

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CU 0351

MATTHEW W. BAILEY

VERSUS

KARYN A. BAILEY

Judgment rendered: MAY 02 2017

On appeal from
The Family Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 169,960

Honorable Lisa Woodruff-White, Judge

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Plaintiff/Appellee
Matthew W. Bailey

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Defendant/Appellant
Karyn A. Bailey

BEFORE: WHIPPLE, C.J., GUIDRY, AND McCLENDON, JJ.

*PMc McClendon, J. Agrees in part and dissents
in part and assigns reasons.*

JS
VGW by JS

by JS

by JS

GUIDRY, J.

A mother appeals a judgment granting the father of her minor child a decrease in his child support obligation and declining to find the father in contempt of court for alleged breaches of his child custody and support obligations. Based on our review of the record before us, we will amend the Family Court's award of child support.

FACTS AND PROCEDURAL HISTORY

On June 8, 2009, Matthew W. Bailey filed a petition to divorce Karyn A. Bailey, whom he had married on February 4, 2005, and with whom he had one child, namely Jordyn Reese Bailey, born during the marriage on April 10, 2006. In the petition for divorce, Matthew requested that the parties be awarded joint custody of the minor child with both parties being named co-domiciliary parents. In answer to the petition, Karyn requested that the parties be awarded provisional joint custody with her being designated as the domiciliary parent. By a judgment signed February 24, 2010, the Family Court awarded the parties joint custody of the minor child without a designation of a domiciliary parent, pursuant to a stipulation of the parties. The judgment further provided that Matthew would pay Karyn \$2,000.00 a month in child support and that he would pay all expenses incurred for the minor child, including mother's day out, dental insurance, out-of-pocket medicals, future tuition, and required school fees.

On January 26, 2011, the Family Court signed a judgment of divorce terminating the parties' marriage.

On May 26, 2011, the Family Court held a hearing on the parties' cross motions to establish a holiday visitation schedule and on Karyn's requests for an increase in child support and rule for contempt. By a judgment signed November 30, 2011, the Family Court dismissed Karyn's rule for contempt, increased

Karyn's child support award to \$2,255.00 per month, and set a holiday visitation schedule pursuant to the stipulation of the parties.

Thereafter, the parties filed various pleadings, including rules for contempt and to modify custody. Following a hearing on June 15, 2012, the Family Court signed a judgment on October 4, 2013,¹ designating Karyn as domiciliary parent, changing the parties' physical custody to a seven-day rotating schedule, and denying their respective rules for contempt.² The judgment otherwise provided that "all other provisions or judgments rendered on May 26, 2011, and signed on November 30, 2011, not modified by this ruling, remain in effect with regard to custody."

On July 28, 2014, Matthew filed a rule for reduction in child support, wherein he alleged that since the rendition of the Family Court's November 30, 2011 judgment, in which he was ordered to pay child support to Karyn in the amount of \$2,255.00 per month, his income had substantially decreased by over \$100,000.00. Consequently, Matthew requested that his support obligation be reduced. In response, Karyn filed a rule for an increase in child support and for contempt.

In her rule, Karyn alleged that Matthew was no longer obligated to pay child support for his son from a prior marriage. She further alleged that Matthew regularly traveled out of town, resulting in Karyn having physical custody of their daughter in excess of fifty percent of the time. She also alleged that Matthew refused to pay for extracurricular activities that their daughter wished to participate in during Karyn's custodial time. Thus, for those reasons, she alleged that she was entitled to an increase in the amount of child support awarded to her. She also

¹ The actual date that appears on the judgment is October 4, 2012; however, the notice of judgment issued in connection with the decree states that the judgment was signed on October 4, 2013.

² The Family Court did, however, find Karyn in contempt of court for violating the court's sequestration order.

recounted several instances in which she claimed Matthew violated orders of the Family Court for which she requested he be held in contempt of court.

The Family Court held hearings on the parties' cross rules on July 17, 2015, and August 24, 2015. Following the hearings, the Family Court took the matter under advisement and later rendered judgment reducing Matthew's child support obligation to \$1,160.38 per month, retroactive to the date of judicial demand. According to the Family Court's written reasons for judgment and the worksheets attached thereto, the court determined Karyn's gross monthly income to be \$1,256.66 and Matthew's gross monthly income to be \$12,190.54, equaling a combined gross monthly income of \$13,447.20. According to the guidelines in effect at the time,³ the Family Court extrapolated the amounts shown to determine \$1,535.78 to be the basic child support obligation for one child based on the parties' combined gross monthly income. Multiplying this amount by Matthew's proportionate share of the parties' combined adjusted gross monthly income, 90.65 percent, resulted in a child support obligation of \$1,392.18. However, according to a comment found on Worksheet A completed by the Family Court, in calculating the child support owed by the parties, the Family Court reduced the \$1,392.18 amount "by a custody sharing credit based on [Matthew] having [the minor child] 45% of the time by \$231.79." This resulted in Matthew's child support obligation being set at \$1,160.38.

Disagreeing with the Family Court's reduction of Matthew's child support obligation and its failure to find him in contempt of court, Karyn appeals the November 25, 2015 judgment.

³ Louisiana Revised Statutes 9:315.19 was revised by 2016 La. Acts, No. 602, §1, effective August 1, 2016. The judgment in this matter was signed by the Family Court on November 25, 2015.

ASSIGNMENTS OF ERROR

On appeal, Karyn contests the Family Court's determinations and judgment in the following respects:

- I. The trial court erred in modifying the child support obligation in that Mr. Bailey failed to establish a material change in circumstances.
- II. The trial court erred in finding that Mr. Bailey's gross monthly income was \$12,190.54.
- III. The trial court erred as a matter of law in setting the amount of the child support award.
- IV. The trial court erred in finding that Mrs. Bailey's gross monthly income was \$1,256.66.
- V. The trial court erred in failing to grant Mrs. Bailey's Rule for Contempt of Court.

DISCUSSION

An award for 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 of the award. La. R.S. 9:311(A)(1). To obtain a reduction or increase in support, the change in circumstances of one of the parties must be *material*, defined as a change in circumstance having real importance or great consequences for the needs of the child *or the ability to pay of either party*. La. R.S. 9:311, Comments—2001(a) (emphasis added).

As the calculation of Matthew's income is integral to the determination of whether Matthew established a material change in circumstances warranting modification of the child support award and to the determination of whether the Family Court properly modified the support award, we will first consider Karyn's second assignment of error regarding the Family Court's calculation of Matthew's income.

Assignment of Error No. 2

According to La. R.S. 9:315(C)(3), "gross income," for the purposes of determining child support, is defined as:

(a) The income from any source, including but not limited to salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, recurring monetary gifts, annuities, capital gains, social security benefits, workers' compensation benefits, basic and variable allowances for housing and subsistence from military pay and benefits, unemployment insurance benefits, disaster unemployment assistance received from the United States Department of Labor, disability insurance benefits, and spousal support received from a preexisting spousal support obligation;

(b) *Expense reimbursement or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business, if the reimbursements or payments are significant and reduce the parent's personal living expenses.* Such payments include but are not limited to a company car, free housing, or reimbursed meals; and

(c) *Gross receipts minus ordinary and necessary expenses required to produce income, for purposes of income from self-employment, rent, royalties, proprietorship of a business, or joint ownership or a partnership or closely held corporation.* "Ordinary and necessary expenses" shall not include amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses or investment tax credits or any other business expenses determined by the court to be inappropriate for determining gross income for purposes of calculating child support. [Emphasis added.]

At the hearing on the cross rules for support modification, Matthew testified that he is the sole owner of the law firm, Walsh and Bailey, which is classified as an S-Corporation, and he identified the income from the law firm as his primary source income.⁴ As such, in determining Matthew's income, La. R.S. 9:315(C)(3)(c) clearly applies.

Although the Family Court indicated that it was applying La. R.S. 9:315(C)(3)(c) to determine Matthew's income, the court did not use the gross receipts from the law firm minus ordinary and necessary expenses as dictated in the statute. Instead, the Family Court used the amount Matthew reported on his personal income tax as being his income and added back to that figure certain expenses that the Family Court found not to be ordinary and necessary expenses. The Family Court further indicated that it found the amount from Matthew's 2014

⁴ Matthew's 2014 personal tax return also showed some additional income from capital gains and rental property.

individual tax return to be the proper amount to use because of the testimony of Gus Levy, qualified by the court as an expert in the area of certified public accounting. Nevertheless, this determination of Matthew's income was not consistent with the calculation required by law and therefore is error. See Scott v. Scott, 43,455, p. 8 (La. App. 2d Cir. 8/13/08), 989 So. 2d 290, 296. Hence, we will calculate *de novo* Matthew's income in accordance with La. R.S. 9:315(C)(3)(c).

According to the law firm's 2014 business tax return, the gross receipts of the law firm for 2014 were \$606,254.00. Of that sum, \$572,284.00 in deductions were claimed for a net income of \$33,970.00. Hence, the first step in our review will be to consider the deductions claimed in the law firm's 2014 tax return to determine whether each of those deductions constitute an ordinary and necessary expense of the law firm.

Reviewing the law firm's general ledger and the testimony of Matthew,⁵ of his current wife and office manager, Melissa Lawson Bailey, and of Mr. Levy in connection with the law firm's 2014 tax return, we find a majority of the listed deductions constitute ordinary and necessary expenses to produce the income of the law firm, except for the following amounts or deductions:

\$372.00 included in the deduction for repairs and maintenance⁶;

⁵ Although Karyn asserts that Matthew's testimony regarding the law firm's expenses was "self-serving," we observe that when questioned about several of the expenses that we have determined herein as not being ordinary and necessary to produce income, Matthew acknowledged uncertainty as to the expenses or outright error in including an amount as an expense of the law firm in his testimony. As such, we find no basis to simply discredit Matthew's testimony as Karyn urges. See Kern v. Kern, 00-1126, p. 4 (La. App. 4th Cir. 4/25/01), 786 So. 2d 193, 196 (wherein the court accepted the attorney-father's testimony that certain business expenses listed on the firm's tax return were not personal expenses).

⁶ While the general ledger entry for "Janitorial/Yardwork" displays some entries that indicate that some of the housekeeping services for which the law firm paid were performed at Matthew's residence, both Matthew and Melissa explained that the indications appeared to be a typo. Mr. Levy and Melissa testified that the accounting system used by the law firm to generate the general ledger has a default that would sometimes wrongly code expenses. However, the four amounts of \$93.00 listed for pest control under the entry for "Janitorial/Yardwork" appear to be for services performed at Matthew's home. Those amounts total \$372.00.

\$225.00 included in the deduction for dues and subscriptions⁷;

\$514.95 included in the deduction for office expenses⁸;

\$1,380.00 included in the deduction for telephone expenses⁹;

\$196.00 included in the deduction for seminars and meetings¹⁰;

\$488.00 listed as a charitable contributions deduction¹¹; and

\$750.00 listed as a political contributions deduction.¹²

The total of these disallowed sums equals \$3,925.95. Thus, we will reduce the total deductions claimed by the law firm in its tax return to \$568,358.05, resulting in \$37,895.95 being attributable to Matthew as gross income.¹³

⁷ This sum is listed in the law firm's general ledger as homeowner's association dues for Matthew's home in University Club Plantation, which Matthew acknowledged that it was a mistake for that sum to be included in the deduction for dues and subscriptions.

⁸ This sum is listed in the general ledger as being for an iPad that Matthew testified he knew nothing about.

⁹ According to the general ledger, included among the amounts listed under the telephone deduction were payments for the monthly Cox services provided at Matthew's home in University Club Plantation, which services were for telephone, internet, and cable television. Matthew and Melissa both testified that Melissa used their home as a home office, performing about one-half of her office manager duties there. Melissa testified that about \$100.00 of the monthly Cox bill was attributable to cable television, but she admitted the television portion of the home Cox services was not used for the business.

Also included in the telephone deduction were the costs of the cell phone service for Matthew's son from a prior marriage, William. Matthew and Melissa testified that roughly \$10 to \$15 of the monthly cell phone bill was attributable to the costs of William's portion of the monthly cell phone bill.

¹⁰ This sum is listed in the general ledger as being for a harbor cruise that Matthew and Melissa took while Matthew was attending a conference for the Association of Defense Trial Attorneys (ADTA) in Canada.

¹¹ See Holleman v. Barrilleaux, 14-499, pp. 3-4 (La. App. 3d Cir. 11/19/14), 161 So. 3d 789, 792 (where the amount of charitable contributions was disallowed as an "ordinary and necessary" expense).

¹² On appeal, Karyn also contests the Family Court's failure to disallow the deductions for certain legal expenses incurred by Matthew that were paid for by the firm. Matthew, however, testified that a portion of those expenses were incurred in defending him on three disciplinary complaints filed against him by Karyn. For the remaining portion of the legal fees, he admitted that some were related to the child support proceedings with Karyn, but he explained: "I try to separate personal charges from what I consider business charges throughout the child-support proceedings once I filed my motion. ... A lot of stuff that they've requested has been Walsh and Bailey stuff. So in my opinion, ... some of the work that he's [Matthew's counsel] done has been relative to Wals[h] and Bailey."

¹³ The firm's gross receipts in the amount of \$606,254.00 minus \$568,358.05 equals \$37,895.95.

Additionally, the personal use of a corporation's assets to pay living expenses or the use of corporate income as a fringe benefit must also be credited to Matthew's gross income. See La. R.S. 9:315(C)(3)(b); Sawyer v. Sawyer, 35,583, p. 6 (La. App. 2d Cir. 11/2/01), 799 So. 2d 1226, 1231, writ not considered, 01-3189 (La. 2/8/02), 808 So. 2d 349. The general ledger offered into evidence shows that Matthew had several personal living expenses that were paid for by the law firm, including the costs of insurance for him and his family, car payments, and homeowners' association dues. These in-kind payments meet the statutory test for inclusion as income because they significantly reduce Matthew's personal living expenses. See Ola v. Ola, 07-0667, pp. 4-5 (La. App. 1st Cir. 4/16/08), 985 So. 2d 786, 788-89; Dejoie v. Guidry, 10-1542, p. 9 (La. App. 4th Cir. 7/3/11), 71 So. 3d 1111, 1118, writ denied, 11-1779 (La. 9/2/11), 68 So. 3d 520; Scott, 43,455 at p. 10, 989 So. 2d at 296-97.

So although these amounts were not shown as deductions on the law firm's tax return, according to the law firm's general ledger, the following expenses were paid by the law firm on Matthew's behalf:

Contributions to his Medical Savings Account = \$6,600.00¹⁴

Payments for Matthew's Personal Vehicle = \$8,585.44

Family Home and Auto Insurance Premiums = \$7,866.32

Family Dental Insurance Premiums = \$1,108.69

University Club Dues Payments = \$4,878.30¹⁵

Total = \$29,038.75

¹⁴ The law firm's general ledger shows that \$800.00 of this amount, which was paid to Bancorp Bank, the apparent administrator of Matthew's medical savings account, was recorded with amounts paid for medical coverage for the firm's employees.

¹⁵ We observe that the tax deduction amount the law firm claimed on its tax return for client development did not include this amount, which sum is equal to the total amount of payments listed as being paid to the University Club.

Thus, based on the applicable law and our *de novo* review of the record, we find that Matthew's total gross income is \$160,053.70, which amount includes the above-referenced sums, plus \$82,500.00 recorded as "draws" taken by Matthew from the revenue of the law firm and the amounts of \$9,313.00 in rental income and \$1,306.00 in capital gains reported on Matthew's 2014 personal tax return. Accordingly, we find that Matthew's gross monthly income to be \$13,337.81 for purposes of determining his child support obligation and considering Karyn's assignments of error number one and three.

Assignment of Error No. 1

Now turning to Karyn's assertion that Matthew failed to establish a material change in circumstances sufficient to warrant the Family Court's modification of child support, we disagree. As previously recounted, in 2011, the Family Court set Matthew's monthly child support obligation at \$2,255.00 per month based on its determination that Matthew had a gross monthly income of \$33,583.00. At the time of the hearing in the present matter, however, the Family Court found Matthew's gross monthly income to be \$12,190.54 monthly, which amounts to a decrease in his monthly income by \$21,392.46. And although we have found that the Family Court incorrectly determined Matthew's gross monthly income in this instance, we nevertheless observe that our determination of Matthew's gross monthly income as being \$13,337.81 is still a decrease in his monthly income by \$20,245.19. Moreover, in conjunction with the submission of Matthew's 2010, 2011, 2012, 2013, and 2014 personal tax returns, Mr. Levy testified regarding the decrease¹⁶ in Matthew's income. Matthew attributed the loss in income to the loss of some major corporate clients that had previously provided the defense firm with a steady load of cases of approximately 25-30 files per month. Based on this

¹⁶ The tax return for 2011 actually showed an increase in income from the prior year; however, after 2011, the tax returns all show a steady decrease in income.

evidence, and in particular, the significant decrease in Matthew's monthly gross income, we find that Matthew established a material change in circumstances warranting modification of the parties' child support obligation. See La. C.C. art. 142; La. R.S. 9:311(A)(1); Hernandez v. Hernandez, 05-1342, p. 4 (La. App. 1st Cir. 6/9/06), 938 So. 2d 1019, 1021.

Assignment of Error No. 3

In her third assignment of error, Karyn asserts that the Family Court legally erred in setting the amount of the child support award, but as we have found error in the Family Court's calculation of Matthew's gross monthly income, we must, accordingly, recalculate the child support obligation of the parties.

Calculation of the child support obligation requires proof of the parties' adjusted gross incomes. La. R.S. 9:315.2. The basic child support obligation is determined by reference to the schedule set forth in La. R.S. 9:315.19 based on the combined adjusted gross income of the parties and the number of children involved. La. R.S. 9:315.2(D). In this case, the adjusted gross monthly income imputable to Karyn is \$1,256.66¹⁷ and the adjusted gross monthly income attributable to Matthew is \$13,337.81, resulting in a combined adjusted gross monthly income of the parties of \$14,594.47. Karyn's proportionate share of the combined amount is 8.61 percent and Matthew's proportionate share is 91.39 percent.

According to the version of the guidelines¹⁸ that was in effect at the time of the hearing, the parties' combined adjusted gross monthly income equates to a basic child support obligation of \$1,592.40 for one child. Using worksheet A, we

¹⁷ As discussed in our consideration of Karyn's fourth assignment of error, we find this determination of Karyn's gross monthly income to be proper.

¹⁸ See La. R.S. 9:315.19 prior to amendment by 2016 La. Acts, No. 602, § 1.

calculate Matthew's basic child support obligation to be \$1,455.29 per month. See La. R.S. 9:315.8. We will amend the judgment to reflect this amount.¹⁹

Assignment of Error No. 4

In her fourth assignment of error, Karyn contests the Family Court attributing \$1,256.66 to her as her monthly income. It is undisputed that there is nothing in the record that shows that Karyn was actually earning that amount at the time of the hearings. In fact, Karyn testified that she was employed as a teaching assistant at St. Aloysius Catholic School and that her annual salary was "around \$10,000 a year." She said that she worked a fulltime schedule of 7:45 a.m. to 1:45 p.m. Monday through Friday, but the amount she was paid per paycheck fluctuated. She also stated that she was paid at a set hourly rate, but when she substituted for a teacher, she would be paid "sub pay" or if she were asked to work an extra hour, she would get paid the extra hour at her basic hourly rate.

Initially, Karyn stated that she did not know how much she was paid an hour; then she declared it was "minimum wage," but admitted that she did not know the minimum wage rate. According to her amended tax return for 2014, Karyn made \$6,467.00 for the year. Even accepting Karyn's testimony of an annual income of \$10,000.00, this amount would only equate to a monthly income of roughly \$833. Thus, in order to have attributed \$1,256.66 to Karyn as her

¹⁹ In calculating the award below, the Family Court used Worksheet A, but then reduced the award by granting Matthew a credit of \$231.79 against the award for time spent with the child of about 45 percent. While La. R.S. 9:315.8(E) does allow for such a credit, in reviewing the record before us, we find there is nothing in the pleadings nor argued or presented at the hearings whereby Matthew requested or proved he was entitled to such a credit. See La. R.S. 9:315.8(E)(4). Moreover, jurisprudence has held that where the time spent with the nondomiciliary parent does not affect the ongoing expenses of the domiciliary parent, the credit should not be granted. See Jones v. Jones, 38,890, pp. 10-11 (La. App. 2d Cir. 6/25/04), 877 So. 2d 1061, 1069-70; Falterman v. Falterman, 97-192, pp. 7-8 (La. App. 3d Cir. 10/8/97), 702 So. 2d 781, 784-85, writ not considered, 98-0076 (La. 3/13/98), 712 So. 2d 863. Thus, on *de novo* review of Matthew's child support obligation, we decline to order such a credit.

monthly income, the Family Court must have determined that Karyn was voluntarily underemployed to impute to her the higher income.²⁰

If a party is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of income earning potential, unless the party is physically or mentally incapacitated, or is caring for a child of the parties under the age of five years. La. R.S. 9:315.11(A). Voluntary unemployment or underemployment is a fact-driven consideration. The trial court has wide discretion in determining the credibility of witnesses, and its factual determinations will not be disturbed on appeal absent a showing of manifest error. Whether a parent is in good faith in ending or reducing his or her income is a factual determination that will not be disturbed absent manifest error.²¹ Aguillard v. Aguillard, 08-1131, p. 6 (La. App. 1st Cir. 12/23/08), 9 So. 3d 183, 187. Furthermore, the trial court's conclusions of fact regarding financial matters underlying an award of child support will not be disturbed in the absence of manifest error. Romanowski v. Romanowski, 03-0124, p. 8 (La. App. 1st Cir. 2/23/04), 873 So. 2d 656, 662.

Karyn testified that the last job she held prior to becoming a teaching assistant was performing data entry work for a company called GoTech. She explained that she held that job in 2005 or 2006, prior to her marriage to Matthew. She believed she earned about \$27,000.00 a year at the time. When asked by the court if she had looked for employment more consistent with what she had earned in that prior employment, Karyn stated that she had, but then indicated that the

²⁰ The Family Court did not give any reasons for imputing this express amount to Karyn as income. In his brief on appeal, Matthew points out, and we agree, that the amount imputed to Karyn as her monthly income is the equivalent of someone working fulltime at minimum wage (i.e. \$7.25 (minimum wage) x 40 (hours per weeks) x 52 (number of weeks in a year) ÷ 12 (number of months in a year) = \$1,256.66).

²¹ We do not find that the Family Court's error in calculating Matthew's income affected this finding or its findings on the issue of contempt, and thus, we decline to extend our *de novo* review to the remaining issues raised in this appeal. See Dejoie, 10-1542 at p. 16, 71 So. 3d at 1121.

reason she did not secure such employment was due in part to her inability to get Matthew to agree to sharing the cost of any aftercare and summer care that would be needed for their daughter if she were employed fulltime. She also explained that she believed that her work as a teaching assistant was what she “should be doing” with only a high school education and her experience as a mother. She felt any difference in hourly pay was outweighed by her being available to care for her daughter during school breaks or when Matthew asked her to watch their daughter when he travels. She also testified that due to health reasons, she did not believe she was physically capable of performing the same type of work for nine hours a day that she did in her prior employment.

Based on our review of the record, we do not find any manifest error in the conclusion that Karyn was voluntarily underemployed or in finding reasonable factual support for the imputation of monthly income of \$1,256.66 to Karyn, reflecting a minimum wage earning capacity. Although it is undisputed that Karyn kept her daughter on days when she was scheduled to be in the physical custody of her father, such occasions amounted to roughly 20 additional days or an additional five percent of the parties’ “equal sharing” joint custodial arrangement. Matthew testified that on those occasions, he always advised Karyn that his current wife or his mother-in-law was available to keep the child.²² He further testified that he asked Karyn for replacement or makeup days. Karyn acknowledged that Matthew “sometimes” asked for makeup days, but she did not give him any because she did not want to forfeit her time with her daughter.

Moreover, under the parties’ seven-day rotating schedule of physical custody, Karyn’s availability for the child’s school breaks technically would be

²² The November 30, 2011 judgment expressly provides that “the noncustodial parent will have first right of care for the minor child when the custodial parent has to leave the custodial child overnight for one or more nights during said parent’s custodial period. The custodial parent agrees to provide notice and opportunity to the non-custodial parent.”

only for the days that she had physical custody of the child. And while Karyn's desire to spend as much time as possible with her daughter is understandable and commendable, it cannot be pursued to the detriment of Matthew. Under the law, it is the obligation of both parents to support their children based on their respective ability. See La. C.C. art. 99 and 141. Thus, as the minor child, who was nine years old at the time of the hearings, was of school age, and there was nothing presented to the Family Court to establish that Karyn is mentally or physically incapable of seeking or securing better paying employment, see La. R.S. 9:315.11(A), we find no manifest error in the Family Court's decision to impute \$1,256.66 to Karyn as her monthly income.

Assignment of Error No. 5

In her final assignment of error, Karyn contends that the Family Court erred in failing to find Matthew in contempt of court for the various acts alleged in her rule for contempt.

A constructive civil contempt of court includes the "[w]illful disobedience of any lawful judgment, order, mandate, writ, or process of the court." La. C.C.P. art. 224(2). A finding that a person willfully disobeyed a court order in violation of article 224(2) must be based on a finding that the person violated an order of the court intentionally, knowingly, and purposefully, without justifiable excuse. Carollo v. Carollo, 13-0010, p.15 (La. App. 1st Cir. 5/31/13), 118 So. 3d 53, 64. 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. Boyd v. Boyd, 10-1369, p. 14 (La. App. 1st Cir. 2/11/11), 57 So. 3d 1169, 1178. However, the trial court's predicate factual determinations are reviewed under the manifest error standard of review. Boyd, 10-1369 at p. 15, 57 So. 3d at 1178.

In her rule, Karyn asserted several instances in which she alleges Matthew violated orders of the Family Court and for which he should have been held in contempt of court. We will address each of the instances raised.

First, Karyn alleged that Matthew failed to obey orders by the Family Court to pay his pro rata share of the minor child's counseling sessions with Marcia Cox, as well as for the travel and preparation costs charged by Ms. Cox, and half of the expert witness fee charged by Avis Brown. At the hearings, Karyn only testified regarding Matthew's alleged failure to pay his portion of a November 28, 2012 invoice from Ms. Cox.

In a judgment rendered on December 20, 2012, and signed on October 4, 2013, the Family Court decreed that "Mr. Bailey pay 100% of the travel and preparation time of the 11/28/12 invoice from Marcia A. Cox (Exhibit P-2 of 12/20/12) in the amount of \$550.00" and that "[a]ny additional fees charged by Marcia Cox in the November 28, 2012 invoice are to be paid by Ms. Bailey, including the extended time fee noted in Exhibit KB-1." (Emphasis added.) At the hearings, Karyn's counsel attempted to argue that a portion of a prior invoice, which the Family Court had ordered the parties to each pay one-half, was included in the November 28, 2012 invoice; however, the Family Court sustained an objection raised by Matthew's counsel that Ms. Cox would be required to testify about whether the November 28, 2012 invoice had been paid or if she even sent the invoice to Matthew for payment. Ms. Cox did not testify at the hearings.

In order to be held in contempt, it must be proven that Matthew violated the court's judgment "intentionally, knowingly, and purposefully, without justifiable excuse." See Carollo, 13-0010 at p. 15, 118 So. 3d at 64. As previously discussed, through the objection of counsel, Matthew pointed out that Karyn could not establish that, in fact, Matthew had failed to pay the relevant invoice from Ms. Cox or whether the invoice had even been sent to him. Accordingly, we find no abuse

of the Family Court's discretion nor error in the court's finding that Karyn failed to bear her burden of proof on this allegation. See Rogers v. Dickens, 06-0898, p. 11 (La. App. 1st Cir. 2/9/07), 959 So. 2d 940, 947 (wherein this court held that a party seeking the contempt ruling was "required to prove every fact necessary to support the charge of constructive contempt of court").

Next, Karyn alleged that Matthew failed to pay his full proportionate share of their daughter's school tuition. It is undisputed that Matthew paid all of the child's school tuition and fees; however, in May 2012, Matthew sent Karyn a child support payment in the amount of \$975 with correspondence indicating that the payment represented his support payment "less 2 percent of tuition for 2011 and 2012, and 2012 and 2013, which was just paid." Matthew acknowledged that the November 30, 2011 judgment signed by the Family Court decreed that his pro-rata share of the expenses incurred for his daughter was 99.8 percent, but despite this, he attempted to hold Karyn accountable for a full two percent as her pro-rata share of the child's expenses, rather than just .02 percent, which he deemed to be incorrect.

The law does not accord Matthew the authority to simply correct an alleged error in a judgment by his unilateral act. See Boudreaux v. Vankerkhove, 07-2555, p. 10 (La. App. 1st Cir. 8/11/08), 993 So. 2d 725, 732 (wherein this court recognized that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect, the remedy is to apply for review, and absent a stay, to comply with the order pending review. Persons who make private determinations of the law and refuse to obey an order risk contempt even if the order is ultimately ruled incorrect). But in considering whether the Family Court abused its discretion in not finding Matthew in contempt of court, we observe that Karyn acknowledged not having reimbursed Matthew for her pro rata share of their daughter's

expenses.²³ Thus, considering the foregoing, we cannot say that the Family Court abused its vast discretion in refusing to hold Matthew in contempt of court for withholding payment of \$152.50 from Karyn's May 15, 2012 child support payment.

Karyn next asserts that Matthew should be held in contempt because he paid "child support late on a regular basis." Karyn testified that Matthew mailed support payments to her, and if a support payment did not arrive on the date when due, which was the 1st and 15th of each month, the latest she would receive the payment would be a day or two later. Karyn did not present any evidence, such as envelopes, to show exactly when Matthew mailed the "late" payments. Instead, she introduced into evidence copies of correspondence she sent to Matthew regarding the "late" payments. All of the correspondence regarding the allegedly late payments were dated either the 1st or the 15th of the month, which were the dates when payment was due. Based on the testimony and evidence presented, we find no abuse of the Family Court's discretion in failing to hold Matthew in contempt for Karyn's failure to timely receive the bi-monthly child support payments.

As for Karyn's accusation that Matthew limited her telephone access to their daughter when the child was in his physical custody, the November 30, 2011 judgment recites that "the custodial parent will make all reasonable efforts to ensure telephone access and a return call" and that the custodial parent will make a reasonable effort to ensure that the child calls the noncustodial parent during the midpoint of each visitation period.

²³ According to Karyn, she did not reimburse Matthew because he either did not ask to be reimbursed or failed to present her with documentation of the expenses. A March 3, 2015 letter from Karyn to Matthew does indicate that Karyn attempted to make one payment to Matthew, in the amount of \$1.35, as reimbursement for some of the expenses Matthew had notified Karyn he had paid for the period of January and February 2015.

At the hearing, Karyn testified that after the judgment decreeing five minute telephone contact was rendered,²⁴ she only had that contact with the child once or twice a week when the child was in the physical custody of Matthew. She admitted, however, that during the school year, she would also see and talk with her daughter each day at school. So while Matthew may not have shown himself to be as accommodating as Karyn in encouraging and supporting communication with the non-custodial parent when the child was in his physical custody,²⁵ we cannot say that the Family Court erred in finding the evidence presented by Karyn on this issue to be insufficient to support a finding of contempt.

Karyn further claims that Matthew should be held in contempt of court for having failed to reimburse her for several expenses she paid while their daughter was in her physical custody. And related to this claim is Karyn's complaint about Matthew unilaterally changing the gymnastics programs in which their daughter was enrolled and his alleged refusal to discuss or agree to several extracurricular activities in which their daughter expressed interest.

The November 30, 2011 judgment provides that Matthew is responsible for paying his pro rata share of all the minor child's medical and dental insurance, out-of-pocket medical and dental expenses, school tuition, registration fees, uniforms, school lunches, miscellaneous school fees, and extracurricular activities agreed upon by the parties. Karyn admitted that Matthew paid for all of their daughter's school tuition, supplies, registration and maintenance fees, lunch costs, field trip fees, uniforms, vision, dental and health insurance premiums and that "most of the time," he paid her out-of-pocket medical expenses and prescriptions. In regard to

²⁴ In the October 4, 2013 judgment, the Family Court decreed that each parent "shall allow" the child to call the other parent once daily for a period of five minutes, **if** the child "asks and wants to call the other parent."

²⁵ Karyn testified that she provided her daughter with a landline telephone in the child's bedroom, a cell phone, and an iPad to communicate with Matthew when the child is in her physical custody.

the child's extracurricular activities, Karyn testified that Matthew paid for the activities in which he placed their daughter.

In reviewing Karyn's testimony and the evidence she offered regarding Matthew's failure to reimburse her, we observe that she only testified regarding one out-of-pocket medical expense for which Matthew did not reimburse her the cost, which was for skin medication that cost roughly \$35. The remainder of Karyn's reimbursement requests are related to extracurricular activities in which her daughter participated, such as first communion, gymnastics, a school fair, a Thanksgiving camp, and vacation bible school. Further, Karyn admitted that none of these activities were *required* educational activities and the testimony from parties established that the activities were not "agreed upon."²⁶ Although Karyn may have attempted to discuss and secure Matthew's agreement to their daughter's participation in the identified activities, according to the November 30, 2011 judgment, Matthew was only obligated to reimburse Karyn for his pro rata share of extracurricular activities agreed upon by the parties. As Karyn admitted that Matthew had not agreed to the extracurricular activities for which she sought reimbursement, and he otherwise fully complied with paying more than his pro rata share of the expenses specified in the November 30, 2011 judgment, we cannot say that the Family Court erred in finding insufficient evidence to support holding Matthew in contempt of court for failing to pay the reimbursement requests presented by Karyn.

We likewise find no abuse of the Family Court's vast discretion in choosing not to hold Matthew in contempt of court for failing to provide Karyn with copies of school documents and notices that he received during his scheduled week of

²⁶ The parties initially agreed to their daughter's participation in an LSU gymnastics program, but later Matthew informed Karyn that he no longer wanted their daughter to participate in the LSU gymnastics program. Instead, Matthew enrolled the child in other programs, at his own expense, and Karyn eventually acquiesced in switching the child to the other programs.

physical custody. While Karyn testified and presented evidence of the numerous times Matthew failed to provide her with copies of school documents and forms, such as the school registration packet, homeroom parent participation form, handbook acknowledgement form, media release form, picture order form, school directory order forms, and others, it is undisputed that Karyn works at the school her daughter attends and that she knew about and had access to the various forms as a consequence of her employment. Hence, although Matthew's failure to provide Karyn with copies of the school documents he received plainly violated the November 30, 2011 judgment, the fact of Karyn's employment at the school was the reason presented to the Family Court to justify the failure. Under such circumstances, we cannot say that the Family Court abused its discretion in not finding Matthew in contempt for failure to provide Karyn with copies of the identified school documents.

As for Karyn's final assertion that Matthew violated the provision in the November 30, 2011 judgment that "if a parent is transporting the minor child ... out-of-state for any reason, said parent will notify the other parent," she testified that she learned from her daughter that Matthew had taken her to Texas one weekend and she contacted Matthew via the "Our Family Wizard" website to request that he "abide by the court order pertaining to out of state transportation by either parent." That was the sole incident relative to out-of-state travel that Karyn reported; as such, we find no abuse of the Family Court's discretion in not holding Matthew in contempt for this accusation.

CONCLUSION

Having thoroughly reviewed the evidence presented in the record before us, and in light of the Family Court's error in calculating the income Matthew derived from his solely-owned business, we amend the Family Court's judgment to decree that the child support order for Matthew be set at \$1,455.29 per month and to

amend the respective child support percentages recited in the judgment to 8.61 percent for Karyn and 91.39 percent for Matthew. We further will amend the judgment to reduce the amount of credit that Matthew is to receive due to the reduction of his child support obligation being made retroactive to July 28, 2014, the date of his filing of the rule to reduce his child support obligation, to \$11,995.65. In all other respects, the judgment of the Family Court is affirmed. All costs of this appeal are to be borne equally by the parties.

AMENDED, AND AS AMENDED, AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CU 0351

MATTHEW W. BAILEY

VERSUS

KARYN A. BAILEY

McClendon, J., agreeing in part and dissenting in part.

I disagree with the majority's conclusion that Matthew was not in contempt. The record establishes that Matthew failed to comply with the judgment, which required notification to the other parent if the child was to be transported out of state. Matthew did not dispute that he took the minor child to Texas without notifying Karyn. Therefore, I disagree with the majority's affirmance of the family court in this regard.

*PMC
by
[Signature]*