IS EVIDENCE OF REGISTRATION AND OWNERSHIP OF THE VEHICLE PREJUDICIAL, WHEN THE COURT SPECIFICALLY INSTRUCTS THE JURY THAT OWNERSHIP ALONE IS NOT EVIDENCE OF OPERATION OF SAID VEHICLE; AND DID THIS COURT ERR BY ADMITTING SUCH EVIDENCE?

The defendant cites *Commonwealth v. Slaybaugh*, Pa. , 364 A. 2d 691 (1976), to support his assertion that the testimony of the officers as to the defendant's registration card and its indication that he was the owner of the vehicle parked in the medial strip was, in itself, prejudicial.

In *Slaybaugh*, the Court held Sect. 1212 of the Vehicle Code to be unconstitutional because it shifted the burden of proof to the defendant, after it is shown that he owned the vehicle in question, to testify that he had not been driving it at the time in question.

Slaybaugh clearly is inapplicable to this issue in the instant case, and it does not support the defendant's argument. We specifically and expressly instructed the jury in our charge (N.T. 42-43) that "The mere fact of ownership of a vehicle is not, in and of itself, evidence of the operation of a motor vehicle. More than that is required."

Our charge clearly is in accordance with the *Slaybaugh* holding that "the inferred fact of operation of a motor vehicle at a specific time does not flow logically beyond a reasonable doubt from the mere established fact of ownership." *Commonwealth v. Slaybaugh*, supra, at p. 690.

DID THIS COURT ERR IN IMPOSING A NEW SUSPENDED SENTENCE WHEN NO SUPERSEDEAS HAD BEEN ENTERED DURING THE EARLIER APPEAL, AND WHEN THE TIME OF SUSPENSION OF SENTENCE PREVIOUSLY IMPOSED HAD EXPIRED?

It is not disputed that the defendant was never subjected to probation and did not pay any fine or costs under the previous sentence. In addition, the defendant will be given credit on the suspension now imposed for the time that his privileges were suspended following the first trial on this matter and prior to reinstatement pending appeal.

The defendant's argument on this point is unclear but seems to be based upon the Constitutional protections against double jeopardy. He cites no authority to support his position.

We believe that it is readily apparent that the defendant's contention on this point is illogical and contrary to common sense. The defendant did not serve the previous suspended sentence and did not pay the costs or fines then imposed. It is then neither unlawful, unfair, nor unconstitutional for us to now impose a second suspended sentence and fine, following a second jury trial and verdict.

For the above stated reasons, we are of the opinion that the defendant's contentions are without merit and that his post-trial motions were properly dismissed.

Editor's Note: This conviction was sustained by the Pennsylvania Superior Court, per curiam, with dissents by Jacobs, P. J., and Hoffman, J., on June 7, 1978. See No. 404 March Term, 1977. Allocatur was denied by the Pennsylvania Supreme Court, per curiam, on August 9, 1978. See No. 370 Allocatur Docket.

IN RE: ESTATE OF DICKEN, C.P. O.D. Franklin County Branch, Est. No. 75-082

Orphan's Court - Exceptions to Auditor's Report - Quantum meruit - Express contract for Services Rendered a Decedent - Costs.

1. Where an express contract has been asserted but not proven, the claimant may not then rest his claim upon the theory of quantum meruit even if a valid claim under that theory exists.

2. There is a presumption of full satisfaction where a person has received periodically a certain sum of money for services performed.

3. Where compensation has been given for services rendered a decedent, an action for additional compensation must be supported by proof of the existence of a special contract beyond the original agreement.

4. Proof that decedent inquired of third parties whether a specific sum of money would be adequate compensation for services performed constitutes sufficient evidence of a special contract for additional services rendered the decedent.

5. Allowance of costs in Orphan's Court is in the sound discretion of the court.

6. Where the subject matter in dispute was a mixed question of law and fact calling for the opinion and judgment of the court, and the contention before the auditor in a distribution case was filed in good faith with probable cause to object to the auditor's conclusion, the estate is to bear the burden of payment of costs.

Stephen E. Patterson, Esq., Attorney for Executor

David S. Dickey, Esq., Attorney for Exceptant

Dennis A. Zeger, Esq., Auditor

OPINION

Before Eppinger, P. J., Keller, J.
Opinion by Eppinger, P. J., December 17, 1976:

A. R. Dicken (Dicken) died in August, 1974, leaving a will probated in Franklin County, Pennsylvania. His executor filed a first and final account with a proposed schedule of distribution. Martin A. Landis (Landis) filed objections to the account and schedule, claiming that Dicken owed him $1,420.00 room and board at the time of death. The Court appointed an auditor who took testimony and filed his report with findings of fact and conclusions dismissing the objections.

The evidence established that beginning in December, 1973, Dicken left the Guilford Convalesarium where he was paying $600.00 or $625.00 for care and went to live with Landis. While there, Landis prepared Dicken's meals, provided separate sleeping quarters, had his clothing laundered, gave him his medicine and provided other care. Dicken lived with Landis except when he was hospitalized until the time of death.

While he was with Landis, Dicken paid approximately $35.00 per week, a total of $980.00. During this time, Dicken inquired of friends and associates whether $300.00 per month would be a fair sum to pay to Landis for the care being received. These facts were found by the auditor. However, then the auditor found that Landis had refused to accept cash or checks written or endorsed by Dicken and that no oral or written agreement was made between Dicken and Landis that Landis would provide total care for $300.00 per month. Landis excepted.

He also excepted to the auditor's finding that he should pay the costs of the audit.

It is Landis' contention that he did not refuse the checks, but merely indicated that payment could be made at a later time. Landis also contends that there was a contract or agreement between him and Dicken for the $300.00 per month.

RECOVERY ON THE THEORY OF QUANTUM MERUIT

On the practical side, it does seem that $300.00 per month

is a reasonable figure for taking care of a person of advanced age. On this basis, Landis makes the point that even if there was no specific understanding, he should be entitled to received $300.00 on the theory of quantum meruit. It has not been questioned that the services were rendered and accepted by Dicken; therefore, Landis argues that he should be paid upon proof of their value. This position is not supported in law. For even if a valid claim in quantum meruit exists, where an express contract is asserted but not proven, a claimant cannot thereafter rest his case on this theory. In *Irvine's Estate*, 372 Pa. 110, 115-116, 92 A.2d 544, 546 (1952), our Supreme Court stated:

> Where a claimant pleads, but fails to prove, an express contract but does prove performance of valuable services which the beneficiary willingly accepted, the claim cannot be rested on a *quantum meruit.* As Chief Justice Maxey said in *Lach v. Fleth*, 361 Pa. 340, 348, 64 A.2d 821, "Such an action [on an express contract] and an action on quantum meruit are utterly distinct." (citing cases). In *Roch's Estate*, 16 D&C 700, 703, Mr. Justice Steare, then on the Orphan's Court of Philadelphia County, correctly said that "It is the general rule, based upon sound reason and logic, that one who alleges a contract and fails in his proofs may not thereafter rely upon a quantum meruit," citing *Witten v. Stout*, 284 Pa. 410, 131 A. 360. See also, *Nuebling v. Topton Borough*, 323 Pa. 154, 156, 185 A. 725; and *Luzerne Township v. Fayette County*, 330 Pa. 247, 254, 199 A. 327.

It is clear in this case that Landis attempted to prove an agreement to pay a sum in addition to the $35.00 he received weekly. His claim must be limited to whether the proof was adequate to establish such an agreement. We find it was sufficient.

RECOVERY ON THE THEORY OF EXPRESS CONTRACT

For the services in caring for Dicken, $35.00 a week was wholly inadequate. At the hearing there was conflicting testimony concerning what this amount was to supply. It was Landis' position that it was to provide groceries only. Others indicated that it was intended to be full compensation. In Pennsylvania there is a presumption of full satisfaction of any demand where a person receives a certain sum of money each month for services performed, *Schleich's Estate*, 286 Pa. 578, 134 A. 442 (1926). This brings us squarely to the issue in this case and the law is that where compensation has been given for services rendered a decedent, there must be proof of a special contract to support an action for additional compensation. *In*

LEGAL NOTICES, cont.

Sr., late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

WHITE — First and final account, statement of proposed distribution and notice to the creditors of Millard A. Ullman, administrator of the estate of Charles W. White, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

ZIMMERMAN — First and final account, statement of proposed distribution and notice to the creditors of June Zimmerman Weber and Calvin E. Weber, executors of the estate of Emma F. Zimmerman, late of Lurgan Township, Franklin County, Pennsylvania, deceased.

GLENN E. SHADLE
Clerk of the Orphans' Court
Franklin County, Pennsylvania

(9-8, 9-15, 9-22, 9-28)

SHERIFF'S SALES

Pursuant to Writ of Execution issued on Judgment A.D. 1978-366 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, September 29, 1978 the following real estate improved as indicated:

All that lot of ground lying and being situate in Guilford Township, Franklin County, Pennsylvania, bounded and described as follows:

BEGINNING at a point in the center of the Falling Spring Road; thence through the same and by land of Gilbert V. Anderson, North 26 degrees 21 minutes 23 seconds East, 219.40 feet to an iron post at land of Charles A. Bender; thence by the same, South 62 degrees 41 minutes 48 seconds East, 93.37 feet to an iron post; thence by the same, South 27 degrees 01 minute 43 seconds West, 222.17 feet through an iron pin in line to an iron pin at other land of the grantors; thence by the same, North 86 degrees 10 minutes 27 seconds East, 61.30 feet to a railroad spike in the center line of said Falling Spring Road; thence through said road, North 31 degrees 03 minutes 30 seconds West, 45.23 feet to a point in the center of the said road, the place of beginning, as shown on a draft made for the grantors by William E. Fox, R. S., dated July, 1974, a copy of which is attached hereto.

The grantors reserve for themselves, their heirs and executors, a permanent easement for a right of way over the small tract of land marked "Parcel B" as shown on the above mentioned draft.

BEING the same real estate which Mildred E. Arble and Robert L. Arble, her husband, and Chester L. Gipe, single, by their deed dated the 4th of

SHERIFF'S SALES, cont.

June, 1947, and recorded in the Deed Records of Franklin County, Pennsylvania, in Deed Book Vol. 369, Page 62, conveyed to Dick H. Kieffer and Edna G. Kieffer, his wife, the grantors herein.

And having erected thereon a building of ⅓ block and ⅔ tile, with a concrete block foundation, ½ basement area of earth floor. Roof is of metal.

Seized and taken in Execution as the real estate of G. L. Osler, under Judgement No. 1978-366.

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 October 11, 1978, and when a 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 October 25, 1978, distribution will be made in accord therewith.

August 30, 1978

FRANK H. BENDER, Sheriff of
Franklin County, Pennsylvania

(9-8, 9-15, 9-22)

re Brose's Estate, 155 Pa. 619, 26 A. 766 (1893); *In re McHugh's Estate*, 152 Pa. 442, 25 A. 875 (1893). In *Grossman v. Thunder*, 212 Pa. 274, 278, 61 A. 904, 906, (1905), a case like this one, it was said:

> The appellant, a domestic and nurse in the home of the testatrix, having received fixed wages for her services, as such, cannot recover in this action for alleged extra services in the absence of an express contract to that effect or an agreement to provide for such compensation by a legacy.

In *Piersol's Estate*, 27 Pa. Super. 204, (1905) the claimant performed housekeeping services for the decedent under an original contract at the rate $1.50 per week but she also made a claim for nursing services at a value of $5.00 per week. The court held that she was unable to recover the additional services and relied upon the Auditor's findings:

> The auditor expressly finds: "The testimony does not show that the decedent had any conversations with the claimant on the subject of additional compensation. The testimony goes no further than that the decedent expressed in the presence of the claimant a willingness and a desire and an intention that she should be well paid but she did not agree to pay her, did not fix any amount to be paid her nor any time when she was to be paid, nor any means by which she was to be paid. There is no evidence of any meeting of the minds, and, therefore, no contract." *Id.* at 205.

In its own words, the court then added:

> The expectations of the appellant may have had some basis in the general declarations of the decedent, but there is nowhere to be found in the evidence any express contract either to pay her a fixed sum by the week for her services, outside of those which she rendered as a housekeeper under the original contract, nor to compensate her by a legacy in the will of the decedent. *Id.* at 206.

In this case, proof of an agreement for the payment of $300.00 monthly rested on testimony that Dicken had inquired of friends whether that amount was appropriate; was it sufficient.

We conclude these statements of intention on the part of Dicken to pay Landis at least $300.00 per month is just the evidence that is needed for an express contract, as required in *Grossman* and discussed in *Piersol.* The auditor found that because Dicken had not ever really established $300.00 as the

amount, there could be no contract. We find that the intention of Dicken was clear that the sum would be no less than $300.00. Had Dicken's inquiry to his friends been a general question of what would be a sufficient amount, we might concur in the auditor's findings. And if Landis was claiming a sum in excess of $300.00, we would find that there was no statement of intention on the part of Dicken to pay more than $300.00. But here it is clear that Dicken intended that Landis should get at least $300.00 per month and we cannot deny him that amount.

We find that Landis rendered services to Dicken at the latter's request, that Landis did not do this gratuitously but was to be compensated for it and that such compensation was to be in an amount of not less than $300.00 per month. In this case, there was an intention to pay and the expectation of payment. We find further that Landis' claim has been established by evidence which is direct, positive, definite and unambiguous. See *Lach v. Fleth*, Supra.

The facts in this case differ from those in *Piersol* where no definite sum was expressed by the decedent. There she only stated that she intended that the claimant should be well paid but did not agree to pay her, did not fix any amount to be paid nor the time of payment nor the means by which she was to be paid.

As noted earlier, Dicken moved from a nursing home where the cost of care was $600.00 or more. Dicken obviously considered $300.00, or half of the earlier cost to be appropriate in his mind and his only confusion was whether other people would consider it to be enough. Actually what other people would think about the amount would not be to germaine, except that it indicated that Dicken was concerned that Landis be adequately paid, and that the sum that was paid would be something that others would think was about right.

ASSESSMENT OF COSTS OF AUDIT

Since we have found that Landis should recover his claim for the care of Dicken, we will further order that the costs be paid from the estate. We should add, however, that even if Landis' claim had been found to be invalid, we think the auditor was in error in directing that Landis pay the costs. The auditor's theory was that it would be unfair to impose the costs on the other beneficiaries of Dicken's estate in Landis' attempt to reduce the amount they would receive. Speaking of fairness, however, it is obvious that if Landis had not taken care of Dicken at the modest rate of $300.00 per month, the estate's

assets would have been greatly reduced.

The general rule is that the allowance of costs in the Orphan's court is in the sound discretion of the court. *In re Toomey's Estate*, 150 Pa. 535, 24 A. 697 (1892). The problem was discussed in *In re Oplinger's Estate*, 13 Northampton 274 (1911) where the Court, quoting from *Cameron v. Crossman*, 4 Pa. Co. Ct. Rep. 316, 317 (C.P. Ind. Co. 1886) said:

> Now, what is or should be the probable cause for contention before an auditor in a distribution case that will relieve the losing party from the costs? We consider that where the subject-matter in dispute is a mixed question of law and fact raising such a contention, started and conducted in good faith, as reasonable calls for the opinion and judgment of a court, the fund, and not the losing party, should bear the costs. Where, however, the precise matter of contention is purely a matter of fact, one party alleging the disputed and controlling fact was in a particular way, and the other denying it, the ordinary rule that the losing party bears the costs should prevail.

In a case involving exceptions taken to his return by a creditor after a sheriff's sale where the exceptions were referred to an auditor and found to be unfounded, the court held the party excepting should pay the costs unless he satisfies the court that he had probable cause to object to the return. *Larimer's Appeal*, 22 Pa. 41 (1853).

In the present case, whether the discussions between Dicken and others about the $300.00 monthly stipend constituted a contract, was a mixed question of law and fact calling for the opinion and judgment of the court. We are satisfied that Landis had probable cause to object to the auditor's conclusion in this respect even if he had not sustained his claim, and that Landis filed his exceptions in good faith with a true belief that Dicken intended to compensate him over and above the $35.00 weekly.

We will make an order giving effect to the conclusions expressed in the foregoing opinion sustaining Landis' objections to the auditor's report.

ORDER OF COURT

NOW, December 17, 1976, the objections and exceptions of Martin A. Landis to the Account and Schedule of Distribution of William Mogg, Executor of the Estate of A. R. Dicken are sustained.

IT IS ORDERED that the balance in the hands of the accountant be distributed as follows:

SCHEDULE OF DISTRIBUTION

Balance in the hands of the accountant		$9,634.52
Additional charges against the estate:		
Beck, Patterson & Kaminski, legal fee	$ 175.00	
Glen E. Shadle, Clerk of Courts, Costs of Audit	376.05	
Martin A. Landis, for care of decedent prior to his death	1,420.00	
Total charges against the estate		1,971.05
Balance for Distribution		$7,663.47

THe balance for distribution shall be distributed as follows:

To Jane D. Williamson	$ 1.00
To Pearl M. Wyble	1.00
To William H. Mogg	957.68
To Martin Landis	957.68
To Elmer Landis	957.68
To Trinity Luthern Church	957.68
To Maude E. Harner	957.68
To John Calbraith	957.69
To William Shifflett	957.69
To Nevin Martin	957.69
	$7,663.47

which exhausts the fund.

It further appearing to the court that the estate has overpaid the transfer inheritance taxes, it is directed that the accountant apply to the Commonwealth for a refund and that upon receipt thereof, he pay to each of the above-named legatees, except Jane D. Williamson and Pearl M. Wyble, a one-eighth share thereof, and a release signed by each such legatee for such share shall be a sufficient accounting by the executor for the faithful performance of the provisions of this part of the order. The payment of the additional charges against the estate and the above stated distribution of the balance shall not await the completion of the claim for a refund of taxes but shall be made forthwith.

COMMONWEALTH Ex. Rel. BAUGHMAN v. BAUGHMAN, C.P. Cr. D. Franklin County Branch, No. N.S. 31 of 1974

Non-support - Parental Responsibility of Support - Conway v. Dana - Modification of Order of Support of Minor Child - Earning Capacity.

1. An order of support of a minor child which predates the decision of the Supreme Court of Pennsylvania in *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974), may be modified to take into account the altered obligation of support.

2. Generally, modification of a court order of support of a minor child may occur only upon a showing of changed circumstances, and the party seeking it must show by competent evidence changes justifying modification.

3. The Supreme Court of Pennsylvania in *Conway v. Dana* 456 Pa. 536, 318 A.2d 324 (1974), held that the support of a minor child is the equal responsibility of the child's mother and father, according to their earning capacities.

4. A mother who is employed and who then removes herself from the employment market, not because of the need to be with her children but because of her remarriage, retains the earning capacity she had before she terminated her employment.

5. To determine a mother's employability with respect to her obligation to support her minor child, the following factors should be considered: her work record and availability for employment, her skills, her health and stamina, and the presence or absence of children in the home.

Kenneth F. Lee, Esq, Attorney for Petitioner

Timothy S. Sponseller, Esq., Attorney for Respondent

OPINION AND ORDER

Eppinger, P.J., January 26, 1977:

On March 13, 1974, on the stipulation of William A. Robertson (father), without the assistance of counsel, and Beverly A. Robertson, now Beverly A. Baughman (mother) who had an attorney, the father agreed to pay the mother the sum of $85.00 per week for the support of four minor children. He also agreed to maintain medical and hospitalization insurance as provided at his place of employment for the benefit of his family. The court made a notation that the father's income at the time of the making of the order was $127.00 per week. Nothing is said about the mother's income.