NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JEW
JTP by JEW
PMC by JEW

NUMBER 2011 CU 1566

EDWARD GAFNER

VERSUS

SHANNON GAFNER

Judgment Rendered: MAR - 6 2012

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Appealed from
The Family Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 161,034

Honorable Lisa M. Woodruff-White, Judge

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

WELCH, J.

Edward Gafner appeals a trial court judgment maintaining Shannon Gafner, as the domiciliary parent of the minor children of their marriage, denying his request for a decrease in child support, and finding him in contempt of court for his failure to pay child support. We affirm the judgment of the trial court in compliance with Uniform Rules--Courts of Appeal, Rule 2-16.1(B).

Edward and Shannon were married on March 3, 1997, and of their marriage, two children were born. On February 6, 2007, Edward filed a petition for divorce and a judgment of divorce was ultimately rendered on April 7, 2008. Previously, on November 28, 2007, the parties had entered into a consent judgment which provided, among other things, that the parties would share joint custody of their minor children, that Shannon would be designated as the children's domiciliary parent, and that Edward would have physical custody of the minor children in accordance with his work schedule such that he would have the children approximately 45% of the time. Additionally, the judgment provided that Edward would pay child support in the amount of $800 per month and each party would pay their *pro rata* share (*i.e.*, Edward 65% and Shannon 35%) of all daycare expenses, private school tuition expenses, "out-of-pocket" medical expenses, and the children's health insurance premium (collectively referred to as "the children's expenses").

Following this stipulated judgment, Edward filed pleadings requesting: (1) a change in the designation of the domiciliary parent, (2) a decrease in his child support obligation, and (3) that Shannon be found in contempt of court for allegedly violating the November 28, 2007 consent judgment by failing to allow Edward all of his physical custodial time with the children and by failing to reimburse Edward for her *pro rata* share of the children's expenses. Additionally, Shannon filed several pleadings requesting: (1) a modification of custody (from

joint to sole custody), and (2) that Edward be found in contempt of court for allegedly violating the November 28, 2007 consent judgment by failing to pay his monthly child support obligation and by failing to reimburse Shannon for his *pro rata* share of the children's expenses.

After a two day-trial, the trial court rendered judgment, with written reasons assigned, maintaining joint custody with Shannon designated as the domiciliary parent, subject to Edward having physical custody for approximately 45% of the time. Additionally, the trial court allocated Edward specific physical custodial time during the school year, summer, and holidays. The trial court denied Edward's rule to reduce his child support obligation, found Edward in contempt of court for failing to pay his monthly child support obligation and ordered Edward to reimburse Shannon for his *pro rata* share of the children's expenses that she incurred. A written judgment reflecting the trial court's ruling was signed on January 5, 2010. Edward subsequently filed a motion for new trial, which the trial court denied by judgment signed on April 7, 2010, and Edward now appeals.

On appeal, Edward essentially asserts that the trial court erred in: (1) maintaining Shannon as the domiciliary parent; (2) failing to decrease his child support obligation; (3) finding him in contempt of court for failing to support and ordering him to reimburse Shannon for his *pro rata* share of the children's expenses and not finding Shannon in contempt of court for failing to allow Edward the opportunity to care for the children in Shannon's absence and for failing to reimburse Edward for her *pro rata* share of children's expenses;[1] and (4) denying his motion for new trial.[2]

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[1] We note that Shannon was found in contempt of court with regard to "parental alienation/custody" as set forth in the trial court's reasons for judgment.

[2] "[T]he established rule in this circuit is that the denial of a motion for new trial is an interlocutory and non-appealable judgment." **McKee v. Wal–Mart Stores, Inc.**, 2006-1672 (La. App. 1st Cir. 6/8/07), 964 So.2d 1008, 1013, writ denied, 2007-1655 (La. 10/26/07), 966 So.2d 583. However, we may consider interlocutory judgments as part of an unrestricted appeal from a

Concerning the trial court's decision to maintain Shannon as the domiciliary parent, it is well-settled that the paramount consideration in any determination of child custody is the best interest of the child. **Evans v. Lungrin**, 97-0541, 97-0577 (La. 2/6/98), 708 So.2d 731, 738. As such, the trial court is in the best position to ascertain the best interest of the child given each unique set of circumstances. **Major v. Major**, 2002-2131 (La. App. 1st Cir. 2/14/03), 849 So.2d 547, 550. Accordingly, a trial court's determination of custody is entitled to great weight and will not be reversed on appeal unless an abuse of discretion is clearly shown. **Major**, 849 So.2d at 550.

In cases, such as this one, where the underlying custody decree is a stipulated judgment, and the parties have consented to a custodial arrangement with no evidence as to parental fitness, the party seeking modification must show that there has been a material change of circumstances since the original custody decree was entered and that the proposed modification is in the best interest of the child.[3] **Major**, 849 So.2d at 552. Thus, in order to modify the parties existing

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final judgment. **Bailey v. Robert V. Neuhoff Limited Partnership**, 95-0616 (La. App. 1st Cir. 11/9/95), 665 So.2d 16, 18, writ denied, 95-2962 (La. 2/9/96), 667 So.2d 534. Since Edward challenges the trial court's denial of his motion for new trial as part of the appeal from the final judgment, we may consider the issue on appeal.

[3] Louisiana Civil Code article 134 provides:

> The court shall consider all relevant factors in determining the best interest of the child. Such factors may include:
>
> (1) The love, affection, and other emotional ties between each party and the child.
>
> (2) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child.
>
> (3) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.
>
> (4) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.
>
> (5) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (6) The moral fitness of each party, insofar as it affects the welfare of the child.

custodial arrangement, Edward was required to establish that a change in circumstances materially affecting the welfare of the child had occurred since the rendition of the consent judgment on November 28, 2007, and further, that the modification proposed by him (*i.e.*, that he be designated as the children's domiciliary parent) was in the best interest of the child.

On appeal, Edward, relying heavily on the factual evidence adduced at trial, contends that he proved that it was in the children's best interest that he be designated as the children's domiciliary parent. Regardless of whether Edward proved that the modification sought by him was in the best interest of the child, he was still nonetheless required to prove that there had been a material change of circumstances since the November 28, 2007 consent judgment was rendered. We have thoroughly reviewed the record before us and find that it is devoid of any evidence establishing that a change in circumstances materially affecting the welfare of the children had occurred since the rendition of the consent judgment on November 28, 2007. Accordingly, we find no error in the trial court's decision to maintain joint custody with Shannon designated as the domiciliary parent of the children.

With regard to Edward's request for a decrease in child support, La. R.S. 9:311(A)(1) provides that "[a]n award for support shall not be modified unless the party seeking the modification shows a material change in circumstances of one of

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(7) The mental and physical health of each party.

(8) The home, school, and community history of the child.

(9) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.

(10) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party.

(11) The distance between the respective residences of the parties.

(12) The responsibility for the care and rearing of the child previously exercised by each party.

the parties between the time of the previous award and the time of the rule for modification of the award." To obtain a reduction in support, the change in circumstances must be *material*, defined as a change in circumstances having real importance or great consequences for the needs of the child or the ability to pay of either party. La. R.S. 9:311, comment (a). What constitutes a change in circumstances is determined on a case-by-case basis and falls within the great discretion of the trial court. **Folse v. Folse**, 2001-0946 (La. App. 1st Cir. 5/10/02), 818 So.2d 923, 925. On appeal, a trial court's child support order will not be reversed except for abuse of discretion. However, as in any other case, on appellate review of a trial court's factual findings, those findings of fact are subject to the manifest error/clearly wrong standard of review. **Harang v. Ponder**, 2009-2182 (La. App. 1st Cir. 3/26/10), 36 So.3d 954, 967, writ denied, 2010-0926 (La. 5/19/10), 36 So.3d 219.

The previous award of child support was established by the November 28, 2007 consent judgment. As the party seeking modification of the child support obligation, Edward had the burden of proving a change in circumstances of one of the parties since the time of the previous award. Edward's request for a reduction in child support, which was filed on December 16, 2008, alleged that he was involved in a work-related accident, and because of that accident, he had been unable to work, was not likely to return to work for a substantial period of time, and his income had decreased, thereby entitling him to a modification of his child support obligation.

In the trial court's written reasons for judgment, the trial court found that although Edward was involved in an accident that rendered him unable to work, a reduction in child support was not warranted because Edward eventually received his full wages in the form of employee benefits and insurance. However, Edward contends that the trial court erred in denying his request for a decrease in child

support because of the evidence at trial establishing that significant sums of money had been deposited into Shannon's checking account between June 2007 and October 2008. Edward contends that this evidence established that Shannon's income had increased, thus warranting a reduction in his child support obligation.

According to Shannon's testimony at trial, the sums of money at issue were given to her by Dr. Robert Fields. Shannon explained that she was romantically involved with Dr. Fields, and that the funds deposited into her account were used for various household expenses of Dr. Fields, with whom she lived when she did not have physical custody of her children. Shannon further explained that her romantic relationship with Dr. Fields ended around September or October 2008, and that after their personal relationship ended, she did not receive any funds from him for his household expenses. However, Shannon testified that she is currently employed by Dr. Fields as a dental hygienist and her salary is approximately $4,100-$4,200 per month. Thus, by the time Edward filed his rule to reduce child support in December 2008, Shannon was no longer receiving any funds from Dr. Fields, except her monthly salary. The record reveals that the trial court carefully considered all of the evidence concerning the income of both parties and found there had not been a change in circumstances affecting either party's ability to pay support since the previous award of support. After a thorough review of the record, we conclude that the record reasonably supports the trial court's factual finding in this regard.

Concerning the trial court's decision to find Edward in contempt of court but not find Shannon in contempt of court, we recognize that willful disobedience of any lawful judgment constitutes constructive contempt of court. La. C.C.P. art. 224(2). To find a person guilty of constructive contempt, the trial court must find the person violated the court's order intentionally, purposely, and without justifiable excuse. **Barry v. McDaniel**, 2005-2455 (La. App. 1st Cir. 3/24/06), 934

So.2d 69, 73. The trial court is vested with great discretion in determining whether a party should be held in contempt for disobeying a court order, and the court's decision should be reversed only when the appellate court discerns an abuse of that discretion. **Boudreaux v. Vankerkhove**, 2007-2555 (La. App. 1st Cir. 8/11/08), 993 So.2d 725, 733.

The trial court found Edward in contempt of court for failing to pay his monthly support obligation and ordered Edward to reimburse Shannon for his *pro rata* share of the children's expenses. Implicit in the trial court's ruling was that Edward had violated an order of the court, *i.e.*, the child support provisions set forth in the November 28, 2007 consent judgment, intentionally, knowingly, and without justifiable excuse. Considering all of the evidence in the record, particularly the testimony of Edward that he was in fact behind in his monthly child support and reimbursements to Shannon, we do not find that the trial court abused its discretion in finding Edward was in contempt of court.

With regard to Shannon, the trial court determined that although she failed to pay her *pro rata* share of the children's insurance, she consistently deducted her portion of that expense from the calculation of the reimbursements owed to her by Edward. With regard to Shannon's alleged failure to allow Edward physical custodial time, the trial court attributed some of the lost time to Edward for not timely notifying Shannon about his work schedule as required by the November 28, 2007 consent judgment. Thus, the trial court apparently concluded that Shannon had not intentionally, knowingly, and without justifiable excuse violated an order of the court. Based on the evidence in the record, we do not find that the trial court abused its discretion in this regard.

Lastly, with regard to the trial court's denial of the motion for new trial, Edward sought a new trial based on La. C.C.P. art. 1972(1) and (2), which provide:

> A new trial shall be granted, upon contradictory motion of any

party, in the following cases:

> (1) When the verdict or judgment appears clearly contrary to the law and the evidence.
>
> (2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial.

The standard of appellate review for denial of a motion for new trial is the abuse of discretion standard. **Rao v. Rao**, 2005-0059 (La. App. 1st Cir. 11/4/05), 927 So.2d 356, 361, writ denied, 2005-2453 (La. 3/24/06), 925 So.2d 1232. Edward argued that he was entitled to a new trial because the judgment was contrary to the law and the evidence and because, after the trial of this matter, Shannon remarried and her living arrangements with the minor children changed. Based on our review of the merits of this case, the trial court's judgment was not contrary to the law and the evidence. Thus, Edward was not entitled to a new trial on the basis La. C.C.P. art. 1972(1), and the trial court did not abuse its discretion in denying the motion for new trial in that respect. Moreover, although Shannon's subsequent re-marriage may constitute a change in circumstances materially affecting the welfare of the children that may warrant a new action by Edward for a modification of custody, we cannot say that the trial court abused the discretion afforded it in concluding that Shannon's subsequent remarriage did not warrant a new trial based on La. C.C.P. art. 1972(2).

For all of the above and foregoing reasons, the January 5, 2010 judgment of the trial court is affirmed. All costs of this appeal are assessed to the plaintiff/appellant, Edward Gafner.

AFFIRMED.