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| **KRISTEN LAURENT** | * | **NO. 2018-CA-0126** |
| **VERSUS** | * | |
| | | **COURT OF APPEAL** |
| **IVAN S. PREVOST** | * | |
| | | **FOURTH CIRCUIT** |
| | * | |
| | | **STATE OF LOUISIANA** |

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| **CONSOLIDATED WITH:** | **CONSOLIDATED WITH:** |
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| **IVAN S. PREVOST** | **NO. 2018-CA-0127** |
| **VERSUS** | |
| **KRISTEN LAURENT** | |

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2009-05499, DIVISION "H-12"
Honorable Monique E. Barial, Judge
* * * * * *
**Judge Terri F. Love**
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(Court composed of Judge Terri F. Love, Judge Edwin A. Lombard, Judge Rosemary Ledet, Judge Sandra C. Jenkins, and Judge Dale N. Atkins)

**LEDET, J., CONCURRING IN PART WITH REASONS**
**JENKINS, J., CONCURS IN PART, DISSENTS IN PART**
**ATKINS, J., CONCURS IN PART FOR REASONS ASSIGNED BY JUDGE LEDET**

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**AFFIRMED AS AMENDED; REMANDED WITH INSTRUCTIONS**
**JULY 11, 2018**

Ivan Prevost ("Mr. Prevost") seeks appellate review of the trial court's modification of custody. We conclude, after review of the record, that the trial court was presented with two permissible views of the evidence as to whether use of kneeling as a form of discipline was abusive requiring modification of the interim custody plan. We cannot say the trial court's finding was manifestly erroneous. Similarly, we find the trial court's appointment of counsel for the minor children was not in contravention to La. R.S. 9:345. We do, however, find ordering Mr. Prevost to obtain the services of an outside supervisor, at his expense, in order to exercise visitation with his children to be an abuse of discretion. Accordingly, we amend the trial court's interim judgment to permit Mr. Prevost visitation with his children under the supervision of a family member.

## *FACTUAL BACKGROUND AND PROCEDURAL HISTORY*

This appeal arises from a change in custody of four minor children. Plaintiff Mr. Prevost and Kristen Laurent ("Ms. Laurent") were never married but became intimately involved, and as a result four children were born of the relationship: Y.P., J.P., A.P., and B.P.[1]

[1] The initials of the minor children are used to protect and maintain the privacy of the minor children involved in this proceeding. *See* Uniform Rules, Courts of Appeal, Rules 5-1 and 5-2.

In March 2015, Mr. Prevost filed a petition for protection from abuse against Ms. Laurent, in which he alleged that an investigation by the Department of Children and Family Services (DCFS) was launched as a result of B.P. bringing marijuana to school. B.P. had retrieved the marijuana from Ms. Laurent's kitchen table and brought it to school and was demonstrating for other students how to roll it up and smoke it. B.P. allegedly also told other children and the school social worker, Stephanie Anderson ("Ms. Anderson") that there was a large amount of marijuana at Ms. Laurent's home and that he had only brought a small portion to school with him. A temporary restraining order was issued along with an award of temporary custody in favor of Mr. Prevost.

After a hearing on the petition for protection from abuse, the trial court rendered an interim judgment, which was signed on June 1, 2015. The interim judgment dismissed Mr. Prevost's petition for failure to prove by the appropriate standard the allegations contained in the petition, granted the parties joint custody of the minor children, and limited Ms. Laurent's physical custodial periods with the minor children. When the temporary restraining order was issued in March 2015, Mr. Prevost acted as the de facto domiciliary parent and continued primary physical custody of the minor children based on the June 2015 interim judgment. Ms. Laurent did not appeal the judgment of custody and visitation.

In December 2015, a hearing was held on Ms. Laurent's rule for contempt against Mr. Prevost. A number of issues were addressed at the hearing including Ms. Laurent's allegations of denial of visitation, denial of telephone communication with the minor children, Mr. Prevost's failure to participate in the custody evaluation, and Ms. Laurent's failure to pay child support. At the hearing, Ms. Laurent also alleged that Mr. Prevost was physically abusive. The trial court,

on its own motion, appointed an attorney to represent the minor children. The judgment was signed in January 2016.

In July 2017, appointed counsel filed an "Ex-Parte Motion for Temporary Protective Order for Minor Children, Temporary Relocation of Minor Domicile, Contempt of Court, and Modification of Physical Custody." The ex-parte motion sought relief pursuant to La. C.C.P. art. 3945, which alleged Mr. Prevost was physically abusive. However, the ex-parte motion did not include specific dates or incidents when the abuse allegedly occurred. Based on various exceptions filed by Mr. Prevost, appointed counsel amended his pleadings to include more specific allegations. In addition, appointed counsel filed a motion for contempt and a motion to request a *Watermeier* hearing.[2]

Thereafter, Mr. Prevost filed a "Motion and Order to Terminate and Vacate Ex-Parte Order of Custody, Motion and Order to Strike Petitioner's Verification Affidavit, Rule for Contempt for Failure to Comply with La. C.C.P. art. 3945 and/or Motion and Order for Imposition of Sanctions, Fees, and Costs, Peremptory Exceptions of No Cause of Action and/or No Right of Action and Dilatory Exceptions of Vagueness and Incorporated Memorandum in Support and Rule for Contempt for Failure to Abide by Judgment." He also filed his opposition to the request for a *Watermeier* hearing and a "Motion and Order for Imposition of Sanctions, Fees and Costs and Dilatory Exceptions of Vagueness" in response to the motion for contempt filed by appointed counsel for the minor children.

A hearing commenced on all pending matters in September 2017, including the ex-parte motion filed on behalf of the minor children. The trial court granted sole legal custody of the minor children to Ms. Laurent and granted Mr. Prevost

[2] *See Watermeier v. Watermeier*, 462 So.2d 1272 (La. App. 5th Cir. 1985).

liberal supervised visitation with the minor children. Mr. Prevost timely appeals.

***STANDARD OF REVIEW***

"In child custody cases, appellate courts will not disturb an award of custody absent a manifest abuse of discretion in the trial court." *Leard v. Schenker*, 09-1438, p. 2-3 (La. App. 4 Cir. 3/24/10), 35 So.3d 1152, 1154 (citing La. C.C. art. 134, Revision Comments–1993, Comment (b)); *Bergeron v. Bergeron*, 492 So.2d 1193, 1196 (La. 1986) (stating "the determination of the trial judge in child custody matters is entitled to great weight, and his discretion will not be disturbed on review in the absence of a clear showing of abuse"). "'[T]he trial court sitting as a trier of fact is in the best position to evaluate the demeanor of the witnesses, and its credibility determinations will not be disturbed on appeal absent manifest error.'" *Alfonso v. Cooper*, 14-0145, p. 14 (La. App. 4 Cir. 7/16/14), 146 So.3d 796, 805 (quoting *Ruiz v. Ruiz*, 05-0175, p. 4 (La. App. 5 Cir. 7/26/05), 910 So.2d 443, 445).

When factual findings are based on determinations of the credibility of witnesses, the manifest/clearly wrong standard of review "demands great deference to the trier of fact's findings; for only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said." *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989). "[W]here two permissible views of the evidence exist, the fact-finder's choice cannot be manifestly erroneous or clearly wrong." *D.M.S. v. I.D.S.*, 14-0364, p. 19 (La. App. 4 Cir. 3/4/15), 225 So.3d 1127, 1140.

However, when the trial court commits a legal error, *de novo* review is required. *Evans v. Lungrin*, 97-0541, p. 6-7 (La. 2/6/98), 708 So.2d 731, 735. "When such a prejudicial error of law skews the trial court's finding of a material

issue and causes it to pretermit other issues, the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining the essential material facts *de novo*." *Id.*, 97-0541, p. 7, 708 So.2d at 735 (citation omitted).

Mr. Prevost asserts that the trial court abused its discretion in finding that his actions rose to the level of abuse warranting a change in custody; that the trial court committed legal error when it granted Ms. Laurent custody of the minor children in contravention to *Bergeron*; and that the trial court committed legal error when it appointed an attorney to represent the minor children in contravention of the law.

***BERGERON STANDARD***

Since the second assigned error concerns the burden of proof relating to the modification of a contested custody judgment, we address this assigned error first. Mr. Prevost contends that the June 2015 judgment was a considered decree and therefore could not be modified unless the heavy burden imposed in *Bergeron* was met. The Louisiana Supreme Court stated:

> When a trial court has made a considered decree of permanent custody the party seeking a change bears a heavy burden of proving that the continuation of the present custody is so deleterious to the child as to justify a modification of the custody decree, or of proving by clear and convincing evidence that the harm likely to be caused by a change of environment is substantially outweighed by its advantages to the child.

*Bergeron*, 492 So.2d at 1200.

Counsel for the minor children submits that the June 2015 judgment is not subject to the heightened requirements of *Bergeron* because the judgment is not a considered decree. Counsel argues that the record is silent as to whether any evidence was provided relative to parental fitness and relies on a judgment drafted

by Mr. Prevost's counsel and the handwritten note from the trial court thereon, which counsel claims demonstrates that the parties had a stipulated agreement. Although we find this argument meritless[3], our analysis does not extend that far because the June 2015 judgment was not a decree of permanent custody.

The June 2015 judgment is not subject to *Bergeron* standards because it was an interim custody plan, and *Bergeron* only applies to a "considered decree of *permanent* custody." *Id.* Therefore, the burden of proof in this case requires that the party seeking a change in the custody arrangement prove: "1) a change in circumstances affecting the welfare of the [child] had occurred since the original decree; and 2) the proposed modification is in the best interests of the [child]." *Cerwonka v. Baker*, 06-856, p. 6 (La. App. 3 Cir. 11/02/06), 942 So.2d 747, 752 (quoting *Aucoin v. Aucoin*, 02-0756, p. 5 (La. App. 3 Cir. 12/30/02), 849 So.2d 1245, 1249).

***MODIFICATION HEARING***

At the December 2016 hearing, the trial court heard testimony from each party, numerous witnesses, and the minor children via *in camera* court interviews. Mr. Prevost testified that he never punched, hit, or grabbed the children or threatened them with physical violence. He was asked whether he had ever caused any of the minor children to kneel on concrete for extended periods of time. He testified that the longest period of time that he ever made the children kneel was 30 minutes. Mr. Prevost explained that he made the children kneel as a form of discipline and as an alternative to spanking. He stated that he found kneeling to be

[3] The judgment drafted by counsel for Mr. Prevost was rendered moot on June 2, 2015. The trial court prepared its own written judgment, signed on June 1, 2015, which indicated its judgment was rendered after consideration of the evidence, testimony, pleadings, and the law presented at the May 11, 2015 hearing. A plain reading of the June 1, 2015 judgment reflects that it was not issued pursuant to a stipulated agreement.

more effective than spanking. Mr. Prevost testified that over the course of the two years that he had primary custody, the minor children were made to kneel about 15 times.

At the time Mr. Prevost became the de facto domiciliary parent and gained primary physical custody of the children, the evidence shows that the children were exhibiting behavioral problems at school and that the youngest child, B.P., brought marijuana to school that he retrieved from Ms. Laurent's kitchen table. Mr. Prevost produced a number of witnesses at trial, including several teachers and administrators from the minor children's school, who provided the following testimony regarding their interactions and observations of the Prevost children.

Linda Dennis, Mr. Prevost's hired nanny for the minor children, testified that she would watch the children five days a week, Saturday through Wednesday. During her employment, she testified that she never observed Mr. Prevost hit, punch, choke, or drag the children, and she never observed any bruising on the children. Ms. Dennis was also questioned about the type of discipline Mr. Prevost implemented. She stated that Mr. Prevost would always talk to the minor children, and that she had witnessed Mr. Prevost making the children kneel. She testified that "[i]f they did something that they had no business doing, then he would make them get down on their knees." Ms. Dennis testified that on one occasion, after Mr. Prevost had the minor children kneel, she told the boys they could stop after 20 minutes. At trial, she stated that she never saw Mr. Prevost spank the children and that she would rather the boys kneel as a form of discipline than for them to be spanked with a belt.

Kermit Smith, the coach at the minor children's school, testified that he taught all of the minor children during the 2015/2016 and 2016/2017 school years

and that he never witnessed any bruising on their bodies when they attended his class in their physical education uniforms. Their physical education teacher Toby Garner also testified that he never saw bruising on the children, nor had the children expressed to him any allegations of abuse. Fourth grade teacher Stacy Clayton taught three of the four children, as did teacher Trynitha Fulton, who both testified to observing no bruising on the children. Ms. Clayton stated that the children did not express concerns about being physically abused, nor did she witness either parent being violent with them.

Jennifer Kagan, the school counselor, also testified that she did not observe any bruising on the children. She indicated that in the past two years, since the children had been in their father's care, she noticed the children's behavior and grades improved. Ms. Kagan classified Mr. Prevost as a "very involved" parent and that she never saw signs of fear or apprehension by the minor children when spending time with their father. Based on her experience and background, Ms. Kagan testified that children who are physically abused are typically "very withdrawn" or aggressive. Children who are physically abused, she stated, are fearful to go home, back away from friends, and their grades drop. While it is possible that an abused child's grades may improve out of fear, Ms. Kagan testified that such a situation does not occur often. Ms. Kagan also testified that based on her interactions with the minor children, she believed J.P. would have revealed to her if he was being physically abused. She further stated that she would not attribute the improvement of the minor children's grades to abuse.

Dean of Students Justin Legett testified that when the minor children were younger they would act out, but that while the children were living with Mr. Prevost, he noticed improvement in the children's behavior. Mr. Legett indicated

that in the past when he had to call Mr. Prevost to come to the school because one of the children was acting out, he never witnessed Mr. Prevost acting violently or aggressively with the children. Mr. Legett testified that he is "pretty close" with all four of the minor children and that if either parent was physically abusive, he believed they would have told him. Mr. Legett stated that "if they are having a bad day, they'll just come and talk to me." He testified to having never seen any bruising or injuries. He stated that the children never expressed concern about the discipline they received at home with Mr. Prevost or indicated they were fearful of their father, or fearful for him to be called to the school.

Stephanie Anderson, the school's social worker, testified at trial. She stated that she holds a Bachelor's Degree in Psychology and a Master's Degree in Social Work. She testified that since the children began to live with Mr. Prevost, the children's classroom behavior had improved, and they were not pulled out of the classroom as much. She stated that while in Mr. Prevost's care, the children were more disciplined, "more relaxed then [sic] when they're with mom."

Ms. Anderson testified that she receives annual training in handling situations of physical abuse of a child. She indicated that she had not seen any bruising on any of the Prevost children, noting that she would have noticed signs of physical abuse because the minor children have "very light" complexions. Ms. Anderson testified that she would be surprised if she learned that the children were abused because she saw no visible or emotional signs of abuse. She stated that the children were very friendly and very well-mannered, and she believed that the children would have told her and the school counselor Ms. Kagan first, if they thought they were in danger. She testified that B.P. told her everything regarding the incident when he brought marijuana to school. She indicated that Y.P. and B.P.

would "for sure" disclose to her if they were abused. She further indicated that J.P. and A.P. would likely tell Ms. Kagan if they were being abused because they were close with her.

At trial, counsel for the minor children presented the testimony of Ms. Laurent and the *in camera* interviews of the minor children. Ms. Laurent was asked whether during the time the minor children were living with Mr. Prevost if she ever saw injuries suffered by the children. She testified that a couple of times when she was exercising visitation, she "would catch a bruise or I'd see something on them." She clarified that more often she would become aware of incidents that caused bruising when she would visit the children at school. She "didn't always physically see the bruising…because [the minor children] didn't feel comfortable disclosing that kind of stuff in front of the teachers." Ms. Laurent testified she saw injuries on the children three or four times a month. She testified that she spoke with the school principal and called DCFS regarding the injuries she observed. However, the principal did not testify at trial and evidence of a DCFS report mentioning any of the injuries or incidents Ms. Laurent testified to reporting was also not presented at trial.

Other than reporting this information to DCFS and the school principal, Ms. Laurent testified that she never addressed her concerns or the injuries she saw with Mr. Prevost. She further stated that she had brief conversations with two or three "other teachers" but she never went into detail because she did not trust "all those people at the school." Ms. Laurent was also asked if she ever sought medical attention for the minor children as a result of the bruising she saw. She responded in the negative. Ms. Laurent testified that her children expressed a fear of her disclosing the allegations of abuse "almost constantly." No evidence or testimony

was presented regarding Mr. Laurent's home conditions since the children were removed in 2015.

The paramount consideration in any child custody determination is the best interest of the child. La. C.C. art. 131. As the moving party, appointed counsel on behalf of the minor children had the burden to show there was a change in circumstances affecting the welfare of the Prevost children and that a modification was in the best interest of the children. After appointed counsel met with the minor children, counsel filed a pleading with the trial court seeking modification of custody plan that made allegations of abuse. In its oral reasons, the trial court based its decision to modify custody upon a finding that Mr. Prevost's use of kneeling as a form of discipline was abusive.

The record reflects that when the children were removed from Ms. Laurent's home, the minor children were exhibiting behavioral issues at school. The behavioral issues precipitated the children's removal from the classroom and the police and DCFS to become involved. The minor children were originally moved from Ms. Laurent's physical custody after her parental fitness was questioned as a result of one of the minor children bringing marijuana to school that he retrieved from Ms. Laurent's kitchen table. Upon Mr. Prevost obtaining primary custody, the school witnessed marked improvement in all four children's behavior and grades, which they attributed to the structure and discipline Mr. Prevost provided. The trial court found the children's behavior and grades improved since living with their father.

The record also reflects that the minor children expressed to the trial judge a desire to reside with Ms. Laurent full-time. The trial court reasoned that this desire is likely based on the fact that it is the household in which they are "the freest."

However, the trial court noted that this consideration is "not always what is best for the children."

Pursuant to La. C.C. art. 228, "[a] child shall obey his parents in all matters not contrary to law or good morals. Parents have the right and obligation to correct and discipline the child in a reasonable manner." The trial court recognized that Mr. Prevost was exercising his right to correct and discipline his children. Additionally, the trial court "believe[d] that there ha[d] been a positive effect" and that "it would be a disservice to the children if they did not have contact with their father." Nevertheless, the trial court reasoned that the frequency of the kneeling was greater than Mr. Prevost testified to, but not as frequent as the children stated. The trial court ultimately found the repeated use of kneeling, as a form of discipline, abusive.

After review of the record and the transcripts of the *Watermeier* hearing, we find the trial judge was presented with two permissible views concerning whether Mr. Prevost's use of kneeling as a form of discipline was abusive to the extent it was affecting the welfare of the children so as to require a modification of custody. As it relates to the issue of kneeling, we cannot say the trial court's findings were manifestly erroneous. *Melerine v. O'Connor*, 13-1073, p. 3-4 (La. App. 4 Cir. 2/26/14), 135 So.3d 1198, 1202 (citing *Stobart v. State, Dept. of Transp. and Development*, 617 So.2d 880, 882-83 (La.1993). However, we find the trial court's ordering Mr. Prevost to obtain, at his expense, the services of an outside supervisor in order to exercise visitation with his children to be an abuse of discretion. We find it is in the best interests of the children that Mr. Prevost be able to visit with his children as soon as possible under the supervision of a family member.

## *APPOINTMENT OF COUNSEL*

Finally, Mr. Prevost contends the trial court committed legal error in its appointment of an attorney for the minor children. He claims that the appointment was made in contravention to La. R.S. 9:345 because the trial court failed to hold a contradictory hearing on the issue and take into account the parties' ability to pay for the representation. The appointment of counsel was made on the court's own motion concurrently with a contradictory hearing. The trial court cited as its basis for the appointment its concern regarding the delayed custody evaluation and Ms. Laurent's implications of abuse toward the minor children. Each party had an opportunity to testify or present argument relative to the appointment. However, neither party objected to the appointment at the hearing or at any subsequent time during the proceedings in this case. Moreover, the record shows the trial court discussed the various steps it took to secure counsel for as little cost as possible for the parties. Therefore, we find no merit to this assignment of error.

## *DECREE*

We find the trial court was presented with two permissible views of the evidence concerning the use of kneeling as a form of discipline. Based on the record before us, we cannot say the trial court's findings were manifestly erroneous. We also find the trial court complied with La. R.S. 9:345 in its appointment of counsel for the minor children. Therefore, we affirm the portion of trial court's judgment that awarded temporary sole custody of the minor children to Ms. Laurent. However, the trial court abused its discretion in ordering Mr. Prevost to obtain the services of an outside supervisor, at his expense, in order to exercise visitation with his children. We find visitation supervised by a family

member to be in the best interests of the children.

The matter is remanded to the trial court to conduct a status hearing within 30 days to address the following: 1) the custody evaluation; and 2) Mr. Prevost's supervised visitation with the minor children. Accordingly, we affirm as amended and remand with instructions.

**AFFIRMED AS AMENDED ; REMANDED WITH INSTRUCTIONS**