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.

George inherited $14,000 from his mother and this sum and $3,000 more are in the Employees Credit Union at Letterkenny Army Depot. Should we dip into this in fixing the support order?

EARLY RETIREMENT

George retired March 31, 1978, after 37 years of government service. He was 55 years old. Our courts have consistently held that the purpose of a support order is not to punish the husband for his misconduct toward his wife. See, *e.g., Commonwealth ex rel. Baugher v. Baugher*, 5 Adams L. J. 104 (1957). Therefore, if George did retire to remain with a girlfriend as the facts suggest, we are not at liberty to impose a punitive support order on him.

Nevertheless, trial courts are to be especially watchful where there may be some question of the husband's good faith. *Commonwealth ex rel. Rosen v. Rosen*, 91 Mont. 122, 125 (1960), citing *Commonwealth ex rel. Spielvogel v. Spielvogel*, 181 Pa. Super. 61 (1956). If the evidence demonstrates that a husband retired solely to extinguish or reduce his earnings to avoid support payments to his wife, the Court would be justified in making an order based on the husband's pre-retirement income. *Commonwealth ex rel. Burns v. Burns*, 232 Pa. Super. 295, 331 A. 2d 768 (1974).

In *Burns*, a 61-year-old man retired after working 45 years. The case was remanded by the majority when the Court held that the entire circumstances of a man's retirement must be examined to determine the extent of his responsibility to support his estranged wife. Two factors were deemed relevant in deciding whether the award should be based on pre-retirement income: Whether he planned to retire at a certain age and the state of his health.

In a dissent, Judge Price stated that he would base the order on post-retirement income, noting that the strain of competition and stress makes the standard normal retirement age of 65 no longer viable. It was his view that if the plan under which the husband is working authorizes him to retire at a reasonable age, retiring at that age should not be construed as an act of bad faith toward the wife or as a vindictive effort to withdraw from income-producing employment. The Federal Government retirement plan permits retirement at 55 with 30 years of service.

As we stated this is hardly an issue in the case. We do not conclude that George retired to reduce his support payments -

at the time of his retirement there was no support order. He retired to be able to stay in New Jersey. Even so his spendable income was not drastically reduced by the step. In *Commonwealth ex rel. Ross v. Ross*, 206 Pa. Super 429, 433-34, 213 A. 2d 135, 138 (1965), the court said: "retirement often reduces the income of the retired couple. Husbands and wives learn to adjust to their newly-limited means. In effect, they acquire a new station in life."

ONE THIRD RULE

Generally, Pennsylvania courts have held that a husband should not be required to pay more than one-third of his total income for the support of his wife. See, *e.g., Commonwealth ex rel. Keeth v. Keeth*, 223 Pa. Super, 96, 289 A. 2d 732 (1972); *Commonwealth ex rel. Lipsky v. Lipsky*, 214 Pa. Super. 215, 251 A. 2d 759 (1969); *Commonwealth ex rel. Milne v. Milne*, 150 Pa. Super. 606, 29 A. 2d 228 (1942). However, qualifications to the one-third rule have evolved because in some cases an award based on the one-third rule would be inequitable.

One such qualification to the one-third rule is that "income" is not limited to actual earnings; it encompasses the supporting individual's "earning capacity" as well. *Commonwealth ex rel. McNulty v. McNulty*, 226 Pa. Super. 247, 34 A. 2d 701 (1973). This allows the court to award reasonable support in cases where the supporting individual has tried to escape liability by withdrawing from all income producing endeavors, *Commonwealth ex rel. Wieczorkowski v. Wieczorkowski*, 155 Pa. Super. 517, 38 A. 2d 347 (1944), or has sought to minimize his support payments by taking low paying employment not commensurate with his earning potential, *Commonwealth ex rel. Raitt v. Raitt*, 203 Pa. Super. 226, 199 A. 2d 512 (1964); *Commonwealth ex rel. McNulty v. McNulty, supra.*

Emma's position is that this is one of those cases in which income alone should not be the basis for determining the support award. We are asked to consider George's Letterkenny Credit Union account which contains $17,000.

While it is true that the court should consider a supporting individual's earnings, his earning power and his attendant financial conditions, including the kind and amount of his assets (*Commonwealth ex rel. DiSanti v. DiSanti*, 221 Pa. Super. 435, 293 A. 2d 115, *allocatur refused*, 221 Pa. Super. xliv (1972)), it appears that courts include cash assets in the basis of their awards only in extraordinary circumstances. For example, in

Commonwealth ex rel. Rahill v. Rahill, 97 Mont. 306 (1974), the supporting husband reported his income as between $13,000 - $16,000 per year. But he had built up a savings account of $10,000 and a stock portfolio worth $30,000. The court awarded support payments exceeding one-third of the husband's reported income saying that his accumulation of savings following led it to believe his income was "far in excess of that which he reported."

The instant case does not present a situation in which the supporting individual's capital is disproportionate to his income. Were that so, cash assets could no doubt be considered in "upping" the amount of support awarded. But here, Emma will receive reasonable support payments based on George's post-retirement income. She has a savings account in her own name of $1,800, lives in a house which she owns jointly with George and on which he is making the mortgage payments, has worked in the past, though her present ability to get a job at age 53 with heart murmur and high blood pressure may be questioned. In addition to making the mortgage payments, George is also paying the tuition and other expenses for their son who is attending the University of Pittsburgh.

All support orders are subject to modification if conditions change. With the obligations George has accepted to pay the mortgage and to pay his son's expenses, even considering that there may be some income from his credit union account, we believe that the order of $100.00 is a correct one and see no reason to change it.

We file this opinion in support of that order.

BARNHART v. BOROUGH OF GREENCASTLE, ET AL., C.P. C.D., Franklin County Branch, No. 97, November Term, 1976

Civil Procedure - Preliminary Objections - Motion to Strike - Joint and Several Liability

1. The Court will not strike a complaint in trespass where persons other than those named defendants allegedly inflicted the harm insofar as negligence to render a person liable need not be the sole cause of an injury it may be a concurring cause.

2. Seperate lawsuits may properly be brought where there is no legal relationship between the persons who commit seperate trespasses, or do seperate acts tending to produce injuries to another.

Denis M. DiLoreto, Esq., Attorney for Plaintiff

Rudolf M. Wertime, Esq. and *Robert J. Stewart, Esq.*, Attorneys for the Defendants

OPINION AND ORDER

EPPINGER, P.J., November 30, 1978:

Donald E. Barnhart (Barnhart) was in the Hotel Greencastle. An encounter lasting for a period of time culminated in the Proprietor, Joseph E. Henson, Jr., shooting Barnhart. Before the shooting occurred, the Greencastle Police Department was summoned but did not respond. Barnhart has sued the Borough of Greencastle, the Chief of Police and three officers stating the Borough and the individual officers were negligent in not going into the hotel to quell the disturbance.

Another suit has been filed by Barnhart against Henson, his father and his brother, all of whom Barnhart alleges were involved in the encounter. The Hensons have joined the defendants in this case as additional defendants in that case which is No. 96 November Term, 1976.

The principal thrust of the preliminary objections filed by the Borough and the named police officers (collectively the borough) is that this complaint should be stricken since Barnhart has not joined the Hensons as defendants in this case.

It would seem that with the joinder of the borough in the suit against the Hensons there is no need for this suit, especially since in this suit it is alleged that the injuries inflicted upon Barnhart were inflicted by persons other than the borough. We would by inclined to this view and in the interest of economy in judicial proceedings would think it wise to strike this case on general principles and because not all of the alleged responsible parties are joined.

However, negligence to render a person liable need not be the sole cause of an injury, it may be a concurring cause. Thus where two causes combine to produce injuries, a defendant is not relieved because he is responsible for only one of them. *Gorman v. Charlson, et al. (No. 1)*, 287 Pa. 410, 135 A. 250 (1926). Moreover, where there is no legal relationship between persons who commit separate trespasses, or do separate acts tending to produce injuries to another, the resulting liability is several and not joint. *Shaull v. A. S. Beck New York Shoe Co., Inc.*, 369 Pa. 112, 117, 85 A. 2d 698, 701 (1952). We conclude therefore that a separate suit is properly brought against the borough and that it is not necessary to strike that suit in order to effectively try this case.