approached the agents asking them if they wanted to buy some LSD and then arranged for the sale and, before the sale was actually made, informed the agents of the price. The inference of a conspiracy with the seller is obvious.

If we are to find a conspiracy between Evangelista and Ott, we ought to find some personal or financial interest in bringing trade to Ott, *Commonwealth v. Simione*, 447 Pa. 473, 291 A. 2d 764 (1972), or evidence of prolonged cooperation between the two parties, *Commonwealth v. Stephens*, 231 Pa. Super 481, 488-89, 331 A. 2d 719, 722 (1974); *Direct Sales Co. v. U.S.*, 319 U.S. 703 (1943).

Stephens owned a store and in exchange for room and board, a friend worked in the store without pay. A narcotics agent entered the store, went directly to the friend and made a purchase of marijuana from a supply which the friend kept in another room. Though Stephens was two feet away from the friend during the transaction, he did not react or respond to the conversation regarding the sale. Stephens' convictions for possession and conspiracy to sell marijuana were reversed because even though it could be inferred Stephens overheard the conversation and realized that marijuana was being sold, it was not reasonable to infer that he had made a prior agreement to sell.

The mere happening of a crime in which several people participate does not of itself establish a conspiracy among those people. There must be evidence of an agreement and even apparently concerted action does not prove an agreement or common understanding. *Commonwealth v. Holman*, 237 Pa. Super 291, 296-97, 352 A. 2d 159, 161-62 (1975). The fact that a person is present at the scene of a crime when it is committed, by itself, is insufficient to convict that person of conspiracy to commit the crime. *Commowealth v. Goodyear*, 235 Pa. Super 544, 549, 344 A. 2d 672 (1975).

If there was any agreement in this case, it was the agreement between Evangelista and Albrecht that Evangelista would try to direct the agent to a place or person where he could get what he asked for. There was no showing of any agreement between Evangelista and Ott to sell the controlled substance, only a statement by Ott to Evangelista that he would sell to Albrecht which Evangelista transmitted.

ORDER OF COURT

NOW, November 15, 1978, the defendant's demurrer is sustained, the case is dismissed and the costs are placed on the county of Franklin.

IN RE: TRUST UNDER WILL OF FRANTZ, C. P. Franklin County Branch, O.C. Doc. Vol. 87, p. 811

Orphan's Court - Advisory Opinions - Invasion of Trust Corpus - Maintenance of Beneficiary in Comfort - Station in Life - Attorney's Fees - Services Rendered an incompetent - Costs.

1. While advisory opinions are generally not given, they may be proper in a case where the language of a trust instrument is uncertain, the trustee may subject itself to surcharge by making certain disbursements, and all parties are present and all question are fully discussed.

2. The propriety of invading the corpus of a trust is controlled by the settlor's intent as reflected in the trust instrument, provided that that intent is within the rules of law.

3. Where testator has created marital and residuary trusts, with the stipulation that the residuary trust cannot be invaded until the marital trust is exhausted, the testator's primary intent is to provide for his widow during her lifetime.

4. Where settlor has given to the trustee the discretion to invade corpus to the extent "necessary to properly maintain and support my wife in similar comfort and in like manner as our standard of living provides", the invasion of corpus is not limited to the provision of necessaries.

5. Where settlor has given to the trustee the discretion to invade corpus to the extent "necessary to properly maintain and support my wife in similar comfort and in like manner as our standard of living provides", the trustee's payments of assessments against the benificiary's apartment residence, of reasonable room and board in light of the beneficiary's station in life, and of hospitalization expenses are proper disbursements.

6. Where settlor has given to the trustee the discretion to invade corpus to the extent "necessary to properly maintain and support my wife in similar comfort and in like manner as our standard of living provides", the trustee's payments of the expense of a rental car for the purpose of visiting family friends and chauffer charges and auto expenses incurred for depositions, court hearings, and doctor's examinations may be proper disbursements.

7. Where settlor has given to the trustee the discretion to invade corpus to the extent "necessary to properly maintain and support my wife in similar comfort and in like manner as our standard of living provides", the trustee's payment of the expenses of legal services to restore the legal competency of the beneficiary, to obtain a divorce for the beneficiary, and to establish the beneficiary's claim against the trust may be proper disbursements.

8. Attorney's fees at a rate similar to that charged by other attorneys of equal ability in the same geographical area are presumed to be reasonable in the absence of proof to the contrary.

9. Persons supplying goods or services to an incompetent are entitled to be reimbursed from the incompetent's estate even absent a contract if they did not intend to perform gratuitously.

10. Costs of Orphan's Court proceedings where the trustee petitions for approval of trust fund disbursements are borne by the trust.

LeRoy S. Maxwell, Esq., Attorney for Citizen's National Bank and Trust Company of Waynesboro, Pennsylvania

Edmund C. Wingerd, Jr., Esq., Attorney for Barbara Ann Sanders, Sally Hewitt Lake, Daniel H. Sanders, Jr., and Barbara Stewart Van Penick

OPINION AND ORDER

EPPINGER, P.J., October 11, 1978:

When Raymond H. Frantz wrote his will, he created two trusts, one a Marital Deduction Trust for the benefit of his wife Lola, giving her a power of appointment by will, and the second, a Residuary Trust, with Lola as the life beneficiary and relatives of Mr. and Mrs. Frantz to receive the remainder. Both Mr. and Mrs. Frantz were married before their marriage to each other.

The Citizens' National Bank and Trust Company of Waynesboro (bank) was named trustee of each trust and was given the discretion to invade and use principal to the extent "[n]ecessary to properly maintain and support my wife in similar comfort and in like manner as our standard of living provides". The couple lived well.

The problems presented by this case occurred after Mr. Frantz died on June 19, 1974, and Lola had married James Waddell (Waddell). Within a short time after their marriage, Waddell had Lola declared an incompetent and himself appointed as her guardian. He continued in this position from December, 1976, until he was removed from the office against his will in June of 1977. Prior to being declared an incompetent, Lola had transferred a substantial amount of her property to joint ownership with Waddell. In addition she spent substantial sums on a trip for the two of them and during the

time when he was her guardian, to put it mildly, Waddell seems to have been a faulty administrator. Items which Lola owned cannot now be found or have been disposed of without accounting for them.

Late in May, 1977, Lola became aware of what was happening to her and she consulted friends Gladys and Charles Stevens who in turn took her to see an attorney, Richard H. Olsen. The three of them took charge of Lola's affairs. Mr. Olsen obtained the removal of Waddell as guardian and Mrs. Stevens was appointed in his place. Olsen also took action to restore her status as a legally competent person. In the meantime, the Stevens were looking after her and in so doing incurred substantial expenses.

The bank petitioned for the Court's approval to invade the corpus of the Marital Deduction Trust so that the expenses which were incurred by Lola could be paid, together with the rent for her apartment and other items. The bank wants to avoid the risk of being surcharged if they responded to Lola's request to invade the principal of the Marital Deduction Trust.

Generally advisory opinions are not given by our courts. *Girard's Estate*, 49 D & C 217 (1944). However such opinions may be proper when the language of the trust instrument is uncertain, the trustee may subject itself to surcharge by making payments, all parties are present and all questions are fully discussed. See *Langdon's Estate*, 57 D. & C. 595 (CP Warren County 1972), *Arrott's Estate*, 36 D & C 546 (O.C. Phila. County 1939). Though both of these cited cases involved the requests at the audit for a declaration to guide the future conduct of trustees, the circumstances in this case are sufficiently similar so that both *Langdon* and *Arrott* are authority for a response by this court to the bank's request.

In addition to contending that the court has no authority to give an advisory opinion, the respondents who are residuary legatees (legatees) object to the disbursements by the bank, arguing that payments of substantial funds from the principal of the Marital Trust would risk the invasion of the Residuary Trust, should the combined income from the two trusts be inadequate to maintain and support Lola in similar comforts and in like manner as she and Mr. Frantz enjoyed when they were together.

That is a realistic problem. We are asked to approve payments that would substantially diminish the fund in the Marital Trust. As of April 14, 1978, the market value of the assets of the marital Trust was $58,987.99 and the Residuary

Trust was $228,200.80. The income paid to Lola in 1977 was $3,795 from the marital Trust and $13,860 from the Residuary Trust. Lola's assets were difficult to determine at the time of the hearing because of the confused state of her affairs, including the problem of joint ownership with Waddell.

We have determined that the primary purpose of Mr. Frantz was to provide for his widow during her lifetime. The legatees argue this is not so, citing their relationship to the testator and the stipulation that the Residuary Trust could not be invaded until the Marital Trust was exhausted. We believe if the testator's intent was to primarily benefit those who will receive the remainder of his estate, he would simply have provided that there could be no invasion of the principal of the Residuary Trust for Lola's benefit. He did not do this.

In many respects, Lola's ill-advised entrance into marriage with Waddell is not much different than if she had suffered from some disease and the money that Mr. Frantz set aside had been necessary to care for her. The difference is that Lola's problem was not physical in the usual sense, but her liason with Waddell led to or culminated in a breakdown that seemed to leave her helpless for a time. To restore her to dignity and responsibility, not physicians, but a lawyer and friends did acts which were obviously essential to re-establish her to the standard of living she enjoyed when living with Mr. Frantz. We think this is exactly what he intended. We use the analogy to illnesses because we believe it would have gone unchallenged had principal from the Marital Trust been sought for that purpose.

The propriety of invading the corpus of a trust is controlled by the intent of the settlor as reflected in the trust instrument if such intent is consistent with the rules of law. *Leffman Trust*, 378 Pa. 128, 105 A. 2d 115 (1954). In *Zumbro v. Zumbro*, 69 Pa. Super 600, Judge Kephart interpreted a clause similar to that in the Frantz will and stated. "Her comfort may embrace a variety of things. It is not limited solely to the necessaries of life, but may include things which bring ease, contentment and enjoyment." *Zumbro* encourages liberal interpretations of what is necessary to the comfort of a beneficiary and we believe that Mr. Frantz intended it to be done in the case of his will.

Mr. & Mrs. Frantz owned two houses, one in Florida and one in Pennsylvania, and there is testimony that they maintained a rather high standard of living. To support Lola in the manner in which they had lived would necessitate the invasion of the principal which the bank now seeks.

The bank asks us to approve expenses totalling $57,451.99 of which $7,664.40 has already been paid. The court previously authorized the payment of $2,585.35 out of the corpus of the Marital Deduction Trust. If we approve all of the expenses included in the request, the trust corpus would be reduced from an inital value of $73,360.00 to $12,430.66.

The legatees argue, however, that because there was no contractural relationship between Lola and those who submitted the claims, they may not be paid. Under the Act of 1956, P.L. 1154, Sect. 511 as amended, 50 P.S. Sect. 3511, an adjudicated incompetent is incapable of making a contract. But persons supplying comforts and necessities to an incompetent are entitled to be reimbursed out of the incompetent's estate even absent a contract. *In re Siglin*, 20 D & C 105 (C.P. Union County 1933). All that is required is that the supplier did not intend to supply the goods or services gratuitously. *Landis' Estate*, 59 D & C. 544 (C.P. Berks County 1947). In *Ziegler's Estate*, 4 D & C 51 (O.C. Phila. Co. 1917), the Court ordered the trustee of a support trust to pay all bills for the proper support of an incompetent beneficiary and to invade the corpus if the income should prove insufficient.

Incidentally, the court said further that under the terms of that particular trust, the fact that the beneficiary had property of her own did not require that her money be expended before the trust corpus was invaded.

At the time of the taking of testimony, the bank introduced certain testimony and exhibits. The legatees objected on the grounds that the evidence was irrelevant based on their position that there was no authority in the bank to pay the sums. We reserved ruling on the objections. In view of our finding that the bank can be required to pay certain of the amounts requested from the corpus of the estate, we now overrule the objections because the exhibits and testimony are clearly relevant.

Surf Club Apartment Assessments. Lola sold her house in Waynesboro and bought Mr. Frantz's Surf Club apartment from the estate. To live in this complex, the occupant must be a member of the Surf Club and in addition pay the assessments and rents. Before coming to us for approval, the bank paid $5,664.40 in assessments to Surf Club to preserve Lola's right to continue to reside in her apartment. The legatees did not object to this payment, and we approve it as necessary to Lola's proper support.

Claim of Gladys and Charles Stevens. Gladys and Charles

Stevens are the benefactors to whom Lola went when things apparently seemed most desperate. They took her in and immediately set in motion the program to restore her to her former position in life. In doing this they incurred certain expenses and submitted an affidavit at the hearing listing them. Because we only have an affidavit, the supporting information is a little sketchy. We will discuss the claims individually.

(a) *Room and Board.* This item includes all meals at home and at the Ole Post Inn Restaurant for a period of nine months and is in the amount of $4,500.00. At the time Lola went to the Stevens it was necessary to physically remove her from Waddell's presence. Considering Lola's station in life, the sum of $500 per month is not unreasonable for room and board. We will aprove this item.

(b) *Use of rental car - 10,000 miles.* This item includes approximately 40 round trips from Marco Island to Miami and one trip from Marco Island to Buskirk, New York, and return. During their marriage, Lola and Mr. Frantz lived at Marco Island. So it was natural for her to go to the Stevens who lived there. Marco Island is some distance from Miami. We find that the trips to Miami were essential and that the Stevens should be compensated for the car rental. The trip to Buskirk, New York, is in a different category. The evidence showed that Waddell owned some property there, that he placed it in joint title with Lola when she was transferring everything to him. It can only be assumed that going to Buskirk was an attempt to evaluate what Lola had in a one-half interest in that property. Such a trip was a matter of establishing her property rights in her own estate and could not be classified as necessary to her support. We disapprove this item.

Our research has revealed that that round-trip to Buskirk, New York, was 2,930 miles. In computing the per mile charge for the use of the auto the Stevens used 9.8 cents per mile. We deduct the 2,930 miles from 10,000 miles, leaving 7,070 miles at 9.8 cents per mile and approve $692.86 of this claim.

(c) *Chauffer charges and auto expenses.* This item is for 200 hours of service at $5.00 per hour from trips to Miami for depositions, court hearings, doctor's examinations, etc. We do not question the need for these trips and find that $5.00 per hour to be a reasonable rate to charge for the services and approve the payment of $1,000.

(d) *Party for Lola Frantz.* This party was held to celebrate the restoration of Lola's legal competency. We do not doubt that there was occasion to celebrate and that such celebration

would be a festive event and perhaps expensive. We are not convinced, however, that a party was necessary even under the interpretation of Mr. Frantz's will that we have adopted. We disapprove the reimbursement of this item out of the corpus of the Marital Trust.

(e) *Loss of Business at Ole Post Inn.* The Stevens were apparently the proprietors of this Inn. They claim to have closed it for twelve days to take Lola to Miami. There is no supporting evidence to indicate that it was necessary for both Mr. and Mrs. Stevens to accompany her. Perhaps this was a matter of convenience to them. At any rate, we feel that because of the lack of evidence to indicate that this is a valid claim to be paid out of the corpus of the marital trust we must disapprove it.

(f) *Loss of real estate sales commission.* The Stevens apparently moved Lola from their home on Marco Island to her home at Miami. Mr. Stevens asserts that while doing this he lost commission on the sale of real estate. We believe that it was a necessary matter for Lola to be moved to her home at the Surf Side Club, but there is insufficient evidence before us to explain this claim. We are unable to determine how the loss occurred or understand why it would occur simply because of Mr. Stevens' absence from Marco Island. The claim is too speculative for our approval.

We have therefore approved payments from the corpus of the Marital Deduction Trust to the Stevens in the amount of $6,192.86.

Counsel fees. During Lola's legal battle to have competency restored, she incurred counsel fees of $28,750.00. This figure represents 287.5 hours of work by Attorney Richard H. Olsen at $100 per hour.

The legatees make two points: First, that the portion of this fee which is involved in enforcing Lola's claim against the trust should not be allowed, *Bright's Estate*, 74 Montg. 431 (1958) and, second, that a trustee has no right to pay an attorney except for services in the administration and protection of the trust. 39 P.L.E. 139. We think the services over and above the enforcement of Lola's claim may be put into several other categories, however: (1) Services to extricate Lola from the grip of Waddell and to restore her to legal competency, (2) Preservation of the assets which Waddell had under his control from further abuse, (3) Diminishing the fee of Waddell's attorney in resisting Waddell's removal as guardian, (4) Services in attempting to restore Lola's property to her and

Building, served as President of the Waynesboro YMCA and served his Church in many capacities.

Further, the Franklin County Bar Association, while accepting the inevitable, keenly feels the loss it has suffered and desires to preserve a record thereof and thus bear testimony to the esteem in which he was held.

THEREFORE, BE IT RESOLVED, that the Franklin County Bar Association, in Special Meeting, assembled this 23rd day of December, 1978, records an expression of its high regard for Roy S. F. Angle and for his service to his profession and his community and to express its deep sense of loss, as he will be sorely missed and deeply mourned by his family, friends, associates and clients.

It is FURTHER RESOLVED that this Resolution be spread upon the minutes of this Meeting and a copy delivered to his wife.

DATED: December 23, 1978

KENNETH E. HANKINS, JR.
E. FRANKLIN MARTIN
MILLARD A. ULLMAN
Resolutions Committee

(5) Services rendered in obtaining a divorce or termination of the marriage to Waddell.

We think that all of the services which Mr. Olsen provided in categories (1) and (5) must be paid from the Marital Deduction Trust because they are essential to Lola's maintenance. A person could hardly be comfortably maintained under an adjudication of incompetency when she is actually competent, nor when married to a person who actually seems to have been working against her. Protecting Lola's estate from further abuse, reducing attorneys fees charged against the guardianship, and efforts to restore Lola's property are not in the same category. They are like the trip to Buskirk, New York, These costs will have to be paid from Lola's resources.

While *Bright's Estate* supra, states the general rule with regard to payment of fees to enforce Lola's claim against the estate, we concur with the court in *Stuckey's Estate*, 40 D & C 2d 46, (O.C. Dauphin County 1966) that the rule is designed to prevent abuse of a trust fund by those claiming benefits. Though disliking the prospect of setting a precedent contrary to the general rule, the *Stuckey* Court nevertheless felt that in the circumstances of that case, as we feel in this, such costs and fees fall properly within Lola's needs. As stated in *Stuckey*:

> While the orphans' court is not a court of equity, it does apply the rules and principles of equity. An equitable result requires that the (beneficiary's) request for costs and attorney's fees (in establishing her claim against the trust) be granted.

We will therefore approve counsel fees in categories (1) and (5) and in enforcing the claim against the estate as indicated above.

Unfortunately, we do not have a breakdown of Mr. Olsen's bill. However, it should not be difficult to determine which of his services and the amount and value thereof were rendered in the approved areas. We will permit the testimony to be reopened and afford the bank the opportunity to establish this, and suggest that it might be done by interrogatories or depositions taken of Mr. Olsen rather than to require him to appear again in Franklin County. But if that cannot be done we will hold a further hearing on the bank's application. If interrogatories are used, the answers shall be submitted to the court and counsel and counsel for legatees shall have the right to file cross-interrogatories to be answered before the record is completed. If depositions are taken counsel for the bank shall give the legatees 20 days notice of the time and place of taking such depositions and the legatees shall have the right to be represented by counsel at the taking of the depositions.

Of course, if Mr. Olsen presents a breakdown of his labors and counsel can stipulate to the number of hours involved in categories (1) and (5) and in enforcing Lola's claim against the trust fund reserving all legal objections, that will expedite the proceedings and keep the costs down.

Mr. Olsen's charge of $100 per hour was stated by him to be within the rates charged by lawyers of equal ability in the Miami area. In *Crawford's Estate*, 340 Pa. 187, 16 A. 2d 521 (1940), the Court evaluated counsel fees claimed against the corpus of a trust and stated that counsel fees submitted to a court for approval must be presumed to be reasonable in the absence of proof to the contrary. In our case, at the hearing the legatees did not offer evidence of the inappropriateness of Mr. Olsen's hourly rate. The statement of his account was objected to as being irrelevant and we have overruled that objection. So we will approve the rate of $100 per hour for services rendered by Mr. Olsen.

Medical Expenses. The final claim against the Trust is for $216.00 due Saint Francis Hospital. This bill was incurred when Waddell claimed Lola attempted suicide. It may be that Waddell really intended by admitting Lola to further his scheme to take over her assets. But on the surface we feel a hospital admission, even under these circumstances, was related to Lola's support and we therefore approve the payment of $216.00 to Saint Francis Hospital.

Under the Orphans' Court power to do whatever is needful to carry out the duties within its jurisdiction, *In re Clunen's Estate*, 34 D & C 490 (1939), we will make a preliminary order to obtain the testimony concerning Mr. Olsen's fee. When that has been completed, we will calculate the sums to be paid from the Marital Trust in accordance with this opinion and make a final order, placing the costs of these proceedings upon the Marital Trust. *In re Morrison's Estate*, 11 D & C 447.

PRELIMINARY ORDER

NOW, October 11, 1978, the evidence is reopened to permit testimony to establish the fee of Richard H. Olsen, attorney in restoring Lola Frantz to legal competency, including the removal of James Waddell as guardian, in obtaining a divorce or the termination of the marriage to Waddell and in enforcing her claim against the trustee.

COMMONWEALTH EX REL HARMON V. HARMON, C.P. Cr.D. Franklin County Branch, No. 216 of 1978 N.S.

Support - Early Retirement - One-third Rule

1. Where the evidence demonstrates that a spouse has retired solely to extinguish or reduce his earnings to avoid spousal support the Court is justified in making an order based on the spouse's pre-retirement income.

2. The entire circumstances of an individual's retirement must be examined to determine the extent of his responsibility to support the estranged spouse.

3. Where the supporting spouse's individual capital is disproportionate to his income the Court may make an award in excess of one-third of the total income.

Kenneth F. Lee, Esq., Attorney for the Petitioner

Timothy S. Sponseller Esq., Attorney for Respondent

OPINION

EPPINGER, P.J., November 24, 1978:

George R. Harmon (George) is separated from his wife, Emma B. Harmon (Emma) and is living in New Jersey. She is in Chambersburg. Ordinarily we would not find this an occasion to discuss the reasons why George left since he concedes the support duty, but Emma's counsel believes that he has voluntarily suffered a decrease in income to remain in New Jersey. He was employed at Letterkenny Army Depot, was placed on temporary duty and when he was directed to return to Chambersburg, he elected to retire.

George's retirement income is $300.00 weekly. The evidence established that before retirement, his take-home income from all sources was about $325.00 weekly. If he has suffered a loss in real income, it is a small amount. When we made the order in the case, which we called a temporary order because Emma's counsel wanted to present a brief on the subject, we fixed Emma's support at $100.00 a week, just one-third of George's weekly retirement income. Are we limited to one-third as George contends, or can we fix a higher figure as Emma believes?

Emma has requested support in the amount of $600.00 monthly which would not cover her listed expenses of $733.00.