

**[J-10-2023] [MO: Todd, C.J.]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

IN RE: ADOPTION OF: M.E.L., A MINOR : No. 109 MAP 2022  
: :  
: Appeal from the Order of the  
APPEAL OF: D.D.L., FATHER : Superior Court dated September 9,  
: 2022 at No. 479 MDA 2022 Vacating  
: the Decree of the York County Court  
: of Common Pleas, Orphans' Court,  
: dated February 22, 2022, at No.  
: 2021-0212a and Remanding.  
: :  
: ARGUED: March 8, 2023

**CONCURRING AND DISSENTING OPINION**

**JUSTICE WECHT**

**DECIDED: July 19, 2023**

The Adoption Act opens with two broad premises: “[a]ny individual may be adopted,”<sup>1</sup> and “[a]ny individual may become an adopting parent.”<sup>2</sup> In the provisions that follow, however, the Adoption Act imposes “exacting substantive and procedural requirements” that limit “a petitioner’s eligibility to finalize an adoption.”<sup>3</sup> The requirements “serve the critical broadscale function of scrutinizing the safety, wellbeing, and viability of the resulting court-sanctioned, permanent parental relationship.”<sup>4</sup>

The General Assembly could have left it at that: meet the requirements to adopt or the adoption cannot proceed. But it did not. Instead, in Section 2901,<sup>5</sup> the General

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<sup>1</sup> 23 Pa.C.S. § 2311.

<sup>2</sup> *Id.* § 2312.

<sup>3</sup> *Int. of K.N.L.*, 284 A.3d 121, 139-40 (Pa. 2022).

<sup>4</sup> *Id.* at 139.

<sup>5</sup> 23 Pa.C.S. § 2901.

Assembly provided trial courts with discretion to grant adoptions that do not conform to the statute's exacting requirements. For instance, one of the Adoption Act's legal requirements is Section 2711(d)'s relinquishment requirement.<sup>6</sup> Ordinarily, a parent consenting to adoption of her child by another individual must agree to relinquish her own parental rights to the child. The Act contains one stated exception to this relinquishment requirement. Under Section 2903, if the prospective adoptive parent is the parent's spouse, the parent-child relationship between the parent and child remains intact after the spouse's adoption of the child.<sup>7</sup> But, what if the parties seeking an adoption are an unmarried couple comprised of the child's legal parent and that parent's long-term partner? Section 2901 provides trial courts with marching orders in such situations. If the legal requirements of the Act are satisfied, the court may enter an adoption decree. If the legal requirements of the Act are not met, the trial court shall not enter the decree, "[u]nless the court *for cause shown* determines otherwise."<sup>8</sup>

In its attempt to effectuate what it discerns to be a legislative preference for formally married couples, the Majority interprets Section 2903 as a "spousal requirement" rather than as an exception to the relinquishment requirement.<sup>9</sup> It then creates a two-part framework that all but forecloses an adoption by a parent's partner if the couple chooses not to marry.<sup>10</sup> In attempting to honor what it perceives as the implicit intent behind Section 2903, the Majority disregards the explicit words of Section 2901.

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<sup>6</sup> 23 Pa.C.S. § 2711(d).

<sup>7</sup> *Id.* § 2903 ("Whenever a parent consents to the adoption of his child by his spouse, the parent-child relationship between him and his child shall remain whether or not he is one of the petitioners in the adoption proceeding.").

<sup>8</sup> *Id.* § 2901 (emphasis added).

<sup>9</sup> Maj. Op. at 16.

<sup>10</sup> *Id.* at 15.

Section 2901 does not invite courts to cast aside the Act's requirements with reckless abandon. Yet, as written, Section 2901 manifests the General Assembly's express blessing to allow a trial court, interacting with the parties on the front lines, to use its measured discretion to override the Adoption Act's legal requirements in a particular case upon a showing of cause. This Court already has held that it is "indeed, possible for parties to waive the relinquishment requirement under Section 2901 upon a showing of cause. . . ." <sup>11</sup> Thus, while I concur in the Majority's decision to affirm the Superior Court's order vacating the decree that terminated D.D.L. ("Father")'s parental rights and remanding for further proceedings, <sup>12</sup> I dissent from the Majority's analysis.

The subject of the instant case, M.E.L. ("Child"), was on the verge of turning six years old at the time of the hearing before the trial court. Child and C.J. ("Mother") have lived with Mother's partner, T.V. ("Partner"), since Child was two years old. Mother and Partner are raising Child alongside Partner's older child from a previous relationship and a younger child who was born to Mother and Partner. Mother and Partner have not married, but the adults and children consider themselves to be, and operate on a daily basis as, a unified and loving family.

While Partner parents Child daily, Partner is not Child's only paternal figure. Child's legal and biological father is Father. Child and Father used to have a relationship after Mother and Father separated and divorced. When Child was age three and a half, Father discontinued that relationship, signed an agreement giving Mother full custody of Child, and disappeared from Child's life. Father's parents ("Paternal Grandparents") have

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<sup>11</sup> *In re Adoption of M.R.D.*, 145 A.3d 1117, 1127 (Pa. 2016) (citing *In re Adoption of R.B.F.*, 803 A.2d 1195, 1203 (Pa. 2002)).

<sup>12</sup> The Majority describes the Superior Court's opinion as unanimous. Maj. Op. at 7. It was unanimous as to the disposition, but without elaboration Judge Dan Pellegrini concurred only in the result.

regular contact with Child through an informal arrangement with Mother, but Father does not. Nor does Father support Child financially (or in any other manner).

Averring that Partner is a father to Child for all practical and emotional purposes, Mother and Partner filed two correlating petitions with the objective of creating a legal tether between Child and Partner: a termination of parental rights (“TPR”) petition and an adoption petition. In the TPR petition, Mother and Partner sought to involuntarily terminate Father’s parental rights to Child. In the adoption petition, Mother and Partner petitioned the court to permit Partner’s adoption of Child while allowing Mother to retain her parental rights.<sup>13</sup>

Although they are separate petitions with distinct statutory requirements, the TPR petition and the adoption petition necessarily are intertwined. The Adoption Act provides a mechanism for one parent to petition to terminate involuntarily the parental rights of the child’s other parent who, “by choice or neglect . . . has failed to meet the continuing needs of the child.”<sup>14</sup> It is axiomatic that a TPR has “significant and permanent consequences for both the parent and child.”<sup>15</sup> Unlike a custody order, which is subject to modification when it meets the best interest of the child, an order severing parental rights is final. It is, in effect, the “nuclear option.”<sup>16</sup>

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<sup>13</sup> Alongside the TPR petition, Mother and Partner also filed a report indicating Partner’s intention to adopt Child pursuant to 23 Pa.C.S. § 2531. Of the three filings, only the TPR petition appears in the certified record before us.

<sup>14</sup> *In re B.E.*, 377 A.2d 153, 156 (Pa. 1977); *see also* 23 Pa.C.S. § 2511.

<sup>15</sup> *In re Adoption of L.A.K.*, 265 A.3d 580, 591 (Pa. 2021).

<sup>16</sup> *In re Adoption of C.M.*, 255 A.3d 343, 376 (Pa. 2021) (Wecht, J., concurring and dissenting).

A TPR petition filed by one parent against the other is an extreme measure that cannot, and should not, ever be used “to punish an ineffective or negligent parent.”<sup>17</sup> Instead, a parent-filed TPR petition is a means to a singular end: the establishment of a “new parent-child relationship” between a prospective adoptive parent and a child.<sup>18</sup> A TPR decree eliminates the need for the non-petitioning parent’s consent to adoption<sup>19</sup> and protects “the integrity and stability of the new family unit,” which is comprised of the child, the petitioning parent, and the prospective adoptive parent.<sup>20</sup>

The Adoption Act requires a parent who seeks an involuntary TPR against the other parent to attest that he or she will assume custody until such time as the child is adopted.<sup>21</sup> For her TPR claim to be “cognizable,” the petitioning parent must demonstrate, that “an adoption of the child is anticipated.”<sup>22</sup> Because the sole legislatively recognized purpose of a parent’s TPR petition against the other parent is to clear the path for creation of a new family unit with legal ties between a prospective adoptive parent and child,<sup>23</sup> the parent-petitioner must demonstrate, as part of a cognizable TPR proceeding,

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<sup>17</sup> *B.E.*, 377 A.2d at 156. See also *C.M.*, 255 A.3d at 376 (Wecht, J., concurring and dissenting) (condemning the weaponization of TPRs “as implements in order to lever advantage in custody, to stiff-arm a neglectful father or mother, or to punish an inattentive parent who belatedly seeks to reconnect with a child”).

<sup>18</sup> *B.E.*, 377 A.2d at 156.

<sup>19</sup> Among the many ways that TPR eviscerates the ties between a parent and child is by “extinguish[ing]” the parent’s “power” or “right” to object to, or even to “receive notice of,” adoption proceedings. 23 Pa.C.S. § 2521(a).

<sup>20</sup> *M.R.D.*, 145 A.3d at 1128.

<sup>21</sup> 23 Pa.C.S. § 2512(b)(2).

<sup>22</sup> *M.R.D.*, 145 A.3d at 1120.

<sup>23</sup> The Adoption Act contains one exception to this purpose. A petitioner whose child was conceived as the result of rape or incest is not “required to aver that an adoption is presently contemplated nor that a person with a present intention to adopt exists.” 23 Pa.C.S. § 2512(b)(3).

that the desired adoption will be able to proceed in accordance with the statutory requirements of the Adoption Act.<sup>24</sup>

One statutory requirement that comes into play in private adoptions is Section 2711, entitled “Consents necessary to adoption.”<sup>25</sup> Subsection 2711(a)(3) states that, except as otherwise provided in the Adoption Act, consent to an adoption is required of the “parents or surviving parent of an adoptee who has not reached the age of 18 years.”<sup>26</sup> This consent must be attached as an exhibit to the adoption petition.<sup>27</sup> In the consent, the parent must aver that he or she intends “to permanently give up all rights to this child.”<sup>28</sup> This requirement obviously poses a problem for a legal parent who wishes to create a new family unit with a partner. The goal in such a scenario is to connect the partner and child legally, not to destroy the existing connection between the legal parent and child.

To that end, the General Assembly created a path for a parent’s spouse to adopt the parent’s child while the parent maintains his or her parental rights. Section 2903, entitled “Retention of parental status,” provides that “[w]henver a parent consents to the adoption of his child by his spouse, the parent-child relationship between him and his

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<sup>24</sup> *M.R.D.*, 145 A.3d at 1120.

<sup>25</sup> 23 Pa.C.S. § 2711.

<sup>26</sup> *Id.* § 2711(a)(3); *see also id.* § 2713 (providing the trial court with discretion to dispense with consents other than that of the adoptee in limited circumstances not present here).

<sup>27</sup> *Id.* § 2701(7) (requiring that “all consents required by section 2711 . . . are attached as exhibits” or that the petition set forth “the basis upon which such consents are not required”); *see also id.* § 2702(1) (mandating that the petitioner attach to the adoption petition the consents required by section 2711).

<sup>28</sup> *Id.* § 2711(d)(1).

child shall remain whether or not he is one of the petitioners in the adoption proceeding.”<sup>29</sup> Because Section 2903 applies only to an adoption by a “spouse,” the intended adoptive parent must be married to the child’s parent.<sup>30</sup>

Referring to Section 2903 as the “spousal requirement”—a characterization that, as I will explain, is a misnomer—the Majority asserts that “the General Assembly did not intend” for such requirement “to be merely aspirational.”<sup>31</sup> Issues of nomenclature aside, I have no reason to quarrel with this assertion. By providing for automatic retention of the legal parent’s rights, the plain language of Section 2903 reveals the General Assembly’s intent to facilitate the creation of and legal recognition of families through remarriage and adoption with as few statutory hurdles as possible.

That the General Assembly intended to facilitate stepparent adoptions is not dispositive, as the General Assembly also afforded trial courts the discretion to permit an adoption to proceed even if the adoption is not pursued by formally married couples. Section 2901, which is entitled “Time of entry of decree of adoption,” provides as follows:

Unless the court *for cause shown* determines otherwise, no decree of adoption shall be entered unless the natural parent or parents’ rights have been terminated, the investigation required by section 2535 (relating to investigation) has been completed, the report of the intermediary has been filed pursuant to section 2533 (relating to report of intermediary) and all other legal requirements have been met. If all legal requirements have been met, the court may enter a decree of adoption at any time.<sup>32</sup>

Let’s break down this provision one component at a time. Section 2901 allows a trial court to enter a decree of adoption at any time, provided that “all legal requirements are met.” Section 2901 also addresses the inverse: it prohibits a trial court from entering

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<sup>29</sup> *Id.* § 2903.

<sup>30</sup> *R.B.F.*, 803 A.2d at 1199-1200.

<sup>31</sup> *Maj. Op.* at 16.

<sup>32</sup> 23 Pa.C.S. § 2901 (emphasis added).

a decree of adoption if the proposed adoption does not meet “all legal requirements.” The General Assembly expressly listed three of the legal requirements—termination of the rights of the child’s parent or parents; a completed Section 2535 investigation; and a filed Section 2533 report of intermediary—and concluded with a catchall—“all other legal requirements.” The only circumstance in which the court may enter a decree of adoption that does not meet the referenced requirements is when “the court for cause shown determines otherwise.”

The Majority interprets Section 2901 to be “consistent” with a two-step process that it imposes today.<sup>33</sup> First, the Majority says, a party must “show why he or she *cannot* meet the statutory requirements for adoption.”<sup>34</sup> Notably, the statute itself does not contain this obligation. The General Assembly did not mandate any prior demonstration of incapacity to satisfy the statutory requirements as a condition precedent to invocation of the “for cause” provision. The statutory requirement in this instance, the Majority maintains, is the “spousal requirement.”<sup>35</sup> By “cannot,” the Majority means that the party is “unable,” emphasizing that the same-sex partners in *R.B.F.* and the mother and grandfather in *M.R.D.* were “legally prohibited from marrying.”<sup>36</sup> “By contrast,” the Majority says, Mother and Partner are simply unwilling to marry; no “legal impediment” stands in the way of their matrimony.<sup>37</sup>

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<sup>33</sup> Maj. Op. at 15. The Majority relies upon this portion of Section 2901: “[u]nless the court for cause shown determines otherwise, no decree of adoption shall be entered *unless . . . all other legal requirements have been met.*” *Id.* (citing 23 Pa.C.S. § 2901) (emphasis in Maj. Op.).

<sup>34</sup> *Id.* (emphasis added).

<sup>35</sup> *Id.* at 16.

<sup>36</sup> *Id.* at 15.

<sup>37</sup> *Id.* at 15-16.



Under the Majority’s rubric, it is not until the second step, after a party shows that he or she cannot meet the legal requirement, that such party “may *then* appeal to the court’s discretion by demonstrating with clear and convincing evidence why the purpose of Section 2711(d) [*i.e.*, relinquishment] would nevertheless be fulfilled or unnecessary in their case, despite the parties’ inability to fulfill the statutory requirements.”<sup>38</sup>

I am unconvinced that Section 2901—either the portion quoted by the Majority or the section in its entirety—justifies the Majority’s two-step process. First, the prescribed procedure intermingles the legal requirements at issue. There is no “spousal requirement.” The Adoption Act does not require parties to be married (or even coupled) in order to adopt. “Any individual may become an adopting parent.”<sup>39</sup> The specific legal requirement that Mother failed to fulfill is submission of a consent to adoption that relinquishes her parental rights.<sup>40</sup> Section 2903 operates as an automatic *exception* to Section 2711’s parental consent and relinquishment requirement.<sup>41</sup> It is one of the ways that the Adoption Act confers a “benefit” to certain prospective adoptive parents based upon their relationships to the children.<sup>42</sup> That married stepparents get the benefit of a

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<sup>38</sup> *Id.* (emphasis in Maj. Op.).

<sup>39</sup> 23 Pa.C.S. § 2312; *see also R.B.F.*, 803 A.2d at 1202.

<sup>40</sup> 23 Pa.C.S. § 2711(a)(3), (d)(1).

<sup>41</sup> *See R.B.F.*, 803 A.2d at 1199 (“An exception to this relinquishment provision appears at Section 2903 . . . .”); *M.R.D.*, 145 A.3d at 1120-21 (“An exception to this relinquishment requirement exists . . . in second-parent adoption cases where the adopting party is the spouse of the parent seeking termination—that is, in the context of a stepparent adoption.”). Section 2903 does not prohibit adoption by unmarried individuals. It is, however, the only express exception to Section 2711’s relinquishment requirement.

<sup>42</sup> *See In re Adoption of Hess*, 608 A.2d 10, 13 (Pa. 1992). Another such “benefit” is eliminating Section 2531’s requirement to file a Report of Intention to Adopt. *See* 23 Pa.C.S. § 2531(c); *see also Hess*, 608 A.2d at 13 (construing the legislative choice to relieve parents, grandparents, stepparents, whole or half-siblings, or aunts or uncles by (continued...))

simplified path to adoption in Section 2903 does not inherently prohibit others from invoking Section 2901 to demonstrate cause to excuse relinquishment under Section 2711.

Second, as noted above, by insisting that petitioners prove that it is legally impossible for them to meet a statutory requirement for adoption, the Majority is foisting a burden onto petitioners that the statutory language does not expressly contain. The court's authority to determine whether there was "cause shown" relates to its evaluation of the reason offered by the party as to why the requirement was not met, not just to the ultimate decision of whether to grant the petition. Regardless, nowhere does the statute state that such evaluation occurs *only after* other exceptions are demonstrated to be unavailable or impossible to meet. The Majority's strict use of "cannot" in its two-step formulation restricts the trial court from considering whether the petitioner had *cause* to deviate from the legal requirements.

When interpreting a statute, our job is to ascertain and effectuate the General Assembly's intent.<sup>43</sup> Our search for the General Assembly's intent "begins and ends with the plain language of the statute if that statute is unambiguous."<sup>44</sup> Perhaps the Majority is correct that the General Assembly did not intend to let the "cause shown" exception in Section 2901 override the requirement that a parent must relinquish her rights except if her spouse is the prospective adoptive parent. But the words that the General Assembly

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blood, marriage, or adoption of filing a Report of Intention to Adopt as the General Assembly's conference of a benefit upon the named individuals based upon their relationship to the child). Eliminating the requirement to file a Report of Intention to Adopt also renders a stepparent exempt from the investigation requirement. See 23 Pa.C.S. § 2535(a).

<sup>43</sup> 1 Pa.C.S. § 1921(a).

<sup>44</sup> *Pa. Rest. & Lodging Ass'n v. City of Pittsburgh*, 211 A.3d 810, 822 (Pa. 2019).

chose do not align with such supposed intent, and we are not permitted to disregard the letter of the Adoption Act under the pretext of pursuing its spirit.<sup>45</sup>

“It is not for the judiciary to improve upon the legislative branch’s efforts in contravention of the law’s plain language.”<sup>46</sup> The General Assembly is and was perfectly capable of designing a statutory scheme that limited the cause shown exception to specified circumstances. It did not do so. Instead, the General Assembly clearly and unambiguously used broad, open-ended language in Section 2901 to vest the trial court with discretion to deviate from statutory requirements for cause shown. The legal requirements excusable by Section 2901 extend beyond the parental consent and relinquishment at issue in this case.<sup>47</sup> The General Assembly plainly intended each requirement to serve a purpose that is more than “aspirational.”<sup>48</sup> Yet, any of the statutory requirements may be excused “for cause shown.”

The General Assembly’s vesting of this discretion with trial courts to judge “cause shown” is congruent with the Adoption Act’s focus upon the best interest of the prospective adoptee.<sup>49</sup> In honoring the General Assembly’s preference for marriage, the

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<sup>45</sup> 1 Pa.C.S. § 1921(b).

<sup>46</sup> *Commonwealth v. Peck*, 242 A.3d 1274, 1288 (Pa. 2020) (Wecht, J., concurring).

<sup>47</sup> See *Int. of K.N.L.*, 284 A.3d at 139 (summarizing the statutory requirements regarding, *inter alia*, consents, reports, home studies, background checks, investigations, pleading specifications, exhibits, and hearing procedure).

<sup>48</sup> See Maj. Op. at 16.

<sup>49</sup> See *R.B.F.*, 803 A.2d at 1202 n.11 (determining that the trial court’s assessment of whether there is cause to dispense with a legal requirement overlaps with “an examination of the best interests of the child”); see also *Hess*, 608 A.2d at 13 (“At all stages of the proceedings, the best interest of the child is the paramount consideration.”); 23 Pa.C.S. § 2902(a) (“If satisfied that the statements made in the petition are true, *that the needs and welfare of the person proposed to be adopted will be promoted by the adoption* and that all requirements of this part have been met, the court shall enter a decree so finding.”) (emphasis added).

Majority ignores the General Assembly’s expression of flexibility in Section 2901 and significantly circumscribes the trial court’s ability to decide what is best for the proposed adoptee. Restricting Section 2901 only to petitioners who have a legal impediment to marriage seems to put the child’s best interest in the backseat, elevating instead the decision to marry (or not) as the paramount interest. In any event, while the General Assembly presumably is free to rewrite the statute to entrench such a restriction, we are not.

Prior to the General Assembly’s addition of Section 2901, adoption petitioners who did not present legally conforming adoption petitions had no recourse. In *E.M.A.*, an unmarried person filed a petition to adopt a child. The child’s father consented to the adoption but wished to retain his parental rights.<sup>50</sup> This Court declined to allow the adoption to proceed because the petitioner and the father were not married, describing the stepparent path in the predecessor to Section 2903 as an “exclusive intra-family provision legislatively reserved only for spouses of consenting parents.”<sup>51</sup> Permitting the petitioner to use Section 2903 to adopt without the father’s relinquishment of rights would create a judicial exception “where the Legislature did not see fit to create” one.<sup>52</sup>

Significantly, the version of the Adoption Act in effect when we decided *E.M.A.* did not contain a provision akin to the “for cause” mechanism in Section 2901. By the time we decided *R.B.F.*, our next case involving unmarried prospective adoptive parents, the statutory landscape was vastly different.

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<sup>50</sup> *In re Adoption of E.M.A.*, 409 A.2d 10 (Pa. 1979). The opinion in *E.M.A.* did not explore the nature of the relationship between the petitioner and the father, other than to note that the petitioner was not married to the father. See *id.* at 11.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

*R.B.F.* involved petitions to adopt filed by the same-sex partners of legal parents at a time when same-sex couples were prohibited from marrying each other in Pennsylvania.<sup>53</sup> Because the petitioners legally could not marry, the spousal exception to relinquishment in Section 2903 did not apply. Nevertheless, this Court held that Section 2903 was not the only mechanism in the Adoption Act that a petitioner could rely upon in order to excuse the parental relinquishment requirement.<sup>54</sup> Several years after *E.M.A.*, the General Assembly added Section 2901 to the Adoption Act. This Court interpreted Section 2901 as “afford[ing] the trial court discretion to decree the adoption without termination of the legal parent’s rights pursuant to Section 2711(d)” when “the requisite cause is demonstrated.”<sup>55</sup>

This Court rejected the notion that the trial court’s exercise of discretion would “open the door to unlimited adoptions by legally unrelated adults.”<sup>56</sup> Discretion was neither unreasonable nor unfettered, we reasoned, because it would be “confined by a finding of cause and a determination of the best interests of the child in each individual case” and subject to review for abuses.<sup>57</sup> This Court also denied that it was “creating a judicial exception” to the Act’s requirements; rather, the Court observed, it was “applying the plain meaning of the terms employed by the Legislature” in Section 2901.<sup>58</sup>

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<sup>53</sup> See 23 Pa.C.S. §§ 1102, 1704 (defining marriage in Pennsylvania as a civil contract between one man and one woman); *but see Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that same-sex couples may exercise the fundamental right to marry in all states).

<sup>54</sup> *R.B.F.*, 803 A.2d at 1201-02.

<sup>55</sup> *Id.* at 1202.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

Unlike today's Majority, which inaccurately pinpoints the statutory requirement as marriage, the *R.B.F.* Court recognized that the statutory requirement at issue was the relinquishment requirement in Section 2711(d).<sup>59</sup> *R.B.F.* held that Section 2901 gave the petitioners leeway to demonstrate cause as to why the petitioners were seeking an adoption without relinquishment of the legal parent's rights.

Nowhere in *R.B.F.* did this Court indicate in any way that the petitioners' inability to marry was an implicit antecedent and prerequisite to invocation of the cause shown provision in Section 2901. To the contrary, in *M.R.D.*, this Court explicitly recognized that the *R.B.F.* Court's "broad" interpretation of 2901 and its interplay with Section 2711 was *not* contingent upon the same-sex partners' legal inability to marry at the time.<sup>60</sup> We unambiguously declared that the partners' inability to marry "was not relevant to our decision other than in noting that the spousal exception obviously did not apply to them."<sup>61</sup>

It is hard to square *R.B.F.*'s reasoning with the Majority's holding today, particularly the first step of its Section 2901 framework. In its effort to disallow the exception from swallowing the rule, the Majority declares that only unmarried couples with a legal impediment to marriage can attempt to convince the trial court that they should be able

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<sup>59</sup> See *id.* ("When the requisite cause is demonstrated, Section 2901 affords the trial court discretion to decree the adoption without termination of the legal parent's rights pursuant to Section 2711(d)."); *id.* at 1203 (remanding for determination of "cause as to whether the purpose of Section 2711(d)'s relinquishment of parental rights requirement will be otherwise fulfilled or is unnecessary under the particular circumstances of each case."); *id.* at 1203 n.14 ("As we find that the Adoption Act provides Appellants an opportunity to establish cause why the legal parent need not relinquish parental rights . . .").

<sup>60</sup> *M.R.D.*, 145 A.3d at 1127 n.2 ("[A]lthough Justice Baer suggests that this Court's holding in *R.B.F.* was limited to adoption petitions filed by same-sex partners at a time when they could not marry, our decision in that case contains no such limitations.") (cleaned up).

<sup>61</sup> *Id.*

to adopt. In this Commonwealth, that category includes minors, most incompetent persons, people under the influence of drugs and alcohol when applying for a license, relatives within specified degrees of consanguinity, people without a marriage license, and people already married except in the case of presumed death.<sup>62</sup> Instead of allowing committed couples who do not marry by choice with this statutory opportunity to prove that there is cause to excuse the relinquishment requirement, the Majority interprets Sections 2901 and 2903 as affording the opportunity only to couples with a legal impediment to marriage. By subordinating Section 2901 to Section 2903, the Majority's interpretation distorts the intent of both of these statutory provisions.

The Majority's interpretation of Sections 2901 and 2903 also is incongruent with the rationale of *M.R.D.* as to the types of proceedings that carry a high risk of gamesmanship. In *M.R.D.*, this Court condemned the use of the TPR and adoption statutes as weapons to defeat custody actions. There, a mother filed a TPR petition after the children's absent father resurfaced. The mother sought to manufacture an adoption by the children's maternal grandfather so that the mother and grandfather could co-parent. This Court declined to allow the adoption to proceed, warning that such an unconventional adoption, *inter alia*, may "open the door for misuse of adoption proceedings by spiteful parents as a means to involuntarily terminate the rights of unwanted parents."<sup>63</sup>

Here, Mother and Partner, who stand in a "horizontal relationship, are equals as between each other, and are equals with respect to the child,"<sup>64</sup> seek to create a legally

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<sup>62</sup> See 23 Pa.C.S. §§ 1301(a), 1304, 1702; see also 18 Pa.C.S. § 4301 (criminalization of bigamy); 18 Pa.C.S. § 4302 (criminalization of incest).

<sup>63</sup> *M.R.D.*, 145 A.3d at 1129.

<sup>64</sup> *Id.* at 1128.

recognized parent-child relationship between Partner and Child. Despite the apparent legitimacy of Mother's and Partner's relationship, the Majority still insists that "allowing the adoption to proceed without first requiring Mother to demonstrate why she and Partner are unable to marry" would open the door to "spiteful parents seeking to terminate the rights of unwanted parents."<sup>65</sup> The Majority also expresses concern that permitting non-spouses to adopt would distort grandparents' custodial rights.<sup>66</sup>

I wholeheartedly agree with the Majority that we must protect against gamesmanship in TPR proceedings involving private family adoptions.<sup>67</sup> But unlike the tactic ventured by the mother-grandfather adopting duo in *M.R.D.*, there are no inherent unique complications that militate against allowing unmarried partners to invoke the cause shown provision in order to pursue adoption without the legal parent's relinquishment. It is of course possible that unmarried partners could misuse adoption proceedings together and participate in gamesmanship. So could people in a sham marriage. So could married couples who do not discover an interest in formalizing a stepparent/child relationship until the child's absent parent resurfaces. The risk of gamesmanship here is not so high that this Court can or should presume as a matter of law that the arrangement sought could never be legitimate. Instead, when deciding whether petitioners make a showing of cause sufficient to excuse the relinquishment requirement, trial courts should scrutinize each individual case for gamesmanship. Similarly, trial courts should examine the correlative impact upon grandparents' rights on a case-by-case basis.

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<sup>65</sup> Maj. Op. at 17.

<sup>66</sup> *Id.* (discussing 23 Pa.C.S. § 5326, which extinguishes grandparent custody rights after adoption except for adoption of the child by a stepparent, grandparent, or great-grandparent).

<sup>67</sup> See *infra* n. 72 and accompanying text.



In Section 2901, the General Assembly left “cause shown” undefined. In the absence of a statutory definition, this Court has directed petitioners to demonstrate that a legal requirement “will be otherwise fulfilled or is unnecessary under the particular circumstances of each case.”<sup>68</sup> Instead of categorically denying unmarried couples the ability to protect the child’s relationship with the parent’s partner by adoption, I would do as the General Assembly intended: I would permit trial courts to scrutinize each non-conforming adoption case for a sufficient showing of cause. Petitioners must make this showing by clear and convincing evidence.<sup>69</sup> Adoption is a statutory right, and “the parent seeking termination must strictly comply with all pertinent provisions of the Adoption Act in order for the adoption to be valid.”<sup>70</sup> Thus, the trial court’s decision to approve a non-conforming adoption should not be undertaken lightly or indiscriminately. Section 2901 is a rare exception, not the rule or a gaping loophole. It is no guarantee of approval of a non-conforming adoption.

Of course, trial courts must have some parameters to guide their discretion. In my view, trial courts should consider the following non-exhaustive list when scrutinizing a case for cause. First, the court should examine the circumstances of the case carefully for gamesmanship. As the Majority notes, this Court has refused to allow a parent to misuse TPR and adoption proceedings to eliminate an undesired parent from a child’s life. Trial courts should be diligent in ensuring that a parent is not “pull[ing] the TPR arrow out of the quiver” to stave off a custody dispute.<sup>71</sup> Custody disputes belong in custody court. I have warned repeatedly concerning the perils of gamesmanship in TPR

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<sup>68</sup> *R.B.F.*, 803 A.2d at 1203.

<sup>69</sup> *M.R.D.*, 145 A.3d at 1127.

<sup>70</sup> *Id.* at 1120.

<sup>71</sup> *Id.* at 1134 (Wecht, J., concurring).

proceedings.<sup>72</sup> Given the finality and severity of a TPR decree, it is imperative that trial courts scrutinize each case carefully to ascertain whether the parent and partner are seeking adoption in order to formalize and protect the relationship between partner and child, or whether they are seeking adoption to eliminate the other parent from the child's life.<sup>73</sup>

Another factor to consider is the relationship between the child being adopted and the family of the parent whose rights would be terminated in order to clear the path for the adoption.<sup>74</sup> In some cases, grandparents will not have a meaningful relationship with a child. In others, adoption by an unmarried partner may jeopardize a child's connection to grandparents. Trial courts should weigh the impact upon grandparents' legal ability to seek custody in each case.

Finally, in light of the permanence of severing a parent's parental rights and the intended permanence of adoption, unmarried petitioners should be prepared to demonstrate their understanding of the gravity of what they are asking the court to do,

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<sup>72</sup> See *M.R.D.*, 145 A.3d at 1133-35 (Wecht, J., concurring); *C.M.*, 255 A.3d at 372-383 (Wecht, J., concurring and dissenting).

<sup>73</sup> This case differs from *M.R.D.* in several particulars. Here, Mother and Partner are in a long-term relationship, live as partners, and parent each other's children and their own joint biological child. There was no impending custody action by Father; he had agreed to yield his own custodial rights years before. Nor were the TPR petition and adoption petition filed in response to a custody petition filed by Paternal Grandparents. It was the other way around. Paternal Grandparents filed their custody petition only after Mother and Partner filed the TPR and adoption petitions.

<sup>74</sup> In this case, the orphans' court took a myopic view of the proceedings, dismissing Father's concerns about the impact upon Paternal Grandparents' ability to seek custody as being outside the scope of the proceeding. Tr. Ct. Op., 3/31/2022, at 5 (unnumbered). From my perspective, discerning the importance of Child's relationship with Paternal Grandparents could be a proper part of the needs and welfare inquiry under Section 2511(b) of the Adoption Act involving the TPR petition. But it also plays into the cause shown provision, because, if Partner adopts Child, Paternal Grandparents will lose their right to pursue custodial rights under Section 5326.

and to present evidence of their commitment to each other and to the child. The petitioners should present information sufficient for the trial court to discern: the nature of the relationship between the petitioners; the stability and longevity of the relationship; the petitioners' living and parenting arrangements; and the degree to which the petitioners' lives are intertwined. The trial court should consider whether the petitioners are operating for practical and emotional purposes as an intact family, and whether adoption of the child by the legal parent's partner is the missing piece that would formalize and protect the child's relationship with the parent's partner, provide security for the child, and complete the family.

Finally, although I dissent today because I disagree with the Majority's two-step framework and its subordination of Section 2901 to Section 2903, I agree with the Majority's assessment that the orphans' court "precipitously terminated Father's rights."<sup>75</sup> It is the petitioners' burden, as part of a cognizable TPR petition, to prove that adoption of the child is "anticipated" and that the petitioners can "strictly comply with all pertinent provisions of the Adoption Act."<sup>76</sup> This is true even if the opposing party does not appear for the hearing.

Father exercised his right to appeal from the termination decree. He correctly asserted that the orphans' court entered the termination decree without examining whether Mother and Partner proved that Partner's proposed adoption of Child could proceed in accordance with the statutory requirements because they were not married. The orphans' court, which already had announced its intention to grant the adoption decree,<sup>77</sup> whipsawed Father by accusing him of waging an improper "attack" upon the

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<sup>75</sup> Maj. Op. at 18.

<sup>76</sup> *M.R.D.*, 145 A.3d at 1120; *see also* 23 Pa.C.S. § 2512(b).

<sup>77</sup> N.T., 2/22/2022, at 28.

adoption.<sup>78</sup> The court insisted that it made a point of not finalizing the adoption in order to avoid such attacks, and it refused to address Father's argument that the orphans' court erroneously terminated Father's rights in service of an invalid adoption.<sup>79</sup> The orphans' court should have been more attentive to the statutory requirements in the first instance and should not have summarily rebuffed Father's valid arguments on appeal.

Because the orphans' court erred by terminating Father's parental rights without Mother's and Partner's demonstration that Partner's proposed adoption of Child would satisfy the requirements of the Adoption Act, including a showing of cause of why Partner should be able to adopt Child without Mother's relinquishment of her parental rights, I agree that we must affirm the Superior Court's order vacating the termination decree and remanding for further proceedings regarding cause. I respectfully dissent from the Majority's interpretation of Section 2901. My disagreement with the Majority centers upon the Majority's disregard of the plain language of that provision. The General Assembly intended both Section 2901 *and* 2903 to have meaning. In the Majority's effort to protect the implied intent of Section 2903, the Majority has ignored the General Assembly's express intent stated in Section 2901. I would honor the General Assembly's intent by instructing the orphans' court to conduct further proceedings with the requisite rigor in order to determine whether Mother and Partner have demonstrated cause to disregard the requirement that Mother relinquish her parental rights.

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<sup>78</sup> Tr. Ct. Op., 3/31/2022, at 4 (unnumbered).

<sup>79</sup> *Id.*