

10. The parcels shall be sold subject to limitations of use as provided by existing zoning ordinances of the respective Boroughs and/or Townships involved excepting coal and mining rights as heretofore conveyed and subject to such building restrictions and other exceptions, reservations, and restrictions as may appear of record.

SHIPPENSBURG AREA SCHOOL DISTRICT

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6/24, 7/1, 7/8/88

MILLER v. MILLER, C.P. Franklin County Branch,  
No. FR 1987-5685

*Support - Request to Leave - Voluntary Withdrawal*

1. Where a wife requests her husband to leave the marital home, the husband is under no compulsion to leave and if he does so, he owes obligation of support to his wife.

*John W. Frey, Esq., Counsel for Plaintiff*

*Janice M. Hawbaker, Esq., Counsel for Defendant*

WALKER, J., December 9, 1987:

The parties to this action are husband and wife. This matter is before the court on the support hearing appeal of the plaintiff, Dorothy G. Miller. This court finds that the defendant, Patrick L. Miller, shall pay the plaintiff support in the amount of twenty five dollars per week. This was the amount stipulated to by the parties in the event that this court should find a duty of spousal support.

A hearing on this matter was held on November 14, 1987, and briefs were subsequently filed. The pertinent facts are now set forth. The parties were married on August 7, 1980. This is not the first marriage for either party. The plaintiff has two children from a prior marriage, ages sixteen and seventeen years. The marital home is owned by the plaintiff's mother, who lived in the house with the parties, and the two children. Marital difficulties began approximately three years ago as a result of the defendant's drinking. These marital difficulties reached a zenith on March 13, 1987, when the defendant returned home in a drunken condition and an argument ensued. The argument ended by the plaintiff asking the defendant to leave the marital home, which the defendant did. The plaintiff testified that she made this request because the defendant drank too much.

On August 18, 1987, the plaintiff filed a complaint for support with the Franklin County Domestic Relations Office. A hearing was held on September 23, 1987. The hearing officer then issued an order dismissing the plaintiff's complaint for support as the officer determined that the plaintiff has requested the defendant to leave the marital home. The hearing officer's report was approved by the court on September 24, 1987. On October 5, 1987, the plaintiff filed a demand for a hearing, which was held on November 14, 1987, and is the matter presently before the court.

The law is well settled that when a wife voluntarily withdraws from the marriage without an adequate legal reason her right to support is defeated, unless the husband consented to the separation. *Commonwealth v. Sincavage*, 153 Pa. Super. 457, 34 A.2d 266 (1943); *Commonwealth ex rel. Lebowitz v. Lebowitz*, 227 Pa. Super. 593, 307 A. 2d 442 (1973). As counsel state in their briefs, there is little case law discussing spousal support where the spouse seeking support requested the other spouse to leave. However, there are at least two Pennsylvania Superior Court cases squarely on point. *Commonwealth ex. rel. Myerson v. Myerson*, 160 Pa. Super. 432, 51 A. 2d 350 (1947); *Commonwealth ex. rel. Testa v. Testa*, 164 Pa. Super 413, 65 A. 2d 257 (1949). Both of these cases focus on the consensual nature of the separation.

The lower court in *Myerson* held that since the wife required her husband to leave the marital home, she was not entitled to support. The Superior Court disagreed. "While it is admitted that the [wife] asked her husband to leave, he was under no legal compulsion to do so." *Myerson*, 160 Pa. Super at 434, 41 A. 2d at 351. The Superior Court dismissed the order of the lower court denying the wife support and entered an order granting support to the wife.

In *Testa*, the issue was whether or not the defendant was under a duty "to support his wife because she requested or demanded that he should leave" the marital home. *Testa*, 164 Pa. Super. at 414, 41 A. 2d at 258. The *Testa* court stated that if the defendant "left because his wife requested him to do so, this would not relieve him of the duty of supporting her; he was under no compulsion to leave." *Id.* at 414-15, 65 A. 2d at 258. The Superior Court affirmed the order of the lower court granting the wife support.

In the instant case, as in the *Myerson* and *Testa* cases, the defendant left the marital home because his wife asked him to do so. Applying the case law, the defendant owes a duty of support to the plaintiff since he consented to the separation. Indeed, the defendant testified at the hearing that he was not interested in returning to the marital home, rather only in obtaining a divorce. As the court finds that the defendant consented to the separation, the court will not address the issue of whether the plaintiff had an adequate legal reason for voluntarily withdrawing from the marriage.

Based upon the foregoing discussion, this court finds that the defendant has a duty of spousal support to the plaintiff in the amount of twenty-five dollars per week.

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## ORDER OF COURT

December 9, 1987, the court finds that the defendant owes a duty of spousal support to the plaintiff and directs the defendant to pay the sum of twenty-five (\$25.00) per week to the defendant.

GSELL V. GSELL, C.P. Franklin County Branch,  
No. F.R. 1983 - 774

*Alimony - Social Security Benefits - Parker v. Parker, 335 Pa. Super. 348 (1984).*

1. Social security benefits are properly considered "income" for purposes of determining alimony.
2. Where a party refuses to apply for social security benefits, his right to benefits is considered in determining earning capacity.

*David C. Cleaver, Esq.* Counsel for Plaintiff  
*William C. Cramer, Esq.* Counsel for Defendant  
*Timothy S. Sponseller, Esq.* Master

WALKER, J., February 20, 1987\*:

In July, 1985, plaintiff, Grant Gsell, and defendant, Elizabeth Gsell, were granted a divorce. The court retained jurisdiction over the issues of equitable division of marital property, alimony pendente lite, counsel fees and expenses, and permanent alimony. Master's hearings were held on February 6th and 19th, 1986, and a report was filed on August 21, 1986. Defendant filed exceptions to the report on August 29, 1986, regarding the denial of permanent alimony and the distribution of the marital property. Both sides briefed and argued these matters, which are now properly before this court.

First, defendant takes exception to the master's recommendation that no alimony should be granted to her. An award of alimony is justified if the party seeking alimony lacks sufficient property to provide for his or her reasonable needs and he or she is unable to support themselves through appropriate employment.

\*Editor's Note: See supplement opinion in this case, published immediately following the instant report of Opinion and Order.

23 Pa. C.S.A. §501 (a). It is uncontested here that, due to her ill health and her lack of education or training, defendant is unemployable. The master found, and plaintiff concedes, that the \$273 a month that defendant receives from Social Security is insufficient for her to support herself. As such, defendant is an appropriate candidate for alimony.

The next determination to be made is as to the necessity of alimony, its nature, amount, duration, and manner of payment. 23 P.S. §501(b). The first factor to be considered is "the relative earnings and earning capacities of the parties." *Id.* §501(b) (1). In doing so, "the sources of income of both parties including but not limited to medical, retirement, insurance or other benefits" must be taken into account. *Id.*, §501(b) (3). Here, plaintiff's only potential source of income is Social Security benefits. The master concluded, however, that since the plaintiff is not currently receiving these benefits and since he cannot be forced to apply for them, that he has neither earning nor earning capacity. On this basis, alimony was denied.

The master erred in two respects. Plaintiff is entitled to \$570 a month in Social Security benefits and this amount, whether he chooses to apply for it or not, is his earning capacity. A party may not deliberately reduce his level of income in order to reduce his alimony obligation. *Pacella v. Pacella*, 342 Pa. Super. 178 (1985).

Secondly, Social Security benefits are properly considered "income" for the purposes of determining alimony. As cited above, §501(b) (3) of the Divorce Code specifies that "sources of income" is to include such things as "medical, retirement, insurance or *other benefits (s)*". 23 P.S. §501 (b) (3). Social Security benefits fall into this last category. Furthermore, at least one Superior Court case suggests that Social Security benefits are to be considered when awarding a party alimony. *See, Geyer v. Geyer*, 310 Pa. Super. 456 (1983). Also, various Common Pleas courts have explicitly taken these kinds of benefits into account when granting alimony. *See, Clark v. Clark*, 45 Fayette L.J. 3 (1980) (Social Security benefits); *Orange v. Orange*, 33 Westmoreland L.J. 111 (1980) (workmen's compensation and disability benefits). Based on the expansive language of §501(b) (3), case law, and the equities of the situation, this court believes that Social Security benefits should be considered a source of income when calculating parties' earning capacities in an alimony dispute.

The remaining question is as to the amount of alimony to be ordered. In fixing that amount, the court must work economic justice and achieve a reasonable and compassionate result. *Pacella*,