NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CU 1752

TARA ELIZABETH GAUDET MOSELEY

VERSUS

CHAD MICHAEL MOSELEY

On Appeal from the 16th Judicial District Court
Parish of St. Mary, Louisiana
Docket No. 109,678 Division "G"
Honorable Charles L. Porter, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Judgment rendered December 28, 2006

McClendon, J. concurs and assigns reasons.

PARRO, J.

In this child custody dispute, the father appeals the judgment of the trial court denying his rule to recognize and modify his visitation rights. We affirm.

FACTUAL AND PROCEDURAL HISTORY

This is a child custody dispute between Chad Michael Moseley (Chad) and Tara Elizabeth Gaudet Moseley (Tara), who were divorced by judgment signed April 30, 2003. By consent judgment signed October 8, 2002 (consent judgment), the parties agreed to joint custody of their only child, Jaiden Michael Moseley (Jaiden), with Tara named as the domiciliary parent. Chad was granted extensive visitation pursuant to the judgment.

In March or April 2003, Tara became aware that Chad was using illegal drugs when he failed to exercise his visitation with Jaiden. Consent judgments were signed on April 17, 2003, and August 4, 2003, setting forth certain restrictions on Chad's visitation due to his drug use. On October 17, 2003, Chad filed a petition for custody. Before a hearing could be held on the petition, Chad tested positive for cocaine in December 2003. As a result of this positive test, the trial court ordered Chad to submit to a drug screening within 36 hours prior to each visitation period and provide the results of the drug screen to Tara's attorney.

The trial on Chad's petition for custody was held on March 3, 2004. The trial court filed reasons for judgment into the record on May 10, 2004, finding that Chad's visitation should be restricted until Chad had met certain conditions. The trial court signed a judgment in accordance with those reasons on June 23, 2004 (the June judgment). Instead of the extensive visitation Chad had enjoyed under the consent judgment, the June judgment only allowed Chad visitation with Jaiden two days a week for a few hours, with the visitation to be supervised by Tara or by Jaiden's grandparents. The judgment further ordered as follows:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that CHAD MICHAEL MOSELEY undertake periodic monthly drug hair tests to determine whether he is using or had used any controlled dangerous substance and any positive test result for the presence of controlled dangerous substance will result in a suspension of visitation which will not be reinstated unless and until CHAD MICHAEL MOSELEY receives a

recommendation or unless his therapist or counselor would submit a request to the Court indicating that he has abstained from the use of controlled dangerous substance for a period of at least ninety (90) days before reinstatement of visitation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that CHAD MICHAEL MOSELEY is required to continue drug and substance abuse counseling at least two times a month and show proof of attendance.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that CHAD MICHAEL MOSELEY shall attend parenting courses or classes.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that after twelve months of negative drug hair tests, CHAD MICHAEL MOSELEY shall have visitation unsupervised in accordance with the consent decree entered by the parties dated October 8, 2002 and filed in the record of this proceeding.

Chad appealed the June judgment to this court, and on February 11, 2005, this court affirmed the judgment. **Moseley v. Moseley**, 2004 CU 2479 (La. App. 1st Cir. 2/11/05) (unpublished opinion).

On March 3, 2005, Chad filed a rule to show cause, contending that he had completed the requirements of the June judgment and seeking to have his visitation rights as set forth in the consent judgment recognized and enforced. Chad further requested certain modifications to the visitation schedule. Prior to the hearing on this rule, Tara filed a rule for contempt, contending that Chad had failed to comply with the requirements of the June judgment because he had failed to submit to monthly drug tests or attend substance abuse counseling as required by the judgment. Tara also contended that Chad was delinquent in his child support obligation, as well as in his obligation to reimburse her for Jaiden's medical expenses.

After a hearing on February 22, 2006, the trial court denied Chad's rule and refused to reinstate his visitation rights in accordance with the consent judgment, finding that Chad had failed to comply with the requirements of the June judgment. The trial court ordered that Chad would continue to exercise supervised visitation in accordance with the terms of the June judgment. The trial court further ordered Chad to pay Tara the sum of $808.76 as reimbursement for Jaiden's medical expenses. This appeal by Chad followed.

DISCUSSION

On appeal, Chad has not challenged the court's award of medical expenses. Instead, he has focused solely on the issue of whether he was in "substantial compliance" with the court's orders regarding drug testing. Chad contends that he submitted the results of approximately 14 drug tests and that he failed only one of the tests.

The record reflects that Chad submitted the results of the following relevant hair drug screens:

Collection Date:[1]	**Result:**
1) June 14, 2004	Negative
2) July 19, 2004	Negative
3) August 24, 2004[2]	Negative
4) September 24, 2004	Negative
5) December 10, 2004	Negative
6) January 31, 2005	Negative
7) February 25, 2005	Negative
8) May 27, 2005	Negative
9) June 27, 2005	Negative
10) July 29, 2005	Negative

Clearly, Chad submitted only a total of ten relevant tests. The judgment required twelve negative tests; therefore, Chad did not complete the requirements of the June judgment. In addition, the tests were not performed monthly, as required by the June judgment. There is a two-month gap between September and December 2004,[3] a two-

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[1] Chad also submitted the results from seven tests taken between December 18, 2003, and February 25, 2004. The judgment at issue in this matter was signed on June 23, 2004; therefore, any tests prior to that time were taken in response to earlier court orders and are not relevant to the issue of Chad's compliance with the requirements of the June judgment. The June 14, 2004 test has been included in the total, because it occurred after the trial court had issued its written reasons for judgment, although no judgment had been signed. Furthermore, the June judgment requires hair samples; therefore, any tests not performed on hair samples are irrelevant. Chad did not submit any drug test results for the period between February 25, 2004, and June 14, 2004.

[2] There are two documents purporting to show testing from August 2004. One shows a collection date of August 24, 2004, and one shows a collection date of August 26, 2004. It is not clear from the record if these results have been submitted as separate tests, but these tests may only be counted as one test, because they were conducted within the same month.

[3] There was testimony that Chad submitted a hair sample in November 2004; however, the sample apparently could not be tested due to a problem with the packaging.

month gap between February and May 2005, and no tests were performed after July 29, 2005.[4]

On appeal, Chad contends that the June judgment did not require that the drug screens be conducted in consecutive months. This argument is without merit. First, the clear language of the judgment requires monthly tests. In addition, Chad testified at the trial of the matter that he had not taken the tests every month as ordered because he did not have the money. He acknowledged at the hearing that he knew it was a court order and that he should have been more diligent in following the order.

Furthermore, the court's reasons clearly indicate that the tests were to be taken in consecutive months. Specifically, the reasons provide, in pertinent part:

> That Chad Mosley [sic] undertake periodic monthly drug hair tests to determine whether he is using or has used any controlled dangerous substance. Any positive tests for presence of controlled dangerous substance will result in a suspension of visitation and visitation will not be reinstated unless and until Chad Gaudet [sic] has received a recommendation or unless his therapist or counselor would submit a request to the Court indicating that he has abstained from the use of controlled dangerous substances for a period of at least ninety days before reinstatement of visitation. Chad Mosley [sic] is required to continue drug, substance abuse counseling at least two times a month and show proof [of] attendance. He shall have two day visitations, two days during the week during the evening after school until eight P.M. He shall attend parenting courses or classes and again provide a monthly hair sample for testing once a month for a period of twelve (12) months. After twelve months of negative testing Chad Mosley [sic] will have visitation unsupervised in accordance with the consent decree entered into by the parties on or about October 8, 2002.

Chad contends that he should at least be given some credit for the negative drug tests he did submit; however, it does not appear that any credit can be given, because Chad has not complied with the court's order to submit to monthly drug tests. The trial court established certain conditions that Chad was required to follow in order to have the extensive visitation rights he enjoyed pursuant to the consent judgment reinstated. The testimony and evidence introduced at the trial of this matter clearly

[4] The trial was held on February 22, 2006.

demonstrate that Chad did not comply with the conditions set forth in the June judgment, even though he was aware of the conditions.[5]

In addition, Chad asks this court to take judicial notice that hair drug tests are retroactive for a period of ninety days, contending that the retroactive effect of the tests demonstrates that Chad was drug-free for all periods, including those in which he did not submit to a drug test. Chad attempted to testify at trial that his understanding was that hair drug tests were retroactive, but Tara's attorney objected to the testimony, and the court sustained the objection. No other evidence was introduced, and Chad never requested that the trial court take judicial notice of the fact.

Courts can only take judicial notice of a fact that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence and a fact that is not subject to reasonable dispute. **Walker v. Halliburton Services, Inc.**, 93-722 (La. App. 3rd Cir. 3/1/95), 654 So.2d 365, 368, writ denied, 95-1507 (La. 9/22/95), 660 So.2d 481; see LSA-C.E. art. 201. Accordingly, the alleged retroactivity of hair drug tests is not a matter about which judicial notice may be taken.

DECREE

For the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are assessed to Chad Michael Moseley.

AFFIRMED.

[5] In addition to Chad's failure to comply with the requirements concerning drug testing, there is also no evidence in the record that Chad attended drug counseling twice a month as required.

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McCLENDON, J., concurring.

Although I agree with the result reached by the majority, I do not find the language of the judgment to be clear and unambiguous. However, based on the trial court's reasons for judgment and Mr. Moseley's own testimony, it is clear that Mr. Moseley understood the requirement of twelve consecutive months of drug testing on a monthly basis. However, to the extent that the trial court's denial of Mr. Moseley's request for unsupervised visitation is interpreted as requiring that a twelve month period start anew from said denial, I would disagree and would note that the only interest to be considered in this case is the best interest of the child.