Editor's Note: In a companion case, *Rife Motor Company, Inc. v. Valley Bus Lines*, C.P. Franklin County Branch, No. A.D. 1977-17, the Court incorporated by reference the foregoing Opinion, and entered the same Order.

COMMONWEALTH v. CARMACK, C.P., Franklin County Branch, No. 254 of 1977-NS

Nonsupport Action - Adulterous Relationship of Petitioner and Respondent - Connivance - Mental Illness as Defense - Interpretation of Helman v. Helman, Pa. Super , 371.2d 964 (1977)

1. In a nonsupport action, the respondent's conduct in abandoning the marital home, rebuffing the petitioner's attempt at reconciliation, and continuing an adulterous relationship with knowledge of the petitioner's severe mental depression does not amount to the corrupt intent necessary for the defense of connivance.

2. In a nonsupport action the petitioner's mental and emotional disturbance does not constitute a defense to her own adulterous conduct.

3. The fact that the petitioner in a nosupport action engaged in an adulterous relationship after the respondent had moved out of their marital home is not necessarily grounds for denial of the petitioner's claim to support.

4. *Helman v. Helman*, Pa. Super , 371 A.2d 964 (1977), instructs the lower courts that it would be an abuse of discretion to refuse to consider the respondent's misconduct in determining the petitioner's claim to support.

William C. Cramer, Jr., Esq., Assistant District Attorney, Attorney for Petitioner

William H. Kaye, Esq., Attorney for Respondent

OPINION AND ORDER

KELLER, J., December 14, 1977:

On August 12, 1977, Judith H. Carmack petitioned the Court for support for herself from her husband, Grandon H. Carmack, pursuant to the provisions of the Pennsylvania Civil Procedural Support Law of 1953. An order was signed setting Wednesday, September 7, 1977, as the date for hearing on the petition. The respondent-husband filed an answer denying liability for his wife's support. A full hearing on the matter was held on September 7, 1977. Briefs were filed on behalf of the parties and the Court heard argument on the questions of law on October 27, 1977. The matter is now ripe for disposition.

FINDINGS OF FACT

1. The petitioner, Judith H. Carmack, resided at 241 Lincoln Way West, Chambersburg, Pa. at the time of the hearing.

2. The respondent, Grandon H. Carmack, resided with his father at R. D. 4, Chambersburg, Pa. at the time of the hearing.

3. The petitioner and respondent were married on December 23, 1967.

4. The petitioner was thirty-four (34) years old at the time of the hearing, was unemployed and had no employment experience for the last two years.

5. The respondent was thirty-six (36) years old at the time of the hearing and in good health.

6. For the six years prior to July 9, 1977, the respondent was a manager of the B.P. Service Station on Loudon Street in Chambersburg, Pa., and with his brother-in-law was an owner of the business. The respondent's brother-in-law managed the finances of the service station and paid the respondent $85.00 per week for three weeks and withheld each fourth week's pay for "taxes".

7. The respondent terminated his business relationship with the service station on July 9, 1977, and was unemployed at the time of the hearing and testified that he had been resting but expected to look for employment promptly.

8. The respondent is capable of doing general repairs and general mechanical work on automobiles.

9. The respondent left his wife and the marital home on July 10, 1977, and has refused petitioner's request for a reconciliation.

10. The petitioner did not feel that there were any serious problems with the marriage. She repeatedly testified that she loved the respondent and desired a reconciliation.

11. Prior to the separation the respondent worked long hours at the service station and the petitioner would take respondent some of his meals and help to clean the service station.

12. The respondent testified that the petitioner had,

throughout the marriage, been unreasonably jealous, accused him of improper conduct with other women, including customers, "jumped all over him" in the presence of others, including customers, and regularly called him profane names and addressed him with profanity which she knew was offensive to him. In addition, the respondent testified that the petitioner had on one occasion threatened him with a knife during 1976, and about one year before the separation had threatened to kill him and placed the respondent's shotgun and shells by the bed.

13. The respondent testified that he knew a Mrs. X as a customer and as a neighbor who lived near the service station, and that he was friendly with her as a neighbor, but that she did not cause problems in the marriage of the parties, despite the fact that petitioner had complained many times about Mrs. X.

14. On cross-examination the respondent conceded that primarily in the two years preceding the separation, he had told the petitioner that he was going fishing or hunting, but, in fact, did not engage in those sports.

15. Respondent's cousin was an extremely regular visitor and part-time helper at the service station and could recall only one occasion when he heard the petitioner address the respondent profanely. He did hear the petitioner object to respondent waiting on female customers and observed that she made sarcastic remarks.

16. On cross-examination the cousin testified that there were times when he knew that the respondent had told the petitioner he was going fishing, but the cousin delivered respondent to the home of Mr. X and left him there for periods of up to one and one-half hours. At those times Mrs. X was separated from her husband and lived in the home with her daughter. When the cousin would pick up the respondent, there were times when he would brag about having sexual relations with Mrs. X.

17. The petitioner testified that respondent's relationship with Mrs. X was the cause of many of their problems, and the subject of many of her accusations during the preceding two and one-half years. She testified that she suspected the existence of a sexual relationship between her husband and Mrs. X, but that she continued to have sexual relations with her husband despite that suspicion.

18. On day following the separation, the petitioner attempted to commit suicide and was hospitalized at the Chambersburg Hospital for a period of time. She attempted to

commit suicde again after her discharge from the hospital. The petitioner had been attending the Franklin/Fulton County Mental Health Center every day from 9:00 a.m. to 3:00 p.m. to secure assistance with her emotional and psychiatric problems.

19. Since the separation the petitioner has developed a relationship with a Mr. Y and permitted him to spend the night with her at her apartment because she "needed someone to care about me". She admitted having sexual relations with him on two occasion because she "needed someone to love me". Mr. Y stayed at the petitioner's apartment on the night preceding the hearing because she needed someone to talk to, but she denied having sexual relations with him on that occasion.

20. The respondent was aware of the fact that his wife had established a relationship with Mr. Y, for he testified that he had observed a man enter his wife's apartment at about 10:00 p.m. on August 29th and 30th, 1977, and did not observe him leave by 12:30 a.m. on the morning of August 30th, and did observe him leave at 6:43 a.m. on the morning of August 31st.

21. The petitioner denied that she had any plans to commence living with Mr. Y and testified that he dates other women. From this, we conclude the relationship was a casual one.

22. The respondent was aware of the fact that his wife was going to the Franklin/Fulton Mental Health Center after the separation, and of her attempted suicides.

23. The petitioner and respondent had sexual intercourse at an unspecified date after the July 11th separation.

DISCUSSION

The petitioner and the respondent have been married for ten years. They have been separated since July 10, 1977 when the respondent left the marital home. The respondent testified that the petitioner made his life miserable, primarily by her unreasonable jealousy. The evidence shows, however, that the petitioner's jealousy was not altogether unreasonable, for there is sufficient basis to infer that the respondent was carrying on an improper relationship with another woman for some time prior to the separation of the parties. Following the separation of the parties, the petitioner admitted having twice engaged in sexual intercourse with a man other than the respondent. The sole issue before the Court is whether the petitioner's post-separation adultery is grounds for denial of support.

The law is well established that the only basis for withdrawal of the husband's duty to support his wife is conduct on her part which would constitute grounds for divorce. *Commonwealth ex rel. Holderman v. Holderman.* 230 Pa. Super. 125, 326 A. 2d 908 (1974); *Commonwealth v. Eifert,* 226 Pa. Super. 98, 311 A. 2d 718 (1973). The petitioner's adultery clearly presents grounds for divorce. Act of May 2, 1929, P. L. 1237, Sect. 10; as amended March 19, 1943, P. L. 21 Sect. 1 (23 P. S. sect. 10).

Neither condonation nor connivance may successfully be asserted by the petitioner as a defense to her adultery. Act of May 2, 1929, P. L. 1237 Sect. 52 (23 P. S. Sect 52). Condonation, the abandonment by a spouse of an action for divorce on the grounds of adultery by a renewal of the marital relationship or by a single act of sexual intercourse after knowledge or belief that the adultery has occurred, is not available here because the petitioner testified that, although the parties did engage in sexual intercourse at an unspecified time after their separation, that act did not occur at a time after her adultery.

Connivance, the corrupt consenting by one spouse to the adultery of the other, likewise is unavailable as a defense. The Commonwealth contends that the respondent's conduct in abandoning the marital home, rebuffing all of the petitioner's attempts at reconciliation, and continuing his own adulterous affair with full knowledge of his wife's severe depression and loneliness, as evidenced by her attempts at suicide, constitute subtle and indirect connivance. While this is certainly reprehensible and unacceptable conduct, we do not find that it is tantamount to the corrupt consent to the spousal adultery that is required for the defense of connivance. We quote with approval from Judge Spaeth's dissenting opinion in *Hellman v. Hellman,* Pa. Super. , 371 A. 2d. 964, 975 (1977):

> "One spouse may not disclaim responsibility for his or her conduct merely because the other spouse did not necessarily disapprove. The question is not whether a husband allowed his wife to do that which she did, but whether he induced her action, and corruptly consented to it."

The District Attorney also asserts that the petitioner's mental and emotional disturbance, as shown by her attempts at suicide and her continued need for out-patient treatment at the Mental Health Center, presents a defense to her adulterous conduct. We cannot agree. The law in Pennsylvania in this matter is well stated by Judge Woodside in *Manley v. Manley,* 193 Pa. Super. 252, , 164 A. 2d 113, 120 (1960):

> "Insanity is a defense to an action for divorce brought against a wife on the ground of adultery if it affirmatively appears from all of the evidence that at the time the defendant committed adultery she did not know the nature and consequences of her acts, or have the ability to distinguish between right and wrong."

There is nothing resembling this degree of mental illness in the instant case, and the defense of insanity is not available to the petitioner.

The statutory defenses to adultery not being available to the petitioner, we must now examine the question whether the conduct of the respondent justifies the entry of an order for support which would otherwise be denied because of the petitioner's conduct furnishing grounds for divorce.

"Adultery may be inferred from facts and circumstances. '*Campbell v. Campbell*', 185 Pa. Super. 474, 477, 137 A. 2d 830. Under the doctrine known as the 'inclination and opportunity rule,' adultery will be presumed where these elements are shown: (1) The adulterous disposition or inclination of the defendant and co-respondent, and (2) the opportunity created to satisfy their adulterous inclination." *Levitz v. Levitz,* 199 Pa. Super. 327, 185 A. 2d 620 (1962). Although the respondent herein stated that his relationship with Mrs. X was merely a friendly one "as a neighbor", and that he knew of nothing he did to justify the petitioner's jealousy, he admitted having told the petitioner that he was going hunting or fishing when he in fact did not do so. Leroy Fleagle, the respondent's cousin who worked part-time at the service station previously managed by the respondent, testified that he knew that there were times when the respondent had told the petitioner he was going fishing when, in reality, Mr. Fleagle had delivered the respondent to Mrs. X's home and left him there for up to one and one-half hours. At those times Mrs. X was separated and lived alone with her daughter. Mr. Fleagle also testified that the respondent at times bragged about having had sexual relations with Mrs. X. Adultery on the part of the respondent can be reasonably inferred from these facts and circumstances.

The petitioner's adulterous conduct occurred after the respondent had abandoned the marital home, had himself engaged in an adulterous relationship, and had rebuffed all attempts by the petitioner at reconciliation. We must now determine whether the two instances of adultery engaged in by the petitioner cause her to forfeit her right to receive support from the respondent.

In *Commonwealth ex rel. Keeth v. Keeth*, 223 Pa. Super. 96, 289 A. 2d 732, 733 (1972), the petitioner-wife found her husband-respondent with another woman and slapped the woman, after which the husband in turn slapped the wife and then moved out of the marital home. The court stated that "The only legal cause which would justify a refusal of the husband to support his wife is conduct of the wife which would support valid grounds for divorce.... When the husband leaves the common abode, the wife need not establish facts which would entitle her living apart from her husband. *Commonwealth ex rel Korn v. Korn*, 204 Pa. Super. 153, 203 A. 2d 341 (1964)." Thus, the fact that the petitioner, by her own commission of adultery, would be prevented from asserting the respondent's adultery as grounds for divorce by reason of the defense of recrimination, does not, in and of itself, preclude her from seeking support.

The position taken by the respondent, that the fact of his wife's adultery bars her from any support regardless of his conduct, was the position taken by many of the courts of Pennsylvania, prior to the recent case of *Hellman v. Hellman*, Pa. Super. , 371 A. 2d 964 (1977). The authority most commonly cited for the pre-Hellman position was *Commonwealth ex rel. Crabb v. Crabb*, 119 Pa. Super. 209, 180 A. 902 (1935) and *Brobst v. Brobst*, 173 Pa. Super. 171, 96 A. 2d 194 (1953).

In *Crabb, supra*, at p. 703 the court stated "We are at a loss to understand why or how the effect of the husband's adulterous relations can be construed to allow or impart leave, license or excuse to the wife to subsequently enter into similar relations." Similarly, in *Brobst* it was held that the court below did not abuse its discretion by vacating the payment of support to the wife "under the circumstances." *Brobst, supra*, at p. 174, 96 A. 2d at 195. *Commonwealth ex rel. McCuff v. McCuff*, 196 Pa. Super. 320, 175 A. 2d 124 (1961) followed the same rationale.

The Superior Court in *Hellman* held that the husband's adultery may be relevant to a determination of the wife's right to support, and disaffirmed the language to the contrary in *Crabb* and *Brobst*. In doing so, the court pointed out that the language in those cases was not the holding; i.e., that the language in *Crabb* and *Brobst* "implied in dicta that [the court] does not consider a husband's adultery to be relevant to a determination of a wife's right to support. Notwithstanding this language, however, this court has never instructed the court below to refuse to consider such evidence in its review of a particular case. To the contrary, this court had implied in all

of its *holdings*, particularly in *Brobst*, that such evidence is properly within the lower court's scope of review." *Hellman, supra* at p. 967. (Emphasis theirs.)

Hellman does not then present a drastic change in the law on this point; it instead clarifies the law and disaffirms prior dicta which conflicted with earlier holdings and caused much confusion. The respondent contends that *Hellman* is distinguishable on its facts from the instant case, because in *Hellman*, the husband had allegedly attempted to encourage his wife to have an extramarital affair so that he could avoid paying support. The court in *Hellman* was concerned that, if this evidence had been considered by the trial court, it might have shown the husband guilty of connivance and led to a different result. We are of the opinion that this factual distinction is immaterial and that the rules of law stated in *Hellman* do indeed apply to the instant case. The law as stated in *Hellman* is couched in broad terms and may properly be extended beyond the specific facts of that case.

We conclude *Hellman* instructs us that we would abuse our discretion should we refuse to consider the respondent's misconduct. The court states that "the termination [and, a fortiori, the entry] of an order of support rests within the discretion of the court below and depends upon the equities of the case. The Act of May 23, 1970, P. L. 227 sect. 1 (48 P. S. sect. 131). The Act of June 19, 1939, P. L. 440, No. 250, sect. 1 (17 P. S. sect. 263)." *Id.* at p. 967.

The petitioner admits having twice committed adultery. She did so, however, only after the respondent engaged in an adulterous relationship, abandoned the marital home and refused all of the petitioner's attempts at reconciliation. Part of his conduct was engaged in with awareness of the petitioner's mental and emotional upset and the fact that she had twice attempted suicide. We unequivocally agree that "an act of adultery on the part of the husband does not give a wife, unrestrained by morality or personal dignity, a right to act forever in a licentious manner and still command support from her husband." *Hellman, supra*, at p. 967. However, those are not the circumstances in the instant case. The petitioner stated that she permitted Mr. Y to spend the night with her at her apartment because she "needed someone to care about" her. She admitted having had sexual relations with him on two occasions because she "needed someone to love" her.

The petitioner was a lonely and mentally disturbed woman who engaged in wrongful and improper relations on two occasions. While we in no way condone her adulterous acts

and misdeeds" (*Hellman*, *supra*, at p. 968, f.n. 2) we do consider the respondent's misconduct in determining the petitioner's claim to support. As the court in *Hellman* stated at p. 967:

> "Support laws . . . were not promulgated for the purpose of rewarding a wife's good behavior. An order of support seeks to secure a reasonable allowance for the maintenance of the wife so that she may not become a charge of the state. Thus, . . . we must not focus our attention solely on the wife's conduct in reviewing her right to support. We must look at all the circumstances present in each case. If we were to mechanically apply the appelee's inflexible rule, if we did not view each case in its entirety, then certainly we would eventually occasion an inequitable termination [or refusal] of support"

The facts and circumstances of this case lead to the conclusion that the petitioner has not forfeited her right to support from the respondent. The need of the petitioner for the support is established, as is the earning capacity of the respondent to pay. An order for support will be entered in favor of the petitioner effective September 12, 1977.

ORDER

NOW, this 14th day of December, 1977, it appearing to the Court that Grandon H. Carmack, respondent, owes a duty of support to his wife and has a net weekly earning capacity of $64.00, and that affiant has no net take home pay;

IT IS ORDERED that respondent pay the cost of these proceedings and enter into his own bond in the amount of $3,000.00 to guarantee faithful compliance with this order, and commencing Monday, September 12, 1977, pay to Judith Carmack via the Collection Officer of this Court, the sum of $20.00 plus $.20 service charge and a like sum of $20.20 each Monday thereafter until further order of the Court for the support of Judith Carmack.

BEEGLE, et al v. GREENCASTLE—ANTRIM SCHOOL DISTRICT AND GREENCASTLE-ANTRIM SCHOOL BOARD, C.P., Franklin County Branch, Vol. 7, Page 134, In Equity

Equity - Preliminary Injunction - Review by Court En Banc - Right to File Amended Pleading - Discretion of School Board

1. The Court consisting of a single judge sitting in equity, sustained the defendants' preliminary objections, in the nature of a demurrer, to the plaintiffs' complaint, whereupon plaintiff filed exceptions to the decision of the Court and asked for a hearing by the full court en banc, which in Franklin County consists of two judges.

2. No rule of court or statute requires that preliminary objections be considered by the court en banc.

3. In that a single judge has the power to grant summary judgment, he also has the power to dismiss a case on preliminary objections in that both actions bring about the same end result.

4. There is no authority to file exceptions to a court's ruling on preliminary objections.

5. If a party is seeking to have his preliminary objections heard by the court en banc he should raise this issue at the time of argument when it would be more convenient for the Court to grant his request. If the party does not raise the issue at the time of argument he cannot later complain that his case was not heard by the full court.

6. The courts are not super school boards with the authority to substitute their judgment for that of the duly elected members of the school board. It is only when the school board transcends the limits of its legal discretion that the court may issue an injunction.

William J. Peters, Esq., Attorney for Plaintiffs

Jan G. Sulcove, Esq., Attorney for Defendant, Greencastle-Antrim School Board

Rudolf M. Wertime, Esq., Solicitor for Greencastle-Antrim School District Attorney for Defendant, School District

OPINION AND ORDER

EPPINGER, P.J., February 27, 1978:

This action in equity to restrain a school district and the school directors (the district) from closing a school was filed by seven resident taxpayers (residents) of the district. Preliminary objections were filed, a demurrer and a motion to strike. At the time set for the hearing on the application for a preliminary injunction, counsel for the district asked for an immediate decision on the preliminary objections.

Ruling was reserved, counsel were given an opportunity to file briefs and argue the case, and testimony was taken. Later,