

**SCOTT G. VINCENT**

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**NO. 2005-CA-1175**

**VERSUS**

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**COURT OF APPEAL**

**JANET P. VINCENT**

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**FOURTH CIRCUIT**

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**STATE OF LOUISIANA**

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**CANNIZZARO, J. CONCURS IN PART AND DISSENTS IN PART  
FROM THE PER CURIAM AND ASSIGNS REASONS**

I respectfully concur in part and dissent in part with respect to the per curiam. My position on each of the issues addressed in the per curiam is set forth below.

**Interim Spousal Support**

I agree with the per curiam that Ms. Vincent is entitled to interim spousal support. I would affirm the trial court's award of interim spousal support in the amount of \$10,044.29 per month.

**Final Spousal Support**

I would award final spousal support in the amount of \$3,000.00 per month for a five-year period. Therefore, I would find that the prenuptial agreement did not preclude the award of final spousal support.

I do not believe that the language in the prenuptial agreement between

Mr. Vincent and Ms. Vincent was sufficient to waive Ms. Vincent's right to final support. I think, however, that the trial court's award of final support in the amount of \$7,275.20 a month for five years was excessive based on the evidence of Mr. Vincent's income that was contained in the record. I would instead award final support in the amount of \$3,000.00 per month for five years.

In DeMontluzin v. DeMontluzin, 464 So.2d 948 (La. App. 4<sup>th</sup> Cir. 1985), this Court held that a waiver of permanent alimony must be clear and unequivocal. 464 So.2d at 949. In Sharpe v. Sharpe, 536 So.2d 434 (La. App. 4<sup>th</sup> Cir. 1989), this Court determined that the language in a separate property agreement stating that neither of the parties would have "any economic claim upon the other" was an attempt to "prohibit either party from claiming (in the event of separation or divorce) alimony... ." 536 So.2d at 437.

In the instant case, there is no express waiver of the right to final alimony in the prenuptial agreement. Although the prenuptial agreement does state that the parties will be separate in property, the language upon which Mr. Vincent relies in asserting that he has no obligation to provide final support is insufficient, in my opinion, to be a valid waiver of his final support obligation. The prenuptial agreement states that each party owns

substantial paraphernal property and that any civil fruits, revenues, or products of that property shall be assets of the owner's separate estate. Then the agreement states that "[t]he non-owner party shall have no claim to or interest in the other party's separate assets or the fruits, revenues or products thereof." This language relates solely to the characterization of the fruits, revenues, and products of the parties' separate property as also being separate property. It does not expressly or impliedly create a waiver of the final support obligation.

I find that the language in the prenuptial agreement in the instant case is clearly distinguishable from the language in the Sharpe case. In Sharpe the parties expressly stated that they would have "no economic claim" against each other. The Sharpe case directly addressed the claims that the parties would have against each other, but that was not done by the parties in the instant case.

Because I believe that the parties in the instant case did not validly waive the final support obligation, I have examined the record to determine whether the trial court considered the relevant factors set forth in La. Civil Code article 112(A) relating to the award of final support. It appears to me from the trial court judge's reasons for judgment that she did consider the relevant factors, but I find that the amount of the award of final spousal

support was excessive.

Based on the facts in the record relating to Mr. Vincent's net income, I believe that the amount of final spousal support awarded by the trial court judge exceeds the limit set forth in La. C.C. art. 112(B), which limits the amount of final spousal support to no more than one-third of the obligor's net income. Finally, I believe that the trial court correctly determined that the wife in this case was free from the type of fault that, under the provisions of La. C.C. art. 111, would preclude an award of final support. Thus, I would affirm the trial court's determination that final support should be awarded, but I would reduce the amount of the award to \$3,000.00 per month for five years.

I do not, however, agree with the award of final spousal support set forth in the per curiam. Although a majority of judges agrees that final spousal support should be awarded, a majority does not agree upon the amount to be awarded. The per curiam relies upon Butler v. Zapata Haynie Corp, 94-1171 (La. 7/5/94), 639 So.2d 1186, to determine that because two judges agree that the amount of final spousal support should be \$3,000.00 and one judge thinks that the amount should be a greater amount, then there is a majority determination that the amount of final spousal support should be \$3,000.00. The reasoning is that the amount the third judge would award

includes the lesser amount of \$3,000.00. Therefore, that judge would award at least \$3,000.00 in spousal support.

I do not read the Butler case to mean that whenever a majority of judges on a panel cannot agree upon the amount of an award, then the award shall be the lowest amount that a judge agrees to award, because that amount is a lesser, included amount in the higher amounts that other judges would award. I do not think that the Butler case establishes a general rule or formula for awarding damages when a majority of the judges on a panel agree that damages should be awarded but do not agree upon the amount of the award. There is nothing in the Butler case to indicate that the Supreme Court did not consider de novo the amount of damages to award in that case, but it is clear that a majority of the judges on the Supreme Court did agree regarding the amount of the award. In the instant case, however, a majority of the judges do not agree on the amount to be awarded. Until the Supreme Court establishes a rule or formula for the circuit courts of appeal to use in breaking a deadlock when a majority of judges on a panel cannot agree on the amount of a damage award, I think that the Butler case should be limited to its facts.

### **Attorney's Fees**

I agree with the per curiam that the trial court erred in assessing to Mr.

Vincent all attorney's fees in this matter. There was no contractual obligation or statutory mandate upon which the assessment of attorney's fees to one party could be made.

### **Court Costs**

I disagree with the per curiam in vacating the assessment of all court costs to Mr. Vincent. I believe that it was in the trial court's discretion to assess all court costs against him.

### **Other Aspects of the Trial Court Judgment**

I agree with the per curiam in affirming all aspects of the trial court judgment not specifically addressed in the per curiam.

### **Writ Application**

I agree with the disposition of the writ application in the per curiam.