cannot now claim that it had no knowledge of what was occurring.

This court has carefully considered all of the arguments made and has taken special note of the events surrounding the raid and must find that the truck seized was used for the unlawful sale of alcohol and that Chambersburg Beverage knew or should have known of such use. Chambersburg Beverage's motion for return of the truck is denied and the Bureau's petition for forfeiture is granted.

ORDER OF COURT

October 18, 1990, the motion of Chambersburg Beverage, Inc. for return of the above captioned 1982 Ford truck is denied, and the Bureau of Liquor Control Enforcement for forfeiture of the 1982 Ford truck is granted.

CARR V. AUTO CLUB OF SOUTHERN PENNSYLVANIA, ET AL., C.P. Franklin County Branch, No. A.D. 1990-272

Life Insurance - Retired Employee - Conversion Option - Demurrer

1. Where an insured does not receive notice of a conversion option upon retirement from employment, 40 Pa. CSA, Sec. 532.7 grants insured an additional sixty days beyond the time limit in the policy.

2. A demurrer to the plaintiff's complaint will be granted where insured failed to convert his life insurance policy within the statutory time frame and coverage lapsed prior to insured death.

Jay H. Gingrich, Esq., Attorney for Plaintiff
Douglas B. Marcello, Esq., Attorney for Defendant, Commercial Union Life Insurance Company of America
Robert H. Griffith, Esq., Attorney for Auto Club of Southern Pennsylvania.

OPINION AND ORDER

KELLER, P.J., October 25, 1990:

Gloria B. Carr, plaintiff, commenced this action on June 6, 1990, by filing a complaint against the defendants, Auto Club of Southern Pennsylvania (defendant Auto Club) and Commercial Union Life

Insurance Company of America (defendant Commercial). The plaintiff is seeking to recover damages under a life insurance policy which was issued by the defendant Commercial and covered employees of the defendant Auto Club; one of whom was the late husband of the plaintiff.

The defendant Commercial filed preliminary objections on July 30, 1990 in the nature of a demurrer and a motion to strike the plaintiff's complaint. Briefs were received from the plaintiff and the defendant Commercial. Oral arguments were held on October 4, 1990. The defendant Auto Club neither filed a brief nor took part in oral arguments since it did not take a position concerning the preliminary objections filed by its co-defendant. This matter is now ripe for disposition.

The defendant Commercial demurs to the complaint on the ground that the plaintiff has failed to state a cause of action against it for the following reasons:

(a) Plaintiff's decedent did not convert the policy within the time required by the policy;

(b) Plaintiff's decedent did not convert the policy within the time required by the applicable Pennsylvania statute, including but not limited to 40 P.S. §532.7;

(c) The facts alleged in plaintiff's complaint do not support a cause of action.

Initially we note the analytical guidelines we must be mindful of when reviewing each party's arguments.

> Preliminary objections in the nature of a demurrer admit as true all well pleaded, factual averments and all inferences fairly deducible therefrom. Conclusions of law, however, are not admitted by a demurrer. It is in this light that the complaint must be examined to determine whether it sets forth a cause of action which, if proved by the plaintiff, would entitle him to the relief he seeks. If the plaintiff does set forth a course of action on which he is entitled to relief upon proof, the demurrer cannot be sustained. Conversely, a preliminary objection in the nature of demurrer is properly sustained where the complaint has filed to set forth a cause of action. *Cunningham v. Prudential Property & Casualty Insurance Co.,* 340 Pa. Super. 130, 133, 489 A.2d 875, 877 (1985) (citations ommitted).

Higgins v. Clearing Mach. Corp. 344 Pa. Super. 325, 496 A.2d 818 (1985), appeal denied.

Additionally, when considering a preliminary objection in the nature of a demurrer, every material and relevant fact well pleaded in the complaint, and every inference fairly deductible therefrom are to be taken as true. *See, Creeger Brick v. Mid-State Bank,* 385 Pa. Super. 30, 560 A.2d 151 (1989), *DeSantes v. Swigart,* 296 Pa. Super. 283, 442 A.2d 770 (1982) and *Otto v. American Mutual Ins. Co.,* 241 Pa. Super. 423, 361 A.2d 815 (1976). Only where it appears with certainty that, upon the facts averred the law will not permit recovery, will a demurrer be sustained. If any doubt exists as to whether the demurrer should be sustained, the doubt should be resolved by refusing to sustain the demurrer. *Creeger, supra.*

The plaintiff's late husband was employed by the defendant Auto Club which provided coverage under a group life insurance policy to its employees through the defendant Commercial. The policy allowed employees to convert the group insurance coverage into individual coverage for a period of 31 days after employment terminated. Mr. Carr retired on January 8, 1989, and never received notice of his conversion option.

Title 40 Pa. C.S.A. §532.7 states as follows:

> If any individual insured under a group life insurance policy hereafter delivered in this State becomes entitled under the terms of such policy to have an individual policy of life insurance issued to him without evidence of insurability, subject to making of application and payment of the first premium within the period specified in such policy, and if such individual is not given notice of the existence of such right at least fifteen days prior to the expiration date of such period, then, in such event the individual shall have an additional period within which to exercise such right, but nothing herein contained shall be construed to continue any insurance beyond the period provided in such policy. This additional period shall expire fifteen days next after the individual is given such notice but in no event shall such additional period extend beyond sixty days next after the expiration date of the period provided in such policy. Written notice presented to the individual or mailed by the policyholder to the last known address of the individual or mailed by the insurer to the last known address of the individual as furnished by the policyholder shall constitute notice for the purpose of this section.

This section lengthens the conversion period, thus; Mr. Carr would have received an additional sixty (60) days in which he could have converted the policy. This would extend his conversion period through April 9, 1989. Mr. Carr died on May 21, 1989 without converting his policy.

In *Harris v. St. Christopher's Hospital, Etc.* 291 Pa. Super. 451, 436 A.2d 203 (1981), the insured died 71 days after her employment was terminated without converting her policy. Since her employer failed to notify her regarding the conversion option, the period of time in which she could convert was extended to 91 days - 31 days as provided in the policy and a additional 60 days as mandated by statute. The Court held:

> "Here, the insured died within the total 90-day period. *Had she died at a later time, not within the 90 days, then our holding would be different.* See McGinnis v. Bankers Life Co., 39 App. Div. 393, 334 N.Y.S. 2d 270 (1972)."

(emphasis ours). *McGinnis, supra,* the cited case is factually similar to the one at bar. It was decided under the New York conversion option statute which is identical to 40 Pa. C.S.A. §532.7 in all relevant provisions. In that case, the insured also did not receive notice of the conversion privilege, therefore; she had a total of 90 days in which to convert her group insurance coverage into individual coverage. The Court held because the insured met his demise in excess of 90 days after termination of his employment, all rights had expired under the policy and the insurer was not liable to the plaintiff beneficiary.

Based on the foregoing, we are persuaded that the plaintiff has not alleged facts sufficient to set forth a cause of action against the defendant Commercial in that Mr. Carr failed to convert his life insurance policy in the requisite period of time. Thus, coverage lapsed prior to his demise and plaintiff is not entitled to recover damages. We will sustain the defendant Commercial's demurrer and grant leave to the plaintiff to amend her complaint.

ORDER OF COURT

NOW, this 25th day of October, 1990, the preliminary objections of Commercial Union Life Insurance Company of America in the nature of a demurrer is sustained.

The plaintiff is granted leave to file an amended complaint within twenty (20) days hereof.

Exceptions are granted the plaintiff.

HARBAUGH V. KELLER, C.P. Franklin County Branch, No. F.R. 1988-664

Custody - Civil v. Criminal Contempt - Right to Purge

1. If a person is found in violation of a partial custody or visitation order, unlike other types of civil contempt, no provision must be included allowing the party to purge himself of the contempt.

R. Mark Thomas, Esquire, Attorney for Plaintiff
Jonathan D. Fenton, Esquire, Attorney for Defendant
Teresa Wolfgang, Chief Domestic Relations Officer

OPINION AND ORDER

WALKER, J., October 26, 1990;

Procedural History

Plaintiff Terry L. Harbaugh (hereinafter "plaintiff") and defendant Tonya L. Keller ("defendant") are the parents of Jackie Marie Harbaugh ("Jackie"), born August 17, 1988. Plaintiff filed a complaint for custody on December 12, 1989. On February 15, 1990, an order of court for joint legal custody pending a custody hearing was entered by this court awarding plaintiff partial custody on alternate weekends on Saturday or Sunday, at his election.

Plaintiff was to exercise partial custody of Jackie on Father's Day, June 17, 1990. However, the defendant informed him that day that the child was ill and could not go with him. Plaintiff, alleging that the child was not sick, filed a petition for contempt for failure to comply with the custody/partial custody order on June 21, 1990.

Plaintiff, after exercising partial custody on June 24, 1990, failed to return the child. Defendant filed a petition for contempt on June 27, 1990, and, on that date, Judge William H. Kaye issued an order directing plaintiff to return the child to her mother, giving defendant sole physical custody of the child pending a custody

hearing and vacating that section of this court's previous order granting plaintiff partial custody on alternate weekends. Judge Kaye also ordered that defendant's paramour, Jeffrey L. Pine ("Pine"), who had been charged with possession with the intent to deliver, not have any contact with the child while the charges were pending against him. Plaintiff returned the girl on June 28, 1990.

A contempt hearing was held on July 17, 1990 and September 25, 1990.

Discussion

This is an unfortunate, yet all too common, situation in which two parents use a child to serve their own selfindulgent interests. To be certain, it is the child who is put in the middle of the senseless battle and who truly suffers. Despite its concerns, however, this court is compelled to rule only on the petitions now before it.

This court must first address the issue of whether the present petitions were properly brought in the nature of petitions for civil contempt or whether, as counsel for the defendant now maintains, the petitions should have been brought as criminal contempt petitions.

Section 4346 of the Domestic Relations Code provides:

> A party who willfully fails to comply with any visitation or partial custody order may, as prescribed by general rule, be adjudged in contempt. Contempt shall be punishable by any one or more of the following:
>
> (1) imprisonment for a period not to exceed six months;
> (2) a fine not to exceed $500;
> (3) probation for a period not to exceed six months.

23 Pa. C.S.A. Section 4346 (a).

The Superior Court held in *Vito v. Vito,* 380 Pa.Super. 258, 551 A.2d 573 (1988), that when parties are guilty of contempt for isolated, past violations, the contempt is criminal in nature and the party must be entitled to all of the essential procedural safeguards that a criminal defendant is afforded. The court also explained that civil contempt may only be punished by a fine or imprisonment that