



# SWAN Legal Services Initiative

## September Legal Report

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## PENNSYLVANIA SUPREME COURT

### **C.G. v. J.H.**

Date of Decision: September 21, 2018

Cite: 2 MAP 2018

### **Holding:**

In a fact-specific ruling, the Pennsylvania Supreme Court held that a same-sex unmarried partner did not meet the definition of in loco parentis and was not a parent under 23 Pa.C.S §5324(1) for purposes of seeking custody of a child. A non-biological parent must demonstrate both parental status and the discharge of parental duties when alleging in loco parentis status. The court may consider post-separation conduct as part of the analysis.

### **Facts and procedural posture:**

C.G. and J.H. were living together as a same-sex couple in Florida at the time of the child's birth. J.H. is the biological mother of the child. C.G. has no genetic connection and did not adopt the child at the time of his birth because it was not legal to do so, nor did an adoption take place when it became legal to do so. Similarly, when it became possible for the couple to marry they did not do so. The couple cohabitated for approximately five years. When they separated, J.H. and the child moved to Pennsylvania.

Approximately three years later, C.G. filed a custody complaint in Pennsylvania seeking shared legal and partial physical custody of the child and alleged that she acted as a mother to the child, that the child was conceived by mutual consent and with the intent that the parties would co-parent. C.G. alleged that the post-separation contact with the child was minimal and limited to once weekly contact because J.H. withheld the child, did not notify or consult C.G. about the move and denied requests for more contact.

J.H. filed preliminary objections alleging that C.G. did not have standing under 23 Pa.C.S. §5324 because she is not a parent, did not stand in loco parentis and is not a grandparent. J.H. contradicted C.G.'s assertion that the child was conceived by mutual consent and alleged that it was solely her decision to have the child. J.H. alleged that she met all the financial obligations, and made all of the educational and medical decisions for the child. After the parties separated, J.H. alleged that C.G. provided no financial support and had minimal contact with the child.

During a three-day trial, the court heard from sixteen witnesses who offered testimony regarding the parties' relationship with child, the intent of the parties prior to and after conception and birth of the child, and the parental duties discharged by each party. The trial court issued an order sustaining the preliminary objections and concluded that C.G. did not have standing pursuant to 23 Pa.C.S. §5324(1).

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Because same-sex and second parent adoptions were not legal during the relevant period of time, C.G. could only have parent standard if she met the definition of C.G. in loco parentis. The court concluded based on the evidence presented that C.G. did not agree to have a child, but “merely acquiesced to J.H. having one.” While the court heard conflicting testimony, it found compelling that J.H. made the medical, educational and extra-curricular decision for the child without consulting C.G. While C.G. occasionally attended activities, the court declined to accept that participation as evidence of C.G. discharging parental duties. The familial relationships with C.G.’s parents and adult children were incidental to the relationship and did not demonstrate a bond or connection. Finally, the court analyzed C.G.’s post-separation conduct and found it consistent with their finding that C.G. was not a parent to the child. C.G. did not request consultation in matters relating to the child, sent nominal packages and had only one visit in four years.

C.G. appealed the order based on the finding that she was not a parent under section 5324(1) and that she did not stand in loco parentis. The Superior Court affirmed the order and opined that “Pennsylvania case law has consistently treated same-sex life partners who have not adopted a child as third parties for purposes of custody matters.” In upholding the lower court’s ruling, the Superior Court held that the analysis was fact-specific and the decision rested on the court’s credibility determinations. The argument that the court erred in assigning too much weight to post-separation conduct was dismissed by the Superior Court. The Court held that the post-separation conduct was but one factor to be considered in the in loco parentis analysis. It is from that order that C.G. filed a petition for allowance of appeal.

**Issues:**

1. Whether a former same-sex, unmarried partner of a biological parent may have standing to pursue custody as either a parent or someone who stood in loco parentis.
2. Whether post separation conduct is relevant to an in loco parentis analysis.

**Rationale:**

The Supreme Court first acknowledged that the “fundamental concept of standing ensures that a party seeking to litigate a matter has a substantial, direct, and immediate interest in the subject-matter of the litigation.” The stringent application of standing in family matters seeks to protect a family from unnecessary intrusion. 23 Pa. CS §5324 seeks to limit the class of people who may have a substantial, direct or immediate interest in the custody of children by identifying only parents, a person who stands in loco parentis or a grandparent as those who may have standing. Standing is a threshold question of law that must be resolved prior to any analysis of the central issue.

The statute does not define the word “parent,” therefore, the Court relied on its popular meaning which includes biological and adoptive persons. Further, that common meaning is consistently applied in case law. While the Court recognized that the concept of what comprises a family is evolving, the Supreme Court was unwilling to extend legal parentage to those who are third parties but allege an intent to co-parent. C.G.’s reliance on cases supporting legal parentage by contract was misplaced. The Court opined that in the instant matter there was no contract regarding the parties’ intentions nor was she identified as an intended parent at the time of conception.

The Court is clear to point out that a statutory presumption of parentage would not “be bestowed on a similarly situated male based on cohabitation in the absence of marriage.” Further, C.G. did not participate in the child’s conception or hold the child out as her own. Consequently, under these facts, the Court found no cause to expand the definition of the term “parent” in Section 5324(1).

In loco parentis

The term “in loco parentis” essentially requires the assumption of parental status and the discharge of parental duties with the consent of the parent. C.G. argued that the court should give weight the bond between the child and non-biological parent as part of the inquiry as to a partner’s in loco parentis standing. The Supreme Court declined to adopt that argument citing that the existing case law does not support a loose application of standing principles in matters related to child custody where the paramount concern is the best interest of the child.

Finally, the Supreme Court addressed the treatment of post-separation conduct in analyzing whether a third party stands in loco parentis. The Court opined that post-separation conduct is one factor to consider when a person is seeking standing. In the instant matter, the record established that C.G. did not assume a parental status or discharge parental duties. The post-separation conduct was consistent with that determination.

*Concurring Opinion by Justice Dougherty:* While Justice Dougherty concurs in the result due to the credibility determinations made by the trial court, he takes issue with the majority’s narrow interpretation of “parent” under 23 Pa.C.S. §5324(1). Under the current precedent, parentage may only be established biologically, through adoption, a presumption attendant to marriage or legal parentage by contract. Justice Dougherty opines that under this narrow construct, it is impossible for both partners of a same-sex couple to have standing, absent marriage or adoption. In the absence of a legislative directive and in light of evolving concepts of family, it is his opinion that the precedent supports that an individual who lacks biological, adoptive or marital ties may establish standing under 23 Pa.C.S. §5324(1). However, this case does not present a factual pattern that would permit a different interpretation.

*Concurring Opinion by Justice Wecht:* Justice Wecht joins in the result, but diverges from the majority with regard to two points. First, he identifies the need to analyze the intent of the parties who may have relied on assisted reproductive technology (ART). Justice Wecht argues that the majority draws too narrowly on the jurisprudence relating to parentage by contract, specifically *Ferguson v. McKiernan* (940 A.2d 1236 (Pa.2007) and *In re Baby S*, 128 A.3d 296 (Pa.Super.2015). With regard to *Ferguson*, the court found the parties’ oral contract between mother and sperm donor to be enforceable and held that mother was unable to seek child support. While the court did not consider the parties’ intentions, Justice Wecht opines that an analysis of their intentions yields the same result. Mother’s and sperm donor’s actions “bore all the hallmarks of a clinical donation of gametes calculated and designed to result in no parental role for the donor.” The Court similarly focused on the surrogacy contract in *In re Baby S*, but could have easily come to the same conclusion by analyzing the actions demonstrating the intentions of the parties. Justice Wecht suggests that there may be scenarios in which a contract-based approach to determining parentage may foreclose a valid claim and yield a different result if the court applied an intent-based analysis. Such a constricted approach fails to account for the best interest of the child and focus on the child’s needs. In the instant matter, however, it is clear that there was no mutual intent between the parties.

Second, Justice Wecht argues that post-separation conduct should only be considered in an in loco parentis analysis if the court is first able to determine that the custodial parent did not withhold the child from the other party. Justice Wecht agrees with the majority that neither the bond between a child and third party nor post-separation conduct are dispositive in an in loco parentis analysis. He opines that if there is evidence that a third party assumed parental status and discharged parental duties, but the custodial parent withheld the child after separation, the post-separation conduct should not be considered for purposes of denying that third party’s request for standing. In the instant matter, post-separation conduct seemingly played a significant role in the analysis but the trial court made a finding that the custodial parent did not withhold the child from C.G.

## PENNSYLVANIA SUPERIOR COURT

### **In the Interest of E.O.**

Date of Decision: September 5, 2018  
Cite: 2641 EDA 2017

#### **Holding:**

Superior Court vacated an order finding Father in contempt for violating a visitation provision in a dependency matter and imposing a seven-day sentence of incarceration, and remanded for further proceedings.

The opinion in this case was published in July and again in September. Please see the July Legal Report for a complete summary. The opinion can be accessed through the link below.

<http://www.pacourts.us/assets/opinions/Superior/out/Opinion%20%20Vacated%20%2010368763041587263.pdf>

### **In re: H.R.**

Date of Decision: September 21, 2018  
Cite: 199 EDA 2018

#### **Holding:**

Superior Court affirmed orders denying a motion to dismiss petition for involuntary treatment and committing H.R. to mental health treatment for a period of one year.

#### **Facts and Procedural Posture:**

H.R. was adjudicated delinquent at age thirteen for indecent assault of a child less than thirteen years of age and was ordered to undergo inpatient treatment for sexual offenders at a residential treatment facility. At age twenty, H.R. was assessed by the Sexual Offender's Assessment Board, a dispositional hearing was held before the court and it was determined that H.R. was in need of further treatment. The county filed a motion for involuntary treatment and H.R. filed a motion to dismiss in response. The court denied the motion to dismiss and granted the motion for involuntary treatment. It is from that order that H.R. filed his initial appeal.

Subsequently, Appellant was placed on the Pennsylvania State Police's sex offender registry as a sexually violent delinquent child (SVDC). H.R. filed a motion to be removed from the sex offender registry and the court granted that motion removing him from the registry. H.R. also appeals from this order arguing that the evaluation mechanisms under the Act are unconstitutional.

#### **Issues:**

1. Whether Act 21 is punitive, such that its retroactive application to H.R. and its mechanism for determining whether an individual is a sexually violent delinquent child are unconstitutional based on the court's prior rulings.

#### **Rationale:**

Act 21 establishes rights and procedures for the civil commitment of sexually violent delinquent children who, due to mental abnormality, are unable to exercise control over their behaviors. Legislation may be deemed unconstitutionally punitive if it is determined that the legislative intent is to punish. If the intent is non-punitive, the second inquiry is whether the effect of the legislation is contradictory to the stated intent.

The Superior Court analyzed whether the legislative intent was to punish. The Court cited its opinion in *In re: S.A.*, 925 A.2d 838 (Pa.Super. 2007) which held "the General Assembly's intent in promulgating Act 21 was not to punish sexually violent delinquent children, but rather, to establish civil commitment procedures designed to provide necessary treatment to such children and to protect the public from danger." Here, the court opined that the only consequence of the judicial determination as set forth in Act 21 is court-ordered treatment. The case law cited by H.R. considered the constitutionality of SORNA, not Act 21; therefore, the court held that those cases are not dispositive in the instant matter. Further, since the statute is not punitive, the clear and convincing standard to determine whether a child is a SVDC is constitutional.

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**M.W. v. S.T. and V.T.**

Date of Decision: September 26, 2018  
Cite: 712 WDA 2018

**Holding:**

Superior Court affirmed an order dismissing Grandmother's complaint for custody of her grandchildren.

**Facts and Procedural Posture:**

Somerset Children and Youth placed grandchildren in the care of M.W., Grandmother, for a period of approximately six months. During the placement with Grandmother, the children were adjudicated dependent. The children were removed from Grandmother and placed with an aunt, and later placed with another set of grandparents. At that time, Grandmother petitioned to intervene in the dependency proceeding. Prior to the disposition of Grandmother's petition, the children returned to parents but remained under the supervision of the court. After argument on Grandmother's petition, the court issued an order denying the petition and ordered that she could re-file in civil division. Grandmother then filed a complaint for custody against S.T. and V.T., parents, in civil division. During the pendency of the custody matter, the dependency matter closed.

Due to the parties failing to complete required seminars, a custody conference was not completed. The court granted a continuance at Grandmother's request due to health issues. Grandmother petitioned for a conference but neither she nor parents attended. The court permitted the matter to be scheduled by praecipe of any party. Grandmother eventually filed a praecipe and in response, counsel for parents filed a petition to dismiss. The trial court concluded that pursuant to 23 Pa.C.S. §5324 Grandmother no longer had standing because the children were no longer dependent and they were living with parents. It is from that order that Grandmother appeals.

**Issues:**

1. Whether the trial court erred in dismissing a custody complaint for lack of standing pursuant to 23 Pa.C.S. §5324.

**Rationale:**

There is no dispute that the only applicable statute to support Grandmother's complaint is 23 Pa.C.S. §5324(3), which provides as follows:

- (3) A grandparent of the child who is not in *loco parentis* to the child:
  - (i) whose relationship with the child began either with the consent of a parent of the child or under a court order;
  - (ii) who assumes or is willing to assume responsibility for the child; and
  - (iii) when one of the following conditions is met:
    - (A) the child has been determined to be a dependent child under 42 Pa.C.S. Ch. 63 (relating to juvenile matters);
    - (B) the child is substantially at risk due to parental abuse, neglect, drug or alcohol abuse or incapacity; or
    - (C) the child has, for a period of at least 12 consecutive months, resided with the grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, in which case the action must be filed within six months after the removal of the child from the home.

Grandmother contends that she fulfilled the statutory requirements because she filed her custody complaint when the children were dependent. She contends that the court erred in evaluating her status for purposes of standing at the wrong point in time. The trial court held that Grandmother lost her standing because the children were no longer dependent at the time of the hearing on the petition to dismiss her custody complaint. Superior Court acknowledged that there are no cases directly on point as it relates to dependency but concluded that the children's change in status from dependent to non-dependent and reunified with parents are relevant changes in circumstances that permit a re-evaluation of standing. Further, the Superior Court opined that child custody cases are fluid and as such the trial court did not err in considering the facts as they existed at the time the petition to dismiss was filed as opposed to the status of the case months prior.

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Secondarily, Grandmother argues that the statute would still permit the court to grant her standing because of the possibility of future harm to the children or future dependency adjudications. The Court reiterates the fundamental interest in a parent's right to the care, custody and control of their children. The Court declined to adopt Grandmother's interpretation of the statute because the law presumes that parents are fit. Third parties should not be permitted to "bootstrap" a prior dependency action to a custody proceeding for the purposes of requesting partial custody or visitation.

**S.W. v. S.F.**

Date of Decision: September 18, 2018  
Cite: 331 MDA 2018

**Holding:**

Superior Court adopted the trial court's opinion in its entirety and affirmed the order granting a final protection from abuse order on behalf of child.

**Facts and Procedural Posture:**

Mother and Father have engaged in a litigious custody action since 2009. The Protection from Abuse petition (PFA) was filed by Father on behalf of himself and minor child, S.W. The petition alleged that Mother and child had an argument and Mother threatened to beat child. The petition included information regarding several incidents of past abuse alleged at the hands of Mother, including Mother drinking and driving with child in the car, pushing and punching child, and throwing household objects at her.

An *ex parte* hearing was held pursuant to 23 Pa.C.S. §6107(b)(1) and the child was interviewed *en camera*. The court found the child's testimony to be compelling and granted a temporary PFA. An evidentiary hearing was subsequently conducted wherein Father, step-mother, Mother and maternal grandmother testified. The court granted the petition against Mother for a term of three years. It is from that order that Mother appeals.

**Issue:**

1. Whether the trial court abused its discretion and made an error of law when it did not allow child to testify at the PFA hearing, did not permit Mother the opportunity to cross examine the child and relied on the testimony taken during an *ex-parte* hearing.

**Rationale:**

Mother's issues raised on appeal challenge the sufficiency of the evidence. The Court cited the relevant portion of the PFA statute that permits an *ex parte* hearing in camera. There is no statutory requirement or case law that would permit a defendant to participate in an *ex parte* hearing and to allow such would create a clear contradiction with the intent of the PFA statute to protect the minor victim. The opinion further identifies Mother's confusion between the *ex parte* hearing from which a temporary PFA was issued, and the evidentiary hearing from which the final order was issued. The child requested the *ex parte* hearing pursuant to 23 Pa.C.S. §6107(b)(1). There is no statutory requirement that the defendant have a right to confront the petitioner in that proceeding which resulted in a temporary order and evidentiary hearing. Mother never objected during the hearing to the child's unavailability at the evidentiary hearing. However, Mother did object to hearsay from her own witness, Father. The Court opined that after listening to witnesses call by both parties, the preponderance of the evidence indicated that there was abuse and that the child deserved protection. Mother waived any argument regarding alleged due process violations by failing to object at trial.

**Special Transmittal: Relative Notification**

Dated: September 5, 2018

Reissued: September 13, 2018

The purpose of this transmittal is to inform county and private children and youth social service agencies about the impact of Pennsylvania Act 92 of 2015 related to the expansion of relative notification and the clarification of the definition of sibling.

**OCYF Bulletin #3130-18-04/3700-18-03/3800-18-01 Reasonable and Prudent Parent Standard**

The legislative changes enacted in 2014 and 2015 promoting normalcy for children in out of home placements also clarified how decisions should be so that children have access to developmentally appropriate activities and experiences. This bulletin's purpose is to advise agencies, resource families and placement settings supported by Title IV-E or IV-B funding of the legislative provisions for promoting normalcy for children in care through the reasonable and prudent parent standards. The bulletin can be found through the link below.

<http://swantoolkit.org/wp-content/uploads/OCYF-Bulletin--3130-18-04-3700-18-03-3800-18-01-Reasonable-and-Prudent-Parenting-Standards-issued-092620182.pdf>

**Pennsylvania Rules of Civil Procedure**

Rules 1930.4 Service of Original Process in Domestic Relations Matters was amended to include directives related to proof of service and acceptance of service, including the information that must be included in the proof of service or acceptance of service that is to be filed with the prothonotary. The document must be filed within ten days of service. This rule change is effective as of September 28, 2018.