

SCOTT G. VINCENT

*

NO. 2005-CA-1175

VERSUS

*

COURT OF APPEAL

JANET P. VINCENT

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

*

*

**JONES, J., CONCURS IN PART AND DISSENTS IN PART AND
ASSIGNS REASONS.**

I respectfully concur in part and dissent in part in the majority's opinion for

the following reasons.

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.

Statement of Facts and Procedural History:

Mr. and Ms. Vincent were married on May 26, 1990, and have no children. The parties executed a separation of property regime agreement

(hereinafter “the agreement”) on the date 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.

Mr. Vincent later filed for divorce on May 19, 2004, which was subsequently granted on December 21, 2004. Following the divorce, a Special Master was appointed by court order to assist in partitioning the community property. In accordance with La. R.S. 13:4165, the Special Master filed a *proces verbal* finding the separation of property agreement valid. No objections to the Special Master’s findings 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. The

order that increased the 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. Additionally, 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, 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 timely filed the present 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.

This Court considered the appeal of Scott G. Vincent and pursuant to Article V, Section 8 of the Louisiana Constitution of 1974, the matter was re-argued before a five-judge panel of this Court. Subsequently, Mr. Vincent filed an application for a supervisory writ, numbered 2006-C-1312, which was ordered consolidated with this appeal.

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, thereby 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 belonging to a community property regime. 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, I would find that the district court erroneously

awarded final support to Ms. Vincent, and the judgment awarding final support should be vacated. Moreover, because I would find the issue of fault to be irrelevant given the fact that the prenuptial agreement is enforceable and valid, I pretermitt any discussion of Mr. Vincent's claim that the district court erroneously found Ms. Vincent free from fault.

Furthermore, I cannot see how an award of permanent alimony in the amount of \$7,275.20 is justified by this record. Again, the gross income of Mr. Vincent is \$140,967.60. Thus, it is unconscionable to think that this award is "reasonable."

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 one cannot contract out of owing interim support. *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. I agree. Since I would vacate the award of final support for the reasons discussed above, I would only consider the district court's basis for awarding interim support in the amount of \$10,044.29 per month. However, while I do not think Ms. Vincent is entitled to any permanent alimony and since there is division among those judges who would award permanent alimony, I would limit permanent alimony to a period of five (5) years.

With regard to the issue of interim support, 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 pursuant to an order issued in September of 2004. These amounts were 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, the district court abused its discretion by not reinstating the original consent agreement. Since, I would reduce the interim support order to direct Mr. Vincent to pay \$3,000 per month, I 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 argues 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, I would find that the district court incorrectly ordered all attorney's fees and costs to be paid by Mr. Vincent, and would vacate the same.

For the foregoing reasons, I hereby concur in part and dissent in part with the per curiam opinion of this court.