

and determined is identical” even though “the subsequent proceeding may be upon a different right of action.” *Ottinger*, 335 Pa. at 80, 5 A. 2d at 803. *Wallace’s Estate* was a controversy among heirs to an estate over the status of certain shares of stock, whether they had been held by one heir as trustee or whether he owned them outright. Three successive suits were filed. The court addressed the issue of whether the prior decisions should be considered *res judicata* in the present action:

“Broadly stated, the rule of *res judicata* is that when a court of competent jurisdiction has determined a litigated cause on its merits, the judgment entered, until reversed, is, forever and under all circumstances, final and conclusive as between the parties to the suit and their privies, in respect to every fact which might properly be considered in reaching a judicial determination of the controversy, and in respect to all points of law there adjudged, as those points relate directly to the cause of action in litigation and affect the fund or other subject-matter then before the court.” *Wallace*, 316 Pa. at 153, 174 A. at 399.

In the present case, the suit in equity will be determinative of the law as related to the subject matter before the court, the road in controversy. All parties who presently have an interest in the status of that road, or who subsequently acquire an interest in it, will be bound by that determination.

Exceptions were filed by the plaintiffs to the Adjudication and Decree Nisi filed December 18, 1978. No further action has been taken by either of the parties to dispose of the exceptions. No final decree has been entered disposing of plaintiffs’ complaint alleging the existence of an easement over the lands of the defendants. Until this alleged right of the plaintiffs is finally disposed of there is no established necessity for a Board of View to lay out a private road over defendants’ land.

ORDER OF COURT

NOW, this 16th day of November, 1979, the defendants Preliminary Objections to plaintiffs’ Petition to Appoint a Board of View are sustained. The order of January 11, 1979, appointing a Board of View is vacated.

Exceptions are granted the plaintiffs.

GUNDER v. SIMMERS, C.P. Franklin County Branch, No. F.R. 1979 - 258C

SIMMERS v. GUNDER, C.P. Franklin County Branch, No. 22 of 1979

Adoption - Involuntary Termination of Parental Rights

1. Parental rights may be forfeited for failure to perform parental duties for a six month period, despite the absence of a settled purpose to relinquish parental claims.
2. A parent’s problems with social life, marital difficulties, probation due to criminal convictions and financial pressure do not justify a failure to show an interest in her children.
3. A period of asserted hardship does not completely relieve a person of parental responsibilities.

William F. Kaminski, Esq., Counsel for George E. Simmers and Terry L. Simmers

J. Edgar Wine, Esq., Counsel for Rebecca Hollenshead Gunder

OPINION AND ORDER

KELLER, J., September 27, 1979:

Rebecca K. Hollenshead Gunder presented her Petition to Revoke or Amend Custody Order on March 13, 1979, and an order was signed the same date granting a Rule upon George E. Simmers and Terry L. Simmers to show cause why a change in custody should not be made, and setting May 7, 1979 at 1:30 o’clock P.M. as the date and time for hearing. Service of a true copy of the Rule, Petition and Order was made upon the respondents on March 17, 1979.

On March 21, 1979, George E. Simmers and Terry L. Simmers presented their petition to involuntarily terminate parental rights of Rebecca Hollenshead Gunder, and an order was signed the same date granting a Rule on the respondents to show cause why the prayer of the petition should not be granted; with the Rule returnable and hearing set for 9:30 o’clock A.M., April 3, 1979. The Petition, Rule and Order were served on respondent on March 23, 1979.

On March 29, 1979, counsel for Rebecca Hollenshead Gunder petitioned to consolidate the above-captioned matters, and an order was signed the same date granting the prayer of the petition and setting 9:30 A.M., April 3, 1979 for hearing on both matters. Rebecca Hollenshead Gunder filed her answer to the petition to involuntarily terminate parental rights on April 3, 1979.

In conference with counsel for the parties it was determined that the Simmers would present their case in chief first; Mrs. Gunder would then present her defense to the termination proceeding and her case in chief on the petition for custody; the Simmers would present any rebuttal on the termination proceeding and their defense in chief to the custody action; then Mrs. Gunder would present any rebuttal evidence on the custody proceeding.

The case was tried pursuant to the format above set forth on April 3, 1979, June 28 and June 29, 1979.

The matters are now ripe for disposition.

FINDINGS OF FACT

1. Rebecca K. Hollenshead Gunder (mother) resides at 135 Hamilton Avenue, Waynesboro, Pennsylvania. She was born September 8, 1956, and is twenty-two years of age.

2. Barry L. Hollenshead, Sr. (father) resides at R. D. No. 3, Waynesboro, Pennsylvania.

3. Mother and father were married on June 29, 1973. They were divorced in March 1976.

4. Heidi Heather Hollenshead (Heidi) and Barry Lee Hollenshead (Barry) were born to mother and father on October 21, 1973, and October 24, 1974, respectively.

5. Mother married Randall J. Gunder (stepfather) on March 7, 1979. Stepfather and mother reside together at 135 Hamilton Avenue, Waynesboro, Penna. with their child who was born July 8, 1976.

6. George E. Simmers (foster father) and Terry Lee Simmers (foster mother) live at 7946 Tomstown Road,

Waynesboro, Pennsylvania. The foster father is twenty-seven years old and the foster mother is twenty-five years old. They have been unable to have children of their own.

7. Mother father were living together in the late fall of 1974, and in early 1975. Mother was physically abusive to Barry who was only a few months old and called him profane names such as bastard and son-of-a-bitch and told him that she hated him. She told father that he was not the father of either of the children.

8. At this time father was suffering from muscular dystrophy and could not do many things. Mother began to run around and would be gone for several days at a time. She told father that she did not want to be bothered with the children and wanted to find out what she had missed. She did very little for the children and father was primarily responsible for their care. She was gone over Christmas 1974.

9. In February 1975 mother left the home on a Wednesday. Both children had colds and were sick. Father felt he could no longer take care of them and he took them to the home of his cousin and long-time friend, George E. Simmers.

10. Father asked Mr. and Mrs. Simmers to keep the children for several weeks until he could get himself straightened out. He asked the Simmers not to let mother have the children if she came for them.

11. The Simmers agreed to keep the children for father. At that time Barry was three months old and Heidi was fifteen months old.

12. The Simmers observed that Heidi did not know how to feed herself and did not know what to do with a sandwich when it was given to her.

13. When foster mother took Barry to her doctor, she learned that the child had not been given any of his baby shots.

14. Father and mother separated after the children were delivered to the home of the Simmers.

15. Mother came to see the children on February 17, 1975. She told the foster mother that she enjoyed her freedom and was satisfied that the children were loved and cared for. Mother visited the children again on March 13, 1975 for one half hour. On that visit the foster mother asked mother what the children should call them. Mother told her that she wanted the children to call her "Becky", and the Simmers "Mom and Dad". The foster mother asked the mother if they could adopt the children, and mother told her that after a few months it would be "okay".

16. Mother visited the Simmers' home again on April 1, 1975, in the company of her present husband. She told the foster mother that she enjoyed having no responsibility and was satisfied to have the children with them.

17. On the visits above referred to mother talked to the foster parents instead of paying attention to the children.

18. Father, mother, foster father and foster mother signed an agreement dated June 10, 1975, which inter alia provided:

WHEREAS, the parties hereto, by agreement dated February 20, 1975, disposed of custody of the minor children of the marriage of Barry L. Hollenshead and Rebecca K. Hollenshead, Heidi H. Hollenshead, born October 21, 1973, and Barry L. Hollenshead, Jr., born October 24, 1974;

AND WHEREAS, the parties feel that the best interest and general welfare of the children dictate that they be in the custody of George E. and Terry L. Simmers ...

The agreement then provided for primary custody of the children to be in the foster parents with visitation rights in father every Wednesday from 1:00 to 5:00 P.M. at the foster parents' residence; visitation rights for mother every other Tuesday from 1:00 to 5:00 P.M. at the home of the foster parents. The agreement further provided for visitation at other times as the parties may agree, and that if visitation could not be exercised the parties were to make "a good faith effort" to notify the other of the inability to exercise the visitation right.

19. On the basis of the June 10, 1975 agreement and petition of all of the parties, an order was entered June 12, 1975.

20. At about the time of the entry of the court order above referred to, the foster mother visited mother at her home at 612 W. Main Street, Waynesboro, Penna. to talk with her about her visitation rights under the agreement and order. Mother told foster mother that "it would be a cold day in hell when she came out - there was nothing there she wanted." Mother also told foster mother that she didn't know who Barry's father was, but that father was the only one dumb enough to marry her, and that she had told father when Barry was born, "Here's the little bastard - you raise him."

21. The foster parents have an unlisted telephone number and that number was given to mother during one of the visits she made prior to June 1975.

22. The foster parents and the children have at all times since February 8, 1975 to the date of the hearings in this matter lived at the same home.

23. From June 12, 1975 until Christmas 1975, foster mother and the children remained home on the Tuesday designated as visitation days for mother. She did not exercise her visitation rights and did not give notice as called for by the court order on any of those dates.

24. The foster parents took the children to view the Christmas Parade in Waynesboro in 1975, and the children were seated in the car along the parade route. Mother came up to foster mother to talk to her. Foster mother offered to get the children out of the car so she could see them. Mother said, "No, I can see them from here."

25. The foster parents initially told the children that Jesus had brought them to them in a special way. Later when they were older, the foster mother explained that they had another mother and father who couldn't provide the necessary care so that's why they were brought to them. The foster mother has led the children to believe their mother was concerned with their welfare and care, and that was the reason for the placement because she did not want to tell the children that their parents didn't want to take care of them. The foster parents did not personally believe that mother was concerned with placement of the children, for only father was involved in the original placement.

26. Mother did not visit with the children or make any effort to exercise her visitation rights as provided in the court order from April 1, 1975 until February 1979.

27. Mother has made no contribution to the support of the children and made no offer of contribution to the support of the children at any time to the date of the hearings.

28. From February 8, 1975 until March 13, 1979, mother sent no cards, letters, presents or other remembrances to her children, and she made no attempt to contact them by telephone or through any other intermediary or means.

29. The foster parents were subpoenaed to testify in a custody proceeding involving stepfather and his former wife in October 1978, and saw mother during that proceeding. Mother said nothing to either of the foster parents to reflect any interest in her children or a desire to re-establish contact with them or a desire to regain custody.

30. The foster father operated the Fat Boy Drive-In in Rouzerville, Pennsylvania from 1976 until the end of 1978. Mother was a regular patron of the drive-in. She never made any inquiry concerning the children to the foster mother or father when she saw them at the place of business.

31. With a few exceptions father has regularly visited with his children pursuant to the court order or has made arrangements for alternative visits.

32. Due to the father's disability the Simmers receive a Social Security check in the amount of \$97.00 each month under the father's Social Security account. The checks are payable to George E. Simmers for the benefit of Barry L. and Heidi H. Hollenshead.

33. The Simmers talked to attorneys twice about adopting the children, but never proceeded beyond the conference stage until the commencement of the above-captioned actions.

34. The children call the foster father "Daddy" and the foster mother "Mom".

35. Father has consented to the voluntary termination of

parental rights and testified that they now have a home which he could not provide, and they are treated beautifully and with love.

36. Father testified that he had no reason to believe that mother was trying to re-establish contact with the children until February 1979, when she told him she wanted to see the children and expressed an interest in them. At that time he offered to arrange with the Simmers to let her see the children.

37. The Simmers never requested any support from mother.

38. Mother was indicted in the Fall of 1975 on seven felony counts arising out of alleged forgery and uttering of four of father's checks. On a negotiated plea to one count a suspended sentence was imposed on January 7, 1976, and she was placed on probation for one year on certain specified conditions.

39. In February 1977, mother was charged with being an accessory to shoplifting, assault, and some other offense in Hagerstown, Washington County, Maryland, and was sentenced to thirty days probation on each count.

40. As a result of the charges in Washington County, Maryland mother was found in violation of her probation in this court and her probation was extended for an additional ninety days.

41. At the end of 1976, mother was charged with assault in the Borough of Waynesboro, Pennsylvania before Justice of the Peace Ingels and pled nolo contendere. Mother paid a fine of \$77.00.

42. Mother has not been charged with any criminal offenses since the assault charge.

43. By stipulation of counsel it was agreed this Court would take judicial notice of the Opinion and Order of this Court in the *Commonwealth of Pennsylvania ex. rel. Vicki E. Gunder v. Randall J. Gunder and Rebecca Hollenshead* to No.

"10. Rebecca had two children born to a prior marriage - a girl three years old and a boy age 2. Voluntarily, she placed the two children with her ex-husband's cousin and spouse on February 8, 1975; with the understanding that she could visit them from 2:00 P.M. until 5:00 P.M. every other Tuesday. Visitation rights were exercised two or three times in 1975, and not since Thanksgiving 1975. The two children have received no gifts, letters, cards or contacts since that date from their mother.

"11. Rebecca testified that she was uncertain how long her two children had been away; that she didn't want to see them because she upsets them; that she doesn't intend to do anything about them until they are older, when she will probably get them again."

"Father (Randall J. Gunder), Rebecca, their infant and child (son of Randall J. Gunder) moved into the Hamilton Avenue, Waynesboro, Pennsylvania home in July 1976, and have continued to reside at that address."

"59. The home on Hamilton Avenue has been kept clean and well furnished by Rebecca and father (Randall J. Gunder) since their occupancy, and it is in all respects adequate."

44. Judicial notice is also taken of the fourth Conclusion of Law in the *Gunder v. Gunder and Hollenshead* case which found: "The respondents (stepfather and mother herein) are not proper persons to have custody of the child (son of stepfather herein).

45. Mother testified that at the end of the first or second week of June 1975 after she had signed the agreement and petition for Order of Court granting custody to the foster parents, she visited at the home of the Simmers with stepfather. She talked to the children and she and the children became upset over seeing each other and she cried. Foster mother told her she was upsetting herself and the children and she shouldn't come back anymore until she got on her feet. Mother then read the agreement and concluded she couldn't come to see the children every other Tuesday as provided in the agreement and court order, so she didn't. We

find this testimony unbelievable.

46. Mother commenced living with stepfather on May 30, 1975.

47. Mother testified that she only had off and on jobs from June 1975 to the end of the year. She also testified that she contacted Legal Services, Inc. in 1975 concerning the children and recovering custody, and was told that she was making too much money to be given free counsel.

48. In 1976 mother testified that she was receiving \$18.00 per week unemployment compensation and had no employment. She also testified that she again contacted Legal Services, Inc. concerning the children and she was told that she was making too much money and also they could not represent her concerning the children because they represented father in the divorce action against her.

49. In 1977 mother testified that she was employed at Freeman's Shoe from March until October, and at Fedders in Frederick, Maryland for the remainder of the year and until July 31, 1978.

50. Mother also testified that she again contacted Legal Services, Inc. in 1977, and was told that she could not have free counsel represent her because she made too much money.

51. Mother was employed after leaving Fedders at Hennessey Products, Inc. from July 1978 until December 1978.

52. Mother testified that Randall Gunder's attorney's fee in the *Gunder vs Gunder and Hollenshead* custody proceeding above referred to were \$1,300.00, and that in 1976 and 1977 she contributed what she could to the payment of her paramour's counsel fees.

53. Mother also testified that Randall Gunder's wife initiated a support action against stepfather after she secured custody and "came in for money" every time she and stepfather got a little ahead.

54. Stepfather and his former wife own the property 135-137 Hamilton Avenue, Waynesboro, Pennsylvania. In

LEGAL NOTICES, cont.

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 or after March 17, 1980, an application for a certificate for the conducting of a business under the assumed or fictitious name of The Colorworks with its principal place of business at 10966 Country Club Road, Waynesboro, Pa. 17268. The names and addresses of all persons owning or interested in said business are Claire Hunter, 10966 Country Club Road, Waynesboro, Pa. 17268; Vincent Cahill, 10966 Country Club Road, Waynesboro, Pa. 17268.

(3-14)

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 March 13, 1980, an application for a certificate for the conducting of a business under the assumed or fictitious name of ALLEN FABRIC COMPANY, with its principal place of business at R. D. #11, Box 434A, Chambersburg, Pennsylvania 17201.

The names and addresses of parties owning or interested in said business are: Nell D. Allen, R. D. #11, Box 434A, Chambersburg, Pa. 17201; Daniel L. Allen, R. D. #11, Box 434A, Chambersburg, Pa. 17201.

R. Harry Bittle, Esq.
239 Lincoln Way East
Chambersburg, Pa. 17201

(3-14)

NOTICE IS HEREBY GIVEN of the intention of the individuals mentioned herein to file in the Office of the Secretary of the Commonwealth of Pennsylvania and in the Office of the Prothonotary of Franklin County, Pennsylvania, on or about 19th March 1980, an application for carrying on or conducting a business under the assumed or fictitious name of Zodiac Hair Designers, having its principal place of business at #9 Norland Shopping Center, Philadelphia Ave., Chambersburg, Penna. 17201, and that the names and residence addresses of the persons owning or interested in said business are Linda M. Hobbs, 6517 Little Mountain Terrace, Chambersburg, Pa. 17201; Judith M. Kanner, 361 Briar Lane, Chambersburg, Pa. 17201.

(3-14)

NOTICE OF FILING OF ARTICLES OF AMENDMENT

Notice is hereby given that the First Brethren Church, Waynesboro, Pa., 250 Philadelphia Avenue, Waynesboro, Pennsylvania 17268 has filed Articles of Amendment to change the corporate name from First Brethren Church, Waynesboro, Pa. to Grace Brethren Church, Waynesboro, Pa. The Articles of Amendment were filed with the Commonwealth of Pennsylvania, Department of State, Corporation Bureau on March 6, 1980, all in compliance with the require-

LEGAL NOTICES, cont.

ments of the "Nonprofit Corporation Law of 1972", as amended.

ULLMAN, PAINTER, MISNER
and AYRES, Attorneys at Law
Trust Company Building
Waynesboro, PA 17268

(3-14)

IN RE: : In the Court of
: Common Pleas of the
: 39th Judicial Dis-
: trict, Penna.
Estate of Clarence : Franklin County
D. Ricker, : Branch
Deceased :
: Orphans' Court
: Division

NOTICE OF AUDITOR'S HEARING

NOTICE is hereby given that the undersigned Auditor, appointed by the Court of Common Pleas of the 39th Judicial District, Pa., Franklin County Branch, Orphans' Court Division, to determine the validity of, and legal questions raised by Objections to First and Final Account of Stanley F. Bloyer, Executor of the Estate of Clarence D. Ricker, deceased, pertaining to certain claims made against the above named decedent's estate and questions pertaining to the distribution of the fund in the hands of the accountant, will sit for the performance of the duties of his appointment in Courtroom No. 2 of the Franklin County Courthouse, Chambersburg, Pennsylvania, on Friday, April 4, 1980, at 10:00 o'clock, a.m., prevailing time, at which time and place all persons claiming any interest in the fund in the hands of the accountant should appear and establish their claims or be forever barred from participation in the distribution of said fund.

Timothy S. Sponseller, Auditor
210 Chambersburg Trust Co. Bldg.
Chambersburg, Pennsylvania 17201
Telephone (717) 263-3939

(3-14, 3-21, 3-28)

1978 stepfather's former wife sold her interest in the double property presumably to stepfather. The purchase price paid was borrowed and mother co-signed the note. She did not know what the monthly payments were.

55. At the end of December 1978 or January 1979, mother again contacted Legal Services, Inc. for free counsel to represent her concerning the children. She was again told she was making too much money, but was referred to the Legal Referral Service and received the name of three attorneys who she could contact. In February 1979, she contacted J. Edgar Wine, Esq. and retained him.

56. Counsel for mother on March 8, 1979 wrote to counsel for the foster parents advising that mother would exercise her visitation rights pursuant to the June 1975 Order of Court on Tuesday, March 13, 1979 at 4:15 P.M. Counsel wrote a similar letter on March 19, 1979 advising counsel for the foster parents that the mother would be at the Simmers' home on March 20, 1979 at 4:00 P.M. pursuant to the order and would continue to visit every Tuesday thereafter until she was permitted to visit with her children.

57. Pursuant to agreement of counsel mother has visited with the children at the home of the foster parents for one hour on June 12, 1979; fifteen minutes on June 21, 1979; and fifteen minutes on June 26, 1979.

58. Mother testified that from June 1975 to date she has had stepfather, relatives or friends drive her past the Simmers' home twice a week or more in the hope that she would see her children, but in the four year period only saw them once outside. Usually these "drive bys" occurred while mother and her driver were going to some other place such as the ballfield at Quincy School, stepfather's parents' home, or the Twin Kiss. She had testified that the Simmers' home was somewhat out of the way to the destination.

59. The foster parents testified that they and the children spend a great deal of time outside, and they never observed mother driving by until this spring.

60. Mother testified that she had not attempted to call the children or the foster parents on the telephone because she lost their unlisted number in 1975, and had never asked

the petitioners for it again despite having seen them from time to time.

61. Mother conceded that from the time Barry was four months old to June 28, 1979, she had seen or been exposed to him a total of eighteen minutes, and she knows nothing about him except that he is involved in some church activities.

62. Mother testified that the obstacles which prevented her from asserting her parental rights to the children prior to February 1979 were the criminal charges she had, the bad things that were happening to her, that stepfather's former wife had succeeded in her custody action, and had sought support. She conceded that the obstacles were her own fault, but testified that she has changed.

63. Mother and stepfather commenced sending their daughter, Jamie, to Sunday School at the blue Rock Church in March 1979.

64. Mother is employed full-time at Anvil Products in Greencastle, Pennsylvania and estimates her annual take-home pay to be between \$8,000 and \$9,000 per year.

65. Mother testified that if she recovers custody of her children she will secure a babysitter to look after them, and if that is not successful she will quit her job and remain home with them.

66. Stepfather has been employed by Landis Machine Company for nine months, and has an annual take-home pay of between \$7,000 and \$8,000.

67. The home of mother and stepfather at 135 Hamilton Avenue, Waynesboro, Pennsylvania would in all respects be a satisfactory and adequate home for mother's two children.

68. Neither mother nor stepfather are improper persons to have Heidi and Barry in their custody.

69. The foster parents and the children live in a home at 7946 Tomstown Road, Waynesboro, Pennsylvania in Washing-

ton Township, Franklin County, Penna. The home has three bedrooms, two baths, a livingroom, diningroom and kitchen, and is located in the country with a large backyard. Each of the children has their own bedroom with the usual furniture.

70. The foster parents and children attend the Edenville United Methodist Church regularly and participate in church-related activities.

71. The children have friends that they play with in the neighborhood around the home of the foster parents.

72. The foster parents have provided in all ways for the children, including their medical care. By stipulation of counsel the letter of Dr. Barkley was read into the record and it indicates that their health care has been excellent and there have been regular visits according to the recommendations of the Academy for Pediatric Care.

73. The foster mother bathes the children every evening and gets them ready for bed; they say prayers with the foster parents and are tucked in bed by the foster parents with hugs and kisses.

74. The children have chores that they perform around the home such as picking up their toys, feeding the kitten and gold fish, etc.

75. The children are disciplined usually with a withdrawal of privileges or being sent to their room, but occasionally with spankings.

76. The foster mother is unemployed outside of the home.

77. The foster father is employed at Fairfield Graphics and earns, without overtime \$200.00 to \$250.00 per week gross and has advancement opportunities.

77. Both foster mother and foster father have large extended families that get together regularly. Barry and Heidi are accepted on both sides of the foster families as part of the family circle.

78. The present home of the foster parents is entirely

satisfactory and adequate for the children.

79. The foster parents are fit and proper persons to have custody of the children.

DISCUSSION

The decision in the present case will be determinative of the final custody of two children, Heidi Heather Hollenshead, born October 21, 1973, and presently almost six years old, and Barry Lee Hollenshead, born October 24, 1974, and presently almost five years old. These children were voluntarily placed in the custody of George and Terry Simmers, foster father and foster mother, by the children's father, Barry L. Hollenshead, in the beginning of February of 1975. Rebecca Hollenshead Gunder, the children's mother, left the marital domicile without explanation and father, himself suffering from muscular dystrophy, felt he could not properly attend to the needs of the children then aged fifteen months and three months respectively. Mother and father had been experiencing serious marital difficulties which eventually resulted in a divorce. Father asked Mr. and Mrs. Simmers to care for the children, and left them at the foster parents' home. George is a cousin to father and has been a friend over the years.

Provision for involuntary termination of parental rights is found in the Adoption Act, Act of July 24, 1970, P.L. 620; No. 208, Art. III, Section 311 (1 P.S. Section 311) (Supp. 1978). Section 311 (1) provides for termination of the rights of a parent in regard to a child on the ground that:

"The parent by conduct continuing for a period of at least six months either has evidenced a settled purpose of relinquishing parental claim to a child, or has refused or failed to perform parental duties."

As noted by the court in *In Re Burns*, 474 Pa. 615, 379 A. 2d 535, 539 (1977), unlike its predecessor, which required a showing of *both* a settled purpose to relinquish parental claims *and* a refusal or failure to perform parental duties for a minimum six-month period, the present Section 311(1) "establishes alternative grounds for proving abandonment. Under present law, parental rights may be forfeited for failure

to perform parental duties for a six-month period, despite the absence of a settled purpose to relinquish parental claims. *Adoption of Croisette*, 468 Pa. 417, 364 A. 2d 263 (1976); *In Re Adoption of M.T.T.*, 467 Pa. 88, 354 A. 2d 564 (1976); *In Re Adoption of Mahlon Nichelle McCray*, 460 Pa. 210, 331 A. 2d 652 (1975)."

The courts have been sensitive, however, to the harsh connotations and finality of the termination of parental rights, and, therefore, the record must clearly show that such a finding is warranted. *In Re Adoption of Sarver*, 444 Pa. 507, 509, 281 A. 2d 890, 891, (1971). The party petitioning for involuntary termination bears the burden of proving by a preponderance of clear and competent evidence that the *statutory requirements have been fulfilled* (emphasis ours). *In Re Adoption of P.*, 475 Pa. 197, 380 A. 2d 311 (1977), citing *Adoption of Baby Girl Fleming*, 471 Pa. 73, 369 A. 2d 1200 (1977); *In Re Adoption of McAhern*, 460 Pa. 63, 331 A. 2d 419 (1975); *In Re Adoption of McCray*, 460 Pa. 29, 312 A. 2d 601 (1973).

The court must then consider the individual circumstances of the abandoning parent to determine whether the parent "failed to use all available resources to preserve his parental relationship." *In Re Adoption of P.*, supra; *Adoption of Croisette*, supra.; *Re: Adoption of M.T.T.*, supra.; *Adoption of McCray*, supra. The explanation of the parent for a failure to perform parental duties for the statutory period of six-months must be examined by the court to determine if the parent exercised reasonable firmness in declining to yield to obstacles in the path of continuing a close relationship with the child. *Adoption of McCray*, supra, *In Re Adoption of P.*, supra.

The considerations of the court are within the perspective of what has been recognized in Pennsylvania law as the parental obligation. The courts have taken the view that it is in the child's best interest to require that a parent "exert himself to take and maintain a place of importance in the child's life." *Appeal of Diane B.*, 456 Pa. 429, 433, 321 A. 2d 618, 620 (1974) quoting *In Re: Adoption of J.R.F.*, 27 Somerset L. J. 295, [298], 304-305 (Pa. C. P. 1972).

The parent has an affirmative duty to love, protect and support her child and to make an effort to maintain commun-

LEGAL NOTICES, cont.

IN RE: : In the Court of
 : Common Pleas of the
 : 39th Judicial Dis-
 : trict, Penna.
 :
 Estate of Clarence : Franklin County
 D. Ricker, : Branch
 Deceased :
 : Orphans' Court
 : Division

NOTICE OF AUDITOR'S HEARING

NOTICE is hereby given that the under-
 signed Auditor, appointed by the Court of
 Common Pleas of the 39th Judicial District,
 Pa., Franklin County Branch, Orphans'
 Court Division, to determine the validity of,
 and legal questions raised by Objections to
 First and Final Account of Stanley F.
 Bloyer, Executor of the Estate of Clarence
 D. Ricker, deceased, pertaining to certain
 claims made against the above named deced-
 ent's estate and questions pertaining to the
 distribution of the fund in the hands of the
 accountant, will sit for the performance of
 the duties of his appointment in Courtroom
 No. 2 of the Franklin County Courthouse,
 Chambersburg, Pennsylvania, on Friday,
 April 4, 1980, at 10:00 o'clock, a.m., pre-
 vailing time, at which time and place all
 persons claiming any interest in the fund
 in the hands of the accountant should ap-
 pear and establish their claims or be for-
 ever barred from participation in the dis-
 tribution of said fund.

Timothy S. Sponseller, Auditor
 210 Chambersburg Trust Co. Bldg.
 Chambersburg, Pennsylvania 17201
 Telephone (717) 263-3939

(3-14, 3-21, 3-28)

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 Pennsyl-
 vania at Harrisburg and with the Prothono-
 tary of the Court of Common Pleas of
 Franklin County, Pennsylvania, on March
 28, 1980, an application for a certificate for
 the conducting of a business under the as-
 sumed or fictitious name of Sports Unlimited
 with its principal place of business at R. D.
 #1, Greencastle, Franklin County, Pennsyl-
 vania 17225. The name and address of the
 person owning or interested in said business
 is Donald L. Wingert, R. D. #4, Greenc-
 castle, Pennsylvania 17225.

J. Dennis Guyer, Attorney
 Wertime and Guyer
 11 S. Washington St.
 Greencastle, PA 17225

(3-21)

LEGAL NOTICES, cont.

ication and association with that child. *McCray*, supra; *Diane B.*, supra; *J.R.F.*, supra.

"Parenthood is not a mere biological status, or passive state of mind which claims and decline to relinquish ownership of the child. It is an active occupation, calling for constant affirmative demonstration of parental love, protection and concern." *Diane B.*, 456 Pa. at 433, 321 A. 2d at 620. See also *Adoption of Orwick*, 464 Pa. 549, 347 A. 2d 677 (1976); *In Re Burns*, 474 Pa. 615, 379 A. 2d 535 (1977); *Smiths' Adoption*, 412 Pa. 501, 194 A. 2d 919 (1963).

"Parental duty does not require the impossible, but may encompass that which is difficult and demanding. A parent may not yield to every problem, but must act affirmatively, with good faith, interest and effort, to maintain the parent-child relationship to the best of her ability, even in difficult circumstances. *Burns* at 541, citing *Orwick*, supra; *McCray*, supra., *J.R.F.*, supra."

In the present case, mother did not participate in the placement of her children with the Simmers. Father felt compelled to place them with foster parents after mother left the marital domicile. Mother subsequently consented to the placement, and signed an agreement dated June 10, 1975 providing for primary custody in foster parents with visitation rights in father and mother at separate times. Yet, mother did not visit with the children; did not make any effort to exercise her visitation rights from April 1, 1975 until February 1979, a period of almost four years. Mother has never made any contribution to the support of the children; she has never offered any support to the foster parents and has not inquired as to the needs of the children for such support or for any particular need of either child. From February 8, 1975 until March 13, 1979, a period of over four years, mother sent no cards, letters, presents or other remembrances or tokens of affection to her children. Birthdays and holidays were ignored by mother. During this period, she made no attempt to telephone the foster parents, to inquire about the well-being of the children; mother did not send any intermediary or agent to inquire about the children's welfare. In short, mother chose to ignore her two children for approximately four years. Her inaction manifests a contentment on her part with the

arrangement. Mother proceeded to live her life free of the burdens of parental responsibility, while the day-to-day needs of her children were met by foster parents.

The court in *Smith Adoption Case*, 412 Pa. 501, 505, 194 A. 2d 919, 922, (1963) states:

“Parental rights may not be preserved by complete indifference to the daily needs of a child or by merely waiting for some more suitable financial circumstances or convenient time for the performance of parental duties and responsibilities (while others adequately provide the child with her immediate and continuing physical and emotional needs.) The parental obligation is a positive duty and requires affirmative performance which may not be delayed beyond the statutory period by the parent if the parental right is not to be forfeited.”

The explanations for mother's lack of communication with her children during this four year period do not rise to the level of insurmountable obstacles to which mother was forced to yield. The present case is unlike the situation in *In Re Adoption of P.*, supra, where the child was taken from mother's custody by court order, where mother reasonably relied upon her family to maintain contact with the child, and where mother exercised what limited resources she had to indicate to the Children's Services Agency that she cared for her child and was working to have her daughter returned. This case is a situation “in which the parent has voluntarily surrendered... her child to the care of another, thereby electing to forego the exercise of important affirmative parental duties.” *Adoption of P.* at 206.

Mother has not been confined to a hospital or mental institution during the four years; she has not been forced by economic circumstances to live a considerable distance from the children; she was not involved in any open hostility with foster parents. Her problems with her social life, marital difficulties, arrests and convictions, (which resulted only in probation) and financial pressure or inconveniences do not justify abandonment of her children, do not excuse her failure to exert any effort whatsoever to express affection for or an interest in her children. A period of asserted hardship does not completely relieve a person of parental responsibilities. *Adoption of David C.*, 479 Pa. 1, 387 A. 2d 804 (1978);

Compare *In Re Adoption of M.T.T.*, 467 Pa. 88, 354 A. 2d 564 (1976).

When abandonment becomes complete is a question of fact to be determined from the evidence. It requires an intent to escape parental responsibility, and conduct in effectuation of such intent: See *Hazuka's Case*, 345 Pa. 432, 29 A. 2d 88 (1942); *Davies Adoption Case*, 353 Pa. 579, 587, 46 A. 2d 252, 256 (1946). Mother contends in her brief that she kept alive the intention of someday regaining custody of her children. Yet, a total failure on her part to manifest any intention of maintaining a relationship with the children over a four year period indicates to the Court that she did not feel compelled to supply any of the emotional needs of her children, not did she suffer any loss from their absence.

Abandonment is not an ambulatory thing the legal effects of which a delinquent parent may dissipate at will by the expression of a desire for the return of the discarded child. *Davies Adoption Case*, 353 Pa. 579, 587, 46 A. 2d 252, 256 (1946); *Adoption of McCray*, supra.

The Court's assessment of the child's situation in *Davies Adoption Case* is particularly appropriate to the present case:

“[T]he inexorable circumstances of a child that has been abandoned may soon render the abandonment effectual. . . . A child's natural needs for food, clothing and shelter demand that someone immediately assume the attendant responsibility which an abandoning parent has ignored; and that responsibility endures constantly. It does not await the capricious decision of an uncertain parent, perhaps, years later. The longer the responsibility continues to be discharged capably by the foster parent, the stronger become the ties that form out of the new relationship until there comes a time - possibly, not long deferred, - when the welfare of the child may justly require that the parental responsibility be allowed to remain where the abandoning parent has willingly permitted it to be.” *Davies* at 587.

The Court finds in the case at bar, that the foster parents have successfully carried the burden of proving by competent evidence that the statutory requirements of

Section 311(1) of the Adoption Act have been met. Rebecca Hollenshead Gunder has failed to perform her parental duties for a period far in excess of six months. Mother's present expression of a desire to remain the parent of Heidi and Barry is not effective to dissipate the effect of this failure; mother has, by her neglect of her parental responsibilities, forfeited her parental rights in Heidi and Barry.

The Court has considered the circumstances of mother during this period and finds that her conduct was unreasonable, that she failed to use all available resources, (which were considerable given her geographic proximity to the children and the availability of telephone and postal services), to preserve a close, parental relationship with the children. Her conduct manifested a lack of affection for the children, a lack of concern for their welfare, and an intent to avoid the parental obligation.

"Once abandonment has been proved with legal sufficiency, the welfare of the abandoned child is the primary and paramount concern of the court unaffected by the desire or caprice of the abandoning parent." *Davies*, 353 Pa. at 587, 46 A. 2d at 256. See also *Battle Adoption Case*, 456 Pa. 553, 558, 321 A. 2d 622, 624 (1974).

At present, mother expresses a desire to assume her parental duties. Her present situation is a significant improvement over her previous lifestyle. Mother acknowledges that she is a virtual stranger to the children, having been exposed to Barry a total of eighteen minutes since he was four months old. Over the past four and one-half years the foster parents have provided a stable family life for the children who refer to George and Terry Simmers as "Daddy" and "Mom." They have supplied the children's day-to-day needs for love, protection and support.

At this point in time, mother has forfeited her prima facie right to custody of her children, and the Court must, therefore, place custody of the children in the environment which best promotes their welfare. The rights of parents, by legislative mandate in Pennsylvania, yield to the child's health and safety needs. The constitutionality of such a requirement has been consistently upheld. In circumstances addressed by Section 311 of the Adoption Act, the interest of the parent in keeping the child conflicts with the interest of the child in

its essential physical and emotional needs and the Legislature has mandated that the interests of the weaker party, the child, should prevail. *Maher v. Roe*, 432 U.S. 464 (1977).

The policy of the Commonwealth is to preserve and protect the family wherever possible. The Adoption Act provides for state intervention in the parent-child relationship when essential to protect the welfare of the child. *In Re William L.*, 477 Pa. 322, 383 A. 2d 1228 (1978); See *Adoption of R.I.*, 468 Pa. 287, 295, footnote 9, 361 A. 2d 294, 298, footnote 9, (1976). The state generally exercises great restraint in removing a child from a parent's control. The Pennsylvania Supreme Court addressed this policy in *In Re William L.*:

"This policy of restraint, however, is not intended solely to protect the rights of parents. Continuity of relationships is also important to a child, for whom severance of close parental ties is usually extremely painful. Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child* 20, 31-34 (1973) cited in Wald, "Search for Realistic Standards," supra at 994. Thus the policy of restraint is incorporated in the demanding standards of our removal and termination statutes to protect the family from harmful and unwarranted state intrusion.

"The 'continuity of relationships' consideration, however, is equally applicable where, as here, the child has lived with one foster family for a considerable period of time. Removal of the children from their foster home, or inflicting upon them the fear that they might be removed at any time, could create psychological and emotional distress similar to that caused by their removal from their natural parent. See *Adoption of R.I.*, supra, 468 Pa. at 299, footnote 13, 361 A. 2d at 300, footnote 13; *Commonwealth ex rel Children's Aid Society v. Gard*, 362 Pa. 85, 97, 66 A. 2d 300, 306 (1949); Foster, *Adoption and Child Custody: Best Interests of the Child*, 22 Buff. L. Rev. 1, 11-14, footnote 8 (1972)." *William L.*, 477 Pa. at 348, 383 A. 2d at 1241.

The court in *William L.* states that the language of Section 311(2) of the Adoption Act should not be used to compel courts to ignore a child's need for a stable home and strong, continuous parental ties, which the policy of restraint in state intervention is intended to protect, where disruption of the natural family has already occurred and there is no reasonable

LEGAL NOTICES, cont.

IN RE: : In the Court of
: Common Pleas of the
: 39th Judicial Dis-
: trict, Penna.

Estate of Clarence : Franklin County
D. Ricker, : Branch
Deceased :
: Orphans' Court
: Division

NOTICE OF AUDITOR'S HEARING

NOTICE is hereby given that the under-
signed Auditor, appointed by the Court of
Common Pleas of the 39th Judicial District,
Pa., Franklin County Branch, Orphans'
Court Division, to determine the validity of,
and legal questions raised by Objections to
First and Final Account of Stanley F.
Bloyer, Executor of the Estate of Clarence
D. Ricker, deceased, pertaining to certain
claims made against the above named dece-
dent's estate and questions pertaining to the
distribution of the fund in the hands of the
accountant, will sit for the performance of
the duties of his appointment in Courtroom
No. 2 of the Franklin County Courthouse,
Chambersburg, Pennsylvania, on Friday,
April 4, 1980, at 10:00 o'clock, a.m., pre-
vailing time, at which time and place all
persons claiming any interest in the fund
in the hands of the accountant should ap-
pear and establish their claims or be for-
ever barred from participation in the dis-
tribution of said fund.

Timothy S. Sponseller, Auditor
210 Chambersburg Trust Co. Bldg.
Chambersburg, Pennsylvania 17201
Telephone (717) 263-3939

(3-14, 3-21, 3-28)

NOTICE IS HEREBY GIVEN pursuant to
the provision of the Act of Assembly of May
24, 1945, P.L. 967 and its amendments and
supplements of intention to file with the Sec-
retary of the Commonwealth of Pennsylvania
at Harrisburg and with the Prothonotary of
the Court of Common Pleas of Franklin
County, Pennsylvania, on April 15, 1980, an
application for a certificate for the conduct-
ing of a business under the assumed or fic-
titious name of AMERICAN TRADING
COMPANY with its principal place of busi-
ness at P. O. Box 338, 1939 Wayne Road,
Chambersburg, Pennsylvania.

The names and addresses of all persons
owning or interested in said business are
Richard E. Christman, 1939 Wayne Road,
Chambersburg, Pennsylvania 17201.

H. Anthony Adams
132 East King Street
Shippensburg, Pa. 17257
Attorney

(3-28)

LEGAL NOTICES, cont.

prospect of reuniting it without serious emotional harm to the
child. (The Pennsylvania Supreme court has indicated in
Appeal of Diane B., supra at footnote 5, that both sections
311(1) and 311(2) involve the duty of a parent to care for
the child, and "decisions under one section may fruitfully be
used in discussing the provisions of the other.")

The issue of custody in the present case, as in *William
L.*, is not whether the state should intrude to disrupt an on-
going family relationship between mother and children, but
whether the state should seek to preserve in law a relationship
which no longer exists in fact. The Court finds that to remove
the children from the custody of foster parents would not be
in their best interest. Their family ties have formed where
mother placed parental responsibility four and one-half years
ago, with George and Terry Simmers.

ORDER

NOW, this 27th day of September 1979, the petition of
George E. Simmers and Terry L. Simmers to terminate the
parental rights of Rebecca Hollenshead Gunder in Heidi H.
Hollenshead, born October 21, 1973 and Barry L. Hollens-
head, born October 24, 1971, is granted. Custody of the said
children shall remain in George E. Simmers and Terry L.
Simmers. The petitioners are granted leave to proceed with
the adoption of said children.

The petition of Rebecca Hollenshead Gunder for custody
of said children is denied.

Exceptions are granted Rebecca Hollenshead Gunder.

MARTIN v. BELTZ, et al., C.P. Franklin County Branch,
A.D. 1978 - 432

*Preliminary Objections - Demurrer - Landlord and Tenant - Breach of
Implied Warranty of Habitability*

1. Preliminary objections in the nature of a demurrer to an answer to
new matter and counterclaim will not be granted where the plaintiffs
assert factual circumstances which may establish a defense to the
breach raised by the defendants in New Matter.
2. An agreement between a landlord and a tenant shifting the cost of