

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

VODA L. JOHNSON,

Petitioner,

vs.

KEVIN W. JOHNSON,

Respondent.

Case No. 6729

ORDER

DATE OF HEARING: September 22, 1999.

DATE OF DECISION: September 23, 1999.

APPEARANCES:

For the petitioner: W. Gerald O’Kief with petitioner.

For the respondent: James D. Gotschall with respondent.

SUBJECT OF HEARING: petitioner’s application to modify decree, respondent’s cross-petition to modify, and contempt citation issued to respondent upon petitioner’s motion.

DECREE INVOLVED:

Date of original decree: May 15, 1998.

Date last modified: not applicable.

FINDINGS: The court finds:

1. The modification proceedings were consolidated for trial with the hearing on the contempt citation. The court’s determination of the matter of contempt is set forth in a separate order entered contemporaneously with this order.

2. There has not been any material change of circumstances since the decree was entered.

3. The matter of visitation was submitted largely by the petitioner upon the respondent’s failure to timely return the children and the children’s “wishes.” The court is not persuaded that the wishes of the children regarding Wednesday visitation are based upon sound reasoning. Because the visitation orders were entered as part of a negotiated settlement agreement, no change should be made with regard to such orders except as may

be in the best interests of the children in response to a material change in circumstances. Because the court concludes that there has not been such a change, the decree should not be modified in that regard.

4. The testimony of the children's teachers persuades the court that there is no greater problem with homework after a visitation than on other days that do not follow a visitation. The conduct and demeanor of the witnesses regarding the suggestion of bias over the respondent's position as a school board member convinces the court that these teachers are not intimidated by the parties involved or by anything else, and are truthful and reliable witnesses.

5. The respondent is cautioned that failure to return the children by the time specified in the order may be grounds for contempt and is not excused by the participation in the church youth group activities. The evidence discloses that such youth group activities existed at the time of the negotiated settlement. If the youth group is not concluded in sufficient time to return the children to the petitioner on-time by 8:30 p.m., the respondent will have to forgo the participation in youth group or make appropriate arrangements for the participating children to leave early. Compliance with the decree is a legal duty enforced by law, not a choice left up to a party. The failure of the petitioner to previously enforce the decree in this regard significantly reduces the weight accorded to it on the issue of modification. However, the respondent is now on notice that the situation may be different in the future.

6. The matter of the children's income tax and tax preparation is controlled by *National Acct. Sys. of Lincoln v. Vergith*, 246 Neb. 604, 521 N.W.2d 910 (1994), which holds that the amount of child support determined by the court, so long as the decree remains in full force, is the legal measure of the noncustodial parent's liability for the support of such children. Payment of the respondent's child support satisfies his full legal obligation in this regard. Income taxes and tax preparation expenses certainly should have been within the contemplation of the parties when the settlement was negotiated and does not constitute a change in circumstances.

7. The monthly net incomes of the parties are set forth on Appendix "B" attached hereto and incorporated by reference. The child support amounts determined pursuant to the Nebraska Child Support Guidelines are computed on Appendix "B." Because there has not

been a variation of 10% or more, no presumption of a material change of circumstances arises. The evidence fails to otherwise establish any such change.

8. The respondent should be required to pay attorney's fees for the benefit of the petitioner's attorney in the amount of \$250.00 taxed as costs. The parties should otherwise be required to pay their own taxable costs.

ORDER: IT IS THEREFORE ORDERED, ADJUDGED, AND
DECREED that:

1. The petitioner's application is denied.
2. The respondent's cross-petition is denied.
3. The decree previously entered in this case (and as previously modified, if applicable) shall remain in full force and effect.

4. Each party shall be required to pay their own respective costs and attorney fees, except that \$250.00 for petitioner's attorney's fees are taxed to respondent, to be paid within 30 days from the date of entry of this order. Judgment is hereby entered accordingly.

ENTERED: September 23, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 19__ by ____.
- : Enter judgment for attorney fees on the judgment record.
Done on _____, 19__ by ____.
- : Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 19__ by ____.
- : Note the decision on the trial docket as: 9/23/99 Signed "Order" entered denying petitioner's application, denying respondent's cross-petition, and taxing \$250 of petitioner's attorney fees to respondent as costs; judgment accordingly.
Done on _____, 19__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge