NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CU 0797

ANISSA CONSTANT-PLYLER

VERSUS

ANDREAS P. PLYLER

consolidated with

2006 CU 0798

ANISSA CONSTANT-PLYLER

VERSUS

ANDREAS P. PLYLER

Judgment rendered: September 20, 2006

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On Appeal from the 17th Judicial District Court
Parish of Lafourche, State of Louisiana
Civil Number 97508 c/w Civil Number 98051; Div. "E"
The Honorable F. Hugh LaRose, Judge Presiding

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BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.

Pettigrew J. Dissents and assigns reasons.

DOWNING, J.

This appeal and answer to appeal address several aspects of a family court judgment including issues of physical custody, child support and expenses, and interim spousal support. The trial court entered judgment ordering that physical custody of the two children be split between the father, Andreas Plyler, and the mother, Anissa Constant-Plyler. The judgment ordered Mr. Plyler to pay child support and expenses and interim spousal support, including retroactive amounts, but did not make the judgment executory. The judgment further ordered that interim spousal support terminated on the date the divorce was granted. For the following reasons, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

Ms. Anissa Constant-Plyler first filed for divorce in October 2003. There was a brief reconciliation, but she again filed for divorce in January 2004. These separate actions were consolidated. In her petition, Ms. Plyler sought custody of both children, Seth (a son born in January 1998) and Alexandra (a daughter born in April 1999), and sought child support and interim spousal support. In both petitions, Ms. Plyler "reserve[d] her right upon conduct of due proceedings to be awarded final periodic support." Judgment of divorce was entered on August 24, 2004.

A major factor in the child custody and support matters is Seth's medical condition. Seth suffers either from autism or from a pervasive developmental disorder with autistic tendencies. By agreement of both parents, Seth is enrolled in a special program that attempts to meet his needs. This program requires Ms. Plyler to be intensively involved in his care and treatment.

After extensive hearings, the trial court entered judgment. Pertinently, it granted both parents joint custody, but designated Ms. Plyler as the domiciliary parent of Seth and designated Mr. Plyler as the domiciliary parent of Alexandra. The judgment ordered that both children spend every weekend, the entire summer, all holidays, and birthdays together. The judgment ordered that Ms. Plyler be paid interim spousal support from January 22, 2004 through the date of divorce, August 24, 2004. The judgment also ordered Mr. Plyler to pay child support retroactive to the date of request, based on his income and the finding that Ms. Plyler was not voluntarily unemployed or underemployed.

At the hearing on the motion for new trial, the parties consented to several decrees. However, the trial court also rendered judgment on the contested issues. Pertinently, it denied the motions for new trial regarding its previous custody determinations. It declined to make executory its judgment for spousal support in light of enumerated offsets. It declined to make the amount of past due child support executory, subject to later review. It ordered Mr. Plyler to pay $100.00 per month to apply to the arrears. It denied Ms. Plyler's request for child support for Alexandra for the period between filing suit and February 24, 1005. In all other respects, it denied the motion for new trial.

Ms. Plyler appealed, asserting seven assignments of error, summarized as follows:

1. the trial court erred in law and fact in finding that the children's best interest were served by dividing domiciliary status between the parents;

2. the trial court erred in finding that Ms. Plyler had engaged in an extra-marital affair;

3. the trial court erred in finding that the children were impacted by Ms. Plyler's extramarital affair or that they were exposed to the affair;

4. the trial court erred in determining the appropriate amount of child support;

5. the trial court erred in determining the proper amount of extraordinary medical expenses in connection with Seth's medical needs;

6. the trial court erred in determining the "appropriate entitlement" to spousal support;

7. the trial court erred in failing to make executory the judgments for accrued spousal support and child support.

Mr. Plyler answered the appeal, asserting four assignments of error. In brief, however, he argued the following three specifications of error, summarized as follows:

1. the trial court erred in failing to appoint him as the domiciliary parent of Seth, in addition to Alexandra;

2. the trial court erred in calculating the proper assessment of child support because it failed to impute any income to Ms. Plyler;

3. the trial court erred in ordering Mr. Plyler to pay "extraordinary" expenses above his basic child support obligation.

DISCUSSION

Split Custody

Ms. Plyler challenges the trial court's decision to name her domiciliary parent of Seth while naming Mr. Plyler Alexandra's domiciliary parent, suggesting that she should be named domiciliary parent for both children. In support of her argument, she points to Louisiana's strong policy against separating children when parents divorce. *See* **Howze v. Howze**, 99-0852, p. 3 (La. 5/26/99), 735 So.2d 619, 621. Mr. Plyler argues, only conditionally, that if we agree that the children should not be separated, he should be named domiciliary parent.

We conclude that the trial court's ruling regarding separating the domiciles of the children was not manifestly or legally erroneous. Before finding it to be in Seth's and Alexandra's best interest that they be domiciled

with different parents, the trial court recognized the policy asserted in our jurisprudence that shows "great disdain for the separation of young siblings." Even so, the trial court found it in the children's best interest to do so.

First, the trial court found Ms. Plyler's "undogged [sic] determination" to advocate and provide for Seth's needs to be "quite beneficial" to Seth. However, the trial court then found "that same undogged determination to be detrimental to [Alexandra]." The trial court observed: "I'm concerned that in her pursuit of the best interests of Seth, she will overlook the best interest of [Alexandra]." The trial court noted that Alexandra needed socialization and the friendship of others. It noted that if the children were together, it would be extremely difficult for Ms. Plyler to balance both children's needs and that the situation would be "a tremendous disadvantage to one or the other" child.

The trial court then fashioned a joint custody implementation plan that ensured frequent and meaningful contact between the children, ordering that they spend every weekend, holiday, birthday, and summer together.

At the hearing on the motions for new trial, the trial court further explained its reasoning in separating the children. It observed that due to Seth's special needs and because of the protocol he follows that requires substantial periods of time in a room, Alexandra "was being separated from [Seth] anyway." The court noted that Alexandra also had needs, which could best be met under the prescribed custody plan. It concluded that the needs of both children would best be met by splitting domiciles between the parents such that the children would be "only separate and apart during the weekdays of the school year with holidays to be spent together."

At the new trial hearing, the trial court again stated that it was "very mindful" of the jurisprudence generally disapproving the separation of siblings. It stated, however, that "because of the special circumstances . . ., I felt it necessary to issue the judgment I did." It then denied both parents' motions for reconsideration of this issue.

We acknowledge Ms. Plyler's argument that the trial court erred in finding that she engaged in an extra-marital affair and that the children, particularly Alexandra, who is more aware than Seth, were exposed to her paramour. In making its findings, however, the trial court relied on evidence in the record including photographs that had been introduced into evidence and undisputed testimony that one of Ms. Plyler's male companions joined her on a trip with the children to have Seth's eyes operated on. The trial court's findings in this regard are not manifestly erroneous.

While moral fitness insofar as it affects the welfare of children is a factor to consider under La. C.C. art. 134, it is clear that this is not the only factor the trial court considered in fashioning its custody order. Rather, as set forth above, the trial court was also abundantly concerned that Seth's needs be met and that Alexandra also receive the attention, support and socialization she needs.

In **Howze**, 99-0852 at p. 3, 735 So.2d at 621, the Louisiana Supreme Court recognized that separation of children is sometimes necessary. It also recited that "[t]he paramount consideration in child custody cases is the best interest of the child." Here, the trial court found for well-articulated reasons that under the circumstances of this case, it was in Seth's and Alexandra's best interest that they be separated in domicile. He did not err in so doing.

Accordingly, we conclude that Ms. Plyler's first, second and third assignments of error are without merit. Further, since we did not conclude

that the trial court erred in separating the children, we pretermit discussion of Mr. Plyler's conditional first assignment of error.

Child Support

The parties dispute the amount of basic child support due. Ms. Plyler seems to claim support for Alexandra, who is domiciled with Mr. Plyler. Mr. Plyler asserts that the trial court erred in finding that Ms. Plyler was not voluntarily unemployed and in, therefore, failing to impute income to her for child support calculation purposes. Both parties dispute the award of extraordinary expenses: Ms. Plyler claims the award is too low; Mr. Plyler asserts the award is too high. For the following reasons, we affirm the award of $1,075.00 per month as the child support award, including basic child support and extraordinary expenses, due from Mr. Plyler to Ms. Plyler.

Nondomiciliary children

In her calculation of basic child support, Ms. Plyler seems to include a demand for support of Alexandra, who is domiciled with Mr. Plyler. Under La. R.S. 9:315.8D, Mr. Plyler owes support only for Seth, since he is the nondomiciliary parent. *See also* La. R.S. 9:315.10A(2). Accordingly, the calculation of the base amount of support he owes Ms. Plyler is calculated correctly.

Voluntary Unemployment

Regarding Mr. Plyler's claim that Ms. Plyler is voluntarily unemployed such that the trial court should impute income to her for calculation of child support, the trial court specifically found that she was not voluntarily unemployed. Under La. R.S. 9:315.11, income is imputed to an unemployed or underemployed spouse for child support calculation, subject to specific exceptions, only where a spouse is voluntarily unemployed or underemployed. La. R.S. 9:315C(5)(b) provides that "[a]

party shall not be deemed voluntarily unemployed or underemployed . . . if the unemployment or underemployment results through no fault or neglect of the party." "Voluntary unemployment or underemployment for purposes of calculating child support is a question of good faith on the obligor-spouse." **Romanowski v. Romanowski**, 03-0124, p. 6 (La.App. 1 Cir. 2/23/04), 873 So.2d 656, 660. The **Romanowski** court continued: "In virtually every case where a parent's voluntary unemployment or underemployment was found to be in good faith, courts have recognized extenuating circumstances beyond that parent's control which influenced or necessitated the voluntary change in employment." **Id.**

Here, the trial court recited the following extenuating circumstances in support of its finding that Ms. Plyler is not voluntarily unemployed. In its oral reasons after the trial on the merits, the trial court observed that Ms. Plyler is dealing with a very special needs child who requires 24 hour monitoring. In its ruling on the motions for rehearing, the trial court specifically found that Ms. Plyler was "not voluntarily unemployed because of the special needs of [Seth]."

"Voluntary unemployment or underemployment is a fact-driven consideration." **Romanowski.**, 03-0124 at p. 8, 873 So.2d at 662. A trial court has broad discretion in determining the credibility of witnesses, and we will not disturb its factual determinations absent a showing of manifest error. **Id.** "Whether a spouse is in good faith in ending or reducing his or her income is a factual determination which will not be disturbed absent manifest error." **Id.**

Here, the trial court's finding that Ms. Plyler was not voluntarily unemployed is not manifestly erroneous under the facts of this case. We

therefore find no merit in Mr. Plyler's argument that the trial court erred in failing to impute any income to Mrs. Plyler.

Extraordinary Expenses

Louisiana Revised Statutes 9:315.5 mandates that extraordinary medical expenses be added to the basic child support obligation. In this regard, the parties stipulated to judgment requiring Mr. Plyler to be obligated "to pay for two thirds of all uncovered medical care that are reasonable and necessary over and above the sum of $250.00 per year," and that Mrs. Plyler "shall be responsible for one third of such charges." The trial court further ordered that the sum of $225.00 be added to Mr. Plyler's child support obligation. In his oral reasons for judgment in connection with the motions for new trial, the trial court ruled that this sum was "to go towards the additional costs of the special dietary needs of the child[.]" It also found that there was additional cost for Pull-Ups.

Ms. Plyler argues that the $225.00 assessed is inadequate in light of her detailed claim for expenses. Mr. Plyler argues that the expenses are not medical expenses, and should have been awarded, if at all, pursuant to La. R.S. 9:315.1B as deviations from the guidelines. And he argues that the trial court did not comply with La. R.S. 9:315.1 in making the award.

The evidence before us shows that Seth's special diet is part of his prescribed regimen and is reasonable and necessary in the treatment of his condition. As such, the costs of Seth's dietary needs are allowable medical expenses. *See* **Treitler v. Treitler**, 03-1931, p. 7 (La.App. 4 Cir. 4/7/04), 872 So.2d 1200, 1204-05. We do not decide here whether the term "medical care" as used in the judgment differs in meaning from the term "medical expenses" as used in La. R.S. 9:315.5. We do, however, note that the award for special dietary needs is consistent with the award for medical care in that

the award of $225.00 per month is very close to two-thirds of the $350.00 claimed cost of Seth's special diet. And we note that other medical care is provided for in the judgment, obviating many if not all of Ms. Plyler's claims for allowable extraordinary expenses.

Accordingly, we conclude that the trial court did not err in awarding $225.00 as an addition to the basic child support obligation. We conclude that Ms. Plyler's fourth and fifth assignments of error are without merit. We further conclude that Mr. Plyler's second and third assignments of error are without merit.

Spousal Support

In ruling that interim spousal support would terminate as of the date of divorce, the trial court found that Ms. Plyler filed no petition for permanent spousal support and never sought an award of permanent spousal support. La. C.C. art. 113 provides in pertinent part as follows in this regard:

> If a claim for final spousal support **is pending at the time of the rendition of the judgment of divorce**, the interim spousal support award shall thereafter terminate upon rendition of a judgment awarding or denying final spousal support or one hundred eighty days from the rendition of judgment of divorce, whichever occurs first. (Emphasis added.)

Ms. Plyler argues, however, that her claim for permanent spousal support was pending at the time the divorce judgment was rendered and that the trial court made no ruling on her claim until five months after the divorce decree. Therefore, she argues that her interim spousal support should have been ordered to continue an additional five months.

On reviewing the record, including the pleadings, we agree with the trial court and conclude that it committed no error in terminating interim spousal support as of the date the divorce decree was rendered. In her petitions, Ms. Plyler "reserve[d] her right upon conduct of due proceedings

to be awarded final periodic support." In her prayers for relief, she prayed for "interim periodic support . . . pending these proceedings," again specifically reserving her right to seek final periodic support. But nothing in the record indicates that she ever sought permanent spousal support or that such claim was pending when the divorce decree was rendered. Ms. Plyler cites no authority equating reservation of a right with pursuit of that right, nor can we find any.

Therefore, according to the provisions of Art. 113, we conclude that the trial court did not err in terminating interim spousal support as of the date of rendition of the divorce decree. We find no merit in Ms. Plyler's sixth assignment of error.

Support Orders

Ms. Plyler argues that the trial court erred by giving Mr. Plyler double credits for payments he made on her behalf. She also argues that the trial court erred in failing to make the spousal and child support orders immediately executory.

Credits

The trial court awarded credits sufficient to equal the amount of spousal support Mr. Plyler owed under the judgment. While the trial court was mindful of Mr. Plyler's continuing payments of Ms. Plyler's house notes, her automobile payments and her utilities, it did not obligate Mr. Plyler to pay these sums in its judgment ordering retroactive interim spousal support in the amount of $1,15400 per month. The trial court explained that it was awarding all Ms. Plyler's claimed expenses other than these that Mr. Plyler was paying.

Credit for Mr. Plyler's payments is mandatory under La. R.S. 9:310B, which provides as follows:

> Any support of any kind provided by the judgment debtor from the date the petition for support is filed to the date the support order is issued, to or on behalf of the person for whom support is ordered, shall be credited to the judgment debtor against the amount of the judgment.

The judgment amount for seven months of spousal support amounted to $8,078.00. The trial court credited Mr. Plyler with this amount for his payment of expert fees, car notes and utility bills as it was mandated to do. It did not err in doing so. Mr. Plyler did not receive double credit for his payments.

Non-executory Judgments

Ms. Plyler also asserts that the trial court erred in not making the spousal and child support judgments executory. Her only argument in brief in this regard, however, is that "[t]he record contained no reason as to why the judgments rendered for spousal support and child support should not have been made executory." Ms. Plyler cites no authority for the proposition, and we can find none, that a trial court has no discretion to delay making a judgment executory for a brief term while related matters are pending before the court.

Here, the trial court found that Mr. Plyler owed Ms. Plyler $12,408.43 for child support retroactive to the date of filing. It very clearly stated its reasons, however, for declining to make the judgment in this amount immediately executory on June 24, 2005. It noted that both parties were in extreme financial difficulties. It observed that a pretrial conference was set for July 12, 2005, to address the community property issues. It stated its awareness of "the fact right now that there is just simply not enough money to go around." The trial court then ordered that Mr. Plyler pay an additional $100.00 to apply to the retroactive child support obligation.

The trial court next observed that it did not intend to give Mr. Plyler an interest free loan, but that it did not "want to allow for further economic chaos in this structure" when the pretrial hearing on the community property issues would be held within a few weeks. It then stated that it would address the issue of making the judgment executory at the partition of the community.

"A trial court has inherent power to take whatever reasonable actions are necessary to maintain control of its docket." **Wallace v. PFG**, 04-1080, p. 6 (La.App. 1 Cir. 5/6/05), 916 So.2d 175, 178. The trial court's reasons and actions show that it was attempting to keep control of this matter by declining to make the child support judgment executory for a limited period of time. Accordingly, we cannot conclude the trial court abused its discretion.

We note, however, that trial courts have limited discretion to delay in making money judgments executory. Accumulated child support is a vested property right. **Cummings v. Cummings**, 469 So.2d 17, 18 (La.App. 1 Cir. 1985). And we are mindful of La. C.C.P. art. 3946A, which provides as follows: "When a payment of support under a judgment is in arrears, the party entitled thereto may proceed by contradictory motion to have the amount of past due support determined and made executory. On the trial of the contradictory motion, the court shall render judgment for the amount of past due support." *See* **Appleby v. Appleby**, 245 So.2d 440, 442-43 (La.App. 1 Cir. 1970) and **Rodriguez v. Rodriguez**, 245 So.2d 765, 767-68 (La.App. 4 Cir. 1971) construing almost identical language and deciding that trial courts have no discretion in making executory judgments for arrearages in alimony payments.

We further note, however, that Mr. Plyler is not in arrears and no judgment has been entered to that effect. We also observe that the trial court's decision to delay making the child support judgment executory is a temporary, short term decision interposed, not to delay or possibly defeat Ms. Plyler's rights (*see* **Appleby**, above), but to more efficiently manage all proceedings filed in connection with the issues involved in the Plylers' divorce.

Accordingly, we find no merit in Ms. Plyler's seventh assignment of error.

DECREE

Concluding the trial court showed great experience and expertise in its handling of this matter, we affirm the judgment of the trial court. Costs are assessed to Ms. Anissa Constant-Plyler.

AFFIRMED

ANISSA CONSTANT-PLYLER

VERSUS

ANDREAS P. PLYLER

NUMBER 2006 CU 0797 C/W
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COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

PETTIGREW, J., DISSENTS, AND ASSIGNS REASONS.

PETTIGREW, J., dissenting.

I must respectfully dissent from the majority. I do not find any factual or legal basis for the trial court to enter a judgment splitting the domiciliary custody of the two children by granting domiciliary custody of Seth to his mother, Anissa Constant-Plyler, while granting domiciliary custody of Alexandra to her father, Andreas P. Plyler. In my humble opinion, domiciliary custody of both children should have been awarded to the mother, Anissa Constant-Plyler. It is important to remember that the mother has had domiciliary custody of and reared both children from birth through the trial of the merits.

The paramount consideration in child custody cases is the best interest of the child. La. Civ. Code art. 131. Louisiana law has a long-standing principle that seeks to avoid the separation of children of a family when parents divorce. **Sanders v. Sanders**, 05-0803, p. 5 (La. App. 1 Cir. 9/23/05), 923 So.2d 721, 724; **Richardson v. Richardson (Blackmar)**, 01-0777, p. 14 (La. 9/28/01), 802 So.2d 726, 734, writ denied, 01-2884 (La.11/16/01), 802 So.2d 618; see also, **Howze v. Howze**, 99-0852, p. 3 (La. 5/26/99), 735 So.2d 619, 621. The separation of children of a family, though sometimes necessary, is a custodial disposition that courts seek to avoid. **Richardson**, 01-0777 at p. 14, 802 So.2d at 734. Normally, the welfare of these children is best served by leaving them together, so that they can have the full benefit of companionship and affection. When feasible, a court should shape its orders to maintain family solidarity. **Tiffee v. Tiffee**, 254 La. 381, 387-388, 223 So.2d 840, 843 (1969); **Howze v. Howze**, 99-0852 at p. 3, 735 So.2d at 621; **Earnest v. Earnest**,

286 So.2d 747,750 (La. App. 1 Cir. 1973), writ denied, 290 So.2d 330 (1974). In each of the foregoing cases, the trial court's judgment awarding custody of siblings to separate parents was reversed based on manifest error in finding the best interests of the siblings were served by separating them. **Richardson**, 01-0777 at p. 14, 802 So.2d at 734.

This court has reaffirmed its commitment to maintain family solidarity, as required by **Tiffee**, in its recent opinion in **Sanders v. Sanders**, 05-0803, p. 5 (La. App. 1 Cir. 9/23/05), 923 So.2d 721, 724. In **Sanders**, this court set forth the law applicable to cases of this nature:

> Sibling solidarity offers children some continuity during the separation and divorce of their parents. Generally, "the welfare of children is best served by leaving them together, so they can have the full benefit of companionship and affection." *Howze v. Howze*, 99-0852, p. 3 (La.5/26/99), 735 So.2d 619, 621; *Tiffee v. Tiffee*, 254 La. 381, 223 So.2d 840, 843 (1969); *Richardson v. Richardson*, 01-0777, p. 14 (La.App. 1 Cir. 9/28/01), 802 So.2d 726, 734, *writ denied*, 01-2884 (La.11/16/01), 802 So.2d 618. Where feasible, a court should strive to shape custody orders to maintain family connections by keeping siblings in the same home. *Id.* On appeal, the trial court's custodial determinations will not be overturned absent abuse of discretion. *Shaffer v. Shaffer*, 00-1251, p. 5 (La.App. 1 Cir. 9/13/00), 808 So.2d 354, 358, *writ denied*, 00-2838 (La.11/13/00), 774 So.2d 151.

The majority relies upon the "well-articulated reasons" of the trial court to justify the separation of Seth and Alexandra. Unfortunately, the "well-articulated" reasons are illusionary and are not supported by the factual evidence presented at the trial. In fact, Dr. Cave, the only expert or professional the trial court accepted as being reliable, was of the opinion that the best interest of both children was to be together. I would humbly reverse the trial court and grant the domiciliary custody of both Seth and Alexandra to their mother, Anissa Constant-Plyler. I would further reverse the child support award to Anissa Constant-Plyler and remand that part of the proceeding to the trial court to determine the child support owed to Anissa Constant-Plyler based upon her having domiciliary custody of both children.

I also disagree with the majority's holding of credits under La. R.S. 9:310B. Louisiana R.S. 9:310B does not contemplate credits for expert fees towards spousal support. I am of the opinion that this is reversible error.

I further disagree with the majority in affirming the trial court in not making the past spousal and child support executory. Spousal and child support issues are separate and apart from community property issues. Accumulated child support is a vested property right. **Cummings v. Cummings**, 469 So.2d 17, 18 (La. App. 1 Cir. 1985). Louisiana Revised Statute 9:310 provides that an order for spousal support shall be retroactive to the filing of the petition. In addition, La. R.S. 9:315.21 provides that a judgment awarding child support shall be retroactive from the date of judicial demand. At the time of the trial, Andreas Plyler was already in arrears with respect to both child support and spousal support. In my opinion, the trial court abused its discretion in failing to make executory the past-due support in accordance with La. Code Civ. P. art. 3946A, and I would reverse same.