

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37**

M.J.H., : IN THE SUPERIOR COURT OF  
 : PENNSYLVANIA  
 v. :  
 :  
 C.S.H., :  
 :  
 Appellant : No. 946 MDA 2012

Appeal from the Order entered May 3, 2012,  
in the Court of Common Pleas of Juniata County,  
Civil Division, at No. 113 of 2006.

BEFORE: MUNDY, OTT, and STRASSBURGER,\* JJ.

MEMORANDUM BY STRASSBURGER, J.: Filed: January 31, 2013

C.S.H. (Mother) appeals from the May 3, 2012<sup>1</sup> order concerning Mother’s petition for modification of custody of her three children, W.P.H. (born 2003), B.E.H. (born 2006), and L.A.H. (born 2008) (Children). We affirm.

The trial court succinctly set forth the underlying facts as follows.

This case arose out of a custody dispute originally filed in 2006 in which the parents, [M.J.H. (Father) and Mother], each desired custody of the couple’s two children. Sometime thereafter, the parties reconciled and a third child was born. Marital differences continued, however, and the situation came to a head when [the Children’s maternal grandmother] shot and killed [Father] in September of 2010. She was convicted of Murder in the First Degree on February 3<sup>rd</sup>, 2012 and sentenced

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<sup>1</sup> Although the order is dated April 26, 2012, it was not entered on the docket until May 3, 2012. We have amended the caption accordingly. **See** Pa.R.A.P. 108(b) (“The date of entry of an order in a matter subject to the Pennsylvania Rules of Civil Procedure shall be the day on which the clerk makes the notation in the docket that notice of entry of the order has been given as required by Pa.R.Civ.P. 236(b).”).

\*Retired Senior Judge assigned to the Superior Court.

to life imprisonment in a State Correctional Facility on February 9<sup>th</sup>, 2012.

Immediately after the murder and arrest of [Maternal Grandmother], the deceased's parents, [J.H. and K.H. (Paternal Grandparents)], filed an emergency petition to intervene in the custody dispute. That request was granted by the [c]ourt, and on September 16<sup>th</sup>, 2010, [Paternal Grandparents] were granted temporary custody of [Children]. On October 6<sup>th</sup>, 2010, the [c]ourt awarded Mother primary physical custody, and [Paternal Grandparents] were awarded partial physical custody.

On July 27<sup>th</sup>, 2011, Mother filed a petition for modification of the custody order alleging [that Paternal Grandparents] were awarded significant periods of partial custody, far in [excess] of what is normally awarded. At Mother's request, a hearing was held after the conclusion of the maternal grandmother's murder trial. Finally, after a hearing on April 26, 2012, the [c]ourt modified the custody arrangement allowing [Paternal Grandparents] extended periods of custody[, but less than they had under the prior order].

Trial Court Opinion, 7/20/2012, at 1-2.

On May 23, 2012, Mother filed a notice of appeal. Pursuant to a court order, Mother filed a statement of matters complained of on appeal on June 6, 2012.<sup>2</sup> Mother presents the following issue for our consideration.

The lower court erred in granting substantial periods of partial custody to [Paternal Grandparents] in that the court failed to determine that the requirements of 23 Pa.C.S.A. § 5328(c)(1)(i) were not complied with; in failing to determine that the award would interfere with the parent/child relationship,

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<sup>2</sup> Pursuant to Pa.R.A.P. 905(a)(2) and 1925(a)(2)(i), Mother was required to file her concise statement of matters complained of on appeal at the same time as her notice of appeal. Mother's failure to do so renders the notice of appeal defective, but does not divest this Court of jurisdiction. ***In re K.T.E.L.***, 983 A.2d 745, 747 (Pa. Super. 2009). We see no prejudice to any party resulting from Mother's failure to adhere to the procedural rules in this instance.

and that the substantial award of partial custody was not in the best interests of the children. [Paternal Grandparents] failed to present evidence regarding the amount of personal contact between the children and them prior to the filing of the action; and the court failed to find that the award of substantial periods of partial custody was primarily in the best interests of [Paternal Grandparents], and the court failed to determine that the enmity between [Mother and Paternal Grandparents] was such that the partial custody award interferes with the parent/child relationship.

Mother's Brief at 4.

Our standard of review of custody determinations is as follows.

In reviewing a custody order, our scope is of the broadest type and our standard is abuse of discretion. We must accept findings of the trial court that are supported by competent evidence of record, as our role does not include making independent factual determinations. In addition, with regard to issues of credibility and weight of the evidence, we must defer to the presiding trial judge who viewed and assessed the witnesses first-hand. However, we are not bound by the trial court's deductions or inferences from its factual findings. Ultimately, the test is whether the trial court's conclusions are unreasonable as shown by the evidence of record. We may reject the conclusions of the trial court only if they involve an error of law, or are unreasonable in light of the sustainable findings of the trial court.

***J.R.M. v. J.E.A.***, 33 A.3d 647, 650 (Pa. Super. 2011) (quoting ***Durning v. Balent/Kurdilla***, 19 A.3d 1125, 1128 (Pa. Super. 2011)).

Once a custody order is in place, a court may modify it on petition "to serve the best interest of the child." 23 Pa.C.S. § 5338(a). In performing the best-interests analysis, a trial court is required to consider the factors

set forth at 23 Pa.C.S. § 5328.<sup>3</sup> **See E.D. v. M.P.**, 33 A.3d 73, 80 (Pa. Super. 2011) (“[W]hen a party files a petition for modification of a custody order, the trial court must perform a ‘best interests of the child’ analysis considering all of the section 5328(a) factors.”).

Mother asserts that “as those factors are reviewed in this type of case, where the issues of partial custody for grandparents [are] involved, it would seem that many if not most of those are not relevant.” Mother’s Brief at 18. We agree that many of those factors are not applicable in the instant case, in which Paternal Grandparents do not have, and do not seek, to serve a parental role for Children or to provide for Children’s daily needs. **See, e.g.**, 23 Pa.C.S. § 5328(a)(3) (“The parental duties performed by each party on behalf of the child.”); §5328(a)(8) (“The attempts of a parent to turn a child against the other parent....”); § 5328(a)(10) (“Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.”).

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<sup>3</sup> We note that, as the hearing on Mother’s petition to modify custody was held in April 2012, the applicable law is the child custody statutes enacted on November 23, 2010, codified at 23 Pa.C.S. §§ 5321-5340. **See E.D. v. M.P.**, 33 A.3d 73, 77 (Pa. Super. 2011) (holding that the provisions of the child custody act apply to requests for modification filed after the effective date of January 24, 2011, although the initial custody action was originally filed prior to the effective date). **See also C.R.F. v. S.E.F.**, 45 A.3d 441, 445 (Pa. Super. 2012) (holding that the new act applies when the hearing is held after the effective date of the statute, even if the request or petition for relief that was the subject of the hearing was filed prior to January 24, 2011).

The factors that Mother discusses on appeal, which we agree are the relevant factors, are as follows.<sup>4</sup>

**(a) Factors.**--In ordering any form of custody, the court shall determine the best interest of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including the following:

(1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.

\* \* \*

(4) The need for stability and continuity in the child's education, family life and community life.

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(13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.

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<sup>4</sup> In its opinion, the trial court noted that the transcript of the hearing was not yet available, but that it believed that it specifically addressed all of the section 5328 factors on the record. Trial Court Opinion, 7/17/2012, at 3 n. 2. Our review of the transcript reveals that the trial court did not specifically discuss each of the 16 factors in section 5328(a) at the hearing, but did address each of the grandparent-specific factors of section 5328(c). **See** N.T., 4/26/2012, at 119-122. Because it is clear that the trial court diligently reviewed the relevant child custody statutes prior to rendering its decision, **see id.** at 118-119, and did address those factors that are relevant to the factual situation at hand, we do not find it necessary to remand this case for further analysis by the trial court. **Compare E.D., supra** (remanding case for the trial court to address each of the statutory factors in supporting its decision to grant the father's petition to relocate and denying the mother's counterclaim for primary physical custody where the record was unclear whether the trial court had considered the relevant factors, did not reference the record, and did not explain its conclusions).

\* \* \*

**(c) Grandparents and great-grandparents.--**

(1) In ordering partial physical custody or supervised physical custody to a party who has standing under section 5325(1)<sup>[5]</sup> or (2) (relating to standing for partial physical custody and supervised physical custody), the court shall consider the following:

- (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.

We first address Mother's argument that the trial court erred in finding that the amount of personal contact between Children and Paternal Grandparents warranted the amount of partial custody ordered. It is important to note that the issues before us do not involve the trial court's initial decision to award partial custody to Paternal Grandparents. Rather, we are considering Mother's petition to modify the custody arrangement that was in place for more than one and a half years. That arrangement, which followed several weeks during which Paternal Grandparents had primary physical custody of Children, had Children in Paternal Grandparents' custody

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<sup>5</sup> Paternal Grandparents have standing to seek custody of Children under 23 Pa.C.S. § 5325(1) (providing that parents of a deceased parent may seek partial physical custody of their grandchildren).

“every other weekend from Friday at 5:00 p.m. until Monday at 10:00 a.m.” as well as “every other Thursday at 5:00 p.m. until Friday at 7:00 p.m.” Order, 10/7/2010, at ¶ 2.

Mother conceded that Children had overnights with Paternal Grandparents at least 150 times prior to the hearing. N.T., 4/26/2012, at 31. As such, Mother’s argument that the trial court did not have sufficient evidence, pursuant to 23 Pa.C.S. § 5328(c)(1), of the amount of personal contact between Children and Paternal Grandparents prior to considering Mother’s petition is specious. Further, allowing significant periods of partial custody with Paternal Grandparents advances the goal of maintaining stability and continuity in Children’s lives. **See** 23 Pa.C.S. § 5328(a)(4). Therefore, the amount of contact Children have had with Paternal Grandparents for the 18 months following the death of their Father strongly favors continuing frequent partial custody by Paternal Grandparents.

Next, Mother argues that the evidence showed that granting Paternal Grandparents extensive periods of partial custody interferes with the parent-child relationship. Specifically, Mother claims that Paternal Grandparents are hostile toward Mother based upon their suspicions about Mother’s involvement in the death of Father. Mother’s Brief at 21-22. At the hearing, Mother testified about three exchanges during which Paternal Grandfather expressed his hostility in front of Children by yelling at Mother. **See** N.T., 4/26/2012, at 20-21, 30-31. In particular, Mother references one occasion

on which Paternal Grandparents screamed at Mother because one of the Children said that Paternal Grandfather had killed father, and, despite a court order prohibiting discussion of the homicide with Children, Paternal Grandfather told the child that Maternal Grandmother was the murderer. *Id.* at 20; Mother's Brief at 21-22. Mother argues that allowing Paternal Grandparents to have frequent custody of Children, "only increases the chances that something like this may happen again." Mother's Brief at 22.

The trial court acknowledged that the incident was troubling. *See* N.T., 4/26/2012, at 120-122. However, the confrontation occurred "awhile" before the hearing, *see id.* at 20, 31; and based upon the testimony of Paternal Grandparents' counselor and Paternal Grandfather, the trial court found that Paternal Grandparents are "making great strides in dealing with [their] grief." *Id.* at 121. The trial court determined that counseling has led Paternal Grandparents to accept "their role as grandparents - not substitute father." Trial Court Opinion, 7/17/2012, at 4. Furthermore, the trial court opined that, although Mother claims that she only wishes to reduce Paternal Grandparents' time with Children "to a level more reflective of grandparent status, rather than parental status[,]," Mother's Brief at 19, "absent a court order, ... there is little chance these children will be able to maintain any relationship with" Paternal Grandparents. Trial Court Opinion, 7/17/2012, at 6. It is clear to this Court that the trial court carefully considered the factors at 23 Pa.C.S. § 5328(a)(1), (a)(13), and (c)(ii); and did not abuse its



discretion in determining that these factors militated in favor of ordering significant periods of partial custody for Paternal Grandparents.

Finally, Mother argues that the evidence shows that awarding frequent partial custody to Paternal Grandparents is in the best interests of Paternal Grandparents, but not the best interests of Children. Mother claims that the activities Children engage in on weekends with Paternal Grandparents are things they can do "with their mother every weekend that they are at their own home." Mother's Brief at 19-20.

The trial court did note that Paternal Grandfather's testimony highlighted the negative effect that depriving Paternal Grandparents of time with Children would have on Paternal Grandparents. **See** N.T., 4/26/2012, at 121. However, Mother's testimony similarly discussed her own wishes rather than the needs of children. **See, e.g., id.** at 46 ("I want the holidays with my kids. ... I want their birthdays.... Those are my days with my kids.").

When asked by Mother to change the current custody arrangement to eliminate the Thursday and Sunday overnights with Paternal Grandparents because they interfered with the cyberschooling of one child and the bus routine of another, **id.** at 45, 7-12, the trial court accommodated Mother's request.<sup>6</sup>

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<sup>6</sup> Children's guardian *ad litem* informed the trial court at the close of the hearing that with an every-other-weekend schedule, "both sides would

As the trial court aptly noted, “[t]hroughout this entire unfortunate situation, one of the only constant[s that Children] have enjoyed is the support of their paternal grandparents.” Trial Court Opinion, 7/17/2012, at 6. The trial court, carefully considering all of the evidence and applicable statutory factors, concluded that “[i]t is the best interests of the children that they spend at least as much time with their grandparents” as is provided in the May 3, 2012 order. *Id.* We conclude that the trial court did not err in determining that spending every other weekend and enumerated holidays with Paternal Grandparents is in Children’s best interests under 23 Pa.C.S. § 5328(c)(iii).

Therefore, we hold that the trial court did not abuse its discretion or commit an error of law in reaching its findings or entering the May 3, 2012 order.<sup>7</sup>

Order affirmed.

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prosper, as well as the kids.” N.T., 4/26/2012, at 117. We also note that in her brief on appeal, Children’s guardian *ad litem* takes the position that the trial court’s May 3, 2012 order serves the best interests of Children and should be affirmed by this Court. *See* Guardian *Ad Litem*’s Brief at 7, 9.

<sup>7</sup> In her brief, Mother also argues that the trial court erred in failing to modify the prior custody order to allow Mother to travel out of Pennsylvania with Children without written agreement of the parties. *See* Mother’s Brief at 23-24. This issue is not raised in Mother’s Statement of Questions Involved, and is therefore waived. *See* Pa.R.A.P. 2116(a) (“No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby.”).