

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

H.B.,	:	
Plaintiff	:	
	:	
v.	:	No. 04-20,121
	:	PACES NO. 787706131
K.B.,	:	
Defendant	:	

OPINION and ORDER

This opinion addresses the Exceptions filed by Husband to the Master’s order of March 30, 2004, awarding Wife spousal support.

Husband’s first two exceptions relate to Wife’s entitlement to support. The law regarding entitlement is that a “dependent spouse is entitled to support until it is proven that the conduct of the dependent spouse constitutes grounds for a fault divorce. The party seeking to nullify the obligation bears the burden of proving the conduct claimed by clear and convincing evidence.” Hoffman v. Hoffman, 762 A.2d 766, 770 (Pa. Super. 2000) (citing Crawford v. Crawford, 633 A.2d 155, (Pa. Super. 1993). Conversely, a voluntary withdrawal of the dependent spouse must, in order to justify the payment of support, be based either upon the consent of the other spouse or upon adequate legal cause. Commonwealth ex rel. Rovner v. Rovner, 111 A.2d 160 (Pa. Super. 1955). Thus a dependent spouse seeking support after his or her non-consensual, voluntary withdrawal need not establish grounds for divorce. He or she need only show by sufficient evidence adequate legal cause for the withdrawal. Id. at 771, Brotzman-Smith v. Smith, 650 A.2d 471 (Pa. Super. 1994); McKolanis v. McKolanis, 644 A.2d 1256 (Pa. Super. 1994), Rock v. Rock, 560 A.2d 199 (Pa. Super. 1988); Larkin v. Larkin, 396 A.2d 761 (Pa. Super. 1978). A consensual withdrawal by the dependent spouse does not preclude spousal support. Hoffman, supra, at 771. Where the dependent spouse simply requests the other spouse to leave the marital residence, the

separation will be normally be considered consensual unless the payor spouse is under a compulsion to leave. Rovner, supra.

In summary, if the dependent spouse commits fault grounds for a divorce, spousal support will not be awarded. Barring that, however, spousal support will only be denied when the dependent spouse voluntarily causes the separation (either by leaving the residence or requesting the other spouse to leave the residence), without the consent of the other spouse, and without adequate legal cause.

Turning to the sad facts in the case before the court, the incident precipitating the separation occurred in April 2003. Unfortunately, the Master did not make findings of fact, nor did he assess credibility of the witnesses. However, from the transcript, the court can arrive at the following facts. Wife, who is 86 and Husband, who is 87, have been married for 63 years. Both were diagnosed with some degree of dementia, although Husband's affliction was apparently worse than Wife's. Wife wanted the couple move to the Williamsport Home, with Husband eventually being placed in the Alzheimer's unit. Although the testimony is unclear, it appeared Wife had already made plans for that move to take place. Wife did in fact move to the Williamsport Home shortly after the incident.

The testimony was also clear that Husband opposed the move. The couple's two sons, R.B. and K.B., along with R.B.s wife H.B., all testified that Husband was adamantly opposed to moving to the Williamsport Home. He did not want to leave his residence or his dog. Wife gave contradictory testimony on the issue. She initially stated he did not agree to move to the Williamsport Home. A short time later, however, when asked whether Husband ever objected to living at the Home, she stated, "Not at all. Not at that time, no." Given Wife's equivocal testimony, along with her dementia and the overwhelming and clear testimony of the other witnesses, the court must conclude that Husband did not wish to go to the Home. R.B. and H.B. invited the couple to live with them, promising to care for the couple, but Wife declined that offer

and was not interested in exploring other options, such as hiring in-home care to permit the couple to remain in their own residence.

On the day of the separation, R.B. and S.B. had been visiting the couple for several days. G.B. was also present. Upon opening the mail, Wife discovered that Husband had executed a new Power of Attorney, replacing Wife with R.B. and S.B. Wife flew into a rage, and eventually told Husband to leave the residence, stating it was her house.¹ She refused to permit him to take his dog, his clothes, or his medication. K.B. and S.B. took Husband to their home, where he has resided ever since. Shortly after the incident, Wife cancelled Husband's credit card and closed his personal accounts.

The Master did not state precisely why he found Wife to be entitled to support. However, the Master appeared to place great weight upon the fact that Husband had eliminated Wife as Power of Attorney. The Master considered Wife's reaction to this change "understandable."

Regardless of whether Wife was justified in being upset at the change in Power of Attorney, she was not justified in ordering Husband out of the house because of it. Husband had a right to choose whomever he wished as Power of Attorney, and in all likelihood he eliminated Wife because Wife intended upon using that power to move him into the Williamsport Home against his will. Moreover, we cannot consider the separation to be consensual, as under the circumstances, we find that Husband was compelled to leave upon Wife's demand.

Based upon the court's conclusion that Wife voluntarily initiated the separation, that the separation was non-consensual, and that Wife did not have legal cause to demand that Husband leave the residence, Wife is not entitled to spousal support.

¹ Although Wife denies ordering Husband out of the house, the court must conclude she did so, based on the clear and overwhelming testimony of K.B., R.B., and S.B., and considering Wife's dementia.

ORDER

AND NOW, this _____ day of September, 2004, for the reasons stated in the foregoing opinion, Husband's Exceptions are granted and it is hereby ordered that:

1. Husband owes no spousal support to Wife. Wife shall re-pay to Husband the entire amount Husband has paid in spousal support, in payments of \$500 per month, payable on the first day of each month, until such time as all funds have been re-paid to Husband.
2. Husband shall continue to provide medical insurance coverage for Wife until further order of court.
3. Wife shall be responsible for the first \$250 each year of unreimbursed medical expenses. Any unreimbursed medical expenses beyond that amount shall be paid as follows: Wife is responsible for payment of 21% and Husband is responsible for 79%. Unreimbursed medical, dental, optic, and orthodontic expenses shall be determined after submission to both parties' insurance companies, if any, with documentation of payments or denial of payment to be presented to the Domestic Relations Section.
4. H.B. shall pay court costs in the amount of \$38.50 to the Domestic Relations Section within thirty days of the date of his order.

BY THE COURT,

Richard A. Gray, J.

cc: Dana Jacques, Esq., Law Clerk
Hon. Richard A. Gray
Jeffrey Yates, Esq.
Patricia Bowman, Esq.
Domestic Relations (JJ)
Family Court
Gary Weber, Esq.