IN THE
MISSOURI SUPREME COURT

MARY HANSON and DAVID HANSON,	)	
Petitioners-Appellants,	)	
v.	)	**No. SC96179**
MARGARET CARROLL and BRIDGET CARROLL,	)	
Respondents-Respondents.	)	

Appeal from the Circuit Court of the
City of Saint Louis, State of Missouri
The Honorable Christopher McGraugh, Judge

SUBSTITUTE BRIEF OF PETITIONERS-APPELLANTS, MARY HANSON AND DAVID HANSON

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This is an action by Petitioners-Appellants, MARY HANSON and DAVID HANSON (hereinafter collectively referred to as "Grandparents"), for visitation and custody of their grandson, RORY EOGHAN CARROLL/HANSON.

On May 14, 2015, Respondents-Respondents, MARGARET CARROLL and BRIDGET CARROLL (hereinafter collectively referred to as "Guardians"), filed a Motion to Dismiss the Petition for lack of standing and for failure to state a claim upon which relief can be granted.

On August 19, 2015, the trial court heard argument on the Motions and subsequently, on August 25, 2015, the trial court issued its Order and Judgment dismissing the Petition of Grandparents for failure to state a claim.

On October 2, 2015, Grandparents timely filed their Notice of Appeal.

Grandparents appealed from the trial court's Judgment on the basis that their Petition states a claim upon which relief can be granted and that the trial court's ruling to the contrary is based upon misstatements and/or misapplications of the law. In addition, Grandparents appealed because the trial court's dismissal with prejudice is likewise based upon a misstatement and/or misapplication of the law.

On November 22, 2016, the Missouri Court of Appeals, Eastern District, filed its Opinion reversing the trial court's Judgment. On December 7, 2016, Guardians filed their Application for Transfer to the Supreme Court. On January 10, 2017, the Missouri Court of Appeals, Eastern District, denied said Application. On January 25, 2017,

Guardians filed their Application for Transfer to the Missouri Supreme Court, which was granted by this Court on February 28, 2017. The Missouri Supreme Court has jurisdiction herein, pursuant to Article V, Section IV of the Missouri Constitution, in accordance with this Court's general superintending power as implemented under Rule 83.03.

STATEMENT OF FACTS

On March 30, 2015, Petitioners-Appellants, MARY HANSON and DAVID HANSON (hereinafter collectively referred to as "Grandparents"), filed their Petition for Visitation and Custody. [L.F. p. 6]. The Petition was directed to Respondents-Respondents, MARGARET CARROLL and BRIDGET CARROLL (hereinafter collectively referred to as "Guardians"). Grandparents noted that their son, JOHN, was the biological father of the minor child, RORY EOGHAN CARROLL/HANSON. [L.F. p. 7]. Their Petition went on to state that they had had a good relationship with the minor child, they previously had liberal periods of custody and visitation, the minor child had previously resided with them, and the minor child had developed a strong bond with them. [L.F. pp. 7-8]. Moreover, the Petition averred that the minor child's welfare required Grandparents to be part of his life and that it was in the minor child's best interest that they be granted joint physical and legal custody. [L.F. p. 8]. Grandparents proposed a custody schedule that is commonly referred to as "2-5-5-2," where Grandparents would have the minor child for overnights on Mondays and Tuesdays, the Guardians would have custody on Wednesdays and Thursdays, and they would alternate weekends from Friday afternoon through Monday. [Supp. L.F. p. 8]. The custody schedule also proposed a holiday and special occasion schedule which was essentially in conformance with *Siegenthaler v. Siegenthaler*, 761 S.W.2d 262 (Mo. App. 1988).

In response, Guardians, on May 14, 2015, filed a Motion to Dismiss both for lack of standing and for failure to state a claim. [L.F. p. 21]. The argument of Guardians was

centered on Section 452.402 R.S.Mo., essentially that if Grandparents were to have any rights with regard to the minor child whatsoever, they were limited to the provisions of Section 452.402 R.S.Mo. in securing them.

The trial court, in its Order and Judgment of August 25, 2015, agreed with the Guardians that the Petition of Grandparents did not state a claim upon which relief can be granted. [L.F. p. 35]. It did not address the question of standing. The trial court agreed with the Guardians with regard to the effect of Section 452.402. It went further in its Judgment by stating that a claim for relief was not set out pursuant to Section 452.375 R.S.Mo., despite the Missouri Supreme Court's decision in *In re T.Q.L*, 386 S.W.3d 135 (Mo. banc 2012).

The trial court designated the dismissal as being with prejudice.

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN DISMISSING THE PETITION OF GRANDPARENTS FOR CUSTODY AND VISITATION BECAUSE SUCH ACTION BY THE TRIAL COURT CONSTITUTED A MISAPPLICATION OF LAW IN THAT REVIEW OF THE PETITION IN THE LIGHT MOST FAVORABLE TO GRANDPARENTS REVEALS THAT THEY STATED A CLAIM UNDER SECTION 452.375 R.S.MO. AS AMPLIFIED BY *IN RE T.Q.L.*, 386 S.W.3d 135 (MO. BANC 2012) AND THAT ALLOWING GRANDPARENTS RIGHTS WOULD NOT IMPINGE IN ANY WAY ON ANY RIGHTS OF PARENTS.

In re T.Q.L., 386 S.W.3d 135 (Mo. banc 2012)

McGaw v. McGaw, 468 S.W.3d 435 (Mo. App. 2015)

In Matter of Adoption of C.T.P., 452 S.W.3d 705 (Mo. App. 2014)

Edoho v. Board of Curators of Lincoln University, 344 S.W.3d 794 (Mo. App. 2011)

II.

THE TRIAL COURT ERRED IN DISMISSING WITH PREJUDICE THE PETITION OF GRANDPARENTS BECAUSE SUCH DESIGNATION WAS A MISAPPLICATION OF LAW IN THAT ISSUES OF CUSTODY OF MINOR CHILDREN ARE ALWAYS SUBJECT TO INQUIRY BY THE COURT, DO NOT HAVE ABSOLUTE FINALITY, AND THE DESIGNATION HAS THE EFFECT OF PRECLUDING GRANDPARENTS FROM EVER SEEKING CUSTODY RIGHTS.

Ritter v. Aetna Cas. & Sur. Co., 686 S.W.2d 563 (Mo. App. 1985)

In the Interest of S.L., 872 S.W.2d 573 (Mo. App. 1994)

Mason v. Mason, 873 S.W.2d 631 (Mo. App. 1994)

Liberman v. Liberman, 863 S.W.2d 364 (Mo. App. 1993)

ARGUMENT

I.

THE TRIAL COURT ERRED IN DISMISSING THE PETITION OF GRANDPARENTS FOR CUSTODY AND VISITATION BECAUSE SUCH ACTION BY THE TRIAL COURT CONSTITUTED A MISAPPLICATION OF LAW IN THAT REVIEW OF THE PETITION IN THE LIGHT MOST FAVORABLE TO GRANDPARENTS REVEALS THAT THEY STATED A CLAIM UNDER SECTION 452.375 R.S.MO. AS AMPLIFIED BY *IN RE T.Q.L.*, 386 S.W.3d 135 (MO. BANC 2012) AND THAT ALLOWING GRANDPARENTS RIGHTS WOULD NOT IMPINGE IN ANY WAY ON ANY RIGHTS OF PARENTS.

On August 25, 2015, the trial court issued its Order and Judgment dismissing the Petition of Grandparents for visitation and custody of their grandson for failure to state a claim. [L.F. p. 35]. The trial court's Judgment, while recounting a litany of the interaction between Grandparents and Guardians, focused its reasoning on § 452.402 R.S.Mo. which specifically provides for grandparent visitation under certain circumstances. [L.F. p. 39]. The trial court seems to indicate that Grandparents were limited to that statutory remedy. To the contrary, Grandparents did state a cause of action and the trial court's dismissal of their Petition should be reversed.

The trial court's grant of a Motion to Dismiss is reviewed *de novo*. *Howard v. Frost National Bank*, 458 S.W.3d 849, 852 (Mo. App. 2015), *Whipple v. Allen*, 324

S.W.3d 447, 449 (Mo. App. 2010), *Delaney v. Signature Health Care Foundation*, 376 S.W.3d 55, 56 (Mo. App. 2012).

A motion to dismiss for failure to state a claim upon which relief can be granted is a challenge to the sufficiency of the petition. *Adams v. USAA Cas. Ins. Co.*, 317 S.W.3d 66, 75 (Mo. App. 2010). Appellate courts are to review petitions in the light most favorable to petitioners. *Morgan v. Morgan,* 555 S.W.2d 378, 380 (Mo. App. 1977), *Whipple*, *supra*, *Howard*, *supra.* In reviewing the grant of a motion to dismiss, this Court takes as true the facts alleged in the Petition, *George Wood Builders, Inc. v. City of Lee's Summit*, 157 S.W.3d 644, 646 (Mo. App. 2004), *Whipple*, *supra*, *Howard, supra*, and accords it the benefit of every reasonable and favorable inference the facts pleaded will permit. *Missouri Dept. of Social Services v. Agri-Bloomfield Convalescent Center, Inc.*, 682 S.W.2d 166, 168 (Mo. App. 1984), *Whipple*, *supra*. The credibility or persuasiveness of the facts alleged is not weighed. *Edoho v. Board of Curators of Lincoln University*, 344 S.W.3d 794, 797 (Mo. App. 2011). A motion to dismiss for failure to state a cause of action may be sustained only when the petition fails to allege the facts essential to a recovery. *Arana v. Koerner*, 735 S.W.2d 729, 735 (Mo. App. 1987). Dismissal of a petition is erroneous, if the petition, reasonably construed, sets forth any theory supporting recovery. *Bracey v. Monsanto Co., Inc.*, 823 S.W.2d 946, 947 (Mo. banc 1992). These principles are to be applied liberally in determining whether a cause of action is presented. *Morgan*, *supra* at 379.

As noted above, the Petition stated that the son of Grandparents was the father of

the minor child, that they had a good relationship with him, as well as previous liberal periods of custody and visitation, and had a strong bond. The Guardians, Grandparents, and the court, as evidenced by the Judgment, were aware that neither father nor mother had the ability to serve in any real capacity as parent for the minor child.

In recent years, there have been various efforts by individuals who do not fit the traditional roles as mother or father to obtain custody rights. In *Cotton v. Wise*, 977 S.W.2d 263 (Mo. banc 1998), this Court rejected the Equitable Parent Doctrine. In *Chipman v. Caunts*, 104 S.W.3d 441 (Mo. App. 2003), the Southern District of the Court of Appeals turned down a grandmother's attempt to obtain custody under the Guardianship Statute. The Southern District also spurned a similar effort in *In Re Moreau*, 161 S.W.3d 402 (Mo. App. 2005). More recently, the Western District of the Court of Appeals in *White v. White*, 293 S.W.3d 1 (Mo. App. 2009), rebuffed an endeavor by a woman who brought an action against her former romantic partner for a declaration of maternity and custody rights where the child had been conceived by artificial insemination.

Then, this Court decided *In re T.Q.L.*, 386 S.W.3d 135 (Mo. banc 2012). In *T.Q.L.*, the former paramour of mother brought an action for custody rights with regard to a child even though he was not the biological father. This Court reversed the trial court's dismissal and held that a cause of action was stated under § 452.375.

After *T.Q.L.* was issued, five (5) cases have been decided that in some way attempt to flesh out this Court's reasoning. In *T.W. ex rel. R.W. v. T.H.*, 393 S.W.3d 144

(Mo. App. 2013), the Eastern District of the Court of Appeals reversed a trial court's award of "third party visitation" to grandmother because it impinged on mother's constitutional rights. Grandparent visitation statutes and procedures throughout the country have been viewed through this prism since the United States Supreme Court decision in *Troxel v. Granville*, 120 S.Ct. 2054 (2000). However, in the instant case, neither father nor mother are in the picture. Mother's grandmother and aunt are Guardians. Consequently, there is no parental "constitutionally protected fundamental right of privacy . . . at stake." *Massman v. Massman*, 505 S.W.3d 406, 412 (Mo. App. 2016), *quoting Hampton v. Hampton*, 17 S.W.3d 599, 605 (Mo. App. 2000). Any rights which would be accorded Grandparents would not impinge in any way on the rights of the parents of the child herein. Therefore, while *T.W.* may be giving practitioners and courts guidance as to how to implement *T.Q.L.* where one or both parents are part of the child's life and may be a reason to first consider application of § 452.402 before proceeding to § 452.375, here, neither parent would be affected by determining the rights of Grandparents. Moreover, despite the trial court's reliance upon § 452.402 R.S.Mo. in dismissing the Petition of Grandparents, there is no question that Grandparents are not limited to that statute in pursuit of physical custody rights. *See*, *Jones v. Jones*, 10 S.W.3d 528 (Mo. App. 1999) and *Young v. Young*, 59 S.W.3d 23 (Mo. App. 2001).

In *D.S.K., ex rel. v. J.J.K. v. D.L.T.*, 428 S.W.3d 655 (Mo. App. 2013), the Western District of the Court of Appeals affirmed refusal by the trial court to allow intervention by a husband seeking custody rights in a paternity action brought by wife to

declare that her children were sired by her deceased paramour. In doing so, Judge Hardwick noted that "nothing prevents him from asserting his third-party custody claims as an independent cause of action." *Id.* at 660.

In *In Matter of Adoption of C.T.P.*, 452 S.W.3d 705 (Mo. App. 2014), the Western District had before it a stepparent adoption. Mother's former romantic partner sought to intervene with a child custody petition. Ultimately, the Court, while acknowledging that the party seeking to intervene can have a recognizable interest under *T.Q.L.*, since the adoption proceeding would not preclude recognition of that interest, she had no right to intervene.

A similar result was reached in *In Matter of Adoption of E.N.C.*, 458 S.W.3d 387 (Mo. App. 2014). In *E.N.C.*, it was the paternal grandmother who sought to intervene in a stepparent adoption brought by mother and her husband. The Eastern District reversed an award of visitation to grandmother and, in essence, found that such proceedings are not the appropriate venue to pursue such rights.

Finally, *McGaw v. McGaw*, 468 S.W.3d 435 (Mo. App. 2015), rejected efforts by mother's former romantic partner to obtain custody rights under an equitable parentage theory. In doing so, the court recognized that § 452.375 provided a basis to commence an action for custody and visitation.

Here, there is no question that neither parent presently has any interest or involvement in the child's life. Therefore, § 452.375 R.S.Mo., as amplified by *T.Q.L.*, allows Grandparents to petition the trial court to request custody rights. This they have

clearly done by their Petition. They stated a cause of action upon which relief can and should be granted by the trial court. The trial court committed error in dismissing the action of Grandparents for failure to state a claim. Consequently, the Judgment should be reversed.

II.

THE TRIAL COURT ERRED IN DISMISSING WITH PREJUDICE THE PETITION OF GRANDPARENTS BECAUSE SUCH DESIGNATION WAS A MISAPPLICATION OF LAW IN THAT ISSUES OF CUSTODY OF MINOR CHILDREN ARE ALWAYS SUBJECT TO INQUIRY BY THE COURT, DO NOT HAVE ABSOLUTE FINALITY, AND THE DESIGNATION HAS THE EFFECT OF PRECLUDING GRANDPARENTS FROM EVER SEEKING CUSTODY RIGHTS.

Even more troubling than the trial court's dismissal of the Petition by Grandparents for failure to state a claim is the fact that the trial court did so with prejudice.

This Court reviews a trial court's decision to grant a motion to dismiss under a *de novo* standard of review. *New England Carpenter's Pension Fund v. Haffner*, 391 S.W.3d 453, 459 (Mo. App. 2012).

Dismissal with prejudice bars any further assertion of the cause of action. *Ritter v. Aetna Cas. & Sur. Co.*, 686 S.W.2d 563, 564 (Mo. App. 1985). The problem, of course, is that issues with regard to custody and support of minor children are always subject to inquiry by the court. Any custody arrangement is susceptible to modification in the interest of the child and does not have absolute finality. *In the Interest of S.L.*, 872 S.W.2d 573, 577 (Mo. App. 1994). Since the parties cannot enter into agreements regarding custody that are non-modifiable, *Mason v. Mason*, 873 S.W.2d 631, 635 (Mo.

App. 1994), neither should the trial court be in a position to preclude grandparents from ever asking an appropriate court for custody and/or visitation rights with respect to their grandson.

The Eastern District of the Court of Appeals previously touched upon the question of domestic actions being dismissed with prejudice in *Liberman v. Liberman*, 863 S.W.2d 364 (Mo. App. 1993). The Court had before it the third dissolution action between the parties. Two previous actions had been dismissed by wife voluntarily. Husband maintained that the second dismissal was with prejudice and, therefore, wife could never proceed with a dissolution. While this Court did not specifically address any policy questions concerning dismissals in domestic relations cases, it would appear, from reading between the lines, that dismissals with prejudice, involving questions such as custody, support, and the very existence of a marriage, are extremely disfavored.

If this Court should not grant the first point of Grandparents regarding the dismissal of their action for failure to state a claim, the Court's designation of its dismissal with prejudice should be reversed.

CONCLUSION

For all of the foregoing reasons, Petitioners-Appellants, MARY HANSON and DAVID HANSON, pray the Court reverse the trial court's dismissal of their Petition for Custody and Visitation and remand to the trial court for further proceedings in accordance therewith or, in the alternative, that the dismissal be designated as without prejudice.

Respectfully submitted,

GILLESPIE, HETLAGE & COUGHLIN, L.L.C.

By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Substitute Brief and Appendix of Substitute Brief of Petitioners-Appellants, MARY HANSON and DAVID HANSON,** were filed via the Court's Missouri eFiling System and mailed, by United States mail, first class, postage prepaid, to Mr. David M. Slaby, Attorney for Respondents-Respondent, 165 North Meramec, Suite 110, Clayton, Missouri 63105 this 16th day of March, 2017.

Further, the undersigned states that said Substitute Brief contains Two Thousand Seven Hundred Thirty-Three (2,733) words.

_____
LAWRENCE G. GILLESPIE

STATE OF MISSOURI)
) **SS.**
COUNTY OF SAINT LOUIS)

Comes now, LAWRENCE G. GILLESPIE, and being duly sworn upon his oath, deposes and states that the facts stated in the foregoing are true and correct to the best of his knowledge, information and belief.

LAWRENCE G. GILLESPIE

Subscribed and sworn to before me, a Notary Public, this the 16th day of March, 2017.

Laurie A. Robinson
Notary Public

My Commission Expires:

LAURIE A. ROBINSON
Notary Public, Notary Seal
State of Missouri
Saint Louis City
Commission # 12516823
My Commission Expires 10-17-2020