

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1731

DUSTIN MARK TERRY

VERSUS

STEPHANIE HEBERT

DATE OF JUDGMENT: DEC 30 2014

ON APPEAL FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT
NUMBER 111213, PARISH OF LAFOURCHE
STATE OF LOUISIANA

HONORABLE JEROME J. BARBERA, III, JUDGE

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Higginbotham, J. dissents in part and assigns reasons.
BEFORE: KUHN, McCLENDON, HIGGINBOTHAM, THERIOT, AND
DRAKE, JJ.
MRT dissents in part & joins in the reasons assigned
Disposition: AFFIRMED. *by Higginbotham, J. BY JKH*

KUHN, J.

Defendant-in-rule, Dustin Terry, appeals the trial court's judgment in favor of plaintiff-in-rule, Stephanie Hebert, which made executory arrearages from Dustin's non-payment of one-half of their minor child's school expenses and ordered him to pay court costs and attorney's fees. We affirm.

FACTS AND PROCEDURAL HISTORY

Stephanie Hebert and Dustin Terry are the parents of Adrienne Terry, born on April 17, 2008. Stephanie and Dustin filed numerous petitions and rules for custody and support of Adrienne. On February 4, 2010, the parties reached an agreement and signed a consent judgment addressing the care, custody, and control of Adrienne. In that judgment, two provisions are relevant to the judgment currently on appeal. First, the judgment provides that "once the minor child starts school ... each parent shall be responsible for one-half (1/2) of all school related expenses...." Second, the judgment provides "both parents shall have the right to make major decisions for the minor child regarding her schooling and education placement consistent with the child's original baptized faith...."¹ Adrienne was baptized in the Catholic Church.

Prior to Adrienne beginning pre-kindergarten, Stephanie sent a text message to Dustin about two schools she was considering for Adrienne. The schools were St. Bernadette's, a Catholic school, and St. Matthew's, an Episcopal school. Dustin did not state a preference, but replied that he thought St. Bernadette's was Stephanie's first choice. In August 2012, Adrienne was enrolled at St. Bernadette's for pre-kindergarten. Shortly after the beginning of the school year, Stephanie had a meeting with the school counselor. Dustin had planned to attend

¹ The parties signed a second consent judgment in March 2012 which did not address these issues, but stated "all provisions of any previous judgment not modified herein shall remain in full force and effect."

this meeting, but he had to cancel. After the meeting, Stephanie decided to move Adrienne to St. Matthew's where she remained for the rest of the school year.²

In November 2012, Dustin filed a rule requesting, among other things, that Stephanie be found in contempt for violating the consent judgment by "changing the school of [Adrienne] without ever notifying or discussing same with [him]." Rules to show cause filed by both parties on contempt, change in custody, reimbursement of expenses, and modification of visitation were heard over four days in February and April 2013. In a judgment signed on May 20, 2013, the trial court found Stephanie in contempt for "[f]ailure to consult with [Dustin] prior to changing the minor child's schools."

On April 2, 2013, Stephanie forwarded to Dustin the bill for Adrienne's kindergarten tuition at St. Matthew's. After receipt of the bill and a subsequent letter regarding the fees, Dustin notified Stephanie that he was not going to pay his one-half of the tuition because Adrienne was not attending a Catholic school as they agreed to in the 2010 consent judgment. On May 28, 2013, Stephanie filed a "Rule for Contempt and to Make Past Due Education Expenses Executory," for Dustin's refusal to pay his one-half of Adrienne's tuition.

After a hearing, the trial court rendered an executory judgment ordering Dustin to pay his one-half of the tuition and expenses, attorney's fees, and court costs. Dustin was not held in contempt. It is from this judgment that Dustin appeals asserting that the trial court erred in ordering him to pay his portion of the tuition and in ordering him to pay attorney's fees and court costs.

TUITION

² According to the record, the reasons for changing schools were considered by the trial court in a previous hearing and the trial court took judicial notice of that testimony. The transcript of that hearing was not made part of the appellate record, and the record before us does not detail the decision to change the schools. The trial court did note in its reasons for judgment that, during the contempt hearing, Stephanie stated she moved Adrienne to St. Matthew's "because of her daughter's distress."

Dustin asserts that the trial court erred in not considering the consent judgment as a whole and in giving effect to the provision that requires him to pay one-half private school tuition, but disregarding the provision that Adrienne attend a school of her original baptized faith.

The trial court determined that the parties considered St. Matthew's prior to enrolling Adrienne in St. Bernadette's and found that switching her to a school they originally considered was not a violation of their agreement. Although Dustin never consented to Adrienne changing schools, he never rejected it either. Dustin filed a rule requesting that Stephanie be held in contempt for changing the schools without discussing it with him; however, he never requested that Stephanie be held in contempt for placing Adrienne in a non-Catholic school and he never petitioned the court to return her to a Catholic school. His testimony reflected his desire not to pay private school tuition and not his desire that Adrienne attend a Catholic school. He admitted that Adrienne was doing well at St. Matthew's. The trial court found Dustin "latched on" to the argument about the Catholic school to avoid paying tuition. The trial court noted that although the consent judgment stated Adrienne would attend a school "consistent with the child's original baptized faith," the parties were "long past that by the time [they] came to court about whether or not that was an issue or major decision."

Considering the record before us, we find sufficient evidence to support the trial court's determination. Stephanie and Dustin had been before the trial court numerous times for multiple issues and, thus, the trial court was familiar with the parties and their situation. We find no error in the trial court's decision to uphold the provision requiring Dustin to pay one-half the St. Matthew's tuition.

ATTORNEY'S FEES AND COURT COSTS

Dustin asserts that the trial court erred in ordering him to pay attorney's fees and court costs because it did not find him in contempt. The trial court cited La. R.S. 9:375(A) as its reason for awarding attorney's fees and court costs. La. R.S. 9:375(A) states in pertinent part "When the court renders judgment in an action to make executory past-due payments under a spousal or child support award... it shall, except for good cause shown, award attorney's fees and costs to the prevailing party." Under this provision, the trial court is given great discretion in determining whether good cause exists and in assessing the amount of attorney's fees awarded. See *Burnette v. Burnette*, 98-0498 (La. App. 4th Cir. 10/21/98), 720 So.2d 757, 763. The trial court found no good cause was shown and awarded attorney's fees and costs. We find no error in the conclusion that the defendant had not established good cause for nonpayment, as required to avoid liability for attorney's fees under La. R.S. 9:375.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. All costs of the appeal are assessed to appellant, Dustin Terry.

AFFIRMED.

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HIGGINBOTHAM, J., dissenting in part,

I respectfully disagree with the portion of the majority opinion affirming the trial court's award of attorney's fees. The trial court cited La. R.S. 9:375(A) as its authority for awarding attorney's fees and court costs. The statute states in pertinent part: "When the court renders judgment in an action to make executory **past-due** payments under a spousal or child support award... it shall, except for good cause shown, award attorney's fees and costs to the prevailing party." (Emphasis added.) Although the trial court awarded attorney's fees and court costs, it noted in its reasons for judgment that the judgment was poorly worded, and that Dustin's behavior was not contemptuous. Further, the trial court stated "I don't believe [Dustin] willfully wanted to violate the judgment or just ignored it." Because of the unusual facts of this case, the very issue before the trial court was to determine whether the school tuition was "due" at all to Stephanie considering the wording of the consent judgment. Therefore, the tuition and expenses were not determined to be due until the date of the hearing and were not "past due" as required by the statute to award attorney's fees and costs. For these reasons, I would reverse the portion of the judgment ordering Dustin to pay attorney's fees and court costs. In all other respects, I agree with the decision of the majority.