

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 2568

NYLE A. POLITZ

VERSUS

ALICE CATHERINE BORDELON POLITZ

*PMC  
by [signature]*

Judgment Rendered: AUG - 1 2007

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On Appeal from the First Judicial District Court  
In and For the Parish of Caddo  
State of Louisiana  
Docket No. 470,473

Honorable Charles R. Scott, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

*Guidry, J. concurs in the result.  
Parro, J. concurs with the result, in light of  
the Second Circuit's jurisprudence. by [signature]*

**McCLENDON, J.**

Alice Catherine Bordelon Politz appeals a judgment which granted her final periodic spousal support from her ex-husband, Nyle A. Politz, and ruled on other ancillary matters. For the following reasons, we deny the appeal in part, dismiss the appeal in part, and amend the award of final spousal support.<sup>1</sup>

**FACTS AND PROCEDURAL HISTORY**

Catherine Bordelon and Nyle Politz were married in May 1977, when both were enrolled as students at Louisiana State University Law School. Thereafter, the parties moved to Shreveport and Mr. Politz established a private law practice. Mrs. Politz worked for a short time, but left the work force to raise the couple's three children. The parties physically separated when Mr. Politz left the matrimonial domicile on September 18, 2002, after the parties' youngest child graduated from high school. Mr. Politz filed a petition for divorce on October 18, 2002. On February 18, 2003, Mrs. Politz filed a reconventional demand, seeking relief ancillary to the divorce proceeding, including interim and final periodic support, partition of the community, injunctive relief, and an allocation and accounting of community property. A judgment of divorce was signed on May 22, 2003, but all pending requests were continued.

On April 16, 2004, a rule for contempt was filed by Mrs. Politz against Mr. Politz, as well as a motion to refix the ancillary matters. On August 24, 2004, the parties began the hearing on the ancillary matters raised by the reconventional demand. The parties compromised the issues of

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<sup>1</sup> Initially, we note that this matter was transferred from the Court of Appeal, Second Circuit, to the Court of Appeal, First Circuit, by order of the Louisiana Supreme Court, following the recusal of the judges of the Second Circuit. Mrs. Politz is currently employed as a law clerk for Judge John Larry Lolley of the Second Circuit.

interim spousal support and preliminary injunctive relief, which compromises were incorporated into a judgment signed and filed on December 21, 2004. The remaining issues were heard on December 21 and 22, 2004, after which the trial court took the matter under advisement.

On February 28, 2005, the trial court issued its ruling and written reasons. The court denied Mrs. Politz's request that Mr. Politz be held in contempt; granted her request for an allocation of certain community assets; granted her request for the issuance of an order for an accounting of community assets; and awarded her final periodic support in the amount of \$658 per month.<sup>2</sup> Judgment was signed on April 26, 2005. Thereafter, on the motion of Mrs. Politz, the trial court designated the entire judgment to be a final judgment in accordance with LSA-C.C.P. art. 1915. Mrs. Politz appealed, assigning the following as error:

- 1) The trial court erred in failing to find Mr. Politz guilty of contempt of court;
- 2) The trial court erred in satisfying Mrs. Politz's entitlement to a distribution of community assets by awarding to her funds on deposit in an IRA account and in concluding that there were no other assets available for distribution;
- 3) The trial court erred in the amount it fixed for final periodic support, insofar as it failed to consider all relevant factors mandated by law pursuant to LSA-C.C. art. 112;
- 4) The trial court erred in finding final periodic support payable only until satisfaction of the community indebtedness on the family home; and
- 5) The trial court erred in awarding final periodic support retroactive only to May 2004, when it should be retroactive to December 1, 2003, the date after which interim spousal support was no longer due.

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<sup>2</sup> In addition to awarding the amount of \$658 per month, the judgment also provided that this sum would "be due and payable until the mortgage debt on the house and lot previously owned by the community in which Alice Catherine Politz resides is paid in full."

## APPELLATE JURISDICTION

Initially, we note that the trial court found that Mr. Politz was not in criminal contempt of court. Criminal contempt is a crime, and the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal proceeding against conviction of a crime except upon proof beyond a reasonable doubt of every fact necessary to constitute the contempt charge. **Dauphine v. Carencro High School**, 02-2005, p. 15 (La. 4/21/03), 843 So.2d 1096, 1108. In this matter, the trial court determined that Mr. Politz did not intentionally defy the authority of the court. Accordingly, the denial of Mrs. Politz's motion was equivalent to an acquittal in a criminal matter, and the Fifth Amendment prohibition against double jeopardy precludes any appeal of the trial court's denial. Therefore, we deny this portion of the appeal.

With regard to Mrs. Politz's remaining assignments of error, Louisiana Code of Civil Procedure article 1841 provides:

A judgment is the determination of the rights of the parties in an action and may award any relief to which the parties are entitled. It may be interlocutory or final.

A judgment that does not determine the merits but only preliminary matters in the course of the action is an interlocutory judgment.

A judgment that determines the merits in whole or in part is a final judgment.

The trial court's judgment of April 26, 2005, awarded final periodic support, which is clearly a final appealable judgment. LSA-C.C.P. art. 3943.<sup>3</sup> However, the trial court also ruled on a partial allocation of

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<sup>3</sup> Louisiana Code of Civil Procedure article 3943 provides:

An appeal from a judgment awarding custody, visitation, or support of a person can be taken only within the delay provided in Article 3942. Such an appeal shall not suspend execution of the judgment insofar as the judgment relates to custody, visitation, or support.

community assets, but only ordered an accounting of other community assets and did not partition the community. Thus, the judgment rendered by the trial court regarding the allocation of some community property is a partial one. Because a partial judgment has been appealed, we must first address the jurisdictional issue of whether it is a final judgment for purposes of this appeal.

Whether a partial final judgment is appealable is determined by examining the requirements of LSA-C.C.P. art. 1915. Louisiana Code of Civil Procedure article 1915(B)(1) provides that when a court renders a partial judgment as to “one or more but less than all of the claims, demands, issues, or theories” presented in an action, that judgment is not final for the purpose of an immediate appeal “unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.” This provision “attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties.” **R.J. Messinger, Inc. v. Rosenblum**, 04-1664, p. 13 (La. 3/2/05), 894 So.2d 1113, 1122.

Because the trial court’s judgment in this matter, certifying the judgment as final, did not provide explicit reasons for such certification, we are required to determine *de novo* whether the certification was proper. **R.J. Messinger**, 04-1664 at pp. 13-14, 894 So.2d at 1122. In conducting this review, we consider the “overriding inquiry” of “whether there is no just reason for delay,” as well as the other non-exclusive criteria trial courts should use in making the determination of whether certification is appropriate, which include:

- (1) The relationship between the adjudicated and unadjudicated claims;

- (2) The possibility that the need for review might or might not be mooted by future developments in the trial court;
- (3) The possibility that the reviewing court might be obliged to consider the same issue a second time; and
- (4) Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

**R.J. Messinger**, 04-1664 at pp. 13-14, 894 So.2d at 1122.

Mrs. Politz requested in the court below an allocation of community property, pursuant to LSA-R.S. 9:374(E), pending the partition of the community.<sup>4</sup> In this appeal, Mrs. Politz contends that she is not asserting error in the allocation by the trial court of the balances of the Vanguard accounts to her. Rather, she asserts that the trial court erred in concluding that there were no other assets of the community available for allocation, when in fact, there were approximately \$80,000 in funds from the Vanguard accounts that Mr. Politz withdrew and has not accounted for. However, the judgment herein did not make an accounting or valuation of the community, although it did order an accounting. Nor does the judgment divide the community assets and liabilities between the parties; the community property of the parties has yet to be partitioned. The judgment merely allocated certain community assets to Mrs. Politz, which she now appeals. To permit an appeal of such a judgment would encourage multiple appeals and piecemeal litigation, and prohibit expeditious disposition of community property cases. Accordingly, we find that the trial court's certification of

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<sup>4</sup> Louisiana Revised Statute 9:374(E)(1) provides:

In a proceeding for divorce or thereafter, upon request of either party, where a community property regime existed, a summary proceeding may be undertaken by the trial court within sixty days of filing, allocating the use of community property, including monetary assets, bank accounts, savings plans, and other divisible movable property pending formal partition proceeding, pursuant to R.S. 9:2801.

this part of the judgment was improper, and Mrs. Politz's appeal of this part of the judgment must be dismissed.<sup>5</sup>

## DISCUSSION

With regard to the amount of the award of final periodic support, Mrs. Politz contends that the trial court failed to consider all relevant factors in making its award. We agree.<sup>6</sup>

A court may grant final periodic support to a spouse who, prior to the filing of an action to terminate the marriage, was free from fault.<sup>7</sup> Once freedom from fault is established, the basic tests for the amount of spousal support are the needs of that spouse and the ability of the other spouse to pay. LSA-C.C. arts. 111, 112<sup>8</sup>; **Patton v. Patton**, 37,401, pp. 2-3 (La.App. 2 Cir. 9/24/03), 856 So.2d 56, 59.

At all pertinent times, LSA-C.C. art. 111 provided:

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.

Additionally, LSA-C.C. art. 112 provided:

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

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<sup>5</sup> The proper procedural vehicle to contest an interlocutory judgment that is not immediately appealable is an application for supervisory writs. However, in this matter, no application for supervisory writs was filed, nor was the motion for appeal filed within the 30-day period applicable to supervisory writs contained in Uniform Rules-Courts of Appeal, Rule 4-3.

<sup>6</sup> Because this case is being presided over by the trial court in the Second Circuit where the parties reside and where there are ongoing issues pending between the parties before the trial court, we choose to follow Second Circuit jurisprudence.

<sup>7</sup> In this matter, the trial court previously ruled that Mrs. Politz was free from fault. That determination has not been appealed.

<sup>8</sup> Civil Code articles 111 and 112 were amended by 2006 La. Acts, No. 749, § 1, effective June 30, 2006. The provisions of the amended articles are not applicable herein. See Act 749, § 2.

- (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.

Thus, LSA-C.C. art. 112 mandates the court to consider all relevant factors in determining the award for final periodic spousal support. The nine specific factors listed in Article 112 are not exclusive. The listed factors, as well as other relevant factors, are for the purpose of determining entitlement, amount, and duration of final support. However, Article 112 does limit the amount to not more than one-third of the obligor's net income. **Patton**, 37,401 at p. 3, 856 So.2d at 59.

The earning capacities of the parties, their ages, and the duration of the marriage are relevant factors that are listed in LSA-C.C. art. 112. The relative financial positions of the parties and the standard of living during the marriage are not listed in Article 112, but can be relevant factors. **Gremillion v. Gremillion**, 39,588, pp. 14-15 (La.App. 2 Cir. 4/6/05), 900



So.2d 262, 271; **Patton**, 37,401 at p. 3, 856 So.2d at 59.<sup>9</sup> See also Kenneth Rigby, The 1997 Spousal Support Act, 58 La.L.Rev. 887, 905-06 (1998).

The trial court is vested with great discretion in determining awards of spousal support, and its judgment will not be disturbed absent a clear abuse of discretion. **Gremillion**, 39,588 at p. 15, 900 So.2d at 271.

At the time of the hearing, Mrs. Politz was 52 years old. She re-entered the work force in November 2003, working as a law clerk for the Second Circuit Court of Appeal. The parties had been married for more than twenty-five years, and Mrs. Politz, in accordance with Mr. Politz's wishes, had subordinated her career during the marriage to stay at home and raise the Politz's three children.

Mrs. Politz testified that she could not meet her monthly expenses and was relying on financial help from relatives and friends. She submitted an income and expense affidavit showing gross monthly income in the amount of \$3,360.08,<sup>10</sup> monthly withholdings in the amount of \$991.70,<sup>11</sup> and monthly expenses in the amount of \$5,442.42, resulting in a shortage of \$3,074.04 per month.<sup>12</sup>

In its reasons, the trial court determined that Mrs. Politz had an adjusted gross monthly income of approximately \$2,686.00, and that the

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<sup>9</sup> We also note that the First Circuit in the decision of **Brett v. Brett**, 00-0436, p. 7, (La.App. 1 Cir. 5/30/01), 794 So.2d 912, 917, writ denied, 01-2283 (La. 11/16/01), 802 So.2d 611, has recognized that the standard of living during the marriage can be a relevant factor.

<sup>10</sup> At trial, Mrs. Politz testified that a subsequent cost of living raise increased her net income by about \$150.00 per month.

<sup>11</sup> This withholding amount is comprised of \$823.72 in mandatory withholdings and \$167.98 in discretionary withholdings.

<sup>12</sup> In her appeal, Mrs. Politz is actually requesting one-third of what she asserts was the adjusted gross monthly income of Mr. Politz at the time of trial (\$10,973.00), or \$3,658.00

adjusted gross monthly income of Mr. Politz was \$10,797.00.<sup>13</sup> The court further determined the monthly amount for Mrs. Politz's needs to be \$3,344.00, summarized as follows:

\$1,500	Mortgage
\$9	Home Owner's Assoc.
\$350	Food/Supplies
\$510	Utilities
\$200	Laundry/Clothing
\$200	Debt Service
\$200	House Maintenance
\$20	Telephone
\$157	Life and Hospital Ins.
\$98	Flex Plan Med.
\$100	Gasoline, Oil, Lube
<u>\$3,344</u>	Total

Therefore, based on Mrs. Politz's monthly adjusted gross income of \$2,686.00, the trial court determined the difference to be \$658.00, and set the final periodic support at that amount.

The trial court denied the following requested monthly expenses by Mrs. Politz:

Medical and Dental Expenses	\$80
Personal and Grooming	\$165
Entertainment and Gifts	\$450
Expenses related to Caroline, the Politz's adult college- student daughter	\$490
Yard Man	\$130
Fitness Center	\$50
Pet Expenses	\$20
Newspaper	\$15
<u>Incidentals</u>	<u>\$200</u>
Total	\$1600

The trial court also reduced the following requested monthly expenses:

- Clothing (\$250) and Laundry (\$40) totaling \$290 reduced to a combined total of \$200
- Gas (\$200) and Motor Club (\$8.58) totaling \$208.58 reduced to a combined total of \$100 for Gasoline, Oil, and Lube

<sup>13</sup> According to the trial court, Mrs. Politz's adjusted gross monthly income was based on a gross monthly income of \$3,559.00 less withholdings of 25.41%. Mr. Politz's adjusted gross monthly income was based on his gross monthly income of \$15,425.00 less taxes of 30%.

Additionally, the requests for \$484 for the lease of Mrs. Politz's vehicle and \$141.60 for car insurance, as indicated in her expense affidavit, were withdrawn by Mrs. Politz, once it was established that Mr. Politz was paying these amounts. The trial court also rejected \$90, which was requested for professional expenses, since the evidence revealed that those expenses are paid by Mrs. Politz's employer.

In making its award to Mrs. Politz for final spousal support, the trial court indicated that it followed the factors listed in Article 112. However, in reviewing the trial court's reasons, as well as comparing allowed expenses with disallowed expenses, the court appears to have focused primarily on Mrs. Politz's needs. In balancing all relevant factors, we note that Mrs. Politz subordinated her own career advancement, while paying attention to the needs of her husband and her family over the duration of their twenty-five year marriage. The standard of living enjoyed by the parties during their twenty-five year marriage was relevant in this case and should have been considered under the specific facts presented herein. Further, Mr. Politz has a much greater earning capacity than Mrs. Politz, due at least in part to the amount of time he has spent in the legal profession. Mr. Politz testified that his gross business income was more than \$15,000 per month, or more than \$180,000 per year. Mrs. Politz's gross income is now less than one-quarter of that amount. We are instructed to consider both Mrs. Politz's needs and Mr. Politz's ability to pay, under LSA-C.C. art. 111, and all relevant factors, under LSA-C.C. art. 112, in determining the entitlement, amount, and duration of final support. Mrs. Politz's needs are only one such factor to be considered. We find that the trial court rendered a decision based primarily on the needs of Mrs. Politz under Article 111, without considering all relevant factors, and erred in this respect. Consequently, a *de*

*novo* review is in order. See Evans v. Lungrin, 97-0541, 97-0577, pp. 6-7 (La. 2/6/98), 708 So.2d 731, 735.

Taking into consideration all relevant factors, including the duration of the marriage, the parties' relative financial positions, the earning capacity of the parties, Mrs. Politz's age, Mrs. Politz's needs, Mr. Politz's ability to pay, and the standard of living during the marriage, we conclude that an award of \$1300 per month as final spousal support is reasonable. We therefore amend the trial court's judgment of April 26, 2005, and award Mrs. Politz \$1300 in final periodic spousal support monthly, due and payable on the first day of each month beginning retroactively to the payment due for June 1, 2004 and due and payable until the mortgage debt on the house and lot previously owned by the community in which Mrs. Politz resides, is paid in full.<sup>14</sup>

### CONCLUSION

For the foregoing reasons, Mrs. Politz has no right to appeal the denial of her claim that Mr. Politz was in criminal contempt of court. We also dismiss the appeal in part, with regard to that portion of the judgment allocating to Mrs. Politz the balance of the Vanguard accounts pending an accounting and partition of the community. Additionally, we amend the amount awarded for final periodic support and order Nyle A. Politz to pay to Alice Catherine Bordelon Politz \$1300 per month in final periodic support, due and payable on the first day of each month beginning retroactively to the payment due for June 1, 2004, and due and payable monthly until such time as the mortgage debt on the house and lot previously owned by the

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<sup>14</sup> The evidence established, and the parties do not dispute, that Mr. Politz paid the mortgage on the family home through May of 2004. Therefore, we find no merit in Mrs. Politz's argument that the support award should be retroactive prior to June 1, 2004. Nor do we, at this time, find merit to the argument that final periodic support should be payable beyond satisfaction of the mortgage.

community, in which Mrs. Politz resides, is paid in full. As amended, the judgment is affirmed. Costs of this appeal shall be assessed equally between the parties.

**APPEAL DENIED IN PART AND DISMISSED IN PART;  
JUDGMENT AMENDED AND, AS AMENDED, AFFIRMED.**