

# P E N N S Y L V A N I A LAW WEEKLY

## The Role of Third Parties in Custody Disputes

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Special to the Law Weekly

The Superior Court recently addressed the role of third parties as against natural parents in *Jordan v. Jackson*, 2005 Pa. Super. 208 (2005). In *Jordan*, the paternal grandmother and stepgrandfather of W.H. Jr., secured an Order of Custody against the mother, who had never been married to the deceased father of W.H., Jr., and who had six children from three different fathers. Mother had an extensive criminal history. *Id.* at 209. Mother was sentenced, spent one year in jail and was paroled in March of 2002. During this time, W.H., Jr., lived with the grandparents who sought and obtained an Order confirming custody in them in March of 2002.

Mother filed a Complaint for primary custody and in April of 2003 an Order was entered granting shared custody. Mother filed a Petition for Modification in September of 2003 seeking primary custody. After hearing, the trial court entered an Order on June 8, 2004 granting mother primary custody and awarding “substantial partial custody” to grandparents. It is from that Order that grandparents appealed. In its decision of June 2, 2005, the Superior Court affirmed the Order of the trial court, leaving primary custody in mother with certain provisos including that mother remain drug free and refrain from criminal activity.

An examination of the case law in Pennsylvania with regard to custody contests between third parties and natural parents evidences the Supreme Court of Pennsylvania in 1980 held there is a *prima facie* right of natural parents to custody of their children as against third parties. *Ellerbe v. Hooks*, 490 Pa. 363, 416 A.2d 512 (1980).

The *Ellerbe* Court examined the case of *In re Hernandez*, 249 Pa. Super. 274, 376 A.2d, 648 (1977), wherein, Judge Spaeth stated:

“[t]he parties do not start out even; the parents have a ‘*prima facie* right to custody’, ‘which will be forfeited only if ‘convincing reasons’ appear that the child’s best interest will be served by an award to the third party. Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the parents’ side. What the judge must do, therefore, is first hear all evidence relevant to the child’s best interest, and then, decide whether the evidence on behalf of the third party is weighty enough to bring the scale up to even, and down on the third party’s side.” *In re Hernandez*, 249 Pa. Super. at 286, 376 A.2d at 654 (1977). *Id.* at 368.

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The standard set in *Ellerbe, supra*, remained the law until the issue again came before the Supreme Court of Pennsylvania in *Rowles v. Rowles*, 542 Pa. 443, 668 A.2d 126 (1995). In that case, a plurality abolished the presumption in favor of the natural parent in a custody determination. However, because *Rowles, supra*, was a plurality rather than a majority decision, it was not binding. Presently, a natural parent has a superior right over a third party, even when the third party has *in loco parentis* standing. See *Charles v. Stehlik*, 560 Pa. 334, 744 A.2d 1255 (2000). and *In re Slaughter*, 1999 Pa. Super. 221, 738 A.2d 1013 (1999).

In *Charles v. Stehlik, supra*, custody was awarded to a stepfather who stood *in loco parentis* in a custody contest between the stepfather and the natural father. Mother had two children from a prior marriage when she married father in 1989. They had one child, Matthew, then separated, and mother and Matthew and her other two children went to live with her parents. Mother married stepfather in 1990 when Matthew was one year old. When Mother died of cancer in September 1995, the other two children went to live with their father and custody of Matthew became a contested issue.

The trial court tipped the scales in favor of the natural father, but still found convincing evidence to award primary physical custody of Matthew to stepfather. The Supreme Court of Pennsylvania, referred to a prior opinion of the court, *Albright v. Commonwealth ex. rel. Fetters*, 491 Pa. 320, 421 A.2d 157 (1980), wherein the Court stressed that the biological parent's *prima facie* right to custody could not be construed as precluding a custody award to a non-parent. *Charles v. Stehlik, supra*, at 1259.

In *B.A. v. E.E.*, the contest was between the biological father and the prospective adoptive parents. *B.A. v. E.E.*, 559 Pa. 545, 741 A.2d 1227 (1999). The birth mother had placed the child for adoption with an agency which immediately placed the child for adoption with D and C. Mother had executed a consent but the biological father, A., refused to consent to the adoption. D and C had the child for ten months when A. Filed for custody of his child. The trial court found for the adoptive parents finding they had *in loco parentis* standing. A. appealed to the Superior Court which affirmed the Trial Court. The Supreme Court of Pennsylvania found that the natural father, A., attempted to secure custody of the child almost from the outset. D and C could not retain custody of the child in defiance of father's wishes and the Court reversed both the trial court and the Superior Court.

The case law evidences that each case involving third parties against a natural parent must be considered on the facts of that particular case. Even though a biological parent tips the scale against third parties, there are many instances where the third party has prevailed. Although the Grandparent Statute, 23 Pa. C.S. §5313, gives automatic standing to grandparents in a custody dispute, they nevertheless must prove their case by clear and convincing evidence. In *Campbell v. Campbell*, 448 Pa. Super 640, 672 A.2d. 835 (1996), primary physical custody of two children was confirmed in the paternal grandparents against the natural mother. Father, an alcoholic, was not involved.

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Mother had entered into an Agreed Order for the grandparents to have joint legal custody in 1994. When the grandparents sought primary physical custody, they not only had joint legal custody but also partial physical custody. In reality, the grandparents had exercised physical custody of the children most of their lives.

In *Walkenstein v. Walkenstein*, 443 Pa. Super. 683, 663 A.2d 178 (1993), the Superior Court confirmed an Order of the trial court granting primary custody to the maternal grandmother against the natural mother. Although the grandparents were divorced, in 1990, both petitioned for and were granted joint custody of David. Mother had been involuntarily committed to Eastern Pennsylvania Psychiatric Institute for drug and alcohol abuse. Mother was eventually discharged from EPPI and remained drug and alcohol free as of November of 1990. The trial court awarded primary physical custody to Grandmother, partial physical custody to mother, and ordered legal custody shared by Grandmother, Grandfather, and Mother. In a contest between a natural parent and a third party, the third party bears the burden of production and persuasion to present clear and convincing evidence as to why the third party should prevail over the natural parent. Grandmother carried her burden of persuasion in producing such evidence. *Id.* at 691. Also see *Cardamone v. Elshoff*, 442 Pa. Super. 263, 659 A.2d 575 (1995) where custody was granted to a maternal aunt who had established that she stood *in loco parentis* to the child for a period in excess of twenty-eight months.

In *E.A.L. v. L.J.W.*, the Superior Court vacated the Trial Court's Order of Custody for Mother against Mother's parents and remanded the matter for further proceedings. *E.A.L. v. L.J.W.*, 443 Pa. Super. 573, 662 A.2d 1109 (1995). In *Butler v. Illes*, 2000 Pa. Super. 54, 747 A.2d 943 (2000), the natural father prevailed over a maternal aunt. In *McDonel v. Sohn*, 2000 Pa. Super. 342, 762 A.2d 1101 (2000), the lower court made an award of shared legal custody between the natural father and the maternal aunt and uncle and granted primary physical custody of C.S. to her maternal aunt and uncle. The Superior Court affirmed.

Finally, there is the matter pending before the Supreme Court of Pennsylvania, *K.B. v. C.B.F.*, 2003 Pa. Super. 364, 833 A.2d 767, appeal granted, in part, 577 Pa. 135, 842 A.2d 917 (2004). The trial court awarded full custody to the child's paternal grandparents. The Superior Court reversed and remanded to the trial court. The Superior Court concluded that §5313 conferred automatic standing on any grandparent seeking physical and legal custody of a grandchild, regardless of whether there has been a prior determination of unfitness by a parent or dependency of the child. *Id. at. 775.* Citing *Richards v. Hepfer*, 2000 Pa. Super. 394, 764 A.2d 623 (2000), the Superior Court also found that §5313 does not modify the common law presumption that parents have a *prima facie* right to custody over third parties. *K.B. v. C.B.F. at 776.* Based on the common law analysis, the Superior Court found the evidence in the trial court was not sufficient to warrant removal of the child from his biological mother. *Id. at. 776.* The Supreme Court of Pennsylvania granted the Petition for Allowance of Appeal from the Order of the Superior Court limited to the issue of "whether grandparents have standing to seek custody under 23 Pa. C.S. §5313(b) absent a finding that the child is substantially at risk, or that the parent is unfit, or that the child is dependent." 577 Pa. at 135.

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The question of whether grandparents can seek custody of their grandchildren against the natural parents without a prior showing of a child being at risk, or of a parent being unfit, or upon a child being declared a dependent is still unanswered. Until the Supreme Court resolves this issue, Grandparents, although they have standing, must still carry the burden of production and persuasion by clear and convincing evidence to prevail over a natural parent in a custody dispute.

Should there come a time when the presumption in favor of the natural parent is abolished by a majority and not a plurality of the Supreme Court of Pennsylvania, third parties may be on equal footing with natural parents in custody disputes. For the present, there is still a presumption that a natural parent has a *prima facie* right against third parties to custody of a child.

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