

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

A.S.

Appellee

v.

I.S.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1563 EDA 2013

Appeal from the Order Entered May 22, 2013
In the Court of Common Pleas of Montgomery County
Civil Division at No(s): 2010-00038

BEFORE: BENDER, P.J.E., PANELLA, J., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J.

FILED MAY 28, 2014

I.S. ("Mother") appeals from the order of the Court of Common Pleas of Montgomery County dismissing her claim against A.S. ("Stepfather")¹ for child support for her twin fourteen-year-old boys. After our review, we affirm on the basis of the comprehensive opinion authored by the Honorable Cheryl L. Austin.

The boys are the biological children of Mother and Z.V. ("Biological Father"). The children were born in Serbia in October 1998. On December 1, 2005, Mother married Stepfather in Serbia. When the boys were six years-old Mother relocated with them to the United States to live with

¹ A stepfather, by definition, is the "husband of one's mother." Since A.S. is no longer Mother's husband, he is technically no longer a stepfather, but rather a former stepfather. We refer to him here, however, as Stepfather. **See** Black's Law Dictionary (9th ed., 2009).

Stepfather in Lower Moreland, Montgomery County. Biological father remained in Serbia. Mother has a custody and support order from the Serbian courts, and has enforced the custody order against Biological Father, but has not pursued support from him.

Mother and Stepfather separated in 2009 and divorced in 2010. Stepfather and Mother, without a formal custody agreement, shared time with the children.

In May 2012, Mother graduated from law school. She flew to California to take the California bar examination, and was planning to relocate to California.² Stepfather filed a complaint in Montgomery County for custody, partial custody, or visitation, as well as an emergency petition to prevent Mother from relocating with the children.

Judge Austin issued an order prohibiting Mother from leaving the jurisdiction pending further order.³ On September 24, 2012, the court entered a temporary order awarding Mother primary custody and Stepfather partial custody (every other weekend as well as every Wednesday after school until 9 p.m.).

² Mother passed the bar examination and was admitted to the California bar in January 2013.

³ Mother has since passed both the Pennsylvania and New Jersey bar examinations, and in May 2013 she was admitted to the Pennsylvania bar.

On September 28, 2012, Mother filed a complaint for child support against Stepfather. Following required mediation and conciliation, Mother filed preliminary objections to Stepfather's complaint for custody, as well as a motion for summary judgment to dismiss the complaint for lack of standing. Following a hearing and a court interview of the children, the court denied both Mother's preliminary objections and motion for summary judgment, concluding Stepfather stood *in loco parentis* and thus had standing to seek custody. The court issued an interim order awarding shared physical custody. **See** Order, 2/15/2013.

Following a support conference, the master dismissed Mother's complaint against Stepfather for support. Mother filed exceptions. On May 22, 2013, the trial court entered an order dismissing Mother's claim and ordering that Stepfather had no duty of support. Mother filed this appeal. She raises the following claims:

1. Whether a former stepfather owes a duty of support to two minor children where stepfather has commenced a custody action against the children's mother, has established his custodial rights based on his *in loco parentis* status, and the court of common pleas has entered an order awarding shared physical and legal custody of the children to the children's mother and former stepfather?
2. If this Court finds a duty of support, whether the amount of support owed is calculated by the statutorily imposed child support guidelines?

Parents are liable for the support of their children who are unemancipated and 18 years of age or younger. **See** 23 Pa.C.S.A. §

4321(2). Although under no legal duty of support, Mother argues that equitable principles require this Court to impose a duty of support upon Stepfather. Mother relies on the case of **L.S.K. v. H.A.N.**, 813 A.2d 872 (Pa. Super. 2002). However, **H.A.N.**, as Judge Austin points out, is clearly distinguishable.

In that case, H.A.N., a lesbian, filed a complaint for custody against her former partner, L.S.K., who was the children's biological mother. The court granted the parties shared legal custody, and granted H.A.N. partial physical custody and directed her to pay child support. **Id.** at 874. On appeal, this Court addressed the novel issue of whether H.A.N. should be required to pay her former domestic partner, L.S.K., child support for five children conceived through artificial insemination and born during their relationship. Despite being granted court-ordered legal and partial custody, H.A.N. argued on appeal that she should not be required to pay child support since she is not a biological or adoptive parent. She argued that her status was similar to that of a stepparent. **Id.** at 877. This Court held that: (1) equitable principles demanded that both parties be responsible for the needs of the children, and therefore, H.A.N. was obligated to pay support; and (2) the child support guidelines applied to the case. **Id.** at 878-79.

In **H.A.N.**, however, we found that H.A.N.'s conduct estopped her from claiming she owed no duty of support. There, the parties were involved in a relationship for over ten years and they agreed to have children together. They arranged for L.S.K. to conceive through artificial insemination. After

L.S.K. became pregnant, the couple prepared for the birth of the child, and in December 1990, L.S.K. gave birth to a son. H.A.N. was present during the delivery and she cared for the newborn while L.S.K. returned to work and supported the family. In 1992, the parties decided to have more children. L.S.K. was again artificially inseminated and this time became pregnant with quadruplets. Prior to the birth, L.S.K. was incapacitated and H.A.N. took care of all of her needs. In March 1993, L.S.K. gave birth to a set of quadruplets. H.A.N. stayed at home and cared for the children while L.S.K. returned to work and completed a college degree. The parties separated in 1997. **Id.** at 874-75.

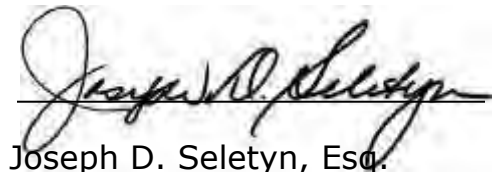
In **H.A.N.**, we noted that the trial court in that case found that H.A.N.'s conduct estopped her from claiming she owed no duty of support and that "estoppel applied even more strongly here than in a stepparent situation [because u]nlike a stepparent, it is evident that H.A.N. did not enter into a relationship where children already existed. Instead, she and Mother decided to start a family together." **Id.** at 877. Unlike **H.A.N.**, the parties in this case did not agree to start a family together. Though Stepfather clearly has a bond with the children, he has not held himself out as their father or agreed to support the children financially. Further, Mother has chosen not to pursue her legal right to support against the children's biological father in Serbia. We conclude, therefore, that the trial court properly determined that former Stepfather, although *in loco parentis*, is under neither a legal nor an equitable duty of support. **Cf. Hamilton v.**

Hamilton, 795 A.2d 403 (Pa. Super. 2002) (when stepparent has held child out as his own, he may be estopped from denying paternity and therefore be liable to support stepchild following divorce under doctrine of equitable estoppel). We agree with Judge Austin's statement that the purpose of the court's order was to enforce the parties' prior agreement to share custody, "not to create a new class of support obligors[.]" Trial Court Opinion, 7/9/2013, at 13.

Because we agree with the trial court's determination that there is no duty of support here, we need not address Mother's second claim. We rely upon Judge Austin's opinion in support of our decision to affirm the underlying order. We instruct the parties to attach a copy that opinion in the event of further proceedings in the matter.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/28/2014

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,
PENNSYLVANIA
FAMILY DIVISION

A [REDACTED] S [REDACTED],
Appellee/Stepfather

vs.

I [REDACTED] S [REDACTED],
Appellant/Mother

: Superior Court No.: 1563 EDA 2013

:

:

: Trial Court No.: 2010-00038

:

:

: PACSES No.: 681113557

OPINION

AUSTIN, J.

July 8, 2013

INTRODUCTION

Appellant, I [REDACTED] S [REDACTED] ("Mother") appeals to the Superior Court of Pennsylvania from this Court's Order dated May 22, 2013. Said Order denied Mother's claim that Appellee, A [REDACTED] S [REDACTED] ("Stepfather") has a duty to pay child support to his stepchildren.

FACTS AND PROCEDURAL HISTORY

Mother has twin sons by a prior relationship, A [REDACTED] V [REDACTED] and A [REDACTED] V [REDACTED], born October 20, 1998, age 14, whose biological father is Z [REDACTED] V [REDACTED] ("Biological Father"). Mother, Biological Father and children are from Serbia. On or about December 1, 2005, Mother and Stepfather were married in Serbia. The children were 6 years old when Mother relocated them to the United States to reside with Stepfather in Lower Moreland, Montgomery County, Pennsylvania. The Biological Father remained in Serbia. Mother has an Order from the Serbian Courts, governing custody and child support. Although Mother has enforced the custody portion against Biological Father, Mother has not pursued the support portion against Biological Father.

On January 4, 2010, Stepfather filed a Divorce Complaint against Mother. Prior to the Divorce Complaint, the parties separated in late 2008 or 2009. Following the parties' separation, the children divided their time between Mother and Stepfather, spending increasing amounts of time with Stepfather. When Mother moved to Philadelphia, Pennsylvania, the children remained enrolled in Lower Moreland School District and have been enrolled in this school district since age 6. In August 2012, Mother called the Lower Moreland police department, using the Serbian Custody Order to remove the children from Stepfather's custodial care, which initiated the parties' custody proceedings.

On August 27, 2012, Stepfather filed a Complaint for Custody against Mother. On September 7, 2010, Mother and Stepfather were divorced from the bonds of matrimony. On February 13, 2013, the parties appeared for a one-day protracted custody hearing. At the hearing, Stepfather sought primary custody of the children based on the wishes of the children and recommendation of the court-appointed Custody Evaluator, Dr. Gerald Cooke against Mother's objections. Although the parties were not able to conclude their custody hearing that day, this Court did interview the twin children. After determining that Stepfather stands *in loco parentis*, this Court issued an Interim Custody Order dated February 15, 2013, directing the parties to share physical custody of the children equally. This Court's Interim Custody Order, awarding the parties shared custody took into great consideration the expressed preference of the children. This Court's Order also continued the parties' custody hearing to be heard at a later date.

Shortly after Stepfather filed a Custody Complaint, Mother filed a Complaint for Support on September 28, 2012. On March 4, 2013, the parties appeared before Support Master, Patricia Coacher, Esquire ("Master Coacher") for a Support conference. Master Coacher dismissed Mother's Complaint for Child Support because Stepfather is not the children's biological father

and does not have a duty to pay support. On March 14, 2013, Mother filed Support Exceptions to Master Coacher's Support recommendation. On April 29, 2013, this Court ordered the parties to file briefs in support of their position regarding Stepfather's duty to pay child support. This Court issued an Order dated May 22, 2013, finding that Stepfather has no duty to pay support for the children after the dissolution of the parties' divorce.

On May 30, 2013, Mother filed a timely Notice of Appeal to the Pennsylvania Superior Court from this Court's Order dated May 22, 2013. On the same day, Mother also filed a Concise Statement of Matters Complained of on Appeal without Court Order. On June 4, 2013, this Court took procedural safeguards and issued an Order pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate.

ISSUE(S)

Although Mother's Concise Statement did not succinctly identify the ruling or error that Mother challenges, this Court presumes it is the following issue:

1. This Court erred in ruling that Stepfather, who equally shares court-ordered custody with Mother, has no legal duty to contribute to the children's support.

DISCUSSION

A. STEPFATHER ACTING *IN LOCO PARENTIS* WITH SHARED CUSTODIAL RIGHTS DOES NOT HAVE A LEGAL OBLIGATION TO SUPPORT HIS STEPCHILDREN.

On appeal, Mother erroneously contends that this Court erred in ruling that Stepfather, who equally shares court-ordered custody with Mother, has no legal duty to contribute to the children's support. Pennsylvania Courts have repeatedly held that a stepparent is not liable for child support following the dissolution of a marriage, even where a stepparent assumes *in loco parentis* status both before and after the dissolution of the marriage and remained close to the

child. *Garman v. Garman*, 646 A.2d 1251 (Pa.Super.1994); *McNutt v. McNutt*, 496 A.2d 816 (Pa. Super. Ct. 1985); *Drawbaugh v. Drawbaugh*, 647 A.2d 240 (Pa. Super. Ct. 1994). The Appellate Court in *McNutt* and *Drawbaugh* determined that:

[If] a stepparent acting *in loco parentis* [is] held liable for support even after the dissolution of the marriage then all persons who gratuitously assume parental duties for a time could be held legally responsible for a child's support.... These acts of generosity should not be discouraged by creating a law would require anyone who begins such a relationship to continue financial support until the child is eighteen years old. (emphasis added)

496 A.2d at 817-818; 647 A.2d 241. In *Garman*, the Appellate Court held that stepparents acting *in loco parentis* perform a vital role, which should be applauded rather than punished. 646, A.2d at 1253.

In this instant case, Stepfather and Mother separated in late 2008 or 2009 prior to Stepfather filing a Divorce Complaint in January 2010. After the parties' separated, Mother and Stepfather continued to share custody and the daily parental duties for the children until August 2012, when Mother contacted the Lower Moreland police department to remove the children from Stepfather's custodial care. Mother's contemptuous actions led Stepfather to file a Complaint for Custody against Mother on August 27, 2012. This Court entered an Interim Custody Order, finding that Stepfather stands *in loco parentis* based on the parties' prior, non-court-ordered custody agreement. As a result of Stepfather's standing and the expressed preference of the 14 year old children, this Court ordered the parties to equally share custody of the children. This Court's Interim Order protects Stepfather's relationship with the children, which is in the best interest of the children, who have known and loved Stepfather since age 6. *See Spells v. Spells*, 378 A.2d 879, 883 (Pa. Super. Ct. 1977) (when stepparent is *in loco parentis* with stepchildren, courts must jealously guard his rights to visitation).

This case is similar to *McNutt* because Mother permitted Stepfather to assume status of *in loco parentis* before and after the dissolution of the marriage as well as remain close to the children. Contrary to Mother's assertions that this Court infringed on her constitutional right to parent the children as she sees fit, Mother consented to Stepfather sharing custody of the children, raising the children and making decisions regarding their education, health, moral values and religion prior to the Court entering an Interim Order on February 15, 2013.

Analogous to *McNutt* and *Drawbaugh*, Stepfather's past and continued love and devotion to the children, should not carry with it a duty to financially support the children. To tack on a financial obligation would discourage any stepparent from gratuitously assuming parental duties after the dissolution of the marriage and require anyone, (grandparents, aunts, uncles and other persons) who stands *in loco parentis* to continue financial support until the child is eighteen years old. *McNutt*, 496 A.2d at 817-818; *Drawbaugh*, 647 A.2d 241. Similar to *Garman*, this Court did not err in ruling that Stepfather had no legal duty to contribute to the children's support because this Court desires to encourage Stepfather's generous actions instead of punishing him.

Mother alleges that this Court should have applied an equitable support obligation based on this Court's Interim Order, granting Stepfather with legal custodial rights over the children similar to adoptive or natural parents. "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[.]" *Fish v. Behers*, 741 A.2d 721, 723 (Pa. 1999). Equitable estoppel applies to prevent a party from assuming a position or asserting a right to another's disadvantage inconsistent with a position previously taken. *Commonwealth ex rel Gonzalez v. Andreas*, 369 A.2d 416, 418 (Pa. Super. Ct. 1976). The courts have created an equitable obligation for support

if a non-biological father has held himself out as the father of a child. Paternity by estoppel was applied when a stepfather held himself out as the father, prevented the mother from taking action against the biological father and signed an acknowledgment of paternity knowing he was not the father. *Hamilton v. Hamilton*, 795 A.2d 403, 405 (Pa. Super. Ct. 2002).

Mother claims that this present case is similar to *L.S.K. v. H.A.N.*, 813 A.2d 872 (Pa. Super. Ct. 2002). *L.S.K.*, the biological parent, sought support from her former same-sex partner, *H.A.N.*, the non-biological parent. The Appellate Court agreed with the trial court's finding that *H.A.N.*'s conduct estopped her from claiming she owed no duty of support. The trial court found that estoppel applied even more strongly here than in a stepparent situation. Unlike a stepparent that generally has no legal duty to support a stepchild following the dissolution of marriage, it was evident that *H.A.N.* did not enter into a relationship where children already existed. Instead, she and *L.S.K.* decided to start a family together by planning the artificial insemination and birth of the children together. *Id.* at 877-878. Accordingly, the Appellate Court affirmed that a same-sex partner who had participated in the decision to create children could be liable for the support of those children after the parties separated. *Id.* at 878. The Appellate Court stated that in the absence of legislative action, it was creating a support obligation for the same-sex parent. *Id.* Thus, the facts of *L.S.K.* establish that the liability for child support was based not on *in loco parentis* status but the parties' joint decision to start a family.

Unlike *Hamilton* and *L.S.K.*, Stepfather never held himself out as the children's biological father. Stepfather did not participate in the decision of creating the children or planning the birth of the children together with Mother. The children were born before Mother and Stepfather married. As such, Stepfather entered into a relationship with Mother where the children already existed. When Stepfather married Mother in 2006, there was a Serbian support

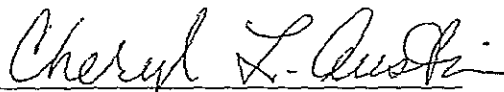
order in effect against Biological Father. Mother did not pursue support because Biological Father is an indigent person who lives 5,000 miles away. See Mother's Brief, 5/7/13, at 6. Furthermore, Stepfather never prevented Mother or the children from contacting Biological Father. In addition, Stepfather did not sign an acknowledgment of paternity nor did he agree to financially support the children.

The purpose of this Court's Interim Order, awarding Stepfather shared custodial rights, was to enforce the parties' prior, non-court ordered agreement of shared custody as well as the children's expressed preference, not to create a new class of support obligors, which is contrary to established Pennsylvania law. Therefore, this Court did not err in ruling that Stepfather has no legal duty to contribute to the children's support.

CONCLUSION

Based on the reasons above, the undersigned respectfully requests that the Court's Order dated May 22, 2013 be AFFIRMED.

BY THE COURT,


CHERYL L. AUSTIN J.

Copy of the above Order sent to the following on 7/9/13

By Interoffice:

Court Administration

DRO

By First-Class Mail:

Joanne E. Kleiner, Esquire

Irena Shiloh, Esquire, Pro Se


Judicial Secretary