NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CU 1594

LEE N. WEST, JR.

VERSUS

DENISE E. WEST

Judgment Rendered: December 28, 2006

Appealed from the
Family Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number 136,998

Honorable Luke Lavergne, Judge Presiding

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Scott Gaspard **Baton Rouge, LA**	**Counsel for Plaintiff/Appellant,** **Lee N. West, Jr.**
Brian J. Prendergast **Baton Rouge, LA**	**Counsel for Defendant/Appellee,** **Denise E. West**

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BEFORE: CARTER, C.J. WHIPPLE AND McDONALD, JJ.

WHIPPLE, J.

This is an appeal by plaintiff from a judgment finding defendant to be in contempt of court for failure to pay child support as ordered and making the arrearages executory, but failing to take any punitive action for defendant's contempt, reducing defendant's child support obligation from the time of filing a rule for modification of child support until the time of trial herein, naming defendant the domiciliary parent based on a change in circumstances, and ordering plaintiff to now pay defendant child support. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Lee West, Jr. and Denise West McNabb were married in March 1988 and were subsequently divorced in February 2001. Two children were born of the marriage. On May 21, 2001, by stipulated judgment, joint custody of the children was ordered, with Mr. West designated as the domiciliary parent. Thereafter, by judgment dated July 24, 2001, Ms. McNabb was ordered to pay Mr. West child support in the amount of $644.00 per month.

On January 7, 2002, judgment was rendered, finding Ms. McNabb in contempt of court for failure to pay court-ordered child support, and the arrearages in the amount of $3,109.40 were made executory. On November 8, 2004, Mr. West filed the rule for contempt at issue herein, alleging that Ms. McNabb had "still not complied with the orders" of the court for the payment of child support and arrearages. He further alleged that since May 2003, Ms. McNabb had paid child support through a wage assignment, but that she had made no payments toward the arrearages, which totaled $17,447.70. In his rule for contempt, Mr. West sought to have the arrearages made executory and to be awarded costs, attorney's fees "and any

other sanctions, including but not limited to a wage assignment, the Court deems appropriate to impose for this contempt."

Ms. McNabb then filed a Rule for Modification in Custody and Modification in Child Support. In the rule, Ms. McNabb alleged that there had been a material change in circumstances with regard to the parties' incomes and, thus, sought a reduction in her child support obligation. With regard to custody of the children, Ms. McNabb averred that Mr. West had neglected his duties as the domiciliary parent, constituting a material change in circumstances materially affecting the children, and that designating Ms. McNabb as domiciliary parent would be in the children's best interest.

Following a hearing on the rules, the trial court rendered judgment, finding Ms. McNabb in contempt of court, fixing the amount of child support arrearages at $16,403.00 and making that amount executory. However, the trial court declined to take any punitive action against Ms. McNabb for the contempt, "due to mitigating circumstances and factors presented to the Court on her behalf." The trial court also reduced Ms. McNabb's child support obligation retroactively to December 28, 2004. The trial court further found that there had been a material change in circumstances affecting the children, and that although joint custody continued to be in the children's best interest, Ms. McNabb should be the domiciliary parent. Mr. West was, thus, ordered to pay Ms. McNabb child support commencing July 1, 2005.[1]

From this judgment, Mr. West appeals, assigning the following as error: (1) the trial court erred in failing to assess punitive damages against Ms. McNabb after determining that she was in contempt of court for failure

[1]While judgment was rendered on June 17, 2005, the written judgment was not actually signed until May 16, 2006.

to pay court-ordered child support; (2) the trial court erred in denying Mr. West's motion for involuntary dismissal of Ms. McNabb's rule for modification of custody; (3) the trial court abused its discretion by changing the domiciliary parent to Ms. McNabb and ordering Mr. West to pay child support; and (4) the trial court erred in finding a change in circumstances and granting Ms. McNabb a reduction in child support.

TRIAL COURT'S CONTEMPT RULING
(Assignment of Error No. 1)

In this assignment of error, Mr. West contends that the trial court erred in failing to impose any punitive damages or action against Ms. McNabb for her contempt of court for failure to pay court-ordered child support. Pursuant to LSA-R.S. 13:4611(1)(d), the trial court **may** impose a penalty for disobeying a child support order in the way of a fine of not more than five hundred dollars, imprisonment for not more than three months, or both. Leger v. Leger, 2000-0505 (La. App. 1st Cir. 5/11/01), 808 So. 2d 632, 635. As noted by our brethren on the Second Circuit Court of Appeal, a proceeding for contempt is not designed for the benefit of the litigant, though infliction of a punishment may inure to the benefit of the mover in the rule. Rather, the object of the proceeding is to vindicate the dignity of the court. Martin v. Martin, 37,958 (La. App. 2nd Cir. 12/10/03), 862 So. 2d 1081, 1083, writ not considered, 2004-0481 (La. 3/12/04), 869 So. 2d 807.

Because the use of the word "may" in LSA-R.S. 13:4611(1)(d) denotes that the imposition of a penalty is permissive, see LSA-R.S. 1:3, the trial court has discretion as to whether the imposition of a penalty is warranted in any given case. Lewis v. Lewis, 616 So. 2d 744, 747 (La. App. 1st Cir.), writ granted in part and opinion set aside in part on other grounds, 624 So. 2d 1211 (La. 1993).

As stated above, the trial court in the instant matter determined that Ms. McNabb was in contempt of court for failure to pay court-ordered child support. The court further ordered the arrearages made executory and ordered Ms. McNabb to pay attorney's fees and costs for Mr. West bringing the rule. However, because the trial court found that there were "mitigating circumstances," the court declined to take any further action against Ms. McNabb.

At the hearing on the rule for contempt, Ms. McNabb acknowledged that she had not paid child support in the amount of $644.00 per month as ordered and conceded that there was a sizable arrearage. However, she explained that the original July 24, 2001 child support order was based upon her prior income of $2,308.00 per month she had earned as a customer service representative for Stewart Finance.

Ms. McNabb testified that in December 2000, several months before the original child support award was rendered, she left her job at Stewart Finance to take a job at Broke-Til-Payday, at a salary of $961.00 per month. While the pay was significantly less at this job, Ms. McNabb explained that she knew the owner of Broke-Til-Payday and was asked to take that job due to her job performance and ability. Although it is unclear from the record whether Ms. McNabb believed this lower paying job offered her greater advancement potential, it is clear from the record that her decision to accept this job did not work out to her advantage in that her employment with Broke-Til-Payday was subsequently terminated in November 2001.

Thereafter, Ms. McNabb received unemployment benefits for several months until she found a job at Warwick Financial in April 2002, where she earned $680.00 per month. However, Ms. McNabb subsequently obtained a

job at R & T Financial, where she was employed at the time of the hearing, earning $1,594.66 per month.

With regard to her payment of child support, Ms. McNabb acknowledged that she paid only $175.00 in 2001 and $644.00 in 2002, during the time she was experiencing job difficulties. However, Ms. McNabb further testified that beginning in 2003, she paid child support through a garnishment of her wages. She explained that she has been paying child support through a garnishment in the amount of $320.30 every two weeks, which was supported by the arrearages chart submitted by Mr. West as an attachment to his rule for contempt. Ms. McNabb further stated that she was also paying an additional $100.00 per month out of pocket toward the arrearages.

Clearly, based on this testimony, Ms. McNabb had been paying her child support obligation regularly for a substantial period of time prior to the hearing and was making efforts to pay the arrearages. Thus, the trial court determined that punitive action against her was not warranted. While we may have ruled differently if sitting as the trial court, we cannot conclude that the trial court abused its discretion herein in declining to order jail time or assess a fine against Ms. McNabb. See Lewis, 616 So. 2d at 747.

Mr. West further contends on appeal that the trial court erred in failing to impose alternative means of punishment pursuant to LSA-R.S. 9:315.30 et seq., which authorizes the suspension of certain licenses of individuals found in contempt of court for failing to comply with a child support order. However, we note that Mr. West did not specifically request this remedy below, nor did he object below to the trial court's choice not to impose this penalty on its own motion. Issues not presented to the trial court for consideration will generally not be considered by the appellate court on

appeal. Salassi v. State, Department of Public Safety and Corrections, Administrative Hearing Section, 96-0321 (La. App. 1st Cir. 11/15/96), 684 So. 2d 1014, 1018. Accordingly, we decline to consider this issue on appeal.

CHANGE IN DOMICILIARY PARENT
(Assignment of Error No. 3)

In this assignment of error, Mr. West contends that the trial court erred in modifying the prior stipulated custody award by naming Ms. McNabb as domiciliary parent, where Ms. McNabb failed to prove that there had been a change in circumstances materially affecting the children or that the change in custody was in the children's best interests. Mr. West further contends that because the trial court erroneously named Ms. McNabb as domiciliary parent, it also erred in ordering Mr. West to pay Ms. McNabb child support.

In cases such as this, where no considered decree of custody has been rendered, the "heavy burden" rule set forth in Bergeron v. Bergeron, 492 So. 2d 1193 (La. 1986), does not apply. However, to prevail on her rule to change custody, Ms. McNabb was required to prove that a change in circumstances had occurred which materially affected the children's welfare *and* that the modification proposed was in their best interest. Day v. Day, 97-1994 (La. App. 1st Cir. 4/8/98), 711 So. 2d 793, 795. Every child custody case must be viewed within its own peculiar set of facts, and a trial court's determination of custody is entitled to great weight and will be overturned on appeal only when there is a clear abuse of discretion. Scott v. Scott, 95-0816 (La. App. 1st Cir. 12/15/95), 665 So. 2d 760, 763, writ denied, 96-0181 (La. 2/2/96), 666 So. 2d 1106.

In the instant case, Ms. McNabb's request for a change in custody focused in part on the deleterious effects of the existing custody arrangement

on their son's academic performance. She testified that while their son, L.W., had struggled "a little bit" in elementary school, he had been an honor student in fifth grade. However, L.W.'s academic performance declined significantly in sixth grade. Moreover, L.W. failed the seventh grade during the pendency of this hearing.[2]

According to Ms. McNabb, when L.W. got home from school, he was "attending to himself," because the kids were home alone after school. She testified that when L.W. spent more time with her, he did well academically. She explained that when she was there to help him with school work, she would check his work and make him redo it if it was incorrect. She felt that L.W.'s grades had declined because he was not getting the help he needed due to Mr. West's work schedule. Ms. McNabb further testified that because Mr. West worked late at night, the children had no authority figure at home with them.[3]

Additionally, while the current custody order provided that she was to have the children every other weekend during the school year, Ms. McNabb testified that she in fact had her daughter D.W. much more often than that. Specifically, she testified that, in the months preceding the hearing, she had D.W. for fourteen visits in January, thirteen visits in February, fifteen visits in March, and nine visits in April. With regard to L.W., Ms. McNabb acknowledged that, while she had had sixteen overnight visits with L.W. from January through March, he had not visited her as often as D.W. did. Ms. McNabb was concerned that the lack of parental supervision at Mr. West's home resulted in L.W. wanting to stay at his father's home and not

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[2]The hearing in this matter commenced on April 27, 2005, and was then continued on June 3, 2005.

[3]At the time of the hearing, L.W. was eleven years old and D.W. was seven years old.

wanting to visit his mother at her home.

As further support for her request for modification of custody, Ms. McNabb testified as to Mr. West's refusal to communicate with her with regard to the children. Specifically, since Mr. West was designated domiciliary parent in 2001, there had been no sharing of information, and he had never provided Ms. McNabb with information about the children's schooling, such as progress reports, report cards or dates of parent-teacher conferences. According to Ms. McNabb, Mr. West only called her when the children were sick, so that she could bring them to the doctor. Despite Mr. West's refusal to communicate with Ms. McNabb, Ms. McNabb had contacted the children's schools in order to keep herself informed and had, in fact, attended numerous conferences at school with regard to L.W.'s academic problems.

Ms. McNabb testified that her work hours, which were 9:00 a.m. to 6:00 p.m., allowed her time in the evenings to supervise the children and to review and correct homework with the children, as opposed to the current situation. Accordingly, Ms. McNabb requested that she be named domiciliary parent.

Mr. West, on the other hand, denied that Ms. McNabb's testimony was true and accurate. He testified that she did not have the children as often as she claimed and that L.W. had not been visiting his mother. Additionally, with regard to his work schedule, Mr. West testified that while he previously worked jobs as a chef until late at night, he no longer works "real late jobs" after 10:00 p.m. because of the children. He further stated, "Sometimes 7:30 or 8:00 o'clock I cut it off. I let my job know ... I can't do the hours anymore." However, he then later testified that he usually gets home between 5:00 and 7:00 p.m., depending on the job. He acknowledged

that there had been incidents where he had worked as late as midnight, but he stated that on those occasions, his mother would stay with the children. According to Mr. West, it had been about one year since he had worked that late.

With regard to communicating with Ms. McNabb about the children, Mr. West acknowledged that he did not communicate with her to inform her about the children, with his explanation being simply that he can not talk to Ms. McNabb.

With regard to helping L.W. with homework, Mr. West stated that L.W. had homework "every blue moon," but that L.W. also had projects that Mr. West had helped him complete. When the court questioned him about L.W.'s poor academic performance, Mr. West stated that he had known that L.W. was having problems in science, but he acknowledged that he did not know L.W. was also experiencing problems in reading, another subject that L.W. failed in seventh grade. Mr. West further acknowledged that Ms. McNabb had taken the initiative to enroll L.W. in summer school in an attempt to allow him to move up to the next grade level. From his testimony, it was clear that Mr. West was not even aware of what class L.W. was taking in summer school. Mr. West also acknowledged that on the two occasions that he had moved since the original custody award, Ms. McNabb had taken the initiative to register the children in the new school districts, even though he was the domiciliary parent. Ms. McNabb has also been the parent who takes the children to doctor and dentist's appointments.[4]

In reasons for judgment, the trial court found as a fact that there had been a change in circumstances materially affecting the children, focusing

[4]According to Mr. West, Ms. McNabb took the children to medical appointments because she had the children's medical cards.

heavily on L.W.'s deteriorating academic performance and Mr. West's refusal to communicate with Ms. McNabb with regard to the children. The court further found that Mr. West had failed to fulfill his responsibilities as domiciliary parent by failing to supervise the children, failing to be attentive to L.W.'s studies, and failing to communicate with Ms. McNabb. The court concluded that naming Ms. McNabb domiciliary parent, a role the court found she had informally held during the past year, was in the children's best interests. Accordingly, the court ordered Mr. West to pay child support to Ms. McNabb, a figure that was recalculated based on changes in income of both parties.

Considering the foregoing and the record as a whole, and mindful of the trial court's discretion in matters of custody, Scott, 665 So. 2d at 763, we cannot conclude that the trial court abused its discretion in continuing joint custody, but naming Ms. McNabb as domiciliary parent.

This assignment of error lacks merit.

DENIAL OF MOTION FOR INVOLUNTARY DISMISSAL
(Assignment of Error No. 2)

Mr. West also contends that the trial court erred in denying his motion for involuntary dismissal at the close of Ms. McNabb's case on her rule for modification of custody. In light of our determination that the trial court did not err in finding that a change in circumstances materially affecting the children had occurred and that a change in domiciliary parent was in the children's best interests, we find it unnecessary to address the trial court's denial of Mr. West's motion for involuntary dismissal. See Morrison v. Allstar Dodge, Inc., 2000-0398 (La. App. 1st Cir. 5/11/01), 792 So. 2d 9, 15, writ denied, 2001-2129 (La. 11/2/01), 800 So. 2d 878.

REDUCTION IN MS. McNABB'S CHILD SUPPORT OBLIGATION (Assignment of Error No. 4)

In this assignment of error, Mr. West contends that the trial court erred in reducing Ms. McNabb's child support obligation where the evidence demonstrated that Ms. McNabb was voluntarily underemployed. Louisiana Revised Statute 9:311(A) provides that "[a]n award for support shall not be reduced or increased unless the party seeking the reduction or increase shows a material change in circumstances of one of the parties between the time of the previous award and the time of the motion for modification of the award." If a party is "voluntarily underemployed," LSA-R.S. 9:315.2(B) and 9:315.11 provide that a court must consider the party's "income earning potential" in determining combined gross income for purposes of setting the child support obligation. See Buchert v. Buchert, 93-1819 (La. App. 1st Cir. 8/26/94), 642 So. 2d 300, 305. However, a party will not be considered voluntarily underemployed if: (1) she is caring for a child of the parties under the age of five; (2) she is physically or mentally incapacitated; (3) she is absolutely unemployable; (4) she is incapable of being employed; or (5) her unemployment or underemployment results through no fault or neglect of her own. LSA-R.S. 9:315(C)(5)(b) & LSA-R.S. 9:315.11.

Voluntary underemployment is a fact-driven consideration. The trial court has wide discretion in determining the credibility of witnesses, and its factual determinations will not be disturbed on appeal absent a showing of manifest error. Moreover, whether a spouse is in good faith in ending or reducing his or her income is a factual determination which will not be disturbed absent manifest error. Romanowski v. Romanowski, 2003-0124 (La. App. 1st Cir. 2/23/04), 873 So. 2d 656, 662.

As discussed above, Ms. McNabb's income had decreased because of her decision to accept employment with a company owned by an acquaintance whose character she respected. While this decision ultimately did not prove to be advantageous to Ms. McNabb, the record demonstrates that since that time, she worked diligently toward securing employment in her field at a better rate of pay. At the time of trial, approximately four years after she left employment with Stewart Finance, Ms. McNabb was working for R & T Financial, earning $1,594.66 per month. While this pay was still less than what she had earned at Stewart Finance, the trial court obviously determined that Ms. McNabb was not underemployed in bad faith. Based on our review of the record and specifically the salaries that other employers offered Ms. McNabb, we do not find that the trial court manifestly erred in determining that Ms. McNabb was entitled to a reduction in her child support obligation or its apparent rejection of Mr. West's contentions that Ms. McNabb was voluntarily underemployed or acted in bad faith. Accordingly, we find no merit to this assignment of error.

CONCLUSION

For the above and foregoing reasons, the trial court's May 16, 2006 judgment modifying custody and child support is affirmed in its entirety. Costs of this appeal are assessed against appellant, Lee West, Jr.

AFFIRMED.