NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 1706

LETTIE LOUISE HARKINS SIMON

VERSUS

BRETT ANTHONY SIMON

DATE OF JUDGMENT: March 26, 2008

ON APPEAL FROM THE FAMILY COURT
(NUMBER 146,601, DIVISION D), PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE ANNETTE LASSALLE, JUDGE

* * * * * *

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BEFORE: PARRO, KUHN AND DOWNING, JJ.

Disposition: AFFIRMED IN PART AND VACATED IN PART.

KUHN, J.

Appellant, Brett Anthony Simon, appeals the trial court's judgment that awards his ex-wife, Lettie Louise Harkins, an increase in child support and dismisses his request for federal and state income tax dependency deductions. We affirm in part and vacate in part.

FACTUAL AND PROCEDURAL BACKGROUND

Simon and Harkins are divorced and have one minor child for which they, by stipulated judgment, have agreed to share joint custody with Harkins designated as the domiciliary parent. According to the terms of the stipulated judgment, Simon's child support obligation is $450 per month. Simon filed a rule to show cause, seeking a reduction in his child support obligation, income tax dependency deductions, and a joint custody implementation order setting forth his schedule for holiday visitation with the minor child. The stipulated judgment does not address the parties' entitlement to income tax dependency deductions and, although it orders the parties to follow the East Baton Rouge Parish public school system calendar and divide all holidays "equally between the parties as determined by the parties," Simon avers that this provision has not been adhered to and has proven unworkable.

The parties waived an evidentiary hearing and submitted the matter for a disposition based solely on their briefs. The trial court rendered a judgment, implicitly denying Simon's request for a reduction in his child support obligation, awarding an increase in child support to Harkins, and denying Simon's request for income tax dependency deductions. The judgment did not address Simon's request for a joint custody implementation order to divide the child's holidays

among the parties. After the denial of his motion for new trial, Simon appealed, urging the trial court erred when it denied him a reduction in child support and granted an increase to Harkins; denied him tax dependency deductions; and failed to issue a joint custody implementation order with a holiday schedule.

DISCUSSION

Asserting that he has exercised shared custody with Harkins, Simon claims La. R.S. 9:315.9 is applicable to the determination of his child support obligation, and its application results in a reduction from the amount he presently pays under the terms of the stipulated judgment as calculated on Worksheet B (reproduced in La. R.S. 9:315.20). He contends the failure to reduce his child support obligation was legal error because the trial court relied on information submitted in the briefs without giving him an opportunity to challenge the authenticity of the evidence and the credibility of the record keeper. Specifically, he claims that the trial court relied on dates supplied in Harkins's brief to ascertain the total number of days that he exercised his visitation and thereby precluded application of La. R.S. 9:315.9 to the determination of his entitlement to a reduction. Although Simon acknowledges that he agreed to submit the matter on briefs, he urges that the trial court overstepped the waiver of the evidentiary hearing when it extrapolated Harkins's unsubstantiated statements and used them as evidence against him, particularly since he was not able to either examine the underlying documents or cross examine Harkins.

La. R.S. 9:315.9 contains the formula for calculating child support when the parents have shared custody.[1] The formula differs from the typical child support formula, in that it has a built-in adjustment for the duplication of costs that inevitably occurs in a shared custody arrangement[2] and is applied to reflect the actual percentage of time the child spends with each parent. ***Martello v. Martello***, 06-0594, p. 10 (La. App. 1st Cir. 3/23/07), 960 So.2d 186, 195. When the joint custody order is deemed to provide for shared custody, the parent with the lesser percentage of time with physical custody does not have the additional burden of proving, as he or she does under La. R.S. 9:315.8, an increase in direct child-related expenses and a concomitant decrease in the other parent's direct child care expenses.[3] ***Martello***, 06-0594 at pp. 10-11, 960 So.2d at 195.

In determining whether a particular arrangement is shared, La. R.S. 9:315.9 does not bind the trial court to a threshold percentage determined solely on the number of days. Rather, the statute mandates an "approximately equal amount of time." Comment (a) to La. R.S. 9:315.9 provides, in relevant part:

> This Section ... contains a formula for calculating the basic child support obligation and an adjustment when the parents have *shared* custody, which is defined as equal or approximately equal physical custody under a joint custody decree. The reference in Subsection (A)(3) should be interpreted as one half or an

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[1] "Shared custody" is defined as "a joint custody order in which each parent has physical custody of the child for an approximately equal amount of time." La. R.S. 9:315.9A(1).

[2] Some of these "redundant costs" include housing expenses, utilities, a bedroom for the child, and toys. ***Martello v. Martello***, 06-0594, p. 10 n.11 (La. App. 1st Cir. 3/23/07), 960 So.2d 186, 195 n.11.

[3] A joint custody arrangement that does not constitute shared custody, even though the non-domiciliary parent is granted more than the typical amount of physical custody, may entitle the non-domiciliary parent to a reduction, in the form of a credit, in the amount of child support owed to the domiciliary parent. La. R.S. 9:315.8E; ***Martello***, 06-0594 at p. 11 n.12, 960 So.2d at 195 n.12.

> approximately equal amount of time, expressed in percentages such as forty-nine percent/fifty-one percent. See Subsection (A)(1).

The trial court has discretion in determining whether a particular arrangement constitutes "shared custody," justifying the application of La. R.S. 9:315.9. ***Martello***, 06-0594 at p. 11, 960 So.2d at 195-96.

According to the stipulated judgment:

> Simon shall enjoy visitation with the minor child ... in alternating weeks from Thursday after school until Tuesday morning when he returns the child to school. During the week in which he does not have the child for the weekend, [Simon] shall have overnight visitation with the child, picking the child up after school on Thursday and returning the child to school on Friday morning. ...
>
> Simon shall have summer visitation, commencing the second Friday of June consisting [of] three, (3), non-consecutive two week visitation periods. Between each two week visitation period with [Simon], [Harkins] shall enjoy one uninterrupted week with the child. Additionally, during [Simon's] two week visitation period, [Harkins] shall have overnight visitation with the minor child commencing the second Monday of [Simon's] visitation period, after day camp and ending when [Harkins] returns the child to camp on Tuesday morning.

In its written reasons for judgment, the trial court stated, "Simon is in the National Guard and he has not been able to exercise his scheduled visitation as allowed by the [stipulated] judgment so his actual time spent with the minor child is even less than the 120-130 days out of the year granted to him." Simon maintains this finding evinces the trial court's reliance on representations made by Harkins in brief about the number of days he actually visited with his child. But at the hearing on Simon's motion for new trial, the trial judge stated:

> Let's assume, for the sake of the argument that Mr. Simon has exercised all of his visitation. He still wouldn't be up to 50%. My law clerk and I reran these numbers. ... If he exercised every holiday

he was going to get and every day during the week, it only came to 44%."[4] (Footnote added.)

In this appeal, Simon maintains that under the stipulated judgment, he has had physical custody of the minor child 46.8% of the time. Even accepting Simon's determination, we cannot say the trial court abused its discretion in its conclusion that the arrangement Simon and Harkins agreed to in the stipulated judgment, in which Simon has had physical custody of the minor child 46.8% of the time, was not shared custody.[5] In light of the dearth of evidence, the fact that the stipulated judgment referred to the parties' custody as "joint," and that it was Simon's burden to prove a shared custody arrangement, we find the trial court did not abuse its discretion in rejecting Simon's request to reduce his child support obligation.[6]

We note that the trial court's judgment does not expressly deny Simon's request for a reduction in his child support obligation. It is well settled that silence in a judgment on any issue that has been placed before the court is deemed

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[4] Because the record does not contain any evidence of the East Baton Rouge Parish public school system's calendared holidays or the duration of summer, we cannot say with exactitude whether the trial court correctly calculated the days Simon had physical custody of the minor child pursuant to the stipulated judgment. We note a significant difference between the parties' respective determinations in interpreting the provision, "Simon shall enjoy visitation with the minor child ... in alternating weeks from Thursday after school until Tuesday morning." Simon claimed six days of visitation out of every fourteen days, and Harkins urged that Simon has had five in every fourteen days.

[5] Simon had earlier filed a rule to change custody, and an amended rule to change custody; in each of these pleadings, Simon stated, "he has maintained regular and consistent contact with his minor child, visiting on a regular basis; however only subject to his military duty." Because we find no abuse of discretion by the trial court in its determination that La. R.S. 9:315.9 is not applicable to the arrangement set forth in the stipulated judgment, we do not address the issue of whether these statements in Simon's rules had the effect of a judicial confession, ***see*** La. C.C. art. 1853, and thus lend evidentiary support to the trial court's finding that he did not fully exercise his visitation.

[6] Because there is no evidence showing that Simon's physical custody of the minor has increased his financial burden and decreased Harkins' and that reduction in support would be in best interests of the child, the applicability of La. R.S. 9:315.8E is not supported by this record.

a rejection of the claim. ***Hayes v. Louisiana State Penitentiary***, 06-0553, p. 6 n.9 (La. App. 1st Cir. 8/15/07), 970 So.2d 547, 554 n.9, ***writ denied***, 07-2258 (La. 1/25/08), 973 So.2d 758. Accordingly, for clarification, we modify the judgment to expressly decree "Simon's request for a reduction in his child support obligation is denied."

In its judgment, the trial court awarded an increase in child support to Harkins. But Simon complains that the record is devoid of a pleading wherein Harkins requested an increase in child support and, therefore, the trial court erred as a matter of law.

A judgment rendered beyond the pleadings is a nullity. ***Benware v. Means***, 98-0203, p. 10 (La. App. 1st Cir. 5/12/00), 760 So.2d 641, 647, ***writ denied***, 00-2215 (La. 10/27/00), 772 So.2d 650; ***Havener v. Havener***, 29,785, p. 2 (La. App. 2d Cir. 8/20/97), 700 So.2d 533, 535. The trial court has discretion to allow enlargement of the pleadings to conform to the evidence. ***See*** La. C.C.P. art. 1154.

A timely objection, coupled with the failure to move for an amendment of the pleadings, is fatal to an issue not raised in the pleadings. ***Benware***, 98-0203 at p. 10, 760 So.2d at 647; ***Havener***, 29,785 at p. 3, 700 So.2d at 535. If the evidence is admissible on the issues properly pleaded, the pleadings are not enlarged by its admission. ***Benware***, 98-0203 at p. 10, 760 So.2d at 647; ***Havener***, 29,785 at p. 3, 700 So.2d at 535.

Article 1, Section 2 of the Louisiana Constitution of 1974 provides that no person shall be deprived of life, liberty, or property except by due process of law. The essentials of "due process of law" are notice and an opportunity to be heard

and to defend in an orderly proceeding rules and principles established in our system adapted to the nature of the case. ***Havener***, 29,785 at p. 3, 700 So.2d at 535.

La. C.C.P. art. 862 grants the trial court authority to render a final judgment granting 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. ***Benware***, 98-0203 at p. 10, 760 So.2d at 647. Nothing in the article, however, is intended to confer jurisdiction on a court to decide a controversy which the parties have not regularly brought before it. ***Havener***, 29,785 at p. 3, 700 So.2d at 536.

Our review of the record confirms that Harkins did not file a pleading requesting an increase in child support or an order requiring Simon to pay a percentage of the child's medical expenses. Since the evidence that the trial court relied on in ordering Simon to pay an increase in child support and 58.65% of specified medical expenses was also admissible on the issue of Simon's entitlement to a reduction in his child support obligation, the pleadings were not enlarged by the stipulations submitted in the parties' respective briefs. Because the issue was not pleaded and, therefore, not properly before the trial court, we vacate those portions of the trial court judgment that order Simon to pay to Harkins $551.31 per month in child support and 58.65% of specified medical expenses.

Simon next complains that the trial court erred in denying his request for federal and state tax dependency deductions, urging that under the terms of La. R.S. 9:315.18, he is entitled to the deductions based upon the percentage of the total child support obligation he is obligated to pay. According to the statute:

> A. The amounts set forth in the schedule in R.S. 9:315.19 presume that the custodial or domiciliary party has the right to claim the federal and state tax dependency deductions and any earned income credit. However, the claiming of dependents for federal and state income tax purposes shall be as provided in Subsection B of this Section.
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> B. (1) The non-domiciliary party whose child support obligation equals or exceeds fifty percent of the total child support obligation shall be entitled to claim the federal and state tax dependency deductions if, after a contradictory motion, the judge finds both of the following:
>
> (a) No arrearages are owed by the obligor.
>
> (b) The right to claim the dependency deductions or, in the case of multiple children, a part thereof, would substantially benefit the non-domiciliary party without significantly harming the domiciliary party.
>
> (2) The child support order shall:
>
> (a) Specify the years in which the party is entitled to claim such deductions.
>
> (b) Require the domiciliary party to timely execute all forms required by the Internal Revenue Service authorizing the non-domiciliary party to claim such deductions.
>
> C. The party who receives the benefit of the exemption for such tax year shall not be considered as having received payment of a thing not due if the dependency deduction allocation is not maintained by the taxing authorities.

Despite Simon's representations that he does not owe arrearages, the record does not contain any evidence to demonstrate the accuracy of his representations. Additionally, there is no evidence showing that the right to claim the dependency deductions would substantially benefit Simon without significantly harming Harkins. Thus, because Simon has failed his burden of proof under La. R.S. 9:315.18, the record does not support a finding that he is entitled to the deductions, and the trial court correctly denied his claim.

Lastly, Simon contends that the trial court erred by failing to set forth a joint custody implementation order since, in his rule, he requested the minor child's holiday schedules be divided among the parties. He asserts, based on his representations in brief that Harkins retained physical custody of the minor unequally during the holidays and that she has failed to submit any proposed joint custody implementation plan, the trial court erred in failing to implement the one he submitted. But the record does not contain a proposed plan from either party or any other evidence from which the trial court could have fashioned an implementation order. Accordingly, we find no error in the trial court's implied rejection of this claim.[7]

DECREE

To clarify the trial court's ruling, we modify the trial court's judgment to expressly decree "Simon's request for a reduction in his child support obligation is denied," and affirm that portion of the judgment. We vacate those portions of the judgment that order Simon to pay an increase in child support and 58.65% of "any and all deductibles or co-payments for a health and hospitalization insurance policy, or any medical, dental, or prescription costs not covered by said insurance." In all other respects we affirm the judgment. Appeal costs are assessed 50% to Brett Anthony Simon and 50% to Lettie Louise Harkins.

AFFIRMED IN PART AND VACATED IN PART.

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[7] Nothing precludes Simon from requesting a hearing on his request for a joint custody implementation order. ***See*** La. R.S. 9:335 and La. C.C.P. art. 963.