

446 Pa.Super. 371
Superior Court of **Pennsylvania**.

Theresa **COSTELLO**, Appellant,
v.
Martin **COSTELLO** and Linda Werner.

Argued Sept. 21, **1995**.

|

Filed Oct. 26, **1995**.

Synopsis

After grandmother was granted custody of child due to mother and father's failure to attend custody hearing, father requested partial custody. The Court of Common Pleas, Philadelphia County, Family Division, No. DR 90-09421, granted partial custody. Grandmother appealed. The Superior Court, No. 04070 Philadelphia 1994, [Cirillo, J.](#), held that trial court did not create record upon which partial custody award to father could properly be based.

Vacated and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (5)

[1] **Child Custody** 🔑 Discretion

In child custody matters, reviewing court is empowered to determine whether trial court's incontrovertible factual findings support its factual conclusions, but it may not interfere with those conclusions unless they are unreasonable in view of trial court's factual findings, and thus, represent gross abuse of discretion.

[2] **Child Custody** 🔑 Decision and Findings by Court

In child custody matters, trial court must ensure that full and complete record is created when a decision as important as welfare of child is at issue.

[3] **Child Custody** 🔑 Welfare and Best Interest of Child

Paramount concern in child custody proceedings is best interest of child.

[30 Cases that cite this headnote](#)

[4] **Child Custody** 🔑 Decision and Findings by Court

Trial court did not create record upon which partial custody award to father could properly be based, where record did not fully explore circumstances underlying Protection From Abuse order issued against father, and contained only scant information about father's drug and alcohol treatment programs. [Rules Civ.Proc., Rule 1915.1\(b\)](#), 42 Pa.C.S.A.

[2 Cases that cite this headnote](#)

[5] **Child Custody** 🔑 Mental Condition

Appropriate standard to apply when presented with issue of parental visitation is whether parent suffers from mental or moral deficiencies which pose great threat to child.

[1 Case that cites this headnote](#)

Attorneys and Law Firms

****1097 *372** [Mary A. Scherf](#), Philadelphia, for appellant.

Before [CIRILLO](#), [TAMILIA](#) and [HOFFMAN](#), JJ.

Opinion

[CIRILLO](#), Judge:

Paternal Grandmother Theresa **Costello** (Grandmother) appeals from an order awarding her primary physical custody of her grandchild, Kevin, and awarding partial custody of Kevin to her son, Martin **Costello** (Father). We vacate and remand.

Father filed a petition to confirm custody against Kevin's mother, Linda Werner (Mother). Mother apparently had a serious drug problem. On the day the custody matter was

listed for trial, Mother failed to appear, and custody was confirmed in Father.

Grandmother petitioned for custody of the child. She asserted that Kevin had been living with her since 1990, and that Father was homeless and had both drug and alcohol addictions. Additionally, Mother filed a petition requesting partial custody. The trial court consolidated the outstanding petitions of Mother and Grandmother and a hearing was scheduled. Grandmother appeared at the hearing; Mother and Father did not. Custody was confirmed in Grandmother without prejudice to either parent. Approximately one month later, the court granted Grandmother a temporary *ex parte* Protection From Abuse order against Father.


*373 Father requested a custody hearing, at which Father, Grandmother, and Grandmother's counsel were present.¹ During the hearing, Father voluntarily relinquished primary physical custody of Kevin to Grandmother. The court granted Father's request for partial custody. The parties worked with the court (on the record) and decided upon acceptable times for Kevin to spend with Father. The trial court's order provided:

Primary physical custody of child Kevin is awarded to Theresa **Costello**, paternal grandmother. Father to have partial custody on Wednesday from 5 p.m. to 8 p.m. Paternal Grandmother will take the child to his soccer game and Father will attend and take him after the game. Father also to have the child every Saturday and Sunday, Saturday from 9 a.m. to 7 p.m. Drop off at Nativity Church and Sunday from 9 a.m. to 8 p.m. Pick up and return on Sundays to take place at curb side. Relist in six (6) months for review.

Grandmother attempted to file a petition to modify the court's order. The Custody Intake Department refused, stating that the case was to be relisted in six months, and that the case had only been in court one week earlier. Grandmother filed a notice of appeal to this court.




The following issues have been presented for our consideration:

(1) Did the trial court abuse its discretion in failing to make a complete record from which a determination of Kevin's best interests could be made before entering a partial custody order for Father?

****1098** (2) Did the trial court err by violating  23 Pa.C.S.A. § 5303(a) when it entered a partial custody order in conflict with a valid, existing PFA order under which Father was prohibited from having contact with the child?

[1] In child custody matters, this court is guided by the following standard of review:


*374 The scope of review of an appellate court reviewing a child custody order is of the broadest type; the appellate court is not bound by the deductions or inferences made by the trial court from its findings of fact, nor must the reviewing court accept a finding that has no competent evidence to support it.... However, this broad scope of review does not vest in the reviewing court the duty or the privilege of making its own independent determination.... Thus, an appellate court is empowered to determine whether the trial court's incontrovertible factual findings support its factual conclusions, but it may not interfere with those conclusions unless they are unreasonable in view of the trial court's factual findings; and thus, represent a gross abuse of discretion.




  *Kaneski v. Kaneski*, 413 Pa.Super. 173, 604 **A.2d** 1075 (1992) (citing  *McMillen v. McMillen*, 529 **Pa.** 198, 602 **A.2d** 845 (1992)).

Grandmother argues that the record did not contain sufficient evidence concerning Father's behavior, *i.e.*, the circumstances surrounding the PFA order, and Father's history of drug and alcohol problems. We agree.

[2] [3] In the context of a child custody case a trial court must ensure that a full and complete record is created when a decision as important as the welfare of a child is at issue.

 *Tettis v. Boyum*, 317 Pa.Super. 8, 463 **A.2d** 1056 (1983).

As we have cautioned the lower courts time and time again, in order to assess the best interests and general welfare of the child or children, it is the duty of the trial judge to make the fullest possible inquiry in custody actions.  *Commonwealth ex rel. Cox v. Cox*, 255 Pa.Super. 508, 388 **A.2d** 1082 (1978); *Commonwealth ex rel. Ashfield v. Cortes*, 210 Pa.Super. 515, 234 **A.2d** 47 (1967). All pertinent facts and circumstances surrounding the contesting parties must be fully explored and developed. *Sipe v. Shaffer*, 263 Pa.Super. 27, 396 **A.2d** 1359 (1979). The hearing judge should consider the character and fitness of the respective parties, the type of home they can offer, [and] their ability to financially provide for the child. *375 *Gerald G. v. Theresa G.*, 284 Pa.Super. 498, 502, 426 **A.2d** 157, 159 (1981), quoting *Commonwealth ex rel. Leighann A. v. Leon A.*, 280 Pa.Super. 249, 252, 421 **A.2d** 706, 708 (1980).

 *Moore v. Moore*, 535 Pa. 18, 25, 634 **A.2d** 163, 167 (1993) (emphasis added) (quoting  *Tettis*, 317 Pa.Super. at 23, 463 **A.2d** at 1064); see also  *Lambert v. Lambert*, 409 Pa.Super. 552, 566, 598 **A.2d** 561, 568 (1991). It is axiomatic that the paramount concern in child custody proceedings is the best interest of the child. *McMillen, supra*.

In order to ensure that the best interests of the child will be served, the appellate court will engage in a comprehensive review of the record.... Thus, while it will defer to the [trial] court's findings of fact, the appellate court will not be bound by the deductions and inferences made by the trial court.... Where the record is incomplete or the opinion of the [trial]

court is inadequate, the case will be remanded.

Gerald G. v. Theresa G., 284 Pa.Super. 498, 501–04, 426 **A.2d** 157, 159–60 (1981) (citations omitted).

[4] Our review of the testimony indicates an inadequate record with regard to the PFA order. Specifically, Father testified that the PFA order was a result of him spitting on his sister. The trial court pursued Father's explanation with this inquiry: "Did this incident have anything to do with Kevin[?] ... Was he involved? Was he injured by you or anything like that?" Father responded "no." There was no further testimony on the subject of the PFA. Additionally, the fact that Father had a PFA order entered against him was not mentioned in the trial court's opinion. Similarly, the record contains scant information with regard to Father's drug and alcohol treatment programs. Details were not provided. In fact, Father alleged that he had been "clean" for some time, yet also **1099 admitted to having a drink the week before the hearing. The trial court has not provided this court with a record upon which a custody award, albeit a partial custody award, could properly be based. *Tettis, supra*; *Moore, supra*. We, therefore, remand for a full hearing to consider the circumstances underlying the PFA order, and for a more *376 complete inquiry into Father's drug and alcohol problems and/or treatment.

[5] On remand, we suggest, without directing, that the trial court consider fashioning an award of visitation, as opposed to partial custody.² If an order of visitation is decided upon, a full hearing on remand is still necessary, considering the applicable standard for parental visitation. "[T]he appropriate standard to apply when presented with the issue of parental visitation is whether the parent suffers from mental or moral deficiencies which pose a grave threat to the child." *Green v. Sneeringer*, 431 Pa.Super. 66, 69, 635 **A.2d** 1074, 1076 (1993) (citing *In re Damon B.*, 314 Pa.Super. 391, 460 **A.2d** 1196 (1983); *Commonwealth ex rel. Peterson v. Hayes*, 252 Pa.Super. 487, 381 **A.2d** 1311 (1977)); see *Commonwealth ex rel. Sorace v. Sorace*, 236 Pa.Super. 42, 344 **A.2d** 553 (1975) (parent should seldom be denied right to visit with his child, but when severe mental or moral deficiency constitutes threat to child's welfare, visitation rights may be denied to parent who manifests such condition); *Scarlett v. Scarlett*, 257 Pa.Super. 468, 390 **A.2d** 1331 (1978) (visitation may be limited or denied in a custody case only where a parent has

been shown to suffer from severe mental or moral deficiencies that constitute a grave threat to the child).

All Citations

Order vacated and remanded. Jurisdiction relinquished.

446 Pa.Super. 371, 666 A.2d 1096

Footnotes

- 1 Mother did not appear, nor did she forward an explanation of her whereabouts.
- 2 Pursuant to [Pa.R.C.P. 1915.1\(b\)](#), “ ‘partial custody’ means the right to take possession of a child away from the custodial person for a certain period of time[,]” and “ ‘visitation’ ” means the right to visit a child, but does not include the “right to remove the child from the custodial person's control.” [Pa.R.C.P. 1915.1\(b\)](#).

Custody in PFA Matters Fact Sheet

Statute: 23 PA CSA § 6108(a)(4)

Awarding temporary custody of or establishing temporary visitation rights with regard to minor children.

In determining whether to award temporary custody or establish temporary visitation rights pursuant to this paragraph, the court **shall** consider any risk posed by the defendant to the children as well as risk to the plaintiff. The following shall apply:

(i) A defendant **shall not** be granted custody, partial custody or unsupervised visitation where it is alleged in the petition, and the court finds after a hearing under this chapter, that the defendant:

(A) abused the minor children of the parties or poses a risk of abuse toward the minor children of the parties; or

(B) has been convicted of violating 18 Pa.C.S. § 2904 (relating to interference with custody of children) within two calendar years prior to the filing of the petition for protection order or that the defendant poses a risk of violating 18 Pa.C.S. § 2904.

(ii) Where the court finds after a hearing under this chapter that the defendant has inflicted abuse upon the plaintiff or a child, the court **may** require supervised custodial access by a third party. The third party must agree to be accountable to the court for supervision and execute an affidavit of accountability.

(iii) Where the court finds after a hearing under this chapter that the defendant has inflicted serious abuse upon the plaintiff or a child or poses a risk of abuse toward the plaintiff or a child, the court **may**:

(A) award supervised visitation in a secure visitation facility; or

(B) deny the defendant custodial access to a child.

(iv) If a plaintiff petitions for a temporary order under section 6107(b) (relating to hearings) and the defendant has partial, shared or full custody of the minor children of the parties by order of court or written agreement of the parties, *the custody shall not be disturbed or changed unless the court finds that the defendant is likely to inflict abuse upon the children or to remove the children from the jurisdiction of the court prior to the hearing under section 6107(a)*. Where the defendant has forcibly or fraudulently removed any minor child from the care and custody of a plaintiff, the court **shall** order the return of the child to the plaintiff unless the child would be endangered by restoration to the plaintiff.

(v) Nothing in this paragraph shall bar either party from filing a petition for custody under Chapter 53 (relating to custody) or under the Pennsylvania Rules of Civil Procedure.

(vi) In order to prevent further abuse during periods of access to the plaintiff and child during the exercise of custodial rights, the court **shall** consider, and may impose on a custody award, conditions necessary to assure the safety of the plaintiff and minor children from abuse.

PFAs When There is No Pre-Existing Custody Order

- The Court has the authority to award a party seeking a PFA temporary custody in the PFA order. (§6108(a)(4))
- The custody portion will last for the duration of the PFA order; which is may not exceed 36 months. (§6108(d))
- The order can be extended an unlimited number of times, based on:
 - Evidence of subsequent acts of abuse
 - Pattern or practice that indicates continued risk of harm to plaintiff and/or minor child
 - Pendency of a contempt petition. (§6108(e)(1))
- The other party may still file and receive a separate, permanent custody order while the PFA is in effect. However, the terms cannot conflict with the PFA (PFA trumps for duration of order). *Dye v. McCoy, 423 Pa. Super. 334, 621 A.2d 144 (1993).*

PFAs When There is a Pre-Existing Custody Order

- The Court issuing a temporary PFA can supersede the pre-existing custody order, if it finds abuser is likely to abuse the child(ren) or remove them from the jurisdiction before the hearing for the final protection order. (§6108(a)(4))
- PFAs sought specifically for minor children may address custody even if a custody order already exists. *Dye v. McCoy, 423 Pa. Super. 334, 621 A.2d 144 (1993)*. But, may only do so based on consideration of the best interest of the child. *Shandra v. Williams, 2003 PA Super. 85, ¶ 1, 819 A.2d 87, 88; see Lawrence v. Bordner, 2006 PA Super 246, 907 A.2d 1109*

Getting the PFA Order

A PFA can be obtained if a family member, an intimate partner, or someone with whom you share a child:

- Injured you or is trying to injure you (physically or sexually).
- Is threatening to harm you.
- Is preventing you from going somewhere.
- Is abusing or has abused minor children (physically or sexually).
- Is stalking you in a way that makes you feel afraid of getting hurt.

An ex parte hearing will be held. The Court will decide whether or not to grant a temporary PFA order. Whether or not the temporary order is granted, a final PFA hearing (evidentiary hearing) will be scheduled within 10 business days of the filing.

A PFA can be filed at the following locations and times:

Family Court

1501 Arch St.
Domestic Violence Intake Unit
8th floor
Phone: (215) 686-3512
Hours: 8 a.m. to 5 p.m.

Criminal Justice Center – FOR EMERGENCY REQUESTS

1301 Filbert St.
Room B-03
Hours: Open for emergency requests 5 p.m. to 8 a.m. on weekdays, and 24 hours on weekends.

Domestic Violence in Family Court

in custody and dependency cases

Scenario #1

Scenario #1

Xavier is the father of 2 children, ages 8 and 6 years old. He has been in a relationship with their mother, Alexis, for the past 9 years. The relationship has been on and off for several of those years, due to repeated instances of physical abuse by both parties. For the last few months, Xavier and Alexis have maintained separate residences, but exchange the children regularly with no issue. This morning, Alexis showed up to Xavier's house unannounced to pick up their children and became upset when she found another woman at the home. Xavier and Alexis began to argue and a physical altercation took place outside of the house. The fight ended with Alexis getting into her car and running into Xavier. She then forced the children into her car without their booster seats and left the scene. Xavier received medical attention for bruised ribs from being hit, and several scratches and cuts to his face from their fight. He has not heard from Alexis or the children since the morning.

Xavier received your information from a family friend and has called you after-hours for advice. He informs you that Alexis has attempted to take the children before with no contact, but that she's come back in a few days. He said neither party has ever physically abused the children, but Alexis drinks pretty frequently and uses drugs recreationally.

How do you advise Xavier? What type of PFA should he file and should he include custody? What is the court's obligation?

Custody in PFA Matters

- Governed by 23 PA CSA § 6108(a)(4): Awarding temporary custody of or establishing temporary visitation rights with regard to minor children
- PFAs When There is No Pre-Existing Custody Order
 - The Court has the authority to award a party seeking a PFA temporary custody in the PFA order
 - The custody portion will last for the duration of the PFA order; which is may not exceed 36 months
 - The order can be extended an unlimited number of times, based on:
 - Evidence of subsequent acts of abuse
 - Pattern or practice that indicates continued risk of harm to plaintiff and/or minor child
 - Pendency of a contempt petition
 - The other party may still file and receive a separate, permanent custody order while the PFA is in effect. However, the terms cannot conflict with the PFA (PFA trumps for duration of order)
- PFAs When There is a Pre-Existing Custody Order
 - The Court issuing a temporary PFA can supersede the pre-existing custody order, if it finds abuser is likely to abuse the child(ren) or remove them from the jurisdiction before the hearing for the final protection order
 - PFAs sought specifically for minor children may address custody even if a custody order already exists.
 - But, may only do so based on consideration of the best interest of the child

Scenario #2

Scenario #2

You represent Mother, who wants custody of two children, aged 4 and 7, who are currently subject to a dependency case due to domestic violence. Mother pro se filed a Protection from Abuse petition and currently has final PFA order under which Father is evicted from the home for three years and prohibits any contact between your client and Father. While no PFA petition was filed on behalf of the child, Mother alleges that Father routinely abused Mother in the presence of the children.

Mother hopes to reunify with her children now that Father is evicted and has requested DHS allow visitation. Mother fears that Father, however, will take out his anger and frustration on the children and does not believe he should be reunified with the children.

What should you counsel your client in terms of what visitation options are available? How do you argue that Mother's visitation should be different from Father's?

Standards for Ordering Supervised Visitation

- The Grave Threat standard is used in both Custody and Dependency.
 - “[T]he appropriate standard to apply when presented with the issue of parental visitation is whether the parent suffers from mental or moral deficiencies which pose a grave threat to the child.”
 - *Green v. Sneeringer*, 431 Pa.Super. 66, 69, 635 A.2d 1074, 1076 (1993) (citing *In re Damon B.*, 314 Pa.Super. 391, 460 A.2d 1196 (1983); *Commonwealth ex rel. Peterson v. Hayes*, 252 Pa.Super. 487, 381 A.2d 1311 (1977)); see *Commonwealth ex rel. Sorace v. Sorace*, 236 Pa.Super. 42, 344 A.2d 553 (1975) (parent should seldom be denied right to visit with his child, but when severe mental or moral deficiency constitutes threat to child's welfare, visitation rights may be denied to parent who manifests such condition); *Scarlett v. Scarlett*, 257 Pa.Super. 468, 390 A.2d 1331 (1978) (visitation may be limited or denied in a custody case only where a parent has been shown to suffer from severe mental or moral deficiencies that constitute a grave threat to the child).

Standards for Ordering Supervised Visitation

Dependency Caselaw

In the Interest of C.B. 2004 Pa. Super. 402, 861 A.2d 287 (Pa. Super. 2004).

- In dependency cases, the standard for visitation is mandated by the family service plan.
 - If reunification is the goal, visitation is required and cannot be reduced unless visitation would pose a “grave threat”.
 - The grave threat standard is met when there’s evidence that a parent is clearly unfit to associate with their children or when the parent demonstrates severe mental and moral deficiency.
 - If the goal is not reunification, visitation can be limited, reduced, supervised, or denied completely if it is in the best interest of the child.
- In this case, visitation was denied completely because the court found there was a grave threat to one child because Father had sexually abused the child’s sibling.
 - Criminal conviction not required.
 - Clear and convincing evidence from multiple witnesses regarding the abuse.
 - Conduct indicating moral deficiency does not need to be as to the child in question.
 - Violent nature of the conduct indicates a moral deficiency.

Standards for Ordering Supervised Visitation

Custody Caselaw

- *Costello v. Costello*, 446 Pa. Super. 371, 376, 666 A.2d 1096, 1099 (1995) (vacating award of partial custody to father and remanding with suggestion that trial court consider more limited award of visitation where trial court did not fully consider abusive behavior by father).
- *Green v. Sneeringer*, 431 Pa. Super. 66, 70, 635 A.2d 1074, 1076 (1993) (upholding denial of visitation where father was convicted of first degree murder of mother of their two-year-old child).
- *Schwarcz v. Schwarcz*, 378 Pa. Super. 170, 186, 548 A. 2d 556, 564 (1988) (limiting father's visitation rights due to, among other things, threats against mother, brandishing gun, and assault of mother-in-law).
- *Hughes v. Hughes*, 316 Pa. Super. 505, 508, 463 A.2d 478, 479 (1983) (denying father visitation where he had a long history of abusing child's mother and had once shot her while she was holding child).
- *Gwyszcz Appeal*, 206 Pa. Super. 397, 404-5, 213 A.2d 155, 158-9 (1965) (ordering father's visitation with son to take place outside mother's home and presence because abuse of mother during previous meetings was inappropriate for child to witness).

Scenario #3

Scenario #3

You represent Mother, a survivor of domestic violence, in a custody proceeding.

Mother and Father share three children, ages 3 months, 4 years, and 10 years. Your client's Petition for Custody alleges that Father has been physically abusive to her and the children. Most recently Mother alleges that Father abused her in front of the kids and that the 10 year old intervened and was injured. The kids are now experiencing nightmares. In your preparation with your client you learn that Mother and Father have been in an on and off again relationship for 13 years. Mother has left and returned to the relationship a total of four times, this is her fifth time leaving. Mother's Petition for Custody alleges that Father has abused the children their entire lives and that there have been multiple unfounded DHS reports against Father.

In your preparation of this case, you reasonably expect Father's attorney to question why Mother returned to a violent relationship, why she did not call the police, and assert that the DHS reports are false allegations created by Mother in order to manipulate custody in her favor.

What questions do you want to ask your client on direct examination? How would you prepare your client for court? What points would you like to emphasize in closing arguments?

	Traditional Approach	Trauma Informed Approach
Client/ Protective Parent Preparation	<ul style="list-style-type: none"> ● Assuming clients are familiar with court systems ● Preparing testimony in linear timelines ● Minimizing the importance of DV as a factor ● Dictating case theory or achievable outcomes ● “Why didn’t you...” <ul style="list-style-type: none"> ○ Call the police, tell the doctor, take the kids to the hospital, go to the hospital yourself, tell a therapist, tell DHS ● Emphasize court-based options as the main way to enhance safety <ul style="list-style-type: none"> ○ Filing for a PFA, PFA OBO, engaging with the criminal system 	<ul style="list-style-type: none"> ● Client all aspects of court environment (direct, cross, room layout, etc.) ● Client is active participant in the creation of direct examination, case theory, and understands potential cross examination questions ● “What is your ideal outcome” ● “What can we ask for that would make you feel safer participating in custody exchanges” ● “I would like to hear about that strategies you have used to keep your family safe” ● “What would you like to see the other party do”
Direct and Cross of Client in Court	<ul style="list-style-type: none"> ● Spotlight is on what the protective parent has done to keep the abusive partner away ● Spotlight is on the protective parent involving outside agencies like police, DHS, courts ● Minimizing or ignoring client’s trauma responses <ul style="list-style-type: none"> ○ Repetition, non-linear timelines, ● Expectation that it is solely the burden of the protective parent to stop the violence ● Expectation is that the protective parent will have evidence of the violence 	<ul style="list-style-type: none"> ● Spotlight is on the abuse committed by the abusive party ● Emphasis is on holding abusive party accountable for their actions ● Questions highlighting unique safety plans created by the protective parent- even if non-traditional ● Allows the protective parent to explain their actions ● Prior preparation allows the attorney to suggest unique solutions to the court ● Protective parents are given space (and grace) when reliving their trauma
Result in Court	<ul style="list-style-type: none"> ● Credibility determination against your client ● Confused Judges! ● Unsupported clients ● Adverse outcomes that could lead to contempt or dependency actions 	<ul style="list-style-type: none"> ● The court has a full picture ● Goal is safety for the entire family ● Expectation turns to the abusive party to stop abusive actions or engage in work to repair the relationship with children ● Minimizes future court involvement- both dependency and custody

Scenario #4

Scenario #4

You represent Parent 1 in a child custody case. Although there is no PFA in place, there has been domestic violence in the household, affecting both Parent 1 and the child. Parent 1 believes that Parent 2 should not have any contact with the child, but does not want to obtain a PFA.

There is an upcoming hearing before a judge. Parent 1 wants the child to testify and you believe the judge will rule in your favor if they hear from the child.

How do you prepare the child for testifying, or do you at all? Will you waive your presence during the interview? What questions will you request that the judge ask in camera to bring out the information you think is essential to your case?

Testimony of the Children

- In PFA cases, where the child is the subject of the petition, the child will be required to testify in open court as the parents have the right to have the child testify in open court. HOWEVER, if it is believed that the child testifying in open court will traumatize the child, a motion or petition must be raised to avoid having the child testify in open court.
- It is important to ask open-ended questions to avoid putting anything into the child's thought process or having the child believe that is the answer you are looking for instead of trying to find out exactly what the child observed and/or is feeling.
 - EXAMPLES:
 - Has anything happened to you that made you feel upset?
 - What happened?
 - When did happen?
 - Who did it?
 - How did you feel?
 - How did that parent/person make you feel?
 - How do you feel now explaining to us what happened?
- If the child feels that he or she is getting the other parent in trouble, they may be protective or fearful to provide testimony. Must recognize that and find a way to reassure the child.

Scenario #5

Scenario #5

You represent Client in her custody case against her former Wife. The two parties share one child, age 5. There is a history of domestic violence, perpetrated by Wife against Client. In one instance, Client was holding the child (who was at the time, age 2) and Client obtained a PFA obo (on behalf of) the child. The PFA obo has now expired. Wife has taken anger management classes and is currently in therapy. Wife wants to resume a relationship with the Child and has filed a Complaint for Custody.

Client wants her child to have a relationship with Wife, but does not want Wife to be unsupervised. Client does not have anyone willing to supervise and is not comfortable having Wife at her home.

What options can you suggest for Client? How can you help Client feel safe and empowered as Wife reunites with the child? What can you request from the court in a potential Custody Order?

New Supervised Visitation Site

- The new site is through the Office of Domestic Violence Strategies, managed by WES Health Services
 - Three conference rooms (small, medium, large)
 - 2 hour slots on weekends 10am-6pm
 - 1 monitor per room, with 1 floater
 - Capacity to serve 65-80 families per week
 - No means testing
 - No custodial exchanges for now
- How do referrals work?
 - Direct referral from court- when judge orders, the court will schedule an intake for each party (on different days)
 - Parties will have intake and orientation before first visit
- Court Orders must include:
 - ordering parties to complete intake
 - frequency of supervised visits
 - after how many missed sessions the visits will terminate
 - who can drop off, pick up, and attend with the child/children
 - relist for status *ORDERS CANNOT BE FINAL, MUST BE RELISTED IN 90-120 DAYS (Judge will automatically become CCM judge once supervised custody is ordered)

New Supervised Visitation Site

- Safety
 - Different entrances for opposing parties
 - Security with guards and wands
 - Staff will be aware of PFAs
 - Children will be accompanied by WES staff always
 - If sessions are harming child, staff will intercede and inform court if the sessions are detrimental
 - If a session is terminated early, the custodial party will be contacted to pick up the child/children and told why
- Reports
 - Before the relisted hearing, parties, attorneys, and the court will be provided with an attendance report
 - If there have been any issues, WES will also send incident reports
 - WES staff can be subpoenaed to testify

All materials can be
provided after the
meeting via email.

Domestic Violence in Family Court

in custody and dependency cases

Scenario #1

Scenario #1

Xavier is the father of 2 children, ages 8 and 6 years old. He has been in a relationship with their mother, Alexis, for the past 9 years. The relationship has been on and off for several of those years, due to repeated instances of physical abuse by both parties. For the last few months, Xavier and Alexis have maintained separate residences, but exchange the children regularly with no issue. This morning, Alexis showed up to Xavier's house unannounced to pick up their children and became upset when she found another woman at the home. Xavier and Alexis began to argue and a physical altercation took place outside of the house. The fight ended with Alexis getting into her car and running into Xavier. She then forced the children into her car without their booster seats and left the scene. Xavier received medical attention for bruised ribs from being hit, and several scratches and cuts to his face from their fight. He has not heard from Alexis or the children since the morning.

Xavier received your information from a family friend and has called you after-hours for advice. He informs you that Alexis has attempted to take the children before with no contact, but that she's come back in a few days. He said neither party has ever physically abused the children, but Alexis drinks pretty frequently and uses drugs recreationally.

How do you advise Xavier? What type of PFA should he file and should he include custody? What is the court's obligation?

Custody in PFA Matters

- Governed by 23 PA CSA § 6108(a)(4): Awarding temporary custody of or establishing temporary visitation rights with regard to minor children
- PFAs When There is No Pre-Existing Custody Order
 - The Court has the authority to award a party seeking a PFA temporary custody in the PFA order
 - The custody portion will last for the duration of the PFA order; which is may not exceed 36 months
 - The order can be extended an unlimited number of times, based on:
 - Evidence of subsequent acts of abuse
 - Pattern or practice that indicates continued risk of harm to plaintiff and/or minor child
 - Pendency of a contempt petition
 - The other party may still file and receive a separate, permanent custody order while the PFA is in effect. However, the terms cannot conflict with the PFA (PFA trumps for duration of order)
- PFAs When There is a Pre-Existing Custody Order
 - The Court issuing a temporary PFA can supersede the pre-existing custody order, if it finds abuser is likely to abuse the child(ren) or remove them from the jurisdiction before the hearing for the final protection order
 - PFAs sought specifically for minor children may address custody even if a custody order already exists.
 - But, may only do so based on consideration of the best interest of the child

Scenario #2

Scenario #2

You represent Mother, who wants custody of two children, aged 4 and 7, who are currently subject to a dependency case due to domestic violence. Mother pro se filed a Protection from Abuse petition and currently has final PFA order under which Father is evicted from the home for three years and prohibits any contact between your client and Father. While no PFA petition was filed on behalf of the child, Mother alleges that Father routinely abused Mother in the presence of the children.

Mother hopes to reunify with her children now that Father is evicted and has requested DHS allow visitation. Mother fears that Father, however, will take out his anger and frustration on the children and does not believe he should be reunified with the children.

What should you counsel your client in terms of what visitation options are available? How do you argue that Mother's visitation should be different from Father's?

Standards for Ordering Supervised Visitation

- The Grave Threat standard is used in both Custody and Dependency.
 - “[T]he appropriate standard to apply when presented with the issue of parental visitation is whether the parent suffers from mental or moral deficiencies which pose a grave threat to the child.”
 - *Green v. Sneeringer*, 431 Pa.Super. 66, 69, 635 A.2d 1074, 1076 (1993) (citing *In re Damon B.*, 314 Pa.Super. 391, 460 A.2d 1196 (1983); *Commonwealth ex rel. Peterson v. Hayes*, 252 Pa.Super. 487, 381 A.2d 1311 (1977)); see *Commonwealth ex rel. Sorace v. Sorace*, 236 Pa.Super. 42, 344 A.2d 553 (1975) (parent should seldom be denied right to visit with his child, but when severe mental or moral deficiency constitutes threat to child's welfare, visitation rights may be denied to parent who manifests such condition); *Scarlett v. Scarlett*, 257 Pa.Super. 468, 390 A.2d 1331 (1978) (visitation may be limited or denied in a custody case only where a parent has been shown to suffer from severe mental or moral deficiencies that constitute a grave threat to the child).

Standards for Ordering Supervised Visitation

Dependency Caselaw

In the Interest of C.B. 2004 Pa. Super. 402, 861 A.2d 287 (Pa. Super. 2004).

- In dependency cases, the standard for visitation is mandated by the family service plan.
 - If reunification is the goal, visitation is required and cannot be reduced unless visitation would pose a “grave threat”.
 - The grave threat standard is met when there’s evidence that a parent is clearly unfit to associate with their children or when the parent demonstrates severe mental and moral deficiency.
 - If the goal is not reunification, visitation can be limited, reduced, supervised, or denied completely if it is in the best interest of the child.
- In this case, visitation was denied completely because the court found there was a grave threat to one child because Father had sexually abused the child’s sibling.
 - Criminal conviction not required.
 - Clear and convincing evidence from multiple witnesses regarding the abuse.
 - Conduct indicating moral deficiency does not need to be as to the child in question.
 - Violent nature of the conduct indicates a moral deficiency.

Standards for Ordering Supervised Visitation

Custody Caselaw

- *Costello v. Costello*, 446 Pa. Super. 371, 376, 666 A.2d 1096, 1099 (1995) (vacating award of partial custody to father and remanding with suggestion that trial court consider more limited award of visitation where trial court did not fully consider abusive behavior by father).
- *Green v. Sneeringer*, 431 Pa. Super. 66, 70, 635 A.2d 1074, 1076 (1993) (upholding denial of visitation where father was convicted of first degree murder of mother of their two-year-old child).
- *Schwarcz v. Schwarcz*, 378 Pa. Super. 170, 186, 548 A. 2d 556, 564 (1988) (limiting father's visitation rights due to, among other things, threats against mother, brandishing gun, and assault of mother-in-law).
- *Hughes v. Hughes*, 316 Pa. Super. 505, 508, 463 A.2d 478, 479 (1983) (denying father visitation where he had a long history of abusing child's mother and had once shot her while she was holding child).
- *Gwiszcz Appeal*, 206 Pa. Super. 397, 404-5, 213 A.2d 155, 158-9 (1965) (ordering father's visitation with son to take place outside mother's home and presence because abuse of mother during previous meetings was inappropriate for child to witness).

Scenario #3

Scenario #3

You represent Mother, a survivor of domestic violence, in a custody proceeding.

Mother and Father share three children, ages 3 months, 4 years, and 10 years. Your client's Petition for Custody alleges that Father has been physically abusive to her and the children. Most recently Mother alleges that Father abused her in front of the kids and that the 10 year old intervened and was injured. The kids are now experiencing nightmares. In your preparation with your client you learn that Mother and Father have been in an on and off again relationship for 13 years. Mother has left and returned to the relationship a total of four times, this is her fifth time leaving. Mother's Petition for Custody alleges that Father has abused the children their entire lives and that there have been multiple unfounded DHS reports against Father.

In your preparation of this case, you reasonably expect Father's attorney to question why Mother returned to a violent relationship, why she did not call the police, and assert that the DHS reports are false allegations created by Mother in order to manipulate custody in her favor.

What questions do you want to ask your client on direct examination? How would you prepare your client for court? What points would you like to emphasize in closing arguments?

	Traditional Approach	Trauma Informed Approach
Client/ Protective Parent Preparation	<ul style="list-style-type: none"> ● Assuming clients are familiar with court systems ● Preparing testimony in linear timelines ● Minimizing the importance of DV as a factor ● Dictating case theory or achievable outcomes ● “Why didn’t you..?” <ul style="list-style-type: none"> ○ Call the police, tell the doctor, take the kids to the hospital, go to the hospital yourself, tell a therapist, tell DHS ● Emphasize court-based options as the main way to enhance safety <ul style="list-style-type: none"> ○ Filing for a PFA, PFA OBO, engaging with the criminal system 	<ul style="list-style-type: none"> ● Client all aspects of court environment (direct, cross, room layout, etc.) ● Client is active participant in the creation of direct examination, case theory, and understands potential cross examination questions ● “What is your ideal outcome” ● “What can we ask for that would make you feel safer participating in custody exchanges” ● “I would like to hear about that strategies you have used to keep your family safe” ● “What would you like to see the other party do”
Direct and Cross of Client in Court	<ul style="list-style-type: none"> ● Spotlight is on what the protective parent has done to keep the abusive partner away ● Spotlight is on the protective parent involving outside agencies like police, DHS, courts ● Minimizing or ignoring client’s trauma responses <ul style="list-style-type: none"> ○ Repetition, non-linear time lines, ● Expectation that it is solely the burden of the protective parent to stop the violence ● Expectation is that the protective parent will have evidence of the violence 	<ul style="list-style-type: none"> ● Spotlight is on the abuse committed by the abusive party ● Emphasis is on holding abusive party accountable for their actions ● Questions highlighting unique safety plans created by the protective parent- even if non-traditional ● Allows the protective parent to explain their actions ● Prior preparation allows the attorney to suggest unique solutions to the court ● Protective parents are given space (and grace) when reliving their trauma
Result in Court	<ul style="list-style-type: none"> ● Credibility determination against your client ● Confused Judges! ● Unsupported clients ● Adverse outcomes that could lead to contempt or dependency actions 	<ul style="list-style-type: none"> ● The court has a full picture ● Goal is safety for the entire family ● Expectation turns to the abusive party to stop abusive actions or engage in work to repair the relationship with children ● Minimizes future court involvement- both dependency and custody

Scenario #4

Scenario #4

You represent Parent 1 in a child custody case. Although there is no PFA in place, there has been domestic violence in the household, affecting both Parent 1 and the child. Parent 1 believes that Parent 2 should not have any contact with the child, but does not want to obtain a PFA.

There is an upcoming hearing before a judge. Parent 1 wants the child to testify and you believe the judge will rule in your favor if they hear from the child.

How do you prepare the child for testifying, or do you at all? Will you waive your presence during the interview? What questions will you request that the judge ask in camera to bring out the information you think is essential to your case?

Testimony of the Children

- In PFA cases, where the child is the subject of the petition, the child will be required to testify in open court as the parents have the right to have the child testify in open court. HOWEVER, if it is believed that the child testifying in open court will traumatize the child, a motion or petition must be raised to avoid having the child testify in open court.
- It is important to ask open-ended questions to avoid putting anything into the child's thought process or having the child believe that is the answer you are looking for instead of trying to find out exactly what the child observed and/or is feeling.
 - EXAMPLES:
 - Has anything happened to you that made you feel upset?
 - What happened?
 - When did happen?
 - Who did it?
 - How did you feel?
 - How did that parent/person make you feel?
 - How do you feel now explaining to us what happened?
- If the child feels that he or she is getting the other parent in trouble, they may be protective or fearful to provide testimony. Must recognize that and find a way to reassure the child.

Scenario #5

Scenario #5

You represent Client in her custody case against her former Wife. The two parties share one child, age 5. There is a history of domestic violence, perpetrated by Wife against Client. In one instance, Client was holding the child (who was at the time, age 2) and Client obtained a PFA obo (on behalf of) the child. The PFA obo has now expired. Wife has taken anger management classes and is currently in therapy. Wife wants to resume a relationship with the Child and has filed a Complaint for Custody.

Client wants her child to have a relationship with Wife, but does not want Wife to be unsupervised. Client does not have anyone willing to supervise and is not comfortable having Wife at her home.

What options can you suggest for Client? How can you help Client feel safe and empowered as Wife reunites with the child? What can you request from the court in a potential Custody Order?

New Supervised Visitation Site

- The new site is through the Office of Domestic Violence Strategies, managed by WES Health Services
 - Three conference rooms (small, medium, large)
 - 2 hour slots on weekends 10am-6pm
 - 1 monitor per room, with 1 floater
 - Capacity to serve 65-80 families per week
 - No means testing
 - No custodial exchanges for now
- How do referrals work?
 - Direct referral from court- when judge orders, the court will schedule an intake for each party (on different days)
 - Parties will have intake and orientation before first visit
- Court Orders must include:
 - ordering parties to complete intake
 - frequency of supervised visits
 - after how many missed sessions the visits will terminate
 - who can drop off, pick up, and attend with the child/children
 - relist for status *ORDERS CANNOT BE FINAL, MUST BE RELISTED IN 90-120 DAYS (Judge will automatically become CCM judge once supervised custody is ordered)

New Supervised Visitation Site

- Safety

- Different entrances for opposing parties
- Security with guards and wands
- Staff will be aware of PFAs
- Children will be accompanied by WES staff always
- If sessions are harming child, staff will intercede and inform court if the sessions are detrimental
- If a session is terminated early, the custodial party will be contacted to pick up the child/children and told why

- Reports

- Before the relisted hearing, parties, attorneys, and the court will be provided with an attendance report
- If there have been any issues, WES will also send incident reports
- WES staff can be subpoenaed to testify

All materials can be
provided after the
meeting via email.

861 A.2d 287

Superior Court of **Pennsylvania**.

In the **Interest** of **C.B.** and A.L., Minors, Appellees
 Appeal of W.L., Appellant.
 Appeal of W.L., Natural Father
 of Minor Children, Appellant.
 Appeal of **C.B.**, Natural Mother
 of Minor Children, Appellant.

Argued March 10, **2004**.Filed Oct. 20, **2004**.**Synopsis**

Background: After county child services agency took custody of ten-year-old girl and six-year-old boy who had been living with mother of both children and father of boy, the Court of Common Pleas, Monroe County, No. 9 N.C.2003, [Worthington, J.](#), issued orders suspending father's visitation with son and suspending family reunification efforts by child services agency. Father appealed visitation order and both parents appealed suspension of reunification efforts.

Holdings: The Superior Court, Nos. 2754, 3007 and 3157 EDA 2003, [Bowes, J.](#), held that:

[1] father displayed such severe moral deficiency that he constituted a grave threat to son, justifying suspension of visitation with son;

[2] boy's father was girl's "parent" for purposes of statute permitting the cessation of family unification efforts if a child of the parent has been the victim of severe physical abuse;

[3] evidence was sufficient to establish that boy's father sexually abused girl; and

[4] evidence was sufficient to establish that mother knew boy's father was sexually abusing girl.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (21)

[1] **Infants**  Vacation, extension, and modification

Order suspending father's visitation with his son in custody of county child services agency was a final, appealable order.

[7 Cases that cite this headnote](#)[2] **Infants**  Visitation issues

In a dependency case, the standard against which parent's visitation with child is measured depends upon the goal mandated in the child services agency's family service plan; if reunification of the family remains the goal of the family service plan, visitation will not be denied or reduced unless it poses a grave threat, but if the goal is no longer reunification, then visitation may be limited or denied if it is in the best **interests** of the child or children.

[16 Cases that cite this headnote](#)[3] **Infants**  Visitation issues

The "grave threat" standard for denial of parental visitation is met when the evidence clearly shows that a parent is unfit to associate with his or her children.

[18 Cases that cite this headnote](#)[4] **Infants**  Visitation issues

The "grave threat" standard for denial of parental visitation is satisfied when the parent demonstrates a severe mental or moral deficiency that constitutes a grave threat to the child.

[21 Cases that cite this headnote](#)[5] **Infants**  Visitation issues

Father who raped and sodomized his six-year-old son's ten-year-old half-sister in front of son displayed such severe moral deficiency

that he constituted a grave threat to son, who exhibited inappropriate sexual acting-out after visiting father in prison, justifying suspension of visitation with son, regardless of whether father's conduct resulted in criminal convictions.

[2 Cases that cite this headnote](#)

[6] **Infants** 🔑 Dependency, Permanency, and Rights Termination

In dependency proceedings, Superior Court's scope of review is broad; nevertheless, the court will accept those factual findings of the trial court that are supported by the record because the trial judge is in the best position to observe the witnesses and evaluate their credibility.



[9 Cases that cite this headnote](#)

[7] **Infants** 🔑 Trial or review de novo
Infants 🔑 Dependency, Permanency, and Rights Termination

Superior Court is not bound by trial court's inferences, deductions, and conclusions from factual findings in dependency proceeding; although court accords great weight to trial judge's credibility determinations and accepts factual findings of trial court that are supported by the record, Superior Court must exercise its independent judgment in reviewing trial court's determination, and must order whatever right and justice dictate.


[9 Cases that cite this headnote](#)

[8] **Infants** 🔑 Needs, **interest**, and welfare of child

The federal Adoption and Safe Families Act (ASFA) directs the emphasis away from the paramount importance previously enjoyed by parental rights to establish unequivocally that the goals for children in the child welfare system are safety, permanency and well-being. Social Security Act, § 471, as amended,  42 U.S.C.A. § 671;  42 Pa.C.S.A. §§ 6301-6365.

[10 Cases that cite this headnote](#)


[9] **Infants** 🔑 Needs, **interest**, and welfare of child

The amendments to the **Pennsylvania** Juvenile Act prompted by the federal Adoption and Safe Families Act (ASFA) make clear that the health and safety of the child supersede all other considerations.  42 Pa.C.S.A. §§ 6301-6365.

[5 Cases that cite this headnote](#)


[10] **Infants** 🔑 Purpose, construction, and interpretation in general

The federal Adoption and Safe Families Act (ASFA) was designed to curb an inappropriate focus on protecting the rights of parents when there is a risk of subjecting children to long term foster care or returning them to abusive families.

Social Security Act, § 471, as amended,  42 U.S.C.A. § 671.

[16 Cases that cite this headnote](#)


[11] **Infants** 🔑 Rehabilitation; Reunification Efforts

The purpose of the federal Adoption and Safe Families Act (ASFA) is to eliminate the need for family reunification efforts when it is established that the children were exposed to sexual or physical abuse. Social Security Act, § 471, as amended,  42 U.S.C.A. § 671.

[2 Cases that cite this headnote](#)

[12] **Infants** 🔑 Extension, termination, and renewal

Man who lived with ten-year-old girl and her mother, and fathered a child with girl's mother, had status of "in loco parentis" and thus was girl's "parent" for purposes of statute permitting the cessation of family unification efforts if a child of the parent has been the victim of physical abuse resulting in serious bodily injury, sexual violence or aggravated physical neglect by the parent, where man cared for girl on daily basis while her mother was at work, and was the only

father figure in girl's life, and girl called him "daddy."  42 Pa.C.S.A. § 6302(2).

3 Cases that cite this headnote

[13] Parent and Child  Persons in loco parentis in general

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 going through the formality of a legal adoption.

2 Cases that cite this headnote

[14] Parent and Child  Persons in loco parentis in general

Parent and Child  Liability for injuries to child

The status of in loco parentis embodies two ideas; first, the assumption of a parental status, and second, the discharge of parental duties.

2 Cases that cite this headnote

[15] Parent and Child  Liability for injuries to child

The rights and liabilities arising out of an in loco parentis relationship are exactly the same as between parent and child.

2 Cases that cite this headnote

[16] Parent and Child  Persons in loco parentis in general

A third party can not place himself in loco parentis in defiance of the parents' wishes and the parent-child relationship.

1 Case that cites this headnote

[17] Parent and Child  Persons in loco parentis in general


The doctrine of in loco parentis is applied 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.

[18] Parent and Child  Persons in loco parentis in general

An important aspect of the in loco parentis doctrine is whether the third party lived with the child and the natural parent in a family setting, irrespective of its traditional or nontraditional composition, and developed a relationship with the child as a result of the participation and acquiescence of the natural parent.


3 Cases that cite this headnote

[19] Courts  Number of judges concurring in opinion, and opinion by divided court

A decision that does not command a majority of the votes is a non-precedential plurality decision.

3 Cases that cite this headnote


[20] Infants  Extension, termination, and renewal

Evidence was sufficient to establish that mother's live-in boyfriend sexually abused mother's ten-year-old daughter, establishing aggravated circumstances justifying the suspension of family reunification efforts; testimony of forensic pediatrician, two psychologists, and two child services agency caseworkers substantiated claim of abuse, forensic pediatrician's examination revealed physical abnormalities consistent with sexual abuse, and daughter's foster mother and daycare provider of her half-brother testified that both children exhibited behavioral manifestations consistent with abuse victims.  42 Pa.C.S.A. § 6302(2).

1 Case that cites this headnote

[21] Infants  Extension, termination, and renewal

Evidence was sufficient to establish that mother knew her live-in boyfriend was sexually abusing her ten-year-old daughter,

establishing aggravated circumstances justifying the suspension of family reunification efforts; daughter told therapist her mother knew of the abuse and had told daughter she should not engage in sexual activity, in letter to child services agency mother accused daughter of lying about the abuse, then later claimed daughter was responsible for the abuse, and daughter, who had previously exhibited no inappropriate behavior while in foster care, began to exhibit behavior characteristic of sexual abuse victim after visiting with mother.  42 Pa.C.S.A. § 6302(2).

2 Cases that cite this headnote

Attorneys and Law Firms

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David J. Williamson, East Stroudsburg, for C.B. and A.L., minors.

Elizabeth B. Weeks, Stroudsburg, for Monroe County Children and Youth Services.

Before: BOWES, McCAFFERY and POPOVICH, JJ.

Opinion

BOWES, J.:

[1] ¶ 1 W.L. (“Father”) appeals from the juvenile court’s August 13, 2003 order suspending visitation with his son, A.L.¹ He also appeals from the September 24, 2003 order in which the court found the *290 existence of aggravated circumstances which permitted the suspension of all reunification efforts for the family in this dependency proceeding. C.B. (“Mother”) also appeals the September 24, 2003 order. We affirm.

¶ 2 The following history is pertinent. C.B.² was born on December 10, 1992. Her parents are Mother and a man who is not involved in this appeal. A.L. was born on December 7, 1996. His parents are Mother and Father. On January 24, 2003, the children were taken into protective custody due to deplorable living conditions and truancy. After a hearing on

January 30, 2003, the children were adjudicated dependent and placed into the care and custody of Monroe County Children and Youth Services (“CYS”). Dawn Walker, the intake caseworker, testified on behalf of CYC at that hearing. According to her testimony, CYC’s involvement with this family began in January 2001, when it received a referral based on A.L.’s poor hygiene and concerns about Father’s abuse of alcohol. The agency made an announced visit, and the caseworker conducted a full assessment. An intermediate unit referral was made for A.L. due to developmental delay, and an appointment was made for Father to attend drug and alcohol counseling. C.B. lived with her grandmother at that time. In October 2001, the agency closed the case because the goals were met.

¶ 3 On December 23, 2002, CYC received a second referral based on reports that Father was intoxicated while caring for children, that deplorable living conditions existed at the family dwelling, and that the children were not attending school. At that time, C.B. was ten years old, and A.L. was six years old. Ms. Walker conducted an unannounced visit on January 23, 2003. When no one was home, she returned, again unannounced, the following day.


¶ 4 Father was at home alone with the children, caring for them while Mother was at work. Ms. Walker stated that “the home was in extreme deplorable conditions,” and there were feces “smeared” all over the flooring in the kitchen, bathroom, living room, and shower. N.T. Dependency Hearing, 1/30/03, at 10. The home had an overpowering smell of urine and feces. “The children’s bedroom had, approximately, a foot worth of debris and clutter” that constituted a fire hazard. *Id.* at 11. The bathroom had mold growing and rotting food was found on the stove and countertops of the kitchen. The children were unclean, having “a foul smell” and were in immediate need of hygienic care. *Id.* at 13. The children had not attended school since October 2002. Ms. Walker immediately took the children into custody, discovering that six-year-old A.L. was not toilet trained. The children were placed together in foster care.

¶ 5 Ms. Walker subsequently conducted a full interview with C.B. but was unable to complete one with A.L. because he communicated on the level of a two-year-old. During her interview, C.B. referred to Father as “daddy.” She told Ms. Walker that she had been disciplined by being struck with a belt buckle and that Father had touched her underneath her clothing, “that it hurt, [and] that it happened many times.” *Id.* at 20. When asked why it hurt, C.B. responded that Father

placed his hands “inside of her.” *Id.* The young girl also stated that she “was afraid” to tell Ms. Walker about the sexual contact because “it was a secret; and that her daddy had told her that it's a secret between him and her and that no one's to know[.]” *291 *Id.* at 21. When asked who her “daddy” was, **C.B.** responded with Father's full name. *Id.* Mother told Ms. Walker that she had no information about **C.B.'s** biological father. *Id.* at 19.

¶ 6 Ms. Walker immediately scheduled a visit with an abuse specialist, Dr. Andrea Taroli. Ms. Walker also was present. During that interview, **C.B.** “disclosed that her father ... had stuck his private in her butt.” *Id.* at 25. In addition, **C.B.** “talked about ... her father forcing her to perform fellatio on him, that she had gagged.” *Id.* Thereafter, Mother and Father were arrested.

¶ 7 At the January 30, 2003 dependency hearing, Dr. Taroli was qualified as an expert witness in the area of forensic pediatrics. She confirmed that **C.B.** described being anally raped by Father and being forced to perform fellatio on Father. **C.B.** told Dr. Taroli that “dad told her that she'd be grounded if she told anybody and that she wouldn't be allowed to play with A.L., or he'd take away the TV and she'd have to stay in her room.” *Id.* at 62. The child was able to describe the physical manifestations of an erection and its subsequent characteristics during and after ejaculation and an adult sexual device that Father used occasionally during the sexual abuse. This sexual device was recovered by police while executing a search warrant at the home. Dr. Taroli's physical examination of **C.B.** revealed findings consistent with “repeated anal penetration” and attempted vaginal penetration. *Id.* at 67. Dr. Taroli diagnosed **C.B.** as a victim of sexual abuse. A.L. suffered from stunted physical growth and **mental retardation**, having the mental acuity of a two-year-old child.


¶ 8 Based on this evidence, after the January 30, 2003 dependency hearing, the trial court found by clear and convincing evidence that the children were dependent. At that time, the goal of the CYS family service plan was reunification. CYS immediately moved to amend its petition alleging the existence of aggravated circumstances under  42 Pa.C.S. § 6302(2),³ thus allowing it to suspend efforts at reunification.

¶ 9 The hearing on this request occurred on April 30, 2003. Cynthia Weber, the children's permanent caseworker, indicated the following. As a result of the abuse, Mother had been charged with endangering the welfare of children

and corruption of minors while Father was charged with endangering the welfare of children, corruption of minors, rape, statutory rape, involuntary deviate sexual intercourse, and three counts of aggravated indecent assault.⁴ The children had been placed in the same foster home. **C.B.** attended counseling and was enrolled in fourth grade with special education services. A.L. was in individual counseling and was enrolled in day care, receiving developmental educational services.

¶ 10 Mother sent Ms. Weber a letter indicating that Mother was the victim of verbal and physical abuse by her mother, that she was incapable of caring for **C.B.**, and also that she “doesn't believe the accusations, the allegations that [**C.B.**] is making against [Father].” N.T. Hearing, *292 4/30/03, at 11. Ms. Weber concluded that aggravated circumstances existed based on Father's sexual abuse of **C.B.**, the deplorable living conditions in the home, neglect, and the children's failure to attend school.

¶ 11 Psychologist Judith T. Munoz performed an evaluation of **C.B.**, determined that she was a victim of sexual abuse, and confirmed that **C.B.** referred to Father as her father. **C.B.** related the details of Father's abuse consistently with what she previously had told Dr. Taroli. **C.B.** also told Ms. Munoz that Mother knew about the abuse and told **C.B.** that **she** should stop having sexual relations. In addition, **C.B.** related to Ms. Munoz that Father took pictures of his penis and of incidents of sexual abuse and posted them on the internet. Ms. Munoz opined that **C.B.** is developmentally delayed with “an overall adaptive behavior composite of four years one month,” “scores in daily living skills ... of about three years five months, [c]ommunication was five years eleven months, and socialization was two years eleven months.” *Id.* at 32.

¶ 12 Psychologist Michelle Tavormina was **C.B.'s** sexual abuse therapist and was making inroads in helping **C.B.** cope with the abuse. **C.B.** lives with A.L. in the same foster home, and her foster parents received counseling from Ms. Tavormina on how to assist victims of sexual abuse. **C.B.** indicated to Ms. Tavormina that she “would like” her foster parents to become her “new mommy and daddy.” *Id.* at 58. A representative of **C.B.'s** elementary school confirmed that **C.B.** remained enrolled in the fourth grade, after being absent from October through December 2002, and that she was receiving educational support services. Based on this evidence, on September 24, 2003, the court found that aggravated circumstances existed under  42 Pa.C.S.

§ 6302(2) and that CYS was relieved from making further reunification efforts with this family.

¶ 13 In the interim, on August 8, 2003, before the trial court suspended reunification efforts, Father filed a motion to compel visitation with A.L. at the jail where he was incarcerated. He stated that, although visits with A.L. had begun on June 30, 2003, he sought more frequent visitation. On August 12, 2003, the court held a hearing on that petition, where the following was established. A.L. started visiting Father in jail every other week at the end of June 2003. Prior to those visits, he did not engage in any inappropriate sexual behavior. After those visits, both his foster parents and his teacher reported that A.L. would display disturbing behavior, including placing his hands on his penis inside his pants and rubbing his penis until it was red and also placing his hands on his neck and face. A.L.'s day care provider testified about this behavior at the hearing and reported that A.L. consistently displayed it after visiting Father.

¶ 14 Ms. Weber acknowledged the existence of a “bond” between A.L. and Father, n.t. hearing, 8/12/03, at 12; nevertheless, based on A.L.'s behavior after the visits, Ms. Weber concluded, “I’ve seen many children that have been sexually abused or have been witnesses of sexual abuse, and I would say that [A.L.] meets that criteria.” *Id.* at 13.

¶ 15 Since the April 30, 2003 hearing, Mother had pled guilty to endangering the welfare of a child, had begun work, and was permitted supervised visitation with the children. Ms. Weber noted that the children “are happy to see [Mother] when she visits with them,” and Mother “acts appropriately” during those visits. *Id.* at 17. Even though Mother had been compliant with the agency's goals, CYS was requesting that visits with her be suspended to aid the children's stability. Ms. Weber *293 opined that for “the children to make more progress, continue to be stable in the foster home,” visits with Mother should cease. *Id.* at 20.

¶ 16 Ms. Tavormina updated the court about therapy and testified that during one session, C.B. reported to Ms. Tavormina that A.L. was present when Father would rape and sodomize C.B. C.B. told Ms. Tavormina,

“My brother was in the room when daddy was hurting me. He was in the room. When I was on the couch and daddy was on top of me, [A.L.] didn't

save me. I called him to save me. He didn't save me. He was supposed to save me. He saw what daddy did.”

Id. at 28.

¶ 17 Ms. Tavormina also told the court that C.B. had not exhibited any inappropriate behavior in foster care for five months. Then, a week after her first visit with Mother, C.B. engaged in humping behavior with A.L. and other children in the foster home. C.B. also started rubbing her vagina after visits with Mother began. Ms. Tavormina expressed her “clinical opinion” that “the visits [with Mother were] obviously causing some type of disruption.” *Id.* at 36. In addition, Ms. Tavormina expressed deep concern about a letter from Mother in which she vilified C.B. “in terms of being responsible for the abuse.” *Id.* at 29. Finally, Ms. Tavormina concluded that Mother did not have skills necessary to properly parent C.B. and A.L. because they had been “so severely sexually abused in so many capacities” and to such “an extreme nature.” *Id.* at 37.

¶ 18 Cheryl Calandrino, the children's foster mother, confirmed that prior to June 2003, when the children started to visit Father and Mother, they behaved well and were appropriate with each other and other people in the household. After the first visit with Mother, A.L.'s demeanor did not change, but C.B. started to act inappropriately. A.L. started to place his hands on his penis after his first visit with Father.⁵ Based on this evidence, on August 13, 2003, the court suspended all visits between Father and A.L.

¶ 19 Presently before this Court are Father's appeal from the August 13, 2003 order suspending visitation with A.L., and both parents' separate appeals from the September 24, 2003 order finding the existence of aggravated circumstances and suspending reunification efforts.

Appeal Number 2754 EDA 2003

¶ 20 This is Father's appeal from the August 13, 2003 order suspending visits between him and A.L. He raises one issue for our review:

Did the Juvenile Court, Dependency Division, err by suspending visits between natural father and his son, where [CYS] failed to show by clear and convincing evidence that the visits between father and son constitute a grave threat?

Appellant's brief at 5.

[2] [3] [4] ¶ 21 In a dependency case,

The standard against which visitation is measured ... depends upon the goal mandated in the family service plan. Where ... reunification still remains the goal of the family service plan, visitation will not be denied or reduced unless it poses a grave threat. If ... the goal is no longer reunification of the family, then visitation may be limited or denied if it is in the best **interests** of the child or children.

In re B.G., 774 A.2d 757, 760 (Pa.Super.2001) (quoting ***294** *In re C.J.*, 729 A.2d 89, 95 (Pa.Super.1999)). The “grave threat” standard is met when “the evidence clearly shows that a parent is unfit to associate with his or her children;” the parent can then be denied the right to see them. *In re C.J.*, *supra* at 95. This standard is satisfied when the parent demonstrates a severe mental or moral deficiency that constitutes a grave threat to the child. *See id.*

[5] ¶ 22 Since the family reunification plan was intact when visitation was suspended, the trial court utilized the higher, more difficult standard, whether visitation posed a grave threat to A.L. Trial Court Opinion, 10/28/03, at 6. The trial court concluded that visitation between A.L. and Father posed a grave threat to A.L. Even though the sexual abuse charges were dismissed, the trial court found by clear and convincing evidence that Father sexually abused **C.B.** Based on the violent nature of the conduct, the trial court determined that *Green v. Sneeringer*, 431 Pa.Super. 66, 635

A.2d 1074 (1993), was applicable. In *Green*, the appellant-father sought visitation with his child after his conviction for the first degree murder of the child's mother. This Court concluded that the murder conviction alone was evidence that the appellant possessed a moral deficiency constituting a grave threat to the child. In the instant case, the trial court determined, likewise, that the evidence of Father's sexual abuse of **C.B.** was so heinous and repugnant that *Green* was applicable.

¶ 23 We agree with the trial court. Father has displayed such severe moral deficiency that he constitutes a grave threat to A.L. Regardless of whether his conduct resulted in criminal convictions, numerous CYS witnesses attested to the horrific sexual abuse perpetrated by Father on a ten-year-old girl in his care and custody. We view as entirely irrelevant the fact that this girl, who clearly viewed him as her father, was not actually Father's biological child. Father raped and sodomized this girl in front of A.L., who exhibited inappropriate sexual acting out after visiting Father in prison. We wholeheartedly concur with the trial court that in light of Father's clearly established moral depravity, he poses a threat to A.L. Hence, we affirm the suspension of visitation between him and A.L.

Appeal Number 3007 EDA 2003 and Appeal Number 3157 EDA 2003

[6] [7] ¶ 24 These appeals are Father's and Mother's separate appeals from the September 24, 2003 order finding the existence of aggravated circumstances and suspending reunification efforts. Initially, we examine the relevant scope and standard of review:

In dependency proceedings our scope of review is broad. Nevertheless, we will accept those factual findings of the trial court that are supported by the record because the trial judge is in the best position to observe the witnesses and evaluate their credibility. We accord great weight to the trial judge's credibility determinations. Although bound by the facts, we are not bound by the trial court's inferences, deductions, and conclusions therefrom; we must exercise our independent judgment in

reviewing the court's determination, as opposed to its findings of fact, and must order whatever right and justice dictate.

In re M.W., 842 A.2d 425, 428 (Pa.Super.2004) (quoting *In the Interest of S.B.*, 833 A.2d 1116 (Pa.Super.2003)).

¶ 25 At issue in this case are the provisions of the newly-enacted revisions to **Pennsylvania's** Juvenile Act. A short examination of the history and purpose of these revisions is important to our resolution of these matters.

*295 [8] [9] ¶ 26 Due to the requirements of the federal Adoption and Safe Families Act (“ASFA”), enacted in 1997, and to obtain vital federal funding, the legislature amended the **Pennsylvania** Juvenile Act, 42 Pa.C.S. §§ 6301–6365. See *In re Adoption of A.M.B.*, 812 A.2d 659 (Pa.Super.2002). The significance of these changes to the law cannot be overstated because the focus in dependency proceedings can be shifted under certain circumstances. Essentially, the ASFA directs the emphasis away from the paramount importance previously enjoyed by parental rights to establish “unequivocally that the goals for children in the child welfare system are **safety, permanency and well-being**.” *In re R.T.*, 778 A.2d 670, 678 (Pa.Super.2001) (quoting *In Interest of Lilley*, 719 A.2d 327, 334 n. 5 (Pa.Super.1998) (emphasis in original)); see 42 U.S.C. § 671. “The amendments make clear that the health and safety of the child supercede all other considerations.” *In re R.T.*, *supra* at 678 (quoting *Lilley*, *supra* at 333).

[10] [11] ¶ 27 The legislative history of ASFA reveals that this act was designed to curb an inappropriate focus on protecting the rights of parents when there is a risk of subjecting children to long term foster care or returning them to abusive families. See *In re J.I.R.*, 808 A.2d 934, 939 n. 5 (Pa.Super.2002) (examining House Report No. 105–77, April 28, 1997, Cong. Record Vol. 143 (1997), “Purpose and Scope,” Page 8). ASFA's purpose is to eliminate the need for family reunification efforts when it is established that the children were exposed to sexual or physical abuse. *Id.*

¶ 28 With this background in mind, we now review the impact of the provisions of the Juvenile Act on this case. Family reunification efforts ended in this proceeding based

on the existence of this aggravated circumstance: “(2) The child or another child of the parent has been the victim of physical abuse resulting in serious bodily injury, sexual violence or aggravated physical neglect by the parent.” 42 Pa.C.S. § 6302. The juvenile court herein concluded that CYS presented clear and convincing evidence that **C.B.** was the victim of sexual violence by Father, her parent, justifying the elimination of family reunification efforts.

[12] ¶ 29 The first question we address is whether the juvenile court erred in applying the definition of “parent” to Father, who was not **C.B.'s** biological parent. Both Mother and Father raise this question. We conclude that under the circumstances of this case, Father properly was determined to be **C.B.'s** parent, as envisioned by 42 Pa.C.S. § 6302(2). The following facts are relevant to this determination. First, Father and Mother lived together and had a biological child together. **C.B.** resided with them for eighteen months prior to being removed. She lived with her maternal grandmother and then with Father and Mother. Father himself assumed the responsibility of caring for **C.B.** and A.L. on a daily basis while Mother was at work. He told authorities that he was home schooling **C.B.** Father was the only father figure in her life. **C.B.'s** biological father was unknown to her. Indeed, Mother could not even provide the biological father's birth date and had no information about his whereabouts. In addition, **C.B.** never labeled Father as her stepfather; instead, all the witnesses confirmed that **C.B.** consistently referred to him as daddy. There was, in fact, evidence that when one interviewer referenced Father as **C.B.'s** stepfather, **C.B.** corrected the interviewer and stated that he was her daddy.

*296 [13] [14] [15] [16] [17] [18] ¶ 30 The following must be established to support a conclusion that the legal status of *in loco parentis* exists:

The phrase “*in loco parentis*” refers to a person who puts oneself in the situation of a lawful parent by assuming 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. 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. v. L.R.M., 567 Pa. 222, 228–29, 786 A.2d 913, 916–17 (2001) (citations omitted). The doctrine is applied “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.” ¶ *Id.* at 230, 786 A.2d at 917. Another important aspect of this doctrine is “whether the third party lived with the child and the natural parent in a family setting, irrespective of its traditional or nontraditional composition, and developed a relationship with the child as a result of the participation and acquiescence of the natural parent.” ¶ *Bupp v. Bupp*, 718 A.2d 1278, 1281 (Pa.Super.1998).

¶ 31 The present facts satisfy all aspects of the doctrine. First, Father assumed parental status and discharged parental duties each day by caring for C.B. while Mother worked and by representing to school authorities he was teaching her. This relationship was sustained over one and one-half years, and there was no biological father to defy Father's assumption of that status. Father unquestionably assumed parental stature in C.B.'s eyes, and she psychologically strongly viewed him as her father. Finally, Father lived with C.B. and her biological Mother in a family setting, and Mother acquiesced in the development of the parental bond between Father and C.B. See *T.B. v. L.R.M.*, *supra* (female in homosexual relationship with another female obtained *in loco parentis* status as to biological child of her partner); *Bupp*, *supra* (mother's live-in paramour acquired *in loco parentis* status by having assumed and discharged parental duties with the consent of the biological mother even though parties cohabitated for only one year). Therefore, we consider Father a parent to C.B. under ¶ 42 Pa.C.S. § 6302(2), irrespective of the absence of any biological or adoptive bond.

¶ 32 We must analyze the significance of ¶ *In re Davis*, 502 Pa. 110, 465 A.2d 614 (1983), to our holding. *Davis*

was authored by Justice Rolf Larsen. Only one other justice, Justice Roberts, joined in that case. The other justices concurred in the result. One of the questions presented in that case involved the definition of “parent” for purposes of determining whether a child was a “dependent child,” as envisioned by the Juvenile Act, which contains no definition of parent. The context of that inquiry revolved around the question of whether a child, Shane, was dependent because he was without a “parent.” Shane' mother had been abandoned by her biological parents as a child and raised by a couple who never adopted her. That couple also helped raise Shane, whose biological father was unknown. Shane's mother died, and the question was whether Shane was without “a parent, guardian, or legal custodian,” for purposes of 42 Pa.C.S. § 9302's definition of “dependent child” so that the local child welfare agency could become involved in his care. The Supreme *297 Court ruled that the doctrine of *in loco parentis* would not be used to determine whether a person was a parent, legal guardian, or legal custodian for purposes of determining whether a child was a dependent child and that a person who was not a biological or adoptive parent was not a parent.

[19] ¶ 33 *Davis* is a nonprecedential decision,⁶ and it is relied upon heavily by Father and Mother. Regardless of its precedential power, *Davis* stands for the sound proposition that the doctrine of *in loco parentis* should not be employed when determining whether a child has a parent for purposes of determining whether the child is dependent and thus, whether agency involvement should be initiated. However, the thrust of *Davis* supports the more fundamental precept that the Juvenile Act should be interpreted to accord the most protection to children. Clearly, the result in *Davis* was to enable the local child welfare agency to intervene and to ensure that the child was safe. Thus, *Davis* stands for the essential proposition that the Juvenile Act should be construed so as to afford the maximum opportunity to safeguard children.

¶ 34 Herein, we analyze a different provision of the Juvenile Act and conclude that for purposes of defining “parent” in the context of “aggravated circumstances,” the doctrine of *in loco parentis* is appropriately applied. Actually, *Davis* is conceptually compatible with our holding, which also is motivated solely by the desire to interpret each provision of the Juvenile Act in the manner which best serves the protection of children.

¶ 35 Importantly, our finding that Father is a parent within the meaning of § 6302(2) strikes at the central purpose of ASFA, which is to remove children from an abusive home environment. The abuse was perpetrated in C.B.'s home. C.B. had no other father but Father; he was the biological father of her brother. Mother allowed Father to assume parental status by committing both her children to his care daily while she worked. In C.B.'s home, Father was the perpetrator of horrific and sustained sexual abuse against this ten year-old girl. Father allowed his biological son to witness this abuse. If we are to heed the mandate of the federal and state legislature that directs us to focus on the **safety** and **well-being** of children, we cannot reach any other conclusion but that Father was a parent for purposes of 42 Pa.C.S. § 6302(2) in this case.

[20] ¶ 36 Father also maintains that the evidence regarding the sexual abuse was speculative and did not comply with the necessary standard of clear and convincing evidence. He contends that the allegations were “unsupported by solid and conclusive evidence.” Father's brief at 10. We strongly disagree. The evidence of sexual abuse was substantiated by a forensic pediatrician after physical examination, two psychologists, and two caseworkers. All five witnesses opined that C.B. was the victim of repeated sexual abuse by Appellant and rebuked any efforts to cast doubt on the credibility of C.B.'s accusations. The foster mother and A.L.'s day care provider confirmed that A.L. and C.B. exhibited behavioral manifestations consistent with abuse victims.

¶ 37 Contrary to Father's assertion that C.B.'s physical examination was inconclusive, Dr. Taroli testified, “The examination finding of the abnormal anal tone and immediate [dilation of the anus](#) with separation *298 of the buttocks is abnormal; and consistent with and most often seen with repeated anal penetration.” N.T. Dependency Hearing, 1/30/03, at 66–67. Ms. Walker, the intake caseworker, acknowledged the existence of C.B.'s memory difficulties, which are emphasized by Father in his brief. Nevertheless, Ms. Walker unequivocally testified that she did not believe that C.B. had any difficulty discerning the difference between truth and fiction and did not consider C.B.'s reports to be inaccurate. *Id.* at 31. C.B. was consistent about the existence and type of abuse to both caseworkers, Dr. Taroli, and two psychologists. None of these professionals doubted this child. Her humping and the rubbing of her vagina, which were observed by her caretakers, were described by expert

witnesses as behavior consistent with victims of sexual abuse. Witness after witness at each of the three hearings conducted in this proceeding provided vast amounts of evidence on this question. We agree with the trial court that the evidence in this case was clear and convincing; indeed, it was overwhelming. We reject Father's assertion that the evidence was insufficient to support the finding of child abuse and likewise reject Mother's related assertion that an abuse of discretion was present in this case.

[21] ¶ 38 In addition, Mother's professed lack of notice of the sexual abuse is beyond belief and highlights the tragic circumstances in which these children lived. C.B. informed her therapist that Mother was aware of the abuse. However, rather than make any attempt to stop Father from sexually abusing the child, Mother told C.B. that **she** should not engage in sexual activity with Father. N.T., 4/30/03, at 26–29. In a letter to CY5, Mother accused C.B. of lying about the abuse, and then, once faced with irrefutable proof of the facts, Mother blamed the ten-year-old girl as being responsible for the sexual abuse.

¶ 39 Mother avers that we cannot rely on the hearsay statement C.B. made to her therapist. However, C.B.'s statement was supported by the fact that C.B., who had engaged in no sexually inappropriate behavior beforehand, started to rub her vagina and hump other children after her first visit with Mother. We do not hesitate to conclude that Mother knew what was happening to her daughter.



¶ 40 ASFA's purpose is to eliminate the need for family reunification efforts when it is established that children were exposed to sexual or physical abuse. These parents have exhibited no responsibilities attendant with parenting but have been abusive and grossly neglectful; thus, we direct our focus away from any parental “rights” and toward the protection of these innocent, scarred children, who have been subjected to egregious horrors that shake the very foundations of the precious family institution. We affirm the decision of the trial court to suspend reunification efforts in this dependency proceeding.

¶ 41 Orders affirmed.

All Citations

861 A.2d 287, 2004 PA Super 402

Footnotes

- 1 This order is a final, appealable order.  *In the Interest of H.S.W.C.-B & S.E.C.-B.*, 575 Pa. 473, 836 A.2d 908 (2003).
- 2 Since Mother has the same initials as **C.B.**, we refer to Mother as such throughout this decision. For consistency, we refer to Father similarly.
- 3 That section provides:
- Aggravated circumstances.** Any of the following circumstances:
-
- (2) The child or another child of the parent has been the victim of physical abuse resulting in serious bodily injury, sexual violence or aggravated physical neglect by the parent.
- 4 Father represents that on October 21, 2003, he pleaded guilty to child endangerment and corruption of minors; the rape and related sexual assault charges were dismissed.
- 5 We observe that no evidence was presented that A.L. was the victim of sexual abuse; however, testimony was presented that he witnessed **C.B.'s** abuse.
- 6 In  *Commonwealth v. Price*, 543 Pa. 403, 672 A.2d 280 (1996), the Court observed that a decision that does not command a majority of the votes is a non-precedential plurality decision.

Pa. RPC 1.1

State Court Rules current with amendments July 1, 2023. Local federal district and bankruptcy court rules and ECF documents are current with amendments received through August 15, 2023. All other local federal district and bankruptcy court materials are current with amendments received through June 1, 2023. Local Court Rules are current with amendments received through December 1, 2022

PA - Pennsylvania Local, State & Federal Court Rules > RULES OF PROFESSIONAL CONDUCT > CLIENT-LAWYER RELATIONSHIP

Rule 1.1. Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

EXPLANATORY COMMENT

Legal Knowledge and Skill

1§ In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

2§ A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

3§ In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impracticable. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest.

4§ A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also **Rule 6.2.**

Thoroughness and Preparation

5§ Competent handling of particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See **Rule 1.2(c).**

Retaining or Contracting With Other Lawyers

6§ Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also **Rules** 1.2, 1.4, 1.6, and 5.5(a). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, **professional conduct rules**, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

7§ When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See **Rule** 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these **Rules**.

Maintaining Competence

8§ To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. To provide competent representation, a lawyer should be familiar with policies of the courts in which the lawyer practices, which include the *Case Records Public Access Policy of the Unified Judicial System of **Pennsylvania***.

CODE OF PROF. RESP. COMPARISON

DR 6-101(A)(1) provides that a lawyer shall not handle a matter "which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it." DR 6-101(A)(2) requires "preparation adequate in the circumstances"; **Rule 1.1** more fully particularizes the elements of competence.

Annotations

Notes to Decisions

Criminal Law & Procedure: Counsel: Effective Assistance: Appeals

Legal Ethics: Client Relations: Conflicts of Interest

Legal Ethics: Client Relations: Effective Representation

Legal Ethics: Sanctions: Suspensions

Torts: Malpractice & Professional Liability: Attorneys

Criminal Law & Procedure: Counsel: Effective Assistance: Appeals

An attorney's actions of confusing his client with another person and incorrectly citing the crimes his client committed is carelessness that falls well below the level of thoroughness and preparation required for competent representation by **Pa.** R. Prof. **Conduct 1.1**. [Commonwealth v. McDaniels, 2001 PA Super 295, 785 A.2d 120, 2001 Pa. Super. LEXIS 2744 \(Pa. Super. Ct. 2001\)](#).

Legal Ethics: Client Relations: Conflicts of Interest

In disciplinary proceedings against an attorney that represented a university and three of its administrators during grand jury proceedings investigating child abuse accusations against a former football coach, the attorney violated **professional rules** of **conduct** relating to competence and conflicts of interest, because, inter alia, she had inadequate information for a conflict of interest analysis and there was significant risk that representation of any individual client would materially limit her ability to represent the others. [Office of Disciplinary Counsel v. Baldwin, 657 Pa. 339, 225 A.3d 817, 2020 Pa. LEXIS 1080 \(Pa. 2020\).](#)

Legal Ethics: Client Relations: Effective Representation

In disciplinary proceedings against an attorney that represented a university and three of its administrators during grand jury proceedings investigating child abuse accusations against a former football coach, the attorney violated **professional rules** of **conduct** relating to competence and conflicts of interest, because, inter alia, she had inadequate information for a conflict of interest analysis and there was significant risk that representation of any individual client would materially limit her ability to represent the others. [Office of Disciplinary Counsel v. Baldwin, 657 Pa. 339, 225 A.3d 817, 2020 Pa. LEXIS 1080 \(Pa. 2020\).](#)

Client was awarded punitive damages in a legal malpractice action because the attorney, inter alia, undertook the representation of the client's case, but did little to nothing on it until threatened with sanctions or penalties, did not turn over the client's file despite promising under oath to do so, and when confronted with the consequences of his bad actions, turned on the client, used the file, and gave himself the zealous representation he denied the client. [Wright v. Levan, 44 Pa. D. & C.5th 1, 2014 Pa. Dist. & Cnty. Dec. LEXIS 4182 \(Pa. County Ct. Oct. 31, 2014\).](#)

Attorney was suspended from the Bar of the Commonwealth of **Pennsylvania** for two years after engaging in extensive wrongdoing in six separate matters; the attorney took on cases and failed to follow through on the representation, failed to comply with court orders and attend meetings, failed to communicate, failed to provide written fee agreements, failed to return client files and/or refund advance payments of fees that were not earned, mailed solicitation letters to four clients that contained misleading information, and approved of her non-lawyer assistant meeting with and providing a client with legal advice on bankruptcy without the attorney being present. The attorney's clients were harmed by the attorney's actions. [Office of Disciplinary Counsel v. Lewis, 3 Pa. D. & C.5th 406, 2007 Pa. LEXIS 2969 \(Pa. Jan. 26, 2007\).](#)

Attorney was suspended from the practice of law for one year and one day as a result of failing to provide competent representation to clients in three separate immigration matters out-of-state, which caused two of the clients to have been deported. The attorney's mental illness (bipolar disorder) was acknowledged as was his prior discipline history. [Office of Disciplinary Counsel v. Levine, 83 Pa. D. & C.4th 539, 2006 Pa. LEXIS 2582 \(Pa. 2006\).](#)

Legal Ethics: Sanctions: Suspensions

Attorney was suspended from the Bar of the Commonwealth of **Pennsylvania** for two years after engaging in extensive wrongdoing in six separate matters; the attorney took on cases and failed to follow through on the representation, failed to comply with court orders and attend meetings, failed to communicate, failed to provide written fee agreements, failed to return client files and/or refund advance payments of fees that were not earned, mailed solicitation letters to four clients that contained misleading information, and approved of her non-lawyer assistant meeting with and providing a client with legal advice on bankruptcy without the attorney being present. The attorney's clients were harmed by the attorney's actions. [Office of Disciplinary Counsel v. Lewis, 3 Pa. D. & C.5th 406, 2007 Pa. LEXIS 2969 \(Pa. Jan. 26, 2007\).](#)

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Torts: Malpractice & Professional Liability: Attorneys

Client was awarded punitive damages in a legal malpractice action because the attorney, inter alia, undertook the representation of the client's case, but did little to nothing on it until threatened with sanctions or penalties, did not turn over the client's file despite promising under oath to do so, and when confronted with the consequences of his bad actions, turned on the client, used the file, and gave himself the zealous representation he denied the client. [Wright v. Levan, 44 Pa. D. & C.5th 1, 2014 Pa. Dist. & Cnty. Dec. LEXIS 4182 \(Pa. County Ct. Oct. 31, 2014\)](#).

PENNSYLVANIA RULES OF COURT

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Scenario #1

Xavier is the father of 2 children, ages 8 and 6 years old. He has been in a relationship with their mother, Alexis, for the past 9 years. The relationship has been on and off for several of those years, due to repeated instances of physical abuse by both parties. For the last few months, Xavier and Alexis have maintained separate residences, but exchange the children regularly with no issue. This morning, Alexis showed up to Xavier's house unannounced to pick up their children and became upset when she found another woman at the home. Xavier and Alexis began to argue and a physical altercation took place outside of the house. The fight ended with Alexis getting into her car and running into Xavier. She then forced the children into her car without their booster seats and left the scene. Xavier received medical attention for bruised ribs from being hit, and several scratches and cuts to his face from their fight. He has not heard from Alexis or the children since the morning.

Xavier received your information from a family friend and has called you after-hours for advice. He informs you that Alexis has attempted to take the children before with no contact, but that she's come back in a few days. He said neither party has ever physically abused the children, but Alexis drinks pretty frequently and uses drugs recreationally.

How do you advise Xavier? What type of PFA should he file and should he include custody? What is the court's obligation?

Scenario #2

You represent Mother, who wants custody of two children, aged 4 and 7, who are currently subject to a dependency case due to domestic violence. Mother pro se filed a Protection from Abuse petition and currently has final PFA order under which Father is evicted from the home for three years and prohibits any contact between your client and Father. While no PFA petition was filed on behalf of the child, Mother alleges that Father routinely abused Mother in the presence of the children.

Mother hopes to reunify with her children now that Father is evicted and has requested DHS allow visitation. Mother fears that Father, however, will take out his anger and frustration on the children and does not believe he should be reunified with the children.

What should you counsel your client in terms of what visitation options are available? How do you argue that Mother's visitation should be different from Father's?

Scenario #3

You represent Mother, a survivor of domestic violence, in a custody proceeding.

Mother and Father share three children, ages 3 months, 4 years, and 10 years. Your client's Petition for Custody alleges that Father has been physically abusive to her and the children. Most recently Mother alleges that Father abused her in front of the kids and that the 10 year old intervened and was injured. The kids are now experiencing nightmares. In your preparation with your client you learn that Mother and Father have been in an on and off again relationship for 13 years. Mother has left and returned to the relationship a total of four times, this is her fifth time leaving. Mother's Petition for Custody alleges

that Father has abused the children their entire lives and that there have been multiple unfounded DHS reports against Father.

In your preparation of this case, you reasonably expect Father's attorney to question why Mother returned to a violent relationship, why she did not call the police, and assert that the DHS reports are false allegations created by Mother in order to manipulate custody in her favor.

What questions do you want to ask your client on direct examination? How would you prepare your client for court? What points would you like to emphasize in closing arguments?

Scenario #4

You represent Parent 1 in a child custody case. Although there is no PFA in place, there has been domestic violence in the household, affecting both Parent 1 and the child. Parent 1 believes that Parent 2 should not have any contact with the child, but does not want to obtain a PFA.

There is an upcoming hearing before a judge. Parent 1 wants the child to testify and you believe the judge will rule in your favor if they hear from the child.

How do you prepare the child for testifying, or do you at all? Will you waive your presence during the interview? What questions will you request that the judge ask in camera to bring out the information you think is essential to your case?

Scenario #5

You represent Client in her custody case against her former Wife. The two parties share one child, age 5. There is a history of domestic violence, perpetrated by Wife against Client. In one instance, Client was holding the child (who was at the time, age 2) and Client obtained a PFA obo (on behalf of) the child. The PFA obo has now expired. Wife has taken anger management classes and is currently in therapy. Wife wants to resume a relationship with the Child and has filed a Complaint for Custody.

Client wants her child to have a relationship with Wife, but does not want Wife to be unsupervised. Client does not have anyone willing to supervise and is not comfortable having Wife at her home.

What options can you suggest for Client? How can you help Client feel safe and empowered as Wife reunites with the child? What can you request from the court in a potential Custody Order?

Standards for Supervised Visitation

Custody Cases

Costello v. Costello, 446 Pa. Super. 371, 376, 666 A.2d 1096, 1099 (1995) (vacating award of partial custody to father and remanding with suggestion that trial court consider more limited award of visitation where trial court did not fully consider abusive behavior by father).

- The Grave Threat standard is used in both Custody and Dependency.
 - “[T]he appropriate standard to apply when presented with the issue of parental visitation is whether the parent suffers from mental or moral deficiencies which pose a grave threat to the child.” *Green v. Sneeringer*, 431 Pa.Super. 66, 69, 635 A.2d 1074, 1076 (1993) (citing *In re Damon B.*, 314 Pa.Super. 391, 460 A.2d 1196 (1983); *Commonwealth ex rel. Peterson v. Hayes*, 252 Pa.Super. 487, 381 A.2d 1311 (1977)); see *Commonwealth ex rel. Sorace v. Sorace*, 236 Pa.Super. 42, 344 A.2d 553 (1975) (parent should seldom be denied right to visit with his child, but when severe mental or moral deficiency constitutes threat to child's welfare, visitation rights may be denied to parent who manifests such condition); *Scarlett v. Scarlett*, 257 Pa.Super. 468, 390 A.2d 1331 (1978) (visitation may be limited or denied in a custody case only where a parent has been shown to suffer from severe mental or moral deficiencies that constitute a grave threat to the child).

Green v. Sneeringer, 431 Pa. Super. 66, 70, 635 A.2d 1074, 1076 (1993) (upholding denial of visitation where father was convicted of first degree murder of mother of their two-year-old child).

Schwarcz v. Schwarcz, 378 Pa. Super. 170, 186, 548 A. 2d 556, 564 (1988) (limiting father's visitation rights due to, among other things, threats against mother, brandishing gun, and assault of mother-in-law).

Hughes v. Hughes, 316 Pa. Super. 505, 508, 463 A.2d 478, 479 (1983) (denying father visitation where he had a long history of abusing child's mother and had once shot her while she was holding child).

Gwiszcz Appeal, 206 Pa. Super. 397, 404-5, 213 A.2d 155, 158-9 (1965) (ordering father's visitation with son to take place outside mother's home and presence because abuse of mother during previous meetings was inappropriate for child to witness).

Dependency Case

In the Interest of C.B. 2004 Pa. Super. 402, 861 A.2d 287 (Pa. Super. 2004).

- In dependency cases, the standard for visitation is mandated by the family service plan.
 - If reunification is the goal, visitation is required and cannot be reduced unless visitation would pose a “grave threat”.
 - The grave threat standard is met when there’s evidence that a parent is clearly unfit to associate with their children or when the parent demonstrates severe mental and moral deficiency.
 - If the goal is not reunification, visitation can be limited, reduced, supervised, or denied completely if it is in the best interest of the child.
 - In this case, visitation was denied completely because the court found there was a grave threat to one child because Father had sexually abused the child’s sibling.
 - Criminal conviction not required.
 - Clear and convincing evidence from multiple witnesses regarding the abuse.
 - Conduct indicating moral deficiency does not need to be as to the child in question.
 - Violent nature of the conduct indicates a moral deficiency.

	Traditional Approach	Trauma Informed Approach
Client/ Protective Parent Preparation	<ul style="list-style-type: none"> - Assuming clients are familiar with court systems - Preparing testimony in linear timelines - Minimizing the importance of DV as a factor - Dictating case theory or achievable outcomes - “Why didn’t you…” <ul style="list-style-type: none"> o Call the police, tell the doctor, take the kids to the hospital, go to the hospital yourself, tell a therapist, tell DHS - Emphasize court-based options as the main way to enhance safety <ul style="list-style-type: none"> o Filing for a PFA, PFA OBO, engaging with the criminal system 	<ul style="list-style-type: none"> - Client all aspects of court environment (direct, cross, room layout, etc.) - Client is active participant in the creation of direct examination, case theory, and understands potential cross examination questions - “What is your ideal outcome” - “What can we ask for that would make you feel safer participating in custody exchanges” - “I would like to hear about that strategies you have used to keep your family safe” - “What would you like to see the other party do”
Direct and Cross of Client in Court	<ul style="list-style-type: none"> - Spotlight is on what the protective parent has done to keep the abusive partner away - Spotlight is on the protective parent involving outside agencies like police, DHS, courts - Minimizing or ignoring client’s trauma responses <ul style="list-style-type: none"> o Repetition, non-linear timelines, - Expectation that it is solely the burden of the protective parent to stop the violence - Expectation is that the protective parent will have evidence of the violence 	<ul style="list-style-type: none"> - Spotlight is on the abuse committed by the abusive party - Emphasis is on holding abusive party accountable for their actions - Questions highlighting unique safety plans created by the protective parent- <i>even if non-traditional</i> - Allows the protective parent to explain their actions - Prior preparation allows the attorney to suggest unique solutions to the court - Protective parents are given space (and grace) when reliving their trauma
Result in Court	<ul style="list-style-type: none"> - Credibility determination against your client - Confused Judges! - Unsupported clients - Adverse outcomes that could lead to contempt or dependency actions 	<ul style="list-style-type: none"> - The court has a full picture - Goal is safety for the entire family - Expectation turns to the abusive party to stop abusive actions or engage in work to repair the relationship with children - Minimizes future court involvement- both dependency and custody