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.

2. In the context of the Pa. No-Fault Act, residence is one of the requirements established by the act to determine which company is responsible for the injured's expenses.

3. Where parents, youth agency and court intended minor to reside with father at the time of the accident, the fact the minor went to live with his mother after release from the hospital does not change the minor's residency at the time of the accident.

John N. Keller, Esquire, Counsel for Plaintiff
Thomas E. Brenner, Esquire, Counsel for Defendant, U.S.F. & G.
David L. Schwalm, Esquire, Counsel for Defendant, Commercial Union Assurance Companies
Charles W. Rubendall II, Esquire, Counsel for additional defendant, County of Franklin

OPINION AND ORDER

EPPINGER, P. J., September 28, 1984:

Jessie Daniel Smetzer (Danny) was injured in an automobile accident on May 16, 1982, at a time when he was living with his father, George R. Smetzer, Jr. His father had an insurance policy with United States Fidelity and Guaranty Company which contained Pennsylvania no-fault coverage. The car in which Danny was riding at the time of the accident was operated by Danny's cousin, Robert Joseph Smetzer. This automobile was insured by Commercial Union Assurance Companies.

Danny was 17 years old at the time of the accident and had been living with his father for nine days. In 1978 our Juvenile Division placed Danny in the care, custody and control of the county youth agency. From then until he went with his father on May 7, 1982, he had lived with his paternal grandparents, his mother, Brenda Smetzer, and in the children's home of the Franklin County Children's Aid Society. The order of May 7 continued Danny in the care, custody and control of the county youth agency "with placement to commence this date with his father, . . . " The order was made following an agreement between Danny's mother, father and county youth agency.

When Danny recovered enough to be released from a two-month's stay at the Baltimore Shock Trauma Center, apparently

LEGAL NOTICES, cont.

to the creditors of the Chambersburg Trust Company, executor of the estate of Mary Louella Ridgley, late of Chambersburg, Franklin County, Pennsylvania, deceased.

SECREST First and final account, statement of proposed distribution and notice to the creditors of A. Margaret Secrest, executrix of the last will and testament of Jackson L. Secrest, late of Lurgan Township, Franklin County, Pennsylvania, deceased.

STUMBAUGH First and final account, statement of proposed distribution and notice to the creditors of Kevin M. Stumbaugh and Joyce E. Remavege, administrators of the estate of Beverly J. Stumbaugh, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

STUMBAUGH First and final account, statement of proposed distribution and notice to the creditors of Reuben S. Stumbaugh, administrator of the estate of Lester P. Stumbaugh, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

Glenn E. Shadle
Clerk of Orphans' Court of
Franklin County, PA

4-5, 4-12, 4-19, 4-26

IN THE COURT OF COMMON PLEAS
OF THE 39TH JUDICIAL DISTRICT
OF FRANKLIN COUNTY,
PENNSYLVANIA —
ORPHANS' COURT DIVISION

The following list of Trustees, Guardians of Minors, Guardians of Incompetents and Custodians Accounts will be presented to the Orphans' Court Division of the Court of Common Pleas, Franklin County, Pennsylvania for Confirmation on May 2, 1985.

ETTER First and final account, statement of proposed distribution and notice to the creditors of the Valley Bank and Trust Company, Trustee for the Trust established under the Will of O. C. Etter, deceased.

Glenn E. Shadle
Clerk of Orphan's Court of
Franklin County, PA

4-19, 4-26

without further order of the court, Danny went to live with his mother.

Substantial expenses were incurred in caring for Danny. Demands were made by Danny on both U.S.F.&G. and Commercial Union, and when each refused to pay, this action for a declaratory judgment was filed. U.S.F.&G. joined the County of Franklin on the theory that Danny was in the care, custody, and control of the county youth agency and, therefore, the county's policy should provide the coverage.

What is before us now are the motions for summary judgment filed by all four parties. The essential facts are not in dispute. Danny is a "victim" entitled to receive basic loss benefits, including medical expenses, pursuant to Section 201(a) of the Pennsylvania No-Fault Motor Vehicle Insurance Act, 40 P.S. §1009.101 et seq. The only question here is which of the three defendants is required to provide the coverage. We are of the opinion that U.S.F.&G. is the one.

This case is somewhat unique in that while Danny was living with his father at the time of the accident, he was in the care, custody and control of the county youth agency. In addition, when Danny recovered he did not return to his father's house, but went to live with his mother.

In these proceedings, noone is really arguing that Commercial Union is the responsible company. It is U.S.F.&G.'s position that the county's carrier is alone liable, and if not, then jointly responsible with U.S.F.&G. for the no-fault benefits.

Section 204 of the no-fault act, 40 P.S. §1009.204, provides a system of priorities where two or more policies might be applicable. *Pennsylvania National Mutual Casualty v. J.C. Penney,* 8 D&C3d, 265, 268 (Dauphin 1978). We are governed by Section 204(a)(2) which provides that the company that shall pay is the one under which the victim is insured. This section includes Danny as an insured under his father's policy if his father's home was his residence at

the time of the accident.[1] Arguably, if the county was his residence at the time of the accident, Danny would be included as an insured under its policy.

It seems clear that in reading Section 103(B)(ii), 40 P.S. §1009.103, where we find the definition of "Insured", Danny was a minor in the custody of his father in residence at the time of the accident in his father's household.

We have been referred to *Baigis v. Harleysville Mutual Insurance Co.*, 15 D&C3d 317 (Bucks 1980). In that case a child who had been placed in foster care by the county youth agency and was injured in an accident was found to be in the custody of both the foster parents and of the county. *Baigis* relied upon the definition of "custodian" found in the Juvenile Act, 42 Pa.C.S.A. §6302, as one *other than a parent* (emphasis ours) or legal guardian, who stands in loco parentis to the child, or a person to whom legal custody of a child has been given by order of a court." Here the court's order was that Danny should be placed with one of his parents.

It seems to us that Danny, as an insured, must meet two tests. He must be in custody and in residence. One is a resident of a household if he usually takes his home in the same family unit, even though he temporarily lives elsewhere. 40 P.S. §1009.03. *Baigis* did not deal with the residency requirement so far as the county's liability is concerned.

Residence is a term whose statutory meaning depends upon the context and purpose of the statute in which it occurs. *Jones' Case,* 341 Pa. 329, 332, 19 A.2d 280, 282 (1941). A child usually takes the domicile of the parent with whom he lives in fact. *Baker v. Baker,* 8 Cumberland 13, 14 (1957), and under our case law, "residence" in the statutory sense, is synonymous with "domicile". *Loudenslager Will,* 430 Pa. 33, 37, 240A.2d 477, 479 (1968).

[1] In this case, the father was required to pay support for his son under the order of the court. As a part of the order he was required to cover the child with medical insurance. U.S.F.&G. argues that since auto insurance was not mentioned, the father is not responsible for such coverage. Medical insurance is mentioned in most support orders. So far as we can recollect, auto coverage has never been mentioned even where a dependent is known to have a car. Regardless of that, what the court might have said in this regard would give way to the coverage system provided by the no-fault act.

LEGAL NOTICES, cont.

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, April 24, 1985, an application for a certificate for the conducting of a business under the name of Dave's Tavern, with its principal place of business at 404 South Main Street, Chambersburg, Pennsylvania. The names and addresses of the persons owning or interested in said business are Gary L. Carter of 488 East Washington Street, Chambersburg, PA 17201, and Jack A. Goulding of 1063 South Fifth Street, Chambersburg, PA 17201.

Patrick J. Redding, Esquire
3 North Second Street
Chambersburg, Pa 17201

5-3-85

NOTICE

A Bankruptcy Judge Search Committee has been appointed to make recommendations to the Judicial Council of the Third Circuit concerning two full-term appointments for United States bankruptcy judge for the Middle District of Pennsylvania. The Search Committee is composed of: James M. Howley, Esquire; Thomas Wood, Esquire; Smith Barton Gephart, Esquire; John H. Doran, Esquire; and Mrs. Elsie Swenson.

Any qualified persons wishing to be considered for appointment should contact:

Bankruptcy Judge Search Committee
c/o William R. Slate, II, Esquire
Third Circuit Executive
Room 20716 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

to receive a copy of the appropriate application materials. Phone # 215-597-0718.

The position of bankruptcy judge is a fourteen-year appointment, carrying a present salary of $68,400 per annum. Applicants must be admitted to practice before the highest court of at least one state, or the District of Columbia, and must be in good standing in every other bar of which they are members. All qualified candidates will be considered equally and without regard to race, sex, religious affiliation or national origin.

Completed applications should be received in the Circuit Executive's office by *May 17, 1985.*

5-3-85

In the context of the Pennsylvania No-Fault Act, residence is one of the requirements to establish the priorities listed in Section 204. While Danny may remain in the "legal custody" of the county, he surely did not live in the home of the county. He lived with his father.

An argument was made that such residence was temporary because he had lived with his mother, was with his father at the time of the accident, then went back to his mother after the accident. There is no question that all the parties, mother, father, Danny, the county youth agency and the court intended that Danny should be residing with his father at the time of the accident.

Under all of these circumstances we find that his residence was with his father and his father's insurance company, U.S.F.&G. is liable for the no-fault benefits.

ORDER OF COURT

September 28, 1984, on the question of liability, we find in favor of Jesse Daniel Smetzer, plaintiff, and against United States Fidelity and Guaranty Company. We find in favor of Commercial Union Assurance Companies and the County of Franklin.

Trial on the issue of damages shall be set on motion of one of the parties if the matter cannot be resolved between them. Costs shall be paid by United States Fidelity and Guaranty Company.

EICHELBERGER v. EICHELBERGER, C.P. Franklin County Branch, No. F.R. 1983 - 600

Divorce - Alimony Pendente Lite - Counsel Fees

1. The purpose of alimony pendente lite is to ensure that a financially dependent spouse will be able to defend an action in divorce.

2. In making the award the court is to consider the husband's ability to pay, the separate estate and income of the wife, and the general situation of the parties.

3. An award for alimony pendente lite exceeding one-third of the