

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CW 2459

STATE OF LOUISIANA

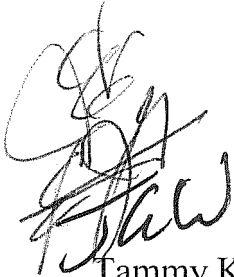
VERSUS

LESLI FUMAR AND BLAKE CAREY ANDRIESSEN

DATE OF JUDGMENT: November 3, 2006

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
(NUMBER NS-04-0270), PARISH OF ST. TAMMANY
STATE OF LOUISIANA

THE HONORABLE LARRY J. GREEN, JUDGE



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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Disposition: WRIT GRANTED AND MADE PEREMPTORY; MATTER REMANDED FOR FURTHER PROCEEDINGS.

KUHN, J.

Defendant, Blake Carey Andriessen, appeals a trial court judgment that ordered him to pay child support in the amount of \$600.00 plus administrative fees per month “at the time the custodial parent moves out of the home owned by defendant.” For the following reasons, we convert this appeal to an application for supervisory writs, grant the writ, and remand this matter to the trial court for further proceedings in accordance with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 7, 2004, plaintiff, the State of Louisiana through the Department of Social Services (“DSS”), filed suit against Andriessen and Lesli Fumar, seeking to have the trial court set child support based on the defendants’ current incomes. Although Andriessen and Fumar never married, it is undisputed they have previously lived together and have two minor children. Pursuant to the terms of a May 2004 stipulated judgment, Fumar and Andriessen exercise joint custody of their minor children. The judgment designated Fumar as the primary domiciliary parent and awarded Andriessen liberal visitation. With respect to this suit to establish the parties’ respective support obligations, the record reveals the following pertinent facts.

In June 2000, Andriessen was hurt in an accident, in which he sustained a closed head injury and injuries to his neck, lower back, and right arm. Numerous physicians have treated him for these injuries. Prior to the accident, Andriessen was employed as a commercial driller, but since the accident, he has not worked.

In June 2002, Andriessen and Fumar separated. Fumar continued to reside in Andriessen's house with the children at no cost to herself. It is undisputed that the house is Andriessen's separate property.

In October 2003, Andriessen obtained funds from the settlement of a lawsuit pertaining to his injuries. The proceeds were in excess of \$200,000.00.¹

On September 30, 2004, a hearing officer for the Twenty-Second Judicial District Court ordered defendant to pay "child support in the amount of \$665 plus an administrative fee of 5% per cent thereof per month through Support Enforcement Services, as directed thereby, effective once mother moves out of father's house" In computing Andriessen's monthly child support obligation, the hearing officer attributed a monthly gross income of \$3,330.00 to Andriessen and a monthly gross income of \$1530.00 to Fumar. The hearing officer's worksheet comments indicate that she based Andriessen's income on "1/5 the settlement proceeds less \$10,000 year for medical expenses. Insurance not included." She based Fumar's income on "\$10.50 x 27.5 plus min[.] wage x 12.5/hr/wk." Andriessen appealed this order, and the trial court held a December 13, 2004 hearing.

At this hearing, Andriessen, who was 39 years old, testified he was attending college and pursuing a Psychology degree with an anticipated graduation date of "June of 2007 -- or 2006." He estimated he would become employed again in "just over two years with an undergraduate degree," and he indicated he was striving to work as a psychologist.

¹ Counsel for the State referred to the settlement amount as \$220,000.00. Andriessen testified that the settlement was "just one sum" that was not broken down into different elements of recovery.

During the previous fall semester, Andriessen had completed 13 credit hours and had attended school on Tuesdays and Thursdays. In the upcoming spring semester, he planned to complete the same number of hours, but he was going to attend school on Mondays, Wednesdays, and Fridays.

Andriessen explained that because he has a mental disability or cognitive problem, he is required to seek special modifications to pursue his education. He continues to receive medical treatment for his neck, back, and shoulder pain, and he is also being treated for anxiety, depression, headaches, tinnitus, and vision problems. He also described that his physician is treating him with “cognitive medication, memory medication.”

Andriessen testified that since his injury, he had not sought any type of employment. He was, however, being trained to work as a volunteer tour guide at the New Orleans Museum of Art, where he was performing tour guide activities for four hours each week. Andriessen also volunteered at a local food bank on some mornings and was being trained to work as a volunteer for a rape/suicide crisis phone line.

With respect to his earning capacity, Andriessen testified that his physicians have found him to be permanently physically disabled from his former type of employment. Andriessen described his earning capacity as “zero,” but he also stated that he considered himself able to perform sedentary work or “a minimum wage job.” Additionally, at the time of the hearing, Andriessen’s application for Social Security disability benefits was pending.

Dr. Kenneth N. Adatto, an orthopedist, who examined Andriessen about two weeks before the hearing, assigned a permanent anatomical impairment of 10-15%

of the cervical spine, 10-15% of the lumbar spine, and 5-10% of the shoulder. Dr. Adatto's report indicated that Andriessen "needs to avoid repetitive stooping or bending and repetitive lifting of objects over 10-20 pounds as well as prolonged sitting or standing in the same position for 45 minutes, plus/minus 15 minutes without being able to move around and change position." The report further stated that Andriessen also "needs to avoid repetitive looking up and down or working with arms above shoulder level."

Regarding the settlement funds, Andriessen testified he had already depleted about one-half of them. He indicated he had spent the funds on "school, the children, living, [and] furnishing a home." He stated his children were ages 9 and 6 at the time of the hearing, and that he was paying \$99.00 per month for each child to maintain their medical insurance. Andriessen also testified that one of his daughters needed surgery to have her adenoids removed.

Andriessen further stated that after he and Fumar separated, he continued to pay the mortgage on his house, and Fumar and the children had stayed in the house in lieu of him paying child support. Based on the rental values of neighboring houses, Andriessen estimated that he could receive \$1000.00 per month in rental income. After inspecting his house and upon finding that it had been damaged, he decided to begin collecting rent from Fumar in order to protect his property.²

² Photographs of the interior of the house revealed that the children had been allowed to paint and write on the walls in the hallways and in their bedroom. The photographs also reveal stains on the carpet and a dirty oven. Andriessen also testified that there was "cat stuff all in the bathtub."

Fumar testified that she had received a letter from or on behalf of Andriessen indicating that if she did not vacate the house by December 1, 2004, she would be obligated to begin paying rent to him in the amount of \$1000.00 per month. At the December 13, 2004 hearing, Fumar was still living in the residence, but she did not address whether she had paid any rent to Andriessen. She testified that she had signed a purchase agreement on a house and that her financing was still pending; she hoped to be able to move out of Andriessen's house within six weeks.

Fumar also testified that she was working 27½ hours per week for WWLTV and earned \$10.50 per hour. Additionally, she was pursuing a business administration degree through a "distance educational program through a school in France." She was working on a thesis, a case study, and quantitative research, and she expected to receive her degree within 16 to 18 months. Fumar had borrowed funds through student loans to pursue this degree.

Regarding Andriessen's health, Fumar acknowledged that Andriessen had sustained a brain injury and that he continued to have some psychological problems. She conceded that within the last year, Andriessen had been committed, and that her family members had taken the action to have him evaluated. Nevertheless, Fumar testified she did not believe that Andriessen's injuries necessarily impacted his ability to work. Regarding health insurance, Fumar testified that Andriessen did not need to pay for private insurance because Medicaid would cover the children's medical needs.

At the end of the hearing, the trial court stated the following, in pertinent part:

[The hearing officer] has come up with an interesting way to award support, which I compliment her on....

You're sitting there with "X" amount of money [directed to Andriessen].... I don't know how much you're paying your psychiatrist and your psychologist ... but maybe you can get a couple of good books. I mean, I could maybe even give you the name of a couple of good books that would help you as much as a psychiatrist. You could go to the library.... Why don't you go volunteer at the library, or maybe you can get a part-time job at the library.

[Argument by counsel]

.... The question I have is when is he going to get on Social Security Disability? You know, when is he going to get off his duff and get a part-time job?

... [B]ack when I was talking about library work. I think you can find something to do. I find it admirable at least you have provided a home for your children....

... [A]ny ruling I make today would commence the day she moves out of the house.

...

The court finds that [Andriessen has] had some medical problems I also find ... that he could find some type of employment, number one. Number two, I think he will be subject to some sort of disability somewhere along the way. Number three, he's not without funds.

...

The Court is going to deviate from the hearing officer recommendation due to the fact that [Andriessen] has testified he's maintaining insurance, and also there may be some repairs that are I think kind of out of the ordinary to the house

In accordance with its oral reasons, the trial court signed a December 20, 2004 judgment that reads in pertinent part as follows:

Defendant ordered to pay child support in the amount of \$600.00 plus an administrative fee of 5% per cent thereof per month, through Support Enforcement Services, or as directed thereby, effective at the time the custodial parent moves out of the home owned by defendant.

...

Defendants right to request a modification is reserved pending [Social Security Disability] application. Defendant to continue to maintain health insurance coverage until child's surgery is completed. Deviation from hearing officer's findings due to repairs necessary to home. Judge specifically finds the defendant is not without funds.

Andriessen has appealed, challenging the trial court's calculation of his child support obligation, *i.e.*, he asserts the trial court should not have considered his personal injury settlement funds as income. He contends the trial court should have applied the support guidelines based on his actual income or his earning capacity.³

II. ANALYSIS

A. Validity of the Trial Court's Judgment

A judgment must be precise, definite and certain. *Vanderbrook v. Coachmen Industries, Inc.*, 01-0809, p. 11 (La. App. 1st Cir. 5/10/02), 818 So.2d 906, 913. A judgment must not be based on any contingency. *Drury v. Drury*, 01-0877, pp. 7-8 (La. App. 1st Cir. 8/21/02), 835 So.2d 533, 539; *Crefasi v. Crefasi*, 628 So.2d 1274, 1276 (La. App. 3d Cir. 1993). If a judgment based upon a demand for money purports to be final, the amount of the recovery must be stated in the judgment with certainty and precision, and the amount should be determinable from the judgment without reference to an extrinsic source such as pleadings or reasons for judgment. *Vanderbrook v. Coachmen Industries, Inc.*, 01-0809 at pp. 11-12, 818 So.2d at 913. If the amount remains to be determined by a future contingency, or is otherwise indefinite and uncertain, it is

³ Andriessen's 2003 United States Individual Income Tax Return reflected a total income of \$899 and a taxable income of \$0.

not a valid and proper judgment. *Fontelieu v. Fontelieu*, 116 La. 866, 41 So. 120, 125 (La. 1906); *see also Russo v. Fidelity & Deposit Co.*, 129 La. 554, 561, 56 So. 506, 508 (La. 1911) and *Simon v. Hulse*, 12 La.App. 450, 451, 124 So. 845, 846 (La. App. 1st Cir. 1929).

In the instant case, the trial court's judgment ordered the defendant to pay "child support in the amount of \$600.00 ... per month ... effective "at the time the custodial parent moves out of the home owned by defendant." (Emphasis added.) The judgment is clearly based upon a contingency that makes it unenforceable. Additionally, review of the record is required to determine the identity of the custodial parent. Thus, the judgment lacks certainty, rendering it invalid.

In the absence of a valid final judgment, this court lacks appellate jurisdiction to review this matter. *Laird v. St. Tammany Parish Safe Harbor*, 02-0045, p. 3 (La. App. 1st Cir. 12/20/02), 836 So.2d 364, 366. However, in keeping with the Louisiana Civil Code's dictate that the paramount consideration in child support proceedings is the best interest of the child, and in consideration of the amount of time this case has already spent in the judicial system, we convert Andriessen's appeal to a writ application and exercise our supervisory jurisdiction to review Andriessen's assignment of error. *See Guillot v. Munn*, 99-2132 (La. 3/24/00), 756 So.2d 290, 301.

B. Calculation of the Basic Child Support Obligation

Louisiana Revised Statutes 9:315.1(A) sets forth:

The guidelines set forth in this Part are to be used in any proceeding to establish or modify child support filed on or after October 1, 1989. There shall be a rebuttable presumption that the amount of child support obtained by use of the guidelines set forth in this Part is the proper amount of child support.

The trial court is allowed to deviate from these guidelines if their application would not be in the child's best interest or would be inequitable to the parties. La. R.S. 9:315.1B. Additionally, the court is required to give specific or oral written reasons to support a deviation and to specify the amount of support that would have been required under a mechanical application of the guidelines, along with the particular facts and circumstances that warrant the deviation. *Id.*

In the instant case, it is undisputed that the hearing officer considered Andriessen's personal injury settlement funds in determining the amount of his monthly gross income. It is also clear that the trial court accepted the hearing officer's calculations regarding the monthly gross income of the parties, before recognizing that Andriessen's monthly support obligation should be reduced by \$65 (due to Andriessen's payment of his children's medical insurance and because he would incur some repair expenses when Fumar left the house).

In *Kelly v. Kelly*, 99-2478 (La. App. 1st Cir. 12/22/00), 775 So.2d 1237, *writ denied*, 01-0234 (La. 3/23/01), 787 So.2d 1001, *overruled in part on other grounds by Salles v. Salles*, 04-1449 (La. App. 1st Cir. 12/2/05), 928 So.2d 1, this court addressed the issue of whether personal injury settlement funds were properly considered as "gross income" pursuant to the applicable statutory guidelines for calculating support under Title 9 of the Louisiana Revised Statutes. The *Kelly* court, which also considered a father's challenge to the trial court's calculation of his child support obligation, described the father's receipt of a personal injury settlement in a lump sum as a "fund" rather than a "flow," and it held that the personal injury settlement should not be considered as part of the father's "gross income." The court directed, however that the settlement funds

could be considered to justify a deviation from the support guidelines and that “any interest or other returns from an investment of this sum should constitute ‘income’ for purposes of determining child support obligations.” *Id.*, 99-2478 at p. 10, 775 So.2d at 1244.

In the instant case, by accepting the hearing officer’s conclusion that a portion of the settlement funds was attributable to Andriessen as his monthly gross income, the trial court committed legal error that warrants a new calculation of his child support obligation. If the record were complete we would determine Andriessen’s obligation, but because the record lacks sufficient evidence for this court to render a decision, a remand is necessary. *Id.*, 99-2478 at pp. 10-11, 775 So.2d at 1244.

Although the trial court implicitly found that Andriessen was voluntarily unemployed, the trial court failed to make express findings regarding his income earning potential. *See* La. R.S. 9:315.11. In determining Andriessen’s income earning potential, the trial court should specify the amount of hours it deems that Andriessen is capable of working and the hourly rate it finds that Andriessen is capable of earning. Additionally, in determining Andriessen’s monthly gross income, the trial court should consider any evidence offered by the parties that addresses whether Andriessen’s settlement funds have yielded “income.” *See Kelly*, 99-2478 at p. 10, 775 So.2d at 1244.

With respect to Fumar’s income, the trial court should address whether it also finds her underemployed and, if so, it should address her earning potential. The trial court is also ordered to mandate that each party provide it with a “verified

income statement showing gross income and adjusted gross income, together with documentation of current and past earnings.” La. R.S. 9:315.2.

On remand, if the trial court finds it in the best interest of the children to deviate from the statutory guidelines, the trial court shall set forth its finding as to the amount of support that it would have required under a mechanical application of the guidelines, and then shall give specific oral or written reasons to support its deviation. La. R.S. 9:315.1. If Fumar has not moved out of Andriessen’s house or is paying rent to Andriessen, the trial court may consider those factors in determining whether any deviation is warranted.

III. CONCLUSION

For these reasons, we consider Andriessen’s appeal as an application for supervisory writs, we grant Andriessen’s application, and we remand this matter for reconsideration in accordance with the views expressed herein. The costs of this proceeding are assessed against Fumar and Andriessen in equal proportions.

WRIT GRANTED AND MADE PEREMPTORY; MATTER REMANDED FOR FURTHER PROCEEDINGS.