IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

S.G.,	:	
Plaintiff	:	
	:	
v.	:	No. 03-21,556
	:	PACES NO. 801105758
M.A.S.,	:	
Defendant	:	

OPINION and ORDER

This case involves the question of when spousal support and child support may be awarded when the husband, wife, and children live in the same residence. Wife claims the court should order support under either of two theories: (1) When the parties are living separate and apart (although dwelling in the same home), and (2) When the dependent spouse and children are not being adequately provided for. The Master found that the couple was living separate and apart, and went on to order spousal support ($263.87 per month) and child support ($742.32 per month). After argument and a review of the transcript, the court finds the couple is not living separate and apart, and that Husband has not failed to adequately provide for Wife and the children. Therefore, neither spousal support nor child support is warranted.

Living Separate and Apart

The issue of whether the parties are living separate and apart is one which is highly fact-sensitive. Unfortunately, the Master did not make any findings of fact, nor did he assess credibility. Ordinarily, we would have to remand the matter back for factual findings; however, we need not do so here because a review of the transcript convinces the court that the parties are not living separate and apart for support purposes, even if we resolve contradictory testimony in Wife's favor.

The parties were married in 1978. They have two minor children living at home, as well as two emancipated children living in the home, one of whom works full time and the other whom works one day a week. The parties have not had sexual relations for two years. Wife sleeps on a bed in the living room. Wife claims Husband asked her to leave the bedroom; Husband claims she left on her own. Husband gives Wife $100 per week, apparently intended for groceries, although there are no limitations on how the money is to be spent. Husband pays for the electric service, telephone service, fuel costs, and newspaper subscription. The home is paid for. Husband also buys some groceries, other household items, and some of the items for the children, although Wife buys most of these items. Wife's employment provides health insurance for the children at no charge. The parties have always maintained separate checking accounts throughout their marriage, and continue to do so. Before filing her petition for support, Wife had not asked Husband to contribute more money or pay any bills other than those he is currently paying.

Both parties work full time, and are home virtually every evening. They frequently eat meals together (Wife testified 2-3 times per week, Husband testified almost every evening). Wife usually cooks, but Husband occasionally does some cooking, along with one of the children. After dinner, both parties almost always remain at the home. Wife testified that Husband never watches television with her and the younger children, but instead watches television with Andrew, the oldest son, in Andrew's room. Husband testified that virtually every evening he, Wife, and the children sit in the same room, watching television or reading. The house is not divided into separate living sections. Both parties use the entire house, including the bedroom, where Wife keeps her clothing. Husband and Wife do not socialize or attend family functions together, but there was no testimony that either party does much socializing alone, either. In fact, there was a dearth of additional information as to any changes in the parties' lives after "separation."

Husband requested counseling, and Wife attended one session but refuses to continue. Husband desires a reconciliation of the couple's intimacy, but Wife will not consider any type of reconciliation. Husband testified that he would welcome Wife to re-join him in the marital bed.

The definition of "separate and apart" is found in 23 Pa.C.S.A. §3103: "Complete cessation of any and all cohabitation, whether living in the same residence or not." The Superior Court has stated that "cohabitation" means "the mutual assumption of those rights and duties attendant to the relationship of husband and wife." Thomas v. Thomas, 483 A.2d 945 (Pa. Super. 1984). The gravamen of the phrase "separate and apart" is the existence of "separate lives not separate roofs." Frey v. Frey, 821 A.2d 623 (Pa. Super. 2003).

Although Wife testified the parties "lead separate lives," her testimony did not establish that fact. While it is true the parties do not engage in sexual intercourse, "The ties that bind two individuals in a marital relationship involve more than sexual intercourse." Frey, supra, at 628. The parties' home is not divided into separate living sections, the family eats frequent and regular meals together, and both Husband and Wife spend virtually every evening at the home, with each other and their children. Moreover, according to Husband's testimony, the parties spend most evenings watching television together or reading. In fact, this family's living situation does not appear to be very much different from standard intact families, except for the lack of intimacy between the parents. The parties also share expenses such as food, with Husband providing the utilities and heat and Wife apparently buying the majority of the groceries. Both parties purchase miscellaneous household items although according to Wife's testimony, she purchases the bulk of such items, as well as most of the children's clothing.

A review of the case law establishes that in instances where parties residing in the same residence were deemed to live separate and apart, a much greater amount of

physical separation existed. For instance, in Frey, supra, the husband's limited presence in the marital residence was entirely due to maintaining his relationship with his daughter. While he usually ate meals away from home, he occasionally ate with his daughter at the marital residence. However, he could not remember the last time he and his wife shared a meal together. For the most part, he used the marital residence for sleeping purposes only, although he did not always sleep at the marital residence. He arrived home from work sometime after dark, and left for work again at approximately 6:00 a.m. Many times after coming home from work, the husband would soon leave again to prepare for the next days' work. Although husband and wife took two vacations together, the sole purpose of the trips was to benefit their daughter, and the husband specifically informed the wife that he was going solely to benefit their daughter. The trial court concluded the parties' activities together were knowingly performed solely for the benefit of their daughter, and found that the parties had been separated for the purpose of obtaining a divorce based upon a two-year separation. The appellate court affirmed this finding, adding that the husband should not be penalized for attempting to make life for his daughter more pleasurable. In the case before this court, by contrast, both Husband and Wife were present in the residence together every evening, frequently ate meals together, and shared expenses.

In Mackey v. Mackey, 545 A.2d 362 (Pa. Super. 1988), the parties were found to live separate and apart where Husband, who was a dairy farmer, felt it necessary for him to live at the farm in order to perform the daily farm chores. When his wife refused to leave, Husband established separate living arrangements, with Husband sleeping in the first floor bedroom and using the adjoining bathroom, and Wife residing on the second floor. Neither spouse ventured into the other's private living quarters. The parties generally prepared their own meals and did their own grocery shopping, but they occasionally ate meals together, shared food produced on the farm, shared a number of joint expenses, and occasionally socialized together. The Superior Court found that the

facts clearly showed the husband "lived a life separate from that of his wife," and that the husband should not be denied a unilateral divorce merely because he and his wife "have demonstrated a level of civility rarely seen in a divorce action." Id. at 365.

In Thomas v. Thomas, 483 A.2d 945 (Pa. Super. 1984), the spouses were found to be living separate and apart for the purposes of obtaining a 23 Pa. C.S.A. §3301(d)(1) divorce where the parties maintained separate residences, although the husband returned to the marital residence numerous times to visit his son, and occasionally engaged in sexual intercourse with his wife . The husband never, however, remained at the marital residence overnight.

In Flynn v. Flynn, 491 A.2d 156 (Pa. Super. 1985), the parties were found to be living separate and apart for the purpose of obtaining a §3301(d)(1) divorce where the parties lived under the same roof but in separate parts of the house, and had ceased all marital relations.

In the case before this court, Husband and Wife have, despite their lack of intimacy, maintained a household together and are functioning as an intact family not only financially, but also by spending time together and eating meals together. Under the circumstances, the parties have not completely ceased all cohabitation, nor are they leading living separate lives. Therefore, the court finds the parties are not living separate and apart, and that there is neither a physical nor a financial separation.

Moreover, even if the court were to find that the parties are living separate and apart, the court believes it would still be necessary to find that Wife's and children's needs were not adequately being met before ordering support. *See* Biler v. Biler, 508 A.2d 1261 (Pa. Super. 1986) (once parties were found to be living separate and apart, the court examined whether the husband neglected to provide suitable maintenance for wife). As addressed in the next section, the court does not believe Wife and children have been so neglected.

Failure to Provide for Wife and Children

As to the issue of whether the court can order support when the parties are not living separate and apart, that theory originated with Commonwealth v. George, 56 A.2d 228 (Pa. 1948). In George, the action was brought under a criminal law, 18 Pa. §4733, which was repealed in 1985. That law applied to a husband who "separates himself from his wife or from his children or from wife and children, without reasonable cause, or willfully neglects to maintain his wife or children, such wife or children being destitute, or being dependent wholly or in part on their earnings for adequate support." Under the statute, such a dependent spouse could seek judicial assistance to secure a reasonable allowance for herself and the children. The George court found that the husband had provided adequate shelter, food, clothing, and reasonable medical attention, and declined to enter an order of support. The court went one step further, however, stating,

> We are not now required to determine the power of a court to enter an order where, although the parties reside under the same roof, the husband neglects or refuses to provide food, clothing and reasonable medical attention to his wife and family. We decide only that where, as here, the husband provides a home, food, clothing and reasonable medical attention, he cannot be directed to pay a given stipend to the wife so that she may have it available for her own personal disposition.

Despite this language, the George opinion does seem to indicate that support could be awarded when the parties are not living separate and apart, and some cases decided after George seem to interpret George that way.[1] Others contain language that seems to indicate that before entering a support order, a court must first find that the parties are living separate and apart.[2] The court believes that the more appropriate rule

[1] Commonwealth v. Goldstein, 413 A.2d 721 (Pa. Super. 1979), Scuro v. Scuro, 323 A.2d 49 (Pa. Super. 1974), Commonwealth ex rel. Gauby v. Gauby, 289 A.2d 745 (Pa. Super. 1972), Commonwealth ex rel. Glenn v. Glenn, 222 A.2d 465 (Pa. Super. 1966).

[2] Shilling v. Shilling, 575 A.2d 145 (Pa. Super. 1990), Commonwealth v. Biler, 508 A.2d 1261 (Pa. Super. 1986).

may be to require a finding of living separate and apart before ordering support, as most of the cases indicating otherwise were decided under a statute no longer in existence and before the support guidelines took effect.

However, even if the court were to consider ordering support where the parties are not living separate and apart, we would not order support in this case. The George rule, although appearing to permit a support order where the parties were not separated, does so only when the wife or children are being denied essentials. The George court was extremely reluctant to interfere with the domestic arrangements of a family, stating,

> The arm of the court is not empowered to reach into the home and to determine the manner in which the earnings of a husband shall be expended where he has neither deserted his wife without cause nor neglected to support her and their children. . . . The statute was never intended to constitute a sounding board for domestic financial disagreements, nor a board of arbitration to determine the extent to which a husband is required to recognize the budget suggested by the wife or her demands for control over the purse strings.

George, supra, at 231. Subsequent appellate courts have also expressed extreme reluctance to issue an order for support where the family is intact and there is no "startlingly obvious evidence of neglect." Glenn, supra, at 467. *See also* Gauby, supra, at 745, 747 (record does not present such "obvious neglect" as to take the case out of the general rule that the court will not reach into the home to determine the manner in which the earnings of a husband should be expended where the parties are living together); Shilling, supra at 147 (no "obvious neglect"). In conclusion, courts are highly reluctant to micromanage family budgets, and rightly so.

In the case before this court, there is no justification for the court to interfere with the family's financial arrangements. The family residence is owned debt free. Husband pays the utility bills, supplies the fuel for heating, and contributes $100 per week for groceries, in addition to buying other household items. Wife and children are not wanting for food, clothing, or shelter. All family members have health insurance.

Wife has her own income and vehicle. Requiring Husband to pay a total of $1006.19 per month in spousal and child support, as the Master did, when Husband lives in the same residence as Wife and the children, and pays the majority of the household bills, appears unjust under these facts.

Moreover, both parties testified that Wife never asked Husband to pay other bills or give her additional money prior to filing her petition for support. It would be poor policy to permit spouses to turn to the court before even requesting support from the other spouse, as the other spouse would have had no chance to grant the request and work things out between the family members themselves, thus keeping the entire matter out of court.

In addition, the court believes that Wife's entitlement to spousal upport is a critical issue. Even if the Master found Wife's testimony that Husband originally asked her to leave the bedroom to be credible, the record clearly shows that Husband sincerely wants to reconcile with Wife. He has requested a continuation of marital counseling, which Wife refuses to attend, and has invited her to rejoin him in the marital bed. Wife will not consider reconciliation, and gives no reason other than her belief that she and Husband are incompatible. Incompatibility does not constitute adequate legal cause, and in the absence of adequate legal cause, spousal support is not warranted—especially in light of her refusal to accept Husband's bona fide offers of reconciliation. *See* Commonwealth ex rel. Goldstein v. Goldstein, 413 A.2d 721 (Pa. Super. 1979).

And finally, regarding the issue of child support, even if the court found that child support was warranted, there was certainly no finding of which party, if any, is the primary physical custodian. In a case such as this, where the parties live in the same residence with the children, even if child support were ordered, a significant, if not total, deviation from the Guideline amount would appear to be warranted.

O R D E R

AND NOW, this _____ day of April, 2004, for the reasons stated in the foregoing opinion, the defendant's exceptions are granted and the Master's order of December 12, 2003 is hereby vacated. It is hereby ordered that Mark A. Smith shall owe no spousal support and no child support. It is further ordered that Susan G. Smith shall repay the entire amount she has thus far received under the order of December 12, 2003, in the amount of $200 per month, beginning on May 1, 2004 and continuing until the entire amount has been repaid, with each payment due on the first of each month. In the event the parties' circumstances change and spousal support or child support is ordered in the future, any amount that has not yet been repaid to Mrs. Smith may be used as a credit toward Mr. Smith's obligation.

BY THE COURT,

_____
Richard A. Gray, J.

cc: Dana Jacques, Esq., Law Clerk
Hon. Richard A. Gray
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