NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 2248

SUCCESSION OF JAMES WINFORD VAUGHN

Judgment Rendered: DEC 0 3 2014

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Livingston, Louisiana
Docket Number 10665

Honorable Brenda Bedsole Ricks, Judge Presiding

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William W. Thies **Baton Rouge, LA**	**Counsel for Plaintiff/Appellant** **Karl W. Vaughn**
C. Glenn Westmoreland **Livingston, LA**	**Counsel for Defendants/Appellees** **John Wesley Vaughn, Michael Anthony Vaughn, and Martha Raye Smiley Vaughn**

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BEFORE: WHIPPLE, C.J., PARRO, McCLENDON, WELCH, AND CRAIN, JJ.

Crain, J. dissents for reasons assigned.
Parro, J. dissents for the reasons assigned by J. Crain.

WHIPPLE, C.J.

This matter is before us on appeal by plaintiff, Karl W. Vaughn, from a summary judgment granted in a succession proceeding in favor of the defendants, dismissing plaintiff's petition to annul the probated testament. We reverse in part, affirm in part, render in part, and remand for further proceedings.

BACKGROUND FACTS AND PROCEDURAL HISTORY

James Winford Vaughn ("the decedent"), a resident of Livingston Parish, died on January 3, 2002. The decedent was married once, to Martha Raye Smiley Vaughn. Of this marriage, three children were born, namely, John Vaughn, Karl Vaughn, and Michael Vaughn. At the time of the decedent's death, all of the children were over the age of twenty-four (24) and none suffered from a mental incapacity or physical infirmity.

On November 27, 2002, Mrs. Vaughn filed a petition for probate and for possession, attaching the last will and testament of the decedent, dated January 14, 1988. The testament, signed in proper notarial form, stated:

> I, JAMES WINFORD VAUGHN, husband of MARTHA RAYE SMILEY VAUGHN, a resident of Livingston Parish, 26700 James Vaughn Road, Holden, Louisiana 70744, being of sound mind and wishing to make proper disposition of my property in case of my death, do make and declare this to be my last will and testament, hereby revoking all prior wills.
>
> I desire that all of my just debts be paid.
>
> I leave and bequeath to my beloved wife, MARTHA RAYE SMILEY VAUGHN, my entire estate including all properties, vehicles, monies, etc. until her death at which time all properties will be divided between all three sons, leaving and bequeathing the Old Home Place at 26700 James Vaughn Road, Holden, Louisiana 70744 to my oldest son, JOHN WESLEY VAUGHN.

A judgment of possession was signed on November 27, 2002, naming Mrs. Vaughn as the sole legatee and, in pertinent part, giving her ownership and possession of five separate parcels of immovable property, all located in Livingston Parish. An amended judgment of possession was later signed on

February 2, 2010, which delineated that Mrs. Vaughn was also given ownership and possession of a 1998 Chevrolet Truck and a 2000 Ford CRV.

On January 12, 2012, one of the decedent's sons, Karl Vaughn ("plaintiff" herein), filed a petition to annul the probated testament, naming his mother and two brothers as defendants.[1] The petition alleged that the decedent's testament was invalid because it contained a prohibited substitution, specifically, the testament provided that all of the deceased's properties were left to Mrs. Vaughn ("the institute"), with a charge to preserve the properties until her death, at which time the properties were to be transferred to the decedent's sons ("the substitutes"). The petition further alleged that the properties subject to the prohibited substitution were community property, subject to a usufruct in favor of Mrs. Vaughn and that each son was entitled to one-third (1/3) of the testator's one-half (1/2) community property interest. Thus, plaintiff alleged he was entitled to his one-sixth (1/6) share of said properties subject to his mother's usufruct. Plaintiff further contended that despite plaintiff's interest in the properties, Mrs. Vaughn had donated two of the properties and had sold a large parcel of land to a third-party.[2] Accordingly, plaintiff sought a judgment: (1) declaring the last will and testament to be invalid because it contained a prohibited substitution; (2) setting aside the order probating the will; (3) transferring ownership of the properties according to the laws of intestacy; (4) ordering that cash received for the sale of the properties be returned to the estate; and (5) annulling the donations of the property or crediting plaintiff's

[1]Plaintiff subsequently filed an amended petition to clarify that his mother, Martha Raye Smiley Vaughn, was named a party defendant in both her personal capacity and in her capacity as executrix of the Succession of James Winford Vaughn.

[2]Attached to the petition are the two disputed acts of donation and the cash sale. The two acts of donation were signed by Mrs. Vaughn on August 12, 2004, reflecting a donation of seven (7) acres in Livingston Parish to her son, Michael Anthony Vaughn, and a donation of five (5) acres in Livingston Parish to her son, John Wesley Vaughn. The cash deed was executed by Mrs. Vaughn on January 11, 2007, and set forth her sale of 5.35 acres in Livingston Parish to a third party for ninety-five thousand dollars ($95,000.00).

brothers for the value of said donations received in kind against the estate of the decedent.

Plaintiff's mother and his two brothers filed a joint answer and exception to the petition to annul the probated testament, generally denying all of the allegations in the petition and raising the objection of prescription.[3]

Thereafter, plaintiff filed a motion for summary judgment, requesting that the court: (1) declare the last will and testament an absolute nullity; (2) declare the decedent's estate to be an intestate succession; (3) declare that plaintiff has a one-sixth (1/6) interest in the succession of his father; and (4) declare Mrs. Vaughn to be a succession debtor. Defendants filed a cross-motion for summary judgment, seeking a judicial declaration that the last will and testament was not an absolute nullity and did not contain a prohibited substitution.

Following a hearing on the motion and cross-motion for summary judgment, the trial court took the matter under advisement and ordered the parties to file additional briefs. Plaintiff filed a post-hearing memorandum and attached a proposed judgment, granting plaintiff's motion for summary judgment. On August 14, 2013, the trial court signed the judgment that was attached to plaintiff's post-hearing memorandum. However, on August 19, 2013, the trial court issued written reasons for judgment, which completely conflicted with the judgment the court had signed, as the reasons for judgment stated that judgment was rendered in favor of John Vaughn (one of the defendants) and that plaintiff's claims were dismissed with prejudice.

On September 3, 2013, the defendants filed a motion to vacate the judgment, contending that the August 14, 2013 judgment was signed by mistake and error, as it directly conflicted with the trial court's decision as set forth in its reasons for

[3]The peremptory exception raising the objection of prescription was denied by the trial court, and the defendants did not seek review of said ruling. Accordingly, the merits of this exception are not before this court.

judgment. On September 5, 2013, the trial court signed an order vacating the August 14, 2013 judgment and signed a second judgment in accordance with the written reasons for judgment, thereby granting the defendants' motion for summary judgment and dismissing plaintiff's petition to annul the probated testament. Plaintiff then filed the instant appeal.

On appeal, plaintiff contends that the trial court erred, both by granting the defendants' motion for summary judgment and by denying plaintiff's motion for summary judgment.[4] Thus, plaintiff urges this court to:

(1) Declare the January 14, 1988 testament as the only testament of the decedent;

(2) Declare that the January 14, 1988 testament contains a prohibited substitution and for the testament to therefore be declared an absolute nullity and the estate of James Winford Vaughn be declared an intestate succession;

(3) Vacate the amended judgment of possession;

(4) Nullify the inter vivos donations from Martha Raye Smiley Vaughn to Michael Anthony Vaughn and John Wesley Vaughn; and

(5) Adjudicate Martha Raye Smiley Vaughn as a debtor to the estate in the amount of ninety-five thousand dollars ($95,000.00), pursuant to her cash sale to a third party of a certain parcel of real property.

Alternatively, plaintiff urges this court to: (1) grant summary judgment in his favor; (2) declare that the testament contains a prohibitive substitution and,

[4]When an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory judgments prejudicial to him, in addition to the review of the final judgment. Moreover, because the issues involved in the granting of the defendants' summary judgment are identical to those presented by plaintiff's motion for summary judgment, i.e., whether the testament contains a prohibited substitution, it is clearly appropriate to review the interlocutory judgment denying plaintiff's motion at this time. Thus, plaintiff may properly seek appellate review of the interlocutory judgment in this appeal. See Dean v. Griffin Crane & Steel, Inc., 2005-1226 (La. App. 1st Cir. 5/5/06), 935 So. 2d 186, 189 n.3, writ denied, 2006-1334 (La. 9/22/06), 937 So. 2d 387; Johnson v. State Dept. of Social Services, 2005-1597 (La. App. 1st Cir. 6/9/06), 943 So. 2d 377, 377 n.8, writ denied, 2006-2866 (La. 2/2/07), 948 So. 2d 1085.

therefore, is an absolute nullity; (3) set aside the amended judgment of possession; and 4) remand the matter to the district court.

JUDGMENT ON APPEAL

As a reviewing court, we are obligated at the outset 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 the validity and legal effect, if any, of the amended judgment of the trial court signed on September 5, 2013.

Louisiana Code of Civil Procedure article 1951, as amended by Acts 2013, No. 78, §1, effective Aug. 1, 2013, addresses amendments of judgments and provides that:

> On motion of the court or any party, a final judgment may be amended at any time to alter the phraseology of the judgment, but not its substance, or to correct errors of calculation. The judgment may be amended only after a hearing with notice to all parties, except that a hearing is not required if all parties consent or if the court or the party submitting the amended judgment certifies that it was provided to all parties at least five days before the amendment and that no opposition has been received.

Generally, the substance of a final judgment can be altered only by a timely motion for new trial or a timely appeal. LaBove v. Theriot, 597 So. 2d 1007, 1010 (La. 1992). There is no question that the amended or second judgment in this matter, signed on September 5, 2013, altered the substance of the original judgment, as the second judgment denied the motion for summary judgment filed by the plaintiff and granted the opposite parties' motion for summary judgment. Nevertheless, we find that, under the facts of this particular case, the judgment was properly amended without the need for a timely motion for new trial or appeal, because all of the parties consented to the substantive amendment of the original judgment. See Villaume v. Villaume, 363 So. 2d 448, 451 (La. 1978); LaBove, 597 So. 2d at 1010. Here, plaintiff did not raise the validity of the amended

judgment as an assignment of error on appeal and specifically states in his brief that "[the] inadvertent signing of the [p]laintiff/[a]ppellant's proposed [j]udgment is not an issue." Moreover, during oral arguments, counsel for both sides advised this court that the amended judgment was rendered "as a joint presentation" to the trial court. Further, plaintiff's counsel specifically acknowledged that he consented to the amended judgment.[5]

We conclude that the September 5, 2013 judgment is a valid final judgment from which an appeal can be taken.[6] Accordingly, we next turn to a discussion of the merits of the appeal.

DISCUSSION

At issue in this appeal is the validity of the decedent's testament and particularly, whether the testament should be declared invalid as containing a prohibited substitution. Louisiana Civil Code article 1520 addresses "prohibited substitutions" and provides that:

> A disposition that is not in trust by which a thing is donated in full ownership to a first donee, called the institute, with a charge to preserve the thing and deliver it to a second donee, called the substitute, at the death of the institute, is null with regard to both the institute and the substitute.

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[5]In Glass v. Voiron, 2008-1347 (La. App. 1st Cir. 3/27/09) (unpublished opinion), plaintiff's counsel submitted an amended judgment to the trial court. Neither party disputed the validity of the amended final judgment; however, this court found that the judgment was an absolute nullity because there was insufficient evidence in the record to support a finding that the judgment was amended by consent of the parties. In so concluding, this court noted that the defendant was not present at trial and participated in the proceedings only by virtue of a court-appointed curator ad hoc. This court further commented that by taking the position that the judgment was amended by consent of the parties, new time delays for appeal would begin and the defendant could thereafter gain appellate review of the rulings set forth in the first and second judgments. We find Glass to be distinguishable from the present matter. In particular, plaintiff herein was represented by counsel, who acknowledged that the judgment was amended with his consent. Moreover, plaintiff gained no benefit from acknowledging that he consented to the amended judgment.

[6]An action to annul a probated testament is a new suit, and is technically a separate action from the succession proceeding, with its object being the annulment of the testament probated in the succession proceeding. Accordingly, a judgment annulling a testament determines the merits of that separate action, even though brought in the succession proceeding, and thus constitutes a final judgment. In re Succession of Theriot, 2008-1233 (La. App. 1st Cir. 12/23/08), 4 So. 3d 878, 881-882.

In the district court and on appeal, the parties' arguments focus on whether or not the decedent's testament requires Mrs. Vaughn "to preserve" "all properties" for her lifetime. We note that the decedent's testament essentially contains four different dispositions, namely: (1) "all properties"; (2) "the vehicles"; (3) "the monies"; and (4) the "Old Home Place." Plaintiff's argument in regard to the prohibited substitution focuses only on the disposition of "all properties." Moreover, while not clearly specified in the testament as "immovable property," the parties herein imply, and we agree, that the disposition of "all properties" can be reasonably interpreted to mean the disposition of the decedent's **immovable** property. Accordingly, we will consider the testament with regard to each disposition.

Disposition of "All Properties" & "The Old Home Place"

Plaintiff contends that the disposition of "all properties" "inherently" obligates Mrs. Vaughn to preserve the properties, and should be interpreted as obligating her to do so, and at her death the preserved properties will be divided by defendant and his siblings, in contravention of Louisiana succession law. Defendants counter that as plaintiff has repeatedly acknowledged throughout this matter, a prohibited substitution requires a charge that the properties are to be preserved and/or made inalienable in the testament itself. Defendants note that while plaintiff "attempts to read-in a charge to preserve, the plain language of the disposition clearly shows that no such charge exists," and there is nothing to demonstrate that Mrs. Vaughn was charged therein with the obligation to preserve the properties and/or that she was not free to alienate the properties bequeathed to her in the testament. For these reasons, the defendants contend (and the trial court agreed) there was no duty to preserve imposed in the testament, and therefore, the dismissal, by summary judgment, of the petition to annul was legally correct. After careful consideration, we disagree.

As the trial court recognized, there is no specific language in the testament imposing a duty to preserve. However, to create a prohibited substitution, the testator need not use the identical terms found in LSA-C.C. art. 1520. It suffices that the charge to preserve and to deliver necessarily results from the tenor of the disposition, or, what amounts to the same thing, that it is impossible to execute the disposition without preserving and making restitution of the property given or bequeathed. Baten v. Taylor, 386 So. 2d 333, 337 (La. 1979). The testament herein clearly instructs that Mrs. Vaughn is to receive Mr. Vaughn's entire estate, including "all properties," and at her death, "all properties" are to be divided between the decedent's three sons. Thus, in order for the decedent's sons to receive their respective share of "all properties" in accordance with the terms of the testament, the properties could not be sold or otherwise disposed of by Mrs. Vaughn during her lifetime. Simply stated, execution of the testator's disposition of such properties would be impossible without reading into the testament a charge to preserve the properties. Therefore, the statutory requirements setting forth a prohibited substitution are satisfied in this matter, and, thus, we must conclude that the disposition of "all properties" in the decedent's testament is prohibited as such. For these same reasons, we find that the disposition of the "Old Home Place" in the decedent's testament likewise is a prohibited substitution, as the testament clearly instructs that Mrs. Vaughn is to receive the Old Home Place and at her death, the decedent's oldest son is to receive this property.

In Succession of Merritt, 581 So. 2d 728, 729 (La. App. 1st Cir.), writ denied, 584 So. 2d 1165 (La. 1991), this court was faced with testamentary language similar to the language in the case *sub judice* and found that such language constituted a prohibited substitution. The disposition in question in Succession of Merritt read, "The house left like it is and land and timber for Edward Earl Lawrence at his death it will come back to all brother Hulon and

Sisters Children." Finding no material distinction between the language in the testament currently before us and that set forth in the testament in Succession of Merritt, we are constrained to find that the testament herein contains a prohibited substitution as to the (immovable) "properties" and the "Old Home Place."[7]

In concluding that the decedent's will contains a prohibited substitution, we are mindful of the consequences and results that flow from such. Although we recognize the inequitable situation that will result from so finding, given the length of time between the opening of the succession and the challenge by plaintiff, this result is warranted by the applicable law and jurisprudence. In particular, we are mindful of LSA-C.C. art. 1612, which provides that a disposition should be interpreted in a sense in which it can have effect, rather than in one in which it can have none. However, where the language of a testament is clear, the court must interpret the will as written and not what the court thinks the testator intended to say. See Succession of Flowers, 532 So. 2d 470, 472 (La. App. 1st Cir.), writ denied, 534 So. 2d 446 (La. 1988). To hold otherwise and ignore the clear words of the disposition would result in the court's rewriting the will. See Succession of Merritt, 581 So. 2d at 731.

Is the Entire Will Rendered Null?

The next issue before us is whether or not a prohibited substitution renders the entire testament an absolute nullity, as plaintiff contends. In Succession of Walters, 261 La. 59, 69, 259 So. 2d 12, 16 (1972), the Supreme Court addressed this exact issue and ultimately concluded, "[T]he nullity of a bequest, as containing a prohibited substitution, does not affect the enforceability of other valid provisions of the will, which are regular to form." Notably, in Succession of Walters, the Supreme Court recognized that in prior cases, the Court had stated that

[7]See also Maddox v. Butchee, 203 La. 299, 306-08, 14 So. 2d 4, 6-7 (1943), wherein the supreme court found that the following disposition contained a prohibited substitution:

> At my Death I donate and bequeath all the property I then own to may [sic] husband Wesley Maddox after his death it is to go to my great niece Johnnie Tilley.

the whole will is stricken when there is a prohibited substitution, whereas in cases of *fidei commissa*, only those dispositions which are tainted with that designation are invalid.[8] However, the Supreme Court concluded that "[c]learly this pronouncement misstates the law as to the effect of both substitutions and *fidei commissa*, and was an inadvertent statement by the court. Succession of Walters, 259 So. 2d at 65. Accordingly, in the instant matter, we find no merit to plaintiff's argument that the entire testament should be declared an absolute nullity on the basis that it contains prohibited substitution(s).

In sum, we find merit to plaintiff's contention that the dispositions in the testament of "all properties" and the "Old Home Place" are prohibited substitutions. However, this in no way affects the enforceability of the other valid dispositions in the will, namely the disposition of "the vehicles" and "all monies," neither of which involve any duty or charge to preserve. Accordingly, we conclude that the trial court erred in denying plaintiff's motion for summary judgment, in granting the defendants' motion for summary judgment, and in dismissing, with prejudice, plaintiff's petition to annul the probated testament.

CONCLUSION

For the above and foregoing reasons, we hereby reverse, in part, the September 5, 2013 judgment of the trial court. Finding that there are no disputed issues of material fact and that plaintiff is entitled to judgment, in part, in his favor as a matter of law, summary judgment is hereby granted in favor of plaintiff Karl Vaughn, declaring that the testamentary dispositions of "all properties" and the "Old Home Place" constitute prohibited substitutions and those testamentary dispositions are, therefore, null and without legal effect with respect to both the institute and the substitutes. In all other respects, the judgment is affirmed.

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[8] See Succession of Johnson, 223 La. 1058, 67 So. 2d 591 (1953); Succession of Simms, 250 La. 177, 195 So. 2d 114 (1967); and Crichton v. Succession of Gredler, 256 La. 156, 235 So. 2d 411 (1970).

Further, the matter is remanded to the trial court for further proceedings consistent with the views expressed herein. Costs of this appeal are assessed one-half each to plaintiff and to defendants.

REVERSED IN PART; AFFIRMED IN PART; RENDERED IN PART; AND REMANDED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 2248

SUCCESSION OF JAMES WINFORD VAUGHN

CRAIN, J., dissenting.

I respectfully disagree that the September 5, 2013 judgment is a valid final judgment from which an appeal can be taken. Although the supreme court has recognized that a final judgment may be substantively amended by consent of the parties, competent evidence of that consent must appear ***in the record***. *See LaBove v. Theriot*, 597 So. 2d 1007, 1011 (La. 1992); *see also Glass v. Voiron*, 08-1347 (La. App. 1 Cir. 3/27/09), 2009WL838682; *Starnes v. Asplundh Tree Expert Co.*, 94-1647 (La. App. 1 Cir. 10/6/95), 670 So. 2d 1242, 1246. The record on appeal is that which is sent by the trial court to the appellate court and includes the pleadings, court minutes, transcripts, jury instructions (if applicable), judgments, and other rulings, unless otherwise designated. *See* La. Code Civ. Pro. arts. 2127 and 2128; Official Revision Comment (d) for La. Code Civ. Pro. art. 2127; *Niemann v. Crosby Dev. Co., L.L.C.*, 11-1337 (La. App. 1 Cir. 5/3/12), 92 So. 3d 1039, 1044. Representations made in the appellate briefs and during oral arguments before this court, such as those relied upon by the majority, do not rise to the evidentiary level needed to show consent. *See LaBove*, 597 So. 2d at 1010; *see also Glass*, 2009WL83868 at *4 (recognizing that a trial court cannot substantively alter a judgment on the *ex parte* motion of a party, as appears to have been the case here, and also that a party's silence on the issue could not be considered competent evidence of consent).

In this case, ***the record*** does not reflect plaintiff's consent to the amendment of the August 14, 2013 judgment. I therefore find that the September 5, 2013 judgment is absolutely null, and this court lacks jurisdiction to review its merits. *See* La. Code Civ. Pro. art. 2002; *Starnes*, 670 So. 2d at 1246. For these reasons, I would vacate the September 5, 2013 judgment, reinstate the August 14, 2013 judgment, and dismiss the appeal.