

ORDER OF COURT

December 9, 1987, the court finds that the defendant owes a duty of spousal support to the plaintiff and directs the defendant to pay the sum of twenty-five (\$25.00) per week to the defendant.

GSELL V. GSELL, C.P. Franklin County Branch,
No. F.R. 1983 - 774

Alimony - Social Security Benefits - Parker v. Parker, 335 Pa. Super. 348 (1984).

1. Social security benefits are properly considered "income" for purposes of determining alimony.
2. Where a party refuses to apply for social security benefits, his right to benefits is considered in determining earning capacity.

David C. Cleaver, Esq. Counsel for Plaintiff
William C. Cramer, Esq. Counsel for Defendant
Timothy S. Sponseller, Esq. Master

WALKER, J., February 20, 1987*:

In July, 1985, plaintiff, Grant Gsell, and defendant, Elizabeth Gsell, were granted a divorce. The court retained jurisdiction over the issues of equitable division of marital property, alimony pendente lite, counsel fees and expenses, and permanent alimony. Master's hearings were held on February 6th and 19th, 1986, and a report was filed on August 21, 1986. Defendant filed exceptions to the report on August 29, 1986, regarding the denial of permanent alimony and the distribution of the marital property. Both sides briefed and argued these matters, which are now properly before this court.

First, defendant takes exception to the master's recommendation that no alimony should be granted to her. An award of alimony is justified if the party seeking alimony lacks sufficient property to provide for his or her reasonable needs and he or she is unable to support themselves through appropriate employment.

*Editor's Note: See supplement opinion in this case, published immediately following the instant report of Opinion and Order.

23 Pa. C.S.A. §501 (a). It is uncontested here that, due to her ill health and her lack of education or training, defendant is unemployable. The master found, and plaintiff concedes, that the \$273 a month that defendant receives from Social Security is insufficient for her to support herself. As such, defendant is an appropriate candidate for alimony.

The next determination to be made is as to the necessity of alimony, its nature, amount, duration, and manner of payment. 23 P.S. §501(b). The first factor to be considered is "the relative earnings and earning capacities of the parties." *Id.* §501(b) (1). In doing so, "the sources of income of both parties including but not limited to medical, retirement, insurance or other benefits" must be taken into account. *Id.*, §501(b) (3). Here, plaintiff's only potential source of income is Social Security benefits. The master concluded, however, that since the plaintiff is not currently receiving these benefits and since he cannot be forced to apply for them, that he has neither earning nor earning capacity. On this basis, alimony was denied.

The master erred in two respects. Plaintiff is entitled to \$570 a month in Social Security benefits and this amount, whether he chooses to apply for it or not, is his earning capacity. A party may not deliberately reduce his level of income in order to reduce his alimony obligation. *Pacella v. Pacella*, 342 Pa. Super. 178 (1985).

Secondly, Social Security benefits are properly considered "income" for the purposes of determining alimony. As cited above, §501(b) (3) of the Divorce Code specifies that "sources of income" is to include such things as "medical, retirement, insurance or *other benefits (s)*". 23 P.S. §501 (b) (3). Social Security benefits fall into this last category. Furthermore, at least one Superior Court case suggests that Social Security benefits are to be considered when awarding a party alimony. *See, Geyer v. Geyer*, 310 Pa. Super. 456 (1983). Also, various Common Pleas courts have explicitly taken these kinds of benefits into account when granting alimony. *See, Clark v. Clark*, 45 Fayette L.J. 3 (1980) (Social Security benefits); *Orange v. Orange*, 33 Westmoreland L.J. 111 (1980) (workmen's compensation and disability benefits). Based on the expansive language of §501(b) (3), case law, and the equities of the situation, this court believes that Social Security benefits should be considered a source of income when calculating parties' earning capacities in an alimony dispute.

The remaining question is as to the amount of alimony to be ordered. In fixing that amount, the court must work economic justice and achieve a reasonable and compassionate result. *Pacella*,

supra. Considering the duration of their marriage and the respective living conditions of the parties, the court finds that awarding defendant \$125 a month in permanent alimony is a fair and equitable redistribution of the parties' incomes that is best suited to fit their reasonable needs. Having done this, the court finds it unnecessary to disturb the master's recommendation with regard to division of the marital property.

ORDER OF COURT

February 20 1987, plaintiff, Grant S. Gsell, is hereby ordered to pay defendant, Elizabeth B. Gsell, the sum of \$125 a month in permanent alimony to be applied retroactively to May 1, 1986, the first full month that plaintiff was sixty-two years old.

The parties' marital property shall be equitably divided as follows:

A. The net proceeds from the sale of the parties' real estate located at 216 Heritage Road, Chambersburg, Pennsylvania, be divided equally;

B. That the plaintiff be awarded his 1969 AMC Rambler automobile and the 1959 12 foot travel trailer;

C. That the defendant be awarded all other tangible personal property.

Each party shall pay their own attorney fees and the costs of this action is to be divided equally between them.

SUPPLEMENTAL OPINION

WALKER J., May 11, 1987:

Since the issuance of the original opinion in the above captioned matter, a Pennsylvania Superior Court case has come to this court's attention that has bearing on the present controversy.

Plaintiff argues that his right to Social Security benefits cannot be considered "income" for the purposes of determining the amount of alimony that he should pay defendant. His position is that Social Security benefits are exempt from the definition of "income" because such benefits are not subject to execution, levy, attachment or garnishment under 42 U.S.C. §407.

In *Parker v. Parker*, 335 Pa. Super. 348 (1984), appellant argued that Veterans' Administration benefits were not "income" for the



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purposes of fixing alimony because such benefits were not subject to attachment, levy or execution. The Pennsylvania Superior Court rejected his argument on two grounds; (1) his wife was not a "creditor" within the meaning of the statute and (2) the action was not one of attachment or garnishment. the *Parker* court analogized veterans' benefits with other nonattachable government benefits, including Social Security, and cited with approval sister jurisdictions specifically holding that Social Security is "income" for the purposes of fixing alimony, in spite of 42 U.S.C. §407. See *Brown v. Brown*, 32 Ohio App. 2d 139, 288 N.E. 2d 852 (1972) and cases cited therein.

This court adopts the rationale and precedent cited by the *Parker* court and incorporates by reference its original opinion and order issued on February 20, 1987, in reaffirming its position with regard to the present issue.

COMMONWEALTH V. DAVIS, C.P. Franklin County Branch,
Crim. Action No. 680 of 1987

Rape - Probable Cause - On Scene Identification - In-Court Identification

1. General Descriptions of a suspect which are equally applicable to large numbers of people usually do not support finding of probable cause.
2. Where a defendant is stopped within ten minutes after the crime is reported, six minutes after police were given the description and withing walking distance of the victim's residence, probable cause for arrest is shown.
3. An In-custody at-the-scene identification made shortly after the commission of a crime does not offend the notions of due process.
4. Even an in-court identification which is suggestive is permissible if the victim has an independent origin for identification.
5. Where the victim could not identify defendant at a line-up seven weeks after the crime, there is not independent origin for an in-court identification.

John F. Nelson, Esq., District Attorney, Counsel for the Commonwealth

Douglas W. Herman, Esq., Assistant Public Defender, Counsel for the Defendant

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