

**NOT DESIGNATED FOR PUBLICATION**

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STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

*J*

NUMBER 2018 CA 0354

*EM*

ELAINE T. MARSHALL, INDIVIDUALLY AND AS  
CO-TRUSTEE OF THE MARSHALL LEGACY  
FOUNDATION AND THE MARSHALL HERITAGE  
FOUNDATION, ET AL.

VERSUS

PRESTON L. MARSHALL

Judgment Rendered: NOV 02 2018

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Appealed from the  
19<sup>th</sup> Judicial District Court  
In and for the Parish of East Baton Rouge, Louisiana  
Trial Court Number 656,183

Honorable William A. Morvant, Judge

\* \* \* \* \*

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Plaintiffs – Elaine T. Marshall,  
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Defendant – Preston L. Marshall

\* \* \* \* \*

**BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.**

**WELCH, J.**

The plaintiffs, Elaine T. Marshall, individually and as co-trustee of the Marshall Legacy Foundation (“MLF”) and the Marshall Heritage Foundation (“MHF”); Stephen D. Cook, as co-trustee of the MLF and the MHF; and E. Pierce Marshall, Jr., as co-trustee of the MHF, appeal a judgment denying their motion to remove the defendant, Preston L. Marshall, as the trustee of the EPS/EPM Charitable Remainder Unitrust (the “trust”). For reasons that follow, we dismiss the appeal.

**BACKGROUND**

This case involves a dispute among family members. Elaine Marshall is the mother of Preston Marshall and Pierce Marshall. Elaine is the sole non-charitable beneficiary of the trust, and the principal beneficiaries of the trust are the MHF and the MLF. In October 2016, the plaintiffs commenced this action against Preston seeking the release of mandatory disbursements from the trust. The plaintiffs alleged in their petition that pursuant to the terms of the trust, Preston was required to pay 10.4% of the net fair market value of the trust assets as of January 1 of each year to Elaine in quarterly installments. The plaintiffs further alleged that pursuant to Department of Treasury regulations, the trust can be found to have failed to function as a charitable remainder trust if the required distributions are not made within a reasonable time. The plaintiffs alleged that Preston had not made a distribution to Elaine since October 2014, that Preston had not provided the proper tax forms to them for 2015, and that Preston had failed to render the annual accountings of the trust. The plaintiffs further claimed that Preston’s acts and omissions had resulted in excise taxes to the corpus of the trust and jeopardized the tax-exempt status of the trust. Based on these allegations, the plaintiffs sought: the immediate payment of all distributions to Elaine, together with the income attributable to such distributions; full accountings for each year of the trust’s

existence; tax forms for each year of the trust's existence; filing of excise tax returns for each year that distributions were wrongfully withheld; reimbursement for all self-dealing excise taxes; amendment of any tax returns and payment of any associated excise taxes for years in which the trust earned income on the withheld distributions; reimbursement to the trust for excise taxes on its unrelated business income; reimbursement for the value of the loss of tax-exempt status; reimbursement for all legal and accounting fees resulting from the withholdings of distributions; and a finding that the plaintiffs are the charitable beneficiaries of the trust.

Thereafter, on July 26, 2017, the plaintiffs filed a motion for a preliminary injunction against Preston to enjoin Preston from withholding accountings from the trust and to order him to render accountings for the trust; to enjoin Preston from withholding distributions due from the trust to Elaine and to order him to distribute all distributions due to Elaine; and to enjoin Preston from using any property of the trust to pay his attorney's fees and other costs related to this action. In addition, the plaintiffs also filed a motion seeking to remove Preston as the trustee of the trust, essentially for the reasons set forth in their petition, and an order requiring him to render his final accounting of the trust. Preston opposed the motion, essentially arguing that Elaine's actions in terminating Preston from his employment with MarOpCo (a corporation set up by the Marshall family to administer the various trusts and corporations that they own), and in instructing her attorneys to "raid" Preston's office and "seize" everything, including the documents pertaining to the trust, prevented his administration of the trust. After the plaintiffs, in response to Preston's opposition, referenced various alcohol related events and an alleged incident of physical violence by Preston against his wife, Preston filed a motion *in limine* seeking to exclude such evidence at the hearing on the basis that it was irrelevant.

A hearing on the pending motions was held on August 17, 2017. At the hearing, the trial court granted Preston's motion *in limine*, granted in part and denied in part the plaintiffs' motion for injunctive relief, and denied the plaintiffs' motion to remove Preston as trustee of the trust. A judgment in accordance with the trial court's ruling was signed on September 19, 2017, and it is from this judgment that the plaintiffs have appealed.<sup>1</sup> On appeal, the plaintiffs contend that the trial court erred or abused its discretion in denying their motion to remove Preston as trustee of the trust, in granting Preston's motion *in limine*, and in excluding other evidence at the hearing.<sup>2</sup>

## JURISDICTION

Louisiana Code of Civil Procedure article 2083(A) provides for appeals of final judgments, and subsection (C) of that article provides that an interlocutory

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<sup>1</sup> We note that the plaintiffs filed an application for supervisory writ seeking review of the September 19, 2017 judgment with respect to the trial court's rulings on the motion to remove Preston as trustee of the trust, Preston's motion *in limine*, and other related evidentiary issues. On March 7, 2018, this Court denied the supervisory writ application on the basis that the criteria set forth in **Herlitz Construction Co., Inc. v. Hotel Investors of New Iberia, Inc.**, 396 So.2d 878 (La. 1981) (*per curiam*) were not met. See Elaine T. Marshall, Individually and as Co-Trustee of the Marshall Legacy Foundation and The Marshall Heritage Foundation, et al vs. Preston L. Marshall, 2017-1494 (La. App. 1<sup>st</sup> Cir. 3/7/18)(*unpublished writ action*), writ denied, 2018-0550 (La. 5/25/18), 243 So.3d 569.

<sup>2</sup> The plaintiffs' motion for appeal requested and the trial court granted a devolutive appeal from the September 19, 2017 judgment denying their motion to remove Preston as trustee and the related granting of Preston's motion *in limine*. On March 19, 2018, this Court issued a rule to show cause as to the timeliness of the plaintiffs' appeal, noting that the September 19, 2017 judgment addressed various motions that were taken up by the trial court on August 17, 2017, including a motion for preliminary injunction, but that the appeal from that judgment was not taken within the delay allowed for an appeal of a judgment relating to a preliminary injunction. See La. C.C.P. art. 3612.

In response to the show cause order, the plaintiffs/appellants maintained, as evidenced by the motion and order for appeal, that they were not seeking a review of or an appeal from that portion of the judgment relating to the injunctive relief, but rather, were seeking to appeal from that portion of the judgment relating to the denial of their motion to remove Preston as trustee and the evidentiary issues related thereto. Accordingly, another panel of judges from this Court maintained the appeal, but reserved for this panel of judges (*i.e.*, the panel assigned to the merits of the appeal) the final determination as to whether this appeal should be maintained. See Elaine T. Marshall, Individually and as Co-Trustee of the Marshall Legacy Foundation and The Marshall Heritage Foundation, et al vs. Preston L. Marshall, 2018-0354 (La. App. 1<sup>st</sup> Cir. 5/29/18)(*unpublished action*). However, because we find, for the reasons detailed herein, that this court lacks jurisdiction over this appeal, the issue raised by this Court's rule to show cause, *i.e.*, the timeliness of this appeal, is moot.

judgment is appealable only when expressly provided by law. A judgment that determines the merits, in whole or in part is a final judgment, and a judgment that does not determine the merits, but only preliminary matters in the course of the action, is an interlocutory judgment. La. C.C.P. art. 1841.

Louisiana Code of Civil Procedure article 1915 provides, in part:

A. A final judgment may be rendered and signed by the court, even though it may not grant the successful party or parties all of the relief prayed for, or may not adjudicate all of the issues in the case, when the court:

(1) Dismisses the suit as to less than all of the parties, defendants, third party plaintiffs, third party defendants, or intervenors.

(2) Grants a motion for judgment on the pleadings, as provided by [La. C.C.P. arts.] 965, 968, and 969.

(3) Grants a motion for summary judgment, as provided by [La. C.C.P. arts.] 966 through 969, but not including a summary judgment granted pursuant to [La. C.C.P. art.] 966(E).

(4) Signs a judgment on either the principal or incidental demand, when the two have been tried separately, as provided by [La. C.C.P. art.] 1038.

(5) Signs a judgment on the issue of liability when that issue has been tried separately by the court, or when, in a jury trial, the issue of liability has been tried before a jury and the issue of damages is to be tried before a different jury.

(6) Imposes sanctions or disciplinary action pursuant to [La. C.C.P. arts.] 191, 863, or 864 or [La. C.E. art.] 510(G).

B. (1) When a court renders a partial judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, or theories against a party, whether in an original demand, reconventional demand, cross-claim, third-party claim, or intervention, the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.

(2) In the absence of such a determination and designation, any such order or decision shall not constitute a final judgment for the purpose of an immediate appeal and may be revised at any time prior to rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

As previously noted, the plaintiffs are seeking review of certain evidentiary rulings, and the September 19, 2017 judgment granting Preston's motion *in limine* and denying the plaintiffs' motion to remove Preston as trustee. Based upon the relief sought in the plaintiffs' petition herein, the September 19, 2017 judgment is an interlocutory judgment because it determines only preliminary matters and does not determine the merits (in whole or in part), does not dismiss any claims of the parties, and does not otherwise fall within the enumerated parameters of La. C.C.P. art. 1915(A).<sup>3</sup> Thus, the September 19, 2017 judgment is only appealable if "expressly" allowed by law.

Louisiana Revised Statute 9:1791 provides:

A judgment or an order of court appointing or removing a trustee shall be executed provisionally. An appeal from an order or judgment *appointing or removing a trustee* must be taken and the security therefor furnished within thirty days from the date of the order or judgment notwithstanding the filing of an application for a rehearing or a new trial. The appeal shall be docketed and heard by preference.  
(Emphasis added).

This statute clearly provides for an appeal from a judgment "appointing" or "removing" a trustee. However, the September 19, 2017 judgment herein *denied* a motion to remove a trustee, which is not included within the express statutory language of La. R.S. 9:1791. Thus, the September 19, 2017 judgment is an interlocutory judgment, which is not immediately appealable, and therefore, this Court lacks appellate jurisdiction, and we must dismiss this appeal.<sup>4</sup>

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<sup>3</sup> We note that the September 19, 2017 judgment also grants injunctive relief in favor of the plaintiffs, which would be appealable pursuant to La. C.C.P. art. 3612; however, there are no issues on appeal with respect to the injunctive relief granted or any issues integrally related to that injunctive relief. See footnote 2.

<sup>4</sup> We recognize that when confronted with a judgment on appeal that is not final and appealable, we are authorized to exercise our discretion to convert the appeal to an application for supervisory writs and that the Supreme Court has instructed the appellate courts to exercise supervisory jurisdiction when (1) an appellate reversal will "terminate the litigation," (2) there is no dispute of fact to be resolved, and (3) the trial court decision is "arguably incorrect." **Herlitz Constr. Co., Inc. v. Hotel Investors of New Iberia, Inc.**, 396 So.2d 878 (La. 1981) (*per curiam*). However, as previously set forth in footnote 1, the plaintiffs already filed an application for supervisory writs from the September 19, 2017 judgment, raising the same issues

## CONCLUSION

For all of the above and foregoing reasons, the appeal of the September 19, 2017 judgment is dismissed. All costs of this appeal are assessed to the plaintiffs/appellants, Elaine T. Marshall, individually and as co-trustee of the Marshall Legacy Foundation and the Marshall Heritage Foundation; Stephen D. Cook, as co-trustee of the Marshall Legacy Foundation and the Marshall Heritage Foundation; and E. Pierce Marshall, Jr., as co-trustee of the Marshall Heritage Foundation.

**APPEAL DISMISSED; RULE TO SHOW CAUSE MOOT.**

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as this appeal, and that writ application was denied on the basis that the criteria set forth in **Herlitz** were not met. See Elaine T. Marshall, Individually and as Co-Trustee of the Marshall Legacy Foundation and The Marshall Heritage Foundation, et al vs. Preston L. Marshall, 2017-1494 (La. App. 1<sup>st</sup> Cir. 3/7/18)(*unpublished writ action*), writ denied, 2018-0550 (La. 5/25/18), 243 So.3d 569.