

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

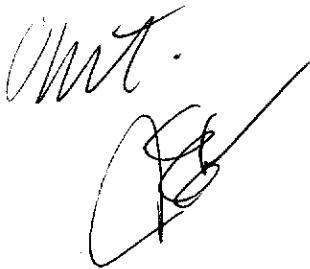
FIRST CIRCUIT

NO. 2013 CA 0174

BROOKS E. FONTENOT-SWEARENGIN

VERSUS

ISSAC JAMES SWEARENGIN



Judgment Rendered: November 1, 2013

**Appealed from the
21st Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Case No. 131131**

The Honorable Elizabeth P. Wolfe, Judge Presiding

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Baton Rouge, Louisiana**

**Counsel for Defendant/Appellant
Issac James Swearengin**

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**Counsel for Plaintiff/Appellee
Brooks E. Fontenot Swearengin**

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

Higginbotham, J. dissents and assigns reasons.

THERIOT, J.

In this case, a former husband appeals a trial court judgment awarding his former wife final periodic support. We affirm.

FACTS AND PROCEDURAL HISTORY

Issac Swarengin and Brooks Fontenot Swarengin were married on May 2, 2004. One child was born of the marriage on July 3, 2009. The parties separated and a petition for divorce was filed in December 2010. Brooks filed an amended petition for divorce on June 9, 2011, requesting child support and spousal support. Pursuant to a stipulation entered in court on August 15, 2011, the trial court awarded Brooks interim spousal support of \$800.00 per month and child support of \$800.00 per month. On April 18, 2012, Brooks filed a rule to extend the interim spousal support or, in the alternative, for permanent spousal support. She also sought to have the court order the parties to pay their percentage share of the minor child's extraordinary expenses. The parties were divorced by judgment dated December 3, 2012.

After a hearing on Brooks's rule, the court ordered Issac to pay Brooks final periodic support in the amount of \$750.00 per month, retroactive to the date of filing, with the support obligation terminating on July 31, 2014. The court further denied Brooks's request to modify child support to order Issac to pay his percentage share of the child's extraordinary expenses.

Issac has appealed, asserting that the court erred in awarding rehabilitative support to a spouse who is not seeking any additional training or education; in failing to consider two sources of Brooks's income; in considering Brooks's expenses for her gym membership and cable television when calculating permanent spousal support; and in awarding an amount of

spousal support greater than the deficiency listed on the income and expense affidavit.

DISCUSSION

Louisiana Civil Code article 111 provides that in a proceeding for divorce, a court may award final periodic support to a party who is in need of support and who is free from fault prior to the filing of a proceeding to terminate the marriage. Final support may be awarded, based upon the needs of the party seeking support and the ability of the other party to pay, when the spouse seeking support has not been at fault and is in need of support. La. C.C. art. 112(A). The claimant spouse has the burden of proving insufficient means of support, and until need has been demonstrated, the other party's financial means are irrelevant. *Prestenback v. Prestenback*, 08-0457, p. 7 (La.App. 1 Cir. 11/18/08), 9 So.3d 172, 177.

In awarding final periodic support, the court shall consider all relevant factors, which may include:

- (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.

La. C.C. art. 112(B).

The sum awarded in final periodic support shall not exceed one-third of the obligor's net income. La. C.C. art. 112(C). The court has great discretion in

determining awards of spousal support, and these determinations will not be disturbed absent a clear abuse of that discretion. *Prestenback* at p. 5, 9 So.3d at 176.

In Issac's first assignment of error, he asserts that the trial court erred in awarding rehabilitative final spousal support to a "healthy, employed 32 year old who was not seeking any additional training or going back to school." There is no requirement under Article 112 that a spouse be seeking additional training or going back to school in order to receive final periodic support. Rather, the requirements for final periodic support are that the claimant spouse is free from fault and has insufficient means to support herself. The parties stipulated that Brooks was free from fault in the breakup of the marriage. Brooks testified at trial that she had insufficient means for her support and had been accumulating credit card debt in order to pay her bills since Issac had stopped paying spousal support under the prior consent judgment. She further testified that her car was unreliable and in need of multiple repairs, and she would have to purchase a new car soon, incurring an additional monthly expense for a car note. Brooks testified that she was not asking for spousal support for the rest of her life, but rather for two years to give her a "head start" and a "foot up." Based upon the evidence before the court, we find no abuse of discretion in the court's determination that Brooks has insufficient means to support herself. The court's reasons for judgment show that the court considered all relevant factors in making the determination to award spousal support, and we find no abuse of discretion in this determination.

In his next assignment of error, Issac argues that the court erred in failing to assess some additional income to Brooks for a friend who lives with her rent-free. Brooks testified that she does not charge her friend rent

because she helps Brooks out with the minor child. Issac's argument in favor of imputing rental income to Brooks seems to be that since Brooks is claiming \$701.00 a month in daycare expenses, she should not also be allowed to have a friend live with her rent-free in exchange for child care. However, Brooks testified that Issac exercises a minimal amount of physical custody of the child, sometimes as little as two days a month, due to his work schedule, and she sometimes needs help with the baby. We find no error in the trial court's decision not to impute additional income to Brooks based upon this arrangement.

Issac next argues that Brooks should be assessed some additional income for her share of the proceeds from the sale of a community-owned business. However, Issac admitted that even though he had been receiving monthly payments in varying amounts from the sale of the community business, Brooks had never received any of her share of the proceeds from the sale. Issac's argument that additional income should be assessed to Brooks was simply based on the assumption that the proceeds from the sale of the business would probably eventually be declared to be community, and he would have to share them with her at some point in the future. Under these circumstances, we cannot say that the court erred in refusing to consider the proceeds of the sale of the business when calculating Brooks's means for spousal support purposes.

Issac's next assignment of error is that the court erred in calculating spousal support because Brooks's affidavit of income and expenses included her gym membership and cable television expense. While Issac is correct that expenses attributable to entertainment, such as cable television service, are not necessary for a spouse's maintenance and should not be considered in calculating final periodic support, see *Prestenback* at p. 8, 9 So.3d at 178,

the record does not support Issac's conclusion that the court included these items in its calculation of Brooks's expenses. Although Brooks listed the gym membership and cable expense on her income and expense affidavit, the trial court did not simply award the amount of the deficiency shown on the affidavit. Brooks's affidavit showed income of \$2025.74 and expenses of \$3039.33, resulting in a deficiency of \$1013.59. However the court also stated that it was considering additional items in calculating the parties' needs and means: the \$800.00 monthly child support payment Brooks receives from Issac, Brooks's prospective vehicle expenses, and the cost of the health insurance Issac provides for the child. The court ultimately awarded \$750.00 per month in final periodic support. Based upon all of the factors considered by the court, we cannot say that the court abused its discretion in awarding this amount of spousal support.

Issac's final argument is that the court erred in awarding an amount of spousal support which is greater than the deficiency listed on the income and expense affidavit. Although the amount of the court's award, \$750.00, is not greater than the deficiency shown on the affidavit (\$1013.59), Issac's argument that the amount awarded is greater than the deficiency is premised upon his assertions that the court should have attributed additional income to Brooks for child support received, for rent foregone, and for potential profits from the sale of the community business, and that the court should have reduced her expenses by removing her gym membership and cable television expenses. However, as previously stated, the court considered additional income and expenses besides what was shown on the affidavit in calculating support, and the court's calculation was not an abuse of discretion. This assignment of error is without merit.

CONCLUSION

The judgment awarding final periodic support in the amount of \$750.00 per month is affirmed. Costs of this appeal are assessed to appellant, Issac Swearengin.

AFFIRMED.

BROOKS E. FONTENOT-SWEARENGIN STATE OF LOUISIANA

COURT OF APPEAL

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FIRST CIRCUIT

ISSAC JAMES SWEARENGIN

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 **BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.**

HIGGINBOTHAM, J., DISSENTS AND ASSIGNS REASONS.

HIGGINBOTHAM, J.

The purpose of final periodic support is to provide a spouse in need with sufficient means for support. See La. Civ. Code art. 112. "Support" means a sum sufficient for the claimant spouse's maintenance, which includes the allowable expenses for food, shelter, clothing, transportation expenses, medical and drug expenses, utilities, and household maintenance. Expenditures for gifts, recreation, vacation, and church tithes are not to be considered in awarding permanent alimony. Similarly, expenses attributable to entertainment, including cable television service, are not necessary for a spouse's maintenance and should not be considered in fixing permanent alimony. **Prestenback v. Prestenback**, 08-0457 (La. App. 1 Cir. 11/18/08), 9 So.3d 172, 178.

According to the record, Ms. Swearengin's monthly expenses, excluding cable and gym, exceed her total monthly net income by only about \$250.00 per month. Therefore, the \$750.00 awarded to Ms. Swearengin per month greatly exceeds the allowable expenses as testified to by Ms. Swearengin and was significantly more than the sum needed for her maintenance. Thus, the trial court abused its discretion. Therefore, I respectfully dissent.