

Defining Parental Rights In Pennsylvania In The 21st Century

By BENJAMIN L. JERNER,¹ Philadelphia County
 And LEORA COHEN SCHIFF,² Philadelphia County
 Members of the Pennsylvania Bar



ABSTRACT

There is no clear Pennsylvania statutory definition of “parent.” The question of who is considered to be a legal parent has taken on particular importance and complexity with the increasing number of nontraditional and blended families and the increased use of assisted reproductive technology (ART), including egg donation, sperm donation, embryo donation, and the use of gestational carriers and surrogates.

In the absence of legislative guidance from the Pennsylvania General Assembly, Pennsylvania appellate courts have examined this question in the context of various family structures, applying the legal doctrines of in loco parentis, parentage by estoppel, and parentage via contract. This article discusses recent cases and examines the evolving definition of those considered to be—or not considered to be—legal parents. The article also discusses the importance of ART contracts, confirmatory adoptions and pre-birth orders.

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1. Benjamin L. Jerner is the founder of Jerner Law Group, P.C., practicing in the Greater Philadelphia region of Pennsylvania and New Jersey in the areas of estate planning, estate administration, adoption, and legal issues affecting lesbian, gay, bisexual and transgender clients. He serves on the Board of Trustees of the Women’s Law Project and is a member of the National LGBT Bar Association and the National LGBT Bar Association’s Family Law Institute. His email address is bjerner@jernerlaw.com.

2. Leora Cohen Schiff is an associate with Jerner Law Group, P.C., practicing in the Greater Philadelphia region of Pennsylvania and New Jersey in the areas of family law and assisted reproduction law. She handles a wide range of matters both in and out of the courtroom including divorce, support, custody, equitable distribution, prenuptial/postnuptial agreements, egg/sperm donor contracts, and gestational carrier agreements. Her email address is lschiff@jernerlaw.com.

I. INTRODUCTION

Who is a parent? This seemingly simple question remains one of the most murky and illusive concepts in Pennsylvania law. The word “parent” is not defined in any Pennsylvania custody or domestic relations statute. The closest one comes to a legal definition of “parent” in Pennsylvania is the adoption statute that explains that the term “parent” also includes adoptive parents.³

Whereas traditionally one was considered a “parent” if one had contributed genetically, had gestated a child or had adopted a child, many who play a crucial role in bringing a child into the world and caring for the child—specifically, those who turn to assisted reproductive technology (ART), including egg, sperm or embryo dona-

tion to conceive their children—may not fall into any of these categories. The failure to recognize these individuals as parents disproportionately affects those in the LGBTQ community. Opposite-sex couples faced with fertility issues that require them to utilize ART can also be impacted.

The word “parent” is not defined in any Pennsylvania custody or domestic relations statute.

Because there is no clear definition of “parent” in any Pennsylvania statute, the Pennsylvania courts have had to address this issue through case law. In determining parentage outside the limited realms of biology or adoption, the courts have applied the marital presumption of parentage, parentage through *in loco parentis*, parentage by estoppel, and contract law when

a party seeks to establish (or decline to establish) parental rights. This article highlights recent cases which illustrate the expanding concept of parentage. Of note, the well-established concepts of biological relation and adoption remain the most certain methods of establishing parenthood.

II. ESTABLISHING PARENTAGE WITH THE MARITAL PRESUMPTION

In Pennsylvania, the marital presumption of parenthood exists when a child is born to an intact marriage or if the child is conceived during the marriage.⁴ This presumption has been described by the Pennsylvania Supreme Court as “one of the strongest presumptions known to the law.”⁵ The marital presumption arose to protect the marital unit and to prevent a child from being labeled as illegitimate.⁶

This presumption is only applied in cases where its application advances the policy of preserving the family unit. Thus, if the marriage is intact, the marital presumption is applicable and generally irrebuttable.⁷ However, if the parties in question are no longer an intact family, the courts will not apply the marital presumption.⁸

Until recently, Pennsylvania case law applied the marital presumption to opposite-sex couples in an intact marriage and chose to sidestep the issue of whether the

3. See 23 Pa.C.S. §2102.

4. 23 Pa.C.S. §5102(b).

5. *Strauser v. Stahr*, 726 A.2d 1052, 1053–54 (Pa. 1999) (citations omitted).

6. *E.W. v. T.S.*, 916 A.2d 1197, 1201-02 (Pa. Super. 2007).

7. See *Strauser supra* note 5 at 1054 (Pa. 1999).

8. See *Vargo v. Schwartz*, 940 A.2d 459, 463 (Pa. Super. 2007); see also *K.E.M. v. P.C.S.*, 38 A.3d 798, 801 (Pa. 2012).

presumption applied to same-sex couples in an intact marriage. However, the decision handed down in the recent Superior Court case of *Interest of A.M.*⁹ explicitly states that the presumption applies to same-sex couples where one spouse gives birth during the marriage to a child who is not biologically related to other spouse.

Interest of A.M. involved a non-biological parent of a same-sex¹⁰ married couple who sought standing to participate as a party in dependency proceedings of a child of the marriage. At the initial hearing, the biological mother informed the court that the non-biological parent was her spouse, was listed as the “father” on the child’s birth certificate and should be regarded as the child’s legal parent.¹¹ However, at a subsequent court appearance, the biological mother mentioned that the parties were experiencing marital problems.¹² As a result, the trial court denied the non-biologically related parent’s request for standing, noting that the “marital presumption of paternity” was not applicable because the marriage was no longer intact.¹³

The Superior Court overturned the trial court decision on the ground that the trial court erred in finding that the parties were no longer an intact couple at the time of the hearing. Specifically, the Superior Court clarified “that the existence of troubles in a marriage . . . does not mean that such a marriage is not intact for purposes of determining the applicability of the presumption of paternity.”¹⁴ Upon finding that the parties’ marriage remained intact, the Superior Court held that the marital presumption of paternity applies to same-sex intact marriages:

Our case law plainly states that the policy underlying the presumption of paternity is to preserve marriages. Same-sex marriages are legal in Pennsylvania and must be “afforded the same rights and protections as opposite-sex” marriages. . . . We therefore have no difficulty in holding that the presumption of paternity is equally as applicable to same-sex marriages as it is to opposite-sex marriages.¹⁵

Notably, the Superior Court chose to maintain the “gendered” language of the marital presumption to be consistent with the terminology used by the Pennsylvania Supreme Court.¹⁶ However, the court acknowledged this pitfall and noted in a footnote that the term “presumption of paternity” does not sufficiently include or reflect the reality of modern families, “which include those with two spouses of the same sex.”¹⁷

Whether termed the marital presumption of paternity or the marital presumption of parenthood, it now seems clear that the presumption should be applied to all intact families in Pennsylvania regardless of the sex of the party seeking to assert his or her rights as a parent.

9. *Interest of A.M.*, 223 A.3d 691 (Pa. Super. 2019).

10. Although the Superior Court, the trial court, and, apparently, the parties themselves, referred to the parties as a same-sex couple, the Superior Court used masculine pronouns to refer to the spouse who was not biologically related to the child, noting “[the spouse who is not biologically related to the child] was born female but uses male pronouns and titles to refer to himself.” *Id.* at 693, n.1.

11. *Id.* at 693.

12. *Id.* at 694.

13. *Id.*

14. *Id.* at 695–96.

15. *Id.* at 697 (citation omitted).

16. Black’s Law Dictionary defines “Paternity” as the “quality, state, or condition of being a father, esp. a biological one.” See, PATERNITY, Black’s Law Dictionary (11th ed. 2019).

17. *Interest of A.M.*, *supra* note 9 at 694 n.2.

III. ESTABLISHING STANDING THROUGH THE DOCTRINE OF *IN LOCO PARENTIS*

Although the decision in *Interest of A.M.* is noteworthy, most parentage cases that make their way into the courtroom involve marriages or other well-defined relationships that are no longer “intact.” As detailed above, if the parties in question are no longer together, the non-biological parent likely cannot rely on the marital presumption to establish standing as a parent.

When there is no longer an intact marriage and a non-biological parent is looking to establish or disestablish parental status, the court examines whether to apply the doctrines of “*in loco parentis*” and/or “parentage (or paternity) by estoppel.” In the vast majority of custody cases, the court will defer to the doctrine of *in loco parentis* over the doctrine of parentage by estoppel to establish standing for the non-biological parent because it is an easier threshold to meet.

Non-biological or non-adoptive parents can establish standing through *in loco parentis* (a Latin phrase that translates to “in the place of a parent”) if the court finds that they have assumed parental responsibilities and obligations with the consent of child’s parent. This doctrine is intended to protect the child when “the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child’s eye a stature like that of a parent.”¹⁸ If the court determines that a party is able to establish standing through *in loco parentis*, that party is then “granted standing so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a natural parent’s objections.”¹⁹

The Pennsylvania courts have applied the doctrine of *in loco parentis* to opposite-sex and same-sex couples, as well as to couples who conceive children through assisted reproductive technology, including couples who employed a surrogate. In the case of *S.A. v. C.G.R.*,²⁰ the Superior Court of Pennsylvania held that the former wife had standing through her *in loco parentis* status to pursue custody of the child born to her former husband and a surrogate. The court found that the former wife had cared for the child since birth, was the parent primarily responsible for the child in the mornings and shared the parental duties with her former husband in the evenings.²¹ Moreover, the court found that the former husband and the former wife had contemplated the former wife would assume the role as parent when they entered into the surrogate agreement. The trial court held that former wife had standing through “mother by estoppel.” However, the Superior Court found that it was unnecessary to apply the legal concept of estoppel and granted former wife standing in custody by way of *in loco parentis*.²²

In the more recent case of *A.J.B. v. A.G.B.*,²³ the court found that mother’s ex-wife had standing through her *in loco parentis* status even though the child had a biological father with custodial rights. In *A.J.B.*, a child was conceived through sexual intercourse with a man who was not intended to be a donor and was later identified as the father through genetic testing.²⁴ The child was born during the brief marriage of the two women. The court noted that the ex-wife participated in the pregnancy

18. *T.B. v. L.R.M.*, 753 A.2d 873, 883 (Pa. Super. 2000), *aff’d* 786 A.2d 913 (Pa. 2001).

19. *Id.*

20. *S.A. v. C.G.R.*, 856 A.2d 1248 (Pa. Super 2004).

21. *Id.* at 1250.

22. *Id.*

23. *A.J.B. v. A.G.B.*, 180 A.3d 1263 (Pa. Super. 2018), *app. den.*, 196 A.3d 1016 (Pa. 2018).

24. *Id.* at 1268.

and preparations prior to the child's birth, participated in the child's birth, was married to the mother at the time of the child's birth, and had the intent to jointly raise the child with mother.²⁵

The above cases highlight the courts' broad application of *in loco parentis* standing in custody. In *S.A. v. C.G.R.*, the court granted *in loco parentis* standing to the former wife even though she was not biologically related to, nor had gestated, the child, as she and the former husband used a traditional surrogate to create the child. In *A.J.B. v. A.G.B.*, the court granted *in loco parentis* standing to the ex-wife even though the child had both a mother and father who were genetically related, and therefore who both had standing in custody. In both cases, the courts ultimately held that the non-biological parent figures had *in loco parentis* standing because they had a parent-like relationship with the child that was established with the consent of the child's known legal parent(s).

IV. ESTABLISHING PARENTAGE THROUGH THE DOCTRINE OF PARENTAGE BY ESTOPPEL

Although the doctrine of *in loco parentis* is more readily applied by the courts than the doctrine of parentage by estoppel, parentage by estoppel remains alive and well. The doctrine of parentage by estoppel as applied by the Pennsylvania Courts was explained by the Pennsylvania Supreme Court in the 1999 case of *Fish v. Behers*:

Estoppel in paternity actions is merely the legal determination that because of a person's conduct (e.g., holding out the child as his own or supporting the child) that person, regardless of his true biological status, will not be permitted to deny parentage, nor will the child's mother who has participated in this conduct be permitted to sue a third party for support, claiming that the third party is the true father . . . The doctrine of estoppel in paternity actions is aimed at achieving fairness as between the parents by holding them, both mother and father, to their prior conduct regarding the paternity of the child.²⁶

The policy supporting paternity by estoppel is based on the idea that children should be secure in knowing the identity of their parents. The Pennsylvania Supreme Court case of *K.E.M. v. P.C.S.*,²⁷ upheld the doctrine holding that "paternity by estoppel continues to [apply] in Pennsylvania, but it will apply only where it can be shown, on a developed record, that it is in the best interests of the involved child."²⁸ The application of the "best interest of the child" analysis within the framework of parentage by estoppel was further addressed in the Superior Court case of *T.E.B. v. C.A.B.*²⁹ Specifically, the court held that if an individual has held themselves out as a parent and has bonded with a child as a parent, that child "should not be required to suffer the potentially damaging trauma that may come from being told that the father he had known all his life is not in fact his father."³⁰ *T.E.B. v. C.A.B.*, 74 A.3d 170, 173 (Pa. Super. 2013).

This doctrine has been applied by the Pennsylvania courts in a broad array of scenarios involving opposite-sex unmarried parties,³¹ and where the child's relation-

25. *Id.* at 1278.

26. *Fish v. Behers*, 741 A.2d 721, 723 (Pa. 1999) (quoting *Freedman v. McCandless*, 654 A.2d 529, 532-33 (Pa. 1995)).

27. *K.E.M. v. P.C.S.*, 38 A.3d 798 (Pa. 2012).

28. *Id.* at 810.

29. *T.E.B. v. C.A.B.*, 74 A.3d 170 (Pa. Super. 2013).

30. *Id.* at 173.

31. *See, R.K.J. v. S.P.K.*, 77 A.3d 33 (Pa. Super. 2013).

ship with the non-biological parent began after the child's birth and there is no dispute that such individual was not the child's biological parent.³²

In addition, the courts have applied the doctrine of parentage by estoppel to same-sex unmarried parties. The case of *L.S.K. v. H.A.N.*,³³ involved a former partner of a same-sex relationship who was seeking to avoid paying child support for children born to her partner during their relationship. The children were conceived using an anonymous sperm donor.³⁴ The former partner argued that she was not a "parent" but rather a third party who was not obligated to pay child support.³⁵ The Superior Court found that the former partner was a "parent" under the doctrine of equitable by estoppel, noting that although she was neither a biological parent nor an adoptive parent, she had an obligation to pay child support to the biological mother on the same basis as a parent.³⁶ The court explained that the former partner was estopped from denying an obligation to support the children as a result of her involvement in the children's conception, as well as her course of conduct, which indicated that she was co-parenting the children.³⁷ Notably, the Court found the doctrine of parentage by estoppel to be particularly poignant for couples who conceived their children through ART as an intact family because, unlike a stepparent or other third-party relationship, both parties chose to have the child whose parentage is at issue.

The most recent case to apply the doctrine of parentage by estoppel is *S.M.C. v. C.A.W.*³⁸ *S.M.C. v. C.A.W.* involved opposite-sex unmarried parties who were in a relationship for twelve years.³⁹ Although the putative father was not biologically related to the child, the child "lived in [putative father]'s home for virtually the first twelve years of Child's life, during which time [putative father] held himself out as Child's father, provided most of Child's financial support, listed Child as a dependent on seven years of tax returns, and formed a close emotional bond with Child."⁴⁰

When the relationship between the child's mother and the putative father ended, the child moved out of the putative father's home.⁴¹ The putative father stopped providing financial support and, apart from a few visits, ceased all contact with the child.⁴² Subsequently, the child began seeing a psychologist and was diagnosed with an "adjustment disorder with mixed anxiety and depression."⁴³ The psychologist concluded that the child viewed putative father as her *de facto* emotional parent.⁴⁴

The trial court concluded that it was in the child's best interest to apply the pater- nity by estoppel doctrine against the putative father and require that he pay child support.⁴⁵ The Superior Court upheld the trial court's decision in determining that he was estopped from denying an obligation to support the child, as he had held the child out as his own "for well over a decade" and because of the child's need for continued support.⁴⁶

32. See, *Hamilton v. Hamilton*, 795 A.2d 403 (Pa. Super. 2002).

33. *L.S.K. v. H.A.N.*, 813 A.2d 872 (Pa. Super. 2002).

34. *Id.* at 874.

35. *Id.* at 877.

36. *Id.* at 878.

37. *Id.*

38. *S.M.C. v. C.A.W.*, 221 A.3d 1214 (Pa. Super 2019).

39. *Id.* at 1219.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1216.

45. *Id.* at 1217.

46. *Id.* at 1219.

Although the courts have limited the application of parentage by estoppel in recent years, the recent case of *S.M.C. v. C.A.W.* indicates that parentage by estoppel remains a viable doctrine in Pennsylvania.

V. ESTABLISHING PARENTAGE BY CONTRACT

It is well established within Pennsylvania that contracts governing ART arrangements are legally enforceable. Moreover, the case law has found that the entrance into such a contract establishes a non-biological party's standing as a parent. This policy was first recognized in the case of *Ferguson v. McKiernan*,⁴⁷ and further reinforced in the case of *In Re. Baby S*.⁴⁸ More recently, the Pennsylvania Supreme Court confirmed the application of this policy in the case of *C.G. v. J.H.*,⁴⁹ stating: "there appears to be little doubt that the case law of this Commonwealth permits the assumption or relinquishment of legal parental status, under the narrow circumstances of using assisted reproductive technology, and forming a binding agreement with respect thereto."

The landmark *Ferguson* case involved a sperm donor who entered into a verbal contract in which he agreed that he would not seek custodial rights and in turn, the woman agreed that she would not seek support for any children conceived as a result of his donation.⁵⁰ Despite the verbal agreement, several years after a child was born, the woman sued the sperm donor for child support. The Pennsylvania Supreme Court noted that when a child is born via intercourse, "the parties to any resultant conception and birth may not contract between themselves to deny the child the support he or she requires."⁵¹ However, where parties arrange for sperm or egg donation and the transaction has "the hallmarks of institutional, non-sexual conception," a contract between the parties to the effect that a donor will not be a parent to any resulting children was enforceable.⁵² Moreover, whether the identity of the donor is known or unknown to the recipient of the genetic material is irrelevant.⁵³ Ultimately, the Pennsylvania Supreme Court in *Ferguson* held that the parties' agreement was enforceable and, therefore, the sperm donor owed no duty of support.⁵⁴

In the 2015 Superior Court case of *In Re. Baby S*,⁵⁵ a married couple conceived a child through the use of an egg donor, the husband's sperm and a gestational carrier. Prior to the conception, the parties entered into a gestational carrier contract.⁵⁶ The contract provided that the wife and her then-husband were the intended parents and that the gestational carrier would have no parental rights or obligations.⁵⁷ During the gestational carrier's pregnancy, the couple separated.⁵⁸ Upon separation, the wife sought to declare the gestational carrier contract null and void, claiming that she was not a parent to the child because she lacked a genetic connection

47. *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007).

48. *In Re. Baby S*, 128 A.3d 296 (Pa. Super. 2015), *app. den.*, 35 Pa. 729 (Pa. 2016).

49. *C.G. v. J.H.*, 193 A.3d 891, 904 (Pa. 2018).

50. *Ferguson v. McKiernan*, 940 A.2d 1236, 1239 (Pa. 2007).

51. *Id.* at 1245 (citations omitted).

52. *Id.* at 1246.

53. *Id.* at 1247-1248.

54. *Id.* at 1248.

55. *In Re. Baby S*, 128 A.3d 296 (Pa. Super. 2015), *app. den.*, 35 Pa. 729 (Pa. 2016).

56. *Id.* at 300.

57. *Id.* at 306.

58. *Id.* at 301.

and had not adopted the child.⁵⁹ The Superior Court held that the surrogacy contract was enforceable and, therefore, the wife was the legal mother to the child.⁶⁰

In 2018 the Pennsylvania Supreme Court had occasion to address parentage by contract once again in *C.G. v. J.H.*⁶¹ In *C.G.* the mother's former partner sought custody of a child conceived by mother via intrauterine insemination using an anonymous sperm donor. The conception and birth of the child occurred while the mother and her former partner were in a relationship. However, the parties were never married.

The former partner argued that, when a child is conceived using ART, parentage can be established by proving the intentions of the parties regarding who the parent(s) of the child shall be. The Pennsylvania Supreme Court rejected this argument. The Court determined that intent alone was not enough, holding that the former partner was not a parent because she was not a party to a contract establishing legal parentage of the child.⁶²

Thus far, the courts have refused to recognize parentage based on the intent of the parties. Therefore, it is crucial to counsel clients on the importance of a comprehensive ART contract. The contract should include language which sets forth the parties' intentions regarding their legal relationship to the intended child(ren).

VI. IMPORTANCE OF CONFIRMATORY ADOPTIONS

As detailed above, there is no dispute that one is a parent to a child if one is biologically related to, or has adopted, the child. For this reason, it is highly recommended that nonbiological parents confirm their legal rights through adoption. An adoption ensures that parental rights are protected even if a party moves out of state. Additionally, an adoption ensures that federal benefits, such as Social Security, will be given to a child based on their relationship with their non-genetic or non-gestational parent, if other conditions of eligibility are met.⁶³

The procedure for confirmatory adoptions in Pennsylvania varies from county to county. Once granted, the adoption ensures that the adopting parents' rights will be recognized no matter what circumstances they face or the jurisdiction in which they are attempting to assert those rights.

VII. IMPORTANCE OF PRE-BIRTH ORDERS FOR CHILDREN BORN USING A GESTATIONAL CARRIER

If a child is born using a gestational carrier,⁶⁴ in addition to entering into a surrogacy contract, intended parents should obtain a pre-birth order of parentage prior to the birth of their child.⁶⁵ The procedure for obtaining pre-birth orders varies from county to county, with some counties requiring in-person hearings.

A pre-birth order designates parentage to the intended parents, removes any rights or obligations from the gestational carrier and eliminates the need for an adoption once the child is born. Once granted, a pre-birth order allows intended

59. *Id.* at 302.

60. *Id.* at 307.

61. *C.G. v. J.H.*, 193 A.3d 891 (Pa. 2018).

62. *Id.* at 905.

63. *See*, 20 C.F.R. §404.350 *et seq.*

64. A pre-birth order cannot be issued if using a traditional surrogate, as the traditional surrogate will be required to terminate her rights after the birth of the child.

65. PA. DEPT OF HEALTH, POLICY & PROCEDURE FOR ASSISTED CONCEPTION BIRTH REGISTRATIONS (2003), 34 Pa. Bull. 4217, 4282 (Aug. 7, 2004).

parents to be named on the child's birth certificate, allows intended parents to make medical decisions on behalf of the child at birth, and ensures that the child can be discharged to the intended parents rather than the surrogate.⁶⁶ Pre-birth orders should be given full faith and credit throughout the United States.⁶⁷ A pre-birth order coupled with a surrogacy contract ensures that the intended parents have parental rights from the moment their child is born.

VIII. CONCLUSION

In the absence of legislative guidance from the Pennsylvania General Assembly, Pennsylvania appellate courts have expanded the legal definition of a "parent" through case law. Although the courts have stopped short of considering the "intent" of the parties as sufficient to establish parentage, recent cases have expanded the marital presumption of parentage to same-sex couples and have upheld the validity of ART contracts that address the issue of parentage. It is not possible to know how assisted reproductive technologies will evolve in the future, or how Pennsylvania jurisprudence regarding parentage may change. However, it seems that three pieces of family law attorneys' oft-repeated advice to non-biologically related parents seeking to secure their legal status as parents will continue into the foreseeable future: 1) when using assisted reproductive technologies with known donors, make sure that there is a (preferably written) contract between the parties; 2) once the child is born, obtain a confirmatory adoption to ensure that the parentage of the intended parent(s) is secured; and 3) if utilizing a gestational carrier, obtain a pre-birth order prior to the birth of the child to ensure that the intended parents are recognized as the legal parents.

66. *Id.*

67. *V.L. v. E.L.*, 136 S. Ct. 1017, 1022 (2016).