

Having disposed of the issue on the basis of the intention of the testatrix, it is unnecessary for us to consider the other issues raised by counsel.

### DECREE

NOW, this 14th day of April, 1977, pursuant to the case stated by counsel for the parties, judgment is entered for the reasons above set forth in favor of Margaret Barrie Gallagher and Charles Gallagher. Pennsylvania Inheritance Tax and Federal Estate Tax attributed to the devise to Margaret Barrie Gallagher and Charles Gallagher shall be paid by Harvey M. Miller and Oscar E. Lohman, Executors of the Estate of Mary L. S. Osborne Campion.

Costs to be paid by the Estate of Mary L. S. Osborne Campion.

Exceptions are granted the estate.

FRANKLIN COUNTY ASSOCIATION FOR RETARDED CITIZENS v. LINCOLN INTERMEDIATE UNIT No. 12, C.P. Franklin County Branch, E.D. Vol. 7, Page 60

*Equity - public school intermediate unit - Commonwealth Court jurisdiction - Appellate Court Jurisdiction Act of 1970, P.L. 673, No. 223, 17 P.S. 211.101 et. seq.*

1. An intermediate unit, which is created by State legislative mandate, regulated and primarily funded by the State Board of Education, and governed by a board comprised of certain members of constituent school boards, is an agency of the State Board of Education.
2. The Commonwealth Court, which has original jurisdiction of suits against agencies of the Commonwealth, has exclusive original jurisdiction of a suit against a public school intermediate unit.

*Stephen E. Patterson, Esq., Counsel for Plaintiff*

*Thomas J. Finucane, Esq., Counsel for Defendant*

### OPINION AND ORDER

KELLER, J., February 19, 1976:

The plaintiff's complaint in equity filed June 30, 1975 alleges various expenditures made or incurred by defendants in connection with a series of hearings on the proposed demotion

of the Director of Special Education to School Psychologist; the transfer of funds from Special Education Fund accounts to the Special Education Fund legal service account; the expectation of additional account transfers and disbursements; and that the defendants have acted arbitrarily and capriciously in that (a) the payment of legal fees and expenses incurred by reason of the demotion hearings is an improper expenditure of Special Education Fund monies, and (b) it deprives exceptional children of the right to obtain an education. The plaintiff seeks an injunction restraining the defendants from: (a) making additional transfer to the Special Education legal fund to pay expenses incurred by the demotion hearings and (b) paying such expenses and requiring the defendants to reimburse the Special Education Fund for the illegal transfers and disbursements. True copies of the complaint were served upon the defendants between June 30, 1975 and July 15, 1975. Preliminary objections to the plaintiff's complaint were filed on July 30, 1975, and served by mail upon counsel for the plaintiff. On August 12, 1975 the plaintiff filed its amended complaint and a true and attested copy of the same was served upon the defendants by service upon their counsel of record.

On September 5, 1975 the defendants filed preliminary objections to the amended complaint in the nature of:

1. A motion to dismiss on the grounds that the plaintiff has failed to allege facts showing that it is a real party in interest in violation of Pa. R.C.P. 2002 (a).
2. A demurrer on the grounds that the plaintiff failed to set forth how it is damaged, affected or in any way interested in the matter set forth in the amended complaint.
3. A motion for a more specific complaint contending that the plaintiff has failed to allege how an education is denied exceptional children.

The defendants' preliminary objections came on for argument before the Court en banc on October 2, 1975. *Sua sponte* the Court inquired of counsel for plaintiff and defendants when the case was called whether the Commonwealth Court did not have original jurisdiction by reason of the defendant, Lincoln Intermediate Unit No. 12, being an agency of the Commonwealth. Not surprisingly, counsel for the plaintiff felt this Court had jurisdiction to hear the matter, and counsel for the defendants were certain that this court did not have jurisdiction of the defendants. The

Court heard counsel's arguments on the preliminary objections and requested counsel to submit supplemental briefs on the jurisdiction questions. The supplemental briefs have been submitted and are before the Court for disposition.

If counsel for the defendants is correct in his contention that the Commonwealth Court has original jurisdiction, then any adjudication by this Court other than to transfer the matter to the court having jurisdiction would be bootless. We will, therefore, first address ourself to the jurisdictional question.

The Appellate Court Jurisdictional Act of 1970, P.L. 673, No. 223, Art. I and Section 102(a)(1), 17 P.S. 211.102(a)(2) provides:

"(a) The following words and terms shall have the following meanings, unless the context clearly indicates otherwise:

"2. 'Commonwealth' includes departments, departmental administrative boards and commissions, officers, independent boards or commissions, authorities and other agencies of this commonwealth, but shall not include any political subdivision, municipal or other local authority, or any officer or agency of any such political subdivision, municipal or local authority."

Section 401(a)(1) and (b), 17 P.S. 211.401(a)(1) and (b) provide:

"(a) The Commonwealth Court shall have original jurisdiction of:

"(1) All civil actions or proceedings against the commonwealth or any officer thereof, acting in his official capacity, except (i) actions or proceedings in the nature of applications for a writ of habeas corpus or post-conviction relief not ancillary to proceedings within the appellate jurisdiction of the court, and (ii) proceedings under the Eminent Domain Code.

"(b) The jurisdiction of the Commonwealth Court under this section shall be exclusive except as provided in section 201 of this act and except with respect to actions or proceedings by the Commonwealth or any officer thereof, acting in his official capacity, where the jurisdiction of the court shall be concurrent with the several courts of common pleas."

Clearly the statutory definition of "Commonwealth", supra, does not specifically include or exclude intermediate units. The research of counsel and the independent research of the Court has failed to produce any statutory or case law

identifying intermediate units as either "agencies of this Commonwealth" or an "agency of any such political subdivision, municipal or local authority." We must, therefore, consider the case at bar as one of first impression.

The Public School Code of 1949, as amended by the Act of 1970, P.L. 311, No. 102, Section 1; 24 P.S. 9-951 provides for the establishment of intermediate units:

"Each school district of the Commonwealth shall be assigned to an intermediate unit, and shall be entitled to the services of an intermediate unit in accordance with a program of services adopted by the intermediate board of directors. The arrangement of the school districts of the Commonwealth into intermediate units shall reflect consideration of (i) the number of public school children enrolled in kindergarten through grade twelve, (ii) ease of travel within each intermediate unit, and (iii) the opportunity to provide adequate basic services. Intermediate units shall be part of the public school system of this Commonwealth, and shall become operative on July 1, 1971."

The school districts assigned to Intermediate Unit No. 12 are:

"Bermudian Springs Merged, Conewago Township, Cumberland Township, East Berlin Borough, Fairfield Area Merged, Franklin Township, Germany Township, Gettysburg Area Merged, Latimore Township, Littlestown Borough, McSherrystown Borough, Mount Joy Independent, Mount Pleasant Township, New Oxford Area Merged, Union Township, Upper Adams Merged, Central York Dallastown Area, Dover Area, Eastern York, Northeastern, Red Lion Area, South Eastern, Southern York County, South Western, Spring Grove Area, West York Area, York City, York Suburban, Hanover Borough, Chambersburg Area, Waynesboro Area, Tuscarora, Greencastle Antrim and Fannett Metal" 24 P.S. 9-952.

The Act also provides inter alia:

(a) That the State Board of Education shall adopt regulations necessary to guide the organization and operation of intermediate units. 24 P.S. 9-955.

(b) That each intermediate unit shall submit a program of services for the next school year to the Superintendent of Public Instruction for budgetary approvals. 24 P.S. 9-956.

(c) That intermediate units shall receive subsidies from the Commonwealth. 24 P.S. 9-957.

(d) That the power and duties of county boards of school directors with respect to special pupil services and vocational-technical education are transferred to intermediate unit boards of directors. 24 P.S. 9-957 and 958.

(e) The powers and duties of the intermediate units board of directors - not including the power to sue and be sued. 24 P.S. 9-964.

(f) That the intermediate unit board of directors shall be composed of thirteen members chosen from among members of the boards of school directors of school districts comprising the intermediate unit.

(g) The procedure for allocating that portion of an intermediate unit's approved budget exceeding the Commonwealth's appropriation to the unit among the school districts within the unit. 24 P.S. 9-970.

(h) That the annual financial report of each intermediate unit, together with an auditor's report shall be submitted to the Superintendent of Public Instruction.

The provisions of the Public School Code governing intermediate units above referred to indicate clearly that the State Board of Education regulates their operation, approves their programs, primarily funds their activities, audits their expenditures, and may expand the duties mandated for the units by the legislature. It also must be observed that school districts are "vested as, bodies corporate, with all necessary powers to enable them to carry out the provisions of this act.", i.e., The Public School Code, (24 P.S. 2-211), . . . "may adopt, . . ., a corporate seal for the use of said district" (24 P.S. 2-212); but the legislature did not see fit to so endow the intermediate units. However, we must also recognize the legislature has mandated that the governing body of each unit which has substantial powers and duties vested in it, will be composed of members who are also directors of school districts comprising the unit; thus assuring some rather substantial degree of control in the constituent school districts and accountability to the electorate residing therein.

Whatever else an intermediate unit may be, we can conclude that it is a rather unique hybrid given the breath of life by legislative mandate, but having the marked characteristics of both an agency of the Commonwealth and an agency of local government.

In support of its contention that original jurisdiction lies with the court of common pleas rather than the Commonwealth Court, plaintiff cites *Clearfield County Housing Corporation vs Hughes et al.*, 13 Pa. Commonwealth 96 (1974), *Levine vs Redevelopment Authority of the City of New Castle, Pa.* Commonwealth , 333 A. 2d 190 (1975), and *Southeastern Penna. Transportation Authority vs Kohn, et al.*, Pa. Commonwealth , 336 A.2d 904 (1975). The issue in each of these cases is whether the Commonwealth Court or the appropriate court of common pleas has original jurisdiction. We will review each case to determine whether it provides any illumination for the case at bar.

*Clearfield County Housing Corporation vs Hughes*, supra: In an action in equity in the Court of Common Pleas of Clearfield County, property owners secured a decree enjoining the Corporation and Authority from continuing to construct low cost housing in a township in the county. On appeal the Authority contended the Appellate Court Jurisdiction Act, supra, conferred original jurisdiction upon the Commonwealth Court because various cases have declared "that municipal authorities, although created by political subdivisions, are, for some purposes, agencies of the State". The Commonwealth Court rejected the contention concluding the Authority was a local authority specifically excluded from the definition of "Commonwealth".

*Levine vs Redevelopment Authority of the City of New Castle*, supra: The petitioner was refused permission to inspect and copy documents of the Authority and commenced the proceeding under the "Right to Know Act" in the Lawrence County Court of Common Pleas. On objection by the Authority, the trial court concluded that it lacked jurisdiction to hear the case. On appeal to the Commonwealth Court and in response to the Authority's argument that it is an "agency of the Commonwealth" because language used in the enabling statute describes an urban redevelopment authority as "a body, corporate and politic, exercising public powers of the Commonwealth as an agency thereof . . ."; Judge Blatt speaking for the Court ordered the matter transferred back to Lawrence County and held at page 192:

"It is true, of course, that the courts have 'consistently held that municipal authorities created pursuant to the Municipalities Authorities Act of 1954 are not the creatures, agents or representatives of the municipalities which organize them, but rather are independent agencies of the Commonwealth, and part of its sovereignty.' " (Citations omitted.) *Commonwealth v. Erie Metropolitan Transit*

*Authority*, 444 Pa. 345, 348, 281 A. 2d 882, 884 (1971). It has also been held, however, that such authorities are treated for some purposes as local authorities notwithstanding language to the contrary in the enabling statute. *Clearfield Area Housing Authority Corp. v. Hughes*, 13 Pa. Cmwlth. 96, 318 A.2d 754 (1974). . . . We must reach the same conclusion in the case at hand, for to reach any other conclusion would lead to the absurd and unreasonable result that a citizen would be required to pursue his right to gain access to information in Harrisburg even though the records were located in the community and the agency involved had been created by an individual city or county and the issues involved were matters strictly within the concern of a particular locality rather than a concern of the Commonwealth generally. The General Assembly, of course, could not have intended such a result. The Statutory Construction Act of 1972, 1 Pa. C.S. Section 1922 (1).”

*Southeastern Pennsylvania Transportation Authority (SEPTA) vs Kohn, et al*: The Court of Common Pleas of Philadelphia County concluded that the Commonwealth Court had original jurisdiction over this action in equity on the grounds that SEPTA was an authority or agency of the Commonwealth. On appeal, the Commonwealth Court noting its decisions that local agencies not state agencies were involved in *Levine*, supra, and *Clearfield County*, supra, found SEPTA to be a local agency despite its multi-county structure and operating territory, reversed and remanded the matter to Philadelphia County. President Judge Bowman speaking for a unanimous court held at page 906:

“We will not repeat the rationale of our decisions in *Levine* and *Clearfield*. We would only observe that notwithstanding the multicounty structure and operation of SEPTA, this fact does not raise it to the level of a state agency for purposes of jurisdiction within the meaning of section 102 of the ACJA. Just as the Commonwealth Court is a court of statewide jurisdiction, the legislature, in defining its jurisdictional role with respect to state and local agencies, intended the Commonwealth Court in its original jurisdiction to concern itself with statewide agencies or statewide instrumentalities of local government or governments. Section 402(4), ACJA, 17 P.S. Section 211.402(4).

“Nor do we believe that any provisions of the Metropolitan Transportation Authorities Act of 1963 afford reason to reach a different result. Found in this statute, as in many similar enabling statutes, is language which, for various purposes, has been said to make them independent agencies of the

Commonwealth and part of its sovereignty. *Commonwealth v. Erie Metropolitan Transit Authority*, 444 Pa. 345, 348, 281 A. 2d 882, 884 (1971). See also *Levine*, supra. And we have so declared with respect to SEPTA, *Philadelphia v. Southeastern Pennsylvania Transportation Authority*, 8 Pa. Cmwlth. 280, 303 A. 2d 247 (1973), but not within the context of the jurisdiction issue here posed and controlled by other statutory law.”

The above cases are instructive in that they provide us with some insight as to the rationale adopted by the Commonwealth Court in construing the Appellate Court Jurisdiction Act. However, we do not find them to be controlling precedents on the jurisdictional question here raised because they can be readily distinguished on their facts or applicable law in manner following:

A. *Levine* and *Clearfield*, supra, involve authorities created by local municipalities for the express purpose of conducting certain specific activities on a local level for the benefit of the local area. To identify them as anything other than local authorities, specifically excluded from the definition of “Commonwealth”, would be to fly in the face of the obvious.

B. SEPTA was created by the Metropolitan Transportation Authorities Act of 1963, P.L. 984; 66 P.S. 2001 et seq., which was enacted as a legislative effort to establish an effective and viable mass transit system for Philadelphia County and those counties within twenty miles of Philadelphia County. SEPTA is a “body corporate and politic” (66 P.S. 2003(1) ); with the express power “to sue and be sued”, “adopt and use and alter at will a corporate seal” (66 P.S. 2004(2)(3) ), borrow money . . . make and issue notes, bonds and other evidences of indebtedness, which shall not be or become an obligation of the Commonwealth or any political subdivision (66 P.S. 2004(10), 66 P.S. 2010(c) ); acquire private and public property by eminent domain with the court of common pleas having “exclusive jurisdiction” (66 P.S. 2004(13), 2008(b)(f) ). SEPTA is governed by an administrative board consisting of two members from Philadelphia, two members from each county of the “metropolitan area”, and a gubernatorial appointee (66 P.S. 2015, 2016). SEPTA appears to be an entirely autonomous body regulated by no department, administrative board, board, officer or agency of the Commonwealth and responsible only to the court. The court of common pleas of any county in the “metropolitan area” is specifically given jurisdiction over rate, service or change of service appeals. (66 P.S. 2004 (9) ). No provision for Commonwealth funding appears.

We conclude that the enabling legislation giving life to SEPTA clearly demonstrates that the legislature intended to create a purely local authority, dealing with purely local transit problems and entirely unrelated to statewide concerns or statewide departments or agencies.

When we compare the enabling legislation for intermediate units with the Metropolitan Transportation Authorities Act and the Municipality Authorities Act of 1945 (53 P.S. 301 et seq.), we conclude:

1. The legislature was addressing itself to the solution of a statewide problem by the establishment of the units throughout the Commonwealth.

2. The creation of the intermediate units was in direct compliance with the mandate of Art. III, Section 14 of the Constitution of Pennsylvania: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth."

3. The limitations on the powers of the boards of directors of the intermediate units and the imposition of various oversight duties and controls on the State Board of Education or Superintendent of Public Instruction evidences a legislative intent to maintain statewide supervision of the units.

4. The omission of any taxing or borrowing authority in the individual intermediate units, coupled with the implied assurance of primary funding from the Commonwealth via the State Board of Education, demonstrates that the units have minimal autonomy and are responsible to the State Board of Education.

We conclude that the defendant, Lincoln Intermediate Unit No. 12 and the individual members of its Board of Directors in their capacity as the unit's governing body, are an agency of the State Board of Education. Consequently, we also conclude that the Commonwealth Court has original jurisdiction over this cause of action.

#### ORDER

NOW, this 19th day of February, 1976, pursuant to Section 503(b) of the Appellate Court Jurisdiction Act of 1970, P.L. 673, 17 P.S. 211.503(b), this case is hereby transferred to the Commonwealth Court. The Prothonotary shall certify to the Clerk of the Commonwealth Court a photocopy of the docket entries of the above action and transmit to him the entire record.

#### COMMONWEALTH OF PENNSYLVANIA, ex rel. NORTH v. NORTH, C.P. Franklin County Branch, A.D. 1978-82

##### *Custody - Visitation Rights - Extra-marital Relationship*

1. The right of a parent to visit with his child can be limited or denied only in cases where severe mental or moral deficiency of the parent constitutes a real and grave threat to the welfare of the child.

2. The fact that the father is living with another woman does not disqualify the father from exercising his visitation rights on the basis of being severely morally deficient.

3. Where exposure to extra-marital relationships could be damaging to children and the effects of such an experience far reaching, the court may order the visitation rights granted to the parent shall not be exercised in the presence of any person with whom the parent may be living out of wedlock.

*Kenneth E. Hankins, Jr., Esq.*, Attorney for Petitioner

*Thomas J. Finucane, Esq.*, Attorney for Respondent

#### OPINION AND ORDER

EPPINGER, P.J., May 26, 1978:

Curtis D. North (father) and Sally A. North (mother) are the parents of Christopher and Ryan North (children). The father brought this habeas corpus action against the mother, the current custodian of the children, for visitation rights.

The parents are separated, but no divorce action has been started. The father is currently living with another woman at his home in Coraopolis, Pennsylvania. The mother has no objection to the father having visitation rights. She objects, however, to these rights being exercised in the presence of the other woman as being detrimental to the best interests of the children. The inclusion of a restriction in the visitation order that any visitation should not be in the presence of the other woman is the subject of this dispute.

The relationship between parent and children is protected by public policy, *Commonwealth ex rel. Lotz v. Lotz*, 188 Pa. Super 241, 146 A.2d 362 (1958), and the right of a parent to visit with his child can be limited or denied only in cases where severe mental or moral deficiencies of the parent constitute a real and grave threat to the welfare of the child. *Lotz, supra*; *Commonwealth ex rel. Sorace v. Sorace*, 236 Pa. Super 42, 344