NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 1992

IN RE: PATERNITY OF P.A.H.

Judgment Rendered: JUN 15 2007

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Appealed from the
Family Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 105,564
Honorable Toni Higginbotham, Judge Presiding

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

WHIPPLE, J.

This appeal concerns issues related to a child, P.A.H., born out of wedlock to the parties, who have never married. The child's mother, Joanna Harrell (Ms. Harrell), appeals from a judgment denying her request for contribution from the father, Scott Pittman (Mr. Pittman), for private school tuition for their child and terminating the court's previous child support order. For the following reasons, we vacate the trial court's judgment and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

P.A.H. was born on December 14, 1992. The protracted litigation resulting in the instant appeal began approximately three months after P.A.H.'s birth when, on March 18, 1993, Mr. Pittman filed a "Petition for Judgment of Paternity, For Recognition of Paternal Rights and for Revision of Birth Certificate," seeking joint custody, or in the alternative, a court-ordered visitation schedule and a court-ordered child support judgment. Prior to filing the petition, Mr. Pittman executed an "Acknowledgment of Paternity and Legitimation by Notarial Act" that was filed and recorded in East Baton Rouge Parish on January 25, 1993, and certified and filed in the Louisiana Putative Father Registry on February 1, 1993. The Acknowledgment was filed into this record as an exhibit to his original petition.

By judgment signed July 27, 1993, Ms. Harrell was awarded provisional custody, reserving Mr. Pittman's right to seek joint custody in the future. The judgment also awarded Mr. Pittman specific visitation and ordered him to pay child support.[1] Following this judgment, numerous rules

[1]Mr. Pittman was ordered to pay $100.00 per month from March 18 to July 3, 1993; $150.00 per month from July 3 to September 18, 1993; and, beginning October, 1993, $200.00 per month.

and motions regarding visitation were filed, including a petition for joint custody seeking revised visitation, based on allegations that Mr. Pittman was not being allowed visitation as provided by the court's order. By judgment rendered March 29, 1994, the parties were ordered to submit to mediation. A post-mediation stipulated judgment was rendered on February 27, 1995, awarding Ms. Harrell sole custody, with a revised visitation plan containing specific provisions for holidays, and awarding Mr. Pittman increased visitation.

Litigation resumed on December 15, 1999, when Mr. Pittman filed a Rule to Change Custody, alleging that a change in circumstances had occurred and that it was in the child's best interest that custody be changed to joint custody, with Mr. Pittman to be designated as domiciliary parent, subject to reasonable visitation rights in favor of Ms. Harrell. Mr. Pittman also sought an award of child support from Ms. Harrell. In his Supplemental and Amending Petition, Mr. Pittman alleged that Ms. Harrell had taken steps to undermine his relationship with their child by denying, obstructing, and refusing flexibility with respect to his visitation rights, failing to discuss with him major decisions affecting their child's life, and making unilateral decisions regarding counseling for the child and for Mr. Pittman, then refusing to participate without informing Mr. Pittman.

Ongoing litigation continued throughout the years 2000 to 2002, including a rule to increase child support filed by Ms. Harrell, alleging an increase in the parties' incomes as well as increasing medical expenses and insurance costs, and various rules filed by Mr. Pittman to establish and modify interim custody and visitation schedules. On August 28, 2001, the court rendered a judgment ordering Mr. Pittman to pay interim child support in the increased amount of $355.00 per month and to maintain a policy of

medical insurance for the child. The remaining matters were resolved by judgment dated January 18, 2002, ordering Mr. Pittman to pay child support in the amount of $276.42, $80.00 per month as part of the private school education of the child until she completes the fifth grade, and pay 50% of all uncovered medical expenses, in addition to maintaining the child on a medical insurance plan as previously ordered. The judgment also reiterated, with specific modifications, Mr. Pittman's interim visitation rights.

On April 11, 2002, a trial on Mr. Pittman's Rule to Change Custody began, but was recessed prior to completion. Additional evidence was introduced on April 26, 2002. The trial was completed on June 20, 2002, and the matter was taken under advisement. Written reasons for judgment were rendered on August 21, 2002, and a judgment in accordance therewith was signed on April 10, 2003. The judgment awarded the parties joint custody, ordered that the parties share physical custody of the child equally on a weekly basis, and designated Ms. Harrell as the domiciliary parent. The judgment also: (1) provided detailed and specific instructions for implementation of the custody and visitation plan, addressing ancillary issues such as communicating about the child, the child's general health, welfare, education, and extracurricular activities; and (2) admonished the parties to refrain from alienating the affections of the child for either parent, and ordered the parties to provide each other equal access to the child's educational and medical records and other information. This judgment also maintained the prior child support award and medical insurance obligations. With regard to the child's private school education, the court ordered that the child remain at St. Luke's Elementary School, where she had been attending, until she completed her fifth grade (final) year at the school. The court specifically ordered that after that time, "any decision regarding the

educational life of P.A.H. *shall be made by mutual agreement.*" (Emphasis added).

Approximately six months later, on February 6, 2003, Ms. Harrell filed a rule to modify custody, and for contempt and attorney's fees, alleging the following change in circumstances: (1) that the child's counselor had advised that the current custody equal-sharing plan was "not working" and was operating to the detriment of the minor child; (2) that Mr. Pittman had stated that he would no longer pay his 50% share of expenses for the child to see the counselor; and (3) that Mr. Pittman was allowing his present wife (the child's stepmother) to be involved in decision making regarding the child, and to be included in "mother/daughter" events and activities, to Ms. Harrell's detriment. She also alleged that Mr. Pittman had changed the child's doctor and dentist without consulting her, and that he had failed to communicate with her at all on various issues regarding the child's general health, welfare, education, and development.

In response, on September 8, 2003, Mr. Pittman filed a Rule to Decrease Child Support, based on the change in circumstance, i.e., the awarding of joint custody with equal physical sharing of the child. On October 21, 2003, Mr. Pittman filed a Rule to Change Domiciliary Parent Designation and to Modify the Schedule of Physical Custody, alleging that Ms. Harrell had been engaging in the use of illegal drugs while she was in the presence of the child, and that she had left the child with third parties on several occasions so she could "pursue late[-]night social engagements." By judgment rendered December 11, 2003, and signed on March 23, 2004, Ms. Harrell was ordered to submit to random drug testing at least twice per month, for a period of ninety days, to be followed by a review by the Court.

Shortly thereafter, on April 8, 2004, Mr. Pittman filed a "Rule to Establish School for the Minor Child and to Establish Random Drug Testing," alleging that P.A.H. would be completing the fifth grade at St. Luke's in May, and that the parties were unable to amicably resolve the choice of private school for the child, despite the trial court's prior order directing that the decision be made by "mutual agreement." Notably, Mr. Pittman expressly requested that the court "*choose a school proposed by one of the parties.*" (Emphasis added). He also alleged that contrary to the trial court's prior order, Ms. Harrell had not yet submitted to the court-ordered random drug testing, and that the court had failed to determine whether she had complied with the order.

On August 11, 2004, Ms. Harrell filed a "Rule for Modification in Child Support and other Ancillary Matters," in which she claimed that she had completed her drug-testing period and submitted the results (all negative) to the court. Thus, she requested that the court review and terminate the prior order. She also alleged that the parties had been unable to mutually agree on which private school the child should attend and sought a judicial determination of the amount of contribution owed by Mr. Pittman "towards the tuition at Parkview Baptist," where she had enrolled the child.

On December 28, 2004, the court rendered an interim order, expressly providing that its issuance was on a "temporary basis with the parties reserving any and all rights to relitigate the above referenced issues without the necessity of showing a change in circumstances." The interim order terminated Ms. Harrell's random drug testing, set the child support due by Mr. Harrell at $310.00 per month, on a temporary basis, and ordered the parties to contribute 50% of the expenses associated with mutually agreed-upon extracurricular activities for the child. (The custody arrangement was

not modified; thus, the parties continued to share physical custody of P.A.H. on an equal, week-to-week basis.)

On October 31, 2005, trial was held on Mr. Pittman's September 8, 2003 rule to decrease child support, and Ms. Harrell's rule to fix the pro rata portion of private school tuition expenses due by Mr. Pittman. Evidence was submitted and the matter was taken under advisement. Written reasons were issued on March 30, 2006, and a judgment was signed on May 16, 2006. The judgment terminated the court's prior award of $310.00 per month due by Mr. Pittman to Ms. Harrell, implicitly denying Ms. Harrell's request for contribution from Mr. Pittman for tuition for the child to attend private school. The instant appeal by Ms. Harrell followed.

Private School Tuition

Louisiana Revised Statutes 9:315.6 provides for the inclusion of expenses for private school attendance as an addition to the basic child support obligation as follows, in pertinent part:

> By agreement of the parties or order of the court, the following expenses incurred on behalf of the child ***may be added*** to the basic child support obligation:
>
> (1) Expenses of tuition, registration, books, and supply fees required for attending a special or private elementary or secondary school ***to meet the needs of the child.***[2]

(Emphasis added.)

In denying Ms. Harrell's request to include in Mr. Pittman's child support obligation a portion of the expenses for P.A.H.'s attendance at Parkview Baptist School, the trial court made the following findings of fact:

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[2]Prior to the 2001 amendment to the statute by Acts 2001, No. 1082, § 1, a party seeking to include private school expenses in the basic child support obligation had the burden of showing that private school attendance was necessary to meet the "particular educational needs" of the child. The amendment, applicable to actions filed after August 15, 2001, eliminated this requirement, and under the current version of the statute, the needs of the child met by attendance at a private school is not limited to "particular educational needs," but may include such needs as the need for stability or continuity in the child's educational program. See LSA-R.S. 9:315.6, Comment-2001.

> There was no evidence presented at trial that the parties ever agreed to send the child to Parkview or that private school was necessary to meet the "needs of the child." Joanna Harrell testified that the parties discussed school options but that they were unable to agree on any school. Scott Pittman testified that he told Ms. Harrell he could not afford to pay for private school but that his parents were willing to pay for St. George or to pay part of the U High tuition. However, his parents were not willing to help pay for any other private school. Nevertheless, *Joanna Harrell unilaterally decided to send the child to Parkview.*
>
> Although [P.A.H.] has been attending Parkview (because of Joanna Harrell's decision) and LSA-9:315.6 provides that private school expenses may be added to the child support obligation to meet the needs of the child, *Joanna Harrell should not be able to single handedly create the "need" and thereafter, seek to have the Court make Scott Pittman pay for it.* ... Therefore, this Court declines to include private school tuition in the calculation of Scott Pittman's child support obligation.

(Emphasis added.)

A trial court's determination of whether to include private school tuition in a basic child support obligation will not be disturbed absent an abuse of discretion. D'Aquilla v. D'Aquilla, 2003-2212, p. 9 (La. App. 1st Cir. 4/2/04), 879 So. 2d 145, 150, writ denied, 2004-1083 (La. 6/25/04), 876 So. 2d 838; Walden v. Walden, 2000-2911, p. 12 (La. App. 1st Cir. 8/14/02), 835 So. 2d 513, 523, *citing,* Valure v. Valure, 96-1684, p. 3, (La. App. 1st Cir. 6/20/97), 696 So. 2d 685, 687. With regard to the factual findings made by the trial court in determining an award of child support, appellate review of such factual findings is subject to the manifest error standard of review. See Romanowski v. Romanowski, 2003-0124, p. 8 (La. App. 1st Cir. 2/23/04), 873 So. 2d 656, 662.

Appellant, Ms. Harrell, assigns error to the trial court's stated finding that there was no evidence to show that either party agreed that "private school was necessary to meet the 'needs of the child.'" In a separate but related assignment of error, she asserts the trial court erred as a matter of law in failing to consider the child's having been enrolled in private school for

many years as meeting the "particular educational needs" of the child pursuant to LSA-R.S. 9:315.6. On review, we agree.

Contrary to the trial court's statements (and related finding) that there was no evidence that the parties mutually agreed to send the child to private school, we find that the record, in its entirety, amply demonstrates and firmly establishes that the parties mutually agreed that the child should attend a private school, and the trial court erred in failing to find that the tuition was necessary to meet the "needs of the child." While we do agree with the trial court that there was no evidence of a mutual agreement that the child attend *Parkview Baptist School*, we conclude that the following evidence in the record demonstrates that the trial court erred with respect to its finding regarding the parties' mutual intent and preference to send the child to a private school.

Initially, we note that in Mr. Pittman's own "Rule to Establish School for the Minor Child," he alleged that the parties had been unable to amicably agree "on *a* school" to send the minor child, and stated in paragraph 5 of that pleading: "Mover desires that this Honorable Court choose *a school proposed by one of the parties.*" (Emphasis added.) Significantly, there is no evidence in this entire record that *any public* school was ever discussed, considered, or proposed by either party. To the contrary, all of the evidence presented pertained to discussions and consideration of certain specific private schools, the *choice among which* the parties were unable to mutually agree.

First, it is undisputed by the parties that the child was enrolled in St. Luke's Episcopal Elementary School, without objection from Mr. Pittman, for at least six years, until she completed the fifth grade. The issue of the extent of Mr. Pittman's obligation to contribute to those expenses was again

raised by Ms. Harrell in pretrial inserts filed with the court on May 24, 2001, prior to the hearing on her rule to modify child support. Therein, she contended that one of the issues to be determined by the court is "Child Support, including tuition." She further set forth therein that "the minor child attends private school which cost was not figured into any calculation." By judgment dated January 18, 2002,[3] the court modified the child support of Mr. Pittman according to the guidelines and *further ordered that "Mr. Pittman will pay $80.00 per month toward the education of the minor child until she finishes the 5th grade."*[4] (Emphasis added.) In ordering this contribution, the trial court did not make any factual findings concerning the needs of the child, further supporting the conclusion that the decision to send the child to private school was made by agreement. Moreover, contrary to the assertions now made by Mr. Pittman, there is no evidence in the record that he objected to this ruling.

Additionally, the judgment rendered on August 21, 2002, and signed on April 10, 2003, specifically provides:

> Based on the significant amount of evidence introduced at trial that [P.A.H.] needed to maintain the school routine she has had for the last several years, (*and since both parties testified that they wanted [P.A.H.] to remain in St. Luke's),[P.A.H.]* shall continue to attend St. Luke's school, and she shall not be removed from St. Luke's except by mutual consent of the parties. When [P.A.H.] finishes school at St. Luke's, any decision regarding the educational life of [P.A.H.] shall be made by mutual consent.

(Emphasis added.)

Finally, the testimony of both parties *at the trial underlying the current issue regarding continued private school tuition,* although differing

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[3]Although the judgment itself reads that it was signed on January 18, 2001, the stamped filing date and the date of the hearing confirm that the actual date of the judgment should read 2002.

[4]The minute entry in the record for this hearing provides "child support was fixed at $355.00 per month, included in the amount is $80.00 representing his share of school expenses."

slightly in minor details, regarding the choices of schools they were considering and upon which they could not agree clearly shows that *all of these schools were private schools:* Parkview Baptist and Episcopal proposed by Ms. Harrell; St. George and U High proposed by Mr. Pittman. And, as mentioned above in Mr. Pittman's own pleading leading to the trial and judgment at issue, he specifically asked the court to choose "*a school proposed by one of the parties.*" Thus, Mr. Pittman's argument on appeal that the factual finding that the parties mutually agreed to send the child to private school was applicable only to the prior proceedings and not to this one must fail on the basis of his own pleadings.

Given the abundance of clear evidence that the child's first five to six years of enrollment at a private school was based, at least in part, on the agreement of the parties, we find the trial court erred in finding to the contrary.

Pursuant to LSA-R.S. 9:315.6, once the parties mutually agree that private school meets the needs of the child, expenses associated therewith may be awarded. Moreover, as set forth in the jurisprudence, significant consideration shall be given to rendering such an award when the evidence reveals a history of the child's attendance at private schools. The continuation of that stability is an indicative factor that expenses for private school expenses should be awarded. In Valure, this court considered the issue in factual circumstances similar to those presented herein: there was an established history of the child's attendance in private school *that had occurred at some point with the father's consent.* On review, this court found no abuse of the trial court's discretion in its conclusion that this history warranted a finding that the child's best interest required continuation of private school and that the father's child support obligation

should include an amount therefor. Valure, 96-1684 at pp. 3-4, 696 So. 2d at 687-688. Citing Campbell v. Campbell, 95-1711, p. 11 (La. App. 1st Cir. 10/10/96), 682 So. 2d 312, 320, this court noted, "A child's successful continuation of his or her education in a proven academic environment is generally found to be in his or her best interest." Valure, 96-1684 at p.4, 696 So. 2d at 688. See also Buchert v. Buchert, 93-1819 (La. App. 1st Cir. 8/26/94), 642 So. 2d 300, 307 ("Contrary to the trial judge's statements at trial, a particular educational need of a child to remain in private school does include consideration of the child's history of attending a private school and whether a continuation of their education in that setting is in the child's best interest"); see also Kelly v. Kelly, 99-2478, p. 12 (La. App. 1st Cir. 12/22/00), 775 So. 2d 1237, 1245 writ denied, 2001-0234 (La. 3/23/01), 787 So. 2d 1001, overruled on other grounds, Salles v. Salles, 2004-1449, p. 12 (La. App. 1st Cir. 12/2/05), 928 So. 2d 1, 8. Therefore, we also find merit to Ms. Harrell's claim that the trial court manifestly erred in failing to consider P.A.H.'s history of attendance at private school and the demonstrated stability of such attendance as necessary to meet her needs. Thus, the trial court erred in refusing to order a contribution from Mr. Pittman therefor.

Instead, the trial court's errors prevented it from determining the pertinent and remaining issue before it, as raised by Mr. Pittman in his pleading: i.e., ***which*** of the private schools proposed by the parties best meets the needs of the child. There is some evidence in the record related to this issue, including evidence that Mr. Pittman's parents generously offered to pay 100% tuition for the child's attendance at St. George (the school that her two step-siblings with whom she lived on alternating weeks would be attending) and that they were also willing to contribute a portion to U High.

The record also reveals that these offers were rejected by Ms. Harrell.[5] She also admitted that she unilaterally made the decision of which particular private school the child should attend, notwithstanding the court's prior order that the decision be reached by mutual agreement (or presumably by judicial determination otherwise).

However, given the court's erroneous rulings, the issue was not addressed and therefore, there is no factual determination for us to review. For these reasons, we must vacate the trial court's judgment on this issue and remand to the trial court for a hearing, and determination as to *which* of the private schools proposed by the parties best meets the needs of the child. Once this determination is made, pursuant to the appropriate application of LSA-R.S. 9:315.6, the trial court shall re-calculate Mr. Pittman's child support obligation to include his proportionate share toward the educational expenses associated with the particular private school designated by the court.

This assignment has merit.

Termination of Child Support

Ms. Harrell also assigns error to the trial court's termination of Mr. Pittman's child support obligation, alleging the trial court erred in deviating from the guidelines and its prior award "without citing a scintilla of rationale" therefor. Initially, we note that our conclusion that the trial court erred in failing to order private school tuition expenses shall be included as

[5]Ms. Harrell testified that she felt that U High was too inconvenient from a location standpoint for both herself and Mr. Pittman. With regard to St. George, her concern was that the school provided classes only through eighth grade, and P.A.H. would then have to be moved to another school. Mr. Pittman testified that Ms. Harrell would not even consider St. George and that, consistent with Ms. Harrell's testimony, she indicated to him that U High was too far out of the way. We note that while he testified that the only options available to him were St. George and U High in that his parents were willing to pay for some or all of the tuition at those schools, Mr. Pittman's current wife testified that P.A.H. was not accepted at either St. George or U High due to a lack of openings.

part of Mr. Pittman's child support obligation (once the remand hearing is had and the choice of private school is judicially determined) serves to automatically reverse the judgment insofar as it terminated Mr. Pittman's child support obligation. Thus, technically, this assignment of error is moot. However, because we may otherwise have been inclined to reverse the termination of support, we note the following factors we conclude the trial court must consider when rendering a final child support award after the remand on the private school issue.

Generally, an award of child support is entitled to great weight and also will not be disturbed on appeal absent an abuse of discretion. Lambert v. Lambert, 2006-2399, p. 1 (La. App. 1st Cir. 3/23/07), ___So.2d___. There is a rebuttable presumption that the amounts set forth in the child support guidelines (LSA-R.S. 9:315.19) are proper. LSA-R.S. 9:315.1(A); Templeton v. Templeton, 2000-0536, p. 5 (La. App. 1st Cir. 12/22/00), 774 So. 2d 1257, 1260. However, the court may deviate from the guidelines "if their application would not be in the best interest of the child or would be inequitable to the parties." LSA-R.S. 9:315.1(B). If the trial court deviates, it must give specific oral or written reasons for the deviation, including a finding as to the amount of support that would have been required under a mechanical application of the guidelines and the particular facts and circumstances that warranted a deviation from the guidelines. Barton v. Barton, 2005-1190, p. 5 (La. App. 1st Cir. 6/9/06), 938 So. 2d 779, 781.

The record contains each party's income and expense affidavits as well as other financial information necessary for the application of the statutory guidelines. The record further reveals that the trial court computed a child support obligation owed by Mr. Pittman pursuant to the statutorily mandated calculations; a copy of the calculations is included in the written

reasons for judgment and computes Mr. Pittman's child support obligation at $52.58 per month. However, the trial court obviously deviated from the guidelines in terminating his obligation. Contrary to Ms. Harrell's assertions, we find the trial court did indeed cite a rationale for deviating from the guidelines. However, we find the rationale cited is legally insufficient to warrant such deviation from the guidelines, and, in particular, to the extent of completely terminating Mr. Pitman's obligation for the support of P.A.H.

The trial court cited LSA-R.S. 9:315.1(C)(2) as authority to consider a party's obligation to support dependents who are not the subject of the action before the court and who are in that party's household, and then stated its rationale for deviating from the guidelines, as follows:

> In this case, Scott Pittman has two other children, besides [P.A.H.], in his household[,] which he must support.
>
> In addition, Scott Pittman has been paying interim support in an amount more than is called for by the guidelines for shared custody.

The evidence reveals that Mr. Pittman and his current wife have one child born out of their marriage who lives with them. In addition to P.A.H., Mr. Pittman also has shared custody of another child born after P.A.H., but prior to his current marriage. The evidence reveals that P.A.H. and the other child live in his household on an alternating weekly schedule. Our review of the jurisprudence indicates no support for a deviation from the guidelines based on this factor alone. Recently, in Lambert v. Lambert, we confirmed that LSA-R.S. 9:315.1(C)(2) *does not allow an automatic deviation* from the child support guidelines when, as here, the deviation is based solely on the obligation to support dependents who are not the subject of the proceedings and who are in that party's household. Instead, all that is required is that the

trial court consider such obligation. Lambert, 2006-2399, at p. 4, ___ So. 2d ____. Although there is evidence in the record that Mr. Pittman has one child with his current wife and shared physical custody of one other child besides P.A.H., the record contains only limited information regarding some expenses associated with shared custody of these other children, and insufficient information regarding the amount of support, if any, that Mr. Pittman receives from the other child's mother. See also D'Aquilla, 2003-2212 at pp. 7-8, 879 So. 2d at 149-150. The record also reveals that Mr. Pittman's current wife contributes to the income and expenses of the Pittman household on an equal basis to Mr. Pittman. Pursuant to LSA- R.S. 9:315(C)(5)(c), the court should also consider as income the benefit a party derives from expense-sharing and other sources. Notably, there is no indication that this fact was considered at all by the trial court.

Finally, although it appears from the calculations submitted into evidence in this case that Mr. Pittman may have been paying more than his share, the evidence fails to reveal that any portion of the obligation represented contributions for private school attendance at St. Luke's, which we have found as a matter of fact was mutually agreed to (without objection) by Mr. Pittman. Thus, any "excess" referred to by the trial court as having been paid by Mr. Pittman in the past could reasonably be attributable to the contribution for private school tuition that he owed by law during that time. In any event, the trial court cited no authority, nor do we find any, for terminating a future child support obligation based on unsupported or unexplained overpayments in the past.

CONCLUSION

For all of the foregoing reasons, the judgment of the trial court is vacated and the matter remanded for a hearing and the introduction of

evidence on the choice of private school issue and for a re-calculation of Mr. Pittman's child support obligation, which calculation shall include a determination of the parties' proportionate share for educational expenses. On remand the court shall also take into consideration Mrs. Pittman's income contribution to the Pittman household expenses, as well as the specific income/expense obligations regarding Mr. Pittman's other dependents. Costs are assessed equally to Ms. Harrell and Mr. Pittman.

JUDGMENT VACATED AND MATTER REMANDED.