

Montgomery County) 89 D. & C. 486 (1954) made an appropriate disposition. Lewis Miller became dizzy while driving and pulled his car to the side of the road (and note that Kathleen Miller had pulled her car to the side of the road), where the wheels struck a bank and overturned. The cause of Lewis Miller's dizziness and unconsciousness was established to be an epileptic seizure. His previous seizures had been preceded by a warning.

At the hearing on appeal from the withdrawal of his driving privileges, Lewis Miller's physician said he was a safe driver as long as he continued on the medication. He needed his car for work and agreed to faithfully take his medicine.

Epilepsy may be described as a controllable handicap. In this era when we are attempting to allow handicapped people the full participation everyone else enjoys, what the Montgomery County Court said more than 20 years ago seems particularly enlightened:

We are convinced that there is no more risk of (Lewis Miller) causing injury to himself or others by reason of his epileptic condition than there is of the average driver who may suffer a heart attack, an apoplectic stroke or any one of a number of things that may cause a sudden loss of consciousness.

The court concluded that it was unjust to deprive a competent driver of the needed use of an automobile because of a rather remote possibility of having another seizure while driving. The case *Commonwealth v. Foulkrod*, 66 D. & C. 2d 679 (C. P. Forest County, 1973), using the same reasoning, reached the same result.

Kathleen Miller's notice recalling her operating privileges stated:

This decision has been made by comparing your physician's report with the standards recommended by our Medical Advisory Board and adopted by this department.

These standards were not presented to us, so we have no way of reviewing whether Kathleen Miller's physician's report did or did not compare favorably with the standards recommended by the Department's Medical Advisory Board.

For all these reasons, we will sustain the appeal of Kathleen Miller.

ORDER OF COURT

September 20, 1979, the appeal of Kathleen Rose Miller is sustained and the order of the Secretary of the Department of Transportation withdrawing her operating privileges is reversed.

Appellant shall pay the costs.

BAKNER v. BAKNER, C.P. Franklin County Branch, Eq. Doc., Vol. 7, Page 221

Equity - Partition - Appointment of Receiver - Stay of Execution

1. Where wife seeks partition of entireties real estate which are the subject of mortgage foreclosure action, and she has been excluded from the benefits of those properties, she is entitled to have a receiver appointed to collect rents and apply same to joint debts.

2. There is no distinction between threatened physical loss or destruction of property which would warrant the appointment of a receiver and threatened loss at Sheriff's sale.

Donald L. Kornfield, Esq., Attorney for Petitioner

Harvey C. Bridgers, Jr., Esq., Attorney for Respondent

John F. Nelson, Esq., Receiver

OPINION AND ORDER

KELLER, J., November 14, 1979:

This action in equity for partition of real estate and personal property allegedly owned by the parties was commenced by the filing of a complaint on September 27, 1979. Preliminary objections in the nature of a demurrer and motion for more specific pleading were filed on October 17, 1979. Argument has not been heard on the preliminary objections.

On September 27, 1979 Jean H. Bakner, plaintiff, petitioned the Court for the appointment of a receiver to receive the rents and profits from certain real estate located in the Borough of Waynesboro and Washington Township, Pennsylvania owned by the parties as tenants by the entireties. An order was signed on the same date directing the issuance of a rule upon T. E. Bakner, the respondent, to show cause why a receiver should not be appointed to take possession of the income producing properties, receive the rents and profits and pay the debts

thereon. A rule was also issued on the First National Bank & Trust Company, Waynesboro, Pa. to show cause why it should not be enjoined from further execution process pending the determination of the rule to appoint a receiver. The rules were made returnable October 24, 1979 at 3:00 P.M.

No responsive pleading was filed by the respondent, Thomas E. Bakner. The respondent and his counsel appeared at the hearing on October 24, 1979. No responsive pleading was filed by First National Bank & Trust Company, Waynesboro, Pennsylvania. Testimony in support of the petition was given by petitioner, exhibits were offered and admitted without objection. The petitioner was not cross-examined. The respondent introduced no evidence. By agreement of counsel a report was to be secured from counsel for the First National Bank & Trust Company, Waynesboro, Pa. concerning the intention of that judgment creditor and submitted to the Court for consideration with all other relevant matters. Briefs were submitted by counsel on October 29, 1979. The matter is ripe for disposition.

FINDINGS OF FACT

1. The parties are husband and wife, but live separate and apart from each other.
2. The parties own real estate as tenants by the entireties in the Boroughs of Waynesboro and Mont Alto, and in Washington Township, Pennsylvania.
3. Each party occupies a home in Washington Township, Pennsylvania which is owned by the parties as tenants by the entireties.
4. A house has been erected on the tenants by the entireties real estate in Washington Township, Pennsylvania which is unoccupied and for sale.
5. The parties own eight townhouses on Sixth Street in the Borough of Waynesboro and twelve townhouses in the Borough of Mont Alto as tenants by the entireties.
6. The parties have granted various mortgages binding some and perhaps all of the real estate they own as tenants by the entireties to the Citizens National Bank & Trust Company, Waynesboro, Penna., First National Bank & Trust Company, Waynesboro, Penna., (hereinafter First National), and Waynesboro Savings Association. The mortgages are recorded in Franklin County Mortgage Books Vol. 298, Page 97, Vol. 340, Page 460, Vol. 373, Page 450, and Vol. 378, Page 227.

7. The parties are also indebted to the Citizens National Bank & Trust Company, Waynesboro, Penna. and First National on notes in the total principal amount of \$29,000.00.

8. The petitioner receives rents from four of the townhouse rental units and applies the total rents received to mortgage payments due the Citizens National Bank & Trust Company, Waynesboro, Penna. and the Waynesboro Savings Association.

9. The petitioner does not know how many of the remaining sixteen townhouse rental units are rented, but respondent receives the rents from those units which are rented.

10. The respondent does not apply the rents received to the indebtedness of the parties or pay any portion to or for the benefit of petitioner.

11. On September 17, 1979 First National confessed judgment on the parties mortgage note dated September 16, 1976 in the amount of \$125,047.09 to D.S.B. No. 1979-1631. (By supplemental agreement dated September 7, 1977, the parties agreed to pay \$1,267.84 each month until September 10, 1992.) No payment has been made since July 6, 1979.

12. On September 17, 1979 First National confessed judgment on the parties mortgage note dated November 10, 1975 in the amount of \$110,260.29 to D.S.B. No. 1979-1632. (By supplemental agreement dated September 10, 1976 the parties agreed to pay \$1,166.41 each month until September 10, 1991.) No payment has been made since July 6, 1979.

13. On September 17, 1979 First National confessed judgment on the parties mortgage note dated February 19, 1975 in the amount of \$68,793.10 to D.S.B. No. 1979-1633. (By supplemental agreement dated October 7, 1975 the parties agreed to pay \$760.70 each month until October 10, 1990.) No payment has been made since July 6, 1979.

14. On September 17, 1979 First National confessed judgment on the parties mortgage note dated May 31, 1978 in the amount of \$69,986.15 to D.S.B. No. 1979-1634. Interest at 9¼% per annum payable quarterly was last paid on May 25, 1979 for the payment due March 1, 1979.

15. First National caused the Sheriff to execute on the parties' townhouse rental properties in Mont Alto and Waynesboro and the unoccupied house in Washington Township.

LEGAL NOTICES, cont.

NOTICE IS HEREBY GIVEN pursuant to the provisions of the Act of Assembly of May 24, 1945, P.L. 967 and its amendments and supplements of intention to file with the Secretary of the Commonwealth of Pennsylvania at Harrisburg and with the Prothonotary of the Court of Common Pleas of Franklin County, Pennsylvania, on or after December 11, 1979, an application for a certificate for the conducting of a business under the assumed or fictitious name of Cumberland Court Associates with its principal place of business at 550 Cleveland Avenue, Chambersburg, Pennsylvania 17201. The names and addresses of all persons owning or interested in said business are Theodore K. Nitterhouse, Route 6, Chambersburg, Pennsylvania 17201, and Denise Nitterhouse, Route 6, Chambersburg, Pennsylvania 17201.

Welton J. Fischer, Attorney
550 Cleveland Avenue
Chambersburg, Pennsylvania 17201

(12-28)

Notice is hereby given that White Church, Inc., a close corporation organized and existing under the Business Corporation Law of the Commonwealth of Pennsylvania, on December 21, 1979, filed in the Department of State of the Commonwealth of Pennsylvania its Articles of Incorporation, said corporation having as its corporate purposes the unlimited power to engage in and to do any lawful act or thing for which corporations may be incorporated under the Business Corporation Law.

White Church, Inc.

Black and Davison
209 Lincoln Way East
P. O. Box 513
Chambersburg, Pennsylvania 17201
Solicitors

(12-28)

LEGAL NOTICES, cont.

16. By letter of counsel for First National dated October 4, 1979 the Sheriff was directed to withdraw the parties' properties from the list of properties for Sheriff's Sale in November 1979. Counsel also directed the Sheriff to assume the properties would be advertised and sold in December unless such sale became unnecessary.

17. The Mont Alto and Waynesboro rental properties and the unoccupied Washington Township house represent a substantial portion of the parties' real estate holdings.

18. The parties have been unable to agree upon a partition of their real estate.

19. The petitioner intends to pursue to conclusion the partition action commenced by her.

20. The parties have been sued for other debts which are alleged to be unpaid and owing.

21. The petitioner is excluded from all benefits from sixteen of the twenty townhouse rental units owned by the parties.

22. Counsel for First National by letter dated October 26, 1979 has advised that he expects, "...to execute promptly on these judgments (Nos. 1979-1631; 1632, 1633, 1634) if payments sufficient to bring them up-to-date, together with principal, interest and collection costs, is not forthcoming promptly. I can say further that we believe that if payment is brought up-to-date in the very near future (including payments of principal, interest and collection costs) AND if there is a reasonable expectation that payments will continue to be made on time, then, we expect there to be little or no likelihood of continuing the execution process."

DISCUSSION

Counsel for the respondent contends there is no statutory authority for the Court to appoint a receiver and general equitable principles do not permit such an appointment unless it is necessitated to save property from injury or threatened loss or destruction. Counsel urges the Court to conclude that petitioner seeks the appointment of a receiver as a "mere weapon of coercion."

In *Lindenfelser v. Lindenfelser*, 396 Pa. 530, 533 (1959), the Supreme Court of Pennsylvania ordered the appointment of a receiver to inter alia collect rents and held:

"The decision to appoint a receiver or not to is generally a matter of discretion, but it is a judicial discretion whose abuse will be corrected upon appeal..."

The Court also held: "Taking our conclusions in Lindenfelter and DeLuca together, we believe the modern rule to be that where husband and wife are separated but not divorced and where one of them is excluded from the exercise or enjoyment of rights inherent in an estate held by the entireties, an accounting of property so held may be ordered and the property or proceeds divided equally between them." (Pages 534, 535) See also *Shapiro v. Shapiro*, 424 Pa. 120, 137 (1966).

In the case at bar, the petitioner has established her entireties interest in the income producing property, her exclusion from the benefits of those properties, and the imminent threat of their loss via Sheriff's Sale. We fail to perceive any difference between threatened physical loss or destruction of property, and its loss at Sheriff's Sale. In our judgment the petitioner is entitled at this stage of the proceedings to have a receiver appointed to collect the rents from all of the entireties real estate and apply the same to those debts of the parties which presently threaten the parties' real estate.

ORDER OF COURT

NOW, this 14th day of November, 1979, John F. Nelson, Esq., is appointed Receiver to collect all rents from all rental properties owned by the parties as tenants by the entireties; to establish a separate checking account as such Receiver; to pay the necessary operating expenses of said rental properties; each month to apply the remaining balance of the rents received to those debts of the parties which in the judgment of the Receiver should receive priority of payment. The Receiver is authorized to confer with counsel for the parties and counsel for the judgment and lien creditors to establish a program for proportionate payments of the net rentals received by the Receiver.

Upon request of counsel for either of the parties or the lien creditors the Court will set the amount of a surety bond to be posted by the Receiver. Costs of the same to be paid from the rentals received.

Exceptions are granted to the parties.

COMMONWEALTH v. EVERTS, C.P. Fulton County Branch, No. 47 of 1978

Criminal Law - Pennsylvania School Code - Unexcused Absences

1. In order for a defendant to be guilty of the compulsory attendance provisions of the School Code the school district must show an unexcused absence followed by a notice thereof to the defendant and an unexcused absence after receipt of said notice.

2. The poor condition of the private lane is not a defense under the Compulsory School Law in that it is the parents' responsibility to arrange transportation to a public road.

Gary D. Wilt, District Attorney, Counsel for the Commonwealth

Lawrence C. Zeger, Esq., Counsel for the Defendants

OPINION AND VERDICT

KELLER, J., September 27, 1979:

The defendants, Stanley and Betty L. Everts, are the mother and father of Dorothy Everts and Kimberly Everts. During the 1977-1978 school year Dorothy Everts was in third grade at the Warfordsburg Elementary School, and Kimberly Everts was in eighth grade at the Southern Fulton High School. The defendants, their daughters and Dorothy Esta Everts, paternal grandmother of the children, reside on a rural route in Big Cove, Tannery, Fulton County, Pennsylvania.

The daughters of the defendants had a substantial number of unexcused absences from their respective schools. Pursuant to applicable provisions of the School Code notices were sent to the parents, including certified mail notices, which were not picked up by the defendants. Prosecutions for violation of the School Code were initiated pursuant to law. On April 17, 1978 hearing on the charges was held before the Honorable J. Pierce Gordon, District Justice of the Peace. The defendants were found guilty of violation of the Pennsylvania Public School Code as to their daughter, Dorothy, on February 9, 10 and 21, 1978, and to their daughter, Kimberly, on February 9 and 10, 1978. Sentence was imposed by the District Justice and the defendants appealed to this court.

The trial de novo was held on May 1, 1979. Counsel for the defendants and the District Attorney have submitted briefs and the matter is ripe for disposition.

FINDINGS OF FACT

1. Dorothy Everts was absent from school on February 9, 10 and 21, 1978.