Judgment rendered April 4, 2007
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 41,835-JAC

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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STATE OF LOUISIANA, IN THE INTEREST OF THE MINOR CHILD, S.L., JR. — Plaintiff-Appellant

versus

STEVEN LEWIS, SR. — Defendant-Appellee

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Appealed from the
Twenty-Sixth Judicial District Court for the
Parish of Bossier, Louisiana
Trial Court No. 15,317

Honorable Dewey E. Burchett, Jr., Judge

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ROBERT RANDALL SMITH
Assistant District Attorney
Counsel for Appellant

KAMMER & HUCKABAY
By: Pugh T. Huckabay, III
Counsel for Appellee

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Before BROWN, WILLIAMS and CARAWAY, JJ.

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

BROWN, Chief Judge, concurs.

CARAWAY, J.

This appeal arises from a judgment denying a rule for child support filed by the State of Louisiana, Department of Social Services (the "State"), pursuant to La. R.S. 46:236.1.1, *et seq*. The State argues that the hearing officer and trial court failed to apply the provisions of Louisiana's Child Support Guidelines in rejecting the State's claim. We affirm.

Facts

Steven Lewis ("Steven") and Amanda Lewis ("Amanda") are the parents of the minor child, who is the subject of this child support dispute. In June 2002 in the parties' separate domestic action, the parents were awarded by consent judgment joint custody of the child and co-domiciliary status. The custody plan provided roughly for equal time for the two parents. In May 2003, a judgment of divorce was signed. In September 2004, Steven sought to be named as the domiciliary parent of the minor child based on allegations of change of circumstances. After a trial on the issue in February 2005, the court rendered a judgment that largely maintained the joint custody plan from 2002 and specifically stated that neither party would owe the other party child support. That judgment was not appealed.

The present suit is an action filed by the State pursuant to La. R.S. 46:236.1.1, *et seq.,* which grants the State a separate cause of action against a biological parent of a child for support in any case in which the State is providing services (hereinafter, the "support enforcement proceeding"). The February 2006 rule filed by the State sought child support based upon

allegations that Amanda qualified for child support services from the State and that the minor child was in need of child support, medical insurance, and dental insurance that Steven was able to provide.

At the support enforcement proceeding on June 20, 2006, the hearing officer began the hearing with the following statement:

> All right, in this matter after pre-trial discussion let me make a part of the record the facts that we discussed. This is a true shared custody situation with the child, who is four (4) years old, and the respondent's income and it's stipulated as one thousand eight hundred fifty-two dollars ($1,852), that would be the father's to make that clear, one thousand eight hundred fifty-two dollars ($1,852). Apparently the mother at this time is unemployed. *And so what we need to see, and this is the only issue before the court*, is what your earning capacity is, ma'am. (Emphasis added.)

In support of its case, the State did not introduce any evidence to show Amanda was receiving support that would entitle the State to bring its action, although at one point in the proceeding there was an assertion that Medicaid was provided to the child. Most testimony presented on behalf of the State concerned Amanda's earning capacity. When Amanda was asked why she was not currently employed, she responded:

> Well, I let my four (4) year old go to school and then I have another kid that's two (2) that I stay at home with.

When the hearing officer asked if the father of the two-year-old supported Amanda, she responded in the affirmative, indicating that the father was employed as an iron worker.

After determining that Steven and Amanda both had a high school education and equal earning capacity, the hearing officer concluded that no child support was owed in a Hearing Officer Recommendation. Thereafter,

because neither party sought an appeal of the ruling in district court, a district court judge declared the recommendations of the hearing officer to be the judgment of the court on June 28, 2006, in accordance with La. R.S. 46:236.5(C)(7).

Discussion

On appeal, the State argues that the hearing officer (and subsequently the trial court) erred in imputing any income to Amanda because the minor child was under five years of age based upon the Child Support Guidelines provision of La. R.S. 9:315.11 which provide in pertinent part as follows:

> If a party is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of the party's income earning potential, unless the party is physically or mentally incapacitated, or is caring for a child of the parties under the age of five years.

Two prior rulings of this court have shown its disinclination to upset the pre-existing custody and child support rulings obtained by the parents when the State later intervenes to recover governmental assistance payments for a parent who, as a non-domiciliary parent, was not otherwise receiving child support. *State ex rel. H.B. v. Blair*, 40,140 (La. App. 2d Cir. 8/17/05), 909 So. 2d 710, *writ denied*, 05-2392 (La. 03/17/06), 925 So. 2d 548; *State ex rel. Gilbert v. Gilbert*, 34,203 (La. App. 2d Cir. 12/20/00), 775 So. 2d 1182.

The rationales of both of those cases apply again in this case for affirmance of the trial court's refusal to impose a support obligation on Steven. The financial difficulties of a parent and the receipt of governmental aid does not require the payment of child support by the other

parent who is sharing an equal load in the custody of the child and **already providing most of the financial support for the child from his marginal income**. As we noted in *Blair*, the State is prevented under La. R.S. 46:236.1.2(D)(1) from obtaining a child support order when it is not in the best interest of the child. This is clearly such a case.

Likewise, as in *Blair*, factual support concerning Amanda's status as a recipient of public assistance is scant. Amanda was not formally questioned concerning receipt of public assistance, and no other evidence was introduced on that point. Only after the support enforcement proceeding had closed and the hearing officer denied the State's request for support did she speak up and offer an unsolicited statement that she was receiving Medicaid because her child was slightly autistic. We do not consider such statements to be persuasive evidence.

Moreover, the record shows that the State never raised the issue of the applicability of Section 315.11(A) of the Child Support Guidelines. La. R.S. 9:315.11(A). Rather, as previously noted, the hearing officer clearly stated on the record that "the only issue before the Court is what your earning capacity is ma'am." The State raised no objection to this statement and made no argument to the hearing officer or to the trial court that no income should be imputed to the mother under Section 315.11(A). When issues are not submitted to the trial court, but are argued for the first time on appeal, this court ordinarily will not review such issues in the absence of a strong countervailing concern for the interest of justice. *See Smith v. Boothe,* 28,065 (La. App. 2d Cir. 2/28/96), 669 So. 2d 682, *writ denied,* 96-

0821 (La. 5/10/96), 672 So. 2d 928; *Haltom v. State Farm Mut. Auto. Ins. Co.*, 588 So. 2d 792 (La. App. 2d Cir. 1991). *See also Treen Construction, Inc. v Schott*, 03-1232 (La. App. 5th Cir. 1/27/04), 866 So. 2d 950.

Conclusion

For the reasons set forth above, the judgment of the trial court is affirmed. Costs of this appeal are assessed at $119.50 in accordance with La. R.S. 13:5112, subject to the provisions of La. R.S. 13:4521(A)(3).

AFFIRMED.