



STATE OF DELAWARE  
THE COURTS OF THE JUSTICES OF THE PEACE  
820 NORTH FRENCH STREET, 11TH FLOOR  
WILMINGTON, DELAWARE 19801

NORMAN A. BARRON  
CHIEF MAGISTRATE

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LEGAL MEMORANDUM 81-45

TO: ALL JUSTICES OF THE PEACE  
STATE OF DELAWARE

FROM: NORMAN A. BARRON  
CHIEF MAGISTRATE

DATE: MARCH 12, 1981

RE: THE INTERSPOUSAL IMMUNITY DOCTRINE

A question was recently raised as to whether or not the Courts of the Justices of the Peace have jurisdiction over an action of replevin in a matter not exceeding \$1,500, the parties being married<sup>1</sup>. The facts are basically as follows: Husband owned certain furniture prior to his marriage to wife. Husband and wife marry. Husband brings his furniture with him into the marital relationship. Husband and wife separate, the wife retaining possession of the furniture. Husband brings replevin action in a Justice of the Peace Court.

The question raises the issue over the application of the interspousal immunity doctrine, a common law doctrine which, briefly stated, prevents one spouse from suing the other in an action at law. At common law, "the legal existence of the wife

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<sup>1</sup>Although the question raised concerns itself with an action of replevin, the result reached herein would be the same regarding any civil action where the parties are married.

was merged in that of her husband, and they were termed and regarded as one person at law." Plotkin v. Plotkin, Del.Super., 125 A. 455 (1924). The doctrine was most recently discussed in the case of Alfree v. Alfree, Del.Supr., 410 A.2d 161 (1979). Recognizing the modern, widespread criticism of the rationale of the doctrine, the Delaware Supreme Court, nevertheless, stated:

"We are not persuaded that the common law rule as recognized by the Superior Court in the Plotkin case in 1924 and by the Court of Chancery and the Supreme Court since 1924 should be overruled by judicial decision. '[T]he right [of spouses] to sue each other strikes at the very heart of domestic relations and its effect not only upon the home ties, but upon society generally would be far reaching.' Plotkin v. Plotkin, supra, 125 A. at 457."

The Delaware Supreme Court concluded that "It is settled law in Delaware that one spouse may not sue the other at law in tort." Alfree v. Alfree, supra. (Emphasis added.) The Court then cited seven (7) prior Delaware cases as supporting the Court's conclusion. One might well suppose, therefore, that the interspousal immunity doctrine finds its present application with regard to negligence actions only. However, and significant for the purposes of this memorandum, two (2) of the seven (7) cases cited by the Supreme Court in the Alfree case involved replevin actions filed by one spouse against the other. In one of these replevin cases, Plotkin v. Plotkin, supra, the Superior Court found that the interspousal immunity doctrine had not been abolished by the Married Women's

Act, 13 Del.C., §§311-314<sup>2</sup>. In the other replevin case, duPont v. duPont, Del.Ch., 98 A.2d 493 (1953), the Court of Chancery stated:

"Since the passage of a so-called Married Women's statute, 13 Del.C., §311, there is no longer any question about the power of a married woman to hold title to her own property. There still exists however the legal disability which prevents either spouse from suing the other at law." (Emphasis added.)

Is there no remedy available to the husband under the facts of our case? Surely, there must be. Afterall, our Constitution provides that "every man for an injury done him . . . shall have remedy by the due course of law." Del.Const. of 1897, Art. I, Sec. 9. It is submitted that the Court of Chancery, a court of equity, gives to the husband a remedial avenue. As was stated in duPont v. duPont, supra:

"We have here a case where the law gives a married person individual property rights but has failed to provide a legal remedy in case such rights are invaded by the other spouse. In keeping with its long-established practice, a court of equity can very properly step in to provide a remedy by determining title and entering an order appropriate to its decision."

See also Peters v. Peters, Del.Ch., 169 A. 298 (1933).

For the foregoing reasons, the Justice of the Peace should dismiss the instant case for lack of jurisdiction. At present, jurisdiction resides in the Court of Chancery. Should the husband

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<sup>2</sup>Nor did Justice (then Chancellor) Duffy in the case of McElroy v. McElroy, Del.Ch., 256 A.2d 763 (1969).

wish to pursue his action in replevin, an action which is available to him in the Court of Chancery, he should be aware that the Court of Chancery will only have jurisdiction while the marital relationship exists. If either party intends to file for divorce in the Family Court of the State of Delaware, the husband might well wish to delay an action for the recovery of his furniture until the divorce action is filed.

At a future divorce proceeding, the Family Court would then have jurisdiction to decide ancillary matters such as the division of property. 13 Del.C., Ch. 15; Family Court Rule 465.

NAB:pm

cc: The Honorable Daniel L. Herrmann  
The Honorable William Marvel  
The Honorable Albert J. Stiftel  
The Honorable Robert H. Wahl  
The Honorable Robert D. Thompson  
The Honorable Alfred Fraczkowski  
The Honorable Richard S. Gebelein  
The Honorable Lawrence Sullivan  
The Honorable William J. O'Rourke  
The Honorable Richard McMahon, State Prosecutor  
Harold Schmittinger, Esquire, Pres., Delaware State Bar Assoc.  
Nicholas M. Valiante, Director, NCC Dept. of Public Safety  
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