

Nature v. Nurture
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Nature v. Nurture

In lesbian family breakup, Superior Court affirms custody award for non-biological parent

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Special to the Law Weekly

Last week, the Superior Court affirmed the order of a trial court awarding primary physical custody of twin boys to their non-biological parent in a custody dispute. In so doing, the court reapplied a well-established doctrine in Pennsylvania law, but also implicitly recognized a new reality in family formation – the rise in parenting by same-sex couples.

The Superior Court first announced its decision in *Jones v. Jones*, PICS Case No. 05-1564 (Pa. Super. Sept. 30, 2005) Klein, J. (9 pages) as a non-precedential memorandum opinion on Sept. 27. Three days later, however, the court decided to report the case as precedential.

The case is the first appellate Pennsylvania authority in which a non-biological lesbian parent has been awarded primary physical custody over the biological lesbian parent. It has generated much discussion within a very short period.

This couple began living together in 1988 and eventually decided to have a child via artificial insemination. Ellen Boring Jones (whom I'll refer to as "Boring" for simplicity's sake) gave birth to twin boys in December 1996 and, with Boring's domestic partner, Patricia Jones, the four lived together as a family until 2001 when Boring left with the children. The litigation saga began shortly thereafter when Jones filed for custody and Boring filed for child support. The initial custody order of 2001 granted shared legal custody to the parties, primary physical custody to Boring, and partial physical custody to Jones. A support order against Jones was entered at the same time. An interesting adjunct to this hard fought custody matter is that by Boring's filing and receiving a court order for child support, she implicitly conceded that Jones stood in loco parentis to the children.

In the Aug. 8, 2005 *Pennsylvania Law Weekly*, this column explored the role of third parties as against biological parents. Pennsylvania law clearly states there is a presumption for primary physical custody in favor of the biological parent rather than for the parent who stands in loco parentis. *Ellerbee v. Hooks*, 416 A.2d 512 (Pa. 1980). The non-biological party must first prove that she had standing to assert a right to custody. It has long been established at common law that if a person stands in loco parentis, standing will be afforded to that individual to seek custody of a child. Even when a party successfully establishes standing, the scales are still tipped in favor of the biological parent. See *Ellerbee* and *In re Hernandez*, 376 A.2d 648 (Pa. Super. 1977). In the *Jones* case, Jones had the burden of proving by clear and convincing evidence that the best interests of the children were served by the non-biological party. See *McDonel v. Sohn*, 762 A.2d 1101 (Pa. Super. 2000).

Although in 2001 the initial order for primary physical custody was in the biological parent, during the next two years, Jones filed various contempt petitions with regard to Boring's not complying with the 2001 order. The trial court resolved those allegations by conference or hearing, avoiding the need to make a finding of contempt. However, it was clear that Boring was attempting to thwart Jones' partial physical custody and to reduce Jones' contact with the boys.

In 2002, Boring filed a petition with the Family Court, seeking to relocate to Virginia. The trial court was without jurisdiction to hear the petition because Boring had appealed the 2001 custody order granting partial physical custody to Jones. On Aug. 5, 2002, the Superior Court affirmed the Sept. 28, 2001 order and thereafter Boring did not pursue her petition for relocation to Virginia. In July of 2002, Boring married Timothy Boring and moved to Souderton, Montgomery County, without notice to Jones. On Oct. 3, 2002, Jones filed a petition asking the court to enforce her custody rights. Boring followed with her second petition to relocate, this time to Indiana. Various hearings took place in January and February of 2003 and an order was entered whereby the parties still had joint legal custody, Boring had primary physical custody, and Jones still had partial physical custody. The order was in existence until the 2004 custody hearings resulting in the 2005 custody order recently affirmed on appeal.

The state Supreme Court in *T.D. v. L. R. M.*, 786 A.2d 913 (Pa. 2001), held that the non-biological parent in a lesbian relationship resulting in a child's birth had standing to seek custody of the child of the union. In that case, the two females had engaged in an exclusive intimate relationship. They purchased a home together and decided to have a child. One partner cared for the other during her pregnancy and was present during the child's birth. The parties shared child-rearing responsibilities, including but not limited to, medical visits, transporting the child to daycare and other similar activities. When the parties separated, after one visit with the child by the non-biological parent, the biological mother refused all visitation requests and shut her former partner out of the child's life. Relying on a prior Superior Court case, the trial court found that the non-biological parent had standing to seek custody or visitation under the doctrine of *in loco parentis*.

Strong Psychological Bonds'

The Superior Court stated in the precedent, *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. Super. 1996), that the "*in loco parentis* 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."

The *J.A.L.* court further stated that "E.P.H.'s rights as the biological parent do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so."

In *T.D. v. L.R.M.*, the Superior Court affirmed the trial court and the Supreme Court concurred, holding that the non-biological parent had standing to seek custody or partial custody by asserting *in loco parentis* status.

A third party's ability to prevail over a biological parent is well established in Pennsylvania. *Jones* therefore applied existing law. There is still a presumption that primary custody of children is heavily weighted in favor of the biological parent and that the non-biological party has to prove by clear and convincing evidence that she will serve the best interest of the children. Why, then, has there been so much comment about this case? The headline attention to *Jones* is because in a same-sex relationship, the non-biological parent was granted primary physical custody of the twin boys. Prior to the 2001 Supreme Court decision of *T.D. v. L.R.M.*, there were cases where grandparents, stepparents, aunts and other third parties had prevailed in a custody situation over a biological parent. Those legal decisions did not garner that much attention. *Campbell v. Campbell*, 672 A.2d 835 (Pa. Super. 1996), (primary physical custody in paternal grandparents); *Walkenstein v. Walkenstein*, 663 A.2d 178 (Pa. Super. 1993) (maternal grandmother); *Cardamone v. Elshoff*, 659 A.2d 575 (Pa. Super. 1995) (aunt awarded primary physical custody); *McDonel v. Sohn* (shared legal custody between natural father and maternal aunt and uncle with aunt and uncle having primary physical custody).

Subsequent to *T.D. v. L.R.M.*, *supra*, cases followed awarding standing and subsequent visitation and custody rights to third parties. *S.A. v. C.G.R.*, 856 A.2d 1248 (Pa. Super. 2004), (natural child of a father and surrogate finding standing in the mother by virtue of her *in loco parentis* status to the child); *Liebner v. Simcox*; 834 A.2d 606 (Pa. Super. 2003) (stepfather found to be *in loco parentis* awarded visitation with mother's son). Those cases have not caused much discussion. In contrast, there has been high interest in *Jones* because the third party is a lesbian non-biological parent.

In the eyes of the law, *Jones* is just another third party versus biological parent matter. To the gay and lesbian community, it is far more than another third party versus biological parent case. Twenty years ago the Superior Court stated, "While we would hold that . . . homosexuality per se is not a basis for denying visitation or partial custody to a parent, we do not consider it irrelevant." *Constant A. v. Paul C.A.*, 496 A.2d 1, 10 (Pa. Super. 1985), citing *Bezio v. Patenaude*, 381 Mass. 563, 410 N.E.2d 1207 (1980). That same court indicated that a parent's sexual orientation was nevertheless a factor in a court's decision regarding the best interest of a child. The *Constant A.* court further stated there are "significant social, moral and legal distinctions between the traditional heterosexual family relationship and the *illicit* homosexual relationship [emphasis added]." In 2005, the issue in *Jones* was simply which parent will serve the best interest of the children. The concept of family has evolved over the years and the law has adapted. •