NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CU 1564

CHRIS POILLION

VERSUS

ERICA THOMAS

Judgment Rendered: SEP 21 2017

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On Appeal from the
21st Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Trial Court No. 2008-0003261

The Honorable Jeff Cashe, Judge Presiding

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Chris Poillion

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Appellant/Pro Se,
Erica Thomas

* * * * *

BEFORE: WHIPPLE, C.J., WELCH, AND PENZATO, JJ.

PENZATO, J.

In this child custody case, the mother, Erica Thomas, appeals the trial court's judgment awarding the father, Chris Poillion, sole custody of the minor child, and granting the mother supervised visitation. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

The parties herein were never married. They are the parents of one child, C.T., born October 17, 2007. In January 2009, the parties entered into a stipulated judgment whereby they were granted joint custody of the minor child with Ms. Thomas being designated as the domiciliary parent, and Mr. Poillion having visitation on alternating weekends and alternating Wednesdays. The judgment further provided that Mr. Poillion would pay child support in the amount of $575.00 per month. On February 8, 2010, a judgment was signed authorizing Mr. Poillion's father to pick up the minor child on occasions when Mr. Poillion could not, and ordering Ms. Thomas to provide Mr. Poillion with her current physical address and copies of medical insurance cards for the minor child.

Thereafter, on June 3, 2014, Mr. Poillion filed a motion to modify custody, asserting therein that there had been changes in circumstances since the signing of the stipulated judgment and that it was no longer in the best interest of the minor child that the parties continue with the current custody agreement. The changes in circumstances alleged by Mr. Poillion included allegations that Ms. Thomas speaks negatively about him to the minor child, refuses to communicate with him about the minor child, refuses to provide information about school functions, refuses to establish counseling for the minor child to address these and other concerns, plays games regarding visitation, and that Ms. Thomas has unstable living arrangements, having moved six times in the last six years. Mr. Poillion asserted that it was in the best interest of the minor child that he be designated as the domiciliary parent with

Ms. Thomas having physical custody every other weekend and half of the holidays. Following a hearing on July 21, 2014, an interim agreement was reached, and a judgment was signed on August 6, 2014, ordering, *inter alia*, that the minor child attend counseling with Dr. Mark Crosby, that the parties attend and complete a co-parenting class, that the parties complete a psychological evaluation, that Mr. Poillion complete an alcohol evaluation at Ms. Thomas' expense, and that the minor child have adult supervision by a person other than Stacey Polito (Mr. Poillion's girlfriend), when in the presence of B.P. (Ms. Polito's son). A pre-trial conference was set for August 18, 2014. This pre-trial conference was continued because of outstanding discovery and limited counseling sessions with Mark Crosby.

On October 3, 2014, Ms. Thomas filed a pro se answer to the June 3, 2014 motion to modify custody filed by Mr. Poillion, wherein she denied the allegations made by him, and asserted that he failed to present any claims of a material change in circumstances that would warrant changing the custody arrangement then in place. She also filed "Pre-Trial Inserts" contending that Mr. Poillion drove a 4-wheeler with the child on it while consuming alcoholic beverages, that Mr. Poillion resides with a woman of questionable character to whom he is not married, and that he refused to discuss with Ms. Thomas an incident involving his girlfriend's fifteen-year-old son. On November 3, 2014, Ms. Thomas filed a motion for contempt, asserting therein that Mr. Poillion took the minor child from school on Friday October 31, 2014, prior to the start of his scheduled visitation, without Ms. Thomas' knowledge or consent. This contempt rule was set for hearing on January 12, 2015, and thereafter continued to January 26, 2015.

On November 14, 2014, Ms. Thomas filed "Pre-Trial Inserts" again contending that Mr. Poillion had failed to allege a material change in circumstances warranting a modification, and further asserting that she has been

the constant for the minor child, that the child maintains all "A"s at school and has received four awards. She indicated that she opposed Mr. Poillion's modification request, and that she sought provisions to protect the minor child from Mr. Poillion's drinking and driving as well as the abuse from his girlfriend's son.

The pre-trial conference, originally set for August 18, 2014, was ultimately held on December 1, 2014, at which time a judgment was rendered ordering that the minor child and his parents attend, cooperate and participate in counseling with Livingston Youth and Family Counseling at least once per week, and that Livingston Youth and Family Counseling issue periodic reports to the trial court. The judgment also indicated that the matter was not ready for trial due to outstanding motions, and ordered that a motion to reset be filed when the matter was ready to proceed to trial.

On December 9, 2014, Ms. Thomas filed a motion to modify visitation, seeking to change Mr. Poillion's visitation or to put provisions in place for the safety of the minor child based upon Mr. Poillion drinking alcohol and driving with the minor child on a four-wheeler, and physical altercations and harassment of the minor child by Mr. Poillion's girlfriend's fifteen-year-old son. Ms. Thomas also filed a motion for contempt alleging that Mr. Poillion had left the minor child alone with B.P. in violation of the August 6, 2014 judgment. These motions were not accompanied by an order, and were not set for hearing. A third motion for contempt was filed by Ms. Thomas on December 12, 2014, alleging that Mr. Poillion consistently paid child support late. This motion was not accompanied by an order, and was not set for hearing.

On January 26, 2015, the parties appeared for a hearing on the motion for contempt filed by Ms. Thomas on November 3, 2014. The record does not reflect that a hearing was held on the motion; rather, there was a mediation with the hearing officer and trial was set for March 20, 2015.

On March 2, 2015, Mr. Poillion filed an ex parte motion to modify custody and for contempt, alleging that since the execution of the previous judgments regarding custody, Ms. Thomas' behavior had become increasingly impulsive, irrational and violent, warranting an immediate temporary order for change of custody until the custody trial set for March 20, 2015. In support thereof, Mr. Poillion testified by affidavit that Ms. Thomas discontinued court-ordered counseling with Livingston Youth and Family Counseling; that she had been banned from the minor child's school; that due to her unwillingness to cooperate, Dr. Mark Crosby would be discontinuing his services in the matter; and that counselors at Livingston Youth and Family Counseling Center had concerns for the minor child's safety and well-being. An order was signed March 3, 2015, awarding to Mr. Poillion temporary sole custody of the minor child, pending the custody trial scheduled on March 20, 2015, with Ms. Thomas to have supervised visitation at the Livingston Youth and Family Counseling Center.

On March 20, 2015, upon motion of counsel for Ms. Thomas, the matters set for that day were continued until June 3, 2015, at which time the matter came for trial on Mr. Poillion's motions to modify custody and Ms. Thomas' motion for contempt regarding Mr. Poillion taking the minor child from school on Friday, October 31, 2014, prior to the start of his scheduled visitation.

Mr. Poillion testified that he was involved in a relationship and was living with Stacey Polito and her two children, P.P., age seventeen, and B.P., age sixteen. He further testified that following the original custody judgment of 2009, Ms. Thomas began sending him accusatory text messages. He testified that in May of 2013, Ms. Thomas accused B.P. of throwing oranges at C.T.'s head. The evidence indicates that on April 7, 2014, Ms. Thomas contacted the Tangipahoa Parish Sheriff's Office to file a report in reference to an incident that occurred at Mr. Poillion's house when B.P. slapped C.T. on the face. Mr. Poillion testified that the

continued escalation and constant battles with Ms. Thomas, including her attacks on B.P. and her reporting the above incident to the police, caused him to file the June 3, 2014 motion to modify custody. He was concerned for C.T.'s safety, and feared that, while in a rage, Ms. Thomas might hurt C.T.

Mr. Poillion also testified regarding the incident of October 31, 2014. Mr. Poillion was scheduled to go on a field trip with C.T. on that day. The day before the field trip, Mr. Poillion sent Ms. Thomas several messages asking if he could bring C.T. home with him after the field trip/school, as he was scheduled to have C.T. for his weekend visitation and did not want to have to wait to get C.T. at 6:00 p.m. on Friday, as there would not be much time to get home to go trick-or-treating. Ms. Thomas did not reply to the messages. Following the field trip on Friday, Mr. Poillion again attempted to reach Ms. Thomas by telephone, but could not get in touch with her. At around 3:00 p.m., Mr. Poillion made the decision to check-out C.T. from school, since he was scheduled to get C.T. at 6:00 p.m. that day anyway. According to Mr. Poillion, Ms. Thomas called shortly thereafter in a rage, stating that she was going to Mr. Poillion's house to get C.T. She arrived at his home around 4:30 p.m., and demanded that C.T. leave with her. Mr. Poillion then picked up C.T. at McDonald's at 6:00 p.m. for his weekend visitation.

Mr. Poillion testified that after he filed the June 3, 2014 motion to modify custody, his interaction with Ms. Thomas remained hostile, and her outbursts became directed at other people, such as C.T.'s teachers and counselors. He testified that Ms. Thomas did not want to co-parent with him.

Dr. Mark Crosby, licensed professional counselor and licensed marriage and family therapist, testified that he was appointed by the court in August of 2014 to provide counseling services in this case. In addition to his testimony, his report was introduced into evidence. Dr. Crosby terminated the court-ordered counseling/therapy after three sessions due to a lack of cooperation by Ms.

Thomas. According to Dr. Crosby, Ms. Thomas threatened to tape the counseling sessions, dismantled the radio located in the waiting room, displayed contempt and a disrespectful attitude towards Dr. Crosby and abruptly terminated the third counseling session on November 10, 2014, and threatened to contact the medical board. Dr. Crosby rendered a report based upon the three sessions with the parties, and with regard to Ms. Thomas, concluded that while Ms. Thomas presented as a protective mother, her protection may present as symptomatic of paranoia. Dr. Crosby recommended that Ms. Thomas have a full psychological evaluation to rule out a serious mental illness that could impact her ability to parent and co-parent.

In connection with Dr. Crosby's testimony, a psychological evaluation of Ms. Thomas performed by psychologist, Dr. Brian Murphy, on August 12, 2014, was introduced into evidence. While Dr. Murphy concluded that Ms. Thomas was not suffering from a debilitating psychological disturbance, he noted that Ms. Thomas "compromised [the] MMPI-2 test findings due to her proclivity to give herself every benefit of the doubt in an unbelievable way." He did not offer diagnostic classification of any consequence. He did not believe that Ms. Thomas was depressed, psychotic, and/or characterologically flawed, but acknowledged that he did not have objective test findings to validate his opinion, as the objective data was compromised to the extent that many psychologists might consider the data un-interpretable.

Meghan Pamplin, C.T.'s first-grade teacher from August 2014 through January 2015, testified regarding her interactions with Ms. Thomas. Ms. Pamplin testified that Ms. Thomas contacted her through e-mail with complaints, including that Ms. Pamplin was not allowing C.T. to eat breakfast at school, Ms. Pamplin's discipline of C.T., and that other students were being given school supplies that Ms. Thomas bought for C.T., including an accusation that Ms. Pamplin was taking C.T.'s pencils and giving them to her son. Issues also arose when Ms. Thomas

came to the school to have lunch with C.T. On January 13, 2015, Ms. Pamplin advised Ms. Thomas that she could not be in the hallway, at which time Ms. Thomas told Ms. Pamplin to "back off." Ms. Thomas was advised by letter from counsel for the Tangipahoa Parish School System that as a result of her behavior, she was banned from the campus of C.T.'s school and all school functions at other facilities. Finally, Ms. Pamplin testified that on May 3, 2015, Ms. Thomas, who worked at the Winn Dixie where Ms. Pamplin shopped, followed Ms. Pamplin around the store, taking pictures and video. Ms. Pamplin reported the incident to the Winn Dixie store manager and to the St. Tammany Parish Sheriff's Office.

Kelvin McCoy was qualified as an expert licensed clinical social worker. He testified that he was the executive director for Livingston Youth and Family Counseling, and became involved in this case pursuant to the December 29, 2014 court order. Mr. McCoy acted as counselor for Mr. Poillion, and participated in family sessions with Ms. Thomas and C.T., and the counselors assigned to them. Mr. McCoy provided a report to the court expressing his concerns about Ms. Thomas' actions and erratic behaviors, including her dramatic mood swings, and his belief that she needs therapy and treatment, but does not display a concern for her son nor his relationship with his father. Mr. McCoy recommended that the court take a concerned look at the domiciliary placement of the child or assess the limitations of the father's involvement in the care and well-being of the son. He further recommended a psychiatric evaluation for Ms. Thomas.

Katie Carpenter testified that she was a social worker intern at Livingston Youth and Family Counseling Center, and that she had been C.T.'s therapist since January. She testified that she did not believe that it was in C.T.'s best interest to have more contact with Ms. Thomas due to safety concerns. She recounted an instance where Ms. Thomas pulled C.T. by his arm and dragged him out of a

counseling session. Due to Ms. Carpenter's concerns, Mr. McCoy reported the incident to the Department of Child and Family Services ("D.C.F.S.").

Ms. Thomas testified that from C.T.'s birth until the ex parte order of custody was granted, she was C.T.'s primary caregiver. She further testified that she wanted C.T. to know his father and that she wanted it to be a healthy relationship. She did not want Mr. Poillion to call C.T. a liar or to lie and manipulate situations. She stated that she wanted him to co-parent with her, but was not sure how to get to that point. Ms. Thomas was asked about whether she had any mental health diagnoses and she responded that she dealt with depression in 2002. She also recounted a time when she was eight months pregnant with C.T. and was taken by the coroner to North Oaks because of a report from her mother or grandfather that she was threatening to kill herself and her child. She denied that she was committed. Ms. Thomas further testified that from 2007 until the time of trial, she had lived in eight residences.

Based upon the testimony and the documentary evidence introduced by the parties, the trial court noted that the parties had terrible communication, and that Ms. Thomas was not co-parenting. The trial court stated that Ms. Thomas' testimony that a lot of the health care workers were lying about statements she made and all of the teachers and counselors were working against her caused the court to question her credibility. The trial court was concerned about all of her moves, her interaction with the school system, and believed that Ms. Thomas threatened the teacher. The trial court also believed Ms. Thomas exhibited poor judgment in questioning C.T. about the custody case. With regard to Ms. Thomas' concerns about abuse by B.P., the trial court indicated that the situation had been evaluated by counselors, the police and D.C.F.S. The trial court was disturbed by the incident at Halloween. The trial court stated that while he did not think Ms. Thomas was a danger to C.T., his concerns were that her actions had a

psychological effect upon the child, and expressed concerns as to Ms. Thomas' mental health. Accordingly the trial court issued an oral ruling granting sole custody to Mr. Poillion, with supervised visitation to Ms. Thomas, pending a complete evaluation clearing her for unsupervised visitation.

On June 8, 2015, Ms. Thomas filed a motion to stay the execution of order of the judgment, which included a motion to recuse the trial court judge based upon his receipt of financial contributions from parties involved in the case.

On June 24, 2015, the trial court signed a Judgment in accordance with his oral reasons of June 3, 2014[1]. On June 29, 2015, Ms. Thomas filed a notice of intent to file appeal, evidencing her intent to apply for a supervisory writ for review of the trial court's "Judgment of June 3, 2015 on Defendants [sic] Motion of Recusal." At that point, no decision had been rendered on the motion to recuse, although on July 2, 2015, an order was signed by the trial court setting a return date of June 29, 2015. No further action was taken by Ms. Thomas with respect to this supervisory writ.

Ms. Thomas then filed a motion for appeal from "the Judgment which was stated and entered into on record 6/3/15 during trial, rendered on, June 3, 2015." An order in connection therewith was signed by the trial court on July 2, 2015.

Thereafter, on July 13, 2015, the motion to recuse filed by Ms. Thomas came for hearing before another judge, who denied the motion in open court. At the request of Ms. Thomas, that judge issued reasons for judgment in connection therewith.

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[1] The judgment was signed after Ms. Thomas filed a motion to recuse the trial court, but before that motion was heard and denied by another judge. Ms. Thomas has not raised this issue on appeal, therefore we do not address same herein. See *Judson v. Davis*, 2004-1699 (La. App. 1 Cir. 6/29/05), 916 So. 2d 1106, 1121 n.11, writ denied, 2005-1998 (La. 2/10/06), 924 So. 2d 167.

We also note that the judgment did not address the motion for contempt also heard on June 3, 2015. Generally, silence in a judgment of the trial court as to any issue, claim, or demand placed before the court is deemed a rejection of the claim and the relief sought is presumed to be denied. *Schoolhouse, Inc. v. Fanguy*, 2010-2238 (La. App. 1 Cir. 6/10/11), 69 So. 3d 658, 664.

Rule to Show Cause

This appeal was originally brought referencing the date of June 3, 2015, the date of the trial and the trial court's oral reasons. This court issued a rule to show cause, and the trial court issued an amended order of appeal on June 26, 2017, reflecting the correct date of the judgment as June 24, 2015.

ERRORS

On appeal, Ms. Thomas essentially challenges the trial court's judgment granting sole custody of the minor child to Mr. Poillion, with supervised visitation of at least two hours per week to Ms. Thomas, and ordering Ms. Thomas to undergo a full mental health evaluation before unsupervised visitation would be considered. Ms. Thomas also assigns as error the finding that she failed to meet her burden of proof with regard to the motion to recuse the trial judge.

LAW AND DISCUSSION

When an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory rulings prejudicial to him, in addition to the review of the final judgment appealed from. See *Landry v. Leonard J. Chabert Med. Ctr.*, 2002-1559 (La. App. 1 Cir. 5/14/03), 858 So. 2d 454, 461 n. 4, writs denied, 2003-1748, 2003-1752 (La. 10/17/03), 855 So. 2d 761.

While Ms. Thomas seeks review of the ruling on her motion to recuse, she has failed to provide us with a transcript of that hearing. The appellant bears the burden of furnishing the appellate court with a record of the proceedings below. When the record lacks a transcript that is pertinent to an issue raised on appeal, the inadequacy of the record is attributable to the appellant. If a transcript, exhibits or other documentation are missing and the appellant fails to act, there is no basis for the appellate court to determine that the trial court erred and the judgment is affirmed because a judgment is presumed correct. *Byrd v. Pulmonary Care*

Specialists, Inc., 2016-0485 (La. App. 1 Cir. 12/22/16), 209 So. 3d 192, 196. Thus, we affirm the trial court's ruling on the motion to recuse.

The trial court is vested with broad discretion in deciding child custody cases. Because of the trial court's better opportunity to evaluate witnesses, and taking into account the proper allocation of trial and appellate court functions, great deference is accorded to the decision of the trial court. Thus, a trial court's determination regarding child custody will not be disturbed absent a clear abuse of discretion. *Olivier v. Olivier*, 2011-0579 (La. App. 1 Cir. 11/9/11), 81 So. 3d 22, 26.

In this case, and as in most child custody cases, the trial court's determination was based heavily on factual findings. It is well settled that an appellate court cannot set aside a trial court's findings of fact in the absence of manifest error or unless those findings are clearly wrong. *Rosell v. ESCO,* 549 So.2d 840, 844 (La. 1989).

The burden of proof on a party seeking to modify a prior custody award is dependent on whether the prior award was made by a considered decree or a stipulated decree. A considered decree is an award of permanent custody in which the trial court receives evidence of parental fitness to exercise care, custody, and control of children. *Evans v. Lungrin*, 97-0541, 97-0577 (La. 2/6/98), 708 So. 2d 731, 738. A stipulated decree is one in which the parties consent to the custodial arrangement and no evidence of parental fitness is taken. *Id.*

In the present case, the prior custody decree signed January 5, 2009, providing for joint custody with Ms. Thomas as the domiciliary parent and Mr. Poillion having visitation on alternating weekends and alternating Wednesdays, was a stipulated judgment, and thus a stipulated decree. The party seeking modification of a stipulated custody decree must prove (1) that there has been a change in circumstances materially affecting the welfare of the child since the

original (or previous) custody decree was entered, and (2) that the proposed modification is in the best interest of the child. *Elliott v. Elliott*, 2010-0755 (La. App. 1 Cir. 9/10/10), 49 So. 3d 407, 413, writ denied, 2010-2260 (La. 10/27/10), 48 So. 3d 1088.

The parties' failure to communicate well has been held to constitute a change in circumstances materially affecting the welfare of the child. See *Harvey v. Harvey*, 2010-1338 (La. App. 3 Cir. 3/9/11), 2011 WL 803778 (unpublished), writ denied, 2011-0719 (La. 4/29/11), 62 So.3d 117. See also *Richard v. Richard*, 2009-0299 (La. App. 1 Cir. 6/12/09), 20 So. 3d 1061 (the parties' failure to communicate was a factor supporting the trial court's finding of a material change in circumstances); and *Boesch v. Boesch*, 16-526 (La. App. 5 Cir. 2/8/17), 210 So. 3d 937 (mother's remarriage and the parties' subsequent decline in communication and effective co-parenting constituted a material change in circumstances.)

In this case, while the trial court did not make an express finding regarding a change in circumstance, we find no error in the trial court's apparent determination that Mr. Poillion met his burden of proving that a material change in circumstances has occurred since the prior 2009 stipulated custody decree[2], namely a decline in the communication between the parties and their inability to co-parent, as well as Ms. Thomas' escalating attacks on B.P., including her reports of alleged abuse by him to the police, and her interactions with C.T.'s teachers and counselors. We further find no error in the trial court's apparent determination that these changes affect the welfare of the minor child. We note that C.T.'s counselor at Livingston Youth and Family Counseling Center expressed concerns about C.T.'s safety of such a nature to mandate a report to D.C.F.S. We further agree with the trial court that Ms. Thomas' actions have a psychological effect on the minor child.

[2] See *Elliott*, 49 So. 3d 407.

There having been a change in circumstances materially affecting the welfare of the child since the previous custody decree was entered, we now address whether the trial court's modification of custody is in the best interest of the child.

Generally, the court shall award custody to the parents jointly; however, if custody to one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent. La. Civ. Code art. 132. Every child custody case is to be viewed on its own particular set of facts and the relationships involved, with the paramount goal of reaching a decision that is in the best interest of the child. The trial court is vested with broad discretion in deciding child custody cases. Appellate courts must be vigilant to not retry cases. A trial court's determination regarding child custody will not be disturbed absent a clear abuse of discretion. *Henry v. Sullivan*, 2016-0564 (La. App. 1 Cir. 7/12/17), ___ So.3d ___, ___, 2017 WL 2982129.

The best interest of the child standard is a fact-intensive inquiry that requires the weighing and balancing of factors concerning the issue of custody on the basis of the evidence presented. The trial court is in the best position to ascertain the best interest of the child and any findings made in furtherance of that best interest should not be disturbed on appeal absent a clear showing of abuse of discretion. *Id.* In this case, the trial court was personally able to observe Ms. Thomas during trial and to make its own findings as to how her conditions affected the child and the best interest of the child. The evidence in the record overwhelmingly supports the granting of sole custody to Mr. Poillion and the award of supervised visitation to Ms. Thomas. Having found no manifest error or abuse of discretion, we affirm the trial court's modification of custody.

CONCLUSION

For the above reasons, the July 13, 2015 ruling on the motion to recuse is affirmed. Further, the trial court's June 24, 2015 judgment granting sole custody of the minor child to Mr. Poillion, with supervised visitation of at least two hours per week to Ms. Thomas, and ordering Ms. Thomas to undergo a full mental health evaluation before unsupervised visitation would be considered, is affirmed. All costs of this appeal are assessed against the appellant, Erica Thomas.

AFFIRMED.