

NOT DESIGNATED FOR PUBLICATION

*JAW*  
*(P)*  
*RHB*

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 0281

ANNA JOYCE RUMSOWER WILLIAMS

VERSUS

WILLIAM DAYMOND WILLIAMS

Judgment Rendered: NOV 14 2012

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Appealed from the  
21<sup>st</sup> Judicial District Court  
In and for the Parish of Livingston, Louisiana  
Trial Court Number 92291

Honorable Robert H. Morrison, III, Judge

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Plaintiff – Anna Joyce  
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Defendant – William Daymond  
Williams

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BEFORE: PARRO, HUGHES, AND WELCH, JJ.

**WELCH, J.**

Anna Joyce Rumsower Williams appeals a trial court judgment finding that a monthly monetary obligation owed to her by her ex-husband, William Daymond Williams, was spousal support and terminating that obligation. Additionally, Anna has filed a peremptory exception raising the objection of *res judicata* with this court. For reasons that follow, we set aside the order dismissing the appeal, affirm the judgment of the trial court, and decline to consider the objection of *res judicata*.

**FACTUAL AND PROCEDURAL HISTORY**

Anna and William were married on July 17, 1959, in Reno, Nevada, and subsequently established their matrimonial domicile in Tallahassee, Florida, where it remained until the parties physically separated on June 8, 2000. Following the separation of the parties, William moved to Evansville, Indiana, and Anna moved to Denham Springs, Louisiana.

On May 9, 2001, Anna filed a petition for divorce based on Louisiana Civil Code article 103. In Anna's petition, she requested that William "continue to pay the pension of \$846.93 per month" and that he "should be ordered to pay her health care insurance payments of \$131.00 per month."<sup>1</sup> In response, William filed an acceptance of service and waiver of citation and appearance, providing that he "formally and expressly acknowledge[d], accept[ed], and agree[d] to the provisions alleged [in the petition], specifically: ... [f]or an order condemning [him] to pay the pension of \$846.93 per month and to pay [Anna's] health care insurance payments of \$131.00 per month." He also filed an answer, admitting all the allegations of the petition for divorce and praying for a divorce and for an order condemning him "to pay the pension of \$846.93 per month and to pay [Anna's]

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<sup>1</sup> Anna also filed an affidavit attesting to the truth of the facts in support of her petition for divorce, requesting the same relief.

health care insurance payments of \$131.00 per month.” On August 7, 2001, the trial court rendered and signed a judgment granting Anna a divorce from William and ordering William “to pay the pension of \$846.93 per month and to pay her health care insurance payments of \$131.00 per month.”

On March 4, 2010, William filed a motion to reduce or eliminate spousal support. In this rule, William alleged that at the time of the divorce, he agreed to pay Anna spousal support in the monthly sum of \$846.93 and her health insurance premium of \$131.00 per month, because he was financially able to pay such sums and because Anna was needy. He also alleged that since the rendition of the judgment of divorce, circumstances had changed that warranted a reduction or elimination of spousal support. Specifically, he claimed that his circumstances had materially changed for the worse, as his income was insufficient to support all of his needs. He also claimed that Anna’s circumstances had materially improved, because of a personal injury lawsuit she had against Wal-Mart Stores, Inc., for which she had received the sum of \$769,418.63, plus interest, such that she was no longer in need of the support that was being provided.

In response, Anna filed a rule to show cause why William should not be held in contempt of court because he had failed to continuously pay her the monthly obligation of \$846.93 and the health insurance premium of \$131.00 in accordance with the August 7, 2001 judgment.

After a hearing, the trial court rendered and signed a judgment on November 3, 2010, classifying the monetary obligation set forth in the August 7, 2001 judgment as spousal support and terminating William’s obligation to pay that spousal support, retroactive to March 4, 2010, the date that he filed his motion to reduce or eliminate that support.<sup>2</sup>

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<sup>2</sup> The trial court’s judgment was silent with respect to the rule for contempt of court filed by Anna. Silence in a judgment as to any issue that was placed before the trial court is deemed a rejection of that demand or issue. **Hayes v. Louisiana State Penitentiary**, 2006-0553 (La. App.

Anna filed a timely motion to suspensively appeal that judgment, which was granted on December 7, 2010; however, on April 6, 2011, on motion of the Livingston Parish Clerk of Court's office, the trial court dismissed the appeal due to non-payment of appeal costs and filing fees. Anna then filed a motion to devolutively appeal the April 6, 2011 dismissal of her appeal, claiming that the dismissal was absolutely null and further seeking to appeal the November 3, 2010 judgment.

### **ASSIGNMENTS OF ERROR**

On appeal, Anna contends that the trial court legally erred in: (1) dismissing her appeal for non-payment of costs without conducting the necessary hearing as required by La. C.C.P. art. 2126(E); (2) classifying the retirement pension benefit as final spousal support without factual or jurisprudential support; (3) eliminating her spousal support based upon her receipt of settlement proceeds for damages arising from personal injuries; and (4) eliminating her spousal support by examining her prior monetary expenditures, as opposed to her current income, means, and expenses as of the time of the hearing.

### **LAW AND DISCUSSION**

#### ***Dismissal of Appeal***

We will first address the propriety of the trial court's dismissal of Anna's appeal. On April 6, 2011, pursuant to a motion filed by the clerk of court, the trial court signed an order dismissing Anna's suspensive appeal due to her failure to pay appeal costs and filing fees.

Louisiana Code of Civil Procedure article 2126(E) provides:

If the appellant fails to pay the estimated costs, or the difference between the estimated costs and the actual costs, within the time specified, the trial judge, on his own motion or upon motion by the clerk or by any party, *and after a hearing*, shall:

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1<sup>st</sup> Cir. 8/15/07), 970 So.2d 547, 554 n.9, writ denied, 2007-2258 (La. 1/25/08), 973 So.2d 758. Thus, the silence in the judgment as to Anna's rule for contempt is deemed a denial of that request for relief.

(1) Enter a formal order of dismissal on the grounds of abandonment;  
or

(2) Grant a ten day period within which costs must be paid in full, in default of which the appeal is dismissed as abandoned. (Emphasis added).

The record, which includes the minutes of the court, does not reflect that the trial court conducted the requisite hearing prior to dismissing Anna's appeal. The trial court should have held a hearing to allow Anna the opportunity to show why costs had not been paid, and the trial court's failure to do so constituted error.

Because the trial court erred in dismissing Anna's appeal without holding a hearing regarding the failure to pay costs, we set aside the trial court's order dismissing the appeal. We will therefore consider the assignments of error urged by Anna on appeal.

#### ***Classification of Obligation as Spousal Support***

Anna contends that the trial court erred in classifying William's obligation to pay his pension to Anna as spousal support. Instead, she claims that she was legally entitled to one-half of that pension benefit, because it was community property, and that William's agreement to pay her the monthly pension of \$846.93 constituted a voluntary partition of that community asset. William contends that it was not a partition of a community asset, because Anna is receiving 100% of the pension and because the judgment does not reflect that it is a partition of community property.

First and foremost, we recognize that the provision contained in the August 7, 2001 judgment relative to the payment of the pension to Anna was not a judicial decree, but rather, a consent judgment by the parties. A consent judgment is a bilateral contract between the parties by which the parties adjust their differences by mutual consent, with each party balancing his hope of gain against his fear of loss. **Horrigan v. Horrigan**, 2010-1377 (La. App. 1<sup>st</sup> Cir. 6/14/11), 70 So.3d 111,

114, writ denied, 2011-1596 (La. 10/7/11), 71 So.3d 325. As a consent judgment is a type of contract between the parties, its interpretation is governed by the determination of the common intent of the parties. *Id.* Thus, when the words of a contract are clear and explicit and lead to no absurd consequences, the intent of the parties is to be determined by the words of the contract. *Id.* See also La. C.C. art. 2045 and 2046.

Although extrinsic evidence is normally inadmissible to explain, expand, or contradict the terms of a contract, where the terms of the agreement are unclear, the court may consider extrinsic evidence to explain the terms of the agreement and to determine the parties' intent. **Hulshoff v. Hulshoff**, 2011-1055 (La. App. 3<sup>rd</sup> Cir. 12/7/11), 81 So.3d 57, 62. The trial court's factual finding as to the intent of the parties is a finding of fact subject to the manifest error standard of review. *Id.*

As previously set forth, the August 7, 2001 consent judgment orders William "to pay the pension of \$846.93 per month and to pay [Anna's] health care insurance payments of \$131.00 per month." The terms of this provision do not clearly and explicitly provide that the payment of this monthly sum is either spousal support or a voluntary partition of that asset. Thus, extrinsic evidence was necessary to explain the terms of the agreement and to determine the parties' intent with regard to that monetary obligation.

In its reasons for judgment, the trial court made the following observations and findings:

... [William] agreed in the pleadings he filed to "pay the pension of \$846.93 per month and to pay her health care insurance payments of \$131.00 per month", which is reflected in the judgment of divorce. However, there is no specific designation that these sums are to be considered as spousal support.

"The pension" was the entirety of the retirement benefit [William] had accumulated from his past employer. [Anna's] counsel contended that under this terminology, these payments were not designated as spousal support, and that [William] could not therefor[e] maintain this cause of action. However, the testimony established that

there had never been any property settlement and the [c]ourt concludes that the payments could *only* be construed as spousal support; otherwise, [Anna] would [have] no legal basis to enforce a claim for these payments.

Our review of the record supports the trial court's finding that the monetary obligation set forth in the August 7, 2001 judgment was intended by the parties to be spousal support. According to the testimony of both William and Anna, at the time they separated, William was living in Indiana and Anna was living in Louisiana, and the only income that they had was the pension and social security benefits. When the parties decided to divorce, William did not want to come to court in Louisiana, so he reached an agreement with Anna and signed the papers that she sent him. Since William was receiving social security benefits in the approximate amount of \$1,600 per month and Anna was receiving social security benefits in the approximate amount of \$800 per month, William agreed to pay Anna *all* of the pension benefit that he received (\$846.93), so that they would each have roughly the same monthly *income* on which to live. Thus, the intent of the parties' agreement was to equalize their monthly income (a factor considered in the determination of spousal support), not to partition or equally divide that asset. See La. C.C. art. 112(B)(1) and La. R.S. 9:2801. Accordingly, we find no manifest error in the trial court's determination that the monetary obligation set forth in the August 7, 2001 judgment was spousal support.

### ***Termination of Spousal Support***

Next, on appeal, Anna contends that the trial court erred in terminating her spousal support based upon her receipt of personal injury settlement proceeds, because those proceeds are not income. She also contends that the trial court erred in terminating her spousal support by examining her prior monetary expenditures, as opposed to her current financial circumstances.

Louisiana Civil Code article 114 provides, in part, that “[a]n award of periodic support may be modified if the circumstances of either party materially change and shall be terminated if it has become unnecessary.” In determining whether the support should be modified or terminated based on the changed circumstances of either party, the court should consider the relevant factors listed in La. C.C. art. 112. La. C.C. art. 114, comment (b). However, a finding of a change in circumstances does not automatically result in a modification or termination of support. **Mizell v. Mizell**, 40,601 (La. App. 2<sup>nd</sup> Cir. 1/25/06), 920 So.2d 927, 929. Rather, the effect of a finding of a change in circumstances is to shift the burden to the party opposing the modification or termination of spousal support to prove need and the relevant La. C.C. art. 112 factors. *Id.*

The factors set forth in La. C.C. art. 112(B) are as follows:

- (1) The income and means of the parties, including the liquidity of such means.
- (2) The financial obligations of the parties.
- (3) The earning capacity of the parties.
- (4) The effect of custody of children upon a party’s earning capacity.
- (5) The time necessary for the claimant to acquire appropriate education, training, or employment.
- (6) The health and age of the parties.
- (7) The duration of the marriage.
- (8) The tax consequences to either or both parties.

The trial court’s determination of whether to reduce, increase, terminate, or continue the amount of spousal support should not be overturned or modified by an appellate court absent a clear abuse of discretion. **Gardner v. Gardner**, 97-0749 (La. App. 1<sup>st</sup> Cir. 4/8/98), 710 So.2d 1153, 1155.

In this case, the trial court was presented with evidence concerning the income and means, financial obligations, earning capacity, and health and age of both William and Anna, and concluded that William had satisfied his burden of establishing a material change in circumstances and that Anna was no longer in need of support. The trial court gave the following reasons for its finding:



The parties testified that they had very little financial wherewithal. Other than “the pension”, [Anna’s] only other income was \$813.50 per month in Social Security benefits; [William’s] only income was \$1,741.00 in Social Security benefits. Until June of 2008, the parties’ relative financial positions since the divorce were basically unchanged, other than cost of living increases to their Social Security benefits.

In June of 2008, [Anna] settled a personal injury claim, which, after payment of attorney’s fees, costs, and medical expenses, netted her the sum of \$323,724.27. In the intervening two years, she had expended all but \$40,000.00 of these proceeds which she finally (wisely) had placed into an annuity. These funds were used by her for such things as paying off the mortgage on her daughter’s home, where she was residing, paying off one daughter’s car loan, purchasing a car for [another] daughter, and others, making cash gifts to various family members, charitable contributions, etc. She testified that she felt the settlement was a “gift” and that she “wanted to use it to do good for others”.

While [Anna’s] spirit of charity was admirable, given her age, the prior financial condition of the parties, and the size of the settlement, she certainly could not have at that time been considered to be in “necessitous circumstances”. If the [c]ourt were to condone the expenditures she thereafter lavished on others, while maintaining a claim for spousal support, she would essentially be forcing [William] to subsidize her largesse through his payments.

...

... [T]he [c]ourt will also terminate [William’s] spousal support obligation at this time. The [c]ourt notes that [Anna] testified that she had previously agreed to eliminate the \$131.00/month payment for medical insurance apparently when she became covered under Medicare. ... [T]here is no community property issue before the [c]ourt, and the action taken merely ends the requirement that the pension benefits be paid over as spousal support.

Our review of the record supports the trial court’s finding that there had been a material change in circumstances and that spousal support was no longer necessary. Contrary to Anna’s argument on appeal, the trial court’s consideration of the net sum that she received in the personal injury settlement was not improper. A parties’ income **and** means, including the liquidity of those means, is a factor that may be considered by the court in determining whether spousal support should be reduced or terminated. See La. C.C. arts. 112(B)(1) and 114.

We also find no error in the trial court's consideration of Anna's monetary expenditures since receiving that personal injury settlement, as those expenditures are related to whether she is in need of support. Anna's testimony revealed that she received the net sum of approximately \$323,000 from her personal injury lawsuit, and that she had spent almost all of those funds, except for \$40,000, over the last two years. She testified that the remaining \$40,000 was invested in an annuity, which yielded interest of approximately \$130 to \$160 per month. Anna also testified that she received approximately \$813.50 per month in social security benefits, but that she was still dependent upon her children to support her living expenses and was still in need of support from William.

Although Anna used some of the funds received to pay off some of her debts, she also spent approximately \$66,000 to pay off the mortgage on the home of one of her children (Dayna), where she now resides rent-free; she spent \$16,000 on a car for her daughter who was depressed; she spent \$20,949 on a car for "Lisa"; she spent \$12,000 on a car for "Nicole"; gave her granddaughter, Lisa, and Dayna each the sum of \$10,000; and gave her brother \$6,000. Although we agree with the trial court that Anna's spirit of charitable gifts to others was admirable, her willingness to bestow such expensive gifts on others from her personal injury settlement proceeds suggests that she had more than sufficient income and means to support herself and was no longer in need of support from William. Accordingly, we cannot say that the trial court abused its discretion in terminating William's spousal support obligation.

#### **PEREMPTORY EXCEPTION**

While this appeal was pending, Anna filed a peremptory exception raising the objection of res judicata with this court. In this exception, Anna claims that the August 7, 2001 judgment precluded litigation of the issues raised in William's rule to reduce or eliminate support. However, her entire argument is premised on her

contention that the stipulation set forth in the August 7, 2001 judgment that William “pay the pension of \$846.93 per month” was a voluntary, equal division of the pension benefit—not spousal support.

Louisiana Code of Civil Procedure article 2163 provides that “[t]he appellate court *may* consider the peremptory exception filed for the first time in that court, if pleaded prior to a submission of the case for a decision, and if proof of the ground of the exception appears of record.” (Emphasis added). In light of our decision herein that the trial court did not err in determining that the monetary obligation owed pursuant to the August 7, 2001 judgment was spousal support and our affirmance of the judgment of the trial court, we decline to consider Anna’s peremptory exception raising the objection of *res judicata*.

#### CONCLUSION

For all of the above and foregoing reasons, the April 6, 2011 order dismissing this appeal is set aside, and the November 3, 2010 judgment, which determined that the monetary obligation set forth in the August 7, 2001 judgment was spousal support and terminated that obligation, is affirmed. We decline to consider Anna’s peremptory exception raising the objection of *res judicata*.

All costs of these proceedings are assessed to the appellant/defendant-in-rule, Anna Joyce Rumsower Williams.

**ORDER DISMISSING APPEAL SET ASIDE; JUDGMENT AFFIRMED; PEREMPTORY EXCEPTION NOT CONSIDERED.**