

also. We have reviewed the notes made by the reporter with her and find that only argument on the proponent's motion to dismiss was not transcribed. Counsel for the exceptants believed that an amendment to a stipulation had not been included in the record. It was however. We therefore will overrule the exceptions to the transcript of the testimony.

ORDER OF COURT

September 21, 1981, the exceptions filed by the Appellants to the Court's order dismissing the appeal are overruled. The costs shall be paid by the Appellants.

CHAPPELL v. CHAPPELL, C.P. Franklin County Branch, No. F.R. 1980 - 966

Divorce - No-Fault Act - Section 201(c) - Death of Defendant

1. The fact the Defendant in a divorce action died after a motion requesting a divorce decree was filed and all pleadings were delivered to the judge's chambers, but death occurred before the decree with signed, does not require the Court to sign the divorce decree after death of defendant.
2. The granting of a divorce decree under Pennsylvania R.C.P. 1920.42 (a) (1) is not a ministerial act in that the Rule requires that "The Court ... shall review the complaint and affidavits."
3. The Court could not, as a matter of law, have entered a final decree in divorce.

Kenneth F. Lee, Esquire, Counsel for Plaintiff

Jerry A. Weigle, Esquire, Counsel for Respondents

OPINION AND ORDER

KELLER, J., November 9, 1981:

Diane L. Chappell, Plaintiff, filed her Complaint in Divorce under Section 201(c) and 201(d) of the Divorce Code in the

FIRST NATIONAL

bank and trust co.

13 West Main St.
WAYNESBORO, PA. 17268
717 - 762 - 3161



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CITIZENS *National Bank*
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17268

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THREE CONVENIENT LOCATIONS
POTOMAC SHOPPING CENTER — CENTER SQUARE
WAYNESBORO MALL

SHERIFF'S SALES, cont.

BEGINNING at the southeast corner of lot, now or formerly of J. R. McElroy and running thence South with South Potomac Street 35 feet to a lot formerly owned by Simon Weiner; thence West 136 feet to a 12 foot alley; thence along said alley, North 35 feet to southwest corner now or formerly of J. R. McElroy; thence East with said lot 136 feet to the place of beginning.

BEING the same real estate conveyed to Anna Katherine King and Her husband, George William King, Sr. by deed of Nellie K. Glessner, widow, dated May 17, 1969, and recorded in Franklin County Deed Book Vol. 638, Page 629. George William King, Sr. died September 4, 1971 vesting fee simple title in Anna Katherine King.

BEING sold as the Property of Anna Katherine King, Writ No. A.D. 1981-298.

SHERIFF'S SALES, cont.

TERMS

As soon as the property is knocked down to a purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, December 21, 1981 at 4:00 P.M. E.S.T. Otherwise, all money previously paid will be forfeited and the property will be resold at the hour at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff

Franklin County, Chambersburg, PA.

EDITOR'S NOTE

As I have reported before, bound volume 4 is well on its way to production. We should have it available for distribution in a few weeks. Should any local subscribers want an extra copy, please get the order to me immediately. We cut back on the quantity being bound this time, in order to save expense. Thus, we could, but I doubt that we shall, have problems filling last minute orders. Also, we want a few extra copies to deliver to the Law Library in case replacements become necessary later on.

Remember: Bar Association meeting Friday, December 11, 1981, Jury Assembly Room at 1:30 P.M., followed by corporation meetings of Legal Services Society and Franklin County Legal Journal.

Office of the Prothonotary on November 20, 1980. On May 1, 1981 the plaintiff and defendant, each being represented by counsel, entered into a comprehensive post-marital separation, property settlement and child custody agreement, and it was filed in the Office of the Prothonotary on June 26, 1981. Affidavits of Consent under Section 201(c) of the Divorce Code were executed by the defendant on June 22, 1981, and the plaintiff on June 25, 1981, and filed in the Office of the Prothonotary on June 26, 1981, together with a Motion of counsel for the plaintiff alleging the marriage to be irretrievably broken, ninety days elapsed, and praying that a Decree divorcing the parties be granted. June 26, 1981 was a Friday. The pleadings in this divorce action were delivered to the chambers of the undersigned judge for review and appropriate action. At about 9:30 p.m. on June 28, 1981 the defendant, George E. Chappell, died in a motor vehicle accident.

At the time of the death of the defendant this Court had not had an opportunity to review the pleadings and supporting documents in the divorce action, and had taken no action on the motion of plaintiff's counsel that a Decree in Divorce be granted. On June 29, 1981 counsel for the plaintiff advised the Court of the death of the defendant, and learned that the Court had not reviewed the proceedings in the matter or ruled upon the plaintiff's motion.

On August 21, 1981 counsel for the plaintiff presented the plaintiff's petition for a rule to show cause upon the defendant's heirs and assigns, and his counsel of record why she should not be permitted to withdraw her motion for a divorce, and an order was signed the same date granting the issuance of the rule. The answer of the parents of the deceased defendant was filed on September 25, 1981. Under new matter the respondents alleged that the Court is required to enter a final Decree in Divorce under Pa. R.C.P. 1920.42(a) (1) if the complaint and affidavits are in compliance with Section 201(c) of the Divorce Code, and therefore this Court is required to enter a final Decree in Divorce in the matter.

Briefs were submitted and arguments heard on the petition and answer on November 5, 1981, and the matter is ripe for disposition.

Preliminarily, it is noted that there is absolutely no evidence of the service of the complaint in divorce on the defendant and the docket in the Prothonotary's Office fails to reflect that service.

Pa. R.C.P. 1920.42(a) (1) provides:

If a complaint has been filed requesting a divorce on the grounds of irretrievable breakdown and both parties have filed an affidavit under Section 201(c) of the Divorce Code evidencing consent to the entry of a final decree, the court on motion of either party or its own motion shall review the complaint and affidavits. If in compliance with Section 201(c), the court shall enter a final decree.

In reliance of the foregoing counsel for the respondent contends that the function of the Court in granting a final Decree of Divorce under Section 201(c) is entirely ministerial rather than judicial. Therefore, the decree was ripe for granting immediately upon the filing of the motion with the necessary affidavits, and it should now be granted notwithstanding the intervening death of the defendant.

We do not agree with the contention that the granting of a Decree in Divorce under Pa. R.C.P. 1920.42(a) (1) is entirely a ministerial act, for counsel ignores the mandate of the Rule that "the court... shall review the complaint and affidavits" (italics ours). The case at bar is a classic example of precisely why the granting of a divorce decree cannot be considered a ministerial act. Here, the record discloses no evidence that the complaint in divorce was served upon the defendant. Pa. R.C.P. 1920.4 inter alia sets forth in detail the procedure for the service of a complaint in divorce. Neither under that rule or any other rule is service of the complaint excused. Thus, it would have been the responsibility of this Court upon the review mandated by Pa. R.C.P. 1920.42(a) (1) to have remanded the entire matter to counsel for the plaintiff to establish that service of the complaint had, in fact, been made or to follow the necessary procedures for securing jurisdiction of the defendant.

In the case at bar, this Court could not as a matter of law have entered a final decree in divorce at any time prior to the death of the defendant. Upon the death of Mr. Chappell the marriage of the parties was terminated by that death, and the entry of a decree subsequent to that date would be of no legal effect.

Present counsel for the plaintiff has argued that it was unnecessary for the plaintiff to petition to withdraw her motion for a divorce because of the termination of the marriage by reason of the defendant's death; and it would have been sufficient as a matter of law to file a suggestion of the defendant's date of death which would have had the effect of abating

the above-captioned proceeding. This would appear to be correct. However, original counsel for the plaintiff out of an over abundance of concern for the rights of all parties elected to proceed by way of the petition to withdraw the motion for divorce, and we do not find this to be in error since it did present potential heirs at law of the defendant the opportunity to have their day in court.

ORDER OF COURT

NOW, this 9th day of November, 1981, the Rule is made absolute and the Plaintiff's Motion for a Divorce is deemed withdrawn.

Exceptions are granted the respondents.

COMMONWEALTH v. PORTMANN, C.P. Franklin County Branch, Cr. Div., No. 22 of 1981

Criminal Law - Proof of Identity - Suppression of Evidence - Pa. R.C.P. 130 - Warrantless Search

1. Where the Commonwealth presents no testimony that the person at the defense table was the party apprehended by police, a demurrer would be sustained if the defendant were being tried by a jury.
2. At a non-jury trial, where the Commonwealth presents no testimony specifically identifying the defendant, but the defendant appeared before the trial judge on three separate occasions and identified himself by name and as the defendant, the identity of the defendant was established beyond a reasonable doubt.
3. Where the defendant was taken to a district justice's office for arraignment within six hours after arrest and the district justice, for unknown reasons, did not appear until after the six hour period elapsed, statements secured prior to arraignment will not be suppressed because the delay was attributable to judicial delay and was not the fault of the Commonwealth.
4. A police officer's act of shining a flashlight into the cab of a truck to aid the driver in finding the owner's card and thereafter seizing drug paraphenalia which was in plain view was lawful.

David W. Rahausser, Assistant District Attorney, Counsel for Commonwealth