

An impertinent matter is one which has no necessary connection with the action at hand, need not be proved, is irrelevant to the material issue, and should have no influence in the result. *Grubb v. Mahoning Navigation Co.*, 14 Pa. 302, 305 (1850); *The Maryland and Virginia Eldership of the Churches of God v. Martin*, 12 Adams L.J. 197 (1971). Thus, when an impertinent matter is pleaded, it is entirely appropriate to make a motion to strike such when it is unrelated to plaintiff's cause of action. *Hudock v. Donegal Mutual Insurance Co.*, 438 Pa. 272, 277, 264 A.2d 668, 671 (1970), footnote #2. Since these matters pleaded have no relevant connection with plaintiff's cause of action, we grant defendant's motion to strike paragraph 10 as impertinent.

Defendant's final objection is that we are without jurisdiction to render a decree because plaintiff has failed to join an indispensable party. It is contended, by defendant, that the claimed right of way also passes through the lands of Paul and Anna Reed, who are therefore indispensable parties, without whom any decree would be null and void for lack of jurisdiction. We do not agree.

In Pennsylvania, an indispensable party is one whose rights are so directly connected with and affected by a particular litigation that he must be a party of record to protect such rights, and his absence renders any order or decree of court null and void for want of jurisdiction. *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 464 Pa. 377, 379, 346 A.2d 788, 789 (1975).

We do not perceive the Reeds as indispensable to this disposition. No allegation has been made by either plaintiff or defendant that the Reeds have tried to interfere with plaintiff's access to the public road or have in any manner asserted their privileges as owners of the passage. Even were we to assume that the Reeds were necessary to this case, we could still proceed without their joinder as long as there was no prejudice to any of the joined or possible parties. *Mechanicsburg Area School District v. Kline*, 494 Pa. 476, 486, 431 A.2d 953, 959 (1981). Of course, defendants may on their own motion seek to join additional defendants under Pa. R.C.P. Sec. 2252, if they believe it is necessary to protect their interests in this matter. *Martinelli v. Mulloy*, 223 Pa. Super. 130, 299 A.2d 19 (1972).

Therefore, since the Reeds are not indispensable to this case, we hold that this court has appropriate jurisdiction.

#### ORDER OF COURT

September, 23rd, 1983, defendants' demurrer to Count 2 is

sustained. All other preliminary objections are overruled. The plaintiff is granted sixty (60) days from the filing of this Order to file an amended complaint.

RICHARDS v. RICHARDS, C.P. Fulton County Branch, No. 65 of 1981-C

*Divorce - Alimony - Counsel Fees - Marital Misconduct*

1. Marital misconduct is not to be considered in an action for alimony pendente lite.
2. The guidelines for determining alimony pendente lite are clearly different than those for determining alimony.
3. Child support, spousal support and alimony pendente lite are different in character and one is not to be considered when the other is awarded.
4. The award of counsel fees lie within the discretion of the Court and is not intended to lie in full reimbursement of fees charged.
5. An award of alimony pendente lite should be retroactive to the date of filing the petition.

*Michael B. Finucane, Esquire, Attorney for Plaintiff*

*Robert B. Stewart III, Esquire, Attorney for Defendant*

*Stanley J. Kerlin, Esquire, Master*

#### OPINION AND ORDER

EPPINGER, P.J., July 5, 1983:

On April 21, 1982, a hearing was held before the Master, Stanley J. Kerlin, Esquire, regarding the award of alimony pendente lite, counsel fees, expenses, and costs in which plaintiff requested \$189.50 per week alimony pendente lite plus expenses incurred in the divorce proceeding to call expert witnesses and \$2,444 for counsel fees. In his report, the Master recommended that the plaintiff, Patricia Richards, should receive \$100 per week

as alimony pendente lite, and \$1,250 for counsel fees and expenses, with the costs to be paid by the defendant, Ronald Richards. Plaintiff and defendant both filed exceptions to the Master's Report.

Defendant's exceptions 7 and 11 state that the Master erred in not considering evidence of marital misconduct. Marital misconduct is not to be considered in an action for alimony pendente lite because "It would be a harsh rule which denied the wife the means of establishing her rights until she had first fully proved them." *Brady v. Brady*, 168 Pa. Super. 538, 539, 79 A.2d 803 (1951). The purpose of an award of alimony pendente lite, counsel fees, and expenses is to ensure that a financially dependent spouse will be able to maintain or defend an action for divorce. *Young v. Young*, 274 Pa. Super. 298, 418 A.2d 415 (1980). Pennsylvania law has never contained any absolute bar to an award of alimony pendente lite to a spouse at fault. *McKelvey v. McKelvey*, 16 D.&C. 3d 611 (1980). Therefore, the merits of the main proceeding, marital misconduct, were correctly not considered by the Master.

Defendant's brief states that the guidelines for determining alimony pendente lite, counsel fees, expenses and costs are essentially the same as that set forth in 23 Pa. C.S.A. Sec. 501 concerning permanent alimony. This allegation is not supported by the statute which gives two separate definitions: one for alimony pendente lite, and another for alimony. 23 Pa. C.S.A. Sec. 104 (1980). If the legislature had meant these to be the same, they would not have provided separate definitions. The statute also has separate sections dealing with each of these. 23 Pa. C.S.A. Sec. 501, 502 (1980). The guidelines for determining alimony pendente lite are clearly different than those for determining alimony.

Defendant's exceptions 9 and 13 state that the Master erred in not requiring the plaintiff to sharpen her skills as a beautician and practice her trade to support herself and her family and cites 23 Pa. C.S.A. Sec. 501 in support thereof. The statute cited deals with alimony. The issue at bar is one of alimony pendente lite. The applicable law is 23 Pa. C.S.A. Sec. 502 which does not state that the plaintiff must sharpen her skills for employment. Alimony involves consideration of different factors than those in alimony pendente lite. *Klein v. Klein*, 20 D.&C. 3d 482 (1980).

Defendant's exception 16 states that the findings by the Master violate the one-third rule. This contention is based on the fact that under an agreement with the plaintiff, the defendant is obligated to pay her \$300 a week for the support of two children.

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In the event the matter is not resolved at mediation, the officer shall visit each home located in (Franklin) (Fulton) County and submit a report to the Court, in writing, describing the physical layout of the home, the furnishings, the surroundings, availability of schools, and other pertinent factors. The information gathered in these visits shall be included in the Mediation Officer's report. A copy of the report shall be sent to counsel for the parties. The parties will be deemed to have stipulated to the admissibility of the full report unless the Mediation Officer is subpoenaed to appear and testify.

The costs of such mediation and home visit shall be borne equally by the parties unless otherwise ordered by the Court.

\_\_\_\_\_ (plaintiff or defendant, whoever is petitioner) has deposited the sum of \$150 with the Prothonotary as an advance on the costs of such mediation and home visit. (or, the deposit of the sum of \$150 with the Prothonotary as an advance on the costs of such mediation and home visit has been waived by the Court.)

(Special provisions for custody and visitation pending the outcome of the case may be added here.)

By the Court,

\_\_\_\_\_  
P. J.

This Order signals a change in the approach to custody mediation. The mediator is not necessarily in the psychiatric or psychological disciplines, so counsel may want to make their own arrangements for such testimony.

Adding the \$300 to the \$100 awarded as alimony pendente lite to the plaintiff by the Master may indeed result in requiring the defendant to pay the plaintiff more than one-third of his income. This rule applies to awards of alimony but even if it were to apply to alimony pendente lite, the rule is not violated.

"Although a support Order for a wife alone may not exceed one-third of the husband's earning capacity, the maximum is lifted when children are also receiving support." *Lutz v. Lutz*, Pa. Super. , 444 A.2d 1281, 1284 (1982).

Defendant's exception 12 states that the Master erred in not considering the child support award when considering testimony regarding the weekly family expenses. Defendant's claim is meritless. Child support, spousal support and alimony pendente lite are different in character and one is not to be considered when the other is awarded. Child support is for the welfare of the children. *Dunbar v. Dunbar*, 291 Pa. Super. 224, 435 A.2d 879 (1981).

"The purpose of alimony pendente lite is to enable the [financially dependent spouse] to maintain the principal action and it differs somewhat in character from an order of (spousal) support." *Remick v. Remick*, Pa. Super. , 456 A.2d 163, 170 (1983).

"The two proceedings (alimony pendente lite and spousal support) may run concurrently." *Id.*

Defendant's exception 10 states that consideration must be given to the husband's ability to pay. An award of alimony pendente lite is dependent upon need. The award will be determined by defendant's ability to pay as determined by his estate, his income and earning capacity; the need of plaintiff as determined by her income, her separate estate; and the character, situation, and surroundings of the parties. *Kayaian v. Kayaian*, 213 Pa. Super. 103, 297 A.2d 136 (1972). A review of the evidence presented to the Master reveals that there was sufficient evidence to support the Master's findings that the husband has the means and the wife has the need to support his recommendation.

Plaintiff's exceptions 1, 2 and 7 state that the Master erred in not making a finding that counsel fees incurred to date by plaintiff were reasonable and interim; by not stating what expenses are likely to be incurred in the employment of the various expert witnesses needed to document plaintiff's case; and by awarding \$1250 instead of an amount equal to the amount already incurred<sup>1</sup>

<sup>1</sup> \$2444 being calculated at \$40 per hour for 61.1 hours.

and those expected to be incurred. Defendant's exception 15 states that the Master failed to state the reason for awarding \$1250 for plaintiff's attorney's fees. In order to appropriately determine what is a 'reasonable' counsel fee in any case, the Court must know, in addition to the needs and abilities of the parties, information disclosing the nature and extent of the legal services performed or rendered in the case. *Dimock v. Dimock*, 21 D.&C. 3d 499, 502 (1982). This is best done at the conclusion of the case except in a lengthy or complex case where it would be unreasonable to require counsel or a party to await the conclusion of the proceedings. Id.

"An award of counsel fees is not intended to be in full reimbursement, but should be sufficient an amount to prevent a denial of justice." Id. at 500.

"There are no fixed rules or formulas as to the amount to be allowed as counsel fees. It is not, however, to be measured solely by the value of counsel services or by the wife's necessities." Id. at 501.

"An award of counsel fees and costs is not mandatory and lies within the sound discretion of the Court." Id.

We find that the award of \$1250 is correct by the Master and should be interim pending final disposition of the case.

Plaintiff's exceptions 3 and 5, and defendant's exceptions 1, 2, 3, 4, 5, 8, and 14 deal with the dollar amount of the award and the reasons for such award. An award of alimony pendente lite is to enable the dependent spouse to maintain or defend the principal action in divorce and is ancillary to the principal action in divorce. *Remick v. Remick*, supra. The duty of spousal support arises out of the marriage itself and terminates when the marriage ends. Id. We find that the Master was correct in awarding \$100 per week alimony pendente lite. The plaintiff is not entitled to maintain the same standard of living she enjoyed during the marital relationship.

Plaintiff's exception 4 states that the Master erred in finding an equity of \$35,000 in her rental property because the list sale price of \$58,000 was incorrectly used rather than the rough market value of \$48,000.<sup>2</sup> We find that the Master correctly chose

In his Opinion, the Master states that the equity is between \$25,000 and \$35,000 depending upon whose valuation is more accurate.

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## SHERIFF'S SALES, cont.

(120) feet to a point on the South side of Cumberland Avenue; thence by said South side of Cumberland Avenue, North fifty-four (54) degrees fifty-three (53) minutes nine (9) seconds East, twenty (20) feet to a point, the place of beginning. And being Lot No. 6 on a plan of lots entitled "A Land Subdivision for Beattie-Overcash-Chidakel," Borough Plan No. RE-94, revised December 7, 1964, approved as a land subdivision by the Town Council of the Borough of Chambersburg, on April 26, 1965, a copy of which was recorded in the Office of the Recorder of Deeds of Franklin County, Pennsylvania, on May 11, 1965, in Plan Drawer 1, and a further copy of which is of record in Franklin County Deed Book Volume 288, Page 177.

BEING sold as the property of Steve F. Barna & Irene Barna, husband and wife, Writ No. 83-N-390.

### SALE NO. 9

Writ No. AD 1983-257 Civil 1983  
Judg. No. AD 1983-257 Civil 1983  
Valley Bank & Trust Company

— vs —

Harold R. Deshong &  
Janet L. Deshong

Atty: Robert C. Schollaert

ALL THAT CERTAIN tract or parcel of real estate lying and being situate in Lemasters, Peters Township, Franklin County, Pennsylvania, more particularly bounded and described as follows, to wit:

BEGINNING at a point in the center of the road running through the Village of Lemasters to Church Hill; thence by the center of the road, South 2 degrees West 50 feet to a point in the road at the north line of a public alley; thence by the north line of the alley, North 85¼ degrees East about 87 feet to a point at corner of lot formerly of Russell C. McLucas and Imogene McLucas, his wife, now Viola M. McLucas, being the eastern portion of what was once a larger lot, this point being about 6 feet east of a concrete block garage presently erected on the lot hereby conveyed, and running thence by former lands of McLucas in a northerly direction parallel to and about 6 feet east of the aforesaid concrete block garage, about 52 feet to a point on line of lot formerly of Garnet G. Friese, now Vernon Glover; thence by lot of Glover, South 82 degrees 32 minutes West about 86 feet and nine inches to the point, the place of beginning.

BEING the same real estate which Paul A. Maun and Kathleen M. Maun, his wife, by their deed dated May 1, 1979, and recorded in Franklin County, Pennsylvania, in Deed Book Volume 787, Page 581, conveyed to Harold R. Deshong and Janet L. Deshong, his wife.

IMPROVED with a masonry commercial building approximately 40 feet by 60 feet in dimension.

BEING sold as the property of Harold R. Deshong and Janet L. Deshong, Writ No. AD 1983-257.

### TERMS

As soon as the property is knocked down to a purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment

## SHERIFF'S SALES, cont.

is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, December 19, 1983 at 4:00 PM, EST. Otherwise all money previously paid will be forfeited and the property will be resold on Friday, December 23, 1983, at 1:00 PM, EST in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack  
Sheriff

Franklin County, Chambersburg, PA

11/18, 11/25, 12/2

### ESTATE NOTICES FIRST PUBLICATION

Notice is hereby given in the estate of the decedant set forth below the Register of Wills has granted letters, testamentary or of administration, to the person(s) named. All persons having claims or demands against said estate are requested to make known the same, and all persons indebted to said estate are requested to make payment without delay to the executor(s) or administrator(s) or (his) (her) (their) attorney(s) named below:

Estate of William S. Amberson, deceased late of Waynesboro, Franklin County, Pennsylvania.

Executor:

Jean D. Amberson  
128 West Main Street  
Waynesboro, PA 17268  
and

First National Bank & Trust Co.  
Center Square  
Waynesboro, PA 17268

Attorney(s):

Ullman, Painter & Misner  
10 East Main Street  
Waynesboro, PA 17268

12/2, 12/9, 12/16

the list sale price as being the value of the property. Plaintiff by listing her property for \$58,000 is stating that she, the owner, and a real estate broker knowledgeable in such matters, feel that the property is worth that much. This figure is inherently more reliable than an estimate of rough market value by the Chief Executive Officer of the First National Bank. Also, when plaintiff sells the property, she expects to and probably will receive the list price (or a price fairly close to that); and not the estimate of rough market value by a bank officer.

Defendant's exception 6 states that the Master erred in not considering plaintiff's equity in the rental property as an available source of income to plaintiff. This exception is meritless, because this was considered by the Master as stated on page 4 of his Opinion dated August 11, 1982.

Plaintiff's exception 8 states that the Master erred in failing to include a proposed order stating specifically to whom and when the sums shall be paid. 23 Pa. C.S.A. Sec. 504 provides that alimony pendente lite shall be paid to the domestic relations section of the Court which issued the order or such section of the Court at the residence of the party entitled to receive such an award. The Domestic Relations section shall then distribute the payments to the person entitled thereto as soon as possible after receipt. We find that the Master erred in failing to include such a proposed order.

Plaintiff's exception 6 states that the Master erred in recommending that the Court ordered the defendant to pay alimony pendente lite from August 16, 1982, rather than from the Motion for Appointment of Master on February 22, 1982, or from the date of the petition.

"It (alimony pendente lite) is intended to cover only the period during which the divorce proceeding may, with due diligence be prosecuted to conclusion." *Remick* at 169.

We find that the Master erred in making the award to begin August 16, 1982. The award should be retroactive to the date of plaintiff's petition, July 21, 1981. *Remick v. Remick*, No. 471 June Term, 1968 (C.P. Clinton County 1983).

### ORDER OF COURT

July 5, 1983, the plaintiff's and the defendant's exceptions to the Master's Report are denied, except for the following: that the award of \$1250 for counsel fees and expenses shall be an interim

award with the right of plaintiff to apply for additional sums when the case is completed, that the award of \$100 per week shall be retroactive to July 21, 1981, and that such sums awarded shall be paid to the Domestic Relations section of the Court which shall then distribute the payments to plaintiffs as soon as possible after receipt.

COMMONWEALTH v. BAUGHMAN, C.P. Franklin County Branch, No. 467 of 1970

*Criminal Law - Flat Sentence - No minimum sentence*

1. The Sentencing Code requires imposition of a minimum sentence.
2. Where defendant is sentenced a flat sentence with no minimum, the sentence is upheld because the minimum is presumed to be one day.

*John F. Nelson, Assistant District Attorney, Counsel for the Commonwealth*

*Blake E. Martin, Esq., Counsel for Defendant*

#### OPINION AND ORDER

KELLER, J., July 14, 1983:

Dennis Baughman was charged with robbery by assault and force. On February 22, 1971, an order was entered finding that the defendant had voluntarily and understandingly offered to enter a plea of guilty and it was accepted. On March 17, 1971, the defendant was sentenced to pay the costs of prosecution and undergo imprisonment in a State Correctional Institution for a period of 10 years flat to be computed from the expiration of No. 519 - 1968. The defendant's petition under the Post Conviction Hearing Act was presented to the Honorable George C. Eppinger on December 21, 1982, and an order entered appointing Blake E. Martin, Esq. as counsel for the defendant, and granting a rule upon the Commonwealth to show cause why hearing should not be granted. On December 22, 1982, the Court found that the only fact germane to the disposition of the case is the legality of the sentence imposed in 1971. Counsel were ordered to confer and notify the Court of the time for legal argument on the matter.

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