benefit of the tenants. *Shapiro v. Shapiro*, supra; *Berhalter v. Berhalter*, 315 Pa. 225, 173 A. 2d 172 (1934). Where one spouse appropriates entireties property to his or her own use and not for the mutual benefit of the tenants, a revocation of the estate may occur, for the appropriation may be construed as an offer of an agreement to destroy the estate; which will be deemed to be accepted where the other spouse sues for partition of the property. *Shapiro v. Shapiro*, supra; *Stemniski v. Stemniski*, supra; *Vento v. Vento*, 256 Pa. Super. 91, 389 A. 2d 615 (1978). Furthermore, where there has been an improper appropriation of a single unit of entireties property, all property of the parties held by the entireties is subject to partition, not merely the unit that has been improperly appropriated. *Vento v. Vento*, supra." *Gray v. Gray*, 275 Pa. Super. 131, 133, 134; 418 A. 2d 646 (1980). See also *Fascione v. Fascione*, 272 Pa. Super. 530, 416 A. 2d 1023 (1978). s,

On the basis of the above facts, stipulated to by counsel for the parties and the applicable law, there can be no doubt but that the withdrawal of all funds from the tenancy by the entireties checking and savings account constituted an offer to partition all of the assets owned by the defendant and Marie P. Ritzert, as tenant by the entireties?and the filing of the complaint for partition constituted the acceptance of the offer. Therefore, an order of partition will be entered.

ORDER OF COURT

NOW, this 30th day of March, 1982, partition of all of the assets owned by George Ritzert and Marie P. Ritzert, his wife, as tenants by the entireties, is ordered with each party entitled to one-half of the same. The share of Marie P. Ritzert shall be paid over to the Fulton County National Bank and Trust Company, Guardian of her Estate. Partition shall proceed according to applicable law, and applicable Rules of Civil Procedure.

Costs shall be paid by the defendant.

Exceptions are granted the defendant.

COMMONWEALTH V. CHAMBERLAIN, C. P. Franklin County Branch, Civil Action, Vol. Y, Pg. 56

Vehicle Code - Suspension of Driving Privileges - Bus Driver - Regulations of Penn DOT - Physical Exam - Irrebuttable presumption of Disability

1. Where a bus driver's operating privilege is suspended due to his medical condition in accordance with Penn DOT regulations, an irrebuttable presumption of medical incompetency is created.

2. While irrebuttable presumptions are not favored in the law, they are not constitutionally invalid unless there is no rational relation to a legitimate legislative goal.

3. It is a privilege and not a right to operate a vehicle and as a privilege there is no strict constitutional protection.

4. There is a rational relationship between the presumption that an established medical history of a cardiovascular disease renders a person an unacceptable risk to drive a school bus and the legislative intent to assure safe transportation of school children.

5. The court does not have the legal authority or the medical expertise to substitute its judgement for that of Penn DOT's Medical Advisory Board.

Forest N. Myers, Esq., Attorney for Respondent

Francis P. Bach, Assistant Counsel, Department of Transportation, Attorney for Respondent

OPINION AND ORDER

KELLER, J., March 30, 1982:

Prior to September 28, 1982, Ray G. Chamberlain (Chamberlain) was the holder of a Pennsylvania Department of Transportation Operator's Card No. S-59688 with school bus driver's operator's privileges pursuant to Sections 1504 and 1509 of the Motor Vehicle Code; 75 P.S. 1504 (c) and 75 P.S. 1509. On September 28, 1982, the Commonwealth of Pennsylvania, Department of Transportation, Bureau of Traffic Safety (Commonwealth) mailed Chamberlain an official notification of withdrawal of motor vehicle privileges suspending indefinitely and until competency is established his school bus operator's privileges effective October 5, 1981. The reason given was "cardiovascular." Chamberlain's petition for an order setting aside the suspension of school bus operating privileges was presented on October 7, 1981, and an order entered the same date granting

the prayer of the petition and setting Monday, December 7, 1981, at 1:30 o'clock P.M. as the date and time for hearing. On December 2, 1981, counsel for Chamberlain petitioned to continue the hearing because of the unavailability of his medical witness. An order was granted the same date continuing the hearing to January 21, 1982, at 9:30 o'clock A.M.

The hearing was held as scheduled and the Commonwealth offered in evidence as its Exhibit 1 the certification to which was attached the official notification of withdrawal of motor vehicle privileges, memo of Dr. Fox of the Department of Health, Cardiovascular Form, final diagnosis and summary by Dr. M. R. Cashdollar, dated August 11, 1981, school bus driver's physical examination dated July 22, 1981, and Chamberlain's driving record. In addition, the Commonwealth offered the regulations governing school bus drivers. The Commonwealth then rested. Counsel for Chamberlain requested a continuance due to the failure of Dr. Glenn Lytle to appear; he not having been subpoenaed. With the approval of the Commonwealth the continuance was granted, and it was ordered that Chamberlain not operate any school bus pending ultimate disposition of the proceeding and that he deliver his school bus operator's license to the Prothonotary for safekeeping.

On January 28, 1982, the continued hearing was held and the testimony of Drs. Michael R. Cashdollar and Glen H. Lytle was received. Pursuant to the request of the Court counsel for Chamberlain submitted his brief on February 19, 1982, and counsel for the Commonwealth submitted his brief on March 9, 1982. The matter is ripe for disposition.

FINDINGS OF FACT

1. In December, 1980, Chamberlain blacked-out in the Chambersburg Hospital while visiting a patient. He was admitted to the Coronary Care Unit for evaluation and electrically monitored for 72 hours with no results evidencing a heart attack.

2. In July, 1981, he was treated for injuries suffered from falling off a ladder when he blacked-out and was again referred to Dr. Cashdollar for an evaluation.

3. Dr. Cashdollar detected brief lapses in Chamberlain's heart beat, i.e., an electric abnormality with the rhythm and prescribed the insertion of a pacemaker.

4. Dr. Glenn H. Lytle inserted a spectrax model pacemaker in Chamberlain on August 5, 1981.

5. The pacemaker is designed to activate itself if the heart stops or slows below 60 beats per minute.

6. The spectrax model pacemaker is the newest type and programming can be changed from the outside of the body. The battery life expectancy is between 10 and 20 years for Chamberlain because it is activated so infrequently.

7. Dr. Lytle described the placement of the pacemaker as "totally uneventful."

8. The pacemaker system is an independent system and, therefore, not affected by stress, diet or other external factors. Dr. Lytle testified that a blunt trauma could disrupt the wire lead and cause the pacemaker to fail, but he believed such an event unlikely.

9. While the pacemaker battery depletes itself over an extended period of time, Dr. Lytle has had experience with early battery failure, i.e., before the predicted life expectancy, but did not feel the possibility of early battery failure to be a significant problem because such failure occurs at a uniform rate, and there is a 6 month period within which to change the battery or generator.

10. Individuals using pacemakers are required to have regular checkups in the hospital to permit an evaluation of the operation of the pacemaker. Dr. Cashdollar recommends semi-annual evaluations. Medicare will pay for evaluations every 3 months. Dr. Lytle feels 3 month evaluations are excessive.

11. After the placement of the pacemaker in Mr. Chamberlain, its operation was monitored by Dr. Cashdollar for 24 hours and was found to adequately control the heart function. Dr. Cashdollar saw and examined Chamberlain again on November 30, 1981, and found no abnormality or other problems, and the pacemaker was operating properly.

12. Dr. Cashdollar described Mr. Chamberlain's condition as a cardiovascular disease. He testified that Mr. Chamberlain experienced syncope twice. Syncope is defined as blacking out or loss of consciousness, which is caused inter alia by a heart condition.

13. Dr. Lytle testified that Chamberlain has a cardiovascular disease and that disease or "cardiac event" caused the two incidents of syncope.

14. Dr. Cashdollar expressed the opinion that Chamberlain was competent to operate a motor vehicle, that he was quite safe medically and medically competent to drive a school bus.

15. Dr. Lytle testified that in his opinion Mr. Chamberlain is competent to operate a school bus, is now in better shape than before the placement of the pacemaker, and is not prone to heart attacks.

16. Dr. Cashdollar completed the cardiovascular form, which is included as a portion of Commonwealth's Exhibit 1, at the request of Chamberlain.

DISCUSSION

Section 1504 of the Motor Vehicle Code; Pa. C.S.A. 1504 provides inter alia:

> (a) Proper class of license required.--No person shall drive any motor vehicle on a highway in this Commonwealth unless the person has a valid driver's license for the type or class of vehicle being driven.
>
> (c) Qualifications of applicants.--The department shall establish by regulation the qualifications necessary for the safe operation of the various types, sizes or combinations of vehicles in the manner of examining applicants to determine their qualifications for the type or general class of license applied for.
>
> (d) Number and description of classes.--Licenses issued by the department shall be classified in the following manner:
>
> (4) Class 4.--Persons who have qualified to operate school buses in accordance with this title and the rules and regulations promulgated and adopted by the department shall have the qualifications endorsed on the license as provided in this section.

Section 1509 of the Motor Vehicle Code, 75 Pa. C.S.A. 1509 provides inter alia:

> Qualifications for Class 4 license.

> (a) School bus driver requirements.--No person shall be issued a Class 4 license unless the person:
>
> (2) Has satisfactorily passed an annual physical examination to be given by the physician for the school district by which the person is employed;
>
> (b) Proof of annual physical and vision examination.--Every school bus driver shall carry a certificate issued by an examining physician indicating that the person has passed the prescribed physical examination, including an examination of the eyes, within the preceding 12 months.

Section 1517 of the Motor Vehicle Code; 75 Pa. C.S.A. 1517 provides: Medical Advisory Board

> (a) Membership.--There shall be a medical advisory board consisting of 13 members appointed by the secretary. The board shall be composed of an authorized representative from the Department of Transportation, Department of Justice, Governor's Council on Drug and Alcohol Abuse, Department of Health, Pennsylvania State Police and professionals as follows: one neurologist, one doctor of cardiovascular disease, one doctor of internal medicine, one general practitioner, one optomologist, one psychiatrist, one orthopedic surgeon, and one optometrist.
>
> (b) Formulation of regulations.--The board shall formulate rules and regulations for adoption by the department on physical and mental criteria including vision standards relating to the licensing of drivers under the provisions of this chapter. (The Attorney General was made a member of the medical advisory board by Act of 1980, P.L. 950, No. 164, Sect. 505; 71 P.S. 732-505.)

Chapter 71 or 67 Pa. Code sets forth the regulations adopted by the Pennsylvania Department of Transportation governing school bus drivers. 67 Pa. Code 71.3, "Physical examination," provides inter alia:

> (a) General rule.--A physical examination shall be given by a school transportation physician:
>
> (1) to every applicant for a Class 4 driver's license;
>
> (2) annually to every holder of a Class 4 driver's license.
>
> (b) Requirements of physical examination.--The following shall be the minimum requirements for passing a physical examination:

(3) No established medical history or clinical diagnosis of;

(iii) *any other form of cardiovascular disease*, including hypertension, *with syncope*, dyspnea, loss of consciousness, collapse, or congestive failure. (italics ours.)

Chamberlain's operating privileges as a school bus driver were suspended indefinitely, when it was determined that he did have an established medical history of cardiovascular disease with syncope. The sole issue raised on this appeal is whether the Commonwealth may promulgate regulations which create an irrebuttable presumption of medical incompetency to operate a school bus.

In support of his position Chamberlain argues that the evidence introduced establishes his medical competence to operate a school bus, and, indeed, establishes he is in better physical condition than he was prior to the cardiac events. He correctly observed that the position of the Commonwealth is to rely entirely upon the regulations above quoted, and ignore:

1. The notation of the Commonwealth's expert, Dr. Fox, on Exhibit 1, which states: "9/23/81 This man would be ok to drive a car, at this point, however, I would like to see a trial period of at least 6 months to be sure that the pacemaker is going to control his syncope before he be allowed to take responsibility of school bus driving.

His EKG shows a Bundle Branch block (LBBB) which should be controlled now by his pacemaker; however, a schobl bus is a heavy responsibility."

2. The term of suspension "indefinite and until competency is established" as set forth on the official notification, also a part of Commonwealth's Exhibit 1.

The appellant concedes that the regulations promulgated by the Department of Transportation are a proper exercise of powers granted under Section 1504(c), supra. However, he urges that regulation 71.3(b)(3)(iii) establishes an insurmountable medical criteria for him which permanently bars him from serving as a school bus driver, notwithstanding the unrefuted medical evidence of his good health and medical competence to serve as a school bus driver. This he contends constitutes an irrebuttable presumption of disability or at least inability to safely transport school children, which renders the regulation arbitrary and capricious and beyound the intent of the Motor Vehicle Code. He cites *Weinberger v. Salfi*, 422 U.S. 749, 95 S.

Ct. 2457 (1975), 45 L. Ed. 2d 541, as authority that irrebuttal presumptions must be invalidated.

To the contrary the Commonwealth contends that the regulations establishing minimum physical requirements are conditions precedent to the granting or continuation of a Class 4 license; are a reasonable exercise of discretion by the Medical Advisory Board which has been charged with the duty of formulating rules and regulations on physical and mental criteria (Section 1517(b)); and the Court should not substitute its judgment for that of the Board.

Preliminarily, we note that the Supreme Court of the United States in *Weinberger v. Salfi*, supra, reversed the United States District Court which had held an irrebuttal presumption constitutionally invalid. A majority of the court held:

> Under those standards, the question raises not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions, and would be directly contrary to our holding in *Mourning*, supra. Nor is the question whether the provision filters out a substantial part of the class which caused congressional cconcern, or whether it filters out more members of the class than non-members. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which is legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. . . .(At page 545-546)
>
> "The administrative difficulties of individual eligibility determinations are without doubt matters which Congress may consider when determining whether to rely on rules which sweep more broadly than the evils with which they seek to deal. . . .
>
> There is thus no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce. (At page 550)

In *Division 85, Amalgamated Transit Union v. Port Authority of Allegheny County*, Pa. Cmwlth. , 437 A. 2d 105

(1981), Ellwood Tegtmeier was employed by the Port Authority as a bus operator until the Authority learned he had diabetes and was insulin-dependent at which time he was disqualified as a bus operator. The disqualification was required by the Authority's Medical Department Standard which specifically under "Diabetes Mellitus" prohibited operators to use insulin injections. The union filed a grievance, and an arbitration board concluded that the medical standard as applied to Tegtmeier was unreasonable because he was capable of continuing in his duties as a bus operator "without any increased risk to the public caused by his diabetes." The Board ordered Tegtmeier reinstated subject to periodic medical examinations. On appeal, the Court of Common Pleas of Allegheny County found that the Board had exceeded its authority in creating exceptions to the Port Authority's medical standard and set aside the award. The union appealed the trial court's decision to the Commonwealth Court. One of the two issues raised was "whether the medical standard for diabetes mellitus is unconstitutional in that it creates an irrebuttable presumption resulting in automatic disqualification of insulin-dependent diabetics." The Commonwealth Court held that the medical standard there at issue promoted the declared public policy in favor of promoting transportation safety and was within the rule making authority of the Port Authority, and declined to address the constitutionality of the standard.

It would seem to us that while irrebuttal presumptions are not favored by the law, they do not rise to the level of constitutional invalidity unless they affect a writer's status entitled to constitutional protection or if the criteria applied there is "no rational relation to a legitimate legislative goal." *Weinberger v. Salfi*, at page 522. It is a privilege and not a right to operate vehicles on the highways. Therefore, that privilege is not entitled to strict constitutional protection and the question becomes one of whether there is a rational relationship between the presumption that an established medical history of cardiovascular disease renders the appellant an unacceptable risk for purposes of a Class 4 license, and the legislative intent to assure safe transportation of school children. It would appear that to us that such a rational relationship does exist in the case at bar.

In *Uniontown Area School District v. Pennsylvania Human Relations Commission*, 455 Pa. 52, 76, 313 A. 2d 156 (1973), the Supreme Court held:

> There is a well recognized distinction in the law that administrative agencies between the authority of a rule adopted by an agent pursuant to what is denominated by the text writers as

Rudolf M. Wertime, executor of the estate of Ruth B. Warfield, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

MIDDLEKAUFF First and final account, statement of proposed distribution and notice to the creditors of William C. Middlekauff, executor of the estate of Mildred May Middlekauff, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

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

6-4, 6-11, 6-18, 6-25

Bar News Item

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legislative rule making power and the authority of an adopted pursuant to interpretative rule making power. The former type of rule 'is the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body,' and 'is valid and is as binding upon a court as the statute if it is (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable.' . . .A court, in reviewing such a regulation, 'is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action. . .involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be trouble "so entirely at odds with fundamental principles. . .as to be the expression of a whim rather than an exercise of judgement.'

While we wholeheartedly sympathize with Mr. Chamberlain's dilemma and have no reason not to accept the testimony of his medical experts that his cardiovascular disease with syncope has been corrected; we do not feel that we have the legal authority or the medical expertise to substitute our judgment for that of the Medical Advisory Board. If we are to err, we would prefer to do so on the side of overabundant safety precautions for school children.

If the regulations here in question are to be revised to permit the issuance of a Class 4 license after a trial period as suggested by Dr. Fox, or after correction of the condition referred to in regulations; that would properly be a matter for action either by the Medical Advisory Board or by the Legislature.

In conclusion, we cite with approval the Opinions and Orders in *Commonwealth of Pennsylvania v. William L. Huntsberger*, No. 122 November Term 1980; *Berks County Court of Common Pleas and Commonwealth of Pennsylvania v. Robert Mack*, No. 77 July Term 1976; Wyoming County Branch, Court of Common Pleas 44th Judicial District.

ORDER OF COURT

NOW, this 30th day of March, 1982, the Appeal of Ray G. Chamberlain from suspension of operating privileges as a licensed Class 4 school bus driver is dismissed. The order of the Department of Transportation, Bureau of Traffic Safety suspending said operating privileges is reinstated.

Exceptions are granted the appellant.