

## SAME-SEX CO-PARENTS WIN VISITATION RIGHTS IN PENNSYLVANIA COURT

By Sarah E. Kurtz

The Pennsylvania Supreme Court, in a 5-2 ruling, has affirmed that same-sex co-parents are permitted to file petitions to win visitation rights with the children they have parented as long as they are deemed to be *in loco parentis* to the child—that is, if they have put themselves “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.” *T.B. v. L.R.M.*, 786 A.2d 913, 916 (Pa. 2001).

### Background

On August 27, 1993, the two parties in this case—T.B. and L.R.M., both women—were living together in a home that they jointly purchased, when L.R.M. gave birth to a child, A.M., after being impregnated by donor sperm from a donor chosen by T.B. While the two parties did not enter into any formal parenting agreement, for the next several years they lived together with the child, sharing day-to-day child rearing responsibilities. Shortly after the joint purchase of a new home in May of 1996, the two women separated and ended their relationship.<sup>1</sup>

After being refused her requests for visitation, telephone calls and giving of gifts, T.B. filed a “Complaint for Shared Legal and Partial Custody and Visitation,” requesting partial custody based on more than three years acting as a parent to A.M. A hearing officer concluded that T.B. did indeed have the right to seek custody/visitation by virtue of her *in loco parentis* standing, and that it would be in A.M.’s best interest to grant partial custody for purposes of visitation.<sup>2</sup>

Adopting the recommendations of the hearing officer, the Court of Common Pleas (Cambria County, Penn., No. 1996-3626, August 26, 1997) granted T.B. one visitation period per month, subject to continued review. L.R.M. appealed to the Superior Court of Pennsylvania, which granted a stay on December 5, 1997. The Superior Court ultimately agreed in a unanimous *en banc* ruling that T.B. had *in loco parentis* standing and the right to seek partial custody of A.M., although it vacated the visitation order stating

that further review of the best interests of A.M. was necessary.<sup>3</sup>

### Supreme Court Decision

On December 1, 2000, the Pennsylvania Supreme Court agreed to hear L.R.M.’s appeal of the standing decision. The National Center for Youth Law became involved with the case by signing on as one of 55 *amici curiae*, representing a diverse spectrum of children’s advocacy, religious, social service, labor, women’s, and community-based organizations. Attorneys for *amici curiae* in the case included Susan Frietsche, Women’s Law Project; Seth Kreimer; Meredith Schalick, Support Center for Child Advocates; and Tiffany L. Palmer, Center for Lesbian and Gay Civil Rights.<sup>4</sup> The *amici curiae* supported affirming the Superior Court ruling, arguing against creating any special rules to exempt the children of lesbian and gay parents from the well-established protections of the *in loco parentis* standing doctrine, and discussing the literature concerning the importance to children of maintaining ties with the adults who raised and love them.

In a majority decision written by Chief Justice Stephen A. Zappala, the court affirmed the Superior Court’s standing ruling, holding that the *in loco parentis* doctrine permits visitation petitions to be filed by anyone, including same-sex former partners, who can demonstrate that they have a parental relationship with the child and that this relationship developed with the approval of the legal parent. Actual granting of visitation rights depends on the court’s evaluation of the child’s best interests, with a heavy presumption in favor of the biological parent’s side. The court’s decision, however, permits same-sex co-parents to attempt to show that the child’s best interests would be served by a continuing relationship with the co-parent.

In its decision, the Court stated: “the nature of the relationship between Appellant and Appellee has no legal significance to the determination of whether Appellee stands *in loco parentis* to A.M. The ability to

<sup>1</sup> *Id.*, 786 A.2d at 914-915.

<sup>2</sup> *Id.*, 786 A.2d at 915.

<sup>3</sup> *T.B. v. L.R.M.*, 753 A.2d 873 (Pa. Super. 2000).

<sup>4</sup> Appellee was represented by Patricia M. Logue, Lambda Legal Defense Fund, Inc., and Roger McGill, Smorto, Persio, Webb, & McGill.

marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties.”<sup>5</sup> The Court added that while the method by which the third party gained parental status is relevant, in this case appellant had consented to appellee’s performance of parental duties: “a biological parent’s rights 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.”<sup>6</sup>

### Significance of the Court’s Decision

The Court’s decision is significant because the Pennsylvania adoption statutes have been interpreted to require that the existing legal parent must terminate her own parental rights before a non-stepparent may adopt the existing legal parent’s child.<sup>7</sup> Because of the adverse impact of this interpretation on second-parent adoptions, many children will only have their best interests in continued contact with the second parent evaluated in the context of *in loco parentis* petitions.

While the dissenting justices argued that the common law *in loco parentis* doctrine was superseded by subsequent comprehensive legislation on the subject matter, the majority observed that the legislature must specifically preempt accepted common law for it to be disregarded, and here the legislature had not revised the domestic relations code to preclude *in loco parentis* standing.<sup>8</sup> The majority also rejected the dissent’s argument that the common law doctrine should be limited to petitioners with legal or biological ties to the child, noting that it had been applied to unmarried heterosexual couples where the former partner was not the biological parent. Finally, the majority distinguished *Troxel v. Granville*, 120 S. Ct. 2054 (2000), where the Supreme Court found that Washington’s statute permitting anyone to petition for visitation rights infringed upon the fundamental constitutional right of the mother in that case to make decisions concerning the care, custody, and control of her children. The Pennsylvania court found its common law doctrine to be both narrower and more deferential to the mother’s wishes: narrower in that it

is limited to persons who, with the mother’s consent, assumed parental status and discharged parental duties; more deferential in light of the presumption in Pennsylvania that a fit parent will act in the best interests of the child.

Thus, while the burden of proof may be a heavy one, former same-sex partners in Pennsylvania who can prove that with their former partner’s consent they assumed parental status and discharged parental duties, stand *in loco parentis* to the children they helped raise. Further, they may be granted custody or visitation if they can also establish, despite the great weight given their former partner’s objections, that it would be in the best interest of the children to do so. The *in loco parentis* doctrine, therefore, is an important protection for the welfare of children in these families in Pennsylvania and in other states with similar issues.

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<sup>5</sup> *T.B. v. L.R.M.*, *id.*, 786 A.2d at 918-919.

<sup>6</sup> *Id.*, 786 A.2d at 919, quoting from *J.A.L. v. E.P.H.*, 453 Pa. Super. 78, 682 A.2d 1314, 1322 (Pa. Super. 1996).

<sup>7</sup> *In re Adoption of R.B.F.*, 762 A.2d 739 (Pa. Super. 2000), *alloc. granted*, 784 A.2d 119 (Pa. 2001).

<sup>8</sup> *T.B. v. L.R.M.*, *id.*, 786 A.2d at 918.