

witnesses testified that the road from Tosh to Cook was not cleared and bulldozed until 1956, and before that time there was only a footpath from Tosh to Cook, possibly usable by jeep, and that all observed vehicle traffic circled out around the Tosh property. Thus, for twenty-one years, the defendants argue that the easement claimed was not substantially the same. The serious factual question whether the road went straight from Tosh to Cook buttresses the conclusion that the land was

unenclosed woodland up until 1956. We do not find any persuasive evidence to the contrary.

We are persuaded by the evidence that the easement claimed by the plaintiff passed through unenclosed woodlands, and those lands were not cleared, and thus removed from the effect of the Unenclosed Woodlands Act until 1956. Therefore, the prescriptive rights claimed by the plaintiff did not begin to accrue before 1956, and were terminated in 1975, less than the required twenty-one year period. It is with no little regret that we conclude that the plaintiff's claim to a means of access to his real estate across the lands of defendants Houser and Cook must be denied as a matter of law by reason of the operation of an 1850 statute recently repealed.

The plaintiff's uncontradicted evidence established an adverse, open, notorious and continuous use of the right-of-way across the lands of Dale and Anna Gamby, his wife, for twenty-one years and more. There was no evidence that the right-of-way over the Gamby lands was at any time, here relevant, unenclosed woodland.

#### CONCLUSIONS OF LAW

1. By virtue of the Unenclosed Woodland Act, supra, the plaintiff, William Noll, did not acquire an easement by prescription over the lands of Ronald W. Cook and Evelyn Cook, his wife, and Ray C. Houser and Brenda Houser, his wife.

2. The plaintiff, William Noll, did acquire an easement by prescription over the lands of Dale Gamby and Anna Gamby, his wife. The said easement is one held in common with other users of the existing right-of-way.

#### ADJUDICATION

NOW, this 8th day of November, 1978:

In the suit of William Noll v. Ronald W. Cook and Evelyn Cook, his wife, and Ray C. Houser and Brenda Houser, his wife, the Court finds for the defendants.

In the suit of William Noll v. Dale Gamby and Anna Gamby, his wife, the Court finds for the plaintiff.

Costs to be paid by plaintiff.

Exceptions are granted the plaintiff and defendants.

MILLER, ET AL. v. MILLER, C.P. Franklin County Branch,  
No. A.D. 1978-409

#### *Child Custody - Past Moral Lapses*

1. Past moral lapses are not enough to deprive a parent of custody; the issue is the parent's present fitness and not past misconduct.

*Edwin R. Frownfelter, Esq.*, Counsel for Petitioner

*David C. Cleaver, Esq.*, Counsel for Respondent

#### OPINION AND ORDER

KELLER, J., December 13, 1978:

This habeas corpus proceeding was commenced by Carol A. Miller by the presentation of a petition for a writ of habeas corpus on July 31, 1978. An order was signed on the same date directing the respondent, William R. Miller, to bring John R. Miller and Christine D. Miller, children of the petitioner and respondent, before the Court. The hearing was set for August 8, 1978, at 1:30 o'clock P.M. The August 8, 1978 hearing was continued until August 24, 1978 at 2:00 P.M., because the Sheriff has been unable to make service of the petition and order upon the respondent. Service of the petition and order was made upon the respondent by Deputy Sheriff Barnhart on August 10, 1978 at 3:45 o'clock P.M. By stipulation of counsel dated September 15, 1978, it was established that the petitioner at that time had custody of John R. Miller, and the respondent custody of Christine D. Miller, and the Court was requested to enter an order providing for visitation by the children with their respective parents on alternating weekends. This order was entered September 20, 1978. By stipulation of counsel the Court will determine the custody of both children and will consider the proceeding as one where each parent seeks custody of both children. Hearing on the matter was held on November 6 and 7, 1978.

## FINDINGS OF FACT

1. The petitioner is Carol A. Miller, hereinafter referred to as (mother).
2. The respondent is William R. Miller, hereinafter referred to as (father).
3. The petitioner and respondent were married on August 27, 1966. Two children were born of the marriage: John Robertson Miller, born June 18, 1967, and Christine Diane Miller, born September 29, 1970.
4. The parties separated sometime prior to December 8, 1975, and on December 8, 1975 entered into a property and separation agreement which inter alia granted custody of the parties' children to the mother with visitation rights to father, and provided for support according to a stipulation executed by the parties and Order of Court to be entered pursuant to the stipulation.
5. Contrary to the testimony of mother there was no provision in the agreement for father to provide medical or dental care other than by way of his weekly support payments.
6. Father was the plaintiff in a divorce action in this Court and a decree was granted in 1976.
7. Father married his present wife, Ruth Miller, on March 3, 1978.
8. Ruth Miller had previously been married to, divorced from, remarried to, and divorced from and remarried to and divorced from a brother of petitioner. Angela Andrews, age 13, is the daughter of Ruth Miller and her former husband; and she resides with her mother and stepfather, respondent herein.
9. From the time of the parties' separation at about October 1975 until the Spring of 1977, mother and the two children resided in Florida for a month; with her parents at their home on R. D. 1, St. Thomas, Pa. on two occasions; at the White Orchard Motel, Fort Loudon, Pa. for two months; on Race Track Road for two months; at the Mt. Parnell Motel and in Fannettsburg.
10. In March 1977, the mother rented a furnished mobile home in the names of Carol and Leroy Adams for their use and the use of the two children of the parties. Mr. Adams left the trailer after living there for approximately six months. Mr. Adams and mother were not married.

11. The mobile home was rented from a Mr. and Mrs. David Angle, who had lived in it with their two children for nine or ten years until they built a new home for themselves approximately 600' to 700' from the mobile home. Mrs. Angle had personally cleaned the mobile home and furniture and shampooed the carpeting when she and her family moved to their new home. Mother, her paramour and two children were the first tenants to occupy the mobile home after the Angles left. Under the rental arrangement, Mr. Angle was to be responsible for any necessary repairs.

12. Mother left the mobile home at the end of September 1978. Inspection of the mobile home, its furniture and fixtures revealed:

- (a) Badly stained mattresses from the master bedroom, occupied by mother, and from a bunkbed occupied by one of the children.
- (b) Poor housekeeping practices in the kitchen, and particularly involving the stove, broiler pan and exhaust hood.
- (c) An extremely filthy and stained commode.
- (d) A badly stained and dirty bathtub and tile wall behind it.
- (e) Maggots in the couch in the livingroom.
- (f) Soiled and spotted carpeting in the master bedroom and livingroom with what appeared to be residue of feces from pets, and a distinct odor of urine in the carpeting.

13. Mother testified that a week or two before she left the mobile home the septic tank became blocked and backed up in the tub and commode causing the filthy conditions observed after her departure. The landlords were not notified of the need for immediate repairs. Subsequently, the landlords determined the line to the septic tank was clogged with sanitary napkins.

14. On June 9, 1978, Mother left the children with their paternal grandmother, Mrs. Sue Miller, for two days because the maternal grandmother was hospitalized. Mrs. Sue Miller delivered the children to father who first asked mother for another week visitation, and then on June 20, 1978 notified mother he was not returning the children because they did not want to return.

15. While the son, John, was living with father he went to the Green Wood Hills Bible Camp as he had the year before. On

August 10, 1978 John wrote to his father and stepmother telling them he loved them very much, wanted to be home with them, was homesick and wanted them to come get him. He apparently communicated similar thoughts to his mother, who removed him from the camp to her mobile home about the time the letter was written.

16. Mother and John moved from the mobile home at the end of September 1978 to a home on Route 7, Chambersburg, Pennsylvania, where they lived with four of mother's friends for six weeks. They then moved to Thompsontown, Perry County, where they shared a six room house with another lady and her two children for one and one-half weeks. Mother and John shared one of the three bedrooms in the house. Mother and John moved to the home of mother's parents at R. D. 1, St. Thomas, Penna. on November 5, 1978.

17. Mother gave her address as being that of her parents at R. D. 1, St. Thomas, Penna., but her stated intentions are, upon completion of this litigation, to return to Port Royal, Penna., where she had recently found employment and locate an apartment.

18. To the date of the hearing John has been enrolled in the Middle School of the Chambersburg Area School District and in the 6th grade in Thompsontown, Pennsylvania. No evidence was introduced as to where and when he would again be enrolled in public school since the move to St. Thomas.

19. Testimony of John's 5th grade teachers during the 1977-78 school year at the Hamilton Heights Elementary School can be summarized as follows:

(a) During the first semester: (1) his clothing was unclean and his T-shirt filthy around the neck; (2) his trousers were too short, his flannel shirts too small and too warm for warm weather; (3) he was dirty when he arrived at school and body odor could be detected at times; (4) he was a quiet, subdued child; not involved or paying attention in class; and not participating in recess activities; (5) he has a good mind but not working up to his ability and reading on a 4th grade level; (6) he rarely had his homework done; (7) he would put his head down and sleep for one-half hour during mathematics class which began at 11:30 A.M.; (8) on occasion he would complain of nausea and say he had no breakfast. He would feel better after being given crackers and/or fruit from the school kitchen; (9) his attendance was not regular; (10) due to his apparent attitude toward learning, i.e., lack of motivation and achievement, his teacher sent to mother via John a note

requesting a parent-teacher conference at a specified date and time. No answer was ever received and mother did not appear for the conference.

(b) During the second semester: (1) daily he and his clothing were dirty; (2) his reading level remained at 4th grade, but he was one of the best 4th grade readers in the second semester of 5th grade; (3) his assigned homework was generally not done, and he would rather receive an "F" than do it; (4) he had an overall "C" average, but he could have been doing much better if he did not lack interest and motivation; (5) he was absent two or three days and mother sent notes explaining he had overslept, and she had no way to get him to school; (6) he only had one friend, and there was no interaction with his other classmates; (7) mother was sent an invitation to a parent-teacher conference, and she responded that she did not want a conference; (8) he would get "out of control" unless the teacher was firm with him.

20. Testimony of Christine's second grade teachers during the 1977-1978 school year at the Hamilton Heights Elementary School can be summarized as follows:

(a) During the first semester: (1) she arrived in school dirty; her hair was in need of shampooing, combing and brushing; and she frequently had "sleepies" in her eyes; (2) her clothing was dirty and inappropriate for the weather, e.g., long sleeves on a warm day; (3) she did not have a good attitude toward the property of others, i.e., she did not return books taken home or returned them in poor condition; (4) her teeth were unattended and a yellow coating could be observed, and bad breath detected; (5) mother would not send notes explaining Christine's absences and being tardy despite written requests from the teacher; (6) the teacher scheduled at least two parent-teacher conferences for specific dates and times; mother neither attended nor explained her non-attendance; (7) she is a pleasant child, extremely alert and intelligent; she has a lot of potential but has not been motivated to achieve it; (8) she has some friends, but at times had difficulty interacting with her classmates.

(b) During the second semester: (1) her clothing was very soiled and dirty when she arrived at school, and she would wear the same outfit for two or three consecutive days; (2) her legs and hands were observed to be dirty and at times body odor was detected; (3) she had extremely bad breath; (4) her hair was greasy and needed to be shampooed; (5) these things affected her relationship with the other children, who wouldn't play with her; she only had one friend; (6) she missed three recesses because mother failed to send notes explaining absences.

21. After father took custody of the two children, he or his wife scheduled dental appointments with Layman Associates, a professional corporation consisting of four dentists. Dr. George Layman's testimony concerning the condition and treatment of the children's teeth can be summarized as follows:

(a) John's left lower molar, an adult tooth, was decayed beyond repair and extracted; ten cavities in permanent teeth were filled.

(b) One of Christine's deciduous (first or children's) teeth was lost prematurely, i.e., pulled, and six of her deciduous teeth had cavities which were filled. Two permanent teeth also had cavities which were filled.

(c) The dental hygiene for both children was described as "terrible", active decay rate was apparent on front teeth, and they are in critical need of help. (By way of explanation and clarification the witness testified that such conditions in an adult would lead to a prognosis of "hopeless.")

(d) The dental hygiene found in the children can be reversed with daily brushing and professional care through restoration and cleaning.

(e) The children do not have healthy mouths; they were not receiving adequate mouth care; they were not brushing their teeth regularly; and the conditions were the result of neglect and ignorance.

(f) The active decay rate found in both children evidences a high intake of carbohydrates coupled with a lack of proper hygiene.

(g) The heavy plaque buildup evidences poor nutrition.

22. Christine, 8 years old, was interviewed privately in the presence of counsel for the parties, and a record of the interview was made. The interview produced the following information.

(a) She is living with father, stepmother and 13 year old stepsister at Edenville and gets along well with them.

(b) While living with her mother, she did not always get breakfast and had sandwiches for supper; now she has regular good meals.

(c) She is in third grade at St. Thomas Elementary School;

working harder, doing her homework, has more friends now, and is doing well. The stepmother and stepsister help her with her homework. Her mother never helped her with her school work.

(d) While living with her mother there were times when she went to school with wet clothes; now she goes to school clean and with good smelling breath.

(e) She attends the services of the Open Door Church and likes to go to church.

(f) Mother kissed her goodnight but didn't tuck her into bed. Stepmother always kisses and tucks her into bed; father doesn't always do this.

(g) Mother left both children play and never made them do anything. Father and stepmother require both girls to clean their rooms, do the dishes and keep themselves clean. Either father or stepmother administer spankings to the girls for failure to do chores.

(h) The girls take turns or help each other with the dishes.

(i) Both girls are treated the same.

(j) She loves her parents, her brother, her stepmother and her stepsister.

(k) She definitely wants to make her home with her father and stepmother, but wishes to visit her mother on weekends.

(l) While living with mother, her brother at times wet the bed. She slept in the bottom bunk and one time was wet upon.

23. Throughout the interview Christine was bright, alert and positive.

24. John, 11 years old, was interviewed privately in the presence of counsel for the parties, and a record of the interview was made. The interview produced the following information:

(a) He and his mother just moved to his grandparents' home in St. Thomas from Thompsontown "for court." He had been enrolled in school at Thompsontown, and has not been enrolled in school here. He expects to return to Thompsontown.

(b) Since the beginning of the 1978-1979 school year, he has lived in four homes and been enrolled in two schools.

(c) Mother does not make the children do chores. When he lived with father and stepmother he was required to keep himself and his room clean, and he had a list of chores just like his sister and stepsister. He was spanked when he did not do his assigned chores.

(d) His stepmother tells him she loves him and sounds like she means it, but he doesn't believe she does because she spansks him and makes him do chores. He always knew why he was spanked.

(e) He denied wetting his bed in the trailer, falling asleep in mathematics class, and not having lots of friends in school.

(f) He gets regular and adequate meals while living with mother; e.g., cereal or bacon and eggs for breakfast, sandwiches and soup or "cooked stuff" for dinner depending of "what we wanted to eat."

(g) He took a bath and washed his hair twice a week while he lived in the trailer.

(h) He felt mother kept the trailer clean.

(i) He loves his mother and father, but definitely prefers to live with his mother.

(j) He likes to be with his father and participate in activities with him. He desires regular visits with him.

25. Throughout the interview John was quiet, introspective and at times seemed uncertain in his responses.

26. Father owns his tractor-trailer rig and is a long haul driver for Ford Transport Inc. Customarily he is on the road from Sunday night or early Monday morning until Thursday night, and at home Friday through Sunday evening. In the summer months he works one week and then takes a week off, all other months he works three weeks and takes the fourth week off.

27. When the parents and children lived together, father used profanity and on occasion may have treated the children too roughly or unnecessarily picked on and at them, considering their ages at the time. He has now given up swearing and administers reasonable physical punishment after a discussion and warning first.

28. Father and stepmother love both children. They insist upon them doing chores about the home and keeping themselves clean, because they believe that will teach them responsibility and the meaning of work and give them character.

29. Father wants his children to be good citizens and acquire a better education than he did. In his opinion, John is not moving toward the educational goals he wants for him, but Christine is.

30. Father has always supported the children and now seeks custody of both of them.

31. The stepmother is unemployed outside the home, desires custody of both children, and is willing to assume the responsibility of caring for them.

32. The stepmother agrees with father's work and punishment philosophy and administers reasonable punishment to the children in the home after first explaining the reason for the punishment.

33. Stepmother's daughter, Angela, receives no different treatment than John and Christine from either her mother or stepfather. Angela is presently attending the Cumberland Valley Christian School, a parochial school operated by the Open Door Church.

34. Father and stepmother, Christine and Angela regularly attend the Open Door Church services. Father and stepmother are members of the Church and take the children to services.

35. Presently Angela and Christine have separate bedrooms at father's home. If custody of both children is awarded to father, Angela and Christine will share a bedroom and John will have a separate bedroom.

36. Father's home is attractive, well kept and entirely adequate to provide shelter for Angela, Christine, John, father and stepmother.

37. The maternal grandparents' home in St. Thomas is a two-story, six room house. The grandparents would occupy one bedroom, John the second bedroom, and Mother and Christine the third bedroom. The home is entirely adequate to provide shelter for the family of five if custody is awarded to mother.

38. The maternal grandparents love John and Christine, and

are interested in their well-being and welfare. They could and would provide necessary and adequate care for the children.

39. There is no assurance mother will continue to reside with her parents if custody of the children is awarded to her.

40. If mother returns to Port Royal, Pennsylvania upon completion of this litigation, she has no established home or apartment to go to.

41. Mother loves both of the children and wants custody of both of them.

42. Mother is a member of no church and has not taken the children to Sunday School or church, but testified that she would not stop them if they wanted to go.

43. Despite the fact that mother was not employed outside the home except for a few weeks, and had a living income via Public Assistance, father's support and help from her parents; it is evident that:

(a) She did not keep the children clean; nor did she train them to keep their bodies or their teeth clean.

(b) She did not keep the clothing the children wore to school satisfactorily clean.

(c) She abdicated her responsibility to oversee the education of the children by:

1. Seeing that they got up and got on the school bus.

2. Failing to attend parent-teacher conferences requested by the teachers.

3. Failing to supervise the doing and completion of homework, and encouraging the children to work up to their potential.

(d) The constant moving from place to place and home to home created a substantial lack of stability.

(e) She seriously neglected the children's dental care.

(f) Her poor housekeeping and housecleaning practices set a poor example of cleanliness for the children.

(g) She made available food in sufficient quantity, but lacking in necessary nutritional quality.

(h) She did not provide necessary and adequate discipline or training for the children.

44. The father and stepmother are fit and proper persons to have custody of John and Christine.

45. The mother is not a fit and proper person to have custody of John and Christine at this time.

## DISCUSSION

The overriding purpose of a custody hearing is to determine what placement is in the best interest of the child. In *Commonwealth ex rel. Holschuh v. Holland-Moritz*, 448 Pa. 437, 444 (1972), Chief Justice Eagen speaking for a majority of the Supreme Court of Pennsylvania stated:

"The relevant legal principles in this area are well settled and are easily stated in the abstract. Concrete application is much the more formidable task. The paramount consideration in cases of this nature is at all times the best interests and welfare of the child, which includes its physical, intellectual, moral and spiritual well-being, and all other considerations are subordinate. *Commonwealth ex rel. Kuntz v. Stackhouse*, 176 Pa. Superior Ct. 361, 108 A. 2d 73 (1954). This rule of law holds true whether the contest be between parents or between a parent and a third party. *Commonwealth ex rel. Shaak v. Shaak*, 171 Pa. Superior Ct. 122, 90 A. 2d 270 (1952). See also *Commonwealth ex rel. Tucker v. Salinger*, Pa. Super. , 366 A. 2d 286, 289 (1976)."

See also *Shoup v. Shoup*, Pa. Super. , 390 A. 2d 814, 816 (1978).

In *Commonwealth ex rel. Spriggs v. Carson*, 470 Pa. 290, 368 A. 2d 635, 637 (1977), the same court held: "It is now beyond dispute that the sole issue to be decided in a custody proceeding between contending parents is the best interests and welfare of the child."

In *Commonwealth ex rel. Williams v. Williams*, 229 Pa. Super. 327, 330 (1976), the Superior Court included "the child's emotional well-being" as a factor to be considered by the trial court. In *Augustine v. Augustine*, 228 Pa. Super. 312, 318 (1974), the Superior Court found; "...a careful and comprehensive inquiry into the ability of these parents to provide a stable and healthy atmosphere for the child" should be made.

In the case at bar, the evidence established that several years ago the father had engaged in regular use of profanity and on occasion may have treated the children too roughly or unnecessarily picked on or at them. In addition, the stepmother's three marriages and three divorces from the same husband suggests strongly that at the time there was a substantial lack of stability in her life. However, both the father and stepmother appear to now enjoy a stable and happy marriage. They are active members in the Open Door Church and Angela is attending the Cumberland Valley Christian School, a private and not inexpensive school. Nothing in the evidence indicates any present instability, abusiveness or unreasonable conduct on the part of either of these parties. It has been often held that past moral lapses are not enough to deprive a parent of custody. The issue is the parent's present fitness and not past misconduct. *Commonwealth ex rel. Keer v. Cress*, 194 Pa. Super. 529, 532 (1961); *Commonwealth ex rel. Batch v. Barber*, 161 Pa. Super. 82; *Snellgrose Adoption Case*, 432 Pa. 158 (1968). Therefore, we conclude any prior misconduct or instability evidenced by the father or stepmother does not bar their rights to custody of John and Christine.

We also note the long hours and days the employment of father requires him to be away from the home. In *Hooks v. Ellerbe*, Pa. Super. , 390 A. 2d 791, 794, the Superior Court held, "The fact that a parent must work is certainly not a factor that may be used to deprive the parent of custody where adequate arrangements have been made for the child's care in the parent's absence." In the case at bar, the father's stays away from the home are offset by extended periods of time at home. In addition, we are well satisfied that the father has, with the active assistance and participation of the stepmother, provided adequate arrangements for the care and supervision of John and Christine during his absences.

After weighing and analyzing all of the facts in the case at bar, we conclude that the best interests and welfare of John Robertson Miller and Christine Diane Miller require us to award custody to the father, William R. Miller, and his wife, Ruth Miller, for the following reasons:

1. As hereinbefore found as a fact mother is not at this time a fit and proper person to have custody of the children.

2. We consider the permanence and adequacy of the father's home and the presence and availability of the mother in the home during the normal waking hours of the children are extremely important to them, for the combination provides a stability that has been missing in their lives.

3. The combination of love, rules, discipline and church attendance is essential to the development of character, self-control and goals.

4. Neither child has in the past successfully achieved their potential in school, and such achievement is more likely under the discipline and help provided in the home of the father and stepmother.

5. The physical well-being of the children requires close and intensive supervision which father and stepmother have indicated a willingness to provide, and mother has failed to provide.

#### ORDER OF COURT

NOW, this 13th day of December, 1978, primary custody of John Robertson Miller, born June 18, 1967, and Christine D. Miller, born September 29, 1970, is awarded to William R. Miller, father and respondent, and to Ruth Miller, stepmother, to be exercised at their home, R. D. 4, Chambersburg, Franklin County, Pennsylvania, commencing December 17, 1978, at 5:00 P.M.; at which time father shall receive custody of John Robertson Miller at the home of the maternal grandparents, R. D. 1, St. Thomas, Pennsylvania.

Visitation rights with both children are granted to the mother, Carol A. Miller, from 5:00 P.M. on Friday, January 12, 1979, until 7:30 P.M. Sunday, January 14, 1979, and on alternating weekends thereafter to be exercised at the home of the maternal grandparents at R. D. 1, St. Thomas, Pennsylvania. (Visitation may be exercised other than at the home of the maternal grandparents by modified Order of Court, or by agreement of the parties in writing.)

The mother, father and stepmother, shall alternate visitation rights with both children on Easter, Memorial Day, July 4th, Labor Day and Thanksgiving Day with the visitation time being from 8:30 A.M. until 8:30 P.M. Father and stepmother shall have both children on Easter 1979, and the visitation shall alternate thereafter.

The school Christmas vacation shall extend from 5:00 P.M. on the last day of school preceding vacation until 7:30 P.M. New Year's Day. In even-numbered years the father and stepmother shall have visitation with the children until 9:00 A.M. on December 26th, and the mother for the remainder of the vacation. In odd-numbered years the mother shall have visitation with the children from 5:00 P.M. on the last school day until 9:00 A.M. December 26th.

It shall be the responsibility of the father or stepmother to deliver the children to the home of the maternal grandparents and pick them up at the dates and times hereinabove set forth until further Order of Court.

Each party to pay his or her own costs.

COMMONWEALTH v. SCRUTON, C.P. Cr.D. Franklin County Branch, No. 326, 1974

*Criminal Actions - Disorderly Conduct - Appeal of Summary Conviction - Lesser Included Offense*

1. Obscene language uttered in the course of a backyard dispute is not in a public place as required by Pennsylvania Crimes Code definition of disorderly conduct.
2. Two features of the crime of disorderly conduct include: (1) a public unruliness which leads to tumult and disorder and (2) the crime of disorderly conduct is not to be used as a dragnet for all the irritations which happen in a community.
3. A defendant who cannot be found guilty of the offense charged may be found guilty of a lesser included offense.
4. Harrassment as defined is a misdemeanor of the third degree, and not a lesser included offense of the summary violation of disorderly conduct.
5. On appeal from a summary conviction, a Common Pleas Court may impose a sentence greater than that originally imposed in the Justice of the Peace Court.

*John R. Walker, District Attorney, Attorney for the Commonwealth*

*William H. Kaye, Esq., Attorney for the Defendant*

#### OPINION AND ORDER

EPPINGER, P.J., August 18, 1975:

This criminal action arose out of an incident which occurred on June 25, 1974, near State Line, Franklin County, Pennsylvania, in which the defendant, Katrina J. Scruton (Scruton), made various obscene comments to her neighbor, Glen R. Shockey (Shockey), during the course of an argument in the parties' back yards. On June 28, 1974, as a result of this incident, Shockey, a private citizen, filed charges before District

Justice Robert E. Eberly, alleging that Scruton had violated Section 5503 of the Pennsylvania Crimes Code, 1972, Dec. 6, P.L. \_\_\_\_\_, No. 334, Sect. 1, 18 P.S. 5503. The specific nature of Scruton's conduct complained of by Shockey was that she was guilty of disorderly conduct under Section 5503(3) because she "did unlawfully and intentionally cause public annoyance by using obscene language to the annoyance of the general public." A summary trial was held before Squire Eberly on July 29, 1974, and Scruton was found guilty and sentenced to pay a fine of \$25.00 and \$11.00 costs. In accordance with Pa. R. Crim. P. 67 and 68, Scruton took an appeal to this Court and a de novo trial was held on October 31, 1974. Thus, the issue before the Court for decision is whether Scruton's obscene language was uttered in a "public place", which is necessary in order to find her guilty of disorderly conduct under Section 5503(3).

The facts, which are fairly simple, center around a dispute which arose between Scruton and her neighbor, Shockey, as a result of Scruton's mowing off one of Shockey's shrubs. This shrub was approximately 10 feet within Shockey's boundary line and Shockey testified that he saw Scruton back her riding lawn mower onto his property and over the shrub. When Shockey came out of his house to complain about the damage, Scruton responded: "You go to hell, you son of a bitch". Later, during the argument, Scruton told Shockey to tell his "bitchy" wife to come out of the house and Scruton would "smash" her.

The entire argument lasted no longer than five minutes. This argument was heard by several people; Scruton's mother and sister and Gene Creager and his children, who were neighbors of both Shockey and Scruton. Scruton's mother and sister both testified that Scruton used obscene language toward Shockey. Creager also testified that he heard Scruton use obscene language. However, none of the witnesses of Scruton's obscene remarks were prompted to intervene in the dispute and only seemed suprised by her language.

The area in which this dispute took place was approximately 180 feet from the nearest public road, the Hykes Road. There was nothing but an open field for approximately 500 feet to the rear of the place where the argument took place. There are also no alleys between the properties in this area, nor are there sidewalks existing in this area. The surrounding area where this dispute took place is still primarily rural, the various properties having undoubtedly been sold off of a farm.

As mentioned in the beginning of this opinion, the central issue before the Court for decision is whether Scruton's