

# The Changing Face of Families: In the Place of Primary Parenthood

by Angela Dunne and Angela Terry

*Editorial Note: Angela Dunne served as counsel for the appellant in Russell v. Bridgens and as counsel for the appellee in Latham v. Scwerdtfeger, referenced below.*

The face of families has been changing in Nebraska and across the country over the last decade. With the United States Supreme Court's recent focus on DOMA legislation and the rights of same-sex persons to marry, it appears that the legal definitions of families may be changing in the future as well. In Nebraska, same-sex partners may not marry nor may a same-sex partner adopt their partner's biological child or join in a joint adoption of a child. However, the conversation regarding these types of parenting relationships is taking place in our state, as this year the Nebraska State Legislature considered Legislative Bill 380, which provided for the adoption by two adult persons jointly.

Not surprisingly, over the last decade, we have seen a rise in same-sex custody disputes and the Nebraska Supreme Court has looked at these rights in particular. We offer this article as a practical guide to understanding the rights of non-biological,

non-adoptive parents, how to advise non-biological, non-adoptive parents under the law and advice for litigating these same-sex custody cases.

## Establishing Custody

In Nebraska, various statutes establish a means for seeking custody and visitation of a minor child. These statutes include dissolution actions pursuant to Neb.Rev.Stat. §§ 42-341-381 (Reissue 2008 & Cum.Supp.2010); paternity actions pursuant to Neb.Rev.Stat. §§43-1401-43-1418 (Reissue 2008); juvenile proceedings pursuant to Neb.Rev.Stat. §§43-245 to 43-2,130 (Reissue 2008 & Sup..2009); guardianship proceedings pursuant to Neb.Rev.Stat. §§30-2601 to 30-2616 (Reissue 2008 & Cum.Supp.2010); adoption proceedings pursuant to Neb.Rev. Stat. §§43-010 to 43-165 (Reissue 2008 & Cum.Supp.2010); and actions under the Uniform Child Custody Jurisdiction and Enforcement Act, Neb.Rev.Stat. §§43-1226 to 43-1266 (Reissue 2008 & Cum.Supp.2010).<sup>1</sup>

Not surprisingly, our state's statutory scheme fails to con-



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template all potential scenarios which may arise in the ever changing and evolving notion of familial relations.<sup>2</sup> Thus, various equitable doctrines have been created by courts to address the child's best interest when a non-biological, non-adoptive parent seeks custody and/or visitation with a minor child.<sup>3</sup> In 2011, the Nebraska Supreme Court specifically looked at the issue of a non-biological, non-adoptive person's standing to seek custody, without an underlying statutory authority. In *Latham v. Schwerdtfeger*, Schwerdtfeger gave birth to a child in 2001 via in vitro fertilization. Schwerdtfeger and the child lived with Latham, a non-biological, non-adoptive parent, until 2006, when the parties separated. Latham continued some level of visitation with the minor child from 2006 until 2009, after which Latham's visitation was reduced.<sup>4</sup> In that case, the Nebraska Supreme Court concluded that Latham may bring an action for custody and visitation of the minor child under the common law doctrine of *in loco parentis*. An action to establish custody and support was filed in Nebraska in 2009.

### The *In Loco Parentis* Doctrine

In Nebraska, the common law doctrine of *in loco parentis* affords rights of custody and visitation to nonparents when the exercise of such rights is in the best interest of the minor child.

The Nebraska Supreme Court has defined the *in loco parentis* doctrine as, "A person standing *in loco parentis* to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligation incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent."<sup>5</sup>

However, the *in loco parentis* basis for standing recognizes that the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child's best interest.<sup>6</sup> Thus, while it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong psychological bonds with a person, who although not a biological parent, has lived with the child, provided care, nurture, and affection, assuming in the child's eyes a stature like that of a parent.<sup>7</sup>

The purpose of the doctrine is to ensure that actions are brought only by people with substantial interests. Accordingly, the doctrine must be flexibly applied dependent on the particular facts of each case.<sup>8</sup> When a genuine relationship exists, Nebraska courts have granted standing to the *in loco parentis* parent because the primary consideration when determining the standing of a non-parent seeking custody or visitation with a minor child is the best interests of that child.

The analysis the Nebraska Supreme Court focuses on when

making an *in loco parentis* determination is whether the person seeking *in loco parentis* status assumed the obligations incident to a parental relationship.<sup>9</sup> To determine what obligations are incident to a parental relationship, the Nebraska Supreme Court has turned to the Nebraska Parenting Act for guidance and clarity.<sup>10</sup>

The Parenting Act articulates the rights, duties, and liabilities as a function of the parenting relationship. The Parenting Act defines parenting functions as:

(17) Parenting functions means those aspects of the relationship in which a parent or person in the parenting role makes fundamental decisions and performs fundamental functions necessary for the care and development of a child. Parenting functions include, but are not limited to: (a) Maintaining a safe, stable, consistent, and nurturing relationship with the child; (b) Attending to the ongoing developmental needs of the child, including feeding, clothing, physical care and grooming, health and medical needs, emotional stability, supervision, and appropriate conflict resolution skills and engaging in other activities appropriate to the healthy development of the child within the social and economic circumstances of the family; (c) Attending to adequate education for the child, including remedial or other special education essential to the best interests of the child; (d) Assisting the child in maintaining a safe, positive, and appropriate relationship with each parent and other family members, including establishing and maintaining the authority and responsibilities of each party with respect to the child and honoring the parenting plan duties and responsibilities; (e) Minimizing the child's exposure to harmful parental conflict; (f) Assisting the child in developing skills to maintain safe, positive, and appropriate interpersonal relationships; and (g) Exercising appropriate support for social, academic, athletic, or other special interests and abilities of the child within the social and economic circumstances of the family.<sup>11</sup>

In Nebraska, the *in loco parentis* status has most commonly been applied to allow an ex-steparent visitation with his or her ex-stepchild. In *Hickenbottom v. Hickenbottom*, the Nebraska Supreme Court applied the *in loco parentis* doctrine to determine the visitation rights of a stepparent to a child whom the stepparent had raised since the child was two years old.<sup>12</sup> The court held that rather than decide rights to a child by blood relations, it is often better for the child to be able to continue the relationship with a party when examined in the light of what is best for the child's continued growth and happiness.<sup>13</sup> The court specifically stated:

Visitation is not solely for the benefit of the adult visitor but is aimed at fulfilling what many conceive to be a vital, or at least wholesome contribution to the child's emotional well-being by permitting partial continuation of an earlier established close relationship. Usually such an

affiliation is with a natural parent. But it need not be. Those involved with domestic relations problems frequently see situations where one who is not the natural parent is thrust into a parent-figure role, and through superior and faithful performance produces a warm and deeply emotional attachment.<sup>14</sup>

The Court went on to state that when an ex-stepparent establishes that during the marriage, he or she acted as a parent to the stepchild, the doctrine of *in loco parentis*, although not enumerated in the statutes, is a proper consideration when determining stepparent visitation with due consideration to the best interest of the child.<sup>15</sup> As such, the court found that acting pursuant to Neb.Rev.Stat. §42-364 (Reissue 1998), the court has jurisdiction to grant rights of visitation to an ex-stepparent when that ex-stepparent establishes that during the marriage, he or she acted as a parent to the stepchild.<sup>16</sup>

In *Weinand v. Weinand*, the wife gave birth to a child, who was not the biological child of her husband, however the husband raised the minor child for two years.<sup>17</sup> Upon their separation, the wife lived with the biological father of the minor child, who became a father figure and contributed to the minor child's support.<sup>18</sup> In *Weinard*, the Supreme Court found that the ex-stepparent did not stand *in loco parentis* to the child when he had neither the legal means nor the intention of taking the place of the lawful father in carrying out the day-to-day functions of a father as described in the Parenting Act.<sup>19</sup>

Similarly to ex-stepparents, the *in loco parentis* status has also been applied to grandparents. In the case of State on behalf of *Combs v. O'Neal*, the Nebraska Court of Appeals affirmed an Order granting custody of a minor child to the grandmother based on the doctrine of *in loco parentis*, notwithstanding a claim of parental preference by the biological father.<sup>20</sup>

### Application of the *In Loco Parentis* Doctrine in Same-Sex Custody Cases

In 2002, in the case of *Russell v. Bridgens*, the Nebraska Supreme Court looked at the enforceability of a same-sex adoption entered in another state.<sup>21</sup> Bridgens adopted the minor child in Pennsylvania in September, 1996 and both Bridgens and Russell adopted the same minor child in a "coparent adoption" in December, 1997. They lived together and raised the child until 1999. At the time of separation, Bridgens was stationed in Germany and Russell returned to the United States with the minor child. An action to establish custody and support was filed in Nebraska in 2000.

The Court concluded that a judgment entered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment. Therefore, it is established that

Nebraska courts must treat same-sex adoptions in sister states as valid and in the event of a separation between the parents, a custody determination will need to be made.

In a concurring opinion, Justice Gerrard specifically addressed, for the first time in Nebraska, the applicability of the *in loco parentis* doctrine in a same-sex custody dispute where a valid order granting parental rights does not exist, explaining, "Russell can maintain her petition regardless of whether the Pennsylvania adoption is given full faith and credit, if Russell can demonstrate an *in loco parentis* relationship with the minor child."<sup>22</sup>

In *Latham v. Schwerdtfeger*, the Court reiterated that a non-biological, non-adoptive person has standing based on the doctrine of *in loco parentis* which affords the opportunity to fully litigate the issue of custody and visitation.<sup>23</sup> The litigation then focuses on whether or not the non-biological, non-adoptive parent has put himself or herself in the situation of a lawful parent by assuming the obligation incident to the parental relationship.

### Practical Considerations

When meeting with a non-biological, non-adoptive parent who is currently parenting a child either before or after separation from the legal parent, or with a person who intends to be a parent to a child in the non-biological, non-adoptive role, it is crucial to obtain evidence regarding the full scope of how the non-biological, non-adoptive parent has been demonstrating every aspect of parental obligations.

Evidence you may want to consider to support the non-biological, non-adoptive parent's relationship with the child may include:

- evidence of performing the parental functions identified in the Parenting Act;
- a parenting agreement between the parties<sup>24</sup>;
- estate planning documents naming the non-biological, non-adoptive parent as guardian and conservator of the child<sup>25</sup>;
- the execution of a Power of Attorney for the Minor Child granting the non-biological, non-adoptive parents rights to make decisions for the child<sup>26</sup>;
- the non-biological, non-adoptive parent's name on the child's birth certificate;
- giving the child the last name of the non-biological, non-adoptive parent;
- providing financial support for the child<sup>27</sup>;
- identifying the non-biological, non-adoptive person as a co-parent for purposes of being present for the labor and delivery of the child<sup>28</sup>;
- exercising consistent and frequent parenting time with the

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child upon the separation of the parents; and,

- family portraits.

When representing a non-biological, non-adoptive parent, be mindful of the intricacies of the ever evolving laws defining parenthood to ensure the appropriate application of the *in loco parentis* doctrine and to protect the best interest of the minor child. As we continue to observe Nebraska families changing, it is important that we, the lawyers representing the families, remain flexible and adaptable to the law that changes with them. 

### Endnotes

- <sup>1</sup> *Latham v. Schwerdtfeger*, 282 Neb.121, 127, 802 N.W.2d 66, 72 (2011).
- <sup>2</sup> *Id.* at 129, 802 N.W.2d at 73 (quoting *In re Parentage of L.B.* 155 Wash.2d 679, 706-07, 122 P.3d 161, 176 (2005)).
- <sup>3</sup> Angela Dunne & Susan Ann Koenig, *Advocacy for Nebraska Children with Gay and Lesbian Parents: A Call for the Best Interest of the Child to be Paramount in the Case of Non-Biological, Non-Adoptive Parents*, 36 Creighton L. Rev. 3, 12 (2002).
- <sup>4</sup> *Latham*, 282 Neb. at 122, 802 N.W.2d at 69.
- <sup>5</sup> *Weinand v. Weinand*, 260 Neb. 146, 152-153, 616 N.W.2d 1, 6 (2000).
- <sup>6</sup> *Latham*, 282 Neb. at 126, 802 N.W.2d at 71 (quoting *J.A.L. v. E.P.H.* 682 A.2d. 1314, 1318-19 (1996)).

- <sup>7</sup> *Id.* at 130, 802 N.W.2d at 74.
- <sup>8</sup> *Id.* (quoting *J.A.L. v. E.P.H.* 682 A.2d. 1314, 1319-20 (1996)).
- <sup>9</sup> *Id.* at 131, 802 N.W.2d at 74.
- <sup>10</sup> *Weinand*, 260 Neb. at 152-153, 616 N.W.2d at 6.
- <sup>11</sup> Neb.Rev.Stat. § 43-2922(17).
- <sup>12</sup> *Hickbottom v. Hickbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991).
- <sup>13</sup> *Id.* at 592-93, 477 N.W.2d at 17.
- <sup>14</sup> *Id.* at 587, 477 N.W.2d at 14 (quoting *Cooper v. McManus*, 581 P.2d 487, 4880489 (Okla.App. 1978)).
- <sup>15</sup> *Id.* at 591.477 N.W.2d at 16.
- <sup>16</sup> *Id.* at 592.477 N.W.2d at 17.
- <sup>17</sup> *Weinand*, 260 Neb. at 148, 616 N.W.2d at 3.
- <sup>18</sup> *Id.*
- <sup>19</sup> *Id.*
- <sup>20</sup> *State on Behalf of Combs v. O'Neal*, 11 Neb.App. 890, 897, 662 N.W.2d 231, 237 (2003).
- <sup>21</sup> *Russell v. Bridgens*, 264 Neb. 217, 218, 647 N.W.2d 56, 58 (2002).
- <sup>22</sup> *Id.* at 229, 647 N.W.2d at 65 (Gerrard J., concurring).
- <sup>23</sup> *Latham*, 282 Neb. at 134, 802 N.W.2d at 76.
- <sup>24</sup> *J.A.L. v. E.P.H.*, 453 Pa.Super.78, 83, 682 A.2d 1314, 1317 (Pa. Super. 1996).
- <sup>25</sup> *Id.*
- <sup>26</sup> *Id.*
- <sup>27</sup> *T.B. v. L.R.M.*, 567 Pa. 222, 225, 786 A.2d 913, 914 (Pa. 2001).
- <sup>28</sup> *Id.* at 225, 786 A.2d at 915.

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