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Third Party Standing and Custody Proceedings

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Approximately 20 years ago, I had the horrific experience of losing a client to domestic violence. I can vividly remember learning of Jody's (not her real name) death while I was attending the Family Law Section Conference in Pittsburgh. It was a frigid evening in early January when I received a call from her sister informing me that Jody had been shot by an "unidentified sniper" through the rear window of her home. The bullet struck her heart and killed her instantly.

The police investigation focused on Jody's husband, Robert, who was a prominent cardiovascular surgeon in the community and was also known to be an expert outdoorsman and marksman. Jody and Robert had been married 9 years earlier and had a four-year-old son (Robbie), who was Jody's pride and joy. Police speculate that Robert had drugged Robbie, who was asleep in the back seat of his father's car when the murder occurred. The homicide was later featured on an episode of 48 hours, which dubbed the program "Heart Shot - Murder of a Doctor's Wife."

While details surrounding the investigation would certainly make an interesting CSI episode, following Jody's death my involvement in the case focused on the custodial rights to the parties' son, Robbie. From the beginning, police strongly suspected that Robert had killed his wife. Unfortunately, they didn't have sufficient evidence to make an immediate arrest. Robbie's maternal grandmother, who spent significant time with Jody and Robbie following the parties' separation, was able to secure an order of partial custody of her grandson under 23 Pa.C.S.A. § 5325. However, her attempts to maintain a relationship with Robbie were frustrated when several years following Jody's death, Robert and his new live-in girlfriend decided to relocate to the state of Washington to start a new life. Robert's decision to relocate was not without thought. Several years earlier, the United States Supreme Court had determined that the Washington state statute affording third parties standing to petition state courts for child visitation rights over parental objections was an unconstitutional infringement on a parent's fundamental right to make decisions regarding the rearing of his/her children. Jody's sister, who had been named in Jody's

will as Robbie's guardian in the event of her death, filed a separate custody proceeding in Pennsylvania; which the court dismissed due to her lack of standing.

In researching the issue of third party standing, I learned of an earlier Dauphin County case where a woman named Laurie Kellogg had been convicted of arranging the murder her husband, Bruce Kellogg and she was sentenced to prison for a term of 25 years. Bruce's first wife, Deborah, was seeking custody of Laurie and Bruce's two children, then ages 19 and 14, both of whom had been placed with Laurie's mother and stepfather (the "Francises") during Laurie's imprisonment. The Francises then claimed *in loco parentis* status as the children's custodians.

Considering the best interest of the children in *Kellogg*, the result appeared to be fairly obvious. The trial court observed that the Francises had told the children that their father deserved to die, were attempting to erase the memory of their deceased father from their lives and were incapable of fostering a relationship between the children and Deborah. The court further noted that while their father was living, the children spent significant time with Deborah and their younger half-siblings. The court observed that the Francis' claim for custody seemed to be motivated by a significant Social Security check they were receiving as the children's custodians. There seemed to be little question that the children wanted to live with Deborah and it would be in their best interest to do so. The one hurdle that remained was the issue of standing, as Deborah met none of the statutory tests for standing to enable Deborah to litigate the custody issue

In affirming the trial court's decision granting custody to Deborah, the Superior Court noted the lack of precedent addressing the rights of a third party to file custody proceedings *vis a vis* another third party. The Superior Court thus carved out an exception to the standing requirements limited to situations where a child's parents are not available to exercise custody. The court held that to be accorded standing, a third party must prove by clear and convincing evidence that he or she has shown a "sustained, substantial and sincere" interest in the welfare of the child. While the court stated that the Pennsylvania Rules of Civil Procedure require that standing must be raised by preliminary objections, that procedural requirement should not serve as a means of delaying the custody proceeding. The Superior Court thus held that a trial court could exercise its discretion in determining the order of evidence and could delay the standing issue until the end of the trial.

In 2010, the Pennsylvania legislature adopted 23 Pa.C.S.A. § 5324, which establishes the standards for persons to file custody proceedings in Pennsylvania. Under that statute, a non-parent third party is given standing to file for any form of physical custody or legal custody in only the following circumstances:

- (1) if they are in *in loco parentis*; and

(2) if they are a grandparent of a child

(i) whose relationship with the child began either with the consent of a parent of the child or under a court order;

(ii) who assumes or is willing to assume responsibility for the child; and

(iii) when one of the following conditions is met:

(A) the child has been determined to be a dependent child under 42 Pa.C.S. Ch. 63 (relating to juvenile matters);

(B) the child is substantially at risk due to parental abuse, neglect, drug or alcohol abuse or incapacity; or

(C) the child has, for a period of at least 12 consecutive months, resided with the grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, in which case the action must be filed within six months after the removal of the child from the home.

Essentially, the statute prevents a court from considering claims for custody similar to those filed by either Robbies grandmother or Deborah Kellogg.

Since the enactment of Section 5324, our courts have taken a very restrictive view of what it takes for a third party to be *in loco parentis* to a child. Thus, in the very recent case of *C.G. v. J.H.*, 2017 Pa. Super LEXIS 786 (Oct. 11, 2017) the Pennsylvania Superior Court held that a lesbian woman who lived with, but was not married to the birth mother did not establish *in loco parentis* status to a child born during the parties' relationship through *in vitro* fertilization; despite her claim that she had assisted in raising the child, who referred to her as "Mama Cindy." In *C.G.*, the Superior Court observed that when *Kellogg* was decided, the Court did not have the benefit of Supreme Court decisions that emphasize the need for early resolution of the standing question.

Recent legislation proposed by Senator Don White from Indiana County would change the rights of third parties to file custody proceedings where the parents of the child are not available. Facing the reality of a significant number of absent parents suffering from opioid addiction, Senator White recently presented House Bill 844, which would mandate a return to the standing requirements established in *Kellogg* by amending the third party standing provisions of 23 Pa.C.S. § 5324 to provide that where no biological or adoptive parents have custody of the child, a custody proceeding may be filed by any party who:

- (1) assumes or is willing to assume responsibility for the child;
- (2) has a sustained and sincere interest in the welfare of the child, which may be demonstrated by factors involving the nature, quality, extent and length of involvement by the individual involved in the child's life, including but not limited to:
 - a) The financial support or assistance paid by the individual for the benefit of the child;
 - b) Whether or not the individual has previously stood *in loco parentis* to the child."

The principle objection to loosening the third-party standing requirements in custody proceedings has revolved around the court's legitimate concern in protecting children from involvement in unwarranted custody litigation. As the court noted in *Kellogg*, "[t]he law cannot expose children who are properly placed in a third party's custody to potential frivolous custody claims, making their lives vulnerable to disruption and instability." Accordingly, courts must be vigilant in establishing a high threshold of proof prior to allowing a third-party to file custody proceedings which could disrupt a child's living arrangements and expose them to the uncertainties of litigation.

On October 16, 2017, the Family Law Section presented its Report and Recommendation to the Pa. Bar Association's Board of Governors in support of HB 844, subject to several important modifications. These modifications included a requirement that the third party standing provisions should not apply to situations where dependency proceedings have been initiated and to permit a third party to challenge foster care placements of an order of permanent custody made by a dependency court. The Section also recommended that the statute be modified by requiring that a party's claim to standing be established by clear and convincing evidence and that the court be given authority to appoint a Guardian Ad Litem pursuant to 23 Pa.C.S. § 5334. The Board of Governor's unanimously approved the Section's Recommendation at a meeting held on October 16, 2017.

Thanks go out to Christine DeMatteo and Skip Persick for their efforts in drafting and presenting the section's position to the Board of Governors and to PBA's legislative liaisons, Fred Cabell and Ashley Murphy advocating the Section's position on this important issue. As always, we will keep you advised of the legislation as it progresses.

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