SHAKTI BELWAY	*	**NO. 2018-CA-0455**
VERSUS	*	
		COURT OF APPEAL
GREGORY NEAL THYSSEN	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

*** * * * * * ***

CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
SHAKTI BELWAY	**NO. 2018-CA-0723**
VERSUS	
GREGORY NEAL THYSSEN	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2016-05468, DIVISION "H-12"
Honorable Monique E. Barial, Judge
* * * * * *

Judge Joy Cossich Lobrano
* * * * * *

(Court composed of Judge Terri F. Love, Judge Joy Cossich Lobrano, Judge Dale N. Atkins)

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AFFIRMED

DECEMBER 12, 2018

This domestic matter is a child custody case. Plaintiff/appellant, Shakti Belway ("Mother"), appeals two judgments of the district court: (1) January 5, 2018 judgment finding Mother in contempt of court; and (2) April 13, 2018 judgment modifying child custody. For the reasons that follow, we affirm both judgments.

The parties, Mother and defendant/appellant, Gregory Neal Thyssen ("Father"), were married in 2007, and divorced in 2016. This litigation stems from a custody dispute concerning the parties' minor child ("Child"), who is presently four years old. On October 7, 2016, when Child was two years old, the parties entered into a consent judgment governing custody (the "consent judgment"),[1] which provided, in pertinent part, as follows:

> …[The parties] shall share joint legal custody of [Child]. Shakti [Mother] shall have physical custody and domiciliary status….

[1] On this same date, the parties also entered into a consent judgment regarding partition of community property, which is not at issue in this appeal. Therefore, for the purposes of this opinion, the "consent judgment" referred to throughout this opinion is the October 7, 2016 consent judgment regarding child custody.

> The parents will have joint legal custody, specifically conferring regarding education and any major, serious and life-threatening medical or health-related issues that may arise….
>
> Greg [Father] may exercise parenting time on at least two occasions per week and not less than twenty-five (25) hours per month with [Child], allowing for reasonable exceptions such as travel or other schedule conflicts. Additional parenting time opportunities may be scheduled through the consent of both parties. His parenting time will take place at the home of Shakti or, if outside the home, with Shakti or her designee present. Parenting time will occur at a time and in a manner consented to by Shakti….
>
> Should either Greg or Shakti wish to move from New Orleans, Louisiana, they will give the other parent thirty (30) days notice. Both will comply with the Louisiana Relocation Statute….

Less than one month later, on November 3, 2016, Mother sent a relocation letter to Father via certified mail announcing her intention to move with Child from New Orleans, Louisiana to Santa Barbara, California. In the relocation letter, Mother stated that she and Child would return to New Orleans approximately once per month and that Father's visitation would "approximate that which we agreed upon." Father did not object to the relocation. Nevertheless, litigation over custody ensued in both New Orleans and Santa Barbara, though the Santa Barbara court ultimately declined jurisdiction on December 8, 2017, and this matter proceeded before the Civil District Court for the Parish of Orleans.

On September 20, 2017, Father filed a rule for contempt and to modify visitation, in which he argued that Mother failed to abide by the visitation and medical decision-making provisions in the consent judgment. Father filed a supplemental rule for contempt on December 4, 2017, raising additional arguments regarding Mother's failure to abide by the medical decision-making provisions in the consent judgment. Following a hearing on December 20, 2017, the district

court rendered judgment on January 5, 2018 (the "contempt judgment"), granting Father's motion for contempt and casting Mother with court costs and attorney's fees in the amount of $2,122.00. Mother's timely appeal followed.

On February 26, 2018, Father filed a rule for ex parte custody. The district court denied his request for provisional temporary physical custody, and scheduled a custody hearing on March 16, 2018. On April 13, 2018, the district court rendered judgment (the "custody judgment") granting Father's rule for custody in part, maintaining joint custody of Child, maintaining Mother's designation as domiciliary parent, awarding Father visitation of Child during the majority of the summer and certain holiday periods, and awarding nightly Skype communication with Child to the parent not exercising physical custody. Mother also timely appealed this judgment, and thereafter, both appeals were consolidated.

With respect to the contempt judgment, Mother contends that the district court erred in finding that Mother failed to (1) abide by the physical custody schedule in the October 7, 2016 consent judgment; and (2) confer with Father regarding "any major, serious and life threatening issues of the minor child."

Regarding the custody judgment, Mother argues that the district court erred (1) by failing to apply the standard for modification of custody set forth in *Bergeron v. Bergeron*, 492 So.2d 1193 (La. 1986); (2) by granting Father unsupervised visitation "despite [Father's] history of untreated family violence and alcohol abuse"; and (3) by modifying custody without "proof the modification was

in [Child's] best interest, and where the modification violated the Post-Separation Family Violence Relief Act, La. R.S. 9:361-367."

This Court has set forth the relevant standards of review as follows:

> **A. *Contempt of Court***
>
> Appellate courts review a trial court's finding of contempt by a manifestly erroneous standard. *Jaligam v. Pochampally*, 14-0724, p. 5 (La. App. 4 Cir. 2/11/15), 162 So.3d 464, 467. A trial court is vested with great discretion in determining whether circumstances warrant holding a party in contempt pursuant to the constructive contempt statute for willful disobedience of a judgment or order of the court. La. C.C.P. art. 224(2); *South East Auto Dealers Rental Ass'n, Inc. v. EZ Rent To Own, Inc.*, 09-0011, p. 8 (La. App. 4 Cir. 6/30/10), 42 So.3d 1094, 1099.
>
> **B. *Child Custody Determinations***
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> Child custody determinations are reviewed under the abuse of discretion standard. *Leard v. Schenker*, 06-1116, p. 3 (La. 6/16/06), 931 So.2d 355, 357. Thus, "the determination of the trial judge in a child custody matter is entitled to great weight and his discretion will not be disturbed on review in the absence of a clear showing of abuse." *Id.* at pp. 3-4, 931 So.2d at 357 (quoting *AEB v. JBE*, 99-2668, p. 7 (La. 11/30/99), 752 So.2d 756, 761.
>
> In most child custody cases, the trial court's rulings are based heavily on its factual findings. *Hanks v. Hanks*, 13-1442, p. 8 (La. App. 4 Cir. 4/16/14), 140 So.3d 208, 214 (citing *Palazzolo v. Mire*, 08-0075, pp. 34-37 (La. App. 4 Cir. 1/7/09), 10 So.3d 748, 768-70). "[A] court of appeal may not set aside a trial court's or a jury's findings of fact in the absence of 'manifest error' or unless it is 'clearly wrong.' " *Evans v. Lungrin*, 97-0541, 97-0577, p. 6 (La. 2/6/98), 708 So.2d 731, 735 (citing *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989)).
>
> "Every child custody case must be viewed based on its own particular facts and relationships involved, with the goal of determining what is in the best interest of the child." *Mulkey v. Mulkey*, 12-2709, p. 15 (La. 5/7/13), 118 So.3d 357, 367; *see* La. C.C. art. 131 (providing that "the court shall award custody of a child in accordance with the best interest of the child"). In determining the best interest of the child, "[e]ach case must be viewed in light of the child's age, the situation of the parents, and any other factor relevant to the particular case." *Palazzolo*, 08-0075 at p. 35, 10 So.3d at 768.

> Because the trial judge is in a better position to evaluate the best interest of a child from his superior position to observe and evaluate the demeanor and credibility of the parties and the witnesses, his decision will not be disturbed on review absent a clear showing of abuse. *Smith v. Smith*, 07-0260, 07-0261, p. 4 (La. App. 4 Cir. 2/13/08), 977 So.2d 1114, 1116-17; *Palazzolo*, 08-0075 at p. 35, 10 So.3d at 768; *Foshee v. Foshee*, 12-1358, p. 4 (La. App. 4 Cir. 8/28/13), 123 So.3d 817, 820; *Watts v. Watts*, 08-0834, p. 2 (La. App. 4 Cir. 4/8/09), 10 So.3d 855, 857. As this court recently noted in *Jaligam v. Pochampally*, 16-0249, p. 6 (La. App. 4 Cir. 12/7/16), 206 So.3d 298, 303, "the court of appeal cannot simply substitute its own findings for that of the trial court." *See also*, *Mulkey*, 12-2709, p. 16, 118 So.3d at 368.

State through Dep't of Children & Family Servs. Child Support Enf't v. Knapp, 2016-0979, pp. 11-13 (La. App. 4 Cir. 4/12/17), 216 So.3d 130, 139-40.

We first consider the appeal of the contempt judgment. "A contempt of court is any act or omission tending to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority. Contempts of court are of two kinds, direct and constructive." La. C.C.P. art. 221. "A direct contempt of court is one committed in the immediate view and presence of the court and of which it has personal knowledge, or a contumacious failure to comply with a subpoena or summons, proof of service of which appears of record." La. C.C.P. art. 222. "A constructive contempt of court is any contempt other than a direct one. Any of the following acts constitutes a constructive contempt of court: … [willful] disobedience of any lawful judgment, order, mandate, writ, or process of the court…" La. C.C.P. art. 224(2). "A court's finding that a person willfully disobeyed a lawful judgment in violation of La. C.C.P. art. 224(2) must be based on a finding that the accused violated an order of the court

'intentionally, purposely, and without justifiable excuse.'" *Knapp*, 2016-0979, p. 13, 216 So.3d at 140 (quotation omitted).

"A child has a right to time with both parents.… Neither parent shall interfere with the visitation, custody or time rights of the other unless good cause is shown." La. C.C. art. 136.1. Louisiana Revised Statute 13:4611(d)(i) provides the penalty for contempt of court for disobeying "an order for the right of custody or visitation, … a fine of not more than five hundred dollars, or imprisonment for not more than three months, or both." "In addition to or in lieu of the above penalties, when a parent has violated a visitation order, the court may order any or all of the following: … [r]equire the parent violating the order to pay all court costs and reasonable attorney fees of the other party." La. R.S. 13:4611(e)(iv).

Here, Mother argues that the district court erred in finding her in contempt of court. She, first, argues that because Father consented to Mother's relocation, "knowing that the move would vitiate the specific terms of his visitation schedule as set forth in the consent judgment[,] he is equitably estopped from enforcing those terms." Mother cites to no law, and we find none, that supports her argument.[2] Mother filed no pleadings in the district court to modify custody or visitation. It is undisputed that Father did not object to the relocation. Father testified that he did not contest the relocation based on Mother's statement in the relocation letter that Father's visitation would approximate what was provided in

[2] Mother cites to *Morris v. Friedman*, 94-2808 (La. 11/27/95), 663 So.2d 19, and *Succession of Hirt*, 612 So.2d 1054 (La. App. 4th Cir. 1993), in support of her equitable estoppel argument. Neither of these cases provides any guidance to this Court in the instant matter, as neither case involves issues of family law nor a consent judgment.

the consent judgment, 25 hours of parenting time per month. Father also testified that, after Mother's relocation to Santa Barbara, Mother brought Child to New Orleans for visitation only once, in January 2017, and had not brought Child to New Orleans since then; Father traveled to Santa Barbara in June 2017 to visit Child but had not seen her since then. Mother offered no evidence to refute this testimony. We find no manifest error in the district court's decision. This assignment lacks merit.

Mother also argues that the district court erred in finding that the consent judgment required the parties to "confer on all medical decisions of the minor child." The consent judgment provides that "[t]he parents will have joint legal custody, specifically conferring regarding … any major, serious and life-threatening medical or health-related issues that may arise." It was undisputed that the Child fell, received a gash above her eye, and was treated with stitches. It was also undisputed that Father was not notified of the injury or treatment. Father argues that a determination that medical attention requiring stitches is "serious" is a finding of fact, which should not be disturbed absent manifest error by the district court. We agree. Moreover, the district court was well within its great discretion in finding Mother in contempt of court for violation of the visitation schedule and in imposing penalties pursuant to La. R.S. 13:4611(d)-(e). We decline to disturb the district court's January 5, 2018 judgment granting Father's motion for contempt.

We next turn to the appeal of the custody judgment. Mother first argues that the contempt judgment, dated January 5, 2018, is a considered decree; therefore,

according to Mother's argument, the district court erred in failing to apply the *Bergeron* test for modification of custody. We disagree, and we find no legal error.

As the Louisiana Supreme Court has explained:

> This court has … recognized a distinction between two types of custody awards. One type of custody award is a "considered decree," which "is an award of permanent custody in which the trial court receives evidence of parental fitness to exercise care, custody, and control of children." *Mulkey*, 12-2709 at 10, 118 So.3d at 364. A second type of custody award has been referred to as a "stipulated judgment," which a court renders "when the parties consent to a custodial arrangement, and no evidence of parental fitness is taken." *Evans*, 97-0541 at 13, 708 So.2d at 738.
>
> This court has recognized that different burdens of proof apply to each of the two types of custody awards. "[T]he jurisprudential requirements of *Bergeron v. Bergeron* ... are applied to actions to change custody rendered in considered decrees." *AEB*, 99-2668 at 7, 752 So.2d at 761. That is, "the proponent of change must show that a change of circumstances materially affecting the welfare of the child has occurred since the prior order respecting custody." *AEB*, 99-2668 at 7, 752 So.2d at 761 (citing *Bergeron*, 492 So.2d at 1195). Additionally, for considered decrees, "[t]he party seeking a change 'bears the 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.' " *AEB*, 99-2668 at 7, 752 So.2d at 761 (quoting *Bergeron*, 492 So.2d at 1200).
>
> In contrast to considered decrees, "where the original custody decree is a *stipulated judgment*, the party seeking modification must prove (1) that there has been a material change of circumstances since the original custody decree was entered, and (2) that the proposed modification is in the best interest of the child." *Evans*, 97-0541 at 13 708 So.2d at 738.

Tracie F. v. Francisco D., 2015-1812, pp. 9-10 (La. 3/15/16), 188 So.3d 231, 239-40 (emphasis in original). The Supreme Court noted that the terms "consent judgment," "consent agreement," or "consent decrees" can be used interchangeably with "stipulated judgment." *Id.*, 2015-1812, p. 10, n. 6, 188 So.3d at 240.

"Because visitation has an independent basis from custody, the *Bergeron* test rule is not applicable to a motion to modify visitation." *Moore v. Moore*, 47,947, p. 17 (La. App. 2 Cir. 3/6/13), 111 So.3d 1120, 1129 (citing *Acklin v. Acklin*, 29,193, p. 3 (La. App. 2 Cir. 2/26/97), 690 So.2d 869, 871).

As explained herein, Father filed a rule for contempt and to modify visitation. In its January 5, 2018 contempt judgment, the district court found Mother in contempt, but awarded Father no additional visitation. No part of the contempt judgment adjudicates custody. The contempt judgment is not a considered custody decree. *Bergeron* does not apply to the facts before us. Rather, the original joint custody decree herein was the October 7, 2016 consent judgment, which is a stipulated decree. This assignment is without merit.

Lastly, we consider together Mother's remaining arguments. Mother argues that the district court erred in granting Father unsupervised visitation without proof that the modification was in Child's best interest, "despite [Father's] history of untreated …alcohol abuse" and where the modification "violated the Post-Separation Family Violence Relief Act."

"Every child custody case must be viewed based on its own particular facts and the relationships involved, with the goal of determining the best interests of the child." *Hiatt v. Duhe*, 2017-0574, pp. 5-6 (La. App. 4 Cir. 1/31/18), 238 So.3d 484, 488. La. C.C. art. 134 provides a list of "non-exclusive factors for the court to consider in awarding custody, of which the trial court shall consider all relevant factors in determining the best interests of the child." *Id.*, 2017-0574, p. 6, 238

So.3d at 489.[3,4] "The trial court is not bound to a mechanical evaluation of all of the statutory factors listed in the article, but should consider each case on its own facts in light of the factors." *Id.*, 2017-0574, pp. 6-7, 238 So.3d at 489.

"In the absence of agreement, or if the 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

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[3] At the time of the hearing, La. C.C. art. 134 provided:

> The court shall consider all relevant factors in determining the best interest of the child. Such factors may include:
>
> (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 maintaining 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.

[4] Several Louisiana Civil Code articles and Revised Statutes pertaining to child custody, including La. C.C. arts. 132, 134, and 136 and La. R.S. 9:364, were amended in the 2018 Legislative Session, which took place after the hearing of this matter. This opinion, therefore, cites to the pre-amendment text of those articles and statutes.

of the child, the court shall award custody to that parent." La. C.C. art. 132 (2017). "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." La. C.C. art. 136(A) (2017).

The Post-Separation Family Violence Relief Act is found in La. R.S. 9:361 to 367. Section 364 states, in pertinent part:

> There 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.
>
> La. R.S. 9:364(A) (2017).

In *Dufresne v. Dufresne*, 2008-215, p. 11 (La. App. 5 Cir. 9/16/08), 992 So.2d 579, 587, *writ denied*, 2008-2843 (La. 12/17/08), 996 So.2d 1123, the appellate court upheld the district court's award of relief under the Post-Separation Family Violence Relief Act to the wife in a post-divorce hearing on custody and other matters, even though the wife did not specifically request relief for domestic abuse in her pleadings; two witnesses testified as to the physical abuse of the wife by her husband with no objection from husband's counsel, and the district court granted the wife's request to amend pleadings to conform with the evidence after judgment was rendered.

Nevertheless, in *Nguyen v. Le*, 2007-81, p. 7 (La. App. 5 Cir. 5/15/07), 960 So.2d 261, 265, the court recognized that "the Post-Separation Family Violence

Relief Act cannot be ple[d] for the first time on appeal, as it requires the trial court to make a specific determination of 'a history of perpetration of family violence.'"

Here, Mother filed no pleadings in the district court in which she alleged family violence, domestic abuse, alcohol abuse, or otherwise claimed entitlement to relief under the Post-Separation Family Violence Relief Act. In the custody judgment, the district court noted that a complaint was filed with Child Protection Services in California, but the case was closed as "unfounded." Likewise, evidence was introduced at the hearing that Child was evaluated at Children's Hospital in New Orleans, but Child did not disclose any abuse.

On review of the district court's judgment and reasons and considering the record before us, we are constrained to infer that the district court did not find that any parent had a "history of perpetrating family violence"; thus, no presumption against an award of joint custody to Father was triggered under La. R.S. 9:364. Moreover, as Mother invokes the Post-Separation Family Violence Relief Act for the first time on appeal, we do not consider it. While this Court does not take allegations of abuse lightly, we are a court of record; we cannot review claims of family violence that have not been adjudicated by the district court below.

Mother has identified no other basis on which to challenge the district court's finding that increased visitation with Father is in Child's best interest. As discussed herein, we review a district court's child custody determinations under an abuse of discretion standard, and its discretion will not be disturbed in the absence of a clear showing of abuse. *Knapp*, 2016-0979, p. 12, 216 So.3d at 139.

Further, we give great deference to the district court's findings in matters of credibility, as the district court is in the best position to "evaluate the demeanor and mannerisms of the witnesses." *Hiatt*, 2017-0574, p. 7, 238 So.3d at 489.

In the custody judgment, the district court found that a material change in circumstances occurred as a result of Mother's relocation and establishment of household in Santa Barbara and a change in "communication and cooperation" between the parties. After hearing all testimony and considering evidence at the hearing, the district court ordered that the parties continue joint custody and Mother remain domiciliary parent; the district court only modified Father's visitation, granting Father unsupervised summer and holiday visitation, and permitting Skype or FaceTime communication to whichever parent is not exercising physical custody. We cannot say that the district court abused its discretion by increasing Father's visitation or by not ordering supervised visitation. On the particular facts before us, we find no reason to disturb the district court's custody ruling.

Accordingly, for the reasons discussed above, we affirm the January 5, 2018 and April 13, 2018 judgments of the district court.

AFFIRMED