Custody Pleadings and Third Parties

Pa.R.C.P. No. 1915.3(e) and Pa.R.C.P. No. 1915.15(a) require pleadings by third parties to set forth the factual basis for standing:

> (e) Pleading Facts Establishing Standing.
>
> (1) An individual seeking physical or legal custody of a child, who is in loco parentis to the child, shall plead facts establishing standing under 23 Pa.C.S. § 5324(2) in Paragraph 9(a) of the complaint in Pa.R.C.P. No. 1915.15(a).
>
> …
>
> (3) An individual seeking physical or legal custody of a child, who is not in loco parentis to the child, shall plead facts establishing standing under 23 Pa.C.S. § 5324(4) and (5) in Paragraph 9(c) of the complaint in Pa.R.C.P. No. 1915.15(a).

Raising the Question of Standing

Standing is a threshold question and may be raised through Preliminary Objections or sua sponte by the Court.

Preliminary Objections are raised in accordance with Pa.R.C.P. No. 1028.

Sua Sponte: an issue of subject matter jurisdiction in child custody

In general, the question of standing is distinguishable from that of subject matter jurisdiction. However, when a statute creates a cause of action and designates who may sue, the issue of standing becomes interwoven with that of subject matter jurisdiction. See Grom v. Burgoon, 672 A.2d 823, (Pa. Super. 1996) citing, Hill v. Divecchio, 625 A.2d 642 (Pa. Super. 1993), alloc. denied, 645 A.2d 1316 (Pa. 1994).

Standing as it relates to child custody, is purely designated by statute at 23 Pa. C.S. § 5324. Standing then becomes a jurisdictional prerequisite to any custody action. It is well-settled that the question of subject matter jurisdiction may be raised at any time, by any party, or by the court *sua sponte*.

Presumptions and Third parties

In cases between a third party and a parent, there is presumption in favor of the parent for primary physical custody, which may be rebutted by clear and convincing evidence. 23 Pa. C.S. § 5327.

ILP Prongs analyzed case by case:

1) Assumption of parental status; and
2) Discharge of parental duties; and
3) Consent and knowledge of the parent.

What is "consent" of a parent for establishing in loco parentis?

A party cannot place himself or herself in an *in loco parentis* status with respect to a child in defiance of a parent's wishes. It must begin and be formed with the consent of a natural parent. K.W. v. S.L., 157 A.3d 498 (Pa. Super. 2017). Often, this is in the context of a parent and a party residing together and co-parenting a family unit. See M.J.S. v. B.B., 172 A.3d 651 (Pa. Super. 2017) and T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001).

Relevant time period is determining consent whether the relationship between child and third party BEGAN or was ESTABLISHED by the parent between the child and third party, not whether the parent consents as of the time of trial.

CIPRIANI INN OF COURT
MARCH 8, 2020
CUSTODY STANDING
PRELIMINARY OBJECTIONS
CHARLES C. SHAINBERG, ESQ.

I should begin this by saying Preliminary Objections (Hereinafter: "PO's") maybe an effectively "neutered" process in Philadelphia County.

Under the prior Rule PO's had to be raised within 20 days of service of the pleading and further, filing should not delay the hearing. That language has been replaced by the more extensive language in the amended Rule 1915.5:

> Rule 1915.5 - Question of Jurisdiction, Venue, or Standing Counterclaim. Discovery. No Responsive Pleading by Defendant Required
> (a) Question of Jurisdiction, Venue, or Standing.
> (1) A party shall raise jurisdiction of the person or venue by preliminary objection.
> **(2) A party may raise standing by preliminary objection or at a custody hearing or trial.**
> (3) The court may raise standing sua sponte.
> (4) In a third-party plaintiff custody action in which standing has not been resolved by preliminary objection, the court shall address the third-party plaintiff's standing and include its standing decision in a written opinion or order.
> (Emphasis added)

PO's are initially governed by Pa.R.C.P 1028:

> Rule 1028 - Preliminary Objections
> (a) Preliminary objections may be filed by any party to any pleading and are limited to the following grounds:

Pa.R.C.P 1017 specifies:

> Rule 1017 - Pleadings Allowed
> (a) Except as provided by Rule 1041.1, the pleadings in an action are limited to
> (1) a complaint and an answer thereto,
> (2) a reply if the answer contains new matter a counterclaim or a cross-claim,
> (3) a counter-reply if the reply to a counterclaim or cross-claim contains new matter,
> **(4) a preliminary objection and a response thereto.**
> (b) Rescinded.
> (c) No formal joinder of issues is required.
> (Emphasis added).

Thus, the Rules provide that once may file PO's to PO's and the answer thereto.[1]

PO's must go to a Judge for resolution. However, Philadelphia County has elected to follow Pa.R.C.P 1915.4-2 for Partial Custody actions and full custody matters will initially proceed to a Hearing Officer for review. Thus, the issue of standing will most likely come up before the Hearing Officer before the Court ever lists the PO's for a hearing.

Whatever, the Hearing Officer's decision a finding in a finding in a Partial Custody matter may only be challenged by exceptions from the record and decision of the Hearing Officer. In a custody (non-partial) the Hearing Officer, if unable the resolve the matter, passes the on for a *de novo* before a Judge. This includes a finding by the Hearing Officer of a lack of standing by the party. In which case the issue of standing proceeds before a Judge on both the PO's and the Hearing Officer's finding.[2]

Which raises the question of why even file PO's on standing. I would respectfully suggest that if neither the Hearing Officer or the Judge willingly raises standing *sua sponte* what is the attorney's defense to a subsequent claim of malpractice for not raising standing?

---

[1]While the writer has filed such a pleading (but not in a Custody matter) one filing such a pleading should expect a level of frustration from and negative response from the Court system.

[2] Note the Court may raise the standing issue *Sua Sponte* even if no one has done so previously.

Who has Standing? 23 Pa. C.S.A §5324

- (1) Parents (including Adoptive Parents)
- (2) Persons *in loco parentis*
  - **No** statutory definition, case law defines as:
    - Assumption of parental status
    - Discharge of parental duties
    - With the Consent of the Parent
      - Implied Sufficient, See *M.J.S. v. B.B.*, 172 A.3d 651 (Pa Super 2017)

Grandparent Standing: §5324(3)

(3-Prong Approach)

Grandparents have standing **without** *ILP* if (1) Relationship began with **consent** of a parent or court order; (2) Already have or willing to assume responsibility, ***and*** (3) one of the following:

- The child has been adjudicated **dependent** (legal conclusion for dependency cases)
- The child is substantially at risk due to neglect, abuse, drug or alcohol abuse or incapacity;
- Child has, for a period of 12 consecutive months, resided with the grandparent . . ***must be filed within six months after the removal of the child from the home***

Third Party Standing Generally
23 Pa. C.S.A §5324(4)

- Any third party can seek custody, where they can demonstrate, by clear and convincing evidence that:
  - The individual has assumed or is willing to assume responsibility for the child, and
  - The individual has a sustained, substantial, and sincere interest in the welfare of the child; and
  - Neither parent has any form of care and control of the child

Partial Custody Under the Grandparent Statute 23 Pa. C.S. §5325

- Grandparents have the right to seek partial custody (**narrowly defined*)
  - Where the parent of the child is deceased, a parent or grandparent of the deceased parent may file for partial custody
  - Where the relationship with the child began with consent of a parent, or court order, **and** where the parents of the child:
    - Have commenced a proceeding for custody, ***and***

Partial Custody Under the Grandparent Statute 23 Pa. C.S. §5325 (Cont.)

- Do not agree as to whether the grandparents or great-grandparents should have custody under this section; **or**
- When the child has, for a period of at least 12 months, resided with the grandparent or great-grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, an action **must be filed** within **six months** after the removal of the child from the home.

Case Notes

In Loco Parentis

Grandmother had standing to seek child custody because the grandmother stood in loco parentis, as (1) thegrandmother did not have to be the child's sole parental figure, (2) the grandmother shared parental responsibilities with the child's mother, and (3) the child's father impliedly consented to that status. M.J.S. v. B.B., 2017 PA Super 327, 172 A.3d 651, 2017 Pa. Super. LEXIS 804 (Pa. Super. Ct. 2017).

Trial court misapplied the law in finding that the grandmother stood in loco parentis to the child and therefore had standing to pursue the child custody action because the grandmother's efforts to assist the mother and the child in leaving her home were strongly inconsistent with an assumption of full parental responsibility, and the periods of co-residence were more consistent with the grandmother assisting the mother and the child in a time of need than with the grandmother's informal adoption of the child. D.G. v. D.B., 2014 PA Super 93, 91 A.3d 706, 2014 Pa. Super. LEXIS 235 (Pa. Super. Ct. 2014).

Maternal grandparents (MG) were allowed to intervene in a child custody dispute between the parents since they had achieved in loco parentis status where: (1) they had been involved in the seven-month-old child's life since his birth; (2) the child was born with serious health complications that required him to be hospitalized for an extended time, during which time the MG frequently visited; (3) the child and his mother lived with the MG when the child was released from the hospital; (4) the parents were both in high school and the MG typically cared for him while his parents attended school; and (5) to the extent possible due to the child's age, the MG had established a bond with the child. Higbee v. Curea, 29 Pa. D. & C.5th 169, 2013 Pa. Dist. & Cnty. Dec. LEXIS 265 (Pa. County Ct. Mar. 18, 2013).

Standing

Trial court did not err in dismissing the grandmother's complaint for custody of her grandchildren for lack of standing pursuant to this section because, although the grandmother had standing when the petition was filed, the children were no longer dependent. *M.W. v. S.T., 2018 PA Super 268, 196 A.3d 1065, 2018 Pa. Super. LEXIS 1068 (Pa. Super. Ct. 2018)*.

Notwithstanding a child's custodial situation, the Child Custody Act, *23 Pa.C.S. §§ 5321-5340*, grants standing to grandparents to file for any form of physical or legal custody when their grandchild is substantially at risk due to the parental behaviors stated in *23 Pa.C.S. § 5324(3)(iii)(B)*, and a decision sustaining the maternal great-grandparents' preliminary objections, concluding that the paternal grandparents did not have standing to pursue custody of the child, was improper. G.A.P. v. J.M.W., 2018 PA Super 229, 194 A.3d 614, 2018 Pa. Super. LEXIS 900 (Pa. Super. Ct. 2018).

Grandmother had standing to seek child custody because the grandmother stood in loco parentis, as (1) the grandmother did not have to be the child's sole parental figure, (2) the grandmother shared parental responsibilities with the child's mother, and (3) the child's father impliedly consented to that status. *M.J.S. v. B.B., 2017 PA Super 327, 172 A.3d 651, 2017 Pa. Super. LEXIS 804 (Pa. Super. Ct. 2017)*.

Maternal grandmother lacking standing to petition for special relief from a child custody order, and therefore the trial court lacked jurisdiction over her appeal, because she acknowledged that she was not the child's parent and she did not currently stand in loco parentis to the child, she failed submit evidence of current risk to the child, and the child did not reside with her for 12 consecutive months. *A.A.L. v. S.J.L., 2016 Pa. Dist. & Cnty. Dec. LEXIS 12278 (Pa. C.P. June 29, 2016)*, aff'd, *169 A.3d 1151, 2017 Pa. Super. Unpub. LEXIS 1328 (Pa. Super. Ct. 2017).*

Trial court erred in denying a motion by maternal grandparents (MGs) to schedule a custody trial with respect to the custody of their grandsons, who had been adjudicated as dependent, as the MGs had standing to seek custody under the plain statutory language, notwithstanding the permanency goals of reunification. *In re C.L.P., 2015 PA Super 210, 126 A.3d 985, 2015 Pa. Super. LEXIS 568 (Pa. Super. Ct. 2015)*.

Standing: Burdens of Proof

Trial court properly denied a paternal grandmother's petition to intervene in an underlying custody action involving her grandchild in order to seek custody due to lack of statutory standing. *M.S. v. J.D., 2019 PA Super 215, 2019 Pa. Super. LEXIS 701 (Pa. Super. Ct. 2019)*.

In a paternal grandmother's (PG) petition to intervene in order to seek custody of her grandchild, the PG did not establish that she had standing where the testimony did not prove that the mother lacked care and control over the child. *M.S. v. J.D., 2019 PA Super 215, 2019 Pa. Super. LEXIS 701 (Pa. Super. Ct. 2019)*.

In support of an affirmance on appeal pursuant to Pa. R. App. P. 1925(a)(2)(h), grandparents had standing for purposes of a temporary custody order that awarded them partial custody of parents' minor child, as they were in loco parentis because they had assumed the obligations incident to the parental relationship, and alternatively the mother had allowed them to take care of the child. Sproul v. Gatley, 2015 Pa. Dist. & Cnty. Dec. LEXIS 497 (Pa. County Ct. Dec. 24, 2015).

Child Custody Awards: Non-parents

Trial court properly denied a paternal grandmother's petition to intervene in an underlying custody action involving her grandchild in order to seek custody due to lack of statutory standing. M.S. v. J.D., 2019 PA Super 215, 2019 Pa. Super. LEXIS 701 (Pa. Super. Ct. 2019).

In a paternal grandmother's (PG) petition to intervene in order to seek custody of her grandchild, the PG did not establish that she had standing where the testimony did not prove that the mother lacked care and control over the child. M.S. v. J.D., 2019 PA Super 215, 2019 Pa. Super. LEXIS 701 (Pa. Super. Ct. 2019).

Trial court did not err in dismissing the grandmother's complaint for custody of her grandchildren for lack of standing pursuant to this section because, although the grandmother had standing when the petition was filed, the children were no longer dependent. M.W. v. S.T., 2018 PA Super 268, 196 A.3d 1065, 2018 Pa. Super. LEXIS 1068 (Pa. Super. Ct. 2018

Trial court erred in denying a motion by maternal grandparents (MGs) to schedule a custody trial with respect to the custody of their grandsons, who had been adjudicated as dependent, as the MGs had standing to seek custody under the plain statutory language, notwithstanding the permanency goals of reunification. *In re C.L.P., 2015 PA Super 210, 126 A.3d 985, 2015 Pa. Super. LEXIS 568 (Pa. Super. Ct. 2015)*.

Under 23 Pa.C.S. § 5324, although a grandfather cared for his granddaughter for a summer at the mother's request and he assumed responsibility for the child in the past and demonstrated that he was capable of doing so in the future, there was no risk to the child from parental misconduct or deficiencies; accordingly, the grandfather was not entitled to legal or physical custody of her. Lehman v. Lehman, 24 Pa. D. & C.5th 1, 2011 Pa. Dist. & Cnty. Dec. LEXIS 532 (Pa. C.P. Apr. 15, 2011).

Trial court erred under Pa. R. Civ. P. 1028(a)(4) when it failed to grant a father's preliminary objection to a grandmother's assertion of standing and request for custody of the parties' child, as the grandmother failed to sufficiently plead that she was entitled to fully custody pursuant to former 23 Pa.C.S. § 5313 (now at 23 Pa.C.S. § 5324). R.M. v. J.S., 2011 PA Super 98, 20 A.3d 496, 2011 Pa. Super. LEXIS 601 (Pa. Super. Ct. 2011).

§ 5325. Standing for partial physical custody and supervised physical custody.

Where maternal grandparents were awarded partial physical custody of their deceased daughter's child, the grandparent visitation statute did not violate the father's due process rights to raise his child without government interference because the statute met the compelling state interest in protecting the health and emotional welfare of children, and it was narrowly tailored to meet that interest since it allowed only grandparents whose child had died to seek visitation or partial custody. J. & S.O. v. C.H., 2019 PA Super 91, 206 A.3d 1171, 2019 Pa. Super. LEXIS 280 (Pa. Super. Ct. 2019).

As the parents of a paternal grandmother's (PG) grandchild agreed that the PG should not have custody, denial of the PG's petition to intervene in a custody proceeding in order to seek custody was properly denied due to lack of standing based on the clear and unambiguous statutory language. M.S. v. J.D., 2019 PA Super 215, 215 A.3d 595, 2019 Pa. Super. LEXIS 701 (Pa. Super. Ct. 2019).

This statute grants standing in custody proceedings to grandparents of children born out of wedlock, and thus, the trial court misinterpreted the statute by concluding that the grandparents of a child whose parents never married lack standing to seek partial custody. L.A.L. v. V.D., 2013 PA Super 212, 72 A.3d 690, 2013 Pa. Super. LEXIS 1692 (Pa. Super. Ct. 2013

Trial court erred by awarding standing to the maternal grandmother, 23 Pa.C.S. § 5325(2), because the deceased father was no longer able to either assent or oppose the mother's decisions regarding the maternal grandmother's custody; while the maternal grandmother possibly had standing based upon the parents' disagreement prior to the father's death, the factual circumstances subsequently changed, and the trial court erred in failing to consider that change in circumstances. E.A. v. E.C., 2021 PA Super 144, 2021 Pa. Super. LEXIS 456 (Pa. Super. Ct. 2021).

E.A., III v. E.C., 259 A.3d 497, 2021 PA Super 144 (Pa. Super. July 13, 2021).
York County

ISSUE(S)

1. Did the court err when it did not give plain meaning to the language of 23 Pa.C.S. § 5325(2)(ii) ("do not agree") and characterized the wishes of a deceased parent as a relevant "disagreement" with the remaining presumed fit living parent when the statute is written in the present tense with no provision concerning past or future agreements?
2. Did the court err by giving consideration to any standing Maternal Grandmother might have achieved in the event that she had filed an Intervenor action prior to the death of Father, and, once determining that she "had or would have had standing" had such filing been made, granting standing to her "by logic" in the instant Intervenor action?

HOLDING(S)

1. The court erred by not giving plain meaning to the language of 23 Pa.C.S. § 5325(2)(ii).
2. The court erred by holding that grandmother could allege standing to intervene in a custody proceeding where the child's parent, who approved of maternal grandmother's exercise of partial physical custody was now deceased, as there was no longer a present disagreement between parents regarding maternal grandmother's involvement in their child's life.

FACTS

Father, now deceased, had filed a custody complaint seeking partial custody of the parties' child. The trial court granted the parents shared legal custody, with mother having primary physical custody and father partial physical custody. Thereafter, mother moved to modify the custody arrangement and father filed a cross motion to modify custody and a motion for contempt. Mother later moved to cancel the custody proceedings after father passed away, which the trial court granted.

Maternal grandmother subsequently filed a petition to intervene in the custody litigation. Mother objected and argued that maternal grandmother lacked standing to intervene. Maternal grandmother contended that she had standing pursuant to 23 Pa.C.S. §5325(2), which permitted grandparents to file for partial physical custody where: (1) the relationship with the child began with the consent of a parent; (2) the parents of the child commenced custody litigation; and (3) the parents disagreed as to whether the grandparent should exercise partial physical custody. Maternal grandmother argued that, since she presumably would have had standing had she sought to intervene pursuant to §5325(2) before father died, she should be able to exercise standing in accordance with that provision after his death. In other words, maternal grandmother argued that father's endorsement of her relationship with the child and the parties' prior disagreement over her involvement in the child's life survived father's passing.

Mother countered that §5325(2) only acted in a present sense, and therefore, because father had since passed away, there was no present disagreement between the parents over grandmother's involvement in the child's life.

The trial court rejected mother's argument and accepted grandmother's argument, granting her petition to intervene. Mother appealed, arguing that the trial court erred when it did not give plain meaning to the clear and unambiguous language of 23 Pa.C.S. §5325(2)(ii) and characterized the wishes of a deceased parent as a relevant disagreement with the remaining living parent when the statute was written in the present tense with no provision concerning past or future agreements.

ANALYSIS

The court found that the words of the statute were clear and free from all ambiguity. The court agreed with mother that the plain language of §5325(2) did not allow for inquiry into the past disagreements between parents and that granting grandmother retroactive standing would interfere with mother's fundamental liberty interest to raise her child without interference from the state. The court further agreed with mother that the plain language of that section relates to a current disagreement between the parents as of the time that standing is to be determined. Therefore, absent an applicable statutory exception, a third-party such as maternal grandmother could not seek custody of the child in derogation of mother's wishes. The court noted that standing in custody cases was a fluid concept, such that it would not be logically inconsistent to state that even if grandmother could have standing while father was alive, she did not have standing following his death.

The court held that regardless of maternal grandmother's putative standing to intervene prior to father's death, the court must examine whether standing was present in light of the factual circumstances as they currently existed. Accordingly, the court found that the trial court erred in ignoring this fundamental principle of child custody law in deeming maternal grandmother's standing inevitable based upon her favor with father before he died. Thus, while maternal grandmother may have had standing based upon the parents' disagreement prior to father's death, the factual circumstances subsequently changed. Therefore, the trial court erred in failing to consider that change of circumstances when determining whether maternal grandmother had standing to pursue custody pursuant to §5325(2) at that junction.

The court continued that the plain language of the statute confers standing to grandparents and great-grandparents to intercede in custody litigation when the parents "do not agree" as to the nature of the third-party's interaction with their child. Hence, regardless of any prior disagreements between parents about a grandparent's ability to exercise partial custody, the court held that the Child Custody Law does not extend standing to grandparents to file for partial physical custody under this section when the predicate disagreement no longer exists. Thus, the trial court erred as a matter of law in awarding standing to maternal grandmother based upon §5325(2) when father was no longer able to either assent or oppose mother's decisions regarding maternal grandmother's custody.

CONCLUSION

Reversed and remanded.

2021 PA Super 144

E.A., III	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
E.C.	:	
Appellant	:	No. 1439 MDA 2020
C.Q., INTERVERNOR	:	

Appeal from the Order Entered September 25, 2020
In the Court of Common Pleas of York County Civil Division at No(s): 2017-FC-2186-03

BEFORE: BOWES, J., DUBOW, J., and STEVENS, P.J.E.*

OPINION BY BOWES, J.: **FILED JULY 13, 2021**

E.C. ("Mother") appeals from the September 25, 2020 order that granted the petition filed by C.Q. ("Maternal Grandmother") seeking to intervene in child custody litigation involving J.A., who was born to Mother and E.A., III ("Father") in November 2012. We reverse.

The trial court succinctly summarized the relevant procedural history of the custody litigation:

> On November 13, 2017, Father, now deceased, filed a complaint for custody seeking partial custody rights of his daughter. On February 5, 2018, a stipulated order for custody was entered by the court which granted the parents shared legal custody and Mother primary physical custody with Father having partial physical custody rights. On April 26, 2019, Mother filed a petition to modify. On June 12, 2019, Father filed a motion for contempt and cross[-]motion for modification. An interim order

* Former Justice specially assigned to the Superior Court.

> was entered on July 12, 2019, in which the Court granted make-up dates to Father due to Mother's acknowledgment of withholding custody. [The court ordered a custody trial which, following several continuances, was scheduled for July 28, 2020.] On April 27, 2020, Mother filed a motion to withdraw custody complaint and cancel custody trial due to the death of Father in March 2020. The court granted this motion on April 29, 2020.

Trial Court Opinion, 11/20/20, at 1-2 (unnecessary capitalization omitted).

More than three months after Father's death, and more than two months after the court granted Mother's petition to withdraw Father's custody complaint and cancel the custody trial, Maternal Grandmother filed a petition to intervene in the custody litigation.[1] Mother filed a preliminary objection challenging Maternal Grandmother's standing to intervene and Maternal Grandmother filed her response asserting standing based upon § 5325(2) of the Child Custody Law, which we reproduce *infra.* That provision permits, *inter alia*, grandparents to file for partial physical custody where 1) the relationship with the child began with the consent of a parent; 2) the parents of the child commenced custody litigation; and 3) the parents disagree as to whether the grandparent should exercise partial physical custody. ***See*** 23 Pa.C.S. § 5325(2).

---

[1] Maternal Grandmother initially filed a custody complaint in Cumberland County but withdrew it following Mother's preliminary objection asserting jurisdiction in York County, where Father initiated the instant custody litigation. In conjunction with the instant petition to intervene, Maternal Grandmother also sought to transfer venue from York County to Cumberland County, where Maternal Grandmother asserts the parties all reside. The trial court held that motion in abeyance pending resolution of Maternal Grandmother's standing.

At the ensuing oral argument, the trial court took judicial notice of the prior custody litigation between Mother and Father and that the parties stipulated Father previously endorsed Maternal Grandmother's relationship with J.A. prior to his death. N.T., 9/9/20, at 7-9. The crux of Maternal Grandmother's argument was that, since she ostensibly would have had standing had she sought to intervene pursuant to § 5325(2) before Father died, she should be able to exercise standing in accordance with that proviso after his death. Stated plainly, she contended that Father's endorsement and the parties' prior disagreement over her involvement in J.A.'s life survived Father's passing.

Mother countered that the unambiguous language of the statute, which is to be narrowly construed, was drafted in the present tense, *i.e.*, "parents . . . do not agree as to whether the grandparent . . . should have custody[,]" and there is no statutory authorization of standing based on past or future considerations. ***See*** 23 Pa.C.S. § 5325(2)(ii). She continued that, since Father had died more than three months before Maternal Grandmother sought to intervene, the requisite disagreement between the parents simply did not exist.

The trial court rejected Mother's argument, accepted Maternal Grandmother's position, and granted the petition to intervene.[2] Specifically, the trial court reasoned,

> Looking at the statute of 5325(2), the court is going to adopt Maternal Grandmother's [position] that she had or would have had standing while Father was alive because [the requirements] under subsection 2[(i) and (ii)] were both fulfilled. The court believes that it is illogical to say that grandmother had standing while Father was alive but now would not have standing since Father has been deceased.

Trial Court Order, 9/10/20, at 3 (cleaned up). Mother filed a timely motion to certify the interlocutory order for appeal, which the trial court granted on September 25, 2020, and entered an amended order certifying the matter for an immediate interlocutory appeal.

This timely appeal followed, wherein Mother complied with Pa.R.A.P. 1925(b) by filing a concise statement of errors complained of on appeal.[3] The trial court's ensuing opinion pursuant to Pa.R.C.P. 1925(a) explicitly adopted the rationale that the court outlined in its prior order and amended order entered during September 2020. Mother presents two issues for our review:

> 1. Did the court err when it did not give plain meaning to the clear and unambiguous language of 23 Pa.C.S. § 5325(2)(ii) ("do not

---

[2] The trial court initially granted relief based entirely upon its preliminary review of the case and Maternal Grandmother's argument. ***See*** N.T. 9/9/20, at 10-11. However, after Mother correctly highlighted that she had not been granted an opportunity to present her counterargument, the court delayed its decision until after hearing Mother's legal positon. ***Id***.

[3] Mother filed in this Court a petition for permission to appeal interlocutory order, which we granted on November 17, 2020.

> agree") and characterized the wishes of a deceased parent as a relevant "disagreement" with the remaining presumed fit living parent when the statute is written in the present tense with no provision concerning past or future agreements?
>
> 2. Did the court err by giving consideration to any standing Maternal Grandmother might have achieved in the event that she had filed an Intervenor action prior to the death of Father, and, once determining that she "had or would have had standing" had such filing been made, granting standing to her "by logic" in the instant Intervenor action?

Mother's brief at 4.

As both of Mother's arguments implicate Maternal Grandmother's standing to participate in the custody dispute following Father's death, we address the contentions jointly. Typically, we review a trial court's custody order for an abuse of discretion, accepting the court's credibility determinations and factual findings that the record supports. ***V.B. v. J.E.B.***, 55 A.3d 1193, 1197 (Pa.Super. 2012) ("Ultimately, the test is whether the trial court's conclusions are unreasonable as shown by the evidence of record."). However, "[g]randparent standing to seek an order directing custody or visitation is a creature of statute, as grandparents generally lacked substantive rights at common law in relation to their grandchildren." ***D.P. v. G.J.P.***, 146 A.3d 204, 213 n.13 (Pa. 2016). Thus, where, as here, the appeal involves a pure question of law, such as statutory interpretation, we employ a *de novo* standard of review and plenary scope of review. ***G.A.P. v. J.M.W.***, 194 A.3d 614, 616 (Pa.Super. 2018).

As we previously explained,

> When interpreting a statute, this [C]ourt is constrained by the rules of the Statutory Construction Act of 1972 (the "Act"). The Act makes clear that the goal in interpreting any statute is to ascertain and effectuate the intention of the General Assembly while construing the statute in a manner that gives effect to all its provisions. ***See*** 1 Pa.C.S. § 1921(a). The Act provides: "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b). Moreover, it is well settled that "the best indication of the General Assembly's intent may be found in a statute's plain language." ***Cagey v. Commonwealth***, 179 A.3d 458, 462 (Pa. 2018). Additionally, we must presume that the General Assembly does not intend a result that is absurd, impossible of execution, or unreasonable and does intend to favor the public interest over any private interest.

Id. (select citations and emphasis omitted).

Instantly, we need not engage in a lengthy statutory analysis because the words of the statute are clear and free from all ambiguity. As noted, *supra*, this appeal turns on the application of § 5325(2), which provides grandparents and great-grandparents standing to pursue partial physical custody and supervised physical custody in the following specific situation:

> In addition to situations set forth in section 5324 (relating to standing for any form of physical custody or legal custody), grandparents and great-grandparents may file an action under this chapter for partial physical custody or supervised physical custody in the following situations:
>
> . . . .
>
> (2) where the relationship with the child began either with the consent of a parent of the child or under a court order and where the parents of the child:
>
> (i) have commenced a proceeding for custody; and
>
> (ii) do not agree as to whether the grandparents or great-grandparents should have custody under this section[.]

23 Pa.C.S. § 5325(2).[4]

In child custody cases, the concept of standing is fluid and differs from the typical determination regarding whether a party has a direct interest in the outcome of litigation. ***See M.W. v. S.T.***, 196 A.3d 1065, 1071 (Pa.Super. 2018) (recognizing that standing in child custody cases may be subject to change and can be re-evaluated after factual changes in circumstances). This Court further explained,

> In the area of child custody, principles of standing have been applied with particular scrupulousness because they serve a dual purpose: not only to protect the interest of the court system by assuring that actions are litigated by appropriate parties, but also to prevent intrusion into the protected domain of the family by those who are merely strangers, however well-meaning.

D.G. v. D.B., 91 A.3d 706, 708 (Pa.Super. 2014) (quoting ***J.A.L. v. E.P.H.***, 682 A.2d 1314, 1318 (Pa.Super. 1996)).

Instantly, the trial court took judicial notice of the earlier custody litigation and the joint stipulation that Mother and Father previously disagreed about Maternal Grandmother's relationship with J.A. prior to Father's death. Hence, the only question before the trial court was whether that disagreement survived Father's death and currently constitutes a basis to revive the custody

---

[4] Grandmother did not assert standing under any of the remaining subparagraphs, including the provision that extends standing to "a parent or grandparent of the deceased parent[.]" 23 Pa.C.S. § 5325(1). ***See*** N.T. 9/9/20, at 9 (Maternal Grandmother assenting to the court's statement, "So, presumably under [§] 5325(1), grandmother doesn't have standing . . . because she is not the parent of the deceased parent."

litigation. As previously noted, the trial court adopted Maternal Grandmother's contention that her prior, perceived standing to intervene in the then-active custody litigation endured after Father's death, and presumably the withdrawal of the pertinent custody complaint.

On appeal, Maternal Grandmother contends that the statute is ambiguous because it does not "state that both parents must be living in order for a grandparent to establish standing under Section 5325(2)." Maternal Grandmother's brief at 4. Conveniently disregarding ensconced principles regarding the fluidity of standing in matters involving child custody, she attempts to draw opacity from the statute's alleged lack of clarity regarding 1) when the predicate disagreement between parents must exist; and 2) how long the disagreement must endure. ***Id*** at 4-5. Treating the nature of standing in these circumstances as static, she opines that, in light of these "many issues surrounding the timing of this 'disagreement' that are not specifically addressed by the plain words of the statute . . . , this Court should look to the Statutory Construction Act for guidance." ***Id***. at 5.

Maternal Grandmother's arguments fail. As noted in the foregoing discussion and further elucidated *infra*, our case law establishes that standing in child custody is indefinite and determined based upon the facts **when the issue is decided**. ***See M.W.***, ***supra*** at 1071. Hence, any ambiguity that Maternal Grandmother could draw from her hypothetical questions concerning the timing of the disagreement between parents is ephemeral, and insofar as

the statute is clear and unambiguous in this regard, we may not interject new meanings to the plain words under the guise of construction. ***See*** 1 Pa.C.S. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."). Thus, notwithstanding Maternal Grandmother's protestations to the contrary, this appeal does not warrant a comprehensive application of statutory construction. ***See Cagey, supra*** at 462 ("the best indication of the General Assembly's intent may be found in a statute's plain language.").

Turning to Mother's argument, Mother stresses that parents have a fundamental liberty interest in raising children as they see fit and that the state will not interfere with child-rearing decisions of otherwise fit parents absent a showing of harm. ***See*** Mother's brief at 13-14 (citing ***D.P. supra*** and ***Hiller v. Fausey***, 904 A.2d 875 (Pa. 2006)). In addition, invoking the principle of statutory construction outlined in 1 Pa.C.S. § 1921(b), Mother accurately observes that, "Where the language of a statute is clear and unambiguous, a court may not, under the guise of construction, add matters the legislature saw fit not to include at the time." ***Id***. at 12 (quoting ***M.S. v. J.D.***, 215 A.3d 595, 602 (Pa.Super. 2019)). Hence, she argues that the trial court's sweeping interpretation of § 5325(2), in order to circumvent the effect of Father's death and grant standing to Maternal Grandmother based upon past disagreements, impeded her right to raise J.A. without interference. Mother's brief at 13. She reasons that the plain language interpretation of the

statute's reference to parents who "do not agree" relates to the present tense with no reference to past or future agreements. ***Id***. Thus, Mother opines that, because "there is no longer the possibility for either agreement or disagreement" between Mother and late Father, the trial court erred in interpreting § 5325(2) in a manner that grants Maternal Grandmother "retroactive standing" based on the past parental disagreements regarding her involvement with J.A. ***Id***.

Phrased differently, Mother contends, "had the General Assembly intended consideration of any past agreements between living parents or inquiry into the wishes of a deceased parent, [it] would have been free to include such in the statute rather than couch it strictly in terms of present tense." ***Id***. at 15. Bolstered by the fact that the General Assembly did not include these considerations in the statute or suggest that a retrospective analysis would be appropriate in any circumstances, she opines that the plain language of § 5325(2)(ii) relates to a current disagreement between the parents as of the time that standing is to be determined. For the following reasons, we agree.

The crux of the trial court's decision, both as announced from the bench and as outlined in the operative order, was that it would be "illogical to say that grandmother had standing while Father was alive but now would not have standing since Father has been deceased." Trial Court Order, 9/10/20, at 3. This logic-based rationale, however, not only presumes that Maternal

Grandmother sought to intervene when Father was alive, which she did not, it ignores three settled principles regarding standing to participate in child custody litigation: (1) standing in child custody may be inconstant; (2) fit parents have a fundamental right to parent without governmental interference;[5] and (3) where there is no dispute between parents whether to permit interactions with third parties, court-mandated associations with third parties intrudes upon the parents' constitutional prerogatives. ***See M.W.***, ***supra*** at 1071 ("[standing in] custody cases may be fluid under some circumstances"); ***D.P. v. G.J.P.***, 146 A.3d 204, 214 (Pa. 2016) ("absent factors such as abuse, neglect, or abandonment, the law presumes parents are fit and, as such, that their parenting decisions are made in their children"s best interests."); ***Id***. at 593–94 (citing ***Hawk v. Hawk***, 855 S.W.2d 573, 577 (Tenn.1993) ("[T]he trial court's interference with the united decision of admittedly good parents represents a virtually unprecedented intrusion into a protected sphere of family life."). Hence, absent an applicable statutory exception, a third party such as Maternal Grandmother cannot seek custody of J.A. in derogation of Mother's wishes.

The Child Custody Law enumerates the exceptions to the general rule restricting third-party interference and Maternal Grandmother invoked the exception outlined in § 5325(2). Since the parties stipulated that Maternal

---

[5] Grandmother abandoned her initial assertion that Mother was unfit and detrimental to J.A.'s wellbeing.

Grandmother's relationship with J.A. began with Father's consent and that the parents were embroiled in custody litigation when Father died, the court reasoned that any ostensible standing that Maternal Grandmother could have exercised prior to Father's death continues and permits her to intervene after his passing. The flaw in the trial court's rationale is that standing in child custody cases is dynamic.

In ***M.W.***, ***supra***, this Court addressed the sometimes labile nature of standing in child custody cases pursuant to a related section of the Child Custody Law and held that the trial court did not err in considering a change of circumstances when determining third-party standing. In that case, a grandmother sought standing to seek physical or legal custody of her grandchildren pursuant to 23 Pa.C.S. § 5324(3)(A), which applies, *inter alia*, when "the child has been determined to be dependent[.]" The record revealed that her grandchildren were dependent when she filed her complaint for custody but the dependency case was closed three months later and the children were reunited with their parents. Thereafter, the trial court granted the parents' petition to dismiss the grandmother's complaint for custody, reasoning that, although the grandmother had standing in accordance with § 5324(3)(A) when she filed the custody complaint, she lost her standing when the juvenile court determined that the subject children were no longer dependent.

In affirming the order dismissing the grandmother's complaint for lack of standing, this Court acknowledged that "custody cases may be fluid under some circumstances," noted situations where we have "re-evaluated a party's standing following a factual change in circumstances," and observed that standing can be challenged beyond the 20-day period provided for preliminary objections. ***Id***. at 1071 (citations omitted). We ultimately concluded,

> [the c]hildren's change in status from dependent to not dependent, and reunification with [p]arents, are relevant changes in circumstances that permit the re-evaluation of standing upon motion by a party. **In fact, it would not make sense to permit a party to raise standing at any time, but then consider the factual circumstances as they existed at the time the complaint was filed for such fluid child custody cases**.

Id. (emphasis added).

Although ***M.W.*** involved a different basis for standing than Maternal Grandmother invoked in the case at bar, the identical principle applies herein, *i.e.*, regardless of Maternal Grandmother's putative standing to intervene prior to Father's death, we examine whether standing is present in light of the factual circumstances as they currently exist. This principle is consistent with the present tense language of § 5325(2)(ii) requiring a grandparent or great-grandparent to demonstrate that parents "do not agree as to whether the grandparents . . . should have custody under this section[.]" Accordingly, the trial court erred in ignoring this fundamental principle of child custody law in deeming Maternal Grandmother's standing inevitable based upon her favor with Father before he died. Thus, while Maternal Grandmother may have had

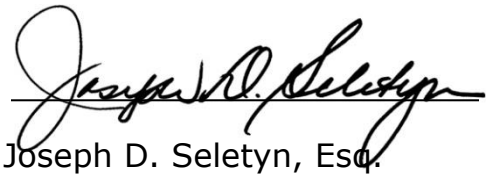
standing based upon the parents' disagreement prior to Father's death, the factual circumstances subsequently changed. The trial court erred in failing to consider that change of circumstances when determining whether Maternal Grandmother had standing to pursue custody pursuant to § 5325(2) at this junction.

In sum, § 5325(2)(ii) confers standing upon grandparents and great-grandparents "where the parents of the child (i) have commenced a proceeding for custody; and (ii) do not agree as to whether the grandparents or great grandparents should have custody under this section[.]" The words of this provision are clear and unambiguous, and they do not make an exception to consider past disagreements. Consistent with our precedent discussing the fluid nature of standing in child custody cases, the plain language of the statute confers standing to grandparents and great-grandparents to intercede in custody litigation when the parents "do not agree" as to the nature of the third-party's interaction with their child. Hence, regardless of any prior disagreements between parents about a grandparent's ability to exercise partial custody, the Child Custody Law does not extend standing to grandparents to file for partial physical custody under this section when the predicate disagreement no longer exists. Thus, the trial court erred as a matter of law in awarding standing to Maternal Grandmother based upon § 5325(2) when Father is no longer able to either assent or oppose Mother's decisions regarding Maternal Grandmother's custody.

Accordingly, for all of the foregoing reasons, we reverse the order granting Maternal Grandmother's petition to intervene and direct the trial court to dismiss the petition due to Maternal Grandmother's lack of standing to pursue partial physical custody in accordance with the § 5325(2)(i) and (ii).

Order reversed. Case remanded with instructions. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 07/13/2021

Samantha J. Evian, Esquire **Obermayer Rebmann Maxwell & Hippel LLP**

WHO CAN BE IN LOCO PARENTIS

STEPPARENTS

Stepparent *In Loco Parentis* & Same Sex Couples

A.J.B. v. A.G.B. 180 A.3d 1263 (PA. Super. 2018): The Superior Court found that in a custody dispute between a mother, the mother's ex-wife, and a father, it was error not to grant the ex-wife in loco parentis based on the circumstances. The court found that ex-wife stood in loco parentis to the child because she participated in the pregnancy and birth, was present at birth, was married to mother at the time of birth, intended to jointly raise the child, was named as a parent on the child's birth certificate, was involved in naming the child, was financially and otherwise involved with the child during and after the marriage, and she held herself out as the child's parent.

Stepparent *In Loco Parentis* & Living with the Child

M.L.S. v. T.H.-S. 195 A.3d 265 (PA Super. 2018): The Superior Court found that the trial court did not err by finding the child's stepfather stood in loco parentis to the child under 23 Pa.C.S. § 5324 because he served in place of the child's deceased biological father and mother accepted benefits of stepfather's child rearing efforts together with any risks. The court found that although living with the child is an important element, it is not dispositive in itself, as under these circumstances stepfather was stationed on a military base.

Stepparent *In Loco Parentis* & Child Support

A.S. v. I.S. 634 Pa. 629, 130 A.3d 763 (2015): The PA Supreme Court looked to whether a stepparent may be liable for child support under certain circumstances. In this case the stepfather had aggressively litigating for shared legal and physical custody of the children, preventing mother from relocating, and the shared custody was granted for the parties. Mother then filed for child support. The court found that when a stepparent takes affirmative legal steps to assume the same parental rights as a biological parent, the stepparent likewise assumes parental obligations, such as the payment of child support.

23 Pa.C.S. § 5324

Pa.C.S. documents are current through 2022 Regular Session Act 13; P.S. documents are current through 2022 Regular Session Act 13

§ 5324. Standing for any form of physical custody or legal custody.

The following individuals may file an action under this chapter for any form of physical custody or legal custody:

(1) A parent of the child.

(2) A person who stands in loco parentis to the child.

(3) A grandparent of the child who is not in loco parentis to the child:

(i) whose relationship with the child began either with the consent of a parent of the child or under a court order;

(ii) who assumes or is willing to assume responsibility for the child; and

(iii) when one of the following conditions is met:

(A) the child has been determined to be a dependent child under 42 Pa.C.S. Ch. 63 (relating to juvenile matters);

(B) the child is substantially at risk due to parental abuse, neglect, drug or alcohol abuse or incapacity; or

(C) The child has for a period of at least 12 consecutive months, resided with the grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, in which case the action must be filed within six months after the removal of the child from the home.

(4) Subject to paragraph (5), an individual who establishes by clear and convincing evidence all of the following:

(i) The individual has assumed or is willing to assume responsibility for the child.

(ii) The individual has a sustained, substantial and sincere interest in the welfare of the child. In determining whether the individual meets the requirements of this subparagraph, the court may consider, among other factors, the nature, quality, extent and length of the involvement by the individual in the child's life.

(iii) Neither parent has any form of care and control of the child.

(5) Paragraph (4) shall not apply if:

(i) a dependency proceeding involving the child has been initiated or is ongoing; or

(ii) there is an order of permanent legal custody under 42 Pa.C.S. § 6351(a)(2.1) or (f.1)(3) (relating to disposition of dependent child).

History

Act 2010-112 (H.B. 1639), P.L. 1106, § 2, approved Nov. 23, 2010, eff. in 60 days; Act 2018-21 (S.B. 844), § 1, approved May 4, 2018, eff. July 3, 2018.

Annotations

Commentary

JOINT STATE GOVERNMENT COMMISSION COMMENTS.

Report of the Advisory Committee on Domestic Relations Law. Custody — Recommended Amendments (November 1999).

[Subsection (2).] Based on former section 5313(b) (when grandparents may petition) and expanded to include any adult who meets the standing requirements set forth in paragraph (2).

[Subsection (3).] Conceptually based on sections 2.03(1)(b) and 2.04(1) of the American Law Institute's Principles of the Law of Family Dissolution: Analysis and Recommendations (Tentative Draft No. 3, Part I, March 20, 1998) ("ALI draft").

[Subsection (4).] The phrase "did not object" in paragraph (4) includes the failure of a party to appear at the proceeding at which the court confirmed custody. Paragraphs (2), (3) and (4) are intended to include the parent's parent or grandparent if that individual satisfies the criteria for standing.

Under this section, the enumerated classes of individuals have standing to file an action for primary physical custody, sole physical custody, shared physical custody, partial physical custody, sole legal custody, sole physical custody, visitation or supervised visitation.

See the comment following the introductory language of [23 Pa.C.S. § 5325(a)] (standing for partial physical custody and visitation).

LexisNexis® Notes

Notes

Editor's Notes

Section 3 of Act 2018-21 provides: "The addition of 23 Pa.C.S. 5324(4) AND (5) shall apply to all custody proceedings irrespective of whether the proceeding was commenced before, on or after the effective date of this section.

Amendment Notes

The 2018 amendment added (4) and (5).

Case Notes

Civil Procedure: Justiciability: Standing

Civil Procedure: Justiciability: Standing: General Overview

Civil Procedure: Justiciability: Standing: Burdens of Proof

Civil Procedure: Justiciability: Standing: Third Party Standing

Civil Procedure: Appeals: Appellate Jurisdiction: Collateral Order Doctrine

Civil Procedure: Appeals: Appellate Jurisdiction: Final Judgment Rule

Civil Procedure: Appeals: Reviewability: Preservation for Review

Family Law: Adoption: Procedures: General Overview

Family Law: Child Custody: Awards

Family Law: Child Custody: Awards: Legal Custody: Sole Legal Custody

Family Law: Child Custody: Awards: Nonparents

Family Law: Child Custody: Jurisdiction

Family Law: Child Custody: Procedures

Family Law: Parental Duties & Rights: In Loco Parentis

Civil Procedure: Justiciability: Standing

Trial court did not err in dismissing the grandmother's complaint for custody of her grandchildren for lack of standing pursuant to this section because, although the grandmother had standing when the petition was filed, the children were no longer dependent. M.W. v. S.T., 2018 PA Super 268, 196 A.3d 1065, 2018 Pa. Super. LEXIS 1068 (Pa. Super. Ct. 2018).

Notwithstanding a child's custodial situation, the Child Custody Act, 23 Pa.C.S. §§ 5321-5340, grants standing to grandparents to file for any form of physical or legal custody when their grandchild is substantially at risk due to the parental behaviors stated in 23 Pa.C.S. § 5324(3)(iii)(B), and a decision sustaining the maternal great-grandparents' preliminary objections, concluding that the paternal

grandparents did not have standing to pursue custody of the child, was improper. G.A.P. v. J.M.W., 2018 PA Super 229, 194 A.3d 614, 2018 Pa. Super. LEXIS 900 (Pa. Super. Ct. 2018).

Grandmother had standing to seek child custody because the grandmother stood in loco parentis, as (1) the grandmother did not have to be the child's sole parental figure, (2) the grandmother shared parental responsibilities with the child's mother, and (3) the child's father impliedly consented to that status. M.J.S. v. B.B., 2017 PA Super 327, 172 A.3d 651, 2017 Pa. Super. LEXIS 804 (Pa. Super. Ct. 2017).

Order sustaining appellee's preliminary objection to appellant's standing to seek custody of a 10-year-old child, who was appellee's biological son was proper because, under case law, the trial court did not err in finding that appellant lacked standing as a parent, particularly since the parties had agreed that appellant was not a parent when the child was born. C.G. v. J.H., 2017 PA Super 320, 172 A.3d 43, 2017 Pa. Super. LEXIS 786 (Pa. Super. Ct. 2017), aff'd, 193 A.3d 891, 2018 Pa. LEXIS 4952 (Pa. 2018).

Maternal grandmother lacking standing to petition for special relief from a child custody order, and therefore the trial court lacked jurisdiction over her appeal, because she acknowledged that she was not the child's parent and she did not currently stand in loco parentis to the child, she failed submit evidence of current risk to the child, and the child did not reside with her for 12 consecutive months. A.A.L. v. S.J.L., 2016 Pa. Dist. & Cnty. Dec. LEXIS 12278 (Pa. C.P. June 29, 2016), aff'd, 169 A.3d 1151, 2017 Pa. Super. Unpub. LEXIS 1328 (Pa. Super. Ct. 2017).

Civil Procedure: Justiciability: Standing: General Overview

Trial court erred in denying a motion by maternal grandparents (MGs) to schedule a custody trial with respect to the custody of their grandsons, who had been adjudicated as dependent, as the MGs had standing to seek custody under the plain statutory language, notwithstanding the permanency goals of reunification. In re C.L.P., 2015 PA Super 210, 126 A.3d 985, 2015 Pa. Super. LEXIS 568 (Pa. Super. Ct. 2015).

Even if a mother could successfully challenge a father’s status, the father had standing to pursue custody because he was listed as father on the child’s birth certificate, and he provided support, cared for, and loved the child; the father testified that he changed the child’s diapers, fed, clothed, played, and generally took care of all the child’s needs, and the child called the father “daddy.” Roberts v. Nafus, 31 Pa. D. & C.5th 334, 2013 Pa. Dist. & Cnty. Dec. LEXIS 400 (Pa. County Ct. June 16, 2013).

Civil Procedure: Justiciability: Standing: Burdens of Proof

Trial court properly denied a paternal grandmother’s petition to intervene in an underlying custody action involving her grandchild in order to seek custody due to lack of statutory standing. M.S. v. J.D., 2019 PA Super 215, 2019 Pa. Super. LEXIS 701 (Pa. Super. Ct. 2019).

In a paternal grandmother’s (PG) petition to intervene in order to seek custody of her grandchild, the PG did not establish that she had standing where the testimony did not prove that the mother lacked care and control over the child. M.S. v. J.D., 2019 PA Super 215, 2019 Pa. Super. LEXIS 701 (Pa. Super. Ct. 2019).

In support of an affirmance on appeal pursuant to Pa. R. App. P. 1925(a)(2)(h), grandparents had standing for purposes of a temporary custody order that awarded them partial custody of parents' minor child, as they were in loco parentis because they had assumed the obligations incident to the parental relationship, and alternatively the mother had allowed them to take care of the child. Sproul v. Gatley, 2015 Pa. Dist. & Cnty. Dec. LEXIS 497 (Pa. County Ct. Dec. 24, 2015).

Civil Procedure: Justiciability: Standing: Third Party Standing

Former same-sex, unmarried partner (UP) of a biological mother (BM) did not have standing to pursue custody as a parent, as the child was conceived via assistive reproductive means using an anonymous sperm donor pursuant to a contract only signed by the BM, such that the UP was not a biological parent, she did not intend to conceive and raise the child, and she had not adopted the child. C.G. v. J. H., 193 A.3d 891, 2018 Pa. LEXIS 4952 (Pa. 2018).

Former same-sex, unmarried partner (UP) of a biological mother (BM) lacked standing to seek custody of the BM’s child as a person who stood in loco parentis to the child, as the record supported the finding that prior to the couple’s separation, the UP did not assume a parental status or discharge parental duties. C.G. v. J. H., 193 A.3d 891, 2018 Pa. LEXIS 4952 (Pa. 2018).

For purposes of in loco parentis standing for seeking custody, although the post-separation conduct should not be determinative of the issue of standing, the conduct by either parent or partner could shed light on the analysis of whether the person seeking standing was ever viewed as a parent-like figure. C.G. v. J. H., 193 A.3d 891, 2018 Pa. LEXIS 4952 (Pa. 2018).

In a custody dispute between a mother, the mother's ex-wife, and a father, it was error not to grant the ex-wife in loco parentis status because (1) the ex-wife participated in the pregnancy and preparations before the child's birth, as well as the birth, (2) the mother and ex-wife were married at the time of the birth and intended to jointly raise the child, (3) the ex-wife was named as a parent on the child's birth certificate and involved in naming the child, (4) the ex-wife was involved financially and otherwise with the child during and after the marriage and held herself out as the child's parent, and (5) the mother could not expunge the ex-wife's relationship with the child that the mother fostered. A.J.B. v. A.G.B., 2018 PA Super 50, 180 A.3d 1263, 2018 Pa. Super. LEXIS 197 (Pa. Super. Ct. 2018).

Civil Procedure: Appeals: Appellate Jurisdiction: Collateral Order Doctrine

Father's appeal of an order denying his preliminary objections and granting prospective adoptive parents in loco parentis standing was properly before the superior court because the order satisfied the collateral order doctrine; the father's claim would be irreparably lost if review was postponed until the entry of a final order, and he had a fundamental constitutional right to parent the child, which included the right to be free of custody litigation involving third parties. K.W. v. S.L., 2017 PA Super 56, 157 A.3d 498, 2017 Pa. Super. LEXIS 154 (Pa. Super. Ct. 2017).

Civil Procedure: Appeals: Appellate Jurisdiction: Final Judgment Rule

Appeal by a mother from a trial court order that denied her petition for declaratory judgment upon finding that no sperm-donation contract existed between her and the biological father of their child required quashing, as it was an unappealable interlocutory order because the trial court had also granted the father standing to seek custody of the child and the custody aspect of the proceeding was ongoing. J.A.F. v. C.M.S., 2017 PA Super 172, 164 A.3d 1277, 2017 Pa. Super. LEXIS 395 (Pa. Super. Ct. 2017).

Civil Procedure: Appeals: Reviewability: Preservation for Review

As a paternal grandmother did not claim that she had standing to seek custody of her grandchild based on a particular statutory provision in her petition, she waived that argument for purposes of appeal. M.S. v. J.D., 2019 PA Super 215, 2019 Pa. Super. LEXIS 701 (Pa. Super. Ct. 2019).

Family Law: Adoption: Procedures: General Overview

Boyfriend, who had lived with the adoptive mother prior to her adoption of the children, lacked standing to seek custody of the children where the boyfriend ultimately sought to assert custody based upon his relationship with the children prior to their adoption. E.T.S. v. S.L.H., 2012 PA Super 207, 54 A.3d 880, 2012 Pa. Super. LEXIS 2526 (Pa. Super. Ct. 2012).

23 Pa.C.S. § 5326 terminates all custody rights granted under 23 Pa.C.S. § 5324, without regard as to whether the person seeking to assert those rights is a grandparent, in the situation where the child is adopted by an individual other than a stepparent, grandparent, or great-grandparent. E.T.S. v. S.L.H., 2012 PA Super 207, 54 A.3d 880, 2012 Pa. Super. LEXIS 2526 (Pa. Super. Ct. 2012).

Family Law: Child Custody: Awards

Order sustaining appellee's preliminary objection to appellant's standing to seek custody of a 10-year-old child, who was appellee's biological son was proper because, under case law, the trial court did not err in finding that appellant lacked standing as a parent, particularly since the parties had agreed that appellant was not a parent when the child was born. C.G. v. J.H., 2017 PA Super 320, 172 A.3d 43, 2017 Pa. Super. LEXIS 786 (Pa. Super. Ct. 2017), aff'd, 193 A.3d 891, 2018 Pa. LEXIS 4952 (Pa. 2018).

Family Law: Child Custody: Awards: Legal Custody: Sole Legal Custody

Permanent legal custody order did not prohibit a parent from later seeking primary custody because neither the Pennsylvania Juvenile Act, 42 Pa.C.S. § 6301 et seq., nor the federal Adoption and Safe Families Act of 1997, 42 U.S.C.S. §§ 671 — 675, prohibited the parent from petitioning to regain custody of their child. In re S.H., 2013 PA Super 165, 71 A.3d 973, 2013 Pa. Super. LEXIS 1611 (Pa. Super. Ct. 2013).

Family Law: Child Custody: Awards: Nonparents

Trial court properly denied a paternal grandmother's petition to intervene in an underlying custody action involving her grandchild in order to seek custody due to lack of statutory standing. M.S. v. J.D., 2019 PA Super 215, 2019 Pa. Super. LEXIS 701 (Pa. Super. Ct. 2019).

As a paternal grandmother did not claim that she had standing to seek custody of her grandchild based on a particular statutory provision in her petition, she waived that argument for purposes of appeal. M.S. v. J.D., 2019 PA Super 215, 2019 Pa. Super. LEXIS 701 (Pa. Super. Ct. 2019).

In a paternal grandmother's (PG) petition to intervene in order to seek custody of her grandchild, the PG did not establish that she had standing where the testimony did not prove that the mother lacked care and control over the child. M.S. v. J.D., 2019 PA Super 215, 2019 Pa. Super. LEXIS 701 (Pa. Super. Ct. 2019).

Award of shared legal and physical custody to biological mother and her former female paramour was upheld because former paramour rebutted presumption in favor of biological mother by undisputed decisions regarding custody that parties had made together both prior to and following their separation, and once trial court granted former paramour in loco parentis status, she did not need to establish that the biological mother was unfit or deficient in any of the 23 Pa.C.S. § 5328 custody factors. R.L. v. M.A., 2019 PA Super 145, 2019 Pa. Super. LEXIS 419 (Pa. Super. Ct. 2019).

Trial court did not err in dismissing the grandmother's complaint for custody of her grandchildren for lack of standing pursuant to this section because, although the grandmother had standing when the petition was filed, the children were no longer dependent. M.W. v. S.T., 2018 PA Super 268, 196 A.3d 1065, 2018 Pa. Super. LEXIS 1068 (Pa. Super. Ct. 2018).

Trial court erred in denying a motion by maternal grandparents (MGs) to schedule a custody trial with respect to the custody of their grandsons, who had been adjudicated as dependent, as the MGs had standing to seek custody under the plain statutory language, notwithstanding the permanency goals of reunification. In re C.L.P., 2015 PA Super 210, 126 A.3d 985, 2015 Pa. Super. LEXIS 568 (Pa. Super. Ct. 2015).

Trial court did not err in granting custody to a stepmother at those times when neither the mother, nor the father was available to care for a child because, according to the record, the stepmother had clearly acted in loco parentis to the child. R.L.P. v. R.F.M., 2015 PA Super 29, 110 A.3d 201, 2015 Pa. Super. LEXIS 43 (Pa. Super. Ct. 2015).

Maternal grandparents (MG) were allowed to intervene in a child custody dispute between the parents since they had achieved in loco parentis status where: (1) they had been involved in the seven-month-old child's life since his birth; (2) the child was born with serious health complications that required him to be hospitalized for an extended time, during which time the MG frequently visited; (3) the child and his mother lived with the MG when the child was released from the hospital; (4) the parents were both in high school and the MG typically cared for him while his parents attended school; and (5) to the extent possible due to the child's age, the MG had established a bond with the child. Higbee v. Curea, 29 Pa. D. & C.5th 169, 2013 Pa. Dist. & Cnty. Dec. LEXIS 265 (Pa. County Ct. Mar. 18, 2013).

Trial court erred under Pa. R. Civ. P. 1028(a)(4) when it failed to grant a father's preliminary objection to a grandmother's assertion of standing and request for custody of the parties' child, as the grandmother failed to sufficiently plead that she was entitled to fully custody pursuant to former 23 Pa.C.S. § 5313

(now at 23 Pa.C.S. § 5324). R.M. v. J.S., 2011 PA Super 98, 20 A.3d 496, 2011 Pa. Super. LEXIS 601 (Pa. Super. Ct. 2011).

Under 23 Pa.C.S. § 5324, although a grandfather cared for his granddaughter for a summer at the mother's request and he assumed responsibility for the child in the past and demonstrated that he was capable of doing so in the future, there was no risk to the child from parental misconduct or deficiencies; accordingly, the grandfather was not entitled to legal or physical custody of her. Lehman v. Lehman, 24 Pa. D. & C.5th 1, 2011 Pa. Dist. & Cnty. Dec. LEXIS 532 (Pa. C.P. Apr. 15, 2011).

Family Law: Child Custody: Jurisdiction

Maternal grandmother lacking standing to petition for special relief from a child custody order, and therefore the trial court lacked jurisdiction over her appeal, because she acknowledged that she was not the child's parent and she did not currently stand in loco parentis to the child, she failed submit evidence of current risk to the child, and the child did not reside with her for 12 consecutive months. A.A.L. v. S.J.L., 2016 Pa. Dist. & Cnty. Dec. LEXIS 12278 (Pa. C.P. June 29, 2016), aff'd, 169 A.3d 1151, 2017 Pa. Super. Unpub. LEXIS 1328 (Pa. Super. Ct. 2017).

Family Law: Child Custody: Procedures

Award of shared legal and physical custody to biological mother and her former female paramour was upheld because former paramour rebutted presumption in favor of biological mother by undisputed decisions regarding custody that parties had made together both prior to and following their separation, and once trial court granted former paramour in loco parentis status, she did not need to establish that the biological mother was unfit or deficient in any of the 23 Pa.C.S. § 5328 custody factors. R.L. v. M.A., 2019 PA Super 145, 2019 Pa. Super. LEXIS 419 (Pa. Super. Ct. 2019).

Former same-sex, unmarried partner (UP) of a biological mother (BM) did not have standing to pursue custody as a parent, as the child was conceived via assistive reproductive means using an anonymous sperm donor pursuant to a contract only signed by the BM, such that the UP was not a biological parent, she did not intend to conceive and raise the child, and she had not adopted the child. C.G. v. J. H., 193 A.3d 891, 2018 Pa. LEXIS 4952 (Pa. 2018).

Trial court did not err by finding that the stepfather, a member of the armed forces stationed away from the mother and the child stood in loco parentis to the child because he both assumed parental status and discharged parental duties. Therefore, the trial court properly found that he had standing to pursue the custody action. M.L.S. v. T.H.-S., 2018 PA Super 241, 195 A.3d 265, 2018 Pa. Super. LEXIS 936 (Pa. Super. Ct. 2018).

Notwithstanding a child's custodial situation, the Child Custody Act, 23 Pa.C.S. §§ 5321-5340, grants standing to grandparents to file for any form of physical or legal custody when their grandchild is substantially at risk due to the parental behaviors stated in 23 Pa.C.S. § 5324(3)(iii)(B), and a decision sustaining the maternal great-grandparents' preliminary objections, concluding that the paternal grandparents did not have standing to pursue custody of the child, was improper. G.A.P. v. J.M.W., 2018 PA Super 229, 194 A.3d 614, 2018 Pa. Super. LEXIS 900 (Pa. Super. Ct. 2018).

Appeal by a mother from a trial court order that denied her petition for declaratory judgment upon finding that no sperm-donation contract existed between her and the biological father of their child required quashing, as it was an unappealable interlocutory order because the trial court had also granted the father standing to seek custody of the child and the custody aspect of the proceeding was ongoing. J.A.F. v. C.M.S., 2017 PA Super 172, 164 A.3d 1277, 2017 Pa. Super. LEXIS 395 (Pa. Super. Ct. 2017).

In support of an affirmance on appeal pursuant to Pa. R. App. P. 1925(a)(2)(h), grandparents had standing for purposes of a temporary custody order that awarded them partial custody of parents' minor child, as they were in loco parentis because they had assumed the obligations incident to the parental relationship, and alternatively the mother had allowed them to take care of the child. Sproul v. Gatley, 2015 Pa. Dist. & Cnty. Dec. LEXIS 497 (Pa. County Ct. Dec. 24, 2015).

Appellate court had no basis upon which to conclude that the grandmother had standing to seek primary physical custody of the child because, while the record was replete with examples of the mother's irresponsible behavior and poor parenting skills, the trial court made no findings as to whether the mother's shortcomings put the child substantially at risk. D.G. v. D.B., 2014 PA Super 93, 91 A.3d 706, 2014 Pa. Super. LEXIS 235 (Pa. Super. Ct. 2014).

Permanent legal custody order did not prohibit a parent from later seeking primary custody because neither the Pennsylvania Juvenile Act, 42 Pa.C.S. § 6301 et seq., nor the federal Adoption and Safe Families Act of 1997, 42 U.S.C.S. §§ 671 — 675, prohibited the parent from petitioning to regain custody of their child. In re S.H., 2013 PA Super 165, 71 A.3d 973, 2013 Pa. Super. LEXIS 1611 (Pa. Super. Ct. 2013).

Even if a mother could successfully challenge a father's status, the father had standing to pursue custody because he was listed as father on the child's birth certificate, and he provided support, cared for, and loved the child; the father testified that he changed the child's diapers, fed, clothed, played, and generally took care of all the child's needs, and the child called the father "daddy." Roberts v. Nafus, 31 Pa. D. & C.5th 334, 2013 Pa. Dist. & Cnty. Dec. LEXIS 400 (Pa. County Ct. June 16, 2013).

Boyfriend, who had lived with the adoptive mother prior to her adoption of the children, lacked standing to seek custody of the children where the boyfriend ultimately sought to assert custody based upon his relationship with the children prior to their adoption. E.T.S. v. S.L.H., 2012 PA Super 207, 54 A.3d 880, 2012 Pa. Super. LEXIS 2526 (Pa. Super. Ct. 2012).

23 Pa.C.S. § 5326 terminates all custody rights granted under 23 Pa.C.S. § 5324, without regard as to whether the person seeking to assert those rights is a grandparent, in the situation where the child is adopted by an individual other than a stepparent, grandparent, or great-grandparent. E.T.S. v. S.L.H., 2012 PA Super 207, 54 A.3d 880, 2012 Pa. Super. LEXIS 2526 (Pa. Super. Ct. 2012).

Trial court erred under Pa. R. Civ. P. 1028(a)(4) when it failed to grant a father's preliminary objection to a grandmother's assertion of standing and request for custody of the parties' child, as the grandmother failed to sufficiently plead that she was entitled to fully custody pursuant to former 23 Pa.C.S. § 5313 (now at 23 Pa.C.S. § 5324). R.M. v. J.S., 2011 PA Super 98, 20 A.3d 496, 2011 Pa. Super. LEXIS 601 (Pa. Super. Ct. 2011).

Family Law: Parental Duties & Rights: In Loco Parentis

Former same-sex, unmarried partner (UP) of a biological mother (BM) lacked standing to seek custody of the BM's child as a person who stood in loco parentis to the child, as the record supported the finding that prior to the couple's separation, the UP did not assume a parental status or discharge parental duties. C.G. v. J. H., 193 A.3d 891, 2018 Pa. LEXIS 4952 (Pa. 2018).

For purposes of in loco parentis standing for seeking custody, although the post-separation conduct should not be determinative of the issue of standing, the conduct by either parent or partner could shed light on the analysis of whether the person seeking standing was ever viewed as a parent-like figure. C.G. v. J. H., 193 A.3d 891, 2018 Pa. LEXIS 4952 (Pa. 2018).

Trial court did not err by finding that the stepfather, a member of the armed forces stationed away from the mother and the child stood in loco parentis to the child because he both assumed parental status and discharged parental duties. Therefore, the trial court properly found that he had standing to pursue the custody action. M.L.S. v. T.H.-S., 2018 PA Super 241, 195 A.3d 265, 2018 Pa. Super. LEXIS 936 (Pa. Super. Ct. 2018).

In a custody dispute between a mother, the mother's ex-wife, and a father, it was error not to grant the ex-wife in loco parentis status because (1) the ex-wife participated in the pregnancy and preparations before the child's birth, as well as the birth, (2) the mother and ex-wife were married at the time of the birth and intended to jointly raise the child, (3) the ex-wife was named as a parent on the child's birth certificate and involved in naming the child, (4) the ex-wife was involved financially and otherwise with the child during and after the marriage and held herself out as the child's parent, and (5) the mother could not expunge the ex-wife's relationship with the child that the mother fostered. A.J.B. v. A.G.B., 2018 PA Super 50, 180 A.3d 1263, 2018 Pa. Super. LEXIS 197 (Pa. Super. Ct. 2018).

Grandmother had standing to seek child custody because the grandmother stood in loco parentis, as (1) the grandmother did not have to be the child's sole parental figure, (2) the grandmother shared parental responsibilities with the child's mother, and (3) the child's father impliedly consented to that status. M.J.S. v. B.B., 2017 PA Super 327, 172 A.3d 651, 2017 Pa. Super. LEXIS 804 (Pa. Super. Ct. 2017).

Trial court erred by denying a father's preliminary objections and granting prospective adoptive parents in loco parentis standing to pursue custody of his child because the father did not consent to the adoptive parents attaining in loco parentis status; the father acted in a manner inconsistent with consent by promptly informing the adoption agency that he did not want the child to be adopted and by filing a custody complaint shortly thereafter. K.W. v. S.L., 2017 PA Super 56, 157 A.3d 498, 2017 Pa. Super. LEXIS 154 (Pa. Super. Ct. 2017).

Father's appeal of an order denying his preliminary objections and granting prospective adoptive parents in loco parentis standing was properly before the superior court because the order satisfied the collateral order doctrine; the father's claim would be irreparably lost if review was postponed until the entry of a final order, and he had a fundamental constitutional right to parent the child, which included the right to be free of custody litigation involving third parties. K.W. v. S.L., 2017 PA Super 56, 157 A.3d 498, 2017 Pa. Super. LEXIS 154 (Pa. Super. Ct. 2017).

Trial court misapplied the law in finding that the grandmother stood in loco parentis to the child and therefore had standing to pursue the child custody action because the grandmother's efforts to assist the mother and the child in leaving her home were strongly inconsistent with an assumption of full parental responsibility, and the periods of co-residence were more consistent with the grandmother assisting the

mother and the child in a time of need than with the grandmother's informal adoption of the child. D.G. v. D.B., 2014 PA Super 93, 91 A.3d 706, 2014 Pa. Super. LEXIS 235 (Pa. Super. Ct. 2014).

Maternal grandparents (MG) were allowed to intervene in a child custody dispute between the parents since they had achieved in loco parentis status where: (1) they had been involved in the seven-month-old child's life since his birth; (2) the child was born with serious health complications that required him to be hospitalized for an extended time, during which time the MG frequently visited; (3) the child and his mother lived with the MG when the child was released from the hospital; (4) the parents were both in high school and the MG typically cared for him while his parents attended school; and (5) to the extent possible due to the child's age, the MG had established a bond with the child. Higbee v. Curea, 29 Pa. D. & C.5th 169, 2013 Pa. Dist. & Cnty. Dec. LEXIS 265 (Pa. County Ct. Mar. 18, 2013).

Research References & Practice Aids

PENNSYLVANIA ADMINISTRATIVE CODE REFERENCES.

231 Pa. Code Part I, Ch 1915, Rule 1915.15 (2014), PART GENERAL.

TREATISES AND ANALYTICAL MATERIALS

15-260 Pennsylvania Transaction Guide—Legal Forms § 260.43, Division 2 Marriage Settlement Agreements, Child Custody.

15-261 Pennsylvania Transaction Guide—Legal Forms § 261.01, Division 2 Marriage Settlement Agreements, State Statutes.

15-261 Pennsylvania Transaction Guide—Legal Forms § 261.22, Division 2 Marriage Settlement Agreements, Particular Provisions.

15-269 Pennsylvania Transaction Guide—Legal Forms § 269.02, Division 2 Marriage Settlement Agreements, State Statutes.

15-269 Pennsylvania Transaction Guide—Legal Forms § 269.21, Division 2 Marriage Settlement Agreements, Individuals with Standing to Seek Custody.

15-269 Pennsylvania Transaction Guide—Legal Forms § 269.212, Division 2 Marriage Settlement Agreements, Provision Providing Partial Physical Custody Rights to Grandparents.

15-269 Pennsylvania Transaction Guide—Legal Forms § 269.29, Division 2 Marriage Settlement Agreements, Rights of Grandparents and Great-Grandparents.

End of Document

A.J.B. v. A.G.B.

Superior Court of Pennsylvania

December 11, 2017, Submitted; March 7, 2018, Decided; March 7, 2018, Filed

No. 1164 WDA 2017

Reporter

180 A.3d 1263 *; 2018 Pa. Super. LEXIS 197 **; 2018 PA Super 50; 2018 WL 1177628

A.J.B. v. A.G.B.D.K. v. A.B. AND A.G.B. APPEAL OF: A.M.G.

Subsequent History: Appeal denied by A.J.B. v. A.G.B.D.K., 2018 Pa. LEXIS 5742 (Pa., Nov. 2, 2018)

Prior History: [**1] Appeal from the Order Entered July 31, 2017. In the Court of Common Pleas of Cambria County Civil Division at No(s): No. 2016-2996, No. 2017-941. Before LINDA R. FLEMING, J.

Counsel: Sheryl A. Safina-Pfarr, Johnstown, for Appellant.

Joel C. Seelye, Altoona, for A.J.B., Appellee.

Richard M. Corcoran, Ebensburg, for D.K., Appellee.

Judges: BEFORE: BENDER, P.J.E., STEVENS, P.J.E.*, and STRASSBURGER, J.** OPINION BY STEVENS, P.J.E.

Opinion by: STEVENS

Opinion

[*1265] OPINION BY STEVENS, P.J.E.:

Appellant, A.M.G. ("Ex-Wife"), files this appeal from the Order dated July 7, 2017, and entered July 31, 2017,[1] in the Cambria County Court of Common Pleas, granting A.J.B.'s ("Mother") Motion to Strike Co-Defendant [Ex-Wife] for Lack of Standing, and granting D.K.'s ("Father") Motion to Vacate Order and Mother's Petition to Vacate Consent Order. After review, we affirm in part, and vacate and remand in part.

The trial court summarized the relevant procedural and factual history as follows:

> PROCEDURAL HISTORY
>
> This matter involves two cases and three pleadings, which the trial court consolidated for hearing:
>
> DIVORCE ACTION (DOCKET NO. [])
>
> In the first case (Docket No. []), A.J.B. ["Mother"] filed a Complaint in [*1266] Divorce against A.M.B., now A.M.G. ["Ex-Wife"], on August 12, 2016 [(]"divorce action"[)]. Although Mother's Complaint did not include a claim for custody, Mother and Ex-Wife nonetheless filed a Consent Order for Custody [**2] [(]"Consent Order"[)] regarding a minor child, D.H.B. (born November [] 2015)

* Former Justice specially assigned to the Superior Court.

** Retired Senior Judge assigned to the Superior Court.

[1] The subject order was dated July 7, 2017. However, the clerk did not provide notice pursuant to Pa.R.C.P. 236(b) until July 31, 2017. Our appellate rules designate the date of entry of an order as "the day on which the clerk makes the notation in the docket that notice of entry of the order has been given as required by Pa.R.C.P. 236(b)." Pa.R.A.P. 108(b). Further, our Supreme Court has held that "an order is not appealable until it is entered on the docket with the required notation that appropriate notice has been given." ***Frazier v. City of Philadelphia***, 557 Pa. 618, 621, 735 A.2d 113, 115 (1999).

[(]"Child"[)]. The trial court executed the Consent Order on August 15, 2016. Pursuant to the Consent Order, Mother and Ex-Wife shared legal custody; Mother exercised primary physical custody; and Ex-Wife had partial custody every weekend, shared holidays, and at other times as mutually agreed.

On April 21, 2017, Father filed a Motion to Vacate Order in the divorce action. On April 24, 2017, Mother filed a Petition to Vacate Consent Order for Custody.

CUSTODY ACTION (DOCKET NO. [])

In the second case (Docket No. []), [Father] filed a Complaint for Physical Custody and Shared Legal Custody against Mother and Ex-Wife on March 13, 2017 [(]"custody action"[)]. On April 17, 2017, Mother filed a Motion to Strike Co-Defendant for Lack of Standing.

PROCEEDINGS

The trial court consolidated the cases for hearing and scheduled summary proceedings for June 19, 2017.[2] The trial court scheduled the matter for an additional full-day hearing on July 7, 2017.[3] The trial court rendered a decision from the bench at the conclusion of the hearing. The trial court filed an Order confirming its decision on July 31, 2017.[4] Ex-Wife filed [**3] a Notice of Appeal and a Concise Statement of Matters Complained of on Appeal on August 7, 2017.[5] . . .

FINDINGS OF FACT

The [c]ourt makes the following Findings of Fact:

. . .

3. Mother had a romantic and sexual relationship with [Ex-Wife] that led to marriage and culminated in divorce.

. . .

5. Beginning April 6, 2009, Mother and Ex-Wife dated while Ex-Wife was in high school. Ex-Wife was 15 years old when she began to date Mother; Mother was 20.

6. In 2011, Mother and Ex-Wife began to reside together.

7. On March 15, 2013, Mother and Ex-Wife developed a plan to conceive a child. Mother and Ex-Wife determined that Mother would carry the child. Mother chose men to engage in three-way sex with her and Ex-Wife. The men ejaculated in Mother. Some of the men knew they were being used as sperm donors; others did not. Mother did not [*1267] become pregnant after approximately one year of following this protocol.

8. Between February 2014 and February 2015, Mother and Ex-Wife were not in a relationship.

9. From March 2014 to January 2015, Mother had a romantic relationship with [Father] that included sexual intercourse. Mother and Father also had sexual relations around Mother's birthday (January 27, 2015) [**4] through mid-February 2015 during an unsuccessful reconciliation attempt.[6]

10. During Mother's relationship with Father, Mother did not believe she could become

[2] The Notes of Testimony for this proceeding are not included as part of the certified record.

[3] Mother, Father, and Ex-Wife were all present at the hearing and represented by counsel. All testified on their own behalf. Additionally, Ex-Wife presented the testimony of a friend, J.L.

[4] In the interim, Ex-Wife filed a Motion for Reconsideration/Motion for Court Intervention in Custody Reduction Schedule/Motion for Final Order on July 27, 2017. By Order dated and entered August 2, 2017, the court, in relevant part, denied the Motion for Reconsideration and determined the Motion for Final Order moot as a result of the subject order of the instant appeal dated July 7, 2017, and entered July 31, 2017.

[5] Ex-Wife filed a revised Notice of Appeal on September 5, 2017, to correct the caption.

[6] Critically, Mother testified that she and Father had sexual relations approximately the second weekend of February. N.T. at 50, 170-71, 175.

pregnant.
11. Mother did not intend for Father to impregnate her so she could raise the child with Ex-Wife.
12. On January 25, 2015, Mother had sexual relations with a male, D.F., in Clarion, Pennsylvania. D.F. was not one of the men used for the purpose of conception.
. . .
14. In February 2015, Mother and Ex-Wife met for lunch to discuss reconciliation. That night, Mother sent Ex-Wife a photo of a positive pregnancy test. The next day, Mother took three more pregnancy tests in Ex-Wife's presence. All were positive.
15. About two weeks after their luncheon meeting, Mother and Ex-Wife moved in together.
16. Mother's doctor calculated the date of conception to be January 29, 2015.
17. Mother and Ex-Wife were not in a monogamous relationship at the time of Child's conception.

18. Initially, Mother did not believe Father could be Child's parent based on the date of conception.

19. Father . . . learned Mother was pregnant. Mother advised Father that "the dates didn't match up to the time [Father] had intercourse with [Mother]." Father reasonably [**5] believed he was not Child's father at this time.
20. On April 14, 2015, Mother and Ex-Wife legally married.
21. After their marriage[,] but prior to Child's birth, Mother and Ex-Wife consulted an attorney regarding termination of parental rights for D.F., whom Mother and Ex-Wife believed to be Child's father. Neither Mother nor Ex-Wife followed through with legal action.
22. Mother gave birth to Child [in] November [of] 2015.

23. Mother and Ex-Wife are both listed on Child's birth certificate as parents.
24. Ex-Wife chose Child's first name; Mother and Ex-Wife jointly selected Child's middle name.
25. Ex-Wife served as the sole source of financial support for Mother and Child for approximately six weeks after Child's birth when Mother was on maternity leave.
26. From Child's birth until December 16, 2015, Mother and Ex-Wife intended to "raise the child together in a happy marriage...." The parties shared day-to-day childcare duties during this time.

27. The marriage lasted approximately five to six weeks after Child was born. On December 16, 2015, Mother learned that [Ex-Wife] was having an affair; and the parties separated. (The parties memorialized the date of separation in a Marriage Settlement [**6] Agreement filed on August 12, 2016.)

28. After separation, Mother refused Ex-Wife's offers of support. Mother did [*1268] not file a complaint for support against Ex-Wife.
29. On January 21, 2016, D.F. participated in a store-bought paternity test. By report dated February 3, 2016, D.F. was "excluded as the biological father of [Child]."
30. In March of 2016, Mother approached Father and advised him that D.F. had failed the paternity test. Father took a store-bought paternity test, which indicated he was not Child's father.
31. Ex-Wife continued to reside at the home, mostly separate and apart from Mother, from December 16, 2015, to April 2016.[7]

32. Between December 16, 2015, and April 2016, Ex-Wife's contact with Child was impacted by working an overnight shift, attending college classes, and staying with a male friend. Ex-Wife continued to perform

[7] Ex-Wife disputed Mother's characterization of their interaction while Ex-Wife remained in the home. N.T. at 81.

routine parenting duties for Child when she (Ex-Wife) was available.[8]
33. In April 2016, Ex-Wife moved out of the home she shared with Mother.
34. Between April 2016 and August 2016, Ex-Wife had contact with Child initially for a few hours per week, then on Wednesdays and every weekend.

35. Mother received and relied upon legal advice from a competent attorney [**7] that Ex-Wife was entitled to custody because Child was born during their marriage.

36. Ex-Wife presented credible testimony that Mother agreed to Ex-Wife's weekend custody in exchange for Mother receiving the marital residence in equitable distribution.
37. On August 12, 2016, Mother filed for divorce.

38. On or about August 15, 2016, Mother and Ex-Wife executed a Consent Order for Custody.[9] Pursuant to the Order, Mother and Ex-Wife shared legal custody; Mother exercised primary physical custody; and Ex-Wife had partial custody every weekend (Friday at 5:00 P.M. to Monday at 12:00 P.M.), shared holidays, and other times by mutual agreement.
39. Neither Mother nor Ex-Wife notified Father of the Consent Order.

40. Ex-Wife attended to Child's day-to-day needs during her custody periods. Ex-Wife also attends Child's doctor appointments with Mother.
41. Mother and Ex-Wife were divorced by Decree dated December 12, 2016.
42. In January 2017, Father took a second store-bought paternity test that indicated he is Child's father. Father received the results of this test in mid-February 2017.

43. On March 1, 2017, Father took a third paternity test administered by a reputable lab that confirmed he is [**8] Child's father.

44. Father contacted an attorney the day after receiving the lab test results; and he filed a Complaint for Physical Custody and Shared Legal Custody against Mother and Ex-Wife on March 13, 2017.
45. Father had no contact with Child between her birth and March 2017.

[*1269] 46. Since March 2017, Mother has facilitated partial physical custody between Father and Child a few days every week.
47. Child calls Father "Dad."
48. Child calls Ex-Wife "Mommy." Child also calls maternal grandmother, maternal great-grandmother, Father's fiancée, and paternal grandmother "Mom" or "Mommy" on occasion.

49. Ex-Wife holds herself out as Child's mother, although Ex-Wife's family and friends understand she is not a biological parent.

. . .

T.C.O. at 2-9 (citations to record omitted) (footnotes omitted).

On appeal, Ex-Wife raises the following issues for our review:

> I. Did the [t]rial [c]ourt err in failing to grant [Ex-Wife] *in loco parentis* standing under 23 Pa.C.S.[A.] § 5324(2) to pursue continued custody of [C]hild born during same-sex marriage when [Ex-Wife] assumed parental status with consent of biological [m]other and discharged parental duties for nearly two years, wherein [Ex-Wife] established strong bond with [C]hild [**9] by providing care, nurture and affection, like that of a parent?
>
> II. Should the [t]rial [c]ourt have used [a] best

[8] Mother disputed the nature and extent of Ex-Wife's involvement with Child prior to her leaving the marital home. N.T. at 13.

[9] The trial court notes that "[i]t is the trial court's policy to approve and execute consent orders that contain executed joinders without requiring the parties to appear in court." Trial Court Opinion ("T.C.O."), 9/15/17, at 2 n.4.

> interest analysis to determine whether or not to vacate [the] Consent Order for Custody entered into between same-sex spouses' [sic] during divorce when: 1.) [C]hild's best interests require [Ex-Wife] be granted standing in order to fully litigate if [the] parent-child relationship should be maintained over natural parent's objection; 2.) the need to protect the rights of a natural parent must be tempered by the paramount need to protect the child's best interests as declared by the Pennsylvania Supreme Court in ***T.B. v. L.R.M.*** (Pa. 2001); and 3.) vacating the Consent Order constituted a change in custody under 23 Pa.C.S.[A.] § 5338?
>
> III. Absent corroborative expert testimony, was the [t]rial [c]ourt's finding that [] [C]hild would not remember [Ex-Wife] supported by the record below?

Ex-Wife's Brief at 4.[10]

Our scope and standard of review is as follows:

> In reviewing a custody order, our scope is of the broadest type and our standard is abuse of discretion. We must accept findings of the trial court that are supported by competent evidence of record, as [**10] our role does not include making independent factual determinations. In addition, with regard to issues of credibility and weight of the evidence, we must defer to the presiding trial judge who viewed and assessed the witnesses first-hand. However, we are not bound by the trial court's deductions or inferences [*1270] from its factual findings. Ultimately, the test is whether the trial court's conclusions are unreasonable as shown by the evidence of record. We may reject the conclusions of the trial court only if they involve an error of law, or are unreasonable in light of the sustainable findings of the trial court.

C.R.F., III v. S.E.F., 2012 PA Super 108, 45 A.3d 441, 443 (Pa.Super. 2012) (citation omitted). ***See also E.R. v. J.N.B.***, 2015 PA Super 260, 129 A.3d 521, 527 (Pa.Super. 2015), *appeal denied*, 635 Pa. 754, 135 A.3d 586 (2016). This Court consistently has held:

> the discretion that a trial court employs in custody matters should be accorded the utmost respect, given the special nature of the proceeding and the lasting impact the result will have on the lives of the parties concerned. Indeed, the knowledge gained by a trial court in observing witnesses in a custody proceeding cannot adequately be imparted to an appellate court by a printed record.

Ketterer v. Seifert, 2006 PA Super 144, 902 A.2d 533, 540 (Pa.Super. 2006) (*quoting* ***Jackson v. Beck***, 2004 PA Super 357, 858 A.2d 1250, 1254 (Pa.Super. 2004)).

Initially, we must first consider whether the July 31, 2017, Order was properly appealable. [**11] [11]

> "'[S]ince we lack jurisdiction over an unappealable order it is incumbent on us to determine, *sua sponte* when necessary, whether the appeal is taken from an appealable order.'" ***Gunn v. Automobile Ins. Co. of Hartford, Connecticut***, 2009 PA Super 70, 971 A.2d 505, 508 (Pa.Super. 2009) (quoting ***Kulp v. Hrivnak***, 2000 PA Super 407, 765 A.2d 796,

[10] We observe that Ex-Wife states her issues somewhat differently than in her Rule 1925(b) Statement, but find that she has preserved her first and second issues. In addition, we note that Ex-Wife raised numerous additional issues in her 1925(b) Statement, which she did not address in her Statement of Questions Involved or her brief. As such, Ex-Wife has waived any claims as to these issues. ***See Krebs***, 893 A.2d at 797; ***see also In re W.H.***, 2011 PA Super 119, 25 A.3d 330, 339 n.3 (Pa.Super. 2011), *appeal denied*, 611 Pa. 643, 24 A.3d 364 (2011) (quoting ***In re A.C.***, 2010 PA Super 34, 991 A.2d 884, 897 (Pa.Super. 2010)) ("[W]here an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived."). With regard to Ex-Wife's third issue, that the trial court erred in determining that Child would not remember Ex-Wife, in light of our discussion *infra*, we find it unnecessary to address this issue.

[11] While Ex-Wife addressed in her brief the appealability of the order in question, this was not addressed by the trial court.

798 (Pa.Super. 2000)). It is well-settled that, "[a]n appeal lies only from a final order, unless permitted by rule or statute." ***Stewart v. Foxworth***, 2013 PA Super 91, 65 A.3d 468, 471 (Pa.Super. 2013). Generally, a final order is one that disposes of all claims and all parties. ***See*** Pa.R.A.P. 341(b).

K.W. v. S.L. & M.L. v. G.G., 2017 PA Super 56, 157 A.3d 498, 501-02 (Pa.Super. 2017).

In the case *sub judice*, the order in question is not a final order. ***See G.B. v. M.M.B., T.B. & A.B.***, 448 Pa. Super. 133, 670 A.2d 714 (Pa.Super. 1996) (a custody order is final and appealable after the trial court has concluded its hearings on the matter and the resultant order resolves the pending custody claims between the parties). Ex-Wife concedes this fact. Ex-Wife's Brief at 8. Nonetheless, the order is appealable pursuant to the collateral order doctrine. ***See*** Pa.R.A.P. 313(a) (providing that an appeal may be taken as of right from a collateral order of a lower court). "A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost." Pa.R.A.P. 313(b). ***See also K.C. & V.C. v. L.A.***, 633 Pa. 722, 729-32, 128 A.3d 774, 779-81 (2015); ***K.W.***, 157 A.3d at 501-04 ("standing is an issue [**12] separable from, and collateral to, the main cause of action in a child custody case;" the right to intervene in custody cases implicates Pennsylvania's "paramount interest in the welfare of children and, as a result, in identifying the parties who may participate in child custody proceedings;" and the right to appeal is irreparably lost when intervention in child custody proceedings is denied).

Having determined that the subject order was appropriately appealable as a collateral [*1271] order, we take Ex-Wife's issues out of turn for ease of disposition and address her second issue first. With this issue, Ex-Wife challenges the trial court's vacation of the Consent Order.

The Pennsylvania Rules of Civil of Procedure establish parameters with regard to the filing of a claim for custody and notification of those with parental and custodial rights. Rule 1915.3 provides as follows with regard to the commencement of an action for custody:

> **Rule 1915.3. Commencement of Action. Complaint. Order**
> (a) Except as provided by subdivision (c), an action shall be commenced by filing a verified complaint substantially in the form provided by Rule 1915.15(a).
>
> (b) An order shall be attached to the complaint directing the defendant to appear at a time and place specified. [**13] The order shall be substantially in the form provided by Rule 1915.15(b).
>
> *Note:* See § 5430(d) of the Uniform Child Custody Jurisdiction and Enforcement Act, 23 Pa.C.S.[A.] § 5430(d), relating to costs and expenses for appearance of parties and child, and 23 Pa.C.S.[A.] § 5471, relating to intrastate application of the Uniform Child Custody Jurisdiction and Enforcement Act.
>
> (c) A claim for custody which is joined with an action of divorce shall be asserted in the complaint or a subsequent petition, which shall be substantially in the form provided by Rule 1915.15(a).
>
> *Note:* Rule 1920.13(b) provides that claims which may be joined with an action of divorce shall be raised by the complaint or a subsequent petition.
>
> (d) If the mother of the child is not married and the child has no legal or presumptive father, then a putative father initiating an action for custody must file a claim of paternity pursuant to 23 Pa.C.S.[A.] § 5103 and attach a copy to

the complaint in the custody action.

> *Note:* If a putative father is uncertain of paternity, the correct procedure is to commence a civil action for paternity pursuant to the procedures set forth at Rule 1930.6.
>
> . . .

Pa.R.C.P. No. 1915.3 (bold in original).

[*1272] Further, Rule 1915.15, in relevant part, sets forth the following as to notification of those with custodial and/or [**14] parental rights:

> **Rule 1915.15. Form of Complaint. Caption. Order. Petition to Modify a Custody Order**
>
> . . .
>
> 6. Plaintiff (has) (has not) participated as a party or witness, or in another capacity, in other litigation concerning the custody of the child in this or another court. The court, term and number, and its relationship to this action is:
>
> —
>
> Plaintiff (has) (has no) information of a custody proceeding concerning the child pending in a court of this Commonwealth or any other state. The court, term and number, and its relationship to this action is:
>
> —
>
> Plaintiff (knows) (does not know) of a person not a party to the proceedings who has physical custody of the child or claims to have custodial rights with respect to the child. The name and address of such person is:
>
> —
>
> . . .
>
> 8. Each parent whose parental rights to the child have not been terminated and the person who has physical custody of the child have been named as parties to this action. All other persons, named below, who are known to have or claim a right to custody of the child will be given notice of the pendency of this action and the right to intervene:
>
> Name Address Basis of Claim
>
> —
>
> 9.(a) If the plaintiff is a grandparent who is not in loco [**15] parentis to the child and is seeking physical and/or legal custody pursuant to 23 Pa.C.S.[A.] § 5323, you must plead facts establishing standing pursuant to 23 Pa.C.S.[A.] § 5324(3).
>
> —
>
> (b) If the plaintiff is a grandparent or great-grandparent who is seeking partial physical custody or supervised physical custody pursuant to 23 Pa.C.S.[A.] § 5325, you must plead facts establishing standing pursuant to § 5325.
>
> —
>
> (c) If the plaintiff is a person seeking physical and/or legal custody pursuant to 23 Pa.C.S.[A.] § 5324(2) as a person who stands in loco parentis to the child, you must plead facts establishing standing.
>
> —
>
> . . .

Pa.R.C.P. No. 1915.15 (bold in original).

In addition, when seeking custody in connection with an action for divorce, Rule 1920 provides:

> **Rule 1920.13. Pleading More Than One Cause of Action. Alternative Pleading**
>
> (a) The plaintiff may state in the complaint one or more grounds for [*1273] divorce and may join in the alternative a cause of action for annulment.
>
> (b) The plaintiff may
>
> (1) join in the complaint in separate counts

> any other claims which may under the Divorce Code be joined with an action of divorce or for annulment or, if they have not been so joined, the plaintiff may as of course amend the complaint to include such other claims or may file to the same [**16] term and number a separate supplemental complaint or complaints limited to such other claims; or
>
> (2) file to the same term and number a subsequent petition raising such other claims.
>
> (c) The court may order alimony pendente lite, reasonable counsel fees, costs and expenses pending final disposition of any claim.

Pa.R.C.P. No. 1920.13 (bold in original).

Moreover, Rule 1915.7 states as follows with regard to Consent Orders:

> **Rule 1915.7. Consent Order**
>
> If an agreement for custody is reached and the parties desire a consent order to be entered, they shall note their agreement upon the record or shall submit to the court a proposed order bearing the written consent of the parties or their counsel.

Pa.R.C.P. No. 1915.7 (bold in original).

In the instant matter, in vacating the Consent Order entered into by Mother and Ex-Wife, the trial court reasoned as follows:

> In the case at bar, Mother and Ex-Wife short-circuited the custody process. Neither woman filed either a custody complaint or a count for custody in the divorce action. Nevertheless, they jointly presented a Consent Order for Custody in the *divorce* case, which the trial court executed. It is clear that Father was not given notice of the pendency of this action or the right to intervene in accordance [**17] with the Rules of Civil Procedure. Mother and Ex-Wife's collective failure to properly file the Consent Order in a custody action/count does not relieve them of the obligations to notify all parties who could claim a right to Child's custody.
>
> The trial court acknowledges that Mother and Ex-Wife did not have confirmation of Child's paternity when they reached the custody agreement on August 15, 2016. D.F. had been excluded as Child's father on February 3, 2016; Father had been ruled out in March 2016. Despite the apparently-inexplicable test results, Mother and Ex-Wife knew Child *had* a father; they did not know the father's *identity*. Mother and Ex-Wife failed or refused to take reasonable steps at that time to determine Child's parentage by retesting the putative fathers. (Father's second paternity test did not occur until January 2017, *after* the Consent Order was filed.) Because of their omission, Mother and Ex-Wife entered into the Consent Order for Custody at their own risk; and the Consent Order cannot stand. Accordingly, Father's Motion to Vacate Order and Mother's Petition to Vacate Consent Order for Custody are GRANTED.

T.C.O. at 10-11 (footnotes omitted) (emphasis in original).

Ex-Wife argues [**18] that the trial court should have utilized a best interest analysis in determining whether to vacate the Consent Order. Ex-Wife's Brief at 16-17. Ex-Wife asserts that Child's best interests supersede any parental objection to third party standing and Child's best interests support her standing to pursue custody. ***Id.*** Moreover, Ex-Wife posits that the resulting change to the Consent Order as to [*1274] Ex-Wife amounts to a modification requiring a formal best interest analysis pursuant to 23 Pa.C.S.A. § 5328. ***Id.*** at 16. In so arguing, Ex-Wife states:

> The [t]rial court's Order[] of July 7, 2017[][12] vacated the existing Consent Order for Custody, dated August 15, 2016, between

[12] As indicated, this order was not entered until July 31, 2017.

> Mother and [Ex-Wife]. The change to the Order, reducing and eliminating [Ex-Wife] from the child's life, clearly constitutes a "modification of an existing Order" which triggers a best interest analysis under 23 Pa.C.S.[A.] § 5328.
>
> Our [c]ourts have held that a natural parent's objection to a third party's in loco parentis relationship is not grounds to deny standing because the best interests of the child is paramount to the rights of a parent. Standing is fact sensitive, based upon the conduct/actions of the third party towards the child. Once standing is granted, [**19] the third party must meet their evidentiary burden which provides protection to biological parents against unwanted intrusion into the sanctity of the family. Here[,] however, there is no intact family unit to protect. Mother is remarried to another woman. Father has a fiancée to whom [sic] has a son. And, [Ex-Wife] lives with her boyfriend.
>
> The [t]rial [c]ourt never considered the child's best interests which, as previously stated, are paramount to the rights of a natural parent to object to a third party's standing. Under Pennsylvania law, a best interest analysis would have proven that removal of a stepparent from a child's life wreaks the same havoc and negative effects as removal of a parent.
>
> Thus, the [t]rial [c]ourt committed an error of law in failing to grant standing to [Ex-Wife] and in failing to apply the best interest factors to determine if modification, i.e. reduction/elimination of [Ex-Wife]'s partial physical custody, was in child's best interests.

Id. at 16-17 (citation omitted).

Upon review, we disagree. We discern no abuse of discretion by the trial court in vacating the Consent Order. Mother and Ex-Wife did in fact "short-circuit" the custody process. Mother and Ex-Wife failed [**20] to file a Complaint for Custody or a count for custody in the Complaint for Divorce, as required, in complete disregard of the Rules of Civil Procedure.[13] Moreover, as noted by the trial court, "Father's fundamental constitutional right to parent Child" favors vacation of the Consent Order. T.C.O. at 11. As a result, as determined by the trial court, this procedural deficit requires that the Consent Order be vacated. Ex-Wife's second issue is, therefore, without merit and fails.

Next, with Ex-Wife's first issue, she alleges error generally with regard to the trial court's finding that she did not stand *in loco parentis* to pursue custody of Child. Ex-Wife's Brief at 9-16. Ex-Wife maintains that she "fully assumed her parental status with the consent of Mother and discharged parental duties, for nearly two years, wherein [Ex-Wife] established a strong bond with the child by providing care, nurture and affection, like that of a parent." ***Id.*** at 10.

[*1275] A trial court's determination regarding standing will not be disturbed absent an abuse of discretion. ***Butler v. Illes***, 2000 PA Super 54, 747 A.2d 943, 944 (Pa.Super. 2000). As we have stated, "An abuse of discretion is not merely an error of judgment; if, in reaching a conclusion, the court overrides or misapplies the law, or the judgment exercised [**21] is shown by the record to be either manifestly unreasonable or the product of partiality, prejudice, bias or ill will, discretion has been abused." ***Bulgarelli v. Bulgarelli***, 2007 PA Super 295, 934 A.2d 107, 111 (Pa.Super. 2007) (quotation omitted).

As to third parties and standing with respect to custody, 23 Pa.C.S.A. § 5324 provides as follows:

> § 5324. Standing for any form of physical custody or legal custody.

---

[13] We do, however, disagree with the trial court's suggestion that both Mother and Ex-Wife "failed or refused to take reasonable steps at that time to determine Child's parentage by retesting the putative fathers." T.C.O. at 11. We decline to state that Mother and Ex-Wife had a duty to "retest" either Father or D.F. and find that the trial court erred in creating such a duty.

> The following individuals may file an action under this chapter for any form of physical custody or legal custody:
>
> (1) A parent of the child.
>
> (2) A person who stands in loco parentis to the child.
>
> (3) A grandparent of the child who is not in loco parentis to the child:
>
> > (i) whose relationship with the child began either with the consent of a parent of the child or under a court order;
> > (ii) who assumes or is willing to assume responsibility for the child; and
> > . . .

23 Pa.C.S.A. § 5324.

For purposes of the instant matter, we focus on "*in loco parentis*."[14] On this topic, this Court has stated:

> Generally, the Child Custody Act does not permit third parties to seek custody of a child contrary to the wishes of that child's parents. The Act provides several exceptions to this rule, which apply primarily to grandparents and great-grandparents. ***See*** 23 Pa.C.S.A. § 5324(3); 23 Pa.C.S.A. § 5325. In fact, unless a person seeking custody is a parent, grandparent, [**22] or great-grandparent of the child, the Act allows for standing only if that person is "*in loco parentis*." 23 Pa.C.S.A. § 5324(2).
>
> "The term *in loco parentis* literally means 'in the place of a parent.'" ***Peters v. Costello***, 586 Pa. 102, 891 A.2d 705, 710 (2005) (citing Black's Law Dictionary, 791 (7th Ed. 1991)). A person stands *in loco parentis* with respect to a child when he or she "assum[es] the obligations incident to the parental relationship without going through the formality of a legal adoption. The status of *in loco parentis* embodies two ideas; first, the assumption of a parental status, and, second, the discharge of parental duties." ***Id.*** (quoting ***T.B. v. L.R.M.***, 567 Pa. 222, 786 A.2d 913, 916-17 (2001)). Critical to our discussion here, "*in loco parentis* status cannot be achieved without the consent and knowledge of, and in disregard of [,] the wishes of a parent." ***E.W. v. T.S.***, 2007 PA Super 29, 916 A.2d 1197, 1205 (Pa.[Super.] 2007) (citing ***T.B., supra***).

K.W., 157 A.3d at 504-05. "[T]he showing necessary to establish in loco parentis status must in fact be flexible and dependent upon the particular facts of the case." ***J.A.L. v. E.P.H.***, 453 Pa. Super. 78, 682 A.2d 1314, 1320 (Pa.Super. 1996).

Of relevance, looking to cases involving step-parents, we have held that former same-sex partners are entitled to *in loco [*1276] parentis* standing as third parties where they "lived with the child and the natural parent in a family setting, whether a traditional family or a nontraditional [**23] one, and developed a relationship with the child as a result of the participation and acquiescence of the natural parent." ***J.A.L.***, 682 A.2d at 1321; ***see also T.B. v. L.R.M.***, 567 Pa. 222, 232-33, 786 A.2d 913, 918-19 (2001). Specifically, as we summarized recently in ***C.G. v. J.H.***, 2017 PA Super 320, 172 A.3d 43 (Pa.Super. 2017), *allocatur granted*, No. 769 MAL 2017, 179 A.3d 440, 2018 Pa. LEXIS 341 (January 17, 2018):

> In ***T.B.***, the trial court found that a same-sex partner, T.B., had *in loco parentis* standing to the child at issue, A.M. This Court and the Supreme Court of Pennsylvania affirmed. In its opinion, the Supreme Court deferred to the trial court's factual findings because the record supported them. ***T.B.***, 786 A.2d at 919. Those findings included that the parties "engaged in an exclusive, intimate relationship," "shared

---

[14] Mother asserts that Ex-Wife argues standing as a parent. While Ex-Wife offered a presumption of parentage and parentage by estoppel in her reply to Mother's petition to vacate the consent order and her Rule 1925(a)(2)(i) statement, Ex-Wife has not pursued those arguments in this Court.

finances and expenses," "jointly purchased a home," "decided to have a child," and "agreed that [the biological mother, L.R.M.] would be impregnated by a sperm donor and that [T.B.] would choose the donor." ***Id.*** at 914-15 (footnote omitted). T.B. "cared for [L.R.M.] during her pregnancy and attended childbirth classes with her[, and] was the designated co-parent for purposes of being present in the operating room during the birth." ***Id.*** at 915. After the child was born, the parties lived together with the child but did not enter into a formal parenting agreement. ***Id.*** L.R.M. named T.B. as [**24] guardian of the child in her will. ***Id.*** L.R.M. and T.B. "shared day-to-day child rearing responsibilities, including taking [the child] for medical check-ups and other appointments." ***Id.*** T.B. "was active, yet deferential to [L.R.M.] in making parental decisions." ***Id.*** Accepting the trial court's findings, the Court agreed that T.B. stood *in loco parentis* and had standing to seek partial custody. ***Id.*** at 919-20.

In ***J.A.L.***, this Court reversed a trial court ruling that a same-sex partner, J.A.L., lacked *in loco parentis* standing with respect to the child there at issue, G.H. ***J.A.L.***, 682 A.2d at 1316. We stated that "[t]he facts as found by the trial court clearly indicate that [the biological mother,] E.P.H. and J.A.L. lived together ... as a nontraditional family, for many years before the birth of the child" and that the child "was to be a member of their nontraditional family." ***Id.*** at 1321. Those facts included: "the parties agreed that E.P.H. would be artificially inseminated to attempt to conceive a child whom the parties would raise together"[;] the parties selected a sperm donor together; J.A.L. performed the inseminations; J.A.L. accompanied E.P.H. to doctor visits and childbirth classes; J.A.L., along with two other friends of [**25] E.P.H., was present at the birth of the child; and the child was given J.A.L.'s surname as a middle name. ***Id.*** at 1316. In addition, before the child's birth, the parties consulted an attorney who drafted documents, including "a Nomination of Guardian in which E.P.H. named J.A.L. as the guardian of the child in the event of E.P.H.'s death or disability"; "an Authorization for Consent to Medical Treatment of Minor, permitting J.A.L. to consent to medical or dental treatment of the child[;]" "a Last Will and Testament for each party, providing for the other party and the child[,]" and, in E.P.H.'s will, a clause appointing J.A.L. as the guardian of the child; and a co-parenting agreement. ***Id.*** at 1316-17. The parties executed all of these documents except for the co-parenting agreement, which J.A.L. refused [*1277] to execute after counsel advised the parties that the agreement was not enforceable in Pennsylvania. ***Id.*** at 1317. After the child's birth, the parties lived together with the child, and J.A.L. "assisted with all aspects of the care of the baby." ***Id.*** After the parties separated, J.A.L. visited the child frequently and regularly. ***Id.*** at 1317, 1322.

C.G., 172 A.3d at 57-58.

Notably, however, in ***C.G.***, we affirmed the trial court's determination that a former same-sex [**26] partner did not stand *in loco parentis* due to the specific factual circumstances of the case. In distinguishing ***C.G.*** from ***J.A.L.*** and ***T.B.***, we stated:

> The court's holding rests on the unique facts of this case, and there are significant distinctions between this case and ***T.B.*** and ***J.A.L.***, the main decisions on which C.G. relies. For example, in ***T.B.*** and ***J.A.L.***, the parties decided together to have a child; here, the court credited J.H.'s testimony that C.G. "never agreed to have a child, but merely tolerated the idea of [J.H] having a child." Moreover, unlike the parties seeking custody in ***T.B.*** and ***J.A.L.***, C.G. did not participate in educational or medical decisions regarding the child, was not intended to be the child's guardian if something

> happened to J.H., and acted more like a babysitter than a parent. Further, there were no formal documents indicating a co-parenting arrangement, the child did not bear C.G.'s surname, and C.G. did not visit the child frequently and regularly after the parties separated.

Id. at 58-59 (citations omitted).

Moreover, *in loco parentis* status cannot be in defiance of the natural parents' wishes and the parent-child relationship. ***T.B.***, 567 Pa. at 229, 786 A.2d at 917. Notwithstanding, such defiance must [**27] have been to the creation of a parent-child bond with the third party, rather than to the continuation of the relationship. ***Liebner v. Simcox***, 2003 PA Super 377, 834 A.2d 606, 610 (Pa.Super. 2003). This has been reiterated in cases involving prospective adoptive parents where a child has been placed for adoption against a natural parent's wishes. ***See B.A. v. E.E. ex rel. C.E.***, 559 Pa. 545, 741 A.2d 1227 (1999) (reversing and vacating the trial court's order granting prospective adoptive parents standing *in loco parentis* where the father refused to consent to the child's adoption and attempted to gain custody from shortly after the child's birth); ***K.W.***, 157 A.3d at 505-07 (reversing the trial court's order granting prospective adoptive parents standing *in loco parentis* where the mother placed child for adoption without the father's knowledge of her pregnancy and, upon location by the adoption agency, the father expressed his lack of consent and filed for custody shortly thereafter). Nevertheless, a natural parent cannot seek to "eras[e] a relationship between a former partner and a child which was voluntarily created and actively fostered simply because after the parties' separation [the natural parent] regretted having done so." ***J.A.L.***, 682 A.2d at 1322; ***see also T.B.***, 567 Pa. at 232, 786 A.2d at 919. Also a factor and consideration, is whether only limited custody rights were being sought by the [**28] third party. ***J.A.L.***, 682 A.2d at 1321.

In the case *sub judice*, while acknowledging a parent-child relationship, in determining Ex-Wife lacked *in loco parentis* standing, the trial court reasoned as follows:

> In the case at bar, Ex-Wife is in a similar position to the prospective adoptive parents in ***B.A. and K.W., supra***. Here, Mother attempted to confer in loco parentis status on Ex-Wife, initially when they agreed to raise Child in an intact marriage, and later when they entered into a Consent Order for Custody. Father reasonably believed he was [*1278] not Child's father at that time. First, Mother told Father that the date of conception "didn't match up to" the dates of their sexual encounters. Second, an initial paternity test (purchased from a drug store) concluded he was not Child's father. However, from mid-February 2017, when Father received positive results from a second store-bought paternity test, he took swift and decisive action. On March 1, 2017, Father took a third paternity test administered by a reputable lab. One day after receiving confirmation from the lab that he is Child's father, he contacted an attorney. On March 13, 2017, Father filed a custody complaint against Mother and Ex-Wife. When Father learned of his paternity, [**29] his actions were immediately inconsistent with consent to Ex-Wife's *in loco parentis* status.
>
> Several other salient facts likewise support the trial court's decision. Father and Mother were engaged in a relationship. Father was not one of the men recruited by Mother and Ex-Wife to be a sperm donor. Mother and Father did not conceive Child to be raised by Mother and Ex-Wife. Ex-Wife is not a biological parent. Ex-Wife did not pursue adoption through the courts. Ex-Wife's marriage to Mother lasted only six weeks after Child's birth. The Child was less than two years old when the trial court ordered Ex-Wife to transition from Child's life. Child likely will not remember this period in her youth. The trial court cannot continue to perpetrate the fiction of Ex-Wife's *in loco*

> *parentis* status based on her short relationship with Child, which Mother and Ex-Wife facilitated in defiance of Father's constitutional rights.

T.C.O. at 15-16.

Upon review, we disagree with the trial court and find that Ex-Wife does have standing *in loco parentis* with respect to Child. The record reveals that Ex-Wife participated in the pregnancy and preparations prior to Child's birth, as well as Child's birth. N.T. at 9, 34, 38-39, 86, 103. Further, Mother and [**30] Ex-Wife were married at the time of Child's birth and, regardless of the ultimate length of the marriage, they had the intent to jointly raise Child "together in a happy marriage." ***Id.*** at 7, 22, 34, 47. Ex-Wife was named as a parent on Child's birth certificate and involved in the naming of Child. ***Id.*** at 34, 86, 104. Prior to Child's birth, Mother and Ex-Wife consulted an attorney regarding termination of D.F.'s parental rights. ***Id.*** at 39, 46-48, 103. Moreover, while there was some disparity as to the extent of Ex-Wife's involvement, Ex-Wife was clearly involved financially and otherwise during the marriage and remained involved in Child's life after separation. ***Id.*** at 13-14, 18-19, 34, 86-89, 91, 94-95, 101-02. Although known to family and friends that she was not Child's biological parent, Ex-Wife likewise held herself out as Child's parent. ***Id.*** at 94-95, 123-24. Significantly, while declining to confer standing, the trial court even found the existence of a parent-child relationship as to Ex-Wife and Child, stating as follows:

> Here, there is little doubt that Ex-Wife established a parent-like relationship with Child during the approximately six weeks Mother and Ex-Wife were happily married after Child's birth. Even after Mother and Ex-Wife separated (December 16, 2015), but prior to Ex-Wife's departure from [**31] the residence (April 2016), Ex-Wife performed day-to-day childcare duties consistent with her schedule of work, school, and relationships. After separation, Mother afforded Ex-Wife increasing amounts of custody, culminating in the Consent Order of August 15, 2016.

T.C.O. at 13.

By way of contrast from the cases involving prospective adoptive parents, instantly, [*1279] a situation is presented where Mother is attempting in hindsight to expunge Ex-Wife's relationship with Child, a relationship that was created, fostered, and continued, regardless of any legal beliefs or advice, by Mother, a biological parent, since prior to Child's birth and for approximately a year and a half thereafter. Also distinguishable, Mother was the only known biological parent, as Child's paternity was unknown, until Child was approximately 1 1/2 years old. ***See*** Father's Exhibit 1. In addition, Father, once aware of his paternity, filed a Complaint for Custody against both Mother and Ex-Wife. N.T. at 62-63. Notably, he did not file to challenge Ex-Wife's standing. Further, unlike prospective adoptive parents, whose intent by virtue of adoption is to completely supplant and oust the biological parents, Ex-Wife does not intend to completely supplant and oust Mother [**32] and Father. ***See*** Ex-Wife's Brief at 13.

Importantly, we recognize that this conferral of standing does not automatically result in or equate to custodial time for Ex-Wife. It merely allows the trial court to consider Child's best interests. ***J.A.L.***, 682 A.2d at 1319-20.

> . . .The existence of such a colorable claim to custody grants standing only. In other words, it allows the party to maintain an action to seek vindication of his or her claimed rights. A finding of prima facie right sufficient to establish standing does not affect that party's evidentiary burden: in order to be granted full or partial custody, he or she must still establish that such would be in the best interest of the child under the standards applicable to third parties.

Id. As we further stated, "A determination of standing simply implies that the party has a substantial interest in the subject matter of the

litigation and that the interest is direct, immediate and not a remote consequence." ***T.B.***, 567 Pa. at 233, 786 A.2d at 919-20 (citation omitted). However, it "does not speak to [the] chance of success on the merits, but merely affords . . . the opportunity to fully litigate the issue." ***Id.*** at 233-34, 786 A.2d at 920.

Accordingly, for the foregoing reasons, we affirm the order of the trial court in part, and [**33] vacate and remand in part.

We affirm the trial court's order as it relates to the Consent Order. However, we vacate the trial court's order as it relates to Ex-Wife's standing and remand for a custody hearing on the merits as to Father's Complaint for Custody as against Mother and Ex-Wife. The custody hearing should be accomplished as quickly as is practicable in order to satisfy the interests of finality and stability in custody arrangements for the Child.

Additionally, it is hereby Ordered that the custody arrangement with Ex-Wife having physical custody every weekend (Friday at 5:00 p.m. to Monday at 12:00 p.m.) shall be reinstated pending the outcome of the new hearing.

Order affirmed in part, and vacated and remanded in part. Jurisdiction relinquished.

Judgment Entered.

Date: 3/7/2018

A.S. v. I.S.

Supreme Court of Pennsylvania

November 17, 2015, Argued; December 29, 2015, Decided

No. 8 MAP 2015

Reporter
634 Pa. 629 *; 130 A.3d 763 **; 2015 Pa. LEXIS 3129 ***

A.S., Appellee v. I.S., Appellant

Prior History: [***1] Appeal from the Order of the Superior Court at No. 1563 EDA 2013 dated May 28, 2014, Affirming the Order of the Court of Common Pleas of Montgomery County, Civil Division, at No. 2010-00038 dated May 22, 2013.

A.S. v. I.S., 104 A.3d 60, 2014 Pa. Super. LEXIS 2761 (Pa. Super. Ct., 2014)

Judges: SAYLOR, C.J., EAKIN, BAER, TODD, STEVENS, JJ. Mr. Justice Eakin did not participate in the decision of this case. Madame Justice Todd and Mr. Justice Stevens join the opinion. Mr. Chief Justice Saylor files a dissenting opinion.

Opinion by: BAER

Opinion

[*631] [**764] **MR. JUSTICE BAER**

We granted review to determine whether a ***stepparent*** may be obligated to [**765] pay child support for his former spouse's biological children when he aggressively litigated for shared legal and physical custody of those children, including the filing of an action to prevent his former spouse from relocating with them. For the reasons set forth herein, we hold that when a ***stepparent*** takes affirmative legal steps to assume the same parental rights as a biological parent, the ***stepparent*** likewise assumes parental obligations, such as the payment of child support.

Appellant, I.S. ("Mother"), has twin sons who were born in Serbia in 1998.[1] In 2005, Mother married Appellee, A.S. ("Stepfather") in Serbia and subsequently the family relocated to Pennsylvania. [***2] [2] The parties and the children resided together [*632] until 2009 when the parties separated. Following their separation, Mother and Stepfather informally shared physical custody of the children, who were about eleven years of age. In 2010, Stepfather filed for divorce.

Mother graduated from law school in May 2012 and took the California bar examination in July 2012, planning to relocate to California with the children at the end of September that year. In August 2012, Stepfather filed a complaint for custody of the children and an emergency petition to prevent Mother's relocation, asserting that he stood ***in loco parentis*** to the children. The trial court immediately granted Stepfather's [***3] emergency petition, entering an order prohibiting Mother from leaving the jurisdiction with the children. Additionally, the trial court entered a temporary custody agreement awarding Mother primary physical custody and Stepfather partial custody every other weekend and every Wednesday evening. Subsequently, the parties attended the court-ordered custody mediation, parenting seminar, and custody conciliation.

---

[1] There is a Serbian court order between Mother and the children's biological father that governs both child custody and child support. However, Mother never sought child support from the biological father, and he has not sought custody. Indeed, he has not been involved with his children since 2006.

[2] The parties are currently divorced, and therefore A.S. is actually the former stepfather of the children. However, because the courts below referred to him as "Stepfather," we will also do so for purposes of consistency.

On February 13, 2013, the trial court held a hearing on Mother's various preliminary motions seeking to dismiss Stepfather's complaint for custody for lack of standing. The trial court concluded that Stepfather stood ***in loco parentis*** to the children, and therefore it denied Mother's motions.[3] Following an interview with the children, the trial court entered a second interim custody order granting the parties shared physical custody and, thus, expanded Stepfather's custodial time with the children.

[*633] The case proceeded to a full custody hearing in July 2013. At its conclusion, the trial court entered a final custody order granting the parties shared legal as well as physical custody, with each enjoying alternating weeks.[4] The trial court [**766] further directed the parties to participate in co-parenting counseling and prohibited either party from relocating with the children without the permission of the other party or the court.[5]

Meanwhile, on September 28, 2012 (four days after the trial court entered its order granting Stepfather's emergency custody petition and preventing Mother from relocating to California), Mother filed a complaint for child support against Stepfather. Following a support conference on March 4, 2013, a support master dismissed Mother's complaint reasoning that Stepfather owed no duty to support the children because he is not their biological father. Master's Recommendation, March 4, 2013, at 1; see, e.g., DeNomme v. DeNomme, 375 Pa. Super. 212, 544 A.2d 63, 65 (Pa. Super. 1988) (stating that generally a ***stepparent*** does not owe a duty of support to his stepchildren). Mother filed exceptions to the master's recommendation, contending that Stepfather should be treated as a biological parent for purposes of support because he litigated and obtained the same legal and physical custodial rights as a biological parent, and, further, successfully prevented Mother's relocation with the children.

On May 22, 2013, the trial court entered an order affirming the master's decision to dismiss Mother's [***6] support complaint. The trial court cited governing precedent establishing that under Pennsylvania law, a ***stepparent*** generally is not liable [*634] for child support following the dissolution of a marriage. Trial Court Opinion, July 8, 2013, at 3-4 (citing Commonwealth ex rel. McNutt v. McNutt, 344 Pa. Super. 321, 496 A.2d 816, 817 (Pa. Super. 1985) (holding that ***in loco parentis*** status alone is insufficient to create a ***stepparent***-support obligation); Garman v. Garman, 435 Pa. Super. 590, 646 A.2d 1251, 1253 (Pa. Super. 1994) (holding that when a stepfather signs an acknowledgement of paternity, knowing he is not the biological father, absent facts that show he has a parent-child relationship with the child, he will not owe a duty of support); Drawbaugh v. Drawbaugh, 436 Pa. Super. 57, 647 A.2d 240, 242-43 (Pa. Super. 1994) (finding a ***stepparent*** owes no duty of support where a ***stepparent*** seeks minimal visitation of a child)).

The trial court acknowledged that in Hamilton v. Hamilton, 2002 PA Super 72, 795 A.2d 403 (Pa.

---

[3] See 23 Pa.C.S. § 5324 (providing "[a] person who stands ***in loco parentis*** to the child" has standing to seek any form of child custody).

The phrase "***in loco parentis***" refers to "a person who puts himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without [***4] going through the formality of a legal adoption." Commonwealth ex rel. Morgan v. Smith, 429 Pa. 561, 241 A.2d 531, 533 (Pa. 1968). The status of ***in loco parentis*** embodies two ideas: 1) the assumption of a parental status; and 2) the discharge of parental duties. Id.

[4] Shared legal custody is defined as "[t]he right of more than one individual" to "make major decisions on behalf of the child, including, but not limited to, medical, religious and educational decisions." 23 Pa.C.S. § 5322(a). Shared physical custody is defined as "[t]he right of more than one individual to assume physical custody of the child, each having significant periods of physical custodial time with the child." Id.

[5] As acknowledged by both parties in their briefs, Stepfather has since consensually obtained sole physical custody of the children. Subsequently, Stepfather filed a complaint for child support [***5] against Mother. In that support action, Stepfather asserted that his income should not be considered in the support calculation because as a ***stepparent*** he owes no duty of support.

Super. 2002), the Superior Court found a support obligation for a stepfather who signed an acknowledgment of paternity despite knowing he was not the biological father and held himself out as a child's father. The trial court stated that the stepfather in Hamilton "prevented the mother from taking action [in support] against the biological father. . . ." Tr. Ct. Op. at 6.[6] The trial court reasoned that [**767] unlike Hamilton, in the instant case, Stepfather never held himself out as the biological [***7] father; did not prevent Mother from enforcing the Serbian child support order against the biological father; and did not sign an acknowledgment of paternity. Tr. Ct. Op. at 6-7. For those reasons, the trial court found Hamilton inapposite. The trial court concluded that the facts in this case did not warrant a finding that Stepfather owed the children a duty of support on the basis of law or equity.

[*635] Mother appealed the trial court's decision to the Superior Court, raising the following issues: 1) whether Stepfather, under the circumstances presented, owes a duty of support to the children, and 2) if a duty of support exists, whether [***8] the amount owed should be calculated by the statutorily-imposed child support guidelines. In an unpublished memorandum, a panel of the Superior Court affirmed the trial court's determination that Stepfather did not owe a duty of support to the children because "he has not held himself out as their father or agreed to support the children financially." A.S. v. I.S., 1563 EDA 2013,*5, 2014 Pa. Super. Unpub. LEXIS 1118 (Pa. Super. filed May 28, 2014). The Superior Court further noted that Mother has chosen not to pursue her legal right to support against the children's biological father in Serbia. As the Superior Court found that no duty of support existed, it did not address Mother's second issue.

Mother sought this Court's discretionary review, and we granted her petition for allowance of appeal to address two issues:

> (1) Whether, under Pennsylvania law, a former ***stepparent*** who has pursued and established equal parental rights as the children's natural parent—and per a court order, equally shares physical and legal custody with the natural parent—should be relieved of the duty to contribute to the children's support.
>
> (2) If this Court finds that [a] duty of support lies with both parties who share physical and legal custody [***9] of the children, whether the amount of support owed is calculated by the statutorily imposed child support guidelines.

A.S. v. I.S., 631 Pa. 208, 108 A.3d 1280, 1281 (Pa. 2015).

Mother asserts that because Stepfather initiated aggressive custody litigation based on ***in loco parentis*** standing, he should be liable for support, especially where he achieved and is exercising custodial rights equal to those of a biological parent, and, consistent therewith, has prevented Mother from relocating with her children. Mother argues that through his child custody litigation, Stepfather voluntarily assumed the [*636] status of *de facto* parent, which should carry the same obligations as any other parent. Mother advocates for a narrow holding that "only refers to a ***stepparent*** who has sought and obtained in a court of law *equal parental rights* on par with a fit natural parent." Mother's Reply Brief at 5 (emphasis original).

Acknowledging that there are no published Pennsylvania cases that analyze this issue in accord with facts similar to those presented herein, Mother analogizes her case to L.S.K. v. H.A.N., 2002 PA

---

[6] This statement was erroneous, as Hamilton did not involve a stepfather who interfered with the mother's ability to seek child support from the biological father. We believe the trial court may have confused the facts of Hamilton with those of Miller v. Miller, 97 N.J. 154, 478 A.2d 351 (N.J. 1984), which our Superior Court has frequently cited in the cases discussed *infra*. In Miller, the New Jersey Supreme Court found that a ***stepparent*** may be liable for child support where he destroyed checks sent by the biological father and affirmatively took on the duty of supporting the children while married to their mother.

Super 390, 813 A.2d 872 (Pa. Super. 2002). In L.S.K., the Superior Court determined that a woman was liable for child support for five children born to her former same-sex partner using a sperm donor where the parties [***10] agreed to start a family together and both women acted as the children's parents.

Mother distinguishes the cases relied on by the trial court where the Superior Court declined to find a ***stepparent*** liable [**768] for child support. For instance, Mother points out that in McNutt, although the ***stepparent*** maintained a relationship with his stepchild, he neither sought nor was awarded any court-ordered custodial rights. See McNutt, 496 A.2d at 816-17. Similarly, Mother asserts that in Garman, the ***stepparent*** signed an acknowledgement of paternity but did not maintain any type of relationship with the child. See Garman, 646 A.2d at 1253. Lastly, in Drawbaugh, the ***stepparent*** sought and obtained minimal visitation with the children, but did not enjoy shared legal and physical custody, and did not seek to prohibit the children's relocation with their mother. Drawbaugh, 647 A.2d at 240-41. Thus, Mother argues that Stepfather took far more proactive steps to establish himself as the co-equal parent of these children than the ***stepparents*** in each of those cases, and therefore those cases are not controlling here.

In response, Stepfather reiterates the general rule that ***stepparents*** do not owe a duty to support their stepchildren, citing McNutt, Garman, and Drawbaugh. Failing to acknowledge [***11] that none of the ***stepparents*** in the prior cases had obtained shared physical and legal custody nor prevented a parent's relocation, Stepfather declines to view his actions as [*637] any different from the ***stepparents*** in those cases. As Stepfather sees it, he merely provided love and care for Mother's children, which is insufficient to create a support obligation. Stepfather submits that if we find him liable for support, we will discourage ***stepparents*** from engaging in gratuitous relationships with their stepchildren.

Stepfather asserts that Mother's reliance on L.S.K. is misplaced because the facts of that case differ significantly from the instant case. Specifically, Stepfather posits that the determinative fact in L.S.K. was the joint decision of a same-sex couple to start a family together. Because Stepfather did not participate in Mother's decision to have the children at issue, he believes L.S.K. is not applicable.

Whether a ***stepparent*** may be liable for child support under the circumstances presented is an issue of first impression for this Court. This issue presents a question of law, for which our standard of review is *de novo* and our scope of review is plenary. Kripp v. Kripp, 578 Pa. 82, 849 A.2d 1159, 1164 n. 5 (Pa. 2004).

We begin our inquiry [***12] by reviewing the child support statute from which all child support obligations are derived. The statute provides that "[p]arents are liable for the support of their children . . . ." 23 Pa.C.S. § 4321. As both parties concede, the support statute and its corresponding rules do not define "parent" or "child." However, we reject both parties' suggested definition of "parent" for purposes of this case. Mother would like us to adopt the definition found in the Child Protective Services regulations, 55 Pa. Code § 3490.4 (defining "parent" as "[a] biological parent, adoptive parent, or legal guardian"), while Stepfather proposes a competing definition found in the Liability for Tortious Acts of Children chapter within the Domestic Relations Code. 23 Pa.C.S. § 5501 (defining "parent" as "natural or adoptive parents"). Although the subjects of child protective services and tortious acts of children both deal with children, neither chapter is more than tenuously related to child support. Thus, we find these definitions largely irrelevant to the case before us. Moreover, [*638] accepting either definition would ignore the definition of a parent for support purposes as it has developed in our case law. Accordingly, we turn to that jurisprudence.

We begin by noting [***13] that cases within our

jurisdiction have deemed a [**769] "parent" for child support purposes as encompassing more than biological or adoptive parents. Rather, courts have looked to whether a nonparent has taken affirmative steps to act as a legal parent so that he or she should be treated as a legal parent. For instance, employing the common-law doctrine of paternity by estoppel, we have found a ***stepparent*** could be liable for child support where he has held a child out as his legal child. Fish v. Behers, 559 Pa. 523, 741 A.2d 721 (Pa. 1999). The doctrine of paternity by estoppel provides that where a party assertively holds himself out as a child's father, that party may be estopped from subsequently denying this status. The rationale behind the doctrine is "achieving fairness as between the parents by holding them, both mother and father, to their prior conduct regarding the paternity of the child" because children should be secure in knowing who are their parents. Id. at 723.

In Hamilton, *supra*, the Superior Court applied paternity by estoppel to find a ***stepparent*** liable for child support where he held the child out as his own and continued his relationship with the child after his separation from the child's mother. 795 A.2d at 407. In Hamilton, the stepfather met the mother when [***14] the child was three years old. Despite obviously knowing he was not the biological father, the stepfather signed an acknowledgement of paternity and treated the child as his own both during and after the conclusion of his marriage to the mother. After the dissolution of their marriage, the mother sought child support from the stepfather. The Superior Court found that the stepfather was obligated to pay child support because, although it was clear he was not the child's biological father, he held himself out as the biological father and thus was obligated to continue in the role of the child's father so as to not obscure the child's understanding of who his parents were, in accord with the doctrine of paternity by estoppel.

[*639] Recently, in K.E.M. v. P.C.S., 614 Pa. 508, 38 A.3d 798 (Pa. 2012), this Court reaffirmed the doctrine of paternity by estoppel, recognizing that:

> [C]ourts have been most firm in sustaining prior adjudications (or formal acknowledgments) of paternity based on the need for continuity, financial support, and potential psychological security arising out of an established parent-child relationship.

38 A.3d at 810 n. 12. As with many determinations involving children, we held that the paternity by estoppel doctrine should only be applied where it serves [***15] the best interests of the child. Id. at 810.

In addition to finding a ***stepparent*** liable for child support based on paternity by estoppel, our Superior Court has found a support obligation for an individual who took affirmative steps to act as a parent, under general principles of equity, even where the child would not confuse that individual with a biological parent. L.S.K., 2002 PA Super 390, 813 A.2d 872. In L.S.K., a woman agreed to create a family with her same-sex partner who became pregnant using artificial insemination and both women acted as mothers to the resulting children. Upon dissolution of the relationship, the non-biological mother obtained custody rights to the children by establishing ***in loco parentis*** standing but denied that she had a corresponding duty of child support, claiming that only biological parents can owe a duty of support.

The L.S.K. court rejected her argument and found that the non-biological mother's forceful steps to act as a parent estopped her from denying that status. The L.S.K. court recognized two determinative facts motivating its decision: 1) the biological mother went through a significant undertaking [**770] to have children relying on the non-biological mother's agreement to start a family together; [***16] and 2) the non-biological mother had obtained custodial rights to the children based on ***in loco parentis*** standing. As to the latter fact, the court stated "equity mandates that [the non-biological mother] cannot maintain the status of ***in loco parentis*** to pursue an action as to the children, alleging she has acquired rights in relation [*640]

to them, and at the same time deny any obligation for support merely because there was no agreement to do so." Id. at 878.

On the other hand, the Superior Court has reviewed several cases in which it determined a ***stepparent*** did not take sufficient affirmative steps as a parent to be held liable for support. As noted, the Superior Court has held that the mere existence of a relationship between the ***stepparent*** and the child, *i.e.,* ***in loco parentis*** status, is insufficient to establish a support obligation for the ***stepparent***. See McNutt, 496 A.2d at 817. In a similar vein, the Superior Court has found that supporting stepchildren during the marriage was insufficient to obligate a stepfather to pay child support after the marriage dissolved. See DeNomme, 544 A.2d at 66. Additionally, signing an acknowledgement of paternity, without more, was insufficient to obligate a ***stepparent*** to pay support. See Garman, 646 A.2d at 1253. Even establishing [***17] ***in loco parentis*** standing in order to seek minimal visitation with a child was not enough to find that person liable for support. See Drawbaugh, 647 A.2d at 242-43. The Drawbaugh court noted the public policy behind McNutt and its progeny:

> If we were to hold that a ***stepparent*** acting ***in loco parentis*** would be held liable for support even after the dissolution of the marriage then all persons who gratuitously assume parental duties for a time could be held legally responsible for a child's support . . . . These acts of generosity should not be discouraged by creating a law which would require anyone who begins such a relationship to continue financial support until the child is eighteen years old.

Id. at 242 (quoting McNutt, 496 A.2d at 817).

Upon consideration of these two lines of cases, we agree and, accordingly, reiterate that ***in loco parentis*** status alone and/or reasonable acts to maintain a post-separation relationship with stepchildren are insufficient to obligate a ***stepparent*** to pay child support for those children. However, the instant case involves a far greater assumption, indeed, a relentless pursuit, of parental duties than that of a ***stepparent*** desiring a continuing relationship with a former [*641] spouse's children, as was the case in McNutt, [***18] DeNomme, Garman, and Drawbaugh. Here, we have a stepfather who haled a fit parent into court, repeatedly litigating to achieve the same legal and physical custodial rights as would naturally accrue to any biological parent. This is not the "typical case" of a ***stepparent*** who has grown to love his stepchildren and wants to maintain a post-separation relationship with them. Stepfather in the instant case has litigated and obtained full legal and physical custody rights, and has also asserted those parental rights to prevent a competent biological mother from relocating with her children.

Stepfather simply does not fall into the category of a ***stepparent*** who desires a continuing post-separation relationship with his stepchildren. Rather, he has insisted upon and became a full parent in every sense of that concept. We find that under these facts, Stepfather has taken sufficient affirmative steps legally to obtain parental rights and should share in parental obligations, such as paying child [**771] support. Equity prohibits Stepfather from disavowing his parental status to avoid a support obligation to the children he so vigorously sought to parent.

We emphasize that we are not creating a new class [***19] of ***stepparent*** obligors and our decision today comports with the line of cases that have held that ***in loco parentis*** standing alone is insufficient to hold a ***stepparent*** liable for support. The public policy behind encouraging ***stepparents*** to love and care for their stepchildren remains just as relevant and important today as it was when Drawbaugh was decided. However, when a ***stepparent*** does substantially more than offer gratuitous love and care for his stepchildren, when he instigates litigation to achieve all the rights of parenthood at the cost of interfering with the rights of a fit parent, then the same public policy attendant

to the doctrine of paternity by estoppel is implicated: that it is in the best interests of children to have stability and continuity in their parent-child relationships. By holding a person such as Stepfather liable for child support, we increase the likelihood that only individuals who are truly [*642] dedicated and intend to be a stable fixture in a child's life will take the steps to litigate and obtain rights equal to those of the child's parent.

Having concluded Stepfather is obligated to provide child support under the facts herein, we turn to the second issue [***20] we granted on appeal, namely, whether the amount of support owed should be calculated pursuant to the child support guidelines. Stepfather provides no persuasive reason why the support guidelines should not be applied to calculate his support obligation. In fact, Stepfather concedes that the guidelines apply "to cases where there is a duty to provide support. . . ." Stepfather's Brief at 19. Accordingly, similar to the Superior Court's approach in L.S.K., we find that where a ***stepparent*** owes a duty of support based on obtaining equal legal and physical custodial rights to those of a biological parent, then the typical support procedure should follow, including application of the guidelines found in the Rules of Civil Procedure. See Pa. Rules Civ. Pro. 1910.16-1; L.S.K., 813 A.2d at 879 (finding the support guidelines apply when calculating a non-biological parent's equitable support obligation).

Based on the foregoing, the order of the Superior Court is reversed and the case is remanded to the trial court for a calculation of child support that is based on both Mother's and Stepfather's income.[7]

Jurisdiction is relinquished.

Mr. Justice Eakin did not participate in the decision of this case.

[*643] Madame Justice Todd and Mr. Justice Stevens join the opinion.

Mr. Chief Justice Saylor files a dissenting opinion.

Dissent by: SAYLOR

Dissent

DISSENTING OPINION

MR. CHIEF JUSTICE SAYLOR

As the majority initially recognizes, under existing law, the legal obligation of support should turn upon whether Appellee can be deemed to be a "parent" of A.S.'s children. *See* Majority Opinion, *slip op.* at 8 (citing 23 Pa.C.S. §4321). Biological paternity obviously is a primary means of establishing legal parentage, *accord* 23 Pa.C.S. §4343 [**772] (providing for genetic testing as a means to establish paternity); adoption is another avenue. *See In re Davies' Adoption*, 353 Pa. 579, 590, 46 A.2d 252, 257 (1946). Beyond that, the common law has recognized a presumption of paternity and the doctrines of paternity by estoppel, *see generally K.E.M. v. P.C.S.*, 614 Pa. 508, 523-30, 38 A.3d 798, 806-10 (2012), neither of which appears to be the basis for the majority's decision or an appropriate ground for establishing legal parenthood [***22] under the facts of the present case.

Instead, the majority seems to apply a looser equitable construct. *See* Majority Opinion, *slip op.* at 12 ("Equity prohibits Stepfather from disavowing his parental status to avoid a support obligation to the children he has so vigorously sought to parent."). In this regard, the majority premises Appellee's status as a parent on his "instigat[ing] litigation to achieve all the rights of

[7] We note that finding Stepfather has a duty to support the children does not necessarily mean that he will actually owe Mother a financial contribution. [***21] As set forth in the support statute and rules, the support calculation will take into account both parties' incomes, as well as who has been the primary custodian during the relevant periods and the amount of parenting time the partial custodial parent has spent with the children. See 23 Pa.C.S. §§ 4301 - 4396; Pa.R.Civ.P. Nos. 1910.1 - 1910.50.

parenthood at the cost of interfering with the rights of a fit parent." *Id.* at 13.

I differ with the majority's approach for several reasons. First, I note that Appellant's complaint for child support was dismissed at the pleadings stage. Thus, there is no developed evidentiary record available to support a full and balanced inquiry into the overarching equities involved. *Cf. K.E.M.*, 614 Pa. at 529, 38 A.3d at 810 (limiting the application of paternity by estoppel to instances in which "it can be shown, *on a developed record*, that it is in the best interests of the involved child" (emphasis added)).

[*644] I also observe that, in order to succeed in securing custody rights, Appellee was required to demonstrate clear and convincing reasons to overcome the strong presumption that custody should have been awarded to Appellant. *See* 23 Pa.C.S. §5327(b). Furthermore, at least [***23] per the view of the family court, Appellant has engaged in a course of "contemptuous" conduct relative to her treatment of the parties' prior custody agreement. *See A.S. v. I.S.*, No. 2010-0038, *slip op.* at 4 (C.P. Montgomery July 8, 2013). At the very least, to the degree that this case should turn on equitable factors, it would seem to me that there is a fuller range of these considerations to be evaluated by a fact-finder.

More broadly, I am uncomfortable with the majority's fashioning of a new doctrine of parentage. The Legislature has seen fit to accord standing to pursue custody to those ***in loco parentis*** to children in furtherance of the children's best interests. *See* 23 Pa.C.S. §5324(2). The Assembly has not, however, concomitantly adjusted the law of support. As there are mixed policy considerations involved, *see, e.g.*, Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611 (2009), I believe it is the Legislature's purview to consider whether such adjustments should be implemented.

As an aside, I note that in some jurisdictions, while an individual who voluntarily accepts custody of a stepchild may be held liable for support, such a person has the option of surrendering custody to alleviate the support [***24] obligation. *See, e.g., Foust v. Montez-Torres*, 2015 Ark. 66, 456 S.W.3d 736, 738 (Ark. 2015). It is unclear whether, under the majority opinion, Appellee is to be accorded such option.[1]

Finally, in terms of Appellant's constitutional arguments, it is significant to me that she is not challenging the shared custody award in the abstract, but rather its import in terms of the dismissal of her support complaint. *See* Brief for Appellant [**773] at 31-33. The award of equal, shared, physical and [*645] legal custody to a non-parent (as opposed to visitation) over and against a fit parents wishes does, in my mind, raise serious constitutional concerns. Assuming that such award is permissible in the first instance, however, I do not find the Legislature's failure to provide for a corresponding obligation of support to be disabling.

End of Document

[1] Certainly, read against the family court's existing best-interests determination, the effect of an exercise of such an option upon the children involved would be detrimental.

648 Pa. 418
Supreme Court of Pennsylvania.

C.G., Appellant
v.
J.H., Appellee

No. 2 MAP 2018
|
Argued: May 15, 2018
|
Decided: September 21, 2018

Synopsis

Background: Mother's same-sex former partner brought action seeking legal and partial physical custody of child born during parties' relationship. The Court of Common Pleas, Centre County, Civil Division, No. 2015–4710, Pamela A. Ruest, J., sustained mother's preliminary objection to standing. Former partner appealed. The Superior Court, 172 A.3d 43, affirmed. Former partner petitioned for allowance to appeal, which petition was granted.

Holdings: The Supreme Court, No. 2 MAP 2018, Mundy, J., held that:

[1] former partner was not a "parent" who had standing to seek custody of child, and

[2] trial court was not required to consider existence of bond between child and former partner as decisive factor as to whether former partner stood in loco parentis to child.

Affirmed.

Dougherty, J., filed concurring opinion.

Wecht, J., filed concurring opinion in which Donohue, J., joined.

West Headnotes (12)

[1] **Action** Persons entitled to sue

The fundamental concept of standing ensures that a party seeking to litigate a matter has a substantial, direct, and immediate interest in the subject-matter of the litigation.

[2] **Child Custody** Parties; intervention

Determining standing in child custody disputes is a threshold issue that must be resolved before proceeding to the merits of the underlying custody action; it is a conceptually distinct legal question that has no bearing on the central issue within the custody action as to who is entitled to physical and legal custody of a child in light of his or her best interests. 23 Pa. Cons. Stat. Ann. § 5324.

9 Cases that cite this headnote

[3] **Appeal and Error** Standing

Issues of standing are questions of law; thus, the standard of review is de novo and the scope of review is plenary.

3 Cases that cite this headnote

[4] **Child Custody** Assisted reproduction; surrogate parenting

Child Custody Parties; intervention

Mother's same-sex unmarried former partner, who had no biological relationship to child and who had not adopted child, was not a "parent" who had standing to seek custody of child who was conceived, through assisted reproduction with an anonymous sperm donor, and born during partner's relationship with mother. 23 Pa. Cons. Stat. Ann. § 5324(1).

2 Cases that cite this headnote

[5] **Statutes** Undefined terms

Statutes Plain language; plain, ordinary, common, or literal meaning

Absent a definition in the statute, statutes are presumed to employ words in their popular and plain everyday sense, and the popular meaning of such words must prevail.

[6] **Child Custody** In loco parentis; de facto parents

Child Custody Parties; intervention

In loco parentis, as a basis for seeking custody of a child, is a legal status and proof of essential facts is required to support a conclusion that such a relationship exists. 23 Pa. Cons. Stat. Ann. § 5324(2).

2 Cases that cite this headnote

[7] **Child Custody** In loco parentis; de facto parents

Child Custody Parties; intervention

Trial court was not required to consider existence of bond between child and mother's same-sex unmarried former partner as decisive factor as to whether former partner stood in loco parentis to child, when determining whether former partner had standing to seek custody of child, who was born during parties' relationship through assisted reproduction; relevant considerations were whether former partner had assumed parental status or had discharged parental duties. 23 Pa. Cons. Stat. Ann. § 5324(2).

4 Cases that cite this headnote

[8] **Child Custody** In loco parentis; de facto parents

Child Custody Parties; intervention

Gaining in loco parentis status, as a basis for seeking custody of a child, requires the petitioning individual to demonstrate two elements: the assumption of parental status and the discharge of parental duties. 23 Pa. Cons. Stat. Ann. § 5324(2).

4 Cases that cite this headnote

[9] **Child Custody** Welfare and best interest of child

The paramount concern in child custody cases is the best interests of the child.

15 Cases that cite this headnote

[10] **Child Custody** In loco parentis; de facto parents

Child Custody Parties; intervention

The relevant time frame to determine whether a party stands in loco parentis, such that the party has standing to seek custody of a child, is when the party developed the relationship with the child with the acquiescence or encouragement of the natural parent. 23 Pa. Cons. Stat. Ann. § 5324(2).

[11] **Child Custody** In loco parentis; de facto parents

In a child custody dispute, the rights and liabilities arising out of in loco parentis are the same as that between child and parent and its status is conferred upon a person who puts him or herself in the situation of a lawful parent.

4 Cases that cite this headnote

[12] **Child Custody** In loco parentis; de facto parents

Child Custody Parties; intervention

While not determinative of the issue of standing, post-separation conduct by either party can be considered when determining whether a non-parent third party asserting standing in a custody dispute based on in loco parentis status was ever viewed as a parent-like figure. 23 Pa. Cons. Stat. Ann. § 5324(2).

****892** Appeal from the Order of the Superior Court at No. 1733 MDA 2016 dated October 11, 2017 Affirming the Order of the Centre County Court of Common Pleas, Civil Division,

at No. 2015-4710 dated September 22, 2016. Pamela A. Ruest, Judge

Attorneys and Law Firms

Craig Barry Bluestein, Esq., for Academy of Adoption and Assisted Reproduction Attorneys, Indiana, Amicus Curiae.

Helen Eileen Casale, Esq., Hangley Aronchick Segal Pudlin & Schiller, for American Academy of Matrimonial Lawyers, Pennsylvania Chapter, Amicus Curiae.

Leonore F. Carpenter, Esq., Temple University School of Law, Rebecca Gail Levin, Esq., Tiffany Lynn Palmer, Esq., Jerner & Palmer, P.C., for Appellant.

John Caleb Bee, Esq., Steven S. Hurvitz, Esq., McQuaide Blasko, Julia Cronin Rater, Esq., McQuaide Blasko Attorneys at Law, for Appellee.

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

OPINION

JUSTICE MUNDY

***422** In Pennsylvania, standing requirements limit who may seek physical or legal custody ****893** of a child to the following individuals: (1) a parent; (2) a person who stands in loco parentis to the child; or (3) under certain conditions, a grandparent of the child who does not stand in loco parentis. 23 Pa.C.S. § 5324. We granted allowance of appeal to explore whether a former same-sex, unmarried partner of a biological parent may have standing to pursue custody either as a parent or as a person who stood in loco parentis to the Child, and to what extent post-separation conduct is relevant in an in loco parentis analysis.

I.

Appellant C.G. and Appellee J.H. were a same-sex couple living together in Florida. In October 2006, J.H. gave birth to Child. Child was conceived via intrauterine insemination using an anonymous sperm donor. J.H. is the biological mother of Child. C.G. shares no genetic connection with Child, and did not adopt Child.[1] Following Child's birth, the couple continued to live together for approximately five years before separating. J.H. and Child moved to a separate residence in Florida in February 2012, and they relocated to Pennsylvania in July 2012.

On December 8, 2015, C.G. filed a custody complaint seeking shared legal and partial physical custody of Child alleging she "acted (and acts) as a mother to the minor child as well, as the minor child was conceived by mutual consent of the parties, with the intent that both parties would co-parent and act as mothers to the minor child." Custody Compl., 12/8/15, at ¶ 3. She averred further that "[i]t is in child's best interests ***423** and permanent welfare to have a relationship with both parents." *Id.* at ¶ 7. C.G. continued that she "mutually agree[d] to have a child with [J.H.], and both participated in selecting a sperm donor in order for [J.H.] to conceive their minor child." *Id.* C.G. claimed she served daily as Child's mother from the time of conception and birth until 2011 by, for example, appearing at pre-natal appointments, participating in the birth of Child, and cutting his umbilical cord. *See id.* With respect to her relationship with Child following the dissolution of her relationship with J.H., C.G. claimed that J.H. began withholding Child from C.G. in February 2012,[2] allowing only once a week contact, despite C.G.'s requests for more; J.H. moved Child to Pennsylvania without notifying or consulting C.G.; C.G. has had minimal and inconsistent contact with Child, via telephone and one physical contact since J.H. and Child relocated to Pennsylvania; J.H. represented to C.G. she could have more regular contact with Child following the parties' settling financial matters attendant to their separation, but following the parties' resolution of those matters, J.H. did not permit C.G. to see or have contact with Child. *See id.*

On January 6, 2016, J.H. filed preliminary objections to the complaint asserting that C.G. lacked standing to bring an action ****894** for any form of custody under 23 Pa.C.S. § 5324 because C.G. is not a parent, does not and did not ever stand in loco parentis to Child, and is not a grandparent. *See* Prelim. Objections, 1/6/16, at ¶¶ 7-11. J.H. disputed that Child was conceived by mutual consent with the intent to co-parent. Rather, she contended that "the decision to have a child was solely that of [J.H.] ... [C.G.] made it clear to [J.H.] that [C.G.] did not want another child (having two children of her own from a prior relationship) and that [J.H.] would bear responsibility for the child she conceived[.]" *Id.* at ¶ 12. J.H. continued that she bore all costs of Child with the exception of ***424** limited situations in which C.G. contributed "minimally," and "since the child's birth [J.H.] has acted as the sole parent for the child. [C.G.'s] involvement was solely that of [J.H.'s] girlfriend from the child's birth

until November 2011[.]" *Id.* Additionally, she asserted that pursuant to C.G.'s desire not to be a parent to Child, J.H. "made all decisions regarding the child's education, medical care, growth and development, and attended to all of his daily, educational and medical needs with the exception of limited times during which [C.G.] babysat for [J.H.]" *Id.* J.H. claimed that, in December 2011, C.G. asked J.H. to move out of the shared residence by February 2012 because C.G. wanted to continue a romantic relationship with a woman with whom she was having an affair. *See id.* J.H. agreed that she and Child moved out of the house in February 2012, and moved to Pennsylvania in July of that year. *See id.* She additionally agreed that C.G. "has spoken with the child only minimally and seen him only one time, which was in March 2014." *Id.* She continued that since the move, C.G. has not provided financial support to Child except for one week of camp and one month of before and after school care, and has occasionally sent nominal gifts. *See id.* She sought dismissal of the complaint based on legal insufficiency and lack of capacity to sue. *See* Pa.R.C.P. 1028(a)(4) and (5).

C.G. filed a response to the preliminary objections on January 25, 2016, in which she claimed standing as a parent under Section 5324(1) or "at the very least" as a person in loco parentis to Child under Section 5324(2). *See* Response to Prelim. Objections, 1/25/16, at ¶¶ 7-11. She generally disputed the factual representations in J.H.'s preliminary objections in support of her own account of the decision to conceive and parent Child. *See id.* at 12.

The trial court held hearings over three days at which a number of witnesses testified and conflicting evidence was presented. Consistent with the assertions in the complaint and responses, the gravamen of the parties' respective presentations was C.G.'s participation in the conception, birth, and raising of Child, the intent of the parties with respect thereto, and the perception others held of the household or family ***425** dynamic. For example, C.G. testified she and J.H. "planned to have a child together[;]" that J.H. did not begin the process of trying to become pregnant until C.G. consented; the couple would look for donors together on a donor site; and she considered Child her son from the time he was born. N.T., 4/12/16, at 38-55. Following his birth, C.G. described her relationship with Child as a parent/child relationship. *See id.* at 103. J.H., by contrast, testified the decision to have a child was hers alone, she did not consider C.G. to be a parent to Child, or hold her out to others as such. *See* N.T., 2/5/16, at 28-29 ("[C.G. did not want a child[,]" but "tolerated the idea" of J.H. having one.); *see also* N.T., 4/12/16, at 207-08 ("I wanted to have a child. [C.G.] did not want that, and I let her know I made an appointment with a fertility doctor, and I was moving forward with that ****895** for myself."); *id.* at 222 ("I am [Child's] mom, and [C.G.] is not.").

In all, the trial court heard from 16 witnesses, offering differing testimony on issues bearing on the parties' relationship between and among J.H., Child, C.G., and her daughters (who were, at the relevant time, college age), the intent of the parties prior to and after Child's conception and birth, and parental duties performed for Child. C.G. offered a number of witnesses supporting her position that she acted as a mother to Child and that she and J.H. undertook jointly to conceive and raise child. *See, e.g.,* N.T., 2/5/16, 85-91 (C.G.'s daughter, Christine Comerford, testifying she understood J.H. and C.G. were having a baby together, she was told the Child was her brother, C.G. performed day-to-day activities for Child including picking him up from school, bathing him, and preparing meals); *id.* at 118-130 (C.G.'s daughter, Lauren Comerford, testifying she understood her mother and J.H. were having a baby together, her mother tended to Child and attended his activities as he grew older, and they took vacations together as a family); N.T., 6/20/16, at 123-28 (Terri Michaels, friend and work colleague of C.G., former colleague of J.H., testifying she understood J.H. and C.G. were having a baby together, C.G. would arrange for Terri and her daughter to babysit Child, and she observed C.G. perform parental duties such as preparing ***426** Child's meals, playing with him, or correcting him). J.H., by contrast, offered a number of witnesses who testified that J.H. decided unilaterally to have a child and was Child's primary caregiver. *See, e.g.*, N.T., 4/12/16, at 7-11 (Katina Gray, one of Child's babysitters in Florida, testifying J.H. hired her and would discuss Child's needs with her and perceiving C.G.'s involvement with Child akin to "a babysitter"); N.T., 6/20/16, at 17-22 (Dr. Alicia Chambers, J.H.'s friend, testifying to her discussions with J.H. about her commitment to becoming a mother despite the fact that C.G. "didn't want that," "wanted to be free[,] and had her own children" and her understanding that C.G. did not want to have a child. She explained that C.G. and J.H. had an arrangement "that this was [J.H.'s] child, and therefore, [J.H.] was going to do the work that was involved..."); N.T., 6/20/16, at 48 (J.H.'s brother testifying "it was clear" C.G. did not desire to have a baby, J.H. performed the parental caretaking of Child, and J.H. asked him and his wife to be Child's godparents and "take care of [Child] if anything would happen to [J.H.]").

A number of exhibits, including handwritten notes, e-mails, Child's medical records, and Christmas cards were also admitted into evidence by the parties attempting to evidence or refute C.G.'s status as a parental figure to Child.

On September 22, 2016, the trial court issued an opinion and order sustaining J.H.'s preliminary objection as to C.G.'s standing to pursue custody.[3] The trial court concluded that C.G. was not a parent pursuant to Section 5324(1) because both parties agreed that at the time and place of Child's birth, same-sex marriage and second-parent adoptions were not recognized. Thus, it proceeded to determine whether C.G. stood in loco parentis to Child.

In its analysis, the trial court outlined certain undisputed facts, i.e, that Child was conceived while the parties were in a relationship, Child referred to C.G. as "Mama C[.]," the parties ***427** had a commitment ceremony, and C.G. was present for ****896** the birth and christening of Child. *See* Trial Ct. Op. at 5. It then made a number of findings of fact regarding the disputed evidence and testimony of the parties which are supported by the record. First, the trial court looked to whether any documentation existed evidencing the parties' intent that C.G. be viewed as a co-parent to Child. The court noted that C.G. is not listed on Child's birth certificate nor does he bear her name, and notwithstanding the fact that Florida did not allow second-parent adoption at the time Child was born, neither party suggested adoption following its legalization in 2010 nor executed or memorialized a co-parenting agreement. *See id.* at 6. The trial court considered a note written by J.H. to C.G. that referenced the hope of "having a child together" and one expressing J.H.'s happiness following her baby shower, as well as the fact that Child was a beneficiary on C.G.'s life insurance policy and was carried on her medical and dental insurance plans, prior to separation. *Id.* at 6. However, in weighing the evidence, it concluded "[t]wo letters and one policy" did not overcome J.H.'s testimony that C.G. did not agree to have a child, but merely acquiesced to J.H. having one. *Id.* Moreover, it credited J.H.'s testimony that following the couple's separation, C.G. removed J.H. and Child from her medical and dental policies and would not continue to provide coverage for Child. The trial court found other documentation similarly demonstrated that C.G. was not a parent, and that J.H. did not hold her out to be a parent to others. Specifically, on school and medical forms, C.G. was listed as an emergency contact or as "partner" to J.H., rather than as a parent or mother, and on certain paperwork for activities, she was omitted entirely. *See id.* at 7.

Focusing on the pre-separation period of time, the court evaluated the various and conflicting testimony on C.G.'s discharge of parental duties toward Child. The trial court found it significant that J.H. did not consult C.G. when choosing Child's doctor, preschool, and extra-curricular activities, and J.H. was responsible for the scheduling of Child's appointments, events, and made the childcare arrangements. The ***428** court found C.G. occasionally attended activities, appointments, and provided care; however, it further found that such contributions did not amount to the discharge of parental duties, and that J.H. did not encourage C.G. to assume the status of a parent. *See id.* at 8. Turning to the couple's finances, the trial court highlighted that J.H. testified that she solely purchased the items necessary for Child's care, and the couple split household expenses. The court found C.G. financially contributed to the household overall which created a tangential benefit to Child. *Id.*

With respect to C.G.'s family and testimony offered by her daughters and father reflecting familial titles, such as, in the case of C.G.'s parents, "Grandma A[.]" and "Grandpa J[.]," the court found the interactions were incidental to J.H. and C.G.'s relationships and titles were created for convenience rather than demonstrating an actual familial bond or connection. *See id.* at 8.

The court briefly touched on whether a parent/child bond existed between C.G. and Child. It acknowledged that because the hearings were pursuant to preliminary objections and not a custody determination, evidence was not offered directly on the subject of a bond. It found, nevertheless, that testimony elicited at the hearing demonstrated that Child is well-adjusted and does not request to see C.G. *See id.* at 9.

Finally, the court reviewed evidence regarding the post-separation conduct of C.G. It noted that C.G. did not request to be involved in the educational, medical, or ****897** day-to-day decisions concerning Child, C.G. sent nominal care packages, but has only seen Child once since July 2012, in March 2014, when he and J.H. visited Florida. *See id.* The court found that the level of contact for a period of approximately four years is not consistent with a person who has discharged parental duties or assumed parental status. *Id.* at 10. It did not credit C.G.'s assertion that J.H. withheld Child; rather it found J.H. permitted occasional phone contact, provided updates via text messages and email, and accepted gifts for Child. *See id.* It noted J.H.'s account that such interactions were consistent with C.G.'s overall involvement in Child's life

and the same as ***429** the type of involvement she permitted other friends to have. *Id.* The court concluded that "the parties' post-separation conduct is consistent with the finding that [C.G.] was not a parent to the child." *Id.*

C.G. filed a direct appeal arguing, inter alia, the trial court erred in ruling she was not a parent under Section 5324(1) because she and J.H. jointly conceived and raised Child. The Superior Court concluded the trial court did not err because Pennsylvania "case law has consistently treated same-sex life partners who have not adopted a child as third parties for purposes of custody matters" and C.G. has failed to cite to a statute or case law establishing a non-biological, non-adoptive former partner can be a parent. *C.G. v. J.H.*, 172 A.3d 43, 51-52 (Pa. Super. 2017). C.G alternatively argued the trial court erred in finding that she did not stand in loco parentis to Child. The Superior Court concluded that the trial court's holding was based "on the unique facts of this case" and it's opinion "reflect[ed] a careful, thorough, and proper consideration of the evidence presented by ***both*** parties, and did not, as C.G. alleges, simply disregard the evidence in her favor." *Id.* at 58-59. Because the decision of the trial court rested on credibility determinations made within the trial court's discretion, the Superior Court affirmed the ruling that C.G. did not stand in loco parentis to Child. *See id.* at 59. Finally, the Superior Court addressed and dismissed C.G.'s argument that the trial court erred by affording too much weight to the post-separation conduct of the parties in its analysis. It observed that the trial court did not find that C.G. was denied standing based on her post-separation conduct; rather, the trial court viewed all of the evidence, including pre- and post-separation conduct, when it evaluated whether C.G. ever stood in loco parentis to Child. *Id.* at 60.

In a concurring opinion, Judge Musmanno questioned whether C.G. should be treated as a third-party for the purpose of custody and suggested "it may be time to revisit the issue of the appropriate standard and presumptions to be applied in determining standing where a child is born during a same-sex relationship." *Id.* at 60 (Musmanno, J., concurring). ***430** He further notes that same-sex marriage was not allowed in Florida at the time, and suggests that if C.G. were a male, she would have standing as a parent, seemingly assuming that J.H. and C.G. would have formally married had it been legal or had they been in a heterosexual relationship. *See id.* n. 1.

We granted C.G.'s petition for allowance of appeal to consider the following question.

> Whether the Superior Court erred in affirming the decision of the trial court that a former same-sex partner lacked standing both 1) as a parent and 2) as a party who stood in loco parentis to seek custody of the child born during her relationship with the birth mother where the child was conceived via assisted reproduction with an anonymous sperm donor and the parties lived together as a ****898** family unit for the first five years of the child's life.

C.G. v. J.H., —— Pa. ——, 179 A.3d 440 (2018) (per curiam).

II.

[1] **[2]** **[3]** Before addressing the arguments of the parties, we outline some general principles regarding standing in custody matters. The fundamental concept of standing ensures that a party seeking to litigate a matter has a substantial, direct, and immediate interest in the subject-matter of the litigation. *Ken R. on Behalf of C.R. v. Arthur Z.*, 546 Pa. 49, 682 A.2d 1267, 1270 (1996); *see D.G v. D.B.*, 91 A.3d 706, 708 (Pa. Super. 2014). "In the area of child custody, principles of standing have been applied with particular scrupulousness[.]" *D.G.*, 91 A.3d at 708. This stringent application of standing principles serves to protect both the interest of the court system by ensuring that actions are litigated by appropriate parties and the interest in keeping a family unit free from intrusion "by those that are merely strangers, however well-meaning." *Id.* (citation omitted). Indeed, in evaluating whether a Washington state statute conferring standing to "any person" to seek visitation of children, the United States Supreme Court has recognized the significant interest at stake in the context of persons seeking judicial intervention to gain visitation or custody of children. "The liberty interest ... of parents in the ***431** care, custody and control of their children-is perhaps the oldest fundamental liberty interest recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). In Pennsylvania, Section 5324 of the Domestic Relations Code limits the classes of persons deemed to have a substantial, direct, and immediate interest in the custody of children by conferring standing only upon "(1) a parent of the child[;] (2) a person who stands in loco parentis to the child[; and] (3) a grandparent of the child who is not in loco parentis to the child[,]" under certain circumstances. 23 Pa.C.S. § 5324. Determining standing in custody disputes is a threshold issue that must be resolved before proceeding to the merits of the underlying custody action. *K.C. v. L.A.*, 633 Pa. 722, 128 A.3d 774, 779 (2015). It "is a conceptually

distinct legal question which has no bearing on the central issue within the custody action-who is entitled to physical and legal custody" of a child in light of his or her best interests. *Id.* Issues of standing are questions of law; thus, the standard of review is de novo and the scope of review is plenary. *K.W. v. S.L.*, 157 A.3d 498, 504 (Pa. Super. 2017). With that in mind, we turn to the question of C.G.'s standing in the instant case.

III.

A. *Standing as a parent*

[4] C.G. argues that she is a "parent" to Child under 23 Pa.C.S. § 5324(1) because Child was conceived via assistive reproductive means using an anonymous sperm donor; Child was born to C.G.'s partner, J.H., during their relationship; C.G. participated in parenting Child; and C.G., J.H., and Child lived together as a family unit for the first five years of Child's life. C.G.'s Brief at 19, 24. She contends the Superior Court erred when it held the term "parent" is limited to the biological or adopted parents of a child. She urges this Court to hold that legal parentage under Section 5324(1) should include those who intend to bring a child into the world with the use of assistive reproductive technology and then co-parent the child subsequently born through that process, in addition to the traditional concepts of parentage by biology and adoption. ***432** *See id.* at 21. She highlights that ****899** medical options to conceive are varied and open to a variety of intended parents.[4] Moreover, same-sex couples, in particular, necessarily feature non-biological parent/child relationships because the couple "must turn to donor gametes to conceive." *Id.* at 25. C.G. reasons that reading this Court's decision in *Ferguson v. McKiernan*, 596 Pa. 78, 940 A.2d 1236 (2007) with the Superior Court's decisions in *In re Baby S.*, 128 A.3d 296 (Pa. Super. 2015); *J.F. v. D.B.*, 897 A.2d 1261 (Pa. Super. 2006); and *L.S.K. v. H.A.N.*, 813 A.2d 872 (Pa. Super. 2002), illustrates that a genetic connection to a child is not determinative of legal parentage in cases involving assistive reproductive technologies. *See id.* at 27-35.

Consequently, C.G. advocates for an intent-based approach to determining legal parentage when a child is born through the use of assistive reproductive technology. *See id.* at 27-35. C.G. also posits that this intent-based approach is consistent with how other jurisdictions and the Uniform Parentage Act (2017) have addressed related issues.[5] C.G.'s Brief at 35-38.[6]

***433** J.H. emphasizes the stringent test applied in determining who has standing in child custody matters is essential to preventing unnecessary intrusion into a family. *See* J.H.'s Brief at 38-42. She continues that the cases C.G. relies on for the proposition that parentage may be determined by intent do not support that reading of the case law because those cases do not relate to parentage by intent, but parentage by mutual assent of the parties. *Id.* at 49. She continues that "it would be wrong to allow [C.G] to be deemed a legal parent ****900** in the absence of [J.H.'s] assent, especially when [C.G.] outwardly voiced objections to the pregnancy and thereafter failed to discharge parental duties." *Id.* J.H. notes that although C.G. accuses the trial court of relying on discriminatory laws in concluding she was not a parent, the court undertook an examination of the evidence to evaluate the intent of the parties in the conception of Child and C.G.'s discharge of parental duties, in its in loco parentis analysis, which is the same standard C.G. advocates for in determining parentage when a child is born via assistive reproductive technology. *Id.* at 50. She emphasizes the factual findings made by the trial court regarding C.G.'s participation in Child's life and asks this Court to disregard C.G.'s factual assertions that were not credited by the trial court.[7] *See id.* at 50-57. She maintains ***434** that C.G. is not a parent based on the credible evidence accepted as fact by the trial court. *See id.* at 60.

[5] Section 5324 does not define the term parent. "Absent a definition in the statute, statutes are presumed to employ words in their popular and plain everyday sense, and the popular meaning of such words must prevail." *Centolanza v. Lehigh Valley Dairies, Inc.*, 540 Pa. 398, 658 A.2d 336, 340 (1995) (citing *Harris-Walsh, Inc. v. Borough of Dickson City,* 420 Pa. 259, 216 A.2d 329 (1966)). The popular and everyday meaning of the term parent plainly encompasses a biological mother and a biological father and persons who attain custody through adoption, and our case law supports those applications. *See J.F.*, 897 A.2d at 1273 ("Well-settled Pennsylvania law provides that persons other than a child's biological or natural parents are 'third parties' for purposes of custody disputes." (citation omitted)); *Faust v. Messinger*, 345 Pa.Super. 155, 497 A.2d 1351, 1353 (1985) (Recognizing, "[t]he entire body of law pertaining to adoption harmonizes in order to place an adopted child in the shoes of a natural child in all legal respects[.]" However, the reality of the evolving concept of what comprises a family cannot be overlooked. *See Troxel*, 530 U.S. at 63, 120 S.Ct. 2054 ("The composition of families varies greatly from household to household."); *J.A.L. v. E.P.H.*, 453 Pa.Super. 78, 682

A.2d 1314, 1320 (1996) (Observing, "increased mobility, changes in social mores and increased individual freedom have created a wide spectrum of arrangements, filling the role of the traditional nuclear family[.]"). Thus, C.G. directs our attention to cases that specifically involve the use of alternative means of conceiving and or reproducing through assistive reproductive technologies, and asks this Court to revisit and expand the definition of parent to include persons involved in the process but bearing no biological connection to the resulting child.[8]

****901** ***435** *J.F. v. D.B.*, involved the relative rights of parties to a surrogacy agreement vis-à-vis the resulting triplets. In that case, an unmarried couple used the services of a surrogate, an egg donor, and the father's sperm to reproduce. The gestational carrier, who bore no genetic relation to the triplets she delivered, began misinforming Father and his partner, the intended-mother of the children, about the pregnancy and ultimately took them home and assumed them as her own. The trial court voided the surrogacy contract, and concluded the gestational carrier stood in loco parentis and was the children's legal mother. On appeal, the Superior Court held that the gestational carrier was a third party and had not established in loco parentis as she "took custody of the children in flagrant defiance of Father's wishes," it further held the trial court erred in voiding the surrogacy contract and concluding the gestational carrier was the legal mother. *Id.* at 1280. The surrogacy contract at issue identified Father as "Biological Father or Adoptive Father" and his partner as "Biological Mother or Adoptive Mother." *J.F.,* 897 A.2d at 1265. Although Father's partner was not named in the action, the Superior Court concluded the trial court erred in voiding the surrogacy contract. The court declined to rule on the propriety of surrogacy contracts in general, leaving that task for the General Assembly to address. *J.F.*, 897 A.2d at 1280. It is undisputed that C.G. was not a party to a contract in connection ***436** with Child's birth, and her reliance on *J.F.* to support the intent-based approach to parentage is misplaced.

This Court addressed a situation involving contracting for release of parental rights in the context of assistive reproductive conception in *Ferguson v. McKiernan*. Mother in that case sought the assistance of a former paramour (Donor) in conceiving a child. Although reluctant initially, Donor agreed to provide his sperm for purposes of in vitro fertilization after Mother agreed to release him from any rights and or obligations attendant to paternity. *See Ferguson*, 940 A.2d at 1239. His identity was intended to remain confidential, and following the birth of the twins, Mother acted in accordance with the agreement for approximately five years at which time she filed a support action against Donor. The trial court specifically found that Mother and Donor had formed a binding oral contract to release Donor from parental obligations in exchange for his participation in conception; however, it voided the contract reasoning a parent cannot bargain away children's right to support, as allowing such agreement would violate public policy. *See id.* at 1241. This Court disagreed that enforcing such an agreement violated public policy, particularly "in the face of the evolving role played by alternative reproductive technologies in contemporary American society." *Id.* at 1245. The focus of our analysis was the enforceability of what was determined to be a binding oral contract. Our reasoning, in part, follows.

> ****902** [W]e cannot agree with the lower courts that the agreement here at issue is contrary to the sort of manifest, widespread public policy that generally animates the court's determination that a contract is unenforceable. The absence of a legislative mandate coupled to the constantly evolving science of reproductive technology and the other considerations highlighted above illustrates the very opposite of unanimity with regard to the legal relationships arising from sperm donation, whether anonymous or otherwise. This undermines any suggestion that the agreement at issue violates a "dominant public policy" or "obvious ethical standards" ***437** sufficient to warrant the invalidation of an otherwise binding agreement.

Id. at 1248 (internal citations omitted). We found it noteworthy that but for the agreement between Donor and Mother, the children at the center of the issue would not have come into being. *Id.* Thus, we concluded that the agreement obviating Donor of his legal parental rights and obligations was indeed enforceable. *Id.*

More recently, the Superior Court addressed establishing parentage by contract in the context of a surrogacy arrangement where the intended mother was not biologically related to the resulting child in *In re Baby S.* In that case, S.S. and her Husband decided to become parents, and S.S. underwent fertility treatments to achieve that end. Eventually, the couple entered into a service agreement with a company that coordinates gestational carrier arrangements, identifying S.S. and Husband as the intended parents. The agreement provided that the intended parents could terminate the agreement provided gestational carrier had not undergone the necessary procedure to produce pregnancy; in the event

she had, the intended parents could still terminate the agreement, but only after confirmation the gestational carrier was not pregnant. *See In re Baby S.*, 128 A.3d at 298. S.S. and Husband were matched with a gestational carrier in Pennsylvania. They next entered into a service agreement with an egg donation agency, and entered into an ovum donation agreement with an anonymous egg donor providing, in part, "that the Intended Mother shall enter her name as the mother and the Intended Father shall enter his name as the father on the birth certificate of any Child born from such Donated Ova.... Donor understands that the Intended Parents shall be conclusively presumed to be the legal parents of any Child conceived pursuant to this Agreement." *Id.* at 299-300 (citations omitted). Following the selection of the egg donor, the couple entered into a gestational contract with gestational carrier providing the intended parents were to assume legal responsibility for any child born pursuant to the agreement and that intended mother wished to be the mother of a child who was biologically ***438** related to intended father. *See id.* The gestational carrier became pregnant with an embryo created from Husband's sperm and the anonymous egg donor's egg. S.S. expressed gratitude and largely financed the procedure, and she and Husband attended the twenty-week ultrasound. *Id.* However, prior to the child's birth, S.S. refused to sign the necessary paperwork to have her named on the child's birth certificate because she and Husband were experiencing marital problems. While pregnant, the gestational carrier sought a court order declaring S.S. and Husband to be the legal parents of the child. In the meantime, Baby S. was born, and gestational carrier was named as the mother, and no name was listed for the father. Husband took custody of Baby S. S.S. filed a response and new matter arguing the gestational carrier contract was unenforceable. Following hearings, the trial ****903** court entered an order declaring S.S. and Husband as the legal parents, and resolving other ancillary matters. *Id.* at 301. S.S. appealed to the Superior Court arguing inter alia, the legislature has evidenced its reluctance to sanction surrogacy contracts in the Commonwealth by declining to enact laws recognizing their validity; Pennsylvania provides only two mechanisms to parentage, biology and adoption, and neither situation applies to surrogacy agreements; the Court cannot authorize a new means by which legal parentage is established, and the contract violates public policy by creating a parent/child relationship without an adoption or judicial oversight. *See id.* at 303. Drawing largely from our decision in *Ferguson*, the court concluded that S.S. failed to demonstrate the surrogacy contract was against public policy. *See id.* at 306. The court disagreed with the position of S.S. that the lack of legislative direction regarding surrogacy agreements implies disapproval. Rather, the court reasoned, "the absence of a legislative mandate one way or the other 'undermines any suggestion that the agreement at issue violates a dominant public policy..." *Id.* The court acknowledged, as this Court did in *Ferguson*, that "case law from the past decade reflects a growing acceptance of alternative reproductive arrangements in the Commonwealth." *Id.* Finally, the court expressly disagreed with S.S.'s assertion that a biological relationship or ***439** formal adoption are the only ways to attain the status of a legal parent in Pennsylvania:

> Further, the Adoption Act is not the exclusive means by which an individual with no genetic connection to a child can become the legal parent; and nothing in the Adoption Act evinces a "dominant public policy" against the enforcement of gestational contracts. The legislature has taken no action against surrogacy agreements despite the increase in common use along with a [Department of Health] policy to ensure the intended parents acquire the status of legal parents in gestational carrier arrangements. Absent an established public policy to void the gestational carrier contract at issue, the contract remains binding and enforceable against [S.S.].

Id. at 306 (citation omitted).

It is beyond cavil that parentage is established either through a formal adoption pursuant to the Adoption Act[9] or when two persons contribute sperm and egg, respectively, either through a sexual encounter or clinical setting, and an embryo is formed that is carried to term and results in a child. However, cognizant of the increased availability of reproductive technologies to assist in the conception and birth of children, the courts are recognizing that arrangements in this latter context may differ and thus should be treated differently than a situation where a child is the result of a sexual encounter. Specifically, the willingness of persons to act as sperm donors, egg donors, and gestational carriers, is at least somewhat dependent on the extinguishment of the donor or carrier's parental claim to any resulting child and the intended parent's release of any obligation to support the child. *See, e.g., In re Baby S.*, 128 A.3d at 298-300 (Egg Donor and Gestational Carrier's respective contracts outlining intended parents were to be deemed legal parents). Given this, and especially in the absence of legislative guidance surrounding this intimate and sensitive undertaking, it seems obvious that contracts regarding the parental status of the biological contributors-whether one is an anonymous contributor or known ***440** to the intended parent to the

**904 child be honored in order to prohibit restricting a person's reproductive options. *See Ferguson*, 940 A.2d at 1247-48 (opining, "where a would-be donor cannot trust that he is safe from a future support action, he will be considerably less likely to provide his sperm to a friend or acquaintance who asks, significantly limiting a would-be mother's reproductive prerogatives." (footnote omitted)).

Likewise, the Superior Court recognized that after a child is conceived through the use of a surrogate and an egg donor, both of whom contracted away any parental rights to the child, the non-biologically related intended parent's contract to assume the role of legal parent is enforceable. *In re Baby S.*, 128 A.3d at 298. Consequently, there appears to be little doubt that the case law of this Commonwealth permits assumption or relinquishment of legal parental status, under the narrow circumstances of using assistive reproductive technology, and forming a binding agreement with respect thereto.[10] The courts of this Commonwealth, when faced with the issue and without legislative guidance, have expressly declined to void such contracts as against public policy.

However, this narrow judicial recognition of legal parentage by contract—where a child is born with the assistance of a donor who relinquishes parental rights and/or a non-biologically related person assumes legal parentage—does not afford C.G. the relief she seeks. There was no dispute that C.G. was not party to a contract or identified as an intended-parent when J.H. undertook to become pregnant through intrauterine insemination. Therefore, she is clearly not a parent under any bases that have been recognized by our jurisprudence.[11]

**905 *442 C.G. contends our case law stands for the broad proposition that parentage can be established by intent in situations where a child is born with the aid of assistive reproductive technology. It does not. The jurisprudence in this Commonwealth has declined to void contracts involving surrogacy and/or the donation of sperm or ova recognizing a separate mechanism by which legal parentage may be obtained (or relinquished). The facts of C.G.'s case do not place her into this narrow class of cases where legal parent rights and responsibilities have been relinquished or assumed via contract.[12]

C.G. also points to recent decisions in Vermont and Massachusetts to support her intent-based approach. In *Sinnott v. Peck*, —— Vt. ——, 180 A.3d 560 (2017), the Vermont Supreme Court addressed whether a person who is not biologically related to a child, has not adopted a child, and is not married to the child's parent may be the legal parent of the child. In that case, Mother had a one-year-old child, whom she had adopted, when she began her relationship with Partner. When Mother's child was two years old, Mother and Partner jointly decided to adopt another child from Guatemala, where Mother's first child was born. The couple sought to adopt using the same agency Mother had used to facilitate her first adoption; however the agency did not permit same-sex parent adoption. Mother presented herself as the adoptive parent, and ultimately, the **906 second child, M.P., was brought home to Vermont *443 in February 2006 and lived as a family unit together with the couple until 2010. *See Sinnott*, 180 A.3d at 561-63. Following the couple's separation, the family division dismissed Partner's petition to establish parentage based on her assertion that she was the intended mother of both children. *Id.* at 563. The Vermont Supreme Court affirmed the decision with respect to the older child, but concluded the family division erred with respect to the child the parties mutually agreed to adopt. It reasoned that its past case law has "created a legal framework in which parental status is viewed in the absence of marriage, civil union, or biological or adoptive relationship with the child in a narrow class of cases in which the parents intended to bring a child into their family and raise the child together, and did in fact do." *Id.* at 563 (footnote omitted). As we have expressed, our case law has acknowledged a much narrower framework for establishing parentage in the absence of adoption, biology, or a presumption attendant to marriage, and the facts of C.G.'s case do not fit into such a paradigm.[13]

Similarly, C.G.'s reliance on Massachusetts's case law is inapposite to her claim. By statute, Massachusetts, unlike Pennsylvania, provides a presumption that a man is the father of a child born out of wedlock "if he jointly, with the mother received the child into their home and openly held out the child as their child." *Partanen v. Gallagher*, 475 Mass. 632, 59 N.E.3d 1133, 1135 (2016). In *Partanen*, the undisputed facts were that two women were in a committed relationship and jointly undertook to conceive and have children via in vitro fertilization. The couple welcomed two children. Ultimately, the parties separated and the non-biologically related party sought to be declared the presumptive parent. The Supreme *444 Judicial Court of Massachusetts concluded that the statute may be applied in a gender-neutral manner despite the gendered terms it employed and "may be construed to apply to children born to same-sex couples, even though at least one member of the

couple may well lack biological ties to the children." *Id.* at 1138 (footnote omitted).

The instant case is not one where a statutory presumption would be bestowed on a similarly-situated male based on cohabitation in the absence of marriage, and as highlighted throughout, the factual findings of the trial court determined that C.G. did not jointly participate in Child's conception and hold him out as her own. Accordingly, this case does not provide this Court with a factual basis on which to further expand the definition of the term parent under Section 5324(1).[14]

**907 III.

B. *Standing as in loco parentis*

[6] Before outlining the arguments of the parties, this Court has explained in loco parentis as follows:

> *In loco parentis* is a legal status and proof of essential facts is required to support a conclusion that such a relationship exists....
>
> The phrase "*in loco parentis* " refers to a person who puts oneself in the situation of a lawful parent by assuming the *445 obligations incident to the parental relationship without going through the formality of a legal adoption. The status of *in loco parentis* embodies two ideas; first, the assumption of a parental status, and second, the discharge of parental duties. The rights and liabilities arising out of an *in loco parentis* relationship are, as the words imply, exactly the same as between parent and child. The third party in this type of relationship, however, can not place himself *in loco parentis* in defiance of the parents' wishes and the parent/child relationship.

T.B., 786 A.2d at 916-17 (citations omitted).

[7] C.G. argues the trial court erred in its in loco parentis analysis in two respects. First, C.G. contends the Superior Court failed to take into account the presence or absence of a parent-like bond between C.G. and Child. C.G.'s Brief at 50-52, 55. She continues that the primary determinant in establishing in loco parentis standing is whether the third-party lived with the child and the natural parent in a family-setting and developed a bond with the child as a result of the natural parent's participation and acquiescence. *Id.* at 52. She highlights cases where in loco parentis has been conferred on a former-partner based on the parties' decision to have a child together and subsequently living together as a family unit and cases where courts declined to confer in loco parentis status where the petitioning party was more akin to a babysitter, or the parties never lived as a family unit, or where the party assumed a parental status in defiance of the parent's wishes. *Id.* at 54-56. C.G. posits that the trial court failed to focus on the existence of a bond and instead created a new test in its analysis by its categorization of the evidence, i.e., it looked to documents, the parties' finances, and who took primary responsibility for Child. *See id.* at 57.

Next, C.G. contends the trial court erroneously held that the post-separation conduct of the parties was determinative of whether she stood in loco parentis. She continues that concluding that the post-separation conduct of a party disaffirms an in loco parentis relationship runs contrary to appellate case law on the matter. *See* C.G.'s Brief at 61-63. Specifically, she *446 claims the trial court's analysis regarding the post-separation period of time violated three principles of the in loco parentis doctrine, that once attained, the status cannot be lost; post-separation conduct cannot be used to deny a person in loco parentis status; and post-separation conduct may be used to support a finding that a person stood in loco parentis. *See id.* at 63-74. She asks this Court to "hold that the relevant time period in which to examine bonding between the party and the child is the time during which the natural **908 parent fostered or acquiesced to the relationship between the child and the third party."[15] *Id.* at 62.

J.H. counters that C.G.'s position emphasizing the existence of a bond as the determinant factor is misplaced. Rather, to gain in loco parentis status a person must first demonstrate that he or she assumed parental status and discharged parental duties, a fundamental requirement which C.G. failed to establish. *See* J.H.'s Brief at 61-63. She continues that notwithstanding C.G.'s claim, the trial court examined the nature of C.G.'s relationship with Child. J.H. highlights that C.G.'s current view is the trial court erred by failing to conduct a bonding evaluation, appoint a guardian ad litem, or interview Child, despite not making any of these requests before the trial court. *Id.* at 65.

Responding to C.G.'s argument that the trial court placed too much weight on her post-separation conduct, J.H. notes that the trial court and Superior Court recognized that C.G. did not lose her status based on post-separation conduct; rather, her post-separation conduct was consistent with her

pre-separation conduct, i.e., she did not act or hold herself out as a parent to Child. *See id.* at 66-67. Finally, J.H. argues that a rule preventing courts from evaluating post-separation conduct would elevate the rights of former partners over the rights of natural parents because under ***447** 23 Pa.C.S. § 2511(a)(1), parental rights are subject to termination when a parent fails to perform parental duties for a period of at least six months. *See id.* at 68-69. Thus, she maintains post-separation conduct is a relevant factor in looking to whether a party stands in loco parentis.

[8] Section 5324(2) permits a person who stands in loco parentis to a child to petition the court for custody of a child. As noted, gaining in loco parentis status requires the petitioning individual to demonstrate two elements: the assumption of parental status and the discharge of parental duties. *See T.B.*, 786 A.2d at 916-17.

In *T.B.*, on which C.G. relies, a former same-sex partner sought custody rights to a child born during her relationship with the child's Mother. This Court agreed with the conferral of in loco parentis standing on the former partner. Factually, Partner and Mother agreed to have a child together with Mother carrying the child and the Partner choosing the sperm donor. They shared day-to-day parental duties such as taking the child to appointments, the Partner was designated as guardian of child in Mother's will, and she had exclusive responsibility for child when Mother was not present. *See id.* at 914-15. We concluded that the facts demonstrated Partner assumed a parental status and discharged parental duties with the consent of Mother. *Id.* at 920. We also rejected Mother's argument at the time that the legal impossibility of Mother and Partner marrying prohibited the court from conferring on Partner standing based on in loco parentis. "The ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties." *Id.* at 918.

In *J.A.L.*, the Superior Court reversed the trial court's denial of in loco parentis standing to a former same-sex partner. In that case, Mother and Partner agreed to ****909** raise a child together and together selected the sperm donor. Mother and Partner executed a nomination of guardian document, which included a statement reflecting the parties' intent to ***448** raise the child together, and an authorization for consent to medical treatment, allowing Partner to consent to treatment for the child. Following the parties' separation, the trial court concluded Partner lacked standing. The Superior Court disagreed and noted the following.

> The in loco parentis basis for standing recognizes that the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child's best interest. Thus, while it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent. Where such a relationship is shown, our courts recognize that the child's best interest requires that the third party be granted standing so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a natural parent's objection.

Id. at 1319-20.

The court applied the principles of in loco parentis to the facts and concluded that "[t]he inescapable conclusion to be drawn from this evidence is that in both [Mother's and Partner's] minds, the child was to be a member of their nontraditional family, the child of both of them and not merely the offspring of [Mother] as a single parent. The intention is born out by the documents executed by the parties before the child's birth and by [Mother] giving the child [Partner's] surname as a middle name on the birth certificate." *Id.* at 1321. The Superior Court closely examined the record and concluded that the parties' conduct after the child's birth and pre-separation, established the Mother and Partner's intent to create a parent-like relationship with the Partner. It then turned to post-separation conduct, finding that the "contact was reinforced after the parties' separation, visits which occurred with a frequency and regularity similar to that of post-separation ***449** visits by many noncustodial natural parents and thus must be considered adequate to maintain any bond previously created." *Id.* at 1322. Thus, the Superior Court concluded Partner had standing to challenge custody.

[9] The paramount concern in child custody cases is the best interests of the child. *K.C. v. L.A.*, 128 A.3d at 775. The important screening functions of standing requirements protect the child and the family from unnecessary intrusion by third parties. *See D.G.*, 91 A.3d at 708; *K.W.*, 157 A.3d at 503-04. C.G. seeks to have this Court adopt a rule that the decisive factor in this assessment is the existence of a bond between the third party and the child. Our case

law does not support such a loose application of standing principles. The appellate courts of this Commonwealth have consistently described the prerequisites to in loco parentis standing as assumption of parental status and discharge of parental duties.[16] *See* ****910** *Peters v. Costello*, 586 Pa. 102, 891 A.2d 705, 710 (2005); *K.W.*, 157 A.3d at 505. Here, the trial court found C.G.'s evidence lacking in these important regards based on its credibility determinations, faced with conflicting testimony. Of course, it is a concern to the courts whether a child has developed strong psychological bonds, however, such bonds must necessarily be based on the assumption of parental status and discharge of parental duties in order to achieve this legal status. *See J.A.L.*, 682 A.2d at 1319-20. Indeed, if the determining factor were the child's development of a bond with the person seeking standing, it would be of no moment to the court if the bond was forged contrary to the natural parent's wishes. Acceptance of such a rule would undermine well-established principles of in loco parentis analyses. *See T.B.*, 786 A.2d at 917 (explaining that a third party "can not place himself *in loco parentis* in defiance of the parent's wishes and the parent/child relationship").

***450** **[10]** **[11]** Finally, we turn to the question of the court's treatment of C.G.'s post-separation conduct and its bearing on an in loco parentis analysis. As an initial point, we do not disagree with C.G.'s position that the relevant time frame to determine whether a party stands in loco parentis is when the party developed the relationship with the child with the acquiescence or encouragement of the natural parent. Indeed, it is fundamental that a party must have discharged parental duties and assumed parental status in order to gain standing as a third party. The question is of what relevance, if any, is the conduct of the party after there has been some separation between the party and the child. The Superior Court dismissed a mother's argument that her former paramour lost his in loco parentis standing after the parties separated and she remarried in *Liebner v. Simcox*, 834 A.2d 606, 611 (Pa. Super. 2003) (explaining mother had cited no case law to support the proposition that once attained, in loco parentis status could be lost due to change in circumstances). In *J.A.L.*, the Superior Court acknowledged the post-separation conduct of partners to buttress its conclusion that the former-partner of the mother stood in loco parentis. *See J.A.L.*, 682 A.2d at 1322 ("This early contact was reinforced by visits after the parties' separation, visits which occurred with a frequency and regularity to that of post-separation visits by many noncustodial natural parents and thus must be considered adequate to maintain any bond previously created."). We reiterate, the rights and liabilities arising out of in loco parentis are the same as that between child and parent and its status is conferred upon a person who puts him or herself in the situation of a lawful parent. *See T.B.*, 786 A.2d at 916-17. In *J.A.L.*, the court found the post-separation conduct of both parties supported the in loco parentis determination because it was akin to post-separation conduct of many natural parents.

[12] In the instant matter, we agree with C.G. that the post-separation conduct should not be determinative of the issue of standing; however, the conduct by either parent or partner may shed light on the analysis of whether the person seeking standing was ever viewed as a parent-like figure. We ***451** recognize that in some situations a natural parent may seek to withhold a child from a person who has assumed parental status (or another natural parent). *See, e.g.*, *Jones v. Jones*, 884 A.2d 915, 919 (Pa. Super. 2005) (awarding primary physical custody to former-partner of natural mother who gained in loco parentis status and disapproving of mother's continued attempts to exclude her former-partner following the couple's separation). However, this potential for misconduct ****911** does not render the actions of the person seeking in loco parentis status immune from review following a separation. We note in the instant case, despite characterizing the court's analysis of the post-separation contact determinative of whether or not C.G. stood in loco parentis to Child, it was not. The trial court found, and the record supports, that prior to the couple's separation, C.G. did not assume a parental status or discharge parental duties. The trial court simply concluded that the post-separation conduct of C.G. was consistent with its initial determination, as the Superior Court did in *J.A.L.* In loco parentis analyses are necessarily fact-intensive and case-specific inquiries, and we decline to foreclose a trial court from reviewing all relevant evidence in making this important determination that so greatly will impact the family unit.[17]

IV.

In sum, we conclude that C.G. is not a parent under Section 5324(1) for the purpose of seeking custody of Child. We further conclude that the trial court did not commit error by failing to consider the existence of a bond between C.G. and ***452** Child as the decisive factor of whether C.G. stood in loco parentis to Child. Indeed, the trial court undertook to examine all of the evidence of record to determine whether C.G. assumed parental status and discharged parental duties, and we discern no legal error in its analysis. The order of the Superior Court is affirmed.

Chief Justice Saylor and Justices Baer and Todd join the opinion.

Justice Dougherty files a concurring opinion.

Justice Wecht files a concurring opinion in which Justice Donohue joins.

JUSTICE DOUGHERTY, Concurring

The trial court's credibility findings in this case compel the conclusion C.G. lacks standing to seek custody of Child. But in my respectful view, nothing warrants, much less necessitates, the majority's cramped interpretation of "parent" under 23 Pa.C.S. § 5324(1), the inevitable result of which will be the continued infliction of disproportionate hardship on the growing number of nontraditional families — particularly those of same-sex couples — across the Commonwealth. I therefore concur in the result only.

According to the majority, our precedent supports a conclusion parentage for standing purposes may be proven in only four ways: biology, adoption, a presumption attendant to marriage, or "legal parentage by contract — where a child is born with the assistance of a donor who relinquishes parental rights and/or a non-biologically related person assumes legal parentage[.]" Majority Opinion, at 904. Unfortunately, even under this paradigm of parentage, it remains impossible — absent marriage or adoption — for both partners of a same-sex couple to have standing as a parent, as only one can be biologically related to the ****912** child or contract to assume legal parentage. I see no good reason why the Court should continue to impose such an overly-restrictive formulation, which fails to take into account equitable principles and may ultimately ***453** frustrate the paramount concern of protecting a child's best interests. *See* Douglas NeJaime, *The Nature of Parenthood*, 126 Yale L.J. 2260, 2289 (2017) ("[E]ven as principles of gender and sexual-orientation equality have animated shifts in parental recognition, parentage law continues to draw distinctions that carry forward legacies of inequality embedded in frameworks forged in earlier eras.").

The majority correctly observes the reality that what comprises a family is an evolving concept. *See* Majority Opinion, at 900–01, *citing Troxel v. Granville*, 530 U.S. 57, 63, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) ("The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household."); *J.A.L. v. E.P.H.*, 453 Pa.Super. 78, 682 A.2d 1314, 1320 (1996) ("In today's society, where increased mobility, changes in social mores and increased individual freedom have created a wide spectrum of arrangements filling the role of the traditional nuclear family, flexibility in the application of standing principles is required in order to adapt those principles to the interests of each particular child."). Yet despite recognizing the diverse range of parental configurations that now exist, the majority interprets our case law in a manner that continues to primarily tether parentage to traditional notions of biology and adoption. There is a very real and grave risk to this approach, to children and putative parents alike. *See Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, 39 N.Y.S.3d 89, 61 N.E.3d 488, 499 (2016) ("A growing body of social science reveals the trauma children suffer as a result of separation from a primary attachment figure — such as a de facto parent — regardless of that figure's biological or adoptive ties to the children[.]") (collecting sources); NeJaime, 126 Yale L.J. at 2322 ("The harms of nonrecognition are not only practical but expressive. Courts routinely term those who serve as parents but lack biological ties "nonparents" — casting them as third parties who are otherwise strangers to the family.").[1]

***454** Cognizant of these potential harms, I would not interpret our case law so narrowly. Instead, I believe there is room in our precedent — particularly in the absence of any guidance from the legislature — to conclude an individual who lacks biological, adoptive, or marital ties may nevertheless establish standing as a parent to seek custody under 23 Pa.C.S. § 5324(1). *See Sinnott v. Peck*, —— Vt. ——, 180 A.3d 560, 573 (2017) ("[T]he Legislature's inaction to date is not an impediment to our own obligation to resolve the specific cases before us by developing a consistent and coherent approach to defining parenthood within the construct that the Legislature has given us and our prior case law; in fact, it creates a more urgent need for us to act."). Such is certainly the trend in other states. *See id.* at 569-72 ****913** (detailing cases that "reinforce the modern trend" of analyzing non-biological, non-adoptive, and non-marital parenthood by "focusing on the parties' agreement and intentions at the time they brought a child into their home"); NeJaime, 126 Yale L.J. at 2260 (explaining "the law increasingly ... recognizes parents on not only biological but also social grounds" and offering comprehensive analysis of legal trends).

In line with this trend in other jurisdictions, C.G. asks this Court "to clarify that parentage may not only be determined by biology or adoption, but also by the intent of parties who

create a child together using assisted reproductive technology, and then co-parent that child together." C.G.'s Brief at 21. In her view, parentage "turns on whether the party in question had agreed to the conception of the child and whether that party had intended to parent the child following the child's birth." *Id.* at 34. Justice Wecht would similarly "embrace an intent-based test for parentage for persons pursuing parentage ***455** through" assisted reproductive technology. Concurring Opinion, at 917 (Wecht, J.).

In my view, it is unnecessary at this juncture to endorse any particular new test for establishing standing as a parent. As noted, the nature of the family in the modern era continues to evolve, and the various alternative tests proffered above, as well as the tests adopted by other jurisdictions, strongly suggest there may not be a one-size-fits-all approach to adequately address each unique familial situation. *See Brooke S.B.*, 61 N.E.3d at 500-01 (rejecting premise it must "declare that one test would be appropriate for all situations" and thus declining to decide whether, in a case where a biological or adoptive parent consented to the creation of a parent-like-relationship between his or her partner and child after conception, the partner would have standing).

In any event, I am constrained to agree with the majority that "the trial court found as fact that the parties did not mutually intend to conceive and raise a child, and the parties did not jointly participate in the process." Majority Opinion, at 904 n.11. Those findings — which this Court is bound to accept, no matter how seemingly harsh their effect — preclude a holding that C.G. has standing as a parent under any of the proffered definitions of intent-based parentage. Accordingly, I agree that C.G. is not entitled to the relief she seeks, and we must await another case with different facts before we may properly consider the invitation to expand the definition of "parent" under 23 Pa.C.S. § 5324(1).[2]

JUSTICE WECHT, Concurring

***456** Governed by our well-settled standard of review, I join in today's result. Along the way to this conclusion, my analytical journey diverges twice from the path that the learned Majority takes. First, for purposes of adjudicating standing to sue as a parent in cases involving assisted reproductive ****914** technologies ("ART"),[1] courts must probe the intent of the parties. Reliance solely upon biology, adoption and contracts is insufficient. Second, for purposes of deciding *in loco parentis* standing, courts should consider post-separation conduct only when they first are able to determine that the custodial parent has not withheld the child from the other party. Otherwise, custodial parents effectively can preclude most *in loco parentis* claims by non-custodial parties. My thinking on these two points follows.

Parentage and Intent

In affirming the Superior Court, the Majority correctly notes that the appellate panel's cramped definition of parentage as including only biological and adoptive parents overlooked the recognition of parentage by contract expounded in *Ferguson v. McKiernan*, 596 Pa. 78, 940 A.2d 1236 (2007) and *In re Baby S.*, 128 A.3d 296 (Pa. Super. 2015).[2] This is fine as far as it goes. But it does not go far enough. The Majority draws too narrowly upon *Ferguson* and *Baby S.*, validating ***457** solely their contractual jurisprudence but declining to proceed further.[3] While a measured approach to standing is always appropriate,[4] the Majority's analysis, while reasonable in the main, nonetheless fails to imagine and embrace the intent-based paradigm that ART-related child custody disputes require.

Consider *Ferguson*. There, the trial court found, and this Court accepted, that the mother approached her former intimate partner with a request for sperm donation so that she could conceive a child via *in vitro* fertilization. *Ferguson*, 940 A.2d at 1239. Only after the mother convinced the sperm donor that he would bear no legal or financial responsibility for the prospective child did the donor agree to the arrangement. *Id.* The donor did not pay for the *in vitro* fertilization, did not complete most of the paperwork, and did not attend prenatal appointments. *Id.* at 1240. After mother went into premature labor, she requested the sperm donor to ****915** join her at the hospital, where she delivered twins. Afterward, with the mother's agreement, the sperm donor maintained anonymity, assumed no financial responsibility, and was not listed on the birth certificates. *Id.* Indeed, the donor had little contact with the mother or twins following the birth, provided no financial support, and assumed no paternal duties. *Id.* Rejecting the mother's public policy arguments, this Court decided that the oral contract between the mother and the sperm donor was enforceable and held that the mother was foreclosed from seeking child support from the donor. *Id.* at 1247-48.

***458** Viewing *Ferguson* from the perspective of the parties' intent, the same adjudication would result. The sperm donor's

actions bore all the hallmarks of a clinical donation of gametes calculated and designed to result in no parental role for the donor. The mother acted in accordance with that intention for approximately the first five years following the twins' births. She did not seek financial support, and she did not attempt to involve the sperm donor in the lives of her children. Neither the mother nor the sperm donor ever manifested any intent for the latter to be a parent to the twins at any time before or after the birth; in fact, both the mother and the donor expressed and acted upon the opposite intention. And then, some five years on, the mother sued the sperm donor for child support. It was this volte-face that our Court declined to approve. By intention, as well as by contract, the mother's case for support was a non-starter.

Now, consider *Baby S.* There, in determining that the ex-wife was the legal parent of the child born through ART, the Superior Court focused upon the existence of a contract. But the appellate panel just as easily could have ruled based upon the parties' intent. The father and ex-wife signed a contract to enter into a surrogacy with a gestational carrier and evidenced their intent to be the legal parents of the resulting child. *Baby S.*, 128 A.3d at 298. The ex-wife's communications with the gestational carrier demonstrated the ex-wife's intent to be a parent to the child. *Id.* at 299. The father and the ex-wife chose a gestational carrier in Pennsylvania because the ex-wife could be listed on the birth certificate without having to go through the adoption process. *Id.* at 298. When the pregnancy was confirmed, the ex-wife and the father moved to a new home in order to accommodate a larger family. They attended the twentieth-week ultrasound and acted in a way that suggested that they intended to parent the child. *Id.* at 300. Only when the father and ex-wife began to experience marital difficulties did the ex-wife begin to act in a manner contrary to that joint intention. *Id.* at 301. Because the ex-wife gave every indication that she was the parent of the child conceived through ART, the Superior Court could have relied upon her ***459** expressed and manifest intentions in order to find that she was the child's legal parent. That the Superior Court relied instead upon the existence of a contract is no contradiction of this principle.

Viewed through the lens of the parties' intentions, the *Ferguson* and *Baby S.* cases arrive at the same destination reached *via* a contract-based analysis. This is unsurprising, inasmuch as the contract evidences the intent. But the point of this exercise is that ART requires us to hypothesize other scenarios, cases in which an intent analysis would not foreclose a valid claim to parentage while a contract-based approach would. Under the Majority's formulation of parentage by contract, one becomes a parent through use of ART and the formation of a binding contract regarding ART. Maj. Op. at 904–05. Fair enough. But suppose that the members of ****916** a same-sex couple decide that one partner will become pregnant *via* ART and sperm donation; it is entirely foreseeable that only the partner being impregnated would contract with the ART facility. The second partner, who would have no biological connection to the child, would have no contract establishing a claim to parentage. Suppose further that no adoption is formalized, and that the couple separates after years in which both parties diligently raise and lovingly support the resulting child. Under the Majority's approach, the second partner has no claim to parent status and no standing to pursue any custody rights. Such a result is by no means dictated by the terms or spirit of our custody standing statute, which speaks in this regard only of "[a] parent of the child", thus begging the question now at hand. *See* 23 Pa C.S. § 5324(1). As well, such a result supplants the best interests analysis, eliminates the focus on the child's needs, and fails entirely to comport with contemporary family realities and especially the circumstances of Pennsylvanians who are parenting in same-sex relationships.

But, wait, you say. The second partner in the scenario imagined above almost certainly would enjoy standing in custody under an *in loco parentis* theory. *See* 23 Pa C.S. § 5324(2). The problem is not so simple. First, if the couple ***460** separates shortly after (or before) the child's birth, the second partner -- who fully intended to be a parent (and this with the first partner's knowledge and consent) -- will have no claim to *in loco parentis* standing, there having been insufficient time for assumption of parental status and discharge of parental duties. *See T.B.*, 786 A.2d at 916-17. Second, and more significantly, resort to an *in loco parentis* approach concedes the parentage claim, which is the very issue that is at bar here. The point is that the second partner in these scenarios should be considered a parent for purposes of standing in custody. *In loco parentis* generally is considered a species of standing sought by *third* parties.[5]

In the past, Pennsylvania courts have found that same-sex partners have standing under the *in loco parentis* rubric. This paradigm has evolved with time and with the forward march of humanity. As a matter of law, a same-sex partner who participated in the decision to bring a child into the world, to raise, to educate, to support and to nurture that child, is no longer a third party. He or she is a parent. *See* Douglas NeJaime, *The Nature of Parenthood*,

126 Yale L.J. 2260, 2317-23 (June 2017) (discussing the practical and expressive harms attending non-recognition of parentage); Jillian Casey, Courtney Lee, & Sartaz Singh, *Assisted Reproductive Technologies*, 17 Geo. J. Gender & Law 83, 117 (2016) (identifying "judicial parentage tests that consider factors beyond intent" as a primary source of disparate treatment of same-sex couples seeking parentage). At this late date, there is no defensible reason that partners in scenarios like the one sketched above should not be recognized as parents under the standing statute. It bears emphasis that nothing in the custody statute promulgated by our General Assembly bars such an intent-based approach. Only the judiciary stands in the way.

***461** Observe that members of an opposite-sex couple availing themselves of ART in a ****917** situation identical to the one described above would not be consigned to such limbo. If the female partner contracts for ART with a sperm donor and the male partner is not a party to that contract and does not adopt the child, the male partner nonetheless can find shelter (and, more importantly, standing) in the paternity by estoppel doctrine in the event of a separation.[6] The male partner would need only to show that he held the child out as his own. He would not have to attempt intervention as a third party who seeks to stand in the shoes of a parent. I perceive no need or reason for treating these hypothetical parties differently when both intended fully to be parents and when both acted in accordance with those intentions.

While I would embrace an intent-based test for parentage for persons pursuing parentage through ART, I nonetheless concur with the Majority's determination that C.G. was not a parent under the facts of this case as found by the trial court.[7] As the Majority notes, the trial court found that J.H. was credible when she testified that C.G. never intended to be a parent to Child and that C.G. did not act as a parent. Further, the trial court credited testimony that C.G. and J.H. reached no mutual decision to become parents. Given that there was no documentary evidence of C.G.'s intent to parent, and given that the trial court found, consistent with the record, that C.G.'s actions were not those of a parent, I join the Majority's conclusion that C.G. did not have standing as a parent pursuant to 23 Pa.C.S. § 5324.[8]

***462 In Loco Parentis**

Turning to the issue of *in loco parentis* standing, I agree with the Majority that the bond between a child and a third party is not dispositive. Maj. Op. at 909–10. I further agree that "post-separation conduct [of the third party] should not be determinative of the issue of [*in loco parentis*] standing." *Id.* at 910. Nonetheless, the Majority would (and in fact does) permit the consideration of post-separation conduct as "shed[ding] light on ... whether the person seeking standing was ever viewed as a parent-like figure." *Id.* I differ with the Majority as to how post-separation conduct should be considered and as to the manner in which such conduct plays a role in this case.

The Majority recognizes that there is "potential for misconduct" inasmuch as a parent can withhold the child from the third party in an attempt to destroy an *in loco parentis* relationship. *Id.* Though it acknowledges this concern, the Majority deems it no bar to consideration of C.G.'s post-separation conduct, and "decline[s] to foreclose a trial court from reviewing all relevant evidence...." *Id.* The elasticity of this standard gives me pause. If there is evidence that the third party has assumed parental status and discharged parental duties during the relationship, and if there is evidence that the custodial parent purposefully ****918** withheld the child, then post-separation conduct should not be considered for purposes of denying standing to the third party. This Court should not countenance even the suggestion that a parent unilaterally can erase from a child's life a third party who, in all material respects, acted as a parent.

The Majority maintains that the trial court in this case did not premise C.G.'s lack of standing upon her post-separation conduct. *Id.* Instead, the Majority opines, the trial court "simply concluded" that the post-separation conduct was "consistent" with the trial court's conclusion that C.G. did not act ***463** as a parent. *Id.* In ruling that C.G. did not act *in loco parentis*, the trial court considered that C.G. removed J.H. and Child from C.G.'s health insurance after separation and reasoned that doing so was consistent with C.G.'s post-separation conduct of ending any financial support and arranging for J.H. and Child to leave the shared residence. Trial Court Opinion at 6-7. The trial court also emphasized the fact that C.G.'s extended family did not maintain a relationship with Child following separation. *Id.* at 8. Finally, the trial court devoted one of the six categories it considered in determining *in loco parentis* standing to post-separation conduct. *Id.* at 9-10. In fact, the trial court began that portion of its analysis with: "Perhaps most telling that [C.G.] did not assume the role of a parent is her conduct post-separation."

Id. at 9. Given that this case hinged upon credibility findings — in that the parties and their witnesses agreed upon very few facts — it appears that C.G.'s post-separation conduct weighed heavily in the trial court's finding that C.G. lacked standing to pursue custody.

The standard that Pennsylvania courts should follow is to foreswear consideration of any post-separation conduct until after they determine whether the custodial parent withheld the child from the third party. Only if the trial court decides that the parent did not withhold the child should the court consider post-separation conduct. This will prevent post-separation conduct from being deployed as a thumb upon the scale unless and until the trial court determines that it was the third party, rather than the custodial parent, who decided to limit post-separation contact. Unlike the Majority, I do not view the trial court's consideration of post-separation conduct here as merely confirming its decision on standing. Instead, it appears that this consideration figured significantly as a distinct and influential factor in the trial court's analysis.

That said, I recognize and respect the reality that the trial court made a finding that J.H. did not withhold the child from C.G. *Id.* at 10. Accordingly, even under the test that I advance here, the trial court would have been free to consider the post-separation conduct.

***464** * * * * * *

In sum, I think that today's case is a missed opportunity for this Court to address the role of intent in analyzing parental standing in ART cases. I differ as well with the Majority's assessment of the manner in which post-separation conduct can be considered in weighing *in loco parentis* claims. These differences notwithstanding, we are bound on appellate review by the trial court's fact-finding and credibility determinations. Under that familiar standard, regardless of my divergences from the Majority's rationale, C.G. lacked standing to pursue custody here. Accordingly, I concur in the result.

Justice Donohue joins the concurring opinion.

All Citations

648 Pa. 418, 193 A.3d 891

Footnotes

1 The parties agree that at the time of Child's birth in 2006, same-sex second-parent adoption was not legal in Florida, and although it became legal in 2010, the parties did not discuss pursuing adoption. *See* N.T., 2/5/16, at 8 (C.G. testified the parties did not talk about adoption following its legalization in Florida); *id.* at 57(J.H testified the issue of adoption "was never raised."); *see also* N.T., 4/12/16, at 310.

2 C.G. lists the dates of J.H. and Child's move from the shared residence and their move to Pennsylvania as occurring in February and July of 2011, respectively. *See* Custody Compl., 12/8/15, at ¶ 12. However, the record indicates that the relevant time of separation began in 2012. *See*, *e.g.* N.T., 2/5/16, at 5-6 (C.G. testified that she and J.H. separated in February 2012 and that J.H. moved to Pennsylvania in July 2012, and acknowledged the error in the custody complaint.).

3 Because the trial court sustained the preliminary objection regarding standing, it did not rule on J.H.'s preliminary objection in the nature of a demurrer.

4 C.G. notes that in 2014, for example, there were 60,000 live births that were the result of in vitro fertilization and the number of children born as a result of donor gametes and gestational carriers has increased. *See* C.G.'s Brief at 25.

5 C.G. devotes a portion of her argument to the state of law in Florida at the time of her relationship with and separation from J.H., in particular its restrictions on same-sex marriage and adoption around the time of Child's birth. *See* C.G.'s Brief at 39-47. She argues the trial court's analysis and Superior Court's affirmance did not give due consideration to these legal barriers and instead "the courts below considered the state of law in Florida as a legal conclusion that C.G. is not a parent." *Id.* at 46. She posits to allow these legal impediments to serve as evidence that she lacked intent is unfair to C.G., and others similarly situated "as it allows the discriminatory treatment of LGBT parents-even where the treatment has been held to be unconstitutional-to continue to injure litigants in perpetuity." *Id.*
C.G. seems to suggest she is entitled to a presumption of parentage based on, inter alia, the uncontested fact that she and J.H. participated in a commitment ceremony in Florida prior to Florida's recognition of same-sex marriage. *See, e.g. Brinkley v. King*, 549 Pa. 241, 701 A.2d 176, 177 (1997) (OAJC) ("One of the strongest presumptions in Pennsylvania law is that a child conceived or born in marriage is a child of the marriage."). However, addressing whether a commitment ceremony in another state should be considered a marriage for purposes of applying presumptions of parentage is beyond

the scope of the legal issue presented and the facts of this case. The trial court explained in its Pa.R.A.P. 1925(a) opinion that it wished to clarify that the focus of its analysis was on C.G.'s "actions and/or lack of actions. This finding in no way unconstitutionally restricts persons in a same-sex relationship from being able to reproduce and share legal parentage." Trial Ct. Op., 10/31/16. Moreover, it is not disputed that the parties declined to register with their county as domestic partners or pursue adoption once it became legal.

6 Academy of Adoption and Assisted Reproduction Attorneys has submitted an amicus curiae brief in support of C.G. Amicus argues the trial court erred by concluding that biology and adoption are the only means to achieve legal parentage in Pennsylvania, the word "parent" is not sufficiently defined, and Pennsylvania should broaden the concept of parentage to determine who a parent is through the eyes of the child.

7 J.H. further contends that presumptions of parentage are not implicated in this case, despite Judge Musmanno's suggestion in his concurring opinion. *See* J.H.'s Brief at 57-60. Specifically, she acknowledges the unavailability of marriage, but highlights the parties did not formalize their union by registering as domestic partners in their county, an option available to them, and further that Child was born because of the unilateral decision of J.H. *Id.* at 58-59.

8 C.G. argues *L.S.K.* stands for the proposition that Pennsylvania courts have recognized that "a person who intends to create children through assistive reproductive technology ought to be held legally responsible" for the children on the same basis as a parent. C.G.'s Brief at 29. In that case, Mother, L.S.K., and H.A.N. were in a same-sex relationship and Mother eventually bore five children conceived through artificial insemination. *L.S.K.*, 813 A.2d at 874. The couple separated after approximately seven years of living as a family, and H.A.N. filed a complaint for custody. The trial court granted H.A.N. shared legal and partial physical custody, ruling that she stood in loco parentis to the children, *see* 23 Pa.C.A. § 5324(2), not that she was a parent to the children under Section 5324(1). H.A.N. attempted to avoid paying child support for the children, which the trial court denied. The Superior Court affirmed the trial court's determination based on equitable principles: "equity mandates that H.A.N. cannot maintain the status of *in loco parentis* to pursue an action as to the children, alleging she has acquired rights in relation to them, and at the same time deny any obligation for support merely because there was no agreement to do so." *Id.* at 878. However, it did not conclude that H.A.N. was a parent for the purpose of standing requirements. Rather, she was a third party who stood in loco parentis to the children.

9 23 Pa.C.S. § 2101 *et seq.*

10 We do not wish to imply that a biological parent may bargain away his or her child's right to support. *See Kesler v. Weniger*, 744 A.2d 794, 796 (Pa. Super. 2000) (rejecting Father's argument that he had a sexual relationship with Mother in order to help her conceive, under the impression she would not hold him responsible for child support).

11 Notwithstanding the fact that Pennsylvania has not recognized a definition of parent that is based on the mere intentions of two people to be viewed as parents, Justice Dougherty expresses his concern that the failure to now recognize a broader definition results in "a cramped interpretation of 'parent' " that will inevitably inflict continued hardship on non-traditional families, particularly same-sex couples undertaking to start a family. *See* Concurring Opinion, Dougherty, J., *op.* at 913–14. In that regard, Justice Dougherty contends under today's decision "it remains impossible" for both partners in a same-sex couple to have standing as legal parents in the absence of marriage or adoption, "as only one can be biologically related to the child or contract to assume legal parentage." *Id.* at 911–12. Similarly, Justice Wecht acknowledges that the case law in this area has focused on a contractual relationship among intended parents (or persons who wish to renounce parental claims) but concludes the decision today "does not go far enough" and should draw from earlier decisions an intent-based recognition of parentage. *See* Concurring Opinion, Wecht., J., *op.* at 914–16. Justice Wecht further imagines a scenario wherein a same-sex partner may be foreclosed from seeking standing as a parent. *See id.* at 915–16. Respectfully, we disagree, and clarify that nothing in today's decision is intended to absolutely foreclose the possibility of attaining recognition as a legal parent through other means. However, under the facts before this Court, this case does not present an opportunity for such recognition, as the trial court found as fact that the parties did not mutually intend to conceive and raise a child, and the parties did not jointly participate in the process. Indeed, despite the disapproval expressed by the concurring opinions over the development of case law thus far on the evolving definition of the term parent for purposes of standing, Justice Dougherty views it "unnecessary at this juncture to endorse any particular new test for establishing standing as a parent." Concurring Opinion, Dougherty, J., *op.* at 913. We agree that "we must await another case with different facts before we may properly consider the invitation to expand the definition of 'parent.' " *See id.* at 913–14.

Justice Dougherty hypothesizes that it is impossible for both partners in a same-sex marriage to attain legal parentage absent marriage or adoption. With respect for this perspective, we must disagree. We do not view today's decision or the case law as developed to compel such a result. For example, in *J.F.*, Biological Father's unmarried partner was the intended mother of the children they sought to have via use of a surrogate. Although the issue in that case was

not Partner's standing, but rather the non-biologically related surrogate's standing to the children she bore, the Superior Court expressly declined to void the surrogacy contract. *J.F.*, 897 A.2d at 1280. Likewise, in *In re Baby S.*, the Superior Court concluded that S.S., identified as the Intended Mother, in the surrogacy agreement was to be deemed the legal mother. *In re Baby S.*, 128 A.3d at 298. Although S.S. was married to biological Father, the court grounded its reasoning in the principles espoused in the case law involving surrogacy agreements, not the presumption of parentage married persons enjoy. *Id.* There is nothing to suggest in our case law that two partners in a same-sex couple could not similarly identify themselves each as intended parents, notwithstanding the fact that only one party would be biologically related to the child. However, this issue is not before the Court, and we are not tasked with defining the precise parameters of contracts regarding assistive reproductive technology. Likewise, the doctrine of parentage by estoppel, which Justice Wecht contends heterosexual-sex couples may avail themselves of to seek standing but which same-sex couples may not, is not implicated by the facts before this Court.

12 We recognize that C.G. was unable to adopt Child at the time of his birth under Florida law. However, her argument is that adoption should not be the sole means by which a non-biologically related person may obtain legal parentage of a child, and that the intent of the parties should be determinative of the issue of parentage. We note C.G. acknowledged in her complaint for custody that Child was born out of wedlock. Custody Compl., 12/8/15, at ¶ 3. Although she now suggests a presumption should apply, she does not focus her argument on why an informal commitment ceremony, without registering her relationship in her municipality as domestic partners, should compel application of the presumption of parentage that married persons enjoy. We decline to speculate on what actions the parties may have taken had Florida law been different at the time of Child's birth; however, as we have noted, the parties declined to seek recognition of their union by registering as domestic partners and likewise declined to pursue adoption when it became available, while the relationship was still intact.

13 We recognize the view of the concurring Justices favoring a definition of parent that would focus on the intent of the parties as the operative fact in determining who is a parent under Section 5324(1); however the concurrences likewise recognize that this case does not fall into such a framework. *See* Concurring Opinion, Dougherty, J., *op.* at 912–13; Concurring Opinion, Wecht, J., *op.* at 916–17. Accordingly, as expressed *supra*, we agree with Justice Dougherty that it is unnecessary at this time to expand the definition of parent or endorse a new standard under the facts before this Court. *See* Concurring Opinion, Dougherty, J., *op.* at 913–14.

14 We note other jurisdictions have legislatively addressed the issue of parentage where assistive reproductive technology is employed. *See, e.g.*, 13 Del.C. § 8-201 (Delaware statute explaining that a mother-child relationship is established between a woman and a child under a number of circumstances, including, the "woman having consented to assisted reproduction by another woman ... which resulted in the birth of a child" and also outlining the scenarios by which one is deemed a de facto parent); DC Code § 16-407 (Washington, D.C. statute establishing parentage in "collaborative reproduction" in different contexts including gestational surrogacy arrangements and defining parent as the intended parent regardless of a genetic connection to the child). As we have observed, however, in this case C.G. was not a party to an agreement to conceive Child and did not intend to be a parent. Thus, even if this Court or the General Assembly expanded the definition of parent, she would not be entitled to the relief she seeks.

15 The American Academy of Matrimonial Lawyers (AAML), Pennsylvania Chapter has submitted an amicus curiae brief in support of C.G. AAML argues that C.G. has standing as a person in loco parentis to the Child, and the consideration of post-separation conduct is irrelevant and may encourage bad behavior on the part of the parent with custody to withhold the child.

16 The in loco parentis test has been applied in the same fashion regardless of whether the person seeking in loco parentis is a former step-parent or a former same-sex partner who had not married the child's biological parent. *See, e.g. Bupp v. Bupp*, 718 A.2d 1278, 1281-82 (Pa. Super. 1998); *J.A.L.*, 682 A.2d at 1318-19.

17 Indeed, we find persuasive J.H.'s position that it would be incongruous to ignore all post-separation conduct between a third-party and a child for the purpose of assessing whether the party stood in loco parentis, when the Adoption Act provides that a petition seeking involuntary termination of a natural or adoptive parent's rights may be filed if the parent has "evidenced a settled purpose of relinquishing parental claim to a child and has refused or failed to perform parental duties" for a period of at least six months preceding the filing of the petition. 23 Pa.C.S. § 2511. To render all post-separation conduct irrelevant would be to afford a person seeking in loco parentis standing, at any time, a greater advantage to a natural or adoptive parent even in the event the third party had demonstrated his or her relinquishment of parental claims to a child.

1 I do not intend to minimize the significant and fundamental right of biological or adoptive parents to control the upbringing of their children. As the majority properly appreciates, the interest of parents in the care, custody, and control of their

children "is perhaps the oldest [of the] fundamental liberty interest[s.]" Majority Opinion, at 898, *quoting* *Troxel*, 530 U.S. at 65, 120 S.Ct. 2054. This fundamental right necessarily militates caution in expanding the category of those who may be identified as a "parent." However, in my respectful view, the law need not deny the salience of biological or adoptive bonds to recognize the validity of additional indicia of parenthood.

2 Parenthetically, I note my agreement with the majority that the bond between a third party and a child is not dispositive of *in loco parentis* standing. Furthermore, with regard to the issue of post-separation conduct, I agree "the relevant time frame to determine whether a party stands in loco parentis is when the party developed the relationship with the child with the acquiescence or encouragement of the natural parent." Majority Opinion, at 910. I depart from the majority, however, to the extent it implies post-separation conduct can be used **against** a party seeking *in loco parentis* status. *See, e.g.*, *Liebner v. Simcox*, 834 A.2d 606, 611 (Pa. Super. 2003) (rejecting argument "that once *in loco parentis* status has been obtained, it can be lost" due to post-separation conduct); *J.A.L.*, 682 A.2d at 1322 (considering post-separation conduct only to "reinforce" finding third party stood *in loco parentis*).

1 For purposes of the discussion at hand, I include within the ART rubric the full variety of medical interventions designed to allow for reproduction through means other than sexual intercourse, including *in vitro* fertilization, sperm and egg donation, gestational surrogacy, and artificial insemination. *See generally*, Jillian Casey, Courtney Lee, & Sartaz Singh, *Assisted Reproductive Technologies*, 17 Geo. J. Gender & Law 83, 83-85 (2016).

2 *See* Maj. Op. at 904–05. To this list, I would add that one can be found to be a parent, regardless of biology or adoption, through the presumption of paternity, *see* *Brinkley v. King*, 549 Pa. 241, 701 A.2d 176, 178-79 (1997) (stating that a child conceived or born during a marriage is presumed to be the husband's child), and paternity by estoppel. *See* *Freedman v. McCandless*, 539 Pa. 584, 654 A.2d 529, 532-33 (1995) ("Estoppel in paternity actions is merely the legal determination that because of a person's conduct (*e.g.*, holding out the child as his own, or supporting the child) that person, regardless of his true biological status, will not be permitted to deny parentage.").

3 *See* Maj. Op. at 904–05 & n.11.

4 At the time that C.G. filed for custody, the applicable statute provided standing to pursue custody to a parent, a person who stands *in loco parentis*, or a grandparent in certain specified circumstances. 23 Pa.C.S. § 5324 (2011). In response to J.H.'s preliminary objections, C.G. asserted standing as a parent or, alternatively, as someone who stood *in loco parentis* to Child. As the Majority notes, standing in custody cases is governed by statute. *See* *T.B. v. L.R.M.*, 567 Pa. 222, 786 A.2d 913, 916 (2001) (stating that standing exists in custody cases when authorized by statute). Standing for custody purposes implicates the fundamental liberty issue of a parent's ability to direct the care and custody of his or her child. *See generally* *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

5 *See* *T.B.*, 786 A.2d at 916 ("A third party has been permitted to maintain an action for custody ... where that party stands *in loco parentis* to the child''); *Morgan v. Weiser*, 923 A.2d 1183, 1186 (Pa. Super. 2007) ("As a general rule, third parties, other than grandparents, usually do not have standing to participate as parties in child custody actions. An exception to this general rule exists when the third party stands *in loco parentis* to the child.").

6 *See supra* n.2.

7 "We must accept findings of the trial court that are supported by competent evidence of record, as our role does not include making independent factual determinations. In addition, with regard to issues of credibility and weight of the evidence, we must defer to the presiding trial judge who viewed and assessed the witnesses first-hand." *D.K. v. S.P.K.*, 102 A.3d 467, 478 (Pa. Super. 2014).

8 With respect both to this issue and to the *in loco parentis* analysis, as the trial court noted, the testimony of the parties and the witnesses was "in direct conflict." T.C.O. at 5. The record provides testimony that, if found credible, would support C.G.'s claims that she intended to be a parent and that she assumed a parental role and discharged parental duties. Similarly, there is testimony that supports J.H.'s claims to the opposite effect. Because we are bound as a reviewing court by the trial court's credibility findings, we must accept the testimony of J.H. and her witnesses.

M.L.S. v. T.H.-S.

Superior Court of Pennsylvania

August 29, 2018, Decided; August 29, 2018, Filed

No. 302 WDA 2018

Reporter
195 A.3d 265 *; 2018 Pa. Super. LEXIS 936 **; 2018 PA Super 241; 2018 WL 4102597

M.L.S. v. T.H.-S., Appellant

Prior History: [**1] Appeal from the Order Entered December 19, 2017. In the Court of Common Pleas of Fayette County. Civil Division at No(s): No. 401 of 2016, G.D.

Counsel: John W. Eddy, Uniontown, for appellant.

Amanda M. Como, Uniontown, for appellee.

Judges: BEFORE: OLSON, J., McLAUGHLIN, J., and STRASSBURGER*, J. OPINION BY OLSON, J.

Opinion by: OLSON

Opinion

[*267] OPINION BY OLSON, J.:

T.H.-S. ("Mother") appeals from the December 19, 2017 order granting her and M.L.S. ("Stepfather") joint legal custody of K.M.H. ("Child").[1] We hold that Stepfather, a member of our nation's armed forces stationed away from Mother and Child, stands *in loco parentis* to Child. Accordingly, we affirm.

The factual background of this case is as follows. In December 2005, Mother gave birth to Child. C.H., Mother's late husband, was Child's biological father. After C.H.'s death, Mother married Stepfather. In July 2013, A.S. was born of this matrimonial bond. The parties were in the process of obtaining a divorce at the time the instant case was initiated.[2]

For the past 15 years, Stepfather has served as an active duty member of the United States Navy. While Mother lived in Western Pennsylvania, Stepfather was stationed in Virginia, Maryland, and, at the time of the evidentiary hearing, North Carolina. Stepfather visited Mother, A.S., and Child for a total [**2] of between four and five weeks per year (including both weekends and vacation) while on leave from the Navy.

On May 2, 2017, Stepfather filed a complaint seeking custody of Child. Mother moved to dismiss the complaint arguing that Stepfather lacked standing. After an evidentiary hearing, the trial court denied Mother's motion to dismiss on September 6, 2017. Mother filed a notice of appeal which this Court quashed as being taken from an interlocutory order. On December 19, 2017, the trial court entered a final custody order. Mother filed a notice of appeal on February 20, 2018.

Mother presents one issue for our review:

> Did the [t]rial [c]ourt commit an error of law by ruling that [Stepfather stands] *in loco parentis* [to Child] . . . ?

Mother's Brief at 2.

Prior to addressing the merits of Mother's appeal, we *sua sponte* consider if we have jurisdiction over this appeal. ***See A.J.B. v. A.G.B.***, 2018 PA Super 50, 180 A.3d 1263, 1270 (Pa. Super. 2018) (citation

* Retired Senior Judge assigned to the Superior Court.

[1] The order also granted Stepfather partial physical custody of Child.

[2] Child was 11 years old when this case was initiated.

omitted). It is axiomatic that this Court lacks jurisdiction over untimely appeals. ***Commonwealth v. Duffy***, 2016 PA Super 153, 143 A.3d 940, 944 (Pa. Super. 2016). In order to be timely, a notice of appeal [*268] must be filed within 30 days after entry of the appealable order. Pa.R.A.P. 903(a). Mother filed her notice of appeal 63 days after entry of the final, appealable order. Nonetheless, our review of [**3] the certified record indicates that the Fayette County Prothonotary failed to note on the docket that notice of the December 19, 2017 order was served pursuant to Pennsylvania Rule of Civil Procedure 236. Hence, there was a breakdown in the court system and we have jurisdiction over this appeal. ***See Fischer v. UPMC Nw.***, 2011 PA Super 247, 34 A.3d 115, 121 (Pa. Super. 2011) (citations omitted).

Having determined that we have jurisdiction over this appeal, we turn to the merits. Mother argues that Stepfather lacked standing to file the instant custody action. Issues of standing are pure legal questions; therefore, our standard of review is *de novo* and our scope of review is plenary. ***K.W. v. S.L.***, 2017 PA Super 56, 157 A.3d 498, 504 (Pa. Super. 2017) (citation omitted). "The following individuals may file an action under this chapter for any form of physical custody or legal custody . . . (2) [a] person who stands *in loco parentis* to the child." 23 Pa.C.S.A. § 5324. "The term *in loco parentis* literally means in the place of a parent. There are two components to *in loco parentis* standing: (1) the assumption of parental status and (2) the discharge of parental duties." ***M.J.S. v. B.B.***, 2017 PA Super 327, 172 A.3d 651, 656 (Pa. Super. 2017) (cleaned up).

Stepfather presented overwhelming evidence to support the trial court's finding that he had standing to pursue custody of Child. Stepfather spoke with Child on the telephone approximately every other day [**4] when he was in the United States and as often as permitted by his superiors when deployed to the Middle East. ***See*** N.T., 8/29/17, at 76. During these telephone calls, Stepfather kept abreast of Child's grades and medical conditions. ***See id.*** at 12, 76-77.

Stepfather frequently traveled to Western Pennsylvania to spend time with Mother and Child. During these visits, Stepfather and Mother both read Child bedtime stories. ***Id.*** at 77. While in Western Pennsylvania, Stepfather also assisted Child with his homework. ***See id.*** at 36. He attended Child's parent-teacher conferences with Mother. ***Id.*** at 37. During a parent-teacher conference, Stepfather learned that another student was bullying Child and assisted Mother in addressing the issue. ***Id.*** Although Stepfather was unable to attend career day at Child's school, he made special arrangements with Child's teacher to present about his career in the military. ***Id.*** at 64. Stepfather also taught Child the basics of male grooming, *e.g.*, how to shave, put on foot powder, and put on deodorant. ***Id.*** at 38.

As a former musician, Stepfather assisted Child when Child expressed an interest in playing the clarinet. ***Id.*** at 15, 68. Stepfather also played video games with Child and "roughhoused" with Child. ***Id.*** at 14-15. Stepfather, Mother, Child, [**5] and A.S. would go to the movies, go out to eat, play miniature golf, and bowl together when Stepfather was in Western Pennsylvania. ***Id.*** at 60. All of these actions are those typically undertaken by a parent — not a mentor or friend as suggested by Mother.

We also find persuasive a decision of the Court of Appeals of North Carolina. In ***Duffey v. Duffey***, 113 N.C. App. 382, 438 S.E.2d 445 (N.C. App. 1994), the court found that a service member's provision of benefits to a child, by listing the child as a dependent, was strong evidence that the service member stood *in loco parentis* to the child. ***See id.*** at 447. In this case, Stepfather listed Child as his dependent and, therefore, Child received medical and dental benefits as a part of Stepfather's military benefits package. N.T., 8/29/17, at 44. Mother was [*269] aware that Child received these benefits and did not object to Stepfather listing Child as a dependent. We agree with the Court of Appeals of North Carolina that the provision of such benefits is

a strong indication that Stepfather stands *in loco parentis* to Child.

The fact that Stepfather did not live with Child and Mother in a family setting due to his military service does not automatically defeat Stepfather's claim that he stands *in loco parentis* to Child. ***Cf. C.G. v. J.H.***, 2017 PA Super 320, 172 A.3d 43, 47 (Pa. Super. 2017), *appeal [**6] granted on other grounds*, 179 A.3d 440 (Pa. 2018) (citation omitted) (although parties lived together in a family setting the one party did not stand *in loco parentis*). Stepfather's absence from the family home is merely one factor in determining whether he stands *in loco parentis* to Child. Mother cites no case law, nor are we aware of any, holding that this factor alone is dispositive. Instead, it is only an important factor that courts must consider when determining if a third-party is standing *in loco parentis* to a child.

Today, many biological parents and those who discharge parental duties do not live with a child and a natural parent in a family setting. Remarriage following the death of, or divorce from, a natural parent and traveling employment arrangements have become common occurrences in modern society. Because of these shifts, whether a child and a third-party reside as a family unit has become less conclusive when determining if an individual stands *in loco parentis*.

The other factors that we have discussed above are relevant when determining if an individual stands *in loco parentis* to a child. In these respects, Stepfather served in the place of Child's deceased biological father. Although she [**7] argues otherwise, Mother accepted the benefits of Stepfather's childrearing efforts together with any risks associated with that arrangement, *i.e.*, the ability of Stepfather to seek custody of Child. She did so, among other ways, by allowing Stepfather to extend his military benefits to Child and by allowing a parental bond to form. Mother is attempting to use Stepfather's noble military service against him. Although living with a child is often an important element of the *in loco parentis* inquiry, it is not a dispositive factor by itself. That is particularly the case under these circumstances, where the party asserting *in loco parentis* status did not live with the child because of his service in our nation's armed forces. The evidence educed at the hearing showed that Father both assumed parental status and discharged parental duties. Hence, we hold that the trial court properly found that Stepfather had standing to pursue this custody action.

Order affirmed.

Judgment Entered.

Date: 8/29/2018

---

209 A.3d 391
Superior Court of Pennsylvania.

R.L.

v.

M.A., Appellant

No. 2740 EDA 2018
|
Argued March 13, 2019
|
Filed May 3, 2019

Synopsis

Background: Former romantic partner of child's biological mother brought action for custody of child against biological mother. The Court of Common Pleas, Lehigh County, Civil Division, No. 2018-FC-0597, Melissa T. Pavlack, J., awarded biological mother and former partner shared custody of child. Mother appealed.

Holdings: The Superior Court, No. 2740 EDA 2018, Dubow, J., held that:

[1] record supported finding that former partner rebutted presumption supporting custody in favor of biological mother, and

[2] former partner had burden to tip evidentiary scale that shared legal custody was in child's best interest to even, not down to partner's side.

Affirmed.

West Headnotes (20)

[1] **Child Custody** Retroactive operation

The Child Custody Act governs all custody proceedings commenced after act went into effect. 23 Pa. Cons. Stat. Ann. § 5321 et seq.

[2] **Child Custody** Decision and findings by court

A trial court must delineate the reasons for its decision when making an award of custody either on the record or in a written opinion. 23 Pa. Cons. Stat. Ann. §§ 5323(a), 5323(d), 5328(a).

2 Cases that cite this headnote

[3] **Child Custody** Decision and findings by court

There is no required amount of detail for the trial court's explanation for its decision to make an award of child custody; all that is required is that the enumerated factors are considered and that the custody decision is based on those considerations. 23 Pa. Cons. Stat. Ann. §§ 5323(a), 5323(d), 5328(a).

2 Cases that cite this headnote

[4] **Child Custody** Welfare and best interest of child

The paramount concern in child custody cases is the best interests of the child.

[5] **Child Custody** Welfare and best interest of child

The best-interests standard in custody cases, decided on a case-by-case basis, considers all factors that legitimately have an effect upon the child's physical, intellectual, moral, and spiritual well-being. 23 Pa. Cons. Stat. Ann. § 5321 et seq.

1 Cases that cite this headnote

[6] **Child Custody** Discretion

Superior Court reviews a child custody determination for an abuse of discretion.

3 Cases that cite this headnote

[7] **Child Custody** Discretion

When reviewing an award of child custody, the Superior Court will not find an abuse of

discretion merely because a reviewing court would have reached a different conclusion. 23 Pa. Cons. Stat. Ann. § 5321 et seq.

4 Cases that cite this headnote

[8] **Child Custody** Discretion

When reviewing a child custody award, the Superior Court will find a trial court abuses its discretion if, in reaching a conclusion, it overrides or misapplies the law or the record shows that the trial court's judgment was either manifestly unreasonable or the product of partiality, prejudice, bias, or ill will. 23 Pa. Cons. Stat. Ann. § 5321 et seq.

5 Cases that cite this headnote

[9] **Child Custody** Review

When the Superior Court reviews a trial court's best interests analysis in child custody matters, its scope of review is broad, but it is bound by findings supported in the record and may reject conclusions drawn by the trial court only if they involve an error of law or are unreasonable in light of the sustainable findings of the trial court.

[10] **Child Custody** Credibility of witnesses

When reviewing an award of child custody, on issues of credibility and weight of the evidence, the Superior Court defers to the findings of the trial judge, who has had the opportunity to observe the proceedings and demeanor of the witnesses. 23 Pa. Cons. Stat. Ann. § 5321 et seq.

1 Cases that cite this headnote

[11] **Child Custody** Discretion

The Superior Court can only interfere with a trial court's decision to award child custody where the custody order is manifestly unreasonable as shown by the evidence of record. 23 Pa. Cons. Stat. Ann. § 5321 et seq.

[12] **Child Custody** Presumption in favor of parent

The parent has a prima facie right to custody as against a third party, which will be forfeited only if convincing reasons appear that the child's best interest will be served by an award to the third party. 23 Pa. Cons. Stat. Ann. § 5327(b).

1 Cases that cite this headnote

[13] **Child Custody** Presumption in favor of parent

Given the presumption in favor of a biological parent in a custody dispute with a third party, even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the biological parents' side.

2 Cases that cite this headnote

[14] **Child Custody** Scope of inquiry

Child Custody Decision and findings by court

When making a decision to award primary physical custody to a nonparent, the trial court must hear all evidence relevant to the child's best interest and then decide whether the evidence on behalf of the third party is weighty enough to bring the scale up to even and down on the third party's side.

3 Cases that cite this headnote

[15] **Child Custody** Burden of proof

Child Custody Degree of proof

Principles that evidentiary scale is tipped hard to biological parents' side and that a nonparent must present evidence that tips the scale down to the nonparent's side do not preclude an award of custody to the nonparent but simply instruct the trial court that the nonparent bears the burden of production and the burden of persuasion and that the nonparent's burden is heavy.

[16] **Child Custody** Welfare and best interest of child

When determining child custody, while Commonwealth places great importance on biological ties, it does not do so to the extent that the biological parent's right to custody will trump the best interests of the child.

1 Cases that cite this headnote

[17] **Child Custody** Welfare and best interest of child

In all child custody matters, the Commonwealth's primary concern is, and must continue to be, the well-being of the most fragile human participant, that of the minor child.

1 Cases that cite this headnote

[18] **Child Custody** In loco parentis; de facto parents

Child Custody Degree of proof

When determining child custody, once it is established that someone who is not the biological parent is in loco parentis, that person does not need to establish that the biological parent is unfit but instead must establish by clear and convincing evidence that it is in the best interests of the children to maintain that relationship or be with that person.

1 Cases that cite this headnote

[19] **Child Custody** Presumption in favor of parent

Record supported finding that former romantic partner rebutted presumption supporting custody in favor of biological mother by evidence that was clear and convincing based upon undisputed decisions regarding custody that parties had made together both prior to and following their separation, such that award of shared physical and legal custody of child between biological mother and former partner was warranted; couple were in committed romantic relationship when decision was made to conceive child by artificial insemination using sperm from partner's brother, couple ended their relationship shortly after birth of child, and partners had informal custody agreement to share physical custody of child for over three years after end of relationship. 23 Pa. Cons. Stat. Ann. § 5321 et seq.

[20] **Child Custody** Joint custody

In action seeking shared legal custody of child, former romantic partner of biological mother of child had burden to tip evidentiary scale that shared legal custody was in child's best interest to even, not down to partner's side.

***393** Appeal from the Order Entered August 28, 2018, In the Court of Common Pleas of Lehigh County Civil Division at No(s): 2018-FC-0597, Melissa T. Pavlack, J.

Attorneys and Law Firms

Michael R. Shelton, Doylestown, for appellant

BEFORE: OLSON, J., DUBOW, J., and STEVENS,* P.J.E.

Opinion

OPINION BY DUBOW, J.:

Appellant, M.A., who is the biological mother of V.L. ("Child"), appeals from the August 28, 2018 Order, which awarded shared legal and physical custody of Child to Appellant and R.L., Child's non-biological mother and Appellant's former paramour. Upon careful review, we affirm.

The relevant factual and procedural history is as follows. Appellant and R.L. were involved in a committed romantic relationship in 2012 when they made a decision together to conceive Child by impregnating Appellant via artificial insemination using sperm from R.L.'s brother. The couple planned and prepared for Child's birth together, including decorating a nursery and shopping for baby supplies. R.L. was present at Child's birth, R.L. chose Child's first name, and the couple decided together to give Child R.L.'s surname. Soon after Child's birth, the couple broke up.

Under an informal agreement, Child lived with Appellant and spent every other weekend with R.L. until June 2014, when Appellant and R.L. agreed to share 50/50 custody of Child. Child spent alternating weeks with Appellant and R.L. until an incident in February 2018, when R.L. called the daycare where Appellant worked and Child attended. R.L. complained that Appellant was having too much contact with Child, including taking Child off the premises during the day. As a result of the phone call, Appellant stopped the weekly custody rotation.

On May 10, 2018, R.L. filed a Complaint for Custody of then-5-year-old Child. On June 29, 2018, after a hearing, the trial court granted R.L. "*in loco parentis* " status, and therefore standing, to pursue any ***394** form of physical or legal custody of Child pursuant to 23 Pa.C.S. § 5324(2).[1] On August 23, 2018, after a pre-trial conference, the trial court held a custody hearing.

On August 28, 2018, the trial court awarded Appellant and R.L. shared legal and physical custody of Child, and, *inter alia*, ordered Child to spend alternating weeks with Appellant and R.L. On the same day, the trial court issued a Memorandum of Factors, which reviewed and made findings regarding the 23 Pa.C.S. § 5328 Custody Factors. This timely appeal followed.[2]

***395** Appellant raises the following issues on appeal:

> [1.] Has the [nonparent] litigant met her burden of proof under [23 Pa.C.S. § 5327(b)] by presenting clear and convincing evidence that [nonparent] should have the same amount of physical custodial time as a parent in a case where the parent seeks primary physical custody of the child?
>
> [2.] Did the Court err as a matter of law when it awarded equal physical custodial time to a parent and [nonparent] after weighing all relevant factors evenly between the parties in its Memorandum and Opinion?

Appellant's Brief at 3.

[1] **[2]** **[3]** The Child Custody Act, 23 Pa.C.S. §§ 5321-5340, governs all custody proceedings commenced after January 24, 2011. ***E.D. v. M.P.***, 33 A.3d 73, 77 (Pa. Super. 2011). The Custody Act requires a trial court to consider all of the Section 5328(a) best interests factors when "ordering any form of custody." 23 Pa.C.S. § 5328(a). A trial court must "delineate the reasons for its decision when making an award of custody either on the record or in a written opinion." ***S.W.D. v. S.A.R.***, 96 A.3d 396, 401 (Pa. Super. 2014). ***See also*** 23 Pa.C.S. § 5323(a) and (d). However, "there is no required amount of detail for the trial court's explanation; all that is required is that the enumerated factors are considered and that the custody decision is based on those considerations." ***M.J.M. v. M.L.G.***, 63 A.3d 331, 336 (Pa. Super. 2013).

[4] **[5]** "The paramount concern in child custody cases is the best interests of the child." ***C.G. v. J.H.***, —— Pa. ——, 193 A.3d 891, 909 (2018). "The best-interests standard, decided on a case-by-case basis, considers all factors which legitimately have an effect upon the child's physical, intellectual, moral and spiritual well-being." ***M.J.N. v. J.K.***, 169 A.3d 108, 112 (Pa. Super. 2017).

[6] **[7]** **[8]** This Court reviews a custody determination for an abuse of discretion. ***In re K.D.***, 144 A.3d 145, 151 (Pa. Super. 2016). We will not find an abuse of discretion "merely because a reviewing court would have reached a different conclusion." ***Id.*** (citation omitted). Rather, "[a]ppellate courts will find a trial court abuses its discretion if, in reaching a conclusion, it overrides or misapplies the law, or the record shows that the trial court's judgment was either manifestly unreasonable or the product of partiality, prejudice, bias or ill will." ***Id.***

[9] **[10]** **[11]** Further, when this Court reviews a trial court's "best interests" analysis in custody matters, our scope of review is broad, but we are "bound by findings supported in the record, and may reject conclusions drawn by the trial court only if they involve an error of law, or are unreasonable in light of the sustainable findings of the trial court." ***Saintz v. Rinker***, 902 A.2d 509, 512 (Pa. Super. 2006) (quotation and citation omitted). Importantly, "[o]n issues of credibility and weight of the evidence, we defer to the findings of the trial judge who has had the opportunity to observe the proceedings and demeanor of the witnesses." ***K.T. v. L.S.***, 118 A.3d 1136, 1159 (Pa. Super. 2015) (citation omitted). We can only interfere where the "custody order is manifestly unreasonable as shown by the evidence of record." ***Saintz***, 902 A.2d at 512 (citation omitted).

***396** In her first issue, Appellant avers that R.L., the non-biological mother, did not present clear and convincing evidence that she should have equal custodial time as Appellant, the biological mother. Appellant's Brief at 6-7. Appellant argues that 23 Pa.C.S. § 5327 requires a trial court

to apply a presumption in favor of a "biological parent" as opposed to a "nonparent litigant" and that R.L. did not meet her burden of proof to overcome the presumption in favor of Appellant. ***Id.*** at 7. Appellant argues that the "scale was already tipped hard" to Appellant before the trial and that it was R.L.'s burden as a nonparent litigant to "tip the scale in favor of [R.L.]" rather than "tip the scale only to equal" in order to obtain shared physical custody with equal custodial time. ***Id.*** Finally, Appellant asserts that the trial court erred when it considered the previous informal custody arrangement between Appellant and R.L as dispositive evidence in determining whether R.L. met her burden of proof. ***Id.*** For the following reasons, Appellant is not entitled to relief.

[12] The parent has a *prima facie* right to custody, "which will be forfeited only if convincing reasons appear that the child's best interest will be served by an award to the third party." ***V.B. v. J.E.B.***, 55 A.3d 1193, 1199 (Pa. Super. 2012) (quoting ***Charles v. Stehlik,*** 560 Pa. 334, 744 A.2d 1255, 1258 (2000)). Section 5327 of the Custody Act pertains to cases "concerning primary physical custody" and provides that, "[i]n any action regarding the custody of the child between a parent of the child and a nonparent, there shall be a presumption that custody shall be awarded to the parent. The presumption in favor of the parent may be rebutted by clear and convincing evidence." 23 Pa.C.S. § 5327(b). This Court has defined clear and convincing evidence "as presenting evidence that is so clear, direct, weighty, and convincing so as to enable the trier of fact to come to a clear conviction, without hesitation, of the truth of the precise facts in issue." ***M.J.S. v. B.B. v. B.B.***, 172 A.3d 651, 660 (Pa. Super. 2017) (citations and internal quotation marks omitted).

[13] **[14]** Accordingly, "even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the biological parents' side." ***V.B.***, 55 A.3d at 1199 (quoting ***Charles,*** 744 A.2d at 1258). When making a decision to award **primary** physical custody to a nonparent, the trial court must "hear all evidence relevant to the child's best interest, and then, decide whether the evidence on behalf of the third party is weighty enough to bring the scale up to even, and down on the third party's side." ***Id.*** (quoting ***McDonel v. Sohn,*** 762 A.2d 1101, 1107 (Pa. Super. 2000)).

[15] **[16]** **[17]** **[18]** These principles do not preclude an award of custody to the nonparent but simply instruct the trial court that the nonparent bears the burden of production and the burden of persuasion and that the nonparent's burden is heavy. ***Jones v. Jones***, 884 A.2d 915, 918 (Pa. Super. 2005). It is well settled, "[w]hile this Commonwealth places great importance on biological ties, it does not do so to the extent that the biological parent's right to custody will trump the best interests of the child. In all custody matters, our primary concern is, and must continue to be, the well-being of the most fragile human participant—that of the minor child." ***Charles***, 744 A.2d at 1259. "Once it is established that someone who is not the biological parent is ***in loco parentis***, that person **does not need to establish that the biological parent is unfit**, but instead must establish by clear and convincing evidence that it is in the best interests of the children to maintain that relationship or be with that person." ***Jones***, 884 A.2d at 917 (emphasis in original).

***397** The crux of Appellant's first argument is that R.L. failed to present clear and convincing evidence to rebut the statutory presumption in favor of awarding primary physical custody to Appellant as opposed to R.L. Appellant's Brief at 7-8.

[19] Instantly, R.L. filed a Custody Complaint seeking shared physical and legal custody, to memorialize the informal custody agreement that had been in place between her and Appellant for several years. In response, Appellant stated on the record that she was seeking primary physical custody. N.T. Custody Hearing, 10/16/18, at 100-01. The trial court recognized a statutory presumption in favor of Appellant but made a finding that "R.L. rebutted that presumption by evidence that was so clear and convincing based upon the undisputed decisions regarding custody that the parties had made together both prior to and following their separation." ***See*** Trial Court Opinion, filed 10/22/10, at 6. The trial court found R.L.'s testimony to be credible that Appellant and R.L. had an informal agreement to share physical custody of Child on a weekly rotation from June 2014 until February 2018. ***Id.*** at 7. The trial court made a finding that Child had been thriving in this 50-50 custody arrangement for 70% of his life, and that the only reason Appellant discontinued the week-to-week arrangement was because Appellant was upset when R.L. contacted Appellant's place of employment. ***Id.*** at 7-8. Accordingly, the trial court found that the "evidence and testimony was clear, direct, weighty, and convincing" that "the scale was tipped to even between R.L. and [Appellant]" and Child's "best interest had been served for the majority of his life by implementing the week-to-week physical custody." ***Id.*** at 7, 11. Based on these findings, which are supported in the record, the trial court awarded shared physical and legal custody of Child to R.L. and Appellant.

Appellant argues that the court applied the incorrect burden when it only required R.L. to present clear and convincing evidence to "tip the scale only to equal" rather than "tip the scale in favor of [R.L.]" prior to awarding shared physical custody. ***Id.*** at 10. The trial court opined:

> The parents have a *prima facie* right to custody, which will be forfeited only if convincing reasons appear that the child's best interest will be served by an award to the third party. Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the biological parents' side. In a case of shared physical custody, this [c]ourt views the scale analogy as placing the burden on the non-biological parent to tip that scale to equal. It is not believed that the burden was for the non-biological parent to tip the scale down farther than equal, as that may well result in an award of primary physical custody to the non-biological parent[.]

Trial Court Opinion, filed 10/22/18, at 5-6. We agree.

[20] Indeed, this Court has long required a trial court to "decide whether the evidence on behalf of the third party is weighty enough to bring the scale up to even, and down on the third party's side" prior to awarding **primary** physical custody to a nonparent. ***See V.B.***, 55 A.3d at 1199. ***See also Charles***, 744 A.2d 1255 (upholding award of primary physical custody to stepfather instead of father following mother's death); ***McDonel***, 762 A.2d at 1107 (upholding award of primary physical custody to maternal aunt and uncle instead of father following mother's death); ***Jones***, 884 A.2d at 918 (upholding award of primary physical custody to non-biological mother of children born to same-sex partners by artificial insemination). However, ***398** Appellant has failed to cite any legal authority that requires a third party to tip the scale in their favor prior to awarding **shared** physical custody. Our precedent merely requires the scale to tip to the third party's side prior to awarding **primary** physical custody to the third party and, thus, we find no error in the trial court's finding that, in this case, when the scale was "tipped to even," an award of shared legal custody was in Child's best interest.

Finally, Appellant argues that the "previous informal arrangement between the parties should not be dispositive in determining whether [R.L.] met her burden" and challenges the weight that the trial court placed on this evidence. Appellant's Brief at 11. The trial court engaged in an analysis of the Section 5328 custody factors and the record supports the trial court's findings. As stated above, on issues of credibility and weight of the evidence, we defer to the findings of the trial judge. ***See K.T.***, 118 A.3d at 1159. Accordingly, we find no error.

The trial court applied the statutory presumption in favor of Appellant, found that clear and convincing evidence rebutted that presumption, found that shared physical and legal custody was in Child's best interest, and awarded shared physical and legal custody to Appellant and R.L. The record supports the trial court's findings. Accordingly, Appellant is not entitled to relief on her first issue.

In her second issue, Appellant avers that the trial court erred in awarding shared physical custody when the trial court determined that all of the Section 5328 factors weighed evenly between the parties because the court is required to apply a presumption in favor of Appellant. Appellant's Brief at 12-17. Appellant further argues that the record is devoid of evidence that she is unable to care for Child. ***Id.*** at 16.

Appellant fails to cite any authority to support her bald assertion that, because of the statutory presumption in favor of a parent, if all of the Section 5328 factors are equal, then a parent should automatically get primary physical custody of a child instead of a third party. On the contrary, in a custody dispute, the best-interests standard is decided on a **case-by-case** basis and "considers all factors which legitimately have an effect upon the child's physical, intellectual, moral and spiritual well-being." ***M.J.N.***, 169 A.3d at 112.

Once the trial court granted R.L. *in loco parentis* status, R.L. did not need to establish that Appellant was "unfit" or deficient in any of the Section 5328 custody factors; R.L. merely needed to establish that it was in Child's best interest to maintain a relationship with her. ***See Jones***, 884 A.2d at 917. Accordingly, Appellant's second issue lacks merit.

The trial court engaged in an analysis of the Section 5328 custody factors, applied the statutory presumption in favor of Appellant, found that clear and convincing evidence rebutted that presumption, found that shared physical and legal custody was in Child's best interest, and awarded shared physical and legal custody to Appellant and R.L. The record supports the trial court's findings. Accordingly, we find no error.

Order affirmed.

All Citations

209 A.3d 391, 2019 PA Super 145

Footnotes

* Former Justice specially assigned to the Superior Court.

1 "The term *in loco parentis* literally means in the place of a parent." ***M.L.S. v. T.H.-S.***, 195 A.3d 265, 267 (Pa. Super. 2018) (citation and quotation omitted). Section 5324, *inter alia*, grants standing to file an action for any form of custody to "[a] parent of the child" or "[a] person who stands *in loco parentis* to the child[.]" 23 Pa.C.S. §§ 5324(1), (2). We acknowledge that the trial court's June 29, 2018 Order did **not** grant R.L. standing to pursue custody as a parent pursuant to Section 5324(1) despite the Custody Complaint averring: 1) R.L. and Appellant planned to conceive Child together and they were involved in an intimate relationship prior to, during, and after Child's birth; 2) Child has been living with R.L. every other week for most of his life; 3) Child calls R.L. Mother and they have a parent/child bond; and 4) R.L. has acted as a parent to Child for Child's entire life. ***See*** Order, 6/29/18; Custody Complaint, 5/10/18, at ¶¶ 4, 5. Rather, the Order only granted R.L standing to pursue custody *in loco parentis* pursuant to Section 5324(2). R.L. failed to challenge this Order. Accordingly, we are constrained to review this case pursuant to R.L.'s *in loco parentis*, or third party, status.

We recognize that our Supreme Court has recently declined to expand the definition of the term "parent" under Section 5324(1) in a case where a biological mother's same-sex unmarried former partner sought standing as a "parent," when the former partner did not jointly participate in the child's conception and hold the child out as her own. ***See C.G. v. J.H.***, —— Pa. ——, 193 A.3d 891, 906 (2018). The Court recognized that Section 5324 does not define the term parent and acknowledged, "the reality of the evolving concept of what comprises a family cannot be overlooked." ***Id.*** at 900. However, bound by the trial court's findings that the former partner did not intend to conceive the Child, the Court concluded, "this case does not provide this Court with a factual basis on which to further expand the definition of the term parent under Section 5324(1)." ***Id.*** at 906.

Here, R.L. **did** intend to conceive Child and **did** hold Child out as her own. Nevertheless, even though this case might provide a factual basis on which to expand the definition of the term "parent" under Section 5324(1), that issue is not before us and, as stated above, we are constrained to review this case treating R.L. as a third party rather than a parent. We, however, agree with the Supreme Court that the evolving nature of family relationships requires the appellate courts to re-examine the definition of "parent" under Section 5324(1).

2 The instant appeal is a children's fast track case. When Appellant filed a Notice of Appeal, she failed to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and Pa.R.A.P. 905(a)(2) or provide notice of the appeal to the trial court judge pursuant to Pa.R.A.P. 906(a)(2). When the trial court learned of the appeal on October 2, 2018, the court ordered Appellant to file a Concise Statement of Matters Complained of on Appeal within seven days. On October 10, 2018, Appellant filed a Concise Statement of Matters Complained of on Appeal. On October 22, 2018, the trial court filed a Pa.R.A.P. 1925(a) Opinion. Because Appellant failed to comply with Pa.R.A.P 1925(a)(2)(i) and Pa.R.A.P. 905(a)(2), Appellant's Notice of Appeal is defective. ***See In re K.T.E.L.***, 983 A.2d 745, 747 (Pa. Super. 2009) (holding that the failure of an appellant in a children's fast track case to file contemporaneously a concise statement with the notice of appeal pursuant to rules 905(a)(2) and 1925(a)(2), will result in a defective notice of appeal and the disposition of the defective notice of appeal will then be decided on a case by case basis). However, as Appellant's procedural misstep has not prejudiced the other party and does not impede our review of the matter, we decline to quash or dismiss this appeal for noncompliance. ***See id. See also Coffman v. Kline***, 167 A.3d 772, 776 (Pa. Super. 2017), ***appeal denied***, 645 Pa. 698, 182 A.3d 433 (2018) (observing that when an appellant fails to serve the notice of appeal on the trial court judge per Rule 906(a)(2), this Court has discretion to take any appropriate action).