

**RENEE MARIE ZUVICH,
WIFE OF GEORGE DALE
GIBSON**

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NO. 2000-CA-2278

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

GEORGE DALE GIBSON

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 87-9994, DIVISION "C-6"
HONORABLE ROLAND L. BELSOME, JUDGE

JUDGE MICHAEL E. KIRBY

(Court composed of Judge Steven R. Plotkin, Judge Michael E. Kirby, Judge
David S. Gorbaty)

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In this domestic matter, Renee Zuvich Lastrapes and George Dale Gibson both appeal the trial court's judgment of December 9, 1999 on the issues of child support, child care expenses and custody. The parties to this case are former spouses and the parents of a son, Lindsey Gibson, who was born on August 22, 1983. Mrs. Lastrapes and Mr. Gibson were married in 1982. Mrs. Lastrapes filed a petition for separation in 1987 when Lindsey was four years old. In 1987, they entered into a consent judgment, which addressed custody, child support, child care and community property issues. A judgment of divorce was rendered in 1989.

The 1987 consent judgment awarded the parties joint custody of their son. Mr. Gibson was given final authority in the choice of Lindsey's schools, but was ordered not to make any decision without consulting Mrs. Lastrapes in advance, considering her feelings and suggestions, and attempting to agree mutually on any choice. The judgment set forth a detailed custody schedule, allowing each parent to have custody of Lindsey for approximately 50% of the time. Mr. Gibson was ordered to pay child support by paying directly all tuition costs, and health and dental costs, including health insurance, uncovered medical and dental expenses, and

prescription medication. Mr. Gibson was also ordered to pay Mrs. Lastrapes a monthly cash payment of \$150.00 beginning on October 1, 1987.

The judgment ordered that expenses for child care expenses be divided so that Mr. Gibson pays two-thirds of these expenses and Mrs. Lastrapes pays one-third, subject to certain conditions. Those conditions are that payments by Mr. Gibson be made only when Mrs. Lastrapes is working full time and not living in her mother's home, that payments by Mr. Gibson cease any time that Mrs. Lastrapes is not working full-time, and that Mr. Gibson select the child care center that the child attends with the approval of Mrs. Lastrapes. George Gibson was given the sole right to claim the minor child as his dependent on his income tax returns. The judgment also decreed that neither party would consider Mrs. Lastrapes' subsequent employment as a sufficient change in circumstances warranting a reduction or modification of the child support award. The provisions in the judgment regarding community property are not at issue in this appeal.

In June 1993, Mrs. Lastrapes filed a rule to increase child support, alleging a change in the circumstances of the parties. In September 1993, Mr. Gibson filed a rule for recovery of amounts due under the 1987 consent judgment. In that rule, Mr. Gibson alleged that Mrs. Lastrapes had not reimbursed him for her share of the expenses of the housekeeper who cares

for their minor child. Mr. Gibson also filed a rule for child support and to be declared the primary domiciliary parent. He claimed that their child spends the vast majority of his time with him, even though the consent judgment allowed both parties essentially equal amounts of time with the child. He also asked that his child support obligation to Mrs. Lastrapes be terminated. Mr. Gibson filed a motion for a psychological evaluation of Lindsey, and the trial court granted his request. The trial court appointed Dorothy Randolph to conduct the psychological evaluation of Lindsey. Mrs. Randolph conducted the evaluation and submitted a report to the trial court on October 4, 1995.

After many delays, this matter finally went to trial on September 9-10, 1999. The trial court heard testimony from George Gibson; Renee Lastrapes; John Lastrapes, Lastrapes' current husband; and Dorothy Randolph, the court-appointed mental health professional. After hearing testimony and reviewing the exhibits submitted by both parties, the trial court rendered judgment on December 9, 1999. In that judgment, the trial court ordered that Mr. Gibson pay Mrs. Lastrapes \$541.89 per month in child support and that Mr. Gibson continue to pay the child's tuition. The trial court ordered that this increased child support award be paid retroactively for thirty-six months, from December 1996 through December

1999. Mrs. Lastrapes was ordered to reimburse Mr. Gibson \$1,050.00 for the psychological evaluation and counseling fees paid on behalf of the minor child. The court further ordered that the parents share joint custody of the child, with Mrs. Lastrapes as the domiciliary parent. Mr. Gibson was granted visitation every other weekend, beginning Friday evening and ending Monday morning, together with alternating holidays and six weeks each summer.

In reasons for judgment, the trial court noted that the trial in this matter was delayed for six years from the filing of the rule to increase child support, through no fault of the parties. The court stated that it was basing the child support award solely on the basis of the parties' current income and situation. After considering the child support guidelines and the evidence presented, the trial court found that Mrs. Lastrapes was entitled to an increase in child support of \$1,083.78, but that Mr. Gibson was entitled to have one-half of the child's necessary expenses credited against his monthly child support obligation due to the fact that he has taken primary financial responsibility for the child's expenses. The resulting monthly child support amount owed by Mr. Gibson was set at \$541.89.

The court stated that the repeated changes in the parties' income and the living arrangements with the child made it difficult to determine the

exact amounts of past child support owed to Mrs. Lastrapes or the fair amount of any credits or reimbursement to Mr. Gibson. The trial court rejected Mr. Gibson's request for reimbursement from Mrs. Lastrapes for one-third of the expenses related to the child care provider, finding that, in all but the child's earlier years, the duties of the nanny/housekeeper have been related more to Mr. Gibson's general household than to the care of Lindsey. The trial court also rejected Mr. Gibson's claim for reimbursement for attorney's fees relating to an incident involving the child in 1998. However, the court did grant Mr. Gibson's request for reimbursement from Mrs. Lastrapes for one-half of the fees for the psychological evaluation and counseling of Lindsey, totaling \$1,050.00.

Regarding child custody, the court found that both parents provide a fully equipped home with a caring and loving environment. The court granted joint custody to the parties, with Mrs. Lastrapes as the domiciliary parent. The court stated that it strongly encouraged the parties to keep the child's living arrangements as they have been, allowing the child freedom to comfortably move back and forth from each home.

Mr. Gibson filed a motion for new trial, which was denied by the trial court. Mr. Gibson appealed the trial court's judgment of December 9, 1999. Mrs. Lastrapes has answered the appeal.

In his first assignment of error, Mr. Gibson argues that the trial court erred in failing to order Mrs. Lastrapes to reimburse him for her share of child care expenses. According to Mr. Gibson, Mrs. Lois Turner provided child care for Lindsey in both his and Mrs. Lastrapes' homes from 1987 until 1998 when Mrs. Lastrapes asked Mrs. Turner to stop coming to her home. Since that time, Mrs. Turner has continued to provide child care services for Lindsey at Mr. Gibson's home. Mr. Gibson argues that under the 1987 consent judgment, Mrs. Lastrapes is obligated to reimburse him for her one-third share of costs related to the employment of Mrs. Turner. He contends that the trial court erred in not enforcing the provision of that contract that required Mrs. Lastrapes to reimburse Mr. Gibson for one-third of the cost of child care once she began working full time.

Mrs. Lastrapes' response to this argument is that the trial court properly found that Mr. Gibson was not entitled to reimbursement for costs associated with Mr. Gibson's employment of Mrs. Turner. She argues that the consent judgment only required her to pay for one-third of the costs of a child care center, and that she did not agree in the judgment to pay for a personal nanny for her son. Mrs. Lastrapes contends that Mr. Gibson unilaterally decided to hire Mrs. Turner to provide child care, and she claims that she verbally notified Mr. Gibson several months after he hired Mrs.

Turner that she could no longer afford to pay for a personal nanny and would not be able to contribute to any future expenses related to Mrs. Turner.

A judgment obtained by the consent of all of the parties to a suit gets its binding force and effect from the consent, which the parties give, rather than from adjudication by a competent court. Lacour v. Lacour, 99-0913, p. 5 (La.App. 4 Cir. 2/9/00), 763 So.2d 678, 680. In the 1987 consent judgment, Mrs. Lastrapes agreed to pay one-third of the child care expenses with one of the conditions being that Mr. Gibson was to “select the child care center that the child attends with the approval of” Mrs. Lastrapes. This consent judgment was executed when the child was only four years old. Even accepting as true that Mrs. Lastrapes told Mr. Gibson early on that she was not willing to pay for a personal nanny, the testimony establishes that Mrs. Turner provided child care for Lindsey in both parents’ home until 1998. It is undisputed that Mr. Gibson paid Mrs. Turner’s salary without any contribution from Mrs. Lastrapes except for the first few months after the signing of the consent judgment.

Mrs. Turner did not testify at trial. Mrs. Lastrapes testified that until 1997, Mrs. Turner picked up Lindsey from school each day and brought him to the parent’s home at which he was scheduled to stay that night. On days

when Lindsey had baseball or soccer practice away from school, Mrs. Turner brought Lindsey to practice and waited for practice to end before bringing him to the home of one of his parents. When Mrs. Turner was first hired in 1987, her duties were to bring Lindsey to and from pre-school and to keep him occupied between the time school ended and his parent returned home. Mrs. Turner performed these duties at both parents' homes. Mrs. Lastrapes also testified that Mrs. Turner performed light housework at her home. She said the housework was limited to washing breakfast dishes, ironing and straightening up.

Mrs. Lastrapes testified that she paid one-third of Mrs. Turner's salary for three or four months and then told Mr. Gibson that she could no longer afford this and requested that Lindsey be enrolled in a day care center. Mrs. Lastrapes claims that Mr. Gibson told her that he would pay all of Mrs. Turner's salary.

Mr. Gibson testified that Mrs. Turner does a "little" housework for him but her primary duties are related to child care. He said that on the days that Lindsey has stayed at his home since 1987, Mrs. Turner has been at home with Lindsey while Mr. Gibson worked. That included after school and all day during the summer vacation and holidays. She fixed his meals, took him to doctor and dentist appointments and to his sporting practices and

games.

Mr. Gibson testified that at his house, Mrs. Turner does “light ironing,” washes the breakfast dishes, and occasionally cleans the bathrooms and mops the kitchen floor, but does not do heavy cleaning. He said she does not vacuum “anymore,” indicating that her duties have included vacuuming at some point prior to the trial.

From the time Mrs. Lastrapes stopped making payments for Mrs. Turner’s services in 1988 until the trial date in 1999, Mr. Gibson spent \$83,111.00 for Mrs. Turner’s salary and employment taxes. Mr. Gibson requests reimbursement from Mrs. Lastrapes for one-third of that amount. Mr. Gibson stated that he has paid all of Mrs. Turner’s salary since 1988, but he never forfeited his right to collect reimbursement from Mrs. Lastrapes for her share of this expense. Mrs. Lastrapes returned to work in 1988 and was still working in 1998 when she asked Mrs. Turner to no longer come to her home.

The trial court rejected Mr. Gibson’s request for reimbursement of amounts paid to Mrs. Turner, finding that Mrs. Turner’s duties were primarily related to child care during Lindsey’s early years, but changed to being related more to Mr. Gibson’s general household as Lindsey grew older. While we agree with the trial court’s conclusion that Mrs. Turner’s

child care duties have diminished as Lindsey has gotten older, we find that the trial court erred in not ordering Mrs. Lastrapes to reimburse Mr. Gibson for **any** expenses related to the employment of Mrs. Turner.

Mrs. Lastrapes' own testimony established that she utilized Mrs. Turner as a child care provider when Lindsey was in her custody from 1988 until 1998 when she instructed Mrs. Turner to no longer come to her home. We find that her willingness to participate in and benefit from this arrangement obligates her to reimburse Mr. Gibson for her share of expenses related to the child care provided by Mrs. Turner.

It is impossible to determine the exact amount of time that Mrs. Turner engaged in housework and the amount of time dedicated to child care, especially without the benefit of Mrs. Turner's testimony. Certainly, Mrs. Lastrapes is not responsible for paying for any portion of Mrs. Turner's housekeeping work performed at Mr. Gibson's house. While Mrs. Lastrapes' testimony indicated that Mrs. Turner performed some housework at her home, these duties were lighter than the housekeeping duties performed at Mr. Gibson's house. After reviewing the testimony of both parties, we find that \$10,000.00 is a fair amount to be assessed to Mrs. Lastrapes for her share of child care expenses from 1988 to 1998.

Mr. Gibson's next argument is that the trial court erred in increasing

the amount of child support payable by him to Mrs. Lastrapes. He contends this increase was error because Mrs. Lastrapes could not prove she paid any of Lindsey's expenses and the change in the parties' circumstances since support was set in 1987 was favorable to Mrs. Lastrapes and unfavorable to Mr. Gibson. Mrs. Lastrapes argues that the trial court correctly held that she proved a change in circumstances and was entitled to the increased child support amount.

The 1987 consent judgment ordered Mr. Gibson to pay Mrs. Lastrapes \$150.00 per month. The trial court increased Mr. Gibson's monthly child support payment to \$541.89 in addition to the tuition that Mr. Gibson was ordered to continue paying. The trial court stated in reasons for judgment that it arrived at this figure after considering the evidence presented and the child support guidelines. The court heard testimony from both parents as well as from Mrs. Lastrapes' current husband, regarding income, expenses, and expense sharing between Mrs. Lastrapes and her current husband. The court calculated the total monthly child support owed to be \$1,031.78, but held that Mr. Gibson was entitled to have one-half of this amount credited against his monthly support obligation.

La. C.C. art. 142 provides as follows:

An award of child support may be modified if the circumstances of the child or of either parent change and shall be terminated upon proof that it

has become unnecessary.

La. R.S. 9:311(A) provides as follows:

An award for support shall not be reduced or increased unless the party seeking the reduction or increase shows a change in circumstances of one of the parties between the time of the previous award and the time of the motion for modification of the award.

In Stogner v. Stogner, 98-3044, p. 12 (La. 7/7/99), 739 So.2d 762, 769, our Supreme Court stated that the change of circumstances relied upon need not be substantial. The party seeking modification of a child support award need only prove a change of circumstances sufficient to justify the modification. Id. The Court stated that in matters concerning modification of child support, each case will rise or fall on the peculiar facts adduced and an appellate court will not disturb the trial court's decision, absent clear abuse of discretion. Id. at p. 12, 739 So.2d at 770.

The rule to increase child support was filed by Mrs. Lastrapes in 1993. The court noted that for approximately five years before this rule was filed, from 1987 through 1992, Mr. Gibson's annual income averaged \$73,740.00. It then noted that Mr. Gibson's annual income has averaged \$112,470.00 for the five years prior to trial. During those same periods, Mrs. Lastrapes' income has increased from minimum wage to approximately \$20,000.00 per

year.

In this case, not only have the incomes of both parties increased in recent years, the needs of the minor child have gotten more expensive as he has gotten older. Considering the incomes of the parties and the needs of the minor child, we find no abuse of discretion in the trial court's determination that Mrs. Lastrapes proved a change in circumstances sufficient to increase the monthly amount of child support paid to her by Mr. Gibson.

Furthermore, we find no abuse of discretion in the trial court's determination of the amount of the increase.

Mr. Gibson argues that the trial court improperly made the award of increased child support to Mrs. Lastrapes retroactive to December 1996. At the time the rule to increase child support was filed, the retroactivity of awards modifying child support was governed by La. R.S. 9:310. La. R.S. 9:310 provides that an order for modifying a child support order shall be retroactive to the filing date of the petition therefor, unless the court finds good cause for not making the award retroactive, in which case the court may fix the date such award shall become due. A trial court has the discretion to fashion a different solution than making the award retroactive to the date of filing when required by justice in extraordinary circumstances. Hogan v. Hogan, 549 So.2d 267 (La. 1989).

In this case, the trial court did not make the increased child support award retroactive to the date of filing in 1993, but chose instead to make the award retroactive to December 1996, the midway point between the date of filing of the rule to increase and the date of trial. The court commented in its reasons that trial was not held for six years “through no fault of the parties.” At the conclusion of trial, the court stated on the record, “I think the delays in this case going to trial have done a complete injustice to both of ya’ll.”

As the trial court noted, the lengthy delay in the trial of the rule to increase support occurred through no fault of the parties in this case. Furthermore, the record shows that Mr. Gibson has always provided very generously for his son, and has greatly exceeded his financial responsibilities to his son set forth under the consent judgment. Under these particular circumstances, we find that good cause was shown for not making this award retroactive, and the trial court’s ruling on the retroactive effect of this award was an abuse of its discretion. The increase in child support is effective only as of the date of the December 1999 judgment.

In Mr. Gibson’s final argument, he contends that the trial court erred in naming Mrs. Lastrapes as the domiciliary parent and in failing to allocate to him the right to claim Lindsey as his dependent for income tax purposes. The 1987 consent judgment granted the parties joint custody and

set forth a detailed schedule for the child's living arrangements. The 1987 judgment did not designate either party as the domiciliary parent. Mr. Gibson filed a request to be declared domiciliary parent on September 7, 1993.

In cases where the original custody decree is a stipulated judgment, such as when the parties consent to a custodial agreement, and no evidence of parental fitness is taken, the party seeking modification must prove (1) that there has been a material change of circumstances since the original custody decree was entered, and (2) that the proposed modification is in the best interest of the child. Mire v. Mire, 98-1614 (La.App. 4 Cir. 3/24/99), 734 So.2d 751, citing Evans v. Lungrin, 97-0541 (La. 2/6/98), 708 So.2d 731. Although the trial court continued the joint custody of the parties, he modified the custody arrangement by declaring Mrs. Lastrapes the domiciliary parent and reducing the amount of time that Lindsey spends in Mr. Gibson's custody. We find that it abused its discretion in doing so.

In her pleadings, Mrs. Lastrapes has not asked to be declared the domiciliary parent, nor did she oppose Mr. Gibson's request to be declared the domiciliary parent. After reviewing the record, we do not find that the evidence enlarged the pleadings to justify the designation of Mrs. Lastrapes as domiciliary parent. We find no abuse of discretion in the trial court's

decision not to designate Mr. Gibson as domiciliary parent either. The record does not contain sufficient proof that there has been a material change in circumstance regarding custody or that modification is in the best interest of the child. The joint custody arrangement that is detailed in the 1987 consent judgment and was in place prior to the December 1999 judgment is hereby reinstated.

Regarding Mr. Gibson's contention that the trial court erred in not specifically allocating to him the right to claim Lindsey as his dependent for income tax purposes, we note that the trial court did not address this issue in the December 1999 judgment. However, the 1987 consent judgment gave Mr. Gibson the sole right to claim Lindsey as his dependent for purposes of invoking the dependency exemption under the income tax laws. The record in this case establishes no reason to change that designation. Accordingly, Mr. Gibson will continue to have the sole right to claim Lindsey as his dependent for tax purposes.

Finally, Mrs. Lastrapes asks this court to award her attorney's fees and costs for frivolous appeal under La. C.C.P. art. 2164. This request is clearly without merit.

For the reasons stated above, the portions of the trial court's judgment awarding Mrs. Lastrapes increased child support in the monthly amount of

\$541.89, continuing Mr. Gibson's obligation to pay tuition and ordering Mrs. Lastrapes to reimburse Mr. Gibson \$1,050.00 for the psychological evaluation and counseling of the minor child are affirmed. The portions of the trial court's judgment making this award retroactive to December 1996, naming Mrs. Lastrapes as domiciliary parent and decreasing the amount of time that Lindsey lives at Mr. Gibson's home are reversed. The judgment is amended to assess Mrs. Lastrapes \$10,000.00 for her share of child care expenses. The award of increased child support owed by Mr. Gibson to Mrs. Lastrapes is effective as of the date of the signing of the December 9, 1999 judgment and is subject to a credit to Mr. Gibson of \$11,050.00 for the above-stated expenses owed by Mrs. Lastrapes.

AFFIRMED IN PART; REVERSED IN PART; AMENDED