(2) The Archie Coons farm shall go to Norman C. Coons for less than the market value.

(3) The home and land where Jane Estep lives shall pass to her under the will on condition that she pays $26,000 to the estate. Such sum or any portion thereof may be charged against her share of the estate.

The costs of these proceedings shall be paid by the estate.

MOHN V. MOHN, C.P. Franklin County Branch, F.R. 1984-370

*Divorce - Discovery - Interlocutory Order - Bifurcation*

1. A spouse seeking divorce is not entitled to the detailed financial information of the other spouse until a Master determines that the plaintiff is entitled to a divorce.

2. An order bifurcating a divorce action between issue of alimony pendente lite, counsel fees, expenses and divorce - the issue of property distribution is an interlocutory order and not appealable.

3. An order is interlocutory and not final unless it effectively puts the litigant out of court.

4. The issue of bifurcation of a divorce proceeding is properly raised in the defendant's prayer for relief in his answer.

5. Where defendant stipulates ability to pay alimony pendente lite, plaintiff must show need and detailed information on defendant's business is irrelevant in proving need.

*Eileen F. Schoenhofen, Esquire,* Counsel for Plaintiff

*Wayne F. Shade, Esquire,* Counsel for Defendant

OPINION AND ORDER

EPPINGER, P.J., June 14, 1985:

On May 30, 1984, plaintiff, Maxine E. Mohn (Maxine), filed a complaint seeking a divorce, equitable division of property, alimony pendente lite, counsel fees and expenses. Subsequently, she served interrogatories on defendant, George B. Mohn (George). Included were requests for information about his business which



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she claimed was relevant to her entitlement to alimony pendente lite, counsel fees and property division. George objected claiming this information was sensitive, confidential commercial information, involved private transactions with several business partners, and should not be required to be disclosed until Maxine established her entitlement to a divorce.

On November 7, 1984, Maxine filed a motion for compliance with discovery. George's answer to this motion contained a request for bifurcation in the prayer for relief. A discovery compliance hearing was held before this court on December 3, 1984. George stipulated that if the Master found Maxine to be entitled to alimony pendente lite, counsel fees and expenses, then he had the ability to pay such award. At the hearing Maxine made no objection to George's request for bifurcation.

By order of December 7, 1984, we ordered that George make only the disclosures required by Pa.R.C.P. 1920.31 and that the case be bifurcated between the issues of alimony pendente lite, counsel fees and expenses, and divorce on the one hand and property distribution on the other. We also held that the matter should be referred back to the Master to determine if Maxine's needs entitled her to alimony pendente lite, counsel fees and expenses. Until the Master determines that Maxine is entitled to a divorce, we stated that she was not entitled to detailed financial information regarding George's assets and earnings as required under Pa.R.C.P. 1920.33.

Maxine presented a motion for partial vacation of this order on January 3, 1985. We denied this motion.

On February 22, 1985, Maxine presented a motion for reconsideration of our order entered December 7, 1984. We then issued a rule upon George to show cause why the proceedings should not go forward in two phases. In the first phase the Master would determine Maxine's claims for alimony pendente lite, counsel fees and expenses, and divorce. In the second phase, if the Master recommended that a divorce be granted, then within thirty days of such recommendation he would proceed with hearings on the issue of distribution of property.

Maxine asks us to reconsider our order in regard to our grant of bifurcation and our holding concerning what financial information George is required to disclose through discovery at this time. If



reconsideration is denied, Maxine requests that the rule issued by this court on February 22, 1985, be made absolute.

George contends that Maxine cannot request reconsideration because the December 7, 1984 order was final and she failed to request reconsideration within thirty days of said order. George maintains his position that Maxine must establish she is entitled to a divorce before he must disclose his confidential financial information. He continues to stipulate that he has the ability to pay any award of alimony pendente lite, counsel fees and expenses, that the Master deems necessary and reasonable.

We find our order of December 7, 1984 to be an interlocutory order and not appealable. Therefore, Maxine's motion for reconsideration filed February 22, 1985 is timely, and we can properly consider it.

In ascertaining what is a final order, we must look beyond the technical effect of the order to its practical ramifications. *Bells v. Consumer Discount Co.,* 465 Pa. 225, 228, 348 A.2d 734, 735 (1975). A final order has been defined as one, "which ends the litigation, or alternatively disposes of the entire case." *Piltzer v. Independence Savings and Loan Association,* 465 Pa. 402, 404, 319 A.2d 677, 678 (1974); *James Banda, Inc. v. Virginia Manor Apts., Inc.,* 451 Pa. 408, 409, 303 A.2d 925, 926 (1973). "An order is interlocutory and not final unless it effectively puts the litigant 'out of court.' " *Ventura v. Skylark Motel, Inc.,* 431 Pa. 459, 463, 246 A.2d 353, 355 (1968). If the practical effect of our order was to put Maxine out of court by precluding her from presenting the merits of her claim then the order would be appealable. *Pugar v. Greco,* 483 Pa. 68, 74, 394 A.2d 542, 545 (1978).

When these principles are applied to our order of December 7, 1984, it is clear that neither party is prevented from presenting any claims or defenses that could have been presented under the Divorce Law. *Toll v. Toll,* 293 Pa. Super. 549, 556, 439 A.2d 712, 716 (1981). The only effect of the bifurcation order is to determine how and when the issues will be heard, not to foreclose hearing them.

George cites *Hall v. Hall,* Pa. Super. , 482 A.2d 974 (1984), to support his assertion that our order of December 7, 1984, was final and appealable. In *Hall,* the wife appealed from an

order granting a divorce and bifurcating the proceedings. The Superior Court held this to be a final, appealable order, explaining that if the wife were to wait until all economic claims were resolved, she would risk losing her right to appeal the bifurcation.

Our situation is quite different from that in *Hall.* Initially, the court in *Hall* held that, "an order entering a *bifurcated divorce* is final and appealable." *Hall,* supra at 978. (emphasis added). Our order of December 7, 1984 did not enter a divorce decree; it merely specified that the case would go forth as a bifurcated proceeding. Secondly, since no final divorce decree is involved, the parties did not risk losing their right to appeal the bifurcation because our order was interlocutory and the thirty-day appeal period was not applicable. Neither party was "put out of court" or irreparably harmed by the order. "As the possibility of irreparable harm indicates finality, so the absence of irreparable harm indicates lack of finality." *Toll,* supra at 556, 716.

George's next contention is that, according to Pa.R.A.P. 1701(b)(3), reconsideration of an order must be sought within thirty days of the subject order. Pa.R.A.P. 1701(b) is applicable only, "after an appeal is taken or review of a quasijudicial order is sought." As discussed above, our order was interlocutory, thus precluding the applicability of Pa.R.A.P. 1701(b).

We are also aware of the common law rule that a court cannot change its judgment after the term at which it was entered. *Appeal of Clarendon V.F.W. Home Association*, 167 Pa. Super. 44, 47, 75 A.2d 171, 172 (1950). However, this rule applies only to a final judgment and is inapplicable to interlocutory orders, such as the one at issue. "Interlocutory judgments may be opened, amended, or vacated at any time while the proceedings remain in fieri, and before the final judgment." *Commonwealth v. Bowden, 456 Pa. 278, 281, 309 A.2d 714, 716 (1973); Atlantic Richfield Co. v. J.J. White, Inc.,* 302 Pa. Super. 276, 280, 448 A.2d 634, 636 (1982).

As for our decision regarding bifurcation and the discoverability of George's financial information, we stand by our memorandum and order of December 7, 1984, and make absolute the rule issued by this court on February 22, 1985. In order to clear up any confusion and to expedite the proceedings, we deem it necessary to discuss this matter further.



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Maxine contends we improperly considered bifurcation at the discovery compliance hearing of December 3, 1984, as the issue was not discussed and no evidence considered in light of it. We disagree. George had raised the issue of bifurcation in his prayer for relief in his answer to Maxine's motion for compliance with discovery. This is a proper way to raise bifurcation under Pa.R.C.P. 1920.16 and, even if it were not, Pa.R.C.P. 1920.16 allows bifurcation to be raised by the court on its own motion.

Our decision to bifurcate was, "the result of a reflective examination of the individual facts." *Wolk v. Wolk,* Pa. Super. , 464 A.2d 1359, 1362 (1983). *Wolk* requires us to bifurcate divorce proceedings only after the disadvantages and advantages have been carefully explored and analyzed.

As we mentioned in our memorandum, bifurcation seems to be the most appropriate and expeditious manner of resolving this situation. George is involved with business partners in various enterprises and is concerned that unnecessary disclosure of this commercial information would place strains on his business relationships and could harm him in pursuit of future business opportunities. George also denies that Maxine is entitled to a divorce. On the other hand, we recognize Maxine's understandable desire that the divorce and property distribution occur as soon as possible so she can move on with her life.

After consideration of these various, and sometimes contradictory, factors and desires, we conclude that bifurcation is the best method to satisfy George's concern about premature disclosure of business information, and Maxine's desire to expedite the proceedings.[1] George's detailed financial information is more appropriately a topic to consider for property distribution, and until Maxine can prove she is entitled to a divorce, there is no need for this information to be disclosed. We are without authority to adjudicate equitable distribution of property before a divorce decree is entered. *Shaffer v. Shaffer,* 29 D.&C.3d 205, (Somerset Cty. 1983).

[1] George appealed our order of December 7, 1984, and subsequently withdrew the appeal. Maxine expects him to appeal every step of the way.



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LEGAL NOTICES, cont.

Notice is hereby given pursuant to the provisions of the Act of Assembly of December 16, 1982, P.L. 1309 and its amendments and supplements which have been filed with the Secretary of the Commonwealth of Pennsylvania at Harrisburg, on January 23, 1986, an application for a certificate for the conducting of a business under the assumed or fictitious name of Buchanan Trail Tire Sales, 6596 Buchanan Trail East, Waynesboro, Pennsylvania 17268. The names and addresses of all persons owning or interested in said business are Richard K. Mohn, Jr., 10497 Old Forge Road, Waynesboro, Pennsylvania 17268. Attorney: D.L. Reichard, II, 134 West Main Street, Waynesboro, Pennsylvania 17268.

2-14-86

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, the intention to file, with the Department of State of the Commonwealth of Pennsylvania, on January 15, 1986, an application for a certificate for the conducting of a business under the assumed or fictitious name of Hickey Enterprises, with its principal place of business at 51 Amethyst Drive, Chambersburg, Pennsylvania. The name and address of the persons owning or interested in said business are Robert J. Hickey, Sr., 51 Amethyst Drive, Chambersburg, Pennsylvania 17201, and Robert J. Hickey, Jr., 2720 Black Gap Road, Chambersburg, Pennsylvania 17201.

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2-14-86

In determining alimony pendente lite, counsel fees and expenses, the only financial information which George must disclose is that required by Pa.R.C.P. 1920.31. Maxine would have George disclose detailed financial information pursuant to Pa.R.C.P. 1920.33, but this rule is applicable only to distribution of property, which we are not concerned with at this time.

We agree with Maxine that the factors to be considered in determining alimony pendente lite, counsel fees and expenses are, "the husband's ability to pay, the separate estate and income of the wife, and the character, situation and surroundings of the parties." *Orr v. Orr,* 315 Pa. Super. 168, 172,461 A.2d 850, 852 (1983). However, we do not agree that "character, situation and surroundings," requires the Master to examine George's earning capacity and income potential. We found no case defining this phrase as such. It appears that this phrase more appropriately means an examination of the parties' standard of living which was established during the marriage. *Sands v. Sands*, 112 Montg. Co.L.R. 287 (1983).

Maxine cites *Orr v. Orr*, supra, and *Wechslar v. Wechslar,* 242 Pa. Super. 356, 363 A.2d 1307 (1976), in support of her proposition that the Master must look at George's earning capacity in determining alimony pendente lite, counsel fees and expenses. However, Maxine overlooked one crucial fact. In both cases the defendant husband was disputing his ability to pay such an award. Here, George stipulated he has the ability to pay any award but disputes that Maxine is entitled to such an award based on her income and assets.

Maxine also cites *Boni v. Boni,* 302 Pa. Super. 102, 448 A.2d 547 (1982); *Banks v. Banks,* 275 Pa. Super. 439, 418 A.2d 1370 (1980); and *Shuster v. Shuster*, 226 Pa. Super. 542, 323 A.2d 760 (1974), to support her argument that the Master must consider the extent of George's property and financial resources. These are all support cases and Maxine argues that there is no relevant difference between support and alimony awards. We disagree. "Support is a cause of action separate and distinct from alimony pendente lite." *Remick v. Remick,* Pa. Super. , 456 A.2d 163, 170 (1983). Alimony pendente lite, "differs somewhat in character from an order for support." *Id.* at 170.

A grant of alimony pendente lite is predicated upon need. *Sutliff v. Sutliff,* Pa. Super. , 474 A.2d 599 (1984). "Courts have defined the standards governing alimony pendente lite, counsel fees and expenses in language focusing on the husband's ability to pay and the wife's right to recover." *Wechslar*, supra at 362, 1310. The fact that George earns more than Maxine does not automatically entitle her to alimony pendente lite, counsel fees or expenses. "There must be a showing that the spouse earning less needs the relief sought in order to adequately defend his or her rights in the principal litigation." *Sutliff,* supra at 600.

As the moving party, it is Maxine's burden, "to allege and prove need and ability to pay." *Dimock v. Dimock*, 21 D.&C. 3d 499, 503 (Luzerne Cty. 1982). Since George has stipulated as to his ability to pay, if Maxine can prove need then she would be entitled to alimony pendente lite. Detailed financial information concerning George's business holdings is totally irrelevant to proving Maxine's "need" for alimony pendente lite, counsel fees and expenses.

In conclusion, we make absolute our rule issued February 22, 1985, stating that the proceedings should go forth in two phases, and reaffirm our memorandum and order of December 7, 1984, regarding the discoverability of the financial information requested in Maxine's interrogatories.

ORDER OF COURT

June 14, 1985, the rule issued February 22, 1985 is made absolute and this action shall proceed in two phases. The Master shall proceed immediately with the taking of evidence on the subject of divorce and alimony pendente lite, counsel fees and expenses and make a report. If the Master recommends a divorce, then within thirty (30) days from the date of such recommendation, the Master shall proceed with the taking of testimony on equitable distribution and make a report on that subject.



COMMONWEALTH OF PENNSYLVANIA v. CARBAUGH, C.P. Franklin County Branch, No. 228 of 1984, No. 229 of 1984, and No. 230 of 1984

*Criminal Law - Miranda Warnings - Robbery*

1. Where the defendant's initial incriminating statements are in violation of Miranda, they may be considered harmless if properly admitted evidence is substantially similar to the erroneously admitted evidence.

2. An accused who has invoked his rights may change his mind and choose to waive his rights so long as he initiates further communication and so long as his waiver is voluntary and intelligent.

3. The crime of robbery may be found even when the defendant's assault on the victim and the intent to steal are not exactly contemporaneous.

*John F. Nelson, Esquire,* Assistant District Attorney

*Douglas W. Herman, Esquire,* Assistant Public Defender

OPINION AND ORDER

EPPINGER, P.J., July 16, 1985:

Late on the evening of April 16, 1984, or early in the morning of April 17, 1984, defendant, Randy Scott Carbaugh, met the victim, Diane Reed, at the Cabbage Patch bar in Chambersburg. They left the bar together in the victim's car. Sometime later, Carbaugh beat and killed her. Carbaugh then took the body to a wooded area near Cowans Gap and buried it. He kept her car and took some of her checks.

On the morning of April 17, 1984, Carbaugh went to the homes of his two sisters. He confessed to both that he had just killed a female. Both sisters observed blood on him.

On April 17 and 19, 1984, Carbaugh forged several of the checks belonging to the victim, endorsed them, and cashed them at the Letterkenny Federal Credit Union. The head teller identified Carbaugh from photographs as the individual who cashed the checks.