**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 2182

SHERYL MAGEE BUXTON

VERSUS

JOHN L. BUXTON

VGW

**Judgment Rendered:** MAR 2 8 2012

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Appealed from the
The Family Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 100,064

Honorable Toni Higginbotham, Judge

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

**GUIDRY, J.**

In this child support proceeding, Sheryl Magee Buxton Carbo appeals from a judgment of the trial court denying her rule for contempt. John L. Buxton also appeals from the trial court's denial of his motion for sanctions. For the reasons that follow, we dismiss John L. Buxton's appeal, and we convert Sheryl Magee Buxton Carbo's appeal to an application for supervisory writs, grant a writ of certiorari, and affirm the trial court's judgment denying the rule for contempt.

## FACTS AND PROCEDURAL HISTORY

Sheryl Buxton and John L. Buxton were married on March 4, 1978, and three children were born of the marriage. On February 13, 1992, Sheryl filed a petition for divorce and a judgment of divorce was signed by the trial court on November 2, 1992.

Thereafter, the parties filed motions regarding custody, child support, and other incidental matters. These matters were submitted to the trial court for decision. The trial court issued reasons for judgment on November 8, 2004, finding that the parties shared equal physical custody of the minor child and that: (1) for the period October 2000 to May 2001, John owed child support to Sheryl in the amount of $399.00 per month for a total of $3,192.00; (2) for the period June 2001 to September 2001, Sheryl owed child support to John in the amount of $275.50 per month for a total of $1,102.00; and (3) for the period September 2001 to November 2004, John owes child support to Sheryl in the amount of $223.03 for a total of $8,698.17. Because neither Sheryl nor John had paid the amounts owed, the trial court found those to be the amounts of the arrearages owed by the parties, and after offsetting the amounts, determined that John owed arrearages in child support to Sheryl in the amount of $9,375.62. The trial court signed a judgment in conformity with its reasons on May 22, 2007.

Thereafter, on November 20, 2009, Sheryl filed a rule for contempt, attorney's fees, and court costs. In her rule, Sheryl acknowledged that the parties had entered into negotiations concerning custody and child support, but that the negotiations were never finalized in any recorded document or judgment, and that no final settlement was agreed to by the parties. Further, Sheryl stated that since the May 2007 judgment, John has failed to pay any of the arrearages ordered, and has also failed to pay the ordered $223.03 per month in child support from November 2004 to April 2008, when the child turned nineteen,[1] resulting in an additional arrearage of $11,820.59.

On January 14, 2010, John filed a motion for sanctions for the filing of a frivolous rule against him. John asserted that the parties held a status conference with the trial judge on April 14, 2005, and thereafter, the parties prepared a joint stipulation and stipulated judgment in accordance with the agreements reached between the parties at the conference, whereby: (1) Sheryl was granted sole custody of the minor child and was designated as the domiciliary parent, subject to reasonable visitation of John; (2) the parties agreed no child support shall be due by one to the other and each party waived, released, and/or relinquished the other party from any and all arrearages in child support presently due and/or in the future; (3) John was to maintain a policy of health insurance for the benefit of the minor child until Sheryl can transfer the child to a health insurance plan provided by her or her current husband; (4) John shall immediately deliver to Sheryl the minor child's current insurance card, social security card, birth certificate, and personal belongings located at the residence of John; and (5) the parties agreed to immediately dismiss with prejudice all pending rules and motions filed against the other party.

[1] The child was still in high school at the time he turned nineteen.

Following a hearing on the rule for contempt and motion for sanctions, the matter was left open for the submission of post trial memoranda. On June 4, 2010, the trial court issued reasons for judgment, finding that the parties did have an extrajudicial agreement, and that John relied on this agreement and fulfilled his obligations under the agreement. Thereafter, the trial court signed a judgment on July 1, 2010, denying Sheryl's motion for contempt and John's motion for sanctions, and dismissed the rule and the motion with prejudice. The parties now appeal from this judgment.

## DISCUSSION

**Appellate Jurisdiction**

This court, *ex proprio motu*, issued a rule to show cause to the parties after examining the record and finding that the judgment at issue appears to be a non-appealable ruling. The July 1, 2010 judgment from which the parties seek to appeal denies Sheryl's rule for contempt and John's motion for sanctions. This court has previously determined that both of these types of judgments are interlocutory, as they do not determine the merits of the case. See La. C.C.P. art. 1841; Suazo v. Suazo, 10-0111, pp. 3-4 (La. App. 1st Cir. 6/11/10), 39 So. 3d 830, 832; Brown v. Sanders, 06-1171, p. 2 (La. App. 1st Cir. 3/23/07), 960 So. 2d 931, 933. An interlocutory judgment is appealable only when expressly provided by law. La. C.C.P. art. 2083(C). Because there is no law that expressly provides for the appealability of these types of judgments, we find that the July 1, 2010, judgment is not an appealable judgment.[2] However, a court of appeal may exercise

[2] We note that a judgment that *imposes* sanctions pursuant to La. C.C.P. art. 191, 863, 864 or Code of Evidence article 510(G) is a final judgment for purposes of appeal. See La. C.C.P. art. 1915(A)(6). Further, though some circuits have found where the object of the proceeding before the court is to hold someone in contempt for violating the orders of the court, a direct appeal is the appropriate remedy since, in those instances, the trial court judgment would be final, see Pittman Construction Company, Inc. v. Pittman, 96-1079, (La. App. 4th Cir. 3/12/97), 691 So. 2d 268, 269-270, writ denied, 97-0960 (La. 5/16/97), 693 So. 2d 803; Thibodeaux v. Thibodeaux, 99-618, p. 1 (La. App. 5th Cir. 11/10/99), 748 So. 2d 1180, 1181, this circuit has not adopted that view.

supervisory jurisdiction over all matters arising within its jurisdiction. La. Const. art. V §10(A). In the present case, Sheryl filed her motion to appeal from the trial court's July 1, 2010 judgment denying her rule for contempt on July 29, 2010, within the 30-day delay provided for seeking supervisory writs. See URCA Rule 4-3; La. C.C.P. art. 1914. Accordingly, we will convert Sheryl's appeal of the interlocutory ruling relative to her rule for contempt to an application for supervisory writs, and consider it under our supervisory jurisdiction. However, because John's motion for appeal was not filed until August 3, 2010, more than 30-days after the July 1, 2010 judgment was signed by the trial court, we will not convert John's appeal to an application for supervisory writs, and we dismiss his appeal. See URCA Rule 4-3.

**Rule for Contempt**

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. La. C.C.P. art. 221. There are two kinds of contempt of court, direct and constructive. La. C.C.P. art. 221. The willful disobedience of any lawful judgment or order of the court constitutes a constructive contempt of court. La. C.C.P. art. 224(2). 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. Barry v. McDaniel, 05-2455, p. 5 (La. App. 1st Cir. 3/24/06), 934 So. 2d 69, 73. In the context of delinquent child support, the court must determine that disobedience of 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. State, Department of Social Services, Support Enforcement Services, ex re. A.M. v. Taylor, 00-2048, p. 7 (La. App. 1st Cir. 2/15/02), 807 So. 2d 1156, 1161-1162.

The decision to hold a party in contempt of court for disobeying the court's orders is within the trial court's great discretion, and the court's decision should only be reversed when the appellate court discerns an abuse of that discretion. Boudreaux v. Vankerkhove, 07-2555, pp. 10-11 (La. App. 1st Cir. 8/11/08), 993 So. 2d 725, 733. However, the trial court's predicate factual determinations are reviewed under the manifest error standard of review. See Rogers v. Dickens, 06-0898, p. 7 (La. App. 1st Cir. 2/9/07), 959 So. 2d 940, 945.

In the instant case, it is undisputed that John did not pay child support pursuant to the May 2007 judgment. However, John asserts that the parties entered into a joint stipulation, whereby Sheryl was granted sole custody of the minor child and the parties agreed that no child support would be due by one to the other, with each party waiving and releasing the other party from any and all arrearages in child support presently due and/or due in the future.

The general rule in Louisiana is that a child support judgment remains in full force until the party ordered to pay it has the judgment modified, reduced or terminated by the court. Halcomb v. Halcomb, 352 So. 2d 1013, 1015-1017 (La. 1977). However, our courts have recognized that a judgment awarding child support can be modified extrajudicially by agreement of the parties. Such an agreement must meet the requisites of a conventional obligation and the evidence must establish the parties have agreed to waive or otherwise modify the court-ordered payments. Dubroc v. Dubroc, 388 So. 2d 377, 380 (La. 1980); see also Trisler v. Trisler, 622 So. 2d 730, 731 (La. App. 1st Cir. 1993). Furthermore, the agreement must foster the continued support and upbringing of the child; it must not interrupt the child's maintenance or upbringing, or otherwise work to his detriment. Dubroc, 388 So. 2d at 380; see also Serrate v. Serrate, 96-1545, p. 4 (La. App. 1st Cir. 12/20/96), 684 So. 2d 1128, 1131. The party seeking to modify

his obligation under the judgment has the burden of proving the existence of such an agreement. Trisler, 622 So. 2d at 731.

At the contempt hearing, Sheryl and John introduced copies of letters and proposed stipulations evidencing the parties' negotiations regarding the custody of the minor child and a waiver of child support. Initially, the stipulations provided for sole custody of the minor child to transfer to Sheryl, but only relieved John of future child support payments. After several communications between the parties and their counsel, the parties and their counsel appeared at a status conference with the trial judge on April 14, 2005. Following the status conference, *Sheryl's counsel* forwarded a joint stipulation and stipulated judgment, prepared in accordance therewith, to John's counsel. This stipulation specifically provided:

> The parties agree and stipulate that pursuant to the previous orders of this Court, **SHERYL MAGEE BUXTON CARBO** shall be granted the sole care, custody and control of the minor child ... and that she be designated as the primary/domiciliary custodial parent subject to reasonable visitation upon the mutual agreement of [the minor child] and **JOHN L. BUXTON**.
>
> The parties further agree and stipulate that no child support shall be due by one to the other, and that each party waives, releases and/or relinquishes the other party from any and all arrearages in child support presently due and/or in the future.
>
> The parties further agree and stipulate that **JOHN L. BUXTON** shall continue to maintain a policy of health and hospitalization insurance for the benefit of the minor child until **SHERYL MAGEE BUXTON CARBO** can transfer the minor child to a plan of hospitalization and health insurance provided by her or her current husband.

John's counsel responded, requesting that the judgment be revised to provide that the health insurance be transferred immediately (within five days) and indicating that once this change was made, John would sign the agreement. No further action was taken on this matter until Sheryl's counsel filed a motion for contempt in November 2009. However, the record demonstrates that John

delivered the minor child to Sheryl after the negotiations commenced,[3] continued to maintain the minor child on his health and hospitalization insurance, and delivered the child's health insurance card, social security card and birth certificate as also agreed to by the parties. John, by his actions, accepted the offer as presented by Sheryl. See La. C.C. art. 1927. Accordingly, we find that John established that the parties entered into an agreement, whereby Sheryl waived her right to collect past, present and future child support arrearages from John.[4]

However, this does not end the inquiry. In Dubroc, 388 So. 2d at 380, the supreme court found a parent could temporarily suspend a child's right to collect support by taking over the physical custody and actual support of the child, but it maintained the principle enunciated in Walder v. Walder, 159 La. 231, 105 So. 300 (1925) that a parent cannot permanently waive or set aside that right by agreement. In Walder, the supreme court noted that "[t]he duty of the father to support his minor children is a continuing obligation. He cannot escape it. A decree which purports to enable him to escape that duty is beyond the power of a court to render. It would be contrary to public policy to give such a decree effect." Walder, 159 La. at 236, 105 So. at 302.

The second circuit, in Pierce v. Pierce, 397 So. 2d 62, 65 (La. App. 2nd Cir. 1981), followed the holding set forth in Walder, finding that "[a]lthough it is generally true that a party receiving rights under a judgment may waive these rights ... the overriding duty of support which a parent owes to a child ... is not

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[3] We note that there was conflict in the testimony as to when the minor child began living with Sheryl. John stated that the child went to Sheryl's house after the negotiations commenced, whereas Larry Carbo, Sheryl's current husband, stated that the child started living with Sheryl in early 2004. However, a February 9, 2005 letter attached to a proposed joint stipulation sent by Sheryl's counsel to John's counsel states "[b]ased upon the conversation with my client, I understand that your client has agreed to relinquish custody of [the minor child] to her immediately." Where there is conflict in the testimony, reasonable evaluations of credibility ad reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989).

[4] We note that Sheryl was not present and did not testify at the contempt hearing.

waivable indefinitely or for a permanent time." Further, in Richardson v. Richardson, 427 So. 2d 518, 520-521 (La. App. 3rd Cir.), writ denied, 433 So. 2d 182 (La. 1983), the third circuit found a judgment wherein a mother waived future child support in exchange for a lump-sum payment was null and void as against public policy, holding that "the duty to support a minor child is a continuing one and cannot be escaped by a waiver which purports to be permanent and everlasting in its impact."

By the clear terms of the joint stipulation, the parties waived all child support due by either party, and waived, released and/or relinquished the other party from any and all arrearages in child support presently due and/or due in the future.[5] Accordingly, this provision purports to permanently waive either spouse's right to child support, and as such, is contrary to public policy. Persons may not, by their agreement, derogate from the laws enacted for the protection of the public interest and any agreement that violates a rule of public order is absolutely null. See La. C.C. arts. 7 and 2030. Therefore, we find that John has failed to establish that he and Sheryl entered into a valid and enforceable extrajudicial agreement as would relieve him of his continuing support obligations or abrogate his obligation to pay the arrearages recognized in the May 2007 judgment.

However, in considering whether John was in contempt of court, we note that the evidence otherwise establishes that the parties acted in conformity with the terms of the agreement, and that John operated under a good faith belief that he had an agreement with Sheryl, whereby he was relinquished from his obligation to pay child support and any child support arrearages. The fact that this court has subsequently determined that the agreement is unenforceable as against public

[5] Originally, the parties enjoyed equal physical custody of the minor child, and both parties were responsible to one another for child support during the periods when the other party exercised physical custody of the child. As noted in the May 2007 judgment, both parties failed to pay their support obligation, and both incurred arrearages. However, when the trial court offset the parties' arrearages, John still owed arrearages in the amount of $9,375.62 to Sheryl.

policy does not alter this good faith belief. Accordingly, because the record is devoid of any evidence that John willfully disobeyed the court's May 2007 judgment or deliberately refused to pay the ordered child support, we find that the trial court was correct in denying the rule for contempt.

**Request for Award of Additional Arrearages**

As part of her rule for contempt, Sheryl also requested that the trial court order John to pay $11,820.59 in child support arrearages from December 2004 through April 2008. However, at the time of the contempt hearing, the trial court had not determined that child support arrearages were owed for this period of time. Further, from our review of the May 2007 judgment, it is unclear that John was ordered to pay continued support in the amount claimed by Sheryl of $223.03 per month, as that judgment was specifically limited to determining the amount of arrearages then existing and owed by John. Accordingly, because this issue was not addressed by the trial court, we find the proper course is to vacate the trial court's judgment to the extent that it implicitly denied Sheryl's request that John be ordered to pay additional child support arrearages, and remand this matter to the trial court for consideration of Sheryl's claim.[6]

## CONCLUSION

For the foregoing reasons, we affirm that portion of the trial court's July 1, 2010 judgment that denied Sheryl Magee Buxton Carbo's rule for contempt, attorney's fees, and costs. However, we vacate the July 1, 2010 judgment to the extent that it inferentially held that the arrearages owed to Sheryl Magee Buxton Carbo, as set for the May 22, 2007 judgment, were abrogated and extinguished by a subsequent extrajudicial agreement and to the extent that it denied Sheryl Magee Buxton Carbo's request for additional arrearages accruing after the May 22, 2007

[6] Because we do not reach the merits of Sheryl's entitlement to additional arrearages, we likewise do not address Sheryl's entitlement to attorney's fees. See La. R.S. 9:375(A).

judgment and we remand this matter to the trial court for further consideration of Sheryl Magee Buxton Carbo's claim. In all other respects, the July 1, 2010 judgment is specifically affirmed.

Additionally, we hereby dismiss John L. Buxton's appeal as untimely. All costs of this appeal are assessed one-half each to the parties.

**WRIT OF CERTIORARI GRANTED IN PART AND DENIED IN PART; JUDGMENT AFFIRMED IN PART, VACATED IN PART AND REMANDED; APPEAL BY SECOND APPELLANT DISMISSED.**