 So.2d at 845; *Succession of Salzer*, 617 So.2d 244, 247 (La. App. 4th Cir. 1993). For these reasons, we find no error in the trial court's judgment.

CONCLUSION

For the foregoing reasons, the judgment of the trial court denying the Gendron sisters' petition to re-open succession and recover decedent's funds and petition to annul the decedent's probated testament is hereby affirmed.

AFFIRMED.

FIFTH CIRCUIT
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054
www.fifthcircuit.org

(504) 376-1400
(504) 376-1498 FAX

NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **JUNE 23, 2021** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

Curtis B. Pursell

CURTIS B. PURSELL
CLERK OF COURT

21-CA-14

E-NOTIFIED
40TH DISTRICT COURT (CLERK)
HONORABLE MADELINE JASMINE (DISTRICT JUDGE)
HONORABLE VERCELL FIFFIE (DISTRICT JUDGE)
VERCELL FIFFIE (APPELLANT)
LINDSAY M. FAUCHEUX (APPELLANT)
CHRISTOPHE L. FAUCHEUX (APPELLANT)
ROBERT R. FAUCHEUX, JR. (APPELLANT)
ISAAC H. RYAN (APPELLANT)
CHARLES R. JONES (APPELLEE)

MAILED
MICHAEL A. MCNULTY, JR. (APPELLEE)
ATTORNEY AT LAW
4608 RYE STREET
METAIRIE, LA 70006