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# The Marital Residence—A Strategic Battleground

Norman Perlberger\*

## I. Introduction

It is difficult to say which problem associated with divorce is the most predominant or severe. Undoubtedly, the personal crisis that befalls the members of the family unit is enduring and difficult to resolve. Courts and attorneys may seek, by order or agreement, to establish guidelines for such matters as custody and visitation, but the inefficacy of our system of justice is highlighted by the increasing number of family victims seeking psychiatric assistance for their adjustment to new lives.

In the pendency of a divorce, the lawyer is more effective in dealing with the financial affairs of his clients than are the clients themselves. Aside from the personal and psychological consequences of a broken marriage, the family members are faced with the problem of arriving at an acceptable means of surviving within the bounds of their new economic situation. The marital residence usually is the focal point of the financial arrangement.

Within traditional notions, the "home" is more than the living quarters of a family. It is at once the symbol of many intangible, yet vital, links in the family's identity: security, success, solidarity, independence, and stability, to name a few. Not surprisingly, the marital "home" often stands at the center of negotiations in the war between spouses. The marital residence is both sword and shield in the strategic game that is often played at the emotional and psychological expense of the clients and their families. The following discussion will center upon the varying rights and liabilities that arise from the ownership or occupancy of the marital residence.

## II. The Unwritten Law

Although equalization of the sexes may obliterate the stereotype of the male as breadwinner and the female as housewife, the historical

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relationship still provides some authority for the statement that when the marital partners separate, it is the woman, especially if she retains custody of minor children, who demands that any settlement accord her an unassailable right to exclusive ownership and possession of the marital residence. From that custom has arisen the expression "the woman gets the house!"

While there is no legal requirement that it be so, negotiations generally begin with the marital residence—the typical family's primary asset. Often there can be no fruitful discussion between the parties or their attorneys until the disposition of the marital residence has been effected. In practice, the manner in which title to the premises is held is generally of little significance in the demands of the parties. The claiming spouse frequently ignores the realities of ownership when discussing the "equities" of the situation.

Since Pennsylvania is a "fault" state,<sup>1</sup> the relative footing of the parties may be weighed by simply examining the facts and circumstances of the separation. If the claiming spouse is either "innocent" or has not behaved heinously, he or she stands to gain great financial advantage over the "culpable" spouse. The inability of the latter to obtain a divorce without escaping to a "no-fault" state acts as an incentive to meet the demands of the spouse seeking possession or ownership of the marital residence—especially if the claiming spouse is the one who can proclaim that "the woman gets the house."

### III. Support Overtones

#### A. *Jurisdiction and Venue*

The courts of common pleas have jurisdiction over support matters.<sup>2</sup> Either plaintiff or defendant must reside in the Commonwealth in order to bring a support action.<sup>3</sup> The more difficult and common problem is to obtain personal jurisdiction over a defendant who has avoided service of process by leaving the Commonwealth. If the defendant is unable to be served personally, quasi in rem jurisdiction may be obtained for the purposes of pursuing the support action by attaching property belonging to the defendant.<sup>4</sup> Property that is owned by the entireties, which would include the marital residence,<sup>5</sup> may serve as the basis for obtaining

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1. See PA. STAT. ANN. tit. 23, § 10 (Purdon 1955).

2. *Id.* tit. 62, § 2043.12 (Purdon 1968); *id.* tit. 23, § 15(1) (Purdon Supp. 1976).

3. *Id.* tit. 48, § 131 (Purdon 1965).

4. *Id.* § 32.

5. *DiFlorido v. DiFlorido*, 459 Pa. 641, 331 A.2d 974 (1975) (household goods); *In re Carnevalino's Estate*, 435 Pa. 336, 257 A.2d 546 (1969) (mortgages); *In re Brose's Estate*, 416 Pa. 386, 206 A.2d 301 (1965) (bank deposits); *Wallaesa v. Wallaesa*, 174 Pa. Super. Ct. 192, 100 A.2d 149 (1953) (notes); *In re Smulyan*, 98 F. Supp. 618 (M.D. Pa. 1951) (United States savings bonds); *O'Boyle v. Home Life Ins. Co. of America*, 20 F. Supp. 33 (M.D. Pa. 1937) (life insurance policies).

jurisdiction over a spouse who has deserted or otherwise abandoned his family.<sup>6</sup>

Obtaining jurisdiction does not necessarily mean that the courts will be able to compel the appearance of the defendant in the initiating county. If the new residence of the defendant is known and it is in a county or state other than that in which suit was commenced, the defendant is entitled to require that the “responding” county or state hear the case and issue the order.<sup>7</sup>

### *B. Consideration as to Amount*

In determining the appropriate amount of support, a court is not restricted to the actual earnings and income of the parties. The court may consider not only the parties’ “earning capacity,” but the nature and extent of each party’s property or other financial resources.<sup>8</sup> If the marital residence is owned by the defendant-spouse, it may be considered for its “income potential” in arriving at a support order,<sup>9</sup> but it is unlikely that a court would consider the residence as a factor if it were occupied by the plaintiff-spouse and the children.

If the property is owned by the entireties, the same rule should apply. In *Gitman v. Gitman*,<sup>10</sup> the Supreme Court of Pennsylvania recognized that entireties property could be subject to execution for delinquent support payments and could be considered in computing the amount of support order. Despite the right of the courts to consider the marital residence as one of the resources owned by one or both of the parties in fashioning a support award, however, appellate courts have held that support proceedings cannot be utilized to divide or distribute the defendant-spouse’s estate.<sup>11</sup>

### *C. The Effect of Cohabitation or Sharing the Household*

One of the most effective tactical weapons available to a party engaged in domestic conflict is that which flows as a consequence of physical possession of the marital residence. There is a general rule providing that an order of support will not be issued if the parties are living together and the record does not present an obvious failure to provide for the family’s needs.<sup>12</sup>

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6. See PA. STAT. ANN. tit. 48, § 132 (Purdon 1965); *id.* tit. 62, § 1977 (Purdon 1968).

7. *Id.* tit. 62, §§ 2043-1 to 2043-44 (Purdon 1972); Commonwealth *ex rel.* Powell v. Powell, 238 Pa. Super. Ct. 369, 357 A.2d 566 (1976).

8. See, e.g., Commonwealth *ex rel.* Roviello v. Roviello, 229 Pa. Super. Ct. 428, 323 A.2d 766 (1974); Shuster v. Shuster, 226 Pa. Super. Ct. 542, 323 A.2d 760 (1974).

9. Commonwealth *ex rel.* Gitman v. Gitman, 428 Pa. 387, 237 A.2d 181 (1967).

10. 428 Pa. 387, 237 A.2d 181 (1967).

11. Commonwealth *ex rel.* Bishop v. Bishop, 234 Pa. Super. Ct. 600, 341 A.2d 153 (1975); Commonwealth *ex rel.* Roviello v. Roviello, 229 Pa. Super. Ct. 428, 323 A.2d 766 (1974).

12. Commonwealth *ex rel.* Gauby v. Gauby, 223 Pa. Super. Ct. 92, 289 A.2d 745 (1972). This general rule is not applicable to alimony pendente lite, which the superior court

The question whether a spouse can pursue a support action for inadequate or insufficient maintenance while the parties reside in the same household has been answered in the negative by the supreme court, which has declared that

[if a] 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.<sup>13</sup>

In a recent case, the superior court ruled that if a husband was paying the fixed bills, including the mortgage installments, and giving his wife twenty dollars per week, there could not be such neglect as to permit his wife to obtain a support order.<sup>14</sup> This rule is not without exception. Should the defendant provide a modicum of support, but pursue a course of conduct that degrades or humiliates the other party, an order of support may be obtained even though the parties live in the same household.<sup>15</sup>

This position taken by our courts has been and continues to be a vicious weapon in the negotiations of the parties. A common hypothetical may illustrate its effectiveness. A husband and wife decide to separate. The minor children go to school and have many friends in the neighborhood. Mindful of the difficulties the children will have in adjusting to the marital breakdown, the parties decide that the wife should remain in the house with the children while the husband takes up residence in an apartment of his own.

After many years of marriage, during which "child-bearing" years she was unemployed, the wife feels the need to obtain a suitable income and sufficient assets to continue living in the style to which she and her children have become accustomed. The husband has similarly become accustomed to his independence and would like to secure a substantial standard of living for himself. Being thwarted in her individual desires, the wife institutes a support action even though her husband has been paying a weekly sum that he considers to be sufficient for her needs. The husband is advised that if he moves back into the house the support action can be aborted even if he has no desire to resume a marital relationship with his wife. Husband returns; wife consults her attorney and finds that she is powerless to act because the marital residence is jointly owned and her husband therefore has an absolute right to return and live in it with her.<sup>16</sup>

If the husband now cuts down his weekly payments so as to provide only the bare necessities of the household, he can go about his "single

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has held may be awarded even when the parties are living in the same household, without a requirement that the plaintiff-spouse establish willful neglect or denial of necessities. *Wechsler v. Wechsler*, — Pa. Super. Ct. —, 363 A.2d 1307 (1976).

13. *Commonwealth v. George*, 358 Pa. 118, 56 A.2d 228 (1948).

14. *Scurio v. Scurio*, 226 Pa. Super. Ct. 592, 323 A.2d 49 (1974).

15. *DiPadova v. DiPadova*, 223 Pa. Super. Ct. 408, 302 A.2d 510 (1973).

16. *Commonwealth v. George*, 358 Pa. 118, 56 A.2d 228 (1948).

life," sleep in a separate bedroom, and come and go as he pleases without fear of legal consequences. On the other hand, the wife must be careful not to commit any indiscretions since adulterous conduct on her part would cut off any support to which she might otherwise be entitled.<sup>17</sup>

Once the wife has "come to her senses," the husband may move out and resume negotiations with the hope that the threat of returning will be a sufficient deterrent to avoid the "unreasonable" demands made by his wife during the prior negotiations. This weapon cannot, of course, be utilized to avoid the duty of support if the marital residence is owned solely by the plaintiff-spouse.

This horrific script is one that is repeated in many marital disputes by parties who have been frustrated by months or years of fruitless negotiations. Despite the good intentions that the parties may have had at the outset of their separation, the gradual erosion of harmony that attends a prolonged separation often brings them to this tragic juncture. Unfortunately, more often than not the victims of this strategy are the children. As long as the law remains stringent on this subject, the "game" will be played.

#### IV. A Man's Castle

Although the marital residence may be jointly owned, thereby creating equal rights of title and possession in the parties, an anachronism in the law continues despite the adoption of the Pennsylvania Equal Rights Amendment.<sup>18</sup> The law has long recognized that a woman must live in the house chosen by her husband.<sup>19</sup> A husband may require his wife to change her domicile if his work, comfort or convenience requires it.<sup>20</sup> In fact, a wife's refusal to move with her husband can constitute desertion.<sup>21</sup> The qualification upon this rule is that a husband has a continuing duty to provide a suitable home, and the new home chosen must be one that is amenable to the family's needs.<sup>22</sup>

Whether this rule of law will prevail when confronted by a direct attack under the Equal Rights Amendment remains to be seen. The superior court has hinted that it would consider this constitutional question in a light most favorable to women if presented upon appeal.<sup>23</sup> Until the resolution of this issue, the present law makes the woman the subservient occupant of the home even if she is an equal partner with her mate in the ownership of the premises.

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17. *Commonwealth ex rel. Young v. Young*, 213 Pa. Super. Ct. 515, 247 A.2d 659 (1968); *Commonwealth v. Levitz*, 189 Pa. Super. Ct. 438, 150 A.2d 581 (1959).

18. PA. CONST., art. I, § 28.

19. *DiMilia v. DiMilia*, 204 Pa. Super. Ct. 188, 203 A.2d 382 (1964).

20. *Yohey v. Yohey*, 205 Pa. Super. Ct. 329, 208 A.2d 902 (1965); *Fitelson v. Fitelson*, 189 Pa. Super. Ct. 366, 150 A.2d 389 (1959).

21. *Santarsiero v. Santarsiero*, 231 Pa. Super. Ct. 286, 331 A.2d 868 (1974); *Yohey v. Yohey*, 205 Pa. Super. Ct. 329, 208 A.2d 902 (1965).

22. *Urbaczewski v. Urbaczewski*, 158 Pa. Super. Ct. 614, 45 A.2d 925 (1946).

23. *Smith v. Smith*, 235 Pa. Super. Ct. 286, 340 A.2d 552 (1975).

## V. Ownership of Contents

The Equal Rights Amendment has served to eliminate many time-worn doctrines founded upon sexually discriminate treatment between the marital parties.<sup>24</sup> One of these concerned the ownership of the contents of a marital residence.

Under prior law,<sup>25</sup> it was presumed that household goods belonged to the husband. This presumption was based upon the premise that the husband as “breadwinner” had paid for these items. The Supreme Court of Pennsylvania abolished this common-law presumption in *DiFlorido v. DiFlorido*,<sup>26</sup> declaring that the household contents must be viewed as presumptively owned by the entireties. The court acknowledged “the equally important and often substantial non-monetary contributions made by either spouse.”<sup>27</sup> Thus the ownership of the marital residence is not important in the resolution of title to its contents. Whether the residence is owned solely or jointly has no bearing on how the contents should be divided.

## VI. Changing the Locks

One of the most common questions that a domestic relations client asks an attorney is whether or not the locks on the marital residence may be changed following separation. Whether there was a desertion or the separation was voluntary does not alter the general approach to this problem. Unless there has been physical abuse, locks may not be changed without assumption of the accompanying peril of such action.

A spouse may not appropriate entireties property without the consent or subsequent approval of the other spouse. Changing the locks or other conduct amounting to exclusion of one spouse by the other permits the “innocent” spouse to institute a partition action or a proceeding for an accounting as to the property.<sup>28</sup> Since the owners of entireties property are entitled to its mutual use,<sup>29</sup> the exclusion of one spouse by the other creates an “offer” to destroy the tenancy and divide the property. The “offer” is “accepted” by instituting partition or accounting proceedings.<sup>30</sup>

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24. See *Henderson v. Henderson*, 458 Pa. 97, 327 A.2d 60 (1974) (husband has right to seek support from wife); *Wiegand v. Wiegand*, 226 Pa. Super. Ct. 278, 310 A.2d 426 (1973) (husband may seek divorce from bed and board, alimony pendente lite, counsel fees and costs in a divorce action); *Hopkins v. Blanco*, 224 Pa. Super. Ct. 116, 302 A.2d 855 (1973) (wife has right to husband's consortium).

25. PA. STAT. ANN. tit. 48, § 31 (Purdon 1965) (repealed by Act of July 17, 1957, P.L. 969, No. 417, § 2).

26. 459 Pa. 641, 331 A.2d 174 (1975).

27. *Id.* at 650, 331 A.2d at 179.

28. *Shoup v. Shoup*, — Pa. —, 364 A.2d 1319 (1976); *Backus v. Backus*, 464 Pa. 380, 346 A.2d 790 (1975); *Reifschneider v. Reifschneider*, 413 Pa. 342, 196 A.2d 324 (1964).

29. *Lindenfelser v. Lindenfelser*, 396 Pa. 530, 153 A.2d 901 (1959); *Flood v. Flood*, 9 Adams 46, 43 Pa. D. & C.2d 283 (C.P. 1967).

30. *Backus v. Backus*, 464 Pa. 380, 346 A.2d 790 (1975).

The right of the excluded spouse to seek a pre-divorce partition applies not only to real property, but also to personalty owned jointly by the parties.<sup>31</sup> It should be pointed out, however, that appropriation by a spouse of household property—*i.e.* personal property applied to the mutual use, enjoyment or benefit of the spouses, including the support of minor children—is deemed not to be wrongful<sup>32</sup> and therefore does not fall within the purview of the discussion in this subsection. Implications of the not infrequent practice of changing locks after separation are, therefore, extremely serious and should be avoided unless absolutely necessary.

## VII. Protection from Abuse

On October 7, 1976, the Protection from Abuse Act became effective.<sup>33</sup> This statute permits a spouse, under limited circumstances, to exclude the other spouse from use of or access to the marital residence. The Act recognizes the ever-present danger that physical abuse may be inflicted upon one spouse by the other. Cognizant of the fact that the marital residence may become a “torture chamber” or “prison” for a victimized spouse, the law provides certain emergency relief.

The term “abuse” is defined in the statute as:

(i) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury or serious bodily injury with or without a deadly weapon.

(ii) Placing by physical menace another in fear of imminent serious bodily injury.

(iii) Sexually abusing minor children as defined pursuant to the act of November 26, 1975 (No. 124), known as the “Child Protective Services Law.”<sup>34</sup>

When such abuse has allegedly occurred, the common pleas courts have the right to enter *ex parte* temporary restraining orders on behalf of the plaintiff-spouse. Following a hearing, the court may grant orders that will bring about a “cessation of abuse.” These may include, without limitation, orders

(1) Directing the defendant to refrain from abusing the plaintiff or minor children.

(2) Granting possession to the plaintiff of the residence or household to the exclusion of the defendant by evicting the defendant and/or restoring possession to the plaintiff when the residence or household is jointly owned or leased by the parties.

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31. Commonwealth *ex rel.* Bishop v. Bishop, 234 Pa. Super. Ct. 600, 341 A.2d 153 (1975).

32. Shapiro v. Shapiro, 424 Pa. 120, 224 A.2d 164 (1966); Glover v. Manupelli, 201 Pa. Super. Ct. 429, 193 A.2d 758 (1963).

33. Act of October 7, 1976, P.L. —, No. 218, 1976 Pa. Legis. Serv. 600 (Purdon's) (to be codified as PA. STAT. ANN. tit. 35, §§ 10181-10190); *see also*, implementing court rules of procedure, P.R. CIV. P. 1901-1905.

34. *Id.* § 2 (to be codified as PA. STAT. ANN. tit. 35, § 10182).

(3) When the defendant has a duty to support the plaintiff or minor children living in the residence or household and the defendant is the sole owner or lessee, granting possession to the plaintiff of the residence or household to the exclusion of the defendant by evicting the defendant and/or restoring possession to the plaintiff, or by consent agreement allowing the defendant to provide suitable, alternate housing.

(4) Awarding temporary custody of and/or establishing temporary visitation rights with regard to minor children.<sup>35</sup>

To protect the victimized plaintiff from detriment upon being forced to abandon the marital residence, the Act specifically provides that the plaintiff's right to relief "shall not be affected by his or her leaving the residence or household to avoid further abuse."<sup>36</sup>

An order entered upon a petition filed pursuant to the Act insulates the plaintiff from claims that the exclusion of the defendant from the marital residence constitutes an "offer" to partition the entireties property.<sup>37</sup> The Act goes further in that it expressly permits a court to grant exclusive possession of the marital residence to the plaintiff-spouse even if the premises are owned solely by the defendant.<sup>38</sup> While the constitutionality of this Act is uncertain, so long as it is in effect it provides an important remedy. It allows the creation of a legal barrier surrounding the marital residence, a barrier that the defendant cannot penetrate without becoming subject to the contempt powers of the court.<sup>39</sup>

### VIII. Post-Divorce Partition

Pennsylvania law provides that if no other disposition of property belonging to the spouses has been made following a divorce, all property titled in the name of one of the parties remains the separate property of that person, while all joint tenancy property is converted into a tenancy in common.<sup>40</sup> The parties may seek partition of joint property by the institution of appropriate proceedings,<sup>41</sup> and if sale of the premises is forced, the parties share in the proceeds equally. If the premises were owned solely by one of the parties, the other has no claim to ownership or possession after divorce. Of course, one spouse may agree to convey the property to the other or to permit limited possession of the premises.

### IX. Conclusion

In the final analysis, the marital residence is the situs of numerous battles that can have a devastating effect upon the lives of the spouses and

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35. *Id.* § 6 (to be codified as PA. STAT. ANN. tit. 35, § 10186).

36. *Id.* § 4 (to be codified as PA. STAT. ANN. tit. 35, § 10184).

37. *Id.* § 6(c) (to be codified as PA. STAT. ANN. tit. 35, § 10186(c)).

38. *Id.* § 6(a)(2) (to be codified as PA. STAT. ANN. tit. 35, § 10186(a)(2)).

39. *Id.* § 10 (to be codified as PA. STAT. ANN. tit. 35, § 10190).

40. PA. STAT. ANN. tit. 68, § 501 (Purdon 1965); *Moss v. Moss*, 80 Dauph. 312, 31 Pa. D. & C.2d 88 (C.P. 1963).

41. PA. STAT. ANN. tit. 68, § 501 (1965). *See also* *Shoup v. Shoup*, — Pa. —, 364 A.2d 1319 (1976).

their families. It is often the most prized of possessions, and the battlefield upon which strategies are planned and carried into effect. While the shell of the house remains, the ashes of the relationship leave the marital residence but a painful reminder of what was or may have been. In the end, divorce not only ends the marital relationship but often forces the parties to sell the residence speedily and establish new roots for their respective lives.

