

**NOT DESIGNATED FOR PUBLICATION**

**GRETCHEN COUSINS** \* **NO. 2004-CA-0957**  
**CARROLL** \*  
**VERSUS** \* **COURT OF APPEAL**  
\* **FOURTH CIRCUIT**  
**KENNETH CARROLL** \* **STATE OF LOUISIANA**  
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**APPEAL FROM**  
**CIVIL DISTRICT COURT, ORLEANS PARISH**  
**NO. 93-8114, DIVISION "DRS-1-L"**  
**Honorable Kern A. Reese, Judge**  
\* \* \* \* \*  
**Judge Dennis R. Bagneris, Sr.**  
\* \* \* \* \*

(Court composed of Judge Dennis R. Bagneris Sr., Judge Max N. Tobias, Jr.,  
and Judge Leon A. Cannizzaro, Jr.)

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## **AFFIRMED**

This appeal arises from a Community Property Partition dispute between Gretchen Cousin Carroll (“Ms. Carroll”) and Kenneth Carroll (“Mr. Carroll”). Ms. Carroll appeals the trial court’s judgment ordering her to reimburse Mr. Carroll for a loan and denying Ms. Carroll’s request for a portion of Mr. Carroll’s retirement benefit. It is from this ruling that Ms. Carroll appeals.

## **FACTS AND PROCEDURAL HISTORY**

Mr. and Ms. Carroll were married for approximately twenty years when the parties physically separated and Mr. Carroll vacated the community home. Following the trial court’s judgment granting Ms. Carroll’s Petition for Divorce, Ms. Carroll petitioned the court for Partition of the Community Property.

At trial the parties attempted to reach a partition settlement with the stipulation of certain suspensive conditions. Subsequent to this agreement the suspensive conditions were unfulfilled and the matter was reset for trial. When the parties returned to trial, Ms. Carroll presented receipts and canceled checks for alleged repairs to the community home and for

mortgage payments. Mr. Carroll's counsel timely objected, asserting that neither the alleged repairs nor the mortgage payments were listed in the sworn descriptive list.

The trial court rendered a judgment ordering Ms. Carroll to refinance the community home and pay \$42,000.00 to Mr. Carroll in order to settle the community dispute. The trial court further ordered Mr. Carroll to reimburse Ms. Carroll the \$5,000 that was withdrawn from the community life insurance policy, which had a cash value of \$10,000. Finally, the trial court granted the Joint Motion for Qualified Domestic Relations Order, and ordered the retirement accounts distributed by qualified domestic relations order and divided in accordance with the Sims Formula.

### **STANDARD OF REVIEW**

An appellate court can only reverse a fact finder's determinations when: (1) it finds from the record that a reasonable factual basis does not exist for the findings of the trial court, and (2) it further determines that the record establishes the findings are manifestly erroneous. *Stobart v. State, through Department of Transportation and Development*, 617 So.2d 880, 883 (La. 1993). The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the fact finder's conclusion was a reasonable one. *Cosse v. Allen-Bradley Co.*, 601 So. 2d 1349 (La.

1992).

### **Assignment of Error One**

In Ms. Carroll's first assignment of error, she asserts the trial court erred in refusing to consider evidence of reimbursements owed to her in connection with the community property home. Ms. Carroll acknowledged that the alleged reimbursements were not listed in her detailed descriptive list; however, she contends that pursuant to La. R.S. 9:2801(A)(1)(b), the trial court is required to permit amendments to the detailed descriptive list at anytime. La. R.S. 9:2801(A)(1)(b) provides in part "[e]ach party shall affirm under oath that the detailed descriptive list filed by that party contains all of the community assets and liabilities . . . . Amendments to the descriptive lists shall be permitted." Conversely, Mr. Carroll contends that Ms. Carroll had the opportunity to amend her sworn descriptive list, but failed to do so.

It is well settled that a trial court has broad discretion in adjudicating issues raised by divorce and partition of the community regime. *Thompson v. Thompson*, 2000-0225, p. 3 (La. App. 4 Cir. 3/14/01), 785 So.2d 855, 857. Further, in *Norman v. Norman*, 99-2750, p. 6 (La. App. 4 Cir. 7/12/00), 775 So.2d 18, 23, this Court opined that the trial judge is afforded a great deal of latitude in arriving at an equitable distribution of the assets between the

spouses. When the spouses are unable to agree on a partition of community property or on the settlement of the claims between the spouses arising from the matrimonial regime, either spouse, upon termination of the matrimonial regime . . . may institute a proceeding, which shall be conducted in accordance with the La. R.S. 9:2801. Further, La. R.S. 9:2801 provides the procedure for judicial partitions of community property.

Courts have used their discretionary powers to allow amendments of these pleadings at various stages during the proceeding. In *Ledet v. Ledet*, 496 So. 2d 381, 383 (La. App. 4 Cir. 1986), this Court affirmed the trial court's judgment ordering Mr. Ledet to reimburse Mrs. Ledet for a loan that was not listed in her detailed descriptive list.

In the present case a significant period of time elapsed between Ms. Carroll's filing of the detailed descriptive list and the actual trial date. However, prior to trial Ms. Carroll never attempted to amend her initial list or traverse any item on Mr. Carroll's list.

Ms. Carroll asserts the trial court erred by not considering evidence not included in the detailed descriptive list because the court is *required* to permit amendments. According to La. R.S. 9:2801, the trial court has broad discretion during divorce proceedings to *permit* amendments, but the language does not suggest that the trial court is *required* to allow

amendments. The court in *Soileau v. Soileau*, 2003-1282, p.4 (La.App. 3 Cir. 4/7/04), 870 So.2d 584, 587, declined to consider an alleged community loan that was not in the wife's detailed description. In the case *sub judice*, Ms. Carroll did not list the alleged community debt in her detailed descriptive list. Accordingly, the trial court exercised its discretion in deciding not to consider any unlisted evidence. We do not find that the trial court was manifestly erroneous in considering only evidence listed in Ms. Carroll's detailed descriptive list.

### **Assignment of Error Two**

In her second assignment of error, Ms. Carroll alleges the trial court erred by ordering her to reimburse Mr. Carroll for a loan that he did not prove was part of the community property regime.

Mr. Carroll testified, during the first trial proceedings, that he received a loan from his employer prior to Ms. Carroll filing for divorce. However, he could not recall the exact year he received the loan but recalled repaying the loan after the divorce was granted. The loan, listed in Mr. Carroll's sworn descriptive list, was purportedly used for home repairs.

Mr. Carroll, as the one claiming reimbursement, has the burden of proof to demonstrate by a preponderance of the evidence the nature of the indebtedness. *Sequeira v. Sequeira*, 04-443 (La. App. 5 Cir. 11/30/04), 888

So.2d 1097, 1101.

Mr. Carroll raised the presumption that the funds were of community character pursuant to the Louisiana Civil Code. La. C.C. art. 2361 provides that all obligations incurred by the spouse during the existence of the community regime are presumed to be community obligations. Mr. Carroll testified that he used the loan to make home repairs. According to *Ledet, supra*, this type of testimonial evidence satisfies the burden of proof evidencing the nature of the indebtedness. In *Ledet*, Mr. Ledet contended that loans made during the marriage could not be characterized as community obligations because they were obtained without his knowledge and the loans were not listed in Mrs. Ledet's detailed descriptive list. *Ledet*, 496 So.2d at 383. However, Mrs. Ledet only presented testimonial evidence to prove that the loans were acquired during their marriage and used for their children. *Id.*, 496 So.2d at 382, 383. This Court upheld the trial court's judgment finding Mr. Ledet failed to rebut the presumption that the loans, incurred during the existence of the community, were community debts. *Id.*, 496 So.2d at 383. In the case at bar, Mr. Carroll only submitted testimonial evidence to prove that a loan was acquired during the community regime and used to repair the community home. Further, Ms. Carroll's counsel neither objected to this testimony nor offered any evidence to rebut the fact that the

loan was acquired during the community property regime. Therefore, we affirm the trial court's judgment ordering Ms. Carroll to reimburse Mr. Carroll for the community loan.

### **Assignment of Error Three**

In her final assignment of error, Ms. Carroll asserts that the trial court erred by not awarding her a portion of Mr. Carroll's retirement benefits, which he had already collected. Ms. Carroll avers that, pursuant to La. R.S. 9:2801.1, she is entitled to half of Mr. Carroll's retirement plan including past benefits already distributed. The record establishes that issues regarding the retirement accounts were addressed in the qualified domestic relations order, issued by the trial court, and stipulated to by both parties. Accordingly, we find this assignment of error without merit.

### **Appellant's Assertion of Frivolous Appeal**

In his answer to Ms. Carroll's appeal, Mr. Carroll asserts that the appeal is frivolous and seeks damages. La. C.C.P art. 2164 provides for the imposition of damages for frivolous appeals. This imposition of damages is penal in nature and must be strictly construed. *Kambur v. Kambur*, 94-775, p. 10 (La. App. 5 Cir. 3/01/95), 652 So.2d 99, 104. Damages are considered in the following situations: (1) the appeal was taken solely for the purpose of delay, (2) serious legal questions are not raised, or (3) the appealing counsel



does not believe in the position he advocates. *Id.* Additionally, if contentions on appeal are found to lack merit, but raise legitimate issues, damages for frivolous appeals are not allowed. *Id.*, citing *Barnes v. L.M. Massey, Inc.*, 612 So.2d 120 (La. App. 1 Cir. 1992).

In the case *sub judice*, the facts do not suggest that Ms. Carroll's appeal was taken solely for the purpose of delay of payment. In her appeal, Ms. Carroll asserts that the trial court has broad discretion in considering evidence outside of the detailed descriptive list and accordingly abused its discretion. Although her appeal was unsuccessful, a legitimate issue was raised. Thus, Mr. Carroll's claim for damages for frivolous appeal is denied.

Accordingly, we affirm the judgment of the trial court and deny Mr. Carroll's request for costs and attorney's fees for frivolous appeal.

**AFFIRMED**

