

Judgment rendered May 20, 2009
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 44,186-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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STATE OF LOUISIANA DOSS IN THE
INTEREST OF THE MINOR CHILDREN
OF: LESLEY MCKNEELY LACY

Plaintiff-Appellee

versus

STEPHEN LESTER LACY

Defendant-Appellant

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Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 410,787

Honorable Monty W. Wyche, Judge
Honorable Frances J. Pitman, Judge

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STEPHEN LESTER LACY

In Proper Person

CHARLES R. SCOTT
District Attorney

Counsel for Appellee,
State of Louisiana

EDWARD M. BROSSETTE
BRIAN PAUL JOFFRION
Assistant District Attorneys

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Before WILLIAMS, STEWART and CARAWAY, JJ.

NOT DESIGNATED FOR PUBLICATION.
Rule 2-16.3, Uniform Rules, Courts of Appeal.

STEWART, J., concurs in result only.

CARAWAY, J.

Upon the recommendation of a hearing officer, the trial court rendered judgment against the father of three children for child support arrearage in the amount of \$93,000 on June 13, 2008. The father has filed a pro se devolutive appeal of the judgment claiming that the hearing officer erred in failing to grant him a required continuance or to allow him to present evidence at the hearing. Finding merit to the father's claims, we reverse and remand for further proceedings.

Facts and Procedural History

The record shows that Stephen and Lesley Lacy were granted a judgment of divorce on December 20, 1995. Of the marriage two children, Stephen (May 10, 1989) and Elisabeth (May 13, 1992), were born. The judgment of divorce ordered Stephen to pay monthly child support of \$1,000 (specifically, \$500 per child) and the parties shared joint custody of the children. Custody proceedings between the parties concluded in 1996 with the parties' community property partition. After a reconciliation between the parties, a third child, William, was born on January 22, 2000. No award of child support was ever made for this child.

In June 1999, through the Caddo Parish District Attorney's Office, the Louisiana Department of Social Services, Support Enforcement Services (hereinafter DOSS) named Stephen as a defendant in a rule to fix arrearages on behalf of the minor children pursuant to La. R.S. 46:236, *et. seq.* These pleadings were filed under the same docket number as the parties' divorce and custody proceedings, but with a different suit caption, *State of*

Louisiana, DOSS in the Interest of the Minor Children of Lesley McKneely Lacy v. Stephen Lester Lacy, the name utilized for purposes of this appeal. On June 22, 1999, Lesley filed an affidavit in the arrearage proceedings, seeking to have them dismissed due to the reconciliation of the parties. On July 16, 2002, DOSS once again sought arrearages and an increase in the child support obligation due to a change in circumstances. Although the record shows that a hearing was scheduled on the rule for August 29, 2002, no further action occurred in the proceedings at that time.

On April 24, 2008, the hearing officer signed an order directing Stephen to show cause on June 5, 2008, why the child support obligation should not be increased and why he should not be cast for back due child support. Service instructions by certified mail, return receipt requested pursuant to the Louisiana Long Arm Statute are contained on the order as well as instruction to serve Stephen at his New Orleans home. No service of this rule upon Stephen is evidenced in the record.

On April 30, 2008, DOSS filed an “Amended Rule” to fix arrearages and for an increase in the child support obligation due to a change in circumstances, apparently seeking to complete the earlier unfinished proceedings. Attached to this pleading was Lesley’s affidavit showing the total amount of claimed arrearages from September 2000 to April 2008 to be \$92,000. A May 8, 2008 order set the hearing on the rule for June 5, 2008. A notation on the order states as follows: CERTIFIED MAIL, RETURN RECEIPT REQUESTED, PURSUANT TO THE LONG ARM STATUTE, LSA-13:3201, *et seq.* The order also has instructions to “please serve”

Stephen at his New Orleans home. No evidence of service is contained in the record.¹

On June 2, 2008, Stephen filed a request for continuance of the hearing, due to travel restrictions related to his residence at a halfway house and incarceration with the Federal Bureau of Prisons. Stephen alleged that from his incarceration in August 2001 until April 28, 2008, when he began employment, he had no income from any source other than that which he earned in prison to cover basic necessities. Stephen claimed that he was served with an unidentified motion on April 23, 2008.

On June 5, 2008, Stephen filed a second motion for continuance urging that at 10:00 p.m. on June 2, 2008, he was served with a supplemental motion and affidavit in support of the rule to show cause. He argued that the service was not timely and that he would be unable to appear in court before his release date of October 8, 2008.

The June 5, 2008 record minutes reflect that the rule was “regularly taken up before [a] hearing officer,” with evidence adduced. Lesley was represented by counsel and Stephen did not appear and was unrepresented at the hearing. Subsequently, the hearing officer rendered written recommendations which decreased Stephen’s monthly child support obligation from \$1,000 to \$653. Stephen was also ordered to provide medical insurance through employment, if available. The hearing officer determined that Stephen had a \$93,000 child support arrearage and ordered an immediate income assignment for that sum as of May 31, 2008.

¹DOSS states in brief that Stephen “was served notice of the June 5, 2008 hearing on June 2, 2008, by a member of the Orleans Parish Sheriff’s Office.”

A judgment by the trial court accepting the recommendations followed on June 13, 2008. It is this judgment which is now the subject of this appeal. Both the hearing officer and trial court signed a certification that no written exceptions to the recommendations were made on June 13, 2008, and declaring the recommendations to be the final judgment of the court. The notice of judgment was mailed on June 18, 2008.

Stephen sought a new trial on the issue of arrearages on June 30, 2008. He argued that the hearing officer's recommendations failed to comply with the provisions of La. R.S. 46:236.5 and that he should have been granted a continuance of the hearing. The minutes reflect no ruling on the motion for new trial.

On August 12, 2008, DOSS filed a motion to amend the judgment and for further disposition with the sole allegation being, "Coming back for further disposition to fix arrears." The minutes reflect that a hearing on the rule occurred on September 18, 2008. Evidence was adduced and Stephen was present in proper person by telephone. A second hearing officer's recommendations were signed by the hearing officer on September 18, 2008. The recommendation contained the following notation: "Credit with \$13,000 / State may withhold an additional \$100 per month only." The prior \$93,000 arrearage judgment, which was apparently the subject of the "\$13,000 credit," was not identified in the recommendations. The recommendation was signed and made a judgment by the trial court on September 25, 2008, with an income assignment ordered the same day.

Prior to the September hearing, however, on August 19, 2008, the trial court granted Stephen's motion for devolutive appeal of the June 13, 2008 judgment.

Discussion

From concessions now made in DOSS's appellate brief and borne out by its August 2008 motion to "Amend Judgment," Stephen's objections to the procedural process for the obtaining of the June 13, 2008 judgment are tacitly, if not expressly, admitted by DOSS. According to DOSS's statements in brief, Stephen was only given notice of the June 5, 2008 hearing, three days before the hearing. This is in apparent violation of First Judicial District Court Family Law Divisions Rule 18. Thus, with this due process violation, DOSS asserts in its brief that "[t]he judgment dated September 25, 2008, superseded the judgment dated June 13, 2008 that Mr. Lacy is attempting to appeal." Accordingly, the June 13, 2008 judgment is reversed as a nullity. La. C.C.P. 2002.

Moreover, with this matter now remanded to the trial court and in light of DOSS's claim for a superseding judgment, we further consider the provisions of La. C.C.P. art. 2088 and the divestiture of the jurisdiction of the trial court which resulted from Stephen's August 2008 appeal. Article 2088(A) provides:

A. The jurisdiction of the trial court over all matters in the case reviewable under the appeal is divested, and that of the appellate court attaches, on the granting of the order of appeal and the timely filing of the appeal bond, in the case of a suspensive appeal or on the granting of the order of appeal, in the case of a devolutive appeal. Thereafter, the trial court has jurisdiction in the case only over those matters not reviewable under the appeal, including the right to:

- (1) Allow the taking of a deposition, as provided in Article 1433;
- (2) Extend the return day of the appeal, as provided in Article 2125;
- (3) Make, or permit the making of, a written narrative of the facts of the case, as provided in Article 2131;
- (4) Correct any misstatement, irregularity, informality, or omission of the trial record, as provided in Article 2132;
- (5) Test the solvency of the surety on the appeal bond as of the date of its filing or subsequently, consider objections to the form, substance, and sufficiency of the appeal bond, and permit the curing thereof, as provided in Articles 5123, 5124, and 5126;
- (6) Grant an appeal to another party;
- (7) Execute or give effect to the judgment when its execution or effect is not suspended by the appeal;
- (8) Enter orders permitting the deposit of sums of money within the meaning of Article 4658 of this Code;
- (9) Impose the penalties provided by Article 2126, or dismiss the appeal, when the appellant fails to timely pay the estimated costs or the difference between the estimated costs and the actual costs of the appeal; or
- (10) Set and tax costs and expert witness fees.

Accordingly, the “coming back . . . to fix arrears” hearing and its corresponding notation/judgment on September 2008 occurred after the divestiture of the trial court’s jurisdiction.

Conclusion

For the reasons set forth herein, we reverse the judgment of the trial court and remand for further proceedings. Costs of this appeal are assessed against DOSS.

JUDGMENT REVERSED; REMANDED FOR FURTHER PROCEEDINGS.