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Taheera S. Randolph

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## SHALL DOES NOT MEAN SHALL IN *SHORT V. SHORT*

Taheera Sabreen Randolph\*

### I. BACKGROUND

The case of *Short v. Short*<sup>1</sup> is the first reported decision regarding an award of interim spousal support since the enactment of Louisiana Revised Statute 9:326<sup>2</sup> in 2009. The statute mandates certain documentation be provided by both parties in a full evidentiary hearing on the determination of income for spousal support.<sup>3</sup> A key issue in the case was whether a claimant spouse who fails to comply with the mandatory provisions in the statute, as a consequence, fails to prove entitlement to interim spousal support.<sup>4</sup>

On remand from the Louisiana Fifth Circuit Court of Appeal due to the district court's lack of a full evidentiary hearing on the matter in the first instance,<sup>5</sup> the district court determined that Pamela Short was entitled to interim spousal support from her husband, David Short, from the time Mr. Short left the family home in April 2006 until the extinguishment of the obligation on

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\* J.D./D.C.L. Candidate, May 2014, Paul M. Hebert Law Center, Louisiana State University. The author would like to thank Professor Elizabeth R. Carter for her guidance throughout the writing of this case note.

1. *Short v. Short*, 11-1084 (La. App. 5 Cir. 5/22/12), 96 So. 3d 552.

2. LA. REV. STAT. ANN. §9:326 (2013 supp.).

3. See ROBERT C. LOWE, 1 LOUISIANA PRACTICE DIVORCE § 8:150 (2013 ed.). The author points out the new requirements concerning evidence of income for spousal support apply to both interim and final spousal support.

4. *Short*, 96 So. 3d at 557. (A claimant has the burden of proving his or her need to spousal support by proving a lack of sufficient income or the ability to earn a sufficient income to maintain the standard of living comparable to that enjoyed by the parties during their marriage.)

5. *Short v. Short*, 33 So. 3d 988, 995. The case was remanded because the district court did not allow both parties to introduce certain evidence before awarding interim spousal support. Although a district court has the discretion to award interim spousal support, it has a statutory duty imposed by Louisiana Civil Code art. 113 to consider the needs of the claimant spouse, the ability of the other spouse to pay and the standard of living the parties enjoyed during the marriage, which is accomplished by a full evidentiary hearing on the matter.

March 27, 2008.<sup>6</sup> As evidence of her need, Ms. Short submitted only a copy of an income and expense form that indicated her expenses severely outweighed her income. However, she admitted that the amounts were mere estimates, and also relied on documentation submitted by Mr. Short regarding the family expenses during the marriage.<sup>7</sup> During the evidentiary hearing, Mr. Short argued that the court should consider Ms. Short's entire financial situation, which included additional income from personal injury settlements and loans from her family.<sup>8</sup> The district court disagreed with Mr. Short and stated that the amount of interim spousal support is not to be reduced or offset using the separate assets of either spouse because there is a statutory duty<sup>9</sup> for each spouse to support each other during marriage.<sup>10</sup> Adopting the figures submitted by Ms. Short on her income and expense form as a means of calculating her net monthly income (although unsupported by any documentation, as required under Louisiana Revised Statute 9:326), the district court stated that the expenses she enumerated were reasonable and not excessive.<sup>11</sup> The district court ultimately held the amount of \$44,968.71 as an appropriate total for the relevant time period, asserting that Ms. Short proved sufficient need for interim spousal support.<sup>12</sup>

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6. *Id.* The extinguishment of the obligation was due to the judicial determination that Ms. Short's admitted cohabitation with another man was sufficient grounds to grant a divorce to Mr. Short.

7. Short, 96 So. 3d at 557.

8. *Id.* at 555. (In his brief to the appellate court, Mr. Short pointed to prior jurisprudence that held that a claimant spouse's entire financial circumstances must be considered, including all sources of income from which the claimant's expenses can be met, in determining a claimant's need for interim spousal support.)

9. LA. CIV. CODE art. 98.

10. Short, 96 So. 3d at 555.

11. *Id.* at 557.

12. *Id.*

## II. JUDGMENT OF THE COURT

On a subsequent appeal to the Louisiana Fifth Circuit, Mr. Short's foremost argument was that the district court erred in its judgment because Ms. Short<sup>13</sup> failed to comply with mandates prescribed in Louisiana Revised Statute 9:326 regarding evidence required to be submitted to a court in order to correctly calculate income in the determination of an award for interim spousal support.<sup>14</sup> Ms. Short responded that her failure to comply with the statute was due to her inability to earn the requisite amount of income necessary to file a 2006 and 2007 tax return during their separation and, furthermore, that at the time of their separation she was a full-time stay-at-home mom.<sup>15</sup> The Fifth Circuit Court of Appeal upheld the district court's award of interim spousal support, despite Ms. Short's failure to comply with the mandates in the statute.<sup>16</sup> The court began its analysis with provisions from the Louisiana Civil Code, noting that a trial court has significant discretion<sup>17</sup> to award interim spousal support based on the needs of the claimant, the ability of the other spouse to pay, and the

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13. *Id.* at 554. At the time of this appeal, Ms. Short reverted back to her maiden name Marinovich which the court used throughout the opinion. However, for the purposes of this analysis, the author will continue to use Ms. Short out of mere convenience and for lack of confusion.

14. *Id.* at 556. In his original brief to the appellate court, Mr. Short contended that the evidence required under the statute is for the purposes of corroborating statements of income made to the court by each party. He contended that Ms. Short did not meet the burden of proving her need because she did not comply with the statute.

15. *Id.* at 558. Mr. Short noted in his original brief to the appellate court that Ms. Short admitted in the evidentiary proceeding to being self-employed as a calligrapher of wedding invitations and working at St. Tammany Parish Hospital in 2007. He argued that Ms. Short should be required to produce paycheck stubs from the hospital to corroborate her income and she should also be mandated to produce the documentation required by the IRS used to determine if she owed self-employment tax.

16. *Id.*

17. *Id.* at 556 (citing *Lambert v. Lambert*, 960 So.2d 921, 928 that the standard of review is an abuse of discretion and the district court's conclusion will only be reversed if there is a reasonable factual basis in the record for doing so and the finding in the record is clearly or manifestly erroneous.

standard of living of both spouses during the marriage.<sup>18</sup> The court reiterated that a spouse's right to claim spousal support is grounded in the statutorily imposed duty that spouses are to support each other during marriage,<sup>19</sup> and that the definitive purpose behind a judgment of interim spousal support is to assist the claimant in maintaining the status quo and sustaining the lifestyle enjoyed by both spouses during the marriage while the divorce litigation is pending.<sup>20</sup>

The court cited the pertinent portion of Louisiana Revised Statute 9:326(A), outlining the mandates therein, yet apparently accepting Ms. Short's assertion that she was unable to produce tax returns for 2006 and 2007 because she did not earn enough money so as to require her to file.<sup>21</sup> The court subsequently upheld the district court's adoption of the estimated figures from Ms. Short's expense list, and did not address whether the separate assets of the spouses should be assessed in order to reduce or offset any spousal support judgment; nor did the court address the implications of the failure on the part of Ms. Short to comply with the mandates in the statute, even after she admitted to having been employed during the time in which she was awarded interim spousal support.<sup>22</sup> The Fifth Circuit Court of Appeal ultimately found no abuse of discretion in the judgment of the district court, and upheld the award of interim spousal support.<sup>23</sup>

### III. COMMENTARY

The Fifth Circuit Court of Appeal adhered to the standard set prior to enactment of Louisiana Revised Statute 9:326, and reinforced the notion that an abuse of discretion will only be found if the record supports the trial court's conclusions about the means

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18. LA. CIV. CODE art. 113.

19. LA. CIV. CODE art. 98.

20. Short, 96 So. 3d at 556.

21. *Id.* at 557.

22. *Id.* at 557-58.

23. *Id.* at 558.

of the payor spouse and his ability to pay.<sup>24</sup> Besides quoting the statute in its opinion, the appellate court made no mention regarding how its enactment impacts any analysis of the needs of the claimant generally or its impact on Ms. Short's claim in particular. Thus, the legal analysis in *Short v. Short* did not fully take into account the implications of the newly enacted evidentiary standards in the statute in determining interim spousal support.

Louisiana Revised Statute 9:326(A) lays out, in clear and unambiguous language,<sup>25</sup> the documentation that is required to be produced by each party as evidence of income in a court proceeding on the determination of spousal support. The statute expressly states that both parties “shall provide to the court a verified income statement showing gross income and adjusted gross income, together with documentation of current and past earnings” and provides examples of what constitutes suitable documentation.<sup>26</sup> The statute uses the word “shall” a total of four times in the pertinent part of subsection A, and mandates that each party in an evidentiary hearing for spousal support provide the court with a verified income statement showing gross and adjusted gross income along with *documentation of current and past earnings*.<sup>27</sup> The statute also stipulates that both parties shall submit their “most recent federal tax return.”<sup>28</sup> There is no time restriction or constraint in the language of this requirement which leads to the reasonable conclusion that Ms. Short had a statutory duty to

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24. See, e.g., *Derouen v. Derouen*, 893 So.2d 981, 984 (stating there is no abuse of discretion “if the record supports the trial court’s conclusions about the means of the payor spouse and his or her ability to pay,” and also establishing that any award of interim spousal support requires a finding that the expenses claimed are reasonable); *Lambert*, 960 So.2d at 928 (citing *Derouen*).

25. See LA. CIV. CODE art. 9: “When a law is clear and unambiguous and its application does not lead to absurd consequences, *the law shall be applied as written* and no further interpretation may be made in search of the intent of the legislature” (emphasis added).

26. LA. REV. STAT. ANN. 9:326(A) (2013 supp.): “Suitable documentation of current earnings shall include but not be limited to pay stubs or employer statements” (emphasis added).

27. *Id.* (emphasis added).

28. LA. REV. STAT. ANN. §9:326(A) (2013 supp.) (emphasis added).

produce her most recent tax return, which was in 2005, to serve as verification of income from her employment as a part-time nurse until August of that year.<sup>29</sup> Nowhere in the statute does it state that a party is not required to produce his or her most recent tax return simply due to a status of voluntary or involuntary unemployment at the time of separation.<sup>30</sup> Moreover, on its face, it appears Ms. Short was statutorily required to produce paycheck stubs from her employment with St. Tammany Parish Hospital during 2007, in addition to any documentation she provided to the Internal Revenue Service regarding her income from her business as a calligrapher of wedding invitations.<sup>31</sup>

Commentary on the statute provides insight into how a court may interpret the mandatory provisions, and points out the fact that the language in Subsection A is almost identical to the language in Louisiana Revised Statute 9:315.2(A), which lays out the evidentiary requirements for calculating child support obligations; the latter statute was amended by the same act that enacted Revised Statute 9:326.<sup>32</sup> An appellate court placed in the Fifth Circuit's position should inquire into the intent behind the Louisiana legislature's enactment of a spousal support statute with language almost identical to that of the child support determination statute. Furthermore, an inquiry into case precedent that determines what happens to a claim for child support when the evidentiary requirements under the child support statute are not adhered to might also help interpret and apply the spousal support statute.

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29. Short, 96 So. 3d at 557.

30. Ms. Short argued she could not produce any verification of income because at the time of separation she had been unemployed for several months due to her role as a full-time stay at home mother. Short, 96 So.3d at 558.

31. Mr. Short noted in his reply brief to the appellate court that Ms. Short admitted to being employed and consequently should have been required to provide a copy of her 1099 form from St. Tammany Parish Hospital along with any paycheck stubs to corroborate her income. He also noted she did not produce any financial documentation from her own business in the form of tax documents, business expenses, receipts, customer checks, etc.

32. 2009 La. Sess. Law Serv. Act 378 (WEST); *See also* LA. CIV. CODE art. 13 (laws on the same subject matter should be interpreted *in pari materia*).

Louisiana Revised Statute 9:315.2(A) requires each party to provide the identical documentation now required under Louisiana Revised Statute 9:326.<sup>33</sup> Therefore, any case precedent interpreting the child support evidentiary obligations prior to 2009 are relevant for the interpretation of the statutory language currently in effect. In *Drury v. Drury*,<sup>34</sup> the Louisiana First Circuit Court of Appeals vacated a judgment signed by a district court directing a spouse to pay child support because the record was devoid of the supporting documentation required by Louisiana Revised Statute 9:315.2. The court made reference to the essential nature of documentation in calculating child support payment obligations, even in the interim setting, and to the fact that judgments for child support cannot be based on contingencies.<sup>35</sup> Moreover, the court recognized the inherent requirement of equity in determining child support obligations achieved only through the examination of the complete financial status of both parties,<sup>36</sup> which is directly relevant to Mr. Short's argument regarding the failure of the district court to take into account the entirety of Ms. Short's economic situation and sources of income. The First Circuit in *Drury* held that due to the district court's failure in requiring the parties to submit the documentation clearly set out under the statute, the district court could not properly apply the appropriate guidelines under the law and its judgment could not be affirmed.<sup>37</sup>

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33. LA. REV. STAT. ANN §9:315.2(A) (2013 supp.):

Each party *shall* provide to the court a verified income statement showing gross income and adjusted gross income, together with documentation of current and past earnings. . . . Suitable documentation of current earnings shall include but not be limited to pay stubs or employer statements. The documentation shall include a copy of the party's most recent federal tax return. A copy of the statement and documentation shall be provided to the other party. (emphasis added)

The amendment to this statute in 2009 did not change this pertinent language in the calculation of basic child support obligations and simply aligned the language with that of La. R.S. 9:326(A).

34. 835 So. 2d 533, 539 (La. App. 1 Cir. 2002).

35. *Id.* at 538-39.

36. *Id.* at 539.

37. *Id.* "In the instant case, *both* parties failed to submit verified statements as to their respective incomes, documentation of current and past earnings,

In *Harris v. Harris*,<sup>38</sup> a husband appealed the amount of child support awarded to his wife based on the incorrect calculation of his monthly income, which was a combination of his employment wages and the rent he received from some of his properties. His monthly employment income was calculated based on pay records supplied by his employer and his monthly rental income was calculated based on a spreadsheet Mr. Harris prepared himself.<sup>39</sup> The Louisiana Fourth Circuit Court of Appeal immediately noted that “neither party complied with the mandatory requirement . . . that they submit a copy of their most recent tax return”<sup>40</sup> and held that the record contained insufficient evidence in order to determine what the rental income should be and the case was remanded for recalculation of Mr. Harris’ monthly rental income.<sup>41</sup>

The language under Louisiana Revised Statute 9:326(A) for the determination of interim spousal support calls for the exact documentation that was required in *Drury* and *Harris* in the context of child support. Without submission of the requisite documentation, the district court’s judgment in *Drury* could not be upheld, nor could the calculation of monthly rental income be upheld in *Harris*. There is no reason to set a different standard for the evidence required to calculate a party’s income in spousal support determinations when the language of Louisiana Revised Statute 9:326(A) is clear, unambiguous and precisely mimics the language for the required documentation under the child support statute. Thus, perhaps the intent of the legislature was to make spousal support determinations more equitable to both parties. It accomplished this by placing a fixed and mandatory evidentiary

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copies of their most recent tax returns, as well as other evidence mandated by La. R.S. 9:315.2”.

38. 976 So. 2d 347 (La. App. 4 Cir. 2008).

39. *Id.* at 348.

40. *Id.* at 351.

41. *Id.* The court upheld the calculation of his monthly employment income because the documentation used to make the calculation were pay records provided by his employer.

standard on the claimant's burden to show need, in addition to the payor spouse's ability to pay, which constituted the exclusive focus in the past. The author is of the opinion that "shall" should mean "shall" in *Short v. Short*.