

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

C.L.

v.

S.H.T.

APPEAL OF: A.L. AND B.L.

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1348 WDA 2013

Appeal from the Order July 12, 2013  
In the Court of Common Pleas of Jefferson County  
Civil Division at No(s): 2010-188 C.D.

BEFORE: BOWES, J., ALLEN, J., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J.

FILED: November 27, 2013

A.L. and B.L. (Grandparents)<sup>1</sup> appeal from the trial court's order granting C.L.'s (Mother) preliminary objections and denying Grandparents' amended petition for leave to intervene in the underlying custody action involving their biological grandchild, N.L. (born May 2007). After careful review, we reverse and remand.

N.L. is the biological child of Mother and S.H.T.; the parties were never married. N.L. and Mother resided with Grandparents for the first five years of N.L.'s life. In July 2012, Mother and N.L. moved out of Grandparents' home. On March 13, 2013, Grandparents filed a petition to intervene in Mother's February 2010 custody action that Mother filed against S.H.T.,<sup>2</sup> seeking full custody of N.L. In their petition, Grandparents sought ongoing

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<sup>1</sup> A.L. and B.L. are N.L.'s maternal grandparents.

<sup>2</sup> Biological Father, S.H.T., has not filed a brief on appeal.

visitation with N.L. Mother filed preliminary objections claiming that Grandparents' petition failed to allege, with specificity, sufficient facts to confer standing upon them under the Child Custody Act, 23 Pa.C.S. § 5321, *et seq.* ("the Act"). On April 10, 2013, Grandparents filed an amended petition to intervene, raising section 5325(2) of the Act as their grounds for standing, and alleging that N.L.'s parents have been separated for at least six months. Amended Petition to Intervene, 4/10/2013, at ¶ 4.

After a hearing, the trial court granted Mother's preliminary objections and dismissed Grandparents' petition, determining that the petition was untimely because it was not filed within six months after N.L. was removed from their home pursuant to section 5324(3)<sup>3</sup> of the Act. Grandparents now appeal, raising the following issues for our consideration:

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<sup>3</sup> Pursuant to section 5324(3)(iii)(C):

The following individuals may file an action under this chapter for any form of physical custody or legal custody:

\* \* \*

(3) A grandparent of the child who is not in loco parentis to the child:

\* \* \*

(iii) when one of the following conditions is met:

\* \* \*

(C) the child has, for a period of at least 12 consecutive months, resided with the grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, in

*(Footnote Continued Next Page)*

- (1) Did the lower court err when it found out that the grandparents lacked standing to intervene in the custody action as the parents of the child have been continuously separated since prior to the child's birth and therefore grandparents have standing pursuant to 23 Pa.C.S.A. § 5325(2)?
- (2) Did the lower court err in its interpretation of 23 Pa.C.S.A. § 5325(2) because the statute does not require that the parents be together at any point during the child's life, it merely requires that the parents be separated for at least 6 months at the time of the filing of the custody action?

When our Court reviews a trial court's order granting preliminary objections, we must determine whether the trial court committed an error of law. *Stanley-Laman Group, Ltd. v. Hyldahl*, 939 A.2d 378, 382 (Pa. Super. 2007) (citation omitted). "In ruling on whether preliminary objections should have been granted, an appellate court must determine whether it is clear from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish a right to relief." *R.M. v. Baxter ex rel. T.M.*, 777 A.2d 446, 449 (Pa. 2001) (citation omitted).

Instantly, the trial court dismissed Grandparents' petition based upon section 5324 of the Custody Act. In their petition, Grandparents specifically sought visitation rights. Section 5324 applies to individuals seeking standing for any form of physical or legal custody. Section 5325 of the Act, however, applies to those individuals seeking standing only for partial physical custody or supervised physical custody.

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which case the action must be filed within six months after the removal of the child from the home.

23 Pa.C.S. § 5324(3)(iii)(C).

The Custody Act defines visitation, when used in reference to child custody, as either, "(1) partial physical custody; (2) shared physical custody; or (3) supervised physical custody." 23 Pa.C.S. § 5322(b). Because Grandparents' petition seeks visitation rights with N.L., section 5325, not 5324, applies to their case.

Section 5325(2) of the Custody Act, in part, confers standing upon grandparents and great-grandparents to file an action for partial physical custody or supervised physical custody "where the parents of the child have been separated for period of at least six months[.]" 23 Pa.C.S. § 5325(2). In its Pa.R.A.P. 1925(a) opinion, the trial court states:

Th[is] [c]ourt believes that Paragraph 2 [of section 5325] does contemplate parties who had been married and then separated for at least 6 months prior to Grandparents filing an action. It did not contemplate the situation before the [c]ourt where Grandparents are filing a custody action against their own daughter who was a co-resident at their house for a period of five years.

Trial Court Opinion, 7/19/2013, at 4. We disagree with the trial court's interpretation of section 5325(2) and, ultimately, its decision to deny Grandparents' petition to intervene.

In **L.A.L. v. V.D.**, 72 A.3d 690 (Pa. Super. 2013), our Court recently determined that grandparents of children born out of wedlock have standing to pursue partial physical and supervised physical custody rights of their grandchildren under section 5325(2) of the Act.<sup>4</sup> In **L.A.L.**, child was born

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<sup>4</sup> Grandparents filed their amended petition to intervene on April 10, 2013, and the trial court subsequently held argument on the petition. Therefore, section 5325(2) of the Act guides our consideration of whether they have  
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out of wedlock in 2010, child's parents ended their relationship without marrying and, subsequently, entered into a shared custody arrangement. Approximately one year later, paternal grandparents sought partial custody of child, claiming that child's parents had maintained separate residences since 2011. The trial court denied the petition, finding that "the plain meaning of section 5325(2) only gives standing to grandparents of children whose parents have been married and emphasized the state's interest in protecting and promoting marriage." *Id.* at 691.

On appeal, our Court reversed the trial court's order, concluding that section 5325, like its predecessor (section 5312, now repealed), should be interpreted to include unwed parents. Specifically, the court found that because both sections 5312 and 5325 concerned the same subject matter, there is a strong presumption that the General Assembly intended the existing judicial construction "to be placed upon the same language." *See* 1 Pa.C.S. § 1922(4); *see also Bishop v. Piller*, 637 A.2d 976, 977 (Pa. 1994)<sup>5</sup> and *Malone v. Stonerook*, 843 A.2d 1278 (Pa. Super. 2004) (cases, decided under section 5312, conferring standing to grandparents seeking custody of child born out of wedlock).

(Footnote Continued) \_\_\_\_\_

standing. *See C.R.F. v. S.E.F.*, 45 A.3d 441 (Pa. Super. 2012) (where evidentiary proceeding on underlying petition commences on or after effective date of Child Custody Act, January 24, 2011, provisions of the Act apply).

<sup>5</sup> In *Bishop*, as in the case at bar, child's parents never married or cohabitated and child resided with maternal grandmother since his birth. 581 A.2d at 671.

Instantly, Grandparents' amended petition for leave to intervene avers: that N.L.'s parents have been separated for at least 6 months; and, that they have standing under section 5325(2) to bring this action seeking visitation. Mother claims in her preliminary objections that because she left N.L.'s biological father well before N.L. was born and never married Father, they were never "separated" for purposes of section 5325 during N.L.'s lifetime. Preliminary Objections to Amended Petition to Intervene, 4/23/2013, at ¶6. Mother's argument fails.

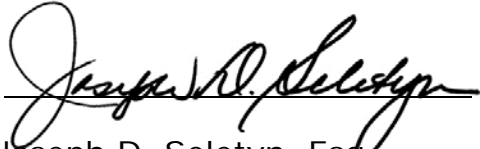
In Mother's complaint for custody she states that N.L. "was born out of wedlock." Mother's Complaint for Custody, 2/25/2010, at ¶ 3. Because section 5325(2) confers standing to grandparents of children whose parents are separated<sup>6</sup> for at least six months and have never been married to each other, *L.A.L., supra*, Grandparents have standing to pursue their petition for visitation under section 5325. Accordingly, we must reverse the trial court's order. *R.M., supra*.

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<sup>6</sup> Moreover, the fact that Mother and biological Father never cohabitated does not defeat Grandparents' claim for standing. As our Supreme Court recognized in *Schmehl v. Wegelin*, 927 A.2d 183, 188 (Pa. 2007), the purpose behind "this narrowly-tailored statute [is to] address[] grandparent involvement in non-intact families." Therefore, it does not matter for purposes of section 5325(2) whether a child's parents ever cohabitated; rather, the critical inquiry is whether they are an intact family for six months prior to and at the time the petition is filed.

Order granting preliminary objections and dismissing petition to intervene reversed. Case remanded for proceedings consistent with the dictates of this decision.<sup>7</sup> Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.  
Prothonotary

Date: 11/27/2013

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<sup>7</sup> Because the trial court found that Grandparents lacked standing, it did not review the evidence necessary to evaluate whether granting Grandparents' petition would be in the best interest of N.L. Upon remand, the trial court must conduct a section 5328(c)(1) analysis which requires a court to consider the following factors when awarding custody to grandparents and great-grandparents:

- (i) the amount of personal contact between the child and the party prior to the filing of the action;
- (ii) whether the award interferes with any parent-child relationship; and
- (iii) whether the award is in the best interest of the child.

23 Pa.C.S. § 5328(c)(1)(i)-(iii). Moreover, the court shall consider section 5328(a) of the Act, which provides a list of sixteen non-exhaustive factors to evaluate when determining the best interest of the child.