



01/03/94 PETITIONER v. RESPONDENT

1994 | Cited 0 times | Delaware Family Court | January 3, 1994

FACT-FINDING ON ISSUE OF CONSENT

(Support Arrears)

Before the HONORABLE WILLIAM J. WALLS, JR., JUDGE of the Family Court of the State of Delaware:

Before the Court is a Petition for Support Arrears filed by the Division of Child Support Enforcement ("DCSE") on behalf of Esther M. C. . On December 23, 1992 a teleconference was held wherein counsel stipulated to submit memoranda as to the issues of (1) jurisdiction of Kentucky to enter the original Order and (2) whether incest or rape is a defense to paying support. ¹ This is the Court's decision on these two preliminary issues.

The procedural history of this case is that on July 7, 1986, an Order was entered in Hardin District Court, Commonwealth of Kentucky, wherein Respondent was found to have a duty to support her infant children: Renatae S. S , born April 17, 1980; Denatae C. L , born October 17, 1982; and, Terraine D. L , born May 25, 1984. The Kentucky Court found that Respondent was obligated for support of the minor children in the amount of \$250.00 per month. Petitioner filed a Petition for Registration of Foreign Support in this Court. A hearing was held before a Master of Family Court and the Kentucky Order of child support was made a Delaware Order and arrears were established in the amount of \$15,250.00.

On March 18, 1992 the Petitioner filed the instant Petition for Support Arrears alleging that the Respondent had failed or refused to comply with the Support Order and was in arrears in the approximate amount of \$17,250.00. A hearing was initially held on the instant petition before a Master of Family Court, wherein Respondent, appearing pro se stated that she had never paid any support for the three minor children and had no intention of doing so. Respondent argued that the three minor children were the product and the result of an incestuous relationship with her brother and that under the circumstances it was not a voluntary decision on her part to have the minor children, and therefore, she should be relieved of her obligation to pay child support. The Master of Family Court rejected Respondent's argument and found that Respondent did not have just cause for failing to pay support. Further, given the alleged special circumstances of this case and Respondent's affirmation that she did not intend to make any payments, the matter was forwarded for further Disposition before a Judge of the Family Court.



01/03/94 PETITIONER v. RESPONDENT

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Respondent first argues that because she was not afforded adequate notice of the original Kentucky support hearing, and consequently was denied the opportunity to be heard, Kentucky never properly obtained jurisdiction to enter the original support Order. The absence of proper service would divest this Court of the ability to accord full faith and credit to Kentucky's Order. This is not, however, the situation in the instant matter. The copy of the summons submitted by Petitioner clearly demonstrates that the Respondent was properly served in the Kentucky support action. The proof of service states that Mary M L received service of a true copy of the summons and petition at HHD 75th SPT Bn, Fort Knox, KY, 40121, on May 15, 1986. The Proof of Service was signed by the Deputy Sheriff. There is no assertion by the Respondent that the proof of service document is anything other than what it purports to be.²

Based upon the evidence before the Court, the Respondent was afforded adequate notice and was provided with the opportunity to be heard at the Kentucky support hearing. Kentucky had proper jurisdiction over the Respondent to enter the original support Order which, in turn, is entitled to full faith and credit by this Court pursuant to 13 Del.C. § 639.

Respondent next argues that rape or incest is a defense to paying support for children conceived as a result of the incest or rape. Respondent relies on 13 Del.C. § 506 which states:

"No person shall be required to support another while he has just cause for failing or refusing to do so."

The issue of whether incest or rape is "just cause" for failing or refusing to support children conceived as the result of an incestuous relationship is one of first impression in Delaware. Both father and mother have a statutory duty to support their children and this duty has priority over any other support obligation. 13 Del.C. § 505(a). It is clear that the statutory duty to support one's children imposes a heavy burden on any parent asserting a "just cause" defense for failing or refusing to provide such support to convince the Court to exercise judgment in their favor.

The Court begins its analysis of whether incest or rape is "just cause" under 13 Del.C. § 506 with a review of Delaware cases where the defense of "just cause" for failing or refusing to pay child support has been raised. Concealment of the whereabouts of a child by the parent entitled to receive child support is "just cause" under 13 Del.C. § 506, and excuses the obligor from the obligation of paying child support during the time of concealment. *Sears v. Sears*, Del. Fam. Ct., 462 A.2d 1099 (1983). The *Sears* Court noted that the child's concealment, was by the mother's own deliberate act and the father was left without any means to furnish support. On the other hand, where there is a denial of child visitation or removal of a child to a far place by a parent to whom support is to be paid effectively denying visitation by the parent who is obligated to provide support, the obligor remains under a duty to pay support provided that the child's whereabouts is known to the obligor. *Millard v. Taylor*, Del. Ch., 247 A.2d 436 (1968).



01/03/94 PETITIONER v. RESPONDENT

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Likewise, voluntarily terminating one's employment or reducing one's income is not grounds for excusing, reducing or terminating an obligor's child support payments. *Husband K. v. Wife K.*, Del. Supr., 343 A.2d 597 (1975). Nor is a claim of drug dependency through voluntary participation in the use of drugs a defense for noncompliance with a Court Order to pay child support. *McDermott v. Bender*, Del. Fam. Ct., 598 A.2d 709 (1990). "While [the father] suffers from psychological disability and it is recognized by the Court that he has undergone a drastic change in his economic circumstances, he voluntarily induced his present condition. He cannot benefit from his self-inflicted disability to the detriment of his children." *Id.* at 712-713.

It is clear from the line of cases that Delaware Courts are very reluctant to excuse payment of child support and will only do so in those rare instances where the circumstances creating the "just cause" are beyond the control of the support obligor. Where the alleged "just cause" for failing or refusing to provide the required support is the product of voluntary and deliberate action on the part of the support obligor, the payment of child support will not be excused under 13 Del.C. § 506. Here, Respondent argues that rape or incest is "just cause" for failing or refusing to provide child support. It appears that if the sexual relations which resulted in the three minor children in question were forced upon the Respondent without her actual consent, she may have "just cause" for failing or refusing to support the children.

Recognizing that a review of other jurisdictions finds no case law specifically addressing the issue of whether a mother has "just cause" to refuse to support children conceived as the result of an incestuous relationship, Petitioner argues that the instant case is analogous to those cases dealing with fathers who have conceived children in violation of a state's statutory rape laws. *State ex rel. Hermesmann v. Seyer*, Kan. Supr., 252 Kan. 646, 847 P.2d 1273 (1993); *Mercer County Department of Social Services v. Alf M.*, N.Y. Fam. Ct., 589 N.Y.2d 288 (1992).

This line of cases is clearly distinguishable from the instant matter. The issue involved was one of legal consent as opposed to actual consent. Not one of the cases cited raised a genuine issue of material fact as to whether the father's sexual intercourse with the mother was actually non-consensual or involuntary. To the contrary, in each of the cases, the respective Court appeared to infer from the factual assertions that the sexual intercourse was voluntary. Where voluntary intercourse results in parenthood, then for purposes of child support, the parenthood is voluntary. A parent's duty to support the child flows directly from his voluntary parenthood.

This Court, after careful review of the exceptions to payment of child support, holds that rape or incest may be a defense to payment of child support. If the sexual intercourse which results in the birth of a child is involuntary or without actual consent, a mother may have "just cause" pursuant to 13 Del.C. § 506 for failing or refusing to support such a child.

In the instant case, the Respondent argues that the three minor children were the product and result of an incestuous relationship with her brother and that under the circumstances it was not a



01/03/94 PETITIONER v. RESPONDENT

1994 | Cited 0 times | Delaware Family Court | January 3, 1994

voluntary decision on her part to have the minor children. Here the issue is not whether the Respondent legally consented to the sexual intercourse which resulted in her three children, but rather, whether she actually consented to the sexual relations.

The Court, based upon the pleadings, cannot make a summary decision as to whether this case falls within the rape/incest exception. Therefore, a fact-finding hearing on the issue of consent is necessary. Accordingly, a hearing will be scheduled in conjunction with the attorneys' offices.

IT IS SO ORDERED this 3rd day of January, A.D. 1994.

WILLIAM J. WALLS, JR., JUDGE

1. By letter dated March 2, 1993, the Court not having received the requested information, requested that the proposed briefs be submitted to the Court by March 12, 1993. Because of difficulties Patricia A. Dailey, Esq. had in locating her client who had moved, Respondent's memorandum was not received by the Court until April 5, 1993. DCSE, through its attorney, provided the Court with their response to Respondent's letter memorandum on September 29, 1993.

2. The proof of service was provided by Petitioner with the memorandum. The Court assumes that had Respondent disputed that document, she would have responded. Regardless, should Respondent dispute the use of the document as presented, she may raise her objection prior to the hearing by informing the Court and Mr. Moore.

