

on the part of our highest court to withdraw from the harsh and arbitrary "old rule" but also partial authority for the substantive law decisions made by this court.

We have carefully considered the reasons for appeal stated and authorities cited by defendant/appellant, and remain persuaded that no error was committed in the trial of this case.

FUNK v. FUNK, C.P. Franklin County Branch, F.R. 1983 - 472-S

Support for Spouse - Adulterous Conduct - Indignity

1. Any conduct on the part of one spouse which would be grounds for divorce will also justify denying spousal support.
2. Adultery may be found when the parties to the alleged adulterous conduct are so disposed or inclined and an opportunity existed for the satisfaction of such inclination.
3. A spouse's relationship with a member of the opposite sex, other than his or her own spouse, may constitute an indignity even where the evidence is insufficient to sustain a charge of adultery.

George E. Wenger, Esquire, Counsel for Plaintiff

John R. Walker, D.A., Counsel for Defendant

OPINION AND ORDER

KELLER, J., September 26, 1984:

The parties in this support appeal are Darlin M. Funk, hereinafter wife, who currently resides at 14195 Buchanan Trail West, Mercersburg, Pennsylvania and James A. Funk, hereinafter husband, who currently resides at 1056 Bear Valley Road, Fort Loudon, Pennsylvania. They were married on May 29, 1971 and are the parents of two children. On August 6, 1983 marital difficulties precipitated the separation of the parties and on August 11, 1983 wife filed a complaint for child support. The Honorable George C. Eppinger, P.J. scheduled a hearing on the matter for September 9, 1983 at 9:00 o'clock a.m. before Robert J. Woods, the Domestic Relations Hearing Officer. The hearing



13 West Main St.
P.O. Drawer 391
717-762-8161



TRUST SERVICES
COMPETENT AND COMPLETE



WAYNESBORO, PA 17268
Telephone (717) 762-3121

THREE CONVENIENT LOCATIONS:
Potomac Shopping Center - Center Square - Waynesboro Mall
24 Hour Banking Available at the Waynesboro Mall

was held as scheduled and on Mr. Wood's recommendation an order was entered on September 13, 1983 requiring husband to pay \$75.00 per week as child support. In November of 1983 the parties agreed to a shared custody arrangement whereby each spouse retained custody of both children for a three-month period on an alternating basis. On March 28, 1984 wife filed a petition to modify the September 13, 1983 order to increase the support payments. The parties were ordered to appear before Mr. Woods. A hearing was held as scheduled on May 1, 1984 and on May 7, 1984 we acted upon Mr. Wood's recommendation by entering an order dismissing wife's petition for modification for failure to show any significant change of circumstances. Wife appealed that order and on May 16, 1984 husband filed his petition to modify the original support order. Another hearing was scheduled before the hearing officer for June 22, 1984 at 9:00 o'clock a.m. On May 24, 1984 wife filed her demand for an appeal hearing and the hearing was scheduled for June 6, 1984 at 1:00 o'clock p.m. That hearing was continued until June 27, 1984. Testimony was taken, arguments were heard and briefs were submitted as directed. The matter is now ripe for disposition.

Husband contends that his wife is no longer entitled to spousal support because she engaged in an extramarital adulterous affair.

Preliminarily, it must be noted that any conduct on the part of one spouse which would be grounds for divorce will also justify denying spousal support. *Commonwealth ex rel. Darges v. Darges*, 202 Pa. Super. 330, 195 A. 2d 847 (1963). *Commonwealth ex rel. Halderman v. Halderman*, 230 Pa. Super. 125, 362 A. 2d 908 (1974), *Larkin v. Larkin*, 262 Pa. Super. 294, 396 A. 2d 761 (1978).

Section 201 of the Divorce Code of 1980, 23 Pa. C.S.A. 201 provides inter alia:

§201 *Grounds for divorce*

(a) It shall be lawful for the court to grant a divorce to the innocent and injured spouse whenever it shall be judged that the other spouse shall have:

(2) Committed adultery.

(6) Offered such indignities to the innocent and injured spouse as to render his or her condition intolerable and life burdensome.



13 West Main St.
P.O. Drawer 391
717-762-8161



TRUST SERVICES
COMPETENT AND COMPLETE



WAYNESBORO, PA 17268
Telephone (717) 762-3121

THREE CONVENIENT LOCATIONS:
Potomac Shopping Center - Center Square - Waynesboro Mall
24 Hour Banking Available at the Waynesboro Mall

Adultery may be found when the parties to the alleged adulterous conduct are so disposed or inclined and an opportunity existed for the satisfaction of such inclination. *Commonwealth ex rel. D'Andrea v. D'Andrea*, 262 Pa. Super. 302, 396 A. 2d 765 (1978). The record in this case is replete with evidence which established such inclination and opportunity. For example:

1. Wife testified that she maintained a relationship with Mr. Gary Vale which she characterized as friendly, platonic and which she claimed did not include sexual intercourse.

2. Wife's diary showed that she routinely confided in Mr. Vale about her personal affairs.

3. Testimony revealed that wife visited Mr. Vale every weekend from June 24, 1983 through August 6, 1983. During those visits the two would engage in various activities including camping trips, dining and dancing.

4. Testimony revealed that from January 1984 through March 1984 wife resided almost continuously with Mr. Vale in his apartment while she maintained temporary employment in the suburban Baltimore, Maryland area. Although she testified at hearing that she did not sleep with Mr. Vale during this period, wife told husband prior to the hearing that the two were "making love".

This evidence overwhelmingly supports husband's contention that his wife and her boyfriend had both the inclination and the opportunity to engage in sexual intercourse. Her failure to persuasively rebut this presumption of adultery by her own testimony and by calling Mr. Vale, compels us to conclude that she is no longer entitled to the spousal support granted her by the September 13, 1983 Order of Court. In *Commonwealth ex rel. Grow v. Grow*, 268 Pa. Super. 290, 407 A. 2d 1361 (1979), the Superior Court specifically identified adulterous conduct as grounds for denying spousal support.

A spouse's relationship with a member of the opposite sex, other than his or her own spouse, may constitute an indignity even where the evidence is insufficient to sustain a charge of adultery. *Narbesky v. Narbesky*, 255 Pa. Super. 48, 386 A. 2d 129 (1978). The *Narbesky* court identified the nature of an indignity holding:

The "essential feature" of a charge of indignities is a "course of conduct" that will depend "largely upon the circumstances of each case" but . . . in every case must be "inconsistent with the position and relation as a spouse." *McKrell v. McKrell*, 352 Pa. 173, 42 A. 2d 609 (1945) and [must] render the condition of the innocent and injured spouse "intolerable" and his or her life "burdensome . . ."

Evidence of an extramarital affair is sufficient to prove indignities only when it is an open exhibition of affection sufficiently serious to bring upon the spouse continued shame, humiliation and disgrace. It must be an open and notorious exhibition of improperly placed affection. *Harding v. Harding*, 156 Pa. Super. 438, 40 A. 2d 869 (1945), *Lapsika v. Lapsika*, 202 Pa. Super. 607, 198 A. 2d 386 (1964), *Narbesky v. Narbesky*, supra.

We consider wife's regular weekends with Mr. Vale followed by her open, notorious, continuous and virtually uninterrupted three-month residence in his home constitutes behavior which is absolutely inconsistent with her position as a wife. We are satisfied that such conduct must bring shame, humiliation and disgrace upon her husband, and we do not doubt that it rendered her husband's life intolerable and burdensome. For these reasons, we conclude that wife is not entitled to spousal support.

ORDER OF COURT

NOW, this 26th day of September, 1984, the order of May 7, 1984 is affirmed and defendant's appeal is dismissed.

The September 13, 1983 order providing support for the children of the parties shall remain in effect.

Exceptions are granted the defendant.

SMETZER v. UNITED STATES FIDELITY AND GUARANTY COMPANY, ET AL., C. P. Franklin County Branch, A.D. 1983-141

Declaratory Judgment — No-Fault Act — Residence

1. Where, by order of court, a minor is under the care and custody of the county youth agency but living with his father, the father's no-fault insurance carrier is responsible for medical expenses and not the county's insurance carrier.