IN THE SUPREME COURT
OF LOUISIANA

No. 2009-C -0570

CELIA M. LAUVE,

PLAINTIFF-APPLICANT,

versus

RICHARD M. LAUVE,

DEFENDANT-RESPONDENT.

ON APPLICATION FOR WRIT OF CERTIORARI TO THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL IN CASE NO. 2008-CA-0076 AND TO THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA, NO. 2000-8949, THE HONORABLE HERBERT A. CADE, PRESIDING JUDGE, DIVISION "K"

APPLICATION FOR RECONSIDERATION OF APPLICATION FOR WRIT OF CERTIORARI FILED ON BEHALF OF CELIA M. LAUVE, PLAINTIFF-APPLICANT

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APPLICATION FOR RECONSIDERATION OF APPLICATION FOR WRIT OF CERTIORARI FILED ON BEHALF OF CELIA M. LAUVE, PLAINTIFF-APPLICANT

The applicant, Celia M. Lauve, respectfully applies for reconsideration of her application for writ of certiorari in this matter. Her writ application, originally filed *pro se* and considered and denied on an expedited basis, is ripe for full reconsideration by this Court. While Ms. Lauve recognizes that this is an extraordinary remedy, this matter is an appropriately extraordinary case that squarely falls within this Court's enumerated writ grant considerations. Foremost, this matter presents this Court with an opportunity to address the significant unresolved issue of law regarding the allocation of the burden of proof for modification of a child support award. Without clear guidance from this Court, this important legal framework will be placed in disarray by the Fourth Circuit's opinion, and the overriding public policy concern for the best interest of children will be jeopardized.

I. This Application for Reconsideration is Procedurally Appropriate.

Ms. Lauve timely applied for writ of certiorari from this Court, filing her writ application *pro se* on March 13, 2009. Because of the urgency of the financial situation posed by the reduced child support award affirmed by the Louisiana Court of Appeal for the Fourth Circuit, Ms. Lauve's *pro se* writ application sought priority, expedited treatment. Accordingly, without even awaiting filing of an opposition by counsel for the defendant-respondent, Dr. Richard M. Lauve, this Court considered and denied Ms. Lauve's writ application on March 24, 2009.

Under La. S. Ct. Rule IX, § 1, an application for "rehearing" must be made within fourteen calendar days of a judgment by this Court. Although Rule IX, § 6 specifically provides that "[a]n application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari[,]" this Court has consistently entertained and granted applications for "reconsideration." In 2008, this Court granted four such applications for reconsideration. *See Zachary Fin., Inc. v. Darjean*, No. 2008-1364 (La. 11/21/2008), 996 So. 2d 1098, 2008 La. LEXIS 2671 (granting application for reconsideration of writ denial at 993 So. 2d 1272, 2008 La. LEXIS 2032); *Tucker v. Lannes*, No. 2008-1225 (La. 6/12/2008), 984 So. 2d 2, 2008 La. LEXIS 1494 (granting application for reconsideration of partial writ denial at 2008 La. LEXIS 2969); *Maiurano v. Carriere-Stumm, Inc.*, No. 2007-2267 (La. 3/7/2008), 977 So. 2d 915, 2008 La. LEXIS 519 (granting application for reconsideration of writ denial at 973 So. 2d 747, 2008 La. LEXIS 211); *Bass, Ltd. v. Gerald*,

No. 2007-1225 (La. 1/25/2008), 972 So. 2d 1148, 2008 La. LEXIS 163 (granting application for reconsideration of writ denial at 964 So. 2d 321, 2007 La. LEXIS 2018).

Indeed, this Court's practice of granting reconsiderations from denials of writ applications is so long-established that the U.S. Court of Appeals for the Fifth Circuit, in a recent opinion examining when a Louisiana state conviction becomes final for purposes of the running of the limitations period to file a federal petition for habeas relief, held that a timely filed application for rehearing from a writ denial in the Louisiana Supreme Court will extend the time before a conviction will be deemed final. *Wilson v. Cain*, ___ F.3d ___, 2009 U.S. App. LEXIS 6855 (5th Cir. April 1, 2009). The Fifth Circuit held that, "since the [Louisiana Supreme Court] has entertained motions for rehearing notwithstanding the language in Louisiana Supreme Court Rule IX, § 6, this rule does not prevent [the applicant's] motion for rehearing from being considered in determining the date his conviction became final." *Id*. at *10. The *Wilson* court observed that "Louisiana courts do not invariably apply Louisiana Supreme Court Rule IX, § 6 to procedurally bar motions for rehearing where the [Louisiana Supreme Court] has merely granted or denied a writ application," citing to cases from 1987 and 1995 to illustrate the long-standing nature of this Court's practice of granting motions for reconsideration from denials of writ applications. *Id*. at *7-8 (citing *State v. Vale*, 661 So. 2d 1358 (La. 1995); *James v. Cain*, 653 So. 2d 1179 (La. 1995); *State ex rel. Glass v. State*, 507 So. 2d 1246 (La. 1987)).

Accordingly, as this application for reconsideration is timely filed under Rule IX, § 1, it is not automatically procedurally barred by Rule IX § 6. As discussed below, Ms. Lauve's application for reconsideration should also rise above any substantive bar, as well, as the Fourth Circuit judgment as to which she seeks a writ is plainly and objectively in conflict with decisions of the First, Second, and Third Circuit Courts of Appeal on a significant legal issue as to which this Court has not weighed in for ten years. The intervening period has seen a substantive amendment to the child support legal regime by the Legislature, and the development of a body of jurisprudence that was consistent among the intermediate circuits until the Fourth Circuit's judgment in this case. It is now time for the Court to act again in this area.

II. This Case Presents a Significant Legal Issue Requiring This Court's Action – Proper Allocation Of The Burden Of Proof For Child Support Modification.

"The overriding consideration in child custody cases is the best interest of the child." *Guillot v. Munn*, No. 99-2132 (La. 3/24/2000), 756 So. 2d 290, 298; *see also* La. C.C. art. 131. Concomitantly, calculation of child support awards and the question of whether

modification of a child support award is appropriate, must focus on this same ultimate consideration of the child's best interest. *See Stogner v. Stogner*, No. 98-3044 (La. 7/7/1999), 739 So. 2d 762, 768. Despite the overriding interest at issue, characterized by this court as a public policy concern, *id*. at 768, this Court has rarely found it necessary to exercise its discretionary jurisdiction over child support matters. The last published opinion by this Court concerning modification of child support awards due to changed circumstances was in 1999 in its decision in *Stogner v. Stogner*.

A. After *Stogner* Was Superseded, The Courts Of Appeal Developed A Consistent Jurisprudence Regarding Burden Of Proof.

In *Stogner*, this Court held that the child support modification provisions in the law at that time did not require a showing of "substantial change" in circumstances by the non-custodial parent seeking modification. *Id*. at 769.

The Legislature, however, subsequently amended the child support statutes to overrule *Stogner*. Under amended La. R.S. § 9:311(A)(1), "An award for support shall not be modified unless ***the party seeking the modification shows a material change in circumstances*** of one of the parties between the time of the previous award and the time of the rule for modification of the award." (Emphasis added). Professor Katherine Spaht commented as follows:

> The addition of the word "material" was purposeful; the amendment was intended to overrule *Stogner v. Stogner* in which the Louisiana Supreme Court 'held that any change in circumstances is sufficient to justify a reduction or increase in child support, a conclusion extended to spousal support …." …The threshold consideration of materiality of the change in circumstance is intended to impose ***a greater burden*** than existed after *Stogner* ***upon the party seeking the change*** as a deterrent to frequent, costly litigation over a child support award for alleged insignificant changes in a party's circumstances.

Katherine Spaht, *The Two "ICS" of the 2001 Louisiana Child Support Guidelines: Economics and Politics*, 62 La. L. Rev. 709, 748-49 (emphasis added) (footnotes omitted). One of the issues made "material" to the question of changed circumstances is whether the changed circumstance is due to voluntary unemployment or underemployment of the parent seeking the child support modification. *See* La. R.S. §§ 9:315(C)(5)(b); 9:315.11.

Following the amendment of § 9:311 to focus on the burden of the parent seeking modification to prove a "material change," the Courts of Appeal in this state consistently and expressly included in that burden of proof that the advocating parent had the burden of proving any unemployment or underemployment was involuntary and/or in good faith. *See Strange v. Strange*, No. 42,318 (La. App. 2d Cir. 6/20/2007), 960 So. 2d 1223, 1228-

29 ("When a parent voluntarily terminates his or her employment, the child support obligation may be reduced ***if the obligor parent can show that*** (1) a change in circumstances has occurred; (2) the voluntary change is reasonable and justified; (3) the parent is in good faith and not attempting to avoid his or her alimentary obligation; and (4) the action will not deprive the child of continued reasonable financial support.") (emphasis added); *Ezernack v. Ezernack*, No. 04-1584 (La. App. 3d Cir. 4/6/2005), 899 So. 2d 198, 200 ("The party seeking the modification has the burden of proving that a change in circumstances has occurred since the prior award was made. … Voluntary unemployment or underemployment for purposes of calculating child support is a question of good faith on the part of the obligor spouse."); *Walden v. Walden*, No. 2000-2911 (La. App. 1st Cir. 8/14/2002), 835 So. 2d 513, 518 (holding, immediately after reciting the provision that, in the case of voluntary underemployment, child support is to be calculated on the basis of earning potential, that "the party seeking the modification has the burden of proving that a change in circumstances has occurred"); *see also Douthit v. Douthit*, No. 31,713 (La. App. 2d Cir. 3/31/1999), 732 So. 2d 616, 618 ("A reduction of child support may be ordered on a showing by the party seeking the reduction that a change in circumstances has occurred; that the voluntary change in circumstances is reasonable and justified; that he or she is in good faith in not attempting to avoid his alimentary obligation; and his or her action will not deprive the child or children of continued reasonable financial support.").

Indeed, the question that must be resolved by showing by the parent seeking modification is not just whether any initial unemployment or underemployment was involuntary, but whether the continuation of that underemployed status is involuntary and in good faith. "The question under the statute is simply whether [the parent seeking modification] was shown at trial to have income potential but had neglected ***to regain*** meaningful employment." *Arrington v. Arrington*, No. 41,012 (La. App. 2d Cir. 4/26/2006), 930 So. 2d 1068, 1077 (emphasis added). In *Arrington*, the Second Circuit followed up this holding with an analysis of the testimony presented by the parent seeking the modification, underscoring that the burden of proof on the question of voluntariness of underemployment resided with that parent. *Id.*; *see also McDaniel v. McDaniel*, No. 03-1763 (La. App. 3d Cir. 5/24/2004), 878 So. 2d 686, 689.

B. The Fourth Circuit's Opinion Conflicts With Consistent Jurisprudence From The Other Circuits, Requiring This Court's Hard Look At Allocation Of The Burden Of Proof.

Despite the clear text of § 9:311 regarding the burden on the parent seeking

modification to show all "material" change in circumstance, and the inclusion with that burden by the First, Second, and Third Circuits of the issue as to whether the parent's underemployment is involuntary and/or in good faith, the Fourth Circuit in this case plainly crafted its own opposite allocation of the burden of proof. In response to Dr. Lauve's motion to reduce his child support obligation, the Fourth Circuit held, "after [Dr. Lauve] prov[ed] loss of his job through no fault of his own, ***the burden shifted to Ms. Lauve*** to prove that he lost his job through some fault of his own." *Lauve v. Lauve*, No. 2008-0076 (La. App. 4th Cir. 8/20/2008), 2008 La. App. LEXIS 1163, *8 (see Exh. 2 to Writ Application in this matter) (emphasis added).

There is no support in the text of the statute, nor in the post-amendment/post-*Stogner* jurisprudence, for the burden-shifting framework imposed by the Fourth Circuit in this matter. Through the burden-shifting employed by the district court and explicitly approved by the Fourth Circuit, Dr. Lauve's child support obligation was reduced by 73%, a reduction made retroactive such that the practical effect is that his child support outlay (and the support received for the benefit of his children) has been reduced to $0 for an extended period of time. While this result is tremendously inequitable, and results also from numerous errors by the district court and the Court of Appeal (all of which are assigned and briefed in Ms. Lauve's original writ application and which justify the review of this Court), it is the Fourth Circuit's misinterpretation of the significant legal issue of the allocation of the burden of proof that is the primary substantive issue that should drive this matter into this Court's exercise of its discretionary jurisdiction.

III. Conclusion

While Ms. Lauve, especially considering her *pro se* treatment of this substantive legal issue in her writ application, sufficiently briefed the importance of this legal error, it is conceivable that the pure legal significance of this issue was mired in the recitation of the other defects in the Fourth Circuit's opinion. This Court's view of the litany of inequities and errors below should not cloud its appreciation of the presence of a pure and significant legal issue requiring its careful consideration. In light of the stark conflict between the Fourth Circuit's opinion in this case as to the proper allocation of the burden of proof for modification of child support awards and the clear text of the statute as supported by the

jurisprudence of the First, Second, and Third Circuits, Ms. Lauve requests that this Court reconsider her application for writ of certiorari, grant the writ, and order the appropriate relief to Ms. Lauve after full briefing and argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to La. S. Ct. Rule IX, § 1, and Rule V, § 2, I certify that a copy of this Application for Reconsideration has mailed via U.S. Postal Service pre-paid First Class postage, and by facsimile transmission, this 7th day of April, 2009, to the below-listed counsel for the respondent Defendant-Appellee:

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_____
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