

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2020 CA 0694

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TMMH*

JENNIFER RUTH NIXON

VERSUS

CHAD TREBOR NIXON

Judgment Rendered: DEC 30 2020

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On Appeal from
The Family Court
In and For the Parish of East Baton Rouge,
State of Louisiana
No. F197293

The Honorable Lisa Woodruff-White, Judge Presiding

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BEFORE: HIGGINBOTHAM, THERIOT, AND WOLFE, JJ.

Theriot, J. agrees with result reached

WOLFE, J.

Jennifer Nixon appeals a judgment that sustained her former husband's exception of prescription and dismissed her claim for permanent spousal support. We affirm.

FACTS

Jennifer Nixon and Chad Nixon married on July 3, 2014. Later the same year, Jennifer obtained a protective order, which included a temporary restraining order, based on allegations of abuse. The protective order ordered Chad to pay Jennifer monthly support in the amount of \$50.00 for charges incurred for Chad's daughter's cell phone, as well as the cost of medical and psychological care for Jennifer and her minor child. Jennifer then filed a petition for immediate divorce pursuant to Louisiana Civil Code article 103(5) and requested an award of final spousal support pursuant to the domestic abuse provisions of Louisiana Civil Code article 9:327 and Louisiana Revised Statutes 9:327. The divorce was granted on March 25, 2015.

On May 4, 2015, Jennifer filed a motion for contempt, alleging Chad failed to make payments required by the protective order. Additionally, Jennifer re-urged her request for final spousal support, seeking an amount equal to travel and other expenses she paid during the marriage, and any other amounts determined in the court's discretion. The parties entered into a consent judgment that was signed by the Family Court on September 1, 2015, which set forth Chad's agreement to pay the previously ordered amounts according to a payment schedule, in default of which Jennifer would have the right to enforce the agreement through wage garnishment. On November 29, 2016, Jennifer filed another motion for contempt, alleging Chad had failed to make any of the required payments. The Family Court rendered judgment on May 16, 2017, setting forth its interpretation of the 2015 judgment and stipulations of the parties regarding amounts Chad owed and payments Chad made to Jennifer.

On August 19, 2019, Jennifer filed a “Rule to Establish Final Support,” alleging that the parties’ divorce was granted based on Chad’s abuse, that she was free from fault, and that she reserved her right to final support. Jennifer requested that Chad be ordered to show cause why he should not pay her final support in accordance with the law. In response, Chad filed exceptions of *res judicata* and prescription,¹ with the exception of prescription based on peremption.² Chad argued the three-year preemptive period applicable to Jennifer’s claim had lapsed and further that the issue of support had been decided by the protective order. The Family Court sustained the exception of prescription and dismissed Jennifer’s claim for support, then denied her motion for new trial.

Jennifer now appeals, contending she timely urged her claim for spousal support in the petition for divorce and in subsequent pleadings.

DISCUSSION

Peremption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon expiration of the preemptive period. La. Civ. Code art. 3458. Peremption is not subject to renunciation, interruption, or suspension. La. Civ. Code art. 3461.

The objection of peremption is properly raised by a preemptory exception. La. Code Civ. Pro. art. 927. Peremption has been likened to the objection of prescription and the rules governing the burden of proof as to prescription also apply

¹ Alternatively, Chad requested mental health evaluations of both parties to determine whether there had been any abuse pursuant to Section 9:327, which he denied, claiming that he agreed to the Protective Order only so the divorce could be quickly granted.

² Louisiana is a fact-pleading state that values substance over form and requires courts to look beyond the caption of the pleadings in order to ascertain their substance and do substantial justice to the parties. **Matter of Cole**, 2019-0938 (La. App. 1st Cir. 12/27/19), 293 So.3d 1163, 1169, writ denied sub nom., **In Matter of Mental Health of Derrick Cole**, 2020-00184 (La. 3/9/20), ___ So.3d ___. Although captioned as an exception of prescription, the pleading clearly raises the issue of peremption; therefore, we consider it as such.

to peremption. See La. Civ. Code art. 3459; **Rover Group, Inc. v. Clark**, 2018-1576 (La. App. 1st Cir. 12/12/19), 291 So.3d 699, 705, writ denied, 2020-00101 (La. 3/9/20), 294 So.3d 481. Ordinarily, the exceptor bears the burden of proof at the trial of the peremptory exception. **Quatrevingt v. State through Landry**, 2017-0884 (La. App. 1st Cir. 2/8/18), 242 So.3d 625, 632, writ denied, 2018-0391 (La. 4/27/18), 239 So.3d 837. However, if the plaintiff's claim is perempted or prescribed on its face, the burden shifts to the plaintiff to show the action is not perempted or prescribed. **Bank v. Rayford**, 2017-1244 (La. App. 1st Cir. 3/29/18), 247 So.3d 733, 736. Evidence may be introduced to support or controvert the exceptions of peremption and prescription. See La. Code Civ. Pro. art. 931. In the absence of evidence, exceptions of peremption and prescription must be decided on the facts alleged in the petition with all allegations accepted as true. **Lomont v. Bennett**, 2014-2483 (La. 6/30/15), 172 So.3d 620, 627, cert. denied sub. nom., **Myer-Bennett v. Lomont**, 136 S.Ct. 1167, 194 L.Ed.2d 178 (2016). Further, where no evidence is introduced to support or controvert the exception, the manifest error standard of review does not apply, and the appellate court's role is to determine whether the trial court's ruling was legally correct. **Bank**, 247 So.3d at 736. In this case, no evidence was introduced to support or controvert the exception.

Louisiana Civil Code article 117 provides:

The right to claim after divorce the obligation of spousal support is subject to a peremption of three years. Peremption begins to run from the latest of the following events:

- (1) The day the judgment of divorce is signed.
- (2) The day a judgment terminating a previous judgment of spousal support is signed, if the previous judgment was signed in an action commenced either before the signing of the judgment of divorce or within three years thereafter.
- (3) The day of the last payment made, when the spousal support obligation is initially performed by voluntary payment within the periods described in Paragraph (1) or (2) and no more than three years has elapsed between payments.

A right is timely exercised by an action asserting the right. See La. Civ. Code arts. 3458 and 3462; **Stephens v. Stephens**, 48,957 (La. App. 2d Cir. 4/9/14), 137 So.3d 1242, 1245. Jennifer asserted her claim for final support in her divorce petition. She argues that this ends the inquiry, proving that her claim is not preempted.³

The pendency of a civil claim is, however, subject to abandonment. See La. Code Civ. Pro. art. 561. An action is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for a period of three years. La. Code Civ. Pro. art. 561. A “step” is a formal action before the court that is intended to hasten the suit toward judgment. **Louisiana Dep’t of Transp. & Dev. v. Oilfield Heavy Haulers, L.L.C.**, 2011-0912 (La. 12/6/11), 79 So.3d 978, 981. Abandonment is self-executing, occurring automatically on the passing of three years without a step being taken by either party, and is effective without a court order. **McNealy v. Englade**, 2019-0573, (La. App. 1st Cir. 2/21/20), 298 So.3d 182, 186.

The record establishes that on January 5, 2015, Jennifer filed the petition for divorce in which she asserted her claim for spousal support. Months later, she re-asserted her claim for spousal support in a motion filed May 4, 2015. The next step in the prosecution of Jennifer’s claim for final spousal support that is contained in the record is the rule to establish final spousal support that Jennifer filed on August 19, 2019. Since more than three years passed between the 2015 motion and 2019 rule without a step toward prosecution, Jennifer’s claim for spousal support was abandoned.

³ In support, Jennifer cites **Lacombe v. Lacombe**, 2011-1178 (La. App. 3d Cir. 2/1/12), 85 So.3d 721. Although the Lacombe court noted that the wife asked for spousal support in her petition for divorce, the issue of preemption was decided based on assertion of the claim within months of the last voluntary payment. See **Lacombe**, 85 So.3d at 726. Thus, **Lacombe** is distinguishable from the issues presented herein.

Louisiana Civil Code article 3463 provides that an interruption of prescription resulting from a suit properly filed within the prescriptive period continues only as long as the suit is pending. “Interruption is considered never to have occurred if the plaintiff abandons, voluntarily dismisses the action at any time either before the defendant has made any appearance of record or thereafter, or fails to prosecute the suit at the trial.” La. Civ. Code art. 3463. In contrast to prescription, Louisiana Civil Code article 3461 provides that peremption may not be renounced, interrupted, or suspended; however, the provisions on prescription governing computation of time apply to peremption. See La. Civ. Code art. 3459. Confirming that abandonment has the same effect on peremption as on prescription, Revision Comment (c) to Article 3461 states, “[W]hen an action asserting a right subject to peremption has been commenced or served as provided in Article 3462, the right has been exercised *and so long as the action is pending* the lapse of the period of peremption does not extinguish the right.” (Emphasis added.) See also **Stephens**, 137 So.3d at 1245-46.

Jennifer’s spousal support claim was abandoned; therefore, for purposes of peremption, the assertion of the claim is considered never to have occurred. See **Stephens**, 137 So.3d at 1246. Consequently, there was no exercise of the right and upon the expiration of the three-year preemptive period the right was extinguished. The Family Court correctly sustained the exception of prescription based on the objection of peremption.

CONCLUSION

The judgment of the Family Court sustaining the exception and dismissing the claim for spousal support is affirmed. Costs of this appeal are assessed to Jennifer Nixon.

AFFIRMED.