NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

A.S., Appellant v. M.K., Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3009 EDA 2012

Appeal from the Order of November 8, 2013,
in the Court of Common Pleas of Philadelphia County,
Domestic Relations at No. 0C0702021

BEFORE: GANTMAN, MUNDY and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J: **FILED AUGUST 16, 2013**

A.S. ("Appellant") appeals from the order entered November 8, 2012, terminating her custodial rights to I.S. ("Child") (born in July of 2005), awarding sole legal and physical custody of Child to M.K. ("Biological Mother"), and ordering that Appellant, the paramour of the recently-deceased M.S. ("Father"), shall have no contact with Child. We vacate and remand with instructions.

This case was initiated in December of 2007, when Father filed a custody complaint with respect to Child. In an interim order dated March 27, 2008, a custody master granted Biological Mother two hours per week of

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*Retired Senior Judge assigned to the Superior Court.

visitation with Child at the family court nursery. Prior to the instant proceedings which resulted in the order on appeal, the March 27, 2008, order was the most recent custody order entered on the docket and made part of the certified record. At that time, Child resided with Father and his paramour, Appellant. Father and Appellant were never married, but were in a relationship for approximately seven years.

In June of 2008, Biological Mother filed a petition for contempt of the March 27, 2008, order against Father alleging that he failed to bring Child to several visits. On July 14, 2008, the petition was relisted for August 29, 2008. On August 29, 2008, the petition was dismissed without prejudice for lack of prosecution.

On September 8, 2008, Father's initial petition for custody was dismissed without prejudice, also for lack of prosecution. The order also issued a bench warrant on Father, although no explanation for this order was made part of the record. On September 29, 2008, Biological Mother filed a pro se petition to modify custody. In her petition, she acknowledged that the current custody order permitted her weekly visitation for two hours at the family court nursery and requested primary physical and legal custody.[1] On February 20, 2009, Biological Mother's petition to modify

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[1] The notes of testimony suggest, to this Court, that Biological Mother believed the trial court granted her petition for primary physical and legal custody and that the trial court found that a 2008 order granted her primary
(Footnote Continued Next Page)

custody was dismissed for lack of prosecution. The order noted that neither party appeared at the hearing.

On April 3, 2009, Appellant, then pro se, filed a petition to modify custody, seeking primary physical and legal custody of Child. Father was listed as respondent in the petition. Appellant withdrew the petition on June 8, 2009.

On January 1, 2012, Father was killed in a car accident. Following Father's death, Child initially resided with his paternal grandfather. After a short time, Appellant took Child into her custody. On January 18, 2012, Appellant filed the instant petition to modify the custody order dated March 27, 2008, seeking primary physical and legal custody of Child. On August 10, 2012, after a hearing on Appellant's motion for expedited relief, the trial court entered a temporary order awarding Appellant primary physical and legal custody of Child.[2]

(Footnote Continued) ———————————

physical and legal custody of Child. ***See*** N.T., 11/08/12, at 62-64, 70-72. The docket reflects that Biological Mother's motion to proceed *in forma pauperis* on her petition to modify custody was granted on September 29, 2008, however, the record indicates that Biological Mother's underlying petition was dismissed for lack of prosecution on February 20, 2009, when neither Biological Mother nor Father appeared at the scheduled hearing. The trial court docket, and the orders made part of the certified record, demonstrate that Biological Mother has never been awarded legal or physical custody of Child.

[2] Biological Mother failed to appear at the hearing, due, the trial court later found, to insufficient service of process by Appellant.

On November 8, 2012, the trial court held a hearing on Appellant's petition. At the hearing, the court permitted opening remarks by Appellant's counsel and then proceeded to engage in a sua sponte unstructured inquiry of Appellant, Biological Mother, Child, and counsel for the parties, for the remainder of the hearing.[3] Appellant's counsel did not conduct a direct examination of his client and was not given an opportunity to cross examine either Child or Biological Mother. Biological Mother's counsel began a cross examination of Appellant, throughout which the trial court interrupted, and eventually, dominated. In its inquiry, the trial court pursued its own theory that Appellant sought to perpetrate a fraud on the court, as well as on the United States Social Security Administration with respect to the receipt of Child's survivor benefits.

During the hearing, Child was brought in to be interviewed by the court in camera. The parties and their counsel were asked to leave the room and neither party objected. Child's testimony was not transcribed. Following Child's interview, the trial court explained: "I brought natural mom in the room just to be observed [b]y [Child]. I wanted to know if he knew who she was. And he told me, yeah, he knew who she was. And he said

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[3] The court advised counsel "counsel will only address the Court when the Court wants to hear from counsel. . . . The parties will only address the Court when the Court wants to hear from the parties." N.T., 11/08/12, at 15. The court further stated to counsel "only answer my questions because I'm going to cut straight through to what this issue is all about . . . without hearing from what the attorneys think is relevant." ***Id.*** at 24.

that she was his school teacher." N.T., 11/08/12, at 68. The trial court asked Biological Mother why Child would think that she was his school teacher. Biological Mother responded, "Well, I -- this -- he might have been brainwashed." Id. at 69. Thereafter, the trial court proceeded to announce its determination, awarding custody to Biological Mother.

Following the hearing, the trial court entered its order, *inter alia*, awarding sole physical and legal custody of Child to Biological Mother, terminating Appellant's custodial rights to Child, and ordering that Appellant shall have no contact with Child. Appellant's timely appeal followed.

In her brief on appeal, Appellant raises two issues for our review:

> 1. Did the trial court err by denying the in loco parentis status to Appellant . . . ?
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> 2. Was Appellant . . . denied meaningful appellate review when the testimony of the child is not part of the record?

Appellant's Brief at 3.

Biological Mother argues that Appellant failed to raise these issues in her Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Such an omission results in waiver of issues on appeal. Pa.R.A.P. 1925(b)(4)(vii). Appellant's first issue is not waived. Appellant phrased this issue differently in her 1925(b) statement, but argued that she stood *in loco parentis* to Child. Moreover, the issue was sufficiently raised, so as to permit the trial court to understand it, and address it in its opinion pursuant to Pa.R.A.P. 1925(a). ***See*** Trial Court Opinion, 01/18/13, at 2-4 (addressing

issue of *in loco parentis* standing). Appellant's second issue, concerning the transcription of Child's testimony, was not raised in her statement of errors complained of on appeal. Accordingly, Appellant's second issue is waived.

Our standard of review is as follows:

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

C.R.F., III v. S.E.F., 45 A.3d 441, 443 (Pa. Super. 2012) (citation omitted).

Turning to Appellant's sole preserved issue, we find that the trial court abused its discretion and erred as a matter of law.

Our Supreme Court has held:

> 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. ***Id.***; ***Commonwealth ex rel. Morgan v. Smith***, 429 Pa. 561, 241 A.2d 531, 533 (1968). 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. ***Spells v. Spells***, 250 Pa.Super. 168, 378 A.2d 879, 882 (1977). 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. ***B.A. and A.A. v. E.E.***, 559 Pa. 545, 741 A.2d 1227, 1229 (1999); ***Gradwell v. Strausser***, 610 A.2d at 1003.

T.B. v. L.R.M., 786 A.2d 913, 916-17 (Pa. 2001).

Further, this Court has stated:

> The in loco parent[ ]is basis for standing recognizes that the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child's best interest. Thus, while it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent. Where such a relationship is shown, our courts recognize that the child's best interest requires that the third party be granted standing so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a natural parent's objections.
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> Although the requirement of *in loco parentis* status for third parties seeking child custody rights is often stated as though it were a rigid rule, it is important to view the standard in light of the purpose of standing principles generally: to ensure that actions are brought only by those with a genuine, substantial interest. When so viewed, it is apparent that the showing necessary to establish *in loco parentis* status must in fact be flexible and dependent upon the particular facts of the case. Thus, while unrelated third parties are only rarely found to stand *in loco parentis*, step-parents, who by living in a family setting with the child of a spouse have developed a parent-like relationship with the child, have often been assumed without discussion to have standing to seek a continued relationship with the child upon the termination of the relationship between the step-parents. ***See, e.g., Commonwealth ex rel. Patricia L.F. v. Malbert J.F.,*** [420 A.2d 572 (Pa. Super. 1980)] (considering, but denying on the merits, step-parent's claim for custody); ***Auman v. Eash***, 228 Pa. Super. 242, 323 A.2d 94 (19[74]) (same). Where the issue of a step-parent's standing has been

> directly addressed by this court, standing has been found to exist because the step-parents stood *in loco parentis* to the child or children in question. ***Karner v. McMahon,*** [640 A.2d 926 (Pa. Super. 1994)]; ***Spells v. Spells***, 250 Pa. Super. 168, 378 A.2d 879 (1977).

J.A.L. v. E.P.H., 682 A.2d 1314, 1319-20 (Pa. Super. 1996)

> Additionally, this Court has held:
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> [A]n important factor in determining whether a third party has standing 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.

J.F. v. D.B., 897 A.2d 1261, 1274 (Pa. Super. 2006) (emphasis omitted) (citations omitted).

Here, Appellant testified that she put herself in the situation of a lawful parent during her relationship with Father. She testified that she began her relationship with Father around the time of Child's birth, that she identifies herself as Child's "step-mom," and that she raised Child from infancy. N.T., 11/08/12, at 4.

In its opinion, the trial court determined that Appellant's parental status was achieved in defiance of Biological Mother's wishes and concluded that, as a result, Appellant lacked *in loco parentis* standing. Trial Court Opinion, 01/18/13, at 4. The trial court found that:

> [Biological Mother], on numerous occasions accompanied by the police, attempted to make contact with her child, but was refused by [Appellant] . . . . Police informed [Biological Mother] that a petition for custody by [Appellant] was pending and not to return to [Appellant's] home.

Trial Court Opinion, 01/18/13, at 4. Additionally, the court found that "[Appellant] violated court orders in refusing to allow [Biological Mother] to see or interact with [Child] when she had no custodial rights to do so." ***Id.*** at 6. The trial court made no finding that Biological Mother did not wish for Appellant to undertake a parental role in Child's life, only that Appellant did not permit Biological Mother to have contact with Child.

The trial court's findings in this regard are not supported by the record. There is no evidence of record that Appellant prevented Biological Mother from seeing Child. Biological Mother's counsel made two errant statements that Appellant did not permit Biological Mother to see Child. ***See*** N.T., 11/08/12, at 22, 51-52. However, our Supreme Court has stated, "[I]t is well-settled that arguments of counsel are not evidence . . . ." ***Commonwealth v. Puksar***, 951 A.2d 267, 280 (Pa. 2008). The only testimony from Biological Mother regarding not being permitted to see Child alluded to Father preventing her from seeing Child, not Appellant.

Further, no evidence of record suggests that Appellant "violated court orders in refusing to allow [Biological Mother] to see or interact with [Child]." Trial Court Opinion, 01/18/13, at 6. The trial court docket, and the orders made part of the certified record, demonstrate that Biological Mother has never been awarded legal or physical custody of Child, despite her testimony to the contrary. Prior to the order on appeal, the most recent custody order in this case concerning Biological Mother restricted her

visitation of Child to two hours per week, to be held exclusively at the family court nursery. No allegation was made that Appellant was in violation of that order. Accordingly, our review reveals that the trial court abused its discretion in concluding that Appellant refused to allow Biological Mother to interact with Child.

Additionally, we conclude that the trial court erred as a matter of law in determining Appellant's *in loco parentis* status.[4] Here, in order to determine whether Appellant placed herself *in loco parentis* to Child, the trial court was required to determine whether Appellant put herself in the place of a lawful parent through the assumption of parental status and discharge of parental duties. Such an inquiry is necessary especially where, as here, there is no evidence of record to suggest that Biological Mother has ever had a parental relationship with Child.[5]

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[4] At the hearing, in arguing that Appellant had standing to pursue custody of Child, Appellant's counsel informed the court that Child had lived for the past six-and-a-half years with Appellant and Father. The court inquired as to whether there was any relationship by way of blood between Child and Appellant. After being informed by Appellant's counsel that there was no blood relationship between Child and Appellant, the court inquired "So what standing does she have?". N.T., 11/08/12, at 14. Thus, the record reveals the court did not conduct a proper inquiry as to whether Appellant stood *in loco parentis* to Child.

[5] Though Child's testimony was not made part of the record, the trial court, immediately following Child's testimony, explained that Child identified Biological Mother as a teacher at his school.

Accordingly, we vacate the trial court's order and remand for further proceedings. On remand, we direct the trial court to hold a full hearing on the issue of whether Appellant has *in loco parentis* standing, so as to permit her to pursue custody of Child, and, if necessary, to hear Appellant's petition for custody. At the hearing, the trial court must permit the parties and their counsel to introduce evidence, call witnesses, and engage in examinations and cross examinations of those witnesses, so as to develop a record upon which it may properly base its findings.

Order vacated. Case remanded with instructions. Jurisdiction relinquished.

Judgment Entered.

Prothonotary

Date: 8/16/2013