

**IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

No. 14 WAP 2024

In the Interest of: S.W., A Minor
Appeal of: S.W. & CYF

CHILDREN'S FAST TRACK

BRIEF FOR APPELLEE, W.W.

From the Opinion and Order of the Superior Court at 22 WDA 2023, vacating the Order of Court of the Allegheny County Court of Common Pleas Judge Eleanor L. Bush, Family Division, Juvenile Section at CP-02-DP-0000729-2020 dated November 8, 2022.

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STATEMENT OF JURISDICTION

This is an appeal from the Opinion and Order of the Pennsylvania Superior Court, vacating a final order from the Family Court, Juvenile Division of the Allegheny County Court of Common Pleas.

Pursuant to 42 Pa.C.S. § 724(a), this Court has jurisdiction to review final orders of the Superior Court upon allowance of appeal. Appellants' Joint Petition for Allowance of Appeal was granted by way of per curiam Order dated May 22, 2024 at 127 WAL 2024.

ORDER IN QUESTION

This appeal is taken from the Pennsylvania Superior Court's March 13, 2024 Opinion and Order (Kunselman, J., joined by Lazarus, J., with a separate Concurring Opinion issued by Lazarus, J. and a Dissenting Opinion issued by Bender, P.J.E.) ruling, in pertinent part, as follows:

To conclude: we are constrained to apply ***M.R.F., III***, and under that precedent, Appellants met the prospective adoptive parent exception. Thus, the juvenile court erred when it denied Appellant's petition to intervene.

[...]

Order vacated. Case remanded for further proceedings consistent with this decision. Jurisdiction relinquished.

See Superior Ct. Maj. Op. at p. 31.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

“Issues of standing generally raise pure questions of law for which we employ *de novo* review of a trial court's decision.” *In re K.N.L.*, 284 A.3d 121, 132 (Pa. 2022) (quoting *Markham v. Wolf*, 136 A.3d 134, 138 (Pa. 2016)). “In matters arising under the Adoption Act, as well as appeals of child custody and dependency decisions, our plenary scope of review is ‘of the broadest type.’” *Id.* at 132-33; *T.B. v. L.R.M.*, 786 A.2d 913, 916 (Pa. 2001).

STATEMENT OF THE QUESTION INVOLVED

- I. Whether the judicially created "prospective adoptive parent" exception to the general prohibition against foster parents participating in dependency cases was abrogated by the Legislature's subsequent enactment of Section 6336.1(a) of the Juvenile Act, which provides that preadoptive foster parents shall not have standing in the matter absent an award of legal custody of the child?

Suggested Answer: Yes.

STATEMENT OF THE CASE

On October 16, 2020, Allegheny County Children Youth and Families ("ACCYF") obtained an Emergency Custody Authorization to remove S.W. from W.W. (hereinafter "Mother")'s care. ACCYF placed S.W. in the Pressley Ridge foster home of A.E. and Ann.E. Thereafter, a shelter hearing was conducted, at which time the Court granted ACCYF temporary legal custody of S.W. and ordered that she remain in the physical custody of A.E. and Ann.E. See Shetler Care Order dated October 22, 2020.

On November 25, 2020, the Court of Common Pleas (hereinafter, "trial court") adjudicated S.W. dependent pursuant to 42 Pa.C.S. § 6302(1), awarding legal custody of S.W. to ACCYF and maintaining physical custody with A.E. and Ann.E. See Order of Adjudication and Disposition dated December 17, 2020. The trial court conducted regular permanency review hearings approximately every three (3) months, affirming the permanency goal of "reunification" in each subsequent Order.

On August 12, 2022, ACCYF filed a Motion for Permission to Place, requesting a change in foster care placement for S.W. due

to ongoing concerns that A.E. and Ann.E. had used ableist and racially offensive language to describe Mother. See ACCYF's Motion for Permission to Place dated August 12, 2022. ACCYF's Motion further averred that A.E. and Ann.E. were not supportive of S.W.'s permanency goal of reunification and that they were not compliant with ACCYF or the foster care agency. The trial court entered an Order scheduling the matter for a hearing on August 26, 2022.

On August 26, 2022, all parties to the dependency matter and/or their counsel appeared. A.E. and Ann.E. also appeared and were accompanied by counsel. Before proceeding with the scheduled hearing, Counsel for Mother raised the issue of Foster Parents' counsel participating in the hearing as a preliminary matter. (Trial Tr. at 8, August 26, 2022) At that time Counsel for A.E. and Ann.E. indicated that her clients were *not* parties to the dependency matter and that they were *not* seeking to intervene as such. (Trial Tr. at 8-9, August 26, 2022). Accordingly, the hearing proceeded with A.E. and Ann.E. present, seated in the back of the courtroom with their counsel. (Trial Tr. at 11, August 26, 2022)

During the hearing the Court heard testimony from several witnesses who expressed concerns about the appropriateness of S.W.'s placement with A.E. and Ann.E. Specifically, it was reported that A.E. and Ann.E. regularly expressed resistance to S.W.'s court-ordered visitation with Mother, requested reductions in that visitation, and requested that termination of parental rights be "expedited" on several occasions. (Trial Tr. at 17, 35, August 26, 2022. In addition, it was reported that when A.E. and Ann.E. were confronted with their limited decision-making authority as foster parents, they made ableist and racist remarks about Mother.¹ (Trial Tr. at 23, 48, 64, August 26, 2022) At the conclusion of the hearing the Court granted ACCYF's Motion and ordered that S.W.'s placement be changed. See August 26, 2022 Order granting Motion to Change Child's Placement.²

On September 21, 2022, A.E. and Ann.E. filed a Motion to Intervene and a Motion for Return of Child to Foster Parents. The

¹ A.E. and Ann.E. acted unilaterally to change Child's pediatrician despite being advised by ACCYF and Pressley Ridge that Mother retained medical decision-making authority for S.W. and was not in agreement with the change. 8/26/22 Trial Transcript at 23.

² Notably, Appellants did not appeal the August 26, 2022 Order granting ACCYF's Motion to Change Child's Placement.

Motion to Intervene was denied without prejudice, for failure to conform with Pa.R.J.C.P. 1133, at which time Counsel for A.E. and Ann.E. simultaneously withdrew the Motion for Return. On October 5, 2022, A.E. and Ann.E. filed a new Motion to Intervene, which the court scheduled for argument on October 26, 2022.³

During the argument on October 26, 2022, Counsel for A.E. and Ann.E. argued – for the first time – that her clients had “achieved the status of prospective adoptive parents” and were therefore entitled to party status in the dependency matter. (Trial Tr. at 21, October 26, 2022) In response, Counsel for ACCYF argued that the prospective adoptive parent exception was abrogated by the enactment of Section 6336.1 of the Juvenile Act in 1999. (Trial Tr. at 33-34, October 26, 2022) S.W.’s Guardian *ad litem* joined ACCYF’s argument and Counsel for Mother likewise urged the court to adhere to the plain language in Section 6336.1(a) prohibiting foster parent standing in dependency matters absent an award of legal custody. (Trial Tr. at 40-41,

³ Counsel for Mother notes that A.E. and Ann.E. simultaneously filed an appeal in administrative court related to S.W.’s removal from their care pursuant to 55 Pa. Code 3700.73(a), but voluntarily withdrew the same on March 14, 2023.

October 26, 2022) At the close of argument, the court took the matter under advisement. An Order was issued denying Foster Parents' Motion to Intervene on November 8, 2022.

On December 7, 2022 A.E. and Ann.E. filed a Petition for Permission to Appeal with the Superior Court. On December 20, 2022, ACCYF filed an Answer to the Petition for Permission to Appeal.⁴ On January 5, 2022, the Superior Court entered a per curiam order granting A.E. and Ann.E.'s Petition.

Following the issuance of the trial court's opinion on February 17, 2023, all parties filed timely briefs. On June 1, 2023, the Superior Court filed a letter confirming that the matter had been listed for submission on briefs without oral argument for the panel's consideration on June 20, 2023. However, on June 5, 2023, the Superior Court filed another letter advising that the matter had been removed from the list on June 20, 2023 and indicated that the matter would be relisted when the companion case is completed.⁵

⁴ Counsel for Mother and S.W.'s Guardian *ad Litem* subsequently filed letters joining ACCYF's Answer.

⁵ In the months following S.W.'s removal from A.E. and Ann.E.'s care, ACCYF proceeded on its previously filed Petition for Involuntary Termination of Parental Rights. A hearing was held

On March 13, 2024, the Superior Court issued an Opinion and Order (Kunselman, J., joined by Lazarus, J., with a separate Concurring Opinion issued by Lazarus, J. and a Dissenting Opinion issued by Bender, P.J.E.) vacating the trial court's October 26, 2022 Order denying Motion to Intervene and remanding the matter for further proceedings.

On April 12, 2024, ACCYF and S.W.'s Guardian *ad Litem* filed a Joint Petition for Allowance of Appeal to this Honorable Court. An Order granting the Joint Petition was entered. The instant appeal follows.

on January 27, 2023, and the trial court entered an order terminating Mother's parental rights on February 15, 2023. Mother appealed the trial court's decision, which was subsequently affirmed by the Superior Court on November 8, 2023.

SUMMARY OF THE ARGUMENT

Mother is a party to the instant appeal by virtue of her participation in the proceedings in the intermediate appellate court below. The recognition of “prospective adoptive parent” standing in dependency matters would allow third parties, who (by definition) have no interest in preserving family unity and pursuing the goal of reunification, to participate in a child’s dependency matter and advance interests that are directly opposed to those of parents seeking reunification with their children.

Although the status of foster parent standing in dependency matters was previously more ambiguous, that ambiguity was resolved when our General Assembly enacted Sections 6336.1 of the Juvenile Act in 1999. The statute provides resource parents with the right to notice of hearings and an opportunity to be heard, but simultaneously imposes discrete limits on those rights. The term “unless” in Section 6336.1 creates a subordinate conjunction, which makes clear that standing should not be granted to any third parties absent an award of legal custody by the trial court.

The intermediate appellate court has struggled to uniformly apply the plain language of Section 6336.1, at times resurrecting case law decided prior to 1999 to arrive at results inapposite to the plain language of the statute itself. A close review of case law demonstrates that the language limiting in Section 6336.1 flows directly from historical concerns surrounding expansion of foster parents' rights. Such an expansion is incongruous with the historically subordinate nature of the role in relation to child welfare agencies and parents.

Finally, the interests of "prospective adoptive parents" in dependency matters are in direct conflict with parents' fundamental liberty interest in the care, custody and control of their children. Foster parents' interests are derived from a contractual relationship with the state and are therefore protected by our Commonwealth's statutory scheme that provides for administrative review for aggrieved parties. Accordingly, to the extent that the Juvenile Act is read to permit foster parents to gain *any* standing in dependency matters – no matter how limited – such a reading cannot survive constitutional scrutiny.

ARGUMENT

I. MOTHER IS A PARTY TO THE INSTANT APPEAL

As a preliminary matter, Counsel for Mother would like to address Appellants' failure to comply with Pa.R.A.P. 908 and Pa.R.A.P. 1115(b) in the filing of their Joint Petition for Allowance of Appeal.⁶ Pa.R.A.P. 908 (Parties on Appeal) provides that:

All parties to the matter in the court from whose order the appeal is being taken shall be deemed parties in the appellate court, unless the appellant shall notify the prothonotary of the appellate court of the belief of the appellant that one or more of the parties have no interest in the outcome of the petition.⁷

Despite Mother's participation in the proceedings in the intermediate appellate court, Appellants' April 12, 2024 Joint Petition fails to identify Mother as a party or provide service to Mother and/or her Counsel.⁸ Accordingly, Counsel for Mother was

⁶ Though the Joint Petition for Allowance of Appeal was dated April 12, 2024, it was not docketed by the Supreme Court Prothonotary until April 15, 2024.

⁷ Pa.R.A.P. 908 Parties on Appeal. [continues from above]: A copy of such notice shall be served on all parties to the matter in the lower court, and a party noted as no longer interested may remain a party in the appellate court by filing a notice that he has an interest in the appeal with the prothonotary of the appellate court. All parties in the appellate court other than the appellant shall be appellees, but appellees who support the position of the appellant shall meet the time schedule for filing papers which is provided in these rules for the appellant.

⁸ Ironically, this may be the first time ever that counsel for the ACCYF, the child's Guardian *ad Litem* Attorney and Parent Counsel all take the same position and yet ACCYF has averred that Mother has no interest in the outcome of this appeal.

not notified of the filing until contacted directly by the Pa. Supreme Court Prothonotary on April 15, 2024.

Pa.R.A.P. 908 states that an appellant who holds the belief that one of the parties below has no interest in the outcome shall file a notice of the same and serve all parties to the matter in the lower court. *Id.* Pa.R.A.P. 1115(b) (Caption and Parties) further reiterates this requirement. Both Pa.R.A.P. 908 and Pa.R.A.P. 1115 provide that, “a party noted as no longer interested may remain a party [...] by filing a notice that he has an interest in the petition” and shall be named as respondents. Accordingly, Counsel for Mother filed a Notice of Interest and Praecipes for Appearance on April 17, 2024 and may rightfully proceed as an Appellee. *Township of Concord v. Concord Ranch, Inc.* 664 A.2d 640, 650 (Pa. Commw. Ct. 1995).

Setting aside the clear rules-based justification for Mother’s participation in this matter, the material basis for ACCYF’s attempt to exclude Mother from participation in this appeal appears to be

mootness.⁹ Assuming Appellants will brief the issue, we will address it here.

The mootness doctrine states:

As a general rule, an actual case or controversy must exist at all stages of the judicial process, or a case will be dismissed as moot. "An issue can become moot during the pendency of an appeal due to an intervening change in facts of the case or due to an intervening change in the applicable law." [...] "An issue before a court is moot if in ruling upon the issue the court cannot enter an order that has any legal force or effect."

In re D.A., 801 A.2d 614, 616 (Pa.Super.2002) (en banc) (internal citations omitted).

Given that the underlying case remains open, the doctrine of mootness does not apply. Mootness does not address party interests but rather the ability of the court to render a decision that has legal force or effect. *In re J.A.*, 107 A.3d 799, 813 (Pa. Super. 2015). It is incongruous to say that this Court can render a decision that has legal force or effect to some but not all who were, indeed, parties at the time of the intermediate appeal. A decision

⁹ ACCYF's April 12, 2024 Notice of No Interest refers to the termination of Mother's parental rights (which occurred subsequent to the entry of the trial court's order which is the subject of this appeal) and alleges that she is no longer a party to this appeal as a result. Counsel for Mother recognizes that the trial court's decision in the termination of parental rights matter, and subsequent affirmation of the same by the Superior Court, will not be disturbed by the outcome of the instant matter. Mother nevertheless asserts an interest in the instant appeal for the reasons set forth in this section.

in this matter will affect all parties' interests and all future parties to dependency proceedings interests.

It should also be noted that even if the mootness doctrine did apply, two of the exceptions to the same would apply in the case at bar. Those being that the "case involves a question of great public importance," and "a party to the controversy will suffer some detriment due to the decision of the trial court." *In re D.A.* at 615. Given that this Court is considering whether a prospective adoptive parent exception exists to the Juvenile Act's prohibition against foster parents having standing absent an award of legal custody of the child, it is a matter of great public importance as the exception would allow third parties who have no interest in preserving family unity and pursuing the goal of reunification (by definition of the exception itself) to participate in hearings and appeals, including initiating appeals, in direct contradiction to the plain language of the Juvenile Act. Likewise, parents would certainly suffer detriment by the inclusion of any third party whose interest is directly opposed to that of the parents.

Therefore, Mother submits that she has a strong interest in the case and legal standing to brief the matter as Appellee. Neither ACCYF nor the Child's GAL Attorney can presume to speak on behalf of parents' interests as is evidenced by their desire to silence the same even in a case such as this where all counsel seek the same outcome.¹⁰

Finally, if this Court is inclined to disagree that Mother maintains an interest in this matter, we ask the Court to accept this brief as an Amici Brief and we ask this Court to grant Counsel for Mother the opportunity to argue on behalf of Parents' interests in this matter.

II. THE JUDICIALLY CREATED "PROSPECTIVE ADOPTIVE PARENT" EXCEPTION TO THE GENERAL PROHIBITION AGAINST FOSTER PARENTS PARTICIPATING IN DEPENDENCY CASES WAS ABROGATED BY THE LEGISLATURE'S SUBSEQUENT ENACTMENT OF SECTION 6336.1(a) OF THE JUVENILE ACT

The Juvenile Act does not affirmatively define "party" or provide an exhaustive list of individuals who may qualify as the

¹⁰ The suggestion that Mother no longer has an interest in the case is baseless and whether the argument is made in good faith is questionable.

same. However, case law has conferred party status in dependency proceedings on only three (3) classes of persons: (1) the parents of the juvenile whose dependency status is at issue; (2) the legal custodian of the juvenile whose dependency status is at issue; or the person whose care and control of the juvenile is in question. *In re: J.S.*, 980 A.2d 117, 120 (Pa. Super. 2009). It is undisputed that A.E. and Ann.E. do not fall into any of these three (3) categories. Nevertheless, A.E. and Ann.E. sought to intervene in S.W.'s dependency matter as "prospective adoptive parents" – a class of persons for whom they argued case law had carved out an exception to the general prohibition against foster parent standing in dependency matters. (Trial Tr. at 18, October 26, 2022) All parties to S.W.'s dependency matter objected to A.E. and Ann.E.'s Motion and argued that Section 6336.1(a) the Juvenile Act explicitly limits foster parent standing to those who have been awarded legal custody pursuant to Section 6357, which A.E. and Ann.E. had not been granted. 42 Pa.C.S. § 6336.1(a); 42 Pa.C.S. § 6357. (Trial Tr. at 35, 41, October 26, 2022).

The panel in the Superior Court below struggled with the question of whether the “prospective adoptive parent” exception developed in case law was abrogated by the enactment of Section 6336.1(a) and “whether the plain language of Section 6336.1(a) could permit the exception”. *In the Interest of S.W.*, 312 A.3d 345, 355-56 (Pa. Super. 2024). Accordingly, to answer the question presented of whether the enactment of Section 6336.1 (Notice and hearing) of the Juvenile Act abrogates the judicially created standing for “prospective adoptive parent” this Court must engage in statutory interpretation when looking to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S. § 1921(a).

a. THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 6336.1 OF THE JUVENILE ACT BARS FOSTER PARENTS FROM GAINING LEGAL STANDING IN DEPENDENCY MATTERS

Section 6336.1 (Notice and hearing) of the Juvenile Act was initially enacted on December 15, 1998, effective January 1, 1999, in response to federal legislation known as the Adoption and Safe Families Act of 1997 (hereinafter, “ASFA”). Act of December 15, 1998, P.L. 949 No. 125 Cl, as amended 42 Pa. C.S. § 6336.1. Section 6336.1 (Notice and hearing) corresponds to Section 104

(Notice of Reviews and Hearings; Opportunity to be Heard) of ASFA.

Section 104 states:

Section 475(5) of the Social Security Act (42 U.S.C. 675(5)) as amended by section 103, is amended - ...
(3) by adding at the end of the following:

“(G) the foster parents (if any) of a child and any preadoptive parent or relative providing care for the child are provided with notice of, and an opportunity to be heard in, any review or hearing to be held with respect to that child, except that this subparagraph shall not be construed to require that any foster parent, preadoptive parent, or relative providing care for the child be made a party to such a review or hearing solely on the basis of such notice and opportunity to be heard.”

P.L. No. 105-89.

The Congressional Record leading to the enactment of Section 104 of ASFA reveals that the rights of foster parents in dependency matters was specifically considered:

The bill establishes for foster and pre-adoptive parents the right to be given notice of hearings and the right to testify on behalf of children in their care. How could anyone ever want to leave these people out of the process? These parents have been in charge of the children 24 hours a day, 7 days a week. They are the ones in the best position to know the problems that the children might have and can represent the children's concerns. It is an important change to make as we seek to better represent the children's best interests.

105 Cong. Rec. S12672 (daily ed. Nov. 13, 1997) (statement of Sen. Charles Grassley).

Accordingly, there is no ambiguity as to the intent of the federal legislation to give foster parents, preadoptive parents and relatives providing care notice and an opportunity to be heard. The intent is not to make these individuals parties with standing, but rather to ensure these individuals can provide helpful testimony to inform the best interest of the child analysis required of the court in making all dispositional decisions for children.

Likewise, there is no ambiguity as to the intent of the General Assembly with respect to Section 6336.1 (Notice and hearing) of the Juvenile Act. When first enacted on December 15, 1998, effective January 1, 1999, the section read:

Section 6336.1. Notice and hearing

The court shall direct the county agency or juvenile probation department to provide the child's foster parent, preadoptive parent or relative providing care for the child with timely notice of the hearing. The court shall provide the child's foster parent, preadoptive parent or relative providing care for the child the opportunity to be heard at any hearing under this chapter. **Nothing in this section shall give the foster parent, preadoptive parent or relative providing care for the child legal standing in the matter being heard by the court.**

Act of December 15, 1998, P.L. 949 No. 125 Cl, as amended 42 Pa. C.S. § 6336.1 (emphasis added).

There have been two subsequent amendments to Section 6336.1 which have more explicitly clarified that this section does not provide standing for preadoptive parents. The first amendment came December 9, 2002 and read:

The court shall direct the county agency or juvenile probation department to provide the child's foster parent, preadoptive parent or relative providing care for the child with timely notice of the hearing. The court shall provide the child's foster parent, preadoptive parent or relative providing care for the child the opportunity to be heard at any hearing under this chapter. **Unless a foster parent, preadoptive parent or relative providing care for a child has been awarded legal custody pursuant to section 6357 (relating to rights and duties of legal custodian), nothing** in this section shall give the foster parent, preadoptive parent or relative providing care for the child legal standing in the matter being heard by the court.

The second amendment, which is the current version of Section 6336.1, was enacted on December 14, 2023, effective February 12, 2024, and reads:

(a) General rule. – The court shall direct the county agency or juvenile probation department to provide the child's foster parent, preadoptive parent, relative providing care for the child or a potential kinship care resource under 67 Pa.C.S. § 7507(c) (relating to Kinship Care Program) with timely notice of the hearing. The court shall provide the child's foster

parent, preadoptive parent or relative providing care for the child the right to be heard at any hearing under this chapter. The court shall provide a potential kinship care resource with the right to be heard during a scheduled hearing or at a separate dispositional hearing, but only as to the individual's qualifications to provide kinship care. Once a potential kinship care resource has had an opportunity to address the court, the court shall render a decision as to whether the potential kinship resource may receive notice or participate in future hearings under this chapter. **Unless a foster parent, preadoptive parent, relative providing care or a kinship care resource for a child has been awarded legal custody pursuant to section 6357 (relating to rights and duties of legal custodian), nothing in this section shall give the foster parent, preadoptive parent, relative providing care or a potential kinship care resource for the child legal standing in the matter being heard by the court.**

42 Pa.C.S. § 6336.1(a) (2024) (emphasis added).¹¹

The plain text of the statute both recognizes the importance of foster parent participation in dependency hearings and explains the *limits* of that participation as envisioned by the General Assembly.

The 2023 amendments to Section 6336.1 include specific reference to Section 6357 of the Juvenile Act. The inclusion of this

¹¹ Counsel for Mother recognizes that there was also an amendment to Section 6336.1 in 2008 (42 Pa.C.S. § 6336.1(b)(1), effective December 8, 2008), however the 2008 amendment related only to foster parents' right to be heard (in the form of submitting written reports) and did not address standing in dependency proceedings. As such, discussion of the 2008 amendment will be omitted.

reference is not accidental. Section 6357 empowers the trial judge with the ability to award legal custody to third parties. Section 6357 reads:

6357. Rights and duties of legal custodian.

A custodian to whom legal custody has been given by the court under this chapter has the right to the physical custody of the child, the right to determine the nature of the care and treatment of the child, including ordinary medical care and the right and duty to provide care for the care, protection, training, and education, and the physical, mental, and moral welfare of the child. An award of legal custody shall be subject to the conditions and limitations of the order and to the remaining rights and duties of the parents or guardian of the child as determined by the court. The court may award legal custody under this section on a temporary basis to an individual or agency under section 6351(a)(2) (relating to disposition of dependent child) or permanent basis to an individual under section 6351(a)(2.1).

42 Pa.C.S. § 6357 (1999) (emphasis added).

With Section 6357, the Juvenile Act does not leave open the opportunity for third parties to achieve standing by virtue of their status of being a placement resource for a child whether that be a foster parent, preadoptive or prospective adoptive parent, or a relative providing care absent the trial court affirmatively granting them legal custody.

So, the question then becomes: Given that Section 6336.1(a) does *not* provide legal standing absent the trial court granting legal custody under Section 6357, does the judicially created standing exception for prospective adoptive parents survive? Given both the unambiguous language used in the statute and the subordinate conjunction created by the use of the word “unless,” the answer is manifestly obvious that it does not.

When the terms of a statute are clear and unambiguous, they will be given effect consistent with their plain and common meaning. *Commonwealth v. Brown*, 981 A.2d 893, 897 (Pa. 2009); *Commonwealth v. McCoy*, 962 A.2d 1160, 1166 (Pa. 2009); 1 Pa.C.S. § 1921(b) (2019); *Commonwealth v. Kelley*, 801 A.2d 551, 554 (Pa. 2002). We ascertain the plain meaning of a statute by ascribing to the particular words and phrases the meaning which they have acquired through their common and approved usage, and in context. 1 Pa.C.S. § 1903 (2019).

In Section 6336.1(a) the term “unless” creates a subordinate conjunction. *Black’s Law Dictionary* 1536 (6th ed. 1980). Unless legal custody has been awarded under Section 6357

(subordinate/dependent clause), nothing shall give [them] legal standing in the matter heard by the court (main clause).

"The word 'shall' by definition is mandatory and it is generally applied as such." *Chanceford Aviation Props., L.L.P. v. Chanceford Twp. Bd. of Supervisors*, 923 A.2d 1099, 1104 (Pa. 2007) (citation omitted). When a statute is unambiguous, "shall" must be construed as mandatory. *Id.* Here, the use of "shall" is unambiguous and hence, mandatory. The conclusion is that no third party who has the right to notice and hearing under Section 6336.1(a) shall have legal standing unless they were awarded legal custody under Section 6357.

Additionally, this Court in *In re: K.N.L.* said:

In Pennsylvania, the doctrine of standing is a judicially-created tool intended to "winnow out" litigants with no direct interest in the matter, and to otherwise protect against improper parties. *In re Hickson*, 573 Pa. 127, 821 A. 2d 1238, 1243 (2003). Consequently, **where the General Assembly expressly prescribes the parties who may pursue a particular course of action in Pennsylvania courts, legislative enactments may further enlarge or distill these judicially-applied principles.**

284 A.3d 121, 136-137 (Pa. 2022) (emphasis added). Therefore, the 1999 legislative enactments of Section 6336.1 and Section

6357 by the General Assembly did, in fact, distill the judicially-applied principles of standing to the point of limiting them to those third parties whom the trial court has granted legal custody. No longer can the courts engage in a determination of whether a third party (including a prospective adoptive parent) is adversely affected, or aggrieved by the child's removal from their care such that they can achieve party standing in a dependency matter.

b. CASE LAW SUBSEQUENT TO THE ENACTMENT OF SECTION 6336.1 OF THE JUVENILE ACT CLEARLY INTERPRETED SECTION 6336.1 TO LIMIT STANDING TO ONLY THOSE THIRD PARTIES AWARDED LEGAL CUSTODY

Despite the enactment of Sections 6336.1 and 6357 in 1999, our intermediate appellate court has struggled to uniformly apply the plain language of the statute for nearly twenty years. On the issue of "prospective adoptive parent" standing for A.E. and Ann.E., the Superior Court panel below at once recognized that the plain language of Section 6336.1(a), "plainly disallows standing to any foster parent, pre-adoptive parent, or relative providing care to the child, at least when it comes to the dependency proceedings" and affirmed subsequent case law that arrived at an inapposite result.

In the Interest of S.W., 312 A.3d 345, (Pa. Super. 2024). Specifically, the Superior Court pointed to its own earlier opinion in *In the Interest of M.R.F., III*, (hereinafter, "*M.R.F., III*") stating, "our case law has carved a narrow exception to permit the limited participation of a foster resource who has attained prospective adoptive status: prospective adoptive parents have standing to contest the child welfare agency's decision to remove a child it placed with them in anticipation for adoption." 182 A.3d 1050, 1056 (Pa. Super. 2018). Although *M.R.F., III* was decided in 2018, it relied upon what scholars have called, "shadow precedents." Deborah A. Widiss, *How Courts Do – And Don't – Respond to Statutory Overrides*, 104 *Judicature* 51, 51 (2020). That is, the case law cited to support the holding in *M.R.F., III*, reaches back to a time *before* Section 6336.1 was enacted (*Mitch v. Bucks County Children and Youth Social Service Agency*, 556 A.2d 419 (Pa. Super. 1989) (hereinafter, "*Mitch*") and *In re: Griffin*, 690 A.2d 1192 (Pa. Super. 1997) (hereinafter, "*Griffin*"). Because Section 6336.1 (Notice and hearing) speaks directly to the role of resource parents in dependency matters where the Juvenile Act was

previously silent, the enactment of Section 6336.1 constitutes a legislative "override" of previous judicial interpretations of the law as it relates to resource parent standing.

In *Mitch* and *Griffin* the courts interpreted the question of foster parent standing based on traditional concepts of common law standing (e.g. whether an individual had a substantial, direct, and immediate interest in the matter before the court). However, in 1999 this Court in *In the Interest of G.C.* (hereinafter, "G.C.") explained that such traditional standing analysis is misplaced when it comes to foster parents. 558 Pa. 116, (Pa. 1999). The Opinion in Support of Affirmance in *G.C.* reviewed decades of precedent on the question of foster parent standing and noted that, "the court's primary focus in all cases has been on the nature of the foster parent/child relationship as established by the Legislative scheme." *Id.* at 120. The opinion goes on to underscore the distinction between physical and legal custody and the importance of the child welfare agency retaining the latter:

The agency, while transferring physical custody to the foster parents, remains responsible for the care of the child, and may at any time be required by the child's interests to regain physical custody and terminate the foster parent's

relationship to the child. [...] [A]gency supervision of the performance of the foster parents takes forms indicating that the foster parent does not have full authority of a legal custodian. Moreover, the natural parent's placement of the child with the agency does not surrender legal guardianship: the parents retain authority to act with respect to the child in certain circumstances.

Id. Citing to *In re: Adoption of Crystal D.R.*, 480 A. 2d 1146, 1149-1150 (Pa. Super. 1984); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977). It is notable that the Superior Court panel in the instant matter below did not squarely address this Court's decision in *G.C.* given that the analysis in *G.C.* itself proceeds from the US Supreme Court opinion in *Smith v. Organization of Foster Families*, *supra*. Though this Court was evenly split when it rendered its decision in *G.C.*, thereby affirming the intermediate appellate court's decision (finding that foster parents do not have standing to contest awards of custody concerning their foster children), both the Opinion in Support of Affirmance and the dissent address the paramount question presented by S.W.:

We are persuaded by the overwhelming analysis of the Superior Court regarding the uniquely limited and subordinate, state-created, agency-maintained, foster parent/child relationship established through the Legislative scheme, that foster parents lack standing to seek or contest custody of their foster children. (n.3)

(n.3) Apparently, the dissent would favor ignoring the statutory framework set forth by the legislature regarding the limited role foster parents play in the lives of their foster children in analyzing whether they have standing to seek or contest custody proceedings. The dissent seems to advocate the view that the foster parent/child relationship, by its nature, gives foster parents a direct, substantial and immediate interest in such proceedings. However, given that the role of foster parents is exclusively defined through legislative scheme, to ignore the same when determining their status in child custody proceedings, as advocated by the dissent, would be improper.

Id. at 125.

Following the enactment of Section 6336.1 the Superior Court first took up the question of foster parent standing in 2004 in *In re: N.S.* (hereinafter, "N.S."). In *N.S.* a former foster parent relied on *Mitch* to argue that she was a "prospective adoptive parent" based on the length of time the children were placed in her care. 845 A.2d 884 (Pa. Super. 2004) citing *Mitch*, 556 A.2d 419 (Pa. Super. 1989). Similar to *M.R.F., III*, Appellant argued that her prospective adoptive status distinguished her from other foster parents and therefore conferred standing to pursue visitation and/or adoption. 845 A.2d 884, 886 (Pa. Super. 2004). Pointing directly to the newly enacted Section 6336.1 of the Juvenile Act,

the court in *N.S.* dismissed Appellant's argument as relying on case law that was decided *prior* to the enactment of Section 6336.1. *Id.* at 887.

The opinion in *N.S.* cites *In re: G.C.* and its progeny for the guiding principle that the status of "foster parent" is a "uniquely limited and subordinate, state created, agency-maintained [relationship] established through the legislative scheme." 735 A.2d 1226, 1230 (Pa. 1999). Accordingly, the court in *N.S.* interpreted the plain language of Section 6336.1 limiting standing to *only* those foster parents who have been granted legal custody as a natural extension of the "uniquely limited and subordinate, state created, agency-maintained [relationship]" intended by our Legislature historically. *G.C.* at 125.

The Superior Court next took up the question of third party standing in dependency matters in 2006 in *In re: L.C., II*, (hereinafter, "*L.C., II*") where a grandmother who had raised L.C. for many years was denied standing in the dependency matter, which was initiated after a court had awarded legal and physical custody of L.C. to his mother. 900 A2d 378, 379 (Pa. Super. 2006).

The court denied standing because grandmother did not have legal custody or *in loco parentis* status at the time of the adjudication, nor was her care and control of L.C. in question. *Id.* at 380. The court reiterated the categories of persons to whom party status in dependency matters has been conferred via case law: (1) the parents of the juvenile whose dependency status is at issue; (2) the legal custodian of the juvenile whose dependency status is at issue; or (3) the person whose care and control of the juvenile is in question. *In re: J.P.*, 832 A.2d 492, 496 (Pa. Super. 2003); *In re: L.J.*, 691 A.2d 520, 526 (Pa. Super. 1997); *In re: Manuel*, 566 A.2d 626, 628 (Pa. Super. 1989); *In re: Michael Y.*, 530 A.2d 115, 118 (Pa. Super. 1987). Pointing, again, to the statute the court explained that, “[t]hese categories logically stem from the fact that upon an adjudication of dependency, the court has the authority to remove a child from the custody of his or her parents or legal custodian. Due process requires that the child’s *legal caregiver*, be it a parent or other custodian, be granted party status[.]” *Id.* at 381 (emphasis added). The opinion further clarified that even *in loco parentis* status is irrelevant to the determination of whether

one has standing in dependency matters unless the potential intervenor was the child's primary caretaker *before* the dependency proceeding was initiated and that individual's care and control of the child was the subject of the dependency proceeding. *In re: F.B.*, 927 A.2d 268, 274 (Pa. Super. 2007); *In re: D.K.*, 922 A.2d 929 (Pa. Super. 2007). Accordingly, it is the fact that the potential intervenor falls within one or more of the enumerated categories set forth in existing case law that confers standing – not *in loco parentis* status. *Id.*

Less than three (3) years later the Superior Court again took up the question of foster parent standing in *In the Interest of J.S.* (hereinafter, "J.S."), where foster parents sought to intervene in the dependency matter after the court changed J.S.'s permanency goal from reunification to subsidized permanent legal custodianship (hereinafter, "SPLC"). In *J.S.* the court observed that:

[T]he issue of standing is so significant in dependency proceedings that Pennsylvania jurisprudence has developed case law specifically outlining the narrow class of participants that are entitled to standing in dependency proceedings. **See *In re L.C.,II, supra*** (collecting cases). Further, the legislature identified the limited rights foster parents, pre-

adoptive parents, and relative providing care possess during dependency petitions. *Id.* at 381-382; 42 Pa.C.S. § 6336.1

Id. at 10.

In *J.S.*, the court reiterated that unless a potential intervenor falls within one or more of the categories enumerated in *L.C., II*, they are not entitled to standing in a dependency matter. *Id.* Citing to *In re: L.C., II*, 900 A2d 378 (Pa. Super. 2006); *In re: F.B.*, 927 A.2d 268, 273 (Pa. Super. 2007) (“Since appellees do not fit in any of these categories, they did not have standing [T]hey are not entitled to ... participate, to be heard on his or her own behalf, to introduce evidence and/or to cross-examine witnesses.”) Further, the opinion in *J.S.* explained that the order changing J.S.’s permanency goal to SPLC was immaterial. The court recognized that although all the parties agreed that SPLC with the potential intervenors was, “appropriate, if not the preferred, disposition, Foster Parents’ *prospective status* as permanent legal custodian is not certain.” *Id.* at. 17 (emphasis added). Indeed, the court emphasized:

Until the juvenile court enters an order pursuant to Pa.R.J.C.P. 1515(b) and Pa.R.J.C.P. 1609, regarding the transfer of legal custody, and closes the dependency

proceedings pursuant to Pa.R.J.C.P. 1614, regarding termination of court supervision, Foster Parents' legal status remains unchanged.

Id. at 16. Accordingly, *J.S.* stands for the proposition that it is not enough for the potential intervenors to have an *expectation* of gaining legal custody; rather, legal custody must, in fact, be conferred by order of court for a foster parent to be endowed with legal standing.

Finally, the Superior Court took up the question of whether a child's Maternal Aunt, who had previously served as a kinship foster parent before the child was removed from her care by court order, may be granted standing in her former foster child's dependency matter in *In re: S.H.J.*, 78 A.3d 1161 (Pa. Super. 2013). In a unanimous opinion, Judge Wecht (now Justice Wecht) recounted the categories enumerated in *L.C.,II* and subsequent authority further defining those categories as *exclusive* of foster parents unless they have been granted legal custody. *Id.* at 1161-62. (Citing to *In re: D.K.*, 922 A.2d 929 (Pa. Super. 2007); *In re: J.S.*, 980 A.2d 117 (Pa. Super. 2009)). Where the opinion references *In re: Griffin* (decided prior to the enactment of Section 6336.1) it is

to dismiss the appellant's claim to having achieved "pre-adoption status," which the court notes is irrelevant to the question of foster parent standing in dependency matters. *Id.* at 1162.

While there exists a more recent line of Superior Court decisions that appear to diverge from the well hewn path of *N.S., L.C., II*, and their progeny, those divergent opinions suffer from the same flawed reasoning in *M.R.F., III*. That is, they cite to "shadow precedent" despite the statutory override of Section 6336.1 and the case law that followed affirming the same. Accordingly, Mother contends that to the extent that *M.R.F., III* is read to stand for the proposition that foster parents may gain standing in dependency matters of their foster children by attaining the status of "prospective adoptive parents" – it was wrongly decided. *M.R.F., III's* extension of the "prospective adoptive parent" exception beyond the enactment of Section 6336.1 belies the history which led to the section's enactment and ignores a wealth of case law decided after its enactment, interpreting the section to explicitly bar foster parent standing in dependency matters.

c. ANY "EXPECTATION INTEREST" ADVANCED BY A FOSTER PARENT IN THE POTENTIAL ADOPTION OF THEIR FOSTER CHILD CANNOT SURVIVE CONSTITUTIONAL SCRUTINY

Finally, the interests of "prospective adoptive parents" in dependency matters are, by definition, in direct conflict with parents' fundamental liberty interests in the care, custody and control of their children. *Troxel v. Granville*, 530 U.S. 57, at 65-6 (2000). Although there have been arguments that foster parents have constitutional liberty interests in the foster children placed in their care, this argument has never been decided by the U.S. Supreme Court. In *Smith v. Organization of Foster Families* (hereinafter, "*Smith*"), however, this U.S. Supreme Court provided insight into what process is due to foster families when the removal of a foster child from their care is undertaken. 431 U.S. 816, 856 (1977). The court does not address whether foster parents have a "liberty interest" within the Fourteenth Amendment's protections regarding foster children in their care; rather the Court acknowledges that the foster parent/child relationship is derived from a contractual relation with the State and looks to state law to ascertain the expectations and entitlements of the parties. *Id.* at

847. Accordingly, the Court addresses the issue of “what process is due” in the particular context. *Id.* at 845-847.

The *Smith* Court concludes that the statutory scheme that provides for an administrative review where foster parents may request a hearing and opportunity to be heard is sufficient due process. *Id.* at 850. Specifically, the Court observes that:

The foster parent-foster child relationship involved in this litigation is, of course, wholly a creation of the State. [The State] law defines the circumstances under which a child may be placed in foster care, prescribes the obligations of the foster parents, and provides for the removal of the child from the foster home “in [the] discretion” of the agency with custody of the child. ... The agency compensates the foster parents, and reserves in its contracts the authority to decide as it sees fit whether and when a child shall be returned to his natural family or place elsewhere. ... Were it not for the system of foster care that the State maintains, the relationship for which constitutional protection is asserted would not even exist.

Id. at 856.

Given the derivative nature of the foster parent “interest” being discussed (be it a liberty interest or not) Counsel for Mother is inclined to agree with the Concurring Opinion that states:

... I cannot understand why the Court thinks itself obliged to decide these cases on the assumption that either foster

parents or foster children in [the state] have some sort of “liberty” interest in the continuation of their relationship. Rather than tiptoeing around this central issue, I would squarely hold that the interests asserted by the appellees are not of a kind that the Due Process Clause of the Fourteenth Amendment protects.

Id. at 857-858.

Accordingly, to the extent that the Juvenile Act in its present form is read to permit foster parents to gain *any* standing in dependency matters – no matter how limited – such a reading cannot survive constitutional scrutiny. As the majority below observed:

The government – by way of the local child protective services agency – may narrowly infringe upon the parent’s constitutional right to care, custody, and control of the child, because it has a *compelling state interest* – namely, the protection and stability of the child.

In the Interest of S.W., 312 A.3d 345, 357 n.4 (Pa. Super. 2024) Citing *In re: D.C.D.*, 105 A.3d 662. 676-677 (Pa. 2014).

A foster parent’s expectation of adoption is *not* narrowly tailored to advance the compelling state interest in protecting children because foster parents’ interests are inherently subordinate to the interests of parents, children and the county agency charged with protecting children and preserving families. *See In the Interest of*

G.C., 735 A.2d 1226 (Pa. 1999), citing *In re Adoption of Crystal D.R.*, 480 A.2d 1146, 1150-1151 (Pa. 1984). As this Court observed in *Crystal*, “it is the foster parents’ responsibility to help achieve these purposes – not to subvert them.” *Id.* at 1151. Accordingly, Mother urges this Court to reiterate its conclusion in *Crystal* that, “[F]oster parents may not by pleading their love for the child escape their legal status” as subordinate to both the agency’s and to the child’s parents. *Id.* at 1151.

CONCLUSION

WHEREFORE, Appellee Mother would respectfully request that this Court make clear that the enactment of Sections 6336.1 of the Juvenile Act abrogated earlier case law permitting “prospective adoptive parents” to gain standing in dependency matters and therefore reverse the March 13, 2024 Superior Court Order and affirm the November 8, 2022 trial court order denying A.E. and Ann.E.’s Motion to Intervene in S.W.’s dependency action.

Respectfully submitted,

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