

according to Pa.R.C.P. 1150. However, the defendants have filed a counterclaim in trespass and are constitutionally entitled to demand a jury trial for those counterclaims. U.S. Const. Amend. VII, PA. Const., Art. I, §6.

The Pennsylvania Rules of Civil Procedure provide the time limit in which a demand for a jury trial must be made.

(a) In any action in which the right to jury trial exists, that right shall be deemed waived unless a party files and serves a written demand for a jury trial not later than twenty (20) days after service of the last permissible pleading.

Pa.R.C.P. 1007.1

In the case at bar, the last pleading was filed on February 15, 1990, and defendants had twenty (20) days from that date to make their demand for a jury trial. The defendants failed to make their demand within the time period allowed in the rules.

The Supreme Court in *Jones v. VanNorman*, 513 Pa. 572, 522 A.2d 503 (1987), clearly stated that Rule 1007.1 is to be enforced, and that prejudice to the other side is not to be considered where the provisions of Rule 1007.1 (a) have not been satisfied. Therefore, we are compelled to find that the defendants waived their right to a jury trial by not making their demand within the time period prescribed by the rule.

The defendants' petition for leave of court to make a written demand for a jury trial is denied.

ORDER OF COURT

NOW, June 21, 1990, defendants' petition for leave to file a demand for jury trial is DENIED.

OMMERT V. OMMERT (NO.2)*, C.P. Franklin County Branch, No. FR. 1987-905S

Child Support - Modification - Changed Circumstances - Increase in Salary

*Editor's Note--Another case, involving the same parties, was reported earlier, at 10 Franklin 114.

1. A 10% increase in salary is sufficient to show a change in circumstances justifying modification.
2. A Court order awarding exclusive possession of the marital real estate to wife does not constitute a change in circumstances.

Martha B. Walker, Esq., Attorney for Plaintiff

Thomas J. Finucane, Esq., Attorney for Defendant

OPINION AND ORDER

KAYE, J., May 21, 1990:

OPINION

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This matter is before the Court on a petition to modify child support payments which was filed by Robert E. Ommert ("Robert"). Robert and Bonnie L. Ommert ("Bonnie"), the respondent, are husband and wife. They are the parents of Kristy N. Ommert ("Kristy"), born March 16, 1980. Robert is employed as a rural mail carrier for United States Postal Service. Bonnie works as a United States Postal Office Clerk.

The parties separated on October 21, 1987 when Robert left the marital home to reside elsewhere. Currently, there is a divorce action pending between them. Kristy has continued to live with Bonnie in the marital home.

On February 1, 1988, the parties entered into a stipulation and agreement, whereby Robert would pay \$92.00 every two weeks to Bonnie for child support and maintain medical coverage for Kristy through his employer. Further, the parties agreed that each would pay one-half (½) of the monthly mortgage payment on the marital home. An order of court was made pursuant to this stipulation and agreement on February 5, 1988.

On September 15, 1988, the Court made a new order in conformity with a second stipulation and agreement between the parties

to modify the February 5, 1988 order. The stated reason for the amendment was that Robert had not been paying the Mortgage payment directly to Bonnie as previously ordered. The parties agreed that an amount of one-half (1/2) of the bi-monthly mortgage payment, \$126.00, would be added to the \$92.00 bi-monthly child support amount and would be paid directly to Domestic Relations Collection Officer in a lump sum.

The third order was made by the Court on October 12, 1989 as a result of a third stipulation and agreement which indicated that one-half (1/2) of the bi-monthly mortgage payment should be \$136.00 rather than \$126.00. The Court ordered Robert to pay \$228.00 every second Monday to Bonnie. This amount reflected the \$136.00 mortgage payment plus the \$92.00 child support payment.

On October 30, 1989, the Honorable John W. Keller issued an opinion and decree which awarded Bonnie exclusive possession of the marital home located at 5951 Sampache Drive, Shippensburg, Franklin County, Pennsylvania. The decree enjoined Robert from entering the real estate or the marital home located at the above address after finding that Robert had engaged in conduct which served to annoy and harass his wife and daughter.

On December 20, 1989, Robert filed a petition with the Court seeking to modify the previous support order. On January 19, 1990, a hearing was held before a Domestic Relations Hearing Officer who dismissed the petition finding that there was insufficient evidence to warrant a modification. The petitioner appeared before the Court, challenging the hearing officer's decision, on March 21, 1990. Both parties were directed to submit memoranda regarding this matter, which have been received and reviewed by the Court. The matter is ready for disposition.

DISCUSSION

Parties to a divorce action are permitted by law to enter into child support agreements and to have those agreements made an order of court. Further, the Court has the authority to modify child support stipulations and agreements upon a showing of changed circumstances. 23 P.S. §401.1(b).

In this case, we must first decide whether Robert has made a

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LEGAL NOTICES, cont.

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showing of changed circumstances which warrants a change in the prior child support order. Robert has asserted two changes in circumstance. First, Robert states that Bonnie has had an increase in salary of more than 10% since the last order. Second, Robert asserts that the Court's order of October 30, 1989 giving Bonnie exclusive possession of the marital residence, is a change in circumstance which is sufficient to justify a modification in support.

Evidence offered at the hearing indicated that Bonnie currently receives a net pay of \$900.00 every two weeks or \$450.00 per week. The previous child support order was based on a net pay of \$400.00 per week. The \$50.00 increase in salary translates into an increase of more than 10%. We believe that this increase in salary is sufficient to show a change in circumstances which justifies a modification of the child support order. We note, however, that we do agree with the respondent's position that the Court's order awarding exclusive possession of the marital real estate to Bonnie, standing alone, does not constitute a change in circumstance which would justify a modification of the support order in this case. Robert had been maintaining a separate residence prior to the previous child support agreements.

Next, we must determine from the evidence the net pay of each of the parties. Both parties agree that Bonnie's net weekly pay is \$450.00. However, there is a dispute between the parties as to the correct amount of Robert's net pay.

The parties seem to agree that Robert's annual adjusted gross income is \$33,337.00, plus an equipment allowance provided by the Postal Service of \$2,870.00 for a total annual gross income of \$36,207.00. That amount is decreased by actual vehicle expenses which Robert incurs as an employee business expense for maintaining and operating his own vehicle for the delivery of mail.

The amount of actual vehicle expense seems to be the primary source of dispute in arriving at Robert's net weekly pay. Robert asserts that his actual vehicle expenses amounted to \$5,563.00 in 1989. Of that amount, 98% \$5,452.00 represents the amount of the expense actually incurred for business purposes according to Robert's 1989 Federal Income Tax Return.

Robert brought an envelope containing the vehicle receipts to

the hearing, but he did not enter them into evidence. Bonnie was given the opportunity to examine these receipts at the hearing because they were not available to her prior to the hearing date. However, she did not request that they be entered into evidence at the hearing, nor did she request a continuance so that she could examine the receipts more thoroughly. However, in her post-hearing memorandum, Bonnie requested that the receipts be marked as an exhibit for the defendant. In a letter received by the Court on April 17, 1990, Robert objected to their admission. In light of the petitioner's objection, and the fact that the evidence was closed at the conclusion of the hearing, we are denying the respondent's request to admit the receipts into evidence. Therefore, we accept the \$5,452.00 amount, as shown on Robert's 1989 Federal Income Tax Return, as the amount of business related vehicle expense.

To calculate Robert's weekly net pay, we take his annual gross income of \$36,207.00 and deduct \$5,452.00 for business vehicle expense, to arrive at \$30,755.00, or \$1,182.88 bi-weekly (\$30,755.00 divided by 26 annual bi-weekly pay periods). From \$1,182.88 gross bi-weekly income, we deduct \$90.49 Social Security (7.65% of \$1,182.88), \$201.00 Federal Withholding (Tax table - \$1,182.88 bi-weekly wage), \$24.84 State Income Tax (2.1% of \$1,182.88), \$13.92 Local Wage Tax (1% of 36,207.00 divided by 26 bi-weekly pay periods), \$20.80 FICA/MED (as listed on pay stub, Respondent's Exhibit 2), to obtain \$831.82 net bi-weekly income, or \$415.91 per week. Based on Robert's net bi-weekly net income of \$831.32 and Bonnie's bi-weekly net income of \$900.00, Robert's support obligation is \$120.00 using the current statewide support guidelines. Pa.R.C.P. 1910.16-1 et seq.

To that we add \$20.00 bi-weekly to reflect Robert's share of reasonable child care expenses which are currently \$20.00 per week. Bonnie testified that during the summer child care expenses are \$40.00 per week for which Robert must pay \$40.00 bi-weekly. Pa./R.C.P. 1910.16-5(h), provides that reasonable child care expense which is paid by the custodial parent in order to maintain employment, is the responsibility of both parents, and one-half (1/2) of the expense is added to the non-custodial parent's monthly support obligation. We find that the \$20.00 or \$40.00 per week amounts are reasonable and necessary for Bonnie's employment.

In this case, all of the court orders which were entered pursuant to an agreement of the parties, labeled the lump sum that Robert was paying as an amount to be used "for the support of the parties' minor child." Because 23 P.S. §401.1 permits the court to modify an agreement for child support upon a showing of changed circumstances, we have granted the petitioner's request to modify.

However, we note that 23 P.S. §401.O(c) states:

In the absence of a specific provision to the contrary appearing in the agreement, a provision regarding the disposition of existing property rights and interests between the parties, alimony, alimony pendente lite, counsel fees or expenses shall not be subject to modification by the court.

Because this is a proceeding to modify child support, we believe that it is inappropriate for the court to change any agreement between the parties related to the mortgage payment or to determine whether such an agreement is enforceable; therefore, we are refraining from deciding in this proceeding, whether the agreement to pay one-half (1/2) of the mortgage is enforceable.

ORDER OF COURT

NOW, May 21, 1990, a hearing having been held, and the attached finding having been made, the order of support previously entered in this matter is amended to the following extent:

Defendant shall pay to plaintiff via the Collection Officer of the Court, the sum of \$140.00 plus 50¢ service charge, on the first Monday following December 20, 1989 on which defendant's obligation to pay support pursuant to the most recent support order was due, and a like sum of \$140.50 each second Monday thereafter for the support of the parties' one minor child, Kristy N. Ommert, born March 16, 1980. This support provision is based on the parties' earnings as set forth in the opinion filed herewith, and upon the other considerations set forth therein.

Costs to be paid by defendant.