

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2020 CA 0437

GWENDOLYN CALVARUSO

VERSUS

DARRELL CALVARUSO

Judgment Rendered: DEC 30 2020

* * * * *

APPEALED FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ASSUMPTION
STATE OF LOUISIANA
DOCKET NUMBER 35046, DIVISION "A"

HONORABLE JASON M. VERDIGETS, JUDGE

* * * * *

Evan J. Bergeron
New Orleans, Louisiana

Attorneys for Plaintiff/Appellee
Gwendolyn Calvaruso

E. Robert Sternfels
Napoleonville, Louisiana

Lana Ourso Chaney
Pierre Part, Louisiana

Julie B. Distefano
Plaquemine, Louisiana

Attorney for Defendant/Appellant
Darrell Calvaruso

BEFORE: McDONALD, HOLDRIDGE, and PENZATO, JJ.

ep Holdridge J. concurs

McDONALD, J.

This is an appeal from a trial court judgment that reduced spousal support. After review, we amend the trial court judgment to provide that the reduced spousal support is effective retroactive to the filing of the motion for a reduction in spousal support. As amended, we affirm the trial court judgment.

FACTS AND PROCEDURAL HISTORY

Darrell Calvaruso and Gwendolyn Calvaruso were married on October 5, 1990. They were divorced after 25 years, on October 28, 2015. On October 19, 2016, the court awarded Ms. Calvaruso final periodic spousal support in the amount of \$2,000.00 per month.

On June 14, 2018, Mr. Calvaruso filed a motion to terminate, or alternatively, reduce the final periodic spousal support award to Ms. Calvaruso, maintaining that Ms. Calvaruso's income had increased, her expenses had decreased, and his income had decreased. After a hearing, the matter was taken under advisement. Thereafter, the trial court found there had been a material change in circumstances since the award of periodic final spousal support and reduced the final periodic support to \$1,146.42 per month. That judgment was signed on January 22, 2020. Mr. Calvaruso appealed that judgment. Mr. Calvaruso makes the following assignments of error.

1. The trial court abused its discretion in deciding that [Ms.] Calvaruso did not cohabit with a man in the manner of married persons.
2. The trial court abused its discretion in not terminating the spousal support obligation as unnecessary altogether.
3. The trial court abused its discretion in failing to set final periodic spousal support for a specific duration.
4. The trial court abused its discretion in not imputing some sort of income to [Ms.] Calvaruso, despite finding a material change in circumstance due to this change in income and a reduction in her living expenses.

5. Alternatively, the trial court abused its discretion in not giving retroactive effect to the filing date of the motion to reduce the amount of the support award.

DISCUSSION

The trial court is vested with much discretion in determining awards of spousal support. Such determinations will not be disturbed absent a clear abuse of discretion. Further, the appellate court's review of factual findings is governed by the manifest error-clearly wrong standard. The manifest error standard of review obligates an appellate court to give great deference to the trial court's findings of fact. We will not reverse factual determinations, absent a finding of manifest error. **Ledet v. Ledet**, 2006-0586 (La. App. 1 Cir. 2/9/07), 2007 WL 441580, at *1.

Louisiana Civil Code article 111 provides that in a proceeding for divorce or thereafter, the court may award interim periodic support to a party or 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. Louisiana Civil Code article 112 provides in part:

A. When a spouse has not been at fault prior to the filing of a petition for divorce and is in need of support, based on the needs of that party and the ability of the other party to pay, that spouse may be awarded final periodic support in accordance with Paragraph B of this Article.

B. The court shall consider all relevant factors in determining the amount and duration of final support, including:

- (1) The income and means of the parties, including the liquidity of such means.
- (2) The financial obligations of the parties, including any interim allowance or final child support obligation.
- (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.

.....

D. The sum awarded under this Article shall not exceed one-third of the obligor's net income. Nevertheless, when support is awarded after a judgment of divorce is rendered pursuant to Article 103(4) or (5), or when the court determines that a party or a child of one of the spouses was the victim of domestic abuse committed by the other party during the marriage, the sum awarded may exceed one-third of the obligor's net income and may be awarded as a lump sum.

ASSIGNMENT OF ERROR NUMBER 1

In this assignment of error, Mr. Calvaruso maintains that the trial court abused its discretion in finding that Ms. Calvaruso did not cohabit with a man in the manner of married persons.

Louisiana Civil Code article 115 provides that the obligation of interim spousal support or final periodic support is extinguished upon the remarriage of the obligee, the death of either party, or a judicial determination that the obligee has cohabited with another person of either sex in the manner of married persons. As used in La. C.C. art. 115, the phrase "cohabited...in the manner of married persons" means to live together in a sexual relationship of some permanence regardless of whether the cohabitants are prohibited from marrying. It does not mean just acts of sexual intercourse. The use of this quoted phrase obviates the difficulties of proving absence of concealment that were inherent in the term "open concubinage" used in former La. C.C. art. 112 (as amended by 1982 La. Acts, No. 580). La. C.C. art. 115, Official Revision Comments – 1997, comment (e).

Ms. Calvaruso testified that she was in an intimate relationship with Joe

Cataldo, but that she did not live with him. She testified that she might stay in his home ten to twenty nights some months but none in others. She did not have mail delivered to his address, did not have his address on her driver's license, she had no utilities in her name at his home, she did not contribute to his home expenses, and did not claim the homestead exemption at his home.

Mr. Cataldo testified that he considered Ms. Calvaruso his girlfriend, but also testified that they were really just good friends. He testified that she was more of a caretaker for him. He testified that he did not contribute to her living expenses or give her any money. Mr. Cataldo was 79 years old at the time of trial, while Ms. Calvaruso was around 57 years old. Mr. Cataldo testified that Ms. Calvaruso lived at her home on Highway 1 when she was not with him. Ms. Calvaruso's treating psychologist, Dr. Darlene G. Nemeth, testified that Ms. Calvaruso had indicated that she had developed a friendship with Mr. Cataldo, and that Ms. Calvaruso had told her that she sometimes stayed over with Mr. Cataldo, but she was not living with him.

The trial court found that Mr. Calvaruso and Mr. Cataldo did not have the intent to live together as married persons. The trial court found it was questionable whether the parties resided together to a degree of permanence.

Our review of the record shows that Ms. Calvaruso stayed over at Mr. Cataldo's home sometimes twenty nights in a month and some months not at all. There is no indication in the record that this was a permanent situation. Considering the record in its entirety, we find no manifest error in the trial court's determination that Ms. Calvaruso and Mr. Cataldo did not live together in the manner of married persons as required by La. C.C. art. 115 to warrant the termination of Mr. Calvaruso's final spousal support obligation. *See Almon v. Almon*, 2005-1848 (La. App. 1 Cir. 9/15/06), 943 So.2d 1113, 1118. This

assignment of error has no merit.

ASSIGNMENT OF ERROR NUMBER 2

In this assignment of error, Mr. Calvaruso maintains that the trial court abused its discretion in not terminating the spousal support obligation completely. He asserts that the trial court found a material change in circumstances so as to warrant a modification in support from \$2,000.00 per month to \$1,146.42 per month, and that the same change in circumstances should have led to a termination in spousal support.

Mr. Calvaruso operates Darrell's Maintenance as a sole proprietorship and performs painting, drywall services, and various home and apartment repairs. Mr. Calvaruso, who was 64 years old at the time of trial, maintains that he performs manual labor, that he is less agile than he used to be, and that he has low back pain and arthritis, as well as anxiety and depression. He admitted that after the 2016 spousal support determination his expenses had decreased when his mother died, as he no longer paid for her health insurance and other expenses. Also, Mr. Calvaruso admitted to providing free painting and pressure washing services at times.

A finding of a change in circumstances does not automatically result in a modification or termination of support; rather, the effect of a finding of a change in circumstances is to shift the burden to the party opposing the termination of spousal support to prove need and the relevant La. C.C. art 112 factors. **Freeman v. Freeman**, 2016-0580 (La. App. 1 Cir. 4/12/17), 218 So.3d 653, 657.

Mr. Calvaruso's income decreased from \$68,423 in 2016 to \$48,319 in 2018 due to decreased work. Mr. Calvaruso testified that he worked as a handyman making repairs to apartment buildings when tenants moved out. He testified that

after the 2016 flood, the apartments he worked on were full, not as many people were moving out, and his income decreased.

At the time of the 2016 spousal support award, Ms. Calvaruso was not employed. In the year prior to the hearing, Ms. Calvaruso had worked as a sitter for an elderly man, but the work appeared to be sporadic and she testified that “[i]t just takes its toll on me and my anxiety level.” She stated that she had worked as a cashier but testified that “I didn’t work a lot.” Ms. Calvaruso testified that while her brother had moved in with her, she did not ask him to contribute to the household expenses because she had lived with him in the past.

The trial court found that, while the circumstances of the parties had changed somewhat, Ms. Calvaruso still had a need for spousal support based upon her expenses and Mr. Calvaruso still had the ability to pay spousal support. Ms. Calvaruso’s affidavit showed monthly expenses of \$3,820.00 and showed that her only income was \$2,000.00 in spousal support. We find that the trial court accounted for the change in circumstances of the parties in its reduction of monthly spousal support from \$2,000.00 per month to \$1,146.42 per month.

We find no abuse of discretion by the trial court in not terminating spousal support. This assignment of error has no merit.

ASSIGNMENT OF ERROR NUMBER 3

In this assignment of error, Mr. Calvaruso maintains that the trial court abused its discretion in failing to set periodic spousal support for a specific duration. Mr. Calvaruso asserted that he would reach the age of 65 years old in September of 2020 and that he planned to retire at that time.¹ He noted that his social security income would then be \$2,366.00 per month, or \$28,392.00 per year. He notes that the one-third cap of his new monthly income will be \$780.78, almost

¹ We note that this appeal was pending during September of 2020.

half of the current amount of \$1,146.42 per month spousal support. He maintains that he would then have no choice but to file a motion seeking to reduce the amount of spousal support once he retired, and that judicial efficiency and fundamental fairness require this court to amend the judgment to set a term for the spousal support.

After review, we find no abuse of discretion in the trial court failing to set periodic spousal support for a specific duration. At the time of trial, Mr. Calvaruso had not retired but was *planning* to retire when he reached age 65 and could collect Social Security. An award of interim spousal support or final periodic support may be modified if the circumstances of either party materially change and shall be terminated if it has become unnecessary. La. C.C. art. 114. When Mr. Calvaruso does retire, he can file a motion for reduction or termination of spousal support based upon a change in circumstances. This assignment of error has no merit.

ASSIGNMENT OF ERROR NUMBER 4

In this assignment of error, Mr. Calvaruso maintains that the trial court abused its discretion in not imputing some sort of income to Ms. Calvaruso despite finding a material change in circumstances due to a change in income and a reduction in her living expenses.

Although the record shows that Ms. Calvaruso had worked as a caregiver in the past year, and as a cashier, this work appeared to be sporadic. Ms. Calvaruso testified that she sometimes started a job, and then got sick and could not work. Ms. Calvaruso's affidavit showed that her only monthly income was her \$2,000.00 in spousal support.

After a thorough review of the record, we find no abuse of discretion by the trial court in not imputing income to Ms. Calvaruso. This assignment of error has no merit.

ASSIGNMENT OF ERROR NUMBER 5

In this assignment of error, Mr. Calvaruso alternatively maintains that the trial court abused its discretion in not making the reduction of the spousal support award retroactive to the date of the filing of the motion to terminate or reduce the amount of the support award.

Louisiana Revised Statutes 9:321(C) provides that except for good cause shown, a judgment modifying or revoking a final spousal support judgment shall be retroactive to the date of judicial demand. Absent a showing of good cause, it is mandatory that an award for spousal support be made retroactive to the filing date. **Loftice v. Loftice**, 2007-1741 (La. App. 1 Cir. 3/26/08), 985 So.2d 204, 210.

There was no good cause recited by the trial court for failing to make the reduction of spousal support retroactive to the date of the filing of the motion for termination or reduction of spousal support, and after review of the record, we find that the trial court abused its discretion in failing to make the reduction of spousal support from \$2,000.00 per month to \$1,146.42 per month retroactive to the date of the filing of the motion, June 14, 2018. Thus, we amend the judgment to make the reduction in spousal support retroactive to June 14, 2018.

CONCLUSION

The trial court judgment is amended to provided that the reduction in spousal support from Darrell Calvaruso to Gwendolyn Calvaruso from \$2,000.00 per month to \$1,146.42 per month is retroactive to the date of the filing of the motion for reduction of spousal support, June 14, 2018. In all other respects, the judgment is affirmed. Costs of this appeal are assessed to Gwendolyn Calvaruso.

JUDGMENT AMENDED, AND AS AMENDED, AFFIRMED.