NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2016 CA 1379

ALICE ROGERS PAXTON

VERSUS

DEVIN HAILE PAXTON

Judgment Rendered: OCT 25 2017

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Appealed from the
Family Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. F166933

The Honorable Lisa Woodruff White, Judge Presiding

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William J. Larzelere, III **Covington, Louisiana**	**Counsel for Defendant/Appellant** **Devin Haile Paxton**
Thomas G. Hessburg **Baton Rouge, Louisiana**	**Counsel for Plaintiff/Appellee** **Alice Rogers Paxton**

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

FLW
Welch J. concurs without reasons
JFM McClendon, J. concurs in the Result.

THERIOT, J.

The appellant, Devin Haile Paxton, appeals the Parish of East Baton Rouge Family Court's judgment denying a rule to modify child support filed by the appellant and the sustaining of a peremptory exception raising the objection of no cause of action filed by the appellee, Alice Rogers Paxton (a/k/a Alice Rogers Ashley), who also filed a rule to modify child support. The family court increased the child support award in the appellee's favor. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Mr. Paxton and Mrs. Ashley[1] were divorced on November 18, 2009. Four children were born from their marriage. Pursuant to a consent judgment signed February 28, 2012, it was agreed that the parents would share joint custody of the children, with Mrs. Ashley designated as the domiciliary parent. Mr. Paxton was ordered to pay $1,400.00 per month in child support, with his gross monthly income established as 60% of the total gross income of the two parents. Each parent was allowed to claim two of the children as dependents for income tax purposes.

Subsequent to the divorce, Mrs. Ashley's daycare business declined. While licensed to care for fifty-seven children, she was only caring for fifteen children when the business eventually closed down. On its 2014 tax return, the daycare business reported a loss of $28,451.00. In her 2014 individual income tax return, Mrs. Ashley reported that she sold the commercial building where the daycare business had been located for $210,000.00, and she individually reported a loss of $18,164.00.

In January 2014, Mrs. Ashley enrolled one of the children in a private school that specialized in teaching children with dyslexia. According to

[1] Alice Rogers Paxton has since remarried and is now Alice Rogers Ashley.

Mrs. Ashley, Mr. Paxton agreed with the enrollment, as long as Mrs. Ashley paid the tuition and brought the child to the school.

Mrs. Ashley filed a rule to modify child support on March 28, 2014. She alleged a material change in circumstances, which included her substantial loss of income and the tuition for the private school in which their child was enrolled. She alleged that while Mr. Paxton agreed to the enrollment, he had refused to pay any tuition.

Mr. Paxton responded by filing an answer, reconventional demand and rule for contempt, requesting equal visitation for the children and a recalculation of child support. He avered that Mrs. Ashley agreed to pay all tuition costs related to the private school, and requested the trial court order her to do so. He further requested the right to claim tax exemptions for all of the children. Mr. Paxton amended his answer on April 28, 2015 to include other material changes in circumstances, including that he was remarried and living in a new home, and that Mrs. Ashley was once again employed.

On May 7, 2015, Mrs. Ashley filed a peremptory exception of no cause of action, alleging that Mr. Paxton had failed to plead facts that set forth a material change in circumstances that would warrant a modification of custody that would be in the best interest of the children. After a hearing, the trial court sustained the exception and dismissed the portion of Mr. Paxton's answer, reconventional demand, and rule for contempt that sought to modify the custody arrangement. A judgment in accordance with the trial court's ruling was signed on July 23, 2015. All other matters proceeded to trial. After the trial, the trial court increased Mr. Paxton's monthly child support obligation to $2,316.88. A judgment in accordance with the trial court's ruling was signed on March 24, 2016. Mr. Paxton appeals both the

interlocutory judgment, signed July 23, 2015, and the final judgment, signed March 24, 2016.[2]

ASSIGNMENTS OF ERROR

Mr. Paxton alleges two assignments of error:

1. The trial court's interlocutory judgment incorrectly sustained Mrs. Ashley's exception of no cause of action regarding Mr. Paxton's request for a modification of the stipulated judgment on physical custody.

2. The trial court's calculation of child support in the final judgment is an abuse of discretion and manifest error.

STANDARD OF REVIEW

With respect to the trial court's sustaining the exception for no cause of action, the *de novo* standard of review applies, and we must employ the same principles applicable to the trial court's determination of the exception. *LeBlanc v. Alfred*, 2015-0397 (La. App. 1 Cir. 12/17/15), 185 So.3d 768, 773.

With respect to the trial court's judgment on child support, the standard of review is manifest error. Generally, an appellate court will not disturb a child support order unless there is an abuse of discretion or manifest error. *State, Department of Social Services ex rel. D.F. v. L.T.*, 2005-1965 (La. 7/6/06), 934 So.2d 687, 690.

DISCUSSION

Peremptory Exception of No Cause of Action

The peremptory exception of no cause of action questions whether the law affords any relief to the plaintiff if he proves the factual allegations in the petition and annexed documents at trial. For purposes of determining the

[2] The July 23, 2015 judgment was an interlocutory judgment that was not designated as a final, appealable judgment pursuant to La. C.C.P. art 1915(B). See La. C.C.P. art. 1841 and 2083. When an appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory judgments prejudicial to him in addition to the review of the final judgment. See *Landry v. Leonard J. Chabert Medical Center*, 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. Thus, we can consider the correctness of the July 23, 2015 judgment in conjunction with the appeal of the March 24, 2016 judgment, which is a final judgment.

issues raised by the exception of no cause of action, all well-pleaded facts in the petition must be accepted as true. *LeBlanc v. Alfred*, 185 So.3d at 773.

In his reconventional demand, Mr. Paxton averred that he and Mrs. Ashley had deviated from the February 28, 2012 consent judgment in that he had been exercising visitation contrary to the judgment's visitation schedule, and that he believed more equal visitation would be in the best interest of the children. Also, he alleged that the children had expressed a desire to have a more balanced visitation schedule. Mr. Paxton also requested child support be reduced should visitation be modified.[3]

Mr. Paxton has merely asserted that he and Mrs. Ashley had mutually modified the visitation schedule, but did not make any factual allegations as to why any modifications would be in the best interest of the children, other than that the children desired a more equal visitation.[4] In his amended reconventional demand, Mr. Paxton alleged other changes in circumstances, namely, his remarriage and new home, his more flexible job schedule, new employment for Mrs. Ashley, and increased self-reliance of the children. We find that none of these pled facts establish that a modification in custody or child support would promote the best interest of the children. See *Bergeron v. Bergeron*, 492 So.2d 1193, 1201 (La. 1986). A party seeking a change in a consent decree must prove a material change that affects the welfare of the children, and that the proposed modification would be in the

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[3] Mr. Paxton also requested the trial court to order that the child enrolled in private school be re-enrolled in public school, or that Mrs. Paxton be ordered to pay all costs associated with the private school. He then alleged that since Mrs. Ashley remarried, the children have been covered by both his and her health insurance policies, and he requested that she be solely responsible for paying the children's health insurance premium. Mr. Paxton also requested that he be granted income tax deductions for all four children. Mr. Paxton claimed in his reconventional demand that Mrs. Ashley was in contempt of the February 28, 2012 consent judgment by scheduling activities (presumably involving the children) during his custodial periods without prior discussion. Mr. Paxton further claimed that Mrs. Ashley was in contempt of the consent judgment for calling the children when they were with Mr. Paxton outside of the prescribed calling periods. These matters were adjudicated in the judgment signed March 24, 2016, and are not included in the interlocutory judgment.

[4] A child's preference, in and of itself, with no explanatory evidence, is not a material change of circumstances affecting the child's welfare. *Bergeron v. Bergeron*, 492 So.2d 1193, 1203 (La. 1986).

best interest of the children. *Richard v. Richard*, 2009-0299 (La. App. 1 Cir. 6/12/09), 20 So.3d 1061, 1066.

The trial court did not err in sustaining Mrs. Ashley's exception of no cause of action. Mr. Paxton's first assignment of error lacks merit.

Calculation of Child Support

An award of child support shall not be modified unless the party seeking the modification shows a material change in circumstances of one of the parties between the time of the previous award and the time of the rule for modification. La. R.S. 9:311(A)(1). Comment (a) from the statute states that to obtain a reduction in support, the change in circumstances must be *material*, defined as a change in circumstances having real importance or great consequences for the needs of the child or the ability to pay of either party.

At trial, Mr. Paxton's financial records of the past few years were admitted into evidence. His tax return from 2014 showed his adjusted gross income to be $104,069.00. His "Paxton Corporation," which owned rental property, had a net loss of $6,573.93. Mr. Paxton's 2015 W-2 from his employer showed a gross income of $117,432.61. In 2015, Paxton Corporation showed a net loss of $15,505.23. His bi-weekly net income from the first two months of 2016 was approximately $2,373.00.

Mrs. Ashley's financial records were also introduced at trial. In 2014, her gross income was $9,808.07. Her day care business reported a loss of $28,451.00. She was re-employed in October of 2014. Mrs. Ashley's 2015 tax return shows a gross income of $75,025.01. In 2015, a full year of tuition at the private school was $11,330.00.

The evidence at trial showed that Mr. Paxton earned substantially more than Mrs. Ashley, despite the losses he has suffered in his rental

property business. Taking the losses from Mr. Paxton's rental business into account, Mr. Paxton still earned approximately $100,000.00 a year. The trial court determined Mrs. Ashley's income earning potential was approximately $75,000.00 a year[5] and she paid $12,000.00 to $13,000.00 in private school tuition for the 2015-2016 school year.[6]

However, the trial court's calculation of Ms. Ashley's monthly gross income was $3,466.66, or a yearly gross income of $41,592.00. Mr. Paxton contends that this calculation by the trial court is baseless, and that Mrs. Ashley's monthly gross income is within the range of $5,000.00 to $6,000.00. We find that at her last place of employment, Mrs. Ashley earned approximately $2,165.00 per month upon her resignation. Although this figure is lower than the trial court's, we recognize that because of her previous work history, Mrs. Ashley is capable of earning a higher salary. We therefore cannot conclude that the trial court's determination of Mrs. Ashley's gross income was an abuse of discretion.

As to Mr. Paxton's earning capacity, the trial court calculated that he had a monthly gross income of $12,378.34 in 2016, approximately $149,000.00 per year. His monthly earnings from his employment with Entergy in 2016 were $8,608.00 per month (as averaged through the date of the hearing). The Tax return for Paxton Corporation from 2014 reflects total rent received as $95,017.00, with total expenses of $90,398.00, with $22,180.00 as depreciation expense.[7] Mr. Paxton avers that the depreciation expenses were not accelerated depreciation, which would be disallowed by La. R.S. 9:315(C)(3)(c). Mr. Paxton also avers that any income reflected on

[5] Mrs. Ashley was unemployed at the time of the trial. If a party is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of income earning potential. La. R.S. 9:315.11.

[6] By agreement of the parties or order of the court, expenses of tuition for attending a special or private school to meet the needs of the child may be added to the basic child support obligation. La. R.S. 9:315.6.

[7] No other tax returns reflecting rental income for Paxton Corporation was entered into evidence.

his tax returns was due to his inability to deduct the principal payment portion of his mortgage payments on the rental properties. However, the profit and loss statements that Mr. Paxton compiled and introduced at the hearing were unsupported by evidence. Considering the great discretion vested in the trial court, we cannot conclude that there was an abuse of discretion in calculating Mr. Paxton's gross income.[8]

Using the calculation guidelines of La. R.S. 9:315.20, we find that there has been no material change in Mr. Paxton's circumstances to warrant a reduction in his child support obligation. There was no manifest error in the trial court's underlying factual determinations, nor an abuse of discretion in the amount of support that was awarded. We neither find an abuse of discretion in the family court's increase in the child support award.

Mr. Paxton further contends that he was not allowed visitation credit provided by La. R.S. 9:315.8(E). After reviewing the record in its entirety, we find no support for Mr. Paxton's claim and find the trial court did not abuse its discretion.

Finally, Mr. Paxton contends that the trial court erred in not awarding him tax exemptions for all four minor children, despite assessing him with over 78% of the child support obligation and Mrs. Ashley being unemployed. Mr. Paxton avers that La. R.S. 9:315.18[9] allows the tax exemption be given to the non-domiciliary parent if that parent pays more

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[8] The trial court did not consider the private school tuition in its child support calculations, specifically denying Mrs. Ashley's request for tuition. However, that denial of the tuition has not been raised by either party on appeal.

[9] Louisiana Revised Statutes 9:315.18 states, in pertinent part:

> B. (1) The non-domiciliary party whose child support obligation equals or exceeds fifty percent of the total child support obligation shall be entitled to claim the federal and state tax dependency deductions if, after a contradictory motion, the judge finds both of the following:
>
> (a) No arrearages are owned by the obligor.
>
> (b) The right to claim the dependency deductions or, in the case of multiple children, a part thereof, would substantially benefit the non-domiciliary party without significantly harming the domiciliary party.

than 50% of the child support obligation and is not in arrears on support. However, Mr. Paxton has failed to show how awarding him the tax exemptions would substantially benefit him without significantly harming Mrs. Ashley. We therefore cannot conclude that the trial court's awarding of the tax exemptions to Mrs. Ashley was an abuse of discretion.

Concluding that the trial court did not abuse its discretion in calculating the child support obligation, we find Mr. Paxton's second assignment of error to be without merit.

DECREE

The judgment of July 23, 2015, sustaining the exception of no cause of action filed by the appellee, Alice Rogers Paxton (a/k/a Alice Rogers Ashley), is affirmed. The judgment of March 24, 2016, increasing the child support obligation owed by the appellant, Devin Haile Paxton, is also affirmed. All costs of this appeal are assessed to the appellant, Devin Paxton.

AFFIRMED.