

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CU 0737

JASON R. CUTRIGHT

VERSUS

BRANDY DESHAY WAITS

Consolidated With

2015 CU 0738

BRANDY DESHAY WAITS

VERSUS

JASON ROBERT CUTRIGHT

Consolidated With

2015 CU 0739

BRANDY DESHAY WAITS

VERSUS

JASON ROBERT CUTRIGHT, SR.

Judgment Rendered: NOV 10 2015

*** * * * ***

On Appeal from the Twenty-Second Judicial District Court

In and for the Parish of St. Tammany

State of Louisiana

No. 2012-12121 c/w No. 2012-12143 c/w No. 2014-11342; No. 2012-12143 c/w

No. 2012-12121 c/w No. 2014-11342; and No. 2014-11342 c/w No. 2012-12121

c/w No. 2012-12143

Honorable Mary C. Devereux, Judge Presiding

*** * * * ***

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Plaintiff/Appellant No. 2012-12143 and
No. 2014-11342

* * * * *

BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.

McCLENDON, J.

This is an appeal from a family court judgment pursuant to Louisiana's domestic abuse assistance statutes that awarded court costs and attorney fees to the appellee for the filing of a frivolous petition. For the following reasons, we reverse in part. Additionally, we deny appellant's pending motions as moot.

FACTUAL AND PROCEDURAL HISTORY

Jason R. Cutright, Sr. and Brandy DeShay Waits are the parents of two minor children, J.R.C., born on April 6, 2009, and A.G.C., born on December 12, 2011. The parties lived together for approximately four years before physically separating in 2012. They were never married.

As a background to the filing of the petition for a protective order, the following partial brief history of the ongoing litigation between the parties is helpful. Mr. Cutright originally filed suit on April 13, 2012, in docket number 2012-12121, requesting, *inter alia*, joint custody of the minor children. Ms. Waits filed her own petition on April 16, 2012, in docket number 2012-12143, requesting various items of relief, including custody. By a joint motion, the matters were consolidated on May 14, 2012. On June 29, 2012, pursuant to a consent judgment, the parties were awarded joint custody of the minor children, with Ms. Waits being designated as the domiciliary parent. A custody schedule was also implemented.

Thereafter, in November of 2012, Ms. Waits' mother died, and Ms. Waits took the children to Arkansas on December 16, 2012. On December 19, 2012, Mr. Cutright filed a motion for the immediate return of the minor children from Arkansas, stating his belief that Ms. Waits intended to remain in Arkansas permanently with the children. Following a hearing before the hearing officer, the family court adopted the recommendations of the hearing officer and ordered the immediate return of the children, issuing a civil warrant to effect the return. A consent judgment was signed by the court on April 16, 2013, wherein the parties agreed that Ms. Waits would return to Louisiana with the minor children no later than August 1, 2013.

In early October 2013, Ms. Waits filed a report of abuse against Mr. Cutright. Following an investigation by the Department of Children and Family Services, the report was not validated and was dismissed.¹

On October 30, 2013, Mr. Cutright filed an ex parte motion for the immediate sole custody of the minor children, asserting that "Ms. Waits' behavior has continued to become more reckless, dangerous and erratic." Believing that irreparable harm might occur to the minor children, Mr. Cutright requested an immediate ex parte order awarding him temporary sole custody, subject to only supervised visitation in favor of Ms. Waits. The family court granted Mr. Cutright's requests and set a hearing for November 14, 2013. Following the hearing, the court ordered that the ex parte order of custody and visitation remain in effect until further order of the court. Thereafter, a hearing officer conference took place on December 13, 2013. The hearing officer's conference report, dated January 2, 2014, recommended that Mr. Cutright be granted sole custody of the minor children, Ms. Waits have only supervised visitation of the children, and Ms. Waits submit to bimonthly random urine drug screens. On January 27, 2014, the family court signed a judgment, making the recommendations a final judgment of the court.²

On March 24, 2014, Ms. Waits filed a Petition for Protection from Abuse pursuant to LSA-R.S. 46:2131, *et seq.*, Louisiana's domestic abuse assistance statutes, asserting that Mr. Cutright abused the children. Specifically, Ms. Waits contended that on February 8, 2014, at the children's visitation, J.R.C. showed up with "a large, raised red and purple bruise on his right, upper buttock" and that a month later he had "a bruise on his left upper thigh." She asserted that when she asked about the bruises, J.R.C. stated that he hit the faucet in the bathtub and that his "Daddy spanked him." Ms. Waits also alleged that Mr. Cutright "doesn't

¹ Mr. Cutright admitted spanking his older child on three occasions in September or October 2013.

² Ms. Waits appealed the January 27, 2014 custody judgment, but because of an outstanding motion for new trial, the appeal was dismissed as premature. See Cutright v. Watts, 15-0734 (La.App. 1 Cir. 9/10/15)(unpublished order).

know how to keep [A.G.C.] clean” so she keeps “getting these [staph] infections.” Ms. Waits also presented other allegations of past incidents of abuse against herself and the children. In the petition, Ms. Waits sought injunctive relief as well as custody of the children. This new filing, docket number 2014-11342, was consolidated into docket number 2012-12121 on April 14, 2014. On March 24, 2014, the family court denied the requested temporary restraining order but set a hearing before the commissioner.³ Following the hearing, the commissioner recommended that Ms. Waits’ petition for protection be denied. The commissioner found that even if Ms. Waits’ allegations were accepted as true, she failed to prove by a preponderance of the evidence that abuse of the minor children occurred. The commissioner also found that the petition was brought frivolously and ordered Ms. Waits to pay court costs.

Thereafter, Ms. Waits filed an exception to the commissioner’s ruling, and a hearing was scheduled before the family court on May 8, 2014. After the May 8 hearing, the family court agreed with the commissioner and dismissed the petition. The court specifically noted the “many inconsistencies” in Ms. Waits’ testimony, finding it “extremely self-serving.” The family court also ordered Ms. Waits to pay court costs as well as attorney fees in the amount of \$4,325.00.⁴ The judgment of dismissal was signed on May 8, 2014, and Ms. Waits appealed.

In her appeal, Ms. Waits contends that the family court erred in finding her petition for protection from abuse to be frivolous. She also asserts that the court erred in assessing her with Mr. Cutright’s attorney fees and court costs.

DISCUSSION

Pursuant to the domestic abuse assistance statutes, upon good cause shown in an ex parte proceeding, the court may issue a temporary restraining order to protect from abuse the petitioner, any minor children, or any person alleged to be an incompetent. LSA-R.S. 46:2135A. Any person who shows

³ The hearing was originally scheduled for April 9, 2014, but was continued to April 23, 2014.

⁴ The record indicates that court costs were in the amount of \$373.40.

immediate and present danger of abuse shall constitute good cause. **Id.** If no temporary restraining order has been granted, the court shall issue a rule to show cause why the protective order should not be issued, and set the rule for hearing on the earliest day that the business of the court will permit, but in any case within ten days from the date of service of the petition, at which time the petitioner must prove the allegations of abuse by a preponderance of the evidence. LSA-R.S. 46:2135D.

According to LSA-R.S. 46:2132(3), “[d]omestic abuse” is defined as including, but not limited to, “physical or sexual abuse and any offense against the person as defined in the Criminal Code of Louisiana, except negligent injury and defamation, committed by one family or household member against another.” However, family arguments that do not rise to the threshold of physical or sexual abuse or violations of the criminal code are not in the ambit of the domestic abuse assistance statute. **Rouyea v. Rouyea**, 00-2613 (La.App. 1 Cir. 3/28/01), 808 So.2d 558, 561.

Additionally, LSA-R.S. 46:2136.1 provides:

A. All court costs, attorney fees, costs of enforcement and modifications proceedings, costs of appeals, evaluation fees, and expert witness fees incurred in maintaining or defending any proceeding concerning domestic abuse assistance in accordance with the provisions of this Part shall be paid by the perpetrator of the domestic violence, including all costs of medical and psychological care for the abused adult, or for any of the children, necessitated by the domestic violence.

B. However, if the court determines the petition was frivolous, the court may order the nonprevailing party to pay all court costs and reasonable attorney fees of the other party.

In this appeal, Ms. Waits does not challenge the denial of the issuance of the protective order. Rather, she complains that she was cast for court costs and attorney fees based on the finding by the family court that the petition was filed frivolously.

Ms. Waits testified at both the hearing before the commissioner and the hearing before the family court. She introduced several photographs of her children into evidence. To the contrary, Mr. Cutright denied ever abusing the

children, although he admitted to spanking one of his children a total of three times and stated, when questioned by Ms. Waits about the spankings, that he felt bad about same. He additionally argued that Ms. Waits was simply trying to relitigate the merits of the custody case by filing the petition for a protective order.

We have found no cases under LSA-R.S. 46:2136.1B where a protective order was denied and attorney fees granted. Nonetheless, cases discussing LSA-C.C.P. art. 863, regarding the signing of pleadings in the trial court, and LSA-C.C.P. art 2164, regulating the imposition of damages for a frivolous appeal, provide guidance regarding frivolous filings.⁵

Under LSA-C.C.P. art. 863, a signature to a pleading constitutes a certification that the attorney or party, if the party is unrepresented, has read the pleading and, after reasonable inquiry, the attorney or party believes that the

⁵ Louisiana Code of Civil Procedure art. 863 provides, in pertinent part:

B. Pleadings need not be verified or accompanied by affidavit or certificate, except as otherwise provided by law, but the signature of an attorney or party shall constitute a certification by him that he has read the pleading, and that to the best of his knowledge, information, and belief formed after reasonable inquiry, he certifies all of the following:

- (1) The pleading is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.
- (2) Each claim, defense, or other legal assertion in the pleading is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law.
- (3) Each allegation or other factual assertion in the pleading has evidentiary support or, for a specifically identified allegation or factual assertion, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
- (4) Each denial in the pleading of a factual assertion is warranted by the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

* * *

D. If, upon motion of any party or upon its own motion, the court determines that a certification has been made in violation of the provisions of this Article, the court shall impose upon the person who made the certification or the represented party, or both, an appropriate sanction which may include an order to pay to the other party the amount of the reasonable expenses incurred because of the filing of the pleading, including reasonable attorney fees.

Louisiana Code of Civil Procedure art. 2164 provides:

The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages, including attorney fees, for frivolous appeal or application for writs, and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.

pleading is well grounded in fact, legally tenable, and not interposed for any improper purpose. Courts, in applying Article 863, have found that the article is intended to be used only in exceptional circumstances, and when there is even the slightest justification for the assertion of a legal right, sanctions are not warranted. Additionally, the failure of a party to prevail does not trigger an award for sanctions. Only when the evidence is clear that there is no justification for the assertion of a legal right, should sanctions under LSA-C.C.P. art. 863 be considered. See Hampton v. Greenfield, 618 So.2d 859, 862 (La. 1993); **Witter v. Witter**, 94-0378 (La.App. 1 Cir. 12/22/94), 648 So.2d 1052, 1053; **Curole v. Avondale Indus., Inc.**, 01-1808 (La.App. 4 Cir. 10/17/01), 798 So.2d 319, 322.

Regarding LSA-C.C.P. art. 2164, courts have not awarded damages, including attorney fees, unless it is clear that the appeal was taken solely for the purpose of delay or that the appellant's counsel lacks seriousness in the position advocated. Moreover, damages for frivolous appeals are penal in nature, and, therefore, they must be strictly construed. The mere fact that an argument does not have merit does not render an appeal frivolous. Furthermore, courts are reluctant to grant frivolous appeal damages because of the chilling effect it may have on the appellate process. See Carlin v. Wallace, 00-2892 (La.App. 1 Cir. 9/28/01), 809 So.2d 1017, 1023; **Fisk v. Mathews**, 525 So.2d 223, 227 (La.App. 1 Cir. 1988); **Tillmon v. Thrasher Waterproofing**, 00-0395 (La.App. 4 Cir. 3/28/01), 786 So.2d 131, 137.

A trial court's factual determination that sanctions are warranted is reviewed under the manifest error standard of review. See Lane Memorial Hosp. v. Gay, 03-0701 (La.App. 1 Cir. 2/23/04), 873 So.2d 682, 686.

The record shows that some of the photographs that Ms. Waits introduced at the hearings before the commissioner and family court were taken prior to the hearing on the custody matter and considered in the previous proceeding. However, Ms. Waits also presented photographs to the court that were taken between February and April 2014, after the custody hearing. These later

photographs showed redness and bruising on J.R.C.'s lower back and showed bruising on his left thigh.

Considering the jurisprudence regarding sanctions and cognizant of the possible chilling effect of an award of penalties in cases of purported domestic abuse, we find that an award of sanctions under LSA-R.S. 46:2136.1B is penal in nature and should only be awarded in exceptional circumstances. Only when the evidence is clear that there is no justification for the filing of a petition for protection from abuse should sanctions be warranted. Thus, while Ms. Waits was not successful in her request for a protective order, her belief that incidents of abuse had occurred since the previous court hearing, as evidenced in the photographs, provided some justification for the filing.⁶ For these reasons, we find that the trial court erred in finding that the filing of the petition for protection from abuse was frivolous. Accordingly, we reverse that portion of the May 8, 2014 judgment that ordered Ms. Waits to pay Mr. Cutright's court costs and attorney fees for the filing of a frivolous petition.

OUTSTANDING MOTIONS

Ms. Waits also has pending motions to consolidate this appeal with the related custody appeal, to suspend the briefing schedule, and to remand the custody appeal. Because the custody appeal was dismissed as premature, we deny the pending motions as moot. See **Cutright v. Waits**, 15-0734 (La.App. 1 Cir. 9/10/15)(unpublished order).

CONCLUSION

For the foregoing reasons, we reverse that portion of the May 8, 2014 judgment that ordered Ms. Waits to pay Mr. Cutright's court costs and attorney fees for the filing of a frivolous petition. In all other respects, the judgment is affirmed. Ms. Waits's pending motions are denied as moot. All costs associated with this appeal are assessed to Jason R. Cutright, Sr.

**JUDGMENT REVERSED IN PART AND AFFIRMED IN PART;
MOTIONS DENIED AS MOOT.**

⁶ We need not address whether the result would have been different had Ms. Waits not presented evidence of events that occurred after the custody hearing.