

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

MD,		: No. 19-20,448
	Plaintiff	:
		:
vs.		: CIVIL ACTION - LAW
		:
CD and NS,		:
	Defendants	: CUSTODY

ORDER

AND NOW, this **22nd** day of **November, 2019**, before the Court is a Petition to Intervene filed on July 12, 2019, by Ryan C. Gardner, Esquire, on behalf of LT, the maternal grandmother of MRD, born on June 5, 2018. MD is the paternal grandmother of the children and, pursuant to a custody Order dated October 22, 2019, has primary custody of the child. NS is the mother of the child. She has visitation with the child at the home of MD each Tuesday from 10:00 a.m. until 12:00 p.m. CD is the father of the child and, as of the date of the most recent custody Order, indicated that he would be challenging paternity and not exercising any visitation with the child. The custody Order does provide for visitation each Wednesday from 1:00 p.m. until 3:00 p.m. at the home of MD if he chooses. LT was present at the hearing and represented by her counsel, Ryan C. Gardner, Esquire. MD was present and represented by her counsel, Mark Taylor, Esquire. NS was present and unrepresented. CD was not present at the hearing.

By way of background, this custody action was initiated on May 29, 2019, when MD filed a Petition for Emergency Custody, alleging that the child was unsafe in the home of

the parents due to their inability to properly care for her. Sole physical custody was temporarily granted to MD and at the full hearing on June 12, 2019, the parties reached an agreement under which MD maintained primary physical and legal custody. Follow-up custody conferences were held on July 23, 2019, and October 22, 2019, which resulted in the current custody order described in the prior paragraph.

The Court initially notes that in the Petition to Intervene and Modify, Petitioner requests primary physical custody of the child and alleges that she has standing to file for custody pursuant to her *in loco parentis* status under 23 Pa.C.S. §5324, as well as under 23 Pa.C.S. §5325. Prior to the hearing to determine whether Petitioner has standing, the Court had an opportunity to consult with counsel in chambers at which time counsel for the Petitioner conceded that she did not stand *in loco parentis* to the child. Instead, counsel for Petitioner argues that Petitioner should be granted standing in this matter pursuant to the factors outlined in 23 Pa.C.S. §5324(3) which grants grandparents who are not *in loco parentis* to the child the right to file an action for any form of physical or legal custody:

- (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.

In support of his position that maternal grandmother has standing to pursue custody of the child even though the Court had already granted custody of the child to paternal grandmother, Counsel for the Petitioner provided the Court with the case of **G.A.P. v. J.M.W. v. S.J. and R.J.**, 194 A.3d 614 (Pa. Super. 2018). In **G.A.P.**, paternal grandparents filed a petition to intervene in child custody proceedings, alleging that they had standing because “the child is substantially at risk due to parental abuse, neglect, drug or alcohol abuse or incapacity” pursuant to 23 Pa.C.S. §5324(3)(iii)(B). Maternal great-grandparents filed preliminary objections asserting that paternal grandparents did not have standing because the child was not currently substantially at risk since they had primary custody of him. The trial court sustained the preliminary objections and dismissed the petition to intervene for lack of standing. On appeal, the Superior Court reversed and remanded the case, finding that the provisions of the statute are clear and unambiguous, and confer standing upon grandparents in cases where “the child is substantially at risk due to parental abuse, neglect, drug or alcohol abuse or incapacity.” The plain language of the statute does not make an exception for the current custodial situation of a child. The Superior Court agreed with paternal grandparents’ assertion that the purpose of the statute is to grant grandparents standing in custody matters, not “to create a situation where grandparents are essentially in a race to file to receive standing” because the grandparent who files first is the only one able to obtain standing in a custody matter.” **Id.** at 618. Petitioner argues that she has standing to pursue custody of the child even though the child is no longer substantially at risk. Petitioner further argues that an award of custody should not be limited to the grandparent that

filed first, but rather the court should have the opportunity to determine which grandparent can best serve the child's needs.

While the case of G.A.P. is factually analogous to the present case in that both paternal and maternal grandmothers were seeking custody of a child due to ongoing parental behaviors that would put the child at risk, there is one significant factual discrepancy between that case and the present case. Section 5324(3)(iii)(B) confers standing upon grandparents in cases where "the child is substantially at risk due to parental abuse, neglect, drug or alcohol abuse or incapacity," *when the requirements of Section 5324(3)(i) and (ii) are also met.* Id. It is undisputed that maternal grandmother is willing to assume parental responsibility of the child, thus satisfying subsection (ii) of Section 5324(3). However, this Court cannot find that there was a relationship between the Petitioner and the child that began with either the consent of the parent or by court order. Petitioner, by her own admission in the pleadings, had never even met the child at the time of the filing of the petition. Counsel for the Petitioner argues that although perhaps not specifically stated, it is strongly inferred that Mother consents to Petitioner having the opportunity to develop a relationship of the child, given that Mother voluntarily gave Petitioner primary legal and physical custody of her recently born infant.

Unfortunately, the plain language of this portion of the statute is also unambiguous and therefore must be strictly construed. An inference of a willingness on the part of a parent to consent to a potential relationship between the child and grandparent in the future is insufficient to satisfy the statutory requirement for standing to pursue custody in the present. Accordingly, the Petition to Intervene and Modify Custody filed on July 12, 2019, is hereby **DENIED**.

The Court notes that this is a situation where both parents have struggled with issues that have resulted in serious concerns regarding their ability to care for the child. This child deserves the love and support of every family member who is willing to be involved in her life. Although there is no legal basis under which the Petitioner may pursue custody of this child, and the Court has no authority to award periods of visitation to her, paternal grandmother is strongly encouraged to include Petitioner in the child's life to ensure that the child develops and maintains a relationship with her mother's side of the family, including her half-sibling who is in the Petitioner's primary physical custody.

By The Court,

Joy Reynolds McCoy, Judge