STATE OF LOUISIANA, DEPARTMENT OF SOCIAL SERVICES IN THE INTEREST OF L. R.	NO. 17-CA-328
VERSUS	FIFTH CIRCUIT
CHRISTOPHER HAINES	COURT OF APPEAL
	STATE OF LOUISIANA

ON APPEAL FROM THE JEFFERSON PARISH JUVENILE COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 09-NS-1077, DIVISION "A"
HONORABLE ANN MURRY KELLER, JUDGE PRESIDING

December 13, 2017

MARC E. JOHNSON
JUDGE

Panel composed of Judges Marc E. Johnson,
Robert M. Murphy, and Hans J. Liljeberg

AFFIRMED IN PART; AMENDED IN PART

MEJ
RMM
HJL

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DEFENDANT/APPELLANT,
CHRISTOPHER HAINES

Christopher Haines
In Proper Person

JOHNSON, J.

Defendant appeals the juvenile court's judgment modifying his child support obligation, specifically increasing the amount from $275/month to $597/month inclusive of private school tuition, and ordering it retroactive to the date of judicial demand. For the following reasons, we affirm in part and amend in part.

FACTS & PROCEDURAL HISTORY

This matter began by a petition to prove paternity and obtain child support filed in 2009 by the State of Louisiana, Department of Social Services (now the Department of Children and Family Services), in the Interest of L.R. against Defendant, Christopher Haines. Defendant subsequently acknowledged the minor child as his biological child, and child support was set in September 2010 after a hearing. Defendant appealed the judgment setting child support and assessing arrearages. On appeal, this Court vacated the September 2010 judgment on the basis the record was devoid of any evidence to allow a review, and we remanded the matter for further proceedings. *State Department of Children & Family Services ex rel. L.R. v. Haines*, 11-84 (La. App. 5 Cir. 5/6/11); 67 So.3d 515.

On remand, the parties reached an agreement regarding child support, and the agreement was made the judgment of the court on December 5, 2011. Specifically, the recipient agreed to a reduced child support amount of $275/month plus 5% court costs for a total of $288.75/month, with the obligation having prospective application only; thus, Defendant owed no arrearages.

Approximately five years later, on September 9, 2016, the State filed a motion to modify support on the basis it had been more than three years since support was set. The matter was heard by a hearing officer on November 29, 2016, who made certain recommendations – specifically that child support be increased to $801/month plus 5% court costs for a total of $841.05/month – with which

Defendant disagreed.[1] As a result, a disagreement hearing was set before the juvenile court judge for March 6, 2017.

At the disagreement hearing, the State indicated that the increase of child support recommended by the hearing officer was based on a determination of Defendant's income from the Louisiana Occupational Wage Survey for a roofer because Defendant did not provide the requested information regarding his income. The State advised the juvenile court that Defendant, on the day of the disagreement hearing, provided his 2015 tax returns with rental income information and check stubs from a new job that he started on December 30, 2016.[2] Based on this new information, the State argued that Defendant's child support obligation was $697/month, inclusive of his proportionate share of private school tuition.[3]

After hearing testimony and considering various documents submitted, the juvenile court agreed with the State's calculation and set Defendant's child support obligation at $697/month, inclusive of private school tuition. The court gave Defendant a $100/month second family credit based on the fact Defendant's oldest daughter from a previous relationship lived with him, resulting in a total obligation of $597/month plus 5% court costs for a total of $626.85/month. The court ordered the child support retroactive to the filing date of September 9, 2016. It is from this March 6, 2017 judgment that Defendant now appeals.

ISSUES

Defendant raises three issues on appeal. First, he argues the trial court erred in calculating the amount of his rental income for purposes of determining his adjusted monthly gross income. Second, he maintains the trial court erred in

[1] The juvenile court signed an order on November 29, 2016, making the hearing officer's recommendations the judgment of the court.
[2] The record shows that Defendant's new job was with Home Depot where he earned $13/hour.
[3] The State explained that it calculated Defendant's monthly income to be $2,819.22 based on his rental income (exclusive of the mortgage, insurance and taxes) and his current income from Home Depot. It further noted that the recipient's monthly income was $1,516.67 (based on her current employment at EZ Cash earning $10/hour working 35 hours per week). According to the child support obligation worksheet, Defendant's proportionate share of the basic child support obligation was determined to be 65%. Additionally, the obligation worksheet listed the private school tuition at $330.42/month.

including private school tuition in the basic child support obligation. And, third, Defendant avers the trial court erred in ordering the child support obligation retroactive to the filing date of September 9, 2016.

DISCUSSION

Standard of Review

The trial court's discretion in setting the amount of child support is structured and limited. *Dept. of Social Services ex rel. A.D. v. Gloster*, 10-1091 (La. App. 5 Cir. 6/29/11); 71 So.3d 1100, 1102. The obligation must be administered and fairly apportioned between parents in their mutual financial responsibility for their children. The guidelines for determination of child support are set forth in La. R.S. 9:315, *et seq*., and balance the needs of children with the means available to parents. The standard of review in a child support case is manifest error, and an appellate court will not disturb a child support order unless there is an abuse of discretion or manifest error. *Gloster*, *supra*.

Rental Income

Defendant argues that the juvenile court erred in computing his adjusted monthly gross income by incorrectly calculating his monthly rental income. Specifically, Defendant asserts the juvenile court erred in arbitrarily finding his rental income was $513.22/month when his records and tax returns show his rental income was only $52.33/month.

The schedule of basic child support obligations contained in La. R.S. 9:315.19 relies on the combined adjusted monthly gross income of the parents. Rental income is a component of gross income under La. R.S. 9:315(C)(3)(c), which states:

> (c) Gross receipts minus ordinary and necessary expenses required to produce income, for purposes of income from self-employment, rent, royalties, proprietorship of a business, or joint ownership or a partnership or closely held corporation. "Ordinary and necessary expenses" shall not include amounts allowable by the Internal

> Revenue Service for the accelerated component of depreciation expenses or investment tax credits or any other business expenses determined by the court to be inappropriate for determining gross income for purposes of calculating child support.

Under this statute, any amount received for rental property shall not be included in gross income until after the "ordinary and necessary" expenses required to produce said income have been deducted. *Widman v. Widman*, 619 So.2d 632, 636 (La. App. 3rd Cir. 1993). The party seeking the subtraction of "ordinary and necessary" expenses from the gross receipts bears the burden of proving the expenses are "ordinary and necessary." *Dazet v. Price*, 16-362 (La. App. 5 Cir. 12/7/16); 204 So.3d 1152, 1154. The court is not bound by a party's designation of which expenses are "ordinary and necessary," even if made in federal tax returns. *Dejoie v. Guidry*, 10-1542 (La. App. 4 Cir. 7/13/11); 71 So.3d 1111, 1118, *writ denied*, 11-1779 (La. 9/2/11); 68 So.3d 520.

On appeal, Defendant fails to identify which expenses he believes were "ordinary and necessary" that were not deducted from the gross receipts by the juvenile court. Instead, he simply makes a broad allegation that the juvenile court failed to use the amount of rental income as computed on his federal tax return, which as stated above is clearly not required by law.

The record shows that at the disagreement hearing, the State explained that it had calculated Defendant's rental income to be $513.22/month based on two properties being rented at $1,190/month for a total of $14,280/year.[4] From that amount, the State indicated that it deducted expenses relating to insurance, taxes and the monthly mortgage payments. It specifically noted that it did not deduct expenses for water or electricity, noting that Defendant did not provide the leases for the occupied properties to show what was paid for by the tenants. Defendant

[4] We note that Defendant's 2015 tax return shows his rental income as $17,256. Defendant explained that the higher number on his tax return reflected a third tenant who only rented for a few months at the beginning of the year. The State indicated it did not use the higher number from Defendant's tax return, but rather calculated rental income based on rent Defendant currently received from his two tenants. Defendant did not dispute that he received $1,190/month in rental payments from his tenants.

pointed to his bank statements and other documents and argued that they showed he paid the water bill on the rental property. Ultimately, the trial court used the $513.22/month figure calculated by the State as Defendant's rental income.

Upon review, we cannot say the trial court was manifestly erroneous in its calculation of Defendant's rental income. The record shows the rental property at issue,[5] located on Fourth Street in Marrero, was a building with four units, two of which Defendant rented out and one of which Defendant used for equipment, storage, and maintenance products.[6] It was incumbent upon Defendant to prove the "ordinary and necessary" expenses required to produce income. The record shows the juvenile court clearly allowed some expenses, i.e. insurance, taxes and mortgage payments, as "ordinary and necessary" and disallowed others. Because Defendant has failed to specify on appeal what "ordinary and necessary" expenses were required to produce income and what expenses the trial court failed to deduct from his gross receipts, we cannot find the juvenile court was manifestly erroneous in its calculation.

Private School Tuition

Defendant next argues the trial court erred in allowing private school tuition in the child support calculation without proof of the cost of tuition or that the child's mother, Ms. Rose Roux, paid it.

The inclusion of expenses for private school attendance as an addition to the basic child support obligation is authorized by La. R.S. 9:315.6, which provides in pertinent part:

> By agreement of the parties or order of the court, the following expenses incurred on behalf of the child may be added to the basic child support obligation:

[5] The record indicates that Defendant had two rental properties – one in Marrero and one in Baton Rouge – but only the Marrero property generated income.

[6] There was no indication as to the current use of the fourth unit, although at some point in early 2015 a third tenant occupied the building for a period of time. (*See* footnote 4, *supra*.)

> (1) Expenses of tuition, registration, books, and supply fees required for attending a special or private elementary or secondary school to meet the needs of the child.

According to the official comments to this statute, "The needs of the child met by the special or private school need not be particular educational needs, but may include such needs of the child as the need for stability or continuity in the child's educational program." *See Thomas v. Robinson*, 15-82 (La. App. 5 Cir. 9/23/15); 176 So.3d 698, 700-01. A trial court's determination of whether to include private school tuition in a basic child support obligation will not be disturbed absent an abuse of discretion. *Id*. at 702.

At the disagreement hearing, Ms. Roux testified that the child was in school at Word of Life Academy. She stated the child, who is in second grade, had been attending that school for four years, since pre-K. Ms. Roux explained that she pays cash for the tuition. The child support obligation worksheet introduced into evidence indicated tuition was $330.42/month.[7]

Defendant's argument against private school tuition during the hearing was that he never agreed to private school, that it was a unilateral decision on the part of Ms. Roux, he could not afford private school, and that the school the child is attending is not accredited. However, the only issue Defendant raises on appeal is that there was no proof offered regarding the amount of tuition or that Ms. Roux paid it. We disagree. Ms. Roux testified that she paid the school tuition and the obligation worksheet showed tuition, based on documentation from the school, was $330.42/month. Additionally, documentation from the school showed numerous cash payments were made throughout the 2015-2016 school year and the beginning of the 2016-2017 school year. Defendant offered nothing to controvert this

[7] At the initial hearing before the hearing officer, the State explained that the amount of tuition was calculated from a statement of account from Word of Life Academy, which was introduced into evidence, showing an average tuition of $330.42/month based on registration, fees, and tuition divided over 12 months. The statement of account further showed numerous cash payments from August 2015 through September 2016.

evidence. Accordingly, we find sufficient evidence to support the juvenile court's inclusion of private school tuition in the basic child support obligation.

Retroactivity of Child Support

Defendant also argues the trial court erred in ordering the March 6, 2017 child support judgment retroactive to the date of filing of September 9, 2016, creating arrearages during a time he was involuntarily unemployed.

"[R]etroactivity is intrinsic to the concept of child support under Louisiana's civilian tradition[.] Louisiana law 'abhors a gap in the support of one in need.'" *Dept. of Social Services ex rel. P.B.*, 12-838 (La. App. 5 Cir. 4/24/13); 114 So.3d 1161, 1167, *writ denied*, 13-1193 (La. 9/13/13); 120 So.3d 698, quoting *Fink v. Bryant*, 01-987 (La. 11/28/01); 801 So.2d 346, 350. Retroactivity in this context "is not in the nature of a penalty, but merely a judicial recognition of a pre-existing entitlement. Only practicality postpones the effective date of the obligation to pay child support to the date a court orders that payment." *Id*., quoting *Vaccari v. Vaccari*, 10-2016 (La. 12/10/10); 50 So.3d 139, 142.

A judgment modifying a child support judgment shall be retroactive to the date of judicial demand, except for good cause shown. La. R.S. 9:315.2(C). When the court finds good cause for not making the award retroactive to the date of judicial demand, the court may fix the date on which the award shall commence. La. R.S. 9:315.21(E). The burden is on the obligor parent to prove that good cause exists for not making the award retroactive to the date of judicial demand. *Dept. of Social Services ex rel. P.B.*, 114 So.3d at 1167-68. As previously noted, the trial court is vested with much discretion in fixing awards of child support, and the court's reasonable determinations shall not be disturbed unless there is a clear abuse of discretion. *Harrington v. Harrington*, 43,373 (La. App. 2 Cir. 8/13/08); 989 So.2d 838, 844.

Upon review, we find the juvenile court abused its discretion in failing to find good cause existed for not ordering the child support modification retroactive to the date of judicial demand. The State filed its motion to modify support on September 9, 2016 on the basis more than three years had passed since the last child support judgment of December 2011. There was no indication in the record that Defendant had even been in arrears. In fact, at the time of the initial hearing on the motion, Defendant had a $13.75 credit for overpayment of child support.

At the disagreement hearing, Defendant explained that he had been self-employed as a contractor until August 12, 2016, when his house flooded during the catastrophic Denham Springs flood.[8] He stated that he, his two daughters and his elderly mother had to be rescued by boat from the roof of his house after it took on four and one-half feet of water. As a result of the flood, Defendant testified that he "lost everything" – most of the contents of his home, all his vehicles, and his tools and equipment. He stated that he had insurance for his home, but not for his contractor business, CGH Specialty Contractors, Inc. After losing all his tools and equipment and being unable to obtain an SBA loan, Defendant was forced to dissolve his company. He submitted a certificate from the Louisiana Secretary of State showing his business corporation, domiciled in Denham Springs, was dissolved on November 23, 2016. Approximately one month later, on December 30, 2016, Defendant obtained full-time employment at Home Depot, where he earns $13/hour.

Nothing in the record indicates Defendant's credibility was called into question. In fact, the juvenile court even noted that Defendant could not go back to his self-employment if he lost all of his tools and equipment. Additionally, the

[8] We take judicial notice of the fact the August 2016 flood was of historic and devastating proportion with widespread flooding, especially in Denham Springs, where approximately 90% of homes and buildings were flooded, and surrounding areas. *See* La. C.E. art. 201(B) (Judicial notice may be taken of a fact "not subject to reasonable dispute in that it is either . . . [g]enerally known within the territorial jurisdiction of the trial court; or . . . [c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.")

juvenile court ultimately based the modification of child support on Defendant's earnings from Home Depot and not his contractor business. However, despite Defendant's request that the modification of child support not be made retroactive prior to his new job because he was not employed in September, October, November or December because of the flood damage he sustained, the juvenile court ordered the child support modification retroactive to the date of filing, or September 9, 2016. We find this was an abuse of the juvenile court's discretion. Defendant clearly proved that good cause existed for not making the modification award retroactive to the date of judicial demand. Accordingly, we amend that portion of the judgment making the increased child support retroactive to the filing date of September 9, 2016, and render the judgment retroactive to December 30, 2016, the date Defendant obtained new employment after the flood.

DECREE

For the foregoing reasons, we amend that portion of the March 6, 2017 judgment ordering the modification of child support to be retroactive to the filing date and order it retroactive to December 30, 2016. In all other respects, the judgment is affirmed. Each party is to bear its own costs.

AFFIRMED IN PART; AMENDED IN PART

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **DECEMBER 13, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-CA-328

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