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with Reports of Important Cases in other Counties

DAVID C. KEITER, EDITOR

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ADOPTION

1. Mother, after having agreed to having her child placed with prospective adoptive parents, now seeks to challenge the petition for involuntary termination of parental rights and the petition for adoption. Mother had earlier agreed to the adoption and had last seen the child in August 2002 when she picked up the child for a custody proceeding and returned her to petitioners the same day. Mother never had any further contact with the child thereafter despite being invited to her birthday party in October 2002 and despite the availability of petitioners' address and phone number nor did petitioners raise any barrier to her contacting the child. Since mother had no sufficient explanation for her failure to meet parental obligations for a period in excess of six months, the court granted the petition to terminate her parental rights.

-ADOPTION OF A.D.D., 83

1. Petitioners sought to adopt the child whom they had raised since she was eight months old and sought to terminate father's parental rights. Father was incarcerated in a state facility for dealing in drugs. He initially was not told he was the father nor was the child. However, after both were informed that he was the father, he wrote letters, made phone calls and sent gifts or money to the child from prison; requested assistance from Children and Youth Services; participated in parenting classes at prison; and sent a videotape of him reading a story. The court found that, although the father had not seen the child for more than six months, he had made substantial efforts to maintain a relationship with her to the best of his ability and therefore had not abandoned her. Since he had the possibility of release from prison, it therefore refused to terminate his parental rights.

-ADOPTION OF: J.N.A., A MINOR, 106

1. Petitioners sought to adopt N.A.G. and natural father objected to a petition to involuntary terminate his parental rights. The court found that father had visited with the child only about five times in ten years, mostly between 1996 and January 2001. Testimony showed that father knew at virtually all times the address and phone number of mother and that he threatened to file an action for visitation in January 2001 after a minor dispute with mother over care of the child. However, he did nothing until fall 2003 and has not seen the child or had any contact since January 2001. The court further found that while father may have had a valid explanation for his failure to contact the child for a period of about six months commencing in September 2001 due to a serious injury to his stepson, he could offer no explanation for his failure to contact the child at other times and did not demonstrate reasonable firmness in attempting to preserve the parent-child relationship. It therefore granted the petition to terminate his parental rights.

-ADOPTION OF N.A.G., A MINOR, 126

1. Biological mother reluctantly relinquished custody of the child to petitioners at the hospital four days after the child was born in 1995 at the insistence of her parents. Petitioners now seek to adopt the child and terminate biological mother's parental rights. A custody agreement was signed originally that granted mother certain visitation rights that were exercised for about eighteen months. Mother has not seen the child since but has attempted to do so and has sent the child cards, but her attempts were frustrated by petitioners who did not was the child to know that she was the biological mother. Mother ultimately filed a custody petition and petitioners responded by filing this action. The court refused to terminate mother's parental rights finding that, although she had not seen the child for over four years, she had nevertheless tried to maintain contact by sending cards and phoning and e-mailing petitioners to try to visit the child, but all such efforts were rebuffed. She has, therefore, offered a sufficient explanation for her failure to perform her parental duties.

-ADOPTION OF: N.R.M., A MINOR, 31

CIVIL PROCEEDINGS

1. Plaintiffs brought this action for wrongful use of civil proceedings after prevailing in a prior action brought against them by defendants. The prior judgment was entered after a bench trial which followed a refusal to grant motions for summary judgment and compulsory non-suit. Defendants now move for summary judgment alleging that since the prior action has survived a motion for summary judgment, plaintiffs have failed to establish a lack of probable cause for the prior action against them, a necessary element of an action for wrongful use of civil proceedings. The court found that the judge in the prior action described the facts presented by both sides and found for plaintiffs in this action, but did not go so far as to say that defendants (then plaintiffs) failed to introduce any evidence whatsoever to support their claims and further found that the trial judge was not the same judge that had ruled on the prior motion for summary judgment so that two independent judges have reviewed the matter. The court therefore granted the motion as there was clearly probable cause for the prior action and dismissed the complaint.

-STERN, FLAX & THE GILES BUILDING & DEVELOPMENT COMPANY, INC. v. CROWN AMERICAN FINANCING, ET AL., 117

CIVIL PROCEDURE

1. Plaintiff sought leave to amend her complaint to raise an additional theory of liability arising from a plane crash that killer her decedent. Defendant objected on the ground that the amendment seeks to add a new cause of action after the statute of lim-

itations had run. The court disagreed, finding that the proposed amendment introduces a new theory of recovery based upon the same operative facts as alleged in the initial complaint and does not introduce a new cause of action. It therefore granted the motion and permitted the amendment.

-CLARK v. GIARRUSSO, 12

CONTRACTS

1. Plaintiff sued defendant on a debt owed to it by the owner of a business sold to defendant, alleging that it was a third party beneficiary of the contract of sale. Defendant moved for judgment on the pleadings. The court granted the motion finding that the contract does not contain any express provision that plaintiff become a beneficiary nor is it implied since the agreement specifically provided that other debts of the seller would be paid by defendant in exchange for the seller's training and since there was no deduction from the purchase price to compensate the purchaser for assuming other debts. Therefore plaintiff is not a third party beneficiary

-RICHMAN'S AUTO SUPPLY, INC. v. HODGES, T/A DOC'S TRUCK & AUTO CENTER, 4

CRIMINAL LAW

1. Defendant was charged with numerous offenses after being involved in a fatal traffic accident. He now files a motion to quash the charges alleging that he lacked the mens rea to commit a crime. Although defendant is deaf and has suffered from epilepsy, he alleges that he has a valid driver's license and takes medicine to control his seizures and therefore did not have the necessary mens rea to commit the acts which he is charged. The court denied the motion, finding that the issue of mens rea was a question for the jury and that a motion to quash is to test the sufficiency of the Commonwealth's case and not to ascertain the defense of the defendant's case.

-CMWLTH OF PA vs. CHIDLOW, 146

1. Defendants filed a second petition pursuant to the Post Conviction Relief Act some seven years after his conviction and two years after the Supreme Court had refused to consider his first petition. Since there is a one year limit on filing a petition for relief, the court is without jurisdiction to consider this petition unless the defendant can show that failure to raise the claim earlier was prevented by government officials, the facts were unknown and unable to be ascertained by the defendant prior to their being raised, or the right raised was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania and held to be retroactive. The court therefore dismissed the petition finding that none of the exceptions was applicable. The "newly discovered" evidence was not raised within 60 days of its "discovery" and was not newly discovered in any event. Appeal counsel was further not ineffective since the absence of the proffered testimony failed to prejudice the defendant in any way.

-CMWLTH OF PA v. MABLE, 26

1. Defendant filed a Post Sentence Motion for New Trial after being convicted for first-degree homicide alleging several grounds for error. He alleged that he was deprived of a fair trial when the court denied a request for a jury instruction regarding the testimony of a witness that allegedly contradicted other "direct" evidence. The court found that the instruction given was fair and complete and the testimony did not merit the classification of "low grave' in addition. He also alleged that the court wrongly excluded evidence regarding his love of the victim and lack of motive. The court disagreed finding that defendant specifically failed to proffer the evidence at trial; that the evidence sough to be introduced was hearsay and speculative lay opinion; that defendant failed to identify and call witnesses from who it submits affidavits which waives the argument as to those witnesses; and any error made was harmless because the Commonwealth agreed to the lack of motive and the testimony elicited from a Commonwealth witness to this effect. Finally defendant waived any objection to the instruction given regarding the testimony of the emergency room physician by not objected to it at trial.

-CMWLTH OF PA v. WITMAN, 95

1. Prior to trial the court issued a Case Administration Order including, inter alia, that jurors were to be referred to only by number and their names would not be released so that they would not have to be sequestered. At the completion of the trial, the court indicated to the jurors that they could speak to the press, but none wished to do so. York Newspaper Company now seeks release of their names and addresses. The court concluded, although it is the policy of Montgomery Country from where the jury was selected not to release jurors names, since the jury array is a public record open for inspection and the right to inspect judicial documents has been broadly construed, that the list of persons actually selected from the jury array is a judicial document open for public inspection. It therefore ordered release of the information after seven days to allow for an expedited appeal if objections were filed.

-CMWLTH OF PA v. WITMAN, 40

CUSTODY

1. In a juvenile court matter, the child was found not to be dependent because she had a father willing and able to provide care. Child was living with mother, however, and the juvenile court concluded that it had no authority under the Juvenile Act to transfer custody absent a finding of dependency. Child, through her guardian ad litem, then filed a petition for special relief to have custody transferred to father even though no custody action had been instituted. The court reviewed the confusing state

of the law, but accepted the petition pursuant to Rule of Civil Procedure 1915.13, and directed that custody be transferred immediately, at least temporarily, without a dependency finding or a hearing since the juvenile court had found a sibling to be dependent and further directed that a complaint be filed to institute a proper custody action.

-R.W. v. K.W., 1

1. Paternal grandfather filed a petition seeking partial custody or visitation. Mother, who had sole custody of the child, objected to his standing to bring the action and to the constitutionality of the statute regarding grandparents rights in custody matters. The court found that grandfather had standing to bring the action pursuant to 23 P.S. ß5312 since the parents are divorced. However the court further found that the statute does not grant automatic standing nor does it mandate a different standard for determining whether a grandparent is entitled to custody or visitation The statute is limited in the scope of its application by its own terms and the natural parent is bestowed with the presumption that he or she is the preferable party to exercise custody, and it, therefore, does not unconstitutionally infringe upon the right of the custodial parent to be free from outside interference in the raising of the child.

-KILE, JR. v. KILE AND KILE, 21

1. Mother who had been relocated to California by her employer, appealed an order granting majority physical custody of the child to father, who remained in York County. The court found that the relocation of one parent prior to the entry of a custody order should be analyzed in the context of the best interest of the child with neither side having the burden to demonstrate compliance with the factors to be analyzed in a relocation case. Furthermore, the tender years doctrine is no longer applicable and as both parents had been the primary care giver at various times, other factors are more significant in deciding majority custody. Finally, the child's preference was not strongly expressed and was considered but did not carry enough weight to overcome the other factors favoring majority custody for father.

-KIRKENDALL v. KIRKENDALL, 46

DISCOVERY

1. After plaintiff brought suit for emotional distress arising from alleged sexual misconduct on the part of individual defendants, defendants moved to compel depositions of plaintiff's treating psychiatrist and psychologist. The court granted the motion finding that: 1) by placing her mental state at issue, plaintiff waived the privilege of confidentiality of psychiatric treatment; 2) a treating physician is to be treated as an ordinary witness, not as an expert witness and is, therefore, subject to ordinary discovery rules; and 3) discovery of information through deposition as well as written records is permitted by Pennsylvania law but such information must be used only for the purpose of the litigation and is not to be divulged otherwise

-HEPLER v ALVIS, TROUT, ET AL., 57

DIVORCE

1. Wife filed preliminary objections to husband's complaint for divorce filed in York County alleging a lack of in personam jurisdiction and forum non conveniens. Husband had relocated to Pennsylvania but wife is a resident of Maryland. The court found that divorce is an in rem proceeding so that it could dissolve the marriage since husband met the minimum requirement of six months' residency in York County. However, husband also requested the court to resolve economic issues. Using the doctrine of divisible divorce, the court found that resolution of these issues requires in personam jurisdiction over wife which is not present. Since it does not have jurisdiction to decide the ancillary economic claims, the court therefore declined to address the divorce claim since it is clear that Maryland is the proper forum to resolve all other issues.

-ST. MARTIN v. ST. MARTIN, 75

1. After bifurcation and the grant of a divorce, economic issues came before the master. The master found that wife was not capable of gainful employment nor would she be in the future. Husband was a principal in several businesses and the parties had numerous animals, some of which went to wife. The master valued the businesses by using a net annual commission multiplier with the one business value discounted by 10% due to the liquidity of husband's interest. The master also found that wife was entitled to alimony which included an amount for the care of the animals that she received but which should be reduced by the rate of $150 per month after the first year and a further $150 per month in each of the next seven years to reflect the normal attrition of her horse herd. (Ed. Note: This is a portion of a mater's report. The issues discussed were upheld by the Superior Court in an unpublished opinion.)

-SMITH v. SMITH, 88

EVIDENCE

1. Plaintiffs filed a motion to compel answers to Interrogatories propounded to the defense's expert medical witness for the purpose of showing bias and for possible impeachment during trial. Plaintiffs sought all 1099 forms received between January 1, 1999 and December 31, 2002 from insurance companies or attorneys; an income allocation for the same three years seeking the percentage of income received from medical opinions for defendants, defense attorneys and/or insurance companies; and a list of the fifty most recent defense medical examination reports. The court upheld only the request for the 1099 forms finding that the information would not be a burden to provide and may be relevant for impeachment purposes or to show

bias. However it denied the other two requests finding that such broad statistical discovery would obviate the purpose of Rule of Civil Procedure 4003.5 and would also allow the release of such information as of right.

-SULLIVAN v. WHETZEL, JR., 61

INSURANCE

1. Plaintiffs brought suit after defendant refused to provide coverage for wife's treatment for mercury poisoning. Defendant had issued a group insurance policy to husband's business. Defendant moved for summary judgment, alleging that the action was preempted by ERISA. The court denied the motion, finding that a business owner cannot be both an employer and an employee for the purposes of ERISA and that business owners who are also employees are not covered by ERISA. Since plaintiff husband could not assert his right to future benefits from the corporation, defendant cannot invoke ERISA to shield itself from this action as husband had purchased the insurance for himself through his business and the policy was not any kind of benefit or incentive to other employees of the business.

-FRIEDRICH & FRIEDRICH v. EDUCATORS MUTUAL LIFE INSURANCE COMPANY, 36

JUVENILE LAW

1. Defendant was charged with Possession of a Weapon on School Property and discharging an air rifle as well as other charges after discharging a paintball gun from his vehicle at lunch and then placing it in the trunk when he returned to the school parking lot. He now challenges whether the paintball gun is a weapon and an air rifle as defined in the Criminal Code. The court found that a paintball gun is a weapon since it is capable of inflicting serious bodily injury such as permanent eye injury. The court further found that since a paintball gun is carbon dioxide powered and capable of causing bodily harm, it also meets the definition of air rifle in 18 Pa. C.S. ß6304.

-INTEREST OF M.H.M, 131

MENTAL HEALTH PROCEDURES ACT

1. Petitioner sought to have his mental health records expunged and to have his weapons that were seized returned to him. Petitioner had been involved in a stand off with police and ultimately taken to York Hospital for evaluation under Section 302 of the Mental Health Procedures Act, 50 Pa.C.S. ß7302, where he was examined. At a hearing on the hospital's application to have his involuntary treatment continue, the hearing officer found that petitioner did not present a clear and present danger to himself or others and he was discharged. The court found that since petitioner was not committed pursuant to the MPHA, Section 6105 of the Crimes Code, 18 Pa.C.S. ß6105, regarding seizure of weapons was not applicable since mere admission to the hospital for evaluation did not constitute commitment to trigger the statute. It therefore ordered that his weapons be returned. Furthermore, since there was no certification that petitioner was commitable, his record will be expunged

-IN RE: BRIAN LLOYD SARVER, 52

MUNICIPAL CORPORATIONS

1. Defendant appealed a summary conviction for violating a city ordinance regulating the keeping of animals because she kept five goats in an enclosure on her property. The parties agreed that the only part of the ordinance that was violated was the requirement that such enclosure be set back at least 100 feet from any dwelling or public street. Defendant moved to quash challenging the validity of that requirement. The court granted the motion finding that the section was invalid as there was no evidence that the keeping of goats in this matter constituted a nuisance or that keeping of goats generally was a nuisance per se and, therefore, the requirement is arbitrary and beyond a reasonable exercise of police power.

-CMWLTH OF PA v. GRIES, 8

REPLEVIN

1. After Penn Township withdrew authorization for defendant to fight fires in the Township, plaintiff brought this action in replevin seeking return of equipment purchased by it with receipts pursuant to the Foreign Fire Insurance Tax Distribution Law, 53 P.S. ß895.701 et seq. Defendant continues to provide hazardous materials clean up and other non-fire fighting services. The court found that under the law all equipment purchased with funds provided through the Relief Association is the property of the Relief Association and directed its return notwithstanding the fact that defendant continues to provide some service and the fact that defendant acquired some of the equipment directly without prior approval of the Association and suing its own tax identification number. It therefore granted the writ of seizure conditioned upon the posting of the required bond.

-PENN TWP FIREMEN'S RELIEF ASSOC., INC. v. GOODWILL FIRE COMPANY OF GRANGEVILLE, INC., 49

TORTS

1. Mother brought suit on her own behalf and on behalf of her minor daughter who was injured at cheerleading practice when she was eight years old. Prior to enrolling in the program, both mother and daughter signed a release prepared by defendant. Plaintiff filed a motion for partial summary judgment alleging that the release did not bar the minor's claim. The court agreed finding that the

minor was incompetent to execute a release and that a parent cannot compromise a minor's right to pursue legal action arising from injuries sustained by a minor since such a release is voidable. The court therefore struck the affirmative defense of release as to the minor's claim but not as to the mother's own claim.

-WANCHO, WANCHO vs. THE VIPER P.I.T., INC., 134

WILLS AND ESTATES

1. Four years after his burial, decedent's wife petitioned to disinter and exhume his remains so that they could be cremated, alleging that decedent's disinherited children were defacing the grave and that the cemetery would not keep it presentable The court reviewed numerous factors finding that 1) the spouse had the ability to determine the disposition of the remains; 2) decedent had expressed no preference as to the disposition of his remains; 3) no objection to the proposed disinterment was received; and 4) despite the length of time since burial, the unforeseen harassing conduct of decedent's children and petitioner's wish to keep the remains to be buried with her are strong reasons to allow the disinterment. The court therefore granted the petition.

-IN RE: ESTATE OF JOHN F. NICKOL, DECEASED, 122

1. Decedent, who was killed when his plane crashed, had written a will leaving his tangible personal property to his son who claimed that the insurance proceeds from the destroyed plane and decedent's destroyed watch should be distributed to him. The court agreed, finding that although the plane and watch had been destroyed, they were still owed by decedent at his death as he had not sold them or given them away. Therefore the bequest had not been adeemed and the son was entitled to receive the insurance proceeds from the items of tangible personal property.

-IN RE: ESTATE OF HENRY K. SAGEL, DECEASED, 111

1. Petitioner killed decedent, his wife, and now seeks to impose a constructive trust on a certain piece of property that had been conveyed to him by his mother for estate planning purposes and which was to have been reconveyed to her when his father died. Although the father has since died, the reconveyance had no occurred and petitioner now seeks to protect the property from a survival action. The court found that, regardless of being a slayer under the Slayer's Act, 20 Pa.C.S. ß8801, petitioner did not have standing to seek to have a constructive trust imposed on the property as he is not the real party in interest, but rather it is the potential beneficiary, his mother, who is the real party in interest.

-IN RE: ESTATE OF DONNA LYNN STERLING, DECEASED, 114