BENNY COUNCIL	*	**NO. 2016-CA-1228**
VERSUS	*	**COURT OF APPEAL**
TAMEKA COLLINS LIVINGSTON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2014-00672, DIVISION "K"
Honorable Bernadette D'Souza, Judge

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JUDGE SANDRA CABRINA JENKINS

* * * * * *

(Court composed of Chief Judge James F. McKay, III,
Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins)

MCKAY, J., CONCURS IN THE RESULT

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REVERSED IN PART; REMANDED IN PART; AND AFFIRMED IN PART

SEPTEMBER 20, 2017

In this child custody/child support case, Benny Council appeals the trial court's September 7, 2016 judgment (the "Judgment") giving Mr. Council and appellee, Tamika[1] Collins Livingston, joint custody of their minor child, BDC[2], and designating Ms. Livingston as the domiciliary parent. The Judgment also established a graduated physical custody schedule for Mr. Council, during which time a parent/child play therapist would work with Mr. Council and his son. The trial court also ordered Mr. Council and Ms. Livingston to attend individual psychotherapy sessions. Mr. Council was ordered to pay Ms. Livingston $573.44 in monthly child support. For the reasons that follow, we reverse the trial court's award of child support, remand for recalculation of the child support obligation consistent with this opinion, and affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. Council and Ms. Livingston began dating in 2008, but did not live together. On April 19, 2012, their son BDC was born. Mr. Council and Ms.

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[1] The record on appeal sometimes spells Tamika's given name as "Tameka." We have spelled her name herein as Tamika.

[2] In this opinion, the initials, rather than the full name, of the minor child are used to protect and maintain the privacy of the minor child in these proceedings.

Livingston never married, and less than two years after BDC's birth, their relationship ended. Although BDC always lived with his mother, Mr. Council visited BDC at Ms. Livingston's home whenever he wanted.

Mr. Council began this litigation on January 17, 2014, when he filed a Petition to Establish Paternity, Custody and Visitation, seeking joint custody of BDC and asking that the parties be designated co-domiciliary parents. In the alternative, Mr. Council asked the court to appoint a mental health coordinator to act as a parenting facilitator between the parties, or appoint a mental health expert to perform a custody evaluation to provide recommendations to the court regarding custody and domiciliary status. Mr. Council asserted that, although he and Ms. Livingston had an amicable relationship, she consistently disregarded his input as to the care and welfare of BDC, and deliberately denied him the opportunity to give his son love, affection, guidance, and nurture.

On April 1, 2014, Ms. Livingston filed an Answer and Reconventional Demand, seeking joint custody and asking that she be designated as the domiciliary parent. Ms. Livingston alleged that, because of the age of the child, the need to provide him with a sense of safety and security, the child's inability to articulate his needs or fears, and Mr. Council's lack of experience and/or training in early child rearing, all visitation should take place at Ms. Livingston's home at mutually agreed times. In the alternative, Ms. Livingston asked the trial court to order a custody evaluation and mental health evaluation, with the cost to be shared by the parties. Ms. Livingston also sought child support.

On April 4, 2014, the trial court ordered the parties to mediate their custody dispute and attend co-parenting classes. Although the parties attended a co-parenting class and three days of mediation, the mediator, Lakeisha Jefferson, reported to the court on November 7, 2014 that the parties had not reached an agreement.

On January 20, 2015, Mr. Council filed a Motion to Determine Unsupervised Visitation and Overnight Schedule, and Appoint a Mental Health Evaluator and Child Custody Evaluator. Mr. Council argued that Ms. Livingston was refusing to allow him unsupervised visitation with BDC, as recommended by the court and the mediator. He also asserted that Ms. Livingston was endangering the wellbeing and safety of BDC by: (1) placing a lamp next to the bath tub while bathing him; (2) painting BDC's fingernails with nail polish; (3) driving BDC in a car without a child car seat; and (4) allowing BDC to sleep in the same bed with her and her 13-year-old daughter.

On February 27, 2015, the court rendered an Interim Consent Judgment appointing Dr. Dahlia Bauer to conduct a psychological evaluation and custody evaluation, with the parties to share the cost. The parties agreed that Dr. Bauer had the authority to set an interim unsupervised visitation schedule prior to the completion of the custody evaluation, if appropriate. Otherwise, Mr. Council would continue to exercise supervised visitation, as agreed to by the parties. Mr. Council was ordered to pay interim child support of $500.00 monthly subject to

recalculation and retroactivity when the final child support determination was made by the court.

Dr. Bauer's Mental Health and Custody Evaluation

On March 3, 2016, Dr. Bauer issued a written custody evaluation for the purpose of "determin[ing] a custody arrangement which would be in the best interest of the minor child [BDC]." As part of the evaluation, Dr. Bauer interviewed Mr. Council, Ms. Livingston, Mr. Council's father, Ms. Livingston's father, and observed BDC in the presence of both parents. Dr. Bauer also conducted psychological tests on each parent, known as "Minnesota Multiphasic Personality Inventory."

Dr. Bauer reported that Mr. Council's specific concerns were that: (1) Ms. Livingston did not allow him to be a father to his child by denying him unsupervised visitation; (2) she was emotionally damaging to BDC by allowing the child to sleep with her and her daughter, by reinforcing negative behaviors such as temper tantrums, and by painting BDC's fingernails; (3) she was putting BDC in danger by not using a child car seat, bathing BDC with a lamp next to the bathtub, and becoming violent if Mr. Council expressed concern; and (4) she was depressed and incapable of making life choices independently.

Dr. Bauer reported that Ms. Livingston's specific concerns were that: (1) Mr. Council had "unresolved issues" from his own kidnapping by his father at the age of five or six, as well as his history of physical and emotional abuse which kept him from bonding with BDC; (2) he was not aware of the impact of his childhood

issues; (3) he was trying to get in his abusive father's good graces by treating BDC as his father treated him; and (4) he teased, taunted, and scared BDC instead of providing him comfort and solace.

In response to Mr. Council's specific concerns, Dr. Bauer reported that: (1) Ms. Livingston's home appeared to be safe, with age-appropriate toys and no observable safety hazards; (2) Ms. Livingston stated that she used the child car seat for BDC; and (3) there were no reports or observations of temper tantrums by BDC, although he might be "more anxious and dependent than a typical toddler." With respect to Mr. Council's assertion that he should be the domiciliary parent, Dr. Bauer reported:

> [BDC] has yet to spend any time alone with his father. He has not had the experience of typical caretaking responsibilities, such as feeding, bathing, dressing and putting to bed on a consistent basis. It is these intimate moments which allow for the development of a secure bond. Mr. Council should have opportunities for parenting activities. However, it would be very confusing and potentially frightening for a child to change their primary attachment figure abruptly at the age of three. . . . Gradual increases in time with Mr. Council does [sic] not have to be traumatic for [BDC].

In response to Ms. Livingston's specific concerns, Dr. Bauer reported that: (1) Mr. Council appeared to significantly minimize the impact of his unstable childhood, in which he was kidnapped by his father from his mother's home and did not see her for more than a year; (2) although Mr. Council might have no intention of replicating his past (breaking the law and kidnapping BDC), he might fail to appreciate the effects of a separation between BDC and his mother; (3) Mr. Council's "teasing" of BDC involved jokes that were not harmful or abusive; and (4) Mr. Council's home appeared to be safe and age-appropriate.

Based on Dr. Bauer's interviews, home visits, evaluation of test results, review of parenting history surveys, medical records, and photographs, she concluded that Ms. Livingston should be the domiciliary parent, with a parent coordinator used to gradually alter custody to a co-parenting arrangement "so that [BDC] may enjoy safety, security, love and guidance from both parents." With respect to Ms. Livingston, Dr. Bauer concluded as follows:

> Mrs. Livingston presents as a very concerned and dedicated mother. She is a very bright woman with a history of a strong academic background. She is a member of a very close knit family. This family tends to provide support for each other and is very insular in preferring to assume caregiving responsibilities and limit involvement of others. . . . [BDC] has been in the care of Mrs. Livingston since he was born. She has been his primary parent and has provided him with a nurturing, safe and stimulating environment. She should remain his primary caregiver and domiciliary parent.

With respect to Mr. Council, Dr. Bauer concluded:

> Mr. Council is a very motivated father. He has experienced significant adversity throughout his life and has persevered to complete his education, pursue athletics and acquire a successful career. He presented with a strong work ethic. His presentation also reflected a desire to be a good father for his son. He has been consistent in his efforts to be present in his son's life. However, there exists an awkward disconnection between Mr. Council and Mrs. Livingston which was present throughout much of their relationship. Consequently, Mrs. Livingston has not allowed Mr. Council to attend to [BDC] alone because she has been concerned that he is not capable of bonding with him or understanding his development level. . . . Mr. Council should have the opportunity to parent his son. In spite of . . . Mrs. Livingston's fears that Mr. Council will harm his son or parent roughly, there is no evidence that Mr. Council will abuse his son or that he will be aggressive with [BDC] to please his own father. He should have an opportunity to be a parent for [BDC] and have independent time with his son so that a more secure bond may develop between the parent and child.

Dr. Bauer recommended that the parents use a parent coordinator to create and manage a specific schedule, with incremental increases in time for visitation

between Mr. Council and BDC in order to transition to a situation in which they would co-parent BDC and in which Mr. Council would have a "more typical paternal role":

> At the beginning of this process, [BDC] may need an opportunity to slowly adjust to his father's home and the experience of Mr. Council as an independent caregiver. Furthermore, Mr. Council will need guidance in helping [BDC] adjust to the changes. Visitation can be increased on a gradual basis. . . . [BDC] has not spent time away from his mother for extended periods of time and consequently, it is not recommended that [BDC] travel for extended periods of time to other states without his mother presently. [BDC] has limited verbal skills due to his tender age and may not comprehend the changes in custodial changes. Eventually, [BDC] may experience a sense of security with his father over time and may enjoy vacations with his father in the distant future. This should be a tangible goal that both therapists can address.

Dr. Bauer also recommended that Mr. Council receive psychotherapy to address childhood and relationship issues, and that Ms. Livingston receive psychotherapy to address the anxiety that she experienced in response to Mr. Council's relationship with BDC. Dr. Bauer further recommended that Mr. Council attend "Parent Child Interaction Therapy" to help him learn to understand his child's particular temperament and development level so that he could parent appropriately.

Shortly after Dr. Bauer issued her custody evaluation, the trial court rendered another Interim Consent Judgment setting forth specific periods of supervised visitation for Mr. Council, with the parties agreeing to choose a parenting coordinator, and agreeing to use Our Family Wizard[3] to communicate regarding the child.

[3] Our Family Wizard is a web-based tool designed to assist divorced and never-married parents to communicate regarding custody schedules, parenting plans, and other child custody arrangements.

The trial of this matter was held on July 25, July 29, and August 2, 2016.

Dr. Bauer's Testimony

At trial, Dr. Bauer, a licensed clinical psychologist, was qualified as an expert in the fields of psychology and custody evaluations. Dr. Bauer testified that she was appointed by the trial court to perform a custody evaluation for Mr. Council and Ms. Livingston.

Dr. Bauer testified that Mr. Council's chief concern was that Ms. Livingston was not allowing him to parent his son independently. Dr. Bauer stated that Ms. Livingston's chief concern was that she did not think that Mr. Council was capable of safely interacting with their son, and that he did not appropriately attach or bond to the child. With respect to Ms. Livingston's fear that Mr. Council would take BDC away from her in the same way that he was taken by his father, Dr. Bauer testified that she did not believe that Mr. Council would take his child away from Ms. Livingston, but that she was concerned that BDC's leaving his mother would be an adjustment for him.

Dr. Bauer also testified that although Mr. Council's childhood experience certainly had an impact on him, she was more concerned that Mr. Council had minimized the impact of that experience, which could also impact his awareness of BDC's emotional life. She noted that Mr. Council "teased and taunted" BDC which, although it did not harm the child, might not be "relationship building." Dr. Bauer testified that she personally observed that Mr. Council was extremely interested in interacting with his son, was very excited to be in the room with him,

and was very loving. Dr. Bauer saw no evidence of any neglect or harsh parenting. Her concern was that Mr. Council was "disconnected," i.e., he might not be listening and paying close enough attention to what BDC was doing and how he was responding. Dr. Bauer testified that she was "looking forward to increased time and therapy to help these two people to develop a greater relationship."

With respect to Mr. Council's claim that Ms. Livingston put BDC in danger by placing a lamp next to the bath tub, Dr. Bauer testified that she saw nothing dangerous in Ms. Livingston's home that caused her any concern for BDC's safety. Dr. Bauer also stated that it was not unusual for children of BDC's age to sleep with parents and siblings.

Dr. Bauer stated that she recommended that Ms. Livingston be the domiciliary parent because it would be very confusing and potentially frightening for the child to change his primary attachment figure abruptly.

Because Dr. Bauer found that BDC was a "very anxious" and "reticent" child, she recommended a gradual change in physical custody from two hours of visitation, to more hours of unsupervised visitation, with eventual overnights and eventual weekends and trips.

Dr. Bauer also testified that she recommended psychotherapy for Mr. Council to help him adjust to the changes to his relationship with BDC, and to talk about his childhood history and its impact. She was not concerned about Mr. Council abusing BDC, but hoped that Mr. Council could benefit from having some guidance in interacting in a way that was attentive to the child's needs.

Dr. Bauer also recommended parent/child interaction therapy to assess BDC's emotional reactions and to provide Mr. Council with guidance about how to read the child's cues and how to interact with the child to foster growth and a positive relationship. Dr. Bauer further recommended a parent coordinator to map out a plan to increase time and help the parties with any conflicts along the way.

Ms. Livingston's Testimony

Ms. Livingston testified that when BDC was born, Mr. Council did not have an apartment, and he was sleeping on a cot in his father's plumbing office. She stated that she gave Mr. Council "open access" to visit BDC at her home whenever he wanted. According to Ms. Livingston, when BDC became more active, she began to notice "problematic interactions" between Mr. Council and the child, such as not comforting BDC when he cried. She testified that Mr. Council teased and taunted the child. She said he also played age-inappropriate games that left BDC confused and frustrated. She agreed that eventually BDC would be ready for overnight visits with his father, although not at this time. Ms. Livingston was in favor of the parent/child therapy recommended by Dr. Bauer.

Ms. Livingston stated that either she or her teen-age daughter painted BDC's finger nails with polish while they were teaching him colors and helping him to develop fine motor skills, and that BDC enjoyed it. She also testified that when she stood next to the bath tub holding a lamp while Mr. Council was bathing the child, she thought she was being "helpful" because the lights in the bathroom were

not bright enough, although she acknowledged that it was a safety hazard. She insisted that she did not allow her child to ride in a car without a car seat.

Mr. Council's Testimony

At trial, Mr. Council testified that, during Ms. Livingston's pregnancy, he went with her to all of her doctor's appointments. He also was present when his son was born. Mr. Council is listed as the father on BDC's birth certificate. Mr. Council testified that he participated in caring for BDC and was present during milestones in the child's life, as shown in photographs and videotapes introduced at trial.

According to Mr. Council, he and Ms. Livingston did not agree on certain parenting issues. For example, he believed that Ms. Livingston should not allow the child to throw temper tantrums. He stated that, even though he purchased a bed for BDC, Ms. Livingston permitted the child to sleep with her and her 13-year-old daughter, which upset the child's pediatrician. Mr. Council also disagreed with Ms. Livingston's choice of school for BDC. Mr. Council denied teasing or taunting BDC.

Judgment

On September 7, 2016, the trial court signed the Judgment, which: (1) ordered the parties to share joint custody of BDC; (2) designated Ms. Livingston as the domiciliary parent; (3) ordered a graduated physical custody schedule for Mr. Council, during which time he and BDC would be seen by a parent/child therapist; (4) set forth a detailed holiday visitation schedule; (5) ordered Mr. Council and Ms.

Livingston to attend individual psychotherapy; and (6) ordered Mr. Council to pay $573.44 in monthly child support to Ms. Livingston.

The trial court's Judgment established the following graduated physical custody schedule for Mr. Council:

- For one month, one hour of unsupervised visitation on Tuesday and Thursday, and two hours on Saturday and Sunday each week;
- For one month, one hour of unsupervised visitation on Tuesday and Thursday, and three hours on Saturday and Sunday each week;
- For two months, three hours of unsupervised visitation on Tuesday, Thursday, Saturday, and Sunday each week;
- For three months, three hours of unsupervised visitation on Tuesday and Thursday, and six hours on Saturday and Sunday each week;
- For five months, three hours of unsupervised visitation on Tuesday and Thursday, and overnight from Saturday at 10:00 a.m. to Sunday at noon;
- Thereafter, unsupervised visitation on alternating weekends with Mr. Council picking up BDC after school on Fridays, and returning him to school on Monday morning.

The Judgment also established an alternating physical custody schedule based on 10 holidays per year.

On September 13, 2016, the trial court issued its Reasons for Judgment. Mr. Council timely appealed the Judgment.

DISCUSSION

Mr. Council lists seven assignments of error:

1. The trial court erred in granting Ms. Livingston joint custody and domiciliary status and erred in failing to find that Ms. Livingston intentionally prohibited Mr. Council from fulfilling the factors listed in La. C.C. art. 134.

2. The trial court erred in concluding that Ms. Livingston has an annual income of $40,000 and erred in finding that the parties stipulated to this amount.

3. The trial court erred in failing to find that Ms. Livingston intentionally deceived the court.

4. The trial court erred in failing to appoint a co-parenting coordinator based on the highly-contested nature of the case and the inability of the parties to agree.

5. The trial court erred in ordering psychotherapy for Mr. Council when he had already seen two psychotherapists who both had the same findings.

6. The trial court erred in relying on Dr. Bauer's Mental Health and Child Custody Evaluation and failing to find that it was biased.

7. The trial court erred in failing to provide a visitation schedule in the best interest of the child, failing to calculate child support in accordance with Worksheet B, and violating his constitutional rights.

Assignment of Error No. 1

Mr. Council contends that the trial court erred in granting Ms. Livingston joint custody of BDC and domiciliary status under La. C.C. art. 134.

"Child custody determinations made by the trial court are entitled to great weight and, upon appellate review, that determination will not be disturbed absent a clear showing of abuse of discretion." *Hilkirk v. Johnson*, 15-0577, p. 25 (La. App. 4 Cir. 12/23/15), 183 So.3d 731, 746, *writ denied*, 16-0083 (La. 2/19/16), 186 So.3d 1172.

A court shall award custody of a child in accordance with the best interest of the child. La. C.C. art. 131. The court shall consider all relevant factors in determining the best interest of the child, including:

> (1) The love, affection, and other emotional ties between each party and the child.
> (2) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child.

(3) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.
(4) The length of time the child has lived in a stable, adequate environment, and the desirability of maintain continuity of that environment.
(5) The permanence, as a family unit, of the existing or proposed custodial home or homes.
(6) The moral fitness of each party, insofar as it affects the welfare of the child.
(7) The mental and physical health of each party.
(8) The home, school, and community history of the child.
(9) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.
(10) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party.
(11) The distance between the respective residences of the parties.
(12) The responsibility for the care and rearing of the child previously exercised by each party.

La. C.C. art. 134.

These factors are not exclusive, and the court is "not required to make a mechanical evaluation" of each factor. *Bonnette v. Bonnette*, 15-0239, p. 17 (La. App. 4 Cir. 2/17/16), 185 So.3d 321, 331, *writ denied*, 16-0663 (La. 5/20/16), 191 So.3d 1072. "[T]he determination as to the weight to be given each factor is left to the discretion of the trial court." *Jaligam v. Pochompally*, 16-0249, p. 7 (La. App. 4 Cir. 12/7/16), 206 So.3d 298, 304, *writ denied*, 17-0255 (La. 3/13/17), 216 So.3d 804.

In most child custody cases, the trial court's decision is based heavily on factual findings, which we review under the manifest error standard. *Hilkirk*, 15-0577, pp. 25-26, 183 So.3d at 746. "If, upon review of the trial record, the appellate court finds no reasonable factual basis for the trial court's finding or the

record establishes that the finding is clearly wrong, then the appellate court shall set aside the trial court's finding." *Id.*, p. 26, 183 So.3d at 746.

In its Reasons for Judgment, the trial court addressed all twelve factors. The court found that factors (2) and (3) were neutral and did not weigh in favor of either party. The court noted that, with the financial assistance of their families, both parents had the capacity and disposition to provide BDC with food, clothing, medical care, and other material needs. In addition, the court noted that neither party alleged that the other was morally unfit to care for BDC.

The court also found that factors (2), (4), (5), and (12) weighed in Ms. Livingston's favor. The court gave weight to the fact that Ms. Livingston had been the child's primary caregiver for the entirety of his life, and had been responsible for attending to BDC's intellectual and spiritual development. At the same time, the trial court recognized that Mr. Council's lack of involvement was primarily attributable to Ms. Livingston's unwillingness to allow him to provide substantial care for the child.

The court found that factor (10) weighed in favor of Mr. Council, given Ms. Livingston's "hard position against unsupervised visitation for Mr. Council throughout the pendency of this case."

In its Reasons for Judgment, the trial court presented a thoughtful, in-depth analysis of what it considered to be the "best interest of the child." The trial court concluded as follows:

> Throughout the trial, much emphasis was placed on Mr. Council's lack of experience providing direct, individual care for the

> minor child and whether he is able to appropriately respond to the child's cues without Ms. Livingston's involvement. Ms. Livingston also emphasized Mr. Council's past and the impact it could possibly have on his ability to parent [BDC] effectively. Mr. Council showed at trial that he has been active in [BDC's] life as much as he has been permitted throughout the child's life, and that he strongly desires to be an involved father. Of note, Mr. Council's lack of parenting time spent with the child is directly attributable to Ms. Livingston's refusal to permit unsupervised visitation and overnight visits between Mr. Council and the child. Additionally, Mr. Council and both of his parents testified as to his childhood, and that he grew up to be a well-adjusted adult despite the possibly traumatic events of his childhood.
>
> Ms. Livingston testified that she has always been [BDC's] primary caretaker and that she shares a close bond with the child. She testified to her concerns about Mr. Council's upbringing impairing his ability to be a parent to [BDC]. Her major concerns seemed to be Mr. Council's difficulty interpreting [BDC's] cues and responding appropriately, a topic Dr. Bauer also testified about. Dr. Bauer testified that she was concerned by Mr. Council's expectation that the child would acclimate to major changes in physical custody with minimal issue, and it was her opinion [BDC] would not handle such a change as well as Mr. Council believes. Dr. Bauer recommended in her report and in her testimony that the Court order a physical custody schedule that gradually increases Mr. Council's custodial time so that the child has time to adapt to the changes, with filial therapy occurring simultaneously to monitor the development and assist Mr. Council with any parenting concerns which may come up.
>
> Dr. Bauer testified that a sudden, major change in the status quo would likely be detrimental to [BDC], who is accustomed to Ms. Livingston as his sole primary caregiver, and that introducing Mr. Council as another primary caregiver should happen over time. It is the Court's hope that a gradually increasing physical custody schedule will allow Mr. Council and the child to develop a bond of their own, while ensuring there is no adverse impact on the child.

We have reviewed the record, the trial testimony, and the trial court's factual findings, and find no manifest error or abuse of discretion. In so doing, we are keenly aware of the great deference owed to the trial court, which has the better capacity to evaluate witnesses, and has first-hand knowledge of and extensive experience dealing with the parties in this custody matter. *Smith v. Smith*, 07-0260, 07-0261, p. 4 (La. App. 4 Cir. 2/13/08), 977 So.2d 1114, 1116-17. Accordingly,

we affirm the trial court's decision granting the parents joint custody, and designating Ms. Livingston as the domiciliary parent.

Assignment of Error No. 2

Mr. Council contends that the trial court erred in concluding that Ms. Livingston has an annual income of $40,000 and erred in finding that the parties "stipulated" to this amount. Mr. Council claims that Ms. Livingston actually has no income, and the trial court should not have relied on Ms. Livingston's estimate of her income potential. Instead, he asserts, the trial court should have required Ms. Livingston to provide the court with written verification of her actual income.

At trial, Ms. Livingston was asked about her income in connection with the issue of child support. Ms. Livingston testified that she had no income in 2015 because she was staying home with the child and was financially supported by her family. Ms. Livingston did not introduce into evidence a verified income statement or her most recent federal tax return, as required by La. R.S. 9:315.2(A).[4] She testified that when BDC started school full time, she could return to work as an attorney. She estimated that her annual income at that time would be $40,000.00.

In calculating Mr. Council's child support obligation, the trial court relied on Ms. Livingston's estimate of her potential annual income when she returned to work:

[4] With respect to his income, Mr. Council testified that he worked two days a week as a sleep study technician, and practiced law part-time. Mr. Council introduced into evidence a copy of his 2015 W-2 from his sleep study employer showing that he earned $29,172.50. Mr. Council's 2014 tax return showed adjusted gross income of $17,179.00, with business losses from his law firm and real estate transactions.

> The child support we worked on the joint obligation worksheet A, we took into consideration the testimony which was $40,000.00 for the custodial parent and we averaged the income tax returns of the non-custodial parent and that amount is $34,000.00. So the obligation [under the child support guidelines] is $573.44. The percentage shares for extra-curricular activities and tuition is 54 percent to Ms. Livingston and 46 percent to Mr. Council.

La. R.S. 9:315.11, part of Louisiana's Guidelines for Determination of Child Support, permits the court to impute potential income to a parent under certain circumstances:

> 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.** [Emphasis added.]

At the time of trial, BDC was four years old. Thus, the mandatory language in La. R.S. 9:315.11 requiring the use of income earning **potential** does not apply. *Palacios v. Palacios*, 608 So.2d 243, 245 (La. App. 5th Cir. 1992); *Romanowski v. Romanowski*, 03-0124, p. 10 (La. App. 1 Cir. 2/23/04), 873 So.2d 656, 663 n.9. As Ms. Livingston was caring for a child of the parties under the age of five, no income can be imputed to her under La. R.S. 9:315.11. *Stowe v. Stowe*, 617 So.2d 161, 163 (La. App. 3d Cir. 1993). The trial court, therefore, erred in calculating child support by imputing the figure of $40,000.00 as Ms. Livingston's potential gross income.

Mr. Council argues that the trial court erred by not requiring Ms. Livingston to submit financial documents to verify her actual income. We agree.

La. R.S. 9:315(A) provides:

> A. Each party shall provide to the court a verified income statement showing gross income and adjusted gross income, together with documentation of current and past earnings. Suitable documentation of current earnings shall include but not be limited

> to pay stubs, employer statements, or receipts and expenses if self-employed. The documentation shall include a copy of the party's most recent federal tax return. A copy of the statement and documentation shall be provided to the other party.

"In establishing or modifying a basic child support obligation it is incumbent upon the trial court to examine the income and financial status of both parties." *State in the Interest of Joseph*, 97-0780, p. 4 (La. App. 4 Cir. 12/23/97), 705 So.2d 776, 779. Documentation is essential to the setting of child support. *Ventura v. Rubio*, 00-0682, p. 8 (La. App. 4 Cir. 3/16/01), 785 So.2d 880, 888. The lack of necessary documentation in the record means that the trial court could not properly apply the guidelines of La. R.S. 9:315, *et seq*., and neither can this court. *Broussard v. Broussard*, 617 So.2d 1187, 1190 (La. App. 4th Cir. 1993). We find that the trial court erred in not requiring Ms. Livingston to submit income statements and her federal tax return, as mandated by La. R.S. 9:315.2(A). Accordingly, we remand to the trial court for Ms. Livingston to offer proper documentation to verify her income, and for a recalculation of the child support obligation based on that evidence. *Jackson v. Belfield*, 98-0440, p. 8 (La. App. 4 Cir. 11/25/98), 725 So.2d 32, 36.

Assignment of Error No. 3

Mr. Council contends that the trial court erred in failing to find that Ms. Livingston intentionally deceived the court by falsely stating in one of her pleadings that Mr. Council had met with two physicians who determined that Mr. Council needed a mental health evaluation. Mr. Council also argues that Ms. Livingston intentionally deceived the court by stating in her pleading that Mr. Council's home had "lead poisoning paint," which made it unsafe for BDC. Mr.

Council relies on La. C.C.P. art. 863(B)(1)-(3), which gives the trial court the authority to impose sanctions for false certification of pleadings as well grounded in fact.

Mr. Council did not raise this issue before the trial court. Generally, issues not raised in the trial court will not be given consideration for the first time on appeal. *See* Rule 1-3, Uniform Rules--Courts of Appeal; *Rousset v. Smith*, 14-1409, pp. 32-33 (La. App. 4 Cir. 9/23/15), 176 So.3d 632, 650, *writ denied*, 15-1939 (La. 11/30/15), 184 So.3d 35. We, therefore, do not consider this assignment of error.

Assignment of Error No. 4

Mr. Council contends that the trial court erred in failing to appoint a co-parenting coordinator based on the "highly-contested nature of the case and the inability of the parties to agree."

In order for the court to appoint a parenting coordinator on its own motion or on the motion of a party, good cause must be shown. La. R.S. 9:358.1(A). "Good cause" includes the following: (1) a determination by the court that either or both parties have demonstrated an inability or unwillingness to collaboratively make parenting decisions without the assistance of others or insistence of the court; (2) an inability or unwillingness to comply with parenting agreements and orders; (3) a determination by the court that either or both parties have demonstrated an ongoing pattern of unnecessary litigation; (4) a refusal to communicate or difficulty in communicating about and cooperation in the care of the children; and (5) a refusal

to acknowledge the right of each party to have and maintain a continuing relationship with the children. *Palazzolo v. Mire*, 08-0075, p. 54 (La. App. 4 Cir. 1/7/09), 10 So.3d 748, 779 (citing La. R.S. 9:358.1, Comment (c)). The trial court should also take into account financial hardship under La. R.S. 9:358.1, as the appointment of a parental coordinator is prohibited if one party cannot pay his or her apportioned cost. *Griffith v. Latiolais*, 10-0754, p. 19 (La. 10/19/10), 48 So.3d 1058, 1071.

Although Dr. Bauer recommended a parenting coordinator, the trial court did not find it necessary:

> [M]y goal is that the parties would be able to confer because otherwise I have to appoint a parenting coordinator and you are already spending so much in therapy [individual psychotherapy for each parent and parent/child play therapy for Mr. Council and BDC] and I don't see the need for a parenting coordinator because you all can communicate with each other.

Based on our review of the record, we find no abuse of discretion by the trial court in not appointing a parenting coordinator.

Assignment of Error No. 5

Mr. Council asserts that the trial court erred in ordering him to attend psychotherapy. According to Mr. Council, because he already has submitted to two mental health evaluations in connection with this child custody matter, additional psychotherapy would be "redundant and expensive, thus serving no purpose."

Dr. Bauer testified at trial that psychotherapy for Mr. Council during the gradual increases in his visitation with BDC would help him adjust to the changes

to his relationship with the child, and to talk about his childhood history and its impact. She was not concerned about Mr. Council abusing BDC, but hoped that Mr. Council could benefit from having some guidance in interacting in a way that was attentive to the child's needs.

The trial court concluded that ultimately it was in the best interest of BDC for Mr. Council to attend psychotherapy during this important transition period. We find no abuse of discretion.

Assignment of Error No. 6

Mr. Council contends that the trial court erred in relying on Dr. Bauer's Mental Health and Child Custody Evaluation and in failing to find that it was biased.

In child custody matters, expert testimony is to be weighed by the trial court the same as any other evidence. *Moreau v. Moreau*, 15-0564, p. 7 (La. App. 4 Cir. 11/18/15), 179 So.3d 819, 824. After weighing and evaluating expert and lay testimony, the trial court may accept or reject the expert's opinion. *Id.* "The effect and weight to be given to expert testimony is within the broad discretion of the trial judge." *Id.*

Dr. Bauer testified at trial that Mr. Council had difficulty interpreting BDC's cues and responding appropriately without Ms. Livingston's involvement. Dr. Bauer was also concerned by Mr. Council's expectation that the child would acclimate to major changes in physical custody with minimal issues, and she opined that BDC would not handle such change as well as Mr. Council believed. Dr. Bauer testified that a sudden, major change in the status quo would likely be

detrimental to the child, who was accustomed to Ms. Livingston as his sole primary caregiver, and that introducing Mr. Council as another primary caregiver should happen over time. On that basis, Dr. Bauer recommended that the court set a gradually increasing physical custody schedule.

After our review of the evidence, we cannot say that the trial court's evaluation of Dr. Bauer's expert report and testimony and its subsequent ruling was an abuse of its great discretion.

As for the alleged "bias" by Dr. Bauer, we need not consider this argument, which Mr. Council did not raise in the trial court. Accordingly, we find no merit in this assignment of error.

Assignment of Error No. 7

In a single assignment of error, Mr. Council presents four unrelated arguments.

First, Mr. Council argues that he should have a physical custody schedule with BDC greater or exactly equal to that of Ms. Livingston "in order to rehabilitate the father-child bond that Livingston has intentionally blocked for the first four years of B.D.C.'s life." He contends that the trial court's physical custody schedule gives him visitation for only four days per month, which is only 13 percent of the child's time, while BDC spends 87 percent of his time with Ms. Livingston.[5]

In the absence of a custody agreement between the parents, "the court shall award custody to the parents jointly." La. C.C. art. 132. Further, La. R.S. 9:335 provides, in pertinent part, as follows:

[5] Mr. Council does not include the Friday afternoons and evenings, the Monday mornings, and the five holidays a year in which he has physical custody of BDC.

> A. (1) In a proceeding in which joint custody is decreed, the court shall render a joint custody implementation order except for good cause shown.
> (2)(a) The implementation order shall allocate the time periods during which each parent shall have physical custody of the child so that the child is assured of frequent and continuing contact with both parents.
> (b) **To the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally.** [Emphasis added.]

"The primary goal of joint custody is upheld so long as the non-domiciliary parent is assured of frequent and continuing contact with the child." *Moreau*, 15-0564, p. 10, 179 So.3d at 826. "Substantial time, rather than strict equality of time, is mandated by the legislative scheme providing for joint custody of children." *Id*. Thus, an award of joint custody does not necessarily require equal sharing of physical custody. *Id*.

Again, every child custody case is to be reviewed on its own peculiar facts and the relationships involved, with the paramount goal of reaching a decision that is in the best interest of the child. *McKenzie v. Cuccia*, 04-0112, p. 5 (La. App. 4 Cir. 6/23/04), 879 So.2d 335, 339. Here, Dr. Bauer described BDC as a "very anxious" and "reticent" three-year-old, who may be confused, frightened, and perhaps traumatized by being taken away from his mother for significant periods of time.

The trial court, after considering the testimony of the witnesses, the exhibits presented at trial, and the report and testimony of Dr. Bauer, concluded that it was in BDC's best interest to adopt Dr. Bauer's recommendation of gradually increasing the physical custody schedule to allow Mr. Council and the child to slowly develop a bond of their own, while ensuring that there was no adverse impact on the child.

Based on our review of the record, the trial court's Reasons for Judgment, and the unique circumstances presented here, we cannot say that the trial court abused its discretion in deciding that an unequal physical custody schedule was in the best interest of BDC.

Second, Mr. Council also contends that the unequal visitation schedule violates his Fourteenth Amendment rights by severely limiting his parental rights. Because Mr. Council did not raise this issue in the trial court, we do not address it. *See* Rule 1-3, Uniform Rules--Courts of Appeal.

Third, Mr. Council further contends that the trial court should have calculated child support using Worksheet B, reproduced in La. R.S. 9:315.20. We find that the trial court did not err in computing child support on Worksheet A rather than Worksheet B, which is used only when the parents have shared custody of the child for an approximately equal amount of time. *See Mendoza v. Mendoza*, 14-94, pp. 4-5 (La. App. 4 Cir. 5/14/15), 170 So.3d 1119, 1122 (citing La. R.S. 9:315.9).

Finally, Mr. Council argues that the trial court erred in not setting a vacation schedule so that he could travel out of state with BDC to visit relatives. Dr. Bauer stated in her report that because BDC had not spent time away from his mother for extended periods of time, she would not recommend that the child travel for extended periods of time to other states without his mother. According to Dr. Bauer, eventually BDC may experience a sense of security with his father over time and may enjoy vacations with his father in the distant future. Given the trial

court's acceptance of Dr. Bauer's opinions and recommendations, we find no abuse of discretion.[6]

CONCLUSION

Based on the foregoing, we reverse the trial court's award of child support to Ms. Livingston, and remand the case to the trial court for a recalculation of the child support obligation consistent with this opinion. We affirm the trial court's Judgment in all other respects.

REVERSED IN PART; REMANDED IN PART; AND AFFIRMED IN PART

[6] Mr. Council also contends that the trial court erred in not addressing how missed visitation days are to be made up. The trial court's Judgment does address this issue, ordering that visitation that cannot take place because of the child's illness will be made up the following weekend.