

Adams County Legal Journal

Vol. 37

December 1, 1995

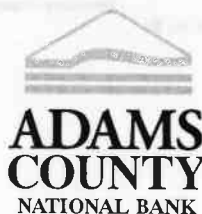
No. 27, pp. 137-140

ANNOUNCEMENT OF CONTINUING LEGAL EDUCATION PROGRAMS

1. *Representing Residential Landlords & Tenants*. December 12—8:45 a.m. Room 207B, Adams County Courthouse—4 C.L.E. credits in substantive law and 0 C.L.E. credit in ethics. Registration through P.B.I.
2. *Hot Issues in Custody*. January 17—8:45 a.m. Room 207B, Adams County Courthouse—5 C.L.E. credits in substantive law and 1 C.L.E. credit in ethics. Registration through P.B.I.
3. *The 1995 Amendments to the Pa. Inheritance Tax Act & Other Recent Developments*. January 23, 1996—8:30 a.m. Room 307 A&B, Adams County Courthouse—3 C.L.E. credits in substantive law and 0 C.L.E. credit in ethics. Registration through P.B.I.

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ADAMS COUNTY LEGAL JOURNAL (USPS 542-600)

Designated for the Publication of Court and other Legal Notices. Published every Friday by Adams County Bar Association, Donald G. Oyler, Esq., Editor and Business Manager.

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Business Office — 112 Baltimore Street, Gettysburg, PA 17325. Telephone: (717) 334-1193

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NOTICE BY THE ADAMS COUNTY CLERK OF COURTS

NOTICE IS HEREBY GIVEN to all heirs, legatees and other persons concerned that the following accounts with statement of proposed distribution filed therewith have been filed in the Office of the Adams County Clerk of Courts and will be presented to the Court of Common Pleas of Adams County—Orphans' Court, Gettysburg, Pennsylvania, for confirmation of accounts and entering decrees of distribution on Friday, December 15, 1995, at 9:00 o'clock a.m.

BREIGNER—Orphans' Court Action Number OC-140-95. The First and Final Account of Adams County National Bank, Executor of The Estate of Janet E. Breighner, deceased, late of the Borough of Littlestown, Adams County, Pennsylvania.

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Peggy J. Breighner
Clerk of Courts

12/1, 8

INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on April 12, 1995. The name of the corporation is GETTYSBURG HISTORY CENTER, INC. The corporation has been incorporated under the Pennsylvania Business Corporation Law of 1988.

Robert E. Campbell
Campbell, White & George
122 Baltimore Street
Gettysburg, PA 17325
Attorneys

12/1

NOTICE BY THE ADAMS COUNTY CLERK OF COURTS

NOTICE IS HEREBY GIVEN to all heirs, beneficiaries and other persons concerned that the First and Final Account for Trust Under Item V of the Will of William H. B. Stevens, Deceased, for the benefit of Ida R. Stevens, with statement of proposed distribution filed therewith, has been filed in the Office of the Adams County Clerk of Courts and will be presented to the Court of Common Pleas of Adams County—Orphans' Court, Gettysburg, Pennsylvania, for confirmation and entering decree of distribution on Friday, December 15, 1995 at 9:00 o'clock a.m.

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LEGAL NOTICE

The Annual meeting of the policyholders of Protection Mutual Insurance Company of Littlestown will be held at the office at 101 South Queen Street, Littlestown, Pennsylvania between the hours of 1:00 and 2:00 P.M. on January 13, 1996 to elect directors and to transact any other business properly presented.

Attest,
Marilyn Q. Butt
Secretary-Treasurer

12/1, 8, 15, 22

COMMONWEALTH VS. JONES

1. On a charge of rape, the necessary forcible compulsion includes physical, moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will.

2. On a charge of rape, the degree of force necessary is relative and depends on the facts and circumstances of each case.

3. On a charge of rape, the threat of forcible compulsion is measured by an objective standard that would be such as would prevent resistance by a person of reasonable resolution.

4. On a charge of indecent assault, forcible compulsion or threat thereof is not required although a lack of consent is critical.

5. In evaluating a jury charge, one must examine the entire charge.

6. On the charge of rape, lack of prompt complaint is an issue which can be considered by a jury since it may raise a doubt as to whether the event took place or whether it was consensual.

In the Court of Common Pleas, Adams County, Pennsylvania, Criminal No. CC-382-94, COMMONWEALTH VS. RONALD D. JONES.

Roy A. Keefer, Esq., District Attorney

Jeffery M. Cook, Esq., for Defendant

MEMORANDUM OPINION

Kuhn, J., May 26, 1995.

On November 18, 1994, a jury found Defendant guilty of two counts of Rape, 18 Pa. C.S.A. §3121(1) (Count I) and §3121(2) (Count II), Indecent Assault, 18 Pa. C.S.A. §3125(1) (Count IV), and Simple Assault, 18 Pa. C.S.A. §2701(a)(3) (Count V)¹ Sentencing was entered on January 30, 1995. Defendant subsequently filed his Post-Verdict Motion on February 8, 1995.²

Viewing the evidence in a light most favorable to the Commonwealth, the following credible evidence was produced at trial. In April, 1994, the victim, S.B., then age 19, and five months pregnant, was living alone in Room #3 at the Homeless Shelter in Gettysburg, Pennsylvania. Defendant, his girlfriend, Angela Clark, and their three children were residing in Room #1, across the hallway from S.B.'s unit. Occasionally when Ms. Clark was not nearby, Defendant would utter sexual remarks or make sexual overtures toward S.B. who thought he was joking at the time.

On April 5, 1994, S.B. retired for the evening at 11:00 P.M. Sometime between 12:30-1:00 A.M., S.B. was awakened by Defendant's entry into her room. Defendant approached S.B.'s bed and asked if she was going to have sex with him. S.B. refused. Defendant hit S.B. in the face several

¹ On the verdict form Indecent Assault and Simple Assault were identified as Count III and IV respectively because Aggravated Indecent Assault, Count III in the Information, was withdrawn before the taking of any testimony. See Order of November 18, 1994.

² The Motion should be styled as a Post-Sentence Motion. Pa. R.Crim.P. 1410.

times with a pillow which "kind of hurt". Then while holding her shoulders down, he pulled her shirt off and began kissing her breasts. S.B. protested but Defendant told her to be quiet or he would tell Ms. Clark that S.B. invited him to her room and Ms. Clark would "beat her up". S.B., who appears shy and lacking in self-confidence, was afraid of Ms. Clark because she looked "rough". S.B. was also afraid that Defendant would hit her in the stomach. Defendant then pulled off S.B.'s pants, penetrated her vagina with his penis, and continued telling her to be quiet when she protested. When Defendant finished he left the room.

At the time of the incident approximately 15 persons were staying at the Shelter, including S.B.'s friend, plus two staff persons. S.B. did not cry out for help. The next day S.B. went to work and spent time with another friend but told no one about the incident with Defendant out of embarrassment. On the evening of April 6, 1994, Defendant again entered S.B.'s room, went through her wallet, removed her medical card, Social Security card and identification card and said he would keep them unless S.B. gave him some money from her next paycheck. After Defendant left her room, S.B. reported both incidents to her friend, a staff person, and the police.

Defendant acknowledged seeing S.B. earlier on April 5, and asking "Are you going to give me good loving tonight?" He admitted entering S.B.'s room and engaging in sexual intercourse but claimed it was consensual. When departing the room within 10 minutes after entry, he thought it important to say "Thank you."

Defendant, age 20, stood 6'1", weight 220 pounds and was in good physical shape. He displayed an attitude of being able to take whatever pleased him whether that be sex or important personal documents.

Defendant raises several issues discussed below. First, Defendant argues that the evidence was insufficient to prove beyond a reasonable doubt that the sexual intercourse was without consent or by forcible compulsion in order to sustain a conviction for rape. He makes the same argument regarding lack of consent with respect to the charge of indecent assault.

Under 18 Pa. C.S.A. §3121 Rape occurs when a person engages in sexual intercourse with another person not his spouse:

- (1) by forcible compulsion; or
- (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution

Defendant cites *Commonwealth v. Berkowitz*, 537 Pa. 143, 641 A.2d 1161 (1994) to support his contention that the sexual intercourse involved here was not by forcible compulsion. In *Berkowitz*, our Supreme Court determined there was no forcible compulsion and therefore no rape under the circumstances of that case. Here, unlike in *Berkowitz*, there is evidence of forcible compulsion sufficient to sustain the offense.

First, we observe that forcible compulsion includes physical, moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will. Commonwealth v. Rhodes, 510 Pa. 537, 555, 510 A.2d 1217, 1226 (1986). Second, the degree of force necessary is relative and depends on the facts and circumstances of each case. Id. 510 Pa. at 554, 510 A.2d at 1226. Third, the threat of forcible compulsion is measured by an objective standard that it be such as would prevent resistance by a person of reasonable resolution. Fourth, if there is a lack of consent but no actual or threatened physical force or psychological coercion, there is no forcible compulsion. Berkowitz, supra., 537 Pa. at 149, 641 A.2d 1164.

The case sub judice is significantly different than Berkowitz. Here, Defendant entered S.B.'s bedroom without invitation (there the victim entered defendant's dormitory room). Here, Defendant hit S.B. with a pillow several times (there defendant did not strike the victim). Here, Defendant held S.B. down while removing her clothing (there the victim was not restrained when her clothes were removed). Here, when S.B. protested Defendant told her to shut up and threatened to get someone to beat her up (there defendant made no threats to the victim). In addition, there are factors not disclosed in Berkowitz which appear relevant here, including, S.B.'s pregnancy, S.B.'s personality, and Defendant's size. Furthermore, the attitude of the two defendants are distinguishable.

Under the circumstances we believe the jury was justified in entering a guilty verdict on the charge of Rape.

Without the need to comment extensively, Berkowitz does clearly support the guilty verdict on Indecent Assault. On that charge forcible compulsion or threat thereof is not required. Rather a lack of consent is critical. S.B.'s protestations are as effective in establishing lack of consent as was the victim repeatedly saying "no" in Berkowitz.

The second issue raised by Defendant concerns whether the Court erred in its charge relating to lack of prompt complaint. Defendant's concern has to do with the sufficiency of the charge.

In 18 Pa. C.S.A. §3105, the Legislature provided that in sexual offenses

Prompt reporting to public authority is not required...Provided, however, that nothing in this section shall be construed to prohibit a defendant from introducing evidence of the alleged victim's failure to promptly report the crime if such evidence would be admissible pursuant to the rules of evidence.

The relevant portion of the charge provides,

...there is no requirement for a victim of a sexual assault...to make a prompt complaint. There's no time limit. Lack of prompt complaint is something that you can consider

but by itself it doesn't mean that the event didn't occur. There's argument here that there is some passage of time, opportunities to make complaint and there wasn't. That's something you can consider and in doing that, consider again the setting, the circumstances, the individuals, the reasons that might have been given for that and determine whether that means anything to you or not. [T. 103-4].

Defendant argues that the Court should have used the exact wording found in Pa. SS Crim J.I. §4.13A (1979). In evaluating a jury charge one must examine the entire charge. Furthermore, the court is not required to instruct the jury exactly as requested by counsel.

Lack of prompt complaint is certainly an issue which can be considered by a jury. The theory is that a victim would be expected to complain at the first opportunity. Therefore, prompt complaint might infer lack of an opportunity to fabricate while delay, without reasonable explanation, can raise an inference regarding the alleged victim's credibility. Lack of prompt complaint although not dispositive may raise a doubt as to whether the event took place or whether it was consensual. *Commonwealth v. Snoke*, 525 Pa. 295, 580 A.2d 295 (1990).

The undersigned acknowledges not giving the instruction verbatim as set forth in the standard jury instructions and upon review, realizes that a better instruction could have been fashioned.³ Here, however, the only issue was consent because even Defendant admitted that the sexual intercourse occurred. Both counsel discussed the issues of prompt complaint and consent during their closing arguments. The court gave general instructions related to the credibility of witnesses and the above referenced charge regarding prompt complaint. Several references were made to the effect that consent negates the offense.

Under all the circumstances we conclude that the jury charge, as a whole, was adequate and it did not so misstate the law or prejudice Defendant as to entitle him to a new trial.

Accordingly, the attached Order is entered.

ORDER OF COURT

AND NOW, this 26th day of May, 1995, in accordance with the attached Opinion, Defendant's Post-Verdict Motion filed February 8, 1995, is denied.

Defendant shall report to the Adams County Prison within ten (10) days after the date of this Order to commence serving the sentence entered January 30, 1995.

³ Not until this issue arose did this court become aware that a prompt complaint suggested jury instruction was not available in our volume of the instructions.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION

ESTATE OF PAULINE B. HLUBB, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Executor: Adams County National Bank, Lincoln Square Offices, Gettysburg, PA 17325

Attorney: Robert E. Campbell, Esq., Campbell, White & George, 122 Baltimore Street, Gettysburg, PA 17325

SECOND PUBLICATION

ESTATE OF ROSE MARIE BRYAN, DEC'D

Late of Conewago Township, Adams County, Pennsylvania

Executrix: Laura B. Zimmerman, 171 Northview Drive, Hanover, PA 17331

Attorney: Elyse E. Rogers, Esquire; Mette, Evans & Woodside, 3401 North Front Street, Harrisburg, PA 17110

ESTATE OF BESSE D. GOOD, a.k.a. BESS T. GOOD, DEC'D

Late of the Borough of Gettysburg, Adams County, Pennsylvania

Executor: John D. Thrush, 200 Springs Ave., Gettysburg, PA 17325

ESTATE OF ANNE H. KORTE, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Administrators: Elizabeth Korte Gardner, 64 Belmont Rd., Gettysburg, PA 17325; Terry Richard Gardner, 64 Belmont Rd., Gettysburg, PA 17325

ESTATE OF ROSE E. REXROTH, DEC'D

Late of Butler Township, Adams County, Pennsylvania

Executrix: Susan A. McKinney, 345 Table Rock Rd., Gettysburg, PA 17325

Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

ESTATE OF PAUL R. WAYBRIGHT, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Executrix: Mary B. Waybright, 716 Mason-Dixon Rd., Gettysburg, PA 17325

Attorney: Gary E. Hartman, Esq., Hartman & Yannetti, 126 Baltimore Street, Gettysburg, PA 17325

THIRD PUBLICATION

ESTATE OF FLORENCE A. BAUM-GARDNER, DEC'D

Late of Menallen Township, Adams County, Pennsylvania

Executrices: Tina Scott, 2630 E. Shippensburg Road, Biglerville, PA 17307; Karen Lawson, 1221 Windswept Circle, Chesapeake, VA 23320

Attorney: Charles W. Wolf, 112 Baltimore Street, Gettysburg, PA 17325

ESTATE OF KATHLYN BURCH, DEC'D

Late of Franklin Township, Adams County, Pennsylvania

Executors: Joseph E. and Veronica Burch, 9505 Poorhouse Road, Port Tobacco, MD 20677

Attorney: Gary E. Hartman, Esq., Hartman and Yannetti, 126 Baltimore Street, Gettysburg, PA 17325

ESTATE OF ROBERT P. KEBIL, DEC'D

Late of Gettysburg Borough, Adams County, Pennsylvania

Executor: Adams County National Bank, 675 Old Harrisburg Road, Gettysburg, PA 17325

Attorney: Gary E. Hartman, Esq., Hartman and Yannetti, 126 Baltimore Street, Gettysburg, PA 17325

ESTATE OF UIMA M. LEMMON, DEC'D

Late of the Borough of Littlestown, Adams County, Pennsylvania

Executrix: Catherine Mort, 76 Prince Street, Littlestown, PA 17340

Attorney: David K. James, Esq., 234 Baltimore Street, Gettysburg, PA 17325

ESTATE OF THOMAS R. STORM, DEC'D

Late of the Borough of McSherrystown, Adams County, Pennsylvania

Executors: Elizabeth L. Krumrine, 250 South Street, McSherrystown, PA 17344; Robert L. Krumrine, 250 South Street, McSherrystown, PA 17344

Attorney: Ronald J. Hagarman, Esquire, 110 Baltimore Street, Gettysburg, PA 17325

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 95-S-867 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 12th day of January, 1996, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL that tract of land situate, lying and being in the Borough of Carroll Valley, Adams County, Pennsylvania, being Lot No. 288 in Section "K", bounded and described as follows:

BEGINNING at a point in the center of Snow Trail at Lot No. 289; thence by said lot, North 37 degrees 16 minutes 28 seconds East, 225 feet to Lot No. 264; thence by said lot and by Lot No. 265, South 55 degrees 50 minutes 46 seconds East, 179.98 feet to Lot No. 287; thence by said lot, South 66 degrees 29 minutes 35 seconds West, 265.90 feet to a point in the cul-de-sac of said Snow Trail; thence in the cul-de-sac and in said Snow Trail, North 55 degrees 50 minutes 46 seconds West, 50 feet to the place of BEGINNING.

The above description was taken from a plan of lots labeled "Section K, Charnita," dated March 3, 1969, prepared by Evans, Hagan and Holdefer, and recorded in Plat Book 1 at page 42.

BEING the same property which James A. Saylor and Geralyn M. Saylor, his wife, by their deed dated February 28, 1991, and recorded in the Office of the Recorder of Deeds of Adams County, Pennsylvania, on March 6, 1991 in Deed Book 580, page 1109, granted and conveyed unto Elmer E. Horton and Donna M. Horton, his wife.

HAVING erected thereon a dwelling known as 7 Snow Trail, Fairfield, PA 17320.

PARCEL No. 7-2.

TOGETHER WITH rights and SUBJECT TO restrictions, conditions and easements referred to in the above recited deed and contained in Deed Book 296 at page 831.

SEIZED and taken into execution as the property of Elmer E. Horton and Donna M. Horton, and to be sold by me.

Bernard V. Miller
Sheriff
Sheriff's Office, Gettysburg, PA
November 2, 1995.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on February 5, 1996, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

All claims to property must be filed with Sheriff before sale.

As soon as the property is declared sold to the highest bidder 20% of the purchase price or all of the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.

11/24, 12/1, 12/8

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 94-S-847 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 12th day of January, 1996, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THAT CERTAIN lot of land situate in Latimore Township, Adams County, Pennsylvania being more particularly described as Lot No. 1218 on a plan of lots of Lake Meade Subdivision, duly entered and appearing of record in the Office of the Recorder of Deeds of Adams County, Pennsylvania, in Misc. Book 1, Page 21, and subject to all legal highways, easements, rights of way and restrictions of record.

ALL THAT CERTAIN lot of land situate in Latimore Township, Adams County, Pennsylvania, being more particularly described as Lot No. 1219 on a plan of lots of Lake Meade Subdivision, duly entered and appearing of record in the Office of the Recorder of Deeds of Adams County, Pennsylvania in Misc. Book 1, Page 21, and subject to all legal highways, easements, rights of way and restrictions of record.

ALL THAT CERTAIN lot of land situate on Latimore Township, Adams County, Pennsylvania, being more particularly described as Lot No. 1220 on a plan of lots of Lake Meade Subdivision, duly entered and appearing of record in the Office of the Recorder of Deeds of Adams County, Pennsylvania in Misc. Book 1, Page 21, and subject to all legal highways, easements, rights of way and restrictions of record.

BEING 733 McCandless Drive, East Berlin, PA 17316.

PARCEL: 68.

SEIZED and taken into execution as the property of **William S. Nelson and Kathryn W. Nelson**, and to be sold by me.

Bernard V. Miller
Sheriff

Sheriff's Office, Gettysburg, PA
November 6, 1995.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on February 5, 1996, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

All claims to property must be filed with Sheriff before sale.

As soon as the property is declared sold to the highest bidder 20% of the purchase price or all of the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.

11/24, 12/1, 12/8

IN THE COURT OF
COMMON PLEAS OF
ADAMS COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW
NO. 95-S-1032

LIBERTY TOWNSHIP, Plaintiff,

vs.

CHARNITA INC., JOHN F. BAKER AND
KATHE BAKER, Defendants.

Legal Notice

Action for Declaratory Judgment

YOU HAVE BEEN SUED IN COURT.

If you wish to defend against the claim set forth in this Complaint you must take action within twenty days after this publication by entering a written appearance personally or by an attorney and filing in writing with the court your defenses or objections and claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you in the court without further notice for the relief requested by the plaintiff. You may lose money, property or other rights important to you.

You should take this notice to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone:

Court Administrator
Adams County Courthouse
Fourth Floor
Gettysburg, PA 17325
Phone number: (717) 334-6781

The complaint, filed in the Court of Common Pleas of Adams County, Pennsylvania at #95-S-1032 alleges that Liberty Township, a political subdivision of Adams County, Pennsylvania claims an interest and are owners/holders of a prescriptive easement to property known as the "park area" as described in subdivision plans designated as "AD Charnita, dated January 12, 1970 and recorded in Adams County Plat Book One, Page 93 and Section AE Charnita, dated March 3, 1970 and recorded in Adams County Plat Book One, Page 95. Both plans show a parcel known as "park area."

The court has ordered that notice to this action be given by publication so that titles of the property can be adjudicated. Complaint requests the court to decree that the title to the property is vested in the general citizenry of Liberty Township and is free and clear of any claim or interest of any of the said dependents, their heirs, and assignees and said defendants be barred from asserting any right, title or interest in and to the property inconsistent with the interest and claim of the plaintiffs unless the defendants assert rights on their behalf within twenty days of the date of this publication.

Respectfully submitted,
Matthew R. Battersby, Esq.
Solicitor of Liberty Township

12/1

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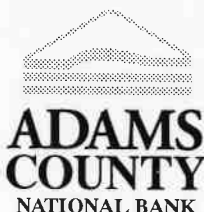
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Peggy J. Breighner
Clerk of Courts

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Attest,
Marilyn Q. Butt
Secretary-Treasurer

12/1, 8, 15, 22

INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that Articles of Incorporation for the LAND CONSERVANCY OF ADAMS COUNTY, INC., were filed with the Department of State of the Commonwealth of Pennsylvania for the purpose of obtaining a Certificate of Incorporation for a domestic non-profit nonstock corporation organized under the provisions of the Pennsylvania Business Corporation Law of 1988.

John A. Wolfe, Esq.
Attorney for the Corporation

12/8

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, that on November 3, 1995, an application was filed under the Fictitious Name Act, No. 1982-295 (54 Pa. C.S. Section 311) in the Office of the Secretary of the Commonwealth of Pennsylvania setting forth that: James M. Sunbury is the only person or entity owning or interested in a business, the character of which is the repair and state inspection of vehicles, and that the name, style and designation under which said business is and will be conducted is D.A.D. AUTO and the location where said business is and will be located is 121 Hanover Street, New Oxford, Pennsylvania.

Stonesifer and Kelley

12/8

THE BRETHREN HOME, INC. VS. MARTIN

1. Summary judgment may be entered only in cases that are clear and free from doubt and the moving party has the burden of proving that no material issue of fact exists.

2. Guaranty contracts are subject to the same rules of interpretation as other contracts.

3. The Court has responsibility of determining whether a contract provision is ambiguous and if ambiguity exists, extrinsic evidence and the surrounding circumstances are admissible to aid in the interpretation of the contract.

4. If a contract term is ambiguous, it is to be construed against the drafter.

5. When a person executes a contract in his representative capacity, he is not personally liable thereon unless he assumes, by appropriate words, individual responsibility.

6. The Parole Evidence Rule does not bar evidence of one's capacity to contract and the other party's knowledge thereof.

7. Because Defendant gave no indication on the contract that he was executing it in his representative capacity, the burden shifts to him to show that he signed as agent and that Plaintiff understood that fact.

8. Parol Evidence is not admissible to support an allegation of fraud in the inducement, as opposed to fraud in the execution, where that parol evidence attempts to contradict the written contract.

9. Ordinarily, only the direct purchaser of goods or services who suffers a loss may maintain a private action under the UTPCPL.

10. The four elements of a cause of action for intentional interference with contractual relations are as follows: (1) the existence of a contractual relationship; (2) an intent on the part of the Defendant to harm the Plaintiff by interfering with that contractual relationship; (3) the absence of a privilege or justification for such interference; and (4) damages resulting from the Defendant's conduct.

11. In order to state a claim under which relief can be granted for the tort of intentional infliction of emotional distress, the plaintiffs must allege physical injury.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 91-S-1071, THE BRETHREN HOME, INC. VS. CHARLES A. MARTIN.

Michael W. Flannelly, Esq., for Plaintiff

Thompson J. McCullough, Esq., for Defendant

OPINION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Kuhn, J., May 26, 1995.

Plaintiff, The Brethren Home, Inc., operates a nursing home facility near New Oxford, Pennsylvania. Defendant's stepmother, Kathryn A. Martin, became a resident of the facility. A dispute arose over liability for fees owing for Kathryn's care from April–December, 1991. Plain-

tiff asserts that Defendant is personally liable for the entire balance of \$15,876.01. Before the Court presently is Plaintiff's Motion For Summary Judgment and Defendant's Motion For Partial Summary Judgment.

As this Court noted in *Higgs v. Hanover Brick and Block Company*, 36 Ad. Co. L.J. 201, 202 (1994),

It has often been stated that,

Summary judgment may be granted if the pleadings, depositions, answers to interrogatories and admissions on file show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law... Summary judgment may be entered only, cases that are clear and free from doubt... The moving party... has the burden of proving that no material issue of fact exists... *Allstate Insurance Co. v. McFadden*, 407 Pa. Super. 537, 540, 595 A.2d 1277, 1278 (1991); *Alloc. den.* 602 A.2d 855 (1991) (citations omitted).

In addition, the record must be examined in a light most favorable to the non-moving party, accepting as true all well-pleaded facts in the pleadings and giving that party the benefit of all reasonable inferences drawn therefrom. *Godlewskiv. Pars Manufacturing Company*, 408 Pa. Super. 425, 430, 597 A.2d 106, 109 (1991). Finally, pursuant to the Nanty-Glo rule, summary judgment is not available where the moving party relies exclusively upon oral affidavits or depositions to establish the absence of a genuine issue of material fact, except where that oral testimony consists of admissions of the opposing party or his witnesses. *Johnson v. Johnson*, 410 Pa. Super. 631, 637, 600 A.2d 965, 968 (1991).

From the record before the Court, the following background is relevant. Sometime prior to January 3, 1989, Kathryn became a resident of the personal care portion of the Brethren Home. Subsequently an Admission Agreement was prepared and dated January 3, 1989 to transfer Kathryn to the nursing care facility. In the Agreement, Kathryn was described as the "Resident" and Defendant as the "Guarantor". Paragraph 13 of the Agreement reads, in pertinent part,

The Guarantor accepts primary liability for all sums herein agreed to be paid for the account of the Resident and as a Guarantor of payment shall forthwith... pay such sum or sums as may, from time to time, then be due and unpaid by the Resident...

At the time Defendant executed the Agreement, he was attorney-in-fact for Kathryn pursuant to a written Power of Attorney dated May 21, 1985. Plaintiff was aware that Defendant served Kathryn in that capacity. Defendant signed the Agreement on the line designated "Guarantor" but did not expressly note that he was signing as attorney for Kathryn. Defendant admits reading the Agreement before signing. Plaintiff admits that its employees made no oral statements to Defendant before he signed the Agreement as to his individual liability for costs of services for Kathryn.

By letter dated September 20, 1990, Defendant advised Plaintiff that he would be removing Kathryn from the facility on or about October 15, 1990. By document dated October 5, 1990, Kathryn revoked Defendant's power of attorney. Defendant alleges that Plaintiff prepared the revocation and obtained Kathryn's signature without any prior notice to him. Plaintiff contends that Kathryn and two nieces requested the revocation in order to prevent Defendant from removing Kathryn from the facility.

On or about October 16, 1990, Kathryn executed a new power of attorney appointing a niece and her husband. Apparently these persons refused to accept the power granted them. On or about the same date, Defendant went to Plaintiff's facility to remove Kathryn but was denied that opportunity. By March 18, 1991, Plaintiff requested that Kathryn create a new power of attorney to fill the void created by the earlier revocation and lack of acceptance. Defendant was then reinstated to his former position.

Defendant also alleges that Plaintiff failed to process a medical assistance application for Kathryn in a timely fashion. He alleges that a timely application would have reduced the balance owing on Kathryn's account.

As stated, Plaintiff sued Defendant, as guarantor, for the balance owing on Kathryn's account. Defendant's Answer avers 1) that in executing the Admission Agreement he only guaranteed to use Kathryn's funds but did not agree to be personally liable, 2) that Plaintiff participated in having his power of attorney revoked to prevent him from removing Kathryn from the facility, and 3) that Plaintiff delayed processing Kathryn's medical assistance application. In New Matter Defendant avers 1) that Plaintiff engaged in fraudulent conduct concerning its intent to enforce the Admission Agreement against him, and 2) by having him removed as power of attorney Plaintiff changed the premises upon which the Admission Agreement was based. Defendant also counterclaimed under the Pennsylvania Unfair Consumer Protection, 73 P.S. §201-1, et seq., hereinafter "UTPCPL" (Count I), for

interference with contract (Count II) and for failure to process the medical assistance application in a timely fashion (Count III).

Plaintiff's Motion first raises the question whether the parol evidence rule bars testimony concerning any oral statements made prior to the execution of the Admission Agreement regarding Defendant's personal liability thereunder. Defendant has taken the position that extrinsic evidence is admissible because the contract is ambiguous and because he was fraudulently induced into entering the contract. We begin this discussion by noting that guaranty contracts are subject to the same rules of interpretation as other contracts. *Meeting House Lane, Ltd. v. Melso*, 427 Pa. Super. 118, 125, 628 A.2d 854, 857 (1993).

The Court has the responsibility of determining whether a contract provision is ambiguous. If the contract is clear, its meaning must be determined by its expressed terms whether or not the parties agree upon the interpretation. A contract is ambiguous if reasonably intelligent persons would differ regarding its meaning. In making its determination regarding ambiguity, the court must not apply an overly subtle or technical interpretation to defeat the reasonable expectations of the parties but neither will the court convolute the clear meaning of a writing merely to find an ambiguity. If ambiguity exists, extrinsic evidence and the surrounding circumstances are admissible to aid in the interpretation of the contract. If a contract term is ambiguous, it is to be construed against the drafter. *Meeting House Lane, Ltd. v. Melso*, Id., 427 Pa. Super. at 126, 628 A.2d at 858; *Ready Food Products, Inc. v. Great Northern Ins. Comp.*, 417 Pa. Super. 643, 646, 612 A.2d 1385, 1387 (1992); *Young v. Donegal Mutual Ins. Comp.*, 400 Pa. Super. 311, 314, 583 A.2d 803, 804 (1990).

We note that generally one is legally bound to know the terms of his contract regardless whether he read or fully understood the terms and this is especially so where, as here, the party is of age. One having capacity to enter a contract is presumed to know the meaning of words in the contract even if he is not familiar with those terms and gives them a mistaken interpretation or legal effect. *Denlinger, Inc. v. Dendler*, 415 Pa. Super. 164, 180, 608 A.2d 1061, 1069-70 (1992).

We find that the language of the contract is unambiguous. The term "guarantor" is not defined in the Agreement, however, its plain meaning is well understood as being one who will answer for the payment of another's debt in case of a default. *Black's Law Dictionary* 4th Ed.; *Webster's New Collegiate Dictionary* (1979). Although Paragraphs 2 and 3 of the Agreement clearly state that the Resident "shall pay" certain charges, Paragraph 13 makes it likewise clear "that the Guarantor accepts primary liability" for all sums herein agreed to

be paid for the account of the Resident..." We do not believe that reasonable minds would differ that Defendant, as guarantor, accepted primary liability" for Kathryn's account. It appears without question that Kathryn did not have adequate personal funds to pay that portion of her account now being demanded from Defendant. This recognition and disposition does not, however, resolve the question regarding the capacity in which Defendant signed as Guarantor.

The question of the capacity in which Defendant signed as guarantor is quite a different matter. Did Defendant execute the Agreement in his individual capacity, his agency capacity, or both? In Pennsylvania, the general rule appears to be that when a person executes a contract in his representative capacity, he is not personally liable thereon unless he assumes, by appropriate words, individual responsibility. *Pennsylvania Co. For Insurances On Lives and Granting Annuities v. Wallace*, 346 Pa. 532, 31 A.2d 71 (1943). Thus, where one knowingly contracts with an agent in his representative capacity, the agent may not be personally liable even if he does not expressly indicate his capacity in the contract. The parole evidence rule does not bar evidence of one's capacity to contract and the other party's knowledge thereof. Whether Defendant did or did not sign as agent does not modify the terms of the contract. If he executed the contract in his individual capacity he would be liable for the debt but if he signed in his representative capacity he would not be personally liable. *Id. McKee v. Moon*, 400 Pa. Super. 161, 163, 583 A.2d 5, 6 (1990) (An individual acting as an agent for a disclosed principal is not personally liable on a contract between the principal and a third party unless the agent specifically agrees to assume liability). Facts need to be established.

Here, Plaintiff knew Defendant had power of attorney for Kathryn when the Agreement was executed. Therefore, there is no question that Kathryn was a disclosed principal. Plaintiff then has the burden of showing that Defendant executed the contract in his individual capacity. Because Defendant gave no indication on the contract that he was executing it in his representative capacity, the burden shifts to him to show that he signed as agent and that Plaintiff understood that fact. The record is not in position to make this determination by motion for summary judgment. Thus, all evidence prior to or contemporaneous with the execution of the Agreement relative to Defendant's capacity to contract and Plaintiff's knowledge thereof is admissible.

The above discussion resolves the admissibility of extrinsic evidence. We note by way of clarification and for future purposes that parole evidence will not be admitted in this case to show that Defendant was fraudulently induced into executing the contract. Specifically,

Defendant is alleging that Plaintiff induced him into signing the Agreement by guaranteeing that Kathryn's funds, rather than his, would be used to satisfy her account balances. Generally,

Where the alleged prior or contemporaneous oral representations or agreements concern a subject which is specifically dealt with in the written contract, and the written contract covers or purports to cover the entire agreement of the parties, the law is now clearly and well settled that in the absence of fraud, accident or mistake the alleged oral representations or agreements are merged in or superseded by the subsequent written contract and parol evidence to vary, modify or supersede the written contract is inadmissible in evidence. *Myers v. McHenry*, 398 Pa. Super. 100, 106, 580 A.2d 860, 863 (1990).

Despite the general rule regarding fraud, it is also well settled that parol evidence is not admissible to support an allegation of fraud in the inducement, as opposed to fraud in the execution, where that parol evidence attempts to contradict the written contract. *Iron Worker's Savings & Loan Assoc. v. IWS, Inc.*, 424 Pa. Super. 255, 265, 622 A.2d 367, 372 (1993); *Abel v. Miller*, 293 Pa. Super. 6, 10-11, 437 A.2d 963, 965 (1981). As noted above, the Agreement is clear and unambiguous regarding the liability of the Guarantor. If it is determined that Defendant executed the contract in his individual capacity he will not be heard to complain that the plain language of the document was misrepresented.

Plaintiff's second motion for summary judgment challenges Defendant's theory that Kathryn's revocation of Defendant's power of attorney nullified Defendant's individual liability as Guarantor. The theory offered by Defendant is that when he executed the Agreement he had a power which authorized him to remove Kathryn from the facility whenever he deemed it appropriate to do so and in that way he could control his personal liability to the extent there was any such exposure. However, after that power was revoked, he lost his ability to control his personal liability.

Although there doesn't appear to be much Pennsylvania authority on the issue, the federal courts recently recognized that generally a guarantor is not liable if the underlying agreement is materially altered without his consent and such a change will discharge him from his obligation. *Pennsylvania House, Inc. v. Barrett*, 760 F. Supp. 439, 444 (M.D. Pa. 1991). Other authority cited therein suggests that an uncompensated guarantor may be discharged by an alteration of the principal's obligation even if the guarantor is not prejudiced by the change. The the

rationale for these rules is that the guarantor must be able to estimate his risk and when events beyond his control dramatically increase that risk, the assumptions upon which the contract was founded are undercut. *Id.* n. 8, citing *United States Shoe Corp. v. Hackett*, 793 F.2d 161 (7th Cir. 1986).

A problem exists here which prevents summary judgment at this juncture. Factual issues exist with regard to the underlying assumptions upon which the guaranty was based. If Defendant executed the Agreement as agent he has no exposure and the issue is moot. If he signed in his individual capacity, facts need to be developed regarding the assumption upon which the agreement was based regarding Defendant's ability to remove Kathryn from the facility and limit his personal exposure. We know Defendant was reinstated as attorney-in-fact but we don't know exactly when or under what conditions.¹ He may have had the power to remove Kathryn from the facility after his reinstatement, failed to do so, and incurred the liability at issue. In the latter scenario he should not be heard to complain.

Plaintiff next moves for dismissal of Defendant's first counterclaim wherein he alleges that Plaintiff violated the UTPCPL. That Act allows "any person who purchases or leases goods or services primarily for personal, family or household purposes" to file a civil action where loss is suffered because of acts or practices declared unlawful. 73 P.S. §201-9.2. Plaintiff acknowledges that it is subject to the Act, citing *Chalfin v. Beverly Enterprises, Inc.*, 741 F. Supp. 1162 (E.D. Pa. 1989), but contends that Defendant does not have standing to assert a cause of action because he did not directly purchase the goods or services from Plaintiff.

In *Chalfin*, the family of a resident of a nursing home facility was denied status as a plaintiff under the Act. The court noted that,

While her family may have in fact derived some benefit from Mrs. Chalfin's stay at the facility, it was Mrs. Chalfin herself who purchased health care services from the defendant.

741 F. Supp. at 1177.

Defendant argues that here, unlike in *Chalfin*, he is a signatory of the Admission Agreement and, under Plaintiff's theory, is personally liable for the cost of services provided to Kathryn. That argument represents an oversimplification of the issue.

Under the Act only the person who purchased the services may maintain a private cause of action. Here, pursuant to the provisions of

¹Defendant's deposition suggests he was verbally reinstated in October, 1990, and expressly reinstated by mid-January, 1991.

Admissions Agreement it was Kathryn who purchased the services. Defendant acted only as a guarantor of payment in case Kathryn failed to pay for the services. Ordinarily, only the direct purchaser of goods or services who suffers a loss may maintain a private action under the Act. *Lauer v. McKean Corp.*, 2 D&C4th 394 (Allegheny Co. 1989) (Prospective customer who did not actually purchase the goods has no standing).

Although not precisely on point, some guidance is available for the situation sub judice. It is clear that to have standing to bring a private action under UTPCPL, the strict technical concept of privity is not necessarily followed. *Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators, Inc.*, 393 Pa. Super. 339, 574 A.2d 641 (1990), *aff'd*, 529 Pa. 512, 605 A.2d 798 (1992). (A residential incorporated condominium association was permitted to maintain a private cause of action under the UTPCPL in its statutory representative capacity of individual unit owners.) In *Valley Forge* the Superior Court discussed factors such as whether the plaintiff/third party was specifically intended to rely on the alleged fraudulent conduct or whether the plaintiff/third party's reasonable reliance on the alleged fraudulent conduct was specifically foreseeable. 574 A.2d at 646. Here, Defendant's position is that Plaintiff knew he was Kathryn's power of attorney and used deceptive practices to induce him to enter a contract which allegedly exposed him to personal liability. We conclude, under these circumstances, that Defendant has standing to pursue this cause of action. This conclusion supports the general intent of the legislation to eradicate fraudulent business practices.

Plaintiff contends next that as a matter of law it cannot be held to have interfered with a contractual relationship of power of attorney between Defendant and Kathryn. The allegation is that Plaintiff induced Kathryn to revoke Defendant's appointment without authority or notice to Defendant. At the same time Defendant has moved for summary judgment on this counterclaim.

The law on interference with contractual relations has been recently set forth in *Triffin v. Janssen*, 426 Pa. Super. 57, 626 A.2d 571 (1993), *Alloc. den.* 639 A.2d 32 (1994), wherein the Court wrote,

The four elements of a cause of action for intentional interference with contractual relations are as follows: (1) the existence of a contractual relationship; (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship; (3) the absence of a privilege or justification for such interference; and (4)

damages resulting from the defendant's conduct. 426 Pa. Super. at 63, 626 A.2d at 574.

The thrust of Plaintiff's argument concerns the nature of the relationship between Defendant and Kathryn as being one of agency and not contract. If there is no contract there can lie no cause of action. *Al Hamilton Contracting Co. v. Cowder*, 434 Pa. Super. 491, 497-8, 644 A.2d 188, 191 (1994). Plaintiff has offered no substantial authority for its position except a general statement that a power of attorney is not governed by the law of contracts, but is generally considered to be governed by the law of agency, citing *Billow v. Billow*, 96 Dauph. 448 (1974). As respects certain aspects of the relationship between the principal, agent and a third person, Plaintiff is correct. That does not, however, answer the question whether the creation of the power is a contract which can be tortuously interfered with by a third person. Because a power of attorney can be express or implied and with consideration, in the abstract, one cannot preclude it from being a contract. We decline to dismiss the counterclaim at this time on the sole rationale that this was not a contract. Defendant may ultimately have difficulty establishing consideration to establish a contract but that demonstration awaits another day.

We will not grant Defendant's motion for partial summary judgment on the counterclaim for interference with contractual relations because many factual questions must be determined. There are numerous factors which must be considered in deciding whether Plaintiff improperly and intentionally interfered with the alleged contractual relationship between Defendant and Kathryn including, but not limited to: 1) the nature of Plaintiff's conduct, 2) Plaintiff's motive, 3) the interests of others with which Plaintiff's conduct interfered; 4) the interests Plaintiff sought to advance, 5) the proximity of Plaintiff's conduct to the interference; and 6) the relations of the parties. *Triffin v. Jonseen*, supra., 426 Pa. Super. at 63-4, 626 A.2d at 574, citing *Restatement (Second) Torts* §767.

There may also be question whether Defendant suffered any pecuniary loss as a result of the alleged interference. Even if Plaintiff caused revocation of the power of attorney, Defendant nevertheless acknowledges in his deposition that the power was expressly reinstated by mid-January, 1991, or several months before the unpaid expenses at issue were incurred.

Plaintiff's motion continues with a request to dismiss that portion of Defendant's second counterclaim which asserts a cause of action for emotional distress suffered by himself and Kathryn arising from "Plaintiff's wanton disregard of the power of attorney." Defendant

alleges that the intentional infliction of emotional distress occurred when Plaintiff interfered with Defendant's power as attorney-in-fact by preventing him from removing Kathryn from the facility. At most, Defendant describes the physical manifestations of his emotional distress as depression, tension and sleeplessness.

One of the most recent statements on the issue of intentional infliction of emotional distress appears in *Hart v. O'Malley*, 436 Pa. Super. 151, 647 A.2d 542 (1994) wherein the following appears:

There is much controversy over whether Pennsylvania jurisprudence recognizes the tort of intentional infliction of emotional distress. . . . However, it is clear that in Pennsylvania, in order to state a claim under which relief can be granted for the tort of intentional infliction of emotional distress, the plaintiffs must allege physical injury. 436 Pa. Super. at 174-5, 647 A.2d at 553-4 (citations omitted).

There is no indication that Defendant suffered physical injury. Therefore, this claim must fail.

We further add that the confusion referred to in *Hart* focused on whether Pennsylvania did or did not recognize a cause of action for intentional infliction of emotional distress and, if it did, what standard is to be followed to establish the cause of action. If §46 of the Restatement (Second) of Torts is the generally accepted standard, then one must prove that 1) the defendant intentionally engaged in extreme and outrageous conduct toward him; and 2) the plaintiff suffered bodily harm. As we interpret Defendant's argument, this action is being pursued under §46(1) (conduct directed to the plaintiff) and not §46(2) (conduct directed to a third person). Therefore, arguments presented regarding whether Defendant was within the "zone of danger" are irrelevant. The alleged intentional and outrageous conduct is involvement in the revocation of the power of attorney and denying Defendant the right to remove Kathryn from the facility. It is for the court to determine whether the conduct is so outrageous as to permit recovery. *Hackney v. Woodring*, 424 Pa. Super. 96, 101, 622 A.2d 286, 288 (1993), *Alloc. gr.* 634 A.2d 224 (1993). We are not in a position to make that determination at this point.

There is no verification that Defendant filed the counterclaim for intentional infliction of emotional distress on behalf of Kathryn other than a reference in Paragraph 44 that he "has suffered emotional distress both for himself and on behalf of his stepmother, Kathryn A. Martin. . ." This single reference is inadequate to set forth a cause of action on behalf of Kathryn.

Plaintiff finally moves to dismiss Defendant's third counterclaim wherein Defendant alleges that Plaintiff failed to fulfill its purported obligation to apply for medical assistance benefits on behalf of Kathryn. The gist of Plaintiff's argument is that it is not the sole person who could apply for the benefits and that it was Defendant's lack of diligence which caused the delay.

In this count Defendant averred that "upon information and belief Plaintiff has the power to apply for medical assistance for patients" (Para. 34). He alleges that Plaintiff delayed in applying for those benefits from March, 1991 through the Fall of 1991 (Para. 35 and 36). However, in his deposition Defendant admits having a form needed by Plaintiff to process the medical assistance application from March, 1991, through October 15, 1991 (Dep. p. 76-7). He also admits receiving an information sheet from Plaintiff in October, 1990 relative to medical assistance and of being advised by Plaintiff at that time to notify Plaintiff several months in advance of the exhaustion of Kathryn's funds so the application for the assistance could be made (Dep. p. 39-47, 59-60). Defendant failed to return the information because he wanted to see a copy of the entire medical assistance application form which he claims Plaintiff refused to give him (Dep. p. 77 and 79). By August 15, 1991, Kathryn executed a document indicating her intent to reside in York County (Dep. Ex. 14). The purpose of the document was to inform governmental authorities that she would be obtaining medical assistance in York County (Dep. p. 68-9 and 82).

Defendant cites *Chalfin v. Beverly Enterprises, Inc.*, supra., as authority for this cause of action. However, that case is distinguishable. In *Chalfin*, unlike here, the admission agreement expressly stated that the nursing home would assist the resident in determining eligibility for medical assistance and would submit the claim form. The alleged refusal to process the application was considered fraudulent conduct likely to create confusion or misunderstanding in violation of §201-2(4)(xvii) of UTPCPL. In the case sub judice there is no similar contractual provision nor has Defendant sued under UTPCPL on this count.

The Pennsylvania Code at 55 Pa. Code §123.72 provides that any individual wanting to apply for medical assistance benefits may obtain an application from the County Assistance Office. The applicant may be the individual himself, a representative of an institution or any person acting on behalf of the person seeking assistance. Thus, Defendant as Kathryn's attorney-in-fact after March, 1991, was legally able to obtain and complete the application.

Defendant has cited no other legal authority or theory for this counterclaim. Based upon Defendant's allegations and admissions, we conclude that he has failed to state a cause of action. Accordingly, the attached Order is entered.

ORDER OF COURT

AND NOW, this 26th day of May, 1995, in consideration of Plaintiffs Motion For Summary Judgment and Defendant's Motion For Partial Summary Judgment the relief requested is granted in part and denied in part as more fully set forth in the attached Opinion, however, it is noted that:

1. The parol evidence rule does not bar evidence relative to Defendant's capacity in executing the Admission Agreement or Plaintiff's knowledge as to that capacity;

2. Defendant's defense that Kathryn Martin's revocation of his power-of-attorney discharged his personal liability is not dismissed;

3. Plaintiff's request to dismiss Defendant's first counterclaim is denied;

4. Both party's request for summary judgment on Defendant's counterclaim for interference with contractual relations is denied.

5. Defendant's cause of action for intentional infliction of emotional distress is dismissed.

6. Defendant's third counterclaim alleging Plaintiff's failure to properly apply for medical assistance for Kathryn Martin is dismissed.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION

ESTATE OF ARTHUR A. MILLER, DEC'D

Late of Berwick Township, Adams County, Pennsylvania
 Executor: Adams County National Bank, Old Harrisburg Road, P.O. Box 3129, Gettysburg, PA 17325
 Attorney: Walton V. Davis, Esquire, 31 S. Washington St., Gettysburg, PA 17325

ESTATE OF CHESTER F. OGDEN, DEC'D

Late of the Borough of Bendersville, Adams County, Pennsylvania
 Executrix: Amelia C. Ogdén, 134 North Main Street, Bendersville, PA 17306
 Attorney: Bulleit, Schultz & Thrasher, 16 Lincoln Square, Gettysburg, PA 17325

SECOND PUBLICATION

ESTATE OF PAULINE B. HLUBB, DEC'D

Late of Straban Township, Adams County, Pennsylvania
 Executor: Adams County National Bank, Lincoln Square Offices, Gettysburg, PA 17325
 Attorney: Robert E. Campbell, Esq., Campbell, White & George, 122 Baltimore Street, Gettysburg, PA 17325

THIRD PUBLICATION

ESTATE OF ROSE MARIE BRYAN, DEC'D

Late of Conewago Township, Adams County, Pennsylvania
 Executrix: Laura B. Zimmerman, 171 Northview Drive, Hanover, PA 17331
 Attorney: Elyse E. Rogers, Esquire; Mette, Evans & Woodside, 3401 North Front Street, Harrisburg, PA 17110

ESTATE OF BESSE D. GOOD, a.k.a. BESS T. GOOD, DEC'D

Late of the Borough of Gettysburg, Adams County, Pennsylvania
 Executor: John D. Thrush, 200 Springs Ave., Gettysburg, PA 17325

ESTATE OF ANNE H. KORTE, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania
 Administrators: Elizabeth Korte Gardner, 64 Belmont Rd., Gettysburg, PA 17325; Terry Richard Gardner, 64 Belmont Rd., Gettysburg, PA 17325

ESTATE OF ROSE E. REXROTH, DEC'D

Late of Butler Township, Adams County, Pennsylvania
 Executrix: Susan A. McKinney, 345 Table Rock Rd., Gettysburg, PA 17325
 Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

ESTATE OF PAUL R. WAYBRIGHT, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania
 Executrix: Mary B. Waybright, 716 Mason-Dixon Rd., Gettysburg, PA 17325
 Attorney: Gary E. Hartman, Esq., Hartman & Yannetti, 126 Baltimore Street, Gettysburg, PA 17325

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 95-S-867 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 12th day of January, 1996, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL that tract of land situate, lying and being in the Borough of Carroll Valley, Adams County, Pennsylvania, being Lot No. 288 in Section "K", bounded and described as follows:

BEGINNING at a point in the center of Snow Trail at Lot No. 289; thence by said lot, North 37 degrees 16 minutes 28 seconds East, 225 feet to Lot No. 264; thence by said lot and by Lot No. 265, South 55 degrees 50 minutes 46 seconds East, 179.98 feet to Lot No. 287; thence by said lot, South 66 degrees 29 minutes 35 seconds West, 265.90 feet to a point in the cul-de-sac of said Snow Trail; thence in the cul-de-sac and in said Snow Trail, North 55 degrees 50 minutes 46 seconds West, 50 feet to the place of BEGINNING.

The above description was taken from a plan of lots labeled "Section K, Charnita," dated March 3, 1969, prepared by Evans, Hagan and Holdefer, and recorded in Plat Book 1 at page 42.

BEING the same property which James A. Sayler and Gerilyn M. Sayler, his wife, by their deed dated February 28, 1991, and recorded in the Office of the Recorder of Deeds of Adams County, Pennsylvania, on March 6, 1991 in Deed Book 580, page 1109, granted and conveyed unto Elmer E. Horton and Donna M. Horton, his wife.

HAVING erected thereon a dwelling known as 7 Snow Trail, Fairfield, PA 17320.

PARCEL No. 7-2.

TOGETHER WITH rights and SUBJECT TO restrictions, conditions and easements referred to in the above recited deed and contained in Deed Book 296 at page 831.

SEIZED and taken into execution as the property of **Elmer E. Horton and Donna M. Horton**, and to be sold by me.

Bernard V. Miller
 Sheriff

Sheriff's Office, Gettysburg, PA
 November 2, 1995.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on February 5, 1996, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

All claims to property must be filed with Sheriff before sale.

As soon as the property is declared sold to the highest bidder 20% of the purchase price or all of the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.

11/24, 12/1, 12/8

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 94-S-847 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 12th day of January, 1996, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THAT CERTAIN lot of land situate in Latimore Township, Adams County, Pennsylvania being more particularly described as Lot No. 1218 on a plan of lots of Lake Meade Subdivision, duly entered and appearing of record in the Office of the Recorder of Deeds of Adams County, Pennsylvania, in Misc. Book 1, Page 21, and subject to all legal highways, easements, rights of way and restrictions of record.

ALL THAT CERTAIN lot of land situate in Latimore Township, Adams County, Pennsylvania, being more particularly described as Lot No. 1219 on a plan of lots of Lake Meade Subdivision, duly entered and appearing of record in the Office of the Recorder of Deeds of Adams County, Pennsylvania in Misc. Book 1, Page 21, and subject to all legal highways, easements, rights of way and restrictions of record.

ALL THAT CERTAIN lot of land situate on Latimore Township, Adams County, Pennsylvania, being more particularly described as Lot No. 1220 on a plan of lots of Lake Meade Subdivision, duly entered and appearing of record in the Office of the Recorder of Deeds of Adams County, Pennsylvania in Misc. Book 1, Page 21, and subject to all legal highways, easements, rights of way and restrictions of record.

BEING 733 McCandless Drive, East Berlin, PA 17316.

PARCEL: 68.

SEIZED and taken into execution as the property of **William S. Nelson and Kathryn W. Nelson**, and to be sold by me.

Bernard V. Miller
Sheriff

Sheriff's Office, Gettysburg, PA
Novmeber 6, 1995.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on February 5, 1996, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

All claims to property must be filed with Sheriff before sale.

As soon as the property is declared sold to the highest bidder 20% of the purchase price or all of the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.

11/24, 12/1, 12/8

Adams County Legal Journal

Vol. 37

December 15, 1995

No. 29, pp. 153-158

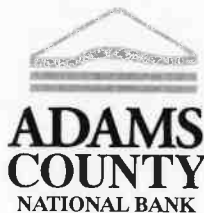
IN THIS ISSUE

COMMONWEALTH VS. WOERNER

AND

PATZER VS. GADDINI

Strong.
Rooted Upon Traditional Values.
Dedicated to Quality.
Customer Service.
Dependable.
Branching Into The Future.
Our Commitment Is You.



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ADAMS COUNTY LEGAL JOURNAL (USPS 542-600)

Designated for the Publication of Court and other Legal Notices. Published every Friday by Adams County Bar Association, Donald G. Oyler, Esq., Editor and Business Manager.

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INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that Articles of Incorporation were filed with the Pennsylvania Department of State at Harrisburg, Pennsylvania. The name of the proposed corporation organized under the provisions of Commonwealth of Pennsylvania Business Corporation Law of 1988 is VIVID IMAGERY, INCORPORATED.

Law Offices of Welton J. Fischer
550 Cleveland Avenue
Chambersburg, PA 17201

12/15

LEGAL NOTICE

The Annual meeting of the policyholders of Protection Mutual Insurance Company of Littlestown will be held at the office at 101 South Queen Street, Littlestown, Pennsylvania between the hours of 1:00 and 2:00 P.M. on January 13, 1996 to elect directors and to transact any other business properly presented.

Attest,
Marilyn Q. Butt
Secretary-Treasurer

12/1, 8, 15, 22

IN THE COURT
OF COMMON PLEAS
OF ADAMS COUNTY
COMMONWEALTH OF PENNSYLVANIA
ORPHANS' COURT DIVISION

NOTICE OF HEARING

To: Roland Gessner

YOU ARE HEREBY NOTIFIED that a Petition for Involuntary Termination of Parental Rights to Child has been filed in the Orphans Court Division of the Court of Common Pleas of Adams County, Pennsylvania. A hearing has been scheduled for January 11, 1996, at 1:00 p.m., prevailing time, at the Adams County Courthouse, Room 411, Gettysburg, Adams County, Pennsylvania, for the purpose of determining whether or not statutory grounds exist for the involuntary termination of your parental rights with respect to your child.

You should contact your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Court Administrator
Adams County Courthouse
111 Baltimore Street
Gettysburg, PA 17325

12/15, 22, 29

IN THE COURT
OF COMMON PLEAS
OF ADAMS COUNTY,
PENNSYLVANIA

1995 TERM, NO. S-194

David Patrick Kump, Plaintiff, v.
Gerald Patrick Moriarty, Defendant

**NOTICE TO
GERALD PATRICK MORIARTY**

You have been named as a defendant in a civil action instituted by plaintiff David Patrick Kump against you in this Court. Plaintiff David Patrick Kump alleges that he was injured in an assault involving you at Marvelous Marv's Restaurant and Bar on October 16, 1993.

If you wish to defend, you must enter a written appearance personally or by attorney and file your defenses or objections in writing with the Court, within twenty days from date of this publication. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you without further notice for the relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS NOTICE TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Court Administrator of Adams County
Adams County Courthouse
111 Baltimore Street
Gettysburg, PA 17325
Phone: (717) 334-6781

Frankel, Bare & Associates
Mark David Frankel, Esquire
Attorney for Plaintiff
14 West King Street
P.O. Box 1389
York, PA 17405-1389

12/15

COMMONWEALTH VS. WOERNER

While consent is certainly an issue in certain sexual offenses, it is never an issue in a corruption charge because the statute making corruption of minors an offense is protective in purpose and places the guardianship of minors' morality upon adults.

In the Court of Common Pleas, Adams County, Pennsylvania, Criminal No. CC-165-94, COMMONWEALTH VS. CARL G. WOERNER.

Martha A. Duvall, Esq., Assistant District Attorney
Jeffery M. Cook, Esq., for Defendant

OPINION PURSUANT TO PA. R.APP.P. 1925(A)

Kuhn, J., June 2, 1995.

On January 12, 1995, after a non-jury trial, the undersigned entered a guilty verdict against Defendant as to Count II, Corruption of Minors, 18 Pa. C.S.A. §6301(a). Sentencing was entered on February 27, 1995. Defendant has appealed. Defendant claims that the statutory provision under which he was sentenced is unconstitutional as applied to him. That section provides, in pertinent part, §6301. Corruption of minors

(a) Offense defined - Whoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age . . . is guilty of a misdemeanor of the first degree.

Viewing the evidence in a light most favorable to the Commonwealth, we find ample evidence to support the conviction. This incident occurred on January 12, 1994, when the victim, AP, was age 14 (D.O.B. July 6, 1979) and Defendant was approximately 51 years old. Defendant had been plowing snow that day and evening at various locations in the Gettysburg vicinity. Defendant invited AP, who was a family friend, to accompany him during a portion of this project.

After dropping off his wife at home, Defendant proceeded with AP to the Gettysburg Country Club where he plowed out a small lane. Defendant then stopped his truck, began kissing AP, touched her breasts and told her to get into the rear cab of the truck. Once in the rear cab, Defendant again began kissing AP, removed her shirt, and asked her to remove her pants. Feeling afraid, AP complied with Defendant's request. Defendant then removed his

pants and engaged in sexual intercourse with AP. Several minutes later, Defendant engaged in sexual intercourse a second time.

Shortly thereafter, Defendant returned AP to his home where she was picked up by her mother. Two days later AP reported the incident to her mother and the police. AP testified that she neither encouraged nor protested Defendant's sexual advancements although she was afraid he would get mad if she refused.

Defendant's statement to the Pennsylvania State Police essentially admitted the sexual contact although he stated that AP initiated the sexual advances and insisted on getting in the rear cab. Defendant denied penetration and any ejaculation, but ejaculate was discovered on a blanket found in the rear cab.

Essentially, Defendant contends that AP's consent should be a relevant defense. Defendant appears to question how a 14 year old's consent to sexual relations can negate Rape (§3121) and Indecent Assault (§3126) and yet "tend to corrupt."

In answering Defendant's query, we are mindful that a not guilty verdict on the charge of Indecent Assault (Count I) is not the equivalent of a finding that AP consented. Rather, that verdict is a recognition that the Commonwealth failed to prove beyond a reasonable doubt AP's lack of consent.

Second, it is our opinion that §6301 addresses a different interest than the Legislature is trying to protect in §3121 and §3126. *Commonwealth v. Sayko*, 511 Pa. 610, 515 A.2d 894 (1986). While consent is certainly an issue in certain sexual offenses, it is never an issue in a corruption charge "because the statute, protective in purpose, places the guardianship of minors' morality upon adults." *Commonwealth v. Anderson*, 379 Pa. Super. 589, 593, 550 A.2d 807, 809 (1988). In commenting upon the issue of consent under the corruption section (§4532) of the former Penal Code, Superior Court noted that,

The section of the Code forbids any act by an adult which tends to or actually does corrupt the morals of a child. The terms of the proscription are clear; no adult may with impunity engage in conduct with a minor which has the effect of corrupting the morals of the child; and it could not be argued persuasively that the acts charged here did not fall within the category of conduct which the law forbids. Whether the child consented to, or even solicited the advances which affected her mor-

als, is of no moment. While under the common law a child of the age of [victim] was considered of sufficient capacity to consent to an indecent assault, an enlightened legislature of this Commonwealth has recognized that the inexperience of youth prevent intelligent judgment in matters of morality. It has therefore removed children from the area of responsibility for their own fault within the purview of the above section of The Penal Code and has placed the guardianship of their morality upon adults. Thus, any depraved adult who participates in the corruption of the children must do so at his own risk; and the fact that he may have succumbed to the invitation of a female of tender years is more an aggravation than an excuse. Commonwealth v. Blauvelt, 186 Pa. Super. 66, 73, 140 A.2d 463, 467 (1958), Alloc. den.

With these different issues and interests at stake, we found no manner in which Defendant was constitutionally deprived.

PATZER VS. GADDINI

Failure of Plaintiff to file in the Court of Common Pleas a bond conditioned upon prosecuting his claim as joint tenant in that Court pursuant to Pa. R.C.P.D.J. 513(b) would entitle Defendants to have the stay of the eviction proceeding lifted but does not allow for dismissal of the action before the Court.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 91-S-1055, ROBERT A. PATZER VS. LOUIS D. GADDINI AND MILDRED A. GADDINI.

Michael A. George, Esq., for Plaintiff
Louis D. Gaddini, Pro Se

OPINION ON DEFENDANTS' MOTION TO DISMISS

Kuhn, J., July 14, 1995.

By way of background, Plaintiff is the widower of Defendants' deceased daughter. In 91-S-999, Plaintiff filed an action in replevin seeking possession of various items of personal property which he claims belonged to he and his deceased wife as joint tenants with right of survivorship. In 91-S-1055 Plaintiff filed a Complaint setting forth a count in resulting trust, unjust enrichment and quantum meruit. The issue there is the value of Plaintiff's interest, if any, in a duplex home built on real estate owned by Defendants.

Defendants filed a Motion to Dismiss on August 17, 1994. Therein they allege that on November 20, 1991 (one day after the filing of the Complaint in 91-S-999 but prior to the case filed at 91-S-1055) they filed a landlord-tenant complaint against Plaintiff before District Justice Harold R. Deardorff seeking eviction and damages. A hearing was scheduled for November 29, 1991, but was continued. By letter dated January 29, 1992, Plaintiff's counsel requested a stay of the proceedings before the District Justice under Pa. R.C.P. D.J. 513(b) until Plaintiff's action filed at 91-S-1055 could be prosecuted in the court of common pleas.

Pa. R.C.P.D.J. 513(b) provides,

If the defendant declares in writing, an oath or affirmation, that the real property is held and claimed by him as a joint tenant or tenant in common with the plaintiff and that he truly believes that the real property so held does not exceed in quantity or value the just proportion of his share as a joint tenant or tenant in common, the district justice shall stay the proceedings, provided the

defendant files in the court of common pleas of the county in which the real property is located a bond, satisfactory to that court, conditioned upon prosecuting his claim in the court of common pleas. If the claim is not prosecuted in accordance with the conditions of the bond, the bond shall be forfeited to the plaintiff and the district justice shall proceed to judgment.

Defendants claim that Plaintiff neither filed a proper bond with the Court nor did he actively prosecute the case at 91-S-1055. It is clear that Plaintiff failed to file any bond. Furthermore, as noted in our Memorandum Opinion dated June 1, 1994, Plaintiff was somewhat dilatory in prosecuting his claim before this Court. The Complaint in 91-S-1055 was filed on December 9, 1991, and Defendants' Answer was filed on January 15, 1992. No further record actively occurred until Defendants filed a Motion for Entrance of Judgment of Non Pros on February 17, 1994. A hearing on that Motion was held on March 28, 1994, where Plaintiff only appeared through counsel. Based primarily upon counsel's assurance that the case would be pursued promptly and our concern that Plaintiff would immediately re-file his complaint, we rejected the Motion. On April 8, 1994, Plaintiff listed the case for a pre-trial conference which was held on June 3, 1994. The issue concerning violation of D.J. Rule 513(b) was not brought to our attention until the present Motion was filed.

There is no question that Defendants have been delayed and prejudiced by Plaintiff's lack of effort in pursuing his claim. However, a close reading of D.J. Rule 513(b) leads the Court to conclude that its violation does not constitute a basis upon which to dismiss 91-S-1055. The rule clearly states that a stay is premised upon the filing of a bond and prosecution of the matter before the court of common pleas. Plaintiffs failure to file the bond would entitle Defendants to request the District Justice to lift the stay in the landlord-tenant case. Failure to prosecute the claim would entitle Defendants to have the stay lifted and the bond forfeited. The rule makes no allowance for dismissal of the action before this Court and it would be improper to incorporate that relief where it has not been expressly authorized.

It would seem proper for Defendants to have the District Justice lift the stay.

Based upon agreement, Defendant's Motion For Leave to Amend Pleadings is granted.

Accordingly, the attached Order is entered.

ORDER OF COURT

AND NOW, this 14th day of July, 1995, Defendants' Motion to Dismiss for violation of Pa. R.C.P.D.J. 513(b) is denied.

Defendant's Motion For Leave to Amend Pleadings is granted. Defendants shall file their amended pleading within thirty (30) days of the date of mailing of this Order.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION

ESTATE OF ADRIANA NEELTGE DIRENZO, a/k/a ADRIANA N. DIRENZO, DEC'D

Late of the Borough of Abbottstown, Adams County, Pennsylvania
 Executrix: Carol Marie Drenzo, 250 York Street (Gates & Mooney), Hanover, PA 17331

Attorney: John J. Mooney, III

ESTATE OF PHYLLIS MARY HANSON HENNESSY, a/k/a PHYLLIS MARY HENNESSY, a/k/a MARY HANSON HENNESSY, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Executor: Charles H. Wigo, Jr., 2900 Banyan St., Apt. 402, Ft. Lauderdale, FL 33316

Attorney: Charles H. Wigo, Jr.

ESTATE OF SAMUEL A. KIRK-PATRICK, DEC'D

Late of Hanover, Adams County, Pennsylvania

Executrix: Yolanda A. Kirkpatrick, 139 Villa Vista Drive, Hanover, PA 17331

Attorney: Shumaker Williams, P.C., P.O. Box 88, Harrisburg, PA 17108

ESTATE OF ELEANOR A. PORTER, DEC'D

Late of Huntington Township, Perry County, Pennsylvania

Executrix: Pamela L. Shenk, R.D. 2, Box 345A3, Loysville, PA 17047

Attorney: Allan W. Holman, Jr., Holman & Holman, 16 E. Main Street, P.O. Box 97, New Bloomfield, PA 17068

ESTATE OF GRACE A. SCOTT, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Executrices: Martha K. Black, 125 Hunterstown Rd., Gettysburg, PA 17325; Dorothy S. Rice, 115 Huntertown Rd., Gettysburg, PA 17325

Attorney: John W. Phillips, Esquire, 101 West Middle Street, Gettysburg, PA 17325

ESTATE OF FRANK R. SHRIVER, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Executor: Adams County National Bank, Lincoln Square, Gettysburg, PA 17325

Attorney: Teeter, Teeter & Teeter, 108 W. Middle Street, Gettysburg, PA 17325

ESTATE OF EDWARD F. SMITH, DEC'D

Late of Mt. Pleasant Township, Adams County, Pennsylvania
 Executor: Adams County National Bank, P.O. Box 4566, Lincoln Square Office, Gettysburg, PA 17325

Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

SECOND PUBLICATION

ESTATE OF ARTHUR A. MILLER, DEC'D

Late of Berwick Township, Adams County, Pennsylvania

Executor: Adams County National Bank, Old Harrisburg Road, P.O. Box 3129, Gettysburg, PA 17325

Attorney: Walton V. Davis, Esquire, 31 S. Washington St., Gettysburg, PA 17325

ESTATE OF CHESTER F. OGDEN, DEC'D

Late of the Borough of Bendersville, Adams County, Pennsylvania

Executrix: Amelia C. Ogden, 134 North Main Street, Bendersville, PA 17306

Attorney: Bulleit, Schultz & Thrasher, 16 Lincoln Square, Gettysburg, PA 17325

THIRD PUBLICATION

ESTATE OF PAULINE B. HLUBB, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Executor: Adams County National Bank, Lincoln Square Offices, Gettysburg, PA 17325

Attorney: Robert E. Campbell, Esq., Campbell, White & George, 122 Baltimore Street, Gettysburg, PA 17325

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 95-S-885 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 26th day of January, 1996, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THOSE CERTAIN two lots or pieces of ground located in the Borough of Arendtsville, Adams County, Pennsylvania, more particularly bounded and described as follows:

TRACT NO. 1: BEGINNING at a pin located in Pearl Street at the common boundary line between Lot No. 1 and Lot No. 2 of the aforementioned Subdivision Plan and proceeding along said Lot No. 2 South 74 degrees 00 minutes 00 seconds West 185.51 feet to a pin; thence along Lot No. 4 as described on the aforementioned Plan and lands now or formerly of Mary S. Tate North 16 degrees 35 minutes 49 seconds West 97.78 feet to a pin; thence along lands now or formerly of Kathleen I. Malinosky North 77 degrees 45 minutes 20 seconds East 187.30 feet to a pin in the aforementioned Pearl Street; thence along Pearl Street South 15 degrees 45 minutes 00 seconds East 85.50 feet to a pin, the place of BEGINNING. CONTAINING 17,061.00 square feet.

The above lot being identified as Lot No. 1 on a Subdivision Plan by Group Hanover of Hanover, Pennsylvania, dated January 20, 1987, bearing Project Number 871040 and recorded in the office of the Recorder of Deeds of Adams County, Pennsylvania, at Plan Book 46 at page 50.

TRACT NO. 2: BEGINNING at a pin common to Lot No. 3, as described in the aforementioned Subdivision Plan, and lands now or formerly of the Trustees of the Arendtsville Community Fire Company; thence along the aforementioned Lot No. 3 South 74 degrees 00 minutes 00 seconds West 79.86 feet to a pin; thence along lands now or formerly of Mary F. Tate the following two courses and distances: (1) North 28 degrees 37 minutes 27 seconds West 66.58 feet to a pin; (2) North 57 degrees 58 minutes 35 seconds East 97.23 feet to a pin; thence along Lot No. 1 and Lot No. 2 as described on the aforementioned Plan South 16 degrees 35 minutes 49 seconds East 91.82 feet to an iron pin, the place of BEGINNING. CONTAINING 6,897.00 square feet

The above lot being identified as Lot No. 4 on a Subdivision Plan by Group Hanover of Hanover, Pennsylvania, dated January 20, 1987, bearing Project Number 871040 and recorded in the office of the Recorder of Deeds of Adams County, Pennsylvania, at Plan Book 46 at page 50.

BEING the same two lots of ground which Alan K. Patrono, Executor under the Last Will and Testament of Jeanette

B. Skinner, by deed dated July 31, 1987, and recorded in the office of the Recorder of Deeds of Adams County, Pennsylvania, in Record Book 464 at page 833 conveyed to James R. Kupp and Janice N. Kupp, husband and wife, the Defendants herein.

SEIZED and taken into execution as the property of **James R. Kupp and Janice N. Kupp**, and to be sold by me.

Bernard V. Miller
Sheriff

Sheriff's Office, Gettysburg, PA
December 5, 1995.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on February 15, 1996, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

All claims to property must be filed with Sheriff before sale.

As soon as the property is declared sold to the highest bidder 20% of the purchase price or all of the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.

12/15, 22, 29

Adams County Legal Journal

Vol. 37

December 22, 1995

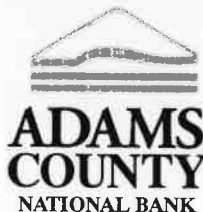
No. 30, pp. 159-164

NEW ADVERTISING RATES EFFECTIVE JANUARY 1, 1996

Decedent's Estate Notice	\$40.50
Corporation Notice	40.50
Fictitious Name	40.50
Change of Name	40.50
Guardianship Account	40.50
Trust Account	40.50

THE ABOVE FIXED PRICE LEGAL ADVERTISING RATES INCLUDE ONE PROOF OF PUBLICATION AND MUST BE PAID FOR IN ADVANCE. ALL OTHER LEGAL ADVERTISING WILL BE BILLED IN THE SAME AMOUNT CHARGED BY THE GETTYSBURG TIMES PLUS \$2.00 FOR PROOF OF PUBLICATION.

Adams County National Bank's commitment to its communities is more than a fleeting promise. It is a tradition founded upon our more than 130 years of service to the individuals, businesses and organizations in these communities.



Member FDIC

ADAMS COUNTY LEGAL JOURNAL (USPS 542-600)

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All rights reserved.

LEGAL NOTICE

The Annual meeting of the policyholders of Protection Mutual Insurance Company of Littlestown will be held at the office at 101 South Queen Street, Littlestown, Pennsylvania between the hours of 1:00 and 2:00 P.M. on January 13, 1996 to elect directors and to transact any other business properly presented.

Attest,
Marilyn Q. Butt
Secretary-Treasurer

12/1, 8, 15, 22

INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that Articles of Incorporation have been filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, for the purposes of obtaining a Certificate of Incorporation of a proposed business corporation to be organized under the provisions of the Pennsylvania Business Corporation Law of 1988, approved December 21, 1993, P.L. 1444, No. 177, as amended. The name of the Corporation is RAMONA K. OVERTON, P.C.

Ramona K. Overton, P.C.
36 East Middle Street
Gettysburg, PA 17325

12/22

IN THE COURT
OF COMMON PLEAS
OF ADAMS COUNTY
COMMONWEALTH OF PENNSYLVANIA
ORPHANS' COURT DIVISION

NOTICE OF HEARING

To: Roland Gessner

YOU ARE HEREBY NOTIFIED that a Petition for Involuntary Termination of Parental Rights to Child has been filed in the Orphans Court Division of the Court of Common Pleas of Adams County, Pennsylvania. A hearing has been scheduled for January 11, 1996, at 1:00 p.m., prevailing time, at the Adams County Courthouse, Room 411, Gettysburg, Adams County, Pennsylvania, for the purpose of determining whether or not statutory grounds exist for the involuntary termination of your parental rights with respect to your child.

You should contact your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Court Administrator
Adams County Courthouse
111 Baltimore Street
Gettysburg, PA 17325

12/15, 22, 29



**B & W WELDING, INC. VS. GETTYSBURG FOUNDRY
SPECIALTIES COMPANY**

While the right to a Mechanics' Lien is purely a creature of statute which must be strictly construed as being in derogation of Common Law, that does not mean that the court should apply only the narrowest meaning of the statute, or ignore the legislative intent.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 94 of 1995.

Edward G. Puhl, Esq., for Plaintiff
Thomas A. Beckley, Esq., for Defendant

**OPINION ON PRELIMINARY OBJECTIONS
TO MECHANICS' LIEN CLAIM**

Spicer, P.J., June 6, 1995.

On January 25, 1995, claimant notified owner that it intended to file a mechanics' lien claim for \$41,662.00. The claim was filed February 27, 1995, and alleged that claimant, as a subcontractor, furnished a kiln frame for the erection and construction of a kiln on owner's property at 2664 and 2810 Emmitsburg Road, Gettysburg, Adams County. The material was described as a steel frame used for supporting kiln components.

On March 15, 1995, owner filed preliminary objections, endorsed with a notice to plead and a request for determination of facts by hearing. Owner alleged, inter alia, that the work involved a "replacement of an old furnace, within Gettysburg's existing building." (¶ 1) Gettysburg was the abbreviation used by owner to describe itself in the objection.

Objections were filed pursuant to the Mechanics' Lien Law of 1963, specifically 49 P.S. § 1505. Objections were based, in the words of owner, on lack of conformity with the Act, in that the work did not involve an improvement to owner's property. Alternately, owner alleged that the work was, at most, a repair and argues that the claim must fail because of lack of requisite notice by claimant as a subcontractor.

We need not address the second contention because claimant acknowledges that its claim rises or falls on whether the work qualifies as an improvement.

Objections, in this case can be described as a demurrer. *Morehall Contracting Company, Inc. v. Brittany Estates* 396 Pa.Super. 265, 578 A.2d 508 (1990). *Mele Construction Company, Inc. v. Crown Ameri-*

can Corporation, 421 Pa.Super. 569, 618 A.2d 956 (1992). Normally, demurrers are judged by allegations contained in the complaint. However, the Act, *supra.*, authorizes consideration of additional evidence. Even though the Act empowers the court to take evidence to resolve factual disputes, it is not required to supplement pleadings. Nothing in the Act requires the court to either hold a hearing or to solicit depositions, *id.* However, the court must consider evidence established by preliminary objections and responses thereto. Such establishment takes the objections out of speaking demurrer status.¹ *Lisk Plumbing and Heating Co., Inc. v. Schons*, 283 Pa.Super. 344, 423 A.2d 1288 (1981).

The court has conducted no hearings and no depositions have been filed. We consider the complaint and admitted allegations of the preliminary objections.

Although claimant correctly points out that its response to objections has not admitted that the smelting kiln was constructed in an existing building, claimant concedes this point in its brief (page 4).

Thus, for purposes of the objections, the following facts emerge: 1) claimant acted as a subcontractor in providing components for a smelting kiln; 2) the work involved replacing an existing kiln with a new one; and 3) both kilns were housed in an existing building.

The Act authorizes liens for improvements to the estate or title of an owner, *supra.*, § 1301. Determination of such rights require inquiry into several definitions. In section 1201, the following appears:

(1) "Improvement" includes any building, structure or other improvement of whatsoever kind or character erected or constructed on land, together with the fixtures and other personal property used in fitting up and equipping the same for the purpose for which it is intended.

This definition requires a look at "erected or constructed". Section 1201 continues:

(10) "Erection and construction" means the erection and construction of a new improvement or of a substantial addition to an existing improvement or any adaptation of an existing improvement rendering the same fit for a new or distinct use and effecting a material change in the interior or exterior thereof.

¹A demurrer which alleges or assumes a fact not already pleaded and which constitutes the ground of the objection.

(12) "Erection, construction, alteration or repair" includes:

(a) Demolition, removal of improvements, excavation, grading, filling, paving and landscaping, when such work is incidental to the erection, construction, alteration or repair;

(b) Initial fitting up and equipping of the improvement with fixtures, machinery and equipment suitable to the purposes for which the erection, construction, alteration or repair was intended; and

(c) Furnishing, excavating for, laying, relaying stringing and restringing rails, ties, pipes, poles and wires, whether on the property improved or upon other property, in order to supply services to the improvement.

We notice that subsection (12) is not, strictly speaking, a definition. It, rather, indicates what is included in the general definition. However, by limiting inclusions to initial equipping of fixtures, it can be argued that replacements are excluded. This accords with the holding announced by Supreme Court in *Parrish and Hazard's Appeal*, 83 Pa. 111 (1877).

Claimant points out that this decision interpreted different statutory provisions than those in the 1963 version and contends that the case is no longer controlling authority. It argues that the 1963 Act, *supra.*, greatly expands the right to file a lien and authorizes its claim.

Although discussion frequently defines the right to a claim as being dependent on work performed or material furnished in erecting or repairing a building,² we can agree that improvements may include more than structures commonly described as buildings. Persons familiar with the Gettysburg area have viewed the old Pfeffer brick kiln on Route 30, just east of the borough, on many occasions. This domed shaped edifice has never been contained within any other structure but could certainly be considered an improvement. We are sure there are many other examples of out door kilns.

However, that is not the case at bar. Claimant has admitted that the smelting kiln was located in an existing building. By arguing that it was a fixture, it clearly implicates subsections (10) and (12).

The complaint says nothing about the kiln being a substantial addition to the building (existing improvement) or that it was an

² Sec, e.g. dissent in *Morehall Contractors v. Brittany Estates*, *supra.*

adaptation of the building rendering it fit for a new or distinct use and effecting a material change in the interior or exterior thereof. Therefore, the demurrer must be sustained.

The question then arises whether claimant should be afforded the right to amend under Section 1504. If the replacement kiln can legally amount to a substantial addition or adaptation to the building, we cannot say with certainty that the law will not permit recovery and should allow the amendment. If, on the other hand, subsection 12(b) limits, by implication, the right to a lien to fixtures initially installed within a building, the right to amend should not be granted.

The right to a Mechanics' Lien is purely a creature of statute, which must be strictly construed as being in derogation of Common Law. *Morehall Contractors v. Brittany Estates*, supra. However, this does not mean that the court should apply only the narrowest meaning of the statute, or ignore legislative intent. *Commonwealth v. Nernberg*, 402 Pa. Super 411, 587 A.2d 317, (1991).

The factual situation in *Parrish and Hazard's Appeal*, supra., involved a claimant who conceded that nothing was done to the building itself. On the other hand, *Appeal of Dickey*, 115 Pa. 73 (1886), ruled on a claim filed against a building which had been substantially altered to accommodate new fixtures. Supreme Court upheld a lien against the building. However, the right was characterized as being one for alteration and repairs.

Reading all sections the 1963 Act, as we are required to do, we find a legislative intent to continue the holding in *Parrish and Hazard's Appeal*, supra, as to work done or material furnished in placing of fixtures without more. If the definition of improvement included both initial and subsequent fixture fittings, there would have been no need for 12(b). If the legislature intended to overrule the construction adapted by Supreme Court in *Parrish and Hazard's Appeal*, supra., it could easily have done so. Instead, the language indicates a legislative intent to continue Supreme Court's approach. This is somewhat a converse approach from that espoused in 1 Pa. C.S.A. 1922(4), but would indicate continuation of the holding, nonetheless.

On the other hand, by expanding the definition of improvement, the legislature has also indicated that situation presented in *Dickey* is no longer limited to repairs and alterations. Thus, when equipment is replaced, a lien against the building may lie if the work falls within the purview of subsection (10).

We come to this conclusion because of clear wording of the statute and despite comments indicating that no important changes have been intended in definitions. See, Joint State Commission Comments that definitions in the new act were intended to neither expand nor abridge definitions contained in the statute's immediate predecessor.

This court, therefore, concludes that the objections must be sustained but that claimant must be given an opportunity to replead and show entitlement under 49 P.S. 1201 (10). In allowing this opportunity, we emphasize that claimant must do more than allege that a valuable fixture was installed within the building.

ORDER OF COURT

AND NOW, this 6th day of June, 1995, preliminary objections are sustained. Pursuant to 49 P.S. § 1504, claimant may file an amended claim within twenty (20) days hereof.

COMMONWEALTH VS. RIFFE

The general rule of Statutory construction is that where the legislature has deleted specific wording the Courts should not read those words back into the Statute.

In the Court of Common Pleas, Adams County, Pennsylvania, Criminal No. CC-373-95, COMMONWEALTH VS. ERNEST LEE RIFFE.

Bernard A. Yannetti, Jr., Esq., Assistant District Attorney
Floyd P. Jones, Esq., for Defendant

MEMORANDUM OPINION

Kuhn, J., June 26, 1995.

On January 26, 1995, Defendant was charged with violation of 75 Pa. C.S.A. §1301(a). That section provides that

“No person shall drive...upon any highway any vehicle which is not registered in this Commonwealth unless the vehicle is exempt from registration.”

On the date in question Defendant was driving a 1981 Oldsmobile sedan registered to Ernest Lee Riffe on several streets in the Borough of Gettysburg. Officer Alspaugh of the Gettysburg Police Department observed that the vehicle had a lighted “Taxi” sign and magnetic “Taxi” signs with telephone numbers on the exterior of the car. Inside the vehicle was a lighted meter which denoted “Fare.” The license

plate read "AHJ5006." Upon being stopped Defendant produced a current passenger vehicle registration for the car.

Commonwealth contends that the vehicle should have been registered as a taxi and because it was not properly registered Defendant violated §1301(a). Before registering any taxi, the owner must produce a certificate from the Public Utility Commission (75 Pa. C.S.A. §1305(b)) and pay a fee of \$36.00 (75 Pa. C.S.A. §1925) rather than the \$24.00 fee for a passenger car (75 Pa. C.S.A. §1912). Defendant did not produce a taxi registration. A taxi license plate would begin and end with a "T."

Defendant contends that he cannot be found guilty of violating §1301(a) because the car he was driving was registered. We are inclined to agree.

Commonwealth suggestion that a vehicle which is not "properly" registered violates §1301(a) must be rejected. Nowhere in §1301(a) does the Legislature say the vehicle must be "properly" registered. Formerly, §1302(a) of the Vehicle Code provided that no vehicle could be operated on a highway unless "properly registered." This language was deleted. Likewise, §1301 was amended by Act 146 of 1984 to delete language making it an offense to drive a vehicle "for which the appropriate fee has not been paid." The general rule of statutory construction is that where the legislature has deleted specific wording the courts should not read those words back into the statute. We must assume that when the Legislature deleted the words "properly registered" and replaced it with the word "registered" only it did so intentionally and for a purpose.

Defendant's vehicle is registered although perhaps not properly registered. This does not mean there is no recourse for such conduct. One operating as a motor carrier without a certificate, permit or license authorizing the service is guilty of a summary offense. 66 Pa. C.S.A. §3310. Furthermore, the registration of a vehicle operated as a motor carrier without P.U.C. approval can be suspended. 75 Pa. C.S.A. §1375.

Accordingly, the attached Order is entered.

ORDER OF COURT

AND NOW, this 26th day of June, 1995, the charge of violation of 75 Pa. C.S.A. §1301(a) as filed in Citation No. 0084817 is dismissed. Costs to be paid by the County of Adams.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION

ESTATE OF ALMA WEIKERT CROUSE, DEC'D

Late of the Borough of Littlestown, Adams County, Pennsylvania
 Executrix: Elizabeth C. Ross, 540 Cabot Drive, Hockessin, DE 19707
 Attorney: Bulleit, Schultz & Thrasher, 16 Lincoln Square, Gettysburg, PA 17325

ESTATE OF MELVIN OVERHOLTZER, JR., DEC'D

Late of Mt. Joy Township, Adams County, Pennsylvania
 Executor: Adams County National Bank, P.O. Box 4566, Gettysburg, PA 17325
 Attorney: Pyle and Entwistle, 33 West Middle Street, Gettysburg, PA 17325

ESTATE OF JOHN FREDERICK ROBINSON, DEC'D

Late of Straban Township, Adams County, Pennsylvania
 Executrix: Mary Lou Seamens, 2476 Chambersburg Road, Biglerville, PA 17307
 Attorney: Jeffery M. Cook, 234 Baltimore Street, Gettysburg, PA 17325

ESTATE OF JOSEPH A. ROBINSON, DEC'D

Late of the Borough of New Oxford, Adams County, Pennsylvania
 Executors: James R. Robinson, 517 Berlin Road, New Oxford, PA 17350; Joseph A. Robinson, Jr., 5721 Kenwood Avenue, Harrisburg, PA 17112
 Attorney: Ronald J. Hagarman, Esquire, 110 Baltimore Street, Gettysburg, PA 17325

SECOND PUBLICATION

ESTATE OF ADRIANA NEELTGE DIRENZO, a/k/a ADRIANA N. DIRENZO, DEC'D

Late of the Borough of Abbotstown, Adams County, Pennsylvania
 Executrix: Carol Marie Direnzo, 250 York Street (Gates & Mooney), Hanover, PA 17331
 Attorney: John J. Mooney, III

ESTATE OF PHYLLIS MARY HANSON HENNESSY, a/k/a PHYLLIS MARY HENNESSY, a/k/a MARY HANSON HENNESSY, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania
 Executor: Charles H. Wigo, Jr., 2900 Banyan St., Apt. 402, Ft. Lauderdale, FL 33316
 Attorney: Charles H. Wigo, Jr.

ESTATE OF SAMUEL A. KIRK-PATRICK, DEC'D

Late of Hanover, Adams County, Pennsylvania
 Executrix: Yolanda A. Kirkpatrick, 139 Villa Vista Drive, Hanover, PA 17331
 Attorney: Shumaker Williams, P.C., P.O. Box 88, Harrisburg, PA 17108

ESTATE OF ELEANOR A. PORTER, DEC'D

Late of Huntingdon Township, Perry County, Pennsylvania
 Executrix: Pamela L. Shenk, R.D. 2, Box 345A3, Loysville, PA 17047
 Attorney: Allan W. Holman, Jr., Holman & Holman, 16 E. Main Street, P.O. Box 97, New Bloomfield, PA 17068

ESTATE OF GRACE A. SCOTT, DEC'D

Late of Straban Township, Adams County, Pennsylvania
 Executrices: Martha K. Black, 125 Hunterstown Rd., Gettysburg, PA 17325; Dorothy S. Rice, 115 Hunterstown Rd., Gettysburg, PA 17325
 Attorney: John W. Phillips, Esquire, 101 West Middle Street, Gettysburg, PA 17325

ESTATE OF FRANK R. SHRIVER, DEC'D

Late of Straban Township, Adams County, Pennsylvania
 Executor: Adams County National Bank, Lincoln Square, Gettysburg, PA 17325
 Attorney: Teeter, Teeter & Teeter, 108 W. Middle Street, Gettysburg, PA 17325

ESTATE OF EDWARD F. SMITH, DEC'D

Late of Mt. Pleasant Township, Adams County, Pennsylvania
 Executor: Adams County National Bank, P.O. Box 4566, Lincoln Square Office, Gettysburg, PA 17325
 Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

THIRD PUBLICATION

ESTATE OF ARTHUR A. MILLER, DEC'D

Late of Berwick Township, Adams County, Pennsylvania
 Executor: Adams County National Bank, Old Harrisburg Road, P.O. Box 3129, Gettysburg, PA 17325
 Attorney: Walton V. Davis, Esquire, 31 S. Washington St., Gettysburg, PA 17325

ESTATE OF CHESTER F. OGDEN, DEC'D

Late of the Borough of Bendersville, Adams County, Pennsylvania
 Executrix: Amelia C. Ogden, 134 North Main Street, Bendersville, PA 17306
 Attorney: Bulleit, Schultz & Thrasher, 16 Lincoln Square, Gettysburg, PA 17325

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 95-S-885 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 26th day of January, 1996, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THOSE CERTAIN two lots or pieces of ground located in the Borough of Arendtsville, Adams County, Pennsylvania, more particularly bounded and described as follows:

TRACT NO. 1: BEGINNING at a pin located in Pearl Street at the common boundary line between Lot No. 1 and Lot No. 2 of the aforementioned Subdivision Plan and proceeding along said Lot No. 2 South 74 degrees 00 minutes 00 seconds West 185.51 feet to a pin; thence along Lot No. 4 as described on the aforementioned Plan and lands now or formerly of Mary S. Tate North 16 degrees 35 minutes 49 seconds West 97.78 feet to a pin; thence along lands now or formerly of Kathleen I. Malinosky North 77 degrees 45 minutes 20 seconds East 187.30 feet to a pin in the aforementioned Pearl Street; thence along Pearl Street South 15 degrees 45 minutes 00 seconds East 85.50 feet to a pin, the place of BEGINNING. CONTAINING 17,061.00 square feet.

The above lot being identified as Lot No. 1 on a Subdivision Plan by Group Hanover of Hanover, Pennsylvania, dated January 20, 1987, bearing Project Number 871040 and recorded in the office of the Recorder of Deeds of Adams County, Pennsylvania, at Plan Book 46 at page 50.

TRACT NO. 2: BEGINNING at a pin common to Lot No. 3, as described in the aforementioned Subdivision Plan, and lands now or formerly of the Trustees of the Arendtsville Community Fire Company; thence along the aforementioned Lot No. 3 South 74 degrees 00 minutes 00 seconds West 79.86 feet to a pin; thence along lands now or formerly of Mary F. Tate the following two courses and distances: (1) North 28 degrees 37 minutes 27 seconds West 66.58 feet to a pin; (2) North 57 degrees 58 minutes 35 seconds East 97.23 feet to a pin; thence along Lot No. 1 and Lot No. 2 as described on the aforementioned Plan South 16 degrees 35 minutes 49 seconds East 91.82 feet to an iron pin, the place of BEGINNING. CONTAINING 6,897.00 square feet

The above lot being identified as Lot No. 4 on a Subdivision Plan by Group Hanover of Hanover, Pennsylvania, dated January 20, 1987, bearing Project Number 871040 and recorded in the office of the Recorder of Deeds of Adams County, Pennsylvania, at Plan Book 46 at page 50.

BEING the same two lots of ground which Alan K. Patrono, Executor under the Last Will and Testament of Jeanette

B. Skinner, by deed dated July 31, 1987, and recorded in the office of the Recorder of Deeds of Adams County, Pennsylvania, in Record Book 464 at page 833 conveyed to James R. Kupp and Janice N. Kupp, husband and wife, the Defendants herein.

SEIZED and taken into execution as the property of **James R. Kupp and Janice N. Kupp**, and to be sold by me

Bernard V. Miller
Sheriff

Sheriff's Office, Gettysburg, PA
December 5, 1995.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on February 15, 1996, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

All claims to property must be filed with Sheriff before sale.

As soon as the property is declared sold to the highest bidder 20% of the purchase price or all of the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.

12/15, 22, 29

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 95-S-717 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 26th day of January, 1996, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THOSE TWO TRACTS OF LAND SITUATE, LYING AND BEING IN FREEDOM TOWNSHIP, ADAMS COUNTY, PENNSYLVANIA, BOUNDED AND DESCRIBED AS FOLLOWS:

LOT NO. 1: BEGINNING at a point about 136 feet from the west bank of Marsh Creek at corner of land now or formerly of C.B. Dougherty and William D. Gilbert; thence South, 50 feet to line of land now or formerly of B.F. Reaser; thence West, 60 feet to land now or formerly of Robert C. Witherow; thence North, 50 feet to land now or formerly of C.B. Dougherty; thence East, 60 feet to the place of BEGINNING.

LOT NO. 2: BEGINNING at a driven iron pin on line near west bank of Marsh Creek; thence by land now or formerly of Frank Reaser; West 138 feet to a pin; thence by land now or formerly of R.C. Witherow, North 2 1/2 degrees East, 50 feet to a pin; thence by land now or formerly of William Gilbert East 136 feet to a pin; thence by land now or formerly of E.H. Markley, Trustee, South 50 feet to the place of BEGINNING.

LOT NO. 2: being known as Lot No. 17 on plan of lots as surveyed and laid out by S. M. Miller, on September 12, 1922.

BEING the same which Barbara Ann Orndorff, unmarried, by deed dated June 22, 1984 and recorded in the office of the Recorder of Deeds of Adams County, Pennsylvania in Record Book 381 at page 1105, conveyed unto Frank J. Kelly and Gladys M. Moser, now married and known as Gladys M. Kelly.

BEING the same which Frank J. Kelly, and Gladys M. Kelly, formerly Gladys M. Moser, husband and wife, by deed dated April 22, 1992 and recorded in the office of the Recorder of Deeds of Adams County, Pennsylvania in Record Deed Book 623 at page 831, conveyed unto Gladys M. Kelly, married.

SEIZED and taken into execution as the property of **Frank J. Kelly and Misty Stitely as Administratrix of the Estate of Gladys M. Kelly**, and to be sold by me

Bernard V. Miller
Sheriff

Sheriff's Office, Gettysburg, PA
November 8, 1995.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on February 15, 1996, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

All claims to property must be filed with Sheriff before sale.

As soon as the property is declared sold to the highest bidder 20% of the purchase price or all of the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.

12/22, 29, 1/5

Adams County Legal Journal

Vol. 37

December 29, 1995

No. 31, pp. 165-174

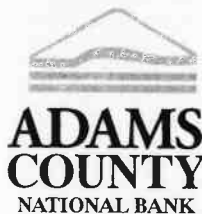
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ADAMS COUNTY LEGAL JOURNAL (USPS 542-600)

Designated for the Publication of Court and other Legal Notices. Published every Friday by Adams County Bar Association, Donald G. Oyler, Esq., Editor and Business Manager.

Subscribers within Adams County should send subscriptions direct to the business office. Subscribers outside of Adams County should send subscriptions to Wm. W. Gaunt & Sons, Inc., 3011 Gulf Drive, Holmes Beach, FL 34217-2199. Postmaster: Send address changes to Adams County Legal Journal, 112 Baltimore Street, Gettysburg, PA 17325.

Business Office - 112 Baltimore Street, Gettysburg, PA 17325. Telephone: (717) 334-1193

Second-class postage paid at Gettysburg, PA 17325.

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IN THE COURT
OF COMMON PLEAS
OF ADAMS COUNTY
COMMONWEALTH OF PENNSYLVANIA
ORPHANS' COURT DIVISION

NOTICE OF HEARING

To: Roland Gessner

YOU ARE HEREBY NOTIFIED that a Petition for Involuntary Termination of Parental Rights to Child has been filed in the Orphans Court Division of the Court of Common Pleas of Adams County, Pennsylvania. A hearing has been scheduled for January 11, 1996, at 1:00 p.m., prevailing time, at the Adams County Courthouse, Room 411, Gettysburg, Adams County, Pennsylvania, for the purpose of determining whether or not statutory grounds exist for the involuntary termination of your parental rights with respect to your child.

You should contact your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Court Administrator
Adams County Courthouse
111 Baltimore Street
Gettysburg, PA 17325

12/15, 22, 29

COURT OF COMMON PLEAS
OF ADAMS COUNTY,
COMMONWEALTH OF PENNSYLVANIA
ORPHANS' COURT DIVISION

In re: Estate of Margaret M. Irvin, of the Borough of Gettysburg, Adams County, Pennsylvania, an incompetent.

No.

Second and Final Account of Adams County National Bank, guardian.

NOTICE

NOTICE HEREBY IS GIVEN that Adams County National Bank, Guardian of the Estate of Margaret M. Irvin, an incompetent, has filed its Second and Final Account showing no balance for distribution as such Guardian in the Office of the Clerk of Courts of Common Pleas of Adams County, Commonwealth of Pennsylvania, Orphans' Court Division, and that the same will be presented to said Court for confirmation of the Account January 16, 1996, at 9:00 o'clock a.m., at the Adams County Courthouse, Gettysburg, Pennsylvania.

Peggy J. Breighner
Clerk of said Court
Bulleit, Schultz & Thrasher
Attorneys

12/29, 1/5

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN that on December 15, 1995, an application was filed under the Fictitious Name Act, No. 1982-295 (54 Pa. C.S. Section 311) in the Office of the Secretary of the Commonwealth of Pennsylvania setting forth that: Richard M. Hankey is the only person or entity owning or interested in a business the character of which is massage therapy and strength training; and that the name style and designation under which said business is and will be conducted is: NEW OXFORD MUSCULAR THERAPY CENTER, and the location where said business is and will be located is: 185 Chapel Road, Hanover, PA 17331.

Stephen Portko
Bratic and Portko
Attorneys at Law

12/29



MOTTER VS. MOTTER

1. A Master's Recommendations, although entitled to careful consideration, are advisory only but on the issue of credibility of witnesses, it is to be given the fullest consideration.
2. Fair rental value is not a marital asset subject to marital distribution but rather it represents revenues that were foregone by the marital estate due to one party's residence in the marital home during separation and, when granted, is to be calculated as a deduction from the equitable distribution awarded to the spouse in possession.
3. The proper method used to calculate fair rental value is to a) grant the deduction if there are not equitable defenses available; b) limit the deduction to the dispossessed spouse's share in the property; c) limit the deduction to the period of exclusive possession; and d) give credit to the spouse in possession for payments made to maintain the property.
4. Alimony following divorce is a secondary remedy and is available only where economic justice and the reasonable needs of the parties cannot be achieved by way of an equitable distribution award and development of an appropriate employable skill.
5. An award of counsel fees, costs and expenses is within the discretion of the Court and its purpose is to effectuate economic justice and insure that the financially dependent spouse will be able to maintain or defend the divorce action and are not automatically awarded but must be based upon a showing of actual need.

In the Court of Common Pleas, Adams County, Pennsylvania, Civil No. 90-S-796, GENE R. MOTTER VS. JEAN E. MOTTER.

Henry O. Heiser, III, Esq., for Plaintiff
Michelle C. Kahan, Esq., for Defendant

OPINION ON EXCEPTIONS TO MASTER'S REPORT

Kuhn, P.J., June 12, 1995.

Each party has filed numerous exceptions to the Master's Report. Where possible the exceptions shall be lumped together. Rather than discussing the entire matter, reference shall be made to the Master's Report except where necessary to emphasize a point or deviate from a recommendation. As stated previously:

The Court is mindful that a Master's Recommendations, although entitled to careful consideration, are advisory only. *Reed v. Reed*, 354 Pa. Super. 284, 289, 511 A.2d 874, 877 (1986). However, on the issue of credibility of witnesses, it is to be given the fullest consideration. *McBride v. McBride*, 335 Pa. Super. 296, 298, 484 A.2d 141, 142 (1984). Because the Master is in the best position to evaluate the witnesses' credibility, the Court will not disturb his findings on credibility absent an abuse of discretion. *Rice v. Rice*, 29 Ad. Co. L.J. 109,110 (1987).

Generally, these parties were married on July 8, 1958, and separated on September 20, 1990. Presently Husband is approximately 59 years of age and Wife is approximately 57 years of age. The parties raised four children who are all currently adults. A Decree of Divorce was entered on November 9, 1992. The Master recommended a 55-45 split of various assets in favor of Wife and a 50-50 split of certain specified assets. Alimony was recommended but not awarded. Costs were to be shared. Each party was to pay his/her own legal fees. The Court held a subsequent hearing to receive additional information.

It would be helpful to list the marital assets and values given to them by the Master.

1. Marital home	\$74,500.00
2. Hunting cabin	700.00
3. Dodge automobile	4,625.00
4. Chrysler automobile	7,500.00
5. Jeep	2,450.00
6. Gettysburg National Bank Checking	4,500.00
7. Six firearms	1,380.00
8. Fidelity Cash Reserve Account	23,224.38
9. Wife's IRA	4,239.97
10. Janus account	65,832.72
11. Installment sales contract	6,025.49
12. Cash in brief case	1,000.00
13. Employee Stock Option Plan (ESOP)	98,444.47
14. Four building lots	unknown
15. Condominium	unknown
16. Tangible personal property	6,207.00

RENTAL INCOME AND VALUE

(Husband's Exceptions 8 and 9)

Husband argues that the Master failed to take into account rental income of \$250.00 per month received by Wife from the parties' son, Eric, and failed to give him credit for lost rental resulting from Wife's occupancy of the marital home during separation. Wife admits receipt of \$250.00 per month in rental income but the record fails to disclose when that arrangement began. Wife testified to purchasing Eric's food (undisclosed amount) from that income.

The stipulated rental value of the home is \$500.00 per month. Husband left voluntarily on September 20, 1990, and Wife has remained in the residence. A mortgage on the residence secured the parties' Myrtle Beach condominium. Husband paid that mortgage of

approximately \$806.43 per month. The condominium was sold on December 3, 1993, and \$80,632.95 of the net proceeds was used to pay off the mortgage.

Husband paid taxes and insurance on the marital home for 1990. Taxes and insurance for 1991 were paid out of a joint income tax refund. Wife paid taxes (\$1,435.05) and insurance (\$230.00) for 1992. Because Wife maintained the marital home and Husband maintained the condominium at considerable expense, the Master recommended that no credit go to either party.

No portion of the rental income paid by the parties' son will be credited to Husband. In *Gordon v. Gordon*, 436 Pa. Super. 126, 647 A.2d 530 (1994) the parties' son lived with Wife in the marital residence and paid her for room and board. The Court stated

...room and board is not necessarily marital property.

Room and board is more than mere rental income; it may encompass meal preparation, grocery shopping, laundry services and housecleaning services. There is nothing in the record which establishes what portion of room and board pertained specifically to rent, we conclude, therefore, that Husband's claim for a share of room and board is without merit. 436 Pa. Super. at 149, 647 A.2d at 541.

Here, likewise, the record does not break down services and rent. Therefore, no credit for rental income will be given.

In making an equitable distribution scheme it is within the discretion of the trial court to include a provision for fair rental value by a dispossessed spouse when the other spouse has constructive or actual exclusive possession of the marital residence. Fair rental value is not a marital asset subject to equitable distribution but rather it represents revenues that were foregone by the marital estate due to one party's residence in the marital home during separation. An award of rental value is not mandatory but when granted is to be calculated as a deduction from the equitable distribution granted to the spouse in possession. *Gordon v. Gordon, Id., Butler v. Butler*, 423 Pa. Super. 530, 546, 621 A.2d 659, 668 (1993), Alloc. granted 631 A.2d 1002 (1993).

The proper method used to calculate fair rental value is to 1) grant the deduction if there are no equitable defenses available, 2) limit the deduction to the dispossessed spouse's share in the property, 3) limit the deduction to the period of exclusive possession, and 4) give credit to the spouse in possession for payments made to maintain the property. *Trembach v. Trembach*, 419 Pa. Super. 80, 87-8, 615 A.2d 33, 37 (1992).

During 1990 maximum rental value credit would be approximately \$750.00 (3 months x \$500 + 2). In 1991-4 the maximum rental credit is \$24,000 (48 months x \$500 + 2). Throughout the period Wife physically maintained the real estate. Taxes and insurance totaling \$1,670.25 were paid by Wife in 1992 of which one-half represents Husband's share. We will assume payment of similar amounts in 1993 and 1994. Because the mortgage paid by Husband in fact related to the condominium those payments will not be considered as a credit in this discussion. *Ressler v. Ressler*, 434 Pa. Super. 563, 644 A.2d 753 (1994).

It should be noted that income levels were significantly different during certain portions of the considered time frame. Husband was earning \$78,000 gross income until he was summarily dismissed as company president in January, 1992, by his employer of 32 years. Then from February 1-December, 1992, Husband had employment at an annual gross salary of \$50,000. He lost that job through no fault of his own and began collecting unemployment compensation of \$317.00 per week. That status remained until August 5, 1993, when he opened a beer distributorship. The beer license cost of \$100,000 was totally financed. Records supplied to this Court at our last hearing indicated a before tax income for Husband from this business of approximately \$2,000 per month.

Wife began working at Gettysburg Hospital as a nurse in October, 1990, and continued there until February, 1991, when she resigned because her skills for that level of nursing had deteriorated during the years she was out of the job market. In October, 1991, Wife began working at The Lutheran Home as a nurse at \$12.50 per hour and by December, 1993, was being paid \$13.50 per hour. During 1993, she earned nearly \$23,000.

Based on all the equities, the Court finds that Husband is entitled to a rental value credit of \$10,000 (exclusive of credit for taxes and insurance of \$2,505.38).

THE CONDOMINIUM

(Husband's Exception 7; Wife's Exceptions 6 and 28)

At the time of the Master's Hearing, the parties were trying to sell their condominium. The parties agreed to share the cost of sale. The Master did not assign any value to the equity in the condominium but recommended that the equity be divided equally. He also recommended that the Janus Money Market Account be divided equally and that all rental income from the condominium be placed in that account

and that all expenses related to the condominium be paid from that account.

Husband complained that he was not given adequate credit for paying Wife's share of the expenses related to the condominium after separation. Wife complained that the Master erred in his recommendation regarding use of the Janus account and in accepting Husband's testimony regarding potential income from the condominium.

The Court accepts the Master's factual and credibility conclusions but determines that it would be appropriate that Husband receive credit for sums paid by him to maintain the condominium. Income received or credited (due to Husband's use of the condominium) totaled \$26,453 for the period October, 1990–December, 1992.¹ Fees, expenses and mortgage for the same period totaled at least \$30,096.86.² No figures were made available for 1993. Thus, expenses paid by Husband over income received was \$3,643.86. Husband will be credited \$1,821.93.

We find the Master's use of the Janus account to handle the 1993 income and expenses to be appropriate.

The condominium sold on December 3, 1993 for \$129,000. After payment of all expenses and satisfaction of the mortgage on the marital home, the parties netted \$37,074.77. These funds were placed in an escrow account with PNC Bank.

BUILDING LOTS

(Wife's Exception 10)

The parties owned four building lots upon which the Master placed no value. The Master recommended that Husband be reimbursed for subdivision costs he incurred in the amount of \$1,615.00. He further recommended that net proceeds from the sale of the lots be shared equally. Wife excepts to this credit. The Court finds that expense to be reasonable and the allocation to be appropriate. Thus, Husband is entitled to a credit of \$807.50, representing one-half of the amount paid.

It should be noted that after the Master prepared his reports one lot sold for \$20,711.16 net. Those funds were placed in the PNC escrow account. In addition, Husband negotiated with municipal authorities to run public water to the remaining three lots with the municipality paying one-half of the costs. The Motters' share was \$3,029.85. Per Order dated December 21, 1993, that expense was directed to be paid from the escrow account.

¹\$395—1990; \$11,275—1991; \$14,783—1992.

²\$3237.20—1990; \$12,887—1991; \$13,972.66—1992.

HUSBAND'S IRA

(Wife's Exception 12 and 32)

The Master found that Husband had an IRA valued at separation at \$8,826.16 which he rolled into the Janus account. The Master recommended that Husband receive 45% of his IRA (valued at \$11,400.48) when the Master's Report was written and 50% of the Janus account after certain credits. It appears that the Master may have counted the IRA twice but this matter has been corrected as part of the Court's equitable distribution scheme.

MISCELLANEOUS TANGIBLE GOODS

(Wife's Exceptions 13 and 14)

Wife claims that the Master improperly listed the value of certain miscellaneous tangible personal property in his report. The Master valued these items at \$6,207, being the total of the stipulated value (\$5907) plus the value of some items Husband admitted taking (\$300). Items in Wife's possession were then valued at \$5577 and items in Husband's possession were valued at \$630 for a total of \$6207. We find no merit to these exceptions

WEAVER INSTALLMENT CONTRACT

(Wife's Exception 33)

The Master valued this asset at \$6025.49 of which \$5651.46 was principle and \$374.03 represented interest. Husband had use of the account and paid income tax on the interest in 1992. The Master listed the asset as \$5,651.46 when distributed to Husband with the understanding that the reduction was in recognition of the tax paid by Husband. The Master's reduction seems to have been excessive. Even if Husband was in the 30% tax bracket the tax would have only amounted to \$112.21. Based on the equities we will include the entire sum of \$6,025.49 as property distributed to Husband.

SOURCES OF INCOME AND FUTURE ACQUISITIONS

(Husband's Exceptions 5 and 6)

Under the categories "Amount and sources of income, vocational skills and employability; and "Opportunity for Future Acquisition of Capital and Income" the Master found that these factors favored Wife in making the equitable distribution. The Court accepts the Master's factual conclusions. Subsequent to the Master's Report Husband did open the beer distributorship. Initially his income potential from that business was approximately the same as the income Wife earned from

her employment. At the same time Husband is building equity in the liquor license. The Court agrees that these factors favor Wife but only slightly.

MANAGEMENT OF THE JANUS ACCOUNT

(Wife's Exception 15)

Wife excepted to the Master's recommendation that Husband have authority to manage the Janus account from which the condominium income and expenses were managed. That issue is now moot. Besides, no expenditure could be effectuated without Wife's signature.

STATION AND STANDARD OF LIVING

(Wife's Exceptions 21 and 22)

We find no merit to Wife's contention that the Master erred in concluding that Husband was not then enjoying "the amenities of life in the form of vacations and business related travel" and in concluding that Husband's social life was not comparable to pre-separation days.³ We find no error in the Master's Report. At separation Husband was the president of a trucking company earning \$78,000 per year while at the time the Master's Report was written he was age 57 and collecting \$317 per week in unemployment benefits.

CASH ADJUSTMENT

(Wife's Exceptions 16, 17, 19, 20 and 29; Husband's Exception 4)

The Master determined that Wife owed Husband \$20,657.36 as a cash adjustment on the property being divided on a 55/45 basis and that he be paid on or before distribution of the final ESOP payment (with interest at the rate of 6% per annum effective September 30, 1993). To secure this obligation it was recommended that the marital residence which was being distributed to Wife not be sold or encumbered until the cash adjustment had been paid. Wife excepted to the recommendation that she owed Husband any sum and that she pay interest on any sum owed. She further objected to being required to pay off the adjustment within three years. She also objected to the restriction on not being able to encumber the residence. Generally, we find no merit to Wife's exceptions. In addition, the Court's equitable distribution scheme will address all other issues not already rendered moot.

³ In fact, the Master reported that "Husband's social life remains on a level comparable to pre-separation days..." (p. 9).

“DEBT FREE HOME”

(Wife’s Exception 23)

The Master noted that Wife lived in “what is in reality a debt free home” (R.9) and that after the condominium was sold she would be living in a home without a mortgage (R. 18, 20, 23). The mortgage has, in fact, been paid off and under the Court’s revised scheme Wife will not owe Husband any sums.

SOURCES OF INCOME

(Wife Exception 25)

Wife avers that the Master erred in not finding that the category “amount and sources of income, vocational skills and employability” did not favor Wife. In fact the Master concluded as Wife requests.

HUSBAND’S EMPLOYMENT EFFORTS

(Wife’s Exception 24)

We find no merit to Wife’s exception to the Master’s finding that Husband made serious efforts to seek employment within the trucking industry.

MISCELLANEOUS

(Wife’s Exceptions 26 and 27)

The Court finds no merit to these exceptions and they are dismissed.

EMPLOYEE STOCK OPTION PLAN (ESOP)

Husband’s ESOP was valued by the Master at \$98,444.47 (based upon December 31, 1991 value less the first withdrawal). His interest could be withdrawn in five equal annual installments. The value of the plan varies based on the value of Husband’s former employer. The first payment of \$24,611.12 was received in July, 1992 and placed in the Janus account. The second payment of \$29,899.07 was made in August, 1993, and also placed in the Janus account. The third payment of \$45,258.19 was received in July, 1994. In addition, the Court recently received information that Husband’s former employer is being purchased by another entity and the final two years of the ESOP will be paid in lump sum within 3–4 months in a total amount of approximately \$180,000.

ALIMONY

(Wife’s Exceptions 7, 8, 9, 30, 31; Husband’s Exceptions 1, 2, 3 and 10)

The Master concluded that a need for alimony exists but that no recommendation would be made based upon the parties' relative incomes at the time. Wife contends that an alimony amount should have been ordered while Husband argues that the Master should not even have recommended alimony.

The Court has examined all of the relevant factors discussed at 23 Pa. C.S.A. §3701. Based primarily on the equitable distribution being awarded to each party and their relative incomes we find that an alimony award would not be appropriate in this case.

As has been said,

The purpose of alimony is not to reward one party and to punish the other, but rather to ensure that the reasonable needs of the person who is unable to support himself or herself through appropriate employment, are met... Alimony following divorce is a secondary remedy and is available only where economic justice and the reasonable needs of the parties cannot be achieved by way of an equitable distribution award and development of an appropriate employable skill. *Nemoto v. Nemoto*, 423 Pa. Super. 269, 275-6, 620 A.2d 1216, 1219 (1993) (citations omitted).

FEES AND COSTS

(Wife's Exceptions 1, 2, 5 and 18)

The Master recommended that each party pay his/her own counsel fees and that the costs would be shared equally. Wife asserts that the Master's fee was excessive and that the Master erred in not awarding Wife any counsel fees. The record suggests a request for legal fees of nearly \$5,000 from Wife.

First, the Court believes the Master did an admirable job in this case. The fee requested by the Master (\$2,072.50) is certainly not excessive based upon the record.

An award of counsel fees, costs and expenses is within the discretion of the court and its purpose is to effectuate economic justice and ensure that the financially dependent spouse will be able to maintain or defend the divorce action. Counsel fees are not automatically awarded but must be based upon a showing of actual need. *Butler v. Butler*, supra., 423 Pa. Super. at 545, 621 A.2d at 667.

Based upon the equitable distribution entered herein and the relative incomes of the parties, the Master's recommendation is appropriate and will be adopted.

EQUITABLE DISTRIBUTION

Finally, with all due respect to the Master and after weighing all the factors, the Court believes that a final distribution of 54/46 in favor of Wife as to all assets would effectuate economic justice.

Accordingly, the attached Order is entered.

ORDER OF COURT

AND NOW, this 12th day of June, 1995, in consideration of the cross exceptions filed, said exceptions are granted in part and denied in part. The economic issues are resolved in accordance with the Court's Opinion on Exceptions to Master's Report and the Recapitulation attached at the end thereof.

The parties are directed to divide the available assets in accordance with the plan set forth herein.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION

ESTATE OF HAROLD RAYMOND HEVERLY, DEC'D

Late of Straban Township, Adams County, Pennsylvania
 Executrix: Nola Mummert, 51 Wheatland Drive, Gettysburg, PA 17325
 Attorney: Harold N. Fitzkee, Jr.

SECOND PUBLICATION

ESTATE OF ALMA WEIKERT CROUSE, DEC'D

Late of the Borough of Littlestown, Adams County, Pennsylvania
 Executrix: Elizabeth C. Ross, 540 Cabot Drive, Hockessin, DE 19707
 Attorney: Bulleit, Schultz & Thrasher, 16 Lincoln Square, Gettysburg, PA 17325

ESTATE OF MELVIN OVERHOLTZER, JR., DEC'D

Late of Mt. Joy Township, Adams County, Pennsylvania
 Executor: Adams County National Bank, P.O. Box 4566, Gettysburg, PA 17325
 Attorney: Pyle and Entwistle, 33 West Middle Street, Gettysburg, PA 17325

ESTATE OF JOHN FREDERICK ROBINSON, DEC'D

Late of Straban Township, Adams County, Pennsylvania
 Executrix: Mary Lou Seamens, 2476 Chambersburg Road, Biglerville, PA 17307
 Attorney: Jeffery M. Cook, 234 Baltimore Street, Gettysburg, PA 17325

ESTATE OF JOSEPH A. ROBINSON, DEC'D

Late of the Borough of New Oxford, Adams County, Pennsylvania
 Executors: James R. Robinson, 517 Berlin Road, New Oxford, PA 17350; Joseph A. Robinson, Jr., 5721 Kenwood Avenue, Harrisburg, PA 17112
 Attorney: Ronald J. Hagarmen, Esquire, 110 Baltimore Street, Gettysburg, PA 17325

THIRD PUBLICATION

ESTATE OF ADRIANA NEELTGE DIRENZO, a/k/a ADRIANA N. DIRENZO, DEC'D

Late of the Borough of Abbottstown, Adams County, Pennsylvania
 Executrix: Carol Marie Direnzo, 250 York Street (Gates & Mooney), Hanover, PA 17331
 Attorney: John J. Mooney, III

ESTATE OF PHYLLIS MARY HANSON HENNESSY, a/k/a PHYLLIS MARY HENNESSY, a/k/a MARY HANSON HENNESSY, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania
 Executor: Charles H. Wigo, Jr., 2900 Banyan St., Apt. 402, Ft. Lauderdale, FL 33316
 Attorney: Charles H. Wigo, Jr.

ESTATE OF SAMUEL A. KIRKPATRICK, DEC'D

Late of Hanover, Adams County, Pennsylvania
 Executrix: Yolanda A. Kirkpatrick, 139 Villa Vista Drive, Hanover, PA 17331
 Attorney: Shumaker Williams, P.C., P.O. Box 88, Harrisburg, PA 17108

ESTATE OF ELEANOR A. PORTER, DEC'D

Late of Huntington Township, Perry County, Pennsylvania
 Executrix: Pamela L. Shenk, R.D. 2, Box 345A3, Loysville, PA 17047
 Attorney: Allan W. Holman, Jr., Holman & Holman, 16 E. Main Street, P.O. Box 97, New Bloomfield, PA 17068

ESTATE OF GRACE A. SCOTT, DEC'D

Late of Straban Township, Adams County, Pennsylvania
 Executrices: Martha K. Black, 125 Hunterstown Rd., Gettysburg, PA 17325; Dorothy S. Rice, 115 Hunterstown Rd., Gettysburg, PA 17325
 Attorney: John W. Phillips, Esquire, 101 West Middle Street, Gettysburg, PA 17325

ESTATE OF FRANK R. SHRIVER, DEC'D

Late of Straban Township, Adams County, Pennsylvania
 Executor: Adams County National Bank, Lincoln Square, Gettysburg, PA 17325
 Attorney: Teeter, Teeter & Teeter, 108 W. Middle Street, Gettysburg, PA 17325

ESTATE OF EDWARD F. SMITH, DEC'D

Late of Mt. Pleasant Township, Adams County, Pennsylvania
 Executor: Adams County National Bank, P.O. Box 4566, Lincoln Square Office, Gettysburg, PA 17325
 Attorney: Teeter, Teeter & Teeter, 108 West Middle Street, Gettysburg, PA 17325

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 95-S-885 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 26th day of January, 1996, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THOSE CERTAIN two lots or pieces of ground located in the Borough of Arendtsville, Adams County, Pennsylvania, more particularly bounded and described as follows:

TRACT NO. 1: BEGINNING at a pin located in Pearl Street at the common boundary line between Lot No. 1 and Lot No. 2 of the aforementioned Subdivision Plan and proceeding along said Lot No. 2 South 74 degrees 00 minutes 00 seconds West 185.51 feet to a pin; thence along Lot No. 4 as described on the aforementioned Plan and lands now or formerly of Mary S. Tate North 16 degrees 35 minutes 49 seconds West 97.78 feet to a pin; thence along lands now or formerly of Kathleen I. Malinosky North 77 degrees 45 minutes 20 seconds East 187.30 feet to a pin in the aforementioned Pearl Street; thence along Pearl Street South 15 degrees 45 minutes 00 seconds East 85.50 feet to a pin, the place of BEGINNING. CONTAINING 17,061.00 square feet.

The above lot being identified as Lot No. 1 on a Subdivision Plan by Group Hanover of Hanover, Pennsylvania, dated January 20, 1987, bearing Project Number 871040 and recorded in the office of the Recorder of Deeds of Adams County, Pennsylvania, at Plan Book 46 at page 50.

TRACT NO. 2: BEGINNING at a pin common to Lot No. 3, as described in the aforementioned Subdivision Plan, and lands now or formerly of the Trustees of the Arendtsville Community Fire Company; thence along the aforementioned Lot No. 3 South 74 degrees 00 minutes 00 seconds West 79.86 feet to a pin; thence along lands now or formerly of Mary F. Tate the following two courses and distances: (1) North 28 degrees 37 minutes 27 seconds West 66.58 feet to a pin; (2) North 57 degrees 58 minutes 35 seconds East 97.23 feet to a pin; thence along Lot No. 1 and Lot No. 2 as described on the aforementioned Plan South 16 degrees 35 minutes 49 seconds East 91.82 feet to an iron pin, the place of BEGINNING. CONTAINING 6,897.00 square feet

The above lot being identified as Lot No. 4 on a Subdivision Plan by Group Hanover of Hanover, Pennsylvania, dated January 20, 1987, bearing Project Number 871040 and recorded in the office of the Recorder of Deeds of Adams County, Pennsylvania, at Plan Book 46 at page 50.

BEING the same two lots of ground which Alan K. Patrono, Executor under the Last Will and Testament of Jeanette

B. Skinner, by deed dated July 31, 1987, and recorded in the office of the Recorder of Deeds of Adams County, Pennsylvania, in Record Book 464 at page 833 conveyed to James R. Kupp and Janice N. Kupp, husband and wife, the Defendants herein.

SEIZED and taken into execution as the property of **James R. Kupp and Janice N. Kupp**, and to be sold by me

Bernard V. Miller
Sheriff

Sheriff's Office, Gettysburg, PA
December 5, 1995.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on February 15, 1996, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

All claims to property must be filed with Sheriff before sale.

As soon as the property is declared sold to the highest bidder 20% of the purchase price or all of the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.

12/15, 22, 29

SHERIFF'S SALE

IN PURSUANCE of a Writ of Execution, Judgment No. 95-S-717 issuing out of the Court of Common Pleas of Adams County, and to me directed, will be exposed to Public Sale on Friday, the 26th day of January, 1996, at 10:00 o'clock in the forenoon at the Courthouse in the Borough of Gettysburg, Adams County, PA, the following Real Estate, viz.:

ALL THOSE TWO TRACTS OF LAND SITUATE, LYING AND BEING IN FREEDOM TOWNSHIP, ADAMS COUNTY, PENNSYLVANIA, BOUNDED AND DESCRIBED AS FOLLOWS:

LOT NO. 1: BEGINNING at a point about 136 feet from the west bank of Marsh Creek at corner of land now or formerly of C.B. Dougherty and William D. Gilbert; thence South, 50 feet to line of land now or formerly of B.F. Reaser; thence West, 60 feet to land now or formerly of Robert C. Witherow; thence North, 50 feet to land now or formerly of C.B. Dougherty; thence East, 60 feet to the place of BEGINNING.

LOT NO. 2: BEGINNING at a driven iron pin on line near west bank of Marsh Creek; thence by land now or formerly of Frank Reaser; West 138 feet to a pin; thence by land now or formerly of R.C. Witherow, North 2 1/2 degrees East, 50 feet to a pin; thence by land now or formerly of William Gilbert East 136 feet to a pin; thence by land now or formerly of E.H. Markley, Trustee, South 50 feet to the place of BEGINNING.

LOT NO. 2: being known as Lot No. 17 on plan of lots as surveyed and laid out by S. M. Miller, on September 12, 1922.

BEING the same which Barbara Ann Orndorff, unmarried, by deed dated June 22, 1984 and recorded in the office of the Recorder of Deeds of Adams County, Pennsylvania in Record Book 381 at page 1105, conveyed unto Frank J. Kelly and Gladys M. Moser, now married and known as Gladys M. Kelly.

BEING the same which Frank J. Kelly and Gladys M. Kelly, formerly Gladys M. Moser, husband and wife, by deed dated April 22, 1992 and recorded in the office of the Recorder of Deeds of Adams County, Pennsylvania in Record Deed Book 623 at page 831, conveyed unto Gladys M. Kelly, married.

SEIZED and taken into execution as the property of **Frank J. Kelly and Misty Stitely as Administratrix of the Estate of Gladys M. Kelly**, and to be sold by me

Bernard V. Miller
Sheriff

Sheriff's Office, Gettysburg, PA
November 8, 1995.

TO ALL PARTIES IN INTEREST AND CLAIMANTS: You are notified that a schedule of distribution will be filed by the Sheriff in his office on February 15, 1996, and distribution will be made in accordance with said schedule, unless exceptions are filed thereto within 10 days after the filing thereof. Purchaser must settle for property on or before filing date.

All claims to property must be filed with Sheriff before sale.

As soon as the property is declared sold to the highest bidder 20% of the purchase price or all of the cost, whichever may be the higher, shall be paid forthwith to the Sheriff.

12/22, 29, 1/5