RECENT JURISPRUDENTIAL DEVELOPMENTS
pertaining to

THE LAW OF PARENT & CHILD:
Filiation & Child Support

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by

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I Filiation

A Maternal filiation

Succession of Gore, 223 So.3d 628 (La. App. 5th Cir. 2017)

Facts: Robert Mack Gore, Jr. was born on March 10, 1970, at Sara Mayo Hospital in New Orleans, Louisiana. The birth certificate filed on March 20, 1970, lists Robert Mack Gore, Sr. as his father and Claudette Barilleaux Gore as his mother. Robert Mack Gore, Jr. was raised in the Gore household with two sisters, Darlene and Tammy, Claudette's biological daughters from a previous marriage, who were adopted by Robert Mack Gore, Sr. upon his marriage to Claudette. Robert, Jr. was held out to the world as Robert, Sr. and Claudette's biological child. On his eighteenth birthday he was told by his parents that he was not their biological child. He was told he was the biological child of Robert, Sr.'s sister, Donna Boren, and that Robert, Sr. and Claudette had agreed to adopt and raise him as their own child. Neither he, nor his sisters had any knowledge of this relationship until their parents' revelation on his eighteenth birthday. After the revelation, the filial relationship of Robert Jr. to his parents continued until the deaths of Robert, Sr. and Claudette. Robert, Sr. died intestate on January 30, 1994.

Shortly thereafter, in April of 1994, Claudette, Darlene, Tammy, and Robert, Jr. filed a petition for possession and an affidavit of death and heirship in Robert, Sr.'s succession recognizing Claudette as Robert, Sr.'s surviving spouse and Darlene, Tammy and Robert, Jr. as his only children and heirs. The three children donated their rights, title and interest in Robert Sr.'s property to their mother, Claudette, via a donation inter vivos. Claudette died intestate on March 8, 2013.

On May 1, 2014, Robert Jr. filed a petition for the appointment of a succession administrator that stated he, Darlene and Tammy are the sole heirs of Claudette and alleged Darlene and Tammy were converting Claudette's assets and funds, living in her home, and refusing the communicate with Robert, Jr. or allow him access to the home to recover his personal property. On June 12, 2014, Darlene and Tammy filed an exception of no right of action, arguing that Robert, Jr. was never formally adopted by Claudette and had no right to open her succession for the appointment of a succession administrator. Robert, Jr. responded to the exception by filing a certified copy of his birth certificate which lists Claudette as his mother.

The trial court denied the exception of no right of action. At trial held on January 12, 2016, Robert, Jr. offered into evidence his certified birth certificate listing Claudette as his mother and Robert, Sr. as his father. Darlene and Tammy argued that the burden was on Robert, Jr. to produce a judicial decree of adoption in order to prove his status as a legitimate heir of Claudette. The trial court entered a judgment recognizing Robert, Jr. as the adopted son of Claudette and as a legal heir of the succession. Trial amended its final judgment and Darlene and Tammy appealed.

Result: Amended and affirmed the judgment as amended.

Rationale: "In the absence of valid testamentary disposition, the undisposed property of the

deceased devolves by operation of law in favor of his descendants, ascendants, and collaterals, by blood or by adoption . . ." in the particular order established in La. C.C. art. 880. The Civil Code establishes that the first class of heirs is descendants who succeed to the property of their ascendant to the exclusion of other potential, secondary classes of heirs. La. C.C. art. 888, et seq.

Filiation is the legal relationship between a child and his parent, and it is established by proof of maternity or paternity or by adoption. La. C.C. arts. 178 and 179. Whether a person is related by blood or adoption to the decedent and therefore a legal heir is a question of fact.

Robert, Jr. introduced into evidence his certified birth certificate, which shows that his mother is Claudette Barilleaux Gore. Under La. R.S. 40:42(A), the birth certificate is prima facie evidence that Claudette is his mother, and the burden of proof is on the opponent of the certificate to establish that she is not his mother. Darlene and Tammy had the burden to prove that Claudette is not Robert Jr.'s birth mother or his adoptive mother.

Darlene and Tammy correctly pointed to the absence of a judicial decree of adoption and correctly argued that Robert, Jr. should be required to produce one. He failed to do so. Thus, the trial court was manifestly erroneous in concluding that Robert, Jr. is the adopted son of Claudette. The judgment is amended to delete the declaration that Robert, Jr. is the adopted son of Claudette.

However, Darlene and Tammy failed the half of their burden in proving that Claudette is not Robert, Jr.'s biological mother. At the hearing on the exception of no right of action, no witnesses were called and no evidence was admitted to establish these alleged alternative circumstances of Robert, Jr.'s birth. At the hearing, Robert, Jr. correctly argued that his certified birth certificate is prima facie proof of the information contained therein. At trial, Darlene and Tammy called no witnesses. Robert, Jr. called Darlene under cross-examination. She testified that it was not until she was an adult that she was told by her parents that Robert, Jr. was adopted, thus clearly establishing that she does not have personal, first-hand knowledge regarding the identity of Robert, Jr.'s birth mother or the circumstances of his birth. Their argument is that second-hand recounted statements are sufficient to establish that Claudette is not his birth mother, but they are not sufficient to establish he was adopted by Claudette. We disagree. There was no manifest error in the trial court's determination that Robert Jr. is a son of Claudette, and affirm that portion of the trial court's judgment that declares Robert, Jr. is a legal heir to the succession of Claudette.

B Paternal filiation (avowal action)

Leger v. Leger, 2017 WL 6029740 (La.App. 3 Cir. 12/06/17)

Facts: A minor child was born on August 21, 2012, during the marriage of Danielle Gotreaux Leger and Michael J. Leger, II. Mr. Leger commenced divorce proceedings in May 2016. John Jerome Fontenot, filed a June 17, 2014 Petition of Intervention alleging that DNA

testing established that he was the biological father of the minor child. Further, he asserted that he had been unable to timely file the avowal action pursuant to La. C.C. art. 198. He asserts that the "bad faith" exception was applicable to the matter due to his concerns for the safety of both Ms. Leger and the child if paternity was revealed.

The trial court granted Mr. Leger's exception of peremption on the avowal action. That determination was affirmed by the court of appeal. Further, the panel declined to rule on Dr. Fontenot's claim that La. C.C. art. 198 is unconstitutional as the claim was not previously raised in his pleadings and the trial court had not ruled on that claim.

Back in the trial court, Dr. Fontenot filed another claim to declare La. C.C. art. 198 unconstitutional because "[t]he one-year time peremptive period contained within Louisiana Civil Code article 198 is unconstitutionally short and an undue interference with [his] constitutionally protected rights as the parent" of the minor child. Further, Dr. Fontenot claims that La. C.C. art. 193 allows a mother to institute an action to disavow a presumed father and establish the paternity of the biological father as long as she institutes the action within two years of the date of the birth of the child. The disparity violated his rights of equal protection of both La. Const. art. 1, section 3 and U.S. Const. amend. XIV, section 1. The trial court denied Dr. Fontenot's claim.

Result: Affirmed.

Rationale: Dr. Fontenot's delay in filing was clearly at odds with the policy statement contained in La. C.C. art. 198, comment (e). Comment (e) states, "Requiring that the biological father institute the avowal action quickly is intended to protect the child from upheaval of such litigation and its consequences in circumstances where the child may actually live in an existing intact family with his mother and presumed father or may have become attached over many years to the man presumed to be his father." Dr. Fontenot's two year delay in filing directly contravenes the policy in comment (e). Further, his argument that the minor child did not become attached to Mr. Leger between the 2012 birth and filing of the avowal action in June 2014 is conclusory and not established in the record.

There is also no merit to Dr. Fontenot's equal protection claim. Dr. Fontenot claims that alleged fathers and mothers are treated differently in their respective claims for paternity. In the event that a statute classifies a person on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be refused unless the state or other advocate of the classification shows that the classification has a reasonable basis. The father and mother are not in similar circumstances as contemplated by La. C.C. arts. 193, 198. Article 193 involves a larger contestation claim and the establishment of paternity. Article 198 deals only with the avowal action where the child is presumed to be the child of another man. The actions differ in nature, interests, and consequences. Thus, there is no merit to Dr. Fontenot's claim under Louisiana Constitution's or United States Constitution's Equal Protections Clause.

II Child support

A Substantive law

1 Setting the original award

a Determination of gross income

Bailey v. Bailey, 2017 WL 1755624 (La. App. 1st Cir. 2017)

Facts: On June 8, 2009, Matthew W. Bailey filed a petition to divorce Karyn A. Bailey. By a judgment signed February 24, 2010, the family court awarded the parties joint custody of the minor child without a designation of a domiciliary parent, pursuant to a stipulation of the parties. The judgment further provided that Matthew would pay Karyn $2,000 a month in child support and that he would pay all expenses incurred for the minor child, including mother's day out, dental insurance, out-of-pocket medicals, future tuition, and required school fees.

On May 26, 2011, the court held a hearing on the parties' cross motions to establish a holiday visitation schedule and on Karyn's requests for an increase in child support and rule for contempt. In its judgment signed November 30, 2011, the court dismissed Karyn's rule for contempt, increased the child support award to $2,255 per month, and set a holiday visitation schedule pursuant to the stipulation of the parties.

Thereafter, the parties filed various pleadings, including rules for contempt and to modify custody. Following a hearing on June 15, 2012, the court signed a judgment on October 4, 2013, designating Karyn as domiciliary parent, changing the parties' physical custody to a seven-day rotating schedule, and denying their respective rules for contempt. The judgment otherwise provided that "all other provisions or judgments rendered on May 26, 2011, and signed on November 30, 2011, not modified by this ruling, remain in effect with regard to custody."

On July 28, 2014, Matthew filed a rule for reduction in child support. Matthew alleged that since the rendition of the court's November 30, 2011 judgment, his income had substantially decreased, by over $100,000. Consequently, Matthew requested that his support obligation be reduced. In response, Karen filed a rule for an increase in child support and for contempt, alleging that Matthew was no longer obligated to pay child support for his son from a previous marriage, that she had physical custody more than 50% of the time because of Matthew's travel, and that Matthew failed to pay for his daughter's extracurricular activities that took place during her custodial time.

The court held hearings on the parties' cross rules on July 17, 2015, and August 24, 2015. Following the hearings, the Family Court took the matter under advisement and later rendered judgment reducing Matthew's child support obligation to $1,160.38 per month, retroactive to the date of judicial demand. Karyn appealed.

Result: Amended, and as amended, affirmed.

Rationale: (1) Calculation of child support. – In 2011, the lower court set Matthew's monthly

child support obligation at $2,255 per month based on its determination that Matthew had a gross monthly income of $33,583. At the time of the hearing in the present matter, however, the lower court found Matthew's gross monthly income to be $12,190.54 monthly. Our own determination, for reasons to be explained hereafter, is that Matthew's gross monthly income is $13,337.81. This is still well below the initial calculations, which means that Matthew has therefore established a material change in circumstances warranting modification under La. Civ. Code art. 142 and La. R.S. 9:311(A)(1).

In calculating Matthew's monthly gross income, the family court did not use the gross receipts from the law firm minus ordinary and necessary expenses as dictated in La. R.S. 9:315a(C)(3)(c). Instead, the lower court used the amount Matthew reported on his personal income tax returns as his income and added back to that figure certain expenses that the court found not to be ordinary and necessary expenses. The lower court further indicated that it found the amount from Matthew's 2014 individual tax return to be the proper amount to use because of the testimony of Gus Levy, qualified by the court as an expert in the area of certified public accounting. Nevertheless, we find that this determination of Matthew's income is inconsistent with the calculation required by law and is erroneous. See Scott v. Scott, 43,455, p. 8 (La. App. 2d Cir. 8/13/08), 989 So. 2d 290, 296. We must, therefore, calculate Matthew's income de novo in accordance with La. R.S. 9:315(C)(3)(c).

We consider, first, the deductions taken by the law firm to determine whether they constituted ordinary and necessary business expenses attributable to the law firm. Due to these erroneous deductions, the court reduced the total claimed deductions by $3,935.95 (the sum of the expenses that were found erroneously deducted). This change resulted in $37,895.95 being attributable to Matthew as gross income. Moreover, the personal use of a corporation's assets to pay living expenses or the use of corporate income as a fringe benefit must also be credited to Matthew's gross income. The general ledger offered into evidence showed that Matthew had several personal living expenses that were paid for by the law firm, including the costs of insurance for Matthew and his family, car payments, and homeowners' association dues. These in-kind payments meet the statutory test for inclusion as income because they significantly reduced Matthew's personal living expenses. The court found the missing amounts to total $29,038.75. Based on its de novo review of the record, the court concluded that Matthew's gross monthly income was $13,337.81.

Because the court found that the lower court miscalculated Matthew's gross monthly income, the child support obligation of the parties has to be recalculated. The basic child support obligation is determined by referencing the schedule set forth in La. R.S. 9:315.19. In this case, the adjusted gross monthly income attributable to Karyn was $1,256.66 and the adjusted gross monthly income attributable to Matthew was $13,337.81, resulting in a combined adjusted gross monthly income of the parties of $14,594.47. Karyn's proportionate share of the combined amount is 8.61 percent and Matthew's proportionate share is 91.39 percent. According to the version of the guidelines that was in effect at the time of the hearing, the parties' combined adjusted gross monthly income equates to a basic child support obligation of $1,592.40 for one child. Using

worksheet A, we calculate Matthew's basic child support obligation to be $1,455.29 per month. We amend the judgment to reflect this amount.

It was undisputed that there is nothing in the record that showed Karyn was actually earning $1,256 per month at the time of the hearings. In fact, Karyn testified that she was employed as a teaching assistant at St. Aloysius Catholic School and that her annual salary was "around $10,000 a year." According to her amended tax return for 2014, Karyn made $6,467.00 for the year. Even accepting Karyn's testimony of an annual income of $10,000.00, this amount would equate to a monthly income of roughly $833. Thus, in order to have attributed $1,256.66 to Karyn as her monthly income, the lower court must have determined that Karyn was voluntarily underemployed to impute to her the higher income.

If a party is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of income earning potential, unless the party is physically or mentally incapacitated, or is caring for a child of the parties under the age of five years. La. R.S. 9:315.11(A). Voluntary unemployment or underemployment is a fact-driven consideration.

Karyn testified that the last job she held prior to becoming a teaching assistant was performing data entry work for a company called GoTech. She explained that she held that job in 2005 or 2006, prior to her marriage to Matthew. She believed she earned about $27,000.00 a year at the time. When asked by the court if she had looked for employment more consistent with what she had earned in that prior employment, Karyn stated that she had, but then indicated that the reason she did not secure such employment was due in part to her inability to get Matthew to agree to sharing the cost of any aftercare and summer care that would be needed for their daughter if she were employed fulltime. She also explained that she believed that her work as a teaching assistant was what she "should be doing" with only a high school education and her experience as a mother. She felt any difference in hourly pay was outweighed by her being available to care for her daughter during school breaks or when Matthew asked her to watch their daughter when he travels. She also testified that due to health reasons, she did not believe she was physically capable of performing the same type of work for nine hours a day that she did in her prior employment.

Based on our review of the record, we do not find any manifest error in the conclusion that Karyn was voluntarily underemployed or in finding reasonable factual support for the imputation of monthly income of $1,256.66 to Karyn, reflecting a minimum wage earning capacity. The daughter was 9 years old at the time. Although it is undisputed that Karyn kept her daughter on days when she was scheduled to be in the physical custody of her father, such occasions amounted to roughly 20 additional days or an additional five percent of the parties' "equal sharing" joint custodial arrangement. Matthew testified that on those occasions, he always advised Karyn that his current wife or his mother-in-law was available to keep the child. He further testified that he asked Karyn for replacement or makeup days. Karyn acknowledged that Matthew "sometimes" asked for makeup days, but she did not give him any because she did not want to forfeit her time with her daughter.

(2) Contempt for non-payment of child support. – Regarding the various contempt charges, Karyn alleged that Matthew failed to obey orders by the lower court to pay his pro-rata share of the minor child's counseling sessions with Marcia Cox, as well as for the travel and preparation costs charged by Ms. Cox, and half of the expert witness fee charged by Avis Brown. However, the court did not find an abuse of discretion in finding that that Karyn failed to bear her burden of proof on this allegation.

Next, Karyn alleged that Matthew failed to pay his full proportionate share of their daughter's school tuition. It is undisputed that Matthew paid all of the child's school tuition and fees; however, in May 2012, Matthew sent Karyn a child support payment in the amount of $975 with correspondence indicating that the payment represented his support payment "less 2 percent of tuition for 2011 and 2012, and 2012 and 2013, which was just paid." Matthew acknowledged that the November 30, 2011 judgment signed by the trial court decreed that his pro-rata share of the expenses incurred for his daughter was 99.8 percent, but despite this, he attempted to hold Karyn accountable for a full two percent as her pro-rata share of the child's expenses, rather than just .02 percent, which he deemed to be incorrect.

The law does not accord Matthew the authority to simply correct an alleged error in a judgment by his unilateral act. But in considering whether the Family Court abused its discretion in not finding Matthew in contempt of court, we observe that Karyn acknowledged not having reimbursed Matthew for her pro rata share of their daughter's expenses. Thus, considering the foregoing, we cannot say that the Family Court abused its vast discretion in refusing to hold Matthew in contempt of court for withholding payment of $152.50 from Karyn's May 15, 2012 child support payment.

Karyn next asserts that Matthew should be held in contempt because he paid "child support late on a regular basis." Karyn testified that Matthew mailed support payments to her, and if a support payment did not arrive on the date when due, which was the 1st and 15th of each month, the latest she would receive the payment would be a day or two later. Karyn did not present any evidence, such as envelopes, to show exactly when Matthew mailed the "late" payments. Instead, she introduced into evidence copies of correspondence she sent to Matthew regarding the "late" payments. All of the correspondence regarding the allegedly late payments were dated either the 1st or the 15th of the month, which were the dates when payment was due. Based on the testimony and evidence presented, we find that the trial court did not abuse its discretion in failing to hold Matthew in contempt for Karyn's failure to timely receive the bi-monthly child support payments.

Karyn further claimed that Matthew should be held in contempt of court for having failed to reimburse her for several expenses she paid while their daughter was in her physical custody. Related to this claim was Karyn's complaint about Matthew unilaterally changing the gymnastics programs that their daughter was enrolled in. The November 30, 2011 judgment provides that Matthew is responsible for paying his pro-rata share of all the minor child's medical and dental insurance, out-of-pocket medical and dental expenses, school tuition, registration fees, uniforms, school lunches, miscellaneous school fees, and extracurricular activities agreed upon by the parties.

Karyn admitted that Matthew paid for all of their daughter's school tuition, supplies, registration and maintenance fees, lunch costs, field trip fees, uniforms, vision, dental and health insurance premiums and that "most of the time," he paid her out-of-pocket medical expenses and prescriptions. In regard to the child's extracurricular activities, Karyn testified that Matthew paid for the activities in which he placed their daughter. The expenses Karyn claimed she should be reimbursed for were activities that were not required for education or activities that were agreed upon by the parties. Based on this, the court concluded that the lower court was not in error when it found that Matthew complied with its judgment and, therefore, was not in contempt of court.

Council v. Livingston, 2017 WL 4161681 (La. App. 4 Cir. 9/20/17)

Facts: Mr. Council and Ms. Livingston began dating in 2008, but did not live together. On April 19, 2012, their son BDC was born. Mr. Council and Ms. Livingston never married, and less than two years after BDC's birth, their relationship ended. Although BDC always lived with his mother, Mr. Council visited BDC at Ms. Livingston's home whenever he wanted.

On January 17, 2014, Mr. Council filed a Petition to Establish Paternity, Custody and Visitation, seeking joint custody of BDC and asking that the parties be designated co-domiciliary parents. In the alternative, Mr. Council asked the court to appoint a mental health coordinator to act as a parenting facilitator between the parties, or appoint a mental health expert to perform a custody evaluation to provide recommendations to the court regarding custody and domiciliary status. Mr. Council asserted that, although he and Ms. Livingston had an amicable relationship, she consistently disregarded his input as to the care and welfare of BDC, and deliberately denied him the opportunity to give his son love, affection, guidance, and nurture.

Ms. Livingston filed an Answer and Reconventional Demand, seeking joint custody and asking that she be designated as the domiciliary parent and also sought child support. the trial court signed the Judgment, which: (1) ordered the parties to share joint custody of BDC; (2) designated Ms. Livingston as the domiciliary parent; (3) ordered a graduated physical custody schedule for Mr. Council, during which time he and BDC would be seen by a parent/child therapist; (4) set forth a detailed holiday visitation schedule; and (5) ordered Mr. Council to pay $573.44 in monthly child support to Ms. Livingston.

Mr. Council appealed claiming that the trial court erred in determining his child support obligation, specifically, that the trial court (1) should have used Worksheet B instead of Worksheet A and (2) miscalculated Ms. Livingston’s income in various respects.

Result: Reversed in part; remanded in part; and affirmed in part.

Rationale: The trial court did not err in computing child support on Worksheet A rather than Worksheet B, which is used only when the parents have shared custody of the child for an approximately equal amount of time. See Mendoza v. Mendoza, 14-954 (La. App. 4 Cir. 5/14/15), 170 So.3d 1119, 1122(citing La. R.S. 9:315.9).

Nevertheless, the trial court's award of child support to Ms. Livingston must be reversed, and the case must be remanded to the trial court for a recalculation of that award. That's because the trial court committed two errors in calculating child support.

First. At trial, Ms. Livingston was asked about her income in connection with the issue of child support. Ms. Livingston testified that she had no income in 2015 because she was staying home with the child and was financially supported by her family. Ms. Livingston did not introduce into evidence a verified income statement or her most recent federal tax return, as required by La. R.S. 9:315.2(A). She testified that when BDC started school full time, she could return to work as an attorney. She estimated that her annual income at that time would be $40,000.00. In calculating Mr. Council's child support obligation, the trial court relied on this estimate of Ms. Livingston's potential annual income when she returned to work: La. R.S. 9:315.11, part of Louisiana's Guidelines for Determination of Child Support, permits the court to impute potential income to a parent under certain circumstances:

> If a party is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of income earning potential, unless the party is physically or mentally incapacitated, or is caring for a child of the parties under the age of five years. [Emphasis added.]

At the time of trial, BDC was four years old. Thus, the mandatory language in La. R.S. 9:315.11 requiring the use of income earning potential does not apply. As Ms. Livingston was caring for a child of the parties under the age of five, no income can be imputed to her under La. R.S. 9:315.11. The trial court, therefore, erred in calculating child support by imputing the figure of $40,000.00 as Ms. Livingston's potential gross income.

Second. Mr. Council argues that the trial court erred by not requiring Ms. Livingston to submit financial documents to verify her actual income. We agree. In establishing or modifying a basic child support obligation it is incumbent upon the trial court to examine the income and financial status of both parties." Documentation is essential to the setting of child support. The lack of necessary documentation in the record means that the trial court could not properly apply the guidelines of La. R.S. 9:315, et seq., and neither can this court. We find that the trial court erred in not requiring Ms. Livingston to submit income statements and her federal tax return, as mandated by La. R.S. 9:315.2(A). Accordingly, we remand to the trial court for Ms. Livingston to offer proper documentation to verify her income, and for a recalculation of the child support obligation based on that evidence.

State ex rel. L.R. v. Haines, 2017 WL 6350134 (La.App. 5 Cir. 12/13/17)

Facts: The matter began by a petition to prove paternity and obtain child support filed in 2009 by the State of Louisiana, Department of Social Services (which is not the Department of Children and Family Services), in the Interest of L.R. against Christopher Haines. The defendant subsequently acknowledged the minor child as his biological child and child support was set in September 2010. Defendant appealed the judgement setting child

support and the court vacated the September 2010 judgement on the basis the record was devoid of any evidence to allow a review and the matter was remanded. On remand the parties reached an agreement regarding child support, and the agreement was made the judgement of the court on December 5, 2011. The recipient agreed to a reduced child support amount of $275 per month plus 5% court costs.

Five years later, the State filed a motion to modify support on the basis it had been more than three years since support was set. The matter was heard by a hearing officer on November 29, 2016, who made certain recommendations that child support be increased to $801 a month. Defendant disagreed.

At the disagreement hearing, the State indicated that the increase of child support recommended by the hearing officer was based on a determination of Defendant's income from the Louisiana Occupational Wage Survey for a roofer because Defendant did not provide the requested information regarding his income. The State advised the juvenile court that Defendant, on the day of the disagreement hearing, provided his 2015 tax returns with rental income information and check stubs from a new job that he started on December 30, 2016. Based on this new information, the State argued that Defendant's child support obligation was $697/month, inclusive of his proportionate share of private school tuition.

After hearing testimony and considering various documents submitted, the juvenile court agreed with the State's calculation and set Defendant's child support obligation at $697/month, inclusive of private school tuition. The court gave Defendant a $100/month second family credit based on the fact Defendant's oldest daughter from a previous relationship lived with him, resulting in a total obligation of $597/month plus 5% court costs for a total of $626.85/month. The court ordered the child support retroactive to the filing date of September 9, 2016.

Result: Affirmed in part and amended in part.

Rationale: The trial court's discretion in setting the amount of child support is structured and limited. Dept. of Social Services ex rel. A.D. v. Gloster, 10-1091 (La. App. 5 Cir. 6/29/11); 71 So.3d 1100, 1102. The obligation must be administered and fairly apportioned between parents in their mutual financial responsibility for their children. The guidelines for determination of child support are set forth in La. R.S. 9:315, et seq., and balance the needs of children with the means available to parents. The standard of review in a child support case is manifest error, and an appellate court will not disturb a child support order unless there is an abuse of discretion or manifest error.

1. Determination of gross income. – Defendant argues that the juvenile court erred in computing his adjusted monthly gross income by incorrectly calculating his monthly rental income. The schedule of basic child support obligations contained in La. R.S. 9:315.19 relies on the combined adjusted monthly gross income of the parents. Rental income is a component of gross income under La. R.S. 9:315(C)(3)c.

Under this statute, any amount received for rental property shall not be included in gross income until after the “ordinary and necessary” expenses required to produce said income have been deducted. The party seeking the subtraction of “ordinary and necessary” expenses from the gross receipts bears the burden of proving the expenses are

“ordinary and necessary.”

Defendant did not show what expenses he believed were not properly deducted from the gross receipts by the juvenile court but instead makes a broad allegation that the juvenile court failed to use the amount of rental income as computed on his federal tax return, which is not required by law.

The record shows that at the disagreement hearing, the State explained that it had calculated Defendant's rental income to be $513.22/month based on two properties being rented at $1,190/month for a total of $14,280/year. From that amount, the State indicated that it deducted expenses relating to insurance, taxes and the monthly mortgage payments. It specifically noted that it did not deduct expenses for water or electricity, noting that Defendant did not provide the leases for the occupied properties to show what was paid for by the tenants. Defendant pointed to his bank statements and other documents and argued that they showed he paid the water bill on the rental property. Ultimately, the trial court used the $513.22/month figure calculated by the State as Defendant's rental income. Upon review, we cannot say the trial court was manifestly erroneous in its calculation of Defendant's rental income.

2. – Extraordinary expenses. – Defendant also argues that the trial court erred in allowing private school tuition in the child support calculation without proof of the cost of tuition or that the child's mother paid it.

The inclusion of expenses for private school attendance as an addition to the basic child support obligation is authorized by La. R.S. 9:315.6, which provides in pertinent part:

> By agreement of the parties or order of the court, the following expenses incurred on behalf of the child may be added to the basic child support obligation:
>
> 1) Expenses of tuition, registration, books, and supply fees required for attending a special or private elementary or secondary school to meet the needs of the child.

According to the official comments to this statute, "The needs of the child met by the special or private school need not be particular educational needs, but may include such needs of the child as the need for stability or continuity in the child's educational program." A trial court's determination of whether to include private school tuition in a basic child support obligation will not be disturbed absent an abuse of discretion. Id. at 702. The child support obligation worksheet introduced into evidence indicated tuition was $330.42/month. The court finds sufficient evidence to support the juvenile court's inclusion of private school tuition in the basic child support obligation.

3. Retroactivity. – Defendant also argues the trial court erred in ordering the March 6, 2017 child support judgment retroactive to the date of filing of September 9, 2016, creating arrearages during a time he was involuntarily unemployed. "[R]etroactivity is intrinsic to the concept of child support under Louisiana's civilian tradition[.] Louisiana law 'abhors a gap in the support of one in need.' " Retroactivity in this context "is not in the nature of a penalty, but merely a judicial recognition of a pre-existing entitlement. Only practicality postpones the effective date of the obligation to pay child support to the

date a court orders that payment." Id., quoting Vaccari v. Vaccari, 10-2016 (La. 12/10/10); 50 So.3d 139, 142. A judgment modifying a child support judgment shall be retroactive to the date of judicial demand, except for good cause shown. La. R.S. 9:315.2(C). When the court finds good cause for not making the award retroactive to the date of judicial demand, the court may fix the date on which the award shall commence.

Here, we find the juvenile court abused its discretion in failing to find good cause existed for not ordering the child support modification retroactive to the date of judicial demand. Defendant explained that he had been self-employed as a contractor until August 12, 2016, when his house flooded during the catastrophic Denham Springs. As a result of the flood, Defendant testified that he "lost everything"—most of the contents of his home, all his vehicles, and his tools and equipment. He stated that he had insurance for his home, but not for his contractor business, CGH Specialty Contractors, Inc. After losing all his tools and equipment and being unable to obtain an SBA loan, Defendant was forced to dissolve his company. He submitted a certificate from the Louisiana Secretary of State showing his business corporation, domiciled in Denham Springs, was dissolved on November 23, 2016. Approximately one month later, on December 30, 2016, Defendant obtained full-time employment at Home Depot, where he earns $13/hour. Nothing in the record indicates Defendant's credibility was called into question. Defendant clearly proved that good cause existed for not making the modification award retroactive to the date of judicial demand.

Anderson v. Anderson, 2017 LEXIS 267, 2016 1568 (La.App. 1 Cir. 09/15/17)

Facts: Husband and Wife filed for divorce in June 2012. The parties entered into a stipulated judgment in which they agreed to joint custody of their three children with Mrs. Anderson designated as the domiciliary parent. The agreement stipulated visitation and provided that Mr. Anderson would pay Mrs. Anderson $1,550 per month in child support. In Summer 2015, the two older children began living with Mr. Anderson. They remained in his physical custody despite the 2012 judgment. Mrs. Anderson did not object. Mr. Anderson continued to pay $1,550 per month in child support. In September 2015, Mr. Anderson filed a rule to modify custody, seeking designation as domiciliary parent of the two older children and averred that the change in custody entitled him to termination of all child support payments to Mrs. Anderson. The family court granted awarded primary physical custody to Mr. Anderson and determined child support calculations. The youngest child support would be calculated by Worksheet A; the two older children support would be calculated by Worksheet B. The family court ordered Mr. Anderson to pay Mrs. Anderson $1,100 per month for the youngest child support an $981 per month for support of the two older children beginning on May, 2016. Judgment ordered Mr. Anderson to pay Mrs. Anderson $3,116.48 for child support arrearages from November 1, 2015 and February 10, 2016. Additional arrearages in the amount of $3,365.50 was assessed for Mr. Anderson failing to pay child support from February 11, 2016 through May 15, 2016.

Result: Affirmed in part, vacated in part.

Rationale: Support from November 1, 2015 to February 10, 2016 – Mr. Anderson contends that he should not have to pay child support because during that time he had been unable to work due to a back surgery. His 2015 W-2 forms indicate that Mr. Anderson had monthly wages of $7,715.42 from November to December of 2015. In 2016, his monthly wages, despite his back injury, was $8,175.08. Trial correctly awarded Mrs. Anderson arrearages for those months.

Support after February 10, 2016 - Bench trial awarding Mr. Anderson custody and child support was ruled in favor of Mr. Anderson on February 11, 2016. Thus, arrearages from February 11, 2016 and May 15, 2016 are set aside.

Guste v. Guste, 2016-0872, 217 So.3d 542 (La.App. 4 Cir. 4/19/17)

Facts: Ms. Guste filed a petition for divorce as well as other matters, including child support and custody, On July 29, 2014. At the time of trial, they had two children, ages two and four. The parties entered into a consent judgment on March 5, 2015. Mr. Guste was ordered to pay $600 per month child support for the children, with an additional $500 per month for the children's tuition. On September 23, 2015, the trial court entered a final judgment awarding joint, shared custody of the children, with equal physical custody. Mr. Guste was ordered to pay $533.70 per month as child support, but not retroactively.

Ms. Guste appealed asserting that the trial court erred in permitting Mr. Guste to depreciate assets in calculating Mr. Guste's gross income, in not making the child support award retroactive, and in failing to order reimbursement of school tuition.

Result: Affirmed.

Rationale: La. R.S. 9:315, et seq. are guidelines designed to fairly apportion between the parents the mutual obligation they owe to their children in an efficient, consistent and adequate manner. Child support is to be granted in proportion to the needs of the children and the ability of the parents to provide support.

(1) Depreciation expenses. In her first assignment of error, Ms. Guste argues that the trial court erred in permitting Mr. Guste to depreciate certain assets, thereby reducing his gross income for purposes of determining child support. Mr. Guste owns several rental properties in Orleans Parish. On his 2014 IRS 1040 form, he claimed a depreciation expense of those properties of $18,734.00 and total expenses of $86,422.00. Ms. Guste argues that by allowing the depreciation, the trial court is allowing Mr. Guste "artificially" reduce his gross income.

La. R.S. 9:315(C)(3)(c) expressly provides that ordinary and necessary expenses shall not include amounts allowed by the I.R.S. for the accelerated component of depreciation expenses for determining gross income for the purposes of calculating child support. It is the burden of the parent claiming the depreciation to prove that earnings are calculated without the use of accelerated depreciation. In Dejoie v. Guidry, this Court determined that straight-line, non-accelerated depreciation may be considered as an ordinary and necessary expense. Mr. Guste testified that the depreciation taken was straight-line and is corroborated by his tax returns.

(2) Income. Ms. Guste also argues that the trial court inaccurately calculated Mr.

Guste's income from his job with Gulf Coast Bank. Mr. Guste testified that his income is based on commission, not salary, and that the commission is contingent upon the residential loan market, which fluctuates by season and year. The trial court accepted his testimony and considered it in the calculation of his gross income. The trial court explained that it considered the two pay periods covered within the two check stubs for 2015 produced by Mr. Guste to arrive at his monthly gross income. Specifically, the court multiplied his gross pay for the two week period in August by two and added the amount of income derived from a side-business in which Mr. Guste was involved, to arrive at his monthly gross income. The trial court also was provided with Mr. Guste's 2014 W–2 forms that indicated his total gross income for that year. We cannot say that the trial court's method of calculating Mr. Guste's gross income was legal error.

(3) Retroactivity of child support. Under La. R.S. 9:315.21(A) - Except for good cause shown, a judgment awarding, modifying, or revoking an interim child support allowance shall be retroactive to the date of judicial demand. Further, the statute provides that only if there is no interim support award order in place should a final support order be made retroactive to the date of judicial demand. La. R.S. 9:315(B)(2). The trial court reasoned that a consent judgment was awarded in this case to provide "interim support" until the determination of a final child support obligation amount. In so reasoning, the trial court did not abuse its discretion in not making the child support award of September 23, 2016, retroactive to the date of judicial demand.

(3) Private school tuition reimbursement - Las R.S. 9:315.8 provides that extraordinary expenses should be included in the child support calculations; however, La. R.S. 9:315.6 provides that ". . . the following expenses incurred on behalf of the child, may be added to the basic child support obligation: (1) Expenses of tuition . . . to meet the needs of the child." The trial court noted that the parties demonstrated an ability to come together to make major educational decisions regarding the children, and had already agreed on schools for the children for the 2015–16 school year. The parties also testified that they were capable of discussing the future educational needs of the children. Thus, the trial court did not err in not specifically including private school tuition as part of the basic child support obligation.

Gary v. LeBlanc, 2016-1054 (La.App. 3 Cir. 6/7/17)
See *infra*.

b Inclusion of extraordinary expenses

State ex rel. L.R. v. Haines, 2017 WL 6350134 (La.App. 5 Cir. 12/13/17)
See *supra*.

Guste v. Guste, 2016-0872, 217 So.3d 542 (La.App. 4 Cir. 4/19/17)
See *supra*.

c Which worksheet

Council v. Livingston, 2017 WL 4161681 (La. App. 4 Cir. 9/20/17)
See *supra*.

Clarke v. Clarke, 16-669, 219 So.3d 1228 (La.App. 5 Cir. 4/12/17)
See *infra*.

d Credit for time spent with domiciliary parent

Gary v. LeBlanc, 2016-1054, 222 So.3d 784 (La.App. 3 Cir. 6/7/17)

Facts: Gary and LeBlanc are unmarried parents of Alaia Clare LeBlanc. Gary has paid a mutually agreed upon amount in child support and occasional visitation since the child was two months of age, though there was no formal or signed agreement. Gary petitioned the trial court in 2016 to be named as domiciliary parent of the minor child and to changed the child's last name to Gary. Leblanc answered and demanded child support. The trial court addressed La. C.C. art. 134 to determine the best interests of the child and consulted the worksheets to determine a child support amount. Trial court awarded joint custody of the child and designated LeBlanc as the domiciliary parent. Trial denied Gary's name change request and ordered Gary to pay $941.49/month in child support. Gary appealed.

Result: Judgment amended and affirmed as amended.

Rationale: After considering the evidence and hearing the testimony and arguments of both parties, the trial court found that both parents were fit, but that it would be Alaia's best interest to continue living primarily with her mother and brothers. Trial court is entitled to great deference and we find no error in the trial court's award of domiciliary status to LeBlanc.

Name change - La. R.S. 40:34(B)(1)(a)(v) provides that any name change in the surname of a child shall be by court order. La. R.S. 13:4752 states that a proceeding to change a name shall be conducted contradictorily with the State. The court raised and granted peremptory exceptions of no cause of action and failure to join an indispensable party, the St. Landry Parish District Attorny in the case, and dismiss Gary's petition as to the change of the minor child's name.

Child Support - La. R.S. 9:315.8 outlines child support calculation guidelines and addresses the issue of allowing a credit at the trial court's discretion based upon the amount of time spent with the non-domiciliary parent.

Time with non-domiciliary parent. La. R.S. 9:315.8(E) allows the trial court to grant a credit to the non-domiciliary parent against his or her basic child support obligation if the parent exercises at least seventy-three days of visitation a year. However, the parent seeking the credit bears the burden of proving: (1) the time spent with the child exceeds seventy-three days of visitation; (2) the physical custody of the child results in an increase in his/her financial burden and a decrease in the financial obligation of the other parent; and (3) the best interests of the child and what is equitable between the parties would be served by allowing the credit. Gary did not offer any

evidence to show an increased financial burden caused by the increased visitation with his daughter. Gary asserts that he did not see a need to present evidence of his child care expenses as he was optimistic that he would be named domiciliary parent. A father is not entitled to the rebuttable presumption that the financial burden of raising children is being shared equally without submitting additional proof of that fact. Thus, the trial court was not manifestly erroneous or clearly wrong in not reducing the amount of support for the time spent in Gary's custody.

Inclusion of bonuses. Gross income refers to income from all sources, including bonuses. La. R.S. 9:315(C)(3)(a). Here, there were no large year-end bonuses, the inclusion of which might be unfair. Further, Gary is in the employ of his father in a family business, and there was no testimony that the bonuses were sporadic or subject to cancellation. Trial court was not manifestly erroneous or clearly wrong in its decision to include Gary's bonuses within his gross income.

e Documentation of reasons for award

Clarke v. Clarke, 16-669, 219 So.3d 1228 (La.App. 5 Cir. 4/12/17)

Facts: The parties were married on March 31, 1989. Three children were born of the marriage, but only one child is a minor at the time of the suit. On August 19, 2015, Larry filed a petition for 102 divorce seeking of joint custody of the minor child with designation of himself as domiciliary parent and child support from Juanita. Juanita demanded joint custody with designation of herself as domiciliary parent and child support for the minor child. Three documents were introduced into evidence: a pay statement for Larry; a pay statement for Juanita; and a photograph of a vehicle. On February 3, 2016, the trial court held a hearing on Juanita's rule for child custody and child support. The Order awarded interim shared custody of the minor child and child support of $279.34/month commencing 2/15/16. On July 25, 2016, the trial judge rendered a judgment ordering the parties share custody of the minor child equally and setting final child support at $3.87/month. Juanita appealed.

Result: Vacated in part and affirmed in part and remanded.

Rationale: 1. The trial court committed legal error in the calculation of child support by imputing the incorrect gross income amount to the appellee and failed to apply the calculation of child support retroactively to the date of filing. In a shared custody situation, the determination of an award of child support is made pursuant to La. R.S. 9:315.2. 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. La. R.S. 9:315.9(B) provides that Worksheet B reproduced in R.S. 9:315.20 shall be used to determine child support.

Only three documents were introduced into evidence, the parties' pay statements and a photo of a vehicle. Larry testified that, by June 23, 2016, he had become disabled and his income had been significantly reduced. He testified that he received roughly $4,000/month. Based on his testimony, the trial judge awarded final child support of

$3.87 per month. There is no documentation to support that award. La. R.S. 9:315.2 requires verified income statements showing gross income and adjusted gross income. There is no documentation to establish Larry's disability status or reduced employability.

Further, there is no indication that the trial judge used Worksheet B to calculate the final child support award required by La. R.S. 9:315.9(B). The statutory requirements ensure the trial judge has the appropriate information before him and eliminate guessing by an appellate court; noncompliance with them renders the figures almost meaningless. The parties failed to introduce the statutorily required evidence, therefore, we vacate the child support award in the July 25, 2016 judgment and reinstate the child support award from the February 3, 2016, retroactive to February 5, 2016.

2. Juanita argues that the trial judge also erred in allowing Larry to claim L.N.C. as a dependent on his income tax returns. We note that the trial judge ordered that the "parties shall alternate yearly claiming of the minor for income tax purposes" with Larry receiving the benefit for odd years. Juanita specifically argues that Larry was "obviously in arrears in child support" so the law precluded him from claiming the dependent tax credit. As noted, there was little evidence introduced at the June hearing and none to establish that Larry was in arrears on his child support.

Further, this is a shared custody arrangement without a domiciliary parent. After a contradictory hearing, the trial court ordered that the parties were to alternate claiming the deduction. Based on the record before us, we decline to disturb that ruling.

f Timing: retroactivity

State ex rel. L.R. v. Haines, 2017 WL 6350134 (La.App. 5 Cir. 12/13/17)
See *supra*.

Guste v. Guste, 2016-0872, 217 So.3d 542 (La.App. 4 Cir. 4/19/17)
See *supra*.

Larson v. Larson, 229 So.3d 1043 (La. App. 5 Cir. 10/25/17)
See *infra*.

2 Modification of the original award

a Judicial modification

*** Material change of circumstances (voluntary v. involuntary)**

Larson v. Larson, 229 So.3d 1043 (La. App. 5 Cir. 10/25/17)

Facts: Mr. Larson and Ms. Larson were married on June 26, 1999. On the same day, the parties executed a pre-nuptial agreement wherein the parties agreed they would remain separate in property and they renounced the establishment of a community of acquets and gains

between them. Ms. Larson filed a petition for divorce on February 21, 2013, requesting child support and interim spousal support, and in due course, final spousal support. On February 26, 2013, Mr. Larson filed an answer and reconventional demand for divorce, requesting interim spousal support.

On May 1, 2013, the hearing officer recommended that Mr. Larson pay Ms. Larson child support in the amount of $2,066.00 per month, effective February 21, 2013, and ordered Mr. Larson to pay health insurance, and 78% of uncovered extraordinary medicals, school tuition, registration, mandatory fees, and extracurricular activities for the children. The hearing officer further recommended that once the parties obtained shared custody (50/50), Mr. Larson's child support obligation would be reduced to $1,091.00 per month, plus the 78% uncovered extraordinary medicals, school tuition, registration, mandatory fees, and extracurricular activities for the children. Mr. Larson objected to the award of child support to Ms. Larson. Ms. Larson objected to the amount of child support.

The trial court denied Mr. Larson's request for spousal support. The trial court also granted Mr. Larson's rule to reduce child support, retroactive to the date of filing, January 1, 2014, and reduced the amount to $401.00 per month. The trial court further granted Ms. Larson's rule to increase child support, retroactive to the date of filing, August 8, 2014, and increased the amount to $1,081.00 per month.

On appeal, Mr. Larson contends that the trial court abused its discretion and was manifestly erroneous in simultaneously granting his rule to reduce child support and granting Ms. Larson's motion to increase child support because Ms. Larson's motion to increase child support was not pending before the trial court.

Result: Affirmed as amended.

Rationale: An appellate court will not disturb a child support order unless there is an abuse of discretion or manifest error. State, D.S.S. ex rel. D.F. v. L.T., 05-1965 (La. 07/06/06), 934 So.2d 687, 690. An award of child support may be modified if the circumstances of the child or of either parent materially change. La. C.C. art. 142. An award for child support shall not be modified unless the party seeking the modification shows a material change in circumstances of one of the parties between the time of the previous award and the time of the rule for modification of the award. R.S. 9:311 A(1).

The court concludes that the trial court did not abuse its discretion and was not manifestly erroneous in granting both Ms. Larson's motion to increase child support and Mr. Larson's rule to reduce child support obligation. Mr. Larson's rule to reduce child support was filed January 1, 2014, when he was unemployed due to no fault of his own. The trial court granted Mr. Larson's rule to reduce child support, retroactive to January 1, 2014. Ms. Larson filed her motion to increase child support on August 4, 2014, alleging that a material change in circumstance had occurred when Mr. Larson had obtained new employment since the last hearing officer conference. Thus, Ms. Larson established a material change in circumstance which supports the trial court's granting of Ms. Larson's motion to increase child support. Accordingly, the trial court did not abuse its discretion and was not manifestly erroneous in awarding Ms. Larson an increase in child support.

However, the award was incorrectly made retroactive to August 8, 2014. Ms.

Larson filed her motion to increase child support on August 4, 2014. Therefore, that portion of the judgment is amended to reflect that the award of child support to Ms. Larson is retroactive to August 4, 2014.

Martinez v. Martinez, 228 So.3d 764 (La. App. 3 Cir. 10/4/17)

Facts: David Martinez and Mirla Martinez were married in May 2004 and have one child born in December 2010. On February 5, 2014, Mirla filed a petition for divorce requesting joint custody and her be the domiciliary parent and David answered and also requested to be the designated domiciliary parent. Both parties alleged the need for child support from the opposing party. An interim judgement rendered in May 2014 awarded joint custody of the child to both parties, named Mirla as the domiciliary parent, and ordered David to pay child support of $188.00 for twice a month for April and May. Thereafter the parties entered into a consent judgement where they agreed that they would have joint custody of their son, Mirla would be the designated domiciliary parent, and David would pay child support to Mirla in the amount of $750.00 per month.

Around two years later David moved to modify his child support obligation due to a significant change in his circumstances caused by his change of employment from an associate professor in Texas to a real estate agent in Michigan. Before moving to Michigan, David was employed as a tenured associate professor at the University of Texas-Pan American where he earned 60,000.00 dollars per year and both he and his wife were teaching at University of Texas-Pan American when they both moved to Natchitoches to teach at Northwestern State University. Northwestern offered Mirla a permanent position but not David. David returned to University of Texas-Pan American, but failed to fill out the proper paperwork and lost his job. He was offered a teaching position at Arkansas State University but turned it down because it was not a tenured position. He then decided to move to Michigan to spend time with his father who had lung cancer.

He claimed that he experienced a drastic decrease in his income which warranted a modification in his child support obligation. He further requested that the child support obligation should not be set according to Louisiana's uniform child support guidelines.

The trial court denied David's motion to modify his child support obligation, finding that he was voluntarily underemployed. David appealed arguing that the trial court erred in determining that Mr. Martinez was voluntarily underemployed, that the erred in declining to reduce M. Martinez's child support obligation to a level consistent with the income offered by Arkansas State University, and that the trial court exceeded its authority to question Mr. Martinez.

Result: Affirmed.

Rationale: The party seeking modification of a child support award bears the burden of proving that a material change in circumstances has occurred since the time of the precious award and the time of the rule for modification of the award. There is a difference between voluntary and involuntary changes in circumstances where an involuntary change in circumstances results from fortuitous events or other circumstances beyond a person's

control where a voluntary change generally does not justify a reduction in the support obligation. Even so, when a parent voluntarily terminates his or her employment upon which the original support obligation was based, the child support obligation may nevertheless be reduced if the obligor parent can show that: (1) a change in circumstances has occurred; (2) the voluntary change in circumstances is reasonable and justified; (3) the parent is in good faith and not attempting to avoid his or her alimentary obligation; and (4) the action will not deprive the child of continued reasonable financial support.

The trial court denied David's motion due to the fact that he left a tenured position with UTPA for a speculative position with NSU, and then after losing his position at UTPA, he turned down a position with Arkansas State University. The trial court held that even though the school offered David a non-tenured track position for one year at a lower salary, this position could have led to further employment based on his job performance. It further held that David's child support obligation would remain at $750.00 per month.

The appeals court ruled that the trial court did not abuse its discretion by finding that David was voluntarily underemployed and that his employment was neither reasonable nor justified.

Kyle v. Kier, 233 So.3d 708 (La. App. 3 Cir. 11/15/17)

Facts: Richard Brandon Kyle and Brittany Kier entered a stipulated judgement for custody of their one minor child on August 31, 2015. The judgement established child support at $700.00 a month, paid by Mr. Kyle to Ms. Kier. Mr. Kyle filed a Motion to Modify Child Support in September 2016 asserting that he became unemployed and cannot be employed due to a physical injury to his neck and back. Mr. Kyle wanted his child support payments modified to the statutory minimum of $100.00. At the hearing, Mr. Kyle introduced certified medical records from Dr. Troy Vaughn in which Dr. Vaughn opines Mr. Kyle is unable to work on a sustained basis and unable to resume gainful employment due to a neck and back injury. Ms. Kier testified that Mr. Kyle had a dog breeding hobby.

The trial court denied Mr. Kyle's Motion to Modify Child support, finding insufficient evidence upon which to base the a modification and amended the custody agreement. Mr. Kyle appeals arguing the trial court erred in denying his motion for modification of child support and modifying the stipulated judgment regarding terms of custody because the issue was not raised by pleading.

Result: Affirmed.

Rationale: An award of child support may be modified if the circumstances of the child or of either parent materially change and shall be terminated upon proof that it has become unnecessary." La.Civ.Code art. 142. Child support will not be modified absent a material change in circumstances of one of the parties since the previous award. Cole, 139 So.3d 1225. The party seeking child support modification has the burden of proving there has been a material change in circumstances. La.R.S. 9:311(A)(1); Cole, 139 So.3d 1225.

A "material" change in circumstance is a change "having real importance or great

consequences for the needs of the child or the ability to pay of either party." La.R.S. 9:311(A)(1) cmt (A); Cole, 139 So.3d at 1229. Louisiana jurisprudence distinguishes a voluntary change in circumstance, which generally does not justify modification of child support, from an involuntary change in circumstance. State Dep't. of Children and Family Servs. In Interest of E.G., II v. Jones, 14-918 (La.App. 5 Cir. 4/15/15), 170 So.3d 297.

An involuntary change in circumstance is a change resulting from a fortuitous event or circumstances beyond the party's control, for example, loss of position or illness. Id. In the case of employment and income, a party will be excused from its child support obligation if it appears the party is not only unemployed, but unemployable. Under some circumstances, even voluntary underemployment or unemployment may justify modifying child support. If the obligor parent can prove "(1) a change in circumstances occurred; (2) the voluntary change is reasonable and justified; (3) the parent is in good faith and not attempting to avoid his or her alimentary obligation; and (4) the action will not deprive the child of continued reasonable financial support," a modification may be made.

Mr. Kyle is unemployed; however, there is a question as to whether he derives any income from his dog breeding hobby. The court finds that Mr. Kyle is voluntarily unemployed. Mr. Kyle did not prove there are no jobs he would be able to do due to his injury, but instead the record shows that he is capable of his dog breeding activities.

b Extra-judicial modification

Kerrigan v. Kerrigan, 2017 LEXIS 356, 2017 0174 (La.App. 4 Cir. 11/09/17)

Facts: On November 3, 2009, Mr. and Mrs. Kerrigan entered into a consent judgment for a Louisiana Civil Code Article 102 divorce. The judgment required Mr. Kerrigan to pay $3,600 in child support for the couple's two minor sons, effective July 15, 2009. On January 25, Ms. Kerrigan filed a rule for contempt alleging that in August 2011, the parties entered into an extrajudicial agreement which required Mr. Kerrigan to pay $5,000 per month. She contends Mr. Kerrigan owed her $54,242 in child support payments and he owed child support reimbursement expenses in the amount of $3,906. Mr. Kerrigan denied any extrajudicial agreements.

According to Ms. Kerrigan, Mr, Kerrigan complied with the agreement for only a few months. After that, Mr. Kerrigan paid whatever he wanted. According to Ms. Kerrigan, contrary to their verbal agreement, Mr. Kerrigan unilaterally reduced the $5,000.00 monthly child support payments without her consent. Ms. Kerrigan testified that Mr. Kerrigan routinely requested sexual favorsin exchange for child support payments. She said the talk of sex was "quite frequent" and "[Mr. Kerrigan] said that he decided that the $5,000 a month meant that [she] had to have sex with him twice a month." Ms. Kerrigan introduced into evidence a text message exchange between her and Mr. Kerrigan. Ms. Kerrigan stated that when she texted him, "[d]on't forget the check," he responded, [d]on't forget the [vagina]."

The trial court found that the parties entered into an enforceable extrajudicial agreement, increasing Mr. Kerrigan's child support payments to $5,000 a month.

Result: Affirmed.

Rationale: A child support judgment generally remains in full force until the party ordered to pay it has the judgment modified, reduced or terminated by a court. However, the parties may modify or terminate child support payments by conventional agreement if it does not interrupt the children's maintenance or upbringing and is in their best interests. The party asserting an extrajudicial modification has the burden of proving a clear and specific agreement; mere acquiescence in accepting reduced payments does not waive the right to enforce the judgment.

The district court reasoned that evidence of $5,000 child support payments in August and September of 2011 and $4,500 payments for the remainder of 2011 and the majority of 2012 corroborated the existence of the extrajudicial agreement. The court also accredited Ms. Kerrigan's testimony that Mr. Kerrigan unilaterally reduced the child support payments without her consent. In contrast, the district court found that Mr. Kerrigan's credibility was damaged by his testimony regarding a text message sent to Mrs. Kerrigan requesting sexual favors to increase his child support payments. The apparent request for sexual favors demonstrated that Mr. Kerrigan held child support payments over Ms. Kerrigan's head. He maintained control over the payments, and unilaterally chose to reduce payments whenever he desired.

B Procedural law

1 Contempt for non-payment of child support

Bailey v. Bailey, 2017 WL 1755624 (La. App. 1st Cir. 2017)

See *supra*.

2 Inaction on request for child support

Hammond v. Hammond, No. 51,316-CA (La.App. 2 Cir. 4/5/17)

Facts: Beth and John married in 2005 and had two boys together, born in 2002 and 2009. John left the matrimonial domicile in June 2014 to Oklahoma. Beth filed for a 102 divorce in August 2015. She requested joint custody of the minor children with herself as primary domiciliary parent, child support, the dependent tax credit, and spousal support. Beth submitted a plan of implementation. John answered and reconvened in November 2015 seeking an Article 103 divorce. He demanded primary custody of the minor children but did not submit a plan of implementation. HOC recommended joint custody with Beth as the domiciliary parent, subject to standard alternating-weekend visitation. He further recommended that John pay child support of $628 per month, that Beth receive the dependent tax credit, that John pay interim periodic spousal support of $300 per month and that child and spousal support debts be made retroactive to the date of judicial demand. John objected. On December 17, 2015, the trial court signed a temporary order adopting the HOC report as the order of the court pending the final disposition of the

issues. John had not paid child support under the temporary order. At trial on May 25, 2016, John introduced pay stubs and his 2015 Form 1040, showing adjusted gross income of $34,500. Beth testified she was working at a Hilton Garden Inn for $8.25 an hour, had lived in a homeless shelter and was currently in a Section 8 apartment in West Monroe. She was receiving food stamps, had no credit cards, was driving a 14-year-old Ford Taurus that an uncle had given her and that she asked John for support, but only received half of the couple's final income tax refund. The judgement gave primary domiciliary custody to Beth and departed from the HOC report, giving John reasonable visitation during the school year and for a majority of the summer. The judgment did not mention child support, the dependent tax credit or interim spousal support. Beth appealed.

Result: Judgment amended and, as amended, render.

Rationale: When a judgment is silent to any demand at issue in the cause under the pleadings, such silence constitutes an absolute rejection of such demand. Reviews of silence are by abuse of discretion. The trial court abused its discretion and was in manifest error in the denial of Beth's claims for child support, the dependent tax credit and interim spousal support. The HOC made detailed factual findings concerning the parties' financial situations, resulting in the recommendations outlined above. Notably, John objected to aspects of the HOC report, but did not challenge the HOC's findings as to the parties' income and expenses, and disputed the tax credit chiefly because he sought custody. The district court made the HOC report the order of the court. At trial, the testimony and documentary evidence entirely corroborated the HOC's findings, and neither side seriously disputed the other's income and expenses. In short, there was no evidence on which to reject Beth's claims for child support, the tax credit and interim spousal support, or even to modify the HOC report and the temporary judgment as to these claims. The judgment will be amended to reinstate these awards.

3 Nullity of child support judgment

Wilson v. Wilson, 2017 WL 6629368 (La. App. 5 Cir. 12/29/17)

Facts: The parties were married on August 15, 1992 and had one child in January 1994. The parties were divorced in January 2006 and the judgment granted the parties joint custody of the minor child. The appellant was ordered to pay appellee $550.00 dollars per month, plus 100% of medical insurance coverage and uncovered medicals for the minor child. On November 3, 2015, appellee filed a "Rule for Contempt, to Compel Payment of Child Support, Request for Attorney's fees, and Court Costs" where the appellee claimed that the appellant failed to pay child support pursuant to the January 2006 judgment. The appellant argued that he paid child support and that the appellee's allegations were false. In the alternative, he argued that the January 2006 judgment was never legal binding in that it was, for various alleged reasons, “absolutely null”.

The trial court found that the January 2006 judgment was still in effect and had not been modified, reduced, or terminated and ordered the appellant to pay the appellee past due child support of $41,869.85 and awarded appellee attorney's fees and court costs.

Appellant appealed.

Result: Affirmed.

Rationale: A child support judgment remains in full force and effect until the party who is responsible for payment has it modified or terminated by the court. However, a judgment awarding child support can be extrajudicially modified by agreement of the parties. Such an agreement must meet the requisites of a conventional obligation and must foster the continued support an upbringing of the child. The burden of proof is on the person seeking to modify his obligation, and there must be a clear showing that the parties agreed to change and the change is not detrimental to the child. The trial court's findings should not be reversed on appeals absent manifest error and an appellate court will not disturb a child support order unless there is an abuse of discretion or manifest error.

The appellant argues, however, that the January 2006 judgment is absolutely null and, therefore, never had any legally binding effect.

The grounds for an action in nullity are provided exclusively pursuant to La. C.C.P. art. 2001, et seq. There are two types of nullity of judgments: (1) absolute nullity, i.e., null for vice of form pursuant to La. C.C.P. art. 2002; and (2) relative nullity, i.e., null for vice of substance, pursuant to La. C.C.P. art. 2004. An action to annul a final judgment based on La. C.C.P. art. 2002 may be brought at any time. La. C.C.P. art. 2002 B.

According to the appellant, the January 2006 judgment is an absolute nullity because it did not comply with the civil procedure articles on divorce. As a result, he argues, all subsequent orders and trials are null and void. The appellant also argues that the January 2006 judgement is not a valid award of child support because the trial court (1) did not consider the child support guidelines for the adequacy of the stipulated amount of child support, (2) did not provide written reasons warranting a deviation from those guidelines, and (3) did not consider the unique nature of the relationship between the parties and the minor prior to the January 2006 judgment.

A review of the record reveals that the validity of the January 18, 2006 judgment was never properly before the trial court. The January 18, 2006 judgment awarding appellee child support in the amount of $550.00 per month remained in full force and effect at the time of the May 18, 2016 hearing on appellee's rules for contempt for failure to pay child support and to compel payment of past due child support. Despite appellant's contentions to the contrary, the nature of the parties' relationship concerning child support prior to the January 18, 2006 judgment is irrelevant. Appellant did not appeal, file a petition for nullity, or move to modify, reduce, or terminate the January 18, 2006 judgment. Furthermore, appellant did not sustain his burden to show that the parties entered into an extrajudicial agreement *after* the January 18, 2006 judgment awarded appellee child support. Based on the testimony and evidence, we find that the trial court did not commit manifest error or abuse its discretion in granting appellee's rule to compel past due child support in the amount of $41,869.85.4 The first three assignments of error are therefore without merit.

4 Adequacy of record for appeal

State, Department of Children and Family Services v. Redmann 231 So.3d 897 (La. App. 5 Cir. 10/25/17)

Facts: The State of Louisiana Department of Social Services through the District Attorney for the Parish of Jefferson ("State") began providing support enforcement services to Helen Redmann on January 11, 2006. As such, all child support issues between Helen Redmann and Kirk Redmann were transferred from the 24thJudicial District Court to Juvenile Court for the Parish of Jefferson.

Kirk filed a motion for reduction of child support and for future credit for amounts owned on the basis that he had been unemployed since January 31, 2015 and sought a credit for Helen's proportionate share of health insurance premiums for the children that she allegedly had not paid.

A hearing on the motion was held on July 9, 2015 before the hearing officer. The hearing officer recommended that Kirk's motion to reduce child support be granted and that his child support obligation be reduced on an interim basis from $786 per month to $265.65 per month, retroactive to the filing date of April 1, 2015 once a permanent order was entered. The hearing officer also recommended that each parent be responsible for his or her percentage share of extraordinary medical expenses. The hearing officer did not address the issue of credits and instructed the parties to meet with the State to review the receipts submitted by each as they related to requested credits. Helen disagreed with the recommendation, specifically the interim reduction of child support, and a disagreement hearing before the juvenile court judge was set.

On December 28, 2015, the trial judge stated that he had reviewed all of the documents submitted and found that Kirk's share of the expenses owed was $1,345, minus a $250 credit for each child, resulting in $845 owed to Helen. Kirk requested an opportunity to retain counsel. The trial judge indicated that he had rendered judgment but would give Kirk three months to obtain counsel to file a motion to reconsider or appeal.

Kirk obtained counsel who subsequently filed a motion to reconsider the December 28, 2015 judgment on March 11, 2016, which was within the three-month time period set by the trial judge. The trial judge denied the motion to reconsider on June 20, 2016, and Kirk filed a motion for appeal on July 6, 2016.

Result: Vacated in part and remanded.

Rationale: We cannot properly address the December 28, 2015 judgment because we cannot ascertain what evidence the trial court considered in reaching its decision. Courts of appeal are courts of trial record. For purposes of our review, the record consists of the testimony, exhibits and other evidence introduced during trial. When rendering its decision the trial court never identified any of the documents, and based on the record it was unclear if any documentation was admitted into evidence. We find it impossible to ascertain from the record how the trial court reached its determination and therefore find it necessary to vacate the portion of the juvenile court's December 28, 2015 judgment finding Kirk Redmann owes Helen Redmann $845 and remand the matter for a new hearing on Kirk Redmann's motion for credits.