NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CU 1266

MEGHAN DOURS

VERSUS

TODD O'NEILL

CONSOLIDATED WITH

NUMBER 2011 CU 1267

TODD O'NEILL

VERSUS

MEGHAN DOURS

Judgment Rendered: MAR - 9 2012

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Appealed from
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Docket Number 2009-0004036 c/w 2010-0001436

Honorable Brenda Bedsole Ricks, Judge

* * * * * *

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* * * * * *

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

GUIDRY, J.

A father appeals a child custody and support decree wherein the trial court approved the mother's relocation with the child and awarded her domiciliary custody. For the following reasons, we amend the judgment, and as amended, affirm.

FACTS AND PROCEDURAL HISTORY

In June 2006, Meghan Dours and Todd O'Neill began dating, and as a result of that relationship, Alana Claire O'Neill was born on May 19, 2007. At the time of Alana's birth, Meghan lived in Baton Rouge with her mother, and for the first ten months of the child's life, Todd frequently traveled to Baton Rouge from Hammond to spend time with his daughter. In March or April 2008, Meghan's mother moved to Texas, so Meghan and Alana moved to Hammond to live with Todd. The couple shared a home in Hammond until February 2009, when Todd moved out, and in June 2009, Meghan moved to an apartment in a neighboring town. From February 2009 to February 2010, the couple shared physical custody of their daughter, with Todd keeping her Monday through Wednesday, and occasionally on additional days as Meghan's schedule required, with the assistance of his family.

In late February 2010, Meghan moved with Alana to a suburb of Dallas, Texas to live with her mother and stepfather. Following the move, Alana did not return to Louisiana, and it was not until Easter 2010, that Todd traveled to Texas to see his daughter. At the time of the Easter visit, Todd requested and was allowed to take physical custody of Alana and bring her back to Louisiana for a week; however, on returning to Louisiana, Todd immediately filed a petition opposing Meghan's relocation with the child and seeking a court decree as to exercise of custody by the parties. Todd's custody action was later consolidated with a dormant custody action that had previously been filed by Meghan.

A hearing on the consolidated custody pleadings began on June 16, 2010, but was not completed, so the matter was recessed for three weeks. During the recess, Todd filed a motion to recuse the trial judge, which motion was eventually denied, but resulted in the recessed hearing being delayed for several months.[1] Finally, on April 1, 2011, the custody hearing was resumed, following which the trial court rendered judgment granting the parties joint custody of Alana, with Meghan being designated the domiciliary parent. The trial court further allowed Meghan's relocation to Texas with Alana and ordered Todd to pay $1,144.00 a month in child support.

It is from this judgment that Todd appeals, assigning the following rulings of the trial court as error[2]:

> Assignment of Error # 1
> The trial court erred when it adopted that portion of the argument of Dours' counsel which shifted the burden of proof to O'Neill to show why the child should not be allowed to relocate.
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> Assignment of Error # 2
> Dours failed to carry her two-pronged burden of proof that (1) she was in good faith in relocating the child to Texas and (2) that relocation is in the best interest of the minor child.
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> Assignment of Error # 3
> That portion of the April 13, 2011 Judgment which sets child support lacks the support of evidence of record and applicable law, is not precise, definite, and certain, and is based on contingencies, and whether the trial court erred when it failed to properly calculate child support.
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> ...

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[1] Todd filed a writ application seeking supervisory review of the denial of the motion to recuse. This court denied writs in the matter. See O'Neill v. Dours, 10-1498 (La. App. 1st Cir. 12/3/10) (unpublished writ action).

[2] In his brief, Todd only presented arguments regarding assignments of error 1, 2, 3 and 5. As he failed to brief assignment of error number 4, that alleged error is deemed abandoned in accordance with Uniform Rules, Courts of Appeal, Rule 2-12.4.

Assignment of Error # 5
That portion of the trial court's April 13, 2011 Judgment which was rendered on Dours' November 16, 2009 Petition is an absolute nullity pursuant to Louisiana Code of Civil Procedure Article 1201.

DISCUSSION

In his first assignment of error, Todd alleges that the trial court improperly placed the burden of proof on him on the issue of relocation by adopting as its reasons for judgment the closing arguments of Meghan's counsel. While it is true that the trial court simply adopted the arguments of Meghan's counsel, with some modifications, a review of the counsel's closing arguments reveals that Todd mischaracterizes the findings of the trial court pursuant to that action. In his closing arguments, counsel for Meghan went through each of the twelve factors listed in La. R.S. 9:355.12 and discussed the evidence presented in relation to each factor. At the conclusion of counsel's evaluation of each of the factors, he stated "[t]hey haven't refuted any of the elements that I just told you in their direct examination of their client."

Louisiana Revised Statute 9:355.13 states that "[t]he relocating parent has the burden of proof that the proposed relocation is made in good faith and is in the best interest of the child." Nothing in our review of the closing arguments of Meghan's counsel, which were adopted as the reasons for judgment of the trial court, persuades us that the trial court improperly shifted the burden of proof to Todd. Rather, a simple reading of the closing arguments indicates a determination that Meghan met her burden of proof, and Todd was unsuccessful in showing otherwise. Accordingly, we find no merit in Todd's first assignment of error and reject the allegations contained therein.

In his second assignment of error, Todd alleges that Meghan failed to sustain the requisite burden of proof under La. R.S. 9:355.13. We disagree. While

Meghan clearly failed to comply with the requisites of La. R.S. 9:355.3(B)[3] when she effectively relocated to Texas with Alana without first obtaining court authorization or the written consent of Todd, that action alone was not sufficient to deem the relocation to have been made in bad faith. Instead, La. R.S. 9:355.6 states:

> The court may consider a failure to provide notice of a proposed relocation of a child as:
>
> (1) A factor in making its determination regarding the relocation of a child.
>
> (2) A basis for ordering the return of the child if the relocation has taken place without notice or court authorization.
>
> (3) Sufficient cause to order the parent seeking to relocate the child to pay reasonable expenses and attorney fees incurred by the person objecting to the relocation.

A determination as to whether the proposed relocation was made in good faith is subject to manifest error review on appeal. See Nelson v. Land, 01-1073, p. 9 (La. App. 1st Cir. 11/9/01), 818 So. 2d 91, 96-97.

At trial, Meghan stated that she discussed the possibility of moving to Texas with Todd in December 2009 because (a) she was having trouble paying her rent, and he could not assist; (b) Alana was not in school, and they could not agree on one, plus better schools were offered in Texas; and (c) she was not working full time in Louisiana, but thought she could find full-time employment in Texas. Todd acknowledged that Meghan had discussed with him the possibility of moving to Texas to live with her mom prior to her doing so. He stated that he asked Meghan not to go to Dallas and "plant any roots," but he could not recall if told her *not* to go to Dallas when she informed him that she was trying to get a job there.

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[3] Louisiana Revised Statute 9:355.3(B) provides "[i]f both parents have equal physical custody of a child, a parent shall notify the other parent of a proposed relocation of the child's principal residence as required by R.S. 9:355.4, ***but before relocation shall obtain either court authorization to relocate***, after a contradictory hearing, ***or the written consent of the other parent prior to any relocation.***" (Emphasis added.)

Meghan admitted that she did not apply for any jobs in her field in Louisiana, but she stated that she knew from experience that there simply were no jobs available. She explained that as the president of the American Marketing Association, a position she held while enrolled at Southeastern, she set up a job board for members and looked for positions where members could work, volunteer, or intern, but said she did not have "a whole lot of success" in finding appropriate positions to post for members. However, she testified that she was able to obtain suitable employment in her field upon moving to Texas.

As for Alana's schooling, Meghan testified that since moving to Texas, she was able to successfully enroll Alana in a Montessori-based pre-school, which she had been unable to accomplish in Louisiana. Meghan testified that she had wanted to enroll Alana in the Montessori system in Hammond, but found the Montessori schools in Hammond were too expensive and "had waiting lists and didn't take child care assistance." She said she had discussed with Todd her desire to enroll Alana in a Montessori school in Hammond, but explained "[w]e both understood that we couldn't afford it."

Based on this evidence, we cannot say that the trial court erred in finding that the relocation was made in good faith. Thus, we must now consider whether the relocation was in the best interest of the child.

An illustrative list of factors for the court to consider in making this determination is found in La. R.S. 3:355.12.[4] This list parallels the listing of

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[4] Louisiana Revised Statute 9:355.12 provides:

> A. In reaching its decision regarding a proposed relocation, the court shall consider the following factors:
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> (1) The nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate and with the nonrelocating parent, siblings, and other significant persons in the child's life.
>
> (2) The age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.

multiple factors found in La. C.C. art. 134, with special emphasis on the logistical and economic circumstances associated with a relocation, particularly an out-of-state relocation. Bonnecarrere v. Bonnecarrere, 11-0061, p. 10 (La. App. 1st Cir. 7/1/11), 69 So. 3d 1225, 1233.

Meghan's purpose for relocating was to explore employment opportunities and to provide a more stable and reliable lifestyle for her daughter; Todd's reason for opposing the relocation is that the move means significantly less time he will be able to spend with his daughter.

In the reasons for judgment adopted by the trial court, each of the factors listed in La. R.S. 9:355.12 were discussed, with primary consideration being given

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(3) The feasibility of preserving a good relationship between the nonrelocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties.

(4) The child's preference, taking into consideration the age and maturity of the child.

(5) Whether there is an established pattern of conduct of the parent seeking the relocation, either to promote or thwart the relationship of the child and the nonrelocating party.

(6) Whether the relocation of the child will enhance the general quality of life for both the custodial parent seeking the relocation and the child, including but not limited to financial or emotional benefit or educational opportunity.

(7) The reasons of each parent for seeking or opposing the relocation.

(8) The current employment and economic circumstances of each parent and whether or not the proposed relocation is necessary to improve the circumstances of the parent seeking relocation of the child.

(9) The extent to which the objecting parent has fulfilled his or her financial obligations to the parent seeking relocation, including child support, spousal support, and community property obligations.

(10) The feasibility of a relocation by the objecting parent.

(11) Any history of substance abuse or violence by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.

(12) Any other factors affecting the best interest of the child.

B. The court may not consider whether or not the person seeking relocation of the child will relocate without the child if relocation is denied or whether or not the person opposing relocation will also relocate if relocation is allowed.

to the fact that Meghan has acted as the primary caregiver for Alana since birth. The record further reveals that at the time of trial, Alana was of the fairly young age of three years old; nevertheless, upon relocating to Texas, Meghan successfully enrolled Alana in an academically structured, Montessori pre-school. There was no evidence presented that the move adversely affected Alana physically, emotionally, or educationally. The child's attitude did not change, and she was at the head of her pre-school class in Texas.

The record indicates that prior to the relocation, the parties shared free and easy access to the child; however, following the relocation, the opposite was true, mainly due to the lack of a formal custody decree. As a result, Meghan refused to grant Todd physical custody without a written stipulation as to when the child would be returned. Todd, in turn, attempted to keep the child in Louisiana and opposed returning the child to Texas absent a court decree. The court found that pending the subject custody hearing, Meghan encouraged Todd's visitation with the child, albeit, in Texas with supervision.

By residing with her mom in Texas, Meghan is able to provide decent housing for her and Alana at no expense. Meghan testified that in her mother's house, she and Alana have their own separate bedrooms, a separate living area shared by just the two of them, and a Hollywood bathroom that connects their two bedrooms. Todd, conversely, testified that he lives in a two-bedroom trailer home with his wife and newborn son and, consequently, Alana would share a room in the home with the newborn son, while residing with Todd.

Finally, Meghan testified that since the relocation, "[e]verything is more stable for [Alana]. We have routines for everything, for bedtime, for after school. She knows who's going to be there in the afternoon. She knows what house she's going to ... [sleep] at. I've noticed a lot less acting out from her. She craves routines. She loves them. She gets very upset if you go out of routine."

On reviewing the record before us, we find that evidence adequately supports the trial court's determination that granting the relocation was in the best interest of Alana. We therefore hold that the trial court did not abuse its discretion in allowing Meghan to relocate to Texas with Alana. See Curole v. Curole, 02-1891, p. 4 (La. 10/15/02), 828 So. 2d 1094, 1096.

Todd next contends that the trial court erred in setting the award of child support. Due to the nature of Todd's employment, he contends that the trial court erred in strictly relying on the gross receipts reported on his income tax returns and not taking into consideration necessary expense deductions attributable to his employment as a musician. We find merit in this assignment of error.

Neither party submitted a verified income statement as required by La. R.S. 9:315.2; nevertheless, some documentary evidence was introduced at trial and the parties also testified regarding their incomes. Meghan introduced a recent pay stub and testified that it was representative of her monthly gross salary of $2,000.00 per month.[5] Todd introduced copies of his tax returns for 2007, 2008, and 2009. According to the gross receipts listed on his tax returns, Todd earned $53,514.00 in 2007, $29,901.00 in 2008, and $41,961.00 in 2009. At the time of trial, Todd had not completed his tax return for 2010, so he testified regarding his income for 2010, since he started working with a new band that year. According to his testimony, in 2010, he estimated that he earned roughly $300.00 per show and that he performed on average two shows a week, which equals a yearly gross income of $31,200.00; however, Todd estimated that his gross salary was closer to $25,000.00 for the year. In closing arguments, Todd's counsel asserted that Todd had a monthly salary of roughly $2,200.00 per month; whereas counsel for

[5] The pay stub actually shows that the $2,000.00 total earnings listed were payable on a semi-monthly basis; however, Meghan testified that the $2,000.00 amount is actually a monthly "draw" that she receives from working on commission that is paid back through what she makes.

Meghan asserted that an average of Todd's income for the last four years is $41,600.00.

The child support worksheets used by the parties to calculate the amount of support that would be due were not included in the record before us, but considering the evidence in the record before us, we are unable to replicate the sums accepted by the trial court from Meghan's counsel.[6] Further, La. R.S. 9:315(C)(3)(c) expressly defines "gross income," in part, as:

> Gross receipts minus ordinary and necessary expenses required to produce income, for purposes of income from self-employment, rent, royalties, proprietorship of a business, or joint ownership or a partnership or closely held corporation. "Ordinary and necessary expenses" shall not include amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses or investment tax credits or any other business expenses determined by the court to be inappropriate for determining gross income for purposes of calculating child support.

Thus, we find that the trial court erred in failing to deduct from its calculation of Todd's gross income ordinary and necessary expenses in accordance with La. R.S. 9:315(C)(3)(c). Accordingly, we will recalculate the award of child support.

For 2007, Todd's income tax return indicates that he earned $2,954.00 in "wages, salaries, tips, etc.," and had gross receipts of $53,514.00. Deducting from his gross receipts ordinary and necessary expenses in the sum of $10,331.00,[7] results in a gross income of $46,137.00 for 2007. For 2008, Todd's income tax return indicates that he earned $5,875.00 in "wages, salaries, tips, etc.," and had gross receipts of $29,901.00. Deducting from his gross receipts ordinary and

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[6] The average of $53,514.00, $29,901.00, $41,961.00, and $31,200.00 is $39,144.00, not $41,600.00 as stated by counsel for Meghan.

[7] These expenses are listed on Todd's tax return as "supplies," "travel," "utilities," and "other expenses" of bank charges, postage, and telephone costs. We disallowed the "depreciation and section 179 expense deduction" as an accelerated component of depreciation expenses allowed by the IRS. We also disallowed the amounts listed for "car and truck expenses" and "contract labor," as Todd claimed a separate "travel" expense, and we cannot discern from the records submitted or Todd's testimony the basis for the "contract labor" expense.

necessary expenses in the sum of $4,938.00,[8] results in a gross income of $30,838.00. And for 2009, Todd's income tax return only shows gross receipts of $41,961.00, from which ordinary and necessary expenses in the sum of $6,384.00[9] are deducted to equal a gross income of $35,577.00. Relying on Todd's testimony regarding his earnings for 2010 as being approximately $31,200.00, we find an average of Todd's income for the four years prior to trial to be $35,938.00, equaling an average monthly income of $2,995.00.

Thus, in accordance with the worksheet found in La. R.S. 9:315.20, we calculate the child support owed by Todd as follows. The combined monthly income of Todd and Meghan is $4,995.00. According to La. R.S. 9:315.19, the "Louisiana Child Support Guideline Schedule of Basic Child Support Obligations," a combined income of $4,995.00, translates to a monthly child support obligation of $825.40 for one child. Returning to the worksheet, this amount is added to the net child care costs of $750.00 per month,[10] and the child's health insurance premium cost, of $155.00 per month based on the testimony of Meghan, equaling a total child support obligation of $1,730.40. As Todd's percentage share of the parties' combined gross monthly income is 60 percent, we find that Todd owes monthly child support of $1,038.24. We will amend the judgment to reflect this amount. We will also amend the judgment to set forth the

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[8] These expenses are listed on Todd's tax return as "insurance," "supplies," "travel," and "other expenses" of bank charges, postage, and telephone costs. As done for the 2007 tax return, we disallowed the amounts listed as "depreciation and section 179 expense deduction," "car and truck expenses" and "contract labor."

[9] These expenses are listed on Todd's tax return as "supplies," "travel," and "other expenses" of bank charges, postage, and telephone costs. As done for the 2007 and 2008 tax returns, we disallowed the amounts listed as "depreciation and section 179 expense deduction," "car and truck expenses" and "contract labor."

[10] At trial, Meghan testified that in addition to the $750.00 amount, an additional charge is assessed for extended care; however, the bill from the Montessori school that she introduced into evidence does not support this statement. The bill shows that an additional charge is assessed for extended care for parents paying for enrollment for just the school day from 9:00 a.m. to 2:00 p.m., which enrollment cost is listed as $580.00 per month. An enrollment cost of $750.00 per month provides for the school day plus extended care.

precise date each month that such payments are due. See Wells v. Wells, 07-1663 (La. App. 1st Cir. 12/28/07), 972 So.2d 493 (unpublished opinion).

In Todd's final assignment of error, Todd contests that portion of the trial court's judgment decreeing him liable for child support payments retroactive to November 16, 2009, the date Meghan filed her "Rule to Set Custody and Visitation and for Provisional Custody." Todd's contests this order because he was never served with this pleading, and therefore, he contends that the ruling based on the unserved pleading is an absolute nullity.

As a preliminary matter, we observe that pursuant to a motion filed by Todd on April 21, 2010, proceedings on Meghan's rule were consolidated with proceedings initiated by a "Petition to Set Custody, Ex-Parte Custody and to Set Aside Agreement," filed by Todd on April 7, 2010. Moreover, in answer to Todd's petition, Meghan filed a reconventional demand on April 13, 2010, in which she sought, among other claims, an award of child support. While it is true that a judgment rendered against a defendant who has not been served with process as required by law is an absolute nullity, see La. C.C.P. arts. 1201(A) and 2002(A)(2), the objectionable decree in this case can be properly premised on the April 13, 2010 reconventional demand with which Todd was served. Thus, in addition to amending the amount of child support Todd is ordered to pay in the judgment, we will amend the judgment to reflect that the award is retroactive to April 13, 2010, as the date Meghan judicially demanded the award. See La. R.S. 9:315.21(B)(2).

CONCLUSION

Finding no error in the trial court's judgment allowing the mother to relocate with the minor child and making her the domiciliary parent, we affirm that portion of the judgment. Having determined that the trial court erred in its award of child support, we amend that portion of the judgment to decree that the father, Todd

O'Neill, owes child support in the amount $1,038.24 per month, payable to Meghan Dours on the 15th day of each month. Moreover, the award of child support is retroactive to the date of filing of Meghan's reconventional demand on April 13, 2010. All costs of this appeal are apportioned equally to the parties.

JUDGMENT AMENDED IN PART, AND AS AMENDED, AFFIRMED.