

ORDER OF COURT

NOW, October 16, 1978, the appeal of M. Realty & Leasing Company from the decision of the Zoning Hearing Board is dismissed. The cost shall be paid by M. Realty & Leasing Company, Appellant.

COMMONWEALTH EX REL. COLEMAN V. COLEMAN, C.P. Franklin County Branch, No. 241-1978 N.S.

*Nonsupport - Support of Spouse - Spouses in Common Abode - Requirement that Breadwinner Spouse Neglect to Provide Necessaries*

1. The Court may impose an order for support on a spouse for the maintenance of the other spouse where the parties continue to reside together in their home only where the evidence establishes that the breadwinner-spouse is neglecting to provide food, shelter, medical and dental care and other necessary living expenses which are reasonable and in accordance with the family station in life.

*Thomas M. Painter, Esq., Counsel for Petitioner*

*William F. Kaminski, Esq., Counsel for Respondent*

OPINION AND ORDER

KELLER, J., October 20, 1978:

The petition of Margaret M. Coleman for support was filed July 5, 1978, and an order setting hearing on the matter for July 26, 1978 was signed the same date. The hearing was subsequently continued until September 27, 1978, and then until October 4, 1978. The hearing was held on that date and counsel submitted Memoranda of Law in support of the position of their respective clients.

FINDINGS OF FACT

1. The petitioner, Margaret M. Coleman, and respondent, William W. Coleman, are husband and wife.

2. The parties reside at their home 433 Fairview Avenue, Waynesboro, Franklin County, Pennsylvania.

3. There are no dependent children and the petitioner seeks support only for herself.

4. The petitioner is employed by G. C. Murphy Co. as a checkout clerk.

5. The petitioner's average weekly income during the last six months was \$91.00, which included overtime.

6. The respondent is self-employed as a trucker.

7. The petitioner and respondent filed a joint United States Individual Income Tax Return for 1977. An analysis of Form 1040, Schedule C, discloses the respondent had a net profit of \$7,183.76, plus a depreciation deduction of \$4,421.20 for a total of spendable pre-tax income of \$11,604.92 per annum, or \$223.10 pre-tax net weekly income.

8. The petitioner testified that respondent loads and unloads his own truck and therefore the "unloading" expense item in the amount of \$1,918.00 on Schedule C was not an out-of-pocket deduction. This represents an additional \$36.00 per week pre-tax income.

9. The respondent pays all household bills such as utilities, fuel oil, insurance, maintenance and repairs.

10. The respondent gives the petitioner \$25.00 per week for groceries and household goods.

11. The respondent rarely eats at home, and the petitioner does not prepare meals for him.

12. During the last three years the respondent has had a new roof and siding installed on the home, and during the past year expended \$600.00 for insulation. He has advised the petitioner that she need not put any of her money into the home.

13. The petitioner has recently purchased new linens and a pole light for the yard. She has done interior painting and put carpeting down, has made some interior repairs and does the yard work.

14. The petitioner submitted the following as a list of her weekly expenditures:

Car payment	\$	27.11
Car insurance		4.84
Food		35.00
Gas and car maintenance		12.00
Waynesboro Hospital (past due bill having \$232.00 balance)		2.50
Medical and dental		3.85
Clothing		9.61

Miscellaneous	10.00
Blue Cross and Blue Shield (does not have any medical insurance coverage)	5.00
<b>TOTAL</b>	<b>\$ 109.91</b>

**NOTICE OF ANNUAL MEETING**

The 1978 annual meeting of the Association will be held Friday, December 8, 1978, at 2:00 o'clock, P.M., in Courtroom 1, Franklin County Courthouse for the election of officers, reviewing and acting on reports of committees and conducting such other business as may properly come before the meeting.

All committee chairmen are requested to file a written committee report with the Secretary at the meeting.

**JOHN MCD. SHARPE, JR.**  
*Secretary*

**ADDENDUM**

At approximately 3:30 o'clock, P.M., following the Association meeting, the Legal Services Society of Franklin County will hold its annual meeting to receive reports, elect directors, and take such other action as may properly come before the meeting.

**GEORGE E. WENGER, JR.**  
*Secretary*

At approximately 3:45 o'clock, P.M., following the Association meeting, the Franklin County Legal Journal (corporation) will hold its annual meeting to receive reports, elect directors, and take such other action as may properly come before the meeting.

**JAY H. GINGRICH**  
*Secretary*

15. The petitioner just purchased and is driving a 1977 Volare, which she is paying for as indicated on the weekly expenditure list above.

16. The weekly food item of \$35.00 includes expenditures made by the petitioner for meals taken outside the home.

17. The petitioner testified that she spent the \$25.00 given her by the respondent each week for expense items other than those set forth on her weekly expenditure list. The only expense items specifically identified in this category was seven cans of dog food at thirty-three (\$.33) cents per can, plus a box of dog food, which would not qualify as a necessary expense.

18. At the time of hearing some or all of the 1978 Real Estate Taxes were not paid, and a furnace or heating repair bill of approximately \$20.00 had not been paid. Counsel for respondent with respondent's approval advised the Court that it was the respondent's intention to continue to pay the petitioner \$25.00 per week and all household bills as heretofore paid; and that the 1978 Real Estate Taxes and the heating bill would also be paid.

19. In the petitioner's petition, she requested an award of \$50.00 per week, but at the hearing testified that if the respondent continued to pay all household expenses as heretofore, she would require only \$35.00 support per week.

20. The parties while continuing to share the same residence have established different lifestyles and go their own separate ways without regard to each other.

21. The petitioner testified that respondent has been engaging in a relationship of some undefined variety for a number of years with a woman who resides in Front Royal, Virginia, and that she had seen them together on several occasions.

22. When the respondent is not on the road, he stays at the parties' home, but usually comes home late after drinking.

23. Until approximately three years ago the respondent gave the petitioner \$45.00 per week, provided her with credit cards and paid for her gasoline. He then told petitioner she should secure employment; reduced her weekly payment and terminated her use of the credit cards, which were unidentified.

24. The petitioner had purchased personal items for the respondent until three years ago, but no longer does so.

## DISCUSSION

The issues presented in this case are:

### I

May the court impose an order for support on a spouse for the maintenance of the other spouse where the parties continue to reside together in their home?

### II

Do the facts in the case at bar justify the imposition of a support order on the respondent herein for the benefit of the petitioner?

Preliminarily, we commend counsel for both parties for the thoroughness and general excellence of the memoranda of law submitted on the issues.

The seminal case on the first issue is *Commonwealth v. George*, 358 Pa. 118. In that case the evidence established that the husband, wife and four of their five children lived in the \$30,000.00 home purchased and being paid for by the husband. The husband paid all household expenses, maintained life insurance, and expended \$1,700.00 per year for family necessities and clothing. He did remain away from home frequently and became intoxicated; he stopped credit at one store; retained control of family finances; insisted purchases be made at a store with which he had a business connection, refused to permit his wife to join a country club, and did not pay bills promptly. On cross-examination the wife conceded that the family lived very nicely and that her main source of complaint was that the husband too strictly controlled the expenditure of his income. The trial court entered a support order requiring husband to pay wife \$300.00 per month.

Reversing, the Supreme Court held:

“The arm of the court is not empowered to reach into the home and to determine the manner in which the earnings of a husband shall be expended where he has neither deserted his wife without cause nor neglected to support her and their children. In the absence of evidence legally sufficient to support a finding of either essentials the court is without power to enter an order upon the husband directing payment to the wife of any amount. The statute was never intended to constitute a court a sounding board for domestic financial disagreements, nor a board of arbitration to determine the extent to which a husband is required to recognize the budget suggested by the wife or her demands for control over the purse strings. The legislature intended Section 733, and prior statutes from which it was derived, to provide the method by which a wife who has been wrongfully deserted by the husband or who has been deprived of support by the neglect of the husband, could seek judicial assistance in securing a reasonable allowance for the support of herself and family: *Commonwealth ex rel. Cunningham v. Cunningham*, 102 Pa. Superior Ct. 104, 107, 156 A. 551. In such circumstances, the court is vested with broad discretionary powers to enter an appropriate award having taken into consideration the husband’s property, income, earning capacity, and the family’s station in society: *Jones v. Jones*, supra.

“Under the circumstances of this case, the Court of Quarter Sessions was without power to enter the order where, although the parties reside under the same roof, the husband neglects or refuses to provide food, clothing and reasonable medical attention to his wife and family. We decide only that where, as here, the husband provides a home, food, clothing and reasonable medical attention, he cannot be directed to pay a given stipend to the wife so that she may have it available for her own personal disposition. The method whereby a husband secures to his wife and family the necessities of life is not a proper subject for judicial consideration and determination in the absence of proof of desertion without cause or neglect to maintain.”

In *Commonwealth ex rel. Turner v. Turner*, 192 Pa. Super. 502, 504 (1960), the Superior Court affirmed an order of support where the husband, wife and child lived together, husband earned \$77.50 per week (net), and wife \$42.00 (net); husband paid the rent for the apartment and gave wife \$9.00 in three weeks; and wife and child were required to eat their meals with wife’s mother. The Superior Court concluded on the evidence that the defendant “was properly chargeable with nonsupport, which made him subject to the orders of the lower court.”

In *Commonwealth ex rel. Hamilton v. Hamilton*, 199 Pa. Super. 255 (1962), the Superior Court found that the husband was adequately maintaining his family, devoting virtually all of his income to family support, and the family was living beyond its income. The support order of the lower court was reversed. In a concurring opinion the Honorable Robert E. Woodside stated:

"I fear that it might be gleaned from the opinion of the majority that it is the court's business to look into the family pocketbook and bill file whenever requested by the wife to do so, and that we have set aside the support order here because, after examining the family budget, we concluded that the husband was handling the money satisfactorily. The law does not contemplate that the courts should attempt to solve the financial difficulties of a husband and wife who are living together.

"Although the majority has advanced sufficient reasons for reversing the order of support after it examined the family financial problems, I believe the order should be set aside solely on the more basic ground that the court should not attempt to allocate the husband's pay check to the family bills when the husband and wife are living together. This, it seems to me, is the rule established by *Commonwealth v. George*, 358 Pa. 118, 123, 56 A. 2d 228 (1948). This rule might be subject to a few exceptions, as, for example, where a husband and father has been regularly drinking his pay before paying the grocer, but certainly the case before us here has nothing to take it out of the general rule. For these reasons, I concur in our reversing the support order."

In *Commonwealth ex rel. Mitterling v. Mitterling*, 201 Pa. Super. 538, 542 (1963), the Court noted that the rule of *Commonwealth v. George*, supra, is based on practical consideration. "It is impractical, if not impossible, for a court to take sufficient testimony of specific expenditures for living expenses to make an intelligent finding on the adequacy of the support furnished by the head of the household to the other members of the household."

In *Commonwealth ex rel. Glenn v. Glenn*, 208 Pa. Super. 206, 211 (1966), the court held:

"To summarize, entirely absent in this case are the usual accusations of excessive drinking, gambling, and extramarital affairs. About the worst that can be said of this hard-working husband is that he did not spend his money as his wife thought it should be spent. We do not favor complete abdication by

the husband and father of his role as head of the household. The testimony in the case at bar does not indicate that the children were undernourished or poorly clothed. There is nothing to show that they have been deprived of necessary medical and dental services. In short, the record is devoid of sufficient evidence to establish actual neglect to maintain."

In *Commonwealth ex rel. Gauby v. Gauby*, 223 Pa. Super. 92, husband, wife and their two children lived together in their jointly owned home. Husband took control of the financial affairs of the family and gave the wife \$30.00 per week for food, clothing and utilities. Wife complained that husband stayed away from home a great deal and of a relationship with another woman. The Superior Court noted husband's testimony that he drove 2800 to 3000 miles per week as a truck driver and observed that the proof in the record concerning the relationship with the other woman was sparse.

The trial court's order of support was reversed as an error of law, and the Superior Court held:

"This record does not present such obvious neglect as to take the case out of the general rule. There was no finding of desertion and the testimony concerning the other woman did not rise much above innuendo. This is the kind of case where the court is reaching into the home in an attempt to allocate the husband's pay check to the family bills when they are living together."

In *DiPadova v. DiPadova*, 223 Pa. Super. 408, 410 (1973), the order of support was affirmed and the Superior Court quoted with approval from the lower court's opinion:

"The husband here has decided that he will support his family in the manner that he decides. He also pursued a course of conduct that degrades and humiliates his wife forcing her to stay in the same household if she is to live and eat overlooking his transgressions just so that she can survive. This Court does not believe that she must do this. If she chooses to go her own way with her children, he must support her all the same."

In *Scuro v. Scuro*, 226 Pa. Super. 592 (1974), an order for support in the amount of \$300.00 per month was reversed where the Superior Court found the parties were living together in their jointly owned home with the husband paying all the bills and giving his wife \$20.00 per week.

From this analysis of the appellate court decisions, we conclude that as a matter of law an order may be entered

requiring a spouse to provide support for the other spouse when they are living together only where the evidence establishes that the breadwinner-spouse is neglecting to provide food, clothing, shelter, medical and dental care and other necessary living expenses which are reasonable and in accordance with the family station in life. Such necessities are not however to be confused with luxuries, spending money or financial control. Since the approval of the Equal Rights Amendment and the line of cases construing the Amendment, it is also necessary in each case for the trial court to ascertain and give consideration to the income or earning capacity of the petitioner-spouse.

Thus, the answer to the first issue must be that this Court may impose an order for support in the case at bar, despite the fact that the parties are living together if the facts of the case establish a neglect to provide necessary support on the part of the respondent.

In the case at bar, the petitioner submitted a list of weekly expenditures totalling \$109.91. Her average weekly earned income was \$91.00, and she receives \$25.00 per week from the respondent for a total weekly income of \$116.00. When the petitioner was questioned concerning the apparent surplus of income over expenses, she testified that she spent the \$25.00 provided by the respondent on items not included on her expense list such as several dollars worth of dog food, and concluded that there was a weekly deficit rather than a surplus. Petitioner's memorandum suggests, in addition to dog food, that she purchased cleansing and laundry supplies.

Considering the facts that the petitioner has a \$10.00 miscellaneous item in her expense list, and (with all due regard to the importance of man's best friend) dog food hardly qualifies as a necessary for petitioner, we conclude that the petitioner has failed to sustain her burden of proving that the respondent has neglected to support her. On the facts presently before the Court, we conclude it would be an error of law to impose an order of support upon the respondent.

We are mindful of the facts that the petitioner expressed concern over the failure of the respondent to pay certain current real estate taxes and a furnace or heating repair bill, and that respondent's counsel, with his client's approval, stated that respondent would pay the taxes and the bill and continue to pay all other expenses as heretofore with the \$25.00 per week to petitioner.

We also note that petitioner includes in her expense list a past due bill of the Waynesboro Hospital in the amount of

\$232.00, which she proposes to pay at the rate of \$2.50 per week. Clearly, hospital bills are a necessary item of support. Respondent's financial ability to pay for such necessities is equally clear as is his legal responsibility to do so. There is no justification in law or logic why the hospital should be expected to wait more than 92 weeks for its past due bill.

We conclude that the best interests and the rights of both parties and the law will be served if this Court retains jurisdiction of this proceeding for a further period of three months. If during that period the parties should discontinue their present living arrangement, or the respondent should discontinue or lower the level of his contributions to the petitioner, or the respondent should within the three months fail to pay in full the current real estate taxes, heating repair bill and balance of the Waynesboro Hospital bill; then the petitioner, via her counsel, may request a prompt hearing to consider her right to have a support order entered. If the parties' living arrangement continues with the respondent's contributions undiminished, and the taxes and bills are paid in full by respondent, then the Court will entertain a motion at the expiration of three months for the dismissal of the petition.

#### ORDER OF COURT

NOW, this 20th day of October, 1978, this case is continued until January 22, 1979.

Exceptions are granted the parties.

CHAMBERSBURG MOTOR SPEEDWAY, INC. V. HOOVER,  
C. P. Franklin County Branch, E. D. Vol. 7, p. 64

#### *Equity - Agreement to Lease - Specific Performance*

1. An agreement to lease is an executory contract, which, if valid, may be specifically enforced.
2. An agreement to lease, signed by both parties and complete in itself as to essential and material terms, constitutes a presently enforceable contract.
3. Where an agreement to lease recites an express intent to be legally bound to enter into a lease for described premises for an express term beginning upon a specific date, and defines the rental payments, a demurrer to an action for specific performance will be overruled.

*Joel R. Zullinger, Esq., Attorney for Plaintiff*