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SUPREME COURT GRANTED DISCRETIONARY REVIEW:
APRIL 15, 2009
(FILE NO. 2008-SC-0950-DE)

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001783-ME

L.J.P. AND M.J.P. APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE LISA O. BUSHELMAN, JUDGE
ACTION NO. 06-AD-00096

CABINET FOR HEALTH AND
FAMILY SERVICES APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT AND THOMPSON, JUDGES.

CAPERTON, JUDGE: Appellants, L.J.P. and M.J.P., the paternal grandparents (Grandparents), appeal from an order by the Kenton Family Court, which denied

their motion to intervene and request for custody of their grandchild D.J.P. For the following reasons, we reverse and remand to the trial court.

The child in issue is the grandparents' grandchild, D.J.P. The grandparents' son (J.P.), and the mother (A.F.), of D.J.P. lost custody of D.J.P. and his two half-siblings[1] on October 4, 2005. D.J.P. and his two half-siblings have resided in foster care since that time.

The Cabinet filed a petition to involuntarily terminate parental rights on November 15, 2006. On March 9, 2007, the parents of D.J.P. filed a petition for voluntary termination of parental rights, conditioned upon D.J.P. being placed with the grandparents. The grandparents also filed a motion to intervene and request for custody in the involuntary termination action.

In the order denying the motion to intervene, the family court noted that the voluntary petition was untimely in that the involuntary petition was filed more than three months before the voluntary petition. The judge found the grandparents did not have standing in the involuntary termination case, and the filing of the voluntary termination petition by the parents did not give the grandparents standing. The judge also found it was in the best interest of D.J.P. to remain with his half-siblings in foster care. It is from that decision that the grandparents now appeal.

Initially, and for clarity, we address the finding by the trial court concerning the best interest of D.J.P., which was included in the order denying

[1] The three children of A.F. all have different fathers. The two half-siblings are six and eight years older than D.J.P.

intervention. The order denying intervention is appealable not because of any mandatory language required by CR 54.02(1) but because the order denies intervention. *See Ashland Public Library Board of Trustees v. Scott*, 610 S.W.2d 895 (Ky. 1981). The parties made no argument as to the "best interest" finding, which is interlocutory in nature and reviewable, if at all, in an order finally disposing of all the claims, rights and liabilities of the parties or an order which recites the mandatory language of CR 54.02(1). Therefore, that part of the order that makes a finding as to the best interest of D.J.P. is dismissed from this appeal.

The grandparents argue that they should have been allowed to intervene in the termination of parental rights proceeding as a matter of right. In so arguing, the grandparents rely on *Baker v. Webb*, 127 S.W.3d 622 (Ky. 2004). The court in *Baker* held that biological relatives were entitled to intervention as a matter of right under CR 24.01 in an adoption proceeding. However, the question before our Court is whether the grandparents have a right under CR 24.01 to intervene in a termination of parental rights action. Regardless, we do find that our holding in *Baker* is relevant to the question before us.

While the purpose of a termination proceeding is to determine whether parental rights of the child's biological parents should be terminated, such action necessarily gives rise to a custody determination upon termination of the parental rights. KRS 625.100. As KRS 625.060 specifically limits the parties in an involuntary termination proceeding to the child, the Cabinet (if not the

petitioner), the petitioner and the biological parents,[2] the grandparents lacked standing to intervene in an involuntary termination decision. As to the placement of the child post-termination, while such a decision is necessitated by the termination order, it is still a separate decision.

Pursuant to KRS 625.100, the court is to place the child with the Cabinet for Families and Children, child-placing agency, child-caring facility, or "another person" post-termination. Additionally, "[i]f the other person is unrelated to the child, a grant of custody shall be made only with the written approval of the secretary or his designee." KRS 625.100. Thus, KRS 625.100 specifically recognizes that persons related to the child have an elevated status when the court awards custody of the child in that they do not need permission from the Cabinet for Families and Children before the court may place the child with them. It strains logic to understand how grandparents, as related persons, might assert their interest as potential custodians if intervention is disallowed.

In the matter sub judice, we have grandparents both related to the child and whose "rights" have been recognized by both statute and case law. Pursuant to KRS 405.021, grandparent visitation statutorily survives termination of parental rights if established before such termination and is not contrary to the best interests of the child. Further, as our Supreme Court recognized in *Baker v. Webb*, 127 S.W.3d 622 (Ky. 2004), grandparents have a matter of right to intervene in an

[2] Appellants would not be entitled to notice of the action under KRS Chapter 625.

adoption proceeding. Thus, as the law of this Commonwealth makes clear, grandparents have a legally cognizable interest in their grandchildren.

When considering the lives of our children, our Court has recognized such factors as "the nature and stability of the relationship between the child and the grandparent seeking visitation . . ." and "the stability of the child's living and schooling arrangements . . ." as proper considerations when evaluating the child-grandparent relationship. *Vanwinkle v. Petry*, 217 S.W.3d 252, 257 (Ky.App. 2007*)*. *See also Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky.App. 2004).

CR 24.01[3] allows intervention as a matter of right when a person has an interest relating to the subject matter of an action and is so situated that disposition of the action may impair or impede such person's ability to protect that interest. The right of grandparents to intervene in an adoption proceeding, recognized in *Baker*, would be impaired or impeded if the grandparents were denied the right to intervene in the custody determination subsequent to a termination proceeding because the *stability of the child* as well as the *child-grandparent relationship*, factors to be considered in a subsequent adoption proceeding, may likely be adversely affected by the custody order that follows termination but precedes adoption.

Therefore, we hold that grandparents may intervene as a matter of right in the custody determination made under KRS 625.100. Having addressed the motion to intervene, we will not address the remaining issues that were

[3] We also note that a denial of intervention as a matter of right is not interlocutory and is thus appealable based on *Ashland Public Library v. Scott*, 610 S.W.2d 895 (Ky. 1981).

discretionary with the trial court and are to be reviewed, if at all, on appeal from a final judgment.

We reverse and remand to the trial court for further proceedings consistent with this opinion.

ALL CONCUR.

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