Good Morning,

Introduction:

I am Judge Carol L. Van Horn, and I am here today to testify about House Bill 642 which proposes to give siblings, and a parent, guardian or custodian of a minor sibling, statutory standing to sue for partial physical custody or supervised physical custody of a child. By way of background, I am completing my fourteenth year on the bench after practicing law for fifteen years with a focus on family law matters. The emphasis of my entire professional career has been on issues relating to children and their families. It is from this perspective that I offer remarks based on my perception of the proposed law. I should also note that I discussed HB 642 with the Honorable David Workman of Lancaster County who serves as Chair of the Family Law Section of the Pennsylvania Conference of State Trials Judges and he shares many of my views. I would like to begin by emphasizing that we are here today because we all recognize the value and importance of sibling relationships. As a Judge, I am required to consider sibling relationships in a variety of contexts because this legislature and Pennsylvania Courts have consistently protected the rights and interests of siblings. I think it is helpful to place the proposed legislation in the context of other statutes and case law that recognize the importance of sibling relationships.

Siblings in Family Law:

I. Siblings in Dependency

First, we should look at dependency proceedings where a court becomes involved with a child based upon allegations of abuse, neglect, or abandonment. A court must consider sibling relationships at every step of the proceedings. Pursuant to our Juvenile Statutes, before a child can be deemed dependent and removed from his home, a court must determine whether a sibling

is also subject to removal, and enter findings on the record about "whether reasonable efforts were made prior to the placement of the child to place the siblings together or whether such joint placement is contrary to the safety or well-being of the child or sibling." 42 Pa.C.S. § 6351(b). Unfortunately, a dependent child may be separated from his siblings. In this instance, this legislature has said that "[i]f a sibling of a child has been removed from his home and is in a different placement setting than the child, the court shall enter an order that ensures visitation between the child and the child's sibling no less than twice a month, unless a finding is made that visitation is contrary to the safety or well-being of the child or sibling." 42 Pa.C.S. § 6351(b.1). When the court conducts a permanency hearing, if a child and his sibling have been separated and the sibling has been removed from his home, the court must determine "whether reasonable efforts have been made to place the child and the sibling of the child together or whether such joint placement is contrary to the safety or well-being of the child or sibling." 42 Pa.C.S. § 6351(f)(10).

II. Siblings in Relocation

Second, when a parent wishes to relocate with a child, sibling relationships must be considered when deciding whether to allow the relocation. 23 Pa.C.S. §5337(h)(1). The Superior Court has stated that "[r]elocation cases have highlighted the enduring value of the maintenance of sibling relationships." *Speck v. Spadafore*, 895 A.2d 606, 613 (Pa. Super. 2006).

III. Siblings in Custody

Third, sibling relationships are extremely relevant in custody disputes. For example, during a custody dispute, a court must determine what is in the best interests of a child. This requires examination of a non-exhaustive list of statutory factors, including "[t]he child's sibling relationships." 23 Pa.C.S. § 5328(a)(6).

Additionally, Pennsylvania courts have emphasized the importance of sibling relationships in custody determinations. The Superior Court has stated that siblings help provide "continuity and stability" to a child's development. *Ferdinand v. Ferdinand*, 763 A.2d 820, 824 (Pa. Super. 2000). It is and always has been the policy of the Commonwealth to keep siblings together whenever possible. *Wiskoski v. Wiskoski*, 629 A.2d 996, 998 (Pa. Super. 1993) (citing *Pilon v. Pilon*, 492 A.2d 59 (Pa. Super. 1985)). Courts have referred to this policy of keeping siblings together as the "family unity" doctrine. *Johns v. Cioci*, 865 A.2d 931, 942 (Pa. Super. 2004) (citing *Wiskoski* 629 A.2d at 999). Siblings should be separated only where there are "compelling reasons" to do so. *Id.* at 998 (citing *Pilon*, 492 A.2d 59). "Compelling reasons" means that siblings should be raised together in the same household unless "forceful" evidence indicates it is "necessary" to separate them. *Wiskoski*, 629 A.2d at 998 (citations omitted). Even "'[g]ood reasons are not necessarily 'compelling' reasons for disrupting the integrity of a family unit." *Id.* In fact, when making a decision to separate siblings, courts must examine the sibling relationship and the benefits derived from it, rather than just the relationship between one child and the prospective custodians. *Ferencak v. Moore*, 445 A.2d 1282, 1286 (Pa. Super. 1982). The policy of keeping siblings together holds true even in the case of half siblings. *In re H.V.*, 37 A.3d 588, 595 (Pa. Super. 2012) (citing *Cioci*, 865 A.2d at 942). It is important to note that the "family unity doctrine" has been invoked mostly in cases where siblings lived together prior to the divorce or separation, and is not as often discussed when siblings were previously raised separately. *Cioci*, 865 A.2d at 943.

Wiskoski is a custody case involving Zachary who was the four year old son of separated parents. *Wiskoski*, 629 A.2d at 997. Zachary's Mother had two other sons from a previous marriage who were Zachary's older half-brothers. *Id.* When Zachary's parents separated, his

mother took him and his two half-brothers to live elsewhere. *Id.* The trial court awarded Zachary's Father primary physical custody of Zachary during the school year. *Id.* at 998. Zachary's Mother appealed that determination, and the Superior Court held that a solid brotherly relationship had clearly been established between Zachary and his half-brothers, and the trial court erred because the Father did not offer any "compelling reasons" to separate the siblings. *Id.* at 988-999.

In *Weber v. Weber*, another custody case, Judge Brosky of the Superior Court, in a concurring opinion, says it best:

> The relationships between siblings should be closely guarded and nurtured, since it is those relationships that will provide a harbor from which a child may find her way through the often turbulent waters of life. While it is true that parents may serve this function as well, we must realize that more often than not, parents predecease their children, creating the situation where siblings must comfort, support and depend upon each other. Even in less drastic circumstances, because siblings are closer in age and have shared life experiences, it would be quite natural for them to seek each other's counsel and companionship on routine matters as well.

Weber v. Weber, 524 A.2d 498, 500 (Pa. Super. 1987).

Standing in Custody Disputes

I. *In Loco Parentis*

After highlighting the important role siblings play in family relations, I now want to focus on the issue at hand. As you know, I am here today testifying about House Bill 642, which proposes to give siblings statutory standing to sue for custody. It is my belief that this proposed legislation in its present form is both unnecessary and potentially detrimental to children who find themselves in the middle of custody disputes.

Currently, "[i]n Pennsylvania, there are three types of custody disputes: parent versus parent; parent(s) versus state; and parent(s) versus third party." *Cardamone v. Elshoff*, 659 A.2d 575, 579 (Pa. 1995) (citation omitted). Today our focus is on third parties. Before a third party can even begin to sue for custody, they must establish standing. At present, there are two ways a party can gain standing in a custody dispute being (1) specific legislative authorization, or (2) an *in loco parentis* relationship to the child. *D.N. v. V.B.*, 814 A.2d 750, 753 (Pa. Super. 2002) (citing *T.B. v. L.R.M.* 786 A.2d 913, 916 (Pa. 2001).

Under 23 Pa.C.S. § 5324(2) which gives standing to obtain physical or legal custody of a child to "[a] person who stands *in loco parentis* to the child," a sibling may seek physical custody if he can establish that special relationship. *In loco parentis* literally means "in place of a parent," and a person standing *in loco parentis* can be a related or unrelated third-party. *Peters v. Costello*, 891 A.2d 705, 710 (Pa. 2005). Someone who stands *in loco parentis*, has not formally adopted a child, but by virtue of their conduct, has assumed all parental responsibilities, obligations, and duties. *T.B. v. L.R.M.*, 786 A.2d 913, 916 (Pa. 2001). They have assumed the parental status by taking on both the rights and liabilities associated with parenthood. *T.B.*, at 917. The Superior Court has stated that *in loco parentis* "[s]tanding will be found where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent." *S.A. v. C.G.R.*, 856 A.2d 1248, 1250 (Pa. Super. 2004). The Superior Court has also said that:

> "[a]n important factor in determining whether a third party has standing is whether the third party lived with the child and the natural parent in a family setting, irrespective of its traditional or nontraditional composition, and developed a relationship with the child as a result of the participation and acquiescence of the natural parent."

Bupp v. Bupp, 718 A.2d 1278, 1281 (Pa. Super. 1998). Once an *in loco parentis* relationship is shown, the third party is given standing because it is in the child's best interest for that third party to have an opportunity to fully litigate the issue of the child's custody. *T.B. v. L.R.M.*, 753 A.2d 873, 883 (Pa. Super. 2000). Such is the case even over the objections of the biological parent. *Id.* Therefore, establishing an *in loco parentis* relationship only gives a third party the right to sue in court. It does not guarantee a custody award over the natural parents.

The purpose of showing an *in loco parentis* relationship is "to ensure that actions are brought only by those with a genuine, substantial interest." *T.B. v. L.R.M.*, 753 A.2d 873, 884 (Pa. Super. 2000). Although seemingly stringent, the *in loco parentis* standing standard can be flexible based upon the facts, and courts have lessened the burden somewhat in instances where a step-parent has developed a parental relationship, or third-parties do not wish to replace the natural parent, but simply maintain a relationship with the child. *Id.* Therefore, a sibling can establish a parental relationship with a child, thereby establishing standing to sue for formalized custody rights.

As I explained, the showing required to obtain *in loco parentis* standing is purposefully high. When analyzing this proposed legislation, it is important to understand why the law requires third-parties to establish such a significant parental relationship just to have standing to sue for custody.

The Supreme Court of Pennsylvania reasoned that "[t]he *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. Thus . . . it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy." *Peters v. Costello*, 891 A.2d 705, 711 (Pa. 2005) (citations

omitted). Pennsylvania courts have set high barriers to third-party standing in custody matters to "prevent intrusion and interference" into the family unit by well-meaning yet unconnected individuals. *Bupp v. Bupp*, 718 A.2d 1278, 1281 (Pa. Super. 1998) (citation omitted).

Grounding this rationale are parents' constitutionally protected rights to raise their children. The Supreme Court of the United States has stated, "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 67, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *see also Pierce v. Society of Sisters*, 268 U.S. 510, (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Superior Court has stated that "Pennsylvania courts have similarly recognized that the law protects the natural parent's relationship with his or her child and will not interfere unnecessarily with that relationship, even at the expense of estrangement to the extended family." *Cardamone v. Elshoff*, 659 A.2d 575, 579 (Pa. Super. 1995). Natural parents have a clear and strong right "to raise their children as they see fit." *Peters v. Costello*, 891 A.2d 705, 710 (Pa. 2005). In light of this fundamental right, any court interference with parental custody rights should be and has been only "in rare and exceptional circumstances." *Ken R. on Behalf of C.R. v. Arthur Z.*, 682 A.2d 1267, 1271 (Pa. 1996).

Furthermore, in a dispute between a parent and a non-parent, the natural parent has a prima facie right to custody of their child. *E.A.L. v. L.J.W.*, 662 A.2d 1109, 1112 (Pa. Super. 1995) (citing *In re Custody of Hernandez*, 376 A.2d 648 (Pa. Super. 1977)). This means that in a custody dispute, the scales are tipped in favor of the natural parent, and the evidentiary burden on the third party is increased. *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1319 (Pa. Super. 1996). This parental right to custody can be overcome only by showing "convincing reasons" that it is in the

child's best interest to award custody to the third party. *Tracey L. v. Mattye F.*, 666 A.2d 734, 735 (Pa. Super. 1995).

IV. 23 Pa.C.S. §5325

Besides establishing an *in loco parentis* relationship, this legislature has also allowed grandparents and great-grandparents to intervene in the parental relationship by granting them automatic standing to sue for partial physical custody and supervised physical custody in certain circumstances pursuant to 23 Pa.C.S. § 5325. Obviously siblings cannot be grandparents, but it is beneficial for us to examine how this statute has operated thus far before making a decision to expand the standing rights to siblings. Pursuant to the current statute, grandparents have a broad grant of standing rights to sue for partial custody when: 1) a parent is deceased, 2) the parents are divorced, involved in dissolution proceedings or have been separated for six months or more, or 3) a child has lived with the grandparent for at least twelve months and is then moved by the parents. 23 Pa.C.S.§ 5325. Courts have further held that the statute gives grandparents standing to sue for partial custody when the parents have never been married to each other. *L.A.L. v. V.D.*, 72 A.3d 690, 691 (Pa. Super. 2013). Although undoubtedly well-meaning and well-intentioned, the purpose of providing grandparents with automatic standing is to further the paramount goal of making custody determinations based upon what is in the best interests of the child. *Johnson v. Diesinger*, 589 A.2d 1160 (Pa. Super. 1991). Although 23 Pa.C.S. § 5325 only went into effect in January, 2011, this legislature has passed similar statutes that have granted grandparents standing to sue for custody or visitation since the early 1980s.[1] Unfortunately, these established

[1] See *Commonwealth ex rel. Miller v. Miller*, 478 A.2d 451, 453-54 (Pa. Super. 1984) ("our legislature enacted the Custody and Grandparents Visitation Act, 23 P.S. § 1001 et seq. (1981). . . . 'If a parent of an unmarried child is deceased, the parents or grandparents of the deceased parent may be granted reasonable visitation rights to the unmarried child by the court upon a finding that visitation rights would be in the best interests of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the application.'").

standing rights have resulted in emotional and bitter custody battles between parents and grandparents, all fighting over a child, with some losing focus on what is actually in the best interests of the common child.

So what have been some of the negative scenarios? When two arguably fit parents are divorcing, separating or were never married, they very likely must work out a custody arrangement between themselves, which is often not an easy task. However, because both the maternal and/or paternal grandparents also have standing, they can enter the mix and sue for custody as well. There are potentially four parties all trying to gain court-ordered time with a child or children, and we have some potentially serious intrusions on parental rights. Those are the facts of *L.V.L v. V.D.* The father and the mother of the child were never married and ended their relationship after the child was born. *L.A.L. v. V.D.*, 72 A.3d 690, 691 (Pa. Super. 2013). Soon thereafter, the father and mother entered into a shared custody agreement. *Id.* However, the paternal grandparents of the child also filed a petition for partial custody, and the court determined they had standing to do so. *Id.*

Some appellate decisions have recognized the need to limit trial court orders awarding custodial rights to grandparents. Deaths and divorces can be extremely traumatic, especially for children, and it is not always in a child's best interest to allow grandparents to intervene and potentially create further trauma. For example, the facts in *Johnson v. Diesinger* are devastating. Two little girls lost their mother to cancer, and their maternal grandmother sued for custody. After the mother's death, relations between the maternal grandmother and father "turned sour" because the father planned to marry another woman and started limiting the grandmother's visitation. *Johnson v. Diesinger*, 589 A.2d 1160, 1161 (Pa. Super. 1991). The trial court did grant partial physical custody rights to the maternal grandmother; however, the Superior Court

determined that the order was "excessive and overly burdensome" because it required the little girls to be with their grandmother during approximately one fourth of their free time. *Id.* Ultimately, the father wanted the maternal grandmother to have contact with his children, but did not want that contact to interfere with his attempts to strengthen and build his new family. *Id.* at 1162. The Superior Court reasoned that the award was improper because the primary consideration in such custody disputes must always be the best interests of the children, not the litigants. *Id.* at 1163. The court noted that "[o]ur Supreme Court has recognized that the rivalry between parents and grandparents for a child's affection can be devastating." *Id.* at 1164. Furthermore, "[i]n an action such as this the children are not a prize to be awarded to the winner, they are the person whose interests must be protected." *Id.* at 1163. Ultimately, despite the animosity between the parties and the traumatic loss of their mother, the girls appeared to be "happy and healthy" with their father, and that was the most important consideration. *Id.* at 1164.

Commonwealth ex rel. Zaffarano v. Genaro, is an older case Pennsylvania Supreme Court case where the child's mother was killed in a car accident a little more than a year after her birth, and the maternal grandparents then sued for partial custody. *Commonwealth ex rel. Zaffarano v. Genaro*, 455 A.2d 1180, 1181 (Pa. 1983). The relationship between the father and the grandparents had deteriorated and the father testified that "although he believed that appellees love Shannon, he did not want to leave Shannon alone with appellees because they had been saying nasty things about him." *Id.* The Supreme Court determined the lower court erred in its award of partial custody to the grandparents. The Supreme Court went into great detail about the devastating effect of an unhealthy rivalry between a child's parent and grandparents, holding that "the detrimental effects caused by the hostility between the parties outweighs the

benefits [the child] would receive from a renewed relationship with her grandparents. . . . We believe that it would be in [the child's] best interest not to be placed in the crossfire between her father and her grandparents." *Id.* at 1184. The Court further reasoned that "[the child] is not an inanimate object which may be moved from one environment to another without any ill or lasting effects; she is a human being who deserves the chance to grow up in an environment free of continuing hostility between family members." *Id.* at 1185.

K.B. II v. C.B.F, involved a complicated and ongoing custody battle between two divorced parents and the child's paternal grandparents, ultimately concluding in an award of primary physical custody to the grandparents. *K.B. II v. C.B.F.*, 833 A.2d 767, 770 (Pa. Super. 2003). The Superior Court determined that removal of the child from the custody of his biological mother was improper, reasoning that "[m]any children have relationships with their parents that "run hot and cold," but this does not justify the state's intrusion or removal of the child from his or her biological parent." *Id.* at 788.

I personally have presided over cases where grandparents have intervened causing trauma to children in already difficult circumstances. In one case, the fight actually was about who got to take the little girl to Disney World first – her paternal grandmother or her mother. In another case, after the death of the children's mother, the maternal grandparents were granted time with the children that had to be periodically reduced and eventually eliminated in its entirety due to the inability of the grandparents to refrain from making derogatory remarks about the children's father, his new wife and their children, half-siblings to the children in question.

As demonstrated by these case examples, although grandparents do have broad statutory standing to assert custody rights, in some instances, Pennsylvania courts have attempted to limit

such an intrusion on parental rights. No parent is perfect, and parents certainly do not need to be perfect to have a right to raise their children as they see fit.

V. Proposed Legislation

Importantly, siblings do not have a constitutional right to be raised together. Moreover, sibling standing is a relatively new development compared with grandparent standing rights which have been recognized by the legislature and courts of this Commonwealth for decades. In fact, courts have continually and routinely denied siblings standing in custody disputes. *In re L.J.*, 691 A.2d 520, 524 (Pa. Super. 1997). In *D.N. v. V.B.*, an older half sibling sued for custody of her younger siblings after the death of their father, and the trial court dismissed her complaint for lack of standing. *D.N. v. V.B.*, 814 A.2d 750, 751 (Pa. Super. 2002). The Superior Court agreed, reasoning that the older half-sister did not have standing because she had not established *in loco parentis* status, nor had the legislature afforded her standing. *Id.* at 753. In *Ken R. on Behalf of C.R. v. Arthur Z*, the court also held that a sibling does not have standing to seek visitation with a minor sibling. *Ken R. on Behalf of C.R. v. Arthur Z.*, 682 A.2d 1267, 1269 (Pa. 1996). In *Weber v. Weber*, parents did not allow an adult sibling to visit a minor sibling. *Weber v. Weber*, 524 A.2d 498 (Pa. Super. 1987). The adult sibling filed a complaint seeking partial custody of her minor sibling, and her complaint was dismissed for lack of standing. Also, her parents had a right to raise their daughter and make the decision to limit her visitation. *Id*. The proposed legislation would dramatically alter the current state of the law.

Overall, the cases I have discussed only highlight some of the disputes associated with custody suits and the attempts by our courts to force various parties to remain focused on what is important - the best interests of the child. Although undoubtedly well-intentioned, giving

siblings statutory standing to involve themselves in custody battles will likely result in increased, emotional and traumatic litigation, and infringe further on constitutional parental rights. Furthermore, sibling standing is unnecessary. As you have heard me discuss, sibling rights and interests are already protected in custody disputes. Furthermore, the *in loco parentis* statute provides a proper avenue for siblings to gain standing. Although the standing requirements for *in loco parentis* are more rigorous than the proposed legislation, it has a dual purpose - to protect the interests of the child and safeguard parental rights. These are two considerations we should be reconciling here today.

Our primary focus in any custody legislation is and always has been the best interests of the child. It is not always in a child's best interest to allow multiple parties, albeit important and connected, to intervene in custody disputes. I have serious concerns about the legislation as currently proposed, particularly as it relates to minor siblings. No distinction is made in the proposed definition of "sibling" as to whole or half-blood and I can envision cases where spurned former partners of a parent who also share a child with that parent will now have standing to sue for partial custody or visitation on behalf of the minor half-sibling. Step-parents may also enter into the litigation under a similar scenario. I encourage a modification to the proposed legislation to limit standing to only adult siblings and not their guardians, custodians, or parents on their behalf.

Another suggested limitation to standing for siblings is to legislate standing to an adult sibling only if one of the child's parents is deceased. Such action would acknowledge the paramount importance of parental rights while also recognizing the importance of sibling relationships.

Finally, it is suggested that the term “sibling” be clearly defined with specific consideration given to whether the relationship must be one of whole blood or if it includes half-blood relationships. Litigation will likely ensue without this clarification.

A child is a person, not an item to be desired, and when children are court-ordered to split their time potentially between their divorced parents, their grandparents, and now perhaps even a sibling or two, or a minor sibling’s guardian, the child is left without any time for themselves. It goes without saying that all individuals seeking custody are presumed to love and care for the child. However, sometimes our love causes us to lose sight of the bigger picture which includes the reality that fighting over a child causes pain and distress to the child, that dividing limited time among several parties who disagree can potentially damage the child’s relationship with all parties, and that kids need time to just be kids.

Thank you for the opportunity to share my views.