NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1346

IN THE MATER OF THE SUCCESSION OF
WILDA JEAN BARNETT HUTCHINSON

DATE OF JUDGMENT: MAY 0 1 2014

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
NUMBER 13505, DIV. H, PARISH OF LIVINGSTON
STATE OF LOUISIANA

HONORABLE ZORRAINE M. WAGUESPACK, JUDGE

JEK by JMH

* * * * * *

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* * * * * *

Theriot, J concurs with reasons.
Higginbotham, J. concurs.

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

Disposition: AFFIRMED.

KUHN, J.

The Appellant, Susan B. Landrum, appeals a district court judgment dated May 8, 2013, denying the Peremptory Exception of No Right of Action filed by the succession representative of the succession of Wilda Jean Barnett Hutchinson; and granting the Motion to Traverse Sworn Descriptive List filed by the heirs of Harry Hutchinson. We affirm the judgment.

PROCEDURAL HISTORY

This case involves a dispute as to the ownership of an antique breakfront and several paintings that were the separate property of Harry Hutchinson, owned by him prior to his marriage to Wilda Jean Barnett Hutchinson. That these items were Harry's separate property prior to his marriage to Wilda is not in dispute. Harry and Wilda entered into a marriage contract providing that Harry's separate property acquired before marriage would remain his separate property. This is not in dispute. When he died in 1990, he left a will leaving to his children by two previous marriages "in equal shares, share and share alike, all of the property I die possessed of, whether community or separate subject to the usufruct the law grants to my wife, Wilda Jean Barnett Hutchinson, under the provisions of Article 916 and 916.1 of the Louisiana Civil Code[1]. The breakfront and the paintings, however, were not specifically mentioned in Harry's will. Susan Landrum, one of Wilda's children, now claims that the breakfront and paintings became Wilda's property upon Harry's death.

On August 9, 1999, Wilda executed a Release of Usufruct, releasing "the usufruct granted to appearer under the Last Will and Testament of Harry Cooper

[1] At that time, La. C.C. art. 916 provided for the usufruct of the surviving spouse over the decedent's one-half interest in the community and La. C.C. art. 916.1 allowed for a usufruct over the separate property family home regardless of forced heirship considerations that existed at that time where children of other marriages were a factor. The Hutchinsons make no claim to the family home in this case.

Hutchinson, Jr., and otherwise provided by law forever.[2]" The authenticity of this document is not in dispute.

Wilda died on November 15, 2009, leaving a will appointing DeAnn M. Johnson as the Independent Executor; leaving a special legacy of her interest in certain real property to her daughter, Susan Landrum, the appellant in this matter; and the balance of her estate to her three children, including the aforementioned Susan Landrum. Although all of Wilda's children would have an equal claim to the disputed items under the terms of her will, only Wilda's daughter, Susan, is asserting a claim to them. Her siblings make no claim to the disputed items and have not joined in her appeal. Wilda's will made no specific reference to the disputed breakfront and paintings. DeAnn M. Johnson, Wilda's granddaughter, was confirmed as the independent executor by court order signed on November 18, 2009.

On March 31, 2010, Harry's children, Jondalyn Kismet Whitis, Robert Rhom Hutchinson, Jodi Lee Hutchinson, and Howard Coyt Hutchinson (hereinafter referred to collectively as "the Hutchinsons"), all appellees herein, filed a Claim Pursuant to Louisiana Code of Civil Procedure Article 3245, claiming the right to the disputed items by virtue of the extinguishment of the usufruct in Wilda's favor, and asking to have the items delivered to them. Among the exhibits annexed to this Claim was a copy of the aforementioned Release of Usufruct.

Also annexed to the Claim was a copy of the judgment of possession in Harry's succession dated October 22, 1996, recognizing Wilda as the surviving spouse in community and sending her into possession as such of one-half of the community, which would not have included the disputed items as they were Harry's separate property. Harry's children were placed in possession of all of his

[2] While the parties make much of this release, for reasons hereinafter set forth, we find this release to be irrelevant as a matter of law to the disposition of this case.

other property both real and personal in equal shares. The only personal property listed consisted of two horses, two Ford vehicles, two bank accounts, shares of stock in Exxon and the Livingston Bank and "household goods and personal belongings." The disputed property is not specifically described in the judgment.

On April 19, 2010, the Hutchinsons filed a Motion to Compel Sworn Descriptive List and for Preliminary Injunction, whereby they sought to compel Wilda's executrix to file a sworn descriptive list in order that they might have the opportunity to traverse it. They also sought an injunction preventing the placing of Wilda's heirs into possession of the disputed property. A show cause hearing was scheduled for June 21, 2010.

On May 20, 2010, Wilda's independent executrix, DeAnn M. Johnson, filed a Detailed Descriptive List, including the disputed items. On May 27, 2010, the Hutchinsons filed a Motion to Traverse Sworn Descriptive List in which they contested the inclusion of the disputed goods in the Descriptive List filed in Wilda's succession. They also prayed for damages arising out of the delay in obtaining possession of the disputed goods and for attorney fees.

After the Hutchinsons' Motion to Compel Sworn Descriptive List and for Preliminary Injunction was heard (the "first hearing") on June 21, 2010, a judgment was signed on July 6, 2010, ordering that:

1. The Hutchinsons' Motion to Traverse was granted.

2. DeAnn M. Johnson, as Wilda's succession representative, makes the disputed items "available for the Hutchinsons to retrieve."

3. The disputed items are stricken from the descriptive list of Wilda's succession.

4. The Hutchinsons "shall not transfer or alienate any of these items unless and until this Judgment is final, pending any appellate review.

5. The Hutchinsons' Motion to Compel Sworn Descriptive List was declared to be moot.

6. There was a declaration that the court had determined that there is no need for delay and that the "judgment is determined to be a final judgment pursuant to the provisions of La. C.C.P. art. 1915(B)(1)."

Susan Landrum, the appellant in the instant case, sought a suspensive, or in the alternative, a devolutive appeal of this judgment to this Court. Because she was not a party to the proceedings in the trial court, the Hutchinsons opposed the granting of a suspensive appeal, but did not oppose the granting of devolutive appeal.

Pursuant to that appeal, on December 21, 2011, this Court vacated the judgment of the trial court and remanded based on findings that just prior to the hearing below, Wilda's executrix donated the disputed items to Susan Landrum and recorded the donation in the public records. This Court concluded that Ms. Landrum was an indispensable party and that it was necessary to remand in order that she might be added as a party to the proceedings in the trial court. ***Succession of Wilda Jean Barnett Hutchinson***, 11-0452 (La. App. 1st Cir. 12/21/11) (unpublished).

On January 23, 2012, a Judgment of Possession was signed in Wilda's succession, declaring that "[t]he succession has divested its interest in a breakfront cabinet and paintings...," i.e., the disputed items.

On remand, on April 8, 2013, a hearing (hereinafter referred to as the "second hearing") was held on the executrix's Peremptory Exception of No Right of Action and the Hutchinsons' Motion to Traverse Sworn Descriptive List. Pursuant to that hearing, a judgment was signed on May 8, 2013:

1. Denying the Peremptory Exception of No right of Action filed by Wilda's executrix.

2. Granting the Hutchinsons' Motion to Traverse Sworn Descriptive List.

3. Striking the disputed items from the Descriptive List of Wilda's succession.

4. Declaring the disputed items to be the property of the Hutchinsons and to never having been the property of Wilda's succession.

It is from this judgment of May 8, 2013, that Ms. Landrum brings this appeal[3]. There are no written reasons for judgment and the transcript contains no oral reasons. Neither Wilda's executrix nor Wilda's other children, Ms. Landrum's siblings, have appeared in this appeal to oppose the Hutchinsons.

ANALYSIS

I. WILDA DID NOT ACQUIRE OWNERSHIP OF THE DISPUTED ITEMS BY ADVERSE POSSESSION OF MOVEABLES FOR TEN YEARS.

At the second hearing, the only evidence offered by Ms. Landrum to substantiate her claim to the disputed items was a copy of Harry's will, the descriptive list from Harry's succession and the judgment of possession from Harry's succession. She was the only witness to testify on her behalf. She gave no admissible testimony concerning the disputed items. She attempted to offer hearsay testimony concerning the disputed items, but it was ruled inadmissible. Ms. Landrum has not raised the exclusion of her hearsay testimony as part of this appeal. Therefore, there is no testimony in the record to substantiate her claims to the property.

Ms. Landrum's primary argument in her brief is as follows:

> While it is undisputed that Harry Hutchinson had purchased the breakfront cabinet prior to his marriage to Wilda, appellant submits the evidence clearly established that **Wilda Hutchinson acquired ownership of the property by 10 year acquisitive prescription of movables pursuant to Civil Code Article 3491.** [Emphasis added.]

Ms. Landrum admits that the disputed items were Harry's separate property and formed no part of the marital community. Ms. Landrum bases her claim of ten-year acquisitive prescription on the fact that Wilda had possession of the disputed items since they were located in the marital home that she continued to occupy for more than ten years after Harry's death and for more than ten years

[3] In addition to the foregoing procedural steps leading up to this appeal, Ms. Landrum attempted to remove this matter to federal court and to take writs to this Court and to the Louisiana Supreme Court. As none of these efforts by Ms. Landrum were successful, they have no bearing on this appeal.

after the date of the Release of Usufruct. She argues that this possession conferred upon Wilda the presumption of ownership under La. C.C. art. 530 and, consequently, furnished the basis for a claim that Wilda adversely possessed and prescribed as owner. However, this presumption of ownership does not extend to one whose possession commences as a precarious possessor. La. C.C. art. 3427. Even Ms. Landrum's brief acknowledges that prescription does not run in favor of the precarious possessor, citing La. C.C. art. 3477 and that prescription can only commence in favor of the precarious possessor "when he gives actual notice to the person on whose behalf he is possessing that he intends to possess for himself." La. C.C. art. 3478. The 1982 Revision Comments to La. C.C. art. 3478 indicate that it replaced former La. C.C. art. 3512 regarding which the Comments state:

> Louisiana courts have interpreted this provision expansively and have held that a precarious possessor may change the nature of his possession by his own overt and unambiguous acts that are sufficient to give notice to the owner.

Regardless of whether this Court applies the actual notice standard found in La. C.C. art. 3478 or the jurisprudential standard arising out of former article La. C.C. art. 3512 (i.e., an overt and unambiguous act sufficient to give notice to the owner), the result is the same as Wilda did nothing sufficient to meet either standard.

The Hutchinsons contend Wilda's possession was precarious because it commenced when she became usufructuary possessor under Harry's will:

> I will and bequeath to my children...all of the property I die possessed of, whether community or separate subject to the usufruct the law grants to my wife under the provisions of Article 916 and 916.1 of the Louisiana Civil Code.

The problem with this argument is that La. C.C. art. 916 referred only to community property and it is uncontested that the disputed items had been Harry's separate property. Louisiana Civil Code article 916.1, as it existed at the time that Harry made his will, referred only to the separate property family home, and the

family home was Wilda's separate property. Therefore, the usufruct Harry's will conferred on Wilda did not create a testamentary usufruct over the disputed items as they were neither community property nor were they the family home, i.e., the testamentary usufruct does not support the Hutchinson's contention that Wilda's possession of the disputed items was precarious at its commencement.

However, we note that the items were in the family home shared by Harry and Wilda during his lifetime and that her possession of those items could, therefore, be joint with Harry during the time until he died. In that sense, we find that Wilda's possession was precarious at its inception – each possessed the household contents with the permission of the other and without any intention to exclude the ownership of the spouse to whom such items might separately belong. Ms. Landrum agrees that Wilda's possession began long before Harry died. She contends in her brief that Wilda's possession was as owner: "Wilda possessed as owner from shortly after her marriage to Harry Hutchinson and continued in such possession...." While we agree with Ms. Landrum that Wilda possessed from long before the time of Harry's death, she did not do so as owner, but only in the sense that both she and Harry jointly possessed the contents of the matrimonial domicile, and that such joint possession was precarious as to the separately owned property of each, just as co-owners are presumed to possess precariously *vis-a-vis* each other. La. C.C. art. 3478. As such, Wilda's continued possession of the disputed items after Harry's death does not create a presumption of ownership that can serve as a basis for prescription.

Ms. Landrum did not testify to any act by Wilda that would indicate that she ever intended to possess the disputed items as owner.

> A possessor whose possession begins other than as owner must do something to make generally known that he has changed his intent and he must prove specifically when he manifested to others his intent to possess as owner. **Continued physical possession alone does not suffice to**

> **rebut the presumption that the possession remains precarious.** The character and notoriety of the possession must be sufficient to inform the public and the record owners of the possession as owner. [Emphasis added.] [Citations omitted.]

Hammond v. Averett, 415 So.2d 226, 227 (La. App. 2d Cir. 1982).

Harry's children testified that they left the items in the house after their father died only out of respect for Wilda, their stepmother. The Hutchinsons also testified that Wilda acknowledged to them on more than one occasion that the items belonged to them. When Wilda acknowledged that the disputed items belonged to the Hutchinsons and that she did not claim them as owner, she could not be said to be the adverse possessor of them, even if she had never been a precarious possessor. The trial court was in a better position than this court to judge the credibility of this testimony, and the court obviously accepted it. Therefore, we find no manifest error in the implicit finding that Wilda never acquired ownership of the disputed items by ten-years adverse possession. See ***Rosell v. ESCO***, 549 So.2d 840, 844 (La. 1989).

Moreover, there is no evidence that Wilda ever took any steps that would indicate to the Hutchinsons or any third party that there was any change in the quality of her possession after her husband died. The disputed items were in the house when Harry died and remained there until Wilda's death. Adverse possession requires something to indicate that somehow the would-be adverse possessor has taken possession adversely to the interests of the owner. In the instant case, the status of possession of the disputed items never changed upon Harry's death. The failure of the Hutchinsons to list the items specifically in their father's succession did not transfer ownership to Wilda. Even Ms. Landrum does not assert that Harry left the disputed items to Wilda in his will, and she does not contend that Harry left any of his separate property in full ownership to Wilda.

As these items were acknowledged by Ms. Landrum to have been Harry's separate property, and as this Court has found that any possession Wilda may have had commenced precariously, there are no presumptions of ownership arising out of possession favoring Ms. Landrum and the burden of proof on the question of ownership remains with her. We find no manifest error in the trial court's implicit finding that Wilda did not possess as owner adversely to the Hutchinsons. Implicit findings are also subject to the manifest error standard of review. ***Alexis v. Alton Ochsner Found. Hosp.***, 07-0355 (La. App. 4th Cir. 8/29/07), 966 So.2d 673, 677.

II. WILDA DID NOT ACQUIRE THE DISPUTED ITEMS BY DONATION FROM HARRY DURING HIS LIFETIME.

Ms. Landrum argues alternatively that Wilda acquired the disputed items from Harry by donation during his lifetime, but she can produce no written act of donation. A written act is not, however, a formality required by the law. The donation of movables may be accomplished by mere delivery to the donee:

> The statutory basis for manual donations of corporeal movables is LSA-C.C. Art. 1539, which provides:
>
> "The manual gift, that is, the giving of corporeal movable effects, accompanied by a real delivery, is not subject to any formality."
>
> Case law holds that **while mere delivery of a corporeal movable is sufficient to effect a change in ownership, the burden of proving that a donation was made rests on the donee, who, by "strong and convincing proof," must establish both that the donor intended to donate and that delivery actually took place.** [Emphasis added.] [Citations omitted.]

Pardue v. Turnage, 383 So.2d 804, 805 (La. App. 1st Cir. 1980).

Ms. Landrum contends that the donation of the disputed items was accomplished in this case when Harry moved them into the home he shared with Wilda with the intention that they be hers. The problem with this contention is that moving the items into the family home demonstrates no donative intent or delivery. These items were Harry's personal possessions, just as his clothes would have

been. Of course, he moved all his personal items into the home where he and Wilda lived together after they were married. No donative intent and nothing translative of title to property from one spouse to the other can be inferred from such an act.

Ms. Landrum claims that proof of donative intent may be inferred from the failure to list the disputed items specifically in Harry's will or in his succession. She argues that the items were not listed in Harry's succession because he had already given them to Wilda and they, for that reason, formed no part of his estate. She presented no evidence other than the inference she draws from the failure to list these items.

While inferences might be drawn from the failure to include mention of the disputed items in Harry's will and succession, there is nothing mandating that such inferences must be drawn or that based on other evidence in the record other inferences could not reasonably be drawn by the factfinder. Harry's children testified directly that their father never donated the items to Wilda. The trial court obviously accepted their testimony in this regard, which is a credibility call peculiarly within the province of the trial court. Ms. Landrum has produced no strong and convincing evidence of either intent to donate or to deliver as required by this Court in ***Pardue***. No witness testified that Harry donated the disputed items to Wilda. Harry's children testified to the contrary. Ms. Landrum produced no documentary proof of donation. She, in effect, argues that the trial court committed manifest error when it failed to infer from the failure to specifically reference the disputed items in Harry's succession that he must have donated them to Wilda during his lifetime. We disagree. Our review of the record as a whole shows that the Hutchinsons proved by a preponderance of the evidence, in spite of the fact that it was not their burden to do so, that Harry made no such donation. Donative intent is a factual determination which will not be overturned unless

clearly wrong. ***Robin v. Finley***, 597 So.2d 178, 180 (La. App. 3d Cir.1992). Therefore, viewing the record as a whole, we find that the trial court was not clearly or manifestly erroneous when it implicitly found that no such donation had been made. See ***Alexis***, 966 So.2d at 677.

III. THE DATES OF WILDA'S ACKNOWLEDGEMENTS THAT SHE DID NOT INTEND TO POSSESS AS OWNER ARE IRRELEVANT

Ms. Landrum complains that the testimony of the Hutchinsons concerning Wilda's acknowledgments that she did not claim the disputed items as owner does not specify the dates on which they purportedly were made. From this fact, Ms. Landrum argues that the acknowledgments may have occurred prior to the renunciation of the testamentary usufruct Wilda executed over ten years before she died and that this act of renunciation placed Wilda in the posture of an adverse possessor of the disputed items for over ten years prior to her death, long enough to acquire the disputed items by acquisitive prescription. In other words,Wilda may have changed her position from precarious possessor to adverse possessor in time to accrue over ten years of adverse possession prior to her death by virtue of having executed the renunciation of the testamentary usufruct. However, as we have already found that Harry's will gave no usufruct over the disputed items to Wilda, the renunciation of the testamentary usufruct has no bearing on the disputed items one way or the other. Therefore, as long as the acknowledgements occurred subsequent to Harry's death and Wilda took no other actions subsequent to Harry's death to express an intention to possess adversely to the Hutchinsons, it does not matter what the exact dates of the acknowledgements were.

IV. THE TESTIMONY OF THE HUTCHINSONS WAS ADMISSIBLE AND WORTHY OF CONSIDERATION

Ms. Landrum objects to the testimony of the Hutchinsons concerning what Wilda may have told them concerning the disputed items. She admits that it was admissible testimony, but contends that it is the weakest form of evidence, citing:

Larocca v. Ofrias, 231 La. 292, 296, 91 So.2d 351, 352 (1956); ***Succession of Rockwood***, 231 La. 521, 91 So.2d 779, 782 (1956); ***Phillips v. Nereaux***, 357 So.2d 813, 823 (La. App. 1st Cir. 1978); and ***Succession of McKean***, 618 So.2d 1108, 1110-11 (La. App. 1st Cir. 1993).

The Supreme Court in ***Larocca*** stated that "testimony respecting declarations of a person since deceased, even when against interest, is the weakest form of evidence," but in the same sentence the ***Larocca*** court added, "nevertheless, such statements are legal evidence against his executor, administrator, heirs or other persons claiming under him." ***Larocca***, 91 So.2d at 296. Even more significantly, the ***Larocca*** court went on to rule in favor for the party offering such evidence of what transpired between that party and the decedent, just as the Hutchinsons did in this case. None of the other cases would disallow such evidence or state that it must be disregarded.

In this case, the "weakest form of evidence" is all that would be required to overcome the very insubstantial and very indirect evidence offered by Ms. Landrum. In addition to the weak evidence of what Wilda may have declared to them prior to her death, the Hutchinsons' case is bolstered by more than just the evidence already discussed, which is sufficient in itself to support the judgment of the trial court. The Hutchinsons' case is based on a common sense interpretation of the facts and the relationships of the parties, both living and deceased. For example, it is plain common sense that Harry would move his separate personal property into the family home. No donative intent on his part can be inferred from that act, and no intent for Wilda to possess those items as owner can be inferred from their mere presence in the family home she shared with Harry. Moreover, it makes sense for Harry to feel that the paintings, especially the art work painted by his mother, should go to his children, her grandchildren, rather than to Wilda's children for whom they would not have had the same significance. Additionally,

the trial court could also have inferred from the refusal of Ms. Landrum's co-heirs to join in her claim that they did not believe that Wilda intended to possess the disputed property as owner, whether by acquisitive prescription or by *inter vivos* donation from Harry.

We find regardless of the weakness of the Hutchinsons' testimony concerning declarations made by Wilda to them, that based on the record as a whole we cannot say that the trial court was manifestly erroneous or clearly wrong.

> Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. . . .[A]ppellate courts must constantly have in mind that their initial review function is not to decide factual issues de novo. . . . When findings are based on determinations regarding the credibility of witnesses, the manifest error--clearly wrong standard demands great deference to the trier of fact's findings; for only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. . . . [Where] a factfinder's finding is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong.

Rosell, 549 So. 2d at 844.

Our review of the record indicates that the testimony of the Hutchinsons was reasonable and we cannot say that it was so internally inconsistent or contradicted by documentary evidence that no reasonable fact finder could believe it.

V. LESLIE McDOWELL'S TESTIMONY WAS ADMISSIBLE

Ms. Landrum's final complaint is that the trial court erred in allowing the Hutchinsons to introduce into evidence the transcript of Leslie McDowell's testimony from the first hearing on this matter held on July 21, 2010, to which she was not a party. Mr. McDowell died between the time of the first hearing and the second hearing and was, therefore, obviously unavailable to testify at the second hearing. Ms. Landrum does not dispute the fact that he was unavailable to testify at the second hearing that is the subject of this appeal. At the first hearing, he

testified that Wilda indicated a desire to purchase insurance to protect the Hutchinsons, evidence that she did not intend to possess as owner.

Louisiana Code of Evidence article 804 provides, in pertinent part, that:

> **B. Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> **(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, **a party with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.** Testimony given in another proceeding by an expert witness in the form of opinions or inferences, however, is not admissible under this exception. [Emphasis added.]

In the instant case, the "party with a similar interest" to that of Ms. Landrum would be the executor of Wilda's estate, who would have had the same legal interest in claiming the disputed items for the estate as Ms. Landrum had in claiming those items as Wilda's child and heir. Ms. Landrum argues in her brief that:

> The succession representative did not have a similar interest as Susan Landrum during the prior proceeding. In fact, counsel for the executrix stated at the June 21, 2010 hearing that his clients had no desire to spend any money to claim the property. The trial court erred in admitting this evidence.

In any event, it is not critical to the outcome case that this Court achieve a definitive resolution of this issue, as we find that even if the trial court erred in admitting Mr. McDowell's prior testimony, the error was harmless. In ***Hesser v. Richardson***, 579 So.2d 1136, 1139-40 (La. App. 2d Cir.1991), the Court had occasion to consider harmless error in the context of testimony from a prior proceeding:

> However, in reaching an ultimate decision on such an alleged procedural error, the court must consider not only whether the particular ruling constituted error, but also whether the error caused harm or prejudice to the parties. Unless prejudice resulted, reversal is not warranted.

> Further, the party alleging error has the burden of showing that the error was prejudicial to his case. In other words, the determination is whether the error, when compared to the record in its totality, has a substantial effect on the outcome of the case.

[Citations omitted.]

In the instant case, the record amply supports the trial court's conclusions. Moreover, Mr. McDowell's testimony, which indicated that Wilda did not intend to possess the disputed items as owner, was merely cumulative of other properly admitted testimony from the Hutchinsons to that same effect. See ***McGlothlin v. Christus St. Patrick Hospital***, 10-2775 (La. 7/1/11), 65 So.3d 1218, 1230. Thus, even if the trial court erred in admitting Mr. McDowell's testimony from the first hearing, given the entirety of the evidence presented, the error surely did not affect the outcome of the trial. Therefore, any error in the admission of this testimony was clearly harmless error.

CONCLUSION

Thus, having carefully considered all of Ms. Landrum's arguments, we find no error and no reason to reverse or amend the judgment. For the foregoing reasons, the judgment of the trial court is affirmed at appellant's cost.

AFFIRMED.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1346

IN THE MATER OF THE SUCCESSION OF
WILDA JEAN BARNETT HUTCHINSON

THERIOT, J., concurring and assigning reasons.

I agree that the trial court was not clearly wrong or manifestly erroneous when it implicitly found that Harry donated the disputed items to Wilda. However, I would further find that the will did leave the disputed items to Harry's children.

The intent of the testator controls the interpretation of his testament. La. C.C. art. 1611. If the language of the testament is clear, its letter is not to be disregarded under the pretext of pursuing its spirit. *Id.* The will states Harry bequeathed to his children "all of the property" he possessed. Wills should be read as to lead to testacy, not intestacy. *Succession of Mitchum,* 515 So.2d 345, 348 (La. App. 4 Cir. 1987), writ denied, 514 So.2d 1177 (La. 1987). Although the will did not specifically mention the disputed items, the phrase "all of the property" should be interpreted to incorporate the disputed items since Harry possessed and owned them at the time of his death. Absent a clear expression of a contrary intention, testamentary dispositions shall be interpreted to refer to property that the testator owns at his death. La. C.C. art. 1614.

Therefore, the resolution of the instant case rests entirely, in my opinion, upon the literal reading of the will, and I would reach the same conclusion as my learned colleagues.