

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 2401

TERESA MAE BADEAUX FERNANDEZ

VERSUS

DONALD F. HEBERT, ET AL.

*DATE OF JUDGMENT: May 4, 2007*

ON APPEAL FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT  
(NUMBER 101047 DIV. "C"), PARISH OF LAFOURCHE  
STATE OF LOUISIANA

HONORABLE WALTER I. LANIER, III, JUDGE

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**BEFORE: KUHN, GAIDRY, AND WELCH, JJ.**

**Disposition: AFFIRMED.**

KUHN, J.

Plaintiff-appellant, Charles Raymond Fernandez,<sup>1</sup> appeals the trial court's grant of partial summary judgment in favor of defendant, Thomas Badeaux, dismissing the claims arising out of assets he sold and an annuity he subsequently purchased on behalf of his aunt Viola Mary Tabor Badeaux (the decedent) prior to her death.<sup>2</sup> We affirm.

Fernandez, the residual legatee under the decedent's will, claims that the sale of decedent's Hibernia Corp. assets -- which included stock, certificates of deposit, and savings accounts totaling approximately \$800,000 -- during 2001, and the subsequent use of the proceeds from the sale to purchase an American National Insurance Company (ANICO) annuity on October 16, 2001, were unauthorized transactions undertaken by Thomas Badeaux, ostensibly pursuant to a power of attorney decedent had given him in October 1993. Fernandez reasons that but for the unauthorized sale and purchase of the ANICO annuity, which ultimately designated 17 beneficiaries, the Hibernia Corp. assets would have devolved upon the residuary legatee under the decedent's will. And having obtained all claims she may have arising out of the purchase of the ANICO annuity in a partial judgment of possession issued in the decedent's succession, the residuary legatee also asserts entitlement to damages from Thomas Badeaux on behalf of the decedent.

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<sup>1</sup> Although this lawsuit was instituted by Teresa Mae Badeaux Fernandez, after her death Charles Raymond Fernandez, the duly-appointed testamentary executor of her succession, was substituted as plaintiff.

<sup>2</sup> The record shows that while Fernandez filed a motion to appeal a judgment in favor of Camille Morvant and the law firm of Morvant & Cavell, signed on the August 24, 2006, in the same pleading as the appeal of the judgment under review, he failed to fully perfect that appeal. Thus, the propriety of the trial court's grant of partial summary judgment, dismissing Fernandez's claims against these defendants is not before us in this appeal.

It is undisputed that on November 11, 2001, pursuant to a request by ANICO representatives, the decedent personally applied for and purchased the annuity Thomas Badeaux had earlier executed on her behalf pursuant to the power of attorney. In conjunction with her application and purchase of the annuity, decedent signed five different documents. And on May 19, 2003, the decedent personally signed an ANICO customer service form, which specifically designated each of the 17 beneficiaries to the annuity. Among the designated beneficiaries were two of the Fernandez cousins.<sup>3</sup>

It is also undisputed that in the concursus proceeding, instituted subsequent to decedent's death and the institution of this lawsuit, in which ANICO tendered the proceeds of the annuity, a consent judgment issued on March 23, 2006, that permitted the proceeds of the annuity to be distributed to the 17 named beneficiaries. Among the provisions of the consent judgment were decrees that the ANICO annuity and the designation of the 17 beneficiaries were "valid." Fernandez signed the judgment in both his capacity as residuary legatee and owner of the decedent's claims arising out of the purchase of the ANICO annuity.

Thomas Badeaux subsequently filed a motion for partial summary judgment, averring entitlement to dismissal of the claims arising out of the sale of the Hibernia assets and the purchase of the ANICO annuity. The trial court granted summary judgment, and this appeal followed.<sup>4</sup>

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<sup>3</sup> The Fernandez cousins are J. Michael Fernandez and Charles Raymond Fernandez, the latter of whom has been substituted as a party plaintiff on behalf of the succession of his mother, the named residuary legatee under decedent's will.

<sup>4</sup> We find no error in the trial court's certification of the partial summary judgment in favor of Thomas Badeaux as final. *See Motorola, Inc. v. Associated Indem. Corp.*, 02-1351, pp. 16-17 (La. App. 1st Cir. 10/22/03), 867 So.2d 723, 732-33.

On appeal, Fernandez contends the trial court erred in concluding that the decedent had capacity to subsequently apply for and purchase the annuity; to designate the 17 beneficiaries; and to ratify Thomas Badeaux's unauthorized transactions of selling the Hibernia Corp. stock and purchasing the annuity in October 2001. Fernandez also asserts that summary judgment is precluded by outstanding issues of material fact on whether the decedent had been subjected to fraud, duress, mistake, or undue influence.

We initially note that when Fernandez stipulated the annuity and beneficiary designations were "valid" in both his capacity as residuary legatee and that of beneficiary to the annuity, he conceded the decedent had capacity to apply for and purchase the ANICO annuity and to designate the beneficiaries. See La. C.C. arts. 1918, 1919, 2029, 2031, 2033 & 2035. The "valid" stipulation by Fernandez also amounts to a concession that decedent's subsequent action of applying for and purchasing the annuity was a ratification of Thomas Badeaux's authority to bind her as principal to the annuity agreement. *See* La. C.C. art. 3008.

Moreover, addressing the merits of Fernandez's claim, we note that all persons have capacity to contract, except unemancipated minors, interdicts, and persons deprived of reason at the time of contracting. La. C.C. art. 1918. Thus, the presumption is that all persons have the capacity to contract. A lack of capacity must be shown by clear and convincing evidence. *Florida v. Stokes*, 05-2004, pp. 6-7 (La. App. 1st Cir. 9/20/06), 944 So.2d 598, 603.

The principal is not bound to the mandatary to perform the obligations that the mandatary contracted which exceed the limits of the mandatary's authority *unless* the principal ratifies those acts. La. C.C. art. 3010. (Emphasis added.)

Ratification is a declaration whereby a person gives his consent to an obligation incurred on his behalf by another without authority. An express act of ratification must evidence the intention to be bound by the ratified obligation. La. C.C. art. 1843. An unauthorized act of a mandatary may be ratified by the subsequent action of the principal upon being apprised of the facts; ratification amounts to a substitute for prior authority. *See North American Specialty Ins. Co. v. Employers Reinsurance Corp.*, 02-2649 p. 4 (La. App. 1st Cir. 9/26/03), 857 So.2d 606, 610-11, *writ denied*, 03-2977 (La. 1/16/04), 864 So.2d 633.

After introducing the documents decedent signed in conjunction with her application and purchase of the ANICO annuity on November 19, 2001, decedent's capacity was presumed and the burden of proof of lack of capacity was on Fernandez to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial. In support of this showing, Fernandez relied on excerpts from Thomas Badeaux's May 14, 2004 deposition testimony.

In that testimony, Thomas Badeaux acknowledged that the decedent was advanced in age, of limited vision and hearing, and in declining health. He also testified that the decedent "had virtually no knowledge of the world of business and finance and transactions and so forth." This, Fernandez maintains, is sufficient to create a genuine issue of material fact on the decedent's capacity. He also urges the same deposition testimony creates a genuine issue of fact on whether the decedent knew, understood, and intended what she was doing when she signed.

Despite Thomas Badeaux's description of decedent's health issues, a review of the entirety of his deposition reveals that he repeatedly testified that the

decedent was mentally "sharp." Absent evidence that decedent's health issues actually interfered with her mental faculties or that she demonstrated conduct of a person with less than full faculties, the limited testimony of Thomas Badeaux relied upon by Fernandez standing alone does not support a finding that she lacked the necessary capacity to apply for and purchase the annuity, designate her beneficiaries, or to ratify Thomas Badeaux's actions in applying for and purchasing the annuity. This showing fails to create an issue of material fact about the decedent's capacity either on November 11, 2001, when she signed the five ANICO documents in conjunction with her application and purchase of the annuity or on May 19, 2003, when she signed the form enumerating her designated beneficiaries.<sup>5</sup>

We also find no merit in Fernandez's assertion that the trial court improperly granted summary judgment because he produced evidence that the power of attorney Thomas Badeaux used to sell the Hibernia Corp. assets and to purchase the annuity had been altered at some point between October 1993, when it issued and July 20, 2000, when another version was purportedly used to transfer other stock the decedent owned. The gist of his contention is that unrefuted affidavit testimony established the power of attorney used after July 2000, which contained

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<sup>5</sup> Fernandez asserted that whether the decedent's subsequent application and purchase of the annuity was a knowing ratification of Thomas Badeaux's unauthorized transactions is a material issue of fact precluding summary judgment and relies on the same deposition testimony he asserted supported a finding of lack of capacity to support his contention. But nothing in the testimony purports to address the events surrounding the affixation of decedent's signature to the five ANICO documents. That decedent had health issues is insufficient to sustain Fernandez's burden of producing factual support necessary to satisfy his evidentiary burden at trial. See La. C.C. art. 1831 (party asserting an obligation is null must prove the facts or acts giving rise to the nullity). Thus, the trial court correctly granted summary judgment on this basis.

gifting language<sup>6</sup> that was not present in the original power of attorney, indicated the signatures signed on the later version were identical to those affixed in October 2001. Thus, he maintains, he has established that the power of attorney was "forged" and used "to liquidate [decedent's] Hibernia [Corp.] stock and certificates of deposit and purchase the ANICO annuity and name [Thomas Badeaux] and his Badeaux cousins as beneficiaries." Fernandez, therefore, urges that the decedent was the subject of fraud, duress, mistake, or undue influence.

Even if Fernandez proved that Thomas Badeaux acted without authority when he sold the Hibernia Corp. assets and used the proceeds to purchase the annuity, the decedent's affirmative act of signing the ANICO application and personally purchasing the annuity constituted a ratification of Thomas Badeaux's authority. *See* La. C.C. art. 3010. Thus, whether the power of attorney was altered is not a material issue of fact sufficient to preclude summary judgment. The record is devoid of any evidence showing that the decedent was defrauded, under duress, mistaken, or otherwise unduly influenced when she signed the application and purchased the annuity. Accordingly, Fernandez has failed to prove a genuine issue of material fact that can preclude summary judgment.

Because Fernandez, in his capacity as residuary legatee and as a beneficiary to the annuity, is bound by his consent to the consent judgment, which concluded that the annuity and the beneficiary designations were valid, and on the merits of

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<sup>6</sup> Admitted into evidence were two versions of a power of attorney, both dated October 14, 1993, which contained nearly identical language. Both stated that the decedent appointed Thomas Badeaux as "Agent" and granted "full power and authority for him ... to conduct, manage and transact all ... affairs, business, concerns and matters of whatever nature or kind, without any exception or reservations whatsoever," but one version added, "including but not limited to donations, gifts of any kind and/or character said agent in his sole discretion deems necessary to make."



his claim, having failed to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial, we find no error in the trial court's grant of summary judgment. Accordingly, in compliance with La. URCA Rule 2-16.1B, the trial court's judgment is affirmed. Appeal costs are assessed against Charles Raymond Fernandez.

**AFFIRMED.**