

LEONARD D. HOOK V. LINDA L. BIRELY, C.P. Franklin County Branch, F.R. 1991-727-S

Non-support Action- Plaintiff filed an appeal on a denial of support claiming that defendant should be compelled to pay child support although a post marital agreement provides that defendant be released from any obligation to pay support for the children of the marriage so long as plaintiff is capable of providing adequate support- Plaintiff's petition for modification denied as the children are adequately being provided for.

1. Child support obligations can be increased if to do so would be in the best interest of the child or children regardless of merger or incorporation into a divorce decree.
2. Visitation, custody, and child support matters are enforced according to the best interest of the child and the parties' agreement, while entitled to consideration, has only advisory effect.
3. A party who has a greater income than when the agreement was entered into and who has failed to show extraordinary expenses has not shown sufficient justification for modifying that agreement as to child support obligations when it appears that the children are adequately being provided for pursuant to that agreement.
4. A parent who, pursuant to a property settlement agreement, is obligated to provide support for her children if the other parent is unable to adequately support them is not bargaining away her children's right of support.

Janice M. Hawbaker, Esquire, Attorney for Plaintiff
J. Dennis Guyer, Esquire, Attorney for Defendant

OPINION & ORDER

WALKER, P.J., June 20, 1995:

FINDINGS OF FACT

Two children were born to the marriage of plaintiff Leonard D. Hook and defendant Linda I. Birely. Daniel Hook was born April 13, 1982 and Derek Hook was born June 2, 1985. The parties were subsequently divorced in 1992. A post marital agreement was drafted by defendant's attorney, Deborah K. Hoff and was signed by both parties on January 7, 1992. Plaintiff was represented by Attorney Timothy Misner at the time the agreement was prepared and signed.

The post marital agreement provides that defendant be released from any obligation to pay support for the children of the marriage so

long as plaintiff is capable of providing adequate support. "Husband hereby releases Wife from any support obligation for said children so long as Husband is capable of providing adequate support." At the time the agreement was executed, plaintiff was working for the Department of Army, and defendant was driving a school bus twenty hours a week, nine months out of the year and going to school.

Plaintiff filed for support against defendant in April of 1993. A support order was entered and defendant filed an appeal. This court granted defendant's motion to dismiss finding that plaintiff would be precluded from receiving support from defendant for the children unless he is able to factually prove that he is incapable of providing adequate support for the children. Plaintiff then refiled for support on February 24, 1995. This support request was denied and plaintiff has appealed from the said order.

Plaintiff's current income has not decreased since the execution of the agreement but instead has increased. Plaintiff currently nets \$2,177 per month after taxes and health insurance premiums are taken out. Defendant has completed her education and is employed full-time at the Welty Medical Center in Waynesboro. Plaintiff currently resides with Derek and Daniel Hook. Defendant has remarried and resides with her current husband.

DISCUSSION

Regardless of whether this property settlement agreement was merged into the divorce decree, child support obligations can be increased if to do so would be in the best interest of the child or children. Visitation, custody, and child support matters are enforced according to the best interest of the child and the parties' agreement, while entitled to consideration, has only advisory effect. *Belan v. Belan*, 399 Pa. Super. 458, 582 A.2d 684 (1991); *Knorr v. Knorr*, 527 Pa. 83, 588 A.2d 503 (1991); *Sonder v. Sonder*, 378 Pa. Super. 474, 549 A.2d 155 (1988).

The facts presented in this case do not show that the children are not being adequately cared for under the present arrangement. In fact, plaintiff is making more now than when the agreement was signed by the parties. The expenses incurred due to the activities that the children are involved in are not extraordinary expenses which would support a deviation from the present arrangement. Indeed,

extraordinary expenditures such as orthodontic devices may be cause for a deviation from the agreement. However, plaintiff has not consulted an orthodontist to see whether such treatment is needed at this time.

Plaintiff cites *Oman v. Oman*, 333 Pa. Super. 356, 482 A.2d 606 (1984) as supporting their argument that mother as a parent cannot bargain away the right of support for her children despite the validity and legality of the agreement the parties entered into. In this case, however, mother is not bargaining her children's right to adequate support away. If the children's father is unable to adequately support the children, their mother is obligated under the agreement to make up the difference so that the children are adequately cared for. Upon a showing that plaintiff can no longer adequately provide for the children, the court would be willing to entertain the possibility for a modification of the agreement.

CONCLUSION

Plaintiff signed a property settlement agreement in which he agreed to provide for his children as long as he could adequately do so. Both parties were represented at the time the agreement was drafted and at the signing of the agreement. Both parties agreed to be bound by the agreement. The court feels that the children are adequately being provided for and has not found adequate grounds justifying a modification of the agreement, the agreement will stand.

ORDER OF COURT

June 20, 1995, the court finds that the children in this matter are being adequately provided for under the post marital agreement dated January 7, 1992 and does not find adequate grounds to justify a modification of the agreement. The marital agreement of January 7, 1992 will stand.

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