

should be vacated is whether the minor's interests were sufficiently protected, i.e., whether the case was adequately prepared, defended and tried so as to assure that the minor's rights were fully protected. *Hamilton v. Moore*, supra.; *Herron v. Piatone*, supra.; *Keystone Ins. Co. v. Winters*, 78 York Legal Record 208 (1965). In the case at bar the Court is well-satisfied that the minor's rights were fully protected and that the interests of all parties require that the verdict not be vacated.

We also observe that the appointment of a guardian at this point in time would serve no useful purpose. In *Hamilton*, the court appointed a guardian to investigate and report upon the minor's position. In the instant case, as in *Keystone*, the record is complete and adequately informs the court of the protections afforded to the defendant minor before and at the time of trial. At present, the defendant is no longer a minor and does not require the protection of a guardian ad litem and the vacating of the verdict will be denied.

ORDER OF COURT

NOW, this 2nd day of May, 1979, the Petition to Appoint Guardian and to Vacate Verdict and Judgment, is denied. The Domestic Relations Division of this Court will schedule this matter for hearing at the earliest convenient date, so that a determination can be made of the amount of support to be paid by the defendant. The first payment due on said order shall be April 30, 1979, notwithstanding the date of hearing.

Exceptions are granted the defendant.

GREENCASTLE-ANTRIM SCHOOL DISTRICT, ET AL. v. PETERSON, ET AL., C.P. Franklin County Branch, E.D. Vol. 7, Page 177.

School Directors - Removal from Office - Insufficiency to State a Cause of Action

1. The removal of an officer, duly elected by the people, is highly penal in nature and can only be exercised if the power is clearly granted by statute.
2. Illegal acts of school directors can be restrained, but their discretionary acts cannot be controlled by the Courts.

Thomas A. Beckley, Esq., and Bradley S. Gelder, Esq., Attorneys for the Plaintiffs

Jack M. Stover, Esq., Jack M. Hartman, Esq., and Frederic G. Antoun, Jr., Esq., Attorneys for Defendants

OPINION AND ORDER

EPPINGER, P.J., May 14, 1979:

Five directors of the Greencastle-Antrim School District brought this action in equity seeking removal of three other directors of the school district and reimbursement of certain legal fees. The defendant directors demurred to the Complaint; their demurrer is now before us.

The first issue here is whether equity has jurisdiction. Plaintiffs argue that, while there may be statutory and constitutional provisions permitting removal of school directors, these legal remedies are inadequate; therefore, they are properly in equity. The removal procedures are stated to be inadequate because the plaintiffs are seeking monetary damages as well as removal of the directors.

Plaintiffs say they cannot avail themselves of any of the statutory or constitutional removal procedures. The constitutional provisions permit removal of civil officers for misbehavior in office or conviction of any infamous crime (Art. VI, Sect. 7) and removal of elected civil officers by the Governor for reasonable cause on the address of two-thirds of the Senate (Art. VI, Sect. 7). One statutory provision permits removal of school directors for failure to organize or for refusing or neglecting to perform any duty imposed on them by the School Code when ten resident taxpayers in the district petition for their removal, Act of March 10, 1949, P.L. 30, art. III, Sect. 318 (24 P.S. Sect 3-318). The School Code authorizes school directors to declare another director's office vacant in some circumstances — e.g., if newly elected or appointed school director refuses or neglects to qualify as director or if a qualified school director refuses or neglects to attend two successive meetings (barring illness or necessary absence) or refuses or neglects to act in his official capacity at meetings. Act of March 10, 1949, supra, Sect. 319 (24 P.S. Sect. 3-319).

Defendants argue that the above removal procedures are exclusive. Plaintiffs believe that since they are unable to remove defendants under any of these provisions, they have no adequate remedy at law and are properly in equity.

Regardless of whether the plaintiffs are found to be properly in equity, the result of this case will be the same. The second issue, whether plaintiffs have stated a cause of action against defendants, is the determinative one.

Defendants' demurrer takes as true all well-pleaded facts in the complaint. In their complaint, the plaintiffs: (1) stated that

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 7, 1979.

BURKHOLDER First and final account, statement of proposed distribution and notice to the creditors of Wilbur Cordell and Wilda Cordell, administrators c.t.a. of the last will and testament of Lester E. Burkholder, late of Guilford Township, Franklin County, Pennsylvania, deceased.

CREAGER First and final account, statement of proposed distribution and notice to the creditors of Betty M. Creager Mills, executrix of the estate of Grace M. Creager, late of the Borough of Waynesboro, Franklin County, Pennsylvania.

HAMILTON First and final account, statement of proposed distribution and notice to the creditors of Dean W. Estep, administrator c.t.a. of the estate of Robert A. Hamilton, late of Lurgan Township, Franklin County, Pennsylvania, deceased.

HORNER First and final account, statement of proposed distribution and notice to the creditors of The Chambersburg Trust Company, executor of the estate of Mary K. Horner, late of Guilford Township, Franklin County, Pennsylvania, deceased.

JOHNSTON First and final account, statement of proposed distribution and notice to the creditors of Marvin Miller and Gladys M. Miller, executors of the estate of Mabel Louise Johnston, late of St. Thomas Township, Franklin County, Pennsylvania, deceased.

KEEFER First and final account, statement of proposed distribution and notice to the creditors of Robert L. Keefer, executor of the estate of Beryl Keefer, late of the Borough of Mont Alto, Franklin County, Pennsylvania, deceased.

KUHL First and final account, statement of proposed distribution and notice to the creditors of Elizabeth Kuhl, executrix of the estate of Charles C. Kuhl, late of St. Thomas Township, Franklin County, Pennsylvania, deceased.

MILLER First and final account, statement of proposed distribution and notice to the creditors of The Chambersburg Trust Company, administrator of the estate of Emmer Hornbaker Miller, late of St. Thomas Township, Franklin County, Pennsylvania, deceased.

McCULLOH First and final account, statement of proposed distribution and notice to the creditors of Pearl C. McCulloh, executrix of the last will and testament of Roy C. McCulloh, late of the Borough of Mercersburg, Franklin County, Pennsylvania, deceased.

LEGAL NOTICES, cont.

PATTISON First and final account, statement of proposed distribution and notice to the creditors of Carl E. Cowan, executor of the estate of Beulah M. Pattison, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

PUGH First and final account, statement of proposed distribution and notice to the creditors of Isabel C. Pugh, executrix of the estate of Fannie E. Pugh, late of Hamilton Township, Franklin County, Pennsylvania, deceased.

SHEFFLER First and final account, statement of proposed distribution and notice to the creditors of Lorraine Statler and Larue Jones, executrices of the estate of Merle A. Sheffler, late of Antrim Township, Franklin County, Pennsylvania, deceased.

WARD First and final account, statement of proposed distribution and notice to the creditors of Pauline H. Ward and Thomas N. Ward, Jr., executors of the estate of Thomas N. Ward, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

BYERS First and final account, statement of proposed distribution and notice to the creditors of Betty M. Wolford, executrix of the estate of Ellen Janet Byers, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

GLENN E. SHADLE

Clerk of the Orphans' Court
Franklin County, Pennsylvania

(5-11, 5-18, 5-25, 6-1)

the defendants should be removed from office because they breached their fiduciary duty to govern the school district properly (Paragraph No. 12); (2) alleged that defendants breached their duty to properly manage the school district because the defendants never voted to approve payment of any expenditures by the school district (Paragraph No. 11); and (3) alleged that the defendants obstructed the school district in the conduct of its educational program and forced it to expend revenues defending its activities in litigation (Paragraph No. 7). These latter "obstructive activities" were done despite the defendants' so-called "fiduciary relationship" to the school district, and consisted of the filing of Defendants' complaint in equity over the Brown's Mill School sale and the filing of Defendant's Petition for Review of the Department of Education's approval of plaintiffs' Long Range Plan for construction of a new elementary school (Complaint, Paragraph 7(a)(i)-(vi), 7(b)(i)-(ix)).

First of all, do the defendants owe a fiduciary duty to the school board? A public office is understood to be a public trust, and the holder of that office may be considered a trustee or fiduciary. *Marshall Impeachment Case*, 363 Pa. 326, 336, 69 A.2d 619, 625 (1949); *Commonwealth v. Kirk*, 141 Pa. Super. 123, 145, 14 A.2d 914, 924 (1940). However, to whom the fiduciary duty is owed is the relevant question. It seems that the duty here is owed to the director's constituents and not, as plaintiff directors assume, to the other directors making up the school board. In taking his oath of office, a school director swears that (s)he will discharge the duties of office "with fidelity"; fidelity to whom is unspecified. Act of March 10, 1949, *supra*, Sect. 321 (24 P.S. Sect. 3-321).

Plaintiff's apparent authority for the position that the duty is owed to the school board is *In re: Appeal of Logan Township School District*, 84 Dauphin 37 (1965). The Court in that case said once majority action was taken by a school board, all board members were bound by that action (because courts could not be super-school boards, etc.) However, *Logan* does not signal success for plaintiffs because the court went on to state that a minority board member might attack majority board action if fraud or illegality was present. 84 Dauphin at 37.

In the instant case, when defendants brought their complaint in equity against plaintiffs, they alleged illegality in several respects (see our April 14, 1978 opinion in the case of *Shoemaker, et al. v. Greencastle-Antrim Board of School Directors, et al.*, Civil Action-Equity, Vol. 7, Page 153, page 1). Therefore, their recourse to the courts was proper via *Logan*

and did not constitute any breach of fiduciary duty supposedly created by *Logan*. In addition, the Pennsylvania Commonwealth Court recognized equity jurisdiction of an action challenging a school board's decision to build a new school as an abuse of discretion. *York v. Montrose Area School Dist.*, 9 Pa. Cmwlth. 379, 307 A.2d 478 (1973). In *York*, plaintiffs were residents, taxpayers and parents of children within the school district. The equitable action plaintiffs herein complain of was brought by defendant directors and others, all as individual taxpayers and representatives of all taxpayers of the Greencastle-Antrim School District.

Therefore, if the defendants owed a fiduciary duty to the school board, it was not breached when the defendants pursued discussions with the Pennsylvania Department of Education on the board's Long Range Plan. The defendants withdrew their Petition for Review of the Department's approval of the plan.

In addition to alleging breach of fiduciary duty to the school board, plaintiffs alleged that defendants breached their duty to properly manage the school district because defendants never voted to approve payment of expenditures by the school board. This hardly makes out a case for the defendants' removal. It is possible that defendants, as candidates for the board, promised to reduce spending and are now simply representing the voters who supported and elected them. In *Kurtz v. Steinhart*, the court recognized that the illegal acts of school directors could be restrained, but the discretionary acts could not be controlled. 60 D&C 345, 352 (C.P. Northumberland, 1947). It would appear that defendants may have gone too far and that there must have been non-controversial expenditures they could have voted for but in so doing they have been merely exercising discretion and plaintiff directors have not alleged that defendants' voting practices constitute abuses of discretion.

Plaintiffs allege defendants breached their fiduciary duty to govern the district properly because defendants' alleged acts were done with the intention of subverting the decisions of the plaintiffs—the majority of the board. (See Complaint, paragraph 12.) Plaintiffs want defendants removed from office for this. Perhaps plaintiffs believe they are making out a case of misbehavior in office with this allegation. Although the offense of misbehavior in office occurs when a public official (among other things) performs a discretionary act with an improper or corrupt motive (*Commonwealth v. Evans*, 190 Pa. Super 179, 225, 154 A.2d 57, 82 (1959)), the offense is a common law criminal offense. As mentioned above, if defendants were convicted of misbehavior in office they could be removed from

office under Article VI, Sect. 7 of the Pennsylvania Constitution.

In summary, plaintiffs' complaint states no cause of action against defendants. It hints at malicious use of process, but does not allege facts necessary to state such a cause of action (e.g., unlawful interference with plaintiffs' person or property; intentional use of process for wrongful object; malicious action taken without probable cause). It hints at misbehavior in office but is an inappropriate vehicle to charge that crime. The complaint does reveal a dispute carried to extreme; a difference of opinion not left alone. In *Kurtz, supra*, the Court stated "the removal of an officer, duly elected by the people, is highly penal in nature and can only be exercised if the power is clearly granted by statute." 60 D&C at 354. See also *Jenkins Twp. School Director's Removal Case*, 344 Pa. 267, 272, 25 A.2d 158, 161 (1942).

Plaintiffs' complaint is insufficient to state a cause of action against defendants; therefore, defendants' demurrer will be sustained and the case dismissed, it appearing to the Court the plaintiffs cannot state a cause of action.

ORDER OF COURT

NOW, May 14, 1979, defendants' demurrer is sustained and the case is dismissed. The costs shall be paid by the plaintiffs.

COMMONWEALTH EX REL. LEEDY v. SHAFFER, C. P.
Franklin County Branch, F. R. 1978 - 465

Custody - Prior Conduct - Tender Years Doctrine - Child's Preference

1. Past moral lapses are not enough to deprive a parent of custody of her child, for the issue is her present fitness and not her past misconduct.
2. The guideline that, absent compelling reasons, the needs of a daughter of tender years are better served by awarding custody to the mother, remains viable, regardless of the demise of the Tender Years Doctrine, by reason of its logic and the weight of experience.
3. The preference of an eight year old is a point to be weighed by the Court, but is not controlling.

Martha B. Walker, Esq., Counsel for Petitioner

Edward I. Steckel, Esq., Counsel for Respondent