NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1564

ANNA MARIE BLACKWELL

VERSUS

JOHN HENRY BLACKWELL

Judgment Rendered: March 25, 2011

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Appealed from the
22nd Judicial District Court
In and for the Parish of Washington
State of Louisiana
Case No. 98027

The Honorable Dawn Amacker, Judge Presiding

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Elisabeth W. Ramirez **Covington, Louisiana**	**Counsel for Plaintiff/Appellant** **Anna M. Blackwell**
Roy K. Burns, Jr. **Covington, Louisiana**	**Counsel for Defendant/Appellee** **John Henry Blackwell**

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

GAIDRY, J.

In this divorce proceeding, a wife appeals a judgment awarding her final periodic support. We affirm.

FACTS AND PROCEDURAL HISTORY

John and Anna Blackwell were married on May 8, 1999 and were divorced by judgment signed July 30, 2009. On July 31, 2009[1], the court rendered a judgment terminating interim spousal support and dismissing Anna's claim for final support, finding that she had sufficient income to meet her basic needs. Anna filed a motion for new trial, asserting that the judgment of the court was clearly contrary to the law and evidence because the court, in calculating her expenses for purposes of determining her entitlement to final support, failed to consider her housing expense of $600.00 per month and her medical insurance premium of $84.00 per month. The trial court granted a new trial on the issue of final support and set the matter for hearing. After a hearing, at which John testified but Anna did not appear, the trial court rendered judgment awarding final spousal support to Anna in the amount of $168.36 per month, for two years from the date of the judgment of divorce.

Anna appealed, assigning the following trial court errors:

1. The court abused its discretion in not considering Anna's monthly housing expense and her obligation to pay the note on a community camper for purposes of determining final support.
2. The court abused its discretion in considering evidence at a new trial which went beyond the issues raised in the motion for new trial.
3. The court was without authority to change her findings of fact on a motion for new trial.

[1] Although the hearing was held and an oral judgment was rendered on July 31, 2009, the written judgment states that it was "read, rendered and signed" on September 17, 2009.

4. The court erred in limiting support to a period of two years.

DISCUSSION

It is within the trial court's sound discretion to allow and fix the amount of spousal support, to be exercised not arbitrarily or willfully but with regard to what is just and proper under the facts of the case. *Prestenback v. Prestenback*, 08-0457, p. 5 (La.App. 1 Cir. 11/18/08), 9 So.3d 172, 176. Such awards should not be disturbed absent a clear abuse of that discretion. *Id.*

Louisiana Civil Code article 111 provides that in a proceeding for divorce or thereafter, the court may award final spousal periodic support to a party who is in need of support and who is free from fault prior to the filing of a proceeding to terminate the marriage. In awarding final periodic support to a party who is free from fault and in need of support, La. C.C. art. 112 provides that the court "shall consider all relevant factors," which *may* include:

> (1) The income and means of the parties, including the liquidity of such means.
>
> (2) The financial obligations of the parties.
>
> (3) The earning capacity of the parties.
>
> (4) The effect of custody of children upon a party's earning capacity.
>
> (5) The time necessary for the claimant to acquire appropriate education, training, or employment.
>
> (6) The health and age of the parties.
>
> (7) The duration of the marriage.
>
> (8) The tax consequences to either or both parties.
>
> La. C.C. art. 112(B).

Article 112 bases an award of spousal support on the needs of the claimant spouse and the ability of the other spouse to pay, subject to the qualifying rules in Article 112 and the following articles. Article 112 provides that in determining the entitlement, amount, and duration of final support, the court "shall" consider all relevant factors; however the article further states that those factors "may" include the nine enumerated factors. Thus, it follows from a plain reading of Article 112 that a court need not consider all of the listed factors, as the consideration of all of the listed factors is not mandatory, but discretionary. The phrasing of Article 112 also clearly indicates that a court may consider factors that are not listed, provided they are relevant to the entitlement, amount, and duration of final support. *Prestenback*, 08-0457 at pp. 6-7, 9 So.3d at 177.

In an action for spousal support, the claimant has the burden of proving insufficient means of support. *Prestenback*, 08-0457 at p. 7, 9 So.3d at 177. "Means" include both income and property. In deciding entitlement and amount of alimony, the court should consider, among other things: the income, means and assets of the spouses; the financial obligations of the spouses, including their earning capacities; the time necessary for the recipient to acquire appropriate education, training or employment; and the health and age of the parties. *Id.*, 08-0457 at p. 7, 9 So.3d at 178. Although "means" include both income and property, courts usually determine initially the monthly income to be attributed to the claimant spouse and compare this sum to the spouse's monthly expenses. If the income equals, or is greater than the expenses, then no further inquiry should be necessary. However, if the expenses exceed the income, the court will need to decide to what extent the spouse should be made to deplete the property before being entitled to alimony. *Id.*, 08-0457 at pp. 7-8, 9 So.3d at 178.

"Support" means a sum sufficient for the claimant spouse's maintenance, which includes the allowable expenses for food, shelter, clothing, transportation expenses, medical and drug expenses, utilities, household maintenance, and the income tax liability generated by alimony payments. This includes mortgage payments, utilities, and other related expenses. Expenditures for newspapers, gifts, recreation, vacation, and church tithes are not to be considered in awarding permanent alimony. Similarly, expenses attributable to entertainment, including cable television service, are not necessary for a spouse's maintenance and should not be considered in fixing permanent alimony. *Id.*, 08-0457- at p. 8, 9 So.3d at 178.

In her first assignment of error, Anna argues that the trial court erred in failing to consider her $600.00 per month housing expense and $368.76 per month camper note in calculating the support obligation. Anna argues that under La. C.C. art. 112, the court can consider the financial obligations of the parties in determining final support, and the house and camper notes are her obligations. Although the trial court did not consider Anna's housing expense in calculating spousal support in its first judgment, after granting a new trial, the court explained that it misunderstood the testimony regarding Anna's payment of a portion of the housing expenses, and the court then included the $600.00 housing expense in its calculation of Anna's expenses.

As for the camper note, at the July 31, 2009 hearing, John testified that he did not want the camper and wished to sell it. He testified that he had found several buyers willing to pay approximately $18,000.00 for the camper, but Anna refused to sell it for that amount. After a recess, the parties stipulated that John would transfer the camper to Anna and the camper would be valued at $18,000.00 for purposes of the community

property partition. Anna stipulated that she would take over the camper notes and that amount would not be considered in calculating final support. Anna's attorney repeatedly stated in argument at that hearing and at the hearing on the motion for new trial that this camper note had been specifically excluded from the court's consideration. Strangely, Anna now argues on appeal that whether the trial court felt that the camper was a necessity or not, the obligation was created during the marriage and the court should have considered the parties' standard of living during the marriage and included the camper note in its calculation of her expenses. She claims in her brief that under this court's holding in *Brett v. Brett*, 00-0436 (La.App. 1 Cir. 2001), 794 So.2d 912, *writ denied*, 01-2283 (La. 11/16/01), 802 So.2d 611), the standard of living of the parties "is a relevant factor to be considered in determining final support." However, *Brett* does not hold that the parties' standard of living is a relevant factor; rather, it held that courts are *not prohibited* from considering the standard of living of the parties as a relevant factor in determining final support. *Brett*, 00-0436 at p. 7, 794 So.2d at 917. The court stated several times that even if the parties had not already entered into a stipulation regarding the camper note, it did not feel that the note was properly includable in its calculation. Regardless of the appropriateness of the inclusion of the camper note, the parties clearly stipulated at the hearing on support that the camper note would not be considered for purposes of alimony. Therefore, this assignment of error is without merit.

Anna next argues that the trial court erred in considering evidence at the new trial which went beyond the scope of her motion for new trial. Anna's motion for new trial asserted that the judgment of the court was clearly contrary to the law and evidence because in calculating her expenses

for purposes of determining her entitlement to final support, the court failed to consider her housing expense of $600.00 per month and her medical insurance premium of $84.00 per month. The court's order stated that a new trial was "granted in the matter on the issue of final support." Anna did not appear at the new trial, and her attorney objected to John's testimony regarding anything other than the $600.00 housing expense or the $84.00 insurance premium. The court explained that because it was mistaken about the housing expense at the prior hearing, when it added up all of Anna's purported expenses and they did not exceed her income, the court conducted no further inquiry and made no findings regarding whether Anna carried her burden of proof on her purported expenses. Once the court realized its error and added in the $600.00 housing expense, it became necessary to determine whether Anna proved each of the other expenses to determine her need for support. Anna claimed that since she did not request any new evidence and did not raise any errors by the court other than the housing expense or insurance premium, the court lacked the authority to hear new evidence.

Louisiana Code of Civil Procedure article 1978 provides:

> It shall not be necessary in a non-jury trial to resummon the witnesses or to hear them anew at a new trial if their testimony has once been reduced to writing, but all such testimony and evidence received on the former trial shall be considered as already in evidence. Any party may call new witnesses or offer additional evidence, and with the permission of the court recall any witness for further examination or cross-examination as the case may be. However, the parties shall not be precluded from producing new proofs, on the ground they have not been offered on the first trial. When a new trial is granted for reargument only, no evidence shall be adduced.

The trial judge has great discretion to admit or disallow evidence subject to an objection based upon the scope of the issues and pleadings and to determine whether evidence is encompassed by the general issues raised in the pleadings. *Muscarello v. Ayo*, 93-2081, pp. 4-5 (La.App. 1 Cir.

10/7/94), 644 So.2d 846, 849. A court of appeal will not disturb a trial court's determination in this regard absent an abuse of the trial court's discretion. See *Denton v. Vidrine*, 06-0141, p. 13 (La.App. 1 Cir. 12/28/06), 951 So.2d 274, 285, *writ denied*, 07-0172 (La. 5/18/07), 957 So.2d 152.

In this case, the trial court granted a new trial on the issue of final support; it was not limited to the housing expense and insurance expense. The order granting the new trial also did not limit the new trial to reargument only. Thus, the court's decision to allow John to testify at the new trial regarding Anna's expenses was allowed under La. C.C.P. art. 1978. All evidence at the hearing was relevant to the issue of Anna's eligibility for final spousal support. We find no abuse of discretion by the court, and this assignment of error is without merit.

In her next assignment of error, Anna argues that the court erred in changing its findings of fact on a new trial. Anna's complaints in this regard are that the court included certain items in its calculation of her expenses at the original hearing and then excluded or changed the amounts at the new trial. However, as explained in regard to the preceding assignment of error, the court did not make findings of fact regarding all of Anna's expenses at the original trial. The court added up Anna's expenses which were properly includable if proven and found that Anna's expenses did not exceed her income, making further fact findings by the court on those expenses unnecessary. Once the court realized that it had mistakenly left out the $600.00 per month housing expense, Anna's claimed expenses exceeded her income, and it became necessary on the new trial for the court to determine whether Anna proved each of her expenses. These findings were necessary to the court's determination of the amount of final support and were not

outside of the court's authority. This assignment of error is also without merit.

In her final assignment of error, Anna asserts that the court erred in limiting her final spousal support to a period of two years. In ruling on the matter, the court stated that because Anna admittedly could gain her R.N. degree in approximately two years and by doing so improve her income significantly and well meet her own needs, it was limiting her final support to a period of two years from the date of divorce.

Comment (c) to Civil Code article 112 explains that the language of the article permits the court to award rehabilitative support and other forms of support that terminate after a set period of time. The appropriateness of a rehabilitative award depends upon the capacity of the recipient spouse to become self-supporting, in light of the relevant factors listed in article 112, and the duration of any such award should be determined primarily by the amount of training or other preparation that the recipient requires in order to secure employment that will meet her needs. Other factors may also form the basis of a fixed-duration award, but it is contemplated that such awards will ordinarily be based upon the assumption that certain facts (such as employment of the recipient) will occur within the term fixed in the judgment awarding support. If those facts have not occurred at or after the expiration of the specified term, the recipient may seek modification of the judgment upon proof that circumstances have changed since the awards were made; *i.e.*, that the facts that the court assumed would occur did not. La. C.C. art. 112, comment (c).

On appeal, Anna argues that the court was manifestly erroneous in limiting her support to a period of two years because there was no credible evidence in the record that it was feasible for her to gain an R.N. degree in

two years. We disagree. Anna testified at the original hearing that she believed it would take two years for her to become an R.N. There was also evidence in the record as to the salary of an R.N. and the availability of employment as an R.N. Anna is not prohibited from seeking to have the spousal support award modified if circumstances change. We find no abuse of discretion by the court in its decision to limit Anna's support to a period of two years.

CONCLUSION

The judgment appealed from is affirmed. Costs of this appeal are assessed to Anna Blackwell.

AFFIRMED.