

The same is not true where the statement is made to a fellow prisoner. The *Davenport* rule does not cover such statements. Moreover the alleged statements to Randy Pennabaker were made after Harmon was arraigned. These were not suppressed.

Though there was nothing in the complaint filed by the police specifically mentioning it, the District Attorney prepared an information in which he was charged with two counts of conspiracy. These were filed October 25, 1978, when Harmon was arraigned on the charges growing out of this incident and on which he had had a preliminary hearing. Counsel for Harmon contend that since he had no preliminary hearing on the conspiracy charges specifically, these counts must be quashed.

Pa.R.Crim.P. 225(b) lists the requirements of a valid, sufficient information, including one that the information contain "a plain and concise statement of the essential elements of the offense alleged in the complaint." Pa.R.Crim.P. 225(b)(5). We find that conspiracy is cognate to the offenses alleged in the complaint (criminal homicide, aggravated assault, theft and robbery) and therefore the application to quash informations was denied.

Harmon's attorneys argue that "cognate offense" means a "lesser included offense" and since conspiracy is not a lesser included offense of those contained in the complaint, these counts must be quashed. Webster's Third New International Dictionary defines cognate as "related, akin or similar, especially in having the same or common or similar nature, elements, qualities, or origin..." The Philadelphia Common Pleas Court used this definition in ruling that nine additional offenses were cognate with five offenses contained in the complaints. In *Commonwealth v. Schwartz*, 56 D&C 2d 147 (1972), when the defendant came before the Common Pleas Judge as a committing magistrate, after the testimony at the preliminary hearing was heard, the judge added nine offenses to the five charged. In reviewing this the court concluded that the nine additional charges "satisfied the standard of being 'cognate' with those for which [the defendant] was arrested, that is, they were related to, or had common elements or a common origin with the first set of charges, or sprang from the same alleged facts as portrayed by the testimony." 52 D&C 2d at 157. See also *Commonwealth v. Danner*, 79 Pa. Super 556 (1922) (Any crime arising out of the same transaction can be laid in the indictment... The offenses charged were of a cognate nature and were a part of the same affair).

The conspiracy counts arose out of the same transaction,

criminal act, episode or occurrence as the other charges and Harmon admits this. (See Paragraph 21, Omnibus Pretrial Motion). Therefore the conspiracy charges are cognate and the informations were properly filed by the District Attorney.

A *Campana* argument was raised by Harmon. In that case it was held that a prosecutor is required to bring, in a single proceeding, all known charges against the defendant arising from a "single criminal episode." *Commonwealth v. Campana*, 452 Pa. 233, 304 A.2d 432 (1973). However, *Campana* was a double jeopardy case dealing with the issue of successive prosecutions. Here all charges were brought against Harmon in one proceeding and *Campana* does not apply.

The evidence the court heard supported the conclusion of the District Justice of the Peace that there was a prima facie case and therefore the petition for a writ of habeas corpus is denied.

This opinion is filed in support of our order dated February 6, 1979.

ROCKWELL v. SPIELMAN, ET AL., C.P. Franklin County Branch. No. 65 Aug. Term, 1976

*Habeas Corpus - Child Custody - Contest between Parents inter se and with Third Parties - Best Interests of Child Rule - Prima Facie Right Rule as Against Third Parties - Present Fitness of Parent Rule - Burden of Proof*

1. The Court's concern in custody cases is with the child's physical, intellectual, moral and spiritual well-being.
2. The sole issue to be decided in a custody proceeding is the best interests and welfare of the child.
3. In a custody dispute between parents, the Court must consider the fitness of each parent in determining the best interest and permanent welfare of the child, and each parent has an equal burden of proof.
4. In a custody dispute between a parent and a third party, the parent is said to have a "primary right" to custody, although such right is not absolute.
5. The third party must present convincing reasons related to the child's best interests, and the burden of proof in this regard is a difficult one.
6. The Court will award custody on present conditions, the issue being the parent's present fitness, not the nature or extent of her past misconduct.

Robert E. Graham, Jr., Esq., Attorney for Petitioner

Thomas J. Finucane, Esq., Counsel for Respondent

### OPINION AND ORDER

KELLER, J., September 13, 1979:

This action was commenced on June 3, 1976 by the filing of a petition for writ of habeas corpus by petitioner, Sherry K. Spielman. The petition inter alia alleged that Gary L. Spielman was the respondent; that the parties were married on August 11, 1973, and Jason Spielman was born to the marriage on September 24, 1974; that the parties separated on or about July 1975; that the petitioner had placed the child with the respondent's parents in November 1975; that the respondent subsequent to placement of the child began to live with his parents and petitioner had been unable to regain custody of the child. The writ of habeas corpus was served upon the respondent on June 5, 1976. On June 17, 1976 an answer and counterclaim was filed by the respondent wherein he alleged that the petitioner was not a fit or proper person to have custody of the child, and that the best interest of the child required an order confirming custody of him in the respondent. On June 17, 1976 after a partial hearing this Court on stipulation of counsel awarded custody of the child to Mr. and Mrs. Harold Spielman, paternal grandparents, to be exercised jointly with the respondent and the petitioner was granted visitation rights as set forth therein. On June 7, 1977 the respondent and his parents petitioned this Court for modification of the visitation rights of the petitioner on the grounds that she was not taking proper care of the child, and was violating the condition of the order of June 17, 1977. An order was signed the same date granting a rule to show cause upon the petitioner why the order of June 17, 1976 should not be modified as specifically set forth therein. The rule with a true copy of the petition and order of June 7, 1977 was served upon petitioner on June 7, 1977. On June 30, 1977 the rule was made absolute on praecipe of counsel for the respondent-father and paternal grandparents.

On April 19, 1978 the petitioner petitioned this Court for a rule upon the respondents to show cause why they should not be held in contempt of court for failure to obey the order of June 7, 1977. An order was signed the same date granting the rule and making the same returnable April 25, 1978 at 3:00 P.M. The rule was served upon the respondents on April 19, 1978. On April 25, 1978 counsel for the petitioner discontinued the contempt proceeding and withdrew the rule to show

cause by praecipe to the Prothonotary. On September 13, 1978 a petition for a writ of habeas corpus was presented on behalf of the petitioner and an order signed the same date directing that a writ of habeas corpus issue to the respondents, Gary L. Spielman, Harold Spielman and Mildred K. Spielman, and setting October 19, 1978 at 9:30 o'clock A.M. as the date and time for hearing. Counsel for the petitioner withdrew the petition for writ of habeas corpus on September 29, 1978. On the same date petitioner presented a petition for modification of custody alleging inter alia the identity of the parties; that the petitioner and respondent, Gary L. Spielman, were divorced on May 8, 1978; that the petitioner and William R. Rockwell had married June 5, 1978; and that the best interest of Jason Spielman required that he be placed in petitioner's custody. An order was signed the same date granting the rule to show cause as prayed for and setting October 19, 1978 at 9:30 A.M. as the date and time for hearing. The rule together with a true and attested copy of the petition was served upon counsel for the respondents on September 29, 1978. An answer was filed October 19, 1978, inter alia denying that the best interest of the child required placement of the child in petitioner's custody.

Hearings were held on October 19 and 20, 1978, November 9, 1978, and February 26, 1979. Arguments of counsel were heard on March 6, 1979. The matter is now ripe for disposition.

### FINDINGS OF FACT

1. The petitioner is Sherry K. Spielman Rockwell (mother), who resides at 321 East Liberty Street, Chambersburg, Pa.
2. Mother married William R. Rockwell (stepfather) on June 5, 1978, and he resides with petitioner at 321 East Liberty Street, Chambersburg, Pa.
3. Respondents are:
  - (a) Gary L. Spielman (father).
  - (b) Harold Spielman (grandfather).
  - (c) Mildred K. Spielman (grandmother).

Grandmother and grandfather own and reside in their home, 57 Fifth Avenue, Fayetteville, Pa., and father maintains an address at 57 Fifth Avenue, Fayetteville, Pa.

4. Mother and father were married August 10, 1973, and divorced May 8, 1978.

### BAR NEWS ITEM

The Franklin County Register of Wills now has the new authorized forms for:

Petition for Letters of Administration  
Petition for Probate and Letters Testamentary  
Oaths of Subscribing Witnesses  
Bond and Surety for Personal Representative  
Certificate for Grant of Letters (Testamentary) (Intestacy)  
Renunciation

Attorneys may use present supply of forms until October 31, 1979. In such case the petition and other papers should contain decedent's social security number.

Please note that the new forms of petition contain an order of Appointment of the Fiduciary. In addition a separate certificate will be issued as well as "short" certificate as in the past.

All persons are requested to fill in all blanks before presentation.

GIDEON T. HARTMAN  
*Register and Recorder*

#### NOTICE:

As of November 1, 1979, the fee for recording all plot plans will be \$20.00. The increase reflects additional costs passed on to the Recorder's Office from the printers.

5. Mother and father are the parents of Jason Spielman (child), who was born September 27, 1974.

6. Mother and father separated in June or July 1975.

7. While mother and father were living together, they each apparently indulged in excessive drinking, use of illegal drugs and generally disregarded their marital responsibilities toward each other. Mother was not a good housekeeper. Father declined to assume any responsibilities with regard to the child.

8. At times mother lived with other men and exercised visitation rights with the child in the presence of other men, despite a "non-association" clause in the visitation order.

9. In November or December 1975, mother was living on Goetz Road and her electricity was turned off for non-payment. She asked grandmother to take care of the child and she agreed to do so.

10. At the 1976 partial custody hearing the mother of mother declined to recommend that custody of child be awarded to mother.

11. Mother conceded that while child was visiting her prior to the June 1977 petition for the modification of visitation, the child had suffered flea bites and had contracted ringworm from mother's pets that lived in the house. She could not remember whether child had also developed diaper rash because she used disposable rather than cloth diapers.

12. Mother commenced living with William R. Rockwell in August 1977. At that time mother and stepfather had the understanding that "each would do his own thing" and they would help each other with the bills. In November 1977, they began to discuss changing their lifestyles by cutting back on their drinking, bar hopping and running around; and they began to discuss the possibility of getting married.

13. Mother and stepfather were married June 5, 1978. It is the third marriage for mother and second marriage for stepfather.

14. Stepfather has been employed at Letterkenny Army Depot for more than five years.

15. Prior to March 1977, mother was employed at Hennessey Products, Inc., and from March 1977 to July 1978 at Stanley Company, when she was laid off due to a decrease in

plant production. She was recalled to her place of employment on November 21, 1978, and works a full forty hour week. Her regular hours are from 7:00 A.M. until 3:30 P.M. with one-half hour off for lunch on weekdays. She also has had the opportunity to work some overtime from 5:00 A.M. until 9:00 A.M. on some Saturdays, but the availability of continued overtime is in doubt.

16. Father made a demand on mother for support on or about April 17, 1977. To ensure regular visitation rights mother entered into a stipulation for the payment of \$13.00 plus \$.20 service charge commencing June 9, 1978. The support payments are received by grandmother and grandfather.

17. Since mother and stepfather have married, they have completely changed their lifestyles in that they primarily stay home and watch television. When they go out they go out together. They have stopped drinking and mother has totally discontinued the use of illegal drugs. Mother has learned to control her temper and has become a good housekeeper.

18. Mother and stepfather purchased and moved into their home at 321 East Liberty Street, Chambersburg, Pa. in October 1978. It is a newly remodeled home with three bedrooms, bath, kitchen, diningroom, livingroom, attic, cellar and fenced-in backyard. One bedroom has been set aside and furnished for the child.

19. Stepfather is the oldest of seven children in his family. He has been exposed to children of all ages, including that of child, throughout his life. He has demonstrated his ability to care for children of child's age. He and child have an affinity for each other and stepfather enjoys playing and doing other things with child when mother has visitation weekends with him.

20. Mother has at all times since she lost custody of child expressed an interest in him; has attempted to visit with him with only few exceptions; and desires to have custody returned to her.

21. At the time of the first hearing father resided at Box 67, R.D.#1, Fayetteville, Pennsylvania approximately four and one-half to five miles from the home of his parents, 57 Fifth Avenue, Fayetteville, Pennsylvania. Father was then employed since August 1978 at L. L. Dymond & Son as a mechanic and laborer.

22. In November or December 1975 when mother requested grandmother to take care of child father was living at

his parent's home. Father and child shared the same bedroom until July 1977. At that time the grandparents were remodeling their home. Father initially moved out temporarily during the remodeling process, and rented a four-room apartment or home. With the agreement of his parents father decided to continue living away from the parent's home so child would have more privacy.

23. Both mother and grandmother observed that child would not walk or situp. After grandmother received custody of child she began encouraging him to situp and after several weeks he did so, but still did not progress satisfactorily. Grandmother, occasionally accompanied by mother, took child to be examined by a series of doctors. In July 1976 the child's condition was diagnosed as cerebral palsy resulting either from an injury during mother's pregnancy or at the time of delivery. Active treatment for the condition commenced in February 1977 after various referrals had been completed.

24. Grandmother takes child to the office of the Easter Seal Society for Crippled Children and Adults of Franklin County, Inc. (Easter Seal) each Wednesday for one-half hour of physical therapy. The physical therapist instructed grandmother on home therapy procedures to be followed, and she gives child treatments for the hamstring muscles and heel cords. Depending upon the cooperativeness of child, the home therapy requires twenty-five minutes for each leg for the hamstring muscles and twenty minutes for each leg for the heel cords.

25. After grandmother's first visit at Easter Seal on February 2, 1977, she discussed the home therapy exercises with mother on February 5th; demonstrated the exercises and showed her the paper which she had received from Easter Seal. Approximately August 1978, mother inquired of grandmother whether she could go along to observe the therapy treatments given at Easter Seal. Grandmother discouraged the effort by stating that she would have to secure approval from Easter Seal. Mother did not press the point.

26. Child has shown improvement since therapy began, but in July 1978 hit a plateau of improvement.

27. Child's cerebral palsy causes a tightness of the muscles creating a balance problem. He falls very easily and needs either a railing or a hand for balance when going up and down steps or traveling a grade. He also needs help balancing on the commode.

28. Grandmother administered the home therapy treat-

ments to child before mother picked him up on her day visitations.

29. After father moved from the home of his parents and prior to the first hearing, he visited the home of his parents and was with his child an average of three hours per day and approximately twenty hours per week. Father and child watch television together, play games and romp.

30. Grandmother is 50 years of age, appears to be in good health, has four grown children, and provides the primary care and supervision for child. In addition to caring for child and the home, she takes care of handling grandfather's books and takes business calls for him.

31. Grandfather is 54 years old and appears to be enjoying good health. He is engaged in commercial refrigeration and air-conditioning and operates his business from his home.

32. Neighborhood children of an age comparable to child's and grandchildren of the grandparents regularly visit in the home of the grandparents, and play with the child.

33. At the November 9, 1978 hearing, father testified that subsequent to the first hearings in the matter he had given up his former home and returned to reside in the home of his parents at 57 Fifth Avenue, Fayetteville, Pennsylvania. Father uses and sleeps in the room which also serves as an office for grandfather's business. It is approximately eight feet by ten feet, and is furnished with a desk, file cabinet, bed and closet.

34. Father's return to the home of grandparents was undoubtedly a tactical move, but father testified that if child continued to remain in his custody and that of his parents, their home would be his permanent home until he got married. He testified he had no plans for remarriage.

35. Father also testified that since the first hearing in this matter he has discontinued the use of all illegal drugs; eats his evening meal at home with his parents and the child, and spends more time with the child.

36. The child has his own bedroom at the grandparents' home.

37. During the time after grandparents and father had custody of child, and prior to the hearing on October 19, 1978, grandmother had discouraged mother from learning how to provide the home therapy required by the child and from

attending the physical therapy sessions at Easter Seal. During the same period of time mother failed to take any reasonable steps or show any initiative in securing the necessary information required to provide the home therapy for the child, and was essentially content to let grandmother provide that extremely essential care to the child.

38. Since mother and stepfather have been married, both have read and learned what they can about cerebral palsy so they will be able to provide the necessary care when the child is with them.

39. On October 20, 1978 the Court entered a temporary custody order for the child to the paternal grandparents at their home in Fayetteville and granted substantially increased overnight visitation rights to mother commencing October 27, 1978. The order specifically provided mother was required to go with grandmother on one or more occasions prior to October 27th to observe grandmother administering the home therapy treatments. She was also directed to contact the Easter Seal Society and secure therapy training at the Society, and to attend the appointments with the child and grandmother at Easter Seal each week.

40. Prior to the entry of the above order grandmother had expressed a willingness to demonstrate the home therapy to mother and mother had expressed a willingness to learn all that she needed to know to provide the home therapy, and to go to the Easter Seal Society for training in the therapy.

41. On November 22, 1978 the court appointed J. Edgar Wine, Esq., as counsel to represent the interest of Jason Spielman, the child, and specifically to investigate and ascertain the adequacy and sufficiency of the therapy treatments required to be given by the child's mother during the visitation authorized by the order of October 20, 1978.

42. At the hearing held February 26, 1979 counsel for the child called Sue Kampstra, staff physical therapist for the Easter Seal Society until one week before the hearing. She testified:

(a) Grandmother had been bringing child to the Easter Seal Society and had been responsible and regular in her visits.

(b) The diagnosis of the child was cerebral palsy, spastic diplegia which means too much muscle tone in the legs and causes the child to have trouble controlling his legs.

(c) The child was mildly affected, which means he can walk, climb or crawl, but has some difficulty walking on uneven terrain.

(d) Met mother first on October 25, 1978 at a therapy session during one of the regular visits of the child. The program of stretch and exercise for the legs, hamstring and co-ordination was explained to mother. She also attended sessions on November 1, 8 and 15, 1978, and at other times thereafter which Mrs. Kampstra did not note in the records.

(e) Mother observed the physical therapy treatment and practiced on Mrs. Kampstra, who felt mother could administer the therapy to child but had not seen her do it.

(f) Child's condition is static and without proper exercise he could become stiffer and his balance could become a little worse.

(g) As a patient child is sometimes not very cooperative because he has a limited attention span. He is, however, happy and adjusts well to different therapists and staff working with him.

(h) She had recommended child attend a pre-school nursery program to grandmother who indicated she was not interested in such a program. The discussion was dropped. Such programs are routinely recommended for children with special adjustment problems.

43. Since mother has learned how to administer the therapy treatments, she has done so on child each time she has him. Sometimes he is cooperative in participating in the treatment and other times mother must play with him first to put him into a cooperative mood.

44. Mother and stepfather purchased bedrails for child's bed and have ordered a tub rail for him. They also purchased his own chair for him to sit at the table with them.

45. Mother testified that she would administer therapy to child either in the morning or when she came home in the evenings from work.

46. Mother testified that child could stay at the Stanley Company Day Care Center while she worked, and she would pick him up at the close of the day. Mother was uncertain whether the Day Care Center or a portion of the facility was available to children whose mothers worked overtime, but she believed the children were kept in a separate and supervised room at the Center until the mothers called for them.

47. Mother did not make arrangements for the child to be

admitted to the Center, and did not receive definite assurance that he would be admitted with his particular disability. Mother did not make the arrangements because she was dissuaded from doing so by grandmother.

48. There was some evidence that the Stanley Company Day Care Center does not have the facilities or personnel to care for handicapped children, but would accept child on the approval of Dr. Layman if the child had no special needs.

49. At the February 26, 1979 hearing grandmother testified that she and father took the child to the Hershey Medical Center for an evaluation on December 4, 1978, and mother was invited to accompany them and did so. Grandmother asked mother not to go along on the December 15, 1978 appointment at Hershey Medical Center, and grandmother did not tell mother the child was scheduled for another appointment on February 27, 1979.

50. Grandmother received the reports from the Center on February 13, 1979. She did not discuss the reports with mother or tell mother that she had received them.

51. No evidence was introduced as to the contents of the reports or the results of the most recent evaluation of the child by the Hershey Medical Center.

52. The grandparents incurred the cost of the evaluation and tests at Hershey Medical Center, and received no additional contribution from mother. The Medical Center bills were not presented to mother, but father asked to help out. Part of the Medical Center bills were paid by father's insurance.

53. Father's employment with L. L. Dymond & Son terminated due to a misunderstanding arising out of an accident at work. He is now employed at Canner's Auto Sales from 8:00 A.M. to 5:00 P.M. each weekday, and on Saturday mornings.

54. Father was living in the home of grandparents.

55. Grandmother testified that she did not understand Mrs. Kampstra and the Easter Seal Society were recommending that the child attend pre-school nursery school or she would have arranged for that attendance.

56. The Court met with the child and counsel for the parties in the presence of the court reporter. The child is an alert, bright looking four year old. He shows very little evidence of physical disability or handicap. He stated that he wanted to

live with his grandparents, but did not know why. He stated that he liked to visit his mommy; likes stepfather and likes to play with him; likes where his mother and stepfather live and likes to visit them there.

57. The home of mother and stepfather is entirely satisfactory and adequate in all respects as a home for child.

58. The home of the grandparents is entirely satisfactory and adequate as a home for the child.

59. Mother has completely changed her lifestyle and is a proper person to have the custody of her son.

60. Stepfather is a proper person to share custody of the child with mother.

61. Father provides little in the way of care and supervision and fathering for child, but he does reside in the home of his parents with the child and there is no evidence that he is not also a proper person to share custody of the child with his parents.

62. Grandmother and grandfather are proper persons to have custody of the child.

#### DISCUSSION

The object of this custody dispute is Jason Spielman, born September 27, 1974. The child has been residing with his father and paternal grandparents since November or December of 1975, having been placed there by mother, Sherry K. Spielman Rockwell. Mother attempted to regain custody of the child by formal court action in June of 1976, but father had, at this point in time, returned to live with his parents and father joined grandparents in opposing custody in mother.

The Court's concern in custody cases is with the child's physical, intellectual, moral, and spiritual well-being. *Commonwealth ex rel. Holschuh v. Holland-Moritz*, 448 Pa. 437, 292 A. 2d 380 (1972). The sole issue to be decided in a custody proceeding between contending parents is the best interests and welfare of the child. *Commonwealth ex rel. Spriggs v. Carson*, 470 Pa. 290, 294, 368 A. 2d 635, 637 (1977).

In a custody dispute between parents, the Court must consider the fitness of each parent in determining the best interest and permanent welfare of the child. The burden of proof is shared equally by the parents; custody is awarded on

the basis of a preponderance of the evidence. "The burden of proof is shared equally by the contesting parents; thus, the hearing judge awards custody according to what the preponderance of the evidence shows." *In re Custody of Hernandez*, Pa. Super. , 376 A. 2d 648, 651 (1977). The legal presumptions and burdens are different, however, in a custody dispute between a parent and a third party. In such cases, the parent is said to have a "primary right" to custody of the child, although the right is not absolute and must yield to the child's best interest. *Commonwealth ex rel. Bradley v. Bradley*, 188 Pa. Super. 108, 146 A. 2d 147 (1958). It has also been said that parents have a "prima facie right to custody," which "may be forfeited if convincing reasons appear that the best interests of the child will be served by awarding custody to someone else." *Commonwealth ex rel. Kraus v. Kraus*, 185 Pa. Super. 167, 170, 138 A.2d 225, 226,227 (1958); see also *Hernandez* at 653. The third party's burden is met only by presenting convincing reasons related to the child's best interest, and not merely to some characteristic of the parent that the third party or the hearing judge may regard unfavorably, which are weighty enough to overcome the parent's prima facie right to custody. This is a difficult burden; the evidentiary scale is tipped hard in favor of the parent's side. *Hernandez* at 654, *Commonwealth ex rel. Strunk v. Cummins*, Pa. Super. , 392 A. 2d 817, 819 (1978).

The present case is a complication of these standards enunciated for parent vs. parent, and parent vs. third party custody disputes in that custody of Jason Spielman is jointly in his father and his paternal grandparents. The record shows that mother placed the child in the care of his grandparents when her electricity was turned off for nonpayment in the early winter of 1975. Grandparents assumed primary care of the child. Father lived with grandparents until July of 1977 when he rented an apartment or home, leaving the child with grandparents. Father resumed living with grandparents after the first custody hearings in October of 1978. Father testified that he would continue to live with grandparents, unless and until he remarries, if custody of Jason remains in him and grandparents.

It appears, therefore, that grandparents, who are third parties, are the active custodians of Jason, and that father joins in the custody dispute, although he has made no individual effort to establish a home for his child or to assume primary responsibility for Jason.

In *Strunk v. Cummins*, supra., the mother placed her child with an aunt and uncle when she felt she was unable to properly provide for his needs. Abandoned by her husband, aged seventeen, she had difficulty in providing the basic necessities of

## LEGAL NOTICES, cont.

### NOTICE

To the Heirs of Jacob Hurley, Deceased:  
The above captioned plaintiffs commenced an Action to Quiet Title which is docketed to A.D. 1979-273 in the Office of the Prothonotary, Franklin County, Pennsylvania. It concerns real estate more fully described in Franklin County Deed Book Volume 711, Page 17. You are required to plead to the complaint within twenty (20) days after the service has been completed by publication. If you wish to defend, you must enter a written appearance personally or by attorney and file your defenses or objections in writing with the court. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you without further notice for the relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Legal Reference Service of  
Franklin-Fulton Counties  
Court House  
Chambersburg, PA 17201  
Telephone No.:  
Chambersburg 264-4125, Ext. 13

By: Frank H. Bender  
Sheriff of Franklin County  
Chambersburg, Pennsylvania 17201

(10-19, 10-26, 11-2)

NOTICE IS HEREBY GIVEN pursuant to the provisions of the Act of Assembly of May 24, 1945, P.L. 967 and its amendments and supplements of intention to file with the Secretary of the Commonwealth of Pennsylvania at Harrisburg and with the Prothonotary of the Court of Common Pleas of Franklin County, Pennsylvania, on November 2, 1979, an application for a certificate for the conducting of a business under the assumed or fictitious name of J C Pattern Company with its principal place of business at 610 North Fifth Avenue, Chambersburg, Pennsylvania 17201. The names and addresses of all persons owning or interested in said business are Jesse L. Crusey, 4400 Glenridge Street, Kensington, Maryland 20795.

Joel R. Zullinger  
of Davis and Zullinger, Attorneys  
5 North Second Street  
Chambersburg, PA 17201

(10-26)

NOTICE IS HEREBY GIVEN THAT Articles of Incorporation have been filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on October 1, 1979, for the purpose of incorporating a nonprofit corporation under the Nonprofit Corporation Law of Pennsylvania effective February 13, 1973, as amended. The name of the corporation is METAL CABLE T.V. INC., and the purposes for which it has been organized are to install, provide, maintain, service and repair cable television services to the residents of the Village of Richmond Furnace, Pennsylvania, and vicinity and to engage in and do any lawful act concerning any or all lawful business for which corporations may be in-

## LEGAL NOTICES, cont.

corporated under the Pennsylvania Nonprofit Corporation Law of 1972. The corporation does not contemplate pecuniary gain or profit, incidental or otherwise.

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(10-26)

life. The Court noted as factors in granting custody to mother that: (1) mother placed her child with the aunt and uncle in the best interest of her child; (2) since the placement, mother's situation had substantially improved; she had remarried and had a proper and stable home for her child; (3) mother expressed affection for the child; during the placement she never lost contact with him even though aunt and uncle sought to forbid visitation; (4) the Court below did not find mother to be an unfit parent.

In the present case, mother placed Jason with grandparents after mother and father separated. The record indicates that both mother and father indulged in excessive drinking, use of illegal drugs, and generally demonstrated a lack of maturity and responsibility toward their marriage and each other. Father declined to assume any responsibility for the child. Mother neglected household duties. From the date of placement in 1975 until November 1977 mother's lifestyle did not improve. However, she maintained contact with Jason, and made efforts to regain custody of him during this period. Her relationship with William R. Rockwell settled into a more conservative routine sometime in November of 1977, and the two were married June 5, 1978. Since that time they have purchased a home, furnished a bedroom therein for Jason, and mother has become a good homemaker. She and Bill have adopted a lifestyle that could provide a stable, responsive environment for Jason, offering him a reasonably normal and satisfactory family life.

The Court will award custody on present conditions, *McGowan v. McGowan*, Pa. Super. , 374 A. 2d 1307 (1977); *Commonwealth ex rel. Tucker v. Salinger*, 244 Pa. Super. 1, 366 A. 2d 286 (1976); the issue is the parent's present fitness and not the nature or extent of her past misconduct. *Commonwealth ex rel. Jacobson v. Jacobson*, 181 Pa. Super. 369, 124 A. 2d 462 (1956); *Kerr v. Cress*, 194 Pa. Super. 529, 168 A. 2d 788 (1961).

As was the case of the mother in *Strunk*, supra., the present petitioner evidenced a concern for Jason even during the period of her life which was unsettled, and her placement of him with grandparents was in the best interest of the child. She maintained contact with Jason, but mother conceded that, despite a "non-association" clause in the visitation order, she exercised visitation with Jason in the presence of other men with whom she lived during this period, and that Jason suffered flea bites and contracted ringworm from mother's pets that lived in the house. Clearly, at this stage, although mother evidenced a desire to spend time with Jason, she was not sufficiently responsible to properly attend to his needs.



However, as in *Strunk*, since the placement, mother's situation has substantially improved. She has found a stabilizing force in her husband, William Rockwell, and they have established a traditional home. Stepfather has been employed at Letterkenny Army Depot for more than five years. Mother's work schedule, from 7:00 a.m. until 3:30 p.m., coordinates closely with the usual school hours and would allow mother, at the time Jason enrolls, to provide regular primary care to him. Until that time, mother has available to her the day care center at her employer's, Stanley Company. Mother has made a serious effort to learn to administer the therapy Jason requires because of his disability, a mild form of cerebral palsy. She and stepfather have equipped their home with those items which will accommodate Jason's condition (bed-rails, tub rail, his own chair for meals). There is no indication in the record that father has exerted any effort to learn about Jason's condition or has accepted any responsibility for administering Jason's daily therapy.

Moreover, mother is presently a proper person to have custody of the child. Although no evidence indicates that father is unfit for custody of Jason, he has made no substantial effort to establish a home for Jason, or to take upon himself the responsibility for Jason's growth and development. Grandparents have conveniently and effectively relieved father of the usual difficulties attendant upon the rearing of a child. Mother, on the other hand, has consistently evidenced concern for Jason's well-being. Previously, she was incapable of meeting the child's needs, whether because of her own immaturity or because of the disorientation of her emotionally unstable life. Presently, however, she and stepfather can offer Jason a reasonably normal family life. The natural affection of mother, stabilized by the maturity and experience of stepfather, creates an environment for Jason that would be in his best interests.

Therefore, in the present case, the Court has considered the fitness of each parent in determining the best interests of Jason and finds that mother has evidenced the greater and more sincere concern for the child's welfare. She has manifested a willingness to meet the needs of the child regardless of the inconvenience to her; she has demonstrated her willingness to accept the responsibilities of marriage and a family and, at present, offers a suitable, stable environment for Jason. Father has made no such individual effort. His removal from grandparents' home, and the timing of his return thereto, does not assure the Court of his personal concern for the child, or demonstrate any willingness to yield his individual freedom to the demands of parenting. It is in the best

interests of the child, in considering this custody dispute as parent vs. parent, to give custody of Jason Spielman to his mother, Sherry K. Spielman Rockwell.

The Court recognizes, however, that grandparents have provided Jason with the affection, emotional stability, the physical care that the parents could not provide in the recent past. Grandmother has been particularly dedicated in attending to Jason's special needs outlined by the Easter Seal Society therapist for a child afflicted with cerebral palsy. Although Jason is only mildly affected by this disease, the exercise routine followed by grandmother has strengthened the child and indicates her devotion to his well-being. Grandparents are, nevertheless, third parties in this custody dispute. In the absence of evidence showing that mother is presently unfit as a parent, the scale remains tipped in mother's favor, and her "prima facie right to custody" cannot be overcome by the reasons presented at the hearing in this case.

#### ORDER OF COURT

NOW, this 13th day of September, 1979, primary custody of Jason Spielman is awarded to Sherry K. Spielman Rockwell, mother, and William R. Rockwell, stepfather; effective 12:00 o'clock Noon, Saturday, September 15, 1979.

Gary L. Spielman, father, and Harold Spielman and Mildred L. Spielman, paternal grandparents, are granted visitation rights with Jason Spielman from 5:30 p.m. September 28, 1979 until 6:00 p.m. September 30, 1979, and alternating weekends thereafter; the same to be exercised at 57 Fifth Avenue, Fayetteville, Pennsylvania.

In even-numbered years father and paternal grandparents shall have visitation rights with Jason from 5:30 p.m. on December 22, until 1:00 p.m. on December 25. In odd-numbered years father and paternal grandparents shall have visitation rights with Jason from 1:00 p.m. December 25 until 6:00 p.m. December 28.

Visitation rights on Thanksgiving, New Year's Day, Memorial Day, July 4th and Labor Day shall commence at 9:30 a.m. and end at 7:00 p.m. Father and paternal grandparents shall have visitation rights on alternating holidays commencing with Thanksgiving 1979.

Father and paternal grandparents shall have two full weeks summer visitation with Jason, and the two weeks need not be consecutive. Mother shall be given not less than forty-five days notice of the date or dates when the summer

visitation shall be exercised, and the same shall be scheduled to avoid conflicting with the vacation schedule of mother and stepfather.

Father or the paternal grandparents shall pick up at and return Jason to the home of mother and stepfather on the dates and at the times above set forth.

Exceptions are granted all parties.

COMMONWEALTH v. SHORT, C.P. Franklin County Branch, No. 79 of 1979

*Criminal Law - Aggravated Assault - Points for Charge*

1. In order to convict of an assault where no injury is sustained, an attempt must be shown and this requires the showing of an intent to cause bodily harm.
2. An inference of an intent to inflict serious bodily injury can be made where a person caused a car to accelerate with a police officer standing in front of it.
3. The Court need not read defendant's points for charge verbatim, so long as the issues raised are adequately, accurately and clearly presented to the jury for their consideration.

*John F. Nelson, Esq., Assistant District Attorney, Attorney for the Commonwealth*

*Richard L. Shoap, Esq., Attorney for Defendant*

OPINION AND ORDER

EPPINGER, P.J., September 18, 1979:

The defendant, Alan Ray Short, was a fugitive. He was being actively pursued by the Pennsylvania State Police who learned that he might be in the Barclay Village area of Chambersburg. Cpl. Farrell and Tpr. Lingenfelter in going to that area noticed a car approaching them and Tpr. Lingenfelter identified one of the occupants as Short. Farrell got out of the police car, stood in the center of the lane in which the car was travelling and signaled the car to stop by extending his arm palm outward.

The vehicle was operated by another, but Short was an occupant. When Short saw Cpl. Farrell, whom he knew was a State Police officer, he slouched down in the front seat and when the vehicle was coming to a stop in front of Farrell, Short reached the accelerator with his left foot and the car

sped up. When this happened Farrell was forced to dive from the path of the vehicle, which narrowly missed him. Short and his companion left the scene. Short got out of the car later and continued his flight on foot. He was apprehended later.

The defendant was convicted by the jury of Aggravated Assault on a Police Officer, Simple Assault and Recklessly Endangering another person. He filed timely motions for a new trial and in arrest of judgment. Though five reasons were stated in support of the motion, they can be consolidated into two questions: (1) Was the evidence sufficient to convict the defendant of Aggravated Assault Upon a Police Officer, Simple Assault and Recklessly Endangering Another, and (2) Did the court err in refusing certain instructions to the jury?

SUFFICIENCY OF THE EVIDENCE - In testing its sufficiency, the court must review the evidence in the light most favorable to the Commonwealth. *Commonwealth v. Williams*, 476 Pa. 557, 383 A.2d 503 (1978). In this connection, a reviewing court accepts as true all of the Commonwealth's evidence and all reasonable inferences arising therefrom which would sustain the jury's verdict. *Commonwealth v. Mawson*, 247 Pa. Super 88, 371 A.2d 1340 (1977). A jury is free to believe all, part of none of the evidence in a case. *Commonwealth v. Eckert*, 244 Pa. 424, 368 A.2d 794 (1976).

In order to convict of an assault where no injury is sustained, an attempt must be shown and this requires the showing of an intent to cause bodily harm. *Commonwealth v. Goosby*, 251 Pa. Super 326, 380 A.2d 802 (1977). Such intent may be shown by direct or circumstantial evidence. *Goosby*, supra.

Seldom does a person who is about to commit a crime announce his intentions to the general public. In *Commonwealth v. White*, 229 Pa. Super 280, 323 A.2d 757 (1974), the court quoted from an 18th century New Jersey decision, saying:

The designs of the heart can rarely be proved in a direct manner by the testimony of witnesses. When a man designs to perpetrate a scheme of wickedness, he seldom communicates his intentions unless to an accomplice; hence the intent must, in most cases, be collected from the circumstances.

One such circumstance in a homicide case is the use of a deadly weapon on a vital part of the body. This gives rise to the inference of an intent to kill. *Commonwealth v. Boyd*,