NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CU 1663

ROCHELLE WELLS

VERSUS

LARRY WELLS

Consolidated With

VGW by GHG

NUMBER 2007 CU 1664

LARRY C. WELLS

VERSUS

ROCHELLE A. WELLS

Judgment Rendered: DEC 28 2007

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa, Louisiana
Docket Number 2006-001938 c/w 2006-002270

Honorable Robert H. Morrision, III, Judge Presiding

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BEFORE: WHIPPLE, GUIDRY AND HUGHES, JJ.

Hughes, J. concurs.

WHIPPLE, J.

Rochelle Wells appeals a trial court judgment that addressed issues of child custody, child support, health insurance coverage for the minor children, use of the matrimonial domicile, and spousal support. For the following reasons, we affirm in part, vacate in part, render in part, and amend in part.

FACTS AND PROCEDURAL HISTORY

Larry and Rochelle Wells were married on September 6, 1997. The parties have two children, a son born on September 7, 1996, and a daughter born on April 23, 2003. On June 13, 2006, Rochelle filed a petition for divorce and for a determination of incidental matters.[1]

A hearing was conducted on August 28, 2006, at which time the parties stipulated that Rochelle would be the domiciliary parent of the minor children, Larry would exercise visitation on Mondays and Fridays from 6:00 p.m. to 8:00 p.m. and on Saturdays from 10:00 a.m. to 8:00 p.m., the restraining orders obtained by the parties would be modified as specified to facilitate visitation with Larry and extended family, and Larry would have use of the Chevrolet Tahoe. Thus, the remaining issues before the court were child support, spousal support, use of the family home, and rental reimbursement.

Following the hearing, the trial court rendered a written judgment, which was dated March 26, 2007, implementing the stipulations of the parties as to the domiciliary parent and the visitation schedule. In the judgment, the court further decreed that Larry was not underemployed and that Larry's monthly income was $2,184.00. The judgment further

[1]One month later, on July 13, 2006, Larry filed a petition for divorce. By order dated July 27, 2006, these matters were consolidated in the trial court.

attributed an income to Rochelle based upon minimum wage for a forty-hour work week.

With regard to any actual child support obligation, the judgment did not set forth a specific amount of child support due. Rather, the judgment provided that Larry's child support obligation "shall be set at the appropriate child support guideline amount" based on the earnings attributed to the parties. The judgment further provided that Larry had the option to make the child support payments on the first of each month or to make one-half payment on the first of the month and one-half payment on the fifteenth of the month, retroactive to the filing of the original petition. Additionally, Larry was ordered to provide health insurance coverage for the minor children "when it becomes available through his employment."

Regarding use of the family home, the judgment ordered that Rochelle was to have exclusive use of the matrimonial domicile. Furthermore, the judgment provided that in lieu of spousal support, Larry was to pay all monthly mortgage notes, and Rochelle was exempt from the obligation of rental reimbursement.[2]

From this judgment, Rochelle appeals, listing six assignments of error. Also, after lodging the appeal, this court, *ex proprio motu*, issued an order directing the parties to show cause by briefs whether the trial court's March 26, 2007 judgment was a proper appealable judgment. We will address the show cause order before addressing the remaining issues raised on appeal.

SHOW CAUSE ORDER

The September 14, 2007 show cause order questioned whether the

[2]Thereafter, the trial court rendered a second judgment on April 26, 2007, which differs from the language of the original judgment. The propriety of the trial court's rendition of this second judgment is addressed in our discussion of assignment of error number six.

trial court's March 26, 2007 judgment was a proper appealable judgment, given the lack of decretal language specifying the amount of child support to be paid by Larry. Specifically, this court noted that the March 26, 2007 judgment merely provided that Larry's "child support obligation shall be set at the appropriate child support guideline amount" based on the court's findings as to the actual or attributed earnings of the parties. However, the judgment lacked decretal language specifying the exact amount of child support to be paid by Larry.

Pursuant to LSA-C.C. art. 105, a trial court, in a proceeding for divorce, may render judgment on incidental matters such as custody, visitation, child support, spousal support, and use and occupancy of the family home. A party has a right of appeal, and this court has jurisdiction to review, such a judgment on incidental matters. See LSA-C.C.P. art. 3943 and LSA-R.S. 13:4232(B); see also Martello v. Martello, 2006-0594 (La. App. 1st Cir. 3/23/07), 960 So. 2d 186, 189.

However, a judgment must be precise, definite, and certain. Vanderbrook v. Coachmen Industries, Inc., 2001-0809 (La. App. 1st Cir. 5/10/02), 818 So. 2d 906, 913. Moreover, a judgment must not be based on any contingency. Drury v. Drury, 2001-0877 (La. App. 1st Cir. 8/21/02), 835 So. 2d 533, 538. If a judgment based upon a demand for money purports to be final, the amount of the recovery must be stated in the judgment with certainty and precision, and the amount should be determinable from the judgment without reference to an extrinsic source such as pleadings or reasons for judgment. Vanderbrook, 818 So. 2d at 913. If the amount remains to be determinable by a future contingency or is otherwise indefinite and uncertain, it is not a valid and proper judgment. Fontelieu v. Fontelieu, 116 La. 866, 881, 41 So. 120, 125 (1906); see also

Russo v. Fidelity & Deposit Co., 129 La. 554, 561, 56 So. 506, 508 (1911), and Simon v. Hulse, 12 La. App. 450, 450-451, 124 So. 845, 846 (La. App. 1st Cir. 1929).

As stated above, the March 26, 2007 judgment merely provided that Larry's "child support obligation shall be set at the appropriate child support guideline amount" based on the court's findings as to the earnings of the parties, but did not specifically set the child support amount awarded. As such, this portion of the judgment is clearly based upon a contingency that makes it unenforceable, i.e., the performance of the actual calculation of support due in accordance with the guidelines. Thus, this portion of the judgment lacks certainty, rendering it invalid for purposes of immediate review on appeal.

It is clear that in the absence of a valid final judgment, this court lacks appellate jurisdiction to review the matter. Laird v. St. Tammany Parish Safe Harbor, 2002-0045 (La. App. 1st Cir. 12/20/02), 836 So. 2d 364, 366. However, as pointed out by Rochelle in her brief in response to this court's show cause order, other portions of the judgment at issue herein decided matters ancilliary to this divorce proceeding with precision, definiteness, and certainty and, thus, are subject to appellate review pursuant to LSA-C.C. art. 3943.

Accordingly, to the extent that the issue of Larry's child support obligation may not be properly before this court, we elect to exercise our supervisory jurisdiction to review this issue, in keeping with the Louisiana Civil Code's dictate that the paramount consideration in child support proceedings is the best interest of the child and in consideration of the amount of time this case has already spent in the judicial system. See Guillot v. Munn, 99-2132 (La. 3/24/00), 756 So. 2d 290, 301. For these

reasons, we recall the show cause order and address the issues raised by Rochelle.

LARRY'S CHILD SUPPORT OBLIGATION
(Assignments of Error Nos. 1, 2, 3 & 4)

In these assignments of error, Rochelle challenges the trial court's refusal to specify in the judgment the amount of child support to be paid by Larry, the failure of the trial court to specify in the judgment a certain or exact date when child support payments must be made, the trial court's imputation of a minimum-wage salary to Rochelle, and the trial court's finding that Larry was not voluntarily underemployed. Rochelle requests that this court review the record and conclude that the trial court erred in imputing a salary to her and in finding that Larry was not voluntarily underemployed and that this court further remand this matter to the trial court for a determination of a precise and certain amount of monthly child support due and the date on which such payment is due.

As discussed above, we agree that the trial court erred in failing to render a judgment setting forth the specific amount of child support owed by Larry. For the same reasons, we conclude that the judgment should have set forth the precise date of each month that such payments were due. Thus, we find merit in these assignments of error.

With regard to the trial court's imputation of a minimum-wage salary to Rochelle, she argues on appeal that the trial court erred because she is caring for the parties' child who was under the age of five years. Louisiana Revised Statute 9:315.11(A) provides, in pertinent part, as follows: "If a party is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of his or her income earning potential, **unless the party** is physically or mentally incapacitated, or **is caring for a**

child of the parties under the age of five years." (Emphasis added). The clear meaning of LSA-R.S. 9:315.11 is that the income earning potential of a party who is voluntarily unemployed or underemployed will not be considered in the calculation of child support if that party is caring for a child of the parties under the age of five years. Romanowski v. Romanowski, 2003-0124 (La. App. 1st Cir. 2/23/04), 873 So. 2d 656, 662.

In the instant case, the parties were awarded joint custody, with Rochelle being designated the domiciliary parent. Moreover, a review of the portion of the judgment setting forth Larry's visitation establishes that the child under five years of age is in Rochelle's actual custody during the entire work week, with the exception of four hours of visitation occurring after normal business hours. Accordingly, the trial court erred in imputing a wage to Rochelle for purposes of the child support determination. This assignment of error also has merit.

With regard to the trial court's finding that Larry was not voluntarily underemployed, Rochelle contends on appeal that the trial court abused its discretion in making this determination, as Larry had been earning $16.09 per hour, with a substantial amount of overtime pay, for the three-year period immediately preceding this litigation.

For purposes of the determination of child support, income means the actual gross income of a party, if the party is employed to full capacity. LSA-R.S. 9:315(C)(5)(a). If, on the other hand, the party is voluntarily unemployed or underemployed, income means the potential income of a party. In such a case, the party's gross income shall be determined as set forth in LSA-R.S. 9:315.11. See LSA-R.S. 9:315(C)(5)(b) and 9:315.2(B); Romanowski, 873 So. 2d at 660.

Voluntary underemployment for purposes of calculating child support is a question of good faith of the obligor-spouse. In virtually every case where a parent's voluntary underemployment has been found to be in good faith, the courts have recognized extenuating circumstances beyond the parent's control, which influenced or necessitated the voluntary change in employment. Romanowski, 873 So. 2d at 660.

Voluntary underemployment is a fact-driven consideration. The trial court has wide discretion in determining the credibility of witnesses, and its factual determinations will not be disturbed on appeal absent a showing of manifest error. Thus, whether a spouse is in good faith in reducing his income is a factual determination that will not be disturbed absent manifest error. Romanowski, 873 So. 2d at 662.

In the instant case, Larry testified that for three years during the parties' marriage, he worked as a tractor driver for ADM, a company that operated a grain elevator. However, he left that employment on June 25, 2006, after the parties began living separate and apart. Larry testified that at the time he discontinued his employment, he was earning $16.09 per hour and that in 2005, his income from his employment with ADM was approximately $48,900.00.[3] At the time of the hearing below, Larry was employed by Lightening Services as an air-conditioning technician. Through this employment, Larry was earning $12.00 per hour, and he worked forty to forty-five hours per week.

When questioned as to why he left a higher paying job for one that paid less, Larry explained that when he worked for ADM, he worked a significant amount of overtime, which prevented him from spending much

[3]We note that while the parties' 2005 joint income tax return lists their "[w]ages, salaries, tips, etc." as $48,885, Larry's 2005 W-2 form from ADM lists his actual pay for the year as $47,808.13.

time with his children. According to Larry, during the period from October to April, he worked the most overtime. During that period, he would at times work seventy-five to eighty hours a week, and sometimes he would work six weeks consecutively without any weekends off. Additionally, on some days, he would work a sixteen-hour shift. Because of these long shifts, there were many mornings when Larry would see his son at the bus stop when he got off of work, and he had often already left for work or was about to leave for work when his son got home from school.

Larry further testified that even during the period from April to October, he worked considerable overtime. With regard to his work schedule, Larry explained that he was required to phone the company everyday at 3:00 p.m. to find out his work schedule for the next day, a requirement that prevented him from being able to plan activities with his children.

Thus, Larry testified, after the parties began living separate and apart, he quit his job with ADM and completed a twenty-eight-day training course to become a heating and air-conditioning installer. With his new job, Larry works straight days, forty to forty-five hours per week, and is off nights and "pretty much" on the weekends, a schedule that facilitates his ability to spend time with his children. Larry also stated that his present employer informed him that he could make up to $36,000.00 per year within the next few years.

While Rochelle disputed Larry's testimony about the extent of overtime he worked with his previous employer, she did acknowledge that he worked weekends "[n]ine times out of ten" and that he would have a weekend off once every six weeks.

In refusing to impute a higher wage to Larry for purposes of computing his child support obligation herein, the court stated that it could understand Larry's desire to change occupations given the overtime he worked with his previous job. The court found that given Larry's hourly wage at his previous employment and given that Larry had earned $48,885.00[4] in 2005, a significant portion of those earnings was clearly attributable to overtime work. Thus, the trial court obviously concluded that Larry was in good faith in choosing to reduce his income to facilitate spending time with his children. Because we find no manifest error in this determination, we will not disturb the trial court's factual finding that Larry was not voluntarily underemployed for purposes of the child support calculation. This assignment of error lacks merit.

Thus, in sum, we agree that the trial court erred in failing to render a specific award to be paid on a specific date. We likewise agree that the trial court erred in imputing a wage to Rochelle, where she is caring for a child of the parties under the age of five years. However, we find no merit to her assertion that the trial court manifestly erred in concluding that Larry was not voluntarily underemployed, given the specific circumstances of his previous employment.

Accordingly, because the record before us is complete, we render an award of child support in favor of Rochelle and against Larry, in the amount of $558.00 per month, to be paid to Rochelle on the 20th of each month.[5] See LSA-R.S. 9:315.2; LSA-R.S. 9:315.8; LSA-R.S. 9:315.13(A); LSA-R.S. 9:315.19. This award is retroactive to the date of filing of the original petition.

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[4]See footnote 3 above.

[5]This award is based upon the trial court's finding that Larry's monthly income was $2,184.00 per month.

INTERIM SPOUSAL SUPPORT
(Assignment of Error No. 5)

In this assignment of error, Rochelle contends that the trial court abused its discretion when determining her entitlement to interim spousal support. In oral reasons for judgment, the court stated that it was ordering Larry to continue to pay the house note on the family home as spousal support, with no entitlement by Larry to rental reimbursement. However, the trial court further stated that Larry would not be precluded from asserting a claim for reimbursement for the mortgage notes paid by him in any ultimate community property settlement.

On appeal, Rochelle notes that spousal support is the separate, taxable income of the recipient, see 26 U.S.C. § 61(a)(8) and LSA-R.S. 9:315(C)(3)(a), and that interest on mortgage payments is deductible from income if the taxpayer itemizes deductions. Citing the court's specific finding that Larry's spousal support obligation is "equal to the house note which is $723.00 a month," she points out that if Larry pays the community property mortgage debt out of his separate income, he would be entitled to the tax deductions. According to Rochelle, however, Larry is essentially paying a community mortgage debt with her separate income, i.e., her spousal support, which she contends is improper. Consequently, Rochelle asserts that the matter should be remanded for entry of an appropriate award of spousal support to be paid to her directly (and from which she presumably could pay the note herself), thus entitling her to the tax deduction.

Rochelle further asserts that because the community debt is actually being paid with her separate income, she, not Larry, should be entitled to reimbursement at the time of partition of their community property. For all of these reasons, Rochelle asserts that the award of spousal support

fashioned by the trial court should be reversed, and the matter remanded for a proper determination of the specific amount due to her as spousal support in accordance with the dictates of LSA-C.C. art. 113.

In a proceeding for divorce, the court may award an interim periodic support allowance to a spouse based on the needs of that spouse, the ability of the other spouse to pay, and the standard of living of the spouses during the marriage. LSA-C.C. arts. 111 and 113. Absent a pending demand for final spousal support, an award of an interim spousal support allowance shall terminate upon the rendition of a judgment of divorce. LSA-C.C. art. 113. Interim spousal support is designed to assist the claimant spouse in sustaining the same style or standard of living that he or she enjoyed while residing with the other spouse, pending the litigation of the divorce. Lambert v. Lambert, 2006-2399 (La. App. 1st Cir. 3/23/07), 960 So. 2d 921, 928.

A spouse's right to claim interim periodic support is grounded in the statutorily imposed duty on spouses to support each other during marriage, and thus provides for the spouse who does not have sufficient income for his or her maintenance during the period of separation. Lambert, 960 So. 2d at 928. Interim support is designed to preserve parity in the levels of maintenance and support and to avoid unnecessary financial dislocation until a final determination of support can be made. Lambert, 960 So. 2d at 928. The spouse seeking interim spousal support bears the burden of proving his or her entitlement to it. Martello, 960 So. 2d at 192. The trial court is vested with much discretion in determining an award of interim spousal support. Such a determination will not be disturbed absent a clear abuse of discretion. Martello, 960 So. 2d at 192.

In rendering its award of interim spousal support, the trial court reasoned as follows:

> As far as the claim for spousal support again - - it gets into a situation where it's kind of tough to divide the income that's available. What I'm going to do is order that as spousal support, Mr. Wells continue to pay the house note, that he not be entitled to a rental reimbursement for that, but that does not preclude his claim in any ultimate property settlement as to any amounts that he may be entitled to from that. And I don't even need to get to that point this morning either because as we say, we're not here on a property settlement case.
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> * * * * *
>
> His spousal support is equal to the house note[,] which is $723.00 a month.

Moreover, the judgment provides that Larry "shall pay all monthly mortgage notes due on the matrimonial domicile, and in lieu of spousal support, ROCHELLE WELLS shall be exempt from the obligation of rental reimbursement. However, LARRY WELLS' claim for reimbursement for mortgage notes paid by him shall not be precluded in any ultimate property settlement."

On review, the record shows that the trial court found that Rochelle clearly was entitled to an award of interim spousal support and that Larry possessed the requisite ability to pay some interim spousal support. The trial court then found that Rochelle was entitled to spousal support in the amount of the monthly mortgage note, i.e., $723.00. We find no error in this determination by the trial court. After thorough review of the record, we find that the trial court carefully considered the parties' financial circumstances and attempted to balance the interests of the parties in making its determinations regarding interim spousal support.

To the extent, however, that the trial court ordered that such funds representing Rochelle's interim spousal support award be paid directly to the

mortgage company, we find that the trial court erred. Interim spousal support constitutes the separate income of the payee spouse. LSA-R.S. 9:315(C)(3)(a). Moreover, a party in whose favor a spousal support award is made is entitled to spend those payments as he or she chooses and has the unrestricted right to determine how the funds will be disbursed. Seifert v. Seifert, 374 So. 2d 157, 159 (La. App. 1st Cir. 1979); see also McManus v. McManus, 428 So. 2d 854, 856 (La. App. 1st Cir. 1983), and Thompson v. Thompson, 428 So. 2d 858, 860 (La. App. 1st Cir. 1983). Accordingly, we amend the portion of the trial court's judgment ordering Larry to pay all monthly mortgage notes due on the matrimonial domicile to provide that Larry is to pay interim spousal support in the amount of $723.00 per month, directly to Rochelle. We further vacate the portion of the trial court's judgment exempting Rochelle from the obligation of rental reimbursement and ordering that Larry's claim for reimbursement for mortgage notes paid by him was not precluded in any ultimate property settlement, reserving the rights of the parties to seek determination of these issues in the community property partition between the parties.[6]

PROPRIETY OF THE APRIL 26, 2007 JUDGMENT
(Assignment of Error No. 6)

In her final assignment of error, Rochelle argues that the trial court erred in rendering a second judgment on April 26, 2007, contending that once the April 9, 2007 order of appeal was entered, the trial court was without jurisdiction to execute the second judgment. We agree.

At the time the trial court rendered the second judgment, the original judgment had already been appealed to this court. Pursuant to LSA-C.C.P.

[6]In doing so, we recognize the right of either party to seek further relief in the trial court as may be necessary to protect and preserve the assets of the community pending a community property partition.

art. 2088, the trial court's jurisdiction over all matters in the case reviewable under the appeal is divested, and that of the appellate court attaches, on the granting of the order of appeal in the case of a devolutive appeal. Thereafter, the trial court has jurisdiction in the case only over those matters not reviewable under the appeal. LSA-C.C.P. art. 2088. The second judgment issued by the trial court clearly concerned matters "reviewable under the appeal." Thus, the trial court was divested of jurisdiction to render the second judgment. See Turner v. D'Amico, 96-0624 (La. App. 1st Cir. 9/19/97), 701 So. 2d 236, 238, writ denied, 97-3034 (La. 2/13/98), 709 So. 2d 750.

Accordingly, we vacate the second judgment rendered on April 26, 2007.[7] (r.25) See Miley v. United States Fidelity and Guaranty Company, 94-1204 (La. App. 1st Cir. 4/7/95), 659 So. 2d 792, 799, writ denied, 95-1101 (La. 6/16/95), 660 So. 2d 436.

CONCLUSION

For the above and foregoing reasons, we recall the show cause order issued by this court on September 14, 2007. The portions of the March 26, 2007 judgment, ordering that Larry Wells's child support obligation "shall be set at the appropriate child support guideline amount" and that Larry Wells shall have the option to make the child support payment on either the first of each month or one-half on the first and one-half on the fifteenth of each month, are vacated.

We hereby render judgment in favor of Rochelle Wells and against Larry Wells for child support in the amount of $558.00 per month, to be paid

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[7]This court has the authority to issue any needful writ in aid of its jurisdiction, La. Const. art. V, sec. 2, where, as here, such jurisdiction is infringed by the trial court's second judgment. See Miley v. United States Fidelity and Guaranty Company, 94-1204 (La. App. 1st Cir. 4/7/95), 659 So. 2d 792, 799, writ denied, 95-1101 (La. 6/16/95), 660 So. 2d 436.

on the 20th of each month, retroactive to the date of filing of the original petition on June 13, 2006.

We further amend the portion of the judgment ordering Larry Wells to pay the monthly mortgage on the matrimonial domicile to provide that Larry Wells shall pay directly to Rochelle Wells interim spousal support in the amount of $723.00 per month, to be paid on the 5th of each month, retroactive to the date of demand.

We further vacate the portions of the March 26, 2007 judgment providing that, in lieu of spousal support, Rochelle Wells shall be exempt from the obligation of rental reimbursement and that Larry Wells's claim for reimbursement for mortgage notes paid by him shall not be precluded in any ultimate property settlement. In all other respects, the March 26, 2007 judgment is affirmed. We further vacate the April 26, 2007 judgment in its entirety.

Costs of this appeal are assessed against Larry Wells.

SHOW CAUSE ORDER RECALLED; JUDGMENT OF MARCH 26, 2007 AFFIRMED IN PART, VACATED IN PART, RENDERED IN PART, AMENDED IN PART, AND AFFIRMED, AS AMENDED; JUDGMENT OF APRIL 26, 2007 VACATED.