

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 0851

SUCCESSION OF BOBBY SEABORN HELMS

Judgment Rendered: DEC 23 2015

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On Appeal from the  
21st Judicial District Court  
In and for the Parish of Tangipahoa  
State of Louisiana  
Trial Court No. 2012-30417, Div. D

*[Handwritten signatures and initials: VGW, JEW, and others]*

The Honorable M. Douglas Hughes, Judge Presiding

\* \* \* \* \*

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\* \* \* \* \*

BEFORE: WHIPPLE, C.J., WELCH, AND DRAKE, JJ.

## **DRAKE, J.**

The executor, Billy Donald Helms (Appellant), appeals a judgment of the trial court in favor of Lawrence Helms and Robert Helms (Appellees), objectors to the tableau of distribution, recognizing a lifetime usufruct bestowed to Bobby S. Helms (Decedent) and denying a request for accounting and reimbursement for rents. For the following reasons, we affirm the judgment of the trial court.

### **FACTS AND PROCEDURAL HISTORY**

This matter originally began when Joyce Helms, who at the time was married to the Decedent, executed a Last Will and Testament on February 6, 1976. (Joyce's will). Three children were born of the marriage between Decedent and Joyce Helms, namely, Billy Donald Helms, Lawrence Helms, and Robert Helms. Joyce's will provided as follows:

I give and bequeath unto my husband, Bobby S. Helms, the usufruct of all remaining property of which I die possessed and relieve him of furnishing bond or other security.

After payment of all my just debts, I give and bequeath unto my children, Billy Donald, Lawrence Alan and Robert Douglas, share and share alike, all remaining property of which I die possessed, movable and immovable, both real and personal, **subject however to the lifetime usufruct of Bobby S. Helms.** (Emphasis added).

Joyce Helms died on June 14, 1979, and the usufruct that had been granted to Decedent was recognized in a judgment of possession dated March 19, 1980, (judgment of possession) which stated:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Bobby S. Helms be recognized as surviving spouse in community with decedent and, as such, recognized as owner in his own right of one-half of all community property, together with the usufruct of all remaining property, as hereinafter described.

IT IS FURHTER ORDERED, ADJUDGED AND DECREED that Billy Donald Helms, Lawrence Alan Helms and Robert Douglas Helms be recognized as the sole and only heirs of decedent, and as such, be recognized as the owners of all remaining property owned by decedent, subject to the usufruct in favor of their father, Bobby S. Helms, ...

Decedent remarried Luddie B. Helms on or about November 27, 1981, and they remained married until Decedent died testate on August 24, 2012. After his father's death, Appellant petitioned the trial court to probate Decedent's will and be appointed as executor. As part of the sworn detailed descriptive list, Appellant included an amount he claimed was due the naked owners, (he, Lawrence Helms, and Robert Helms) from the testamentary usufruct of Joyce Helms. Appellees objected to the proposed distribution of funds claiming that the usufruct granted Decedent by Joyce Helms was a lifetime usufruct, so that no reimbursement for rents was owed. Appellant filed an opposition to the motion to traverse the usufruct account, as well as exceptions of improper use of summary proceedings, prescription, no right of action, no cause of action, and lack of jurisdiction.

The trial court held a hearing on the objection to the proposed distribution of funds on March 24, 2014. Following the hearing, a judgment was signed on April 27, 2015, recognizing that Joyce Helms had bestowed a lifetime usufruct to Decedent, and that the estate of Decedent was not required to account for rents or owed reimbursement for rents, profits or advantages derived from the property subject to the lifetime usufruct. The trial court stated in the judgment that there was no reason for delay and designated the judgment as final. It is from this judgment that Appellant appeals.

### **ERRORS**

Appellant claims that the trial court erred in: not addressing and granting his exceptions; determining that Joyce Helms had bequeathed a lifetime usufruct to Decedent; and deciding that Decedent's estate was not required to account for rents or owed reimbursement for rents, profits or advantages derived from the property subject to the lifetime usufruct.

## JURISDICTION

At the outset, we must resolve whether the judgment before us is a partial judgment that is immediately appealable under the provisions of La. C.C.P. art. 1915. Appellate courts have the duty to examine subject matter jurisdiction *sua sponte*, even when the parties do not raise the issue. *State, Department of Transportation and Development v. Henderson*, 2009-2212 (La. App. 1 Cir. 5/7/10), 39 So. 3d 739, 741. This court's appellate jurisdiction extends to "final judgments." La. C.C.P. art. 2083; *Van ex rel. White v. Davis*, 2000-0206 (La. App. 1 Cir. 2/16/01), 808 So. 2d 478, 483. A judgment that determines the merits in whole or in part is a final judgment. La. C.C.P. art. 1841. A declaratory judgment has the force and effect of a final judgment or decree and may be reviewed as other orders, judgments, and decrees. La. C.C.P. arts. 1871 and 1877. However, a judgment that only partially determines the merits of an action is a partial final judgment and, as such, is appealable only if authorized by La. C.C.P. art. 1915. *Rhodes v. Lewis*, 2001-1989 (La. 5/14/02), 817 So. 2d 64, 66.

This matter began as an action to probate the will of the decedent. The judgment at issue on appeal does not dismiss any party nor is it a judgment of possession of the property at issue. Instead, the judgment is limited to a declaration that the decedent was granted a lifetime usufruct by Joyce Helms, that the decedent was not required to account for rents, nor owed the estate any reimbursement, and that Donald Helms was to render the assets according to the decedent's last will and testament. The judgment does not determine the merits of all of the claims pending in the case and, therefore, constitutes a partial judgment that is appealable only if authorized by article 1915. *See Succession of Brantley*, 96-1307 (La. App. 1 Cir. 6/20/97), 697 So. 2d 16, 18, and *Boutte v. Meadows*, 2013-1189, pp. 5-6 (La. App. 1 Cir. 2/18/14) (unpublished).

Whether a partial judgment is immediately appealable is determined by examining the requirements set forth in La. C.C.P. art. 1915. *Henderson*, 39 So. 3d at 741. Pursuant to Subpart A of La. C.C.P. art. 1915, a partial judgment is a final judgment if it:

(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 Articles 965, 968, and 969.

(3) Grants a motion for summary judgment, as provided by Articles 966 through 969, but not including a summary judgment granted pursuant to Article 966(E).

(4) Signs a judgment on either the principal or incidental demand, when the two have been tried separately, as provided by Article 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 Article 191, 863, or 864 or Code of Evidence Article 510(G).

A partial judgment that fits within one of these enumerated categories is a final judgment subject to immediate appeal without the necessity of any designation of finality by the court. La. C.C.P. art. 1911.

However, a partial judgment that is not included in one of these categories is not a final judgment for purposes of immediate appeal unless it is properly designated as “final” by the court after an express determination that there is no just reason for delay. La. C.C.P. arts. 1911 and 1915(B)(1). Code of Civil Procedure article 1915 attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties. *R.J. Messinger, Inc. v. Rosenblum*, 2004-1664 (La. 3/2/05), 894 So. 2d 1113, 1122.

The April 27, 2015 judgment at issue herein, declaring that the decedent was granted a lifetime usufruct, that the estate of decedent owed no reimbursement, and that the property was to be distributed according to decedent’s will does not fall

within any of the categories identified in Subpart A of LSA-C.C.P. art. 1915. The judgment does not dismiss the suit as to any party, nor does it grant a motion for judgment on the pleadings; it also does not pertain to an incidental demand that was tried separately. The judgment likewise does not adjudicate the issue of liability and does not impose sanctions or disciplinary action. Furthermore, the judgment does not grant a motion for partial summary judgment.

Thus, because the April 27, 2015 judgment is not a final judgment for purposes of immediate appeal under the provisions of LSA-C.C.P. art. 1915(A), this court's jurisdiction depends upon whether the judgment was properly designated as a final judgment pursuant to La. C.C.P. art. 1915(B)(1).<sup>1</sup> See La. C.C.P. arts. 1911(B) and 2083; *Boutte*, 2013-1189 at p. 7 (unpublished) (Trial court's judgment that declared that only one "cap" applied to plaintiff's medical malpractice claim against the Patient Compensation Fund did not fall within any of the categories of LSA-C.C.P. art. 1915(A)).

Although the judgment is designated as final and appealable pursuant to La. C.C.P. art. 1915, the trial court gave no explicit reasons for its determination that no just reason for delay existed. Accordingly, this court reviews that determination on a *de novo* basis. *R.J. Messinger, Inc.*, 894 So. 2d at 1122. In conducting this review, we consider the "overriding inquiry" of "whether there is no just reason for delay," as well as the other non-exclusive criteria trial courts should use in making the determination of whether certification is appropriate, which include: (1) the relationship between the adjudicated and the unadjudicated

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<sup>1</sup> Code of Civil Procedure article 1915(B)(1) provides as follows:

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.

claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court, might be obliged to consider the same issue a second time; and (4) miscellaneous facts such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. *R.J. Messinger, Inc.*, 894 So. 2d at 1122-1123.

Applying the factors set forth above in *R.J. Messinger, Inc.*, 894 So. 2d at 1122-1123, we recognize that affirming the judgment of the trial court declaring that the decedent was granted a lifetime usufruct by Joyce's will and that his estate owed no reimbursement would terminate the claim of Billy Helms with regard to the reimbursement. There is no possibility that the type of usufruct granted by Joyce's will would again be considered. Furthermore, a determination as to the type of usufruct granted by Joyce's will may facilitate resolution of the litigation, reduce the costs of litigation, and foster judicial economy.

We find the above-discussed application of the *R.J. Messinger, Inc.* factors persuasive in making our determination that this appeal was properly designated as immediately appealable. The determination of the type of usufruct granted to decedent by Joyce's will in this case is an important issue that warrants appellate review at this juncture. Accordingly, based on the reasoning set forth above, we find that the instant appeal should be maintained.

### **DISCUSSION**

Appellant argues that Joyce's will, which was executed in 1976, did not leave a lifetime usufruct to Decedent. Appellant claims that there is an ambiguity in Joyce's will since one paragraph bequeaths to Decedent the "usufruct of all the remaining property of which I die possessed," and another paragraph states that her remaining property is left to her children "subject however to the lifetime usufruct of [Decedent]." Based on this purported ambiguity, Appellant claims that

Joyce's will did not grant Decedent a lifetime usufruct. Appellant asserts that La. C.C. art. 1499 currently provides that a usufruct granted to a surviving spouse "shall be for life unless expressly designated for a shorter period," but that the article did not come into existence until 1996. *See* 1996 La. Acts, 1<sup>st</sup> Ex. Sess. No. 77, § 1. Furthermore, La. C.C. art. 1499, comment (d) specifically provides that it legislatively overruled *Succession of Chauvin*, 257 So. 2d 422, 426 (La. 1972), which stated that a testamentary usufruct terminates when the surviving spouse enters into a second marriage, unless the will specified otherwise. Additionally, La. R.S. 9:2441 specifically provides, "[w]hen a testament executed prior to June 18, 1996 leaves a usufruct to the surviving spouse without specifying its duration, the law in effect at the time the testament was executed shall govern the duration of the usufruct."

We must first determine if the trial court was correct in finding that Joyce's will granted a lifetime usufruct to Decedent. Appellant claims that Joyce's will is contradictory since one clause refers to a usufruct being left to the Decedent, and a following clause refers to a *lifetime* usufruct. Louisiana Civil Code article 1615 provides that "[w]hen a testament contains contradictory provisions, the one written last prevails."<sup>2</sup> When the will is contradictory, that which is last written is presumed to be the will of the testator, revoking previous contrary dispositions. *See Succession of Moran*, 479 So. 2d 350, 354 (La. 1985); *Succession of Lindsey*, 477 So. 2d 148, 152 (La. App. 1 Cir. 1985). The trial court determined that the last expression in Joyce's will was a lifetime usufruct to Decedent, therefore, the usufruct was granted for the life of Decedent, and not just until his remarriage. (R. 75, 96, 124). Based on La. C.C. art. 1615 and the jurisprudence, we find no error

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<sup>2</sup> Although Louisiana Civil Code article 1615 was not effective until July 1, 1999, after Joyce's will was executed, revision comment (a) to the article, states: "This Article reproduces and combines the provisions of [former] Civil Code Articles 1719 and 1723. It does not change the law."

in the trial court's determination that Joyce's will granted Decedent a lifetime usufruct.

Appellant contends that even if a lifetime usufruct was granted to Decedent in Joyce's will, it was not recognized by the judgment of possession, which did not contain the word "lifetime" and the judgment of possession is *prima facie* evidence that Decedent's usufruct was until remarriage, and not for life. See La. C.C.P. art. 3062.

A judgment of possession is *prima facie* evidence of the right of the heirs in whose favor it was rendered to take possession of the decedent's estate; however, it is not a basis for a plea of res judicata or conclusive evidence against persons having an adverse interest in or claim against the estate. *Guidry v. Dufrene*, 1996-0194 (La. App. 1 Cir. 11/8/96), 687 So. 2d 1044, 1046.

To overcome the *prima facie* evidence of the judgment of possession, Appellees put on evidence at the trial that the decedent was granted a lifetime usufruct. Luddie Helms, the surviving spouse of Decedent, testified that when she and Decedent signed a marriage contract dated November 24, 1981, he reserved his lifetime usufruct over the undivided one-half interest of the property granted to him by Joyce's will. She specifically stated:

He made it very clear that he had [a] lifetime usufruct and that it was his business and his children[s], that I was not involved in it. And we agreed on that. I had no part of their business, you know. That he had a lifetime usufruct from Joyce.

She testified that she had several conversations with Decedent regarding the lifetime usufruct and that Decedent believed that he had a lifetime usufruct based on those conversations.

The marriage contract signed by Luddie Helms and Decedent specifically refers to Decedent being the "legal owner indivision of an undivided one-half interest and lifetime usufructuary of the other undivided one-half interest" in

certain property. Attorney Leonard Yokum, Jr., who drafted the marriage contract, testified that Decedent acted as a lifetime usufructuary and stated, “[Decedent] was in charge, [Decedent] handled everything and he took –he was in control of everything that had to do with that.”

Robert Helms also testified that he had discussed the usufruct with his father and that “he told us, that he had lifetime usufruct or usage of it. That’s the only terms I knew.” Robert Helms also stated that when his father redid his will, he again confirmed that he had a lifetime usufruct. Lawrence Helms also testified regarding discussions he had with his father concerning the lifetime usufruct held by Decedent.

It is well settled that an appellate court cannot set aside a trial court’s findings of fact in the absence of manifest error or unless those findings are clearly wrong. *Rosell v. ESCO*, 549 So. 2d 840, 844 (La. 1989). In order to reverse a fact finder’s determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. *Stobart v. State, DOTD*, 617 So. 2d 880, 882 (La. 1993).

Appellant argues that Appellees are essentially attempting to amend the judgment of possession which was signed on March 19, 1980. In response, Appellees claim that they did not seek to amend the judgment of possession, but that the judgment of possession incorporates the terms of Joyce’s will, citing La. C.C.P. art. 3061(C), which states, “[a] judgment sending one or more petitioners into possession under a testamentary usufruct or trust *automatically incorporates all the terms of the testamentary usufruct or trust* without the necessity of stating the terms in the judgment.” (Emphasis added). Appellant correctly asserts that La. C.C.P. art. 3061(C) did not become effective until August 15, 2010. Therefore,

Appellant claims that La. C.C.P. art. 3061(C) is inapplicable to the present matter. Furthermore, Appellant urges this court not to adopt the Fourth Circuit's holding in *In re Succession of DiLeo*, 2011-1256 (La. App. 4 Cir. 3/21/12), 90 So. 3d 488, writ denied, 2012-1025 (La. 6/22/12), 91 So. 3d 976, where the court held that La. C.C.P. art. 3061(C) applied retroactively.

*Succession of DiLeo* noted that even though La. C.C.P. art. 3061(C) did not become effective until August 15, 2010, the legislature did not express its intent pertaining to retrospective or prospective application, "but it clearly is not a substantive change and therefore is applicable retroactively." *Succession of DiLeo*, 90 So. 3d at 494 n.1 (citing *Sudwischer v. Estate of Hoffpauir*, 1997-0785 (La. 12/12/97), 705 So. 2d 724, 728). In *Succession of DiLeo*, the decedent's wife obtained an amended judgment of possession to recognize a lifetime usufruct granted in his will. One of their daughters sought to annul the amended judgment. Mrs. DiLeo alternatively sought to reopen the succession should the amended judgment be annulled. *Id.* at 490. In applying La. C.C.P. art. 3061(C) retroactively, the Fourth Circuit noted that the daughter involved refused to accept the wishes of her father as evidenced by the will, "arguing instead that the judgment of possession has primacy over the testamentary language and, as such, restricts and permanently eliminates the broader usufruct rights conveyed by testament to Mrs. DiLeo...advocat[ing] a 'gotcha' form of succession law..." *Succession of DiLeo*, 90 So. 3d at 493.

*Succession of DiLeo* also distinguished *Succession of McCarthy*, 583 So. 2d 140 (La. App. 1 Cir. 1991), upon which Appellant further relies, where this court had to determine whether the trial court abused its discretion in maintaining an exception of no cause of action. The judgment of possession at issue in *Succession of McCarthy* granted a surviving spouse a usufruct for life, even though the testament only confirmed a legal usufruct without any express grant for life,

which, under the law at that time, terminated upon remarriage. When the surviving spouse remarried, the decedent's children attempted to reopen the succession to correct the judgment to reflect that the usufruct terminated at remarriage. This court affirmed the trial court's finding of no "proper cause" to reopen the succession, given the trial court's discretion to reopen a succession and that the children had unconditionally accepted a lifetime usufruct. *Id.* at 142.

Here, Appellant contends that Appellees are attempting to "reopen" Joyce's succession and they have no right to do so, pursuant to *Succession of McCarthy*, because they accepted the judgment of possession as rendered in the succession. We find *Succession of McCarthy* distinguishable from the present case. Appellant states, "Joyce's [Judgment of Possession] without provision that the usufruct was for life rather than until remarriage was accepted by Decedent, Appellant, and Appellees." However, we find no such "acceptance" in the record before us, as was present in *Succession of McCarthy*. Furthermore, the present case is in a different procedural posture since there has been no motion to reopen the succession, as in *Succession of McCarthy*, which was decided based upon the interpretation of Louisiana Code of Civil Procedure article 3393(B) regarding the reopening of successions. Instead, this matter arose from an objection to the proposed distribution of funds based on the lifetime usufruct. Furthermore, we agree with Appellees that *Succession of McCarthy*, which was decided long before the implementation of La. C.C.P. art. 3061(C), cannot stand for the proposition that a judgment which omits language used in a testament cannot be recognized to automatically include that language in the judgment. The Appellees provided evidence as to the lifetime usufruct to overcome the *prima facie* evidence of Appellant that the judgment of possession did not include a lifetime usufruct.

The Appellees asked the trial court to interpret the judgment of possession pursuant to their opposition to the distribution of funds proposed by Appellant. A

trial court has authority to consider and interpret a judgment of possession. See *Lasseigne v. Lasseigne*, 393 So. 2d 435, 437 (La. App. 3 Cir. 1980), writ denied, 399 So. 2d 601 (La. 1981). In construing a judgment, the entire context must be considered, and in the event of doubt or ambiguity, it is proper to consider the pleadings, subject matter of the suit, reasons for judgment, and other matters of record in order to arrive at an interpretation consistent with a proper decree on the facts and law presented. *In re Succession of Beard*, 2013-1717 (La. App. 1 Cir. 6/6/14), 147 So. 3d 753, 760 (citing *Williams Law Firm v. Board of Supervisors of Louisiana State University*, 2003-0079 (La. App. 1 Cir. 4/2/04), 878 So. 2d 557, 565; *State, Department of Transportation & Development v. Sugarland Ventures, Inc.*, 476 So. 2d 970, 974 (La. App. 1 Cir.), writ denied, 478 So.2d 909 (La. 1985)).

The pleadings and other matters of record in this succession proceeding include Joyce's will and a petition for possession. Pursuant to the terms and conditions of her will, Joyce granted Decedent a lifetime usufruct. The petition of possession incorporated the terms of the will by stating: "[t]hat under the terms of decedent's last will, ... [Decedent] was named as Testamentary Legatee ... together with the usufruct of all remaining property; and all remaining property was left to decedent's three children, subject to the usufruct in favor of your petitioner." The judgment of possession refers to the petition of possession by stating, "the Court considering the matters set forth in the [p]etitions...." Based upon the clear intent of the testator, Joyce Helms, as reflected in her will probated with the court, we construe the language in the judgment of possession vesting Decedent with a usufruct as including, by reference, the terms and conditions of the lifetime usufruct set forth in Joyce's will, as the judgment of possession specifically refers to the "terms of [Joyce's] last will." This interpretation of the

judgment of possession is entirely consistent with the undisputed facts and law presented to the court when the judgment was rendered.

Appellant relies on *Burmaster v. Plaquemines Parish Gov't*, 2007-2432 (La. 5/21/08), 982 So. 2d 795, 810 to claim that La. C.C.P. art. 3061(C) cannot be given retroactive application and that the judgment of possession cannot be interpreted to grant a lifetime usufruct to Decedent because it would deprive Appellant of a vested right. *See* La. C.C. art. 6. However, the trial court's recognition that the judgment of possession incorporated the lifetime usufruct granted Decedent in Joyce's will did not deprive Appellant of any vested right. At the moment of Joyce Helms's death, Decedent acquired the lifetime usufructuary rights. Appellant did not acquire anything more than what was in Joyce's will. Procedural laws prescribe a method for enforcing a previously existing substantive right and relate to the form of the proceeding or the operation of the laws. *Rochelle v. LeBlanc*, 2010-1901 (La. App. 1 Cir. 5/6/11), 65 So. 3d 240, 243. The only existing right of Appellant was as coheir and naked owner subject to Decedent's lifetime usufruct. Therefore, the retroactive application of La. C.C.P. art. 3061(C) does not deprive Appellant of any constitutional rights.

We find no manifest error in the trial court's interpretation of the judgment of possession at issue. We also agree with the trial court that La. C.C.P. article 3061(C) should be applied retroactively and automatically incorporate the testamentary provisions.

### **Exceptions**

Appellant filed exceptions of improper use of summary proceedings, prescription, no right of action, no cause of action, and lack of jurisdiction. At the hearing, he withdrew the exception of improper use of summary proceedings. Appellant claims that the trial court erred in not addressing and granting his exceptions. Generally, silence in a judgment of the trial court as to any issue,

claim, or demand placed before the court is deemed a rejection of the claim and the relief sought is presumed to be denied. *Schoolhouse, Inc. v. Fanguy*, 2010-2238 (La. App. 1 Cir. 6/10/11), 69 So. 3d 658, 664. The transcript herein reflects that the exceptions were taken up or placed before the trial court in the proceedings below. Although the judgment of the trial court did not specifically state that the exceptions of prescription, no right of action, no cause of action, and lack of subject matter jurisdiction were denied, given the trial court's ruling on the main demand, the trial court clearly considered and rejected those exceptions. *See Id.*

### **Exception of Prescription**

Appellant claims that the Appellees' opposition "to the usufruct account is barred by prescription since, in substance, it seeks to annul and reissue Joyce's [judgment of possession]." Appellant relies on La. C.C.P. art. 2002, vices of form, and La. C.C.P. art. 2004, vices of substance. Since the judgment of possession for Joyce's will was signed on March 19, 1980, Appellant claims that the action of Appellees, filing the opposition to the distribution of fund on December 23, 2013, prescribed pursuant to the articles above or La. C.C. art. 3502, which states, "[a]n action for the recognition of a right of inheritance and recovery of the whole or a part of a succession is subject to a liberative prescription of thirty years. This prescription commences to run from the day of the opening of the succession."

Appellees argue that they never sought to annul or attack the judgment of possession. "[A]ll that Appellees sought was a ruling from the trial court recognizing the lifetime usufruct which was granted in the testament and incorporated into the judgment of possession under La. C.C.P. art. 3061." (Appellee Brief at p. 5). Furthermore, it is a settled issue that coheirs or co-owners do not as a general rule acquire or lose by prescription against each other. *In re Succession of Moore*, 1997-1668 (La. App. 4 Cir. 4/1/98), 737 So. 2d 749, 760, writ denied, 1999-0781 (La. 4/30/99), 743 So. 2d 207 (citing La. C.C. arts. 3439,

3478; La. C.C.P. art. 3659; *Lee v. Jones*, 224 La. 231, 69 So. 2d 26 (1953), and citations therein; *Headrick v. Lee*, 471 So. 2d 904 (La. App. 2d Cir.1985)). It would appear from the judgment of possession that all the parties herein have held the succession property as coheirs or co-owners in indivision since March 19, 1980. Therefore, the prescription of La. C.C. art. 3502 did not accrue in favor of either Appellant or Appellees.

Given our ruling that La. C.C.P. article 3061(C) should be applied retroactively and automatically incorporates the testamentary provisions, we agree that the exception of prescription was properly overruled. Furthermore, we do not find that La. C.C.P. arts. 2002 or 2004 are applicable, since Appellees did not seek to annul the judgment of possession.

**Exceptions of No Right of Action, No Cause of Action, and Lack of Jurisdiction**

Appellant relies on *Succession of McCarthy*, in arguing that the exceptions of no right of action, no cause of action, and lack of jurisdiction were improperly denied. (Appellant's Brief at p. 10). *Succession of McCarthy* was decided on the basis of a no cause of action, and this court declined to reach the exception raising the objection of no right of action. *Id.* at 141. Moreover, in *Succession of McCarthy*, this court did not address the jurisdiction of the trial court. Therefore, in relying on *Succession of McCarthy*, Appellant only offers arguments in regard to the objection of no cause of action. Accordingly, we will limit our remaining review of the exceptions as to whether the trial court properly overruled the objection of no cause of action. *See* Uniform Rules—Courts of Appeal, Rule 2–12.4(B)(4) (“All assignments of error and issues for review must be briefed. The court may consider as abandoned any assignment of error or issue for review which has not been briefed”).

The procedural situation in *Succession of McCarthy* involved plaintiffs seeking to reopen the succession of their father in order to recognize the termination of a usufruct through remarriage. *Id.* at 141. This court found that the children had no cause of action to reopen the succession pursuant to La. C.C.P. art. 3393(B), which permits a reopening “if other property is discovered, or for any other proper cause.” *Id.* at 142.

A cause of action, when used in the context of the peremptory exception, is defined as the operative facts that give rise to the plaintiff’s right to judicially assert the action against the defendant. *Everything on Wheels Subaru, Inc. v. Subaru South., Inc.*, 616 So.2d 1234, 1238 (La. 1993). The function of an exception of no cause of action is to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the petition. *Ramey v. DeCaire*, 2003-1299 (La. 3/19/04), 869 So. 2d 114, 118. No evidence may be introduced to support or controvert the exception raising the objection of no cause of action. La. C.C.P. art. 931.

An interested person may petition the court for notice of the filing of a tableau of distribution. La. C.C.P. art. 3305. An opposition may be filed at any time before homologation. La. C.C.P. art 3307. Appellees in this matter filed their opposition to the tableau of distribution filed by Appellant in a timely manner.

The present matter does not seek to annul the judgment of possession or attack its validity. The Appellees merely filed an objection to a proposed distribution, which required the trial court to construe the judgment of possession. As stated above, a person is entitled to relief by declaratory judgment when his rights are uncertain or disputed in an immediate and genuine situation, and the declaratory judgment will remove the uncertainty or terminate the dispute. *Succession of Beard*, 2013-1717 (La. App. 1 Cir. 6/16/14), 147 So. 3d at 762.

Therefore, we agree that the Appellees had a cause of action to oppose the tableau of distribution and the exception of no cause of action was properly overruled.

### **CONCLUSION**

For the foregoing reasons, the judgment of the trial court recognizing that Bobby Helms was bestowed a lifetime usufruct from his late wife, Joyce Helms, over her property and that the estate of Bobby Helms was not required to account for rents or owed reimbursement for rents, profits or advantages derived from the lifetime usufruct is affirmed. Costs of this appeal are assessed to Billy Donald Helms, executor of the estate of Bobby Helms.

**AFFIRMED.**