

As the hearing in this matter progressed, there was a hopeful sign. It was stated that the parties felt they could work out the phone call problems.

The father wants us to find the mother in contempt of court and, as a sanction, require her to pay his counsel fees. However, no evidence of the amount of counsel fees was presented. Therefore, we cannot make an award but could only hold another hearing to determine what hourly rate the father's attorney charged, what the prevailing rate in the area is, what services were performed and how much time was spent on those services. *In re Estate of Brockerman*, Pa. Super. , 409 A.2d 1199 (1984).

We are not inclined to do that, however, because even if we were to hold the mother in contempt of court, this case is one of mixed results, <sup>1</sup> and in such cases counsel fees should not be awarded. See *DiFilippo v. Morizio*, 759 F.2d 231, 234 (2d Cir. 1985). With no sanction to impose, we believe it is unnecessary to find the mother in contempt but do urge her and the children to live up to any agreement which was made with regard to contacts with the father.

#### ORDER OF COURT

October 1, 1985, the petition to find the mother in contempt is denied, and the petition to modify the custody order is dismissed. The parties shall each pay their own costs.

<sup>1</sup> The petition to modify the custody order must be dismissed.

BARD V. BARD, C.P. Fulton County Branch, No. 32 of 1981-C

#### *Non-Support - Contempt*

1. One who has the right to accept or reject a transaction and who accepts and retains benefits from it is bound by it.
2. A person may be estopped by his silence if another has been induced to act to his detriment.



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*James M. Schall, Esquire, Counsel for Plaintiff*

*Gary D. Wilt, Esquire, Counsel for Defendant*

OPINION AND ORDER

KELLER, J., October 21, 1985:

Roger W. Strait, Domestic Relations Officer of Fulton County on April 9, 1985 filed a petition alleging that Maynard Bard, defendant, had failed to comply with the terms and conditions of a certain Order of Court dated September 24, 1984 in that he had failed to pay mortgage payments in the amount of \$1,773.97, fire insurance in the amount of \$90.00 and court costs in the amount of \$13.00. An order was entered by the Honorable George C. Eppinger, P.J., scheduling a hearing for 9:30 a.m. on April 23, 1985. On that date an order was entered at the request of the defendant continuing the first stage contempt hearing for rescheduling so that the issue whether or not the defendant and the plaintiff, Maxine Bard, had entered into an agreement which would have eliminated the obligation of the defendant to pay the arrearage presently existing on the mortgage of the parties or whether his obligation continued pursuant to the September 24, 1984 order. The hearing was rescheduled and held on June 9, 1985. At the conclusion of the hearing counsel for the parties were directed to prepare and file with the Court proposed findings of fact, conclusions of law and discussion. Counsel have complied with the Court's direction and the matter is now ripe for disposition.

FINDINGS OF FACT

1. The parties are husband and wife; having been married on December 20, 1958, and they remain married as of the date of the hearing.

2. On February 3, 1981, the plaintiff's petition for support for herself and the parties' two children, Travis Bard, born July 2, 1967 and Tiffany Bard, born March 20, 1973, was filed. On March 3, 1981 an order was entered setting April 7, 1981 at 9:30 o'clock a.m. as the date and time for hearing on the petition.



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LEGAL NOTICES, cont.

IN THE COURT OF COMMON PLEAS  
OF THE 39TH JUDICIAL DISTRICT  
OF FRANKLIN COUNTY,  
PENNSYLVANIA —  
ORPHANS' COURT DIVISION

The following list of Executors, Administrators and Guardian Accounts, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: June 5, 1986.

DITCH: First and final account, statement of proposed distribution and notice to the creditors of Clarence W. Ditch, Executor of the Estate of Nelson S. Ditch, late of Waynesboro, Franklin County, Pennsylvania, deceased.

KING: First and final account, statement of proposed distribution and notice to the creditors of Phyllis I. Ecker, Doris P. Tate, Helen Harley Noel and Ruth Elizabeth Smith, Executrices of the Last Will of Ruth H. King, deceased, late of Waynesboro, Franklin County Pennsylvania.

LESHER: First and final account, statement of proposed distribution and notice to the creditors of M. Robert Leshner, Executor of the Estate of Della M. Leshner, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

SITES: First and final account, statement of proposed distribution and notice to the creditors of Doris A. Baumgardner, Executrix of the Estate of Hulda C. Sites, a/k/a Hulda Catharine Sites, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

SWEENEY: First and final account, statement of proposed distribution and notice to the creditors of Millard A. Ullman and Thomas M. Painter, Executors of the Estate of Katherine E. Sweeney, late of Waynesboro, Franklin County, Pennsylvania, deceased.

Robert J. Woods  
Clerk of Orphans' Court  
Franklin County, Pennsylvania

LEGAL NOTICES, cont.

NOTICE

Notice is hereby given that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania on the 9th day of May 1986, for the purpose of obtaining a certificate of incorporation. The name of the corporation organized under the Commonwealth of Pennsylvania Business Corporation Law approved May 5, 1933, P.L. 364 as amended, is WHITE GLOVE JANITORIAL SERVICE, INC., 33 Walnut Street, Waynesboro, PA 17268.

The purpose for which the corporation has been organized is to engage in and to do any lawful acts concerning any or all lawful business for which corporations may be incorporated under the Business Corporation Law of the Commonwealth of Pennsylvania.

Stephen E. Patterson, Esquire  
Patterson, Kaminski, Keller & Kiersz  
239 East Main Street  
Waynesboro, PA 17268

5-30-86

3. On April 7, 1981, the Court entered an order finding the defendant had a net weekly take-home pay of \$350.00 and plaintiff had no take-home pay and ordered the defendant to pay on April 13, 1981, and each Monday thereafter the sum of \$165.50 for support of the plaintiff and the two children of the parties. The defendant was also ordered to pay all mortgage payments and real estate taxes on the parties' real estate as the same becomes due and to maintain fire insurance on the real estate and provide medical insurance coverage for the plaintiff and the children. The sum ordered to be paid was allocated \$110.00 for the support of the children and \$55.00 for the support of the spouse.

4. On July 3, 1982, the parties entered into a separation agreement under the terms of which they agreed inter alia:

(a) The defendant would pay support pursuant to the order entered by the Court provided, however, upon the entry of a divorce decree the support of the wife in the amount of \$55.00 per week would terminate and husband would pay \$65.00 per week and maintain medical insurance coverage on wife for a period of 4 years from and after the date of the divorce decree, and the wife specifically waived her right to alimony pendente lite.

(b) The parcel of real estate presently owned by the parties as tenants by the entirety upon which the marital residence is located in Ayr Township, Fulton County, Pennsylvania, the deed to which is recorded in Fulton County Deed Book 67, Page 449 shall be transferred to wife's name only free and clear of any and all liens. The other parcel of real estate presently owned by the parties as tenants by the entirety adjoining the above-referenced tract in Ayr Township, Fulton County, Pennsylvania, the deed to which is recorded in Fulton County Deed Book 87, Page 267, upon which two (2) mobile homes are located shall be transferred to Husband's name only.

5. The July 3, 1982 agreement does not establish any date for the transfers of title of the marital property to the plaintiff and the defendant.

6. On July 3, 1984, the plaintiff's petition was filed for civil contempt alleging that the defendant was in default by reason of an arrearage of \$827.50 support and service charge up to and including July 2, 1984 plus court costs in the amount of \$13.00, and that defendant had failed to make mortgage payments and pay

taxes on the home and property. An order was signed on the same date setting July 24, 1984 as the date and time for the first stage contempt hearing, and on that date the Court found that the arrearage did exist and ordered the second stage contempt hearing to be held at 9:30 a.m. on August 7, 1984.

7. On August 7, 1974, an order was entered continuing the second stage contempt hearing "on the conditions that the defendant, Maynard Bard, shall continue to pay on account of the existing support order and arrearage the sum of \$200.00 until the modification hearing, which is scheduled for August 27, 1984 at 3:00 p.m., can be held and a decision made. In addition, the Defendant shall meet with the mortgagee to commence making regular payments on account of the existing mortgage."

8. On August 7, 1984, the defendant's petition to modify support order alleging that the defendant's earnings had decreased, the plaintiff was employed and that the petitioner pay \$200.00 on July 31, 1984 and that the arrearage as of that date was \$788.50 was filed. An order was signed the same date setting August 27, 1984 at 3:00 o'clock p.m. as the date and time for hearing on the petition to modify.

9. On September 7, 1984, the parties entered into a stipulation and agreement to modify the support order providing therein that the net weekly earnings of the defendant were \$250.00 and of the plaintiff \$110.00, and the defendant should pay on August 6, 1984 and each Monday thereafter the sum of \$107.50 plus \$.50 service charge for the support of the parties' two children and further provided "defendant to continue paying mortgage payments, real estate taxes, fire insurance and maintain medical insurance as provided by his employer. Defendant agrees to pay all owing support arrearage and owing mortgage payments and taxes on property to August 6, 1984." On September 24, 1984, an order was entered pursuant to the said stipulation and agreement, and the order included the provisions concerning the mortgage payments.

10. The mortgage hereinabove referred to was executed by the parties in favor of the First National Bank of McConnellsburg on September 30, 1978 in the amount of \$15,000. The lien of the mortgage bound the home property of the parties which under the terms of the July 3, 1982 agreement was to be transferred to the plaintiff free and clear of any and all liens.

11. On or about September 10, 1984, the plaintiff's complaint in equity to No. 168 of 1984-C was filed seeking to compel the defendant to transfer real estate pursuant to the July 3, 1982

agreement to her. No answer was filed by the defendant and a default judgment was entered in favor of the plaintiff and against the defendant on November 9, 1984.

12. On February 5, 1985 at 10:55 a.m. the Court entered a final decree at No. 168 of 1984-C providing inter alia that: "The defendant, Maynard Bard, execute a deed for the premises described in Fulton County Deed Book 67, Page 449 and deliver the same to the Plaintiff free and clear of any and all liens . . . the Defendant is given thirty days within which to fully comply with this Order."

13. On the evening of February 4, 1985, the parties had a face-to-face conversation at plaintiff's home and the defendant offered to convey both tracts of real estate and the mobile homes referred to in the July 3, 1982 agreement to the plaintiff if she would assume all mortgage payments so he would not have to go to Court the following day. The plaintiff was willing to assume the mortgage from the date both tracts of real estate were conveyed to her, but she was not willing to assume the arrearage.

14. At about 11:15 p.m, February 4, 1985, the defendant telephoned the plaintiff and they again discussed his proposal to convey both tracts of real estate and the mobile home to her, and she to assume the mortgage obligation. Defendant told plaintiff to have her attorney, James M. Schall, prepare the deeds the next day and he would sign them. At that time the plaintiff understood the defendant expected her to assume the entire mortgage obligation, including the arrearage.

15. The plaintiff did instruct her attorney to prepare the deeds pursuant to the direction of the defendant, and on February 5, 1985 the defendant executed the deeds to the real estate and the titles to the mobile homes conveying the property to the plaintiff, Maxine Bard, and those deeds were recorded in Fulton County Deed Book Vol. 115, Pages 294 and 297 on February 19, 1985.

16. On February 5, 1985, the mortgage principal was approximately \$11,000 and the arrearage was \$1,773.97.

17. The plaintiff expressed the opinion that the value of the property with the mobile homes on it was \$11,000.

18. The defendant testified that the value of the real estate with the mobile homes on it was \$20,000, and he had had a person interested in purchasing the tract which was free of liens.

19. The defendant believed that the plaintiff had agreed to accept the deeds to the two parcels of real estate and the mobile homes, and would assume the mortgage and the existing arrearage because there would have been no advantage to him in conveying the real estate and the mobile homes to her otherwise.

20. Defendant did not know that the plaintiff was not making payments on account of the mortgage and the arrearage until he received the order of April 9, 1985 directing him to appear in court together with the petition for civil contempt for non-payment of the mortgage and fire insurance.

21. The defendant did not file a petition for modification of the Court's order of September 24, 1984 or otherwise notify the Fulton County Domestic Relations Division of the conveyance of the real estate to the plaintiff, and her assumption of the mortgage arrearage.

22. There have been no written amendments to the agreement of July 3, 1982 executed by the parties.

23. There is no evidence that the defendant was represented by counsel on February 4 or 5, 1985, or prior to the June 9, 1985 hearing before the Court.

#### DISCUSSION

The issue in this case is whether the defendant violated the terms of the court order of September 24, 1984 by failing to make the required mortgage and fire insurance payments or whether plaintiff and defendant had entered into an agreement which eliminated the defendant's obligation.

Preliminarily, we feel it appropriate to note that the rules of law governing this case are as hereinafter set forth:

1. A person may be estopped by his silence if another has been induced to act to his detriment. *Fried v. Fisher*, 328 Pa. 497, 196 A. 36 (1938). *Redisco, Inc. v. Boose*, 13 Cumb. 68 (1962).

2. Plaintiffs by accepting benefits under an agreement may be estopped from questioning the validity of the agreement and disputing its provisions. *In Re Brereton's Estate*, 388 Pa. 206, 130 A.2d 453 (1957).



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## BAR NEWS ITEM

The Franklin County Bar Association honored Rudolf M. Wertime, Esq., of Greencastle, for his fifty years of law practice at its annual spring dinner meeting held on May 16, 1986, at the Chambersburg V.F.W.

Wertime is a partner in the law firm of Wertime, Guyer and Gingrich with offices in Greencastle and Chambersburg. He is a past District Attorney for Franklin County, a past president of the Franklin County Bar Association and is actively involved in numerous civic organizations. Senior Judge George C. Eppinger and Judge John R. Walker both extended their congratulations to Mr. Wertime for his long list of accomplishments during his fifty years of practice.

LeRoy S. Maxwell, Jr., President of the Franklin County Bar Association, presided over the occasion recognizing Attorney Wertime for his achievement in reaching this milestone of his career. Maxwell is a partner in the law firm of Maxwell, Maxwell, Dick & Walsh with offices in Waynesboro and Greencastle.

Other officers serving the Franklin County Bar Association for the remainder of the 1986 year include: Vice-President - Richard K. Hoskinson of Mower, Hoskinson and Nelson, Chambersburg; Secretary - Martha B. Walker of Martha B. Walker and Associates, P.C., Chambersburg; and Treasurer - Paul F. Mower of Mower, Hoskinson and Nelson, Chambersburg.

President Maxwell welcomed five new members to the local Bar Association, all of whom signed the Franklin County Registry of Attorneys in the past year.

The most recent member of the Association is John W. Frey of Chambersburg who is an associate with the law firm of Patterson, Kaminski, Keller and Kiersz with offices in Waynesboro and Greencastle.

Others who joined the Association by virtue of their signing the local registry are: Bradley R. Bolinger, associated with DiLoreto and Cosentino, Chambersburg; Joann S. Dittman, associated with Jill A. McCracken, Esq., of Chambersburg and McConnellsburg; Beth Ann C. Gabler of Benedict and Gabler, Chambersburg; and John McDowell Sharpe, V, associated with Sharpe, Wenger and Townsend of Chambersburg.

3. When a fair agreement exists and one party has benefitted from the favorable provisions of such agreement, equity requires that he abide by the remaining provisions. *In Re Estate of Brojack*, 321 Pa. Super. 154, 467 A.2d 1175 (1983). *Haines v. Minnock Construction Co.*, 289 Pa. Super. 209, 433 A.2d 30 (1981).

In the case at bar, the defendant had an obligation under the court order to pay the mortgage payments and fire insurance on the home real estate in which plaintiff resided. The defendant failed to make mortgage payments in the amount of \$1,773.97 and fire insurance payments in the amount of \$90.00. The parties owned a second tract of real estate upon which two mobile homes were located. On February 4, 1985, in a face-to-face conversation, the defendant offered to convey both parcels of land and the mobile homes referred to in their July 3, 1982 separation agreement to plaintiff in exchange for her assumption of the entire mortgage including the arrearage under the court order. No agreement was reached because plaintiff was not willing to assume the arrearage. At 11:15 p.m. the same evening the defendant telephoned plaintiff and they discussed the proposal again. The defendant told plaintiff to have her attorney prepare the deeds and he would sign them. At this time the defendant believed that the plaintiff had agreed to assume all mortgage payments because her assumption of the arrearage was the chief advantage that he expected to derive from the bargain. The plaintiff understood that the defendant expected her to assume the entire mortgage obligation including the arrearage. She said nothing to correct his understanding of the transaction.

Under the circumstances, it was reasonable for the defendant to believe that the plaintiff had assented. The defendant executed the deeds to the real estate and the titles to the mobile homes. The plaintiff accepted them and took possession of the property. The plaintiff was silent when in good conscience she should have spoken. Since she accepted the benefits under the agreement, she will not be heard to object to the remaining provisions that she assume the mortgage including the arrearage and the fire insurance premium. Those payments became her obligation. To compel the defendant to pay the mortgage arrearage pursuant to the court order when plaintiff obtained the deeds, titles and possession of both parcels of real estate in an out-of-court agreement would allow plaintiff to use the court as an instrument of injustice and oppression. The court is not powerless to protect itself from such shenanigans.

In essence, the parties agreed to vacate the provisions of the support order relating to the payment of the mortgage, fire insurance and taxes but failed to properly implement that agreement. Certainly, the court does not approve of such careless practices. The defendant should have had an attorney who would have clarified the February 5, 1985 agreement, reduced it to writing and filed it in the Domestic Relations office to have the provisions for payment of the mortgage, tax and fire insurance vacated. However, defendant's failure to take appropriate action cannot justify the injustice that would result if we were to find the defendant in contempt of the court order. Therefore, we conclude that the defendant did not violate the court order dated September 24, 1985.

#### CONCLUSIONS OF LAW

1. One who has the right to accept or reject a transaction and who accepts and retains benefits from it is bound by it.
2. An estoppel may arise from silence where there is a duty to speak and the silence induces another to act to his detriment.

#### ORDER OF COURT

NOW, this 21st day of October, 1985, the petition to find the defendant in contempt for non-payment of mortgage payments and fire insurance is dismissed.

The provisions of the order of September 24, 1984 requiring the defendant to pay mortgage payments, real estate taxes, fire insurance and arrearages on the mortgage and fire insurance are vacated as of February 5, 1985.

Exceptions are granted the plaintiff.



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