

*Civil Action-- Custody action- Grandparent's standing to seek custody against natural parent- "in loco parentis" with the child*

1. Custody disputes between a non-parent and a parent are characterized as "third party" disputes.
2. Absent a *prima facie* right to custody, a "third party" lacks standing to seek custody against the natural parent.
3. The appropriate manner for a "third party" to obtain custody is through a dependency proceeding.
4. A "third party" may have standing in a custody action based on "in loco parentis" status.
5. The phrase "in loco parentis" refers to a person who puts himself 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.
6. The status of "in loco parentis" embodies two ideas; first, the assumption of a parental status, and second, the discharge of parental duties.

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#### OPINION AND ORDER

Kaye, J., October 17, 1994:

Margaret L. Denton, (hereinafter "plaintiff"), the grandmother of Devin Scott Denton has filed a custody action against her son, Randall S. Denton (hereinafter "defendant"), the natural father of Devin Scott Denton<sup>1</sup>, in which she seeks primary

<sup>1</sup> Sometimes referred to by the parties as Devon Scott Denton.

physical custody of the child.<sup>2</sup> The complaint was filed on April 29, 1994. On August 16, 1994 the defendant, by motion, requested a hearing to address plaintiff's lack of standing in this proceeding. A hearing to determine standing was scheduled for September 19, 1994, at which time the parties and their counsel appeared before this Court. An evidentiary hearing was not held on the latter date, but, we permitted and offer of proof, limited to the issue on standing, to be provided to this Court.

The preliminary objection is in the nature of a demurrer, the effect of which is that plaintiff, as a non-parent of the child, has failed to set forth a cause of action upon which relief can be granted as they do not have a parent-child relationship and they do not stand as "in loco parentis".

When a demurrer is filed, the question is whether, on the facts averred, the law says with certainty that no recovery is possible, and when a doubt exists as to whether it should be sustained, the demurrer should be overruled. *Scarpitti v. Weborg*, 530 Pa. 366, 609 A.2d 147 (1992). In ruling on a demurrer, the court must assume as true all well-pleaded facts and reasonable inferences arising therefrom contained in the pleading. *Gabel v. Cambruzzi*, 532 Pa. 584, 616 A.2d 1364 (1992).

The instant case is a custody action wherein the paternal grandmother seeks an award of custody of her two year old grandson, Devin Scott Denton. Child custody disputes between a non-parent and a parent are characterized as "third party" disputes. *In re Custody of Hernandez*, 249 Pa.Super. 274, 376 A.2d 648 (1977).<sup>3</sup> Absent a *prima facie* right to custody, a "third party" lacks standing to seek custody as against the natural parent. *Rosado v. Diaz*, 425 Pa.Super. 155, 624 A.2d 193 (1993).

<sup>2</sup> April Kleppinger, the natural mother of Devin Scott Denton did join in the complaint, but is not a named party.

<sup>3</sup> As stated in *In re Custody of Hernandez, supra.*, there are three types of interested parties in a child custody dispute: 1/ Parent versus parent; 2) parent(s) versus a third party; and 3) parent(s) versus the state. The instant dispute between a grandmother and parent fall into the second category.

This is based on the rationale that a parent's *prima facie* right to custody should not be subjected to challenge without a clear and convincing showing that the child is not receiving proper parental care. It is further established that the appropriate manner for a "third party" to obtain custody is through a dependency proceeding. *Gradwell v. Strausser*, 416 Pa.Super. 118, 610 A.2d 999 (1992).

In *Jackson v. Garland*, 424 Pa.Super. 378, 622 A.2d 969 (1993), the plaintiff filed a complaint for custody of her sister's three year old son, following the incarceration of the child's father for criminal homicide of the child's mother. At the time of the killing, the child was physically in the custody of the paternal grandparents. Pursuant to stipulation, the father retained legal custody of the child, while physical custody was placed with the paternal grandparents.

The maternal aunt filed the complaint in question, in which she sought only partial custody or visitation with the child so that the child could continue contact with his mother's family. The trial court sustained the defendants' demurrer on the ground that the maternal aunt lacked standing to bring a custody action. In sustaining the trial court's action, Superior Court held as follows:

The law protects the natural parents' relationship with his or her child and will not interfere unnecessarily with that relationship, even at the cost of estrangement to the extended family. Freedom of personal choice in matters of family life, and concomitant freedom from unwarranted governmental intrusions, is a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution [citations omitted].

424 Pa.Super. at 382, 622 A.2d at 970-971

It is clear that a non-parent lacks a *prima facie* right to have custody of a child, thus, the court may not entertain a complaint in custody from such a person when the action is brought against the parent who possesses such a right, in the absence of a statute that creates the right to do so.

One exception that exists to this principle is when there is proof that a party stands "in loco parentis" to the child. *Karner v.*

*v. McMabon*, 433 Pa.Super. 290, , 640 A.2d 926, 929 (1994). Our courts have attempted to define the doctrine of "in loco parentis". The Pennsylvania Supreme Court, in 1968, stated:

The phrase "in loco parentis" refers to a person who puts himself 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.

*Comm. ex rel. Morgan v. Smith*,  
429 Pa. 561, 565, 241 A.2d 531,  
533 (1968).

In *Rosado, supra*, the Superior Court addressed the issue of a grandparent seeking standing in a custody action based on "in loco parentis" status. The Superior Court, in reviewing the trial court's decision denying standing to a third party claiming "in loco parentis" status with the child, held that the trial court should not have summarily dismissed the complaint without taking evidence in support of the plaintiff's allegations of one "in loco parentis". The allegations, however, were compelling, and included that the plaintiff raised the child since birth to the age of six, and that the defendant had never met the child except as a tiny infant.

*Gradwell v. Strausser, supra*, is similar to the instant case. In *Gradwell*, the maternal grandparents and the paternal grandfather sought legal custody of their grandchild from the natural parents. The paternal grandfather argues that he had standing because he acted "in loco parentis" to the child. The paternal grandfather contended that he resided with the child for a length of time and therefore he has overcome the natural parents' *prima facie* right to custody. The trial court determined that the paternal grandfather had resided with the child and her parents for almost two years, after which the child lived with the paternal grandfather without her parents for three months. The court held that without more, a child's preference and the fact that the child and grandparent resided together for a period of time is insufficient to support a finding that the grandparent stood "in

loco parentis". *Gradwell v. Strausser*, 416 Pa.Super. at 126, 610 A.2d at 1003.

Similarly, we find that even when taking all of plaintiff's averments as true, plaintiff falls short of establishing herself as one "in loco parentis" with the child.

Plaintiff avers that from April 22, 1994 to the present the child resided with the father at 208 North Potomac Street, Waynesboro, Franklin County, Pennsylvania. Furthermore, the complaint avers that the only time the plaintiff and the child resided together in the absence of the defendant was for 21 days in March of 1994. We also observe that the child lived with his parents from his birth on July 1, 1992, until March 1, 1993. The plaintiff further avers that since March, 1993, plaintiff has been primarily responsible for feeding, clothing, bathing, playing with, teaching, nurturing and caring for the child.

On September 19, 1994 we permitted an offer of proof, limited to the issue on standing, to be provided to this Court. Plaintiff, in support of her petition, offered that she has supported the child voluntarily since March 1, 1993, always acting as the primary nurturing parent. We find, however, that for most of Devin's life, the defendant has lived with the child, and has maintained his role as the child's father. The mere fact that plaintiff has performed a substantial amount of child rearing and has housed the child is insufficient to establish plaintiff as one who stands "in loco parentis" to the child. *Gradwell v. Strausser, supra*.

We observe that, by action of the General Assembly, there exist several circumstances (i.e. death of a parent; divorce or separation of the parents for a period in excess of six months; and when a child has resided with a grandparent in excess of twelve months) may provide a basis for the Court to award partial custody or visitation rights to the grandparent *if* this is found to be in the child's best interest and not to be detrimental to the parent-child relationship. 23 Pa. C.S.A. §§ 5311-5313. However, this does not give a grandparent standing to seek an award of primary custody of a child, as is sought herein, and we are bound by the decisions cited above to grant the father's motion.

Nonetheless, we encourage the parties involved herein to attempt to reconcile their differences so that the child can receive the benefits in having a meaningful relationship with his paternal grandmother, and vice versa. It is unfair to a child to deprive him of this relationship because of matters that are entirely outside his control. At the same time, the grandmother must understand that as strongly as she may feel about the conduct of others involved in this situation, she is not the child's parent, and must appreciate the limits this puts on her in intervening in her adult son's, and minor grandson's, lives. We think it would be beneficial to all concerned if they would consider involving a family counsellor in this situation to work through their differences. If they fail to do so, it is the child who will suffer the consequences.

#### ORDER OF COURT

NOW, October 17, 1994, defendant's motion which challenges the standing of plaintiff to institute a proceeding for primary custody of plaintiff's minor grandchild, is GRANTED, and the complaint for custody is DISMISSED.