NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CU 0766

CHAD M. LOWE

VERSUS

CAROLINE K. BACON

Judgment rendered NOV 06 2018

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On Appeal from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
No. 2015-14165, Div. "L"

The Honorable Dawn Amacker, Judge Presiding

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BEFORE: McDONALD, CRAIN, AND HOLDRIDGE, J.

HOLDRIDGE, J.

In this appeal, the father appeals from a trial court judgment granting the mother sole custody, awarding him supervised visitation, and denying his rule for contempt. Based on a careful review of the record before us, we affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

Chad Lowe and Caroline Bacon were in a relationship beginning around 2010; although they were engaged for several years, they never married. Two children, both with initials C.M.L., were born of the relationship on October 24, 2011, and December 27, 2013, respectively.[1] The parties and their children lived together in a home in Mandeville, Louisiana.

Chad instituted custody proceedings on October 14, 2015, seeking joint custody, alleging that he was concerned Caroline would leave the state with the children because she had decided to apply to school in Memphis, Tennessee. Caroline answered the petition and filed a reconventional demand seeking sole custody based on her allegations that Chad had a history of drug and alcohol abuse and violent behavior.[2] On February 17, 2016, the trial court signed a consent judgment wherein, among other provisions, Chad and Caroline were awarded joint

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[1] Although we are not required to use initials to protect and maintain the privacy of the minor children involved in child custody cases pursuant to Uniform Rules, Courts of Appeal, Rule 5-1 and Rule 5-2, we choose to use the initials of the minor children in this opinion. See **Jupiter v. Jupiter**, 2014-0395 (La. App. 1 Cir. 9/24/2014), 154 So.3d 1241, 1241 n.1; **Rodock v. Pommier**, 2016-809 (La. App. 3 Cir. 2/1/17), 225 So.3d 512, 515 n.1, writ denied, 2017-0631 (La. 5/1/2017), 221 So.3d 70.

[2] In her reconventional demand, Caroline requested the authority to temporarily relocate with the children to Hernando, Mississippi, where her mother lived, so that she could attend the doctorate program for Nurse Anesthesia at the University of Tennessee Memphis Health Science Center, to which she had been admitted. On the same day that Caroline filed her answer, Chad filed a motion for drug and alcohol testing and a psychological evaluation of Caroline. The trial court set the matter for hearing and ordered that neither parent could be under the influence of illegal drugs or alcohol while exercising custody, that the parents could not remove the children from the court's jurisdiction, and that Chad must undergo drug testing.

custody and joint use and occupancy of the Mandeville home; both parents were prohibited from consuming alcohol at any time.

On November 9, 2016, Caroline filed a motion to modify custody seeking sole custody with supervised visitation for Chad. Among other allegations and requests for relief, she alleged that Chad was not complying with the consent judgment and requested a finding that he had engaged in domestic violence pursuant to the Post-Separation Family Violence Relief Act (PSFVRA), La. R.S. 9:364-69. Caroline asserted that on October 31, 2016, Chad repeatedly hit her when he was inebriated, causing her to fall and break her wrist.[3] Chad answered the motion and alleged that if the court found that the PSFVRA was applicable, then it should find that both parents had a history of perpetrating family violence and should award custody solely to him as the parent who was less likely to perpetrate family violence.

The parties entered into a second consent judgment, which was signed on January 18, 2017. In the judgment, Caroline was awarded temporary sole custody and Chad was granted temporary weekly visitation pending a hearing officer conference.[4] The protective order obtained by Caroline against Chad in separate criminal proceedings (Caroline K. Bacon v. Chad M. Lowe, docket number 2016-14559) arising out of the October 31st incident involving domestic violence and the protective order sought by Chad against Caroline in the criminal proceedings were to be dismissed in favor of civil restraining orders. Chad's request for a

[3] Additionally, Caroline again requested permission to relocate to Mississippi.

[4] The consent judgment also prohibited both parties from harassing each other, and Chad was prohibited from going within one hundred yards of the Mandeville house. Chad was also to wear an ankle bracelet for alcohol detection for ninety days with the results available to the parties' attorneys; neither party was to "imbibe in alcoholic beverages while the child(ren) are in their custody...." The rule to permit relocation was dismissed without prejudice.

protective order arose out of an altercation between Caroline and him where she pulled his necklace from his neck.

After a conference, the hearing officer recommended the continuation of the provisions of the consent judgment granting Caroline temporary sole custody with weekly visitation for Chad pending a custody evaluation or further court order. Both parties were to submit to random biweekly drug screenings for six months and to undergo a custody evaluation.[5] In the hearing officer's findings of fact, she strongly recommended that Caroline immediately begin an anger management program. The judge signed an order decreeing that the hearing officer's recommendations were temporary orders of the court pending a February 23, 2017 custody hearing. However, the judgment did not order Caroline to attend an anger management program.

On February 23, 2017, the trial court held a bench conference, and on March 21, 2017, executed a judgment ordering both parties to submit to a hair follicle drug test and a substance abuse evaluation with Dr. Keli J. C. Simoneaux. After the parties completed the court-ordered evaluations, Chad filed a motion to set custody for trial. He then filed a rule for contempt, alleging that Caroline denied his visitation on July 5 and July 6, 2017, and again on July 16 and 17, 2017. On October 16, 2017, the hearing officer heard the contempt rule and recommended that Caroline be found in contempt for refusing Chad his visitation on July 16, 2017.[6]

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[5] The hearing officer noted that Chad was participating in the Truth 180 Batterer's Intervention Program and stated that "his participation in the Truth 180 drug screening program will suffice for the duration of his participation in Truth 180."

[6] The hearing officer recommended that Caroline be sentenced to serve two days in the parish jail and be fined $250 payable to the court; she recommended that the fine and sentence be suspended on the condition that Caroline pay $500 in court costs and attorney's fees to counsel

The trial court held a hearing on the custody modification and contempt issues on January 8, 2018, issued oral reasons on that date, and signed a judgment on March 6, 2018, reflecting its oral reasons. In the judgment, the trial court granted Caroline's rule to modify custody, finding that a material change in circumstances materially affecting the welfare of the children had occurred, warranting a modification of the legal and physical custody of the children. The trial court found that the modification was in the children's best interest and awarded Caroline sole custody of the children with supervised visitation to Chad. Lastly, the trial court denied Chad's contempt motion.

Chad appeals the judgment, raising three assignments of error. He contends that the trial court erred in its application of the PSFRVA, in its ruling on Caroline's rule to modify custody, and in not finding Caroline in contempt.

APPLICABLE LAW

The court shall award custody in accordance with the best interest of the child. La. C.C. art. 131. Under La. C.C. art. 132 as it read at the time of the hearing in this case, if the parents agree who is to have custody, the court shall award custody in accordance with their agreement unless the best interest of the child requires a different award.[7] In the absence of an agreement, or if the

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for Chad on or before November 2, 2017, and that she not be found to be in contempt of court in any further proceedings.

[7] Louisiana Civil Code articles 132, 134, and 136 and La. R.S. 9:341 and 9:364 have been amended by 2018 La. Acts, No. 412 §§ 1, 2, effective May 23, 2018. The amendment to La. C.C. art. 134 adds a "history of substance abuse, violence, or criminal activity of any party" as a factor in determining a child's best interest. In cases involving a history of committing family violence, "whether or not a party has sought relief under any applicable law," the court shall determine an award of custody or visitation in accordance with La. R.S. 9:341 and 364. La. C.C. art. 134(B).

We note from the outset that the amendments to the Civil Code articles and statutes were not in effect at the time that the trial court heard this matter in January of 2018. An appellate court is bound to adjudge a case before it in accordance with the law existing at the time of its decision. Where the law has changed during the pendency of a suit and retroactive application of the new law is permissible, the new law applies on appeal even though it requires reversal of a trial court

agreement is not in the best interest of the child, the court shall award custody to the parents jointly; however, if custody in 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. **Id.**

In determining the best interest of the child, the court shall consider all relevant factors, and such factors may include those enumerated in La. C.C. art. 134. **Ehlinger v. Ehlinger**, 2017-1120 (La. App. 1 Cir. 5/29/18), 251 So.3d 418, 422. 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. **Id.** A trial court's determination regarding child custody will not be disturbed absent a clear abuse of discretion. **Id.**

Additionally, as in most child custody cases, the trial court's determination as to what is in the best interest of the child is based heavily on factual findings. It is well settled that an appellate court may not 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). If the findings are reasonable in

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judgment that was correct under the law in effect at the time it was rendered. **Wooley v. AmCare Health Plans of Louisiana, Inc.**, 05-2025 (La. App. 1 Cir. 10/25/06), 944 So.2d 668, 673.

The legislature did not express its intent regarding retroactive or prospective application of the amendments, so we must classify them as substantive, procedural, or interpretive. See La. C.C. art. 6; **Segura v. Frank**, 93-1271 (La. 1/14/94), 630 So.2d 714, 723, cert. denied sub nom., **Allstate Insurance Company v. Louisiana Insurance Guaranty Association**, 511 U.S. 1142, 114 S.Ct. 2165, 128 L.Ed.2d 887 (1994). In the absence of contrary legislative expression, substantive laws apply prospectively only. La. C.C. art. 6; La. R.S. 1:2. The amendments at issue in this case are substantive laws, since these code articles and statutes establish additional conditions for the custody and visitation of minor children. See **Severio v. Hill**, 2013-0761 p. 4 (La. App. 1 Cir. 9/13/13), 2013 WL 5177520 (unpublished opinion), writ denied, 2013-2974 (La. 2/7/14), 132 So.3d 398. We will therefore apply the former versions of these code articles and statutes to the appeal before us.

light of the record reviewed in its entirety, an appellate court may not reverse those findings even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Ehlinger**, 251 So.3d at 422.

CUSTODY

In Chad's first assignment of error, he argues that the trial court erred in its application of the PSFVRA as it had no evidence to support its conclusion that Chad was either an alcoholic or that he had committed acts of violence towards Caroline. He additionally alleges that the trial court erred in failing to find that Caroline had committed acts of violence against him and in failing to apply the PSFVRA to her by ordering her to attend an anger management or domestic violence program pursuant to La. R.S. 9:364 and 9:362(3).[8] Chad also complains about the trial court's decision to make his visitation supervised.

A party seeking modification of a physical custody decree set forth in a stipulated or consensual judgment such as in this case must meet the two-prong test of proving: (1) that there has been a change in circumstances materially affecting the welfare of the children since the original decree, and (2) that the proposed modification is in the best interest of the children. **Burns v. Burns**, 2017-0343 (La. App. 1 Cir. 11/3/17), 236 So.3d 571, 573.

Caroline raised the issue of the applicability of the PSFVRA in her motion to modify custody. However, on appeal Caroline argues that the trial court did not err in failing to specifically refer to the PSFVRA in its custody determination because Chad did not raise the PSFVRA at the hearing. She also contends that the

[8] Chad referred to La. R.S. 9:362(7) in brief, but that provision defines "[s]upervised visitation" and La. R.S. 9:362(3) defines a "[c]ourt-monitored domestic abuse intervention program."

evidence showed that Chad's alcoholism was a sufficient basis to justify an award of sole custody to her.

The PSFVRA was enacted in 1992 to address the problem of family violence. It applies only if there is a history of "family violence," which is defined by La. R.S. 9:362(4) as follows:

> includ[ing] but is not limited to physical or sexual abuse and any offense against the person as defined in the Criminal Code of Louisiana, except negligent injuring and defamation, committed by one parent against the other parent or against any of the children. Family violence does not include reasonable acts of self-defense utilized by one parent to protect himself or herself or a child in the family from the family violence of the other parent.

Where a history of family violence exists, La. R.S. 9:364(A)[9] provided at the time of the hearing in this matter in pertinent part:

> [t]here is created a presumption that no parent who has a history of perpetrating family violence shall be awarded sole or joint custody of children. The court may find a history of perpetrating family violence if the court finds that one incident of family violence has resulted in serious bodily injury or the court finds more than one incident of family violence.

However, La. R.S. 9:364(A) further provided that this presumption could be overcome, as follows, in pertinent part:

> The presumption shall be overcome only by a preponderance of the evidence that the perpetrating parent has successfully completed a court-monitored domestic abuse intervention program as defined in R.S. 9:362, **is not abusing alcohol** and the illegal use of drugs scheduled in R.S. 40:964, and that the best interest of the child or children requires that parent's participation as a custodial parent because of the other parent's absence, mental illness, or substance abuse, or such other circumstances which affect the best interest of the child or children.
> (Emphasis added.)

[9] As discussed in footnote 7, La. R.S. 9:364 was amended by 2018 La. Acts, No. 412 § 1 effective May 23, 2018. The amendment does not change the analysis regarding former sections (A) and (B) in this case.

If the trial court finds that both parents have a history of perpetrating family violence, "custody shall be awarded solely to the parent who is less likely to continue to perpetrate family violence. In such a case, the court shall mandate completion of a court-monitored domestic abuse intervention program by the custodial parent." La. R.S. 9:364(B) (as it read at the time of the hearing in this matter).

In oral reasons for judgment, the trial court set forth its reasons for determining that there had been a material change in circumstances warranting a modification of custody such that sole custody for Caroline was in the best interest of the children. The court determined that the change in circumstances included: "significant criminal activity involving violence between the parents, [Chad's] subsequent guilty plea to battery on [Caroline] and the issuing of a protective order from our court after a hearing against [Chad] in favor of [Caroline] in which serious personal injury was sustained by [Caroline]." The trial court also noted that one of the children was seriously injured by fireworks, the parents had different residences, and Caroline had a new boyfriend.

The trial court commented that it considered all of the factors in La. C.C. art. 134. The court referred to the "chaotic situation" in the household with the presence of alcoholism and domestic violence. The trial court observed that both parents loved their children tremendously and then stated:

> The overriding factors in this case deal with, number one, alcoholism. The Court can reach no other conclusion but that the father is an alcoholic. This is a conclusion that's also been reached by Ms. Simoneaux [the substance abuse evaluator]. And Ms. Simoneaux wasn't really operating with all the facts. She finds he has a moderate alcohol disorder; not mild, not none, not severe, but moderate, and that he is in remission. But what Ms. Simoneaux does not know is that the information he has given her is defective; and that is he plans to and he does drink as soon as that is over.

> The Court does not find credible his testimony that he still drinks rarely. I think he drinks on a regular basis. It continues to cause problems, tremendous problems in his life, and that he is in denial about his problem with alcohol. It doesn't do any good at all for him to go to programs, the Duluth method program that he goes to [batterers' intervention program], through an evaluation, do the treatment that is indicated when he does not believe and he is in denial that he has a problem with alcohol.
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> The fact that he continues to drink in the face of numerous criminal arrests and convictions that involve, I believe all of them, him being intoxicated or under the influence, indicates to this court that this problem is not resolved and may never be resolved; that he drinks at work; that he drinks and drives and that he doesn't see the impact this has had on his life and his children's life is a major factor here in this case.

The trial court found that the other major factor in the case was domestic violence and noted that Chad in a criminal matter pleaded guilty to simple battery and a protective order for Caroline was issued. The trial court found Caroline's testimony credible that Chad had battered her and that the violence had gone on for "many, many years." The trial court observed that although Caroline's behaviors such as beating a door with a hammer and recanting her testimony about Chad choking her when they were in Mississippi might seem "strange," that her reactions to Chad's alcoholism and the domestic violence were "classic" and "very common." The court added that Caroline had not always used the best judgment and "certainly she needed anger management classes to control her anger," but found that Caroline "did the best she could for a long period of time."

Because of the alcoholism and history of domestic violence and Chad's refusal to acknowledge either, the trial court determined that his visitation with the children needed to be supervised. The trial court was concerned that Chad would drink and drive with the children. The court noted that Chad loved his children and it also wanted the children to see their father. The trial court discussed an

incident where Chad's younger son was injured by fireworks while in Chad's custody and indicated that it did not believe Chad's testimony as to how the injury occurred. The court added that it was not sure if Chad was drinking on that occasion and it was concerned that Caroline, who is a nurse, was not called after the child was injured and before he was taken to the hospital.

In its reasons for judgment, the trial court did not specifically refer to the PSFVRA although Caroline had alleged it was applicable in her motion to modify custody. However, the trial court did specifically find that domestic violence existed and that Chad had battered Caroline for many years and had pleaded guilty to simple battery on Caroline, which would fit the definition of "family violence" and "a history of perpetrating family violence" pursuant to La. R.S. 9:362(4) and 9:364(A). At the trial, Caroline testified regarding the protective order she obtained after she broke her wrist in October of 2016 when she fell while Chad was harassing and hitting her. She also testified as to a 2012 incident in Mississippi where Chad was drinking heavily, they got into an altercation, and Chad hit her and choked her. According to Caroline, there were many incidents where Chad hit her in front of the children while drunk. While Chad specifically testified as to the 2016 incident that it was not true that he battered Caroline, the trial court rejected this denial.

Under La. R.S. 9:364(A), there is a presumption that the parent who has a history of perpetrating family violence cannot be awarded sole or joint custody. The presumption could be overcome in this case by a preponderance of the evidence that the perpetrating parent successfully completed a court-monitored domestic abuse intervention program, was not abusing alcohol, and that the best interest of the child required the parent's participation as a custodial parent. See

La. R.S. 9:364(A).[10] Based on the trial court's findings that Chad had a history of perpetrating domestic violence and that he continued to abuse alcohol, the presumption that he could not be awarded sole or joint custody was not overcome.

While Chad contends that the trial court could not determine that he was an alcoholic, sufficient testimony supported the trial court's determination. Chad, Caroline, Chad's father, and Chad's son from a prior relationship testified at trial and none of these witnesses, when asked, denied that Chad was still drinking at the time of the hearing. Although Chad had attended two substance abuse programs and was attending Alcoholics Anonymous regularly, he testified that he had consumed alcoholic drinks in the past three months. According to Caroline, Chad would stop drinking and things would get better, but he always resumed drinking. She testified, "But it got worse over time. The time periods where he wasn't drinking got shorter and he would drink more."

Chad signed a pledge on July 11, 2016, that he would not drink any more alcohol. However, a little over two weeks later, on July 28, 2016, Chad's father admitted Chad was drinking during the day and that he called the police to have them remove Chad from the building because Chad was "giving me problems."[11] Chad was arrested for being intoxicated and disturbing the peace and assaulting a police officer. He pled guilty to disturbing the peace.

The trial court concluded that Ms. Simoneaux had underestimated Chad's problem with alcohol. Ms. Simoneaux, a social worker, issued a report to the court

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[10] At the time of the hearing in this case, the elements necessary to overcome the presumption were set forth in La. R.S. 9:364(A) but they are presently in La. R.S. 9:364(B).

[11] In the pledge, he also stated that he would not negatively affect Caroline by interfering with her work or schooling and would take responsibility for the children while she was attending work or school. He also agreed to take responsibility for the children when Caroline was out of town for her clinical requirements.

diagnosing Chad with a moderate alcohol use disorder for which he was in early remission. She recommended in part that he attend Alcoholics Anonymous meetings once a week for three months to help maintain sobriety. Ms. Simoneaux noted in the report that on February 17, 2016, the parties were under court order not to consume alcohol, but that Chad admitted he violated the order, but had since been involved with substance abuse programs "to help maintain his sobriety." Chad told Ms. Simoneaux that he only drank alcohol six to eight times per year. Caroline disputed this testimony.

Chad had been arrested five times for driving while intoxicated and was convicted three times of driving while intoxicated during his twenties. When Chad admitted that he was still drinking at the time of the hearing, he testified that he was not drinking and driving and he was not drinking around the children. Caroline testified that although Chad had an ignition Interlock device on his car to prevent him from driving while under the influence for a period of time, he would have someone else blow in it for him or he would blow in it, pull the power chip out, and leave the car running. Caroline testified that she was concerned that he would drive the children while drinking because the Interlock device was no longer in his car. She also saw the children not in their car seats in Chad's car.

Chad testified that he was not drinking on July 2, 2017, when he had custody of the children and his younger son was injured. A firecracker or sparks from a sparkler landed on the child's swim trunks, causing the fabric to melt onto his skin. In an effort to treat the burns, Chad put peanut butter on the child's wounds. He then brought him to the emergency room at the hospital. The child sustained second degree burns on his thighs and genitals. Caroline was not immediately notified of the incident and was quite upset. She brought the child to a burn

specialist the next morning. Caroline told the burn specialist that Chad said the child was injured when playing with a sparkler, but her older son told her the child was injured when Chad threw a firecracker at him to scare him. The burn specialist notified Child Protective Services and told Caroline to call the police, which she did on July 4, 2017. The St. Tammany Parish Sheriff's Office began investigating the matter, continuing through its interview of Chad and recovery of the swim trunks on July 18, 2017. They cleared Chad of any possible charges. On questioning by the trial judge as to the incident, Chad denied that he was drinking at the time and testified that he "would never throw firecrackers" at the child. However, he later referred to the "firecracker" incident, and when asked by the trial judge, he indicated that he unintentionally misspoke.

As to Chad's contention that Caroline was also guilty of domestic violence, we note that at the time of the hearing, La. R.S. 9:364(B) provided that if both parents have a history of perpetrating family violence, custody shall be awarded solely to the parent who is less likely to continue to perpetrate family violence. Again, while the trial court did not specifically discuss the PSFVRA, the trial court's reasons refer to Caroline's behaviors in beating a door with a hammer and state that "certainly she needed anger management classes to control her anger." The trial court attributed Caroline's behaviors as reactions to Chad's alcoholism and domestic violence.

At the hearing, Caroline admitted that she hit a door with a hammer while Chad was in the room behind the door. Chad introduced a picture of the damaged door into evidence at trial; the picture shows a significant hole in the door. Caroline also admitted that she kicked Chad's car. Chad's son testified that he saw her throw a remote control at Chad two or three times. Caroline denied hitting

Chad with a remote control or punching him in the face, but stated that she might have been verbally abusive to him. Caroline also testified that she and Chad made sixteen calls to police within a twenty-one month period. The St. Tammany Parish Sheriff's Office records show that both parties called the Sheriff's Office, with some calls from Caroline complaining that Chad hit her and others from Chad complaining that Caroline hit him.

In October of 2016 Caroline was charged with simple battery but pleaded guilty to disturbing the peace arising out of an incident that Chad recorded with his cell phone. Caroline testified that she and Chad were arguing because he had been drinking all night and would not get up and help with the children while she did schoolwork. Caroline was a nurse enrolled in a doctoral program and she testified that Chad often prevented her from working or doing schoolwork. Chad stated he had the flu and was leaving to go to an urgent care facility. Chad testified, and the video shows, that during the argument, Caroline yanked his necklace off.[12] Chad introduced a photograph into evidence showing a red mark on his neck. He called the police and sought a protective order against Caroline. According to Chad, Caroline pulled his necklace off six or seven other times. Chad's older son also testified that he saw Caroline pull Chad's chain off on one occasion.

Applying the PSFVRA to the trial court's factual findings, the trial court's reasons indicate that the trial court determined that Caroline did not commit acts that would indicate she had a history of perpetrating family violence. While there is a video in the record showing Caroline yanking the chain off of Chad's neck during an argument, she did not seriously injure him. Because the trial court

[12] Particularly troubling is the fact that this argument and incident occurred in front of Caroline's child from her prior marriage and one of their children.

attributed Caroline's behavior as that of a victim of domestic violence, the court apparently rejected Chad's and his son's testimony as not credible that Caroline threw the remote control at Chad three times and pulled his necklace off on other occasions. We note that even if the trial court had concluded that Caroline had a history of perpetrating family violence, it would not be unreasonable to conclude that she would be less likely to perpetrate family violence than Chad. Moreover, while Chad on appeal complains that the trial court abused its discretion in not requiring Caroline to attend an anger management or domestic violence program, Caroline testified that she completed a twelve week anger management program in part due to her disturbing the peace conviction and in part due to the hearing officer's recommendation.[13] According to Caroline, she submitted her compliance with that program to the District Attorney's Office. She stated that she also completed parenting classes in 2017 and was participating in counseling pursuant to Dr. Simoneaux's recommendation.

We have thoroughly reviewed the testimony and evidence regarding custody and we cannot say that the trial court abused its discretion in awarding Caroline sole custody. Although the trial court did not specifically refer to the PSFVRA in its reasons for judgment, we must consider the PSFVRA because the issue of family violence was raised in the pleadings below, testimony and evidence regarding that abuse was presented at trial without objection, and the trial court made specific findings regarding domestic violence. See **Nettles v. Nettles**, 2013-

[13] We are aware that La. R.S. 9:362(3) and La. R.S. 9:364(B) require a court-monitored domestic abuse intervention program, not simply anger management classes. The court-monitored domestic abuse intervention program is required to be comprised of a minimum of twenty-six in-person sessions, that follows a model designed specifically for perpetrators of domestic abuse where the providers have specific experience pertaining to domestic violence.

1164 n.2 (La. App. 1 Cir. 12/27/13), 2013 WL 6858325 (unpublished opinion). As discussed above, we find no abuse of the trial court's discretion when applying the PSFVRA to its custody award. Thus, Chad's contentions as to custody in his first and second assignments of error have no merit.

VISITATION

In his first and second assignments of error, Chad claims the trial court erred in limiting him to supervised visitation. Pursuant to La. C.C. art. 136 as it read at the time of the hearing, a parent not granted custody or joint custody of a child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would not be in the best interest of the child.[14] At the time of the hearing in this case, the provision on supervised visitation in the PSFVRA, La. R.S. 9:364(C), stated:

> If the court finds that a parent has a history of perpetrating family violence, the court shall allow only supervised child visitation with that parent, conditioned upon that parent's participation in and completion of a court-monitored domestic abuse intervention program. Unsupervised visitation shall be allowed only if it is shown by a preponderance of the evidence that the violent parent has completed a treatment program, **is not abusing alcohol** and psychoactive drugs, and poses no danger to the child, and that such visitation is in the child's best interest.
> (Emphasis added.)

Chad argues on appeal that there was no evidence that he was a danger to the children and that the trial court precluded him from ever completing any treatment programs that would provide the court with objective evidence as to his alleged alcoholism. We have found that the trial court did not abuse its discretion in determining that Caroline should have sole custody, that Chad had perpetrated

[14] Louisiana Civil Code article 136 was amended by 2018 La. Acts, No. 412 to add that visitation is subject to La. R.S. 9:341 and La. R.S. 9:364.

domestic violence, and that he was still drinking despite having previous DWI's and participating in substance abuse programs and Alcoholics Anonymous. Moreover, on one occasion when he had custody of the children, the younger child was injured; the trial court was also concerned that Chad would drink and drive with the children. Thus, the only visitation he was entitled to under La. R.S. 9:364(C) was supervised visitation.

The court issued the following orders regarding Chad's visitation:

> **IT IS FURTHER ORDERED** that at the Hearing Officer Conference set for child support on February 26, 2018, the hearing officer shall determine what type of supervision the father will have and the times and dates of his visitation with his children. Said recommendations will be made temporary orders of the Court pending the rule [on child support] set for March 27, 2018.
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> **IT IS FURTHER ORDERED** that in absence of an agreement made between the parties as further ordered herein below, Chad M. Lowe shall have up to eight hours per week visitation supervised by a representative of the St. Tammany Parish Sheriff's Office to be worked around the mother's schedule, the children's schedules, and the father's schedule, thirdly.
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> **IT IS FURTHER ORDERED** that the parties shall meet with Janis Caserta, the Court's social worker, to determine if they can work out a mutual agreement for a private supervisor or a family member to supervise and to agree to dates and times pending the recommendation of the hearing officer as ordered hereinabove.

The visitation provisions in the judgment are confusing. According to the judgment, for the time period from the date of the hearing, January 8, 2018, until February 26, 2018, the date of the hearing officer conference, the parties were to meet with the court's social worker to try to work out the supervised visitation, and, if they could not agree, then the visitation would be up to eight hours per week at the Sheriff's Office. At the hearing officer conference on February 26, 2018, the hearing officer was to determine the details of the supervised visitation, and the hearing officer's recommendations would be temporary orders of the court

until the hearing set for March 27, 2018, on child support. We note that the judgment was signed on March 6, 2018, but it refers to action to be taken by the hearing officer which predates the judgment. Moreover, the record contains the hearing officer report that was prepared after the hearing officer conference on February 26, 2018, but the report does not contain any findings or recommendations on visitation.

We agree with Chad's contention that the trial court erred in delegating its judicial authority to set visitation to a social worker. Additionally, Caroline had no incentive to agree as to a supervisor for the visitation or as to the visitation dates and times because with no agreement, the visitation was up to eight hours per week at the Sheriff's Office subject to hers and the children's schedule foremost, and then Chad's schedule. We also note that as discussed in footnote 7, La. R.S. 9:364 was amended by 2018 La. Acts No. 412 § 2, effective May 23, 2018, and the section pertaining to the abusive parent's visitation, which is now La. R.S. 9:364(E), presently states, "If the court finds that a parent has a history of perpetrating family violence, the court shall allow only supervised child visitation with that parent pursuant to R.S. 9:341." Louisiana Revised Statutes 9:341(A) currently states, in pertinent part:

> Whenever the court finds by a preponderance of the evidence that a parent has subjected . . . any other household member [besides the children or stepchildren], as defined in R.S. 46:2132, to a history of family violence as defined in R.S. 9:364(A), . . . the court shall allow only supervised visitation between the abusive parent and the abused child or children until such parent proves by a preponderance of the evidence at a contradictory hearing that the abusive parent has successfully completed a court monitored domestic abuse intervention program, as defined in R.S. 9:362(3), since the last incident of domestic violence or family abuse. At the hearing, the court shall consider evidence of the abusive parent's current mental health condition and the possibility the abusive parent will again subject his children, stepchildren, or other household member to family violence

> or domestic abuse. . . . The court shall order visitation only if the abusive parent proves by a preponderance of the evidence that visitation would be in the best interest of the child, considering the factors in Civil Code Article 134, and would not cause physical, emotional, or psychological damage to the child. Should visitation be allowed, the court shall order such restrictions, conditions, and safeguards necessary to minimize any risk of harm to the child, including continued supervision.

Because the visitation provisions in the judgment are so unclear, we find that Chad's contentions as to visitation in his first two assignments of error have merit. This matter must be remanded in order for the court to establish a valid visitation order that does not depend upon the approval of Caroline.[15] The visitation order should be set in accordance with Civil Code articles 136 and 136.1 and La. R.S. 9:341 and 9:364. We note that, as discussed earlier, La. C.C. art. 136 and La. R.S. 9:341 and 9:364 have been amended since the first hearing in this matter, and the trial court is to apply the current version of the article and statutes. If the court, after a contradictory hearing, finds that supervised visitation is appropriate, a visitation schedule should be set in the best interest of the minor children specifying how the visitation should be supervised, the name of the person or persons who will be supervising the visitation, and what steps Chad must complete in order to obtain additional visitation privileges.[16]

CONTEMPT

In Chad's third assignment of error, he contends that the trial court erred in failing to find Caroline in contempt for denying his visitation on July 16, 2017, when she took the children to Texas to vacation at a water park and to Legoland.

[15] We note that La. R.S. 9:362(7) defines supervised visitation and states that at the request of the abused parent, the court "may order" that the supervising person shall be a police officer or other competent professional. However, the trial court did not base Chad's visitation on La. R.S. 9:362(7).

[16] The trial court may also consider whether to appoint an attorney to represent the children in the custody hearings pursuant to the provisions of La. R.S. 9:345.

The trial court's reasons for judgment state that Chad did not prove by clear and convincing evidence that Caroline was in contempt of court for the denial of Chad's visitation.

According to La. C.C.P. art. 224(2), a person may be found in constructive contempt of court for willfully disobeying any "lawful judgment, order, mandate, writ, or process of the court." 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**, 2013-0010 (La. App. 1 Cir. 5/31/13), 118 So.3d 53, 64. The burden of proving that the accused violated the court order intentionally, knowingly, and purposely without justiciable excuse is on the moving party. See **Rogers v. Dickens**, 2006-0898 (La. App. 1 Cir. 2/9/07), 959 So.2d 940, 947. 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**, 2010-1369 (La. App. 1 Cir. 2/11/11), 57 So.3d 1169, 1178.

Chad argues that at the hearing, Caroline admitted that she took the children to Texas in violation of the court order while she was seeing a convicted felon who had a record for driving while intoxicated. However, Caroline did not testify that she went to Texas with the children in violation of the court order. She did testify that she drove to Shreveport, picked up her boyfriend's children, and met him in Dallas, Texas. Caroline also testified that she had asked Chad if she could take a vacation with the children over the summer. She stated that the custody order was a temporary order without any provisions covering vacation or holidays.

According to Caroline, she offered to make up the days Chad missed whenever he wanted. Chad and Caroline's Family Wizard phone records show that Chad objected to her taking the children out of the state.

The trip to Dallas occurred about two weeks after the firecracker incident. According to Caroline, Child Protective Services told her not to let Chad have any visitation with the children until he was cleared of any wrongdoing. Caroline argues that she had a justifiable excuse for denying Chad his visitation because she was waiting for the authorities to finish investigating the firecracker incident before allowing Chad to have custody. Caroline testified, "This is what the police and Child Protective Services told me to do. They said, 'Do not let him have his visitation until we have had a chance to talk to him.'" The Sheriff's Office records show that law enforcement officials did not interview Chad and examine the child's swimming trunks until July 18, 2017, which was after Caroline and the children returned from Texas.

Considering all of the evidence in the record, we do not find that the trial court abused its discretion in finding that Caroline was not in contempt of court. Therefore, we find Chad's third assignment of error lacks merit.

DECREE

For the above and foregoing reasons, we affirm that part of the judgment awarding sole custody to Caroline Bacon and denying the motion for contempt filed against her by Chad Lowe. We reverse that part of the judgment regarding Chad Lowe's visitation and remand this matter to the trial court to hold a contradictory hearing as soon as possible, but within thirty days, to determine what, if any, reasonable visitation should be awarded to Chad Lowe pursuant to

La. C.C. art. 136 and 136.1 and La. R.S. 9:341 and 9:364. The costs of this appeal are assessed equally to Caroline Bacon and Chad Lowe.

AFFIRMED IN PART, REVERSED IN PART, REMANDED.