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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-1529-ME

S.B. AND E.B. APPELLANTS

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE ANGELA J. JOHNSON, JUDGE
ACTION NO. 19-AD-500188

CABINET FOR HEALTH AND
FAMILY SERVICES, COMMONWEALTH
OF KENTUCKY; M.M., A MINOR CHILD;
AND C.M. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND MCNEILL, JUDGES.

CLAYTON, CHIEF JUDGE: S.B. and E.B. are the maternal grandfather and step-grandmother ("Grandparents") of a minor child, M.M. ("Child"). They appeal from an order of the Jefferson Family Court denying their motion to intervene in the action to terminate the parental rights of C.M., Child's biological father,

("Father") and from an order denying their motion to hold the termination proceedings in abeyance. Having reviewed the record and applicable law, we affirm.

The following summary of the underlying facts of the case is compiled from the briefs and the record before us, as well as from an April 30, 2019, order of the Jefferson Family Court denying an earlier motion for custody made by Grandparents. The order is appended to the appellee brief of the Cabinet for Health and Family Services and does not form part of the certified record. Although generally "[o]ur review is limited to the certified record before us[,]" *Brooks v. Byrd*, 487 S.W.3d 913, 920 (Ky. App. 2016), we make an exception in this case because Grandparents have not objected to the inclusion of the order and we are not reviewing its substantive merits. We have also consulted the unpublished Opinion of this Court affirming that order. *See S.B. v. Cabinet for Health and Family Services*, Nos. 2019-CA-000746-ME and 2019-CA-000866-ME, 2020 WL 1898378, at *1 (Ky. App. Apr. 17, 2020), *review denied and ordered depublished* (Aug. 13, 2020).

The Cabinet has been involved with Child since her birth on November 25, 2016. After cannabinoids and opiates were detected in the infant's system, the Cabinet filed a dependency, neglect, or abuse (DNA) petition which resulted in the family court ordering a treatment plan for her biological parents.

Soon after, however, Child's mother passed away from a drug overdose and Father admitted to using heroin. Child was placed with her paternal great-grandmother and Father was later permitted to stay in the home on the condition that he remain clean and sober.

In June 2018, the Cabinet learned that paternal great-grandmother was abusing drugs and that Child had been bitten a second time by the family dog, resulting in Child's hospitalization with severe injuries. The Cabinet filed a DNA petition alleging that great-grandmother and Father had failed to supervise Child and had committed domestic violence and substance abuse. The family court placed Child in the emergency custody of the Cabinet and then with her maternal great-grandparents. That arrangement proved to be short-lived because the maternal great-grandparents were older and suffering from health complications which meant they could not keep up with a toddler. Child was placed with a foster family and the Cabinet worked on its goal of reunifying her with Father. Because of this reunification goal, the Cabinet prioritized local relatives as placement possibilities, although Father expressed a wish for Child to be placed with Grandparents, who live in Florida.

Grandparents contacted the Cabinet and requested consideration for placement. Florida Child Protective Services performed a home study of Grandparents' residence in Florida, pursuant to the ICPC ("Interstate Compact on

the Placement of Children"). The evaluation of Grandparents' home was not completed and approved until January 3, 2019. Concerns were expressed in the home study, and by the Cabinet, about placing Child with Grandparents, based largely on Grandfather's history. He has a criminal record with convictions for aggravated assault with a deadly weapon, DUI, and domestic violence, although he has not been arrested or convicted of any criminal offenses for the past twenty years. Grandfather lost custody of Child's mother and Child was placed with her mother in Kentucky while he moved to Florida. Grandfather has never met Child in person and his only contact with her has been through FaceTime twice per week. The home study also noted that Grandparents' home is relatively small. It has two bedrooms and is inhabited by Grandparents and two minor children. Ultimately, the Cabinet did not recommend placement with Grandparents.

On January 22, 2019, Grandparents sought permanent custody of Child. The family court held a dispositional placement hearing on April 11, 2019, and, at that time, denied Grandparents' custody request. Its order stated in part:

> The Court notes that this child is only two years of age and has endured more tragedy than most adults. Born with drugs in her system, she later lost her mother to a drug addiction. She was then exposed to domestic violence, and horrifically injured by a dog while in her family's care. Moreover, she changed placements four or five times. [Child] has experienced severe trauma. She is doing well with her foster family. She is with a family with whom she is bonded and is receiving the medical and emotional care she needs. Her night terrors are less

> frequent. The foster family has indicated a willingness to maintain contact with the child's biological family. . . . As parental rights have not been terminated, the Court would encourage the [Grandparents] to work with the foster family to build a healthy relationship with [Child].

Grandparents appealed from the denial of their motion for custody. A panel of this Court affirmed the order, stating: "The child's best interest was a paramount consideration in the family court's decision. Given the child's age, traumatic past, and significant improvement in the foster home, it would not be in her best interest to be uprooted, again, to experiment with a relative placement with people with whom she has not bonded—or even knows. Furthermore, Grandfather's criminal history, domestic violence, and past parental concerns weigh heavily in favor of it not being in the child's best interest to live with him. *See* KRS[1] 620.023(1)(b) and (d)." *S.B.*, 2020 WL 1898378, at *5.

Meanwhile, on April 8, 2019, the Cabinet filed a petition to terminate Father's parental rights. On July 31, 2019, Grandparents filed a motion to intervene in the termination case. They also filed a motion seeking to hold the termination case in abeyance pending the resolution of the appeal of the order denying their motion for permanent custody. The family court denied the motion to intervene and the order to hold the termination case in abeyance in two orders entered on September 18, 2019. This appeal by Grandparents followed.

[1] Kentucky Revised Statutes.

"We review the denial of a motion to intervene as a matter of right for clear error." *Hazel Enterprises, LLC v. Community Financial Services Bank*, 382 S.W.3d 65, 67 (Ky. App. 2012). "Findings of fact are not clearly erroneous if supported by substantial evidence." *Ehret v. Ehret*, 601 S.W.3d 508, 511 (Ky. App. 2020) (citation omitted). "We review the family court's legal conclusions under a de novo standard." *Carpenter-Moore v. Carpenter*, 323 S.W.3d 11, 14 (Ky. App. 2010).

In its order, the family court held that Grandparents' motion to intervene was insufficient on its face because it failed to satisfy the conditions of Kentucky Rules of Civil Procedure (CR) 24.03, which requires such a motion to be "accompanied by a pleading setting forth the claim or defense for which intervention is sought." The family court found that, beyond mentioning that they have a relationship with Child, Grandparents failed to state a cognizable claim. We agree with the family court's analysis. The Civil Rules governing intervention of right and permissive intervention, CR 24.01 and CR 24.02, require a statutory or tangible interest in the underlying action.

CR 24.01 permits intervention of right under the following circumstances:

> (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the

> action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

CR 24.01(1).

In *Commonwealth, Cabinet for Health and Family Services v. L.J.P.*, 316 S.W.3d 871 (Ky. 2010), the Kentucky Supreme Court held that grandparents do not have a right to intervene in the parents' termination proceedings under either prong of CR 24.01. Under the first prong, the Supreme Court held that no statute confers an unconditional right on grandparents to intervene. KRS 625.060 specifically enumerates the parties in involuntary terminations; they are "the child, the petitioner, the Cabinet (if not the petitioner), the birth parents, and qualifying putative fathers." *Id.* at 876. Grandparents are not included. Indeed, the statute does not even require non-parental relatives or potential custodians to be given notice of involuntary termination proceedings. *Id.* "To put it simply, non-parental relatives or potential custodians . . . are not mentioned or considered in the termination statutes, and thus it cannot be said that a statute confers an unconditional right to intervene." *Id.*

Under the second prong, the Supreme Court emphasized that the applicant's interest must be "a present substantial interest in the subject matter of the lawsuit, rather than an expectancy or contingent interest." *Id.* at 875 (quoting *Baker v. Webb*, 127 S.W.3d 622, 624 (Ky. 2004)). Because "[a] termination

proceeding concerns the relationship between parent and child, and not any other party[,] . . . [G]randparents[] simply have no cognizable rights to protect or enforce in a termination proceeding." *Id.* at 876. "To the extent that [Grandparents'] interest is in receiving custody post-termination, it would not be a 'present substantial interest' but merely 'an expectancy or contingent interest,' . . . and thus insufficient to warrant their intervention as a matter of right." *Id.* (quoting *Baker*, 127 S.W.3d at 624).

In denying Grandparents' motion to intervene in the case before us, the family court ruled in reliance on *L.J.P.* It found that Grandparents had no statutorily-conferred right to intervene and that there were other means by which Grandparents could achieve relief, noting that their interest as maternal grandparents in visitation or custody would be unaffected by the termination action against Father. Its order states in pertinent part: "There is no record of [Grandparents] filing a motion with this Court seeking relief prior to their motion for permanent custody for [Child] in the DNA action. There is no record of [Grandparents] filing a petition for grandparent visitation rights. . . . [Grandparents] could have filed a petition for grandparent visitation rights especially since they are the parent and step-parent to a deceased party. KRS 405.021. [Grandparents] have not shown this Court how the TPR [termination of parental rights] petition against [Father] would affect any petition they would file

for grandparent visitation or future motions for custody or visitation." The family court's decision is supported by substantial evidence and is fully in accordance with Kentucky case law as delineated in *L.J.P.*

The family court also found permissive intervention inappropriate under CR 24.02, which states:

> Upon timely application anyone may be permitted to intervene in an action: (a) when a statute confers a conditional right to intervene or (b) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

CR 24.02.

The family court found that Grandparents had not identified any statute which conferred a conditional right to intervene. In considering whether they shared a question of law or fact in common with the main termination action, the family court found they did not, stating: "The TPR petition relates to the relationship between the biological parents and the child, while [Grandparents] are seeking custody of the child. Again, [Grandparents] have not shown how the TPR petition against [Father] involves them, especially considering the possibility to file for grandparent visitation rights pursuant to KRS 405.021. The Court need not go further to consider the delay and prejudice that would be inevitable if the intervention were permitted."

The family court's decision to deny permissive intervention is supported by substantial evidence. Its concern about the delays and prejudice resulting from intervention is particularly apt in light of Child's tragic history.

On appeal, Grandparents acknowledge that only the Supreme Court has the authority to reverse the decision in *L.J.P.* They nonetheless encourage consideration of dicta found in a more recent unpublished opinion of that Court, *P.B. v. Cabinet for Health and Family Services*, No. 2017-SC-000360-DGE, 2018 WL 5732480 (Ky. Nov. 1, 2018). In *P.B.*, the Court acknowledged that *L.J.P.* is controlling precedent but expressed some reservations about its suitability at the present time:

> It is true that any rights grandparents have are a natural corollary to, and flow through, the rights of the biological parents. Termination of parental right proceedings are only concerned with the parental relationship; however, grandparents' rights are no doubt impacted by such proceedings. In a climate where so many parents are plagued by outside forces impacting their ability to care and provide for their children, such as the current opioid epidemic, communities and courts alike are calling on grandparents to take over where the natural parents cannot. We give pause, then, in examining *L.J.P.*, as to the wisdom of preventing grandparents from intervening, when appropriate, in TPR proceedings.

Id. at *4.

"[A]s an intermediate appellate court, this Court is bound by established precedents of the Kentucky Supreme Court. [Rules of the Kentucky

Supreme Court] SCR 1.030(8)(a). The Court of Appeals cannot overrule the established precedent set by the Supreme Court or its predecessor court." *Smith v. Vilvarajah*, 57 S.W.3d 839, 841 (Ky. App. 2000).

In any event, in *P.B.*, the Court contemplated grandparental intervention in TPR proceedings only if "appropriate." Under the circumstances of this case, Grandparents have not provided a reason that is sufficiently compelling to warrant reversing the family court's denial of permissive intervention in the termination proceedings.

Grandparents have also relied on opinions from other state courts which in some cases have approved grandparental intervention in termination of parental rights proceedings. Besides not having any precedential value in Kentucky, these opinions are either factually distinguishable or rely on state statutes which are significantly different from Kentucky's.

Grandparents have appended to their brief a petition for custody and visitation which they filed in the Jefferson Family Court on October 15, 2018, after the entry of the orders from which this appeal is taken. They argue that this petition entitles them to intervene in the TPR case and on this basis, they request palpable error review pursuant to CR 61.02. We are unaware if the family court

has ruled on the petition and it is certainly beyond the purview of this appeal.[2] "It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court." *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011), *abrogated on other grounds by Nami Resources Co., L.L.C. v. Asher Land and Mineral, Ltd.*, 554 S.W.3d 323 (Ky. 2018) (citation omitted).

Finally, we address Grandparents' appeal from the denial of their motion to hold the termination proceedings in abeyance pending their appeal in the permanent custody action. The motion was denied on the grounds Grandparents lacked standing in the termination action because the family court had denied their motion to intervene. The family court further explained that the TPR action was addressing Father's parental rights and did not seek to terminate Grandparents' relationship with Child. Grandparents have not raised any arguments in their brief regarding the denial of the motion. The reasoning underlying the family court's denial of the motion is sound and will not be overturned here.

[2] On September 14, 2020, Grandparents moved to supplement the record with a copy of an order entered by the Jefferson Family Court on August 28, 2020, in case No. 19-CI-503136. That order allowed Grandparents to have visitation time with M.M. via twice-weekly telephone or video calls. In a separate order entered contemporaneously with the rendering of this Opinion, the Court denied this motion because the family court's decision in that case has no bearing on the Court's decision herein.

For the foregoing reasons, the Jefferson Family Court's order denying Grandparents' motion to intervene and its order denying their motion to hold the termination proceedings in abeyance are affirmed.

ALL CONCUR.

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