

ning in August, 1978. Plaintiffs testified that the construction costs totalled \$4.8 million and the total project costs amounted to \$5.2 million. These figures were publicized on December 8, 1978 in the Information Fact Sheet on the proposed new school and were openly discussed at the Act 34 public hearing on December 22, 1978. The particular figures adopted are not in question.

The manner in which the project costs were adopted conforms to the procedure required by the Department. In new school construction, the Department requires the board to follow a Plancon manual. In complying with these procedures, the board submitted Plancon D which contained the project costs. It was submitted to the Department on January 31, 1979 and approved on February 1, 1979.

Board approval must occur prior to submission of the Plancon and this was done here. At the January 18, 1979 meeting, the superintendent of schools requested board approval of the submission of Plancon D to the Department. This included certification of project costs. The board resolved by a 5-2 vote to approve the submission of the data. This approval appears in Resolution 79-24 in the minutes of January 18, 1979. As earlier noted, the minutes were a joint exhibit and therefore the plaintiffs' case established that the project costs were adopted by the school board. Furthermore, the notice of the public meeting appeared December 1, 1978. By action of the board on December 20, 1978, a regular meeting, the notice as published containing project costs was ratified and approved. Thus the board approved the project costs effective December 1, 1979.<sup>1</sup>

#### ORDER OF COURT

NOW, June 6, 1979, the defendants' demurrer and motion for a compulsory nonsuit are granted and the costs shall be paid by the plaintiffs.

<sup>1</sup> This procedure was questioned for compliance with the regulations which require the project costs to be approved prior to the scheduling of the public meeting. However, failure to comply with the regulations in this respect is like the failure to issue the project description and mail it to the news media. The avenue of complaint is through the Department.

\*Editor's Note: not reported in this Journal.

WALTERS v. WALTERS, C.P. C.D. Fulton County Branch, No. 2 of 1979-C

*Child Custody - Best Interests and Welfare of Child the Sole Issue - Burden of Proof Shared Equally by Contending Parents - Meretricious Relationship of Parent Relevant*

1. The sole issue to be decided in a custody proceeding between contending parents is the best interests and welfare of the child.
2. The concern is for the child's physical, intellectual, moral and spiritual well-being.
3. The burden of proof is shared equally by the parents, since they each have an equal interest.
4. The standard of morals of a parent involved in a meretricious relationship and its subsequent effect on young children is a proper area for judicial concern.

*Newton C. Taylor, Esq., Attorney for Petitioner*

*Dennis A. Zeger, Esq., Attorney for Respondent*

#### OPINION AND ORDER

KELLER, J., June 20, 1979:

A petition to confirm custody was presented to the Court on January 2, 1979, and an order was signed on the same date directing that a Rule be issued upon the respondent to show cause why custody of Gregory Ross Walters and Melinda K. Walters should not be awarded to the petitioner, Patricia Kay Walters. A hearing was set for January 23, 1979. Counsel for the respondent accepted service of a true copy of the petition, order and rule on January 2, 1979. An answer to the petition was filed January 9, 1979. Hearing on the matter was commenced on January 23, 1979, and a continued hearing held on Monday, February 19, 1979. All evidence was received except the testimony of Dr. J. O. Strite, Psychiatrist, and by agreement of counsel that was received in Courtroom No. 1, Franklin County Courthouse, Chambersburg, Pa. on March 6, 1979.

This matter is now ripe for disposition. We enter the following Findings of Fact:

#### FINDINGS OF FACT

1. The petitioner is Patricia Kay Walters (mother), who

was born November 4, 1950, and resides in a rented trailer on Reservoir Road, Todd Township, Fulton County, Pennsylvania. She has been employed as an occupational health nurse for JLG Industries since January 1977.

2. The respondent is Ross H. Walters (father), age 36, who resides at the parties' home on Clear Ridge, Dublin Township, Fulton County, Pennsylvania. He is employed as a construction worker by E. F. Goetz Company.

3. Father and mother were married February 14, 1970.

4. Two children were born to the marriage. Gregory Ross Walters (Greg) was born September 3, 1970, and Melinda K. Walters (Melinda) was born July 29, 1971.

5. Mother took the children and moved from the home owned by the parties on Tuesday, October 17, 1978, to the trailer she had rented on Reservoir Road. Mother took with her in addition to all of her clothing and clothing of the children, the best of their linens, twelve place settings of dinnerware, a full set of silver, all the interior wall decorating plaques, 90% of the small electric appliances, the washer and dryer, dishwasher, stereo set and the black and white television set. She also reclaimed the color television set from a repair shop and paid the repair bill from the joint checking account of the parties.

6. Mother testified that she left the home because the parties weren't getting along, and she felt there was no marriage left.

7. Mother told father she was going to leave or have a nervous breakdown, but she did not tell him when she was leaving or where she was going. She did not tell the children they were leaving their home and their father until she picked them up from school on October 17, 1978.

8. On October 19, 1978, father received a registered letter advising that mother and children had moved to the McConnellsburg area.

9. On Saturday, October 21, 1978, father commenced a search of the McConnellsburg area for his family and found mother's trailer that evening. He knocked, heard movement inside, but received no response, knocked again and received no response. When he called for the children, mother opened the door and after some discussion agreed he could have the children until Sunday evening. Father observed from the doorway men's shoes, hunting coat and men's work clothing in

the trailer; and he heard sounds inside the trailer made by someone other than the children.

10. Mother testified she permitted the children to go with father because she was afraid of him.

11. Father returned the children to mother's trailer on Monday evening, October 23, 1978, instead of Sunday as promised. Monday was a school holiday.

12. Father had both children from Friday evening until Sunday evening the following weekend, and there were no problems.

13. Commencing November 4, 1978, by agreement of the parties, the father had Greg each weekend and Melinda every other weekend.

14. The mother agreed that father should have the children during Christmas vacation from December 16, 1978 until Sunday evening, December 24, 1978. When the children were not returned to her, she drove to the parties' home at Clear Ridge and finding no one home there proceeded to the home of her parents at Houstontown, Pa., where she found the children, father and her own parents.

15. The children had just opened their Christmas presents when mother entered in a highly emotional state; screaming and crying. At the direction of the maternal grandfather, the grandmother took the children out of the room and he then instructed mother to stop screaming or leave. When she did neither, he and father took her by the arms and escorted her out of the house and into the carport area where father attempted to talk to her.

16. When mother quieted down, her father invited her to come back into the house, but she would not do so. She told father that she did not love him and would not reconcile with him for the sake of the children. Father escorted her to her car and found Tim McQuade was driving.

17. On the evening of December 26, 1978, the mother, her friend, Darlene Ray, Mrs. Ray's husband, and "Butch" McQuade drove to the home of the parties at Clear Ridge. The men waited in the car while mother and Mrs. Ray entered the home about 8:30 P.M. Father, the children, and the maternal grandparents were present. Mother demanded she be allowed to take the children with her.

18. For the next one and a half hours there was a discussion between the parties and the maternal grandparents with the children being asked questions about "Butch" McQuade, whether they liked him and whether he was nice to them.

19. Among other things the maternal grandparents and the father asked questions that suggested mother was having improper relationship with "Butch" McQuade. They did not call mother a whore, but father did tell her that he could find a woman like her on any street corner.

20. After mother signed an agreement to return the children to the father the following evening, he permitted her to take them with her to her trailer so they could receive their Christmas presents.

21. Mother did not return the children to father on December 27th. Her attorney prepared a formal agreement providing for custody, support, and property transfers. The mother advised father that he would have no further visits until the agreement prepared by her counsel was executed.

22. At the conclusion of the first hearing on January 23, 1979, the Court entered a temporary order granting visitation with both children to father on alternating weekends and that visitation schedule has been continued.

23. Father received a request for support of the children from mother or her attorney on January 2, 1979. He apparently made a counter offer, which was not accepted. Father has paid no support for the children. Mother has not commenced an action for non-support on behalf of the children.

24. The mobile home occupied by mother and the two children has two bedrooms, a kitchen, dining area, livingroom and bath. It is adequately furnished, clean and in satisfactory condition. It is an adequate home for the children.

25. When mother and the children moved into the trailer on October 17th, the windows were not tightly closed and the trailer was uncomfortably cold so they slept at "Butch" McQuade's home for 10 to 14 days. Mother and "Butch" McQuade winterized the trailer by putting plastic over the windows in the week between Christmas and New Year's.

26. Mother is employed from 8:00 A.M. until 4:45 P.M. five days per week.

27. She takes the children to school immediately before 8:00 A.M. After school the children walk one block to the home of a Judy Aller. Prior to mother securing the present sitter either "Butch" McQuade or his son, Tim, would pick up the children at school and either take them to "Butch" McQuade's home or to the mother's trailer, where they watched the children until mother came home from work.

28. Prior to the separation the children regularly attended church. From October 17, 1978 until January 23, 1979, they only attended church once, while with mother, and each weekend while with father.

29. The children have few friends their own age living near mother's trailer, and Greg particularly is without male friends.

30. There is a yard around mother's mobile home, but no swing sets or other recreational toys. The Lions' Park playground is within one quarter mile of the trailer, but mother has not permitted them to go there since they moved because she felt it was too cold.

31. Since October 17, 1978, mother has not taken the children to visit their paternal grandparents, and only once has taken Melinda to visit her maternal grandparents, which was over the Thanksgiving holiday.

32. The home of the parties at Clear Ridge is a two-story wood construction home with three bedrooms and bath on the second floor; livingroom, play room and large kitchen on the first floor, where the parties and the children lived since 1974 until the separation. Each of the children had their own bedroom. The home had a large yard with a swing set, a ballfield is located across the road, and there is an area for bicycle riding.

33. In the vicinity of the home of the parties both sets of grandparents, both sets of great-grandparents, aunts, uncles and cousins on the mother's side reside.

34. Prior to the separation, and when father has visitation privileges, the children play with their cousins and also with other children in the neighborhood of comparable ages.

35. Prior to the separation the maternal grandmother frequently babysat for the children, and when both father and mother were working the children would get off the school bus at the home of the maternal grandparents and wait for them.

36. The maternal grandfather, age 52, and maternal grandmother, age 48, have had and continue to have a very close and loving relationship with both of the children.

37. During father's visitation weekends Melinda sleeps at the maternal grandparents on Saturday night, by her choice. Father and both children eat their Sunday dinner with the grandparents at their home.

38. During weekend visitations father takes the children out to eat on Friday evening and cooks all other meals except Sunday dinner. He permits them to play with their own friends in the daytime. He supervises their bathing, gets them clothing and haircuts when they need them, plays with them, takes them to the movies and tucks them into bed with hugs and kisses.

39. During the construction season father works four, five and occasionally the sixth day each week. He gets up at approximately 5:00 A.M. and leaves the house between 5:30 A.M. and 5:45 A.M. to be at work at 7:00 A.M. His work day usually ends at 5:30 P.M., and he arrives home not later than 6:45 P.M. On rare occasions his work prevents him from getting home until 8:00 P.M. Customarily he goes to bed between 9:30 P.M. and 10:00 P.M.

40. If father is awarded custody of either or both children, he has arranged with the maternal grandmother to come to the home before 5:30 A.M. and:

(a) During the school year care for the children and see that they leave for school. After school, they would wait at the grandparents' home for father to pick them up and take them home.

(b) During vacation times care for and supervise the children either at their home or her house until father comes home.

41. Grandmother, Mrs. Foreman, testified that she has no physical problems, has agreed to the child care plan stated by father, and would accept responsibility for the children's care when father was not home.

42. The maternal grandparents' home is approximately three miles from the home of the parties. Their home has in addition to three bedrooms, a livingroom, diningroom, bath and kitchen, a full basement, toy room and large backyard. Cousins and other peer friends of the children live in the neighborhood.

43. Greg, 8 years 5 months, 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) He lives with his mother and sister in a trailer, but his dog, Sleepy, lives at "Butch" McQuades.

(b) He likes living in the trailer and mother takes good care of him, but isn't always good to him.

(c) He sees his father every other weekend from 6:00 P.M. Friday until 8:00 P.M. Sunday, and enjoys being with his father and playing with him and playing and sledding with his friends, Russell and Randall.

(d) Before January, he, his sister and mother slept "a lot" of nights at "Butch" McQuades. He slept on an uncomfortable cot or lawn chair in the livingroom. Melinda shared a couch in the same room with Tammy McQuade. "Butch" slept in a bed with mother most of the time.

(e) Once he went to find his mother and found the door to the bedroom used by her and "Butch" locked. He didn't like that — it made him feel bad and mad.

(f) Since January, he, his sister and mother go to "Butch" McQuades almost every other night. Mother cooks supper and washes clothing. They eat supper and then the children play or watch television until 9:00 P.M. or 10:00 P.M. Frequently mother and "Butch" lay together on the couch and go to sleep. Between 9:00 P.M. and 10:00 P.M. mother takes the children back to the trailer, the children bathe, mother tucks them in bed with hugs and kisses, and they are in bed within 15 minutes of the time they get home.

(g) No boys live near the trailer to play with. He plays with an older (10 year old) girl.

(h) Mother spends most of her time on weekends with "Butch" McQuade.

(i) Neither parent reads to the children.

(j) He is in third grade and gets B's and C's, likes his teacher but doesn't like school.

(k) When the children are with father on Sundays, they always attend church. Since the December 26th incident, mother also takes them to church.

(l) After the December 26th incident, mother took the children back to "Butch" McQuade's home where they received their Christmas gifts from mother and "Butch". Mother did not have a Christmas tree at the trailer.

(m) "Butch" doesn't punish, but he isn't always good to Greg and sometimes is mean.

(n) He would prefer to live with his father because of his friends and relatives who live nearby.

(o) He would like weekend visits with mother.

44. Melinda, 7 years 9 months, 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 is in second grade, gets A's and B's, and likes school and her teacher.

(b) She lives in a trailer with her mother and brother, but their dog "Snoopy" stays at "Butch" McQuade's.

(c) She has various chores to perform at the trailer and at their father's house. Both parents scold her when she doesn't do her chores such as picking up her toys.

(d) She, her brother and mother stayed overnight at "Butch" McQuade's when it was cold but not since they have been in court. She, Greg and Tammy McQuade slept on couches or cots in the livingroom. She did not know where her mother slept.

(e) They eat the supper mother prepares at "Butch" McQuade's "lots of times". After supper she sits on the couch and talks to her mother or watches television, while Greg plays on the floor.

(f) She has no friends at Butch's or at the trailer, but she plays with Greg while mother cleans on the weekends they stay with mother.

(g) Neither mother or father play with her; but when she visits father she plays with friends and her cousins, visits her grandparents, and father takes them to the movies.

(h) Neither parent reads to her but both show affection by hugs, kisses and tucking her into bed.

(i) Mother has recently commenced taking her to church.

(j) She has not belonged to the Brownies since the separation, and neither mother nor Mrs. Ray has talked to her about joining the Brownie group in McConnellsburg.

(k) She liked to take piano lessons and play the piano, but hasn't taken any lessons or played since the separation because there is no piano in the trailer.

(l) She rode a lawnmower at "Butch" MCQuades while Chris McQuade, age 8, drove it. Neither mother nor "Butch" were watching.

(m) She does not like her after school sitter because the sitter is mean and growls at her when she isn't doing anything wrong.

(n) Mother never takes her to see her cousins and only once at Thanksgiving took her to see her grandparents.

(o) She has seen mother and "Butch" hug and kiss. She doesn't think they should do that and doesn't like it.

(p) She loves both her parents.

(q) She would prefer to live with mother, but cannot say why; nor can she say why she doesn't want to live with father.

(r) She would like to have weekend visits with father.

45. At the McQuade home the maternal grandfather observed Melinda riding on the rear of a power mower driven by Chris McQuade. Contrary to mother's testimony the children were mowing grass. Mother and "Butch" were inside the house.

46. Mother testified that Chris McQuade was 9 years old, that she knew Melinda was riding on the riding mower operated by Chris, and that Chris is an experienced mower operator.

47. To permit a 7 year old child to ride on a sit down mower operated by an 8 or 9 years old child is extremely hazardous and evidences either a lack of responsibility or an appropriate recognition of danger by mother.

48. The maternal grandparents have remonstrated with mother concerning her relationship with "Butch" McQuade, urged her to give it up, and urged her to recognize her responsibility to set an example for her own children and the McQuade children.

### BAR NEWS ITEM

The Franklin County Bar Association at a special meeting held on Friday, August 31, 1979 unanimously adopted a resolution to endorse Judge John W. Keller for retention as a judge of the Court of Common Pleas, 39th Judicial District of Pennsylvania, Franklin and Fulton Counties. Judge Keller, pursuant to the judicial retention provisions of the Pennsylvania Constitution, is seeking retention by the electorate of Franklin and Fulton Counties in November to another ten-year term, having completed an elective ten-year term as judge. The judicial retention provisions of the Pennsylvania Constitution permit judges who have served a full elective term to present themselves to the voters for approval or rejection, based strictly on their judicial records and not partisan considerations.

Judge Keller, a native of Waynesboro, Pennsylvania, has had continuous service as Judge in Franklin County since December, 1968 and in Fulton County since January, 1972.

The President of the Association announced the formation of a committee of members of the Franklin County Bar, for the retention of Judge Keller. They are: J. Glenn Benedict, Esq., Chairman; Jay H. Gingrich, Esq., Acting Chairman; Thomas M. Painter, Esq.; Rudolf M. Wertime, Esq.; Thomas B. Steiger, Esq.; David W. Rahauser, Esq.; Leroy S. Maxwell, Jr., Esq.; Charles H. Davison, Esq., Secretary-Treasurer; Thomas H. Humelsine, Esq.; J. Stewart Glen, Jr., Esq.; Donald L. Kornfield, Esq., and William F. Kaminski, Esq.

The President also indicated that members of this committee would be made available to the public as speakers upon the subject of the retention election system for judges in Pennsylvania, its purposes and how it works.

49. The maternal grandfather expressed the opinion that the best interests of the children requires that their custody be placed with the father because they would have a moral home, better living conditions and a better babysitter, who they would like.

50. The maternal grandmother expressed the opinion that the best interest and welfare of the children requires that their custody be placed with the father because they are now living in an immoral and improper situation, have sitters they don't know, are moved from one place to another, sleeping at different places, and they need to have a home where they will know where they are. She also favored placement with father because he is a faithful father, loving and "does" for his children.

51. When mother left father, she moved the washer and dryer she had taken from the family home into "Butch" McQuade's home because she did not have a place for the appliances in her trailer. She does the family wash at McQuades two or three times a week and on Sundays. Prior to the first hearing on January 23, 1979, she and her children ate most of their evening meals there, but since then they eat there only occasionally and not every time she washes.

52. At the March 6, 1979 hearing, mother testified that on February 28, 1979 she and the children moved into a larger, newer and more adequate trailer located in the Borough of McConnellsburg. The new trailer was rented with a washer and is equipped to accommodate installation of a dryer. As of March 6th the dryer had not been moved from McQuade's to the new house. Presumably, mother still does her clothes drying there.

53. At the time of the separation, mother caused the family color television set to be moved from a repair shop and installed at "Butch" McQuade's home because "Butch" didn't have a color television set. Mr. McQuade's wife had taken their family set when they separated. The black and white television set was installed in the trailer.

54. Mother hung some of the interior decorating plaques taken from the family home in her trailer, and used the others to redecorate "Butch" McQuade's home.

55. Mother testified that "Butch" has kissed her in the presence of the children and she felt this was proper since she is separated from father.

56. Mother's testimony that she never shared a bed or slept with Mr. McQuade is refuted by the testimony of Tammy Lea McQuade, age 12, who observed mother in her father's bed when he unlocked the bedroom door at her knock, and by the testimony of Greg as to where his mother slept.

57. The displays of affection, the laying together on the couch, and the sharing of a common bedroom by mother and Mr. McQuade occurred in the presence of the children who are the subject of this custody action and the McQuade children.

58. In the custody action of *Nancy L. McQuade v. Harry B. McQuade* (Butch), 267, 1978-C, this Court entered an Order on February 6, 1979 on the stipulation of the parties which inter alia awarded primary custody of Tammy Lea McQuade, Cammy Lea McQuade and Chris Allen McQuade to Nancy L. McQuade in her home; and granted the father visitation rights with the three children on alternating weekends, certain hours on Christmas Day and two weeks each summer.

59. Both Mrs. Walters and Mr. McQuade remain married to their respective spouses.

60. The inception of the relationship between mother and McQuade antedates the separation of the petitioner and respondent by an unknown time.

61. The relationship between the two married individuals is clearly improper.

62. Mother's interest in Mr. McQuade and her ongoing relationship with him has deprived the children of her time, her interest and her concern during non-working hours as well as depriving them of customary contacts with their relatives on both sides of the family and their friends.

63. No probative evidence of the stability of the Walters-McQuade relationship was presented.

64. Dr. J. O. Strite, a psychiatrist with the Cumberland Valley Mental Health Center, met with the children and mother for a total of one hour on January 22, 1979, and had the benefit of a staff member's record of an interview conducted on January 19, 1979. The doctor found no abnormalities in the children. He found them likeable, normal, well-behaved and responsive to adults. He found no major serious kinds of problems or damage evidenced by the children arising out of the marital strife. He observed and reported a close, warm relationship between mother and children and no evidence that the

children rejected their mother.

65. Dr. Strite was not requested to meet with the father and the children, and expressed no opinion as to his relationship with the children.

66. To the extent that the Court had an opportunity to observe the children, its opinion concerning the children coincides with that of Dr. Strite.

67. The home of the father is an adequate, proper and appropriate home in all respects for the children.

68. The father's plan for the maintenance, care and supervision of the children by the maternal grandparents either in his home or their home, when he is away from home, is reasonable, realistic and appropriate. It will provide stability for the children with consistent loving care, supervision and discipline in familiar settings.

69. The father is in all respects a proper person to have custody of his children.

70. The present home of the mother is adequate, proper and appropriate.

71. Due to the mother's ongoing relationship with Mr. McQuade, and the time and effort she dedicates to the pursuit of it, the best interests and welfare of the children have been of secondary importance and they will be adversely affected.

72. The mother is at this time unfit to have primary custody of the children.

#### CONCLUSIONS OF LAW

1. The best interests and welfare of the children requires primary custody of Gregory Ross Walters and Melinda K. Walters be awarded to Ross H. Walters, father, to be exercised at his home, Clear Ridge, Dublin Township, Fulton County, Pennsylvania.

2. Substantial visitation privileges should be awarded Patricia Kay Walters, mother, to be exercised at her home, but not in the company of any male not related to the mother by blood or marriage.

## DISCUSSION

By the petition presented in this proceeding Patricia Kay Walters, (hereinafter, "mother"), asks the Court to confirm custody in her of Gregory Ross Walters who was born September 3, 1970, and Melinda K. Walters who was born July 29, 1971. The respondent, Ross Walters, (hereinafter, "father"), answered this petition and asks that the Court place the children in his custody.

This custody proceeding, therefore, is a dispute between the parents of the two children in question. The Court in *Commonwealth ex rel. Spriggs v. Carson*, 470 Pa. 290, 294, 368 A. 2d 635, 637 (1977) held:

"It is now beyond dispute that the sole issue to be decided in a custody proceeding between contending parents is the best interests and welfare of the child."

This standard is defined by a controlling statute, and cited by the Court in *In Re Custody of Hernandez*, 249 Pa. Super. 274 280, 376 A. 2d 651 (1977):

"the court is to 'remand such child [either to the father or the mother]..., regard first being had to the fitness of such parent and the best interest and permanent welfare of said child.' Act of June 26, 1895, P.L. 316, Sect. 2, 48 P.S. Sect. 92."

See, *Commonwealth ex rel. Parikh v. Parikh*, 449 Pa. 105, 296 A. 2d 625 (1972); *Augustine v. Augustine*, 228 Pa. Super. 312, 324 A. 2d 477 (1974); *Williams v. Williams*, 223 Pa. Super. 29, 296 A.2d 879 (1972).

The concern in such cases as the instant one is entirely with the children's physical, intellectual, moral and spiritual well-being. *Commonwealth ex rel. Holschuh v. Holland-Moritz*, 448 Pa. 437, 292 A. 2d 380 (1972). The burden of proof is shared equally by the parents, since they shared equally in creating the child and are regarded as having an equal interest in the child's welfare. *Hernandez*, 249 Pa. Super. at 281, 376 A. 2d at 651-652. The Court awards custody according to what the preponderance of the evidence shows. *Id.*

In the present case, both parents are capable of providing adequate homes for the children. Father lives in a two-story frame dwelling with six rooms and a bath in the vicinity of both sets of grandparents, great-grandparents, as well as aunts, uncles and cousins on the mother's side. Care of the children while father works would be assumed by the maternal grandparents at

father's home or at grandparents' home, as suitable to the children's schedules. Grandparents' home is already equipped with a playroom, toys, and a large backyard. Cousins and other peer-group friends of the children reside in the neighborhood.

Mother's home is a rented trailer with two bedrooms, kitchen, dining area, livingroom and bath. It is adequately furnished and clean. There is a yard around the trailer and a playground within one-quarter mile of the trailer, but there are few children of the same age as Greg and Melinda living nearby.

In this dispute, therefore, the primary issue is the fitness of the respective parents and their ability to provide for the children's intellectual, moral, and spiritual well-being. Central to this determination is the relationship of mother to "Butch" McQuade and, most significantly, the effect of this relationship upon the welfare of the children.

The Pennsylvania Supreme Court has said:

"...the mere fact of a parent's nonmarital relationship is insufficient to deny him or her custody of the children. Nevertheless, a parent's nonmarital relationships must be given close scrutiny in determining custody matters. The prevailing issues must remain the best interests of the child, and a nonmarital relationship is merely one of the circumstances which the court must consider before reaching its decision." *Commonwealth ex rel. Myers v. Myers*, 468 Pa. 134, 138, 360 A. 2d 587, 589 (1976).

This does not mean that such nonmarital relationships are a minor consideration in the determination of the best interests and welfare of the children. The Pennsylvania Supreme Court in *Snellgrose Adoption Case*, 432 Pa. 158, 247 A. 2d 596 (1968) states:

"It is true that past moral lapses are not sufficient to deprive a mother of the custody of her child (citation omitted) but, when such conduct is persistent and flagrant, it is impossible to disregard it in considering what is best for the child. *Commonwealth ex rel. Tavoletti v. Tavoletti*, 203 Pa. Super. 4, 198 A. 2d 427 (1964); *Commonwealth ex rel. Burke v. Burke*, 169 Pa. Super. 537, 83 A. 2d 426 (1951)."

The "prime consideration" must always be the best interests of the children, which the court must decide by considering all the facts, including what effect the nonmarital relationship has on the child. *Gunter v. Gunter*, 240 Pa. Super. 382, 361 A. 2d 307 (1976). The Pennsylvania courts are most



inclined to award custody to a parent despite her involvement in a nonmarital affair when the relationship is not a trifling relationship, but one which has ripened into marriage, *Commonwealth ex rel. Gervasio v. Gervasio*, 188 Pa. Super. 95, 145 A. 2d 732 (1958), or one which has proved to be a durable de facto relationship under which the children will enjoy a reasonably normal and satisfactory family life. *Commonwealth ex rel. Staunton v. Austin*, 209 Pa. Super. 187, 223 A. 2d 892 (1966).

In *Staunton*, supra, the relationship had endured for thirteen years prior to the hearing, five children had been born of the union, and the parties expressed the intention to marry as soon as Mrs. Staunton's husband divorced her. The *Staunton* situation is not, therefore, analogous to the situation of Patricia Walters and "Butch" McQuade.

The relationship between mother and "Butch" McQuade is clearly improper; it is a flagrantly immoral relationship between two married individuals. It is in violation of their marriage vows, and is not within the traditional mores of the community. In *Commonwealth ex rel. Davis v. Davis*, 97 Pa. Super. 442 (1929), the court expressed concern that the standard of morals of a parent involved in a meretricious relationship, where the value in which she holds the marital relations and the marriage oath is not high, would be passed on to impressionable young children and, resultingly, be to their ultimate detriment.

In a more recent case, *Snellgrose Adoption Case*, supra, the child observed her mother sitting on the lap of a married man, hugging and kissing him. The youngster realized the impropriety of this behavior. Custody of the child was not given to the mother. The court states:

"Such conduct would have a profound and adverse effect upon her [the child's] concept of moral values and might even instill in her contempt for her mother if she were required to live in the midst of such an atmosphere." 432 Pa. 164, 247 A. 2d at 600.

Pennsylvania's lower courts are in accord with the appeals courts, awarding custody of children to fathers where the mother has cohabited with other married men after separation. These courts indicated that they were concerned about the detrimental effect these relationships would have on the children. See, *Commonwealth ex rel. Barb v. Barb*, 92 Dauph. 221 (1970); *Commonwealth ex rel. Bower v. Bower*, 70 Schuylkill 163 (1972).

Mother's relationship with "Butch" McQuade, alone, is not sufficient to deny her custody. It is only one circumstance to be considered by the Court. This relationship has, however, impacted adversely upon the children. Pursuit of her relationship with Mr. McQuade has deprived the children of her time, her interest and her concern during non-working hours. It has deprived them of the stability of the family unit, as well as the customary contacts with their relatives in the extended family and their friends. At present, the psychiatrist who met with the children found them to be likable and responsive to adults, and concluded that there is a warm relationship between the children and their mother. Melinda, however, stated to the Court that she has seen mother and "Butch" hug and kiss and that she thinks they shouldn't do that and that she doesn't like it. Greg expressed anger and hurt upon finding the door to the bedroom shared by mother and "Butch" locked. Both children were present when mother and "Butch" lay together on his couch in the evenings, and mother admits to kissing "Butch" in the presence of children.

Mother sees nothing wrong with these displays of affection in the presence of her children despite the fact that "Butch" is a married man, and she is still married to the children's father. This would indicate that mother does not hold in high regard the value of marital relations or the marriage vows. It also indicates that she is unconcerned about the moral values she communicates to her children. Such an attitude makes her unfit unfit at this time to guide and direct her children.

Mother moved out of the marital domicile in October of 1978. At the time of the hearing on January 23, 1978, the children had lived under these conditions, under the influence of this relationship for a very short period of time. Although the children love both their parents and seem normal and well-adjusted, they have both expressed resentment and disapproval of mother's liaison with "Butch." The Court is concerned that this feeling will ripen into a negative attitude toward their mother, and a distortion of or confusion over traditional moral standards which place high value upon the marriage vows and family life.

After considering all the facts and circumstances of the present case, we conclude that father can best supply the stable and wholesome environment most conducive to the healthy development of the children. The best interests and welfare of Gregory and Melinda Walters require us to award custody to their father, Ross H. Walters.

ORDER

NOW, this 20th day of June, 1979, primary custody of Gregory Ross Walters, d/o/b September 3, 1970, and Melinda K. Walters, d/o/b July 29, 1971, is awarded to Ross H. Walters, father, effective 6:30 P.M. on June 22, 1979.

Visitation rights are granted to Patricia Kay Walters, mother, with both of her said children from 6:30 P.M. on Friday, June 29, 1979, until 6:30 P.M. on Sunday, July 1, 1979, and on alternating weekends thereafter.

Mother shall have visitation rights with the children from 8:00 A.M. until 7:00 P.M. on Labor Day, New Year's Day, and Memorial Day in odd-numbered years and from 8:00 A.M. until 7:00 P.M. on 4th of July, Thanksgiving and Easter in even-numbered years.

Mother shall have visitation rights with the children from 6:30 P.M. on December 20th until 1:00 P.M. on December 25th in odd-numbered years and from 1:00 P.M. on December 25th until 6:30 P.M. on December 29th in even-numbered years.

Mother shall have four consecutive weeks visitation each summer commencing with the summer of 1980. Mother shall give father three weeks notice of the dates when she will exercise her summer visitation.

Transportation to and from the home of father or the maternal grandparents, at the option of the father, shall be provided by mother.

The father shall not exercise his custodial rights or mother her visitation rights in the presence of any adult female or male respectively, who is not related by blood or marriage.

Costs to be paid by petitioner.

IN RE: MOORE, C.P. Franklin County Branch, O.C.D. No. 84 of 1979

*Orphan's Court - Guardian of Person - 20 Pa. C. S. A. Sect. 5513 - Refusal of Medical Treatment*

1. A competent adult has the absolute right to refuse medical recommendations which may prolong life.

2. Where a person is incompetent when confronted with the question of medical treatment, the court may appoint a temporary guardian to provide substitute consent for medical care and under the Act of 1972, June 30, P.L. 508, 20 Pa. C. S. A. Sect. 5513.

*Howard Ulan, Assistant Attorney General, Attorney for Petitioner*

*Edwin R. Frownfelter, Esq., Attorney for Respondent*

OPINION

EPPINGER, P.J., August 24, 1979:

On May 4, 1979, after a hearing, Florence Moore was adjudicated an incompetent and the Court appointed a guardian for her to provide substitute consent for medical and surgical care necessary to protect her life. She has been a resident at the South Mountain Restoration Center since 1969. We appointed such a guardian ad litem for Mrs. Moore and after our decree, an appeal was filed. This opinion is submitted in support of our adjudication of incompetency.

The petition was brought under the Act of 1972, June 30, P.L. 508, 20 Pa. C.S.A. Sect 5513, which gives authority to a court to appoint a temporary guardian for a person where it appears that the failure to make such appointment will result in irreparable harm to the person of the alleged incompetent. Mrs. Moore appeared at the hearing after a citation was served upon her and testified on her own behalf.

The evidence introduced by the petitioner, Howard Ulan, Assistant Attorney General, was that of Dr. Joseph O. Strite, psychiatrist and medical director of the Cumberland Valley Mental Health Clinic, and Dr. Harold Clossen, Staff Physician at the Restoration Center, the latter by an affidavit.

Dr. Clossen's affidavit describes the situation which occasioned the petition and hearing as a "chronic and progressive problem with a stasis ulceration of the left leg," a condition existing since 1970. Since the inception of the problem, Mrs. Moore has refused appropriate medical treatment and, according to Dr. Clossen, has insisted on using "patently inappropriate and unsanitary" self treatment measures. The disease has developed to a point where the muscles and tendons of her leg are exposed and there is constant drainage from the area. With the destruction of the leg tissue continuing, a further delay in appropriate medical treatment is likely to result in a life threatening situation. The onset of gangrene is imminent, with a