

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2021 CA 0528

BEVERLY WOODS ABREO

VERSUS

BERNARD JAMES ABREO

Judgment rendered: DEC 22 2021

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On Appeal from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
No. 2017-0002606

The Honorable Jeff Cashe, Judge Presiding

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BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.

GH
WRC by GH
Jury

HOLDRIDGE, J.

This appeal concerns whether an agreement in a community property partition to make an equalization payment dependent upon the amount the appellant received in social security benefits is legally permissible. For the following reasons, we vacate and remand.

FACTS AND PROCEDURAL MATTERS

Bernard James Abreo and Beverly Woods Abreo married in 1967. On September 13, 2017, Ms. Abreo filed a petition for divorce, the determination of incidental matters, and a judgment of separation of property pursuant to La. R.S. 9:2801 *et seq.* On October 24, 2017, the parties executed a “**STIPULATED JUDGMENT**” (hereinafter “2017 Stipulated Judgment”) concerning the community property that was signed by the district court on November 27, 2017. According to Mr. Abreo, the parties also executed a “Community Property Partition” (hereinafter “2017 Community Property Partition”) on the same date, but this document is not in the record.¹ In the 2017 Stipulated Judgment, both parties were awarded specific items, and it was further ordered that:

all community property shall be evenly divided between the parties, and both parties shall receive the same amount of funds from all retirement accounts, pensions and social security payments, with an equalization payment being made each and every month by [Mr. Abreo] to [Ms. Abreo], which is currently \$435.72 per month. The parties hereby acknowledge that said figure may change based on the

¹ The notarized 2017 Community Property Partition was purportedly filed as an attachment to Mr. Abreo’s “Petition to Enforce Community Property Partition and Contempt” filed August 6, 2018. Mr. Abreo filed in the district court a motion to supplement the appellate record with the petition and the 2017 Community Property Partition. *See* La. C.C.P. art. 2128. The record was supplemented with Mr. Abreo’s petition, but the 2017 Community Property Partition, although referred to as an attachment to the petition, was not sent to this court to be filed.

It is inappropriate to order the record supplemented with documents that have never been offered, introduced, or admitted into evidence. **Niemann v. Crosby Development Co., L.L.C.**, 2011-1337 (La. App. 1 Cir. 5/3/12), 92 So.3d 1039, 1045. As an appellate court, we have no jurisdiction to review documents that are not in the record on appeal, i.e., that which is sent by the district court to the appellate court. **Brown v. Louisiana Department of Public Safety and Corrections**, 2019-0853 (La. App. 1 Cir. 2/21/20), 296 So.3d 619, 624. As such, our judgment can only be rendered based upon the record on appeal. *See* La. C.C.P. art. 2164.

amount of funds paid by the federal government for social security benefits.

A judgment of divorce was signed on December 28, 2017.

On August 6, 2018, Mr. Abreo filed a **“PETITION TO ENFORCE COMMUNITY PROPERTY PARTITION AND CONTEMPT.”** He alleged that he had been unable to divide any of his retirement accounts because the 2017 Community Property Partition lacked the appropriate language and he sought to have Ms. Abreo sign a supplement judgment with the necessary language. He also alleged he was never paid the equalizing payment awarded him in the 2017 Community Property Partition and sought recovery of those funds. On December 11, 2018, Ms. Abreo filed a rule for contempt, asserting that Mr. Abreo had failed to comply with some of the provisions of the 2017 Stipulated Judgment concerning the \$435.72 monthly payment and the payment of attorney fees and court costs.

On March 18, 2019, the district court held a hearing on the contempt motions. Mr. Abreo and Ms. Abreo testified. The district court ruled at the end of the hearing, stating that it was enforcing the 2017 Community Property Partition. The district court stated that it did not view the \$435.72 amount as spousal support and that “the agreement” did not classify it as such. The district court determined that it was “an equalization payment for retirement accounts.” The district court also indicated that it was not going to enforce parts of the community property settlement, but would either enforce the entire agreement or deem it invalid in its entirety.

On April 29, 2019, the district court signed a judgment which provided that the 2017 Stipulated Judgment and the 2017 Community Property Partition were “enforceable.” The judgment also limited the attorney fees to be paid by Mr. Abreo pursuant to the judgments to a maximum of \$4,000.00 based on a separate

agreement of the parties. Lastly, the judgment stated that “pursuant to Code of Civil Procedure Article 1841[,] this is a final judgment regarding the validity and enforceability of both the November 27, 2017 consent judgment and the October 24, 2017 community property partition.” Mr. Abreo appealed from this judgment, but this court dismissed the appeal because the judgment was not a final appealable judgment as it referred to other documents outside of the judgment and did not state the specific relief ordered in those documents. **Abreo v. Abreo**, 2019-1305 (La. App. 1 Cir. 1/8/20).

On August 9, 2019, while the first appeal was pending in this court, the parties entered into Qualified Domestic Relations Orders (QUDROs) as to Mr. Abreo’s three pension plans.

Subsequently, on September 11, 2019, Ms. Abreo filed a rule for contempt for Mr. Abreo’s alleged failure to abide by the April 29, 2019 judgment. After a hearing on November 12, 2019 on Ms. Abreo’s rule for contempt, and following the dismissal of the first appeal, the parties entered into another “**STIPULATED JUDGMENT**” (hereinafter “2020 Stipulated Judgment”) on January 14, 2020. The 2020 Stipulated Judgment provided that pursuant to the 2017 Stipulated Judgment and the 2017 Community Property Partition, Mr. Abreo was to pay Ms. Abreo an equalization payment of \$116,859.30 from his investment account to Ms. Abreo’s account. According to the judgment, this payment “resolve[d] all investment accounts of the parties, the \$4,000.00 in attorney’s fees paid to [Ms. Abreo’s previous counsel] and all reimbursement claims between both parties that [had] accrued through November 12, 2019.” The judgment stated that it did not modify “and in no way effects any other rights acquired by the [2017] Stipulated Judgment....”

On January 11, 2021, the district court signed a lengthy “FINAL JUDGMENT” following the dismissal of Mr. Abreo’s previous appeal by this court. The pertinent provisions of the judgment are as follows. The judgment set forth the parties’ separate property and allocated the former community property. Ms. Abreo was awarded full ownership of the parties’ former matrimonial domicile and its contents and a car. Mr. Abreo was awarded full ownership of a pickup truck, a van, and a 5th Wheel. The parties split equally Mr. Abreo’s three pension plans, as to which they had executed QDROs; five identified bank accounts; any proceeds remaining after the sale of their properties located in Montana and Missouri and the sale of their recreational vehicle, after deducting sales costs. Mr. Abreo was ordered as “entitled to an equalizing payment in the amount of \$66,968 due to receipt by [Ms. Abreo] of excess value in immovable property and certain movable property; and [Ms. Abreo] is entitled to an equalizing payment in the amount of \$116,859.30 due to receipt by [Mr. Abreo] of an excess value in other property.” The judgment then stated that the parties had received in full their respective equalizing payment amounts “by voluntary modifications of the amounts each has actually received by actual distributions from cash accounts and in the actual divisions contained in [QDROs] actually submitted by the parties to retirement and/or savings plans.” The judgment allocated to Ms. Abreo all expenses related to the former matrimonial domicile and the vehicle and any liabilities in her name. Mr. Abreo was responsible for all expenses related to the truck, van, and 5th wheel.

The part of the judgment at issue in this appeal ordered that:

all community property shall be equally divided between the parties, and (in addition to the equalization payments described above) both parties shall receive the same amount of funds from all social security payments, with an equalization payment being made each and every month by [Mr. Abreo] to [Mrs. Abreo], which was as of November 27, 2017, \$435.72 per month. The parties have been informed and

have acknowledged that said figure may change based on the amount of funds paid by the federal government for social security benefits.

The judgment then stated that Mr. Abreo's previously imposed obligation to pay attorney's fees and court costs incurred in connection with the divorce and community property proceedings was not to exceed \$4,000.00 and had been satisfied by the allocations and transfers described herein above. Mr. Abreo appeals from the January 11, 2021 judgment.

STANDARD OF REVIEW

A trial court's factual findings and credibility determinations made in the course of valuing and allocating assets and liabilities in the partition of community property may not be set aside absent manifest error. **Berthelot v. Berthelot**, 2017-1055 (La. App. 1 Cir. 7/18/18), 254 So.3d 800, 806. Where one or more legal errors by the trial court interdict the fact-finding process, the manifest error standard is no longer applicable. The standard of review for mistakes of law by the trial court requires the appellate court to engage in a *de novo* review of the entire record and render a judgment on the merits. See **Rosell v. ESCO**, 549 So.2d 840, 844 n.2; **Berthelot**, 254 So.3d at 807. The trial court's allocation or assigning of assets and liabilities in the partition of community property is reviewed under the abuse of discretion standard. **Berthelot**, 254 So.3d at 808.

DISCUSSION

The Social Security Act contains what is called an anti-attachment clause, which prevents the attachment of monies meant to aid the beneficiary receiving them. **Young v. Young**, 2006-77 (La. App. 3 Cir. 5/31/06), 931 So.2d 541, 545. 42 U.S.C. §407 of the Social Security Act was created by Congress to ensure that the benefits given to a specific beneficiary actually reach that beneficiary.² "It pre-

² 42 U.S.C. § 407, entitled "Assignment of benefits," states, in pertinent part:

empts all state laws that stand in its way. It protects the benefits from legal process “[n]otwithstanding any other law ... of any State.” **Young**, 931 So.2d at 546, quoting **Hisquierdo v. Hisquierdo**, 439 U.S. 572, 584, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979). Congress amended the Social Security Act to allow benefits to be used to satisfy both child support and alimony obligations. 42 U.S.C. § 659(a).³ However, specifically excepted from the definition of alimony was “any payment or transfer of property or its value by an individual to the spouse or a former spouse of the individual in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.” 42 U.S.C. § 659(i)(3)(B)(ii).

The determination of whether a former spouse’s social security benefits are community property is preempted by federal law. See U.S. Const. art. VI, cl. 2;⁴ 42 U.S.C. § 407 (2002); see also **Carmichael v. Brooks**, 2016-93 (La. App. 3

(a) In general

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

³ 42 U.S.C. § 659 states, in pertinent part:

(a) Consent to support enforcement

Notwithstanding any other provision of law (including section 407 of this title...), effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding in accordance with State law ..., to enforce the legal obligation of the individual to provide child support or alimony.

⁴ Article VI, Clause 2 of the United States Constitution is known as the Supremacy Clause. It states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the

Cir. 6/22/16), 194 So.3d 832, 836, writs denied, 2016-1396, 2016-01501 (La. 11/7/16), 209 So.3d 100. However, La. R.S. 9:2801.1 provides:

When federal law or the provisions of a statutory pension or retirement plan, state or federal, preempt or preclude community classification of property that would have been classified as community property under the principles of the Civil Code, the spouse of the person entitled to such property shall be allocated or assigned the ownership of community property equal in value to such property prior to the division of the rest of the community property. Nevertheless, if such property consists of a spouse's right to receive social security benefits or the benefits themselves, then the court in its discretion may allocate or assign other community property equal in value to the other spouse.

Under the clear language of La. R.S. 9:2801.1, a trial court is granted discretion to choose whether to award a spouse additional community assets as compensation for the right to receive social security benefits, or the benefits themselves, of the other spouse when those benefits would otherwise be classified as community property but for federal preemption. Thus, an appellate court, when reviewing a judgment reached under La. R.S. 9:2801.1, will apply the abuse of discretion standard of review. See Trahan v. Trahan, 2010-0109 (La. App. 1 Cir. 6/11/10), 43 So.3d 218, 233-34, writ denied, 2010-2014 (La. 11/12/10), 49 So.3d 889 (this court found no abuse of discretion where the district court did not assign a spouse community property equal to the amount the other spouse would receive in social security benefits pursuant to La. R.S. 9:2801.1). See also Tucker v. Tucker, 47,373 (La. App. 2 Cir. 8/1/12), 103 So.3d 493, 497-98, writ denied, 2012-1940 (La. 11/9/12), 100 So.3d 844; **Bhati v. Bhati**, 2009-1030 (La. App. 3 Cir. 3/10/10), 32 So.3d 1107, 1111; **Comeaux v. Comeaux**, 2008-1330 (La.App. 3 Cir. 4/1/09), 7 So.3d 110, 113; **Carmichael**, 194 So.3d at 836.

Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

On appeal, Mr. Abreo contends that the district court erred in holding that the 2017 Stipulated Judgment, which he alleges requires the division of federally preempted social security benefits, is fully enforceable. He relies on several out-of-state cases to support his contention that an equalization payment based on the social security benefits was unenforceable. Ms. Abreo contends that his agreement to pay her an equalization payment is not federally preempted merely because the amount was dependent upon the amount Mr. Abreo received for social security. She argues that because the payment was being made by Mr. Abreo and not directly to her by the Department of Social Security, it is not preempted.

At the hearing on the contempt motions wherein the social security payments issue was raised, Mr. Abreo testified that the 2017 Community Property Partition reflected the parties' settlement and that Ms. Abreo would make an equalization payment to him of \$66,968.00. He testified that the 2017 Community Property Settlement did not include any payments based on social security, and that he had "no idea" how the social security amount was derived. He also introduced into evidence a spreadsheet showing the division of their assets that did not include a social security amount. Mr. Abreo testified that he did not understand why the social security payment was in the Stipulated Judgment but not in the 2017 Community Property Partition. In her testimony, Ms. Abreo agreed that the \$435.72 amount was not in the 2017 Community Property Partition because it was the balancing of future incomes and not a division of the assets. She also agreed that she did not receive any other community property equal in value to the social security benefits.

The parties entered into an agreement that, in addition to the equalization payments described therein, Ms. Abreo would receive \$435.72 monthly as an "equalization payment" so that "both parties shall receive the same amount of

funds from all social security payments. ... The parties have been informed and have acknowledged that said figure may change based on the amount of funds paid by the federal government for social security benefits.” The authority to determine when comparable community property value must be awarded to compensate a spouse for the opposing spouse’s social security benefits is set forth in La. R.S. 9:2801.1. Louisiana Revised Statutes 9:2801.1 allows the spouse of a person entitled to social security benefits to be allocated or assigned the ownership of community property equal in value. However, in this case, it appears that the \$435.72 monthly payment is half of Mr. Abreo’s social security benefit as opposed to an award of the ownership of community property equal in value to Mr. Abreo’s right to receive social security benefits, which is what La. R.S. 9:2801.1 authorizes. From the record, this court cannot determine on review if Ms. Abreo received community property of equal net value. The 2017 Community Property Partition is not in the record nor is there any valuation of the social security benefits. Therefore, this court is forced to remand this matter to the district court to determine if the social security benefits were properly considered and whether the payment to Ms. Abreo is allowed in accordance with La. R.S. 9:2801.1 and the federal social security statutes.

CONCLUSION

For the above reasons, that portion of the district court’s judgment ordering “an equalization payment being made each and every month by [Mr. Abreo] to [Mrs. Abreo], which was as of November 27, 2017[,] \$435.72 per month” is vacated and this matter is remanded to the district court for proceedings consistent with the law and the views expressed in this opinion. Costs of this appeal are assessed equally between the parties.

VACATED IN PART AND REMANDED.