Where the parties are separated, the cases cited by the Plaintiff indicate that child support expenses should be borne equitably by the parties, and in accordance with their ability to contribute. *Commonwealth ex rel. Lyle v. Lyle*, 248 Pa. Super. 458, 375 A.2d 187 (1977); *Shapera v. Levitt*, 260 Pa. Super 447, 394 A.2d 1011 (1978); *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974) and *Commonwealth ex rel. Buonocore v. Buonocore*, 235 Pa. Super. 66, 340 A.2d 579 (1975). However, as plaintiff points out in her brief, there is a separate line of cases, among them *George*, supra, and *Scuro v. Scuro*, 226 Pa. Super. 592, 323 A.2d 49 (1974), which applies where the parties are living together.

In *Commonwealth ex rel. Mitterling vs. Mitterling*, 201 Pa. Super. 538, 542, 193 A.2d 618, 620 (1963), Judge Woodside said where the parties are not separated, "It is impractical, if not impossible, for a court to take sufficient testimony on specific expenditures for living expenses to make an intelligent finding on the adequacy of the support furnished by the (husband) to the other members of the household." To make a distinction he said that where the parties are separated and the husband is contributing cash for the children's living expenses and those payments are inadequate, the court should then enter an order for the proper amount.

There are situations where the parties are living together and the court has ordered a husband to pay support. One is *DiPadova v. DiPadova*, 223 Pa. Super. 408, 302 A.2d 510 (1973), which comes under the *George* exception. There the defendant decided to support his family as he chose and degraded and humiliated his wife, forcing her to stay with him and overlook his transgressions if she wanted to survive. In *Commonwealth ex rel. Turner v. Turner*, 192 Pa. Super. 502, 161 A.2d 922 (1960), while reiterating the general rule that courts are not empowered to reach into the home and determine how a husband's earning should be spent, the court said the husband was chargeable with nonsupport. There, the husband earned $77.50 weekly and regarded his total responsibility to wife, who earned $42.00 each week, and child to be that of paying the rent on the apartment and in three weeks to give his wife $9.00 of his income. This required the wife and child to eat with the wife's mother and otherwise try to get along. In these circumstances the lower court had the right to make an appropriate order.

In our case, the husband has set no limits on his contribution. He was, prior to the hearing, simply abiding by an agreement that was made between the parties, and there are no facts here which bring us within the *George* exception or which make

him properly chargeable with nonsupport. "The method whereby a husband secures to his wife and family the necessities of life is not a proper subject for judicial consideration and determination in the absence of proof of desertion without cause or neglect to maintain." *George*, supra, at 124.

Regardless of all this, it is plaintiff's contention that somehow the decision in this case should not follow precedent because this support proceeding is filed in a divorce action under the Divorce Code, the Act of 1980, April 2, No. 1980-26, Sec. 301(a) (3), which provides that child support and assistance may be determined in the divorce proceeding. Reference is also made to Sec. 501(a) (2) which permits the court in a divorce proceeding to allow alimony to a party if the party is unable to support herself through appropriate employment. This is a novel departure coming at the time of argument because the support count is founded on the Pa. Civil Procedural Support Law of 1953, supra.

In *Scuro*, supra, the court opined that the Pennsylvania Civil Procedural Support Law of 1953 provided no substantive rights, requiring courts in these cases to look to the Common Law and statutes and their interpretations by the courts. We do not think the Divorce Code provides any substantive rights either. What is granted is essentially procedural - the right to consolidate all matters that may come up in the dissolution of a marriage. As to alimony, it has not been shown plaintiff cannot support herself.

For these reasons, the Complaint for support will be dismissed.

ORDER OF COURT

February 27, 1981, the prayer of Count IV of Plaintiff's Complaint in Divorce for support for herself and children is denied. Exception is granted to the Plaintiff.

NUNN v. ROMAR FARM PRODUCTS, INC., et al, C.P. Franklin County Branch, A.D. 1978-92

Assumpsit - Motion to Sever Cause of Action - Pa. R.C.P. 213(b)

1. Where severance is moved by one of the parties, the burden is upon that party to show there is good cause for severance.

2. Generally, the court has discretion to grant a severance when a suit combines more than one cause of action.

3. The court must consider the factors of convenience and prejudice in determining whether to grant the severance and it is not necessary to demonstrate both factors.

4. Where the complaint sets forth more than one cause of action against several defendants, the court may permit each cause of action be addressed separately to avoid the possibility of adverse prejudice to one defendant.

Kenneth B. Shelly, Esq., Counsel for Plaintiffs

Edward M. Foley, Esq., Counsel for Kenworth Trucks Philadelphia, Inc., Defendant.

OPINION AND ORDER

KELLER, J., March 3, 1981:

Defendants, Kenworth Trucks, Philadelphia, Inc., (Kenworth) by its attorneys moved this Court to sever plaintiffs' cause of action against it from the cause of action against the other named defendants, Romar Farm Products, Inc. (hereinafter Romar), and Ronald R. Fogal. The Motion to Sever was filed September 15, 1980, and a Rule to Show Cause why the action should not be severed was entered upon plaintiffs on the same date. An Answer to the Motion to Sever was filed on November 6, 1980. Argument was heard by this Court on December 4, 1980. Memoranda were filed in lieu of briefs by the parties with their Motion and Answer.

Defendant avers that the claims and causes of action against the respective defendants are separate and distinct, and that, since a default judgment has been taken against Romar and Fogal, defendants, Kenworth would be adversely and prejudicially affected by evidence relating solely to the causes of action against Romar and Fogal. More specifically, Kenworth avers that the implication of a conspiracy among defendants to perpetrate a fraud upon plaintiff would unnecessarily place Kenworth in a bad light since no such conspiracy or fraud has been alleged against Kenworth by plaintiffs. Plaintiffs argue that the causes of action all relate to a single factual occurrence, the purchase of a truck, and that in the interests of judicial convenience and efficiency the evidence should be presented in a single trial to present the logical, chronological set of circumstances involving the purchase. Plaintiffs also claim they would be prejudiced by a severance because testimony unique to the causes of action against Romar and Fogal,

and admissible in a trial to assess punitive damages, would be inadmissible against Kenworth in a separate trial. Plaintiffs argue that the facts, even if suggestive of a conspiracy, should be presented to a single jury as a matter of convenience to them and to avoid presentation of a disputed set of factual circumstances to two juries.

Pa. R.C.P. 213(b) provides for the severance of actions and issues "in furtherance of convenience or to avoid prejudice." When the severance is moved by one of the parties, the burden is upon that party to show there is good cause for the severance. *Miller v. American Bonding Co.*, 257 U.S. 304 (1921); 5 Standard Pa. Prac., Ch. 22 Sec. 29. The general rule is that the granting of a severance is in the discretion of the court when the suit combines more than one cause of action. *Carlin v. Martyak*, 65 D&C 498, 40 Luz. L. Reg. 195 (1948). Severance is not proper when there is in reality only one cause of action. *Kline v. Ranken*, 79 D&C 260, 67 Montg. Co. Rep. 281 (1951); 1 Goodrich-Amram 2d Sec. 213(b):5. In the present case, the complaint sets forth more than one cause of action against the several defendants. Plaintiff has, in fact, taken a default judgment against defendants Romar and Fogal for fraud, misrepresentation and breach of fiduciary duty. The action against defendant Kenworth is a separate and distinct cause of action. Severance, therefore, is procedurally proper.

The Court must consider the factors of convenience and prejudice in determining whether to grant the severance. *Hippensteel v. Ocker*, 3 Adams L. J. 124 (C.P. 1961). It is not necessary for the moving party to demonstrate both factors in its request for severance. It must be shown that the severance will further the convenience of the parties or avoid prejudice. *Burroughs v. Graham*, 48 Del. 384 (1960). The liabilities of Romar and Fogal which have already been established by the default judgment are not directly relevant to the action against Kenworth. Plaintiffs have not plead conspiracy among the defendants and the inference of such at a joint trial could be detrimentally prejudicial to defendant Kenworth. Plaintiffs will not be adversely affected by a severance; they will be restricted in each trial, as in all cases, to presenting evidence which is relevant to the facts at issue. Therefore, even though there may be some additional burden upon the Court in permitting each cause of action to be addressed separately, to avoid the possibility of adverse prejudice to defendant Kenworth, the Court grants the Motion to Sever.

ORDER OF COURT

NOW, this 3rd day of March, 1981, the motion of Ken-

worth Trucks Philadelphia, Inc. to sever the Plaintiffs' cause of action against it from the causes of action alleged against the other named Defendants is granted, and the Rule made absolute.

Exceptions are granted the Plaintiffs.

COMMONWEALTH v. WITMER, C.P. Franklin County Branch, No. 148-1980.

Criminal Law - Homicide - Degree of Guilt Hearing

1. A motor vehicle may be the instrument used in the commission of the crime of murder.

2. At a degree of guilt hearing the Commonwealth has the burden of presenting evidence to establish first degree murder and the defendant has the burden of reducing it to involuntary manslaughter, if that is what defendant contends the case is.

3. If a defendant wantonly, recklessly and in disregard of the consequences drives his car into another and death results, consciousness of peril or probable peril to human life will be imputed to establish the element of malice.

District Attorney, Attorney for the Commonwealth

Public Defender, Attorney for Defendant

OPINION AND ORDER

EPPINGER, P.J., March 18, 1981:

Jeffrey L. Witmer, the defendant, entered a plea of guilty to murder. After a degree of guilt hearing the defendant was found to have committed murder of the third degree. He filed a postverdict motion saying that the decision was against the the law and a motion in arrest of judgment reiterating the same grounds.

As the legal issue, Witmer contended that the court erred in supporting the presumption that on a guilty plea to murder generally, with nothing more, the defendant is guilty of murder of the third degree, and that the Commonwealth has the burden of proving murder of the first degree and the defendant has the

burden of reducing it to voluntary or involuntary manslaughter.

The defendant's position on the facts is that they are more consistent with involuntary manslaughter than with third degree murder.

We will discuss the facts first. Witmer had been having some problems with her girlfriend. He went to her house, and after some discussion the two of them left her home in his truck. They traveled on some back roads, eventually entering U.S. 30 west of St. Thomas, Pa., heading in the direction of Ft. Loudon. While enroute Witmer said to the girl: "Let's go out and get killed tonight." She replied, "Are you crazy?" He answered, "No I am serious."

When they reached Route 30 and were headed west Witmer was driving the truck riding the yellow line. Even before the fatal event occurred, he came close to hitting another car. This caused the girl to complain to him, saying "Get on your own side of the road." But he didn't do that. Instead, he kept on going onto the other side of the road. Then, according to the girl, Witmer saw a car coming and went for it. When the two cars were about 500 feet apart he really hit the gas pedal and swerved to the left just before the collision. Fruitlessly, the other driver tried to avoid the collision but there wasn't room. Witmer had been drinking, but the girl could not say that he was intoxicated.

The vehicles came together on a slight curve with good sight distance in each direction. One half of the Witmer vehicle was on the wrong side of the road where the accident happened. At the time they came together the other vehicle was on its own side of the road and there were no skid marks to indicate that Witmer attempted to avoid impact. After the accident, which sheared and collapsed the other automobile, the Witmer truck turned on its side and skidded across the road, gathering up some yellow paint from the center line as it did so. The driver of the other vehicle, Mr. Shew, was killed and his wife, injured also, sustained a memory loss.

A motor vehicle may be the instrument used in the commission of the crime of murder. *Commonwealth v. Aurick*, 342 Pa. 282, 19 A.2d 920 (1941).

> "In determining the sufficiency of the evidence to support a finding of [third] degree murder where death results from a motor vehicle accident, it is crucial to determine whether the facts and circumstances surrounding the incident reflect malice which distinguishes murder from other types of homi-