and failed to remedy the situation. As discussed earlier, while it is true that a landlord has a duty to protect tenants from the foreseeable criminal actions of third persons, *Feld v. Merriam,* supra, at 231, the extent of that duty and whether it was breached is a question of fact to be considered in light of all the circumstances. *Id.,* at 232.

ORDER OF COURT

March 14, 1985, the defendants' and plaintiffs' motions for summary judgment are denied.

GARLOCK V. KERLIN, C.P., Fulton County Branch, No. 154 of 1983-C

Equity - Collateral Estoppel

1. Collateral estoppel is applied to situations where matters have been previously decided but have remained substantially static, factually and legally.

2. Collateral estoppel may still be applied as long as the party against whom the defense is invoked is the same, even though the plaintiff is a different person.

James M. Schall, Esquire, counsel for plaintiff

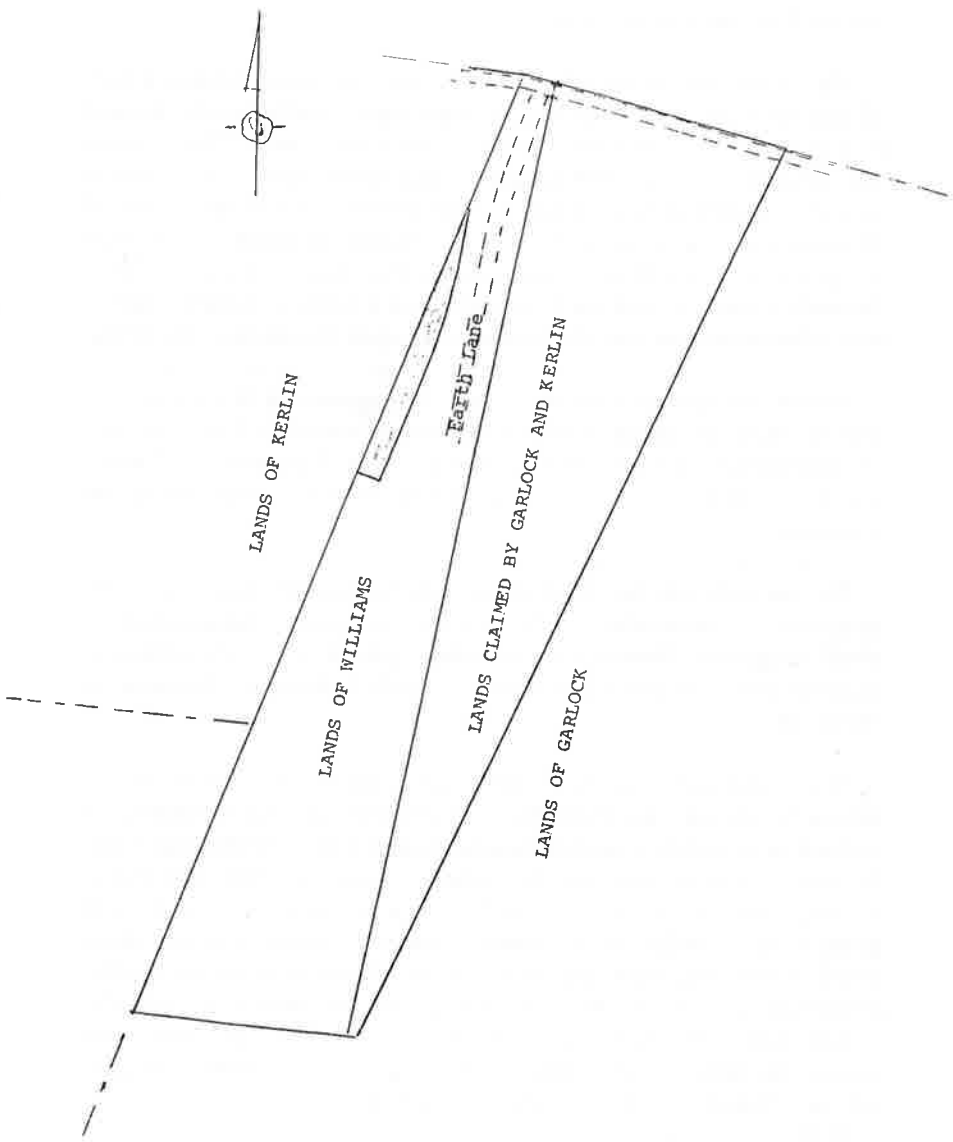
Richard L. Bushman, Esquire, counsel for defendants

OPINION AND DECREE NISI

EPPINGER, P.J., March 25, 1985:

At the time her husband died, Helen Garlock became the sole owner of a jointly held parcel of land. From 1954 to 1974 they farmed the land. After that it was leased to others for farming.

On June 6, 1983, workers employed by defendant, David Kerlin, began to drill a hole about twenty feet over the western boundary of what plaintiff claims is her land. The interesting thing about this is that defendants have to, in effect, jump over land which the court decreed on October 3, 1967, to be lands of



Williams, in a suit of Williams against Kerlin. In this present equity action Garlock is asking us to restrain Kerlin from drilling the well at the intended spot.

The entire situation is better shown by the plot which is a part of this opinion. The lands which seem to be undisputedly owned by Kerlin are on the west. Those marked lands of Williams were the subject of the earlier action in this court. Kerlin's intrusion into the shaded area gave rise to that action. The triangle east of Williams is the area now in contention. Kerlins claim that property is theirs. It is in this triangle that Kerlin started to drill the well. Garlock says no, that triangle is a part of a greater parcel which lies to the east and which is marked as the lands of Garlock.

At the trial and in their proposed findings of fact, both Garlock and the Kerlins introduced old deeds and warrants and plottings to indicate where they believed the line was. A great deal of work was done for both sides in the preparation of the case and of the exhibits.

To one side or the other it may seem clear enough that their position can be sustained by what we can only characterize as conflicting data. Despite our best efforts, we must finally conclude that the previous record of title is of little help in our decision in this case.

We recognize that there are traditional rules of priority for resolving ambiguous boundaries. They are: (1) that monuments prevail over courses and distances except where monuments are doubtful or in dispute; (2) that where there is a conflict between courses and distances and calls for adjoiners, the latter will govern; and (3) that where monuments or courses and distances are doubtful, quantity may be a material factor in determining the intention of the parties. See *Baker v. Roslyn Swim Club*, 206 Pa. Super. 192, 198, 213 A.2d 145, 149 (1965). But there are cases where the facts do not fit squarely within the established principles of law. *Howarth v. Miller*, 382 Pa. 419, 423, 115 A.2d 222, 224 (1955).

In *Baker v. Roslyn Swim Club,* supra, where the adjoining property owners tried to determine their mutual property line and both introduced conflicting deed descriptions and evidence, the Superior Court discussed several situations in which it is not

possible to apply the traditional rules of priority. One is where there is a manifest discrepancy between the distance and adjoiner called for by opposing deeds. *Id.,* at 199, 149, citing *Brolaskey v. McClain*, 61 Pa. 146 (1869). Another is where the application of the rules would lead to an absurd result. *Id.,* at 200, 150, citing *Post v. Wilkes-Barre Connecting Railroad Co.,* 286 Pa. 273, 133 A.377 (1926). And, finally, hard and fast rules should not be applied when the terms of conflicting descriptions are irreconcilable. *Id.,* at 201, 150, citing *Dallas Borough Annexation Case*, 169 Pa. Super. 129, 82 A.2d 676 (1951).

Garlock also claims her title to the land is established by adverse possession. To gain or affirm title by adverse possession it must be shown that the use was (1) actual, (2) continuous, (3) visible and notorious, (4) distinct and exclusive and (5) hostile. Ladner on Conveyancing §4.03. In Pennsylvania the possessary period needed to acquire title by adverse possession is twenty-one years. 42 Pa.C.S.A. §5530.

We accept the testimony that the Garlocks actually farmed the disputed land or had others farm it for them continuously from 1954 through the present. While we did not view the land for this dispute, we did see it during the Williams' trial. Then it gave the appearance of being Garlocks' land, and in that suit Kerlin claimed only the shaded area in the tract marked "Lands of Williams" on the plot. More about that later.

While accepting the testimony that Garlocks occupied the land, we reject the testimony of Kerlin that all of the farming that was done on the land in question was with his consent.

We would hestitate to try to decide this case on principles of construction, but our conclusion is that under principles of adverse possession, Garlock is the owner. However, the central issue here is whether under the principles of collateral estoppel the order of 1967 precludes further judgment on the matter.

Proceedings were instituted to No. 44 January Term, 1967 in the Court of Common Pleas of Fulton County (now the Court of Common Pleas of the 39th Judicial District of Pennsylvania, Fulton County Branch). As indicated in that case Clarence Williams and the Kerlins disputed title to the shaded wedge-shaped parcel lying east of the tract marked lands of Kerlin. The

dispute was resolved when Williams and Kerlin stipulated that the land in dispute belonged to Williams and a decree was entered based on that stipulation.

In another proceeding to No. 1 June Term, 1968, where Williams claimed that Kerlin was crossing onto his land for cultivation, the Court established the line between Kerlin and Williams by a decree dated April 2, 1975, as shown on the plot. In essence the Kerlins' position then was and still seems to be that they have title to fields lying east of their property as shown on the plot. Permitting them to prevail on that theory would be to provide them with a second opportunity on the issue litigated in 1967, that is, where to place defendant's eastern boundary.

Collateral estoppel is applied to situations where matters have been previously decided but have remained substantially static, factually and legally. *Piso v. Weirton Steel Co.,* 235 Pa. Super. 517, 530, 345 A.2d 728, 734 (1975). The doctrine is to be applied liberally and without technical restrictions. *Haines v. City of Allentown,* 237 Pa. Super. 188, 191, 355 A.2d 588 (1975); 10 Standard Pennsylvania Practice 2d, Judgments §65:38, pp. 416-417.

While it is true that plaintiff in this cause is different from the parties opposing the Kerlins in the earlier proceedings, collateral estoppel may still be applied as long as the party against whom the defense is invoked is the same. *Thompson v. Karastan Rug Mills*, 228 Pa. Super. 260, 265, 323 A.2d 341, 344 (1974). The defendants are that party. The second requirement is that the issues of fact be substantially the same; the causes need not be identical. *Id.,* 10 Standard Pennsylvania Practice, supra. There have been earlier disputes with neighbors, but in none of these was Kerlins' present claim ever suggested of the Kerlins. In presenting their case, the Kerlins contended that the Williams' western line was improperly drawn and gave evidence, the purpose of which was to show that they, the Kerlins, owned the Williams' tract. We have already decided the ownership of the Williams' tract and the line that divides that tract from the Kerlins'.

What the Kerlins are actually claiming is fully described in a draft by Byers & Runyon, Surveyors, dated April, 1984. The Kerlins admit that the land outside the plotted area is lands of others. The lands located in Todd Township are described as follows:

IN THE COURT OF COMMON PLEAS
OF THE 39TH JUDICIAL DISTRICT
OF FRANKLIN COUNTY,
PENNSYLVANIA -
ORPHANS' COURT DIVISION

The following list of Executors, Administrators and Guardian Accounts, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: January 2, 1986.

ETTER: First and final account, statement of proposed distribution and notice to the creditors of Emery C. Etter, Jr., and Farmers and Merchants Trust Company, Co-Executors of the Estate of Frank L. Etter, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

HOLDEN: First and final account, statement of proposed distribution and notice to the creditors of Vivian L. Holden, Executrix, and the Farmers and Merchants Trust Company of Chambersburg, Executor of the Last Will and Testament of John W. Holden, late of Guilford Township, Franklin County, Pennsylvania, deceased.

HORN: First and final account, statement of proposed distribution and notice to the creditors of William N. Horn and Kenneth A. Horn, Executors of the Estate of Norman B. Horn, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

JOHNSON: First and final account, statement of proposed distribution and notice to the creditors of Charles E. Johnson, Executor of the Estate of Ethel S. Johnson, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

ROWE: First and final account, statement of proposed distribution and notice to the creditors of H. Gene Hoover, Executor of the Estate of Russell C. Rowe, late of Montgomery Township, Franklin County, Pennsylvania, deceased.

LEGAL NOTICES, cont.

STONER: First and final account, statement of proposed distribution and notice to the creditors of Chambersburg Trust Company, Executor of the Estate of Katherine M. Stoner, late of Chambersburg, Franklin County, Pennsylvania, deceased.

George B. Heefner
Acting Clerk of Orphans' Court of
Franklin County, Pennsylvania
12-6, 12-13, 12-20, 12-27

BEGINNING at a point near an earth lane at the northeast corner of lands of Clarence Williams; thence with the lane, South 75 degrees 49 seconds East, 98.22 feet to an iron pin at a post hole; thence South 24 degrees 30 minutes West, 408.99 feet to a point; thence North 83 degrees 30 minutes 33 seconds West, 5.44 feet to lands of Williams; thence North 11 degrees 24 minutes 45 seconds East, 404.95 feet to the place of beginning.

We find that the above-described tract of land has been established as the lands now of Helen Garlock, if not by conveyance in the deed from Elise A. Kendall, Administratrix of Walter H. Kendall to M. H. Garlock and Helen A. Garlock, his wife, dated July 20, 1954, and recorded in Fulton County Deed Book Volume 62, Page 322, described as follows:

Adjoining lands of George Bivens, Ira Kerlin, D. Howard Wible, Alvin Kerlin, David Kerlin and Peffer heirs. Described as BEGINNING at a chestnut oak, thence along lands of George Bivens, south 52 degrees east, 300 rods to post; thence by lands of Ira Kerlin, north 24 degrees east, 10.3 rods to stones; thence by the same, north 26 degrees east, 126 rods to stone; thence by lands of D. Howard Wible, north 52¼ degrees west, 202.5 rods to lime stone, just west of State Highway Route 522; thence by the same, north 67½ degrees west, 87.25 rods to stone; and thence by lands of Alvin Kerlin, David Kerlin and Peffer heirs, south 29 degrees 55 minutes west, 110 rods to chestnut oak, the place of beginning.

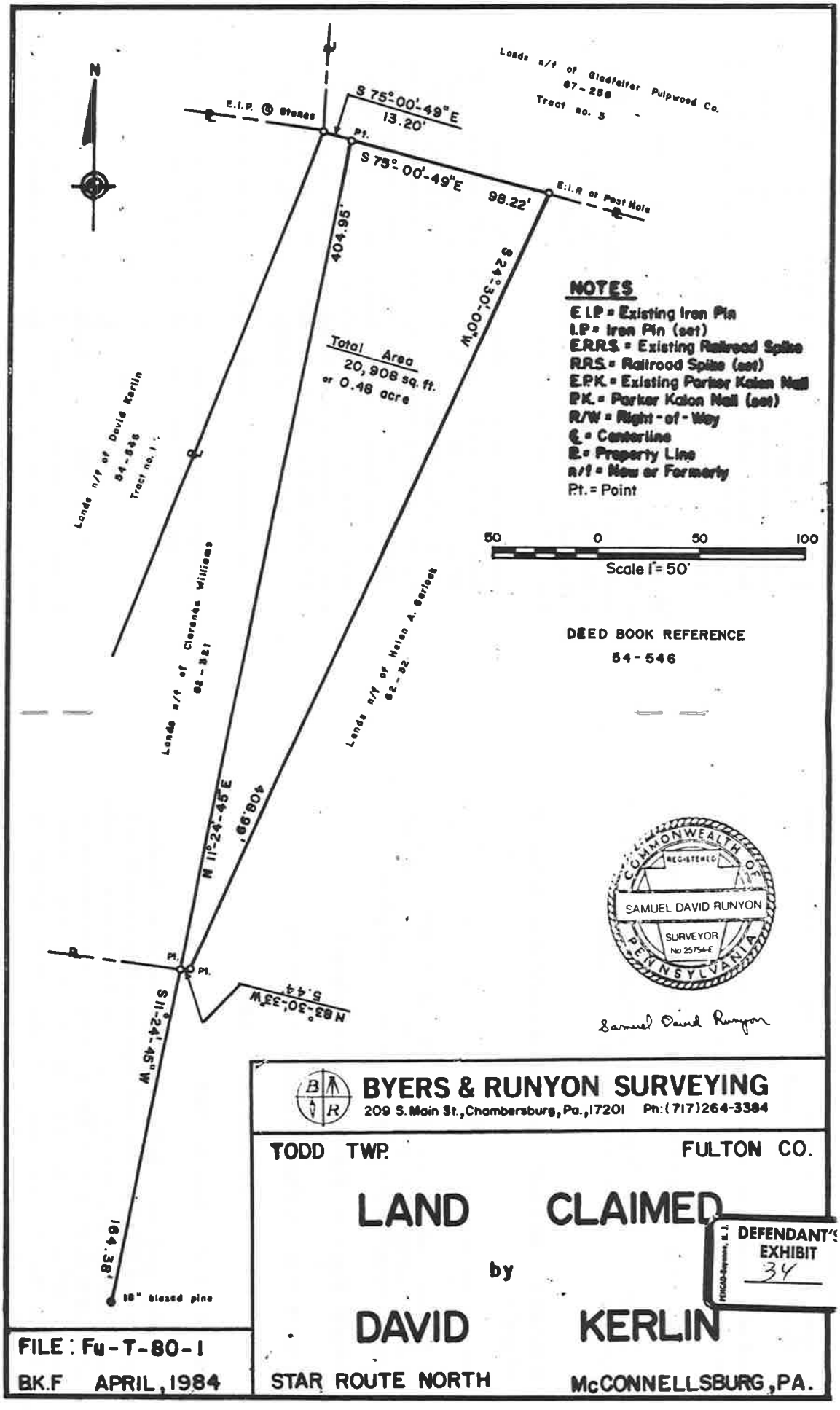
CONTAINING two hundred thirty-eight (238) acres, neat measure.

then by adverse possession by Garlock and her predecessor in title or because of collateral estoppel as to the Kerlins.

DECREE NISI

March 23, 1985, the defendants, David Kerlin and Hazel Kerlin, their agents, servants and employees are enjoined and restrained from entering on the lands of plaintiff, Helen A. Garlock, located in Todd Township, Fulton County, Pennsylvania, described as follows:

BEGINNING at a point near an earth lane at the northeast corner of lands of Clarence Williams; thence with the lane, South 75 degrees 49 seconds East, 98.22 feet to an iron pin at a post hole; thence South 24 degrees 30 minutes West, 408.99 feet to a point; thence North 83 degrees 30 minutes 33 seconds West, 5.44 feet to


N
E.I.P. © Stones
S 75°-00'-49"E
13.20'
Pt.
S 75°-00'-49"E
98.22'
E.I.R at Post Hole
Lands n/f of Bladfelter Pulpwood Co.
87-286
Tract no. 3
404.95'
S 24°-30'-00"W
Total Area
20,908 sq. ft.
or 0.48 acre
Lands n/f of David Kerlin
84-838
Tract no. 1
Lands n/f of Clarence Williams
82-821
Lands n/f of Helen A. Sarlock
82-32
N 11°-24-45"E
408.89'
P.
Pt.
N 83°-30-33"W
5.44'
S 11°-24'-45"W
164.38'
18" blazed pine
NOTES
E.I.P = Existing Iron Pin
I.P = Iron Pin (set)
E.R.S. = Existing Railroad Spike
R.R.S. = Railroad Spike (set)
E.P.K. = Existing Parker Kalon Nail
P.K. = Parker Kalon Nail (set)
R/W = Right-of-Way
℄ = Centerline
℄ = Property Line
n/f = Now or Formerly
Pt. = Point
50 0 50 100
Scale 1"= 50'
DEED BOOK REFERENCE
54-546
COMMONWEALTH OF PENNSYLVANIA
REGISTERED
SAMUEL DAVID RUNYON
SURVEYOR
No 25754-E
Samuel David Runyon
BYERS & RUNYON SURVEYING
209 S. Main St., Chambersburg, Pa., 17201 Ph:(717)264-3384
TODD TWP. FULTON CO.
LAND CLAIMED
by
DAVID KERLIN
STAR ROUTE NORTH McCONNELLSBURG, PA.
FILE: Fu-T-80-1
B.K.F APRIL, 1984
DEFENDANT'S EXHIBIT 34

lands of Williams; thence North 11 degrees 24 minutes 45 seconds East, 404.95 feet to the place of beginning, as shown on draft of Byers v. Runyon attached hereto.

and said defendants are restrained from impeaching, denying or in anyway attacking plaintiff's title to said property.

The costs of these proceedings shall be paid by the defendants.

This decree nisi shall become absolute unless exceptions are filed thereto within ten (10) days from this date.

MELLOTT V. MELLOTT, C.P. Fulton County Branch, No. 195 of 1981-C

Custody - Order ignored by child - Mother's duty to enforce Order

1. Where a 17-year-old child refuses to visit with her father as requested under a visitation order, the Court will deny a request for an Order requiring visitation and will not sanction the custodial parent.

George E. Wenger, Jr., Esquire, Counsel for plaintiff

Jeanne W. McKelvey, Esquire, Counsel for defendant

OPINION AND ORDER

EPPINGER, P.J., April 12, 1985:

Chalmer and Donna Mellott are the parents of two daughters, Angela born July 22, 1969, and Dana born September 9, 1970. Great hostility between the parents was evident at the time of the break up of their marriage. The girls lived with their mother, and their father had no visitation arrangements. Then on December 1, 1981, the father filed a petition for custody of the children, with visitation rights to be granted to the mother.

When the petition was filed we appointed Dr. James W. Nutter, Ed.D. as child custody mediation officer in the case. The parties delayed meeting with Dr. Nutter so the first hearing was not set in the case until April 6, 1982. After the hearing was set, but before evidence was taken, the father petitioned for visitation with the

children, and on February 12, 1982, he was given visitation custody of the two children every third weekend from 6:00 p.m. Friday until 6:00 p.m. Sunday. The order contained a provision that the father should not exercise his visitation in the presence of a female not related to him by blood or marriage.

Next the father filed a petition that this limitation on his visiting with the children was a form of invidious discrimination and requested an order that the limitation be applied to both the parties. The court denied the request as submitted and suggested the father proceed by a rule to show cause.

The hearing on the principal matter, custody, was set for April 20, 1982, but on that date the father filed a petition for a rule on the mother to show cause why she should not be held in contempt for denying the father visitation custody as ordered. That rule was returnable ten days after service. An answer was filed.

On May 14, because of the apparent hostility between the mother and the father and because the children seemed to require their own counsel, the court appointed Stanley J. Kerlin, Esquire, to represent them. It seeming to be impossible to get the family together, the court on June 17, 1982, ordered them all to participate in counseling with Dr. Nutter, hoping in this way that a visitation schedule could be worked out.

June 10, 1982, a further petition for contempt was filed and a rule returnable in fifteen days was issued.

During this time the court had the family under observation on several occasions. In retrospect it might have been better just to have had a full hearing, made an order, and gotten it over with. But we faced the situation where one daughter, the older, did not want to visit with her father and said she would not. The court calculated that counseling before the hearing would be better than trying to pick up pieces after an order had been made, which it seemed would be very difficult to enforce.

After the counseling and the report of Dr. Nutter, the court had the family together again. This time we ordered that the children visit with their father every other weekend. It is our recollection that all parties accepted this order. On July 27, 1982, the father again filed a petition asking that the mother be held in