

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 1857

KATHRYN HYMEL

VERSUS

GAVIN THOMAS GUARISCO

Judgment Rendered: DEC 28 2007

Appealed from the
Sixteenth Judicial District Court
In and for the Parish of St. Mary
State of Louisiana
Docket No. 107,901

Honorable Gerard B. Wattigny, Judge

Kathryn Hymel
Patterson, LA

Plaintiff-in-rule/Appellee
In Proper Person

Edward B. Broussard
Abbeville, LA

Counsel for
Defendant-in-rule/Appellant
Gavin Thomas Guarisco

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

*McClendon, J. concurs. by [signature]
Parro, J., dissents in part for the assigned reasons.
[signature]*

[Handwritten signature]

GUIDRY, J.

A defendant-in-rule appeals from a judgment in favor of his ex-wife that awarded her \$1,532 per month in final periodic spousal support. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Kathryn Hymel (Hymel) and Gavin Thomas Guarisco (Guarisco) were married on April 13, 1991. Of their marriage, three children were born: Nicholas on May 10, 1993, Kathryn Ryan on November 12, 1994, and Gabrielle on October 10, 1999. Hymel had a fourth child from a relationship subsequent to her divorce. On July 18, 2001, Hymel filed a petition for divorce and incidental relief. In October 2001, the parties entered into a joint stipulation regarding joint custody and support of the minor children, spousal support, and exclusive use of the matrimonial domicile. In lieu of interim periodic spousal support, Guarisco agreed to pay the monthly mortgage obligation related to the residence, the premium on the homeowner's insurance policy, utility expenses, telephone expenses, and cable expenses, as well as the premium on Hymel's health and hospitalization insurance. Pursuant to the stipulation, his obligation for these expenses would cease upon the rendition of the judgment of divorce, at which time Guarisco was ordered to pay \$700 per month to Hymel in interim periodic spousal support until a total of \$4,200 had been paid. In the consent judgment, Hymel was named as the domiciliary parent, and Guarisco was ordered to pay \$230.77 in weekly child support.¹ A judgment of divorce was rendered and signed on April 17, 2002.

On January 12, 2005, Guarisco filed a rule to show cause concerning custody and domiciliary parent status. This rule was amicably settled by a consent judgment dated March 7, 2005, which provided for shared custody with co-

¹ The judgment disclosed that the determination of the child support obligation was based on a monthly income figure of \$3,440 for Guarisco and \$0 for Hymel.

domiciliary parent status and ordered Guarisco to pay monthly child support of \$307.19.² Additionally, Guarisco agreed to maintain health and hospitalization insurance on the children, with the non-covered medical expenses of the children being shared equally by Guarisco and Hymel.

Shortly afterwards, Hymel filed a petition for final periodic spousal support. Following a hearing on May 27, 2005, the trial court signed a judgment on August 1, 2005, declaring that Hymel was free from fault and entitled to final periodic spousal support, the amount of which was ordered to be determined by a hearing officer. Based on the evidence presented at the subsequent hearing, the hearing officer made the following findings of fact.³ Guarisco's average gross monthly income of \$4,300 and net income of \$3,218.43 was less than he was capable of earning. Based on the affidavit submitted by Hymel, the hearing officer determined that Hymel's average gross monthly income was \$1,025 from the restaurant Chez Marceaux, with a net income of \$967.67. Hymel did not derive any income from her catering business. However, she did receive \$1,000 per month from her parents as an advance on her inheritance. After examining the expenses listed, the hearing officer determined Hymel's allowable living expenses to be \$1,800 per month, as opposed to \$3,765 listed in her affidavit. Considering Hymel's custodial responsibilities, training, and supplemental income, the hearing officer found that it was not impractical to find that Hymel could be self-supporting. Therefore, the hearing officer concluded that Hymel had failed to

² The joint custody implementation plan attached to the judgment reveals that child support was calculated based on an average monthly gross income of \$4,300 for Guarisco and \$2,150 for Hymel. The child support obligation was based on a shared custody arrangement, and the adjusted monthly child support obligation for Guarisco was \$762.78 and for Hymel was \$455.59. The difference between these amounts was \$307.19, and Guarisco was ordered to pay this difference to Hymel.

³ The appellate record does not contain the transcript of this hearing, but it contains the hearing officer's conference report.

prove sufficient need to warrant an award of final periodic spousal support. To the hearing officer's recommendation, Hymel filed an objection.

Following a hearing on February 3, 2006, relative to Hymel's objection, the trial court signed a judgment on June 2, 2006, that awarded Hymel \$1,532 per month in final periodic spousal support. From this judgment, Guarisco appealed contending that the trial court manifestly erred in finding that Hymel was free from fault and entitled to periodic spousal support. He additionally urged that the trial court (1) utilized incorrect calculations concerning the amount of time the children were in Hymel's custody, (2) improperly considered certain items, (3) neglected to find that Hymel was voluntarily underemployed in that she was not exercising her potential earning capacity, (4) improperly considered his potential inheritance and not Hymel's, and (5) legally erred in awarding final periodic spousal support that exceeded one-third of his net income.

FAULT DETERMINATION

At all relevant times, La. C.C. art. 111 provided, in pertinent part, that 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 La. C.C. arts. 112 et seq.⁴ A condition for the award of final periodic support is the claimant's freedom from fault prior to the filing of a proceeding to terminate the marriage, that is, prior to the institution of an action for divorce. See La. C.C. art. 111, Revision Comments—1997, comment (c).

⁴ Articles 111 and 112 were amended by 2006 La. Acts, No. 749, §1, effective June 30, 2006. The provisions of Act 749 are interpretative and apply to pending claims for final periodic support in which trial has not yet commenced as of the effective date of the Act. 2006 La. Acts, No. 749, §2. Since the trial of this matter was concluded prior to the effective date of the 2006 amendments, the pre-amendment versions of La. C.C. arts. 111 and 112 govern in this matter.

The claimant spouse bears the burden of showing that he or she is free from fault in the dissolution of the marriage. Gitschlag v. Gitschlag, 593 So.2d 1331, 1335 (La. App. 1st Cir. 1991). Since Hymel did not present any evidence regarding the issue of fault at the support hearing on February 3, 2006, Guarisco submitted on appeal that she failed in her burden of proof and was not entitled to an award of final periodic spousal support. Notably, the issue of fault was determined by the trial court in connection with the bifurcated hearing that was conducted on May 27, 2005. The transcript of that hearing is not included in the record on review. However, the August 1, 2005 judgment states that the trial court determined that Hymel was free from fault and entitled to final periodic spousal support based on the evidence presented at the May 2005 hearing. Accordingly, there was no need for Hymel to introduce evidence on the fault issue at the February 3, 2006 hearing.

Furthermore, there is no evidence in the record that Guarisco sought review by this court as to the August 1, 2005 judgment declaring Hymel to be free from fault. Notably, if the August 1, 2005 judgment on the issue of fault was an interlocutory judgment, it would be subject to review in connection with the appeal of the June 2, 2006 judgment, which fixed the amount of final periodic spousal support. However, since the record is devoid of the transcript or evidence that was introduced at the May 27, 2005 hearing and since Guarisco's arguments on appeal are limited to the lack of a production of evidence at the subsequent hearing on February 3, 2006, we find it unnecessary to resolve the issue of whether the August 1, 2005 judgment was an appealable one as urged by Hymel or an interlocutory one. Accordingly, Guarisco's argument on the issue of fault lacks merit.

FINAL PERIODIC SPOUSAL SUPPORT

Article 111 set forth the basic principle that a court may award support to a party in an action for divorce out of either the assets or earnings, or both, of the

other spouse in accordance with the needs of the claimant and the ability of the other party to pay. In addition to these two fundamental criteria, the court must consider all relevant factors, which may include any of the nine factors listed in La. C.C. art. 112. La. C.C. art. 111, Revision Comments—1997, comment (b). Article 112 provided:

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 this particular case, the relevant factors relied on by the trial court included the income and the means of the parties, their needs, their earning capacity, and the effect of custody of the children upon Hymel's earning capacity.

In her "Supplemental Financial Declaration to Hearing Officer Conference Affidavit," Hymel initially declared that her monthly gross income was \$1,025, monthly net income was \$967.67, and monthly expenses were \$3,765. In connection with the filing of her opposition to the findings of the hearing officer, Hymel revised her affidavit to reflect a monthly gross income of \$740.04, net

income of \$682.71, and expenses of \$2,775. These revised income and expense figures were the focus of the trial court's consideration at the February 3, 2006 hearing.

The list of her revised monthly expenses included: \$595 for rent, \$300 for food and household supplies, \$100 for clothing, \$400 for a car note, \$164 for car insurance, \$300 for fuel and maintenance, \$208 for medical and dental expenses, \$156 for health insurance, \$237 for utilities, \$30 for laundry and cleaning, \$50 for personal and grooming, \$100 for child care, and \$135 for phones and internet. Out of her total of \$2,775 for these expenses, the trial court found the amount of \$2,186.68 to be reasonable and necessary.⁵

In this appeal, Guarisco challenges the amounts the trial court allowed for the following expenses: utilities, medical and dental,⁶ automobile insurance, and maintenance/car note. Regarding the utilities, Guarisco urges that the trial court should have reduced the amount allowed for utilities based on the fact that some of these costs were associated with other family members. We disagree. The entire mortgage payment, utilities, and other related expenses occur regardless of whether the children are in the home or not. Mayes v. Mayes, 98-2228, p. 7 (La. App. 1st Cir. 11/5/99), 743 So.2d 1257, 1262. Therefore, a spouse with children living with her is not necessarily limited in her request for spousal support to a portion of the expenses in the household because of the presence of the children. Accordingly, under the facts of this case, the inclusion of the full amount of utilities was appropriate.

⁵ Of Hymel's itemized expenses, the trial court allowed the revised amounts set forth for rent, food and household supplies, health insurance, utilities, laundry and cleaning, personal and grooming, and phones and internet. A reduced amount was allowed for fuel, automobile insurance, and a car note, but no allowance was given for clothing, medical and dental expenses, or child care.

⁶ Since the trial court did not allow anything for medical and dental expenses, we find that Guarisco's argument pertaining to the medical and dental expenses lacks merit.

Relative to her automobile insurance expense, Hymel offered a copy of the invoice for her insurance premium for coverage for the period of February 28, 2005 to March 31, 2005, which evidenced a monthly premium charge of \$131.18. She also provided supporting testimony as to this expense. In an effort to limit this expense, Guarisco introduced a copy of the declaration sheet that had been issued to Hymel concerning her liability insurance coverage for the period of December 16, 2003, to December 16, 2004, which indicated a premium of \$607. Based on this evidence, Guarisco urged that Hymel's monthly automobile insurance expense should be limited to \$50, especially when considering that the premium increase was admittedly due to Hymel's involvement in a 2004 automobile accident. The trial court was not persuaded by his argument. Based on the discretion afforded to the trial court in determining matters of this nature, we are unable to find that the trial court manifestly erred or abused its discretion in determining the amount to be allowed for her automobile insurance.

Guarisco also complains that the trial court erred in recognizing any allowance for a non-existent car note. The record reveals that Hymel was contemplating the replacement of her 10-year-old Suburban with a newer model used vehicle that would cost her less than the approximately \$400 per month she was spending for repair costs, including loan repayment. Hymel testified that she had incurred approximately \$10,000 in repair costs for her Suburban over the past few years. The record shows that since she did not have the funds to pay for the repairs, she had to borrow money from her parents to have the repairs performed. She calculated her monthly indebtedness to her parents on the \$10,000 loan to be \$400. Hymel further explained that her Suburban was giving her trouble again. The trial court's allowance for the automobile repair expenses was limited to \$315 in light of the testimony that the note on a newer automobile would be less than her current expenses relating to her Suburban. In light of this evidence, we are unable

to find that the trial court manifestly erred or abused its discretion in determining that this was a reasonable and necessary expense.

In light of the above analysis, we are unable to find that the trial court manifestly erred or abused its discretion in finding that a total of \$2,186.68 of these expenses was reasonable and necessary for Hymel's needs.

In reviewing Guarisco's challenge to the trial court's determination of Hymel's earning capacity, we note the following. During their 11-year marriage, Hymel maintained the residence and cared for the family while Guarisco worked. Hymel was a high school graduate with one year of college. Prior to her marriage to Guarisco, Hymel went to France for a six-month period to attend a cooking school; however, she did not stay at the school long enough to obtain certification as a chef. At the time of the hearing, Hymel was employed by Chez Marceaux, where she cooked a lunch buffet and other menu items. Hymel testified that based on the needs of her children and considering the costs of childcare, she worked five days a week from 9:00 a.m. to 2:00 p.m. She was particularly comfortable with this job because it allowed her to attend to the urgent needs of her children during the workday and allowed her to be there for them at the end of their school day.

Her December 24, 2005 check stub from Chez Marceaux revealed a year-to-date gross income of \$7,410.40 for the previous 10 months, resulting in an average monthly gross income of \$741.04. This is substantially less than the initial \$1,025 monthly gross income figure set forth in her affidavit. According to Hymel, she was making more at the time she completed the affidavit because she was pulling a heavier workload due to a co-worker's absence. Furthermore, she explained that in the latter part of the year, she missed at least one day of work a week. Nonetheless, she admitted that she had the opportunity to earn a gross income of \$910 a month at her current job.

Furthermore, after their separation, Hymel started her own catering business. In oral reasons, the trial court found that Hymel never realized any income or profit from her catering business. However, in answers to interrogatories, Hymel indicated that she received a net income from that business of \$2,000 in 2003, \$3,000 in 2004, and \$800 in 2005, which was her last year of operation. These earnings were in addition to those made while reportedly working a 25-hour work-week for Chez Marceaux and Jo Jo's Café before that. In light of this evidence, we conclude that the trial court's finding that Hymel never realized any income or profit from her catering business is clearly wrong. Hymel did in fact earn a net income in her catering business by performing after-hours work. However, at the time of the hearing, she was no longer operating the catering business.

At the time of the hearing on final periodic spousal support, the Guarisco children were approximately 6, 11, and 12 years old. Hymel and Guarisco shared custody, with each parent having them 50 percent of the time. Pursuant to the custody arrangement, Hymel had physical custody of the children during the work-week on Monday, Tuesday, and every other Friday, and Guarisco had them on Wednesday, Thursday, and every other Friday.⁷ Hymel explained that when she had physical custody of the children, it was necessary for her to be present and available for the children when they are out of school. According to Hymel, she had no one else to care for the children during those times and placing them in child care would cost more than she would make working additional hours. Nonetheless, she conceded that only two of their three children would need to be placed in after-school care, presumably the two youngest children. Based on this evidence, we agree with Guarisco that the trial court improperly considered the costs of child care for all three of their children and her fourth child in connection

⁷ Hymel also shared joint custody of her two-year-old son with his father.

with her ability to work a fulltime job for purposes of determining Guarisco's obligation for spousal support.⁸

Hymel testified that if she worked an extra two or three hours a day,⁹ the costs of after-school care for the two children would be a total of \$16 per day. Pursuant to the custody arrangement, she has the children only on Monday and Tuesday and every other Friday during the work-week, which averages out to 2.5 days a week during a two-week period. At \$16 per day for an average of 2.5 days a week, child care costs would run an average of \$40 per week for her to work a 35 to 40-hour work-week, as opposed to a 25-hour work-week.

Working an eight-hour day, Monday through Friday, at an hourly rate of \$9.50, Hymel would have grossed \$380 per week, or approximately \$1,634 per month. Hymel testified that she did not mind working a fulltime job so long as she had the flexibility to handle the issues that arose with the care of her children.¹⁰ However, according to Hymel, Chez Marceaux only offered two work shifts--9:00 a.m. to 2:00 p.m. and 3:00 or 4:00 p.m. to 10:00 p.m. Therefore, she was unable to work a straight eight-hour day for her current employer.¹¹ Further, there is nothing in the record to establish that any evening shifts were actually available for Hymel to work.

While earning capacity is a consideration in determining entitlement to and the amount of spousal support after divorce, it does not necessarily follow that a spouse should be required to take employment of any nature immediately

⁸ We note that net child care costs are properly considered in determining the amount of a parent's basic child support obligation. See La. R.S. 9:315.3 and 315.20.

⁹ This would equate to 10 or 15 additional hours per week respectively, raising the total work-week hours to 35 or 40 respectively.

¹⁰ She was currently exploring a job opportunity with the Holiday Inn that would allow her to work longer hours when she did not have physical custody of the children.

¹¹ Based on her desire to be with her children when they got out of school, Hymel would also be unavailable to work the late shift at Chez Marceaux when she had physical custody of the children.

following divorce. See Alford v. Alford, 610 So. 2d 923, 925 -926 (La. App. 1st Cir. 1992). Accordingly, we find the record does not support a finding that at the time of the hearing Hymel's gross earning potential was \$2,150 per month, the amount she used as her monthly gross income in calculating child support in the beginning of 2005. However, assuming that the trial court believed that Hymel's earning capacity was less because she had physical custody of the children 50 percent of the time, we conclude that the record reasonably supports that finding.

In light of the above, Hymel's reasonable and necessary monthly expenses of \$2,186.68 would exceed her potential monthly net income of \$645.09¹² by \$1,541.59. Considering all relevant factors including Hymel's age, the duration of the marriage, Guarisco's ability to pay, Hymel's needs, the income and means of both parties, their financial obligations, and the earning capacity of both parties, we conclude that the record reasonably supports the trial court's award of \$1,532 per month as final periodic spousal support. Although this amount seemingly would exceed one-third of Guarisco's monthly net income, we nevertheless find that the award is proper and within the discretion afforded the trial court based on the evidence presented. The trial court, in its reasons for judgment, observed that:

Mr. Guarisco and the divorced spouse, Kathryn [Hymel], have not provided the Court with any tax information or the necessary tax forms for the years 2003, 2004, and 2005.^[13] The only exhibit offered to show income of Gavin Guarisco for that time frame is Defendant's Exhibit 7. This exhibit shows that he has a payroll in January of 2006 for a gross pay of \$4300 from Guarisco Clinic of Chiropractic. This again is his father's chiropractic clinic. No information has been provided either by Gavin Guarisco or anyone else to show what his income was in 2003, 2004, and 2005 while he was practicing chiropractic in Morgan City.

* * *

Gavin Guarisco testified at the hearing that he is presently practicing out of his father's business which is Guarisco Clinic of Chiropractic in Morgan City. He testified that he oversees the

¹² We observe that the net income of \$645.68 recited in the judgment is incorrect. The correct amount is \$645.09.

¹³ The hearing for permanent, periodic spousal support was held on February 3, 2006.

financial aspects of the business. He further testified that he treats all patients who come to the clinic. He says that his father does not treat any of the patients. However, his father did cover for him with the patients when Gavin was on vacation.

* * *

Gavin Guarisco testified that the income at the clinic in Morgan City varies. He testified that at present he does not know what the monthly collections are. He does not know what the total collections are. He did testify that for the year 2004 the gross revenues of the clinic were \$300,000 plus or minus and had a net of approximately \$300,000 plus or minus.... His testimony is that he receives a salary only from Guarisco Clinic of Chiropractic in Morgan City. He testified that the business itself is owned by his father. However, as previously indicated, his father does not treat any patients in that business except to cover for Gavin when Gavin is on vacation.... This Court under no circumstances believes that Gavin Guarisco is working full-time as a chiropractor in the city of Morgan City and grossing over \$300,000 per year in gross income from his practice and only makes a gross of \$4300 per month in salary.... This Court finds that it would have been in the interest of Gavin Guarisco to produce documentation relative to his earnings in 2003, 2004, and 2005 if in fact they were as low as \$4300 per month.... This court therefore finds that the testimony of Gavin Guarisco as to his earnings is not credible and not believable. In fact, the documentation which he has submitted including his income tax return for the years 2001 and 2002 contradict his testimony. His testimony is that he does not have any interest nor does he receive any distributions from Guarisco Clinic of Chiropractic. However, in his 2001 income tax return his 1099 reflects that he received non-employee compensation from Guarisco Clinic of Chiropractic of \$13,800. In 2002, his 1099 reflects that he received non-employee compensation of \$5,800 from Guarisco Clinic of Chiropractic. Therefore, the latest two income tax returns reflect that since Gavin Guarisco went back to work with his father in Morgan City that he has received disbursements from that clinic over and above his salary.

* * *

[T]his Court believes that Gavin Guarisco has considerable amount of monthly income over and above the \$4,300 he has testified to. The Court does not have an exact amount but anticipates that Gavin Guarisco would be entitled to yearly earnings greatly in excess of that stated from the revenues that he is producing at the clinic totaling around \$300,000 a year. The Court does find that Gavin Guarisco can easily meet the needs of himself and his family as well as the reasonable and necessary monthly expenses of Kathryn [Hymel].

Having thoroughly and completely reviewed the evidence in the record relative to Guarisco's income, we find no error in the trial court's conclusion regarding Guarisco's income. Although the record is unclear as to the exact amount of Guarisco's net income, it includes sufficient evidence to support the trial

court's conclusion that Guarisco has an earning capacity greater than what he has admitted to earning. Therefore, we find no abuse of the trial court's discretion in awarding Hymel spousal support in the amount of \$1,532 per month. See Moore v. Moore, 03-1217, p. 12 (La. App. 5th Cir. 1/27/04), 866 So. 2d 910, 917.

CONCLUSION

For the foregoing reasons, the judgment of the trial court in favor of Kathryn Hymel is affirmed. Costs of this appeal are assessed to Gavin Thomas Guarisco.

AFFIRMED.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 1857

KATHRYN HYMEL

VERSUS

GAVIN THOMAS GUARISCO

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

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PARRO, J., dissenting in part.

Based on the evidence presented, I feel the majority ignores the fact that the evidence reasonably supports a finding that Hymel's earning capacity exceeded her actual earnings at Chez Marceaux during the 10-month employment period on which the trial court relied in fixing Guarisco's monthly spousal support obligation. Moreover, I believe the trial court manifestly erred in confining its determination of Hymel's earning capacity to her actual earnings during the 10-month period at Chez Marceaux.

I believe the record reasonably supports a finding that, at a minimum, Hymel could have worked seven more hours each week. At an hourly wage of \$9.50, Hymel could potentially earn \$304 per week¹ or approximately \$1,307.20 per month gross by working an additional seven hours a week.² By using Hymel's actual gross (\$741.04) and net (\$645.09) monthly income figures from Chez Marceaux and my determination of a minimum \$1,307.20 gross monthly income, I calculate by extrapolation a monthly net income potential of \$1,137.94. As a result of this calculation, Hymel's reasonable and necessary monthly expenses of \$2,186.68 would exceed her potential monthly net

¹ 32 hours per week x \$9.50 per hour = \$304 per week.

² \$304 per week x 4.3 weeks per month = \$1,307.20 per month.

income of \$1,137.94 by \$1,048.74. Therefore, I feel that the trial court clearly abused its great discretion in ordering Guarisco to pay final periodic spousal support of \$1,532 per month.

Accordingly, I would amend the judgment of the trial court to reduce the award of final periodic spousal support in favor of Kathryn Hymel to \$1,050 per month. For this reason, I respectfully dissent in part.