NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 1984

SUCCESSION OF OLLIS PITTMAN SHARP

Judgment Rendered: MAY 14 2012

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Docket Number 2010-30193

Honorable Peter J. Garcia, Judge Presiding

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Kuhn, J. concurs.

WHIPPLE, J.

This appeal involves a succession proceeding in which two separate testaments were presented to the trial court for probate. The record on appeal contains two rulings by the trial court, both addressing issues presented or purportedly presented to the trial court at a November 16, 2010 hearing, but containing different provisions.

While both rulings were signed by the trial court on April 12, 2011, and it is unclear from the record the order in which they were signed, we recognize that only one of the two rulings is an appealable judgment. The interlocutory ruling signed by the trial court on April 12, 2011, addressing the sufficiency of the attestation clause, to the extent it has any remaining viability under the present posture of the case herein, is an interlocutory judgment not subject to appeal. Accordingly, we dismiss the appeal as to that interlocutory ruling. In reviewing the only appealable judgment signed on April 12, 2011, the judgment which ordered execution of the later-drafted testament, removed the original executor, and confirmed a new executor, we vacate the judgment and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Ollis Pittman Sharp died on February 16, 2010, at the age of 87. Thereafter, on March 18, 2010, Gregory Joel Sharp ("Gregory"), the grandson of the decedent, filed a "Petition for Probate of Statutory Testament and for Confirmation as Testamentary Executor," seeking to probate a testament executed by the decedent on August 17, 2001. In the August 17, 2001 testament, the decedent bequeathed her entire estate to Gregory and appointed Gregory as executor. By order dated March 22, 2010, the trial court ordered that the August 17, 2001 testament be filed and

executed in accordance with LSA-C.C. art. 2891, et seq., and confirmed Gregory as testamentary executor.

However, on May 17, 2010, Kenneth E. Sharp ("Kenneth"), the surviving son of the decedent, filed a "Motion to Probate Testament, Annul Previously Probated Testament, Substitute Executor and Rule to Show Cause," seeking to probate a testament executed by the decedent on November 14, 2007. In the November 14, 2007 testament, the decedent made bequests to both Kenneth and Gregory and appointed Kenneth as executor of her estate.

Gregory filed an "Opposition to Motion to Probate Will, Annul Will, Appoint Executor," challenging the November 14, 2007 testament on the following grounds: (1) the attestation clause of the November 14, 2007 testament is fatally defective, thus rendering the testament null; (2) the decedent lacked capacity to execute the November 14, 2007 testament and to fully understand the consequences thereof; and (3) because the decedent lacked capacity to comprehend generally the nature and consequences of the disposition she was making if she did sign the testament, then her signature was procured by fraud.

A hearing in the matter was scheduled for November 16, 2010, and on that date, counsel for Kenneth addressed the court as follows:

> Your Honor, what we've agreed to do - - before the Court is a rule to revoke probate of previous testament and to probate a subsequently executed testament. We've agreed that the November testament, which is in the record, be introduced into evidence as prima facia [sic] proof of its contents subject to the issue Mr. Caruso has raised on **the validity of the testament based on the attestation clause.**
>
> **We'd ask that the Court make a ruling on that matter, that issue alone**, reserving to Mr. Caruso the right to re-urge his objections as to the competency of the testator or any other matter that may affect the validity of the testator [sic] other than the form of the testament. [Emphasis added.]

The court then took the matter under advisement.

Thereafter, on March 24, 2011, the trial court issued written reasons for judgment, noting that "[t]he very limited issue presented to the court by agreement of the parties is whether the attestation clause in the November 14, 2007 testament is sufficient to meet the requirements of law for a valid testament." The court then found that the attestation clause was valid, and that there was no fatal defect in the attestation clause rendering the testament null. In its reasons for judgment, the court instructed the succession administrator to present a written judgment to the court for signing.

Thereafter, counsel for the parties could not agree on the substance of the judgment, resulting in both parties submitting proposed judgments to the trial court. The judgment submitted by counsel for Gregory (hereinafter referred to as "the Caruso judgment") provided, in accordance with the limited finding in the trial court's reasons for judgment, as follows:

> **IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**
>
> That the attestation clause in the November 14, 2007 testament of the decedent is sufficient to meet the requirements for a valid testament.

On the other hand, the judgment submitted by counsel for Kenneth (hereinafter referred to as "the Robichaux judgment") provided as follows:

> IT IS ORDERED, ADJUDGED AND DECREED that, in accordance with La. C.C.P. art. 2891, the Last Will and Testament of Ollis Pittman Sharp, dated November 14, 2007, in notarial (statutory) form, notarized by Carter B. Wright and witnessed by Ernest N. Souhlas and Nancy Odem, be filed, deposited and recorded in the office of the Clerk of Court for St. Tammany Parish, Louisiana, and that the execution thereof take place according to law.
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> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Gregory Joel Sharp be removed as executor of the succession and that he file a final account of his administration within forty-five (45) days of this date.

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that petitioner, Kenneth E. Sharp, be confirmed as testamentary executor of the succession of Ollis Pittman Sharp and that letters testamentary be issued immediately to him, without bond, as provided in decedent's last will and testament, upon his taking his oath of office.

According to the record before us, both the Caruso judgment and the Robichaux judgment were filed on April 4, 2011, both judgments were signed by the trial court on April 12, 2011, and notices of judgment for both the Caruso judgment and the Robichaux judgment were mailed to the parties on April 21, 2011.

Gregory then timely filed a motion and order for appeal, requesting that the court "grant a suspensive appeal from the two judgments, both rendered and signed on the 12th day of April, 2011." In response, the trial court ordered "that a [s]uspensive appeal be granted to [Gregory], with the exception of those portions relating to the removal of Gregory Sharp as Executor and the appointment of Kenneth Sharp as Executor," for which Gregory was granted a devolutive appeal.

On appeal, Gregory contends that the trial court erred in: (1) holding that it was unnecessary for the notary and witnesses to attest that the testatrix signed the testament on each page; (2) signing two written judgments for one decision; and (3) granting the judgment submitted by Kenneth, because it went beyond the limited issue submitted to the court by the agreement of the parties. Conversely, in his brief to this court, Kenneth avers that neither the Caruso judgment nor the Robichaux judgment is a final judgment subject to immediate appeal. Alternatively, Kenneth avers that the attestation clause of the November 14, 2007 testament is not fatally deficient, and that because the judgment submitted by his counsel was "the natural consequence" of the

trial court's ruling that the attestation clause was not deficient, the trial court did not err in signing the Robichaux judgment.

VALIDITY AND APPEALABILITY OF JUDGMENTS

As a reviewing court, we are obligated to recognize our lack of jurisdiction if it exists. Starnes v. Asplundh Tree Expert Company, 94-1647 (La. App. 1st Cir. 10/6/95), 670 So. 2d 1242, 1245. Accordingly, we must first address Kenneth's contention that neither the Caruso judgment nor the Robichaux judgment is subject to immediate appeal.

Citing LSA-C.C.P. arts. 1841 and 1915, Kenneth contends that neither judgment on appeal is a final judgment. Additionally, he avers that the final judgment in a succession proceeding is the judgment of possession, and that, while a judgment removing an executor may be considered a partial final judgment, in the instant case, neither judgment was certified as final pursuant to LSA-C.C.P. art. 1915(B). Accordingly, Kenneth contends that this matter is not properly before this court in that the judgments at issue are interlocutory rulings, and he seeks dismissal of Gregory's appeal.

Generally, appeals from orders or judgments rendered in succession proceedings shall be governed by the rules applicable to appeals in ordinary proceedings. LSA-C.C.P. art. 2974; Succession of Theriot, 2008-1233 (La. App. 1st Cir. 12/23/08), 4 So. 3d 878, 882. Under these rules, a judgment that does not determine the merits, but only resolves preliminary matters in the course of the action, is an interlocutory judgment. LSA-C.C.P. art. 1841. However, where a court renders a partial judgment as to one or more but less than all of the claims, demands, issues, or theories, the trial court can designate the judgment as a final judgment after an express determination that there is no just reason for delay. LSA-C.C.P. art. 1915(B)(1). But in the absence of such a determination or designation, a ruling adjudicating

fewer than all claims shall not constitute a final judgment for the purpose of an immediate appeal. LSA-C.C.P. art. 1915(B)(2).

In determining whether we have jurisdiction herein to review either judgment, we first consider the two judgments separately. The Caruso judgment, which merely declares that the attestation clause of the November 14, 2007 testament is sufficient to meet the requirements for a valid testament, clearly does not determine the merits of the case, does not qualify as a partial final judgment under LSA-C.C.P. art. 1915(A), and was not designated by the trial court as final for purposes of immediate appeal pursuant to LSA-C.C.P. art. 1915(B). See generally Succession of Brantley, 96-1307 (La. App. 1st Cir. 6/20/97), 697 So. 2d 16, 18-19 (trial court's determination that decedent was entitled to presumption of testamentary capacity did not determine ultimate issue of whether decedent had capacity at the time the testament was executed and was an interlocutory judgment).

The Robichaux judgment, however, as stated above, orders execution of the November 14, 2007 testament, removes Gregory as executor, and orders him to produce a final accounting of his administration, and confirms Kenneth as the new executor of the decedent's estate. Although appeals from orders or judgments rendered in succession proceedings are generally governed by the rules applicable to appeals in ordinary proceedings, LSA-C.C.P. art. 2974 contains an exception to that rule as follows:

> Appeals from orders or judgments rendered in succession proceedings shall be governed by the rules applicable to appeals in ordinary proceedings, **except that an order or judgment confirming, appointing, or removing a succession representative ... shall be executed provisionally, notwithstanding appeal.** [Emphasis added.]

In Schneider v. Schneider, 371 So. 2d 1380, 1382 (La. App. 1st Cir. 1979), this court rejected the argument that a judgment appointing an administrator

was an interlocutory judgment not subject to appeal. Rather, this court determined that LSA-C.C.P. art. 2974 clearly contemplated an appeal from an order of the trial court appointing a succession representative and, thus, that a judgment appointing a succession representative was an appealable judgment.[1] Schneider, 371 So. 2d at 1382. Thus, the Robichaux judgment constitutes an appealable judgment in that it removed Gregory and confirmed Kenneth as the executor of decedent's estate. LSA-C.C.P. art. 2974.

However, complicating our determination of whether we have jurisdiction herein is the fact that, as stated above, both the Caruso and Robichaux judgments, which differ in substance, were signed by the trial court on the same day, and on the record before us, we are unable to determine which judgment was signed first.[2] Because these judgments differ in substance, a potential question arises as to the validity of each judgment to the extent that the substance of the judgment may have been altered by the signing of the other judgment.

Pursuant to LSA-C.C.P. art. 1951, a **final** judgment may be amended by the trial court at any time to alter the phraseology of the judgment or to correct errors of calculation, but not to alter the substance of the judgment.

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[1]Indeed, LSA-C.C.P. art. 2083(C) specifically provides that an interlocutory judgment is appealable when expressly provided by law.

[2]This issue was raised by Gregory in his second assignment of error, through which he avers that the trial court erred in signing two judgments, both purporting to resolve the "limited issue" presented to the trial court. While Gregory further avers that only the Caruso judgment should have been signed, in that it is the judgment that accurately reflects the trial court's ruling as set forth in its reasons for judgment, we are constrained to conclude that the Robichaux judgment is the only viable and appealable judgment before this court. Nonetheless, we address Gregory's concerns about the extent of relief granted in the Robichaux judgment in our discussion of his third assignment of error below.

Strawn v. Superfresh, 98-1624 (La. App. 1st Cir. 9/24/99), 757 So. 2d 686, 689. A judgment may be amended where the amendment takes nothing from or adds to the original judgment. Villaume v. Villaume, 363 So. 2d 448, 450 (La. 1987). In the absence of a timely application for a new trial, a trial court cannot alter the substance of its judgment. Louisiana Casino Cruises, Inc. v. Capitol Lake Properties, Inc., 2004-0882 (La. App. 1st Cir. 3/24/05), 915 So. 2d 784, 786; South Louisiana Bank v. White, 577 So. 2d 349, 350 (La. App. 1st Cir. 1991). Thus, any subsequent judgment constituting a substantive alteration to the original ruling in the absence of a timely motion for new trial is a nullity. Strawn, 757 So. 2d at 688-689.

However, it is well settled that prior to rendition of a final judgment, a trial court may, at its discretion and on its own motion, change the result of **interlocutory** rulings it finds to be erroneous. VaSalle v. Wal-Mart Stores, Inc., 2001-0462 (La. 11/28/01), 801 So. 2d 331, 334-335. Inasmuch as the Caruso judgment addressing the sufficiency of the attestation clause was an interlocutory judgment, the trial court would have been within its discretion, **procedurally,** to subsequently change or alter that ruling. Thus, to the extent that the Caruso judgment would have been signed first on April 12, 2011, the trial court would not have been prohibited, at least from a **procedural** standpoint, from subsequently signing the Robichaux judgment.

On the other hand, the Caruso judgment, in simply declaring that the attestation clause of the November 14, 2007 testament is sufficient to meet the requirements for a valid will, did not **alter** the terms of the Robichaux judgment, which ordered execution of that testament and appointment of the testamentary executor named therein. Thus, we conclude that, if the Robichaux judgment was the first judgment signed, the subsequent signing of the Caruso judgment would not have had any effect on the terms of the

Robichaux judgment, and the Robichaux judgment remains a valid and appealable judgment.

Therefore, regardless of the order in which the Caruso and Robichaux judgments were signed, we recognize that the Caruso judgment is an interlocutory judgment not subject to immediate appeal, and the Robichaux judgment remains a valid judgment and is the only judgment properly before this court on appeal. Accordingly, we now address Gregory's remaining assignments of error as they relate to the Robichaux judgment.

EXTENT OF RELIEF GRANTED BY THE ROBICHAUX JUDGMENT

In his third assignment of error, Gregory avers that the trial court erred in signing the Robichaux judgment, in that it grants relief beyond the limited issue presented to the court. As set forth above, in his motion to probate the November 14, 2007 testament, Kenneth also sought to annul the previously probated August 17, 2001 testament. Moreover, in response to Kenneth's motion to probate the November 14, 2007 testament, Gregory filed an opposition, raising three challenges to the November 14, 2007 testament: (1) the sufficiency of the attestation clause; (2) the capacity of the decedent; and (3) fraud. Nonetheless, while there were various pending and unresolved issues in the succession proceeding, by agreement of the parties and as recognized by the trial court in its written reasons for judgment, the **only** issue presented to the trial court at the November 16, 2010 hearing was the validity and sufficiency of the attestation clause of the November 14, 2007 testament.

However, despite the clear limitation of the scope of that hearing, the Robichaux judgment before this court on appeal did not specifically address the sole issue presented to the trial court at the November 16, 2010 hearing,

but instead granted relief beyond the determination of the sufficiency of the attestation clause in: (1) ordering execution of the November 14, 2007 testament (despite unresolved challenges to that testament raised by Gregory in his opposition to its probate); (2) removing Gregory as testamentary executor; and (3) confirming Kenneth as testamentary executor.[3]

On review, we conclude that, in granting the relief set forth in the Robichaux judgment, the trial court went beyond the limited issue before the court. See Kruger v. Garden District Association, 99-3344 (La. 3/24/00), 756 So. 2d 309, 310 (per curiam). The hearing conducted was limited in scope to addressing the sufficiency of the attestation clause in the November 14, 2007 testament. However, other challenges to that testament remained unresolved. Indeed, we conclude that before the probate of the August 17, 2001 testament can be properly annulled on the basis that it was later revoked by decedent's execution of a subsequent testament, the court below should have first determined the issues previously raised as to the validity of the later-drafted November 14, 2007 testament.[4] Accordingly, because the

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[3]On appeal, Kenneth avers that the parties further agreed to revoke the probate of the previous August 17, 2001 testament, relying upon the minute entry of the hearing which so provides. However, a reading of the transcript of the hearing does not reveal any such agreement by the parties to revoke the probate of the August 17, 2001 testament. Rather, the parties stipulated that the November 14, 2007 testament would be introduced as prima facie evidence of its contents subject to the issue raised as to the validity of the attestation clause and reserving to Gregory his remaining objections to the validity of the testament. In such a situation, the transcript prevails. See Williams v. Cooper, 2005-2360 (La. App. 1st Cir. 10/6/06), 945 So. 2d 48, 51.

[4]We acknowledge that under ordinary circumstances, a notarial testament, which both testaments at issue in these proceedings purport to be, does not need to be proved and that, upon production of the testament, the court shall order it filed and executed. LSA-C.C.P. art. 2891; In re Succession of Graham, 01-676 (La. App. 5th Cir. 11/27/01), 803 So. 2d 195, 196. However, prior to the signing of the Robichaux judgment ordering execution of the later November 14, 2007 testament, Gregory had raised three challenges to the validity of that testament, two of which had not been addressed by the trial court. Moreover, as stated above, the **parties stipulated** at the scheduled hearing that the sole and very limited issue presented to the trial court at that time was the sufficiency of the attestation clause in the November 14, 2007 testament.

Moreover, at the time Kenneth sought to have the November 14, 2007 testament probated, the trial court had already entered judgment probating the prior August 17, 2001 notarial testament. Thus, Kenneth had additionally sought to annul the previously probated testament, which is a separate action before the trial court within the succession

relief granted in the Robichaux judgment went beyond the scope of the limited issue presented to the court for adjudication, we must vacate the Robichaux judgment in its entirety. See generally Kruger, 756 So. 2d at 311.

Because we are constrained to vacate the Robichaux judgment, as granting relief beyond the scope of the issue presented to the trial court, we pretermit discussion of Gregory's first assignment of error in which he challenges, on the merits, the trial court's interlocutory ruling regarding the sufficiency of the attestation clause in the November 14, 2007 testament. This issue may properly be considered by this court in any subsequent appeal of a final or otherwise appealable judgment when properly rendered in the succession proceeding following our remand of the matter for further proceedings consistent with the views expressed herein.

CONCLUSION

For the above and foregoing reasons, we find that the April 12, 2011 interlocutory ruling drafted by counsel for Gregory Sharp and addressing the sufficiency of the attestation clause (the Caruso judgment), to the extent it has any remaining viability under the present posture of the case herein, is an interlocutory judgment not subject to appeal. Accordingly, we dismiss the appeal taken from that interlocutory ruling. With regard to the appeal of the April 12, 2011 judgment drafted by counsel for Kenneth Sharp, which ordered execution of the later-drafted testament, removal of the original executor, and confirmation of a new executor (the Robichaux judgment), we

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proceeding. See LSA-C.C.P. arts. 2931-2932; In re Succession of Theriot, 4 So. 3d 878, 881-882.

Accordingly, under the particular circumstances of this case, we must conclude that the trial court erred in signing the Robichaux judgment, ordering execution of the November 14, 2007 testament, prior to conducting a contradictory hearing on the remaining issues concerning the efficacy of the two testaments. See In re Succession of Graham, 803 So. 2d at 196.

vacate the judgment in its entirety. This matter is remanded to the trial court for further proceedings consistent with the views expressed herein. Costs of this appeal are to be born equally by Kenneth Sharp and Gregory Sharp.

APPEAL OF APRIL 12, 2011 JUDGMENT DECLARING SUFFICIENCY OF ATTESTATION CLAUSE IN NOVEMBER 14, 2007 TESTAMENT DISMISSED; APRIL 12, 2011 JUDGMENT ORDERING EXECUTION OF NOVEMBER 14, 2011 TESTAMENT, REMOVAL OF PREVIOUS TESTAMENTARY EXECUTOR, AND CONFIRMATION OF NEW TESTAMENTARY EXECTUTOR VACATED; REMANDED FOR FURTHER PROCEEDINGS.