[J-029-99]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

B.A. AND A.A.,	:	No. 41 Western District Appeal Docket
	:	1998
Appellants	:	
	:	Appeal from the Order of Superior Court
v.	:	entered on January 8, 1998 at 124PGH97
	:	affirming the Order entered on November
E.E., A MINOR, BY AND THROUGH HER	:	13, 1996 in the Court of Common Pleas,
PARENTS AND NATURAL GUARDIANS,	:	Cambria County, Civil Division at 1996-
C.E. AND D.E.,	:	473.
	:	
v.	:	
	:	
D. AND C., proposed adoptive parents,	:	ARGUED: March 8, 1999
	:	
Appellees	:	

DISSENTING OPINION

MADAME JUSTICE NEWMAN **DECIDED: NOVEMBER 24, 1999**

The essential concern in this case is whether D and C are in loco parentis to the child M and I respectfully dissent because I believe they are clearly in this position here. D and C assumed a parental role towards the child, had a legitimate expectation that this child was part of their family unit, and did not assume the status of "in loco parentis" in defiance of A's wishes, as the Majority concludes. Thus, they had a right to be heard in any legal proceeding that affects that relationship.

> The phrase "in loco parentis" refers to a person who puts himself in the situation of 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.

Commonwealth ex rel. M v. Smith, 429 Pa. 561, 565, 241 A.2d 531, 533 (1968). See also Commonwealth v. Gerstner, 540 Pa. 116, 656 A.2d 108, 111-113 (1995) for a discussion of "in loco parentis."

In determining if an individual has assumed a parental role towards a child in defiance of a parent's wishes, we should view the facts during the period that the surrogate parents undertake the responsibility, not months later when a biologic parent changes his or her mind. Here, at the relevant time, D and C acted "in loco parentis" and it was not contrary to the wishes of A. At no time during E's pregnancy did A express a definite intent to assert custody of the child, nor did he provide financial support to E. Instead, he silently stood by and allowed E to take sole responsibility for the financial and emotional burden of pregnancy and he made no objection to E's stated intention to give the child to D and C for adoption. The record clearly indicates that A was well aware that E meant to place the child for adoption and that she had made plans to give birth in an institution that would facilitate the adoption. He still did not act, and was not even present when the child was born.

E consented to the child's adoption and transferred her parental obligations to D and C so that they could adopt the child. A, by his silence and his utter failure to undertake any responsibility, financially or otherwise, acquiesced in this decision. His neglect in not asserting his parental rights while he was aware that E had specifically requested that others assume parental duties amply shows that D and C's role was not against A's wishes. I believe that in order to prevent D and C from assuming in loco parentis status to his child, A was required to file a petition for custody, or in some other meaningful way assert his parental rights, before the child was born and placed with the prospective adoptive parents.

He failed to do so and cannot now claim that D and C retain in loco parentis status against his wishes.

Additionally, I differ from the Majority because I do not believe that these prospective adoptive parents, to properly intervene into the custody action between the biological parents, must first show that the child, who is in their care, is a "dependent" child per the Juvenile Act, 42 Pa. C.S.A. § 6302. Instead, if prospective adoptive parents have a direct, substantial and legitimate interest in the welfare of a child in their care, they should have standing to intervene in a custody action governing that child. A meaningful custody determination should not be made without the input of all relevant factors, which necessarily includes details of the child's current custody arrangements. Here, I believe D and C have an unquestionable interest in the welfare of M and thus have standing to intervene into a proceeding that impacts their relationship with her. They became interested parties by virtue of their de facto assumption of parental duties for this child and because the Mother had signed over her parenting responsibilities to them. In essence, D and C stood in the Mother's shoes and assumed her parenting responsibilities. They correspondingly should be allowed to have some role in a legal determination that involves this relationship.

As I stated in my Opinion in Support of Reversal In Re G.C., 735 A.2d 1226 (Pa. 1996) (hereinafter "GC"), individuals "who have cared for and nurtured a child … in essence acting as de facto parents, have a direct, substantial and immediate interest in the [child]." Id. at 1233. Moreover, it appears plain enough to me that in the instant matter a meaningful custody disposition could not have been made without the input of D and C because only they could provide necessary information about M in view of the fact that they had the day to day parenting responsibilities for the child. Prospective adoptive and foster parents who have physical custody of a child hold valuable information concerning the best interests of the child and these parents should have a right to be heard in order to contest

any disposition that could transfer the child from their care. Id. The appropriateness of removing a child from adults who are raising the child in their home, whether in a foster care, prospective adoptive or some other parenting arrangement, should be made only after gathering all relevant information about the child and by hearing from all parties involved, including foster and prospective adoptive parents.

I continue to agree with the language I stated in GC:

> It is in the best interests of the child involved that all parties who have an interest in his welfare be heard by [the court.] ….The combined effort of all interested parties, whether they be the agency, the extended family or foster parents, is essential to decide what custody arrangement is best.

Id. at 1237. Akin to GC, to deny standing to persons who have assumed the role of de facto parent to a child "discounts the inevitable emotional bond that develops between a family and a child." Id.

> Nothing could be more cruel than the forceable separation of a child from either its real or foster parents by whom it has been lovingly cared for and to whom it is bound by strong ties of affection; to a child it is equally cruel whether the separation is brought about by 'kidnapping' or by legal process. In passing on the contested custody of children no judge can do justice without considering the human aspect of his problem.

Commonwealth ex rel. Children's Aid Society v. Gard, 362 Pa. 85, 97, 66 A.2d 300, 306 (1949).

We also should be mindful that M, the subject of the custody determination, was in the physical custody of individuals who fully expected to adopt this child as their own and had already formed a psychological bond to her as part of their lives. Resembling the foster parents at issue in GC, these prospective adoptive parents have a real interest in the child's welfare, and in fact may have a limited liberty interest in that parent-child

relationship. See GC, 735 A.2d at 1233, citing Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816 (1977). I do not think it would be proper to rip apart this family unit without allowing D and C to participate in the relevant legal proceedings. D and C have a right to be heard because the ultimate result of the legal action substantially impacts upon their family, either by allowing them to retain physical custody of M or by forcing them to relinquish custody of this little girl that they altogether and reasonably expected to adopt and to make a member of their permanent family.

For these reasons, I would affirm the decision of the trial court to allow D and C to intervene in this action. See also Silfies v. Webster, 713 A.2d 639 (Pa. Super. 1998)(holding that party standing in loco parentis has standing to seek custody of child); In Re: Griffin, 690 A.2d 1192 (Pa. Super. 1997), appeal denied, 700 A.2d 441 (Pa. 1997)(deciding that prospective adoptive parents who cared for the child had standing to challenge custody determination in juvenile court); Mollander v. Chiodo, 675 A.2d 753 (Pa. Super. 1996)(finding that prospective adoptive parents stood in loco parentis to child where mother signed consent to adoption --prospective adoptive parents did not lose this status simply because mother revoked consent at a later date.) Cardomone v. Elshoff, 659 A.2d 575 (Pa. Super. 1995) (maternal aunt who at time of custody petition involving biologic mother had physical custody of child for some twenty-eight months was “in loco parentis” to child); Rosado v. Diaz, 624 A.2d 193 (Pa. Super. 1993)(holding that stepmother could stand in loco parentis to child, and thus assert custody action against biologic mother if stepmother could show that she had sole custody of child).

I would also affirm the decision to grant continued custody of the child to D and C because the trial court made a thorough and well-supported determination that the child’s physical, intellectual, moral and spiritual well-being would best be suited by remaining in their custody. I come to this conclusion completely aware that at the time this matter was before the trial court, there was a presumption that a biological parent had a prima facie

right to custody as against third parties such as D and C. Rowles v. Rowles, 542 Pa. 443, 668 A.2d 126 (1995); J.A.L. v. E.P.H., 682 A.2d 1314, 1318 (Pa. Super. 1996). However, this presumption does not mean that an interested party may never obtain primary custody of a child compared with the biological parent. Instead, this presumptive right to custody has the effect of increasing the evidentiary burden on the nonbiological parent seeking custody. I believe that the trial court correctly determined that D and C met this burden.

Accordingly, I dissent.

Mr. Justice Castille joins this dissenting opinion.