

LYCOMING ANIMAL PROTECTION SOCIETY, INC.,	:	IN THE COURT OF COMMON PLEAS OF
Plaintiff	:	LYCOMING COUNTY, PENNSYLVANIA
	:	
vs.	:	NO. 98-00,704
	:	
SHIRLEY LUTCHER and	:	
GLORIA ANN SHURER,	:	NON-JURY EQUITY TRIAL ADJUDICATION
Defendants	:	

**ADJUDICATION AND DECREE NISI**

This adjudication is entered June 14, 1999, following a non-jury equity trial held in February and April 1999.<sup>1</sup> For the reasons hereinafter set forth, this Court determines that the Plaintiff's Petition For Confirmation of Officers and Directors must be DENIED. In addition, Defendants' counterclaim, seeking (1) reinstatement as members, directors and officers of Plaintiff and (2) new elections for the Board of Directors and Officers of Plaintiff be held, must be GRANTED.

**Background of Procedural and Factual History**

On May 7, 1998, Plaintiff (a Pennsylvania nonprofit corporation governed by the provisions of the Nonprofit Corporation Law of 1988, 15 Pa.C.S. §5101, *et seq.*) filed an action in equity titled "Petition to Confirm Officers and Directors," naming as Defendants Shirley Lutcher (hereinafter referred to at times as "Lutcher") and Gloria Ann Shurer (hereinafter referred to at times as "Shurer"). The Petition alleges, *inter alia*, that a general membership

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<sup>1</sup> Evidentiary hearings were held by this Court on February 18, 19 and April 12, 1999. Other record proceedings were also held on October 19, 1998, November 9, 1998, January 15, 1999 and March 3, 1999.

meeting was held December 4, 1997 and “all vacancies on the Board were filled.” Shurer, who had been President of the corporation, was removed from office because her statutory term had expired and also by Board action on January 29, 1998, pursuant to 15 Pa.C.S. §5733;<sup>2</sup> Lucher was also removed as a Board member and Treasurer on April 16, 1998. Despite requests to so do, Defendant Lucher had not surrendered control of the bank accounts or records of the Plaintiff to its legal officers. The Petition further alleges both Defendants prior to removal had acted improperly and both Defendants continued to hold themselves out as members and officers of Plaintiff. By these actions and in other ways, Defendants interfered with Plaintiff’s mission of operating as animal shelter. Plaintiff claims adverse consequences resulted including the Jersey Shore State Bank “freezing” the assets of Plaintiff. The Petition seeks to obtain the return of all property of Plaintiff possessed by either Defendant, as well as to compel Shurer to cease representing that she is affiliated with Plaintiff. The Petition also seeks to confirm the election of Plaintiff’s present Board and officers.

The Petition was served upon Defendants via Certified, Return Receipt, U.S. Mail. On May 13, 1998, an Order was issued pursuant to Lycoming County Rule of Civil Procedure L1007, that a scheduling conference be held June 8, 1999. This Order and Scheduling Conference Notice were never served upon Defendants. On June 8, 1998, a Notice of Intent to Enter Default Judgment was filed by Plaintiff. The Notice of Intent to Enter Default Judgment was also served upon Defendants via Certified, Return Receipt, U.S. Mail. On June 19, 1998, Plaintiff filed a Praecipe to enter Default Judgment, which was entered against Defendants by the Lycoming County Prothonotary.

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<sup>2</sup> 15 Pa. C.S. §5733, provides an officer may be removed by the Board of Directors if doing so is in the best interests

Defendants took no action in these proceedings until their counsel entered his appearance on June 25, 1998. On July 8, 1998, Defendants filed a Motion to Open Judgment and for Extension of Time to Answer. A Rule to Show Cause was issued on Plaintiff in response to that Motion July 31, 1998. On October 22, 1998, after hearing and argument, an Order was entered striking the Default Judgment.

On November 9, 1998, a Motion for Sanctions against Plaintiff was granted by this Court, directing Plaintiff to respond to Defendants' discovery requests in order that Defendants could respond to Plaintiff's initial Petition.

Defendants filed an Answer, New Matter and Counterclaim on or about December 15, 1998. By their Counterclaim, Defendants seek reinstatement as members, officers and directors of Plaintiff. Defendants also request that Plaintiff proceed with the proper election of a Board of Directors and Officers in accordance with its bylaws, in order to restore order to Plaintiff's operations. Defendants also seek reimbursement for Attorney fees and expenses.

#### **FINDINGS OF FACT**

1. The corporation, known as Lycoming Animal Protection Society, Inc. (L.A.P.S.), was properly incorporated in the Commonwealth of Pennsylvania in February 1992, through the filing of Articles of Incorporation (Defendants' Exhibit 6) in compliance with 15 Pa.C.S. §5306.
2. The Articles of Incorporation named five incorporators as officers, but did not name any directors.

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of the corporation, unless the bylaws provide otherwise.

3. L.A.P.S.' incorporation as a nonprofit organization is on a non-stock basis, as a member organization, with the articles not indicating more than one class of membership.
4. L.A.P.S. was the Plaintiff in prior legal proceedings concerning its organization, governing officers and bylaws which resulted in a final Order of Court on June 25, 1996, by the Honorable Clinton W. Smith, P.J. filed to #96-00,563.
5. Pursuant to Judge Smith's Order of June 25, 1996, the Court found the organization was without a properly elected Board of Directors and properly adopted set of bylaws. The Court specifically ordered and directed, in part, as follows:

Plaintiff's complaint is dismissed in part and granted in part.

- a. The Order of April 23, 1996 (specifying six persons to manage the corporation) shall remain in effect until a Board of Directors is elected pursuant to 15 Pa.C.S.A. §5704, §5725, §5755, and §5757.
- b. The Order of April 23, 1996 shall be dissolved upon the proper election of a Board of Directors. Bylaws may be properly adopted, pursuant to 15 Pa.C.S.A. §5504.

Lycoming County Case No. 96-00,563, *Lycoming Animal Protection Society v. Patricia Courtright, Philip A. Courtright, Gloria Shurer, Sandy Grafius and Tammy Sayman*, Order of June 25, 1996.

6. In accordance with said Court Order, the corporation held a meeting of the membership for the election of a Board of Directors pursuant to 15 Pa.C.S. §5704, on August 29, 1996.
7. The parties in this litigation agree that L.A.P.S. elected a Board of Directors (hereinafter "Board") on August 29, 1996, at a validly noticed and held membership meeting pursuant to the June 25, 1996, Order of Court and Pennsylvania law: 15 Pa.C.S. §5725 (election of

directors), §5755 (membership meetings), §5756 (quorum) and §5757 (action by members).

8. The evidence presented in this case did not persuasively establish either the number of directors so elected, nor the names of those directors.
9. From evidence submitted by testimony and exhibits, there is a conflict as to the number and identity of the directors, varying from 12 to 14. (See, e.g., the names on the November 21, 1996 Board Minutes (Defendant Exhibit 15) as opposed to the names on the November 1996 proposed bylaws (Defendant Exhibit 17). No direct testimony as to the number and names of the Board elected at the August 1996 membership meeting was introduced by either party, nor did they present this Court with any minutes of that meeting.
10. The Board elected officers on or about September 5, 1996, pursuant to 15 Pa.C.S. §5732. According to the testimony given in this case, those officers were James Losell, President, Gloria Shurer, Vice-President, Charlotte King, Secretary, and Shirley Lutchter, Treasurer.
11. James Losell, elected as President in September 1996, served until his resignation on April 21, 1997.
12. Gloria Ann Shurer, elected as Vice President of the corporation in September 1996, served in that office until she became President following the resignation of President James Losell on April 21, 1997.

13. With the approval of the Board, Gloria Ann Shurer was acting as President of the corporation from at least May 1997 through January 29, 1998. On that date she was allegedly removed from this position by improper Board of Directors action.
14. Shirley Lutcher acted as Treasurer of the corporation from September of 1996 until on or about April 16, 1998. On that date she was allegedly removed from that position by improper Board of Directors action.
15. Gloria Ann Shurer was notified she was terminated and/or removed as a member and volunteer of the corporation on or about February 11, 1998, by improper Board of Directors action.
16. The Board meetings on September 19, 1996 and October 17, 1996, focused on the drafting of L.A.P.S. bylaws.
17. The Board conducted a meeting on November 21, 1996, at which time all in attendance unanimously approved and adopted bylaws for the corporation.
18. These bylaws were never approved by a properly held membership meeting where a quorum of members was present.
19. This Court entered an Order on February 19, 1999, upon the consent of Plaintiff and over the objection of Defendants, to the effect that the corporation had not adopted any valid bylaws. All of the testimony clearly indicated that the only action of any body to approve bylaws of L.A.P.S. was at meetings of the Board and not at meetings of the membership.
20. A membership meeting was held on December 4, 1997. This was the first general membership meeting held since the August 29, 1996, meeting.

21. Although there is no specific testimony as to who called this December 4, 1997, meeting and no persuasive evidence given as to notice, based upon all parties giving testimony that this membership meeting was properly scheduled and noticed, the Court finds proper notice was given to the membership of this special membership meeting. The notice for the membership meeting that was mailed stated that L.A.P.S. “is having a membership meeting for the purpose of electing a Board of Directors.” *See* Plaintiff’s Exhibit 2 and Defendants’ Exhibit 22.
22. As of December 1997, the membership of the Plaintiff was fifty-four (54), as ascertained by a stipulation of counsel reached following the conclusion of testimony on February 19, 1999 and stated on the record. By that same stipulation twenty (20) members attended the December 4, 1997 membership meeting.
23. The membership attending the meeting of December 4, 1997, did not constitute a quorum. That membership meeting was “adjourned” to the date of January 15, 1998, with notices of the adjournment and additional membership meeting of January 15, 1998, to be given to the membership. *See, e.g.*, Defendants’ Exhibit 24, Minutes of December 4, 1997.
24. The January 15, 1998, meeting was cancelled due to inclement weather.
25. A membership meeting was attempted to be held on January 29, 1998. There is no persuasive evidence this meeting was called by the valid action of the Board, nor by ten percent (10%) of the members in accordance with 15 Pa.C.S. §§5702 and 5755.
26. This Court finds that all of the members, as required by law, were not given five days written notice of either the planned resumption of the adjourned membership meeting that

was to have been held on January 15, 1997, nor the meeting to be held on January 29, 1998.

27. The testimony and evidence indicated there was no sign-in sheet confirming which members were present at the meeting of January 29, 1998. The testimony of Plaintiff's witnesses, including Charlotte King, Recording Secretary, indicated there were twenty (20) members present at the January 29, 1998 meeting.
28. The testimony of Plaintiff indicated there were approximately sixty-four (64) people who were members of L.A.P.S. on or about January 1998.
29. At the membership meeting on January 29, 1998, seventeen (17)-twenty (20) members attended. At that time, membership consisted of at least sixty-four (64) members. A quorum was not present at the January 29, 1998, meeting as 15 Pa.C.S. §5756 requires at least a majority of the membership be present, in the absence of a bylaw to the contrary.
30. There was no evidence given by Plaintiff with respect to the minutes of the January 29, 1998 meeting, at which Gloria Shurer was removed from being a director and officer of the corporation.
31. When applying the Pennsylvania law to the case at bar, at least thirty-two (32) members of the supposed sixty-four (64) members of L.A.P.S. would have needed to participate in the vote to remove Gloria Shurer from the organization as a director in order for this action to be valid.
32. The testimony and evidence indicate that not more than twenty (20) members were in attendance at the meeting on January 29, 1998, at which time Gloria Shurer was allegedly removed as a director and officer. It is not a matter of record who of these members (by



name or number) voted for Gloria Shurer's removal, nor is it contended by Plaintiff that such action was taken by the membership.

33. No valid notice was given to Gloria Shurer with respect to her removal as a Board member or officer of L.A.P.S. prior to the January 29, 1998 meeting in which she was allegedly removed from the Board and as President.
34. The evidence indicates there was no notice given to Shirley Lutchter with respect to her removal as a Board member and officer of L.A.P.S. prior to the April 1998 meeting, at which time she was allegedly removed as director and treasurer.
35. This Court finds that serious questions exist as to who, in fact, are members of this corporation and whether any of the acts taken by the corporation, at least from August 29, 1996 to this date, are valid.
36. Plaintiff has failed to comply with discovery requests properly proposed by Defendants resulting in Defendants being required to expend additional sums of money for purposes of trial and causing a delay in the completion of these proceedings through the failure to appear for the deposition of Charlotte King, Secretary, on December 31, 1998 as well as the failure to produce the documents requested through the subpoena appropriately served on Ms. King requesting all recorded minutes of Director, special and general membership meetings, as well as notices for same and agenda and sign-up sheets for general membership meetings. *See*, Defendants' Exhibit No. 37 and Testimony of Charlotte King.

### Discussion

The case before Judge Smith, No. 96-00,563, involved L.A.P.S. as Plaintiff and Patricia A. Courtright, Phillip A. Courtright, Gloria Shurer, Sandy Grafius and Tammy Sayman as Defendants. Judge Smith had entered a preliminary injunction Order by agreement, dated April 23, 1996, which directed that the day-to-day operations of L.A.P.S. were to be managed by a board consisting of six (6) individuals, specifically: Ginny Martino, Denise Rohrer, Penny Ellis, Sandy Grafius, Gloria Shurer and Charlotte King. The final Order of Judge Smith, as noted above, continued the April 23, 1996 Order in effect until a board of directors was appropriately elected by the membership. As referenced in Judge Smith's Opinion and in the testimony introduced in this case, both prior to and after that adjudication reference is made to the corporation's affairs being managed by a number of directors – eighteen (18) directors with five (5) as a quorum; proposed bylaws would have provided for sixteen (16) or seventeen (17) board members.

Judge Smith's final adjudication of June 25, 1996, did not establish the number of directors who were to be elected by the membership. However, the Order certainly contemplated that bylaws providing for a specific number would be adopted at that meeting. Regrettably, no such bylaws were adopted then, nor subsequently, by the membership and now this Court must determine the number of directors on the corporation Board and who, if anyone, has been validly elected to the Board. Judge Smith found that the supposed election of directors by the membership on April 12, 1996 (the number of directors to be so elected not being specified in the adjudication) was conducted at a meeting which was not duly organized and the action was invalid. In addition, Judge Smith found that the general membership had never approved a set of

bylaws; inasmuch as bylaws had not been approved at the initial organizational meeting of the corporation following its incorporation, the membership would need to approve the adoption of any proposed bylaws, all pursuant to 15 Pa.C.S. §§5704, 5425, 5755 and 5757.

The testimony before this Court does not persuasively demonstrate the number or identity of directors elected and approved by the membership at the membership meeting held August 29, 1996. All of the parties to this litigation agree that the August 29, 1996 membership meeting was a validly held meeting of the membership and was attended by a quorum. It is further agreed that the directors then elected were elected by at least a majority of those members attending the meeting; therefore, those directors were appropriately elected to office. The directors elected at the August 29, 1996 meeting would have been elected for a statutory period of one year in the absence of a bylaw to the contrary and would hold office for that term, or until their successors had been selected and qualified, unless their terms would cease earlier due to death, resignation or removal. 15 Pa.C.S. §5724.

In the absence of a bylaw or provision in the Articles of Incorporation, a corporation is to have three (3) directors and three (3) officers. 15 Pa.C.S. §§5723, 5732. Here, the Articles of Incorporation did not provide for a number of directors, but did provide that there were to be five (5) officers – a President, two (2) Vice-Presidents, a Secretary and a Treasurer. This Court determines that this provision in the Articles of Incorporation is an appropriate attempt to state there would be five (5) persons running the affairs of the corporation and, although designated therein as officers, such individuals would be, in fact, directors; the persons who would be conducting the business and affairs of the corporation and who had the authority to operate the corporation. *See*, 15 Pa.C.S. §§5721, 5723. It is obvious and agreed that the

corporation did in fact act and carry out its affairs and business with those officers and their successors (however elected), managing the affairs of the corporation from shortly after the filing of the Articles of Incorporation through this date.

Although the number of the board of directors elected following the entry of Judge Smith's Order is not known, nor is the identity of all those individuals who served on the board known, it is agreed by all those giving testimony, and also by stipulation entered at the close of testimony, that as of December 4, 1997, the remaining members of the board of directors consisted of five (5) individuals specifically: Gloria Shurer, Shirley Lutcher, Mary Ann Mulaski, Lee Goodenow and Charlotte King. It was also agreed by all those giving testimony, and the Court so finds, that all of those stated five (5) directors had been duly elected by the membership on August 29, 1996 and had continued in office through December 4, 1997.<sup>3</sup>

The meeting held December 4, 1997, was a membership meeting and not a Board meeting. The parties are in agreement and, accordingly, this Court finds that appropriate notice of the December 4, 1997, membership meeting was given to the membership; however, a quorum did not attend. The five (5) remaining Board members, Lee Goodenow, Gloria Shurer, Mary Ann Mulaski, Charlotte King and Shirley Lutcher attended the December 4, 1997 membership meeting. The majority of those Board members present at that meeting, through attempted action of the five (5) aforementioned Board members, appointed six (6) additional directors to act as an "interim board of directors" along with the original five (5), specifically also appointing: Sue Fryer, Kathleen Fronk, Mary Ann Rosello, Pat Courtright, Sandy Grafius,

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<sup>3</sup> Patricia Courtright had been elected as a director in the August 29, 1996 meeting, but had resigned as a director in approximately August of 1997.

and Pat VonNeeda. This action was done without a valid bylaw authorizing a particular number of directors. Pursuant to 15 Pa.C.S. §5725, a majority of the board of directors could fill the vacancies in the office of the board of directors. However, this appointment would be only to serve for the balance of the unexpired term of the vacant directorship.

The term of those directors elected August 29, 1996 would have expired on August 29, 1997, or at the time of the resignation of those individuals. 15 Pa.C.S. §5724. It is agreed that as of December 4, 1997, all directors had resigned, except for the five (5) who attended the December 4, 1997 meeting. There was no unexpired term of any directors at the December 4, 1997, meeting to which the remaining directors could elect or appoint additional directors in the way of filling vacancies. Therefore, the six (6) individuals appointed to the “interim Board” on December 4, 1997, were not validly named as directors of the corporation.

It was a requirement as of December 4, 1997, that the directors to be named to act as the Board of Directors of L.A.P.S. must be elected by the members, pursuant to 15 Pa.C.S. §5725. This, in fact, was the stated purpose of the membership meeting held that date.

The December 4, 1997 membership meeting was adjourned (although perhaps unintentionally) in accordance with 15 Pa.C.S. §5755(c). However, it was not adjourned from day to day but was attempted to be adjourned until January 15, 1998, a period in excess of fifteen (15) days. As a result of the adjournment, the next meeting of the membership which was to be held January 15, 1998, would have of necessity been a special meeting that needed to be called by either the Board or ten percent (10%) of the membership. Instead, it appears the five (5) individuals at the December 4, 1997 meeting called the meeting of January 15, 1998. There is no

persuasive proof that appropriate notice of the January 15, 1998 meeting was given to the membership.

The membership meeting of January 15, 1998, was postponed due to bad weather. The January 15, 1998 meeting date was also to be the regular meeting of the Board, held on the third Thursday of each month. That Board meeting was also postponed. The Board meeting was rescheduled for January 22, 1998, but that meeting was not held either due to inclement weather.

At sometime on or prior to January 21, 1998, a membership meeting was scheduled to be held January 29, 1998, by a “majority of the 11 board members.” *See, inter alia*, Defendants’ Exhibit 30. There is no persuasive proof that this special meeting of the members was appropriately called, either by a majority of the five (5) existing Board members nor by ten percent (10% )of the membership. There is also no persuasive proof that appropriate notice to the membership of the January 29, 1998 membership meeting was given at least five (5) days prior thereto, as required by 15 Pa.C.S. §5704. Specifically, Plaintiff’s Exhibit No. 7, which was purported by Plaintiff’s testimony to be the notice so sent, could not have been sent prior to January 21, 1997, inasmuch as it appears it was not until that date that a decision to hold the meeting on January 29<sup>th</sup> has been reached by anyone. The testimony to the contrary, that such notice was given in early or mid-December 1997, or early in January is rejected as being unreliable. The recalled memory of those testifying was neither consistent nor convincing, inasmuch as they had no specific recollection nor documentary evidence to support their recollection. Plaintiff’s Exhibit No. 4, the supposed notice, was something that was generated from the “computer of the corporation” on February 18 or 19, 1999. It does not contain a date as

to when the same was prepared. There is no credible proof this notice was duly sent to the membership.

The membership meeting of January 29, 1998, was not a validly organized membership meeting because it had not been validly called nor validly noticed as required by the above referenced statutory provisions of the NonProfit Corporation Law. In addition, the membership meeting was not an adjourned meeting of the prior December 4, 1997 membership meeting because it was held more than fifteen (15) days thereafter, exceeding the time limit set forth in above referenced statutory provisions. The minutes of the January 29, 1998 membership meeting have not been provided to this Court and it is unclear as to what action was taken by whom, but it is clear that this meeting was a membership meeting and not a Board meeting.

Further, a quorum of members was not present at the January 29, 1998 meeting. Attempts by the members to elect directors of the corporation at the January 28, 1998 membership meeting and any attempt to adopt bylaws at this meeting were invalid.

Following the postponements of the January 1998 Board meetings, the next Board meeting was to be held at its regular time on the third Thursday of February 1998. The supposed action of the Board taken February 2, 1998 (set forth in Defendants' Exhibit No. 31) to remove Gloria Shurer as President and Board member of L.A.P.S., purportedly by a majority of the Board, is not valid as this was not a validly conducted Board meeting. No notice of the Board meeting for that date (January 29, 1998) had been given. Further, a quorum of the five (5) existing members of the Board was not present -- Lee Goodenow, Shirley Lutchter and Gloria Shurer were absent and such action does not qualify under the unanimous consent provisions of the Board under 15 Pa.C.S. §5727.

Although the Board does have authorization under 15 Pa.C.S. §5733 to remove Gloria Shurer as an officer of the corporation, the removal of Gloria Shurer as a director by the Board was not for a reason for which the Board may remove a director under 15 Pa.C.S. §5726(b) (unsound mind, conviction of a felony, or proper cause specified by the bylaws). Thus, the removal of Gloria Shurer as director could only have been accomplished by action of the members. The members did not so act.

Similarly, the subsequent removal of Shirley Lutchter as an officer at the April 1998, third Thursday of the month regular Board meeting was not valid. It is clear that neither Gloria Shurer nor Shirley Lutchter were present at that meeting. It is not a matter of any testimony as to what Board members did attend that meeting or what Board members voted for the removal of Shirley Lutchter as an officer. Also, to the extent that the April Board meeting attempted to remove Shirley Lutchter as a Board member, the same is invalid.

It is not apparent to this Court exactly how valid members of the corporation are now able to be identified. There are no bylaws that appropriately provide for qualifications of membership. The corporation has recognized as members those who have paid dues to the corporation. There is no bylaw that would suspend members for non-payment of dues. The corporation has recognized various classes of members but there is no bylaw which would provide for such membership classes. There is no bylaw that provides for removal of members. There is no evidence in the record that any appropriate removal of members ever occurred through action of the recognized membership. Accordingly, the Court finds that the corporation should appropriately recognize as members anyone who was included on a recognized



membership list on or after Judge Smith's Order of June 25, 1996, unless such person has evidenced their intent to resign by submitting a written resignation from membership.

What is apparent to this Court is that the operation of the corporation has been in turmoil and that its purposes have been frustrated because of the inability of the people who are interested in the corporation's affairs and willing to act to cooperate. The officers and directors are so divided in opinion and deadlocked that they cannot manage the corporation without irreparable injury occurring to it. This is evidenced by their continued inability to convene a membership meeting that has an appropriate quorum and also the inability of the officers and those leading the corporation to appropriately adopt bylaws, despite the corporation having filed its Articles of Incorporation in 1992 and the 1996 instructive Order of Judge Smith. Therefore, this Court believes that the only remedy is for this Court to appoint a custodian and master to reorganize the corporation so that it may proceed to operate in the fulfillment of its corporate purpose: to operate a nonprofit animal protection shelter, to place animals in suitable homes and to raise funds for operations and for neutering and spaying programs. *See* Articles of Incorporation, Defendant's Exhibit No. 6.

Lastly, as would relate to the Defendants' request for attorney fees and sanctions against Plaintiff because of its failure to comply with discovery, this Court has concluded such sanctions must be imposed although not to the extent requested by Defendants. Defendants initially assert that they should obtain all attorney fees expended, in excess of \$8,000 as a result of being forced to go through this litigation. Although the Court has found that the Defendants prevail in the litigation it does not follow that Plaintiff must pay Defendants' legal expenses. This is so, even though there was no duly authorized action of the Plaintiff to commence the

lawsuit. Nevertheless, this Court believes that those who commenced the lawsuit on behalf of Plaintiff were acting initially, at least, in good faith attempting to straighten out the operations of the corporation. It is appropriate that the disarray of the corporation be brought before the Court. At the same time, the Defendants who were members and directors and officers had an obligation to see that the Order of Judge Smith on June 25, 1996, was initially entered concerning the corporate reorganization as directed was properly implemented. The Defendants failed in so doing to the same extent as any other person who has been connected to the interest of the corporation. Therefore, they are not entitled to recover their counsel fees in full.

The Court does find there was a willful failure by Plaintiff to produce Charlotte King for deposition on December 31, 1998, as well as the records that the Defendants requested in accordance with the subpoena Ms. King acknowledges receiving. Those records were also the subject of many requests by Defendants to Plaintiff through their respective counsel. The Court is satisfied that had those documents been produced timely and had Ms. King submitted to the appropriate deposition, the length of trial would have been shortened by several hours (approximately four (4)) and also that the trial strategy of Defendants would have been affected and at the very least Defendants would not have had to go through the process of preparing an amended proposed findings of fact. The Court believes that as a result the Plaintiff should compensate Defendants for six (6) hours of counsel time, at the average rate of \$100 Court hour (counsel asserting a \$90 per hour billing rate for out-of-court time and \$110 per hour rate for in-Court time). In addition, we believe that Plaintiff's counsel has not fulfilled his obligations to the Court insofar as seeing that necessary documents available to he and Plaintiff and which should have been furnished in discovery were made available. It has been noted that this has

caused a significant unnecessary use of the Court's time in this litigation. As a sanction to Plaintiff's counsel for that failure, Plaintiff's counsel shall pay a fine in the amount of \$100 to the Lycoming County Law Librarian. The Court will consult with the Library as to appropriate use of this fine for obtaining and production and circulation of material to the Lycoming County Bar Association members as would relate to counsel's responsibilities to their clients and the Court in connection with complying with discovery and other related ethical issues.

**Conclusions of Law**

1. The applicable Pennsylvania law requires the affirmative vote of the majority of the members present at a duly held meeting of the corporation in order to remove a member of the elected board of directors, which votes the members present would be entitled to cast at any annual or other regular election of directors. 15 Pa.C.S. §5726.
2. The applicable Pennsylvania law requires action by the board of directors to remove an elected officer of the corporation. 15 Pa.C.S. §5733.
3. The applicable Pennsylvania law requires the corporation may remove a member in the manner provided in a bylaw after notice, trial and conviction as prescribed by the bylaws. 15 Pa.C.S. §5766.
4. A majority of L.A.P.S. members were not present to vote or remove Gloria Shurer from the Board at the January 29, 1998, meeting, and, hence Gloria Shurer was not removed in accordance with applicable law, there being no bylaw to the contrary.
5. Gloria Shurer was not removed as President at the January 29, 1998, by valid action of the Board and, hence, Gloria Shurer was not removed as President in accordance with applicable law.

6. Gloria Shurer was not removed as a member of the corporation at the January 29, 1998, meeting in the manner as provided by any bylaw, nor did Gloria Shurer receive any notice or trial as would relate to her removal and, hence, Gloria Shurer was not removed in accordance with applicable law.
7. The new Board of Directors named at the January 29, 1998 meeting were not confirmed legally in accordance with applicable Pennsylvania law; hence, they do not now validly serve as the Board of Directors of the corporation.
8. The new officers named at the January 29, 1998 meeting were not elected in accordance with applicable Pennsylvania law; hence, they are not authorized to act as officers of the corporation.
9. The remaining Board members, as set forth in the December 4, 1997, minutes are still the Board of Directors of L.A.P.S., as of this date. Specifically, they are: Gloria Shurer, Shirley Lutchter, Lee Goodenow, Mary Ann Mulaski and Charlotte King.
10. The officers, as set forth in the December 4, 1997, minutes are still the officers of L.A.P.S., as of this date. Specifically, they are: President, Gloria Shurer, Secretary, Charlotte King , and Treasurer, Shirley Lutchter.
11. Any action by the Board to remove either Gloria Shurer or Shirley Lutchter as a member was invalid, inasmuch as there is no evidence any bylaw exists that would provide for the manner of removal from membership and there is no evidence that any notice, trial or conviction for expulsion was carried out in accordance with any bylaw all as required by 15 Pa.C.S. §5766.

12. Anyone who was recognized by the directors and/or officers operating the business affairs of the corporation as a member remains a member, inasmuch as there are no bylaws providing for termination or requirements for maintenance of membership, except as to those individuals indicating they have resigned their membership.
13. Under the provisions of the NonProfit Corporation Law, specifically 15 Pa.C.S. §§5764 and 5792, this Court has the authority to appoint a custodian and/or master where it appears the membership of the corporation is so divided that appropriate directors have not been elected and that the directors are so deadlocked in management of the affairs of the corporation that they are unable to operate the same without irreparable injury occurring to the corporation (*see, also* 15 Pa.C.S. §5981; despite the Court Order of June 25, 1996, bylaws have still not been adopted at a properly held meeting of the membership).
14. It is appropriate to impose sanctions upon the Plaintiff and Plaintiff's counsel for failure to cooperate in discovery where that has resulted in additional expense to the Defendants in the way of counsel fees as well as requiring additional time of this Court.

Accordingly, the Court finds that the corporation is in need of a custodian/master.

**DECREE NISI**

Based upon the foregoing it is **ORDERED, ADJUDICATED and DECREED**  
as follows:

1. The Board of Directors of Lycoming Animal Protection Society, Inc. are Gloria Shurer, Shirley Lutcher, Lee Goodenow, Mary Ann Mulaski and Charlotte King who shall hold office until such time as they resign or are removed from office by death or other disability, Order of Court or until their successors are duly elected.
2. The Officers of the Lycoming Animal Protection Society, Inc. are Gloria Shurer, President, Charlotte King, Secretary and Shirley Lutcher, Treasurer.
3. Keith Barrows, Esquire, is hereby appointed as custodian/master of Lycoming Animal Protection Society, Inc. under the provisions of 15 Pa.C.S. §§5764 and 5792.
4. No action of the corporation other than the operation of its day-to-day operations under its current employees and existing practices shall be undertaken without the express approval of the custodian/master. This includes but is not limited to the disposition of any assets and the expenditure of any funds.
5. Within seven (7) days of this Decree Nisi becoming a Final Decree the custodian/master shall convene a meeting of the Defendants in this case, the above-identified Directors and Officers of this corporation, counsel for

Plaintiff and counsel for Defendants, the original incorporators, if the same can be found, that is, Richard Lewis, Linda Kiodo, Catherine Strauser, Lou Anne Bloom, and Doris Kowalchik. The custodian/master shall give those individuals notice by telephone or letter of the place and time of the meeting. The addresses of the incorporates were set forth on Defendants' Exhibit 6, Articles of Incorporation, although either counsel for this proceeding who know of more current addresses for any individual named as an incorporater shall furnish them to the custodian/master. In addition, the individuals who appear to this Court to have been named as an "interim" Board of Directors, at the December 9, 1997 membership meeting, specifically Mary Ann Rosello, Patricia Courtright, Sandy Grafius, Pat VonNeeda, Kathleen Fronk and Sue Fryer shall also be notified of the convening of this meeting with responsibility for notifying the same to be that of Plaintiff's counsel.

6. At the initial meeting of the custodian/master he shall discuss with those who attend appropriate procedures, dates and times for holding a membership meeting of the corporation for the purposes of adopting bylaws and electing appropriate directors and officers pursuant to those bylaws. This meeting is to be held within forty-two (42) days of this Order becoming final. In fulfilling this function, the Court further DIRECTS that the custodian/master be furnished by the Plaintiff and any purported officer or member of the Plaintiff who has access or control or

possession of all minutes and records of the corporation of any type whatsoever, including but not limited to, membership lists indicating the names and last-known addresses and/or telephone numbers of all individuals who have been members of the corporation as considered in the records of the corporation on or after the date of June 25, 1996. The Court also DIRECTS that the custodian/master takes steps to see that all persons who are indicated as members on those lists are notified of the place and time of the membership meeting. The Court also DIRECTS that the bylaws proposed to be adopted at the membership meeting shall be those bylaws as proposed in Defendants' Exhibit 17 (which indicate that it is a draft copy submitted for approval on November 21, 1996). The custodian/master shall establish procedures to receive proposed amendments or substitute bylaws prior to or at the time of the membership meeting. This may include, but is not limited to the requirement that any such proposed amendment or substitute bylaw be submitted in writing with at least five (5) copies thereof being made available at the time of its submission and that proposal be made by at least three (3) members of the corporation. Following adoption of the bylaws at the membership meeting directors and officers shall be elected in the number and to the offices established by the bylaws, provided that any adopted bylaw to the contrary the persons to hold such offices may be nominated from the floor of the membership meeting provided that the nomination is seconded by at least



two (2) members in attendance and that the individual nominated consent to serve in the stated office.

7. It is further ORDERED and DIRECTED that at the membership meeting to be conducted by the custodian/master for purposes of adopting bylaws, electing directors and officers that at least five (5) days written notice shall be given to all those individuals who are identified as members by the custodian/master of the date, time and place and purpose of the meeting and a place where copies of this Order as well as the proposed bylaws may be inspected and obtained for the cost of copying the same. At such meeting those members attending, regardless of the actual number, shall constitute a quorum for the purposes of conducting business. The action by a majority of those attending that meeting for the purposes above set forth as would relate to adopting bylaws, electing directors and officers, shall be necessary for the approval of any action. The custodian/master shall be fully in charge of that meeting.
8. The custodian/master's fees and expenses shall be compensated by the Plaintiff. Compensation of the custodian/master shall be at the rate of \$65 per hour and the custodian/master's fees and expenses shall not exceed \$1,000 unless approved by the Court. The custodian/master's fees and expenses may be billed on an interim basis to the corporation who shall cause the same to be paid within three (3) business days of receipt of the billing.

9. The custodian/master shall file a final report with the Court indicating the date, time and place of the meeting and the actions taken at that meeting along with a copy of his total billing. The Court will then enter an Order of discharge.
10. Plaintiff, within ninety (90) days of the finalization of this Order, shall pay to Defendants at the office of Defendants' counsel the sum of \$600 on account of Defendants' counsel fees incurred in this matter.
11. John Piazza, Esquire, shall pay within thirty (30) days of the date of the finalization of this Order the sum of \$100 to Lycoming County Law Library. This fine will be used for appropriate education as would relate to the responsibilities of counsel in discovery litigation and other ethical purposes after consultation between this Court and the Law Librarian.
12. This Court retains jurisdiction of these proceedings in order to assure that the foregoing Decree is carried out. This Decree shall be entered as a final Decree if no exceptions thereto are filed within ten (10) days of the date of its filing.

BY THE COURT,

Date: June 30, 1999

William S. Kieser, Judge

cc: Court Administrator  
John Piazza, III, Esquire  
John A. Gummo, Esquire  
Keith Barrows, Esquire  
Judges  
Nancy M. Snyder, Esquire  
Gary L. Weber, Esquire (Lycoming Reporter)