

CASE COMMENTARY

THREE PARENTS?

**Jacob v Shultz-Jacob, 923 A 2d 473, 2007 Pa Super Lexis 957
(Pa Super 2007)**

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United States Supreme Court Justice Antonin Scalia once famously opined that, “. . . law, like nature itself, makes no provision for dual fatherhood.”¹ Of course, we know that many children today are being raised in households where their primary paternal figure is a stepfather, and their natural father, who is their legal father, may or may not exercise some quantum of visitation/access.² Moreover, many American jurisdictions today allow same-sex couples to adopt, so that a child has either two mothers or two fathers.³ But the situation which Justice Scalia was addressing involved a child whose mother was married at the time of conception, who apparently was the product of her mother’s affair with another man, and where the mother’s husband had forgiven all and accepted the child as his own.⁴ Justice Scalia could not imagine that the law, or nature, would permit a child to have three parents, in that case a mother and two fathers. Indeed, in the typical same-sex adoption case, either there is no known father because one of the lesbian partners was inseminated by an anonymous donor,⁵ or a known donor has agreed to terminate his parental rights.⁶ In either of those scenarios, a child ends up with the normal number of parents: two.

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¹ *Michael H v Gerald D*, 109 S Ct 2333, 2339 (1989).

² *See, e g, Charles v Stehlik*, 744 A 2d 1255 (Pa 2000).

³ *See Adoption of B L VB and E L VB*, 628 A 2d 1271 (Vt 1993). But see *Adoption of Luke*, 640 N W 2d 374 (Neb 2002); *Lofton v Sec of Dept of Children and Family Services*, 358 F2d 804 (11th Cir 2004).

⁴ *Michael H*, above n 1 at 2337-8.

⁵ *See, e g, B L VB*, above n 3.

⁶ *See, e g, Adoption of Tammy* 619 N E 2d 315 (Mass 1993).

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The recent case of *Jacob v Shultz-Jacob* appears to break the mold and at least suggest, if not definitively hold, that children in Pennsylvania can have three legal parents, that is three people who share custodial rights and support duties.⁷ *Jacob* also appears to be the first appellate authority anywhere in the United States for such a proposition.

The underlying facts in *Jacob* are relatively straightforward. Two women, Jodilynn Jacob and Jennifer Shultz-Jacob, began living together in an intimate relationship in 1996. They underwent a “commitment ceremony” in Pittsburgh, Pennsylvania, and entered into a “civil union” in Vermont.⁸ A Vermont “civil union” is akin to a British “civil partnership” under the CPA 2004; i.e., for same-sex couples it is a marriage in all but name.⁹ However, Pennsylvania does not recognize a same-sex marriage even if legally entered into elsewhere, and it is therefore highly doubtful that a Pennsylvania court would give legal effect to a Vermont civil union.¹⁰

The subject children were conceived by Jodilynn through artificial insemination from a known sperm donor, Carl Frampton.¹¹ It is clear that Jennifer never adopted the children. However, they were raised in Jodilynn and Jennifer's household from their births (June 20, 1998, and April 6, 2000)¹² until February 2006 when, the intimate relationship having ended, Jodilynn left with the children.¹³ Both custody and support litigation ensued, involving Jodilynn, Jennifer and Carl.

LITIGATION AT THE TRIAL COURT LEVEL

In the custody litigation, the trial court awarded Jodilynn and Jennifer shared legal custody of the children.¹⁴ Under Pennsylvania law, legal custody

⁷ *Jacob v Shultz-Jacob*, 923 A2d 473, 2007 Pa Super Lexis 957 (Pa Super 2007).

⁸ *Id* 923 A2d at 476.

⁹ Vermont enacted civil unions in response to the decision of the Vermont Supreme Court in *Baker v State*, 170 Vt 194, 744 A 2d 864 (1999), holding that same-sex couples in Vermont could not be denied the “common benefits” available to opposite-sex couples through marriage. See 1999 Vermont House Bill No 847, codified at Vt Stat Ann Tit 15 §§ 1201-1207 and Tit 18 §§ 5160-5169.

¹⁰ It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth. 23 Pa Cons Stat § 1704 (2007).

¹¹ *Jacob*, above n 7, at 476. Jodilynn also adopted two other children, who were her nephews, who were not the primary focus of litigation.

¹² *Jacob v Shultz-Jacob*, C P Dauph, Domestic Relations Section, Docket No 00603-DR-06 (Sept 4, 2007).

¹³ *Jacob*, above n 7, at 476.

¹⁴ *Ibid*.

means, "The right to make major decisions affecting the best interest of a minor child, including, but not limited to, medical, religious and educational decisions."¹⁵ The trial court awarded Jodilynn primary physical custody of the children, and awarded partial physical custody to both Jennifer and Carl.¹⁶ Partial physical custody is, "the right to take possession of a child away from the custodial parent for a certain period of time."¹⁷

In the child support litigation, Jodilynn sued Jennifer, asserting that Jennifer was liable to support the children although she had not adopted them. Jennifer did not deny her liability for child support, but asked the trial court to join Carl as an additional defendant, arguing that he, too, was liable. The court denied Jennifer's request for "joinder" of Carl, finding that Jennifer by her actions had accepted responsibility for providing support for the children. In a decision explaining the denial of joinder, the trial judge first noted that there had been a stipulation of counsel that Carl had never been *in loco parentis* to the children. The judge also noted the absence of any legislation in Pennsylvania addressing "the rights and obligations of the myriad of parties potentially involved in the assisted conception of children." The judge was concerned that to hold Carl "liable for support would create a situation in which three parties/parents would be liable for support," something simply not envisioned in Pennsylvania law. The judge made a prediction which must have seemed safe at the time:

"This court is unaware of any appellate or lower court decision in Pennsylvania that have (sic) held three parties liable for support and would predict that our courts would never so require."¹⁸

Jennifer appealed both the custody and support orders, and the cases were decided together by the Pennsylvania Superior Court.

CUSTODY

The Superior Court's analysis of Jennifer's custody claims was brief. All the litigants below had stipulated that Jennifer stands *in loco parentis* to the children.¹⁹ The doctrine of *in loco parentis* standing for asserting custodial rights had been addressed in 2001 by the Pennsylvania Supreme Court in *T B*

¹⁵ 23 Pa Cons Stat § 5302 (2007).

¹⁶ *Jacob*, above n 7, at 476.

¹⁷ 23 Pa Cons Stat §5302 (2007).

¹⁸ *Jacob v Schultz-Jacob*, In the Court of Common Pleas of Dauphin County, PA, No 603 DR 2006 (Nov 21, 2006) (slip op).

¹⁹ *Jacob*, above n. 7, at 477.

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*v L R M*²⁰ In *T B*, as in *Jacob*, one party to a lesbian relationship was impregnated by a known sperm donor and the resulting child was jointly raised by the lesbian couple, but subsequently the biological mother left the relationship and assumed full authority over the child. When the biological mother refused her ex-partner all access to the child, the ex-partner sued for shared legal and partial custody and visitation.²¹ The biological mother argued that her ex-partner lacked standing to assert such rights. The lower courts found that the ex-partner did have *in loco parentis* standing, and the Pennsylvania Supreme Court affirmed:

“The phrase *in loco parentis* refers to a person who puts oneself (sic) in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. The status of *in loco parentis* embodies two ideas; first, the assumption of a parental status, and, second, the discharge of parental duties. . . . The rights and liabilities arising out of an *in loco parentis* relationship are, as the words imply, exactly the same as between parent and child. . . .”²²

Confusingly, although the Court opined that a non-parent with *in loco parentis* standing has exactly the same rights and responsibilities as a parent, it later contradicted itself and noted that it had recently reaffirmed “that where a custody dispute is between a biological parent and a third party, the burden of proof is not evenly balanced and that the evidentiary scale is tipped hard to the biological parent's side.”²³

There is one critical distinction between the facts in *T B* and the facts in *Jacob*. In *T B*, “The sperm donor's parental rights were terminated after the child was born.”²⁴ Hence the courts that dealt with *T B* and *L R M* did not have to concern themselves with the Solomon-like possibility of splitting the child into thirds.

In *Jacob*, Jennifer essentially argued that the trial court had erred in not granting her primary custody of the children.²⁵ She had presented testimony from an expert witness (a psychologist), “that absent the possibility of an

²⁰ *T B v L R M*, 786 A 2d 913 (Pa 2001).

²¹ In Pennsylvania, “visitation” is, “the right to visit a child, (but) the term does not include the right, to remove a child from the custodial parent's control.” 23 Pa Cons Stat 5302 (2007).

²² *T B*, above n 20, at 916-917.

²³ *Ibid*, at 919, n 8, citing *Charles v Stehlik*, n 2, above.

²⁴ *T B*, above, n 20, at 915, n 1.

²⁵ *Ibid*.

'ideal' arrangement, that is, shared custody,²⁶ primary custody should be awarded to her."²⁷ Jennifer cited the recent case of *Jones v Jones* in which the Pennsylvania Superior Court had upheld the granting of primary physical custody of two children to a woman in exactly Jennifer's position, i.e., the lesbian ex-partner of the biological mother.²⁸ Interestingly, in *Jones* the Pennsylvania Superior Court referred to the ex-partner as the "non-biological parent" of the children. One cannot help but wonder exactly what a "non-biological parent" is, as the court did not bother to define this new legal term of art. Apparently in Pennsylvania we now have:

- 1) Parents (biological or adoptive),
- 2) Step-parents,
- 3) Third parties standing *in loco parentis*, and
- 4) Non-biological parents.

To what extent category 4 overlaps categories 2 and 3, it is impossible to say.

The *Jacob* court readily distinguished the instant case from the situation in *Jones* where the biological mother had "tried in every way possible to sabotage (her ex-partner's) relationship with the children," "suffered from psychological dysfunction" and had a drinking problem.²⁹ Jodilynn had no such conditions, nor any approximation of them.³⁰ Hence, despite repeating the mantra that a person with *in loco parentis* standing has "exactly the same" rights arising out of that relationship "as between a parent and child,"³¹ the court applied the natural parent preference to affirm primary physical custody in Jodilynn.³²

CHILD SUPPORT

The more fascinating aspect of *Jacob* is its analysis of the child support issues. The precise question on appeal was the refusal of the trial court to join Carl as a party defendant. Jennifer did not contest her own liability for support of the children despite the fact that she had not adopted them. Rather, she argued that Carl was also liable, and hence was an "indispensable

²⁶ Shared custody" is defined in Pennsylvania as, "An order awarding shared legal or shared physical custody, or both, of a child in such a way as to assure the child of frequent and continuing contact with and physical access to both parents." 23 Pa Const Stat § 5302 (2007).

²⁷ *Jacob*, above n 7, at 477.

²⁸ *Jones v Jones*, 884 A 2d 915 (Pa Super 2005).

²⁹ *Jacob*, above n 7, at 479.

³⁰ *Ibid*.

³¹ *Ibid*, at 477.

³² *Ibid*, at 479.

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party” to the litigation. (Since the Pennsylvania child support formula³³ simply does not contemplate a situation in which three adults would be liable to support the same child(ren), it was unclear whether Jennifer's support obligation would be lowered if Carl also were compelled to support them.)

Pennsylvania's support law provides that, "parents are liable for the support of their children who are unemancipated and 18 years of age or younger."³⁴ Of course, Jennifer was neither the biological nor adoptive parent of the children. However, her liability was squarely premised on the analysis of the Superior Court in the factually similar 2002 case of *L S K v H A N*.³⁵ L S K and H A N had had an intimate lesbian relationship for over a decade during which L S K bore five children (a solo and, subsequently, quadruplets) conceived through artificial insemination. H A N carried out many parental duties, indeed acted as the stay-at-home parent when L S K returned to work after the births. The couple separated, with L S K eventually moving to California with the children. H A N sued L S K for custody and was eventually found to have *in loco parentis* status and awarded shared legal and partial physical custody.

L S K, naturally, sued H A N for child support, and H A N denied liability on the basis that she was neither the children's natural nor adoptive parent. The trial court found that H A N was equitably estopped from denying liability, and the Superior Court affirmed. First, the Court noted that H A N's *in loco parentis* status conferred in the custody litigation, "embodies two ideas: first, the assumption of parental status, and, second, the discharge of parental duties." H A N argued that her status was similar to that of a stepparent and that stepparents have no legal duty to support a child after the dissolution of a marriage. The Court acknowledged that stepparents normally cannot be sued for child support,³⁶ but noted that if they hold themselves out as a child's parent they may be estopped from denying liability.³⁷ Thus, H A N was properly estopped. She and L S K had decided to start a family together, she had acted as a "co-parent," and she had sued for custody. "Although statutory law does not create a legal relationship, applying equitable principles we find that in order to protect the best interest of the children involved, both parties are to be responsible for the emotional and financial needs of the children."³⁸ However, the facts in *L S K* differed from the facts in *Jacob* in one notable respect. L S K had been impregnated with

³³ Pa Rules of Civil Procedure 1910.16-4.

³⁴ 23 Pa Const Stat 4321(2) (2007).

³⁵ *L S K v H A N*, 813 A 2d 872 (Pa Super 2002).

³⁶ *Drawbaugh v Drawbaugh*, 647 A 2d 240 (Pa Super 2004).

³⁷ Citing *Hamilton v Hamilton*, 813 A 2d 403 (Pa Super 2002).

³⁸ H A N secondarily argued that the statewide support guidelines should not apply to her where her liability was based on equitable principles rather than the support act. The Superior Court rejected this proposition. *L S K*, *above* n 35, at 878-9.

sperm from anonymous donors; therefore the five children in *L S K* had no known father to turn to for support. Jodilynn's children had a known father: Carl.

In *Jacob*, the trial court had cited *L S K* to conclude that Jennifer rather than Carl was responsible for child support.³⁹ The Superior Court found such reliance inappropriate. Unlike *H A N*, Jennifer was not denying her own liability for child support, only asserting that she shared her liability with Carl (and, of course, Jodilynn). The Superior Court found Carl liable on two separate grounds: estoppel and legal parenthood. Carl was estopped because he had made significant voluntary financial contributions on the children's behalf and had been awarded partial custody. Moreover, as the children's biological father whose rights had never been terminated in an adoption proceeding, Carl was statutorily liable to support them under the support law.

The Superior Court also rejected the trial court's concern that inclusion of a third party in the child support calculations would create a situation never anticipated by the support guidelines. The Court rather inscrutably reasoned:

"We are not convinced that the calculus of support arrangements cannot be reformulated, for instance, applying to the guidelines amount set for (Jennifer) fractional shares to incorporate the contributions of another obligee."⁴⁰

Accordingly, the Superior Court vacated the support award and remanded the case to the trial court with directions that Carl "be joined as an indispensable party for a hearing at which the support obligation of each litigant is to be recalculated."

AN IRONIC TWIST: THREE "PARENTS" BECOME TWO

When the Superior Court's decision in *Jacob* was handed down on April 30th 2007, it became national news in the United States as apparently the first appellate case to find that a child may essentially have three parents.⁴¹ New York Law School professor Arthur S. Leonard was quoted in one article as stating, "I'm unaware of any other state appellate court that a child has, simultaneously, three adults who are financially obligated to the child's support and are also entitled to visitation."⁴²

³⁹ *Jacob*, above n 7, at 480.

⁴⁰ *Ibid*, at 482.

⁴¹ See "Pennsylvania Court Orders Sperm Donor to Lesbian Couple to Pay Child Support," Assoc Press, May 9, 2007, available at http://www.foxnews.com/printer_friendly_story/0,3566,271116,00.html.

⁴² *Ibid*.

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But in a development of which the Superior Court was apparently unaware, Carl Frampton had unexpectedly died of a stroke in March 2007, a month after the case was submitted to the Court and a month prior to the Court's decision.⁴³ This left the children with two living parents and one deceased parent, which is nevertheless legally different in significant ways from having only two parents. On the one hand, the law is clear in Pennsylvania that a parent may disinherit even a minor child and that a deceased parent is not liable for child support.⁴⁴ This is the majority rule in the United States, but recently it has been rethought in at least one American jurisdiction.⁴⁵ On the other hand, Carl had an enforceable obligation to pay child support for the period from at least the filing of the complaint until his untimely demise.⁴⁶

While a Pennsylvania parent may disinherit a child, even a minor child, if the parent dies intestate, the child is entitled to a share of the estate under the rules of intestacy.⁴⁷

More significantly in many cases, the minor child of a deceased worker who has paid enough credits into the American Social Security system can receive survivors' benefits on that parent's earnings record.⁴⁸

WAS THE SUPERIOR COURT CORRECT?

The Superior Court in *Jacob* had no occasion to review Jennifer's *in loco parentis* status which has been stipulated to below, nor did it review the grant to her of shared legal and partial physical custody. With regard to custodial rights, the Court merely affirmed the trial court's decision to vest primary physical custody in Jodilynn, the natural and legal mother, relying upon the natural parent preference in custody.

Certainly there are cogent policy and constitutional reasons for presuming that it is in a child's best interest to be with a parent (natural or adoptive) as opposed to a non-parent. The United States Supreme Court has long asserted the primacy of parents. Over fifty years ago, the Supreme Court stated, "It is

⁴³ *Deceased Sperm Donor Held Liable for Child Support*, A P, May 10, 2007, available at http://cbs3.com/topstories/local_story_130091936.html.

⁴⁴ *Benson v Patterson*, 830 A 2d 966 (Pa 2003).

⁴⁵ *L W K v E R C*, 432 Mass 438, 735 N E 2d 359 (Mass 2000). "We conclude that the death of the father does not extinguish his duty to support his minor child."

⁴⁶ "An order of support shall be effective from the date of the filing of the compliant or petition for modification unless the order specifies otherwise." Pa Rule of Civil Procedure 1910.17(a).

⁴⁷ See generally 20 Pa Cons Stat §§ 2102-2103 (2007).

⁴⁸ See 20 Code of Federal Regulations (CFR) § 404.350. Based on information provided by counsel, it appears that the children are receiving survivors' benefits on Carl's Social Security account.

cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”⁴⁹

Moreover, the Pennsylvania Supreme Court ruled in August 2002 that a same-sex partner may adopt the child of her partner without the biological parent partner giving up her own parental rights.⁵⁰ Thus, from August 2002 until their relationship ended, Jodilynn and Jennifer could have gone through an adoption proceeding which would have made them both legal parents of the children (and which presumably would have ended Carl’s status as a parent). Such an adoption proceeding would have required Jodilynn’s agreement and active participation. We do not know whether Jodilynn and Jennifer ever contemplated an adoption or what Jodilynn’s position on adoption would have been. If Jodilynn had been ready, willing and able to have Jennifer adopt the children but Jennifer declined to do so, then equity would dictate that Jennifer should not be heard to complain that she did not stand on equal footing in the custody litigation.

If Jodilynn objected to Jennifer’s adoption of the children, the equities may again favor Jodilynn in custody. Jodilynn then could be interpreted as signaling that she wanted to remain in charge of the children, putting Jennifer on notice that the children weren’t hers and would not be hers.

Of course there may have been myriad reasons why Jodilynn and Jennifer did not have Jennifer adopt the children. They may never have thought about it. They may have thought about it but assumed it was unnecessary. They may not have been able to afford it. They may not have wanted to antagonize Carl or lose his contributions to the children. Carl may have voiced his objections. One or both of them might have feared what eventually happened—that their relationship might end badly. Or, they may just have never gotten around to it. There may well have been other reasons that we cannot know.

In the absence of an adoption of the children by Jennifer, it is difficult to fault the courts for preferring Jodilynn in the contest over primary custody. Arguably Jodilynn could have challenged Jennifer’s *in loco parentis* standing, given the fact of Carl’s parenthood and holding himself out as the children’s father. Had Jodilynn prevailed on that argument, Jennifer would have had no custodial claims whatsoever. But this litigation posture, if successful, would have almost certainly precluded a claim against Jennifer for child support.

Similarly, with regard to child support, the Superior Court had no occasion to review the issue of Jennifer’s liability; she had conceded it. But should she have? Since the children already had two natural and legal parents, Jodilynn and Carl, it is less than obvious that Jennifer had a support

⁴⁹ *Prince v Massachusetts*, 321 US 158 (1944).

⁵⁰ *In re: Adoption of R B F*, 569 Pa 269, 801 A2d 1195 (2002).

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duty than Carl. If Jennifer had wished to adopt the children and Jodilynn had opposed the adoption, then equity would suggest that Jennifer not have a legal duty of support. Indeed, there are other examples in the law where a person has custodial or visitation rights but no reciprocal support obligations. Foster parents may have custody of a child but no support duty; indeed they are paid by the state for fostering neglected or abused children.⁵¹ Similarly, grandparents often have the right under state laws to seek visitation or even custody, with no corresponding support duty.⁵²

Again, one can hardly fault the Superior Court for imposing support liability on Carl, a known biological and legal father. Had Jennifer challenged her own support liability, the courts might have confronted a more difficult decision.

CAN OR SHOULD CHILDREN HAVE THREE PARENTS?

On a technical reading of *Jacob*, the children only have two legal parents, Jodilynn and Carl. Jennifer is merely a third party standing *in loco parentis* to the children. But, in all practicality, the decision (except for Carl's death) would have left them with three parents. If we view legal parenthood as a bundle of legal rights and duties, three adults shared parenthood.

While it may well be confusing for children to have two mothers and one father, many children today live in blended families where they relate to either one or two stepparents. Depending on the age of a child and the strength of the personal relationship, that child may well view a stepparent as more of a parent figure than a natural parent. Nor is it reasonable to argue that a child is harmed by having the right to obtain support from three adults.

As problematic as the result in *Jacob* is, it compares well with an analogous case decided by the Utah Supreme Court two months earlier, *Jones v Barlow*.⁵³ In *Jones*, as in *Jacob*, two women entered into an intimate relationship and traveled to Vermont where they entered into a civil union. They agreed to have children, and one of them, Cheryl, was impregnated by a known sperm donor. Cheryl gave birth to a daughter in October 2001. For the next two years, Cheryl and her partner, Keri, co-parented the child. Shortly after the child's second birthday, the couple broke up, and Cheryl left, taking the child with her. When Cheryl cut off all contact between Keri and the child, Keri sued, seeking a "decree of custody and visitation" based on the claim that she had standing under the doctrine of *in loco parentis*. The trial court found that Keri did stand *in loco parentis* and that visitation was in the

⁵¹ See *Smith v Organization of Faith Families for Equality and Reform*, 431 U S 816, 97 S Ct 294 (1977). See also 16 Purdon's Stat 2164(6) (2007).

⁵² See *Troxel v Granville*, 530 US 57, 120 S Ct 2054 (2000).

⁵³ *Jones v Barlow*, 154 P 2d 808 (Utah 2007).

child's best interest. The court awarded Keri visitation and ordered her to provide financial support.

On appeal, the Utah Supreme Court reversed. The Court reasoned that while Keri may have stood *in loco parentis* to the child while she was actually living with the child and providing for her care, that status simply ended when Cheryl and the child moved out. The Court declined to give Keri any ongoing rights—or duties—as a “psychological parent” or “de facto parent.” Thus, the Court terminated Keri’s visitation rights and support duties without any consideration of the best interests of the child. Surely this result is even less appealing and less protective of children than the three parent result reached in *Jacob*.

THE WAVE OF THE FUTURE?

Jacob, while apparently unique in the United States, has a recent counterpart in Canada. In 2007, in the case of *A A v B B*, the Court of Appeal for Ontario found that a child may have two mothers and one father.⁵⁴ The Ontario Appeals Court was unequivocal:

“Five-year-old D D has three parents: his biological father and mother (B B and C C, respectively) and C C’s partner, the appellant, A A. A A and C C have been in a stable same-sex union since 1990.”

The trial judge in *A A* would have found that D D had three parents, but felt that he lacked authority to do so. The Court of Appeal agreed that there was no such authority under Canada’s Children’s Law Reform Act, but found that there was authority under the court’s inherent *parens patriae* jurisdiction.

A A goes beyond *Jacob* in one regard. Technically, *Jacob* held that the children had only two parents and another person *in loco parentis*. *A A* held that the child had three legal parents.

However, in one regard *A A* was an easier case than *Jacob*, in that the parties were all in agreement that such a declaration was in the child’s best interest. *A A* wanted the declaration in order to protect both her partner and the child, and the two women did not want to do an adoption which would have necessarily terminated the father’s rights. Thus the court in *A A* was presented with a “win-win-win” scenario with all the parties seeking the same relief. In *Jacob*, the three parties were clearly seeking conflicting results.

If *Jacob* and *A A* are the wave of the future, then what is over the horizon? Could children have more than three adults with custodial rights and support duties? What happens if Jodilynn marries and her husband starts to assume a

⁵⁴ *A A v B B*, [2007] O J. No 2; 2007 ON C Lexis 2.

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parental role? What if Jennifer does the same?⁵⁵ Could children have five adults in the legal role of parent? If Carl had a spouse or life partner who aided with the children, could the tally rise to six legally responsible parental figures? Such a result could be fabulous for the financial support of children, at the expense of dividing their leisure time into far too many units. (Imagine a child with six parental figures and twelve (or more) grandparental figures all seeking some quality time with that child or even battling over primary custody!) This would call upon our family law system to enter into truly uncharted territory where angels might indeed fear to tread.

POSTSCRIPT

On December 27, 2007, the highest court in Pennsylvania, the Pennsylvania Supreme Court, decided by the narrowest of votes the long-awaited case of *Ferguson v McKiernan*,⁵⁶ which calls into serious question the result in *Jacob*.

In *Ferguson*, the trial court had found that Joel McKiernan and Ivonne Ferguson had entered into an oral contract whereby Joel would donate sperm to Ivonne in a clinical setting, his role as sperm donor would remain confidential, he would not seek custodial or visitation rights, and she would not seek child support. On Valentine's Day 1994, Joel provided a sperm sample at a medical center where the doctor had been told (falsely) that Joel was Ivonne's husband. The sperm was used to fertilize her eggs by IVF, which were then implanted. Ivonne gave birth prematurely to twins on August 25, 1994. She falsely named her estranged husband (Paul Ferguson) as the father on the twins' birth certificates. In fact, her husband had filed for divorce on the very day that Joel, the sperm donor, had provided his sperm at the medical center. From August 1994 until mid-1999, Joel had almost no contact with the twins, nor did he contribute to their support in any way. Indeed he moved out of the area, married and had a child by his wife. Ivonne contacted Joel in May 1999 and subsequently filed for child support.

The trial court found that there was a binding contract between Joel and Ivonne to waive child support, but that this agreement violated public policy, hence was unenforceable. The Pennsylvania Superior Court affirmed,

⁵⁵ Both former lesbian partners involved in the *L S K* case subsequently got married. *L S K*, above note 35, 813 A 2d at 875, n 2.

⁵⁶ *Ferguson v McKiernan*, 2007 Pa Lexis 2895. The case was argued before the Court over two and a half years earlier, on May 17, 2005. There are normally seven justices on the Court, but the vote in *Ferguson* was 3-2, with former Justices Nigro and Newman not participating in the decision. Hence, the three-justice majority in the case, rather anomalously, do not constitute a majority of the full court.

adopting the trial court's analysis.⁵⁷ The Pennsylvania Supreme Court has now reversed the lower courts.

The state supreme court framed the issue thus:

“We are called upon to determine whether a sperm donor involved in a private sperm donation—i.e., one that occurs outside the context of an institutional sperm bank—effected through clinical rather than sexual means may be held liable for child support, notwithstanding the formation of an agreement between the donor and the donee that she will not hold the donor responsible for supporting the child that results from the arrangement.”

The majority acknowledged the usual rule that parents cannot waive a minor child's right to be supported. However, the majority limited this rule to circumstances “of divorce and other parenting arrangements arising in the context of sexual relationships,” and proceeded to draw a “commonsense distinction between reproduction via sexual intercourse and the non-sexual clinical options for conception that are increasingly common in the modern reproductive environment.”

Had Ivonne received IVF at a medical centre from a truly anonymous donor, that donor (even if later somehow identified) would clearly have had no liability for child support. The facts that Ivonne chose Joel as sperm donor because of his characteristics rather than using the lottery system of anonymous donation and that Joel's anonymity had been breached with a handful of family members were not enough to distinguish the instant case from anonymous clinical sperm donation. Thus the agreement did not so offend public policy as to render it unenforceable. While this result left the twins without a legal father to support them, it protected the right of women to choose their sperm donor, the right of sperm donors to help such women procreate without fear of financial liability, and, in this case, the financial interests of Joel's marital child.

It is unclear what implications the *Ferguson* decision has for the scenario in *Jacob v Schultz-Jacob*, should it recur. There is no direct impact as the *Jacob* case was not appealed to the Pennsylvania Supreme Court. The *Ferguson* majority posited a continuum of situations, as follows:

“Thus, two potential cases at the extremes of an increasingly complicated continuum present themselves: dissolution of a relationship (or a mere sexual encounter) that produces a child via intercourse, which requires both parents to provide support; and an anonymous sperm donation, absent sex, resulting in the birth of a

⁵⁷ *Ferguson v McKiernan* 855 A 2d 121 (Pa Super 2004).

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child. These opposed extremes produce two distinct views that we believe to be self-evident. In the case of traditional sexual reproduction, there simply is no question that the parties to any resultant conception and birth may not contract between themselves to deny the child the support he or she requires.... In the institutional sperm donation case, however, there appears to be a growing consensus that clinical, institutional sperm donation neither imposes obligations nor confers privileges upon the sperm donor. Between these poles lies a spectrum of arrangements that exhibit characteristics of each extreme to varying degrees—informal agreements between friends to conceive a child via sexual intercourse; non-clinic non-sexual insemination; and so on.”

The *Ferguson* majority recognized that, “locating future cases on this spectrum may call upon courts to draw very fine lines, (but) courts are no strangers to such tasks. . . .” Where the *Jacob* facts would fall on this spectrum is difficult, if not impossible, to conclude with any certainty.

As in *Ferguson*, in *Jacob* there was a known sperm donor and the children were conceived through artificial means. In neither case was the sperm donor named as father on the children’s birth certificates. However, in *Jacob* it does not appear that conception was effected through medical intervention in a clinical setting. In *Ferguson*, the sperm donor father had never asserted visitation rights; in *Jacob*, the sperm donor father was awarded partial custody. In *Ferguson*, the sperm donor father had made no contributions to the children’s support; in *Jacob*, the sperm donor father had made contributions to the children in excess of \$13,000 and had provided the family with a car.

Thus reasonable arguments could be made on both sides of the question of whether the *Ferguson* rationale would be applied to a case such as *Jacob*.

Finally, while a decision of the Pennsylvania Supreme Court trumps a decision of the Pennsylvania Superior Court, one must ask which represents the better public policy in the absence of clear statutory guidance. The *Jacob* children ended up with three parental figures from whom they could claim support, rather than the customary two. But the *Ferguson* children now have but one adult from whom they can claim parental responsibilities. Clearly the *Jacob*, three-parents, court has been more solicitous of the rights of children. Although having three parents may well be confusing for any child, it has been amply demonstrated that having but one parent significantly heightens risks to a child’s financial well-being, as well as physical security.⁵⁸

⁵⁸ See, generally, American Bar Assoc. Presidential Working Group on the Unmet Legal Needs of Children and their Families, *America’s Children at Risk* (1993).