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In Loco Parentis Status Should Start With Consent

BY MICHAEL E. BERTIN

Special to the Legal

The recent case of *K.W. v. S.L. and M.L. v. G.G.*, 2017 Pa. Super. 56 (March 6), addresses two important issues for family court practitioners and the bench to take note. First, it addresses the collateral order doctrine and then the issue of in loco parentis standing in child custody matters.

In family law cases, practitioners and litigants are often faced with interim orders and whether they may be appealed. As reiterated in the *K.W.* case: "It is well-settled that, an appeal lies only from a final order, unless permitted by rule or statute." Pursuant to Pa.R.A.P. 341(b), a final order, generally, is an order that disposes of all claims and all parties. An interim order is appealable if it qualifies under



MICHAEL E. BERTIN

is a partner at the law firm of Obermayer Rebmann Maxwell & Hippel. He is co-author of the book "Pennsylvania Child Custody Law, Practice, and Procedure."

Bertin is a fellow of the American Academy of Matrimonial Lawyers, a former chair of the family law section of the Philadelphia Bar Association, the current co-chair of its custody committee, and holds the officer position of second vice chair of the family law section of the Pennsylvania Bar Association. Bertin can be reached at 215-665-3280 or michael.bertin@obermayer.com.

the collateral order doctrine. Pursuant to Pa.R.A.P. 313(b): "A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost."

The Superior Court in *K.W.* reminds all that the court may sua sponte determine whether the appeal is from an appealable order. In this case, the Superior Court did just that.

The facts of this case, in part, are as follows: the father and mother dated briefly, but stopped prior to the birth of their child. According to the opinion, the mother did not directly inform the father of her pregnancy and contacted Bethany Christian Services (BCS) in order to place the child for adoption. Two days after the child was born, BCS placed the child in the care of the appellees. Shortly before the child's birth, BCS attempted to contact the father through Facebook messages and friend requests, which the father claimed were not delivered due to spam filters. BCS also sent letters to the father approximately

a month after the child was born. Upon the father receiving the letters, he contacted BCS to set up a meeting. A month thereafter, the father informed BCS that he did not want the child to be adopted.

The Superior Court in *K.W.* perfectly describes the procedural history in the case as “convoluted.” Basically, after a number of proceedings, transfers of venue, and numerous filings, at issue was the father’s preliminary objections to the appellees’ claim that they had standing to file for custody. The trial court denied the father’s preliminary objections and granted appellee’s in loco parentis standing. The father filed a timely notice of appeal thereafter.

In the Superior Court’s sua sponte analysis as to whether the order from which the father appealed was an appealable order, it agreed with the father that the Pennsylvania Supreme Court case of *K.C. v. L.A.*, 128 A.3d 774 (Pa. 2015), was applicable to the instant case. In *K.C.*, the Supreme Court “held that an order denying intervention in a child custody case due to a lack of standing meets both the first and second prongs of the collateral order doctrine, as standing is an issue separable from, and collateral to, the main cause of

action in a child custody case, and because the right to intervene in custody cases implicates Pennsylvania’s ‘paramount interest in the welfare of children, and, as a result, in identifying the parties who may participate in child custody proceedings.’” The Superior Court acknowledged the distinguishing aspect of *K.C.* in the third prong, as intervention must be appealed within 30 days of the order.

Often overlooked when analyzing in loco parentis standing is the critical aspect of consent, which is the springboard for achieving in loco parentis status.

However, the Superior Court concluded in the present case that the father’s claim would be irreparably lost if review of the matter were postponed until entry of the final order. The Superior Court highlighted that standing in child custody cases is a matter of constitutional significance. The Superior Court relied on the recent Pennsylvania Supreme Court case of *D.P. v. G.J.P.*, 146 A.3d 204 (Pa. 2016), and quoted the court’s emphasis

of “the importance of permitting parents to challenge standing in child custody cases, in order to protect the constitutional rights of parents.” As highlighted by the Supreme Court in *D.P.*, the Child Custody Act “facilitates early dismissal of complaints, thereby relieving families of the burden of litigating their merits where a sufficient basis for standing absent.” In completing its analysis of the collateral order doctrine as it applies to the present case, the Superior Court stated: “If we quash this appeal and remand to the trial court, father will be subjected to extensive litigation involving appellee’s, including a custody hearing at a second appeal on the exact issue he now seeks to raise. Not only would father incur a substantial financial burden as a result of this litigation, but he also could lose months of time caring for and bonding with child as the custody hearing appeals process drags on. ... We therefore conclude that the order on appealed satisfies all three prongs of the collateral order doctrine, and that father’s appeal as properly before us.”

The merits of the appeal pertain to in loco parentis standing. As the appellees are not grandparents, they can only bring an

action under the Custody Act if they have standing under the in loco parentis doctrine. Primarily, there are three prongs to in loco parentis. First, in loco parentis status must begin with the consent and knowledge of the parents. Second, the person claiming in loco parentis status must have assumed parental status and, third, discharged parental duties. The first prong, as stated by the Superior Court is “critical.” In the present case, the trial court found that the appellees stood in loco parentis because they assumed parental status and discharged parental duties on the child’s behalf since “shortly after birth.” However, with regard to the consent prong of in loco parentis, “the trial court reasoned that father gave his implied consent ... because he did not express interest in parenting child until almost a month after being informed that she was residing with a prospective adoptive family.” The father countered this reasoning claiming that implied consent is not permissible under Pennsylvania law. The Superior Court agreed with the father. The Superior Court analyzed numerous cases that focused on whether actions of parents can lead to consent to in loco parentis status. For example, in looking at the case of

In re C.M.S., 884 A.2d 1284 (Pa. Super 2005), the Superior Court indicated that the father acted in a manner consistent with consent when he chose to have no part in the child’s life for a year and failed to provide any care for the child or establish any sort of bond during that year. In the *K.W.* case, the father acted in a manner inconsistent with consent, according to the Superior Court, by promptly informing BCS that he did not want the child to be adopted less than a month after being notified that she was residing with the prospective parents. Also, he filed a custody complaint shortly thereafter. Therefore, the Superior Court concluded that the trial court erred in denying the father’s preliminary objections and granting appellees in loco parentis standing on an implied basis. The Superior Court then vacated the order and remanded the case to the trial court to grant the father’s preliminary objections and conduct a custody proceeding consistent with the opinion and indicated in a footnote that on remand the trial court should consider the mother’s rights with regard to any wishes that she has in sharing custody with the father.

Interestingly, the Superior Court notes “with disapproval”

that the father “has been deprived of child without any evidence in the record that he is an unfit parent, and without the benefit of due process protections.” The Superior Court further stated: “BCS’s decision to place Child for adoption without father’s consent is particularly troubling.”

This case is very important for family law practitioners and the bench because it provides an analysis regarding appealing interim orders in child custody matters and the viability of doing so under the collateral order doctrine. Further, the issue of in loco parentis is always a tricky one. Often overlooked when analyzing in loco parentis standing is the critical aspect of consent, which is the springboard for achieving in loco parentis status. Without the consent of the parents, in loco parentis status cannot exist. •