

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1070

ALISA ANN ALESSI FUSSELL

VERSUS

JOHN WILLIAM FUSSELL, SR.

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Judgment Rendered: DEC 21 2011

On Appeal from the Twenty-First Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Docket No. 125,216

Honorable M. Douglas Hughes, Judge Presiding

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

Handwritten note: Or Pettigrew, J. concurs with results and assigns reasons

McCLENDON, J.

In this divorce action, a former spouse challenges the judgment of the trial court that dismissed her claim for final periodic support. For the reasons that follow, we vacate the judgment and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Alisa Ann Alessi Fussell and John William Fussell were married for a second time on October 10, 2003. On August 19, 2009, Ms. Fussell filed a petition for divorce, asserting that she was subjected to constant manipulative mental abuse by Mr. Fussell. She further asserted that she was without income or means to support herself and was therefore entitled to interim spousal support, as well as permanent periodic spousal support in an amount sufficient for her to maintain the standard of living established for her during the marriage. Mr. Fussell answered the petition and included a reconventional demand in which he asserted that he was free from fault in the breakup of the marriage and that Ms. Fussell was at fault.

The parties reached a temporary agreement and an interim judgment was signed on January 21, 2010, in which Mr. Fussell was to pay Ms. Fussell \$2,500 per month as interim spousal support from December 2009 through March 30, 2010.¹ The judgment also recognized that the amount agreed upon for interim spousal support was not to be considered as an admission by either party as to the reasonableness of the amount.

Thereafter, the parties were divorced on June 1, 2010, and the hearing on the issue of final support was held on December 8, 2010. After Ms. Fussell rested her case, Mr. Fussell moved for a directed verdict, which was granted.² Judgment was signed on January 10, 2011, finding that Ms. Fussell failed to

¹ The interim spousal support award was reduced to \$2,000 per month and then to \$1,000 per month at subsequent hearings on the matter.

² Counsel for Mr. Fussell moved for a "directed verdict," which may be granted only in a jury trial under LSA-C.C.P. art. 1810, rather than for an involuntary dismissal under LSA-C.C.P. art. 1672B, which may be granted in a bench trial. Nevertheless, that error is one of form rather than substance, as the ultimate object of both motions is the same. **Gillmer v. Parish Sterling Stuckey**, 09-0901, p. 3 n.2 (La.App. 1 Cir. 12/23/09), 30 So.3d 782, 785 n.2.

meet her burden of proof and dismissing her claim for permanent spousal support. Ms. Fussell appealed.

APPLICABLE LAW

Louisiana Civil Code article 111 provides:

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 in accordance with the following Articles.

Thus, freedom from fault is a necessary element of a claim for final periodic spousal support, and the burden of proving freedom from fault is on the claimant. **Elbert v. Elbert**, 08-2139, p. 5 (La.App. 1 Cir. 5/13/09), 15 So.3d 236, 239, writ denied, 09-1322 (La. 9/25/09), 18 So.3d 72. Further, to constitute fault sufficient to deprive a spouse of final periodic support, the spouse's misconduct must not only be of a serious nature, but it must also be an independent, contributory, or proximate cause of the separation. **Hammack v. Hammack**, 99-2809, p. 3 (La.App. 1 Cir. 12/22/00), 778 So.2d 70, 72, writ denied, 01-0913 (La. 5/25/01), 793 So.2d 166.

Additionally, LSA-C.C. art. 112 provides that the trial court shall consider all relevant factors in determining the amount and duration of final support.³

³ Louisiana Civil Code article 112 provides:

A. When a spouse has not been at fault 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. Those factors 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.

Thus, Article 112 bases an award of spousal support on the needs of the claimant spouse and the ability of the other spouse to pay, subject to the qualifying rules in Article 112 and the following articles. **Prestenback v. Prestenback**, 08-0457, p. 6 (La.App. 1 Cir. 11/18/08), 9 So.3d 172, 177. In an action for spousal support, the claimant spouse has the burden of proving insufficient means of support and until need has been demonstrated, the other spouse's financial means are irrelevant. **Id.**, 08-0457 at p. 7, 9 So.3d at 177.

An involuntary dismissal should not be reversed by an appellate court in the absence of manifest error. **Robinson v. Dunn**, 96-0341, p. 4 (La.App. 1 Cir. 11/8/96), 683 So.2d 894, 896, writ denied, 96-2965 (La. 1/31/97), 687 So.2d 410. However, where one or more trial court legal errors interdict the fact-finding process, the manifest error standard is no longer applicable, and, if the record is otherwise complete, the appellate court should make its own independent *de novo* review of the record and determine a preponderance of the evidence. **Evans v. Lungrin**, 97-0541, pp. 6-7 (La. 2/6/98) 708 So.2d 731, 735.

Nonetheless, there are cases where the weight of the evidence is so nearly equal that a first-hand view of witnesses is essential to a fair resolution of the issues. **Franklin v. Franklin**, 05-1814, p. 8 (La.App. 1 Cir. 12/22/05), 928 So.2d 90, 94, writ denied, 06-0206 (La. 2/17/06), 924 So.2d 1021. Where such a need arises, the case should be remanded for a new trial. It is the duty of the appellate court to determine when the court can fairly find a preponderance of the evidence from the cold record, or whether the case should be remanded. **Id.** Although a court should always remand a case whenever the nature and extent of the proceedings dictate such a course, whether or not any particular case should be remanded is a matter which is vested largely within the court's

(8) The tax consequences to either or both parties.

C. The sum awarded under this Article shall not exceed one-third of the obligor's net income.

discretion and depends upon the circumstances of the case. **Alex v. Rayne Concrete Service**, 05-1457, p. 23 (La. 1/26/07), 951 So.2d 138, 155.

DISCUSSION

In this matter, the trial court granted Mr. Fussell's motion for involuntary dismissal after the presentation of Ms. Fussell's case-in-chief and based on a finding that Ms. Fussell failed to establish fault on the part of Mr. Fussell. In her appeal, Ms. Fussell contends that the trial court erred in denying her permanent final support based solely on its determination that Mr. Fussell was not at fault in the breakup of the marriage. She maintains that fault on the part of Mr. Fussell is irrelevant under LSA-C.C. art. 111. Therefore, according to Ms. Fussell, because the trial court failed to find fault on her part, the matter should be remanded for a determination of Ms. Fussell's needs.

At trial, Ms. Fussell testified that she was fifty-three years old and has had mental health issues for many years. She stated that she was currently taking medication, but has been very anxious because of Mr. Fussell's actions. Ms. Fussell testified that currently she is living either at her mother's house or with her son. She further stated that she has not attempted employment since the breakup of her marriage. Ms. Fussell testified that she was a good wife and did not believe that she was responsible for the breakup of the marriage.

Ms. Fussell also introduced the deposition of Dr. Brian Murphy, an expert in psychology, who examined Ms. Fussell on three occasions for psychological evaluation. Dr. Murphy testified that Ms. Fussell had two prior psychiatric hospitalizations. Based on Ms. Fussell's history and his evaluations, it was Dr. Murphy's opinion that Ms. Fussell would qualify for social security disability benefits. It was also his opinion that the chances were low that Ms. Fussell would be able to sustain a full-time job.⁴

The trial court, in ruling on Mr. Fussell's motion for involuntary dismissal, commented that it "went to great pains" to allow Ms. Fussell to testify regarding

⁴ Ms. Fussell also presented the testimony of a former attorney, her son, and Antoinette Middlestat, her neighbor for more than five years. However, the testimony of these witnesses was not relied upon by the court in reaching its decision.

the actions of Mr. Fussell. The court stated that it could not find "any of them that rise to the level that would constitute fault" on Mr. Fussell's part and again that his actions did not "reach the level of legal fault necessary to assess fault against Mr. Fussell." The court continued:

Finally, I think at the end of the day, the problem is not so much with Mr. and Mrs. Fussell as it is with their children and those relationships. I think they both caused problems for both of them.

Based on that, taking the testimony most favorable in the light of the non-moving party, as required, I don't think that there's . . . adequate testimony that fault should be assessed to Mr. Fussell. So, I so rule.

After a review of the record and the applicable law, we conclude that the trial court legally erred in basing its decision to grant the involuntary dismissal of Ms. Fussell's claim for final periodic support on the fault of Mr. Fussell. We agree with Ms. Fussell that fault on the part of Mr. Fussell is not at issue in determining whether she is entitled to final periodic support. We also agree that the trial court failed to address the issue of fault on the part of Ms. Fussell, as well as the needs of Ms. Fussell. Further, because of the granting of the involuntary dismissal, Mr. Fussell did not have the opportunity to offer any evidence as to Ms. Fussell's fault or lack of need. Accordingly, we reverse the granting of the involuntary dismissal, vacate the trial court's judgment, and remand the matter for further proceedings consistent with our opinion herein.

CONCLUSION

For the above reasons, the January 10, 2011 judgment of the trial court is vacated, and this matter is remanded to the trial court for further proceedings in accordance with this opinion. Costs of this appeal are assessed to John William Fussell.

VACATED AND REMANDED.

ALISA ANN ALLESSI FUSSELL

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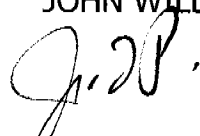
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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

PETTIGREW, J., concurs with the results and assigns reasons.

As a reminder, under La. Civ. Code art. 111, it is Ms. Fussell's burden to prove she is free from fault and that she is in need of support.