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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001092-ME

K.P. APPELLANT

v. APPEAL FROM HARDIN FAMILY COURT
HONORABLE MATTHEW B. HALL, JUDGE
ACTION NO. 05-J-00525

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; K.P., NATURAL MOTHER; F.K., NATURAL FATHER; AND J.C. AND BARBARA CONTRERAS, INTERVENING PETITIONERS APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON AND DIXON, JUDGES.

DIXON, JUDGE: Appellant, K.P., through his guardian ad litem, appeals from an order of the Hardin Family Court removing him from the custody of Appellee, the Cabinet for Health and Family Services ("Cabinet"), and returning him to his natural mother. Finding no error, we affirm.

K.P. was born on May 25, 2004. On July 5, 2005, he was removed from the custody of his mother, K.P. ("mother"), after she left him in the care of his grandmother who was disabled and unable to take care of him. In September 2005, the family court found K.P. to be dependent and placed him in the custody of the Cabinet. K.P. was thereafter placed in foster care with Appellees, J.C. and Barbara Contreras. K.P. was subsequently diagnosed with Reactive Attachment Disorder (RAD), as well as speech and behavioral issues, and participated in therapy in the Contrerases' home.

The Contrerases and K.P.'s mother worked together toward the Cabinet's goal of reunification. By 2007, K.P. was spending three days of each week with his mother. Unfortunately, K.P. did not adjust well to the split in time between his mother and the Contrerases, and began regressing towards his former behavior. The Contrerases eventually became frustrated when the Cabinet ignored their concerns and requests for a reevaluation of the reunification plan. As noted by the family court, the Contrerases were no longer able to handle the emotional pain of witnessing K.P.'s regression and, on February 8, 2007, filed the fourteen-day notice with the Cabinet to discontinue foster care of K.P.

K.P. was thereafter returned to his mother's care by the Cabinet on February 22, 2007. It appears from the record that the reunification was without either the required court approval or a review of K.P.'s CATS assessment. In May 2007, both K.P. and his infant sibling were the subject of a new dependency

petition[1] after their mother was involved in an altercation with her boyfriend. Although both children were initially removed, the infant was informally adjusted and returned to the mother. K.P. was placed in the home of new foster parents, James and Andrea Edwards[2].

Upon learning that K.P. had again been removed from his mother's home, the Contrerases immediately contacted the Cabinet but were informed that they were no longer eligible to provide K.P. foster care. As a result, on November 28, 2007, the Contrerases filed a motion to intervene in the instant action "for the purposes of placement and custody." On December 12, 2007, the family court entered an order ruling as follows:

> Since the Contreras' [sic] are the persons with whom the natural mother wishes for the child to be placed, and since there is evidence that they may stand in a superior position due to the statutory language and have been "tapped" by the natural mother to be the custodians, then in that event, by operation of Civil Rule 24.01, and pursuant to the [*Baker v. Webb*, 127 S.W.3d 622 (Ky. 2004)] holding, they shall be allowed to intervene in this action.
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> The allowance of intervention does not guarantee placement or equal footing in a custody determination, but simply recognizes their status under the statutory enactment.

[1] The trial court questioned why the Cabinet chose to file a new petition when K.P. was already legally in its care and custody. As a result, K.P. was actually represented by two separate guardian ad litems. There is no explanation provided in the record as to why a second petition was filed.

[2] Interestingly, the Edwards were not married at the time K.P. was placed in their home. In fact, the Contrerases took care of K.P. during the Edwards' one-week honeymoon.

On April 29, 2008, the family court held a lengthy evidentiary hearing to determine the custodial placement of K.P. On May 9, 2008, the court entered its Findings of Fact, Conclusions of Law and Order, removing K.P. from the Cabinet's custody and returning him to his mother. This appeal ensued.

Appellant first argues that the trial court erred in permitting the Contrerases to intervene in the action herein. Appellant cites to *Commonwealth, Cabinet for Health and Family Services v. Huddleston*, 185 S.W.3d 222, 223 (Ky. App. 2006), wherein a panel of this Court held that KRS 610.010(11) confers sole and exclusive authority upon the Cabinet to determine the appropriate placement of a child committed to its care and, in fact, "explicitly prevents [the family court] from intervening in Cabinet decisions with respect to their placement."

In granting intervention, the family court cited to CR 24.01, which provides in relative part:

> (1) Upon timely application anyone shall be permitted to intervene in an action (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 the interest is adequately represented by the existing parties.

Kentucky courts construe this rule liberally in order to effectuate the purpose of intervention. *Yocom v. Hi-Flame Coals, Inc.*, 568 S.W.2d 757 (Ky. App. 1978). Further, so long as the threshold timeliness requirement is satisfied, the decision to grant intervention is within the sound discretion of the trial court and will not be

disturbed absent a showing of abuse of that discretion. *See Webster v. Board of Education, Walton-Verona Independent School District*, 437 S.W.2d 956 (Ky. 1969); *Arnold v. Commonwealth ex rel. Chandler*, 62 S.W.3d 366 (Ky. 2001).

We initially find that this issue is essentially moot in that the family court did not order placement of K.P. with the Contrerases. In fact, the family court explicitly stated that it did not have the power to do so. Rather, the court terminated custody to the Cabinet and awarded custody to the natural mother.

Nevertheless, in granting the motion to intervene, the family court commented,

> The question remains is there a present substantial interest in the subject matter of the litigation in order that the Contreras' [sic] be allowed to intervene. . . . The seminal case in this arena is . . . Baker v. Webb, 127 S.W.3d 622 (Ky. 2004), which held "in order to intervene, the party's interest relating to the transaction must be a present substantial interest in the subject matter of the lawsuit, rather than an expectancy or contingent interest." [Citation omitted]. The Court in Baker held that the regulations and policies of the Cabinet for Families and Children, now Cabinet for Health & Family Services, constituted sufficient legal interest under CR 24.01 to allow intervention into the action. In Baker, the parties seeking to intervene were family members of the minor child. Here, the Contreras [sic] also fall into a superior category which is a person, upon considering the wishes of the parent concerning the placement of the child.

As such, the family court concluded because both the Contrerases and the natural mother wanted K.P. to be placed with them, the Contrerases had a significant interest in the outcome of the proceedings and permitting them to intervene served

K.P.'s best interests. We are of the opinion that such determination was well-within the family court's discretion.

The Contrerases have cited this Court to the recent unpublished decision of our Supreme Court in *Hammond v. Foellger*, 2005-SC-000966-MR (March 22, 2007). Therein, a foster parent, Tina Carter, moved for custody of a child who had been in her care. Over the objections of relatives and the guardian ad litem, the trial court recognized Carter as an "other person" under KRS 620.140(1)(c) and ruled that she had standing to seek custody of the child. After the trial court found that it was in the best interests of the child to remain with Carter, the relatives sought a writ of prohibition in this Court, which was denied. On appeal, our Supreme Court held:

> The Family Court Division of the Campbell Circuit Court had the authority and responsibility to hear all matters related to the custody and care of the child. Pursuant to *Baker v. Webb*, 127 S.W.3d 622 (Ky. 2004), the court appropriately allowed Tina Carter to present evidence as to the best interests of the child. With the passage of KRS § 23A.100, the General Assembly created a court with the authority to hear all custody matters related to children who are the subject of custody cases (including all matters in the nature of actions for custody or actions arising from dependency, neglect, or abuse). Procedurally, this case was brought back to the Court by the Cabinet for a review of a prior dispositional determination. Following the motion for review, Tina Carter filed a motion for custody pursuant to KRS § 403.270 and at the hearing of this matter stated that she desired to be considered as a placement alternative under KRS § 620.140(1)(c). The Family Court held these grounds to be a proper basis for Tina Carter to bring an action seeking custody. Tina Carter, as the primary

> caregiver and foster parent, had a significant interest in the outcome of the proceedings.
>
> In *Baker*, this Court stated as follows: "In so holding, we are ensuring that all options for a permanent placement are afforded children in need of a home. Evaluating several possible homes only more thoroughly serves the overriding legislative policy of considering the best interests of the child." *Id.* at 625-26.
>
> *Baker* involved cousins of a child who had already been adopted by foster parents seeking custody of the child. This Court, in finding fault with the Cabinet, did note that relatives are to be considered for placement of a child. However, the clear holding of that case, as stated above, is that the Court should consider which placement of a child best fits within the best interests of the child. Here the Family Court made a reasonable determination on a matter within its jurisdiction, and we find no abuse of discretion on the part of the Court of Appeals in denying extraordinary relief.

Hammond, at 2-3.

While the *Hammond* decision cannot be cited as precedent, we agree that as in *Hammond*, the family court herein acted within its discretion in determining that it was in K.P.'s best interest that the Contrerases participate in the custody proceedings to ensure that he was afforded "all options for a permanent placement." *Baker*, 127 S.W.3d at 625. Clearly, KRS 620.090(1) and KRS 620.140(1)(c) require consideration of a parent's wishes as to placement of a child. There is no dispute that K.P.'s parents wanted him to be placed with the Contrerases. Thus, we find no error in the trial court's order granting the motion to intervene.

However, we emphasize that the Contrerases sought to intervene only for the limited dispositional determination of custody and placement of K.P., and the family court noted as much in its order granting their motion. No request was made to intervene in the proceedings to determine whether "there were reasonable grounds to believe [K.P. was] dependent, neglected or abused . . ." KRS 620.080; KRS 620.090. And we certainly do not believe that intervention for that purpose would be proper or appropriate.

We are also of the opinion that the family court erroneously concluded that it could not award custody of K.P. to the Contrerases.[3] It is clear from the family court's order that it believed it was prohibited from placing K.P. with the Contrerases based upon the language of KRS 620.130, which provides:

> (1) In any proceeding under this chapter, when the court is petitioned to remove or continue the removal of a child from the custody of his parent or other person exercising custodial control or supervision, the court shall first consider whether the child may be reasonably protected against the alleged dependency, neglect or abuse, by alternatives less restrictive than removal. Such alternatives may include, but shall not be limited to, the provision of medical, educational, psychiatric, psychological, social work, counseling, day care, or homemaking services with monitoring wherever necessary by the cabinet or other appropriate agency. Where the court specifically finds that such alternatives are adequate to reasonably protect the child against the alleged dependency, neglect or abuse, the court shall not order the removal or continued removal of the child.

[3] The Contrerases concede that this issue is not preserved as they did not appeal the family court's findings in this respect. As such, we decline to reverse on this basis.

> 2) If the court orders the removal or continues the removal of the child, services provided to the parent and the child shall be designed to promote the protection of the child and the return of the child safely to the child's home as soon as possible. The cabinet shall develop a treatment plan for each child designed to meet the needs of the child. The cabinet may change the child's placement or treatment plan as the cabinet may require. The cabinet shall notify the committing court of the change, in writing, within fourteen (14) days after the change has been implemented.

Although the family court did not specifically reference subsection (2), it is evident that it assumed it was bound by the Cabinet's placement decisions.

In fact, it is KRS 610.010(12) that prohibits a family court from directing the Cabinet where to place a child that is in the Cabinet's custody:

> (12) Except as provided in KRS 630.120(5), 635.060(3), or 635.090, nothing in this chapter shall confer upon the District Court or the family division of the Circuit Court, as appropriate, jurisdiction over the actions of the Department of Juvenile Justice or the cabinet in the placement, care, or treatment of a child committed to the Department of Juvenile Justice or committed to or in the custody of the cabinet; or to require the department or the cabinet to perform, or to refrain from performing, any specific act in the placement, care, or treatment of any child committed to the department or committed to or in the custody of the cabinet.

However, the family court herein specifically removed K.P. from the Cabinet's custody. At that point, KRS 620.140(c) authorized the court to place K.P. in the custody of "an adult relative, *other person*, or child-caring facility or child-placing agency, taking into consideration the wishes of the parent or other person exercising custodial control . . . ." And as our Supreme Court held in

Hammond, a foster parent falls within the definition of "other person." Accordingly, we believe that the family court had the discretion to grant custody of K.P. to the Contrerases.

Next, Appellant contends that K.P was denied procedural due process when the family court refused to allow the Cabinet to present its case. At the beginning of the hearing, the court announced that the Contrerases and the Cabinet would each have one hour and forty five minutes to present their cases and all other parties would be afforded fifteen minutes. That amount of time was to be used for both direct and cross-examination. No objections to the time limits were made. However, after the conclusion of the Cabinet's first witness, the court stopped the hearing. The Contrerases claim that the Cabinet used all of its time in cross-examination, while the Cabinet argues that the family court improperly cut off its right to present evidence.

We cannot conclude that the Cabinet was prevented from presenting its case. The family court clearly articulated its time constraints at the onset of the hearing. No objection was made at either the time the court started or stopped the hearing. In fact, the Cabinet's counsel's only remark to the court was just that he was "disappointed" in how he presented the case.

The family court was well-apprised of the facts of this case at the time of the evidentiary hearing. The Cabinet had every opportunity to call witnesses but instead chose to stipulate to a majority of the testimony. Further, there is no

indication that Appellant sought to present any evidence as the guardian ad litem. Consequently, we conclude that no error occurred.

We also find no merit in Appellant's claim that the family court erred in permitting the Contrerases to introduce records from K.P.'s daycare center. Not only did the evidence qualify as business records under KRE 803(6), but the individual daycare workers testified about the personal observations that were contained in the records.

Finally, Appellant argues that the family court erred in returning K.P. to his mother because she lacks the stability and skills to care for him. Appellant claims that the court's decision was not based on any evidence in the record.

As an initial observation, we find it interesting that Appellant takes the position that K.P.'s mother is unfit to have custody of him when it was Appellant who, acting as guardian ad litem for K.P.'s younger sibling, advocated for the return of the infant to the mother. Notwithstanding, we agree with the Contrerases that the family court had three options in this matter: (1) leave K.P. in the custody of the Cabinet and with a foster family that evidence established was not meeting his needs; (2) return him to his mother who already had custody of his younger sibling; or (3) place him with the Contrerases. Given that the court felt that it was statutorily prohibited from granting custody to the Contrerases, it returned K.P. to his mother with the knowledge that she was going to receive assistance from the Contrerases. And, in fact, they have had physical custody of K.P. since April 2008.

There is no question that the family court herein was frustrated with the Cabinet. In its Findings of Fact, Conclusions of Law, and Order, the court stated:

> It amazes this Court that CHFS wants [K.P.] to remain with the Edwards for stability sake when they have done everything contrary when it comes to his stability.
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> . . .
>
> As much as this Court would like to place this child with the Contrerases, it cannot tell CHFS where to place [K.P.]. KRS 620.130 states:
>
> > In any proceeding under this chapter, when the court is petitioned to remove or continue the removal of a child from the custody of his parents or other person exercising custodial control or supervision, the court shall first consider whether the child may be reasonably protected against the alleged dependency, neglect or abuse, by alternatives less restrictive than removal . . . Where the court specifically finds that such alternatives are adequate to reasonably protect the child against the alleged dependency, neglect or abuse, the court shall not order the removal or continued removal of the child. (Emphasis added).
>
> When parents do not stabilize their life and do what CHFS or the Court needs of them for the sake of their child, the Court removes them from the parents' care. In this case, CHFS has made very poor choices with [K.P.]. CHFS has made one bad decision after another and has never backed up or regrouped for the sake of the child. Instead of putting [K.P] first, they brought in Dr. Brenzel to bolster their case. Instead, Dr. Brenzel's testimony only proved that CHFS's actions continued to put [K.P] in one disruptive setting after

> another, and this Court is removing him from their care. It is found that [K.P.] would be better off reunited with his mother. There was specific testimony regarding [K.P.'s] attachment to his mother. Both of [K.P.'s] parents[4] believed that [K.P.] was better off in the Contrerases' care and requested this Court, at the close of evidence, to place [K.P.] back into the Contrerases' home. This Court finds that placing [K.P.] with [his mother], along with the assistance of the Contrerases, is a least restrictive alternative than removal of the child. . . . [K.P.] is far better off in the care of his mother with the Contrerases' assistance than remaining in foster care indefinitely, especially in the setting where the child is out of his foster home 55 hours per week.[5]

We are of the opinion that the family court certainly had a legitimate basis for its frustration with the Cabinet's handling of this case. However, we are additionally concerned about exactly what it is that Appellant desires to have happen to K.P. The other guardian ad litem who represented K.P in the family court tendered a memo to the court objecting to any appeal on the grounds that such would only add to the lack of permanency in K.P.'s life and would not serve his best interests. Moreover, there is an indication in the record that the Edwards are no longer married. So, while it was Appellant's argument in the family court that K.P. should be returned to the Edwards, that is no longer a viable option. Thus, to reverse the family court, as Appellant urges us to do, would result in K.P. being placed in yet another unfamiliar setting. As was aptly stated in the family court, "there is a difference between doing what is right and doing what one has a

[4] K.P.'s father is currently serving a fifteen-year prison term, but was present at the hearing and represented by counsel.

[5] The evidence established that the Edwards had placed [K.P.] in daycare five days a week from 8:15 a.m. until 7:00 p.m.

right to do." We conclude that given all of the facts and evidence in this case, the family court acted well within its discretion in fashioning a remedy that would serve K.P.'s best interests and provide him the stability he so desperately needs.

The order of the Hardin Family Court is affirmed.

CAPERTON, JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

CLAYTON, JUDGE, CONCURRING IN RESULT: I concur in the result reached by the majority opinion, but I write separately because I believe the Hardin Family Court erred when it allowed J.C. and Barbara Contreras, the foster parents, to intervene in the dependency, neglect, and abuse action. KRS 620.360, which is titled **"**Rights and responsibilities of foster parents[,]" states:

> (4) Nothing in this section shall be construed to establish monetary liability of or cause of action against the cabinet.

Therefore, according to this statutory requisite, foster parents are not allowed to intervene in these actions. In fact, the family court in its order entered December 27, 2007, recognized that restriction when it stated that "[i]t is assumed that this motion to intervene is made pursuant to Civil Rule 24, since there is no separate right to intervene conferred through KRS Chapter 620."

At this point, the court begins to explore several theories of intervention. First, it determines that the Contrerases did not qualify as *de facto custodians* of K.P. Next, the court discussed both parental unfitness and waiver of

custody. Ultimately, the court dismissed these theories as a basis for intervention. Finally, the court concluded that "[t]he Contrerases are simply asking to be allowed to intervene in this action[,]" and allowed the intervention by relying on CR 24.01 and *Baker v. Webb*, 127 S.W.3d 622 (Ky. 2004). The court held that "[h]ere, the Contrerases also fall into a superior category [*sic*] which is a person, upon considering the wishes of the parent concerning the placement of the child." I disagree with the majority's conclusion that this analysis was correct.

I do, however, agree with the majority's result. Hence, because K.P. was placed with his mother, the court's decision to allow the Contrerases to intervene does not alter the decision of this Court. However, there are significant implications in concluding that foster parents have the right to intervene in these actions.

As noted above, KRS 620.360(4) prohibits foster parents from bringing any action against the Cabinet for the alleged violation of any right created by KRS 620.360, leaving as the only basis to intervene CR 24.01. Nevertheless, CR 24 does not allow the Contrerases to intervene for several reasons. First, CR 24.03 requires:

> A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor (sic) and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene. . . .

The Contrerases filed no such pleading. This language is mandatory. Furthermore, the family court is clear in its order entered December 27, 2007, that "[t]his allowance of intervention does not guarantee placement or equal footing in a custody determination, but simply recognizes their status under the statutory enactment." Yet, if the Contrerases don't have an "equal footing" on their custody claim, then what substantial interests do they have under CR 24? As held in *Gayner v Packaging Service Corp. of Kentucky,* 636 S.W.2d 658, 659 (Ky. App. 1982), CR 24.01 requires that the interest must be a "present substantial interest in the subject matter of the lawsuit as distinguished from a mere expectancy or contingent interest." In other words, "simply asking to intervene" is not enough. Thus, the Contrerases never had a present substantial interest in the litigation. Supporting the contention that the Contrerases did not have a present substantial interest is the fact that the family court, in its order entered May 9, 2008, did not grant the Contrerases' request for placement of K.P. with them but held that KRS 620.130 does not permit the court to tell the Cabinet where to place a child. KRS 610.010(12) also forbids the court from directing the Cabinet to perform any specific act of placement.

Without a substantial interest in the litigation, the only "expectancy" that the Contrerases had was a desire for a suitable placement for K.P. In this matter, their interest was adequately represented by existing parties; namely, the mother and the child. The court was aware that the mother wanted K.P. to be placed with the Contrerases. Notwithstanding her desire, the court decided that it

could not grant this relief. Moreover, the mother's wishes were already known to the court without Contrerases' intervention. Therefore, CR 24.01 is not applicable.

Not only is the reliance on CR 24 improper, so is the court's reliance on *Baker,* 127 S.W.3d at 622. *Baker* can be distinguished from the case herein because not only did that case involve an adoption proceeding but also the parties seeking to intervene were relatives of the child, not foster parents. In *Baker*, the Kentucky Supreme Court addressed the definition of "relative" in KRS 199.470 and held that biological relatives of a child sought to be adopted by foster parents had "a sufficient, cognizable legal interest in the adoption proceeding" so as to grant them a right to intervene in the proceeding pursuant to CR 24.01(1). *Id.* at 625. In fact, the regulations of the Cabinet gave priority to relatives of a child placed for adoption, and the Cabinet in that instance failed to follow both the statute and their own regulations. To support its decision, the Court referred to KRS 620.090(2), which requires the Cabinet to give preference to available and qualified relatives of a child when placing a child in a temporary custody situation. *Id*. Thus, the *Baker* decision was based on the parties' status as relatives, not as foster parents, and for that reason, the Bakers had standing. In this case, however, the Contrerases do not have standing because they have no claim or substantial interest. There is no avenue for relief from the court.

I am aware of the family court's frustration with the Cabinet. Family court judges must rule upon very difficult and emotionally compelling cases that decide the welfare and safety of children. They very much want to do the right

thing. Notwithstanding this admirable and understandable motivation, the rules of procedure still apply to family court. And a statutory mandate exists against granting standing to foster parents in these matters. It is not the province of the courts to disregard the language of the statute and ignore the requirements of a civil rule.

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