

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 0964

TORRIE RENÉ RHODES BERGERON

VERSUS

NOAH LEWIS BERGERON, JR.

Judgment Rendered: May 6, 2011

**Appealed from the
16th Judicial District Court
In and for the Parish of St. Mary
State of Louisiana
Case No. 113,682**

The Honorable James R. McClelland, Judge Presiding

**C. E. Bourg, II
Morgan City, Louisiana**

**Counsel for Defendant/Appellant
Noah Lewis Bergeron, Jr.**

**Thomas L. Mahfouz
Morgan City, Louisiana**

**Counsel for Plaintiff/Appellee
Torrie René Eaton**

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

GAIDRY, J.

The father of a minor appeals a judgment on his motion to reduce child support. For the following reasons, we reverse the judgment and remand this matter to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

The appellant, Noah Lewis Bergeron, Jr., and the appellee, Torrie René Eaton,¹ were married on September 19, 1998. Their minor son, Austin Bergeron, was born on January 27, 1999. The parties separated in January 2005. On March 7, 2005, Ms. Eaton filed a petition for divorce and child support.

A consent judgment was signed on April 7, 2005, awarding the parties joint custody of their minor son, designating them as co-domiciliary parents with equal physical custody (shared custody) and providing that Mr. Bergeron pay \$250.00 per month in child support to Ms. Eaton. The parties were divorced by judgment signed on November 9, 2005.

Mr. Bergeron filed a motion to reduce child support on December 10, 2007, based upon his alleged inability to work due to disability from a prior back injury and related surgery. After the motion was initially set for hearing, the hearing was continued indefinitely pending the determination of Mr. Bergeron's social security disability claim.

On March 25, 2009, Mr. Bergeron filed a motion to reschedule his motion to reduce child support, alleging that he had been declared disabled for purposes of social security disability benefits from December 2007 through that time. He also sought a ruling holding Ms. Eaton in contempt for certain alleged violations of the shared custody plan.

¹ Ms. Eaton, the former Ms. Bergeron, remarried following her divorce. We will therefore use Ms. Eaton's current marital surname, rather than her former marital surname used in her petition.

On May 15, 2009, Ms. Eaton filed a motion for a change in custody and an increase in child support, requesting that the entire amount of \$490.00 in social security family benefits for the minor child be paid to her and for additional child support. She subsequently sought a ruling holding Mr. Bergeron in contempt for failure to pay child support, based upon a prior motion filed on October 19, 2007.

Mr. Bergeron's motion to reduce child support and Ms. Eaton's motion to change custody and for an increase in child support were eventually heard on August 19, 2009. At the conclusion of the hearing, the trial court took the matter under advisement. On September 2, 2009, the trial court issued its written reasons for judgment, denying Ms. Eaton's motion seeking a change of custody, denying the parties' respective requests to hold each other in contempt, fixing the child support owed by Mr. Bergeron at \$256.00, representing the sum of \$255.54 rounded off to the nearest dollar, and allocating the excess amount of the monthly social security family benefit received by the minor child equally between the parties.

On September 16, 2009, prior to the signing of the judgment, Mr. Bergeron filed a "Motion to Amend Reasons for Judgment," requesting that the trial court make a finding on the issue of Ms. Eaton's voluntary unemployment. The motion was denied without hearing, on the grounds that Mr. Bergeron's counsel did not submit a pretrial brief or memorandum as required by the uniform Louisiana District Court Rules.²

The trial court's judgment on the parties' motions was signed on October 9, 2009. On October 12, 2009, Mr. Bergeron filed a motion for new

² The record does not reflect that Ms. Eaton's counsel filed a pretrial memorandum, either. However, the issue of Ms. Eaton's voluntary unemployment was clearly raised and discussed during her testimony at trial.

trial. His motion was heard on November 24, 2009, and was denied by judgment signed on December 1, 2009.

Mr. Bergeron now appeals.

ASSIGNMENTS OF ERROR

We summarize Mr. Bergeron's assignments of error as follows:

(1) The trial court erred in failing to determine Mr. Bergeron's child support obligation during the years 2007 and 2008, based upon his being declared disabled for purposes of social security disability benefits as of June 2007.

(2) The trial court erred in failing to properly determine child support by failing to find that Ms. Eaton was voluntarily unemployed and in failing to consider the benefits received by Ms. Eaton from expense-sharing in her remarriage.

(3) The trial court erred in failing to require Ms. Eaton to file a verified statement of income and expenses as required by law prior to rendering judgment.

(4) The trial court erred in denying Mr. Bergeron's motion for new trial, based upon its failure to consider Ms. Eaton's voluntary unemployment, expense-sharing in her remarriage, and extraordinary counseling expenses incurred by Mr. Bergeron for the minor child.

Credit for Social Security Benefits

We will first examine Mr. Bergeron's contention that the trial court miscalculated the amount of his monthly child support obligation based upon his social security disability benefits as his only income. Mr. Bergeron receives \$981.00 per month in social security disability benefits. Those benefits are included in his "gross income" for purposes of determining his child support obligation. *See* La. R.S. 9:315(C)(3)(a).

If it is assumed that Ms. Eaton was unemployable and had no income or potential income, as the trial court evidently found, then the parties' basic child support obligation as of the hearing date would have amounted to \$200.72, as reflected on the "Shared Obligation Worksheet" (Worksheet B) used by the trial court.³ See La. R.S. 9:315.19. Mr. Bergeron's monthly income of \$981.00 thus represented 100% of the amount of the parties' combined adjusted monthly gross income, so his "proportionate share" of the combined adjusted monthly gross income was 100%. See La. R.S. 9:315.2(C). Mr. Bergeron's theoretical child support obligation would amount to \$301.08, as shown on Worksheet B, representing one and one-half times the amount of the combined adjusted gross income multiplied by his "proportionate share" of 100%. See La. R.S. 9:315.9(A)(2). As the parties had actual physical custody of Austin for equal percentages of time, Mr. Bergeron's basic child support obligation would thus amount to \$150.54, or 50% of his theoretical child support obligation. See La. R.S. 9:315.9(A)(3). Adding \$105.00 as the monthly cost of health insurance for Austin to Mr. Bergeron's basic child support obligation would increase his potential child support obligation to \$255.54, as shown on Worksheet B, since his "proportionate share" of the combined adjusted gross income was 100%. See La. R.S. 9:315.9(A)(4).

On its face, the "Shared Obligation Worksheet" or Worksheet B of La. R.S. 9:315.20, used by the trial court, failed to give Mr. Bergeron any credit for the social security family benefit received by Austin. However, it

³ This figure represents an extrapolation for \$981.00, based upon the schedule's figure of \$197.00 for one child, for a combined adjusted gross monthly income of \$950.00, and the figure of \$203.00, for one child, with a combined adjusted gross monthly income of \$1,000.00. See La. R.S. 9:315.19. Dividing the \$6.00 difference between \$197.00 and \$203.00 by the \$50.00 difference between \$950.00 and \$1,000.00 yields 12¢ per each additional dollar over \$197.00, resulting in \$200.72 as the basic child support obligation for \$981.00.

is apparent from the trial court's written reasons and its judgment that it in fact credited Mr. Bergeron for such income.

Austin receives \$490.00 per month by reason of his father's disability. Income of the child that can be used to reduce the basic needs of the child may be considered as a deduction from the basic child support obligation. La. R.S. 9:315.7(A). The social security family benefit received by Austin is considered as "income of the child" under La. R.S. 9:315.7(D). However, it is not deducted from the basic child support obligation of both parents, but rather must be credited against the potential child support obligation of "the parent upon whose earning record it is based." *Id. See also Genusa v. Genusa*, 09-0917, p. 7 (La. App. 1st Cir. 12/23/09), 30 So.3d 775, 779-80. Deducting the \$490.00 monthly social security family benefit received by Austin from \$255.54 yields a surplus payment of \$234.46, as stated by the trial court in its written reasons for judgment. *See* La. R.S. 9:315.7(D) and 9:315.20, Obligation Worksheet B.

Under the foregoing scenario, the monthly amount received by Austin exceeds and completely offsets Mr. Bergeron's child support obligation, as the trial court found. For the period of January 1, 2008, through the hearing date, Mr. Bergeron owed no net child support for those months in which Ms. Eaton received payment for Austin's social security family benefits. Again, if it is assumed that Ms. Eaton had no income or gross income, and that the total combined adjusted gross monthly income of the parties consisted of only Mr. Bergeron's social security disability benefit of \$981.00, then the trial court properly concluded that Mr. Bergeron was entitled to be paid one-half of that amount of the social security family benefit exceeding his child support obligation, with Ms. Eaton entitled to retain the other half.

In summary, if the parties' combined adjusted monthly gross income was in fact \$981.00, the trial court's calculations under La. R.S. 9:315.7(D) and 9:315.20, Obligation Worksheet B, were correct. The foregoing analysis does not conclude our determination of the issue of child support, however.

Ms. Eaton's Voluntary Unemployment

Mr. Bergeron contends that Ms. Eaton was voluntarily unemployed during the time period at issue, and that the trial court erred in failing to take her income earning potential into account in calculating his child support obligation. Based upon the record before us, we agree. The issue of Ms. Eaton's voluntary unemployment was clearly before the trial court and was relevant to the determination of the parties' mutual child support obligation.

For purposes of determining a party's child support obligation, "income" is defined as including the "[p]otential income of a party, if the party is voluntarily unemployed or underemployed." La. R.S. 9:315(C)(5)(b). A party shall not be deemed voluntarily unemployed or underemployed if he or she is absolutely unemployable or incapable of being employed, or if the unemployment or underemployment results through no fault or neglect of the party. *Id.* If a party is voluntarily unemployed or underemployed, his or her gross income shall be determined as set forth in La. R.S. 9:315.11. La. R.S. 9:315.2(B). At the time of the hearing at issue, La. R.S. 9:315.11(A) provided:

If a party is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of his or her income earning potential, unless the party is physically or mentally incapacitated, or is caring for a *child of the parties* under the age of five years. In determining the party's income earning potential, the court may consider the most recently published Louisiana Department of Labor Wage Survey.

(Emphasis added.)⁴

In her testimony at the hearing, Ms. Eaton admitted that she was voluntarily unemployed and that she had no health problem that prevented her from working, but explained that she chose instead to raise her children on a full-time basis. Ms. Eaton admitted that she was employed while she attended college after the divorce. Her youngest child, from her current marriage, was two years old at the time of the hearing. Austin was then ten years old. Her youngest child is not a “child of the *parties*” in this proceeding for purposes of La. R.S. 9:315.11, but a child of only one party. *See Germany v. Germany*, 599 So.2d 350, 354 (La. App. 1st Cir. 1992). Since Ms. Eaton admittedly has some income earning potential, the trial court committed legal error in failing to attribute some income to her or in deviating from the child support guidelines without providing specific reasons for doing so. *Id.*

Accordingly, the total child support obligation owed by both parties must be recalculated. *See, e.g., Todtenbier v. Todtenbier*, 10-0304, pp. 7-8 (La. App. 1st Cir. 10/27/10), 48 So.3d 413, 418. Because the record does not contain evidence of Ms. Eaton’s income earning potential, it is necessary for us to remand this matter to the trial court for an evidentiary hearing on that issue and for recalculation of the total child support obligation of Mr. Bergeron, in addition to possible re-allocation of the excess amount of the monthly social security family benefit received by the minor child over the amount of Mr. Bergeron’s child support obligation. In addition to the wage survey mentioned in La. R.S. 9:315.11(A), La. R.S. 9:315.1.1(B), enacted by

⁴ Subsection A of the statute has since been amended by Acts 2010, No. 238, § 1, effective August 15, 2010, to delete “his or her” before “income earning potential” and to substitute “Louisiana Occupational Employment Wage Survey” for “Louisiana Workforce Commission Wage Survey,” which had replaced “Louisiana Department of Labor Wage Survey” by Acts 2008, No. 743, § 7 and the statutory revision authority of the Louisiana State Law Institute.

Acts 2009, No. 378, § 1, effective August 15, 2009, also provides that “[w]hen the income of an obligor cannot be sufficiently established, evidence of wage and earnings surveys distributed by government agencies for the purpose of attributing income to the obligor is admissible.” This provision provides a useful evidentiary tool “particularly when the obligor is a wage earner who is voluntarily unemployed or underemployed.” La. R.S. 9:315.1.1, Comments – 2010, (g).

Accordingly, we reverse the trial court’s judgment and remand this matter for an evidentiary hearing, as explained above.

Ms. Eaton’s Failure to Provide a Verified Income Statement

Mr. Bergeron contends that the trial court erred in undertaking the determination of the parties’ child support obligations without the benefit of a verified statement of income and expenses from Ms. Eaton. We agree. Louisiana Revised Statutes 9:315.2(A) provides that “[e]ach party *shall* provide to the court a verified income statement showing gross income and adjusted gross income, together with documentation of current and past earnings.” (Emphasis added.) It further provides that the “[s]pouses of the parties shall also provide any relevant information with regard to the source of payments of household expenses upon request of the court or the opposing party[.]”

No evidence of Ms. Eaton’s income earning potential was introduced by Mr. Bergeron at the hearing.⁵ However, his failure to do so could arguably be excused by Ms. Eaton’s unexplained failure to comply with the mandatory provisions of La. R.S. 9:315.2(A), the trial court’s local rules, and the hearing officer’s order of December 12, 2007. Accordingly, we

⁵ The original “Obligation Worksheet B,” forming part of the joint custody implementation plan and the consent judgment of April 7, 2005, listed Ms. Eaton’s gross monthly income as \$537.00.

direct the trial court on remand to order Ms. Eaton to provide a verified income statement, or its equivalent in the form of the "hearing officer conference affidavit" required by its local rules, setting forth the information that should have been provided as of the hearing date of August 19, 2009. Mr. Bergeron shall be permitted to request information relating to the sources of payments of household expense sharing prior to the hearing and to re-submit evidence of any extraordinary counseling expenses incurred for the benefit of the minor child.

DECREE

The trial court's judgment of October 9, 2009, is reversed, and this matter is remanded to the trial court for an evidentiary hearing on the issue of Torrie René Eaton's voluntary unemployment from December 10, 2007, through August 19, 2009, and for recalculation of the total child support obligation of Mr. Bergeron, in addition to possible re-allocation of the excess amount of the monthly social security family benefit received by the minor child over the amount of Mr. Bergeron's child support obligation, consistent with the foregoing opinion. All costs of this appeal are assessed to the appellee, Torrie René Eaton.

REVERSED AND REMANDED WITH INSTRUCTIONS.