

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

OPINION AND ORDER

KELLER, J., January 18, 1979:

This action by Randall Dwight Leedy seeking custody of his daughter, Nicole Lynn Leedy, born January 23, 1971, was commenced by the filing of a petition for a writ of habeas corpus on November 30, 1978. By order of court of the same date the hearing was scheduled for December 21, 1978 at 1:30 P.M. Service of a true copy of the writ was made upon Tawney Malene Leedy Shaffer by Deputy Sheriff Peiffer on December 4, 1978. The petition *inter alia* alleged that the respondent-mother had lived out of wedlock with two different men, and this with other personal problems of the respondent created an atmosphere which has had a negative affect upon the child; whereas the petitioner has remarried and has a stable marriage and income, and he and his wife will try to make a home for the child. An answer to the petition was filed on December 18, 1978. Hearings were held on December 21, 1978 as scheduled, and on January 5, 1979.

FINDINGS OF FACT

1. The petitioner is Randall Dwight Leedy, hereinafter referred to as father. He is the father of Nicole Lynn Leedy, hereinafter referred to as Nicole. He is 26 years of age and resides at 613 Lincoln Way West, Chambersburg, Pennsylvania.
2. Father married Rhey Leedy, hereinafter referred to as stepmother, on September 10, 1977. They reside at the aforesaid address.
3. Tawney Malene Leedy Shaffer is the mother of Nicole and resides in Village Green Manor, a mobile home court in Greene Township, with mailing address Route 1, Chambersburg, Pennsylvania.
4. Mother married Donald Shaffer, hereinafter referred to as stepfather, on December 18, 1978.
5. Nicole has resided at all times with her mother. The parties were separated in 1976, and divorced in November 1976. By agreement of the parties at the time of separation custody of Nicole continued in mother with regular visitations with father. Father paid support according to the amicable agreement of the parties.
6. Nicole was born January 23, 1971, and is presently in second grade at Grandview Elementary School.

NEWS RELEASE

President Judge Cercone of the Superior Court of Pennsylvania has announced the establishment of a Superior Court Advisory Task Force Committee made up of two common pleas judges, lawyers, and court administrators. Judge Cercone said that the function of the committee will include working with the Supreme Court Rules Committee in order to modernize and facilitate the flow of records from the common pleas courts to the Superior Court in order to eliminate delay in disposition of cases; to give advice and counsel to the Court in establishing a completely modernized computer system in court administration; to work with the Court in preparing statistics concerning court records and accomplishments for the information of the public; to screen and evaluate the latest proposed methods of modern court administration as suggested by the National Center for Appellate Courts.

DAVID BERGER, ESQ., will be Chairman of the Committee. Mr. Berger is the former Chancellor of the Philadelphia Bar Association and former City Solicitor of Philadelphia.

Other members will be:

HON. RALPH H. SMITH, JR., Judge of the Court of Common Pleas of Allegheny County;

HON. STANLEY GREENBERG, Judge of the Common Pleas Court of Philadelphia County, Court Administrator in the Court of Common Pleas of Philadelphia, specially assigned to the Superior Court;

JOHN R. O'DONNELL, Chief Deputy Court Administrator for Operations in the Court of Common Pleas in Philadelphia County;

ALAN C. KAUFFMAN, partner in the Philadelphia law firm of Dilworth, Paxson, Kelish, Levy & Kauffman, and

EDWIN C. SCHMIDT, partner in the Pittsburgh law firm of Rose, Schmidt and Dixon.

— Reported by *The Allegheny County Bar Association*

SHERIFF'S SALES, cont.

Exterior walls consist of frame construction, and drop siding. Interior walls are plastered.

Seized and taken in Execution as the real estate of Robert L. Morrison and Betty K. Morrison, his wife, under Judgement No. A.D. 1979-101.

Pursuant to Writ of Execution issued on Judgment A.D. 1979-78 of the Court of Common Pleas of the Thirty-Ninth Judicial District, Franklin County Branch, I will sell at public auction sale in Court Room No. One of the Franklin County Court House, Memorial Square, Chambersburg, Pennsylvania, at One O'clock P.M. on Friday, June 29, 1979 the following real estate improved as indicated:

ALL the following described tract of real estate lying and being situate in the village of Doyleburg, Fannett Township, Franklin County, Pennsylvania, bounded and limited as follows:

BEGINNING at a point at the intersection of Main Street in an alley known as Market Street in the village of Doyleburg; thence by the Westerly side of Main Street South 13 degrees 45 minutes West 110 feet to a point at lands intended to be conveyed to Elizabeth Best; thence by the latter, North 76 degrees 15 minutes West 120 feet to a point on the Easterly side of a 12 foot alley; thence by said alley, North 13 degrees 45 minutes East 110 feet to a point on the Southerly side of Market Street; thence by the latter, South 76 degrees 15 minutes East 120 feet to a point, the place of beginning, and containing 13,200 square feet.

BEING the same real estate which F. Fred McCartney and Carolyn L. McCartney, his wife, by their deed dated the 19th day of January, 1973, and recorded in Franklin County Deed Book Volume 683, Page 998, conveyed to Donald L. Groff and Shirley M. Groff, his wife.

And having erected thereon a single family dwelling of conventional design, Stores, with a brick or stone foundation, 1/2 basement area. Exterior walls consist of frame construction, drop and vertical siding.

Seized and taken in Execution as the real estate of Donald L. Groff and Shirley M. Groff, his wife, under Judgement No. A.D. 1979-78.

Pursuant to Writ of Execution issued on Judgment A.D. 1979-79 of the Court of Common Pleas of the Thirty-Ninth Judicial District, Franklin County Branch, I will sell at public auction sale in Court Room No. One of the Franklin County Court House, Memorial Square, Chambersburg, Pennsylvania, at One O'clock P.M. on Friday, June 29, 1979 the following real estate improved as indicated:

ALL the following described real estate lying and being situate in Greene Township, Franklin County, Pennsylvania, bounded and described as follows:

BEGINNING at a stone on the South side of the Stillhouse Hollow Road at a point common to this lot and lot now or formerly of David M. Short and Mae E. Short, his wife, being Lot No. 9 on Plan hereinafter referred to; thence along said Lot No. 9 South 10 degrees East, 289 feet to a stone; thence by land formerly of H. O. Baughman and Lydia

SHERIFF'S SALES, cont.

V. Baughman, his wife, now George W. Baughman, South 85 degrees West, 75 feet to a stone; thence by Lot No. 7 being other land formerly of H. O. Baughman and Lydia V. Baughman, his wife, now George W. Baughman, North 10 degrees West 289 feet to a stone on the south side of Stillhouse Hollow Road 75 feet to a stone, the place of BEGINNING.

BEING known as Lot No. 8 on a plan of lots laid out by John H. Atherton, County Surveyor, February 7, 1949, for George W. Baughman and wife, a copy of which is recorded in Deed Book Volume 437, page 260, and said lot being improved with a two story frame dwelling.

BEING the same real estate conveyed by J. Alvin Fleming and Beulah M. Fleming, his wife, by their Deed dated the 25th day of April, 1969 and recorded among the Deed Records of Franklin County, Pennsylvania in Deed Book Volume 637, page 833, to Franklin Annis, et ux,

And having erected thereon a single family dwelling of conventional design, with concrete block foundation, full basement area with concrete floor. Exterior walls consist of frame construction and asbestos shingles.

Seized and taken in Execution as the real estate of Franklin R. Annis, under Judgement No. A.D. 1979-79.

TERMS: The successful bidder shall pay 20% of the purchase price immediately after the property is struck down, and shall pay the balance within ten days following the sale. If the bidder fails to do so, the real estate shall be re-sold at the next Sheriff's sale and the defaulting bidder shall be liable for any deficiency including additional costs. Any deposit made by the bidder shall be applied to the same. In addition the bidder shall pay \$20.00 for preparation, acknowledgement and recording of the deed. A Return of Sale and Proposed Schedule of Distribution shall be filed in the Sheriff's Office on July 18, 1979, and when a lien creditor's receipt is given, the same shall be read in open court at 9:30 A.M. on said date. Unless objections be filed to such return and schedule on or before July 27, 1979, distribution will be made in accord therewith.

FRANK H. BENDER, Sheriff of
Franklin County, Pennsylvania

May 30, 1979

(6-8, 6-15, 6-22)

7. Nicole was interviewed privately in the presence of counsel for the parties, and a record of the interview was made. The interview produced the following information:

(a) She has lived with her mother at the same mobile home park since she was five years old, and has been living with her mother and "Chisel" (the stepfather's nickname).

(b) She loves her mother and her father, but was very definite in her determination that she desired to make her home with her mother because she would not have to change schools or miss her friends.

(c) She and her mother take turns reading to each other from books they get at the book mobile. Her mother hugs and kisses her, but only occasionally tucks her into bed because she believes that Nicole is big enough to tuck herself in.

(d) She gets along fine with "Chisel", who works at Letterkenny, and she likes him. He doesn't play with her very much because he is either watching football games or doing something else.

(e) On weekends when she is with her mother she goes to Sunday School and Church at the Open Door Church. Her mother puts her on the bus. Her mother doesn't like to go to church.

(f) She spends every other weekend with her father and stepmother in their apartment and plays with two neighbor children, and visits the paternal grandmother.

(g) Father tucks her into bed with hugs and kisses or will check on her when he goes to bed.

(h) On weekends when she visits her father, she goes to Sunday School and Church with the paternal grandmother. Father doesn't like to go to church.

(i) She has chores to do at her mother's home and at her father's home.

(j) Both parents yell at her when she is bad, but the only punishment administered is to make her sit in a chair.

(k) She was aware of the State Police coming to her mother's home, but she was with her babysitter. Her mother told her that "Chisel" sometimes gets drunk and then they fight, and she has been present during some fights. However, stepfather says he is going to stop drinking and only does so now and then.

(l) Father and mother both smoked "funny looking cigarettes" when they lived together, and so did stepfather. None of them have smoked the funny cigarettes for quite a while.

(m) She likes her stepmother who plays with her and lets her bake cookies.

8. Throughout the interview Nicole was bright, alert, responsive and very positive in her answers.

9. The mother and stepfather lived together from December 1977, and as previously indicated were married on December 18, 1978, after they decided they were ready to be married.

10. Father has been employed at American Can Company for 8 years and works the swing shift, which means that on alternating weeks he works one week the 7:00 A.M. to 3:00 P.M. shift, the next the 3:00 P.M. to 11:00 P.M. shift, and the next 11:00 P.M. to 7:00 A.M. shift.

11. Since the parties agreement about January 1, 1976 that mother should have custody of Nicole, father has faithfully exercised his alternating weekend visitations, and is current in the payment of support.

12. Father and stepmother live in a Townhouse with two bedrooms, bath, livingroom, kitchen, back and front yards. Nicole has her own bedroom and that same bedroom would be available to her if custody would be awarded to the father.

13. The father belongs to the Fourth Street Church of the Brethren, but does not attend regularly.

14. The father used to smoke marijuana, but has not done so for three years and he did receive counseling and assistance at the Mental Health/Mental Retardation Clinic because of his nerves and to get help in "getting off marijuana." It has been more than six months since his last appointment at the clinic and he is not being seen on an outpatient basis.

15. If custody of Nicole would be awarded to father, she would attend Gordy Elementary School or Stevens Elementary School.

16. The father goes over Nicole's school work with her, but has never attended any P.T.A. meetings or talked to her teachers. He relies upon Nicole to bring her report card and school papers to him to see.

17. The father expressed the opinion that Nicole's hair and fingernails were not clean and needed care when he would pick her up for weekend visits.

18. The stepmother who is 22 years of age works at Stanley Manufacturing Company from 7:00 A.M. until 3:30 P.M. She leaves the home at 6:30 A.M. and returns home at approximately 3:35 P.M.

19. The stepmother is a member of Central Presbyterian Church but does not attend.

20. The stepmother expressed a willingness to assume the responsibilities of a surrogate mother to Nicole, and expressed the opinion that she has a good relationship with her.

21. The stepmother agreed with father that when Nicole arrives for weekend visitations her hair needs washing, her fingernails are long and dirty, and she needs cleaning up. She did not, however, believe that the child's body was dirty.

22. Both father and stepmother agreed that Nicole was generally well-nourished, well cared for, and well behaved. Father expressed the opinion that she is a healthy and happy child.

23. If custody of Nicole were awarded to the father and she attended Gordy or Stevens Elementary School, she would not leave for school until approximately 8:15 A.M. Father testified that Mrs. Roger Schaak, a neighbor, would sit for Nicole at her home from the time father and stepmother left for work until it was time for Nicole to go to school. Mrs. Schaak declined to appear in court to testify to the arrangements because, according to father, she was afraid of a court appearance.

24. The father testified that he was seeking custody of Nicole because the mother had lived with Mr. Shaffer out of wedlock for a long time; there had been a shooting incident involving mother and stepfather; he was certain mother and stepfather both smoked marijuana in front of the child, due to having smelled it at the windows of mother's home and because the child was dirty when he picked her up for visits.

25. The mobile home owned by stepfather is new and has three bedrooms, kitchen, bath, livingroom, and an extra room. Nicole has and has had her own bedroom.

26. Nicole has attended Grandview Elementary School

since kindergarten and to this time in second grade. On her last report card she received in November she had three B's and one C.

27. Mother is no longer employed outside the home and is with the child from the time she returns home from school until bedtime, except when Nicole is outside playing with her many friends in the mobile home court. On occasion Nicole spends the night with her friend, Angel, or Angel visits with Nicole.

28. Mother bathes Nicole every other night in the winter and every night in warm weather, and washes her hair once a week. Nicole has regular dental checkups and receives medical care when needed or indicated.

29. Mother provides adequate and nourishing meals for Nicole.

30. Nicole, mother and stepfather show affection for each other.

31. Mother admitted that while she lived with father that she smoked marijuana because he wanted her to, but she no longer does so and stepfather has never smoked marijuana.

32. Mother believes that Nicole and stepfather like each other, have respect for each other, and enjoy a good relationship.

33. Mother's mobile home is neat and clean and in the judgment of neighbors Nicole is also very clean and tidy.

34. Stepfather drinks intoxicating beverages occasionally, but the neighbors have never seen him intoxicated.

35. The stepfather was a member of the United States Air Force from 1965 to 1969 with one year in Viet Nam and was honorably discharged as a sergeant. He has been employed at Letterkenny Army Depot for seven years as a material expeditor with a gross income of approximately \$17,000.00. He is a lifetime resident of Franklin County and has no outstanding debts.

36. Stepfather has known Nicole for one and a half years and feels that they get along very well together, and he loves her and desires that she remain in his home and in the custody of mother. He describes Nicole as a well disciplined child.

37. The stepfather expressed a willingness to continue to

provide supplemental support for Nicole, and testified that since Christmas he and Nicole have been playing more games together. The entire family does various things, including attending movies, as a group.

38. The stepfather would be willing to act as a surrogate father to Nicole.

39. On November 13, 1978, at about 9:25 P.M. Pennsylvania State Troopers Wyrick and Bush received a shooting incident report and were detailed to investigate the incident. Their investigation disclosed that the stepfather was the individual charged with firing a gun, and they found a loaded 12 gauge shotgun in his automobile at the mobile home court where the shooting had taken place. He was placed under arrest for recklessly endangering and was found to be very intoxicated. He was taken by the officers before Justice of the Peace Harrison for preliminary arraignment, and it was necessary for the officers to subdue him when he became resistant and also aggressive toward them. The alleged victim was the mother.

40. Justice of the Peace Harrison set December 8, 1978, as the date for preliminary hearing. The mother-victim failed to appear and the prosecution was dismissed.

41. Both the mother and stepfather testified that the stepfather was neither endangering her or threatening her, and that he fired the shotgun in the air. The stepfather testified that he had just come home from hunting; that he had been drinking to excess; that for no reason he got the shotgun out of the car and fired it in the air, and then he and the mother kept on talking as they had before until the State Police arrived. They had not been having an argument or a fight. He admitted that he had not been rowdy, had misconducted himself with the State Police, and regretted very much what he had done.

42. None of the incidents involving the shooting, the arrest of the stepfather, or his misconduct with the State Police occurred in the presence of the child.

43. The stepfather testified that he has never been convicted of a crime.

44. Mrs. Louise Bitner, Nicole's second grade teacher, testified that Nicole is always properly clothed and neat; that she gets along well with her peers; that she is alert in class; and is not a discipline problem.

45. Nicole received a C in spelling and Mrs. Bitner had a

conference with mother concerning the problems the child was having with spelling, and made suggestions for helping her. Mother appeared interested and the child's spelling has improved since the conference.

46. Nicole was given a kindergarten readiness test at the end of the kindergarten year (May 16, and 17, 1977) to determine her ability, work and readiness to move onto first grade. She scored in the ninety-second percentile and received an A.

47. Nicole received an above average grading of 2.7 on her Achievement Tests - the average is 1.7. She is reading on grade level.

48. Mrs. Bitner has never met the father nor been contacted by him.

49. A non-custodial parent such as the father is not given notice of parent-teacher conferences, and is not sent a copy of the report card.

50. The mother and stepfather are proper persons to have the custody of Nicole.

51. The home of the mother and stepfather is adequate and well cared for.

52. The mother and stepfather will continue to provide the necessary and adequate care, supervision and love for Nicole.

53. The father and stepmother are proper persons to have custody of Nicole.

54. The home of the father and stepmother is adequate and well cared for.

55. The father and stepmother will continue to provide the necessary and adequate care, supervision and love for Nicole.

DISCUSSION

At the outset of this discussion, we feel it proper to observe that the evidence established that both the father and stepmother, and mother and stepfather are interested in Nicole's well-being and either couple could provide her with proper love and affection. Both the father and stepfather are hard workers and quite willing to apply their income to the maintenance of the child. Either couple could provide adequate

housing and care for her. Therefore, neither father nor mother are disqualified as a person unfit to be entrusted with the custody of the child, and it becomes our responsibility to determine on the evidence and the inferences logically flowing from the evidence in which parent's custody the best interest of Nicole might be best served.

In *Commonwealth ex rel. Holschuh v. Holland-Morritz*, 448 Pa. 437, 444, 292 A. 2d 380 (1972), Chief Justice Eagen stated:

"The relevant legal principles in this area are well settled and are clearly stated in the abstract. Concrete application is much the more formidable task. The paramount consideration in cases of this nature is at all times the best interest and welfare of the child which includes its physical, intellectual, moral and spiritual well-being, and all other considerations are subordinate."

During the hearing of this matter the father and one or more of his witnesses expressed serious concern over the acknowledged fact that the natural mother had lived with Mr. Shaffer out of wedlock for a period of approximately one year, while Nicole was in the mother's custody. Since the natural mother and Mr. Shaffer cured the meretricious relationship by matrimony of December 18, 1978, the issue becomes substantially moot in the disposition of this case. However, we feel it appropriate to observe that the appellate courts of this Commonwealth have in recent years relegated parents' adulterous and/or meretricious relationships to a mere circumstance to be considered with all others in a custody action, rather than dispositive of the issue as they once were. See *Gunter v. Gunter*, Pa. Super. ; 361 A. 2d 307 (1976); *Commonwealth ex rel. Staunton v. Austin*, 209 Pa. Super. 187 (1966); *Commonwealth ex rel. Myers v. Myers*, Pa. 360 A. 2d 587 (1976). While this Court does not approve the adoption of a lifestyle and philosophy foreign to the tradition and mores of Pennsylvania, there is no doubt but that our oath requires us to accept the rules of law as enunciated by our higher courts.

In the light of the natural mother's marriage this Court can only consider her pre-December 18, 1978 lifestyle as a past moral lapse. Past moral lapses are not enough to deprive a mother of custody of her child, for the issue is her present fitness and not her past misconduct. *Commonwealth ex rel. Keer v. Cress*, 194 Pa. Super. 529, 532 (1961); *Commonwealth ex rel. Batch v. Barber*, 161 Pa. Super. 82; *Snellgrose Adoption Case*, 432 Pa. 158, 164 (1968). Therefore, we conclude Tawney

Malene Leedy Shaffer's prior moral misconduct, while totally improper, does not per se bar her right to custody of her daughter.

There are several factors of varying importance to be considered in the case at bar. None of them is, in itself, controlling; instead the cumulative weight will be determinative of which party is to be awarded custody of the subject child.

While the tender years doctrine has with justification been laid to rest (*Spriggs v. Carson*, Pa. , 368 A. 2d 635 (1977)), there remains another guideline for custody proceedings which is frequently confused or intermingled with the discredited tender years doctrine. This guideline is well described by Judge Hoffman in his dissenting opinion in *Commonwealth ex rel. Zeedick v. Zeedick*, 213 Pa. Super. 114, 118-119, 245 A. 2d 663 (1968):

"The age and sex of the child is a keystone factor in any custody determination. In this case, we are dealing with young daughters. Our court, in such cases, followed a time honored rule that the care and custody of a child of tender years, especially if the child is a girl, should be committed to the mother. *Urbani v. Bates*, 395 Pa. 187, 149 A. 2d 644 (1959); *Commonwealth ex rel. Horton v. Burke*, 190 Pa. Super. 392, 154 A. 2d 255 (1959). Our court affords great credence to this concept because experience has taught us that young girls need maternal care and affection. A mother can explain the processes of maturation and sexual knowledge to growing daughters better than the father. Experience has also taught us that a girl's psychological and social adjustments to her environment are more easily made through the confidence of a mother-daughter relationship. As a result of this knowledge, we have often reiterated that, absent compelling reasons, the needs of a daughter of tender years are better served by awarding custody to the mother. *Commonwealth ex rel. Keller v. Keller*, 90 Pa. Super. 357 (1927); *Commonwealth ex rel. Blatt v. Blatt*, 168 Pa. Super. 427, 79 A. 2d 126 (1951)."

We believe that this guideline remains viable, regardless of the demise of the tender years doctrine, by reason of its logic and the weight of experience.

Next, the fact that Nicole indicated that she wished to live with her mother is a point to be weighed by the Court, but is not controlling. In a case from this county, *Commonwealth ex rel. Humphreys v. Hess*, 11 Cumb. 33, 40 (1960), it was held:

"This court has never taken the view that the wishes of

children in custody suits preferring one parent to the other are controlling. Depending upon the age of the child and the extent to which the child's views are well founded, the court may properly give weight to them."

Representative cases have held that five years old (*Commonwealth ex rel. Johnson v. Johnson*, 195 Pa. Super. 262, 171 A. 2d 627 (1961)), and four years old (*Commonwealth ex rel. Maines v. McCandless*, 175 Pa. Super. 157, 103 A. 2d 480 (1954)) are too young to be entitled to much weight. In the case at bar, Nicole will be eight years old in a few days.

Nicole was very explicit in her desire to live with her mother and stepfather, and her reasons given while not weighty were reasonable and entitled to the consideration of the Court. *Williams v. Williams*, 223 Pa. Super. 29 (1972); *Clair Appeal* 219 Pa. Super. 436 (1971).

With the exception of the complaints of the father and his witnesses that Nicole's hair and fingernails were dirty and needed care when she visited with them, the witnesses for the petitioner and the respondent were unanimous in their conclusion that Nicole was a well nourished, well disciplined, well cared for, well behaved, healthy and happy child. The observations made by the Court of Nicole lead to a similar conclusion. In addition, it appears that Nicole is above average in her academic achievements to this date. All of this leads the Court to the conclusion that the mother-respondent has been significantly successful in the discharge of her responsibilities as a loving and caring mother, and has provided a stable and proper home.

After weighing and analyzing the facts in the case at bar, we conclude that the best interests and welfare of Nicole Lynn Leedy require us to award custody to the respondent, Tawney Malene Leedy Shaffer, and her husband, Donald Shaffer.

Since the parties have been able to work out satisfactory visitation arrangements in the past, we will not at this time include in the order of court any provision for visitation rights. It has long been the policy of this Court to favor reasonable visitation rights for the parent out-of-custody, and we do urge the parties and their counsel to seek to work out a reasonable and realistic visitation schedule for the benefit of Nicole. Such a visitation schedule should certainly include substantial visitation rights of at least a month during the summer, if the father and stepmother desire the same. If the parties are unable to reach an amicable agreement on visitation the Court will entertain an

application for hearing as promptly as possible and enter an appropriate order.

ORDER OF COURT

NOW, this 18th day of January, 1979, the petition of Randall Dwight Leedy is denied. Primary custody of Nicole Lynn Leedy is granted to her mother, Tawney Malene Leedy Shaffer, and her stepfather, Donald Shaffer, to be exercised at their home, R.D. 1, Greene Township, Chambersburg, Pennsylvania.

Exceptions are granted the petitioner.

IN RE: MYERS NAME CHANGE PETITION, C.P. Franklin County Branch, Misc. Doc. Vol. X, Page 259

Change of Name - Unmarried Parents - Custody in Grandparents

1. The court will grant the petition to change the name of a child from the single mother's surname to the father's surname where the child is in the custody of the paternal grandparents since by custom bearing the father's surname is the natural result of a marriage and fewer questions would come up in the minds of people.

William C. Cramer, Esq., Attorney for Petitioners

Mary Myers Needham, Objector, In Propria Persona

OPINION AND ORDER

EPPINGER, P.J., June 12, 1979:

Crystal Candace Myers lives with her paternal grandparents, Robert Sylvester McClure and Almita Hill McClure. She is the daughter of Mary Myers, now Mary Myers Needham, and Gary Robert McClure, born at a time when the parents were not wed to each other. Custody of the child was awarded to the grandparents by an order of our court dated September 27, 1978 (Misc. Docket Vol. X, page 243), though she has lived with them for five years.

Crystal, by her grandparents as guardians, filed a Petition for Change of Name. At the hearing it was stated that a change of surname to comport with that of her grandparents with whom she is living and her father would be beneficial to her, not only because it would "sound better", but also because it would simplify many matters having to do with school placements, insurance and other benefits to which the child is entitled under the grandfather's employment contract. These difficulties would be minimized if the child's name was changed to McClure.

The mother of the child appeared at the hearing with her husband, Mr. Needham, and protested the change of name, stating that she is in the process of attempting to regain custody of the child. She contended that it would not be beneficial to the child and might be detrimental to her relationship with her daughter. We conclude that there is nothing about changing the child's name that would impinge on Mrs. Needham's rights nor interfere with her relationship with the child. Assuming the child was returned to the mother, she would bear her father's surname. Her mother's name is no longer Myers. By custom bearing the father's name is the natural result of marriage. There may still be significant feeling among the populace that places an illegitimate child in a disadvantaged position, though we hope it is subsiding, for a child is not responsible for the acts of her parents.

Fewer questions would be asked, or come up in the minds of people, in any situation which we can conceive of if the child was named Crystal Candace McClure. So the benefits to the child are apparent in the change of name and there is no harm done to the mother. See *In Re Rocuskie*, 41 Northumberland L.J. 80 (1969).

For the reasons stated in this opinion, we will grant the prayer of the petition.

ORDER OF COURT

NOW, June 12, 1979, the name of Crystal Candace Myers is changed to Crystal Candace McClure. The costs of these proceedings shall be paid by Robert Sylvester McClure and Almita Hill McClure. Exception granted to Mary Myers Needham.