IN THE SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DIVISION

Patricia D. Jones, Appellee, v. Ellen Jones Boring, Appellant.	:	No. 271 EDA 2005 On Appeal from the March 9, 2005 Opinion of the Bucks County Court of Common Pleas in Civil Action No. A06-00-64229-C-19

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COUNTER-STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The standard of review for appellate courts on questions of law is plenary. *See Phillips v. A-Best Products Co.*, 542 Pa. 124, 665 A.2d 1167 (1995). An appellate court "may not interfere with [ ] conclusions [of a trial court] unless they are unreasonable in view of the trial court's factual findings; and thus, represent a gross abuse of discretion." *Roadcap v. Roadcap*, 778 A.2d 687, 689, 2001 PA Super. 167, P7 (2001) (citations omitted). An abuse of discretion in child custody cases exists when the trial court overrides or misapplies the law in reaching its conclusion or when its judgment is manifestly unreasonable. *T.B. v. L.R.M.*, 2000 PA Super. 168, 753 A.2d 873 (2000).

Whereas legal conclusions are subject to de novo review, factual findings generally are to be reviewed on a deferential basis so long as they are supported by the evidence. *Warehime v. Warehime*, 563 Pa. 400, 416, 761 A.2d 1138, 1146 (2000). On questions of fact, the standard of review must not be construed as providing an appellate court with a license to make independent factual determinations, nor does it authorize an appellate court to substitute its judgment for that of the trial court. *See K.B. II v. C.B.F.*, 2003 PA Super. 364, P5, 833 A.2d 767, 770 (2003); *Charles v. Stehlik*, 560 Pa. 334, 339, 744 A.2d 1255, 1257 (2000). On issues of credibility and weight of the evidence, an appellate court must defer to the findings of the hearing judge, who has had the opportunity to observe the proceedings and the demeanor of the witnesses. *Fausey v. Hiller*, 2004 PA Super. 186, P18, 851 A.2d 193, 199 (2004). The scope of review in this case extends to the record hearings below, to the pleadings filed in this matter, and to the exhibits accepted into evidence by the trial court.

COUNTER-STATEMENT OF THE CASE

Ms. Boring and Ms. Jones's Relationship and Their Decision to Have Children

Appellant Ellen Jones Boring (hereinafter "Ms. Boring") and Appellee Patricia D. Jones (hereinafter "Ms. Jones") were involved in a long-term intimate lesbian relationship for a period of approximately 14 years. *See* March 9, 2005 Opinion of the Court of Common Pleas of Bucks County at 1, attached as Appendix A (hereinafter App. A). Ms. Boring works as a medical writer and Ms. Jones is a tenured professor at a local community college. *See* App. A at 7, 26.

Several years into the relationship, the parties decided to start a family. Initially, Ms. Jones conceived through artificial insemination, but was unable to sustain a pregnancy. (R. 125a) Thereafter, Ms. Boring began a series of fertility procedures. (R. 125a). Ms. Boring and Ms. Jones jointly selected anonymous sperm donors and Ms. Boring eventually became pregnant. *See* App. A at 7 n.4. (R. 125a-126a) During the pregnancy, Ms. Jones was actively involved in several aspects of Ms. Boring's prenatal care, including attending obstetrician appointments with Ms. Boring. *See* App. A at 7 n.4. On December 3, 1996, Ms. Boring delivered fraternal twin boys. (R. 125a-126a) Ms. Jones was in the delivery room. *See* App. A at 7 n.4.

The parties together named the children Tyler and Quinn. (R. 126a). Although Ms. Boring's surname was "Schad" at the time, they listed the children's surname as "Jones" on their birth certificates. (R. 126a) Ms. Boring legally changed her surname from "Schad" to "Jones" approximately a year later. (R. 126a)

Both Parties Parenting the Children

The parties and their children lived together as a family in Bucks County, Pennsylvania until the boys were almost four years old. (R. 126a) Both parties actively participated in raising the children and providing for their care. (R.127a-130a) From the time the children began to talk, they referred to Ms. Boring as "Mama El" and Ms. Jones as "Mama Dee." (R. 126a) For the first two years after the birth of the children, Ms. Boring stayed home with the boys while Ms. Jones worked. (R. 127a) After returning from work, Ms. Jones regularly cared for the children in the afternoon and evenings, playing with them and putting them to bed. (R. 127a) During the second two years, the children attended a daycare center on the same grounds as the college were Ms. Jones teaches. (R. 127a) This allowed Ms. Jones to be with the children frequently as she went back and forth between the daycare and her teaching responsibilities. (R. 127a)

Ms. Boring and Ms. Jones made joint decisions regarding the children's education, medical care, daycare and religion. (R. 129a) Both parties jointly contributed to a college fund for the children and participated in the children's baptism in an Episcopal Church in Doylestown, Pennsylvania. (R. 130a) The baptismal record lists Ms. Boring and Ms. Jones as the children's parents. (R. 140a) Ms. Boring also executed guardianship papers authorizing Ms. Jones to make medical decisions for the children. (R. 129a) Ms. Jones regularly took the children to doctor visits and maintained them on her medical insurance policy. (R. 129a-130a)

Disputes Regarding Ms. Jones's Time with the Children

In January of 2001, on or about the children's fourth birthday, the parties separated. (R. 125a) Ms. Boring moved out of the parties home and took the children with her. *See*

App. A at 1, 5-6. The parties disputed about Ms. Jones's time with the children. *See id.* Ms. Jones filed a petition for partial custody in the Court of Common Pleas of Bucks County on December 22, 2000.[1] (R. 134a) After a two-day custody hearing on September 26 and 28, 2001, the court concluded, in an Order dated December 14, 2001, that Ms. Jones is a person standing *in loco parentis* to the children and awarded her partial physical custody. *See* App. A. at 5. (R. 135a-136a) This order was consistent with a custody evaluation report submitted by a court appointed evaluator, Dr. Kimberlee Goodwin. (R. 140a-142a) Thereafter, the court also issued a support order requiring Ms. Jones to pay Ms. Boring the sum of $1,384 per month for the children. *See* App. A. at 5.[2]

Ms. Boring appealed the trial court's order. Although Ms. Boring's did not challenge Ms. Jones's standing to seek custody or visitation as the *in loco* parent, she did appeal the order challenging joint legal custody and the extent of partial physical custody awarded to Ms. Jones. *See* App. A. 6-7. (R. 133a-136a) She did not challenge Ms. Jones's obligation to pay child support. *See* App. A. at 5-6. Ms. Boring also filed a petition with the trial court to relocate to Virginia with the children. *See* App. A at 10. She also married Tim Boring and took his surname. *See* App. A at 7 n.5.

On August 5, 2002, this Court affirmed the trial court's order. (R. 133a-147a) Ms. Boring sought allocator, which the Pennsylvania Supreme Court denied on December 18, 2002. *See* App. A at 11 n.9. Thereafter, Ms. Boring declined to pursue her petition to relocate to Virginia. *See* App. A at 11.

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[1]The four years of litigation in this matter are more fully outlined in the trial court's March 9, 2005 Opinion. *See* App. A.

[2]The support order was later modified requiring Ms. Jones to pay $1,168.81 per month effective October 15, 2002. *See id.* (R. 265a-266a)

Ms. Boring's Failure to Comply with Custody Orders & Her Attempt to Relocate

In 2002 and 2003, Ms. Boring consistently failed to comply with the trial court's custody orders, requiring Ms. Jones to file four separate petitions seeking relief from the court. *See* App. A. at 30-31. The issues raised in the various petitions involved holiday/vacation schedule enforcement, telephone contact, school changes, daycare changes, unilateral medical decisions and co-parent counseling. While the petitions were resolved without a formal finding of contempt (to avoid elevating an antagonistic situation even more, to the detriment of the children), the trial court noted that Ms. Jones's allegations were valid and accurate. *See* App. A. at 30-31.

On February 23, 2004, Ms. Boring filed another petition to relocate, this time to Indiana. (R. 5a-9a) Ms. Jones filed an answer and counterclaim for primary physical custody of the children.[3] (R. 12a-16a, 21a-38a) She requested change in primary custody because of Ms. Boring's malicious interference with Ms. Jones's rights as evidenced by Ms. Boring's long pattern of contemptuous behavior; history of mental and emotional instability; and frequent job and home changes. (R. 12a-16a, 21a-38a) On June 3, 2004, the trial court ordered another custody evaluation, scheduled hearings and ordered that the parties maintain the status quo pending final resolution of their respective motions. (R.39a-47a)

Ms. Boring's Defiance of Relocation Order

Notwithstanding the court's order, Ms. Boring began breaking all ties with Pennsylvania and establishing a new life in Indiana. She sold two residences in Pennsylvania (R. 674a-675a), purchased a home in Indiana (R. 673a), commenced

[3] She also filed a petition for contempt against Ms. Boring.

employment in Indiana (R. 516a), and delayed school enrollment of the children in Pennsylvania, causing them to miss several weeks of school. (R. 712a) Accordingly, Ms. Jones filed an Emergency Petition for Primary Custody on August 30, 2004 and an Emergency Petition for Contempt. *See* App. A at 13. The court held a hearing on September 30, 2004 and once again specifically instructed Ms. Boring that she was prohibited from relocating the children out of the Commonwealth. *See id.*

Custody Evaluation

In July of 2004, Dr. Margaret Cooke, Ph.D, P.C. began the court ordered custody evaluation. (R. 79a) She interviewed the parties, the children and collateral contacts of both parties. These included Don McGee, godfather to the children and a long-time friend of the parties, and Dr. Suzanne Dundas, Tyler's godmother. (R. 78a-81a) Dr. Cooke conducted five tests including a personality inventory, parents questionnaire and behavioral assessment of the children. (R. 79a)

Dr. Cooke found that the children were "cooperative with all the evaluation procedures." Both boys referred to their parents as "Mama D" and "Mama Ellen" respectively or "Mom" generally. (R. 103a, 106a) Each also expressed a desire not to move to Indiana, because it would affect their relationships with Ms. Jones. (R. 104a, 108a). Dr. Cooke questioned Tyler about whether it would be okay if he communicated with Ms. Jones by phone only and he said "no, that when he talked on the phone that would only make him wish that he could be with her more." (R. 104a) Similarly, Quinn "strongly expresse[d] on interview and projective techniques that he wants to keep things the same and doesn't want to go to Indiana because he wouldn't see [Ms. Jones] a lot." (R. 106a)

In Dr. Cooke's interviews with Mr. McGee, he "expressed concern about [Ms. Boring's] irrational decisions and inability to plan . . . ." (R. 113a) "Consistent with the boy's reports, [Mr. McGee] said that [Ms. Boring] told the boys not to call [Ms. Jones] 'Mama Dee' 'because she's not your mother.'" (R. 113a) He also "described [Ms. Boring's] drinking problem and he believes that she drank during her pregnancy. He said her drinking increased after the births and described a phone call after the separation in which she was so drunk he couldn't understand her." (R. 113a)

Dr. Dundas, godmother to Tyler, also stated in her interview that Ms. Boring had a drinking problem. (R. 113a). Further, she "questioned [Ms. Boring's] understanding of the stability needs of the children. [Ms. Boring] made it clear that she doesn't want [Ms. Jones] in their life. However, Dr. Dundas believes that [Ms. Boring] needs a co-parent for support. She says she has heard [Ms. Boring] say that she is going to do anything in her power to wear [Ms. Jones] down and this is her primary goal and that is not in the best interest of the children." (R. 113a) In contrast, Dr. Dundas believes that Ms. Jones "maintains relationships for the children's sake." (R. 113a)

Dr. Cooke also interviewed and met with the parties repeatedly over the course of three months. The results of the psychological testing of the parties were "significantly more positive for Jones than for Boring." *See* App. A at 14. Dr. Cooke concluded that Ms. Boring "suffers from psychological dysfunction that impacts on her ability to parent, especially her capacity to consistently plan for the boys' basic stability and well being." (R. 114a) The testing profile revealed that Ms. Boring was "rigid and deliberately defensive in that she tried to deny pathology and present herself in a more favorable light than would be realistic. She is rigid in that she can only see things one way and not

consider alternatives . . . representing marked psychopathology." (R. 90a) With respect to Ms. Jones, however, Dr. Cooke concluded that she is "psychologically healthy and stable." (R. 114a) Ms. Jones was "much more open and less defensive than most individuals in a custody evaluation. There were no indications of any kind of psychopathology or anxiety or depression." (R. 99a)

Dr. Cooke also expressed some specific concerns about Ms. Boring's ability to meet the needs of the children:

> History, interview, psychological testing, and collateral contacts are consistent in revealing [Ms. Boring's] inability to maintain stability in jobs, residence, school, etc., or continuity of relationships for herself and the boys . . . When she suffered depression and relationship problems while with [Ms. Jones] she turned to alcohol . . . This continued, again by her own admission, through the boys' early years while she was with [Ms. Jones] . . . .

(R. 114a) Ms. Boring admitted that "she drank heavily during the relationship with [Ms. Jones] every night." (R. 85a) She also admitted to using cocaine at parties while she was married to her former husband, Michael Canino, before meeting Ms. Jones. (R. 83a)

Upon concluding and evaluating all of the interviews, Dr. Cooke issued a forty-page report on October 18, 2004 recommending that Ms. Jones have primary custody, based in part on Ms. Boring's marked psychopathology, drinking problem, lack of concern for the children and animosity towards Ms. Jones. (R. 78a-117a)

Hearings

On November 9, 2004 and December 15, 2004, the trial court held hearings regarding Ms. Jones' petition for custody and contempt against Ms. Boring and Ms. Boring's petition to relocate to Indiana with the children. *See* App. A at 2. On the first day of trial, Ms. Boring withdrew her petition to relocate. (R. 245a) The hearings proceeded

on Ms. Jones's petitions. (R. 245a-247a) At the hearings, the court heard testimony from several witnesses, including Ms. Jones (whom the court found credible), Ms. Boring (whom the court found not credible), Mr. Boring and Mary Ellen Myers, Principal of Salford Hills Elementary School. (R. 242a, 504a) (R. 19) Witnesses testified about the parties' parental skills and involvement in the children's lives, and confirmed Ms. Boring's willful attempt to cut Ms. Jones out of the children's lives, Ms. Boring's failure to comply with the court's prior orders and Ms. Boring's drinking problem.

Ms. Jones testified that she participated in the children's first grade class by volunteering in the boys' classroom on Wednesdays after taking them to school. (R. 37a-42a) She also attended various conferences such as Back to School and Parent-Teacher conferences. (R. 37a-42a) Principal Myers confirmed that Ms. Jones regularly performed volunteer work at the school. (R. 152a) The trial court noted, "[Ms. Jones] did [this] volunteer work at a time when there was no litigation ongoing, which indicated an altruistic motivation that was unrelated to appearances in litigation." *See* App. A. 22. Principal Myers recalled meeting Ms. Boring only once and testified that Ms. Boring did no volunteer work at the school. (R. 152a) Principal Myers also testified that the children attended Salford Elementary and she was aware that both Ms. Boring and Ms. Jones were parents to the children. (R. 383a-385a) However, when Ms. Boring completed the emergency list and registration form for the school, she did not include Ms. Jones's name as ordered by the court. (R. 397a-399a) (R. 84a)

The court heard further testimony regarding disruptions to the children's living arrangements by Ms. Boring and its effect on their schooling. In 2004, Ms. Boring moved the children in violation of the court order. Although Ms. Boring was aware that moving

would disrupt the boys' schooling, she did not "have an educational plan in place for them." *See* App. A at 35-36. As a result, the children "were not enrolled in any school in Pennsylvania for the school year beginning September 2004." *See id.* at 19. Ms. Jones testified that the boys had regressed academically as a result of the disruptions. (R. 364a) This was especially disconcerting since Quinn was previously identified as having individual reading needs. Principal Myers testified that Quinn was referred to a reading program designed for children who are working below average and who need academic assistance. (R. 394a, 395a) In addition to causing the boys to miss school, Ms. Boring's moves also interfered with Ms. Jones's time with the boys. Ms. Boring acknowledged that Ms. Jones missed eight days that she was scheduled to have with the boys. (R. 722a)

Both historically and at the 2002 hearings, it was clear Ms. Boring was out to eliminate Ms. Jones from the boys' lives. In 2001, Ms. Boring attempted to change the boys' last names from "Jones" to "Schad" without informing Ms. Jones. *See* App. A. at 9. In direct violation of court orders, Ms. Boring failed to give Ms. Jones any notice of her move to Harleysville, Pennsylvania in July 2002 and failed to consult Ms. Jones about the children's new school or even to provide Ms. Jones with her new address. (R. 271a) Ms. Boring also failed to give Ms. Jones notice of the children's doctor or dental visits. (R. 264a) Ms. Boring deliberately violated orders of the court directing that her husband, Tim Boring, should be referred to by his first name and as the children's stepfather. *See* App. A at 29.

In the 2004 hearings, Ms. Jones also expressed serious concern about Ms. Boring's drinking and its impact on the children. Ms. Jones testified that, prior to separation, Ms. Boring bought a 1.5 liter bottle of wine almost every other day, and that she would drink to

the point of passing out. (R. 435a) Ms. Boring's drinking negatively affected the Children. Ms. Boring hit the boys when she was drunk. (R. 199-201) In 2000, one of the boys had a medical emergency that required a trip to the emergency room, but Ms. Boring was unable to take him because of her drinking. (R. 446a)

Modification of Custody

On January 18, 2005, the court modified the custody order and granted primary physical custody to Ms. Jones. In its opinion, the court listed a number of reasons for shifting custody, including Ms. Jones's strong parental bond with the children who love her (App. A at 38); consistent demonstration of putting the children's interests before her own (App. A at 38); strong parental skills (App. A at 4); and conviction that Ms. Jones would promote the children's relationship with Ms. Boring. With respect to Ms. Boring, the court determined that she had questionable parental skills; failed to demonstrate appropriate parental concerns (App. A at 24); had a tendency to consider herself first and others, including the children, later, if at all (App. A at 28); demonstrated a pattern of trying to exclude Ms. Jones from the children's lives regardless of the effect on the children (App. A. at 30, 35); and repeatedly had violated court orders and exhibited other negative behavior (App. A at 31). The court also expressed concerned about Ms. Boring's drinking habit and its impact on the children. *See* App. A. at 4-5.

Ms. Boring attempted to stay the Order at both the trial and appellate level. On February 11, 2005, Ms. Boring filed an application to stay the trial court's Order, which the trial court denied. On February 28, 2005, Ms. Boring filed an application with this Court to stay the trial court's Order. This Court denied Ms. Boring's application on March 16, 2005.

SUMMARY OF ARGUMENT

The Court of Common Pleas for Bucks County previously awarded the parties joint legal custody. In this modification action, it correctly shifted physical custody to protect the best interests of two children of Ms. Patricia Jones and Ms. Ellen Jones Boring. The trial court held a two-day hearing with multiple witnesses and extensive testimony and received a detailed custodial evaluation and psychological report. The court considered and weighed Ms. Boring's historical role as the children's primary residential custodian and concluded that, given her destabilizing influence on the children and other concerns, modification of physical custody was warranted. The detailed custodial evaluation and psychological report, including interviews and psychological testing of the children, strongly supported the trial court's determination to award primary physical custody to Ms. Jones. The trial court carefully weighed all of the evidence before it and appropriately awarded primary physical custody of the children to Ms. Jones after she amply demonstrated that such a custody shift was in the best interests of the children.

An appellate court "may not interfere with [ ] conclusions [of a trial court] unless they are unreasonable in view of the trial court's factual findings; and thus, represent a gross abuse of discretion." *Roadcap*, 778 A.2d at 689, 2001 PA Super. at P7. Pennsylvania law provides that an appellate court should not make independent factual determinations, or substitute its judgment for that of the trial court. *See K.B.*, 2003 PA Super. at P5, 833 A.2d at 770; *Charles*, 560 Pa. at 339, 744 A.2d at 1257. An appellate court must defer to the findings of the hearing judge who has had the opportunity to observe the proceedings and the demeanor of the witnesses. *Fausey*, 2004 PA Super. at P18, 851 A.2d at 199.

Ms. Boring relies on misguided legal authority and inapposite cases to challenge the trial court's opinion. Under Pennsylvania law, a trial court may modify a custody order to shift physical custody from a biological parent to an *in loco* parent. Here, there were clear and convincing reasons to show that doing so was in the best interest of the child. The trial court properly held that, under either a "convincing reasons" standard or the "preponderance of the evidence" standard appropriate to intended parent families like this one, primary physical custody should shift to Ms. Jones. Ms. Boring, the biological parent, had marked psychopathology, drinking problems, lack of concern for the children and animosity towards Ms. Jones that caused her to make bad parenting decisions.

Contrary to her arguments, there is no requirement, under federal or state law, that Ms. Jones prove that Ms. Boring is unfit before primary physical custody can be shifted from her. The trial court's January 18, 2005 Order and March 9, 2005 Opinion are both fully consistent with federal constitutional requirements and supported by well-established Pennsylvania law regarding custody actions between biological parents and persons standing *in loco parentis*. Ms. Boring offers discredited legal arguments because she knows that the Order below is completely supported by the facts of record. Ms. Jones met her burden of showing that shifting custody to Ms. Jones was in the best interest of the children.

ARGUMENT

A. THE TRIAL COURT CORRECTLY GRANTED PRIMARY PHYSICAL CUSTODY OF THE CHILDREN TO MS. JONES

This Court should uphold the trial court's January 18, 2005 modification Order, because it is fully consistent with the evidence and with Pennsylvania law regarding custody actions between biological parents and intended second parents who stand *in loco parentis*, including non-biological parents such as Ms. Jones. The trial court correctly awarded Ms. Jones primary physical custody of the children after Ms. Jones amply demonstrated that doing so was in the best interests of the children. The trial court exercised proper discretion and followed the law in granting primary physical custody to Ms. Jones, and Ms. Boring's arguments to the contrary are without merit.

1. The Trial Court Found Convincing Reasons to Shift Custody from Ms. Boring to Ms. Jones.

The evidence presented at trial, including the evidence from prior proceedings that were made part of the record, fully supports the trial court's conclusion that there were convincing reasons why custody should be modified and primary physical custody should be awarded to Ms. Jones. The trial court conducted a detailed analysis focusing on the children's best interests. The trial court made specific and detailed findings of fact in its Opinion and Order that are supported by its thorough review of the record. The court drew reasonable inferences and conclusions from its findings of fact and its decision should not be disturbed by this Court. *Roadcap*, 778 A.2d at 689, 2001 PA Super. at P7.

An appellate court "may not interfere with [ ] conclusions [of a trial court] unless they are unreasonable in view of the trial court's factual findings; and thus, represent a gross abuse of discretion."*Id.* Pennsylvania law provides that an appellate court should not make independent factual determinations, or substitute its judgment for that of the trial court. *See K.B.*, 2003 PA Super. at P5, 833 A.2d at 770; *Charles*, 560 Pa. at 339, 744 A.2d at 1257. An appellate court must defer to the findings of the hearing judge who has had the opportunity to observe the proceedings and the demeanor of the witnesses. *Fausey*, 2004 PA Super. at P18, 851 A.2d at 199.

The trial court's March 9, 2005 Opinion sets forth a host of reasons why it awarded custody to Ms. Jones. The opinion noted that Ms. Boring has not been able to provide the children with stability or consistency. For example, Ms. Boring moved at the beginning of the school year, despite not having an educational plan for the boys and knowing her move would disrupt the boys' schooling. (R. 115a) Her failure to provide stability detrimentally affected the boys' behavior and academic performance. *See* App. A at 23-24. Ms. Boring has a tendency to put her interests ahead of the children (*Id.* at 25-28); has questionable parental skills and a bad drinking habit (*Id.* at 23-32); actively opposes Ms. Jones's efforts to maintain her parental relationship with the children, is unable to accept Ms. Jones's role in the children's lives and disregards the harmful effect of her actions on the children (*Id.* at 8-9, 16-19, 29-31, 34-35). Ms. Boring has twice attempted to relocate out of the area to decrease contact between the children and Ms. Jones (*Id.* at 28-29). Ms. Boring has engaged in a deliberate, sustained campaign to cut Ms. Jones from their lives. *See id.* at 9. *See also T.B. v. L.R.M.*, 2005 PA Super 114, 2005 WL 697578 ("In some cases a parent who puts his or her own feelings before that of a child will denigrate or berate the other

party to the child and make efforts to sabotage the other party's relationship with the child. In those situations, it is the function of the court to rein in the offending party.").

In contrast, the court noted that Ms. Jones has a strong parental bond to the children, who love her; has evidenced a concern for the children's well-being and has at all times before and after separation put their interests before hers; is a professional educator with excellent parental skills (*See id.* at 19-25); and has never interfered with Ms. Boring's relations with the boys and would promote the relationship if she had primary custody.

The court also noted that the appointed custody evaluator, Dr. Cooke, recommended that Jones have primary custody. *See id.* at 13-15, 19-20, 35-37. According to Dr. Cooke's report, "[Ms. Boring] suffers from psychological dysfunction that impacts on her ability to parent, especially her capacity to consistently plan for the boys' basic stability and well-being." (R. 114a) Further, the report continued, "[h]istory, interview, psychological testing, and collateral contacts are consistent in revealing [Ms. Boring's] inability to maintain stability in jobs, residence, schooling etc. or continuity of relationships for herself and the boys." (R. 114a) Dr. Cooke concluded that Ms. Jones "is psychologically healthy and stable." (R. 114a)

Contrary to Ms. Boring's contention, Dr. Cooke's report was not the sole basis for the trial court's custody determination, but rather supplemented and supported the rest of the testimony presented to the court. *See* Appellant's Brief at 17. The court's Opinion and Order was based on the testimony of several witnesses including, Ms. Boring (whom the court found not to be credible), Ms. Jones (whom the court found credible) and Mr. Boring. The court also relied on Ms. Boring's history of violating the court's orders and her actions in attempting to cut the children off from their other parent. The facts and conclusions in

Dr. Cooke's report further supported the trial court's finding that there were convincing reasons that a modification of custody was in the best interests of the children.

2. The Trial Court Properly Considered Ms. Boring's Historical Role as a Custodial Parent.

Contrary to Ms. Boring's assertion, the trial court considered her role as the parent who has been the children's primary physical custodian and properly concluded that modification was nevertheless warranted based on her repeated failure in that role to provide the children with stability or to prioritize their needs.

"The paramount concern in a child custody case is the best interests of the child, based on a consideration of all factors that legitimately affect the child's physical, intellectual, moral and spiritual well-being." *Swope v. Swope*, 455 Pa. Super. 587, 591, 689 A.2d 264, 265 (1997). This determination must be made on a case-by-case basis. *Myers v. DiDomenico*, 441 Pa. Super. 341, 345, 657 A.2d 956, 957 (1995). "A custody order is modifiable without proof of a substantial change of circumstances where such a modification is in the best interests of the child." *McMillen v. McMillen*, 529 Pa. 198, 602 A.2d 845, 847 (1992). "Only where [it finds] that the custody order is 'manifestly unreasonable as shown by the evidence of record . . .' will an appellate court interfere with the trial court's determination." *Id.* (citations omitted).

Preserving stability is an important consideration in a modification proceeding; however, the ultimate concern is always the welfare of the children. *See Snarski v. Krincek*, 372 Pa. Super. 58, 74, 538 A.2d 1348, 1356 (1988). A parent's historical role as a primary caretaker "is only one factor to be considered in determining the best interest of the

child." *See Wheeler v. Mazur*, 2002 PA Super. 46, P16, 793 A.2d 929, 935 (2002), *citing Wiseman v. Wall*, 718 A.2d 844, 847 (Pa. Super. 1998). Thus, "stability is not to be preserved when there are other reasons why the environment in which the child is living under the present custody order is no longer the one that will overall serve the child's best interests." *Snarski*, 372 Pa. Super. at 69, 538 A.2d at 1354. It is a mistake to equate having the children "stay put" with stability in all cases. Where the primary custodian has failed to provide the children with stability, as the trial court found to be true in this case, it may take a change to promote true stability. Here, this factor strongly weighs in favor of shifting custody.

In *Snarski*, for example, the court shifted primary custody from the child's father to the grandparents. The court noted the importance of providing stability for the child, but explained that the existing custody order "has provided Joseph with no stability at all. . . . Reconsidering that order at this time will in no way decrease the stability of Joseph's life and, in fact, can do nothing but increase that stability by enabling us to find which of the competing parties has actually provided an overall stabilizing effect in Joseph's life and to award them custody." *Snarski*, 372 Pa. Super. at 74, 538 A.2d at 1356.

Similarly, in this case, there was substantial evidence that Ms. Boring has not been able to provide the children with stability or consistency. According to Dr. Cooke's report, Dr. Suzanne Dundas, who is Tyler's godmother and who had been a friend of both parties for 16 years, "questions [Ms. Boring]'s understanding of the stability needs of the children." (R. 113a). *See also* App. A at 15. Dr. Cooke also concluded that "[Ms. Boring] suffers from psychological dysfunction that impacts on her ability to parent, especially her

capacity to consistently plan for the boys' basic stability and well-being." (R. 114a) *See also* App. A at 35.

The evidence presented throughout the proceedings supported these conclusions. As the court noted in its opinion, Ms. Boring moved at the beginning of the school year, contrary to the order of the court, and despite her own acknowledgment that her move would lead to the "possibility of 3 schools [for the boys] by October" of 2004. *See* App. A. at 18. Although Ms. Boring was aware that moving would disrupt the boys' schooling, she did not "have an educational plan in place for them" and as a result, the children "were not enrolled in any school in Pennsylvania for the school year beginning September 2004." *See id.* at 19, 35. The court weighed evidence that the lack of stability had a detrimental effect on the boys. When the boys returned from Indiana in September 2004, "[t]hey were more combative. They also expressed a fear of going to live in Indiana." *See id.* at 23. Further, Ms. Jones testified that the children regressed academically. *See id.* at 23, 24.

The court also examined evidence that Ms. Boring had destabilized the children's lives by engaging in a deliberate, sustained campaign to cut Ms. Jones out of their lives and undermined Ms. Jones's parental role. *See id.* at 9. Ms. Boring attempted to change the boys' last names from "Jones" to "Schad" without informing Ms. Jones. *See id.* She also moved to a new house and, in direct violation of court orders, failed to inform Ms. Jones or the children's school or to provide her a new address. *See id.* at 28. "To deliberately sabotage visitation rights calculated to serve the best interests of children bears adversely on the fitness of the custodian parent, whose conduct most certainly does not go unnoticed by the children." *Rosenberg v. Rosenberg*, 350 Pa. Super. 268, 273, 504 A.2d 350, 352-353

(1986). Ms. Boring also failed to give Ms. Jones notice of the children's doctor or dental visits. *See* App. A. at 28.

The trial court's ruling is also supported by Ms. Boring's blatant disregard for court orders regarding custody and visitation. In the past few years, Ms. Jones filed four contempt motions, which the court found valid, based on Ms. Boring's willful failure to comply with court orders. *See* App. A at 31. "Frequent and willful disobedience of a court order concerning a parent's right of visitation is a factor to be considered in an application for modification of a custody order." *Rosenberg*, 350 Pa. Super at 273, 504 A.2d at 352. *See also Flannery v. Iberti*, 2000 PA Super. 369, 763 A.2d 927 (2000) (modifying custody by awarding father primary legal and physical custody after mother engaged in a pattern of noncompliance of court orders).

The trial court recognized that Ms. Boring's parenting skills were not as good as Ms. Jones's. Ms. Boring had a "short fuse" with the boys. *See id.* at 31. The boys' godfather testified that Ms. Jones was good with the children and engaged in appropriate educational activities with them. *See id.* at 32. By contrast, the evidence showed that there were days when Ms. Boring did not engage the boys in any interactive activities and just had them watch videos. The court also heard testimony about Ms. Boring's serious drinking problem, which has precluded her from providing proper care to the children. Ms. Jones testified that, prior to separation, Ms. Boring bought a 1.5 liter bottle of wine almost every other day, and that she would drink to the point of passing out. (R. 435a). Ms. Boring hit the boys when she was drunk, and one occasion, when one of the boys had to go to the emergency room, Ms. Boring was unable to take him because of her drinking. (R. 199-201, 446a)

Even before the particularly dramatic upheavals of the 2004 – 2005 school year, when Ms. Boring removed the children from school without any educational plan, Ms. Boring was less involved in the boys' schooling. For example, Mary Ellen Myers, the principal of the boys' former elementary school indicated that "she only met Boring once, at a Halloween party and that Boring did no volunteer work at the school. The court noted that this was true even though from February 2004 until almost the end of the school year, Boring worked out of the Harleysville residence and therefore controlled her schedule and could have actively participated in school activities, if she chose to do so." *See* App. A at 22.

In contrast to Ms. Boring's inability to provide stability for the boys or to prioritize their needs over her own, there was ample evidence that Ms. Jones consistently has provided a stable home and life for the children and consistently has been able to recognize and meet their needs. Ms. Jones historically was "much more involved with the boys' schooling." *See id.* at 22. Ms. Jones volunteered in the boys' first grade classroom on Wednesdays, the days that she had the boys. Ms. Jones also attended various school conferences including Back to School Night and parent-teacher conferences. (R. 275a). The evidence also showed that Ms. Jones provided social stability and security for the children. Dr. Dundas stated: "[Ms. Jones] has long-term friends and stability and maintains relationships for the children's sake." (R.113a). Similarly, Dr. Cooke stated in her report: "[Ms. Boring]'s parenting has been dependent on meeting her own psychological needs at the expense of the boys' needs for stability and predictability in their lives. It is [Ms. Jones] who has met these needs, which are the most important needs these boys have, and it is she who is most likely to do so in the future." (R. 116a)

In sum, the trial court properly considered and weighed the evidence relating to each parent's prior history with the children. Based on the totality of that evidence, the trial court properly found that changing custody would place the children in a more stable and nurturing environment, would best enable the children to maintain a close relationship with both parents, and would best protect and promote their best interests. This Court must defer to the findings of the hearing judge who has had the opportunity to observe the proceedings and the demeanor of the witnesses and "may not interfere with [ ] conclusions [of the trial court] unless they are unreasonable." *See Fausey*, 2004 PA Super. at P18, 851 A.2d at 199; *Roadcap*, 778 A.2d at 689, 2001 PA Super. at P7.

3. The Trial Court Properly Considered the Children's Interviews with the Custody Evaluator.

The trial court evaluated the entire record in this case, including a psychological evaluation of the children, in reaching its determination to award primary physical custody to Ms. Jones. *See* App. A at 37. Although Ms. Boring's contends that the trial court failed to consider the preferences of the children and therefore erred, a review of the trial court's opinion shows that the court in fact considered the children's interviews. *See id.* at 21. The children expressed a desire to maintain a relationship with both parents and Ms. Jones was clearly more likely to meet this need.

Under Pennsylvania law, the expressed wishes of a child do not control a custody decision. *See McMillen*, 529 Pa. at 203, 602 A.2d at 847. However, a child's wishes are an important consideration in determining the child's best interest. *See id.* The child's preference must be based on good reasons and the child's maturity and intelligence must be

taken into account. *See id.* The weight to be attributed to the child's testimony can best be determined by the trial judge. *See id.* An appellate court "may not interfere with [ ] conclusions [of the trial court] unless they are unreasonable." *See Fausey*, 2004 PA Super. at P18, 851 A.2d at 199; *Roadcap*, 778 A.2d at 689, 2001 PA Super. at P7.

In the present matter, the trial court evaluated and considered the children's statements to the custody evaluator in reaching its custody determination. The court stated: "The best interest analysis obviously required us to consider the boys and their relationship with Jones and Boring. The parties agreed that we would not interview the boys. Therefore, we relied on information regarding the boys from the parties and the custody evaluator." *See* App. A at 21. The court "found the entire [custody evaluation] report very significant in reaching [its] custody determination." *See id.* at 14.

Ms. Boring mischaracterizes the children's interviews to suggest that the children, both 7 years old at the time, expressed a clear preference to live with her. Ms. Boring contends "Tyler informed Dr. Cooke that although he wanted to have more time with Jones he would be 'sad' if the custody schedule were reversed." *See* Appellant's Brief at 28. However, a review of the report contradicts this. According to the custody evaluator, Tyler stated:

> He feels pressured by Ellen to have to move to Indiana yet expresses that he doesn't want to. He said that Ellen tries to make him want to go to Indiana and tells them that "Its gonna be really fun."
>
> He was asked about the current custody schedule and <u>if he would want more time with Dee and he said yes he would because he doesn't get to see her that much. He was questioned what if the reverse happened and Ellen went to Indiana and he got to stay with Dee. He said he would get to see Ellen on holidays but that would also make him sad</u>.

(R. 103a, 105a) (emphasis added).

These statements do not constitute a clear preference to live with Ms. Boring. To the contrary, Tyler expressed a strong desire to have more time with Ms. Jones and opposed the move to Indiana despite Ms. Boring's pressure on him. When asked by the evaluator whether speaking to Ms. Jones on the phone would be sufficient, he replied "no, that when he talked on the phone that would only make him wish that he could be with her more." (R. 104a) Tyler stated that the worst thing about Ms. Jones is that "they don't get to see her a lot." (R. 104a)

Similarly, Ms. Boring suggests that Quinn expressed a clear preference to live with her and refers the court to one fragment from Quinn's interview in which he said that "he wanted to keep things the same as now." *See* Appellant's Brief at 26. In context, neither the fragment nor the report as a whole support Ms. Boring's preference claim. The report states:

> [Quinn] strongly expresses on interview and projective techniques that he wants to keep things the same and doesn't want to go to Indiana because he wouldn't see Dee a lot . . . .
>
> Regarding the proposed move to Indiana, Quinn spontaneously reported the following: He said he worries a lot. He said one thing he doesn't trust about Ellen even though she is his real mother is that she says they can go back and forth but he knows that it is too expensive to go back and forth by plane. He also said that even here in Pennsylvania he doesn't trust Ellen in regard to going back and forth with Dee because she doesn't like Dee and she moved away from her. He was asked how he would feel if he had to go to Indiana and he replied "I'd feel really bad. I don't want to live far from Dee. I'd feel the same way in either case" (If he had to live far from Ellen as well) . . . He said if he lived in Indiana he'd have pictures of everybody and never throw them away. He repeated that he doesn't want to go to Indiana . . . Quinn was questioned about how he would change things if they stay in Pennsylvania. He said he wanted to keep things the same as now. He was questioned about Dee having more time and he said he knows that would not be accepted, adding "I don't want anybody to be jealous," (clearly referring to Ellen) . . . .

> He would like me to tell the Judge that he doesn't want to go to Indiana and he wants to keep things the same.

(R. 106a-108a) By modifying the prior custody order and granting custody to Ms. Jones, the trial court respected the expressed wishes of the children, which is to have an ongoing relationship with both parents. The evidence shows that Ms. Boring has not respected the children's relationship with Ms. Jones, that the children are aware of this and do not trust Ms. Boring to maintain their contact with Ms. Jones and that Ms. Jones has been more respectful of the children's relationship with Ms. Boring.

In addition to lacking factual support, Ms. Boring's argument relies on cases that are factually and legally inapposite to the present matter. All of the cases she cites involve children who either expressed a clear preference to reside with one parent with well-supported reasons, or were denied an opportunity to be interviewed as part of a custody determination. Neither is true here. In *McMillen*, the child "repeatedly and steadfastly expressed his preference to live with his father." 529 Pa. at 201, 602 A.2d at 846. The court found that his preference was well supported in that his "stepfather frightens, upsets and threatens him, and his mother does nothing to prevent this mistreatment." *See id.* at 203, 602 A.2d at 847. Similarly, in *Myers*, the children repeatedly expressed their desire to live with their father. 441 Pa. Super. at 345, 657 A.2d at 958 ("Well I want to live with dad"). In *Bovard v. Baker*, the trial court did not interview or take testimony from the children and used no other means to learn their views. 2001 PA Super. 126, 775 A.2d 835 (2001). In the present matter, the parties opposed the judge interviewing the children directly. Instead, a custody evaluator interviewed the children and the trial court

considered those interviews in making its custody determination. Ms. Boring's argument therefore is unavailing.

4. The Trial Court Properly Relied on All Testimony Presented and Preserved in the Record.

The trial court's opinion contains an exhaustive analysis of the record and its specific reasons for its ultimate decision, which was supported by a wide range of evidence. A trial court need not blind itself to the importance of former testimony or conduct in court proceedings. *See Snarski*, 372 Pa. Super. at 79, 538 A.2d at 1359. Ms. Boring erroneously argues that the trial court erred in relying on testimony from prior court appearances in reaching its decision to grant primary physical custody to Ms. Jones.[4]

As this Court stated in *Snarski*:

> We [ ] refuse to accept and apply appellant's theme which seeks to bury the past in favor of an examination of the present . . . It would be patently ridiculous to say [ ] that a court must blind itself to all that a parent has done prior to the custody hearing. We do not live our lives in distinct and unconnected periods of time, with the past importing nothing for the present, nor the present for the future.

Snarki, 372 Pa. Super. at 81, 538 A.2d at 1360.

Ms. Boring relies on two cases that have no import here. The cases, *Commonwealth ex rel. O'Hey v. McCurdy*, 199 Pa. Super. 22, 24-25, 184 A.2d 290, 291 (1962) and *Commonwealth ex rel. Crawford v. Crawford*, 170 Pa. Super. 151, 84 A.2d 237

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[4]Ms. Boring contends that her failure to raise this issue in the Statement of Matters Complained of on Appeal should not result in a waiver, because she did not know that the trial court would rely on prior testimony. Ms. Boring's counsel, however, failed to raise any objections to incorporating prior testimony at the November 2004 hearing when Ms. Jones's counsel requested to "incorporate the previous testimony so that [she would not] have to revisit all of the issues from the custody proceedings that occurred in 2001 as well as the custody proceedings." (R. 252a-253a). The court agreed to incorporate those proceedings. (R. 253a). Ms. Boring's counsel did not raise any objections to incorporating prior testimony. (R. 252a-253a).

(1951), involved litigants that attempted to appeal a court ruling on more than one occasion. In *Commonwealth ex rel. O'Hey*, a father filed a petition to modify a custody order. The court dismissed the petition and reaffirmed its order. The father appealed the same issue again, which the court refused to relitigate. Similarly, in *Commonwealth ex rel. Crawford*, without any evidence of changed circumstances, a litigant filed two habeas corpus petitions seeking custody of three children after the court denied the initial petition. Once again, the court refused to allow the party to relitigate a previously decided issue. These cases apply res judicata and related principles. In the present matter, Ms. Jones has not attempted to relitigate legal issues decided previously. Moreover, custody proceedings by their nature are ongoing and custody judgments remain modifiable if warranted. A custody court is not bound to decide issues the same way in a later proceeding if new evidence changes it view of the best interest of the child. Accordingly, Ms. Boring's claim is baseless.

B. UNDER PENNSYLVANIA LAW, A COURT MAY AWARD CUSTODY TO AN *IN LOCO* PARENT WITHOUT A SHOWING OF UNFITNESS.

Ms. Boring simply is incorrect as a matter of law when she asserts that a court cannot grant custody to an *in loco* parent unless the court finds the biological parent to be unfit. To the contrary, the Pennsylvania Supreme Court has expressly rejected that standard:

> "[T]he cardinal concern in all custody cases is the best interest and permanent welfare of the child" (quoting *Albright v. Commonwealth ex rel Fetters*, 491 Pa. 320, 421 A.2d 157, 158 (Pa. 1980)). In staying true that maxim, we have decreed that there will be instances where it is proper to award custody to the third party even where there has been no showing that

> the biological parent is unfit. While this Commonwealth places great importance on biological ties, it does not do so to the extent that the biological parent's right to custody will trump the best interests of the child. In all custody matters, our primary concern is, and must continue to be, the well-being of the most fragile human participant – that of the minor child.

Charles, 560 Pa. at 342, 744 A.2d at 1259 (emphasis added).

Ms. Jones also misstates the law by suggesting that *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000) required the trial court to determine that appellant was unfit in order to grant primary physical custody to Ms. Jones. The United States Constitution protects the right of parents to makes decisions as to "care, custody and control of their children," but this protection is not absolute. *See Troxel*, 530 U.S. at 66, 120 S. Ct. at 2060. Nor is it limited to biological parents. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438 (1944) (treating the relationship of aunt and niece as that of parent and child). The United States Supreme Court noted in *Troxel* that persons other than biological parents may have an established parent-child relationship that may warrant protection by the State, even over the objection of a fit, biological parent. *See Troxel*, 530 U.S. at 68, 120 S. Ct. at 2059. *See also id.* at 85, 88, 120 S. Ct. at 2072 (Stevens J. dissenting) (speaking favorably of claims by a "once-custodial caregiver" and stating that"parental liberty interest [is] a function, not simply of 'isolated factors' such as biology and intimate connection, but of the broader and apparently independent interest in family."); *id.* at 98-99 (suggesting best interests test for de facto parents). *See also Caban v. Mohammed*, 441 U.S. 380, 397, 99 S. Ct. 1760, 1770 (1979) (Stewart, J., concurring) ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.")

The Pennsylvania Supreme Court determined that there was nothing in *Troxel* that prevented the result it reached on behalf of an *in loco* parent in *T.B. v. L.R.M.*, 567 Pa. 222, 233, 786 A.2d 913, 919 (2001). *T.B.* involved a dispute between a biological parent and her former same-sex partner who stood *in loco parentis* to their children and had been awarded partial custody for purposes of visitation. In *T.B.*, the Supreme Court explained that Pennsylvania legal standards are clearly distinguishable from the standard applied in *Troxel*. In *Troxel*, the Court struck a Washington statute that provided, in pertinent part, that "'[a]ny person may petition the court for visitation rights at any time' and that '[t]he court may order visitation rights for any person when visitation may serve the best interest of the child.'" *T.B.*, 567 Pa. at 233, 786 A.2d at 919. In striking down the statute, the Court based its decision on the grounds that the statute was "breathtakingly broad," and that the state court had given no deference at all to the mother's view of her children's best interests. *See id.* Rather the court decided for its own reasons that visitation was a good idea. *See id.*

In contrast to *Troxel*, "the instant case does not involve an overly broad statute or the abandonment of the presumption that a fit parent will act in the best interests of the child." *Id.* Ms. Jones met a high burden of proof to establish that she was an intended parent all along and is an *in loco* parent with standing to seek custody. She thereby already has tipped the evidentiary scales facing true third parties "up to even." *Ellerbe v. Hooks*, 490 Pa. 363, 367, 416 A.2d 512, 514 (1980). The additional evidence presented at the custody modification hearing and the record of Ms. Boring's past conduct strongly supported Ms Jones' claim that she should now have primary physical custody. In contrast, as the Court noted in *Liebner v. Simcox*, "the grandparents who sought visitation

[in *Troxel*] did so as third parties; there was no allegation or determination that the grandparents stood *in loco parentis* to the children. In contrast, in the instant case, [petitioner] stands *in loco parentis* to [the child], and it is on this basis that [petitioner] has standing to seek visitation with [the child]. As a result, we conclude that *Troxel* is not controlling." 2003 PA Super. 377, P13, 834 A.2d 606, 612 (2003). Ms. Boring's reading of *Troxel* would leave her in control of the children despite substantial evidence that this current situation is detrimental to their best interests. No law supports her claim.

C. THIS COURT SHOULD CLARIFY THAT, AS IN CHILD SUPPORT MATTERS, INTENDED PARENTS LIKE MS. JONES ARE A SPECIAL CATEGORY OF *IN LOCO* PARENTS TO WHOM THE "PREPONDERANCE OF THE EVIDENCE" STANDARD APPLIES.

In most custody disputes between a biological parent and third parties, the biological parent's "prima facie right to custody" is overcome only if "'convincing reasons' appear that the child's best interest will be served by an award to the third party." *Charles*, 560 Pa. at 340, 744 A.2d at 1258. This Court has recognized that same-sex partners can stand *in loco parentis* to their children and have standing to seek custodial rights on this basis. *J.A.L. v. E.P.H.*, 453 Pa. Super. 78, 682 A.2d 1314 (1996) (mother's domestic partner stood *in loco parentis* to child and had standing to seek partial custody). It also has recognized that such a parent has support obligations and, when she has always been an intended parent of the child, stands in a special class. *L.S.K. v. H.A.N.*, 2002 PA Super. 390, 813 A.2d 872 (2002) (holding that a lesbian co-parent who stood *in loco parentis* and previously had been granted joint legal custody of the couple's five children was responsible to support the children).

The trial court properly held that even under the standard traditionally applied to third parties who enter a child's life because of abandonment, marital changes or other circumstances, custody should be modified here. *See* App. A at 39. However, it also correctly indicated from case law of this Court that it did not think that elevated standard applied to cases like this one, in which not only *in loco parentis* standing has been established, but also the parties' shared intent to bring the child into the world as joint parents. Where a couple makes and implements a decision jointly to bring a child into their family, through assisted reproduction or other means, and jointly to parent the children, they should stand on an equal footing. *See* App. A. at 1. As the court stated, "in these non-traditional families and the custody disputes that follow when the relationship breaks up, the only parents the children ever know are the two people who made the decision to have the child. Functionally, both partners are parents from the beginning." *See* App. A at 40. The court rightly noted that the difference in "custody disputes involving a biological parent and traditional third party with *in loco parentis* standing versus custody disputes involving two partners in a non-traditional family is illustrated by the different treatment the issue of support has received from the appellate court when two partners separated." *Id.* (citing *L.S.K. v. H.A.N.*, 2002 PA Super. 390, 813 A.2d 872 (2002)).

In *L.S.K.*, two women in a long term relationship decided to have children, had children, and later separated. The non-biological parent was ordered to pay child support. *L.S.K.*, 2002 PA Super. at P10, 813 A.2d at 877. In rejecting the non-biological parent's argument that she should be treated like a stepparent and therefore had no duty to pay support, the Superior Court noted that "[u]nlike a stepparent, it is evident that H.A.N. did not enter into a relationship where children already existed. Instead, she and Mother

decided to start a family together." *See id.* As in *L.S.K.*, the two parents here were a couple and decided jointly to bring the children into the relationship. *See* App. A. at 1. "The rights and liabilities arising out of that relation [*in loco parentis*] are the same as between parent and child." *See L.S.K.*, 2002 PA Super. at P7, 813 A.2d at 876 (citing *Spells v. Spells*, 250 Pa. Super. 168, 172, 378 A.2d 879, 882 (1977)). Other courts that have grappled with the standard of proof issue in custody disputes involving a same-sex couple who intended to and did parent a child equally yet where one parent is not related to the child biologically or by adoption have adopted a standard similar to that suggested by the trial court. *See, e.g.*, *C.E.W. v. D.E.W.*, 2004 Me. 43, 845 A.2d 1146 (2004) (where an individual's status as a *de facto* parent is not disputed and has been so determined by a court, a best interests analysis should apply); *McDermott v. Doughterty*, 385 Md. 320, 869 A.2d 751 (2005) (distinguishing between "pure third-party cases" and cases in which parties "have, in effect become parents, and thus, the case is considered according to the standards that apply to natural parents").

Cases in which both parties were involved in the decision to bring the child into the family and have in fact functioned as the child's parents are in a special category. They are fundamentally different, as the trial court explained, from cases in which a third party enters into a parental role previously held by someone else, and even more so from the claims of third parties whose role is not truly parental. Consistent with this Court's reasoning in *L.S.K.* and with settled case law that the rights and responsibilities of *in loco* parents are equal to those of other parents, the proper standard of proof to be applied once *in loco* and intended parent status is established should be a "preponderance of evidence" standard as to what is in the best interests of the children.

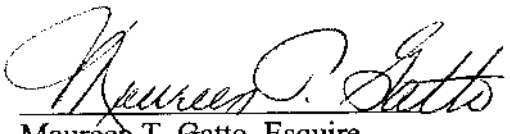
Absent such a standard, the courts are destined to face more cases like this one. As long as the Court leaves doubt as to whether a petitioner, even once established as an *in loco* and intended parent, should be treated like an equal parent or just another third party in determining custody, it unintentionally invites the kind of disputes and unilateral misconduct, to the detriment of children, displayed in this case and similar ones like *T.B.* *See T.B.*, 2005 PA Super. 114, 2005 WL 697578 (reversing the trial court's decision denying visitation to one parent because of the "emotional and psychological turmoil" the other parent subjected to the child).

Accordingly, as the trial court recommended, petitioner asks the Court to clarify that a lower, "preponderance of the evidence" standard should be applied to *in loco,* intended parents such as Ms. Jones. As this lower standard only comes into play once a court gives "special weight" to the view of the established legal parent, s*ee Troxel*, 530 U.S. at 69-70, 72-73, 120 S. Ct. at 2062-2064, by making the petitioner establish she or he stands *in loco* parentis to the child and was an intended equal parent who acted to fulfill that role, it is appropriate at that point to look at whether the requested relief is in the child's best interests based on a preponderance of the evidence.

CONCLUSION

The evidence presented to the trial court overwhelmingly demonstrated that shifting custody from Ms. Boring to Ms. Jones is in the best interest of the children under either a "preponderance of the evidence" standard or the third party "convincing reasons" standard. Ms. Boring has not been able to provide stability or consistency in the lives of the children and exhibits poor parenting skills, including excessive drinking, lack of concern regarding the children's schooling and actively interfering with Ms. Jones's relationship with the children. In contrast, Ms. Jones demonstrated her willingness and ability to provide a stable and consistent environment. The trial court's Order and Opinion are lawful, well-reasoned and fully supported by the facts in this case and its ruling should be affirmed.

Respectfully submitted,



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