

**SUCCESSION OF CHARLES  
EDWARD FOSTER**

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**NO. 2017-CA-0970**

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**COURT OF APPEAL**

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**FOURTH CIRCUIT**

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**STATE OF LOUISIANA**

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APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2014-08853, DIVISION "D-12"  
Honorable Nakisha Ervin-Knott, JUDGE

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**Judge Edwin A. Lombard**

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(Court composed of Judge Edwin A. Lombard, Judge Joy Cossich Lobrano, Judge  
Tiffany G. Chase)

***LOBRANO, J., CONCURS IN THE RESULT***

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**APPEAL CONVERTED TO  
WRIT APPLICATION;  
WRIT GRANTED AND  
RELIEF DENIED**

**MAY 16, 2018**

The instant matter involves the nullification of the will of decedent Charles Edward Foster (“Mr. Foster”) by the district court. Mr. Foster was married to Elizabeth Foster (“Mrs. Foster”) and five children were born of their union: Charles E. Foster, Jr.,<sup>1</sup> Donna Foster Zeno (“Ms. Zeno”), Melvin Foster, Larry Foster and Etheridge Foster.

Allegedly, on January 17, 1973, Mr. Foster authored an olographic will wherein he named Mrs. Foster as his sole legatee. Mr. Foster died on May 6, 1994. Subsequently, his widow, Mrs. Foster passed away in October 2013. Prior to her death, Mrs. Foster executed a statutory will naming Ms. Zeno as her testamentary executrix and sole legatee.

In August 2014, Ms. Zeno, as the executrix for the estate of Mrs. Foster, filed a petition to probate the olographic testament of Mr. Foster. The succession of Mr. Foster was probated. Moreover, in a separate proceeding, a judgment of possession was rendered on September 9, 2014, placing Ms. Zeno in possession of the estate of Mrs. Foster.

In August 2016, Etheridge Foster, Larry Foster and Melvin Foster (collectively “the Foster Brothers”), filed a petition to annul and set aside the

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<sup>1</sup> Charles E. Foster, Jr., is deceased. He is survived by Vonyel Foster, Yolanda Foster and Elise Foster, who are not parties to this appeal.

probate of the purported will and the judgment of possession of Mr. Foster. During a hearing set for December 7, 2016, the district court discovered that Mr. Foster's purported will was in fact a copy. Thereafter, the district court vacated the probate of the copy, and appointed a curator to search for Mr. Foster's will at the expense of Ms. Zeno. The district court further continued all other matters that were set for hearing on that date. The district court signed an order to this effect on December 16, 2016. Ms. Zeno, however, did not pay for the appointment of the curator. She avers that she searched for the will with other persons, but to no avail. She contends that Mr. Foster's original testament was destroyed during or after Hurricane Katrina.

The Foster Brothers, in April 2017, moved to reset their petition to annul. Following a hearing on June 30, 2017, the district court rendered a judgment of possession on July 11, 2017, wherein it: 1) vacated the appointment of an attorney to search for Mr. Foster's original will; 2) granted the petition to annul in favor of the Foster Brothers; 3) ordered that the property be distributed under the rules of intestacy among all descendants of Mr. Foster; and 4) nullified the September 9, 2017 judgment of possession.

Thereafter, Ms. Zeno filed a "Motion to Request for Re-Hearing to Annul Probated Testament by Revoking the Olographic Will and for Judgment of Possession as Intestate Succession with the Setting of an Evidentiary Hearing with Testimony of Heirs with a Rule to Probate the Olographic Will (Copy)" (hereinafter "motion to request re-hearing").<sup>2</sup> Additionally, the Foster Brothers filed an "Exception and/or Motion to Dismiss for Lack of Subject Matter

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<sup>2</sup> Ms. Zeno filed her motion on July 5, 2017, after the June 30, 2017 hearing on the petition to annul, but prior to the district court signing the July 11, 2017 judgment.

Jurisdiction.” In their exception and/or motion to dismiss, the Foster Brothers asserted that Ms. Zeno’s request for re-hearing should be dismissed for lack of jurisdiction as a consequence of her failure to timely appeal or otherwise seek supervisory relief from the December 16, 2016 judgment and because she did not oppose their Motion to Reset Petition to Annul Probated Testament and for Judgment of Possession as Intestate Succession.

The district court rendered judgment on August 31, 2017, denying Ms. Zeno’s request for re-hearing and granting the Foster Brothers’ exception and/or motion to dismiss. The district court later certified the August 31, 2017 judgment as final<sup>3</sup> and granted Ms. Zeno a devolutive appeal from the same.

## **Jurisdiction**

As stated above, Ms. Zeno’s appeal seeks review of the August 31, 2017 judgment of the district court. We find that this judgment is interlocutory and, thus, unappealable. An interlocutory judgment is “a judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment.” La. Code Civ. Proc. art. 1841. “A judgment that determines the merits in whole or in part is a final judgment.” *Id.* Ms. Zeno moved the district court to certify the judgment as a partial final judgment, which it did pursuant to La. Code Civ. Proc. art. 1915 (B)(1):

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

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<sup>3</sup> Ms. Zeno moved the district court to designate the August, 31, 2017 judgment as a final judgment. However, her motion incorrectly refers to the judgment as being dated August 21, 2017.

by the court after an express determination that there is no just reason for delay.

However, an interlocutory judgment is appealable only when expressly provided by law. La. Code Civ. Proc. art. 2083. The judgment at issue denied Ms. Zeno re-hearing on a motion and granted an exception and/or motion to dismiss her motion for re-hearing based on a lack of subject matter jurisdiction. The judgment does not determine the merits in whole or in part; thus, it could not be rendered a partial final judgment.

Moreover, the addition of certification language in a judgment cannot serve to transform an interlocutory judgment into an appealable judgment. *See Stewart v. City of Bogalusa*, 15-1877, pp. 5-6 (La. App. 1 Cir. 8/5/16), 199 So. 3d 651, 653-54, *reh'g denied* (9/14/16) (quoting *Marquez v. Jack Ussery Construction*, 06-1852, p. 6 (La.App. 1 Cir.6/8/07), 964 So. 2d 1045, 1049). Our review reveals that the judgment at issue was improperly designated as final by the trial court, and that this interlocutory judgment is not subject to an immediate appeal. The proper procedural vehicle for seeking review of an interlocutory judgment is by application for a supervisory writ. *Sullivan v. Malta Park*, 16-0875, p. 4 (La. App. 4 Cir. 1/31/17), 215 So. 3d 705, 708 (quoting *Llopis v. State*, 16-0041, pp. 3-4 (La.App. 4 Cir. 12/14/16), 206 So. 3d 1066, 1068). Accordingly, we conclude that we have no appellate jurisdiction to consider the merits of the present appeal. *See Bank of New York v. Holden*, 15-466, p. 5 (La. App. 5 Cir. 12/23/15), 182 So. 3d 1206, 1208.

However, considering that Ms. Zeno's motion for appeal was filed within the thirty-day time period allowed for taking a writ application, we exercise our discretion to convert the appeal to a writ application. We grant the writ application

and consider the issue presented under our supervisory jurisdiction. *See Engine 22, LLC v. Land & Structure, LLC*, 16-0664, pp. 1-2 (La. App. 4 Cir. 4/5/17), 220 So. 3d 1, 3 (citing *Stelluto v. Stelluto*, 05-0074, p. 7 (La. 6/29/05), 914 So. 2d 34, 39). We now turn to the merits of the substantive issue before us.

### **Motion for Request Re-Hearing**

The sole issue raised by Ms. Zeno is that at the June 30, 2017 hearing, the district court erred in failing to hear evidence pertaining to the validity of the previously probated testament before ruling on the testament's validity. The crux of Ms. Zeno's argument is that the district court erred in nullifying the September 9, 2014 judgment of possession and ordering that the estate of Mr. Foster be distributed amongst all of his children without first conducting an evidentiary hearing pursuant to *Succession of Gaulden*, 593 So. 2d 805 (La. App. 4<sup>th</sup> Cir. 1992) and *Succession of Dalier*, 09-0393 (La. App. 4 Cir. 8/12/09), 19 So. 3d 8. She avers that the district court should not have solely relied upon pleadings and the argument of counsel because factual findings were necessary. She requests that this Court vacate the judgment of the district court and remand for an evidentiary hearing.

As previously stated, the district court memorialized its ruling from the June 30, 2017 hearing in the July 11, 2017 judgment of possession that it rendered. Ms. Zeno did not appeal that judgment. Moreover, as the district court noted at the hearings on June 30, 2017 and August 21, 2017, Ms. Zeno also failed to appeal or seek supervisory review of the December 16, 2016 judgment, wherein the district court vacated the probate of the photocopied testament.

The transcript of the August 21, 2017 hearing of Ms. Zeno's motion to request re-hearing reflects that counsel for Ms. Zeno asserted that she was aggrieved by the district court's decision at the December 7, 2016 hearing to prohibit testimony regarding the validity of the photocopied will. Counsel for Ms. Zeno further asserted that Ms. Zeno did not seek an appeal because the December 16, 2016 judgment was not a final judgment. Ms. Zeno's counsel stressed that Ms. Zeno wanted to introduce testimony and evidence, in accordance with *Succession of Talbot*, 530 So. 2d 1132 (La. 1988), that Mr. Foster executed an original will that was destroyed and further that a copy was made, which was maintained by Mrs. Foster. Counsel for Ms. Zeno asserted that under *Talbot*, the photocopy of Mr. Foster's will could be used to probate Mr. Foster's estate.

Throughout the hearing, the district court reminded counsel for Ms. Zeno that the court could not review or revise an order from December 2016—a fact the court recalled reiterating at the June 30, 2017 hearing. The district court further reasoned that even though Ms. Zeno did not think that the December 2016 order was a final judgment, she should have sought supervisory review of the December 2016 ruling, realizing that she was aggrieved by the district court's decision. We agree. Furthermore, we note that by the time Ms. Zeno raised this argument on August 21, 2017, the judgment of possession for the photocopied will had already been nullified; thus, further rendering the need for a rehearing from December 2016, moot.

Moreover, as discussed above, Ms. Zeno's motion for appeal states that she seeks review of the August 31, 2017 judgment denying her motion to request re-hearing, and granting the exception and/or motion to dismiss of the Foster Brothers. The issue she raises in the instant writ application, however, is related to

the July 11, 2017 judgment. We find that Ms. Zeno is impermissibly using the denial of her motion to request re-hearing to seek review of the nullification of the judgment of possession. Even if this Court were to construe her motion to request re-hearing as a motion for new trial, Ms. Zeno failed to move for an appeal of the July 11, 2017 judgment following the denial of her motion to request re-hearing.

Pursuant to La. Code Civ. Proc. art. 2082, an appeal lies only from the judgment rendered. “This court cannot consider claims in which the party confessed or acquiesced in the judgment.” *Magee v. Williams*, 50,726, pp. 5-6 (La. App. 2 Cir. 6/22/16), 197 So. 3d 265, 268 (citing La. Code Civ. Proc. art. 2085; *Trahan v. Coca Cola Bottling Co. United Ltd.*, 04–0100 (La.3/2/05), 894 So. 2d 1096). Essentially, Ms. Zeno acquiesced in both the December 16, 2016, and the July 11, 2017 judgments by failing to timely seek an appeal or supervisory relief. For the foregoing reasons, we deny her writ application.

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