Judgment rendered April 3, 2019.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 52,634-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

LESLIE N. BECKMAN AND BRUCE M. BECKMAN	Plaintiffs-Appellees

versus

TARA RHEANNON COON DEVILLIER AND ERIC DAVID DEVILLIER	Defendants-Appellants

* * * * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 589884

Honorable Roy L. Brun, Judge

* * * * *

KAMMER & HUCKABAY, LTD (A.P.L.C.) By: Charles H. Kammer, III	Counsel for Appellant, Tara Rheannon Coon Devillier
ERIC DAVID DEVILLIER	In Proper Person
JOSEPH WILLIAM HENDRIX	Counsel for Appellees, Leslie N. and Bruce M. Beckman

* * * * *

Before MOORE, STONE, and BLEICH (*Pro Tempore*), JJ.

BLEICH, J. (*Pro Tempore*), concurs in part and dissents in part with written reasons.

STONE, J.

In this custody dispute, appellant, Tara Rheannon Coon Devillier, seeks the reversal of the trial court judgment that granted sole custody of her two children to the maternal grandparents, appellees, Leslie N. Beckman and Bruce M. Beckman, and found her in contempt of court for failure to pay child support and for violating a court order which prohibited the presence of members of the opposite sex during her exercise of visitation.

For the following reasons, we affirm that portion of the trial court judgment that awards sole custody of the two children to the appellees, and finds the appellant in contempt for allowing a member of the opposite sex to be present during her exercise of visitation. We reverse that portion of the trial court judgment which found the appellant in contempt for failure to pay child support.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This appeal arises from litigation initiated by the maternal grandparents, Leslie N. Beckman ("Leslie") and Bruce M. Beckman ("Bruce") (collectively referred to as the "Beckmans"), seeking custody of their maternal grandchildren, A.C.D. and A.G.D. Tara Rheannon Coon Devillier ("Rheannon")[1] and Eric David Devillier ("Eric") (collectively known as the "Devilliers") are the natural parents of A.C.D. and A.G.D.

On December 21, 2015, Leslie filed a petition for protection from abuse in the Juvenile Court of Caddo Parish wherein she alleged a myriad

[1] The record refers to the appellant, Tara Rheannon Coon Devillier, as both Tara and Rheannon. For purposes of this appeal, she will be referred to as "Rheannon" because that is the name she offered during her trial testimony.

of concerns regarding the care of A.C.D. and A.G.D. In her petition, Leslie alleged that both parents of the minor children were using illegal drugs, including medications prescribed to the children; that the utilities in the home were no longer in service; that the mother failed to comply with the medical care for her developmentally delayed child; that the home contained black mold and feces; that Eric possessed an explosive temper which scared one of the children; and that both parents have tested positive for work-related drug screenings. On December 23, 2015, an order of protection was rendered in the proceedings, granting Leslie temporary custody of A.C.D and A.G.D. through January 7, 2016.

On January 7, 2016, the Beckmans and the Devilliers filed a joint motion to establish child custody by consent of the parties in which all parties agreed to grant custody of A.C.D. and A.G.D. to the Beckmans. On January 14, 2016, judgment on the joint motion was rendered which, *inter alia*, granted custody of A.C.D. and A.G.D. to the Beckmans; required the Devilliers to submit to random drug screenings at the request of the Beckmans; granted supervised visitation to the Devilliers until they have tested negative for all nonprescription drugs; ordered substance abuse treatment for the Devilliers; required the Devilliers to deposit $440 per month in an account established by the Beckmans for child support; and stipulated that this matter may be reviewed by any party after January 1, 2017.

On January 10, 2017, Rheannon filed a rule for custody seeking the reinstatement of her parental rights, as well as sole custody of A.C.D. and A.G.D. Subsequently, on March 14, 2017, the Beckmans also filed a rule for custody where they alleged the extensive medical needs of the minor

children; the Devilliers' failure to provide proper medical care; A.C.D.'s controlled, schedule II stimulant medication unaccounted for after visitation with Rheannon; the unkempt condition of Rheannon's home; and the child support arrears in the amount of $2,398.47.

After a hearing on May 30, 2017, an interim order was issued allowing the Beckmans to maintain sole custody of A.C.D. and A.G.D. and awarding Rheannon visitation every other weekend. Additionally, the interim order held Rheannon in contempt of court for failure to pay child support and ordered her to pay $421.21 per week in an attempt to purge the arrears; prohibited the presence of any boyfriends during Rheannon's visitation with A.C.D. and A.G.D.; required Rheannon to submit to random drug screenings upon demand by the Beckmans; required the Beckmans to provide school and medical information to Rheannon; and provided that this matter may be reviewed in four months.

On October 10, 2017, four months after the interim order was issued, Rheannon filed a motion and order to set rule date seeking a review of the interim order, alleging that she has successfully complied with the requirements set forth by the judgment and the Beckmans. After a hearing on November 9, 2017, the trial court issued an interim order which increased visitation to Wednesday after school until Friday morning before school in addition to every other weekend.

Further, the interim order prohibited the presence of any boyfriends or members of the opposite sex, not related by blood or marriage, during Rheannon's visitation with A.C.D. and A.G.D.; provided the terms of visitation on holidays and during summer months; and allowed the Beckmans the right of first refusal to babysit while A.C.D. and A.G.D. are in

Rheannon's custody in the event a babysitter is needed for a period of two hours or greater.

On January 8, 2018, the trial court issued an immediate income assignment order for child support directing Rheannon's employer to withhold $1,608.58 a month and a past due amount of $5,980.88 through weekly payments of $421.21.[2] On April 30, 2018, the Beckmans filed a rule for sole custody, to modify visitation, to reset all of plaintiff's motions, and for contempt ("Rule for Sole Custody") seeking sole custody of A.C.D. and A.G.D. and to modify the terms of visitation with Rheannon. In the rule for sole custody, the Beckmans alleged that the minor children were experiencing significant behavioral, medical, and emotional problems as a result of the increase in visitation.

The trial took place on June 6, 2018, where testimony was heard by the court. Rheannon offered her own testimony; as well as the testimony of her Alcoholics Anonymous sponsor, Gina Jenkins; licensed professional counselor, Dr. Mickey Jones; and longtime friend, Rebecca Harper. Similarly, the Beckmans offered the testimony of Leslie and Dr. Mickey Jones. At the conclusion of the trial, the trial court rendered judgment awarding the Beckmans sole custody of A.C.D. and A.G.D., and awarding Rheannon visitation every other weekend.

In addition, the judgment set forth the terms of visitation during the Christmas and Thanksgiving holidays, and spring and summer breaks; found Rheannon in contempt of court for failure to pay child support in arrears of $1,608.58 and for allowing the presence of Kenneth Jenkins during

[2] The immediate income assignment ordered Rheannon's employer to withhold $371.21 plus an additional $50 for a total of $421.21.

Rheannon's exercise of visitation with the children; and prohibited any means of communication with Kenneth Jenkins. This appeal ensued.

DISCUSSION

On appeal, Rheannon cites several assignments of error regarding the trial court's custody award; however, we find that, fundamentally, the substance of each assignment of error is dependent upon whether the trial court erred in awarding sole custody of the children to the Beckmans. After a careful review of the record, we cannot conclude that the trial court abused its discretion in awarding sole custody of A.C.D. and A.G.D. to the Beckmans.

Standard of Review

The trial court is in the best position to ascertain the best interest of the child given each unique set of circumstances. *Galjour v. Harris*, 2000-2696 (La. App. 1 Cir. 3/28/01), 795 So. 2d 350, 354, *writ denied*, 2001-1238 (La. 6/1/01), 793 So. 2d 1229, *writ denied*, 2001-1273 (La. 6/1/01), 793 So. 2d 1230. The determination of the trial judge in child custody matters is entitled to great weight, and his or her discretion will not be disturbed on review in the absence of a clear showing of abuse. *See Leard v. Schenker*, 2006-1116 (La. 6/16/06), 931 So. 2d 355, *quoting AEB v. JBE*, 99-2668 (La. 11/30/99), 752 So. 2d 756.

Custody Award

A parent has the paramount right to the custody of her child and may be deprived of that custody only when there are compelling reasons. *Wood v. Beard*, 290 So. 2d 675 (La. 1974). In *Tracie F. v. Francisco D.*, 2015-1812 (La. 3/15/16), 188 So. 3d 231, the Louisiana Supreme Court set forth

the standard and burden of proof when a biological parent seeks greater custodial rights and seeks to modify a stipulated custody award, stating:

> [W]e hold that the overarching inquiry in an action to change custody is "the best interest of the child." Moreover, consistent with our prior jurisprudence regarding stipulated custody awards, we further hold that a biological parent with joint custody, who seeks modification of a stipulated custody award to obtain greater custodial rights, must prove: (1) there has been a material change in circumstances after the original custody award; and (2) the proposed modification is in the best interest of the child. *See also Evans v. Lungrin*, 97–0541 (La. 2/6/98), 708 So. 2d 731; *Bergeron v. Bergeron*, 492 So. 2d 1193 (La. 1986).

In this case, the initial custody award was a stipulated judgment in which Rheannon voluntarily consented to the Beckmans having custody of A.C.D. and A.G.D. With this in mind, once Rheannon sought to modify the prior stipulated judgment, at trial, she had the burden of proving that (1) there has been a material change in circumstances after the original custody award; and (2) the proposed modification is in the best interest of the child.

We first consider the best interest of A.C.D. and A.G.D., as this is the overarching inquiry and paramount consideration of this appeal. The best interest of the child is the guiding principle in all custody determinations. The factors set forth in La. Civ. Code art. 134 for determining the best interest of the child "should be followed in actions to change custody, as well as in those to fix it initially." *Tracie F. v. Francisco D.*, 2015-1812 (La. 3/15/16), 188 So. 3d 231; *see* also La. C. C. arts. 131, 134; *Mills v. Wilkerson*, 34,694 (La. App. 2 Cir. 3/26/01), 785 So. 2d 69; *Street v. May*, 35,589 (La. App. 2 Cir. 12/5/01), 803 So. 2d 312.

As listed in La. C. C. art. 134, the factors for ascertaining the best interest are as follows:

The court shall consider all relevant factors in determining the best interest of the child, including:

(1) The potential for the child to be abused, as defined by Children's Code Article 603,[3] which shall be the primary consideration.
(2) The love, affection, and other emotional ties between each party and the child.
(3) 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.
(4) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.
(5) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.
(6) The permanence, as a family unit, of the existing or proposed custodial home or homes.
(7) The moral fitness of each party, insofar as it affects the welfare of the child.
(8) The history of substance abuse, violence, or criminal activity of any party.
(9) The mental and physical health of each party. Evidence that an abused parent suffers from the effects of past abuse by the other parent shall not be grounds for denying that parent custody.
(10) The home, school, and community history of the child.
(11) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.
(12) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party, except when objectively substantial evidence of specific abusive, reckless, or illegal conduct has caused one party to have reasonable concerns for

[3] According to Article 603 of the Louisiana Children's Code "abuse" means any one of the following acts which seriously endanger the physical, mental, or emotional health and safety of the child: (a) The infliction, attempted infliction, or, as a result of inadequate supervision, the allowance of the infliction or attempted infliction of physical or mental injury upon the child by a parent or any other person; (b) The exploitation or overwork of a child by a parent or any other person, including but not limited to commercial sexual exploitation of the child; (c) The involvement of the child in any sexual act with a parent or any other person, or the aiding or toleration by the parent, caretaker, or any other person of the child's involvement in any of the following: (i) Any sexual act with any other person, (ii) Pornographic displays, or (iii) Any sexual activity constituting a crime under the laws of this state; (d) A coerced abortion conducted upon a child; and (e) Female genital mutilation as defined by R.S. 14:43.4.

the child's safety or well-being while in the care of the other party.

(13) The distance between the respective residences of the parties.

(14) The responsibility for the care and rearing of the child previously exercised by each party.

The best interest of the child test under Civil Code articles 131 and 134 is a fact-intensive inquiry requiring the weighing and balancing of factors favoring or opposing custody in the competing parties on the basis of the evidence presented in each case. *Warlick v. Warlick*, 27,389 (La. App. 2 Cir. 9/29/95), 661 So. 2d 706. Each child custody case must be viewed within its own peculiar set of facts. *Galjour, supra.* Based on the trial court's oral reasons for judgment, it appears that the trial court's decision to grant sole custody of A.C.D. and A.G.D. to the Beckmans was in the children's best interest and exclusively based on the testimonies of Leslie Beckman and Dr. Jones. In fact, the trial court made credibility determinations exclusively in favor of the Beckmans and Dr. Jones, stating:

> The Court's [*sic*] listened carefully to the testimony of the witnesses and the Court's been able to make credibility determinations based on the Court's personal observation of the witnesses as they testified and their demeanor as they have been sitting at counsel table with their counsel…
>
> Based on the testimony, the exhibits, and the Court's credibility determinations, the Court finds the following:
>
> Dr. Jones has testified – oh, I do want to say I [b]elieve as far as dealing with credibility calls, I believe Mrs. Beckman's testimony and Mr. Beckman's testimony by stipulation, and Dr. Jones' testimony is credible. And in any manner in which Rheannon's testimony differs from that I specifically make a credibility determination in favor of the Beckmans.
>
> ***

Leslie gave a lengthy testimony regarding the events that transpired since initially filing the protective order in 2015. Leslie testified regarding

the circumstances that caused her and Bruce to intervene and seek custody. She stated that both parents were active drug users. She alleged that Eric was an active methamphetamine user, and Rheannon had an addiction to opioids which resulted in her ingesting A.C.D.'s ADHD medication. Additionally, the family home was an 800-square-foot apartment littered with trash, debris, animal feces and dirty laundry. On more than one occasion, she and other family members spent time cleaning the apartment to make it habitable and safe for living.

Leslie's testimony also involved the extensive medical needs of the children. She stated that when she and her husband took custody, A.C.D. had previously been diagnosed with extreme attention deficit hyperactivity disorder ("ADHD"). Additionally, A.C.D. was in need of about $3,000 in dental work because Rheannon allegedly informed her that she did not have to use toothpaste when she brushed her teeth.

Leslie went on to state that A.G.D. had not begun potty training, and was later evaluated and diagnosed with hearing loss and fetal alcohol syndrome. At time that time, A.C.D. was 6 years old and A.G.D. was 2 years old. Leslie continued that they immediately placed A.G.D. in private speech therapy after conducting extensive research on fetal alcohol syndrome and the benefits of early intervention which is necessary for a better quality of life for the child.

After getting A.G.D. in treatment, Leslie informed Rheannon that she wanted to get A.G.D. re-evaluated to determine if she qualified for more services, but Rheannon discouraged her from doing so. Against Rheannon's recommendation, Leslie elected to have A.G.D. re-evaluated and it was discovered that A.G.D. did in fact qualify for more services at that time.

Moreover, she stated that she had noticed an increase in behavioral issues with both A.C.D. and A.G.D. as a result of the increased visitation with Rheannon. Leslie also spoke extensively about Rheannon's lack of cooperation in helping to improve A.C.D.'s reading skills despite being a certified third-grade teacher, stating:

> A.C.D. has a definite problem with reading, yes. I asked her mother even as far back as in the second grade if she could bring me home what they call a cold read, which is what A.C.D. was having difficulty with, if she could bring some samples home so I could work with A.C.D. And she said sure she didn't have any problem with getting those, but they never appeared. She never provided them. She did about two months before school was out this year bring home a work book that I was about to use help work with A.C.D.

The trial court also heard the testimony of licensed professional counselor, Dr. Mickey Jones. Dr. Jones was qualified as an expert in evaluating who is the proper party to have custody of the minor children. She testified that she has a current counseling relationship with both A.C.D. and A.G.D., and she has an educational relationship with Leslie. Dr. Jones also testified that does not have a current counseling relationship with Rheannon, but had been seeing Rheannon professionally off and on since Rheannon herself was in the fifth grade.

She offered her recommendation that Rheannon should have visitation with A.C.D. and A.G.D. at least two to three weekends a month; the entire summer, excluding the first and last week, with some visitation time designated at the median point of the summer for the Beckmans while splitting holidays. More importantly, during rebuttal, Dr. Jones was questioned again by the appellant's trial counsel. Dr. Jones was specifically

asked what type of custody award would cause substantial harm to the minor children.

The trial transcript reveals the following:

> MR. HENDRIX: Do you believe at this time it would be – cause substantial harm to the children if they were awarded to the parent other than maintaining the current custodial agreement – or custodial award to the grandparents, would it be harmful to children?
>
> DR. JONES: I think it would be harmful to the children to continue in the same fashion it is continuing. Now that's why I backed my recommendation and I informed both parties before I walked in here that I was very strong in that recommendation.
>
> ***

In giving her reasoning for her recommendation Dr. Jones stated:

> Ms. Beckman and Mr. Beckman have done a remarkable job with getting these kids on track and taking care of all those special needs. Rheannon also has recently started taking a very active role in following that lead and has asked as recently as yesterday to start coming in and getting educational assistance with the fetal alcohol and the medical needs and has complied with everything I've asked in the last few months.
>
> ***

After the trial, during the oral reasons for judgment, the trial judge even went as far to state that Dr. Jones' testimony was the reason the court increased Rheannon's visitation, and subsequently concluded that the evidence shows in a very clear and convincing way that the Beckmans should have custody of A.C.D. and A.G.D.

In consideration of the best interest of the child factors, we find that the record evidence overall weighs heavily in the Beckmans' favor. For factors 1 and 2, there is strong evidence to suggest that both Rheannon and the Beckmans have immutable emotional ties, as well as the capacity to love and spiritually guide the children and prevent any potential abuse.

Furthermore, despite the Beckmans' advanced age and Rheannon's lifestyle choices, there is no evidence that Rheannon or the Beckmans are mentally, morally or physically unfit to promote the welfare of the children. Moreover, as to factors 11, 13 and 14 the record is silent as to the distance between the parties' residences, the previous responsibility for the care and rearing of the children exercised by the parties, and A.C.D and A.G.D.'s reasonable preferences.

Consequently, almost all the remaining factors indisputably favor the Beckmans. The Beckmans unequivocally satisfy factors 3 through 6. Considering the extensive medical and educational requirements of A.C.D. and A.G.D., the Beckmans have done an excellent job in both addressing and accommodating those needs. Moreover, based on the trial court's reliance on Dr. Jones' testimony, we place heavier emphasis on the parties' ability to provide a stable home. Here, the Beckmans have been married for 18 years, and have resided in the same home for 15 years. Both Leslie and Bruce are employed full-time, and have adjusted their work schedules to accommodate the children.

Additionally, since the original stipulated judgment, the Beckmans have provided virtually all of the financial support for the children. By contrast, the appellant is recently divorced from the children's biological father, Eric, currently leases a one-bedroom apartment, and has successfully completed one year of teaching special needs children. From our view, Rheannon's living situation appears newly stable, but in comparison to the Beckmans, still lacks the consistency and adequacy essential to the care of A.C.D. and A.G.D.

Moreover, for the tenth factor, the record is replete with evidence of the Beckmans' exemplary efforts in determining and addressing any impediments to A.C.D. and A.G.D.'s educational needs. Specifically, it was the Beckmans who took action in getting A.G.D. diagnosed and treated for fetal alcohol syndrome and hearing loss. They also tested A.C.D. for dyslexia and enrolled her in a tutoring program at Louisiana State University at Shreveport at the suggestion of her counselor.

As to the twelfth factor, we recognize there are issues surrounding the willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party. From our view, it appears that Leslie harbors resentment toward Rheannon for her previous poor choices and lifestyle. The trial transcript of Leslie's testimony reveals the following:

> MR. GOODRICH: To your knowledge since she became – since she went through the rehab program that she went through, do you know of her having taken any medication or being high on any alcohol, drugs, or anything aside from things were prescribed by a doctor for a specific reason?
>
> LESLIE BECKMAN: No sir, but she's a drug addict. She was taking drugs that were prescribed –
>
> MR. GOODRICH: So once you're a drug addict –
>
> LESLIE BECKMAN: Just like you're an alcoholic, you're an alcoholic forever.
>
> ***

Moreover, during Leslie's testimony, she opined that Rheannon is not fit to parent and continues to put herself before her children's needs. Further, she testified that on two prior occasions she has denied Rheannon's requests to be involved in the educational needs of the children because she felt as though her interest was not genuine. She also went on to state that

Rheannon was not entitled to be involved since she only has visitation rights, and not custody. Similarly, Leslie has also denied Rheannon's requests for increased visitation citing the best interest of the children as her reasoning.

Dr. Jones emphasized that the parties' communication and cooperation were the two key factors in getting the children to reach stable improvement. Dr. Jones was emphatic that Rheannon needed to have a greater role in the care of the children. The record shows that Rheannon is willing to cooperate with the Beckmans in the care of A.C.D. and A.G.D., and has continuously expressed her desire to be included in the educational and medical needs of the children. In addition, Dr. Jones also testified that Rheannon has started taking an active role in the needs of the children and complied with every request she has made in the last few months.

It is important to note that Rheannon has made significant improvements in her life. She completed an outpatient addiction recovery program and has been sober for over 3 years. Moreover, she still attends Alcoholics Anonymous ("AA") meetings and communicates with her AA sponsor, Gina Jenkins. She is currently a certified third-grade teacher and regularly attends church and includes A.C.D. and A.G.D.

Still, we are aware of the fact that A.C.D. and A.G.D. are clearly thriving in the Beckmans' care. We are also cognizant of the fact that Rheannon, by her own admission, has had severe issues with caring for A.C.D. and A.G.D. in years prior. At this time and in consideration of these factors, we are unable to conclude that an award of sole custody to Rheannon is in the best interest of A.C.D. and A.G.D.

We also find that Rheannon fails the remaining requirement of showing a material change in circumstances after the original custody award.

In her original rule for sole custody, she did not allege any circumstances since the original stipulated judgment that would rise to the level of "material," and thus warrant a change in custody. Instead, the basis of her argument is largely predicated upon her compliance with the terms of the interim order. Moreover, the substance of her trial testimony solely concerned refuting criticisms and allegations from Leslie's testimony. Thus, we find the record is devoid of any evidence of a material change in circumstances offered by Rheannon after the original custody award.

After a thorough review of the record, we find that Rheannon failed to carry her burden and offer sufficient evidence to show (1) there has been a material change in circumstances after the original custody award; and (2) the proposed modification is in the best interest of the child. Accordingly, we find that the trial court did not abuse its discretion in awarding sole custody of A.C.D. and A.G.D. to the Beckmans.

Contempt

In her remaining assignments of error, Rheannon argues that the trial court committed reversible errors by holding her in contempt of court for (1) failure to pay child support, and (2) failure to prevent her boyfriend, Kenneth Jenkins, from being present during her exercise of visitation with A.C.D. and A.G.D.

The support obligation imposed on a mother and father of minor children by La. C.C. art. 227 is firmly entrenched in our law and is a matter of public policy. *Brown v. Taylor*, 31,352 (La. App. 2 Cir. 2/26/99), 728 So. 2d 1058; *State v. Reed*, 26,896 (La. App. 2 Cir. 6/21/95), 658 So.2d 774; *Kairdolf v. Kairdolf*, 46,035 (La. App. 2 Cir. 3/2/11), 58 So. 3d 527, 532. Neither equity nor practical inability to pay overrides this policy or allows a

parent to avoid paying his or her share of the obligation where the inability arises solely from that parent's own neglect and failure. *Brown, supra*; *Kairdolf, supra*.

As a general rule, failure to pay alimony and child support resulting from an obligor's financial inability cannot support a contempt charge. *Fontana v. Fontana*, 426 So. 2d 351 (La. App. 2 Cir. 1983), *writ denied*, 433 So. 2d 150 (La. 1983); *Lutke v. Lutke*, 33, 001 (La. App. 2 Cir. 2/1/00), 750 So. 2d 512.

While the enforcement of the personal obligation to pay child support can be pursued through ordinary civil remedies by the parent to whom the obligation is owed, the law also expressly provides that "disobeying an order for the payment of child support" is a specific ground for which a court may hold a delinquent party in contempt of court. *See*, La. R.S. 13:4611(1)(d)(i); *Kairdolf, supra*.

In such delinquent child support settings, the court must determine that disobedience to the court's order for support is willful or a deliberate refusal by the parent to perform an act which was within the power of the parent to perform. *See*, La. C.C.P. art. 224(2) and La. R.S. 13:4611(1)(c); *Brown, supra; Kairdolf, supra*.

However, the court in *Brown, supra*, after quoting the above language, added:

> Nevertheless, the court made clear that by examination of certain financial and other factors, such as, (1) the capacity of the parent for gainful employment immediately prior to the start of the contempt proceedings, (2) the living conditions and financial circumstances of the parent despite his unemployment, (3) the efforts to pay the delinquent alimony, and (4) proceedings to reduce or terminate the award based upon a

> change in the circumstances, the trial court can hold the parent in contempt. *Lutke, supra*.

Child Support

On the issue of child support, Rheannon unequivocally admits that she is behind on payments, but maintains that "they"[4] are deducting the maximum amount of federal, state, and local taxes from her biweekly paycheck. Further, Rheannon contends, if the court considers her as: (1) being gainfully employed; (2) having a meager standard of living; and (3) and making substantial payments toward child support, there can be no finding of willful disobedience. We agree.

In this case, Leslie testified that Rheannon is complying with the income assignment order; however, the payments are insufficient to cover her obligation. Moreover, she stated that Rheannon resigned from additional part-time employment, and *acknowledged that she does not earn enough at her primary place of employment to satisfy the monthly payment amount*. Rheannon testified that she is paid twice a month, and after child support is deducted from her paycheck, only $560.64 remains for living expenses. She further explained that she was unable to continue being employed part-time due to her visitation schedule and being diagnosed with fibromyalgia.

In this case, it is evident from the record that the only way Rheannon would be able to make such a payment is through obtaining additional employment. Given her efforts in obtaining increased visitation and ultimately regaining custody of A.C.D. and A.G.D., we cannot conclude that

[4] The term "they" was referenced in Rheannon's brief, as well as in her trial testimony. For purposes of this opinion, we assume "they" refers to her employer.

she willfully or deliberately disobeyed the court order to pay child support to the Beckmans.

Kenneth Jenkins

Conversely, we find that on the issue of having boyfriends, specifically Kenneth Jenkins, present during visitation, the trial court did not abuse its discretion. The record contains limited information regarding the actual relationship between Rheannon and Kenneth Jenkins; however, the trial court was apprised of two specific incidents that transpired with Leslie and Dr. Jones.

During her testimony at trial, Leslie indicated that an exchange took place between her and Kenneth Jenkins on a social media platform where Mr. Jenkins allegedly sent her rude messages.

> MR. HENDRIX: When your children – excuse me, not your children, when A.G.D. and A.C.D. go to see their mother on visitation is it – your knowledge where do they spend most of their time?
>
> LESLIE BECKMAN: To my knowledge their waking hours are spent probably 75 percent of the time with Rheannon and her boyfriend.
>
> MR. HENDRIX: His name is Ken?
>
> LESLIE BECKMAN: Yes.
> MR. HENDRIX: And you and Ken have had problems?
>
> LESLIE BECKMAN: He has been very rude, yes, sir.
>
> MR. HENDRIX: In fact he sent you some nasty stuff over Facebook?
>
> LESLIE BECKMAN: Facebook, yes, and Instant Message as well.
>
> MR. HENDRIX: Would it be fair to say that you two don't get along very well?

> LESLIE BECKMAN: I have nothing to do with the man. Anyone who would behave the way that he has behaved based on the limited information he has about me I have no - - nothing to do with him.

Rheannon also corroborated that incident, stating that Kenneth Jenkins showed her the messages after he sent them but insisting that she chastised him for getting involved. Moreover, Dr. Jones also testified that she had been involved in an altercation with Kenneth Jenkins. She maintains that he abruptly approached her while she was speaking in the hallway with Rheannon and physically pushed her away while placing a protective arm around the appellant. After that incident, Kenneth Jenkins posted a message on Dr. Jones' business website that she classified as "very derogatory."

Additionally, when Dr. Jones was questioned regarding the availability and willingness of Rheannon in cooperating with the Beckmans, she mentioned issues with Kenneth Jenkins.

> MR. GOODRICH: Just to be clear Rheannon has always been available and willing and expressed her desire to be a part of this cooperative spirit?
>
> DR. JONES: There's been some Mr. Jenkins problems.
>
> MR. GOODRICH: Understood.
> DR. JONES: So that was an issue. When Rheannon and I cleared the air I told her I want to see you as a single parent, okay. I want to see you raise your kids. You've never done that, you know. You married Eric, your parents have had them, and now you've got this boyfriend. And he was very involved. Everything was we. And I want to see it be I think this for my kids. I want to see her develop that before we even think about blended family.

Moreover, while giving oral reasons for judgment, the trial judge was very adamant regarding the prohibition of members of the opposite sex, especially Kenneth Jenkins, present during visitation, stating:

> …But more serious than that, you violated the order that is currently in place by having the children in contact rather with Mr. Jenkins. That is a direct violation of the court order that is in place. That's not a judgment call. It's not close. It's black and white. And you violated that order and I take that very, very seriously.
>
> ***
>
> …Its [*sic*] in black and white. Nobody filed to change it and I'm not going to get in to it. It almost meets the parole evidence rule. It's there and it is what it is. And it was not followed. And in addition to that there was an altercation with - - between Mr. Jenkins and Dr. Jones and I'm just very concerned. And what I'm going to do is on the contempt sentence to 30 days in parish jail. I'm not going to suspend, but I'm going to withhold execution of the sentence. And if there is ever issue of the children being exposed to that type of thing or having somebody that you are not related to by blood or marriage in the house and its brought back to the attention of the Court at the time it is if in face those are the cases the court will go ahead with execution of the sentence and you'll be in the parish jail for 30 days and those are actual days.
>
> ***

Given the serious nature of this case and the paramount consideration of the best interest of A.C.D. and A.G.D., we cannot conclude the trial court abused its discretion in prohibiting Kenneth Jenkins from being present during Rheannon's visitation. From our view, it appears Mr. Jenkins poses an obstacle in the parties' cooperation and communication, and has had a negative influence in Rheannon's efforts to regain custody of her children. Accordingly, we find that the trial court did not abuse its discretion in finding the appellant in contempt for allowing a member of the opposite sex to be present during visitation.

CONCLUSION

For the foregoing reasons, we affirm that portion of the trial court judgment that awards sole custody of A.C.D. and A.G.D. to the maternal grandparents, Leslie N. Beckman and Bruce M. Beckman, and finds the

biological mother, Tara Rheannon Coon Devillier, in contempt for allowing a member of the opposite sex to be present during visitation. We reverse that portion of the trial court judgment which found Tara Rheannon Coon Devillier in contempt for failure to pay child support. Costs of this appeal are assessed to the appellant, Tara Rheannon Coon Devillier.

AFFIRMED IN PART, REVERSED IN PART.

BLEICH, J. (*Pro Tempore*), concurring in part and dissenting in part.

Based on the record from the trial court, and the excellent analysis by the author of the primary opinion, it is clear that the conclusion of the trial court is not incorrect when considering the best interest of the child.

Absent from the record, however, is a finding in accordance with La. C.C. art. 133, which is legislatively mandated in cases such as this one. In the view of this writer, this case should be remanded to the trial court for such an analysis.

This conclusion is based significantly on the fact that the language of the January 14, 2016, judgment[5] does not eliminate the necessity of the trial court's finding both of the pertinent requirements of article 133. Therefore, the reasoning set forth in *Tracie F. v. Francisco D.*, 15-1812 (La. 03/15/16), 188 So. 3d 231, is inapplicable.

To overlook this requirement, in the opinion of this writer, even if the ultimate result might be the same, is tantamount to judicial rejection of the clear and express intent of the legislature.

In all other regards, the writer respectfully concurs.

[5] "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this matter may be returned to the docket of this Court for review by any party after January 1, 2017."