

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 2380

CHARLES J. JACKSON

VERSUS

ME-SHALL GORMAN JACKSON

Judgment rendered: September 14, 2007

**On Appeal from the 21st Judicial District Court
Parish of Tangipahoa, State of Louisiana
Suit Number 2006-000186; Division G
The Honorable Ernest G. Drake, Jr., Judge Presiding**

RAB
AKB
[Signature]

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Me-Shell Gorman Jackson**

BEFORE: PARRO, KUHN AND DOWNING, JJ.

DOWNING, J.

Mr. Charles J. Jackson appeals a judgment in which the trial court found Ms. Me-Shall Gorman Jackson free from fault in their divorce and awarded her final periodic support from Mr. Jackson without first finding that she was in need. For the following reasons, we affirm the judgment rendering an award for final periodic support.

PERTINENT FACTS AND HISTORY

Mr. Jackson and Ms. Jackson had been married for over twenty-five years when Mr. Jackson filed for divorce based on their living separate and apart for more than 180 days. Ms. Jackson answered the petition and filed a reconventional demand. She asserted adultery by Mr. Jackson as her ground for divorce. She also sought permanent periodic support.

During most of the marriage, Ms. Jackson had not worked. Toward the end of the marriage, she began a day care center where she cares for between two and six children each month. She earns \$300.00 per month per child. Her debts and expenses are large in relation to her income. Mr. Jackson earns approximately \$1,000.00 per week.

After hearing the evidence at the trial of the matter, the trial court found that Ms. Jackson had not proven Mr. Jackson's fault by adultery and did not grant a divorce on this ground. It therefore entered judgment granting the parties a divorce pursuant to La. C.C. art. 103 on the ground of their living separate and apart without reconciling for more than 180 days. The judgment further terminated Mr. Jackson's obligation to pay ongoing interim spousal support as of the last date of trial. It found Ms. Jackson to be free from fault and awarded her final periodic support in the amount of \$350 per month from Mr. Jackson.

Mr. Jackson now appeals, assigning two errors by the trial court:

1. The trial judge erred in awarding periodic spousal support where defendant has income and has had sufficient means to meet her needs since leaving the marital home.
2. The trial judge erred in finding Mrs. Jackson free from fault[.]

FAULT

Mr. Jackson now claims that Ms. Jackson is not entitled to final periodic support because she was at fault for abandoning him. The applicable version¹ of La. C.C. art. 111 allowed for periodic support as follows:

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 free from fault prior to the filing of a proceeding to terminate the marriage, based on the needs of that party and the ability of the other party to pay, in accordance with the following Articles.

Thus, a spouse seeking final periodic support must be without fault and the burden of proof is upon the claimant. **Mayes v. Mayes**, 98-2228, p. 3 (La.App. 1 Cir. 11/5/99), 743 So.2d 1257, 1259. The existence of fault is a question of fact. A trial court's findings of fact on the issue of a spouse's fault will not be disturbed on appeal unless found to be manifestly erroneous. **Id.** Accordingly, we review the record to determine whether Ms. Jackson has established that she is without fault in this regard.

This court discussed fault in the context of abandonment in **Mayes**, 98-2228, at pp. 3-6, 743 So.2d at 1259-61. **Mayes** instructs us as follows:

1. Abandonment by a spouse occurs when that spouse withdraws from the common dwelling without lawful cause and constantly refuses to return.
2. Mutual incompatibility and general unhappiness with the marital relationship are not lawful causes for leaving the family home.

¹ See note 3, below.

3. Lawful cause sufficient to justify a spouse's departure from the marital domicile is equivalent to reasons for leaving which constituted grounds for separation under former Article 138.²
4. Thus, where one spouse unilaterally decides to leave the marital domicile, and subsequently refuses to return, the separation is either for lawful cause or it is abandonment.
5. One of the elements necessary to prove abandonment is that the abandoned spouse desired the other spouse's return.

Mayes, 98 –2228 at p. 3-4, 743 So.2d at 1260. (Citations omitted; footnote added.)

Here, based on these factors, we conclude that the trial court had a reasonable basis for finding Ms. Jackson to be free from fault. Whether or not she withdrew from the marital dwelling without lawful cause as outlined in the first two factors above, nothing in the record suggests that she refused to return or that Mr. Jackson desired her return as required by the fourth and fifth factors. His testimony discloses that he never discussed the separation with Ms. Jackson and that he accepted the decision to divorce. A pertinent example of his testimony is as follows:

Q.: Okay. And it's your testimony that to this day you have never discussed with your wife of over 20 years why you're getting a divorce?

A.: Right. Never asked her. She never said anything. I never asked her. She packed up and left. You over 18; you make your own decision. I guess that's what you want to do. You don't want to be married no more.

Accordingly, the trial court was not manifestly erroneous in finding Ms. Jackson to be free from fault. Mr. Jackson's second assignment of error is without merit.

NEED FOR SPOUSAL SUPPORT

Mr. Jackson next argues that Ms. Jackson is not entitled to permanent periodic support because she is not in necessitous circumstances. This

² These grounds included adultery, conviction of a felony, habitual intemperance or excesses, cruel treatment or outrages, public defamation, abandonment, an attempt on the other's life, status as a fugitive, and intentional non-support. Former LSA-C.C. arts. 138 and 139 (repealed by Acts 1990, No. 1009, § 2).

assertion is based on a misapprehension of the applicable law. By Acts 1997, No. 1078, § 1, effective January 1, 1998, La. C.C. arts. 111 and 112 were amended. The applicable version of Art. 111 is set out above. Art. 112, as amended, reads as follows:

Determination of final periodic support

A. The court must consider all relevant factors in determining the entitlement, amount, and duration of final support. Those factors may include:

- (1) The needs of the parties.
- (2) The income and means of the parties, including the liquidity of such means.
- (3) The financial obligations of the parties.
- (4) The earning capacity of the parties.
- (5) The effect of custody of children upon a party's earning capacity.
- (6) The time necessary for the claimant to acquire appropriate education, training, or employment.
- (7) The health and age of the parties.
- (8) The duration of the marriage.
- (9) The tax consequences to either or both parties.

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

In discussing the 1998 amendments to La. C.C. arts. 111 and 112, this court, in **Hammack v. Hammack**, 99-2809, pp. 5-6 (La.App. 1 Cir. 12/22/00), 778 So.2d 70, 74, explained that necessitous circumstances were no longer a prerequisite for final periodic support. The court explained as follows:

Based on the prior statutory provisions, permanent alimony was awarded to a former spouse in need, and it is limited to an amount sufficient for the former spouse's maintenance. Since the claimant spouse had the burden of proving insufficient means of support, the next inquiry after the fault issue was whether the spouse claiming support has proved insufficient means for support.

However, under present law, the claimant spouse has only to prove freedom from fault in order to qualify for periodic spousal support. The requirement that the claimant spouse also prove that she *has not sufficient means for support* is no longer included in the statutory language as a threshold criteria for entitlement to support. **Hence, the statutory basis for limiting**

support to a spouse in necessitous circumstances no longer exists. (Bold emphasis added; footnotes omitted.)

Accordingly, the trial court was correct as a matter of law when it awarded final periodic support to Ms. Jackson without first finding her to be in necessitous circumstances.³ Further, although the trial court did not articulate the factors it considered in awarding final periodic support, from

³ Louisiana Civil Code arts. 111 and 112 have again been amended by Acts 2006, No. 749, § 1, effective June 30, 2006. We observe that a stated intent of the act is “to require necessitous circumstances.” We also observe Section 2’s assertion that the act is “interpretive” and shall be applied to “pending claims for final periodic support in which trial has not yet commenced as of the effective date of this Act.”

We need not determine here whether the 2006 amendments are substantive or are truly interpretive. Trial in the matter before us was commenced prior to the June 30, 2006 effective date of the amendments. Therefore, by the act’s own terms, the 2006 amendments do not apply whether or not they merely re-word established law.

The act is set forth in pertinent part as follows. Underlining indicates additions. Strikethroughs indicate deletions.

AN ACT To amend and reenact Civil Code Articles 111 and 112, relative to an award of final spousal support; to require necessitous circumstances; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Civil Code Articles 111 and 112 are hereby amended and reenacted to read as follows:

Art. 111. Spousal support; authority of court

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, ~~based on the needs of that party and the ability of the other party to pay,~~ in accordance with the following Articles.

Art. 112. Determination of final periodic support

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.

~~A.-B.~~ The court ~~must~~ shall consider all relevant factors in determining the ~~entitlement, amount,~~ amount and duration of final support. Those factors may include:

~~(1) The needs of the parties.~~

~~(2)~~(1) The income and means of the parties, including the liquidity of such means.

~~(3)~~(2) The financial obligations of the parties.

~~(4)~~(3) The earning capacity of the parties.

~~(5)~~(4) The effect of custody of children upon a party’s earning capacity.

~~(6)~~(5) The time necessary for the claimant to acquire appropriate education, training, or employment.

~~(7)~~(6) The health and age of the parties.

~~(8)~~(7) The duration of the marriage.

~~(9)~~(8) The tax consequences to either or both parties.

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

Section 2. The provisions of this Act are interpretative and shall apply to pending claims for final periodic support in which trial has not yet commenced as of the effective date of this Act.

the record it appears that this award did not constitute an abuse of its discretion. Mr. Jackson's first assignment of error is without merit.

DECREE

For the foregoing reasons, we affirm the judgment of the trial court.

Costs of this appeal are assessed to Mr. Charles J. Jackson.

AFFIRMED