

SCOTT G. VINCENT

*

NO. 2005-CA-1175

VERSUS

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COURT OF APPEAL

JANET P. VINCENT

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

* * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2004-6924, DIVISION "M-2"
Honorable Paulette R. Irons, Judge

* * * * *

Charles R. Jones
Judge

* * * * *

(Court composed of Judge Charles R. Jones, Judge Edwin A. Lombard, and
Judge Leon A. Cannizzaro Jr.)

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**REVERSED IN PART;
AMENDED AND
AFFIRMED AS
AMENDED IN PART**

The Appellant, Scott Vincent (hereinafter “Mr. Vincent”), seeks review of a district court judgment awarding the Appellee, Janet Vincent (hereinafter “Ms. Vincent”), interim support in the amount of \$10,044.29 per month, terminating upon date of divorce; final support in the amount of \$7,275.20 per month for five years from the date of divorce, and all attorney’s fees and costs. We reverse in part, and amend and affirm as amended in part.

Statement of Facts:

Mr. and Ms. Vincent were married on May 26, 1990, and have no children. Mr. Vincent subsequently filed for divorce on May 19, 2004, which was granted on December 21, 2004. The parties executed a separation of property regime agreement (hereinafter “the agreement”) on the day of their marriage, placing the parties under a separate property

regime. The parties subsequently filed a joint petition for court approval of the agreement. The district court rendered judgment on May 6, 1991, validating the agreement between the parties and toward third persons as of May 26, 1990. In accordance with La. R.S. 13:4165, an appointed Special Master filed a *proces verbal* finding the agreement valid. No objections to those recommendations were filed. On March 10, 2005, the district court decreed that the agreement and judgment validating the agreement were enforceable and had not been renounced.

On September 29, 2004, the district court entered an “Interim Order” based upon a consent agreement between the parties. The order directed Mr. Vincent to pay \$3,000 per month to Ms. Vincent in interim support, and \$2,000 per month to Ms. Vincent’s health care provider for her physical therapy. Interim support was increased to \$18,986.56 per month on December 15, 2004, via another order issued by a different trial judge. We note that this award was issued without a contradictory hearing. This order was based upon a document provided by Ms. Vincent declaring Mr. Vincent’s monthly income to be \$39,973.11. The order further acknowledged that Mr. Vincent made payments of \$21,000 in support and \$10,000 in medical bills for Ms. Vincent’s physical therapy in accordance with the September 2004 order.

As a result of the “Interim Order,” Mr. Vincent filed a Motion for New Trial, which was granted by the district court on March 7, 2005. Following the three-day trial, the district court rendered a judgment on April 18, 2005. The district court found Ms. Vincent free from legal fault in the dissolution of the marriage. The district court additionally found Mr. Vincent in contempt for failing to pay support, to disclose his income, and to produce financial information. The district court, however, explicitly chose not to impose penalties on Mr. Vincent.

Relying upon Ms. Vincent’s income and expense list, the district court awarded her interim support in the amount of \$10,044.29 per month, retroactive to the date of filing, terminating upon rendition of the divorce judgment. The district court additionally awarded Ms. Vincent final support in the amount of \$7,275.20 per month for five years from the date of divorce. Finally, the district court awarded Ms. Vincent all attorney’s fees and costs.

Mr. Vincent filed a timely appeal alleging that the amounts awarded by the district court’s judgment in interim support, final support, and attorney’s fees and costs are extremely high, and not supported by facts or law. He further claims that the awards will significantly deplete his assets and income, thus causing irreparable injury.

Law and Discussion:

Separation of Property Regime Agreement

Mr. Vincent alleges that the district court failed to consider the valid separation of property regime agreement between the parties, thus erroneously awarding final support to Ms. Vincent. Property acquired during marriage is community property. La. C.C. art. 2340. However, in *Clay v. United States*, the United States Court of Appeals for the Fifth Circuit held that the Louisiana Civil Code articles defining separate and community property are mandatory only in the absence of a prenuptial agreement. *Clay v. U. S.*, 161 F.2d 607, 610 (5 Cir. 1947).

The record reveals that the parties entered into an agreement on May 26, 1990, placing them under a separate property regime. The agreement provides in pertinent part:

IV.

Each party owns substantial paraphernal property, including but not limited to, cash, real estate, mineral interests, bonuses, delay rentals, royalties, overriding royalty interests, and shut-in payments arising from mineral leases. Any natural or civil fruits, revenues or products of any paraphernal property shall fall into the separate estate of the owner of that separate asset. The owner party shall use and administer such property separately and alone. The non-owner party shall have no claim to or interest in the other party's separate assets or the fruits, revenues or products thereof.

VI.

This Agreement shall bind and inure to the benefit of the parties, and their respective estates, heirs, successors and assigns.

The parties subsequently filed a joint petition for court approval of the agreement. On May 6, 1991, the district court rendered judgment validating the agreement between the parties and toward third persons as of May 26, 1990. A Special Master, appointed pursuant to La. R.S. 13:4165, filed a *proces verbal* finding the agreement valid. The Special Master's report shall be adopted by the court as submitted, unless clearly erroneous. La. R.S. 13:4165(C)(3). No objections were filed, and on March 10, 2005, the district court accordingly decreed that the agreement and judgment validating the agreement were enforceable and had not been renounced.

Yet, in awarding final support to Ms. Vincent, the district court considered the property as community. Since the agreement placed the parties under a separate property regime, the district court was precluded from considering the property as community. The agreement states that "the non-owner party shall have no claim to or interest in the other party's separate assets or the fruits, revenues or products thereof." Thus, the agreement prevents either party from claiming the other party's separate

property, including claims for final support. In *McAlpine v. McAlpine*, the Louisiana Supreme Court held that prenuptial agreements waiving permanent alimony are enforceable and not against public policy. *McAlpine v. McAlpine*, 94-1594 (La. 9/5/96), 679 So.2d 85, 86. Therefore, we find that the district court erroneously awarded final support to Ms. Vincent, and the judgment awarding final support is vacated. Moreover, because we find the issue of fault to be irrelevant given the fact that the prenuptial agreement is enforceable and valid, we pretermitt any discussion of Mr. Vincent's claim that the district court erroneously found Ms. Vincent free from fault.

Basis for Awarding Support

Mr. Vincent claims that the district court incorrectly assessed the amount of interim and final support awarded to Ms. Vincent. During marriage, a spouse lacking sufficient income for maintenance is entitled to interim support regardless of whether the property regime is community or separate, and this duty of support owed cannot be contracted out of. *Yorsch v. Yorsch*, 503 So.2d 616, 617 (La. App. 4 Cir. 1987). Interim support is based on the needs of the requesting party, the ability of the other party to pay, and the parties' standard of living during the marriage. La. C.C. art. 113.

Mr. Vincent argues that the district court's assessment in the amount

of interim and final support awarded to Ms. Vincent was incorrect and constitutes an abuse of discretion. We agree. Since the award of final support is vacated for reasons discussed above, we need only consider the district court's basis for awarding interim support in the amount of \$10,044.29 per month.

Pursuant to an order issued in September of 2004, Mr. Vincent has been paying \$3,000 per month to Ms. Vincent in interim support, and \$2,000 per month to Ms. Vincent's health care provider for her physical therapy. This amount was agreed to by both parties. A few months later, however, the "Interim Order" was increased to \$18,986.56 per month. This amount was based on a document provided by Ms. Vincent declaring Mr. Vincent's monthly income to be \$39,973.11.

After the new trial, the district court decreased the interim award to \$10,044.29. The district court relied upon Ms. Vincent's income and expense list. Yet, the parties' joint tax returns submitted at trial revealed Mr. Vincent's approximate annual income of \$140,967.60 from 1999 through 2003. Based upon that figure, Mr. Vincent's monthly income is calculated at \$11,747.30. Therefore, there was insufficient evidence of any change of circumstances warranting the initial increase in interim support to \$18,986.56. Thus, we find that the district court abused its discretion by not

reinstating the original consent agreement. Since the interim support order will be amended to direct Mr. Vincent to pay \$3,000 per month, we need not address his assertion that the district court erred by basing the award on Ms. Vincent's claims of inability to work.

Attorney's Fees and Costs

Mr. Vincent alleges that the district court erroneously ordered that he pay all attorney's fees and costs. An award of attorney's fees is a penalty imposed to discourage a particular activity on the part of the opposing party. *Langley v. Petro Star Corp. of La.*, 01-0198 (La. 6/29/01), 792 So.2d 721, 723. The district court found Mr. Vincent in contempt for failing to pay support, to disclose his income, and to produce financial information. The district court, however, specifically chose not to impose penalties upon Mr. Vincent for his acts of contempt. Yet, the district court assessed all attorney's fees and costs to Mr. Vincent. Since the district court did not award attorney's fees and costs for Mr. Vincent's acts of contempt, there is no basis for the award. Thus, the district court incorrectly ordered all attorney's fees and costs to be paid by Mr. Vincent.

Decree:

For the reasons stated herein, the judgment of the district court awarding Ms. Vincent \$10,044.29 in monthly interim support and all

attorney's fees and costs is reversed. The judgment is amended to reinstate interim support in the amount of \$3,000 per month, and to require that the parties each bear their own attorney's fees and costs. The award of \$7,275.20 in monthly final support is vacated.

PART;

REVERSED IN

**AMENDED AND
AFFIRMED AS
AMENDED IN PART**