Received 2/20/2018 6:06:23 PM Supreme Court Middle District

Filed 2/20/2018 6:06:00 PM Supreme Court Middle District
2 MAP 2018

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 2 MAP 2018

C.G,
Appellant,

v.

J.H.,
Appellee.

BRIEF OF *AMICUS CURIAE* AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, PENNSYLVANIA CHAPTER IN SUPPORT OF APPELLANT C.G.

Appeal from the Opinion and Concurring Opinion of the Superior Court of Pennsylvania at No. 1733 MDA 2016, filed October 11, 2017, affirming the Order of the Court of Common Pleas of Centre County, entered September 22, 2016, sustaining J.H.'s Preliminary Objections and Dismissing Petitioners' Custody Complaint at No. 2015-4710

Helen E. Casale (ID No. 74127)
Adam N. Schupack (ID No. 320910)

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200

Counsel for Amicus Curiae *American Academy of Matrimonial Lawyers, Pennsylvania Chapter*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

I. STATEMENT OF INTEREST OF *AMICUS CURIAE* AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, PENNSYLVANIA CHAPTER

Pennsylvania has been in the vanguard of the now majority of states that recognize third parties who stand *in loco parentis* to a child have custody rights worthy of protection. For more than 20 years, courts in this Commonwealth have recognized that the same-sex partner of the biological mother of a child born during their relationship has *in loco parentis* standing to seek custody. *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1321 (Pa. Super. Ct. 1996). Since 2010, this Commonwealth has enshrined that protection in its Child Custody Act by offering standing in custody disputes to a "person who stands in loco parentis to the child." 23 Pa. C.S.A. § 5324(2). This reflects sound policy. It recognizes that the touchstone for custody must be the best interests of the child, that offering additional avenues of familial support for Pennsylvania children should be encouraged, and that this Commonwealth has numerous non-traditional families in which someone other than biological parents are parenting children. Pennsylvania law, therefore, embraces the reality that a child's attachment to someone whose care, love, and devotion to him or her is equivalent to that of a biological parent is deserving of protection. The Superior Court's decision in *C.G. v. J.H.*, 172 A.3d 43 (Pa. Super. Ct. 2017), flies in the face of this history.

Amicus here is the Pennsylvania Chapter of the American Academy of Matrimonial Lawyers ("AAML"). Founded in 1962, the AAML is committed "To provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law." AAML's more than 1,650 Fellows are recognized as preeminent family law practitioners with a high level of knowledge, skill, and integrity. The Pennsylvania Chapter's more than 60 Fellows include this Commonwealth's leading practitioners of family law, who are looked to by bench and bar for their expertise and leadership on legal issues impacting families.

In denying *in loco parentis* standing to Appellant C.G., who lived together with Appellee J.W. in a same-sex relationship for nearly six years following the birth of J.W.H., the Superior Court departed from numerous judicial decisions and the Legislature's intent in adding *in loco parentis* standing to the Child Custody Act in 2010. The Superior Court reached its conclusion, and shut the courthouse door to C.G., by applying standing in an inflexible manner divorced from the goal of the standing doctrine – to ensure that a litigant has a "direct, substantial and immediate" interest in the dispute. Moreover, to hold that C.G. has no such interest in the custody of J.W.H., the child with whom she lived together as a family for the first nearly six years of his life, would permit an overly aggressive application of standing to swallow the *in loco parentis* standing provision enacted by the Legislature.

Applying judicial precedents, the Child Custody Act, and the standing doctrine properly, this Court should hold that C.G. has standing to seek custody over J.W.H. Granting standing to C.G. would entitle her *only* to a custody hearing. It would not, as the Superior Court appeared to believe, obviate C.G.'s need to demonstrate, on the merits, that granting her some form of custody would be in J.W.H.'s best interests.

The Superior Court also erred in placing great stress on the parties' post-separation conduct in evaluating standing. That focus both runs contrary to Pennsylvania law and would encourage bad post-separation conduct by the "legal" parent that is not in the best interests of the child, but is aimed instead at manipulating the *in loco parentis* standing inquiry.

Accordingly, this Court should reverse the decision of the Superior Court and hold that C.G. had *in loco parentis* standing and is entitled to a hearing on whether the award of any form of custody to her is in J.W.H.'s best interests.

II. ARGUMENT

A. Pennsylvania Law and Policy Recognize That Third Parties Who Stand *In Loco Parentis* to a Child Have Custody Rights Worthy of Protection

1. Pennsylvania Has Enshrined the *In Loco Parentis* Doctrine Into Its Child Custody Act

Pennsylvania courts have long recognized that a person may "put 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. This status, (known as 'in loco parentis') embodies two ideas; first, the assumption of a parental status, and second, the discharge of parental duties." *Spells v. Spells*, 378 A.2d 879, 881-82 (Pa. Super. Ct. 1977) (quoting *Commonwealth ex rel. Morgan v. Smith*, 241 A.2d 531, 533 (Pa. 1968)). "The rights and liabilities arising out of that relation are, as the words imply, exactly the same as between parent and child." *Id.* at 882 (quoting *Commonwealth v. Cameron*, 179 A.2d 270, 272 (Pa. Super. Ct. 1962)).

In the groundbreaking 1996 *J.A.L.* decision, the Superior Court, reversing the trial court, held that the same-sex partner of a child's biological mother had *in loco parentis* standing to seek custody because the parties had lived together as a nontraditional family. *J.A.L.*, 682 A.2d at 1321. Focusing primarily on the parties' pre-separation conduct, the court noted that E.P.H. only had the child once J.A.L. agreed, and the child was intended to be part of their family. *Id.* The court rejected the argument that J.A.L. was more akin to a babysitter, noting that she cared for the child to the same extent as the primary breadwinner in many traditional families. *Id.* at 1321-22. Nor was the ten-month period in which the couple lived together with the child too short to establish *in loco parentis* standing; it was the child's entire life up to that point. *Id.* & n.5. The court also held that the trial court had focused too much on E.P.H.'s subjective thought processes and

post-separation intentions, which were "irrelevant to the question of whether the parties by their conduct created a parent-like relationship between J.A.L. and the child which is sufficient to give J.A.L. standing to seek continued contact with her." *Id.* at 1322. E.P.H. was not entitled to whitewash J.A.L. out of the child's life: "E.P.H.'s rights as a biological parent do no 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." *Id.*

In *T.B. v. L.R.M.*, 786 A.2d 913, 914-15 (Pa. 2001), this Court held that the former same-sex partner of a biological mother had *in loco parentis* standing to seek custody of the child born during their relationship. T.B. and L.R.M., the biological mother, lived together with their child in a same-sex relationship for three years. *Id.* at 915. The parties shared daily child-rearing tasks, although T.B. was deferential to L.R.M. in parenting decisions. *Id.* The Court rejected L.R.M.'s argument that T.B.'s inability to adopt the child meant she could not assume the obligations of a "lawful parent." *Id.* at 918. Instead, this Court held that L.R.M. could not erase her consent to and encouragement of T.B.'s performance of parental duties during their relationship. *Id.* T.B. was not a mere caretaker of the child. *Id.* at 919.

Four years after *T.B.*, the Superior Court again examined the scope of the *in loco parentis* doctrine in awarding primary custody over twins to the former same-sex partner of their biological mother, who stood in *loco parentis* to them. *Jones v. Jones*, 884 A.2d 915, 919 (Pa. Super. Ct. 2005). The parties entered a same-sex relationship in 1988, had the twins in 1996, and separated in 2001. *Id.* at 917. Initially, the biological parent was granted primary legal custody and the non-biological parent partial custody. *Id.* Ultimately, however, primary custody was awarded to the non-biological mother because the biological mother had attempted to "sabotage" the children's relationship with their other parent, disrupted their schooling, and "put her own interests ahead of the children's." *Id.* at 919.[1]

The importance of these *in loco parentis* decisions – and this Commonwealth's leadership on the issue – was not lost on the Legislature. On November 23, 2010, Pennsylvania's amended Child Custody Act took effect following unanimous passage of the bill, P.L. 1106, No. 112 § 4 (Nov. 23, 2010), by the Pennsylvania House and Senate. The Act includes a new provision, 23 Pa. C.S.A. § 5324, which specifically enshrines the common-law *in loco parentis*

[1] Others cases have applied the *in loco parentis* doctrine to grant standing to third parties in cases not involving same-sex couples. *See Liebner v. Simcox*, 834 A.2d 606 (Pa. Super. Ct. 2003) (standing granted to live-in boyfriend of more than two years); *Peters v. Costello*, 891 A.2d 705 (Pa. 2005) (standing granted to non-biological grandparents with whom grandchild lived for four years).

doctrine into law.[2] The statute now provides that among the individuals who "may file an action under this chapter for any form of physical custody or legal custody" are "[a] person who stands in loco parentis to the child." 23 Pa. C.S.A. § 5324(2).[3]

2. There Are Strong Policy Reasons for Protecting Third-Party Custody Rights

Strong policy reasons underscore this Commonwealth's protection of third-party custody rights. First, it recognizes the common-sense notion that a child may develop a deep attachment to someone who acts as a parent akin to that of a child for a biological parent. *See T.B.*, 786 A.2d at 917 (recognizing "where the child has established strong psychological bonds" with a third party who "has lived with the child and provided care, nurture, and affection," that person may "assum[e] in the child's eye a stature like that of a parent" (quoting *J.A.L.*, 682 A.2d at 1319-20)). Indeed, a child's attachment to one who stands *in loco parentis* may be equally strong, or stronger, than the child's attachment to the biological parent.

---

[2] The Legislature's enactment of *in loco parentis* standing into law disposed of two primary grounds on which Justice Saylor based his dissenting opinion in *T.B.* 786 A.2d at 920-22 (Saylor, J. dissenting).

[3] The same year that the Legislature added *in loco parentis* standing to the Child Custody Act, the Superior Court abolished the special evidentiary presumption that faced homosexual parents in child custody cases, overruling *Constant A. v. Paul C.A.*, 496 A.2d 1 (Pa. Super. Ct. 1985). *M.A.T. v. G.S.T.*, 989 A.2d 11, 17 (Pa. Super. Ct. 2010) (Donohue, J.). This holding, and the *in loco parentis* decisions cited above, reflect the clear trend in Pennsylvania law towards treating gay parents equally before the law. *See id.* at 18 (holding evidentiary presumption against homosexual parents "is based upon unsupported preconceptions and prejudices" that "have no proper place in child custody cases, where the decision should be based exclusively upon a determination of the best interests of the child . . . .").

See id. Recognition of such attachments is consistent with the "paramount concern" in child custody cases – the best interests of the child. *K.B. II v. C.B.F.*, 833 A.2d 767, 770 (Pa. Super. Ct. 2003).

Second, third-party custody rights provide an additional avenue of support for children. Since "[t]he rights and liabilities arising out of an *in loco parentis* relationship are . . . exactly the same as between parent and child," *T.B.*, 786 A.2d at 917, the benefits of the *in loco parentis* relationship bring with them the burdens of parenthood. These burdens include the responsibility to meet the emotional and financial needs of the child, including by the payment of child support. *See L.S.K. v. H.A.N.*, 813 A.2d 872, 878 (Pa. Super. Ct. 2002) ("[E]quity mandates that H.A.N. cannot maintain the status of *in loco parentis* to pursue an action as to the children . . . and at the same time deny any obligation for support merely because there was no agreement to do so."). It makes eminent policy sense to allow third parties to assume responsibility for children who might otherwise fall through the cracks. *See D.P. v. G.J.P.*, 146 A.3d 204, 214 (Pa. 2016) (noting the state's interest in fostering a third-party custody relationship "may be especially pronounced" where there is "major disruption to the family environment").

Third, protecting third-party custody rights reflects this Commonwealth's recognition of, and respect for, non-traditional families. The *in loco parentis* doctrine, and the protection of third-party custody rights it represents, reaches far

broader than the confines of same-sex couples. *See, e.g.*, *D.P.*, 146 A.3d at 214 (noting that the state has an elevated interest in fostering grandparent-grandchild ties "in view of the changing nature of the family in the modern era"). As this Court noted in rejecting an invitation to abolish the *in loco parentis* doctrine, such a change would "potentially affect the rights of stepparents, aunts, uncles or other family members who have raised children, but lack statutory protection of their interest in the child's visitation or custody." *See T.B.*, 786 A.2d at 917. It is estimated that in Pennsylvania in 2016 approximately 89,000 children (3%) lived with their grandparents,[4] 103,000 children (4%) lived with extended family or close friends,[5] 212,000 children (8%) lived with cohabitating domestic partners,[6] and 126,000 children (5%) lived with neither biological parent.[7] *See also Hiller v. Fausey*, 904 A.2d 875, 886 (Pa. 2006) ("[I]n the recent past, grandparents have assumed increased roles in their grandchildren's lives . . . ."). A significant number of Pennsylvania kids, therefore, are being raised in non-traditional families, and the law and policy of this Commonwealth should continue to recognize those

[4] Kids Count, Data Center, The Annie E. Casey Foundation, (Oct. 2017), http://datacenter.kidscount.org/data/tables/108-children-in-the-care-of-grandparents?loc=1&loct=2#detailed/2/2-52/false/870,573,869,36,868/any/433,434.

[5] *Id.* at http://datacenter.kidscount.org/data/tables/7172-children-in-kinship-care?loc=1&loct=2#detailed/2/2-52/false/1564,1491,1443,1218,1049/any/14207,14208.

[6] *Id.* at http://datacenter.kidscount.org/data/tables/110-children-living-with-cohabiting-domestic-partners?loc=40&loct=2#detailed/2/40/false/870,573,869,36,868/any/437,438.

[7] *Id.* at http://datacenter.kidscount.org/data/tables/111-children-living-with-neither-parent?loc=1&loct=2#detailed/2/2-52/false/870,573,869,36,868/any/439,440.

arrangements. *See J.A.L.*, 682 A.2d at 1320 (requiring a flexible approach to *in loco parentis* standing because of the "wide spectrum of arrangements filling the role of the traditional nuclear family" in modern society).

3. The Clear Trend of Authority Is Towards Protecting Third-Party Custody Rights

A majority of states have followed this Commonwealth's lead in protecting non-traditional families under the *in loco parentis* doctrine or its equivalent. *See Conover v. Conover*, 146 A.3d 433, 449 (Md. 2016) ("[A] majority of states, either by judicial decision or statute, now recognize *de facto* parent status or a similar concept."); *see also* Nancy D. Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 Law & Contemp. Probs. 195, 208 (2014) ("A minority of states . . . have denied a functional psychological parent without legal status the ability to request custody or visitation rights.").[8] That majority consists of "[a] diverse array of jurisdictions, from Alaska to West Virginia." *Conover*, 146 A.2d at 449-50 (collecting cases). In addition, the American Law Institute ("ALI") has included a *de facto* parent in its Principles as one of the parties who should be afforded standing to bring a custody action. ALI,

[8] States refer to third parties who assume a role akin to that of a parent by different terms, including *de facto* parenthood, psychological parenthood, and *in loco parentis*. *See* Katharine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 Law & Contemp. Probs. 29, 61-62 (2014).

Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.04(1)(c) (Am. Law Inst. 2003) (adopted May 16, 2000).

In *Conover*, for example, the Maryland Court of Appeals overruled its own 2008 precedent and held that held that *de facto* parents have standing to contest custody or visitation. 146 A.2d at 449-51. The court held that its 2008 decision "deviates sharply from the decisional and statutory law of other jurisdictions" and had "been undermined by the passage of time," including by Maryland's recognition of same-sex marriage. *Id.* at 448, 451, 453. Recognizing *de facto* parenthood, the court held, served to "fortify the best interests standard by allowing judicial consideration of the benefits a child gains when there is consistency in the child's close, nurturing relationships." *Id.* at 453.

B. C.G. Has *In Loco Parentis* Status Based On Pennsylvania Law

Based on Pennsylvania law and policy, C.G. should be granted *in loco parentis* standing to seek some form of custody over J.W.H. at a hearing.

1. Standing, Even in Custody Actions, Must Still Be Applied Consistently With Its Goal – Ensuring A Litigant Has a Substantial, Direct, and Immediate Interest in the Matter

"The concept of standing, an element of justiciability, is a fundamental one in our jurisprudence: no matter will be adjudicated by our courts unless it is brought by a party aggrieved in that his or her rights have been invaded or infringed by the matter complained of." *J.A.L.*, 682 A.2d at 1318 (citing, *e.g.*,

William Penn Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 269 (Pa. 1975)). "The purpose of this rule is to ensure that cases are presented to the court by one having a genuine, and not merely a theoretical, interest in the matter." *Id.* The test for standing is that "the proponent of the action must have a direct, substantial and immediate interest in the matter at hand." *Id.* "A determination of standing . . . implies that the party has a substantial interest in the subject matter of the litigation and that the interest is direct, immediate and not a remote consequence." *T.B.*, 786 A.2d at 919-20.

Pennsylvania courts have applied standing in child custody cases "with particular scrupulousness" to ensure actions are litigated by real parties in interest and "to prevent intrusion into the protected domain of the family by those who are merely strangers, however well-meaning." *See J.A.L.*, 682 A.2d at 1318-19; *see also T.B.*, 786 A.2d at 916. This Court has instructed that where standing is at issue, it should be determined early to screen out non-meritorious claims and protect parental rights. *D.P.*, 146 A.3d at 213. Parties seeking *in loco parentis* standing must prove the "essential facts" required to support a finding of standing. *T.B.*, 786 A.2d at 916.

Even in evaluating *in loco parentis* "with particular scrupulousness," however, Pennsylvania courts have nonetheless required that standing be applied

flexibly, consistent with the principles underlying the standing doctrine. *J.A.L.*, 682 A.2d at 1318, 1320. As the Superior Court held in *J.A.L.*:

> Although the requirement of *in loco parentis* status for third parties seeking child custody rights is often stated as though it were a rigid rule, it is important to view the standard in light of the purpose of standing principles generally: to ensure that actions are brought only by those with a genuine, substantial interest. When so viewed, it is apparent that the showing necessary to establish *in loco parentis* status must in fact be flexible and dependent upon the particular facts of the case.

Id. The *J.A.L.* court held that the trial court applied standing in an "overly technical and mechanistic" manner that failed to give due consideration to the characteristics of each family and needs of each child. *Id.* at 1318. "In today's society, where increased mobility, changes in social mores and increased individual freedom have created a wide spectrum of arrangements filling the role of the traditional nuclear family, flexibility in the application of standing principles is required in order to adapt those principles to the interests of each particular child." *Id.* at 1320.[9]

[9] The "stringent test" for *in loco parentis* standing quoted by the Superior Court, 172 A.3d at 55 (quoting *T.B.*, 786 A.3d at 916), stemmed at least in part from the common-law roots of the *in loco parentis* doctrine. In the very next sentence in *T.B.*, this Court noted that standing in third-party custody cases is generally found "only where the legislature specifically authorizes the cause of action." *T.B.*, 786 A.2d at 916. At the time *T.B.* was decided, this Court relied on the common law because the Child Custody Act did not provide for *in loco parentis* standing. Now, however, the statute provides that specific authorization.

Here, C.G. has a substantial interest in custody over J.W.H. C.G. and J.H. were in a same-sex relationship, had a commitment ceremony, and lived with J.W.H. as a family for nearly the first six years of his life. 172 A.3d at 47. J.H. acquiesced and consented in allowing C.G. to act as a parent until such time as she moved to Pennsylvania. The parties and the child functioned as a family unit. C.G. acted as a parent, treated J.W.H. as her child, and both C.G. and J.H. communicated to family and friends that they were the parents of the child. *Id.*

2. Standing Must Be Evaluated Against the Legal Bar on Marriage Faced By Same-Sex Couples Prior to *Whitewood* and *Obergefell*

A flexible approach to standing also requires considering that same-sex partners whose relationships ended before the legalization of same-sex marriage were denied their fundamental right to marry. *See* Bartlett, 77 Law & Contemp. Probs. at 57 ("Same sex-couple parenting arrangements . . . were especially vulnerable to the law's traditional resistance to recognition of third-party parents."). As the Supreme Court of Oklahoma recognized in 2015, a same-sex "couple's failure to marry cannot now be used as a means to further deprive the non-biological parent, who has acted *in loco parentis*, of a best interests of the child hearing." *See Ramey v. Sutton*, 362 P.3d 217, 220-21 (Okla. 2015). Had C.G. and J.H. had a wedding granting their relationship legal recognition, the

issues in this case might be very different.[10] C.G. may have been afforded a presumption of parentage, instead of having to fight over standing as she has been required to do.[11] *See C.G.*, 172 A.3d at 60 (Musmanno, J. concurring) ("[I]t may be time to re-visit the issue of the appropriate standard and presumptions to be applied in determining standing where a child is born during a same-sex relationship.").

The decisions striking down the bans on same-sex marriage in this Commonwealth and federally, moreover, recognize the role of childrearing in the family and the importance of providing children with clarity about their parents' marital status. In *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014), which struck down this Commonwealth's same-sex marriage ban, the court noted that non-recognition of same-sex relationships created problems for parents and children. Non-biological parents were required to apply for second-child adoption, a "long, expensive, and humiliating" process, and had no legal ties until that process was complete. *Id.* at 417. Nor could these children understand why their parents were not recognized as married. *Id.*

[10] It is interesting to note, however, that in Pennsylvania *in loco parentis* status has never rested on marital status.

[11] Same-sex marriage only became legal in Florida, where C.G. and J.H. resided with J.W.H., on January 6, 2015, following a federal district court's decision invalidating Florida's same-sex marriage ban, *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014), and a subsequent Order of that court directing the issuance of same-sex marriage licenses, *Brenner v. Scott*, No. 4:14cv107-RH/CAS, 2015 WL 44260, at *1 (N.D. Fla. Jan. 1, 2015).

The Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), that same-sex couples have a fundamental right to marry also focused on marriage's role in safeguarding children and families. Excluding same-sex couples from marriage would deny "hundreds of thousands of children" who "are presently being raised by such couples" the "recognition, stability, and predictability marriage offers" and would result in those children suffering "the stigma of knowing their families are somehow lesser." *Id.* at 2600. It would also relegate them to suffering "the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life." *Id.*

In *Ramey*, the Supreme Court of Oklahoma concluded that a non-biological parent, who had been in an eight-and-a-half year same-sex relationship prior to the legalization of same-sex marriage, had *in loco parentis* standing to seek custody of a child born during the relationship. 362 P.3d at 217. Because Oklahoma denied the couple their fundamental right to marry, their failure to marry could not "be used as a means to further deprive the non-biological parent, who has acted *in loco parentis*, of a best interests of the child hearing." *Id.* at 220-21. The court also held the uncertain status faced by the non-biological mother was the "exact peril identified in *Obergefell*":

> Ramey, the plaintiff, is not a mere 'third party' like a nanny, friend, or relative, as suggested by the district

> court. On the contrary, Ramey has been intimately involved in the conception, birth and parenting of their child, at the *request* and invitation of *Sutton*. Ramey has stood in the most sacred role as parent to their child and always been referred to as 'Mom' by their child.

Id. (citing *Obergefell*, 135 S. Ct. at 2600-01); *see also C.G.*, 172 A.3d at 60 (Musmanno, J. concurring) ("I question whether treating C.G. as a 'third party' is appropriate where, as here, the parties lived together following a commitment ceremony."). Just as in *Ramey*, denying C.G. *in loco parentis* standing to seek custody over J.W.H. would reflect the denigration of their family that *Whitewood* and *Obergefell* decried.

3. Applying a Correct View of Standing to the Facts Here, C.G. Has *In Loco Parentis* Standing

Applying a correct view of standing here, C.G. has *in loco parentis* standing. First, C.G. is "not a mere 'third party' like a nanny, friend, or relative." *See Ramey*, 362 P.2d at 220-21; *C.G.*, 172 A.3d at 60 (Musmanno, J. concurring). C.G. and J.H. were in a same-sex relationship, had a commitment ceremony, and lived together for nearly six years as a family following J.W.H.'s birth in October 2006. *C.G.*, 172 A.3d at 47. J.W.H. referred to C.G. as "Mama Cindy" and J.H. as "Mom." *Id.* Nevertheless, they were legally barred from marriage in Florida, and C.G. could only have begun the "long, expensive, and humiliating" process of second-parent adoption in Florida in 2010. *See Whitewood*, 992 F. Supp. 2d at 417.

Second, in evaluating the facts, both the trial court and the Superior Court used the benefit of hindsight against C.G. For the nearly six years that C.G. and J.H. lived together with J.W.H., Florida did not recognize their relationship to each other or C.G.'s relationship with J.W.H. *See Ramey*, 362 P.3d at 220-21. Thus, there may be explanations for why C.G. was not listed as a "parent" on certain documents that the lower courts considered. *See C.G.*, 172 A.3d at 48. For instance, it does not appear that C.G. could have been listed on J.W.H.'s birth certificate under Florida law as it existed in 2006. *See Brenner v. Scott*, No. 4:14-cv-107-RH/CAS, 4:14-cv-138-RH/CAS, 2016 WL 3561754, at *3-4 (N.D. Fla. Mar. 30, 2016) (rejecting argument that still-extant statute barred some same-sex parents from being listed on the birth certificate); Dara Kam, Florida settles federal birth certificate suit, agrees to recognize same-sex married parents, Miami Herald (Jan. 11, 2017, 4:05 p.m.), http://www.miamiherald.com/news/local/community/gay-south-florida/article125929324.html. Despite such non-recognition of their relationship, C.G. sought to include J.W.H. as her son where she could, such as on her life insurance and medical and dental insurance during her relationship with J.H. *C.G.*, 172 A.3d at 48.

Third, the duration of the relationship between C.G. and J.H. is significantly longer than in other *in loco parentis* cases. The parties lived together as a family following J.W.H.'s birth for nearly six years. That is far longer than in *J.A.L.*, 682

A.2d at 1321 (10 months), *T.B.*, 786 A.2d at 915 (3 years), and *Liebner*, 834 A.2d at 608 (more than two years), in which Pennsylvania courts found *in loco parentis* standing. In fact, in *J.A.L.*, the court noted that the total duration was less important than the fact that the child had lived with the non-biological parent for its entire life to that point. *See* 682 A.2d at 1322 n.5. Here, not only are the nearly six years C.G. and J.H. lived together with J.W.H. significantly longer than the 10 months in *J.A.L.*, but those nearly six years were the entire duration of J.W.H.'s life to that point.

Fourth, the facts surrounding the division of labor between C.G. and J.H. in the household reflect a typical breakdown for families. C.G. worked full-time and was the family's primary breadwinner. *C.G.*, 172 A.3d at 49. J.H., who worked part-time, focused on caring for J.W.H. *Id.* When she was not working, C.G. took care of J.W.H., played with him, and took him on outings. *Id.* Yet the trial court and the Superior Court held this very typical parenting arrangement against C.G., labeling her a mere babysitter and insisting that she merely "played" with the child and did not parent.[12] *Id.* at 58. In *J.A.L.*, when confronting this precise issue, the court refused to make the same value judgment made by the lower courts here. Rejecting the argument that J.A.L. was a mere babysitter and finding that she had

[12] Indeed, had C.G. been a man who worked all week as the primary breadwinner and only occasionally participated in child-rearing, it is difficult to believe the lower courts would have reached the same conclusion about C.G.'s role in the family.

in loco parentis standing, the court noted that she cared for the child to the same extent as the primary breadwinner in many traditional families. 682 A.2d at 1321. Nor, according this Court, is it appropriate to deny *in loco parentis* standing to a non-biological parent who was "deferential" to the biological parent in parenting decisions. *T.B.*, 786 A.2d at 915. Again, it is not uncommon in families for one parent to take the lead in making parenting decisions, as J.H. did here. That C.G. only "occasionally" attended J.W.H.'s activities and appointments, or provided care, does not render her less of a parent. *See C.G.*, 172 A.3d at 48-49. It would be unfair to hold C.G. to a higher standard of involvement in J.W.H.'s life than is required of parents in traditional families.

The decision to deny *in loco parentis* standing to C.G. on very similar facts to cases in which Pennsylvania courts have extended *in loco parentis* standing points to the failure of the trial court and the Superior Court to conform to Pennsylvania law here.

4. Although *In Loco Parentis* Standing Confers a *Prima Facie* Claim to Custody, a Third Party Must Nonetheless Demonstrate That Custody Is In the Best Interests of the Child

Even if this Court were to hold that C.G. has *in loco parentis* standing, it would only entitle her to a custody hearing. The Superior Court, however, suggests that a determination of *in loco parentis* standing would amount to a *fait accompli* on the merits. *See* 172 A.3d at 55. That is incorrect. In *T.B.*, this Court

noted that a "determination of standing simply implies that the party has a substantial interest in the subject matter of the litigation and that the interest is direct, immediate and not a remote consequence." 786 A.2d at 919-20 (citation omitted). As a result, this Court held that "our opinion does not speak to Appellee's chance of success on the merits, but merely affords her the opportunity to fully litigate the issue." *Id.* at 920 (footnote omitted).

The Superior Court, by denying standing to C.G., effectively barred the courthouse doors to her, even though she lived together with J.H. and J.W.H. as a family for nearly the first six years of J.W.H.'s life. Should this Court find C.G. has *in loco parentis* standing, she would still be required to demonstrate, at a custody hearing, that awarding her some form of custody would be in J.W.H.'s best interests. A finding of *in loco parentis* standing would thus not be determinative of the outcome of the custody hearing, but it would allow C.G. the opportunity to present her case on the merits.

C. Post-Separation Conduct Should Not Be Considered In Determining *In Loco Parentis* Standing

1. *In Loco Parentis* Status, Once Achieved, Is Not Lost By Post-Separation Conduct

Both the trial court and the Superior Court focused heavily on C.G.'s post-separation conduct in holding she lacked *in loco parentis* standing. The Superior Court cited the trial court's finding that, "[P]erhaps most telling that [C.G.] did not

assume the role of parent is her conduct post-separation." *C.G.*, 172 A.3d at 49. The court noted, among other facts, that C.G. has only seen J.W.H. once since J.H. moved with him to Pennsylvania, when J.H. visited Florida. *Id.* at 49-50. Consideration of such post-separation conduct was justified, the Superior Court held, because post-separation conduct was considered in *J.A.L.*

J.A.L., however, does not bear that weight the Superior Court places on it. Unlike the lower courts here, the *J.A.L.* court focused primarily on the parties' pre-separation conduct. *See J.A.L.*, 682 A.2d at 1321-22 (focusing on parties' actions before the child's birth and "after the child's birth and before their separation"). Although the court did consider post-separation conduct, it did so only as confirmation of pre-separation contact. *Id.* at 1322 ("This early contact was reinforced by visits after the parties' separation. . . ."). Unlike the lower courts here, which stressed post-separation conduct as a primary reason to find against C.G., the *J.A.L.* court accorded post-separation conduct only minor weight. Moreover, the facts of *J.A.L.* did not involve, as here, the biological parent moving the child more than a thousand miles away. It is also unclear from the evidentiary record whether J.H. allowed C.G. more involvement in J.W.H.'s life than the single visit and occasional telephone calls referenced.

The *J.A.L.* court, and this Court in *T.B.*, were concerned, however, about post-separation attempts by biological parents to erase the relationship their

partners and children developed during their cohabitation as a family. *J.A.L.*, 682 A.2d at 1322; *T.B.*, 786 A.2d at 919. Indeed, this Court has emphasized that "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." *T.B.*, 786 A.2d at 919 (quoting *J.A.L.*, 682 A.2d at 1322). The *J.A.L.* court recognized that it would be likely post-separation for the biological parent who wished to deny custody to minimize the non-biological parent's role. For that reason, the court held that the biological parent's subjective thought processes and post-separation intentions were "irrelevant to the question of whether the parties by their conduct created a parent-like relationship between J.A.L. and the child which is sufficient to give J.A.L. standing . . . ." *J.A.L.*, 682 A.2d at 1322.

In *Liebner*, the Superior Court considered whether the biological mother's former boyfriend had *in loco parentis* standing. The boyfriend maintained regular contact with the child for three years post-separation, until the biological mother cut off contact. The court held the former boyfriend had *in loco parentis* status and did not lose it by virtue of the parties' separation and the mother's remarriage, holding that there was "no case law to support the theory that once *in loco parentis* status has been obtained, it can be lost due to changes in circumstances." *Liebner*, 834 A.2d at 611.

Accordingly, to the extent that the Court considers post-separation conduct, it should give it minimal weight. There are important policy reasons, however, for the Court to evaluate whether it should consider post-separation conduct at all.

2. Considering Post-Separation Conduct Will Encourage Bad Behavior That May Harm the Child

Allowing post-separation conduct to strongly influence custody decisions will encourage bad behavior that may harm children. Such measures could include relocating children far away from non-biological parents, as happened here. It could also include cutting off contact with non-biological parents, as also happened here, as well as seeking to undermine children's bonds with their non-biological parents. Since non-biological parents are third parties, they would have no legal recourse to stop such conduct.

Case law confirms that biological parents often take measures post-separation that are not in the child's best interest. In *T.B.*, the relationship between the parties ended in August 1996. The biological mother permitted the non-biological parent to have one visit with the child on September 4, 1996, but then cut off all contact. In *J.A.L.*, the biological mother permitted the non-biological mother to visit the child for two years post-separation, but then cut off all contact and refused to allow the non-biological mother to visit the child. In *Jones*, the biological mother "tried in every way possible to sabotage" the non-biological mother's relationship with their children by relocating the children out of area,

even though it disrupted their schooling and was not in their best interests. *Jones*, 884 A.2d at 919.

Moreover, a court's use of post-separation conduct to assess *in loco parentis* standing is flawed not only because it encourages bad behavior, but because it also grants too much control over standing to biological parents. Biological parents should not be permitted to defeat the *in loco parentis* standing of non-biological parents merely by cutting off those parents' contact with children after the parties' separation. *See* Kendra Huard Fershee, *The Prima Facie Parent: Implementing a Simple, Fair, and Efficient Standing Test in Courts Considering Custody Disputes by Unmarried Gay or Lesbian Parents*, 48 Family Law Q. 435, 467 (2014) ("When a former partner holds the key to standing, it is difficult to say that the standing test is fair."). Allowing parties to manipulate their litigation adversaries' standing in this manner runs counter to the standing doctrine's purpose of ensuring that litigants have a genuine interest in the subject matter of the litigation. Furthermore, under the equitable clean hands doctrine, biological parents should not be able to benefit from blocking "the parent-child relationship that he or she presumably encouraged and relied upon in happier times." *Id.* at 468.

III. CONCLUSION

C.G. and J.H., following a commitment ceremony, lived together as a family for nearly the first six years of J.W.H.'s life, in spite of the legal obstacles to their

relationship and to C.G.'s relationship with J.W.H. Yet the trial court and the Superior Court, in denying C.G. *in loco parentis* standing, concluded she lacked a genuine interest in pursuing any form of custody over J.W.H., and was not entitled to present her case at a custody hearing. That decision was unreasonable and untenable under Pennsylvania law and policy. Accordingly, this Court should reverse the decision of the Superior Court, hold that Appellant C.G. had *in loco parentis* standing, and grant C.G. a custody hearing to determine whether the award of any form of custody to her is in J.W.H.'s best interests.

Respectfully submitted,

Dated: February 20, 2018

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

By: */s/ Helen E. Casale*
Helen E. Casale (ID No. 74127)
hcasale@hangley.com
Adam N. Schupack (ID No. 320910)
aschupack@hangley.com
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
Tel: 215-568-6200
Fax: 215-568-0300

Attorneys for Amicus Curiae *American Academy of Matrimonial Lawyers, Pennsylvania Chapter*

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing brief complies with the word limit of Pennsylvania Rule of Appellate Procedure 2135. Specifically, it contains 6,376 words based on the word count of Microsoft Word 2014, the word processing program used to prepare the brief.

I hereby further certify that on February 20, 2018, I caused two true and correct copies of the foregoing brief to be served by Federal Express upon the following counsel:

Tiffany L. Palmer, Esq.
Rebecca G. Levin, Esq.
Jerner & Palmer, P.C.
5401 Wissahickon Avenue
Philadelphia, PA 19144-5201
Counsel for Appellant C.G.

Julia C. Rater, Esq.
McQuaide Blasko
811 University Drive
State College, PA 16801-6624
Counsel for Appellee J.H.

/s/ Helen E. Casale
Helen E. Casale