

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1478

ELAINE C. WAGUESPACK

VERSUS

GEORGE K. WAGUESPACK

Judgment Rendered: AUG 20 2010

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APPEALED FROM THE  
TWENTY-THIRD JUDICIAL DISTRICT COURT  
IN AND FOR THE PARISH OF ASCENSION  
STATE OF LOUISIANA  
DOCKET NUMBER 75139, DIVISION A

THE HONORABLE RALPH TUREAU, JUDGE

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BEFORE: PARRO, KUHN, AND McDONALD, JJ.

*Parro, J. dissents and assigns reasons. (by jmm)*

**McDONALD, J.**

This is an appeal of a judgment partitioning the community property belonging to George K. Waguespack and Elaine C. Waguespack. The Waguespacks were married on August 17, 1991, and had two children. The Waguespacks were divorced on September 9, 2004. Their community property regime was terminated on May 8, 2003, the date of the filing of the original petition for divorce.

The primary issues at trial were the valuation of the community interest in Mr. Waguespack's former law practice, Waguespack & Gaudin, APLC (Waguespack & Gaudin), and the classification of payments from cases that were tried or settled after termination of the community property regime.

Waguespack & Gaudin was organized on June 19, 2002, and Mr. Waguespack and his law partner, Gary Gaudin, were each fifty percent shareholders. In November 2004, the Waguespack & Gaudin law firm split up, and Mr. Waguespack established a new law firm, Waguespack and Associates, APLC. Mr. Gaudin established his own firm also. Waguespack & Gaudin clients were given the choice of which attorney would continue to represent them in their ongoing cases. Approximately 80 percent chose Mr. Gaudin, and the rest went with Mr. Waguespack.

On August 4, 2005, Mr. Waguespack and Mr. Gaudin reached an agreement to compensate each other for the value of their ownership interests in Waguespack & Gaudin, agreeing that as the cases from Waguespack & Gaudin settled, fifty percent of the fee would go to whichever of their new law firms handled the case. The other fifty percent would be divided by agreement, and if no agreement could be reached, the funds would be placed in trust. In accordance with the agreement, Mr. Gaudin paid Mr. Waguespack \$241,294.85; Mr. Waguespack paid Mr. Gaudin \$9,432.55. A large balance was carried in Mr. Gaudin's trust account for the

disputed fees. Mr. Waguespack put all of his funds received from the cases into the operating account of his new firm, Waguespack and Associates.

On January 31, 2007, Mr. Waguespack was transferred to disability inactive status by the Louisiana Supreme Court. He had not actively practiced law for some period of time before that date due to health problems.

Ultimately, no amicable resolution of the dissolution of Waguespack & Gaudin could be reached, and Mr. Gaudin filed a petition for an accounting and involuntary dissolution against Mr. Waguespack. Mr. Waguespack failed to answer the suit, and a confirmation of default judgment was obtained by Mr. Gaudin on March 26, 2008. In that judgment, rendered by Judge Thomas J. Kliebert, Jr., Waguespack & Gaudin was dissolved as of November 1, 2004, an accounting was made for assets retained by each owner, and Mr. Waguespack was awarded \$129,141.65, representing his interest in the former law practice. The award included an offset for one-half of the attorney fees and expenses recovered, but never accounted for, by Mr. Waguespack to Mr. Gaudin. Mr. Waguespack appealed that judgment, and on appeal this court found that the district court judgment went beyond the relief requested in the petition, found the district court judgment null and void, reversed the district court ruling, and remanded the case to the district court for a new hearing. **Gaudin v. Waguespack**, 2009-0218 (La. App. 1st Cir. 9/11/09) (unpublished).

The judgment of Judge Kliebert was used by the district court in this case in determining the value of the community interest in Waguespack & Gaudin. The district court accepted Judge Kliebert's findings as to the value of the community interest, and that asset, \$129,141.65, was ultimately allocated to Mrs. Waguespack in the community property partition. Mr. Waguespack appealed the judgment partitioning the community property, and Mrs. Waguespack answered the appeal. Mr. Waguespack makes seven assignments of error, which are summarized below.

1. The district court committed legal error by adopting a judicial decision from a separate corporate dissolution suit, which judgment was not final and was subsequently reversed, as the foundation for two portions of its judgment.
2. The district court committed legal error by utilizing the accounting procedures used in a corporation dissolution suit as the basis for the valuation of a community business pursuant to La. R.S. 9:2801.
3. The district court committed legal error by classifying \$129,141.65 in the escrow account as community property.
4. The district court committed legal error by awarding Mrs. Waguespack \$120,647.42 in reimbursements for funds received after termination of the community.
5. The district court committed legal error by failing to recognize that Mrs. Waguespack admitted through judicial confession that \$241,294.85 in post-termination income was the separate property of Mr. Waguespack.
6. The district court committed legal error by categorizing the Travelers Life and Annuity Company's annuity number 9820NW55450 as a community asset.
7. The district court committed legal error by awarding Mrs. Waguespack any interest in the Travelers Life and Annuity Company's annuity number 9820NW55450.

Mrs. Waguespack asserts seven assignments of error, summarized below.

1. The district court erred in failing to find a community interest in former Waguespack & Gaudin files from which referral fees were anticipated.
2. The district court erred in failing to determine that dividends paid to Mr. Waguespack after termination of the community were community property.
3. The district court erroneously calculated Mrs. Waguespack's reimbursement claim for the value of improvements to Mr. Waguespack's separate property located at 42399 R. Waguespack Road.
4. The district court erred in failing to find a community interest in Waguespack & Gaudin cases handled by defendant but not accounted for prior to the Waguespack & Gaudin dissolution.
5. The district court erred in failing to find a community interest in fees and expenses retained by Mr. Waguespack on Waguespack & Gaudin files.
6. The district court erred in failing to allocate the law building to Mrs. Waguespack.
7. The district court erred in failing to award Mrs. Waguespack costs.

## STATUTORY LAW

Louisiana Revised Statute 9:2801 provides, in pertinent part:

A. When the spouses are unable to agree on a partition of community property or on the settlement of the claims between the spouses arising either from the matrimonial regime, or from the co-ownership of former community property following termination of the matrimonial regime, either spouse, as an incident of the action that would result in a termination of the matrimonial regime or upon termination of the matrimonial regime or thereafter, may institute a proceeding, which shall be conducted in accordance with the following rules:

.....

(4) The court shall then partition the community in accordance with the following rules:

(a) The court shall value the assets as of the time of trial on the merits, determine the liabilities, and adjudicate the claims of the parties.

(b) The court shall divide the community assets and liabilities so that each spouse receives property of an equal net value.

### **MR. WAGUESPACK'S ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO**

In assignments of error numbers one and two, Mr. Waguespack asserts that the district court committed legal error in using a non-final decision of Judge Kliebert, which was later reversed, as the foundation for part of his judgment, and in using the shareholder's corporate liquidation procedures to value the community business.

In determining the value of Waguespack & Gaudin, the district court had, in addition to the judgment of Judge Kleibert: the testimony of Terez LeBlanc, CPA, regarding the firm's book value and the dividend values; the testimony of Mr. Gaudin regarding the firm's fee sharing and compensation plans; Mr. Gaudin's exhibits from the valuation trial; Mr. Waguespack's testimony; and Mrs. Waguespack's testimony. A review of the record shows that there was ample examination of the valuation of the firm done independently of Judge Kliebert's

findings, and the district court had access to all of the information used by Judge Kliebert in the valuation of Waguespack & Gaudin.

The trial court's determination of the value of a community business is a factual one, which will not be disturbed absent manifest error. **Ellington v. Ellington**, 36,943, p. 7 (La. App. 2d Cir. 3/18/03), 842 So.2d 1160, 1166, writ denied, 2003-1092 (La. 6/27/03), 847 So.2d 1269. As long as the trial court is careful to value the interest in the corporate entity, not just the assets of the business itself, the factfinder operates appropriately within his discretion. See Rao v. Rao, 2005-0059, p. 14 (La. App. 1<sup>st</sup> Cir. 11/4/05), 927 So.2d 356, 365, writ denied, 2005-2453 (La. 3/24/06), 925 So.2d 1232.

The district court examined the parties' descriptive lists, adjudged each asset and liability as separate or community property, and assigned value. The interest in the corporate entity was valued, not just its assets. We find no abuse of discretion and no legal error or manifest error by the district court in the valuation of the law practice.

#### **MR. WAGUESPACK'S ASSIGNMENTS OF ERROR NUMBERS THREE AND FOUR**

In assignments of error numbers three and four, Mr. Waguespack asserts that the district court committed legal error in finding the escrow account to be community property and in granting Mrs. Waguespack reimbursement for post-termination funds.

Mr. Waguespack asserts that the trial court erred in failing to use the burden of proof set out in **Lanza v. Lanza**, 2004-1314 (La. 3/2/05), 898 So.2d 280. In **Lanza**, the court discussed issues of status of property as separate or community for the purposes of partition, as well as which spouse has the burden of proof in making that case to the factfinder. In **Lanza**, the court analyzed the post-community income Mr. Lanza earned from renewal commissions generated by

insurance policies written during the marriage. Mrs. Lanza argued that the insurance policies were “things” that could produce “fruits” (renewal commissions). The issues raised in **Lanza** are similar to those in these two assignments of error, that is, which party had the burden of proving whether certain payments to Mr. Waguespack were separate or community.

The **Lanza** court found that only that portion of revenue received during the community was presumed to be community property. Thus, Mrs. Lanza had the burden of proving, by a preponderance of the evidence, which portion of post-community revenue should be attributed to labor performed during the existence of the community. **Lanza**, 2004-1314 at p. 17, 898 So.2d at 290-291.

In the case before us, Mr. Waguespack asserts that the district court’s determination that \$129,141.65 “held in escrow following Judge Kliebert’s ruling in **Gaudin v. Waguespack**” is community property does not meet the requirements of **Lanza**. This assertion is without merit. At trial, the district court accepted testimony and evidence regarding the value of Mr. Waguespack’s interest in **Waguespack & Gaudin** during the existence of the community property regime. The witnesses and evidence offered by Mrs. Waguespack demonstrated that the funds in question (Mr. Waguespack’s share of the value of the law corporation) were attributable to effort exerted during the community property regime.

In a similar vein, Mr. Waguespack argues that Mrs. Waguespack did not meet the **Lanza** standard in regard to \$120,647.42 in post-termination funds awarded to her in the form of reimbursement.<sup>1</sup> However, the district court’s evaluation of the testimony in regard to those funds properly takes into account Mrs. Waguespack’s requirements for proof. Absent manifest error, this determination cannot be disturbed. The link between Mr. Waguespack’s effort

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<sup>1</sup> This reimbursement was based on the court’s classifying as community property the \$241,294.85 payment to Mr. Waguespack by Mr. Gaudin when the cases formerly handled by **Waguespack & Gaudin** were settled.

during the community property regime and those funds was established in the record. Thus, we find no legal or manifest error in this decision.

#### **MR. WAGUESPACK'S ASSIGNMENT OF ERROR NUMBER FIVE**

In assignment of error number five, Mr. Waguespack asserts that the district court committed legal error by failing to recognize a judicial confession by Mrs. Waguespack that the \$241,294.85 post-termination payment was the separate property of Mr. Waguespack.

The district court found that Mr. Waguespack's fifty percent interest in Waguespack & Gaudin was a community asset, as ownership in the law firm was acquired during the community. Thus, the \$241,294.85 payment made to Mr. Waguespack, representing Mr. Waguespack's one-half interest in Waguespack & Gaudin's fees and expenses, was community property, and as such, Mrs. Waguespack was entitled to a reimbursement of one-half of that amount, or \$120,647.42. We find no legal or manifest error in that district court determination.

#### **MR. WAGUESPACK'S ASSIGNMENTS OF ERROR NUMBERS SIX AND SEVEN**

In assignments of error numbers six and seven, Mr. Waguespack argues that the district court committed legal error by categorizing and allocating the Travelers Life and Annuity Co. annuity contract, number 9820NW55450, as a community asset, and by awarding Mrs. Waguespack an interest in that annuity.

Although the annuity was not purchased until September 22, 2004, the annuity was funded by proceeds from a Waguespack & Gaudin case. We find no legal or manifest error in the district court's determination that the annuity was a community asset. Thus, we cannot say the district court erred in finding that Mrs. Waguespack had an interest in this asset.

### **MRS. WAGUESPACK'S ASSIGNMENT OF ERROR NUMBER ONE**

In this assignment of error, Mrs. Waguespack asserts that the district court erred in failing to find a community interest in former Waguespack & Gaudin files from which referral fees would be received at a later date.

Although these files were originally acquired during the existence of the community property regime, payment for referral contracts, if any, would occur after termination. Thus, Mrs. Waguespack had the burden of proving which funds were community property, and the district court found that Mrs. Waguespack failed to establish how much work was done on these files during the existence of the community property regime. Further, the district court found that to state a value or fee for those contracts would be speculative, considering that these cases were being handled by other attorneys due to Mr. Waguespack's disability status.

After a thorough review of the record, we cannot say that the district court erred in this determination.

### **MRS. WAGUESPACK'S ASSIGNMENT OF ERROR NUMBER TWO**

In this assignment of error, Mrs. Waguespack asserts that the district court erred in failing to determine that \$256,599 paid to Mr. Waguespack by Waguespack & Gaudin after termination of the community was community property. The district court found that Mr. Waguespack's only income after the termination of the community until the time that Waguespack & Gaudin ceased doing business consisted of the amounts paid by the law corporation to Mr. Waguespack, and that this was his salary at the time, which was his separate property.

After a thorough review of the record, we cannot say that the district court committed legal or manifest error in this determination.

### **MRS. WAGUESPACK'S ASSIGNMENT OF ERROR NUMBER THREE**

In this assignment of error, Mrs. Waguespack asserts that the district court erroneously calculated her reimbursement claim for the value of improvements to 42399 R. Waguespack Road, Mr. Waguespack's separate property.

She argues that the evidence shows that between \$70,000 and \$85,000 in community funds were used to improve the home and land, but that the district court erroneously found that only \$55,000 of community funds were used for those improvements. Thus, Mrs. Waguespack argues, her reimbursement should have been higher than the \$27,500 awarded to her by the district court.

A review of the record shows that Mrs. Waguespack offered testimony on the amounts she believed the improvements to Mr. Waguespack's separate property were worth. However, she did not have any receipts or documentation, and she admitted that some of the work was done "in trade" by Mr. Waguespack's family and friends (apparently in return for legal work done by Mr. Waguespack) and that only Mr. Waguespack knew the amounts spent on the property. The party claiming the reimbursement has the burden of proof. **Sherrod v. Sherrod**, 97-907, p. 7 (La. App. 5 Cir. 3/25/98), 709 So.2d 352, 356, writ denied, 98-1121 (La. 6/5/98) 720 So.2d 687.

Mr. Waguespack testified that the total amount spent on the property was \$50,000 to \$55,000, excluding the movable appliances, but including the barn, the driveway, and everything else. The district court apparently interpreted \$50,000 to \$55,000 to be around \$53,500 for the house, barn, and driveway, with another \$1,500 added for movable appliances, for a total of \$55,000. We cannot say that the district court committed manifest error in this calculation.

### **MRS. WAGUESPACK'S ASSIGNMENT OF ERROR NUMBER FOUR**

In this assignment of error, Mrs. Waguespack asserts that the district court erred in failing to find a community interest in Waguespack & Gaudin cases

handled by Mr. Waguespack, but not accounted for prior to the Waguespack & Gaudin dissolution. The district court found that Mrs. Waguespack failed to meet the burden of proving how much work was done prior to the termination of the community, and as such, was not entitled to reimbursement for that item. After a thorough review of the record, we find no error by the trial court in that determination.

#### **MRS. WAGUESPACK'S ASSIGNMENT OF ERROR NUMBER FIVE**

In this assignment of error, Mrs. Waguespack asserts that the district court erred in failing to find a community interest in fees and expenses retained by Mr. Waguespack on Waguespack & Gaudin files. The district court found that these fees and expenses were the separate property of Mr. Waguespack. We find no error in that determination. This assignment of error has no merit.

#### **MRS. WAGUESPACK'S ASSIGNMENT OF ERROR NUMBER SIX**

In this assignment of error, Mrs. Waguespack claims the district court erred in failing to allocate the law office building to her. She asserts that the district court determined that her share of the community property equaled \$195,011.10, and the law building was valued at \$195,000. Thus the district court should have awarded her the law building in the partition, especially since she is a single mother with two high-school-aged children, she gets little or no child support from Mr. Waguespack, and the law building rental payments would provide her with an income.

In allocating the community assets and liabilities, the court may divide a particular asset or liability equally or unequally or may allocate it in its entirety to one of the spouses. The court must consider the nature and source of the asset or liability, the economic condition of each spouse, and any other circumstance the court deems relevant. La. R.S. 9:2801A(4)(c); **Ellington v. Ellington**, 36,943 at p. 5, 842 So.2d at 1165.

The law office building (which was purchased from Mr. Waguespack's parents) was formerly used by Mr. Waguespack as his office. While Mrs. Waguespack disagrees with the district court's decision to award the law office building to Mr. Waguespack, she does not show an abuse of discretion by the district court in awarding that asset to Mr. Waguespack.

**MRS. WAGUESPACK'S ASSIGNMENT OF ERROR NUMBER SEVEN**

In this assignment of error, Mrs. Waguespack asserts that the district court erred in failing to award her costs. The court may render judgment for costs, or any part thereof, against any party, as it may consider equitable. La. C.C.P. art. 1920. We find no abuse of discretion in the district court's declining to award Mrs. Waguespack costs.

**DECREE**

Therefore, for the foregoing reasons, the district court judgment is affirmed. Costs of this appeal are assessed one-half to Mr. Waguespack and one-half to Mrs. Waguespack.

**AFFIRMED.**

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2009 CA 1478**

**ELAINE C. WAGUESPACK**

**VERSUS**

**GEORGE K. WAGUESPACK**

*RHPly JMM*

**BEFORE: PARRO, KUHN, AND McDONALD, JJ.**

**PARRO, J., dissenting.**

Based on my reading of the record and the district court's reasons for judgment in this case, it appears the court was attempting to make an equitable division of the former community property in an extremely complicated and difficult situation. While I appreciate that effort, I cannot agree with the majority that this judgment should be affirmed, for the following reasons.

First, in this suit to partition community property, the value of George Waguespack's interest in his former law firm was, according to the district court's reasons for judgment, based entirely on the default judgment confirmed before Judge Kleibert in the dissolution case. That judgment was later reversed by this court, and the record does not indicate whether there has been any attempt to conclude the valuation of the interests of Mr. Waguespack and Mr. Gaudin in the law firm in the dissolution case. I believe this court should not affirm this partition judgment when a major portion of the judgment is based on a valuation that, to our knowledge, has not been completed.

Second, it appears that the district court was inconsistent in its treatment of funds distributed to George Waguespack after the termination of the community. As none of those funds can be presumed to be community property, the same analysis and burden of

proof should have been applied to each of those distributions. A simple reading of the court's reasons for judgment demonstrates the inconsistencies.

Finally, were we to attempt to affirm certain portions of the judgment, we could still not allocate the former community property between the parties until the valuation of Mr. Waguespack's interest in the law firm is complete. Therefore, we could only render a partial judgment.

Therefore, I would set aside the district court's judgment in its entirety and remand this matter for further proceedings, to take place after the valuation of the interests of Mr. Waguespack and Mr. Gaudin in the law firm is complete, and the related judgment is final and definitive.

Accordingly, I respectfully dissent.