

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CU 1152

FRANCES JEAN CROW GIVENS

VERSUS

KENNETH BLAKE GIVENS

Judgment Rendered: December 22, 2010

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Appealed from the  
Thirty-Second Judicial District Court  
In and for the Parish of Terrebonne, Louisiana  
Trial Court Number 150,883

Honorable David W. Arceneaux, Judge

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

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WELCH, J.

Frances Jean Crow Givens appeals a judgment finding her in contempt of court for failing to allow Kenneth Blake Givens his physical custodial time with their child, Olivia, pursuant to a custody judgment and its incorporated joint custody plan; ordering her to pay Kenneth Givens attorney fees in the amount of \$500.00; and awarding Kenneth Givens additional physical custodial time with the child for the time that he lost. Finding no abuse of the trial court's broad discretion with regard to such matters, we affirm.

### BACKGROUND

At issue in this case is Frances Givens' failure to abide by the July 24, 2009 custody judgment and its attached joint custody plan, which is the subject of the appeal in the companion case also rendered on this date, **Givens v. Givens**, 2010-0680 (La. App. 1<sup>st</sup> Cir. 12/22/10), \_\_\_ So.3d \_\_\_. The July 24, 2009 judgment was rendered following a contentious custody trial. The judgment specifically awarded Frances Givens and Kenneth Givens joint custody of the child, designated Frances Givens as the child's domiciliary parent, and awarded Kenneth Givens specific physical custodial periods with the child in accordance with an attached joint custody plan.<sup>1</sup> According to the joint custody plan, Kenneth Givens was given exclusive custody and control of the child every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m., beginning on Friday, July 31, 2009, plus specific custodial time during holidays and the summer. Francis Givens appealed that judgment, essentially complaining about the award of overnight custodial periods in favor of Kenneth Givens. Following our review of the matter, the judgment was

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<sup>1</sup> Frances Givens and Kenneth Givens were awarded joint custody of their minor child. However, we note that both parties and the trial court have used the term "visitation" with reference to Kenneth Givens' custodial time. "Visitation," as provided for in La. C.C. art. 136, applies only when a parent does not have custody or joint custody. The time that parents with joint legal custody share with their children is more properly described as physical custody allocation of a joint custody plan, rather than as visitation. La. R.S. 9:335; **Cedotal v. Cedotal**, 2005-1524, p. 5 (La. App. 1<sup>st</sup> Cir. 11/4/05), 927 So.2d 433, 436; see **Evans v. Lungrin**, 97-0541, pp. 10-11 (La. 2/6/98), 708 So.2d 731, 737.

affirmed. See Givens v. Givens, 2010-0680 at p. 19, \_\_\_ So.3d \_\_\_.

On Friday, October 9, 2009, Kenneth Givens was supposed to take custody and control of Olivia at 6:00 p.m. However, at Frances Givens' request, the time was moved to 10:00 p.m. in order to accommodate an extra-curricular activity that Olivia wanted to attend at her school. Apparently, for this particular custodial weekend, Kenneth Givens planned to surprise Olivia by inviting two of her childhood friends from Houma to spend the weekend with them at his home in Mississippi. On his way from Houma to New Orleans (to pick up the Olivia at her school), Kenneth Givens encountered several delays. First, the highway on which he was traveling was temporarily closed because a movie was being filmed on the highway. Then, after the highway re-opened and as Kenneth Givens approached the New Orleans area, his car had a flat tire. While changing the flat tire, the jack "stripped," requiring him to call the police to request help with changing the tire. At this point (shortly before 10:00 p.m.), Kenneth Givens called Frances Givens to apprise her of the situation and to let her know that due to the delays he encountered, he was probably not going to arrive at Olivia's school by 10:00 p.m.; so Francis Givens agreed to pick Olivia up from the school, arriving shortly after 10:00 p.m. After Kenneth Givens resolved his tire problem, he called Frances Givens to let her know that he was on his way to pick up Olivia. At that time, Frances Givens informed Kenneth Givens that she was not going to allow him to take Olivia. Kenneth Givens arrived at Frances Givens' home approximately ten to twenty minutes after Frances Givens and Olivia arrived home. Frances Givens did not answer the door, and Frances Givens' brother-in-law (who is also her attorney) told Kenneth Givens that he could have Olivia at 8:00 a.m. the following day. The following day, at 8:00 a.m., Kenneth Givens picked Olivia up and went to his home in Mississippi.

In response to these events, Kenneth Givens filed a rule for contempt of

court for Frances Givens' refusal to allow him his custodial time with Olivia on Friday, October 9, 2009. After a hearing, the trial court found that Frances Givens was in contempt of court for willfully and intentionally violating the judgment of the court, ordered Frances Givens to pay attorney fees in the amount of \$500.00, and awarded Kenneth Givens additional time to make up for the visitation. A judgment in accordance with the trial court's ruling was signed on March 19, 2010. From this judgment, Frances Givens appeals, asserting that the trial court erred in finding that she violated the joint custody plan. Essentially, she argues that the parties agreed to modify the joint custody plan on October 9, 2009, to provide that Kenneth Givens would pick up the child at 10:00 p.m., and because he failed to do so, she did not violate the joint custody plan. She also argues that she did not deny Kenneth Givens his custodial time, but rather, that she delayed it until the following morning. Alternatively, on appeal Frances Givens contends that if she did violate the joint custody plan, the trial court erred in finding that her actions were intentional, knowing, and purposeful, and without justifiable excuse. Specifically, Frances Givens contends that she withheld the child from Kenneth Givens on Friday, October 9, 2009, because she was concerned about the safety of the child and because she did not think it was safe for the child to be traveling late at night on a "desolate highway" in Kenneth Givens' car because it was a "late model" with "no spare" and a "stripped jack."

### **LAW AND DISCUSSION**

Louisiana Revised Statutes 9:346 provides in pertinent part:

A. An action for the failure to exercise or to allow child visitation, custody or time rights pursuant to the terms of a court-ordered schedule may be instituted against a parent. The action shall be in the form of a rule to show cause why such parent should not be held in contempt for the failure and why the court should not further render judgment as provided in this Section.

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C. If the action is for the failure to allow child custody, visitation, or time rights pursuant to a court-ordered schedule, and the petitioner is the prevailing party, the defendant shall be held in contempt of court and the court shall award to the petitioner:

(1) A reasonable sum for any actual expenses incurred by the petitioner by the loss of his visitation, custody or time rights.

(2) Additional visitation, custody or time rights with the child equal to the time lost.

(3) All attorney fees and costs of the proceeding.

(4) All costs for counseling for the child which may be necessitated by the defendant's failure to allow visitation, custody, or time rights with the child.<sup>[2]</sup>

Additionally, 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, p. 5 (La. App. 1<sup>st</sup> Cir. 3/24/06), 934 So.2d 69, 73. If a person is found guilty of contempt, "the court shall render an order reciting the facts constituting the contempt, adjudging the person charged with contempt guilty thereof, and specifying the punishment imposed." La. C.C.P. art. 225(B). 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, pp. 10-11 (La. App. 1<sup>st</sup> Cir. 8/11/08), 993 So.2d 725, 733.

In oral reasons for judgment, the trial court stated:

The issue in this case of course has to be resolved with reference to the judgment of the court and there's no question that the previous judgment which was signed July 24<sup>th</sup>, 2009, provided that Mr. Givens would enjoy visitation rights with Olivia every other weekend, and there's no question that October the 9<sup>th</sup> beginning at 6:00 p.m. was one of those visitation periods.

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<sup>2</sup> See also La. R.S. 13:4611(1)(d) and (e).

Mr. Givens agreed to delay the commencement of his time with Olivia to ten o'clock that night apparently at the request of Mrs. Givens.

The joint custody plan attached to the judgment of the court contained several provisions ...

... [and] clearly provides that Mr. Givens had the right to take the exclusive custody and control of Olivia beginning at 6:00 p.m. on Friday, October the 9<sup>th</sup>.

Now, he didn't take exclusive custody and control of her at six, but he certainly had the right to do that. And I suppose he could have refused to pick her up at ten o'clock at school, but he didn't. But he had the right beginning at six o'clock to take exclusive custody and control and he agreed to delay that until ten o'clock. Due to circumstances which I think any reasonable person would believe were not planned by him[,] he was delayed.

Now, Mrs. Givens testified that it's about Olivia's safety and comfort, and that was I think an exact quote. I think she said I'm her mother and it's about Olivia's safety and comfort. And the assumption in that statement is that either Olivia makes a decision about what's going to be safe and comfortable or that Mrs. Givens will make that decision. But there apparently is no room in Mrs. Givens' mind for Mr. Givens to make that decision about what is safe and what is comfortable and what will be done with Olivia when it's his turn to visit with her.

Apparently, based on the evidence that the court has heard, Mrs. Givens decided to substitute her judgment for the judgment of Mr. Givens and, of course, beginning at ten o'clock Mr. Givens had the right to make all those decisions. And whether he was there at ten o'clock or eight o'clock the next morning seems to be irrelevant. He had the right to make the decisions beginning ordinarily at six o'clock. He put it off to ten o'clock at the request of Mrs. Givens. And I suppose if Mrs. Givens had wanted to, if I follow her logic, because Mr. Givens wasn't there at ten o'clock, then to carry her logic to a logical conclusion, she could have refused him the entire weekend. Yet she expects the court to somehow bless her actions because she was gracious enough to allow Mr. Givens to come back at eight o'clock the next morning.

This was not Mrs. Givens' decision. It was Mr. Givens' decision. And if Mr. Givens thought it was safe enough to travel to Wesson, Mississippi at ten o'clock at night that's Mr. Givens' choice. And for Mrs. Givens to substitute her opinion and her judgment for that of the father of the child under these circumstances and with this judgment in place is the height of arrogance. This was Mr. Givens' decision. It was not Mrs. Givens' decision. And the child should have been available when Mr. Givens showed up. He didn't do anything unreasonable, except maybe bang on that door a little louder.

I find Mrs. Givens obviously in contempt of court for failing to abide by this judgment of the court. I find it willful. I find it intentional. I find it designed to frustrate Mr. Givens' visitation rights. And I hold her in contempt of court.

I'm not going to assess any penalty other than ... attorney's fees. And I'm going to order that Mr. Givens' visitation for Easter be extended to the Sunday after Easter Sunday, rather than the Tuesday after Easter Sunday to make up for the time that was lost.

After a thorough review of the record, we find the evidence supports a finding that Frances Givens violated the orders of the court intentionally, knowingly, and without justifiable excuse. There is no dispute that, pursuant to the July 24, 2009 judgment, on October 9, 2009, Kenneth Givens was entitled pick up Olivia at 6:00 p.m. to commence his custodial weekend and that he agreed to move the time to 10:00 p.m. at Frances Givens' request. Although Kenneth Givens arrived approximately thirty to forty minutes late, Frances Givens refused to allow Kenneth Givens his custodial time on that date. Regardless of whether Frances Givens' actions are characterized as denying or delaying the custodial time of Kenneth Givens, her actions were still in direct contravention of the July 24, 2009 judgment and its attached joint custody plan. The justification offered by Frances Givens for her refusal to allow Kenneth Givens his custodial time was his late arrival that evening and her personal opinion that the child's comfort and safety were compromised. However, the evidence established that the delays encountered by Kenneth Givens were clearly unforeseeable and that Frances Givens was well aware of what had happened prior to the designated pick up time. Thus, Kenneth Givens' late arrival was not a justification for denying his custodial time. Furthermore, as the trial court succinctly noted, at 10:00 p.m. on October 9, 2009, it was Kenneth Givens' custodial time, and therefore, any decisions concerning the comfort and safety of the child were for Kenneth Givens to make—not for Frances Givens to unilaterally decide.

Therefore, considering the evidence at the contempt hearing in light of the acrimonious nature of the underlying proceedings that culminated in the July 24, 2009 judgment, we do not find that the trial court abused its discretion in finding Frances Givens in contempt of court

### **CONCLUSION**

For all of the above and foregoing reasons, the March 19, 2010 judgment of the trial court is affirmed.

All costs of this appeal are assessed to the appellant, Frances Jean Crow Givens.

**AFFIRMED.**