RECENT JURISPRUDENTIAL DEVELOPMENTS
pertaining to

THE LAW OF PARENT & CHILD:
Filiation & Child Support

March 2020 - March 2021

by

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I Filiation

A Avowal action (CC art. 198)

1 Mother's "bad faith" deceit

Kinnett v. Kinnett, 302 So.3d 157 625 (La.App. 5 Cir. 8/6/20)

Facts: Karen and Brandon Kinnett were married on January 24, 2009. On August 29, 2011, their daughter, B.A.K., was born.

Thereafter, beginning in the late summer or fall of 2013, Ms. Kinnett engaged in an extramarital affair with Mr. Andrews. Mr. Andrews testified that the relationship consisted mostly of infrequent sexual encounters. The last intimate encounter between Mr. Andrews and Ms. Kinnett occurred on November 15, 2014. Mr. Andrews testified that the NuvaRing® birth control device Ms. Kinnett used throughout their relationship was present during the encounter. Ms. Kinnett testified to having ten years' experience using that birth control method.

In early May of 2015, Ms. Kinnett discovered she was pregnant. Though she knew then that Mr. Andrews was possibly her child's father, she did not tell Mr. Andrews then that she was pregnant or that he might be the father. G.J.K. was born on August 5, 2015. Mr. Andrews testified that he made several attempts to contact Ms. Kinnett via text message in the months between November 2014 and September 1, 2015, without response.

On September 1, 2015, Mr. Andrews tried texting Ms. Kinnett again, and she responded. He testified that she apologized for not answering his texts and explained that she had had sexual relations with her husband one night, had gotten pregnant, and had had a baby "with" her husband. She further explained that she was staying in her marriage for the sake of the children. Mr. Andrews testified that, during the September 1st conversation, it crossed his mind that he could be the child's father, but he testified further that, at that point, he did not recall the date of his last sexual encounter with Ms. Kinnett. During that communication, Ms. Kinnett did not tell Mr. Andrews when G.J.K. had been born or how old he was then. Ms. Kinnett, while initially testifying, "I told him it was my husband's child," eventually restated, "I think the message was that I had had a baby and that I was trying to work on my marriage." She also testified that she believed her husband was her child's father, and that her belief was confirmed when the baby was born looking exactly like Mr. Kinnett.

Fifteen months later, on December 9, 2016, Ms. Kinnett called Mr. Andrews by

phone. During that conversation, she informed him that she had performed a sibling DNA test on her two children and learned that Mr. Kinnett was not G.J.K.'s biological father. According to Ms. Kinnett, when she informed Mr. Andrews of his paternity, he told her that he had suspected that the child was his since first learning of the birth.

On January 12, 2017, she informed Mr. Kinnett that he was not G.J.K.'s biological father, and on January 14, 2017, she filed for divorce. On January 30, 2017, Mr. Andrews, Ms. Kinnett, and G.J.K. all submitted for an additional DNA test. The February 2, 2017 results confirmed that Mr. Andrews is the child's biological father to a scientific certainty of 99.999999998%. Eight days later, on February 10, 2017, Mr. Andrews filed a Petition in Intervention to Establish Paternity and to Obtain Custody of G.J.K. In his petition, Mr. Andrews alleged that Ms. Kinnett had concealed his possible paternity until December 9, 2016, and sought an order establishing paternity and an action to obtain custody.

On February 21, 2017, Mr. Kinnett answered Mr. Andrews' intervention with Exceptions of No Cause and/or No Right of Action, Prescription, and Peremption, arguing that Mr. Andrews' avowal action was perempted under Louisiana Civil Code art. 198 because he failed to file an action within one year of G.J.K.'s birth.

The parties tried the exceptions before the district court on June 2, 2017. The district court judge ruled from the bench denying the exceptions of no cause of action and no right of action as to paternity, but granting the exceptions of no cause of action and no right of action as to custody and visitation. The judge further held that Mr. Andrews' avowal action was perempted under Article 198 based on his finding that (a) Mr. Andrews had not proven "that the mother was actually in bad faith and intended to deceive," and (b) he had filed his avowal action more than a year from the time the judge determined he knew or should have known that he was G.J.K.'s father.

On November 5, and December 18, 2018, the district court heard arguments on the constitutionality of Article 198. The Hon. William C. Credo, III, presided as judge pro tempore.8 On January 10, 2019, the court issued its written judgment, holding "that La. Civ. Code art. 198 is constitutional... Keith Edward Andrews failed to submit evidence that Article 198 violates either substantive or procedural rights to due process or that it fails to protect a fundamental liberty interest, as alleged in his First Supplemental and Amending Petition."

Result: Reversed.

Rationale: The detailed legislative history of Act 192 reflects the legislature's attempt to balance the biological father's interest in an opportunity to parent against the explicit state policy of preserving the intact marriage and the best interests of the child. As is evident from the comments to Article 198's originally proposed language, the Law Institute and some opponents of the amendment believed that denying the biological father the right to avow his child was necessary when the mother was still married to the presumed father. Although jurisprudence "recognized the right of a father to institute an avowal action as a predicate to, or simultaneous with the exercising of parental rights," the comments stated that denying the biological father the right to establish his paternity when the mother was still married "serve[d] to protect a currently intact family unit to which the child belong[ed]."

Other opponents of the law as originally drafted opined that even the peremptory period was too restrictive if the biological father did not become aware of his paternity until after the two years had passed. In response to these latter concerns, another amendment was proposed providing that "if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the date the father knew or should have known of his paternity, but no more than ten years from the date of birth of the child." The amendment incorporating the bad faith exception was adopted by a vote of 78 to 17.

1. Burden of proof. – It appears the trial court placed the burden of proof for the peremption exception on Mr. Andrews. Rather than considering whether it was more probable than not that Ms. Kinnett intentionally insinuated or affirmatively stated that Mr. Kinnett and not Mr. Andrews was G.J.K.'s father, and whether such an act qualifies as bad faith deception, the trial court questioned how Mr. Andrews could possibly claim that he was deceived when it crossed his mind that he could be the father and Mr. Andrews failed to satisfy what the judge believed was "a moral and a legal obligation to simply ask, is this my child?"

Article 198 contains a statutory exception that will prevent the running of the peremptory period and states in pertinent part, "if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity." Reading the plain language of the statute, the question of when Mr. Andrews learned of his paternity arises only in the event that Ms. Kinnett deceived him in bad faith as to his paternity. Therefore, Mr. Andrews was required to plead both that Ms. Kinnett deceived him in bad faith, and also that he did not know and should not have known of his paternity for more than one year before filing his avowal action.

In light of the allegations contained in Mr. Andrews' petition, we find that-as Mr. Andrews specifically pled a statutory exception which would render the peremptive period inapplicable-Mr. Kinnett, as the party claiming peremption, bore the burden of proving that the bad faith deception exception provided for in Article 198 was not applicable, and it was error for the trial court to assign the burden of proving bad faith deception to Mr. Andrews.

Placing the burden of proof on the wrong party is legal error that will interdict the fact-finding process by placing a more onerous standard than the law requires on one of the parties. Therefore, the trial court's factual findings-that Ms. Kinnett was not in bad faith and also that Mr. Andrews knew or should have known of his paternity on September 1, 2015-are no longer entitled to the manifest error standard of review.. Since the record is otherwise complete, we will conduct a de novo review to determine whether Mr. Kinnett satisfied his burden of proving that Article 198's bad faith deception exception to peremption did not apply in Mr. Andrews' case by proving, by a preponderance of the evidence, either that Ms. Kinnett did not engage in bad faith deception or that Mr. Andrews knew or should have known of his paternity for more than one year prior to filing his avowal action.

The question is, then, does a mother, who has singular knowledge of the men with whom she has been intimate, the dates on which she has had sexual encounters with each,

the effectiveness of her birth control method if any, her menstrual cycle, and the approximate date of conception, have a duty to inform both the legal and the potential biological father(s) of the possible paternity of the biological father(s)? To interpret Article 198 to permit a mother to prevaricate, dissimulate, and engage in perfidious silence as to a man's potential paternity and yet be found innocent of deceiving the putative father in bad faith-because she lies by omission rather than by commission of a false statement-flies in the face of the common definition of both "bad faith" and "deceit," belies Article 198's legislative history, and leads to unjust results.

There is no set of circumstances wherein a woman-who has had sexual relations with more than one man during the period of possible conception-may have an "honest belief" that one man, and not the other, is the father. Thus, based upon the foregoing, we find that a mother's act of withholding pertinent information or creating a misimpression through statements, actions, or inactions satisfies the definition of "deceives" within the context of Article 198.

Either Ms. Kinnett had not been intimate with her husband during the period G.J.K. was conceived-and therefore knew that Mr. Andrews was the child's father and failed to disclose his paternity to him-or she had been intimate with both her husband and Mr. Andrews-and therefore did not know for certain who the child's father was-yet failed to tell Mr. Andrews that he could possibly be her child's father. If, however, Ms. Kinnett had been intimate with both her husband and Mr. Andrews during the period of conception, it was impossible for Ms. Kinnett to truthfully assert or insinuate to anyone that she was sure that Mr. Kinnett was the father of her child. It was also impossible for her to have an honest belief that Mr. Kinnett was definitely G.J.K.'s father. Minimally, Ms. Kinnett engaged in self-deception, and her dishonesty of belief cast her in bad faith.

In keeping with our duty to interpret the statute in a manner that preserves its constitutionality, we find as a matter of law that a married woman-whose husband is presumed to be the father of her child-who knows that it is possible that another man is the child's biological father has a duty to inform that man of his possible paternity. Failure to so inform the possible biological father is bad faith deceit as contemplated in Civil Code art. 198.

Therefore, for the aforementioned reasons, we find that Mr. Kinnett did not satisfy his burden of proving that Ms. Kinnett did not deceive Mr. Andrews in bad faith regarding his paternity of G.J.K. However, even if the trial judge correctly placed the burden of proof upon Mr. Andrews, we find that there was no factual basis for the trial court's finding that Ms. Kinnett did not engage in bad faith deceit.

2. "Knew or should have known." – As he expressed in his oral reasons for judgment, the trial court granted the exception of peremption, in part, because it found that Mr. Andrews failed to file his avowal action within one year from the day he knew or should have known of his paternity-September 1, 2015. In other words, the judge applied the peremptory period provided for if Article 198's bad faith exception is triggered. That date being also outside the one-year period from the day of the child's birth-the default peremptory period for filing an avowal action pursuant to Article 198-the trial court granted the exception of peremption without an in-depth analysis of whether the mother in bad faith deceived Mr. Andrews as to his paternity.

We find that the trial court erred in its interpretation of Article 198's "knew or should have known" language, and therefore, manifestly erred in finding that Mr. Andrews knew or should have known that he was G.J.K.'s father after his September 1, 2015 conversation with Ms. Kinnett, that finding being unsupported by the record.

"Constructive knowledge," refers to the "knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." Id. In the context of determining whether a person had knowledge sufficient to trigger the running of a prescriptive period, "constructive knowledge" denotes "whatever notice is enough to excite attention and put the injured party on guard and call for inquiry." Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. A mere apprehension is insufficient.

Upon review of the record, we find that the information available to Mr. Andrews after the September 1, 2015 conversation rendered his failure to file an avowal action within one year thereafter reasonable. Any apprehension or fleeting suspicion he may have had about his paternity upon learning that Ms. Kinnett had had a child was alleviated by her misrepresentations or insinuations that she knew her husband was the father.

Concurrence (Wicker, J.): While we have resolved this case without addressing the constitutionality of Article 198, I write separately to point out my deep lingering concerns with the statute's constitutionality. The question is whether Louisiana Civil Code art. 198 on its face and as applied by the trial court in this case violates Mr. Andrews' and the minor child's right to Due Process guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Louisiana Constitution.

As the opinion of this Court explains, when a statute can be interpreted two ways, one of which calls into question the statute's constitutionality, the court shall choose the interpretation that avoids the constitutional question. Our interpretation of Article 198 does so by attempting to ensure that a biological father receives notice of his child's existence before being deprived of his opportunity to avow his child. See discussion infra, Section I.b. Thus, in interpreting the statute, we did not address the argument-asserted by Mr. Kinnett and cited as partial justification for Article 198's limitation on an unwed father's right to avow30-that the biological father of a child whose mother was married to another man at the time of the child's birth has no constitutional rights to consider when assessing the statute's validity. I am of the opinion that Article 198 affects the fundamental rights of both the putative father and the child, and other interpretations of the statute would violate both the biological father's and the child's rights to due process.

2 Interruption of peremption (?)

Flintroy v. Louisiana Health Science Center, No. 53,777, 2021 WL 800393 (La.App. 2 Cir. 3/3/21)

Facts: Ms. Wright, who suffered from Sickle Cell disease, went to LSU on August 5, 2008, with

a Sickle Cell crisis. Doctors gave her a cocktail of strong narcotics, to control her pain, but early on the morning of August 7, she coded and could not be resuscitated.

Flintroy, claiming to be Wright's father, filed a timely request for Medical Review Panel ("MRP") with the Division of Administration on July 31, 2009. The MRP rendered its opinion on August 1, 2011, finding no breach of any standard of care by LSU or by any of the doctors or nurses who treated Ms. Wright.

Flintroy filed this petition for medical malpractice on November 2, 2011, alleging that Ms. Wright died from narcotic intoxication. He alleged that he was suing "individually and on behalf of his deceased daughter, Jessica Wright," and demanded damages for wrongful death and survival.

At a deposition in September 2015, Flintroy stated that he was Ms. Wright's father, but admitted that he was never married to her mother. In a separate deposition, Ms. Wright's mother, Carolyn Shareef, testified that Flintroy "acknowledged" Ms. Wright as his child, but she confirmed that she was never married to Flintroy.

LSU filed a "peremptive exception of no right of action." This argued that because Flintroy was not married to the patient's mother and never filed an avowal action, he had to prove filiation, under La. C.C. arts. 2315.1 and 2315.2 and Udomeh v. Joseph, 11-2839 (La. 10/26/12), 103 So. 3d 343, but any such action had to be filed within one year of the child's death, under La. C.C. art. 198, and this time period is peremptive. Since more than one year had passed since Ms. Wright's death, LSU argued, Flintroy could not prove paternity; thus, he had no right of action to sue on her behalf.

In response, Flintroy argued that once a plaintiff files a request for MRP, prescription is interrupted; by analogy, he urged, the peremption of Art. 198 should also be interrupted.

The trial court found that filing the MRP request, on July 31, 2009, did not interrupt the peremptive period. Because Flintroy failed to bring a paternity action within that period, he had no standing to sue on Ms. Wright's behalf. The court sustained the exception and rendered judgment dismissing Flintroy's claims with prejudice.

Result: Affirmed.

Rationale: 1. In *Udomeh*, the plaintiff sued the mother of his minor son, a state agency, and a health care provider for the wrongful death and survival damages of his son. The plaintiff, however, had never been married to the boy's mother, adopted him, or filed a paternity action; on this basis, the defendants filed exceptions of no right of action, which the lower courts sustained. The Supreme Court, however, the court applied Louisiana's system of fact-pleading, La. C.C.P. art. 854, to hold that the paternity action need not be a petition that "specifically request[s] a judgment of paternity." The court found that the wrongful death and survival petition, which referred to the plaintiff's "minor child" and "minor son," was sufficient to state a claim for paternity. Id. at 8-9, 103 So. 3d at 348-349. Under the guidance of Udomeh, the courts have liberally construed tort and other petitions as stating enough to preserve the claim of paternity as long as they allege that the plaintiff is the child's father.

In the instant case, we ask the same question: can we liberally construe the request for MRP, filed with the Division of Administration, as sufficient to preserve the claim of paternity? We note that in Udomeh and its progeny the petitions were all filed in district

courts, which have subject-matter jurisdiction to resolve a paternity claim. Flintroy's request for MRP was filed, timely and appropriately, with the Division of Administration, a division of the office of the governor, La. R.S. 39:1, which is charged with overseeing the selection and operation of the MRP, La. R.S. 40:1237.2. The Division of Administration has no authority to adjudicate a paternity claim. Even by the most liberal interpretation, we do not see how the MRP request placed anyone on notice that paternity would be an issue.

2. We must address Flintroy's specific contention that because MLSSA interrupts prescription during the pendency of the MRP proceedings, it must also interrupt peremption. We find no authority for this, with Art. 3461's clear statement that peremption "may not be renounced, interrupted, or suspended." Flintroy's contention that the MRP request interrupted the peremptive period of Art. 198 does not have statutory or jurisprudential support.

B Effect of adoption (CC art. 199)

Rismiller v. Gemini Ins. Co., 2020-0313, 2020 WL 7310506 (La. 12/11/20)

Facts: This matter stems from a tragic accident on October 1, 2015, in which an eighteen-wheeler truck driven by Mark Gordon collided head-on with a vehicle driven by Richard Stewart, Jr. Mr. Stewart was killed, as well as his two minor children, George and Vera Cheyanne Stewart. At the time of his death, Mr. Stewart was married to Lisa Watts Stewart. However, George and Vera Cheyanne were born to Brandie Hardie, with whom Mr. Stewart reportedly had a relationship during his marriage to Lisa Watts Stewart.

Following the accident, three separate survival and wrongful death actions arising out of the deaths of Mr. Stewart and his minor children were filed in district court. Two of the lawsuits present claims filed by or on behalf of Daniel Goins and David Watts, now adults who, as minors, were given for adoption by the Stewarts. Mr. Goins was adopted by Joyce and George Goins, Mr. Stewart's aunt and uncle. Mr. Watts was adopted by his maternal grandparents, Mary and Jimmy Watts.

The defendants filed peremptory exceptions of no right of action against all claimants. The district court overruled the exceptions. As to the claims of Mr. Goins and Mr. Watts, which are the only claims now before this court, the district court ruled that "the biological relationship and dependency" of Mr. Goins and Mr. Watts was the origin of the right of action and, further, "the fact that Watts [and Goins] w[ere] adopted does not prevent [them] from bringing survival and wrongful death claims for the death of [Mr.] Stewart, [their] biological father."

On supervisory review, the court of appeal, in a 4-3 decision, reversed the district court's rulings on the defendants' exceptions of no right of action.3 The majority explained: "It has long been held that children given up in adoption are divested of their legal rights except as to those relating to inheritance." Judges Cooks, Savoie and Conery dissented from the majority's conclusion that Mr. Goins and Mr. Watts do not have a right to assert the survival and wrongful death actions because they were given up for adoption

as minors.

Result: Reversed.

Rationale: Prior to Act 211 of 1986, the survival and wrongful death actions were covered generally by La. C.C. art. 2315. Louisiana C.C. art. 2315 was amended in 1960 to provide essentially what is now contained in La. C.C. arts. 2315.1 and 2315.2. Before the 1960 amendment to La. C.C. art. 2315, the action survived in favor of children, "including adopted children and children given in adoption." See 1948 Acts, No. 333. The 1960 amendment omitted "children given in adoption" from the list of statutory beneficiaries. See 1960 Acts, No. 30, § 1. The current statutory scheme reflects this omission.

Defendant Gemini Insurance Company argues that the deletion of the language "children given in adoption" demonstrates the legislature's intent to do away with this class of claimants and, therefore, Mr. Goins and Mr. Watts are without a remedy for the death of their natural father. We disagree.

At issue is the phrase "child or children of the deceased" in Paragraph (A)(1) of both La. C.C. arts. 2315.1 and 2315.2. A common, or generally prevailing meaning, of this phrase clearly would be a deceased's biological child or children. See Jenkins v. Mangano, 00-790, p. 3 (La. 11/28/00), 774 So. 2d 101, 103, wherein this court emphasized "that the critical requirement for classification of a person as a child under Article 2315.2 is the biological relationship between the tort victim and the child." While both La. C.C. arts. 2315.1 and 2315.2 include Paragraph (D) that expands the phrase "child or children of the deceased" to include non-biological children that the deceased adopted, these code articles contain no language that narrows the term to exclude biological children of the deceased who were given in adoption. Both articles provide that where there is a surviving spouse and child or children, they are the first in the hierarchy of persons entitled to recover. See La. C.C. arts. 2315.1 and 2315.2. It is undisputed that Lisa Watts Stewart, the lawful wife of Mr. Stewart, and his two biological adult sons Mr. Goins and Mr. Watts, survived Mr. Stewart. Nothing in the plain language of La. C.C. arts. 2315.1 and 2315.2 suggests that if Mr. Goins and Mr. Watts were adopted by another, they would no longer be "children" or "brother" within the meaning of the two articles.

Defendant further argues that La. C.C. art. 199 precludes the plaintiffs from bringing wrongful death and survival actions arising from the death of their biological father and half-siblings. Article 199 provides,

> Upon adoption, the adopting parent becomes the parent of the child for all purposes and the filiation between the child and his legal parent is terminated, except as otherwise provided by law. The adopted child and his descendants retain the right to inherit from his former legal parent and the relatives of that parent.

"Filiation is the legal relationship between a parent and child." La. C.C. art. 178. Defendant asserts that Mr. Goins' and Mr. Watts' filiation with Mr. Stewart, terminated upon their respective adoptions and, thus, they cannot be considered "children" for purposes of La. C.C. art. 2315.1(A)(1) and La. C.C. art. 2315.2(A)(1). Again, we disagree.

Louisiana C.C. arts. 2315.1 and 2315.2 contain no language that one must be filiated to the deceased to be considered a "child or children of the deceased." Rather those codal articles suggest that a deceased's biological children, as well as those who have been filiated to the deceased by adoption, are considered children of the deceased. As Judge Savoie pointed out in his dissent, "[i]f filiation were required for one to be considered a deceased's 'child' for purposes of La. Civ. Code arts. 2315.1 and 2315.2, then Paragraph (D) of those articles, which expands 'child' to include the deceased's adopted child, would have no independent meaning."

This court has recognized that the codal articles governing survival and wrongful death actions are sui generis and not dependent on any other statute or codal article. See Levy v. State Through Charity Hospital of Louisiana, 253 La. 73, 216 So. 2d 818 (1968). Therefore, the proper resolution of the issue presented in the case sub judice involves a logical and straightforward application of the relevant provisions of the Civil Code.

Concurrence (Johnson, C.J.): I fully agree with the majority opinion that, based on the clear and explicit wording of La. C.C. arts. 2315.1 and 2315.2, these biological children who are "children of the deceased" and "brothers of the deceased," are specifically designated as claimants permitted to bring wrongful death and survival actions arising from the deaths of their biological father and siblings. I write separately to express my opinion that any holding to the contrary would also be inconsistent with the general constitutional principles set forth by this court in Warren v. Richard, 296 So. 2d 813 (La. 1974), which concerned the rights of illegitimates.

The same policy or rationale is equally applicable in this case involving children given in adoption. As set forth in the jurisprudence addressing the rights of illegitimate children, restricting the rights of a child to bring a wrongful death or survival action arising from the death of that child's biological parent or sibling solely because the child was given in adoption would violate the central meaning of the Equal Protection Clause.

Dissent (Weimer, J.): Resolution of this matter requires an intricate civilian analysis of multiple provisions of the Louisiana Civil Code, coupled with an evaluation of constitutional principles.

The plaintiffs are incorrect to suggest that when Article 199 was enacted, the legislature already intended "children given in adoption" to be wrongful death and survival action claimants. As discussed earlier, the legislature had already removed "children given in adoption" from the lists of eligible wrongful death and survival action claimants. See 1960 La. Acts 30, § 1; compare 1948 La. Acts 333, § 1. See also n.4, infra (listing appellate court cases decided before the enactment of Article 199, holding that children given in adoption were not eligible as wrongful death or survival action claimants). Therefore, the stability in the law that the plaintiffs identify through the enactment of Article 199 already excluded "children given in adoption," such as the plaintiffs, from the lists of eligible claimants. See also La. Ch.C. art. 1256(A) (added by 1991 La. Acts 235, § 12, effective January 1, 1992) ("the adopted child and his lawful descendents are relieved of all legal duties and divested of all legal rights with regard to the parents and other blood relatives.").

The Civil Code speaks directly to the effects of adoption in Article 199. If the plaintiffs' argument that children given in adoption who were the product of the

decedent's marriage had a right of action under Articles 2315.1 and 2315.2 were accepted, no effect would be given to the provision in Article 199 that "the filiation between the child and his legal parent is terminated" as an effect of adoption. The requirement to give effect to each of these interrelated laws, Articles 199, 2315.1, and 2315.2, compels the conclusion that definitionally, the plaintiffs have no right of action stemming from the deaths of Mr. Stewart or their half-siblings.

Dissent (Crichton, J.): The legislative history and in pari materia interpretation of C.C. arts. 199, 2315.1 and 2315.2 support the conclusion that children given in adoption do not qualify as "children" for purposes of survival and wrongful death actions. Contrary to the majority's assertion otherwise, the termination of filiation, as provided by C.C. art. 199, must be interpreted to alter whether a person is a "child" by law. C.C. art. 178 ("Filiation is the legal relationship between a child and his parent."). The terms "child" and "children" appear over one hundred times in the Civil Code alone. E.g., C.C. art. 221 ("The father and mother who are married to each other have parental authority over their minor child during the marriage."). Interpreting all references in the Civil Code to "children" or "child" to necessarily include children given in adoption ignores C.C. art. 199 entirely and guts its effect.

Of course, an adopted child must have at least equal rights per the Civil Code. However, I write separately to highlight that the majority's interpretation would lead to an absurd result, as it has the potential to double the rights of a child given in adoption by maintaining their rights in conjunction with their biological as well as adoptive parents. With respect to the wrongful death and survival action statutes, for example, a child given in adoption would collect twice the amount as a child not given in adoption if both their biological and adoptive parents were killed by the fault of others. See C.C. art. 2315.1 (defining "child" to include children by adoption"); C.C. art. 2315.2 (same). This is contrary to the intent of the law, which is to equalize children given in adoption unless otherwise provided. See C.C. art. 199 (providing that exceptions to the termination of filiation may be provided by law and including therein an express exception for inheritance rights).

II Support

A Substantive law

1 Eligibility to receive payment: non-domiciliary parent

Greene v. Greene, 296 So.3d 1239 (La. App. 5th Cir. 5/28/20)

Facts: Peyton and Landon Greene were married on February 15, 1997. On July 6, 2015, Peyton Greene filed a petition for divorce against Landon Greene. On August 11, 2015, the parties entered into a Consent Judgment and Peyton was ordered to pay "100% of the children's private school tuition, registration, books, and supply fees, other fees, day care expenses and extracurricular activity costs for the minor children." On April 28, 2017, Peyton and Landon signed a subsequent Consent Judgment, stating, inter alia: IT IS

FURTHER ORDERED, ADJUDGED, AND DECREED that in lieu of Plaintiff, [Peyton], paying a monthly child support to Defendant, [Landon], Plaintiff ... shall pay one hundred (100%) percent of the children's private school tuition, registration, books, supply fees, other fees, reasonable and customary extracurricular activity expenses, reasonable and customary camp expenses, tutoring expenses, as well as medical, dental, and vision insurance for the children and medical, dental, vision and psychological expenses which are not covered by insurance. On October 16, 2018, Landon filed a rule to modify custody and Landon contended that his income had decreased from $70,000.00 per year to $5,000.00 per year since 2017, which was a material change in circumstances, and, as such, he sought an award of child support under La. R.S. 9:315 et seq. On November 14, 2014, the hearing officer found that there was insufficient documentation to make an interim support recommendation, deferred all child support matters until January 7, 2019. On November 15, 2018, Landon filed an objection to the hearing officer's recommendations on the basis that the hearing officer should have made an interim award of support. To his objection, Landon attached the hearing officer's shared obligation worksheet dated November 14, 2018, with calculations indicating that Landon should be awarded "recommended child support ... of $2,351.70." Peyton opposed Landon's objection. On November 19, 2018, the trial judge heard Landon's objection, noting that her intent in sending the parties to the hearing officer on November 14 was for the hearing officer to set an interim child support award. That day, the trial judge ordered an interim child support award of $2,351.00 per month payable to Landon, retroactive to the date of filing.3 On December 3, 2018, Peyton sought supervisory review and a stay of the interim award with this Court; both were denied on December 17, 2018. On January 7, 2019, the hearing officer held a conference and increased the temporary support award to $2,370.00 per month. On May 2, 2019, the trial on Landon's rule to set child support and rule for contempt began; it continued on May 21, May 23, June 12, and June 17, 2019. On July 24, 2019, the trial judge granted Landon's rule, awarding him $7,789.00 per month in child support, retroactive to the date of demand, to be paid on the first day of every month, with the first payment due on August 1, 2019. Peyton now appeals that award.

Result: Affirmed.

Rationale: 1. Award to non-domiciliary parent. – Peyton argues that the trial court erred in awarding child support in favor of Landon because he is the "non-domiciliary parent." As the trial judge pointed out Ms. Greene further argues that she cannot be compelled to pay child support to Mr. Greene because she is the domiciliary parent although the Greenes have equal, shared custody of their children.

First, Ms. Greene's counsel cites cases which are not analogous, as none concerned equal, shared custody, including the cited case that was decided by this trial court.

Secondly, Ms. Greene cites La. R.S. 9:315.8 to support her argument. However, paragraph E of that article clarifies that the statute does not apply to "shared custody as defined in La. R.S. 9:315.9." Furthermore, paragraph (E)5 further substantiates that "Worksheet A .... shall be used in accordance with this subsection." Thus on its face and plainly stated in the statute, La. R.S. 9:315.8 is inapplicable to the Greene's custodial

arrangement. This Court holds that La. R.S. 9:315.9, aptly titled "Effect of shared custodial arrangement" is the applicable statute to the case at bar. This statute makes no distinction between a domiciliary and non-domiciliary parent for the purposes of determining support in a shared custodial arrangement. Moreover, it requires the utilization of Worksheet B, which also does not make the distinction as argued by counsel for Ms. Greene.

Thirdly, counsel for Ms. Greene argues that paragraph (7) of La. R.S. 9:315.9[A], states that: (7) The parent owing the greater amount of child support shall owe to the other parent the difference between the two amounts as a child support obligation. The amount owed shall not be higher than the amount which that parent would have owed if he or she were a domiciliary parents. Ms. Greene argues that the second sentence precludes an award of child support to a non-domiciliary parent. However, a plain reading of ... that sentence demonstrates that the "parent owing the greater amount" owes the difference to the other parent without any distinction between domiciliary and non-domiciliary parents. As such, this Court finds this argument contrary to plainly stated law, and without merit. We agree with the trial judge that La. R.S. 9:315.9(A)(7) does not preclude payment of child support to a non-domiciliary parent in a "shared custody" situation - the obligation is based solely on a proportion of income and time. This assignment has no merit. See La. R.S. 9:315.9; Broussard v. Rogers, 10-593 (La. App. 5 Cir. 1/11/11), 54 So.3d 826, 829.

2. Consent Judgment. – Peyton argues that the district court erred by nullifying the binding and enforceable 2017 Consent Judgment agreement between the parties, which was reversible error. Peyton contends, as she did in the district court, that Landon waived his right to child support in exchange for Peyton paying 100% of the children's tuition, expenses, and fees that are enumerated in the Consent Judgment, citing Robertson v. Robertson, 45, 289 (La. App. 2 Cir. 5/26/10), 37 So.3d 597. We look to the trial judge's well-written Reasons for Judgment, in which she clarifies that Robertson is inapplicable to Landon's situation:

> Ms. Greene cites the Second Circuit case of Robertson v. Robertson, ... for the proposition that Mr. Greene must be bound by the prior consent agreement which deviated from the guidelines. This Court finds that the Second Circuit [case]'s facts ... were diametrically opposite to the facts of this case. In Robertson, the court stated: As recognized by both parties, there is a huge disparity in income and resources available to the two parties. Mr. Robertson is wealthy. Mrs. Robertson is not. As recognized in the judgment, this disparity in income was one of the factors used to deviate from the ordinary statutory scheme. There in nothing legally infirm with Mr. Robertson's agreement to pay child support so Mrs. Robertson can have the resources to provide and maintain a comfortable and safe living environment for the children when they are with her. This fosters the support and upbringing of these children. [Robertson, [37 So.3d] at 601].
>
> Thus, Robertson advocates for a deviation in favor of payment to the un-wealthy spouse because it was in the best interest of the children.

> The Consent Judgment in this case does the opposite. In this case, the Greenes deviated in a manner that ... provided no support for the children when they are with the un-wealthy spouse; the Consent Judgment at issue specifically does not provide the minimum support Mr. Greene would be statutorily entitled to receive. For these reasons, the Court finds that argument without merit.

As noted by the trial judge, in Robertson, the wealthy spouse willingly paid child support to the un-wealthy spouse to "maintain a comfortable and safe living environment for the children ... to foster the support and upbringing of these children." Robertson, 37 So.3d at 601. Thus, we find Robertson, supra, inapplicable to this instant proceeding also.

We turn, now, to the 2017 Consent Judgment. La. C.C. art. 227 provides that parents, by the very act of marrying, contract together the obligation of supporting, maintaining, and educating their children. The obligation to support their children is conjoint upon the parents and each must contribute in proportion to his or her resources. Hogan v. Hogan, 549 So.2d 267 (La. 1989). As a complement to that obligation, La. R.S. 9:315 - 315.15 provides a detailed set of guidelines that the courts are mandated to follow in setting the amount of child support in "any proceeding to establish or modify child support filed on or after October 1, 1989." La. R.S. 9:315.1(A); Hildebrand v. Hildebrand, 626 So.2d 578 (La. App. 3 Cir. 1993). As stated in La. R.S. 9:315.1(A), the amount determined by the guideline formula is presumed to be in the child's best interest. Percle v. Noll, 93-1272 (La. App. 1 Cir. 3/11/94), 634 So.2d 498.

Under La. R.S. 9:315.1(B), the parties may deviate from the guidelines if the application of the guidelines would not be in the best interest of the child or would be inequitable to the parties. In this instance, it is incumbent upon the trial court to "give specific oral or written reasons for the deviation, including a finding as to the amount of support that would have been required under a mechanical application of the guidelines and the particular facts and circumstances that warranted a deviation from the guidelines." Id. Moreover, there will be instances where the parents will stipulate (consent) to an amount of child support. La. R.S. 9:315.1(D) provides:

> The court may review and approve a stipulation between the parties entered into after the effective date of this Part as to the amount of child support to be paid. If the court does review the stipulation, the court shall consider the guidelines set forth in this Part to review the adequacy of the stipulated amount, and may require the parties to provide the court with the income statements and documentation required by R.S. 9:315.2.

"(W)hen the trial court reviews the agreement proposed by the parents, it 'shall consider the guidelines ... to review the adequacy of the stipulated amount.' " Stogner v. Stogner, 98-3044 (La. 7/7/99), 739 So.2d 762, 766. "Such an approach underscores the integral role of the trial court as gatekeeper in this area of paramount importance. If properly performed in accordance with the guidelines, this judicial review will further assure the adequacy and consistency of child support awards, foster evenhanded settlements, and preserve a record for the evaluation of later proceedings to modify initially stipulated child support awards." Stogner, supra. As noted by the trial judge, according to all testimony, the hearing officer accepted the Consent Judgment in 2017

without proof of income from any parties because Peyton refused to divulge her income information to Landon or the court. In Stogner, the Louisiana Supreme Court challenged the lower courts to function as "gatekeeper in this area of paramount importance ... [to] further assure the adequacy and consistency of child support awards, foster evenhanded settlements, and preserve a record for the evaluation of later proceedings to modify initially stipulated child support awards." Stogner, supra at 768,. The trial judge found that neither the hearing officer nor the original trial judge functioned as the gatekeeper envisioned by the Stogner court. We find no error in that ruling.

3. Change in circumstances. – Peyton argues that the district court erred by not requiring Landon to bear a burden of proof to show a continuing change in circumstances to justify a modification of child support. Here, the trial judge found that the 2017 Consent Judgment did not rely upon the guidelines as the agreement failed to fix a support obligation between the parties, which amounted to de facto waiver of support by Landon that is void and against public policy. See Sharp v. Moore, 47,888 (La. App. 2 Cir. 2/27/13), 110 So.3d 1232, 1236. Because the 2017 Consent Judgment is void as a matter of public policy and also failed to comply with the guidelines, there was no necessity for Landon to show a change in circumstances according to La. C.C. art. 142; La. R.S. 9:311, Stogner, supra. For these reasons, the trial court was not in error for "nullifying the 2017 Consent Judgment."

4. Child support award. – Peyton challenges the child support award to Landon. In a shared custody situation, such as this, the determination of an award of child support is made pursuant to La. R.S. 9:315.2, which states:

> A. 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. Spouses of the parties shall also provide any relevant information with regard to the source of payments of household expenses upon request of the court or the opposing party, provided such request is filed in a reasonable time prior to the hearing. Failure to timely file the request shall not be grounds for a continuance. Suitable documentation of current earnings shall include but not be limited to pay stubs, employer statements, or receipts and expenses if self-employed. 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.
>
> B. If a party is voluntarily unemployed or underemployed, his or her gross income shall be determined as set forth in R.S. 9:315.11.
>
> C. The parties shall combine the amounts of their adjusted gross incomes. Each party shall then determine by percentage his or her proportionate share of the combined amount. The amount obtained for each party is his or her percentage share of the combined adjusted gross income.
>
> D. The court shall determine the basic child support obligation amount from the schedule in R.S. 9:315.19 by using the combined adjusted gross income of the parties and the number of children involved in the proceeding, but in no event shall the amount of child support be less

than the amount provided in R.S. 9:315.14.

> E. After the basic child support obligation has been established, the total child support obligation shall be determined as hereinafter provided in this Part.

In a shared custody arrangement, La. R.S. 9:315.9(B) provides that "Worksheet B reproduced in R.S. 9:315.20, or a substantially similar form adopted by local court rule, shall be used to determine child support in accordance with this section."

In the present case, during the 5-day trial, the parties introduced more than 1500 pages of exhibits regarding child support. Three days before trial commenced on May 2, 2019, Peyton, under threat of contempt, reluctantly "supplemented" her previous Family Law Affidavit with documentation of her 2018 revenue. Peyton averred that she is a shareholder in four entities that distributed $2,141,903.00 to her in 2018, which was unusually high due to a one-time distribution on a five-year lease. Peyton also admitted that she received royalty payments totaling $16,204.60. Finally, she also stated that, as the beneficiary of a trust, she received income totaling $165,000.00. For 2018, Peyton received revenue totaling at least $2,323,107.60.Based on documentation that Peyton introduced, the trial court recognized that the most significant distribution to Peyton is attributable to a five-year lease, so the trial court divided the total lease payment that Peyton received and prorated it prospectively over the next five years, i.e., $1,973,747.80 ÷ 5 = $394,749.56 per year. To calculate Peyton's monthly income, the trial court took Peyton's total revenue minus the entire one-time lease payment, to find her remaining income, which is $349,359.80. To get Peyton's adjusted 2018 income, the trial court added the revenue to the prorated lease payment for a total of $774,109.36. The trial court found that, with an adjusted income of $744,109.36, Peyton's income per month in 2018 was $62,009.11. Landon testified that his adjusted gross income for 2018 was $37,291.00, which is $3,107.58 per month. He testified that he was a health insurance sales representative, which he had been since 2013. A Family Law affidavit, numerous bank account ledgers, and Landon's 2015 through 2018 federal income tax returns were introduced at trial. The trial court found that the evidence established that the monthly income of the parties for 2018 was $65,116.69, with Peyton's percentage of the monthly income being 95.23% and Landon's being 4.77%.

La. R.S. 9:315.13(B) provides, in pertinent part:

> If the combined adjusted gross income of the parties exceeds the highest level specified in the schedule contained in R.S. 9:315.19, the court: (1) Shall use its discretion in setting the amount of the basic child support obligation in accordance with the best interest of the child and the circumstances of each parent as provided in Civil Code Article 141, but in no event shall it be less than the highest amount set forth in the schedule; and

Further, La. R.S. 9:315.13, Comments, 2001, reads that child support is to be "measured by the standard of living enjoyed by the child while living with his intact family and upon the ability to pay of each of the parents."

In this case, as noted by the trial judge, $65,116.69 is well above the highest amount set forth in the child support schedules found in La R.S. 9:315.19. The highest

combined gross income on the current schedule is $40,000.00, and the highest child support award for three children would be $5,640.00. Here, the trial court awarded Landon $7,789.00 per month in child support, and ordered Peyton to pay the children's tuition, insurance, and other necessary and extraordinary expenses. As the amount of child support is tied to the obligor parent's ability to pay, coupled with the lifestyle the children enjoyed during the marriage, the evidence fully supports this amount. Testimony reflects that, during the marriage, Peyton, Landon, and, more importantly, their children, enjoyed a luxurious lifestyle of privilege, including private schools, international travel, luxurious homes, and luxury vacations. It is well settled that the district court's conclusions of fact regarding financial matters underlying an award of child support will not be disturbed in the absence of manifest error. McClanahan v. McClanahan, 14-670 (La. App. 5 Cir. 3/25/15), 169 So.3d 587, 593-95; Hall v. Hall, 08-706 (La. App. 5 Cir. 2/10/09), 4 So.3d 254, 259, writ denied, 09-812 (La. 5/29/09), 9 So.3d 166. Having reviewed all of the evidence and testimony, and considering the applicable law, we find no manifest error, or abuse of the trial court's discretion, in its setting of the amount of the child support award and, thus, affirm the award.

2 Calculation of the award

a The base calculation

1) Gross income

a) Actual income

1] Business income

Holleman v. Barrilleaux, No. 20-194, 2021 WL 484816 (La. App. 3 Cir. 2/10/21)

Facts: Lindley Scott Holleman and Natalie Louise Barrilleaux are the parents of a minor daughter, R.G.B., who was born on July 3, 2012. On September 11, 2013, the trial court heard evidence of the monthly incomes of the parents and set Holleman's monthly child support obligation at $1,922.95. After Barrilleaux appealed that judgment, this court raised Holleman's monthly child support to $4,161.31 to reflect Holleman's interests in undistributed profits in Hollemire International, LLC, a limited liability company in which he held a fifty percent interest.

On July 27, 2017, Holleman filed a rule to show cause why his monthly child support obligation should not be reduced. As his basis for the reduction, Holleman alleged a change in income as well as a downturn in the oilfield industry that seriously affected his income.

After hearing the testimony of Holleman and Barrilleaux and Holleman's father, James A. Holleman, on February 26, 2018, the trial court denied Holleman's motion for reduction of child support, finding he failed to prove a material change in circumstances. Subsequently, the trial court also denied Holleman's motion for a new trial without

conducting a contradictory hearing.

On August 1, 2018, Holleman timely filed a motion for appeal. On February 13, 2019, this court, relying on La. C.C.P. art. 19721, dismissed that appeal as premature because the trial court could not have denied a motion for new trial without conducting a contradictory hearing.

On April 16, 2019, Holleman's 2017 tax returns were entered into evidence as stipulated by the parties, and the trial court minutes reflect that Holleman submitted his argument for a new trial on the briefs. Thereafter, the trial court denied Holleman's motion for new trial. Judgment was rendered on May 15, 2019, and this appeal followed.

Holleman assigns as error that: (1) the trial court incorrectly denied his motion for a reduction in his child support payments by failing to consider his actual income due to a downturn in the oil business and that he no longer had any interest and/or imputed income from Hollemire International, a business he sold in 2016; and (2) the trial court's denial of his motion for new trial was incorrect because he now had new evidence that was unavailable at the time of the hearing on his motion for a reduction in child support.

Result: Affirmed.

Rationale: Whether we consider our judgment of 2014, which initially set Holleman's child support, or Holleman's subsequent failed attempt to reduce that obligation in 2016, a decision that apparently left in place our earlier award, it was Holleman's burden to prove his entitlement to a child support reduction.

In the present case, the designated record now before us fails to show Holleman presented a verified income statement; instead, he relied upon his 2017 tax returns, his W-2's, and his K-1.

We now turn to Holleman's contention that he no longer has a financial interest in Hollemire International, the keystone of our 2014 decision. He contends that his father purchased his interest in that enterprise, and it is now a shuttered business. Although that may be true, Holleman's only attempt to carry his burden of proof was his self-serving testimony and the testimony of his father which provided a conflicted acquisition timeline of his son's interest in Hollemire International.

Importantly, neither Holleman nor his father presented any documentation of this significant transaction. Holleman's effort in proving his disassociation from Hollemire International could have been aided had he provided the trial court with the various documents referenced in La. R.S. 9:315.2.

As observed in Jackson v. Belfield, 98-440 (La. App. 4 Cir. 11/25/98; 725 So.2d 32, 35,"[The father's] lack of cooperation and failure to comply with [La. R.S. 9:315.2] made it impossible for the trial court to establish his income with any degree of confidence. Such obstructiveness must not be rewarded; it should neither be allowed to inure to him nor to disadvantage his daughter." Those same tenets are applicable here. For these reasons, it is clear the trial court was not manifestly erroneous in denying Holleman's motion to reduce his child support obligation

Lastly, Holleman contends the trial court erred when it denied his motion for a new trial. In his motion for a new trial, Holleman contended that the trial court's judgment was contrary to the law and evidence. Holleman's motion for new trial was based on La. C.C.P. art. 1972(1). However, having found no merit to any of Holleman's arguments, we

are unable to say the trial court abused its discretion in denying Holleman's motion for new trial.

Holleman v. Barrilleaux, No. 20-195, 2021 WL 484747 (La. App. 3 Cir. 2/10/21)

Facts: Lindley Scott Holleman and Natalie Louise Barrilleaux are the parents of a minor daughter, R.G.B., who was born on July 3, 2012. On September 11, 2013, the trial court heard evidence of the monthly incomes of the parents and set Holleman's child support obligation at $1,922.95. After Barrilleaux appealed that judgment, this court raised Holleman's monthly child support to $4,161.31 per month to reflect Holleman's interests in undistributed profits in Hollemire International, LLC ("Hollemire International"), a limited liability company in which he held a fifty percent interest.

On June 27, 2018, Holleman filed yet another rule to show cause why his monthly child support obligation should not be reduced. As his basis for the reduction, Holleman alleged a change in income as well as a serious downturn in the oilfield industry that seriously affected his income.

On September 12, 2018, the trial court heard the testimony of the parents, Holleman and Barrilleaux, and took the matter under advisement.

Thereafter on May 28, 2019, the trial rendered a judgment with written reasons, denying Holleman's motion for reduction of child support.

On July 17, 2019, Holleman filed a motion for appeal. Holleman assigns as error that: (1) the trial court incorrectly denied his motion for a reduction in his child support payments by failing to consider his actual gross income; and (2) the trial court incorrectly relied on information other than his actual income to deny his request for a decrease in his child support.

Holleman contends the trial court manifestly erred when it found he failed to prove his employment circumstances materially changed sufficient to decrease his monthly child support obligation. He argues that it was unrefuted that he no longer had a financial interest in Hollemire International or any other business entity, that his only income was with Cardinal Coil Tubing, LLC ("Coil Tubing"), and that his child support obligation should have been lowered to $915.20, the amount found by the hearing officer.

Barrilleaux contends the trial court had to make credibility determinations about Holleman's gross monthly income, and its assessment was not manifestly erroneous. She further argues that Holleman failed to provide documentation and proof as required in La. R.S. 9:315.2 regarding his contention that he no longer had an ownership interest in Hollemire International or any other business entity.

In support of his motion for a reduction of his monthly child support obligation, Holleman denied having any current income from several former business entities which had been identified in his past child support hearings, namely: Hollemire International, the James and Kelly Holleman Family Trust, LLC ("Family Trust"), and Private Workforce Solutions, LLC. Instead, Holleman testified that his only income was his employment with Coil Tubing.

A letter dated March 2, 2018, from Coil Tubing was entered into evidence. The letter stated: “Mr. Lindley Holleman is being hired as an Equipment Operator and his date

of hire will be 03/05/18. As an Equipment Operator his hourly pay rate will be $15.00. The average hours worked are 60 hrs., which would be 40 hours paid as straight and 20 hours paid at time and a half pay rate. Equipment Operators are only guaranteed 20 hours pay per week when not working."

In addition, Holleman introduced his bank statements from Community First Bank for March 20, 2018 and May 20, 2018 through August 20, 2018. Each of those bank statements show that more money was withdrawn than was deposited.

Finally, Holleman presented his 2017 tax returns. That evidence was entered with the joint stipulation that "they were based solely on information provided by Lindley Holleman." Although there was no expert testimony regarding these returns, several line items bear notation: adjusted gross income is shown as $24,769.00; and itemized deductions are totaled as $40,003.00 (consisting, in part, of: $23,382.00 for income taxes and real estate taxes; $13,706.00 for investment interest; and $2,915.00 for investment expenses).

Result: Affirmed.

Rationale: Against that factual backdrop, we call to mind the onerous task before a trial court in its determination of child support and the burden of proof required of the mover in seeking a reduction of that child support obligation by having to show a material change of circumstances. Whether we consider our judgment of 2014, which initially set Holleman's child support, or Holleman's two subsequent failed attempts to reduce that obligation, decisions that left in place our earlier award, it was Holleman's burden to prove his entitlement to a child support reduction.

In the present case, the designated record now before us fails to show Holleman presented a verified income statement. Instead, he relied upon his 2017 tax return and his current employment with Coil Tubing.

At the hearing of this matter, Mr. Holleman repeatedly testified that he has no other source of income. However, he did testify that his parents will help him out if he needs help with bills, and when confronted with certain transactions on his bank statement, specifically a $10,000 deposit on February 26, 2018, of which $4,000 was taken in cash, admitted that his parents sometimes give him money when he is "in a bind." Further Mr. Holleman testified that he borrowed money from his parents in order to pay off his last child support arrearages of $63,000.00.

This is the third time Mr. Holleman has sought a decrease in child support alleging the same facts. However, the only evidence Mr. Holleman has produced with regards to this request is his own self-serving testimony, his check stubs from Cardinal Tubing, his bank statements from February 21 to August with no April statement, and his 2017 tax returns that were submitted with the stipulation that they were based solely on information provided by Mr. Holleman.

He has repeatedly testified that he no longer owns or receives money from Hollemire, LLC, however, the only evidence he has provided to support that allegation is his own self-serving testimony. He also alleges that he no longer owns or receives money from Workforce Solution, LLC, or The James A. and Kelly S. Holleman Family, LLC, but the only evidence he has provided to support that allegation is his own self-serving testimony. It raises the question that if his only source of income is Cardinal Tubing for

roughly $2,600 a month, where the $10,000 deposit came from.

Therefore, based on the evidence presented and submitted, that Mr. Holleman has not presented sufficient evidence to support a finding that his income has decreased warranting a decrease in child support. This Court finds that based on the totality of the circumstances, that the Mover did not successfully establish his income in its entirety, as evidenced by Mover's bank statements and testimony. Mover's spending habits support a belief that he has access to more money than he is alleging. Therefore, the Court finds that the Mover did not meet his burden of proof by presenting sufficient evidence to support a finding that there has been a material change in circumstances warranting a decrease in child support.

Holleman's self-serving effort in attempting to prove his disassociation from Hollemire International and other income streams could have been met had he provided the trial court with the various documents referenced in La. R.S. 9:315.2; he chose otherwise.

Likewise, as to the $10,000.00 deposit referenced in the trial court's written reasons, Holleman, without any documentation, asserted that he had cashed in his 401(k) because he needed money. Considering Holleman's repeated difficulties of proof in his earlier attempts to reduce his child support obligation, more than his self-serving testimony was needed to prove the source of that significant deposit.

As observed in Jackson v. Belfield, 98-440 (La. App. 4 Cir. 11/25/98; 725 So.2d 32, 35,"[The father's] lack of cooperation and failure to comply with [La. R.S. 9:315.2] made it impossible for the trial court to establish his income with any degree of confidence. Such obstructiveness must not be rewarded; it should neither be allowed to inure to him nor to disadvantage his daughter." Those same tenets are applicable here. Moreover, the trial court observed, for the first time, that Holleman's spending habits belied his allegation that his assets were limited. Under the provisions of La. R.S. 9:315.1.1(3), the trial court properly assessed Holleman's standard of living and assets both prior and subsequent to the establishment of the child support order to reach a conclusion regarding his actual income since "the amount claimed is inconsistent with his lifestyle."

For the foregoing reasons, it is clear the trial court was not manifestly erroneous in denying Holleman's motion to reduce his child support obligation. This trial court was very familiar with Holleman, his credibility, the issues of proof required in La. R.S. 9:315.2(A), and Holleman's past and present failures of proof.

Therefore, we find no manifest error in the trial court's rejection of Holleman's motion to reduce his child support obligation.

Magnon v. Magnon, 307 So.3d 1151 (La. App. 3 Cir. 11/18/20)

Facts: Jeremiah Magnon and Jessica Alleman Magnon were married on August 10, 2002. Two children were born of the marriage, A.M. born on August 30, 2002, and R.M. born on November 16, 2005. Subsequently, in 2014, Jessica sought a divorce as provided in Louisiana Civil Code art. 102 and initiated proceedings to determine the parents' child support obligations. By judgment dated November 26, 2015, the parties were granted

joint custody of the minor children with Jessica designated as the domiciliary parent; at that time, the trial court set Jeremiah's monthly child support at $1,977.73, retroactive to September 16, 2014.

Thereafter, on April 1, 2016, Jeremiah, the owner and sole member of Imperial Consulting, LLC, filed a motion to reduce child support. On January 20, 2017, during a hearing officer conference, child support was re-set at $838.90 per month retroactive to April 1, 2016. Subsequent thereto, both parties objected to the hearing officer's child support determination, and this matter proceeded to the trial court for adjudication. After numerous hearings and ongoing discovery disputes, including five motions to compel Jeremiah to provide accurate information concerning his income and expenses, the trial court conducted a trial on July 8, 2019, more than three years after Jeremiah filed his motion to reduce. At that time, the trial court heard from various witnesses, including two financial expert witnesses, Glenn A. Thibodeaux for Jeremiah and Rick L. Stutes for Jessica, who provided testimony regarding the determination of Jeremiah's monthly gross income.

After finding Jeremiah proved a material change in circumstances, in its final judgment dated July 10, 2019, the trial court set Jeremiah's monthly child support at $1,419.86, with arrearages set at $22,657.44, and costs payable to Jessica's expert in the sum of $8,000.00. Thereafter, on August 29, 2019, Jeremiah was granted a devolutive appeal.

In his sole assignment of error, Jeremiah contends that the trial court legally erred in incorrectly imputing certain business expenses for child support for the years 2016, 2017, and 2018.

Result: Affirmed.

Rationale: In *Baggett v. Baggett,* 96-453, (La. App. 3 Cor. 4/23/97); 693 So.2d 264, 269, this court applied La.R.S. 9:315(C)(3) to a business situation where someone owns their own company:

> [O]ne cannot avoid all or part of his obligations by exercising his exclusive control over a corporation wholly owned by him to limit his own salary. The definition of "gross income" for purposes of child support is far different from the standard used in calculating taxable income by the Internal Revenue Service. We initially note that for owners of closely held corporations, income is not calculated by adding together the value of benefits received with the owner's salary[.] The owner of a closely held corporation is more than an ordinary employee. He has unlimited access to the corporate accounts and has complete control over corporate policy. Because closely held corporations present the opportunity for underestimating the value of the benefits received, 9:315(C)(4) effectively disregards the corporate entity and provides that revenues of the corporation will be treated as revenues of its owner. It further provides that only expenses required to produce income are to be deducted from gross receipts in calculating gross income. Also, "any other business expenses determined by the court to be inappropriate" will be disallowed.
>
> To facilitate the determination of actual income in child support cases when one

of the parties is receiving benefits from a business in which he has an ownership interest and the other party alleges that the income of the obligor is being "concealed or underreported," the trial court "shall admit evidence relevant to establishing the actual income of the party[.]" The trial court has broad discretion in determining which figures are appropriate to use when calculating a parent's monthly gross income. Moreover, "[t]he party seeking to reduce his income by including ordinary and necessary expenses bears the burden of proving that the expenses were ordinary and necessary of the production of income."

The trial court determined Jeremiah's gross income, as that term is defined by La.R.S. 9:315(C)(3), by examining the financial records of Imperial Consulting and reviewing all expenses to determine if they met the criteria set out in Baggett.

Initially, Jeremiah contends the trial court erred when it excluded accelerated depreciation and compensation paid to officers. We disagree. With regards to the exclusion of accelerated depreciation, the trial court astutely rejected that argument. That determination is fully supported by La.R.S. 9:315(C)(3) which specifically provides that ordinary and necessary expenses "shall not include amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses[.]" Likewise, as to officer compensation the trial court duly noted it would make no sense to exclude such an item from the determination of gross income because Jeremiah is the sole officer in this C corporation; as such, Jeremiah's compensation is by definition an element of gross income to be considered in the determination of his child support obligation.

Next, regarding his 2017 and 2018 tax returns, Jeremiah contends that the trial court erroneously excluded rent deductions and improperly reduced "Other Deductions" while only considering 50% of the automobile and truck expense deduction. As to his 2016 tax returns, Jeremiah raises like objections.

From the outset, we recall that this case involves Jeremiah's sole ownership of a C corporation. We are further reminded that the trial court noted that almost three years passed between the filing of Jeremiah's motion to reduce child support and the trial of this matter. The trial court attributed this delay to the complexity in calculating gross income because Jeremiah owns his own company. Yet further, we point out that in addition to Jeremiah's testimony, the trial court heard conflicting expert testimony of Mr. Thibodeaux and Mr. Stutes on the question of Jeremiah's "gross income" as defined in La.R.S. 9:315(C)(3).

In the present case, the trial court provided thirty plus pages of well-expressed reasons for judgment. We note, too, that in its reasons for judgment the trial court specifically stated that it did not blindly accept one expert's opinion over the other; rather, it parsed each expert's opinion and fashioned its own resolution of the factual issue before it.

Unlike Jeremiah's assertion that his testimony and his expert's opinion should alone have been relied upon, we observe that Jeremiah's assertion fails to take into one critical role of the trial court-namely, its responsibility to determine the facts after judging the credibility of the parties and how that credibility determination affects the facts asserted.

In the present case, the trial court's oral reasons speak volumes about Jeremiah's

credibility. At the very beginning of its resolution of the sole factual issue before it, the trial court noted, "It's impossible and I mean it is impossible to determine which ... of the expenses are personal and which are company expenses in this case." The trial court explained that the basis for this observation was that Jeremiah was "using his company credit card, his company bank account as his own personal bank account[.]"

Later, when the trial court addressed the "other deductions" schedule on Jeremiah's corporate tax return, it stated with reference to its 50% reduction of automobile and truck expenses that the evidence simply did not preponderate in Jeremiah's favor. As the trial court stated, "The testimony is confusing, it's convoluted, in a lot of respects it's simply just unbelievable." With regards to its rejection of rental expenses, the trial court stated

> [T]hese are rents paid by your company to you on properties, again, three properties, where you live, where the server is, whether the server can be used for your own personal usage, all of that. It doesn't make any sense. The testimony, none of it, it is as convoluted as I've ever heard. All the rents those are excluded, they are not deducted for purposes of me calculating child support for your gross monthly income.

After reviewing this record in light of the law and the trial court's factual determinations, we find the trial court fully explained its resolution of this convoluted and confusing evidence, fully examining the expert testimony as well as assessing Jeremiah's credibility. Accordingly, we find the trial court's determination of Jeremiah's child support obligation was fully supported by the record and was neither manifestly erroneous nor clearly wrong.

Wisecarver v. Wisecarver, No. 19-1217, 2020 WL 5587092 (La. App. 1 Cir. 9/18/20)

Facts: Kristyn Wisecarver and Glen Wisecarver were married on February 12, 2000, and are the parents of two children, M.J.W., born in 2003, and S.A.W., born in 2001. On October 5, 2010, Kristyn filed a petition for divorce. While the divorce proceedings were pending, by agreement of the parties, the trial court signed a stipulated judgment on November 29, 2010, granting Kristyn and Glen joint custody of the children, with Kristyn designated as the domiciliary parent. Under this judgment, Glen was responsible for paying child support in the amount of $1,950.00 per month. Thereafter, the trial court signed a judgment of divorce on April 15, 2013.

On July 24, 2017, Kristyn filed a rule for contempt, to suspend and modify custody, and to modify child support, contending that a material change in circumstances had occurred. Kristyn alleged that a change in the needs of the children and the income of the parties had occurred, necessitating a modification of child support. Additionally, she alleged that Glen had failed to follow the previous consent judgment and should be found in contempt of court for his failure.

In response, Glen filed exceptions of no cause of action and vagueness, arguing that Kristyn's rule contained conclusions without supporting material facts. Kristyn opposed the exceptions, but also filed an amended pleading further expanding on her allegations before the matter was heard. After a hearing, the court denied the exception of

no cause of action, but granted the exception of vagueness, giving Kristyn fifteen days to amend her pleading.

On April 12, 2018, Glen filed a rule for contempt against Kristyn, alleging that she had not adhered to certain provisions in the 2010 stipulated judgment. On April 13, 2018, Glen filed a rule to decrease child support, alleging that he had undergone neck and back surgery, with additional surgeries scheduled. He also alleged that he had filed for disability and his income was "less than $5,000[.00] per month," which was "significantly less than his previous salary," warranting a decrease in his support obligation.

Kristyn's and Glen's rules were set for hearing and continued several times, until a hearing was eventually held on January 16, 2019. At the hearing, both parties agreed to dismiss their respective rules for contempt, and Kristyn dismissed her rule to suspend and modify custody. Accordingly, the only remaining matters to be heard were the parties' cross-motions to modify child support. Both parties testified and presented evidence. At the end of the testimony, the trial court left the record open for fifteen days, and invited both sides to file post-trial memorandums before a decision would be rendered.

Thereafter, on April 9, 2019, the trial court signed a judgment, granting Kristyn's rule for modification of child support and denying Glen's rule to decrease child support. The trial court found that although Glen alleged that his income was less than $5,000.00 per month, he testified that his total monthly income was actually $13,960.00. Additionally, relying on the definition of gross income found in La. R.S. 9:315(C)(3) and Glen's twenty-five percent ownership interest in Wechem, Inc., his family's company, the trial court imputed to him additional income of $3,000.00 per month for income from the business.

The trial court also found that, despite Glen's assertions, although Kristyn was already certified as an LPN, she was not voluntarily underemployed while working 30 hours per week at an insurance company in order to complete nursing school. Accordingly, utilizing child support obligation Worksheet A as found in La. R.S. 9:315.20, the trial court increased Glen's child support obligation to $2,284.00 per month and ordered him to pay an additional $100.00 per month "towards the accrual amount until satisfied."

Glen then filed the instant appeal, asserting that: (1) The trial court erred in finding that he received an additional $3,000.00 per month in income from Wechem in 2018; and (2) The trial court erred in considering Wechem, Inc.'s corporate retained earnings for the years 2014-2016, when the trial was based on income from 2018, and evidence indicated that Wechem was operating at a loss in 2018. Kristyn contends that the trial court did not abuse its discretion in considering Glen's 2014, 2015, and 2016 tax returns, rather than Wechem's profit/loss statement for 2018, as the returns showed only substantial growth and profit for the business. After careful review, we agree.

Result: Affirmed.

Rationale: Despite Glen's contention that the trial court erred in considering his 2014-2016 income in making its ruling, a child support obligation is subject to modification only when there has been a change in circumstances between the time of the prior support award and the time of the motion for a modification. Further, according to La. R.S. 9:315.2(A) "[w]hen an obligor has an ownership interest in a business, suitable

documentation shall include but is not limited to the last three personal and business state and federal income tax returns." Accordingly, we find no error by the trial court in its decision to consider Glen's 2014-2016 tax documents in determining whether there was a change of circumstances and in determining his income from Wechem.

Additionally, we note that neither party submitted a copy of their most recent tax return as required by La. R.S. 9:315.2(A), which at the time of the hearing would likely have been their 2017 returns. As such, we find Glen's reliance on the requirement in La. R.S. 9:315.2(A) that child support be calculated based solely on current income documentation is misplaced under the facts of this case.

On appeal, Glen makes a broad allegation that the trial court erred in imputing $3,000.00 per month in income from Wechem to him given Wechem's 2018 profit/loss statement showing an operating loss for 2018. However, the trial court's judgment demonstrates that the court carefully considered the evidence and found that, although Wechem's profit/loss statement showed on paper that the company was operating at a loss in 2018, Glen had an admitted history of not drawing earnings from the company "in order to let it grow." As such, the trial court had a right to choose whether or not Glen's testimony that he would not receive any additional draws from Wechem was credible.

Contrary to Glen's assertions, the trial court would err in not considering Wechem's retained earnings in its calculation of Glen's gross income, as La. R.S. 9:315(C) recognizes that these amounts are still considered income for purposes of the child support calculation.

In assessing Glen's income, the court examined his 2014-2016 personal tax returns, and reviewed Wechem's 2018 profit/loss statement, as well as his disability insurance policy, and found that the court was presented with "two vastly different income amounts." The trial court acknowledged that the insurance company calculated his disability insurance based on total monthly earnings of $14,000.00, but recognized that under La. R.S. 9:315(C)(5), "the definition of income is 'actual income of a party'" and that his tax returns reflect that he was earning substantially more income than the $14,000.00 amount.

Considering the evidence in the record, we find no manifest error in the trial court's factual findings as to the amount of Glen's income or in its decision to impute $3,000.00 in additional income for monies from Wechem. As the trier of fact, the trial court was entitled to accept or reject, in whole or in part, any witness's testimony, particularly where, as here, Glen's income was shown to be significantly higher than the amount he claimed.

Dissent (Guidry, J.): I find that the trial court erred by imputing to Mr. Wisecarver an additional $3,000.00 in monthly income for his business ownership interest. While I agree with the majority that the trial court would err in not considering retained earnings from Mr. Wisecarver's business in its calculation of his income, I nevertheless find that nothing in the record supports the trial court's determination on the amount of additional income imputed to Mr. Wisecarver. Consequently, based on the record herein, this court is unable to determine what information was used or what conclusions of fact were reached by the trial court in arriving at its figure.

While we review judgments, and not reasons for judgment, there must nonetheless

be evidentiary support for a ruling. In cases where the record contains inadequate information and documentation upon which to make a child support determination under the guidelines, a remand to the trial court is necessary. I would therefore vacate the trial court's determination of $3,000.00 in additional business income imputed to Mr. Wisecarver and remand this matter to the trial court.

Bailey v. Bailey, 297 So.3d 58 (La. App. 3rd Cir. 3/11/20)

Facts: This matter stems from a contested divorce proceeding initiated by the filing of petitions by both parties. The parties were married on November 25, 2006 in Las Vegas, Nevada but resided together as husband and wife in Leesville, La. They have one child born of the marriage, L.E.B. The initial petition for divorce was filed by [Chuck] on March 9, 2015. Appellant sought the joint and shared custody of the minor child, L.E.B. Appellant alleged that the parties had agreed that no child support would be paid by either party. Appellee answered Appellants First and Second Amending and Supplemental Petitions and filed her First Amending Reconventional Demand.... Said Amendment alleged that Appellant, [Chuck], was physically abusive to Appellee during the parties marriage, again seeking primary custody of L.E.B, seeking child support and a divorce. The court ordered memorandum of law and child support worksheets from the parties. A Judgement was signed on August 17, 2018 awarding the parties joint custody of the minor child, with [Tara]; ordering [Chuck], to pay child support in the amount of $325 per month; finding [Chuck] to be in arrearage of his child support obligation and rendering a judgement against him and in favor of [Tara], in the amount of $14,716.40, to be repaid in the minimum amount of $150 per month. [Chuck] filed a timely Motion for New Trial.... Said Motion was ... heard on December 6, 2018. While the motion for new trial was pending, [Tara] applied for services with the Louisiana Department of Social Services for enforcement and collection of the child support order and arrearages. An enforcement order was filed on September 7, 2018 CS Order and signed by the Honorable C. Anthony Eaves on September 13, 2018, designating DSS as the payee for the child support obligation and transferring jurisdiction over the child support order to the 30th JDC Juvenile court for subsequent enforcement and modification. [Tara], filed 2 rules for Contempt of Court against [Chuck], alleging his failure to pay child support during the pendency of the Motion for New Trial, and his failure to pay attorney fees ordered in the contempt judgement. Those rules were also fixed for hearing on December 6, 2018. On December 6, 2018, the Court denied Appellant[']s Motion for New trail [sic] and requested Memoranda from counsel on issues raised at the hearing. A collection action by Support Enforcement was also heard on December 14, 2018. Appellant filed a Memorandum and Appellee requested the matters be dismissed. Chuck timely appealed.

Result: Affirmed.

Rationale: Guidelines for Determination of Child Support are set forth in La.R.S. 9:315 through 9:315.26. "A child support award is entitled to great weight and will not be disturbed on appeal absent an abuse of discretion." Lavigne v. James, 15-19, p. 3 (La.App. 5 Cir. 5/14/15), 170 So.3d 1163, 1165. However, "a district court's conclusions of fact regarding financial matters underlying an award of child support will not be disturbed in the

absence of manifest error." Id. at 1166.

During the trial of this matter, both Chuck and Tara submitted sample worksheets for the trial court to consider in its calculation of the future child support of Loryn. In the two worksheets he submitted, Chuck asked that Tara be ordered to pay him either $105.00 or $9.64 per month in child support. Tara submitted worksheets supporting her request that Chuck be ordered to pay her either $499.07 or $1,079.71 in monthly child support. In addition, Tara submitted documentation of the amount of past-due child support she was seeking retroactive to 2015, which totaled just of $25,071.06. During her testimony on the second day of trial, Tara noted that, several weeks prior, Chuck gave her $300.00 to put toward the child support arrearages that he owed. At the conclusion of trial, the trial court took the matter under advisement and ordered the parties to submit post-trial memorandums. Chuck's post-trial memorandum did not address the issue of child support. In her post-trial memorandum, Tara submitted an additional child support worksheet based upon the testimony that was elicited at trial wherein she updated her request for prospective child support to be paid by Chuck to the amount of $2,856.69. She also upped her request for child support arrearages owed by Chuck to $30,213.78.

In its written RULING OF THE COURT, the trial court stated, "Child support in this matter is very difficult to determine because of the variation in the income of Mr. Bailey." Thereafter, the trial court explained how it arrived at the figure to use for Chuck's income:

> s Clearly in 2015 he made $109,340.0[0]. In 2016 his W-2 shows $81,597.00 for that year. His W-2 for 2017 shows income of $62,250.00. However, he stated under oath that his company, a consulting firm, made $72,000.00 in Afghanistan for approximately one month. He also stated he made approximately $3,500.00 per month for the months of April through December of 2017 for a total of $31,500.00. He also testified he received approximately $3,000.00 per month for unemployment. While Mr. Bailey testified as to what his company made, he did not testify as to what he received. The Court also takes note of the fact that at least two court dates were continued because Mr. Bailey was out of the country working.
>
> However, because of the unknowns in determining the income of Mr. Bailey, the Court is going to use the amount of $109,340.00 for the year 2015, the amount of $81,597.00 for the years 2016 and the income of $70,000.00 for the year 2017. Because of the disparity of income, the Court is going to use this three year average. This brings the monthly income for Mr. Bailey to $7,248.25.
>
> With that being said, the monthly child support obligation owed by Mr. Bailey would calculate to $325.00 per month, based on shared custody, with Mr. Bailey's percentage being 68% and Ms. Lynn's being 32%.

On appeal, Chuck acknowledges that the amounts the trial court used for the years 2015 and 2016 are correct. With regard to his 2017 income, Chuck's 2017 W-2 lists his wages as $52,124.95. His W-2 does not include the $72,000.00 that he testified he was paid for work he did overseas in November and December 2017 after starting his own

consulting firm. With regard to the amount of his income at the time of trial to be used in calculating prospective child support, Chuck insists that the trial court erred in averaging three years of his prior earnings. He submits that the trial court should have imputed either minimum wage or $0.00 income to him, such that Tara would owe him $305.99 in prospective child support. Moreover, while he claimed at trial to have incurred start-up costs and expenses associated with his business, Chuck did not provide the trial court with any testimony or documentary proof of those actual costs and expenses. Having failed to do so, Chuck is precluded from arguing that the trial court failed to deduct any amounts from his 2017 gross income. See Lavigne, 170 So.3d 1163.

In her appellee brief, Tara notes that in January of 2018, Chuck filed a Motion to Continue in this matter due to him working overseas. She contends that "[a]lthough no income was offered for the overseas work, it was for a longer period of time then his previous trip[,] ... it is totally reasonable to conclude he made a minimum of $72,000, consistent with his previous trip." Tara submits that as "neither amount was included in [Chuck's] 2017 income, both should be included in his 2018 income."

A sizable disparity exists between Chuck's 2017 W-2 and the amount of income he testified as to actually having earned during that year. Likewise, he would have the income that he earned while working overseas in early 2018 ignored for purposes of determining his post-trial child support obligation. Given the totality of the circumstances, we find no manifest error in the trial court's "conclusions of fact regarding financial matters underlying [its] award of child support" in this matter. Lavigne, 170 So.3d at 1166. The explanations provided in its RULING OF THE COURT demonstrate that the trial court painstakingly considered the evidence before it in fashioning the appropriate child support to be awarded. Our review of the record reveals no abuse of discretion in that award.

Bernstein v. Bernstein, No. 2019-1106, 2021 WL 503309 (La. App. 4th Cir. 2/10/21)

Facts: On February 6, 2017, Mrs. Bernstein filed a Petition for Divorce. In her petition, she requested to be granted child support. Trial on Mrs. Bernstein's Rules for Child Support and Interim Spousal Support was originally set for July 27, 2017. The record shows that Mr. Bernstein moved to continue the July 27, 2017 trial. The trial court granted the continuance, and the trial was reset for September 7, 2017. On September 6, 2017, the trial court again granted Mr. Bernstein a continuance of the trial, and scheduled the trial on Mrs. Bernstein's Rules for Child Support and Interim Spousal Support for January 23, 2018. The parties were divorced on September 7, 2017 and parties entered into an Interim Consent Judgment which required Mr. Bernstein, on an interim basis, to: (1) pay $3,000.00 per month directly to Mrs. Bernstein as child support; (2) maintain the children's health insurance; (3) pay the "meet fees" associated with the children's gymnastics activities; (4) pay the cell phone bill for Mrs. Bernstein and the minor children; and (5) pay the mortgage, taxes, and insurance on the former family home, subject to his right to claim reimbursement. Mr. Bernstein was not required to pay any uncovered medical or extracurricular expenses for the children. Thereafter, on January 12, 2018, Mrs. Bernstein filed a Motion for Advance of Community Funds and in her motion,

Mrs. Bernstein noted her concern that her Rule for Child Support, scheduled for January 23, 2018, would be continued yet again because Mr. Bernstein had not produced the necessary documents to determine his income through discovery. On January 22, 2018, after Mr. Bernstein's counsel suffered a serious injury which prevented him from representing Mr. Bernstein in trial, the trial court granted another continuance in favor of Mr. Bernstein, and continued the January 23, 2018 trial of Mrs. Bernstein's Rules for Child Support. On February 6, 2018, the trial court reset all other matters previously scheduled for January 23, 2018-including Mrs. Bernstein's Rule for Child Support-to July 23, 2018. The trial court reset trial on Mrs. Bernstein's Rule for Child Support on April 12, 2019. The bench trial on Mrs. Bernstein's Rules for Child Support commenced on April 12, 2019. On April 12, 2019, the trial court heard testimony from Mrs. Bernstein and her financial expert, Jeffrey E. Meyers, CVA, MAFF, CFE. Trial was recessed and resumed on June 24, 2019, wherein the trial court heard additional testimony from Mr. Meyers based on documentation that Mr. Bernstein provided after the first day of trial and from Mr. Bernstein's financial expert, Jon Folse, CPA. The trial court also heard testimony from Mr. Bernstein's brother, Paul Bernstein, and Mr. Bernstein himself. The record reflects that, on June 23, 2019, the night before trial was to resume on June 24, 2019, Mr. Bernstein forwarded additional discovery materials to counsel for Mrs. Bernstein at 10:55 p.m., which included a statement of Mr. Bernstein's income and expenses. The trial court disallowed any evidence of Mr. Bernstein's expenses to be admitted at trial, as sanction for his late discovery responses. After trial, the parties submitted post-trial memoranda. On September 9, 2019, the trial court rendered judgment on Mrs. Bernstein's Rule Child Support. The trial court ordered Mr. Bernstein to pay $4,082.00 per month in child support dating back to the date of demand, with arrears to be calculated by the parties by taking in consideration past support payments made by Mr. Bernstein.

Result: Affirmed.

Rationale: Mrs. Bernstein assigns the following errors on appeal: (1) the trial court erred in its calculation of Mr. Bernstein's income in calculating the child support award; and (2) the trial court erred in failing to order each party to pay its respective pro-rata percentages of certain add-on expenses of the minor children, despite noting that these expenses should be paid in its reasons for judgment.

1. Calculation of Mr. Bernstein's Income for the Child Support Award. – Mrs. Bernstein contends that the trial court improperly determined that Mr. Bernstein's gross monthly income was $28,292. Mrs. Bernstein maintains the trial court ignored testimony from her financial expert Mr. Meyers, as well as evidence that showed Mr. Bernstein received income in the form of a salary from his employer, Tire Town, and also received other cash distributions from his interests in his family business, Delta World Tire, and that Delta World Tire made direct payments to the Internal Revenue Service to cover Mr. Bernstein's personal tax debt. Mrs. Bernstein contends that the trial court should have included these payments in its calculation of Mr. Bernstein's income, and accordingly, should have concluded that Mr. Bernstein's gross monthly income was $41,626 for purposes of calculating the award.

Based on the principle that "child support is a continuous obligation of both

parents, whose current income the child is entitled to share, as the child should not be the economic victim of a divorce or an out-of-wedlock birth," La. R.S. 9:315 et seq. provides the guidelines for a trial court's determination of child support by calculating the combined gross income of both parents. The child support "obligation must be administered and fairly apportioned between parents in their mutual financial responsibility for their children; toward that end, guidelines balance the needs of children with the means available to parents." Id., 2005-1965, pp. 5-6, 934 So.2d at 690. Importantly, "[t]he trial court's discretion in setting the amount of child support is structured and limited." Id., 2005-1965, p. 5, 934 So.2d at 690. There is a rebuttable presumption that the amount of child support set by use of the guidelines is the proper amount. La. R.S. 9:315.1(A). The court may deviate from the guidelines, however, if the application of the guidelines would not be in the best interest of the children or if it would be unequitable to the parties. La. R.S. 9:315.1(B)(1). If the trial court deviates from the guidelines, the trial court "shall give specific oral or written reasons for the deviation, including a finding as to the amount of support that would have been required under a mechanical application of the guidelines and the particular facts and circumstances that warranted a deviation from the guidelines" and "[t]he reasons shall be made part of the record of the proceedings." Id. "The trial court's failure to follow the mandatory procedure for deviation set forth in La. R.S. 9:315.1, constitutes legal error which precludes review of the deviation under the manifest error standard of review." Dufresne v. Dufresne, 2010-963, p. 8 (La. App. 5 Cir. 5/10/11), 65 So.3d 749, 755 (citing State, Dept. of Social Services ex rel. D.P. v. Pineyro, 2008-1213, p. 5 (La. App. 5 Cir. 4/7/09), 13 So.3d 193, 195-96.

In calculating a parent's gross income, it is important to note that "income" is not limited to salaries. Dejoie v. Guidry, 2010-1542, p. 8 (La. App. 4 Cir. 7/13/11), 71 So.3d 1111, 1117. "Instead, 'gross income' includes 'income from any source,' such as salaries, dividends and interest." Id. (citing La. R.S. 9:315(C)(3)(a)). "Also, 'gross income' includes significant in-kind payments from self-employment which reduce the parent's personal living expenses as well as a parent's closely held corporation's gross receipts 'minus ordinary and necessary expenses required to produce income.' " Id. (citing La. R.S. 9:315(C)(3)). A parent's gross income can include in-kind payments, which "include but are not limited to a company car, free housing, or reimbursed meals." La. R.S. 9:315(C)(3)(b).

The trial court noted that Mr. Bernstein earned income from Tire Town and Delta World Tire, and numerous real estate entities. The trial court recounted that it heard extensive testimony about the direct payments made by Delta World Tire to the Internal Revenue Service to cover Mr. Bernstein's tax liability. The trial court held that it would deviate from the guidelines in calculating Mr. Bernstein's income because using the direct payments from Delta World Tire to the Internal Revenue Service in calculating Mr. Bernstein's income would be inequitable to the parties.

In Melancon, the wife held an interest in her family's business, for which she received a Schedule K-1 for income tax purposes that listed the capital gains and income attributable to her interest in the company. Testimony at trial, however, showed that the wife never received any funds from the company. Instead, they were retained and

reinvested in the company. The trial court found that this interest should not be used in calculating the wife's income because she never actually received any money and had no authority to cause the distributions to be made.

Mr. Bernstein's tax distributions are similar here. Mr. Paul Bernstein, the President of Delta World Tire and Mr. Bernstein's brother, testified at trial that the cash earnings are retained by Delta World Tire, although treated as taxable income under the U.S. Internal Revenue Code. The earnings are used by Delta World Tire to grow the business and the money is never actually distributed. Likewise, Mr. Bernstein's expert CPA Mr. Folse also testified that there is an agreement in place for Delta World Tire to cover the income tax for its shareholders, such as Mr. Bernstein, of Delta World Tire and the shareholders of Delta World Tire's flow-through entities. Thus, the record shows that Mr. Bernstein never actually receives the money; rather, it is paid directly to the Internal Revenue Service or reinvested by Delta World Tire. Mr. Bernstein has no control over the payments or when they are disbursed. Thus, he could not use it for support purposes. The record supports the court's finding that using these direct payments would be inequitable to the parties, and it was not manifestly erroneous.

The record further supports the trial court's determination of Mr. Bernstein's income, as Mrs. Bernstein's financial expert Mr. Meyers testified that Mr. Bernstein's taxable income was $339,500 annually, or $28,292 per month in 2017. Based on the record, and the fact that the trial court articulated specific reasons for deviating from the guidelines-finding that to apply them mechanically would be inequitable-it cannotbe said that the trial court's calculation of income and its child support award of $4,082 based on the parties' combined income is manifestly erroneous. We affirm the trial court's calculation of Mr. Bernstein's income and the child support award amount.

2] Personal injury settlements

State Department of Social Services v. Heard, No. 20-0708, 2021 WL 727922 (La. App. 1 Cir. 2/25/21)

Facts: In proceedings initiated by DCFS and pursuant to several judgments, Mr. Heard has been declared the biological father of or acknowledged paternity of six children with Julia Ann Ford, and he has been ordered to pay child support for all six children. The last judgment prior to the commencement of the proceedings at issue in this appeal was rendered and signed on February 10, 2014. Therein, the trial court set Mr. Heard's monthly child support obligation for his six children at the sum of $627.00 per month, payable in two equal semi-monthly installments of $313.50 each, and it ordered that "an Income Assignment Order be made effective immediately ...."

The February 1, 2014 judgment further provided "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if there is any arrearage [owed by Mr. Heard], [DCFS] reserve[d] the right to intercept lump-sum payments such as, but not limited to, federal and state income tax refunds, settlements, lottery winnings or inheritance."

Mr. Heard failed to pay his monthly child support obligation and was in in arrears. By judgment signed on October 28, 2013, Mr. Heard's child support arrearage was set, as

of that date, in the amount of $32,560.01, with said sum being made executory.

The October 28, 2013 judgment likewise provided for an Income Assignment Order to be made effective immediately and contained the provision that provided "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if there is any arrearage, [DCFS] reserve[d] the right to intercept lump[-]sum payments such as, but not limited to, federal and state income tax refunds, settlements, lottery winnings or inheritance."

Ms. Grodner was retained by and represented Mr. Heard in an unrelated personal injury matter. After learning of Mr. Heard's personal injury claim, on February 27, 2018, DCFS sent Ms. Grodner, as "the Payor of Income" a "NOTICE OF ASSIGNMENT - LUMP SUM" setting forth that Mr. Heard "was ordered to pay $313.50 per semi-monthly for [child] support" and that as of the date of the letter, Mr. Heard owed $58,439.96 in past due support. The notice further set forth that under La. R.S. 46:236.3, DCFS was entitled to an income assignment and that the "past due support [was] to be withheld from any payments due [Mr. Heard], including but not limited to bonuses, judgments, settlements, annuity, and retirement benefits" and that the notice would "remain in effect until further notice."

Almost a year later, on February 21, 2019, after Ms. Grodner had negotiated a settlement on behalf of Mr. Heard, but prior to dispersing the proceeds, Ms. Grodner responded to DCFS's February 27, 2018 notice. Therein, Ms. Grodner acknowledged receipt of the notice; however, she asserted that there was no legal basis for DCFS's claim to any of the settlement proceeds because La. R.S. 36:236.3 and the definition of income therein did "not cover lump[-]sum personal injury settlements."

Although Ms. Grodner acknowledged that the definition of "income" set forth in La. R.S. 46:236.3 included "settlements," she claimed that the use of that term therein related to a workers' compensation or other settlements of wages and not to settlements for personal injuries. Ms. Grodner further argued that lump-sum settlements from personal injury claims were not considered "income" under La. R.S. 46:236.3 because settlements from personal injury claims could not be considered income for purposes of calculating a parent's child support obligation (or the modification thereof) under La. R.S. 9:315, et seq. Ms. Grodner then closed the letter by stating: "We are not able to find any legal basis for your office to assert any lien over the settlement in this case. If we do not receive legal support for the lien asserted in this matter within fifteen (15) days, we will disburse the settlement proceeds to Mr. Hillary Heard."

Approximately thirteen days later, on March 6, 2019, DCFS issued another "NOTICE OF ASSIGNMENT - LUMP SUM" to Ms. Grodner that was identical to the February 27, 2018 notice, except that it set forth that Mr. Heard's arrearages, as of March 6, 2019, were $66,146.46. Again, the notice specifically stated that under La. R.S. 46:236.3, DCFS was entitled to an income assignment and that the past due child support was to be withheld from "any payments due to [Mr. Heard], including, but not limited to, bonuses, judgments, settlements, annuity, and retirement benefits" and that the notice would "remain in effect until further notice."

Attached to the notice of income assignment was an income assignment order, which was dated November 5, 2009, that provided "IN ACCORDANCE WITH [LA.] R.S. 46:236.3, IT IS ORDERED ... [t]hat the PAYOR of any income including, but not

limited to ...any other payments made by any person, private entity ... shall withhold from the income of ... [Mr. Heard] ... to satisfy [Mr. Heard's] current obligation of support[,] together with an additional sum ... to discharge the past due amount," as well as a copy of the pertinent provisions of La. R.S. 46:236.3.

DCFS asserted to Ms. Grodner that "[p]er La. R.S. 46:236.3(3), income means any form of singular or periodic payment to an individual [and] includes settlements" and requested Ms. Grodner forward to DCFS a copy of the settlement statement. Ms. Grodner responded on March 7, 2019, essentially disagreeing with DCFS's position that a one-time lump-sum settlement on a personal injury claim was income, claiming that "the courts have found otherwise." Ms. Grodner closed the letter by stating "[i]f we do not hear from your office in ten days, we will find that your office concedes that, as a matter of law, it does not have a valid lien on any settlement in this matter."

On April 9, 2019, Ms. Grodner disbursed the sum of $4,480.02 to Mr. Heard, which sum represented the settlement amount of $20,000.00, less Ms. Grodner's 35% attorney's fees, her expenses, and medical bills that had been paid on Mr. Heard's behalf. Ms. Grodner did not withhold, pay, disburse, or forward any sums to DCFS for Mr. Heard's monthly child support obligation or the arrearage, as provided in the notices of assignment. Therefore, on April 26, 2019, DCFS filed a rule for contempt of a payor pursuant to La. R.S. 46:236.3 urging that Ms. Grodner should be held in contempt for disbursing the entirety of the net proceeds from the settlement to Mr. Heard and failing to withhold any amount for child support or the arrearage, as mandated by the trial court and La. R.S. 46:236.3.

After several delays, an evidentiary hearing on the rule for contempt was held on September 23, 2019. On October 21, 2019, the trial court issued written reasons for judgment and signed a judgment in favor of DCFS and against Ms. Grodner in the amount of $4,480.02, which sum was made executory. The judgment further ordered that Ms. Grodner pay a fine of $25.00 per day, commencing April 10, 2019 (the day after she disbursed the net settlement proceeds to Mr. Heard), for her failure to withhold or pay over the support in accordance with the provisions of the notice of income assignment, with the fine to continue until all amounts due under the judgment were paid in full.

From this judgment, Ms. Grodner appeals. Ms. Grodner contends that the trial court erred in: (1) finding that lump-sum personal injury settlements were included within the statutory definition of "income" such that Mr. Heard's lump-sum personal injury settlement was subject to a notice of income assignment or income assignment order; (2) finding that the income assignment order produced by DCFS applied to "settlements" either by its terms or by reference to statute; (3) failing to apply the statutory deadline by which DCFS was required to produce an income assignment order to preserve its right to intercept funds on a lump-sum disbursement; and (4) finding that her conduct in disbursing the lump-sum net settlement proceeds was willful, casting her in judgment, and ordering her to pay a daily fine.

Result: Affirmed.

Rationale: First, we address Ms. Grodner's contention that personal injury settlements are not included within the definition of "[i]ncome" set forth in La. R.S. 46:236.3(A)(3). For purposes of enforcing child support by income assignment, La. R.S. 46:236.3(A)(3)

provides that "[i]ncome" means "any form of singular or periodic payment to an individual, regardless of source, including but not limited to ... settlements ... and any other payments made by any person ...." "Settlement" is defined, in pertinent part, by Black's Law Dictionary (11th ed. 2019) as "[a]n agreement ending a dispute or lawsuit." Notably, La. R.S. 46:236.3(A)(3) does not modify, define, or limit the term "settlements" in any way; rather, the term "settlements" is used in the illustrative list of examples of the payments to an individual that are considered to be "income" for purposes of enforcement of child support obligations by income assignment.

Applying the plain language of La. R.S. 46:236.3(A)(3), we find that a settlement of a personal injury claim constitutes a singular or periodic payment to an individual, and thus, is "income" for purposes of the enforcement of child support by income assignment. To find otherwise requires us to read language into the statute distinguishing or limiting the types of "settlements" included within the statute's purview, when the legislature chose not to include such language.

To the extent that Ms. Grodner contends that personal injury settlements should be excluded from "income" as defined by La. R.S. 46:236.3(A)(3), we agree with the trial court's conclusion, in its written reasons for judgment, that the cases relied on by Ms. Grodner (Kelly v. Kelly, 99-2478 (La. App. 1 Cir. 12/22/00); 775 So.2d 1237; State Dept. of Social Services v. Reed, 16-171 (La. App. 5 Cir. 7/27/16); 197 So.3d 817; and Guy v. Guy, 600 So.2d 771 (La. App. 5th Cir. 1992)) are distinguishable. As the trial court noted, "[e]ach of the cited cases holds that lump[-]sum settlements and life insurance proceeds are not considered 'income' when calculating or modifying child support pursuant to La. R.S. 9:315, et seq." In this regard, we note that unlike La. R.S. 46:236.3(A)(3), neither the phrase "any form of singular or periodic payment to an individual, regardless of source" nor the term "settlements" are included in the definition of "gross income" set forth in La. R.S. 9:315(C)(3). Indeed, La. R.S. 46:236.3(A)(3) and La. R.S. 9:315(C)(3) are separate statutes providing for different definitions of income for different purposes. As the trial court further noted, in this case, DCFS "is not seeking to establish [or modify] support [in accordance with La. R.S. 9:315, et seq.] but instead, [is] seeking to enforce Mr. Heard's child support obligation by income assignment pursuant to La. R.S. 46:236.3" Thus, we find the trial court correctly determined that a personal injury settlement is income for the purposes of the enforcement of child support by income assignment.

Next, we address Ms. Grodner's contention that the income assignment order produced by DCFS did not encompass the personal injury settlement disbursed to Mr. Heard because the income assignment order did not contain the word "settlements." However, at the outset, we point out that pursuant to La. R.S. 46:236.3(B), the order for an income assignment is "effectuated immediately by providing written notice to the payor or payors of income" and by "advising the payor to withhold an amount for current support ...plus an additional amount, to be determined by [DCFS], toward any arrearage." Further, the payor's obligation to withhold such sums commences "[u]pon receipt of a notice to withhold." Herein, DCFS first issued a notice of assignment to Ms. Grodner, as the payor of income to Mr. Heard, on February 27, 2018 and then again on March 6, 2019. Upon Ms. Grodner's receipt of those notices of assignment, her statutory obligation

to withhold any sums due to Mr. Heard for the satisfaction of both his current child support obligation and an additional amount toward the arrearages, was triggered. Despite acknowledging receipt of both of those notices, Ms. Grodner did not remit any sums to DCFS.

Insofar as Ms. Grodner claims that, because the November 5, 2009 income assignment order produced by DCFS (with the March 6, 2019 notice of assignment) did not specifically utilize the term "settlements," her obligation to withhold any sums was never triggered, we again point out that the use of the term "settlements," in relation to "income" under La. R.S. 46:236.3, is merely an illustrative example of the types of payments to individuals that are subject to income assignment. Further, while the November 5, 2009 income assignment order itself may not have specifically included the term "settlements" in the illustrative list of examples of the payments considered to be income, the income assignment order expressly stated both that It was issued "IN ACCORDANCE WITH [La. R.S. 46:236.2]" and that it applied to "the PAYOR of any income including, but not limited to ... any other payments made by any person." In determining that the November 5, 2009 income assignment order encompassed Mr. Heard's personal injury settlement, the trial court recognized that "[t]he income assignment order has inclusive language, i.e., any other payments" and that it "cite[d] La. R.S. 46.236.3, which ... specifically states that settlements are income." Accordingly, we find the trial court correctly found that Mr. Heard's personal injury settlement was encompassed by the November 5, 2009 income assignment order.

Ms. Grodner next claims that DCFS failed to abide by the statutory deadline for asserting its right to an income assignment with respect to Mr. Heard's personal injury settlement, and therefore, she was entitled to disburse the settlement proceeds to Mr. Heard without consequence. As set forth above, under La. R.S. 46:236.3(E)(6)(b)(i), when a payor of income intends to issue a lump-sum payment in the amount of three hundred dollars or more, it shall notify DCFS at least fifteen days prior to issuing the lump-sum payment. Thereafter, DCFS has fifteen days within which to submit verification to the payor of any withholdings to the lump-sum payment; if DCFS fails to provide such verification, then the payor may dispense the lump-sum payment in full to the obligor

Notably, Ms. Grodner's argument that DCFS failed to abide by the statutory deadline in this regard and that she was entitled to disburse the settlement proceeds to Mr. Heard is premised on her contention that the November 5, 2009 Income Assignment Order was not applicable to Mr. Heard's personal injury settlement and that the notices of assignment issued to Ms. Grodner on February 27, 2018 and March 7, 2019 were without any effect. However, we have already concluded herein that the notices of assignment issued to Ms. Grodner on February 27, 2018 and March 7, 2019 effectuated the income assignment order and further, that the November 5, 2009 income assignment encompassed Mr. Heard's lump-sum personal injury settlement.

As to the timeliness of DCFS's actions, the trial court noted in its reasons for judgment that DCFS "first sent Ms. Grodner notice of the income assignment order ...on February 27, 2018 and then again on March 6, 2019. Pursuant to La. R.S. 46:236.3(E)(6)(c), [DCFS] submitted verification as to any withholdings of the lump-sum

payment within fifteen days from the date the payor, Ms. Grodner, notified [DCFS] of the lump[-]sum payment." The record supports the trial court's findings in this regard, and as such, we find no error in the trial court's determination that DCS timely complied with La. R.S. 46:236.3(E)(6)(c) prior to Ms. Grodner's disbursement of the proceeds from Mr. Heard's personal injury settlement.

Lastly, Ms. Grodner contends that since she had a factual and legal basis to release the net proceeds of Mr. Heard's personal injury settlement to him, her failure to comply with the notice of assignment was not "willful" and that she should not have been cast in judgment or fined. La. R.S. 46:236.3(K) provides that when a payor willfully fails to withhold or pay over income pursuant to a valid income assignment order, the court, upon due notice and hearing, shall enter judgment against the payor, which sum is to be made executory, and may impose a fine against the payor, up to fifty dollars per day, for the failure to withhold or pay over the support in accordance with the provisions of the notice of income assignment. Ms. Grodner, as the payor of income to Mr. Heard, received two notices of income assignment from DCFS regarding Mr. Heard's child support obligation and arrearage. Upon her receipt of those notices, she was obligated to withhold or pay over the amounts stated therein to DCFS.

While it is apparent that Ms. Grodner disagreed with and objected to the basis for DCFS's claim to an income assignment of those funds, she was fully aware of DCFS's position that it was entitled to and had the right to those funds based on income assignment. Rather than resolving the dispute through the myriad of appropriate legal courses of action available to her, Ms. Grodner chose to disregard DCFS's claim and to disburse the entirety of the net settlement proceeds in the amount of $4,480.02 to Mr. Heard. Therefore, based on the record before us, we cannot say that the trial court erred in its determination that Ms. Grodner's conduct was willful and that she willfully failed to comply with a notice of income assignment. Accordingly, we find no error in the trial court's rendition of an executory judgment against Ms. Grodner in the amount of $4,480.02 or in its order that Ms. Grodner to pay a fine of $25.00 per day until all sums were paid in full.

3] Sundry & miscellaneous income calculation issues

Fairbanks v. Beninate, 308 So.3d 1222 (La. App. 5th Cir. 12/23/20)

Facts: Ms. Beninate and Mr. Fairbanks, have never been married or lived together. Mr. Fairbanks has been identified as the child's biological father by scientific testing and has acknowledged the child since birth. Mr. Fairbanks asserted that Ms. Beninate had prevented him from seeing the child, even though he had been paying her child support. After a hearing officer conference on November 20, 2018 relative to the issues raised in these pleadings, the hearing officer recommended that Mr. Fairbanks pay child support and explore obtaining health insurance. These recommendations were adopted as an interim judgment of the court, and Ms. Beninate timely objected to them. Once Mr. Fairbanks obtained custody of the child, he filed a motion to modify child support and

sought child support from Ms. Beninate. After a hearing officer conference on November 20, 2019 on this motion, the hearing officer recommended that Ms. Beninate pay $469.41 in child support based on imputed income. She objected timely.

Result: Reversed.

Rationale: On appeal, Ms. Beninate argues that the trial court erred in adopting the hearing officer's recommendations regarding child support because no evidence pertinent to child support was introduced at the hearing, and thus the trial court was unable to conduct a de novo review of the child support recommendation. Upon review, we find the record before us does not contain sufficient evidence to support the judgment regarding child support. A child support award is determined pursuant to La. R.S. 9:315.2. La. R.S. 9:315.2(A) provides that "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." None of these required documents were introduced at the January 30, 2020 hearing before the trial court judge. Furthermore, La. R.S. 9:315.2(D) provides: "The court shall determine the basic child support obligation amount from the schedule in R.S. 9:315.19 by using the combined adjusted gross income of the parties and the number of children involved in the proceeding, but in no event shall the amount of child support be less than the amount provided in R.S. 9:315.14." Without the required documentation, this Court cannot determine whether the trial judge erred in calculating the child support award. See, State, Dep't of Children & Family Servs. ex rel. L.R. v. Haines, 11-84 (La. App. 5 Cir. 5/6/11), 67 So.3d 515, 516; State of Louisiana, Department of Social Services and Jessica Rareshide v. Lehman, 06-922 (La. App. 5 Cir. 4/11/07), 955 So.2d 738 Appellate courts are courts of record and may not review evidence that is not in the appellate record. La. C.C.P. art. 2164; Denoux v. Vessel Mgmt. Servs., Inc., 07-2143 (La. 5/21/08), 983 So.2d 84, 88. Because the parties did not introduce evidence regarding child support for this Court to review, we vacate the trial court's judgment to the extent Ms. Beninate is ordered to pay child support. On remand, child support should be awarded based on the guidelines in La. R.S. 9:315.2 et seq. after the parties have submitted the requisite documentation.

Charrier v. Charrier, No. 2019-917, 2020 WL 2934636 (La. App. 3rd Cir. 6/3/20)

Facts: Camille and John Michael Charrier were married in January 2004. In March 2005, Eli, their only child, was born. Camille filed a petition for divorce on March 18, 2018, in which she requested an award for child support. On June 18 and 20, 2019, the trial court conducted a hearing on Camille's claims. The trial court allowed the parties time to file post-trial briefs and left the record open for additional evidence to be filed into the record. However, no post-trial briefs or additional evidence was filed in the record. After receiving the parties' post-trial briefs, the trial court issued a judgment awarding Camille $2,000 in child support. The trial court ordered that the awards were retroactive to the date of judicial demand and that the parties were to conduct an accounting between themselves to "account for any amounts made and/or received during the pendency of this rule[.]" John Michael appealed.

Result: Affirmed as amended.

Rationale: John Michael assigns the following errors with the trial court's awards:

1. It was error for the Trial Court to award child support in the amount of $2,000.00 per month and to not order Camille to maintain the current policy of healthcare insurance covering Eli (through her employment, if available).

2. It was error for the Trial Court to deviate from the child support guidelines without giving "specific oral or written reasons for the deviation, including a finding as to the amount of support that would have been required under a mechanical application of the guidelines and the particular facts and circumstances that warranted a deviation from the guidelines" and "ma[king] the reasons a part of the [r]ecord." R.S. 9:315.1 B(1).

3. It was error for the Trial Court to make its award of child support retroactive to the date of judicial demand.

The trial court signed a judgment awarding child support to Camille without stating reasons or making any findings of fact. Camille contends that without findings of fact, this court cannot find that the trial court abused its great discretion in making its award. She argues that because the parties' child support worksheets submitted to the trial court are not in the record, we cannot find error with the trial court's child support award. John Michael urges that we remand the matter to allow for additional testimony and fairer awards. Trial courts have great discretion in decisions concerning child support awards. Gary v. LeBlanc, 16-1054 (La.App. 3 Cir. 6/7/17), 222 So.3d 784. Appellate courts "review child support determinations using the manifest error standard of review, and we will not disturb the trial court's support order unless it committed manifest error or an abuse of discretion in its determination." Bergeron v. Bergeron, 11-130, p. 4 (La.App. 3 Cir. 10/5/11), 75 So.3d 537, 540, writ denied, 11-2466 (La. 1/20/12), 78 So.3d 144. Financial documentation is necessary to determine child support obligations. La.R.S. 9:315; Collins v. Collins, 12-726 (La.App. 3 Cir. 12/5/12), 104 So.3d 771. Here, although the parties' worksheets are not in the record, "there is sufficient other evidence in the record for the trial court to have determined the parties' gross monthly earnings and to render a child support award in accordance with the guidelines." Id. at 774. Financial information is also necessary to determine awards for interim spousal support. La.R.S. 9:326. The parties introduced financial records and testified regarding their finances to support their claims at trial. Accordingly, remand is not necessary.

John Michael's stipulated monthly gross income is $18,776. He pays child support in the amount of $493 per month for his daughter which must be deducted from his gross income. La.R.S. 9:315(C)(1)(a). John Michael argues the trial court erred in failing to reduce his gross income by the reasonable and ordinary expenses associated with his self employment, such as his truck note and other work-related expenses as provided by La.R.S. 9:315(C)(3)(c). In March 2018, John Michael owned a Dodge truck that he used to travel to and from work sites. His truck note was $815. In April, John Michael bought a used Ford F250 to replace the older truck He testified that his new truck note is $800 to 1,000 per month but did not establish the amount of the note. He now asserts that he pays a $1,000 monthly note. His bank records show a payment on May 7, 2019, in the amount of $899 to Bank of the West, which may be his truck note. Due to the timing of the new purchase as compared to the time Camille's request for support was pending, we find it would be reasonable for the trial court to conclude that it was most equitable to allow

John Michael a reduction of $815 for his truck note, rather than $899. The parties paid insurance in the amount of $1,008 per month for three vehicles, Camille's, John Michael's, and Camille's daughter's. There is no evidence regarding the premium paid for each of the three vehicles insured under the policy. Accordingly, we compute $336 as John Michael's pro-rata share for his vehicle. John Michael did not present evidence of other vehicle expenses at trial, but now seeks to extrapolate Camille's testimony regarding her gas usage and claimed gas expense to calculate his fuel expenses for work. This argument lacks merit for two reasons: (1) it was not made to the trial court and (2) it is not supported by the record. Based on this evidence, the trial court could have determined that John Michael failed to satisfactorily prove the amount of monthly fuel expenditures. Hensgens v. Hensgens, 19-485 (La.App. 3 Cir. 12/18/19), 287 So.3d 795. Therefore, we reduce John Michael's monthly gross income by $493, $815, and $336 per month for an adjusted gross income of $17,132.

Camille's year-to-date statement of earnings ending June 1, 2019, shows her average gross monthly income for January through May 2019 was $5,783. Camille includes $250 as "other gross monthly income" on her income and expense sheet, which she testified was child support for her daughter. It is not included in her gross monthly income. La.R.S. 9:315(C)(1)(d)(i). Camille testified that in 2019, she began working more than she had previously after John Michael closed their checking account and she no longer had adequate funds to pay community expenses and support herself and Eli. She explained that she also utilized paid time off that she had accrued to obtain additional funds. Additionally, she testified that various adjustments were made to her base pay according to what shifts she worked and if she worked weekends; however, she did not show that these pay adjustments were due solely to her additional shifts. Based on this evidence, we find the trial court reasonably could have subtracted $185 per month for Camille's overtime pay when calculating her monthly gross income. See La.R.S. 9:315(C)(3)(d)(iii), which provides that gross income does not include "[e]xtraordinary overtime ... when, in the court's discretion, the inclusion thereof would be inequitable to a party." After subtracting overtime, we calculate Camille's adjusted gross monthly income to be $5,598.

Camille testified that she, Eli, John Michael, and his daughter are provided health and dental insurance through her employer at a total cost of $561 per month. She did not show there is a difference in the cost of the insurance with regard to the principal insured and dependents. Accordingly, we calculate Eli's health insurance cost as $140.

John Michael and Camille's monthly income total $22,730. The basic child support award is $1,968. La.R.S. 9:315.19. The monthly cost of Eli's health insurance and his private school tuition, $262, must be added to this amount, resulting in a total child support obligation of $2,370. John Michael's monthly gross income represents 75% of his and Camille's combined monthly gross income. Accordingly, his monthly child support obligation is $1,778.

The trial court's $2,000 award exceeds this amount. Courts are allowed to deviate from the child support guidelines but must specify in writing or orally why the deviation is warranted. La.R.S. 9:315.1(B)(1). Moreover, the party seeking the deviation must prove the need for a deviation. Carter v. Carter, 49,517 (La.App. 2 Cir. 11/26/14), 155

So.3d 81. With no reasons given by the trial court for deviating or proof of the need for such deviation, we find the $2,000 award for child support constitutes an abuse of the trial court's discretion and reduce it to $1,778.

John Michael next argues the trial court erred in not ordering that he has the right to claim Eli as tax deduction. Louisiana Revised Statutes 9:315.18(A) provides a presumption that the domiciliary party has the right to claim the federal and state tax dependency deductions and any earned income credit. However, La.R.S. 9:315.18(B)(1) provides:

> The non-domiciliary party whose child support obligation equals or exceeds fifty percent of the total child support obligation shall be entitled to claim the federal and state tax dependency deductions if, after a contradictory motion, the judge finds both of the following:
>
> (a) No arrearages are owed by the obligor.
>
> (b) The right to claim the dependency deductions or, in the case of multiple children, a part thereof, would substantially benefit the non-domiciliary party without significantly harming the domiciliary party.

The record does not reflect that this issue was addressed to the trial court. Under Rule 1-3 of the Uniform Rules, Courts of Appeal, we "review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise." We find the issue is not properly before this court and the interests of justice would not be served by our consideration of this argument for the first time on appeal; therefore, we do not consider it.

John Michael next argues the trial court erred in ordering him to pay child support retroactive to the date Camille filed her petition. Camille counters again that this issue is not properly before this court. Pointing to La.R.S. 9:321(A) which provides, "Except for good cause shown, a judgment awarding ... interim child support allowance shall be retroactive to the date of judicial demand," she also argues that the trial court did not err in making its award retroactive. Camille testified that she had full access to her and John Michael's combined monthly incomes until December 31, 2018, and that she maintained her own account where she deposited her income. Based on this evidence and in the interest of justice, we will consider John Michael's request that his child support award not be retroactive. 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. La.R.S. 9:315.21(E). The burden is on the obligor parent to show good cause for not making the award retroactive to the date of judicial demand. The trial court is vested with much discretion in fixing awards of child support. The court's reasonable determinations shall not be disturbed unless there is a clear abuse of discretion. Harrington v. Harrington, 43,373, pp. 10-11 (La.App. 2 Cir. 8/13/08), 989 So.2d 838, 844....In Welborne [v. Welborne, 29,479 (La.App. 2 Cir. 5/7/97), 694 So.2d 578, writs denied, 97-1800 (La.10/13/97), 703 So.2d 621, 97-1850 (La.10/13/97), 703 So.2d 623], the court refused to find good cause when the trial was suspended for over a year due to procedural delays and joint continuances. The court stated that to "demonstrate 'good cause' for not making a child support award retroactive, [the obligor] is required to show

that [the child] was not in need of the increased support or that he was unable to pay the increased amount from the date of demand." There is no evidence on this issue in the record. Finding Camille's continued, uninterrupted use of community funds to be good cause for John Michael's child support obligation to not be retroactive to March 20, 2018, we amend the trial court's order to provide that the award of child support is retroactive to January 1, 2019.

John Michael next argues his obligation should be recalculated to take into account that Eli no longer attends private school. Camille testified that Eli would no longer attend private school after May 2019. We agree with John Michael that his child support obligation should be recalculated for the period beginning June 2019. Taking into account the $262 private school tuition reduction, John Michael's child support obligation is reduced to $1,581 per month effective June 1, 2019.

b) Potential income (voluntary unemployment or underemployment)

State in Interest of Harper v. Harper, No. 53,485, 296 So.3d 1163 (La. App. 2 Cir. 5/20/20)

Facts: On October 5, 2018, the State of Louisiana filed a rule for child support against Mr. Harper to obtain and/or enforce child support on behalf of Hanna Parsons, the mother of the minor child, whose date of birth is January 5, 2015. The matter was scheduled to be heard by a hearing officer. Mr. Harper submitted his check stubs and Ms. Parsons submitted proof of child care expenses. A joint obligation worksheet was filled out by the State. Based on the worksheet, Mr. Harper's total child support obligation was $975.67.

On November 20, 2018, the hearing officer signed the recommendation and recommended Mr. Harper should pay $945 per month in child support. The hearing officer also recommended Mr. Harper pay for the child's medical insurance through his employer, if available. Neither party requested a hearing before a judge. The judgment was signed by the district court on November 28, 2018, adopting the hearing officer's recommendations.

Mr. Harper filed a rule to decrease child support on June 22, 2019. He argued there was a material change in circumstances, specifically: (1) He was terminated from his previous employment by the time the child support order was set. He worked for a second employer in Kansas from February 2019 until June 2019. He recently obtained employment from a third employer in Bossier City, LA; (2) His current estimated monthly income is $2,200, and he is paid as an independent contractor. He has been unable to find alternative employment sufficient to meet his existing child support payments; and (3) The previous order included child care costs, but the child has been removed from daycare.

The matter was scheduled to be heard by a hearing officer. Another joint obligation worksheet was filled out, and Mr. Harper's recommended child support obligation was $681.65. This joint obligation worksheet was completed using information from Mr. Harper's second employer, not his current employer. At the outset of the

hearing, the State pointed out that the second worksheet does not indicate an obligation change of at least 25% and it had not been 3 years since the previous order.

Mr. Harper stated that he was fired from his second employer because his license was suspended for failure to pay child support. The State said the first support payment of $1,321 was received in March 2019, but the payment was involuntarily made. The first voluntary payment of $380.95 was made in April 2019. A wage assignment order was set up, and Ms. Parsons received payments from an employer from June 10 through September 17, 2019.

At the hearing, the State argued that Mr. Harper has the ability to go back to work in the oil field but is choosing not to. Ms. Parsons stated that she has heard Mr. Harper state on multiple occasions that he plans to go back in the oil field after the child support obligation is reduced. Mr. Harper argued that oil field work is project-based and not permanent employment. He also argued that he would be required to move from state to state with each project. Mr. Harper stated that he made payments that were not counted because he paid them directly to Ms. Parsons and she has chosen not to give him credit for those.

Mr. Harper stated that at the time the order was initially set, he was unemployed, and therefore in the hole as far as child support was concerned. He stated that when he finally did get another job (his second job), he gave his garnishment information to the State. He asserted that the State told him that if he gave them his garnishment information, they could stop his license from being suspended. He stated that the State later told him that they first had to receive garnishments. He was ultimately fired for having a suspended license before his employer sent his first garnishment.

The hearing officer denied Mr. Harper's request for a modification based on the timeframe in which it was requested. Mr. Harper filed an exception to the hearing officer's recommendations. The exception was heard in district court on October 21, 2019. The district court stated at the hearing that one of the issues was Mr. Harper's good faith. It stated, "[I]t certainly appears to be the case here, that he does have good faith and that, ... you are entitled to a de novo review of the hearing officer's findings." The district court stated that based on Mr. Harper's good faith in obtaining employment and its review of the record, Mr. Harper's child support obligation would be reduced in accordance with the second joint obligation worksheet.

The district court signed a judgment modifying Mr. Harper's child support obligation, reducing it to $681.65 plus a 5% administrative fee. The State now appeals the reduction of child support.

Result: Affirmed.

Rationale: The State argues the district court judge erred in finding good faith by Mr. Harper when he did not pay his court-ordered child support. It also argues that the district court should have applied the manifest error standard of review instead of a de novo review.

The Louisiana Supreme Court has stated that the district court's de novo review of the hearing officer's recommendation is appropriate. In discussing the 32nd Judicial District Court Rules and Louisiana District Court Rule 35, which mirror one another, the Louisiana Supreme Court stated, "Because the trial court is not required to defer to or accept the hearing officer's recommendations and can receive evidence beyond what the

hearing officer heard, we find de novo review is afforded." Jurisprudence is clear that when a party timely objects to the hearing officer's recommendations, the party is entitled to a de novo review by the district court. As stated in jurisprudence, this de novo review does not require any deference to the hearing officer's recommendations. Therefore, the district court did not err in taking a new look at the child support modification, without deferring to the hearing officer's findings. We find no merit in this argument.

Louisiana jurisprudence distinguishes between voluntary and involuntary changes in circumstances. An involuntary change in circumstances results from fortuitous events or other circumstances beyond a person's control, such as loss of one's position or illness. A voluntary change in circumstances generally does not justify a reduction in the support obligation. Voluntary underemployment is a question of good faith. A determination by the trial court of whether the spouse is in good faith in ending or reducing his or her income is a factual determination which will not be disturbed on appeal absent an abuse of the wide discretion of the trial court. In its de novo review, the district court was entitled to determine whether Mr. Harper was in good faith, without deference to the hearing officer's recommendations. We will not disturb the district court's good faith finding absent a wide abuse of discretion. The only evidence presented that Mr. Harper was voluntarily underemployed was Ms. Parsons' testimony that she had heard Mr. Harper say he would go back to oil field work once the support obligation was lowered.

Although it was Mr. Harper's inconsistent child support payments that led to his license suspension, which caused him to be fired, he did not voluntarily leave this employment. There was no evidence presented that Mr. Harper had the ability to return to work in the oil field, but chose not to. It was within the district court's wide discretion to determine that Mr. Harper was in good faith and not voluntarily underemployed. Based on the record before us, we do not find that the district court abused its discretion. This assignment lacks merit.

Beadle v. Beadle, No. 2020-0264 2020 WL 7770251 (La. App. 1st Cir. 12/30/20)

Facts: Daniel Beadle and Amanda Beadle have four minor children, who, at the time of the hearing, ranged in age from teenager down to age six. On February 26, 2019, Daniel filed a petition for divorce and for incidental relief. Amanda also requested child support and interim spousal support. Finally, the parties agreed that Daniel would pay to Amanda $1,000.00, per month for child support on an interim basis. The judgment also ordered Daniel to pay Amanda $1,430.44 per month in child support based on Worksheet B for Angelina and Ethan and Worksheet A for Gabriel and Dani. In calculating child support, the district court determined Amanda's monthly income to be $1,256.00 and Daniel's monthly income to be $5,584.00. Finally, the judgment denied Amanda's request for interim spousal support. It is from this judgment that Daniel appeals, challenging the allocation of time periods during which each parent was to have physical custody of the two younger children and the calculation of his child support obligation.

Result: Affirmed in part, reversed in part.

Rationale: Daniel contends that "[t]he trial court committed manifest error when it failed to find [Amanda] voluntarily underemployed and failed to impute her with her true earning

capacity; rather, it imputed her with minimum wage which is less than her actual earnings."

In calculating child support, the district court determined Amanda's monthly income to be $1,256.00. During trial, Amanda testified that she works at EXP Realty as a real estate agent. She stated she had not made any sales that year, but had a sale pending on a house. She said she also works at Bobby's Electric where, she makes about $1000.00 per month, and Revival Temple where she makes about $100.00 per month. Amanda said she also works occasionally cleaning houses and job sites for Brett Silas, but does not do so regularly. Amanda testified that, until the time of trial, she has consistently made $1,100.00 per month in 2019 from Revival Temple and Bobby's Electric. She said her income from her other employers is not steady or guaranteed. She testified that her yearly income for 2018 on her W2 was approximately $17,000.00 and therefore her monthly income was $1,416.66. Amanda twice requested that the district court use her income from previous years because she was making more money then and she said "I know that I'm going to work as hard as I can to make more money than I'm making right now." Given that Amanda acknowledged she has a pending home sale and twice asked the court to use her earnings as reflected in her previous W2's as her income, we find that Amanda's income for determining child support should be set at $1,416.66, in accordance with her 2018 earnings.

This court has now granted child support, which should be calculated based entirely on Worksheet B. After using the same income for Daniel as used by the district court, Daniel's child support obligation to Amanda under Worksheet B is reduced to $888.38 per month. (See attached worksheet.) Additionally, the provision in the judgment ordering Daniel to pay Amanda $1,430.44 per month in child support is reversed and we render judgment ordering Daniel to pay Amanda $888.38 per month in child support based on Worksheet B. All other provisions in the judgment regarding summer and holiday schedules, insurance, and co-parenting guidelines shall remain in effect. Costs of the appeal are assessed equally to Daniel Beadle and Amanda Beadle.

H.O.P. v. J.S.P., No. 19-1151, 2020 WL 3026514 (La. App. 1 Cir. 6/5/20)

Facts: H.O.P. (husband) and J.S.P. (wife) were married in Tangipahoa Parish on October 14, 2007 and had one child, C.H.P., born January 14, 2010. On September 21, 2018, H.O.P. filed a petition for divorce in Tangipahoa Parish. On September 25, 2018, J.S.P. filed a petition for divorce pursuant to La. Civ. Code art. 102, custody, support, and incidental matters in Tangipahoa Parish.

The matter went to a trial on the merits on February 28, 2019. After the witness testimony, introduction of evidence, and arguments of counsel, the trial court granted the parties 20 days to find out the status of their 2015, 2016, and 2017 tax returns, which had not been available at the time of trial, and granted J.S.P. 20 days to "explore" the possibility of full-time rather than part-time work. The trial court noted that "I can't accurately set a number on child support and/or a ... claim for spousal support without having an accurate financial picture of what those two numbers are unless you want me to make a decision based upon what I heard here today which is vague to say the least."

Neither party supplemented the record after the trial.

Thereafter, the parties were awarded joint custody with J.S.P. designated as the domiciliary parent.

Child support in the amount of $635.00 per month was awarded to J.S.P. from H.O.P., retroactive to the date of demand, with credit given for payments made. H.O.P. was ordered to pay 60% of childcare costs, health insurance premiums, the child's extraordinary medical expenses, and other agreed-upon expenses. H.O.P. was also ordered to pay 60% of the expenses of tuition, registration, books, supply fees for C.H.P. attending Holy Ghost Catholic School, and extracurricular activity fees that C.H.P. was participating in.

H.O.P. was awarded the right to claim the child for tax purposes in odd years, and J.S.P. was awarded the right to claim the child for tax purposes in even numbered years.

H.O.P. appealed the judgment awarding custody, child support, spousal support, and incidental matters. He makes three assignments of error on appeal. In his third assignment of error, he asserts that the trial court erred in calculating J.S.P.'s income for purposes of determining his child support obligation.

Result: Affirmed as amended.

Rationale: In his third assignment of error, H.O.P. asserts that the trial court erred in calculating the income of J.S.P. for purposes of determining his child support obligation, as she was voluntarily underemployed.

There is no evidence in the record that J.S.R suffers from any mental or physical incapacity which prevents her from obtaining full-time employment, and the parties' only child is over five years old and attends school. J.S.R was only working an average of 24 hours per week at the time of trial but had the potential to pick up more hours and increase her income.

For purposes of determining child support, we find that the trial court manifestly erred by not calculating child support based upon J.S.P.'s earning potential due to her voluntary unemployment. Thus, we vacate the award of child support and we recalculate the child support award using J.S.P.'s earning potential.

H.O.P.'s gross monthly income is $4,972.00. J.S.P.'s imputed gross monthly income is $5,850.00. Their combined grossly monthly income is $10,822.00. Thus, H.O.P.'s portion of their combined gross monthly income is 46% and J.S.P.'s portion of their monthly adjusted gross income is 54%. The basic child support obligation is $1,219.00. H.O.P.'s 46% of $1,219.00 equals a child support obligation of $560.74.

In addition to the basic child support obligation, the other expenses outlined in the trial court judgment are adjusted so that H.O.P. shall be responsible for 46% of any childcare costs, extraordinary medical expenses for C.H.P., and other agreed-upon expenses. Also, H.O.P. shall be responsible for 46% of the expenses of tuition, registration, books, and supply fees required for C.H.P. attending Holy Ghost Catholic School, as well as 46% of fees for those extracurricular activities that the minor child is participating in.

As H.O.P. is paying for 100% of C.H.P.'s $74.00 health insurance premium by payroll deduction, for which he is responsible for only 46%, he gets a credit for paying J.S.P.'s 54% of the $74.00, or $39.96. Thus, H.O.P.'s monthly child support obligation of

$560.74, minus a credit of $39.96, equals a monthly child support obligation of $520.78. Accordingly, H.O.P's monthly child support obligation is amended to $520.78, and as amended, affirmed.

b Adjustments

1) Costs & expenses

Bernstein v. Bernstein, No. 2019-1106, 2021 WL 503309 (La. App. 4th Cir. 2/10/21)

Facts & result: See supra.

Rationale: 2. Failure to Include "Add-On" Expenses in Child Support Award. – La. R.S. 9:315.6 provides:

> 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.
>
> (2) Any expenses for transportation of the child from one party to the other.
>
> (3) Special expenses incurred for child rearing intended to enhance the health, athletic, social, or cultural development of a child, including but not limited to camp, music or art lessons, travel, and school sponsored extracurricular activities.

The trial court's decision to add expenses under La. R.S. 9:315.6 to the basic child support obligation is discretionary and will not be disturbed absent an abuse of discretion. Mrs. Bernstein argues, essentially, that because the trial court's reasons for judgment indicate that the trial court would award "add-on" expenses, it was error for the trial court not to make such an order in its child support award in its judgment. "However, reasons for judgment only set forth the basis for the court's holding and are not binding." Scott v. Am. Tobacco Co., Inc., 2015-1352, p. 11 (La. App. 4 Cir. 5/25/16), 195 So.3d 624, 630 (internal citations omitted). Nevertheless, an appellate court may use a trial court's written reasons for judgment "to gain insight into the district court's judgment." Wooley v. Lucksinger, 2009-0571, p. 78 (La. 4/1/11), 61 So.3d 507, 572. Importantly, "[i]f a disparity exists between the judgment and the written reasons for judgment, the final judgment is definitive." Davis v. Farm Fresh Food Supplier, 2002-1401, p. 3 (La. App. 1 Cir. 3/28/03), 844 So.2d 352, 354 (citing Sanford v. Sanford, 468 So.2d 844, 845 (La. App. 1 Cir. 1985); Carner v. Carner, 1997-0128, p. 5 (La. App. 3 Cir. 6/18/97), 698 So.2d 34, 36). The language of the statute itself shows that the trial court has discretion not to add expenses under La. R.S. 9:315.6 to the basic child support obligation and such a ruling is reviewed for abuse of discretion. Additionally, where, as here, there is a discrepancy between the judgment and the reasons for judgment, the judgment controls. Therefore, this Court must review the trial court's judgment which did not add expenses

under La. R.S. 9:315.6 for abuse of discretion. Because the only significant testimony on the children's "add-on" expenses presented at trial was in relation to their private school tuition and that the tuition is already paid by Mr. Bernstein's family business, the record does not support a finding that the trial court abused its discretion. This assignment of error lacks merit

2) Credits

a) For social security disability benefits

Barrett v. Barrett, No. 20-CA-266, 2021 WL 713965 (La. App. 5th Cir. 2/24/21)

Facts: Heather Barrett and defendant/appellee, Christopher J. Barrett, were married on February 24, 2007, and have three boys. On May 13, 2015, Ms. Barrett filed a petition for protection from abuse and on May 15, 2015, she filed a petition for divorce. On June 17, 2015, Ms. Barrett dismissed her petition for protection from abuse and the parties entered into a consent judgment, signed by the trial court on July 27, 2015, granting Ms. Barrett "temporary custody". With respect to child support, the parties agreed, as follows, that the social security benefits the children received due to Mr. Barrett's disability would serve as his child support payment: Heather Barrett will receive the SSI benefits for the children (now $166.00 per child or a total of $498.00 per month) in lieu of child support. Subsequently, Ms. Barrett requested an increase in child support based on her allegation that Mr. Barrett was working and receiving income in addition to his disability benefits. She complained that Mr. Barrett refused to assist her with extracurricular and school expenses for the children, and asked that the court order him to pay his pro rata share.

On July 18, 2019, Mr. Barrett requested a recalculation of child support based on a shared custody arrangement and to be allowed to claim the dependency tax deductions for the children. The hearing officer denied Mr. Barrett's request to claim the children as dependents for tax purposes, and referred the issues of custody, child support and contempt to the trial court for an evidentiary hearing. Immediately following the hearing officer conference, the parties filed a joint objection to all of the hearing officer's recommendations. The trial court denied Ms. Barrett's request to increase child support and further ordered that Mr. Barrett could claim the federal and state tax dependency for the second child. The trial court ordered Mr. Barrett to pay half of the total amount of the children's baseball activity expenses, not to exceed $75.00 per child. On March 5, 2020, Ms. Barrett filed a timely motion for appeal, which the trial court granted on March 13, 2020. On April 23, 2020, the trial court issued written reasons for its February 4, 2020 judgment.

Result: Affirmed.

Rationale: Ms. Barrett argues for the first time on appeal that the trial court legally erred in denying her request to increase the child support award and requiring her to demonstrate a change in circumstances, because the trial court relied on a flawed stipulated child support award. Ms. Barrett contends that the stipulated award is flawed because the commissioner failed to properly consider the Louisiana Child Support Guidelines, La.

R.S. 9:315, et. seq., prior to accepting the July 27, 2015 consent judgment. She also contends that the stipulated child support award agreed to by the parties in 2015 deviated from the guidelines.

La. R.S. 9:315.1 provides the following requirements regarding child support stipulations relevant to this matter:

> . . .
>
> B. (1) The court may deviate from the guidelines set forth in this Part if their application would not be in the best interest of the child or would be inequitable to the parties. The court shall give specific oral or written reasons for the deviation, including a finding as to the amount of support that would have been required under a mechanical application of the guidelines and the particular facts and circumstances that warranted a deviation from the guidelines. The reasons shall be made part of the record of the proceedings.
>
> . . .
>
> D. The court may review and approve a stipulation between the parties entered into after the effective date of this Part as to the amount of child support to be paid. If the court does review the stipulation, the court shall consider the guidelines set forth in this Part to review the adequacy of the stipulated amount and may require the parties to provide the court with the income statements and documentation required by R.S. 9:315.2.

The parties agree that in Stogner v. Stogner, 98-3044 (La. 7/7/99), 739 So.2d 762, 768, the Louisiana Supreme Court analyzed these provisions and determined the requirements set forth in La. R.S. 9:315.1(D) were not discretionary. The supreme court declared that trial courts must consider the guidelines to review the adequacy of the stipulated amount and provide reasons if it allows a deviation from the guidelines. Id. The Stogner court determined that the prior child support award stipulated to by the parties and approved by the trial court was invalid because the trial court failed to follow the requirements of La. R.S. 9:315.1 prior to allowing the deviation from the guidelines. Therefore, the supreme court determined it was improper for the lower courts to rely on the flawed award in denying the mother's request to modify the child support award. Id. at 769. Unlike Stogner, however, we do not find any evidence in the record that the July 27, 2015 stipulated child support award deviated from the statutory guidelines.

We assume, Ms. Barrett contends the 2015 stipulated award deviated from the guidelines because the commissioner did not deduct the social security disability benefits from the basic child support obligation, but rather allowed the $498.00 in social security disability payments to serve as a credit towards Mr. Barrett's child support obligation. It is well-settled, however, that La. R.S. 9:315.7(D) provides for a parent, such as Mr. Barrett, to receive a credit toward his child support obligation for social security disability payments his children receive due to his disability. Ms. Barrett ignores this Court's precedent in State, Dept. of Social Services in Interest of B.B, supra, and instead cites to Salles v. Salles, 04-1449 (La. App. 1 Cir. 12/2/05), 928 So.2d 1, decided by the First Circuit prior to the legislature's enactment of Section D of La. R.S. 9:315.7 in 2006. See La. Acts 2006, No. 386, § 1. In Salles, the First Circuit treated social security benefits

received by the child as income that should be deducted from the basic child support obligation pursuant to La. R.S. 9:315.7(A).

Ms. Barrett also argues that the record does not indicate that the commissioner considered the guidelines prior to accepting the stipulated amount in 2015. However, unless there is a deviation, the court is not required to provide any oral or written reasons regarding its acceptance of the stipulated amount. Therefore, the absence of an explicit indication from the commissioner in the record regarding his review of the support guidelines does not require this Court to find that he did not review them prior to accepting the stipulated amount or that the stipulated award is flawed. Accordingly, we find this assignment of error is without merit.

In her second assignment of error challenging the trial court's denial of her request to increase the award, Ms. Barnett alternatively argues that the trial court erred when it found she did not prove a material change in circumstances existed to modify the award. An award of child support is entitled to great weight and will not be disturbed on appeal absent an abuse of discretion. Duffel v. Duffel, 10-274 (La. App. 5 Cir. 11/9/10), 54 So.3d 675, 677. The Louisiana Child Support Guidelines set forth the method for implementation of the parental obligation to pay child support. La. R.S. 9:315, et seq. The guidelines are to be used in any proceeding to establish or modify child support. La. R.S. 9:315.1(A). The standard for modification of a child support award is set forth in La. C.C. art. 142, which provides, "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. R.S. 9:311(A)(1) provides, "An award for 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."

Ms. Barrett testified that both in 2015 and at the time of the hearing in November 2019, she received social security disability benefits for the children and herself as a result of Mr. Barrett's disability. In 2015, she received $166.00 per month per child for a total of $498.00 for the children. She also received $166.00 for herself. The amount of the social security disability benefits increased slightly to $180.00 dollars per child for a total of $540.00, and $180.00 for Ms. Barrett. Ms. Barrett testified that since the 2015 consent judgment, she now receives $611.00 per month for supplemental security income payments (SSI) for their son diagnosed with autism. Ms. Barrett testified that she is unable to work full time because she transports their autistic child to and from therapy four times a week. She indicated that in 2019, she worked part-time and earned $962.90 in total gross income for the year. Because the children were all over the age of five and she earned less than the minimum wage, the court attributed a minimum wage income in the amount of $1,256.67 per month to Ms. Barrett.

Ms. Barrett also argues that material changes exist with respect to Mr. Barrett's income. Mr. Barrett testified that in 2015, his only source of income was social security disability payments. He stated that in 2019 at the time of the hearing, he received $1,312.00 per month in social security disability benefits, and this was roughly the same amount he received in 2015. He also testified that since 2015, he went to school to learn massage therapy and tried to start a business he could operate out of his home. He

indicated that despite efforts to market the business, he currently only had two clients. He also testified that he had surgery on his wrist in 2019 and may require another surgery, which decreased the income he was able to earn as a massage therapist. He testified that in 2019, he earned $146.87 per month after expenses for his massage therapy business.

Ms. Barrett argues that the trial court should have attributed an additional $2,110.00 per month to Mr. Barrett for his massage therapy business. She does not base this on evidence that Mr. Barrett actually earned this amount per month in 2019. Rather, she argues that in 2018, Mr. Barrett completed a mortgage application and listed his monthly income as $1,726.00 per month, which included his disability benefits of $1,312.00. This indicates that in 2018, Mr. Barrett earned $412.00 per month for his massage therapy business. However, he testified that he earned less per month in 2019 due to his wrist surgery.

Ms. Barrett also argued that the trial court should attribute additional income to Mr. Barrett because he had $32,000.00 in a savings account and purchased a more expensive home for $270,000.00. Mr. Barrett explained, however, that this sum was the remainder of settlement funds he received as a result of litigation he filed against Ms. Barrett's stepfather after the hunting incident. He also explained that he used the settlement funds to remodel and sell his own home so he could purchase a newer home closer to a location where he could fish with the children. Mr. Barrett testified that Ms. Barrett also received $100,000.00 in settlement funds for the accident. Considering the foregoing, we do not find that the trial court abused its discretion by declining to attribute $2,110.00 per month to Mr. Barrett for his massage therapy business.

Ms. Barrett finally argues in the alternative that she demonstrated a material change in circumstances and the trial court should have ordered Mr. Barrett to pay her $202.50 per month in child support without credit for the $540.00 in social security disability benefits the children receive due to his disability. Ms. Barrett, however, bases this argument on her position that the disability benefits should be deducted from the basic support obligation of $915.00, which is calculated using the monthly minimum wage salary of $1,256.67 for Ms. Barrett and $1,458.87 for Mr. Barrett. As explained above, however, La. R.S. 9:315.7(D) clearly required the trial court to apply the social security disability benefits as a credit toward Mr. Barrett's support obligation, rather than deducting it from the basic support obligation of $915.00.

Based on their incomes, Mr. Barrett owes 54% of the basic support obligation of $915.00, which is $494.10. This amount is less than the $498.00 previously stipulated to by the parties in 2015. Furthermore, Mr. Barrett's credit is now $540.00 due to the slight increase in the benefits the children receive due to his disability. Accordingly, we find that the trial court did not abuse its discretion by finding that Ms. Barrett failed to prove a material change in circumstances and by denying her request to modify the child support award.

Ms. Barrett also argues that the trial court erred by failing to order Mr. Barrett to pay his pro rata share of the extracurricular expenses for sports that she incurs for the children. The trial court ordered Mr. Barrett to pay half of the total amount incurred for baseball activities, not to exceed $75.00 per sports that are important to the children, particularly their autistic child. She argues the children are excited about their games and

practices, and meet many new friends through sports. She testified that Mr. Barrett agreed to assist with baseball expenses, but then refused to pay when she presented him with the receipt. She contends that the trial court's ruling limiting expenses to $75.00 per child for baseball violates La. R.S. 9:315.6, which provides that expenses for extracurricular activities should be added to the child support obligation so that each party pays their pro rata share.

In opposition, Mr. Barrett argues that an order to add expenses for extracurricular activities under La. R.S. 9:315.6 is discretionary with the court. He also argues that Ms. Barrett enrolled the children in other activities without notifying him of her decision or considering his income. After considering all of this testimony and evidence, the trial court concluded that $75.00 per child for baseball is a reasonable amount to add to Mr. Barrett's child support obligation. We do not find that the trial court abused its discretion.

b) For direct payments

State v. Redmann, No. 20-00338, 2020 WL 4382007 (La. 7/31/20)

Facts: Helen Meyer Redmann ("mother") and Kirk Redmann ("father") were parties to a consent judgment wherein they agreed on a support award in which the father would pay 54% of specified expenses of the children, including premiums for their health insurance coverage.

The father subsequently filed a motion seeking, among other things, a credit against the mother for her proportionate share of premiums for the children's health insurance coverage, asserting he had paid 100% of the children's health insurance premiums for several years

At the hearing in the district court, the father testified he paid his second former wife, Terri, $165 per month from September 2007 through November 2010 for the children's health insurance premiums. The father testified he relied on Terri's assertions that $165 was the cost of the children's premiums and he introduced canceled checks to substantiate those payments.

La. R.S. 9:315(C)(4) does not mandate a particular method or require a specific type of evidence to establish "the actual amount paid" for health insurance premiums.

The district court found the father was entitled to reimbursement. While no direct evidence in the form of a detailed paystub or bill from the insurer was introduced to establish the actual amount of the premium paid by Terri for the children's insurance, the district court made a factual finding, based on its credibility determination of the father's testimony, that the father presented adequate evidence to establish he "actually paid" $165 per month for the children's insurance.

The court of appeal found the father did not prove the actual amount he paid for health insurance for his children from September 2007 until November 2010, and thus held the district court erred in allowing a reimbursement credit.

Result: Reversed.

Rationale: We disagree with the court of appeal.

It is well-settled that a court of appeal may not set aside a trial court's finding of

fact in the absence of "manifest error" or unless it is "clearly wrong." Considering the particular facts of this case, we do not find the district court's ruling to be clearly wrong.

The district court's factual finding is supported by the father's canceled checks. Furthermore, there is no dispute the children were covered through Terri's insurer. Therefore, we find no manifest error in the district court's finding that the father paid $165/month for the children's health insurance premiums from September 2007 until November 2010.

Dissent (Weimer, J.): DCFS introduced evidence in the form of insurance premium statements and benefits costs calculations from the State of Louisiana, Office of Group Benefits (OGB) health insurance program. According to DCFS, the $165 amount on which the district court's reimbursement credit is based is several times greater than the amount of the monthly premium attributed to the children of defendant Kirk Redmann as evidenced by the documentation introduced by DCFS.

While DCFS's evidence did not definitely establish the actual amount of the premium paid by the father's former spouse, Terri Redmann, to the OGB on behalf of the children, such evidence calls into question the $165 amount relied on by the father in reimbursing Terri. Moreover, since Terri was not called as a witness by the father (the party seeking a credit against his support obligation for payment of his children's health insurance premiums), DCFS was denied any opportunity to cross examine Terri regarding the accuracy of the $165 amount.

Given the limited proof presented by the father, I am unable to find error in the court of appeal's determination that the father failed to present sufficient evidence of the "actual amount" of the premiums paid for purposes of La. R.S. 9:315(C)(4).

While the father may be sincere in his assertion that he paid Terri $165 a month in premium reimbursements for the children, even the district court acknowledged there was a possibility of fraud in this arrangement, either with or without the father's knowledge. The father could have established the "actual amount paid" as statutorily required by introducing evidence from OGB or calling Terri as a witness.

Dissent (Crain, J.): The defendant, as the party seeking a credit against his support obligation, had the burden of proving "the actual amount paid by [him] for providing health insurance on behalf of the child[ren]" according to La. R.S. 9:315(C)(4) and 315.8(D).

No competent evidence was admitted establishing the cost of the insurance. The defendant's unsubstantiated statements, based entirely on hearsay from his second wife, are not sufficient under these circumstances.

3 Sanctions for non-payment of support: contempt

Keene v. Holdsworth, No. 53,649, 2021 WL 116191 (La. App. 2 Cir. 1/13/21)

Facts: An eight-day trial was held in 2015 regarding custody of the parties' then 12-year-old son K.K. (d.o.b. 1/3/03). On November 19, 2015, the trial court rendered a judgment and interim order awarding the parties joint custody, and also ordered Steven to pay child support in the amount of $869.15 per month, and the parties were each ordered to pay a designated percentage of K.K.'s uncovered medical expenses and tuition expenses at St.

Mark's Cathedral School, where K.K. was to attend until he completed the eighth grade.

The custody schedule was followed until March 20, 2019, when K.K. told his mother that he would not be returning home but would be living with his father instead. Thereafter, Steven failed to return K.K. to Ashley for a period of approximately three to four months; as of June 1, 2019, he also stopped the monthly Social Security payments Ashley had been receiving in lieu of monthly child support payments Steven was obligated to make.

On July 1, 2019, Ashley filed a petition for contempt alleging Steven's failure to abide by the November 2015 judgment and seeking past-due child support, attorney fees and costs. On August 22, 2019, Steven filed an answer and reconventional demand seeking modification of the November 2015 custody judgment and an award of child support. He also asked the court to impose article 863(D) sanctions against Ashley for allegedly making intentionally false statements in her petition for contempt.

Following a one-day trial held on February 4, 2020, the trial court denied Steven's reconventional demands and request for sanctions against Ashley. The trial court rendered judgment in open court that same day finding that Steven was in contempt of court for withholding K.K. from Ashley and sentencing him to 30 days in the parish jail. The trial judge further found that Steven was in contempt of court for failure to pay his portion of K.K.'s tuition, orthodontic and vision expenses in the amount $3,671.60 and sentenced him to an additional 30 days in the parish jail, consecutive to the other 30-day contempt sentence, with an opportunity for Steven to purge the second jail sentence upon his payment of $3,671.60, plus $6,500 in attorney fees, as well as all costs of the proceeding through the date of the filing of the of the trial court's judgment, February 4, 2020.

Steven has appealed from this judgment arguing that the trial court erred in finding him to be in contempt of court for those arrearages, ordering him to pay attorney fees to Ashley's counsel, and sentencing him to the additional 30 days in jail. Additionally, Steven argues that the trial court erred in failing to assess Louisiana Code of Civil Procedure art. 863(D) sanctions against Ashley for making intentionally false statements under oath in her contempt pleading. Specifically, he alleges she knew that her claims of arrearages in support and other expenses were false when she made them; this was proven by her own testimony at trial.

Result: Affirmed in part, reversed in part.

Rationale: A parent alleging arrearages and unreimbursed expenses in a rule for contempt has the burden of proving the claims by a preponderance of the evidence. The burden of proving a credit against the obligation is upon the parent claiming the credit. The obligation imposed upon litigants and their counsel who sign a pleading is to make an objectively reasonable inquiry into the facts and the law. Subjective good faith will not satisfy the duty of reasonable inquiry. The trial court's decision to grant or deny sanctions will not be reversed unless it is manifestly erroneous.

At the hearing, both parties testified that they had an extrajudicial agreement that provided for the monthly direct deposit of a portion of Steven's Social Security benefits to Ashley's account; his monthly child support obligation would first be credited, with any additional amount "going toward" any other money that he owed her, i.e., medical and tuition expenses. The Social Security deposits began in December 2016 and continued

until stopped by Steven at the end of May 2019. Ashley's counsel introduced into evidence a chart he discussed with both parties and which the trial judge used to come up with the figure currently due to Ashley from Steven. Both parties testified that, as of June 1, 2019, Steven had an overage of $4,943.24.

A child support judgment generally remains in full force until the party ordered to pay it has the judgment modified, reduced, or terminated. The parties may modify child support payments by conventional agreement if it does not interrupt the children's maintenance or upbringing and is in their best interests. Clearly the parties did not have an agreement to modify or suspend Steven's child support payments in this case, which arguably would have been based on the fact that K.K. was living with Steven instead of his mother. That "living arrangement" was a unilateral decision made by Steven, not one made by the court. Regarding his decision to redirect the Social Security payments rather than seek relief from the court (Steven testified that he thought Ashley, as domiciliary parent, should be the one to file), Steven stated that he "stopped" making child support payments in June 2019 because "I assumed I had a credit there and that we needed to have this court case to figure out who owes who what."

Ashley, as the party seeking contempt, has to show that Steven, the alleged offender, willfully disobeyed an order of the court prior to the contempt rule. At the time Ashley filed her rule for contempt, Steven was not behind in his support obligations (including deductions from the overage amounts for the St. Mark's tuition and medical expenses, but not the LCP tuition, since Steven's responsibility for paying one-half of the LCP tuition arises not from the 2015 judgment, but from an extrajudicial agreement he and Ashley made after K.K.'s first year of public high school). Therefore, the trial court's contempt finding and 30-day jail sentence (including the award of attorney fees and imposition of court costs), which was not properly based upon a finding that Steven, prior to the date that Ashley filed the instant rule, intentionally, knowingly and purposefully, or without justifiable cause, violated the court's judgment, will be reversed.

In regards to the sanctions, Ashley's attorney contends that, at the time she signed her verification, the allegations contained in the petition filed on July 1, 2019, were true and correct "to the best of her information, knowledge, and belief." This argument is specious at best; however, giving Ashley the benefit of the doubt, the argument that she did not know or should not have known of the falsity of the arrearages allegations could no longer be made once she failed to amend her rule for contempt prior to the hearing in February 2020.

First, she surely "discovered" that Steven was not over $20,000 in arrears once she began gathering information and documents for her attorney in preparation for the hearing; second, Ashley was reminded of the parties' agreement regarding the Social Security payments after being served with Steven's answer and reconventional demand, which was filed on August 22, 2019, and, inter alia, which specifically set forth the inaccuracies in the information she alleged in her rule. Instead, Ashley waited until the hearing, while being questioned by her attorney, to acknowledge that Steven was not in arrears in child support as she had alleged in her rule for contempt, but he actually had an overage of $4,943.24 as of June 1, 2019. We find that Ashley made a false certification in violation of La. C.C.P. art. 863 in her rule for contempt. Once the court finds an article

863 violation, as we have since the trial court erred in not doing so, the imposition of sanctions is mandatory. Upon remand, the trial court can, in its discretion, determine the type and severity of sanctions to impose.

B Procedural law

1 Notice/service

Anderson v. Anderson, No. 20-CA-186, 2020 WL 7639094 (La. App. 5th Cir 12/23/20)

Facts: On June 18, 2012, Karen Bergeron, a paralegal for Ms. Anderson's attorney, filed an affidavit of service of process indicating that on June 1, 2012, she sent Mr. Anderson, via Federal Express, certified copies of the following matters, including a rule for contempt and to make past due support executory, as well as notices of the dates to appear for these matters: Notice of Hearing Officer Conference and Notice of Hearing Date of Suit and Rule for Contempt, To Make Past Due Support Executory, For Legal Interest, Attorneys Fees and Costs which is scheduled for hearing before the hearing officer on August 2, 2012 at 10 a.m. The hearing officer recommendations filed into the record indicate that Mr. Anderson did not attend the conference. In his recommendations, the hearing officer determined that Mr. Anderson owed $10,730.82 in past due child and spousal support. Ms. Anderson's counsel presented a proposed final judgment containing the recommendations rendered by the hearing officer at the August 2, 2012 conference outlined above. The trial court signed this judgment on that same day, September 10, 2012.

On November 2, 2018, Mr. Anderson filed a petition to annul the judgments signed by the trial court on September 10, 2012. In his petition, Mr. Anderson alleged that the judgment are an absolute nullity because Ms. Anderson failed to serve him with the hearing officer recommendations, thereby denying him the opportunity to file objections prior to the rendering of the final judgment. On November 14, 2019, the trial court rendered a judgment and written reasons denying Mr. Anderson's petition to annul the judgments and dismissed his suit with prejudice. On November 27, 2019, Mr. Anderson filed a motion for devolutive appeal of the trial court's judgment dismissing his petition to annul, which the trial court granted on December 2, 2019. Mr. Anderson also seeks to collaterally attack and nullify the September 10, 2012 judgment, in which the trial court rendered amounts for past due child support.

Result: Affirmed.

Rationale: With respect to the September 10, 2012 judgment, he argues that the trial court erred by failing to find his procedural rights were violated because he did not receive the hearing officer recommendations prior to entry of the final judgment. He also argues that the trial court erred with respect to both judgments by declining to find that Ms. Anderson failed to follow proper procedure requiring presentation of the proposed judgments to him for review prior to submitting them to the trial court for signature and that the trial court erred by finding he acquiesced to the judgments. This rule for contempt and to make past due support executory involved a summary proceeding governed by La. C.C.P. art 2594

and set for a contradictory motion.

Mr. Anderson does not deny or contest that he received service, via the long arm statute, of the rule for contempt and to make past due support executory. He also does not deny or contest that he received notice of the August 2, 2012 hearing officer conference and September 10, 2012 district court date assigned for Ms. Anderson's rule.

Instead, he claims, first,that the judgment is invalid because he did not receive a copy of the hearing officer's recommendations, thereby preventing him from filing an objection to the recommendations. Second, he argues that opposing counsel failed to provide a copy of the final judgment to him prior to presenting it to the trial court for signature pursuant to Louisiana District Court Rule 9.5.

Instead of filing a direct appeal, he waited to file a petition to nullify this judgment pursuant to La. C.C.P. art. 2002, which is limited to service of process issues. However, we do not find that any process issues exist as he received proper service of the rule and hearing date in accordance with La. C.C.P. art. 2594. Mr. Anderson had the opportunity to raise objections regarding lack of notice of the hearing officer recommendations and failure to circulate a copy of the proposed judgment on direct appeal. However, he chose not to do so and his attempts to now raise these issues on appeal are untimely. Therefore, as explained above, when a party fails to file a timely appeal from a final judgment, this Court lacks jurisdiction to consider these underlying issues relating to the judgment.

2 Involuntary dismissal

Richard v. Richard, 308 So.3d 363 (La. App. 3 Cir. 11/25/20)

Facts: As part of their divorce proceedings, Penny and Dustin Richard entered stipulated judgments resulting in Mr. Richard paying $1,515 per month in child support and $4,700 per month in interim spousal support. On December 2, 2019, Mr. Richard filed a motion to modify the support awards alleging that he had suffered a material change in circumstances when he was terminated from his employment. During the hearing on the motion, the trial court interrupted Mr. Richard's testimony and dismissed his motion based on his partial testimony. From that decision, Mr. Richard appeals.

Result: Reversed.

Rationale: On appeal, Mr. Richard asserts two assignments of error. He first claims that the trial court erred in dismissing his motion before the conclusion of his case. He also claims that the trial court erred in ruling against his motion based on his uncontroverted testimony. Because we find merit in his first assignment of error, we need not address his second.

La. C.C.P. art. 1672(B) grants to any party the right to move for dismissal after the plaintiff has completed the presentation of his or her evidence. Therefore, a judgment of involuntary dismissal under La. C.C.P. art. 1672(B) requires a motion on behalf of either party. The provision does not allow the trial court to grant a dismissal on its own motion. A trial court may not dismiss an action on its own, as it is not a party to the action

The record on appeal does not reflect that any party moved for an involuntary dismissal under La. C.C.P. art. 1672(B) prior to the trial court's decision. Accordingly, we

find that the trial judge erred in granting an involuntary dismissal where neither the plaintiff nor defendant moved for one. The trial court's rendition of judgment sua sponte was improper and must be reversed.

Furthermore, La. C.C.P. art. 1672(B) allows a party the right to move for dismissal after the plaintiff has completed the presentation of his or her evidence. The record before us indicates that the trial court stopped Mr. Richard's first witness, himself, in the middle of his testimony and summarily ended the case by rendering its decision. Mr. Richard did not get to conclude his own testimony, let alone rest his case or complete the presentation of his evidence. While the trial court's decision may ultimately prove to be correct, granting an involuntary dismissal prior to the close of a plaintiff's evidence is another clear error on the part of the trial court requiring reversal.

3 *Res judicata*

State O/B/O T.J. & T.J. v. Johnson, No. 20-154, 2020 WL 7381220 (La. App. 5 Cir. 12/16/20)

Facts: On August 6, 2015, the trial court rendered a judgment against Mr. Johnson, the acknowledged father of twins born on May 24, 2014, ordering him to pay monthly child support. Mr. Johnson was not present for the August 6, 2015 hearing, although the record indicates he was served via domiciliary service on June 30, 2015. According to DCFS's appellate brief, DCFS received payments on Mr. Johnson's child support obligation via wage assignment from his employer from October of 2015 to September of 2018.

In April of 2018, a hearing was set upon motion of DCFS in which Mr. Johnson sought a modification of his child support obligation. In addition to the DCFS motion for a modification, Mr. Johnson filed - in proper person - a motion to nullify the August 6, 2015 child support judgment on the basis that he had not been properly served, and therefore, the court lacked personal jurisdiction over him.

The trial court heard these motions at a June 28, 2018 hearing at which Mr. Johnson was present, although he refused to identify himself. At the hearing, Mr. Johnson was identified by the mother of his children and by the trial judge using a copy of his driver's license on file in the court record, at which time Mr. Johnson fled the courtroom. The judge subsequently rendered judgment dismissing the modification request and dismissing Mr. Johnson's motion to vacate the August 6, 2015 judgment. The record does not reflect that Mr. Johnson sought appellate review of the trial court's June 28, 2018 judgment.

On August 13, 2018, Mr. Johnson, through legal counsel, filed a second motion to nullify the August 6, 2015 child support judgment. Following a hearing on November 9, 2018, the trial court found that the motion to nullify was "a duplication of prior motion which should have been appealed when it was ruled on." The trial court therefore denied the second motion to nullify the August 6, 2015 child support judgment because it was "seeking the same relief that was sought and heard on June Twenty-Eighth by Judge Becnel."

Mr. Johnson sought supervisory review of the November 9, 2018 judgment, which

this Court denied on January 30, 2019, for failure to provide the documentation required by Uniform Rules-Court of Appeal, Rule 4-5. Mr. Johnson also sought review by the Louisiana Supreme Court, which also denied his writ application.

On August 19, 2019, in a third attempt to annul the August 6, 2015 child support judgment, Mr. Johnson filed a petition to annul the judgment on the same grounds he had previously urged in his two prior motions to annul the judgment, i.e., that he had not been served with process as required by law. While styled as a "petition" instead of a "motion," the arguments are the same as those set forth in Mr. Johnson's previous two "motions" to annul. In response, DCFS filed an exception of res judicata and also argued that Mr. Johnson's petition to annul should be dismissed on the grounds that he had acquiesced in the judgment pursuant to La. C.C.P. art. 2003.

On October 11, 2019, after a hearing on the matter, the trial court rendered judgment sustaining DCFS's exception of res judicata and denying Mr. Johnson's petition to annul.

Result: Affirmed.

Rationale: On appeal, Mr. Johnson argues that the trial court erred in sustaining the exception of res judicata and dismissing his petition for nullity. We disagree.

Five elements must be satisfied for a finding that a second action is precluded by res judicata: (1) the judgment is valid; (2) the judgment is final; (3) the parties are the same; (4) the cause or causes of action asserted in the second suit existed at the time of the final judgment in the first litigation; and (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation

Upon de novo review, we find that the trial court correctly sustained DCFS's exception of res judicata. The record shows that all of the elements necessary for finding the petition to annul precluded by res judicata are met here: there was a valid, final judgment on June 28, 2018, between the same parties, Mr. Johnson and DCFS, over the same subject matter presented in the petition - whether Mr. Johnson was properly served with service of process prior to the August 6, 2015 judgment.

Accordingly, we affirm the October 11, 2019 judgment of the trial court sustaining DCFS's exception of res judicata and dismissing Mr. Johnson's petition to annul the August 6, 2015 child support judgment.

4 Judges involved in judgment

In re M.L.M., 300 So.3d 902 (La. App. 1 Cir. 4/23/20)

Facts: Appellant Lynell Matthews, Jr., and Appellee Shimeka S. White, who were never married, are the parents of a minor child, M.L.M., born on August 3, 2007. In December of 2008, the parties were granted joint custody of their minor child, with Ms. White designated as the domiciliary parent; Mr. Matthews was ordered to pay child support.

On March 20, 2017, Mr. Matthews filed a rule to modify child support and visitation. After several continuances, Mr. Matthews' rule was scheduled to be heard on July 3, 2017. On or about June 15, 2017, Ms. White filed a rule for contempt and

continuance, Ms. White's rule hearing was also scheduled to be heard on July 3, 2017, at which time that hearing was passed by the parties "subject to re-assignment."

In September of 2018, Mr. Matthews moved to have his rule to modify child support and visitation reset; the court scheduled the matter for November 5, 2018. Present at the November 5 hearing were Mr. Matthews, his attorney, and Ms. White's attorney of record. Ms. White was not present, and due to confusion about whether her attorney of record would continue to represent her, the court then again rescheduled the matter to be heard on December 3, 2018.

At the hearing on December 3, 2018, with a "stand-in" judge on the bench, and only Ms. White and her attorney present in court, Mr. Matthews' rule to modify child support and visitation was dismissed. The court then took up Ms. White's rule for contempt, and rendered judgment in favor of Ms. White and against Mr. Matthews. A judgment was signed on December 10, 2018.

On December 21, 2018, Mr. Matthews filed a "motion to vacate judgment and/or for new trial." Mr. Matthews argued, in essence, that he had not been served with notice of the rule for contempt hearing, and prayed that the judgment be annulled due to insufficiency of service. After a hearing on the matter, the trial court, in a judgment signed on May 1, 2019, denied Mr. Matthews' motion to vacate the December 10, 2018 judgment and/or for a new trial.

Mr. Matthews now appeals that judgment, contending that the trial court erred by failing to annul the judgment.

Result: Reversed.

Rationale: Louisiana Code of Civil Procedure art. 1911requires that every final judgment shall be signed by the judge, except as otherwise provided by law. This has been interpreted to mean that the judge before whom the case was tried must sign the judgment. A judgment signed by a judge, other than the one which presided over the hearing, is invalid. Moreover, a judgment signed by a judge who did not preside over the trial is fatally defective and does not constitute a final judgment over which this court can exercise appellate jurisdiction. Until the judge who conducted the trial signs the judgment, there is no final judgment. Moreover, if a judgment not signed as required by La. C.C.P. art. 1911 is not considered a final judgment on direct appeal, it cannot be considered a final judgment simply because there was no direct appeal wherein the fatal defect could have been discovered and corrective measures ordered.

In this matter, the minutes show that Judge William Carmichael presided over the December 3, 2018 hearing. The minute entry reads, "[H]ON. WILLIAM G. CARMICHAEL, STANDING IN FOR KATHRYN E. JONES." Judge Carmichael orally ruled on Mr. Matthews' rule to modify child support and Ms. White's motion for contempt. The written judgment reflects Judge Carmichael's name typed below the signature line; however, the judgment was signed by Judge Jones.

Although there are exceptions allowing a judge who did not hear a matter to sign a judgment, none apply here. A duty judge is permitted to hear and sign specific orders and judgements, but this does not apply to the judgment at issue which reflects the substantive ruling of another judge. Additionally, the exception pertaining to a successor judge found in La. R.S. 13:4209 does not apply as Judge Carmichael "stood-in" for Judge Jones.

5 Modification of out-of-state award

Harvey v. Harvey, 303 So.3d 357 (La. App. 1 Cir. 5/11/20)

Facts: Charles Edward Harvey and Jennifer Chandler Harvey were married on June 23, 2001, and are the parents of three children, Kylei Harvey, Caleb Harvey, and Kelcei Harvey. During the marriage, Charles and Jennifer lived in Florida. On May 12, 2016, the parties were divorced by a judgment signed in Okeechobee, Florida. As part of that judgment, the parties agreed to the custody of their children, and the Florida court ordered Charles to pay child support to Jennifer. The Florida judgment provided that the Florida court "retain[ed] jurisdiction for all purposes."

Thereafter, Charles, Jennifer, and their children moved to East Feliciana and lived there together from about April 2017 to June 2018. In June 2018, Jennifer and the children no longer lived with Charles but remained in Louisiana. In May 2019, Jennifer moved back to Florida with Caleb and Kelcei.

After Jennifer returned to Florida with the minor children, Charles filed in the 20th Judicial District Court for the parish of East Feliciana a "Petition for Legal Custody & to Modify Unregistered Interstate Support Order." In that petition, Charles requested that the child support order be modified. Charles' petition came before the district court on August 5, 2019. By that time, Charles had obtained a copy of the Florida judgment, and he introduced the judgment into the record. Jennifer was not present at the hearing.

After the hearing, the district court signed a judgment on August 27, 2019, modifying the Florida judgment by designating Charles as the domiciliary parent, ordering that the children be returned to Louisiana and enrolled in appropriate schools, providing visitation time for Jennifer, and modifying the Florida support order by ordering Jennifer to pay child support to Charles. As part of the judgment, the district court made the following findings of fact: Jennifer resides in the state of Florida, and Florida had granted a divorce between the parties and approved a consent parenting plan and marital settlement agreement that included terms of joint legal custody, support, and visitation on May 12, 2016.

It is from the August 27, 2019 judgment that Jennifer appealed, contending that the district court lacked subject matter jurisdiction to modify the Florida judgment regarding the child support order under La. Ch. C. art. 1306.11.

Result: Reversed.

Rationale: The Uniform Interstate Family Support Act (UIFSA) found in La. Ch. C. arts. 1301.1 et. seq. was enacted to unify the support law among the states. Subject matter jurisdiction with regard to the issue of child support is governed by Louisiana's version of the UIFSA. Louisiana Children's Code article 1306.13(A)provides that "[i]f all of the parties who are individuals reside in this state and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child support order in a proceeding to register that order."

If Article 1306.13 does not apply, La. Ch. C. art. 1306.11 provides for the modification of the child support order of another state.

In order to modify a child support order, paragraph (A)(1) of La. Ch. C. art.

1306.11 requires the district court to find that neither the child, nor the obligee, nor the obligor resides in the issuing state. In this case, the Florida judgment ordered Charles to pay Jennifer $2,095.00 per month, beginning June 1, 2016. Jennifer, the obligee, resides in Florida, the issuing state of the child support order.

In light of the undisputed facts of this case, the requirements of paragraph (A)(1) of the Article cannot be met, and the district court does not have jurisdiction to modify the Florida child support award. Because the district court did not have subject matter jurisdiction to modify the child support award, the child support award rendered by the district court is void.

C Ethics

In re Mouton, 303 So.3d 298 (La. 10/20/20)

Facts: The Office of Disciplinary Counsel (ODC) commenced an investigation into allegations that respondent engaged in a conflict of interest by representing both a private client and the State of Louisiana in a child support collection matter. Prior to the filing of formal charges, respondent and the ODC submitted a joint petition for consent discipline in which respondent admitted that his conduct violated Rules 1.7(a), 1.9(a), and 1.11(d) of the Rules of Professional Conduct.

Result: Joint petition for consent discipline accepted.

Rationale: It is ordered that the Petition for Consent Discipline be accepted and that Shane M. Mouton, Louisiana Bar Roll number 23537, be suspended from the practice of law for a period of six months. This suspension shall be deferred in its entirety, subject to a six-month period of probation governed by the conditions set forth in the petition for consent discipline. The probationary period shall commence from the date respondent and the ODC execute a formal probation plan. Any failure of respondent to comply with the conditions of probation, or any misconduct during the probationary period, may be grounds for making the deferred suspension executory, or imposing additional discipline, as appropriate.

It is further ordered that all costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.