

to the entire record presented, including deposition testimony of parties, *Ciarrochi v. Olkowski*, 57 Del. Co. R. 66 (1969), and the pleadings filed in the case, *Swabb*, supra. Plaintiffs' claim against Black is based upon Black's performance of "service, replacement, and repair work in a shoddy, unworkmanlike and negligent manner." (Plaintiffs' First Amendment to Complaint, p. 40) Said work was contracted to be performed on the oil-fired heating system on the premises at 1351 Lincoln Way East, Guilford Township, Franklin County, Pa., in August of 1976. (Amendment to Complaint, p. 38.) Deposition testimony indicates that Black, in performing the work to rehabilitate heating system, found no oil leaks in the underground piping, and that Black replaced these underground lines sometime after August 2, 1976. (Tuckey deposition, pp. 7, 37, 97-98, 118.) Defendant, therefore, has failed to state with specificity in its petition any factual basis which would render Temp Con liable for any damage caused by a heating system malfunction after Black's performance of its contract work to rehabilitate that system. (Tuckey deposition, p. 13.-"replace the defective parts and put the thing in operation and see what all worked.")

Defendant Black also seeks to join McDonnell and Miller, ITT, and avers that the float assembly in the day tank of the heating system malfunctioned and that this malfunction caused the damages to the plaintiff. Plaintiffs have averred in their complaint that damages resulted from "long continued leakage of oil." (Complaint p. 18.) Defendant's petition for permission to join additional defendants does not state any factual relationship between the "leakage of oil" which caused damages and the malfunctioning of the float assembly located inside the building. The depositions in this case, which, defendants aver, made it aware of the liability of McDonnell and Miller, ITT, do not clearly establish any factual connection.

Defendant Black's position also fails to allege that a permissive late joinder will not be prejudicial to the proposed additional defendants. Further, plaintiffs protest the joinder of these additional defendants on the basis of further delay of their action.

Certainly the Court recognizes the importance and value of avoiding multiplicity of suits, but we cannot rely upon this rationale alone to ignore the plain meaning of the Rules of Civil Procedure. See *Mercer Gas, Light & Fuel Co. v. Steiger*, 18 D&C 2d 361 (1959). Defendant Black will not be prejudiced by a denial of permission to join Temp Con and McDonnell and Miller, ITT; Black may file a separate suit against the proposed additional defendants. The Statute of

Limitations for an action for indemnity or contribution does not begin to run until after judgment is obtained in the original action. *First National Bank of Ashley v. Reily*, 165 Pa. Super. Ct. 168, 67 A. 2d 679 (1949); *Fasher v. City of Philadelphia*, 112 Pa. Super. 226, 170 A. 875 (1934).

Defendant's petition will be denied.

ORDER

NOW, this 28th day of February, 1980, the Petition of Frank Black Mechanical Services, Inc. to Join Additional Defendants is denied.*

*Editor's Note: Earlier opinion in this case reported at 2 Franklin 40 (1978)

HIPPENSTEEL v. HIPPENSTEEL, C. P. Franklin County Branch, No. F.R. 1978 - 469 -S

Non-support - Termination of Order - Intentional Withholding of Visitation

1. As a general rule, denial of visitation by the custodial spouse will not give rise to a right to terminate support by the non-custodial parent.
2. There is an exception to the general rule, where the conduct of the custodial parent constitutes a flagrantly willful and intentional concealment of the children.
3. Where the custodial parent has evaded a bench warrant and concealed himself and his children from enforcement of a court's visitation order and from supervision of the children by the court's Children and Youth Service, there is flagrantly willful and intentional concealment so as to justify a stay of the prior support order.

David W. Rahauer, Assistant District Attorney, Attorney for the Commonwealth

Grace E. D'Alo, Esq., Attorney for Plaintiff

OPINION AND ORDER

KELLER, J., March 18, 1980:

On November 17, 1978, Dennis W. Hippensteel executed his petition for modification under the Pennsylvania Civil Pro-

LEGAL NOTICES, cont.

class and description, engaging in research and development, furnishing services, and acquiring, owning, using and disposing of real property of any nature whatsoever. The location and Post Office address of the registered office of the corporation is 23 East Seminary Street, Mercersburg, Pennsylvania 17236.

Steiger and Steiger
56 South Main Street
Mercersburg, PA 17236

(5-16)

**COURT OF COMMON PLEAS OF THE
39TH JUDICIAL DISTRICT OF
PENNSYLVANIA**

FRANKLIN COUNTY BRANCH

NOTICE IS HEREBY GIVEN that on May 18, 1980, the petition of Randy William Muller was filed in the above named Court, praying for a decree to change his surname to Randy William Sowers.

The Court has fixed Monday, June 16, 1980 at 9:30 o'clock, a.m., in Courtroom No. 3 of the Franklin County Court House, Chambersburg, Pennsylvania, as the time and place for the hearing of said petition, when and where all persons interested may appear and show cause, if any they have, why the prayer of the said petition should not be granted.

Timothy S. Sponseller, Attorney
210 Chambersburg Trust Bldg.
Chambersburg, Pa. 17201

(5-16, 5-23, 5-30, 6-6)

LEGAL NOTICES, cont.

cedural Support Law and the same was filed in the Court of Common Pleas of Adams County to No. D.R. -50-77 and forwarded to this Court. An order was signed December 11, 1978 directing the defendant, Sharon L. Hippensteel, to show cause why the order entered June 1, 1978 should not be modified and setting December 20, 1978 at 1:30 o'clock P.M. as the date and time for hearing. On November 9, 1978 Sharon L. Hippensteel executed her complaint in this Court to the above captioned number to terminate the order of support entered by this Court on June 1, 1977 requiring her to pay the sum of \$18.00 plus \$.20 service charge on the grounds that her expenses increased. On November 29, 1978 an order was signed by this Court directing the issuance of a rule upon Dennis W. Hippensteel to show cause why the order of June 1, 1978 should not be terminated. The rule was made returnable and hearing set for December 20, 1978 at 1:30 o'clock P.M. The proceedings were consolidated and hearing was held on December 20, 1978. The petition to increase the order of support was denied. The petition to terminate was denied. However, the Court found Sharon L. Hippensteel had an average net take-home per week of \$90.53 and received \$52.00 bi-weekly for the support of herself and her two children, and that she was entitled to relief from the order of June 1, 1977. It was ordered that she pay on December 25, 1978 and each Monday thereafter the sum of \$12.50 for the support of the four children in the custody of Dennis W. Hippensteel, plus \$5.50 on account of the arrearage, and \$.20 service charge making a total payment of \$18.20 and that she executed a wage attachment form addressed to her employer.

On January 3, 1980, Sharon L. Hippensteel executed her complaint to terminate the order of December 20, 1978 on the grounds that the defendant's Dennis W. Hippensteel, earnings had increased and his whereabouts and the whereabouts of the children are unknown and he may not be using the support payments for the care of the children in his custody. An order was signed on January 11, 1980 directing the issuance of a rule upon Dennis W. Hippensteel to show cause why the order of December 20, 1978 should not be terminated and making the rule returnable February 4, 1980 at 9:00 o'clock when hearing on the matter would be held. The return of service executed by a member of the Domestic Relations Division of this Court indicated that service was made upon the defendant, Dennis W. Hippensteel, by sending a true copy of the rule and petition by certified mail, return receipt requested, to the defendant on January 11, 1980, and the return receipt was signed by "Maxine Shriner" on January 18, 1980. An order was entered on February 4, 1980 at the

conclusion of the hearing directing the Domestic Relations Division of this Court to withhold the forwarding of any further payments under the order of December 20, 1978 to Dennis W. Hippensteel or to the Domestic Relations Division of the Adams County Court of Common Pleas until the respondent has had an opportunity to complete the record and counsel for the respondent and the Commonwealth have had an opportunity to submit memoranda of law on the right of the respondent, Sharon L. Hippensteel, to be relieved from the payment of support in the event this Court should conclude that Dennis W. Hippensteel is willfully and intentionally withholding visitation privileges.

By stipulation of counsel certified copies of the following order of the Court of Common Pleas of Adams County were incorporated in the record of the proceeding:

1. Order of March 3, 1977 awarding general custody of Selena and Brian to Sharon L. Hippensteel, and general custody of Kimberly, Dennis, Jassen and Corbett to Dennis W. Hippensteel; providing for temporary custody of Selena and Brian with the father on Sundays from 9:00 a.m. to 6:00 p.m., and temporary of the other four children with the mother from 9:00 a.m. to 6:00 p.m. on Saturdays. The order was conditioned upon all children being placed in the protective custody of the Adams County Children's Service.

2. Order of December 12, 1978 that a rule be issued upon Dennis W. Hippensteel, Sr. to show cause why the existing custody order should not be modified to provide Sharon L. Hippensteel temporary custody of the four children on alternate weekends from 6:00 o'clock p.m. on Friday until 6:00 o'clock p.m. on Sunday; making the rule returnable and hearing set for January 11, 1979 at 1:30 o'clock p.m.

3. Order of March 5, 1979 in the custody proceeding granting to the mother temporary custody of the four children with the father on alternating weekends beginning on Saturday morning at 9:00 o'clock a.m. and as to Kimberly, terminating the same Saturday at 6:00 o'clock p.m., and as to the other three children terminating at 6:00 o'clock p.m. the following Sunday with the responsibility in the mother of picking up the children and delivering the three boys on Sunday. The father to be responsible for designating a home in Franklin County where Kimberly can be delivered or picked up at 6:00 o'clock p.m. on Saturday. The order to be effective March 10, 1979.

4. Order of April 30, 1979 making the rule to show cause

why Dennis W. Hippensteel should not be held in contempt of court for violating the terms and conditions of the order of March 5, 1979 absolute, and ordering the issuance of a bench warrant for the arrest of the defendant; and placing custody of the four children in Adams County Children and Youth Service pending a full hearing.

5. A bench warrant issued April 30, 1979.

The memorandum of law of counsel for the respondent-mother was received February 15, 1980, and memorandum of law of the Assistant District Attorney was received on February 20, 1980. The matter is now ripe for disposition.

FINDINGS OF FACT

1. Proof of service of the complaint to terminate the support order of January 11, 1980 and rule upon Dennis W. Hippensteel is established by testimony of William C. Benson, R.D. 6, Gettysburg, Pa., a window clerk at the Gettysburg Post Office, who testified that a certified letter arrived for Dennis W. Hippensteel; a lady exhibited a power of attorney authorizing her to pick up his mail; signed the return receipt card addressed to Dennis W. Hippensteel, P.O. Box 323, Gettysburg, Pa. 17235 and signed by "Maxine Shriner" and dated January 18, 1980 as the mail piece received.

2. Sharon Hippensteel (defendant) has custody of two of the six children she and Dennis W. Hippensteel (plaintiff) had. She receives no support for the two children from her husband.

3. The plaintiff and defendant have been divorced.

4. The defendant has \$18.20 withheld by her employer per week pursuant to the order of December 20, 1978.

5. The plaintiff is a musician and his income is unknown to the defendant. They were separated in 1977 and were not filing joint income tax returns prior to their divorce in 1979.

6. The plaintiff and defendant acquired a home and vacant lot in the village of Mummasburg on October 15, 1973 and February 6, 1975, where they resided until the time of the separation. On April 26, 1978, the defendant conveyed both parcels of real estate to the plaintiff without consideration for the benefit of the children living there, and because the plaintiff refused to make necessary repairs.

7. As of April 1979 the defendant was informed that

the plaintiff and the four children had removed from the Mummasburg home and plaintiff was renting the property for \$195.00 per month.

8. The plaintiff purchased, and to the best of defendant's knowledge, still owns a 9-car garage in York, Penna., as evidenced by deed in the York County Deed Book 71-V, Page 807 dated June 1, 1977 indicating a consideration of \$4,000.00, and a double house in the same city as evidenced by deed recorded in York County Deed Book Vol. 77-G, Page 182 dated June 13, 1978 indicating a consideration of \$5,000.00. To the best of defendant's knowledge the York real estate is rented by the plaintiff.

9. The plaintiff never divulged any rental income in any support proceeding.

10. The defendant last saw the plaintiff and her four children in March 1979. Thereafter she went to the Mummasburg, Adams County home three or four times pursuant to the Adams County Court of Common Pleas order and never found the defendant or the children at home.

11. Through contacts with the Domestic Relations Division of the Courts of Common Pleas of Franklin County and Adams County, she learned that the plaintiff was cashing the support checks in Gettysburg, Pa.

12. The defendant has requested the assistance of the Adams County Children and Youth Service in locating her children and they have been unsuccessful in finding them.

13. The defendant was advised upon making inquiry at the Cashtown schools that in March 1979 the plaintiff appeared at the school with a copy of the custody order of the Adams County Court of Common Pleas, requested all school records for the four children and removed the children from their schools in that district.

14. From her personal investigation the defendant has learned that the husband and the four children moved from the Mummasburg home immediately before the March 1979 hearing in the Court of Common Pleas of Adams County.

15. Despite diligent efforts the defendant has been unable to locate her four children; has no information as to their whereabouts, their health or their well-being.

16. At the present time the defendant's employer,

Waynesboro Manufacturing Co., has cut employment hours and her average net weekly take-home pay after deduction of the \$18.20 withholding is \$43.00. Her basic expenses for herself and two children are rent of \$100.00 per month, food of \$200.00 per month, utilities of \$30.00 per month and heat of \$130.00 per month.

17. As of February 4, 1980 the Domestic Relations Division of this Court reported an arrearage owed by the defendant under the order of December 20, 1978 in the amount of \$26.60, plus costs of \$29.20.

DISCUSSION

Disregarding the issue of whether the plaintiff's earnings have increased, the primary issue raised in the case is whether the defendant is entitled to termination of an existing support order by reason of the plaintiff, he being the custodial spouse, having willfully concealed the whereabouts of himself and their children for the purpose of denying her visitation rights in direct and active violation of an existing court order awarding such visitation rights.

In *Commonwealth ex rel. Zercher v. Bankert*, Pa. Super. , 405 A. 2d 1266, 1269, (1979), a three judge panel of the Superior Court held:

"Generally, matters of support are separate and independent from problems of visitation and custody, and ordinarily a support order must be paid regardless of whether the wife is wrongfully denying the father's right to visitation. *Commonwealth ex rel. Chila v. Chila*, 226 Pa. Super. 336, 313 A. 2d 339 (1973). In *Commonwealth ex rel. Firestone v. Firestone*, 158 Pa. Super. 579, 45 A. 2d 923 (1946) it has been expressed that the duty of a father to support his children is 'well nigh absolute', and in *Commonwealth ex rel. Crane v. Rosenberger*, 212 Pa. Super. 144, 239 A. 2d 810 (1968) 'Ordinarily, the amount of the support order must be paid regardless of whether the wife is wrongfully denying the father's visitation rights.' In *Commonwealth ex rel. Mickey v. Mickey*, 220 Pa. Super. 39, 280 A. 2d 417 (1971), this statement was repeated with the following addition, 'This is true even if the wife's action places her in contempt of court. *Firestone*, supra.' Also, 'Even assuming that the mother improperly removed the children from the defendant's home to another state, her misconduct in doing so cannot destroy the right of those children to support from their father.' *Commonwealth v. Hopkins*, 241 Pa. 213, 88 A. 442 (1913). (See also *Commonwealth ex rel. Mexal v.*

SHERIFF'S SALES, cont.

to an iron pin on the westerly curblin of North Church Street; thence with said curblin, South 35¼ degrees west 215 feet to the place of beginning, CONTAINING 128 square perches of land, neat measure.

BEING sold as the property of Fred N. Christman, Writ No. 77 Term 1980.

TERMS

As soon as the property is knocked down to a purchaser, 10% of the purchase price, or of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, June 23, 1980 at 4:00 P.M., E.S.T. otherwise all money previously paid will be forfeited and the property will be resold at the hour at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Mexal, 201 Pa. Super. 457, 193 A. 2d 680 (1963); *Commonwealth ex rel. Bucciarelli v. Bucciarelli*, 162 Pa. Super. 582, 60 A. 2d 554 (1948); *Crane v. Rosenberger*, 212 Pa. Super. 144, 239 A. 2d 810 (1968)."

In *Kramer v. Kelly*, Pa. Super. , 401 A. 2d 799, 803 (1979), the Superior Court held:

"It is an accepted principle that the misconduct of the mother does not affect a father's duty to support his child. Indeed, this duty is well nigh absolute, the support order must ordinarily be complied with even if the actions of the wife place her in contempt of court. *Commonwealth ex rel. Mickey v. Mickey*, 220 Pa. Super. 39, 280 A. 2d 417 (1971); *Commonwealth ex rel. McCartney v. McCartney*, 217 Pa. Super. 417, 274 A. 2d 206 (1970); *Commonwealth ex rel. Firestone v. Firestone*, 158 Pa. Super. 579, 45 A. 2d 923 (1946)."

In *Commonwealth ex rel. Chila v. Chila*, 226 Pa. Super. 336, 313 A. 2d 339 (1973), the Court of Common Pleas of Clearfield County, Pennsylvania remitted arrearages of \$3,840.00 which was accumulated over a period of many years during which the husband was unable to locate the mother and the parties' child. During the entire period the husband was in constant contact with the Clearfield County Probation Office, and the court concluded that that Probation Office clearly indicated to the father that it did not expect payment because the office could not forward it to the proper person. After noting the general rule that matters of support are separate and independent from problems of visitation and custody, and that ordinarily, a support order must be paid regardless of whether the wife is wrongfully denying the father's right to visitation; the Superior Court affirmed the lower court concluding that Mrs. Chila and her parents had clearly demonstrated that she did not want or expect the support payments.

In *Kramer v. Kelly*, supra., orders requiring the payment of support by the father and granting visitation to the father with his child were entered prior to 1975. On July 19, 1975 the father found that the mother and child had moved from their home without informing father or the trial court of their new address. Through the efforts of a private detective the mother and daughter's whereabouts were discovered in December 1975. The father had discontinued making support payments under the court order on or about the time that he

SHERIFF'S SALES, cont.

to an iron pin on the westerly curblin of North Church Street; thence with said curblin, South 35 1/4 degrees west 215 feet to the place of beginning, CONTAINING 128 square perches of land, neat measure.

BEING sold as the property of Fred N. Christman, Writ No. 77 Term 1980.

TERMS

As soon as the property is knocked down to a purchaser, 107 of the purchase price, or of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, June 23, 1980 at 4:00 P.M., E.S.T. otherwise all money previously paid will be forfeited and the property will be resold at the hour at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

learned of the clandestine removal of the mother and child from their home. On cross petitions for contempt the father sought to have the arrearage accumulated between July and December 1975 remitted on the grounds that the mother had concealed her whereabouts and those of the daughter. The trial court refused the requested remittitur and on appeal the Superior Court sustained the lower court distinguishing *Chila* and holding:

"The instant situation is radically different. The period of concealment is far shorter (six months), and there were no assurances from county officers that payment was not expected. As previously noted, matters of support are separate and independent from problems of visitation. . . Absent the extreme circumstances present in *Chila*, we are loathe to deprive the child of support payments because of the improvident actions of the mother."

In the case at bar, the Commonwealth asserts on behalf of the plaintiff-father that there is no evidence that the father does not expect continued payments of the existing support order and, in fact, has been cashing those checks in Gettysburg; no agency has indicated to the defendant that she may discontinue the payment to her former husband and, therefore, the general rule that matters of support are separate and independent from problems of visitation should prevail and the complaint to terminate be denied.

To the contrary, counsel for the defendant contends that Mrs. Hippensteel has acted at all times reasonably and properly attempting to proceed within the legal system to enforce her visitation rights, while refraining from taking any self-help measures such as non-payment under the support order. In addition, she has solicited the aid of the court-related agency in Franklin and Adams Counties in an effort to locate her children, and had made her own independent efforts toward the same goal all without success. By contrast, the plaintiff has successfully evaded the execution of the bench warrant issued by the Adams County Court of Common Pleas and equally successfully concealed himself and the children from enforcement of that court's visitation order and supervision of that court's Children and Youth Service. In the meantime, he has managed to continue to reap the benefits of the defendant's support payments by having a woman with a power of attorney pick up his mail at the Gettysburg post office box, which is his only known address.

Parentetically, we note that no evidence had been intro-

duced by the defendant that either the Domestic Relations Division of this court or of the Adams County Court had indicated to her any specific or tacit approval for her to withhold the support payments as occurred in some of the cases above cited. However, this we do not find unusual, for in this Judicial District the Domestic Relations Division does not take it upon itself to modify court orders.

This Court had consistently adhered to the general rule that the misconduct of the custodial spouse concerning visitation matters is not justification for termination of support payments because the child is the primary beneficiary of the support. However, we do recognize an exception in those rare cases where the conduct of the custodial parent constitutes what can only be described as a flagrantly willful and intentional concealment of the children for the purpose of denying the non-custodial parent visitation rights. This exception we conclude is predicated upon the reasonable rationale that it is in the best interest of children for them to also spend time with the non-custodial parents and thus know they also have that parent's love, care, concern and support.

In the case at bar, we conclude that the conduct of Dennis W. Hippensteel does constitute flagrantly willful and intentional concealment of the parties' children for the purpose of denying their mother her right to visitation which justifies a stay rather than a termination of the support order of this Court dated December 20, 1978, effective February 4, 1980, and to remain in effect until the whereabouts of the plaintiff, Dennis W. Hippensteel, and the parties' children, Kimberly J. Hippensteel born August 21, 1964; Dennis W. Hippensteel born February 24, 1968; Jassen W. Hippensteel born March 22, 1970; and Corbett W. Hippensteel born October 27, 1971 are made known to Sharon L. Hippensteel, defendant, this Court, and the Court of Common Pleas of Adams County, Pennsylvania.

Other than the evidence has to the rental income of Dennis W. Hippensteel from the Mummasburg real estate no evidence was introduced to establish that the plaintiff's earnings have increased as alleged in the complaint. The Court, therefore, declines to rule on that issue.

Sua sponte we conclude that the income of the defendant has decreased from \$90.53 net take-home pay on December 20, 1978 to approximately \$61.20 (including \$18.20 support payment being withheld) as of February 4, 1980. Taking into consideration the fact that the defendant is maintaining herself and two children on this minimal week-

ly income, we conclude that the defendant would also be entitled to have the support order of December 20, 1978 stayed effective February 4, 1980, and until her net take-home pay should increase to its prior level on the grounds that she is financially unable to pay support for her four children in the custody of the plaintiff.

ORDER OF COURT

NOW, this 18th day of March, 1980, the order of support dated December 20, 1978, requiring Sharon L. Hippensteel, defendant, to pay the sum of \$12.50 to the support of the four children of the parties, plus \$5.50 on account of the existing arrearage and a \$.20 service charge is stayed; effective February 4, 1980.

The defendant shall remain responsible for the payment of all costs currently due, and at such time as the stay is lifted she shall also be responsible for the payment of any arrearage existing as of February 4, 1980.

The Domestic Relations Division of this Court shall forward a copy of this Opinion and Order to the Domestic Relations Division of the Court of Common Pleas of Adams County, Pennsylvania.

Exceptions are granted the plaintiff, Dennis W. Hippensteel.

KRISE v. STOCKSLAGER, C. P. Franklin County Branch, F. R. 1979 - 622S

Domestic Relations - Child Support - Remarriage of Spouse - Christmas and Birthday Presents

1. In computing the custodial parent's ability to pay, the Court can properly consider the new spouse's voluntary contributions to the family budget.
2. The extent to which a new spouse helps defray the family expenses is a proper inquiry for the Court in establishing a figure for child support.
3. Christmas and birthday presents are gifts, not something in the nature of child support, and therefore not a proper item which the Court will require a noncustodial parent to help pay.