

Larry Eberly, challenging the procedural regularity of the reenactment of the Greencastle Borough Zoning Ordinance apparently adopted December 31, 1979 is sustained and the ordinance is stricken. The parties shall each pay their own costs. Exceptions granted to the Borough of Greencastle appellee.

NEEDHAM v. MYERS, C.P. Franklin County Branch, Misc., Vol. W, Page 193

Custody - Child's Best Interest - Factors to be Considered - Preference of Mature Eleven Year Old Child.

1. Where the physical and financial arrangements of each party do not persuade the Court that they in themselves constitute "convincing reasons" affecting the child's best interest, the Court must focus upon the child's intellectual, moral and spiritual well-being.

2. The expressed preference of a mature eleven year old child will be given weight by the Court in determining the child's best interest.

Thomas M. Painter, Esq., Counsel for Petitioner

David S. Dickey, Esq., Counsel for Respondents

Edward I. Steckel, Esq., Counsel for Respondents

OPINION AND ORDER

KELLER, J., November 18, 1980:

Counsel for Mary C. Needham presented her petition for modification of existing court order to the Court on July 30, 1979. An order was signed on the same date directing a rule to issue upon Charles S. Myers and Mr. and Mrs. Frederick L. Brenner to show cause why the order dated March 30, 1978 should not be modified by placing primary custody of Tammy Joanne Myers in her natural mother. The rule was made returnable twenty days from service and hearing was scheduled for October 1, 1979 at 9:30 A.M. The hearing was subsequently scheduled for December 4, 1979 at 10:00 A.M. On November 28, 1979 counsel for Mrs. Needham moved for a reissuance of the rule because no return of service had been made on the rule issued pursuant to the order of July 30, 1979. The reissued rule, together with a copy of the petition and order, was served upon the respondents on December 3, 1979. An answer was filed by the respondent-father and

respondent's paternal grandparents on January 8, 1980. Hearings were held on January 10, 1980, March 3, 1980, and April 28, 1980. By agreement of counsel the brief of petitioner was filed with the Court on July 18, 1980, and the brief of counsel for the respondents was filed with the Court on July 25, 1980. The matter is now ripe for disposition.

FINDINGS OF FACT

1. The petitioner is Mary Catherine Needham the mother of Tammy JoAnne Myers. Mrs. Needham resided at R.D. 2, Box 162, Newville, Penna. at the time of the filing of the petition, at 69 E. Main Street, Apt. 2, Newville, Penna. on January 10, 1980, and testified at the March 3, 1980 hearing that she and her husband were moving to a new residence approximately one and one-half blocks away from the Main Street home on March 15, 1980.

2. Charles Steven Myers resided at Route No. 11, Box 436, Chambersburg, Penna. at the time of the filing of the petition, and on January 10, 1980 resided in an apartment at 31 Lincoln Way West, Chambersburg, Pennsylvania.

3. Frederick L. Brenner and Phyllis A. Brenner, paternal grandparents of Tammy JoAnne Myers, reside at 4377 Marsh Road, Waynesboro, Pennsylvania. Mrs. Brenner is the paternal grandmother of the child and Mr. Brenner is the paternal step-grandfather of the child.

4. Tammy JoAnne Myers, hereinafter called (child) was born on September 21, 1969 in Germany.

5. Mary Catherine Needham, hereafter (mother), and Charles Steven Myers, hereafter (father), were married in 1968. Father was on active duty in the United States Army and mother was residing with him at the time of the birth of the child in Germany. Father then was assigned to Viet Nam and upon his return from Viet Nam in March of 1972 the parties did not resume living together, and child continued to reside with mother.

6. Mother gave birth to her daughter, Crystal, in December of 1972. Crystal's father was Gary McClure.

7. In August 1974 the child was placed with the paternal grandparents by mother.

8. On January 17, 1975 the paternal grandparents and father petitioned for custody of the child. On February 4,

1975 on stipulation of mother, father and paternal grandparents an order was entered placing custody of child jointly in all of the parties with the provision that the child should continue to live with the paternal grandparents during the week, while attending classes in the Head Start Program at Waynesboro, and mother would have custody every weekend. It was specifically provided that the order would remain in full force and effect until the school term was completed.

9. Hearings were held on the matter and an order entered on June 19, 1975 awarding primary custody of the child to the paternal grandparents with visitation rights to the mother. An appeal from the order was taken by mother to the Superior Court of Pennsylvania to No. 109 March Term 1976.

10. The Superior Court issued an Opinion and Order on September 27, 1976 awarding custody of the child to mother. On March 2, 1977 the Supreme Court of Pennsylvania denied the petition of father and paternal grandparents for allowance of appeal.

11. On March 13, 1978 mother and father entered into a stipulation for the entry of an order providing that:

(a) Child would be placed in the primary custody of father on or before March 18, 1978 to reside with father and his then wife, Nina Lee Myers.

(b) Father would provide transportation for child to the Falling Spring Elementary School where she was currently enrolled.

(c) On or before August 1, 1978 father and mother would review the matter of Tammy's custody and attempt to enter into a mutual agreement as to what arrangements should be made with respect to the primary custody of the child following that date, "taking Tammy's wishes into account."

(d) While primary custody was in father, mother and her mother would have the right to visit the child at such times and upon such terms as the parties would agree.

An order putting the stipulation into effect was entered by this Court on March 30, 1978.

12. This proceeding to modify the custody order of March 30, 1978 was commenced by mother's petition presented July 30, 1979.

13. Mother married Russell Needham on July 5, 1974.

14. Mr. Needham was incarcerated in the Franklin County Prison and in a State Correctional Institution from May 7, 1975 to January 4, 1979 on various convictions the most serious of which was escape.

15. Mr. Needham's escape conviction arose out of his failure to return to the Franklin County Prison while on Work Release in 1976. Mother had Crystal with her when she picked up her husband, which she knew was a violation of his Work Release Rules. She then picked up child at the home of her parents and was proceeding with her husband and the two children to her home when she lost control of the automobile, and the vehicle ended up in a field after sliding off the road. The two girls were "tossed around and bumped each other" and were scared. The Police picked up Mr. Needham the next day.

16. Mother acknowledged that she had thus engaged in a criminal act, but stated she did not consider she was jeopardizing the children.

17. Mother's children are Tammy JoAnne Myers, child, born September 21, 1969 to her and Charles Steven Myers; Crystal Candace McClure, born December 8, 1972 to Gary McClure; and Trinity Needham born to Russell Needham on September 15, 1975.

18. After the Superior Court awarded custody of child to mother, she had custody of all three children.

19. Approximately six months prior to March 1978, mother met a Mr. Thomas Kee through a girlfriend. Mr. Kee was unmarried. The maternal grandmother saw Mr. Kee and mother at mother's trailer when all three girls were there, but she did not know whether he stayed overnight. Mr. Kee went to Florida in January 1978, where he was an employee of a telephone company.

20. Sometime prior to March 13, 1978 mother told father and his wife that the children were too big a burden; it was too much of a strain; that she was becoming short-tempered and feared she would hurt them; had slapped them and almost or had hit child with the telephone; and that she was going to sell her things, pack up and move to Florida to live with Mr. Kee.

21. Sometime prior to March 1978, mother told her mother that she was going to go to Florida to live with Mr. Kee. The maternal grandmother wanted to keep child and

Crystal, and they went to see whether that could be done and were told "the state would come and take child after mother left" so that plan was not carried out. The maternal grandmother was willing to keep all three of mother's children at her home and care for them. The maternal grandmother wanted mother to take the three children with her.

22. Prior to March 1978 mother was employed at the Travelodge in Chambersburg, and the maternal grandmother would keep the three girls while mother worked, but refused to keep them when mother was just going out or going out drinking. The maternal grandmother observed that mother was at that time a "mixed up girl" with pressures from the McClures, the Brenners and herself about raising the children and keeping them all together.

23. Mother testified that about March 1978, she agreed to place custody of child with father, and Crystal with the McClures because she felt she was being backed into a corner by everyone, i.e., her parents, father and the McClures, and they were interfering with the way she was raising her children. She felt that they were ganging up on her and made her feel inadequate.

24. Mother delivered custody of child to father shortly after the stipulation was signed. She asked for no specific visitation schedule for herself because she knew she was going to leave for Florida immediately, and didn't think of a visitation schedule. She intended to stay in Florida indefinitely and perhaps permanently, and intended to remain separated from child and Crystal indefinitely and perhaps permanently.

25. Mother left for Florida on March 28, 1978 with Trinity and lived at R.D. 4, Alba, Florida with Thomas Kee until October 1978. Mr. Kee supported mother and Trinity.

26. Prior to mother leaving for Florida, she also met with Crystal's paternal grandparents and told them she was going to Florida and wanted them to take Crystal, change her name and raise her. Grandfather McClure suggested the children be left with the maternal grandmother and mother said she didn't want them. Papers were drawn up granting the McClures temporary custody with no provision for visitation except over summer vacation.

27. Subsequent to March 1978, and prior to October 1978, mother and Mr. Kee visited the McClures and the McClures learned that mother and Mr. Kee were planning to take all three children back to Florida. After some discussion

mother gave them a better custody paper "to go through court," and she and her boyfriend went back to Florida.

28. There is no evidence that mother made any effort during this visit to Pennsylvania to see or talk to child.

29. The McClures have proceeded in court to change Crystal's name from Myers to McClure. Mother initially disputed the name change, but later said it should have been changed long ago.

30. Child came to live with her father and stepmother after March 13, 1978 when the stipulation was signed, but prior to March 30, 1978 when the order for the change of custody was signed. At that time father and stepmother had been married fifteen months and had a two month old child of their own.

31. Father observed that child had changed in the year or more since mother was granted custody of her, and she now was nervous, agitated, excitable, cried a lot at night, and acted out to get attention. The stepmother described her as hyperactive, easily annoyed, impatient, hard to reason with and please, unwilling to accept assistance, starved for attention and demanding of it, and needed constant reassurance that she cared for and secure in a secure situation. Both testified that child evidenced a fear of punishment if she made a mistake and would lie if she did something wrong. Stepmother observed that she also evidenced a fear of being discriminated against in favor of the baby.

32. When child would cry at night father would go to her and read to her and try to talk to her. He learned that mother would get mad at child and slap her frequently, but not every day; that she liked her mother but did not love her; and that she was afraid she'd have to go back to her mother.

33. Father visited with child's teacher and learned that child's progress in school during the school year had been poor, and she evidenced a lack of interest in school. Later at a P.T.A. meeting father was advised that the teacher had considered recommending a tutor for the child, but due to the fact that since she was with him she had assumed more responsibility in school; she showed marked improvement and her grades had improved "drastically," that tutor would not be needed.

34. The stepmother testified that child appeared to become more comfortable with her after she had been in the home for three weeks and adjusted to the routine of the

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home. She felt that she had gradually lost some of her apprehensive attitude, but also felt her emotional state did not change enough to permit her and father to cope with child.

35. Father observed that while child was in their home she began to take interest in her school work, and stopped acting as if she was looking over her shoulder all the time.

36. Father testified that when mother went to Florida she said she might return in the summer, and would want to have child for a couple of weeks or she might want to have child flown down to her. He agreed to the summer visit, but not to the child flying alone. Child heard from mother within thirty days of mother's departure from Pennsylvania, and she received one letter, a birthday card and a telephone call. Mother apparently communicated about Florida, but made no effort to arrange any visitation or change in custody, and she never mentioned to father or to child any plan to return and live in Pennsylvania permanently.

37. Father and stepmother decided that due to their new baby and child being with them they were having marital problems which would not permit child to continue to live in their home. They decided because child had lived with the paternal grandparents before when mother had placed her there, and she had thrived, that it would be in her best interest for child to again go to live with the paternal grandparents, Mr. and Mrs. Brenner. Child said she loved Mr. and Mrs. Brenner and was content with them.

38. Father testified child moved to home of grandparents late in the summer of 1978, but before the commencement of school. Stepmother testified that child moved to the home of the grandparents in June of 1978, after the end of the 1977-78 school year.

39. Father and stepmother separated on January 18, 1979. Father has custody of their son Nathaniel by court order.

40. The grandparents' home where the child went to live after being with her father was the same home in which she had lived from August 1974 until September 1976.

41. The paternal grandmother, Phyllis Brenner, was 46 years old in January 1980, and the paternal step-grandfather, Frederick L. Brenner, was 45 years old. (They will hereafter be called grandparents).

42. Phillip L. Brenner is a Senior Designer for Baker-Wiboly Associates of Hagerstown, Maryland. He works five days a week from 8:00 A.M. to 5:00 P.M. His annual income is \$21,000.00. He leaves his home for work about 7:50 A.M. and returns home between 5:15 P.M. and 5:30 P.M.

43. Phyllis Brenner is employed at the Parlor House Restaurant in Waynesboro from 11:00 A.M. to 2:00 P.M., Monday through Friday of each week.

44. No children were born to the marriage of Mr. and Mrs. Brenner.

45. The grandparents and child are the only persons living in the home of the grandparents.

46. The home of the grandparents is a relatively new one-story brick and frame home located in a rural area outside of Waynesboro, Pa. on approximately one acre of land. It has a livingroom, diningroom, three bedrooms, kitchen, bath and large recreation room in the basement.

47. The child has her own bedroom which is nicely and completely furnished and decorated appropriately for a child of her age. She also has a corner of the recreation room set aside for her games, toys, a second desk, chalk board and other items.

48. There is a large backyard equipped with monkey bars for the use of the child.

49. There are a number of children of comparable age in the immediate neighborhood that child plays with and considers to be her close friends.

50. Child is bused to school from a bus stop approximately fifty yards from the home of the grandparents. Child and her friends walk to the bus stop together.

51. The home is in all respects entirely adequate for child.

52. Child customarily gets up between 7:15 A.M. and 7:30 A.M. and has breakfast of cereal or eggs. She is picked up at the bus stop by the school bus at approximately 8:00 A.M. with other neighborhood children, and is bused to Fairview Avenue Elementary School in the Borough of Waynesboro. She returns home from school about 3:45 P.M. Customarily she does her homework before dinner and the grandparents help her with it and make certain that it is com-

pleted. During the week she goes to bed between 9:00 P.M. and 9:30 P.M. She and the grandparents play various games such as monopoly, score four and connect four for recreation and to help the child with her numbers and her reasoning skills.

53. The child is active in the Girl Scouts and the grandparents take her to those meetings. On Sunday the step-grandfather takes her to Sunday School at the Salem German Reform Church approximately two miles from their home. After Sunday School the grandparents and the child go to various flea markets where the grandparents have a stand. The child has shown an interest in glassware and the grandparents permit her to maintain her own little stand, price her glassware and sell it. They most frequently attend the flea market in Shippensburg, but from time to time attend others at other places such as Point Royal, Virginia.

54. They also bowl together and roller skate together at times.

55. The grandparents discipline the child when she needs it, most frequently by speaking to her or withdrawing television privileges, but on occasion spanking her.

56. The child has chores to do such as making her bed and washing dishes.

57. The grandmother has taught the child to make her bed and do other chores around the house, which she appears to enjoy. She is teaching her how to sew and to cook under her supervision.

58. The grandparents are in regular contact with the child's teachers and attend P.T.A. meetings. They keep informed as to her progress and when she has problems attempt to assist her in overcoming them.

59. The grandparents obviously have a deep love for the child and are greatly concerned for her well-being and welfare. They feel that she has been damaged by her mother's conduct in placing her and then taking her back, and then placing her again as if she were an inanimate object.

60. The grandparents are stable and well-adjusted people.

61. Mother returned to Pennsylvania from Florida on October 5, 1978. It took her over a month to find out where her ex-husband had moved to in the Chambersburg Area. When she found him she discussed getting custody or

visitation rights with the child, and he agreed to let her see the child. After that conversation father moved again and mother was again unable to locate him to talk about visitation.

62. Mother rented a home in the country at R.D. 2, Newville on December 11, 1978, and her husband joined her at that home on January 4, 1979, when paroled from the State Correctional Institution at Huntingdon.

63. Mother and her husband, Russell, and their daughter Trinity, moved to 69 E. Main Street, Apt. 2, Newville, Penna. when the owner of their home at R.D. 2, Newville sold it.

64. No evidence was introduced as to what efforts mother made to locate father upon her return to Franklin County in October or after he moved again; nor was any evidence introduced as to whether mother made any attempt to contact the grandparents concerning child.

65. Mother ultimately arranged with father to have a weekend visitation with child in February 1979, and child was not returned to the home of the grandparents on Sunday evening as had been agreed. On Monday the grandparents and father began looking for mother and child. Late on Monday afternoon they learned that they were to pickup child at the maternal grandparents' home.

66. Child not only missed a day of school as a result of this incident, but was very upset.

67. Mother secured legal counsel in February of 1979 and there were intermittent discussions and negotiations concerning visitation between counsel and the parties, including the father. Mother's next visitation was in September 1979.

68. Mother had visitation with child in September for child's birthday.

69. Mother requested other visitation opportunities following the September visit, but the requests were not granted because they would be received on a Wednesday or Thursday before the weekend the request applied to and grandparents felt they and child were entitled to more notice so they could plan accordingly.

70. Mother orally requested of grandmother to visit with child during the Christmas holidays in 1979. Grandmother refused until she had an opportunity to confer with her husband and father, and suggested mother have arrangements work-

ed out between the attorneys of the parties because a hearing in this matter was scheduled for January 10, 1980.

71. To withhold a Christmas visitation by mother with child was improper.

72. Russell Needham hereafter (stepfather) has resided with mother and his daughter, Trinity, since his parole on January 4, 1979. He fully supports his wife's efforts to secure custody of child and also of mother's daughter, Crystal.

73. Stepfather lived in the same home with child for approximately two years prior to his incarceration and expressed the feeling that child and Crystal are also his children, and he does not and will not treat them any differently than he treats his own daughter, Trinity.

74. Stepfather was employed by Volk Manufacturing Company from January 8, 1979 until March 29, 1980, when he took other employment with Carlisle Frog Switch Company for higher pay, improved fringe benefits and greater job security.

75. Stepfather had progressed very satisfactorily at Volk Manufacturing Company, and was a welding supervisor with a take-home pay of more than \$200.00 per week in the winter and approximately \$300.00 in the summer due to overtime.

76. Mr. Needham was aware of mother's decision to go to Florida with Mr. Kee in March 1978, and attempted to dissuade her from taking that step. He considers the incident as over with and having no effect on their marital relationship which he described as "decent, solid."

77. As of January 10, 1980 stepfather expressed the opinion that most of the debts would be paid off in three months and he could handle any financial responsibility. There is no evidence that he is unable to do so.

78. Stepfather's parole agent testified that in the year he has supervised Mr. Needham there has been only one negative incident, and he rated his performance as "overall very good." This is borne out by Mr. Needham's testimony and his appearance.

79. The negative incident referred to by the parole officer was a conviction for driving under the influence, and as a result of it he lost his operating privileges.

80. Stepfather's hours of employment at Volk Manu-

facturing Company were from 3:30 P.M. until 2:00 A.M. Due to the loss of his operating privileges, it was necessary for mother to provide transportation for him to and from work which required her to get up and leave their apartment about 1:00 A.M., pickup Mr. Needham and return about 3:00 A.M. Mother took Trinity with her on these nightly trips and if she had had child she would have taken her too; even though she was in school during the day.

81. Stepfather worked the same hours at Carlisle Frog Switch Company as he worked at Volk Manufacturing. Presumably he has now regained his operating privileges and transportation to and from his place of employment is no longer a problem.

82. On January 10, 1980 mother, stepfather and Trinity lived in a five-room and bath apartment consisting of two bedrooms, livingroom, diningroom, kitchen and bath located on the first floor. If mother had custody of Tammy at that time, she testified they would have converted the livingroom into a bedroom for her, and used the diningroom as a livingroom. There is an open archway between the livingroom and diningroom, but she testified they would have put curtains up.

83. The Big Spring Elementary School was approximately five blocks from mother's then home, and child would have walked to school. If she had wished to attend Sunday School she could have gone on a bus that stopped in front of the apartment building, or she could have walked to a church of unknown denomination a block and a half away.

84. Pictures of the apartment presented in evidence indicate that it was adequately furnished and it would have provided an adequate home for child, Trinity, mother and stepfather.

85. At the conclusion of the January 10, 1980 hearing, an order was entered granting alternating weekend visitations for child with mother and stepfather.

86. When child visited, pursuant to the court order, she primarily played with Trinity and the family dog, went on rides or walks with the family, and watched television. She put herself to bed about 10:00 P.M. and got up on Sunday morning about 9:00 A.M. and got a breakfast of cereal for herself and Trinity. She was neither bathed nor told to take a bath during any of the visits.

87. It does not appear that mother or stepfather paid

much attention to child during the visits.

88. Mother prepared the noon and evening meals for the family.

89. Prior to the first visit after the January 10, 1980 court order, child was upset and refused to talk to grandparents about the upcoming visit. When she returned to their home, she appeared hostile, acted in an uncharacteristic way, and was generally upset. Since the initial visit she has accepted the routine visitation, but upon her return to the grandparents' home expresses pleasure that she is back, wants to eat, and then wants a bath. She and her clothing are dirty when she returns.

90. Mother, stepfather and Trinity moved to a two and one-half story home at 8 E. Main Street, Newville on March 14, 1980. The home has three bedrooms, bath, diningroom, livingroom and an enclosed porch, together with a fourth bedroom on the third floor, and there is an enclosed backyard. The monthly rental for the home is \$100.00, and mother and stepfather are required to provide their own heat and utilities. They have no lease.

91. Mother has not been employed outside of the home since the return of stepfather. She and stepfather feel he is financially able to assume responsibility for the needs of the family, including child.

92. Pictures of the unfurnished rooms in the home at 8 E. Main Street, Newville indicate that the physical structure is adequate as a home. Considering the furniture shown in the pictures taken of the prior home of mother and stepfather, and their description of the home, it can be concluded that it would be adequate as a home for mother, stepfather, Trinity and child, and would be adequately furnished.

93. The new home would be closer to the elementary school which child would attend, if she resided with mother and stepfather.

94. Child and Trinity get along well together and she also apparently gets along well with her half-sister, Crystal, on the occasions when Crystal is with them. Apparently child functions in part as a babysitter for the two younger girls.

95. School records introduced indicate that child received satisfactory marks in all courses in first grade, and B's or satisfactory marks in second grade. In third grade (1978-1979) in all four quarters was graded as working at grade level with final

LEGAL NOTICES, cont.

NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the Act of Assembly of May 24, 1945, P.L. 967, as amended, of intention to file in the Office of the Secretary of the Commonwealth of Pennsylvania and in the Office of the Prothonotary of Franklin County, on or about the 30th day of January, 1981, a Certificate for the conduct of business in Franklin County, Pennsylvania, under the assumed or fictitious name of: PLEASANT VIEW UTILITY BARNS with its principal place of business at 8161 Molly Pitcher Highway, Shippensburg, Pennsylvania 17257. The names and addresses of the persons owning and/or interested in said business are: Pleasant View Enterprises, Inc., 8161 Molly Pitcher Highway, Shippensburg, PA 17257.

Forest N. Myers, Esquire
20 South Penn Street
Shippensburg, PA 17257

(1-23-81)

NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the Act of Assembly of May 24, 1945, P.L. 967, as amended, of intention to file in the Office of the Secretary of the Commonwealth of Pennsylvania and in the Office of the Prothonotary of Franklin County, on or about the 30th day of January, 1981, a Certificate for the conduct of business in Franklin County, Pennsylvania, under the assumed or fictitious name of: JESSE C. STITT AND SON REMODELING with its principal place of business at 8161 Molly Pitcher Highway, Shippensburg, Pennsylvania 17257. The names and addresses of the persons owning and/or interested in said business are: Pleasant View Enterprises, Inc., 8161 Molly Pitcher Highway, Shippensburg, PA 17257.

Forest N. Myers, Esquire
20 South Penn Street
Shippensburg, PA 17257

(1-23-81)

LEGAL NOTICES, cont.

NOTICE

NOTICE IS HEREBY GIVEN that Articles of Incorporation were filed on January 12, 1981, with the Department of State, Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, and a Certificate of Incorporation was issued on said date to a business corporation organized under the Business Corporation Law of the Commonwealth of Pennsylvania approved May 5, 1933, P.L. 364, as amended.

The name of the corporation is: PLEASANT VIEW ENTERPRISES, INC.

The purpose or purposes of the corporation are that it shall have unlimited power to engage in and to do any lawful act concerning any or all lawful business for which corporations may be incorporated under the Business Corporation Law.

Forest N. Myers, Esquire
20 South Penn Street
Shippensburg, PA 17257

(1-23-81)

grades of satisfactory in reading, language, Social Studies, science, handwriting, music, art and physical education, and outstanding in mathematics and health. In the fourth grade (1979-1980) in the first quarter she received a grade of outstanding in language and art, and satisfactory in reading, mathematics, Social Studies, handwriting, music, health and physical education. She was marked as needing improvement in science and under the social development category of "works independently."

96. The grandparents testified that at the beginning of the 1979-1980 school year child was having a difficult time keeping her mind on school because of the September visitation planned with her mother. She was restless and school work meant nothing to her.

97. The elementary school principal of Fairview Avenue testified that no psychological testing had ever been administered to child because there was no indication of need for it, and her academic progress "speaks for itself."

98. Child's third grade teacher testified:

(a) She did average to above work all year.

(b) No adjustment problems were observed.

(c) The only occasion when child appeared to be unusually upset was in the winter after Tammy missed being in school on a Monday (the weekend mother failed to return child to grandparents).

(d) The grandparents were particularly interested in child's progress, and secured extra material to help her do her work at home.

(e) Her homework was completed satisfactorily.

(f) She seemed normally healthy and attended school regularly.

(g) She was well-dressed and appeared to be well fed and well rested.

(h) In the current year she "gets very outwardly happy; bubbly, happy appearance usually every time I see her."

99. Child's fourth grade teacher testified:

(a) She is a very hard worker who does the best she can, and is

EDITOR'S NOTE

Last week, we really had no room left for comments by the editor upon the content of our special twenty-four page issue. The editor wants to direct your attention, once again, however, to that issue. It is his thought that the publication, by including the new local proposed divorce rules and forms, has been able to serve our readers in a bit different way than with respect to other matters published. We hope all of you will read this matter thoroughly and make such comments to the committee members involved, as you feel are appropriate. This way real input can come into the matter from the Bar.

Note, the comments should be made directly to the committee chairperson or members and not through the editor.

We also hope other rules committees will take advantage of our offer in regard to publishing proposed rules.

holding her own on the fourth grade level with the exception of reading.

(b) She gets along well with her peers and has no behavior problems.

(c) She has difficulty following directions and it is necessary to spend time on a one-to-one basis with her.

(d) The grandparents show an exceptional amount of interest in her and her progress, and have initiated frequent discussions with the teacher.

(e) She does her homework very well.

(f) On one Monday the child appeared "very disoriented", having real difficulty following directions and did not seem to know what was being done; and when teacher asked her where she spent the weekend the child said with her Mom.

(g) On another Monday morning child complained of an upset stomach and told teacher that she had eaten manwiches and bacon and eggs over the weekend. (Mother had testified to serving manwiches and bacon and eggs on Sunday.)

(h) She has a lot of energy, but is not easily distracted.

(i) Her grooming and appearance are good and she seems well fit and well nourished.

(j) The only special attention child receives is from a speech therapist.

(k) She is doing the work of a normal fourth grade student, and if her reading level improves it will also reach grade level. If it does not, she will be below grade level in that area.

(l) Her grade average for the time she has been in fourth grade is satisfactory and generally on grade level.

(m) She does have difficulty with reasoning skills and the grandparents have been encouraged to go over her papers with her and encourage her to read as much as possible. There has been slight improvement from the beginning of the year.

100. There is no evidence that mother had any contacts with child's teachers or schools, or made any inquiries concerning child's progress, conduct, attitude and achievement in school from March 1978 to date.

101. There is no evidence that stepfather displayed any interest whatsoever in child's progress in school.

102. Pursuant to court order mother, stepfather, grandparents and child met with Richard E. Mason, a psychiatric social worker with substantial experience in dealing with child-rearing problems and children of broken homes. Mr. Mason submitted a report on the conference to the Court with copies to counsel for both parties. He recommended that the Court continue the child in the custody of her grandparents in accordance with her expressed preference; noting that:

"children seem to be able to stand all types of pain and hurt and difficulty; however, they have a very difficult time in coping with inconsistency. Tammy's life to date has been rather inconsistent and I think it is of extreme importance that she remain with the Brenners to ensure that this consistency and dependability continues."

In his report he also noted:

"I had an opportunity to talk to Tammy alone. She presents herself as being a rather open, extroverted young girl who does not appear to be under any acute distress at the present time. She apparently has done fairly well in school over the years, but has been having a few more difficulties this year in fourth grade than she has had previously. The Brenners feel that some of the difficulty may be due to her being pre-occupied about where she will be living in the coming years. When I asked Tammy where she would prefer to stay, she quickly indicated that her preference was to remain with the Brenners although she hopes she can see her mother on a very regular basis. Tammy's reasons for wanting to stay with the Brenners included remaining in her class at school, being around her friends, and also her dog. She seems to have a great deal of affection for the Brenners, but she also seems to have a very warm and tender feeling toward her mother. She seems to hold no resentment toward Mary Needham and while she would prefer to stay with the Brenners, she does not feel it would be disastrous to move back with her mother. She is an engaging young girl and she seems to have come out of a rather chaotic situation with a good sense of self esteem and self confidence.

"After having an opportunity to talk with Steve Myers, Mr. and Mrs. Brenner, and Mary Needham, I could not help but conclude Tammy's best interests would be served by remaining with Mr. and Mrs. Brenner. They have provided her with support, comfort and consistency when other aspects of

Tammy's life have been extremely inconsistent, undependable and confusing. They have shown love, support and care for Tammy and seem to have been functioning as relatively good parents. . ."

103. Pursuant to the procedures of this Court a hearing was held on April 28, 1980 at the request of counsel for mother to give counsel an opportunity to cross-examine Mr. Mason concerning his report and recommendations. Mr. Mason inter alia testified:

(a) He found nothing detrimental concerning the ability of mother and stepfather to care for child, but was concerned that mother's feeling was that she desperately wanted child and child was important to her; whereas he felt the basic concern should be directly and primarily for the child and her needs.

(b) He felt any difference between the homes and equipment of the parties was irrelevant to the best interests of the child.

(c) He felt that the child had had a number of disruptions of her life which she has come through quite well and she now needs stability and consistency for a period of time and he did not believe it would be in her best interest to disrupt her.

(d) He felt the child's relationship with her father was uncertain, but that the child should have regular visitation with both parents.

(e) It was his strong recommendation that Tammy remain with her grandparents.

(f) In response to the Court's request for a statement of reasons for the recommendation the witness stated:

"Tammy is a young girl who has literally been bounced around in her life. She has lived various places under various conditions with different people functioning as parents or surrogate parents, and I think it is time that that stopped. I think it would be criminal to Tammy to perpetuate it, to keep her on the move, not because someone is a bad parent or anything like that, but because this is just not good for a little girl. She has had enough of that in her life. The Brenners seem to be doing a good job. They obviously care, they obviously have a great deal invested in her and I just cannot conceivably see a reason for disrupting that at this time. She has just had too much of that and it is time that she live in one place and stay one place and learn to deal with the school that she is in, the

neighborhood that she is in, the family she lives with and to have those things be steady and she hasn't had that for any length of time. Two years is about the longest in one stretch which is where she is right now, and I would like to recommend that that would continue, and that she have another ten, equally as consistent.

104. Friends of the grandparents who visit in their home and are acquainted with child testified to the evident good family relationship, congeniality and happiness in the home, as well as the love of the grandparents for child and child for grandparents. They recommended that custody of child be continued with the grandparents, but agreed they did not know mother or anything about her.

105. The maternal grandmother and mother of stepfather testified on behalf of mother that both mother and stepfather had become more mature and able to handle their lives, and that they felt custody of child should be placed with mother.

106. The Court interviewed child in the presence of counsel and on-the-record on January 10, 1980, and learned:

(a) She is an attractive, bright and articulate child.

(b) She understood fully the purpose of the hearing. She was somewhat confused as to how long she had been living with her grandparents and did not seem to have a clear recollection of the events leading to her placement with her father, and the transfer of custody from father to grandparents.

(c) She enjoys the living arrangements at her grandparents' home and particularly her own room with her desk and her good friends that live in the neighborhood.

(d) Without hesitation, she expressed the desire to continue to live with her grandparents because she loves them, has friends of her age she plays with in the neighborhood and loves her dog, fish and frog. She likes her school and her school friends a lot. She enjoys her Girl Scout activities and her participation in the activities of the flea markets.

(e) She loves her mother and likes her stepfather. She would like to visit with them regularly.

(f) Her step-grandfather reads to her sometimes. Her mother never reads to her because she doesn't like to. She plays various games such as monopoly with her grandparents and until her step-grandfather pulled a muscle in his back she used to

play with him on the floor.

(g) During the summer when grandmother works at the Parlor House a neighbor girl, about 15 years old, babysits her.

(h) No one told her what to say and she made up her own mind as to where she wanted to live.

(i) She generally gets along well with her half sisters.

107. At the request of counsel for the respondents the child was again interviewed on March 3, 1980 in the presence of counsel and on-the-record for the purpose of ascertaining Tammy's reaction to the court order visitations and her preference, and it was ascertained that:

(a) She visits with her mother and stepfather every other week from Saturday until Sunday at 7:00 P.M.

(b) She enjoys her visits with her mother and stepfather and Trinity. She makes breakfast for herself and Trinity on Sunday mornings.

(c) Mother makes bacon and eggs sometimes for lunch and fixes regular meals for dinner.

(d) She doesn't take a bath while at mother's.

(e) She stays up until about 10:00 P.M. on Saturday night.

(f) Mother and stepfather play with her and play games with her.

(g) She does not go to Sunday School when she visits them.

(h) She is happy when she returns to her grandparents' home because she misses them and her dog.

(i) She does not visit with her father and only sees him when she goes to her great-grandmother's home in Greencastle.

(j) She still wants to live with her grandparents because she has lots of friends there, likes staying there, has lots of toys there.

(k) Even if she had her toys and chalkboard at her mother's home she still would want to stay with her grandparents.

(l) She gave no reason for not wanting to live with her mother

and stepfather, except that she wanted to live with her grandparents because she likes them a lot.

(m) She was somewhat ambivalent in answering the question whether she wanted to continue visiting with her mother and stepfather as she had been doing because she would rather go to her regular Sunday School, and they don't go to Sunday School.

(n) She enjoys going to the Sunday flea markets with her grandparents after Sunday School.

108. Tammy JoAnne Myers is an astonishingly mature, well-adjusted and self-reliant individual who has a well developed and wholesome lifestyle with a strong sense of loyalty to the various and disparate members of her family and a fine perception of her responsibilities. Despite the unstable circumstances in which she has lived she presently presents herself as a warm, happy and personable young lady.

109. At no time during the Court's conferences with her and in her responses to questions posed by the Court and counsel did she ever hesitate or vacillate in her statement that she preferred to live-with her grandparents.

110. No evidence was introduced by any witness that the child had ever indicated a desire to make her home with her mother and stepfather.

111. The child enjoys good health.

112. When the child was removed from the home of the grandparents in the summer or early fall of 1976, she weighed 42 pounds. When mother relinquished custody of her to her father in March of 1978 she weighed 41 pounds. In January she weighed between 58 to 60 pounds.

113. The grandparents testified that they wholeheartedly approved of regular and scheduled visitations by child with her mother, and had no objection to them if the schedule was maintained.

114. The grandfather testified that he would not be opposing custody in the mother if he felt that the child would receive necessary and adequate care, training, supervision, guidance and encouragement in her school work.

115. Mother testified that she wanted custody of child because she loves her, wanted her back, and would give her love

and security. (On June 19, 1975 at the prior custody hearing, mother testified that she wanted child in her custody because she loved her. Child and Crystal get along and child needs that relationship and only with her could she have motherly love.) (N.T. 107, 108.)

116. Father has demonstrated no real interest in child while having custody of child since he placed her with grandparents. He is, therefore, not a factor in this case.

117. The homes of mother and stepfather and grandparents are adequate.

118. There is no doubt that mother loves child and wants custody of her.

119. There is no doubt that stepfather is willing to have child in his home and no reason to believe that he would not fully accept her and provide for her.

120. There is no doubt that the grandparents love child and are totally committed to her and her well being.

121. In the home of the grandparents child is receiving in addition to the basic necessities of life and love, academic and spiritual encouragement and stimulation, as well as stability.

122. At the time of the hearing and for the months prior to the hearings, nothing in the evidence indicates mother is not now a proper person to have custody of child. However, mother's prior lack of consistency in her own lifestyle and lack of constancy in her demonstrated concern for and desire to provide essential mothering and stability for child and her half sister Crystal, constitute a sufficient caveat to present an unequivocal present finding that she is a proper person to have custody of child.

123. The grandparents are proper persons to have custody of child.

DISCUSSION

The present case will determine the custody of Tammy JoAnne Myers, who was born on September 21, 1969 to the parties of record, Mary Catherine Needham, hereinafter "mother;" and Charles S. Myers, hereinafter "father." The actual parties in this case, however, are mother, and the mother and stepfather of father, Phyllis and Frederick L. Brenner. Tammy presently resides with Mr. and Mrs.

Brenner. Mother and father stipulated for the entry of a court order giving primary custody of Tammy Jo to father in March 1978. An order was signed on March 30, 1978 giving custody to father, and indicating the child would reside with father and his wife, Nina Lee Myers, at their residence, and generally providing for visitation for mother by mutual agreement of the parties. At some time after March 1978 and prior to the beginning of the 1978 school year, father placed Tammy with the Brenners. Father is not presently seeking custody of Tammy; he has stated that custody should be awarded to the paternal grandparents.

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). 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 contesting parents; thus, the hearing judge awards custody according to what the preponderance of the evidence shows." *In re Custody of Hernandez*, 249 Pa. Super. 274, 280; 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. Cases which deal with this problem use various, and seemingly inconsistent, expressions in describing the burden of proof that the third party bears. The Pennsylvania Superior Court clarifies the nature of this burden in *In re Custody of Hernandez*, 249 Pa. Super. at 285, 376 A. 2d at 653, 654:

"[I]t has been said that the 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...To say that a parent has a 'prima facie right to custody' properly allocates the burden of proof to the third party who is opposing the parent. The requirement of 'convincing' (rather than 'compelling') reasons makes it clear that the third party's burden is in weight midway between the state's burden ('clear necessity') and the one parent's burden in a case where the dispute is with the other parent (preponderance of the evidence) ...[W]hatever may be the 'reasons' presented by the third party in the effort to overcome the parent's prima facie right, they must relate 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."

In hearing a dispute between a parent and third parties, the hearing judge must hear all the evidence relative to the child's

best interest, and determine whether the evidence presented on behalf of the third party is weighty enough to bring the evidentiary scale, tipped hard in favor of the parents, up to even, and down on the third parties' side. *Hernandez*, supra. See also *Ellerbe v. Hooks**, Pa. Supreme Court, No. 463 January Term, 1978 filed July 16, 1980.

In the present case, the evidence demonstrates that the physical environments of mother and the Brenners are both adequate to child's needs. It cannot be denied that the Brenners' home is more aesthetically pleasing, and is better equipped than the house rented by mother. The Brenner home is located in a rural area, attractively situated on a large lot, near a low traffic road but close to the school bus stop and homes occupied by families with children close to Tammy's age. The home has two baths, and Tammy has her own bedroom as well as a play area in the finished basement. The Brenners enjoy a comfortable middle class lifestyle which allows Tammy to participate in many activities, such as antique collecting, roller skating, bowling and Girl Scouts. It can be assumed that Tammy's financial future and education are secure.

Mother's rented house is located in a small town, and fronts on a busy street. No pictures of the outside of the building were presented to the Court, and the interior pictures were taken before any furniture was in place. It appears, however, to be a house with many small rooms and a crowded traffic pattern typical of such older homes. (Tammy's bedroom, for example, is the "walkway" to the only bathroom.) The home has no central heating system. The backyard is completely enclosed by the backs of other buildings. It is noted that mother changed her residence during the pendency of this case and that it was her third move since December of 1978. Although mother's home offers fewer amenities and is less attractive than the Brenner home, it is adequate to Tammy's needs and the differences do not provide any weight to tip the scale in favor of the Brenners. The same can be said of the financial differences between the Brenners and the Needhams. Russell Needham is the sole support of his family - mother and Trinity. Although he earns substantially less than Mr. and Mrs. Brenner, it is adequate to his family's needs and both he and mother feel they can manage the additional expenses created by custody of Tammy. The Court notes that mother did not present any evidence of her husband's intention to adopt Tammy, so it may be presumed that father's obligation to provide financial support for Tammy would continue. Therefore, the Court is

not persuaded that the financial differences constitute "convincing reasons" affecting the child's best interests.

The Court's concern, therefore, must focus upon child's intellectual, moral, and spiritual well-being. The environment which is central to these aspects of child's well-being is created not by the physical and financial arrangements of the parties, but by the relationships among the people of the parties, but by the relationships among the people who touch her life. The Pennsylvania Supreme Court in *Spriggs v. Carson*, 470 Pa. 290, 300, 368 A. 2d 635, 637 (1977) states:

"[W]e believe that our courts should inquire into the circumstances and relationship of all the parties involved and reach a determination based solely upon the facts of the case then before the Court."

The present action is not the first episode of judicial involvement in the custody of this child. She has developed and grown amid the vacillations and fluctuations of her parents' lives. A short history of Tammy's life provides a perspective on her present attitudes and circumstances. Tammy, born on September 21, 1969, in Germany where her father was stationed with the Army, returned to Chambersburg with her mother in February, 1971, when father was transferred to Viet Nam. On December 8, 1972, when Tammy was about 3½ years old, mother gave birth to her half-sister, Crystal, who was fathered by Gary McClure. Mother and father were divorced on June 12, 1974 upon his return from Viet Nam, the parents never having resumed cohabitation. On July 5, 1974, mother married Russell Needham who, shortly thereafter, returned to prison on a parole violation, leaving mother as sole support of Tammy and Crystal. Mother placed Tammy with the Brenners in September, 1974, when Tammy was 5 years old. Child remained in their custody until September, 1976, when the Superior Court reversed a decision of the Franklin County Court which had granted custody to the Brenners. During this period, on December 15, 1975, mother gave birth to a third daughter fathered by Russell Needham, her husband. At age seven, Tammy returned to her mother's custody. After eighteen months, mother decided to live in Florida with another man, and Tammy was placed by stipulation and court order dated March 30, 1978 in the custody of father. Father subsequently placed Tammy with the Brenners and she has resided with them to date. Since Tammy was originally placed with the Brenners at age 5, until the present hearing, she has resided with her mother for a total of approximately eighteen months.

This Court does not view the remote past behavior of the

* See 1 Pa. Family Lawyer No. 6 (9/80)

parties in this action as substantially relevant to the present circumstances upon which present fitness will be determined and custody of the child will be awarded.

The Pennsylvania Superior Court in *McGowan v. McGowan*, 248 Pa. Super 41, 374 A. 2d 1307 (1977) at 1308 states:

"The court must award custody on present conditions, rather than on consideration of past unfitness."

The Court views the placement of child over the past years as relevant to an understanding of Tammy and her attitudes toward mother, grandparents, and others. Tammy JoAnne is, under present-day pressures of accelerated maturity, in the final years of her childhood. She was more than ten years old at the time of the hearing, turning eleven on September 21, 1980. Although she spent her infancy and early childhood until age five, in the exclusive care of her mother, her years of development, ages five to eleven, have been divided among mother, father and the Brenners, with the greatest share of time being spent with the Brenners. At this point in time, the reasons for this shifting of custody are largely irrelevant, as is any blame ascribable to any of the parties for neglect of duty or over-zealous protection of child. The simple fact is that Tammy now identifies the Brenner household with those elements of her life that mean the security and stability of a "home."

During her interviews with the Court, Tammy JoAnne emerged as a mature and responsible child. The Court was made aware by testimony of father that Tammy had serious adjustment problems when she was placed with him in March, 1978. She appeared distrustful and insecure to both father and his wife. Within a short period of time father and wife determined that they could not cope with child and placed her with the Brenners. Mr. Brenner testified that child weighed 41 pounds in March, 1978. She weighed 42 pounds when mother regained custody of child from the Brenners in September, 1976. Tammy had not thrived either physically nor emotionally during those months of transition, relocation and readjustment.

Child did not complain to the Court about the conduct of any of the parties or the condition of either home. Throughout all the testimony, the Court notes that Tammy never directly complained to anyone regarding her circumstances. Instead, in a surprisingly adult manner, she accepted all situations presented to her, displaying emotional reactions obliquely rather than directly. That is, she complained of a bellyache to explain

her crying at night when placed with father in 1978 (N.T. p. 168); she became impatient with mistakes on schoolwork and generally lost interest in schoolwork in order to gain attention and reassurance from father. (N.T. p. 168 and 186) She refused to be told about or discuss with the Brenners the scheduled visitation with her mother in January, 1979 (N.T. p. 261), and rather than refusing to go, after the first weekend visitation, child was hostile toward the Brenners, (N.T. p. 262, et seq.) until reassured that she was loved and welcome in their home. Child is happy to return "home" to the Brenners after visits with mother, (N.T. p. 264), but she will not negatively compare mother's home to Brenners (N.T. p. 262). Tammy Jo has, most assuredly, been presented with a tangle of emotional demands by the instability of her parents' lives, and the surrogate parenting of the Brenners. She has managed, remarkably, to fit all these people into her world, and to satisfy their needs and her own by successfully socializing with her half sisters (N.T. p. 350), Russell Needham, mother, father, the Brenners and her peer group at school. Yet, without expressing any bitterness toward any of the parties, child consistently and firmly states a preference to maintain her home with the Brenners. It cannot be denied that child maintains a natural attachment to her mother engendered, presumably, by the bonding of early primary care; but primary security and stability have been provided by the Brenners since Tammy was five years old. Tammy states that she wants to stay with the Brenners because "I love them," (N.T. p. 20), "I like them a lot," (N.T. p. 229), and because "I just like staying there," (N.T. p. 229), and further, because the Brenner home includes all the small but important elements which define a child's existence - her pets, dog, frog and fish; her friends; her Sunday school, and her activities (toys and games) (N.T. pp. 20, 229). Far from being trivial or immature reasons for her decision, Tammy expressed to the Court in her somewhat oblique style that, not wanting to betray any of the demands and needs of the parties, nor to stoop to the indignity of bitterness toward any of the people in her life, she is quite resolute in her choice of a home. (She is much less than resolute on continuing visits with mother (N.T. p. 230), and states that she would prefer to attend Sunday school instead.)

The Court, presented with a mature, and rapidly maturing child, who has developed unique powers of adjustment to a confusing melange of people and circumstances, has no doubt that Tammy would appear to adjust herself to any further change in custody. She would because she would know that she must. The function of the Court, however, is not to determine how much change she can endure emotionally, but to determine in whose custody her best interests and permanent

LEGAL NOTICES, cont.

notice to the creditors of Vera E. Laughlin and Rudolf M. Wertime, executors of the estate of Della A. Laughlin, late of Antrim Township, Franklin County, Pennsylvania, deceased.

MELLOTT First and final account, statement of proposed distribution and notice to the creditors of Lena Mellott Keefer and Sonya F. Jones, successor, executrices of the estate of Rosaline A. Mellott, late of Peters Township, Franklin County, Pennsylvania, deceased.

NAUGLE First and final account, statement of proposed distribution and notice to the creditors of Esther Koons, administratrix of the estate of Norman Naugle, late of Guilford Township, Franklin County, Pennsylvania, deceased.

SCHRADER First and final account, statement of proposed distribution and notice to the creditors of Mary Ellen Hahn, executrix of the estate of Robert S. Schrader, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

STATLER First and final account, statement of proposed distribution and notice to the creditors of Shirley A. Statler, executrix of the last Will and Testament of the estate of Garnet G. Statler, late of Hamilton Township, Franklin County, Pennsylvania, deceased.

STINSON First and final account, statement of proposed distribution and notice to the creditors of Erma L. Hays, executrix of the last Will and Testament of Mary B. Stinson, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

VANBUSKIRK Second and final account, statement of proposed distribution and notice to the creditors of the Chambersburg Trust Company, executor of the last Will and Testament of Gordon P. VanBuskirk, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

GLENN E. SHADLE
Clerk of Orphans' Court
of Franklin County, Pa.

(2-6-81, 2-13-81, 2-20-81, 2-27-81)

welfare lie. In the present case, the Court must give weight to the preference of this mature eleven-year-old child. See *Stoyko v. Stoyko*, 254 Pa. Super. 78, 385 A. 2d 533 (1978).

In seeking to understand Tammy's expressed preference, the Court has carefully evaluated the testimony of mother and the Brenners, with close attention to the emphasis created by their selection of "important issues" drawn to the attention of the Court. The Brenners, in relating the elements of their life with Tammy, concentrated upon Tammy's interests, accomplishments, frailties, personality tendencies, and her perceived needs. They seemed proud of her interests, of the fact that she has developed her own depression glass collection, that she has progressed from Brownie Scout to Girl Scout, that she enjoys learning domestic skills such as cooking and sewing, that she seldom needs to be disciplined twice for the same infraction, that she is a warm and loving child. The Brenners seem to relish her interests in Elvis Presley, her dog and other pets, her expressions of vitality and even, at times, temper. A quality of regard for Tammy as an individual pervaded their testimony. These grandparents have and do pay the closest attention to the details of Tammy's life because they genuinely love her as a person. They are not merely performing the duties of child rearing in their participation in Tammy's efforts at school, they are actively rearing Tammy and seeking to maximize her progress as an individual whom they deeply love. The Court believes that Tammy is sensitive to the quality of the Brenners interest in her life, and it is this sensitivity that forms the basis of her decision to remain with them.

Mother testified that she seeks custody of her daughter, Tammy, because "I love her and would like to have her back." The Court believes that mother is sincere in these sentiments. Her testimony, however, does not demonstrate that mother has any knowledge of or interest in Tammy as a person. Mother is aware of Tammy's interest in Girl Scouts, but she has made no efforts to continue Tammy's other activities. Child complained to the Court about missing her Sunday school on visitation weekends. Mother has made no effort to remedy the situation, even though it is of substantial importance to Tammy. Mother and her husband are vague about the activities shared by the family on visitation weekends, and it appears that Tammy and one or both of her half-sisters are left to their own amusements. There seems to be very little communication and interaction between mother and Tammy during visitation periods. Were Tammy an infant or toddler, this would be unimportant, but child is quite developed and requires more than mere physical care. Mother's attitude toward Tammy, in contrast to that of the Brenners, sheds some

light on mother's past decisions regarding custody of child. Mother has vacillated on keeping child in response to personal pressures, and changes in lifestyle. The instability in mother's existence, much of which was created by mother's own indecision about the men in her life, was transmitted to child by mother's repeated placement of child with others and subsequent demand for her return. Although mother is presently enjoying a stable period in her marriage and her life, her attitude toward child has not materially altered. Her perception of Tammy has not deepened into a consideration of child as an individual, as more than a mere sibling to the other children who is essentially the property of mother. The Pennsylvania Superior Court in *Hernandez*, supra, rejected the expression "primary right" in defining the interest a parent has in their child because, "'primary right' connotes a property interest, as though a child were a chattel..." This Court also finds the reduction of a child's identity to the level of a "chattel" as unacceptable. Tammy has struggled to establish some permanence of affection and loyalty in her life; she has, in a real sense, had to make many personal adjustments to create a "home" for herself. She has, in doing this, placed the people in her life in an order which preserves this home and allows a continuity of affection for her natural parents. This Court cannot destroy this order, this home, because mother feels she has a property right in Tammy. Tammy is sufficiently mature and has sufficient sensitivity to the people in her life to perceive where her own happiness lies. Mother has the opportunity to earn Tammy's trust and respect; to develop an integrated relationship with her which may convince Tammy that her mother can be the center of child's "home." At present, we do not find this to be the case. The Court finds that, upon close consideration and analysis of the relationships of the parties, and in consideration and analysis of the expressed preference of a mature child, child's best interests will be served by continuing her residence with the Brenners. Tammy must feel secure that mother will make a permanent home for her after these many years of "temporary arrangements" before this Court could consider destroying her present home and alienating her from any of the people who love her. There are a great many subtleties in the present case, created by the long history of problems in Tammy's life and by her present stage of development.

Tammy's firmly expressed preference, coupled with her present emotional, physical and academic progress, her evident satisfaction in her present situation, and the well reasoned recommendation of the court-appointed psychiatric social worker, constitute compelling reasons for this Court to conclude that her best interests will be served by awarding custody

to Phyllis and Frederick Brenner, the people chosen by mother and father, at various points in Tammy's life, to parent her.

Visitation custody will be awarded mother to assure her the opportunity to re-establish a mother-daughter relationship in which Tammy may with time find the stability and reassurance she needs and is entitled to have.

ORDER OF COURT

NOW, this 18th day of November, 1980, primary custody of Tammy JoAnne Myers, born September 21, 1969 is awarded to Frederick L. Brenner and Phyllis A. Brenner to be exercised at their home, 4377 Marsh Road, Waynesboro, Pennsylvania.

Visitation custody is awarded to Mary Catherine Needham, mother, and her husband, Russell Needham, at their home in Shippensburg, Pennsylvania to be exercised:

1. On alternating weekends according to the schedule heretofore established.
2. From 9:00 a.m. to 8:00 p.m. on the following alternating holidays: Thanksgiving, Easter, Memorial Day, July 4th, and Labor Day.
3. Four consecutive weeks during each summer school vacation period.
4. In even-numbered years from 5:00 p.m. on the first full day of school Christmas vacation until 5:00 p.m. on December 25th and in odd-numbered years from 5:00 p.m. on December 25th until 5:00 p.m. on December 30th.

Mother shall notify grandparents at least thirty (30) days in advance of the four consecutive weeks each summer which she desires for her summer custody.

Mother shall pick up Tammy at the home of the grandparents and return her on the dates and times above set forth.

Each party to pay their own costs.