

- (a) Are enjoined from continuing to trespass on the real estate of the plaintiff and shall cease and desist from such trespass.
- (b) Are required to remove their trailer and gas tank from the lands of the plaintiff and restore it to its former condition with the exception of the tree and brush removed on or before October 1, 1976.
- (c) Shall pay to Jacob F. Shearer, plaintiff, rent for the real estate so occupied at the rate of Twenty (\$20.00) Dollars per month from July 1, 1975.
- (d) Shall pay the costs of these proceedings.

WRIGHT v. WRIGHT, C.P. Franklin County Branch, No. 25 January Term, 1977

Divorce - Alimony Pendente Lite - Counsel Fees - Expenses - Earning Capacity

1. The factors to be considered on a petition for alimony pendente lite, counsel fees and expenses are the need of the moving party, the ability of the respondent to pay, and the character, situation, and surroundings of the parties.
2. "Need of the party" does not mean that the petitioner must be destitute and dependant on charity in order to be awarded alimony.
3. Evidence of petitioner's earning capacity, compared with petitioner's actual income, is not relevant, in that the earning capacity rule has been applied only in cases where the respondent has deliberately reduced his income to defeat a claim for alimony.
4. The factor concerning the character, situation, and surroundings of the parties is held to mean that a party should not be forced, by the fact of having brought or being required to defend a suit in divorce, to live in a fashion far removed and beneath the couple's former lifestyle.

Lawrence C. Zeger, Esq., Attorney for Plaintiff

James M. Schall, Esq., Attorney for Defendant

OPINION AND ORDER

KELLER, J., October 11, 1977:

Peggy D. Wright commenced her action in divorce by filing a complaint on October 29, 1976, and the same was served upon the defendant, Gerald E. Wright, Sr. on November 5, 1976. Defendant filed his answer thereto on November 15, 1976, filing at that time also a power of attorney appointing James M. Schall, Esq. as his attorney and authorizing him to enter an appearance. On November 15, 1976, defendant also caused a Rule to be issued on the plaintiff to file a Bill of Particulars.

The plaintiff, on November 23, 1976, filed her petition for allowance of alimony pendente lite, counsel fees and expenses. On the same date the Honorable George C. Eppinger, P.J., signed an order granting a Rule upon the defendant to show cause why such award should not be made. The Rule upon the defendant was issued on December 1, 1976.

On December 13, 1976, the Rule was served upon the defendant. On December 17, 1976, the defendant filed his answer to the petition alleging that the plaintiff "has sufficient earning capacity and means and resources available to her", and that he is "unable to pay alimony pendente lite, counsel fees, and expenses and still maintain and support himself.

On February 18, 1977, the plaintiff filed her petition for appointment of an examiner and on the same date an order was signed appointing Russell S. Roddy, Esq., Examiner. As it subsequently appeared that Attorney Roddy was no longer eligible to serve as Examiner, an order was signed on March 8, 1977, revoking his commission and appointing Thomas B. Steiger, Sr., Esq., Examiner in his stead.

Notice having been duly given, the Examiner sat for the hearing on April 20, 1977. The plaintiff and the defendant each appeared in person and by counsel.

Briefs were submitted by counsel and the matter was argued before the Court on August 23, 1977. The matter is now ripe for disposition.

FINDINGS OF FACT

1. The plaintiff and defendant are separated; the plaintiff having removed from the marital home on June 10, 1976.

2. The plaintiff resides in a mobile home, on which she is presently making monthly payments, located on a rental space in Black's Trailer Court, McConnellsburg, Pennsylvania.

3. The plaintiff was employed until October 29, 1976, a period of 8-1/2 years, in a supervisory position by the Penn State Extension Office. During this period the plaintiff received an increase in wages every year, until she was netting an average of \$216.00 bi-weekly, plus compensation for travel expenses. No reason was given for the termination of this employment.

4. At some point between mid-November and early December of 1976, the plaintiff began working at the Mecca Food Market in McConnellsburg, Pennsylvania. There she worked two days a week and earned a total of \$424.00 before being laid off in the middle of February of 1977.

5. The plaintiff was then unable to find employment until mid-March of 1977, at which time she began working as a waitress at the Cozy Inn in Chambersburg, Pennsylvania. She works five days a week at this job, averaging 33 hours per week and earning approximately \$75.00 per week, including tips.

6. The defendant pays no support to the plaintiff.

7. Neither of the parties supports any dependents.

8. Shortly before the time when the plaintiff left the marital home, she withdrew \$1,400.14 from the parties' joint checking account, amounting to one-half of the account.

9. At that time the plaintiff also redeemed U. S. Bonds which were in her name only, and some which were in the names of the parties jointly. The parties disagreed as to the exact amount of the bonds redeemed by the plaintiff; she testified that it was \$500.00 of mixed \$50.00 and \$25.00 denominations, while the defendant claimed that there were forty \$25.00 bonds, plus \$950.00 in \$50.00 bonds.

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LEGAL NOTICES, cont.

Valley Bank and Trust Company, executor of the estate of Helen A. Christ, late of the Borough of Chambersburg, Franklin County, deceased.

GLENN E. SHADLE
Clerk of Orphans' Court
Franklin County, Pennsylvania
(11-4, 11-11, 11-18, 11-25)

The following list of Trustees, Guardians of Minors, Guardians of Incompetents and Custodians Accounts will be presented to the Orphans' Court Division of the Court of Common Pleas, Franklin County, Pennsylvania, for CONFIRMATION on December 1, 1977:

Look First and Partial Account of Blair E. Morgenthall, Edgar S. Morgenthall and John W. Keller, Trustees for J. Lucille Look, under the will of Owen L. Morgenthall, deceased.

GLENN E. SHADLE
Clerk of Orphans' Court
Franklin County, Pennsylvania
(11-18, 11-25)

SHERIFF'S SALES

Pursuant to Writ of Execution issued on Judgment A.D. 1977-533 of the Court of Common Pleas of the Thirty-Ninth Judicial District, Franklin County Branch, I will sell at public auction sale in Court Room No. One of the Franklin County Court House, Memorial Square, Chambersburg, Pennsylvania, at One O'clock P.M. on Friday, December 9, 1977 the following real estate improved as indicated:

ALL the following described parcel or lot of ground, together with the improvements thereon, lying and being situate in the Village of Fort Loudon, Township of Peters, County of Franklin and State of Pennsylvania, bounded and described as follows, to wit:—

BEGINNING at a post where lands of Nelson Kegerris intersect Mill Avenue in said Village of Fort Loudon; thence in and by said Mill Avenue North sixty-one (61) degrees thirty (30) minutes East eighty-five (85) feet to an iron pin; thence by lands of Robert I. Leab, South twenty-five (25) degrees forty-five (45) minutes East one hundred seventy (170) feet to a set iron pin; thence by lands of George R. Crouse and Annie M. Crouse, his wife, South sixty-one (61) degrees thirty (30) minutes West eighty-five (85) feet to a set iron pin at a fence line; thence partially along said fence line and by lands of Nelson Kegerris North twenty-five (25) degrees forty-five (45) minutes West one hundred seventy (170) feet to the post, the place of beginning, containing thirty-three hundredths (.33) of an acre, as is shown on draft of Joseph E. Crouse, Prop., surveyed April 17, 1961, by W. B. Marshall II, County Surveyor, attached thereto and made a part of the hereinafter mentioned deed.

The above described real estate is the same which Joseph E. Crouse and Pauline Crouse, his wife, by their deed dated June 17, 1961, and recorded in Franklin County Deed Book Volume 549, Page 505, conveyed to Glen L. Gossert and A. Lucille Gossert,

SHERIFF'S SALES Cont'd

his wife, Grantors herein.

And having erected thereon a single family dwelling of conventional design, having a concrete block foundation, full basement area consisting of 1/2 Cement and 1/4 earth floor. Exterior walls are of frame construction covered with wide Aluminum siding. Interior walls are of Plaster board. The roof is of asphalt shingles.

Seized and taken in Execution as the Real Estate of Paul W. Zeger and Betty J. Zeger, his wife, under Judgement No. A.D. 1977-533.

Pursuant to Writ of Execution issued on Judgment DSB 1975-307 of the Court of Common Pleas of the Thirty-Ninth Judicial District, Franklin County Branch, I will sell at public auction sale in Court Room No. One of the Franklin County Court House, Memorial Square, Chambersburg, Pennsylvania, at One O'clock P.M. on Friday, December 9, 1977 the following real estate improved as indicated:

Specific description of certain real estate situate in Greene Township, Franklin County, Pennsylvania, owned by Vincent P. Lowman and Mildred L. Lowman: —

BEGINNING at a nail in the center of L. R. 28009, known as the Black Gap Road; thence along said road North 44 degrees 36 minutes West 60 feet to an iron pin; thence along lands now or formerly of Edna and Raphael McKenrick, North 42 degrees 56 minutes East 400 feet to an iron pin; thence by lands of John F. Jones and Ruth C. Jones, his wife, South 45 degrees 32 minutes East 60 feet to an iron pin; thence by lands now or formerly of Jere C. Perry and Mary E. Perry, his wife, and McGee, South 42 degrees 58 minutes West 400 feet to the place of beginning.

The above described real estate is the same real estate which John F. Jones and Ruth C. Jones, his wife, by their deed dated October 30, 1968 and recorded in the Recorder's Office of Franklin County, Pennsylvania, in Deed Book Volume 632, Page 631, conveyed to Vincent P. Lowman and Mildred L. Lowman, his wife.

Seized and taken in Execution as the Real Estate of Vincent P. Lowman and Mildred L. Lowman, his wife, under Judgement No. DSB 1975-307.

TERMS: The successful bidder shall pay 20% of the purchase price immediately after the property is struck down, and shall pay the balance within ten days following the sale. If the bidder fails to do so, the real estate shall be re-sold at the next Sheriff's sale and the defaulting bidder shall be liable for any deficiency including additional costs. Any deposit made by the bidder shall be applied to the same. In addition the bidder shall pay \$20.00 for preparation, acknowledgement and recording of the deed. A Return of Sale and Proposed Schedule of Distribution shall be filed in the Sheriff's Office on January 4, 1978, and when a lien creditor's receipt is given, the same shall be read in open court at 9:30 A.M. on said date. Unless objections be filed to such return and schedule on or before January 18, 1978, distribution will be made in accord therewith.

November 11, 1977

FRANK H. BENDER, Sheriff of
Franklin County, Pennsylvania
(11-18, 11-25, 12-2)

10. The plaintiff used these funds to make the down payment on the trailer in which she now lives and to purchase furniture for it.

11. On October 28, 1976, the plaintiff caused to be removed from the marital home approximately one-half of the furniture therein. This conduct was the subject of a criminal action, Commonwealth v. Wright, Fulton County Branch, No. 5 of 1977, with Gerald E. Wright, Sr. being the private prosecutor. Peggy D. Wright was acquitted of the burglary charge, but was found guilty of theft, a misdemeanor in the third degree, by virtue of her removing one piece of furniture owned solely by her husband. The plaintiff has not given the defendant an accounting of the furniture, returned any of it to him, nor paid him any money for it. The furniture remains in storage.

12. The plaintiff has itemized a list of her bills and debts, which list we find somewhat confusing in parts. We accept the following figures and total as the plaintiff's normal monthly expenses:

Groceries	\$100.00
Trailer payment	105.31
Rent on trailer space	32.00
Cable T.V.	5.75
Sewage	9.00
Electricity	14.91
Telephone	17.83
Gas (stove)	1.78
Kerosene (heat)	21.25
Car insurance	11.43
Car - gas and oil	10.00
Car license	2.00
Wage taxes	4.50
Miscellaneous (other taxes, medical, trailer insurance, plumbing, cleaning)	40.00
TOTAL	\$375.76

13. The plaintiff has an outstanding debt to the Fulton County Bank in the amount of \$700.00. No terms of this debt were put into evidence, and consequently we will not include this item with the plaintiff's monthly expenses. The plaintiff has apparently borrowed \$1,745.00 from her elder son. There

were no stated terms on this obligation, and the plaintiff's duty to pay is apparently more in the nature of a self-imposed moral obligation than a legal one. Therefore, we likewise will not include this item, nor allocate any part thereof, as a part of the plaintiff's monthly expenses.

14. The defendant resides in what had previously been the parties' marital home in Wells Tannery, Fulton County, Pennsylvania. The house has four rooms and a two-car garage, and the property upon which it is situated includes 45 acres of land. This real estate, including the house, is owned by the parties as tenants by the entireties.

15. The defendant is employed by the Pennsylvania Department of Transportation as an Operator 3. His gross pay at this time is \$214.87 per week. He testified that he did not know what his take-home pay is.

16. The defendant's normal monthly expenses are as follows:

Groceries	\$100.00
Gasoline (car)	60.00
Electricity	21.00
Telephone	6.00
Fuel oil (heat)	25.00
Truck insurance	9.00
House insurance	2.00
Medical	8.00
Real estate tax	20.83
House cleaning	48.00
TOTAL	\$299.83

17. The defendant has additional assets in the form of savings bonds. The plaintiff left thirty \$25.00 bonds, and the defendant, through a savings program at his place of employment, has purchased one \$25.00 bond every two weeks since June of 1976.

18. The defendant has had additional expenses in the form of attorney's fees, private detective's fees, and court expenses. These expenses were incurred in a prior divorce action (commenced by the defendant herein), and in the aforementioned criminal action involving the parties. These costs are not included in the defendant's normal monthly expenses.

19. The parties, by their respective counsel, have stipulated that \$650.00 is a reasonable sum for counsel fees, expenses, and costs. The plaintiff seeks a sum-total of \$1,500.00 for alimony pendente lite, counsel fees, expenses and costs.

DISCUSSION

This proceeding is brought under the Act of 1963 as amended by the Act of 1974, June 27, P.L. 403, No. 139, Section 1; 23 P.S. 46, which provides in part:

"In case of divorce from the bonds of matrimony or bed and board, the court may, upon petition, in proper cases, allow a spouse reasonable alimony pendente lite, counsel fees and expenses."

The warding of alimony pendente lite, counsel fees, and expenses is a matter of discretion with the trial court. It is not mandatory or a matter of right. *Kayaian v. Kayaian*, 223 Pa. Super. 103, 106, 277 A. 2d 136, 138 (1972); *McCormick v. McCormick*, 202 Pa. Super. 250, 195 A. 2d 851 (1963); *Tumini v. Tumini*, 150 Pa. Super. 363, 28 A. 2d 357 (1942).

The rationale for the statutory relief of alimony pendente lite is to enable the spouse seeking it to maintain his or her action. *Kayaian v. Kayaian*, supra, at p. 106; *Jeffrey v. Jeffrey*, 228 Pa. Super. 64, 296 A. 2d 873, 874 (1972). "Alimony pendente lite is payable to a wife after the commencement of a divorce action for the purpose of providing her with an income during pendency of the action in order that she may not be put at a disadvantage financially by reason of her having brought the action or being required to defend it." *Wechsler v. Wechsler*, Pa. Super. ; 363 A. 2d 1307, 1310 (1976).

We note, parenthetically, that in view of the June 27, 1974 Amendment to 23 P.S. 46, the word, "spouse", should be substituted for "wife", and also that masculine pronouns are understood to be interchangeable with feminine ones, in any of the quotations cited from opinions herein cited.

The reason for the granting of reasonable counsel fees and expenses is much the same as that for awarding alimony

pendente lite. Such award is to be granted "in order 'to promote the administration of fair and impartial justice by placing the parties on a par in defending their rights.'" *Wechsler v. Wechsler*, supra, at p. 1310, citing *Moore v. Moore*, 198 Pa. Super. 349, 354, 187 A. 2d 714, 716 (1962).

It has been stated that "The same considerations are relevant whether a spouse seeks alimony pendente lite or counsel fees and expenses." *Wiegand v. Wiegand*, Pa. Super. ,363 A. 2d 1215, 1218 (1976). While these considerations have been stated in various ways by different courts, it is established that the factors to be considered are the need of the moving party, the ability of the respondent to pay, and the character situation and surroundings of the parties. *Wechsler v. Wechsler*, Pa. Super. , 363 A. 2d 1307 (1976); *Kayaian v. Kayaian*, 223 Pa. Super. 103, 297 A. 2d 136 (1972); *Jeffrey v. Jeffrey*, 228 Pa. Super. 64, 296 A. 2d 873 (1972).

The most important consideration must be the need of the moving party. This would seem only logical in view of the rationale, for Section 46 of the Divorce Law, supra. A line of cases expressly supports this view. See *Kochler v. Kochler*, 73 Pa. Super. 41, A. (1919); *Gross v. Gross*, 3 Bucks L. R. 254 (1954); *Hohweiler v. Hohweiler*, 8 Bucks L.R. 20 (1958).

The plaintiff in the case at bar makes approximately \$75.00 per week working as a waitress at the Cozy Inn in Chambersburg, Pennsylvania. The defendant has never paid any support to her. At the time she separated from the defendant on June 10, 1976, she had additional funds of between \$1,900.00 and \$3,350.00, as a result of her withdrawal of one-half of the parties' joint checking account and her redemption of between \$500.00 and \$1,950.00 worth of bonds, some of which had been held jointly by the parties and some in her own name. It appears that the plaintiff then used this money to make the down payment on the trailer in which she now lives. In addition, on October 28, 1976, the plaintiff removed approximately one-half of the furniture from the marital home, the value of which was estimated by the defendant to be \$4,000.00. It appears that this property has been left in storage by the plaintiff, and thus has not practically increased her personal estate.

It is well established that, while the need of the party seeking alimony pendente lite, counsel fees, and expenses is a

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factor of great importance in proceedings of this nature, this "does not mean, however, that she need be absolutely destitute and dependent upon charity." *Kuehnle v. Kuehnle*, 103 Pa. Super 415, 417, 157 A. 218, (1931); *Gron v. Gron*, 3 Bucks L. R. 254, 255; *Hohweiler v. Hohweiler*, 8 Bucks L. R. 20, 22 (1958).

We found that the plaintiff normally incurs expenses of approximately \$375.00 per month. By comparing her monthly earnings of approximately \$300.00 with her monthly expenses, we conclude that the plaintiff is operating at a monthly deficit. Her need for the award she seeks is thus clearly established.

The plaintiff formerly held a position with the Penn State Extension Office in which she netted approximately \$216.00 bi-weekly, plus compensation for travel expenses. The defendant, in his brief, makes much of the fact that there was no explanation for the termination of this higher-paying employment. He does so in an effort to bring this matter within the ambit of the rule which states that courts are not restricted to the actual earnings of the petitioner, but may also consider earning power or capacity when determining whether an award of alimony pendente lite, counsel fees, and expenses should be granted.

The circumstances surrounding the termination of plaintiff's employment was not put in evidence by either party. We note, however, that, of the cases applying this rule, none brought to our attention by the defendant or found by our own research are applicable to the case at bar. The "earning capacity rule" has been applied in cases where the respondent-husband has deliberately reduced his income in an attempt to defeat his wife's claim to alimony, *Hendel v. Hendel*, 109 Pittsburgh L.J. 199 (1961); where the respondent-husband was temporarily injured and out of work, *Frey v. Frey*, 36 Erie L. J. 25 (1951); and, where the petitioning wife was well-educated and quite capable of working but stated that she was unable to work, *Hammond v. Hammond*, 207 Pa. Super. 333, 217 A. 2d 855 (1966). We see no application of this rule in the instant case, where the plaintiff has continued to seek and retain employment. There is no indication whatsoever that the plaintiff intentionally reduced her income, by terminating her prior more remunerative employment, with an eye to this proceeding. In any event, the need of the petitioner is not the only factor to be considered.

The need of the plaintiff having been established, we next consider the ability of the defendant to pay alimony pendente lite, counsel fees, and expenses. The defendant is employed by the Pennsylvania Department of Transportation and has a weekly gross income of \$214.87. He testified that he did not know the amount of his weekly take-home pay. The defendant resides in a house owned by the parties as tenants by the entirety, which is located on 45 acres of land similarly owned. He possesses additional assets of approximately \$1,500.00 in U.S. Savings Bonds which he has accumulated through a savings program at his place of employment.

We found that the defendant's normal monthly expenses total approximately \$300.00. By comparing the defendant's gross monthly earnings of \$859.48 and his normal expenses, we find that he is able to pay the award sought by the plaintiff.

We turn now to a consideration of the factor of the character, situation, and surroundings of the parties. Few courts have discussed what this factor really means and how it is to be determined and evaluated. We interpret it to mean that a party should not be forced, by the fact of having brought or being required to defend a suit in divorce, to live in a fashion far removed and beneath the couple's former lifestyle. *Wiegand v. Wiegand*, Pa. Super., , 363 A. 2d 1215 (1976).

In the instant case, the parties had resided in a four room house on a 45 acre tract of land. While the defendant still lives there, the plaintiff now lives in a trailer on a rented space in a trailer park. Prior to their separation the parties lived comfortably on their combined income; the defendant alone now lives comfortably - the plaintiff operates at a monthly deficit. Granted, the plaintiff is the party who removed from the home and instituted the divorce action; nevertheless, she will not be forced to live in poverty while the defendant lives in comfort in a house on land co-equally owned by her as a tenant by the entirety.

We conclude that the plaintiff has sustained her burden of proof by demonstrating her need for alimony pendente lite, counsel fees, and expenses. The ability of the defendant to pay the same has likewise been established. The character, situation, and surroundings of the parties point unerringly to the propriety of granting the relief sought.

The parties have stipulated that \$650.00 is a reasonable sum for counsel fees and expenses. The plaintiff seeks a sum total of \$1,500.00 for alimony pendente lite, counsel fees, and expenses.

The amount of the award is within the discretion of the trial court. *Tarbuck v. Tarbuck*, 204 Pa. Super. 569, 205 A. 2d 709 (1965). *Cox v. Cox*, 187 Pa. Super. 177, 144 A. 2d 458 (1958). We conclude \$1,500.00, allocated \$650.00 to counsel fees and expenses, and \$850.00 to alimony pendente lite, since the commencement of this proceeding, is fair and reasonable to both the plaintiff and defendant.

ORDER

NOW, this 11th day of October, 1977, alimony pendente lite, counsel fees and expenses in the amount of \$1,500.00 are awarded to the plaintiff.

Costs to be docketed and follow the final verdict in the case at bar.

Exceptions are granted the defendant.

IN RE: A, MINOR CHILD AND B, HER MOTHER, C. P., Orphans' Court Div., Franklin County Branch, Adoption Doc. No. 29, 1977, Vol. 2, Page 325

Orphans Court - Adoption Act - Involuntary Termination of Parental Rights - Impediment to Visitation

1. There is an affirmative duty on the part of a parent to assert his parental rights and a parent is not relieved of his liability for inaction because of a slight impediment to visitation.
2. The fact that a father is not allowed, under the terms of his parole, to see a child's mother, does not relieve him of the duty to make contact with his child who lives with the mother.
3. A request by the father to his parole officer to have arrangements made for the father to see his child, without further inquiry after no action was taken, is insufficient to establish the assertion of parental rights.
4. In order to defend against a petition for involuntary termination of parental rights which is based on lack of contact with child, a parent is

required to show he asserted himself to take a place of importance in the child's life and that he exercised reasonable firmness in declining to yield to obstacles to contact the child.

George S. Glen, Esq., Attorney for Petitioner

Ruby D. Weeks, Esq., Attorney for Respondent

OPINION AND DECREE NISI

EPPINGER, P.J., October 26, 1977:

For the purposes of this opinion A is the minor child of B the mother and C the father. The mother filed a petition with the Court for the involuntary termination of the father's parental rights.

The matter came before the Court for hearing and both the mother and the father were present and represented by counsel. From the evidence submitted, the Court makes the following:

FINDINGS OF FACT

1. The mother and father are the parents of the child who was born out of wedlock on November 21, 1974.
2. The mother and father were never married.
3. The mother married on September 11, 1976, and the mother and husband desire to adopt the child.
4. Prior to that time the father was committed to a State Correctional Institution.
5. On October 8, 1976, the father was paroled from the State Correctional Institution to an in-residence program for alcoholic treatment. The father resided at the center until October 23rd.
6. Upon leaving the treatment center, the father took up residence in a hotel in Carlisle, Cumberland County, where he lived until early 1977.
7. The father then moved to an apartment in Carlisle.
8. During the period from October 8, 1976, until June 7, 1977, the date when the mother filed her petition for