

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CU 1008

AMBER L. MITCHELL

VERSUS

BENJAMIN R. RISHER

RKB
[Signature]

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**On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 2008-13249, Division "A"
Honorable Raymond S. Childress, Judge Presiding**
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**Raymond C. Burkart, III
Covington, LA**

**Attorney for
Plaintiff-Appellee
Amber L. Mitchell**

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**Attorney for
Defendant-Appellant
Benjamin R. Risher**

BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered December 21, 2011

Higginbotham, J. dissents in part and assigns reasons.

PARRO, J.

In this child custody and child support case, the father, Benjamin R. Risher, appeals a judgment in which the trial court granted sole custody of the parties' minor child to the mother, subject to the father's supervised visitation, and further found Mr. Risher in constructive contempt of court for failure to pay his child support obligation. For the following reasons, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Mr. Risher and Amber L. Mitchell engaged in an intimate and romantic relationship, which resulted in the procreation of one child, R.R., who was born in January 1996.¹ The parties were never married; however, at the time of R.R.'s birth, Mr. Risher and Ms. Mitchell lived together, with R.R., in Baton Rouge. Eventually, the intimate relationship between Mr. Risher and Ms. Mitchell ended, and Ms. Mitchell and R.R. moved to St. Tammany Parish without objection by Mr. Risher.

According to the record in this matter, the parties functioned for much of R.R.'s life without a custody agreement established by a court. Instead, the parties had agreed that R.R. would reside primarily with Ms. Mitchell, subject to Mr. Risher exercising visitation every other weekend. Mr. Risher also enjoyed visitation with R.R. on major holidays and at other times upon which the parties could agree.²

On June 16, 2008, Ms. Mitchell commenced the instant child custody proceedings by filing a petition to obtain legal custody, by which Ms. Mitchell sought a judgment granting the parties joint custody of R.R., with Ms. Mitchell designated as the domiciliary parent, subject to reasonable physical custody on the part of Mr. Risher.

¹ In her petition to obtain legal custody, to modify child support, and for various other matters, which was filed on June 16, 2008, Ms. Mitchell alleged that Mr. Risher had executed an authentic act acknowledging his filiation to R.R. and that he had signed R.R.'s birth certificate pursuant to LSA-C.C. art. 196. Paternity of R.R. is not an issue in these proceedings.

² Mr. Risher's attorney makes numerous assertions in his brief to this court concerning the factual background of this case. For example, the brief contends that at certain points, Mr. Risher was R.R.'s primary caretaker while Ms. Mitchell was in law school. In addition, the brief asserts that in the summer of 2008, R.R. spent the entire summer with Ms. Mitchell, but that he was to be returned to Mr. Risher in the fall for school in Baton Rouge. However, the brief provides no record references for these statements of alleged fact, and these "facts" are contrary to the evidence as testified to in the record by Ms. Mitchell. Moreover, the brief appears to contradict its own rendition of the facts when it acknowledges that the parties had been operating under a system whereby R.R. had been living primarily with Ms. Mitchell, subject to visitation by Mr. Risher.

Ms. Mitchell also sought an increase in the amount of child support Mr. Risher was required to pay for R.R.'s benefit, as well as an adjudication of contempt of court for Mr. Risher's failure to comply with the court's previous orders to pay child support.³ Finally, Ms. Mitchell sought an award of attorney fees and court costs.

The matter was set for hearing before the trial court on August 19, 2008; however, a conference before a hearing officer was scheduled on July 25, 2008. By July 21, 2008, the East Baton Rouge Parish Sheriff's Office had been unable to locate Mr. Risher for service of process at either his home or his place of employment; therefore, Ms. Mitchell filed a motion to appoint a private process server. According to the affidavit of the private process server, Mr. Risher was personally served, at his home, on July 22, 2008. Nevertheless, Mr. Risher failed to appear at the hearing-officer conference. Although the hearing officer made several recommendations at this conference, no judgment was ever rendered by the trial court as a result of the conference. The matter was subsequently reset before the hearing officer for August 13, 2008, with the hearing before the trial court maintained for August 19, 2008.⁴ Again, Ms. Mitchell was required to file a motion to appoint a private process server in order to effect service on Mr. Risher. However, prior to the hearing, Ms. Mitchell filed an *ex parte* petition for temporary sole custody, on August 7, 2008.

According to this petition, since the filing of the original petition in June, Ms. Mitchell had been subjected to numerous threatening, vulgar, and vile text messages from Mr. Risher and his wife, which were sent at all hours of the day and night. In addition, Ms. Mitchell alleged that she had discovered that Mr. Risher had provided R.R. with a secret cell phone through which he and his wife had exchanged text messages with R.R., in which they had encouraged R.R. to defy Ms. Mitchell's authority. Furthermore, the petition contained allegations that Mr. Risher had ordered R.R. to

³ A prior proceeding involving nonsupport by Mr. Risher resulted in a May 1, 2007 judgment that ordered Mr. Risher to pay monthly child support in the amount of \$476.

⁴ According to a motion to reset the conference filed by Ms. Mitchell, Mr. Risher had acknowledged receipt of a courtesy copy of the pleadings on or about June 20, 2008. Ms. Mitchell contended that, thereafter, Mr. Risher began to intentionally avoid service, which forced her to obtain the order appointing a private process server to effect service on Mr. Risher.

sneak out of Ms. Mitchell's house at 1:30 a.m. so that Mr. Risher could take custody of him to prevent his attendance at school.⁵ As a result, Ms. Mitchell requested that she be granted sole custody of R.R., with Mr. Risher being granted supervised visitation. The trial court granted the order and issued a civil warrant, directing all law enforcement agencies to return the minor child to Ms. Mitchell, pending further orders from the court. The regularly scheduled matter, already pending for August 19, 2008, was subsequently continued on motion of Mr. Risher.

After various continuances, in February 2009, the trial court held a status conference on the child custody matter, at which time it issued an interim order granting the parties joint custody, with Ms. Mitchell designated as the domiciliary parent. Mr. Risher was granted physical custody of R.R. every other weekend. In addition, on Mr. Risher's motion, the parties were ordered to submit to and cooperate in a child custody evaluation. The trial court signed a written order in accordance with these rulings on March 6, 2009.

Thereafter, the trial court addressed the issues of contempt of court and child support arrearages. After a hearing on April 23, 2009, the trial court signed a judgment on May 28, 2009, finding Mr. Risher in civil constructive contempt of court for willfully failing to pay his child support obligation as previously ordered. The judgment found that Mr. Risher owed child support arrearages in the amount of \$14,310.92 and ordered that he pay this amount to Ms. Mitchell, along with \$1500 in attorney fees and all costs of court. In addition, the judgment sentenced Mr. Risher to ninety days in the parish jail, which he could avoid serving by meeting certain payment terms.⁶ The judgment further ordered Mr. Risher to continue paying child support in the amount of \$476 per

⁵ R.R. followed the orders of his father that night.

⁶ Under the terms of the judgment, Mr. Risher could purge himself of the contempt of court and avoid serving the ninety-day sentence if he paid Ms. Mitchell \$7000 by April 27, 2009. If Mr. Risher failed to make the payment, he was required to serve the ninety-day sentence. However, if he failed to appear for his sentence after having failed to make the payment, then his sentence was converted to six months in the parish prison. Mr. Risher would then have been required to pay the balance not more than six months after the date of the \$7000 payment or the date he was released from the parish prison, whichever was earlier.

month, pending further orders or judgments from the court.⁷

At a hearing on December 17, 2009, the trial court again noted that Mr. Risher had failed to comply with the previous child support judgment of May 28, 2009. According to the January 19, 2010 judgment resulting from the December hearing, Mr. Risher had failed to pay the remaining balance of \$7,310.92, after paying \$7000, as ordered in the judgment of May 28, 2009, and he was ordered to report to parish prison on December 24, 2009, unless he had paid the amount due by that date. Pursuant to the January 19, 2010 judgment, Mr. Risher was to remain in parish prison until he had paid Ms. Mitchell the full sum of \$7,310.92, or until a hearing on January 28, 2010, on the remaining merits of Ms. Mitchell's motion for contempt and for determination of arrearages. Apparently, Mr. Risher timely paid the balance due and was able to avoid reporting to parish prison.

On January 28, 2010, the parties appeared in the trial court for the hearing on the merits of the motion. Again, the trial court adjudicated Mr. Risher in civil constructive contempt of court for failure to comply with his monthly child support obligation and found him to be in arrears on that obligation in the amount of \$4,284, plus judicial interest. The trial court further adjudicated Mr. Risher in contempt of court for failure to comply with the May 28, 2009 judgment ordering him to pay the court costs of the earlier proceeding, as well as Ms. Mitchell's attorney's fees from that proceeding in the amount of \$1500.⁸ Finally, the trial court ordered Mr. Risher to pay additional attorney fees in the amount of \$750 to Ms. Mitchell's attorney for the current proceedings. Mr. Risher was ordered to pay these amounts by February 4, 2010, or to report to parish prison. A judgment in accordance with these rulings was signed on February 17, 2010.

⁷ In August 2008, Mr. Risher had filed a motion to terminate, suspend, and/or decrease child support due to unemployment. According to this motion, Mr. Risher had lost his job and had been unable to secure new employment, despite diligently looking for new employment. Although this motion was heard by a hearing officer who recommended that there be no modification based on Mr. Risher's voluntary unemployment, the matter has never been brought before the trial court, and no judgment has ever been rendered on the motion.

⁸ The February 17, 2010 judgment also found Mr. Risher in contempt of court for failure to timely pay the balance of \$7,310.92 due on the arrearages as ordered in the May 28, 2009 judgment.

Despite this judgment, Mr. Risher failed to pay the above amounts as ordered, and he did not pay the monthly child support obligation as required for the month of February 2010. Therefore, Ms. Mitchell again filed a motion to have him held in contempt of court for failure to comply with the orders of the court. A hearing was held on this motion on March 30, 2010, at which time the trial court found Mr. Risher to be in contempt of court for his failure to pay his monthly child support obligation for February and March 2010. He was further ordered to pay child support arrearages in the amount of \$972, plus judicial interest. The trial court ordered Mr. Risher to pay Ms. Mitchell's attorney's fees in the amount of \$500, plus court costs. Finally, the trial court again adjudicated Mr. Risher in contempt of court for failure to comply with its earlier judgments.⁹ A judgment in accordance with these rulings was signed on April 13, 2010.

Although the child support issues were constantly before the trial court due to Mr. Risher's failure to comply with the court's orders, the child custody issue had not returned to the trial court for resolution since the parties had been ordered to submit to and cooperate in a child custody evaluation in March 2009. According to the record, although Ms. Mitchell had complied with her portion of the requirements for the child custody evaluation, Mr. Risher had not; therefore, the social worker who had been appointed to complete the evaluation had not written the necessary report.¹⁰ Accordingly, on November 3, 2010, Ms. Mitchell filed a motion to set the child custody matter for trial, as well as to address the child support and contempt of court issues, as Mr. Risher had once again failed to comply with the trial court's orders to pay child support.

The matter was set for hearing on December 3, 2010. Although Mr. Risher was served through his attorney on November 19, 2010, neither Mr. Risher nor his attorney

⁹ The hearing was held without Mr. Risher or his attorney, who failed to appear timely, despite proper service. Mr. Risher did not appear at the hearing at all, and his attorney did not appear until the trial court had already rendered its judgment from the bench. Mr. Risher's attorney argued that he had contacted someone in the judge's office, purportedly to request a continuance. However, the trial court judge advised him that he did not grant continuances on the morning of hearings and that nothing had been filed to request a continuance.

¹⁰ According to the record, Mr. Risher had initially delayed attending the substance abuse assessment required by the evaluation. Thereafter, Mr. Risher failed to pay for his share of the social worker's fee, and the social worker testified that he did not write his report until he had been paid to do so.

had appeared by the time the matter was called at 9:00 a.m. When the hearing actually began at 11:30 a.m., neither Mr. Risher nor his attorney had appeared; however, Mr. Risher's attorney apparently had contacted the court to advise it that his client was ill and unable to attend the hearing. According to the transcript of the hearing, Mr. Risher's attorney had advised the court that he would attend the hearing on behalf of his client. As he had not appeared by 11:30 a.m., the trial court decided to begin the hearing. Shortly thereafter, Mr. Risher's attorney arrived and participated in the proceedings.

After the hearing, the trial court issued oral reasons for judgment on the issues of child support and child custody. With regard to the child support issue, the trial court found that Mr. Risher was again in arrears on his child support obligation in the amount of \$4,284, along with judicial interest. The trial court further ordered that Mr. Risher pay medical reimbursement for R.R.'s medical care in the amounts of \$1,791.91 for 2009 and \$1,467.22 for 2010. In addition, the trial court found Mr. Risher in contempt for his failure to pay Ms. Mitchell's attorney's fees in the amount of \$500, as he had been ordered to do in the judgment of April 13, 2010.

With regard to the child custody issue, the trial court ordered that Ms. Mitchell be granted sole custody of R.R. Mr. Risher was granted supervised visitation, but he was not allowed any overnight visitation. The trial court further ordered Mr. Risher to present evidence to the court that he had started substance abuse counseling. A written judgment in accordance with these oral rulings was signed on January 11, 2011. It is from this judgment that Mr. Risher has appealed.

DENIAL OF CONTINUANCES

In his first assignment of error, Mr. Risher contends that the trial court erred in denying his attorney's motions for continuance on the day of the December 3, 2010 hearing. Mr. Risher's attorney made the first motion for continuance when he initially appeared at the hearing after it had already begun, more than two hours after the 9:00 a.m. call time. According to his attorney, Mr. Risher was unable to attend the hearing

because he was ill; however, when questioned about the specifics of the illness, the attorney was unable to provide any information to the court. Specifically, the trial court and counsel for Mr. Risher engaged in the following colloquy regarding Mr. Risher's absence:

[RISHER'S COUNSEL]:

[...] My client is not present due to medical conditions.

THE COURT:

When did you learn of these medical conditions?

[RISHER'S COUNSEL]:

He's been – he's been treating recently. But his actual status, he was planning to go today[,] and this morning he was unable to. That's the best I can explain, Judge.

THE COURT:

Okay. Well, I mean – there's no – to my knowledge, nobody contacted my office prior to today about any problems with his appearance.

No one filed any type of motion to have the matter continued.

The case, I mean, the service had been made. The case had been set. I realize that you had indicated that you were on your way[,] and we waited until 11:30[,] and we've just now begun, so it's not like you've missed a whole lot.

She's just recapping the history of the child support issues that had existed between the two of them.

I'm sure you are very familiar with that already.

[RISHER'S COUNSEL]:

Yes, sir.

THE COURT:

Okay.

[RISHER'S COUNSEL]:

Just to be prepared, Your Honor, this is, I anticipated until 7:00 this morning, I thought [he] was going to be able to go, so.

THE COURT:

All right. That's fine. We'll just have to proceed without him, then. All right, go ahead.

[RISHER'S COUNSEL]:

For the record, I would like to move for a continuance.

THE COURT:

And I will deny that.

A continuance may be granted in any case if there is good ground therefor. LSA-C.C.P. art. 1601. The decision to grant or deny a continuance rests with the sound

discretion of the trial court. Gilmore v. Wickes Lumber, 04-2769 (La. App. 1st Cir. 2/17/06), 928 So.2d 668, 674. The trial court must consider the particular facts of a case when deciding whether to grant a continuance. Id. In addition, the trial court should consider the diligence and good faith of the party seeking the continuance and other reasonable grounds, and may also weigh the condition of the court docket, fairness to the parties and other litigants before the court, and the need for orderly and prompt administration of justice. Absent a clear abuse of discretion in granting or denying a continuance, the ruling of the trial court should not be disturbed on appeal. Id.

Prior to starting the hearing at 11:30 a.m., the trial court noted that no one was present for the defendant, despite the fact that Mr. Risher's attorney had informed the court earlier that he was on his way. The trial court further noted that this was not the first time that either the defendant or his attorney had failed to appear timely.¹¹ The evidence in the record and the admissions in Mr. Risher's brief to this court indicate that Mr. Risher was properly served with notice of the hearing through his attorney and that he simply failed to appear on the morning of trial. Although his attorney contended that he was too ill to attend, he offered no proof of this illness, despite being given an opportunity to do so by the trial court, both during and after the trial.¹² Considering the repeated absences or late appearances of Mr. Risher and his attorney at previous hearings, we find no abuse of the trial court's discretion in denying the first motion for continuance by Mr. Risher's attorney.

As the trial of the motion regarding child support and child custody progressed,

¹¹ The record indicates that Mr. Risher failed to appear at the hearing-officer conference on July 25, 2008, despite service. In addition, Mr. Risher appeared at a hearing on December 17, 2009, but his attorney did not, claiming that he was ill. Although the attorney had not formally enrolled at that time, he had advised Ms. Mitchell's attorney that he was representing Mr. Risher. Thereafter, on March 30, 2010, neither Mr. Risher nor his attorney timely appeared for the hearing. The trial court conducted the hearing and rendered a judgment in favor of Ms. Mitchell, immediately after which, the attorney for Mr. Risher appeared.

¹² As the trial court was about to render its judgment, it advised Mr. Risher's attorney that he should provide medical documentation of his client's illness to the court, if he could. However, no such documentation was ever provided. Mr. Risher's brief to this court goes into some detail about his alleged medical problems; however, there is nothing in the record to substantiate any of those claims, nor is there anything in the record or the brief to suggest that the specific problems discussed prevented Mr. Risher from appearing in court on the date in question.

Ms. Mitchell began to establish her case for custody. Mr. Risher's attorney then objected, contending that he was not aware that the custody matter had been set for trial on that date, and requested a continuance.¹³ He further argued that additional discovery and preparation time were necessary before the custody matter could be tried, despite the fact that the custody proceedings had been pending since June 16, 2008. He contended that, according to his reading of the pleadings, the parties were simply going to have a status conference to set the custody matter for trial at the present hearing. However, a review of the pleadings does not support this interpretation.

In the motion that was set for hearing on December 3, 2010, Ms. Mitchell noted that she wished to have the child custody matter set for trial. Specifically, she alleged that the trial court had ordered the parties to participate in and to complete a child custody evaluation for their pending child custody action. She further alleged that the evaluation remained incomplete due to Mr. Risher's failure to comply with the requirements of the child custody evaluator. Despite Mr. Risher's failure to comply with the requirements for the evaluation, Ms. Mitchell asserted her entitlement to a final judgment on the custody issue, as the matter had been pending since June 2008, and the parties had been operating under an interim custody order since March 6, 2009. In addition, Ms. Mitchell re-avered all of the factual allegations contained in her original June 16, 2008 and *ex parte* August 7, 2008 child custody petitions, "as if both petitions hereto were attached and copied in extenso." Finally, in her prayer for relief, Ms. Mitchell sought all relief for which she had prayed in the two previous custody petitions. The order attached to the motion ordered Mr. Risher to show cause on December 3, 2010, why the trial court should not grant Ms. Mitchell the relief for which she had prayed in the earlier child custody petitions.

At the hearing, Mr. Risher's attorney acknowledged service on November 19, 2010, of the pleadings and the order setting the hearing. Although he contended that

¹³ Counsel for Mr. Risher did not expressly request a continuance in this exchange; however, he did note his objection to proceeding with the trial on the custody matter on that date.

he had read the pleadings, the order, and the earlier petitions referenced in the current motion, he insisted that he understood the pleadings to mean that, as to the custody issue, the parties were only going to schedule that matter for a future trial at the hearing. Nevertheless, the trial court denied the second motion for continuance. After a thorough review of the pleadings and the order, we find no abuse of the trial court's discretion in denying the motion to continue the hearing on the child custody issue.

CHILD SUPPORT

In his second assignment of error, Mr. Risher contends that the trial court committed manifest error in finding that he willfully disobeyed the previous April 13, 2010 order of the trial court obligating him to pay child support and in holding him in contempt of court based on that finding. A contempt of court is any act or omission tending to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority. LSA-C.C.P. art. 221. Willful disobedience of any lawful judgment, order, mandate, writ, or process of the court is a constructive contempt of court. See LSA-C.C.P. art. 224. The decision to hold a party in contempt of court for disobeying the court's orders is within the trial court's great discretion. Only if the appellate court finds an abuse of that discretion will a trial court's contempt ruling be reversed. Davis v. Davis, 43,490 (La. App. 2nd Cir. 10/22/08), 997 So.2d 149, 157-58. However, the predicate factual determinations underlying the finding of civil contempt of court are reviewed under the manifest error standard of review. See Rogers v. Dickens, 06-0898 (La. App. 1st Cir. 2/9/07), 959 So.2d 940, 945.

The support obligation imposed on parents of minor children is firmly entrenched in Louisiana law and is a matter of public policy. See Brown v. Taylor, 31,352 (La. App. 2nd Cir. 2/26/99), 728 So.2d 1058, 1061. The obligation to nourish and rear one's children has its source in a person's status as father or mother. Fink v. Bryant, 01-0987 (La. 11/28/01), 801 So.2d 346, 349. Each parent owes an obligation to support, maintain, and educate his or her children in proportion to his or her resources. Id.; see also LSA-C.C. art. 240. Neither equity nor practical inability to pay overrides this state's

child support policy or allows a parent to avoid payment of his or her share of the child support obligation where the inability arises solely from that parent's own neglect and failure. Fink, 801 So.2d at 349.

To find a person guilty of constructive contempt, it is necessary to find that he violated the order of court intentionally, knowingly, and purposely, without justifiable excuse. State, Dept. of Social Services, Support Enforcement Services ex rel. A.M. v. Taylor, 00-2048 (La. App. 1st Cir. 2/15/02), 807 So.2d 1156, 1161-62. In the context of delinquent child support, the court must determine that disobedience to the court's order for support was willful or a deliberate refusal by the parent to perform an act that was within the power of the parent to perform. Id. at 1162; see also LSA-C.C.P. art. 224(2) and LSA-R.S. 13:4611(1)(c) and (d).

Generally, the failure to pay child support resulting from the obligor's financial inability to pay does not support a contempt charge. However, a trial court may find such a parent in contempt after an 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 (or underemployment); (3) the party's efforts to make the delinquent payments; and (4) proceedings to reduce or terminate the award based on a change in the circumstances. Davis, 997 So.2d at 158.

In his brief to this court, Mr. Risher suggested that, with regard to the first of the above factors, he had no capacity for gainful employment immediately prior to the start of the contempt proceedings. In support of this argument, Mr. Risher states that he "was and still is undergoing medical treatment[,] including surgery[,] limiting not only his ability to work but his very ability to appear at trial." Despite this assertion in his brief, there is nothing in the record to support it. Mr. Risher's attorney appeared at the hearing and attempted to explain Mr. Risher's absence by claiming that he was ill and unable to attend; however, he offered no evidence to support this claim, despite the

fact that the trial court offered him an opportunity to do so at the end of the hearing.¹⁴ In addition to the fact that there is no evidence to support the allegation that Mr. Risher suffered from any medical condition at the time of, or immediately prior to, the contempt hearing, there is no evidence to support the contention that Mr. Risher was unable to find or maintain employment because of this alleged medical condition. Indeed, there is no evidence in the record that Mr. Risher has attempted to look for any employment at all since he lost his job in July 2008.¹⁵

As to the remaining factors, Mr. Risher also contends generally that his financial condition is poor and that this should mitigate against his being held in contempt of court. It is true that evidence was introduced at trial by Ms. Mitchell that Mr. Risher's house was in foreclosure; however, this evidence alone is insufficient to challenge the trial court's finding that Mr. Risher willfully failed to comply with its child support orders. As his history demonstrates, Mr. Risher has a history of not paying his obligations in a timely fashion until required to do so. With regard to his child support obligation, Mr. Risher has repeatedly been found in contempt of court and has only paid his child support arrearages when faced with jail time. Therefore, the fact that he is also behind on another obligation does not prove that his failure to pay his child support obligation was not willful.¹⁶ Finally, Mr. Risher notes that he has had a motion to decrease his child support pending for several years, which has not yet been heard by the trial court. It appears that the matter was set before a hearing officer, who made various recommendations, but that the motion was never brought before the trial court. Mr. Risher is certainly entitled to have that matter set for hearing, but his failure to do so

¹⁴ In his brief to this court, Mr. Risher's attorney contends that he was unable to reach Mr. Risher, either by telephone or when he knocked on the door of his home, on the day of the hearing. It is unclear how this supports Mr. Risher's claim that he was too ill to attend the hearing.

¹⁵ According to Ms. Mitchell's testimony, Mr. Risher lost his job after he was arrested, when a bench warrant was executed for his failure to appear for an aggravated battery charge against his wife, dating back to 2006. Apparently, he failed to contact his employer, who considered his actions to constitute voluntary abandonment of his employment, and he was then terminated.

¹⁶ In his brief to this court, Mr. Risher notes that he has been allowed to file this appeal as a pauper and suggests that his status as a pauper is relevant to the trial court's ruling on contempt of court. However, the findings as to Mr. Risher's pauper status were not made until after the trial court's judgment finding him in contempt of court and are, therefore, irrelevant to the issue of contempt.

does not grant him the right to ignore the trial court's previous orders in the interim.

After a thorough review of the evidence in the record, we find no manifest error in the factual findings of the trial court, nor do we find any abuse of the trial court's discretion in finding Mr. Risher in contempt of court for willfully disobeying the trial court's previous child support order.

CHILD CUSTODY

In his final assignment of error, Mr. Risher contends that the trial court committed manifest error in awarding Ms. Mitchell sole custody of the parties' minor child, when she neither asked for sole custody in her pleadings¹⁷ nor showed by clear and convincing evidence that sole custody was in the best interest of the minor child. In support of this argument, Mr. Risher relies on Griffith v. Latiolais, 10-754 (La. 10/19/10), 48 So.3d 1058.

In Griffith, the parents of a minor child were involved in a very contentious custody battle. In 2005, the father had filed a petition seeking sole custody of the minor child and set forth allegations regarding choices made by the mother that were not in the best interest of the child. Although the father had been able to freely visit the child at the mother's home, the child had lived solely with the mother since the child's birth in 2001. The mother answered the father's petition, denying the allegations. She further sought joint custody and to be named the domiciliary parent. Id. at 1060.

After a hearing, the trial court granted joint custody of the minor child to the parents, with neither parent designated as the domiciliary parent. Custody was evenly shared and detailed in a document attached to the judgment. Id. at 1065. On appeal, the third circuit court of appeal reversed, granting the mother sole custody of the minor child, despite the fact that she had never requested sole custody in her pleadings.¹⁸ However, the supreme court reversed, finding that the appellate court had erred in

¹⁷ Ms. Mitchell did request sole custody in her August 7, 2008 *ex parte* petition; however, that request was for temporary sole custody only. Ms. Mitchell's earlier petition, filed on June 16, 2008, had requested joint custody.

¹⁸ Griffith v. Latiolais, 09-0824 (La. App. 3rd Cir. 3/3/10), 32 So.3d 380.

granting sole custody to the mother, because not only had she not requested sole custody in her pleadings, she had not proven by clear and convincing evidence that sole custody was in the child's best interest. Id. at 1071. Despite some similarities, Griffith appears to be distinguishable from the case currently before this court.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. LSA-C.C.P. art. 1154. Furthermore, pursuant to LSA-C.C.P. art. 862, a final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

It is true that Ms. Mitchell did not specifically request sole custody in her original petition for custody; however, the issue of sole custody was raised and tried at the hearing, and evidence was introduced on that issue without objection by Mr. Risher's attorney. In fact, at the hearing, Mr. Risher's attorney specifically acknowledged during his questioning of Ms. Mitchell that she was seeking sole custody. Accordingly, it is clear that the issue of sole custody was tried at the hearing and that Mr. Risher's attorney consented to trial of this issue, despite the fact that it had not been raised in her original petition prior to trial.

Mr. Risher further contends that Ms. Mitchell failed to prove by clear and convincing evidence that sole custody was in the best interest of the child. The court shall award custody of a child in accordance with the best interest of the child. See LSA-C.C. art. 131.¹⁹ If the parents agree who is to have custody, the court shall award custody in accordance with their agreement unless the best interest of the child

¹⁹ In the context of this case, we note that LSA-C.C. art. 245 provides, "In a proceeding in which custody of an illegitimate child formally acknowledged by both parents is sought by both parents, ... custody shall be awarded in accordance with the provisions on custody incident to divorce contained in Title V of this Book."

requires a different award. LSA-C.C. art. 132. In the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent. Id.

Proof by clear and convincing evidence requires more than "a preponderance of the evidence," the traditional measure of persuasion, but less than "beyond a reasonable doubt," the stringent criminal standard. State in the Interest of J, K, and T, 582 So.2d 269, 275 (La. App. 1st Cir.), writ denied, 583 So.2d 1145 (La. 1991). To prove a matter by clear and convincing evidence means to demonstrate that the existence of a disputed fact is highly probable, that is, much more probable than its nonexistence. Id. This distinct standard, persuasion by clear and convincing evidence, is usually applied where there is thought to be a special danger of deception, or where the court considers that the particular type of claim should be disfavored on policy grounds. Id.

In determining the best interest of the child, the court shall consider all relevant factors, and such factors may include those enumerated in LSA-C.C. art. 134.²⁰ According to Mr. Risher, the trial court could not have considered all relevant factors, because he was not at the hearing to present evidence in support of his position. This

²⁰ The factors listed in Article 134 are as follows:

- (1) The love, affection, and other emotional ties between each party and the child.
- (2) 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.
- (3) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.
- (4) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.
- (5) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (6) The moral fitness of each party, insofar as it affects the welfare of the child.
- (7) The mental and physical health of each party.
- (8) The home, school, and community history of the child.
- (9) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.
- (10) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party.
- (11) The distance between the respective residences of the parties.
- (12) The responsibility for the care and rearing of the child previously exercised by each party.

argument is without merit.

According to the evidence introduced at trial, R.R. had lived primarily with Ms. Mitchell since the parties' relationship had ended, subject to visitation every other weekend and extended visitation in the summer by Mr. Risher.²¹ Ms. Mitchell testified that she desired to maintain the relationship between Mr. Risher and R.R.; however, she testified that Mr. Risher failed to emotionally support R.R. by failing to attend his extracurricular activities and by failing to call him on the telephone more than once every couple of weeks. Additionally, the record contains evidence of Mr. Risher's repeated failure to support R.R. financially.

Evidence was also introduced to demonstrate that Mr. Risher and his current wife had actively worked to undermine R.R.'s relationship with Ms. Mitchell by encouraging him to sneak out of the house in the middle of the night and by sending him text messages suggesting that he should defy his mother's wishes. Furthermore, evidence was introduced that Mr. Risher's house was in foreclosure at the time of trial, which raised the issue of Mr. Risher's ability to provide R.R. with a stable home in which to live.

The record also contains considerable evidence concerning Mr. Risher's alleged criminal conduct, including the alleged domestic violence toward his wife, committed in the presence of R.R. Finally, the record contains significant evidence regarding Mr. Risher's substance abuse issues. According to Ms. Mitchell, Mr. Risher had always had a drinking problem throughout their relationship, which continued to this day. She further testified that the drinking was an issue in why their relationship ended. In addition, Robert Menuet, the licensed clinical social worker assigned by the court to perform a child custody evaluation, testified regarding Mr. Risher's substance abuse issues based on a substance abuse evaluation performed as part of the custody

²¹ It is not clear from the record exactly when the parties' relationship ended. In her June 16, 2008 petition, Ms. Mitchell alleged that the relationship had ended almost ten years earlier. At trial, she testified that R.R. was born in 1996 and that she had moved to St. Tammany Parish in 2003 with her husband, whom she had married the year before. At the time of trial on December 3, 2010, R.R. was one month from his fifteenth birthday; therefore, R.R. had apparently been living primarily with Ms. Mitchell for at least eight years, and possibly as many as twelve years.

evaluation process. Although Mr. Menuet did not perform the substance abuse evaluation himself, he reviewed and relied on the evaluation as part of his custody evaluation process.²²

According to the substance abuse evaluation, Mr. Risher's family history is reportedly positive for alcoholism. His reported alcohol/drug use suggests a high probability of Mr. Risher's having a substance dependence disorder, by history. Furthermore, the evaluation noted evidence of current alcohol abuse and that there was a moderate possibility that Mr. Risher would resort to further alcohol abuse or dependence in situations of high stress or other problems. According to the evaluation, it was recommended that Mr. Risher abstain from the use of alcohol and continue to abstain from the use of any other illegal drug. It was further recommended that Mr. Risher attend a minimum of two AA meetings a week and provide proof of attendance.

Although Mr. Menuet was hesitant to make a recommendation of sole custody because he had been unable to complete his evaluation, he did state that Ms. Mitchell should "definitely be the domiciliary parent," and that he was unsure about the limitations to be placed on Mr. Risher's visitation. He did state, however, that Mr. Risher should be attending regular AA meetings as recommended in the substance abuse evaluation. He further acknowledged that the reason he had not finished his evaluation was due to the decisions, actions, and inactions of Mr. Risher, and he did not believe that Mr. Risher should have final decision-making authority where R.R. was concerned.

In making its decision, the trial court considered all of this evidence in finding that sole custody with Ms. Mitchell was in the best interest of the minor child. The trial court appeared to focus largely on Mr. Risher's alcohol abuse issues, which the court believed affected not only Mr. Risher's ability to parent R.R., but also his ability to function as a productive member of society. The trial court further noted that this was not the first time that Mr. Risher had failed to appear in court.

²² Mr. Menuet did not complete the child custody evaluation because he was never paid for his services by Mr. Risher; however, he did testify at the hearing, and the substance abuse evaluation was admitted into evidence.

The overwhelming weight of the evidence in the record demonstrated that Mr. Risher had failed to support his child financially and emotionally. Mr. Risher had a history of failing to appear at court proceedings regarding the child, which gives the appearance that such proceedings are not of great importance to him. The record also indicates that Mr. Risher has a history of alleged criminal behavior, including domestic violence committed in the presence of R.R., as well as a history of alcohol abuse, for which he has apparently never sought treatment. Mr. Risher's contention that he was unable to offer evidence to counter the evidence submitted by Ms. Mitchell rings hollow when it is clear that he was properly and duly notified of the hearing and simply failed to appear. Accordingly, after a thorough review of the record, we find no manifest error in the trial court's findings of fact, nor do we find any error of law in the trial court's conclusion that the evidence is clear and convincing that sole custody with Ms. Mitchell is in the best interest of the minor child at the present time.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are assessed to Benjamin R. Risher.

AFFIRMED.

AMBER L. MITCHELL

STATE OF LOUISIANA

VERSUS

COURT OF APPEAL

BENJAMIN R. RISHER

FIRST CIRCUIT

2011 CU 1008

BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J., DISSENTS IN PART AND ASSIGNS REASONS.

HIGGINBOTHAM, J., dissenting in part.

TML

I respectfully disagree with the majority opinion affirming the denial of the defendant's motion for continuance on the issue of custody only. The motion filed by Ms. Mitchell on November 3, 2010, is titled as a "Fourth Motion for Adjudication of Constructive Contempt of Court, for Judgment's Enforcement, for Child Support Arrears, for Executory Judgment, for Attorney's Fees, for Costs, and **Motion to Set Child Custody Trial.**" (Emphasis added.) The motion was filed as a summary proceeding and was heard on December 3, 2010. In the body of the motion she requested that the court "schedule for a merits trial the parties' child custody action." Further, in the prayer of the motion she requested judgment "setting for trial the parties child custody action." Her motion only requested that a date for a final custody trial on the merits be set, not to hear custody on the date set for the other matters in the motion. Mr. Risher was served with this motion, but was clearly not on notice that a final custody trial would be held on that day. He was given no opportunity for discovery or to provide his own witnesses. Therefore, I would remand this case to the trial court in order to set the matter for a full custody trial. I agree with the majority opinion on the issues of child support and contempt. For these reasons, I respectfully dissent in part.