

100TH JUDICIAL DISTRICT COURT FOR THE PARISH OF BLACK ACRE
STATE OF LOUISIANA

NO. 123-456

DIVISION "A"

JANE DOE,

Petitioner,

-versus-

JOHN DOE,

Defendant.

FILED: _____

DEPUTY CLERK

**PEREMPTORY EXCEPTION OF NO CAUSE OF ACTION AND DILATORY
EXCEPTIONS OF VAGUENESS AND AMBIGUITY WITH INCORPORATED
MEMORANDUM¹**

NOW INTO COURT, through undersigned counsel, solely for the purposes of filing the exceptions cited herein, comes JOHN DOE, SR., sought to be made defendant-in-rule, objecting to the several legal errors perpetrated by the petitioner-in-rule, JANE DOE, in the *Rule to Increase Child Support*. Exceptor respectfully requests that this Honorable Court dismiss the *Rule to Increase Child Support* at the petitioner's cost for failing to state a cause of action sufficient upon which relief may be granted and because the allegations contained therein are vague and ambiguous. Finally, exceptor also requests that all court costs and actual attorney fees be taxed against the petitioner in rule.

I.

FACTS AND PROCEDURAL HISTORY

JANE DOE filed a *Rule to Increase Child Support*, seeking a reduction child support. See *Rule to Increase Child Support* filed by JANE DOE. This rule fails to state a cause of action upon which relief may be granted, because it does not contain any well pleaded facts sufficient to demonstrate the material change in circumstances required by Louisiana Revised Statutes 9:311 for a reduction in child support. Moreover, the allegations are vague and ambiguous because it does not state with specificity to what extent that the time he spends with the child has changed since the rendition of the child support award, or how the exceptor's income has changed, so that the exceptor can prepare a defense.

¹ The United States Supreme Court has held that the allegations of a pro se litigant's pleadings are to be held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Article 865 of the Louisiana Code of Civil Procedure mandates that every pleading shall be construed as to do substantial justice.

II.

LAW AND ARGUMENT

The Louisiana Code of Civil Procedure defines an exception as "a means of defense, other than a denial or avoidance of the demand, used by the defendant, whether in the principal or an incidental action, to retard, dismiss, or defeat the demand brought against him." L.C.C.P Art. 921 (West 2004). "Three exceptions and no others shall be allowed: the declinatory exception, the dilatory exception, and the peremptory exception." L.C.C.P Art. 922 (West 2004). "The function of the peremptory exception is to have the plaintiff's action declared legally nonexistent, or barred by effect of law, and hence this exception tends to dismiss or defeat the action." L.C.C.P Art. 923 (West 2004). No right of action and no cause of action are objections which may be raised through the peremptory exception. L.C.C.P Art. 927 (West 2004). "The peremptory exception may be pleaded at any stage of the proceeding in the trial court prior to a submission of the case for a decision and may be filed with the declinatory exception or with the dilatory exception, or both." L.C.C.P Art. 928 (West 2004). The "purpose of the exception of no cause of action is to question whether any legal remedy is available to the plaintiff under the allegations of the petition. "Saxena v. Saxena, 518 So.2d 1098, 1099 (La. App. 5th Cir. 1987) see also La. Code Civ. Proc. Art. 931 (West 2004). "The exception is triable on the face of the plaintiff's petition." Id. The court further declared:

In considering the validity of an exception of no cause of action all well pleaded facts are accepted as true. But, so called allegations which are nothing more than conclusions are disregarded. The petition must set forth the material facts upon which a cause of action is based; the allegations must be ultimate facts; conclusions of law or fact and evidentiary facts will not be considered.

Id. at 1100. Although the Fifth Circuit reviewed the exception in Saxena in the context of a custody matter, it is equally applicable to a modification of an award of child support.

Louisiana Civil Code Article 142 provides that "an award of child support may be modified if the circumstances of the child or of either parent materially change and shall be terminated upon proof that it has become unnecessary. La. Civ. Code 142 (West 2004). That's the triggering event, a material change, whether it's the circumstances of the child, which is generally known by the spouse who has custody, or the circumstances of either parent.

Furthermore, Louisiana Revised Statutes 9:311 mandates in pertinent part that:

An award for support shall not be reduced or increased unless the party seeking the reduction or increase shows a material change in circumstances of one of the parties between the time of the previous award and the time of the modification of the award.

La. Rev. Stat. 9:311 (West 2004). The footnote to Louisiana Revised Statutes 9:311 requires that:

To obtain a reduction or an increase in support the change must be material, defined as a change in circumstances having real importance or great consequences for the needs of the child or the ability to pay of either party.

La. Rev. Stat. 9:311 Comment (a) (West 2004). Therefore as a matter of law the petitioner in rule cannot meet the threshold requirement as required by the statute.

Now, the contemporary cases that have evolved based on the premises stated in Saxena have labelled Saxena as brutal. Saxena stands for the premise that the mover is charged with knowing something that it may not be possible to know. So the mover must allege something that they do know. And a cause of action need not be the entire cause, but it has to be sufficient to keep the petitioner in court. This premise is repeatedly cited in the jurisprudence, and is not limited only to Saxena.

The Fourth Circuit court of Appeal in Hester versus Hester states the burden is on the proponent to demonstrate a change in circumstances. Hester versus Hester, 804 So.2d 783, 2001-0380 (La.App. 4 Cir. 12/12/01). If there is no change, there is no modification. Id. Furthermore, this holding comports with the decision of the First Circuit Court of Appeal in Hudnall versus Hudnall mandating the pleading should be specific, it is not up to the defendant to ferret out information. Hudnall versus Hudnall, 808 So.2d 641, 2000-0330 (La. App. 1 Cir. 5/11/01). In other words, it's not up to the defendant to defend against the unknown, only what is pled. Id.

Finally, in a decision rendered shortly after Saxena, the Second Circuit in State ex rel Dice, states the extreme as to why Saxena applies. State ex rel Dice, 653 So.2d 213 (La. App 2 Cir 4/5/95). In Dice, the State of Louisiana petitioned for an increase in support on behalf of a minor in a paternity proceeding. Id. In that case, child support was set for a child while the child was in grammar school. Id. The request for a modification was not made until the child entered high school. Id. The custodial parent filed a pleading saying there has been a change in

circumstances, a modification of this child's needs, because of the age change, the school change, and things of that nature Id. The Second Circuit Court of Appeal, reversed the decision of the juvenile court, citing a manifest abuse of discretion in increasing the support award because the court could not provide by assumption or by speculation the changes in circumstances. Id. Certainly, there may be different costs for a child in grammar school versus high school, but that's the duty of the plaintiff to allege what those costs are. Id. at 214. Hence, pursuant to the mandate of Saxena the conclusory allegations were insufficient to warrant the increase.

As a result of the pleading conclusory allegations, the Louisiana Code of Civil Procedure requires that:

When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection cannot be so removed, or if plaintiff fails to comply with the order to amend, the action shall be dismissed.

La. Code Civ. Proc. Art. 934 (West 2004).

This court should recognize that a litigant does not have a right without a case, an underlying case, to proceed against the exceptor. The petitioner has unique information including the needs of the child, which can be pled with specificity. The petitioner also knows their income and if their income has been modified in any degree. It's true the petitioner may not know at this point the exceptor's changes, if any even exists, but the reality is that the petitioner in rule has to allege something that gives them a cause of action.

The petitioner did not allege a material change in circumstances sufficient to entitle him to a reduction in the *Rule to Increase Child Support*. The petitioner cites the following conclusory allegation:

“...since that time, circumstances have changed such that JANE DOE is entitled to a decrease in child support payable to JOHN DOE, SR. in favor of the minor child. First the minor child spends approximately fifty percent (50%) of the summer months and forty percent (40%) of the school year with mover. Secondly, JANE DOE believes that JOHN DOE, SR. has been employed since the rendition of the child support determination, said income not used in calculating child support.”

See *Rule to Increase Child Support* filed by JANE DOE. First, the allegation that the minor child spends approximately fifty percent (50%) of the summer months and forty percent (40%) of the school year with mover fails to state what the percentage shared time was as of the initial

setting of support. This same custodial arrangement was in place at the last setting of support. Second, the exceptor is not currently working, as it is alleged that she was not working at the time support was last calculated, and is currently caring for children that are under the age of five (5). Therefore, nothing has changed, at all, whatsoever, hence the Rule on its face does not state a cause of action. The only thing that has changed is that the mover has again failed in his most recent attempt to change custody.

Moreover, the conclusory nature of the allegations are make them vague and ambiguous and by not stating specific facts, so that the exceptor can prepare a defense. This information should be within the petitioner's knowledge if they do in fact exist, and could have easily been alleged. Vagueness or ambiguity of the petition is an objection that is raised pursuant to a dilatory exception. La. Code Civ. Proc Art 926. Vagueness or ambiguity of the petition is an objection that is raised pursuant to a dilatory exception. La. Code Civ. Proc Art 926.

Moreover, as a result of the pleading of conclusory facts in support of the requested reduction all the allegations in the *Rule to Increase Child Support* are vague and ambiguous and collectively do not state a cause of action upon which legal relief can be granted. Mover fails to state any specific facts to support his alleged general conclusions and fails to provide with specificity what circumstances have changed, since the rendition of the judgment that entitles him to a reduction in child support. Therefore, this Honorable Court should dismiss the *Rule to Increase Child Support* and award court costs and actual attorney fees to exceptor in conjunction with the filing of this exception.

WHEREFORE, exceptor, JOHN DOE, SR., prays that after due proceedings are had herein, that his exceptions be maintained by this Honorable Court, that JANE DOE's *Rule to Increase Child Support* be dismissed at his cost, and award court costs and actual attorney fees to exceptor in conjunction with the filing of this exception.

III.

The *Rule to Increase Child Support* is currently set for hearing on January 28, 2004 and exceptor desires that this Motion be heard prior to that date so that the Court can rule on the Exception prior to the adjudication of the Rule to Increase Child Support.

IV.

It has been necessary for petitioner to hire an attorney to handle this matter and to incur court costs. Mover requests that defendant-in-rule be ordered to pay those costs.

WHEREFORE, exceptor, JOHN DOE, SR., prays that after due proceedings are had herein, that his exceptions be maintained by this Honorable Court, that JANE DOE's *Rule to Increase Child Support* be dismissed at his cost, and award court costs and actual attorney fees to exceptor in conjunction with the filing of this exception.

Respectfully Submitted,

JOHN DOE
123 Maple Leaf Drive
Black Acre, Louisiana 70000
(504) 555-1212

JOHN DOE
In Proper Person

100TH JUDICIAL DISTRICT COURT FOR THE PARISH OF BLACK ACRE
STATE OF LOUISIANA

NO. 123-456

DIVISION "A"

JANE DOE,

Petitioner,

-versus-

JOHN DOE,

Defendant.

FILED: _____

DEPUTY CLERK

ORDER

Considering the above and foregoing:

IT IS ORDERED THAT JANE DOE appear and show cause, if he can, on the ____ day of _____, 200__ at _____ o'clock.,

- (1) Why JOHN DOE, SR. exceptions should not be maintained and why the Rule to Increase Child Support should not be dismissed at petitioner's costs; and,
- (2) Why JANE DOE should not pay the court costs and actual attorney fees associated with the filing of this Exception.

IT IS FURTHER ORDERED that any memorandum in opposition to this Exception shall be filed eight (8) calendar days prior to the hearing date.

GRETNA, LOUISIANA, this the _____ day of _____, 2004.

J U D G E

PLEASE SERVE:

JANE DOE
Through her attorney of record
Support Inc.
Attorneys at Law
123 Canal Street
Black Acre, Louisiana 70000